150136

BASIC COURSE INSTRUCTOR UNIT GUIDE

15

LAWS OF ARREST

June 1994

THE COMMISSION
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

1280

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 Standards and Training.

The training specifications referenced herein express the required minimum content of this domain.

UNIT GUIDE 15

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Learning Domain 15
Laws of Arrest

SPECIFICATIONS FOR LEARNING DOMAIN #15: LAWS OF ARREST

June 1, 1994

I. INSTRUCTIONAL GOALS

The goals of instruction of **Laws of Arrest** are to provide students with:

A. an understanding of the arrest powers of a peace officer including:

1. the discretion that an officer has in making an arrest
2. limits on an officer's discretion
3. the elements of an arrest
4. daytime and night time arrests
5. the information that an officer must provide to an arrested person
6. treatment of an arrested person after the arrest
7. exceptions to a peace officer's arrest powers
8. civil liability;

B. the ability to recognize when suspects must be provided their Miranda rights;

C. knowledge of an officer's responsibility where the arrest was made by a private person;

D. knowledge of the elements required to establish reasonable suspicion and probable cause;

II. REQUIRED TOPICS

The following topics shall be covered:

A. Arrest powers of a peace officer

B. Miranda rights of detainees

C. Arrest by a private person

D. Reasonable suspicion and probable cause

E. Legal requirements for entry to make an arrest

F. Follow-up requirements and information which must be provided to an arrested person

G. Consenual encounters

III. REQUIRED TESTS

A. The POST-constructed knowledge test for Domain #15

B. An exercise test that requires the student to approach, contact, interview, and interrogate a suspicious person

IV. REQUIRED LEARNING ACTIVITIES

None

V. HOURLY REQUIREMENTS

Students shall be provided with a minimum of **12 hours** of instruction on laws of arrest.

VI. ORIGINATION DATE

July 1, 1993

VII. REVISION DATES

June 1, 1994

CURRICULUM

I. CONSENSUAL ENCOUNTERS/CONTACTS

A. Consensual Encounters/Contacts by peace officers

1. Police officers may come in contact with private persons for reasons ranging from friendly exchanges of pleasantries to hostile confrontations with armed suspects involving arrests or injuries.

2. In general, a contact is the most common form of communication between a peace officer and members of the public (Reference Terry v. Ohio, 392 U.S. 13).

3. Contacts are different from "detentions" or "arrests" in that they do not involve the "seizure" of persons within the meaning of the Fourth Amendment.

4. Officers are encouraged to initiate contacts with individuals in the community for a wide variety of reasons, and there is no legal justification needed as long as the officer is in a place he or she has a legal right to be.

B. Defining a Consensual Encounter/Contact

A Consensual Encounter/Contact involves:

1. A face-to-face communication between a peace officer and an individual where the individual:

   a. Is not obligated to cooperate or answer questions, and

   b. Is free to leave, and

   c. Reasonably believes they are free to leave

2. Examples of Consensual Encounters include, but are not limited to:

   a. Informing a relative about a death

   b. Interviewing witnesses

   c. Engaging someone in casual conversation

C. Conduct during a Consensual Encounter/Contact

1. Although no legal cause need be present for an officer to initiate a "contact", the persons contacted may not be halted, detained, or frisked against their will. They may not be required to answer questions or to cooperate in any way if they do not wish to do so. If they refuse to cooperate, they must be permitted to leave unless the officer has obtained or developed sufficient additional information which would justify a detention or an arrest.

2. The mere asking of someone for identification or personal information, however, does not necessarily elevate a contact to a detention, as long as the person reasonably believes they are free to leave.

3. The retention of a person's identification throughout the length of the contact may elevate the contact to a detention.

D. Possible consequences associated with inadvertently elevating a contact into an unlawful detention

1. If a peace officer unreasonably restricts the movement of a private person, (e.g., by blocking a person's exit) or conveys the message that the subject was not free to leave when there is no specific reason to justify a detention or an arrest, the officer may be subject to:

   a. Criminal prosecution under Penal code Section 272 (False Imprisonment)

   b. Suppression of evidence discovered (Exclusionary Rule)

   c. Civil and/or criminal prosecution for violation of civil rights

II. REASONABLE SUSPICION

A. Stops/detentions - definition

1. A "stop" is a temporary detention of a person for an investigative purpose.

   It is a "seizure of the person" under the Fourth Amendment, but is allowed because it is not as much of an intrusion into a person's liberties as an arrest.

2. A temporary "detention" or "stop" occurs when a peace officer uses his/her police authority to compel a person to halt, to remain in one place, or to perform some act. Examples are:

   a. a routine traffic stop

   b. a field evaluation of a person suspected of driving under the influence of liquor or drugs

   c. a field interview

3. The purpose of a detention is to allow an officer a reasonable amount of time to investigate a person's involvement in an actual or perceived criminal act.

4. A detention exists if a person being detained either knows or reasonably believes that he/she is not free to leave.

5. A detention occurs when a person is, in fact, detained. (e.g., a person who flees is not detained until they submit or are restrained)

B. Basis for a stop/detention

1. A lawful "stop" or "detention" is warranted if an officer:

   a. is in a place where he or she has a right to be, and

   b. can articulate specific facts as to why he or she has reasonable suspicion to believe that:

      (1) some activity related to crime has occurred, is occurring or is about to occur, and

      (2) the person detained is involved in that activity.

2. An officer's decision to detain cannot be predicated upon a mere hunch, but must be based on specific and articulable facts describing suspicious behavior which would distinguish the defendant from an ordinary, law-abiding citizen.

3. Tests for determining the reasonableness of a detention:

   a. An officer must **objectively** entertain such a suspicion **and**

b. The facts must be such that any reasonable peace officer in a similar situation would come to the same conclusion.

NOTE: The previous test for determining the reasonableness of a detention was the old "Tony C" test which established that an officer must "**subjectively** entertain a suspicion..." The Supreme Court has held repeatedly (Scott v. US, Maryland v Macon, Brower v. Inyo County, Horton v. California) that the 4th Amendment reasonableness must be determined on an **objective** basis, and that the officer's particular subjective opinions are irrelevant.

C. The legal standard - reasonable suspicion:

1. The term "reasonable suspicion" describes a set of specific and articulable facts or circumstances known (or apparent) to an officer which would cause him or her to believe that a particular person was, is, or is about to be involved in criminal activity.

   Reasonable suspicion has also been described as more than a "hunch," but less than the evidence needed to make an arrest.

2. Reasonable suspicion to detain is determined by the **totality of the circumstances**, and therefore requires as many specific and articulable facts as possible to justify why the officer believed the suspect was involved in criminal activity.

3. The following list (which is not all-inclusive) contains some of the factors and examples which the courts have recognized as being solid contributors in establishing reasonable suspicion. It must be remembered, however, that many of these facts, by themselves, may not justify a detention. It is important for the officer to include in his/her report **all relevant facts**, describing as many of the factors as are present.

   a. Appearance

      (1) Did the suspect resemble a wanted person?

      NOTE: Detentions may not be based upon race alone.

      (2) Was the suspect in a wanted vehicle?

      (3) Did the suspect appear to be intoxicated/injured?

   b. Actions

      (1) Did the suspect appear to be casing an area?

      (2) Was the suspect parked in an unusual area?

      (3) Did the suspect appear to be hiding or loitering?

      (4) Was the suspect in the vicinity or proximity of a crime?

(5) Did the suspect attempt to discreetly hide or throw something away (destroy evidence) when officers approached?

(6) Was the suspect running from a crime scene?

