SEARCH & SEIZURE

EVELLE J. YOUNGER, ATTORNEY GENERAL

1972

SEARCH and SEIZURE

A Statement of the Current
Principles and Their Application

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July 1972

INTRODUCTION

The passage of another year has necessitated the revision and updating of the Attorney General's Search and Seizure Manual.

A large amount of additional material is included. There is a new chapter on the use of force. Sections on fruit of the poisonous tree have been greatly expanded into a chapter. Materials on vehicle searches and stop and frisk have been expanded and developed into separate chapters. New sections have been added on apparent authority, out-of-state searches, searches in foreign countries, airport searches, military searches, and student searches. Materials on electronic eavesdropping have been enlarged to include a discussion of recent federal legislation.

The material has been substantially reorganized in an attempt to regroup the material into smaller, more usable units.

The Attorney General's office plans to continue to publish periodic revisions of this publication.

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ACKNOWLEDGEMENTS

The original publication of this manual was undertaken by the Criminal Law Division of the Sacramento Office of the Attorney General. It was prepared under the direction of Doris H. Maier, Assistant Attorney General, with the principal compilation resulting from the efforts of Talmadge R. Jones as well as Eddie T. Keller and Edward W. Bergtholdt.

This is the second revision of the original publication.

Some others participating in the preliminary preparation of the first revision include Charles P. Just, James D. Garbolino, Carol Hunter, Frank A. Iwama, Gary A. Larson, Robert D. Marshall, Loren E. McMaster, and Russell L. Moore.

The assistance of the assistant attorneys general should also be acknowledged for their review of the various drafts. These include Arlo E. Smith, Doris H. Maier, William E. James, and Albert W. Harris, Jr.

We are also indebted to former Chief Assistant Attorney General, Herbert L. Ashby, for his guidance and help.

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CHAPTER ONE

SOME PRELIMINARY CONSIDERATIONS

§ 1.01: *Constitutional and Statutory Provisions*

The Fourth Amendment of the United States Constitution, adopted nearly intact by the Constitution of California, article I, section 19, provides:

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

In brief historical perspective, the amendment received its first authoritative interpretation by the Supreme Court in *Boyd* v. *United States*, 116 U.S. 616 (1886). Although the sweeping dictum of the opinion was to be significantly modified in subsequent cases, it is, the court has said, "the leading case on the subject of search and seizure." *Carroll* v. *United States*, 267 U.S. 132, 147 (1925). *Boyd* stated (at 630) that the purpose of the Fourth Amendment is to protect "the sanctity of a man's home and the privacies of life." It was held that the Fifth Amendment's privilege against self-incrimination was bound inextricably to the protections of the Fourth, each being definitive of the other: "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." This interplay was exemplified recently in *Schmerber* v. *California*, 384 U.S. 757 (1966), where the court held not violative of the Fourth, Fifth, and Fourteenth Amendments, the taking of a blood sample to secure evidence of petitioner's blood-alcohol content.

In 1961, the Fourth Amendment's right to privacy (and coextensively the exclusionary rule formerly applied exclusively to federal prosecutions under *Weeks* v. *United States*, 232 U.S. 383 (1914)) was

declared enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The court held (at 650) that without such a rule, state invasions of privacy would diminish the citizen's freedom from unreasonable searches and seizures, a freedom "implicit in 'the concept of ordered liberty.'"

§ 1.02: *Purpose of the Fourth Amendment*

The Fourth Amendment's principal object is the protection of *privacy*, not property. *See Warden* v. *Hayden*, 387 U.S. 294 (1967), disapproving *Gouled* v. *United States*, 255 U.S. 298 (1921); *Berger* v. *New York*, 388 U.S. 41 (1967), concurring opinion by Douglas, J.; and *Katz* v. *United States*, 389 U.S. 347 (1967). In that spirit, the court requires a magistrate, not the officer, to be the arbiter of probable cause. *Chapman* v. *United States*, 365 U.S. 610, 614–615 (1961), quoting from *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *See also Chimel* v. *California*, 395 U.S. 752 (1969); *Jones* v. *United States*, 357 U.S. 493, 497 (1958); *United States* v. *Mullin*, 329 F.2d 295, 297 (4th Cir. 1964); and *People* v. *Marshall*, 69 Cal. 2d 51 (1968). As will be seen, § 1.06 *et seq.*, *infra*, the exclusionary rule was developed in order to deter such unlawful conduct by the police and, as a result, protect the personal right to privacy. The amendment is designed to prevent, not merely to redress, unlawful police action. *Chimel* v. *California*, 395 U.S. 752, 766 n.12 (1969).

§ 1.03: *Only "Unreasonable" Searches Prohibited*

See infra, § 10.01.

The Fourth Amendment's immunity is granted not against all searches and seizures, but only against those that are "unreasonable," and thus unconstitutional. *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931). Searches and seizures become constitutionally reasonable if either made under the authority of a valid search warrant which is properly executed (Chapter 2, *infra*) or under one of several well-recognized exceptions to that requirement.

§ 1.04: *Only "State Action" is Prohibited*

In *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), it was held that the Fourth Amendment is applicable to "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." In *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), the court reaffirmed its earlier language and said that the amendment's origin and history clearly show that it was intended only to be a limitation upon governmental agencies. For comment with respect to *Burdeau*, *compare People* v. *Botts*, 250 Cal. App. 2d 478, 482 (1967) *with People* v. *Randazzo*, 220 Cal. App. 2d 768, 770 (1963). Of particular interest is a footnote of the California Supreme Court's opinion in *Stapleton* v. *Superior Court*, 70 Cal. 2d 97, 100 n.2 (1968):

> "The decision which led to the Fourth Amendment, Entick v. Carrington, 19 State Trials 1030, 1066, (1765), enunciates a rather Hobbesian absolute right of privacy against all intruders, official and private, not merely a Jeffersonian ideal of limited government. (*Compare* Comment (1963) 72 Yale L.J. 1062, 1069.) . . ."

Thus, as is discussed more fully in § 16.01, *infra*, property illegally seized by private persons does not fall within the Fourth Amendment or its application to the states through the Fourteenth Amendment. *See People* v. *Turner*, 249 Cal. App. 2d 909 (1967); *Stapleton* v. *Superior Court*, 70 Cal. 2d 97 (1968); *People* v. *Baker*, 12 Cal. App. 3d 826, 834 (1970); *People* v. *Wolder*, 4 Cal. App. 3d 984, 993 (1970); *People* v. *Superior Court* (York), 3 Cal. App. 3d 648, 659 (1970).

As a result of the applicability of the federal Constitution to state action, the standard for obtaining a search warrant, as well as reasonableness of the search itself, is governed by the Fourth and Fourteenth Amendments. *Aguilar* v. *Texas*, 378 U.S. 108 (1964), discussed in detail, *infra*, § 2.09.

§ 1.05: *The California Penal Code*

Relative to search warrants, California has codified the requirements of the state and federal Constitutions in section 1525 of the Penal Code. That section provides, in essence, that the warrant cannot be issued except on "probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." *See People* v. *Scoma*, 71 Cal. 2d 332, 335 (1969). Probable cause, of course, is needed also for a warrantless arrest. *See infra*, § 4.05.

§ 1.06: *The Exclusionary Rule Defined*

Implicit in the case of *Boyd* v. *United States*, 116 U.S. 616 (1886) (discused *supra*, § 1.01), was the rule that evidence secured by means of an unconstitutional search was inadmissible in federal court. Although that doctrine was virtually repudiated eighteen years after the *Boyd* case in *Adams* v. *New York*, 192 U.S. 585 (1904), in the case of *Weeks* v. *United States*, 232 U.S. 383 (1914), not only was the *Boyd* rule revived, but also was explicitly stated—materials seized in violation of the Fourth Amendment would not be admissible in a federal criminal trial. "To sanction such proceedings," said the court, "would be to affirm by judicial decision a manifest neglect if not an open defiance, of the prohibition of the Constitution . . . ." *Ibid.*, at 394.

§ 1.07: *Historical Development of the Rule*

The principal question following the court's pronouncements in *Weeks* was whether such a rule could be made applicable to the unlawful conduct of state officers in a federal trial and, more importantly, to such conduct in a state trial. Sections 1.08–1.11, *infra*, chronicle those state and federal cases resolving these issues.

§ 1.08: *The Wolf Case*

The Supreme Court ruled in 1949 in the case of *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that unreasonable state searches violated the due process clause of the Fourteenth Amendment, though the state courts were not required to apply the federal exclusionary rule of *Weeks*. To conduct an unreasonable search would violate due process of law, but to use the fruit of the lawless activity to gain a conviction would not.

Moreover, at that time under the still-accepted "silver platter" doctrine, even the federal courts might nevertheless permit the use of evidence illegally seized by state officers in searches which neither involved federal participation nor were conducted for a federal purpose. *Gambino* v. *United States*, 275 U.S. 310 (1927).

§ 1.09: *The Cahan Case*

In the 1950's, two of the United States Supreme Court's leading search cases involved flagrant violations of the defendants' constitutional rights. *See Irvine* v. *California*, 347 U.S. 128 (1954), and *Rochin* v. *California*, 342 U.S. 165 (1952). Thus, retreating from his earlier rejection of the exclusionary rule in *People v. Gonzales*, 20 Cal. 2d 165, (1942), Justice Traynor was induced in 1955 to author California's landmark decision, *People* v. *Cahan*, 44 Cal. 2d 434 (1955), which approved the rule. In *Cahan*, the court held that evidence obtained by officers illegally entering a house should be excluded because, notwithstanding the serious disadvantages of excluding probative evidence of the commission of a crime, a court should not lend its aid to illegal methods of obtaining evidence. Stated another way by the United States Supreme Court shortly before *Mapp* v. *Ohio*, *infra*, § 1.10, the purpose of the exclusionary rule was "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). In the *Elkins* case, the court admitted that "The experience in California has been most illuminating." *Ibid.* at 220.

Notwithstanding the deterrence to unlawful police conduct generated by *Cahan*, a violation of the Fourth Amendment (or the California Constitution, article I, section 19) is not to be deemed reversible error per se, nor does it require automatic dismissal at the trial level. These qualifications to the exclusionary rule are discussed *infra*, § 20.17 *et seq.*

§ 1.10: *The Mapp Case*

People v. *Cahan*, *supra*, § 1.09, influenced the decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which overruled *Wolf*, *supra*, § 1.08. *Mapp* brought the states into alignment with the federal government in the constitutional law of search and seizure, by directing that they too must exclude from trials evidence seized in violation of the Constitution. *Mapp* was useful in completing the logic of *Elkins* v. *United States*, 364 U.S. 206 (1960), which one year earlier had finally repudiated the "silver platter" doctrine of *Gambino* v. *United States*, discussed *supra*, § 1.08.

The court was careful to note that the exclusionary rule now applicable to the states was based not on a mere rule of evidence, but was "of constitutional origin." *Mapp* v. *Ohio*, *supra* at 649. The rule was considered by the court as much a part of the Fourteenth Amendment as of the Fourth, for it was "an essential part of the *right to privacy* . . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." (Emphasis added.) *Ibid.* at 656.

At the time of the *Mapp* decision, June 19, 1961, a bare majority of the states, California included (*see* § 1.09 *supra*), had adopted the

exclusionary rule, and thus the question of retroactivity did not have the impact it might have had under different circumstances. However, all doubts were laid to rest when in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *Angelet* v. *Fay*, 381 U.S. 654 (1965), the court announced that *Mapp* was prospective, applicable only to cases not yet final (meaning that the time to petition for certiorari had expired by the date of *Mapp*) at the time of the opinion. *See too McClain* v. *Wilson*, 370 F.2d 369, 370 (9th Cir. 1966) (California's voluntary adoption of federal standards does not subject her pre-Mapp cases to review.)

§ 1.11: *The Ker Case*

The chief question which remained unanswered by *Mapp* was whether the states were free to apply their own standards of "reasonableness" to searches and seizures. In *Ker* v. *California*, 374 U.S. 23, 33 (1963), the issue was resolved in the negative, the court holding that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments."

Ker held that not all searches and seizures found to be "unreasonable" by the Supreme Court are necessarily violative of the Fourth Amendment; only those decisions based on constitutional grounds, rather than on the court's supervisory power over the federal court system, are binding on the states. However, nearly all of the court's decisions relative to search and seizure (*e.g.*, probable cause, searches incidental to arrest, automobile searches, and the like) have been decided on constitutional grounds. Hence, the standard of "reasonableness" as applied to the facts of these respective Supreme Court cases is, in turn, applicable to the California courts. *See Cooper* v. *California*, 386 U.S. 58, 61–62 (1967), holding that unless the state standard for reasonableness is higher than the federal standard, the standard or test of reasonableness is that required by the Fourth Amendment of the federal Constitution, and *People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123, 128 (1969).

So long as the federal Constitution is not offended, *Ker* says (at 34) the states are not "precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States." *See too Pendleton* v. *Nelson*, 404 F.2d 1074, 1075 (9th Cir. 1968).

§ 1.12: *Recent Applications of the Rule*

The exclusionary rule applies not only to the objects seized during an unlawful search, but to the "fruits" of that search as well. *Berger* v. *New York*, 388 U.S. 41 (1967); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 271–72 (1969); and *People* v. *Johnson*, 70 Cal. 2d 541 (1969), discussed *infra* at § 18.02.

Furthermore, the rule has found application to proceedings denominated as "civil" but which, by reason of the penalties imposed and/or the attendant procedural protections, are in their very nature "criminal." *See One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), where the rule was applied to a vehicle forfeiture proceeding (*cf. Cooper* v. *California*, 386 U.S. 58 (1967), where the search of a car, validly held as evidence in such a proceeding, was upheld); and *People* v. *Moore*, 69 Cal. 2d 674 (1968), holding that the patient-defendant in a "civil" narcotic addict commitment proceeding was entitled to the protection of the rule. It has also been applied to administrative searches. *See* §§ 15.06, 15.08, *infra*. *See* 5 A.L.R. 3d 670. *See Blair* v. *Pitchess*, 5 Cal. 3d 258, 272–73 (1971) (claim and delivery laws violate Fourth Amendment).

§ 1.13: *Searches Pursuant to Valid Search Warrant*

As discussed fully in Chapter 2, *infra*, it can be said that generally a search and seizure is constitutionally reasonable if made under the authority of a valid search warrant. *Stoner* v. *California*, 376 U.S. 483 (1964). However, the warrant's sufficiency will not excuse its improper execution. This, too, is treated in Chapter 2, and at § 9.03 *et seq.*

§ 1.14: *Valid Searches Without a Search Warrant*

Absent a valid search warrant, the search and seizure, to be "reasonable" within the purview of the Fourth Amendment, must fall within one of several exceptions to the general rule stated in § 1.13. These exceptions comprise must of the subsequent material. However, by way of summary, searches and seizures without a search warrant are valid if:

(1) They are made as incident to a lawful arrest (§ 8.01 *et seq.*);

(2) They are conducted with the voluntary consent of defendant or an authorized third person (§ 14.01 *et seq.*);

(3) They are part of a properly authorized regulatory function (§ 15.06 *et seq.*);

(4) They follow the mere observation by officers, in a place where they are entitled to be, of that which is patent and open to view (§ 13.01);

(5) They take place in an area open to the public (§ 13.10);

(6) They are part of lawful electronic surveillance (§ 17.01);

(7) They are made as a necessary precaution or in a pressing emergency (§ 13.11);

(8) They are conducted by private persons acting on their own initiative and not (directly or indirectly) as government agents (§ 16.01).

Indeed, (4) and (5) are not considered to be searches.

A search permitted as one of the eight exceptions listed may nevertheless be "unreasonable" as to *time and place, object, or scope,* and hence be unlawful. The standard of "reasonableness" varies in the multitude of reported cases. However, an attempt has been made to digest that elusive requirement in § 10.01 *et seq.* below.

§ 1.15: *Continuing Debate About the Exclusionary Rule*

The adoption of the exclusionary rule by the California Supreme Court and by the United States Supreme Court did not end debate. A new wave of discussion was stimulated by Chief Justice Burger's dissent in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 411 (1971), wherein he advocated replacement of the exclusionary rule with a cause of action for damages. *See too* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667 (1970); Taft, Protecting the Public from *Mapp* v. *Ohio* Without Amending the Constitution, 50 A.B.A. J. 815 (1964); Burns, Mapp v. Ohio: An All-American Mistake, 19 De Paul L. Rev. 80 (1969); Comment, The Decline of the Exclusionary Rule: An Alternative to Injustice, 4 Southwestern U. L. Rev. 68 (1972). Other articles are collected in an appendix to Chief Justice Burger's dissent in *Bivens* (at 426–27).

Alternatives to the exclusionary rule are explored in Horowitz, Excluding the Exclusionary Rule—Can There Be an Effective Alternative? 47 L.A. Bar Bulletin 91 (1972). *Cf.* Burger, Who Will Watch the Watchman? 14 Amer. U. L. Rev. 1 (1964). (Before *Bivens,* Chief Justice Burger had urged review boards as an alternative to the exclusionary rule.)

See too Wright, Must the Criminal Go Free If the Constable Blunders? 50 Tex. L. Rev. 736 (1972) (advocates limiting the exclusionary rule to substantial violations).

CHAPTER TWO

SEARCHES PURSUANT TO A SEARCH WARRANT

§ 2.01: *Definition of a Search Warrant*

Penal Code section 1523 provides: "A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate."

§ 2.02: *The Constitutional Requirement*

As discussed *supra* in the introductory material beginning at § 1.01, both the federal (U.S. Const., Fourth Amendment) and the state (Cal. Const., art. I, § 19) constitutions, in order to protect the privacy of citizens from unreasonable intrusion by the government, require a search warrant for all searches in the absence of a recognized exception. *Aguilar* v. *Texas,* 378 U.S. 108 (1964).

Apart from transferring the decision about whether the search should be made from the police officer to a magistrate, a search warrant also affords judicial review prior to the time the search is made, on the theory that an after-the-event review is "too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964); *see too* § 1.02.

§ 2.03: *Establishing Probable Cause by Affidavit*

By the state Constitution (art. I, § 19) and by statute (Pen. Code § 1525) search warrants may be issued only upon the showing of *probable cause* supported by oath or affirmation, usually in the form of an affidavit. Generally, a search warrant violates the Constitution when the affidavit upon which it is based contains no competent evidence sufficient to support the finding of the magistrate. *People* v. *Scoma,* 71 Cal. 2d 332, 335 (1969); *People* v. *Stout,* 66 Cal. 2d 184, 193 (1967). *See also Skelton* v. *Superior Court,* 1 Cal. 3d 144, 150 (1969).

An affidavit in support of a search warrant will be construed in a "commonsense" manner. *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965); *Spinelli* v. *United States,* 393 U.S. 410, 415 (1969). Our State Supreme Court recently stressed this by quoting from *Ventresca* as follows:

"They are normally drafted by non-lawyers in the midst and

haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitute by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

People v. *Superior Court* (Johnson), 6 Cal. 3d 704, 711 (1972). On the other hand, the courts will not supply, under the guise of interpretation, factual material on the basis of which the magistrate can reasonably distinguish between probable cause and "capricious accusation."

While it has been said that "probable cause" for the issuance of a search warrant is approximately the same as that which justifies an arrest without a warrant (*People* v. *Govea,* 235 Cal. App. 2d 285, 296 (1965) [cases cited]; *People* v. *Scott,* 259 Cal. App. 2d 268, 274–75 (1968)), this should not be understood to mean that a quantum of facts upon which a warrantless arrest can properly be made will, at the same time, support the issuance of a search warrant. In the *arrest* situation, "probable cause" is that which would lead an *officer,* as a reasonable man, to believe or entertain a strong suspicion that the person is guilty of a crime; it leaves some room for doubt. See § 4.05. A *search warrant,* however, must be based on facts which would lead a *magistrate,* as a reasonable man, to believe that particular personal property subject to seizure under Penal Code section 1524 (set out *infra,* § 2.17), is to be found on a *specific* person or upon *specific* premises. *See, e.g., People* v. *Perez,* 189 Cal. App. 2d 526, 533 (1961); *Jones* v. *United States,* 362 U.S. 257 (1960); and *Aguilar* v. *Texas,* 378 U.S. 108 (1964).

The sufficiency of an affidavit to support a search warrant has received a great deal of attention. (This is particularly true relative to the weight and sufficiency accorded facts related in an affidavit by reliable or unreliable confidential informants. *See* § 2.09, *infra.*) The following sections set forth some guidelines in the preparation of such affidavits.

See People v. *Wilson,* 256 Cal. App. 2d 411, 422–24 (1967), for an illustrative affidavit in support of a petition for search warrant.

An oath is necessary in support of the affidavit, but in one case the unsworn statement of a police officer that the statements in the affidavit were true was sufficient. The officer's statement was in response to the magistrate's questions and the officer signed the affidavit in the magistrate's presence. *Clifton* v. *Superior Court,* 7

Cal. App. 3d 245, 254 (1970).

One court approved the use of a tape recording in addition to the affidavit, and allowed the use of "physical, documentary and any other competent evidence relevant to the issue of credibility." *People* v. *Sanchez,* 24 Cal. App. 3d 664, 677 (1972).

§ 2.04: *Affidavit Must Set Forth Facts, Not Conclusions*

Crucial to the sufficiency of an affidavit are facts, not conclusions. Pen. Code § 1527 ("The affidavit . . . must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.") *People* v. *Brown,* 259 Cal. App. 2d 663, 670–71 (1968) ("Quite apart from that information [received from a confidential informant], the affidavit plainly states facts gathered from the independent investigation and personal observations of the officers . . . which clearly shows probable cause for issuance of the search warrant."); *People* v. *Kipp,* 255 Cal. App. 2d 473, 477 (1967) (a 147-page affidavit prepared by a Los Angeles policeman was held sufficient to raise probable cause for issuance of the warrant: "Facts in great detail and length are stated as distinguished from mere conclusions."). *See also Aguilar* v. *Texas,* 378 U.S. 108, 112 (1964), quoting from *Nathanson* v. *United States,* 290 U.S. 41, 47 (1933), (" 'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.' ")

The police officer must be prepared to submit sufficient facts to establish grounds for the application, or probable cause for believing that they exist—from this the magistrate must be able to draw his own inferences or conclusions, rather than relying on those drawn by the officer. *Aguilar* v. *Texas, supra; Giordenello* v. *United States,* 357 U.S. 480 (1958); *Lee Art Theatre* v. *Virginia,* 392 U.S. 636 (1968); *Osborn* v. *United States,* 385 U.S. 323 (1966).

Sometimes a commonsense interpretation can rescue conclusory information. *See People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 713 (1972).

§ 2.05: *Timeliness of the Information Relied Upon*

The information, or facts, recited in the affidavit must not be "stale" or too "remote" to justify issuance of a search warrant. *Sgro* v. *United States,* 287 U.S. 206 (1932). In short, the information must show that the property or contraband is *then* present in the prem-

ises, or on the person, to be searched. *People* v. *Nadell,* 23 Cal. App. 3d 746, 755 (1972) ("within last three years" too stale). Thus, in *People* v. *Scott,* 259 Cal. App. 2d 268, 277–78 (1968), it was held that an interval of *18 days* between receipt of the information that marijuana was on the premises and the filing of an affidavit incorporating the information was not too great.

In *People* v. *Sheridan,* 2 Cal. App. 3d 483, 490–91 (1969), the court held that a nine-day lapse between an informer's report (that he had seen marijuana at a certain address "within the previous 30 days") and the issuance of a search warrant for the place, was reasonable. The sheriff had received a report of a similar observation by another informer 11 days before receiving the second report, but probable cause could not be predicated on the first report because the first informer had himself been previously involved in illicit narcotics traffic thus rendering his report subject to corroboration.

In *People* v. *Wilson,* 268 Cal. App. 2d 581 (1968), officers had conducted a three-month investigation of defendant. On May 24, defendant sold marijuana to an undercover agent at his "stash-pad" and gave the agent his "stash-pad" telephone number. Calling the number subsequent to this sale, officers were informed defendant was out of town for several days. The court held, "It may reasonably be inferred that this call was made after the last buy on May 24, and further, that this was the reason the officers waited until June 8th to secure the warrant. We conclude that the *few days* delay did not make the information 'stale'; that the facts alleged support the finding of probable cause." (Emphasis added.) *Ibid.* at 589. *See People* v. *Sanchez,* 24 Cal. App. 3d 664, 679 (1972).

These cases, however, are subject to some qualification. The inference to be drawn from the fact that a person has committed an offense in the past does not of itself provide probable cause to believe that he is presently guilty of a similar offense. Thus, in *Scott, supra,* defendant's previous criminal conduct was not the sole ground for issuance of the warrant—there were facts from which the inference could be drawn of "regular" business dealings in marijuana. Similarly, in *Wilson, supra,* defendant's "stash-pad" and phone number for future sales was used to establish probable cause independent of the former sale.

Without these facts to augment the former criminal conduct, the courts are unwilling to infer present possession. Thus, in *People* v. *Tellez,* 268 Cal. App. 2d 375 (1968), the People were unsuccessful

in the contention that a sale of heroin two weeks earlier in the defendant's car provided probable cause for the officers to believe defendant had possession of heroin in his home. (*Tellez* involved probable cause for arrest.) *See People* v. *Scott,* 259 Cal. App. 2d 268 at 274–75. Cases cited by the People in *Tellez* were distinguished:

> "In People v. Handy, 200 Cal. App. 2d 440 . . . and People v. Reed, 202 Cal. App. 2d 575 . . . the probability of present possession was supported not only by the fact that the arresting officers knew that the defendant had been in possession one or two weeks before the arrest but, in Handy, by information that the defendant was a dealer in narcotics and, in Reed, by the fact that at the time of the search [or analogously in application for a search warrant] cigarette papers of the kind used in rolling marijuana cigarettes were found on the defendant's person." *Ibid.* at 380.

In short, probable cause is "existing" cause. There is no hard and fast rule as to how much time may intervene between the obtaining of the facts and the making of an affidavit upon which the search warrant is based, but it may be stated that the time should not be remote. The following statement of California law has not been overruled:

> "While the authorities outside this state are not in accord as to how current the facts relied upon should be, an interval of not more than 20 days has never been held so unreasonable as to vitiate the search warrant . . . ." *People* v. *Nelson,* 171 Cal. App. 2d 356, 359–60 (1959) (*disapproved on another ground, People* v. *Butler,* 64 Cal. 2d 842 (1966)).

In *People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 713 (1972), the affidavit did not state when the informer made his observations but the magistrate could infer from the whole affidavit it occurred a short time before.

As to an opposite situation, when the police have information that is "too fresh" (the contraband had not yet arrived), *see Alvidres* v. *Superior Court,* 12 Cal. App. 3d 575, 581 (1970), where officers were allowed a warrant where it was reasonably demonstrated that the right to search will exist within a reasonable time in the future. *People* v. *Sanchez,* 24 Cal. App. 3d 664, 679 (1972) (same).

§ 2.06: *Affiant's "Information and Belief" Is Insufficient*

In *People* v. *Sesslin,* 68 Cal. 2d 418 (1968), the California Supreme Court announced that a printed complaint based on "information and belief," rather than the personal knowledge of the affiant, was not sufficient absent additional facts which would " 'enable the appropriate magistrate . . . to determine whether the 'probable cause' required to support a warrant exists.' " *Ibid.* at 426, quoting *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958), and *Aguilar* v. *Texas,* 378 U.S. 108, 115 (1964). Although Sesslin involved the sufficiency of a compliant to support the issuance of an *arrest* warrant (distinguished from an *affidavit* to support a *search* warrant), the court made clear that the appropriate standard, namely *Giordenello-Aguilar,* was equally applicable. *People* v. *Sesslin, supra* at 424. *See also People* v. *Chimel,* 68 Cal. 2d 436, 440 (1968), *rev'd on other grounds in Chimel* v. *California,* 395 U.S. 752 (1969).

§ 2.07: *Credible Hearsay May Be Used*

A magistrate's finding of probable cause may rest upon hearsay statements (usually of an informant or another officer) as long as there is a substantial basis, in the facts related in the affidavit, for crediting the hearsay. *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964); *Jones* v. *United States,* 362 U.S. 257, 269 (1960); *United States* v. *Ventresca,* 380 U.S. 102 (1965); *People* v. *Prewitt,* 52 Cal. 2d 330, 337 (1959). This is actually the second "prong" of the *Aguilar* test discussed *infra,* § 2.09. *People* v. *Tillman,* 238 Cal. App. 2d 134, 137–38 (1965).

§ 2.08: *Hearsay on Hearsay*

Furthermore, information which comes to the affiant as *hearsay on hearsay* need not be utterly disregarded. The magistrate can consider such evidence as part of the total factual situation offered to show probable cause. *People* v. *Scott,* 259 Cal. App. 2d 268, 278–79 (1968). However, hearsay on hearsay cannot, *by itself,* support the issuance of a search warrant. *People* v. *Pease,* 242 Cal. App. 2d 442, 450 (1966). *See Price* v. *Superior Court,* 1 Cal. 3d 836, 841 (1970); *People* v. *MacLeish,* 16 Cal. App. 3d 96, 101–04 (1971) (proper to use admissions made to confidential informer); *People* v. *Nadell,* 23 Cal. App. 3d 746, 753 (1972).

§ 2.09: *Hearsay Statements of an Informant—the Two-Prong Test of Aguilar*

The United States Supreme Court in *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964), announced a two-prong test for the sufficiency of affidavits based upon the hearsay statements of an informant. That test was recently reaffirmed by the court in *Spinelli* v. *United States,* 393 U.S. 410, 413 (1969), and continues to be a workable, though complex, standard for the California courts. *See* §§ 2.10, 2.11, *infra.* The two-pronged test, as stated in *Aguilar,* is as follows:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.' " (Footnote omitted.) *Ibid.,* 378 U.S. at 114.

In *People* v. *Tillman,* 238 Cal. App. 2d 134, 138 (1965), the *Aguilar* test was restated:

> "First, the statement of the informer in the affidavit must be factual in nature rather than conclusionary and must indicate that the informer had personal knowledge of the facts related . . . .
>
> "Secondly, the affidavit must contain some underlying factual information from which the issuing judge can reasonably conclude that the informant, whose identity need not be disclosed, was credible or his information reliable. In other words, the magistrate's finding of probable cause can be sustained only if the affidavit presents a substantial basis for crediting the hearsay . . . ." *See also People* v. *Scoma,* 71 Cal. 2d 332, 336 (1969); *People* v. *Benjamin,* 71 Cal. 2d 296, 301 n.3 (1969); *People* v. *Hamilton,* 71 Cal. 2d 176, 179–80 (1969); and *People* v. *Akers,* 9 Cal. App. 3d 96, 100–01 (1970).

The two sections immediately succeeding discuss those cases in which one or both prongs of *Aguilar* were determinative of the particular affidavit in issue.

§ 2.10: *The First Prong—Facts Indicating Personal Knowledge of the Informer*

The first prong of the *Aguilar* test is sharp, leaving its scars among a number of state and federal cases.

In *People* v. *Hamilton*, 71 Cal. 2d 176 (1969), the affidavit, sworn to by a narcotics agent, stated in essence that the affiant had been informed by a confidential reliable informant that defendant had in her possession at 822 West Alpine Street, Upland, California, approximately 300 rolls of dangerous drugs wrapped in tinfoil in groups of 10. The affidavit set forth defendant's previous narcotics arrest involving identical narcotics containers, and alleged that the informer had proven reliable in previous arrests and convictions. The court stated: "It is the first 'prong' of the Aguilar test which strikes the affidavit now before us; that document undertakes absolutely no effort to set forth any of 'the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were. . . .'" *Ibid.* at 180. The court rejected the notion that the informant's description of the containers provided a sufficient inference of personal knowledge. *Ibid.* at 181.

In *Hamilton*, the court found an apt parallel in the recent case of *Spinelli* v. *United States*, 393 U.S. 410 (1969), where the affidavit similarly related that the agent-affiant "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." 393 U.S. at 422. The affidavit claimed that an independent investigation had revealed the location of the telephones at an address at which Spinelli was a frequent visitor. The United States Supreme Court held that the affidavit failed to reveal the basis of the informant's conclusions. "[I]t is especially important," said the court, "that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416. *See also* the affidavit found wanting for lack of "personal knowledge" facts to support it in *Giordenello* v. *United States*, 357 U.S. 480 (1958). The court rejected the argument that the specific telephone numbers (*cf.* specific containers held insufficient in *Hamilton, supra*) raised any reasonable inference of personal knowledge: "This meager report could easily have been obtained from an off-

hand remark heard at a neighborhood bar." 393 U.S. at 417. *See Price* v. *Superior Court*, 1 Cal. 3d 836, 841 (1970); *People* v. *Nadell*, 23 Cal. App. 3d 746, 755 (1972).

The affidavit in *People* v. *Benjamin*, 71 Cal. 2d 296, 301 (1969), nearly fell victim to the first prong of *Aguilar*. There the statements appearing in a printed form (set out in n.2 at page 300 of 71 Cal. 2d) were grossly insufficient to permit the magistrate to conclude that the incriminating facts related by the informant were gleaned through personal observation rather than rumor or gossip. However, the combination of the insufficient statements with the detailed allegations from the investigating officers' own observations produced a state of facts sufficient to lead the magistrate, as one of ordinary caution or prudence, to believe and conscientiously entertain a strong suspicion that defendant was engaged in bookmaking activities at the apartment which was the subject of the warrant. *Cf. People* v. *Flores*, 68 Cal. 2d 563, 566 (1968), *overruled on other grounds* in *People* v. *De Santiago*, 71 Cal. 2d 18, 28, n.7 (1969).

An example of an affidavit sufficient to withstand the "personal knowledge" requirement is related in *People* v. *Scoma*, 71 Cal. 2d 332, 334–35 (1969). It was the second prong of *Aguilar* to which the *Scoma* affidavit was vulnerable (discussed *infra*, § 2.11.) *See too Krauss* v. *Superior Court*, 5 Cal. 3d 418, 421 (1971).

The United States Supreme Court has offered some guidelines in presenting a sufficient description of criminal activity to withstand *Aguilar's* first prong in *Draper* v. *United States*, 358 U.S. 307 (1959). (Informer did not reveal source of his information, but described with minute particularity what the actions of the suspect were going to be and what clothing he would be wearing. This also indicated a "reliable" source within the second *Aguilar* test.) *See too People* v. *Cain*, 15 Cal. App. 3d 687, 695 (1971); *People* v. *Bryant*, 5 Cal. App. 3d 563, 568 (1970).

However, in *People* v. *Aguirre*, 10 Cal. App. 3d 884, 890 (1970), it was held that personal knowledge may refer merely to matters which the informer heard or read from a source which he credits. Personal knowledge is not always the equivalent of "I saw."

§ 2.11: *The Second Prong—Facts Indicating Credibility or Reliability of the Informer*

In *Spinelli* v. *United States*, 393 U.S. 410, 415 (1969), the Supreme Court stated, "Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be

determined by a more precise analysis." In *Willson* v. *Superior Court*, 46 Cal. 2d 291, 295 (1956), several means were suggested by which it might be shown that reliance on an informant's report of illegal activity was reasonable: "In some cases the identity of, or past experience with, the informer may provide . . . evidence [of the informant's reliability] [citations], and in others it may be supplied by similar information from other sources or by the personal observations of the police. . . ." *See People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 712 (1972).

With the criteria for reliability (as set forth in *Willson, supra*) before them, the California Supreme Court in *People* v. *Scoma*, 71 Cal. 2d 332 (1969), stated that the affidavit in question, (1) stated no facts relative to the informer's *identity* to indicate the reliability of his information, nor (2) facts indicating *past police experience* with the informant. Turning to (3), *facts observed by officers*, the court found them insufficient to provide a basis on which the magistrate could conclude that the informant's report of the illegal activity *on the part of "Dewey"* (among other purported suspects) was reliable information:

> "Surely the facts that the informant was found to possess narcotics gives no credence . . . that he obtained [them] from a named person. . . . Of no greater assistance is the fact that 'Dewey's' past and present addresses were those provided by the informant; again, no inference of criminal activity on 'Dewey's' part may be drawn. [Citations.] [Fn. Omitted.]
>
> "Equally without value . . . are the notes and lists obtained from his [the informant's] wallet. . . . It cannot reasonably be maintained that the list of names and telephone numbers supported the informant's accusation of 'Dewey' any more than . . . any other person on that list." *People* v. *Scoma, supra* at 339.

Compare satisfaction of the reliability-credibility requirement of *Aguilar* in the setting of an arrest. In *McCray* v. *Illinois*, 386 U.S. 300, 303–04 (1967), a reliable informant told police that petitioner " 'was selling narcotics and had narcotics on his person,' " relating also the area where petitioner could be found. Petitioner was found at that location and arrested. Held: The testimony of each officer informed the court of the underlying circumstances to support his conclusion that the informant was reliable, augmented by the officers' personal observations of the petitioner; probable cause for the arrest was present.

Spinelli v. *United States*, 393 U.S. 410 (1969), has already been mentioned (*supra*, § 2.10) as an example of the lack of underlying circumstances from which "personal knowledge" of the informant could be inferred. That same case is also relevant to our discussion of "credibility" herein. In *Spinelli*, the affidavit stated that a "confidential reliable informant" informed the FBI that the defendant was "operating a handbook" and "disseminating wagering information by means of the telephones," supplying officers with the alleged telephone numbers. The affiant-officers themselves stated in the affidavit that they had witnessed petitioner visiting the premises where the telephone numbers were listed. The court held, first, that no information was given in support of the bald statement that the informant was "reliable" and, second, that the corroborating observations by the officers did not overcome the first defect ("reliability"). Stated another way, the results of the investigation do not necessarily support the inference that the informant is trustworthy or that he gained his information in a reliable way. The court said that the tip was not to be totally disregarded; however, it tended to corroborate only minute and relatively unimportant details (*e.g.*, defendant's presence on the premises). However, in dicta, the court conjectured that if there had been an unusual number of telephones in the apartment, the officers' observations of this fact might support the inference of bookmaking.

It has been held that an accomplice who makes declarations against penal interest is a reliable informer prior to arrest. *Ming* v. *Superior Court*, 13 Cal. App. 3d 206, 214 (1970). *See United States* v. *Harris*, 403 U.S. 573 (1971).

In *People* v. *Sanchez*, 24 Cal. App. 3d 664, 676 (1972), a number of factors are pointed to that justified a belief in reliability. *Cf.* Note, 47 Notre Dame Lawyer 632, 640–41 1972).

§ 2.12: *Sustaining the Affidavit by Corroboration*

The magistrate's consideration of the affidavit is not confined to the informer's hearsay statements, which may be defective under one of *Aguilar's* two-pronged requirements. Thus, if the detailed results of the officer's independent investigation of the case are presented in the affidavit together with the hearsay statement of the informant (inadequate by itself), the affidavit will stand provided, when taken as a whole, sufficient facts are set forth "such as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain, a strong suspicion of the guilt of the ac-

cused." *People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 714 (1972) (detailed observations and corroboration); *People* v. *Stout*, 66 Cal. 2d 184, 193 (1967).

In *People* v. *Benjamin*, 71 Cal. 2d 296, 302–03 (1969), this principle was applied where the informer's statements did not indicate "personal observation" (§ 2.10). In *People* v. *Scoma*, 71 Cal. 2d 332 (1969)), the principle was unable to preserve an affidavit where the facts alleged by the officers provided no basis on which the magistrate could conclude the illegal activity alleged was "reliable information" (§ 2.11). *See also Spinelli* v. *United States*, 393 U.S. 410 (1969); *but compare Draper* v. *United States*, 358 U.S. 307 (1959). *See Price* v. *Superior Court*, 1 Cal. 3d 836, 842 (1970).

An accomplice's testimony needs no special corroboration. *Skelton* v. *Superior Court*, 1 Cal. 3d 144 (1969).

Additional material on corroboration may be found in § 6.03.

§ 2.13: *The "Anonymous or Untested" Versus the "Reliable" Informant*

Establishing probable cause for the issuance of a search warrant by the credible hearsay of an informant may vary depending on the informant's denomination "anonymous or untested," as opposed to "reliable." The following principles reveal, in another way, what has been stated *supra* in § 2.12.

(1) Information provided by an *anonymous or untested* informant *cannot alone* establish sufficient basis for a search warrant. *People* v. *Scoma*, 71 Cal. 2d 332, 337 (1969); *People* v. *Amos*, 181 Cal. App. 2d 506 (1960). *But see Ming* v. *Superior Court*, 13 Cal. App. 3d 206, 213–14 (1970). However, if investigation or observation or additional information corroborates the untested informant's report, a search warrant may be obtained if the combined information gives probable cause. *People* v. *Reeves*, 61 Cal. 2d 268, 273 (1964); *People* v. *Scott*, 259 Cal. App. 2d 268, 275 (1968).

(2) On the other hand, probable cause for the issuance of a search warrant may be based *solely* on information furnished by a *reliable* informant if the affidavit is factual in nature rather than conclusionary and informs the magistrate of the basis from which the officer concluded that the informant was credible or his information reliable: *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); *Spinelli* v. *United States*, 393 U.S. 410 (1969) (unsupported assertions of even a reliable informer or an officer will not support a search warrant); *People* v. *Keener*, 55 Cal. 2d 714, 721 (1961), *disapproved on another issue* in *People* v. *Butler*, 64 Cal. 2d 842, 844–45 (1966). *People* v. *Sanchez*, 24 Cal. App. 3d 664, 676 (1972) points out that the question is not whether the informer is reliable but whether the magistrate could reasonably rely on his information.

(3) Information from a citizen who purports to be the victim of a crime or to have observed the unlawful activity has been held sufficient even though his reliability has not been previously tested. *Krauss* v. *Superior Court*, 5 Cal. 3d 418, 421–22 (1971); *People* v. *Hogan*, 71 Cal. 2d 888, 890–91 (1969); *People* v. *Scoma*, 71 Cal. 2d 332, 338 n.7 (1969); *People* v. *Lopez*, 271 Cal. App. 2d 754, 759 (1969); *People* v. *Gardner*, 252 Cal. App. 2d. 320, 324 (1967); *People* v. *Lewis*, 240 Cal. App. 2d 546, 550 (1966) (gathering cases).

(4) Any suggestion in earlier cases that in a narcotics case, information "given by the juvenile [a participant] was somehow clothed with reliability because the informant was a minor" was expressly disapproved in *People* v. *Scoma*, 71 Cal. 2d 332, 338 n.7 (1969).

Compare §§ 6.02–6.03, *infra*, where these same rules are made applicable to arrests without a warrant.

§ 2.14: *Revealing Identity of the Undisclosed Informant*

Both the California and United States Supreme Courts agree that where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of evidence obtained as a result of it. *People* v. *Keener*, 55 Cal. 2d 714, 723 (1961); *People* v. *Brown*, 259 Cal. App. 2d 663, 671 (1968). Thus, in *McCray* v. *Illinois*, 386 U.S. 300 (1967), the court approved the Illinois practice of not requiring police officers to disclose an informer's identity where the trial judge was convinced that the officers acted on credible information supplied by a reliable informant. (*Compare* the similar practice codified in California Evidence Code, § 1042(c).) The high court announced that nothing in the Due Process Clause nor in the Sixth Amendment requires the informant to testify against the petitioner in a hearing (motion to suppress) to determine probable cause for an arrest or search.

The contrary may be true in situations where the informer's identity bears on the defendant's guilt or innocence. *See* discussion in § 6.05.

Note too that section 1042(d) of the Evidence Code provides for an in camera disclosure of the informer's identity to aid the court in deciding whether nondisclosure would deprive the defendant of

a fair trial. *See too People* v. *Superior Court* (Biggs), 19 Cal. App. 3d 522 (1971) (more than in camera hearing may be appropriate).

§ 2.15: *The Affiant May Be Examined Under Oath*

Penal Code section 1526 provides:

"(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

"(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court."

If the affidavit is found to have inadvertently omitted pertinent facts, the affiant should be examined orally and a transcript of the examination attached to the affidavit.

Thus the statute has the effect of creating the so-called "oral search warrant" and altering the rule that the affidavit must be written, previously expressed in *Powelson* v. *Superior Court*, 9 Cal. App. 3d 357, 361 (1970).

Section 1528 of the Penal Code permits the use of a duplicate search warrant. The magistrate can orally authorize the police officer to sign the magistrate's name to a duplicate search warrant.

See *People* v. *Chavez*, 27 Cal. App. 3d 883, 886 (1972), *People* v. *Aguirre*, 26 Cal. App. 3d Supp. 7 (1972).

§ 2.16: *Affidavit Must Be Presented to a Magistrate*

Penal Code section 1523 and the Supreme Court's pronouncement in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), require judicial participation in the issuance of search warrants. The disinterested judgment of a *magistrate* to resolve issues of probable cause is preferred over that of law enforcement officials engaged in the often competitive business of ferreting out crime. California defines a "magistrate" as an officer having the power to issue warrants of *arrest* (Pen. Code § 807), namely, the *judges* of the Supreme Court, courts of appeal, superior courts, municipal courts, and the justice courts. Pen. Code § 808.

In *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969), the Supreme Court again observed, "important safeguards . . . assure that the judgment of a disinterested *judicial officer* will interpose itself between the police and the citizenry." (Fn. omitted; emphasis added.)

A subpoena issued by the District Attorney would not be a sufficient search warrant. *Mancusi* v. *De Forte*, 392 U.S. 364 (1968). *See too Coolidge* v. *New Hampshire*, 403 U.S. 443, 449–50 (1971) (Attorney General may not issue search warrant).

§ 2.17: *The Statutory Grounds for Issuance*

Penal Code section 1524 provides:

"A search warrant may be issued upon any of the following grounds:

"1. When the property was stolen or embezzled.

"2. When the property or things were used as the means of committing a felony."

In *Berger* v. *New York*, 388 U.S. 41 (1967), the New York eavesdropping statute was found unconstitutional on the ground that it did not require the belief that any particular offense had been committed.

"3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered." (Pen. Code § 1524.3.)

This particular provision may be greatly revitalized by virtue of the limitations on a search incidental to an arrest imposed by the Supreme Court in *Chimel* v. *California*, 395 U.S. 752 (1969).

"4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony."

(Pen. Code § 1524.4)

See Aday v. *Superior Court*, 55 Cal. 2d 789 (1961), which held that a magistrate need not read an obscene book in its entirety or take evidence of community standards prior to issuance of the warrant.

"The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be." (Pen. Code § 1524.)

There is no requirement that a complaint have been filed charging any person with a crime in respect to the property which is the subject of the warrant. *Dunn* v. *Municipal Court*, 220 Cal. App. 2d 858, 875 (1963).

§ 2.18: *Issuance of the Warrant*

" 'The determination to issue, or not to issue, a search warrant is primarily for the magistrate to whom application is made, and a court is authorized to set the warrant aside only if, as a matter of law, the affidavit or deposition on which it is based shows, on its face, that the probable cause required by the Constitution and by section 1525 of the Penal Code is lacking. [Citations.]' " *People* v. *Brown*, 259 Cal. App. 2d 663, 670 (1968), *quoting from People* v. *Aguilar*, 240 Cal. App. 2d 502, 507 (1966).

§ 2.19: *Only Upon the Existence of Probable Cause*

Sections 2.04–2.17, *supra*, have attempted to outline important considerations in the *formation* of probable cause requisite to a sufficient affidavit. The question as to whether probable cause is in fact *established*, however, is a question of *law* left to the issuing magistrate. Pen. Code § 1525. Thus, an affidavit will be upset only if it fails as a matter of law. As stated by the California Supreme Court in *People* v. *Stout*, 66 Cal. 2d 184, 193 (1967):

"The warrant can be upset only if the affidavit fails *as a matter of law* to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. . . ." (Emphasis added.)

People v. *Benjamin*, 71 Cal. 2d 296, 302 (1969); *People* v. *Coulon*, 273 Cal. App. 2d 148 (1969).

The magistrate's construction of the affidavit is therefore entitled to great weight. In *United States* v. *Ventresca*, 380 U.S. 102, 108–09 (1965), a general standard was voiced by the federal Supreme Court for testing and interpreting search warrants—namely, the use of common sense:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, *must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion*. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

". . . where . . . circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a *commonsense, manner*." (Emphasis added.)

Applying this principle, *see People* v. *Coulon, supra*, 273 Cal. App. 2d at 153, and *People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 711 (1972).

§ 2.20: *Only Upon Information Constitutionally Acquired*

As is true in the case of an arrest without a warrant (§ 5.05), a search warrant cannot be justified upon the basis of information or evidence that was illegally acquired. *People* v. *Cox*, 263 Cal. App. 2d 176, 181 (1968) (*disapproved on other grounds* in *Greven* v. *Superior Court*, 71 Cal. 2d 287, 295 (1969)).

§ 2.21: *Form of the Warrant*

By law, a search warrant must be "substantially" in the form provided by Penal Code section 1529, set out in the *Appendix*.

Where printed form warrants are used, they should bear some notation of the exercise of discretion by the issuing magistrate. Thus, in *People* v. *Mills*, 251 Cal. App. 2d 420 (1967), a mimeographed warrant was issued in which the magistrate failed to strike out superfluous words relating to a day, versus night, search, and the appellate court was unwilling to permit officers to serve the warrant at night. This same principle is applicable to all such printed form warrants. Where the warrant indicates a choice to be made by the magistrate, the magistrate must make that selection. But a warrant authorizing a search "in the daytime or nighttime" is proper. *People* v. *Grant*, 1 Cal. App. 3d 563 (1969).

A warrant should name on its face "every person whose affidavit has been taken, but a failure to do so may not invalidate the warrant." *People* v. *Sanchez*, 24 Cal. App. 3d 664, 667–68 (1972) (creating exception for confidential informer).

§ 2.22: *Content of the Warrant*

The Fourth Amendment, as well as the California Constitution (art. I, § 19) and Penal Code (§ 1525), is basically a prohibition against general warrants. It requires that a search warrant particularly describe the person (§ 2.23), property (§ 2.24), and place (§ 2.25) to be searched. *People* v. *Brown*, 259 Cal. App. 2d 663, 671 (1968). *See also* Pen. Code § 1529, *Appendix. See* Cook, Requisite Particularity in Search Warrant Authorizations, 38 Tenn. L. Rev. 496 (1971).

§ 2.23: *The Person To Be Searched*

Where the object of a warrant is to search a place, there is no legal need to name or describe a person. *People* v. *Scott*, 259 Cal. App. 2d 268, 274 (1968).

Authority given in a warrant for the search of a named person is, at the same time, authority for an arrest in order to effectuate the search. "Since it is an obvious impossibility to search the person of an individual without first taking him into custody, the warrant impliedly authorized an arrest as a step in the authorized search." *People* v. *Aguilar*, 240 Cal. App. 2d 502, 505 (1966); *see also People* v. *Wilson*, 256 Cal. App. 2d 411, 417–18 (1967); 49 A.L.R. 2d 1209 (sufficiency of description of person in warrant).

However, one who is not named in the search warrant may nevertheless be searched *if* the officers are presented, independent of the warrant, with probable cause for an arrest of that person. An example is presented by *People* v. *Rodriguez*, 274 Cal. App. 2d 770 (1969), where officers approached the residence of Johnny Bracamonte in order to execute a search warrant authorizing the search of Bracamonte's person and residence for narcotics. When one of the officers entered the home, appellant, a suspected dealer of narcotics who had been observed in the company of other suppliers on former occasions, was standing in the living room. Appellant attempted to hide something behind his leg in a clenched fist, and when the officer inquired as to what he was hiding, appellant moved the clenched fist rapidly toward his mouth. The officer dropped the search warrant and grabbed appellant's fist, finding a balloon containing narcotics. The court held that when the totality of circumstances were considered, the officers had reasonable cause to arrest appellant and to search his person as an incident thereto. Thus, although appellant was unnamed in the search warrant, the arrest and search were proper by the existence of independent probable cause presented during execution of the warrant; however, assessed in the court's equation of probable cause was the appellant's presence at the Bracamonte home, a place of suspected narcotics activity as manifested by the warrant.

If the warrant authorizes a search of more than one person there must be probable cause as to both. *People* v. *Nadell*, 23 Cal. App. 3d 746, 752 (1972).

The person to be searched must be described with reasonable particularity. The phrase "unidentified persons" does not describe with reasonable particularity. *People* v. *Tenney*, 25 Cal. App. 3d 16, 22 (1972).

§ 2.24: *The Items To Be Seized*

The search warrant must place a meaningful restriction on the things to be seized. However, it is enough if the property to be seized is described with *reasonable particularity.*

Thus, in *People* v. *Walker*, 250 Cal. App. 2d 214, 220 (1967), the court held that the term "dangerous drugs" was not too general. The court in that decision referred to the earlier case of *Dunn* v. *Municipal Court*, 220 Cal. App. 2d 858, 868 (1963), where a warrant authorizing the seizure of " 'illegal deer meat and/or elk meat' " was upheld.

There is authority that with respect to contraband a lesser description suffices. *United States* v. *De Pugh*, 452 F.2d 915, 920 (10th Cir. 1971); *Elrod* v. *Massachusetts*, 278 Fed. 123, 129 (4th Cir. 1921).

However, in *Aday* v. *Superior Court*, 55 Cal. 2d 789, 795–96 (1961), the warrant was held invalid as to a number of broad, general categories including " 'any and all other records and paraphernalia' connected with the business of the corporate petitioners." The court held, *Ibid.* at 796:

> "Articles of the type listed in the general terms in the warrant are ordinarily innocuous and are not necessarily connected with a crime. The various categories, when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized. Such a warrant is similar to the general warrant permitting unlimited search, which has long been condemned. (*See* People v. Berger, 44 Cal. 2d 459, 461.) . . . [T]his Court has held that a reference in a warrant to property as 'personal goods and property, to-wit, certain paraphernalia,'

without any further specification, does not satisfy the requirement of reasonable particularity of description [citation] . . . ." (Footnote omitted.)

Accord Lockridge v. *Superior Court*, 275 Cal. App. 2d 612, 625 (1969) ($150,000 in merchandise); *Stern* v. *Superior Court*, 76 Cal. App. 2d 772, 784 (1946) ("other evidence"); *People* v. *Mayen*, 188 Cal. 237, 242 (1922) ("certain personal property used as a means of committing a public offense, to wit, attempted grand larceny.").

See also Berger v. *New York*, 388 U.S. 41 (1967), where the New York "permissive eavesdrop" statute was held to be unconstitutional for the reason that it authorized eavesdropping without requiring that the conversations sought be particularly described. *Compare*, however, *McPhaul* v. *United States*, 364 U.S. 372 (1960). There a *subpoena* requiring the production of " 'all records, correspondence and memoranda pertaining to the organization of, the affiliation with other oganizations and all monies received or expended by the Civil Rights Congress' " was upheld since the investigation under way was relatively broad and records were kept by the Civil Rights Congress. The court said defendant should have objected to the production of those records unrelated to the inquiry. Note, however, that *subpoenas* do not receive the strict construction of a search warrant. *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963).

See People v. *Akers*, 9 Cal. App. 3d 96, 99–100 (1970) (brand name of stolen plane including serial numbers of motor, fuel pump, tires and altimeter).

Needless to say, the list of items to be seized should ordinarily be supported by probable cause as to each item. In *People* v. *Sanchez*, 24 Cal. App. 3d 664, 679 (1972), it was said that an authorization to search for peyote and barbiturates, where it was assumed that support was lacking, was still not improper where a valid authorization existed to search for heroin and the extra authorization did not enlarge the permissible scope or intensity of the search.

§ 2.25: *Obscene Books or Films*

Because of the protection afforded books and films by the First Amendment, a seizure made on the determination of a police officer that such property is "obscene" does not afford the owner enough protection to constitute due process. *Flack* v. *Municipal Court*, 66 Cal. 2d 981, 991 (1967); *Aday* v. *Municipal Court*, 210 Cal. App. 2d 229, 247 (1962). "Within the precinct of the First Amend-

ment, only the requirement that a search warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially [*sic*] and not *ad hoc* by police officers in the field." *Flack* v. *Municipal Court*, *supra* at 992. This remains true even as to a search contemporaneous with a valid arrest. *Ibid.* at 991; *Chimel* v. *California*, 395 U.S. 752 (1969). However, an exception conceived by the California Supreme Court might arise in the context of an emergency—i.e., where there is an arrest, accompanied by a high probability that evidence may be lost, destroyed, or spirited away. *See Flack* v. *Municipal Court*, *supra* at 991, n.10.

The rule requiring a judicial determination of obscenity is subject to further qualification. It is not necessary for the issuing magistrate to read (or view) the particular obscene matter in its entirety or to receive evidence as to contemporary community standards (within the obscenity requirements of *Roth* v. *United States*, 354 U.S. 476, 487–89 (1957)), in order to determine the issue of probable cause. *People* v. *Luros*, 4 Cal. 3d 84, 89 (1971); *Aday* v. *Superior Court*, 55 Cal. 2d 789, 798 (1961).

Moreover, at least one copy of the obscene matter can be seized under the search warrant without an adversary proceeding on the obscenity issue. *People* v. *De Renzy*, 275 Cal. App. 2d 380 (1969). The rationale being that, unlike mass seizure, the seizure of a single example of allegedly obscene material does not of itself tend to suppress freedom of expression. *Compare A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969). *See too Monica Theater* v. *Municipal Court*, 9 Cal. App. 3d 1, 13 (1970) (adversary hearing pre-warrant not necessary because of 1538.5 procedure); *People* v. *Golden*, 20 Cal. App. 3d 211, 215 (1971) (stronger showing of probable cause needed but not necessarily prior adversary hearing; obscenity factor established by defendant's out-of-court admission); *People* v. *Adler*, 25 Cal. App. 2d Supp. 24, 38 (1972). See *People* v. *Superior Court* (LOAR), 28 Cal. App. 3d 600, 618 (1972).

A number of federal courts have insisted upon the necessity of a prior adversary hearing before a warrant can be issued. *See United States* v. *Alexander*, 428 F.2d 1169, 1171–73 (8th Cir. 1970); *see too* Note, The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures, 46 N.Y.U. L. Rev. 80 (1971). *Cf. United States* v. *Gower*, 316 F. Supp. 1390, 1393 (D. D.C. 1970).

Many of the cases involve search warrants for the seizure of obscene *books* which can easily be purchased and submitted to a magistrate for his determination. However, the United States Supreme Court has made the rule equally applicable to *films*, whose inaccessibility is far greater a problem than obscene books. The prosecution fear is that if advance notice of seizure is given, the owner of the film can excise portions. In *Lee Art Theater* v. *Virginia*, 392 U.S. 636 (1968), a search warrant had been issued by a justice of the peace on the basis of a peace officer's affidavit, which stated that from the officer's observations of the billboards and films, the films were obscene. Reversing the conviction, the court held that the mere conclusionary assertions of the officer were insufficient to support the warrant. The magistrate's inquiry must be one "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 732 (1961).

Once the question of obscenity has been judicially determined, the warrant may not authorize the seizure of all of the films or books in question, but only those specifically named in the warrant. *Aday* v. *Superior Court*, 55 Cal. 2d 789 (1961). In this connection, the language of the warrant should be narrowly drafted. *Cf. Stanford* v. *Texas*, 379 U.S. 476 (1965), where the search warrant language, "books, records, pamphlets, cards, receipts, lists . . . and other written instruments" was found to be constitutionally fallible.

