FIRST DISTRICT APPELLATE PROJECT

STOP AND FRISK
A PRACTICAL GUIDE TO THE GOVERNING LAW

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INTRODUCTION

These materials are intended to be a user-friendly practical guide for California criminal defense attorneys litigating a motion to suppress evidence or appealing the denial of a suppression motion which challenges the constitutionality of a stop and frisk. In these cases, the attorney raises one of more of the following arguments:

1) The defendant was detained by the officer, within the meaning of the Fourth Amendment, and not merely subject to a consensual encounter.[1]

2) The totality of the circumstances did not support a reasonable suspicion that the defendant was engaged in criminal activity. Thus, the officer had no right to initiate the detention.

3) The totality of the circumstances did not support a reasonable belief that the defendant was armed and dangerous. Thus, the officer had no right to initiate a frisk for weapons.[2]

4) The officer exceeded the permissible scope of a pat-search when he reached inside the defendant's pockets or under his clothing and seized a weapon, contraband or other incriminating evidence.

These materials are organized into three chapters:

CHAPTER ONE discusses *Terry v. Ohio* (1968) 392 U.S. 1, the case that set forth the stop and frisk doctrine.

CHAPTER TWO discusses "The Stop or Detention". This chapter is divided into two main parts. **PART I** provides guidance on "Establishing That the Individual was Detained". **PART II** provides guidance on "Establishing That the Detention was Unreasonable".

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[1] The terms "Terry stop", "stop" and "detention" will be used interchangeably throughout these materials.

[2] The terms "frisk" and "pat-search" will be used interchangeably throughout these materials.

CHAPTER THREE discusses "The Frisk or Pat-Search for Weapons".
PART I provides guidance on "Establishing That the Frisk was Unreasonable".
PART II provides guidance on "Establishing that the Officer Exceeded the Permissible Scope of Lawful Frisk

CHAPTER TWO, **PART I** and **PART II**, as well as **CHAPTER THREE, PART I** and **PART II** are all organized in a similar fashion.

First, we discuss the general legal principles governing each of these topics (e.g. the rules distinguishing a detention from a consensual encounter).

Second, for each topic, there is a section discussing selected decisions which have come out on both sides of the issue (e.g. cases finding that the officer had reasonable suspicion that the defendant was involved in criminal activity, as necessary to initiate a detention, and cases finding that the officer lacked such reasonable suspicion). We have focused on cases from the United States Supreme Court, the California Supreme Court, the California Court of Appeal, and occasionally, the Ninth Circuit Court of Appeals and other federal circuits. We do not claim to have summarized every case from those courts, but we hope to have provided a large enough sample to assist you in starting your research and analysis. **We have divided the cases into categories based on some common factual circumstance, and then provided full summaries, focusing in each case on the facts and the Court's holding**.

Third, for each topic, there is a section discussing common factors relied upon by the courts to support the relevant finding (e.g. factors relied upon to support a reasonable belief that the defendant was armed and dangerous, justifying a frisk for weapons). We list cases that have relied on that factor, usually in combination with other circumstances.

We have tried to provide multiple ways for you to access the law, the precedents and the reasoning you will need to effectively argue that your client was subjected to an unconstitutional stop and frisk.

CHAPTER ONE
THE ORIGINS OF THE STOP AND FRISK DOCTRINE: *TERRY V. OHIO* (1968) 392 U.S. 1

Almost 45 years ago, in an 8-1 opinion authored by Chief Justice Warren, the United States Supreme Court decided that police officers could confront an individual on the street and conduct a "stop" or investigative detention even if they lacked probable cause for an arrest; the officers needed only a reasonable suspicion to believe criminal activity might be afoot. Moreover, the officers could "frisk" or patdown this individual's outer clothing to determine if he had any weapons, an intrusion short of a full-blown search for criminal evidence, if they reasonably believed the detainee was armed.

I. A Question of First Impression Presented to the Court

The larger issue in *Terry v. Ohio* involved "the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances." (*Terry v. Ohio* (1968) 392 U.S. 1, 4.) The narrower question posed by the facts of *Terry* was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest". (*Id.,* at 15.) Prior to *Terry*, the Supreme Court had never found that an involuntary encounter between an individual and a police officer, which intruded upon the individual's "right to personal security", was reasonable under the Fourth Amendment absent probable cause. The lower courts had divided on the issue. (*Id.,* at 9-12.)

II. The Facts of *Terry*

Police Officer McFadden, in plain clothes, was patrolling downtown Cleveland in the afternoon. He was looking for shoplifters and pickpockets in this area, as he had done for the last 30 years. The officer observed two men he had not previously seen, Terry and Chilton, standing on the corner of Huron Road and Euclid Avenue. When Officer McFadden looked at these two men, they did not look back at him. McFadden walked to the entrance of a store about 300 to 400 feet from where Terry and Chilton were standing. As he watched them, one of the men walked down Huron Road past some stores, paused for a moment, looked in a store window, and walked further down the road. He then turned around and walked back to the other man, stopping to peer in the same store window. The two men conferred and then the second man went through this same series of actions. Terry and Chilton repeated this course of conduct about five to six times a piece, roughly a dozen trips up and down Huron Road. At some point in the midst of

these repetitive trips, a third man, Katz, appeared. He conversed briefly with Terry and Chilton and then walked down Euclid Avenue. After a few more trips up and down Huron, Terry and Chilton walked away from the corner, following the path taken by Katz. Officer McFadden followed them and saw them stop in front of a store to confer again with the third man, Katz. (*Id.*, at 5-6.)

Believing that Terry and Chilton had been doing reconnaissance of the store on Huron Road and that they were "casing a job, a stick up", Officer McFadden approached the three men, identified himself and asked for their names. The men mumbled something in response. Immediately, McFadden grabbed Terry and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, he felt a pistol. McFadden removed Terry's overcoat and seized a revolver from the pocket. Officer McFadden then directed all three men to face the wall and patted down the outer clothing of Chilton and Katz. The officer seized a revolver from the pocket of Chilton's overcoat, but found no weapons on Katz. The officer did not reach beneath Terry's or Chilton's outer garments until he felt their guns. They were arrested for carrying concealed weapons. (*Id.*, at 6-7.)

III. The Procedural History

Prosecuted for the weapons charges, Terry and Chilton filed a motion to suppress evidence in the trial court. The court denied that motion, finding that although Officer McFadden lacked probable cause to arrest and search the two men, he reasonably conducted an investigatory stop and frisk; he had reason to believe that Terry and Chilton were conducting themselves suspiciously and might be armed. The seized weapons were admitted into evidence at a subsequent court trial, and the two men were convicted. After gaining no relief in Ohio's appellate courts, Terry and Chilton petitioned for certiorari in the Supreme Court, and the high court agreed to hear their case. (*Id*., at 7-8.) Following the grant of the certiorari petition, Chilton died, so only Terry's conviction was reviewed by the Court. (*Id*., at 4, fn. 1.)

IV. A Stop is a Seizure and a Frisk is a Search Within the Meaning of the Fourth Amendment

The Supreme Court began by holding that the stop and frisk of Terry, conducted by Officer McFadden, implicated the Fourth Amendment. The Court rejected the notion that the Fourth Amendment does not come into play "if the officers stop short of something called a 'technical arrest' or a 'full blown search'." (*Id*., at 19.) If a law enforcement officer accosts an individual and restrains his freedom to walk away, the officer has "seized" that person within the meaning of the Fourth Amendment, even if he

does not make a formal arrest and take the person into custody. Moreover, when an officer explores the outer surfaces of a person's clothing in an attempt to find weapons, he has certainly conducted a "search". (*Id*., at 16.) Because Officer McFadden clearly "seized" Terry and then subjected him to a "search" when "he took hold of him and patted down the outer surfaces of his clothing", the Court had to decide if the officer's intrusions were reasonable as required by the Fourth Amendment – justified at their inception and reasonably related in scope to the circumstances that justified the interference in the first place. (*Id.*, at 19-20.)

V. The Stop or Detention: When is an Individual Detained and When is it Justified?

The Court devoted less attention to Officer McFadden's "stop" of Terry than it did to his frisk for weapons. The Court gave a brief answer to the question of when a stop or investigative detention occurs."[N]ot all personal intercourse between policemen and citizens" – short of arrest – qualify as Fourth Amendment "seizures". A seizure occurs "[o]nly when the officer, by means of force or show of authority, has in some way restrained the liberty of a citizen." (*Id.*, at 19, fn. 16.)

It would not be practical to require police officers to seek a warrant prior to an investigative stop as such police action is necessarily "predicated upon the on-the-spot observations of the officer on the beat". (*Id.*, at 20.) Thus, the officer may "in appropriate circumstances and in an appropriate manner approach a person for the purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." (*Id.*, at 22.) However, the officer's conduct in conducting the stop must be reasonable. (*Id*., at 20.) The officer "must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant that intrusion." The facts must be available to the officer at the moment of the stop and must be judged from an objective viewpoint; subjective good faith is not sufficient." (*Id*., at 21-22.) An officer may stop or detain an individual when the facts lead him to conclude, in light of his experience, "that criminal activity may be afoot". (*Id*., at 30.)

Given the facts before it, the Court concluded that Officer McFadden "seized" Terry when he initiated physical contact for the purpose of searching Terry for weapons. The Court could not tell with any certainty whether the Fourth Amendment was implicated before that point. (*Id.*, at 20, fn. 16.) Moreover, the officer had the right to stop Terry and and his two companions. McFadden was legitimately investigating possible criminal activity when he decided to approach and question the three men. He had seen them engage in a series of actions, each of which could be innocent when considered

individually (e.g., strolling down the street, looking in store windows). However, when the men's actions were considered in their totality, through the lens of the officer's "30 years' experience in the detection of thievery from stores in this same neighborhood," he had the right to investigate their possible criminal intentions. (*Id.*, at 22-23.)

VI. The Frisk: When is it Justified and What is the Allowable Scope of a Patdown Search for Weapons?

The Court reasoned that "[t]he crux of this case.... is not the propriety of Officer McFadden's taking steps to investigate [Terry's] suspicious behavior, but rather whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation." (*Id.*, at 23.) Because it is often performed in public, a frisk for weapons " 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." (*Id.*, at 17.) "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." (*Id.*, at 24-25.)

An officer does not need probable cause to arrest the individual in order to conduct a frisk. (*Id.*, at 25.) A search for weapons is justified when an officer believes "that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." (*Id.*, at 24.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his safety or that of others was in danger." As with any search or seizure, the officer's reasonable belief must be based on the facts, and reasonable inferences drawn from those facts, in light of his experience. (*Id*., at 27.)

As for the scope of such a search, it is limited by this justification. It must be confined to "an intrusion reasonably designed to discover knives, clubs, or other hidden instruments for the assault of the police officer." (*Id*., at 29.) A pat-search of the individual's outer clothing is appropriate. An officer may only place his hands in the individual's pockets or reach under the clothing if he feels a weapon. (*Id.*, at 29-30.)

Applying these rules to the facts of the case before it, the Supreme Court held that Officer McFadden had a reasonable belief, based on his observations and experience, that Terry was armed and presented a threat to officer safety during the investigative stop. McFadden could reasonably hypothesize that the Terry and Chilton "were contemplating a daylight robbery" – which would likely involve the use of weapons. (*Id*., at 28.) This

was sufficient to justify the frisk for weapons. Moreover, by patting down Terry's outer clothing in order to detect a weapon, the officer "carefully restricted his search to what was appropriate to the discovery of the particular items which he sought". (*Id.*, at 30.)

VII. The Supreme Court's Holding Permitting a Stop and Frisk Based on Reasonable Suspicion

Chief Justice Warren, writing for the majority, concluded as follows:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude, in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. (*Id.*, at 30-31.)

VIII. The Concurring Opinions

Justice Harlan and Justice White each filed separate concurring opinions. Justice Harlan made two interesting points. First, he stated that the officer must first have constitutional grounds to make a forcible stop to investigate a suspected crime before he can conduct a frisk for weapons. A police officer cannot walk up to someone and insist on frisking them for weapons if he reasonably believes that person is armed but does not reasonable suspect a crime. (*Id*., at 32-33, conc. opn. of Harlan, J.) Second, if the officer has "an articulable suspicion" of a "crime of violence" or "a serious crime" (such as burglary or robbery), his right to frisk the suspect should be "immediate and automatic". (*Id.*, at 33.)

IX. Justice Douglas's Dissenting Opinion: Taking a Stand for Requiring Probable Cause for any Fourth Amendment Search and Seizure

Justice Douglas was the lone dissenter in *Terry*. He agreed that Terry was seized within the meaning of the Fourth Amendment and that Officer McFadden's frisk for weapons was a search. However, Douglas insisted that under established law, any Fourth Amendment search and seizure cannot be constitutional unless the officer has probable cause to believe that a crime has been committed, is being committed or is about to be committed. (*Terry, supra*, at 35, dis. opn. of Douglas J.) And officers are allowed to search without warrants only when the facts within their personal knowledge would satisfy a magistrate that probable cause is present. According to Justice Douglas, the majority improperly sanctioned a seizure and search without a warrant and without such probable cause. This holding gave the police authority to conduct seizures and searches under circumstances when such intrusions would not be sanctioned by a judge. (*Id*., at 35-37.) "To give the police greater power than a magistrate is to take a long step down the totalitarian path". Such a step should be a deliberate choice of the people through a constitutional amendment. (*Id.*, at 38.)

In a statement timely in any era, Justice Douglas concluded:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. The hydraulic pressure has probably never been greater than it is today. Yet, if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.
> (*Id.*, at 39.)

Clearly, Justice Douglas's viewpoint did not prevail in subsequent cases. It is now well accepted that police officers can conduct a stop and frisk predicated on reasonable suspicion rather than probable cause. In fact, over the years, the appellate courts at all levels have relaxed the circumstances allowing a stop and frisk.

X. Questions Left Unanswered by *Terry*

Despite the persistent influence of *Terry v. Ohio* over the past 45 years, there are many questions left unanswered by the majority opinion. The Court expressly declined to decide the following: 1) whether Terry was seized by Officer McFadden prior to the commencement of the frisk (*Terry, supra*, at 20); 2) precisely what type of contact between a police officer and an individual, short of arrest, constitutes a "stop"(*Ibid*.); and 3) precisely what limitations the Fourth Amendment places upon a protective search for weapons. (*Id.*, at 29.)

Here are some of the questions left unanswered by Terry – questions that subsequent courts, at all levels, have struggled to answer:

1) What constitutes a *Terry* stop or detention? What is the test for determining that an individual has been seized within the meaning of the Fourth Amendment? When does a consensual encounter transform into a detention, requiring constitutional justification?

2) What combination of circumstances provide officers with reasonable suspicion for a *Terry* stop? What are the factors that commonly support a reasonable belief that an individual is engaged in criminal activity?

3) What are the circumstances that support a reasonable belief that a detainee is armed and dangerous, as necessary to initiate a frisk for weapons? What are the factors most commonly relied upon? Is any factor determinative – e.g. that the detainee is reasonably suspected of committing a violent crime or another type of offense?

4) When the police officer pats down the detainee's outer clothing, may he only reach into pockets or below the clothing if he feels a weapon? What if he feels an item that he reasonably believes is contraband?

These materials will discuss the "answers" to these and other questions, as provided by appellate cases filed in the 45 years since the Court decided *Terry v. Ohio*.

CHAPTER TWO
THE STOP OR DETENTION

I. Establishing That the Individual was Detained

When we receive a case in which the defendant was contacted by the police while he was on the street, in a public place or seated in a parked car, our first task may be to establish that the defendant was detained within the meaning of the Fourth Amendment and not merely subject to a consensual encounter.[3]

A. The Three Levels of Police Contacts With Individuals

For purposes of the Fourth Amendment, the United States Supreme Court in *Florida v. Royer* (1983) 460 U.S. 491, and the California Supreme Court in *Wilson v. Superior Court* (1983) 34 Cal.3d 777, defined the "three different categories or levels of police 'contacts' or 'interactions' with individuals, ranging from the least to the most intrusive." (*Wilson, supra*, at 784; *Royer, supra*, at 497-501.)

First, there are **consensual encounters** – interactions between a police officer and the individual "which result in no restraint on an individual's liberty ... and which may properly be initiated by police officers even if they lack any 'objective [reasonable] suspicion'." (*Wilson, supra*, at 784, citing *Royer, supra*, at 497-498.) Under these circumstances, there is no detention or "seizure" within the meaning of the Fourth Amendment and thus, no constitutional rights are implicated. (*Royer, supra*, at 498.)

Second, there are **detentions** – police seizures of individuals "which are strictly limited in duration, scope and purpose, and which may be undertaken by the police 'if there is an articulable suspicion that a person has committed or is about to commit a crime'." (*Wilson, supra*, at 784, citing *Royer, supra*, at 498.) This is the category of seizure defined by *Terry v. Ohio*, *supra*, 392 U.S. at 1, which "created a limited exception to the general rule" that "any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause." (*Royer, supra*, at 498.) "[A]n investigatory detention must be temporary and last no

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[3] Please note that this is generally not an issue when the defendant was an occupant (driver or passenger) in a moving vehicle, the police initiated a traffic stop by signaling the vehicle to pull over, and the driver has complied. During a traffic stop, the driver and any passengers are detained. (See *Brendlin v. California* (2007) 249, 256-57.)

longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." (*Royer, supra*, at 500.)

Third, there are **formal arrests or restraints on an individual's liberty comparable to an arrest** – seizures which "exceed the permissible limits of a detention" and "which are permissible only if the police have probable cause to arrest the individual for a crime". (*Wilson, supra*, at 784.)

B. Distinguishing a Detention From a Consensual Encounter: The General Principles[4]

1. The Individual Must be Physically Restrained or Submit to the Officer's Show of Authority

An individual is detained when police officers restrain his liberty by means of physical force or by show of authority. (See *Terry, supra*, 392 U.S. at 16, 19, fn. 16; *United States v. Mendenhall* (1980) 446 U.S. 544, 552; *California v. Hodari D.* (1991) 499 U.S. 621, 625; *In re Manuel G*. (1997) 16 Cal. 4th 805, 821.) **And the person must submit to the officers' show of authority**. (*Hodari D., supra*, at 626-629.)

Terry defined a detention as follows: "Whenever a police officer accosts and individual and restrains his freedom to walk away, he has seized that person." (*Terry, supra*, at 16.) "The officer must "by means of physical force or show of authority" restrain the individual's liberty. (*Id*., at 19, fn. 16 [holding that although the record did not establish with certainty whether the defendant was detained before the officer physically restrained him for a frisk, he was detained at that moment].)

In *Mendenhall*, decided 12 years after *Terry*, the Supreme Court interpreted the *Terry* decision as assuming that a detention had not taken place until the officer physically restrained the defendant. (*Mendenhall, supra*, at 552-553.) The Court, in *Mendenhall*, expanded that definition by holding that a detention occurs when an officer

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[4] This section discusses the general standards and legal rules as defined by some of the leading United States Supreme Court and California Supreme Court cases decided after *Terry v. Ohio*. Numerous California Court of Appeals and federal circuit cases have also interpreted these rules. The consequences of their interpretations – the circumstances these cases have relied on to find that an individual was or was not detained – will be discussed in a subsequent section of the materials.

restrains the individual's freedom of movement by physical force or by a show of authority. (*Id.*, at 553.) Subsequent Supreme Court cases applied this standard and found that a defendant may be detained by an officer's show of authority, without any application of physical restraint. (See, e.g. *Royer*, *supra*, 460 U.S. at 501-502 [the defendant was detained when officers at the airport identified themselves as narcotics agents, told him that he was suspected of transporting drugs and asked him to accompany them to the police room while retaining his plane ticket and identification].)

In *Hodari D*., the Supreme Court added an important condition to this test. Assuming that a police pursuit of an individual constitutes a "show of authority", that individual is not detained until he yields or submits to that show of authority. (*Hodari D., supra*, 499 U.S. at 626-629.) In other words, if the police are chasing a person and even calling upon him to stop, the person is not detained within the meaning of the Fourth Amendment until he stops and yields to the show of authority or the police physically restrain him. (*Id*., at 622-623, 626, 629 [the minor was not detained when he tossed away a rock of cocaine during an extended police chase before a police officer tackled him].) This is the rule regardless of whether the police chase the individual on foot or in a vehicle. (*Id*., at 628-29, citing *Brower v. Inyo County* (1989) 489 U.S. 593, 596.)

2. The Reasonable Person Test

The test for distinguishing a detention from a consensual encounter is whether a reasonable person, under the circumstances, would have believed that he was not free to ignore the police, disregard the officers' questions, decline their requests, leave the scene, or otherwise terminate the encounter and go about one's business. (See *Mendenhall, supra*, 446 U.S. at 554; *Michigan v. Chesternut* (1988) 486 U.S. 567, 574; *Florida v. Bostick* (1991) 501 U.S. 429, 436-437; *In re Manuel G., supra*, 16 Cal. 4th at 821; *People v. Zamudio* (2008) 43 Cal.th 327, 341.) This test is objective, focusing on a reasonable person's interpretation of the police actions. (*Chesternut, supra*, at 574.) Did the police communicate to the individual, through their words and conduct, that compliance with their requests is required? (*Manuel G., supra*. at 821.)

In the early post-*Terry* cases, the Supreme Court stated the test as whether an individual, in light of the circumstances, would have felt that he was "not free to leave" the scene of the police encounter. (See *Mendenhall, supra*, at 554; *Chesternut, supra*, at 573; *Immigration and Naturalization Service v. Delgado* (1984) 466 U.S. 210, 219.)

However, in 1991, in *Florida v. Bostick*, the Court rephrased the test. (*Bostick, supra*, at 433-440.) In that case, the encounter between the police officers and the individual took place on a crowded bus. Two drug interdiction officers boarded a bus

bound from Miami to Atlanta during a stopover. The officers went down the aisle of the bus, randomly picking out passengers to question. The defendant was one of those selected passengers. Standing over the seated defendant, the officers asked to inspect his ticket and identification; he handed them over and they were immediately returned to him. The officers then explained that they were narcotics agents looking for illegal drugs, and they requested the defendant's consent to search his luggage. They advised him that he had the right to refuse consent, but he acquiesced and they searched his bag, finding contraband. (*Id.*, at 431.) The defendant argued that under these circumstances, no reasonable person would have felt free to leave the bus that was about to depart. If the defendant had disembarked, he would have risked being stranded while the bus took off with his luggage. (*Id.*, at 435.)

The Court declined to hold that the defendant was detained at the moment when he consented to a search of his luggage. He may have reasonably believed that he could not leave the bus as it was about to depart, but that belief was not attributable to the police officers' conduct. The defendant's freedom of movement was restricted by a factor independent of police conduct – i.e., that he was a passenger on a bus. (*Id*., at 436-437.) The Court then restated the standard test distinguishing a detention from a consensual encounter. "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, 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" (*Id.*, at 437), or that he "was not free to decline the officers' requests or otherwise terminate the encounter." (*Id*, at 439.)

The Court found support for this statement of the test in its earlier decision in *Delgado, supra*, 466 U.S. at 210. At issue in *Delgado* was the constitutionality of "factory surveys" during which INS agents entered employers' factories to determine if any workers were illegal immigrants. During these surveys, several agents positioned themselves near the building's exits while other agents dispersed through the factory, randomly selecting some workers for questioning. The agents approached these employees, identified themselves as INS agents and asked a few questions relating to citizenship. The other workers continued with their labor and were free to walk around inside the building. (*Id.*, at 211-213.) The Court declined to hold that the workers were detained by the agents, even though they may not have reasonably felt free to leave the factory. The restrictions on the employees' freedom to leave did not result from the agents' conduct. When people are at work, their freedom of movement is restricted by their "voluntary obligations to their employers". Moreover, the agents did not prevent the workers from moving around inside the building and doing their jobs. (*Id.*, at 218.)

3. The Totality of the Circumstances Must be Considered

No bright line rule or single factor transforms a consensual encounter into a detention requiring justification under the Fourth Amendment. The assessment of whether police conduct amounted to a detention must take into the account the totality of the circumstances. (*Chesternut, supra*, 486 U.S. at 573; *Royer, supra*, 460 U.S. at 506-507; *Manuel G., supra*, 16 Cal. 4th at 821.) The test assesses the coercive effect of the police conduct as a whole rather than emphasizing particular details in isolation. (*Manuel G., supra*, at 821.) Application of this test requires the court to evaluate all of the circumstances from the perspective of a reasonable person in the defendant's position. (*Chesternut, supra*, at 572-574; *Manuel G., supra*, at 821.)

4. Police Questioning Does not Initiate a Detention

Police questioning of an individual, by itself, does not convert a consensual encounter into a detention.. (*Delgado, supra*, 466 U.S. at 216; *Bostick, supra*, 501 U.S. at 434.) As the Supreme Court has held: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [and] by putting questions to him if he is willing to listen ..... The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way." (*Royer*, *supra*, 460 U.S. at 497-498; see also *Terry, supra*, 392 U.S. at 34 [conc. opn. of White, J.]) "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would ... require some particularized and objective justification." (*Mendenhall, supra*., 446 U.S. at 554.)

During a consensual encounter, the individual approached for questioning must reasonably understand that he is free to refuse to answer the officers' inquiries. (See *Wilson, supra*, 34 Cal. 3d at 790-791.) The nature of the questions asked by the officers may affect this assessment. As the questioning moves from general queries concerning facts unrelated to a particular crime to interrogation focusing on specific criminal activity and implying that the individual is a suspect, the person may reasonably conclude that he is not free to decline to answer. (*Ibid*.)

5. A Request for Identification Does not Initiate a Detention

An officer's questions regarding identity or a police request for identification do not escalate a consensual encounter into a detention. (*Mendenhall, supra*, 446 U.S. at 555; *Royer, supra*, 460 U.S. at 501; *Delgado, supra*, 466 U.S. at 216.)[5] However, if the officer retains the individual's identification for more than a moment, that person may reasonably conclude that he is not free to disregard the officer, leave the scene or otherwise terminate the encounter. (*Royer, supra*, at 501-503.)

C. Selected Decisions Finding That the Defendant was Detained or Merely Engaged in a Consensual Encounter

In *Terry v. Ohio*, the Supreme Court held that the defendant was seized within the meaning of the Fourth Amendment when the officer initiated physical contact in order to frisk the defendant for weapons. (*Terry, supra*, 392 U.S. at 20, fn. 16.) The testimony established that the officer had approached the defendant and his two companions, identified himself as a police officer and asked their names. After the men "mumbled something" in response, the officer grabbed the defendant, turned him around and patted down the outside of his clothing. (*Id.*, at 7.) The Court did not decide whether any of the officer's actions prior to grabbing the defendant restrained his liberty and constituted a detention. (*Id.*, at 20, fn. 16.) The question of whether a detention can occur without physical restraint was left to subsequent courts to decide.

In this section, we discuss cases in which appellate courts have found: 1) that the defendant was detained at some point during the interaction with the police; or 2) that he was not detained but merely engaged in a consensual encounter. The facts are described in necessary detail, as the determination of whether an individual was detained is a fact-intensive analysis. In each case, the court decided whether the circumstances communicated to a reasonable person that he was not free to disregard the police, leave the scene or otherwise terminate the encounter. In some cases, the courts' answers to this question, although consistent with the law, are arguably inconsistent with our common understanding of human behavior. There are significantly fewer appellate court cases finding that a defendant was detained compared to those finding a consensual encounter.

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[5] Some justices, including Supreme Court Justice Brennan, have criticized this principle. (See *Royer*, *supra*, at 511-512,dis.opn. of Brennan, J., [stating that "it is simply wrong to suggest" that an individual feels free to walk away when a police officer asks for and receives his driver's license or identification].)

The cases in this section are grouped by some common factual circumstance (e.g., "The Officer Contacts and Questions the Individual at the Airport", " The Officer Pursues the Individual on Foot or in a Vehicle"). In each of those sections, the cases are listed in chronological order, from earliest to most recent. The circumstances relied on to find that the defendant was detained or not detained are in bold print. In the next section, we will list some of the factors that the courts have relied on in finding a defendant detained within the meaning of the Fourth Amendment.

1. The Officer Contacts and Questions the Individual at the Airport

UNITED STATES V. MENDENHALL (1980) 446 U.S. 544. NO DETENTION: THE DEFENDANT'S PERSONAL CHARACTERISTICS DO NOT AFFECT THE REASONABLE PERSON ASSESSMENT

Two narcotics agents were stationed at the Detroit airport. They observed the defendant deplane from a flight from Los Angeles. Because her characteristics fit the "drug courier profile", the agents approached the defendant as she walked through the airport, identified themselves as federal agents and asked to see her identification and airline ticket. She complied with this request and the officers noticed that her license bore the name "Sylvia Mendenhall", whereas the ticket was issued to "Annette Ford". The defendant claimed she just liked using a different name. The agents returned her license and ticket and asked if she would accompany them to the airport DEA office for further questioning. The defendant did not verbally respond but went with the agents to this office. Once there, an agent asked for consent to search her person and handbag. He told her that she had the right "to decline the search if she so desired". The defendant answered "go ahead". An officer searched her and recovered two small packets of heroin. (*Mendenhall, supra*, at 547-549.)

The question before the Court was whether the defendant's apparent consent to accompany the officers to the DEA office and her express consent to the search of her person were the tainted effects of an illegal detention. **The Court held the defendant was not detained when she was approached and questioned by the two agents in the airport's public concourse: 1) The agents wore no uniforms. 2) They displayed no weapons. 3) They did not summon the defendant but approached her and identified themselves as federal agents. 4) The agents requested, but did not demand, to see the defendant's identification and ticket.** "[N]othing in the record suggests that [the defendant] had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way." (*Id.*, at 555-556.) **Additionally, the defendant was not detained when she went with the agents to the DEA office:**

1) She was not told that she had to go to the office, but was simply asked to accompany the officers. 2) Her drivers license and ticket were returned to her before she was asked to accompany the officers. These findings were not affected by the fact that she was a 22-year old black female who "may have felt unusually threatened by the officers, who were white males. (*Id.*, at 557-558.)

***FLORIDA V. ROYER* (1983) 460 U.S. 491.**
THE DEFENDANT WAS DETAINED: THE OFFICERS RETAINED HER DRIVER'S LICENSE AND AIRLINE TICKET

Two plainclothes narcotics detectives observed the defendant at the Miami airport. They believed that his characteristics fit the "so-called drug courier profile". As the defendant walked towards the boarding area, the officers approached him, identified themselves and asked if he had a moment to speak with them. The defendant agreed. Upon request, he gave his airline ticket and driver's license to the officers. They noticed that the defendant's ticket bore the name "Holt" while his driver's license identified him as "Royer". The detectives then informed the defendant that they were narcotics investigators and suspected him of transporting drugs. Without returning the defendant's ticket or driver's license, they asked him to accompany them to a room in the airport. Once the two officers and the defendant reached the small room, one officer took the defendant's baggage check stubs, retrieved his two suitcases and brought them to the room. The officers asked the defendant if he would consent to a search of the two suitcases. Without verbally responding, the defendant unlocked one of the suitcases with a key. Inside that suitcase, the officers found marijuana. The officer pried open the second suitcase and found more marijuana. (*Royer, supra*, at 493-495.)

The question before the Court was whether the defendant was illegally detained when he consented to the search of his luggage, so that the evidence found in the suitcases should have been suppressed. **The court held that the defendant was <u>not</u> detained when the officers approached him, asked to speak to him, and then requested and examined his ticket and driver's license. However, the defendant was detainedwhen the officers: 1) identified themselves as narcotics agents; 2) told the defendant that he was suspected of transporting narcotics; 3) asked him to accompany them to the police room while retaining his license and ticket; and 4) did not tell him that he was free to depart. (*Royer, supra*, at 501.)** The Court distinguished these facts from those of *Mendenhall*. Defendant Royer's ticket and identification remained in the officers' possession throughout the encounter and the officers seized and possessed his luggage. Also, the defendant was never advised that he could decline to be searched. (*Id*., at 503.)

***WILSON V. SUPERIOR COURT* (1983) 34 CAL. 3D 777**
THE DEFENDANT WAS DETAINED: THE OFFICER ACCUSED THE DEFENDANT OF A SPECIFIC CRIME

Two undercover narcotic agents were patrolling the Los Angeles airport. They were monitoring inbound flights from Florida to discover persons transporting drugs. While observing passengers deplaning from a Miami flight, the agents observed the defendant, Flip Wilson, and his nephew get off the flight. The defendant was carrying an attache case. Both men walked from the arrival area towards the street and the first agent followed them. Near the airport exit, the defendant's wife greeted the two men and they all walked outside to a car parked at the curb. The nephew re-entered the airport to retrieve luggage. When he came outside with two bags, the agent approached the defendant, who was standing by the car's open trunk. The agent showed the defendant his identification, told him that he was a police officer and asked if he "might have a minute of his time". The defendant agreed. The agent advised him that he was conducting a narcotics investigation and that he had received information that the defendant would be arriving from Florida that day carrying a lot of drugs. The agent asked the defendant for permission to search his luggage and the attache case that he had carried off the plane, and the defendant consented. The agent searched the attache case and retrieved a vial of hash oil. The agent then asked the defendant to accompany him to an office inside the airport. Once there, he continued searching the attache case and found another vial containing cocaine. Wilson was arrested. (*Wilson, supra*, at 780-783.)

The question presented was whether a reasonable person in the defendant's position would not have felt free to leave when he consented to the search of the attache case. **Relying on *Royer*, the California Court held that the agent detained the defendant when he: 1) advised him that he was conducting a narcotics investigation; 2) told him that he had information that the defendant would be arriving from Florida that day carrying a lot of drugs; and 3) did not tell the defendant that he was free to leave if he desired to do so. At that point, the defendant could not help but understand that he was the focus of the officer's particularized suspicion regarding a specific crime. No reasonable person under these circumstances would have believed he was free to walk away. (*Id.*, 790-791.)**

***PEOPLE V. PROFIT* (1986) 183 CAL. APP. 3D 849 [2ND DIST., DIV. 1]**
NO DETENTION: DEFENDANTS TOLD 5 TIMES THAT THEY WERE FREE TO LEAVE OR DECLINE TO ANSWER QUESTIONS

A narcotics agent assigned to the Los Angeles airport observed the three defendants (Profit and two others) at the ticket counter. Believing they might be transporting narcotics, the agent decided to follow them to the boarding area where he approached Profit. He identified himself as a federal narcotics agent and said he would like to talk to Profit for a minute. He advised him that he was not under arrest or being detained and that he was free to leave and decline to speak to the officer. The agent talked to all three defendants, explaining that he was conducting a narcotics investigation and would like to talk to them. For the second time, he said they did not have to converse with him and were free to leave. The agent asked all three men for identification, and Profit handed over their three airline tickets. The agent looked at the tickets and handed them back. The agent asked the three defendants if they were carrying narcotics, and they all said "no." When asked about the discrepancy between the name of his airline ticket and the name he gave the agent, Profit became extremely nervous. Profit and the other defendants agreed to the agent's suggestion that they continue the conversation in the DEA office. For the third time, the agent told the three men that they could leave any time they wished. As they walked to the office, Profit asked if he was free to leave and the agent said that he was; this was the fourth advisement. When they got to the door of the DEA office, the agent, for the fifth time, told the three men that they were free to leave. Profit struck another agent in the chest and face and took off running, tossing away a bottle of PCP. (*Profit, supra*, at 856-859.)

The issue was whether the defendants were unlawfully detained when Profit struck the second agent and ran away. The Court of Appeal held they were not detained at the critical moment because: 1) the interaction took place in a public area; 2) the defendants outnumbered the officers; 3) the officers did not touch the defendants, display their weapons or use any force; 4) they did not issue any demands or orders; 5) they did not retain the defendants' tickets or identification (distinguishing *Royer*); and 6) the officers did not accuse the defendants of any crime or ask questions indicating that they were the focus of a narcotics investigation (distinguishing *Wilson*). Factor #7 was the most significant: The agent told Profit and the other defendants five times that they were free to leave and did not have to talk to him or answer his questions. While an interaction may remain a consensual encounter even if the officer does not advise the individual in this manner, it is a relevant factor. (*Id*., at 861, 865-866, 877-878.)

***UNITED STATES V. JOHNSON* (9TH CIR. 1990) 903 F.2D 1219.**
NO DETENTION: DEFENDANT TOLD HE WAS FREE TO LEAVE

Two drug interdiction officers were on surveillance duty at the airport. After observing the defendant while he stood in the ticket line, the officers concluded that he might be involved in transporting narcotics. The officers approached the defendant, identified themselves and asked him some questions. They told him that he was free to leave, and he indicated that he understood. One officer asked the defendant for permission to search the carry-on bag that was on the floor next to him. The defendant replied that it was not his bag, but consented. Inside the bag, the officer found cocaine.

The Ninth Circuit held that the defendant was not detained when he consented to the search of the carry-on bag because: 1) the encounter occurred in a public place; 2) the officers did not touch the defendant or block his path; 3) the officers told the defendant he was free to leave and he indicated that he understood. (*Johnson, supra*, at 1221.)