NOTE: The mere running from an officer, without other factors, is not sufficient justification for a detention.

c. Traffic violations

*(1) Did the suspect drive erratically or appear to be under the influence of drugs or alcohol?

(2) Did the suspect commit a traffic violation?

(3) Did the suspect's vehicle have some equipment violation?

d. Prior knowledge of the person

(1) Is the officer aware of the suspect having a prior arrest or conviction record?

(2) Is the suspect otherwise known to have committed a serious offense?

(3) Does the suspect have a history of committing the type of crime under investigation?

e. Suspect demeanor during* a detention

(1) Was the suspect responsive?

(2) Did the suspect give evasive, suspicious or incriminating answers?

(3) Was the suspect excessively nervous, belligerent or even too casual?

* Conduct "during" the detention cannot be used to retroactively justify the detention, but may justify prolonging it.

f. Time of the day

(1) Is it the time of day when the type of crime being investigated is likely to occur?

(2) Is it unusual for people to be in the area at this particular time of day?

g. Area of the stop

(1) Is the suspect near the location of a known offense soon after its commission?

(2) Is the suspect in an area known for an unusually high incidence of a particular criminal activity? If so, can the officer connect the suspect to some type of criminal activity in that specific area?

NOTE: Officers are cautioned that the courts find little credence in the term "high crime area," and that it should be avoided. If reference is to be made to the area of the stop, officers should articulate specific facts concerning that area; for example, the suspect was stopped within three blocks of an area where four commercial burglaries had occurred during the past week. Although more recent cases agree that this **is** a legitimate factor, it isn't enough, by itself, for a detention.

h. Police training and experience

(1) Does the suspect's conduct resemble the pattern or modus operandi followed in a particular series?

(2) Does the officer have experience dealing with the particular kind of criminal activity being investigated?

i. Sources of information - informants

NOTE: The following material regarding informants is provided as background for the instructor. Comprehensive instruction regarding informants is addressed in Learning Domain #16 (Search and Seizure). The key concept to impart to students at this point is that information received from other persons can help to establish reasonable suspicion.

(1) Identified "Citizen" informants

(a) Does not apply if the citizen informant gives information anonymously

(b) No expectation of reward, compensation or revenge, etc. for information. It is presumed therefore that a citizen informant may be trusted with no need for corroboration.

(c) Information received from a citizen informant may supply probable cause justification for an arrest and/or search warrant

(2) Criminal informants

Criminal informants expect something in return for information; may be money, some type of consideration for pending charges, revenge, etc.

There are two types of criminal informants:

(a) Reliable - criminal informants are considered "tested" or "reliable" when they have provided information which:

1) Has proven accurate in the past

2) Is against their penal interests, or

3) Is independently corroborated

(b) Untested (unreliable) - criminal informants who have not previously given verifiable information.

(3) Confidential informants

Confidential informants are often citizens who are fearful of retaliation and so ask to have their identity kept confidential

(4) Application

(a) Reliable - information received from a reliable informant constitutes enough justification for an arrest and/or search warrant

NOTE: Information received from a reliable informant constitutes "enough justification" for an arrest and/or search warrant only if it amounts to probable cause when considered with other facts. Just because information comes from a reliable informant doesn't necessarily means that the information will always be "enough justification for an arrest or search warrant.

(b) Untested - information received from an untested source may be used as the basis of a temporary detention. If an officer is able to corroborate information received from an untested source, then that information may be considered as "reliable."

NOTE: Criminal informants may pose a threat to officer safety and therefore extreme caution should be used.

(5) Evaluating the use of informants

(a) What type of informant is supplying the information?

(b) Did the officer obtain the information directly from the informant or second/third hand?

(c) Can the informant's information be corroborated?

D. Articulable facts justifying a stop/detention

Every officer who conducts a detention must be prepared to include in the report those articulable facts which led him/her to believe that the detention was justified. This is critical for the crime to be charged and for prosecution to be successful.

E. Length of detention - MUST BE "REASONABLE"

1. Officers may only detain a suspect long enough to determine:

   a. if there was, is or might be a crime committed, and

   b. the suspect's involvement in the illegal activity.

2. An officer must complete his or her investigation of the circumstances surrounding a detention within a reasonable length of time. The officer may only investigate those facts which caused him or her to become suspicious in the first place, or follow up on information regarding criminal activity which was developed during the detention. The officer must release the suspect if there is insufficient cause to arrest and no other information has been developed to extend the detention.

3. Warrant checks may be randomly run during a detention, but must be completed within the time it reasonably takes to complete the enforcement activity (e.g., writing a citation). If an officer completes an investigation, but continues to detain the subject while waiting for the results of a warrant check, the continued detention is unlawful and may result in the suppression of any seized evidence.

4. Although there is no set time limit on the length of a detention, the courts will use the scope of the investigation and the seriousness of the offense for determining the reasonableness of the officer's actions.

F. Scope of a detention

1. Does DETENTION + MOVEMENT = ARREST?

   a. Detention plus "movement" does not necessarily equal an arrest (In re Carlos). Detention plus **transport** equals an arrest (Hayes v. Florida), but not all movement of a detainee creates automatic arrest, as the following exceptions illustrate.

   b. A reasonable, brief, on-scene investigation is all that the law authorizes during a detention. Therefore, a person being detained may not be transported or moved from the location of a stop unless:

      (1) The suspect gives his or her permission to be moved, or

      (2) It is impractical to bring the witness/victim to your location (e.g., in a "field show-up" or "curbstone lineup" when the witness/victim is too injured to be moved, etc.)

(3) There is probable cause for arrest

(4) The conditions under which the detention was made were inherently dangerous to the suspect. (e.g., a driver stopped for DUI on the freeway may be moved to a side street for the administering of the field coordination test), or

(5) The conditions under which the detention was made posed a danger to the officer(s). (e.g., an officer who detains a person in a bar where the crowd is becoming hostile may move the suspect).

G. Questioning detained persons - "Miranda" admonishment

1. A peace officer may direct questions to detained persons for the purpose of obtaining their names, addresses and an explanation of their presence and/or conduct. During this questioning, the person need not be advised of his/her constitutional rights.

2. Whether a detainee is or is not in Miranda "custody" depends upon the presence or absence of arrest-like restraints (Berkemer v. McCarty, California v. Beheler, Pennsylvania v. Bruder). A person detained without such restraints (no guns, no cuffs, no cage, etc.) is not in custody and may be interrogated without Miranda procedures (People v. Lopez).

H. Effect of refusal to cooperate

1. Refusal to answer questions does not by itself establish probable cause to arrest; however, a refusal may be considered as a factor in developing probable cause for arrest.

2. A person who flees from a lawful detention may be arrested for violation of Penal Code Section 148 provided that the flight delayed or obstructed the investigation and there is sufficient proof to show that the person knew he/she was being detained by a peace officer.

I. Use of force during a detention

1. If a suspect refuses to cooperate during a detention and attempts to leave, the officer may use reasonable force to compel the person to remain. The force used may not be any more than the minimum amount of force required to gain compliance.

a. An officer may handcuff a person who has been detained and uncooperative without automatically loosing the detention status

b. An officer may also place an uncooperative detainee in a police car without automatically losing the detention status

NOTE: The use of force during a detention does not necessarily elevate the detention to an arrest. If a suspect demands to either be arrested or released,

the proper response would be to say that he or she is still being detained for investigation and not free to leave.

2. The use of force which could cause death or great bodily injury is not authorized during a detention unless the officer is attacked.

J. Warrant checks during traffic stops

1. If an officer has lawfully detained a person or stopped a vehicle for a traffic violation, the officer is allowed to run a warrant check even if he or she has no legal suspicion that there may be an outstanding warrant. However, the warrant check must be completed before the officer completes the investigation for which the suspect was stopped.