It should additionally be noted that a search warrant may not be issued for the search and seizure of obscene materials merely in the possession of the defendant in his home. *Stanley* v. *Georgia*, 394 U.S. 557, 559 (1969): "The mere private possession [distinguished from exhibiting, distributing, and the like] of obscene matter cannot constitutionally be made a crime." *See People* v. *Luros*, 4 Cal. 3d 84, 90–93 (1971); *see too United States* v. *Reidel*, 91 S. Ct. 1410, 1412 (1971) (limits *Stanley*); *People* v. *Golden*, 20 Cal. App. 3d 211, 214 (1971).

§ 2.26: *The Place To Be Searched*

"Constitutional concepts condemn 'general' warrants which impose little or no restriction on the area to be searched . . . ." *Williams* v. *Justice Court*, 230 Cal. App. 2d 87, 101 (1964).

Thus, as was said in *Trupiano* v. *United States*, 334 U.S. 699, 710 (1948), the right of privacy guaranteed by the Fourth Amendment is violated if law enforcement officers, for lack of a warrant specifically defining the extent of their search, are free to determine it for

themselves. It is, therefore, constitutionally essential to the validity of a search warrant that its underlying showing of probable cause, and the warrant itself, describe with particularity the area to be searched. *See* § 2.22, *supra*, and *People* v. *Estrada*, 234 Cal. App. 2d 136, 146 (1965), where the court stated:

". . . 'The basic requirement is that the officers who are commanded to search be able from the "particular" description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed. . . .'" (Quoting *United States* v. *Hinton*, 219 F.2d 324, 326 (7th Cir. 1955).)

It is said that this requirement is met if the description in the warrant is such that the officers can, with reasonable effort, ascertain and identify the place intended. *People* v. *Grossman*, 19 Cal. App. 3d 8, 11 (1971); *Steele* v. *United States*, No. 1, 267 U.S. 498, 503 (1925), *quoted from in Estrada, supra* at 146. *See* 11 A.L.R. 3d 1330.

Part of the showing the People have to make is not only that the place has been described but also that the items will be found there. In one case this was said to be facts from which it could be inferred the defendant probably possessed such contraband and his connection with the place was such as to make it probable the contraband could be found there. It was not necessary to show the defendant used the place as a residence, or that he rented it, or had exclusive possession of it. *Frazzini* v. *Superior Court*, 7 Cal. App. 3d 1005, 1013 (1970). *See too People* v. *Metzger*, 22 Cal. App. 3d 338, 346 (1971); *United States* v. *Bailey*, 458 F.2d 408, 412 (9th Cir. 1972).

A mistake as to an address did not invalidate a warrant where the premises were otherwise adequately identified. *Tidwell* v. *Superior Court*, 17 Cal. App. 3d 780, 787 (1971).

Where an officer was told the address on the warrant was not correct, he said, "Everybody hold it right there," and went back to the magistrate to change it. Then the search was made and upheld. *Mayorga* v. *People*, 496 P.2d 304, 305 (Colo., 1972).

§ 2.27: *Single v. Multiple Living Units*

"In the case of dwellings, the 'place' is usually a single living unit, that is, the residence of one person or family; a warrant directing a search of an apartment house or dwelling place containing multiple living units is void unless issued on probable cause for searching each separate living unit or believing that the entire place is a single living unit; a group of adults, nevertheless, may

share a single dwelling unit as a common residence, and a warrant describing that unit as the 'place' to be searched is constitutionally adequate." (Footnote omitted.) *People* v. *Coulon*, 273 Cal. App. 2d 148, 152 (1969).

In determining whether the place described in the warrant is a single integral unit, it is significant that any part of the place is accessible, and not separated by any real barrier, from any other part. *People* v. *Fitzwater*, 260 Cal. App. 2d 478, 487 (1968).

This was partially the rationale in *Coulon*, *supra* at 151, where a search warrant commanded the search of a "hippie" ranch, specifically "the house, outbuildings, tepees, and campsites at the Old Quadros Ranch in Siskiyou County, as well as the persons in residence there." Petitioners were living in a camp near a creek on the ranch when the officers approached them and conducted a search revealing marijuana. Upholding the search warrant, the court found that the supporting affidavits (including that of a reliable confidential informant who had observed a large delivery of narcotics to the central ranch house) caused the entire ranch, spread over a square mile, to be suspect:

> "There was no reason to assume that the narcotics remained in the ranch house or that the persons who had taken it into the ranch house continued to inhabit that particular structure. Rather, there was probable cause to believe that the contraband, either in bulk or in distributed portions, might be found anywhere on the ranch. To trace the narcotics to compressed spheres of suspicion within the general confines of the ranch would have entailed an elaborate undercover investigation or a self-frustrating giveaway." (Footnote omitted.) *Coulon*, *supra* at 156.

See *People* v. *Sheehan*, 28 Cal. App. 3d 21, 24–26 (1972).

The *Coulon* case is important in a second respect, in that the court held that the term "hippie" could be judicially noticed by the issuing magistrate for the limited purpose of identifying the contraband's location as the Old Quadros Ranch. However, at that point, the term "hippie" exhausted its value; the court was unwilling to infer communal living ("single living establishment") or specific behavior (narcotics usage) by use of the term. The court relied on other facts in the affidavits on which to found probable cause.

Compare People v. *Rogers*, 270 Cal. App. 2d 705, 711 (1969), where an apartment was one distinct living unit occupied by the

three defendants, *the unlocked bedrooms* being an integral part of the same living quarters.

It should also be noted that where sufficient facts are presented in the affidavit, a search warrant may be issued authorizing the search of *two residences*. *People* v. *Alvarado*, 255 Cal. App. 2d 285, 291 (1967).

In *People* v. *Garnett*, 6 Cal. App. 3d 280 (1970), a search warrant was properly issued to search an entire building where the probable cause showed narcotic usage on three floors and there was evidence of communal living.

See 11 A.L.R. 3d 1330.

§ 2.28: *Garages, Outbuildings, Appurtenances, or Other Structures*

See, infra, § 9.02.

In *People* v. *Fitzwater*, 260 Cal. App. 2d 478, 483 (1968), the issue before the court was whether a dismounted van could be searched under a search warrant authorizing the search of " 'a warehouse at 121 West 33rd Street . . . and *appurtenances*.' " The inquiry was resolved in the affirmative, the court holding that the van was used as an "adjunct" or "accessory" to the warehouse on the premises.

It was formerly held that because garages and outbuildings do not have a " 'private character for living purposes such as a house' " or as " 'an outbuilding essential to the comfort and personal well-being of a family,' " they need not be named in the warrant as such "areas" are not constitutionally protected. *See People* v. *Murray*, 270 Cal. App. 2d 201, 204 (1969); *People* v. *Muriel*, 268 Cal. App. 2d 477, 480 (1968); *see too People* v. *Shields*, 232 Cal. App. 2d 716, 721 (1965). However, by reason of the California Supreme Court's denunciation of the principle of "constitutionally protected areas" in *People* v. *Edwards*, 71 Cal. 2d 1096 (1969), the chief concern of the courts shall be whether the area was one within which defendant exhibited a *reasonable expectation of privacy*. *See* § 13.09, *infra*, and *People* v. *Hobbs*, 274 Cal. App. 2d 402, 406 (1969) (holding that even under the former "protected area" theory, defendant's garage cannot be invaded by officers without a search warrant). *Cf. People* v. *Maltz*, 14 Cal. App. 3d 381, 397 (1971). *See People* v. *Medina*, 7 Cal. 3d 30, 40 (1972).

In *People* v. *Grossman*, 19 Cal. App. 3d 8, 11–12 (1971), however, a warrant description of " 'the premises located and described as 13328 Merkel Ave., Apt. A . . . multi-unit apartment, upper and

lower levels' " was held to include a carport cabinet. The court held that if the description of the premises to be searched is ambiguous, the ambiguity may be resolved by reference to the affidavits supporting the warrant.

As to search of a car, *see* 47 A.L.R. 2d 1444.

§ 2.29: *Severance of Partially Invalid Warrants*

The United States Supreme Court has declared that a search warrant will not be invalidated if based on matters of factual inaccuracies of only peripheral relevancy. *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

The same rule is applicable where the warrant is not only *based* on factual inaccuracies, but whose *content* or directions are themselves invalid. Thus, in *Aday* v. *Superior Court*, 55 Cal. 2d 789, 795 (1961), the warrant was overly broad in authorizing the seizure of " 'any and all other records and paraphernalia.' " The court used the following language to support the warrant's validity, adding a word of caution (*Ibid.* at 797):

> "The invalid portions of the warrant are severable from the authorization relating to the named books, which formed the principal basis of the charge of obscenity. The search for and seizure of these books, if otherwise valid, were not rendered illegal by the defects concerning other articles. [Citations.] In so holding we do not mean to suggest that invalid portions of a warrant will be treated as severable under all circumstances. We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated."

§ 2.30: *Service only by Peace Officers*

California Penal Code section 1530 provides:

"A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

§ 2.31: *Time of Service*

By section 1533 of the Penal Code, "Upon a showing of good cause, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m."

In *Solis* v. *Superior Court*, 63 Cal. 2d 774 (1966), the Supreme Court was faced with the question of whether a night search could be directed in the absence of a specific request in the supporting affidavit. The court held the warrant to be proper in view of the extensive narcotic activity spelled out in the affidavit, indicating that the premises in question were well known as a source of narcotics in the Salinas area, and that heroin pushers, the most dangerous of drug peddlers, are as active at night as during the day and probably more so. *See People* v. *Grant*, 1 Cal. App. 3d 563, 568 (1969).

However, in *People* v. *Mills*, 251 Cal. App. 2d 420 (1967), the search warrant, a printed form to be completed by the magistrate, did not specifically authorize the night search in fact undertaken by the officers. An order setting aside the information was affirmed, the court holding that Penal Code section 1533, set out *supra*, expressly requires an *affirmative act* on the part of the magistrate if the night search is to be authorized. It is sufficient if the magistrate signs a warrant directing a search in the nighttime. Two forms do not have to be submitted to him, one requesting a night search. Nor does he have to initial the nighttime authorization in the warrant. *People* v. *Grant*, *supra* at 567. *See* § 2.21, *supra*. *See also Powelson* v. *Superior Court*, 9 Cal. App. 3d 357, 363 (1970) (same). Note too that section 1533 of the Penal Code has been amended to permit service without a special direction from 7 a.m. to 10 p.m.

An unauthorized nighttime search was held to be harmless error when the occupants were arrested and no one was on the premises. *Tidwell* v. *Superior Court*, 17 Cal. App. 3d 780, 786–87 (1971).

In *People* v. *Bruni*, 25 Cal. App. 3d 196 (1972), the search warrant specified daytime service but the warrant was served at 9:30 p.m. This came about due to the oversight in failing to amend section 1529 of the Penal Code when section 1533 was amended. The court held that it was proper to accomplish service at 9:30 p.m.

See United States v. *Smith*, 340 F. Supp. 1023, 1029 (D. Conn. 1972) (suggests that nighttime search requires higher degree of certainty that property is in the home).

§ 2.32: *Announcement of Purpose and Use of Force*

Penal Code section 1531 provides that an officer may resort to forcible entry only after giving "notice of his authority" and having been refused admittance. Because this section and section 844, relative to forcible entry in effecting an arrest, are "identical in principle" (*People* v. *Villanueva,* 220 Cal. App. 2d 443, 447 (1963)) and have equal application to the arrest or search (*Greven* v. *Superior Court,* 71 Cal. 2d 287, 292, n.6 (1969)) they are discussed in detail under the material on arrest in section 9.03, *infra.*

Officers executing a warrant do not have to make the occupant direct them to items in the warrant. They can search. *People* v. *Superior Court* (Martin), 17 Cal. App. 3d 447, 451 (1971).

Where there is no indication anyone is inside, failure of the officer to announce his authority and purpose may be excused. *Hart* v. *Superior Court,* 21 Cal. App. 3d 496, 500 (1971).

§ 2.33: *Seizure of Items Unnamed in the Warrant*

When a search is made pursuant to a warrant, the search and seizure are limited by the terms of the warrant, and ordinarily only property described in the warrant may be seized. As the United States Supreme Court explained in *Marron* v. *United States,* 275 U.S. 192, 196 (1927), "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another . . . nothing is left to the discretion of the officer executing the warrant."

However, the California Supreme Court has noted at least two exceptions to this rule. Items may be seized incident to a valid arrest and contraband may be seized if located while properly executing the warrant. *Skelton* v. *Superior Court,* 1 Cal. 3d 144, 157 (1969); *People* v. *Superior Court* (Martin), 17 Cal. App. 3d 447, 451 (1971); *People* v. *Layne,* 235 Cal. App. 2d 188, 191 (1965); *People* v. *Shafer,* 183 Cal. App. 2d 127 (1960) (blackjack found when search was for narcotic); *People* v. *Acosta,* 142 Cal. App. 2d 59, 65 (1956) (search authorized for heroin; taking of marijuana justified as incident to arrest).

Where serving an arrest warrant officers have been permitted to seize stolen property. *People* v. *Jackson,* 14 Cal. App. 3d 57, 66–67 (1970).

See United States ex rel. Nickens v. *LaVallee,* 391 F.2d 123, 127 (2d Cir. 1968); *United States* v. *Baldwin,* 46 F.R.D. 63 (S.D. N.Y. 1969); 79 C.J.S. Searches and Seizures § 83(e). There is recognition in these authorities that evidence that a crime is being committed in the presence of the officers may be seized.

And in *People* v. *Cain,* 15 Cal. App. 3d 687, 693 (1971), it was held that money not listed in a warrant could be seized from a safety deposit box as it was state money and located by the police in executing a warrant for other bills.

Application of a wider rule appears to be sanctioned by the main opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465 (1971). The court there said, "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search came across some other article of incriminating character." However, if the initial intrusion is bottomed upon a warrant which fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of " 'warrants . . . particularly describing . . . [the] things to be seized,' " at least where the object is not contraband or stolen or dangerous. *Coolidge* v. *New Hampshire, supra* at 471. *See too* Cook, Requisite Particularity in Search Warrant Authorizations, 38 Tenn. L. Rev. 496, 508–12 (1971); *United States ex rel. Herhal* v. *Anderson,* 334 F. Supp. 733, 736 (D. Del. 1971).

Officers can look for suspects as well as contraband when serving a narcotics warrant. *People* v. *Superior Court* (Martin), 17 Cal. App. 3d 447, 451 (1971).

If the search continues after the item or items named in the warrant have been found, any additional items located in this further search may be deemed to be illegally obtained. *United States* v. *Highfill,* 334 F. Supp. 700 (E. D. Ark. 1971).

However, seizure of items in excess of those authorized does not result in suppression of items validly seized. *United States* v. *King,* 335 F. Supp. 523, 545 (S. D. Cal. 1971). *Contra: People* v. *Holder,* 331 N.Y.S. 2d 557, 571 (1972) (electronic eavesdropping).

§ 2.34: *Lawful Searches Independent of an Invalid Search Warrant*

Where the officers are acting pursuant to an invalid warrant, the search may nevertheless be upheld if the officer did not procure the warrant in bad faith or exploit the legality of the warrant, and if the search would have otherwise been lawful—for example, where

there is probable cause for an arrest and an incidental search. *United States* v. *Wilson,* 451 F.2d 209, 215 (5th Cir. 1971); *People* v. *Chimel,* 68 Cal. 2d 436, 442 (1968); *People* v. *Castro,* 249 Cal. App. 2d 168, 173–76 (1967); *People* v. *Rice,* 10 Cal. App. 3d 730, 737 (1970). Consider further whether consent may be used to validate a search where the warrant is defective. *See* and *compare Bumper* v. *North Carolina,* 391 U.S. 543 (1968), where consent was inapplicable since the officers originally relied on the invalid warrant, not the consent.

However, in such instances, the defendant must be informed at trial that the prosecution does not intend to place exclusive reliance on the warrant. *See People* v. *Hamilton,* 71 Cal. 2d 176, 182 (1969), distinguishing *People* v. *Castro* and *People* v. *Chimel, supra,* on the grounds that in *Hamilton* no specific attempt was made to show probable cause *aliunde* the warrant until the case was on appeal; *see also Giordenello* v. *United States,* 357 U.S. 480, 487–88 (1958); *People* v. *Rice, supra* at 737 (ample notice).

Although a search may be proper irrespective of the validity of the search warrant, it should be remembered that the law of searches "incident to an arrest" (§ 8.01), narrower in scope than a warrant search, becomes applicable. Thus, were the search to depend not on the warrant but the arrest, evidence seized outside of the reach of the suspect might well be inadmissible under *Chimel* v. *California, supra.*

§ 2.35: *Jurisdiction of the Officers Executing the Warrant*

Section 1530 of the Penal Code provides that "a search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution." In *People* v. *Scott,* 259 Cal. App. 2d 268, 280 (1968), where the warrant was directed to " 'any Sheriff . . . in the County of Los Angeles,' " the court held that any deputy sheriff was authorized to serve the warrant throughout the county, including the incorporated areas thereof. *Cf. People* v. *Chapman,* 207 Cal. App. 2d 557, 570 (1962) (warrant issued to " 'Peace Officer in the County of San Diego' " could be served by investigator for Board of Medical Examiners).

See People v. *Sandoval,* 65 Cal. 2d 303, 311–13 (1966), upholding arrest in another jurisdiction without a warrant. And *see People* v. *Grant,* 1 Cal. App. 3d 563, 568 (1969), limiting the effect of a search warrant "at least to the county of its origin" but applying doctrine

of hot pursuit to justify the apprehension and search.

By the language of the statute, it would appear that any officers not named in the warrant could serve the warrant only at the instance and in the presence of a named officer.

§ 2.36: *Courtroom Search for Weapons or Instrumentalities*

By section 1542 of the Penal Code the magistrate in a felony case may order the defendant searched in his presence for dangerous weapons or instrumentalities of crime.

§ 2.37: *Tabulation and Receipt of the Property Seized*

Penal Code section 1535 provides:

> "When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

§ 2.38: *Inventory of the Property Seized*

Penal Code section 1537 requires the officer when returning the warrant to the magistrate to also deliver to him a written, verified inventory of the property taken made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they are present. The officer's verification should read: "I [John Law], the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

§ 2.39: *Retention of Seized Property by the Officer*

The officer executing the search warrant must retain the property or things seized in his custody, subject to the order of the issuing court or any other court in which the underlying offense is triable. Pen. Code § 1536. This section of the Penal Code, as well as section 1528, takes precedence over the conflicting language of Penal Code sections 1523 and 1529 which direct the officer to deliver the seized property to the magistrate. *Williams* v. *Justice Court,* 230 Cal. App. 2d 87, 99–100 (1964).

For a discussion of disposition of stolen property seized under a search warrant, *see* 52 Ops. Cal. Atty Gen. 197 (1969).

§ 2.40: *Restoration of Property Illegally Seized or Not Introduced as Evidence*

"If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken." Pen. Code § 1540.

However, "suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, contraband) . . . ." *Warden* v. *Hayden,* 387 U.S. 294, 307 (1967); *Trupiano* v. *United States,* 334 U.S. 699, 710 (1948); *People* v. *Butler,* 64 Cal. 2d 842, 845 (1966). *See also* Health & Saf. Code § 11657.

Penal Code section 1538.5(a)(2), discussed *infra* at § 20.10, provides the grounds on which the defendant may move for the return of property he believes to be wrongfully seized under a search warrant. Should defendant prevail, Penal Code section 1538.5(e) requires the property to be returned to defendant unless other proceedings affect the property, or the property is subject to lawful detention.

§ 2.41: *Expiration Period of the Warrant*

"(a) A search warrant shall be executed and returned to the issuing magistrate within 10 days after date of issuance. A warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. After the expiration of 10 days, the warrant, unless executed, is void. . . ." Pen. Code § 1534.

By this same statute, the documents and records relating to the search warrant (affidavits, testimony, etc.) need not be open to the public until execution and return of the warrant or, at the latest, after the 10-day expiration period following issuance. *See People* v. *Sanchez,* 24 Cal. App. 3d 664, 678, 686 (1972) (affidavit of confidential informer need not be made public until compelled disclosure; misfiling by clerk did not mean it was not a public or judicial record).

In *Cave* v. *Superior Court,* 267 Cal. App. 2d 517 (1968), the court held that the 10-day period for return of the warrant was a maximum period, that promptness in execution is required, and that a deliberate delay of seven days from the date of issuance of the warrant until the search was conducted was too long.

In response to *Cave,* sections 1529 and 1534 of the Penal Code were amended and section 1534 now expressly provides: "A warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. . . ."

There is authority for a reissuance of a warrant. *Sgro* v. *United States,* 287 U.S. 206, 211–12 (1932); *People* v. *Sanchez,* 24 Cal. App. 3d 664, 682 (1972). However, the papers must be more than redated; probable cause must be brought up to date or the information may be regarded as stale.

§ 2.42: *Return of both the Warrant and Inventory to the Magistrate*

The return of a search warrant is an important step in the process of execution. *See Berger* v. *New York,* 388 U.S. 41 (1967), where the New York "permissive eavesdrop" statute failed to provide for a return of the warrant "thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." 388 U.S. 41 at 60.

Return of the warrant and inventory required by Penal Code section 1537 allows the magistrate to compare the seized articles with the warrant he has issued and to return property that is "not the same as that described in the warrant" under Penal Code section 1540.

However, it should be noted that the failure to properly return the warrant may not render the warrant ineffective *ab initio. United States* v. *Wilson,* 451 F.2d 209, 214 (5th Cir. 1971); *People* v. *Phillips,* 163 Cal. App. 2d 541, 548 (1958), citing 79 C.J.S. Searches and Seizures § 84, but disapproved in another respect in *People* v. *Butler,* 64 Cal. 2d 842, 844–45 (1966). *See too United States* v. *Moore,* 452 F.2d 569, 572–73 (6th Cir. 1971) (failure to list item in inventory); *People* v. *Sanchez,* 24 Cal. App. 3d 664, 686 (1972) (citing additional federal authorities).

The return may be made either to the issuing magistrate or to his court. Pen. Code § 1534(c), as amended in 1971.

§ 2.43: *Magistrate's Duty To File the Warrant and Related Documents*

Penal Code section 1538 requires the magistrate when presented with the warrant and inventory to deliver a copy to the aggrieved party and to the applicant for the warrant, usually the executing officer.

Where the magistrate, to whom the warrant is returned, is with-

out jurisdiction over the underlying offense, he must by Penal Code section 1541 immediately file such documents (warrant, affidavits, inventory, and return) with the clerk of the court having the required jurisdiction.

§ 2.44: *Challenging Legal Sufficiency of the Warrant*

An entire chapter, Chapter 20, has been devoted to this subject, discussing in some detail matters of proof, standing, as well as trial, pretrial, and appellate procedure.

CHAPTER THREE

ARREST WARRANTS

§ 3.01: *Nature of Arrest Warrant*

An arrest warrant is a process issued in the name of the state, directed to any sheriff, constable, marshal or policeman, commanding him to arrest and take into custody the named defendant. *Pankewicz* v. *Jess,* 27 Cal. App. 340, 341 (1915). Forms for arrest warrants are in Penal Code sections 814, 1427.

§ 3.02: *Duty to Execute*

Where an officer receives a warrant fair on its face it is his duty to carry out the order of the court and to make the arrest. "Where a warrant valid in form and issued by a court of competent jurisdiction is placed in the hands of an officer for execution, it is his duty without delay to carry out its commands." *Malone* v. *Carey,* 17 Cal. App. 2d 505, 506 (1936). The failure to serve it could be contempt. *Pankewicz* v. *Jess,* 27 Cal. App. 340, 341–42 (1915).

"The law is well settled that for the proper execution of such process the officer incurs no liability, however disastrous may be the effect of its execution upon the person against whom it is issued." *Barrier* v. *Alexander,* 100 Cal. App. 2d 497, 500 (1950). *See too Jackson* v. *Osborn,* 116 Cal. App. 2d 875, 881 (1953). An officer is not required at his peril to look behind the order if it appears to be regular on its face and issued by a court of competent jurisdiction. *Burlingame* v. *Traeger,* 101 Cal. App. 365, 369 (1929).

The officer has a duty not to serve it "where the lack of authority for its issuance is apparent on its face." *Pankewicz* v. *Jess,* 27 Cal. App. 340, 341–42 (1915). Process is said to be regular on its face when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and which is legal in form, and contains nothing to notify or fairly appraise any one that it is issued without authority. *People* v. *Weitzer,* 269 Cal. App. 2d 274, 295 (1969).

An officer who carelessly arrests the wrong person may be liable in damages. *Walton* v. *Will,* 66 Cal. App. 2d 509, 516–17 (1944).

§ 3.03: *Procedure in Securing Warrant*

The basis for the warrant of arrest and the commencement of the preliminary magisterial investigation is the complaint. *See People* v. *Mason,* 183 Cal. App. 2d 168, 172 (1960).

§ 3.04: *Adequacy of Showing To Secure Warrant*

In the complaint the officer sets forth the probable cause to justify an arrest. The purpose of the complaint is to enable the appropriate magistrate to determine whether the probable cause required to support a warrant exists. *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958). The affidavit (or complaint) must recite competent facts that would lead a man of ordinary caution and prudence conscientiously to entertain a strong suspicion of the guilt of the accused. *People* v. *Cressey,* 2 Cal. 3d 836, 842 (1970).

The Supreme Court of California in *People* v. *Sesslin,* 68 Cal. 2d 418, 421 (1968), provided two explicit prohibitions in the drawing of a complaint on which to support the arrest warrant:

> "(1) an arrest warrant issued solely upon the complainant's *'information and belief'* cannot stand if the complaint or an accompanying affidavit does not allege underlying facts upon which the magistrate can independently find probable cause to arrest the accused; (2) sections 806, 813 and 952 of the Penal Code do not authorize the issuance of warrants of arrest based solely upon *complaints couched in the language of the charged offense* . . . ." (Emphasis added.)

Cf. People v. *Cressey,* 2 Cal. 3d 836, 844 (1970).

Failure to appear warrants are not within the *Sesslin* rule. *People* v. *Superior Court* (Copeland), 262 Cal. App. 2d 283 (1968).

As to the amount of probable cause, the cases say:

1. That the test for probable cause with a warrant is approximately the same as the test for probable cause without a warrant. *People* v. *Garnett,* 6 Cal. App. 3d 280, 286 (1970).

2. That more evidence is needed to support probable cause to arrest without a warrant than to justify the issuance of a warrant. *People* v. *Johnson,* 13 Cal. App. 3d 742, 750 (1970); *see too People* v. *Madden,* 2 Cal. 3d 1017, 1023 (1970).

Judge Martin in *Comprehensive California Search and Seizure* (Parker & Son, 1971) terms this (at 37) somewhat contradictory, but she concludes that these search warrant cases are applicable to arrest warrants.

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§ 3.05: *Adequacy of Form of Warrant*

Various challenges have been raised to the form of the warrant papers.

1. Is a judge's facsimile signature or rubber stamp signature proper? With respect to a failure to appear warrant, yes. *People* v. *Weitzer,* 269 Cal. App. 2d 274, 294–95 (1969).

2. A blanket court order requiring the clerk to permit nighttime service may be proper. *Weitzer, supra* at 286–89; *see too* Pen. Code § 840 ("good cause" required by 1969 amendment). ("An arrest for a felony under a warrant may be made at any time." *See Fricke, Cal. Crim. Proc.,* (5th Ed.), p. 25; *see too* Pen. Code § 840.)

3. A document that accompanies the complaint that lacks a date, any indication of the source of the information, or an oath will not supply probable cause. *People* v. *Cressey,* 2 Cal. 3d 836, 844 (1970).

4. Issuance of warrants by blanket direction of court may be proper in some cases. *Weitzer, supra. See too People* v. *Superior Court* (Copeland), 262 Cal. App. 2d 283, 285 (1968).

5. The warrant must specify the time of issuing it, and the city and county where it is issued, and be signed by the magistrate with the title of his office. Pen. Code § 815.

6. A Justice Court judge may issue an arrest warrant in a felony case only with the concurrence of the Attorney General or District Attorney. Pen. Code §§ 813, 1427.

7. A warrant is not a proper means of proceeding against a corporation. A summons should be used. Pen. Code § 1427.

§ 3.06: *Adequacy of Description of Suspect in Warrant*

A warrant of arrest must specify the name of the defendant or, if it is unknown, he may be designated by any name. Pen. Code § 815.

It is proper to use an alias. *People* v. *McLean,* 56 Cal. 2d 660, 663–64 (1961). It is proper to use the term "John Doe." *Fricke,* Cal. Crim. Proc., (5th Ed.) p. 23. However, as was said in *People* v. *Montoya,* 255 Cal. App. 2d 137, 142 (1967):

> "The weight of authority holds that to meet the constitutional requirements, a 'John Doe' warrant must describe the person to be seized with reasonable particularity. The warrant should contain sufficient information to permit his identification with reasonable certainty [citing cases]. This may be done by stating his occupation, his personal appearance, peculiarities, place of residence or other means of identification [citing case]. Where a

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name that would reasonably identify the subject to be arrested cannot be provided, then some other means reasonable to the circumstances must be used to assist in the identification of the subject of the warrant [citing case].

"We hold, therefore, that when read with the constitutional provisions, section 815 does not obviate the necessity of describing the person to be arrested. If a fictitious name is used the warrant should also contain sufficient descriptive material to indicate with reasonable particularity the identification of the person whose arrest is ordered [citing authorities]." (Footnote omitted.)

Montoya held that a description of "white male adult, 30 to 35 years, 5'10" 175 lbs dark hair, medium build" is too general and the warrant as a result is void.

A lawful arrest may not be made upon a warrant which neither names nor in any way describes the person to be seized. "Even in France, blank *lettres de cachet* have been out of fashion since the fall of the Bastile." *In re Schaefer,* 134 Cal. App. 498, 500 (1933).

Fricke suggests that if a fictitious name is used it should be supplemented under the best practice by a statement that the name is fictitious, the real name being unknown. He says that if an alias or assumed name or nickname is used, it "may be used in the warrant to the same practical effect as if it was his real name." *Fricke, Cal. Crim. Proc.,* (5th Ed.), p. 23. Apparently no description is needed with an alias because it alone is adequate identification.

However, even if the warrant is invalid for failure to properly designate the defendant, the police may have additional probable cause and the arrest may be upheld. *See People* v. *Montoya,* 255 Cal. App. 2d 137, 144 (1967).

§ 3.07: *Effect of Inadequacies*

"The facts that the officer had a duty to execute the warrant which appeared regular on its face, and that he is protected from civil liability in the event of a defect in the proceedings leading to its issuance do not render the arrest legal if the warrant was in fact improperly issued." *People* v. *Weitzer,* 269 Cal. App. 2d 274, 296 (1969).

The court said if the complaint did not show reasonable cause it would taint all subsequent proceedings and require the exclusion of evidence so obtained.

If the warrant fails because the complaint is conclusory (*see* § 3.04), an arrest made pursuant to it will not be valid. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Giordenello* v. *United States,* 357 U.S. 480 (1958).

This rule should be read in connection with the rule that, notwithstanding an invalid arrest warrant, if the officers have probable cause apart from the warrant, the arrest will still be lawful. *People* v. *Chimel,* 68 Cal. 2d 436, 440–43 (1968), *overruled on other grounds* in *Chimel* v. *California,* 395 U.S. 752 (1969); *People* v. *Groves,* 71 Cal. 2d 1196 (1969); *People* v. *Rice,* 10 Cal. App. 3d 730, 737 (1970). *See too People* v. *Montoya,* 255 Cal. App. 2d 137, 144 (1967) (failure to designate defendant adequately). This rule may not be helpful in misdemeanor cases due to the "presence" requirement. *See People* v. *Cressey,* 2 Cal. 3d 836, 842 (1970).

Note that if a misdemeanor warrant is erroneously served at night in violation of the Penal Code, evidence subsequently seized may be admissible. *See People* v. *Koelzer,* 222 Cal. App. 2d 20, 28–29 (1963); *cf. People* v. *Cressey, supra* at 846–47.

§ 3.08: *Warrant Need Not Be in Officer's Possession*

The arrest by the peace officer is nonetheless lawful where the officer does not have the warrant in his possession at the time of the arrest. However, if the arrestee so requests, the arrest warrant must be shown to him as soon as practicable. Pen. Code § 842.

If the defendant demands it at trial, the prosecution must produce the original warrant or lay a proper foundation for the use of secondary evidence. *People* v. *Wohlleben,* 261 Cal. App. 2d 461, 466 (1968). (Prosecution at trial sought to prove existence and contents of traffic warrants through testimony of arresting officer who had seen telegraphic abstracts of the warrants at booking; *held,* the legality of the arrest was not established in the absence of presenting the best evidence—the warrant or abstracts thereof); *cf. People* v. *Naughton,* 270 Cal. App. 2d 1, 10, 11 (1969). (This question could not be raised because of the lack of an objection as to competency of proof of the warrant in the trial court); and *People* v. *Graves,* 263 Cal. App. 2d 719, 730–31 (1968), on grounds similar to those in *Naughton, supra.* A telegraphic abstract of a warrant is sufficient. *Hewitt* v. *Superior Court,* 5 Cal. App. 3d 923, 929–30 (1970).

§ 3.09: *Execution of Warrant*

Penal Code section 836 provides that "a peace officer may make an arrest in obedience to a warrant."

A warrant of arrest may be directed generally to any peace offi-

cer, or to any public officer or employee authorized to serve process, where the warrant is for a violation of a statute that the person has a duty to enforce. Pen Code § 816.

The execution of an arrest warrant requires compliance with the provisions of Penal Code section 844, where officers are required to enter a house. This material, together with that relating to execution of search warrants (§ 2.32), has been consolidated *infra,* § 9.03.

With respect to Vehicle Code violations, the officer may be authorized to issue a citation instead of serving the warrant, if there has been no previous provision to appear and the warrant authorizes the use of a citation. Pen. Code § 818.

An arrest warrant does not expire at any specific time, but is good until executed. The magistrate can recall the warrant, however. *Fricke, Cal. Crim. Proc.* (5th Ed.) p. 25.

In the absence of a direction properly endorsed upon a warrant, no arrest can be made under it at night. A warrant that contains alternative directions for day or night service will not suffice to authorize nighttime service where there is nothing on the face of the warrant to show that the magistrate designated either alternative. *Paddleford* v. *Biscay,* 22 Cal. App. 3d 139, 142–43 (1971).

§ 3.10: *Arrestee To Be Brought Before Magistrate*

The arrestee must be taken before a magistrate without unnecessary delay. Pen. Code § 825.

For the procedure on an arrest warrant served outside of the county, *see* Penal Code sections 821, 822, 827, 828, 829. It may be served anywhere in the state.

Bail is fixed at the time the warrant is issued. Pen. Code § 815a.

After an arrest on a warrant, the officer, at the time of bringing his prisoner before a magistrate, endorses his return upon the warrant. *See Fricke, Cal. Crim. Proc.* (5th Ed.) pp. 26–27; *see too* Pen. Code § 828.

CHAPTER FOUR

ARREST WITHOUT A WARRANT

§ 4.01: *What Constitutes an "Arrest"*

By statute, "[A]n arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person." Pen. Code § 834.

"An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. . . ." Pen. Code § 835.

An arrest may be deemed to occur automatically at the point when a suspect's freedom of movement is substantially interrupted, restricted, or curtailed. *Henry* v. *United States,* 361 U.S. 98 (1959). Under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), a person is "arrested" not only where he is placed in custody (*see* Pen. Code § 834, *supra*) or booked, but also if he is "deprived of his freedom of action in any significant way."

Furthermore, an arrest is a *"seizure"* and an arrest without a warrant or probable cause is "unreasonable" within the purview of the Fourth Amendment. *Terry* v. *Ohio,* 392 U.S. 1, 16 (1968); *Wong Sun* v. *United States,* 371 U.S. 471, 479 (1963); *Henry* v. *United States, supra* at 102. *See also People* v. *Curtis,* 70 Cal. 2d 347, 353 n.3 (1969) (". . . there is nothing *de minimis* about any arrest, whether the detention is terminated by release after a few days or a few hours."); and *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 273–74 (1969):

> "Mrs. Marsdin was arrested and placed in the patrol car; Casebeer, the driver, was ordered to the patrol car where he was frisked and then ordered back to the Pontiac and told to stay there; the three members of the group thus remained in the car for a half-hour without being given any explanation. To say that each of the three, including Leonard, was not 'deprived of his freedom of action in any significant way' [citing Miranda v. Arizona, supra . . .], would be to shut one's eyes to realities. . . ."

See also People v. *Harris,* 256 Cal. App. 2d 455, 459–60 (1967):

> "An arrest is more than a transient momentary incident. It continues through a transfer of custody of the accused from a citizen to a peace officer. Ballard v. Superior Court, 64 Cal. 2d

159, 169 [49 Cal. Rptr. 302, 410 P.2d 838], states 'an arrest includes custody.' Black's Law Dictionary (4th ed.) page 140, defines arrest as 'The apprehending *or detaining* of the person in order to be forthcoming to answer an alleged or suspected crime.' (Italics added.) (*See also* 5 Am. Jur. 2d, Arrest, § 3, p. 698.)"

Circumstances, *e.g.,* hour and location, may justify stop and investigation of vehicle. *Bramlette* v. *Superior Court,* 273 Cal. App. 2d 799 (1969). For definition of peace officers, *see* Pen. Code §§ 830–830.6.

Bramlette and *Harris* were questioned in another respect in *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699 (1971).

The police also have a right to "stop and frisk" on less information than is needed to arrest, as explained in *Terry* v. *Ohio, supra,* and discussed in § 11.01, *et seq., infra.*

§ 4.02: *Duty To Submit to Arrest*

Penal Code section 834a declares it to be the duty of a person to refrain from using force or weapons to resist arrest where such "person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer."

Recently, in *People* v. *Curtis,* 70 Cal. 2d 347 (1969), the California Supreme Court enunciated a qualification, namely, that "construing sections 834a [*supra*] and 243 [battery upon a peace officer], it is now the law of California that a person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*Ibid.* at 357.) *See too People* v. *Jones,* 8 Cal. App. 3d 710, 716 (1970) (detention rather than arrest).

§ 4.03: *Manner of Arrest*

By Penal Code section 840, a felony arrest may be made at any hour of the day or night. The same rule is applicable as to misdemeanors committed in the officer's presence or under the specific direction of a warrant; in all other cases, the arrest for a misdemeanor must be made in the daytime. *See People* v. *Graves,* 263 Cal. App. 2d 719, 730–31 (1968) (criticized in another respect in *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 203–04), where, although defendant's claim that misdemeanor traffic warrants did not authorize a night arrest was deemed waived by the lack of an objection at the preliminary examination and at trial, the court stated:

"The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, *or after an escape.*

"*The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.*" "Pen. Code § 841. (Emphasis added.)

In *People* v. *Villareal,* 262 Cal. App. 2d 438, 445–46 (1968), the failure to perform the duty imposed by the foregoing section was excused where the person apprehended attempted to escape when approached by the officer. *See also People* v. *Graves,* 263 Cal. App. 2d 719, 730 (1968) (waived).

Noncompliance with section 841 does not require the exclusion of evidence seized in a search incidental to an otherwise lawful arrest, whether the arrest is made with or without a warrant. *See People* v. *Vasquez,* 256 Cal. App. 2d 342, 345–46 n.2 (1967); *People* v. *Maddox,* 46 Cal. 2d 301, 307 (1956).

§ 4.04: *Arrest by Peace Officer Without a Warrant of Arrest*

Penal Code section 836 provides:

"A peace officer may make an arrest in obedience to a warrant, or may, pursuant to the authority granted him by the provisions of Chapter 4.5 (commencing with section 830) of Title 3 of Part 2, *without a warrant, arrest a person:*

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." (Emphasis added.)

Section 40300.5 of the Vehicle Code authorizes a peace officer to arrest without a warrant a person involved in a traffic accident when the officer has reasonable cause to believe that such person had been driving while under the influence of intoxicating liquor

or under the combined influence of intoxicating liquor and any drug. *See People* v. *Ashley,* 17 Cal. App. 3d 1122, 1126 (1971) (applies to § 23102 of the Vehicle Code and § 367d of the Penal Code).

Otherwise, by statute, if the offense be a *misdemeanor,* the officer must entertain the belief that it was committed "in his presence." *See Freeman* v. *Department of Motor Vehicles,* 70 Cal. 2d 235, 237 (1969); *People* v. *Edgar,* 60 Cal. 2d 171, 174 (1963).

"Presence" is liberally construed to include what is apparent to the officer's senses, including his sight and hearing. *People* v. *Burgess,* 170 Cal. App. 2d 36, 41 (1959). The officer can enlarge his perceptive ability by using a telephone, *People* v. *Cahill,* 163 Cal. App. 2d 15, 18–19 (1958), a telescope, *Roynon* v. *Battin,* 55 Cal. App. 2d 861, 866 (1942), or an electronic device, *People* v. *Lewis,* 214 Cal. App. 2d 799, 802 (1963). *See too People* v. *Bradley,* 152 Cal. App. 2d 527, 532 (1957); *People* v. *Goldberg,* 2 Cal. App. 3d 30, 33 (1969). *Cf. Pate* v. *Municipal Court,* 11 Cal. App. 3d 721, 725 (1970) (not in presence). The arrest must be made timely. *Hill* v. *Levy,* 117 Cal. App. 2d 667, 670 (1953). But a policeman who did not see the offense can assist a citizen who saw it in making the arrest. *People* v. *Sjosten,* 262 Cal. App. 2d 539, 544 (1968).

As will be seen especially in the case of a minor traffic stop (§ 12.03, *infra*), a search incidental to a misdemeanor arrest is far more restricted in scope than that permitted incident to a felony arrest. *See, e.g., People* v. *Superior Court* (Simon), 7 Cal. 3d 186 (1972); *People* v. *Vasquez,* 256 Cal. App. 2d 342, 346 (1967); and *Pate* v. *Municipal Court,* 11 Cal. App. 3d 721, 725–26 (1970).

The factual requirements for a warrantless *felony* arrest, *i.e.,* on "reasonable cause," and the "reasonableness" of an incidental search thereto, are discussed below.

§ 4.05: *On "Reasonable or Probable Cause"—the General Rule and Preliminary Considerations*

The California Supreme Court in *People* v. *Ingle,* 53 Cal. 2d 407, 412–13 (1960), summarized the appropriate standard for the finding of "reasonable cause" as used in subdivisions 1 and 3 of Penal Code section 836, set out *supra,* § 4.04:

> "Reasonable or probable cause for an arrest has been the subject of much judicial scrutiny and decision. There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances [citations]—and on the total atmosphere of the case. [Citations.] Reasonable cause has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. [Citations.] Probable cause has also been defined as having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt. [Citations.] It is not limited to evidence that would be admissible at the trial on the issue of guilt. [Citation.] The test is not whether the evidence upon which the officer acts in making the arrest is sufficient to convict but only whether the person should stand trial. [Citation.]"

According to the federal Supreme Court, probable cause depends upon the measurement of possibilities (*Draper* v. *United States,* 358 U.S. 307, 313 (1959)) based upon the unique facts of each particular case (*Wong Sun* v. *United States,* 371 U.S. 471, 479 (1963)).

As noted in *Hill* v. *California,* 401 U.S. 797, 804–05 (1971), however, probable cause must be judged in accordance with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

The requirements for an arrest without a warrant are at least as stringent as those for a warrant. *Whiteley* v. *Warden of Wyoming Penitentiary,* 401 U.S. 560, 566 (1971).

§ 4.06: *Arrest by Private Citizen*

By Penal Code section 837, subdivision 1, a private person may arrest another for a public offense committed or attempted in his presence. Thus, in *People* v. *Sjosten,* 262 Cal. App. 2d 539 (1968), a private citizen observed the defendant prowling in the nighttime and called the police, who thereupon arrested defendant. The arrest made by the officer was held proper by reference to Penal Code section 839, which impliedly authorized the delegation of the physical act of taking the offender into custody.

Similarly, in *People* v. *Harris,* 256 Cal. App. 2d 455 (1967) (*See* § 4.01), the defendant was detained by a private citizen who observed the defendant commit a misdemeanor "hit-run" violation. After defendant was delivered to the police officer, the officer arrested defendant for the offense. In this situation, the court held that the "arrest is more than a transient momentary incident. It continues through a transfer of custody of the accused from a citizen to a peace officer." *Ibid.* at 460. *See also Freeman* v. *Dept. of*

Motor Vehicles, 70 Cal. 2d 235, 239 (1969).

In *Sjosten, supra* at 543–44, the court noted that the term "*in his presence*" as applied to citizen arrests (Pen. Code § 837) finds analogy to the same terms as applied to arrests by police officers (Pen. Code § 836), *i.e.,* whether the offense is apparent to the officer's senses.

See People v. *Garcia,* 274 Cal. App. 2d 100 (1969) (citizen arrest; pat search by officer was reasonable).

An officer who takes a person into custody after a citizen's arrest has no duty to make a correct decision about whether the citizen had probable cause. *Kinney* v. *County of Contra Costa,* 8 Cal. App. 3d 761, 768 (1970).

CHAPTER FIVE

RULES FOR EVALUATING PROBABLE CAUSE

§ 5.01: *Tested by Facts Known to the Officers*

The question of probable cause to justify an arrest without a warrant must be tested by the facts which the record shows were *known* to the officers at the time the arrest was made. *People* v. *Talley,* 65 Cal. 2d 830, 835 (1967); *People* v. *Gallegos,* 62 Cal. 2d 176, 178 (1964); *People* v. *Van Sanden,* 267 Cal. App. 2d 662 (1968). Facts which would present probable cause but which are *unknown* to the officer at the time of the arrest will not justify the arrest. Thus, in *Dyke* v. *Taylor Implement Co.,* 391 U.S. 216 (1968), there were sufficient facts existing for the arrest of the defendants, but the information transmitted to the arresting officers was not sufficient to support probable cause for the arrest. But *compare People* v. *Castro,* 249 Cal. App. 2d 168, 176 (1967), where the possible subjective intent of the officers was disregarded in view of the facts known to them:

> "[I]t is arguable that this entry was illegal because the officers' subjective intent was to search pursuant to an invalid warrant, rather than to arrest a man who was subject to a lawful nonwarrant arrest. For all we know, they might not have made an arrest if the search had produced no evidence. *But we do not think any such supposed subjective intent renders unlawful an entry and seizure which the law authorized upon the basis of facts then within the knowledge of the officers.*" (Emphasis added.) *See People* v. *Sirak,* 2 Cal. App. 3d 608, 611 (1969); *People* v. *Superior Court* (Johnson), 15 Cal. App. 3d 146, 152 (1971); *People* v. *Richardson,* 6 Cal. App. 3d 70, 76 (1970).

Since the court and not the officer must make the determination whether the officer's belief is based on reasonable cause, the officer must testify to the facts or information known to him on which his belief is based.

It is then the magistrate's function within the meaning of *People* v. *Ingle,* 53 Cal. 2d 407 (1960), § 4.05, to determine whether a reasonable man would have entertained the same strong suspicion of guilt as the officer. In this connection, it should be noted that the *timing of an arrest* may be crucial to the arrest's validity. For exam-

ple, in *Rios* v. *United States,* 364 U.S. 253 (1960), the government conceded that there was no probable cause for an arrest when officers approached the defendant seated in a cab. The case was remanded by the Supreme Court to determine whether the officers approached the cab during routine investigation, or whether they were approaching defendant for purposes of an arrest. In the former case, if they were only going to detain defendant for questioning and the contraband was in open view, the arrest and search would be lawful; in the latter, by the absence of probable cause for an arrest (conceded by the government) the arrest would be unlawful and the search as an incident thereto unreasonable.

An arrest or search cannot be justified by the evidence it produces. *Tompkins* v. *Superior Court,* 59 Cal. 2d 65, 68 (1963).

§ 5.02: *A Question Independent of Guilt or Innocence*

The rule stated in *People* v. *Ingle,* 53 Cal. 2d 407 (1960), § 4.05, should be repeated: Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that ordinarily would be admissible on the issue of guilt. *People* v. *Duarte,* 254 Cal. App. 2d 25, 30 (1967); *People* v. *Jones,* 255 Cal. App. 2d 163, 167 (1967). An officer who is mistaken in the facts he has acquired may still have probable cause. For example, good faith reliance on an unconstitutional statute may justify an arrest. *People* v. *Gibbs,* 16 Cal. App. 3d 758, 762–63 (1971). *See too People* v. *Prather,* 268 Cal. App. 2d 748, 752 (1969) (wrong person); *People* v. *Smith,* 153 Cal. App. 2d 190, 192 (1957) (wrong offense); *People* v. *Jackson,* 14 Cal. App. 3d 57, 68 (1970) (claimed invalid court process). *See Hill* v. *California,* 401 U.S. 797, 804 (1971). *Cf. Agar* v. *Superior Court,* 21 Cal. App. 3d 24, 31 (1971) (invalid arrest due to officer's giving wrong, unrelated offense. Officer has to believe crime was committed but officer's opinion about his belief does not concern courts). *Agar* was lauded in *People* v. *Superior Court (Simon),* 7 Cal. 3d 186, 198 (1972), and followed in *People* v. *Miller,* 7 Cal. 3d 219, 226 (1972).

A result of the *Miller-Agar* cases appears to be, that where the People are urging a "second crime" as the basis for arrest, they have to be careful in examining the officer to inquire as to whether he believed that crime was committed. However, the *Miller-Agar* rule appears to have been eroded in *People* v. *Coleman,* 28 Cal. App. 3d 36, 43 (1972), where the officer was not asked for his probable cause.

Note that "good faith on the part of the arresting officers is not

enough." The United States Supreme Court has said, "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio,* 379 U.S. 89, 97 (1964). A recent article contrasts *Beck* with *Hill* and suggests that courts may use *Hill* to modify the principle stated in *Beck.* Note, Introduction of the "Good Faith" of the Arresting Officer into the Determination of Validity of a Search Incident to a Lawful Arrest, 26 JAG J. 125, 131 (1971).

§ 5.03: *Reasonable Cause Is a Question of Law*

The question as to whether there is reasonable cause for an arrest and search, being one involving the admissibility of evidence, is a question of law to be determined by the court outside the presence of the jury. *People* v. *Holmes,* 237 Cal. App. 2d 795, 797 (1965); *People* v. *Von Latta,* 258 Cal. App. 2d 329, 335 (1968). *See too People* v. *Accardy,* 184 Cal. App. 2d 1, 4–5 (1960); Evid. Code § 318.

§ 5.04: *To Be Distinguished from the Right to Investigate or "Stop and Frisk"*

> "The courts and legislatures of this and other states, recognizing that circumstances short of probable cause may often necessitate immediate investigation, have recently confirmed the broad power of police officers to 'stop and frisk' suspicious persons on the street. (*See* Terry v. Ohio (1968) *supra,* 392 U.S. 1; People v. Mickelson (1963), *supra,* 59 Cal. 2d 448.) It was not casually that the United States Supreme Court and this court have distinguished between the 'reasonable cause' sufficient for a stop and frisk and the probable cause required for an arrest (Terry v. Ohio, *supra,* 392 U.S. at pp. 26–27 [20 L.Ed.2d at pp. 908–909]; People v. Mickelson, *supra,* 59 Cal. 2d at p. 452). The stop and frisk rule 'wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.' . . ." *People* v. *Curtis,* 70 Cal. 2d 347, 358–59 (1969).

This distinction is pointed up in greater detail, *infra,* § 11.01 *et seq.,* discussing, as well, the proper scope of such a "frisk." The "right to investigate," and facts discovered during the course of the investigation sufficient to warrant an arrest are discussed *infra,* § 7.16. *See too People* v. *Watson,* 12 Cal. App. 3d 130, 134 (1970).

§ 5.05: *Facts or Information Must Be Constitutionally Acquired*

Evidence, tangible or verbal, obtained as *the result of* an unlawful invasion (search or arrest) by the police is inadmissible at trial. §§ 18.01–18.02, 18.04. By a similar rationale, the facts and circumstances *antecedent* to an arrest must not have been reached by the exploitation of unlawful police conduct.

Thus, in *People* v. *Reeves,* 61 Cal. 2d 268 (1964), the State Supreme Court found that the officers had no right to rely on facts (for probable cause) gained by ruse or subterfuge in the opening of defendant's apartment door. Nor, said the court, were the officers entitled to rely on the statement of a third person whom they had wrongfully arrested. Similarly, in *Bielicki* v. *Superior Court,* 57 Cal. 2d 602 (1962), officers utilized a peephole in the roof of an amusement park restroom for the clandestine observation of its occupants in the hope of an eventual arrest. The court found such conduct constitutionally reprehensible: "Such a practice amounts to a general exploratory search conducted solely to find evidence of guilt . . . [Citations.]." Ibid. at 606.

For other illustrations of the principle, *see People* v. *Hale,* 262 Cal. App. 2d 780, 787 (1968), where the absence of a proper *Miranda* warning caused the seizure of certain marijuana, revealed by the defendant, to be inadmissible at trial; *People* v. *Kanos,* 70 Cal. 2d 381, 386 (1969), where there was said to be no connection between a purported unlawful seizure of a telephone number and defendant's subsequent arrest; and *People* v. *Teale,* 70 Cal. 2d 497, 506 (1969), where the same rationale was applied to the arrest of defendant on the basis of facts which would have been discovered in the due course of investigation, independent of any incriminating statements unlawfully elicited from a codefendant.

§ 5.06: *Role of the Officer's Sensory Perceptions*

An officer may effect an arrest where a felony has been committed in his "presence." Pen. Code § 836. In *People* v. *Bock Leung Chew,* 142 Cal. App. 2d 400, 402 (1956), the court held that the term "presence" included use of the officer's sense of smell, sight, or hearing. *See also People* v. *Burgess,* 170 Cal. App. 2d 36, 41 (1959); *People* v. *Clifton,* 169 Cal. App. 2d 617, 619 (1959); *People* v. *Monreal,* 264 Cal. App. 2d 263 (1968); *Vaillancourt* v. *Superior Court,* 273 Cal. App. 2d 791 (1969); *People* v. *Nichols,* 1 Cal. App. 3d 173 (1969); and *People* v. *Van Eyk,* 56 Cal. 2d 471, 477 (1961) ("What [the officer] *overheard* and saw while watching the apartment of Hernandez obviously constituted probable cause for defendant's arrest"); *Bethune* v. *Superior Court,* 11 Cal. App. 3d 249 (1970) (defendant arrested after her actions gave surveiling officers reason to believe that she was aiding and abetting a drug dealer); *People* v. *Peterson,* 9 Cal. App. 3d 627 (1970) (officers smelled marijuana); *People* v. *Superior Court* (Thomas), 9 Cal. App. 3d 203 (1970) (officers observed stolen television set); *People* v. *Anderson,* 9 Cal. App. 3d 80 (1970) (officers smelled marijuana and observed green material and zigzag papers); *People* v. *Fitzpatrick,* 3 Cal. App. 3d 824 (1970); *People* v. *Sproul,* 3 Cal. App. 3d 154 (1969).

It should be noted too that what the officer does see has to establish probable cause. *Pate* v. *Municipal Court,* 11 Cal. App. 3d 721 (1970) (officer's observation of flickering lights was not sufficient probable cause to arrest for showing lewd films). However, if the officer smells narcotics he may have probable cause to arrest. *Mann* v. *Superior Court,* 3 Cal. 3d 1, 7 (1970).

In *People* v. *Marshall,* 69 Cal. 2d 51 (1968), involving a warrantless search of an unoccupied residence, a qualification was added. Officers may not rely on their sense of smell to *seize evidence* in the absence of a valid arrest or search warrant. This is basically a limitation on the "open view" doctrine, discussed *infra,* § 5.07. Notable is the fact that the court did not dispute the many cases which hold that an officer may rely on all of his senses in determining whether there is probable cause to believe that a crime has been committed or that contraband is present. *Ibid.* at 57 n.2.

§ 5.07. *Role of the Officer's Training and Experience*

What appears to be innocent conduct by the average citizen may, in the eyes of an experienced officer, warrant an investigation or even an arrest. Thus, in *People* v. *Berutko,* 71 Cal. 2d 84, 90–91 (1969), the Supreme Court noted that what the officer saw (a finger stall tied off at one end containing some lumpy material) in combination with other facts which his investigation had disclosed, "was sufficient—*in view of the officer's training and experience in the field of narcotics*—to constitute reasonable and probable cause for arrest." (Emphasis added.) *People* v. *Medina,* 7 Cal. 3d 30, 37 (1972).

Compare, People v. *Clay,* 227 Cal. App. 2d 87, 95 (1964), where the court said of the police officer's testimony on the "usual procedure of till tappers":

"This gave meaning to the evidence and permitted the jury to appreciate that defendant's activities while in themselves seemingly harmless, when considered with those of Davis [a codefendant], might well have been part of a cleverly planned and precisely executed scheme known as 'till tapping.' Thus the inspector's testimony clearly assisted the jury in determining whether or not defendant's conduct was felonious under all the circumstances."

See also People v. *Crooks,* 250 Cal. App. 2d 788 (1967) (police officer testified that he was familiar with modus operandi used by prostitutes known as "the creeper"); *People* v. *Cole,* 47 Cal. 2d 99, 103 (1956); *People* v. *Soto,* 262 Cal. App. 2d 180, 186–87 (1968). The officer's training and experience is therefore relevant not only to the initial decision to arrest, but to the issue of guilt itself. However, in *People* v. *Cruz,* 264 Cal. App. 2d 437 (1968), the fact that the officer was *not* experienced in narcotics was a factor in striking down his search of a vehicle after a minor traffic stop accompanied by furtive conduct. The search was found to be in response to the officer's *general curiosity* based on seeing defendant reach for something on the floor of the car. *See People* v. *Hana,* 7 Cal. App. 3d 664 (1970) (officer's observation of match boxes and topless match books did not constitute probable cause for arrest); *People* v. *Clayton,* 13 Cal. App. 3d 335, 338 (1970) (officer's expertise said to permit him to recognize and therefore to open bindle).

In *People* v. *Martinez,* 6 Cal. App. 3d 373, 376 (1970), it was noted that experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of the public.

On the other hand, our State Supreme Court has said that while specialized knowledge may render suspicious what would appear innocent to a layman, there are limits to this rule and essentially innocent conduct will not be made culpable. *Cunha* v. *Superior Court,* 2 Cal. 3d 352, 358 (1970). *Cf. People* v. *Maltz,* 14 Cal. App. 3d 381, 391 (1971).

In *People* v. *Johnson,* 21 Cal. App. 3d 235, 243–44 (1971), the officer's opinion was an aid in establishing the probable cause needed for a search warrant.

Officer's experience in drug intoxication was a reasonable basis for concluding the defendant was intoxicated. *People* v. *Blatt,* 23 Cal. App. 3d 148, 152 (1972).