2. The Officer Contacts and Questions the Individual on the Street

***PEOPLE V. FRANKLIN* (1987) 192 CAL. APP. 3D 935 [FIFTH DISTRICT]**
NO DETENTION: DIRECTED SCRUTINY IS NOT A DETENTION

While patrolling in a high crime area, a police officer observed the defendant walking down the street. He was wearing a full-length camouflage jacket and carrying a white cloth-like object that he was trying to conceal from the light. The officer shined his patrol car spotlight on the defendant, pulled his car directly behind the defendant and stopped. The defendant approached the passenger side of the patrol car. When the officer exited, the defendant asked, "What's going on?" The officer asked the defendant to remove his hands from his pockets and when the defendant did so, the officer saw apparent blood on his hands, as well as a vial containing white powder inside appellant's pocket. The defendant then put his hands back in his pocket and when told to remove them, he fled. Eventually, he was tackled and arrested. The police discovered drugs and evidence linking the defendant to a murder that had happened near the scene of the initial police contact. (*Franklin, supra*, at 938.)

The Court of Appeal found that the defendant was <u>not</u> detained prior to being tackled by the police. 1) When the officer pulled his patrol car directly behind the defendant and shined his spotlight on the defendant, he many have reasonably felt "himself the object of official scrutiny. However, such directed scrutiny does not amount to a detention." 2) The officer's request that the defendant remove his hands

from his pocket was not delivered in a manner engendering a reasonably belief that he had to comply. (*Id*., at 940-942.)

***PEOPLE V. ROTH* (1990) 219 CAL. APP. 3D 211 [FOURTH DISTRICT] THE DEFENDANT WAS DETAINED: OFFICER SHINED A LIGHT ON THE DEFENDANT WHILE COMMANDING HIM TO APPROACH**

At 1:30 a.m., two officers in a patrol car were conducting a security check of closed businesses in the Alpha Beta shopping center. They spotted the defendant walking in the parking lot, about 30 yards away from the Alpha Beta store. There were no other people or cars in the lot. The officers shined the patrol car light on the defendant and he stopped walking. Both officers alighted from their car and one commanded the defendant to approach. When the defendant walked over to the patrol car, the officer asked what he was doing at the closed center; he admitted that he was going to look in the dumpsters for junk. Weapons were found in the defendant's possession. (*Roth, supra*, at 213, 216.)

The Court found that the defendant was detained when: 1) the officers shined the patrol car spotlight on him; 2) the officers stopped and exited from the patrol car; and 3) one officer commanded the defendant to approach so he could speak to him." In this situation, no reasonable person would believe himself or herself free to leave. (*Id.*, at 215.)

***PEOPLE V. VERIN* (1990) 220 CAL. APP. 3D 551 [FIRST DIST., DIV. 4] THE DEFENDANT WAS DETAINED: THE OFFICER COMMANDED THE DEFENDANT TO STOP**

An officer in a marked police car was patrolling an area with reported drug activity. The officer saw the defendant and a companion walking down the street. He parked his patrol car, got out and called out to the two men: "Hold it. Police" or "Hold on. Police". The officer never activated the patrol car lights nor displayed any weapon. The defendant's companion immediately stopped, but the defendant kept walking a couple of steps. He then turned to his side, put his hand in his pocket, dropped something and that approached the officer and asked what was happening. The officer picked up the discarded item and found that it was tar heroin. (*Verin, supra*, at 554.)

The Court of Appeal found that the defendant was detained when he discarded the heroin because the officer, by his words, had "explicitly, unambiguously and authoritatively" commanded, and not requested, that the defendant comply with his order to stop. **A reasonable person in this situation would not feel free to leave. (*Id.*, at 556-557.)**

Caveat: *Roth* and *Verin* has been distinguished in numerous unpublished cases but never overruled. Remember that after *California v. Hodari D., supra*, 499 U.S. 621, you cannot argue that a police command to stop initiates a detention unless the individual stops and yields to that show of authority.

******PEOPLE V. JONES* **(1991) 228 CAL. APP. 3D 519 [FIRST DIST., DIV. 2] THE DEFENDANT WAS DETAINED: THE OFFICER'S MANNER OF APPROACH CONVEYED A SENSE OF URGENCY**

A police officer was patrolling an area known for narcotics sales in a marked patrol car at night. He saw three men standing on the corner. From a distance of about 30 feet, he saw one of the men hand the defendant suspected currency. The officer pulled his patrol car to the wrong side of the road and parked diagonally against the traffic about 10 feet behind the three men. As the officer stepped out of his car, the defendant walked away. The officer called out to him, "Stop. Would you please stop." The defendant stopped and reached towards his pants pocket. The officer pulled the defendant's hand from his pocket. He was holding a baggie of suspected methamphetamine. (*Jones, supra*, at 521-522.)

The Court held that the officer detained the defendant before he reached into his pocket based on the following factors: 1) The defendant was standing on the sidewalk, when he was suddenly confronted by a marked police car driving towards him. 2) The car parked diagonally against traffic in such a way as to obstruct traffic. 3) The officer exited the car and immediately commanded the defendant to stop. The Court's implied finding was that the manner of the officer's approach to the defendant conveyed a sense of urgency. Under these circumstances, a reasonable person would not believe he was free to leave. **(*Id.*, at 523-524.)**

PEOPLE V. BOUSER **(1994) 26 CAL. APP. 4TH 1280 [4TH DIST., DIV 3] NO DETENTION: THE DEFENDANT WAS NOT DETAINED DURING A WARRANT CHECK**

The officer saw the defendant in an alley known for drug dealing; he was standing near a dumpster, apparently looking for something. When he spotted the officer's patrol car, the defendant began walking in the opposite direction. The officer stopped his car behind the defendant. He walked towards him and said something like, "Hey, how you doing? Mind if we talk?" The defendant stopped. The officer asked him "general information questions" such as his name, birth date and criminal history. (It does not appear that the officer asked for documentary identification or that the defendant handed over an identification card.) The officer asked what the defendant was doing in the alley,

and he said that he'd visited a friend at a nearby apartment. Standing facing the defendant, the officer used his hand-held radio to conduct a records check for outstanding warrants. He did not tell the defendant what he was doing, but the defendant could hear the officer calling in his name and birthdate. The records check revealed an outstanding arrest warrant. The defendant was arrested and searched. (*Bouser, supra*, at 1282-1283.)

The issue was whether the defendant was detained when the officer ran the warrant check. The Court held he was not detained: 1) The defendant was not seized when the officer approached him, asked him if they could talk, requested identification and inquired what he was doing in the alley. 2) The officer's commencement of the warrant check did not transform the consensual encounter into a detention. The warrant check may have indicated to the defendant that he was being investigated, and coupled with the officer's earlier questions, he may have felt that he was suspected of some unspecified criminality. However, neither the preliminary questioning nor the warrant check related to specific criminal activity (as was the case in *Wilson, supra*, 34 Cal. 3d at 790-791.) 3) The officer did not order the defendant to do anything. 4) The officer did not draw his weapon, make any threatening gestures or utilize his car's lights or siren. (*Id.*, at 1287-1288.)

Justice Crosby wrote a dissenting opinion criticizing the majority for indulging in the fiction that a citizen's submission to police questioning and the demand for identification does not amount to a seizure. No reasonable person would conclude that they could simply leave the scene while an officer conducts a warrant check, using their personal information. (*Bouser, supra*, at 1288-1289, conc. opn. of Crosby, J.)

IN RE MANUEL G. (1997) 16 CAL.4TH 805
NO DETENTION: THE OFFICER ASKED TO QUESTION THE MINOR BUT DID NOT STOP HIM FROM WALKING DOWN THE STREET

The officer was investigating a gang-related shooting. Three days after the shooting, he saw the minor, Manuel G., who he recognized as a gang member, walking down the street. The officer wanted to question the minor about the case. He broadcast over his police radio that he was conducting a gang-related "pedestrian check" and got out of his patrol car. The minor continued walking towards the officer. The officer called out, "Hey, can I talk to you?" and indicated that he wanted to talk about the shooting. The minor said he had no information, but the officer kept asking him about the case. He did not draw his gun or stop the minor from continuing to do what he was doing. The minor said he was tired of the police contacting him and was going to contact "Internal Affairs". Then, he repeatedly threatened the officer, stating that he and his friends would kill the officer and his friends. A second officer, who arrived about two to five minuets after the

officer announced his "pedestrian check" over the radio, saw the minor sitting on the curb, while the first officer was standing and talking to him. (*Manuel G., supra*, at 811.)

The Supreme Court held that the minor was not detained when he threatened the officer, relying on the following factors: 1) The officer contacted the minor in a public place. 2) The officer asked the minor if they could talk and the minor responded to his questions. 3) The officer did not draw his gun or deter or stop the minor from continuing what he was doing – i.e. walking down the street. 4) There was no evidence that the officer ordered the minor to sit on the curb until after he started threatening him. (*Id*., at 821-822.)

***PEOPLE V. FORANYIC* (1998) 64 CAL. APP. 4TH 186 [4TH DIST., DIV. 3] THE DEFENDANT WAS DETAINED: THE DEFENDANT COMPLIED WITH THE OFFICER'S ORDER TO DISMOUNT FROM HIS BIKE.**

A police officer approached the defendant when he saw him standing astride his bicycle at 3:00 in the morning. An ax was attached to the bike. The officer ordered the defendant to dismount. The defendant had difficulty following this direction and could hardly stand without leaning on the bike. The officer suspected that the defendant was intoxicated and an evaluation confirmed that suspicion. The defendant was arrested and found to be carrying methamphetamine. (*Foranyic, supra*, at 188.)

The Court found that the defendant was detained when he complied with the officer's order to dismount from his bike. The officer was free to approach the defendant and question him, but "once he ordered [the defendant] to lay down his bike and step away from it, he clearly conveyed the impression that [the defendant] was not free to leave." (*Ibid*.)

***PEOPLE V. BENNETT* (1998) 68 Cal. App. 4th 396 [FOURTH DIST., DIV. 3] NO DETENTION: THE DEFENDANT CONSENTED TO WAIT IN THE PATROL CAR DURING A WARRANT CHECK**

Police officers saw the defendant talking to a known prostitute. An officer approached the defendant and asked, "Can I talk to you for a moment?". The defendant said, "Yes." Remembering the defendant from a prior contact, the officer asked him if he was still on parole and the defendant said that he was. The officer then asked the defendant if he would be willing to wait in the patrol car while he "ran him for warrants". The defendant agreed. The defendant was placed in the patrol car but handcuffs or other restraints were not used. While the defendant sat in the patrol car, the officer learned that he had violated parole. It took the officer 30 minutes to contact the defendant's parole

officer and verify this information. During that time, the police officer drove the defendant around, presumably in the patrol car. (*Bennett, supra*, at 399.)

The Court held that the defendant was not detained before the computer check revealed the parole violations because "nothing was done to restrain Bennett's liberty in any way": 1) The officer asked the defendant's permission to talk to him and place him in the patrol car while he ran a warrants check, and the defendant answered, "Yes." 2) The officer spoke in a polite, conversational tone. 3) The officer applied no physical or verbal force, and he did nothing to stop the defendant from simply walking away. (*Id*., at 402.) The fact that the officer probably would have stopped the defendant from leaving the scene is "legally irrelevant" as this did not happen. The officer's "uncommunicated subjective motivation" has no bearing on the Court's analysis of whether a detention occurred. (*Id.*, at 402, fn. 5.)

***PEOPLE V. TERRELL* (1999) 69 CAL. APP. 4TH 1246 [2ND DIST., DIV. 4] NO DETENTION: THE OFFICER RETAINED THE DEFENDANT'S DRIVER'S LICENSE WHILE RUNNING A WARRANT CHECK, BUT THE DEFENDANT NEVER ASKED FOR IT BACK**

Two police officers observed the defendant seated on a park bench with two companions. One of the defendant's companions appeared to be under the influence of a controlled substance. The officers approached. After engaging the defendant in a brief conversation, one officer asked him if he had any identification. The defendant responded by producing a driver's license. The officer held onto the defendant's identification and ran a warrants check, learning that the defendant had an outstanding warrant. He was then arrested, searched and found to be in possession of heroin. (*Terrell, supra*, at 1251.)

The Court of Appeal held that the defendant was not detained prior to his arrest: 1) The officer approached the defendant and asked him some questions. 2) The defendant's handing over his driver's license to the officer was a "spontaneous and voluntary action". 3) The defendant never asked the officer to give his driver's license back. 4) The entire encounter lasted only three to four minutes. (*Id.*, at 1254.)

******PEOPLE V. GARRY* **(2007) 156 CAL.APP. 4TH 1100 [FIRST DIST., DIV. 2] THE DEFENDANT WAS DETAINED: THE OFFICER TURNED A SPOTLIGHT ON THE DEFENDANT AND RAPIDLY APPROACHED**

A police officer was patrolling a high-crime area at night. He was in full uniform in a marked patrol car. The officer observed the defendant standing next to a parked car in a residential area for a few seconds. The officer turned on his patrol car's spotlight which illuminated the defendant in white light. The officer parked his patrol car about 35 feet away from the defendant and exited. He noticed that the defendant looked nervous and in shock. The officer walked briskly towards the defendant, who began walking backwards three or four steps. Pointing to a house on his right, the defendant spontaneously stated, "I live right there." The officer continued walking towards the defendant. He called out to the defendant, asking whether he was on probation or parole. The defendant replied that he was on parole. The officer then asked if the defendant had any weapons, guns or knives on him and the defendant indicated that he did not. It took the officer about three seconds to reach the defendant after leaving his patrol car. He then tried to grab the defendant who pulled away "violently" and resisted. The officer was able to apply "an arm-shoulder lock", take the defendant to the ground, and handcuff him. The defendant was arrested, searched and found to be carrying cocaine. (*Garry, supra*, at 1103-1104.)

The issue was whether the defendant was detained when he stated that he was on parole. The Court of Appeal held that the defendant was detained at the critical moment, even though the officer had parked 35 feet away from the defendant, did not use his emergency lights, did not draw a weapon, did not issue any verbal commands, did not do anything to prevent the defendant from leaving, and did not touch the defendant before learning that he was on parole. **The defendant was detained because the armed and uniformed officer: 1) bathed the defendant in his patrol car's spotlight; 2) exited from his patrol car and briskly walked 35 feet in three seconds directly towards the defendant; and 3) pointedly asked the defendant about his legal status (probation or parole) as he quickly approached, disregarding the defendant's indication that he was merely standing outside of his home. Moreover, the defendant's ready response to the officer's questions demonstrate that he had submitted to the officer's show of authority**.**(*Id*., at 1111-1112.)** No matter how politely the officer stated his question regarding the defendant's probation or parole status, any reasonable person would have felt compelled to respond.

3. The Officer Contacts and Questions the Individual While he is Seated in a Parked Vehicle or has Just Exited From the Vehicle

*** *PEOPLE V. BAILEY* (1985) 176 CAL.APP. 3D 402 [6TH DISTRICT] THE DEFENDANT WAS DETAINED: THE OFFICER PULLED IN BEHIND THE DEFENDANT'S PARKED CAR AND TURNED ON THE PATROL CAR'S EMERGENCY LIGHTS**

An officer observed the defendant seated in a car in the parking lot of a closed store. The officer pulled his unmarked patrol vehicle behind the defendant's car and turned on his emergency lights – red and blue in the front and amber in the rear. It was not clear whether the patrol vehicle blocked the defendant's car so that it could not drive away. The officer exited from the patrol vehicle, and approached the defendant's car. From a few feet away, he smelled marijuana. The defendant's consented to a car search, and the officer found marijuana, cocaine, and a loaded pistol. (*Bailey, supra*, at 404.)

The Court of Appeal found that the defendant was detained when the officer: 1) pulled his patrol vehicle behind the car in which the defendant was sitting; and 2) directed his lights toward that car. "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer". The vehicle occupant would not feel free to leave. The defendant's consent was obtained during an illicit detention. (*Id.*, at 405-406.)

**** PEOPLE V. WILKINS* (1986) 186 CAL. APP. 3D 804 [6TH DISTRICT] THE DEFENDANT WAS DETAINED: THE OFFICER'S PATROL CAR BLOCKED THE DEFENDANT'S CAR**

The defendant and another man were seated in a car parked in a store lot at about 10:00 p.m. Driving his marked patrol vehicle through the lot, the officer saw the two men slide down in their seats as he drove past. Intending to contact the two men in the car, the officer parked diagonally behind the parked car so that he was blocking its exit. The officer approached the parked car and talked to the occupants. He requested and obtained their identification, ran a warrant check and learned that the defendant had a probation search condition. Upon searching the defendant, he found marijuana and some suspected cocaine. More drugs were found in the car. (*Wilkins, supra*, at 807-808.)

The Court found that the defendant and his companion were detained when the officer parked his patrol vehicle behind the car in which they were sitting "in such a way that the exit of the parked vehicle was prevented". Under these circumstances, no reasonable person would feel free to leave. **(*Id.*, at 809.)**

**** UNITED STATES V. KERR* (9TH CIR. 1987) 817 F.2D 1384**
THE DEFENDANT WAS DETAINED: THE OFFICER'S PATROL CAR BLOCKED THE DRIVEWAY WHILE THE DEFENDANT WAS BACKING OUT

While on routine patrol in a rural neighborhood, the deputy observed the defendant standing by a car that was parked near a barn located on residential property. The car's trunk was open, exposing cardboard boxes. The residence's driveway was a long one-lane dirt road. As the deputy pulled into this driveway, the defendant was backing his car out. When the defendant was 40 to 50 feet from the patrol car, he exited his own vehicle and met the officer on foot. He then "spontaneously" produced his driver's license and vehicle registration but admitted he had no driver's license. The officer eventually searched the premises and found a methamphetamine lab in the barn. (*Kerr, supra*, at 1385.)

The Ninth Circuit found that the defendant was detained because he stopped and exited from his car primarily in response to the deputy's conduct, rather than of his own volition. The main factors were that: 1) the deputy, in his uniform and marked patrol car, appeared to be acting in an official capacity; 2) the deputy indicated a sense of urgency by pulling into the driveway rather than parking outside the property; and 3) the deputy blocked the one-way driveway as the defendant was backing out; the defendant's freedom of movement was restrained at this moment. The trial court's suggestion that the defendant could have backed around the car or ignored the officer "defies common sense". The deputy provided the defendant "with no reasonable alternative except an encounter with the police. Consequently, the encounter cannot be deemed voluntary. Voluntariness presupposes a freedom of choice that [Kerr] did not have." (*Id.*, at 1386-1387.)

***PEOPLE V. LOPEZ* (1989) 212 CAL. APP. 3D 289 [FOURTH DIST., DIV. 3]**
NO DETENTION: **THE OFFICER'S QUESTIONS TO THE DEFENDANT WERE NOT SUFFICIENTLY ACCUSATORY**

A veteran police officer and a new recruit were patrolling a parking lot, looking for narcotics traffickers. The officers saw the defendant sitting on the hood of a car. The veteran officer thought he recognized the defendant from some prior encounter. While the two officers walked by, the veteran officer asked the defendant if the car he was sitting on was his car. The defendant said that it was not his car, but he was waiting for his friends to play some pool. The officers then stopped and looked back at the defendant. The veteran officer asked him where his pool stick was, and the defendant did not reply. He asked the defendant if he had an I.D.. The defendant reached into his pocket and handed his wallet to the recruit. As the wallet was opened, presumably by the officer, a bindle of

cocaine "popped up." (*Lopez, supra*, at 291.)

The issue is whether the officer's questions and request for identification transformed a consensual encounter into a detention. The court reluctantly concluded that no detention occurred. "*Royer* and *Delgado* compel the conclusion that no seizure occurred here under the Supreme Court's formulation." **The defendant was not detained when he handed over his wallet because: 1) The questions that the officer asked the defendant, although "not the stuff of usual conversation", were not of a sufficiently accusatory nature. Although the inquiries suggested that the officers suspected the defendant of something, they were "brief" and "flip" and did not concern specific criminal activity, in contrast to the questions asked in *Wilson, supra*, 34 Cal.3d at 790-791. 2) The request for identification did not initiate a detention. 3) The officers made no show of force or attempt to physically restrain the defendant. 4) The officers did not order the defendant to remain. (*Id*., at 292-293.)**

The opinion was written by Justice Crosby, who seven years later, in *People v. Bouser, supra*, 26 Cal. App. 4th at 1288-1289, would write a dissent questioning the "fiction" that a person's submission to police questioning and the officer's demand to produce identification does not amount to a seizure. In this earlier opinion, Justice Crosby stated that he felt compelled by binding precedent to rule that Defendant Lopez was not detained. **However, Justice Crosby wrote both the majority opinion and a separate concurring opinion, in which he stated: "In the real world this defendant could not possibly have felt himself free to walk away when his identification was requested, and it is almost laughable to think the officers would have let him do so. . .... "Allowing police to demand identification without reasonable suspicion in ordinary street encounters and requiring those who would assert their rights to resist the police as the price of their freedom is unsound as a matter of constitutional law and sends exactly the wrong message to the citizenry." (*Id.*, at 294.)**

***PEOPLE V. PEREZ* (1989) 211 CAL. APP. 3D 1492 [SIXTH DISTRICT] NO DETENTION: WHEN PARKING HIS PATROL VEHICLE NEAR THE DEFENDANT'S CAR, THE OFFICER DID NOT BLOCK THAT CAR OR TURN ON THE EMERGENCY LIGHTS**.

In the early evening, a police officer was driving his patrol car when he noticed an unlit vehicle, occupied by two individuals, parked by itself in a motel lot's darkened corner. This area was known to be the site of drug dealing and prostitution. The officer drove his patrol car toward the vehicle and positioned it head on with the defendant's vehicle, although leaving plenty of room for the defendant to drive away. The officer activated his high beams as well as the spotlights on both side of the patrol car – but not

the car's emergency lights - in order to get a better look at the vehicle's occupants and gauge their reactions. After the officer activated these lights, he could see the male driver (the defendant) and a female passenger slouched over in the front seat. They did not respond to the lights and the officer was concerned about their sobriety. The uniformed officer then exited the patrol car and walked to the driver's side of the vehicle. He knocked on the window with his flashlight, identified himself and shined his flashlight into the vehicle. As soon as the defendant rolled his window down, the officer smelled a strong marijuana odor. The defendant and his passenger were arrested for being under the influence of PCP. (*Perez, supra*, at 1494-1495.)

The Court of Appeal held that the defendant was not detained when the officer parked his patrol car in front of the defendant's vehicle and shined his high beams and spotlights towards the vehicle occupants.[6] The defendant-driver was not detained because: 1) the officer parked the patrol car in a manner that left room for the defendant's vehicle to leave; and 2) the officer turned on the patrol car's high beams and spotlights but did not activate the car's emergency lights. "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*Id*., at 1495-1496.) The Court distinguished the prior appellate court decisions, *People v. Bailey*, *supra*, 176 Cal. App. 3d at 404-406 [the officer parked his patrol vehicle behind the defendant's car and activated his emergency lights], and *People v. Wilkins*, *supra*, 186 Cal. App. 3d at 402 [the officer parked his patrol car in a manner that blocked the defendant's vehicle from exiting]. (*Perez, supra*, at 1495-1496.)

***PEOPLE V. CASTANEDA* (1995) 35 CAL. APP. 4TH 1222[4TH DIST, DIV 3] THE DEFENDANT WAS DETAINED: THE OFFICER RETAINED THE DEFENDANT'S IDENTIFICATION CARD WHILE RUNNING A WARRANT CHECK**

The defendant was contacted by a police officer while he was seated in the passenger seat of a parked car. The officer requested identification and asked the defendant who owned the car. The defendant handed the officer his identification card and said the car was owned by a friend. While another officer filled out a parking citation for the car, the first officer performed a radio check and discovered that there was an outstanding warrant for the defendant's arrest. (*Castaneda, supra*, at 1225-1226.)

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[6] The Court concluded that once the two vehicle occupants failed to respond to the lights and appeared intoxicated, the officer was justified in approaching the vehicle and contacting the occupants to determine if they needed medical assistance. (*Id*., at 1486.)

The Court of Appeal found that the defendant was not detained when the officer approached him as he sat in the parked car, began talking to him and asked for his identification. **However, the defendant was detained when: 1) he complied with the officer's request and submitted his identification card to the officer, which the officer retained while running a warrant check; and 2) when the second officer began writing a parking ticket**. Under these circumstances, no reasonable person would have felt free to leave or walk away from the officers. (*Id.*, at 1227.)[7]

***PEOPLE V. LEATH* (2013) 217 CAL. APP. 4TH 344 [2ND DIST., DIV. 4] NO DETENTION: RESPONDING TO THE OFFICER'S REQUEST, THE DEFENDANT VOLUNTARILY RELINQUISHED HIS I.D. CARD**

Officers responded to the scene of a late night armed robbery and obtained a description of the two suspects (African-American men, approximately 20 years of age) and the vehicle they were driving (a dark-colored SUV). Several minutes after speaking to the victims and about seven blocks from the crime scene, Officer Leary observed the defendant, an African-American male, walking from the driver's side of a dark SUV towards a driveway. The SUV was parked near the curb with the rear passenger door left open, as though the occupants had been in a hurry to get out. Officer Leary informed the defendant that the SUV's rear door was open and the defendant walked back to the vehicle. In response to Leary's questions, the defendant acknowledged that the SUV was his and stated that he was walking toward a friend or cousin's house. Officer Leary asked the defendant if he had any identification, and the defendant handed his I.D. card to the officer. The officer ran the defendant's name through a database and discovered that he had numerous outstanding traffic warrants. The officer then arrested the defendant on the outstanding warrants. Subsequently, officers discovered the second suspect and numerous items stolen from the victims in the vicinity of where the defendant was contacted. He was then arrested for robbery. (*Leath, supra*, at 347-49.)

The Court of Appeal found that the defendant was not detained when Officer Leary took and retained his identification card. It is well established that the Fourth Amendment is not implicated when a police officer asks to see an individual's identification card. However, cases differ on whether a consensual encounter transforms into a detention, when the individual relinquishes his or her driver's license or other I.D. card and the officer retains it. (Citing *People v. Terrell* (1999) 69

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[7] Under current law, any evidence discovered on a defendant or in a car during an unconstitutional detention, but after a warrant check reveals an outstanding arrest warrant, will not necessarily be suppressed. (See *People v. Brendlin* (2008) 45 Cal. 4th 262.)

Cal. App. 4th 1246; and *People v. Castaneda* (1995) 35 Cal. App. 4th 1222.) The Court concluded that the right to ask for identification is meaningless if the officer would need reasonable suspicion to accept the individual's proof of identification. An individual's voluntary relinquishment of his identification card to the police does not constitute a detention as long as the encounter is consensual under the totality of the circumstances. The individual would be free to request that the identification be returned and to leave the scene. (*Id*., at 350-53.)

4. The Officer Contacts and Questions the Individual on a Bus

***FLORIDA V. BOSTICK* (1991) 501 U.S. 429**
NO DETENTION: THE DEFENDANT'S BELIEF THAT HE WAS NOT FREE TO LEAVE THE BUS WAS NOT CAUSED BY POLICE CONDUCT

Two officers who regularly patrolled bus depots in accordance with state drug interdiction efforts, boarded a crowded bus bound from Miami to Atlanta during a stopover. The bus was about to depart The officers went down the aisle of the bus, randomly picking out passengers to question. The defendant was one of those selected passengers. Standing over the seated defendant, an officer asked to inspect his ticket and identification; he handed them over, and they were immediately returned to him as his ticket matched his identification. The officer then explained that they were narcotics agents looking for illegal drugs, and they requested the defendant's consent to search his luggage. The officer advised him that he had the right to refuse consent, but he acquiesced and they searched his bag finding contraband. (*Bostick, supra*, at 431-432.)

The Supreme Court found that the defendant was not detained when he consented to the search of his luggage, merely because the encounter occurred on a bus. 1) He was not seized when the officer questioned him and asked to inspect his ticket and identification. 2) More importantly, the defendant was not detained merely because he may have reasonably believed that he could not leave the bus as it was about to depart. That belief was not attributable to the police officers' conduct. The defendant's freedom of movement was restricted by a factor independent of the officers' actions – he was a passenger on a bus. He would not have felt free to leave the bus even if the police had not been present. In distinguishing a detention from a consensual encounter the test is whether, considering all the circumstances, the officers communicated to a reasonable person that he was not free to ignore their presence, decline their requests or otherwise terminate the encounter. (*Id.*, at 434-437, 439.)

***UNITED STATES V. STEPHENS* (9TH CIR. 2000) 206 F.3D 914**
THE DEFENDANT WAS DETAINED: THE DEFENDANT WAS ADVISED THAT HE COULD LEAVE THE BUS BUT NOT TOLD THAT HE COULD REFUSE TO ANSWER THE OFFICERS' QUESTIONS

The defendant was traveling by bus from Los Angeles to Seattle. The bus stopped for servicing at a station in Sacramento, where the passengers were required to disembark for approximately one hour. Two drug interdiction officers observed the defendant as he waited in line to reboard the bus. Noticing that he was carrying a "heavy and bulging"gym bag, they watched him board the bus and place this bag in the overhead compartment above his seat. As the bus was about to depart, these two officers and a third officer boarded the bus. They were not wearing uniforms and they concealed their weapons. The three officers stationed themselves at the back, middle and front of the bus. The center aisle was very narrow, and given the officers' presence it would have been very difficult for the passengers to exit. The officer at the front of the bus used the bus company's public address system to address the passengers. He advised that they were police officers conducting a narcotics and weapons investigation on the bus. He stated: "No one is under arrest, and you are free to leave. However, we would like to talk to you". The other two officers immediately started questioning the passengers. Officer Risley went right to the defendant and twice asked him if he had any carry-on luggage, pointing at the compartment above the defendant's head. The defendant twice said that he did not have any carry-on luggage. Officer Risley removed the gym bag he had seen the defendant carrying, went to the front of the bus and asked if any passenger claimed that bag. No one did. Officer Risley took the bag off the bus and found cocaine inside. The defendant was then arrested. (*Stephens, supra*, at 916.)

The Ninth Circuit agreed with the trial court that the defendant had abandoned the gym bag by denying ownership three times. The question was whether he abandoned the bag during an unlawful detention so that his abandonment was not voluntary. (*Id.*, at 917.) **The Court held that the defendant was detained because, as a bus passenger, he would not have reasonably felt free to decline the officer's requests or otherwise terminate the encounter: 1) Prior to questioning, the police officers had told the passengers that they were "free to leave" but did not tell them that they were free to remain on the bus and terminate the encounter by declining to answer the officers' questions. The passengers reasonably believed they had two choices: stay on the bus and consent to a requested search or get off the bus. 2) The encounter took place in the cramped confines of a bus. 3) Three officers boarded the bus while other officers waited outside. 4) Officer Risley singled the defendant out by positioning himself next to the defendant's seat and questioning him first. (*Id*., at 917-918.)**

***UNITED STATES V. DRAYTON* (2002) 536 U.S. 194**
NO DETENTION: BUS PASSENGERS HAD NO REASON TO BELIEVE THAT THEY WERE REQUIRED TO ANSWER OFFICER'S QUESTIONS.

The defendants, Drayton and Brown, were traveling from Ft. Lauderdale to Detroit on a bus. The bus made a scheduled service stop in Tallahassee where the passengers were required to disembark. As they reboarded, the driver took their tickets and retained them while he went to complete paperwork inside the terminal. As the driver left, he allowed three Tallahassee police officers to board the bus as part of a routine drug and weapons interdiction effort. The officers, dressed in plain clothes, carried concealed weapons and visible badges. Once onboard the bus, Officer Hoover stayed at the driver's seat, facing the rear of the bus so he could observe the passengers. Officers Blackburn and Lang went to the rear of the bus. Blackburn stayed there while Lang contacted the passengers, starting in the back. Officer Lang asked the passengers for consent to search some of the their carry-on luggage. Lang did not advise the passengers that they did not have to cooperate or consent. Drayton and Brown were seated next to each other on the bus. Lang approached the defendant from the rear and leaned over Drayton's shoulder, displaying his badge. In a voice loud enough for both men to hear, he told them that the officers were attempting to deter the transportation of drugs and weapons on the bus and asked if they had any bags. Both men pointed to a bag in the overhead rack. Lang asked if he could "check" the bag, and Brown responded, "Go ahead". A search of the bag yielded no contraband. Officer Lang asked Brown if he was carrying any weapons or drugs and asked, "Do you mind if I check your person?" Brown answered, "Sure," and opened up his jacket. Lang patted down Brown's outer clothing and detected hard objects, which felt like "drug packages". Officer Lang then asked to "check" Drayton, who responded by lifting his hands off his legs. During a pat-search, the officer felt objects similar to the suspected "drug packages" detected on Brown. Drayton was arrested and taken off the bus. The hard objects contained powdered cocaine. (*Drayton, supra*, at 197-199.)

The issue before the Supreme Court was whether Drayton and Brown were detained when they consented to be searched. But the narrower question was whether officers need to advise bus passengers of their right not to cooperate and to refuse consent before encounters with officers may be found to be consensual.[8] **The Supreme Court**

[8] The Supreme Court believed that the 11th Circuit Court of Appeals had adopted a per se rule that evidence obtained during suspicionless drug interdiction efforts on buses must be suppressed unless the officers advised passengers of their right to to cooperate and to refuse consent to a search. (*Id*., at 202, citing *United States v. Washington* (11th Cir. 1998) 151 F.3d 1354 and *United States v. Guapi* (11th Cir. 1998) 144 F.3d 1393.)

held that the failure to give this express advisement is only one factor to consider in determining whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter. In the present case, the officers gave the passengers, including Drayton and Brown, no reason to believe that they were required to answer their questions. The following factors supported the conclusion that the two defendants were not detained: 1) When Officer Lang approached, he did not brandish a weapon or make any intimidating movements; 2) He left the aisle free so the defendants could exit from the bus; 3) He spoke to the passengers one by one in a polite, quiet voice. 4) There was no application of force. 5) The officer did not threaten, command or use an authoritative tone of voice. (*Id*., at 203-204.)

5. The Officer Pursues the Individual on Foot or in a Vehicle

***MICHIGAN V. CHESTERNUT* (1988) 486 U.S. 567**
NO DETENTION: THE POLICE PURSUIT OF THE DEFENDANT WAS NOT SUFFICIENTLY INTIMIDATING TO QUALIFY AS A SEIZURE

Four officers were riding in a marked police cruiser were on routine patrol. As the cruiser came to an intersection, one officer observed a car pull over to the curb. A man got out of the car and approached the defendant, who was standing alone on the corner. When the defendant saw the cruiser nearing this corner, he turned and began to run. The police cruiser followed the defendant, caught up with him and drove along beside him for a short distance. The officer saw the defendant pull some packets from his pocket and discard them. One officer exited from the cruiser and examined the packets, discovering that they contained codeine pills. The defendant ran a few more paces but stopped while the officer examined the packets. (*Chesternut, supra*, at 569.)

The issue before the Court was whether the "investigatory pursuit" of the defendant constituted a detention, so that he was seized when he discarded the packets. Both parties advocated for a per se rule. The government argued that the Fourth Amendment is never implicated until an individual stops in response to a police show of authority. The defendant contended that all police chases are Fourth Amendment seizures which must be supported by reasonable suspicion. The Court declined to adopt either rule and decided the case based on the circumstances. **The Court held that the defendant was not detained during the pursuit because the circumstances were not sufficiently intimidating: 1) The police did not activate their siren or flashers as they drove along side the defendant. 2) The police did not display any weapons or command the defendant to stop. 3) The driver did not operate the police cruiser in an aggressive manner or block the defendant's course. (*Id*., at 572-576.)**

***CALIFORNIA V. HODARI D.* (1991) 499 U.S. 621**
NO DETENTION: A FLEEING INDIVIDUAL MUST YIELD TO THE OFFICERS' SHOW OF AUTHORITY OR BE RESTRAINED

Late one evening, Officers McColgin and Pertoso were on patrol in a high-crime area of Oakland. They were driving an unmarked car and dressed in street clothes, but wearing jackets plainly marked "POLICE". As they rounded a corner, the officers saw four or five youths huddled around a small red car parked at the curb. As soon as the young people saw the officers' car approaching, they took flight. The minor, Hodari D. and one companion ran west through an alley while others fled south. The driver of the red car also took off at a high rate of speed. The officers gave chase. Officer Pertoso got out of the car and ran. Observing the minor emerge from the alley and run north, Pertoso chased him on foot. The minor did not turn around until the officer was almost upon him. The minor than tossed away a small rock. A moment later, Pertoso tackled the minor and handcuffed him. The discarded rock was crack cocaine. (*Hodari D., supra*, at 622-623.)