   Example: During a traffic stop, the warrant check would have to be completed before the officer finished the citation. If an officer continued to detain the subject without consent awaiting the results of the warrant check, any evidence seized as a result of an existing warrant would be inadmissable in court.

2. If the warrant check was delayed, the officer could seek consent for further delay or could release the subject, follow him or her until the warrant check was completed and recontact if there was an outstanding warrant.

K. Only peace officers may detain

1. Private persons may not detain; this investigative tool is reserved for peace officers only.

2. Exception - When a manager (or his/her agent) of a retail store, or a librarian has reasonable suspicion to believe that an individual has committed a theft, the manager (or his/her agent) may detain the suspect only long enough to determine whether or not items were in fact stolen. Once that has been accomplished, the suspect must immediately either be arrested or released Penal Code Section 490.5 The purpose of permitting a store owner or librarian to detain a suspected thief is to allow them to recover their property.

   In order to invoke this rule, the following three conditions must be met:

   a. There must have been an apparent theft, and

   b. the employee must have acted promptly after discovering the theft (fresh pursuit), and

   c. the detention must be carried out in a reasonable manner. Agents of the store or library are allowed to use a reasonable amount of non-deadly force.

3. Peace officers are not on duty 24 hours a day, and are considered private persons when not at work. Although officers may legally activate themselves to an on-duty status at will, they should exercise this power in conformance with their department policy.

L. Cursory search (frisk): a limited protective search for concealed weapons or dangerous instruments while a person is lawfully detained. It is limited in scope to the outer garments worn by the suspect unless those clothes are too bulky to allow the officer to determine if a weapon or potential weapon is concealed.

1. An officer may frisk any person who has been lawfully detained when the officer reasonably suspects that the person is carrying a concealed weapon or a dangerous instrument, and that a frisk is necessary to protect the officer or others. A frisk may be conducted at any time during the stop as long as the officers actions can be justified.

NOTE: A detention, by itself, does not justify a frisk.

M. Basis for frisk

1. To "frisk" or "pat-down" a suspect for weapons, the officer must have a lawful detention and reasonable suspicion that the subject is carrying a concealed weapon or dangerous instrument. The reasonable suspicion standard is generally independent of why the suspect was originally detained; in other words, an officer must first be able to explain why the subject was stopped, and then why he or she felt that the detainee was carrying a concealed weapon.

2. An officer who conducts a frisk must be able to articulate specific facts which cause the officer to believe that the suspect is carrying a concealed weapon or dangerous instrument. Simply a statement that an officer feared for his or her safety is not sufficient to justify a cursory search (frisk).

3. The following list (which is not all-inclusive) contains some of the factors and examples which the courts have recognized as being solid contributors in establishing "reasonable suspicion" for a frisk. It must be remembered, however, that most of these facts may not stand alone, and it is important for the officer to include in the report as many of the items listed below as are relevant.

a. Person's appearance: Does the suspect's clothing bulge in such a manner as to suggest the presence of any object capable of inflicting injury?

b. The person's actions:

(1) Did the suspect make a furtive movement as if to hide a weapon?

(2) Is the suspect overly nervous during the course of the detention?

(3) Are the suspect's words or actions threatening?

c. Prior knowledge:

(1) Does the officer know if the suspect has a police record for weapons offenses or for assaults on peace officers (or others)?

(2) Does the officer know if the person has a reputation or history for carrying weapons or for violent behavior?

d. Location:

Is the area sufficiently isolated so that a law enforcement officer is unlikely to receive immediate aid if attacked?

e. Time of day

(1) Is the confrontation taking place at night?

(2) Would this factor contribute to the likelihood that the officer might be attacked?

f. Police purpose:

(1) Was the suspect detained for a serious or violent offense?

(2) Was the suspect detained for an armed offense? (In this case, the reasonable suspicion used for the stop would also justify the reason for a frisk)

g. Companions

(1) Did the officer detain several people at the same time?

(2) Did the frisk of a companion suspect reveal a weapon?

(3) Does the officer have immediate assistance to handle the number of persons detained?

N. Discovery of a weapon or possible weapon during a frisk

1. If an officer feels an object which he or she reasonably believes is a weapon, dangerous instrument or a hard object which could be used as a weapon, the officer has a right to remove it from the person.

a. If the weapon or dangerous instrument is not illegal to possess, the officer should remove it from the subject, keep it until the detention has concluded and then return it to the subject.

b. If the weapon or dangerous instrument is unlawful to possess, the officer should seize the object, ask appropriate questions, place the person under arrest and conduct a full custody search for additional weapons.

NOTE: Generally, there is no need to "jump the gun" regarding the arrest. It is legal, and often smarter, to conduct non-custodial questioning <u>first</u> (no Miranda needed). Once an arrest is made, Miranda applies and may prevent questioning. Also, a "full search" can be made as soon as probable cause to arrest is developed. It is not necessary to make the arrest before the search (Rawlings v. Kentucky, People v. Nieto, People v. Adams, etc.)

c. If the suspect has a container on his/her person, the officer may check it only if it is capable of containing a weapon or dangerous instrument and the officer reasonably believes that it does.

2. Inadvertent discovery of another object:

If an officer removes a suspected weapon or other dangerous instrument from a person and simultaneously discovers another object which is unlawful to possess, the officer has the right to seize the second object.

O. Discovery of a seizable item which is not a weapon or dangerous instrument

1. If an officer conducting a frisk feels what is believed to be a seizable item (such as narcotics) but not a hard object which has the potential to be used as a weapon, the officer **should temporarily ignore the "soft object" and continue the search for weapons**. Since frisks are only allowed for the discovery of weapons or potential weapons, removal of suspected narcotics which pose no danger to the officer exceeds the permissible scope of the frisk.

2. Once it has been determined that the suspect does not have any weapons, the officer may ask the suspect what kind of drug(s) he/she is carrying.

a. If the suspect admits that it is narcotics or some other contraband, the officer has probable cause to arrest and can then conduct a full search.

b. If the suspect denies carrying contraband, the officer must rely on (because it is too late to feel again) other factors and observations (such as the size, shape, aroma, etc.) to establish probable cause, or otherwise release the subject. Ordering the subject to empty his/her pockets, or the use of coercive techniques to induce the subject to reveal the contents will invalidate the seizure in court.

It is always desirable, however, to consider requesting **consent**. Seeking consent is always an available "independent source" for all **non-exigent activity**.

3. If an officer, while conducting the frisk, **immediately** recognizes an item as contraband, it can be seized after the frisk is completed.

III. RECOGNIZING PROBABLE CAUSE

A. The legal standard for an arrest - probable (reasonable) cause

1. Probable cause and reasonable cause are synonymous terms. The word "cause" in this context indicates that sufficient facts exist to justify an arrest.

2. Definition: Probable cause is usually defined as a set of facts that would cause a person of ordinary care and prudence to honestly believe and strongly suspect that the person being arrested may have committed a crime.

   In other words, an arresting officer needs enough factual information to make an average, reasonable officer believe or strongly suspect that an individual is guilty of a crime.

   a. The facts required to establish probable cause may be obtained by direct, circumstantial or even second hand statements ad reports.

   b. The facts required to establish probable cause need not be conclusive; only that amount which would lead the officer (or someone else with comparable training and experience) to believe that the individual arrested committed the crime.

   c. No arrests are made "on suspicion of..." Frequently the media reports that suspects have been arrested on suspicion of a crime or have been arrested pending further investigation. The term "suspicion" is legally connected with justifying detentions, and denotes a lack of probable cause.

