147047

BASIC COURSE INSTRUCTOR UNIT GUIDE

16

SEARCH AND SEIZURE

January 1994

THE COMMISSION
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

The curricula contained in this document is designed as a *guideline* for the delivery of performance-based law enforcement training. It is part of the POST Basic Course guidelines system developed by California law enforcement trainers and criminal justice educators in cooperation with the California Commission on Peace Officer Sandards and Training.

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LEARNING DOMAIN 16
Search and Seizure

CONDITIONS UNDER WHICH A SEARCH CAN BE MADE

Given a word picture depicting a search or seizure, the student will identify if the search or seizure was legal, and if it was legal, the type of search or seizure depicted. The types of searches and seizures and the conditions under which they can be legally conducted are described below.

A. **Searches conducted pursuant to a warrant** are searches authorized by a written order, signed by a magistrate, directing a peace officer to search a specific place for specific items and bring them before the magistrate. The warrant must particularly describe the items sought, the location, vehicle, or person to be searched, and must list the statutory grounds for issuing the warrant. An officer serving a warrant must announce his presence, identify himself as an officer, state his purpose, and demand entry before forcibly entering a private dwelling

B. **Probable cause searches** are warrantless searches by an officer who has specific articulable facts to believe the object of his or her search is located in a specific area. The scope of a lawful search is limited by the circumstances under which it is being conducted (e.g., the outer clothing of a suspect or the interior of a car).

C. **Searches incidental to an arrest** are searches conducted contemporaneous to an arrest. They are limited to the suspect and areas in the suspect's immediate control. The purpose of these searches is to protect the officer (by locating weapons) and to prevent the destruction of evidence or contraband.

D. **Consent searches** are searches conducted after consent to search has been given freely and voluntarily. The person giving the consent must possess and exercise sufficient mentality to make an intelligent choice and must have actual or apparent authority to give consent

E. **Searches under exigent circumstances** are emergency searches. An officer may enter into an area where there is an expectation of privacy for the purpose of protecting life, health or property. The necessity to enter must involve a substantial and immediate threat to life, health or property or in the fresh pursuit of a criminal suspect. Once the emergency abates, a warrant is required. An officer cannot create the exigent circumstances

F. **Plain view seizures** are not searches. If an officer observes items of evidence or contraband in plain view from a position he or she has a lawful right to be, he or she may seize the evidence without a search warrant if the evidence itself is also in a place where the officer has a lawful right to be

G. **Pat-down or frisk searches** are cursory searches of legally detained suspects to protect an officer from an unexpected assault when the officer reasonably believes that the person is armed with a weapon or potentially dangerous instrument

Performance Objective 4.7.1

CURRICULUM

A. Reasonable searches and seizures

1. The items for which an officer may legally search are dangerous weapons, fruits of the crime, instruments of the crime, contraband, suspects, additional victims, and physical evidence.

2. Search With a warrant

a. A search warrant is an order in writing which is signed by a magistrate, directed to a peace officer, and commands the officer to search for personal property and bring it before the magistrate. (California Penal Code Sections 1523-1534).

(1) Search warrant - lists items sought, location(s), vehicle(s), and person(s) to be searched, and statutory grounds for issuance (Penal Code Section 1524) as set forth in the affidavit.

(2) Securing premises pending issuance of search warrant

(a) OK after arrest of suspects within location. (People v. Superior Court (Irwin) 33 CA3 475 (1973).

(b) OK after arrest of suspects whose confederates will destroy items sought upon learning of arrest (People v. Freeny 37 CA3 20 (1974); Ferdin v. Superior Court 36 CA3 774 (1974))

(c) Refusal of consent does not in and of itself provide an authority to secure the premises pending issuance of a search warrant. (People v. Shuey 13 CA3 835 (1973)).

(3) When serving a warrant it is permissible to detain the person present on the premises for officer safety and prevent the destruction of evidence. Searches of these detainees must be based on articulable facts (People v. Gallant 225 Cal App 3d 200 (1990).

b. Affidavit in Support Thereof - identifies who is seeking the warrant, the items to be seized, the areas to be searched, the statutory grounds for issuance (Penal Code Section 1524), and probable cause for affiant's belief that items sought are located in places to be searched.

(1) Description of item sought and areas to be searched

(a) Describe items to be seized and areas to be searched with sufficient particularity so that if an officer, with no knowledge of the case, were to serve the warrant he would have no difficulty in recognizing the items to be seized or the location (including person) to be searched.

(b) Give a physical description of each item of evidence, contraband or paraphernalia associated with the crime and all areas to be searched such as, the resident outbuildings, yard areas, trash

containers, etc.

(c) Under some circumstances a search warrant should be obtained to search for an arrestee in a residence other than his/her own. (Steagald v. U.S. 451 U.S. 204 (1981); Peo. v. Codinha, 138 CA3d 167 (1982)).

(d) Attach exhibits, listing items to be seized and/or photographs/diagrams showing locations to be searched

(e) Seizing items found in plain view that are not named in the warrant (Nexus Rule). When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts. (Skelton v. Superior Court 1 Cal. 3d 144 (1968))

(2) Statutory grounds for issuance (Penal Code Section 1524)

(a) Use as many sections as appropriate

(b) Use subsection 1524(4) to seize evidence such as rent receipts to show possession or control of the premises

(c) Evidence of child pornography (Penal Code Section 311.2) is also a ground for issuance.

3. The stop and frisk

a. A "stop" is a seizure within the meaning of the Fourth Amendment. There must be a reasonable basis for the stop.

b. A "pat-down or frisk" is a cursory search of the outer clothing of the person stopped.

c. The basis for any frisk is to prevent danger to the officer from an unexpected assault. The courts have held that an officer must be able to point to articulable facts from which he reasonably believed, in the light of his experience, that the individual he was dealing with was armed and presently dangerous (Frank V. 223 Cal App 3d 1232 (1992).

d. Transporting nonarrestees

(1) If you are offering to give an individual a ride as a favor, then the officer must tell the individual that they have the right to refuse and that if they accept the ride they will be subjected to a search for weapons (People v. Scott 16 CAL 3d 242 (1976).

(2) If the officer is obligated to transport a person, the officer need not advise them, since they have no choice in refusing (People v. Tobin 219 Cal App 3d 634 (1990).

e. The scope of the frisk

(1) An officer may conduct a cursory search, not only of the individual's outer clothing, but of any area (including a vehicle) from which the individual might easily procure weapons, if the officer reasonably suspects that a weapon is located there (Penn v. Mimms 434 US 106 (1972).

(2) Although the officer may have the right to pat down the suspect's outer clothing, the officer may not reach inside the clothing of the suspect or search further unless they have reason to believe that the pat-down has disclosed the presence of a weapon or contraband (People v. Lee 194 Cal App 3d 975 (1987).

(3) If the stop and frisk or the scope of the frisk are unreasonable, any evidence obtained by the officer as a result of these actions will be inadmissible in court.

4. Search incident to a lawful arrest

a. Rationale for search

(1) The rationale for permitting searches of arrestees without a warrant is based on case law, which allows search incidental to lawful arrest to (a) protect the officer and (b) to prevent destruction of evidence or contraband.

(a) It is dependant not on the single fact of the existence of a "custodial arrest", but rather on the relative danger to the officer associated with each particular arrest. (People v. Longwill 14 C3 1943 (1975)).

(b) It is necessary to prevent the entry of contraband into the jail facility and to prevent destruction of evidence.

(c) Searches incident to an arrest are not permissible when the arrest will be disposed of by a mere citation.

b. Scope of the search

(1) Arms reach rule - The area within the arrestee's immediate control may be searched contemporaneous with the arrest. That area is defined as the area from which a weapon may be obtained or evidence destroyed (Chimel v. California 395 US 752 (1969)).

(2) Search of premises for additional suspects ("protective sweeps") or victims - The premises where the suspect is arrested may be searched for additional suspects or victims when the officer has reasonable cause to believe there are additional suspects or victims. A general exploratory search for "possible" additional suspects or victims is not justified (Buie 110 S.CT. 1093 (1990).

c. Requirements for search

(1) In order for the search to be lawful, the arrest itself must be legal.

(a) If it is later determined in court that the arrest was illegal, then any evidence so obtained will be held inadmissible.

(2) The search must be contemporaneous with the actual arrest.

(a) As a general rule, the search must take place at the same general time and same general location as the arrest.

1) Example: An officer, after having lawfully arrested a person at his job, cannot go to the arrestee's house and search it as incident to the arrest.

(b) However, the courts have allowed searches that were not conducted contemporaneous with the actual arrest, because the time lapse between arrest and search, were attributable to reasonable police necessities.

1) Example: If a motorist is arrested for narcotics violations and a hostile crowd gathers, police may interrupt the vehicle search and tow it to a different location for a more thorough search.

2) In the case of a hit-and-run driver, the police may wish to impound the vehicle and subject it to an extensive analysis for evidence of that crime.

3) In both examples, police should be prepared to explain their reasons for conducting a search at a different time and place than the actual arrest. (See Vehicle Searches)

5. Search pursuant to consent

a. Consent defined

(1) A voluntary agreement to do something proposed by another. To be valid, a person's consent must be clear, specific, and unequivocal.

(2) Types of consent

(a) Expressed consent is that which is directly given either orally or in writing. It is a positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.

(b) Implied consent is manifested by signs, actions, or facts, which raise a presumption that the consent has been given. This is the weakest form of consent, and every effort should be made to obtain an expressed consent.

b. The voluntary consent is one that is freely given, without threat or promise.

(1) A consent is involuntary if given in submission to an unlawful assertion of authority, whether expressed or implied, or following on unlawful arrest or detention.

(2) An officer cannot use coercive methods or otherwise intimidate the person into giving consent.

(a) Example: An officer cannot tell a subject: "You better let me search your car, or else!"

(3) An officer can tell an occupant that he will seek a search warrant if consent is not given provided the officer believes he could in fact seek and obtain one. (People v. Ruster 16 C3 690 (1976)).

(4) Consent obtained as the result of any illegal act will be held to be involuntary.

c. The authority of the consenter

(1) Persons with a right to use or control property may give consent.

(2) As a general rule, no third person can give a valid consent to search the suspect's personal belongings.

(a) Exception: In a husband-wife relationship, either spouse may give consent to search anywhere in the premises, unless the spouses have previously agreed that a certain area is private, e.g., the husband's fishing tackle box.

(b) Exception: Parents can give permission to search a juvenile's room unless it is an area of exclusive control (In Re: Scott K. 24 CAL 3d 395 (1979)).

(3) The following are persons who typically have a right of use or control:

(a) spouse

(b) roommate

(c) co-tenant

(d) other persons in control

(4) The following are not persons who have a right of use or control so as to give consent.

(a) Apartment manager, landlord, hotel clerk

1) Guests in a hotel are protected under the fourth amendment. They are protected as if they were in their own home against unlawful intrusions by police officers.

(5) Parolee's cohabitant cannot refuse the search of common areas.

d. Knowledge of right to refusal

(1) The U.S.Supreme Court has said that it is not legally necessary for an officer to advise a person that he has a constitutional right to refuse consent. (Schneckloth v. Bustamante 412 US 218 (1973) and People v. James, 19 C. 3d 99 (1977)

(2) However, failure to advise the person of their rights may be considered by the court together with the totality of circumstances in determining the voluntariness of the consent.

(3) Compare the following examples:

(a) Officer: "Will you open your trunk?"
Suspect: "Do I have to?"
Officer: "If you don't that means that you're guilty."

(b) Officer: "May we search your trunk? A burglary just took place and a car, similar to yours, was last seen leaving the location. You do not have to give us permission, but if you do decide to cooperate with us, it could remove any suspicion on your part."

e. Limitation on area of consent

(1) Officers must carefully observe any limitations placed upon the consent either directly or by inference.

(a) In other words, consent to search portions of a suspect's premises does not infer consent to search the entire premises.

(2) The person giving consent has the right to withdraw the consent at any time during the search.

(a) The withdrawal of consent may be expressed, or it may be implied by conduct that demonstrates the consent is withdrawn.