The issue was whether the minor was detained when he discarded the drugs. Did the officer's foot pursuit constitute a show of authority, so that the minor was seized even though he did not stop and yield? According to the Supreme Court, the answer is no. (*Id.*, at 623, 625-626.) A reasonable belief that one is not free to depart is a necessary but not sufficient condition for a seizure effected through a show of authority. **Although the officer's foot pursuit of the minor constituted a "show of authority" enjoining the minor to halt, the minor did not comply with that injunction. Thus, he was not actually seized until he was tackled. The drugs abandoned while he was running – before he was detained – were not a fruit of any seizure. An individual is not detained until he submits to an officer's show of authority or is physically restrained. (*Id.*, at 628-629.)**

***UNITED STATES V. SANTAMARIA-HERNANDEZ* (9TH CIR 1992) 968 F.2D 980**
NO DETENTION: THE *HODARI D.* RULE APPLIES TO A CAR CHASE

A border patrol agent stationed atop a viewpoint overlooking a California port of entry from Mexico received a radio message that suspected illegal aliens had crossed the border on foot and were walking north along Intestate 5. This agent then observed a group of pedestrians cross Interstate 5 on the U.S. side of the border. The agent lost sight of them when they neared a set of bushes behind a Burger King, a well-known staging area for smuggling illegal aliens. Minutes later, the agent saw a yellow Ford leave the Burger King parking lot. The car stopped for 20 to 30 seconds before entering the street, and then drove South towards Mexico before turning around before the border and

heading North. The agent believed these actions by the Ford's driver were common "counter-surveillance" tactics. He advised other agents in the area that a car suspected of transporting illegal aliens was heading north. Two other agents in a border patrol vehicle spotted the described Ford and followed it. When the driver of the Ford appeared to detect the border patrol vehicle, he accelerated, moved to the far left lane and started weaving in and out of traffic. The pursuing agents activated the patrol vehicle's emergency lights and siren. The driver of the Ford did not yield and a five-mile high-speed chase ensured. During this chase, the agents observed behavior inside the Ford which they believed supported a reasonable suspicion of smuggling. Ultimately, the Ford stopped about 20 feet from the border with Mexico. The defendant (the driver) was restrained and removed from the vehicle. (*Santamaria-Hernandez, supra*, at 981-982.)

At issue was whether the Supreme Court's *Hodari D*. ruling applied to a vehicle chase. Was the vehicle's driver, detained when the border patrol car activated its red lights and siren (a show of authority), or was he not detained until he stopped the car after the long high-speed chase? (*Id*., at 981-983.) **The Ninth Circuit held that the Supreme Court's *Hodari D*. ruling applied to car chases as well as foot chases. Consequently, the defendant was not detained until he stopped the car and was physically apprehended by border patrol agents at the end of the chase. (*Id.*, at 983.)**

D. Factors Relied Upon by the Courts to Support a Finding That the Defendant was Detained Within the Meaning of the Fourth Amendment

Here are some of the factors that the appellate courts have relied upon in finding that a defendant was detained and not merely subject to a consensual encounter. Of course, no single factor is determinative. In all cases, these factors are considered in combination with others. All of the cases listed in this section are discussed in the previous section of these materials. The page on which each case is discussed is indicated after the formal citation.

1. The Officer Commands the Defendant to Stop, Approach or Take Some Action and the Defendant Complies

People v. Roth **(1990) 219 Cal. App. 3d 211** (p.21) [The officer exited from the patrol car and commanded the defendant to approach so that he could speak with him]

People v. Jones **(1991) 228 Cal. App. 3d 519** (p.22) [After stepping out of his patrol car, the officer commanded the defendant to stop and he complied]

People v. Foranyic **(1998) 64 Cal. App. 4th 186** (p.24) [After approaching the defendant, who was standing astride his bicycle, the officer ordered the defendant to dismount from the bike]

BUT SEE THE FOLLOWING DISTINGUISHABLE CASES:

United States v. Mendenhall **(1980) 446 U.S. 544** (p.16) [The agents did not summon the defendant to their presence but approached her and identified themselves as federal agents, and they asked her if she would accompany them to the DEA office]

People v. Franklin **(1987) 192 Cal. App. 3d 935** (p.20) [The officer asked, but did not command, the defendant to remove his hands from his pockets]

Michigan v. Chesternut **(1988) 486 U.S. 567** (p.35)[As the officers drove alongside the defendant, they did not order him to stop]

***People v. Bennett* (1998) 68 Cal. App. 4th 396** (p. 24)[The officer politely asked the defendant if he would be willing to wait in the patrol car while the officer ran a warrant check and the defendant agreed; he was not commanded to sit in the car]

2. The Officer Approaches the Defendant in a Manner That Conveys a Sense of Urgency

***People v. Jones* (1991) 228 Cal. App. 3d 519** (p.22)[When the officer parked his patrol car on the wrong side of the road, diagonally across traffic, and then immediately commanded the defendant to stop, his manner of approach conveyed a sense of urgency]

***People v. Garry* (2007) 156 Cal. App. 4th 1100** (p.26) [When the officer parked his patrol car and briskly walked 35 feet in three seconds directly towards the defendant, asking the defendant about his legal status as he approached, the officer conveyed a sense of urgency]

***United States v. Kerr* (9th Cir. 1987) 817 F.2d 1384** (p.28) [The deputy conveyed a sense of urgency by pulling into the defendant's driveway as the defendant was backing his car out, rather than parking on the street]

3. The Officer Shines his Spotlight or Emergency Lights on the Defendant

***People v. Garry* (2007) 156 Cal.. App. 4th 1100** (p.26)[As soon as the officer saw the defendant standing by a parked car, the officer turned on his patrol vehicle's spotlight which illuminated the defendant in white light]

***People v. Bailey* (1985) 176 Cal. App. 3d 402** (p.27) [The officer pulled his patrol car behind the parked car in which the defendant was sitting and then turned on his emergency lights which were directed towards the defendant's car]

BUT SEE THE FOLLOWING CONTRARY CASES:

***People v. Franklin* (1987) 192 Cal. App. 3d 935** (p.20) [When the officer pulled his patrol car directly behind the defendant and shined his car's spotlight on him, the defendant may have felt "himself the object of official scrutiny. But such directed scrutiny does not amount to a detention."]

***People v. Perez* (1989) 211 Cal. App. 3d 1492** (p. 29) [When he pulled behind a parked car occupied by two people, the officer activated his high beams and spotlights to get a better look at the occupants, but he did not activate his emergency lights.]

4. The Officer Pulls up or Parks his Patrol Car so as to Block the Defendant's Vehicle

***People v. Bailey* (1985) 176 Cal. App. 3d 402** (p.27) [The officer pulled his patrol car behind the car in which the defendant was sitting, but it was not clear whether he blocked the defendant's car so that he could not pull away]

***People v. Wilkins* (1986) 186 Cal. App. 3d 804** (p.27) [The officer parked his patrol car behind the vehicle in which the defendant and another man were sitting "in such a way that the exit of the [defendant's] parked vehicle was prevented]

***United States v. Kerr* (9th Cir. 1987) 817 F.2d 1384** (p.28)[When the deputy pulled into the defendant's long dirt driveway, as the defendant was backing out in his vehicle, the deputy blocked the one-way driveway, restraining the defendant's freedom of movement.]

BUT SEE THE FOLLOWING DISTINGUISHABLE CASES:

***People v. Perez* (1989) 211 Cal. App. 3d 1492** (p.29) [The officer parked his patrol car head on with the vehicle in which the defendant was sitting, leaving plenty of room for the defendant to drive away]

5. The Officer Makes Accusatory Statements or Comments Which Convey to the Defendant That he is the Focus of a Criminal Investigation

***Florida v. Royer* (1983) 460 U.S. 491** (p.17) [After approaching the defendant at the airport, asking to speak to him and requesting his airline ticket and driver's license, the detectives informed the defendant that they were narcotics investigators and they suspected him of transporting narcotics]j

***Wilson v. Superior Court* (1983) 34 Cal.3d 777** (p.18) [After advising the defendant that he was conducting a narcotics investigation, the agent told the defendant that he had received information that he would be arriving from Florida that very day carrying a lot of drugs, conveying that the defendant was the focus of a specific criminal investigation]

***United States v. Stephens* (9th Cir. 2000) 206 F.3d 914** (p.33) [After three officers boarded the bus and one announced that they were conducting a narcotics and weapons investigation, two officers immediately approached the defendant and asked him if he had any carry-on luggage, thus singling him out]

BUT SEE THE FOLLOWING DISTINGUISHABLE CASES:

***People v. Lopez* (1989) 212 Cal. App. 3d 289** (p. 28) [Questioning the defendant as he sat on the hood of a car, officers asked him if the car belonged to him, and after the defendant said he was waiting to play pool, they asked him where his pool stick was – questions that did not concern specific criminal activity]

6. The Officer Requests the Defendant's Identification and Other Documents and Then Retains the Documents for a Period of Time

***Florida v. Royer* (1983) 460 U.S. 491** (p.17) [The defendant gave the officer his airline ticket and driver's license upon request, and the officer retained these documents when he asked the defendant to accompany him to a small room adjacent to the airport concourse]

***People v. Castaneda* (1995) 35 Cal. App. 4th 1222** (p.30) [The defendant was detained when he complied with the officer's request and handed over his identification card, and the officer retained that card while he ran a warrant check]

BUT SEE THE FOLLOWING CONTRARY CASES:

***People v. Bouser* (1994) 26 Cal. App. 4th 1280** (p.22) [When the officer performed a warrant check using the defendant's identifying information, but did not retain his identification documents, the check did not transform a consensual encounter into a detention]

***People v. Terrell* (1999) 69 Cal. App. 4th 1246** (p.25) [The fact that the officer held onto the defendant's driver's license while running a warrant check did not initiate a detention, as the defendant never asked the officer to return his license]

***People v. Leath* (2013) 217 Cal. App. 4th 344** (p.31) [The individual's voluntary relinquishment of his identification card to the officer, pursuant to the officer's request, does not convert a consensual encounter into a detention]

7. The Officer Does not Inform the Defendant That he was Free to Leave, Refuse to Answer the Questions or Decline to be Searched

***Florida v. Royer* (1983) 460 U.S. 491** (p.17) [During the entire interaction with the narcotics detectives at the airport, the agents never told the defendant that he was free to leave or that he could decline to be searched]

***Wilson v. Superior Court* (1983) 34 Cal. 3d 777** (p.18) [The agents never told the defendant that he was free to leave if he desired to do so]

***United States v. Stephens* (9th Cir. 2000) 206 F.3d 914** (p.33) [The officers who questioned the defendant and other passengers on a bus told them that they were free to leave, but never informed them that they were free to remain on the bus and terminate the encounter by declining to answer the officers' questions]

BUT SEE THESE DISTINGUISHABLE CASES:

***People v. Profit* (1986) 183 Cal. App. 3d 849** (p. 19) [The agent who contacted Defendant Profit and his co-defendants at the airport told Profit five times that he was free to leave and did not have to talk to the officer or answer his questions]

People v. Johnson (9th Cir. 1990) 903 F.2d 129 (p.20) [The officer told the defendant that he was free to leave, and the defendant indicated that he understood]

II. Establishing That the Detention was Unreasonable

After establishing that the defendant was detained by law enforcement officers, within the meaning of the Fourth Amendment, our next task is to establish that the prosecution did not meet its burden of proving that the detention was justified by a reasonable suspicion that the defendant was involved in criminal behavior.

But, what about the exclusionary rule? In order to get the benefit of the exclusionary rule, we must show that the defendant was unlawfully detained at the moment when the officers acquired the defendant's consent or reasonable cause to conduct the search yielding the incriminating evidence. However, if the officer conducts a records check during an unlawful detention and learns from that check that the defendant has an outstanding arrest warrant, triggering a duty to arrest and authorizing a search incident to arrest, the subsequently discovered incriminating evidence is not necessarily excluded from the defendant's criminal prosecution. The officer's discovery of the arrest warrant is an intervening circumstance that attenuates the taint of the unconstitutional detention. (See *People v. Brendlin* (2008) 45 Cal. 4th 262.) There is a split of authority as to whether the officer's discovery of the defendant's probation search condition during an unlawful detention is also an intervening circumstance. In *People v. Durant* (2012) 205 Cal. App. 4th 57 [1st Dist., Div. 5], the court found that the discovery of the probation condition does attenuate the taint of the preceding illicit detention, so that subsequently discovered evidence is admissible. More recently, in *People v. Bates* (2013) 222 Cal. App. 4th 60, the Sixth District disagreed with *Durant*, finding that unlike an arrest warrant, a probation search condition merely gives the officer the discretion to search. *Bates* was filed on December 12, 2013. I suspect the Attorney General will petition for review, and because of the split of authority, review might possibly be granted.

A. Reasonable Suspicion: The General Principles

1. The Government's Burden

The government bears the burden of justifying a detention. (*People v. Bower* (1979) 24 Cal. 3d 638, 644; *People v. Williams* (1999) 20 Cal. 4th 119, 127.)

2. The Common Articulation of the Standard

The Fourth Amendment requires some minimum level of objective investigation before making a *Terry* stop. (*United States v. Sokolow* (1989) 490 U.S. 1, 7.) The government must establish that at the moment of the seizure, the officers were aware of

specific articulable facts, which taken together with reasonable inferences from those facts, provided some objective manifestation that the individual was engaged in criminal activity. (*Terry, supra*, 392 U.S. at 21, 30; *Royer, supra*, 460 U.S. at 498; *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Souza* (1994) 9 Cal. 4th 224, 230.)

A brief investigative detention is justified when the totality of circumstances known or apparent to the officers cause them to reasonably suspect: 1) that a crime has taken place, is occurring or is about to occur; and 2) that the particular person they intend to detain is involved in that activity. (*In re Tony C*. (1978) 21 Cal. 3d 888, 893.)

3. An Objective Standard

The collective facts available to the officer must be judged against an objective standard. (*Terry, supra*, at 21-22.) The facts must be such as would cause any reasonable officer in a like position, drawing on training and experience, to suspect criminal activity and the involvement by the person in question. (*People v. Loewen* (1983) 35 Cal. 3d 117, 123.)[9] Nevertheless, the determination of reasonable suspicion must also be "based on common sense judgments and inferences about human behavior." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *Cortez, supra*, 449 U.S. at 418.) The process of assessing reasonable suspicion does not deal with hard certainties but with probabilities. (*Ibid*.)

4. Assess the Totality of the Circumstances, Including Seemingly Innocent Factors

The assessment of reasonable suspicion must be based on the totality of the circumstances – the "whole picture." (*Cortez, supra*, at 417-418; *United States v. Arvizu* (2002) 534 U.S. 266, 273; *Souza, supra*, 9 Cal. 4th at 230.) There is no bright-line rule applicable to all investigatory stops. In determining if a detention was justified, the court must evaluate the totality of circumstances in the particular case. No single factor can be indicative of criminal involvement in every case. (*Souza, supra*, at 239.)

The circumstances must be viewed together. The factors that the government relies on to support reasonable suspicion should not be assessed in isolation from each other.

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[9] Note that the question of whether an individual has been detained is judged from that individual's perspective – would a reasonable person in this position have believed he was free to leave, disregard the police or otherwise terminate the encounter. The question of whether the officer had a reasonable suspicion of criminal activity is evaluated from the perspective of a reasonable police officer.

Terry precludes this type of "divide and conquer" analysis.[10] (*Arvizu, supra*, at 274-275.) Any one factor, considered by itself, may be consistent with innocent behavior. But taken together, the cumulative factors amount to reasonable suspicion. (*Arvizu, supra*, at 274-275; *Sokolow, supra*, 490 U.S. at 9.) There could be situations in which wholly lawful conduct might justify the suspicion that criminal activity was afoot. (*Reid v. Georgia* (1980) 448 U.S. 438, 441.) Indeed *Terry* involved a series of seemingly innocent acts (standing on the corner, strolling up the street, looking in store windows). But when these acts were viewed together, they warranted further investigation. (*Sokolow, supra*, at 9-10; *Terry, supra*, 392 U.S. at 22-23.)

As the California Supreme Court stated in *Tony C.*: "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal." (*Tony C., supra*, 21 Cal.3d at 894.)

On the other hand, according to other California Supreme Court cases from the 1970's and early 1980's, if none of the circumstances support a reasonable suspicion that the detainee is involved in criminal activity, the stop may be unconstitutional. The factors do not "mysteriously become imbued with an aura of guilt merely by viewing them in their totality". [F]our 'times zero, in [this court's] arithmetic, still equals zero'." (*Loewen, supra*, 35 Cal.3d at 129, quoting *People v. Gale* (1973) 9 Cal.3d 788.)

5. The Officers' Training and Experience is Relevant

The courts must evaluate the totality of circumstances to determine whether the detaining officer had an objective basis for suspecting legal wrong doing. "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information that 'might well elude an untrained person'." (*Arvizu, supra*, 534 U.S. at 273; quoting *Cortez, supra*, 449 U.S. at 417-418.) An officer is entitled to assess the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. (*Arvizu, supra*, at 276.)

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[10] In arguing that police officers lacked reasonable suspicion for a detention, one must usually discuss the factors relied on by the government one at a time. Indeed, this is what the courts do when evaluating reasonable suspicion in their opinions. Respondent's briefs will often cite this comment from *Arvizu*. In writing your briefs, even as you present a factor-by-factor analysis, you should state that the cumulative circumstances, viewed together, do not support reasonable suspicion.

6. A Stop Cannot be Based on a Mere Hunch

The corollary to the rule requiring reasonable suspicion is that a detention predicated on mere curiosity or an "inchoate and unparticularized suspicion or hunch" is unlawful. (*Tony C., supra*, 21 Cal. 3d at 893; *Reid, supra*, 448 U.S. at 441; *Wardlow, supra*, at 123-124.) Moreover, simple good faith on the part of the officer instigating the detention is insufficient. (*Terry, supra*., at 22.)

No detention is permissible when the circumstances are not reasonably consistent with criminal activity and the investigation is therefore based on mere curiosity, rumor or a hunch. (*Loewen, supra*, 35 Cal. 3d at 129, citing *Tony C., supra*, at 894.)

7. Reasonable Suspicion Must be Particularized Suspicion

Reasonable suspicion must be particularized suspicion. The assessment of the total circumstances must yield an objective basis for believing that the particular person stopped was engaged in the suspected wrongdoing. (*Cortez, supra*, 449 U.S. at 417-18.) Moreover, particularized suspicion cannot be based solely on factors unrelated to the detainee, such as criminal activity in the area or the time of night. (*Wardlow, supra*, at 124; *People v. Bower, supra*, 24 Cal. 3d at 645.) But these factors may be relevant in combination with observations of the detainee's behavior. (*Wardlow, supra*, at 124.)

B. Selected Decisions Finding That the Officer did or did not Have the Reasonable Suspicion Required to Detain

In this section, we discuss some of the cases in which the appellate courts have resolved the question of whether the officer's detention was justified by a reasonable suspicion that the particular individual was involved in criminal activity, based on the totality of known or apparent circumstances. Some courts found a lack of reasonable suspicion and thus determined that the detention was unconstitutional. Other courts found reasonable suspicion based on a combination of factors. As with the cases determining whether the individual was detained or subject to a consensual encounter, this is an intensely fact-based analysis, so the circumstances are described in detail.

The cases discussed in this section are grouped by some common factual circumstance (e.g."The Defendant Was Detained at the Airport on Suspicion of Being a Drug Courier", "The Defendant Was Detained After the Officer Observed him Engage in an Unusual Activity"). However, the cases do not all fit neatly into these distinct categories. For example, in *People v. Perrusquia* (2007) 150 Cal. App. 4th 228, the illegal

detention was based in part on the defendant's attempt to avoid police contact, but also on his unusual behavior and his presence at a 7-Eleven after six recent robberies at those stores. Yet, *Perrusquia* is discussed only in the category discussing cases in which "The Defendant was Detained After an Apparent Attempt to Avoid Police Contact." The next section of these materials will list some of the common factors that courts have relied upon in finding reasonable suspicion. *Perrusquia*, like many cases, in listed under multiple factors in that section.

In each separate category, the cases are listed in chronological order, from earliest to most recent. The factors relied on to find reasonable suspicion or the lack thereof are in bold print.

What these materials do not discuss: We do not discuss the many cases in which a detention of frisk is based on an anonymous informant's tip stating or implying that an individual is engaged in criminal behavior. If you have a case in which the detention or frisk is based on an anonymous tip, see "DOES AN ANONYMOUS TIP PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK" (November 2009), available in the Articles and Outlines Database on the FDAP website (www.fdap.org) These anonymous tip materials will be revised in 2014, after the Supreme Court decides *Navarette v. California*. That case presents the following question: Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

Nor do these materials discuss the cases in which the officer observed or reasonably suspected that the driver of a vehicle has committed a Vehicle Code violation, justifying a brief traffic stop.

1. The Defendant was Detained at the Airport on Suspicion of Being a Drug Courier

**REID V. GEORGIA* (1980) 448 U.S. 438
NO REASONABLE SUSPICION: THE DEFENDANT'S OBSERVED CONDUCT WAS CONSISTENT WITH INNOCENT TRAVEL

A narcotics agent observed the defendant arrive at the Atlanta Airport on an early morning flight from Fort Lauderdale. The passengers left the plane and proceeded through the airport. Several feet behind the defendant was another man who carried a shoulder bag like the one that the defendant carried. As they walked down the concourse and past baggage claim, the defendant occasionally looked back in the direction of this second man. When they reached the airport lobby, the second man caught up with the

defendant and spoke briefly to him. They left the airport terminal together. The agent approached them, identified himself as a federal narcotics agent and asked the two men for their ticket stubs and identification. They handed the documents over, and the agent learned that they had only spent one day in Fort Lauderdale. The two men agreed to the agent's request to return to the terminal and let him search their shoulder bags. As they all entered the terminal, the defendant started to run, abandoning his shoulder bag before he was apprehended. It contained cocaine. (*Reid, supra*, at 439.)

The narcotics agent suspected the defendant of a narcotics crime because he appeared to fit the "drug courier profile": 1) He had arrived from Fort Lauderdale, a known place of origin for cocaine sold in the U.S.. 2) He arrived in the early morning when there is usually less law enforcement surveillance. 3) The defendant and the second man appeared to be trying to conceal the fact that they were together, although the defendant occasionally looked back towards the second man. 4) They had no luggage other than their carry-on shoulder bags. (*Id.*, at 440-441.) **The Supreme Court held that these observed circumstances, allegedly fitting a drug courier profile, did not support a reasonable suspicion that the defendant was engaged in illegal drug activity. The fact that the defendant looked back at the second man was the only particularized conduct. The other circumstances "describe a very large category of presumably innocent travelers". The agent was acting on a mere hunch – "too slender a reed to support the seizure." (Id., at 441.)**

***FLORIDA V. ROYER* (1983) 460 U.S. 491**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: DETENTION PROPERLY BASED ON A COMBINATION OF AMBIGUOUS FACTORS
(See, *supra*, p. 17)[11]

Two plain clothes narcotics detectives detained the defendant at the Miami airport. **The agents believed that the defendant's mannerisms and actions fit the so-called "drug courier profile": 1) The defendant was young and casually dressed. 2) He paid cash for a one-way ticket to New York City. 3) He checked his two suitcases which appeared to be heavy, and wrote only a name and destination on the luggage tags. 4) He appeared nervous. (*Royer, supra*, at 493.)**

The Supreme Court held that the agents had reasonable suspicion to initiate a temporary investigative detention when they discovered (during the initial consensual encounter) that the defendant was traveling under an assumed name, and added this to the above-listed facts. (*Id.*, at 502.) However, although the

[11] This indicates that the case has been previously discussed in these materials.

principle was not applied in this case, a person's refusal to listen to or answer the officer's questions during a consensual encounter does not, without more, furnish reasonable suspicion for a detention. **(*Id.*, at 497-498.)**

**** WILSON V. SUPERIOR COURT* (1983) 34 CAL.3D 777**
NO REASONABLE SUSPICION: DETENTION BASED ONLY ON THE DEFENDANT AND HIS NEPHEW MAKING EYE CONTACT WITH THE OFFICERS (See, *supra*, p. 18.)

Two undercover narcotics agents were patrolling Los Angeles airport, monitoring inbound flights from Florida to discover persons transporting drugs. While observing passengers deplaning from a Miami flight, the agents saw the defendant, Flip Wilson, and his nephew get off the flight. The defendant was carrying an attache case. While the two men were in the arrival area, the nephew twice made "eye contact" with one of the undercover agents. Both men walked from the arrival area towards the street and the first agent followed them. Midway down the concourse, the nephew turned his head back in the agent's direction and spoke to the defendant, who then turned back in the general direction of the agent. The defendant walked outside to a car parked at the curb. The agent approached the defendant, who was standing by the car's open trunk waiting for his nephew to retrieve their luggage. After identifying himself and asking to speak to the defendant, the agent said he was conducting a narcotics investigation and that he had received information that the defendant would be arriving from Florida that day carrying a lot of drugs. The agent asked the defendant for permission to search the attache case he had carried off the plane, and the defendant consented. (*Wilson, supra*, at 780-783.)

The Court held that the agent detained the defendant when he advised him that he was conducting a narcotics investigation and told him that he had information that the defendant would be arriving from Florida that day, carrying a lot of drugs. **The agent lacked reasonable suspicion to initiate this detention. The only two circumstances "that might even be plausibly proffered as a basis" for reasonable suspicion were: 1) that the nephew twice made eye contact with the agent upon entering the arrival area; and 2) that both the nephew and the defendant looked back in the agent's general direction as they walked along the concourse to the airport exit. Relying on *Reid v. Georgia*, the Court held that these factors were insufficient to "provide a reasonable basis for distinguishing [the defendant] from the great bulk of passengers arriving at the Los Angeles International Airport." (*Id.*, at 785-787.)**

***UNITED STATES V. SOKOLOW* (1989) 490 U.S. 1**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: BASED ON A COMBINATION OF SEEMINGLY INNOCENT CIRCUMSTANCES

Narcotics agents detained the defendant and his female companion at the Honolulu airport immediately after they deplaned from a flight. **At the moment of the stop, the agents had observed or learned the following: 1) Three days earlier, the defendant had paid $2,100 cash, taken from a role of $20 bills, for two round trip airplane tickets from Honolulu to Miami. The flight left that same day. 2) The defendant traveled under an assumed name. 3) He flew from Honolulu to Miami, a source city for illicit drugs. 4) The defendant stayed in Miami for only 48 hours, even though the round-trip flight takes 20 hours and there were scheduled stop-overs in Denver and Los Angeles. 5) He appeared nervous when he purchased the tickets and during the stop over in Los Angeles. 6) The defendant and his companion carried on four bags but checked no luggage. The agents believed that the defendant's behavior "had all the classic aspects of a drug courier"**. **(*Sokolow, supra*, at 3-5, 10, fn. 6.)**

The Court found that the detention was justified based on the totality of the circumstances listed above. "Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." (*Id.*, at 9.) The agents could rely on their belief that the defendant's behavior was consistent with a "drug courier profile", so long as they articulated the factors leading to that conclusion. **(*Id.*, at 10.)**

2. The Defendant was Detained Near the United States-Mexico Border on Suspicion of Smuggling Drugs or Undocumented Immigrants

***UNITED STATES V. BRIGNONI-PONCE* (1975) 422 U.S. 873**
NO REASONABLE SUSPICION: DEFENDANTS DETAINED BECAUSE THEY APPEARED TO BE OF MEXICAN ANCESTRY

The Border Patrol operated a checkpoint on Interstate 5 at San Clemente, California, north of the Mexican border. One evening, the checkpoint was closed due to inclement weather, so two officers observed northbound traffic from a patrol car parked by the side of the highway. In the dark, the officers used their headlights to illuminate passing vehicles. They stopped the defendant's car solely because the three occupants appeared to be of Mexican descent. Upon questioning the defendant and his two passengers about their citizenship, the officer learned that the passengers had entered this country illegally. The defendant was charged with knowingly transporting illegal immigrants. (*Brignoni-Ponce, supra*, at 874-875.)

This was a "roving patrol stop", not a *Terry* stop, but reasonable suspicion was required. The Court rejected the government's claim that federal statutes granted border patrol agents the authority to randomly stop moving vehicles within 100 miles of the border in order to question occupants about their citizenship when the officers had no reason to believe that the occupants might be illegal immigrants or that there might be such immigrants concealed in the vehicle. **The Court held that away from the border, officers could make a brief stop only when their observations led them to reasonably believe that a particular vehicle might contain illegal immigrants. (*Id*., at 877-887.) In this case, the Court found that officers lacked reasonable suspicion to believe the three occupants of the passing car were illegal immigrants or that the car concealed such immigrants. The officers improperly stopped the car based on the single circumstances that the occupants appeared to be of Mexican ancestry. Mexican appearance may be a relevant factor but standing alone, it does not justify a stop, particularly given the large numbers of native-born and naturalized citizens who have physical characteristics identified with Mexican ancestry**. **(*Id*., at 886-887.)**

******UNITED STATES V. ROBERT L.* **(9TH CIR. 1989) 874 F.2D 701**
NO REASONABLE SUSPICION: THE DEFENDANT DETAINED, IN PART, BECAUSE OF HIS YOUNG AGE

At 1:45 p.m., Border Patrol Agent Truty was helping direct traffic at an accident scene north of Nogales, Arizona, near the Mexican border. Officers were directing drivers to use one lane and move slowly as they passed the accident site. Agent Truty saw the defendant, a juvenile, drive away from the accident scene at a somewhat quicker pace than other vehicles. As the defendant drove by Agent Truty, he glanced at him and then turned away, putting his eyes on the road. Truty knew that it had recently become customary in the Nogales area to use juveniles to transport marijuana, and he believed that the defendant should have been in school at that hour. He also noticed that the defendant's car was an Oldsmobile with an expansive trunk. Agent Truty and his partner entered their marked patrol vehicle to pursue the defendant. The agents were traveling as fast as 90 miles per hour in the left lane when they saw the defendant's vehicle in that same lane. As the defendant presumably saw the agents' vehicle approach, he moved over into the right lane. The patrol vehicle pulled alongside the defendant's car and then noticed another car behind it, being driven by another juvenile. They believed the two cars were traveling in tandem. The agents turned on their emergency lights and stopped the defendant's car. (*Robert L., supra*, at 701-702.)

The Court found that the collective factors cited by the government did not establish reasonable suspicion for stopping the defendant: 1) As he drove past the accident site, the defendant glanced at Agent Truty and then returned his eyes to the

road. Although the manner in which a person looks at or avoids looking at an officer may support reasonable suspicion, it did not do so in the instant case as drivers typically look around as they pass an accident scene. 2) The defendant's actions in driving slightly quicker than others as he left the accident site and moving to the right lane when he saw the approaching patrol car did not qualify as "erratic driving". 3) It was not reasonable to assume that the defendant and the juvenile who was briefly observed driving behind him were traveling "in tandem". 4) The fact that the defendant's older-model car had an expansive trunk "capable of carrying large amounts of anything" lent scant support to the agent's asserted reasonable suspicion. Many vehicles have similar trunk capacity, and nothing else about the defendant's car suggested that it was used for smuggling. 5) The fact that similarly aged juveniles had recently been used to transport marijuana was of little import. "Age, like race, is an immutable trait possessed by large numbers of persons who are completely innocent of any wrongdoing". Without more, it falls short of creating reasonable suspicion. **(*Id*., at 703-705.)**

**PEOPLE V. VALENZUELA* (1994) 28 CAL. APP. 4TH 817 [4TH DIST, DIV 2] NO REASONABLE SUSPICION: DETENTION BASED ON THE DEFENDANT'S NERVOUSNESS AND HISPANIC APPEARANCE

The defendant, a "resident alien" with a valid green card, was driving a car with California license plates on Highway 10, an east-west road, near the California-Arizona border. The defendant stopped his vehicle at a mandatory agricultural inspection checkpoint. A border patrol agent, standing six to eight feet behind the agricultural inspector, noticed that the defendant appeared to be Hispanic and spoke little or no English. He was "kneading" the steering wheel as if nervous or anxious to leave and he avoided eye contact with the agent. The agent concluded that the defendant was probably an illegal immigrant. When the agricultural inspector finished questioning the defendant, the agent stepped forward and asked the defendant to move to the side of the road, thus detaining him. During a consent search, two bricks of cocaine were found in the defendant's trunk. (*Valenzuela, supra*, at 821-822.)

The Court held that the circumstances did not support a particularized reasonable suspicion that the defendant was an illegal immigrant or doing anything else illegal, when the agent detained him: 1) The defendant's failure to meet the border agent's gaze and his kneading of the steering wheel, even if indicative of nervousness, did not provide a sufficient reason to suspect he was involved with criminality. The agent's theory that the defendant was trying to avoid contact with him was pure speculation. 2) The fact that the defendant's vehicle was equipped

with a trunk that was capable of concealing an illegal alien did not provide particularized suspicion. There was nothing about the specific appearance of the defendant's car that indicated that illegal aliens or drugs were being smuggled in the trunk. 3) The fact that the defendant appeared Hispanic and spoke Spanish better than English did not support reasonable suspicion that he was in the country illegally. "These characteristics describe millions of people in the same geographic region who are citizens or lawful residents of the United States." (Id., at 826-830.)

UNITED STATES V. MONTERO-CAMARGO (9TH CIR. 2000) 208 F.3D 1122 [EN BANC DECISION]: DETENTION JUSTIFIED BY REASONABLE SUSPICION: UNUSUAL ACTIONS OF 2 CARS DRIVING IN TANDEM

A passing driver told border patrol agents at an El Centro, California checkpoint that two cars heading north, with Mexicali license plates, had just made U-turns on the highway shortly before the checkpoint. Responding to this tip, Agents Johnson and Fisher got into separate marked patrol cars and headed south to investigate. About one mile from the checkpoint, the agents observed a Chevrolet Blazer and a Nissan Sedan, both with Mexicali plates, pull to the shoulder and then re-enter the highway heading south. According to the agents, the area where the two vehicles had stopped was used to drop off and pickup undocumented immigrants and illegal drugs, partly because it cannot be seen from the border patrol checkpoint. Agent Fisher followed the Nissan Sedan, which had accelerated as the two agents approached. Fisher could see that the driver of the Nisan, later identified as Defendant Montero-Camargo, appeared to be Hispanic. After four miles, the agent stopped the Nissan, searched the trunk and found two large bags of marijuana. Agent Johsnon had followed the Chevrolet Blazer, noting that the driver and passenger appeared to be Hispanic. When the driver and passenger noticed the agent behind them, the passenger picked up a newspaper and began reading. After stopping the Blazer, Johnson learned that the driver was co-defendant Sanchez-Guillan and the passenger was co-defendant Renteria-Wolff (who did not join in this appeal.) The Blazer was searched at the checkpoint, and a loaded firearm and ammunition were found inside. (*Montero-Camargo, supra*, at 1126-1128.)

The Ninth Circuit en banc panel affirmed the rulings of the district court and the three-judge panel that the defendants' detentions were justified by reasonable suspicion. However, the en banc decision rejected two of the factors that the district court and panel had relied upon: 1) The fact that all three defendants appeared to be Hispanic. This factor applies to a substantial number of people, particularly in the contemporary Far West and Southwest. Indeed, Hispanics are the majority in El Centro where the detentions occurred. Hispanic appearance is not appropriately considered in evaluating reasonable suspicion **2) The fact that the passenger in the Blazer picked up**

her newspaper after glancing at the patrol car in the rear view mirror. Although an individual's lack of eye contact with officers can be considered, it should be treated with caution, particularly as the opposite behavior – prolonged staring and eye contact has also been deemed suspicion. The passenger's behavior in this case was not an obvious attempt to evade the officers, as compared to flight.

The en banc decision relied on the combination of four factors as establishing reasonable suspicion: 1) both cars made an illegal U-turn on the highway and them immediately stopped just before the border patrol checkpoint; 2) both cars stopped in an isolated area frequently used to drop off or pick up undocumented immigrants or contraband; 3) the two cars were obviously driving in tandem; and 4) the cars both had Mexicali plates, of significance because their suspected criminal behavior involved crossing the Mexico-United States border. (*Id*., at 1131-1140.)

***UNITED STATES V. ARVIZU* (2002) 534 U.S. 266**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: COMBINATION OF POSSIBLY INNOCENT FACTORS EVALUATED BY AN EXPERIENCED OFFICER

Border Patrol Agent Stoddard was working at a checkpoint situated 30 miles north of the United States-Mexico border in Arizona. His job was to apprehend vehicles smuggling drugs and undocumented immigrants across the border. In the mid-afternoon, he learned that two magnetic sensors had signaled the westbound passage of a vehicle along a rural back road commonly used by smugglers to circumvent border patrol checkpoints during a period when it was not patrolled. Agent Stoddard drove to a location where he might intercept that vehicle and pulled off the road to get a good look at an oncoming minivan – the type of automobile used by smugglers and the only vehicle on that road at that time. **Agent Stoddard followed the minivan and decided to make a vehicle stop after observing the following: 1) There were five people in the minivan - an adult male driving, an adult female in the passenger seat and three children in back. 2) The driver slowed down dramatically as he passed the border patrol agent. 3) The driver's posture was rigid and he did not look at Stoddard. 4) The knees of the children sitting in the backseat were unusually high, as though their feet were propped up on some cargo on the floor. 5) After Agent Stoddard started following the minivan, the children waved mechanically at him while still facing forward, as though they were being instructed. 6) After turning on and off his turn signal, the driver turned abruptly on a road that would avoid the border checkpoint. 7) The minivan was registered to an address in an area notorious for alien and narcotics smuggling**. Upon stopping the van, he gained consent to search the vehicle and found marijuana. (*Arvizu, supra*, at 268-271.)

