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TRAFFIC STOPS AND VEHICLE SEARCHES

Kathryn Seligman

TABLE OF CONTENTS

page

TRAFFIC STOPS AND VEHICLE SEARCHES

By Kathryn Seligman[1]
Staff Attorney, First District Appellate Project
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In the First District, we find that most appeals raising Fourth Amendment suppression issues involve traffic stops. In the "typical" scenario, the police officer pulls the vehicle over for an observed Vehicle Code violation, no matter how minor. During the officer's exchange with the driver, either before or after she issues a citation or warning for the code violation, the officer obtains the driver's consent to search the vehicle. Occasionally, the officer relies on another justification for the search – e.g. probable cause or the need to locate the driver's identification. Whatever the rationale, the officer searches the vehicle and finds contraband.

Over the last ten years, there have been significant changes in the law which basically make it easier for a law enforcement officer to stop and search a vehicle. Thus, the arguments available to the defense attorney who wishes to challenge the stop and search are limited. Nevertheless, we still have some victories in this area, mostly in unpublished opinions.

These materials will address three topics:

1)What circumstances justify the initiation of a traffic stop?

2)What can the officer ask and do during the traffic stop?

3)What circumstances justify a search of the vehicle during or immediately after the traffic stop?

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[1] These materials update and substantially supplement previous materials on traffic stops that were prepared by Kathryn Seligman in June 2003. Law student Alex Coolman assisted with research for these materials.

I. THE INITIATION OF THE TRAFFIC STOP

A. JUSTIFYING THE TRAFFIC STOP: OBSERVE OR REASONABLY SUSPECT A VEHICLE CODE VIOLATION – MAKE A TRAFFIC STOP (THE RULE OF *WHREN V. UNITED STATES*)

In 1996, the United States Supreme Court decided *Whren v. United States* (1996) 517 U.S. 806, making it much easier for police officers to pull over a vehicle and its occupants. All the officer needs is reasonable suspicion of a Vehicle Code violation. If the officer observes a violation, no matter how trivial, she can initiate a traffic stop. The officer can pull the car over for expired registration, a rolling stop, tailgating, a defective break light or an object dangling from the rear view mirror.[2]

1. No more pretext stop doctrine – officer's subjective motivation is irrelevant

It no longer matters if the officer uses the observed Vehicle Code violation as a pretext to pull the car over because she has a hunch that the driver might be carrying drugs or contraband – a hunch based on the appearance of the vehicle or its occupants. The officer can follow the car and look for an equipment violation or wait for the driver to commit a traffic violation. Then, she can pull the car over. Reliance on the traffic violation as a pretext to stop the car may be explicit. (See, e.g., *People v. Gomez* (2004) 117 Cal. App. 4th 531 [suspecting that drug dealing was occurring at a residence, the detective instructed a patrol officer to follow a vehicle departing from the residence, stop the driver for an observable traffic violation, and obtain consent to search].)

In *Whren*, the Supreme Court did away with the "pretext stop doctrine". Under that doctrine, a traffic stop could be ultimately ruled illegal if the police officer had used the

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[2] These materials only discuss traffic stops based on observed or suspected Vehicle Code violations. Of course, if a police officer reasonably suspects that a vehicle occupant is engaged in other criminal behavior (e.g. that the driver matches the description of a suspected burglar or that he is driving a stolen car), the officer can initiate a traffic stop in order to detain the criminal suspect. (See *United States v. Arvizu* (2002) 534 U.S. 266 [determining that the officer had reasonable suspicion the motorist was engaged in drug trafficking; the Court evaluated the totality of the circumstances and considered the officer's training and experience]; but see *People v. Hester* (2004) 119 Cal. App. 4th 376 [holding that the officer lacked a particularized reasonable suspicion that occupants of a vehicle were involved in any criminal activity as necessary to justify the car stop and detention].)

observed Vehicle Code violation as a pretext to pull over the car. The defendant had to meet the difficult burden of proving that the officer's primary motivation was to verify a hunch that the driver was carrying drugs – a mere hunch, not reasonable suspicion. (See *People v. Miranda* (1993) 17 Cal. App. 4th 917, 923-25.) In *Whren*, the Court held that pretext stops do not violate the Constitution. As long as the officer reasonably believed, based on objective facts, that the driver was violating the Vehicle Code, her subjective motivation is deemed irrelevant. (See *Whren v. United States, supra*., 517 U.S. at 812-813; *People v. Gallardo* (2005) 130 Cal. App. 4th 234.)

In *Arkansas v. Sullivan* (2001) 532 U.S. 769, the Supreme Court reiterated its prior holdings in *Whren* and *Atwater v. Lago Vista* (2001) 532 U.S. 318 [an arrest for a fine-only traffic violation does not violate the Constitution]. The Arkansas Supreme Court had granted the defendant's suppression motion, holding that the traffic stop and arrest were illegally pretextual. Although the officer had pulled over the defendant's car for observed Vehicle Code violations (speeding and tinted windows), and then arrested him for speeding, driving without registration and possession of a hatchet, the court concluded that the officer's "ulterior motive" was to investigate a hunch of drug trafficking. The Arkansas Supreme Court had expressly declined to follow *Whren*, noting that it involved a pretextual stop rather than a pretextual arrest. The United States Supreme Court made it crystal clear that *Whren* precludes any Fourth Amendment challenge based on the actual subjective motives of the officers. Pretext traffic stops, pretext arrests and pretext searches are all legitimate. (*Arkansas v. Sullivan, supra*., 532 U.S. at 771-772.)

2. Only reasonable suspicion of a Vehicle Code violation is required

Note that the officer initiating the traffic stop needs only a reasonable suspicion of a Vehicle Code violation. (See *People v. Rodriguez* (2006) 143 Cal. App. 4th 1137, 1148 [reasonable suspicion is less than probable cause, but more than a mere speculation or hunch]; *People v. Bell* (1996) 43 Cal. App. 4th 754, 761.) The officer does not have to be absolutely certain that the observed condition or conduct is prohibited. (See *People v. Saunders* (2006) 38 Cal. 4th 1129, 1136-1137 [holding that the possibility of an innocent explanation for the suspected violation, a missing front license plate, did not preclude a traffic stop to investigate]; *People v. Hanes* (1997) 60 Cal. App. 4th Supp. 6 [holding that officer's suspicion that very dark windows were illegally tinted was reasonable and sufficient to justify a stop, given the officer's observations and experience].)In most cases, the officer's reasonable suspicion will be based on his personal observations. However, in some circumstances, the officer can rely on information from other officers, a reliable informant, or even an anonymous tip.(*People v. Wells* (2006) 38 Cal. 4th 1078 [holding that an uncorroborated anonymous tip that a driver was weaving all over the roadway provided

reasonable suspicion for a stop to check for intoxication] [3]

B. CHALLENGING THE INITIAL TRAFFIC STOP: NO VEHICLE CODE VIOLATION - NO RIGHT TO STOP THE VEHICLE

Why challenge the officer's right to pull over the vehicle? Generally, the defendant challenges the initiation of the traffic stop in order to challenge a search conducted during the traffic stop and to suppress evidence discovered during that search. The defendant argues that consent, probable cause or other justification for the search -- acquired during the unjustified traffic stop -- is illegal. (See *Florida v. Royer* (1983) 460 U.S. 491, 507-08; *People v. Rodriguez, supra*., 143 Cal. App. 4th at 1137; *People v. Gallant* (1990) 225 Cal. App. 3d 200, 211; *People v. Lawler* (1973) 9 Cal.3d 156, 163-64.; *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 727-728.) Remember: Because the traffic stop, the detention of the motorist, and any subsequent search are initiated without a warrant, the prosecution bears the burden of justifying the officer's conduct. (*People v. Williams* (1999) 20 Cal. 4th 119, 127-128; *People v. Bower* (1979) 24 Cal. 3d 638, 644; *Badillo v. Superior Court* (1956) 46 Cal. 2d 269, 272.)[4]

1. Deny the proscribed conduct – The defendant wasn't speeding!

In the trial courts, defendants sometimes challenge the claimed Vehicle Code violation – the defendant asserts that he weren't really speeding or tailgating. He might contend that the officer fabricated the basis for the stop. (See *People v. Rodriguez, supra*., 143 Cal. App. 4th at 1148-1149 [when the defendant claims that the officer fabricated the basis for the stop, the trial court must determine whether the officer testified truthfully regarding his observations].) The defendant might claim that the officer could not have seen the small crack in the vehicle's taillight in the dark and from a distance. Such a challenge usually triggers a credibility contest between the defendant-driver and the police

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[3] Although the Supreme Court, in *Whren*, stated that a vehicle stop is reasonable when the officer has "probable cause to believe that a traffic violation has occurred" (517 U.S. at 810), subsequent cases have clarified that only reasonable suspicion of a Vehicle Code violation is required. (See *United States v. Lopez-Soto* (2000) 205 F.3d 1101, 1104, citing *Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [a traffic stop, akin to a *Terry* stop, requires reasonable suspicion of criminal activity].)