(b) If officers choose to ignore the withdrawal of consent, any evidence that is subsequently seized will be inadmissible at trial unless it can be justified on other grounds.

f. Special categories of consent searches

(1) Probation searches

(a) A probation search is a search made pursuant to consent given by the probationer as a condition of his grant of probation.

1) When placed on "searchable probation" a probationer is said to have waived his rights of privacy that other might exist.

2) Not all probationers have a "search condition" to their probation grant. Not all search conditions are the same.

(b) Reasonable belief that the probationer has violated terms of his grant of probation is not necessary prior to the search. The only prerequisite for this type of search is that the officer must conduct the search

for a legitimate law enforcement purpose and not for the purpose of harassment (People v. Bravo 43 Cal. 3d 600 (1987)).

(c) Verification of status and/or search conditions is recommended. However, some cases have upheld a probation search where the officer was unaware of the search condition. It is not necessary to procure the consent or permission the probation officer.

(d) It is not necessary for the probationer to be present at the time or place of the probation search (People v. Llienthal) 22 CAL 3d 891 (1978)).

(e) Knock and notice is required. (Penal Code Sections 844 and 1531)

(2) Parole searches

(a) A parole search is a search conducted in accordance with the parole conditions set forth by the provisions of 15 CCR 2511. All parolees have the same search condition.

(b) Unlike probation searches, parole searches require reasonable suspicion of violation of the law or of his or her conditions of parole.

(c) There must be a direct and close relationship between the search and the parolee's involvement with a criminal activity (People v. Johnson 47 CAL 3d 576 (1988)).

(d) It is recommended that the officer make some attempt to contact the parole agent before conducting the search.

(3) Entry into posted areas with security criteria imply a consent to search

(a) Courthouses, government buildings

(b) Airport

6. Search pursuant to emergency (exigent circumstances)

a. An officer may enter into an area where there is an expectation of privacy for the purpose of protecting life, health, or property. The necessity to enter must be a substantial and immediate threat to life, health, or property.

NOTE: Instructor should provide examples of facts which support

the officer's reasonable belief that exigent circumstances exist.

b. An officer may enter into an area where there is an expectation of privacy in the fresh pursuit of a criminal suspect if the officer has probable cause to arrest the suspect (People v. Hampton 164 CA3 27 (1985)).

c. Once the emergency has dissipated, a warrant is needed before reentry by the officers. There is no homicide investigation exception (Mincy v. AZ 437 US 385 (1978)).

d. Entering private premises in response to 911 calls - An officer may enter to ensure the safety of other persons, even if the call was not for a law violation, but for what appeared to be a medical emergency (People v. Snead 1 CAL 4th, 380 (1991)).

e. The officer cannot create the exigent circumstances to search (People v. Shuey 30 Cal App 3d 535 (1973)).

7. Search of vehicles

a. Legal authorities for conducting vehicle searches:

(1) Pursuant to a lawful consent

(2) Pursuant to a lawful search warrant

(3) Incidental to a lawful arrest

(4) Seizure of a vehicle as an instrumentality of a crime

(5) Upon probable cause to believe the vehicle contains seizable property

(6) Administrative inventory for impound or tow

b. Vehicle defined

(1) Motor vehicle as defined by CVC 415. A motor vehicle is a vehicle that is self-propelled.

(2) A motor home is considered a mobile "vehicle" and may be searched as any other vehicle when it is being used on a highway, or is capable of such use and is found stationary at a place not regularly used for residential purposes (Calif. v. Carney 5 S Ct 2066 (1985).

c. Pursuant to a lawful search warrant. A vehicle may be the subject of a search warrant. A warrant should be procured whenever it is practical to do so or if the vehicle is no longer mobile.

d. Vehicle consent searches

(1) Generally, consent for vehicles is the same as under the discussion of consent above.

(2) Vehicle stops

(a) Prior to the issuance of a citation - Some courts have held that when consent is obtained by the officer prior to the issuance of a citation, the consent was coerced as a matter of law.

(b) After a citation has been issued - If the officer either issues a citation or tells the traffic offender that they are free to leave, but then asks for consent, the court will usually uphold the search. The key is still voluntariness. It is recommended that the officer get a signed written consent form and or explains to the suspect that they do not have to agree to the search (People v. Galindo 229 Cal App 3d 1529 (1991)).

e. Search incident to lawful arrest

(1) The "Bright line rule of Belton" hold that an officer who makes a custodial arrest of the occupant of a vehicle, may search the passenger compartment of the vehicle, including the glove box, and any containers found, whether open or closed. (N.Y. v. Belton 453 U.S. 454 (1981)).

(2) No matter what the person is in custody for, the scope of the search includes the entire passenger compartment and any container. It does not include the trunk (People v. Stoffle 1 Cal App 4th 1671 (1991)).

(3) This rule applies even when the suspect has already been handcuffed and placed in the back of the patrol car. However, under this rule the search of the vehicle must be contemporaneous and occur at or near the scene of the arrest.

f. Instrumentality of a crime

(1) When the vehicle has been seized as an instrumentality of the crime, the vehicle can be taken from the scene and searched later without a warrant (People v. North 8 Cal 3d 301 (1972)).

g. Vehicle searches upon probable cause (Carroll Doctrine)

(1) Rationale for the rule:

(a) The capacity of a motor vehicle to be moved quickly to an unknown location or beyond the jurisdictional reach of a law enforcement officer often makes it impossible to obtain a warrant to search a vehicle.

(b) In many cases, if the officer takes the time to obtain a search warrant, they takes the risk that contraband, fruits of a crime, instrumentalities of a crime, or other criminal evidence will be destroyed, removed, or concealed in the meantime.

(c) Courts have responded to this problem by allowing warrantless searches of vehicles when the officer has probable cause to believe that the vehicle contains items subject to seizure and exigent circumstances prevent the officer from obtaining a warrant. Carroi v. U.S. 267 U.S. 132 (1925). See People v. Chavers 33 C. 3d 462. (1983), People v. Valdez 35 C. 3d 11 (1983).

(2) When an officer has probable cause to believe that properly seizable items are located within a vehicle, he may conduct a warrantless search of any part of that vehicle, including the trunk (People v. Acevedo 161 Cal App 3d 235 (1985)).

(3) The officer may search any containers found in the vehicle which he reasonably believes to contain the items for which he has probable cause to search (US v. Ross 456 US 798 (1982)). (Example: Don't look in the glove compartment when you have probable cause to believe a stolen 25" TV)

(4) Examples: An officer who stops an auto solely for a traffic infraction violation intending to issue only a citation or warning may order an occupant out of a vehicle:

NOTE: Pennsylvania v. Mimms 434 U.S. 106 (1977)

(a) when the officer, during the course of the traffic stop, observes or receives specific facts which lead him to believe that the occupant is armed or dangerous

(b) when the officer observes facts which indicate some danger to the officer's safety

(c) when the officer observes facts which lead him to believe that more than a traffic violation is involved

(d) when the officer observes facts which lead him to believe that the driver is under the influence of

alcohol and/or drugs

(e) If the officer has, or develops after the detention of the car, probable cause to believe that evidence or contraband is contained in the trunk, he may execute a warrantless search.

d. Inventory searches

(1) Scope of inventory searches

(a) A vehicle inventory search is distinguishable from a conventional vehicle search, in that officers are not looking with the express purpose of finding evidence, but are merely taking note of personal property. (People v. Burch 188 Cal. App. 3d 172 (1986))

(b) An inventory search is conducted whenever the police have decided to store or impound a vehicle.

1) Police are procedurally required to prepare a detailed inventory report of the contents in a vehicle to protect

a) the owner against loss. and;

b) the agency against civil liability.

(2) The general rule is that whenever the police are authorized to remove and store vehicles, and the officer is acting in good faith and following his department standardized procedures, evidence discovered during a contents inventory will be admissible. (Colorado v. Bertine 107 S. Ct. 783 (1987))

(3) Inventory may not be used as a pretext to search for evidence. (People v. Aguilar 228 Cal App 3d 1049 (1990))

9. Administrative/regulatory searches

NOTE: Searches included under these general categories are those sanctioned by or conducted pursuant to some statute or ordinance.

a. Pervasively regulated businesses

The courts have indicated no warrant is necessary in those cases where the industry involved is one that is so pervasively regulated warrantless, inspections are necessary to insure proper business practices.

(1) Example: Warrantless search of a room in a gun dealer's place of business. Searches conducted pursuant to the Gun Control Act were approved by the court in U.S. v. Biswell 408 U.S. 311, 92 SC 1593, 32 LE2 87 (1972).

b. Other regulatory searches

The courts have indicated resort to a warrant is still necessary to perform a lawful search even of an administrative nature such as fire, building code, safety, etc.

In some instances, licenses to do business imply consent to search, but do not permit a forcible entry (Collonade Catering Corporation v. U.S. 397 U.S. 72, 90 SC 774, 25 LE2d 60 (1970).

(2) Residential areas

In 1967 the U.S. Supreme Court indicated a warrant was necessary to conduct a nonconsensual search of a residential area even though the city code stated the search was permissible. The court indicated, however, the "probable cause" necessary for such an appraisal of the area by the inspecting officer. In essence, they did not require the traditional "criminal investigative" probable cause. (Camara v. City and County of San Francisco 387 U.S. 523, 87 SC 1727, 18 LE2d 930 (1967))

(3) Commercial areas

In 1967, the U.S. Supreme Court, in a companion case to Camara above, required the issuance of a search warrant for the regulatory inspection of commercial areas. (See v. City of Seattle 387 U.S. 541, 87 SC 1737, 18 LE2d 943 (1967))

Since these cases, the U.S. Supreme Court has continued to find unconstitutional those provisions of inspection schemes which don't provide for the issuance of a search warrant prior to the inspection. (Marshall v. Barlows, Inc. 436 U.S. 307, 98 SC 1816, 56 LE2d 305, (1978))

In the above three mentioned cases, the court, while requiring a "search warrant," points out that this warrant is NOT the equivalent of a criminal investigative search warrant.

c. California inspection warrant scheme for regulatory searches

After the decision of the U.S. Supreme Court in the cases of

Camara and See, noted above, the California legislature enacted the inspection warrant scheme. Probable cause in the criminal sense is not required.

(1) California Code of Civil Procedure, Sections 1822.50 et seq.

In those instances wherein violation of the regulations governing the business sought to be inspected carry with them criminal sanctions, a search warrant containing probable cause in the traditional criminal law sense IS required. Salwasser v. Municipal Court of Fresno County 94 CA3 223, 156 CR 292 (1979).

d. Administrative and criminal investigative searches

A Michigan furniture store burned in 1978. In connection with the investigation into the cause of the fire, several warrantless entries were made by the fire chief and the police both at the time of the fire and after several weeks had passed.

The Supreme Court approved the initial entries inasmuch as they were governed by exigent circumstances. The later entries, however, were deemed unreasonable and the court suggested "administrative warrant" permitting a search to determine the cause of the fire was necessary.

The court further indicates, when evidence of a crime is observed, a search warrant in the traditional criminal law sense containing probable cause must be obtained. (Michigan v. Tyler 436 U.S. 499, 98 SC 1942, 56 LE2d 486, (1978)).

e. Other California regulatory/administrative searches

(1) Vehicle Code

(a) Section 13353 - Blood, breath, or urine

(b) Section 320(b) - Auto dismantlers

(c) Section 2805 - C.H.P. & auto theft detectives searching for stolen parts

(2) Penal Code

(a) Section 12031(a) - Inspection of firearm in a public place.

(b) Section 12028.5 - Seizure of firearms involved in family violence.

10. Seizures without a search

a. The plain sight rule - If officers observe seizable evidence from a position where they have a lawful right to be, they may seize the evidence without a search warrant, if the evidence itself is also in a place where the officer has a lawful right to go.

(1) In such a case, no search is involved because the officer merely sees what is before the officer in plain view.

(a) Example: After stopping a vehicle for a traffic violation, the officer, while standing outside the vehicle, looks inside and observes a sawed-off shotgun laying on the rear seat.