CHAPTER SIX

SOURCES OF PROBABLE CAUSE

§ 6.01: *Reliable Information*

Discussed hereunder are several sources of information of which officers may take cognizance in effecting an arrest without a warrant. Subject to the requirements developed and enunciated by judicial decision, these sources may be sufficient by themselves, for the arrest, without reference to other facts.

§ 6.02: *The Reliable Confidential Informant—Requirements*

It is now well established that information obtained from a reliable confidential informant may constitute reasonable cause to make an arrest and search without a warrant. *People* v. *De Santiago,* 71 Cal. 2d 18, 22 (1969); *People* v. *Prewitt,* 52 Cal. 2d 330, 337 (1959); *People* v. *Love,* 8 Cal. App. 3d 23, 27 (1970); *People* v. *Velasquez,* 3 Cal. App. 3d 776, 783 (1970). For the arrest to be based *solely* on information furnished by a reliable informant, (1) the information must be factual in nature, rather than conclusionary (*cf.* § 2.10 *supra*), and (2) the officers must be able to relate a sufficient basis for the informant's credibility or reliability of the information given them (*cf.* § 2.11 *supra*). *People* v. *Bryant,* 5 Cal. App. 3d 563, 568 (1970); *Guerrero* v. *Superior Court,* 2 Cal. App. 3d 136, 140 (1969); *People* v. *Castaneda,* 1 Cal. App. 3d 477, 481 (1969). Cases involving the reliability of a nonconfidential informant: *People* v. *Aguirre,* 10 Cal. App. 3d 884, 889–91 (1970); *People* v. *Bevins,* 6 Cal. App. 3d 421, 425 (1970).

These requirements are manifest by the Supreme Court's pronouncements in *McCray* v. *Illinois,* 386 U.S. 300, 304–305 (1967). There, the court pointed out that the officers had properly:

(1) *Related prior occasions when the informer had given information resulting in convictions, including the names of the persons convicted; and*

(2) *Described "with specificity" what the informer actually said and why the officer believed the information was credible, the underlying circumstances from which the officer concluded that the informant was "credible" or his information reliable.*

See also People v. *Marquez,* 259 Cal. App. 2d 593, 599 (1968), where the officer who assumed responsibility for the arrest testified that he had obtained information directly from an informant who claimed to have knowledge of the crime under investigation. "This report was by itself sufficient to justify the arrest if it came from a source of tested reliability. [Citation.] The only additional data needed was that the informant had proven himself reliable in the past. This was the link supplied from within the department, by Sergeant Appier's statement [of the informer's proven reliability] to Camacho [the arresting officer]." But *compare Wong Sun* v. *United States,* 371 U.S. 471 (1963), where the court said that the informant was not "reliable," as he had never given information to the agents before and inadequately described the person subsequently arrested; *and People* v. *Johnson,* 68 Cal. 2d 629, 634 (1968), where the only evidence of reliability was the officer's opinion that the informer was reliable, without any showing of the underlying circumstances or any other factual proof in court as to reliability and credibility.

In *People* v. *Spencer,* 22 Cal. App. 3d 786, 794 (1972), it was said that the informer was reliable as he had given information on two prior occasions which had proved to be accurate and reliable.

§ 6.03: *The Anonymous (Untested) Corroborated Informant—Requirements*

Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, an arrest may not be based *solely on such information,* and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. In some cases the *identity of or past experience with,* the informer may provide such evidence, and in others it may be supplied by *similar information* from other sources or by *personal observations* of the police. *People* v. *Abbott,* 3 Cal. App. 3d 966, 970 (1970).

EXAMPLES—SUFFICIENT CORROBORATION

In *People* v. *Berutko,* 71 Cal. 2d 84, 90 (1969), the State Supreme Court held that it was unnecessary to determine whether the anonymous information was legally sufficient in *itself* to constitute probable cause for the arrest since it at least warranted further investigation (surveillance) which, in turn, revealed further facts to support the arrest. *See also People* v. *Carmical,* 258 Cal. App. 2d 103, 106 (1968). Similarly, in *People* v. *Terry,* 70 Cal. 2d 410, 428 (1969), two unfamiliar (untested) youths informed officers that defendant was in possession of marijuana and the officers made the corroborating observation of a marijuana cigarette in defendant's automobile; *held,* probable cause for defendant's arrest was present.

In *People* v. *Sandoval,* 65 Cal. 2d 303, 308–10 (1966), the court noted no less than *six circumstances corroborating* the statement of an arrestee-informer that defendant, of certain age, weight, and description, driving a 1956 or 1957 Oldsmobile, was waiting at a certain location to deliver a quantity of heroin. First, the officers intercepted a telephone call from defendant who unwittingly told the officers he had the "stuff" in his pocket and urged the listening officer to "hurry up." Second, the officers knew that the arrestee-informer was aware of defendant's whereabouts and a prearranged meeting by virtue of the telephone call and the arrestee's conduct at the time of the arrest, leaving the premises. Third, the officers had no reason to assume the informer was falsifying the information. Fourth, defendant's presence at the appointed location corroborated the informer's statement. Fifth, defendant gave an inherently implausible explanation for his presence. Sixth, the need for swift action was present by virtue of defendant-caller's statement to "hurry up," although concededly no "pressing emergency" was present which, alone, would have justified an arrest on the uncorroborated information. *See also People* v. *Lara,* 67 Cal. 2d 365, 375 (1967), criticized in another respect in *People* v. *Mutch,* 4 Cal. 3d 389, 392 (1971).

Corroboration of an informer not proved reliable may be (and often is) supplied by *furtive or suspicious conduct* observed by the police. Thus, the quick movement of footsteps within the apartment and the sound of a shade going up or down may corroborate the possession of narcotics (*People* v. *Guidry,* 262 Cal. App. 2d 495, 498 (1968) [dictum]; *People* v. *Remijio,* 267 Cal. App. 2d 180 (1968), or other crimes (*People* v. *Talley,* 65 Cal. 2d 830, 836 (1967)). *Cf. People* v. *Fein,* 4 Cal. 3d 747, 753 (1971). The corroboration may also take the form of *statements from a subsequent arrestee* (*People* v. *Camerano,* 260 Cal. App. 2d 861, 866 (1968), *overruled in another respect* by *People* v. *De Santiago,* 71 Cal. 2d 18, 30 (1969)), or the *failure to produce evidence of registration or identity* (*People* v. *Valdez,* 239 Cal. App. 2d 459, 462 (1966), *overruled on other grounds, People* v. *Doherty,* 67 Cal. 2d 9, 15 (1967)). Corroboration may involve matching detailed descriptions. *People* v. *West,* 3 Cal.

App. 3d 253, 257 (1969). *See United States* v. *Manning,* 448 F.2d 992, 999 (2d Cir. 1971) (specific information, verified in part; predicted defendant's movements, who had prior illegal dealings; heard running, scuffling, and hurried conversations in response to knock).

The cases abound in instances of corroboration. Some indication of the techniques involved is shown by the following classification:

United States v. *Harris,* 403 U.S. 573, 576 ("independent corroboration of the informant"); *Jones* v. *United States,* 362 U.S. 257, 271 ("corroboration through other sources of information"); *Willson* v. *Superior Court,* 46 Cal. 2d 291, 295 (corroboration by "similar information from other sources") *People* v. *Fein,* 4 Cal. 3d 747, 752 (corroboration by other "facts, sources or circumstances"); *People* v. *Superior Court* (Johnson), 6 Cal. 3d 704 (corroboration by "detailed nature of . . . observations and by . . . information"); *Skelton* v. *Superior Court,* 1 Cal. 3d 144, 154 n.7 (corroboration by "totality of circumstances"); *People* v. *Diggs,* 161 Cal. App. 2d 167, 171 (1958) (corroboration by "facts known or discovered").

Separate information from different informers may under some circumstances constitute corroboration. *See People* v. *Sheridan, 2 Cal. App. 3d 483, 487–89 (1969); cf. Ovalle* v. *Superior Court,* 202 Cal. App. 2d 760, 763 (1962). As was said in *People* v. *Garcia,* 187 Cal. App. 2d 93, 100 (1960), quoting from *People* v. *Taylor,* 176 Cal. App. 2d 46, 51 (1959).

> "This information came not from a single source but from numerous individuals, separately. One may with reason discount a story brought to him by a single individual. He may continue to view the story with suspicion when a second person relates it to him. But when he gets the same information from a number of independent sources—that a certain man is selling narcotics—he is entitled to attach some degree of reliability to it. It may be that the story is untrue. But it is also possible that a so-called reliable informant is not telling the truth, or that his information is incorrect. . . ."

In *People* v. *Gamboa,* 235 Cal. App. 2d 444, 448 (1965), the court put it this way:

> "The totality of information, coming from a number of independent sources, may be sufficient even though no single item meets the test. If the smoke is heavy enough, the deduction of a fire becomes reasonable."

An important qualification to this rule was pointed out in *People*

v. *Fein,* 4 Cal. 3d 747, 753 (1971). There must be a showing of what information each informer furnished and whether the information was independently furnished. In the absence of this there is no basis for holding that the statements were truly corroborative.

EXAMPLES—INSUFFICIENT CORROBORATION

It is clear that the mere fact that the defendant, who possesses a *criminal record* is *found at the address* named by the untested informant, is insufficient corroboration. *People* v. *Gallegos,* 62 Cal. 2d 176, 179 (1964), relying on *People* v. *Reeves,* 61 Cal. 2d 268, 274 (1964); *People* v. *Scott,* 259 Cal. App. 2d 268, 276 (1968). The criminal record, though relevant to probable cause, does not justify the conclusion of the particular defendant's *present violation* of the law. *People* v. *Scott, Ibid.*

Nor may corroboration be based on *fruits of an unlawful search* of another person. *People* v. *Reeves, supra,* 61 Cal. 2d 268, at 275 (1964).

Furthermore, information from a *second anonymous informant* was not alone corroboration of the original anonymous informer under the circumstances presented in *People* v. *Talley,* 65 Cal. 2d 830, 836 (1967). *Cf. People* v. *Fein,* 4 Cal. 3d 747, 753 (1971).

The mere assertion of a legal right is not corroboration. Thus, in *Lewis* v. *Superior Court,* 226 Cal. App. 2d 102, 103 (1964), an untested anonymous informant told the police that marijuana was to be smoked at a named location (a flat) on a particular night. No detail of hour, number, names or descriptions of participants was given. The court held no corroboration was provided by the officers' observations of: (1) the petitioner's mere entry into the flat, late at night, with three others, one of whom had served a jail sentence for possession of marijuana; (2) two of the occupants' leaving the apartment, then re-entering, slamming the door shut, and shouting "cops" when the officers called to them.

See Whiteley v. *Warden of Wyoming Penitentiary,* 401 U.S. 560, 567 (1971).

In order for corroboration to be adequate it must pertain to defendant's alleged illegal criminal activity; accuracy of information regarding the suspect generally is insufficient. *People* v. *Fein,* 4 Cal. 3d 747, 753 (1971); *People* v. *Sotelo,* 18 Cal. App. 3d 9, 16–17 (1971).

Note that the test of corroboration is not applicable where a *citizen* observes criminal activity. *People* v. *Lewis*, 240 Cal. App. 2d 546 (1966). Thus in *People* v. *Guidry*, 262 Cal. App. 2d 495, 498 (1968), the court said that although the offense was not committed in the immediate presence of the citizen, "the type of relevant information which she had observed was so complete and so unambiguous that the officers were justified in relying on that information."

See §§ 2.13 and 6.08 for a discussion of the citizen informer doctrine.

§ 6.04: *Disclosure of the Informant*

The Evidence Code sets forth in separate sections the privilege against disclosure of *official information* communicated by informants (§ 1040) and the privilege against disclosure of the *identities* of such informants (§ 1041). It also sets forth special rules regarding the *consequences* of invocation of such privileges in a criminal proceeding (§ 1042). Although the rules relating to disclosure are discussed hereafter in the context of probable cause for an arrest, they are equally applicable to probable cause for the issuance of a search warrant. Thus, for example, an informant "material to the defendant's guilt or innocence" would not be subject to the privilege of nondisclosure, whether the informant's data formed the basis (probable cause) either for a search warrant or for an arrest.

In 1969 provisions of the Evidence Code were amended so as to grant the same protection to informers in all criminal cases formerly given to informants in prosecutions of so-called "hard" narcotics cases.

§ 6.05: *Where Disclosure Is Required*

First, it is incumbent upon the defendant seeking to discover the identity of an informant to demonstrate that, " 'in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial.' " *People* v. *Garcia*, 67 Cal. 2d 830, 839 (1967); *People* v. *Sewell*, 3 Cal. App. 3d 1035, 1039 (1970). However, that burden is discharged when the defendant demonstrates a "*reasonable possibility* that the anonymous informant whose identity is sought *could give evidence on the issue of guilt* which might result in defendant's exoneration." *Ibid.* at 839–40. (Emphasis added.) *See*

also People v. *Scott*, 259 Cal. App. 2d 268, 282 (1968). This is true even though the prosecution does not seek to make substantive (evidentiary) use of the information. *People* v. *Garcia*, 67 Cal. 2d 830, at 838 n.8 (1967).

Stated another way, nondisclosure is improper where the informant is a *material witness on the issue of guilt*. *People* v. *Welch*, 260 Cal. App. 2d 221, 225–26 (1968) (the anonymous informer was not a material witness in any respect); *People* v. *Brown*, 259 Cal. App. 2d 663, 671 (1968) ("There is nothing to indicate the informer was a participant in the crimes charged or that he would be a witness whose testimony could benefit the cause of defendants."); *People* v. *Scott*, 259 Cal. App. 2d 268, 280–81 (1968) ("the identity of the informant was material").

The cases therefore uniformly hold that if an informant was a *participant* in the act his identity must be revealed. *Roviaro* v. *United States*, 353 U.S. 53, 60–61 (1957). Moreover, as demonstrated by *People* v. *Garcia*, *supra*, compulsory disclosure is not confined to the participant informer, but to the material witness who *might* ("reasonable possibility") have testified in defendant's favor. Thus, in *Garcia*, where the informant's testimony *might* have supported the defense that defendant was just a visitor, the conviction was reversed because of the prosecution's refusal to identify the informant. Similarly, in *People* v. *Perez*, 62 Cal. 2d 769, 773 (1965), the informer's testimony *might* have confirmed defendant's testimony that he did not know the marijuana was in his possession; nondisclosure was found to be reversible error.

In *Honore* v. *Superior Court*, 70 Cal. 2d 162 (1969), defendant owner was not present when the informant visited the premises and observed contraband; hence the informant was a material witness. *See too Price* v. *Superior Court*, 1 Cal. 3d 836, 842–44 (1970).

See *Theodor* v. *Superior Court*, 8 Cal. 3d 77, 88–89 (1972).

When the prosecution can be compelled to disclose, the address as well as the name must be given up. *See People* v. *Diaz*, 174 Cal. App. 2d 799, 802 (1959).

§ 6.06: *Where Disclosure Is Not Required*

From the foregoing discussion, it can be said that disclosure of the informant is not required where the informant's identity is immaterial to the issue of guilt—*i.e.*, where there is no reasonable possibility that the informer will give evidence which might result in defendant's exoneration. *People* v. *Meyers*, 6 Cal. App. 3d 601,

608–09 (1970). Nondisclosure is proper under the following circumstances:

(1) *Where there is a "mere informer"—i.e., where the informer merely points the finger of suspicion at a person who has violated the law. See, e.g., People* v. *Garcia*, 67 Cal. 2d 830, 837 n.5 (1967) (cases collected); *People* v. *Scott*, 259 Cal. App. 2d 268, 281 (1968); *People* v. *Brown*, 259 Cal. App. 2d 663, 671 (1968); *People* v. *Welch*, 260 Cal. App. 2d 221, 225–26 (1968); and *People* v. *Williams*, 255 Cal. App. 2d 653, 660–61 (1967). In such a situation, the informer merely puts the wheels in motion which cause the defendant to be suspected and arrested, but he plays no part in the criminal act with which the defendant is later charged. The privilege against nondisclosure applies since the informant's identity is not necessary to the defendant's case.

(2) *Where the informer's identity is sought merely for the purpose of defendant's challenge to the magistrate's determination of probable cause. See People* v. *Flores*, 68 Cal. 2d 563, 566 (1968), *disapproved on another point* in *People* v. *De Santiago*, 71 Cal. 2d 18, 28 n.7 (1969); *People* v. *Johnson*, 68 Cal. 2d 629, 633 (1968). In *McCray* v. *Illinois*, 386 U.S. 300, 305 (1967), the United States Supreme Court held that when "the issue is . . . probable cause for an arrest or search . . . police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced . . . that the officers did rely in good faith upon credible information supplied by a reliable informant." In *McCray*, the Supreme Court upheld an Illinois nondisclosure statute similar to California Evidence Code section 1042(c).

(3) *Where the defendant does not request disclosure. Compare People* v. *McShann*, 50 Cal. 2d 802, 808 (1958); *see People* v. *Flores*, 68 Cal. 2d 563, 566 n.3 (1968), *disapproved on another ground* in *People* v. *De Santiago*, 71 Cal. 2d 18, 28 n.7 (1969). *People* v. *Archuleta*, 16 Cal. App. 3d 295, 299 (1971) (Pleaded guilty instead of seeking mandamus).

(4) *Where the informant's name is unknown to the officers.* In *People* v. *Prewitt*, 52 Cal. 2d 330, 338 (1959), it was held that where probable cause is established by information from an informer whose identity is unknown to the officers, the officers may nonetheless be cross-examined fully as to the facts that might tend to identify the informer and test the officer's credibility. This would seem to be consistent with *McCray* v. *Illinois*, 386 U.S. 300, 305 (1967), *supra* paragraph (2), since the privilege may be claimed only upon

"credible information supplied by a *reliable* informant." (Emphasis added.)

(5) *Where the informant's name is already known to the defendant.* "A defendant who knows the identity of the informer ordinarily will not be prejudiced by a refusal to disclose that identity." *People* v. *Williams*, 255 Cal. App. 2d 653, 660 (1967) (Defense counsel admitted to the court, "my client knows who the informant was.").

(6) *Where the informer was used only as a lead to information independently verified by other means. See People* v. *Williams*, 255 Cal. App. 2d 653, 661 (1967), where the informer's communication was not relied upon for probable cause for the arrest; rather, the officers acted upon information independently verified by a victim-observer.

The defendant is not entitled to disclosure of the informant's identity upon mere speculation. *People* v. *McCoy*, 13 Cal. App. 3d 6, 12 (1970); *People* v. *Thomas*, 12 Cal. App. 3d 1102, 1112 (1970).

It may also be noted that while the prosecution has no obligation to produce the informer at trial, the police cannot deliberately resolve to make no effort to learn the residence of the informer or to establish a way by which to locate him. The police should make such inquiries and arrangements as are reasonably necessary to enable the prosecution and defense to locate him. *Eleazer* v. *Superior Court*, 1 Cal. 3d 847, 852 (1970).

§ 6.07: *Police Broadcasts and Other Official Sources*

It is well established that probable cause for an arrest may be based exclusively on information communicated to the arresting officers from official sources where that information originates from a reliable source. *People* v. *Sullivan*, 255 Cal. App. 2d 232, 236 (1967). This may include a *police teletype* informing officers of an outstanding warrant (*People* v. *Webb*, 66 Cal. 2d 107, 112 (1967); *People* v. *Williams*, 263 Cal. App. 2d 756 (1968)), the *telegraphic warrant* itself (*People* v. *Naughton*, 270 Cal. App. 2d 1, 12 (1969); *People* v. *Sanford*, 265 Cal. App. 2d 960, 964 (1968)), or a telephone call or police broadcast (*People* v. *Lara*, 67 Cal. 2d 365, 374 (1967); *People* v. *Schader*, 62 Cal. 2d 716 (1965); *People* v. *Lumar*, 267 Cal. App. 2d 900 (1968); *People* v. *Honore*, 2 Cal. App. 3d 295, 300 (1969)).

However, in those instances where there does not exist an outstanding arrest warrant, the prosecution is required to show that

the officer who initiated the request for defendant's arrest had reasonable cause himself to believe that defendant had committed a felony. *People* v. *Lara*, 67 Cal. 2d 365 at 374 (probable cause present); *People* v. *Marquez*, 259 Cal. App. 2d 593, 598–600 (1968) (same); *People* v. *Hunt*, 250 Cal. App. 2d 311, 313–14 (1967) (probable cause absent); *People* v. *Madden*, 2 Cal. 3d 1017, 1021 (1970) (prosecution failed to show that officer who gave information had adequate basis for his belief); *People* v. *Poehner*, 16 Cal. App. 3d 481, 486–89 (1971) (a valid arrest may be made on information received through official channels even though the information received is incorrect, provided reliance on it was reasonable); *People* v. *Knight*, 3 Cal. App. 3d 500, 503 (1970) (similar); *Whiteley* v. *Warden of Wyoming Penitentiary*, 401 U.S. 560, 568 (1971) (arrest on police bulletin not proper where there was an inadequate basis for the radio bulletin); *United States* v. *Holmes*, 452 F.2d 249, 261 (7th Cir. 1971); *People* v. *Van Sanden*, 267 Cal. App. 2d 662, 664–66 (1968) (traffic warrants; arrest not justified).

It should be remembered that although official channels may provide probable cause for an arrest, the facts necessary for the arrest must be *known* to the arresting officers. *See* § 5.01, *supra*. Hence, in *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216 (1968), the local authorities were confronted with facts sufficient to establish probable cause for the defendant's arrest, but the skeletal information transmitted to the arresting officers in another area was deemed insufficient for the arrest.

It is also said that an officer, without personal knowledge of the facts, can act by direction. *See Restani* v. *Superior Court*, 13 Cal. App. 3d 189, 196 (1970). *See too Whiteley*, *supra*.

§ 6.08: *Citizen Informers*

An arrest may be predicated on the observations of private citizens who report crimes committed in their presence. *People* v. *Lewis*, 240 Cal. App. 2d 546 (1966); *People* v. *Gardner*, 252 Cal. App. 2d 320, 324 (1967); *People* v. *Scoma*, 71 Cal. 2d 332, 338, n.7 (1969). A citizen who purports to be the victim of or to have witnessed a crime is elevated to the category of a *reliable informant* even though his reliability has not theretofore been proved or tested. *People* v. *Waller*, 260 Cal. App. 2d 131, 137 (1968); *cf. People* v. *Coleman*, 258 Cal. App. 2d 560, 564 (1968); *People* v. *Chavez*, 275 Cal. App. 2d 54 (1969); *People* v. *Bevins*, 6 Cal. App. 3d 421, 425 (1970).

The foregoing principle is subject, however, to the qualification that the information related to the officers, and acted upon, "would cause a reasonably prudent man to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty." *People* v. *Guidry*, 262 Cal. App. 2d 495, (1968) (the type of relevant information which the manager of an apartment had observed in defendant's apartment—blackened spoon, needle, syringe, needle marks, abnormal behavior—was so complete and unambiguous that the officers were justified in relying on that information); *People* v. *Waller*, *supra* (two boys furnished eyewitness accounts of the crime, as well as identification of the criminals and the place of the crime; the arrest and attendant search were therefore upheld); *People* v. *Summerfield*, 262 Cal. App. 2d 626, 629 (1968) (defendant, a burglar, was discovered in witness's dressing room and followed to nearby apartment; arrest was justified); *People* v. *Cameron*, 256 Cal. App. 2d 135, 137–38 (1967) (defendant fit description previously given officers by burglary victim); *Mann* v. *Superior Court*, 3 Cal. 3d 1, 6–7 (1970) (police could assume that assistant superintendent of schools was reliable but he had not personally witnessed the narcotic parties he had reported and was merely passing on information).

The language employed in *Krauss* v. *Superior Court*, 5 Cal. 3d 418, 422 (1971), should be noted: "Although her status as a citizen informer did not eliminate the necessity of establishing that her information was reliable, the circumstances of her discovery, the details of her information, and her prior experience in examining marijuana justified the magistrate in concluding that she was reliable."

The officer may have to verify the status of the informer in some cases. *See McClellan* v. *Superior Court*, 18 Cal. App. 3d 311, 314 (1971), where a bare telephone call from a gas station attendant was held to be insufficient to permit his use as a reliable informer.

On the other hand, in *People* v. *Rigsby*, 18 Cal. App. 3d 38, 42 (1971), it was held that an arrest could be made on the basis of information from a minor who was under the influence of drugs and who pointed out her supplier. "The critical factor in the case is the exigency which faced Officer Simpson. He had no time to investigate further before acting; the accused could flee while the officer investigated or obtained a search warrant. It is also obvious that such delay might give the accused time to destroy or sequester the evidence."

An anonymous informer is not classed as a reliable citizen informer. *People* v. *Abbott,* 3 Cal. App. 3d 966, 970 (1970).

A person apparently himself involved in the traffic of narcotics is not classed as a citizen informer, but his involvement in the narcotics traffic may not strip him of citizen informer status if it is not known to the officer. *People* v. *Barrett,* 2 Cal. App. 3d 142, 147–48 (1969).

CHAPTER SEVEN

FACTORS SUPPORTING PROBABLE CAUSE

§ 7.01: *Resembles Suspect*

Where a physical description of a suspect is available to an officer and a second party fits such description, an arrest of the second party is justified. Thus, in *People* v. *Prather,* 268 Cal. App. 2d 748 (1969), defendant's arrest and an incidental search of his car were upheld where the arresting officer honestly and reasonably (though mistakenly) believed defendant to be a murder suspect portrayed in a police bulletin. *See also People* v. *Williams,* 263 Cal. App. 2d 756, 759 (1968); *People* v. *Villareal,* 262 Cal. App. 2d 438, 444 (1968); and *People* v. *Sandoval,* 65 Cal. 2d 303, 307 (1966), where the court assumed, in support of the judgment, that the defendant fit the description supplied by an informer. *See also People* v. *Atmore,* 13 Cal. App. 3d 244, 246 (1970). *See Hill* v. *California,* 401 U.S. 797, 804 (1971).

§ 7.02: *Criminal Record Known*

The mere fact that the arrestee has a known criminal record will not, alone, provide reasonable cause for an arrest. As discussed *supra,* § 6.03, it is unreasonable to assume from such fact a *present* violation of the law. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *People* v. *Gallegos,* 62 Cal. 2d 176, 179 (1964); *People* v. *Reeves,* 61 Cal. 2d 268, 274 (1964); *People* v. *Scott,* 259 Cal. App. 2d 268, 276 (1968). As was stated earlier in *People* v. *Sanders,* 46 Cal. 2d 247, 251 (1956):

> "[T]he fact that defendant had been a bookmaker in the past or bore that reputation and the fact that another bookmaker had been on the premises the day before, would not of themselves constitute reasonable cause to believe that defendant's conduct, which was perfectly consistent with the lawful conduct of his business, in fact constituted occupancy of the premises for the purpose of bookmaking. . . ."

However, when accompanied by other circumstances, the defendant's criminal record, known by the officers, may enter the probable cause equation. Thus, for example, where officers recognize the defendant as a convicted felon and observe him in the possession of a firearm, an arrest is justified. *People* v. *Seals,* 263 Cal. App. 2d

575 (1968); *People* v. *Carmical,* 258 Cal. App. 2d 103 (1968). Similarly, probable cause is present where the officers on the basis of their training and experience observe the defendant, with a known narcotics conviction, attempt to dispose of narcotics when approached by the officers. *People* v. *Rodriguez,* 274 Cal. App. 2d 770 (1969); *People* v. *Duarte,* 254 Cal. App. 2d 25, 30–31 (1967). In *People* v. *Hillery,* 65 Cal. 2d 795, 804 (1967), an arrest was properly made on the basis of defendant's known rape conviction in conjunction with other facts linking defendant to the present crimes of rape and murder. *See also People* v. *Hall,* 62 Cal. 2d 104 (1964), where, among other factors, probable cause for an arrest was presented by defendant's known criminal record, including assault with a deadly weapon. *See Remers* v. *Superior Court,* 2 Cal. 3d 659, 668–69 (1970) (prior arrests based on unfounded charges did not constitute probable cause for subsequent arrests); *People* v. *Superior Court* (Johnson), 15 Cal. App. 3d 146, 155 (1971).

§ 7.03: *Adequate Description of Vehicle*

Where a criminal suspect is reported to have left the scene of a felony in a particularly described automobile and officers shortly thereafter observe the automobile described leaving the vicinity, the officer is entitled to stop the vehicle and question the occupants, or if the facts (usually an armed offense) warrant it, arrest the driver. An arrest may also be made at a time subsequent to the offense where the officers are provided with a sufficient description (*e.g.,* make and license number) of the automobile used and other facts to link the defendant with the offense in question.

Several recent cases will illustrate an arrest made in the first situation: In *People* v. *Chandler,* 262 Cal. App. 2d 350, 354 (1968), the court held that the evidence—an armed robbery a few blocks away in the early morning hours, with defendant's car answering the reported description (" 'light colored compact station wagon' ") being given by the police minutes, possibly seconds, later, traveling away from the robbery on one of the nearest available exits—provided probable cause to believe the car's three male occupants had been involved in the robbery. The court was not persuaded otherwise by the fact that only one person perpetrated the robberies: "It is common knowledge that frequently, perhaps more often than not, where an automobile is used as a robbery getaway car, one or more persons remain in the vehicle. . . ." *Ibid.* at 354.

The court in *Chandler, supra,* relied heavily on the California

Supreme Court's announcements in *People* v. *Schader,* 62 Cal. 2d 716, 722 (1965), where the policeman received a radio report of a robbery and murder, the suspects heading out of the city in a "late model . . . Cadillac." The same or similar vehicle was later observed by the officer on the culprits' suspected line of travel and when he followed it, the car's speed reduced. The court stated, at 723 of 62 Cal. 2d, that the officer

> "was under no compulsion to investigate further before making an arrest. *His immediate duty was to arrest the driver of the suspect vehicle, disarm him of any weapons, with a minimum of risk to his own personal safety and proceed with his investigation.*" (Emphasis added.)

See also People v. *Smith,* 4 Cal. App. 3d 41, 48 (1970); *People* v. *Ortega,* 2 Cal. App. 3d 884, 892 (1969); *People* v. *Turner,* 2 Cal. App. 3d 632, 636–37 (1969); *People* v. *Berry,* 260 Cal. App. 2d 654, 656 (1968); *People* v. *Hutchinson,* 254 Cal. App. 2d 32, 35, 40 (1967); and *People* v. *Cerda,* 254 Cal. App. 2d 16, 22–23 (1967).

Compare, however, *Dyke* v. *Taylor Implement Co.,* 391 U.S. 216, 222 (1968), where the arresting officer was told of a shooting and that the suspects were driving an "old make model car." The federal Supreme Court held that probable cause for the arrest was not present inasmuch as the automobile, a 1960 or 1961 Dodge, was not sufficiently described to the officers.

An adequate description of the automobile used may also provide probable cause for an arrest where the automobile is discovered remote to the time and place of the offense. Thus, in *People* v. *Naughton,* 270 Cal. App. 2d 1 (1969), defendant's license number was recorded by the witnesses of a burglary. The vehicle, registered to a third person, was subsequently found parked near defendant's apartment. Since the defendant had already been identified by the witnesses and others through "mug shots," defendant's arrest was justified. *See also People* v. *Hillery,* 65 Cal. 2d 795, 804 (1967), where, among other factors the arresting officers knew that defendant's uniquely painted black and turquoise 1952 Plymouth had been seen two-tenths of a mile from the scene of the crime, a fact also confirmed by the tread of defendant's tires.

For the scope of search incident to arrests in cars, *see* §§ 12.04–12.06, *infra.*

§ 7.04: *Furtive Conduct*

Officers are frequently confronted with suspicious circumstances, furtive movements or conduct, which give them reason to believe that the person or persons observed are attempting to hide contraband, instrumentalities, or other evidence of crime. The term "furtive conduct" necessarily overlaps material treated elsewhere, as for example, section 7.07 (refusal to answer questions, failure to explain, or evasiveness), and section 7.10 (flight and attempts to escape), and section 9.03 (conduct excusing compliance with Penal Code sections 844 and 1531). Therefore, we look here to "furtive conduct" as applied in its classical sense, the attempt to secrete (or destroy) items, or abnormal behavior, at approach of officers.

The California Supreme Court cautions us, however, that an innocent gesture can often be mistaken for a guilty movement. It has recently disapproved of many holdings where reliance was placed on a furtive movement. It says that more is needed than a mere furtive gesture to constitute probable cause to search. It calls for specific knowledge on the part of the officer relating the suspect to the evidence of crime and says that such knowlege may come from the twin sources of information and observation. *People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 818 (1970).

The narcotics cases provide, by far, the most fertile field of study of "furtive conduct." Thus, the narcotics violator will often *attempt to swallow* the contraband:

> "Swallowing narcotics is a popular method of avoiding detection, and movements of the hand toward the mouth have consistently been held to be the type of furtive movement that may be assessed in the probable cause equation (People v. Cruz, 61 Cal. 2d 861)." *People* v. *Rodriquez,* 274 Cal. App. 2d 770 (1969); *People* v. *Duarte,* 254 Cal. App. 2d 25, 29 (1967).

When the person approached is unable to swallow the drugs or narcotics, he often attempts to *throw the contraband* out of the officer's presence; this too will provide probable cause for an arrest. *People* v. *Monreal,* 264 Cal. App. 2d 263 (1968); *People* v. *Holguin,* 263 Cal. App. 2d 628, 630 (1968); *People* v. *Morales,* 259 Cal. App. 2d 290, 296 (1968) (relative to arrest of codefendant). Finally, the narcotics violator may be arrested after his attempt to *hide or conceal* the contraband. *People* v. *Doherty,* 67 Cal. 2d 9, 22 (1967); *People* v. *Blodgett,* 46 Cal. 2d 114, 117 (1956); *People* v. *Waller,* 260 Cal. App. 2d 131, 139 (1968). *See People* v. *Trotter,* 273 Cal. App. 2d 538 (1969) (armed robbery); *In re Glenn R.,* 7 Cal. App. 3d 558 (1970); *People* v. *Cruz,* 6 Cal. App. 3d 384 (1970); *People* v. *Martinez,* 6 Cal. App. 3d 373 (1970); *Bergeron* v. *Superior Court,* 2 Cal. App. 3d 433 (1969).

"Where a suspect merely slams the door shut in the face of investigators after having been informed that they are police officers, there is no probable cause for arrest in the absence of something more." *People* v. *Satterfield,* 252 Cal. App. 2d 270, 276 (1967). The added statement that "It's the law" or calling out "cops" also does not supply reasonable cause. *Satterfield, supra; Lewis* v. *Superior Court,* 226 Cal. App. 2d 102, 104 (1964).

Other examples of furtiveness are alluded to *infra,* §§ 9.12–9.16, relative to circumstances excusing compliance with Penal Code sections 844 and 1531. *See too* § 12.08.

§ 7.05: *Perception of Narcotics Usage*

The defendant's physical condition and/or behavior, together with the officer's knowledge of other factors (*e.g.,* reputation of premises, presence of other known users or suppliers) may provide the officers with probable cause for an arrest. Thus, in *People* v. *Valdez,* 260 Cal. App. 2d 895, 900 (1968), defendant was arrested for possession of narcotics where his companions on the premises were arrested for that same offense and defendant's physical condition—discolored tissue on his arms and *abnormal contraction* of his pupils—confirmed probable cause for the arrest. *See People* v. *Welch,* 260 Cal. App. 2d 221, 225 (1968) (fresh needle marks and constricted pupils); *People* v. *Gregg,* 267 Cal. App. 2d 567 (1968); *People* v. *Sanchez,* 256 Cal. App. 2d 700, 704 (1967) (defendant sweating and "high"); *People* v. *Kennedy,* 256 Cal. App. 2d 755, 757–58 (1967) (defendant hyperactive, nervous, pupils contracted); *People* v. *Beal,* 268 Cal. App. 2d 481, 484 (1968) (many symptoms of marijuana usage—dilated pupils, heavy eyelids, flaccid face); *People* v. *Legg,* 258 Cal. App. 2d 52 (1968) (marijuana paraphernalia, residue, and smoke on premises); *People* v. *Allen,* 261 Cal. App. 2d 8, 10 (1968) (paraphernalia on floor prepared for use); *People* v. *Goldberg,* 2 Cal. App. 3d 30, 34 (1969) ("Manifestations of drug use such as dilated pupils, slurred speech, and difficulty in balancing, when observed by an experienced officer, present grounds for a valid arrest.").

Similarly, where defendant, an *outpatient* after a narcotics con-

viction, misses his *Nalline test,* had had suspicious marks ("tracks") on his arm, and fails to report for work, probable cause for an arrest is present. *Hacker* v. *Superior Court,* 268 Cal. App. 2d 387, 392 (1968); *see also People* v. *Carrillo,* 64 Cal. 2d 387, 393 (1966) (*parolee* who missed Nalline test gave reasonable cause to believe he possessed narcotics).

Possession of marks alone is insufficient to give rise to probable cause, but additional factors may supply the deficiency. *People* v. *Meyers,* 6 Cal. App. 3d 601, 606 (1970).

The officer may also see the suspect in possession of a package which, by reason of its shape, design or manner of being carried, he can tell contains contraband. *People* v. *Glasgow,* 4 Cal. App. 3d 416, 422 (1970); *People* v. *Torralva,* 17 Cal. App. 3d 686, 690 (1971) (plastic box with brown substance fell from visor; search O.K. even though officers could not be sure of nature of brown substance).

On the other hand, merely to see a plastic bag, a brown paper bag and a shoe box does not give probable cause. *Filitti* v. *Superior Court,* 23 Cal. App. 3d 930, 933 (1972).

The sight of a handrolled cigarette is not enough to warrant the conclusion that it contains marijuana. *Thomas* v. *Superior court,* 22 Cal. App. 3d 972, 977 (1972).

When a suspect appears to be intoxicated but the officer can detect no odor of alcohol or other evidence that he is under the influence of intoxicating liquor, a strong suspicion is created that the suspect is under the influence of a narcotic and a search of his person for drugs is proper. *People* v. *Superior Court* (Johnson), 22 Cal. App. 3d 227, 230 (1971); *People* v. *Munsey,* 18 Cal. App. 3d 440, 446 (1971) (similar). *Munsey* says (at 448–449) that the officer does not have to believe the person is under the influence of alcohol. Even if the evidence seems to show alcoholic intoxication, a search for drugs would be proper. *People* v. *Steeples,* 22 Cal. App. 3d 933, 966 (1972).

Police officers may arrest and search a person who appears as something more than a mere casual visitor to premises where the officers know or have reason to believe narcotic activity is occurring. Mere presence on the premises, however, is insufficient. Opening the door without knocking and flight were held to be sufficient in *People* v. *Tenney,* 25 Cal. App. 3d 16, 26 (1972).

§ 7.06: *Insufficient Observations—Perception of Innocent Conduct*

By Penal Code section 836, set out *supra,* § 4.04, an arrest without a warrant can only be legally made if the person arrested has committed a public offense in the presence of the arresting officer or the arresting officer has reasonable cause to believe the person arrested has committed a felony. With this provision before them, the California Supreme Court in *People* v. *Privett,* 55 Cal. 2d 698, 701–02 (1961), found that the following facts were far short of those necessary for a warrantless arrest: (1) Edwards was seen talking to a known burglar; (2) police records indicated that Edwards himself suffered a burglary conviction; (3) Edwards, defendants and their children were seen in and about defendant's home; (4) seven or eight men (officers) wearing rough clothing walked across defendants' lawn and knocked on the door after seeing Edwards and one defendant looking out the window; (5) the lights went out inside and no immediate response was made to the officer's knocking. The court said, "Taken separately or all together, these facts could not constitute reasonable cause to believe that Edwards had committed a felony so as to justify his arrest without a warrant." *Ibid.* at 702. *See also People* v. *Sanders,* 46 Cal. 2d 247 (1956), discussed *supra,* § 7.02.

If probable cause is to be founded on "furtive conduct," such conduct must be consistent with criminal, not innocent, behavior. Hence, in *People* v. *One 1960 Cadillac Coupe,* 62 Cal. 2d 92 (1964), the following observations were, as in *Privett, supra,* insufficient furtive conduct for an arrest: Defendant was nervous, appeared wary of officers, took an aimless walk in the near vicinity, looked like an untruthful person and as though he did not own the Cadillac he was driving. "We find little, if anything, to distinguish Reulman from any other harried citizen who may have innocently parked his automobile in the same spot . . . ." *Ibid.* at 96. *See Remers* v. *Superior Court,* 2 Cal. 3d 659 (1970), where it was held that there was insufficient probable cause for arrest when defendant was observed looking over her shoulder, talking to a "hippie type" male, and removing a tinfoil package from her purse even though all of her actions occurred at a place known to be a site of frequent narcotics traffic. *See also People* v. *Edgar,* 60 Cal. 2d 171, 174 (1963) (mother of defendant did not "conceal" extortion photos by her refusal to give them to the officers); and *Henry* v. *United States,* 361 U.S. 98 (1959). *See People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807,

818 (1970); *see too Cunha* v. *Superior Court,* 2 Cal. 3d 352, 353 (1970) (officers saw petitioner and companion look around and engage in transactions, not enough).

Compare, however, *People* v. *Torres,* 56 Cal. 2d 864, 866–67 (1961), where the Supreme Court took judicial notice of the fact that the capsules and milk sugar purchased by defendant were for the processing of narcotics, especially where a known narcotic user was seen leaving defendant's apartment.

In *People* v. *Fein,* 4 Cal. 3d 747, 754 (1971), it was held that the sight of two burnt marijuana seeds would not justify an arrest for present use, possession or sale in a home, although it would justify a search of a car. *Fein* suggests that if there was a reasonable inference that a search would uncover larger, usable quantities of drugs, a warrant should have been sought.

In *People* v. *Miller,* 7 Cal. 3d 219, 225 (1972), the Supreme Court analyzed what it felt were insufficient circumstances to conclude a person was guilty of receiving stolen property. The police discovered the defendant asleep in a parking lot and saw electronic equipment on the rear seat. ("Indeed, it seems quite unlikely that an individual who had just received stolen property would go to sleep in a car, leaving the contraband in plain sight.") The defendant's reluctance to permit the seizure did not add to probable cause.

§ 7.07: *Failure to Explain, or Evasiveness*

Where, when confronted by officers, a suspect provides an implausible explanation for his presence near the scene of a crime, or attempts to mislead the officers, this conduct may contribute to probable cause for an arrest.

In *People* v. *Lyles,* 260 Cal. App. 2d 62, 65 (1968), an arrest was justified partially on the defendant's attempt to *mislead* the officers into believing the apartment was not his own. In *People* v. *Waller,* 260 Cal App. 2d 131, 139 (1968), *the failure to produce evidence of identity or registration* augmented justification for an arrest. *See also People* v. *Ceccone,* 260 Cal. App. 2d 886, 890 (1968) (same—officers reasonably believed vehicle was stolen). In *People* v. *Sandoval,* 65 Cal. 2d 303, 310 (1966), defendant was found at a location named by an informer and gave an *inherently implausible explanation* for his presence; this fact with others, justified his arrest. *See also People* v. *Gardiner,* 254 Cal. App. 2d 160, 162 (1967) (defendants parked in high burglary area, telling officers "that they were just sitting in the car doing nothing"; the court found this and other

statements to be "unreasonable"). *Cf. People* v. *Stage,* 7 Cal. App. 3d 681 (1970) (failure of one of four youths to produce satisfactory identification did not constitute probable cause to arrest). *Cf. Gallik* v. *Superior Court,* 5 Cal. 3d 855, 861 (1971).

The police are not necessarily bound by the explanations and identifications given by suspects. *See Hill* v. *California,* 401 U.S. 797, 803 (1971) ("But aliases and false identifications are not uncommon.").

§ 7.08: *Admissions*

The defendant's admission of criminal conduct to officers will support the conclusion that there was probably cause for arrest. *People* v. *Hammond,* 54 Cal. 2d 846, 853 (1960) (officers had been told by defendant that he used narcotics); *People* v. *Schader,* 62 Cal. 2d 716, 721 (1965) ("looks like they've got us"); *People* v. *Hubbard,* 9 Cal. App. 3d 827, 831 (1970) ("They're reds"); *Hoffa* v. *United States,* 385 U.S. 293 (1966) (incriminating statements made to paid government informer). Similarly, where such admissions or incriminating statements are merely *overheard,* the arrest is justified. *People* v. *Van Eyk,* 56 Cal. 2d 471 (1961); *People* v. *Kasperek,* 273 Cal. App. 2d 320 (1969).

In *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 197 n. 10 (1972), the Supreme Court stressed the importance of inquiry by an officer as an investigative device prior to arrest and search. ". . . The police officer should remember there is no substitute for patient and thorough investigation, and should avoid drawing a hasty or preconceived conclusion' . . . ." The court gave examples of how such inquiries may lead to answers that are inconsistent, conflicting or palpably false. The court cautioned however, that there may be a difference between an explanation which is patently inconsistent or false and one which simply does not go into enough detail to persuade the arresting officer of its truth. The latter kind of answer may fall short of the required "objective probability of guilt."

Compare, however, the effect of an illegal interrogation on an admission and the seizure of evidence after the arrest has been effected. *People* v. *Hale,* 262 Cal. App. 2d 780, 787–88 (1968). *See* § 18.03.

§ 7.09: *Reputation of Premises*

The mere fact that a person is on premises where officers have reason to believe there is criminal activity will *not, alone,* justify either his arrest or a search of his person. However, such fact may be considered *with others* in assessing probable cause for an arrest. Thus, in *People* v. *Rodriguez,* 274 Cal. App. 2d 770 (1969), defendant was present at a house to be searched for narcotics and attempted to swallow a balloon; his arrest was justified. To the same effect, *see People* v. *Valdez,* 260 Cal. App. 2d 895, 900 (1968), where defendant's physical condition (narcotics usage) at the home of another arrestee warranted his arrest.

Though an arrest may be unwarranted, the officers are at least entitled to temporarily detain anyone when the officers rationally suspect that some activity out of the ordinary is taking place on the premises and there is some reason to connect the person under suspicion with the activity, and there is some suggestion that the activity is related to crime. *People* v. *Bianez,* 259 Cal. App. 2d 76, 79 (1968) (officer possessed information about narcotic activity on the premises and concluded that the white substance in the bowl held by a person leaving the premises was probably heroin); *see also People* v. *Sanchez,* 256 Cal. App. 2d 700, 703 (1967) (defendant arrested in tunnel, a "hangout" for addicts, after he had been seen entering and leaving the tunnel from the same end with different persons, and exhibited furtive conduct when approached); and *People* v. *Garavito,* 65 Cal. 2d 761, 764 (1967) (occupants, by their actions—staying short periods and departing—warranted at least an investigation; furtive conduct on the officers' approach justified arrest).

§ 7.10: *Flight and Attempts to Escape*

While mere flight at the approach of an officer *is not, of itself,* grounds for an arrest, the officer is acting within his prerogatives in investigating the reason for the flight. *People* v. *Villareal,* 262 Cal. App. 2d 438, 444 (1968) (while conducting pat search defendant hit officer in the stomach and attempted to flee from the scene of detention); *People* v. *Hines,* 260 Cal. App. 2d 13, 16 (1968) (agents saw defendant look in their direction, say "cops," and walk away); *People* v. *Bianez,* 259 Cal. App. 2d 76, 79 (1968) (defendant, resembling escaped prisoner, running from the house with a bowl of heroin); *People* v. *Harris,* 62 Cal. 2d 681, 682 (1965) (defendant told officer, "I have got a knife" and attempted to escape); and *People*

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v. *Garavito,* 65 Cal. 2d 761 (1967) (occupants of house, hearing officers announce themselves at the front door, fled through the rear door); *People* v. *Remijio,* 267 Cal. App. 2d 180 (1968) (defendant, who had narcotics record and had made sale to informant, fled at approach of officers); *People* v. *Boyd,* 16 Cal. App. 3d 901, 906 (1971) (flight from a temporary detention said to be relevant factor in finding probable cause); *Flores* v. *Superior Court,* 17 Cal. App. 3d 219 (1971) (officer said, "Come here," and defendant ran.) *People* v. *Tenney,* 25 Cal. App. 3d 16, 27 (1972). *Compare,* however, *Wong Sun* v. *United States,* 371 U.S. 471 (1963), where the Supreme Court noted that the arrestee's flight was *ambiguous* since the arresting agent never adequately dispelled the misimpression engendered by his own ruse in gaining entry.

Examine also what the courts have considered to be "flight," excusing compliance with the entry requirements of Penal Code sections 844 and 1531, *infra,* § 9.12.

§ 7.11: *High Crime Area*

A frequent circumstance articulated in the probable cause formula is the suspect's unusual behavior in or about a high crime area. *See,* for example, *People* v. *Beal,* 268 Cal. App. 2d 481, 482 (1968) ("high arrest area for narcotics violations"); *People* v. *Muriel,* 268 Cal. App. 2d 477, 479 (1968) ("considerable car stripping in the immediate area"); *People* v. *Davis,* 260 Cal. App. 2d 186, 187 (1968) ("numerous burglaries of juke boxes, shine stands and telephone booths had occurred in the area"); *People* v. *Hines,* 260 Cal. App. 2d 13, 15 (1968) ("high frequency dangerous drugs area"); *People* v. *Gardiner,* 254 Cal. App. 2d 160, 162 (1967) (numerous burglaries in the area); and *People* v. *Ingle,* 53 Cal. 2d 407, 413 (1960) (defendant's presence in area where narcotics trade was known to flourish, plus other known factors). *Compare People* v. *Rice,* 259 Cal. App. 2d 399 (1968) (defendant present in burglary area at midnight did not warrant arrest); *People* v. *Nieto,* 267 Cal. App. 2d 1 (1968) (high narcotics area, plus unusual hour and furtive conduct). However, a high crime rate area cannot convert innocent circumstances into probable cause. *Remers* v. *Superior Court,* 2 Cal. 3d 659, 665 (1970) *Cunha* v. *Superior Court,* 2 Cal. 3d 352, 357 (1970); *People* v. *Moore,* 69 Cal. 2d 674, 683 (1968); *People* v. *Conley,* 21 Cal. App. 3d 894, 899 (1971).

§ 7.12: *Recent Neighborhood Crime*

Analogous to the preceding section (high crime area) is the suspect's presence and conduct near the scene of recent criminal activity. While this will not, standing alone, support probable cause for an arrest, it is often alluded to among other circumstances which, when considered together, do in fact justify the officer's actions. In this connection, *see People* v. *Williams*, 263 Cal. App. 2d 756, 757 (1968) (recent armed robbery in area, defendant's unusual behavior at intersection, and his physical similarity to the suspect, justified arrest); *People* v. *Lopez*, 60 Cal. 2d 223 (1963) (recent burglary, painted crowbar protruded from under the car seat); *People* v. *Hyde*, 51 Cal. 2d 152 (1958) (recent burglary of camera store, cameras in gunny sack on defendant's rear car seat); *People* v. *Duncan*, 51 Cal. 2d 523 (1959) (defendant present four and a half blocks from scene of recent rape-murder of elderly woman, plus other conduct and lack of explanation); *People* v. *Joines*, 11 Cal. App. 3d 259, 262–64 (1970) (recent armed robbery in area and defendant's suspicious activity in car).

§ 7.13: *Presence of Other Known Felons*

A suspect's association with other known felons is insufficient to warrant his arrest absent other circumstances indicating criminal responsibility. Thus in *People* v. *Privett*, 55 Cal. 2d 698, 702 (1961), the Supreme Court cautioned:

> "The facts that Edwards had a burglary record and was seen talking to a known burglar, *while relevant*, are not sufficient to constitute reasonable cause to believe that Edwards had committed a burglary or any other felony." (Emphasis added.)

However, association with those having a criminal record is one of the myriad factors which, together, will justify the arrest. *People* v. *Cerda*, 254 Cal. App. 2d 16, 23 (1967) (officer at least entitled to question defendant, who was occupant in car of prime forgery suspect); *People* v. *Duarte*, 254 Cal. App. 2d 25, 29 (1967) (defendant, known narcotics user, was seated in automobile owned by parole violator with narcotics conviction and talking to Perez, also a known user who had been arrested for narcotics violations); *People* v. *Morales*, 259 Cal. App. 2d 290 (1968) (known narcotics arrestee seen leaving premises of defendant); *People* v. *Torres*, 56 Cal. 2d 864 (1961) (same); *People* v. *Lyles*, 260 Cal. App. 2d 62, 65 (1968) (defendant met narcotic addict on bail); *cf. Nugent* v. *Superior Court*, 254 Cal. App. 2d 420, 426–27 (1967) ("mere association with

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a person who issues a check against insufficient funds is not sufficient to establish criminal responsibility"). Similarly, mere presence of a person on premises where officers have reason to believe there are narcotics will not justify either his arrest or search, but additional factors may supply probable cause. *Pierson* v. *Superior Court*, 8 Cal. App. 3d 510, 521 (1970); *People* v. *Benedict*, 2 Cal. App. 3d 400, 403 (1969) (presence of other felon plus fumbling to get wallet, slow and slurred speech and constricted pupils).

§ 7.14: *Hearsay*

Hearsay is competent for the purpose of establishing reasonable and probable cause for an arrest. *Adams* v. *Williams*, 32 L. Ed 2d 612 (1972). In *People* v. *Hale*, 260 Cal. App. 2d 780, 785 (1968), a police officer intercepted a telephone call at the residence of an arrestee, from the defendant, who identified himself as "Tony" and asked if Bill had "scored the stuff." The officer replied, "Yes," and told him to come on up. The court held: "Arrival at a given location of a person bearing the same name as that given by a caller on the telephone at the approximate time given in a telephone conversation is probative of the fact that the 'Tony' on the telephone and the 'Tony' at the door are in fact one and the same person." *People* v. *Hale*, 262 Cal. App. 2d 780, 789. The arrest and search of "Tony" was therefore proper. *See also People* v. *Gonzales*, 68 Cal. 2d 467, 472 (1968) and *People* v. *Sandoval*, 65 Cal. 2d 303, 306–07 (1966).

§ 7.15: *Unusual Hour*

Often significant in the execution of a warrantless arrest is the defendant's furtive conduct late at night or in the early morning, which may establish grounds for investigation or help confirm existence of probable cause to arrest. *People* v. *Beal*, 268 Cal. App. 2d 481 (1968) (5:50 a.m., squatting beside parked automobile in narcotics area); *People* v. *Williams*, 263 Cal. App. 2d 756, 757 (1968) (4:00 a.m., stopped at intersection for considerable period of time); *People* v. *Holquin*, 263 Cal. App. 2d 628, 629 (1968) (11:15 p.m., two persons seated in smoke-filled vehicle parked in vacant lot); *People* v. *Chandler*, 262 Cal. App. 2d 350 (1968) (4:45 a.m., automobile matched description of getaway car); *People* v. *Davis*, 260 Cal. App. 2d 186, 187 (1968) (12:30 a.m., in closed service station near recent juke box and telephone booth burglaries); *People* v. *Nieto*, 267 Cal. App. 2d 1 (1968) (car parked in high narcotics area at 3:30 a.m.). *But see People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 825 (1970) (cautions us that innocent people are often abroad at night). *See*

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too People v. *Rosenfeld,* 16 Cal. App. 3d 619, 622 (1971).

§ 7.16: *During the Course of Investigation or Questioning*

Five years prior to the Supreme Court's decision in *Terry* v. *Ohio,* 392 U.S. 1 (1968), the California Supreme Court in *People* v. *Mickelson,* 59 Cal. 2d 448, 450–51 (1963) announced:

> "[W]e have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. . . . Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search. . . . "

Similarly, officers are entitled to call at the home of witnesses or suspects for the purpose of questioning. *People* v. *Michael,* 45 Cal. 2d 751, 754 (1955). But the right to seek interviews with suspects or witnesses at their homes does not include the right to walk in uninvited merely because there is no response to a knock or a ring. *Horack* v. *Superior Court,* 3 Cal. 3d 720, 728–29 (1970).

Officers are often confronted by facts on which to support an arrest during the course of investigation. *People* v. *Yeoman,* 261 Cal. App. 2d 338, 341–42 (1968), *overruled in another respect* in *People* v. *De Santiago,* 71 Cal. 2d 18, 30 (1969) (officers investigated complaint of apartment manager, observed an unusually large number of people enter and leave, and confirmed as genuine a sample of marijuana obtained from the apartment by the manager; entry for arrest was proper); *People* v. *Superior Court* (Heap), 261 Cal. App. 2d 687, 689–90 (1968) (respondng to anonymous telephone call, officers observed marijuana through defendant's open door); *People* v. *Berry,* 260 Cal. App. 2d 654, 655–56 (1968) (requesting identification, officers saw burglary tool in open view); *People* v. *Villareal,* 262 Cal. App. 2d 438, 443–444 (1968) (flight during course of investigation of possible parole violator); *People* v. *Garavito,* 65 Cal. 2d 761, 764 (1967) (officers investigating report of unreliable informant were met by fleeing occupants when the officers identified theselves); *People* v. *Hawxhurst,* 264 Cal. App. 2d 398 (1968) (as defendant raised his arms during pat search, plastic containers of marijuana were revealed in defendant's waistband); *People* v. *Heard,* 266 Cal. App. 2d 747 (1968) (defendant, who fit description of armed robber, was parked in poorly lighted area; pat search revealed illegal firearms); *People* v. *Superior Court* (Poole), 267 Cal. App. 2d 363 (1968) (defendant sleeping in car was asked

to step out, revealing narcotics on front seat); *Barajas* v. *Superior Court,* 10 Cal. App. 3d 185 (1970) (defendant arrested after police entered her house to prevent destruction of contraband); *People* v. *Gordon,* 10 Cal. App. 3d 454 (1970) (defendant arrested after marijuana was found in containers he was shipping by air freight); *People* v. *Hubbard,* 9 Cal. App. 3d 827 (1970) (defendant stopped for traffic violation; admitted possession of drugs after officers felt capsules during pat-down search); *People* v. *Akers,* 9 Cal. App. 3d 96 (1970) (defendant arrested after a search with search warrant revealed stolen property); *Vandenberg* v. *Superior Court,* 8 Cal. App. 3d 1048 (1970) (defendant's father consented to search of room; defendant arrested after narcotics paraphernalia found by officer); *People* v. *Diamond,* 2 Cal. App. 3d 860 (1969) (firebombs found in car detained for investigation); *People* v. *Clark,* 2 Cal. App. 3d 510 (1969) (defendant detained for questioning regarding the car in which he was riding; officer then found out that the car had been rented with a stolen credit card).

CHAPTER EIGHT

SEARCHES INCIDENTAL TO A VALID ARREST

§ 8.01: *The General Rule and Its Limits*

In *Chimel* v. *California,* 395 U.S. 752 (1969), at 762–63, the Supreme Court stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . [or] . . . to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . . *There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."* (Emphasis added.)

The area within immediate control was defined in *People* v. *King,* 5 Cal. 3d 458, 462 (1971), as the area under a bed where the defendant was lying on it. *See too People* v. *Spencer,* 22 Cal. App. 3d 786, 797 (1972) (search of box six or eight feet from place of arrest O.K. when police had good reason to think defendant armed); *People* v. *Arvizu,* 12 Cal. App. 3d 726, 729 (1970) (duffel bag at foot of bed in which arrestee is lying, police had cause to believe he possessed gun.).