3. The test for determining the reasonableness of an arrest:

   The facts must be such that any reasonable peace officer, given like training and experience, in a similar situation would have come to the same conclusion (the objective test).

IV. ELEMENTS OF AN ARREST

A. Elements of a lawful arrest:

1. An arrest may be made by a peace officer or private person

2. The arrested person must be taken into custody, in a case and in the manner authorized by law

3. An arrest may be made by actual restraint of the person or the arrested person's submission to custody

4. Reasonable force may be used to effect an arrest, prevent escape or overcome resistance

B. Definition: An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person. (Penal Code Section 834)

1. The key word in this definition is "custody." There is no such thing as a "noncustodial" arrest. The word "custody" implies that the person making the arrest must be close enough to have control.

2. An arrest may be made by actual restraint of the person or the arrested person's submission to custody.

C. Reasonable force may be used to effect an arrest, prevent escape or overcome resistance.

1. Use of force to effect an arrest (Penal Code Section 835a)

a. Any peace officer who has reasonable cause (probable cause) to believe that the person to be arrested has committed a public offense may use reasonable force to effect an arrest, to prevent escape or overcome resistance.

b. Reasonable force is defined as the minimum amount of force required or necessary to gain compliance and/or make an arrest. This will vary depending on the situation. A peace officer need not retreat or desist from their efforts to make an arrest by reason of force or threatened force.

c. Resistance to an unlawful arrest

(1) Peace officers - Private persons may not resist an arrest made by a peace officer even if the arrest is unlawful (made without probable cause).

(2) Since there is a civil remedy for a false arrest (civil suits against the officer and his/her department), private persons are not permitted to resist any arrest made by a peace officer.

NOTE: The law allows a person being arrested to resist **excessive** force.

(a) A peace officer may not assault or beat a prisoner. (felony under Penal Code Section 149)

(b) Inhumanity to prisoners (Penal Code Section 147)

(3) Private persons

(a) A private person may resist what he or she believes to be an unlawful arrest if the arresting party is also a private person.

D. There is no age limit on who may make an arrest; the law requires however that a person be old enough to know the consequences of his/her act.

E. The term "citizens arrest" is a misnomer as Penal Code Section 834 makes no mention of a requirement that person making an arrest be a "citizen." Any person who is a victim, a witness, or one, who of his/her own knowledge, knows that a public offense has been committed, may make a "private person's" arrest.

V. PEACE OFFICER AUTHORITY TO MAKE AN ARREST

A. Warrantless arrests for misdemeanors

1. In order for a peace officer to arrest a person for a misdemeanor crime, the officer must have:

   a. Probable cause to believe

   b. that the suspect being arrested committed a misdemeanor and

   c. **the misdemeanor occurred in the officer's presence.**

2. "In his/her presence" means: When an officer has personal knowledge that the offense in question has been committed. This definition has been expanded to include any facts which are perceived through the use of any of the officer's five senses.

3. Exceptions: An officer may make a warrantless arrest for a misdemeanor **not** committed in his/her presence in the following situations:

   a. 625 W & I - Juveniles: A juvenile may be arrested for a misdemeanor even though the crime did not occur in the officer's presence.

   b. 40300.5 VC - Driving under the influence combined with other acts

      A person may be arrested when an officer has probable cause to believe that the person had been driving under the influence and was:

      (1) involved in an accident, or

      (2) observed by the peace officer in or about a vehicle which is obstructing a roadway

   NOTE: There is no requirement for the suspect to flee or attempt to flee (hit & run). There is also no requirement that the officer personally witness the driving.

   Recent case law has expanded the term "accident" to include volitional acts. (Refer McNabb v. DMV)

   c. Penal Code Section 243.5 - Battery on School Grounds: When a person commits an assault or battery on school property during school hours, a peace officer may arrest regardless of whether or not the crime was committed in his or her presence.

   d. Penal Code Section 12031(a)(2) - Carrying a loaded firearm

4. Citations for infractions (Penal Code Section 853.5)

a. A person arrested for an infraction shall be released on a citation in the absence of certain conditions specified in the section.

b. If the person refuses to sign an infraction citation or fails to provide satisfactory evidence of personal identification, the person may be taken before the nearest magistrate or incarcerated.

5. Citations for misdemeanors (Penal Code Section 853.6)

a. A misdemeanor citation different than an arrest in that an arrest is taking a person **into custody**. If the person is detained and cited to appear on a misdemeanor **in lieu of custody**, there is no arrest (People v. McGaughran).

b. Penal Code Section 853.6(i) requires that a person be released on a misdemeanor citation in lieu of incarceration unless one of the following conditions exists:

(1) The person is intoxicated and a danger to himself or others

(2) The person requires medical treatment

(3) The person was arrested under one or more of the circumstances listed in Vehicle Code Section 40302 or 40303

(4) The person has one or more outstanding warrants for the person

(5) The person could not provide satisfactory evidence of personal identification

(6) Prosecution would be jeopardized by the person's immediate release

(7) Reasonable likelihood that the offense would be continued or that the safety of persons or property would be imminently endangered by release of the person

(8) The person demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice.

c. By signing the misdemeanor citation the person arrested is agreeing to appear in court on the date specified in lieu of being incarcerated.

6. Peace officers are **not** required to make an arrest

a. Peace officers are not required by the Penal Code to make an arrest either on or off duty. The language of Penal Code Sections 836 and 837 specifically states that peace officers **may** make an arrest and then

describes the conditions. In other words, officers have the authority and discretionary power to decide when or when not to make an arrest.

NOTE: Reference should be made to Penal Code Section 142 where a peace officer is legally required to **receive** custody of a person under private person's arrest.

b. The standard for making any arrest is that it must be reasonable and prudent.

7. Peace officers have a right to summon assistance in making an arrest. (Penal Code Section 150)

B. Warrantless arrests for felonies

1. In order for a peace officer to arrest a person for a felony crime, the officer must have

a. probable cause to believe

b. that the suspect being arrested committed a felony.

NOTE: It does not matter whether or not the crime occurred in the officer's presence.

2. Reasonable mistakes - As long as there was probable cause, a peace officer is protected from civil liability for a false arrest even if he or she has

a. arrested the wrong person - (where a subsequent investigation proved that the wrong person had been arrested); or

b. arrested a person even though there was no felony committed.

C. Warrant arrests

1. An arrest warrant is an order signed by a magistrate directed to any peace officer in the state of California commanding that a person be taken into custody and brought before the court. The issuance of a warrant stops the Statute of Limitations.

a. In order to be valid, a warrant must contain certain information. Any officer who intends to serve a warrant must verify that it is still in effect and contains all of the requirements listed below:

(1) Name of person to be arrested

(2) Charge(s)

(3) Bail

(4) Date of issuance

(5) Judge's signature

(6) Court (jurisdiction)

b. Only peace officers may make warrant arrests.

2. An officer is not required to have the warrant in possession in order to make the arrest.

3. If the arrestee demands it, they must be shown the original or a copy of the warrant as soon as practical.

VI. DAYTIME AND NIGHTTIME ARRESTS

A. Felony: An arrest for the commission of a felony may be made on any day and at any time of the day or night.

B. Misdemeanor or infraction: An arrest for the commission of a misdemeanor or an infraction cannot be made between the hours of 10 p.m. of any day and 6 a.m. of the succeeding day, unless:

1. The arrest is made without a warrant, pursuant to Penal Code Sections 836 (offense in the officer's presence) or 837 (private person's arrest); **or**

2. The arrest is made in a public place;

C. Times an arrest warrant may be served:

1. Any warrant may be served in a **public place** at any time, day or night.

2. If not served in a public place, a warrant must be served between the hours of 6 a.m. and 10 p.m. of any day, unless

a. the arrest warrant is endorsed for "night service", or

b. the arrest warrant is served when the person is already in custody for other charges.