(b) This observation does not constitute a search and since the officer's observation of the illegal weapon was from a vantage point where the officer had a lawful right to be, the weapon may be legally seized.

(2) The general rule now is, before an officer may lawfully seize incriminating evidence in plain sight, it must first be established in court that the officer was in a place where he had a lawful right to be.

(a) To state the rule another way, officers must show in court that they did not violate any right of privacy which the defendant reasonably expected.

1) Example: An officer, from a lawful vantage point on a front porch observes unlawful activity in the living room through open venetian blinds. These observations would be lawfully admitted in court, because the officer was standing in an area that is accessible to the general public. Therefore, the occupants in the house could not constitutionally claim that their privacy was invaded.

2) In the absence of bona fide exigent circumstances, however, a warrant or other exception would still be required to enter the residence and seize the contraband.

(3) Recent court decisions have ruled that, if a person by his actions and conduct, exhibits a reasonable expectation of privacy and an officer unreasonably violates that expectation of privacy, the Fourth Amendment has been violated, and any evidence obtained as a result of the unlawful intrusion will be inadmissible in court.

(a) Example: If a person draws the draperies of the window in their living room, they have indicated that they expect privacy, at least with respect to activities which take place in the living room. If an officer walks across the

front yard, positions himself in front of the window and peers through a crack in the draperies into the living room, the court would rule that the officer has unreasonably violated the expectation of privacy which the person exhibited.

1) Thus, any evidence obtained as a result of the unlawful intrusion would be inadmissible.

(4) As a general rule, if an officer is in a "common access" area, that is, an area over which the public or some members of the public have been expressly or impliedly invited, that is in an area where the officer has a lawful right to be.

(a) A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public, including a police officer, to enter the property and observations from these areas would be lawful.

(b) If a person exposes his activities to public view, he does not expect privacy, and observation of these activities by a police officer would obviously be lawful.

(5) Sensory aids

(a) The courts have held that the use of flashlights is permissible under the plain view doctrine.

1) This means that if an officer is standing in a place where he has a lawful right to be, his observation of that which is in plain sight is lawful regardless of whether the illumination permitting the observation is natural light, artificial light or light from a flashlight held by the officer viewing the object.

(b) Binoculars may not be used to violate a reasonable expectation of privacy. Binoculars may be used to enhance what can already be seen with the naked eye (People v. Arno 90 CA3 505 (1979).

(c) Electronic beepers - Authorized if the route upon which the suspect is tracked would have been otherwise visible to the officers. (U.S. v. Knotts 75 L. Ed. 2d 55)

(d) Dogs - The California State Courts do not view such a search as intrusive. (People v. Mayberry 31 Cal. 3d 335)

b. Abandoned property

(1) Abandoned property is not protected under the Fourth Amendment and may be seized without a warrant because it no longer carries with it any reasonable expectation of privacy.

(California v. Hodari 499 US 113 (1991))

(2) Trash that has been placed in a position for pick-up is considered to have been abandoned.

11. Aerial surveillance - A person who cultivates open land can reasonably expect that such activity is exposed to public view by those using the public airspace lawfully. People v. Mayoff (1986) 42 C3 1302

The U.S. Supreme Court has held that it is legal to look down into a fenced backyard or other private area next to a house (the "curtilage") and make naked-eye observations of marijuana from an aircraft which is flying within FAA regulations It makes no difference whether the flight is made as part of a routine patrol or is made in response to a specific "tip." (California vs. Ciraolo 476 US 207 (l986))

DEFINITION OF TERMS

Given a definition of one of the following terms, the student will identify the term that matches the definition:

A. **Knock-and-notice** is the requirement that an officer must announce his presence, identify himself as an officer, state his purpose, and demand entry before forcibly entering a private dwelling
B. The **scope of a search** is the area covered by a search (e.g., the outer clothing of a suspect or the trunk of a car). The scope of a lawful search is limited by the circumstances under which the search is conducted
C. **Search warrants** are written orders signed by a magistrate directing a peace officer to search a specific place for specific items and bring them before a magistrate
D. **Showups** are one-to-one confrontations between a suspect and a witness to a crime that typically occur in the field shortly after a crime has been committed
E. A **photographic lineup** is an identification procedure in which the witness to a crime is typically asked to look at six or more photographs, one of which is a photograph of the suspect
F. A **physical lineup** is an identification procedure in which a witness to a crime is typically asked to look at six or more individuals lined up against a wall, one of which is the suspect

Performance Objective 4.7.2

CURRICULUM

A. **Knock-and-notice** is the requirement that an officer must announce his presence, identify himself as an officer, state his purpose, and demand entry before forcibly entering a private dwelling
B. The **scope of a search** is the area covered by a search (e.g., the outer clothing of a suspect or the trunk of a car). The scope of a lawful search is limited by the circumstances under which the search is conducted
C. **Search warrants** are written orders signed by a magistrate directing a peace officer to search a specific place for specific items and bring them before a magistrate
D. **Showups** are one-to-one confrontations between a suspect and a witness to a crime that typically occur in the field shortly after a crime has been committed
E. A **photographic lineup** is an identification procedure in which the witness to a crime is typically asked to look at six or more photographs, one of which is a photograph of the suspect
F. A **physical lineup** is an identification procedure in which a witness to a crime is typically asked to look at six or more individuals lined up against a wall, one of which is the suspect

USE OF FORCE TO PREVENT SWALLOWING OF EVIDENCE

Given a word picture depicting a suspect attempting to swallow evidence, the student will identify those situations where use of force is justified.

Performance Objective 4.8.1

CURRICULUM

A. Use of reasonable force allowed

1. When a peace officer has probable cause to believe a suspect is swallowing evidence, the peace officer may use force to prevent a suspect from swallowing evidence:

a. Courts have held that officers can act in several ways to prevent the swallowing of evidence, when necessary.

(1) An officer may use restraint by putting his arm around the suspect's neck when he tells him to spit out the substance. A hold of this nature is permissible if it does not prevent breathing or substantially impair the flow of blood to the suspect's head. (People v. Miller 248 Cal. App 2d 731 (1967))

(2) Police officers may forcibly remove an object from a suspect's hand or clenched fist. The force used must be reasonable under the circumstances; use of brutal force is prohibited.

(3) Permissible force may be used by police officers to prevent the suspect from swallowing the evidence. In attempting to define "permissible force," the courts have considered a variety of holds that may be applied to the suspect's neck area. In one case, an officer was able to prevent a subject from swallowing narcotics by pressing the subject's head forward and down.

(4) Of course, an officer can verbally command a suspect to spit out evidence from his mouth.

(5) While physical force may be applied to the neck area, choking is expressly prohibited by the courts. Choking has been defined as the impermissible use of force applied to the neck area, which could result in unconsciousness, or prevents an individual from breathing. The seizure of evidence through choking is a violation of the suspect's Fourth Amendment rights, and the evidence seized would be inadmissible. It makes no difference how little or how long the officer chokes the suspect.

2. In People v. Larkins 52 Cal. App. 3d 514 (1975), a police officer asked a female suspect her name; the officer observed balloons normally used to contain heroin inside her mouth. He reached inside her mouth and retrieved the evidence. The extracted evidence was held admissible.

   a. As a practical matter, the manner in which an officer describes his conduct in arrest reports, as well as in the courtroom, may significantly affect the admissibility of any evidence recovered through the application of physical force.

   b. As an example, an officer testified that he applied a hold about the suspect's neck for approximately ten seconds, while simultaneously ordering the suspect to spit out the narcotics. The officer noted that, during the application of the hold, the suspect was able to breathe and speak, because the suspect kept shouting profanities at the officer.

   c. "Choking" should not be used as a generic term to describe all applications of force to the neck area, particularly when the hold was designed to prevent swallowing, and yet allow the suspect to breathe.

CONDITIONS OF LEGALLY-INDUCED VOMITING

Given a word picture depicting a suspect who has swallowed evidence, the student will identify whether the suspect can be legally induced to vomit (Johnson (1991) 231 Cal. App.3d 1,14; Fulkman (1991) 235 Cal.App.3d 555, 562; Cappellia (1989) 208 Cal.App.3d 1331; Jones (1989) 209 Cal.App.3d. 725). A suspect can be legally induced to vomit in a medically approved manner under any of the following conditions:

A. The suspect consents
B. The ingested substance is an immediate threat to the suspect's life
C. A warrant is issued permitting the search

Performance Objective 4.8.2

CURRICULUM

A. An emetic is a substance used to induce vomiting, and must be administered in a medically approved manner.

1. The expressed or implied consent of a suspect is a factor which will support the administration of an emetic. Another supporting factor would be based on an independent medical decision by a doctor, absent police influence. Evidence seized under these circumstances may lawfully be seized.

2. In People v. Bracamonte 15 Cal. 3rd 394, the court ruled that the forced ingestion of an emetic solution which caused the defendant to vomit seven balloons containing heroin violated her constitutional rights. The court held that under the circumstances, there was insufficient basis to believe that such a procedure was necessary to prevent the destruction of evidence, or to save her life.

   a. In addition, the court commented that such a procedure was shocking to the conscience.

   b. It is interesting to note that the arresting officers went to the defendant's residence at the time of arrest armed with a search warrant.

3. As a general rule, no bodily intrusion is permissible if the force necessary to do it would "shock the conscience of the court". Also, significant intrusions must be subject to independent medical determination of necessity.

   NOTE: Winston v. Lee 36 Crim. Law 3212

PROCEDURES TO OBTAIN BLOOD SAMPLES

Given a direct question, the student will identify the following procedures which should be followed when obtaining a blood sample from a suspect:

A. Obtain the suspect's consent when possible
B. Obtain the blood sample in a medically approved manner
C. Arrest a suspect who refuses to voluntarily supply a blood sample before taking it forcibly
D. Obtain a search warrant if time is not a factor (e.g., if the purpose of the sample is to obtain the suspect's blood type)
E. Use only reasonable force to obtain an involuntary blood sample
F. Take blood samples without consent from incapacitated persons (e.g., dead, incoherent, unconscious) when needed for a legitimate law enforcement purpose

Performance Objective 4.8.3

CURRICULUM

A. The taking of blood by force

1. As a general rule, a test for blood, fingerprints, breath, or saliva may be given, whether or not the defendant is conscious. As an example, in a vehicular traffic accident which has resulted in either property damage, injuries, and/or fatalities, a peace officer may, without a warrant, arrest 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 and any drug (Vehicle Code 40300.5). The officer is then entitled to transport the suspect to a hospital and obtain a blood sample over the protestations of the suspect. It would make no difference if the suspect were conscious or unconscious. However, recent court cases require that the police arrest the suspect prior to obtaining the blood sample. (People v. Superior Court (Hawkins) 5 Cal. 3d 757 (1972))

   NOTE: (Hammer vs. Gross 932 F. 2d 842 (Ninth Circuit 1991)) Reasonable Force to Restrain - may be subject to civil liability

   NOTE: (People v. Ryan 116 CA 3d 168 (1981)) Reasonable force to restrain. Five police officers held suspect -reasonable force permitted - numbers are not controlling.

2. If a blood sample is taken in a "medically-accepted manner" from a person arrested for drunk driving and without "excessive force", no constitutional right is violated.

   The courts have allowed a reasonable degree of force to overcome the resistance of an individual who refused to submit to such test.

3. Officer may use reasonable force to overcome a defendant's verbal refusal to submit to a blood sample. An officer's reasonable force is that force used to position the suspect, not an extreme amount of force necessary to overcome his physical resistance. It is necessary for the officer to use considerable discretion in determining the amount of force that may be used in overcoming a defendant's resistance.

4. A blood test administered in a medically-approved manner does not subject the defendant to an unreasonable search, nor does it violate the defendant's right of due process of law or his privilege against self-incrimination. (Schmerber v. California 384 U.S.757 770-72 (1966))

5. A defendant's failure to participate in a test that he has no legal right to refuse may be used as evidence of consciousness of guilt.

   Examples include blood tests, providing hair samples, saliva samples, or fingernail scrapings.