As *Chimel* says:

> *"There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.* Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less." (Emphasis added.)

Hence, a search warrant is now required for the search of premises in the absence of a "well-recognized exception." Thus an arrest outside of a house does not justify an incidental search of the house.

Dillon v. *Superior Court,* 7 Cal. 3d 305, 311 (1972).

The requirement of a search warrant is not limited to the search of a habitable dwelling house. The Fourth Amendment also protects against the search of the contents of other closed objects. *Swan* v. *Superior Court,* 8 Cal. App. 3d 392, 397 (1970) (improper search of boarded up, uninhabitable building gutted by fire).

The defendant's suitcase, in his possession when he was arrested, was searched after he was handcuffed. The court held that it was not necessary that a warrant be secured. *United States* v. *Mehciz,* 437 F.2d 145, 147 (9th Cir. 1971); *People* v. *Olson,* 18 Cal. App. 3d 592 (1971) (two bindles of heroin found in purse dumped out at booking). In *United States* v. *Smith,* 340 F. Supp. 1023, 1026 (D. Conn. 1972), it was said that an arrest or search may be made of the contents of the arrestee's pockets, except in minor traffic offenses.

§ 8.02: *Factual Contexts to Which Chimel Has Little or No Application*

Requisite to an understanding of the proper scope of an incidental search under the *Chimel* case is a familiarity with those settled rules, or "exceptions," which are *not* affected by the opinion. These may be summarized as follows:

§ 8.03: *The Seizure of Items in Plain View*

The *Chimel* decision does not intimate whether officers may seize evidence or contraband out of the arrestee's reach but in open view. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465–66 n.24 (1971), indicates that where the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee.

In *People* v. *Block,* 6 Cal. 3d 239, 243 (1971), our State Supreme Court said, "We agree that *Chimel* does not preclude the seizure of evidence found in plain sight during the course of a lawful investigation." *See People* v. *Superior Court* (Manfredo), 17 Cal. App. 3d 195, 202 (1971), and discussion *infra* § 13.01. *Cf. People* v. *Cagle,* 21 Cal. App. 3d 57, 66 (1971); *Eiseman* v. *Superior Court,* 21 Cal. App. 3d 342, 350–51 (1971) (no plain view, no consent, and arrestee walking around did not expand right to search).

§ 8.04: *The Seizure of Items Intentionally Placed or Thrown Out of the Suspect's "Reach"*

Distilled from the "plain view" doctrine, *supra,* § 8.03, it can be said that officers may lawfully seize an item which they observe the defendant place out of his "reach" in a furtive attempt to prevent its seizure. *United States* v. *Bradley,* 455 F.2d 1181, 1187 (1st Cir. 1972).

See too People v. *Edwards,* 22 Cal. App. 3d 598, 602 (1971) (search of jacket defendant had worn and placed on chair, then denied it was his).

§ 8.05: *The Seizure of Items Pursuant to Consent*

A "well recognized" exception to the general requirement of a search warrant is consent by one with control over the premises searched. *People* v. *Fuller,* 268 Cal. App. 2d 844, 851–52 (1969). This has not been affected by the *Chimel* decision. *See People* v. *Brown,* 19 Cal. App. 3d 1013, 1017 (1971).

§ 8.06: *The Seizure of Items During Hot Pursuit or the Rendering of Aid*

From the court's opinion in *Warden* v. *Hayden,* 387 U.S. 294 (1967), it can reasonably be said that the "exigencies of the situation" may be such as to dispense with the requirement of a warrant where premises are to be searched. In *Warden,* police were in pursuit of an armed robber seen entering the premises (hot pursuit); in the California cases of *People* v. *Roberts,* 47 Cal. 2d 374 (1956); *People* v. *Clark,* 262 Cal. App. 2d 471 (1968); and *People* v. *Roman,* 256 Cal. App. 2d 656 (1967), they were properly on the premises in an effort to help stricken citizens (to render aid). *See also People* v. *Smith,* 63 Cal. 2d 779 (1966), on the "exceptional circumstances" (fresh pursuit of fleeing suspect who has committed a grave offense) sufficient to justify an entry and search of premises without a search warrant. A search without warrant of an apartment of a suspect believed to have just committed a bombing was held valid in *People* v. *Superior Court* (Peebles), 6 Cal. App. 3d 379 (1970). *People* v. *Baird,* 18 Cal. App. 3d 450, 454 (1971) (search of car during riot). *But see People* v. *Middleton,* 276 Cal. App. 2d 566, 571–72 (1969). In *People* v. *Brown,* 12 Cal. App. 3d 600, 605 (1970), entry was justified where police had information that a helpless child, physically and mentally impaired, might be violently assaulted. *See too* § 9.16.

However, the scope of the warrantless search must be reasonably related to the circumstances upon which the search is justified. *See* § 8.01.

§ 8.07: *The Seizure of Items in Other Rooms, in Plain View During Cursory Search for Armed Confederates*

Analogous to the "exigent circumstances" enumerated in § 8.06, *supra,* are the reasonable precautions taken by an officer to protect himself from an armed confederate of the arrestee. *See Warden* v. *Hayden,* 387 U.S. 294, 298–99 (1967). However, it is clear that if evidence is to be seized during such cursory search, the items must be in plain view. *Chimel* expressly prohibits the search of "desk drawers" and the like (395 U.S. 752, at 763). However, while it also expressly prohibits the search of "closed or concealed areas" in other rooms, it is submitted that under *Warden* a closet or other area into which a confederate could secrete himself is not included within that prohibition. In *Guevara* v. *Superior Court,* 7 Cal. App. 3d 531, 535 (1970), the officer's observation of heroin in plain sight justified its seizure when the officer walked into the kitchen to see if known confederates of suspect, arrested in adjoining room, might be hiding there.

In *People* v. *Block,* 6 Cal. 3d 239, 245 (1971), our State Supreme Court adopted the rule of the *Guevara* case and permitted a search for confederates. It required, however, that a police officer have a reasonable basis on which to infer the presence of additional suspects. *See too Dillon* v. *Superior Court,* 7 Cal. 3d 305, 312–13 (1972).

§ 8.07a: *The Seizure of Items in Another Room After a Request by the Arrestee*

If the arrestee asks to dress in another room, officers may be able to make a search for weapons in that area and to be sure that evidence will not be destroyed. *Curry* v. *Superior Court,* 7 Cal. App. 3d 836, 849 (1970). In *People* v. *Pipkin,* 17 Cal. App. 3d 190 (1971), the defendant was placed under arrest at the door to his apartment. He asked to go to the bathroom and the law enforcement officers accompanied him there. In the toilet bowl were three capsules of cocaine. This seizure was upheld.

In *United States* v. *Broomfield,* 336 F. Supp. 179, 184 (E.D. Mich. 1972), there was a combination of an "I want to dress" situation with a search for confederates. The defendant, who was minimally dressed, asked to enter the house to change clothes. Once in the

house, the agents "fanned out" through it and onto the upstairs floor due to an apprehension that other persons may have come to the aid of defendant. In a walk-in closet on the second floor, an agent located guns. On a dresser he saw heroin. A search warrant was obtained and upheld on the plain view doctrine.

But see Dillon v. *Superior Court,* 7 Cal. 3d 305, 313 (1972) (defendant's request to make phone call did not justify search of house).

§ 8.08: *The Seizure of Items in the Path of Pursuit*

Theoretically, the *Chimel* decision would authorize the search of areas into which the subject might "reach" as he is pursued through the premises or as he moves about the premises following the arrest.

§ 8.09: *The Seizure of Items in a Movable Vehicle*

The majority opinion in *Chimel* has expressly recognized the search of "movable" vehicles, assuming the existence of probable cause. 395 U.S. 752, at 764, n.9.

See § 12.06, for a discussion of searches incident to arrest in a vehicle context.

§ 8.10: *The Seizure of Items in the Possession of Third Persons Concealing or Destroying Evidence*

While lawfully on the premises to effect defendant's arrest, officers can arrest persons committing either the crime of concealing or destroying evidence (Pen. Code § 135, a misdemeanor) or obstructing the officer in the proper discharge of his duties (Pen. Code § 148, also a misdemeanor). However, it seems clear that those offenses must be committed in the officer's "presence." Thus, in *People* v. *Edgar,* 60 Cal. 2d 171 (1963), the Supreme Court held that defendant's mother did not dispose or attempt to dispose of evidence in the officer's presence; therefore when the officers threatened her with an arrest to obtain the evidence, this was an unlawful assertion of authority by the officers, vitiating seizure of the incriminating items which she had given to them. Further, said the court (at 175–76):

> "The officers knew that Edgar wished the pictures hidden, not destroyed. They could have kept his mother under surveillance, and forwarned [*sic*] of what Edgar wished her to do, they were confronted with no substantial risk that she would succeed in putting the pictures beyond their reach before a warrant could

be obtained."

See also People v. *Bradley,* 152 Cal. App. 2d 527, 533 (1957). *See* Comment, Third Party Destruction of Evidence and the Warrantless Search of Premises, 1971 U. of Illinois L. Journal 111.

§ 8.11: *Pre-Chimel Search*

Chimel is not retroactive and applies only to searches and seizures conducted after June 23, 1969. *Hill* v. *California,* 401 U.S. 797, 802 (1971); *Williams* v. *United States,* 401 U.S. 646, 658 (1971). *See too People* v. *Edwards,* 71 Cal. 2d 1096, 1107–10 (1969); *People* v. *King,* 5 Cal. 3d 458, 463 (1971).

In *Von Cleef* v. *New Jersey,* 395 U.S. 814 (1969), a search of the entire house was held violative of pre-*Chimel* standards. *See too People* v. *Medina,* 7 Cal. 3d 30 (1972).

§ 8.12: *Preservation of Evidence Following Defendant's Arrest*

The most perplexing aspect of the *Chimel* case is the extent to which officers may station themselves in or about the premises while a search warrant is obtained following the arrest. The dilemma was forcefully presented by the minority opinion.

Initially, it is clear that probable cause to believe that an article sought is concealed in the house furnishes no justification for a search without the warrant. *Chapman* v. *United States,* 365 U.S. 610, 613 (1961); *Agnello* v. *United States,* 269 U.S. 20, 33 (1925).

However, assuming facts short of probable cause for the co-occupant's arrest, the police are still entitled under *Terry* v. *Ohio,* 392 U.S. 1 (1968); *People* v. *Mickelson,* 59 Cal. 2d 448 (1963); and *People* v. *Michael,* 45 Cal. 2d 751, 754 (1955), to interview other suspects or witnesses in their home. The proper extent of such questioning, conducted following the defendant's arrest and removal, would depend, of course, on the facts. Since such rules allow only "temporary detention," however, the person interviewed must not be deprived of his freedom of action in any "significant way" so as to amount to an arrest. *See* § 4.01, *supra* (What Constitutes an "Arrest").

Moreover, in the pre-*Chimel* case of *People* v. *Edgar,* 60 Cal. 2d 171, 175–76 (1963), the State Supreme Court endorsed the use of "surveillance" to prevent destruction of pictures while a warrant is being secured.

See too Barajas v. *Superior Court,* 10 Cal. App. 3d 185 (1970);

United States v. *Broomfield,* 336 F. Supp. 179, 186 (E.D. Mich. 1972).

An analogous rule permits the detention of a container until a warrant can be sought, although a search of the container itself may be unlawful without a warrant. *People* v. *Baker,* 12 Cal. App. 3d 826, 834–35 (1970); *see United States* v. *Van Leeuwen,* 397 U.S. 249 (1970).

On the other hand, *People* v. *Superior Court* (Evans), 11 Cal. App. 3d 887, 893 (1970), seems to suggest that if there is a right to hold the property there may also be a right to search it. In *Chambers* v. *Maroney,* 399 U.S. 42, 51–52 (1970), the court permitted a search in face of a claim that the property could have been immobilized until a warrant was secured.

> "But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

See too Mayorga v. *People,* 496 P.2d 304, 305 (Colo. 1972) (when officer attempted to serve warrant, it was pointed out to him that the address was incorrect; he said, "Everybody hold it right there," returned to the issuing magistrate, had the warrant corrected, and then made the search, which was upheld.)

§ 8.13: *Other Chimel Limitations*

In *People* v. *Kanos,* 14 Cal. App. 3d 642, 650 (1971) n.3, the court indicated that in dealing with a parolee, a parole agent may not be limited by *Chimel* but that he has an independent right to search a parolee's premises prior to arrest, accompanying it, or after an arrest has occurred elsewhere. The court appeared to be unwilling to accept the result in *People* v. *Belvin,* 275 Cal. App. 2d 955, 958 (1969), where the court applied *Chimel* limits and did not discuss the right of parole agents to search parolee's residence independently of arrest.

Where a valid search is made under *Chimel,* if evidence of another offense turns up, the government may rely on it. *See Ojeda* v. *Superior Court,* 12 Cal. App. 3d 909, 917 (1970); *United States* v. *Simpson,* 453 F.2d 1028, 1031 (10th Cir. 1972).

If the police have information the defendant is armed, it may aid

in enlarging the scope of search. *See People* v. *Spencer*, 22 Cal. App. 3d 786, 797 (1972); *People* v. *Arvizu*, 12 Cal. App. 3d 726, 729 (1970).

Even if reasonable limits for a search have been exceeded, what had been found while the search was within proper limits would not be retroactively rendered inadmissible. *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971).

CHAPTER NINE

ENTRY INTO HOMES—THE ANNOUNCEMENT RULE

§ 9.01: *Entry and Search of Homes*

The law places some of its strongest protections around a home. As was explained in *People* v. *Privett*, 55 Cal. 2d 698, 703 (1961):

> "The sanctity of a private home is not only guaranteed by the Constitution of the United States and of our own state, but it is traditional in our Anglo-Saxon heritage. 'A man's home is his castle' is, and should be, more than an empty phrase. . . ."

The general rule is that a warrant is needed unless there is an "exception." *See Horack* v. *Superior Court*, 3 Cal. 3d 720, 729 (1970); *Raymond* v. *Superior Court*, 19 Cal. App. 3d 321, 325 (1971). Apart from entry to make an arrest, entry may be made without a warrant to capture a fugitive, *People* v. *Marshall*, 69 Cal. 2d 51, 56 (1969); where there is a pressing emergency, *People* v. *Kampmann*, 258 Cal. App. 2d 529, 533 (1968); to render aid, *People* v. *Roberts*, 47 Cal. 2d 374, 378 (1956); or by consent, *People* v. *Burke*, 47 Cal. 2d 45, 49 (1956). Officers cannot use trickery to gain entry if they have no probable cause, *People* v. *Reeves*, 61 Cal. 2d 268, 273 (1964); nor can they make spy holes, *People* v. *Regalado*, 224 Cal. App. 2d 586, 589 (1964). A demand for entry will not result in a valid consent. *People* v. *Jolke*, 242 Cal. App. 2d 132, 148–49 (1966). Even assuming these conditions are met, there must still be a proper method of entry in that the officers must normally identify themselves and announce their purpose, even if they have a warrant. *See* §§ 9.03, *et seq.*

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477–78 (1971), the court examined the assumption that the warrantless entry of a man's home at night to arrest him on probable cause is per se legitimate. It described this as a "grave constitutional question" and said that the notion is in conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined "exigent circumstances." However, the court found it unnecessary to decide the question. *See Williams* v. *United States*, 334 F. Supp. 669, 670 (S.D. N.Y. 1971), citing *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970), and *Vance* v. *North*

Carolina, 432 F.2d 914, 990–91 (4th Cir. 1970).

However, officers may seek interviews with suspects or witnesses at a home. *People* v. *Haven*, 59 Cal. 2d 713, 717 (1963). What they observe when suspect voluntarily opens the door or invites officers in may provide probable cause. *See Fraher* v. *Superior Court*, 272 Cal. App. 2d 155, 163 (1969), disapproved in another respect in *People* v. *Fein*, 4 Cal. 3d 747, 754–55 (1971).

§ 9.02: *Detached Garage Protected From Search*

See § 2.28, *supra*.

In *People* v. *Medina*, 7 Cal. 3d 30, 40 (1972), it was said, "The degree of intrusion of a garage is significantly less than that of a man's house although both are subject to Fourth Amendment protections." *Medina* distinguished *People* v. *Hobbs*, 274 Cal. App. 2d 402, 406 (1969), wherein it was said that the garage should be entitled to the same degree of constitutional protection of the privacy of its contents as the house itself enjoys. *See too People* v. *Verbiesen*, 6 Cal. App. 3d 938, 943 (1970).

It had previously been recognized that police could enter a garage where it was not a "private" area and used in common with other persons as well. *See People* v. *Terry*, 70 Cal. 2d 410, 426 (1969). Where contraband may be seen in the garage in plain sight, no warrant is needed to seize it. *People* v. *Maltz*, 14 Cal. App. 3d 381, 397 (1971) (to seize the contraband, officer put his hand 10 to 12 inches into garage through hole in wall). *See too United States* v. *Knight*, 451 F.2d 275, 278–79 (5th Cir. 1971) (entry of garage without warrant).

§ 9.03: *Request for Admittance and Forcible Entry*

Penal Code sections 844 and 1531 authorize police officers to make a forcible entry into a house for the purpose of effecting an arrest or executing a search warrant if the officers first comply with the following announcement rules:

(1) identify themselves as police officers;
(2) demand admittance,
(3) explain the purpose for which their admittance is desired.

Although all of these statutory prerequisites are not specifically spelled out in both sections 844 and 1531, since the two sections are considered to be identical in principle, the same announcement rules apply as to both. *Greven* v. *Superior Court*, 71 Cal. 2d 287, 292 (1969).

The sections are inapplicable to abandoned houses, garages or

open business premises. *People* v. *James*, 17 Cal. App. 3d 463, 467 (1971). The Supreme Court has left open the question of whether there has to be a "knocking" to enter a bedroom as well as the house itself. *People* v. *King*, 5 Cal. 3d 458, 464 (1971).

> As explained in *Greven* (*supra* at 292): "Announcement rules such as that set forth in section 844 rest upon a doctrinal base exhibiting two related aspects. One of these reflects 'the reverence of the laws for the individual's right of privacy in his house.' [Citing cases.] The other, which is certainly of equal importance and relevance but is less frequently invoked to aid in the resolution of particular cases, is the policy discouraging where possible the creation of situations conducive to violence. . . ." (Footnotes omitted.)

The court alluded to the possibility that officers might be mistaken, in an unannounced intrusion, for someone with no right to be there.

§ 9.04: *"Identity"—Strict Compliance*

It is the presence of the second aspect which requires that compliance with section 844 include, at the very least, an effort by police officers to *identify themselves* as such prior to entry. *Greven* v. *Superior Court*, *supra* at 293. *See Sabbath* v. *United States*, 391 U.S. 585, 589 (1968); *People* v. *Rosales*, 68 Cal. 2d 299, 304 (1968).

The announcement of official identity is insufficient if made in a voice too weak to be heard (*Miller* v. *United States*, 357 U.S. 301 (1958)), or if made simultaneously with the entry, for the occupant has been given no reasonable opportunity to grant or refuse admittance (*People* v. *Benjamin*, 71 Cal. 2d 296, 299 (1969)).

An officer who said, "Police officers" several times adequately identified himself. *People* v. *Lawrence*, 25 Cal. App. 3d 213, 222 (1972). The repeated statement also served as an adequate demand for admittance.

§ 9.05: *"Purpose"—Substantial Compliance*

Literal compliance with the provisions of sections 844 and 1531 is not required in every case. *People* v. *Marshall*, 69 Cal. 2d 51, 55 (1968). Police officers will be deemed to have "substantially complied" with those statutes if, prior to entry, they have given notice of their presence and identified themselves as police officers, and "if the surrounding circumstances made the officers' purpose clear to the occupants or showed that a demand for admittance would be futile." *People* v. *Rosales*, 68 Cal. 2d 299, 302 (1968); *People* v. *Hill*,

19 Cal. App. 3d 306, 318 (1971). In other words, an entry is *not* necessarily unlawful because police officers fail to make an express announcement of *purpose*. *Greven* v. *Superior Court*, 71 Cal. 2d 287, 292 (1969). *See People* v. *Lee*, 20 Cal. App. 3d 982, 988 (1971); *People* v. *Sotelo*, 18 Cal. App. 3d 9, 18 (1971).

Cf. People v. *Boone*, 2 Cal. App. 3d 503, 506–07 (1969).

As was said in *People* v. *Hall*, 3 Cal. 3d 992, 997 (1971), "Where a criminal offense has just taken place within a room, the occupant may reasonably be expected to know the purpose of the police visit and an express statement of purpose may not be necessary." *People* v. *Lawrence*, 25 Cal. App. 3d 213, 223 (1972).

By repeatedly knocking, demanding entry, and identifying themselves prior to entry, police officers will be deemed to have substantially complied with sections 844 and 1531. *People* v. *Superior Court* (Johnson), 6 Cal. 3d 704, 714 (1972); *People* v. *Cockrell*, 63 Cal. 2d 659, 665 (1965); *People* v. *Carswell*, 51 Cal. 2d 602, 607 (1959); *People* v. *Martin*, 45 Cal. 2d 755, 763 (1955); *People* v. *Superior Court* (Ludeman), 274 Cal. App. 2d 578 (1969); *People* v. *Foster*, 274 Cal. App. 2d 778 (1969). Also, where prior to entry police officers identified themselves and placed defendants under arrest while facing them through a screen door, substantial compliance has been found. *People* v. *Castro*, 176 Cal. App. 2d 325 (1959); *People* v. *Littlejohn*, 148 Cal. App. 2d 786 (1957).

But *cf. People* v. *Limon*, 255 Cal. App. 2d 519 (1967), where a parole violator, looking through an open door, already knew identity of the officers. *See too People* v. *Bustamante*, 16 Cal. App. 3d 213, 218 (1971).

§ 9.06: *"Breaking"—What Constitutes*

Since the announcement requirements of section 844 are a codification of the common law, it has been held that, at the very least, the section covers unannounced entries that would be considered a "breaking" as that term is used in defining common law burglary. *People* v. *Rosales*, 68 Cal. 2d 299, 303 (1968). However, the California Supreme Court in *People* v. *Bradley*, 1 Cal. 3d 80 (1969), recently emphasized that section 844 "does not necessarily freeze the law to the rules existing at common law."

When a police officer knocks on a door to see if someone will let him in and, when the door is opened, he smells marijuana, he can arrest and enter without complying with section 844. It would run counter to common sense to have him warn a person actually engaged in the commission of an offense. *People* v. *Peterson*, 9 Cal. App. 3d 627, 632–33 (1970).

There may also be no breaking. *See People* v. *White*, 11 Cal. App. 3d 390, 396–97 (1970) (when apparent occupant opened door officer saw contraband in her purse and arrested her.) *People* v. *Lee*, 20 Cal. App. 3d 982, 990 (1971).

The section does not apply where there is consent to the entry. *Mann* v. *Superior Court*, 3 Cal. 3d 1, 9 (1970); *People* v. *Lamb*, 24 Cal. App. 3d 378, 381 (1972).

The consent of an absent wife is insufficient where the police have not complied with section 844. She could not waive the right to privacy of a husband then on the premises. *Duke* v. *Superior Court*, 1 Cal. 3d 314, 321 (1969).

§ 9.07: *The Opening of Closed but Unlocked Doors or Windows*

Opening a closed but unlocked door (*Greven* v. *Superior Court*, 71 Cal. 2d 287 (1969); *Sabbath* v. *United States*, 391 U.S. 585 (1968)); the opening of an unlatched screen door or window (*People* v. *Hamilton*, 71 Cal. 2d 176, 177–78 (1969); *People* v. *Rosales*, 68 Cal. 2d 299 (1968); *People* v. *Olivas*, 266 Cal. App. 2d 380 (1968)); or an entry effected by use of a passkey (*People* v. *Stephens*, 249 Cal. App. 2d 113 (1967); *People* v. *Arellano*, 239 Cal. App. 2d 389 (1966); *Ker* v. *California*, 374 U.S. 23, 38 (1963)), have been held sufficient "breakings" within the meaning intended by sections 844 and 1531. *Cf. People* v. *Gavin*, 21 Cal. App. 3d 408, 415 (1971) (no violation to open screen door to seize boy).

§ 9.08: *Door Ajar or Opened by Third Persons*

There has existed a conflict in the appellate decisions as to whether entry through an open door is a breaking or necessitates compliance with section 844. *People* v. *Beamon*, 268 Cal. App. 2d 61, 65 (1968) (disapproved such an entry); *People* v. *Rodriquez*, 274 Cal. App. 2d 770, 774 (1969); *People* v. *Taylor*, 266 Cal. App. 2d 14 (1968); and *People* v. *Hamilton*, 257 Cal. App. 2d 296, 300–02 (1967) (approved such an entry in principle). This conflict appears to have been resolved in *People* v. *Bradley*, 1 Cal. 3d 80 (1969). In that case, without complying with section 844, police officers entered defendant's residence at nighttime through an open front door while defendant was asleep. The Supreme Court held that even if an unannounced intrusion through an open door was lawful at com-

mon law, the entry made in this case did not satisfy the purposes of section 844 as articulated in *People* v. *Rosales*, 68 Cal. 2d 299, 304 (1968), and was therefore unlawful. The Supreme Court took pains to confine its holding to the facts of the case before it and specifically declined to state whether the announcement requirements of section 844 applied to all entries through an open door. However, the court also added the following caveat:

> " 'In order to avoid any possible illegality, however, it would be advisable for officers before entering a house through an open door to make an arrest to always demand admittance and explain the purpose for which they desire admittance unless the case comes within an established exception to section 844.' " *People* v. *Norton*, 5 Cal. App. 3d 955, 960–61 (1970).

The holding in *Bradley* appears to also cast doubt upon the validity of those decisions which have found no breaking when a door swings open only as a result of a normal knock and no other force by police officers. *See People* v. *Taylor*, 266 Cal. App. 2d 14, 18 (1968); *People* v. *Naughton*, 270 Cal. App. 2d 1, 10 (1969).

As indicated by *People* v. *Lawrence*, 25 Cal. App. 3d 213, 222 (1972), similarly suspect may be the cases which hold that if the door is opened to police officers, although not by the defendant who is to be placed under arrest, the officers may enter without warning. *People* v. *Rodriquez*, 274 Cal. App. 2d 770, 774 (1969); *People* v. *Chacon*, 223 Cal. App. 2d 739, 743 (1963); *People* v. *Baranko*, 201 Cal. App. 2d 189, 194 (1962) - *but cf. People* v. *Hamilton*, 71 Cal. 2d 176, 178 (1969).

§ 9.09: *Entry by Trick, Ruse, or Subterfuge*

If the police have no probable cause and use trickery to gain entry to a home, it is illegal. *People* v. *Reeves*, 61 Cal. 2d 268 (1964); *People* v. *Roberts*, 47 Cal. 2d 374 (1956); *People* v. *Miller*, 248 Cal. App. 2d 731, 735–40 (1967); *People* v. *Hodson*, 225 Cal. App. 2d 554, 557 (1964); *see also Gouled* v. *United States*, 255 U.S. 298 (1921), *disapproved on other grounds* in *Warden* v. *Hayden*, 387 U.S. 294 (1967).

Where police arranged for an informer to be invited into the defendant's home to observe criminal activity, the entry was not illegal. The court said that there is nothing inherently unlawful in the use of police deceit for the purpose of suppressing crime and apprehending criminals. *People* v. *Metzger*, 22 Cal. App. 3d 338, 341 (1971), citing *Sorrells* v. *United States*, 287 U.S. 435, 441–42 (1932).

See too People v. *Ramirez*, 4 Cal. App. 3d 154, 158 (1970). *Metzger* said, however, that when "artifice" and "stratagem" invade constitutional rights, the evidence must be suppressed.

In cases not too different other results have been reached. In *People* v. *Mesaris*, 14 Cal. App. 3d 71, 75 (1970), the police asked for a Sears repairman. *In re Robert T.*, 8 Cal. App. 3d 990, 993 (1970), saw a plainsclothes officer introduced as "my friend Joe" and invited in.

Mesaris disagreed with *People* v. *Superior Court* (Proctor), 5 Cal. App. 3d 109, 113 (1970). *See too People* v. *Lopez*, 269 Cal. App. 2d 461 (1968). Before *Mesaris* it had been the rule that if prior to an entry police officers have probable cause to arrest the occupants for a felony, and if the door is opened by the defendant as the result of a ruse, subterfuge or trickery, unaccompanied by any exercise of force by the peace officer, the officer may enter without official warning. *People* v. *Superior Court* (Proctor), 5 Cal. App. 3d 109, 113 (1970); *Ponce* v. *Craven*, 409 F.2d 621, 626 (9th Cir. 1969); *People* v. *Coleman*, 263 Cal. App. 2d 697 (1968); *People* v. *Quilon*, 245 Cal. App. 2d 624 (1966); *People* v. *Brooks*, 234 Cal. App. 2d 662 (1965); *People* v. *Lawrence*, 149 Cal. App. 2d 435 (1957); *People* v. *Sanford*, 265 Cal. App. 2d 960 (1968).

In *People* v. *Veloz*, 22 Cal. App. 3d 499, 502–03 (1971), the court did not follow *Mesaris* but elected to adhere to the cited line of cases. It permitted entry by ruse where there is probable cause and found no breaking requiring that section 844 be invoked.

In *Mann* v. *Superior Court*, 3 Cal. 3d 1, 9 (1970), it was held that entry was not gained by fraud. The officers did not imply that they were invited guests by knocking shortly after guests had entered. There was no positive act of misrepresentation. *See too People* v. *Schad*, 21 Cal. App. 3d 201, 206–07 (1971) (officer complied with 844 but had beard and mustache and did not wear uniform or business suit; no illegality.)

If there is no entry but merely a ruse to draw the person out of the house, this is permissible. *People* v. *Rand*, 23 Cal. App. 3d 579, 582–83 (1972); *People* v. *Tahtinen*, 210 Cal. App. 2d 755, 761 (1962).

§ 9.10: *"Presence"—Arrestee Must Be on the Premises*

It should be noted parenthetically that section 844 does not permit a forcible entry in any case unless the person arrested is, or is reasonably believed to be, within the structure to be entered. *Greven* v. *Superior Court*, 71 Cal. 2d 287, 293 n.9 (1969) (early morning

hours entry); *People* v. *Marshall,* 69 Cal. 2d 51, 56 (1968) (entry after observation of narcotics dealing from outside the premises); *People* v. *Carswell,* 51 Cal. 2d 602 (1959) (calling at a time when suspect likely to be home from work); *People* v. *Nash,* 261 Cal. App. 2d 216 (1968) (defendant's car parked outside house); *People* v. *Cox,* 263 Cal. App. 2d 176 (1968) (*disapproved on other grounds* in *Greven, supra*) (reasonable belief defendant on premises, although no answer to knock and identification); *Vaillancourt* v. *Superior Court,* 273 Cal. App. 2d 791 (1969) (when the prosecution fails to produce the evidence showing the officers had reasonable grounds to believe the defendant was inside, the entry cannot be justified); *People* v. *Adkins,* 273 Cal. App. 2d 196 (1969). (officer knowing such facts not called as witness); *People* v. *Cagle,* 21 Cal. App. 3d 57, 65 (1971) (belief must be based on legally obtained evidence).

§ 9.11: *Noncompliance—Where Excused*

The most common grounds which are available to excuse noncompliance with the announcement rules of sections 844 and 1531 are when a police officer acts on a reasonable and good faith belief that compliance would increase his peril, frustrate an arrest, or permit the destruction of evidence. *People* v. *Rosales,* 68 Cal. 2d 299, 305 (1968).

Sections 844 and 1531 are said to be a codification of the common law. *People* v. *Rosales, supra* at 303; *Miller* v. *United States,* 357 U.S. 301 (1958). Consistent with this view, *People* v. *Maddox,* 46 Cal. 2d 301 (1956), first held that compliance with section 844 is not required if the officer's peril would be increased or the arrest frustrated. Cases subsequent to *Maddox* extended excuse for noncompliance to include the prevention of destruction of evidence, relying on the general propensity of suspects to destroy evidence when confronted by police officers. *See People* v. *Gastelo,* 67 Cal. 2d 586 (1967), and *People* v. *De Santiago,* 71 Cal. 2d 18 (1969). *Ker* v. *California,* 374 U.S. 23 (1963), approved the principle of this latter type of case under the Fourth Amendment standards of reasonableness. However, in *People* v. *Gastelo, supra,* the California Supreme Court established a rule which represented a marked departure from prior law. *Gastelo* held that a police officer's belief that compliance was excused must be based upon the specific facts of each case. "It cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape, or destroy

evidence." *People* v. *Rosales, supra* at 305. Moreover, the reason for entry in such cases must be in addition to those which have convinced the officers that they have probable cause to arrest for a felony. *People* v. *De Santiago, supra* at 30. *People* v. *Marquez,* 273 Cal. App. 2d 341 (1969); *Martinez* v. *Superior Court,* 273 Cal. App. 2d 413 (1969).

As aforestated, although each case depends upon the sum of its particular facts, some other examples of circumstances said to excuse noncompliance may be useful as guidance. (§§ 9.12–9.16.) It is proper for a search warrant to authorize noncompliance. *Parsley* v. *Superior Court,* 28 Cal. App. 3d 372, 379 (1972).

§ 9.12: *Assumed Flight or Destroying of Evidence*

People v. *Maddox,* 46 Cal. 2d 301 (1956) (knocking was followed by voice inside saying, "Wait a minute," and the sound of retreating footsteps); *People* v. *Carrillo,* 64 Cal. 2d 387 (1966) (entry followed knock and observation of man moving rapidly through kitchen); *People* v. *Cooper,* 17 Cal. App. 3d 1112, 1121 (1971) (officer saw destruction of narcotics through window); *People* v. *Fernandez,* 255 Cal. App. 2d 842 (1967) (after knocking, officers saw shadow come to door and then move to the rear of the building); *Kinsey* v. *Superior Court,* 263 Cal. App. 2d 188 (1968) (after occupants were aware that men were at door but did not respond after five minutes, officers heard shuffling or rustling noise); *People* v. *Morales,* 259 Cal. App. 2d 290 (1968) (officers saw defendant brace himself against entry door and knew wife in apartment would have opportunity to destroy evidence); *People* v. *Gallup,* 253 Cal. App. 2d 922 (1967), and *People* v. *Phillips,* 240 Cal. App. 2d 197 (1966) (after learning of the officers' identity, defendants attempted to or slammed the door); *People* v. *Scott,* 259 Cal. App. 2d 268 (1968) (defendant arrested outside apartment sounded horn of car to warn occupants on premises); *People* v. *Beamon,* 268 Cal. App. 2d 61 (1968) (woman outside premises saw officers and ran inside defendant's apartment to warn); *People* v. *Martinez,* 264 Cal. App. 2d 679 (1968) (officer told by other officer that defendant-parolee was escaping through window); *People* v. *Clay,* 273 Cal. App. 2d 279 (1969) (running inside house; " 'It's the police' "; sound of shot); *People* v. *Vasquez,* 1 Cal. App. 3d 769, 775 (1969) (defendant attempted to close door when the officers identified themselves); *People* v. *Gonzales,* 14 Cal. App. 3d 881, 886 (1971) (officer had information that defendant and his wife had specifically resolved to

dispose of the evidence in the event of police intrusion). *People* v. *Calvin,* 19 Cal. App. 3d 14, 22 (1971) (heroin was being cut over an open toilet and one suspect had attempted to dispose of evidence before); *People* v. *Lee,* 20 Cal. App. 3d 982, 989 (1971).

§ 9.13: *Armed Suspect*

An exigent circumstance excusing compliance with Penal Code sections 844 and 1531 is the officers' confrontation with a dangerous defendant. Thus, in *People* v. *Smith,* 63 Cal. 2d 779 (1966), and *People* v. *Gilbert,* 63 Cal. 2d 690 (1965), officers were in fresh pursuit of gun-wielding defendants; in *People* v. *Hammond,* 54 Cal. 2d 846 (1960), officer knew that defendant was armed, was likely to use force to resist, and was under the influence of heroin; and in *People* v. *Robinson,* 269 Cal. App. 2d 789 (1969), officers knew that someone on the premises had been spraying the area with bullets. However, the information that a person is or is likely to be armed must not be stale. *People* v. *Kanos,* 70 Cal. 2d 381 (1969)

§ 9.14: *Lack of Response to Knock*

Although some cases suggested the contrary (*People* v. *Cox,* 263 Cal. App. 2d 176 (1968); *People* v. *Valles,* 197 Cal. App. 2d 362 (1961)), it is now settled that even where the defendant is believed inside, mere silence in response to knocking is of itself insufficient to justify a forced entry. *Greven* v. *Superior Court,* 71 Cal. 2d 287, 294–95 (1969); *People* v. *Norton,* 5 Cal. App. 3d 955, 962 (1970). A forced entry is lawful in such a situation only after the police officers have identified themselves and reasonably believe the person inside is intentionally not responding to their knocking. *Greven* v. *Superior Court, supra; People* v. *Carswell,* 51 Cal. 2d 602 (1959); *People* v. *Stephens,* 249 Cal. App. 2d 113 (1967); *Vaillancourt* v. *Superior Court,* 273 Cal. App. 2d 791 (1969). There is some authority that even such an entry is unlawful, absent other exigent circumstances, where the time period after knocking and identification is only a matter of seconds. *People* v. *Cain,* 261 Cal. App. 2d 383 (1968); *cf. People* v. *Nash,* 261 Cal. App. 2d 216 (1968).

§ 9.15: *Contemporaneous Commission of a Felony*

In *People* v. *De Santiago,* 71 Cal. 2d 18, 29–30 (1969), it was held that an officer's knowledge or belief that a felony is being committed in the residence at the time relates to probable cause for arrest and not to the imminence of disposal of evidence. "The reason for entry without announcement must be additional to the basic reason

for entry." However an express statement of the purpose of the police visit may not be necessary. *People* v. *Hall,* 3 Cal. 3d 992, 997 (1971). Also, if the officer's knowledge or belief arises to the point that he sees the offense being committed through an open door, then Penal Code 844 is not applicable. *People* v. *Lee,* 20 Cal. App. 3d 982, 990 (1971).

§ 9.16: *To Render Aid*

An infrequently invoked, although valid reason which also excuses noncompliance with section 844, is when police officers reasonably and in good faith believe that an entry is necessary in order to render aid to a person in distress inside the house. *People* v. *Roberts,* 47 Cal. 2d 374 (1956) (officers knocked, received no response and heard moaning from inside); *People* v. *Clark,* 262 Cal. App. 2d 471 (1968) (screams of "help" from woman and information that she was forced into apartment); *People* v. *Roman,* 256 Cal. App. 2d 656 (1967) (officers investigating child-beating complaint, after knocking and door opened, saw child apparently unconscious on the floor); *People* v. *Neth,* 5 Cal. App. 3d 883, 887 (1970) (officer searched premises to discover what kind of poison had been taken).

The State Supreme Court recently reiterated that necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose. *People* v. *Smith,* 7 Cal. 3d 282, 285 (1972).

However, the court stressed in *Smith* and in *Horack* v. *Superior Court,* 3 Cal. 3d 720, 725 (1970), that there must be a showing of true necessity—that is, an imminent and substantial threat to life, health, or property. In the absence of this showing, the constitutionally guaranteed right to privacy must prevail. In *Smith* an officer was said to have erred in entering an apartment to locate the mother of a six-year-old girl who had been left alone and who had been given temporary shelter by a neighbor. *See too* § 8.06 and § 13.13.

§ 9.17: *Raising Noncompliance*

Two special considerations relative to the raising of an objection to noncompliance with Penal Code sections 844 and 1531 are here pertinent.

§ 9.18: *The Requirement of an Objection*

One of the more immediate impacts of *People* v. *Gastelo,* 67 Cal. 2d 586 (1967), has been in the area of the necessity of an objection

to raise section 844 error. In *People* v. *Flores,* 68 Cal. 2d 563 (1968), the Supreme Court had adhered to the traditional view that the failure to object at trial to an entry in violation of 844 waived the ability to raise the issue on appeal. In *People* v. *De Santiago,* 71 Cal. 2d 18 (1969), however, this holding was reconsidered in light of the dramatic departure from prior law represented by *Gastelo,* and *Flores* was disapproved. It is now the rule that the failure to have objected at trial does not preclude raising the issue on appeal in all cases tried prior to October 30, 1967, the date *Gastelo* was decided. *People* v. *De Santiago, supra; People* v. *Berutko,* 71 Cal. 2d 84, 89 (1969); *People* v. *Hamilton,* 71 Cal. 2d 176, 178 (1969); *People* v. *Benjamin,* 71 Cal. 2d 296, 298–99 (1969). After this date an objection is required. *People* v. *King,* 5 Cal. 3d 458, 464 (1971); *Pate* v. *Municipal Court,* 11 Cal. App. 3d 721, 726 (1970).

§ 9.19: *Applicable to Parolees*

The fact that a defendant is a parole violator does not excuse noncompliance with section 844 even though basic Fourth Amendment guarantees may not apply as fully to such a person. *See People* v. *Limon,* 255 Cal. App. 2d 519 (1967). The protection of section 844 exists because the Legislature has expressly provided that an order to retake a parolee must be executed "in like manner as ordinary criminal process." Pen. Code § 3061; *People* v. *Rosales,* 68 Cal. 2d 299, 302 (1968). Even an escape from custody does not of itself justify entrance into a house to make an arrest without explanation of purpose and demand for admittance. Pen. Code § 855; *People* v. *Kanos,* 70 Cal. 2d 381, 385 (1969); *People* v. *Arellano,* 239 Cal. App. 2d 389, 390–92 (1966).

§ 9.20: *Legal Effect of an Unlawful Entry*

An entry in violation of sections 844 and 1531 renders any evidence seized inadmissible and warrants a reversal of the judgment where that evidence was crucial to the conviction. *People* v. *Berutko,* 71 Cal. 2d 84, 89 (1969); *People* v. *Hamilton,* 71 Cal. 2d 176, 178 (1969); *Duke* v. *Superior Court,* 1 Cal. 3d 314, 325 (1969). However, a reversal on grounds of noncompliance does not preclude the prosecution from developing on retrial further specific facts known to the officer demonstrating the validity of the entry. *People* v. *Berutko, supra* at 90; *People* v. *Hamilton, supra.*

Where noncompliance is evident, there must be an express or implied determination by the trial court that a failure to comply was excused on the basis of specific facts known to the officer.

People v. *Kanos,* 70 Cal. 2d 381, 385–86 (1969). Thus, where the record is silent as to this point (*People* v. *Berutko, supra*), or the trial court relies on an erroneous ground (*People* v. *Kanos, supra*), a higher court cannot assume as a matter of law that compliance was excused.

CHAPTER TEN

RULES FOR REASONABLE SEARCHES

§ 10.01: *The Search Must Be "Reasonable"*

As noted *supra,* § 1.03, the Fourth Amendment's immunity is granted not against all searches and seizures, but only against those that are "unreasonable," and thus unconstitutional. *Go-Bart Co.* v. *United States,* 282 U.S. 344, 357 (1931). The search is "reasonable" if made under a valid search warrant, properly executed, *supra,* Chapter Two. It is also "reasonable" if it satisfies the requirements of a search incident to a lawful arrest, §§ 8.01, *et seq.*

§ 10.02: *The General Standard of "Reasonableness"*

There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances and on the total atmosphere of the case. *Go-Bart Co.* v. *United States,* 282, U.S. 344, 357 (1931); *People v. Berutko,* 71 Cal. 2d 84, 93 (1969); *People* v. *Ingle,* 53 Cal. 2d 407, 412 (1960). Thus in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), *overruled on other grounds* in *Chimel* v. *California,* 395 U.S. 752 (1969), the court conceded that it had no "ready litmus-paper test" for reasonableness.

However, unless California's standard of "reasonableness" is higher than the federal standard, the standard or test of reasonableness is that required by the Fourth Amendment to the United States constitution. *See, e.g., Cooper* v. *California,* 386 U.S. 58, 61–62 (1967), and *People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123, 128 (1969).

§ 10.03: *A Question Independent of the Officer's Subjective Intent*

Reasonableness of the search must be resolved on the basis of an *objective* criterion. Thus, in *People* v. *Castro,* 249 Cal. App. 2d 168, 176 (1967), where the search warrant was defective, the court stated:

> "[I]t is arguable that this entry was illegal because the officers' subjective intent was to search pursuant to an invalid warrant, rather than to arrest a man who was subject to a lawful nonwarrant arrest. For all we know, they might not have made an arrest if the search had produced no evidence. but we do not think any

such proposed subjective intent renders unlawful an entry and seizure which the law authorized upon the basis of facts then within the knowledge of the officers."

See also People v. *Jones,* 255 Cal. App. 2d 163, 169 (1967) ("Regardless of Lieutenant Hawkins' testimony as to his state of mind at the time of the search . . . the search was reasonable."); *People* v. *Sirak,* 2 Cal. App. 3d 608, 611 (1969); *People* v. *Richardson,* 6 Cal. App. 3d 70, 76 (1970); *People v. Superior Court* (Johnson), 15 Cal. App. 3d 146, 152 (1971).

§ 10.04: *Necessity of a Search Warrant Whenever Practical*

In *United States* v. *Rabinowitz,* 339 U.S. 56, 66 (1950), the Supreme Court stated that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Thus, it was recently acknowledged in California that where an arrest was effectuated, "to require . . . that one officer go to obtain a warrant while the other remains camped by the marijuana [or other contraband] would further no recognizable interest; it would magnify technicality at the expense of reason." *People* v. *Kampmann,* 258 Cal. App. 2d 529, 533 (1968). *But see People* v. *Marshall,* 69 Cal. 2d 51, 61 (1968); *People* v. *Fein,* 4 Cal. 3d 747, 755 (1971).

However, in *Chimel* v. *California,* 395 U.S. 752 (1969), the Supreme Court rejected its pronouncements in *Rabinowitz* which, according to the court, could "withstand neither historical nor rational analysis." *Ibid.* at 760. It was then held (*citing McDonald* v. *United States,* 335 U.S. 451, 455–56 (1948); *Agnello* v. *United States,* 269 U.S. 20, 33 (1925); and *Terry* v. *Ohio,* 392 U.S. 1 (1968)) that the general requirement that a search warrant be obtained is not so lightly to be dispensed with. Accordingly, where defendant is properly arrested in a house, officers may not, as an incident to that arrest, search beyond the arrestee's person and the area from within which he might obtain a weapon or destroy evidence.

Specifically excepted from its application was the search of automobiles, which may be searched without warrant where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant is sought. *Ibid.* at 764, n.9. *Cf. Harris* v. *United States,* 390 U.S. 234 (1968), and *Virgil* v. *Superior Court,* 268 Cal. App. 2d 127 (1968), discussed *infra,* 12.03.

§ 10.05: *Technical Violations Will not Vitiate a Reasonable Search*

The California Supreme Court, speaking unanimously in *People* v. *Roberts,* 47 Cal. 2d 374, 380 (1956), concluded that the "fact that abuses sometimes occur during the course of criminal investigations should not give a sinister coloration to procedures which are basically reasonable."

In *People* v. *Willard,* 238 Cal. 2d App. 292 (1965), the court concluded at 302;

> "Both from what the California cases have said on the subject and what they have not said, we apprehend in them the underlying principle that . . . the search does not necessarily become unreasonable and illegal because the police, while not entering the house, may be on the premises when they make [an] observation."

It was thus held that where officers commit technical trespass, their act will not vitiate the reasonableness of a subsequent search where the occupants have not reserved for their personal privacy the area entered. *Ibid.* at 307. *People* v. *Terry,* 70 Cal. 2d 410, 427 (1969) ("a single trespass without more does not invalidate a subsequent search and seizure"). But *cf. People* v. *Edwards,* 71 Cal. 2d 1096 (1969), where *Willard* was followed and the defendant's expectation in the privacy of his trashcan found to be reasonable. *See People* v. *Berutko,* 71 Cal. 2d 84, 91–94 (1969), where *Willard* was distinguished by the fact that the officer's observations were made from a common area available to other tenants of the apartment; *People* v. *Konkel,* 256 Cal. App. 2d 632, 635 (1967) ("The fact that there may have been a technical trespass under the circumstances does not make the search unlawful or unreasonable."); and *People* v. *Gonzales,* 214 Cal. App. 2d 168, 172–73 (1963).

Thus, it should be remembered that:

> " '[I]t is the duty of a policeman to investigate, and *we cannot say that in striking a balance between the rights of the individual and the needs of law enforcement, the Fourth Amendment itself draws the blinds the occupant could have drawn but did not.'* (Italics added.)" *People* v. *Berutko,* 71 Cal. 2d 84, 93 (1969), *quoting State* v. *Smith,* 37 N.J. 481 (1962), *cert. denied,* 374 U.S. 835 (1963).

However, equally clear is the fact that officers may not have the benefit of visual access to premises obtained by means of apertures

made or installed by the officers or third persons for the purpose of observation. *People* v. *Regalado,* 224 Cal. App. 2d 586 (1964).

Recent cases de-emphasize the question of trespass and attempt to resolve the reasonableness of the search by asking whether the accused has exhibited a reasonable expectation of privacy and whether that expectation has been violated by unreasonable governmental intrusion. *People* v. *Maltz,* 14 Cal. App. 3d 381, 394–95 (1971).

An illustration of the effect of unlawful, yet innocuous, conduct by the police on the reasonableness of a search and seizure is presented by the failure to comply with Penal Code section 841 (set out *supra,* § 4.03). A violation of that section, requiring the arrestee to be informed of the cause and authority for the arrest, does not automatically require the exclusion of evidence seized in an otherwise lawful arrest. *People* v. *Vasquez,* 256 Cal. App. 2d 342, 345–46, n.2 (1967).

Similarly, the fact that defendant is not formally placed under arrest prior to the search is immaterial where probable cause for the arrest is in fact present. " 'To hold differently would be to allow a technical formality of time to control when there has been no real interference with the substantive rights of a defendant.' " *People* v. *Cockrell,* 63 Cal. 2d 659, 666–67 (1965), *quoting Holt* v. *Simpson,* 340 F.2d 853, 856 (9th cir. 1965). *See* § 10.07, *infra,* for fuller discussion of the "contemporaneous" nature of incidental searches.

§ 10.06: *To Be Reasonable, the Search Must Be Related, or an Incident to the Arrest*

"To abide by the rule ourselves (and to clarify it for those who must work under it in the field) we are constrained to hold that *a search is not 'incidental to an arrest' unless it is limited to the premises where the arrest is made; is [substantially] contemporaneous therewith; has a definite object and is reasonable in scope." (Emphasis added.) People* v. *Cruz,* 61 Cal. 2d 861, 866 (1964). But see § 8.01.

§ 10.07: *Substantially "Contemporaneous Therewith" as to Time and Place*

It is clear that if probable cause for an arrest exists at the outset, a search *preceding* the formality of a substantially contemporaneous arrest may be "incident" thereto. *People* v. *Terry,* 70 Cal. 2d 410, 429 (1969) ("the fact that defendant's flight prevented an arrest does not alter the legality of the police officers' entry and

search"); *People* v. *Yeoman,* 261 Cal. App. 2d 338, 346 (1968), *overruled in another respect* in *People* v. *De Santiago,* 71 Cal. 2d 18, 30 (1969) (pre-*Chimel* search of apartment producing contraband other than in plain sight was incident to the arrest even though it preceded the arrest); *People* v. *Allen,* 261 Cal. App. 2d 8, 10 (1968) (fact that the search preceded arrest is immaterial where the facts, at the outset, provided probable cause for the arrest); *People* v. *Williams,* 67 Cal. 2d 226, 229 (1967) (search of defendant's vehicle was incident to arrest of defendant one block away 20 minutes after abandoning vehicle); *Caughlin* v. *Superior Court,* 4 Cal. 3d 461, 465 (1971) (after arrest in front of store arrestee directed officer to car in rear parking lot; officer looked inside to find address and saw contraband in open purse; evidence admitted as being seized "virtually contemporaneously with the arrest"); *People* v. *Maltz,* 14 Cal. App. 3d 381, 390 (1971) (search preceded arrest by moments).

A defendant has no right to be arrested at any particular time. *United States* v. *Bradley,* 455 F.2d 1181, 1187 (1st Cir. 1972).

§ 10.08: *Different Time or Place—Examples*

In *Stoner* v. *California,* 376 U.S. 483 (1964), police by their investigation were led to defendant's hotel room where, during defendant's absence, the room was searched and incriminating evidence found. Defendant was arrested in another state, two days later, and the evidence previously seized used to convict him. Among other grounds (improper entry into the hotel room) the Supreme Court held that the search could not be justified as "incidental to an arrest" since the two were unrelated in *time* and *place (citing Preston* v. *United States,* 376 U.S. 364 (1964)). *James* v. *Louisiana,* 382 U.S. 36 (1965).

Similarly in *People* v. *King,* 60 Cal. 2d 308, 311 (1963), a search at a different time (one hour) and place (several blocks) from the arrest was found not to be contemporaneous. To the same effect, *see People* v. *Shelton,* 60 Cal. 2d 740, 744 (1964), where the search, two miles from the point of arrest, was not incidental to the arrest. In *People* v. *Jackson,* 254 Cal. App. 2d 655, 659 (1967), the search of a vehicle at *9 a.m. September 22,* was not incident to the arrest at *11:30 p.m., September 21,* nor did the search take place in the "general area" of the arrest, three miles away. *See also People* v. *Burke,* 61 Cal. 2d 575 (1964). *But see People* v. *Fritz,* 253 Cal. App. 2d 7, 14–16 (1967) (search of car generally incident to arrest). *Cf. Coolidge* v. *New Hampshire,* 403 U.S. 443, 456–57 (1971) (arrest in

house did not authorize search of car in driveway).

Pre-*Chimel*, it was improper to search a dwelling where an arrest is made 15 to 20 feet outside. *Shipley* v. *California*, 395 U.S. 818 (1969). Or even when the arrest is made on the front steps. *Vale* v. *Louisiana*, 399 U.S. 30 (1970). But it was proper to search when at the time of arrest the arrestee's body was half in the doorway and half out. *People* v. *Aguirre*, 10 Cal. App. 3d 884, 892 (1970).

§ 10.09: *The Requirement of "Definite Object" or Purpose*

The object of a search incident to the arrest must be to obtain evidence of the *very offense* which the officers reasonably believe to be committed. *People* v. *Marquez*, 259 Cal. App. 2d 593, 601 (1968) (the officers could reasonably believe articles to contain narcotics; search thereof pursuant to arrest was reasonable).

§ 10.10: *The Arrest Cannot Be a Pretext for the Search*

The officers may not use the fact of an arrest as a *pretext for the search* for evidence. *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 154 (1971); *People* v. *Fein*, 4 Cal. 3d 747, 755 (1971); *Cunha* v. *Superior Court*, 2 Cal. 3d 352, 358 (1970); *People* v. *Edwards*, 71 Cal. 2d 1096 (1969). *Blazak* v. *Eyman*, 339 F. Supp. 40, 43 (D. Ariz. 1971). Thus, in *People* v. *Mickelson*, 59 Cal. 2d 448 (1963), the investigating officers had already determined that a motorist was not the robbery suspect sought but nevertheless searched the car. The court found the search invalid, stating at 454:

> "[T]he officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation. It was not justified by probable cause to make an arrest, and it cannot be justified by what it turned up. [Citation.]"

See also People v. *Haven*, 59 Cal. 2d 713, 719 (1963) (the search, not the arrest, was the real object of officers' entry into a house remote in distance to the point of detention); *People* v. *Groves*, 71 Cal. 2d 1196 (1969) (arrest of defendant in his apartment was delayed not because the officer wished to conduct an incidental search of the apartment, but because the officer hoped that defendant would lead him to defendant's accomplice; thus, the arrest was not pretext for the search); *Cunha* v. *Superior Court*, 2 Cal. 3d 352, 358 (1970); *People* v. *Deam*, 10 Cal. App. 3d 162, 166 (1970). However, that a

narcotics officer served a warrant for burglary did not establish that the arrest was a pretext. *People* v. *Honore*, 2 Cal. App. 3d 295, 302–02 (1969).

§ 10.11: *Absence of Proper Purpose—Examples*

(A number of pre-*Chimel* cases illustrate this concept, although the scope of search today would be more restrictive in most instances under *Chimel*.)

In *People* v. *Tellez*, 268 Cal. App. 2d 375 (1968), defendant executed a sale of heroin to an undercover narcotics agent in a parking lot. Two weeks later, pursuant to an arrest warrant, defendant was arrested in his home and a 45-minute search made revealing narcotics. It was held (*citing People* v. *Jackson*, 198 Cal. App. 2d 698 (1961)), that the search did *not have a definite object* and was unreasonable in scope. The court found that "the *motivation* in the search could not have been to find evidence of the earlier sale" (emphasis added) inasmuch as compelling proof was already present to support that offense (the agent's testimony). *Ibid.* at 379. *But see People* v. *Rogers*, 270 Cal. App. 2d 705 (1969), and *Skelton* v. *Superior Court*, 1 Cal. 3d 144 (1969).

Similarly, in *People* v. *Baca*, 254 Cal. App. 2d 428, 431 (1967), it was held that defendant's arrest on the premises pursuant to a fugitive warrant "could not have been made for the *purpose* of providing evidence of guilt of that crime. The officers had no legitimate *purpose* other than to arrest her as a fugitive . . . . Once they had discovered her, and she had come out of the bathroom, their *purpose* had been fulfilled. There was no need to search further once the object of the search had been found." (Emphasis added.) *See also Nugent* v. *Superior Court*, 254 Cal. App. 2d 420, 427 (1967); and *People* v. *Green*, 264 Cal. App. 2d 614 (1968) (search of vehicle was pursuant to officer's general curiosity). *Compare Lewis* v. *United States*, 385 U.S. 206 (1966), where the Supreme Court stated that the Fourth Amendment is not violated when a government agent enters pursuant to an invitation and then neither sees, hears, nor takes anything either unrelated to the business purpose of his visit (sale of marijuana) or not contemplated by the occupant.

§ 10.12: *Distinction—Evidence of Other Crimes in Open View*

To be distinguished from searches made without a definite object (§ 10.11, *supra*) are those where the officers observe from a lawful vantage point the evidence of *other crimes (or contraband)* in

open view. While this is discussed in some detail, *infra*, § 13.01, *et seq.*, a few examples will be helpful at this point.

In *People* v. *Muriel*, 268 Cal. App. 2d 477 (1968), officers were investigating what they believed to be illicit car stripping and observed narcotics paraphernalia in plain sight on the rear trunk of a vehicle; the arrests, search, and seizures were upheld. In *People* v. *Kampmann*, 258 Cal. App. 2d 529 (1968), evidence observed in defendant's apartment during a proper kidnapping investigation was found to be valid, although a subsequent search of the apartment was held improper. In *People* v. *Carmical*, 258 Cal. App. 2d 103 (1968), a weapon was observed in the possession of a felon during a narcotics investigation. *See also People* v. *Huguez*, 255 Cal. App. 2d 255, 227–28 (1967) (misdemeanor arrest, heroin in open paper bag observed by officer); and *People* v. *Jones*, 255 Cal. App. 2d 163, 170 (1967) (where marijuana observed during rape investigation was properly admitted into evidence).

