POLICE CIVIL LIABILITY LAWSUITS IN CALIFORNIA

By Matthew J. Orebic, Deputy City Attorney for City of Berkeley
League of California Cities®
Webinar
July 23, 2014

DISCLAIMER: *This paper is not offered as or intended to be legal advice. Readers and webinar attendees should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

Table of Contents

INTRODUCTION

This paper provides an overview of police civil liability issues in California under federal law (42 U.S.C. section 1983) and state law. Preliminary matters such as whether to remove the case to federal court, the pre-lawsuit claim requirement, and the applicable statute of limitations are discussed first. After reviewing the threshold liability issue of duty, including whether a "special relationship" with an officer arises, the paper turns to claims involving detention, arrest, search, use of force, retaliation, and discrimination. Liability issues arising out of cases involving taking a person into protective custody under Welfare and Institutions Code section 5150 are discussed in some detail in light of the recent cases of *Hayes v. County of San Diego* and *Sheehan v. City and County of San Francisco.* California civil rights laws that arise in police civil liability cases, such as Civil Code sections 51.7 and 52.1 and the California Constitution, are also discussed. The paper then turns to the defenses of qualified immunity for federal claims and several statutory immunities for state tort claims. The final sections address the discovery rules governing police personnel files, the use of formal settlement offers to reduce a plaintiff's claim for attorney's fees, and bifurcation motions and motions *in limine* to exclude prior complaints against an officer at trial, while allowing evidence of a plaintiff's prior arrests.

I. REMOVAL TO FEDERAL COURT - FACTORS TO CONSIDER

Police civil liability lawsuits that contain both state and federal claims can be filed in either state or federal court.[1] Such lawsuits typically include a federal claim under 42 U.S.C. section 1983. Therefore, if a lawsuit is filed in state court with a Section 1983 claim, the defendants may remove the lawsuit to federal court.[2] The rules governing removal from state to federal court are technical, strictly construed, and beyond the scope of this paper.[3] However, the decision whether to remove the case must be made *immediately* at the outset of the case and typically in unison with the other defendants.[4]

There are several important differences between state and federal court to consider when deciding whether to remove a police civil liability case to federal court. First, police officer personnel files are more difficult to obtain in state court than in federal court, as will be discussed below. Therefore, if defense counsel feels disclosing a defendant police officer's personnel file regarding third party citizen complaints will be problematic, even if the files are disclosed under a protective order and are not likely to come into evidence at trial, he or she may want to consider not removing a police civil liability lawsuit filed in state court.

Second, in certain counties, a Superior Court jury pool may be less favorable than a District Court jury pool for a police officer defendant. This will vary by county, but there is little

---

1 *Williams v. Horvath,* 16 Cal.3d 834 (1976).

2 28 U.S.C. § 1441(b).

3 *See* Rutter Group *California Practice Guide, Federal Civil Procedure Before Trial* for the procedural requirements for removal.

4 *Id.*

question that a juror's past personal experiences with police officers will influence the juror's perception of a police civil liability case. Thus, whether the jury pool is more favorable in state or federal court should also be considered in the decision whether to remove a case.

Third, if a summary judgment motion is more disfavored in the local superior court than the local federal district court, this factor should also be considered because often there is a possibility of success on a partial or full summary judgment motion. In federal court the judge can also summarily adjudicate a single issue, whereas, in state court a summary adjudication motion must eliminate an entire cause of action.[5] Thus, if a discrete issue in the case is subject to summary adjudication in federal court but not state court (because the issue would not dispose of an entire cause of action), removal to federal court may be preferable.

Finally, in a multi-plaintiff case, in federal court under Federal Rule of Civil Procedure 68, a cost-shifting offer to settle can be conditioned on *all* the plaintiffs accepting the various offers. However, in state court, under Code of Civil Procedure section 998, such a conditional cost-shifting settlement offer is not allowed.

II. THE PRE-LAWSUIT CLAIM REQUIREMENT FOR STATE LAW CLAIMS

The pre-lawsuit claim requirement of the Government Claims Act (Gov. Code §§810-996.6) (formerly called the Tort Claims Act) applies to claims asserted under state law, but not federal law.[6] The CEB treatise on *Government Tort Liability Practice* is an excellent resource to research the law governing the pre-lawsuit claim requirement. The requirement is only touched on here and is beyond the scope of this paper. However, if involved early enough, defense counsel should carefully monitor the claim process to evaluate the sufficiency, accrual, tolling, and timeliness of a claim as governed by Government Code sections 901, 905, 910, 911.2, 911.3, 911.4, 913, 915, 935, 945.3, 945.4, and 945.6.

Government Code section 945.4 (when read together with Section 950.2) provides that no lawsuit can be brought against a public employee for which a claim is required "until a written claim therefor has been presented" to the public entity. However, the employee need not be named in the claim even if known to the plaintiff.' Failure to submit a pre-lawsuit claim is fatal to a state tort law cause of action.[8] In fact, failure *to allege compliance* in the complaint with the pre-lawsuit claim requirement is fatal to a state tort law claim for damages, and the claim must be dismissed at the demurrer stage under Section 945.4.[9]

Under Government Code section 911.2, the deadline to submit a pre-lawsuit claim for an "injury" to a person or personal property is six months, whereas other claims must be

---

[5] *Cf.* Code of Civ. Proc. §437c with Fed.R.Civ.Proc. 56.
[6] *Williams, supra,* 16 Cal.3d 834.
[7] Gov. Code § 950.
[8] *Janis v. State Lottery Comm'n,* 68 Cal.App.4th 824, 832 (1998).
[9] *State v. Superior Court (Bodde),* 32 Cal.4th 1234, 1239 (2004).

submitted within one year. The word "injury" in Section 911.2 includes harm to the body, emotional distress, and reputation.° The issue of whether the word "injury" also includes a violation of civil rights brought under Civil Code section 52.1 (discussed below) has apparently not yet arisen in case law.

The most important mistake for defense counsel to avoid is an inadvertent waiver of the late claim defense due to failure to *return* (not deny) a late claim within 45 days.[11] There is no case law on the issue of whether the late claim defense is preserved if the claim appears timely on its face, but in fact is not timely submitted. While that is likely the rule, whenever it appears a claim might be untimely in whole or in part, the best practice is to proactively investigate the actual accrual date(s) and, if late in whole or in part, *return* the claim or the late part of the claim within 45 days.

III. THE GOVERNMENT CLAIMS ACT — A DEFENSE AS TO UNIQUE POLICE FUNCTIONS?

The fundamental principle of the Government Claims Act is that public entities and employees are only liable to the extent provided by statute.[12] The Act governs the potential liability of public entities and their employees and confines it to "rigidly delineated circumstances." [13] [14] Under Government Code section 820(a), a public employee, such as a police officer, may be held liable "to the same extent as a private person" under general tort principles, and when such liability arises, the entity is typically vicariously liable under Government Code section 815.2(a).[15] There are no cases discussing whether Government Code section 820(a) should apply to police officers when they are providing a service or engaging in conduct for which there is *no equivalent* in the private sector. For instance, it is unclear if Sections 815 and 820(a) of the Act would preclude a claim against a police officer (and therefore the entity as well) for incorrectly executing a search warrant, which is a court order, because a private person cannot engage in such a task.

IV. STATUTE OF LIMITATIONS DIFFERS FOR STATE AND FEDERAL CLAIMS

The statute of limitations governing state and federal claims in a police civil liability case are different.

---

io Gov. Code § 810.8.

[11] Gov. Code § 911.3.

[12] Gov. Code § 815.

[13] *Williams, supra,* 16 Ca1.3d at 838.

[14] *State of California v. Superior Court,* 32 Cal.4th 1234, 1243 (2004) (a specific statutory basis is required to hold a public entity directly liable for its own conduct and the general negligence statute in Civil Code section 1714 is *not* a statute that can be utilized to directly sue a public entity; there must be a "specific statute declaring [the entity] to be liable, or at least creating some specific duty of care" by the agency in favor of the injured party); see also *Eastbum v. Regional Fire Protection Authority,* 31 Cal.4th 1175, 1183 (2003).