PRINCIPLES OF EXTRACTING FINGERPRINT EVIDENCE

Given a direct question, the student will identify the following legal principles governing the involuntary collection of fingerprint evidence from a suspect:

A. A suspect has no legal right to refuse fingerprinting
B. An officer may use reasonable force to obtain fingerprint evidence

Performance Objective 4.8.4

CURRICULUM

A. Lawful force in order to obtain fingerprints

1. When being booked, an arrestee has no legal right to refuse a fingerprint examination. Officers may use a reasonable amount of force to obtain the fingerprints; however, if the force necessary shocks the conscience of the court, or would produce a nonidentifiable exemplar, a court has the authority to order the arrestee to submit to a fingerprint examination. Any further refusals would result in a contempt-of-court proceeding.

2. Officers cannot randomly select persons for purposes of obtaining fingerprint exemplars. In Davis v. Mississippi 394 U.S. 721 (1969), police officers fingerprinted a number of male juveniles, without probable cause, to determine if their fingerprints matched those left at the scene of a particular crime. It was held that obtaining fingerprints under these circumstances would be unlawful.

PRINCIPLES OF COLLECTING HANDWRITING EXEMPLARS

Given a direct question, the student will identify the following legal principles governing the collection of a handwriting exemplar from a suspect:

A. A suspect has no legal right to refuse to provide a handwriting exemplar
B. Force may not be used to obtain a handwriting exemplar

Performance Objective 4.8.5

CURRICULUM

A. Exemplars of the defendant's handwriting made for the police are admissible and do not constitute the compelling of a person to be a witness against himself. A court order may be issued to compel.

   NOTE: Use - Attorney General Video Tape entitled "Detention and Interrogation".

   1. For example, during an administrative booking process, a defendant's Fifth Amendment rights are not violated when he is requested to give a handwriting example. A defendant's refusal to give an exemplar may later be commented upon at his trial as consciousness of guilt.

   2. Miranda not required for handwriting exemplars.

B. A suspect has no legal right to refuse to give voice evidence.

   1. Evidence of a statement, previously made by a witness, is admissible as to his identification of the party, or another who participated in a crime or other occurrence (Evidence Code Section 1238).

   2. If an arrested person refuses to give voice evidence, his refusal can later be commented upon in a trial for the purpose of showing consciousness of guilt.

C. A suspect has no legal right to refuse a mug shot that reasonable force may be used to obtain.

CONDUCTING A FIELD SHOWUP

Given a word picture depicting a situation where a showup was used to identify a suspect, the student will identify if the showup was handled appropriately.

Performance Objective 4.9.1

CURRICULUM

A. Showups (one-on-one confrontations)

A one-on-one confrontation between the suspect and a witness or victim is automatically suggestive just because there's only one person to look at, and he is already in police custody.

Nevertheless, the courts reluctantly make an exception to the general rule (that the suspect deserves a full lineup) because a showup held shortly after the offense benefits everyone. The witness has the culprit's image fresh in mind, so an innocent suspect is released immediately, and the police can go on with their investigation while the trail is still fresh. (Stovall (1967) 388 U.S. 293; Gomez (1976) 63 Cal. App. 3d 328)

Even so, the courts won't uphold a showup if it was **too** suggestive. In deciding this question, they try to balance all the circumstances, including

1. the witness' opportunity to view the perpetrator at the time of the crime (length of time, lighting, distance, etc.,);

2. the witness' degree of attention at the time of the crime (Was he concentrating to remember the perpetrator's looks? Was the witness sober? Did the victim know the suspect?);

3. the amount of time that went by between the crime and the showup (probably this should not be more than an hour or two at the most);

4. the physical set-up of the showup itself (Did the officer say "leading" things? How was the suspect positioned? Where was he located?, etc.);

5. the accuracy of the witness' description;

6. the certainty of the witness; identification at the showup. (Biggers (1972) 409 U.S. 188; Nash (1982) 129 Cal. App. 3d 513).

Example: Witnesses had excellent chance to look at robber for 15 minutes from close distances. Circumstances "encouraged" them to remember his face. The showup took place within 20 minutes at defendant's motel. Descriptions given were accurate. The identification was upheld. (Smith (1980) 112 Cal. App. 3d 37)

Example: Showup took place 45 minutes after murder. The defendant was on curb in handcuffs with many officers and patrol vehicles present. However, police did not use the word "suspect," specifically advised witnesses that the murderer might not be the person they would be looking at, and reminded them to keep an open mind. The identification was upheld. (Odom (1980) 108 Cl. App. 3d 100)

Example: Showup took place less than one hour after rape. The victim had "clear view" of perpetrator in daylight. The showup took place on city street with suspect not handcuffed. The victim had given accurate description and was positive of her identification. The identification was upheld. (Kilpatrick (1980) 106 Cal. App. 3d 401)

B. Suggestiveness after the identification

The officer should be very careful concerning conduct after the identification which might be ruled suggestive.

For instance, if the officer tells a witness that they have picked the "right" (or "wrong") person, it may jeopardize the admissibility of later in-court identification.

On the other hand, if the witness has failed to identify anyone, or seems uncertain, it is legal for the officer to question the witness further if the officer believes that he or she has actually recognized someone in the lineup.

Example: Witness failed to identify anyone on the lineup card. Later, outside the lineup room the officer asked her if she had seen anyone who closely resembled the robber. She said she had recognized Perkins in the lineup but could not be sure without seeing the two "lightning bolt" tattoos on his neck. The officer told her Perkins had such tattoos, and the court upheld the remark. (Perkins (1986) 185 Cal. App. 3d 583)

C. Reliability

Even when a lineup (physical or photo) or showup is unduly suggestive, the witness may nevertheless be allowed to identify the suspect at trial if the trial identification has an "independent origin."

In order to establish this, a prosecutor must show by "clear and convincing evidence" that the in-court identification is totally independent of the suggestive identification, i.e., that the suggestive pretrial identification could not have affected the accuracy of the identification at trial. (Orozco (1981) 114 Cal. App. 3d 435) This can be a very difficult burden.

1. Factors

In deciding whether an in-court identification has an "independent origin," the courts consider most of the same factors listed under "Showups" above, as well as any additional identifications or non-identifications which the witness may have made. (Sanchez (1982) 131 Cal. App. 3d 718) By having these factors in mind when interviewing the witness and making the report, the officer may be able to help a prosecutor who is dealing with an unduly suggestive pretrial identification.

2. Documenting a witness' description

Another helpful tool is to fully document any description from a witness.

An identification witness will be subjected to grueling cross-examination by a defense attorney at trial about his or her description as documented in your report. This often occurs because an officer unfairly "suggested" to the witness the description of the suspect. Such suggestions are not only unfair to the suspect, but also unfair to the witness.

Example: A 5' female witness tells an officer that the robber was "tall." The officer then asks, "6'2"-6'4"?" The woman answers "Yes." Later, when it is discovered that the robber is 5'10", the defense attorney has a "field day" destroying the witness' credibility because she was between 4" and 6" off.

NOTE: The woman, upon cross-examination, will never remember that it was the officer who "suggested" the height. She will become flustered and defensive about her poor description. To many 5' women, any robber over 5'8" will look tall (especially if the robber puts a gun in her face). An officer must, before he gets a description documented in his reports, make sure that it is accurate. The following is a list of suggestions - based on the example above - to help ensure a witness' accuracy of description before "memorializing" them in your report.

a. Tell the witness to relax, close her eyes, and visualize the robber's facial features and other characteristics.

b. Ask the woman approximately where her eyes would hit the suspect's body if she looked straight.

c. Ask her if there is any way she can hold her hand up to approximate the height (or use some other method to get an accurate measurement).

d. Ask her to approximate your height and weight.

e. Ask her to approximate the distance between her and the robber by moving closer to her or farther away.

f. Ask her to close her eyes and run through the robbery in her mind step-by-step to determine how long she was looking at the suspect.

g. Ask the witness what she was thinking at the time. If she says the only thing was, "Is he going to shoot me?", ask her if she thought about being able to identify him in the future. (In one case a woman was thinking "Oh, my God, I've memorized his face. Now he's got to kill me!" When she repeated those words to the jury, the effect was devastating to the defendant.)

h. Always go back over a witness' statement with her to avoid miscommunication. Tell her exactly what you are going to put in your report.

D Showups - searches and seizures

1. The general rule is that an officer who detains (seizes) a suspect pending a showup should not

   a. move him to a different location; or

   b. conduct a full-scale search of the suspect.

2. Seizures

   a. You may detain a suspect if there is reasonable suspicion to believe the suspect committed a crime. If the detention occurs soon after the crime, it is all right to arrange a showup between the witness(es) and the suspect.

   b. However, the courts require that the officer inconvenience the suspect as little as possible in making this arrangement. As a general rule, this means the witness should be brought to the suspect. Don't take the suspect to the witness if there is any reasonable alternative. (Harris (1975) 15 Cal. 3d 384)

   c. While awaiting the arrival of the witness, the officer may place the suspect in the patrol car, handcuff them, or take whatever other steps are necessary for officer safety, based on specific facts. (Craig (1978) 86 Cal. App. 3d 905) But remember, the showup will be less "suggestive" if the suspect is outside the car, mixed in with others, not handcuffed, etc.

   d. There are three exceptions to the general rule of "bring the witness to the suspect."

      (1) Probable cause to arrest - If the officer has probable cause to arrest the suspect, the officer may transport them to the witness(es) for identification. (Rafael (1982) 132 Cal. App. 3d 977)

NOTE: If there is any doubt as to whether probable cause to arrest exists, do not move the suspect unless consent is obtained or it is impracticable to bring the witness (see below).

e. Consent

If the officer obtains the valid, voluntary consent of a detainee to move them to the witness for a showup, the movement is lawful. (Ortega (1982) 135 Cal. App. 3d 244)

f. Impracticability

If it is impossible or impractical to bring the witness to the suspect, the courts will often permit the movement of the suspect to the witness.

(1) The witness is injured

If the witness is injured, it is clearly permissible to transport the suspect to the witness (Hall (1979) 95 Cal. App. 3d 299)

(2) Availability of officers is limited

If the detention occurs in an area where there are not enough officers to secure the scene, chase other suspects, transport the witnesses, etc., courts have permitted the immediate transportation of the suspect to the witness. (Gatch (1976) 56 Cal. App. 3d 505)

3. Searches

a. A suspect detained on reasonable suspicion should not be subjected to a "full" search until after positive identification is made at the showup and the suspect is arrested.

b. The officer may, of course, pat down a lawfully detained suspect for weapons if the officer has specific reasons to fear for their safety.

c. There are two exceptions to this general rule of no full search.

(1) Probable cause to arrest

If the officer is certain that they already have probable cause to arrest, they may take the suspect into custody and search him and the passenger compartment of his car, prior to a showup, incident to that arrest.

(2) Consent

The officer may search a suspect prior to a field interrogation if consent is obtained. But beware of the "scope" and "voluntariness" problem areas within consent.

3. Showups

   a. Always take the witness to the suspect unless

      (1) there is probable cause to arrest;

      (2) the suspect unequivocally consents to the movement;

      (3) it is very impractical to move the witness.

   b. Avoid a full search of the suspect or any search of their vehicle prior to positive identification.

   c. Frisk the suspect prior to the identification only if there are specific reasons to believe he may be armed.

   d. If at all possible, avoid any indications that the suspect is in custody (handcuffs, placement in the back seat of the patrol car, spread-eagle position, etc.), although you may do whatever is reasonable for your safety.

   e. In multiple suspect showups each suspect should be shown to the witness(es) independently of each other.

   f. Avoid saying anything to the witness just prior to the identification. It is very helpful if the officer can testify at trial, "As I drove up, Mr. (Victim) said, 'That's the guy who robbed me!'", rather than "I asked him if he recognized anyone and he responded, 'The guy in handcuffs looks familiar.'"

   g. If the witness fails to make a positive identification or rules the suspect out, be sure to get the suspect's name and address so that the suspect cannot be used as a "red herring" at trial.