[4] These materials are intended for attorneys representing criminal defendants in the trial court and on appeal. Generally, an argument that the traffic stop or the vehicle search was illegal – i.e. a challenge to the prosecution's proffered justification – needs to be raised or litigated in the trial court in order to be viable on appeal.

officer. If the trial court believes the officer, it's not worth repeating this argument on appeal. However, it might be worth appealing the initiation of the stop if testimony established that the officer's claimed observations were physically impossible.

2. Argue that the observed conduct or condition did not violate the law – The officer was mistaken regarding the Vehicle Code requirements

What if the police officer believed that the driver's conduct or the condition of the vehicle violated the Vehicle Code, but it turns out that the officer was wrong about the law; the observed facts did not constitute a violation. Can the driver challenge the legality of the traffic stop and any search that resulted from that stop, arguing that she was unlawfully detained? The answer is generally, yes.

A traffic stop based solely on an officer's mistake of law, even if made in good faith, is not based on reasonable suspicion and is thus unlawful. (*People v. White* (2003) 107 Cal. App. 4th 636; *People v. Ramirez* (2006) 140 Cal. App. 4th 849; *People v. Hernandez* (2003) 110 Cal. App. 4th Supp.1); *United States v. Miller* (5th Cir. 1998) 146 F.3d 274, 279; *United States v. Lopez-Valdez* (5th Cir. 1999) 178 F.3d 282, 288-289.) "If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable." (*In re Justin K.* (2002) 98 Cal. App. 4th 695, 700.)

One of the leading "mistake of law" cases is *People v. White*, *supra.*, a decision from the First District, Division Three. In *White*, the defendants were driving down Highway 101 in Humboldt County. A CHP Officer pulled the car over because he'd observed two conditions that he believed violated the law: 1)the car had no front license plate, but only a back plate issued by Arizona; and 2) an air freshener was hanging from the rear view mirror. While questioning the driver, during the traffic stop, the officer noted the odor of burnt marijuana. Suspecting that there was marijuana in the car, the officer ordered both the driver and passenger out of the vehicle and searched the passenger compartment. He found some marijuana in the passenger compartment, but also smelled fresh marijuana emanating from the trunk. In the trunk, the officer found five pounds of marijuana and substantial cash. (*People v. White, supra.*, 107 Cal. App. 4th at 640.)

The court found that the initial traffic stop was illegal, and that consequently, the vehicle search was unconstitutional; the evidence found in the car was suppressed. Neither of the conditions observed by the CHP officer – the missing front license plate or the dangling air freshener – constituted a Vehicle Code violation. The officer's belief that these conditions were illegal was not reasonable even though the officer acted in good faith. "[T]here is no good faith exception to the exclusionary rule for police who enforce a

legal standard that does not exist." (*People v. White, supra.*, 107 Cal. App. 4th at 644.)

First, the officer had believed that two license plates were legally required. But the back plate was issued by Arizona, and Arizona law requires only one license plate on the rear of the car. Relying on a Ninth Circuit case, *People v. Twilley* (9th Cir. 2000) 222 F.3d 1095, the court held that the officer's erroneous belief that Arizona law required two plates did not provide reasonable suspicion. The officer's legal mistake was inexcusable because Arizona is a contiguous state and Arizona motorists frequently drive on California roads. (See *People v. White, supra.*, 107 Cal. App. 4th at 643-644.)

Second, the air freshener hanging from the rear view mirror did not provide reasonable cause for the stop because it had not obstructed the driver's view through the windshield. The officer had mistakenly believed that drivers are prohibited from hanging any objects from their rear view mirrors. He had erroneously relied on a Vehicle Code section that prohibits affixing or attaching any object to the car's window. Plainly, the dangling air freshener was not attached to the windshield. A hanging object only violates the law (under another Vehicle Code section) if it obstructs the driver's view through the windshield. The officer had not testified that the dangling air freshener obstructed the driver's view, nor that the car was driven erratically, suggesting that the driver's view was impaired. With no evidence of obstruction, the hanging object did not provide a legitimate basis for the traffic stop. (*People v. White, supra.*, 107 Cal. App. 4th at 641-642.)

Of course, if the officer merely cites the wrong Vehicle Code section, but testifies to observations that establish reasonable suspicion of another code section violation, then the traffic stop is lawful. "[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct." (*In re Justin K., supra.*, 98 Cal. App. 4th at 700.)

In many of these mistake of law cases, as in *White*, the officer erroneously presumes that the law flatly prohibits the observed condition. Consequently, the officer does not testify to observations that might have established the elements of an actual code violation. An example of this occurs in a pair of tinted window cases. Because not all tinted windows are prohibited, the officer must testify to observations that reasonably support a belief that the windows on the defendant's car were actually illegal.

In *People v. Butler* (1988) 202 Cal. App. 3d 602, the police officer stopped the car merely because it had tinted windows. Because the officer mistakenly believed that all tinted windows violated the Vehicle Code, he did not testify to any additional facts reasonably suggesting that the tinted glass on defendant's car was illegal. Moreover, he had observed the car in the dark as it sped past him, so he had not really had the

opportunity to make the necessary observations. The Court of Appeal refused to hold that an officer could stop a vehicle merely because it had tinted windows in order to investigate further. The court ruled the traffic stop illegal.

In contrast, in *People v. Hanes* (1997) 60 Cal. App. 4th Supp. 6, the appellate court held that the California Highway Patrol Officer had the right to stop the defendant's car, because he reasonably believed that the car's windows were illegally tinted. The CHP officer testified that he was aware of the distinction between legal and illegal tinting, and that he had stopped approximately 400 cars on suspicion of having illegally tinted windows. Moreover, he had observed the defendant's car driving very slowly through a lighted intersection, and the front window appeared as black as the paint on the car. This testimony established a reasonable suspicion of illegal tinting.

As one can tell from this discussion, there are some types of Vehicle Code violations that are routinely cited in these mistake of law cases. Pay particular attention to cases involving tinted windows, objects dangling from the rear view mirror (especially air fresheners), single license plates, cracked or inoperative lights, or unusual lights. (See, e.g. *People v. Hernandez, supra.*, 110 Cal. App. 4th Supp. 1 [driver improperly stopped for having a neon light around the license plate, which was not a Vehicle Code violation].) Also, look for cases where the driver is stopped for failing to signal a turn or a lane change. Under Vehicle Code section 22107, signaling is only required if another vehicle may be affected by the driver's movement. (See *In re Jaime P.* (2006) 40 Cal. 4th 128, 131 [prosecution conceded that the driver's failure to signal a turn did not legally justify a vehicle stop as no other vehicles were affected].)