[15] *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715-16.

Under state law, Code of Civil Procedure section 342 provides "(a)n action against a public entity upon which a cause of action for which a claim is required ... must be commenced within the time provided in Section 945.6 of the Government Code." In a police civil liability case, a pre-lawsuit claim is required under Government Code section 911.2, and therefore, Government Code section 945.6 governs the limitations period. Section 945.6(a) provides, "any suit brought against a public entity on a cause of action for which a claim is required to be presented ... must be commenced: (1) If a written notice is given in accordance with Section 913, not later than six months after the date such notice is ... deposited in the mail" (and) (2) "If written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action." The limitations period under § 945.6 also applies to public employees.[16] Thus, the limitations period is either six months after the denial of the claim, or if the claim is not acted upon, two years after the incident. Tolling of the limitations period is rare.

Under federal law: "In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, [courts] look to the statute of limitations for personal injury actions in the forum state."[17] Under California law, the statute of limitations for personal injury actions is two years.[18] Therefore, the statute of limitations for federal claims under 42 U.S.C. section 1983 is two years.[19]

V. DUTY AS A THRESHOLD ISSUE

In police civil liability cases, the California Supreme Court has emphasized that the threshold issue of duty must be analyzed first *before* reaching the issues of whether the other elements of a claim are adequately pled or immunities apply.[20] The existence of a duty is a question of law for the court.[21]

A. No General Duty To Investigate Or To Investigate Further

In *Williams v. State of California,* the California Supreme Court upheld a demurrer to allegations the police conducted a negligent investigation of an accident. [22] The Court held that the "failure of police personnel to ... investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection" does not state a claim for negligence due to the lack of duty to investigate.[23]

---

16 Gov. Code § 950.6(b).

17 *Maldonado v. Harris,* 370 F.3d 945, 954 (9th Cir. 2004).

18 Code of Civ. Proc. § 335.1.

19 There is a rare exception under 42 U.S.C. section 1985, which has a one-year limitations period.

20 *Williams v. State of California,* 34 Cal.3d at 23 (1983).

21 *Thompson v. County of Alameda,* 27 Ca1.3d 741, 750 (1980).

22 *Williams, supra,* 34 Cal.3d at 23-24.

23 *Williams, supra,* 34 Cal.3d at 25. The defenses under state law immunities under Government Code sections 845 and 821.6 for failure to investigate or to investigate properly are discussed below.

Similarly, in a criminal matter, once probable cause arises, an officer has "no duty of further investigation."[24]

In federal case law, the "duty to investigate" or further investigate has a checkered history in the Ninth Circuit, but currently there is no such duty. In 2001, in *Arpin v. Santa Clara Valley Transportation Agency,* the Ninth Circuit held "officers may not solely rely on the claim of a citizen witness that he was a victim of a crime to establish probable cause, but *must independently investigate* the basis of the witness' knowledge or interview other witnesses."[25] In 2003, without mentioning *Arpin,* the Ninth Circuit held there is no general duty to further investigate a claim of innocence or the lack of criminal intent, "once probable cause is established."[26] However, an officer cannot simply ignore evidence "that would negate a finding of probable cause."[27] Later in 2003, in *Peng v. Mei Chin Penghu,* the Ninth Circuit held that, despite *Arpin,* probable cause is established without such an independent investigation, if the victim provides " 'facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator.' "[28] And just after *Peng,* the Ninth Circuit held there is no duty to investigate, but rather, the failure to investigate must involve "another recognized constitutional right" to arise to a cognizable claim.[29] For instance, an intentional failure to investigate due to racial discrimination violates the equal protection clause.[30] More recently, in *John v. City of El Monte*[31], the Ninth Circuit ostensibly harmonized *Arpin* and *Peng* by stating:

> ... in *Peng,* we concluded that because the alleged victim provided sufficiently detailed facts regarding the incident, her allegations alone sufficed to establish probable cause for the arrest. *Arpin v. Santa Clara Valley Transportation,* 261 F.3d 912 (9th Cir.2001), is not inconsistent. There, we concluded that because the officers had based their arrest solely on an unexamined charge by a bus driver that a rider had assaulted him and had done no further investigation, they did not have probable cause. *Arpin,* 261 F.3d at 925.

Accordingly, the independent investigation rule for solo reporting parties announced in *Arpin* appears to have been abandoned if the victim's statement is sufficiently detailed as in *Peng. Arpin* now appears to stand for the unremarkable proposition that probable cause does not arise if an uninvestigated complaint is not reasonably specific and there is no corroborating evidence.

---

[24] *Hamilton v. City of San Diego,* 217 Cal.App.3d 838, 846 (1990).

[25] ***Arpin v. Santa Clara Valley Transp. Agency,*** 261 F.3d 912, 925 (9th Cir. 2001) (emphasis added).

[26] ***Broam v. Bogan,*** 320 F.3d 1023, 1032 (9th Cir. 2003); accord ***Cameron v. Craig,*** 713 F.3d 1012, 1019 (9th Cir. 2013).

[27] ***Broam, supra.***

[28] ***Peng v. Mei Chin Penghu,*** 335 F.3d 970, 978 (9th Cir. 2003) citing ***Fuller v. M.G. Jewelry,*** 950 F.2d 1437, 1444 (9th Cir. 1991) quoting ***People v. Ramey,*** 16 Cal.3d 263 (1976).

[29] ***Ogunrinu v. City of Riverside,*** 79 F.App'x 961, 962-63 (9th Cir. 2003) quoting ***Gomez v. Whitney,*** 757 F.2d 1005, 1006 (9th Cir. 1985).

[30] ***Elliot-Park v. Manglona,*** 592 F.3d 1003, 1006 (9th Cir. 2010).

[31] ***John v. City of El Monte,*** 515 F.3d 936, 941 (9th Cir. 2008).

B. No General Duty To Assist Or Respond

Under state law, all persons owe a duty to use due care in their own actions to avoid creating an unreasonable risk of injury to others.[32] By contrast, those who have not created a risk of harm generally have no duty to take affirmative action to assist or protect another.[33] Although police officers are paid to act in service of the general public, their official duties do not support liability for failing to prevent injury to an individual; like private citizens, they generally have no duty to come to the aid of others.[34] This "no duty" rule will "bar recovery when plaintiffs, having suffered injury from third parties who were engaged in criminal activities, claim that their injuries could have been prevented by timely assistance from a law enforcement officer."[35] If this were not the rule, the police would potentially be "legally responsible to individual citizens to prevent their victimization by crime."[36]

The fact that an injured party has requested, or even received, police assistance does not itself create a "special relationship" (discussed below) that gives rise to a tort duty to take action or a certain type of action.[37] In other words, a police officer responding to an incident creates no special relationship; the officer need not provide emergency medical aid to any particular individual[38], utilize any particular law enforcement tactic[39], or conduct any particular type of investigation.[40] Even in the face of imminent harm to a person, and even when the police are on the scene observing, the failure of the police to take action to assist the person does not state a claim because the police simply have no legal duty to act.[41] The police owed no "duty to ... protect" even when a physical attack in their presence was reasonably foreseeable and easily preventable.[42]

C. A Special Relationship Gives Rise To A Duty

An exception to the "no duty" to assist rule is the special relationship doctrine. A "special relationship" between a citizen and the police, giving rise to a duty, arises only in rare circumstances when police conduct "not only contributed to and increased the preexisting risk, but also *changed* the risk that would otherwise have existed ... (there is) detrimental reliance on the officers' conduct that prevented them from seeking other assistance; and ... the officers' conduct lulled the ... (citizen) into a false sense of security."[43] A duty of protection or assistance