VII. LEGAL REQUIREMENTS FOR ENTRY TO MAKE AN ARREST

A. Entry into a residence - Requirements of "knock and notice" prior to making a forcible entry (Penal Code Sections 844 (without a search warrant) and 1531 (with a search warrant)

1. Officers who intend to enter a building or enclosure for the purpose of making an arrest must give sufficient notice to allow the occupants the chance to peaceably admit the officers.

2. The intent of the "knock and notice" requirement is to avoid violent confrontations between the police and occupants of the building. It applies to all entries either with or without a warrant.

3. "Knock and notice" is not required in those areas of a business open to the public.

B. Who may make entry

1. Private person - may enter only to arrest for a felony

2. Police - may enter to arrest for either a felony or misdemeanor

C. Requirements for entry

1. "To make an arrest...(the person intending to make the arrest) may break open the door or window of the house or dwelling in which the person to be arrested is, or in which they have reasonable grounds for believing him to be..." The requirement also applies to tents, motorhomes, etc.

2. The term "break" or "forced entry" means any entry; walking through an open exterior door would be considered a "break" or "forced entry."

3. At the exterior door and (depending on the specific circumstances) at all closed interior doors, officers must:

a. Knock or announce presence, and

b. Identify themselves as peace officers - it is not required that the officer's name be given, and

c. State purpose and authority (e.g. "arrest warrant") for the entry

d. Demand entry

e. Wait a reasonable period of time before entering - (long enough for the occupants to respond)

D. Exceptions to the "knock and notice" requirement:

1. An officer does not have to comply with the "knock and notice" requirements if he/she can show that to do so would result in one of the conditions listed below:

   a. Increased peril to officers or occupants

   b. Destruction of evidence

   c. Suspect attempting to flee

2. There is no such thing as a "no-knock" warrant. The decision of whether or not any of the above described conditions exist is left solely to the discretion of the officer.

E. Entry to make an arrest inside a residence generally requires a warrant

1. To make an arrest inside the suspect's residence, an arrest warrant is necessary unless an emergency exists which relieves the officer of the warrant requirement (People v. Ramey, 16 C3d 263-1976, and Payton v. U.S., 445 U.S. 573-1980).

2. The rule affects only arrests in homes, hotel rooms, etc., and does not apply to arrests in public places or commercial establishments open to the public, but it does apply to places of business not open to the public (People v. Lee - involving a lawyer's office).

3. Warrantless, non-consentual, non-exigent entry violates Ramey-Payton, regardless of when probable cause is developed, and whether or not entry is to arrest, detain, or investigate. It is the unauthorized entry that violates the 4th Amendment, not the purpose.

4. The rule only applies for an arrest <u>inside</u> a dwelling. If the officer can convince or trick the suspect to come out of the dwelling, an arrest without a warrant would be valid.

5. A violation of the "Ramey" rules does not prevent prosecution of the suspect, but may result in the suppression of evidence and civil liability.

F. Exceptions to the need for a warrant:

1. The officer has **consent** to enter, or

2. Any of the following **exigent** (emergency) **circumstances** exist:

   a. Danger to officers/others

      When there is probable cause to believe the suspect is armed with a deadly weapon, officers are not required to first obtain a warrant before making an arrest. NOTE: This fact alone does not necessarily justify warrantless entry because people may lawfully arm themselves in their own homes

   b. "Hot pursuit"/"fresh pursuit"

(1) An officer need not give up a chase just because the suspect reached their home. There is not even a requirement that the officer keep the suspect in sight.

(2) An arrest will be valid even though the officer never sees a suspect prior to the actual arrest provided there is a continuous, uninterrupted effort to locate the suspect and the offense suspected is inherently dangerous to life or limb (Welsh v. Escudero. etc.)

c. The officer has reliable information or reasonably believes the suspect is destroying evidence.

d. Forestall the imminent escape of the suspect

e. Imminent danger of serious damage to property

3. If an arrest or detention is lawfully attempted in a public place, including an open door, and the suspect flees or retreats within, the officer may enter to complete the arrest (People v. Lloyd, US v. Santana, etc.)

VIII. INFORMATION PROVIDED TO AN ARRESTED PERSON

A. Elements of an arrest (Penal Code Section 841)

1. The person making the arrest must inform the person to be arrested of the following:

   a. the cause (or reason) for the arrest

   b. the intention of the person making the arrest

   c. the authority to make the arrest

2. Exceptions - the requirements of Penal Code Section 841 are not mandatory when a suspect is:

   a. engaged in the commission or attempted commission of a crime

   b. fleeing or attempting to escape from the commission of a crime

IX. FOLLOW-UP REQUIREMENTS AFTER AN ARREST

A. Disposition of an arrested person

1. Misdemeanor release citations

a. The Penal Code requires that a person arrested for infractions or misdemeanors shall be released on a citation in the absence of certain conditions specified in Penal Code Sections 853.5 (infraction releases) and 853.6 (citation releases with exceptions). See Performance Objective 3.38.1.

b. A Misdemeanor Release Citation requires that all of the conditions for an arrest be met.

c. The person being arrested is agreeing to appear in court on the date and specified time in lieu of being incarcerated.

d. Except as otherwise provided by law, a person who is arrested for an infraction may be cited and released. The arrestee may only be taken into custody if he/she fails to present identification or refuses to sign the written promise to appear. Penal Code Section 853.3.

2. Appearance before magistrate

a. The defendant must in all cases be taken before a magistrate without unnecessary delay and, in any event, within two days after his arrest.

b. After such arrest, any attorney at law entitled to practice in the courts of record in California may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested, any time of the day or night. An arrested person may decline to meet with an attorney.

c. Any officer having charge of the prisoner so arrested who willfully refuses to allow such attorney to visit a prisoner is guilty of a misdemeanor. (Penal Code Section 825)

d. Any officer having a prisoner in charge who refuses to allow any attorney to visit the prisoner when proper application is made therefore, shall forfeit and pay to the party aggrieved the sum of five hundred dollars to be recovered by action in any court of competent jurisdiction.

e. Any physician and surgeon, including a psychiatrist, licensed to practice in this state, who is employed by the prisoner or his attorney to assist in the preparation of the defense, shall be permitted to visit the prisoner while he is in custody. (Penal Code Section 825.5)

B. Officer's requirements when making an arrest pursuant to a warrant (Penal Code Section 848)

1. Duty of officer arresting with a warrant. An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law.

C. Officer's requirements when making a warrantless arrest (Penal Code Section 849(a))

1. When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

D. Releasing suspects from custody (Penal Code Section 849(b))

1. Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

a. The officer is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested (Penal Code Section 849) (b)(1))

b. The person arrested was arrested for intoxication only, and no further proceedings are desirable (Penal Code Section 849 (b)(2))

c. The person was arrested only for being under the influence of a controlled substance drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable (Penal Code Section 849 (b)(3))

E. Record of release (Penal Code Section 849(c))

1. Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a detention only (849c Penal Code Section 851.6)

F. Right of arrested person to make telephone calls

1. Adults

a. Arrested adults have the right to make telephone calls immediately **upon being booked**. Except where physically impossible, they have the right to make: (Penal Code Section 851.5)

(1) at least three completed telephone calls

(2) no later than three hours after the arrest.

2. Juveniles

   a. Arrested juveniles have the right to make telephone calls **upon being taken to a place of confinement**. Except where physically impossible, they have the right to make: (Welfare and Institutions Code 627)

      (1) at lease two completed telephone calls

      (2) no later than one hour after being taken into custody.