The Supreme Court in *Warden* v. *Hayden*, 387 U.S. 294 (1967), *overruled Gouled* v. *United States*, 255 U.S. 298 (1921), which prohibited the seizure of "evidentiary" items; under *Gouled*, officers could seize only "instrumentalities, fruits or contraband." Under *Warden*, however, either type of evidence may now be seized where the officers are properly on the premises. *People* v. *Terry*, 2 Cal. 3d 362, 394–95 (1970).

The new rule was recently extended to permit police to seize not only evidence but potential evidence as well. *People* v. *Curley*, 12 Cal. App. 3d 732, 747 (1970).

One jurisdiction holds, however, that a seizure of private papers is still prohibited. *See Hill* v. *Philpott*, 445 F.2d 144 (7th Cir. 1971); *United States* v. *Blank*, 330 F. Supp. 783, 786 (N.D. Ohio 1971). *See too Note*, Seizure of Personal Records Violates the Fifth Amendment, 46 Tulare L. Rev. 545 (1972).

Seemingly opposed to this position is *People* v. *Thayer*, 63 Cal. 2d 635, 638, 643 (1965), *quoting Gouled* v. *United States*, 255 U.S. 298, 309 (1921): "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized . . . ." See *People* v. *Sirhan*, 7 Cal. 3d 369, 399 (1972).

§ 10.13: *Exploratory or Blanket Searches Prohibited*

The appellate courts often articulate the "definite object" requirement of a search in different ways. Thus, in addition to the rules stated *supra*, § 10.10, it is often said that without probable cause for an arrest, the antecedent search is nothing more than "exploratory" and therefore unreasonable. *See Parrish* v. *Civil Service Commission*, 66 Cal. 2d 260 (1967); *People* v. *Gale*, 46 Cal. 2d 253 (1956) (Border search of automobiles as part of routine searches "to curb the juvenile problem" did not justify search); *People* v. *Schaumloffel*, 53 Cal. 2d 96 (1959) (search of doctor's office was general and exploratory, and the records seized were unconnected with an abortion for which the arrest was made); *but cf. People* v. *Rogers*, 270 Cal. App. 2d 705 (1969), and *Skelton* v. Superior Court, 1 Cal. 3d 144 (1969).

§ 10.14: *"Reasonable in Scope"*

Assuming the existence of a valid arrest, the search undertaken is not incidental thereto unless it is "reasonable in scope." *People* v. *Cruz*, 61 Cal. 2d 861, 866 (1964). The proper scope of a search of a *person* (§ 10.15), *premises* (§ 8.01), and *automobile* (§§ 12.04–12.06) are discussed separately.

§ 10.15: *Search of the Person*

It is axiomatic that a search of the person incidental to a lawful arrest is valid. *People* v. *Ross*, 67 Cal. 2d 64, 69 (1967); *People* v. *Terry*, 2 Cal. 3d 362, 393 (1970). The rule was recently reaffirmed by the United States Supreme Court in *Chimel* v. *California*, 395 U.S. 752 (1969), where the court stated: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." *Ibid.* at 762–63. (*Chimel's* limitation on the proper scope of a search in the immediate area of the arrest is discussed elsewhere.)

§ 10.16: *Proper v. Improper Search—Examples*

" 'Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime.' " *People* v. *Jones*, 255 Cal. App. 2d 163, 168–69 (1967), *quoting Preston* v. *United States*, 376 U.S. 364, 367 (1964). Furthermore, a search of a person for the

purpose of uncovering evidence of *other* crimes is generally incident to a valid arrest, notwithstanding what has been said *supra*, § 10.11, regarding proper object or purpose of the search. *See People* v. *Sirak*, 2 Cal. App. 3d 608, 611 (1969).

Thus, where there are sufficient facts to arrest defendant, the search of his *pockets* for the fruits of a burglary or robbery is proper incident to the arrest. *People* v. *Davis*, 260 Cal. App. 2d 186, 189 (1968). The same rule applies to the search of a suspect's *pockets* or *hands* during the course of a narcotics arrest. *People* v. *Rodriquez* 274 Cal. App. 2d 770 (1969) (clenched fist); *People* v. *Welch*, 260 Cal. App. 2d 221 (1968) (pocket); *People* v. *Duarte*, 254 Cal. App. 2d 25, 29 (1967) (pocket); *People* v. *Carmical*, 258 Cal. App. 2d 103 (1968) (pocket); *People* v. *Monreal*, 264 Cal. App. 2d 263, 265 (1968).

In *People* v. *Duncan*, 51 Cal. 2d 523 (1959), although defendant was arrested for misdemeanor vagrancy, it was held that the search of his person was proper by virtue of recent rape-murders in the area augmented by defendant's conflicting stories. *Cf.* § 12.16, *infra*, however, which indicates that, generally, a misdemeanor arrest (*e.g.*, a traffic offense) does not warrant a general search of the person, only at most a superficial search for weapons.

It has been held proper to search a defendant's suitcase on his arrest. *United States* v. *Mehciz*, 437 F.2d 145, 147 (9th Cir. 1971); *People* v. *Williams*, 174 Cal. App. 2d 175, 183 (1959) (pre-*Chimel* search of arrestee's handbag sustained).

A search of a person at the time of his *booking* has always been considered contemporaneous to his arrest and is a reasonable search. *People* v. *Martin*, 23 Cal. App. 3d 444, 447 (1972); *People* v. *Mercurio*, 10 Cal. App. 3d 426, 430 (1970); *People* v. *Rogers*, 241 Cal. App. 2d 384, 389 (1966); *People* v. *Munsey*, 18 Cal. App. 3d 440, 448 (1971). *See too* Gov. Code § 26640. The practice was said to be "ordinarily reasonable" in *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 208 (1972).

A search for narcotics has been upheld where the person was arrested for alcoholic intoxication. *People* v. *Steeples*, 22 Cal. App. 3d 993, 996 (1972).

CHAPTER ELEVEN

STOP AND FRISK

§ 11.01: *The Right To Detain or Question*

If a police officer has some basis for suspicion, but he does not have probable cause to arrest or to search, are there still some actions he can take against a suspect? Can he make lesser intrusions on privacy than a full arrest and search? The courts have, in general, permitted such intrusions when they are balanced by a matching quantity of information.

The United States Supreme Court remarked in *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968):

> "Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime."

The court said (at 22):

> ". . . a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. . . ."

The United States Supreme Court thus permitted the continued application of an established California rule, described as follows in *People* v. *Mickelson*, 59 Cal. 2d 448, 450–51 (1963)

> "In this state, however, we have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists in the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make a arrest, the officer may arrest the suspect and conduct a reasonable inciden-

tal search. [Citations.]"

This rule applies both to vehicle stops and to confrontations with pedestrians. In fact, the California rule was first established in vehicle cases. *See People* v. *King,* 175 Cal. App. 2d 386, 390 (1959).

It was preceded by statements in the cases that "it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." *People* v. *Michael,* 45 Cal. 2d 751, 754 (1955); *People* v. *Martin,* 45 Cal. 2d 755, 761 (1955).

This rule was then broadened to permit detention. *People* v. *Manis,* 268 Cal. App. 2d 653, 662 (1969).

As was said in *People* v. *One 1960 Cadillac Coupe,* 62 Cal. 2d 92, 96 (1964):

> " 'We do not believe that our rule permitting temporary detention for questioning conflicts with the Fourth Amendment. It strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified.' "

Some questioning and social pleasantries may not require a formal showing of justification, but if the cirumstances indicate a detention, some restriction of the citizen's liberty, then the courts will insist on some degree of cause. As was said in *People* v. *Cowman,* 223 Cal. App. 2d 109, 116 (1963), *quoting from Hood* v. *Superior Court,* 220 Cal. App. 2d 242, 245 (1963):

> " '[E]ven though the circumstances authorized such "temporary detentions" may be "short of probable cause to make an arrest" [citation] nevertheless there must exist *some* suspicious or unusual circumstance to authorize even this limited invasion of a citizen's privacy. . . .' " *See People* v. *One 1960 Cadillac Coupe,* 62 Cal. 2d 92, 96 (1964).

In *Batts* v. *Superior Court,* 23 Cal. App. 3d 435, 439 (1972), it was said that knocking on the window of a van was not a detention. When the window was opened, there was a smell of marijuana, which justified arrest.

The United States Supreme Court recently reaffirmed the Stop and Frisk rules in *Adams* v. *Williams,* 32 L. Ed 2d 612 (1972), where it said:

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. . . ."

§ 11.02: *Circumstances Justifying Temporary Detention*

As was said in *People* v. *Henze,* 253 Cal. App. 2d 986, 988 (1967):

> "While the circumstances which will justify temporary detention have not been articulated with precision, still from the cases we have acquired a rough picture of the situations in which such a detention is warranted. First, there must be a rational suspicion by the peace officer that some activity out of the ordinary is or has taken place. Next, some indication to connect the person under suspicion with the unusual activity. Finally, some suggestion that the activity is related to crime."

See too People v. *Manis,* 268 Cal. App. 2d 653, 665–66 (1969), where the court made a list of concrete examples to give form and content to the general idea of temporary detention.

In *People* v. *Superior Court* (Acosta), 20 Cal. App. 3d 1085, 1088–91 (1971), the court examined the statement, " 'Where the events are as consistent with innocent activity as with criminal activity, a detention based on those events is unlawful. . . .' " made in *Irwin* v. *Superior Court,* 1 Cal. 3d 423 (1969). The *Acosta* court declined to conclude that detention is allowed only where the probability of criminal behavior outweighs the probability of innocence.

§ 11.03: *Factors Justifying or Tending To Support Temporary Detention*

The following factors have been used to help justify temporary detention. Each alone may be insufficient, but they have been regarded as significant by the courts.

NIGHT

People v. *Henze,* 253 Cal. App. 2d 986, 989 (1967). ("The law in many instances draws a sharp distinction between the controls which may be exercised by peace officers during the nighttime and those to which they are limited during daylight hours, and most of the cases upholding temporary detention for inves-

tigation and questioning have arisen out of incidents which occurred at night.")

People v. *Rosenfeld,* 16 Cal. App. 3d 619, 622 (1971); *People* v. *Jackson,* 164 Cal. App. 2d 759, 761 (1958); *People* v. *Flores,* 23 Cal. App. 3d 23, 27 (1972). *See too* § 7.15.

DRIVING

Erratic or Suspicious Driving

People v. *Anguiano,* 198 Cal. App. 2d 426 (1961); *Wilson* v. *Porter,* 361 F.2d 412 (9th Cir. 1966); *People* v. *Williams,* 263 Cal. App. 2d 756, 759 (1968); *Cornforth* v. *Department of Motor Vehicles,* 3 Cal. App. 3d 550, 552 (1970).

Slow Speed of Vehicle

Williams v. *Superior Court,* 274 Cal. App. 2d 709, 712 (1969).

Traffic Violation or Equipment Violation

People v. *Vermouth,* 20 Cal. App. 3d 746, 752 (1971) (cracked tail light); *People* v. *Superior Court* (Fuller), 14 Cal. App. 3d 935, 942 (1971); *People* v. *Clayton,* 13 Cal. App. 3d 335, 337 (1970); *People* v. *Villafuerte,* 275 Cal. App. 2d 531, 543–35 (1969); *People* v. *Bordwine,* 268 Cal. App. 2d 290, 292 (1968).

OTHER VEHICLE INCIDENTS

Illegal Parking

Bramlette v. *Superior Court,* 273 Cal. App. 2d 799, 804 (1969), questioned in another respect in *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699, 703 (1971).

Sitting in a Parked Car at an Unusual Time and Place

People v. *Martin,* 46 Cal. 2d 106, 108 (1956); *People* v. *Cowman,* 223 Cal. App. 2d 109, 118 (1963); *People* v. *Mosco,* 214 Cal. App. 2d 581, 585 (1963).

Vehicle Resembles One Used in Crime

People v. *Watson,* 12 Cal. App. 3d 130, 134–135 (1970); *People* v. *Turner,* 2 Cal. App. 3d 632 (1969). *See too* § 7.03.

Car at Unusual Place

People v. *Beverly,* 200 Cal. App. 2d 119, 125 (1962) (near closed wrecking yard); *People* v. *Martin,* 46 Cal. 2d 106, 108 (1956) (lover's lane); *People* v. *Ellsworth,* 190 Cal. App. 2d 844, 847 (1961) (parked on secluded and lonely road); *People* v. *Sackett,* 260 Cal. App. 2d 307 (1968) (near commercial area with prior burglaries); *People* v. *Lovejoy,* 12 Cal. App. 3d 883, 886 (1970) (near sheriff's warehouse previously burglarized); *In re Elizabeth H.,* 20 Cal. App. 3d 323, 327

(1971) (car in country at 4:00 a.m. with four juveniles); *cf. People* v. *Williams,* 20 Cal. App. 3d 590, 592 (1971) (improper to detain because car at rest area on highway and turned on lights).

ACTIVITY OF INDIVIDUAL

Suspect Fits Description of Felon

People v. *Adam,* 1 Cal. App. 3d 486, 489 (1969); *People* v. *Atmore,* 13 Cal. App. 3d 244, 246 (1970); *People* v. *Crump,* 14 Cal. App. 3d 547, 551 (1971); *People* v. *King,* 175 Cal. App. 2d 386, 390 (1959); *People* v. *Ouellette,* 271 Cal. App. 2d 33, 36 (1969) (AWOL serviceman); *People* v. *Heard,* 266 Cal. App. 2d 747 (1968); *cf. People* v. *Collins,* 1 Cal. 3d 658 (1970).

Flight

People v. *Martin,* 46 Cal. 2d 106, 108 (1956); *People* v. *Sartain,* 268 Cal. App. 2d 486, 490 (1968); *People* v. *Collom,* 268 Cal. App. 2d 242, 246 (1968); *People* v. *King,* 270 Cal. App. 2d 817, 821 (1969).

Hiding

People v. *Cruppi,* 265 Cal. App. 2d 9, 12 (1968). *Cf. Williams* v. *Superior Court,* 274 Cal. App. 2d 709, 712 (1969) (attempt to avoid police).

Hitchhiking

People v. *Superior Court* (Harris), 273 Cal. App. 2d 459, 462 (1969).

Defendant Carrying Wire

People v. *Livingston,* 4 Cal. App. 3d 251, 257 (1970) (officers suspected auto thefts).

Walking on Darkened Street in Neighborhood with Numerous Burglary and Prowler Complaints

People v. *Caylor,* 6 Cal. App. 3d 51, 56 (1970). *See too People* v. *Woods,* 7 Cal. App. 3d 382, 387 (1970) (walking at night where officers were investigating shots fired report); *People* v. *Manis,* 268 Cal. App. 2d 653 (1969) (walking in rain with unprotected typewriter in high frequency burglary area; changed direction on sight of officer).

Furtive Movement on Seeing Police

People v. *Martinez,* 6 Cal. App. 3d 373, 377 (1970); *People* v. *Gravatt,* 22 Cal. App. 3d 133, 137 (1971) (two men in front of bar slam trunk of car shut on sight of officer).

Youthful Appearance

Pendergraft v. *Superior Court,* 15 Cal. App. 3d 237, 241 (1971)

(hitchhiker could be runaway juvenile).

Connection to Car

If officers have *probable cause to arrest* a person and they have a rational suspicion that he may be in a car, they have a right to stop the car. *Jackson* v. *Superior Court,* 274 Cal. App. 2d 656, 661 (1969).

TYPES OF CRIMES

A Rash of Recent Burglaries in the Neighborhood

People v. *Flores,* 23 Cal. App. 3d 23, 27 (1972); *People* v. *McClain,* 209 Cal. App. 2d 224 (1962); *People* v. *West,* 144 Cal. App. 2d 214, 219 (1956).

Burglary or Robbery in Area

People v. *Anthony,* 7 Cal. App. 3d 751, 761 (1970); *People* v. *Mejia,* 272 Cal. App. 2d 486, 490 (1969); *People* v. *Williams,* 263 Cal. App. 2d 756, 759 (1968).

Casing of Service Station in Preparation for Robbery

People v. *Jackson,* 268 Cal. App. 2d 306, 310 (1968).

Burglarious Activity

People v. *Boyd,* 16 Cal. App. 3d 901, 905 (1971).

Area or Address Had Narcotic Activity

People v. *Sartain,* 268 Cal. App. 2d 486, 488–89 (1968). *But see People* v. *Moore,* 69 Cal. 2d 674 (1968).

Defendant Present During Mass Arrest at Situs for Dangerous Drugs

People v. *Roach,* 15 Cal. App. 3d 628, 632 (1971).

Apparent Narcotic Activity

People v. *Beal,* 268 Cal. App. 2d 481, 484 (1968); *People* v. *Collom,* 268 Cal. App. 2d 242, 246 (1968); *People* v. *Handy,* 16 Cal. App. 3d 858, 860–62 (1971); *People* v. *Maltz,* 14 Cal. App. 3d 381, 392–93 (1971). *See too* § 7.05.

If the Place Was One Where Crimes Had Frequently and Currently Occurred

People v. *Mickelson,* 59 Cal. 2d 448 (1963); *People* v. *Gibson,* 220 Cal. App. 2d 15, 20–21 (1963); *People* v. *Brown,* 271 Cal. App. 2d 391, 394 (1969); *People* v. *One 1958 Chevrolet,* 179 Cal. App. 2d 604, 610 (1960) (child molestations). *See too* § 7.09.

SOURCES OF INFORMATION

Informer's Tip

Adams v. *Williams,* 32 L. Ed 2d 612 (1972);

Lane v. *Superior Court,* 271 Cal. App. 2d 821, 824 (1969). *People* v. *Koehn,* 25 Cal. App. 3d 799, 802 (1972).

Official Channels

Restani v. *Superior Court,* 13 Cal. App. 3d 189, 196 (1970); *Ojeda* v. *Superior Court,* 12 Cal. App. 3d 909, 917 (1970); *People* v. *Shoemaker,* 16 Cal. App. 3d 316, 319 (1971); *People* v. *Turner,* 2 Cal. App. 3d 632, 635 (1969).

NECESSITY FOR IMMEDIATE ACTION

People v. *Wickers,* 24 Cal. App. 3d 12, 16–17 (1972) (Companion fled).

Incorrect Information May Justify Detention

People v. *Honore,* 2 Cal. App. 3d 295 (1969); *People* v. *Marquez,* 237 Cal. App. 2d 627 (1965).

§ 11.04: *Evidence Insufficient To Support Temporary Detention*

Nervousness was held to be an insufficient basis in *People* v. *Moore,* 69 Cal. 2d 674 (1968).

Private citizen gave *nebulous information* about defendants carrying on a conversation and behaving in a way that might be consistent with unlawful behavior. *People* v. *Escollias,* 264 Cal. App. 2d 16 (1968).

Citizen reported defendant and companion were *hanging around and acting suspicious. People* v. *Hunt,* 250 Cal. App. 2d 311 (1967).

Car had *out-of-state registration.* Officer felt it might be improper. *People* v. *Franklin,* 261 Cal. App. 2d 703 (1968).

Passenger waiting at Airport. Irwin v. *Superior Court,* 1 Cal. 3d 423, 427 (1969).

Officer says, " 'You're under arrest.' " People v. *Curtis,* 70 Cal. 2d 347, 359 (1969).

Truck had VW parts and one occupant had a prior arrest. *People* v. *Callandret,* 274 Cal. App. 2d 505, 507 (1969). *Cf. Anderson* v. *Superior Court,* 9 Cal. App. 3d 851, 857 (1970).

Two young passengers in car at 1:15 a.m. People v. *Horton,* 14 Cal. App. 3d 930, 933 (1971). *Cf. People* v. *Anguiano,* 198 Cal. App. 2d 426, 428 (1961). *See too People* v. *Henze,* 253 Cal. App. 2d 986, 988 (1967).

Turning Back on Officer

People v. *Rosenfeld,* 16 Cal. App. 3d 619, 622 (1971).

§ 11.05: *Pat Searches*

Prior to the time an arrest is made on full probable cause, the officer may be permitted to make a protective search. The leading case is *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968), which says:

> "[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

The court (at 25) reasoned, however, that even a limited search of the outer clothing for weapons constitutes "a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." The court authorized (at 27),

> "[A] narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. . . ."

The court said too that due weight should be given, not to inchoate and unparticularized suspicions or hunches but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. The court also warned (at 29) that the search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."

The officer in *Terry* had observed three men acting in a manner the officer took to be a preface to a "Stick up." This made a detention reasonable and it was reasonable for the officer to fear they were armed. The court also spoke approvingly of the manner in which the officer made the search. He patted down the outer clothing. "He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns."

In the companion case of *Sibron* v. *New York*, 392 U.S. 40, 64 (1968), the United States Supreme Court elaborated further on these rules:

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. . . ."

The court disapproved of the officer's search in *Sibron*. It said the suspect's mere act of talking with a number of known narcotic addicts over an eight-hour period justified neither arrest nor a fear of life or limb. It noted that the officer placed his hand directly in the suspect's pocket. Because there was "no attempt at an initial limited exploration for arms" the search was "not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man."

The *Terry* protective search rules were recently restated by the United States Supreme Court in *Adams* v. *Williams*, 32 L. Ed 2d 612 (1972).

The California Supreme Court in *Cunha* v. *Superior Court*, 2 Cal. 3d 352, 353 (1970), said that a pat down is an additional intrusion beyond a detention and "can be justified only by specification and articulation of facts supporting a reasonable suspicion that the individual detained is armed, and a further intrusion into a suspect's clothing to recover a weapon requires a similar showing of a reasonable belief that the pat down has disclosed the presence of a weapon." The court also said that if an officer should develop probable cause to arrest, he can arrest and make an incidental search. The court pointed out that the officer did not conduct a pat down but instead directly and immediately intruded into petitioner's pocket.

The State Supreme Court also discussed the *Terry* rule in *Irwin* v. *Superior Court*, 1 Cal. 3d 423, 428 (1969). It said that a temporary detention at most authorizes a police officer to make a "superficial search" of the suspect for concealed weapons. A search of a suspect

for purposes other than locating concealed weapons is unlawful. The court condemned a detention search that was for contraband.

§ 11.06: *Bypassing the Pat Search*

The United States Supreme Court recently permitted an officer to bypass the pat search. The officer had an informer's tip that a person had a weapon in a specific place on his person and the officer reached directly for it. The person rolled down his window rather than step out of his car, which the officer had asked him to do. *Adams* v. *Williams*, 32 L. Ed 2d 612 (1972).

As was said in *People* v. *Superior Court* (*Holmes*), 15 Cal. App. 3d 806, 810 (1971):

> "The requirement of a pat-down search for weapons generally has been discussed in cases in which the officer only suspects upon the basis of articulable facts that the person detained may be armed. These cases generally have not involved situations in which the suspect has engaged in conduct which would lead a reasonable and prudent officer not only to suspect that the person detained is armed but also to apprehend that he is preparing and immediately threatening to use the weapon to fire upon the officer."

In this case there was a "shots fired" situation and the defendant reached for his pocket as though he were desperately trying to get something out. *See too People* v. *Atmore*, 13 Cal. App. 3d 244 (1970); *People* v. *Woods*, 7 Cal. App. 3d 382 (1970); *People* v. *Todd*, 2 Cal. App. 3d 389 (1969).

Improperly Bypassing the Pat Search

People v. *McKelvy*, 23 Cal. App. 3d 1027, 1039 (1972) (state of emergency not sufficient reason).

§ 11.07: *Applications of Pat Search Rule*

Does the officer have to ask questions before he can pat search? Whether he should ask questions cannot be answered categorically, but under the circumstances of *People* v. *Anthony*, 7 Cal. App. 3d 751, 760 (1970), the court said no. The court said there was no reason why the officer " 'should have to ask one question and take the risk that the answer might be a bullet.' "

When a search of the defendant's companion revealed a revolver, a pat search of the defendant was proper. *People* v. *Smith*, 264 Cal. App. 2d 718 (1968). *See too People* v. *Ruiz*, 263 Cal. App. 2d 216, 220 (1968).

Other proper pat searches:

Defendant resembled robber, was parked in poorly lighted area. *People* v. *Heard*, 266 Cal. App. 2d 747 (1968); *People* v. *Anthony*, 7 Cal. App. 3d 751, 760 (1970).

Defendant had numerous hostile run-ins with other officers and had little or no respect for police. *Amacher* v. *Superior Court*, 1 Cal. App. 3d 150, 154 (1969).

Citizen's arrest. *People* v. *Garcia*, 274 Cal. App. 2d 100 (1969).

Late at night on dark street, and officers saw two figures in car by vacant lot; officers investigated, smelled marijuana smoke and made pat down. *People* v. *Holguin*, 263 Cal. App. 2d 628, 630 (1968) ("This court takes notice of the fact that many officers have been killed by suspects who turned and fired upon the officers when they were stopped for investigation").

Crime of violence perpetrated by man with hand gun. Defendant in neighborhood. *People* v. *Hawxhurst*, 264 Cal. App. 2d 398, 402 (1968).

Sudden exit at night from vehicle of three men stopped by police. *People* v. *Hubbard*, 9 Cal. App. 3d 827, 830 (1970).

Other: *People* v. *Baker*, 12 Cal. App. 3d 826 (1970).

Insufficient basis for pat search: *People* v. *Adam*, 1 Cal. App. 3d 486, 492 (1969); *People* v. *Thomas*, 16 Cal. App. 3d 231, 234 (1971); *People* v. *McKelvy*, 23 Cal. App. 3d 1027, 1039 (1972).

§ 11.08: *Examples of Further Search After Pat Search*

In *People* v. *Collins*, 1 Cal. 3d 658, 662–63 (1970), the State Supreme Court reiterated the *Terry* rules and said that the "obvious purpose" of confining officers to a pat search and having them point to reasons that justify it is to "ensure that the scope of such a search cannot be exceeded at the mere discretion of an officer, but only upon discovery of tactile evidence particularly tending to corroborate suspicion that the suspect is armed." It laid down rules for what happens when an officer feels a soft object.

> "To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation that the object might be a razor blade concealed in a handkerchief, a 'sap,' or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person. Such a holding would render meaningless Terry's requirement that pat-downs be limited in scope absent articulable grounds for an additional intrusion."

The court did not completely bar a further search for soft objects or what might be concealed in them, but it placed on officers the burden of showing a suspicion that the suspect is armed with an atypical weapon. *Citing Byrd* v. *Superior Court*, 268 Cal. App. 2d 495 (1968), and *People* v. *Britton*, 264 Cal. App. 2d 711 (1968). The court disapproved *People* v. *Armenta*, 268 Cal. App. 2d 248 (1968), where the Court of Appeal had reasoned that the suspect might have a rubber water pistol loaded with carbolic acid. The court also said that feeling loosely packed marijuana would not reasonably support a suspicion that it was a sap, because a sap would have to possess considerably more mass to be useful as a weapon.

People v. *Hubbard*, 9 Cal. App. 3d 827, 831 n.1 (1970), quotes *People* v. *Mosher*, 1 Cal. 3d 379, 394 (1969), as follows:

> "'A box of matches, a plastic pouch, a pack of cigarettes, a wrapped sandwich, a container of pills, a wallet, coins, folded papers, and many other small items usually carried in an individual's pockets do not ordinarily feel like weapons. . . .' *See People* v. *Aviles*, 21 Cal. App. 3d 230, 233 (1971).

In *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 154 (1971), it was said that the location of an unidentified lump in a shirt pocket did not justify further intrusion into that pocket.

While conducting a pat search, an officer felt a hard, large object. He removed it and found a marijuana-smoking device. It was proper for the officer to remove the object as there was reason to believe it could have been used as a weapon. *People* v. *Roach*, 15 Cal. App. 3d 628, 633 (1971); *People* v. *Todd*, 2 Cal. App. 3d 389, 393 (1969).

Officer saw the outline of a handgun under the defendant's shirt. After feeling it, he removed it.

> "The need to question and search a person who, in an urban area, is in apparent possesson of a deadly weapon is so great as to justify the type of invasion of the rights of that person entailed by that need." *People* v. *Tarkington*, 273 Cal. App. 2d 466, 469 (1969).

Felt sharp object like knife blade. *People* v. *Mosher*, 1 Cal. 3d 379, 393 (1969). *Cf. People* v. *Martines*, 228 Cal. App. 2d 245, 247 (1964).

Officer felt long hard pipe through leather jacket. Proper to remove it. Bag of marijuana came out simultaneously. *People* v. *Watson*, 12 Cal. App. 3d 130, 135 (1970).

§ 11.09: *Actions of Officer Associated with Pat Search*

Officer could forcibly withdraw hand of suspect from jacket pocket. *People* v. *Woods*, 7 Cal. App. 3d 382, 388 (1970).

Officer could force open juvenile's clenched hand. *In re Glenn R.*, 7 Cal. App. 3d 558, 561 (1970).

Officer's hand emerged with more than he intended to remove from pocket. *People* v. *Atmore*, 13 Cal. App. 3d 244, 248 (1970); *People* v. *Watson*, 12 Cal. App. 3d 130, 135 (1970).

The officer was not permitted to ask what was in a boy's pocket. The withdrawal of marijuana was said to be a submission to authority. *People* v. *Abbott*, 3 Cal. App. 3d 966, 969 (1970).

The cursory search for weapons may extend beyond the person to the vehicle in which the defendant was riding. *People* v. *Flores*, 23 Cal. App. 3d 23, 28 (1972); *People* v. *Lumar*, 267 Cal. App. 2d 900, 904 (1968); *People* v. *Wigginton*, 254 Cal. App. 2d 321, 326 (1967). In *People* v. *Vermouth*, 20 Cal. App. 3d 746, 753–54 (1971), it was proper to search the trunk and all closed containers for weapons or contraband, even as to suitcases that a passenger who was not arrested said were his personal property.

§ 11.10: *Length of Detention*

Evidence obtained in the course of an originally permissible detention for questioning is deemed illegally obtained if it flows from a detention extended in duration beyond what is reasonably necessary under the circumstances which made its initiation permissible. *People* v. *Gonsoulin*, 19 Cal. App. 3d 270, 273 (1971); *Pendergraft* v. *Superior Court*, 15 Cal. App. 3d 237, 242 (1971); *People* v. *Shoemaker*, 16 Cal. App. 3d 316, 319–20 (1971); *Crueger* v. *Superior Court*, 7 Cal. App. 3d 147 (1970); *People* v. *Lingo*, 3 Cal. App. 3d 661 (1970); *People* v. *Bloom*, 270 Cal. App. 2d 731 (1969).

It does not appear possible to define the length of detention solely in fixed units of time. In part it may depend on whether the officers have had a reasonable opportunity to complete their investigation. *People* v. *Rosenfeld*, 16 Cal. App. 3d 619, 623 (1971). In one case the court concluded that 40 minutes was too long to hold a man for a record check. *Willett* v. *Superior Court*, 2 Cal. App. 3d 555, 559 (1969). In a more recent case the same amount of time for a record check was permitted where the charge was more serious. *Carpio* v. *Superior Court*, 19 Cal. App. 3d 790, 793 (1971). *See too People* v. *Wickers*, 24 Cal. App. 3d 12, 17 (1972) (five or ten minutes for warrant check OK).

A factor that makes a detention too long is the discovery by government agents that they have the wrong person. Detention after exculpation was deemed illegal in *United States* v. *Coughlin*, 338 F. Supp. 1328, 1329 (E.D. Mich. 1972).

CHAPTER TWELVE

VEHICLE SEARCHES

§ 12.01: *Stopping Cars*

While probable cause to arrest a person in a car or to search a car will justify its detention, it has also consistently been held in California that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, the officer may in self-protection request a suspect to submit to a superficial search for concealed weapons. *People* v. *Mickelson*, 59 Cal. 2d 448, 450–51 (1963); *see too People* v. *Peralez*, 14 Cal. App. 3d 368, 376–77 (1972); *People* v. *Manis*, 268 Cal. App. 2d 653, 662–63 (1969).

However, there must be some suspicious or unusual circumstances to justify even this limited invasion of a citizen's privacy. *People* v. *Horton*, 14 Cal. App. 3d 930, 932 (1971); *Restani* v. *Superior Court*, 13 Cal. App. 3d 189, 195 (1970); *People* v. *Griffith*, 19 Cal. App. 3d 948, 951 (1971) (broken windwing not enough). It is sometimes said that a mere hunch or subjective suspicion is not sufficient and that unusual activity alone, unless there is some suggestion that it is related to criminality, is insufficient. *People* v. *Dominguez*, 21 Cal. App. 3d 881, 884 (1971); *Horton*, *supra* at 933; *People* v. *Superior Court* (Martin), 20 Cal. App. 3d 384, 388 (1971). On the other hand, an officer has the right and duty to investigate suspicious activities even though the grounds do not justify arrest or search. *People* v. *Bryant*, 267 Cal. App. 2d 906, 909 (1968). *See too Anderson* v. *Superior Court*, 9 Cal. App. 3d 851, 856 (1970).

Police cannot just stop cars indiscriminately. *See Wirin* v. *Horrall*, 85 Cal. App. 2d 497, 501 (1948); *People* v. *Gale*, 46 Cal. 2d 253, 256 (1956). Safety checks have been upheld, however. *People* v. *De La Torre*, 257 Cal. App. 2d 162, 165 (1967); *see too People* v. *Superior Court* (English), 266 Cal. App. 2d 685, 689 (1968).

As *Mickelson* (at 454) emphasizes, the right to stop a car does not necessarily include the right to search it. *In re Elizabeth H.*, 20 Cal. App. 3d 323, 327 (1971).

A traffic or equipment violation will justify stopping a vehicle. *People* v. *Martin*, 23 Cal. App. 3d 444, 447 (1972) (illegible license plate); *People* v. *Vermouth*, 20 Cal. App. 3d 746, 752 (1971)

(cracked tail light); *Willett* v. *Superior Court*, 2 Cal. App. 3d 555, 558 (1969). If the officer is justified in stopping the vehicle, he may for his own safety ask the occupants of the vehicle to alight. *People* v. *Nickles*, 9 Cal. App. 3d 986, 991–92 (1970); *see too People* v. *Knight*, 20 Cal. App. 3d 45, 50 (1971); *People* v. *Figueroa*, 268 Cal. App. 2d 721, 726 (1969). *Cf. People* v. *Griffith*, 19 Cal. App. 3d 948, 951 (1971). This procedure was approved to some extent in *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 206 (1972) n.13. The court also indicated that it might be proper, when appropriate, to have the violator keep his hands in sight. The driver's failure to comply may justify an officer in being concerned about his safety and help to justify a weapons search. *Adams* v. *Williams*, 32 L. Ed 2d 612 (1972). The officer may ask the driver for his license and the car registration. *People* v. *Vermouth*, *supra* at 752. *See Lipton* v. *United States*, 348 F.2d 591, 593 (9th Cir. 1965); *People* v. *Washburn*, 265 Cal. App. 2d 665, 670 (1968). *See too People* v. *Gibbs*, 16 Cal. App. 3d 758, 764 (1971) (reply that registration was on steering wheel could be taken as consent to enter vehicle to check it; officer also wanted to demonstrate that car was smoking excessively).

Mere failure of a motorist to have his driver's license and registration does not supply probable cause to believe that the car is stolen. *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 195 (1972). *Simon* suggests (at 197) that the officer can make inquiries of the driver, and it recites a number of cases evaluating the significance of the answers to such a question. Prior cases have permitted limited searches for indicia of ownership. *People* v. *Martin*, 23 Cal. App. 3d 444, 447 (1972); *People* v. *Vermouth*, *supra* at 752. The *Simon* court stated that if additional circumstances are present, such as missing or improperly attached license plates, evasive driving, a failure to stop, or reports of criminal activity in progress in the neighborhood, the inference that the car is stolen may be strong enough to justify arrest.

The fact that the registration had an oriental-type name (Suk K. Lee) and the occupants of the car were Negro did not justify a detention for a stolen car. *People* v. *Dominguez*, 21 Cal. App. 3d 881, 884 (1971).

There is a limit to how long a person can be detained after a stop for a traffic or equipment violation. In *Willett* v. *Superior Court*, 2 Cal. App. 3d 555, 559 (1969), it was said that police were not entitled to hold a person for 40 minutes for a record check. Where the circumstances were said to be more serious, the same amount of

delay was upheld. *Carpio* v. *Superior Court*, 19 Cal. App. 3d 790, 793 (1971). *See* § 11.10.

However, the situation may be such that a radio check of the person's record may be proper, or that the person, even without consent, may be required to step out of an automobile, or back to a police car, or even, in a rare case, to be taken to the police station. *People* v. *Courtney*, 11 Cal. App. 3d 1185, 1190–91 (1970); *People* v. *Wickers*, 24 Cal. App. 3d 12, 16 (1972) (warrant check).

§ 12.02: *General Bases for Searching*

There are two main rules that serve as bases for searches of vehicles: (1) That there is probable cause to believe there is contraband in the car, and (2) that the search in the car is made incident to a valid arrest.

Each of these rules is entirely independent of the other and if one rule does not permit a police search there appears to be nothing that will prevent an officer from resorting to the other. *See Chambers* v. *Maroney*, 399 U.S. 42, 49 (1970).

An examination of each rule follows:

§ 12.03: *Belief Vehicle Contains Contraband*

The *Chimel* case expressly recognizes the continued validity of the warrantless search of automobiles upon the existence of probable cause "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant is sought." *Chimel* v. *California*, 395 U.S. 752, 754 n.9 (1969). *See People* v. *Green*, 15 Cal. App. 3d 766, 772 (1971).

Thus, officers may, with *probable cause* to believe an automobile contains contraband, search it without a warrant. *People* v. *Terry*, 70 Cal. 2d 410 (1969); *People* v. *Gurley*, 23 Cal. App. 3d 536, 556 (1972) (stolen property); *People* v. *Superior Court* (Silver), 8 Cal. App. 3d 398, 401-02 (1970). This standard differs from that applied to a *home*, where probable cause alone furnishes no justification for a search without a warrant. *Chapman* v. *United States*, 365 U.S. 610, 613 (1961); *People* v. *Marshall*, 69 Cal. 2d 51 (1968); *People* v. *Torralva*, 17 Cal. App. 3d 686, 689–70 (1971). See *People* v. *Mendez*, 27 Cal. App. 3d 987, 991 (1972).

Two conditions must come into play before the rule can be utilized. There must be probable cause and the car must be mobile.

If there is no probable cause the vehicle may not be searched under this rule. *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 221

(1968); *Filitti* v. *Superior Court*, 23 Cal. App. 3d 930, 933 (1972); *United States* v. *Day*, 455 F.2d 454, 456 (3d Cir. 1972). *Cf. People* v. *Torralva*, *supra*; *People* v. *Baird*, 18 Cal. App. 3d 450 (1971) (search during riot after fire bombings).

The car must also be in a mobile condition. If the police know in advance that the car is to be seized, or if the vehicle is in police custody, this rule may not be usable. *See Coolidge* v. *New Hampshire*, 403 U.S. 443, 461–62 (1971). *Cf. People* v. *Munoz*, 21 Cal. App. 3d 805, 810 (1971) (other members of gang might have the means, opportunity, and motive to remove car). In *North* v. *Superior Court*, 8 Cal. 3d 301, the State Supreme Court declined to follow *Coolidge* in some respects.

This rule does not mean that an automobile may always be searched without a warrant. As was said in the main *Coolidge* opinion, "The word 'automobile' is not a Talisman in whose presence the Fourth Amendment fades away and disappears."

§ 12.04: *Search Incident to Arrest*

The other main basis for a vehicle search is a search incident to an arrest. Prior to *Chimel* it was clear that an arrest in or around a vehicle justified a search of it. *See* Martin, *Comprehensive California Search and Seizure* (Parker and Son, 1971), pp. 109–10.

§ 12.05: *Examples of Searches Incident to Arrest*

Prior to *Chimel* it was clearly proper for police to arrest occupants of a suspected getaway or stolen car and to make an incidental search of the vehicle. *See People* v. *Upton*, 257 Cal. App. 2d 677, 683–84, n.2 (1968); *People* v. *Airheart*, 262 Cal. App. 2d 673, 681–82 (1968); *People* v. *Chandler*, 262 Cal. App. 2d 350, 354 (1968); *People* v. *Berry*, 260 Cal. App. 2d 654 (1968); *People* v. *Sackett*, 260 Cal. App. 2d 307 (1968); *People* v. *Madero*, 264 Cal. App. 2d 107 (1968); *People* v. *Superior Court* (Hampton), 264 Cal. App. 2d 794 (1968); *People* v. *Stewart*, 264 Cal. App. 2d 809 (1968).

As was said in *People* v. *Akers*, 9 Cal. App. 3d 96, 103 (1970), "Searches of a car generally contemporaneous with the arrest and parked in the vicinity of a defendant's place of apprehension have been upheld as incidental to the arrest."

See People v. *Deane*, 259 Cal. App. 2d 82, 84–85 (1968) (search of auto pursuant to burglary arrest); *People* v. *Gardiner*, 254 Cal. App. 2d 160, 162 (1967) (burglary arrest on remote street where defendants were parked without explanation); *People* v. *Stewart*, 264 Cal. App. 2d 809 (1968) (search of vehicle preceding arrest of

telephone burglars was proper); *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970); *see too Bethune* v. *Superior Court*, 11 Cal. App. 3d 249, 257 (1970) (search of a purse in car after arrest but not incident thereto). If the concept of a search incident to arrest fails, the search may still be proper under the rule described in § 12.03. *See People* v. *Deutschman*, 23 Cal. App. 3d 559, 566 (1972).

See too § 10.08.

§ 12.06: *Post-Chimel Searches Incident to Arrest*

The courts appear to be in the process of deciding whether *Chimel* changes the rule that a felony arrest in or about a car permits a search of the whole car. The dissent in *Caughlin* v. *Superior Court*, 4 Cal. 3d 461, 467 (1971), advocates that *Chimel* be applied to searches incident to an arrest in or about a car, but the majority opinion disposes of the case on the basis that it involved a pre-*Chimel* search and *Chimel* is not retroactive. *See* § 8.09. *See People* v. *Vermouth*, 20 Cal. App. 3d 746 (1971), permitting a search of suitcases and locked truck post-*Chimel*; *see too People* v. *Farley*, 20 Cal. App. 3d 1032, 1037 (1971) (bag in front seat); *People* v. *Flores*, 23 Cal. App. 3d 23, 29 (1972) (glove compartment); *People* v. *Thompson*, 25 Cal. App. 3d 132, 141 (1972) (search of car incident to arrest 25 feet away). Some law reviews have taken the position of the *Caughlin* dissent. *See* Murray and Aitken, *Constitutional Limitations on Automobile Searches*, 3 Loyola L. Rev. 95 (1970), and Comment, *The Effect of Chimel v. California on Automobile Search and Seizure*, 23 Okla. L. Rev. 447 (1970).

In *People* v. *Joyner*, 278 N.E. 2d 756, 761 (Ill. 1972), it was said that a *Chimel* search in a car could extend to the entire passenger section.

People v. *Koehn*, 25 Cal. App. 3d 799, 803 (1972), while recognizing that the law, as well as common sense, dictates that greater latitude be given to warrantless searches of vehicles than is given to the search of a home or building, rejects the position that *Chimel* has no application to car searches. It struck down a search of a locked tire well in a station wagon. (The police pried apart the tire well with a bar, opened a closed suitcase and broke into a metal box.)

If the search is not incident to arrest it may be possible to justify the search by relying on the "probable cause" rule. *See United States ex rel Johnson* v. *Johnson*, 340 F. Supp. 1368, 1373 (E.D. Pa. 1972).

§ 12.07: *Search Following Stop for Minor Traffic Violation*

In the absence of furtive conduct or other suspicious circumstances, officers are not ordinarily justified in searching a vehicle incident to a minor traffic (misdemeanor) arrest. *People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 812 (1970); *People* v. *Cruz*, 264 Cal. App. 2d 437 (1968). Thus, in *Virgil* v. *Superior Court*, 268 Cal. App. 2d 127 (1968), the court held that *defendant's arrest for reckless driving* entitled the officers to arrest defendant, take him before a magistrate, and to remove the defendant's vehicle from the highway; it *did not entitle them to search the vehicle.*

If the basis for the stop is an arrest for driving under the influence of alcohol or a narcotic, a reasonable search incident to the arrest can be made for liquor or narcotics. *Pugh* v. *Superior Court*, 12 Cal. App. 3d 1184, 1188 (1970); *People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 813, n.2 (1970). Such a search does not violate the *Mercurio* rule. *People* v. *Wilken*, 20 Cal. App. 3d 872, 874–76 (1971). A search of the person may also be made at the jail. *People* v. *Yniguez*, 15 Cal. App. 3d 669, 673 (1971).

Probable cause to believe the vehicle contains stolen property or contraband which will justify a search may be present under one or both of the following two circumstances.

§ 12.08: Furtive Conduct

The search of a vehicle is proper where, following a minor traffic stop, the behavior of the driver or other occupants causes the officer to believe that a more serious crime is being committed in his presence. *See, e.g., People* v. *Ceccone,* 260 Cal. App. 2d 886, 890 (1968) (traffic violator could not produce license nor registration, gave conflicting stories as to ownership; officer observed marijuana; *held* that officer had probable cause to arrest for stolen vehicle when he entered car); *People* v. *Knight,* 20 Cal. App. 3d 45, 51 (1971) (smell of marijuana smoke); *People* v. *Monreal,* 264 Cal. App. 2d 263 (1968) (officer smelled marijuana in vehicle while looking for registration); *cf. People* v. *Cruz,* 264 Cal. App. 2d 437 (1968) (search of vehicle by officer, inexperienced in narcotics, following minor traffic stop and furtive conduct, was improper). *See also People* v. *Robinson,* 62 Cal. 2d 889, 894–95 (1965) (when stopped, occupants of car attempted to hide something and were intoxicated; this plus abnormal position of rear seat warranted search for possible presence of liquor containers); *People* v. *Munsey,* 18 Cal. App. 3d 440, 447 (1971) (driver under the influence after traffic stop); *People* v. *Doherty,* 67 Cal. 2d 9, 21–22 (1967) (where defendant furtively placed object in engine, officer could believe that he had been harboring contraband), *citing People* v. *Blodgett,* 46 Cal. 2d 114, 117 (1956) ("Since Officer Barker saw defendant's furtive action in getting out, he had reasonable grounds to believe that he was hiding contraband and the search of the cab was therefore reasonable"); *Byrd* v. *Superior Court,* 268 Cal. App. 2d 495 (1968) (furtive conduct before traffic stop did not warrant thorough search of passenger); *People* v. *Martinez,* 264 Cal. App. 2d 906 (1968) (attempting to check vehicle registration, officer was attacked by defendant, furnishing probable cause for arrest and incidental search of the vehicle); *People* v. *Stokley,* 266 Cal. App. 2d 930 (1968) (furtive activity in auto at time of minor traffic stop justified search of the vehicle before booking the driver); *People* v. *Stewart,* 267 Cal. App. 2d 366 (1968) (defendant trying to conceal something in seat cushions of the car; search also justified by consent); *In re Elizabeth H.,* 20 Cal. App. 3d 323, 328 (1971) (officer smelled burning marijuana).

Our State Supreme Court has recently examined furtive conduct as a basis for probable cause, warning that its use "has on occasion been little short of a subterfuge." *People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 827 (1970). While the court adhered to the rule that conduct genuinely furtive may be relied upon, it examined a variety of situations and found many of them to be of minor or no value:

NERVOUSNESS—The court said this is of little materiality in all but unusual cases as it is a "natural response to the stress situation presented." *People* v. *Superior Court* (Kiefer), *supra* at 826. *See too People* v. *Moore,* 69 Cal. 2d 674, 683 (1968); *People* v. *Rosenfeld,* 16 Cal. App. 3d 619, 622 (1971).

NIGHTTIME—The court pointed out that the significance of this fact should be appraised with caution and that it does not, without more, transform an innocent gesture into a culpable one. *People* v. *Superior Court* (Kiefer), *supra* at 825.

DRIVER ALIGHTS, WALKS BACK TO POLICE CAR—The court said it could easily conceive of a variety of wholly innocent motives for such conduct by a motorist. *People* v. *Superior court* (Kiefer), *supra* at 826–27.

FAILURE TO STOP CAR—This was described as perhaps one of the most persuasive of the circumstances that has been relied upon,

but even here, the court cautions us, the delay in stopping may well be reasonable and accounted for by road conditions, speed, or other traffic. *People* v. *Superior Court* (Kiefer), *supra* at 825; *People* v. *Flores,* 23 Cal. App. 3d 23, 27 (1972).

PRIOR RELIABLE INFORMATION—While this may be rare in a routine traffic stop, the court agrees that if the police have reliable information that there is contraband in the car there would be probable cause. *People* v. *Superior court* (Kiefer), *supra* at 816.

GESTURE—Many gestures have no guilty significance. *See People* v. *Cassel,* 23 Cal. App. 3d 715, 719 (1972).

The State Supreme Court recently reaffirmed its holding in the *Kiefer* case in *Gallik* v. *Superior court,* 5 Cal. 3d 855, 859 (1971), and held that *Kiefer* is retroactive. The court said that the bare circumstance that the motorist denies hiding anything does not give rise to probable cause. The fact that an unarmed student observer was in the patrol car does not justify probable cause (at 862–63). The fact that the officer conducted a pat down of the suspect does not create probable cause to search the vehicle.

Kiefer was distinguished in *People* v. *Flores,* 23 Cal. App. 3d 23, 28 (1972).

In *People* v. *Conley,* 21 Cal. App. 3d 894, 899 (1971), it was said that reaching behind a bumper did not justify a search. The furtive gesture doctrine applies only to a response to an approaching police officer.

See § 7.04.

§ 12.09: *Contraband in Plain Sight*

As explained in *People* v. *Superior Court* (Kiefer), 3 Cal. 3d 807, 816 (1970), the most reliable circumstance after a traffic stop that will justify a search of the car is an observation, from outside the vehicle or other lawful vantage point, of contraband or suspicious objects in plain view inside the vehicle.

The *Ceccone* case, *supra,* § 12.08, is further illustration of the right of officers to search the automobile when there is observed, prior to the search, contraband in open view. There, prior to defendant's alighting from the car, the officer not only had reasonable cause to believe the vehicle was stolen, but had observed capsules (assumed dangerous drugs) among debris in the car. *See also People* v. *Williams,* 263 Cal. App. 2d 756 (1968) (various small hand tools in auto, plus defendant's resemblance to robbery suspect, warranted search of vehicle following traffic stop); *People* v. *Lopez,* 60

Cal. 2d 223, 241 (1963) (defendant properly stopped for traffic violation, red painted crowbar visible under car seat); *People* v. *Superior Court* (English), 266 Cal. App. 2d 685 (1968) (marijuana seeds on front seat during lawful safety check); *People* v. *Martin,* 23 Cal. App. 3d 444, 447 (1972) (saw kilo of marijuana); *People* v. *Koehn,* 25 Cal. App. 3d 799, 802 (1972) (handle of loaded gun protruding from under front seat).

People v. *Conley,* 21 Cal. App. 3d 894, 901 (1971), declined to apply the plain sight rule to something easily reached, though out of sight, a hidden cavity behind a bumper.

See §§ 10.12, 13.02.

§ 12.10: *"Pressing Emergency"*

In *People* v. *Terry,* 70 Cal. 2d 410, 424 (1969), the California Supreme Court acknowledged that a "pressing emergency" may justify the search of an automobile. This commonly involves the fleeing, armed suspect who has committed a grave offense. *People* v. *Laursen,* 264 Cal. App. 2d 932 (1968) (auto abandoned by fleeing robbers), questioned in another respect in *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699, 703 (1971). *See also People* v. *Smith,* 63 Cal. 2d 779, 797 (1966); and *cf. Warden* v. *Hayden,* 387 U.S. 294 (1967) (acknowledging this same exception as applied to a house).

Also, officers finding an unlocked car with its ignition key in place are reasonably permitted to investigate its ownership by looking for the registration. *People* v. *Brown,* 4 Cal. App. 3d 382, 387 (1970); *cf. People* v. *Superior Court* (Fishback), 2 Cal. App. 3d 304, 310 (1969) (search of a car suspected of having been burglarized to locate owner held illegal).

§ 12.11: *Subsequent Searches (Impound Searches)*

The courts have experienced a great deal of difficulty with the search of a car after it has come into police custody and at a time and place different from the arrest. Quite often, in these situations, the police clearly had a right to search incident to the arrest or else have probable cause to believe evidence is in the car. Is their right to rely on search incident to arrest defeated because the search is no longer contemporaneous? Is the "probable cause" rule no longer available because the car, held in police custody, is no longer "mobile"? These problems have caused the decisions to fluctuate to an unusual degree. Following is an attempt to define the present state of the law:

§ 12.12: *Search Following Automobile Accident—Inventory Searches*

Taking an inventory is no longer a valid basis for a search, the California Supreme Court has held in *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699, 712 (1971), overruling a line of cases. *Contra: People* v. *Sullivan,* 272 N.E. 2d 464, 29 N.Y. 2d 69 (1971). The police can adequately protect valuables by rolling up the windows, locking the vehicle doors, and returning the keys to the owner, or storing the car. If police do this they will not be civilly liable for losses. *Mozzetti* involved a police inventory after a traffic accident. *See too People* v. *Heredia,* 20 Cal. App. 3d 194, 198–99 (1971). An inventory may still be made of items of personal property to be found in plain sight within the vehicle. *Mozzetti,* p. 707.

In *People* v. *Miller,* 7 Cal. 3d 219, 224 (1972), the Supreme Court said the police had to honor the arrestee's stated desire that they leave undisturbed an overcoat on the front seat. Even if the officers had permission to take it, or it had been properly seized, the pockets could not be searched.

Mozzetti was made retroactive in *Gallik* v. *Superior Court,* 5 Cal. 3d 855, 860 (1971).

See too People v. *Nagel,* 17 Cal. App. 3d 492, 497 (1971) (prosecution has burden of explaining necessity of taking vehicle into custody).

Cf. People v. *Morton,* 21 Cal. App. 3d 172, 175 (1971) (distinguished inventory search in hospital).

§ 12.13: *Valid if to Protect a Car Held as Evidence*

In *Harris* v. *United States,* 390 U.S. 234 (1968), defendant's car was being *held as evidence* by police. When rolling up a window to protect the car, the officer saw and seized in plain view an item belonging to the robbery victim. *Held,* nothing in these circumstances requires the police to obtain a warrant. *See also People* v. *Teale,* 70 Cal. 2d 497, 508 (1969), where the same principle was applied to defendant's car brought from Louisiana (the place of arrest) to California *as evidence* and for further scientific examination. *Cooper* v. *California,* 386 U.S. 58 (1967) (search of auto properly held in forfeiture proceeding); *Virgil* v. *Superior Court,* 268 Cal. App. 2d 127, 130–31 (1968) (arrest for traffic violation could cause officers to *remove* car from highway, but not to search or inventory the contents of the car); *People* v. *Van Sanden,* 267 Cal. App. 2d 662 (1968) (obscured license plate and lack of operator's

license did not warrant impound search); and *People* v. *Webb,* 66 Cal. 2d 107, 124–25 (1967) (search lawfully begun at scene of arrest could be "continued" at police garage to prevent spectators from destroying evidence). *See too People* v. *Farley,* 20 Cal. App. 3d 1032, 1037–38 (1971).

Note, however, that in *Teale,* 70 Cal. 2d 497, 511 n.10, the court said the vehicle cannot be searched if merely though to be a *container* of crime, rather than *itself* evidence of crime. See *North* v. *Superior Court,* 8 Cal. 3d 301.

§ 12.14: *Valid if Merely a Continuation of Search Lawfully Begun*

From *Webb* (*supra,* §12.13), *People* v. *Waller,* 260 Cal. App. 2d 131, 140 (1968), and other cases, it can be said that a subsequent search at the police garage, in order to prevent spectators or other third persons from tampering with the vehicle and evidence, is proper. *See also People* v. *Harris,* 67 Cal. 2d 866, 871–72 (1967); *People* v. *Williams,* 67 Cal. 2d 226, 229 (1967); and *People* v. *Teale,* 70 Cal. 2d 497, 512 (1969), all of which found exigent circumstances warranting a "continuation" of the search at the police station. *People* v. *Lovejoy,* 12 Cal. App. 3d 883, 887 (1970). *See Chambers* v. *Maroney,* 399 U.S. 42, 52 (1970), which appears to sanction "continuation searches" where the car has to be immobilized before a warrant can be secured. *See too People* v. *Laursen,* 8 Cal. 3d 192, 202 (1972).

§ 12.15: *Invalid if Unrelated to the Reason for Arrest*

It is clear that an impound search (or inventory) may not be undertaken if unrelated to the purpose for the car's storage. Hence, in the leading case of *Preston* v. *United States,* 376 U.S. 364 (1964), defendant's arrest for *vagrancy* bore no relation to an impound search. There was no danger, as in *Webb, supra,* § 12.13, of the vehicle's being removed or the evidence destroyed. *See also Dyke* v. *Taylor Implement Co.,* 391 U.S. 216 (1968).

§ 12.16: *Search of Person on Arrest for Traffic Offense*

In the vast majority of cases the traffic violator is not taken into custody. He is given a citation and released. *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 199 (1972).

In the ordinary traffic case an officer cannot reasonably expect to find contraband or weapons and so a routine search of the person is not permitted. *People* v. *Cassel,* 23 Cal. App. 3d 715, 719 (1972).

There has been some controversy over the search that may be made if the traffic violator is placed in custody and the *Simon* case attempted to resolve the question.

In certain cases section 40303 of the Vehicle Code gives the officer an option to give a citation or to take the violator without unnecessary delay to the nearest or most accessible magistrate. This includes reckless driving, failure to stop after an accident, participating in speed contests, driving with an invalid license, attempt to evade arrest, and refusal to submit to safety inspections.

In other cases the officer has to take the violator before a magistrate without unnecessary delay, *i.e.,* when the violator fails to present a driver's license or other satisfactory evidence of identity, refuses to give a written promise to appear, demands an immediate appearance before a magistrate, or he is charged with misdemeanor drunk driving or driving under the influence of glue or drugs.

A person taken into police custody for transportation to a magistrate is under arrest, according to *Simon* (at 200). *Simon* concludes that an arrest takes place at least in the technical sense when a traffic citation is written.

Simon declined to permit a search for weapons or contraband even when the traffic violator is put into custody.

It prohibited a pat-down when a traffic citation is written, absent specific facts giving the officer reasonable grounds to believe a weapon is secreted on the motorist's person. *See too People* v. *Mercurio,* 10 Cal. App. 3d 426, 429–30 (1970). The same rule applies even when the officer serves an arrest warrant for failure to appear on a traffic citation.

The transportation of the traffic violator to a magistrate was also held not to justify a search of the person (at 208–11). A concurring opinion urged that the police should be allowed to make a pat-down prior to transportation (at 212).