---

32 *Minch v. Department of California Highway Patrol,* 140 Cal.App.4th 895, 908 (2006).
33 *Williams, supra,* 34 Cal.3d at 23.
34 *Id.* at 23-24; *Zelig v. County of Los Angeles,* 27 Cal.4th 1112, 1129 (1998).
35 *Zelig v. County of Los Angeles,* 27 Ca1.4th 1112, 1129 (1998), citing *Williams,* 34 Cal.3d at 25.
36 *Adams v. City of Fremont,* 68 Cal.App.4th 243, 275 (1998).
37 *Hartzler v. City of San Jose,* 46 Cal.App.3d 6, 10 (1975).
38 *Rose v. County of Plumas,* 152 Cal.App.3d 999, 1004 (1984).
39 *Lopez v. City of San Diego,* 190 Cal.App.3d 678, 682 (1987).
40 *Von Batsch v. American Dist. Telegraph Co.,* 175 Cal.App.3d 1111, 1122 (1985).
41 *Davidson v. City of Westminster,* 32 Cal.3d 197, 206-09 (1982).
42 *Id.*
43 *Adams, supra,* 68 Cal.App.4th at 284.

may arise from a special relationship created by an officer's words or conduct.'" To establish such a relationship, the plaintiff must demonstrate that an officer assumed a greater duty than that generally owed to members of the public.[45]

Courts apply this doctrine narrowly to "a limited class of unusual cases."[46] A plaintiff may contend an officer undertook a greater duty by voluntarily providing assistance and by implied and express promises to provide a particular level of protection.[47] A plaintiff may also claim dependence on the officer, who by his or her conduct and promises, lulled the plaintiff into a false sense of security, inducing detrimental reliance on the officer for protection.[48]

However, a special relationship does not arise if the "police conduct only incrementally increased the risk to which the injured person was already exposed."[49] For instance, an officer merely stating to a citizen that an officer will be "(r)esponding to a call for assistance is 'basic to police work and not "special" to a particularized individual,' " and therefore, does not give rise to a special relationship.[5°]

In *M.B. v. City of San Diego,* the plaintiff called the police asking for assistance because a man named Johnson, who had previously worked on plaintiff's home, was sexually harassing her with obscene phone calls, had previously broken into her home, and had stolen her underwear from her bedroom while she was sleeping in the room.[51] The police told her "not to worry" and that an officer would "come by and check on" her, but no officer ever did so.[52] Two days later, Johnson went to plaintiff's house and raped plaintiff in her home. She alleged a special relationship existed because she "reasonably relied" on the police advice by failing to take other protective measures such as installing an alarm and moving to a friend's home. The court held that these facts did not establish a special relationship and dismissed the case for lack of duty. Although the police said they would "come by and check on" her, the court held such a statement in response to a call for police assistance is "basic to police work and not 'special' to a particular individual."[53] Rather, to establish a special relationship, the police must have "induced reliance on a specific promise that they would provide specific protection."[54] Additionally, the court held no special relationship arose because the officer's statements that the police would "come by and check on" her and not to worry "did not *increase* the risk Johnson would return to her house and harm her, they merely failed to *decrease* the risk."[55]

---

[44] *M.B. v. City of San Diego,* 233 Cal.App.3d 699, 704-705 (1991); *Minch, supra,* 140 Cal.App.4th at 905.
[45] *Walker, supra,* 192 Cal.App.3d at 1398.
[46] *Minch, supra,* 140 Cal.App.4th at 905.
[47] *Zelig, supra,* 27 Cal.4th at 1129; *Walker, supra,* 192 Cal.App.3d at 1399.
[48] *Walker, supra,* 192 Cal.App.3d at 1399; *Adams, supra,* 68 Cal.App.4th at 281-82.
[49] *Adams, supra,* 68 Cal.App.4th at 284.
[50] *Adams, supra,* 68 Cal.App.4th at 279 quoting *M.B. v. City of San Diego, supra,* 233 Cal.App.3d at 706.
[51] *M.B. v. City of San Diego, supra,* 233 Cal.App.3d at 702.
[52] *Id.* at 702-03
[53] *Id.* at 706.
[54] *Id.* at 705.
[55] *Id.*

D. Specific Misrepresentations Involving Risk Of Physical Harm Can Give Rise To A Duty

In *Garcia v. Superior Court*, the Court held the parole officer, while having no duty to warn, but having voluntarily "chosen to discuss the parolee's dangerousness" with the plaintiff, had a legal "duty" to use reasonable care in doing so.[56] In *Garcia*, a violent parolee told his parole officer "he was looking for" his girlfriend, Ms. Morales, and he would "kill her if [he] found her."[57] The parole officer then told the parolee's girlfriend, Ms. Morales: "He's not going to come looking for you" and "assured [Morales] of her safety."[58] As a result, Ms. Morales allegedly "failed to take steps to protect herself" and the parolee killed her. The Court held that under these facts, there was no specific promise to protect Ms. Morales, and therefore, no "special relationship."[55] However, this was not necessary for the heirs to state a claim. Rather, Morales' heirs could assert a specialized tort claim called "misrepresentation involving a risk of physical harm."[6°]

The *Garcia* case was distinguished in ***M.B.** v. City of San Diego* (discussed above), where the police said "not to worry" and they would "come by and check on" the citizen.[61] In *M.B.*, the court held *Garcia* did not apply because the officer was "not making representations about what Johnson (the suspect), in particular, might do based on any special knowledge they had about him."[62] The court reiterated that negligent acts in the context of any police investigation are simply not actionable without a special relationship or a specific misrepresentation about the level of danger posed by the suspect.[63]

E. Duty To Intervene With Another Officer

Police "officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen."[64] However, the officer must have a "realistic opportunity" to do so.[65] The same rule applies under state tort law[66], but such a tort action may be barred by the statutory immunity under Government Code section 820.8 for injuries caused by another person.

---

[56] *Garcia v. Superior Court*, 50 Cal.3d 728, 736 (1990).
[57] *Id.* at 736.
[58] *Id. at* 733.
[59] *Id.* at 734.
[60] *Id.*
[61] *Id.* at 702-03
[62] *Id. at* 708.
[63] *Id. at* 708 n. 5. The investigative immunity under Government Code section 821.6 is discussed *infra.*
[64] *Cunningham v. Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2000) quoting *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996).
[65] *Id.* quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n. 3 (1st Cir. 1990).
[66] *Lujano v. County of Santa Barbara*, 190 Cal.App.4th 801, 809 (2010) ("duty to intervene does not arise until a person's constitutional rights are being violated in the officer's presence and there must be sufficient time to do so").

F. A Mandatory Duty May Arise Under Certain State Laws

Government Code section 815.6 provides for liability when a public entity fails to discharge "a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury ...." To state a cause of action under Section 815.6, a plaintiff must assert an enactment that (1) imposes a mandatory rather than a discretionary duty, and (2) is intended to protect against the kind of injury suffered.[67] "Enactments" defined by Government Code section 810.6 include statutes, ordinances, and regulations adopted "by an agency of the state pursuant to the Administrative Procedure Act," but do not include police department regulations put in place by the executive staff.[68]

It is beyond the scope of this paper to attempt to identify all statutes that give rise to a mandatory duty for police officers under Government Code section 815.6. However, statutes that might be characterized as imposing mandatory duties on officers are:

- Informing a domestic violence victim of the right to make a citizen's arrest (Pen. Code § 836(b));

- Enforcing domestic violence restraining orders (Pen. Code § 836(c)(1));

- Investigating who was the dominant aggressor, if there are mutual restraining orders in a domestic violence incident (Pen. Code § 836(c)(3)); and

- Confiscating a deadly weapon in possession of a person taken into protective custody for a mental health condition (Welf. & Inst. Code § 8102(a)).

These state laws would not, however, give rise to any federal constitution right. Rather, they may arguably provide a potential basis for tort actions under Government Code section 815.6, but there are no cases so holding.

VI. DETENTION

A. Federal And State Claims Can Be Made

A claim of improper detention by a police officer can be asserted as a federal claim under 42 U.S.C. section 1983 for an unreasonable seizure under the Fourth Amendment or a state tort claim for false imprisonment.[69]

---

[67] *Thompson v. City of Lake Elsinore,* 18 Cal.App.4th 49, 54 (1993).