3. Charges for suspect's phone calls are

   a. Free if within local dialing area;

   b. At the arrested person's own expense or collect if outside the local area (Penal Code Section 851.5 (a)).

X. PRIVATE PERSON ARRESTS

A. Felony arrest by private persons

1. In order for a private person to arrest someone for a felony crime, the arresting person must have **probable cause** to believe that the suspect being arrested committed a felony.

2. It does not matter whether or not the crime occurred in the presence of the person making the arrest,

3. The felony must, in fact, have been committed.

4. There is no civil liability for a private person who **mistakenly arrests** the wrong person so long as there was **probable cause** and, in fact, a felony was committed.

5. The only difference between felony arrest authority for a private person and felony arrest authority for a peace officer is that in the case of the private person the felony must, in fact, have been committed.

B. Misdemeanor arrest by private persons

1. In order for a private person to arrest another for a misdemeanor crime the suspect being arrested must have committed a misdemeanor in the **presence** of the person making the arrest.

2. The arrest can be made by the victim or any person in whose **presence** the crime was committed.

C. Right of a private person to summon assistance in making an arrest (Penal Code Section 839)

1. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

a. This means that a person making an arrest may ask anyone (including a peace officer) for help.

NOTE: Officers may communicate a victim's (or witness's) intent to make an arrest where the person making the arrest is unwilling to directly confront the suspect.

b. The person being requested is under no legal obligation to assist.

D. Duty of a private person making an arrest (Penal Code Section 847)

1. A private person who has arrested another for the commission of a public offense (any crime) must

a. without unnecessary delay

b. take the person arrested before a magistrate, or

c. deliver him/her to a peace officer.

XI. REFUSAL TO ACCEPT AN ARRESTED PERSON

A. Duty of officer to accept custody of a prisoner arrested by a private person

An officer is required to take custody of a person who has been arrested by a private person. Any officer who willfully refuses to receive or arrest such person has committed a crime classified as a felony, and shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the state prison or in county jail not exceeding one year; or by both such fine and imprisonment. (Penal Code Section 142)

B. The requirement to take custody is binding even if the arrest is unlawful.

1. If the officer believes that the arrest is unlawful, he or she should advise the arresting person of that opinion; however, that does not alter the officer's duty to take custody of the prisoner when so directed by the person making the arrest.

2. The law dictates that if the arresting private person is adamant, the arrest must be accepted even if the officer feels it is an illegal arrest.

C. Liability

In accepting a prisoner from a private person, an officer does not incur any liability if the arrest is later determined to have been unlawful. (Penal Code Section 836.5)

D. Satisfying the requirements of Penal Code Section 142

1. An officer has complied with the requirement of Penal Code Section 142 when he or she has taken custody of the prisoner. In so doing, the officer has five options:

a. Release - If the officer feels that the arrest is unlawful, he or she may unconditionally release the prisoner pursuant to Penal Code Section 849(b)(1).

(1) Any release of a prisoner under this option must be documented see Penal Code Section 851.6

(2) The status of anyone released pursuant to Penal Code Section 849(b)(1) shall be deemed a detention only, and not an arrest.

(3) Once an officer has complied with Penal Code Section 142, the person making the arrest cannot insist on further action regarding that particular incident.

b. Seek an Arrest Warrant: Fill out the appropriate forms to request that a complaint be filed and that a warrant of arrest be issued for the suspect. This does not constitute an arrest, and the suspect must be released once all relevant identifying and crime information has been obtained.

c. Issue a misdemeanor release citation (Penal Code Section 853.6): If there was a crime committed and the victim is willing to prosecute, the officer should issue a Misdemeanor Release Citation to the suspect.

NOTE: Depending on department policy, the arresting person may be required to sign as the "arresting party".

d. Book the suspect into jail: If permitted by statute and local policy, the suspect may be booked into jail.

e. Take the arrested person before the nearest, most accessible magistrate.

XII. EXEMPTION FROM FALSE ARREST CIVIL LIABILITY

A. There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer acting within the scope of authority, for false arrest or false imprisonment arising out of any arrest when: (Penal Code Section 836.5)

1. Such arrest was lawful or when the officer, at the time of the arrest, had probable cause to believe the arrest was lawful

2. Such arrest was made pursuant to a charge, based upon probable cause, that the person arrested had committed a felony

3. The officer was required to receive or arrest a person in order to comply with Penal Code Section 142 (i.e., accepting a person arrested by a private person)

4. A magistrate orally orders an officer to arrest a person who is committing a public offense in the magistrate's presence (Penal Code Section 838)

5. An officer is responding to an oral request for assistance in making an arrest (Penal Code Section 839)

B. Obligation to make an arrest

1. Police officers are not required by the Penal Code to make an arrest either on or off duty. The language of Penal Code Sections 836 and 837 specifically states that police officers may make an arrest under circumstances; in other words, officers have the authority and discretionary decision making power to decide when, or when not to make an arrest.

2. The standard for making any arrest is that it must be reasonable and prudent.

XIII. EXCEPTIONS TO POWERS OF ARREST

A. Circumstances where an officer is precluded from making an arrest:

1. Diplomatic Immunity

a. In general, persons who are covered under diplomatic immunity are not prosecutable for any crime or tort they commit. An officer who arrests such a person would be guilty of a federal felony (22 U.S.C. 252, 253).

b. In a serious crime, officers should:

(1) Detain the offender (diplomat)

(2) Call for a supervisor

(3) Initiate an investigation

(4) Follow departmental procedure regarding the notification of the U.S. State Department.

NOTE: The California Office of Emergency Services (OES) has the liaison responsibility between California law enforcement and the United States Department of State in matters of diplomatic immunity. OES maintains a 24 hour telephone service.

2. "Stale Misdemeanor" rule

a. Not only must the misdemeanor be committed in the presence of the officer, but the officer must make the arrest at the time the crime occurred or within a "reasonable time thereafter." The words "reasonable time thereafter" means the officer had to be in continuous fresh pursuit; i.e. didn't stop looking for the suspect until found.

b. When an officer sees a person who has committed a misdemeanor but not within the scope of fresh pursuit, the officer should not make an arrest but may:

(1) Detain and identify the suspect, and

(2) Seek a warrant of arrest (Notify Warrant) through the local prosecuting agency

c. Violation of the "Stale Misdemeanor" rule makes the arresting party a "legal trespasser" and subject to false imprisonment charges (Penal Code Sections 236 & 237)

d. The "Stale Misdemeanor" rule also applies to arrests made by private persons.

3. Statute of Limitations

a. Purpose: The philosophy for having a statute of limitations is based on the common law premise that a person must be brought to trial within a reasonable amount of time after the commission of a crime. In reality, the longer a crime remains unsolved, the more the chances of developing clues and/or making an arrest diminish.

b. Time restraints: There is no statute of limitations for any crime punishable by death or imprisonment in the state prison for life or life without the possibility of parole, or for the embezzlement of public funds (Penal Code Section 799).

(1) Most felonies - 3 years

(2) Most misdemeanors - 1 year

XIV. ADMINISTRATION OF MIRANDA WARNING

A. Must Mirandize if suspect is in custody and will be interrogated

1. **Custody**: Custody is objectively determined by the totality of circumstances, and is limited to formal arrest or equivalent restraint (California v. Beheler, Berkemer v. McCarty, Minnesota v. Murphy, Stansbury v. California)

NOTE: Miranda warnings are not required simply because police question someone whom they suspect. The issue is not one of focusing upon a person as a suspect; it is an issue of custody.