The officer may have a right, under certain circumstances, to request that an arrestee empty his pockets. *Taylor* v. *Superior Court,* 275 Cal. App. 2d 146, 149–50 (1969).

If there is evidence of another offense apart from the traffic violation, it may justify a thorough search. *See People* v. *Brown,* 14 Cal. App. 3d 507, 510–11 (1971); *People* v. *Farley,* 20 Cal. App. 3d 1032, 1036 (1971).

CHAPTER THIRTEEN

VALID SEARCHES WITHOUT A LAWFUL ARREST OR SEARCH WARRANT

We turn here to a special category of cases in which neither an arrest warrant nor search warrant is needed.

§ 13.01: *Observing That Which is Patent and Open to View*

The observing of that which is in plain view of the officers is not a "search" within the meaning of the Fourth Amendment. Police officers may seize contraband evidence "in plain sight." *People* v. *Gilbert,* 63 Cal. 2d 690, 707 (1965), *rev'd on other grounds; People* v. *Marshall,* 69 Cal. 2d 51, 56 (1968). *Marshall* was distinguished by *Vaillancourt* v. *Superior Court,* 273 Cal. App. 2d 791 (1969).

However, the officer must have a right to be in the position to have that view. *Harris* v. *United States,* 390 U.S. 234, 236 (1968). *See De Conti* v. *Superior Court,* 18 Cal. App. 3d 907, 909 (1971).

An extensive analysis of the "plain view" rule is made in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465 (1971). The court said, "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." The court gave as examples of the use of the rule situations where the police have a warrant and in the course of search come across some incriminating article, or where officers inadvertently come across evidence while in "hot pursuit" of a fleeing suspect, or an object comes into view during a proper search incident to arrest, or where the officer is not searching for evidence, but nevertheless inadvertently comes across an incriminating object.

The court pointed out that the plain view cases have in common that the police officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The court noted that plain view only applies where it is immediately apparent to the police that they have evidence before them; "plain view" may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

The court announced two limits on the plain view doctrine. One is that plain view *alone* is never enough to justify a warrantless

seizure. Apparently, the court means by this that the police have to have a lawful right, gained without illegality, to view the item to be seized. As the court noted, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The second limit is that the discovery of evidence in plain view must be inadvertent. Plain view cannot be used where the discovery is anticipated, where the police know in advance the location of evidence and intend to seize it, at least where the item is not contraband nor stolen nor dangerous.

However, it may be questioned whether the plain view limits of the main opinion, referred to in the other opinions as the court's or the majority, actually was supported by a majority of the court. In *North* v. *Superior Court,* 8 Cal. 3d 301, the California Supreme Court declined to conclude that inadvertence is necessary to invoke the plain view doctrine.

The use of a flashlight directed to that which is in plain sight does not render the observation thereof a search. *People* v. *Benedict,* 2 Cal. App. 3d 400, 403–404 (1969) (officer did not improperly use a flashlight to observe the pupillary reaction of one who appeared to be under the influence of drugs). *See also People* v. *Garcia,* 7 Cal. App. 3d 314, 320 (1970) (officer's observation of puncture wounds on back of defendant's hands after defendant had been ordered to place his hands on top of car "so there wouldn't be any movement as far as weapons or anything else is concerned" was held not to be the result of any search.

§ 13.02: *Contraband Observed in Vehicle*

See § 12.09.

The cases are legion in which officers have lawfully approached a vehicle and observed, in plain view, contraband or other evidence of crime warranting a search of the vehicle and/or an arrest. *See, e.g., People* v. *Terry,* 70 Cal. 2d 410 (1969) (marijuana in ash tray observed by officers lawfully in common garage); *People* v. *Guerin,* 22 Cal. App. 3d 775, 784 (1971) (money bags seen without search); *People* v. *Muriel,* 268 Cal. App. 2d 477, 479–80 (1968) (narcotic paraphernalia on the rear trunk area of vehicle in garage properly entered by officers); *People* v. *Samaniego,* 263 Cal. App. 2d 804, 811 (1968) (stolen auto parts in plain sight in open trunk); and *People* v. *Sackett,* 260 Cal. App. 2d 307, 310–11 (1968), cases collected at n.1 (view from outside of car of contraband inside the car).

Other cases:

People v. *Christensen,* 2 Cal. App. 3d 546, 548 (1969) (odor of burning marijuana emanating from vehicle afforded probable cause to believe the car contained contraband); *People* v. *Murmuys,* 2 Cal. App. 3d 1083 (1969) (officer entered car to look for indicia of ownership after traffic stop and saw contraband); *People* v. *Superior Court* (Mata), 3 Cal. App. 3d 636, 639 (1970) ("Observation of that which is in view [through the window of an automobile] is lawful, whether the illumination is daylight, moonlight, lights within the vehicle, lights from street lamps, neon signs or lamps, or the flash of lights from adjacent vehicles [citations]; that the light comes from a flashlight in an officer's hand makes no difference. [Citations.]"); *People* v. *Childs,* 4 Cal. App. 3d 702 (1970) (pills contained in dark bottle inside automobile were in plain sight).

§ 13.03: *Seizure of Items Based on Plain View of Container*

The plain view rule applies and seizure without a warrant may be made of a package or container where its shape, design, or manner in which it is carried affords reasonable grounds to believe it contains contraband (*e.g.,* pipe used to smoke marijuana). *People* v. *Nickles,* 9 Cal. App. 3d 986, 992–93 (1970). The court noted, however, that a suspicious looking or unusual object which is not contraband may not be seized without a warrant whether or not it is in plain view.

The sight of a handrolled cigarette is not enough to justify the conclusion that it contains marijuana. *Thomas* v. *Superior Court,* 22 Cal. App. 3d 972, 977 (1972).

Our Supreme Court reminds us that it is inherently impossible for the contents of a closed opaque container to be in plain view regardless of its size or the material it is made of. A search is needed to determine its contents and the search may demand a search warrant. *Abt.* v. *Superior Court,* 1 Cal. 3d 418, 421 (1969); *Miramontes* v. *Superior Court,* 25 Cal. App. 3d 877, 883 (1972). *Cf. People* v. *Torralva,* 17 Cal. App. 3d 686, 691 (1971).

But see People v. *Lanthier,* Cal. 3d 751 (1971); *People* v. *Gurley,* 23 Cal. App. 3d 536, 558 (1972); *People* v. *Howard,* 21 Cal. App. 3d 997, 1000 (1971).

See § 8.12.

§ 13.04: *Contraband Observed on Premises from Proper Vantage Point*

The observation of contraband on premises arises most frequently in the following factual settings.

§ 13.05: *Observations While Outside the Premises*

In *People* v. *Berutko,* 71 Cal. 2d 84 (1969), the Supreme Court held that the officer's observations through the aperture which *defendant* had provided through his arrangement of the drapes covering his window was neither an unlawful search nor an unreasonable invasion of defendant's privacy. The court thus distinguished those cases where *the officers* or *third persons* were responsible for such apertures. For additional cases on the observation from vantage points *outside* the premises, *see People* v. *Allen,* 261 Cal. App. 2d 8, 10 (1968) (observed narcotics paraphernalia through open door); *People* v. *Galfund,* 267 Cal. App. 2d 317 (1968) (observations through aperture in drawn blinds); *People* v. *Superior Court* (Heap), 261 Cal. App. 2d 687, 689 (1968) (observed marijuana through open door); *People* v. *Superior Court* (Gaffney), 264 Cal. App. 2d 165 (1968) (observed marijuana through window); *People* v. *Tappan,* 266 Cal. App. 2d 812 (1968) (marijuana cigarette observed on defendant's floor by officers standing in common hallway); *People* v. *Willard,* 238 Cal. App. 2d 292 (1965) (exhaustive survey of California cases on observations from a point outside the premises which might constitute technical trespass); and §10.05, *supra. Compare, People* v. *Edwards,* 71 Cal. 2d 1096 (1969) where the lids on defendant's garbage cans preclude application of the "plain view" theory as to their contents; *see too People* v. *King,* 5 Cal. App. 3d 724, 727 (1970) (proper to see marijuana plants in back yard from driveway); *Vickery* v. *Superior Court,* 10 Cal. App. 3d 110, 116–20 (1970) (trespass and window search but evidence admitted); *Pate* v. *Municipal Court,* 11 Cal. App. 3d 721, 724 (1970) (officer looked through accidental aperture in drapes by climbing out onto a trellis and looking into a second-floor motel room, held illegal).

In *People* v. *Cooper,* 17 Cal. App. 3d 1112, 1117–19 (1971), officer looked through window from fire escape to see if there were guns before effecting entry on suspected armed robber.

In *People* v. *Colvin,* 19 Cal. App. 3d 14, 19–21 (1971), a police officer stood on a guardrail and looked into a bathroom window, the window being 5½ to 6 feet off a public driveway. It was held that

a magistrate could conclude there was no unreasonable expectation of privacy. On the other hand, in *People* v. *Cagle,* 21 Cal. App. 3d 57, 65 (1971), it was said that looking into the bathroom was unlawful, the trial judge having resolved the issue against the government.

In *Hart* v. *Superior Court,* 21 Cal. App. 3d 496, 505 (1971), the officer properly looked through an opening in a neighbor's fence at marijuana plants visible although covered by a plastic sheet.

§ 13.06: *Observations While Inside the Premises*

Similarly, while lawfully *inside* the premises, officers do not have to blind themselves to evidence in plain sight. *See People* v. *Sandoval,* 65 Cal. 2d 303, 308 (1966) (entering premises lawfully, officers observed narcotics in plain view); *People* v. *Hale,* 262 Cal. App. 2d 780, 787 (1968) (officer did not have to blind himself to scale, pan, and marijuana debris which were in sight); *People* v. *Yeoman,* 261 Cal. App. 2d 338, 346 (1968), *overruled in another respect in People* v. *De Santiago,* 71 Cal. 2d 18, 30 (1969) (marijuana on coffee table and dresser); *People* v. *Von Latta,* 258 Cal. App. 2d 329, 336–37 (1968) (parole officer properly on premises observed marijuana pipe in defendant's hand and marijuana on the table); *People* v. *Kampmann,* 258 Cal. App. 2d 529, 533 (1968) (investigating possible kidnaping on the premises, officers observed open coffee can containing narcotics paraphernalia and marijuana); *People* v. *Jackson,* 198 Cal. App. 3d 698 (1961) (bag of marijuana in plain sight); *Romero* v. *Superior Court,* 266 Cal. App. 2d 714 (1968) (officers seized weapons in plain view while properly on the premises at request of fire department personnel, who had discovered arsenal in defendant's closet while extinguishing fire); *People* v. *Lawson,* 1 Cal. App. 3d 729, 731 (1969) (officer in apartment saw narcotics paraphernalia in a bedroom); *People* v. *Superior Court* (Aslan), 2 Cal. App. 3d 131, 134 (1969) ("mere act of picking up and examining the exterior surfaces of an object in open and plain view for identifying marks or numbers does not constitute a search").

§ 13.07: *Effect of Unlawful Entry*

It is clear from what has been said *supra,* § 9.20 (relative to problems of entry under Penal Code sections 844 and 1531), that if officers are improperly inside the premises, the doctrine of plain sight is inapplicable.

§ 13.08: *"Plain Smell" Distinguished*

In *People* v. *Marshall,* 69 Cal. 2d 51 (1968), discussed *supra,* § 5.06, the California Supreme Court held that although an officer's nose may confirm his observation of *already* visible contraband, it may not be deemed the equivalent of plain view. Thus, a closed paper bag from which emanated the smell of wine-soaked marijuana could not be opened by the officers despite the fact that they were properly on the premises. *Cf. People* v. *Nichols,* 1 Cal. App. 3d 173, 177 (1969) (officers may rely on smell of marijuana to make arrest).

See § 5.06.

§ 13.09: *Open Fields*

While the United States Supreme Court has held that the protection accorded to the people in their "persons, houses, papers, and effects" is not extended to open fields (*Hester* v. *United States,* 265 U.S. 57, 59 (1924)), by reason of the court's recent articulation of the Fourth Amendment's protection of "people, not places" (*Katz* v. *United States,* 389 U.S. 347, 351 (1967), and the "security of one's privacy"; *Berger* v. *New York,* 388 U.S. 41, 53 (1967)), the California Supreme Court in *People* v. *Edwards,* 71 Cal. 2d 1096 (1969), has adopted a standard other than one based on a "constitutionally protected area." The consideration now of paramount importance is whether the area searched is one in which the person has exhibited *a reasonable expectation of privacy.*

> "[W]hether the place was a 'constitutionally protected area' . . . does not serve as a solution in all cases involving such claims, and we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion." (71 Cal. 2d at 1100.)

The search was therefore found to be unlawful in view of the following factual considerations:

> "[T]he trash can was within a few feet of the back door of defendant's home and *required trespass* for its inspection. It was an *adjunct to the domestic economy.* . . . Placing the marijuana in the trash can, so situated and used, *was not an abandonment* unless as to persons authorized to remove the receptacle's contents, such as trashmen. . . . The marijuana itself *was not visible* without 'rummaging' in the receptacle. So far as appears defendants also resided at the house. In the light of the combined facts and circumstances *it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case."* (71 Cal. 2d at 1104 (emphasis added).)

Compare, however, *People* v. *Murray,* 270 Cal. App. 2d 201, 203–04 (1969), and *People* v. *Bradley,* 1 Cal. 3d 80 (1969).

§ 13.10: *Conduct or Evidence Observed from Common or Public Areas*

What is observed from a common or quasi-public area will normally be held to be lawful. *People* v. *Berutko,* 71 Cal. 2d 84, 91 (1969). As was said in *People* v. *Terry,* 70 Cal. 2d 410, 427 (1969), "Police officers in the performance of their duties may, without violating the Constitution, peaceably enter upon the common hallway of an apartment building without a warrant or express permission to do so." *People* v. *Seales,* 263 Cal. App. 2d 575, 577–79 (1968). In *Terry* (at 428) the court permitted entry into a garage used in common with other tenants of an apartment building. *People* v. *Peterson,* 23 Cal. App. 3d 883, 894 (1972); *People* v. *Sanchez,* 2 Cal. App. 3d 467, 474 (1969).

In *People* v. *Schad,* 21 Cal. App. 3d 201, 209 (1971), entry into a hospital emergency room was permitted.

Officers can walk into a business open to the public. *People* v. *Arnold,* 243 Cal. App. 2d 510, 517 (1966); *People* v. *Roberts,* 182 Cal. App. 2d 431, 437 (1960).

The court in *People* v. *Foster,* 19 Cal. App. 3d 649, 653 (1971), assumed that officers were permitted to listen at the door of an apartment while standing in a common hallway. In *People* v. *Guerra,* 21 Cal. App. 3d 534, 538 (1971), this was extended to an actual holding. In *United States* v. *Perry,* 339 F. Supp. 209, 213–14 (S.D. Cal. 1972), the court not only permitted such eavesdropping in a motel room, but permitted the officers to arrange a different room for the defendant with the motel management, so eavesdropping would be easier.

As to backyards, *see Vidaurri* v. *Superior Court,* 13 Cal. App. 3d 550 (1970), and *People* v. *Alexander,* 253 Cal. App. 2d 641 (1967). *See too People* v. *Bradley,* 1 Cal. 3d 80, 85 (1969), and *Vickery* v. *Superior Court,* 10 Cal. App. 3d 110 (1970). *Dillon* v. *Superior Court,* 7 Cal. 3d 305, 310–11 (1972).

This rule does not extend to jointly used living areas of rooming or boarding houses where a person may reasonably expect to have his privacy invaded by fellow roomers or guests but not others.

People v. *Douglas,* 2 Cal. App. 3d 592, 595 (1969). However, such common areas may be entered with the permission of the landlady. *People* v. *Corrao,* 201 Cal. App. 2d 848, 851 (1962).

As to observations from public portions of restrooms, *see* § 15.09.

§ 13.11: *Pressing Emergencies*

Emergency circumstances which justify the officer's searching a person, premises, or automobile without a search warrant fall generally into two categories—the need to disarm a dangerous felon during hot pursuit (§ 13.12) or protect the officers' lives during the course of investigation (§ 13.13). *See too People* v. *Gordon,* 10 Cal. App. 3d 454, 460 (1970), which holds that a search warrant is not necessary where there is danger of imminent destruction, removal, or concealment of the property intended to be seized (trunk and footlocker were to be mailed immediately by airline).

§ 13.12: *Hot Pursuit of Dangerous Felon*

In *Warden* v. *Hayden,* 387 U.S. 294 (1967), the Supreme Court held that the "exigencies of the situation," *i.e.,* the pursuit of a suspected armed felon in the house which he had entered only moments before, permitted a warrantless entry and search. *See also People* v. *Smith,* 63 Cal. 2d 779, 797 (1966); *People* v. *Bradford,* 28 Cal. App. 3d 695, 702–703 (1972).

The same principle was applied to the search of a *vehicle* where it was abandoned by an individual suspected of killing a police officer. *People* v. *Terry,* 70 Cal. 2d 410, 424 (1969).

§ 13.13: *Other Emergency Situations*

In *People* v. *Maxwell,* 275 Cal. App. 2d Supp. 1026 (1969), the appellate department of the superior court found a "compelling urgency" justifying inspection by a game warden of sacks carried by passengers leaving a fishing boat, which were reasonably believed to contain fish, "because not to do so would frustrate the governmental purpose," *i.e.,* there would be no other opportunity to inspect. *See too Romero* v. *Superior Court,* 266 Cal. App. 2d 714, (1968) (entry by firemen); *People* v. *Ramsey,* 272 Cal. App. 2d 302, 311 (1969) (same); *People* v. *Grubb,* 63 Cal. 2d 614, 618–19 (1965) (abandoned car protruding into road was traffic hazard); *People* v. *Rhodes,* 21 Cal. App. 3d 10, 19–20 (1971) (entry to secure premises from possible theft). See *People* v. *Sirhan,* 7 Cal. 3d 369, 396 (1972).

See §§ 9.16, 8.06.

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CHAPTER FOURTEEN

CONSENT

§ 14.01: *Searches Conducted with Consent*

Generally, the defendant may waive the requirement of a search warrant and probable cause by *consenting* to a search of his person, premises, or automobile. *People* v. *Egan,* 250 Cal. App. 2d 433, 436 (1967). Similarly, a third person in joint control of defendant's property may consent to its being searched in the absence of defendant, as explained in detail in the ensuing sections.

§ 14.02: *Consent by the Defendant*

The following cases have recognized the validity of defendant's consent to a search of his person or property: *People* v. *West,* 3 Cal. 3d 595, 602 (1970) ("You can take whatever you want."); *People* v. *Beal,* 268 Cal. App. 2d 481, 483–84 (1968) (voluntary submission to search of auto by response to officers, "Go ahead"); *People* v. *Hale,* 262 Cal. App. 2d 780, 787 (1968) ("Come on in"); *People* v. *Lyles,* 260 Cal. App. 2d 62, 65–67 (1968) (although he attempted to mislead officers into believing he did not live there, defendant said he did not care what officers did in the apartment; consent was valid); *People* v. *Perez,* 259 Cal. App. 2d 371, 377 (1968) ("Go ahead and look"—vehicle); *People* v. *Batista,* 257 Cal. App. 2d 413, 418 (1967) (consent to search of person and premises, in hope of incurring good will of the officers, was valid); *People* v. *Dahlke,* 257 Cal App. 2d 82, 87 (1967) ("Do what you want"); *People* v. *Bloom,* 270 Cal. App. 2d 731 (1969); *People* v. *Stewart,* 267 Cal. App. 2d 366 (1968) (driver gave permission to search the car); *People* v. *Doerr,* 266 Cal. App. 2d 36 (1968) (driver repeatedly *invited* officer to search his vehicle); *People* v. *Jones,* 274 Cal App. 2d 614 (1969) (driver consented; search commenced on freeway and continued at another location); *People* v. *Miles,* 2 Cal. App. 3d 324, 328 (1969) (defendant consented to search by opening her purse in presence of officer, exposing marijuana to view); *People* v. *Hidalgo,* 7 Cal. App. 3d 525, 528 (1970) ("Go ahead and look").

A consent to enter may be expressed by actions as well as words. *People* v. *Harrington,* 2 Cal. 3d 991, 995 (1970) (officer asked if he could go inside; defendant made a gesture of invitation); *People* v.

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Sproul, 3 Cal. App. 3d 154, 162 (1969); *Nerell* v. *Superior Court*, 20 Cal. App. 3d 593, 599 (1971); disapproved in another respect in *People* v. *Medina*, 6 Cal. 3d 484, 489 (1972); *People* v. *Munoz*, 24 Cal. App. 3d 900, 901 (1972) (silence was not consent).

As to consent by contract, *see Blair* v. *Pitchess*, 5 Cal. 3d 258, 276 (1971).

§ 14.03: *Facts Relevant to Voluntariness*

Consent obtained by fraud or coercion, including submission to an expressed or implied assertion of authority, is not free and voluntary, and has no legal effect. *People* v. *Tremayne*, 20 Cal. App. 3d 1006, 1015 (1971).

The question as to whether defendant's consent is voluntary or was in submission to an express or implied assertion of authority is a question of fact to be decided in light of all the facts and circumstances. *People* v. *West*, 3 Cal. 3d 595, 602 (1970); *People* v. *Smith*, 63 Cal. 2d 779, 798 (1966); *Nerell* v. *Superior Court*, 20 Cal App. 3d 593, 600 (1971), disapproved in another respect in *People* v. *Medina*, 6 Cal. 3d 484, 489 (1972); *People* v. *Campuzano*, 254 Cal. App. 2d 52, 57 (1967); *People* v. *Bilderbach*, 62 Cal. 2d 757, 762–63 (1965). To the same effect, *see Call* v. *Superior Court*, 266 Cal. App. 2d 163 (1968), relying on *People* v. *Mills*, 251 Cal. App. 2d 420 (1967).

The People have the burden of showing that there was consent. *People* v. *Superior Court* (Arketa), 10 Cal. App. 3d 122, 127–28 (1970). This burden has been characterized as a "heavy" one. *People* v. *McKelvy*, 23 Cal. App. 3d 1027, 1033 (1972). Presently being litigated in the United States Supreme Court is a case that focuses on the extent of that burden. *Bustamonte* v. *Schneckloth*, 448 F. 2d 699 (9th Cir. 1971). The state court had allowed a consent on the basis that where consent was given there is an implication that the alternative of refusal existed. The Ninth Circuit felt that mere verbal assent is not enough. It was concerned that the officer's "May I" might be taken as the courteous expression of a demand backed by force of law.

To be considered voluntary and effective, a consent to search must be unequivocal, specific and intelligently given. The degree of affirmative assistance given to the police by the suspect is often relevant in determining whether a valid consent is given. *Nerell* v. *Superior Court*, 20 Cal. App. 3d 593, 599 (1971). *See too People* v. *Wheeler*, 23 Cal. App. 3d 290, 304 (1971) (volunteered permission and assisted in search).

Cf. People v. *Munoz*, 24 Cal. App. 3d 900, 903 (1972) (consent valid in spite of delay, inquiry about warrant, vacillation, etc.).

§ 14.04: *Custody*

The fact that defendant is in custody at the time consent is given, *though relevant, is not conclusive* of involuntariness. *People* v. *Shelton*, 60 Cal. 2d 740, 746 (1964); *People* v. *Brown*, 19 Cal. App. 3d 1013, 1017–18 (1971); *People* v. *Campuzano*, 254 Cal. App. 2d 52, 57 (1967); *People* v. *Dahlke*, 257 Cal. App. 2d 82, 87–88 (1967); *cf. People* v. *Vasquez*, 256 Cal. App. 2d 342, 346 n.3 (1967).

In *People* v. *Lyles*, 260 Cal. App. 2d 62, 67–68 (1968), this issue was never reached since defendant was not in custody (*i.e.*, not deprived of his freedom of action in any significant way) at the time consent was given.

Compare, however, at the other end of the spectrum, *People* v. *Shelton*, 60 Cal. 2d 740, 745 (1964), where the court said: "The fact that Shelton was under *arrest* at the time, *however, and his subsequent refusal to assist the officers in gaining access* to the apartment establish that his apparent consent was not voluntarily given." Thus, it would appear that where the arrest is accompanied by some act on the part of the defendant negating his apparent consent, the search cannot be justified as "voluntary." *See*, in this connection, *Castaneda* v. *Superior Court*, 59 Cal. 2d 439, 443 (1963) (defendant was arrested, put in handcuffs, and attempted to mislead officers while consenting; these efforts, with the arrest, made consent involuntary). *See too People* v. *Faris*, 63 Cal. 2d 541, 545 (1965).

See § 1403, *infra*.

§ 14.05: *Prolonged Detention or Long, Unexplained Delay*

Recently, in *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 274 (1969), the Supreme Court held that the long, unexplained delay surrounding the officer's questioning of his co-passengers destroyed the voluntary consent of defendant to a search of his car: "We do not think that the half-hour interval was a respite which revived and fortified Leonard's freedom to act; quite the contrary, we would think his prolonged detention increased the tension and pressures of his predicament." If a defendant is detained longer than necessary a consent subsequently given is illegally obtained. *People* v. *Lingo*, 3 Cal. App. 3d 661, 664–65 (1970). *See too People* v. *Gonsoulin*, 19 Cal. App. 3d 270, 273 (1971). *Cf. People* v. *Bloom*,

270 Cal. App. 2d 731, 735 (1969). *See* § 11.10.

§ 14.06: *Express or Implied Coercion*

Where consent is mere submission to the assertion of official authority, the search is involuntary. Thus, in *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), officers searched defendant's house pursuant to consent given by his grandmother. The officers told her they had a search warrant and she replied, "Go ahead." At the trial, however, the prosecution relied not on the search warrant, but on the grandmother's *consent* to the search. The Supreme Court reversed, holding that "the burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Ibid.* at 548–49. Thus, consent cannot be used to justify a search where the officers originally relied upon an invalid warrant, and utilize the warrant in obtaining consent. *Blair* v. *Pitchess*, 5 Cal. 3d 258, 274 (1971). *See too People* v. *Ward*, 27 Cal. App. 3d 218, 224–225 (1972).

In a later decision, the United States Supreme Court stressed the invalidity of the *Bumper* warrant. The propriety of this kind of search depends not on consent but on the validity of the assertion of authority. *United States* v. *Biswell*, 92 S.Ct. 1593, 1596 (1972). *See also People* v. *Legg*, 258 Cal. App. 2d 52, 55 (1968) ("Open up I want to talk to you," was not assertion of authority for entry, rather only the seeking of an interview); *People* v. *Rice*, 259 Cal. App. 2d 399, 403–04 (1968) (officer asserted his "right to [pat] search for weapons" and defendant's consent thereto did not extend to a search into his pockets); and *People* v. *Johnson*, 68 Cal. 2d 629, 632 (1968) (consent secured, immediately following an illegal entry or arrest, involving an improper assertion of authority, is inextricably bound up with the illegal conduct and cannot be segregated therefrom); *People* v. *Green*, 264 Cal. App. 2d 614 (1968) (same); and *People* v. *Cerda*, 254 Cal. App. 2d 16, 23–24 (1967) (defendant's opening of his wallet was not accomplished by force, demands, nor other implied threats; consent voluntary); *People* v. *Cruz*, 264 Cal. App. 2d 437 (1968) (defendant merely shrugged shoulders when officer requested to search vehicle, and was ordered to stand on sidewalk; voluntary consent was not proven); *People* v. *Harrington*, 2 Cal. 3d 991, 997 (1970) (the fact that officer was in uniform, had a gun and represented that he was searching for a missing juvenile did not constitute implied coercion).

Where the defendant stood in a police spotlight surrounded by four officers armed with shotguns or carbines, the consent was not voluntary. *People* v. *McKelvy*, 23 Cal. App. 3d 1027, 1034 (1972).

§ 14.07: *Advising of the Right Not To Consent*

Officers need not, prior to the search, advise or warn the consenting defendant (or other person) that he has a right to refuse consent. *People* v. *Wheeler*, 23 Cal. App. 3d 290, 305 (1972); *People* v. *Tremayne*, 20 Cal. App. 3d 1006, 1014 (1971). *See* cases collected in *People* v. *Beal*, 268 Cal. App. 2d 481, 485 (1968). That case held that "the trial court's scrutiny of the voluntariness of the consent is far more protection to a defendant than the recital of some warning by the police." *Ibid.* at 523. *See also People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 270–71 (1969); *People* v. *Bustamonte*, 270 Cal. App. 2d 648 (1969); *People* v. *Braden*, 267 Cal. App. 2d 939 (1968); *People* v. *Baker*, 267 Cal. App. 2d 916 (1968); *People* v. *Fuller*, 268 Cal. App. 2d 844, 851–53 (1969), reaching that same result; *cf.*, however, *People* v. *MacIntosh*, 264 Cal. App. 2d 701 (1968), where the court said that a waiver of the right to refuse the search must reflect an "understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld." *See also People* v. *Hidalgo*, 7 Cal. App. 3d 525, 529 (1970). However, failure to give such advice may, under the circumstances of a given case, be a factor to be taken into consideration in determining whether or not a *free* consent was actually given. *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 270 (1969); *Blair* v. *Pitchess*, 5 Cal. 3d 258, 275 n.8 (1971); *People* v. *Gravatt*, 22 Cal. App. 3d 133, 137 (1971). *See Bustamonte* v. *Schneckloth*, 448 F.2d 699 (9th Cir. 1971), *cert. granted.*

The person who consents and is in custody does not have to be given his *Miranda* rights prior to search. *People* v. *Thomas*, 12 Cal. App. 3d 1102, 1111 (1970). If he is, however, it may tend to show voluntary consent. *People* v. *Wheeler*, 23 Cal. App. 3d 290, 305 (1972). Consent to search was invalid when given without counsel after counsel had been appointed. *Tidwell* v. *Superior Court*, 17 Cal. App. 3d 780, 790 (1971).

§ 14.08: *Failure To Disclose Role as Government Informer*

The failure to disclose one's role as a government informer does not vitiate the consent of defendant to enter the premises. *Hoffa* v. *United States*, 385 U.S. 293 (1966).

§ 14.09: *Consent Following Illegal Entry, Detention, or Arrest*

As noted in the *Johnson* case, cited *supra*, § 14.06, consent following the unlawful assertion of the officer's power to enter, detain, or arrest, is inextricably bound up to that conduct, making the consent involuntary as a matter of law. In addition to the *Johnson* case, *see also People* v. *Franklin*, 261 Cal. App. 2d 703, 707 (1968) (consent following illegal traffic stop could not validate the search undertaken); *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265 (1969), discussed *supra*, § 14.05; *Beckers* v. *Superior Court*, 9 Cal App. 3d 953, 958 (1970); *People* v. *Horton*, 14 Cal. App. 3d 930, 934 (1971).

In one case consent to entry, with no apparent knowledge of the preceding claimed illegality of looking through a window, was held to dispel the taint. *Mann* v. *Superior Court*, 3 Cal. 3d 1, 7 (1970). *See too People* v. *Pranke*, 12 Cal. App. 3d 935, 946 (1970). It has also been said that there can be a "ratification" of an uninvited entry. *People* v. *Hunter*, 218 Cal. App. 2d 385, 393 (1963). *But see Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 155 (1971).

§ 14.10: *Withdrawal of Consent Previously Given*

Especially in the context of an arrest, defendant's withdrawal of consent previously given militates strongly against the voluntary nature of consent. *See* § 14.04, *supra*; *also People* v. *Martinez*, 259 Cal. App. 2d Supp. 943, 945–46 (1968), where the search undertaken after withdrawal of the consent was deemed improper and the evidence thus seized inadmissible. *Compare Casteneda* v. *Superior Court*, 59 Cal. 2d 439 (1963); *People* v. *West*, 3 Cal. 3d 595, 602 (1970) (withdrawal after discovery of narcotic).

This is another way of stating that the scope of the search must not go beyond that authorized by the consenting party. *People* v. *Martinez*, *supra*, 259 Cal. App. 2d Supp. 943, 945; *see also People* v. *Rice*, 259 Cal. App. 2d 399, 403–04 (1968) (consent to "pat" search did not permit search of defendant's pockets).

In *People* v. *Hidalgo*, 7 Cal. App. 3d 525, 530 (1970), consent to search the trunk of a car was held to include consent to search a shopping bag in the trunk. Consent to search a car included consent to search a matchbox under the front seat. *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 261, 270 (1965). Consent to search a bedroom covered the furniture (dresser, dresser drawers and bed) but did not include a suitcase belonging to someone else. *People* v. *Daniels*, 16 Cal. App. 3d 36, 45 (1971); *People* v. *Egan*, 250 Cal. App. 2d 433,

435 (1967). Consent to enter a house to look for a man did not infer a right to search the house and its closet for a crowbar. *People* v. *Superior Court* (Arketa), 10 Cal. App. 3d 122, 127 (1970). Consent to search a car was not consent to search a jacket in the car. *People* v. *Stage*, 7 Cal. App. 3d 681, 683 (1970).

A consent to one search does not authorize a subsequent second search. *Pinizzotto* v. *Superior Court*, 257 Cal. App. 2d 582, 590 (1968); *cf. People* v. *Jones*, 274 Cal. App. 2d 614, 622–23 (1969). *See too People* v. *Gorg*, 45 Cal. 2d 776, 782–83 (1955).

§ 14.11: *Scope of the Search Must Not Exceed that Authorized*

In this connection, see § 14.10, *supra*.

§ 14.12: *Consent by Third Persons*

It has been recognized that third persons in joint control of defendant's property may consent to its being searched. "[A] search is not unreasonable if made with the consent of a cooccupant of the premises who, by virtue of his relationship or other factors, the officers reasonably and in good faith believe has authority to consent to their entry." *People* v. *Smith*, 63 Cal. 2d 779, 799 (1966); *see also People* v. *McGrew*, 1 Cal. 3d 404 (1969).

§ 14.13: *Husband or Wife of the Defendant*

A valid consent can be given by the husband or wife of a suspect. *People* v. *Bryan*, 254 Cal. App. 2d 231, 234 (1967) (wife). In *People* v. *Carter*, 48 Cal. 2d 737 (1957), the California Supreme Court stated that, assuming amicable relations between husband and wife, if the property seized is of a kind over which a wife normally exercises as much control as the husband, she may consent to a search and seizure. In that case, a *trousers* and *shirt* were held to be properly seized pursuant to consent given by the wife. In *In re Lessard*, 62 Cal. 2d 497, 504–05 (1965), the court held that officers could rely on the wife's consent even though it was later discovered defendant and his wife were separated at the time consent was given. *Cf. People* v. *Fry*, 271 Cal. App. 2d 350, 357 (1969) (husband had instructed wife not to consent, officers could not rely on her consent).

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487–89 (1971), where a wife voluntarily produced guns and clothing, it was held that there was no search and seizure and that the wife did not act as an instrument or agent of the state when she produced her

husband's belongings.

§ 14.14: *Mistresses, Common Law Wives*

Mistresses and common law wives are often accorded the status of a lawful spouse relative to their power to consent to a search of defendant's property. *See, e.g., People* v. *Lobikis,* 256 Cal. App. 2d 775, 778–80 (1967) (relationship justified officers in concluding mistress had authority over defendant's premises as a joint occupant); *People* v. *Smith,* 63 Cal. 2d 779, 799 (1966); *People* v. *Stewart,* 11 Cal. App. 3d 242, 247 (1970), disapproved in another respect in *People* v. *Beagle,* 6 Cal. 3d 441, 451 (1972); *People* v. *Sproul,* 3 Cal. App. 3d 154, 162 (1969).

§ 14.15: *Parents*

Parents, with whom a son is living, may consent to a search of his bedroom. *People* v. *Daniels,* 16 Cal. App. 3d 36, 44 (1971). *See too In re Lokey,* 64 Cal. 2d 626, 632 (1966). Such a consent may be valid despite the protests of the son. *Vandenberg* v. *Superior Court,* 8 Cal. App. 3d 1048, 1055 (1970).

§ 14.16: *Sister*

A sister could not consent to a search of a brother's bedroom. *Beach* v. *Superior Court,* 11 Cal. App. 3d 1032, 1035 (1970).

§ 14.17: *Innkeeper and Guest*

It is clear under *Stoner* v. *California,* 376 U.S. 483 (1964), that consent of a hotel (or, for that matter, a motel) clerk or manager will not render a search of the defendant's room valid. In that case, the court held that there was no basis for the police to believe that the defendant had authorized the clerk of a hotel to permit the search; thus, the search was improper. A man's hotel or motel room is his castle no less than his house. *People* v. *Rodriguez,* 242 Cal. App. 2d 744, 747 (1966); *Pate* v. *Municipal Court,* 11 Cal. App. 3d 721, 724 (1970); *Williams* v. *Superior Court,* 25 Cal. App. 3d 409, 412 (1972). *Compare,* however, the search of defendant's quarters where his tenancy has expired and the manager is entitled to enter the premises. *People* v. *Van Eyk,* 56 Cal. 2d 471, 478 (1961); *see People* v. *McGrew,* 1 Cal. 3d 404, 412 (1969), where it was said that a hotel guest may reasonably expect a maid to enter his room to clean up, but not that a hotel clerk will lead the police in a search of his room. *Krauss* v. *Superior Court,* 5 Cal. 3d 418, 422 (1971). In *People* v. *Rightnour,* 243 Cal. App. 2d 663, 668–69 (1966), the maid

and the owner of the hotel found extreme disarray and burnt bedding and called police. It was proper for them to investigate arson or burglary on the strength of the owner's consent, even though the tenant was out of town. *People* v. *Henning,* 18 Cal. App. 3d 872, 875 (1971), permitted hotel personnel to call on the police to enter a room with a loud radio substantially annoying to other guests. *See too People* v. *Minervini,* 20 Cal. App. 3d 832, 840–41 (1971). ("A person does not become a guest by obtaining a room at an inn solely for the accomplishment of an unlawful purpose.").

§ 14.18: *Landlord and Tenant*

Under *Chapman* v. *United States,* 365 U.S. 610 (1961), similar to *Stoner, supra,* §14.17, it is clear that a landlord may not, absent "exigent circumstances" (to render aid, *e.g.*) consent to a search of the premises of his tenant, even to view waste or abate a nuisance on the premises.

See People v. *Plane,* 274 Cal. App. 2d 1 (1969), defendant arrested, landlord entered to preserve property and invited officer.

Consent by an absent owner is sufficient and a trespasser does not become a householder entitled to this protection of the statute (Pen. Code § 844); *People* v. *Ortiz,* 276 Cal. App. 2d 1, 4 (1969).

Where tenant has abandoned residence (a question of fact), landlord's consent is valid. *People* v. *Urfer,* 274 Cal. App. 2d 307 (1969). The same rule applies where the tenant has been evicted. *People* v. *Superior Court* (York), 4 Cal. App. 3d 648, 657 (1970).

§ 14.19: *Co-tenants*

A co-tenant may consent to the search of areas on the premises which are jointly used and occupied. *People* v. *Debnam,* 261 Cal. App. 2d 206, 210–11 (1968) (consent of a brother-co-tenant); *People* v. *Terry,* 57 Cal. 2d 538, 558–59 (1962) (consent of co-tenant jointly occupying premises with defendant); *People* v. *MacIntosh,* 264 Cal. App. 2d 701 (1968) (same). *People* v. *Amadio,* 22 Cal. App. 3d 7, 14 (1971) (co-user of car). A limitation was set forth in *Tompkins* v. *Superior Court,* 59 Cal. 2d 65, 69 (1963), however. The court there stated that the co-tenant may not consent to a search of even jointly shared areas where the defendant is on the premises and objects to the search. *Cf. People* v. *Smith,* 63 Cal. 2d 779, 799 (1966). A co-tenant's consent may also be invalid if the defendant is present. *See People* v. *Grey,* 23 Cal. App. 3d 456, 461 (1972); *People* v. *Murillo,* 241 Cal. App. 2d 173, 178 (1966). *Cf. People* v. *Munoz,* 24 Cal. App. 3d 900, 908 (1972). *See Duke* v. *Superior Court,* 1 Cal. 3d 314 (1969)

(a person in common ownership or control who is not within a premises cannot give consent to enter and search so as to excuse the police from complying with the announcement rules of Penal Code section 844).

§ 14.20: *House Guests and Other Occupier*

Where there is evidence from which officers may conclude that others are in joint control of the premises, a consent by such parties is valid. *People* v. *Brown,* 238 Cal. App. 2d 924, 927 (1965) (premises under joint control of defendant's wife, her mother, and her stepfather; the mother's consent valid); *Tompkins* v. *Superior Court,* 59 Cal. 2d 65, 69 (1963) (joint occupant); *cf. People* v. *Fuller,* 268 Cal. App. 2d 844 (1969) (consent by occupant to search *her* apartment revealing defendant); *People* v. *Braden,* 267 Cal. App. 2d 939 (1968) (consent of owner to search of his premises occupied by three guests, including defendant, was proper notwithstanding the guests' objections thereto); *Raymond* v. *Superior Court,* 19 Cal. App. 3d 321, 326 (1971) (son could not consent to search of father's things); *People* v. *Misquez,* 152 Cal. App. 2d 471, 479 (1957) (baby-sitter with key).

§ 14.21: *Owners of Public Premises*

Explicit from the Supreme Court's holding in *Bielicki* v. *Superior Court,* 57 Cal. 2d 602 (1962), is that the users of public places do not impliedly consent to their being spied upon indiscriminantly by police officers if a reasonable expectation of privacy is present. *Compare Katz* v. *United States,* 389 U.S. 347 (1967) (the occupant of telephone booth does not expect that his utterances will be broadcast to the world).

§ 14.22: *Apparent Authority*

The leading California case is *People* v. *Gorg,* 45 Cal. 2d 776, 783 (1955). Where a third party seems to have apparent authority to give consent, the police have been held to be justified in relying upon it.

> "In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' (Mr. Justice Stone in McGuire v. United States, 273 U.S. 98, 99 [47 S. Ct. 259, 71 L. Ed. 556]), and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority."

The Ninth Circuit Court of Appeals has formulated a different position. "The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." *Cipres* v. *United States,* 343 F.2d 95, 98 (9th Cir. 1965); *see too Oliver* v. *Amiotte,* 382 F.2d 987, 988 (9th Cir. 1967); *Oliver* v. *Bowens,* 386 F.2d 688, 691 (9th Cir. 1967). In *People* v. *Cirilli,* 265 Cal. App. 2d 607, 611 (1968), doubt was expressed that the quoted statement "is or should be the law."

The California rule has also been criticized in the Ninth Circuit in another way, relying on the *Stoner* case, and suggesting that *Stoner* has the effect of overruling *Gorg. Lucero* v. *Donovan,* 354 F.2d 16, 21 n.6 (9th Cir. 1965). *Stoner* v. *State of California,* 376 U.S. 483, 488 (1964), says:

> "Our decisions make it clear that rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " *See Smayda* v. *United States,* 352 F.2d 251, 259 (9th Cir. 1965).

However, it has subsequently been held that *Stoner* does not overrule *Gorg. People* v. *Sullivan,* 271 Cal. App. 2d 531, 547 (1969). *See too People* v. *Rightnour,* 243 Cal. App. 2d 663, 670 (1966).

In *People* v. *Hill,* 69 Cal. 2d 550, 554 (1968), the State Supreme Court said:

> "Although sometimes criticized, the rule that a search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search has been regularly reaffirmed."

The court discussed the *Stoner* case. *See People* v. *Superior Court* (York), 3 Cal. App. 3d 648, 658 (1970); *People* v. *Pranke,* 12 Cal. App. 3d 935, 944–45 (1970).

In *People* v. *McGrew,* 1 Cal. 3d 404, 412–13 (1969), the court reiterated the rule stated in *Hill* and explained some of the limitations on apparent authority.

> "[T]here must be some objective evidence of joint control or

access to the places or items to be searched which would indicate that the person authorizing the search has the authority to do so." *McGrew* at 412. *See People* v. *Hopper,* 268 Cal. App. 2d 774, 779 (1969); *People* v. *Corrao,* 201 Cal. App. 2d 848, 852 (1962) (inference may be drawn from possession of keys).

2. "The good faith mistake rule does not, however, apply where the third party makes clear that the property belongs to another." *McGrew* at 413. *See De Conti* v. *Superior Court,* 18 Cal. App. 3d 907, 910 (1971) (landlord's agent asked, "You think I can open it?" Consent held to be effective).

3. It does not apply "where the relationship of the third party and the defendant makes clear that the defendant has not authorized the third party to act as his agent."

It is also held that apparent authority does not apply if the defendant is personally present. *People* v. *Murillo,* 241 Cal. App. 2d 173, 178 (1966); *People* v. *Frank,* 225 Cal. App. 2d 339, 343 (1964).

If the person who gives consent has no authority to grant what is asked, apparent authority does not apply. *Bielicki* v. *Superior Court,* 57 Cal. 2d 602, 608 (1962) (amusement park agent could not have been reasonably believed to have authority to consent to spying upon each and every occupant of toilet booths).

What appears to have been the apparent authority rule was applied in *People* v. *Gurley,* 23 Cal. App. 3d 536, 555 (1972). There it developed that the defendant was not in full possession of his faculties when he consented, although this was not evident to the officers. The court concluded that an objective standard should be applied and it upheld the consent.

§ 14.23: *Note: Consent Is Invalid as to Defendant's Private Belongings*

The consent of a third person is invalid if the purpose is to search property known to be exclusively the defendant's. *People* v. *Cruz,* 61 Cal. 2d 861 (1964) (suitcases improperly searched pursuant to consent of two girls living with defendant); *People* v. *Egan,* 250 Cal. App. 2d 433, 436 (1967) (stepfather could not consent to search of kit bag in defendant's room); *People* v. *Hopper,* 268 Cal. App. 2d 774 (1969) (record did not support the authority of consenting party to search premises known to be the defendant's); *People* v. *Baker,* 12 Cal. App. 3d 826, 837 (1970) (consent of manager of bowling alley not enough for search of defendant's locker and handbag). *Baker* says that the owner of property or facilities has no such

interest in determining whether his property or facilities are being used for illegal purposes as to authorize consent to inspection of rooms, lockers or packages which contain suspected contraband he has discovered on his own initiative.

§ 14.24: *Consent of Other Parties*

As to the consent of a school official to search a student's belongings, *see* § 15.05.

As to the power of a military superior to give consent to a search, and the problem of submission to authority in a military context, *see* § 15.04.

As to the power of airline personnel to consent to a search, *see People* v. *McGrew,* 1 Cal. 3d 404, 410–14 (1969); *see too* § 15.03.

Appellant had supervisory power over wired-in area at book company, but the consent to search of his superior, a vice president, was upheld. *United States* v. *Gargiso,* 458 F.2d 584, 586–87 (2d Cir. 1972).

CHAPTER FIFTEEN

SPECIAL TYPES OF SEARCHES

§ 15.01: *Border Searches*

All persons coming into the United States from foreign countries are liable to detention and search by authorized agents of the government. The search which customs inspectors are entitled to conduct upon entry is of the broadest possible character and is governed by federal law. There is no question of probable cause under state law. *People* v. *Eggleston*, 15 Cal. App. 3d 1026, 1029 (1971); *People* v. *Mitchell*, 275 Cal. App. 2d 351, 355 (1969); *People* v. *Clark*, 2 Cal. App. 3d 510, 518 (1969).

Searches of certain body cavities and other personal places have been held to be legal by federal courts under certain circumstances. *United States* v. *Johnson*, 425 F.2d 630 (9th Cir. 1970) (real suspicion needed for strip search); *United States* v. *Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1970) (strip search); *Huguez* v. *United States*, 406 F.2d 366, 374–79 (9th Cir. 1968). *See too Blefare* v. *United States*, 362 F.2d 870 (9th Cir. 1966), discussed in Note, *The Reasonableness of Border Searches*, 4 Cal. West. L. Rev. 355 (1968). Cases have said, in describing what is required for a strip search or body cavity search, that there must be a "clear indication" or "plain suggestion" that narcotics are being smuggled.

See 6 A.L.R. Fed. 317.

Searches may be made at some substantial distance from the border to look for aliens. *People* v. *Herrera*, 12 Cal. App. 3d 629, 634 (1970) (search made on Highway 99 in Kern County); *see United States* v. *Almeida-Sanchez*, 452 F.2d 459, 460–61 (9th Cir. 1971) (specifies 100 air miles from external boundary).

A border search (as distinguished from a search for aliens) can also be made inland if there is a showing that the contraband sought was aboard the vehicle at the time it entered the United States. *See Alexander* v. *United States*, 362 F.2d 379, 382 (9th Cir. 1966).

§ 15.02: *Abandoned Property*

It is well settled that a search and seizure of abandoned property is not unlawful. *People* v. *Siegenthaler*, 7 Cal. 3d 465, 470 (1972). *People* v. *Long*, 6 Cal. App. 3d 741, 748–49 (1970) (suitcase found

in hotel room after defendant vacated it). *See Abel* v. *United States*, 362 U.S. 217, 241 (1960); *United States* v. *Manning*, 440 F.2d 1105, 1111 (5th Cir. 1971).

Typically, upon sight of the police, a defendant will attempt to throw away contraband. When the police recover it, it is said to be abandoned and hence that there is no violation of privacy in taking it into custody. *People* v. *Simmons*, 19 Cal. App. 3d 960, 967 (1971); *People* v. *Superior Court* (MacLachlin), 271 Cal. App. 2d 338, 342–43 (1969); *People* v. *Blackmon*, 276 Cal. App. 2d 346, 348 (1969); *People* v. *Shoemaker*, 16 Cal. App. 3d 316, 319–22 (1971).

However, if the abandonment is a response to illegal police conduct, the abandonment will be contaminated and the seizure will be regarded as illegal. *Badillo* v. *Superior Court*, 46 Cal. 2d 269, 273 (1956); *see too People* v. *Shipstead*, 19 Cal. App. 3d 58, 68 (1971). *Cf. People* v. *Prendez*, 15 Cal. App. 3d 486 (1971) (illegal entry purged by flight and contraband thrown away admitted).

The State Supreme Court has recently considered the question of when an abandonment takes place. It decided that placing items in the trash is not an abandonment. *People* v. *Edwards*, 71 Cal. 2d 1096, 1104 (1969); *cf.* the dissenting opinion of Burger, C.J., in *Work* v. *United States*, 243 F.2d 660, 663 (D.C. Cir. 1957). In a second case, *People* v. *Krivda*, 5 Cal. 3d 357, 366–67 (1971) (*cert. granted*), the Supreme Court decided that trash was not abandoned where it had been placed in the well of a refuse truck. The expectation of privacy continues at least until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. *Cf. People* v. *Superior Court* (Barrett), 23 Cal. App. 3d 1004, 1010 (1972) (item placed in neighbor's trash can could be seized by police).

Some defense-oriented views on abandonment may be found in Mascolo, The *Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 Buffalo L. Rev. 399 (1970).

§ 15.03: *Airport Searches*

Searches that have occurred at airports have received increasing appellate attention. However, they do not involve special rules of law but applications of search and seizure principles to a particular situation. Usually, airport searches involve a contention that there was no time to secure a warrant because the package was about to be shipped from the jurisdiction, that the search was made by the

airline, a private party, or that the airline consented to the search.

The leading case in California is *People* v. *McGrew*, 1 Cal. 3d 404, 410–14 (1969). It was held that a warrant had to be obtained as the footlocker could be held by the airline until a warrant was secured. The court rejected an argument that the shipper had consented to a search of the footlocker by shipping with a common carrier where a right of inspection is vested in the carrier. Consent to an airline search was not consent to a police search. The court also rejected a contention that the police reasonably believed that there was apparent authority for the airline to consent. There must be some objective evidence that the person authorizing the search has authority to do so. A rule contrary to *McGrew* was announced in *People* v. *McKinnon*, 7 Cal. 3d 899 (1972). It permitted police examination of contraband found by an airline employee.

In *People* v. *Temple*, 276 Cal. App. 2d 402, 411 (1969), decided before *McGrew*, the police formulated a plan to ship a substitute box to the consignee and were allowed to seize the original box for this purpose, the court reasoning that there was no time to secure a warrant as delay would arouse suspicion in the consignee.

Another possible police solution is to allow the shipment to go through and then to arrest the recipient or the person carrying the contraband and to search incident to the arrest. *People* v. *Craycraft*, 1 Cal. App. 3d 947, 949 (1969); *United States* v. *Mehciz*, 437 F.2d 145, 146 (9th Cir. 1971).

If the airline search is made completely independent of the police, *McGrew* may be distinguished. *Miramontes* v. *Superior Court*, 25 Cal. App. 3d 877, 884 (1972). *See People* v. *Hively*, 480 P.2d 558, 559 (Colo. 1971); *see too Wolf Low* v. *United States*, 391 F.2d 61, 63 (9th Cir. 1968); *Clayton* v. *United States*, 413 F.2d 297, 298 (9th Cir. 1969); *Gold* v. *United States*, 378 F.2d 588, 591 (9th Cir. 1967).

A recent case, however, indicates that even if this is an independant private search that locates contraband, a search warrant could still be needed, if the contraband was not in plain sight of the police and there was no danger of imminent removal. *People* v. *Segovia*, 13 Cal. App. 3d 134, 137–38 (1970). A hearing has been granted. *See Abt* v. *Superior Court*, 1 Cal. 3d 418, 421 (1969), where the actions of the private citizen, independently of the police, brought the package containing contraband into plain view of the police, but it could not be seized without a warrant, as the package did not indicate the nature of the contents. *People* v. *Superior Court* (Evans), 11 Cal. App. 3d 887, 891–92 (1970). *People* v. *Superior*

Court, supra, questioned the continued vitality of *McGrew* and *Abt* on the strength of *Chambers* v. *Maroney,* 399 U.S. 42 (1970). *See too People* v. *Howard,* 21 Cal. App. 3d 997, 999 (1971) (airline opened suitcase, detected sweet perfumy odor, called police, who opened package. *Held,* lawful search); *People* v. *Thompson,* 25 Cal. App. 3d 132, 142 (1972).

A result different from *McGrew* will be reached if the facts show that the contraband will be shipped out before a warrant can be secured. *People* v. *Gordon,* 10 Cal. App. 3d 454, 461 (1970). *See Hernandez* v. *United States,* 353 F.2d 624, 627 (9th Cir. 1965). *Cf. Corngold* v. *United States,* 367 F.2d 1, 3 (9th Cir. 1966). *See too People* v. *Love,* 8 Cal. App. 3d 23, 30 (1970) (police could arrest on basis of information due to fact contraband was going to different jurisdiction); *People* v. *Thompson, supra* (could be picked up at any time).

Other considerations come into play if a customs search is made or a "warrantless exit search." *See United States* v. *Marti,* 321 F. Supp. 59, 64–65 (E.D. N.Y. 1970) ("Current terror attacks and hijackings of civilian aircraft further demonstrate the strong national interest in providing a reasonable yet effective means of searching the baggage of those emplaning for abroad.").

An analysis of airport security problems may be found in Note, *Airport Security Searches and the Fourth Amendment,* 71 Colum. L. Rev. 1039 1971). *See United States* v. *Epperson,* 454 F.2d 769, 770–71 (4th Cir. 1972) (approves use of magnetometer at airport); *United States* v. *Bell,* 335 F. Supp. 797 (E.D. N.Y. 1971) (as to hijacking system of profile selection, magnetometer detection and stop and frisk). *See People* v. *De Strulle,* 28 Cal. App. 3d 477, 482 (1972); *People* v. *Botos,* 27 Cal. App. 3d 774, 778 (1972).

§ 15.04: *Military Searches*

The government has at times urged military necessity as a substitute for probable cause or a warrant.

Under the circumstances of *People* v. *Rodriguez,* 242 Cal. App. 2d 744, 747–48 (1966), the claim was rejected. There an attempt was made to justify a search of a motel room on the basis of a commanding officer's authorization. The court noted that the search would be illegal even under military law because a search by a commanding officer, or his authorized representative, must be based on probable cause. *See United States* v. *Vorrath,* 40 C.M.R. 334, 336 (1968); *United States* v. *Penman,* 36 C.M.R. 223, 232 (1966).

If the search conforms to military law but not to California search requirements, will the evidence be admitted? *People* v. *Kelley,* 66 Cal. 2d 232, 250–51 (1967), analyzes the possibility that it could be used, as held by *United States* v. *Grisby,* 335 F.2d 652, 656–57 (4th Cir. 1964); *cf. United States* v. *Miller,* 261 F. Supp. 442, 446 (D. Del. 1966).

Situations where a search might be valid under military law:

1. Search by commanding officer or authorized person on probable cause but without a warrant. *See* § 152, Manual for Court Martial (Rev. 1969); *see too United States* v. *Penman,* 36 C.M.R. 223, 229 (1966) (what is sufficient authorization).
2. Search of vehicle entering military base. *See Grisby, supra* at 654–55.
3. Military inspection of barracks or inventory search in placing a person in confinement. *Grisby, supra at 654; see too United States* v. *Kazmierczak,* 37 C.M.R. 214 (1967).
4. Search without a warrant. *Grisby, supra* at 655. *But see* McNeill, *Recent Trends in Search and Seizure,* 54 Military L. Rev. 83, 86 (1971).

Another problem area with military searches is consent. If the commanding officer has the power to make the search, he may have the power to consent that state law enforcement officials make it. *See People* v. *Shepard,* 212 Cal. App. 2d 697, 700–01 (1963).

It should be noted that the situation has changed since the *Shepard* case. Then the commanding officer did not need probable cause; now, he does. "Gone are the halcyon days when he could search on mere suspicion, or delegate his powers to whomever he pleased, or order a shakedown search without probable cause." *See,* Note, *Investigative Procedures in the Military: A Search for Absolutes,* 53 Cal. L. Rev. 878, 892 (1965).

Possibly such a search could be defended on apparent authority, which was also a basis for the *Shepard* decision.

Still another aspect of military consent searches is the problem of submission to authority. "Recognizing the tendency of the enlisted man to yield to the least color of authority, the court has required that consent be shown by clear and positive testimony." 53 Cal. L. Rev., *supra* at 891. The presence of senior officers may be considered intimidating. *United States* v. *Decker,* 37 C.M.R. 17, 21 (1966). *Decker* makes mention of the fact that it helps make a valid consent to have the person advised he did not have to consent. Whether there was submission, according to *Decker,* is a question of fact.

§ 15.05: *Student Searches*

Searches of high school students by school officials have been sustained by California cases. *In re Thomas G.,* 11 Cal. App. 3d 1193, 1196–97 (1970), dealt with the action of a dean of students, in company with the principal, in having a student empty his pockets. The dean then looked in a film canister thus produced and found a dangerous drug. The school officials had been told by classmate that the student was seen to take a pill, was "possibly obviously intoxicated" and "perhaps unable to maintain himself." The court concluded that there was probable cause to arrest but that there would be an adverse effect from such full-blown criminal procedures on the student and on the school's discipline generally." The court relied on the power of the state to control the conduct of children, and permitted the student search without arrest.