[68] See *Wilson v. County of San Diego,* 91 Cal.App.4th 974, 982 (2001) (employee manual).

[69] *Moore v. City & County of San Francisco,* 5 Cal.App.3d 728, 735 (1970).

B. Authority To Detain A Person Is Based On "Reasonable Suspicion"

A police officer is authorized to detain a person when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[70] A fuller statement of the test is: "the circumstances known or apparent to the officer must include specific and articulable facts which, viewed objectively, would cause a reasonable officer to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person the officer intends to stop or detain is involved in that activity."[71] The factors relevant to whether an officer has reasonable suspicion in different situations are evaluated in hundreds of cases too voluminous to cover here. A good resource for an overview of the relevant cases is the CEB *California Judge's Benchbook - Search and Seizure.*

C. The Test As To Whether A Detention Occurred

The test of whether a detention occurred is whether the police conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[72] This is an objective test based on what the officer said and did, and therefore, the officer and the person's subjective beliefs are irrelevant.[73] Pertinent factors include whether the officer spoke in commanding tone or used language such as "stop" or "hold it" rather than requesting language such as, "[M]ay I speak with you just a minute."[74] Non-verbal factors include the use of patrol car lights and blocking the person's path.[75]

D. The Detention Must Be Of Reasonable Duration — Warrant Check Issue

In "assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[76] For instance, a traffic infraction stop is treated as a detention (although there is probable cause for a non-custodial citation "arrest").[77] Thus, a traffic infraction stop "must be reasonable in duration and not prolonged beyond the time necessary to address the traffic violation."[78] However, during a traffic stop, "warrant checks,

---

[70] *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), overruled on other grounds by *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994) (en banc); *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. Souza*, 9 Ca1.4th 224, 231 (1991).

[71] *People v. Conway*, 25 Cal. App. 4th 385, 388 (1994).

[72] *Florida v. Bostick*, 501 U.S. 429, 438 (1991); *Brendlin v. California*, 551 U.S. 249, 256-57 (2007)

[73] *People v. Zamudio*, 43 Ca1.4th 327, 345 (2008); *U.S.* v. *Thompson*, 106 F.3d 794, 798 (7th Cir. 1997); *U.S. v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992).

[74] *U.S. v. McFarley*, 991 F.2d 1188, 1191 (4th Cir. 1993); *Ford v. Superior Court*, 91 Cal.App.4th 112, 128 (2001).

[75] *McFarley, supra; United States v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994).

[76] *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

[77] *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998).

[78] *People v. Gallardo*, 130 Cal.App.4th 234, 238 (2005).

are permissible as long as they do not prolong the stop beyond the time it would otherwise take."[79] Thus, if an officer runs a warrant check in a manner that does not prolong the time needed to verify the authenticity (and validity) of the driver's license and write a citation, doing so is lawful. If the warrant check unreasonably prolongs the stop, however, it may give rise to a claim for an unlawfully prolonged detention.

E. The Requirement To Identify Oneself During A Detention Is Unsettled In California

An officer's authority to require the person to identify him or herself during an investigative detention remains unsettled in California.[80] In earlier cases, the Ninth Circuit repeatedly ruled that a detainee cannot be compelled to identify him or herself during an investigative detention, and therefore, cannot be legally arrested for refusing to provide identifying information under Penal Code section 148, which prohibits resisting or delaying an officer in the course of his or her duties.[81]

The state court in *In re Gregory* came to the same conclusion, holding "a person who merely refuses to identify himself or answer questions" during an investigative detention does not violate Penal Code section 148 or otherwise furnish grounds for arrest.... "A categorical requirement for identification ... incident to a lawful detention would thus appear invalid ....[n82]

As recently as 2002, in *Carey v. Nevada Gaming Control Board,* the Ninth Circuit held that the law of the Fourth Amendment is *so clearly established* on this point that any officer who arrests a detainee during an investigative detention for merely refusing to provide identifying information is personally liable for damages and *cannot claim qualified immunity.[83]*

In 2004, the United States Supreme Court considered the issue in *Hiibel v. Sixth Judicial District Court.[84]* In *Hiibel,* the Supreme Court held an officer may arrest a suspect for his refusing to orally identify him or herself during an investigative detention if a state statute requires the

---

[79] *Id.*

[80] In contrast, if the officer has a legal basis to issue a person a *citation* for any offense, that person *must* provide satisfactory evidence of identification, or face arrest. Penal Code § 853.5. Further, in detentions for *Vehicle Code violations,* the requirements to produce satisfactory identification, and the consequences for failing to do so, are governed by Vehicle Code sections 40302 and 40305.

[81] *Martinelli v. City of Beaumont,* 820 F.2d 1491, 1494 (9th Cir. 1987) (the use of Penal Code "Section 148 to arrest a person for refusing to identify himself during a lawful Terry stop violates the Fourth Amendment's proscription against unreasonable searches and seizures."); see also *Carey v. Nevada Gaming Control Board,* 279 F.3d 873, 880 (9th Cir. 2002) ("the police cannot, consistent with the Fourth Amendment, compel identification during an investigatory stop"); *Kolender v. Lawson,* 658 F.2d 1362, 1366 (9th Cir. 1981)); judgment affd and remanded, 461 U.S. 352, 103 S.Ct. 1855 (1983) (requirement to physically produce identification during a *Terry* stop violates the Fourth Amendment).

[82] *in re v. Gregory S.,* 112 Cal.App.3d 764, 779, 780 (1981).

[83] *Carey v. Nevada Gaming Control Board,* 279 F.3d 873, 882 (9th Cir. 2002).

[84] *Hiibel v. Sixth Judicial District Court,* 542 U.S. 177 (2004).

person to do so.[85] However, California does not have such a law. Further, the *Hiibel* Court did not address the issue of whether an officer can require the detainee to produce *written* identification.

In 2007, without mentioning *Carey*, in *United States v. Lopez*, the Ninth Circuit commented on *Hiibel* in a footnote as follows:

> Apart from disclosing one's identity, *see Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 187-89, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), a person detained by police has no general obligation to answer questions or volunteer information.[86]

This statement indicates the Ninth Circuit's position may now be that a person *is* required to disclose one's identity during an investigative detention in light of *Hiibel*, but the question remains unsettled. Section VIII(C) below will address when an officer can conduct a pat search, pocket search, or vehicle passenger compartment search for identification during an investigative detention.

F. Valid Orders Issued During A Detention

Police officers have wide discretion to issue orders for officer safety during a detention. In *Smith v. City of Hemet*, an officer responded to a dwelling on a battery call and encountered a suspect on the front porch as he arrived.[87] The officer ordered the person to take his hands out of his pockets and come down off the porch, but the person did not comply with either command. The Ninth Circuit held that the suspect's separate acts of refusing take his hands out of his pockets and come down off the porch, among other failures to follow basic directives, "(e)ach ... constituted a violation of (Penal Code) §148(a)(1) sufficient to warrant the filing of a (separate) criminal charge."[88]

State courts have similarly given officers a wide berth to ensure their safety during a detention. Refusing to comply with a lawful order during a police detention violates Penal Code section 148(a), even if the person is just a bystander.[89]

G. Detentions During Search Warrants - Use Of Handcuffs

When police officers execute a search warrant, the "risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the

---

[85] 542 U.S. at 178 *("Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop"); accord *Cady v. Sheahan*, 467 F.3d 1057, 1063 (7th Cir. 2006) (applying Illinois state law requiring a detainee identify him or herself).

[86] *United States v. Lopez,* 482 F.3d 1067, 1078 n.3 (9th Cir. 2007).

[87] *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005).

[88] *Id.* at 697.