Just because the suspect is questioned at a law enforcement facility does not necessarily trigger the Miranda requirement, as long as it is apparent that the suspect is free to leave the facility at will (Oregon v. Mathiason).

2. **Interrogation**: Interrogation means:

a. someone known to the suspect to be an officer engaging in

b. direct questioning about a crime, or

c. **any words or action** likely to elicit an incriminating response.

C. Privilege against self incrimination

1. This privilege is based upon a constitutional guarantee. (Fifth Amendment)

2. This privilege applies to testimonial communication only.

3. This privilege is not violated by requiring the accused to

a. model articles of clothing;

b. participate in a line-up;

c. provide body fluid or other sample for analysis;

d. submit to routine fingerprinting;

e. provide handwriting exemplars;

f. repeat a statement for voice identification;

g. provide routine booking information; or

h. reenact the crime

D. Juveniles

1. In any case where a minor is taken into custody the officer shall advise such minor that

   a. anything they say can be used against him/her;

   b. he/she can remain silent;

   c. he/she have the right to have counsel present during questioning;

   d. he/she have the right to have counsel appointed if unable to afford one.

2. A minor must be advised of their rights whether or not they are going to be questioned (interrogated). The law, however, does not require that they be advised of their rights **immediately** upon arrest as long as the advisement is provided sometime during their custody and/or before any questioning.

XV. LEGAL SUFFICIENCY OF MIRANDA WARNING

A. Admonition

Any statements produced by in-custody interrogation **may** be inadmissible in court unless the suspect is advised of

1. the right to remain silent;

2. the fact that anything the suspect says **may** be used against him in court (People v. Valdivia);

3. the right to have an attorney present while being questioned (People v. Kelly);

4. the right to have an attorney appointed if the suspect cannot afford one.

B. Waiver

After a suspect has been admonished, they may choose to waive the right to remain silent. In order for any statement made after a waiver to be admissible, it must be shown that the waiver was:

1. **Knowingly given** - The subject must understand they have the right to remain silent.

2. **Intelligently given** - The subject must be capable of understanding the admonition and capable of understanding the consequences of the waiver. For example, a subject who does not speak English, but is admonished in English, would not be able to make an intelligent waiver. Likewise, a person incapacitated by injury or intoxication may not be able to intelligently waive his rights.

3. **Voluntarily given** - A statement is involuntary if the suspect was "tricked, threatened, or cajoled" into waiving (Miranda v. Arizona). The waiver must be free of deception

    a. Officers **cannot** use deception (lie or bluff) in order to induce a subject to waive his right to remain silent.

    b. However, once a subject has knowingly, intelligently, and voluntarily waived, you may use deception during the interrogation. The deception must not be of the type which would induce an innocent person to confess to a crime he didn't commit.

C. Invoking Miranda rights

If a subject does not waive their rights, they may invoke their right to:

1. **Remain silent** - No specific language is required to invoke this right.

a. Once a suspect invokes this right, all interrogation must cease.

b. An officer may not re-initiate interrogation about that crime. He may re-initiate interrogation about other uncharged crimes if he "scrupulously honors" the request not to talk about the crime for which the subject was arrested and takes a waiver of the right previously asserted (Michigan v. Mosley).

c. The subject may re-initiate or express a desire to make a statement. In that case, the officer should make a verbatim account of the re-initiation and any volunteered statements, re-admonish, and then interrogate further.

2. **Have an attorney present or speak to an attorney** - Again no specific language is required to invoke this right.

NOTE: The Miranda rule is a procedural safeguard to protect a person's fifth amendment rights. Once a suspect is charged, however, the right to an attorney is guaranteed by the sixth amendment. The sixth amendment bars questioning of a suspect about the charged crime without legal representation, unless the suspect initiates discussion and waives the right to counsel (Stevens v. Sultana, etc.).

a. Once this right is invoked all questioning must cease on this or any other case.

b. An officer may not re-initiate interrogation about the crime for which the subject was arrested or any other crime.

c. When a request for an attorney has been made, a subject may re-initiate. The subject should be re-admonished before interrogation.

NOTE: Many peace officers have been under the impression that if a juvenile requested a parent, grandparent, or probation officer, all questioning must stop. This concept was never a matter of statutory or decisional law, this argument was specifically rejected by the courts (in Fare v. Michael C.). What is important is whether or not the juvenile is attempting to invoke their Miranda rights (e.g. request for an **attorney**).

XVI. EXCEPTIONS TO MIRANDA RULE

A. Exceptions to the Miranda rule

Generally, the Miranda admonition is not required in the following situations:

1. Consensual encounters
2. Traffic stops
3. Detentions
4. Exigent circumstances (Emergency-Rescue Doctrine)
5. General investigative questioning
    a. What
    b. When
    c. Where
    d. Why
    e. Who
    f. How
6. Noncustodial questioning eliciting incriminating statements (e.g., telephone calls)

NOTE: Miranda "custody" can occur during a pedestrian stop or car if arrest-like restraints are used (e.g. handcuffs, guns, cage, excessive show of force), or if the stop is prolonged beyond the bounds of an ordinary temporary detention.

"Investigative questioning" is precisely what is covered by Miranda. Who-what-when questions may very well be "interrogation", if likely to elicit incriminating responses. If the suspect is in custody, Miranda applies. The reason "general on-the-scene questioning" is usually permissible is because it is employed <u>before</u> anyone is taken into custody.

XVII. MIRANDA EXERCISE

A. When a person is in custody and he is going to be interrogated, he must be advised of his Miranda rights. The admonishment must, as a minimum (and at most), include the following elements:

1. Right to remain silent

2. Statements may be used against them

3. Right to an attorney

4. Right to have an attorney appointed

B. After a suspect has been admonished, they may choose to waive the right to remain silent and/or to have an attorney present. In order for any statement to be admissible, it must be shown that the waiver was made under the following situations.

1. **Knowingly given** - The subject must understand they have the right to remain silent.

2. **Intelligently given** - The subject must be capable of understanding the admonition and capable of understanding the consequences of the waiver. For example, a subject who does not speak English, but is admonished in English, would not be able to make an intelligent waiver. Likewise, a person incapacitated by injury or intoxication may not be able to intelligently waive his rights.

3. **Voluntarily given** - A statement (e.g., admission or confession) is voluntary when it is self-motivated with no threats, coercion, promises of leniency, or rewards. Use of deception is not permitted.

   a. You **cannot** use deception (lie or bluff) <u>in order to induce a subject to waive his right to remain silent.</u>

   b. However, once a subject has knowingly, intelligently, and voluntarily waived, you may use deception during the interrogation. The deception must not be of the type which would induce an innocent person to confess to a crime he didn't commit.

C. If a subject does not waive their rights, they may invoke their right to:

1. **Remain silent** - No specific language is required to invoke this right.

   a. Once a suspect invokes this right, all interrogation must cease.

   b. An officer may not re-initiate interrogation about that crime. He may re-initiate interrogation about other uncharged crimes if he "scrupulously honors" the request not to talk about the crime for which the subject was arrested.

c. The subject may re-initiate or express a desire to make a statement. In that case the officer should make a verbatim account of the re-initiation, re-admonish, and then take a statement.

2. **Have an attorney present or speak to an attorney** - Again no specific language is required to invoke this right.

   a. Once this right is invoked all questioning must cease on this or any other case.

   b. An officer may not re-initiate interrogation about the crime for which the subject was arrested or any other crime.

   c. When a request for an attorney has been made, a subject may re-initiate. The subject should be re-admonished before interrogation.