The Court held that the combination of the above-listed factors, along with the minivan's travel on a back road commonly used by smugglers during a time when it was not patrolled, provided reasonable suspicion for the vehicle stop. Although many of these factors (e.g. the driver's deceleration and failure to look at the agent as he passed) could be innocent and some were more probative than others, the agent could consider them collectively, drawing on his own training and experience. He could draw inferences from the cumulative information that might elude an untrained person. (*Id*., at 272-278.)

3. The Defendant was Detained After an Apparent Attempt to Avoid Police Contact

***PEOPLE V. BOWER* (1979) 24 CAL.3D 638**
NO REASONABLE SUSPICION: THE DEFENDANT, A WHITE MAN IN A PREDOMINANTLY BLACK NEIGHBORHOOD, WALKED AWAY BRISKLY TO AVOID THE POLICE

At 8:30 p.m., on a dark night, Officers Povey and Hunt were in a marked patrol car near the entrance to a residential complex. Povey observed the defendant (a white man) exit from "the projects" with a black woman and two or three black men. Povey's attention was drawn to the group because the defendant "was white with a group of blacks". Povey saw that the defendant and his companions walk to a stairway leading to the parking lot where his patrol car was located. When they looked in the direction of the police car, they all stopped and turned around. At the stairway, they formed a huddle and conversed. One black man moved hurriedly away from the group while looking back over his shoulder at the police car. As the officers got out of their patrol car and walked toward the remaining individuals, the group "fragmented". The defendant was walking quickly, almost running, through a passageway to a nearby street. Officer Povey told the defendant to stop and turn around, and he complied. Officer Povey explained that he detained the defendant because he was a white man in a predominantly black area at night. In his three years as a police officer, Povey had "never observed a white person in the projects or around the projects on foot in the hours of darkness for innocent purposes". While frisking the defendant for weapons, the officer found a gun. (*Bower, supra*, at 641-644.)

The Court held that the totality of the circumstances did not support a reasonable suspicion that the defendant was involved in criminal activity. 1) The presence of an individual of one race in an area inhabited primarily by members of another race cannot support reasonable suspicion. 2) The "nighttime factor" is of "minimal importance" in evaluating reasonable suspicion. Also, 8:30 p.m. is not an

unusually late hour. 3) The defendant's presence in a "high crime" area did not elevate these facts into a reasonable suspicion of criminality.[12] 4) The defendant and his companions did not engage in unusual or "furtive" behavior – the group huddled together, conversed and then walked in different directions. Such innocent or ambiguous conduct can easily be misinterpreted as guilty behavior. 5) The fact that the defendant and the others walked briskly away as the officers approached may have been an attempt to avoid police conduct -- something that individuals have a right to do prior to being detained. (*Id*., at 644-648.)[13]

***PEOPLE V. WILKINS* (1986) 186 CAL. APP. 3D 804**
NO REASONABLE SUSPICION: THE DEFENDANT CROUCHED DOWN INSIDE HIS CAR AS A MARKED POLICE VEHICLE DROVE PAST
(See, *supra*, p.27.)

An officer drove his marked police car through the parking lot of a convenience market at about 10:15 p.m. As the officer drove past a parked vehicle, he noticed that two occupants in the front seat "seemed to lower themselves to conceal themselves in a crouched down position". This neighborhood was known for store thefts and narcotics activities. The officer detained the vehicle occupants, one of whom was the defendant. (*Wilkins, supra*, at 807.) **The Court held that the defendant's possible police avoidance behavior, the neighborhood's reputation as a high crime area, and the time of night did not combine to justify the detention. (*Id*., at 809-11.)**

***PEOPLE V. BROWN* (1990) 216 CAL.APP.3D 1442 [FIFTH DISTRICT]**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT WALKED QUICKLY AWAY TO AVOID THE POLICE

At around 11:30 p.m., Patrol Officers Pryor and Willoughby slowly drove by a dance hall and saw about 20 people standing outside. They observed the defendant standing with his back to the dance hall and facing the street. A group was gathered around him with their backs to the street and the officers. The defendant was holding out a small paper bag towards the group. He seemed to be showing them something but the officers could not see what was in the bag. Some people began yelling "roller", a reference to the approaching police car. The group immediately dispersed with people

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[12] This opinion includes helpful quotations as to why reliance on the high crime area justification is easily subject to abuse. (*Bower, supra*, at 645-646.)

[13] Since the defendant ran from police in a high crime area, this case might not come out the same way today, after *Illinois v. Wardlow* (2000) 528 U.S. 119.

walking in different directions. The defendant quickly walked into the dance hall. The officers drove away but returned in five minutes or less. The defendant was back in front of the dance hall, but upon seeing the officers, he quickly went into the dance hall. The officers followed and saw him drop a sack in the bar area and take off again. Officer Willoughby physically apprehended the defendant and Officer Pryor picked up the paper bag which contained rock cocaine. (*Brown, supra*, 1445-1446, 1450.)

The Court of Appeal held that the defendant was not detained until after he abandoned the bag of drugs. The Court held that the officers had reasonable supicion that the defendant was engaged in criminal activity, namely selling drugs. 1) He was displaying a bag containing unknown items to a group of people. 2) Someone issued a warning that the police were approaching and everyone, including the defendant dispersed and walked away. 3) The defendant again walked quickly into the dance hall when the police returned. 4) He dropped the bag before making a last ditch effort to avoid the police. (*Id.*, at 1450-1451.)

***PEOPLE V. RAYBOURN* (1990) 218 CAL. APP. 3D 308 [4TH DIST, DIV 3] NO REASONABLE SUSPICION: THE DEFENDANT RAN AWAY FROM PLAIN CLOTHES OFFICERS**

Around noon, an officer saw the defendant walking down the street. He was not wearing a shirt or shoes and he had a camera hung around his neck. He was carrying a duffel bag and a grocery bag, and the officer believed he was "a transient". The defendant seemed nervous, looking over his shoulder as he walked. The officer was curious, as the defendant's appearance "didn't fit the camera.". The officer, in plain clothes and an unmarked vehicle, drove toward the defendant, identified himself as a police officer and said he wanted to talk. The defendant fled through a parking lot. During the ensuing chase, the officer again told the defendant that he wanted to talk and the defendant responded "Prove it.". When the officer showed the defendant his badge, hee immediately stopped, dropped his possessions and assumed a spread eagle position against the wall. (*Raybourn, supra*, at 310-311.)

The Court held that the officer did not have reasonable suspicion to detain the defendant -- "a somewhat nervous person who appeared to be transient walking on a public street in broad daylight with a camera around his neck". 1) Mere nervous behavior or evasive conduct in the presence of the police will not justify a detention. 2) The defendant had the right to flee when a person in plain clothes in an unmarked car said he wanted to talk. Even if the defendant realized that person was an officer, he had the right to depart from a consensual encounter or a detention unsupported by sufficient cause. 3) The officer could not detain the defendant

because he looked like a homeless person. 4) The officer had no reason to believe that the camera was stolen property. (*Id.*, at 311-313.)[14]

PEOPLE V. SOUZA (1994) 9 CAL. 4TH 224
DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT RAN AWAY AT THE FIRST SIGHT OF AN OFFICER

At 3:00 a.m., a uniformed officer in a marked police car was patrolling a "high crime" residential area, known for burglary and drug activities. The area was almost completely dark as the streetlights were out of order. In a location where the officer had recently made two arrests, including one for burglary, he observed the defendant and a woman standing near a parked vehicle. They were apparently talking to someone in the car. Suspecting an auto burglary in progress, the officer stopped his police car and activated its spotlight, shining it into the parked vehicle. Immediately, the two people in the front seat of the vehicle bent down towards the floorboard and the defendant took off running. The officer stopped him and frisked him for weapons. During the pat-down, a baggie of cocaine fell out of the defendant's clothing. (*Souza, supra*, at 228.)

The Court held that the totality of circumstances provided a reasonable suspicion that the defendant might be involved in criminal activity. 1) The defendant's flight from the police was a relevant circumstance that could be considered in assessing reasonable cause to detain, even if it could have an innocent explanation. Even though individuals have a right to avoid the police,'[t]here is an appreciable difference between to declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer." Flight "is a much stronger indicator of consciousness of guilt." (*Id.*, at 234-235.) The Court, however, rejected the government's proffered bright-line rule that flight alone is sufficient to justify a detention; flight should be considered in combination with other circumstances. 2) The fact that the defendant was observed in a "high crime area" was also a pertinent circumstance in assessing the validity of the stop, as was the fact that the incident occurred at 3:00 a.m. – a late and unusual hour for a social gathering. 3) The evasive actions of the car's occupants – bending forward when the officer spotlighted the car was also a relevant factor. (*Id*., at 233-242.)

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[14] Despite the defendant's flight, this case could come out the same way after *Wardlow, supra*, 528 U.S. at 119, as the defendant was not in a high crime area and he did not flee from someone he could clearly see was an officer.

***ILLINOIS V. WARDLOW* (2000) 528 U.S. 119**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT FLED FROM THE POLICE IN A HIGH CRIME AREA

Uniformed Police Officers were in a four-car caravan patrolling an area known for heavy narcotics trafficking. As the caravan passed the defendant, who was standing next to a building holding an opaque bag, he looked in the direction of the officers and fled. They watched the defendant run through an alley, eventually cornering him on the street. Upon searching the defendant's bag, they found that it contained a handgun and live rounds of ammunition. (*Wardlow, supra*, at 121-122.)

The Court held that the defendant's unprovoked flight upon noticing the police in a high crime area justified his detention. 1) An individual's presence in a high crime area is not sufficient, standing alone, to support a reasonable, particularized suspicion that the person is committing a crime. But it is a relevant consideration, along with other factors. 2) Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight "is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." (*Id*., at 124-125.) The Court stated that the holding in *Wardlow* was consistent with its previous ruling in *Florida v. Royer* (1983) 460 U.S. 491. When an officer approaches an individual, he has the right to ignore the police and go about his business. His refusal to cooperate cannot provide reasonable suspicion for a detention. "But unprovoked flight is simply not a mere refusal to cooperate." (*Id*., at 125.)

***PEOPLE V. PERRUSQUIA* (2007) 150 CAL.APP.4TH 228 [4TH DIST, DIV 3]**
NO REASONABLE SUSPICION: AFTER NOTICING THE OFFICER, THE DEFENDANT TRIED TO PASS HIM, WALKING BRISKLY

Officer Tisdale had been briefed earlier in the day about a series of six armed robberies at 7-Eleven stores in the city, allegedly committed by black or Hispanic males in their late 20's. Officers were told to conduct surveillance at 7-Elevens. At about 11:30 Officer Tisdale entered the parking lot of a 7-Eleven located in a high crime area. He noticed the defendant's car; it was parked near an exit, although there were spaces closer to the store's entrance. Someone was inside the car with the engine idling. Tisdale could see the defendant crouched low in the driver's seat. Seconds later, a second officer pulled in the parking lot and joined Tisdale in observing the defendant, who had not changed positions. As the two officers approached the defendant's car, they heard fumbling and a thud, as though something had been dropped on the car floor. Tisdale saw the defendant look at him in the rear view mirror, turn off the engine and exit from the car. He then "aggressively, quickly" tried to pass the officer. When Tisdale asked him what was going

on, the defendant said he was going to the store. The officer told the defendant to "hang on a second" – an action that the government conceded had initiated a detention. Tisdale asked for identification. The defendant appeared agitated, and repeated that he was just going to the store, but he eventually retrieved his ID from the car. In response to the officer's queries, the defendant denied having any weapons and refused to consent to a pat-search. The defendant started to walk away but was physically restrained by the second officer. (*Perrusquia, supra*, at 229-232.)

The Court found that the officer lacked specific facts justifying the defendant's detention. 1) The fact that the defendant was in a high crime area where there had been recent robberies at 7-Eleven stores was unrelated to this defendant. Nothing in the record indicated that the defendant's appearance matched the described robbers. 2) The factors specific to the defendant – the location where he parked his car, the thud-like sound, and his attempt to avoid the officers by exiting the car and trying to pass – did not support reasonable suspicion.[15]

4. The Defendant was Detained Because he was Observed in the Vicinity of a Recent Crime or With a Suspected Perpetrator

*** *IN RE TONY C.* (1978) 21 CAL.3D 888**
NO REASONABLE SUSPICION: THE DEFENDANT WAS PRESENT IN AN AREA PLAGUED BY RECENT BURGLARIES

Shortly after noon on a weekday afternoon, Officer Joy was patrolling a residential area in his police vehicle. He noticed a 13-year old black minor, later identified as Tony C., walking with another black youth on the sidewalk, approaching an intersection. Officer Joy pulled over, stopped the two boys, and then began questioning them as to their identities, home addresses and purpose for being in the area. Somewhat later, another officer recognized the minor's name and arrested him on an outstanding charge. During a booking search, stolen property was found in his possession. (*Tony C., supra*, at 896, 899.)

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[15] One could cite this case to argue that walking away from police officers is not the same as headlong flight. (See *Wardlow, supra*, 528 U.S. at 119; *Souza, supra*, 9 Cal. 4th at 224.) The concurring justice distinguished *Souza* (*Perrusquia, supra*, at 235, conc. opn. of O'Leary J.) The dissenter argued that the defendant's "evasive conduct, although less incriminating than headlong flight" should be considered in assessing reasonable suspicion. (*Id*., at 239-240, dis. opn. of Bedsworth, P.J.)

The Supreme Court found that Officer Joy had initiated an investigative detention when he approached the two boys and questioned them. **The detention was not supported by reasonable suspicion. Officer Joy explained that he stopped the two boys because: 1) it was during school hours and both boys were of school age and should have been in school; 2) he was aware that juveniles who were truant from school committed crimes; and 3) he had been told that several burglaries had occurred in the neighborhood and that the suspects were "three black males" of unspecified age. The Court found these circumstances inadequate to justify the detention: 1) It was not reasonable to suspect "that any minor proceeding along a public street during school hours is ipso facto bent on committing crimes." Such speculation ignores the many legitimate reasons why a student may be away from school during classroom hours. And even if the a student's absence from school was unauthorized, "Officer Joy's theory would treat every minor truant as a suspected thief, burglar or worse." 2) That there had been several recent burglaries in the neighborhood did not provide particularized suspicion to stop this minor. "A day old burglary report does not transform a residential neighborhood into a no man's land in which any passerby is fair game for a roving police interrogation." 3) Given the vague description of the recent burglary suspects, Officer Joy was not justified in stopping every black male whom he encountered in the area. (*Id*., at 817.)**

******PEOPLE V. LOEWEN* **(1983) 35 CAL. 3D 117**
NO REASONABLE SUSPICION: NO EVIDENCE LINKING THE DEFENDANT TO THEFTS IN THE AREA OR TO TWO SUSPECTS

In the mid-afternoon, Deputy Cozart, a uniformed officer in a marked patrol car, noticed a car illegally parked on the side of the road. A young man, Thomas Landrum, was sitting on the hood of the car. Deputy Cozart approached Landrum, who agreed to move his car. An apparently nervous Landrum said he was waiting for his friend "Bub" to arrive in a yellow Datsun pick-up with a metal rack on the back. During this exchange, a yellow Toyota pick-up drove by, with no metal rack and two occupants. Both of the occupants looked at Deputy Cozart as they passed him and then looked away. The Toyota's driver accelerated and continued down the street. Without issuing Landrum a citation for illegal parking, the deputy got into his patrol car and pursued the Toyota pick-up. He ran that vehicle's license number; the check came back clear and indicated that Defendant Loewen owned the truck. Deputy Cozart contacted other officers and asked them to stop Loewen's Toyota pick-up "for identification purposes". Plainclothes Officers spotted the truck and followed it for seven miles. They observed no vehicle code violations but executed a traffic stop. (*Loewen, supra*, at 121-122.)

The Court held that the combined circumstances did not support a reasonable suspicion that the defendant was involved in criminal activity: 1) The fact that there had been an increasing number of thefts in the area should be viewed with caution. Presence in a high crime area does not transform "otherwise innocent-appearing circumstances" into factors justifying a detention. Also, none of the recent thefts involved a yellow pick-up or anyone named Landrum or "Bub". 2) The deputy's failure to believe Landrum's claim that "Bub" was not driving the yellow Toyota pick-up did not provide a reasonable basis for suspecting the defendant of criminal activity. 3) Landrum's nervousness and dishonesty did not provided particularized suspicion that the defendant had committed any crime, even if he was somehow associated with Landrum. 4) The fact that the truck occupants, the defendant and his passenger, looked away as they passed Cozart's patrol vehicle may have reflected an understandable desire to avoid police contact. Neither engaged in any furtive behavior. Other cases which have based suspicion the opposite behavior – staring at a passing patrol car. (*Id*., at 123-129.)

***UNITED STATES V. KERR* (9TH CIR. 1987) 817 F.2D 1384**
NO REASONABLE SUSPICION: RECENT BURGLARIES IN THE AREA DID NOT JUSTIFY DETAINING THE DEFENDANT, OBSERVED LOADING BOXES INTO A CAR TRUNK
(See, *supra*, p. 28.)

At 3:30 p.m., an officer was on routine patrol in a rural neighborhood. He knew there had been several recent burglaries in the area. As he passed a residential property, the officer observed the defendant by a car parked outside of a barn. The car's trunk was open, exposing cardboard boxes. The defendant was apparently loading these boxes into the trunk. The officer pulled into the driveway as the defendant was backing the car out and detained him. After questioning the defendant and investigating the premises, the officer discovered a methamphetamine lab in the barn. (*Kerr, supra*, at 1385.)

The Ninth Circuit held that the officer lacked reasonable particularized suspicion to detain the defendant. 1) The defendant was loading boxes into a vehicle on residential property at mid-afternoon, an activity that did not raise an inference of criminal activity. 2) The officer did not know who lived at this residence or what vehicles the residents drove. 3) The fact that there had been recent burglaries in the area did not create reasonable suspicion under these circumstances. (*Id.*, at 1387.)

***PEOPLE V. LEE* (1987) 194 CAL.APP.3D 975 [FIRST DIST., DIV. 4] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT STOOD NEAR TWO MEN ACCUSED OF SELLING HEROIN BY A CITIZEN INFORMANT**

Officers Dunbar and Robertson were on foot patrol in an area of Oakland known for "high narcotic activity", asking citizens about possible drug sales in the area. A woman told them that within the last five minutes, she had walked by a park on the west side of Wood Street, between Eighth and Goss, when two men offered to sell her heroin. A third man was standing near the opposite side of the park. The officers drove separate patrol cars to the described area and saw three men standing in the described locations; the defendant was the one standing separately. As the patrol cars approached, one of the two men standing together called out "rollers, rollers", a reference to the police. The defendant immediately turned and began to walk away. Officer Dunbar drove his car to within 15 to 20 feet of the defendant, at which point, he reached inside of his jacket. Believing he was reaching for a weapon, Dunbar told him to remove his hand and the defendant complied. The officer pat-searched the defendant, finding heroin-filled balloons. (*Lee, supra*, at 979-980.)

The Court found that the defendant was not detained until after he reached inside his jacket; at that point, the officer had reasonable suspicion that criminal activity was occurring: 1) The woman who reported the recent offer of heroin was a citizen informant who was presumptively reliable. 2) The defendant remained in the vicinity of persons reported to be selling heroin for at least five minutes. 3) One of the sellers issued a warning regarding the approaching police cars, apparently addressed to the defendant who began to leave the area. 4) As the officer drove toward him, the defendant reached into his jacket, where the officer could reasonably suspect a narcotics vendor to keep a weapon. (*Id*., at 982.)

***PEOPLE V. RENTERIA* (1992) 2 CAL.APP. 4TH 440 [SECOND DISTRICT] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT WAS SEEN WITH THE IDENTIFIED SUSPECT IN A RECENT ROBBERY**

Between 9:00 and 10:00 p.m., two men armed with firearms and wearing nylon stockings over their faces committed a robbery at the Garcia residence in Nipomo. The robbers fled in a vehicle. Garcia reported the robbery to the police at 9:55 p.m., stating that he recognized one robber as a gang member named "Block" who lived in Santa Maria. The police knew that Block was Rudy Valles, who had a penchant for firearms and violence. Officers immediately staked out Valles's house. Around midnight, an

officer saw a truck pull into Valles's driveway. The defendant was driving and Valles was the passenger. Valles got out of the truck, and walked back and forth from the truck to the garage and backyard. He looked nervous and appeared to be hiding something. Valles handed a concealed object to the defendant right before he drove away. The officer then followed the defendant to his grandmother's house and detained him when he pulled into the driveway. In a later search of the defendant's truck, officers found a firearm used in the robbery and a gun stolen from Garcia's house. (*Renteria, supra*, at 442-443.)

The Court found that the police had reasonable suspicion to detain the defendant. The officers knew that: 1) an armed robbery had been committed in Nipomo two hours before and it takes time to drive from Nipomo to Santa Maria, 2) the robbery victim had identified Valles, who had a record for violence, as one of the robbers; 3) the defendant had driven Valles to his home; and 4) Valles had given the defendant an object he had tried to conceal. The defendant was with Valles soon after the robbery, supporting a reasonable suspicion, not an impermissible hunch, that the defendant was the second robber. **(*Id*., at 443-444.)**

***PEOPLE V. LLOYD* (1992) 4 CAL.APP.4TH 724 [FOURTH DIST, DIV 1] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT WAS STANDING OUTSIDE STORE THAT HAD JUST BEEN BURGLARIZED AT 4:00 A.M.**

At 4:00 a.m., two police officers responded to the activation of a silent burglar alarm at an antiques store. When they arrived, the officers noticed a pick-up truck parked at the rear of the building. They also saw the defendant standing on the sidewalk at the corner of the building, about 10 yards from the truck. The defendant looked at the officer, turned around and began walking away. When the officer asked him to stop, he complied. The defendant gave the officers a false name and said that he worked the graveyard shift as a welder at a business down the street, but he did not know the address of his workplace. The officers heard noises coming from inside the antiques store. They placed the defendant in a patrol car for five to ten minutes while they apprehended a suspect inside the store. While at the scene, the officers learned that the truck had been reported stolen one week earlier. Shoe prints near the truck matched the shoes that the defendant was wearing. (*Lloyd, supra*, at 728.)

The Court rejected the defendant's claim that he had been denied the effective assistance of counsel because his trial attorney had not filed a motion to suppress evidence. The Court held that the officers had reasonable suspicion to detain the defendant even before he was placed in the patrol car. 1) The officers found the defendant standing alone at 4:00 a.m. next to a business in which a silent

alarm had just been triggered. 2) When the defendant saw the officers, he started walking away. 3) Once the officers discovered that someone else was still inside the store, it was reasonable to temporarily detain the defendant in the patrol car until they could "stabilize the situation" and question the defendant about his involvement in the criminal activity. (*Id*., at 732-734.)

***PEOPLE V. CONWAY* (1994) 25 CAL.APP.4TH 385 [THIRD DISTRICT] DETENTION JUSTIFIED BY REASONABLE SUSPICION: AT 3:00 A.M., THE DEFENDANT WAS SEEN LEAVING THE AREA WHERE A BURGLARY HAD JUST OCCURRED**

At about 3:00 a.m., Deputy Judd received a dispatch report of a residential burglary in progress on Sawtelle Way. The dispatch had not mentioned a car or given a description of the suspects. The deputy was familiar with the area and quickly drove in the direction of Sawtelle. Less than two minutes after he'd received the burglary dispatch, Judd saw a car driving from away from Sawtelle. He observed no other cars or pedestrians in the area. Inside the car were an older black male and a young white male. Deputy Judd activated his lights and the defendant and his companion quickly got out of the car. Judd stopped the car because it was the only vehicle in the area and he wanted to have the burglary victim take a look at the occupants. (*Conway, supra*, at 387-388.)

The Court found that Deputy Judd had reasonable suspicion to stop the car and detain the occupants. Although he had no description of the suspects and did not know if they had a vehicle, he observed the car less than two minutes after receiving the report of a burglary in progress, and the car was leaving the area of the reported crime at 3:00 a.m. (*Id*., at 389-390.)

****PEOPLE V. PITTS* (2004) 117 CAL. APP. 4TH 881 [FOURTH DIST, DIV 1] NO REASONABLE SUSPICION: THE DETENTION WAS BASED ON GUILT BY ASSOCIATION**

At 1:00 p.m., Officer Loucks was conducting surveillance of a home at 8619 Park Run Road; he suspected the residents were selling methamphetamine due to the recent arrest of Mr. Casilran. (Casilran had been pulled over near 8619 and a pound of methamphetamine had been found in his car. He had a connection to a resident of 8619 who had prior arrests for possessing methamphetamine.) On the day Loucks was conducting surveillance, he noticed Mr. Callugay sitting in a truck parked around the corner from 8619. Callugay exited from his truck and stood on the corner looking down Park Run Road, towards 8619. After making eye contact with the officer, he quickly re-entered his truck. Officer Loucks questioned him, and Callugay said he was waiting for a

friend. Ms. Roy-Munoz then rounded the corner from Park Run Road and walked toward the officer and Callugay. She said she had been visiting a female friend with the same first name as one of the residents of 8619. While the officer was questioning Ms. Roy-Munoz, the defendant walked around the same corner from Park Run Road. The officer recognized the defendant as the subject of a "be on the lookout" bulletin from about two months ago. The bulletin had been issued because an untested informant claimed that the defendant was involved in methamphetamine sales. Officer Loucks contacted the defendant and told him to assume the position for a pat-search. (*Pitts, supra*, at 883-884.)

The Court found that the combination of four factors supported a mere hunch that the defendant was somehow connected to drug activity, not reasonable suspicion: 1) The one-to-two month old "be on the lookout" bulletin was based on an untested informant's allegation that the defendant was involved in methampetamine sales. The tip had no indicia of reliability and the information was not corroborated. 2) The two-to-three week old arrest of Mr. Casillan in the vicinity of 8619 Park Run Road led to the subjective suspicion that 8619 was being used as a site for drug sales. But Casillan's connection to 8619 and its residents was tenuous as best, as was the assumption that this house was being used for drug dealing. 3) Even if the officer's assumption regarding 8619 was reasonable, this merely placed the defendant in a high crime area – a factor relevant to the evaluation of reasonable suspicion but not determinative. 4) The behavior of Mr. Callugay (parking around the corner from 8619, looking down that street and re-entering his truck after making eye contact with the officer) did not support a reasonable suspicion that Callugay was involved with the assumed drug activity at 8619. 5) As for Ms. Roy-Munoz, she merely walked around the corner. The officer's stop of both Roy-Munoz and the defendant demonstrated that he was intent on stopping any pedestrian who rounded that corner coming from the direction of 8619 Park Run Road. 6) There is no guilt by association in the reasonable suspicion analysis. Even if the officer had a legitimate basis for stopping Mr. Callugay and Ms. Roy-Monoz, the fact that the defendant rounded the corner and was present in the vicinity of 8619 at the same time did not provide a valid basis for detaining him. There was no information linking the defendant to the suspected drug house. (*Id*., at 885-889.)

***PEOPLE V. HESTER* (2004) 119 CAL. APP. 4TH 376 [FIFTH DISTRICT] NO REASONABLE SUSPICION: THE DETENTION BASED ON THE DEFENDANT'S PRESENCE IN A CAR WITH A KNOWN GANG MEMBER SIX HOURS AFTER A GANG-RELATED SHOOTING**

Shortly after midnight, Officers Heredia and Carruesco were patrolling an area of Bakersfield considered the territory of the East Side Crips gang. Six hours earlier, there had been a drive-by shooting in a nearby park, killing two people and wounding at least two others. Some of the victims were members of the Country Boy Crips, a rival of the East Side Crips. The police believed that either the East Side or West Side Crips were responsible. Heredia and Carruesco observed three vehicles -- a Chevrolet, Chrysler and Mazda-- driving side by side on a three-lane road. The officers followed these vehicles in their unmarked patrol car and tried to see how many people were in the vehicles. In the Chevrolet, the officers saw four Black males, ages 15-25, including Leon Anderson. Officer Carruesco believed that Anderson was a member of the East Side Crips. (The officers saw four people in the Chrysler, at least two of whom were Black males, but could not discern the race or gender of the Mazda's occupants.) After following the three vehicles for one-half mile, the officers activated their patrol vehicle lights and stopped the Chevrolet. In that car were the defendant, Anderson, and two others. Handguns and cocaine were found in the Chevrolet. (*Hester, supra*, at 382-384.)

The Court held that the officers lacked a particularized suspicion that anyone in the Chevrolet had committed or was about to commit a crime when they stopped the vehicle. 1) The officers' deduction that the three vehicles were traveling together as gang members are prone to do was minimally supported by their observations over a very short distance. 2) The officers believed that all the Black males in the Chevrolet were East Side Crips because they were riding with Leon Anderson, suspected of being an East Side Crip and they were in that gang's territory. This conclusion was unreasonable and consistent with improper racial profiling. The officers' theory would justify detaining every Black male, aged 15 to 25, in this part of Bakersfield, merely because he was in a car with a known or suspected East Side Crips member. 3) The assumption that every member of the East Side Crips was aware of the shooting that occurred six hours before the stop was also unreasonable. 4) The officers' belief that these gang members were expecting retaliation and were accordingly armed did not support a reasonable basis for the stop. Officer Carruesco testified that retaliation between these rival gangs had been going on for two years and retaliation for a specific crime often transpired months later. This reasoning would justify detaining gang members, or those riding in cars with gang members far into the future. (*Id*., at 387-389.)

***PEOPLE V. WALKER* (2012) 210 CAL.APP.4TH 165 [SIXTH DISTRICT] NO REASONABLE SUSPICION: SOME OF THE DEFENDANT'S PHYSICAL CHARACTERISTICS MATCHED THOSE OF A SUSPECT WHO HAD COMMITTED A SEXUAL BATTERY ONE WEEK EARLIER**

Shortly after noon, a sexual battery occurred at the Santa Clara South light rail station in downtown San Jose. Exactly one week later, Detective Woo wrote an e-mail reporting on this incident and including descriptions of the two suspects, both black male adults. He attached photographs of the suspects obtained from a surveillance video that captured the crime. On the afternoon of that same day, one week after the crime, Deputy Thrall was briefed about the sexual battery. Thrall reviewed Detective Woo's e-mail and the attached photos. He also watched the surveillance video. Eight hours later, while Thrall and other deputies were patrolling the Santa Clara South light rail station, where the crime had occurred, Deputy Thrall observed the defendant exit from a train at that station. The deputy believed that the defendant's race, gender, height, age, hairline and nose shape resembled one of the suspects from the sexual battery photos he'd seen earlier that day. Deputy Thrall approached the defendant on the station platform and asked him for proof of fare. The deputy also told the defendant that he resembled a suspect in a sexual battery case and asked him for identification. The defendant said he had none and looked around. Because Deputy Thrall thought the defendant might try to flee, he asked him to sit on a bench and again requested identification. The defendant provided a college I.D. card that turned out to belong to someone else. The deputy arrested the defendant for providing false identification and searched him, discovering a driver's license indicating the defendant's true identity. (*Walker, supra*, at 170-171.)

Without specifying at what point the defendant was detained, the Court held that the deputy lacked a reasonable suspicion that the defendant had committed any crime. The combination of the following circumstances did not support a reasonable belief that the defendant was one of the two men who had committed the week-old sexual battery: 1) The deputy's assertion that the defendant resembled one of the two sexual battery suspects was not reasonable. The defendant was a 19-year black male, about 5', 10" tall, weighing 180 pounds with a medium to dark complexion. He was well-groomed with short black hair. He did not resemble Suspect Two, described as unkempt black male in his 30's, who was about 5', 5" and 195 pounds. In common with the description of Suspect One, the defendant was a black male of about the same age and weight. But he was shorter than Suspect One, had a darker complexion, and was far from unkempt. Moreover, the photos of the two suspects, attached to Detective Woo's e-mail, were of such poor quality that one could not discern the suspect's facial features. 2) The defendant's presence at the scene of sexual battery, one week after it occurred, was of little or no significance. It would

be different if he had been observed at the scene of the crime within moments after it transpired. Also, many people used this rail station every day. 3) That the rail station was a high crime area – "an open air drug market" was not a significant factor in assessing reasonable suspicion, particularly as the defendant was being investigated for a sexual battery, not a drug crime. (*Id.*, at 175-182)[16]

> ***PEOPLE V. LEATH* (2013) 217 CAL. APP. 4TH 344 [2ND DIST., DIV. 4] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT WAS FOUND IN THE VICINITY OF A REPORTED ARMED ROBBERY, MINUTES AFTER IT HAPPENED, AND HE MATCHED THE VICTIMS' DESCRIPTION OF THE ROBBERS.**
> (See, *supra*, p. 31.)

At 11:30 p.m., police officers went to 43rd Street and 6th Avenue to investigate a just-reported armed robbery. The three victims told them that two men exited from a dark-colored SUV. The man from the passenger side pointed a gun at one victim and demanded that she hand over her purse. The two men then "pocket checked" the other victims at gun point, taking cell phones and a wallet. The two men indicated they were from the "Four-Eighth Street" gang and told the victims to turn around and run. The victims described the two perpetrators as African-American males, approximately 20 years old. Just minutes after speaking to the victims, two officers searched the nearby area – territory of the Four-Eight Street gang – for the described SUV and perpetrators. At 48th Street and 4th Avenue, around seven blocks from the scene of the robbery, Officer Leary observed the defendant, a young African-American male, walking away from the driver's side of a dark-colored SUV. The SUV was parked near the curb and the rear passenger door had been left open. Officer Leary called out to the defendant that the door was left open and he returned to the SUV, acknowledging that it was his vehicle. In response to the officer's request for identification, the defendant handed Leary his I.D. card. Officer Leary took the card, ran the defendant's name through a database, and discovered that he had several outstanding traffic warrants. The defendant was arrested on those warrants. Subsequently, officers discovered the second suspect and numerous items stolen from the victims in the vicinity of where the defendant was contacted. He was then arrested for robbery. (*Leath, supra*, at 347-49.)

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[16] This decision was filed in October 2012. The Court cites many prior reasonable suspicion cases, only some of which are discussed in these materials. This decision is a valuable research source.

The Court of Appeal held that the encounter between Officer Leary and the defendant was consensual up to the moment when Leary arrested the defendant on the outstanding traffic warrants. However, if Officer Leary detained the defendant when he took and retained the identification card, the officer – at that point – reasonably suspected that appellant had committed the robbery. **The following circumstances supported reasonable suspicion: 1) The defendant, an African-American man in his early 30's, matched the victims' description of both robbers. 2)The defendant had quickly parked a dark SUV, which met the victims' description of the robbers' vehicle, and the passenger had hastily exited from the SUV, leaving the door open. 3)The officer observed the defendant, walking away from the SUV, blocks away from the robbery scene in the territory of the Four-Eight Street gang. 4) This was just minutes after the robbery had transpired. (*Leath, supra*, at 354-56.)**

5. The Defendant was Detained After the Officer Observed him Engage in Unusual Behavior

***TERRY V. OHIO* (1968) 392 U.S. 1**
DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT'S COMBINED ACTIONS SUGGESTED HE WAS CASING A STORE FOR A ROBBERY
(See, *supra*, pp. 3-9.)

A plain clothes officer was patrolling for shoplifters and pickpockets in a downtown commercial area. He saw two men, Terry and Chilton, standing on the corner. As he watched them, the two took turns engaging in the following activity: One man walked down the street past some stores, stopped to pause and look in a particular store window, walked further down the street, and then turned around and walked back to the second man, pausing to look in the same store window. Each man did this five or six times, a total of 12 trips up and down the street. At some point, a third man joined them, briefly conversed, and then walked away. Terry and Chilton eventually followed his path and the three conferred outside another store. At this point, believing that they were casing the store for a robbery, the officer detained all three men. (*Terry, supra*, at 5-6.)

The Supreme Court held that the officer reasonably concluded, "in light of his experience, that criminal activity may be afoot." Although each of the acts performed by Terry, Chilton and the third man could have been innocent, taken together they warranted further investigation. Although it is not unusual to stroll up and down the street, singly or in pairs, and look in store windows, it was "quite different" when "these men pace[d] alternately along an identical route, pausing to

stare in the same store window roughly 24 times." It would have been poor police work for this experienced officer to have failed to further investigate this unusual behavior. **(*Id.*, at 22-23.)**

****PEOPLE V. ROTH* (1990) 219 CAL. APP. 3D 211 [FOURTH DIST, DIV 1] NO REASONABLE SUSPICION: THE DEFENDANT WAS WALKING THROUGH THE LOT OF A CLOSED SHOPPING CENTER AT 1:20 P.M.**
(See, *supra*, p.21.)