[89] *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1328-29) (bystander willfully delayed the officers' performance of duties by refusing the officers' repeated requests that he step away from the patrol car).

situation."[9°] In *Muehler v. Mena,* the Supreme Court held: "An officer's authority to detain (occupants) incident to a search (warrant) is categorical and it does not depend on the `quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' "[91] The Ninth Circuit has also stated that, under *Muehler,* the duration of a detention may last as long as the search and requires no further justification, provided the detention is conducted in a reasonable manner.[92] Further, in *Muehler,* the Court held that handcuffing the occupants for two to three hours while the officers conducted a search of their home was a "marginal intrusion" outweighed by the interests of the officers in effectuating the search.[93]

On the other hand, the Ninth Circuit has held the use of handcuffs during a search warrant to restrain an 11-year old child for 15 to 20 minutes[94], or a gravely ill person several hours after the premises are secured, raises a question of fact as to whether the manner of detention was reasonable given the totality of the circumstances.[95] Thus, while the use of handcuffs to detain non-disabled adult occupants during a search warrant for several hours is lawful under *Muehler,* leaving children or leaving gravely ill occupants in handcuffs after the premises have been secured may raise a question of fact on the issue of the reasonableness of the manner of the seizure under the Fourth Amendment.

H. Whether A Detention Becomes A *De Facto* Arrest Requiring Probable Cause

If a detention turns into a *de facto* arrest, it becomes an unreasonable seizure under the Fourth Amendment unless the officer has probable cause to arrest[96]. There is "no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest."[97] Rather, whether a police detention is an arrest or an investigative stop is a fact-specific inquiry made "by evaluating not only how intrusive the stop was, but also whether the methods used [by police] were reasonable *given the specific circumstances.*"" Whether a seizure is "an arrest or an investigatory stop depends on what the officers *did,* not on how they *characterize* what they did."[99] For instance, removing a suspect from a vehicle and handcuffing him does not necessarily convert the detention into an arrest requiring probable cause if the circumstances

---

[90] *Michigan v. Summers,* 452 U.S. 692, 702-03 (1981).
[91] *Muehler v. Mena,* 544 U.S. 93 (2005).
[92] *Dawson v. City of Seattle,* 435 F.3d 1054, 1066 (9th Cir. 2006).
[93] *Muehler,* 544 U.S. at 98.
[94] *Tekle v. United States,* 511 F.3d 839, 850 (9th Cir. 2007).
[95] *Franklin v. Foxworth,* 31 F.3d 873, 876-77 (9th Cir. 1994) (removing a gravely ill and semi-naked man during a search warrant from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours, rather than returning him to his bed within a reasonable time after the search of his room, was unreasonable under the Fourth Amendment).
[96] *Dunaway v. New York* 442 U.S. 200, 212 (1979).
[97] *United States v. Parr,* 843 F.2d 1228, 1231 (9th Cir.1988) quoting *United States v. Hatfield,* 815 F.2d 1068, 1070 (6th Cir.1987).
[98] *Washington v. Lambert,* 98 F.3d 1181, 1185 (9th Cir. 1996) (emphasis in original) quoted in *Gallegos v. City of Los Angeles,* 308 F.3d 987, 991 (9th Cir. 2002).
[" *Gallegos v. City of Los Angeles,* 308 F.3d 987, 991-92 (9th Cir. 2002) (emphasis in original).

justify such measures.[10°] Similarly, after a long car chase, "(p)ointing a weapon at a suspect, ordering him to lie on the ground, handcuffing him, and placing him for a brief period in a police vehicle for questioning—whether singly or in combination—does not automatically convert an investigatory detention into an arrest requiring probable cause."[1°1]

The criteria the courts typically consider in deciding whether a detention became an arrest are the length of the detention, handcuffing the suspect, placing the suspect in a patrol car in handcuffs, and/or transporting the suspect to a different location such as the police station. The latter almost always constitutes a *de facto* arrest.[102] Similarly, detaining the suspect for an unreasonably long period under the totality of the circumstances will constitute a *de facto* arrest.[103]

VII. ARREST

A. Probable Cause Is The Standard For Arrest

1. A "Fair Probability" Under The Totality Of The Circumstances

Under federal case law, a "police officer has probable cause to arrest a suspect without a warrant if the available facts suggest a 'fair probability' that the suspect has committed a crime."[104] Probable cause includes the "totality of the circumstances" and only requires that there be a "fair probability."[105] Probable cause is a lower standard than a preponderance standard because it does *not* require a belief that is "more likely true than false."[1°6]

Under state law, a police officer has the authority to arrest a person, if the officer has "probable cause" to believe that the person has committed a misdemeanor in the officer's presence or has committed a felony. Pen. Code § 836. (The misdemeanor-presence rule is discussed below.) The state courts use similar language to define probable cause. "Probable cause" to arrest exists when the facts and circumstances known to the arresting officer would cause a person of reasonable caution to believe an offense has been or is being committed by the person to be arrested.[107] Probable cause requires a "fair probability" the person committed a crime, and is evaluated through the eyes of the officer.[108]

---

100 *Id.*

101 *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995); accord *People v. Johnson*, 231 Cal.App.3d 1, 12-13 (1991); *People v. Bowen*, 195 Cal.App.3d 269, 274 (1987).

102 *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

103 *Florida v. Royer*, 460 U.S. 491, 500 (1983); *U.S.* v. *Place*, 462 U.S. 696, 709-10 (1983).

1°4 *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1094 (9th Cir. 2006); *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999) ("fair probability" is sufficient for probable cause); *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986) ("fair probability").

105 *Illinois v. Gates*, 462 U.S. 213 (1983).

106 *Texas v. Brown*, 460 U.S. 730, 742 (1983).

107 *People v. Souza*, 9 Ca1.4th 224, 230 (1994).

108 *Bailey v. Superior Court*, 11 Cal.App.4th 1107, 1111 (1992).

2. Officer's Subiective Motive Irrelevant On The Issue Of Probable Cause

The subjective intent of the officer is irrelevant in evaluating probable cause because the issue is determined by an objective test, e.g., what a hypothetical "reasonable officer" would believe.[109] In a false arrest claim, the subjective intent of the officer cannot be considered on the issue of probable cause.[110] Thus, even if the officer has an ulterior law enforcement motive unrelated to the stated basis for initiating an otherwise valid traffic stop, the stop is lawful.[m]

3. No Duty To Further Investigate Once Probable Cause Arises

See Section V(A) above regarding the lack of any officer duty to further investigate a claim of innocence or the lack of criminal intent "once probable cause is established."[112]

4. Probable Cause For Any Crime Makes The Arrest Valid

An arrest is lawful if the officer has probable cause for *any* crime; it is irrelevant if the officer subjectively thinks there is a different crime or believes a different arrest charge is more appropriate."[3] The "any crime" rule includes a local police officer making an arrest under federal law when not prohibited from doing so under federal law.[114]

5. Evaluate The Facts Through The Eyes Of The Officer

Whether probable cause exists is always evaluated through the eyes of the officer on the scene at the time of the incident and can incorporate all of the officer's prior training and experience.[115]

6. Probable Cause Through Collective Knowledge

Police officers "can make arrests based on information and probable cause furnished by other officers" or a direction from another officer to make an arrest, provided the directing officer

---

[109] *People v. Letner,* 50 Ca1.4th 99, 145 (2010).

[110] *Devenpeck v. Alford,* 543 U.S. 146, 153-55 (2004) (probable cause is an "objective standard" rendering the officer's subjective intent or belief irrelevant under the Fourth Amendment).

[111] *Whren v. United States,* 517 U.S. 806, 813 (1996).

[112] *Cameron v. Craig,* 713 F.3d 1012, 1019 (9th Cir. 2013); *Broom v. Bogan,* 320 F.3d 1023, 1032 (9th Cir. 2003); *Hamilton v. City of San Diego,* 217 Cal.App.3d 838, 846 (1990); *Gillian v City of San Marino,* 147 Ca.App.4th 1033, 1045 (2007) (citizen victim's detailed and specific information is sufficient for probable cause).

[113] *Devenpeck, supra,* 543 U.S. at 153; *Gomez v. Garcia,* 112 Cal.App.3d 392, 397-98 (1980).