3. Assert that the stop for expired registration was unjustified because a temporary operating permit was displayed on the vehicle

Under California law, vehicles are required to be registered, and registration must be renewed annually. (Veh. Code, secs. 4000(a)(1) and 4601(c).) Current registration tabs indicating the month and year of expiration must be attached to the rear license plate. (Veh. Code, sec. 5204(a)) If a law enforcement officer reasonably suspects that a vehicle's registration has expired, the officer can stop the vehicle and detain the driver to check his license and registration. (See *People v. Saunders* (2006) 38 Cal. 4th 1129, 1135.) Expired registration stops are extremely common.

If an officer sees that a car has expired registration tabs on the license plate, he has reasonable suspicion to initiate a traffic stop. (See *People v. Nabong* (2004) 115 Cal. App. 4th Supp. 1.) But what if the officer also sees a temporary operating permit displayed in the car's window, indicating that the renewal of the vehicle's registration is in process?

Can the officer still pull over the car?

In California, if the owner of the vehicle has begun but not completed the registration process (e.g. she has not done the required smog check), she can obtain a temporary operating permit to display in the vehicle's front or rear window. With a temporary operating permit, the vehicle can be lawfully driven on the roadways until the registration process is completed and current tabs are received. (See *People v. Saunders, supra.*, 38 Cal. 4th at 1132-1133; *People v. Nabong, supra.*, 115 Cal. App. 4th Supp. 3-4.)[5] The temporary operating permit is red with a large bold face white number. The number represents the month in which the permit expires. For example, if the number on the temporary operating permit is "3", that means the permit expires on the last day of March, and the vehicle can be lawfully operated (without current registration tabs) through March 31st. (See *People v. Saunders, supra.*, at 1132-1133.) In addition to the large number, there is other relevant information written on the temporary operating permit, including the make of the vehicle, the license plate number, the vehicle identification number, and the applicable year. (*People v. Saunders, supra.*, at 1133.)

If the officer observes both expired registration tabs (on the license plate) and the temporary operating permit (on the vehicle's window) -- as he drives behind or past the car -- he will be able to see the bold-face number and determine the date on which the temporary operating permit expires. But it is unlikely that the officer could read the other information printed on the permit (e.g. the license number and the applicable year) without stopping the vehicle. Under these circumstances, does the officer have reasonable suspicion to initiate a traffic stop?

Until last year, the only published California case on this issue was *People v. Nabong* – a case from the San Mateo Superior Court Appellate Division. In *Nabong*, a police officer pulled over the defendant's car for expired registration. The license plate tabs indicated that registration had expired, but the officer saw a temporary operating permit in the car's rear window which bore the number "1", indicating that the car could be lawfully driven until the last day of January; the traffic stop occurred on January 6th. The officer suspected that the temporary operating permit might be invalid because in two years, he'd stopped about 30-40 vehicles displaying temporary operating permits, and about half of them turned out to be invalid. The officer could have called his department

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[5] Temporary operating permits are also issued pending the issuance of license plates to show that all fees have been paid to the Department of Motor Vehicles. The vehicle owner is just waiting for the actual plates. (See *People v. Hernandez* (January 11, 2007) 07 C.D.O.S. 445; *People v. Saunders, supra.*, 38 Cal. App. 4th at 1136.)

for a registration check, but he didn't do so in this case and could not explain why he omitted this usual check. (*People v. Nabong, supra.*, 115 Cal. App. 4th Supp. 2-4.)

Under these circumstances, the court concluded that the officer lacked a particularized reasonable suspicion for the traffic stop. He could not rely on his personal experience – that about 50 percent of temporary permits are invalid – because there was nothing about the circumstances reasonably suggesting that the particular sticker placed on the defendant's car was not valid. Moreover, the officer had made no effort to ascertain if this temporary permit was valid by checking with his dispatcher. He should have taken this step before intruding upon appellant's freedom. (*People v. Nabong, supra.*, at 4-5.)

In 2005, the California Supreme Court granted review on this issue in *People v. Brendlin* and *People v. Saunders*: The principle issue in both cases was whether a passenger is necessarily detained when an officer initiates a traffic stop and pulls the vehicle over. (See Section IC below.) However, the Court also granted review on a second question: May a car that has expired registration tags, but also has a temporary registration permit, be legally stopped to investigate the validity of the temporary permit?

Unfortunately, the Supreme Court did not really resolve this issue in either case. In *People v. Brendlin* (2006) 38 Cal. 4th 1107, 1114, the Attorney General conceded that the officer who stopped the vehicle lacked reasonable suspicion that the car's registration was expired, and thus the traffic stop was illegal. Prior to pulling over the car, the officer had seen both expired registration tabs and an unexpired temporary operating permit taped to the vehicle's rear window. He had also phoned dispatch and received radio confirmation that the car's registration had expired two months earlier, but that a renewal application was "in process". (*People v. Brendlin, supra.*, at 1111, 1114.)

In *Saunders*, the officer pulled over a truck that had expired registration tabs and no front license plate. The officer could not recall if he had seen the temporary operating permit which was taped to the truck's rear window. If the temporary permit was valid, it allowed the vehicle to be lawfully operated through the day of the stop. The driver testified that he had applied to register the vehicle in his wife's name and had asked for new license plates, but he had not completed the smog check. Consequently, he'd been issued a temporary operating permit that he had placed in the window. A clerk for the Department of Motor Vehicles testified regarding the legal effect of a temporary operating permit – allowing the owner to drive the vehicle until registration was completed -- but she also explained that one would need to read the small print on the permit (the license plate number, the VIN number, and the year of issuance) to definitively determine that the permit had been issued for that particular vehicle for the current year. (*People v. Saunders, supra.*, 38 Cal. 4th at 1131-1133.)

The Supreme Court determined that the officer had reasonable suspicion to initiate the traffic stop to investigate the missing license plate, if not the expired registration. The Court noted, "[w]e have not yet decided whether an officer may stop a vehicle that has an expired registration tab but also displays a temporary operating permit." (*People v. Saunders, supra.*, at 1135.) The Court acknowledged that other jurisdictions were divided on this issue, but concluded: "We need not decide the issue, however, because [the officer] also noticed that the pickup's front license plate was missing" – a legitimate basis for a traffic stop. (*People v. Saunders, supra.*, at 1136.)

The Court held that the officer could stop the truck to ascertain if the temporary operating permit excused both the expired registration and the missing plate even though the officer had not called dispatch to check if the vehicle owner's registration and application for a license plate was in process. A radio check would have been futile in this case because, as the DMV clerk testified, the temporary permit had not been entered into the database. Also, the officer had to stop the car and read the fine print to verify the permit's validity and scope. Thus, the circumstances in this case were distinguishable from both *Brendlin* and *Nabong*. (*People v. Saunders, supra.*, at 1137.)

In January 2007, the Court of Appeal (Third Appellate District) published the first case on this issue, after *Brendlin* and *Saunders*. (See *People v. Hernandez* (January 11, 2007) 07 C.D.O.S. 445.) In *Hernandez*, the officer stopped the defendant's truck because it had no license plates. However, before the stop, the officer had seen a temporary operating permit properly placed in the truck's rear window. The officer knew that temporary operating permits are provided by the DMV pending issuance of license plates to show that all fees have been paid. Nevertheless, the officer pulled the truck over because, in his experience, "temporary operating permits are very often forged". (*People v. Hernandez, supra*.)

The Court of Appeal held that the traffic stop was illegal because the temporary permit, excusing the missing license plates, was lawfully placed, valid on its face and seen by the officer prior to pulling the car over. Relying on *Nabong*, supra., 115 Cal. App. 4th Supp. At 1-4, *Hernandez* held that the officer's personal experience that temporary permits are "very often" forged did not justify the stop in this case. Like the officer in *Nabong*, the officer in *Hernandez* had not testified to any facts regarding the particular permit on the defendant's car which led him to reasonably suspect that it was forged or invalid. If the stop of the defendant's car was justified, then an officer could "reasonably suspect" that any observed temporary operating permit was invalid. (See People v. Hernandez, supra..) Placing a temporary operating permit on one's car, to explain the excused absence of current registration tabs or license plates, would be a meaningless act, as one could be stopped at any time by an officer who doubted the validity of any permit.