Officers detained the defendant because he was walking in the deserted parking lot of a closed shopping center at 1:20 in the morning. The Court held that these "circumstances were devoid of indicia of [the defendant's] involvement in criminal activity. He had not engaged in any furtive or unusual behavior or even attempted to avoid the police. The detention was not supported by reasonable suspicion of the defendant's criminal involvement. **(*Roth, supra*, at 213, 215.)**

***SANTOS V. SUPERIOR COURT* (1984) 154 CAL. APP.3D 1178 [FIRST DIST, DIV 3] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT'S TWO COMPANIONS PASSED OBJECTS IN A CLOSED PARKING LOT AT 10:00 P.M.**

At 10:00 p.m., Patrol Officers Di Corti and Maier noticed three people standing in the barricaded portion of a parking lot that provided parking for customers of businesses that were closed at that time. There was a municipal ordinance prohibiting loitering around closed businesses. The three men were talking. The officers saw one man, Mr. Gervais, exchanging something from his wallet with an unidentified man (not the defendant). As Officer Di Corti approached the three men, Mr. Gervais and the defendant left in one direction, while the unidentified man left in the opposite direction. Officer DiCorti stopped Mr. Gervais and Officer Maier stopped and talked to the defendant. During a subsequent pat search, he found a knife. (*Santos, supra*, at 1180-1182.)

Although the opinion focused on the propriety of the pat-search, the Court found the detention of the defendant for questioning was justified, after his two companions were seen passing objects in a closed parking lot at 10:00 p.m., and because he was possibly violating the anti-loitering ordinance. **(*Id*., at 1183-1184.)**

***PEOPLE V. JOHNSON* (1991) 231 CAL.APP.3D 1 [FIRST DIST., DIV. 2] DETENTION JUSTIFIED BY REASONABLE SUSPICION: AN ANONYMOUS TIP WAS CORROBORATED BY OFFICERS' OBSERVATIONS OF THE DEFENDANT'S UNUSUAL CONDUCT**

In the late afternoon, two officers went to a designated three-story, three-unit apartment building immediately after receiving an anonymous tip that someone was selling or doing drugs in the building's hallway. The building was located in an area where there had been many arrests involving rock cocaine. When the officers arrived at the apartment building and entered, they discovered that the hallway was very dimly lit. The uniformed officers started up the stairs. When they reached the first floor landing, they saw the defendant just off the second floor landing. He was crouched over in the corner, peering down at them but saying nothing. The defendant stood up, and one officer repeatedly asked the defendant to step off the landing and approach the officers. The defendant did and said nothing. The officer than insistently warned: "If I have to repeat myself one more time, I'm going to come up to get you." The defendant moved his hand to his mouth, put something in it and fled up the stairs towards the third floor. The officers tackled the defendant, initiating a detention. (*Johnson, supra*, at 7, 10-11.)

The Court held that when the officers tackled the defendant, they had reasonable suspicion to detain him. 1) The anonymous tip, coming from an informant who appeared to have inside knowledge, was sufficiently corroborated by the following: the defendant's presence in the hallway of the designated apartment building, his odd position and demeanor, and his lack of response to the officer's repeated requests that he approach the officers. 2) Once the officer demanded that the defendant comply with this request and warned that he would be restrained if he did not do so, the defendant made a hand-to-mouth movement, as though secreting drugs, and fled up the stairs. 3) The officers knew from experience that rock cocaine was prevalent in the neighborhood where this building was located. (*Id*., at 11-12.)

***PEOPLE V. LIMON* (1993) 17 CAL.APP.4TH 524 [SIXTH DISTRICT] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT MADE A HAND-TO-HAND EXCHANGE IN A CARPORT KNOWN AS THE SITE OF DRUG TRANSACTIONS**

At 12:30 p.m., Plainclothes Police Officers Panighetti and Shuper were walking across an elementary school's grassy field on their way to their patrol car. They saw the following events transpired in the carport of an apartment complex, located about 200 yards away: The defendant was standing next to man at the rear of the carport. He walked about 10 feet to a pickup truck, bent down near the front wheel, removed something and

walked back to the other man. The two men touched hands and exchanged something. The defendant then walked back to the truck and placed something near the front wheel. Two other males were standing near another vehicle in the carport. The apartment complex at which the carport was located was in an area known for gang activity, drugs, and weapons. Both Panighetti and employees at the nearby elementary school had seen drug transactions in the carports. Officer Shuper approached the defendant while Panighetti approached the other two men. All three were brought together and pat-searched. Heroin and cocaine were found on the defendant. (*Limon, supra*, at 529-531.)

The Court held that the defendant's detention was justified, as the defendant's behavior reasonably suggested involvement in drug sales. 1) The officers knew that the defendant's location (both the area and the carport) was a site of past drug activity. Although his presence in a high crime area would not provide reasonable suspicion, the location can lend meaning to the person's behavior. 2) The defendant engaged in what appeared to be a hand-to-hand exchange.[17] 3) After this exchange, the defendant walked over and reached into an apparent hiding place. (*Id*., at 531-534.)

***PEOPLE V. FORANYIC* (1998) 64 CAL.APP.4TH 186 [4TH DIST, DIV 3] DETENTION JUSTIFIED BY REASONABLE SUSPICION: THE DEFENDANT WAS SEEN RIDING A BIKE WITH AN AX ATTACHED AT 3:00 IN THE MORNING**

(See, *supra*, p. 24.)

At 3:00 a.m., a police officer approached the defendant when he saw his standing astride his bicycle. Attached to the bike was a large ax. The officer ordered the defendant to dismount from the bike – an action that the Court found initiated a detention. Subsequently, the officer determined that the defendant was intoxicated and methamphetamine was found in his possession. (*Foranyic, supra*, at 188.)

The Court found that the circumstances supported a reasonable suspicion that the defendant was involved in some criminal activity, justifying an investigative stop: 1) The defendant was riding his bicycle with an ax attached – unusual activity which warranted investigation. It did not matter that no recent "ax crimes" had been reported. An ax has historically been used as a weapon. 2) The defendant was

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[17] The Court cited conflicting authority as to whether an observed hand-to-hand exchange in an area known for drug activity justifies a detention. (*In re Frederick B*. (1987) 192 Cal. App. 3d 79, 86-87 [detention justified]; *People v. Jones* (1991) 228 Cal. App. 3d 519 [detention not justified].)

engaged in this behavior at 3:00 a.m., in total darkness. Less is required to support a detention at 3:00 a.m. than would be required for the same action at 3:00 p.m. This is particularly true for the unusual conduct observed in this matter. "While it is true that there are many legitimate uses for an ax, they are generally daylight activities". It did not matter that the officer did not reasonably suspect a particular crime. (*Id*., at 188-191.)

6. The Defendant's Detention was Continued After the Completion of a Lawful Traffic Stop

***UNITED STATES V. WOOD* (10TH CIR. 1997) 106 F.3D 942**
NO REASONABLE SUSPICION: FACTORS INCLUDING NERVOUSNESS, TRAVEL PLANS AND FAST FOOD WRAPPERS

A Kansas Highway Patrol officer stopped the defendant for speeding on Interstate 70. As he stood at the driver's side window, he noticed that there was trash from fast food restaurants on the floor and open maps in the passenger compartment. Also, the defendant seemed "extremely nervous". The defendant confirmed that the car was rented and said he had rented it in San Francisco. The officer told the defendant that he had been stopped for speeding. He took the defendant's rental agreement and license to the patrol car to fill out a warning citation and also ran a license and criminal history check. Looking at the rental papers, the officer noted that the car had been rented in Sacramento, not San Francisco. He asked the defendant to join him in the patrol car and immediately inquired about this discrepancy. The defendant acknowledged his error and explained that he was on vacation. He had flown with his sister to Sacramento and she had returned by plane to Topeka, while he had rented the car for a one-way driving trip back to Kansas to enjoy the scenery. After this conversation, the officer learned the results of the computer checks; the defendant's license was valid and he had a narcotics history. The defendant admitted that he had been arrested for drugs eleven years ago. The officer wrote the warning ticket and handed it to the defendant with his license and rental papers, telling him he was free to go. But as the defendant exited the patrol car, the officer asked him if he had any narcotics or weapons and the defendant said no. The officer asked for consent to search the car and was again told no. He told the defendant that he was detaining him and his car for a canine sniff. The dog alerted on the car, it was searched and drugs were found in the trunk. (*Wood, supra*, at 944.)

Although the initial traffic stop for speeding was valid, the Court held that the officer lacked reasonable suspicion that the defendant had committed another crime, as necessary to continue the defendant's detention in order to subject his car to a canine sniff. 1) The defendant's refusal to consent to a search of his car "cannot form any part of the basis for reasonable suspicion". 2) The defendant's travel plans

– his decision to fly one-way to California and then rent a car to drive back to Kansas to view the scenery were not the sort of "unusual" plans that give rise to reasonable suspicion of criminal activity. 3) The defendant's error in identifying the California city where he had rented the car is not the sort of inconsistency suggesting an attempt to conceal travel from a city that is a known source of narcotics. 4) The presence of open maps and fast food trash in the passenger compartment was consistent with innocent travel. 5) The defendant's "extreme nervousness" should be discounted; the officer had no prior acquaintance with the defendant and could not contrast his behavior during the stop with his usual demeanor.[18] 6) The fact that the defendant admitted a prior narcotics record"adds little to the calculus". "Reliance on the mantra 'the totality of the circumstances" cannot metamorphose these facts into reasonable suspicion." (*Id*., at 945-948.)

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[18] **If you get a case in which the government relies on the defendant's nervousness or extreme nervousness to support reasonable suspicion for an initial detention or a continued detention following the completion of a traffic stop, you will want to take a look at the Ninth Circuit's opinion in *United States v. Chavez-Valenzuela*, and the cases cited therein.** (See *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, amended without affecting the holding at 279 F.3d 1062.) This opinion includes an excellent discussion as to why officers cannot rely on a defendant's nervousness or even extreme nervousness, as manifested by physical symptoms such as shaking hands and trembling, to justify a detention. However, nervousness can be considered in combination with other factors supporting reasonable suspicion. The opinion cites former cases from the Ninth Circuit and other circuits that support this holding. (*Chavez-Valenzuela, supra*, 268 F.3d at 725-727.) *Chavez-Valenzuela* is no longer good authority for another point of law – that the officer exceeded the scope of a lawful traffic stop when it asked questions unrelated to the observed Vehicle Code violation. This point has been abrogated by *Muehler v. Mena* (2005) 544 U.S. 93; see *United States v. Mendez* (9th Cir. 2007) 476 F.3d 1077, 1080.) However, *Chavez-Valenzuela* is still good authority for the proposition that nervousness cannot be the sole factor supporting reasonable suspicion.

***UNITED STATES V. SALZANO* (10TH CIR. 1998) 158 F.3D 1107**
NO REASONABLE SUSPICION: THE DEFENDANT DROVE A LARGE CAPACITY MOTOR HOME FROM CALIFORNIA

A Kansas Highway Patrol Officer stopped the defendant, who was driving a motor home on Interstate 70, because he had strayed on the shoulder. The officer suspected that he might he intoxicated or sleepy. During the stop, the defendant produced a driver's license and told the officer that the motor home was rented. The defendant invited the officer into the vehicle while he searched for the rental agreement. The officer noticed that the defendant seemed nervous, as his hands shook as he handed the officer the rental agreement. In response to questions about his travel plans, the defendant explained that he was on vacation, driving from California to Massachusetts to visit his father. He had chosen to drive rather than fly and had rented the motor home instead of a smaller vehicle as he planned to drive his father back to California and they might visit friends along the way. After determining that the defendant was not intoxicated, the officer returned the defendant's paperwork and issued him a verbal warning about driving while sleepy. The officer then asked if he could search the vehicle for drugs, and the defendant refused. The officer called for a drug dog team. The dog alerted, officers searched the vehicle, and they found 494 pounds of marijuana. (*Salzano, supra*, at 1110.)

The Tenth Circuit agreed with the defendant that after the officer terminated the legitimate traffic stop by handing back the defendant's papers, he lacked reasonable suspicion to continue the detention. 1) The fact that the defendant had taken the time and expense to drive rather than fly could not support reasonable suspicion. Also, the defendant may have chosen to travel by motor home to save lodging costs. 2) The fact that drug runners have used motor homes in the past and that this vehicle was large enough to store quantities of drugs was not incriminating. Considerable quantities of drugs can be stored in many large vehicles, and the officer did not observe anything about the defendant's rented motor home that suggested it was heavily loaded or modified to hide drugs. 3) The defendant's nervousness, not described as unusual or extreme, was merely a common reaction to being confronted by a law enforcement officer. 4) The fact that the defendant had come from California, described as "a source state for narcotics" did not support reasonable suspicion. The defendant did not try and conceal that he came from that state. There was no evidence that vehicles coming from California are more likely to carry drugs than those coming from Texas. (*Id*., at 1111-1114.)

C. Factors Relied on by the Courts to Support a Finding That the Officer had Reasonable Suspicion of the Individual's Involvement in Criminal Activity to Justify a Detention

Here are some of the factors that the appellate courts have relied upon in finding that reasonable suspicion justified the defendant's detention. Of course, no single factor is determinative. In all cases, these factors are considered in combination with others so that the totality of the circumstances is evaluated. The cases listed in this section are discussed in the previous section of these materials. As you will note, a single case may have relied on several of these factors. Under each factor, we also list cases that have criticized reliance or emphasis on the factor in finding reasonable suspicion

1. The Defendant Appeared to be Nervous

***Florida v. Royer* (1983) 460 U.S. 491** (p.48) [when observed by the officers after arriving at the airport, the defendant appeared nervous.]

***United States v. Sokolow* (1989) 490 U.S. 1** (p.50)[The defendant appeared nervous when he purchased tickets to fly from Honolulu to Miami.]

BUT SEE CASES FINDING NERVOUSNESS TO BE A COMMON RESPONSE WHEN OBSERVED OR CONFRONTED BY POLICE OFFICERS, NOT A PARTICULARLY INCRIMINATING FACTOR

***People v. Valenzuela* (1994) 28 Cal. App. 4th 817**) (p. 52) [the defendant's failure to meet the border agent's gaze and his kneading of the steering wheel, even if indicative of nervousness, did not provide a sufficient reasonable suspicion.]

***People v. Raybourn* (1990) 219 Cal. App. 3d 308** (p.57) [nervous behavior or evasive conduct in the presence of the police will not justify a detention.]

***United States v. Wood* (10th Cir. 1997) 106 F.3d 942** (p.74) [the defendant's extreme nervousness should be discounted in the reasonable suspicion analysis; the officer had no prior acquaintance with the defendant and could not contrast his behavior with his usual demeanor.]

***United States v. Salzano* (10th Cir. 1998) 158 F.3d 1107** (p.76) [the defendant's nervousness, described as neither unusual or extreme, was a common reaction to being confronted by a law enforcement officer.]

2. The Defendant Avoided Eye Contact With the Officers

***United States v. Arvizu* (2002) 534 U.S. 266** (p.54) [The officers reasonably suspected that the driver was involved in criminal activity, in part because the driver slowed dramatically as he passed the border patrol agent, the driver's posture was rigid and he did not look at the agent.]

BUT SEE CASES FINDING THE DEFENDANT'S AVOIDANCE OF EYE CONTACT WITH OFFICERS WAS OF MINIMAL OR NO SIGNIFICANCE IN SUPPORTING REASONABLE SUSPICION

***United States v. Robert L.* (9th Cir. 1989) 874 F.2d 701** (p.51) [Although the manner in which a person looks at or avoids looking at an officer may support reasonable suspicion, it did not do so in this case, as the defendant's looking away from the officer as he passed an accident scene is typical behavior.]

***United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122** (p.53) [The district court and three-judge panel erred in relying on the fact that the passenger picked up her newspaper after glancing at the marked patrol car in her rear view mirror. Although an individual's lack of eye contact with officers can be considered, it should be treated with caution, particularly as the opposite behavior (prolonged staring) can also be deemed suspicious.]

***People v. Loewen* (1983) 35 Cal. 3d 117** (p.61) [The fact that the defendant-driver and his passenger looked away as they passed the officer's patrol vehicle may have been entirely innocent or a lawful desire to avoid police contact.]

***Wilson v. Superior Court* (1983) 34 Cal. 3d 777** (p.49) [the fact that the defendant's companion twice made eye contact with the officer, and that both the defendant and his companion looked back at the officer as they walked through the airport did not provide a reasonable basis for the defendant's detention.]

3. The Defendant Ran Away or Walked Away in an Apparent Attempt to Avoid the Police

***People v. Lee* (1987) 194 Cal. App. 3d 975** (p.68) [One of the suspected drug dealers, standing across the park from the defendant, warned that the police were approaching and the defendant immediately started to leave the area – one of the factors supporting reasonable suspicion.]

***People v. Brown* (1990) 216 Cal. App. 3d 1442** (p.56) [After officers drove by the defendant displaying something to a group outside a dance hall, someone indicated that the police were approaching, and the defendant immediately walked quickly into dance hall, eventually fleeing after an officer followed him. This combined with other factors to support reasonable suspicion.]

***People v. Lloyd* (1992) 4 Cal.App. 4th 724** (p.64) [Reasonable suspicion was based in part on the fact that as the officers approached the defendant, who was standing outside a store that had just been burglarized, he looked at the officer turned around and started to walk away.]

***People v. Souza* (1994) 9 Cal. 4th 224** (p.58) [The fact that the defendant fled on foot from the police as soon as they stopped and spotlighted him and the car's occupants with whom he was conversing could be considered in assessing reasonable cause to detain. Even though individuals have a right to avoid the police, there is an appreciable difference between declining to answer an officer's questions and fleeing at the first sight of a uniformed officer.]

***Illinois v. Wardlow* (2000) 528 U.S. 119** (p.59) [Reasonable suspicion was based on the defendant's headlong flight from the approaching police officers in a high crime area. Headlong flight is the "consummate act of evasion"; it is not necessarily indicative of wrong doing but it is certainly suggestive of such.]

BUT SEE THE FOLLOWING CASES HOLDING THAT RUNNING OR WALKING AWAY FROM THE POLICE DOES NOT SUPPORT REASONABLE SUSPICION

***People v. Raybourn* (1990) 218 Cal. App. 3d 308** (p.57) [The defendant had the right to run away from a person in plain clothes and driving an unmarked police car, drove towards him, said he was "police" and asked to converse. The defendant did not know this person was an officer, and when he displayed his badge, the defendant immediately stopped.]

***People v. Perrusquia* (2007) 150 Cal. App. 4th 228** (p.59) [The factors specific to the defendant, including that he walked quickly in an attempt to pass the approaching officer, did not support reasonable suspicion.]

Note: Both of these cases can be distinguished from *Wardlow*. In *Raybourn*, the defendant was not in a high crime area and did not know he was fleeing from the police. In *Perrusquia*, the defendant walked quickly; he did not run.

4. The Defendant was Observed With Other Persons who Were Reasonably Suspected of Committing a Particular Crime

***Santos v. Superior Court* (1984) 154 Cal. App. 3d 1178** (p.71) [The defendant was observed with two persons in a closed parking lot at 10:00 p.m., and his companions engaged in a hand-to-hand exchange.]

***People v. Lee* (1987) 194 Cal. App. 3d 975** (p.63) [A presumptively reliable citizen informant told the police that two men had offered to sell her heroin, and the defendant remained in the vicinity of these people, on the opposite side of the park, for at least five minutes. This is one of the factors that supported reasonable suspicion for his detention.]

***People v. Renteria* (1992) 2 Cal. App. 4th 440** (p.63) [The defendant was seen driving Mr. Valles, an identified suspect in an armed robbery that had occurred earlier that evening, and the robbery victim reported that the two suspects fled in a vehicle.]

BUT SEE THE FOLLOWING CASES FINDING NO GUILT BY ASSOCIATION

***People v. Loewen* (1983) 35 Cal. 3d 117** (p.61) [The fact that the officer did not believe Mr. Landrum's claims and thought he might be hiding something did not cast reasonable suspicion on the defendant, who passed by in a car, even if he was somehow associated with Mr. Landrum.]

***People v. Pitts* (2004) 117 Cal. App. 4th 881** (p.65) [Even if the officer correctly suspected that a particular residence was a drug house and that two persons seen near that residence were somehow involved in those drug activities, he had no basis for detaining the defendant who rounded the corner near the residence at the same time as the two suspects were present. There was no information linking the defendant to the suspected drug house or to the two suspects.]

***People v. Hester* (2004) 119 Cal. App. 4th 376** (p.67) [There was no reasonable basis for detaining the defendant because he was a black male in a vehicle with a suspected member of the East Side Crips gang six hours after a drive-by shooting that may have been perpetrated by the East Side Crips against a rival gang.]

5. The Defendant Was Observed in the Vicinity of Recent Crimes

***People v. Lloyd* (1992) 4 Cal. App. 4th 724** (p.64) [The officers found the defendant standing alone at 4:00 a.m. outside an antiques store in which a silent burglar alarm had just been triggered.]

***People v. Conway* (1994) 25 Cal. App. 4th 385** (p. 65) [At 3:00 a.m., the defendant was observed inside a car with another man, leaving the area of a reported burglary less than two minutes after dispatch had reported the crime in progress.]

People v. Leath (2013) 217 Cal. App. 4th 344 (p. 69) [minutes after a reported robbery and blocks away from the crime scene, an officer observed the defendant, who matched the victims' description of the suspects, exit from a hastily parked dark SUV, which matched the victims' description of the robbers' vehicle.]

BUT SEE THE FOLLOWING CASES DISCOUNTING THIS FACTOR WHEN THERE IS NO EVIDENCE LINKING THE DEFENDANT TO THE RECENT CRIMES

***In re Tony C.* (1978) 21 Cal. 3d. 888** (p.60) [The fact that there had been recent burglaries in the area, and that the suspects were three black males of unspecified ages, did not support particularized suspicion to detain this black male minor]

***United States v. Kerr* (9th Cir. 1987) 817 F.2d 1384** (p.69) [There was no evidence linking the defendant, who was observed loading boxes into a vehicle parked on residential property in the mid-afternoon, to recent burglaries in the area]

***People v. Perrusquia* (2007) 150 Cal. App. 4th 228** (p.59) [The defendant was observed in the parking lot of a 7-Eleven store, but nothing indicated that he matched the description of persons who had recently committed six armed robberies at 7-Eleven stores]

***People v. Walker* (2012) 210 Cal. App. 4th 165** (p.68) [The defendant's very slight resemblance to one of two suspects who had committed a sexual battery at a crowded light rail station one week earlier did not provide reasonable suspicion for his detention]

6. The Defendant was Observed in a High Crime Area (Factors that Must Always be Considered in Combination with Others)

***People v. Limon* (1993) 17 Cal. App.. 4th 524** (p.72) [The officers knew that the apartment carport in which they observed the defendant engage in a hand-to-hand transaction was the site of past drug activity. The high crime area factor can lend meaning to the defendant's observed behavior.]

***People v. Souza* (1994) 9 Cal. 4th 224** (p.58) [The fact that the defendant was observed in a high crime area was a pertinent circumstance in assessing the validity of the detention.]

***Illinois v. Wardlow* (2000) 528 U.S. 119** (p.59) [An individual's presence in a high crime area is not sufficient, standing alone, to support a reasonable suspicion that the person is committing a crime. But it is a relevant factor, along with others.]

BUT SEE THE FOLLOWING CASES URGING THAT THE HIGH CRIME AREA FACTOR SHOULD BE REGARDED WITH EXTREME CAUTION

***People v. Bower* (1979) 24 Cal.3d 638** (p.55) [The fact that the defendant was observed in a high crime area did not elevate the circumstances into a reasonable suspicion of criminality. Many people are present in so-called high crime areas for wholly legitimate purposes.]

***People v. Loewen* (1983) 35 Cal. 3d 117** (p.61) [Presence in a high crime area does not transform "otherwise innocent-appearing circumstances" into factors justifying a detention.]

***People v. Perrusquia* (2007) 150 Cal. App. 4th 228** (p.59) [The fact that the defendant was present in a high crime area was unrelated to the defendant, not an activity under his control.]

***People v. Walker* (2012) 210 Cal. App.. 4th 165** (p. 68) [That the station where the defendant was observed was a high crime area – "an open air drug market" – was not a significant factor in assessing reasonable suspicion, particularly as the defendant was being investigated for sexual battery, not a drug crime.]

7. The Defendant was Observed Late at Night (A Factor That Must Always be Considered in Combination with Others)

People v. Lloyd **(1992) 4 Cal. App. 4th 724** (p.64) [The defendant was found outside a store that had just been burglarized at 4:00 a.m.]

People v. Conway **(1994) 25 Cal. App. 4th 385** (p.65) [The defendant was observed driving away from the area of a just-reported crime at 3:00 a.m.]

People v. Souza **(1994) 9 Cal. 4th 224** (p. 58) [The defendant was observed, conversing with people inside a parked car at 3:00 a.m. – a late and unusual hour for a social gathering.]

People v. Foranyic **(1998) 64 Cal. App. 4th 186** (p. 73) [The defendant was seen riding his bicycle with an ax attached at 3:00 a.m., in total darkness. The court acknowledged that there are legitimate uses for an ax, but they are generally daylight activities.]

BUT SEE THESE CASES DISCOUNTING THE LATE NIGHT FACTOR

People v. Bower **(1979) 24 Cal.3d 638** (p. 55)[The nighttime factor is of minimal importance in evaluating reasonable suspicion, and 8:30 p.m. is not an unusually late hour even if it is after dark.]

People v. Perrusquia **(2007) 150 Cal. App. 4th 228** (p.59) [The defendant was observed in the 7-Eleven parking lot at 11:30 p.m., not a particularly late hour, particularly as the store was open.]

8. The Defendant Engaged in Unusual Behavior or a Series of Seemingly Innocent Actions that Supported Reasonable Suspicion When Observed by a Trained and Experienced Officer

***Terry v. Ohio* (1968) 392 U.S. 1** (p.70) [It is not unusual for someone to stroll up and down a street, alone or with someone else, and look in store windows. But it is different when two men take turns walking the identical route and pausing to stare in the same store window roughly 24 times. This behavior warrants investigation]

***United States v. Sokolow* (1989) 490 U.S. 1** (p. 50) [Viewed together, the defendant's seemingly innocent actions at the airport (buying round-trip tickets to a quick trip to a drug source city, appearing nervous, checking no luggage) were consistent with a "drug courier" profile, justifying his detention]

***People v. Brown* (1990) 216 Cal. App. 3d 1442** (p.56) [The officers observed the defendant standing outside of a dance hall and displaying an open paper bag, containing unknown items, to a group gathered around him]

***People v. Johnson* (1991) 231 Cal. App. 3d 1** (p.72) [After receiving an anonymous tip that someone was selling or doing drugs in a designated apartment hallway, the officers went to that hallway and observed the defendant crouched over in the corner, peering down at the officers and saying nothing. After an officer demanded that he approach, the defendant moved his hand to his mouth, as though concealing something, and fled up the stairs.]

***People v. Limon* (1993) 17 Cal. App. 4th 524** (p. 72) [the officers observed the defendant remove something from near the front wheel of a truck, engage in a hand-to-hand exchange with another man, and then walk back to the truck and place something near the front wheel. Along with other factors, this supported reasonable suspicion of a drug transaction]

***People v. Foranyic* (1998) 64 Cal. App. 4th 186** (p. 73) [The defendant was observed riding his bicycle down the street, in total darkness, with an ax attached.]

***United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122** (p.53) [The defendants, drove separate cars in tandem, were observed making a U-turn on a highway just before a border patrol checkpoint, and stopped at in an isolated area known as a pick-up spot for undocumented immigrants or contraband]

***United States v. Arvizu* (2002) 534 U.S. 266** (p. 54) [The experienced border patrol agent's observation of a series of seemingly innocent acts by the defendant-driver and his passengers supported reasonable suspicion for a vehicle stop.]

BUT SEE THE FOLLOWING CASES OBSERVING THAT THE DEFENDANT'S CONDUCT MUST BE TRULY UNUSUAL

***Reid v. Georgia* (1980) 448 U.S. 438** (p. 47) [The defendant's conduct at the Atlanta airport (arriving on an early morning flight from Fort. Lauderdale with only a carry-on bag) was consistent with a large group of presumably innocent travelers and did not support reasonable suspicion.]

***United States v. Kerr* (9th Cir. 1987) 817 F.2d 1384** (p. 62) [The defendant's conduct – loading boxes into the trunk of a car parked on residential property in the mid-afternoon – did not raise an inference of criminal activity.]

***United States v. Robert L.* (9th Cir. 1989) 874 F.2d 701** (p. 51) [The defendant's driving maneuvers (speeding up as he drove away from an accident scene, moving to the right lane when he saw a police car approaching in the left lane) did not support reasonable suspicion.]

***United States v. Wood* (10th Cir. 1997) 106 F.3d 942** (p. 74) [The defendant's travel plans (his decision to fly one-way to California and then rent a car to drive back to Kansas in order to view the scenery) were not the sort of unusual plans giving rise to a reasonable suspicion of criminal activity. Also, the fact that he had fast food wrappers and open maps in his car was consistent with innocent travel.]

D. Factors That Have Been Discounted or Disapproved as Supporting a Finding That the Officer Had Reasonable Suspicion Justifying a Detention

1. The Defendant Appeared to be of Hispanic or Mexican Ancestry

***United States v. Brignoni-Ponce* (1975) 422 U.S. 873** (p.50) [The officers improperly stopped the car based solely on the fact that all three vehicle occupants appeared to be of Mexican descent. Although this factor may be relevant, it cannot justify a stop given the large number of persons in the United States who have physical characteristics identified with Mexican ancestry.]

***People v. Valenzuela* (1994) 28 Cal. App. 4th 817** (p. 52) [The fact that the defendant looked Hispanic and spoke better Spanish than English did not support reasonable suspicion that he was in the United States illegally. These factors describe many citizens or lawful residents.]

***United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122** (p. 53) [The lower courts improperly relied on the fact that all three defendants, driving near the United States-Mexico border appeared to be Hispanic, a factor not appropriately considered in evaluating reasonable suspicion.]

2. The Defendant Appeared to be Young and was not in School on a Weekday Afternoon

***In re Tony C.* (1978) 21 Cal.3d 888** (p. 60) [The officer improperly assumed that two teenagers seen walking in a residential area when they should have been in school and were involved in criminal behavior. There are many legitimate reasons why a student may be away from school during classroom hours.]

***United States v. Robert L.* (9th Cir. 1989) 874 F.2d 701** (p. 51) [The fact that similarly aged juveniles had been recently used in the Nogales area to transport marijuana was of little import in establishing marijuana. "Age, like race, is an immutable trait possessed by large numbers of persons who are completely innocent of any wrongdoing."]

3. The Defendant Was in an Area Inhabited Primarily by Members of Another Race

People v. Bower **(1979) 24 Cal.3d 638** (p.55) [The fact that the defendant, a white male, was seen exiting "the projects" with three or four black individuals in a primarily black neighborhood could not support reasonable suspicion.]

4. The Defendant Appeared to be Homeless

People v. Raybourn **(1990) 218 Cal.App.3d 308** (p. 57) [The officers wrongly detained the defendant, in part, because he looked like a homeless person and had a camera hung around his neck; the officer had no reason to believe the camera was stolen property]

5. The Defendant was Driving a Vehicle with Large Storage Capacity

United States v. Robert L. **(9th Cir. 1989) 874 F.2d 701** (p. 51) [The fact that the defendant was driving acar with an expansive trunk "capable of carrying large amounts of anything" lent scant support to the agents asserted reasonable suspicion that he was smuggling drugs. Many vehicles have similar trunk capacity]

People v. Valenzuela **(1994) 28 Cal. App. 4th 817** (p.52) [The fact that the defendant's vehicle had a large trunk capable of smuggling illegal immigrants did not provide particularized suspicion; there was nothing about the appearance of the vehicle that indicated that such immigrants or drugs were concealed in the trunk.]

United States v. Salzano **(10th Cir. 1998) 158 F.3d 1107** (p.76) [The fact that the defendant's motor home was large enough to store quantities of drugs and that drug runners have used such vehicles in the past for that purpose did not support reasonable suspicion that the defendant was transporting narcotics. Nothing about the motor home suggested that it was heavily loaded or had been modified to conceal contraband.]

6. The Defendant Exercised his Rights During a Consensual Encounter

***Florida v. Royer* (1983) 460 U.S. 491** (p. 48) [A person's refusal to listen to or answer the officer's questions during a consensual encounter does not, without more, furnish reasonable suspicion for a detention.]

***United States v. Wood* (10th Cir. 1997) 106 F.3d 942** (p. 74) [A person's refusal to consent to a search of his car cannot be used to support reasonable suspicion for a detention.]

CHAPTER THREE
THE FRISK OR PAT-SEARCH FOR WEAPONS

In contrast to establishing a detention, we rarely have to prove that the officer frisked or pat-searched the detainee. In almost all cases, the officer initiates a frisk for weapons when he places his hands upon the detainee and starts patting down the outer clothing, sometimes after an express announcement that he is about to pat-search for weapons. (See *Terry v. Ohio, supra*, 392 U.S. at 19.)

However, in some circumstances, the officer can initiate a weapons frisk without even touching the detainee, for example, when he directs the detainee to lift up his shirt and expose his waistband and pants pockets. (See *United States v. Baker* (4th Cir. 1996) 78 F.3d 135, 138 [holding that the officer's direction to the defendant to lift his shirt, after the officer had noticed a bulge near the waistband of the defendant's pants, constituted a patdown search for weapons]; *United States v. Edmonds* (E.D. Va. 1996) 948 F.Supp 562, 565-566 [holding that the officer's request that the defendant lift his shirt, and the officer's act of lifting the shirt after the defendant refused, was a reasonable means of conducting a frisk for weapons].)

The officer may initiate a pat-search by lifting up the detainee's shirt. (See *United States v. Hill* (9th Cir. 1976) 545 F.2d 1191, 1193 [holding that the officer's act of lifting the defendant's shirt after he noticed a large bulge at the defendant's waist was a lawful weapons frisk].) The officer may also initiate a pat-search by grabbing and securing the defendant's hands in preparation for the frisk, even if he never actually pats down the defendant's clothing. (*People v. Medina* (2003) 110 Cal. App. 4th 171, 176.) Without conducting a preliminary pat-down, the officer may grab the defendant's wrist to prevent him from fully placing his hand into a pocket after the officer observed a one to one-and-a-half inch bulge in that pocket. (*People v. Rosales* (1989) 211 Cal. App.3d 325, 328-31.)

The Fourth Amendment rules set forth in *Terry* apparently authorize a pat search of items other than clothing that the defendant is wearing or holding. (*People v. Lawler* (1973) 9 Cal.3d 156 [the officer pats down the defendant's sleeping bag].)

When we have a case involving a pat-search that leads to the discovery of incriminating evidence, there are two arguments that we may be able to make: 1) that the government did not meet its burden of establishing that the frisk was justified by a reasonable belief that the detainee was armed (PART I); and 2) that the officer exceeded the lawful scope of a weapons frisk when he reached under the detainee's clothing or into his pockets to seized an object he had detected by touch (PART II).

I. Establishing That the Frisk Was Unreasonable, Unsupported by a Reasonble Belief That the Defendant was Armed

A. Initiating a Pat-Search: The General Principles[19]

1. A Weapons Frisk is a Serious Intrusion

A frisk 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." (*Terry, supra*, 392 U.S. at 17.) "Even a limited search of the outer clothing for weapons constitutes a severe though brief intrusion upon cherished personal security, and it must surely be an annoying, frightening and perhaps humiliating experience. (*Id*., at 24-25.)

2. A Justified Detention Does Not Automatically Lead to a Constitutional Pat-Search

A police officer is not entitled to frisk every person whom he contacts and questions, even in the course of a legitimate detention or traffic stop. A lawful weapons frisk does not always flow from a justified detention; a separate and additional rational is required. (*Sibron v. New York* (1968) 392 U.S. 40; 64; see also *Pennsylvania v. Mimms* (1977) 436 U.S. 106, 110, fn. 5 [officers cannot frisk every person stopped for a traffic violation, even though they may routinely order the driver to exit from the car].)

> [D]espite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. (*Maryland v. Buie* (1990) 494 U.S. 325.)

[19] This section discusses the general legal rules as defined by some of the leading United States Supreme Court and California Supreme Court cases.

3. The Reasonable Belief Standard

A patdown search of the detainee's outer clothing is justified only when the officer reasonably believes, based on the totality of the circumstances, that the particular person he is questioning or detaining is armed and presently dangerous. (*Terry, supra*, 392 U.S. at 24, 27, 30; *Sibron, supra*, 392 U.S. at 63; *Ybarra v. Illinois* (1979) 444 U.S. 85, 92-93.) "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, supra*, at 27.)

When this standard is met, the officer can take necessary measures to determine whether the person he is investigating at close range is in fact carrying a weapon. (*Terry, supra*, at 24; *Minnesota v. Dickerson* (1973) 508 U.S. 366, 373.) "The purpose of this limited search is not to discover evidence of a crime but to allow the officer to pursue his investigation without fear of violence." (*Dickerson, supra*, at 373.)

4. The Officer's Reasonable Belief Must be Based on Specific and Particularized Facts

Before an officer places a hand on the individual to conduct a 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, supra*, at 64.) In determining whether the officer acted reasonably under the circumstances, "due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences that he is entitled to draw from the facts. (*Terry, supra,* at 27; *Lawler, supra*, 9 Cal.3d at 161.)