[114] *Sturgeon v. Bratton,* 174 Cal.App.4th 1407, 1413 (2009); *Gonzales v. City of Peoria,* 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Hodgers—Durgin v. de la Vina,* 199 F.3d 1037 (9th Cir. 1999).

[115] *United States v. Fouche,* 776 F.2d 1398, 1403 (9th Cir. 1985) overruled on other grounds in *California v. Hodari D.,* 499 U.S. 621 (1991).

has probable cause for the arrest.[116] Further, when police officers are working together, "when there has been communication among agents, probable cause can rest upon the investigating agents' 'collective knowledge'."[117] However, it is unclear whether probable cause can be based on collective knowledge among officers working together when there has been no communication among officers to assemble facts that would arise to probable cause.

B. State Law For Most Misdemeanor Arrests Requires The Officer Either Witness The Crime Or Obtain A Citizen's Arrest

Under the Fourth Amendment, an officer can make a custodial warrantless arrest for any crime, including an infraction.[118] An officer's violation of the state statutory requirements for misdemeanor arrests and infractions is *not* a violation of the Fourth Amendment.[119]

State law governing arrests is more restrictive than the Fourth Amendment. State law does not authorize a warrantless arrest for most misdemeanors, unless the misdemeanor is committed in the officer's presence.[1]" The word "presence" means "the crime must be apparent to the officer's senses," and therefore, can include hearing.[121] Exceptions to the presence requirement for misdemeanor arrests are violation of a domestic violence protective or restraining order (Pen. Code § 836(c)(1)), domestic violence (as defined in Pen. Code § 836(d)), and carrying a concealed weapon in a controlled area of an airport (Pen. Code § 836(e)). Probable cause, however, is still required.

Under state law, an officer can lawfully effectuate a misdemeanor arrest when the offense took place outside the officer's presence through a citizen's arrest. Under Penal Code section 837, a citizen may lawfully make a misdemeanor arrest for an offense committed in his or her presence, and then may delegate to a police officer the act of taking the suspect into custody. [122] In considering whether a citizen's arrest was made, the citizen need not use any "magic words" and the citizen's arrest "may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."[123]

After Penal Code 142 was amended in 2003, an officer was no longer legally obligated to accept custody of the arrestee from a citizen or effectuate the citizen's arrest under Penal Code section 142. On the contrary, under the Fourth Amendment, the officer is legally required to

---

[116] *People v. Gomez,* 117 Cal.App.4th 531, 538 (2004); *United States v. Ramirez,* 473 F.3d 1026, 1032 (9th Cir. 2007).

[117] *United States v. Jensen,* 425 F.3d 698, 705 (9th Cir. 2005).

[118] *Atwater v. City of Logo Vista,* 532 U.S. 318, 354 (2001); *Virginia v. Moore,* 553 U.S. 164, 171 (2008). [118] *Virginia v. Moore,* 553 U.S. 164, 176 (2008); *Edgerly v. City & Cnty. of San Francisco,* 599 F.3d 946, 956 (9th Cir. 2010).

[120] Penal Code § 836; *Arpin v. Santa Clara Valley Trasnp. Agency,* 261 F.3d 912, 920 (9th Cir. 2001) quoting *Johanson v. Dept. of Motor Veh.,* 36 Cal.App.4th 1209, 1216 (1995).

[121] *People v. Bloom,* 185 Cal.App.4th 1496, 1501 (2010).

[122] *Arpin, supra,* 261 F.3d 912, 920; *Padilla v. Meese,* 184 Cal.App.3d 1022, 1030 (1986).

123 *Id.*

evaluate whether the citizen has probable cause to make a legal arrest.[124] In situations where the citizen has made an unlawful custodial arrest, the officer may momentarily "accept custody" of the arrestee, if necessary to keep the peace, but only for the purpose of releasing the arrestee under Penal Code section 849(b), which provides for release when there are insufficient grounds for making a criminal complaint.

C. State Law Generally Requires A Field Citation-Release For Infractions

Under Penal Code section 853.5, an officer must release a person cited for an infraction in the field if the person provides satisfactory evidence of identification and signs a promise to appear in court on the citation/notice to appear. If the person does not provide satisfactory identification or does not sign the citation, the officer may effectuate a custodial arrest.[125] The officer may offer the person the option of providing a thumb print if satisfactory identification is not provided, but is not required to do so.[126] The specific grounds for not releasing a *misdemeanor* arrestee discussed next cannot be used as grounds for non-release for an infraction.[1]"

D. State Law Gives The Officer Discretion To Issue A Field Citation-Release Or Book For A Misdemeanor, But Citation-Release After Booking For A Misdemeanor Is Required, With Several Exceptions

Under Penal Code section 853.6(a), an officer has discretion to release a person arrested for a misdemeanor with a citation-release in the field, but also has discretion to book the person at jail. After booking is complete, however, the jailor must release a misdemeanor arrestee pursuant to a citation-release/notice to appear signed by the arrestee, unless one of the 10 exceptions in Section 853.6(i) applies. The most common exceptions to the misdemeanor citation-release after booking rule include: (1) the existence of warrants, (2) a misdemeanor driving under the influence arrest, (3) severe intoxication, (4) the offense would likely continue, or (5) immediate release would jeopardize the prosecution of the offense or endanger persons.

As stated above, a violation of the state law citation-release rules for infractions and misdemeanors is not a Fourth Amendment violation; it is solely a state law claim.[128] Earlier cases to the contrary in the Ninth Circuit, namely Bingham v. *City of Manhattan Beach*[129] and *Reed* v. Hoy[13°], have been "effectively overruled." [131]

---

[124] *Arpin, supra,* 261 F.3d 912, 924-25.
[125] Penal Code § 835.5.
[126] *Id.*
[127] *Edgerly v. City and County of San Francisco,* 713 F.3d 976, 982 (9th Cir. 2013).
[128] *Virginia v. Moore,* 553 U.S. 164, 176 (2008).
[129] 341 F.3d 939, 950 (9th Cir. 2003).
[130] 909 F.2d 324, 330 n. 5 (9th Cir. 1989).
[131] *Edgerly v. City and County of San Francisco,* 599 F.3d 946, 956 (9th Cir. 2010).

E. State Law False Arrest Claims Have Two Procedural Differences From Federal Law At Trial

For a warrantless arrest, under state law, the officer has the burden of proof at trial to establish the existence of probable cause.[132] Under federal law, the plaintiff has the burden of proof to establish the officer did not have probable cause to arrest, if the officer provides some evidence of probable cause.[133]

Additionally, in a federal claim for unlawful arrest, the jury decides whether probable cause existed.[134] In a tort claim for false arrest, the court must "instruct the jury as to what facts, if established, would constitute probable cause. ... The jury then decides whether the evidence supports the necessary factual findings."[135]

This makes for somewhat confusing jury instructions in a case containing both a tort claim for false arrest and a Section 1983 claim for unlawful arrest.