Hernandez distinguished *Saunders* because Defendant Saunders was missing only one license plate and had expired registration tabs. Thus, it was impossible to tell, without stopping the car, whether the temporary permit excused the missing plate, the expired registration, or both possible violations. (*People v. Hernandez, supra*.)[6]

Although the rules in this area are far from clear, it appears that one can challenge the validity of a traffic stop when the officer observed both expired registration tags (or missing license plates) and a temporary operating permit in the following circumstances: 1)the officer called dispatch to verify the registration, or he could have easily checked with dispatch but unreasonably failed to do so; or 2)the officer testified that he presumes that all temporary operating permits are invalid, but gave no reason for suspecting invalidity in this particular case.

Sometimes an officer will stop a vehicle because it has expired registration tabs or missing license plates, and the officer does not see a valid temporary operating permit in the window. Alternatively, the officer sees the permit but cannot decipher the expiration date as he drives behind the vehicle. The officer stops the car but – as the officer approaches the stopped vehicle on foot – he sees that there is a valid temporary operating permit posted in the window. (See *United States v. McSwain* (10th Cir. 1994) 29 F.3d 558.) What can the officer do then? A discussion of *McSwain*, and other cases presenting this issue can be found below, in Section II E.

C. WHO MAY CHALLENGE THE INITIATION OF THE TRAFFIC STOP? ONLY DRIVERS, NOT PASSENGERS, AS PASSENGERSARE NOT USUALLY DETAINED WHEN AN OFFICER PULLS THE VEHICLE OVER (THE *BRENDLIN-SAUNDERS* RULE)

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search and seizure." (*Rakas v. Illinois* (1978) 439 U.S. 128, 131, fn. 1.) Consequently, in order to challenge the initiation of the traffic stop – i.e. by arguing that the officer had no legal right to pull the car over – the individual who seeks to suppress evidence must have been personally detained within the meaning of the Fourth Amendment.

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[6] But the court, in *Hernandez*, failed to address an additional concern raised in *Saunders* – whether one can tell that a temporary operating permit is valid without stopping the car and examining the permit to read the fine print. This concern could be met by requiring the officer to attempt a call to dispatch – to verify the validity of the permit – before stopping the car.

1. Drivers are detained at the inception of the traffic stop

It is well settled that the driver is detained when the vehicle is stopped by the police; she has submitted to the officer's show of authority and would not reasonably believe she was free to leave or otherwise terminate the encounter. (*People v. Brendlin* (2006) 38 Cal. 4th 1107, 1114, 1115-1116; *United States v. Whren, supra.*, 517 U.S. at 809-810.) Thus, the driver can challenge the police officer's right to initiate the traffic stop and everything that flows from that stop (e.g. consent to search). But what about the passenger? Is the passenger also detained when the police officer pulls the car over? After all, the passenger's freedom of movement is curtailed along with the driver's.

Although the United States Supreme Court has never expressly addressed this issue, a majority of courts, including several federal jurisdictions, have embraced a per se rule that the passenger is seized at the moment when the driver submits to the police officer's show of authority. (See *People v. Brendlin, supra*., 38 Cal. 4th at 1114-1115.) Until last year, the California Courts of Appeal were divided on the question. (*People v. Brendlin, supra*., 38 Cal. 4th at 1114-1115.)

2. The California Supreme Court decides passengers are not detained when the officer pulls the car over

In 2006, the California Supreme Court held that passengers are not automatically or necessarily detained at the initiation of the traffic stop: "[T]he passenger, whose progress is momentarily stopped as a practical matter, is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority." (*People v. Brendlin*, *supra.*, 38 Cal. 4th at 1111; see also *People v. Saunders, supra.*, 38 Cal. 4th at 1134.)[7] The Supreme Court reasoned that when the vehicle is stopped, the passenger is not subject to the same restraint as the driver. During the typical traffic stop, while the police officer approaches and questions the driver, the passenger is a "mere observer" who can do anything she wishes. She can ignore the police. She can leave the vehicle and walk away. Or she can wait until the investigation of the driver is completed. It is this element of purported choice that distinguishes the passenger's circumstances from the driver's. (*People v. Brendlin, supra.*, at 1117- 1119.)

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[7] On January 19, 2007, the United States Supreme Court granted the defendant's Petition for Certiorari in *Brendlin v. California*, on the issue of whether the police stop of a car results in the detention of the vehicle's passengers, allowing them to contested the legality of the original stop. (Docket No. 06-8120)

Consequently, unless the officer effecting the stop says or does something to the passenger – at the time he pulls the car over -- which reasonably makes her believe that she is the focus of the officer's investigation or show of authority, the passenger is not detained, and she cannot challenge the legality of the traffic stop. (See *People v. Brendlin, supra.*, 38 Cal. 4th at 1111, 1116, 1122; *People v. Saunders*, supra., 38 Cal. 4th at 1134.)

So what are the "additional circumstances", or police officer's actions, that would indicate to a reasonable passenger that she is the subject of the show of authority – i.e. that the officer is pulling the car over to investigate the passenger? The Court, in *Brendlin*, did not really answer this question. However, the Court implied that a passenger would be detained if the officer – upon pulling over the vehicle -- went directly to the passenger's side, blocked her exit, brandished a weapon, or made intimidating movements towards the passenger. (*People v. Brendlin, supra.*, 38 Cal. 4th at 1118.) Note that these circumstances are unlikely to occur in the typical case where the car is stopped because of the driver's Vehicle Code violation.

3. The passenger is detained during the traffic stop if ordered out of the vehicle

In *Saunders*, the Court suggested that even if a passenger is not seized at the outset of the traffic stop, she may be detained during the traffic stop if the officer orders the passenger to do something. And if the officer's authority to make this demand derives from the traffic stop itself, then the passenger can challenge the legality of the stop. (See *People v. Saunders, supra.*, 38 Cal. 4th at 1134.)

Specifically, in *Saunders*, the Court held that a passenger is "unquestionably seized" when the officer orders the passenger out of the vehicle. The United States Supreme Court, in *Maryland v. Wilson* (1997) 519 U.S. 408, 410, authorized a police officer to order a passenger to exit the vehicle as a matter of course during a lawful traffic stop for officer safety reasons. Therefore, when a passenger was ordered out of a car, and consequently detained, the prosecution must demonstrate that the underlying traffic stop was lawful – i.e. justified by reasonable suspicion of a Vehicle Code violation. If the passenger was told to get out of the vehicle during the traffic stop, she can challenge the initiation of the stop and move to suppress any evidence seized during the illicit stop.

Can a passenger also challenge the legality of the traffic stop if the police officer orders her to stay in the vehicle during the stop? There is certainly a strong argument, after *Saunders*, that the officer detains the passenger when she orders him to stay in the car. In *People v. Castellon* (1999) 76 Cal. App. 4th 1369, the defendant was the passenger in a car stopped for expired registration. As the police officer approached the vehicle, he saw the defendant-passenger start to get out of the car. The officer ordered the defendant to get

back into the car, and then ordered him to stop when he started to walk away; the defendant complied. The Court of Appeal held that the defendant was detained when the officer ordered him to remain in the car and the defendant stopped in response to this demand. Relying on the rule of *Maryland v. Wilson* (during a traffic stop, the officer can order the passenger to exit from the vehicle for officer safety), *Castellon* held that the officer can similarly order the passenger to remain in the car: "[W]hether the passenger is ordered to stay in the car or get out of the vehicle is a distinction without a difference." (*People v. Castellon, supra.*, at 1374-1375.) The officer does not need to reasonably suspect the passenger of criminal activity. His authority to order the passenger to stay in the car derives from the lawful traffic stop.