SUPPORTING MATERIAL

AND

REFERENCES

This section is set up as reference information for use by training institutions. These materials can be used for instruction, remediation, additional reading, viewing, or for planning local blocks of instruction. This list is not an endorsement of any author, publisher, producer, or presentation. Each training institution should establish its own list of reference materials.

TOPICAL LIST OF SUPPORTING MATERIALS AND REFERENCES INCLUDED IN THIS SECTION

SB1609: Chapter 1034 Search Warrants
Stop and Frisk
Emergency Searches
Vehicle Searches
History of "Closed Container" Rule
Searches Incident to a Valid Arrest
The Exclusionary Rule
The Frisk
General Rules of Consent Searches

SB 1609: Chapter 1034 Search Warrants. (Amends Pen. Code 1524 and 1525)

As newly amended, California Penal Code 1524 specially regulates the issuance of search warrants for documents or other evidence possessed or controlled by any lawyer, physician, psychotherapist, or clergyman who is not reasonably suspected of being or having been involved in criminal activity related to the items sought to be examined and seized. To obtain and execute a warrant to search and seize property under the possession or control of such an individual, a special procedure must be followed consisting of (1) the issuing court appointing a licensed California attorney as a "special master" to accompany the servers of the search warrant; (2) the special master informing the party being served with the warrant about specific items sought; (3) the special master affording the party served an opportunity to furnish the items sought; (4) the special master searching for items specified in the search warrant that he deems have not been furnished; (5) the special master sealing any items that the served party claims should not be disclosed; (6) the special master delivering sealed items to court for a special hearing; (7) the superior court conducting a hearing where privileges and any issues raisable in a California Penal Code 1538.5 hearing can be asserted by the party searched, with an opportunity to secure the assistance by the party searched, with an opportunity to secure the assistance of counsel, to be held within three days of the warrant's service unless such an expedited hearing date is found impracticable.

The special procedure further requires, that, whenever practicable, a search warrant for the enumerated professionals' materials must be served during normal business hours and must be served upon a party who appears to possess or control the items sought. If no such person is found after reasonable attempts to find one, the special master is instructed to seal items which appear to be privileged by law, and return them to the court for its determination. The special master may not divulge any information he obtains from a search, except to the inquiring court. If a special master cannot be found after a reasonable time trying, the magistrate may authorize a search without a special master but subject to the same special procedural steps.

While the party serving the search warrant on a named professional may accompany the special master during the search, he may not participate in the search or examine any items being inspected.

The revised statute goes on to mandate that no warrant shall issue for any item set out in California Evidence Code 1070 (unpublished information). And California Penal Code 1525, as amended, directs that a search warrant affidavit specifically state when the place sought to be searched is known to be possessed or controlled by an attorney, physician, psychotherapist, or clergyman.

In People v. Long a Court of Appeal held that if a detainee refuses to identify himself but appears to be carrying a wallet or other identification, or if the detainee has identified himself orally but there is basis for believing he is lying, the officer may take whatever steps are reasonably necessary, to ascertain the suspect's identity.

Stop and Frisk

In People v. Lawler, 9 C3 156, officers saw defendant in roadway illegally hitchhiking. Defendant rejoined two companions on curb and taking rolled up sleeping bags, they started walking on sidewalk. Officers questioned them, during which defendant seemed nervous and kept "grabbing" at his sleeping bag as if he wanted to leave. Officer conducted pat-down search including feeling the sleeping bag. He felt lump in the bag which seemed to be some type of automatic weapon. Defendant, when asked by the officer, showed him the contents of the bag which contained marijuana. Court held that evidence did not support inference that officer believed that he was dealing with an armed and dangerous individual; that a pat-down of the bag was not justified; that the hitchhiking violation did not itself justify a pat-down; and that the subsequent consent was invalid because it was inextricably bound up with the previous illegal "pat-down" of the bag.

For a good case in which reasonable grounds to detain suspects based upon detailed description, see People v. Flores, 12 C3 85. The officer had acquired knowledge through official sources that a recent burglary had taken place on his beat. He knew the general description of the suspects and of the vehicle used by them. After four nights of looking for the vehicle (one vehicle fitting the description proved to be a false lead), he observed a second such vehicle, unique primarily because of its vintage and occupied by persons who fitted the general description of the suspects. It did not take the court much additional evidence to determine there was probable cause to arrest.

The Court in People v. Harris, 15 C3 384 held that, in the absence of exigent circumstances, a person lawfully detained for burglary., when there is less than probable cause to arrest, cannot be handcuffed and transported in a police car back to the scene of the burglary for possible identification by the victim.

People v. Scott--if transporting only, and the defendant was not under arrest, then his 16 C3 242 consent must be given prior to a cursory search before placing in a police car. (No consent - No ride) 1976.

CHECKLIST FOR FRISK

1. The nature of the suspected crime and whether it involved a weapon.
2. Whether it is day or night.
3. Knowledge of record of reputation of person stopped.
4. Number of officers making stop.
5. Number of suspects stopped.
6. Demeanor of suspect.
7. Clothing suggest weapon.
8. Companion found to be armed.
9. Stop in high-risk crime area.
10. Suspect makes move as if reaching for a weapon.

EMERGENCY SEARCHES

1. General rationale

   Johnson v. United States (389 U.S. 347)

   a. Scope of emergency searches, generally

2. Classifications

   a. Threat to life or health

      United States v. Barone (330 F2 543) People v. Roberts (47 C2 374) (1956) People v. Smith (/ C3 282) (1972)

   b. Preservation of property

      People v. Parra (930 C3 729) People v. Superior Court (Fishback) (2 CA3 304) (1969)

3. Abatement of emergency

   People v. Ramsey (272 CA2 302) (1969)

4. Hot pursuit

   Warden v. Hayden (387 U.S. 294) (1967)

   a. Permissible scope

      People v. Gilbert (63 C2 690) (1965)

5. Exceptional circumstances

   a. Bombing situations

      People v. Superior Court (Peebles) (6 CA3 379) (1970)

   b. Preservation of evidence

      Cupp v. Murphy (412 US 900) (1973)

   c. Daughhetee 165 C.A. 3d 574 (1985)

VEHICLE SEARCHES

1. In People v. Gale 9 C3 788, the court held that the officer's entry into a Pontiac was valid but his entry into a Porsche was invalid where both vehicles were in a dimly lighted parking lot next to a group of businesses, some of which were known by the officer to have been recently burglarized. Officer saw defendant next to the Pontiac and thereafter move towards the police vehicle, but then veer away and head in the direction of the street. Defendant was detained and produced identification. He said he was waiting for a friend, did not own the Pontiac, that he thought it belonged to the friend, but upon checking found that it wasn't, and that other friends were waiting for him at a cafe located about one block away. After another officer arrived, the first went to the Pontiac and to the nearby Porsche and noticed "dust disturbances" on both cars. He entered both cars and smelled the strong odor of marijuana. Thereafter, he noticed that defendant's clothing also smelled strongly of marijuana. Defendant was arrested. The court held that the arrest and entry of the Pontiac was lawful, but the entry and search of the Porsche was not. Case is important for proposition that "it is the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of the reasonableness". Case is illustrative of what is not an illegally extended detention.

2. In People v. Dumas 9 C3 871 the court upheld search of defendant's vehicle parked in a street about one hundred feet from apartment which had been searched pursuant to warrant where: officer had probable cause to believe the vehicle contained stolen property because he failed to recover the same in search of defendant's apartment pursuant to the warrant, he was apparently unaware that defendant possessed an automobile at the time the warrant was obtained, and there was at least one other person in the apartment at the time of defendant's arrest who would have been in a position to move the vehicle or destroy. the evidence if the police did not conduct an immediate search or seizure.

3. In Cady v. Dombrowski 93 S. Ct. 2523, the United States Supreme Court held as valid under the Fourth Amendment a warrantless search of a vehicle for a service revolver thought to be in a vehicle which had been driven by a police officer arrested for drunk driving. The vehicle had been disabled in an accident and was towed from the highway where it was a hazard to an impound lot where the search took place.

4. In People v. Bravo, the California Supreme Court held that a search which is undertaken pursuant to a condition of probation does not need to be based on a "trigger" such as "probable cause" or even "reasonable suspicion." The only limitation is that the search must be carried out in a reasonable manner and not for the purpose of harassment.

16 93 557 - NARCOTICS, SEARCH OF AUTO'S INTERIOR AND TRUNK, MANDATE - Wimberly v. Superior Court 16 C3 557. At about 2:30 a.m. in 1974, Highway Patrol officers observed an auto traveling at excessive speeds and weaving from lane to lane on a highway near Barstow. Suspecting that its driver might be intoxicated or drowsy, they stopped it. While questioning defendant driver Wimberly with the aid of his flashlight one officer observed a jacket, paper bag, water jug and a pipe on the floor near defendant passenger Harris' feet. Further observation revealed dark seeds which, because of their proximity to a smoking pipe, led to the belief that they were marijuana. Upon request, Harris handed an officer the pipe. Its burnt marijuana residue and odor were detected. The officers followed up with a further search of the car's passenger compartment, and found a plastic bag with a small quantity of marijuana in a jacket. Next, they demanded and obtained keys to the auto trunk, and found several pounds of marijuana in it. Defendants were arrested. After being charged with H.S. 11359 and 11360 marijuana offenses, their Penal Code 1538, motion to suppress was denied. They sought mandate relief. Mandate issued to compel suppression of the marijuana found in the auto trunk. Although the search of the passenger

compartment was legally justified, the search of the trunk was not constitutionally permissible. (Ct. App had denied mandate.)

AUTO PASSENGER COMPARTMENT - (1) The 4th Am. and Cal. Const. 1, 13 (an essentially identical but independent guaranty of personal privacy) have long been interpreted to require impartial approval of a judicial officer before the undertaking of most searches. However, the warrant requirement can be dispensed with a few specifically established and well-delineated circumstances. When there is probable cause to believe that an auto stopped on a highway contains contraband, evidence of a crime, or was itself an instrumentality of the commission of one, the law enforcement officers need not obtain a warrant before conducting a search. (2) Here Officer Moffett had probable cause to seize the pipe and subsequently searched the interior of the car for contraband. As a man of ordinary caution or prudence, he could have entertained a strong suspicion. He had sufficient experience to reasonably believe that the seeds were marijuana, and he acted reasonably in seizing and examining the pipe to confirm his suspicion. The subsequent search of the passenger compartment was constitutionally permissible.

SEARCH OF AUTO'S TRUNK COMPARTMENT - (3) A search which is reasonable at its inception may violate the 4th Amendment by virtue of its intolerable intensity and scope. Here the existence of probable cause to search the interior of the car was not sufficient to justify search of its trunk. There were no specific facts which gave reasonable cause to the officers justifying belief that seizable narcotics items were concealed in the trunk. (4) However, it is not concluded that trunk searches are never justified when the quantity of contraband found in a car's passenger compartment is indicative only of personal use. In other cases, additional circumstances may generate the reasonable suspicion necessary to justify further intrusion (see two samples).

HISTORY OF "CLOSED CONTAINER" RULE

1977 - U.S. v. Chadwick 433 U.S. 1. In this case, the U.S. Supreme Court ruled that even though federal agents had probable cause to believe that a footlocker in the trunk of a car contained dope, a search warrant was required to search it.

1979 - Arkansas v. Sanders 442 U.S. 753. Here, Federal agents saw the suspect place a suitcase in the trunk of a car, and had probable cause to search it for narcotics. However, no search warrant was obtained, and the case was reversed.

1980 - People v. Brown 111 Cal. App. 3d, 523. A plastic bag whose contents are ascertainable from the outside - not a 'search', and no warrant needed.

1980 - People v. Guy 107 Cal. App. 3d, 593. Warrant not required to look into plastic bag containing a pound of white powder to determine its contents.

1980 - People v. Earls 109 Cal. App. 3d, 1009. Search of clothing incident to arrest is proper by laboratory - no warrant required.

1980 - People v. Harris 105 Cal. App. 3d, 204. Search of purse during booking okay.