NOTE: Many peace officers have been under the impression that if a juvenile requested a parent, grandparent, or probation officer, all questioning must stop. This concept was never a matter of statutory or decisional law, this argument was specifically rejected by the courts (in Fare v. Michael C.). What is important is whether or not the juvenile is attempting to invoke their Miranda rights (e.g. request for an **attorney**).

PERFORMANCE OBJECTIVES FOR LEARNING DOMAIN #15

3.6.1 Given a word picture depicting possible criminal activity, the student will identify whether the circumstances would provide an officer with the "reasonable suspicion" needed to temporarily detain a suspect. The elements required to establish reasonable suspicion are a set of specific, articulable facts which support an inference that:

A. A crime-related activity has occurred, is occurring or is about to occur, and
B. The person to be detained is connected with that activity

3.6.2 Given a word picture depicting the activities of a suspicious person or persons, the student will identify if there is probable cause to make an arrest. There is probable cause to make an arrest when an officer has knowledge, based on facts, that would cause a reasonable and prudent person to honestly believe and strongly suspect that the person to be arrested is guilty of a crime.

3.6.3 Given a word picture depicting a law enforcement contact with a person, the student will identify if the contact constitutes a consensual encounter. For a contact to be considered a consensual encounter:

A. The person must be under no obligation to cooperate or answer questions
B. The person is free to leave
C. The person must believe they are free to leave

3.8.3 Given a word picture depicting a possible refusal by an officer to accept an arrested person, the student will identify if the crime of refusal is complete, and if it is complete, will identify it by its common name and crime classification. (Penal Code Section 142)

3.38.1 Given a word picture depicting an arrest, the student will identify if the officer had the authority to make the arrest. (Penal Code Section 836)

3.38.2 Given a word picture depicting an arrest, the student will identify if the arrest is lawful based upon the following: (Penal Code Sections 834, 835 and 835a)

A. An arrest may be made by a peace officer or private person
B. The arrested person must be taken into custody, in a case and in the manner authorized by law
C. An arrest may be made by actual restraint of the person or the arrested person's submission to custody
D. Reasonable force may be used to effect the arrest, prevent escape or overcome resistance

3.38.4 Given a word picture depicting an arrest, the student will identify whether or not the officer provided the required information or if an exception applied. (Penal Code Section 841)

A. Required information
   1. The intention to arrest
   2. The reason for the arrest
   3. The authority to make the arrest, unless the officer is in uniform

B. Exception: If the person about to be arrested is committing or attempting to commit a crime, or is being pursued immediately after committing a crime, or is escaping, the officer need not provide this information, unless the arrested person specifically requests it.

3.38.5 Given a word picture depicting the circumstances under which an arrest is made (i.e., time of day, type of crime and place of arrest), the student will identify if the arrest is consistent with the following provisions of Penal Code Section 840.

A. An arrest for the commission of a felony may be made on any day and at any time
B. An arrest for a misdemeanor cannot be made between 10:00 p.m. and 6:00 a.m. unless one of the following exceptions exists:
   1. The person has committed the offense in the officer's presence (Penal Code Section 836)
   2. The arrest is made in a public place
   3. The arrest is made while the person is in custody for another offense
   4. The arrest is made pursuant to a warrant authorizing service anytime of the day or night

3.38.6 Given a word picture depicting an arrest situation, the student will identify what the peace officer is required to do with the person arrested. (Penal Code Sections 825, 848, 849, 851.5, 853.5, and 853.6)

3.38.7 Given a word picture depicting an officer entering a premises to make an arrest, the student will identify those situations where the legal requirements of such entry were fulfilled. (Penal Code Section 844)

3.38.9 Given a word picture depicting a "private person" arrest, the student will identify if the arrest is legal. (Penal Code Section 837)

A. A private person may make a lawful arrest when:
   1. A suspect commits a misdemeanor in the person's presence, or
   2. The suspect has in fact committed a felony, although not in the person's presence
   3. A felony has in fact been committed, and the person has probable cause to believe that the suspect committed it (Penal Code Section 837)
B. After making the arrest, the person must take the arrested suspect before a magistrate or deliver him to a peace officer without unnecessary delay (Penal Code Section 847)

3.38.12 Given a word picture depicting an officer making an arrest based upon the following situations, the student will identify if the officer is civilly liable for false arrest or false imprisonment: The officer is immune from liability when: (Penal Code Section 847)

A. Such arrest was lawful or when the officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful
B. Such arrest was made pursuant to a charge, based upon reasonable cause, that the person arrested had committed a felony
C. The officer was required to receive or arrest a person in order to comply with Penal Code Section 142 (i.e., accepting a person arrested by a private person)

D. A magistrate orally orders an officer to arrest a person who is committing a public offense in the magistrate's presence (Penal Code Section 838)
E. An officer is responding to an oral request for assistance in making an arrest (Penal Code Section 839)

3.38.13 Given a word picture depicting a situation where an officer has probable cause to make an arrest, the student will identify if any of the following exceptions to Penal Code Section 836 would prevent the officer from making the arrest.

A. Diplomatic immunity
B. "Stale misdemeanor" rule

8.8.1 Given a word picture depicting an encounter between an officer and a suspect, the student will identify if the circumstances of the encounter require the officer to provide the suspect with his rights under the Miranda ruling. A suspect must be advised of his Miranda rights when:

A. The suspect is a minor taken into custody in accordance with Welfare & Institutions Code Sections 601 or 602, or for violating an order of the juvenile court, or for escaping from a juvenile court-ordered commitment (Welfare & Institutions Code Section 625)
B. The suspect is an adult in custody who the officer is about to interrogate

8.8.3 Given a word picture depicting an officer advising a suspect of his "Miranda rights", the student will identify if the advisement is legally sufficient (i.e., does the advisement protect the suspect's constitutional rights). In order to protect the suspect's rights and make subsequent statements admissible as evidence, the following conditions must be satisfied:

A. The officer must inform the suspect of his Fifth and Sixth Amendment rights and warn him that anything he says may be used against him. The Miranda warning has the following elements:
    1. The suspect has the right to remain silent
    2. Anything the suspect says can and will be used against him in a court of law
    3. The suspect has the right to talk to a attorney and have the attorney present while being questioned
    4. If the suspect cannot afford an attorney, one will be appointed to represent him free of charge
B. The suspect must make a knowing, intelligent, and voluntary decision to waive his rights
C. The suspect must **NOT** have invoked his right to remain silent
D. The suspect must **NOT** have invoked his right to an attorney

8.8.4 Given a word picture depicting a situation where one of the following exceptions to the Miranda rule may be present, the student will identify if the situation is one of these exceptions:

A. Consensual encounters
B. Traffic stops
C. Detention

D. Exigent circumstances (Emergency-Rescue Doctrine)
E. General investigative questioning (5 w's and how)
F. Noncustodial questioning eliciting incriminating statements (e.g., telephone calls)

EXERCISE:

8.8.2 Given an exercise depicting person(s) acting suspiciously, the student will safely approach, contact, and interview the person(s) and, if arrested, advise of Miranda rights before interrogation.

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

Stops and Frisks

The Frisk

General Rules of Consent Searches

STOPS AND FRISKS

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 of reasonable grounds to detain suspects based upon de-tailed 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 fit 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--16 C3 242 - if transporting only, and the defendant was not under arrest, then his 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 or reputation of person stopped.
4. Number and size of officers making stop.
5. Number and size of suspects stopped.
6. Demeanor of suspect.
7. Clothing suggests weapon.
8. Companion found to be armed.
9. Stop in high-risk crime area.
10. Suspect makes move as if reaching for a weapon.

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. More-over, 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 conclusive 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)

4. 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

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