What if, during the traffic stop, the officer asks the passenger to provide identification, or inquires whether the passenger is on parole? Would the passenger then be detained? In *Brendlin*, the Court declined to decide this question. (*People v. Brendlin, supra.*, at 1123.) At least one unpublished First District case has held that a mere request for the passenger's identification and parole status does not constitute a detention. "[I]nterrogation relating to one's identity or a request for identification by the police does not constitute a Fourth Amendment seizure." (*People v. Lopez* (1989) 212 Cal. App. 3d 289, 291, quoting *INS v. Delgado* (1984) 466 U.S. 210, 216.) However, if the officer kept the passenger's driver's license to run a warrant check, one might have a viable argument that the passenger was detained. (See *Florida v. Royer, supra.*, 460 U.S. at 501-503; *People v. Castenada* (1995) 35 Cal. 4th 1222, 1227.)

II. THE SCOPE AND DURATION OF THE TRAFFIC STOP

Assume that the law enforcement officer has lawfully pulled the car over and detained the driver to investigate the observed or suspected Vehicle Code violation. What can the officer ask and do during the traffic stop? And how long can the officer take to perform these permissible functions?

As explained below -- under the modern rule -- the officer can ask and do almost anything, as long as she doesn't take too long. (See .e.g. *People v. Brown* (1998) 62 Cal. App. 4th 493.) Specifically, the officer can ask for consent to search during the legitimate traffic stop. (*People v. Brown, supra.*, at 498-499; *People v. Gallardo* (1005) 130 Cal. App. 4th 234, 238-239.) However she cannot search the car, as a matter of course, without consent or other independent justification. (*Knowles v. Iowa* (1998) 525 U.S. 113.)

Why challenge the scope or duration of the traffic stop? As with challenges to the initiation of the stop, one would argue that the officer exceeded the lawful scope or duration in order to challenge a search or seizure that occurred during the traffic stop.

A. THE BASIC LAW GOVERNING THE OFFICER'S CONDUCT DURING THE TRAFFIC STOP

The stop of a vehicle by the police and the consequent detention of the driver constitutes a Fourth Amendment seizure. (*Whren v. United States*, *supra.*, 517 U.S. at 809-810.) Like all detentions, a traffic stop is a brief and limited seizure that must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place". (*Terry v. Ohio* (1968) 392 U.S. 1, 20; *Berkemer v. McCarty* (1984) 468 U.S. 420, 439; *People v. Bell, supra.,* 43 Cal.App.4th at 760-61; *United States v. Wood* (10th Cir. 1997) 106 F.3d 942, 945; *People v. Gallardo, supra.,*130 Cal. App. 4th at 238.) A traffic stop is justified at its inception when the police observe or reasonably suspect a Vehicle Code violation. The scope of the ensuing detention is limited by this justification.

Consequently, after initiating a traffic stop, the police officer can briefly detain the driver while she investigates the Vehicle Code violation and expeditiously performs the duties incident to the citation process. (*People v. McGaughran* (1979) 25 Cal.3d 577, 584; *People v. Miranda* (1993) 17 Cal.App.4th 917, 926-27; *United States v. Bloomfield* (8th Cir. 1994) 40 F.3d 910, 915.) These traditional duties include: 1)examining the motorist's driver's license, vehicle registration and proof of insurance; 2)discussing the violation with the motorist and listening to any explanation; 3)running any necessary computer checks (e.g. warrant and license checks); 4)inquiring about the motorist's travel plans; and

5)writing out a citation or issuing a warning. (See *People v. McGaughran, supra.*, at 584, 586; *People v. Miranda, supra*., at 927; *United States v. Bloomfield, supra*., at 915.) The officer can detain the driver at the scene for the period of time necessary to discharge these duties. (*People v. McGaughran, supra.*, at 584.)

During a routine traffic stop, the police may order the driver and passengers to exit the vehicle. (*Pennsylvania v. Mimms* (1977) 436 U.S. 106, 110-111 [driver]; *Maryland v. Wilson* (1997) 519 U.S. 408, 415 [passengers]) But after ordering a driver or passenger out of the vehicle, the police officer cannot pat-search him for weapons as a matter of routine; additional circumstances must support a reasonable suspicion that the individual is armed. (See *United States v. Brown* (7th Cir. 1999) 188 F.3d 860, 864; *People v. Medina* (2003) 110 Cal. App. 4th 171, 176-177; *Pennsylvania v. Mimms, supra.*, at 110, n. 5)

Although both actions are justified by concerns for officer safety, a weapons frisk is an additional intrusion that does not automatically follow a legal detention or lawful request to exit the vehicle during a traffic stop. (See *Pennsylvania v. Mimms, supra*., at 111 [unlike a *Terry* frisk, removing the driver from the car is a de minimus intrusion]; *Sibron v. New York* (1968) 392 U.S. 40, 64 [A lawful weapons frisk doesn't always flow from a justified detention].) The purpose of ordering the occupants out of a car, during a traffic stop, is to protect officer safety. Once outside, they are denied access to any weapons that might be concealed in the vehicle. (*Maryland v. Wilson, supra*., at 414.) If the occupants are out of the car, the officer can look for bulges, concealing clothing, or furtive gestures that reasonably suggest weapons possession. (*Pennsylvania v. Mimms*, *supra*., at 110-112 [holding that officer was justified in pat-searching the driver as he noticed a large bulge, resembling a weapon, in the driver's jacket after removing him from the car].) Unless observations made by the officer -- before or after he removes the occupant from the vehicle -- reasonably suggest that the particular occupant is armed, a pat-search for weapons is not justified. (See *United States v. Brown, supra*., at 864-865.)

B. LIMITS ON THE SCOPE OF THE TRAFFIC STOP

Years ago, there used to be arguable limitations on the "scope" of the lawful traffic detention. We were able to assert that during a traffic stop, the officer could not ask questions about matters unrelated to the Vehicle Code violation (e.g. "Are you carrying drugs?"). And the officer could not ask for consent to search during the traffic stop. (See, e.g. *People v. Lingo* (1970) 3 Cal. 3d 661; *People v. Grace* (1973) 32 Cal. App. 3d 447, *People v. Lusardi* (1991) 228 Cal. App. 3d Supp 1.) However, this "beyond the scope of the traffic stop" argument has gone the same way as the pretext search doctrine. There are now virtually no limits on what the officer can ask and do during the traffic stop. The only thing the officer can't do is search the vehicle without consent or independent justification.

(See *Knowles v. Iowa*, *supra*., 525 U.S. at 113 [discussed in section IIIA].)

The modern rule, expressed in *People v. Brown, supra.*, 62 Cal. App. 3d at 493, *People v. Gallardo*, *supra.*, 130 Cal. App. 4th at 238, *People v. Bell, supra.*, 43 Cal. App. 4th 754, and *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431 is as follows: During the traffic detention, the officer can do anything (e.g. run a warrant check) and ask about any topic (e.g. drugs, probation status) so long as her conduct and questions "do not prolong the stop beyond the time it would otherwise take". (*People v. Brown, supra.*, at 498.)

Questioning during the routine traffic stop on subjects unrelated to the Vehicle Code violation does not violate the Fourth Amendment. While the driver is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. (*People v. Brown, supra.*, at 499.) Specifically, the officer can ask for consent to search during the traffic stop even if he lack a reasonable suspicion that the driver is engaged in wrongdoing or has contraband in his vehicle. (*People v. Gallardo, supra.*, 130 Cal. App. 4th at 238-239.)

Consequently, when the officer asked the driver if he has drugs in the car or asked for permission to search, one can no longer argue that those questions were improper or that the officer exceeded the scope of a lawful traffic stop. If, in response to those questions, the driver admitted that he had drugs in the car, or consented to the search, one cannot argue that the subsequent search was illegal.