In re Donaldson, 269 Cal. App. 2d 509, 510 (1969), dealt with the search of the footlocker of a 15-year-old high school student. A purchase of pills had been made from him by a fellow student. *Donaldson* classed the school officials as private citizens. It said they stand *in loco parentis* and share a parent's right to use moderate force. (Three justices voted for a hearing.)

A third case is *People* v. *Kelly,* 195 Cal. App. 2d 669, 675–79 (1961). There the police secured the permission of a college official to inspect a room in a student dorm. The court concluded that the officers could reasonably conclude there was apparent authority to give consent. The court had before it the Student House Rules and found that the school official, who had a master key, could open a room in an emergency. It felt that it was implicit that the appellant had agreed (through the rules) that the college official might enter the room.

The State Supreme Court recently touched on this area. It permitted a university employee to open a brief case in a locker to locate the source of an unpleasant odor in a study hall. It declined to reach the question of whether Stanford University was involved in "state action." The court did permit the maintenance supervisor not only to locate the brief case but also to open it and it permitted a deputy sheriff to reopen it without a warrant even though arguably the contents were not in plain sight. *People* v. *Lanthier,* 5 Cal. 3d 751 (1971).

See too *In re Fred C.,* 26 Cal. App. 3d 320 (1972).

The law reviews reach conclusions different from the California cases, and argue for more student rights. *See* Comment, *The Fourth Amendment and High School Students,* 6 Williamette L. J. 567 (1970) (contends that a school official is not a private citizen nor is he in *loco parentis*); Note, *Admissibility of Evidence Seized by Private University Officals in Violation of Fourth Amendment Standards,* 56 Cornell L. Rev. 507 (1971) (discusses classifying of a private university officer as a government officer because of government funding of the university, concludes that degree of government involvement would be a better test); Note, *Is the School Official a Policeman or Parent,* 22 Baylor L. Rev. 554 (1970). Other articles are collected in *People* v. *Lanthier,* 5 Cal. 3d 751, 755 n.3 (1971).

Two cases from other jurisdictions express an intermediate philosophy. Moore v. *Student Affairs Committee of Troy State University,* 284 F. Supp. 725, 730 (M.D. Ala. 1968), advocates a standard lower than probable cause (but a reasonable belief that a student is using a dorm room for a reason that is illegal or would otherwise seriously interfere with campus discipline). The court referred to "the special necessities of the student-college relationship." It felt that a student living in a campus dorm waives objection to reasonable searches conducted pursuant to reasonable and necessary regulations. The appellate department of the New York Supreme Court applied the *loco parentis* rule, conditioned only by reasonable suspicion. *People* v. *Jackson,* 319 N.Y.S. 2d 731, 735 (1971) ". . . a basis founded at least upon reasonable grounds for suspecting that something unlawful is being committed, or about to be committed, shall prevail before justifying a search of a student when the school official is acting *in loco parentis.*").

Two out-of-state cases restrict student searches. In *Piazzola* v. *Watkins,* 316 F. Supp. 624, 627–28 (M.D. Ala. 1970), the court that decided *Moore, supra,* concluded that police entry was illegal even with University consent. ". . . this was not a University-initiated search for University purposes, but rather a police-initiated search for criminal prosecution purposes." The court felt that the college's right to enter the dorm does not mean that it can admit a third party. *See too People* v. *Cohen,* 292 N.Y.S. 2d 706 (1968).

§ 15.06: *Regulatory Searches*

By the companion cases of *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), a search warrant is required for regulatory searches where entry is refused by the occupant. Dispensing with that requirement, however, is

expressly recognized by those cases in an emergency situation.

§ 15.07: *Residential Areas—the Camara Case*

In *Camara, supra,* § 15.06, the Supreme Court applied the requirement of a regulatory search warrant to the search of *residential* areas. However, the court stated that the "probable cause" necessary for the issuance of such warrants need not be dependent on the officer's belief that a *particular dwelling* violates the code, but on the reasonableness of the enforcement agency's appraisal of conditions *in the area as a whole.* In *Camara,* the nonemergency situation required the inspectors to obtain a search warrant.

However, a building inspector did not have to have a warrant to see what was perfectly apparent to any member of the public who happens to be near the premises. *City & County of San Francisco* v. *City Investment Corp.,* 15 Cal. App. 3d 1031, 1039 (1971). The court also said it was questionable whether a vacant building was entitled to Fourth Amendment protection. Moreover, the owner implied consent to enter in an agreement he made with the city.

§ 15.08: *Commercial Areas—the See Case*

The *See* case, *supra,* § 15.06, requires the issuance of search warrants for the regulatory inspection of *commercial* areas (in that case, a warehouse). The court felt that the businessman, like the occupant of a residence, has the right to be free from unreasonable official entries.

In *People* v. *White,* 259 Cal. App. 2d Supp. 936 (1968), the court held that *Camara* did not prohibit a state inspector from inspecting the "public areas" of a convalescent hospital without a search warrant. The court also premised its decision on the rule that acceptance of a license to operate such a hospital was implied consent to such supervision and inspection as required by statute.

In *Colonnade Corp.* v. *United States,* 397 U.S. 72, 77 (1970), it was held that a statute permitting entry to inspectors of dealers in alcoholic beverages, but imposing a penalty for failure to comply, did not authorize warrantless entry.

A different result was reached in *United States* v. *Biswell,* 92 S. Ct. 1593, 1596 (1972). There the federal agents asserted a right under statute to search under the Gun Control Act and the owner acquiesced. "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection."

See sections 1822.50 to 1822.57, Code of Civil Procedure, which enacts a system of inspection warrants to be used where consent is unavailable.

The *See* case was distinguished in *People* v. *Grey,* 23 Cal. App. 3d 456, 461 (1972), because an auto dismantling business was involved, a business "fraught with public danger." *Grey* also indicates that inspections may be made under the Alcoholic Beverage Control Act.

§ 15.09: Restroom Searches

An application of the principle that exploratory or blanket searches are prohibited is the clandestine observation made of an enclosed toilet stall in a restroom. As held in *Bielicki* v. *Superior Court,* 57 Cal. 2d 602, 606 (1962), the use of a peephole in this situation to gain observation of immoral sexual activity involves spying on "innocent and guilty alike" and is unlawful.

Subsequent Court of Appeal decisions held that there is no unreasonable search if the conduct could have been observed had the officer been in an area open to the public. *People* v. *Crafts,* 13 Cal. App. 3d 457, 459 (1970); *People* v. *Heath,* 266 Cal. App. 2d 754 (1968); *People* v. *Roberts,* 256 Cal. App. 2d 488 (1967); *People* v. *Maldenado,* 240 Cal. App. 2d 812, 814 (1966); *People* v. *Hensel,* 233 Cal. App. 2d 834, 836 (1965); *People* v. *Young,* 214 Cal. App. 2d 131 (1963); *People* v. *Norton,* 209 Cal. App. 2d 173 (1962).

Crafts, supra, concluded that these Court of Appeal cases established a rule different from that announced in *Britt* v. *Superior Court,* 58 Cal. 2d 469, 473, (1962), and that the Supreme Court, by denial of hearings, had acquiesced in the new rule.

If the police have evidence of specific unlawful activity in a restroom facility, then it has been held that a search is no longer exploratory. In *People* v. *Clyne,* 263 Cal. App. 2d 331, 332–33 (1968), the police properly entered a locked toilet in a restroom of a laundromat with the consent of the manager and by means of her key.

In *People* v. *Metcalf,* 22 Cal. App. 3d 20, 23 (1971), however, a different rule was announced. It held that section 653n of the Penal Code (forbidding the use of two-way mirrors in restrooms) had crystallized a different policy and altered the rule established by the Court of Appeal cases. It declared illegal the methods of surveillance previously permitted by the Court of Appeal. However, in *People* v. *Triggs,* 26 Cal. App. 3d 381 (June 26, 1972), the court disagreed with *Metcalf* and followed the prior appellate decisions.

CONTINUED

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CHAPTER SIXTEEN

BORDERS OF THE EXCLUSIONARY RULE

§ 16.01: *Searches by Private Individuals*

The Fourth Amendment is inapplicable to searches by private individuals. *Stapleton* v. *Superior Court,* 70 Cal. 2d 97, 100 (1968); *People* v. *Minervini,* 20 Cal. App. 3d 832, 834 (1971) (failure of private citizen to comply with 844). Thus, notwithstanding the fact that the search, if conducted by a state agent, would be unlawful, the evidence is admissible. *Cf. People* v. *Wolder,* 4 Cal. App. 3d 984, 993 (1970) (rule applied to search made by off-duty policeman, who was acting as private citizen); *cf. People* v. *Millard,* 15 Cal. App. 3d 759, 762 (1971) (off-duty policeman has right to arrest as a police officer); *People* v. *Houle,* 13 Cal. App. 3d 892, 895 (1970) (bail bondsman acts as private person).

However, the prosecution bears the burden of showing that such private persons were acting on their own initiative and not as government agents. In this connection, we are provided with two California Supreme Court decisions, with opposing results. *People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123, 128–29 (1969), discussed *supra,* § 17.05 (private detective hired by the petitioner did not act as an agent of the government); *Stapleton* v. *Superior Court,* 70 Cal. 2d 97, 100 (1969) (special agents from credit card companies accompanied police to aid in execution of arrest warrant for credit card fraud; state action found).

The court said it was not called upon to decide whether searches by private investigators and private police forces should be held subject per se to the Fourth Amendment. (Page 100 n.3) It noted, "Searches of such well financed and highly trained organizations involve a particularly serious threat to privacy." The law reviews do not agree on whether the exclusionary rule should be applied to them. *See* Note, *Seizures by Private Parties: Exclusion in Criminal Cases,* 19 Stan. L. Rev. 608, 615 (1967) (yes); Note, *Private Police Forces: Legal Powers and Limitations,* 38 U. of Chi. L. Rev. 555, 572–73 (1971) (no); Note, *Evidence Illegally Obtained by Store Detectives Admitted in Criminal Prosecution,* 12 UCLA L. Rev. 232, 237 (1965) (maybe).

In *People* v. *Mangiefico,* 25 Cal. App. 3d 1041, 1046 (1972), it was

concluded that not every private investigator is a law enforcement official. Where the investigator does not act as an agent, the Fourth Amendment does not apply.

See also People v. *Cheatham,* 263 Cal. App. 2d 458, 461–62 (1968) (no state participation; evidence admissible); *People* v. *Katzman,* 258 Cal. App. 2d 777, 786 (1968) (same); *People* v. *Scott,* 274 Cal. App. 2d 905 (1969) (same); *People* v. *Plane,* 274 Cal. App. 2d 1 (1969) (entry by landlord with officer); *People* v. *Superior Court* (Flynn), 275 Cal. App. 2d 489 (1969) (evidence properly suppressed where unlawful search by postal carrier); *Weinberg* v. *Superior Court,* 21 Cal. App. 3d 1018, 1023 (1971) (OK for postal employee to view damaged package with marijuana showing); *People* v. *Jackson,* 14 Cal. App. 3d 57, 66 (1970) (manager of apartment house found stolen property); *People* v. *Superior Court* (Evans), 11 Cal. App. 3d 887, 891 (1970) (airline cargo supervisor not police agent); *Raymond* v. *Superior Court,* 19 Cal. App. 3d 321, 325 (1971) ("The crux is not the citizen's eagerness but the policeman's involvement").

Even if the first search is independent of the police, and the product of it usable, if a subsequent search is made at the behest of the police, it may be unlawful. *People* v. *Fierro,* 236 Cal. App. 2d 344, 347 (1965).

However, a private citizen's right to search is not diminished by obtaining police assistance in exercising his right or even if he is encouraged by the police to exercise it. *People* v. *Thompson,* 25 Cal. App. 3d 132, 142 (1972).

See 36 A.L.R. 3d 553; *see too* Comment, *Police Bulletins and Private Searches,* 119 U. of Pa. L. Rev. 163 (1970) (argues effects of private citizen acting on police bulletin).

See § 15.05 on Student Searches.

§ 16.02: *Police Acting as Private Citizens*

People v. *Martin,* 225 Cal. App. 2d 91, 93 (1964), announced a rule that a public officer for a particular county or municipality has no official power to arrest offenders beyond the boundaries of the county or district for which he was appointed. *Martin* held that when he acts beyond the limits of his geographical unit his power to arrest is that of a private citizen, and tested by the more limited powers to arrest available to private citizens. (*Martin, supra* at 94.) *See People* v. *Aldapa,* 17 Cal. App. 3d 184, 188 (1971).

As the State Supreme Court subsequently noted in *People* v.

Sandoval, 65 Cal. 2d 303, 311 n.5 (1966), a citizen making an arrest is authorized only to take from the person arrested all offensive weapons which he may have about his person, but there is no right to make a search incident to the arrest, or to search for contraband or seize it upon uncovering it.

There is a rule of fresh pursuit by which the officer can follow a suspected felon into another jurisdiction. *Sandoval, supra* at 312.

The *Martin* case has been curbed by statute, section 830.1 of the Penal Code, which specifies that the powers of a deputy sheriff or police officer extends to any place in the state as to an offense committed in his jurisdiction, or which there is probable cause to believe was committed there, or which is committed in his presence and there is danger to person or property or of escape. He can also act outside of his area with the consent of the local chief of police or sheriff. *See People* v. *Tennessee,* 4 Cal. App. 3d 788, 791–92 (1970). It has been held that a deputy sheriff can give permission on behalf of the sheriff. *People* v. *Woods,* 7 Cal. App. 3d 382, 388 (1970).

The problem of a policeman acting as a private citizen also arises with respect to his off-duty activities. *See People* v. *Wolder,* 4 Cal. App. 3d 984, 993 (1970); *People* v. *Petersen,* 23 Cal. App. 3d 883, 894 (1972); *cf. People* v. *Millard,* 15 Cal. App. 3d 759, 762 (1971) (off-duty policeman has right to arrest as police officer).

§ 16.03: *Out-of-State Searches and Seizures*

Whether evidence illegally seized by police of another state will be excluded in California has not yet been determined by the California appellate courts. In *People* v. *Terry,* 57 Cal. 2d 538, 557 (1962), our State Supreme Court said, "We find it unnecessary to decide the novel and difficult question whether the exclusionary rule should be extended to evidence obtained by an unlawful search made in another state by officers of that state." The court in *Terry* referred (at 557 n.1) to several cases, all of which supported admissibility: *People* v. *Winterheld,* 102 N.W. 2d 201, 202–03, 359 Mich. 467 (1960); *People* v. *Touhy,* 197 N.E. 849, 856–57, 361 Ill. 332 (1935); *State* v. *Olsen,* 212 Ore. 191, 317 P.2d 938, 940 (1957); *Young* v. *Commonwealth,* 313 S.W. 2d 580, 581 (Ky) (1968); *Kaufman* v. *State,* 225 S.W. 2d 75, 76–77, 189 Tenn. 315 (1949). Since the *Terry* decision, however, there has been some erosion in these authorities. *See Ellis* v. *State,* 364 S.W. 2d 925, 928 (Tenn. 1963); *People* v. *Winterheld,* 115 N.W. 2d 80, 366 Mich. 428 (1962); *State* v. *Krogness,*

388 P.2d 120, 122 (Ore. 1963). *See too* Berman and Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure, Federal Problems,* 55 N.W. U. L. Rev. 525, 549–51 (1960), cited in *Terry.*

One technique of handling the issue is to find the evidence lawfully seized. *See People* v. *Mitchell,* 275 Cal. App. 2d 351, 355–57 (1969). *Terry* used the harmless error rule.

A severable problem exists as to whether federally seized illegal evidence can be admitted in a California court. *See People* v. *Kelley,* 66 Cal. 2d 232, 248–51 (1967); *Elkins* v. *United States,* 364 U.S. 206, 223 (1960). *Kelley* says (at 249): "It is generally stated that the 'silver platter' doctrine is still the law where the procedures used were constitutional in the jurisdiction where the evidence was obtained. (United States v. Coppola, 281 F.2d 340, 345; United States v. Grisby, 335 F.2d 652, 656.)" *See too* footnote 5 in *United States* v. *Coles,* 302 F. Supp. 99, 102 (D. Maine 1969), listing restrictions on the use of evidence obtained by federal-state cooperation.

§ 16.04: *Searches and Seizures in Foreign Countries*

There is a substantial body of authority that favors the position that evidence obtained by illegal search and seizure in a foreign country may be admitted, although no California case has directly decided the point. Ninth Circuit cases have so held. *Stonehill* v. *United States,* 405 F.2d 738, 743 (9th Cir. 1968); *Brulay* v. *United States,* 383 F.2d 345, 348 (9th Cir. 1967); *Commonwealth* v. *Wallace,* 248 N.E. 2d 246, 247 (Mass. 1969). Perhaps indicative of the ultimate California result is *People* v. *Helfend,* 1 Cal. App. 3d 873, 886 (1969), where the court relied heavily on *Brulay* to find that a confession in Mexico that did not comply with *Escobedo-Dorado* was nonetheless admissible. The court quoted the portion of the *Brulay* opinion dealing with search and seizure. The result, however, may be different if the state agents cooperate or participate in the search unlawful by California standards, *see Stonehill,* or if there is some fundamental due process violation. *See Helfend* at 890. *See* Note, *At the Border of Reasonableness: Searches by Custom Officials,* 53 Cornell L. Rev. 886 (1968).

See McNeill, *Recent Trends in Search and Seizure,* 54 Military L. Rev. 83, 110 (1971).

§ 16.05: *Parolees*

It has generally been agreed that the parolee's person and premises may be searched by his parole agent on less than full probable cause without the parolee's consent since the search is not governed by the same rules which apply to citizens possessed of full civil rights. *Hernandez* v. *Superior Court,* 16 Cal. App. 3d 169, 172–74 (1971), *disapproved in another respect* by *People* v. *Block,* 6 Cal. 3d 239, 246 (1971); *People* v. *Contreras,* 263 Cal. App. 2d 281 (1968); *People* v. *Quilon,* 245 Cal. App. 2d 624, 627 (1966); *see also United States* v. *Follette,* 282 F. Supp. 10, 15 (S.D. N.Y. 1968); *People* v. *Gilkey,* 6 Cal. App. 3d 183 (1970); *People* v. *Gambos,* 5 Cal. App. 3d 187 (1970); *People* v. *Lamb,* 24 Cal. App. 2d 378, 382 (1972). *See too People* v. *Anglin,* 18 Cal. App. 3d 92, 95 (1971) (rule applied to Youth Authority parolee).

The State Supreme Court has recently cautioned us that a diminution of Fourth Amendment protection for parolees can be justified only to the extent of the legitimate demands of the operation of the parole process. *In re Martinez,* 1 Cal. 3d 641, 647 n.6 (1970). It has been said that this general observation does not rule out appropriate limitations of Fourth Amendment rights for parolees. *People* v. *Kanos,* 14 Cal. App. 3d 642, 650 (1971). It has been said too, though, that "the broad principle" may have been narrowed. *People* v. *Gayton,* 10 Cal. App. 3d 178, 183 (1970).

The rule is subject to several important qualifications. First of all, it is abundantly clear that in effecting entry officers must at all times comply with Penal Code sections 844 and 1531. *See § 9.19, supra.* Second, an outpatient from the California Rehabilitation Center is not to be considered the same as a parolee for purposes of fictional consent. *People* v. *Myers,* 6 Cal. 3d 811 (1972); *People* v. *Jasso,* 2 Cal. App. 3d 955 (1969). Third, the police may not enlist the aid of a parole agent to conduct a search where there is ample time to obtain a search warrant. *People* v. *Coffman,* 2 Cal. App. 3d 681 (1969), where the primary aim of the search was that of law enforcement and not of parole administration. *Smith* v. *Rhay,* 419 F.2d 160, 162–63 (9th Cir. 1969). However, it is proper for the parole agent to be accompanied by police. *People* v. *Kanos,* 14 Cal. App. 3d 642, 649 (1971). Parole authorization of an arrest does not necessarily authorize a police search. *Hernandez* v. *Superior Court,* 16 Cal. App. 3d 169, 172 (1971).

A person on probation or on outpatient status may be required to consent to searches by the terms of his probation or other agree-

ment with the authorities. *People* v. *Kern,* 264 Cal. App. 2d 962, 965 (1968); *People* v. *Myers, supra* (outpatients). *See too People* v. *Perez,* 243 Cal. App. 2d 528, 532 (1960) (the activities of a probationer are thus subject to more careful official scrutiny than those of other citizens). Even if he objects when the search is made, the search will still be valid. *People* v. *Mason,* 5 Cal. 3d 759 (1971).

The exclusionary rule does not apply to a parole revocation hearing and illegally seized evidence can be used in considering whether a person's parole should be revoked. *In re Martinez,* 1 Cal. 3d 641 (1970).

A parolee cannot complain of the search of his residence on the ground that his wife's rights have been violated. *People* v. *Kanos,* 14 Cal. App. 3d 642, 650 (1971).

CHAPTER SEVENTEEN

ELECTRONIC EAVESDROPPING

§ 17.01: *Rejection of Rule Permitting All Eavesdropping*

In 1928 the United States Supreme Court held that the Fourth Amendment cannot be extended and expanded to include telephone wires "reaching to the whole world from the defendant's house or office." *Olmstead* v. *United States,* 277 U.S. 438, 465 (1928).

In some two score years, federal and state legislation and a reconsideration of eavesdropping rules have led to overruling the *Olmstead* decision. *Katz* v. *United States,* 389 U.S. 347, 353 (1967). Eavesdropping today is heavily regulated.

§ 17.02: *Movement Toward Greater Regulation*

Several significant milestones in the trend toward greater regulation of electronic surveillance should be noted.

The concept behind *Olmstead* and cases following it was that a trespass to a constitutionally prohibited area was required.

In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court held that petitioner's conversations seized by means of an electronic device attached to, but which did not "penetrate," a telephone booth, were inadmissible. The "trespass" (or penetration) doctrine required under *Goldman* v. *United States,* 316 U.S. 129 (1942), was disapproved—the violation of petitioner's *privacy* was held to be sufficient. Furthermore, the Fourth Amendment protects *people,* not places or "areas"; petitioner was entitled to assume that his utterances would not be broadcast to the world.

Notable is the fact that the conversations were suppressed notwithstanding sufficient probable cause for the "search" and the limited search (in scope and duration) in fact undertaken.

Retroactivity of the *Katz* case (decided December 18, 1967) was specifically rejected in *Desist* v. *United States,* 394 U.S. 244 (1969), and *Kaiser* v. *New York,* 394 U.S. 280 (1969), those cases holding *Katz* applicable only to state and federal *eavesdropping* conducted after the date of the *Katz* decision. Cases on appeal at the time of the *Katz* decision cannot avail themselves of its pronouncements.

Before *Katz,* California cases did not exclude evidence where police placed a sound amplifying device or detectaphone on the

wall outside of the defendant's apartment. *People* v. *Hughes*, 241 Cal. App. 2d 622, 624–25 (1966); *People* v. *Graff*, 144 Cal. App. 2d 199 (1956).

A second thrust against electronic eavesdropping has been accomplished through federal legislation, the Federal Communication Act (47 U.S.C. § 605). At first evidence obtained in violation of it could be utilized in a state trial. *Schwartz* v. *Texas*, 344 U.S. 199 (1952). But this was overruled in *Lee* v. *Florida*, 392 U.S. 378 (June 17, 1968). (The *Lee* case was held to apply to state trials begun on or after the date of the *Lee* opinion. *Fuller* v. *Alaska*, 393 U.S. 80 (1968).)

Section 605 of the Communications Act of 1934 was a predecessor to the comprehensive scheme for regulating interstate communication embodied in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510–2570), and still continues in effect.

A third aspect to curbing electronic eavesdropping has been the enactment of state laws. In California this is contained in the Invasion of Privacy Act, sections 630 to 637.2 of the California Penal Code.

§ 17.03: *Ideological Struggle Over Eavesdropping*

The emphasis of arguments against eavesdropping has been on the depth of invasion of privacy and the generalized nature of the usual eavesdropping search. *See* Penal Code § 630.

On the other hand, the governmental claim has stressed the value of and need for eavesdropping in combatting crime and protecting national security. Arguments, pro and con, are weighed in *Berger* v. *New York*, 388 U.S. 41, 63 (1967).

Now we will consider in more detail the statutory and case law about eavesdropping. First, though, we consider the major technique used by law enforcement for lawful electronic surveillance.

§ 17.04: *Authorization of Participant in Conversation*

A participant to a conversation can authorize the recording of it without the knowledge of the other participant. In *Rathbun* v. *United States*, 355 U.S. 107 (1957), the police listened in on an extension phone by consent of one party and the procedure was approved. In *People* v. *Malotte*, 46 Cal. 2d 59 (1956), the conversation was recorded by means of an induction coil with the consent of one side of the communication. *See too People* v. *Cruz*, 6 Cal.

App. 3d 384, 391 (1970); *People* v. *Jones*, 254 Cal. App. 2d 200, 220 (1967).

Under this same principle, law enforcement officers have been permitted to use an informer to contact the defendant and to tape the conversation. *United States* v. *White*, 401 U.S. 745 (1971); *Lopez* v. *United States*, 373 U.S. 427 (1963). *See too People* v. *Chatfield*, 272 Cal. App. 2d 141 (1969); *People* v. *Hinman*, 253 Cal. App. 2d 896, 901 (1967). It makes no difference whether the device placed on the informer is self-contained or utilizes a transmitter so that the recording is made at another location. *People* v. *Albert*, 182 Cal. App. 2d 729, 736 (1960). The advantage of this procedure is that it bolsters the credibility of the informer. An informer of dubious reliability can be used to produce trustworthy evidence. In some cases the recording alone has been used and the informer has not testified. *People* v. *Johnson*, 249 Cal. App. 2d 425, 430 (1967).

Where these procedures are used and the defendant is not in custody, *Miranda* rights need not be given. *People* v. *Caravella*, 5 Cal. App. 3d 931, 934 (1970); *People* v. *Ragen*, 262 Cal. App. 2d 392, 399 (1968). Before indictment there is no *Massiah* violation. *People* v. *Mabry*, 71 Cal. 2d 430, 441 (1969).

Under the new federal act it remains lawful without a warrant to intercept a conversation with the consent of one of the parties. 18 U.S.C. 2511(c); *United States* v. *Friedland*, 444 F.2d 710, 713 (1st Cir. 1971) (proper for government agent to carry bugging device); *United States* v. *Puchi*, 441 F.2d 697, 700 (9th Cir. 1971).

§ 17.05: The State Invasion of Privacy Act

Section 633 of the Penal Code specified that the California Invasion of Privacy Act does not prevent law enforcement officers from overhearing or recording any communication which could have previously been lawfully overheard or recorded. As to the uncertain nature and extent of the grant of power (and its relationship to repealed section 653h), *see* Note, *Electronic Surveillance After Berger*, 5 San Diego L. Rev. 107, 129–30 (1968).

The chief thrust of the California Invasion of Privacy Act is against private parties.

The rule that evidence secured by a private party is admissible even if illegally obtained (*see* § 16.01) does not apply here. Statute alters the rule. Pen. Code § 632(d). Moreover, the statute and case law present some circumstances under which what is overheard may be admitted. In *People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123, 131 (1969), the Supreme Court stated that Penal Code

section 632 (formerly 653j) requires proof of the following elements in order to establish the inadmissibility of the evidence involved: (1) a person not a party to the communication who (2) intentionally and (3) without the consent of any party to the communication (4) eavesdropped upon or recorded (5) a confidential communication. In that case, elements (1), (4), and (5), *supra*, were all present. However, the court found that element (2), *intent*, was absent since the recording was made by chance while testing the recorder, not while trying to record a confidential communication.

Secondly, though not discussed, element (3) was probably absent since the *recorded* party (defendant) had ordered the *recording* party to install the equipment.

In *People* v. *Mabry*, 71 Cal. 2d 430 (1969), the court said that the recording of a conversation between the informant (with his permission) and defendant did not violate defendant's Fourth Amendment rights.

See Note, *Electronic Surveillance in California*, 57 Cal. L. Rev. 1182 (1969).

It should be noted that, unless California's standard of "reasonableness" is *higher* than the federal standard, the standard is that required by the Fourth Amendment of the federal Constitution. *People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123 (1969). Presumably, even a higher standard would fall if the field had been preempted by federal legislation.

§ 17.06: *Federal Judicial Development*

Information which is illegally obtained but neither used in evidence nor as an investigative lead does not taint the conviction. *Hoffa* v. *United States*, 387 U.S. 231 (1967). *See too United States* v. *Lamonge*, 458 F.2d 197, 201 (6th Cir. 1972) (applies harmless error rule).

However, *Alderman* v. *United States*, 394 U.S. 165 (1969), where illegal surveillance has been conducted, requires the government to furnish those persons with standing (§ 17.07, *infra*) all records to determine whether the proof used at trial did in fact have an independent origin.

In *Alderman* v. *United States*, 394 U.S. 165 (1969), the Supreme Court made it clear that only those whose rights *were violated by the eavesdrop itself* can successfully suppress such evidence, and not those who are merely damaged by its admission (coconspirators and codefendants have no standing). However, as Alderman says

(at 176), a *homeowner* can object to the use of third party conversations overheard on his premises by unauthorized surveillance, even though he is not present, because the *house itself* is protected by the Fourth Amendment.

An important aspect of the federal judicial development in electronic eavesdropping law has been the increased emphasis on the use of warrants. In *Katz* v. *United States*, 389 U.S. 347 (1967), the officer's eavesdrop of a telephone booth was based on sufficient probable cause and was narrowly circumscribed both in scope and duration, but it was still struck down. A judicial order should have been obtained. *Cf. Osborn* v. *United States*, 385 U.S. 323 (1966), where there was a clear "procedure of antecedent justification before a magistrate." The affidavit was deemed to be sufficiently detailed as "a precondition of lawful electronic surveillance."

The United States Supreme Court has not only pressed for judicial interposition via the warrant procedure, it has also sought to regulate the warrant procedures themselves. New York passed a statute authorizing electronic eavesdropping warrants. The law was struck down in *Berger* v. *State of New York*, 388 U.S. 41 (1967). What the Supreme Court found wrong with the New York statute has influenced subsequent statutory development:

The New York statute did not lay down any requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized," as specifically required by the Fourth Amendment. The court said the need for particularity is especially great in the case of eavesdropping because by its very nature eavesdropping involves an intrusion on privacy that is broad in scope. The court also pointed (at 59) to the statute's failure to describe with particularity the conversations sought. This gives the officer "a roving commission" to seize any and all conversations. It said that authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause. Renewing the warrant for additional two-month periods on the basis of the original grounds was also held to be a defect. The statute did not terminate the eavesdrop with the seizure of the conversation sought. There was no requirement for prompt execution. A showing of exigency in order to avoid giving notice was not required in the statute. The statute did not provide a return, leaving full discretion in the officer as to the use of all of the seized conversations.

Some question was raised (*Berger* at 63, 71), as to whether it would be possible to draft a statute to meet all of these requirements. Congress has answered the question in the affirmative and enacted Title III of the Crime Control Act; thus far its essentials have been held to be constitutional. *See* footnote 9 in *Halpin* v. *Superior Court,* 6 Cal. 3d 885, 896 (1972).

§ 17.07: *Scope and Impact of Title III*

The application of Title III in California was examined in the *Halpin* case, *supra.* The State Supreme Court made the following summary of the main features of the Act:

> "Section 2511 of title 18 of the United States Code makes it a crime, subject to the exceptions contained in subdivisions (2) (a) through (3) of that section, to wilfully intercept or disclose any wire or oral communication. 'Wire communication' is defined by section 2510(1) as 'any communication made . . . through the use of facilities for the transmission of communications by the aid of wire . . . or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.' 'Oral communication' is defined by section 2510(2) as 'any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.' Section 2515 makes inadmissible any evidence, and the fruits thereof, obtained in violation of sections 2510–2520." (Footnotes omitted.)

The court held that Title III had preempted particular fields of wiretapping and electronic surveillance. (As to what is not preempted, *see* footnote 17 on page 899 of *Halpin.*)

Halpin dealt with a telephone call from a prisoner in jail to his wife in another city. The call was electronically monitored and the conversation, tape recorded. The court held that this was an intercepted wire communication that was not authorized by the search warrant procedure of the federal statute. (18 U.S.C. § 2516.)

Halpin did not point out any instances where electronic eavesdropping could still be used in California without a warrant. As noted, however, the federal statute itself permits it where there is a "wired" informer or one party to a conversation consents. *See* 18 U.S.C. § 2511(2) (c). Another possibility is suggested in the case of

People v. *Santos,* 26 Cal. App. 3d 397, 402 (1972), where it was said that the federal act is inapplicable "since it involved no facility furnished or operated by a common carrier." The conversation in question was over an internal jail telephone intercom system and not part of any public telephone system. Still another possibility is suggested in *United States* v. *Focarile,* 340 F. Supp. 1033, 1039 (D. Md. 1972). It holds that the statute does not apply to a pen register, a device for recording phone numbers called. But the opinion reviews conflicting decisions.

§ 17.08: *The Federal Warrant Procedure*

One of the impacts of the *Halpin* case is the pressure it exerts to obtain warrants for most kinds of electronic eavesdropping. The federal government has enacted 18 U.S.C. section 2516, which creates a warrant procedure with many special requirements. A failure to comply with the federal warrant statute renders evidence inadmissible. *See Cross* v. *State,* 171 S.E. 2d 507, 510, 225 Ga. 760 (1969).

A threshhold problem exists as to whether a state has to pass an enabling act before the federal warrant statute can be used. 18 U.S.C. section 2516(2) contains a provision that the prosecuting attorney must be "authorized by statute of that state to make application . . . for an order." In *State* v. *Siegal,* 285 A.2d 671, 681, 13 Md. App. 444 (1971), preexisting state statutes were held to be usable. It was held that provisions of the state act repugnant to the federal act as not being as restrictive were preempted by the federal act. California has no express statute authorizing electronic eavesdropping by judicial order. It does have statutes authorizing search warrants. So far there has been no case law testing the present availability of the federal warrant procedures in California.

The California Legislature has considered a search warrant procedure for wiretapping but did not pass it. *See* Karabian, *The Case Against Wiretapping,* 1 Pacific L. J. 133 (1970). *See too* Biddle, *Court Supervised Electronic Searches: a Proposed Statute for California,* 1 Pacific L. J. 97 (1970).

Assuming that this threshhold requirement of an appropriate state statute is met, it would appear that the usual requisites of a search warrant (*see* Chapter 2), as well as the special, additional requirements of the federal statute, would have to be satisfied, as follows:

1: The application has to be made by the principal prosecuting attorney of the state or the principal prosecuting attorney of a

political subdivision. This would appear to empower the Attorney General and District Attorneys. 18 U.S.C. § 2516(2). Query if a deputy district attorney or deputy attorney general has sufficient power under the federal act? *See United States* v. *Cihal*, 336 F. Supp. 261, 266 (W.D. Pa. 1972) (designation has to be proper); *United States* v. *Focarile*, 340 F. Supp. 1033, 1060 (D. Md. 1972) (same). It does not seem that the police officer or deputy sheriff can secure a warrant on his own from the judge under the federal act. What is an application by the principal prosecuting attorney? It is enough if he hands the police officer's affidavit to the judge? It might be a prudent precaution to include an affidavit from the prosecutor, reciting that he has read the police officer's affidavit and authorizes its presentation to a judge.

2. An eavesdropping affidavit can be obtained only for certain specified crimes. *See* 18 U.S.C. § 2516.

3. The application (or affidavit) has to state certain things:

a. The identity of the officer and the identity of the prosecutor. 18 U.S.C. § 2518(1)(a).

b. A statement of probable cause that a crime has been committed which gives details of the offense, a description of the place where the communication is to be intercepted, a description of the type of communication involved, and the identity of the person who is committing the offense and whose communication is to be intercepted. 18 U.S.C. § 2516(1)(b).

c. Whether or not other investigative procedures have been tried and whether or not it seems likely that they might succeed. 18 U.S.C. § 2518(1)(c). *See United States* v. *Focarile*, 340 F. Supp. 1033, 1043 (D. Md. 1972).

d. The time for which the interceptions will be required. 18 U.S.C. § 2518(1)(d).

e. A statement about previous applications for wiretaps and the action taken on them. 18 U.S.C. § 2518(1)(e).

f. If the application is for an extension of the order, the court has to be told the results thus far. 18 U.S.C. § 2518(1)(f).

4. Certain things have to be inserted into the warrant. The identity of the person whose communications are to be intercepted, the place where the interception will be made, the kind of communication to be intercepted and the offense to which it relates, the agency authorized to intercept and the person authorizing the application, the period of time during which communications will be intercepted and whether interception will terminate when the

described communication has been obtained. 18 U.S.C. § 2518(4). The time cannot exceed 30 days. 18 U.S.C. § 2518(5). *See United States* v. *Lamonge*, 458 F.2d 197, 199 (6th Cir. 1972). (Our state search warrant statutes require the return to be made within 10 days. Pen. Code § 1534.)

A New York case struck down an eavesdropping warrant because it failed to contain a provision that the authorization to intercept had to be executed as soon as practical, and had to be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping. *People* v. *Holder*, 331 N.Y.S. 2d 557, 568 (1972).

Other requisites:

The interception must be recorded, if possible. 18 U.S.C. § 2518(8).

After a period of time (not more than 90 days) the judge has to give an inventory to the parties to the communication. 18 U.S.C. § 2518(8)(d). One court has held that failure to serve the inventory and notice "vitiates the wiretap and precludes the use of evidence derived therefrom. *United States* v. *Eastman*, 326 F. Supp. 1038, 1039 (M.D. Pa. 1971).

The tape cannot be used in evidence unless the order and application are given to the defendant 10 days before trial. 18 U.S.C. § 2518(9). *United States* v. *Lamonge*, 458 F.2d 197, 199 (6th Cir. 1972).

The authorization must contain a provision that the interceptions will be conducted in such a way as to minimize the interception of other communications. *United States* v. *Focarile*, 340 F. Supp. 1033, 1047 (D. Md. 1972) (imposes total suppression for failure to minimize but reviews conflicting decisions).

Note that the federal statute permits a wiretap in advance of a warrant if there is an emergency and it involves national security or an organized crime conspiracy. *See* 18 U.S.C. § 2518(7). But within 48 hours after the interception there has to be an application for a court order.

§ 17.09: *Jail Recordings*

A long established exception to the rule disfavoring the recording of conversations where a participant does not consent has been recordings taken in a jail. A jail shows none of the attributes of privacy of a home, an automobile, an office, or a hotel room. *Lanza* v. *New York*, 370 U.S. 139, 143 (1962). As was said in *People* v.

Morgan, 197 Cal. App. 2d 90, 92–94 (1961), "A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment." *Morgan* permitted the government to record a conversation between a prisoner and his sister over a phone system within the jail. *See People* v. *Jones*, 19 Cal. App. 3d 437, 449 (1971); *People* v. *Califano*, 5 Cal. App. 3d 476, 481 (1970). The rule has been applied to a police car, *People* v. *Chandler*, 262 Cal. App. 2d 350 (1968), but does not extend to a consultation with an attorney in a room designated for that purpose. *People* v. *Lopez*, 60 Cal. 2d 223, 248 (1963).

Halpin (in footnote 21 at page 900) raises a question about the scope of the rule. "We leave unresolved the precise limitations on that rule." *Halpin* was a jail case. *People* v. *Santos*, 26 Cal. App. 3d 397, 402 (1972) (no need to reassess rule where there was knowledge the conversation was being overheard).

It is common for police to tape record interrogations of defendants. *People* v. *Blair*, 2 Cal. App. 3d 249, 254–55 (1969). This practice would seem to survive *Halpin* if only because one party to the conversation is consenting to the recording.

It has recently been held that a video tape recording may be made of a defendant's statements. *Hendricks* v. *Swenson*, 456 F.2d 503, 505 (8th Cir. 1972), citing cases permitting sound motion pictures of defendant's statement. *People* v. *Dabb*, 32 Cal. 2d 491 (1948); *People* v. *Hayes*, 21 Cal. App. 2d 320 (1937).

Prior to *Halpin* courts permitted a chief of police to eavesdrop on his officers. *People* v. *Canard*, 257 Cal. App. 2d 444, 463 (1967). *Halpin* and the federal act throw a dark shadow across such practices.

§ 17.10: *Use of Recording Evidence at Trial*

A re-recording may be made of an audio tape and put into evidence. *People* v. *Albert*, 182 Cal. App. 2d 729, 741 (1960). A transcript may also be made from the recording and introduced into evidence. This serves a particularly useful purpose where the tape or recording is unclear. *People* v. *Morse*, 60 Cal. 2d 631, 655–56 (1964). When played back several times and analyzed closely, a recording can be made clear and the result put into a transcript. *See People* v. *Albert*, *supra* at 742. The best evidence rule is not violated. *People* v. *Ketchel*, 59 Cal. 2d 503, 519 (1963).

§ 17.11: *Something Other than Inadmissibility*

By other sections of the Penal Code, it is criminally unlawful to trespass on private property for the purpose of eavesdropping (§ 634), to sell eavesdrop equipment (§ 635), to record conversations of a prisoner with his clergyman, physician, or attorney (§ 636), or to disclose or misappropriate telegraphic or telephonic messages (§ 637).

Civil remedies against the violator may be sought under section 637.2 by way of injunction and/or damages.

CHAPTER EIGHTEEN

FRUIT OF THE POISONOUS TREE

§ 18.01: *Effect of an Unlawful Arrest—Fruit of the Poisonous Tree*

"The state may not use evidence to convict an accused which it obtained by exploiting an illegal arrest or detention."

Wong Sun v. *United States*, 371 U.S. 471, 484–85 (1963); *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961); *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265 (1969); *People* v. *Sesslin*, 68 Cal. 2d 418, 426–27 (1968). An illegal arrest immediately preceeding the procurement of evidence renders "[that evidence] inadmissible as the 'fruit' of the agents' illegal action." *People* v. *Bilderbach*, 62 Cal. 2d 757, 765 (1965). The reasonableness of the search therefore depends on the constitutional validity of the arrest. *Beck* v. *Ohio*, 379 U.S. 89 (1964).

Similarly, where the police threaten illegal conduct, they cannot reap the benefits of it. Thus the police cannot use evidence "abandoned" in the face of an illegal act nor can they rely on a flight caused by the threat of an illegal search. Whether or not there was such a threat is a question of fact. *See Crueger* v. *Superior Court*, 7 Cal. App. 3d 147, 150–52 (1970).

The rule is discussed in 43 ALR 3d 385.

§ 18.02: *Applicable to Verbal, as Well as Tangible, "Tainted" Evidence*

The application of the "fruit of the poisonous tree" doctrine was restated in *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963):

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion . . . *[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion.* . . ." (Emphasis added.)

Thus, in *People* v. *Johnson*, 70 Cal. 2d 541 (1969), officers without an arrest or search warrant improperly seized a stolen TV set in the apartment of Johnson's codefendant, Howard. Howard was arrested, and after being shown the TV set, confessed, implicating John-

son. Johnson, when confronted with Howard's confession, similarly confessed. The California Supreme Court reversed, holding that Howard's confession was subject to exclusion as fruit of the poisonous tree (*Ibid.* at 581), and that Johnson's confession, secured by exploiting the use of Howard's confession, was similarly inadmissible, tainted fruit of the poisonous tree (*Ibid.* at 584).

People v. *Hatcher*, 2 Cal. App. 3d 71, 77 (1969). *See also Alderman* v. *United States*, 394 U.S. 165 (1969), where the Supreme Court held that overheard conversations, like confessions, may be fruits of an illegal entry and therefore inadmissible.

For a recent example of the poison fruit doctrine as applied to *tangible* evidence, *see People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265 (1969). There, the improper search of the passenger in an automobile was said to taint a subsequent search of the automobile itself.

§ 18.03: *The Effect of an Illegal Arrest v. Unlawful Search, on Confessions*

In *People* v. *Johnson*, 70 Cal. 2d 541, 551, 552 (1969), the California Supreme Court was careful to point out that an illegal arrest, unlike an unlawful search, may not necessarily require the exclusion of verbal evidence (confessions) obtained in conjunction therewith (*Ibid.* at 552):

> "In Rogers v. Superior Court, 46 Cal. 2d 3, 10 [291 P.2d 929], we found a basic distinction between evidence seized in violation of search and seizure provisions and voluntary statements made during an illegal detention. 'The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion.'
>
> ". . . Cases where a confession follows an unlawful arrest, and those where the confession follows a confrontation of the defendant with illegally seized evidence are distinguishable. In the latter case, the illegality induces the confession by showing the suspect the futility of remaining silent. (See People v. Spencer, supra, 66 Cal.2d 158, 167 ['The secret is out for good.'] Where, as in Martin [People v. Martin, 240 Cal. App. 2d 653, 657], a confession follows a false arrest, the custodial environment is merely one factor (though a significant one) to be considered in determining whether the confession is inadmissible." (Citation inserted.)

As was said in *People* v. *Lyons*, 18 Cal. App. 3d 760, 774 (1971), quoting from *Martin*, at 656:

> " '[T]he test of voluntariness . . . remains a practical means for determining whether the connection between an illegal arrest and a confession has become so attenuated as to dissipate the taint or to overcome the "reach of the fruits doctrine". . . . "If the individual confesses his offense because he wills to confess, his statement is the product of his own choice, not that of the illegal restraint." ' "

Lyons held that a confession was the product of free will, not illegal restraint.

People v. *Dominguez*, 21 Cal. App. 3d 881, 885 (1971), argues that the "real thrust" of the inquiry is in terms of voluntariness, not attenuation.

§ 18.04: *Other Examples of Reach of Poisonous Fruit Rule*

That more than the direct consequences of the illegality will be tainted is shown by the following illustrations:

—Photostats were said to be as much the product of the illegal search as the original papers that had been seized. *People* v. *Berger*, 44 Cal. 2d 459, 462 (1955).

—An illegal arrest or entry will vitiate an otherwise valid consent subsequently secured. *People* v. *Johnson*, 68 Cal. 2d 629, 632 (1968); *People* v. *Haven*, 59 Cal. 2d 713, 719 (1963); *People* v. *Green*, 264 Cal. App. 2d 614, 620 (1968) (rule applies even where *Escobedo-Dorado* warning is given); *People* v. *Superior Court* (Casebeer), 71 Cal. 2d 265, 273 (1969) (consent of person not the one illegally arrested did not break chain). *See* § 14.09.

—A threat of an illegal arrest or search followed by abandonment of evidence will not result in admissible evidence. *Badillo* v. *Superior Court*, 46 Cal. 2d 269, 273 (1956); *Gascon* v. *Superior Court*, 169 Cal. App. 2d 356, 358 (1959). If there is no threat of illegality, the evidence, of course, will be admitted. *People* v. *Shipstead*, 19 Cal. App. 3d 58, 68 (1971); *People* v. *Mejia*, 272 Cal. App. 2d 486, 491–92 (1969); *People* v. *Perez*, 243 Cal. App. 2d 528, 532 (1966). Whether there was such a threat capable of being carried out is a question of fact. *Crueger* v. *Superior Court*, 7 Cal. App. 3d 147, 150–52 (1970). Where the defendant contended that there was an implied threat by virtue of two previous illegal searches, it was held that it must be presumed that official duty will be regularly performed. *People*

v. *Piedra*, 183 Cal. App. 2d 760, 762 (1960). "If in response to a reasonable official inquiry, a suspect voluntarily reveals incriminating evidence, he may not later complain that he acted on an implied threat of unlawful conduct of the officers." *Pendergraft* v. *Superior Court*, 15 Cal. App. 3d 237, 242 (1971), quoting from *Perez*, *supra*.

—Testimony impelled by the admission of illegally obtained evidence will not be available to sustain the judgment. *People* v. *Dixon*, 46 Cal. 2d 456, 458 (1956); *cf. People* v. *Nye*, 63 Cal. 2d 166, 175 (1965). *See too People* v. *Chandler*, 262 Cal. App. 2d 350, 354–55 (1968). In *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 155 (1971), it was held that an agreement to testify was not a retroactive waiver of an unlawful search.

—A search warrant is invalid if it is obtained upon information which is the product of an unlawful search. *Raymond* v. *Superior Court*, 19 Cal. App. 3d 321, 326–27 (1971); *People* v. *Superior Court* (Flynn), 275 Cal. App. 2d 489, 492 (1969); *People* v. *Roberts*, 47 Cal. 2d 374, 377 (1956). *Cf. People* v. *Koelzer*, 222 Cal. App. 2d 20, 29 (1963) (prior illegal arrest did not taint subsequent where it was not "the inducing basis of the justifying knowledge"). In *Krauss* v. *Superior Court*, 5 Cal. 3d 418, 422 (1971), a search warrant was upheld in spite of a prior illegality because there was adequate lawful information to uphold it. *Accord: Cornelius* v. *Superior Court*, 25 Cal. App. 3d 581, 586–87 (1972).

—After government seized papers illegally, it studied them, copied them, and brought a new indictment based on the knowledge thus gained. The original papers were subpoenaed and the refusal to produce them was held to be contempt, but this was overturned by the United States Supreme Court. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

—Where a witness is directly obtained as the result of an unlawful search and seizure, his testimony will be excluded. *People* v. *Mickelson*, 59 Cal. 2d 448, 449–50 (1963); *People* v. *Schaumloffel*, 53 Cal. 2d 96, 100 (1959). However, where the prosecution has a lead to find the witness as a result of the illegality, attenuation may come into play. *See United States* v. *Williams*, 436 F.2d 1166, 1170 (9th Cir. 1970). These rules were reviewed recently by our State Supreme Court in *Lockridge* v. *Superior Court*, 3 Cal. 3d 166, 170 (1970). It reiterated the rule developed in *Mickelson* and *Schaumloffel*. It said: "If, however, a witness became known to the police by means independent of the illegal conduct, his testimony is admissible." His

testimony is also admissible, even if he was discovered by illegal police conduct, if he would have been discovered by a lawfully conducted investigation. The court permitted the witness in *Lockridge* to testify. Some of the complexities in this area are explored by Judge Ruffin in *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32 (1967). *See too* the views of Chief Justice Burger in *Smith* v. *United States*, 324 F.2d 879, 881 (D.C. Cir. 1964), described by the State Supreme Court in *Lockridge* as contra to the California position. *See United States* v. *Edmons*, 432 F.2d 577, 584 (2d Cir. 1970) (unlawful arrest to obtain court identification by known witness); *cf. Williams* v. *Superior Court*, 25 Cal. App. 3d 409, 412 (1972).

—A handwriting examplar obtained after an illegal arrest was infected by the illegality. *People* v. *Sesslin*, 68 Cal. 2d 418, 427 (1968). *Sesslin* said that advice as to rights, although a factor that may show an intervening act of free will, does not in isolation demonstrate as a matter of law the requisite attenuation.

—Fingerprints obtained after an illegal arrest or detention are not admissible. *Davis* v. *Mississippi*, 394 U.S. 721 (1969). The court disapproved of the blanket fingerprinting of every Negro male in a southern community. *Davis* was held not to be retroactive in *People* v. *Hernandez*, 11 Cal. App. 3d 481, 497 (1970). Also, absent evidence of illegality, the state is not required to prove that fingerprints on file were legally obtained. *People* v. *Reserva*, 2 Cal. App. 3d 151, 156 (1969). *See too Fogg* v. *Superior Court*, 21 Cal. App. 3d 1, 7 (1971). If the prints are taken not only after an illegal arrest, but also after a judicially authorized detention (bound over for trial after preliminary), the prints may be admitted. *People* v. *Soloman*, 1 Cal. App. 3d 907, 910 (1969).

—When a defendant is confronted with the fruits of an illegal search (stolen property) and he makes admissions, they are not usable. *People* v. *Faris*, 63 Cal. 2d 541, 546 (1965), *cited with approval* in *People* v. *Johnson*, 70 Cal. 2d 541, 547 (1969).

§ 18.05: *"Purging the Taint" of Poisonous Fruit*

The Supreme Court has made it abundantly clear that "not . . . all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, *the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploita-*

tion of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " (Emphasis added.) *Wong Sun* v. *United States,* 371 U.S. 471, 487–88 (1963).

Much earlier, in *Nardone* v. *United States,* 308 U.S. 338, 341 (1939), it had been recognized that the connection between the unlawful conduct and the evidence obtained "may have become *so attenuated as to dissipate the taint.*" (Emphasis added.)

The California Supreme Court described what is necessary to constitute "attenuation" in *People* v. *Sesslin,* 68 Cal. 2d 418, 428 (1968):

> "That degree of '*attenuation*' which suffices to remove the taint from evidence obtained directly as a result of unlawful police conduct *requires at least an intervening independent* act by the defendant or a third party which breaks the casual chain linking the illegality and evidence in such a way that the evidence is not in fact obtained 'by exploitation of that illegality.' " (Emphasis added.)

§ 18.06: *Examples of "Purging the Taint"*

There are pronounced limitations on the extent to which a defendant may profit from the government's illegal misstep. It will not immunize him from prosecution. *People* v. *Valenti,* 49 Cal. 2d 199, 203 (1957); *see too People* v. *Dumas,* 251 Cal. App. 2d 613, 617 (1967). It merely results in the prosecution's inability to use evidence secured as a result of its wrong. *People* v. *Bright,* 251 Cal. App. 2d 395, 398–399 (1967).

Neither will the government be barred from use of the evidence when the taint is dissipated or attenuated. We will attempt to set out "rules" or categories regarding this last process, but we should preface this by noting that the courts have not done so and that legal cause has aspects that are elusive and indefinable. Noting the "intuitive character" of what is involved, Judge Ruffin, in *Out on a Limb of the PoisonousTree: The Tainted Witness,* 15 U.C.L.A. L. Rev. 32, 38 (1967) quotes (in footnote 21) an article by Judge Edgerton, *Legal Cause,* 72 U. Pa. L. Rev. 211 (1924): The "considerations are indefinite in number and value, and incommensurable; . . . legal cause is justly attachable cause. I believe that, while logic is useful in the premises, it is inadequate, that intuition is necessary and certainty impossible." *See too* the dissent in *People* v. *Johnson,* 70 Cal. 2d 541, 558 (1969).

1. *Volunteered Acts*

There are a group of cases where after the illegality the defendant volunteers an act and this seems to be the major element in breaking the causation chain.

—After his unlawful arrest and after being told he couldn't smoke, a defendant took out a marijuana cigarette. *People* v. *Walker,* 203 Cal. App. 2d 552, 556 (1962).

—After the illegal arrest a defendant attempted to bribe a police officer. *People* v. *Guillory,* 178 Cal. App. 2d 854, 856-57 (1960).

—Five or ten minutes after the assumed illegal entry into his apartment by the police, and after he spoke to his attorney, defendant fled out of a window. Evidence of the flight was used in a subsequent murder prosecution. *People* v. *Terry,* 70 Cal. 2d 410, 429 (1969).

—Defendant assaulted officer upon unlawful entry. "The judicial policy of discouraging overzealous entries does not go so far as to authorize imposition of the death penalty upon the offending officer in the discretion of the party offended." *Pittman* v. *Superior Court,* 256 Cal. App. 2d 795, 798 (1967).

2. *Independent Source*

This rule has its roots in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920), where it was said, "Of course this does not mean that the facts thus (illegally) obtained became sacred and inaccessible. If knowledge of them is gained from an independent source they maybe proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Costello* v. *United States,* 365 U.S. 265, 280 (1961); *See Warren* v. *Territory of Hawaii,* 119 F.2d 936, 938 (9th Cir. 1941); *People* v. *Ditson,* 57 Cal. 2d 415, 445 (1962); *Wayne* v. *United States,* 318 F.2d 205, 209 (D.C. Cir. 1963); *Somer* v. *United States,* 138 F.2d 790, 792 (2d Cir. 1943); *see too People* v. *Stoner,* 65 Cal. 2d 595, 602-03 (1967); *People* v. *Edwards,* 71 Cal. 2d 1096, 1106 (1969); *People* v. *Monreal,* 264 Cal. App. 2d 263, 267 (1968). *See too Krauss* v. *Superior Court,* 5 Cal. 3d 418, 423 (1971); *Miramontes* v. *Superior Court,* 25 Cal. App. 3d 877, 886 (1972).

3. *Inevitable Discovery*

A number of cases support the rule that if illegally obtained evidence would have been discovered in any event, then what was obtained unlawfully may be admitted. *See People* v. *Teale,* 70 Cal. 2d 497, 506-07 (1969). As was said in *People* v. *Chapman,* 261 Cal. App. 2d 149, 169 (1968), quoting from *People* v. *Thomsen,* 239 Cal. App. 2d 84, 91 (1965), " 'Usual and commonplace investigatory

procedures would have developed the damaging evidence . . . quite aside from the illegal [police action]. . . .'"

A classic illustration of the rule may be found in *Killough* v. *United States,* 336 F.2d 929, 934-35 (D.C. Cir. 1964). There a dead body was located as a result of an illegally secured confession. It was near a road close to a heavily populated area. Friends and relatives had been concerned over the disappearance. The court reasoned (at 934), "In time the body (or its bones) would have been discovered and would have been identified as that of Mrs. Killough."

Where the rule is applied a limitation on it appears to be given widespread recognition. That is, the evidence may be admitted if it *would* have been discovered otherwise, but not if it merely *could* have been so discovered. *See* Maguire, *How to Unpoison the Fruit, The Fourth Amendment and the* Exclusionary Rule, 55 J. Crim. L.C. & P.S. 307, 317 (1964). In *United States* v. *Paroutian,* 299 F.2d 486, 489 (2d Cir. 1962), it was said, rejecting arguments about what the government might have done or a "possibility" rule, "The test must be one of actualities, not possibilities." The Maguire article, which advocates the "would have" test, was cited and apparently applied in *People* v. *Stoner,* 65 Cal. 2d 595, 603 (1967). In *Bynum* v. *United States,* 262 F.2d 464, 468-69 (D.C. Cir. 1958), the government sought to establish that the FBI already had the defendant's prints and could have used them. The court emphatically rejected this claim. *See too Davis* v. *Mississippi,* 394 U.S. 721, 725 (1969).

A "could have" rule was rejected in *Britt* v. *Superior Court,* 58 Cal. 2d 469, 473 (1962). Arguably, the retreat from *Britt* recognized by *People* v. *Crafts,* 13 Cal. App. 3d 457, 459 (1970), could indicate that California is permitting illegal evidence "if that conduct could have been observed had the officer been in the area open to the public." Though one commentator cites *Britt* as a fruit of the poisonous tree ruling rejecting the "could have" test, *Pitler, "Fruit of the Poisonous Tree Revisited and Shepardized,"* 56 Cal. L. Rev. 579, 628 (1968), it may be that the retreat from *Britt* discussed in *Crafts* does not involve fruit of the poisonous tree at all but is the formulation of a test for the degree of expectation of privacy a person has in a restroom. *See* § 15.09.