F. Outcome Of The Arrest Is Irrelevant On The Issue Of Liability

"The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted — indeed, for every suspect released."[136] Accordingly, the outcome or status of any arrest charge is irrelevant to the issue of whether probable cause for the arrest existed.[137] However, if the plaintiff claims the officers were untruthful with the prosecutor, the fact that a criminal prosecution occurred may come into evidence as part of a plaintiff's claim for emotional and monetary damages in a federal (Section 1983) claim of unlawful arrest.[138]

G. Officer's Territorial Authority

Under Penal Code section 830.1(a), a local police officer's authority to make an arrest outside the political subdivision that employs him or her is limited to: (a) jurisdictions where the chief of police, county sheriff, or their delegate, has given officers from the arresting officer's jurisdiction prior consent to make arrests, or (b) crimes committed in the officer's presence and there is immediate danger to person or property, or of the escape of the perpetrator of the

[132] CACI 1402; *Cervantez v. J.C. Penney Co.* 24 Cal.3d 579, 592 & fn. 7 (1979), superseded on other grounds by Pen. Code § 243; *GilIan v. City of San Marino,* 147 Cal.App.4th 1033, 1044 (2007).
[133] CACI 3021 citing *Dubner v. City & County of San Francisco,* 266 F.3d 959, 965 (9th Cir. 2001).
[134] *Id.*
[135] *Levin v. United Air Lines, Inc.,* 158 Cal.App.4th 1002, 1018-19 (2008).
[136] *Baker v. McCollan ,* 443 U.S. 137 (1979).
[137] *Borunda v. Richmond,* 885 F.2d 1384, 1389 (9th Cir. 1989).
[138] *Id.*

offense. Otherwise, an officer's power to arrest outside his or her employer's jurisdiction is the same as any private citizen and governed by the law applicable to citizen arrests.[139]

If an officer observes a traffic infraction or crime in his or her own jurisdiction, he or she can pursue the suspect even if the suspect crosses the jurisdictional boundary.[14°] However, if an officer observes a non-dangerous traffic infraction in an outside jurisdiction in which there is no prior agreement to allow the officer to enforce laws, there are conflicting cases as to whether the clause allowing the officer to prevent "escape" can be used to make a traffic stop.[141]

H. Failure To Give An Arrestee A *Miranda* Warning Is Not Actionable

The failure to Mirandize an arrestee "cannot be a grounds for a § 1983 action."[142]

VIII. SEARCH

The law of search fills many volumes of legal treatises. This paper only touches on the common search issues that arise in police civil liability cases. Under federal law, claims of unlawful search must be brought as a Section 1983 claim under the Fourth Amendment.[143] Under state law, a tort claim for invasion of privacy is potentially actionable.[144]

A. Running A License Plate Is Not A Search

A license plate check does not arise to the level of a search under the Fourth Amendment.[145]

B. A Pat-Down Search During An Investigative Detention Requires An Articulable Belief The Person Is Armed And Dangerous

Under *Terry v. Ohio*[146], an officer may conduct a "frisk" or pat-down search without violating the Fourth Amendment's ban on unreasonable searches and seizures if: (1) the investigative stop is lawful, and (2) the police officer reasonably suspects that the person stopped is armed and dangerous.[147] The sole justification of a *Terry* stop pat-down search is the "protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[148] The standard for determining whether a pat-down search is

---

[139] *People v. Monson,* 28 Cal.App.3d 935, 940 (1972).
[149] *People v. Cooper,* 101 Cal.App.4th Supp. 1, 6 (2002).
[141] *Cf. People v. Hamilton,* 191 Cal.App.3d Supp. 13, 19 (1986) with *People v. Landis,* 156 Cal.App.4th Supp. 12, 18 (2007).
[142] *Chavez v. Martinez,* 583 U.S. 760, 772 (2003).
[143] *Conn v. Gabbert,* 526 U.S. 286, 293 (1999).
[144] *Baughman v. State of California,* 38 Cal.App.4th 182, 189 (1995).
[145] *United States v. Diaz-Castaneda,* 494 F.3d 1146, 1150 (9th Cir. 2007).
[146] *Terry v. Ohio,* 392 U.S. 1, 8 (1968).
[147] *Arizona v. Johnson,* 555 U.S. 323, 326-27 (2009).
[148] *Terry, supra,* 392 U.S. at 29.

reasonable 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." [149] The officer need not be absolutely certain that the individual is armed, but an officer's "unparticularized suspicion or 'hunch" is not enough to establish reasonableness.[15°] The officer must be able to point to "specific reasonable inferences drawn from the facts in light of his experience."[151] As with probable cause, the need for a pat-down search takes into consideration the "totality of the circumstances" and is evaluated from the perspective of the officers' experience, rather than from the perspective of someone untrained in law enforcement."[152]

During a pat-down search, "if an officer feels an item that he recognizes as contraband or evidence, that 'touch' may provide probable cause for the arrest of the person and seizure of the evidence."[153] The Ninth Circuit has held that, during a pat-down, an officer feeling a rectangular tin, a marijuana pipe, or a golf-ball-sized cellophane bundle wrapped in duct tape provides a sufficient probable cause to remove those items from the suspect's pocket.'[54]

C. Search For Identification During An Investigative Detention

Traffic stops for infractions are treated as investigative detentions for the purpose of evaluating the lawfulness of a search.[155] During a traffic stop, if the person to be cited does not provide satisfactory identification, an officer is entitled to conduct a limited search for identification in the locations in the passenger compartment where a wallet is likely to be found.[158] In *People v. Hart,* the court held that if officer safety is an issue during the stop, "the officer may control the movements of the vehicle's occupants and retrieve the license himself" from the vehicle.[157] The court so ruled even though the officer had no suspicion the detainee is involved in drugs, weapons, or violence.[158]

While not as clearly established as passenger compartment searches for identification, California courts have also approved of pocket searches for identification during an

---

149 *Id.* at 27.

150 *Icl.*

151 *Id.*

152 *United States v. Magana,* 797 F.2d 777, 780 (9th Cir. 1986) citing *United States v. Cortez,* 449 U.S. 411, 417 (1981).

153 *United States v. Miles,* 247 F.3d 1009, 1013 (9th Cir. 2001).

154 *United States v. Hartz,* 458 F.3d 1011, 1018 (9th Cir. 2006).

155 *Knowles v. Iowa,* 525 U.S. 113, 117 (1998).

156 *People v. Artero D.,* 27 Cal.4th 60, 83-85 (2002).

152 *People v. Hart,* 74 Cal.App.4th 479 (1999).

158 *Id.* at 484-85; *accord, People v. Webster,* 54 Cal.3d 411, 431 (1991) (for officer safety, an officer may search a vehicle for registration papers after removing the occupants from the car); *People v. Faddler,* 132 Cal.App.3d 607, 610 (1982) (officer can lawfully search glove compartment for driver's license when occupants "boisterous and mouthy").

investigative detention of a pedestrian in certain circumstances.[159] However, there is no case law in the Ninth Circuit approving a pocket search for identification during an investigative detention. In fact, in one unpublished case, the Ninth Circuit held a pocket search for identification during a bicycle traffic stop violated the Fourth Amendment, but the officer was entitled to qualified immunity due to the two state court cases that suggested such a search was lawful.[160] Further, as stated in Section VI(E) above discussing whether a detainee must verbally identify him or herself during an investigative detention, the Ninth Circuit's position on this issue may have shifted in light of the Supreme Court's decision in *Hilbel v. Sixth Judicial District Court.*[161]

Since the issue of obtaining identification during investigative detentions continues to be a difficult legal problem for police officers, attached to this paper as Exhibit A is a Training Bulletin the Berkeley Police Department uses to advise officers on strategies to obtain identification from the subject of an investigative detention.

D. Search Incident To Custodial Arrest

1. Search Of Arrestee Is Authorized For All Custodial Arrests

In *Robinson v. United States,* the Supreme Court established that a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person.[162] However, the arrest must be a *custodial* arrest, not a field-citation release.[163] A strip search of an arrestee is governed by separate rules explained below in Section IX(G).

2. Search Of Area Within The Arrestee's "Immediate Control"

In *Chime! v. California,* the Supreme Court established that pursuant to a lawful custodial arrest, the officer may conduct a warrantless search of the area within the arrestee's "immediate control." [164]

3. Search Of Arrested Person's Vehicle Contemporaneous With The Arrest Is Now Limited To Specific Circumstances

From 1981 to 2009, *New York v. Belton* provided a bright-line rule that, "when a policeman has

---

[159] *People v. Loudermilk,* 195 Cal.App.3d 996, 1002 (1987) (if officer feels wallet during a lawful patdown search for weapons after suspect denied having identification, the officer is justified in taking it from the suspect's pocket to identify him"); *People v. Long,* 189 Cal.App.3d 77, 88 (1987).

[160] *Salsbury v. City of Berkeley,* 188 Fed.Appx . 613, 615 (9th Cir. 2006).