C. LIMITS ON HOW LONG THE TRAFFIC STOP CAN TAKE

In *Brown* and *Gallardo*, the court held that the officer can ask or do anything during the traffic stop so long as these "investigative activities beyond the original purpose of the stop... do not prolong the stop beyond the time it would otherwise take". (*People v. Brown, supra.*, 62 Cal. App. 4th at 498; *People v. Gallardo, supra.*, 130 Cal. App. 4th at 238.) These modern cases imply the continuing viability of a "prolonged traffic stop" argument – i.e. that an initially legitimate traffic stop can become illegal if the officer takes longer than reasonably necessary to perform the duties flowing from the violation and lacks reasonable cause for doing so. (See *People v. McGaughran*, supra., 25 Cal. 3d at 584-587; *Williams v. Superior Court* (1985) 168 Cal. App. 3d 349) The United States Supreme Court recently confirmed the continuing validity of the prolonged traffic stop doctrine: "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that

mission". (*Illinois v. Caballes* (2005) 543 U.S. 405, 407.)[8]

If additional unrelated questioning, a warrant check, or a wait for back-up officers or a drug-detection dog prolongs the stop beyond the time it should reasonably take, you might have an argument that the traffic stop was unduly prolonged. In those circumstances, you could argue that the officer needed reasonable suspicion of criminal activity (aside from the Vehicle Code violation) to prolong the driver's detention. (See *People v. McGaughran, supra.*, 25 Cal. 3d at 587-588.) If the traffic stop was prolonged for a considerable amount of time (e.g. more than one hour), you might be able to argue that the unreasonably long detention amounted to a de facto arrest for which the officer needed probable cause. (See *People v. Gomez* (2004) 117 Cal. App. 4th 531, 538.) If the officer lacked reasonable suspicion or probable cause for the prolonged stop, you could challenge a search that occurs during the illegally extended detention.[9]

Experience and a review of the case law shows that there are substantial obstacles to success with a prolonged detention argument. First, it's very difficult to prove that the traffic stop was unduly prolonged. How long is too long? The courts have refused to set a time limit (e.g. ten minutes, fifteen minutes). Instead, each case must be decided on its own facts. (See *Williams v. Superior Court, supra.*, 168 Cal. App. 3d at 358.) A prolonged traffic stop argument will not be viable unless the driver's detention lasted longer than 20-

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[8] In this case, discussed below in section IIIE, the Supreme Court held that a dog sniff conducted during a lawful traffic stop is not a Fourth Amendment search requiring independent reasonable suspicion or probable cause. The Court accepted the Illinois Supreme Court's finding that the dog sniff did not unduly prolong the duration of the stop. (*Illinois v. Caballes, supra.*, at 837.)

[9] One would make a "prolonged traffic stop" argument when the officer extends the driver's detention while still ostensibly investigating the Vehicle Code violation, prior to issuing a citation or warning . (See *People v. McGaughran* (1979) 25 Cal. 3d 577, 585-586.) In contrast, when the officer requires the driver to stay on the scene after he issues the citation or warning or otherwise terminates the traffic stop, one would argue that the driver's detention was "improperly continued", without reasonable suspicion. (See, e.g. United States v. Salzano (10th Cir. 1998 158 F. 3d 1107.) This is an important distinction that often gets muddled. In an unduly prolonged traffic stop argument, one argues that the investigation of the code violation and the driver's detention went on too long. In arguing that the driver's detention was improperly continued after the traffic stop, there is no time element. Although there are obstacles to the viability of both arguments, the argument that the driver's detention was improperly continued after the traffic stop is somewhat easier to make.

30 minutes, or there were unusual circumstances.

Second, it's usually not that difficult for the government to establish that the officer had reasonable suspicion or probable cause of criminal activity, to justify the prolonged detention. (See, e.g. *People v. Russell* (2000) 81 Cal. App. 4th 96.) Finally, the recent case of *People v. Gomez* suggests a further obstacle that could preclude a prolonged traffic stop argument in most cases.

People v. Gomez demonstrates the effect of recent Supreme Court rulings on a defendant's ability to challenge a traffic stop and a subsequent car search. In that case, police officers gathered evidence suggesting that drugs were being transported from a particular residence. For some undisclosed reason, the investigating officers did not seek a search warrant for the residence. Instead, they radioed patrol officers and asked them to conduct traffic stops of vehicles departing from the suspected "drug dealing" house. The defendant, Mr. Gomez drove away from the residence in one of those cars – a brown Suburban. Patrol Officer Floren received a radio request to stop the brown Suburban for any observable traffic violation and obtain the driver's permission to search the car. (*People v. Gomez, supra., 117 Cal. App.* 4th at 535-536.) Officer Floren pulled the brown Suburban over because Defendant Gomez was not wearing a seatbelt.[10] During the ensuing traffic stop, the officer saw two large sealed boxes in the car, partially covered by a tarp. He suspected these boxes contained illegal narcotics. After Gomez refused to consent to a search of the car, the officer requested a drug detection dog. It took 60 to 90 minutes from the time of the initial stop until the dog arrived on the scene. The dog alerted to the smell of narcotics in the vehicle by biting and scratching the rear bumper. Officer Floren searched the car, opened one of the aforementioned boxes and found tightly wrapped bricks of cocaine. Officer Floren testified that only 15 minutes would have been needed to prepare a citation for the seatbelt violation. (*People v. Gomez, supra.*, at 536.) However, Floren never issued a citation for the seatbelt offense. (*Id.* at 539.)

Gomez moved to suppress the cocaine. He argued that the 60-90 minute traffic detention was unreasonably prolonged and constituted a de facto arrest, unsupported by probable cause. The court agreed that the detention was unduly prolonged, but concluded that probable cause existed to support the de facto arrest. First, by the time Officer Floren asked for the drug detection dog, the officers had probable cause to believe that Gomez was engaged in drug trafficking. This holding is supportable and case-specific, but it is the court's second holding that causes concern. (*People v. Gomez, supra.*, at 538.)

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[10] This, of course, was a classic pretext stop. However, after *Whren v. United States*, 517 U.S. at 806, that argument is no longer viable.

Second, the court noted that Officer Floren had probable cause to arrest Gomez for not wearing a seatbelt, and that a custodial arrest for this minor offense would not violate the Fourth Amendment -- even though California law does not authorize an arrest for such a minor violation. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354; *People v. McKay* (2002) 27 Cal. 4th 601, 607, 610.) Because Officer Floren had probable cause to arrest Gomez for the seatbelt violation, the prolonged detention/de facto arrest was lawful. (*People v. Gomez, supra.*, 117 Cal. App. 4th at 538-540.) Presumably, under the reasoning of *Gomez*, any time an officer stops a car with probable cause to believe the driver has committed a Vehicle Code violation, the officer could arrest the driver rather than issuing a citation. This could allow a prolonged detention/de facto arrest in virtually every case, but one could argue that the officer must choose to make a custodial arrest, rather than citing the driver, for a minor violation. (See *Knowles v. Iowa* (1998) 525 U.S. 113.)

D. THE TRAFFIC STOP ENDS WHEN THE OFFICER ISSUES A CITATION OR WARNING

Generally, the traffic stop is completed when the officer issues a citation or a verbal warning for the observed Vehicle Code violation and then returns the driver's paperwork. (See *People v. McGaughran, supra.*, 25 Cal. 3d at 585-86; *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 724; *United States v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1134.) After the traffic stop is completed, the driver and any passengers must be "released forthwith". (*People v. McGaughran, supra.*, 25 Cal. 3d at 586.) "The justification for the original [traffic] detention no longer supports its continuation". (*United States v. Shabazz, supra.,* 993 F.2d at 436.) Absent independent justification, no further detention is permissible. (*People v. McGaughran, supra.*, at 586; *United States v. Salzano* (10th Cir. 1998) 158 F.3d 1107, 1111.) The police officer may continue the driver's detention and undertake a general crime investigation only if he reasonably suspects that the driver is involved in criminal activity additional to the Vehicle Code violation. (*People v. McGaughran, supra.*, at 588, 591; *United States v. Mesa* (6th Cir. 1995) 62 F.3d 159, 162.) "The government bears the burden of proving the reasonableness of the officers' suspicion". (*United States v. Salzano*, *supra.*, 158 F.3d at 1111.)