Nothing in *Terry* can be understood to allow a generalized cursory search for weapons in every case, or a search for anything but weapons. The narrow scope of the *Terry* exception "does not permit a frisk for weapons on less than a reasonable belief or suspicion directed at the person to be searched." *Ybarra, supra*, 444 U.S. at 93-94 [emphasis added].) The officer must have individualized suspicion. The mere fact that a person is present in a commercial establishment where an authorized narcotics search is taking place, or that he is near others who might be selling or using narcotics, does not justify a frisk of that individual. (*Ybarra, supra*, at 91, 94; see also *Sibron, supra*, at 64.)

B. Selected Decisions Finding the Officer did or did not Have the Reasonable Belief that the Defendant was Armed, as Required to Initiate a Frisk for Weapons

In this section, we discuss some of the cases in which the appellate courts have resolved the question of whether the officer's frisk of the detainee was justified by a reasonable belief, based on the totality of the circumstances, that he was armed and dangerous. Sometimes the officer detains and frisks the individual simultaneously – i.e., the detention commences with the physical restraint inherent in the pat-search. (See, e.g. *Terry v. Ohio* (1968) 392 U.S. 1; *In re Frank V*. (1991) 233 Cal. App. 3d 1232.) Most of the time, the officers detain first and frisk second. The determination of whether the officer had the required reasonable belief for the frisk is an intensely fact-based analysis. Thus, the circumstances of the cases are described in detail.

The cases discussed in this section are grouped by some common factual circumstance (e.g. "The Frisk was Based on the Nature of the Defendant's Suspected Crime or Gang Membership", "The Frisk was Based, in Part, on the Observation of a Possible Weapon in Proximity to the Defendant".) Of course, in almost all the cases, the courts relied on more than one factor in upholding the frisk. Cases in which the courts have found that the frisk was <u>not</u> justified by the required reasonable belief are discussed in the fifth and final category.

In each separate category, the cases are listed in chronological order, from earliest to most recent. The factors relied on to find a reasonable belief that the defendant was armed, or the lack thereof, are in bold print.

In the next section, we will list some of the common factors that courts have relied on in justifying a pat-search. Because most decisions rely on multiple factors, cases may be listed under more than one factor.

1. The Frisk was Based on the Nature of the Defendant's Suspected Crime or on Gang Membership

TERRY V. OHIO **(1968) 392 U.S. 1**
FRISK WAS JUSTIFIED: **BASED ON THE ASSUMPTION THAT PERSONS PLANNING A ROBBERY WOULD BE ARMED**
(See, *supra*, pp. 3-9, 70.)

Based on his observation of the behavior of Terry and his companions (taking turns walking up and down the same street, pausing to look in the same store window, then conferring), the officer believed that they were contemplating a "daylight robbery". The plain clothes officer approached Terry and his companions, identified himself, and asked for their names. The men mumbled something in response. The officer then immediately grabbed Terry and patted down the outside of his clothing, detecting a pistol in the pocket of his overcoat. (*Terry, supra*, at 5-7, 28.)

The Supreme Court concluded that the officer detained Terry when he grabbed him for the purpose of frisking him for weapons. **The Court held the detention was justified as the officer had reason to believe that Terry and his companions were casing stores and contemplating a robbery. The frisk was justified because it was reasonable to assume that weapons would be used in the intended robbery and that Terry was armed**. **(*Id*., at 27-28.)**

PEOPLE V. MYLES **(1975) 50 CAL. APP. 3D 423 [2ND DIST, DIV 5]**
FRISK WAS JUSTIFIED: BASED ON THE BELIEF THAT BURGLARS POSSESS WEAPONS OR TOOLS THAT CAN BE USED AS WEAPONS

A residence was burglarized sometime after 1:30 p.m., and a television set and gold leather jacket were taken from the home. Seven hours later, an officer saw the defendant walking down the street in a "high burglary neighborhood". He was carrying a television set and had a light tan jacket under his right arm. The officer and his partner stopped the defendant and immediately pat-searched him for weapons. In the defendant's pockets, the officers found burglary tools. (*Myles, supra*, at 427.)

The Court held that the pat-search was justified as the officer reasonably believed that the defendant was armed: 1) He knew that a high number of night-time burglaries had occurred in that neighborhood and that weapons had been taken in some of these burglaries. 2) It was reasonable for the officer to believe that a burglar might be armed with weapons, or tools such as knives and screwdrivers which could be used as weapons. (*Id*., at 430.)

***PEOPLE V. LEE* (1987) 194 CAL.APP. 3D 975 [1ST DIST, DIV 4]**
FRISK WAS JUSTIFIED: BASED ON THE BELIEF THAT PERSONS SELLING NARCOTICS FREQUENTLY CARRY WEAPONS
(See, *supra*, p.63)

Two officers were on foot patrol in an area of Oakland known for "high narcotic activity", asking citizens about possible drug sales in the area. A woman told them that within the last five minutes, she had walked by a nearby park and two men had offered to sell her heroin. She said that a third man was standing on the opposite side of the park. The officers drove to the park and saw three men standing in the described locations; the defendant was standing separately. As the patrol cars approached, one of the two men standing together called out "rollers, rollers", a reference to the police. The defendant immediately turned and began to walk away. One officer drove his car to within 15 to 20 feet of the defendant, at which point, the defendant reached inside of his jacket. Believing he was reaching for a weapon, Dunbar told him to remove his hand and the defendant complied. The officer pat-searched the defendant's jacket in the chest area, finding heroin-filled balloons. (*Lee, supra*, at 979-980.)

The Court held the defendant was not detained until after he reached inside his jacket. At that point, the officer reasonably believed that the defendant was engaged in selling narcotics and reaching for a weapon. It was reasonable for the officer to believe that the defendant was armed, as he knew that narcotics dealers frequently carry firearms. (*Id.*, at 982-983.)

***PEOPLE V. THURMAN* (1989) 209 CAL.APP. 3D 817 [1ST DIST., DIV 2]**
FRISK WAS JUSTIFIED: BASED ON THE DEFENDANT'S PRESENCE IN A PRIVATE RESIDENCE BEING SEARCHED, PURSUANT TO A WARRANT, FOR EVIDENCE OF NARCOTICS ACTIVITY

At a private residence, officers were executing a warrant that authorized a search for evidence of narcotics trafficking. The warrant did not name nor authorize a search of appellant. As they walked through the house, one officer encountered appellant and two females in the front room. Appellant was sitting passively on the sofa; he did not threaten the officer. Nevertheless, the officer ordered appellant to stand up and then frisked him.. Ultimately, the officer found that a bulge in appellant's pocket that he originally believed was a weapon was actually a baggie of rock cocaine. (*Thurman, supra*, at 820-21.)

Recognizing the association of narcotics trafficking, violence and guns and the particular risks involved in searching a private residence where weapons may be hidden and readily accessible, the court concluded that the officer had the right to

initiate a weapons frisk. The court held "that where police officers are called upon to execute a warranted search for narcotics within a private residence, they have a lawful right to conduct a limited *Terry* pat-down search for weapons upon the occupants present while the search is in progress." (*Id*., at 822-824.)

***PEOPLE V. LIMON* (1993) 17 CAL.APP. 4TH 524 [SIXTH DISTRICT] FRISK WAS JUSTIFIED: BASED ON THE PROPENSITY OF DRUG DEALERS TO CARRY WEAPONS**
(See, *supra*, p. 72.)

Officers Panighetti and Shuper were walking across an elementary school's grassy field. They saw the following events transpire in the carport of an apartment complex, located about 200 yards away: The defendant, standing next to another man inside the carport, walked to a pickup truck, bent down near the front wheel, removed something and walked back to the other man. The two men touched hands and exchanged something. The defendant then walked back to the truck and placed something near the front wheel. As the officers walked over to investigate, Panighetti saw two other males standing near another vehicle in the carport. The apartment complex where the carport was located was in an area known for gang activity, drugs, and weapons. Both Panighetti and employees at the nearby elementary school had seen drug transactions in the carports. Officer Shuper approached the defendant while Panighetti approached the other two men. All three were brought together and pat-searched. Heroin and cocaine were found on the defendant. (*Limon, supra*, at 529-531.)

The officers had the right to detain the defendant as his actions, in this setting, reasonably suggested his involvement in drug sales. (*Id*., at 531-534.) **Officer Panighetti testified that he had three reasons for pat-searching the defendant, a suspected drug dealer: 1) The two officers were outnumbered by the three men in the carport and by others in the immediate area. 2) Drug dealers often carry weapons. 3) The area was known for weapons. The Court held the combination of these three factors supported a reasonable belief that the defendant was armed. Neither the fact that the officers were outnumbered nor the fact that there was weapons activity in the area would alone justify a frisk, but viewed together, along with the propensity of drug dealers to carry weapons, these factors were sufficient. (Id., at 534-535.)**

***PEOPLE V. CASTANEDA* (1995) 35 CAL.APP. 4TH 1222 [4TH DIST, DIV 3]**
FRISK WAS JUSTIFIED: BASED ON THE ASSUMPTION THAT BURGLARS FREQUENTLY CARRY WEAPONS
(See, *supra*, p.30.)

The officer arrived in commercial/industrial area at 11:20 p.m. to investigate a citizen's report of a possible prowler at a nearby business. The officer saw the defendant and his passenger seated in a parked car in a lot. There were several other cars parked in the lot, but only the defendant's car appeared to be occupied. The nearby businesses were closed. The officer suspected that the defendant or his passenger might be the prowler. He approached them in the parked car and asked for identification. They responded only in Spanish, which the officer did not understand. The officer asked the defendant, seated in the driver's seat, to exit from the car. He immediately patted him down, finding a loaded magazine and some heroin. (*Castaneda, supra*, at 1226, 1229.)

The Court held that the officer had reasonable cause to detain and frisk the defendant after he exited from the car. 1) The officer was alone with two detainees; and 2) the defendant was a suspected burglar and burglars frequently carry weapons. **(*Id*., at 1230.)**

***IN RE H.M*. (2008) 167 CAL.APP. 4TH 136 [2ND DIST, DIV 3]**
FRISK WAS JUSTIFIED: BASED ON THE KNOWLEDGE THAT GANG MEMBERS ARE FREQUENTLY ARMED

Officers Hernandez and Godoy, assigned to gang detail, were patrolling an area of Los Angeles known as a stronghold of the 18th Street gang. There had been numerous complaints from citizens in that area regarding gang members shooting at passing vehicles and selling narcotics. Detective Magallon arrived to tell the two officers about an apparent gang-related shooting that had occurred the previous day. As Magallon and Hernandez were talking, they observed the 14-year-old minor, H.M., sprint towards them across a busy street through heavy traffic, causing motorists to slow and honk. The minor was sweating profusely and kept looking back. His facial expression suggested that "he was trying to get away from something" and that he was nervous as if "something was happening." Officer Hernandez had previous contacts with the minor and knew that he was an admitted 18th Street gang member who lived in a house that was an 18th Street gang stronghold. Detective Magallon detained the minor for illegally crossing the street. Based on the minor's demeanor and behavior in gang territory, Magallon believed that the minor was running from a crime scene, and that he was either a perpetrator or a victim. Magallon immediately pat-searched the minor, finding a loaded handgun in his pants pocket. (*H.M., supra*, at 140-141.)

The Court held that based on a combination of circumstances, Detective Magallon reasonably believed that the minor was armed and dangerous, justifying the pat-search. 1) Viewed objectively, through the lens of common sense and experience, the minor's unusual behavior (dashing through heavy traffic while looking back, his facial expressions indicating fear and nervousness) strongly suggested that he was fleeing from a crime scene. That the detective did not know whether the minor was a victim or perpetrator was immaterial. 2) The other officers recognized the minor. 3) The minor's flight suggested consciousness of guilt. 4) The minor acted suspiciously in known gang territory, where there had been many crimes, including gang-related shootings, one of which had happened the previous day. 5) It was common knowledge, particularly to officers, that gang members frequently carry guns and other weapons. Thus, Magallon could assume that a crime committed in gang territory would involve a weapon, and that a person fleeing from such a crime was likely armed. (*Id*., at 144-147.)

2. The Frisk Was Based on the Defendant's Conduct or Appearance

***PENNSYLVANIA V. MIMMS* (1977) 434 U.S. 106**
FRISK WAS JUSTIFIED: THE OFFICER SAW A LARGE BULGE IN THE DEFENDANT'S JACKET AFTER ORDERING HIM TO EXIT FROM THE CAR DURING A TRAFFIC STOP

Officers observed the defendant driving an automobile with an expired license plate. They initiated a stop in order to issue a traffic summons to the driver. One officer approached the defendant and asked him to step out of the car and produce proof of ownership and a driver's license. The defendant alighted from the vehicle, and the officer immediately noticed a large bulge under his sports jacket. Fearing that the bulge might be a weapon, the officer frisked the defendant and discovered a loaded revolver in his waistband. (*Mimms, supra*, at 107.)

There was no dispute as to the legality of the detention; the officer had the right to stop the car and driver after he observed the expired license plate. The questionwas whether the officer had the right to order the driver to get out of the car during the legitimate detention. **The Court held that an officer could routinely order a driver out of the vehicle during a lawful traffic stop, without any individualized reasonable suspicion, but cannot frisk every vehicle occupant that he orders out of a car . He must reasonably believe that the detainee is armed. In this case, the officer noticed a large bulge in the defendant's jacket after ordering him out of the car, and this provided the requisite reasonable belief; the frisk was justified. (*Id.*, at 109-112.)**

IN RE FRANK V. (1991) 233 CAL.APP. 3D 1232 [4TH DIST, DIV 3] FRISK WAS JUSTIFIED: THE MINOR PLACED HIS HANDS IN HIS POCKETS AFTER BEING TOLD TO TAKE THEM OUT

At about 9:45 p.m., two officers were dispatched to investigate a report of reckless motorcycle driving on a street in an active gang area. When the officers arrived, they noticed a motorcycle pulling away from the curb in front of a house known for gang activity. The officers made a U-turn, intending to make a traffic stop, and as soon as they turned, the motorcycle pulled to the curb. As the officers approached the motorcycle, the driver held out his driver's license. The minor, Frank V., was the passenger on the back of the motorcycle. He looked straight ahead with both hands in the front pockets of a bulky jacket. Responding to the officer's order, the minor took his hands out of his pockets. When he tried to put his hands back inside his pockets, the officer told him to keep them out. The officer then pat-searched the minor for weapons and discovered a gun in his front jacket pocket. (*Frank V., supra*, at 1236-1237.)

The Court held that the minor was not detained until he was physically restrained by the pat down. Thus, the lawfulness of the detention depends on the reasonableness of the pat down. (*Id*., at 1237, 1240, fn. 3.) The officers had a reasonable belief that the minor might be armed. They did not have to be certain that he had a weapon before commencing the frisk. The following circumstances supported the requisite reasonable belief: 1) He was in a gang area at night, leaving from the curb outside a known gang house. 2) The minor was wearing a heavy coat with his hands in his pockets. 3) The minor placed his hands in his pockets after being told to take them out. (*Id.*, at 1240-1241.)

PEOPLE V. RITTER (1997) 54 CAL.APP. 4TH 274 [4TH DIST, DIV 2] FRISK WAS JUSTIFIED: THE OFFICER SAW THE OUTLINE OF A LIKELY GUN IN THE DEFENDANT'S FANNY PACK

A deputy received a 911 call reporting a disturbance. The caller reported that due to a dispute over money, a man wearing a black hat, red shirt and black jeans "was threatening". When the deputy arrived at the scene, a woman pointed southward down the street, where the deputy saw the defendant walking away; he was wearing the described clothing items. The deputy drove behind the defendant and honked his horn, causing the defendant to stop and turn around. While getting out of his patrol car, the deputy explained that he was investigating a reported disturbance involving the defendant. The defendant said there was no problem and urged the deputy to check with other parties. The deputy remained with the defendant and looked him over. He noticed that the defendant was wearing a fanny pack with several compartments that seemed to be full. In

the outer compartment, the deputy saw the "definitive outline" of a small handgun. When the deputy asked the defendant what was in the pack and whether he had any weapons, he gave evasive answers. The deputy asked the defendant to put the fanny pack on the hood of the patrol car, but the defendant placed the pack on the ground and stepped away from it. The officer then picked up the pack, placed it on the patrol car, unzipped the outer compartment and retrieved a handgun. (*Ritter, supra*, at 276-277.)

The deputy had not frisked the defendant or patted down the fanny pack while the defendant was wearing it. The issue in this case was whether the deputy's opening of the backpack, after the defendant took it off and placed it on the ground, was "a permissible extension of a *Terry* preventative search for weapons." (*Id.*, at 278.) The Court held that this was a legitimate *Terry* search, relying in part on *Michigan v. Long* (1983) 463 U.S. 1032 [holding that it was reasonable under *Terry* to allow officers to search a vehicle's passenger compartment for weapons if they have a reasonable belief that the suspect is potentially dangerous and might retrieve a weapon from the vehicle]. **In the current case, the deputy had a reasonable suspicion that the defendant was armed, and specifically, that he had a weapon in the fanny pack, based on 1) the report that the defendant had engaged in threatening conduct; 2) the outline of a suspected handgun in the outer compartment of the defendant's fanny pack; 3) the defendant's evasive responses to the deputy's questions; and 4) his act of placing the fanny pack on the ground. The deputy "should not be faulted for [his] failure to pat down the fanny pack while the defendant was wearing it." He acted reasonably in opening the pack after it was put it down. (Id., at 279-280.)**

PEOPLE V. COLLIER (2008) 166 CAL.APP. 4TH 1374 [2ND DIST, DIV 6] FRISK WAS JUSTIFIED: BASED ON THE DEFENDANT'S BAGGY CLOTHING AND THE SMELL OF MARIJUANA

Deputy Rosas stopped a car because it did not have a front license plate. A female was driving the car and the defendant was in the front passenger seat. As Deputy Rosas spoke to the driver, he smelled marijuana emanating from the vehicle. Deputy Binder approached the passenger side and smelled a strong marijuana odor. The deputies asked both occupants to exit from the car so they could search the interior. As the defendant alighted from the car, he denied possessing any weapons or anything illegal. Because the defendant was taller than Deputy Binder and wearing baggy shorts that hung down to his ankles and an untucked shirt that extended to his mid legs, the officer could not tell if he was carrying a concealed weapon. Deputy Binder frisked the defendant and discovered a loaded handgun in his pants pocket. (*Collier, supra*, at 1376-1377.)

The Court held that pat-search was justified by a reasonable belief that the defendant was armed based on the combination of three factors: 1) Guns often accompany drugs. The deputies smelled the odor of marijuana, supporting a reasonable suspicion that the defendant might possess or have been smoking marijuana.[20] 2) The defendant was wearing baggy clothing, although the court acknowledged that this factor alone could not support a pat- down search. 3) The defendant was larger than the deputy. (*Id*., at 1377-1378.)

PEOPLE V. OSBORNE (2009) 175 CAL.APP. 4TH 1052 [1ST DIST, DIV 4] FRISK WAS JUSTIFIED: BASED, IN PART, ON THE DEFENDANT'S LARGE SIZE

Officers Malone and Andelin were on afternoon patrol. As they drove down the street, they saw the defendant standing next to a Lexus. The trunk was open and the defendant appeared to be handling exposed wires in the trunk. The defendant looked up. Upon seeing the patrol car, he shut the trunk and walked away from the Lexus. He appeared to be "real nervous". Officer Malone noticed a second man in a nearby driveway, who ran when he observed the patrol car. The defendant approached the officers and Malone ordered him to step back. Malone was concerned because the defendant was much larger than him. The defendant walked back to the Lexus and sat in the driver's seat. Officer Malone than walked over and looked inside the vehicle, noticing that the front passenger door panel and the dashboard trim had been stripped off, with loose wires protruding from both areas. Tools, including screwdrivers and pliers, were strewn about the passenger area. Suspecting that the defendant was burglarizing the Lexus, Malone asked him to get out of the car and prepared to frisk him. After placing the defendant's hands toward the rear of his body and handcuffing him, the officer asked if he had a gun. The defendant admitted he had a gun in his pants pocket. Malone patted the defendant's pants pockets and found a gun. (*Osborne, supra*, at 1056.)

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[20] One could argue that the presumption relied upon in *Collier* – that drug possessors and users, including marijuana smokers, are frequently armed – is inconsistent with previous authorities. Cases stating that drug dealers are commonly armed base this conclusion on assumptions that do not apply to drug users – i.e. that drug traffickers arm themselves in order to protect themselves, their supplies of narcotics, and their money. (*See*, e.g.*, Ybarra v. Illinois, supra*., 444 U.S. at 106, dis. opn. of Rehnquist, J. [for those who sell narcotics, firearms are as much tools of the trade as narcotics paraphernalia]; *Glaser, supra*, 11 Cal. 4th at 367-368 [recognizing the propensity of narcotics sellers to carry firearms to protect themselves from robbers]; *Limon, supra*, 17 Cal. App. 4th at 534 [noting that drug dealers often carry weapons].)

The Court held that Officer Malone lawfully detained the defendant, based on a reasonable suspicion that he was burglarizing or stripping the Lexus. **The subsequent pat-search was justified by a reasonable belief that the defendant was armed based on the following factors: 1) The defendant was a suspected auto burglar. Officers can reasonably anticipate that burglary suspect might be armed with a weapon or carrying "tools of the trade" such as screwdrivers which could be used as weapons. 2) The defendant was acting nervous. 3) His large size constituted a safety threat. 4) Officer Malone was dealing with the defendant alone. 5) Malone's partner had told him that the defendant might be on parole**. **(*Id*., at 1059-1062.)**

3. The Frisk was Based, in Part, on the Observation of a Possible Weapon in Proximity to the Defendant

***PEOPLE V. SUENNEN* (1980) 114 CAL.APP. 3D 192 [1ST DIST, DIV 1] FRISK WAS JUSTIFIED: THE OFFICER OBSERVED A KNIFE IN THE CAR OF THE SUSPECTED BURGLARS**

At night, a Concord police officer initiated a traffic stop of the car that the defendant was driving based on a Vehicle Code equipment violation. The officer approached the car and asked the defendant and his front seat passenger, Co-defendant Hohstadt, for their identification. As the officer stood at the driver's side, he observed a knife with an eight-inch blade inside a sheath of the seat between the two occupants, a pair of dark leather gloves, two cans of beer (one open), and a partially filled pillowcase placed upright on the floor near the passenger's feet. The car's occupants said they were coming from Pittsburg, but their route of travel indicated they were actually coming from a residential area of Concord where a series of evening residential "pillowcase burglaries" had occurred. Based on these facts, the officer suspected that defendant and Hohstadt had just committed a burglary. He escorted the defendant to the rear of the car and then directed his cover officer, who had just arrived, to remove the passenger, Hohstadt, and pat-search him for weapons. The pat-search uncovered two flashlights and two screwdrivers. The defendant was pat-searched but no weapons or contraband were found on his person. (*Suennen, supra*, at 197-198.)

T**he defendant challenged the pat-search of Co-defendant Hohstadt. The Court held that the officer's observations during the traffic stop, coupled with his prior knowledge, provided a reasonable belief that Hohstadt was armed: 1) The officer was aware of recent local pillowcase burglaries. 2) His plain view observation of the half-filled pillowcase, the dark gloves and the defendant's claim that he'd come from Pittsburg, not Concord, provided reasonable suspicion that the car's occupants may have been involved in a burglary. 3) The officer observed a large**

knife on the front seat within easy reach of both occupants. 4) It was dark out and the two officers did not outnumber the two car occupants. (*Id.*, at 198-199.)

PEOPLE V. AVILA (1997) 58 CAL.APP. 4TH 1069 [4TH DIST, DIV 2] FRISK WAS JUSTIFIED: THE OFFICER SAW A METAL OBJECT IN THE TRUCK, 8 TO 10 INCHES FROM THE DEFENDANT'S HAND

The officer saw the defendant walking across a parking lot and littering in a "suspicious" manner; the defendant first walked to the passenger side of a truck, then to the driver's side, then back to the front of the truck with his hand directly in front of his body, finally dropping a white envelope from his waist. The officer contacted the defendant as he stood in the truck's open door. The officer told the defendant that he had seen him littering and asked for identification, which the defendant provided. While the officer was talking to the defendant, he noticed two containers of alcohol on the front seat of the truck but could not tell if they were open or full. Next, the officer observed "a long black metal object" that was similar to a Mag flashlight in the trunk. The suspected flashlight was behind the defendant, about eight to ten inches from his hand. The officer asked what the object was. Without turning around, the defendant said he did not know and denied having any weapons. The officer told the defendant to walk to the back of the truck. He complied, and when he reached the rear of the truck, he assumed the position for a pat-search. The officer then frisked him for weapons. (*Avila, supra*, at 1072-73.)

The Court found that the circumstances supported a reasonable belief that the officer's safety was in danger, justifying the frisk: 1) The defendant had been observed littering in a suspicious manner. 2) The officer saw a metal object within eight to ten inches of the defendant's hand, and without looking at this object, the defendant denied any knowledge of its nature. Although each factor might be individually harmless, they combined to create reasonable fear. (*Id.*, at 1074.)

4. The Frisk was Based on an Anonymous Tip Alleging Firearm Possession or Use[21]

***FLORIDA V. J.L.* (2000) 529 U.S. 266**
FRISK WAS NOT JUSTIFIED: AN ANONYMOUS TIP ALLEGING GUN POSSESSION WAS NOT CORROBORATED BY ANY OBSERVATIONS REASONABLY SUGGESTING THAT THE DEFENDANT HAD A GUN

An anonymous phone caller told the police that a young black male wearing a plaid shirt was standing at a particular bus stop and carrying a gun. Nothing was known about the informant. Some time after receiving the tip – it's not clear how long - police officers were directed to respond. Six minutes later, the officers noticed three black males at the designated bus stop. The officers saw that one of the three men, the defendant, was wearing a plaid shirt. One of the officers approached the defendant, told him to put his hands up and frisked him, seizing a gun from his pocket. (*J.L., supra*, at 268.)

The Court held that the stop and frisk of the defendant was unconstitutional: 1) The informant was truly anonymous and could not be held accountable for any fabrication. 2) The tip was devoid of details, particularly predictive details, which would have supported an inference that the informant had inside knowledge of the subject's illegal activity. 3) The tipster's allegation of illegal activity (gun possession) was not reliable. Before stopping and frisking the defendant, the officer only verified non-criminal details, the individual's race and gender, his apparel and his location. 4) Nothing about the defendant's conduct or appearance reasonably suggested that he possessed a firearm, as alleged by the informant. The defendant made no threatening or unusual movements. (*Id.*, at 271-272.)

The Court rejected the government's proffered "firearm exception", under which an anonymous tip alleging possession of an illegal gun would justify a stop and frisk even if the reliability of the tip was not established by observations corroborating the allegation

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[21] If you have a case in which the detention or frisk is based on an anonymous tip, see "DOES AN ANONYMOUS TIP PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK" (November 2009), available in the Articles and Outlines Database on the FDAP website (www.fdap.org) These anonymous tip materials will be revised in 2014, after the Supreme Court decides *Navarette v. California*. That case presents the following question: Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

of illegal conduct. Nevertheless, the Court suggested that under unique circumstances, such as a report of a person carrying a bomb, the danger alleged by the anonymous tipster might be so great as to justify a search without a showing of reliability.(*Id.*, at 272-274.)

**PEOPLE V. JORDAN* (2004) 121 CAL.APP. 4TH 544 [FIFTH DISTRICT] FRISK WAS NOT JUSTIFIED: ANONYMOUS TIP ALLEGING GUN POSSESSION NOT CORROBORATED BY THE DEFENDANT'S CONDUCT OR APPEARANCE

The police received an anonymous 911 telephone tip. The caller reported that a man in a designated park was carrying a concealed gun in the right front pocket of his jacket. He was described as a black male in his early 30's, wearing a black jacket, tan pants, red boots and a white shirt. The tipster claimed this man had been threatening to shoot people, but did not otherwise reveal why he believed the man had a gun concealed in his jacket. It's unclear how much time passed between the end of the 911 call and the subsequent radio dispatch to officers in the field, relaying most of the details of the tip. Uniformed Officer Gerrity responded and arrived at the park less than one minute after receiving the dispatch. He saw that there were as many as eleven people in the park, but only the defendant matched the physical description provided by dispatch. Officer Gerrity watched the defendant from behind a tree for 30 to 45 seconds. The defendant remained sitting on a park bench with his hands in his lap, not talking to anyone or engaging in any activity. The officer did not see any bulges in appellant's clothing. Gerrity made eye contact with the defendant, motioned him over, and said he was a police officer who needed to talk to the defendant. The defendant rose from the park bench and the officer told him to place his hands in the air, turn around and walk backwards towards him. When the defendant stood up, the officer saw that his clothing was cumbersome, especially the jacket. The officer could not see what was inside the defendant's waistband or pockets. Officer Gerrity took control of the defendant's hands and announced that he was going to pat-search him. He then frisked the defendant and detected a gun in his jacket pocket. (*Jordan, supra*, at 548-551.)

The circumstances did not support a reasonable belief that the defendant was armed. 1) Relying on *Florida v. J.L., supra*, 529 U.S. at 266, the Court found that the anonymous tip claiming that a man resembling the defendant was carrying a concealed gun did not support the pat-search; the tip was devoid of predictive details and the officer corroborated only the physical description of the alleged suspect and his location. The officer saw nothing that corroborated the claim that the defendant had a gun. 2) Officer Gerrity did not see the defendant make a threatening, aggressive or unusual movement, the defendant did not reach for or grab at his pocket and the bulge or outline of a gun was not visible. 3) Although the

Court did not expressly discuss this factor, the pat-search was not justified even though the defendant was wearing cumbersome clothing, including his jacket, which prevented the officer from seeing what was inside the defendant's waistband or pockets. **(*Id*., at 551-552, 553-564.)**

PEOPLE V. LINDSEY (2007) 148 CAL.APP. 4TH 1390 [1ST DIST, DIV 4] FRISK WAS JUSTIFIED: BASED ON ANONYMOUS TIP ALLEGING GUN USE, NOT MERE POSSESSION

The police received a 911 call from an anonymous female stating that a shot had been fired outside of her residence, although the tipster admitted she had not actually seen the suspect fire or hold a gun. She described the suspect as a black male with small ponytails. The police traced the origin of the call to a particular residence located in a high crime area of Pittsburg, and an officer was dispatched to this residence. As the officer neared the residence, about five minutes after receiving the dispatch call, he saw the defendant, a black male with small ponytails, walking with two other black men. From inside his patrol car, the officer observed that the defendant was wearing baggy clothing and holding up his pants at the waist, indicating to the officer that he was carrying something heavy in his pocket or waistband. The officer followed the defendant and his companions for one and a half blocks, without observing any "suspicious activity". The officer noted, however, that the defendant's hand never left his waist during this period. The officer got out of his vehicle and asked the three men if he could speak with them. The defendant eventually stopped and turned toward the officer. The officer told the defendant that he was responding to a report of shots fired and asked him if he had a gun. The defendant said he did not. The officer pat-searched the defendant, finding a sock containing a firearm tied to his waistband. (*Lindsey, supra*, at 1393-1394.)

The Court held that the officer possessed the requisite reasonable suspicion to stop and frisk the defendant. 1) Distinguishing the anonymous tip in *Florida v. J.L*., the Court noted that the 911 call in this case was recorded and traceable to a particular residence, facts that the caller presumably knew; thus, it was less likely that the caller conveyed knowingly false information. Also, people would be less likely to lie about gun use as opposed to gun possession. 2) Because the 911 caller reported that the suspect had actually used a gun and not merely possessed it, the suspect presented a greater public safety risk, and less corroboration of her claim would be required. The Court of Appeal relied on the California Supreme Court's recent decision in *People v. Dolly* (2007) 40 Cal. 4th 458 [holding that a detention and car search were justified by an anonymous tip alleging that an individual had just pulled a gun on the caller. Reported gun use presents a greater theft to public safety than mere possession].) **3) The officer corroborated not only the suspect's location and physical description,**

but also the tipster's allegation of criminal behavior. The defendant was seen continually holding his pants up at his waist, reasonably indicating that he carried a heavy object (possibly a firearm) in his waistband. 4) The stop occurred in a high-crime area. **(*Id*., at 1396-1401.)**

5. Cases Holding That the Frisk was not Justified by the Circumstances

***SIBRON V. NEW YORK* (1968) 392 U.S. 40[22]**
FRISK WAS NOT JUSTIFIED: BASED ON DEFENDANT CONVERSING WITH NUMEROUS DRUG ADDICTS OVER AN EIGHT-HOUR PERIOD

A uniformed officer patrolling his beat, continually observed the defendant from 4:00 p.m. to midnight. Over the course of those eight hours, the officer saw him conversing with several known narcotics addicts out on the street, and then conversing with additional known addicts inside a restaurant. The officer did not overhear any of these conversations or see anything pass between the defendant and any of the others. When the defendant was seated in the restaurant, the officer approached him and told him to come outside. Once outside, the officer said to the defendant, "You know what I am after." The defendant mumbled something and reached into his pocket. Simultaneously, the officer thrust his hand into the same pocket and pulled out several containers of heroin. (*Sibron, supra*, at 45.)

The Court held that the officer did not have reasonable grounds to believe that the defendant was armed and dangerous. The defendant's act of talking with a number of narcotics addicts over an eight-hour period did not support such a reasonable belief. Moreover, the officer's testimony made it abundantly clear that he reached into the defendant's pocket because he believed it contained narcotics, not a weapon. (*Id*., at 63-64.)

***PEOPLE V. LAWLER* (1973) 9 CAL. 3D 156**
FRISK WAS NOT JUSTIFIED: BASED ON THE APPARENT NERVOUSNESS OF AN 18-YEAR OLD HITCHHIKER.

On a midsummer afternoon, an officer observed the 18-year-old defendant standing in the roadway and knocking on the windows of passing cars that had temporarily stopped at an intersection. When the officer parked his patrol car to

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[22] *Sibron v. New York* was a companion case to *Terry v. Ohio*, and the *Sibron* opinion was also authored by Chief Justice Warren.

investigate, the defendant rejoined two companions, a female, age 20, and a boy, age 15. The officer approached and "detained them for questioning". The three informed him that they were hitchhiking and attempting to get to Big Sur, as corroborated by their cardboard signs. The officer then performed a "routine" pat search of the defendant's sleeping bag. He touched a lump which felt liked "some type of automatic weapon, and asked the defendant to unroll the bag. The suspected weapon turned out to be a camping utensils kit, but the bag also concealed several baggies of marijuana. (*Lawler, supra*, at 159.)

The Court held that when the officer patted down the sleeping bag, the facts did not support a reasonable belief that he was dealing with an armed and dangerous individual: 1) "The 18-year-old lost hitchhiker with his young companions, dragging their sleeping bags, hardly paints the picture of an armed and dangerous individual." (*Id*., at 161.) 2)The defendant's apparent nervousness and that fact that he kept grabbing at his sleeping bag as if he wanted to leave did not justify the frisk. "Many individuals who are accosted and queried by a police officer become both upset and desirous of the earliest possible termination of an uncomfortable situation". These were not unusual or suspicious circumstances. 3) Finally, the Court rejected the state's proposal that the defendant's violation of hitchhiking regulations justified the pat-search. (*Id*., at 161-162.)

***YBARRA V. ILLINOIS* (1979) 444 U.S. 85**
FRISK WAS NOT JUSTIFIED: BASED ON THE DEFENDANT'S MERE PRESENCE AS A PATRON AT A TAVERN WHERE THE BARTENDER AND PREMISES WERE BEING SEARCHED FOR EVIDENCE OF DRUG POSSESSION AND DISTRIBUTION.

Based on a reliable informant's tip, a law enforcement officer secured a warrant authorizing the search of the Aurora Tap Tavern and Greg, the bartender, for evidence of possession and distribution of heroin. In the late afternoon of that same day, seven or eight officers went to the tavern to execute the warrant. Upon entering the establishment, the officers announced their purpose and advised the nine to thirteen customers present in the tavern, that each of them would be subject to a "cursory search for weapons". One officer then frisked the customers while the other officers searched the premises. The defendant was one of the tavern's customers. The officer patted down the defendant's outer clothing and felt "a cigarette pack with objects in it". He did not reach into the defendant's pocket to retrieve this item but finished frisking the other customers. He then returned to the defendant and frisked him again. This time, he retrieved the cigarette pack from the defendant's pocket and found heroin inside. (*Ybarra, supra*, at 86-89.)