1981 - N.Y. v. Belton 453 U.S. 454. Incidental to custodial arrest, reasonable search of passenger compartment and containers OK without a search warrant.

1982 - U.S. v. Ross 456 U.S. 798. Probable cause and mobility - warrantless search, including containers.

1982 - People v. Chavers 33 C3 462. During search of glove compartment for registration, officer felt a gun in a shaving kit which he had moved. No search warrant required.

1983 - People v. Valdez 35 C. 3d 11 (1983)

1985 - U.S. v. Johns 105 S. Ct 881 (1985)

1985 - People v. Ruggles 39 C.31 1 (1985)

SEARCHES INCIDENT TO A VALID ARREST

1. In United States v. Robinson 94 Ct. 467 and Gustafson v. Florida 94 S. Ct. 488, the United States Supreme Court held that the Fourth Amendment is not violated by a full body search incident to a custodial arrest even for a traffic violation and was not limited by standards governing stop and frisk procedures. But see, People v. Brisendine 13 C3 528; People v. Norman, 14 C3 929, and People v. Longwill 14 C3 943, where the California Supreme Court relied upon the state constitutional provision concerning searches and seizures to invalidate routine pat-down or full body searches incident to arrests for ordinary traffic violations or their functional equivalents in the absence of "exigent circumstances".

2. In Brisendine, the Court found that officers who had "arrested" persons in a rugged area in which both open campfires and overnight camping were prohibited were justified under the circumstances in making pat-down searches of the persons and effects and very limited inspections of the contents of containers because there was a reasonable basis for apprehension for personal safety during the trip back to civilization.

3. In Norman, the Court expressly held that a pat-down search of a person arrested for a traffic violation is always permissible if he is to be transported in a patrol car.

4. In Longwill, the Court determined that the rule applicable to arrests for traffic violations precluding full body searches applies to arrests for public intoxication until such time as the arrestee is actually to be incarcerated.

5. In United States v. Edwards 94 S. Ct. 1234, the U. S. Supreme Court held that following the lawful nighttime arrest of the defendant and his confinement in the jail, the examination and seizure of his clothing the following morning was a permissible search under the Fourth Amendment.

6. In People v. Liawa 34 C3 711 the California Supreme Court specifically disapproved all "accelerated" booking searches. (Booking searches conducted away from the custodial facility.)

THE EXCLUSIONARY RULE

The one major development common to the imposition of constitutional limitations on all aspects of search and seizure law has been the development of the "exclusionary rule." In order for a law enforcement officer to make any rational decision relative to a search and seizure question, a clear understanding of the "rule" is a necessary prerequisite.

Briefly, in operation, the rule excludes evidence seized in a manner considered unreasonable within the meaning of the Fourth Amendment to the Constitution of the United States. It is a judicially fashioned device whose announced purpose is variously described as "to deter future unlawful police conduct,"[9] or more recently stated, "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." [10]

In order to have a full appreciation of the exclusionary rule, we will trace its historical development. Probably the first case in which the rule was announced, occurred in 1886, in the case of Boyd v. United States. "It is, the court has said, "the leading case on the subject of search and seizure."[12] As we previously noted, the Boyd decision relied, in large measure, on the principles laid down by Lord Cambden in the earlier English case of Entick V. Carrington and three other King's Messengers.[13] The principal constitutional question posed by the case was whether evidence produced by compulsory process and used in a criminal trial was an unreasonable search and seizure within the meaning of the Fourth Amendment.[14] The records, personal private papers of Mr. Boyd, were obtained via a customs-revenue act passed in 1874.[15] Justice Bradley concluded the order under which the production of Mr. Boyds' papers was compelled as unconstitutional because the 1874 statute upon which the order was based violated the Fourth Amendment.

This was the first pronouncement of the "exclusionary rule." While the rule was virtually repudiated a short time later in Adams v. New York[16] (1904), it received even further impetus in 1914 in the case of Weeks v. United States.[17] This case involved an indictment against Weeks on a charge of using the mails to transport tickets to be used as chances in a lottery. At the time of Weeks' arrest, other officers were conducting a search of his home, having gained warrantless entry via a key furnished by a neighbor. A number of items were seized by officers of the Kansas City Police Department and turned over to the United States Marshal. The Marshal, along with local officers, returned later in the day and again, via a warrantless search, seized certain evidence. In its decision, the court indicated the Fourth Amendment was a limitation on the activities of the federal officers and it vigorously reasserted the exclusionary rule. Accordingly, they disapproved admission of that evidence seized by the federal agent (U.S. Marshal). From that day to the present time, federal officers have operated under or around the exclusionary rule.

The question of state action and the exclusionary rule took longer in formulation, however. In 1914, with the Weeks' decision[18], an exclusionary rule was fashioned for federal agents. States however were not bound by the decision as the Fourth Amendment was said to be a limitation on the federal government only. Hence, states could, as they saw fit, fashion for themselves rules of exclusion.

Significant in this regard was the 1949 case of Wolf v. Colorado.[19] The substantive issue in Wolf was presented by Justice Frankfurter in this fashion, "Does a conviction by a state court for a state offense deny 'due process of law' required by the Fourteenth Amendment solely because evidence that was admitted at the trial was obtained under circumstances which would have been rendered inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. United States, 232 US 383"[20]. The court held that the Fourteenth Amendment does not oblige the States to exclude illegally obtained evidence.[21] As we can see, the Fourteenth Amendment played an important part in the Wolf decision. It also was one of the major factors in a most significant search and seizure decision which followed and overturned Wolf. The reader will recall the Fourteenth Amendment

provides, in pertinent part:

> Section I. ... No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. ...

As previously noted, the states followed their own logic in fashioning an exclusionary rule. Many had fashioned their own along the lines of Weeks,[22] while others, as was the case in Colorado, continued to permit introduction of evidence without regard to the reasonableness of its seizure.

To this diversity of opinions among the states in 1961, came the celebrated decision of the United States Supreme Court in Mapp v. Ohio.[23] A warrantless search of Miss Mapp's home was conducted by officers and in the course of their search, ostensibly conducted for the purpose of locating a fugitive, seized obscene materials. These materials were introduced as evidence against Miss Mapp and she was convicted of possessing pornographic material in violation of Ohio law. The Ohio Supreme Court rejected her claims of unlawful search and seizure and, relying on Wolf v. Colorado,[24] upheld her conviction.

The Supreme Court in a 5-4 decision authored by Mr. Justice Clark, overruled the Wolf decision. The decision, by virtue of the fact it was not a mere rule of evidence, but was of constitutional origin, [25] brought all of the states within the framework of the exclusionary rule. In concluding his opinion, Justice Clark States:

> The ignoble shortcut to conviction left open to the state, tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the rights to be secure against the rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer, who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[26]

The Supreme Court, by its decision, did not limit states in fashioning their own rules of exclusion to suit their own particular needs. While the court did make it clear they were, in the Mapp decision, setting minimum standards of "reasonableness" applicable to all search and seizure questions. In the case of Ker v. California[28] the Supreme Court dealt with this issue; "so long as the federal Constitution is not offended, 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.[29]

Thus it is that we occasionally have differing rules between the State and Federal government. For example, examine the scope of the custodial search permitted of a person physically arrested in California for a misdemeanor violation (see People v. Brisendine)[30] and that permitted under the Federal rule (see U.S. v. Robinson[31] and Gustafson v. Florida[32]). For this reason officers of other than federal jurisdictions should refer to the law of their own forum rather than rely on a federal decision in the field of search and seizure law.

Since the Supreme Court's decision in the Mapp case in 1961, there have been a number of decisions which have served to further shape and mold the exclusionary rule.

The Supreme Court indicated in 1963 in the case of Wong Sun v. U.S.[33], the exclusionary rule not only applied to the actual items seized in an "unreasonable" search but to the fruits of that search as well. That is, anything which flowed as a direct result of the primary illegality (unreasonable search) would also be excluded. The "fruit of the poisonous tree" doctrine took shape in this decision.[34]

Recently, the Supreme Court seems to be questioning the efficacy of the exclusionary rule. In a concurring opinion in Stone v. Powell[35] (1976), Mr. Chief Justice Burger commenting on the exclusionary rule states, ... it seems clear to me that the exclusionary rule has been operative long enough to demonstrate its flaws. The time has come to modify its reach, even if it is retained for a small and limited category of cases.

Over the years the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence where the "constable blunders" have led the court to vacillate as to the rationale for deliberate exclusion of truth from the fact finding process. The rhetoric has varied with the rationale to the point where the rule has become a doctrinaire result in search of validating reasons.[36]

The Supreme Court rendered another opinion in 1978, the tone of which seemed to question the scope of the exclusionary rule. In U.S. v. Ceccolini,[37] the court balances the "benefits of excluding evidence against its costs and, in evaluating the standards for application of the rule to live-witness testimony, in light of this balance, material factors to be considered are the length of the "road" between the Fourth Amendment violation and the witness' testimony; the degree of free will exercised by the witness; and the fact that exclusion of the witness' testimony would perpetually disable the witness from testifying about relevant and material facts regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby.[38].

This then, is the exclusionary rule. A product of the Supreme Court in their interpretation of the Fourth Amendment and its rich legal heritage. To be sure, the "rule" has its detractors, not the least of which would appear to be the Chief Justice of the Supreme Court himself.[39]

While the exclusionary rule may undergo changes in the future and conceivably may even be abolished, the important point for law enforcement officers to grasp is that the rules relative to search and seizure will not themselves change. That is, while the fruits of an unreasonable search may be admissible, the search, nonetheless will remain unreasonable. It is therefore important the officer has an appreciation of the leading decisions in the development of the "rule."

THE FRISK

John W. Terry, Petitioner v. State of Ohio
392 U.S. 1 - Decided June 10, 1968

On Writ of Certiorari to the Supreme Court of Ohio

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in Court...

...The right to frisk...depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to take one question and take the risk that the answer might be a bullet...

Mr. Justice Harlan
concurring in Terry v. Ohio

ISSUE

For the first time in more than 50 years of decisions concerning constitutional limitations on police, the Supreme Court squarely faced and decided the delicate issue of a police officer's right to confront a citizen acting suspiciously on the street.

The Supreme Court had to balance the citizen's right to be free from unreasonable government intrusions against the need for police to investigate suspicious street activity. Because street encounters frequently unfold rapidly and because the police often find themselves in hazardous situations, there must be a series of escalating, constitutionally sound responses to meet the very real dangers that can occur in investigating encounters.

In Terry v. Ohio, The Supreme Court set forth detailed guidelines concerning why, when, and how police may act when confronted with a combination of suspicious circumstances.

FACTS

On the last day of October, 1963, in the early afternoon, a Cleveland plainclothes officer with nearly forty years of police experience became curious about two men who were standing on the corner of Huron Road and Euclid Avenue in downtown Cleveland.

What had attracted the officer was the fact that one of the men left the other, strolled casually past a store, paused for a moment, looked in the store window, then casually doubled back around to where the other man was standing. The second man then did exactly what the first man had just done--

looking in the same store window, and then doubling back to join the first man.

The officer, standing off at a distance, watched the two men as they repeated this same ritual. Each man made six trips past the store window and each man doubled back to his waiting partner six times. At this time they were joined by a third man.

Now the officer was thoroughly suspicious. It looked to him as if the immediate purpose of the men was to case the store and that their ultimate objective was armed robbery.

After observing these elaborate maneuvers for ten or twelve minutes, the officer decided to move in. As the plainclothes officer approached the three men, they were now in front of Zucker's Store. He immediately identified himself as a police officer and asked them for their names. The men "mumbled something" unintelligible as the officer swung into action. He grabbed one of the men--Terry--spun him around quickly while facing the other two and patted down the outside of Terry's clothing. In the left breast pocket of Terry's overcoat the officer felt a pistol. He reached inside the coat but could not get the gun out. Keeping Terry between himself and the two other men, the officer ordered all of them into Zucker's Store. He then took Terry's coat from him, removed a .38 caliber revolver from it, and ordered all three men to face the wall with their hands up. He then checked the other men for weapons and discovered a second revolver in an outside coat pocket of one of them. The officer yelled to the store owner to call the police, and a short time later a police wagon arrived and took all three men to the police station. Terry and the other man with the gun were charged with carrying concealed deadly weapons.