[161] *United States v. Lopez,* 482 F.3d 1067, 1078 (9th Cir. 2007) referring to *Hiibel v. Sixth Judicial District Court,* 542 U.S. 177 (2004).

[162] *United States v. Robinson,* 414 U.S. 218, 235 (1973).

[163] *Knowles v. Iowa,* 525 U.S. 113, 118-19 (1998) (search incident to arrest rule does not apply in non-custodial "arrests" such as traffic infractions).

[164] 395 U.S. 752, 763 (1969); *Davis v. United States,* 131 S. Ct. 2419, 2424 (2011).

made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[165] In 2009, in *Arizona v. Gant,* the Supreme Court overruled the long-standing *Belton* rule by holding *"Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been *secured and cannot access* the interior of the vehicle."[166] *Gant* held an officer may "search a vehicle incident to a recent occupant's arrest only when the arrestee is *unsecured and within reaching* distance of the passenger compartment at the time of the search."[167] The Court also reiterated the automobile exception to the search warrant requirement, holding it is still lawful to conduct a vehicle search if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." [168]

In 2010, as to the word "unsecured," the Third Circuit discarded it as an element of the rule because it reasoned that was not the intent of *Gant,* and held that even when a suspect is in handcuffs, the surrounding area and containers/bags may be searched incident to arrest under *Gant,* provided there is something "more than the mere theoretical possibility that a suspect might access a weapon or evidence." [169] In 2011, the Supreme Court in *Davis v. United States* reiterated the "new rule" announced in *Gant,* but this time left out the word "unsecured".[17°] In *Davis,* the Court characterized its holding in *Gant* as follows: "(A)n automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." [171]

However, in 2014, in *Riley v. California,* the Supreme Court re-announced the rule quoting its holding in *Gant* that a vehicle search incident to arrest can proceed "only when the arrestee is

---

[165] *New York v. Belton,* 453 U.S. 454, 460 (1981) overruled by *Arizona v. Gant,* 556 U.S. --, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

[166] *Arizona v. Gant,* 556 U.S. 332, 335 (2009).

[167] *Id. at* 343.

[168] The Court in *Gant,* 556 U.S. at 346-47, also noted that even if the person is not under arrest, an officer can search a vehicle's passenger compartment if there is reasonable suspicion the person is dangerous and might access the vehicle and gain immediate control of weapons, citing *Michigan v. Long,* 463 U.S. 1032 (1983), and further noted the general "automobile exception" to the search warrant requirement when there is probable cause that evidence of a crime will be found, citing *United States v. Ross,* 456 U.S. 798, 820-22 (1982); the Ninth Circuit has also observed a search for drugs in the passenger compartment is lawful under *Gant* pursuant to a DUI arrest for drugs because there was a reasonable belief "evidence relevant to the crime of arrest" would be found. *United States v. Martinez,* 403 Fed.Appx. 182, 183-84 (9th Cir. 2010); accord *United States v. Salas De La Rosa,* 366 Fed.Appx. 757, 759 (9th Cir. 2010).

[169] *United States v. Shakir,* 616 F.3d 315, 321 (3d Cir. 2010) (handcuffed suspect's bag that is close to the arrestee may be searched incident to arrest).

[170] *Davis v. United States,* 131 S.Ct. 2419, 2425, 180 L.Ed.2d 285 (2011).

171 *Id.*

unsecured and within reaching distance of the passenger compartment at the time of the search."[172]

Currently, if an arrestee is handcuffed and placed in a patrol car, he is not within "reaching distance" of his own car, and therefore, absent a reasonable belief the car contains evidence of a crime (or some other extenuating circumstance or other basis to search such as an inventory search conducted after impoundment), a search of the passenger compartment is unlawful under *Gant.* If the arrestee is handcuffed, but not yet in the patrol car, it is unclear (a) if he is still in "reaching distance" to his own car, and (b) whether he is "unsecured." However, the fact the arrestee is in handcuffs makes it unlikely he will be considered unsecured. Thus, *Gant* is a significant shift from the long-standing *Belton* rule, which categorically allowed a vehicle passenger compartment search as part of the search incident to arrest rule.

The words "reaching distance" are now being refined by the courts. There is no Ninth Circuit authority on this issue yet, but the Third Circuit held it applied to a bag close to the arrestee.[173]

4. Search Of A Cell Phone Is Now Generally Prohibited Without A Warrant

The United State Supreme Court recently ruled in *Riley v. California* that the search incident to arrest rule does not apply to cell phones in the arrestee's possession.[174] A search warrant must be obtained to search a cell phone when it is seized incident to arrest.[175] The only exception is for an exigent circumstance, such as when there is a need to prevent imminent destruction of evidence, pursue a fleeing suspect, or assist persons who are seriously injured or threatened with imminent injury.[176] If a search warrant for the phone's contents will be pursued, the officer should attempt to prevent remote deletion of the cell phone's data during the time it takes to obtain a warrant.[177] To do so, the officer should either turn the phone off, remove its battery, or place the phone in an aluminum "Faraday bag" to isolate the phone from radio waves.[178]

E. Non-Custodial Arrest Does Not Trigger The Search Incident To Arrest Rule

The search incident to arrest rule does not apply in non-custodial "arrests" such as traffic infractions.[179] Thus, even if the officer could have made a custodial arrest, e.g., for a misdemeanor, if the officer elects not to do so, a pocket search is not lawful. *Id.*

---

172 *Riley v. California,* WL 2864483 (2014).
173 *U.S. v. Shakir,* 616 F.3d 315, 318 (3d Cir. 2010).
174 WL 2864483 (2014).
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Knowles v. Iowa,* 525 U.S. 113, 118-19 (1998).

F. Search Warrants — Damaging Property And Leaving The Premises In Disarray

In Liston v. County of Riverside, the Ninth Circuit stated it is not clear that an allegation that "the officers ransacked their home, dumping out garbage and removing items from drawers and closets, without cleaning up after themselves" even states a claim under the Fourth Amendment. [180] The court held "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment."[181] In fact, with respect to cleaning up, it might be a violation of the Fourth Amendment to prolong the search to clean up once the search is over. The federal courts allow officers significant leeway in executing a search warrant in terms of reasonable damage that arises.[182]

Under state law, police officers have immunity under Government Code section 821.6 for property damage sustained during the execution of a search warrant.[183] Additionally, under Penal Code section 1531, a city is immune from liability when an officer forces a door open pursuant to a warrant after being refused admittance.

G. Strip Searches

1. Definition

Strip search is defined as "requir[ing] a person to remove or arrange *some or all* of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of such person."[184]

2. The Basic Parameters On The Manner Of Conducting A Strip Search

Strip searches must be conducted by a member of the same gender absent exigent circumstances, and in a private setting.[185] Touching of the breasts, buttocks, or genitalia of the person being strip searched is prohibited.[186] Thus, if an arrestee refuses to comply with a request for a visual body cavity search and the search cannot be done without touching the

---

[180] *Liston v. County of Riverside,* 120 F.3d 965, 979 (9th Cir. 1997) implicitly overruled on other grounds *by Saucier v. Katz,* 533 U.S. 194 (2001).

[181] *Id.* quoted in *Mena v. City of Simi Valley,* 226 F.3d 1031, 1041 (9th Cir. 2000).

[182] *Cf. United States v. Becker,* 929 F.2d 442, 446 (9th Cir. 1991) (reasonable for officers to use a jackhammer to break up a concrete slab in the backyard in order to search for evidence underneath) with *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 974 (9th Cir. 2005) (unreasonable for officers to cut a mailbox off its post, jackhammer the sidewalk, and break a refrigerator).

[183] *Baughman v. State of California,* 38 Cal.App.4th 182, 189 (1995) (destroyed floppy discs during search warrant not actionable and subject to immunity).

[184] Pen. Code § 4030(c).

[185] Pen. Code § 4030(l) and (m); *Byrd v. Maricopa Cnty. Sheriff's Dep't,* 629 F.3d 1135, 1146 (9th Cir. 2011).

[186] Pen. Code § 4030(j).