Focusing on the initial frisk, the Court held that it was not authorized by the search warrant which had not mentioned the patrons of the tavern or alleged that patrons purchased narcotics from Bartender Greg.. Also, the officer lacked probable cause to arrest or search the defendant for a narcotics crime or any other offense. **The circumstances did not support a reasonable belief that the defendant was armed, as required to frisk him for weapons. 1) The officers did not recognize the defendant as a person with a criminal history. 2) Nothing about the defendant's behavior or appearance gave the officers reason to believe that he possessed a weapon or might be inclined to assault them. The defendant's hands were empty, he made no gestures or other actions indicative of an intent to commit assault. He was wearing a 3/4-length lumber jacket, but this clothing item "could be expected on almost any tavern patron in Illinois in early March." 3) The fact that the defendant happened to be present at the tavern while an authorized narcotics search was taking place did not permit a frisk for weapons**. **(*Id*., at 92-94.)**

***UNITED STATES V. THOMAS* (9TH CIR. 1988) 863 F.2D 622**
FRISK WAS NOT JUSTIFIED: OFFICERS CANNOT FRISK EVERY INDIVIDUAL THAT THEY REASONABLY DETAIN

A San Francisco store owner phoned the police and reported that two men, whom he described, were offering counterfeit money to passers-by at 16th and Valencia. About three minutes later, the police dispatcher advised officers in the field to be on the lookout for two men supposedly offering counterfeit money to people near that intersection. The dispatch described the two men as black males, 35-40 years old, one 5'10", wearing a dark blue cap, glasses and a tan coat, and the other one wearing a plaid suit. Officer Siegel, alone in his patrol vehicle, was about one block away from 16th and Valencia when he heard this report. He saw a car attempting to exit out of the entrance of a bank parking lot, located across the street from the scene of the alleged crime. He noticed that the car's occupants appeared to match the descriptions of the suspects; they were two black males of the relevant age and one was wearing glasses. Officer Siegel activated his patrol vehicle's emergency lights and pulled in front of the suspects's car, effecting a stop. As the officer walked towards the stopped car, the defendant-driver alighted from the car and approached the officer. The officer told the defendant that he was investigating a counterfeit scheme and asked for his driver's license. Siegel then asked the defendant if he had any weapons. When the defendant did not respond, the officer patted down his clothing and discovered a gun in his pocket. (*Thomas, supra*, at 624-625.)

The Ninth Circuit held Officer Siegel had reasonable suspicion for an investigative stop, but the pat-search was not justified by a reasonable belief that the defendant was armed. "A lawful frisk does not always flow from a justified stop. Each element, the stop

and the frisk, must be analyzed separately; the reasonableness of each must be independently determined". (*Id.*, at 628.) **Officer Siegel testified that he had frisked the defendant because there were two suspects and the defendant was "a pretty big guy". The court held a suspect's size cannot justify a frisk without additional specific objective reasons for suspecting that he is armed or poses a safety risk. Here, the officer did not see a suspicious bulge, concealing clothing or furtive behavior**. **(*Id*., at 628-630.)**

******PEOPLE V. DICKEY* **(1994) 21 CAL.APP. 4TH 952 [SECOND DISTRICT] FRISK WAS NOT JUSTIFIED: IMPROPERLY BASED ON GENERAL CONCERNS FOR OFFICER SAFETY, NOT PARTICULARIZED FACTS**

In the mid-afternoon, a deputy was on patrol with his partner, driving a marked patrol vehicle down a one-lane dirt road in a rural area. The deputy saw a car stopped in the roadway with the engine running. The driver, later identified as the defendant, made "furtive movements", moving around in the driver's seat. The deputy approached the defendant and asked him why he was parked in the middle of the road, and the defendant said he was admiring the view. When asked for identification, the defendant gave his correct name but could not produce a driver's license or other written identification. Neither could his passenger. Both occupants were ordered out of the car. The deputy ascertained via the police radio that the car was registered to the defendant, even though the defendant could not produce a registration certificate. The deputy twice asked the defendant for permission to search the car, and the defendant twice refused. The deputy then became angry with the defendant and told him so. The deputy looked for items in plain view in the car which would justify the search, but could not find any. He seized a backpack from inside the car. The defendant said he could search it, even though it did not belong to him or the passenger. The deputy found a film cannister of baking powder inside the backpack, which he thought might be used as a cutting agent for narcotics, but the defendant said he used it to brush his teeth. The defendant was nervous and sweating even though it was a cool day. The deputy then pat-searched the defendant for weapons. The deputy hoped he might find contraband which would justify a search of the car. Marijuana and cocaine were found in the defendant's pocket. (*Dickey, supra*, at 954-55.)

The Court held that the combination of the following circumstances did not support a reasonable belief that the defendant was armed: 1) the defendant's failure to provide identification; 2) the defendant's refusal to consent to a search of the vehicle; 3) the fact that the defendant was nervous and sweating; 4) the fact that a small amount of baking powder – not gun powder – was found in the film cannister; 5) the defendant's moving around in the driver's seat, which was not a "furtive gesture". The deputy improperly frisked the defendant out of generalized concerns for

officer safety and because he potentially may have been armed. "Without 'specific and articulable' facts which show that the suspect may be armed and dangerous, these conclusions add nothing. In every encounter with a citizen by the police, the citizen may potentially be armed." (*Id*., at 956.)

***PEOPLE V. MEDINA* (2003) 110 CAL.APP. 4TH 171 [2nd DIST, DIV 6] FRISK WAS NOT JUSTIFIED: BASED SOLELY ON THE DEFENDANT'S PRESENCE IN A HIGH CRIME AREA LATE AT NIGHT**

At around midnight, two officers initiated a traffic stop because the car that the defendant was driving had a broken taillight. The defendant remained in the car until the officers ordered him out. After the defendant promptly exited from the car, the officers ordered him to place his hands behind his head, walk backwards toward the officer and then face an adjacent wall. He complied without incident. The officers intended to frisk him for weapons. One officer explained that "there wasn't anything specific" about the defendant that led him to believe that he might be armed. He frisked him, because this was his standard procedure when he detains an individual in a "high-gang location" at night. The officer grabbed the defendant's hands and secured them behind his head. He then asked the defendant if he had any weapons, sharp objects or anything else that the officers should know about. The defendant admitted that he had a rock of cocaine in his pants, which the officer retrieved. (*Medina, supra*, at 174-175.)

The Court held that the pat search commenced when the officer grabbed the defendant's hands and secured them behind his back. At that moment, he lacked a reasonable belief that the defendant was armed and dangerous. There was nothing about the defendant's appearance or conduct that reasonably suggested that he possessed a weapon. An individual's presence in a high crime area late at night cannot, standing alone, justify a stop or frisk. (*Id*., at 175-176.)

***UNITED STATES V. FLATTER* (9TH CIR. 2006) 456 F.3D 1154 FRISK WAS NOT JUSTIFIED: BASED ON FEAR THAT THE DEFENDANT MIGHT BECOME CONFRONTATIONAL WHEN ACCUSED OF A CRIME**

Following a report that 14 packages of prescribed medication had been lost in transit, postal inspectors began investigating possible mail theft at a postal facility in Spokane, through which all of the lost packages had been routed. They focused on Bay 32 at the Spokane facility which housed sorted mail bound for Idaho. The sorted mail was stored in large mesh boxes. The defendant, the particular focus of the investigation, drove a vehicle which moved the mesh boxes of sorted mail around the facility and loaded them

into the appropriate truck. The defendant had no reason to touch the mail inside the mesh boxes but was observed doing so. The postal inspectors placed six decoy envelopes on top of the sorted mail in two of the mesh boxes. When the inspectors went to remove the six decoy envelopes from the mesh boxes, after the defendant had delivered them to the truck, they found only five decoys which had all been moved within the mesh boxes. Two inspectors summoned the defendant to question him about the missing decoy envelope. They first questioned him in the hallway, but his answers were deemed evasive, so they asked him to come with them to the postal inspectors' office for further questioning. When they arrived at the office, the inspectors told the defendant that they were going to pat him down for weapons to ensure their safety. They frisked him, finding no weapons but noticing an envelope protruding from his rear pocket. Upon removing it, they discovered that it was the missing decoy envelope. (*Flatter, supra*, at 1155-1156.)

The inspector who pat-searched the defendant explained that he had no idea if the defendant had weapons on him before commencing the frisk. He pat-searched him because they were meeting in a small room, and he feared the questioning was likely to become confrontational when they revealed that the defendant was suspected of a crime. The Court found that the inspectors had "absolutely no reason to believe that [the defendant] was armed." Factors which supported the requisite reasonable suspicion in past cases were not present in this matter. 1) They did not observe any bulges in his clothing. 2) The defendant's demeanor did not suggest that he might be armed. 3) He did not act in a threatening manner. 4) The inspectors were unaware of any past violent conduct on the defendant's part. 5) Mail theft by a postal employee is not a crime frequently associated with weapons, such as robbery or large-scale drug dealing. (*Id*., at 1157-1158.)

**IN RE H.H.* (2009) 174 CAL.APP.4TH 653 [1ST DIST, DIV 5] FRISK WAS NOT JUSTIFIED: BASED ON THE DEFENDANT'S REFUSAL TO CONSENT TO A SEARCH

At about 11:30 p.m., an officer driving a patrol vehicle saw the minor, H.H., riding a bicycle without proper lighting, a Vehicle Code violation. The officer pulled over, illuminated the minor with his spotlight and told him to stop. The minor complied. The minor also complied with the officer's next requests – that he step away from the bicycle and take off his backpack. As the minor removed his backpack, he stated "I'm not on probation." The officer wondered why he would say that. Then the minor spontaneously said that he would not give consent to search, a comment that the officer viewed as "kind of a warning flag" suggesting that the minor might have a weapon. The officer advised the minor that he was going to pat-search him and the minor stated, "I do not give consent to search.". The officer found a revolver inside the minor's jacket. (*H.H., supra*, at 656.)

Citing several state and federal cases, the Court held that the minor's express refusal to consent to a search – an assertion of his Fourth Amendment rights – did not, without more, create reasonable suspicion that he was armed and dangerous. Nor was the "form of the assertion of the right to refuse consent" suspicious. The Court rejected the government's attempt to analogize the minor's "unprovoked" and spontaneous refusal to consent to the unprovoked flight from the police, found relevant in *Illinois v. Wardlow, supra*, 528 U.S. at 119. **Finally, the record was devoid of other factors that might support the requisite reasonable suspicion. The defendant was stopped for a traffic infraction, not a crime of violence. There was no indication that he was stopped in a high crime area or that the officer was outnumbered. The minor was not dressed in such a way that suggested he was carrying a weapon**. **(*Id*., at 660.)**

C. Factors Relied on by the Courts to Support a Finding That the Officer had a Reasonable Belief that the Defendant was Armed and Dangerous to Justify a Frisk for Weapons

Here are some of the factors that the appellate courts have relied upon in finding that the officer had a right to frisk the defendant for weapons. With some exceptions (e.g. the detainee was reasonably suspected of committing a crime typically involving the use of firearms), a single factor was not determinative. In most of the cases listed below, the court relied on the listed factor along with other circumstances. Cases finding that the officer lacked a reasonable belief that the defendant was armed have sometimes criticized undue reliance on the listed factor. But many times, these cases have emphasized the absence of one or more of the listed factors.

1. The Officer Reasonably Suspected that the Defendant had Committed a Burglary or Robbery, Supporting a Reasonable Belief That he Possessed Weapons or Tools That Could be Used as Weapons

***Terry v. Ohio* (1968) 392 U.S. 1** (p. 93) [The officers reasonably suspected the defendant and his companions were contemplating a robbery which supported an assumption that they possessed weapons.]

***People v. Myles* (1975) 50 Cal. App. 423** (p.93) [It was reasonable to assume that the defendant, a suspected burglar, possessed weapons or tools that could be used as weapons.]

***People v. Castaneda* (1995) 35 Cal. App. 4th 1222** (p.96) [The defendant was a suspected burglar and burglars frequently carry weapons.]

***People v. Osborne* (2009) 175 Cal. App. 4th 1052** (p.100) [The defendant was a suspected auto burglar, so it could be anticipated that he was armed with a weapon or tool, such as a screwdriver, that could be used as a weapon.]

***People v. Suennen* (1980) 114 Cal. App.. 3d 192** (p. 101) [The officer reasonably suspected that the car occupants may have been involved in recent burglaries.]

2. The Officer Reasonably Suspected That the Defendant was a Drug Dealer, Supporting a Reasonable Belief That he was Armed

***People v. Lee* (1987) 194 Cal. App. 3d 975** (p.94) [The officer reasonably believed that the defendant was selling narcotics, and drug dealers frequently carry firearms to protect themselves from would-be robbers.]

***People v. Thurman* (1989) 209 Cal. App. 3d 817** (p.94) [While executing a search warrant for narcotics at a private residence, the police justifiably pat-searched the defendant, an occupant of the residence.]

***People v. Limon* (1993) 17 Cal. App. 4th 524** (p. 95)[The defendant was reasonably suspected of selling narcotics and drug dealers have a known propensity for carrying weapons.]

BUT SEE CASES HOLDING THAT MERE ASSOCIATION WITH PERSONS SUSPECTED OF DRUG CRIMES IS NOT SUFFICIENT:

***Ybarra v. Illinois* (1979) 444 U.S. 85** (p. 107)[The fact that the defendant was a patron at a tavern where the premises and the bartender were being lawfullysearched for evidence of heroin possession and distribution did not support a reasonable belief that he was personally armed.]

***Sibron v. New York* (1968) 392 U.S. 40** (p. 106) [The fact that the defendant was seen talking to a number of known narcotics addicts over an eight-hour period did not support a reasonable belief that he was armed.]

3. The Officer Reasonably Suspected That the Defendant Possessed or had Smoked Marijuana

***People v. Collier* (2008) 166 Cal. App. 4th 1374** (p.99) [Based on the smell of marijuana emanating from the vehicle occupied by the defendant and the driver, the officer reasonably suspected possession or consumption of marijuana, and guns often accompany drugs.][23]

4. The Officer Reasonably Suspected That the Defendant Had Committed a Crime Supporting a Belief That he Might be Armed

***People v. Ritter* (1997) 54 Cal. App. 4th 274** (p.98)[The defendant was reported to have engaged in threatening conduct.]

BUT SEE CASES WHERE THE DEFENDANT WAS REASONABLY SUSPECTED OF COMMITTING CRIMES THAT DO NOT RAISE A PRESUMPTION OF WEAPONS POSSESSION:

***People v. Lawler* (1973) 9 Cal. 3d 156** (p. 106)[The fact that the 18-year old defendant was hitchhiking with two companions did not support a reasonable belief that he was armed.]

***United States v. Flatter* (9th Cir. 2006) 456 F.3d 1154** (p. 110) [Mail theft by postal employees is not a crime frequently associated with weapons possession.]

***In re H.H.* (2009) 174 Cal. App. 4th 653** (p.111) [The defendant was stopped for riding a bicycle at night without a proper light, not a crime of violence.]

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[23] One could argue that the presumption relied upon in *Collier* – that drug possessors and users, including marijuana smokers, are frequently armed – is inconsistent with previous authorities. Cases stating that drug dealers are commonly armed base this conclusion on assumptions that do not apply to drug users – i.e., that drug traffickers arm themselves in order to protect themselves, their supplies of narcotics, and their money. (See, e.g., *Ybarra v. Illinois, supra*, 444 U.S. at 106, dis. opn. of Rehnquist, J. [for those who sell narcotics, firearms are as much tools of the trade as narcotics paraphernalia]; *Glaser, supra*, 11 Cal. 4th at 367-368 [recognizing the propensity of narcotics sellers to carry firearms to protect themselves from robbers]; *Limon, supra*, 17 Cal. App. 4th at 534 [noting that drug dealers often carry weapons].)

5. The Defendant was Suspected of Being a Gang Member or Associating With Gang Members

***In re H.M.* (2008) 167 Cal. App. 4th 136** (p.96) [The minor was either a gang member or someone who associated with gang members, and it is common knowledge that gang members frequently carry guns and other weapons.]

***In re Frank V.* (1991) 233 Cal. App. 3d 1232** (p.98) [The minor was in a gang area, late at night, leaving from the curb outside a known gang house.]

6. Upon Observing the Defendant, the Officer Noticed a Bulge or an Outline That Resembled a Weapon

***Pennsylvania v. Mimms* (1977) 434 U.S. 106** (p.97) [After ordering the defendant out of the vehicle, during a traffic stop, the officer noticed a large bulge in the defendant's jacket.]

***People v. Ritter* (1997) 54 Cal. App. 4th 274** (p.98) [The officer observed that the defendant was wearing a fanny pack with several compartments that seemed full. In the outer compartment, he noticed the "definitive outline" of a handgun.]

***People v. Lindsey* (2007) 148 Cal. App. 4th 1390** (p. 105) [While investigating an anonymous tip that a particularly described man had discharged a firearm, the officer saw a man with the described physical characteristics holding his baggy pants up at the waist, suggesting to the officer that he was carrying something heavy in his waistband or pocket.]

7. The Officer Saw the Defendant Reach Into his Pockets or Clothing

***People v. Lee* (1987) 194 Cal. App. 4th 975** (p.94) [As the officer drove his car to within 15 to 20 feet of the defendant, who was walking away after being warned that the police were approaching, the officer saw the defendant reach inside his jacket.]

***In re Frank V.* (1991) 233 Cal. App. 3d 1232** (p.98) [After complying with the officer's request to take his hands out of the pockets of his bulky jacket, the minor placed them back inside.]

8. The Defendant was Wearing Baggy and Concealing Clothing (But the Officer did not Observe a Bulge or Anything Suggesting That a Weapon was Actually Concealed Underneath or in Pockets)

People v. Collier **(2008) 166 Cal. App. 4th 1374** (p.99) [The defendant was wearing baggy shorts that hung down to his ankles and an untucked shirt that extended to his mid-legs, so the officer could not tell if he was carrying a weapon. (The Court acknowledged that baggy clothing, alone, cannot justify a pat-search).]

BUT SEE CASES SUPPORTING AN ARGUMENT THAT THE MERE FACT THAT THE DEFENDANT WORE BAGGY CONCEALING CLOTHING COULD NOT SUPPORT A REASONABLE BELIEF THAT HE WAS ARMED:

Ybarra v. Illinois **(1979) 444 U.S. 85** (p.107) [The defendant was wearing a 3/4 length lumber jacket that concealed his waistline, but this clothing item "could be expected on almost any tavern patron in Illinois in early March."]

People v. Jordan **(2004) 121 Cal. App. 4th 544** (p. 104)[Although the defendant's location and physical characteristics were consistent with the gun possessor described by an anonymous tipster, the fact that he was wearing cumbersome clothing that prevented the officer from seeing what was inside his waistband or pockets did not justify a frisk.]

9. The Defendant was a Large Person, Bigger Than the Officer

People v. Collier **(2008) 166 Cal. App. 4th 1374** (p.99) [One of the three factors that supported the officer's decision to initiate a pat-search was that the defendant was much larger than the officer.]

People v. Osborne **(2009) 175 Cal. App. 4th 1052** (p.100) [The fact that the defendant was much larger than the officer constituted a safety threat.]

BUT SEE:

United States v. Thomas **(9th Cir. 1988) 863 F.2d 622** (p. 108)[The fact that the defendant was "a pretty big guy" could not justify a frisk without specific objective reasons suggesting that he was armed.]

10. The Officer Observed a Weapon or a Possible Weapon Within the Defendant's Reaching Distance

People v. Suennen **(1980) 114 Cal. App.. 3d 192** (p.101) [As the officer questioned the two car occupants, after stopping the car for an equipment violation, he noticed a knife with an eight-inch blade on the seat between them.]

People v. Avila **(1997) 58 Cal. App. 4th 1069** (p. 102)[While talking to the defendant, standing in the doorway of a truck about his "suspicious" littering, the officer noticed a large black metal object, possibly a Mag flashlight, 8-10 inches from the defendant's hand.]

11. The Defendant Engaged in Unusual, Evasive or Furtive Behavior

In re H.M. **(2008) 167 Cal. App. 4th 136** (p.96) [The minor's unusual behavior (sprinting across a busy street through heavy traffic, regularly looking behind him, and appearing nervous and fearful) reasonably suggested that he was fleeing from a crime scene.]

People v. Avila **(1997) 58 Cal. App. 4th 1069** (p.102) [The officer's suspicions were aroused when he observed the defendant "littering" in an odd manner; he first walked to the passenger side of a truck, then to the driver's side, then back to the front of the truck with his hand directly in front of his body, finally dropping a white envelope from his waist]

People v. Ritter **(1997) 54 Cal. App. 4th 274** (p.98) [The defendant, who was suspected of having engaged in threatening behavior, as reported in a 911 call, gave evasive answers to the officer's questions about weapons]

BUT SEE:

People v. Dickey **(1994) 21 Cal. App. 4th 952** (p.109) [The defendant's behavior in moving around in the driver's seat of a car stopped in the middle of the road with the engine running was not a "furtive gesture" supporting a reasonable belief that he was armed]

Ybarra v. Illinois **(1979) 444 U.S. 85** (p.107) [The defendant made no gestures or other actions indicative of an intent to commit assault.]

***United States v. Flatter* (9th Cir. 2006) 456 F.3d 1154** (p. 110) [While in a small office with the postal inspectors who were questioning him about mail theft, the defendant did not act in a threatening manner and nothing about his demeanor suggested he was armed or dangerous]

12. The Defendant Appeared to be Nervous

***In re H.M.* (2008) 167 Cal. App. 4th 136** (p. 96) [The minor's facial expressions indicated that he was nervous as he ran through traffic, sweating profusely and regularly looking behind him; this suggested he was running from a crime scene.]

***People v. Osborne* (2009) 175 Cal. App. 4th 1052** (p. 100) [The fact that the defendant appeared to be "real nervous" when he spotted the patrol car, was one of the factors that justified the frisk for weapons]

BUT SEE CASES DISCOUNTING NERVOUSNESS AS A FACTOR IN THE ANALYSIS:

***People v. Lawler* (1973) 9 Cal. 3d 156** (p. 106) [The defendant's apparent nervousness and the fact that he kept grabbing at his sleeping bag as if he wanted to leave did not justify the frisk. "Many individuals who are accosted and queried by a police officer become both upset and desirous of the earliest possible termination of an uncomfortable situation."]

***People v. Dickey* (1994) 21 Cal. App. 4th 952** (p. 109) [The fact that the defendant was nervous and sweating on a cool day as the officer questioned him did not support a reasonable belief that he was armed and dangerous]

13. The Defendant and Other Detainees or Bystanders Outnumbered the Officers

***People v. Limon* (1993) 17 Cal. App. 4th 524** (p. 95) [The fact that the two officers were outnumbered by the three men in the carport and others in the immediate area would not alone justify a frisk, but it supported the pat-search when combined with other factors]

***People v. Castaneda* (1995) 35 Cal. App. 4th 1222** (p. 96) [That the officer was alone with two detainees, suspected burglars, was one factor supporting the frisk]

14. The Defendant Was Detained in a High Crime Area and/or in the Dark of Night (Always Considered With Other Factors)

***People v. Limon* (1993) 17 Cal. App. 4th 524** (p. 95)[The defendant was detained, based on reasonable suspicion that he was involved in a drug transaction, in an area known for drugs and weapons. This alone could not justify a frisk, but it did with other factors]

***In re H.M.* (2008) 167 Cal. App. 4th 136** (p. 96)[The minor acted suspiciously in an area that was the stronghold of a particular gang, where there had been many gang-related shootings, including one the previous day]

***People v. Suennen* (1980) 114 Cal. App. 3d 192** (p. 101) [The vehicle occupants were stopped for a Vehicle Code equipment violation, in the dark of night, in an area where there had been recent pillowcase burglaries]

BUT SEE:

***People v. Medina* (2003) 110 Cal. App. 4th 171** (p. 110) [An individual's presence in a high crime area late at night cannot, standing alone, justify a stop and frisk]

II. Establishing that the Officer Exceeded the Permissible Scope of Lawful Frisk

A. The Scope of the Pat-Search: The General Principles[24]

1. The Scope of the Frisk is Limited by its Justification

A pat-search for weapons "which is reasonable at its inception, may violate the Fourth Amendment by virtue of its intolerable intensity and scope." (*Terry v. Ohio* (1968) 392 U.S. 1, 17-18.) Like any search, a weapons frisk must be strictly circumscribed by the exigencies which justify its initiation. (*Id.*, at 25-26.) Because the sole justification for the pat-search is to ensure the safety of the detaining officer and others nearby, by disarming the potentially dangerous suspect, it must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Id.*, at 29; see also *Sibron v. New York* (1968) 392 U.S. 40, 65.)

2. The *Terry-Sibron* Rule: When May the Officer Reach Into the Suspect's Pocket During a Lawful Frisk

If the circumstances support a reasonable belief that the suspect is armed, the officer may pat-down his outer clothing for concealed weapons. (*Terry, supra*, at 29; *Sibron, supra*, at 65.) If the officer feels an object that he reasonably believes is a weapon or an instrument for assault, he can reach into the suspect's pockets or under his clothing to remove the object and verify its character. (*Terry, supra*, at 29-30; *Sibron, supra*, at 65; *People v. Mosher* (1969) 1 Cal.3d 379, 394.) During a pat-search, the officer must feel "tactile evidence" corroborating his reasonable suspicion that the suspect is armed. (*People v. Collins* (1970) 1 Cal.3d 658, 663.)

Under this *Terry-Sibron* rule, the officer may reach into the suspect's pocket only if he feels an object that he reasonably believes is a weapon or an item useable as an instrument of assault. Only then may the officer remove the object from the pocket or demand that the suspect empty his pockets. (*Sibron, supra*, at 65; *Mosher, supra*, at 394.)

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[24] This section discusses the general standards and legal rules as defined by some of the leading United States Supreme Court and California Supreme Court cases.

Interpreting these requirements, the California Supreme Court articulated a hard object/soft object rule. Absent unusual circumstances, if the officer feels a "soft object" in a suspect's pocket during a pat-down, he generally may not reach into the pocket to retrieve that object. (*Collins, supra*, at 662-663.) Moreover, small items usually carried in an individual's pockets – "a box of matches, a plastic pouch, a pack of cigarettes, a wrapped sandwich, a container of pills, a wallet, coins, [and] folded papers" -- do not ordinarily feel like weapons. (*Mosher, supra*, at 394.)

3. *Minnesota v. Dickerson*: The United States Supreme Court Expanded the Permissible Scope of a Frisk – The Officer May Reach into the Pocket to Retrieve Weapons, Instruments of Assault, or Immediately Apparent Contraband

Twenty-Five years after *Terry* and *Sibron*, the Supreme Court held that while patting down a suspect's clothing to detect weapons of instruments of assault, the officer may also retrieve non-threatening contraband from the suspect's pocket, even though he knows the object is not a weapon. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373-379.)[25] During a justified frisk, if the officers feels an object whose contour or mass makes its identify as contraband "immediately apparent", he can reach into the suspect's pocket, or under his clothing, to retrieve that object. (*Dickerson, supra*, at 375-376.) The Court applied a "plain touch" doctrine analogous to the "plain view" doctrine. (Id., at 374-75, 378-79, citing *Michigan v. Long* (1983) 463 U.S. 1032, 1049-50 [justifying the seizure of drugs discovered in a vehicle in plain view during a protective search for weapons]; *Arizona v. Hicks* (1987) 480 U.S. 321 [invalidating the seizure of stereo equipment discovered while searching a house for other evidence, as the incriminating nature of the equipment was not immediately apparent without a further search].)

In order to justify seizing the item detected by touch while patting down the suspect's outer clothing, the officer must have probable cause to believe the item is contraband when he initially feels it. The officer cannot squeeze, slide, or otherwise manipulate the item in an attempt to ascertain its identity, as this additional exploration constitutes a further search. (*Dickerson, supra*, at 375-76, 378-379.) Because the officer has probable cause to believe, at first touch, that the item is contraband, he is entitled to

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[25] Of course, the *Terry-Sibron* rule remains valid. The officer may reach into the suspect's pocket if he feels an object that he reasonably believes is a weapon or instrument of assault. *Dickerson* merely added to the circumstances which allow an intrusion into the suspect's pockets or below his outer clothing.

do a full search incident to arrest even if the search precedes the arrest.[26]

B. Selected Decisions Finding That the Officer Did or Did Not Exceed the Permissible Scope of a Frisk

In this section, we discuss some of the appellate court cases resolving the question of whether the officer exceeded the permissible scope of a pat-down search when he reached into the suspect's pocket or under the suspect's clothing to seize an object that he has detected by touch. This determination is a fact-based analysis. Thus, the circumstances of the cases are described in detail.

These cases are grouped into three categories tracking the chronology and effects of the major United States Supreme Court decisions (*Terry, Sibron* and *Dickerson*): The first category includes cases applying the *Terry-Sibron* rule and determining whether the officer reasonably detected a weapon or instrument of assault during the pat-down. The second category discusses California Court of Appeal cases decided prior to *Dickerson*, which determined whether the officer had the right to seize suspected contraband detected by touch during a frisk. The third category discusses *Dickerson* and cases applying its ruling, deciding whether the officers had probable cause to seize suspected contraband detected during the pat-search, with or without manipulation.

In each category, the cases are listed in chronological order, from earliest to most recent. For each case, the court's holding is indicated with the citation, and the court's reasoning is in bold print, generally in the second paragraph.

In the final section (Section C), we will list some of the common factors that the appellate courts have relied on in determining whether or not an officer exceeded the lawful scope of a pat-search when he reached in the defendant's pocket to seize an object detected by touch.

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[26] As discussed below, there were California Court of Appeal cases decided before *Dickerson*, that upheld officers' seizure of non-threatening contraband detected during a pat-search. These cases held that at the moment when the officer reached into the defendant's pocket or retrieved an object that turned out to be contraband rather than a suspected weapon, the officer had probable cause to believe the defendant possessed drugs. (See *People v. Lee* (1987) 194 Cal. App. 3d 975; *People v. Thurman* (1989) 209 Cal. App. 3d 817; *People v. Limon* (1993) 17 Cal. App. 4th 524.)

1. Applying the *Terry-Sibron* Rule: Did The Officer Reasonably Believe That he Had Detected a Weapon or Instrument of Assault During the Pat-Search of the Suspect's Outer Clothing?

***TERRY V. OHIO* (1968) 392 U.S. 1**
YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER DID NOT REACH INTO TERRY'S POCKET UNTIL AFTER HE FELT A GUN WHILE PATTING DOWN HIS OUTER CLOTHING
(See, *supra*, pp. 3-9, 70, 93.)

Based on his observation of the actions of Terry and his two companions, the officer reasonably believed that they were casing stores and contemplating a robbery. The officer approached Terry and his companions, identified himself and asked their names. The men mumbled something in response. The officer then immediately grabbed Terry and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, the officer felt a pistol. He then reached inside the overcoat pocket but could not retrieve the gun. He then removed Terry's coat and removed a .38-caliber revolver from the pocket in which he had felt a gun. (*Terry, supra*, at 5-7.)

The Supreme Court concluded that the officer detained Terry when he grabbed him for the purpose of frisking him for weapons, the detention was justified as the officer reasonably believed that Terry and his friends were planning a robbery, and the frisk was justified because it was reasonable to assume that weapons would be used in the robbery. **By patting down Terry's outer clothing, the officer did not exceed the scope of a limited "intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Id*., at 29.) The officer did what was minimally necessary to ascertain whether Terry was armed and to disarm him. He properly did not place his hands into Terry's pocket until after he had felt the gun. (*Ibid.*)**

***SIBRON V. NEW YORK* (1968) 392 U.S. 40**
NO, EXCEEDED THE SCOPE: WITHOUT CONDUCTING A PAT-DOWN, THE OFFICER REACHED DIRECTLY INTO THE DEFENDANT'S POCKET AND RETRIEVED ENVELOPES OF HEROIN
(See, *supra*, p.106.)

Over the course of eight hours, the officer saw the defendant conversing with several known narcotics addicts out on the street and inside a restaurant. The officer did not overhear these conversations or see anything pass between the defendant and the others. When the defendant was seated in the restaurant, the officer approached him and

told him to come outside. Once outside, the officer said to the defendant, "You know what I am after." The defendant mumbled something and reached into his pocket. Immediately, before the defendant could take his hand out, the officer thrust his hand into the same pocket and pulled out several envelopes containing heroin. The officer's testimony made it clear that he reached into the defendant's pocket because he believed it contained narcotics and did not fear that the defendant was reaching for a weapon. (*Sibron, supra*, at 45-46, 64.)

The Court held that the search could not be justified as a frisk, as the officer did not reasonably believe that the defendant was armed and dangerous, based on his conversations with known narcotics addicts over an eight-hour period. **Even if there were adequate grounds to search the defendant for weapons, the intrusion "was not reasonably limited in scope to accomplish the only goal which might conceivably have justified its inception – the protection of the officer by disarming a potentially dangerous man." *(Id.,*at 65.) . The officer did not preliminarily pat-down the defendant's outer clothing, but immediately thrust his hand into the defendant's pocket and pulled out the envelopes of heroin. (*Ibid*.)**

***PEOPLE V. MOSHER* (1969) 1 CAL.3D 379**
YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER REASONABLY BELIEVED THAT THE OBJECT HE IN THE DEFENDANT'S POCKET WAS A KNIFE, EVEN THOUGH IT TURNED OUT TO BE A WATCH

The officers stopped the defendant in the early morning hours, as he matched the description of a reported prowler. One officer pat-searched the defendant for weapons. In the defendant's coat pocket, he felt "a sharp object like a knife blade." The officer reached into the pocket and removed the object; it was not a knife but a gold watch. Ultimately, officers determined that the watch belonged to a woman who had lived in that same neighborhood and had died following a beating that had occurred that same morning. (*Mosher, supra*, at 386-88, 393.)

The California Supreme Court concluded that the motion to suppress the watch was properly denied, because the officer did not reach into the defendant's pocket until after he felt an object that he reasonably believed was a knife. He then had the right to reach into the pocket and pull out the object, which turned out to be evidence of a crime. (*Id*., at 393-94.)

***PEOPLE V. COLLINS* (1970) 1 CAL.3D 658**
NO, EXCEEDED THE SCOPE: WHILE CONDUCTING THE FRISK, THE OFFICER FELT A "LITTLE LUMP" WHICH TURNED OUT TO BE A LID OF MARIJUANA; THE SOFT LUMP DID NOT REASONABLY FEEL LIKE A WEAPON OR INSTRUMENT OF ASSAULT

Patrol officers detained the defendant because he matched the general description of an auto theft suspect and made furtive gestures. During a pat-search, as the officer ran his hand over the defendant's left pants pocket, he felt "a little lump". At that instant, the defendant pushed the officer's hand away and asserted that the police had no right to search him. Thinking that the lump was a weapon, the officer put his hand into the defendant's pocket and pulled out a "lid" of marijuana loosely packed in a plastic bag. (*Collins, supra*, at 660.)

The Supreme Court initially expressed "grave doubts as to the lawfulness of the defendant's detention". (Id., at 660.) However, the court did not determine the validity of the detention and frisk, as it concluded that the officer's search of the defendant exceeded the lawful bounds of a weapons frisk, as defined in *Terry* and *Sibron*. **The Court held that the prosecution did not meet its burden of establishing that the officer reasonably believed the small soft lump was a weapon or instrument for assault; thus he had no right to reach into the defendant's pocket and retrieve it. The officer testified he thought the lump was a weapon, but did not specify the type. His statement did not satisfy the prosecutor's burden.** The prosecution suggested that the officer might have suspected that the little lump was a "sap" – a hard object wrapped in fabric that could be used for assault."The feel of a 'lid' of loosely packed marijuana would not reasonably support a suspicion that the defendant had a 'sap', because a 'sap' to be useful as a weapon would have to possess considerably more mass than the heaviest 'lid' of marijuana." (*Id*., at 661-64.)

***PEOPLE V. KAPLAN* (1971) 6 CAL.3D 150**
NO, EXCEEDED THE SCOPE: THE OFFICER IMPROPERLY REACHED INTO THE DETAINEE'S POCKET TO RETRIEVE A LUMP THAT HE BELIEVED WAS PILLS, NOT A WEAPON

The defendant was driving a car stopped for speeding. After the police officer signaled the defendant to stop, one of the two passengers, Patterson, made a "furtive gesture", suggesting to the officer that he might be concealing a weapon. The officer ordered Patterson to get out of the stopped car and immediately pat-searched his outer clothing. In the course of that search, the officer felt a lump in Patterson's shirt pocket. The officer was "pretty sure...it was not a weapon", but "had an idea that it was pills."

The officer then arrested Patterson for "suspicion of dangerous drugs" and reached into his pocket. He retrieved a plastic bag containing LSD tablets. Patterson claimed he had purchased the LSD tablets from the defendant just 10 minutes before the stop. The defendant was prosecuted for selling a restricted drug and his motion to suppress the evidence of that crime – the LSD tablets seized from Patterson and Patterson's accusatory statement – was denied. (*Kaplan, supra*., at 153-54.)

The prosecution conceded that the officer's arrest and search of Patterson, and his seizure of the LSD pills from Patterson's pocket were illegal. Instead, the prosecution unsuccessfully challenged the defendant's "standing" to assert that illegality and suppress the evidence at his own trial.[27] **For purposes of these materials, the California Supreme Court held: 1)that the officer lacked reasonable suspicion to pat-search Patterson; and 2)that the discovery of the unidentified lump in Patterson's shirt pocket did not justify the further intrusion into his pocket, as the officer knew the soft object was not a weapon before he reached in. Moreover, the court found that the officer had no right to evade the rules set forth in *Mosher* and *Collins* (see above) by arresting Patterson and then searching his pocket incident to arrest. The officer's hunch that the lump felt in the pocket was contraband did not provide probable cause for Patterson's arrest. (*Id.*, at 154-55.)**

[27] The prosecution asserted that California's "vicarious exclusionary rule", permitting a criminal defendant to object to the introduction of evidence illegally seized from a third party (*People v. Martin* (1955) 45 Cal.2d 755), was no longer viable; it had been repealed by the California legislature when they enacted Evidence Code section 351. The California Supreme Court disagreed, found the vicarious exclusionary rule was still valid and granted the defendant's writ of prohibition. Of course, this would no longer be an issue as California's vicarious exclusionary rule was vitiated by Proposition 8. (See *In re Lance W*. (1985) 37 Cal.3d 873.)