The defense promptly filed a motion to suppress, arguing that the officer had no probable cause to arrest and then search the two men for weapons and, therefore, the guns had to be suppressed. The defense contended that the only thing that the officer observed was a few suspicious circumstances that could not, under any interpretation, generate a reasonable belief that the men were about to commit a crime.

In contrast, the prosecution argued that the guns had been seized in a search incident to a lawful arrest for attempted armed robbery.

The trial court categorically rejected the prosecution's theory, stating that it "would be stretching the facts beyond reasonable comprehension"

to find that the officer had probable cause to arrest the three men for attempted robbery before he patted them down for weapons. Nonetheless, the trial court did uphold the officer's method of obtaining the guns on the basis that the officer had a duty to investigate the suspicious activity that he saw and that he had an absolute right to protect himself by frisking for weapons even though he did not have enough probable cause facts to make a lawful arrest for attempted armed robbery.

Terry and the other men were later tried and convicted, and the Supreme Court of the United States granted review in 1967. Showing rare solidarity, the Court decided by an eight to one margin to uphold the officer's right to frisk and seize weapons under these circumstances.

THE SUPREME COURT VIEW OF STREET ENCOUNTERS

Chief Justice Warren, writing for the majority in Terry, focused initially on the fact that the Fourth Amendment protects people whether they are in their homes or on the streets. No matter where a citizen may happen to be, he has a "reasonable expectation of privacy." He has a right, grounded in the common law, to be free from restraint or interference. This right to be let alone yields only to clear, justifiable authority of law.

The authority of law for police to arrest, search, or seize citizens is based on two cardinal rules of the Fourth Amendment. The first rule is that whenever possible, officers should obtain, in advance, judicial approval for arrests, searches, and seizures. The second rule is that failure to obtain arrest and search warrants can generally be excused only by the need for immediate police action in emergency situations.

Chief Justice Warren, for the majority of the Court in Terry, recognized the need to keep the lawful authority of the police in street encounters in harmony with these two main principles of the Fourth Amendment. In order to blend specific law relating to street encounters with the general law embodied in the Fourth Amendment, the Court had to probe with great intensity the nature of street encounters:

> 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.

Later in the opinion, Chief Justice Warren indicated that the law concerning police conduct in street investigations stems from the second cardinal rule of the Fourth Amendment--that relating to emergency situations:

But we deal here with an entire rubric of police conduct--necessarily swift action predicated upon the on-the-spot observations of the officer on the beat--which historically has not been and as a practical matter could not be, subject to the warrant procedure.

Thus, said the Court, all police investigative conduct is regulated by the Fourth Amendment, and the penalty for violating the Fourth Amendment's requirements is the suppression of evidence. The Supreme Court has long emphasized that the major purpose of the Exclusionary Rule is a deterrent one. Chief Justice Warren underlined this theme:

Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. (See Weeks v. United States, 232 U.S. 383, 391-393 (1914)). Thus its major thrust is a deterrent one (see Linkletter v. Walker, 381 U.S. 618, 629-635 (1965)), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." (Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

The second major reason for the Exclusionary Rule was declared by the Court in the case of Elkins v. United States, 364 U.S. 206, 222 (1960). In that decision the Court announced the doctrine of "the imperative of judicial integrity."

The Court, in Terry, crystallized this second vital function of the rule:

> Courts sitting under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

Surging forward, the Court emphatically announced its full intention to supervise all police conduct as

it affects citizens, and that whenever police investigative techniques were unfair or unreasonable, the Exclusionary Rule would be invoked:

> Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decisions, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

THE SUPREME COURT VIEW OF A STOP AND FRISK

Central to the Supreme Court's decision in Terry was the Court's view of a police stop and a police frisk. Chief Justice Warren underscored the Court's concern with the street encounter:

> Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime--"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

While recognizing the full dimensions of the impact of a stop and a frisk on a citizen, the Court contrasted the significant differences between a "stop-and-frisk" and an "arrest":

> An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person....

THE SUPREME COURT STANDARD FOR STREET ENCOUNTERS

The Court, in Terry, announced a formula to test the reasonableness of police conduct when they are engaged in street encounters. First, the Court stated, it is necessary "to focus upon the governmental interest" that would justify the police officer's contact with the citizen, and, second, to explore the intensity and scope of the police contact. The reasonableness test is then a direct one. In reviewing police encounters with citizens, the Courts must balance "the need to search (or seize) against the invasion which the search (or seizure) entails".

Justification for the Street Encounter

The general justification for a street encounter, according to the Court, is the need for effective crime prevention and crime detection by police. In each case of a police encounter with a citizen, however,

there must, in addition to this general justification, be a specific, factual justification based on what the officer sees and experiences when drawn into an inquiry. The Court was explicit in demanding specific, factual justification for police encounters:

And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with logical inferences from those facts, reasonably warrant that intrusion....

Facts, said the Court, are to be judged on a strict objective standard. All the facts confronting the officer at the moment that he stops someone or the moment that he frisks someone have to be evaluated by the reviewing courts to assure that the officer's actions were reasonable in light of the rapidly developing facts. This means that whenever a police officer stops a citizen he must be prepared to justify the probable cause--the arrest standard--or a reasonable belief that someone has committed a crime, but they do have to be suspicious facts--sufficient to arouse the police officer's curiosity and specific enough that he can testify about them. A police officer's belief that a motorist was lost has been held by one court to be an insufficient basis for stopping the vehicle. United States v. Dunbar, 470 F. Supp. 704 (D. Conn. 1979).

Intensity and Scope of the Search

The only justification for a frisk is to protect the officer who is drawn into an inquiry. The Court recognized that police officers are frequently in vulnerable positions when they stop people for on-the-spot investigations. Once the officer's initial action in stopping a citizen is justified at its inception by the suspicious circumstances that drew him into an inquiry, he may frisk the person he has stopped if he reason -ably fears for his safety. The Court has indicated that the frisk or search must be reasonably limited in scope to the circumstances which justified the interference with the citizen in the first place. The scope of a search, whether it be a full search based on probable cause, or a frisk based on a combination of suspicious circumstances and a reasonable fear for safety are "strictly tied to and justified by" the circumstances in each case.

The Court emphasized traditional limitations upon the scope of searches by underscoring the difference in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. Police may make intrusions on a citizen short of arrest so long as they act reasonably under the facts unfolding before them. Finally, the Court emphasized that the right to frisk

> ...must be 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 SUPREME COURT DECISION

Applying these Fourth Amendment rules to the facts of the Terry case, the Court declared that the Cleveland police officer's conduct was reasonable at its inception and was reasonable at the time he found the gun.

The Court found significance in the facts that the police officer had more than 40 years' experience and that his judgment that the men were casing the store for an armed robbery was extremely persuasive under the circumstances. The Court found the officer's conduct completely reason -able here since he identified himself as a police officer, requested their names, and then immediately patted Terry down for a weapon.

Under all these circumstances the Court refused to suppress the evidence and the convictions of the men for carrying concealed deadly weapons were sustained.

TWO VARIATIONS ON THE FRISK THEME

In two related cases decided the same day, the Supreme Court applied the rule of law affecting street encounters announced in Terry to two other police-citizens encounters.

NELSON SIBRON, APPELLANT V. STATE OF NEW YORK
392 U.S. 40 -- Decided June 10, 1958

FACTS

New York has a "stop-and-frisk" law (N.Y. Code Crim. Proc. S180-a), which provides:

1. A police officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in Section 552 of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

The defense, in these two companion cases, argued that this New York statute was unconstitutional "on its face." The Supreme Court refused to rule on the constitutionality of the New York statute and decided to determine the lawfulness of the frisks in these cases on the specific, concrete, factual circumstances involved in the police encounters in each case.

A New York City police officer was patrolling his beat on March 9, 1965 and saw the defendant, Sibron, "continually from the hours of 4:00 p.m. to 12 midnight ... in the vicinity of 742 Broadway." The officer saw Sibron talking with six or eight people that he knew to be narcotics addicts. Admittedly, the officer did not overhear any of the conversations between Sibron and the addicts nor did he see anything pass between Sibron and the others. Late in the afternoon, the officer saw Sibron enter a restaurant and begin speaking with three other addicts. When Sibron sat down and began to eat, the patrolman approached him and told him to come outside. As soon as they got outside the restaurant the officer said, "You know what I'm after." Sibron mumbled something and reached hurriedly into his pocket. At the same time, the officer thrust his hand into the same pocket and discovered glassine envelopes which were later found to contain heroin.

The officer arrested Sibron, who was later convicted for the unlawful possession of heroin. The New York courts refused to suppress the incriminating evidence that the officer took from Sibron.

THE SUPREME COURT DECISION

The Supreme Court of the United States re-emphasized the rule it had announced in the Terry case:

> 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 factors from which he reasonably inferred that the individual was armed and dangerous. (Emphasis added.)

Chief Justice Warren, again writing for the majority of the Court, held that on the record in the Sibron case there were no facts that would constitutionally permit the officer to frisk Sibron. The Court found both that there was not sufficient specific justification for the frisk and that the frisk exceeded reasonableness in intensity and scope.

In analyzing the facts, the Court found that:

> The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime.

The Court expressed its belief that the police officer's intention was to search for narcotics and not to protect himself. According to the officer's own testimony at the suppression hearing, he thought that there were narcotics, not a weapon, in Sibron's pocket.

The Court contrasted the intensity and scope of search for weapons in Terry with the search-frisk in Sibron. In Terry, there was a patting down of the outer clothing of the suspect for weapons, and only after the weapon was discovered did the officer place his hand inside Terry's pocket. In Sibron--"with no attempt at an initial limited exploration for arms"--the officer physically invaded Sibron's pocket and grabbed the heroin. The Court found that the officer in Sibron was looking for narcotics and was not attempting to protect himself.

According to this interpretation of the facts, the Supreme Court has no alternative but to declare the search-frisk of Sibron unreasonable and in violation of the Fourth Amendment.

JOHN FRANCIS PETERS, APPELLANT v. STATE OF NEW YORK
392 U.S. 49 -- Decided June 10, 1968

FACTS

In Peters, an off-duty New York City police officer was in his apartment in Mt. Vernon, New York, on the afternoon of July 10, 1964. He had just finished taking a shower and was drying himself when he heard muted noises at his door. Interrupted momentarily by a telephone call, the officer hung up, and looked through a peephole into the hall to see if anything was going on. The officer saw "two men tiptoeing out of the alcove down the stairway." Calling the police, the officer put on civilian clothes, armed himself with his service revolver and started to investigate. The officer had lived in the 120-unit apartment house for 12 years and did not recognize either man as a tenant. The officer opened the door, stepped into the hallway, and slammed the door loudly behind him. The officer's sudden arrival caused the two men to start running down the stairs. The officer took after them in close pursuit. Catching up to them two floors down, the officer grabbed one of the men--Peters--by the collar and tried unsuccessfully to capture the other one.

The officer asked Peters what he was doing in the apartment house and Peters said that he was visiting a girlfriend. When the officer asked him who the girlfriend was, Peters refused to identify the girl, saying she was a married woman. The officer immediately patted Peters down for weapons and discovered a hard object in his pocket. The officer testified at the suppression hearing that it did not feel like a gun but he thought it might have been a knife. Quickly the officer removed the hard object from Peter's pocket and discovered an opaque plastic envelope containing burglar tools. Peters was tried and convicted for the lawful possession of burglar tools and the New York courts upheld the officer's search-frisk of Peters on the basis of the New York stop-frisk statute.

THE SUPREME COURT DECISION

The Supreme Court held that the officer was fully justified in stopping Peters under these suspicious circumstances and that the facts in the Peters case were so strong that they rose to the level of probable cause to arrest Peters for attempted burglary.

The Court analyzed the probable cause as follows:

FACT 1: "The officer heard strange noises at this door which apparently led him to believe that someone sought to force entry."

FACT 2: "When he investigated these noises, he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway."