E. WHEN THE OFFICER DISCOVERS THAT THERE IS IN FACT NO VEHICLE CODE VIOLATION, THE OFFICER CANNOT CONTINUE THE TRAFFIC STOP

Let's assume that an officer pulls over a car because she has observed a condition that she reasonably believes violates the Vehicle Code. The initiation of the traffic stop is legal. But as the officer approaches the car, she realizes that no violation has in fact been committed. The legitimate basis for the traffic stop terminates at that moment of realization.

The driver should be given a brief explanation and sent on her way. (See *United States v. McSwain* (10th Cir. 1994) 29 F.3d 558, 561-62; *United States v. Edgerton* (2006) 438 F.3d 1043, 1051; *People v. Grace* (1973) 32 Cal. App. 3d 44, 450-452.)

In *McSwain*, the highway patrol officer stopped the defendant's car because it had no license plates, and the officer could not read the expiration date on the temporary registration sticker posted in the car's rear window; the date appeared to be covered with reflective tape. As the officer approached the stopped vehicle on foot, he saw that there was no reflective tape. He was able to read the expiration date on the temporary registration sticker and could discern that the sticker was valid. Nevertheless, the officer contacted the defendant-driver. He mentioned the sticker, but then requested defendant's driver's license and registration. He discovered the defendant had no license and a prior record, and eventually obtained the defendant's consent to search the car, ultimately discovering drugs in the trunk. (*United States v. McSwain, supra.*, 29 F.3d at 559-560.)

The defendant conceded that the initial traffic stop was justified, but contended that the officer had no right to continue his detention after the officer saw that the sticker had not expired. The Tenth Circuit agreed. As soon as the officer approached the car and observed that the temporary sticker was valid, he had no reasonable basis for continuing the stop and the driver's detention. The reasonable suspicion that justified the initial stop was "completely dispelled" before the officer questioned appellant and asked for his license and registration. As a "matter of courtesy", the officer should have briefly explained the reasons for the stop and then allowed the defendant driver to continue on his way, without asking for his driver's license and registration. (*United States v. McSwain, supra.*, at 560-562.)[11]

Just last year, the Tenth Circuit confirmed its ruling in *McSwain*. (*United States v. Edgerton*, *supra.*, 438 F.3d at 1051.) The Supreme Court of Colorado, and other state courts have also adopted this rule. (*People v. Redinger* (1995) 906 P.2d 81, 85 [listing cases from other courts recognizing "that once the purpose of an initially valid investigatory stop has been satisfied, any further detention or questioning of the driver of a vehicle constitutes unreasonable and therefore unlawful detention"].)[12]

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[11] Because the detention was unlawful, the defendant's consent was invalid, and the drugs discovered during the search of the trunk should have been suppressed. (*United States v. McSwain, supra.*, 29 F.3d at 560-564.)

[12] In one unpublished case, the First District declined to strictly follow the rule of *McSwain*. The officer pulled over the car for expired registration tabs. As the officer approached the car, he saw a valid temporary operating permit properly placed in the car's rear window. The officer then contacted the driver, asked for a driver's license, and

The Second Circuit also approved the *McSwain* rule, but nevertheless upheld the continuing detention of vehicle occupants after the officers smelled marijuana. (*United States v. Jenkins* (2d Cir. 2006) 452 F.3d 207.) New York City Police Officers pulled over the vehicle because they believed it did not have any license plates. As the officers exited from the patrol car and approached the stopped vehicle, they could see that it did have a valid temporary Delaware plate affixed to the rear. Delaware law only requires a rear plate, so at this point, the officers realized that there was no violation. Nevertheless, the officers approached the vehicle to speak with the driver. As soon as they got to the car, two officers smelled the distinctive odor of marijuana. The officers conducted a drug investigation and discovered firearms in the vehicle. (*United States v. Jenkins, supra*., at 208-210.)

Applying the rule of *McSwain*, the court held that the officers had the right to initiate the traffic stop, but the legitimate basis for a traffic detention ended when they saw the valid temporary plate. The officers who had stopped the vehicle based on a "reasonable factual mistake" had the right to approach the car and apprise the occupants of the situation. They did not have to wave the vehicle on and get back in their patrol car. As soon as the officers approached the car, they smelled marijuana, giving them an independent basis for detaining the vehicle's occupants. (*United States v. Jenkins, supra*., at 212-214.)

Look for cases where the officer discovers the absence of a Vehicle Code violation as he exits the patrol car and approaches the stopped vehicle. In addition to cases involving temporary operating permits and missing license plates, this might happen in a case where the officer pulled the car over for an object dangling from the rear view mirror. As the officer approached the car, he recognized, or should have recognized, that the object didn't obstruct the driver's view through the windshield, as required to violate the Vehicle Code.

In other cases, the officer might discover that there is no Vehicle Code violation after he has started questioning the driver. For example, the officer stopped the car for a possible registration violation (i.e. no current sticker on the license plate), and then discovered – after asking the driver for license and registration – that the vehicle was a rental car. The person who drives a rental car is not responsible for the registration. (See Veh. Code, § 40001(b) and(e)) Consequently, as soon as the officer saw the rental agreement, he should have returned that agreement and the driver's license to the driver and

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also asked the driver if he was on probation or parole. After learning the driver was on parole, the officer conducted a parole search. The court found that it was permissible for the officer to briefly converse with the driver, and to ask about parole status, even after the officer realized that there was no Vehicle Code violation. The court relied on the principle that mere questioning does not violate the Fourth Amendment.

sent him on his way. The legitimate basis for the traffic detention had ceased.
In these cases, where the officer realized there was no Vehicle Code violation for which the driver could be cited, and yet continued with the traffic detention (asking for documents, running a warrant check, requesting consent to search), one can viably argue that the consent was given in the course of an unlawful detention.

III. SEARCHING THE VEHICLE DURING OR AFTER THE TRAFFIC STOP

Once the officer has stopped a vehicle and detained the driver, there are many ways to justify a search of the vehicle. The officer can obtain consent. She can arrest the driver or passenger and search the vehicle incident to that arrest. The officer can search the car for the driver's license or vehicle registration. She can acquire probable cause to search the car for contraband, sometimes by having a drug-detection dog sniff the exterior of the vehicle. The officer can learn that an occupant of the vehicle is on parole or probation with a search clause.[13] One can seek to suppress evidence by challenging the proffered justification for the search, or by arguing that it was obtained during an illegal detention.

A. NO RIGHT TO SEARCH INCIDENT TO A TRAFFIC STOP AND THE ISSUANCE OF A CITATION (THE RULE OF *KNOWLES V. IOWA*)

In a unanimous opinion, authored by Chief Justice Rehnquist, the Supreme Court, in *Knowles v. Iowa* (1998) 525 U.S. 113, invalidated an Iowa statute that had permitted police officers in that state to conduct a full search of the vehicle after issuing a traffic citation. The statute had given the police the discretion to either make a custodial arrest or to issue a citation when they stopped a driver for certain Vehicle Code violations, specifically including speeding. Then, regardless of whether the officer issued a citation or made a custodial arrest, she had the right to conduct a full vehicle search. The officer could issue the citation and then search the car; she needed no additional justification for doing so. (*Knowles v. Iowa, supra*., at 114-115.)

The Court held that this Iowa statue, which allowed a "search incident to citation" following a traffic stop, violated the Fourth Amendment. When the officer doesn't actually make a custodial arrest, the policies that permit a search of the car's passenger compartment do not come into play. The two policies permitting a search incident to custodial arrest are: 1)the need to disarm the suspect to take him into custody; and 2)the need to preserve evidence that could be lost or destroyed. (*Knowles, supra.*, at 116-117.)