***PEOPLE V. HILL* (1974) 12 CAL.3D 731**
YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER REASONABLY BELIEVED THAT A THREE-INCH LONG, HARD OBJECT MIGHT BE AN INSTRUMENT OF ASSAULT; THE ITEM TURNED OUT TO BE A MATCHBOX, AND THE OFFICER WAS JUSTIFIED IN OPENING THE UNUSUALLY HEAVY MATCHBOX

An officer stopped a vehicle for observed vehicle code violations following a high speed chase. Once the driver, Co-defendant Hill, and the passenger, Co-defendant Schnabel were out of the vehicle, Officer Smith frisked Schnabel for weapons. During the pat-down, the officer observed a large roll of money protruding from Schnabel's pocket. When asked the source of the money, Schnabel replied "wheeling and dealing." Officer Smith then felt a hard, square object in Schnabel's pocket. The officer removed this object and discovered that it was a three-inch long matchbox secured by rubber bands. Because this box seemed unusually heavy and its contents rattled when Officer Smith shook it, Smith opened the match box and saw six .32 caliber bullets. Smith arrested Schnabel for suspicion of armed robbery. (*Hill, supra*, at 741.)

The Supreme Court held that Officer Smith did not exceed the lawful scope of the justified frisk. As he was patting down Schnabel, Officer Smith felt a long, hard object inside the pocket. Having observed a large roll of currency in plain view and received an evasive answer as to the source of the money, Smith reasonably believed the hard object might be an instrument of assault. He was therefore justified in reaching into Schnabel's pocket and retrieving the matchbox. Then, because the box felt much heavier than an "ordinary matchbox" and its contents rattled, Smith was justified in opening the box to assure that "its contents could not be used to inflict injury upon the police officers.". (*Id.*, at 745-47.)

***PEOPLE V. AUTRY* (1991) 232 CAL.APP. 3D 365 [4TH DIST., DIV. 3]**
YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER BELIEVED THAT THE ITEMS HE FELT WHEN PATTING DOWN THE DEFENDANT'S JACKET WERE HYPODERMIC SYRINGES. THE OFFICER WAS JUSTIFIED IN RETRIEVING THESE SYRINGES WHICH COULD BE USED AS DEADLY WEAPONS.

After observing the defendant driving his car in an erratic manner, which suggested that he was driving under the influence, the officer executed a traffic stop. As he talked to the defendant inside the car, the officer noted that he was "fidgety" and wearing a zippered jacket which bulged around the waist The officer asked the defendant to exit from the car and conducted a pat-search. As he patted down the side of the

defendant's jacket, he felt two hard, long slender objects that felt like hypodermic syringes with attached needles. They did not feel like small knives. The officer seized the two objects which were indeed syringes with needles. (*Autry, supra*, at 367-68.)

The Court of Appeal held that the officer was justified in reaching below the defendant's clothing and removing the two objects, because "a hypodermic needle in the possession of someone who might be a drug addict is a potentially deadly weapon." (*Id.*, at 368.) Based on the defendant's driving behavior, the officer could infer that the defendant was a drug user who did not sterilize his needles and who might have AIDS. The officer could reasonably fear that he might contract AIDS or another disease if he was intentionally or accidentally stabbed with the hypodermic needle. Moreover, even without the prospect of AIDS, a hypodermic needle could be easily employed as a weapon "in any number of nasty ways". (*Id.*, at 368-69.)

PEOPLE V. SNYDER (1992) 11 CAL.APP. 4TH 389 [5TH DIST.]
YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER WAS JUSTIFIED IN REMOVING A BOTTLE THAT HE FELT UNDER THE DEFENDANT'S CLOTHING DURING A PAT-SEARCH, AS IT COULD BE USED AS A WEAPON

The officer went to a drugstore to investigate a complaint that a man was panhandling outside the establishment. The only person standing outside the store was the defendant who matched the description of the accused panhandler. While talking to the defendant, the officer noticed a large bulge in the front waistband of his pants. The officer frisked the defendant, felt the object and believed it was a bottle. He did not believe it was a conventional weapon, such as a gun or knife. The officer withdrew the object and found that it was a full bottle of Brandy. (*Snyder, supra*, at 391.)

The Court of Appeal held that during the justified pat-search, the officer had the right to withdraw the object that reasonably felt like a bottle because, like the hypodermic needles in *Autry* (see above), it could be used as a deadly weapon . A full liquor bottle could be used as a club, because it has considerable weight and its neck may serve as a handle. Once broken, the bottle is effective as a slashing weapon. (*Id.*, at 393.)

2. Prior to *Minnesota v. Dickerson*, Did the Officer Have Probable Cause to Seize Suspected Contraband Detected During a Pat-Search?

***PEOPLE V. LEE* (1987) 194 CAL.APP. 3D 975 [1ST DIST., DIV. 4]**
YES, WITHIN THE PERMISSIBLE SCOPE: DURING THE PAT-SEARCH, AT THE SAME MOMENT THAT THE OFFICER REALIZED THAT THE DETECTED "CLUMP" WAS NOT A WEAPON, HE REALIZED IT WAS A BUNDLE OR HEROIN BALLOONS, PROVIDING PROBABLE CAUSE FOR THE DEFENDANT'S ARREST AND SEARCH INCIDENT TO ARREST
(See, *supra*, pp. 63, 94.)

A citizen told officers that two men at a nearby park had just offered to sell her heroin, while a third man stood on the opposite side of the park. The officers drove to the park and saw three men, one of whom was the defendant, standing in the described locations. One man called out a warning of the police presence and the defendant began to walk away. As one officer drove near the defendant, he reached inside his jacket. The officer then stopped, told the defendant to remove his hand from his jacket and pat-searched him. As the officer patted down the chest area of the defendant's jacket, he felt a clump of small resilient objects. He used "a kind of grabbing or claw-type of motion to ascertain the object." The officer knew the clump was not a weapon, but based on his training and experience, he believed he had touched heroin-filled balloons based on their unmistakable tactile characteristics. He arrested the defendant for possession of heroin, reached inside the defendant's jacket and removed two transparent bags, each containing 50 rolled toy balloons. He then arrested the defendant for possessing heroin for sale. (*Lee, supra*, at 980, 984-85.)

The Court of Appeal found that the officer did not exceed the permissible scope of the justified pat-search or improperly reach into the defendant's pocket. At the moment when the officer felt the clump of small resilient objects, he simultaneously realized that the objects were not weapons but contraband. Based on his sense of touch and the totality of the circumstances, the officer had probable cause to believe that the objects were heroin-filled balloons. Thus, he could arrest the defendant for heroin possession and reach into his pocket. The court rejected the defendant's contention that the officer manipulated the object – by pinching, squeezing and probing it – before determining that it was contraband. The court concluded that the officer's gripping or claw-type motion was a part of the pat-down. More than a "gingerly patting of the clothing" may be necessary to determining whether the suspect is armed. (*Id.*, at 983-85.)

***PEOPLE V. VALDEZ* (1987) 196 CAL. APP. 3D 799 [4TH DIST., DIV. 1] EXCEEDED THE SCOPE: THE OFFICER HAD NO RIGHT TO RETRIEVE AND OPEN THE FILM CANNISTER THAT HE FELT IT IN THE DEFENDANT'S POCKET DURING A LAWFUL PAT-SEARCH; THE CIRCUMSTANCES DID NOT SUPPORT PROBABLE CAUSE TO BELIEVE THE CANNISTER CONTAINED DRUGS**

The officers were executing a search warrant at a yard used for storage and auto body repair. The defendant was not named in the warrant. As the officers drove their unmarked vehicle into the yard, they saw the defendant standing close to another person by a car. When one officer exited from the unmarked vehicle, he yelled that he was a police officer with a search warrant. The defendant and the other men started turning away from the officers. the officer drew his gun and ordered both men to put their hands on the hood of the nearby car. He frisked the defendant for weapons and felt an object that he recognized as a 35-millimeter plastic film cannister in the defendant's pocket. The officer knew the cannister was not a weapon. The officer did not see any photography equipment in the area and based on experience, he believeD there would be narcotics in the cannister. While feeling the cannister from outside the defendant's clothing, the officer asked, , "What is this?" In response, the defendant removed he cannister from his pocket and placed it on the hood of the car. When the officer asked the defendant to open the cannister, he told the officer that he could open it. The officer opened the cannister and found cocaine. (*Valdez, supra*, at 802-04.)

Relying on prior case law, the Court of Appeal stated the rule that applies in this situation: "[T]he officer's entry into the individual's pocket can only be justified if the officer's sensorial perception, coupled with other circumstances, was sufficient to establish probable cause to arrest the defendant for possession of narcotics before the entry into his pocket." (*Id*., at 806.) Then, the officer would have probable cause to arrest the defendant and to reach into his pocket during a search incident to arrest, which may precede the actual arrest. **The appellate court held that in this case, the officer had no right to reach into the defendant's pocket. The circumstances (the tactile perception of the film cannister and the defendant's turning away from the police officers) did not support probable cause to believe that the defendant possessed narcotics. A film cannister is not "a distinctive drug carrying item equivalent to a heroin balloon, a paper bindle, [or] a marijuana-smelling brick-shaped package. Rather, the canister is akin to a common product like a pill bottle a pack of cigarettes, or a plastic bag." The cannister may hold film or other legitimate items. (*Id.*, at 806-807.)**

Moreover, the court found that the officer's question "What is it?" was not justified by the pat-search as the officer knew the item was not a weapon. The question was a preliminary step in the search of the defendant's person. Also, the defendant did not consent to the search of the cannister when he responded to the above question by removing the item from his pocket and responded to the officer's request that the defendant open the cannister by telling the officer he could open it. The defendant had no choice but to comply with the officer's requests. (*Id.*, at 807.)

***PEOPLE V. THURMAN* (1989) 209 CAL.APP. 3D 817 [1ST DIST., DIV 2.] YES, WITHIN THE PERMISSIBLE SCOPE: THE OFFICER HAD THE RIGHT TO REACH INTO THE DEFENDANT'S POCKET AFTER FEELING A BULGE THAT HE REASONABLY BELIEVED WAS A GUN, AND HE HAD PROBABLE CAUSE TO RETRIEVE THE OBJECT WHEN HE REALIZED IT WAS ROCK COCAINE**
(See, *supra*, p.94.)

While executing a warrant that authorized a search of a private residence for evidence of narcotics trafficking, an officer encountered the defendan who was passively sitting on the front room sofa. Although the defendant was not named in the warrant, the officer pat-searched his outer clothing. The officer felt a large bulge in the defendant's jacket pocket that he believed was a gun. The officer stuck his hand in the pocket, squeezed the object and realized it was not a weapon; he believed he was feeling a baggie of rock cocaine. He removed the object, confirmed his belief and arrested the defendant for possession of rock cocaine. (*Thurman, supra*, at 820-21.)

The Court of Appeal held that after feeling the large bulge while legally patting down the defendant's jacket pocket, the officer had the right to place his hand inside the pocket; the size and density of the object reasonably suggested that it might be a weapon. Only be reaching into the pocket could the officer confirm or dispel this reasonable belief. The court declined to "impose a condition of certainty that the object is a weapon before allowing an officer" to search the suspect's inner clothing; reasonable belief is sufficient. Finally, the court held that the officer had the right to retrieve the object, even though he realized, upon touching and squeezing it, that the object was not a weapon. Simultaneously, the officer realized he was feeling rock cocaine in a baggie. This tactile perception, combined with the officer's experience, gave him probable cause to remove the baggie and arrest the defendant. (*Id*., at 825-26.)

***PEOPLE V. LIMON* (1993) 17 CAL.APP.4TH 524 [SIXTH DISTRICT] YES, WITHIN THE PERMISSIBLE SCOPE: DURING THE FRISK, AFTER FEELING A HARD OBJECT THAT HE BELIEVED WAS A KNIFE, THE OFFICER LOOKED IN THE DEFENDANT'S POCKET AND SAW A MAGNETIC HIDE-A-KEY BOX. THE OFFICER HAD PROBABLE CAUSE TO BELIEVE THE DEFENDANT POSSESSED DRUGS, PERMITTING REMOVAL AND OPENING OF THE BOX.**
(See, *supra*, pp. 72, 95.)

Officers watched the defendant engage in an apparent hand-to-hand exchange in an apartment complex's carport where previous drug transactions and weapons crimes had occurred. Before and after the defendant exchanged items with another man, he had retrieved or put an item near the front wheel of a nearby truck. Officer Panighetti detained and pat-searched the defendant. In the defendant's pants pocket, Panighetti felt a hard rectangular object, which he thought might be a knife, either folded or in a case. Panighetti asked the defendant, in English, what was in his pocket, but the defendant did not seem to understand. The officer pulled the defendant's pocket open, looked inside, and saw that the hard object was a magnetic hide-a-key box. Suspecting that the box contained narcotics, Panighetti removed it from the defendant's pocket, opened the hide-a-key box, and found packages of heroin and cocaine. (*Limon, supra*, at 529-31.)

During the justified pat-search, because Officer Panighetti reasonably believed that the hard rectangular object he felt while patting down the defendant's pocket was a knife, he could either remove the object from the pocket or look into the pocket to determine whether it was a weapon. When he saw that the object was a magnetic hide-a-key box, he immediately had probable cause to arrest the defendant for possessing drugs and to conduct a search incident to arrest, which allowed him to remove the key box from the defendant's pocket and to open it. Probable cause was based on: the fact that magnetic key boxes are not ordinarily carried in people's pockets; that Officer Panighetti had previously seen narcotics stored in key boxes, and that he had observed the defendant engage in a hand-to-hand transaction that involved removing something from the front wheel of a pick-up truck. (*Id*., at 535-38.)

3. Applying *Minnesota v. Dickerson*, Did the Officer Have Probable Cause to Seize Suspected Contraband Detected During a Pat-Search?

******MINNESOTA V. DICKERSON* **(1993) 508 U.S. 366**
NO, EXCEEDED THE SCOPE: DURING A PAT-SEARCH THE OFFICER FELT A SMALL LUMP THAT DID NOT FEEL LIKE A WEAPON, BUT HE HAD TO SQUEEZE AND MANIPULATE THE LUMP IN ORDER TO GAIN PROBABLE CAUSE TO BELIEVE IT WAS CRACK COCAINE

Officers, in a marked patrol car, observed the defendant leaving an apartment building known for cocaine sales. The defendant walked toward the police, but upon noticing the squad cars, he abruptly halted and walked in the opposite direction, entering an alley. The officers pulled the patrol car into the alley and ordered the defendant to stop and submit to a pat-search. The officer conducting the search did not feel any weapons, but he felt a small lump in the defendant's jacket pocket. After squeezing, sliding and otherwise manipulating the lump, the officer believed it was a lump of crack cocaine in cellophane. The officer reached into the defendant's pocket and retrieved a small plastic bag containing crack cocaine. (*Dickerson, supra*, at 368-69.)

The Supreme Court granted certiorari to resolve a conflict among state and federal courts over whether non-threatening contraband detected through the sense of touch during a lawful pat-search could be admitted into evidence.[28] The Court analogized to the plain view doctrine, which allows police officers to seize contraband if its incriminating character is immediately apparent, and the officers view it from a lawful vantage point (e.g. during a legal search) and have a lawful right of access to the object. (*Id*., at 374-76, citing *Michigan v. Long* (1983) 463 U.S. 1032, 1049-50.) The Court set forth a plain-touch rule: "If the police officer lawfully pats down the suspect's outer clothing [for weapons] and feels an object whose contour or mass makes its identity [as contraband] immediately apparent", the officer can reach into the suspect's pocket to seize the item and it will be admissible as incriminating evidence. (*Id.*, at 375.) At that point, whether the detection is by sight or touch, the officer has acquired probable cause to believe the item is contraband, while staying within the scope of the permissible frisk. However, as with the plain-view doctrine, if the officer has to move or manipulate the item – essentially conducting a further search -- in order to acquire such probable cause, the officer has exceeded the scope of a constitutional pat-down. (*Id*., at 375, 378-79, citing *Arizona v. Hicks* (1987 480 U.S. 321.)

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[28] As indicated by the cases discussed I the previous section, California was one of the states that permitted the admission of contraband seized under these circumstances.

Applying this plain-touch rule the facts of the case before it, the Supreme Court noted that when the officer felt the small lump while patting down the defendant's pocket, he realized it was not a weapon. But the lump's character as contraband was not immediately apparent. The officer had to squeeze, slide and otherwise manipulate the lump to gain probable cause to believe it was rock cocaine. By this further exploration of the defendant's pocket, the officer over-stepped the strict bounds of the pat-search permitted by *Terry*. The further search of the defendant's pocket was constitutionally invalid, as was the seizure of the cocaine. (*Id*., at 377-79.)

*** *PEOPLE V. DICKEY* (1994) 21 CAL.APP.4TH 952 [SECOND DIST.] NO, EXCEEDED THE SCOPE: THE OFFICER HAD NO RIGHT TO RETRIEVE A SOFT OBJECT THAT HE THOUGHT MIGHT BE A PLASTIC BAGGIE CONTAINING A CONTROLLED SUBSTANCE ONLY AFTER SQUEEZING IT**
(See, supra, p. 109)

The officer pat-searched the defendant after encountering him in a stopped vehicle on a country road, observing him moving around in the driver's seat, discovering that he had no identification, noticing that he was nervous, and finding a cannister of baking powder inside a backpack. As the officer patted down the defendant's clothing, he detected no hard objects but felt a soft object. Based on this object's elongated shape, consistency and feel, the officer believed it might be a controlled substance. The officer then squeezed it from the outside, and it felt like "a plastic baggie with something in it." He reached into the defendant's pocket and pulled out baggies containing marijuana and cocaine. (*Dickey, supra*, at 954-55.)

The Court of Appeal held that the combination of circumstances did not support a reasonable belief that the defendant was armed; thus, the officer had no right to initiate the frisk. **The court held that even if the pat-down was justified at its inception, the search became impermissible in scope when the officer reached into the defendant's pocket and retrieved the baggies. The officer had felt a soft object that he did not reasonably believe was a weapon. Under *Dickerson*, the officer could not retrieve the soft object from the defendant's pocket unless its incriminating character was immediately apparent. In this case, as in *Dickerson*, the officer had to squeeze the item before determining that it might be a baggie of drugs. (*Id*., at 957.)**

***PEOPLE V. DIBB* (1995) 37 CAL.APP.4TH 832 [FIFTH DISTRICT] YES, WITHIN THE PERMISSIBLE SCOPE: UPON FEELING AN UNUSUAL LUMP IN AN USUAL PLACE DURING A PAT-DOWN SEARCH, THE OFFICER HAD PROBABLE CAUSE TO BELIEVE IT WAS NARCOTICS BASED ON THE TOTALITY OF THE CIRCUMSTANCES, PERMITTING A SEARCH INCIDENT TO ARREST**

The defendant was a passenger in a car stopped by the police for Vehicle Code violations. Pursuant to the driver's consent, the officer searched the vehicle. The officer obtained the defendant's consent to search a fanny pack that he had taken from the front seat. Inside the pack, the officer found a firearm magazine, a gram scale that smelled of methamphetamine, a small plastic bag, and a beeper. The defendant was wearing another beeper. The officer frisked the defendant's outer clothing for weapons. He did not detect any weapons, but felt an unusual object that was "lumpy" and had "volume and mass" beneath the defendant's pants. When asked what the object was, the defendant said he had nothing in his pants, but the officer did not believe him, thinking the object might be a controlled substance. As instructed by the officer, the defendant rolled up his pants leg and the officer reached up under the pants and retrieved a bag of methamphetamine from the area between the defendant's knee and calf. (*Dibbs, supra*, at 834-35.)

Applying the rule of *Minnesota v. Dickerson* (1993) 508 U.S. 366, the Court of Appeal claimed that the critical question was whether the officer had probable cause to believe that the lump was narcotics when he first touched it during the weapons frisk. In making this determination, the court considered the totality of the circumstances, in addition to the officer's tactile perception of an unusual lump in an unusual location. These circumstances included the suspicious items that had previously been found during the consensual search of the defendant's fanny pack: the scale smelling of methamphetamine, the small plastic bag and the beeper, in addition to the second beeper that the defendant was wearing. The combination of circumstances provided the officer with probable cause to arrest the defendant for possession of narcotics when he first touched the lump, and the officer's exploration of the area below the defendant's pants leg was justified as a search incident to arrest. (*Id.*, at 835-37.)

***PEOPLE V. AVILA* (1997) 58 CAL.APP. 4TH 1069 [4TH DIST., DIV. 2]**
YES, WITHIN THE PERMISSIBLE SCOPE: DURING THE FRISK, UPON FEELING A SOMEWHAT HARD OBJECT AT THE ANKLE, THE OFFICER THOUGHT IT MIGHT BE A WEAPON AND ASKED THE DEFENDANT WHAT THE OBJECT WAS; THE DEFENDANT'S RESPONSE THAT IT WAS "METH" GAVE THE OFFICER PROBABLE CAUSE TO ARREST AND SEARCH INCIDENT TO ARREST
(See, *supra*, p. 102.)

An officer observed the defendant littering "suspiciously" as he walked around a truck parked in a lot. After seeing the defendant drop a white envelope from his waist, the officer contacted the defendant while he was standing in the truck's open door. While he was talking to the defendant, the officer observed, inside the truck, a long metal object, similar to a "Mag" flashlight, that was within the defendant's reaching distance. The defendant denied knowing what the object was, and stated that he had no weapons. The officer instructed the defendant to walk to the back of the truck, and the defendant "assume the position" for a search. The officer conducted a pat-search and felt a bulky and somewhat hard object at the defendant's ankle. The officer thought this might be a weapon. He asked the defendant what the object was, and the defendant said it was "meth". After feeling two more bulges, the officer seized three baggies of methamphetamine. (*Avila, supra*, at 1072-73, 1075.)

The Court of Appeal held that the officer did not exceed the permissible scope of the justified weapons frisk by asking the defendant about the nature of the lump and then retrieving it once the defendant said it was methamphetamine. The court distinguished *People v. Valdez* (1987) 196 Cal. App.3d 799, because the officer believed that the bulky and somewhat hard object that he felt at the defendant's ankle might be a weapon. Thus, he was justified in asking what it was. In *Vargas*, the officer knew that the object he had felt through the defendant's clothing was not a weapon but a film cannister, before he inquired, "What is this?". (*Avila, supra*, at 1076-77, citing *Vargas, supra*, at 803, 807.) **In *Avila*, once the defendant responded to the officer's legitimate question by saying the object was methamphetamine, the officer had probable cause to arrest and search incident to arrest. (*Id.*, at 1076-77.)**

***UNITED STATES V. MATTAROLO* (9TH CIR. 2000) 209 F.3D 1153**
YES, WITHIN THE PERMISSIBLE SCOPE: BELIEVING THAT AN ITEM DETECTED IN THE DEFENDANT'S PANTS POCKET MIGHT BE A KNIFE, THE OFFICER DID A "PRECAUTIONARY SQUEEZE" AND IMMEDIATELY RECOGNIZED THAT THE ITEM WAS NOT A KNIFE BUT A PACKAGE OF DRUGS

The officer was patrolling a dark, secluded country road at midnight, when he observed the defendant back his truck out of the driveway of a closed construction yard. He pulled over the truck and contacted the defendant. After the defendant denied having a gun, the officer asked for consent to search for weapons and the defendant said, "go ahead". During this first pat-search, as the officer pressed his hand against the defendant's pants leg, he felt an object that was a couple of inches long and about one inch in circumference. To determine if it was a small pocket knife, the officer closed his thumb and forefinger around the object. He realized that the object was not a knife, but felt little chunks in plastic bags that he immediately recognized as drugs, based on the item's distinctive feel and his experience. The officer eventually reached into the pocket and retrieved the drugs. (*Mattarolo, supra*, at 1156-57.)

The Ninth Circuit held that the officer had reasonable suspicion to stop and frisk the defendant did not exceed the limited scope of a *Terry* frisk. During the pat-down, when the officer felt an object that could have been a pocket knife, he had the right to conduct a "precautionary squeeze" to confirm or dispel his suspicion. When he squeezed the item, he realized it was not a knife but a package of drugs – immediately apparent contraband. If the officer had "continued to manipulate the object beyond what was necessary to ascertain that it posed no threat, he would have run afoul of the Supreme Court's holding in Dickerson." But the officer realized the item was drugs, without any additional manipulation. The item could then be seized from the pocket "pursuant to a tactile variation on the 'plain-view' rule." (Id., at 1158.)

***UNITED STATES V. MILES* (9TH CIR. 2001) 247 F.3D 1009**
NO, EXCEEDED THE SCOPE: THE OFFICER HAD NO RIGHT TO RETRIEVE A SMALL BOX DETECTED DURING A PAT- SEARCH, AS HE KNEW THE BOX WAS NOT A WEAPON AND DID NOT RECOGNIZE IT AS IMMEDIATELY APPARENT CONTRABAND.

Officers detained the defendant at gunpoint because he matched a citizen's description of a person who had reportedly fired a gun at a residence about 12 minutes earlier. The defendant was detained in the front yard of another residence located approximately six blocks from the residence where shots had been fired. After

handcuffing the defendant, an officer patted him down for weapons. While pushing in on the defendant's outer garments, the officer detected a hard item in the defendant's pocket that felt like a small box; it was no bigger than a large package of chewing gum and one-half the size of a package of cigarettes. The officer did not believe it was a weapon. After the officer wrapped his hands around the box, from outside the pocket, he shook it and moved it up and down and back and forth. He then heard items clanking together inside the box and concluded these items were bullets. The officer reached into the defendant's pocket and retrieved a cardboard box containing .22 caliber shells. Concluding that the defendant was the reported shooter, the officer arrested him and then found a loaded gun six feet away. (*Miles, supra*, at 1010-1012, 1014.)

Applying the rules set forth in *Dickerson*, the Ninth Circuit concluded that the officer exceeded the scope of a permissible pat-search when he shook and manipulated the tiny box, in order to conclude that it contained bullets. The officer "had reached the outer limits of his patdown authority when it was clear that the object was a small box and could not possibly be a weapon." At that point, the officer did not immediately recognize the box as contraband. Thus, he could not manipulate the box to ascertain its contents or immediately retrieve the item from the defendant's pocket. The Ninth Circuit rejected the government's after-the-fact speculation that the officer could have retrieved the box as possibly containing a tiny pen knife, a needle or other slender weapon as the officer had not testified to such motivation. "Under the government's logic, there would be no limit to the bounds of a *Terry* stop....looking for the proverbial 'needle in the haystack' would become the norm." The court distinguished its recent case of *United States v. Mattarola*, *supra*, 209 F.3d at 1153 (discussed above). (*Miles, supra*, at 1013-15.)

IN RE LENNIES H. (2005) 126 CAL.APP. 4TH 1232 [1ST DIST., DIV. 4] YES, WITHIN THE PERMISSIBLE SCOPE: DURING A PAT-SEARCH, THE OFFICER FELT AN OBJECT THAT HE KNEW WAS NOT A WEAPON, BUT A SET OF KEYS; BASED ON THE CIRCUMSTANCES, THE OFFICER HAD PROBABLE CAUSE TO BELIEVE THE KEYS WERE TO A STOLEN CAR

The police received a report that three black males had stolen the victim's Chevrolet Trailblazer at gunpoint. The victim described the Trailblazer and its license plate number. The next day, officers received a report that the described stolen vehicle had been spotted on Roleen Street. The officers went to Roleen and observed the Trailblazer for three hours. During that time, they saw three black males, including the minor and his co-defendant, walk several times from a nearby residence, look around, and look at the vehicle. Corporal Garcia stopped and questioned the minor and his co-

defendant. The two men denied any knowledge of the Trailblazer or possessing any keys. Around the same time, another officer opened the Trailblazer's unlocked door and allowed his K-9 to enter the vehicle and sniff. Upon being commanded to track the scent, the dog went to where the three males were sitting on the curb. Corporal Garcia then pat-searched the minor. While patting down the minor's front pants pocket, Garcia felt an object; he knew it was not a weapon but immediately recognized that it was a set of keys. Garcia asked the minor if he had any knowledge of the keys and the minor said he did not. Garcia immediately removed the keys and saw they bore an insignia for the Trailblazer. He pushed a button on the key fob, which activated the Trailblazer's horn, lights and locks. The minor was arrested. (*Lennies H.,* at 1234-36.)

The minor conceded that the officer had reasonable suspicion for the stop and frisk, but argued that the officer lacked legal justification to remove the keys from the minor's pocket as their incriminating nature was not immediately apparent upon first touch. Unlike a rock of cocaine, a key is not inherently illegal to possess; the officer could not determine that keys belonged to the stolen vehicle without pulling them out and observing them. The Court of Appeal disagreed, concluding that under the circumstances, the officer had probable cause to believe that the keys were to the stolen Trailblazer as soon as he felt them in the minor's pants pocket, while patting down the outside of the garment. The Court emphasized the following circumstances establishing the minor's connection to the stolen vehicle: he matched the description of the suspects; the minor inspected the Trailblazer six or more times in a two and one-half hour period; the dog had sniffed the Trailblazer's interior and then tracked in the minor's direction; and the minor had previously denied having any keys. As soon as Corporal Garcia felt the keys in the minor's pocket, he had probable cause to arrest the minor and search incident to arrest (a search that could preceded the formal arrest). The Court held that Garcia's question to the minor about whether he had any knowledge of the keys, asked right after feeling them, was not analogous to the further manipulation discussed in *Dickerson*; the officer had probable cause to arrest and retrieve the keys before he asked that question. (*Id.*, at 1237-40.)

C. Common Factors Discussed by the Courts in Determining Whether Officers Exceeded the Lawful Scope of a Pat-Search When They Reached into the Defendants' Pockets or Under his Clothing to Seize an Object Detected by Touch

1. During the Pat-Search, the Officer Reasonably Believed he Felt a Weapon or Instrument of Assault, and That Belief Was Reasonable

Terry v. Ohio **(1968) 392 U.S. 1** (p. 123) [Within scope and seizure justified: The officer felt a pistol.]

People v. Autry **(1991) 232 Cal. App. 3d 365** (p. 127) [Within scope and seizure justified: The officer felt a hypodermic syringe which could easily be employed as a weapon.]

People v. Snyder **(1992) 11 Cal. App. 4th 389** (p.128) [Within scope and seizure justified: The officer detected an object which reasonably felt like a bottle, usable as a weapon.]

2. During the Pat-Search, the Officer Reasonably Believed he Felt a Weapon or Instrument of Assault, but the Retrieved Item was not a Weapon

People v. Mosher **(1969) 1 Cal.3d 379** (p.124) [Within scope and seizure justified: The officer felt "a sharp object like a knife blade", which turned out to be a stolen watch, evidence of a crime.]

People v. Hill **(1974) 12 Cal. 3d 731** (p.127) [Within scope and seizure justified: The officer felt a long hard object that he reasonably believed was an instrument of assault, which turned out to be a matchbox containing bullets.]

People v. Thurman **(1989) 209 Cal. App. 3d 817** (p.131) [Within scope and seizure justified: The officer felt a large bulge in the defendant's pocket that he reasonably believed was a weapon; when the officer reached into the pocket to retrieve the item, he squeezed the bulge and realized it was a baggie of cocaine.]

***People v. Limon* (1993) 17 Cal. App. 4th 524** (p.132) [Within scope and seizure justified: The officer reasonably believed that the hard object felt in the defendant's pocket was a knife; when the officer looked into the pocket, he saw it was a hide-a-key box and had probable cause to believe the box held drugs.]

***United States v. Mattarolo* (9th Cir. 2000) 209 F.3d 1153** (p.137) [Within scope and seizure justified: The officer felt the object could have been a pocket knife; after a legitimate "precautionary squeeze" to confirm this suspicion, he recognized that the object was a package of drugs.]

3. During the Pat-Search, the Officer Reasonably Believed he Felt a Weapon or Instrument of Assault, but That Belief was not Reasonable

***People v. Collins* (1970) 1 Cal. 3d 658** (p.125) [Exceeded scope and seizure not justified: The officer believed that the little soft lump he felt in the defendant's pants' pocket was a weapon, but that belief was not reasonable.]

4. During the Pat-Search, Upon Initially Touching the Object, the Officer had Probable Cause, Based on the Totality of the Circumstances, to Believe it was Contraband

***People v. Lee* (1987) 194 Cal. App. 3d 975** (p.128) [Within scope and seizure justified: The officer had probable cause to believe that the clump of small resilient objects that he felt in the defendant's jacket pocket were heroin-filled balloons. (Prior to *Dickerson*, the court held that the officer's gripping of the object from outside the clothing was legitimately part of the pat-down.)]

***People v. Dibb* (1995) 37 Cal. App. 4th 832** (p.135) [Within scope and seizure justified: The officer had probable cause to believe that the unusual lumpy object he felt beneath the defendant's pants was narcotics.]

***In re Lennies H.* (2005) 126 Cal. App. 4th 1232** (p.138) [Within scope and seizure justified: The officer had probable cause to believe that the keys he felt in the minor's pants' pocket were the keys to a nearby stolen vehicle, incriminating evidence.]

5. During the Pat-Search, Upon Initially Touching the Object, the Officer Lacked Probable Cause to Believe he was Feeling Contraband or Incriminating Evidence (Without Further Manipulation)

People v. Valdez **(1987) 196 Cal. App. 3d 799** (p.130) [Exceeded scope and seizure not justified: Upon first touch, the officer did not have reasonable cause to believe that the small box he felt in the defendant's pocket was a weapon or immediately apparent contraband.]

Minnesota v. Dickerson **(1993) 508 U.S. 366** (p.133) [Exceeded scope and seizure not justified: Upon first touch, the officer did not have reasonable cause to believe that the small lump he felt in the defendant's jacket pocket was a weapon or immediately apparent contraband.]

United States v. Miles **(9th Cir. 2001) 247 F.3d 1009** (p.137) [Exceeded scope and seizure not justified: Upon first touch, the officer felt a small box in the defendant's pocket that he did not reasonable believe was a weapon or a container holding contraband.]

6. During the Pat-Search, the Officer Manipulated the Object in Order to Determine that it was Contraband

People v. Lee **(1987) 194 Cal. App. 3d 975** (p.129) [Within scope and seizure justified: The officer used a grabbing or claw-like motion to acquire probable cause to believe that the small resilient objects he felt in the defendant's jacket pocket were heroin-filled balloons. (Prior to *Dickerson*, the court held that this gripping motion was a legitimate part of the pat-down search.)]

Minnesota v. Dickerson **(1993) 508 U.S. 366** (p.133) [Exceeded scope and seizure not justified: The officer felt a small lump in the defendant's pocket that he realized was not a weapon, but the then squeezed and manipulated the lump in order to gain probable cause to believe the lump was rock cocaine.]

People v. Dickey **(1994) 21 Cal. App. 4th 952** (p.134) [Exceeded scope and seizure not justified: The officer felt a soft object in the defendant's pocket that he did not believe was a weapon, and he had to manipulate and squeeze the item before determining that it might be a plastic baggie of drugs.]

***United States v. Mattarolo* (9th Cir. 2000) 209 F.3d 1153** (p.137) [Within scope and seizure justified: Because the officer believed that the object he detected while patting down the defendant's pants leg might be a small knife, he had the right to close his thumb and forefinger around the object and perform a "precautionary squeeze" to confirm or dispel this suspicion, as part of the legitimate pat-down search.]

***United States v. Miles* (9th Cir. 2001) 247 F.3d 1009** (p.137) [Exceeded scope and seizure not justified: In the defendant's pocket, the officer felt a small box that could not possibly be a weapon and that he did not recognize as contraband; he exceeded the scope of a lawful pat-down when he wrapped his hands around he box, from outside the pocket, shook it and moved it up and down to determine that it contained bullets.]

7. During the Pat-Search, the Officer Questioned the Defendant as to the Identity of the Detected Object

***People v. Valdez* (1987) 196 Cal. App. 3d 799** (p.130) [Exceeded scope and seizure not justified: After feeling a film cannister inside the defendant's pocket and lacking reasonable cause to believe the cannister was a weapon or contraband, the officer improperly asked, "What is it?" This question was the preliminary step of an unjustified full search.]

***People v. Avila* (1997) 58 Cal. App. 4th 1069** (p.136) [Within scope and seizure justified: After feeling a bulky, hard object at the defendant's ankle that the officer though might be a weapon, the officer legitimately asked the defendant, "What is this?" The defendant responded that the object was "meth", providing the officer with probable cause to search further and seize the item.

***In re Lennies H.* (2005) 126 Cal. App. 4th 1232** (p.138) [Within scope and seizure justified: Upon feeling keys in the minor's pocket, the officer had probable cause to believe they were keys to the a nearby stolen car; thus, his question as to whether the minor had knowledge of the keys was not equivalent to the further manipulation discussed in *Dickerson*.]