Some question as to the future of the "inevitable discovery exception" has been raised in *People* v. *Ramsey,* 272 Cal. App. 2d 302, 313 (1969), where it is described as having been criticized as being in sharp conflict with the fundamental purpose of the exclusionary rule. *Citing Pitler, supra* at 630. In dicta the court said, "This fundamental purpose, the deterrence of unconsitutional police conduct in the obtaining of evidence, requires that the court focus on the actualities of the conduct involved and not on the possibility or even probability that the evidence might have been turned up in some other manner." However, what appears to be the rule (though not definitely articulated as such) was applied in *People* v. *Baker,* 12 Cal. App 3d 826, 843 (1970). *See too People* v. *Minervini,* 20 Cal.App. 3d 832, 838 (1971) (manager allegedly entered hotel room improperly; occupancy would have ended in hours and maids would routinely enter room).

4. *Stretching of Chain*

Though the road between the initial illegality and the ultimate fruits it taints may be long, the courts may travel it nonetheless. Dissenting in *People* v. *Johnson,* 70 Cal. 2d 541, 558 (1969), Justice Mosk complained that "a prolific harvest of fruit" had been reaped from a tainted tree. Nonetheless, there are some cases which seem best susceptible of analysis on the theory that time had passed, the connecting events are weak, and the chain in general had been stretched to the breaking point. Illustrative of this is *People* v. *Kanos,* 70 Cal. 2d 381, 386 (1969). The court held that although defendant's telephone number had been obtained during an assumed unlawful arrest of someone else, since the officers already knew of defendant's approximate whereabouts and his revoked parole status, the connection was not sufficiently direct.

Possibly exemplifying this point is the statement in *People* v. *Carlin,* 261 Cal. App. 2d 30, 37-38 (1968), that mere leads dropped in an illegal confession are not adequate to poison derivative evidence where the crimes are already known to the police and only certain details are lacking.

In *People* v. *McInnis,* 16 Cal. 3d 821, 826 (1972), the police took a mug shot following an illegal arrest. A month later a different law enforcement agency used it to identify the defendant for another crime. The court relied on the fact that there was a different crime and different agency and found the connection too tenuous.

5. *Where Illegality Not Used*

Where the investigation does not use the prior illegal evidence then the chain is broken. *People* v. *Burke,* 208 Cal. App. 2d 149, 161-62 (1962); *People* v. *Koelzer,* 222 Cal. App. 2d 20, 29 (1963). The same result is reached where the results of a purported illegality are not put in evidence. *Johnson* v. *Louisiana,* 92 S. Ct. 1620, 1626 (1972).

6. *Where Seizure of Evidence is Unrelated to Illegality*

Where the police officer's illegal conduct occurred after the discovery of the evidence, then the evidence will be admitted. *People* v. *Woods,* 133 Cal. App. 2d 187, 191-92 (1955); *People* v. *Patton,* 264 Cal. App. 2d 637, 641 (1968). In *People* v. *Boyles,* 45 Cal. 2d 652, 654 (1955), it was said that any impropriety in entry to a room was unrelated and collateral where the officers were waiting for the defendant and could have apprehended him just as well from another vantage point. *See too People* v. *Martin,* 45 Cal. 2d 755, 763 (1955) (officer opened window before announcing himself); *People* v. *Dees,* 20 Cal. App. 3d 852, 855 (1971) (illegal entry did not contaminate arrest of defendant who arrived later).

7. *Introduction May Be Harmless Error*

The harmless error rule may be applicable. *People* v. *Parham,* 60 Cal. 2d 378, 385-86 (1963), a rule recognized but modified in *Chapman* v. *California,* 386 U.S. 18, 23-24 (1967). (*Parham* was deemed overruled in another respect in *People* v. *Green,* 3 Cal. App. 2d 240, 245 (1969)). *See People* v. *Guerin,* 22 Cal. App. 3d 775, 784 (1971). If the evidence involves only a count on which the defendant has been acquitted, the illegality may not infect the remaining conviction or convictions. *United States* v. *Mont,* 306 F.2d 412, 415 (2d Cir. 1962).

§ 18.07: *Procedural "Purging" Techniques*

Certain special procedural rules apply to search and seizure that have the result of permitting the use of evidence of the kind being discussed. It may be helpful to briefly review them.

1. The defendant has to object not only to the illegally obtained evidence but also to the fruit. *People* v. *Carlin,* 261 Cal. App. 2d 30, 37 (1968); *People* v. *Ditson,* 57 Cal. 2d 415, 441-42 (1962).

2. If state habeas corpus is involved, search and seizure may not be raised thereby. *In re Terry,* 4 Cal. 3d 911, 926 (1971).

3. If the defendant testifies in a way that evidence from the search will impeach or contradict him, evidence from the illegal search may be used for cross-examination. *Walder* v. *United States,* 347 U.S. 62, 65 (1954). The court appears to have given an expanded significance to *Walder* in *Harris* v. *New York,* 401 U.S. 222, 225 (1971), where the defendant's testimony bearing directly on the crimes charged opened the door to use of the illegal conduct. " . . . sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *But see People* v. *Taylor,* 8 Cal. 3d 174 (1972).

4. If the illegally obtained evidence is to be used for the revocation of parole or probation, it will be admissible for that purpose. *In re Martinez,* 1 Cal. 3d 641, (1970) (parole revocation); *People* v. *Hayko,* 7 Cal. App. 3d 604, 609–10 (1970) (probation revocation). *See too* Note, *Application of the Exclusionary Rule at Sentencing,* 57 Va. L. Rev. 1255 (1971), and *United States* v. *Hill,* 447 F.2d 817, 819 (7th Cir. 1971).

§ 18.08: *Prosecution Bears Burden of Showing Break in the Causative Chain*

In *Nardone* v. *United States,* 308 U.S. 338, 341 (1939), it was held that once the defendant has established a relationship between the unlawful police activity and the evidence or confession to which objection is made, the burden is on the prosecution to show that the unlawful taint had been dissipated. *See People* v. *Johnson,* 70 Cal. 2d 541, 554 n.5 (1969), disapproving a contrary rule in *People* v. *La Peluso,* 239 Cal. App. 2d 715, 726 (1966). However, when the defendant claims that the illegal search has tainted other evidence not actually found in the search, he bears the burden of showing the connection. *People* v. *Parker,* 11 Cal. App. 3d 500, 510 (1970).

Our Supreme Court has cautioned triers of fact to exercise great care to determine that asserted fruits were the product of an illegality and would not have been otherwise discovered by the police from information already in their possession or independently acquired. (*People* v. *Ditson,* 57 Cal. 2d 415, 443 (1962) (witnesses named in confession).

CHAPTER NINETEEN

USE OF FORCE TO OBTAIN EVIDENCE

§ 19.01: *Origin of the Rule*

Even before the states were obliged to enforce an exclusionary rule, the United States Supreme Court required that they exclude evidence where police conduct "shocks the conscience," thus violating the due process clause. Such was the rule stated in *Rochin* v. *California*, 342 U.S. 165, 172–73 (1952), where the court said, "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."

In *People* v. *Martinez*, 130 Cal. App. 2d 54, 58 (1954), the court said of the *Rochin* decision: ". . . it is one that should serve as a warning to all those who are tempted to use brutal force for the extraction of evidence from the person of an accused and to all those who have a choice between upholding and condemning the use of such force."

§ 19.02: *Choking*

The use of choking to secure evidence has been condemned by the cases. As was said in *People* v. *Parham*, 60 Cal. 2d 378, 384 (1963) (*see* § 18.06), "Choking a man to extract evidence from his mouth violates due process." *People* v. *Martinez*, 130 Cal. App. 2d 54, 56 (1954), says, "The question, however, is not how hard an officer may choke a suspect to obtain evidence but whether he may choke him at all." *See too People* v. *Sevilla*, 192 Cal. App. 2d 570, 576 (1961) (officer did not use word choking but had his arm pretty "tight" around defendant's neck.); *People* v. *Brinson*, 191 Cal. App. 2d 253, 255–57 (1961); *People* v. *Taylor*, 191 Cal. App. 2d 817, 821 (1961). In *People* v. *Sanders*, 268 Cal. App. 2d 802, 804–05 (1969), the rule was applied to a judo choke hold that stops the person from swallowing or eventually stops the blood flow to the head so he passes out.

Whether or not there was choking is a question of fact. *People* v. *Smith*, 50 Cal. 2d 149, 151 (1958); *People* v. *Cisneros*, 214 Cal. App.

2d 62, 67 (1963); *People* v. *Dickenson*, 210 Cal. App. 2d 127, 137 (1962).

If the defendant spits out the narcotic voluntarily, the evidence will not be excluded. *People* v. *Poole*, 174 Cal. App. 2d 57, 62–63 (1959). It is proper for the police to order a suspect to spit out the substance. *People* v. *Mora*, 238 Cal. App. 2d 1, 3 (1965).

In *Poole*, *supra*, the court said the police could force open the mouth and take out the substance.

The cases often involve a lesser and permissible degree of force than choking. In *People* v. *Dixon*, 46 Cal. 2d 456, 458 (1956), the officers seized the arms of a defendant to prevent her from placing a key in her mouth and in a struggle forced it from her hand. In *People* v. *Dawson*, 127 Cal. App. 2d 375, 377 (1954), the officer put his arm around the defendant's neck and told him to spit it out, which he did.

The application of permissible force has included a variety of holds or actions in the suspect's neck area. These cases are reviewed in *People* v. *Sanders*, *supra*, 268 Cal. App. 2d 802, 804–05 (1969), as follows: ". . . it has been held constitutionally inoffensive to obtain narcotic evidence by applying 'a hold below [the suspect's] chin which prevented him from swallowing anything he might have put in his mouth' (People v. Miller, 248 Cal. App. 2d 731, 733 (1967) [56 Cal. Reptr. 865], hrg. den.), by placing one's hand to the suspect's throat and ordering him to spit them out (People v. Mora, 238 Cal. App. 2d 1, 3 [47 Cal.Reptr. 338], hrg. den.), and where the officer placed his 'hand back of defendant's neck and attempted to press his head forward and downward, to the end that the defendant could not swallow' (People v. Tahtinen, 210 Cal. App. 2d 755, 758 (1962) [26 Cal. Reptr. 864], hrg. den.), or 'did not choke defendant, rather . . . attempted to prevent him from swallowing the evidence by holding his Adam's apple' (People v. Dickenson, 210 Cal. App. 2d 127, 136 [26 Cal. Reptr. 601], hrg. den.), or ' "placed his hand on [defendant's] throat [not] for the purpose of choking him . . . but to prevent him from swallowing" ' " (*People* v. *Sanchez*, 189 Cal. App. 2d 720, 726 (1961) [11 Cal. Rptr. 407], hrg. den.).

What was said in *People* v. *Tahtinen*, 210 Cal. App. 2d 755, 759 (1962), gives us some frame of reference by which to evaluate these situations: "Not every display of force or trespass to the person is unreasonable. . . . Lack of consent and physical resistance by the suspect or accused are not enough in and of themselves to create or constitute illegality. . . . The defendant had no constitutional

right to swallow or destroy the evidence of his crime. . . . The police should not be required to be subjected to beatings by arrestees any more than arrestees should be subjected to beatings by the police."

Further thoughts were expressed in *People* v. *Bass*, 214 Cal. App. 2d 742, 746 (1963), which says the courts are "concerned with condemning the excessive force exerted upon the individual rather than making the 'mouth' a sacred orifice into which contraband may be placed and thereafter disposed of in leisurely fashion. Although we agree that physical evidence, like verbal confessions, may not be 'tortured' from the lips of the accused, it does not follow that merely because a suspect has placed a substance behind his lips, he necessarily is entited to cry 'sanctuary' when the officer of the law, under appropriate circumstances, directs him to surrender it." *See too People* v. *Jones*, 20 Cal. App. 3d 201, 206 (1971).

Choking is not, of course, the only form of brutality that will result in excluding evidence. In *People* v. *Parham*, 60 Cal. 2d 378, 384 (1963) (*see* § 18.06), it was held that clubbing a man to obtain evidence is equally brutal and offensive.

§ 19.03: *Force in Giving Scientific Tests*

In *Schmerber* v. *California*, 384 U.S. 757, 770–72 (1966), the United States Supreme Court stated that a blood test, as an intrusion below the body's surface, is a search requiring a search warrant. However, the officer, having probable cause to believe the defendant was under the influence of alcohol, was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence. The blood sample was an incident to arrest and was obtained in a "medically approved fashion." Hence, defendant's right not to be subjected to "unreasonable" searches was not violated, nor were his privileges against self-incrimination and right to due process. For California cases approving the blood test, *see People* v. *Sudduth*, 65 Cal. 2d 543 (1966); *People* v. *Jordan*, 45 Cal. 2d 697, 706 (1955); *People* v. *Kemp*, 55 Cal. 2d 458, 478 (1961); and *People* v. *Duroncelay*, 48 Cal. 2d 766, 770 (1957).

Kemp involved a saliva test. Breathalyzer tests have been upheld on the same rationale. *People* v. *Sudduth*, 65 Cal. 2d 543, 546 (1966), as have nalline tests. *People* v. *Zavala*, 239 Cal. App. 2d 732, 738 (1966). *People* v. *Lachman*, 23 Cal. App. 3d 1094, 1098 (1972).

However, the test must not be administered in a fashion so as to

shock the conscience or offend one's sense of justice. *Zavala, supra,* at pages 738–39. Where it is so administered the evidence will be excluded. *People* v. *Kraft,* 3d Cal. App. 890, 899 (1970) (officers aggressive beyond all need).

Tests have been permitted where the person is unconscious, *Breithaupt* v. *Abram,* 352 U.S. 432 (1957), and where the person refuses to consent. *Schmerber, supra.* In *People* v. *Barton,* 261 Cal. App. 2d 561, 563–64 (1968), it was said the test must be conducted in "nonbrutal circumstances," which seemingly allows for the use of some force. *Kraft, supra,* did not say that no force could be used.

If there is no arrest and no warrant, a blood sample taken without consent is illegally obtained even when there is probable cause to arrest. *See People* v. *Superior Court* (Hawkins), 6 Cal. 3d 757, 762 (1972).

The courts have said: "It is the duty of law-enforcing agencies, after such arrest, to explore every area suggested by the circumstances of the apprehension of the accused to the end that if the latter is probably guilty, the evidence will have been so assorted and systematized as to expedite judicial procedure, and if the evidence should not in the opinion of the People's counsel warrant a trial, the accused will be promptly discharged." *People* v. *Morgan,* 146 Cal. App. 2d 722, 72, (1956) (police had slides made). In fact, the police could be faulted for failure to make an adequate investigation. *People* v. *Hall,* 62 Cal. 2d 104, 112 (1964).

Where the passage of time will not alter the examination results and the procedure is not done regularly in booking (*e.g.,* X-rays), a search warrant is a proper remedy. *United States* v. *Allen,* 337 F. Supp. 1041, 1043 (E.D. Pa. 1972) (may be issued after indictment); *see too,* Note, *Constitutional Limitations on the Taking of Body Evidence,* 78 Yale L.J. 1074, 1078–79 (1969).

§ 19.04: *Force in Taking Fingerprints or Handwriting Exemplars*

A handwriting exemplar taken by brutal means will be excluded. *People* v. *Matteson,* 61 Cal. 2d 466, 469 (1964).

The same restriction applies to fingerprints. However, where brutality is not used, the prints—and presumably a handwriting exemplar—may be taken. *People* v. *Williams,* 71 Cal. 2d 614, 625 (1969). *Williams* holds that a defendant may be forcibly fingerprinted provided the means used do not shock the conscience. It interpreted *Matteson* as not rendering the evidence inadmissible

because force is used but because it was obtained by brutality.

For an analysis of the problems of admitting fingerprints after an illegal arrest or detention, *see* § 18.04.

§ 19.05: *Rectal or Anal Searches*

The courts have recognized that persons who deal in narcotics will attempt to conceal them in body cavities such as the rectum. *See Rivas* v. *United States,* 368 F.2d 703, 710 (9th Cir. 1966). In California a rectal examination in a medically approved manner by a doctor has been sustained. *People* v. *Woods,* 139 Cal. App. 2d 515, 526 (1956). Such searches have also been sustained by federal courts in connection with border searches where there is no probable cause but a "clear indication." *See United States* v. *Brown,* 421 F.2d 181 (9th Cir. 1969); *Blackford* v. *United States,* 247 F.2d 745, 753 (9th Cir. 1957); *see too* § 15.01.

§ 19.06: *Use of Emetic or Stomach Pump*

Rochin (*see* § 19.01) relied in part for its finding of illegality on the stomach pumping, "the forcible extraction of his stomach's contents."

Vasquez v. *Superior Court,* 199 Cal. App. 2d 61 (1962), dealt with an injection of apomorphine to the petitioner, causing nausea and vomiting which resulted in regurgitating a condom found to contain heroin. The doctor said (at page 63) he gave the injection to prevent absorption into petitioner's system of a lethal dose of heroin. However, there was evidence that the object may pass through the digestive tract without ill effects, the rubber condom effectively preventing the contents from being absorbed into the system. The court held the conduct of the police and doctor was brutal and shocking.

The court noted that there were federal cases where epsom salts had been administered and where there had been some defense consent (not relied upon by the court). *Citing King* v. *United States,* 258 F.2d 754 (5th Cir. 1958). *Barrera* v. *United States,* 276 F.2d 654, 655 (5th Cir. 1960). But it felt that these cases did not show "such a use of force, with its concomitant physical illness."

In *Lane* v. *United States,* 321 F.2d 573, 576 (5th Cir. 1963), the court said, "Administering emetics to cause vomiting in order to recover narcotics is not an unreasonable search of the person." *Arciniaga* v. *United States,* 409 F.2d 513 (9th Cir. 1969).

In *Blefare* v. *United States,* 362 F.2d 870 (9th Cir. 1966), the court upheld the following procedure: Blefare was given saline solution

to produce vomiting. He regurgitated an object but reswallowed it. A soft polyethylene tube, four millimeters in diameter, was inserted through the nose, down the throat and to the stomach. Fluid flows by gravity to the stomach and induces vomiting. There is no pain but some discomfort. There was no consent to the tube. Two agents held his arms and a third his head while the doctor put in the tube. A codefendant received similar treatment. *United States* v. *Espinoza*, 338 F. Supp. 1304 (S.D. Cal. 1972).

A recent California case permitted the use of a stomach pump. *People* v. *Jones*, 20 Cal. App. 3d 201, 206–10 (1971). The court said that the use of body cavities by dealers in narcotics and smugglers is a well known fact of which the courts have taken judicial notice and that the law is not powerless to deal with such tactics. It noted that the stomach pumping was done by a doctor, that the amount swallowed was uncertain, that the doctor, without any suggestion or request from the officer, decided the procedure was needed to save life, and that the doctor felt there was consent from the failure to resist. The court also cited approvingly the federal emetic cases.

§ 19.07: *Use of Force To Arrest or in Self-Defense*

The standards for applying force in situations other than obtaining evidence may be entirely different.

An officer is entitled to use reasonable force to make an arrest or to overcome resistance. *People* v. *Curtis*, 70 Cal. 2d 347, 357 (1969). Deadly force may be used, but the force must be only such as is necessary to accomplish the arrest and for the officers to defend themselves. *People* v. *Almarez*, 190 Cal. App. 2d 380, 383 (1961).

Deadly force should not be used to arrest a misdemeanant. *People* v. *Lathrop*, 49 Cal. App. 63, 67 (1920). Shooting is not justified to prevent the escape of a misdemeanant. *People* v. *Wilson*, 36 Cal. App. 589, 594 (1918). But the officer can pursue and use other necessary force. He must stop short of killing or seriously injuring the fleeing misdemeanor violator, unless in self-defense. *Lathrop, supra* at 67.

> "[A]n officer properly engaged in attempting to make an arrest in such a case has the right to resist attack made upon him, and being rightfully there and not legally considered the aggressor, may in his own defense take life." *Wilson*, at 594.

It has been suggested that if the misdemeanor arrest is being made under the authority of a warrant, greater force may be authorized. The officer may use all necessary force, even to shooting.

Lathrop, at 67–68.

To exercise a right of self-defense, even for a misdemeanor arrest, an officer need not retreat, but in fact has a duty to press forward. *People* v. *Hardwick*, 204 Cal. 582, 587 (1928).

An officer has no right to use unreasonable force (excessive or unnecessary force) for any purpose. *Scruggs* v. *Haynes*, 252 Cal. App. 2d 256, 262 (1967) (officer grounded and pinned man but then struck him repeatedly with fist); *People* v. *Giles*, 70 Cal. App. 2d Supp. 872, 875 (1945).

CHAPTER TWENTY

CONTESTING THE REASONABLENESS OF THE SEARCH

§ 20.01: *Burden of Proof—Search Warrant*

The burden rests upon the defendant to demonstrate the illegality of any search and seizure made pursuant to a search warrant. *People* v. *Pipkin*, 17 Cal. App. 3d 190, 194 (1971); *People* v. *Wilson*, 256 Cal. App. 2d 411, 417 (1967); *People* v. *Kipp*, 255 Cal. App. 2d 473, 476–78 (1967); *Williams* v. *Justice Court*, 230 Cal. App. 2d 87, 97–98 (1964). However, it may be necessary for the prosecution to produce the warrant. Testimony describing the contents of the warrant may not be the best evidence. *Beckers* v. *Superior Court*, 9 Cal. App. 3d 953, 957 (1970); *cf. Hewitt* v. *Superior Court*, 5 Cal. App. 3d 923, 930 (1970).

§ 20.02: *Burden of Proof—No Search Warrant*

The defendant makes a prima facie showing that a search and seizure is unlawful when he shows that it was not made pursuant to a search warrant.

People v. *Johnson*, 68 Cal. 2d 629, 632 (1968); *People* v. *Burke*, 61 Cal. 2d 575, 578 (1964); *Tompkins* v. *Superior Court*, 59 Cal. 2d 65, 67 (1963); *People* v. *Dickerson*, 273 Cal. App. 2d 645 (1969). This rule is attenuated by *People* v. *Burke*, *supra*, which holds that absent a showing that the search and seizure was made pursuant to a search warrant, upon the defendant's objection to proffered evidence it will be assumed that the search was not made pursuant to a search warrant. *People* v. *Burke*, 61 Cal. 2d 575, 578 (1964); *see too People* v. *Hernandez*, 11 Cal. App. 3d 481, 492 (1970). Once a prima facie showing is made that the search and seizure was unlawful the burden shifts to the People to establish that it was lawful. *People* v. *Johnson*, 70 Cal. 2d 541 (1969); *Tompkins* v. *Superior Court*, 59 Cal. 2d 65, 67 (1963); *Badillo* v. *Superior Court*, 46 Cal. 2d 269, 272 (1956); *Horack* v. *Superior Court*, 3 Cal. 3d 720, 725 (1970).

§ 20.03: *Evidence Which Is the "Fruit of the Poisonous Tree"*

A defendant who contends the evidence is a derivative of an unlawful search and seizure bears the burden to establish the connection between the evidence and the unlawful act. The burden

then shifts to the people to show that it was derived from an untainted source. *People* v. *Johnson*, 70 Cal. 2d 541, 554–55 (1969).

§ 20.04: *On Appeal*

The ruling of the lower court will be upheld on appeal unless there is an absence of substantial evidence to support its ruling. *People* v. *Swayze*, 220 Cal. App. 2d 476, 489 (1963). *See People* v. *Stout*, 66 Cal. 2d 184, 193 (1967).

§ 20.05: *Broad Standing Rules Applicable in California*

The rules regarding standing established by the United States Supreme Court are:

Jones v. *United States*, 362 U.S. 257 (1960) (in a federal prosecution for possession of narcotics, defendants need not allege possession in order to gain standing at a pretrial motion to suppress; anyone legitimately on premises at time of search has standing when its fruits are proposed to be used against him). *Simmons* v. *United States*, 390 U.S. 377 (1968) (damaging testimony of defendant, whose own protection was infringed by the search and seizure, given at the suppression hearing, must be excluded at the trial if objected to). *Mancusi* v. *DeForte*, 392 U.S. 364 (1968) (defendant union official has standing where papers were seized from his desk in office shared with others). *See Abbott, et al., Law and Tactics in Exclusionary Hearings*, 49–89 (1969), excellent discussion of federal rules.

However, California follows the rule that a person has standing to complain about the illegal arrest and search of another. *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 161 (1971); *People* v. *Martin*, 45 Cal. 2d 755 (1955).

When the California criminal cases reach the federal court on habeas corpus, the more limited federal standing rule is applied. *Lurie* v. *Oberhauser*, 431 F. 2d 330, 333 (9th Cir. 1970).

It has been held that a parolee cannot complain of a search of his premises on the ground that his wife's constitutional rights were violated. *People* v. *Kanos*, 14 Cal. App. 3d 642, 650 (1971).

The legality of a search and seizure may not be raised by way of a collateral attack because the use of illegally seized evidence carries no risk of convicting an innocent person. *In re Terry*, 4 Cal. 3d 911, 926 (1971); *In re Harris*, 56 Cal. 2d 879, 883–84 (1961). *See too Miller* v. *Hamm*, 9 Cal. App. 3d 860, 869 (1970).

§ 20.06: *History and Purpose of Motion to Suppress Evidence*

The 1967 session of the Legislature enacted Penal Code section 1538.5. In doing so it acted upon the recommendation of the Assembly Interim Committee on Criminal Procedure. Report of the Assembly Interim Committee on Criminal Procedure on Search and Seizure, Preemption, Watts, Firearms Control (1965–67) Committee Reports Vol. 22, No. 12.

The purpose of this statute is: "(1) to provide for final determination of these [search and seizure] questions prior to trial, and (2) to allow the prosecution greater latitude in initiating appellate review of an adverse decision on a search and seizure issue." Report of the Assembly Interim Committee on Search and Seizure, Preemption, Watts, Firearms Control (1965–67) Committee Reports Vol. 22, No. 12, p. 18.

§ 20.07: *Grounds for Motion*

Section 1538.5 does not alter the law regarding (1) standing to raise search and seizure issues, (2) status of person conducting the search and seizure, (3) burden of proof regarding search and seizure or (4) the reasonableness of a search and seizure.

This provision can be used only to suppress evidence which was the subject of a search and seizure with or without a warrant or was the fruit of any such search and seizure. *People* v. *Superior Court* (Redd), 275 Cal. App. 2d 49 (1969); Pen. Code § 1538.5(a). It is therefore the proper vehicle to challenge, among other things, a *search warrant. See Call* v. *Superior Court*, 266 Cal. App. 2d 163 (1968). And an *entry* alleged to be in violation of sections 844 or 1531 (*Greven* v. *Superior Court*, 71 Cal. 2d 287, 290–91 (1969)). *See People* v. *Superior Court* (K. Smith), 70 Cal. 2d 123, 129 (1969) (motion to suppress does not lie to attack search by private citizen); *People* v. *Superior Court* (Mahle), 3 Cal. App. 3d 476, 484 (1970) (motion can be used to attack evidence that is a fruit of an illegal statement). It can be used to suppress intangible evidence (such as testimony) that is the product of an unlawful search and seizure. *Lockridge* v. *Superior Court*, 3 Cal. 3d 166, 169 (1970).

§ 20.08: *Improper Grounds*

On the other hand it cannot be used to discover the identity of an *informant* (*Honore* v. *Superior Court*, 70 Cal. 2d 162, 167 n.5 (1969)), or to challenge the admissibility of *statements* made by the

defendant which are not the fruit of a search and seizure (*People* v. *Superior Court* (Redd), 275 Cal. App. 2d 49 (1969). *Cf. Clifton* v. *Superior Court*, 7 Cal. App. 3d 245, 253 (1970)).

Section 1538.5 alone is not a procedure for answering the problems arising from the constitutional requirement of a speedy judicial determination of the constitutional fact of *obscenity*. Penal Code sections 1538.5(n), 1539, 1540; *People* v. *Bonanza Printing Co.*, 271 Cal. App. 2d Supp. 871, 873 (1969), *criticized in another respect* in *Monica Theater* v. *Municipal Court*, 9 Cal. App. 3d 1, 10 (1970). *See Childress* v. *Municipal Court*, 8 Cal. App. 3d 611, 614–15 (1970). Under section 1538.5 the court is concerned with the existence of probable cause and not the character of the material seized. *People* v. *Bonanza Printing Co., supra.*

§ 20.09: *The Motion's Relation to Penal Code Section 995*

The *exclusive procedure* for raising search and seizure issues is contained in section 1538.5. Section 1538.5(m). Incorporated in section 1538.5 is the section 995 motion to dismiss an information or indictment. Section 1538.5(m). In addition to the special procedures created by section 1538.5 the procedures of section 995 are also a proper means of raising and resolving search and seizure issues. *People* v. *Scoma*, 71 Cal. 2d 332, 335, n.2 2 (1969). The procedure and law relating to section 995 motions and the procedure which may be initiated after the granting or denial of the motion are in no way altered by the provisions of section 1538.5. Section 1538.5(n).

The use of the 995 procedure in conjunction with 1538.5 procedures has caused some problems. *People* v. *Superior Court* (Vega), 272 Cal. App. 2d 383 (1969); *People* v. *Superior Court* (MacLachlin), 271 Cal. App. 2d 338 (1969). In each of these two cases the trial court granted the defendant's motion to suppress and then dismissed the case pursuant to 995. The effect of such a procedure is to deprive the People of a review of the 1538.5 proceedings, either by way of an extraordinary writ (the 995 dismissal terminates the case and an order to the trial court to vacate its granting of the motion to suppress would be an idle act) or by way of appeal from the 995 dismissal (the sole evidence having been suppressed there is clearly no reasonable cause to hold the defendant to answer). These two opinions point out that the proper procedure, if there is insufficient evidence to hold the defendant to answer after granting his motion to suppress, is to dismiss the case pursuant to section

1385. Section 1538.5(i). An appeal from such dismissal will permit the People to obtain review of the order suppressing the evidence. Section 1538.5 and 1238.

It should also be noted that in considering a 995 motion the court may not weigh the evidence before the magistrate whereas that is his duty in ruling on a motion to suppress following which he dismisses the case pursuant to 1538.5. *People* v. *Heard*, 266 Cal. App. 2d 747 (1968).

See too People v. *Sanchez*, 24 Cal. App. 3d 664, 692 (1972) (effect of "guilty" plea on 995 review).

§ 20.10: *Remedies Provided By Section 1538.5*

Section 1538.5 authorizes procedures for determining the validity of a search and seizure. By use of these procedures an aggrieved party may seek suppression of evidence or its return if it is not otherwise subject to detention (*e.g.*, contraband). Section 1538.5(a), (d), and (e). The motion provided for by section 1538.5 may be made at various times and in various stages of the proceedings, depending upon the factors discussed below and the desires of the parties to the criminal proceeding.

§ 20.11: *Form of the Motion*

The defendant by a motion to suppress evidence or seeking the return of evidence brings before the court his contentions regarding the illegality of a search and seizure. Section 1538.5(a). Such motion is not required to be in writing. *Thompson* v. *Superior Court*, 262 Cal. App. 2d 98, 103, n.3 (1968); *Amacher* v. *Superior Court*, 1 Cal. App. 3d 150 (1969). It is important in making the motion that the defendant set forth in the record with specificity not only the grounds for his motion (*Thompson* v. *Superior Court*, 262 Cal. App. 2d 98, 103, n.3 (1968)), but also the evidence he seeks to suppress or have returned. *People* v. *O'Brien*, 71 Cal. 2d 394 (1969); *People* v. *Cagle*, 21 Cal. App. 3d 57, 61 (1971); *People* v. *Superior Court* (Pierson), 274 Cal. App. 2d 228 (1969); *People* v. *Rose*, 267 Cal. App. 2d 648 (1968); *People* v. *Rogers*, 270 Cal. App. 2d 705, 707–08, n.1 (1969). The failure to set forth grounds is fatal. *People* v. *Tremayne*, 20 Cal. App. 3d 1006, 1013 (1971).

§ 20.12: *Notice and Conti ance*

The People are entitled to ten (10) days' *notice* of the defendant's intention to move to suppress evidence at a special hearing in superior court. Section 1538.5(i). Thus, the motion must be made

at least ten (10) days before trial. When the People seek a special hearing in superior court (*see* § 20.16, *infra*) they must so notify the defendant and the magistrate within ten (10) days of the magistrate's order holding the defendant to answer. Section 1538.5(j).

The defendant is entitled to a *continuance* of up to thirty days under each of the following circumstances:

(1) Following notice of the People's intent to seek a special hearing in superior court. Section 1538.5(j).

(2) When the defendant makes a motion to suppress in a misdemeanor case to prepare for the special hearing on his motion. Section 1538.5(*l*).

§ 20.13: *Nature of the Proceedings*

At any *hearing* on a motion to suppress regardless of the nature and stage of the criminal proceeding the judge or magistrate shall receive evidence on any issues of fact necessary to determine the motion. Section 1538.5(c). When the motion is made at a *special hearing in superior court* the legality of the search and seizure shall be relitigated de novo. Section 1538.5(i) and (j). Thus, unlike the consideration given a motion made pursuant to section 995 the court at a special 1538.5 hearing must weigh the evidence. *People* v. *Heard*, 266 Cal. app. 2d 747 (1968). When the transcript of the preliminary hearing is to be considered as all or part of the evidence at the special hearing a stipulation to that effect should be entered in the minutes of the court or reflected in the transcript of the proceedings. *Thompson* v. *Superior Court*, 262 Cal. App. 2d 98, 105 (1968).

In the absence of stipulation the defendant has a right of confrontation and the preliminary transcript cannot be admitted over his objection. *Hewitt* v. *Superior Court*, 5 Cal. App. 3d 923, 927–28 (1970).

The defendant was not entitled to a dismissal of the case because there was a problem in locating the physical evidence. A continuance should have been granted. *People* v. *Ritchie*, 17 Cal. App. 3d 1098, 1104–06 (1971).

§ 10.14: *Defense Pretrial Remedies*

A *search warrant* should be challenged in the first instance before the magistrate who issued the warrant, when consistent with the procedures set forth in section 1538.5. Section 1538.5(b). This provision is also subject to the qualification that the disqualification rules

of Code of Civil Procedure sections 170–170.6 are applicable. Section 1538.5(b).

Whether an accused can attack the accuracy of statements made in an affidavit has been termed a difficult and troublesome question. *See People* v. *Sanchez*, 24 Cal. App. 3d 664, 684 (1972). *See* Comment, *The Outwardly Sufficient Search Warrant Affidavit; What If It's False?* 19 U.C.L.A. L. Rev. 96 (1971). In *Theodor* v. *Superior Court*, 8 Cal. 3d 77, 100 (1972), it was held that a defendant could challenge the factual veracity of an affidavit in support of a search warrant and demonstrate that material statements are false.

In *misdemeanor* cases the motion must be made *prior* to *trial*. Section 1538.5(g). If a misdemeanor is filed jointly with a felony the procedure applicable to felonies shall be applied. Section 1538.5(g).

When a *felony* offense is *initiated by complaint* the motion to suppress evidence may be made at the preliminary hearing. Section 1538.5(f). If the defendant is held to answer the defendant may renew or make his motion to suppress in superior court at a special hearing. Section 1538.5(i). When the felony is *initiated by indictment* the defendant may make his motion to suppress in superior court at a special hearing. Section 1538.5(i). *Greven* v. *Superior Court*, 71 Cal. 2d 287 (1969). *See* section 20.26, *infra*. Section 1538.5(i). The defendant may not, at the trial of his case renew his motion to suppress evidence having once made his motion. *People* v. *Superior Court* (Edmonds), 4 Cal. 3d 605, 611 (1971); *People* v. *O'Brien*, 71 Cal. 2d 394 (1969); *Gomes* v. *Superior Court*, 272 Cal. App. 2d 702, 706, n.9 (1969). *Contra, People* v. *Mejia*, 272 Cal. App. 2d 486, 489 (1969). After once making his motion to suppress the defendant need not object to the evidence at trial to protect his right to raise the issue on appeal. *People* v. *O'Brien*, 71 Cal. 2d 394 (1969); section 1538.5(m). As to whether the motion to suppress can be reviewed before trial, *see People* v. *Bubose*, 17 Cal. App. 3d 43, 47 (1971).

In a proper case the court after granting the defendant's motion to suppress may order the case dismissed pursuant to Penal Code section 1385. Section 1538.5(*l*). When granting the motion to dismiss the trial judge must set forth in the record the grounds for his order which in the case of a motion to suppress should indicate that it is granted following the granting of the motion to suppress because insufficient evidence remains. *People* v. *Evans*, 275 Cal. App. 2d 78, 80 (1969), *disapproved in another respect* in *People* v. *Fein*, 4 Cal. 3d 747, 755 (1971). It should be noted that section 1538.5

(*l*) provides for dismissal pursuant to section 1385 only on the motion of the court whereas section 1385 provides for dismissal upon the court's own motion as well as upon application of the district attorney. The apparent reason for not permitting the district attorney to seek a 1385 dismissal in a 1538.5 proceeding is that for him to do so could be construed to constitute a waiver of any defect in the proceedings on the motion to suppress.

§ 20.15: *Defense Trial Remedies*

At *trial* the defendant can for the first time move to suppress evidence when either (1) opportunity for the motion did not exist (*e.g.,* defendant unaware of the existence of the evidence the People seek to introduce at trial) or (2) the defendant was unaware of the grounds for the motion (*e.g.,* facts discovered by defendant at trial which for the first time disclosed grounds for making the motion). Section 1538.5(*l*); *People* v. *O'Brien,* 71 Cal. 2d 394 (1969). Such a motion is addressed to the discretion of the trial court. Section 1538.5(h). The purpose of this limitation is to permit the People to seek review of an adverse trial court ruling before the trial commences and the defendant is placed in jeopardy. Report of the Assembly Interim Committee on Criminal Procedure on Search and Seizure, Preemption, Watts, Firearms Control (1965–1967) Committee Reports Vol. 22, No. 12.

§ 20.16: *People's Remedies—Pretrial*

The People may not in the first instance seek a determination of the legality of a search and seizure. *See* section 1538.5(a).

When the defendant successfully obtains suppression of evidence at the preliminary hearing and he is not held to answer, the People may file a new complaint or seek an indictment. Section 1538.5(j). The ruling at the preliminary hearing in such a situation is not binding on the People. Section 1538.5(j).

When the defendant is successful with his motion but is held to answer at the preliminary hearing the ruling on the motion to suppress is binding on the People unless they seek relief in superior court. Section 1538.5(j). To obtain relief the People must within ten (10) days after the preliminary hearing file an information in superior court and give notice to the defendant and the court in which the preliminary hearing was held of their request for a special hearing in superior court. Section 1538.5(j). The issue of the legality of the search and seizure shall be litigated de novo. Section 1538.5(j). The defendant is entitled to a continuance of up to thirty

days to prepare for the hearing. Section 1538.5.

§ 20.17: *People's Remedies at Trial*

When the defendant successfully moves to suppress evidence at a special hearing in superior court the People may at the time of trial seek to introduce the suppressed evidence. Section 1538.5(j); *Stapleton* v. *Superior Court,* 70 Cal. 2d 97 (1968). In order to obtain introduction of the suppressed evidence the People must show (1) there was additional evidence relating to the motion to suppress which was not introduced at the special hearing, (2) good cause why the additional evidence was not introduced at the special hearing, and (3) why the prior ruling at the special hearing should not be binding upon the People. Section 1538.5(j). A failure to comply with these rules will leave the People in the position of not being able to contest the committing magistrate's ruling. *Eiseman* v. *Superior Court,* 21 Cal. App. 3d 342, 348 (1971).

§ 20.18: *Necessity of Objection*

In order to obtain review of the lawfulness of a search and seizure it is necessary that the defendant at some stage of the proceedings move to suppress the evidence which is the product of such search. Section 1538.5(m). Having made such a motion prior to trial, the defendant need not again raise the issue at trial to protect his right to review the denial of his motion. *People* v. *O'Brien,* 71 Cal. 2d 394 (1969). Further, a bare objection to the introduction on the grounds that the proffered evidence is the product of an unlawful search and seizure shall be treated whenever possible as a motion pursuant to section 1538.5. *People* v. *O'Brien, supra.*

A failure to object in the lower court will bar review of the search and seizure claim on appeal. *People* v. *Gallegos,* 4 Cal. 3d 242, 249 (1971); *People* v. *Terry,* 2 Cal. 3d 362, 391 (1970); *People* v. *Petersen,* 23 Cal. App. 3d 883, 894 (1972); *People* v. *Simmons,* 19 Cal. App. 3d 960, 967 (1971); *People* v. *Moore,* 13 Cal. App. 3d 424, 433 (1970) (an objection in the trial court on one ground does not permit the raising of another ground on appeal), *People* v. *Sirhan,* 7 Cal. 3d 369, 398 (1972) (same); *People* v. *Tremayne,* 20 Cal. App. 3d 1006, 1016 (1971) (attacked failure to advise him of right to refuse consent; did not attack validity of consent). *Cf. People* v. *Williams,* 9 Cal. App. 3d 565, 570 (1970) ("objections stated orally in the heat of trial cannot be analyzed with the legal acuity reserved for the interpretation of statutes and contracts.") Objection must be made not only to the direct product of the illegality but also to indirect

products like statements. *Tremayne, supra.*

To obtain proper review of the lawfulness of a search and seizure the defendant must set forth with specificity the *grounds* upon which his motion to suppress is based. *Greven* v. *Superior Court,* 71 Cal. 2d 287 (1969); *Thompson* v. *Superior Court,* 262 Cal. App. 2d 98 (1968). *See People* v. *Sullivan,* 255 Cal. App. 2d 232, 236 (1967). The detailing of grounds for the motion provides the prosecution with an opportunity to offer necessary evidence to overcome the objections of defense counsel and gives the trial judge an opportunity to make a ruling on it. E. H. Heafey, Jr., *California Trial Objections* (C.E.B.) 23–25; Evidence Code § 353. This rule requiring specificity of grounds is inapplicable only in special situations where it would place an unreasonable burden on a defendant to anticipate unforeseen changes in the law and encourage fruitless objections in other situations in which a defendant might hope that an established rule of evidence might be changed on appeal. *People* v. *De Santiago,* 71 Cal. 2d 18, 22 (1969).

It is also necessary that the evidence at which the motion to suppress is directed be set forth with specificity to ensure proper review. *People* v. *O'Brien,* 71 Cal. 2d 394 (1969); *People* v. *Superior Court* (Pierson), 274 Cal. App. 2d 228 (1969); *People* v. *Rose,* 267 Cal. App. 2d 684 (1968). *See People* v. *Rogers,* 270 Cal. App. 2d 705, 707–08 n.1 (1969); *Thompson* v. *Superior Court,* 262 Cal. App. 2d 98 (1968).

Somewhat analogous to the necessity of an objection by the defendant is the restriction placed on the government's invention of after-the-fact theories to uphold the police officer's conduct. *People* v. *Superior Court* (Simon), 7 Cal. 3d 186, 198 (1972), praising *Agar* v. *Superior Court,* 21 Cal. App. 3d 24 (1972) ("excellent analysis"). When done on appeal, the *Simon* court said, this deprives the defendant of a fair opportunity to present an adequate record in response. *People* v. *Miller,* 7 Cal. 3d 219, 227 (1972). Cf *People* v. *Coleman,* 28 Cal. App. 3d 36 (1972).

§ 20.19: *Record for Appellate Review*

To assure proper review of any ruling on a motion to suppress, it is incumbent upon the party seeking review to provide the reviewing court with the proper record of the proceedings below. *Thompson* v. *Superior Court,* 262 Cal. App. 2d 98 (1968). *See* § 20.28, *infra. But see Amacher* v. *Superior Court,* 1 Cal. App. 3d 150 (1969), where the court refused to follow *Thompson.*

The judge deciding a motion to dismiss is not required to set forth *findings of fact and conclusions of law* to assure proper review of his decision. *People* v. *Brown,* 272 Cal. App. 2d 448, 452 (1969). *But see People* v. *Superior Court* (Mace), 271 Cal. App. 2d 524, 528–29 (1969).

§ 20.20: *Harmless Error Rule*

The harmless error rule of *Chapman* v. *California,* 386 U.S. 18 (1967), "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" is applicable to search and seizure issues arising out of any appeal from a judgment of conviction following a trial. *People* v. *Hale,* 262 Cal. App. 2d 780, 789–90 (1968).

§ 20.21: *Defendant's Appellate Remedy (Misdemeanor)*

Following an adverse decision on motion to suppress, the defendant in a *misdemeanor* proceeding may appeal the decision to the superior court of the county in accordance with California rules of Court, rules 101 through 108 and rules 181 through 191. § 1538.5(j). *See People* v. *De Renzy,* 275 Cal. App. 2d 380 (1969). *See* § 20.22, *infra.* The defendant apparently may also raise the issue on appeal from his conviction provided he moved to suppress the evidence at some stage of the proceedings. § 1538.5(m). It should also be noted that an extraordinary writ may be sought only in felony proceedings. *See* § 20.22, *infra.*

§ 20.22: *Defendant's Appellate Remedy (Felony)*

The defendant in a *felony* proceeding may seek a pretrial review of the denial of his motion to suppress at a special hearing in superior court by the filing of a petition for an extraordinary writ. § 1538.5(i); *People* v. *Gregg,* 267 Cal. App. 2d 567, 568 (1968) (the denial of a motion to suppress in felony proceedings is not an appealable order). Such a writ must be filed within thirty (30) days after the court orally denies his motion. § 1538.5(i); *Gomes* v. *Superior Court,* 272 Cal. App. 2d 702 (1969). The time within which to file the petition for the writ is jurisdictional. *Gomes* v. *Superior Court,* 272 Cal. App. 2d 702 (1969). The proper writ to seek in obtaining review of the denial of a motion to suppress is mandate. *Stapleton* v. *Superior Court,* 70 Cal. 2d 97 (1968); *Raymond* v. *Superior Court,* 19 Cal. App. 3d 321, 324 (1971). The proper relief to seek in petitioning for such a writ is an order vacating the order denying the motion to suppress. *Greven* v. *Superior Court,* 71 Cal.

2d 287, 295 (1969). The writ will not issue to permanently stay proceedings in the trial court. *Greven* v. *Superior Court, supra.*

The defendant may seek review of a search and seizure issue by appeal from a conviction following a trial provided he moved to suppress the evidence at some point in the proceedings. § 1538.5(m); *People* v. *O'Brien,* 71 Cal. 2d 394 (1969).

People v. *Medina,* 6 Cal. 3d 484, 492 (1972), held that the prior ruling in the writ proceeding does not bar a second review by appeal unless the writ case ended with a written opinion.

The defendant may also seek review of a search and seizure issue by appeal from a conviction following a guilty plea if he moved to suppress the evidence at some point in the proceedings leading to his plea. § 1538.5(m); *People* v. *Fry,* 271 Cal. App. 2d 350, 358 (1969) (premature notice of appeal); *People* v. *Gregg,* 267 Cal. App. 2d 567, 568 (1968); *People* v. *Rose,* 267 Cal. App. 2d 648 (1968).

When appealing from a guilty plea only on grounds that the denial of the motion to suppress should be vacated, a certificate of probable cause (Pen. Code § 1237.5) is not required. *People* v. *Rose,* 267 Cal. App. 2d 648, 649–50 (1968); *Moran* v. *St. John,* 267 Cal. App. 2d 474 (1968). Upon reversal of a conviction obtained by a plea of guilty on the grounds that the motion to suppress should have been granted the guilty plea is set aside. *People* v. *Fry,* 271 Cal. App. 2d 350, 358 (1969). The rule of harmless error cannot be applied because there has been no trial. *People* v. *Fry, supra.*

Guilty pleas are often the product of negotiation whereby other charges may be dismissed upon the entry of a guilty plea. The setting aside of the guilty plea could conceivably raise problems of multiple prosecution prescribed by *Kellett* v. *Superior Court,* 63 Cal. 2d 822 (1966). In *People* v. *Fry,* 271 Cal. App. 2d 350, 358 (1969), the court anticipated this problem and made provision for the reinstatement of the dismissed charges provided they were dismissed in consideration for the defendant's guilty plea.

As to the defendant's remedy after a mistrial, *see Cornelius* v. *Superior Court,* 25 Cal. App. 3d 581, 584–85 (1972).

The appellate court will accept the trial court's resolution of contested factual matters in a section 1538.5 proceeding. *Cornelius, supra* at 587.

§ 20.23: *People's Appellate Remedies*

In *misdemeanor* proceedings the People can seek review in superior court in the same manner as the defendant. § 1538.5(j); *see*

People v. *De Renzy,* 275 Cal. App. 2d 380 (1969). *See* § 20.21, *infra.*

The People may petition for an extraordinary writ to obtain pretrial review in *felony* proceedings of an adverse decision on a motion to suppress. § 1538.5(j), (o). When a case is dismissed pursuant to 1385, however, the People may seek review only by appeal as discussed below. § 1538.5(j). When the trial date is set within thirty (30) days of the granting of the defendant's motion to suppress, notice of intent to petition for the writ must be filed in superior court and served on the defendant. § 1538.5(o). The time within which the notice must be filed is ambiguous. The intent of the Legislature seems to be to require the notice of intent to be filed and served before the trial date and in no event later than ten (10) days after the granting of defendant's motion to suppress. § 1538.5(o); *Gomes* v. *Superior Court,* 272 Cal. App. 2d 702, 703–06 (1969); *People* v. *Superior Court* (Palmeri), 269 Cal. App. 2d 71, 72 (1969). The time within which to file the petition is jurisdictional, *Gomes* v. *Superior Court,* 272 Cal. App. 2d 702, 704 (1969).

The People may seek review of the adverse ruling on the motion to suppress by appeal from the order dismissing the case. § 1238. On appeal the court will consider not only whether or not after granting the motion to suppress there remained sufficient evidence to justify requiring the accused to stand trial but also whether the motion to suppress the evidence was properly granted. *People* v. *Perillo,* 275 Cal. App. 2d 778 (1969); *People* v. *Foster,* 274 App. 2d 778, 781–83 (1969).

The order suppressing evidence is not itself appealable. *People* v. *Shubert,* 10 Cal. App. 3d 810, 812 (1970).

§ 20.24: *After Appellate Review*

The procedure for reinstituting proceedings in the trial court following review by an appellate court is governed by section 1538.5(*l*). Except in those circumstances in which the People seek review without success the proceedings in the trial court must commence within 60 days of the termination of the proceedings relating to the review. §§ 1538.5(*l*), 1382. When the People have sought the issuance of an extraordinary writ and it is denied, proceedings must be reinstituted in the trial court within 30 days of the last denial of the petition. § 1538.5(*l*).

"Termination" of the proceedings (appellate) as used in section 1538.5(*l*) although unclear apparently includes the issuance of the remittitur in the case of an appeal or the extraordinary writ in the

event it issues. When an extraordinary writ sought by the defendant is denied, termination must mean the date the matter can no longer be considered by the appellate courts.

Appeals from *misdemeanors* to the appellate department of the superior court exist only in those counties having at least one municipal court. Code Civ. Proc. § 77. *See Whittaker* v. *Superior Court,* 68 Cal. 2d 357, 362–66 (1968). The remittitur will issue upon expiration of the time for transfer to a Court of Appeal. Rules of Court, rule 191. *See also* Rules 62, 63, 107.

Appeals to superior courts without appellate departments are heard by a single superior court judge. *Whittaker* v. *Superior Court,* 68 Cal. 2d 357, 362–66 (1968). The rule for issuance of the remittitur is the same as for appeals to an appellate department except that the decision by the appellate department is not final until seven (7) days after pronouncement (Rule 107) whereas the decision of a one-judge court is apparently final immediately. Rule 191. *See also* Rules 62, 63.

It should be noted that there is an apparent conflict between sections 1538.5 and 1466 and Rule 181. Section 1466 makes no reference to appeals from proceedings in municipal and justice courts relative to the suppression of evidence. Rule 181 limits the grounds for appeals to superior court to those set forth in section 1466. Section 1538.5(*l*) refers to section 1466 as one of the vehicles providing review by appeal. The intent of the Legislature in section 1538.5(j) and (*l*) to provide for review by appeal in misdemeanor cases is unambiguous. The legislature's failure to alter section 1466 or the Judicial Council's failure to amend the Rules of Court should not operate to frustrate this clear purpose of the Legislature.

In *felony* cases a remittitur will issue following the decision on appeal or denial of an extraordinary writ where an alternative writ or order to show cause has been issued. Rules of Court, Rule 25(a). In the event no hearing is granted by the California Supreme Court the remittitur will issue sixty (60) days after the decision by the court of appeal. Rules 24, 25, 28. In the event a hearing is granted the remittitur issues thirty (30) days after the decision. Rules 24, 25. An extraordinary writ will not issue until the time for hearing in California Supreme Court has passed without transfer (sixty (60) days), or until the decision is final, as to the Supreme Court, should the case be transferred to it (thirty (30) days). Rules 24, 28.

When the Court of Appeal denies a petition for an extraordinary writ without issuing an alternative writ or order to show cause, the

decision is final immediately and if the case is not transferred to the Supreme Court within thirty (30) days there is no further possibility for consideration and the proceeding must be deemed "terminated."

The district attorney to assure that the time to reinstitute proceedings does not lapse, of course, should seek approval of any delay by the defendant by pressing for trial immediately following the denial of the defendant's petition.

Should the People's petition for an extraordinary writ be denied without issuance of an alternative writ or order to show cause the defendant must be brought to trial within thirty (30) days of the last denial of the People's petition. § 1538.5(*l*). Apparently the time begins to run whenever the People have sought and been denied a hearing in the Supreme Court or if they choose to accept the decision of the Court of Appeal then from the date of the denial of the petition. Rules 24, 27, 28.

§ 20.25: *Finality of Decision Regarding Suppression of Evidence*

No decision regarding the admissibility of evidence allegedly seized unlawfully is final as to the defendant until the termination of any appeal from the judgment of conviction. § 1538.5(j), (m). The defendant having sought unsuccessfully prior to trial to suppress evidence may not at the time of trial renew his efforts to have it suppressed, unless the court, in an exercise of discretion, decides otherwise. *People* v. *O'Brien,* 71 Cal. 2d 394 (1969); *People* v. *Harrington,* 2 Cal. 3d 991, 997–98 (1970).

The Superior Court is also without jurisdiction, prior to trial, to reconsider its denial of a motion to suppress following the expiration of the 30-day period within which to seek extraordinary relief. Until the 30-day period expires and the order has become final, the court has inherent power to reconsider and "reopen" its prior ruling. However, successive applications based upon the same factual showing should be discouraged. *People* v. *Krivda,* 5 Cal. 3d 357, 362–63 (1971). It should be noted that in *Krivda* (at 364), although the Supreme Court decided that the trial court's order granting the motion was beyond its jurisdiction and void, it nonetheless ruled on the admissibility of the evidence and affirmed the dismissal, since it concluded that the original motion to suppress should have been granted.

The People on the other hand are generally bound by any pretrial ruling on the suppression of evidence (1538.5(j)). When a motion to suppress is granted at a preliminary hearing and the defendant is held to answer the People are bound by the ruling unless within ten (10) days an information is filed and notice is given to the defendant and magistrate of the People's request for a special hearing in superior court. § 1538.5(j). If defendant's motion is granted and he is not held to answer at the preliminary hearing the People are not bound by the determination in any subsequent proceedings and may file a new complaint or seek an indictment. § 1538.5(j). Thus should the People unsuccessfully seek review of an adverse ruling by an extraordinary writ they could not again seek review by appeal from the dismissal of the action pursuant to section 1385. Unlike the defendant, however, the People may under certain circumstances renew at trial their efforts to obtain introduction of previously suppressed evidence. § 1538.5(j). *See Hewitt* v. *Superior Court,* 5 Cal. App. 3d 923, 929 (1970) (motion to suppress granted on procedural ground and not on merits).

§ 20.26: *Obtaining Return of Property*

Section 1538.5 establishes a procedure not only for suppression of evidence but also for the return of property alleged to have been unlawfully seized. Any property unlawfully seized may be suppressed but only that property which is not otherwise subject to lawful detention. § 1538.5(e). Following the granting of a motion to suppress or return evidence at a *preliminary hearing,* property not otherwise subject to detention (*e.g.,* contraband) shall be returned on order of the court upon the expiration of ten (10) days unless further proceedings are initiated and then upon their termination if the property is no longer subject to detention. Following the granting of a motion to suppress or return evidence at a *special hearing* property not otherwise subject to detention shall be returned upon termination of any review if the property is no longer subject to lawful detention and if no review is sought then upon the expiration of the time for initiating review. § 1538.5(e).

§ 20.27: *Continuance*

The defendant is entitled to a continuance of up to thirty (30) days to prepare for a special hearing requested by the People. § 1538.5(j). *See* § 20.61, *supra.* The defendant may also seek a continuance of similar length to prepare his motion to suppress in any misdemeanor proceeding. § 1538.5(b). *See* § 20.14, *supra.*

§ 20.28: *Notices*

The *defendant* must give the People ten (10) days notice of his intent to renew or make a motion to suppress in superior court. § 1538.5(i). *See* § 20.14, *supra.* The People must within ten (10) days of granting the motion to suppress at a preliminary hearing at which the defendant was held to answer, notify the defendant and the magistrate of its request for a special hearing in superior court. § 1538.5(j). *See* § 20.16, *supra.*

The *People* must notify the defendant of their intention to petition for an extraordinary writ when the trial is set for a date within thirty (30) days of the pronouncement of the decision on a motion to suppress. § 1538.5(o). *See* § 20.21, *supra.*

§ 20.29: *Release of Defendant Pending Review*

Under section 1538.5(k) (as amended in 1970) the defendant who wins a 1538.5 motion is usually entitled to bail pending review except in capital cases or certain specified non-capital cases. When the defendant appeals in a misdemeanor proceeding bail is a matter of right and/or may be used in the discretion of the trial or appellate court. § 1538.5(*l*).

§ 20.30: Transcript of Special Hearings

Section 1539 provides for the preparation of a transcript in special hearings held in superior court pursuant to section 1538.5. The shorthand notes of the court reporter are transcribed only upon the written request by a party to the clerk of the court in which the hearing was held. It is incumbent upon the party who petitions for an extraordinary writ to request the preparation of the transcript and upon receipt of his copy to file it with the Court Appeal. *Thompson* v. *Superior Court,* 262 Cal. App. 2d 98, 104–05 (1968). In the event the transcript is not prepared within the thirty (30) day period for filing the petition (1538.5(i), (o)), the petition must be filed within the time period and the court advised that the transcript had been requested and will be filed as soon as it is received from the clerk. *Thompson* v. *Superior Court,* 262 Cal. App. 2d 98, 104, n.4 (1968).

APPENDIX

APPENDIX

California Penal Code section 1529 (as amended, statutes 1969, ch. 362) provides:

"The warrant must be in substantially the following form:

"County of _____

"The people of the State of California to any sheriff, constable, marshal, or policeman in the County of _____:

"Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, according to Section 1524, or, if the affidavit be not positive, that there is probable cause for believing that _____ stating the ground of the application in the same manner), you are therefore commanded, in the daytime (or at any time of the day or night, as the case may be, according to Section 1533), to make search on the person of C.D. (or in the house situated _____, describing it or any other place to be searched, with reasonable particularity, as the case may be) for the following property: (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

"Given under my hand, and dated this _____ day of _____, A.D. 19__.

"E. F. Judge of the Justice Court (or as the case may be)."

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