FACT 3: "They were still engaged in these maneuvers after he had called the police and dressed hurriedly."

FACT 4: When the officer "entered the hallway, the men fled down the stairs."

The combination of these four facts persuaded all nine members of the Supreme Court that there was a strong factual basis for an arrest of Peters for attempted burglary. As the Court phrased it:

> Deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

In conclusion, the Court found that Peters' arrest and search were fully within the commands of the Fourth Amendment since it was a search incident to a lawful arrest based on probable cause.

CONCLUSION

These three cases illustrate what the Supreme Court stated in 1961 in Mapp v. Ohio: "There is no war between the Constitution and common sense."

The Court, fully recognizing the need for officers to conduct on-the-spot investigations, permits stopping and frisking of suspects only where there is specific justification based on the facts of each case. The power of the police to stop and frisk citizens who are acting suspiciously is narrowly limited by these decisions. Routine, quota, harassment, or mass stops and frisks by police are prohibited. If any incriminating evidence is uncovered by these types of illegal police activity, it probably will be suppressed by the courts.

In contrast, when police are conducting legitimate investigations of suspicious circumstances, they

may stop a citizen and frisk him whenever the officer reasonably fears for his safety. If incriminating circumstances, it will not be suppressed.

The street encounter is important both to the police and to the citizen. Standing guard to assure fairness in this critical area is the Fourth Amendment, guaranteeing to the citizen his full right to privacy and guaranteeing to the officer his full right to investigate.

STOP AND FRISK

A. Grounds for Stop: The police officer must have a reasonable suspicion that the person stopped (other than persons in vehicles) is involved in criminal activity.

1. "He may investigate possible criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio, 392 U.S. 1, 22 (1968).

2. "(A) stop and ensuing limited detention of individuals must be permitted under certain circumstances if law enforcement officers are to carry out their functions of crime prevention and detection. The circumstances which must exist before an individual can be stopped must enable a police officer to reasonably suspect that the particular individual is involved in criminal activity." United States v. McCann III, 465 F. 2d 147, 157-58 (5th Cir.), cert. denied 412 U.S. 927 (1973).

3 ."...(A) citizen may be ... stopped for investigative purposes, ... and it is now axiomatic that a law enforcement officer has the power, indeed the obligation, to detain a person temporarily for the purpose of interrogating him if the officer has a reasonable suspicion about the person." United States v. Smith, 574 F. 2d 882, 886 (6th Cir. 1978).

4. "...(I)t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of seizure or the search, warrant a man of reasonable caution in the belief that the action taken was appropriate." United States v. Nichols, 448 F. 2d 622, 624 (8th Cir. 1971).

5. "Stops ... must satisfy the Fourth Amendment requirement of reasonable cause commensurate with the extent of the official intrusion... (T)he government must come forward with specific and articulable facts which, taken together with the rational inferences from those facts reasonably warrant that intrusion." Young v. United States, 435 F. 2d 405, 408-9 (D.C. Cir. 1970).

B. Grounds for Frisk: The police officer must have a reasonable belief that the person stopped is armed and dangerous.

1. "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." Terry v. Ohio, supra, 392 U.S. at 27.

2. "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." Sibron v. New York, 392 U.S. 40, 64 (1968).

3. "A search for weapons in the absence of probable cause to arrest...must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby..." United States v. Robinson, 414 U.S. 218, 227-28 (1973).

4. "...(T)he question of 'reasonableness' is two-pronged. a reviewing court must objectively determine the following: (1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place." United States v. Harris, 528 F. 2d 1327, 1329 (8th) Cir. 1975).

C. Nature of Frisk: The search for weapons must be only a limited intrusion.

1. "(W)hen a policeman is entitled to forcibly "stop" a person to inquire about possible criminal activity, and has reason to believe that the person is armed and dangerous, he may conduct a limited pat-down search for weapons to protect himself while conducting the inquiry." United States v. Davis, 482 F. 2d. 893, 906 (9th Cir. 1973).

2. The pat-down seeking concealed weapons "must, therefore, be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or hidden instruments for the assault of the police officer." Terry v. Ohio, supra, 392 U.S. at 29.

3. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence and thus the frisk for weapons must be equally necessary and reasonable." Adams v. Williams, 407 U.S. 143, 146 (1972).

4. Consequently, where the officer "was looking for narcotics and he found them, (t)he 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..." Sibron v. New York, supra, 392 U.S. at 65.

5. "The lifting by the officer of (suspect's) shirt was not, under the circumstances, overly intrusive... In the instant case the officer's investigation was wholly confined to the area of the bulge in question and was a direct and specific inquiry.

As such, it did not transcend the permissible bounds established by Terry." United States v. Hill, 545 F. 2d 1191, 1193 (9th Cir. 1976).

D. Search After Frisk: Feeling a hard object which might be a weapon will justify a more extensive intrusion to obtain the weapon.

1. "Further intrusion by search can take place only for the purposes of disarming." Terry v. Ohio, supra, 392 U.S. at 30.

2. "While ... 'a pat-down' involves only the patting of external clothing in the vicinity of the pockets, belts or shoulders where a weapon such as a gun might be secreted, in any given case the right to pat-down carries with it authorization for a full frisk since presumably, if we are authorizing anything, we are authorizing what is necessary to get the job done." United States v. Albarado, 495 F. 2d 799, 808 (2d Cir. 1974).

3. "Even if such a 'pat-down' could have been justified by fear that one who allegedly tried to use a stolen credit card might be armed, (the officer's) reaching into (the suspect's) pockets and extracting the credit card went beyond the permissible scope of a non-arrest 'pat-down' for weapons." United States v. Wilson, 479 F. 2d 936, 939 (7th Cir. 1973).

4. "The search of (the suspect's) breast pocket which produced ten match boxes which in turn contained narcotics (arguably) exceeded the outer limits of a weapons search." United States v. Peep, 490 F. 2d 903, 906 (8th Cir. 1974).

GENERAL RULES OF CONSENT SEARCHES

Generally, the defendant may waive the requirements of a search warrant by consenting to a search of his persons, premises, or automobile. A third person in joint control of defendant's property may consent to its being searched in the absence of defendant.

1. Consent by defendant - the following cases have recognized the validity of defendant's consent to a search of his person or property:

   a. People v. Beal 268 CA2 481, 483-484 (1968) (Voluntary submission to search of auto by response of officers, "Go ahead").

   b. People v. Hale, 262 CA2 780, 787 (1968) ("Come on in").

   c. People v. Lyles, 260 CA2 63,65-67 (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.)

   d. People v. Perez, 257 CA2 371,377 (1968) ("Go ahead and look" -vehicle.)

   e. People v. Batista, 257 CA2 413, 418 (1967) (Consent to search of person and premises, in hope of incurring good will of the officers, was valid.)

   f. People v. Dahlke, 257 CA2 82, 87 (1967) (Do what you want.)

2. Facts relevant to voluntariness

   a. Custody: The fact that defendant is in custody at the time consent is given, though relevant, is not conclusion of involuntariness. People v. Shelton, 60 C2, 740, 746 (1964)

   b. Prolonged detention or long, unexplained delays.

      1) San Bev v. Superior Ct., 71 CA2 281, 290 (1969) the Supreme Court held that the long, unexplained delay surrounded the officer's questioning of his co-passenger destroyed the voluntary consent of defendant to search of his car. (1/2 hour)

   c. Express or implied coercion.

      1) When consent is mere submission to the assertion of official authority, the search is involuntary (People v. Cruz), 264, CA2 437 (1968), defendant merely shrugged shoulders when officer requested search of vehicle and ordered defendant to stand on sidewalk.

3. Advising the right not to consent.

   a. It is now well-established that officers need not, prior to the search, advise or warn the consenting defendant that he has a right to refuse consent. (Schnechloth v. Bustamante, (1973) 412 U.S. 218)

Failure to disclose role as government informer.

a. 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)

5. Consent following illegal entry, detention, or arrest.

a. Consent following the unlawful assertion of the officer's power to enter, detain, or arrest, is inextricably bound up to the conduct, making the consent involuntary as a matter of law. People v. Franklin, 261 CA2 707 (1968) (Consent following illegal traffic stop could not validate the search undertaken) and People v. Superior Court, 71 CA2 281 (1969)

6. Withdrawal of consent previously given.

a. Defendant's withdrawal of consent previously given militates strongly against the voluntary nature of consent. Also People v. Martinez, 259 CA2 Supp. 943, 945-946 (1968) where the search undertaken after withdrawal of the consent was deemed improper and the evidence thus seized inadmissible.

b. The scope of the search must not go beyond the authorized by the consenting party. People v. Martinez, supra, 259 CA2 Supp. 943 at page 945; see also, People v. Rice, 259 CA2 399, 403-404 (1968) (Consent to "pat" search did not permit search of defendant's pockets.)

7. Fictional consent of parolee.

a. A parolee's person and premises may be searched by his parole officer without the parolee's consent since the search is not governed by the same rules which apply to citizens possessed of full civil rights. People v. Contreras, 263 CA2 281 (1968). However, the officers must at all times comply with Penal Code sections 844 and 1531.

b. 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 C3 631 (1970).

8. Consent by third persons.

a. Third persons in joint control of defendant, property may consent to its being searched. (People v. Robinson, (1974) CA3 658)

b. Husband or wife of the defendant.

1) A valid consent can be given by the husband or wife of suspect.

2) The re Tessard, 62 C2 497, 504-505 (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.

c. Mistresses, common-law-wives.

1) Often accorded the status of a lawful spouse relative to the power to consent to search of defendant's property.

d. Innkeeper and guest

1) Under Stoner v. Cal. 376 U.S. 483 (1964) consent of a hotel, motel, etc., clerk will or manager will not render a search of the defendant's room valid. In that case, the court held that the defendant had authorized the clerk or a hotel to permit the search; thus, the search was improper.

e. However, the search of defendant's quarters where his tenancy has expired and the manager, or maid is entitled to enter the premises for the purpose of clearing or removing defendant's belongings. (People v. Van Eyk, 56 C2 471, 478 (1961) not that this right of entry is inapplicable to the following situations: landlord and tenant).

9. Landlord and Tenant

a. Under Chapman v. United States, 365 U.S. 610 (1961) 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.

b. See People v Plane, 274, CA2 1 (1969), defendant arrested; landlord entered to preserve property and invited officer.

c. Consent by an absent owner is sufficient and trespasser does not become a householder entitled to this protection of the statute (Penal Code 844); People v. Ortiz, 276 CA2 13 (1969).

d. Where tenant has abandoned residence (a question of fact) landlord's consent is valid. People v. Urfer, 274 CA2 338 (1969).

10. Co-tenants

a. A co-tenant may consent to the search of areas on the premises which are jointly used and occupied. People v. Debnam, 261 CA2 206, 210-211 (1968) (Consent of brother-co-tenant).

b. A limitation was set forth in Tompkins v. Superior Court, 59 C2 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.

c. See Duke v. Superior Court, 1 C3 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.

11. Houseguest and other occupiers.

a. 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 CA2 924, 927 (1965) (Premises under joint control of defendant's wife, her mother, and her stepfather; the mother's consent is valid.)

b. People v. Braden, 267 CA2 939 (1968) (Consent of owner to search of his premises occupied by three guests, including defendant, was proper notwithstanding the guests objected thereto.)

12. Owners of public premises.

Explicit from the Supreme Court's holding in Bielicki v. Superior Court 57 C2 602 (1962) is that the users of public places do not impliedly consent to their being spied upon indiscriminately by police officers if a reasonable expectation of privacy is present. Compare Katz v. United States, 389 U.S. 347 (1967) (The occupant of the telephone booth does not expect that his utterances will be broadcast to the world.)

13. 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 defendants. People v. Cruz 61 C2 861 (1964) (Suitcases improperly searched pursuant to consent of two girls living with defendant); People v. Hopper, 268 CA2 744 (1969) (Record did not support the authority of consenting party to search premises known to be the defendants.)

ADDITIONAL REFERENCES

POST Video Catalog. (916) 227 4856.