When the officer merely issues a citation, rather than arresting the driver, the concern for officer safety diminishes. There is no need to make sure that the driver does not have possession of or access to a weapon before taking him into custody. Also, the officer has other means available to deal with any reasonable belief that the driver might be

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[13] There are other types of car searches which are not covered in these materials, including inventory searches and border/checkpoint searches.

armed or dangerous: 1)The officer can order the driver and any passengers out of the car during a traffic stop. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106; *Maryland v. Wilson* (1997) 519 U.S. 408.) 2)If the officer reasonably believes the driver is armed, he can conduct a pat-search. (*Terry v. Ohio* (1968) 392 U.S. 1.) 3)If the officer reasonably believes that there is a weapon in the car, he can search the passenger compartment. (*Michigan v. Long* (1983) 463 U.S. 1032.) (See *Knowles v. Iowa, supra.*, at 117-118.)

When the officer merely issues a citation for an observed Vehicle Code violation, like speeding, there is no risk that evidence may be lost or destroyed. If the officer reasonably believes the driver has hidden or destroyed evidence of his true identity, she can arrest the driver on that basis. (*Knowles v. Iowa, supra.*, at 118.)

The Court held, in *Knowles*, that the officer cannot search the car as a matter of course when she stops the driver for a Vehicle Code violation, issues a citation, and does not make a custodial arrest. *Knowles* was a rare defense victory in a sea of decisions making it easier for police officers to stop and search a vehicle. However, the ruling has had little practical impact in California.

Unlike Iowa, our state does not have a statute permitting a full search of a vehicle incident to the issuance of a traffic citation. However, in our state, there are many other ways for an officer to search a lawfully stopped car. An officer can search the vehicle if the driver fails to produce vehicle registration, a driver's license or other written identification during a traffic stop. (*In re Arturo D.* (2002) 27 Cal. 4th 60.) Also, if a person cited for a Vehicle Code violation fails to present the officer with a driver's license or other written identification, the officer can make a custodial arrest and search a vehicle's passenger compartment incident to that arrest. (*People v. McKay* (2002) 27 Cal. 4th 601.) Moreover, the Supreme Court's ruling in *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, made it easier for officers to arrest drivers for even minor traffic violations, by holding that these seizures did not violate the Fourth Amendment. *McKay* suggests that a California driver can be arrested and taken into custody for a Vehicle Code violation, even though our state laws do not authorize this procedure. If the officer actually arrests a driver for a Vehicle Code violation, he can search the passenger compartment pursuant to that arrest. Finally, as discussed below, it is not that difficult for an officer to obtain consent or probable cause to search, even during a routine traffic stop.

B. CONSENT SEARCHES

In most traffic stop cases, the officer obtains the driver's consent to search the vehicle. Here is the typical scenario: The officer stops the car for a Vehicle Code violation. During the ensuing traffic detention, or right after issuing a citation or warning, the officer asks the driver if he has any drugs or weapons in the car. The driver says, "No". Then, the officer asks if he can search the vehicle: "Do you mind if I take a look in the car?" The driver replies, "Go right ahead". The officer searches the vehicle and finds drugs. When a person consents to the search of her car, the officer can search the entire vehicle, including the trunk and any containers that could reasonably obtain the object of the search – unless the person consenting expressly limits the scope of the search. (See *Florida v. Jimeno* (1991) 500 U.S. 248; *People v. Crenshaw* (1992) 9 Cal. App. 4th 1403.)[14]

1. Is there any way to challenge the driver's consent?

Is there any way to viably challenge the driver's consent to search the vehicle? An argument that the driver did not in fact consent (e.g. that the police officer is lying) may be raised in the trial court, but it is rarely viable on appeal.

What about arguing that the driver's consent was involuntary – mere submission to the officer's show of force or authority? (See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248; *Bumper v. North Carolina* (1969) 391 U.S. 543, 549.) This argument very rarely succeeds unless the circumstances of the traffic stop were extraordinarily coercive – i.e. the officer brandished his weapon while asking for consent or falsely claimed that he had the right to search the car regardless of whether the driver gave her permission. (See, e.g. *United States v. Chan-Jiminez* (9th Cir. 1997) 125 F.3d 1324, 1325-1328 [holding that the driver's consent to search his truck was involuntary when the officer kept his hand on his revolver while he talked to the defendant during a traffic detention].) Although an involuntary consent argument may be raised in the trial court, it is very difficult to prevail on appeal, in part because the trial court's finding of voluntary consent is deemed a finding of fact. It will be upheld if supported by substantial evidence. (*Schneckloth v. Bustamonte*, *supra.*, at 248-249; *People v. James* (1977) 19 Cal. 3d 104, 106-107.)

Thus, if you want to challenge the driver's consent to search the vehicle, you

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[14] Nevertheless, one might have a "scope of consent" issue if: the officers only ask for consent to search the interior of the car, but search the trunk; the officers tear open or remove hidden compartments in the car; or the officers search containers clearly belonging to a third party (e.g. a passenger) who did not give consent.

probably need to argue that the consent was obtained in the course of an illicit detention and is thus invalid. (See *Florida v. Royer* (1983) 460 U.S. 491, 507-08; *People v. Gallant* (1990) 225 Cal. App. 3d 200, 211; *People v. Lawler* (1973) 9 Cal.3d 156, 163-64.; *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 727-728.)

The viability of this argument may depend on when the officer asked for consent. If he asked during the traffic stop and ensuing detention of the driver – before issuing a citation or warning – the argument is very difficult. If the officer asked for consent after the traffic stop, the argument is still difficult, but a bit more promising.

2. Challenging consent obtained during the traffic stop

As noted above, there are no longer any limits on what an officer can ask during the traffic stop, while he detains the driver and investigates the Vehicle Code violation. Specifically, the officer can ask for consent to search during the legitimate traffic stop. (*People v. Brown, supra.*, 62 Cal. App. 4th at 498-499; *People v. Gallardo, supra.*, 130 Cal. App. 4th at 238-239.) So if the driver wants to challenge consent given during the stop, you need to argue that the traffic stop and the ensuing detention was illegitimate – that the officer lacked reasonable suspicion that the driver had committed a Vehicle Code violation as necessary to pull over the car. (See section I., above.)

You could also try and argue that consent was obtained during an unlawfully prolonged traffic detention – i.e. that the officer took too long to perform the investigation of the Vehicle Code violation. You would need to establish that the prolonged period of detention was unlawful, unsupported by reasonable suspicion or probable cause. (See *People v. McGaughran, supra.*, 25 Cal. 3d at 587-88.) However, as discussed above (see Part II C), this argument has become nearly impossible. (See *People v. Russell, supra.*, 81 Cal. App. 4th at 96; *People v. Gomez, supra.*, 117 Cal. App. 4th at 536-540.)

3. Challenging consent obtained after the traffic stop

The traffic stop usually ends when the officer issues a citation or verbal warning for the Vehicle Code violation and returns the driver's paperwork. At this point, the officer is supposed to send the driver on his way. (See *People v. McGaughran, supra.*, 25 Cal. 3d at 585-86; *United States v. Beck, supra.,* 140 F.3d at 1134-1135.) What if the officer hands back the driver's paperwork, and then asks a couple of questions: "Do you have any drugs or weapons in the car?" "Do you mind if I take a look?"

If the officer asked for consent after issuing the citation or warning, you can argue that the driver's consent was invalid. You need to make two arguments that have proven to be more challenging than one might suppose: 1)that the driver was still detained when the officer requested consent; and 2)that the officer lacked reasonable suspicion for this renewed or continued detention.

a. Driver still detained when questioned following traffic stop

If you challenge consent obtained after the traffic stop, the prosecution is likely to assert that the driver was no longer detained: His detention ended at the moment when the officer returned his paperwork and issued the citation; thereafter, he was merely subject to a consensual encounter and legally free to go if he chose to do so. If the driver elected to stay, to answer the officer's questions and to consent to the search of his vehicle, that consent was voluntary and valid.

The authority for this argument – that a traffic detention may transform into a consensual encounter at the moment when the officer issues a citation – is found in one published case, *People v. Gallindo* (1991) 229 Cal. App. 3d 1529. Defendant Gallindo was the registered owner of a car stopped for speeding. However, at the time of the stop, he was sitting in the passenger seat and Co-defendant Mendoza was driving. After pulling the car over, the CHP officer approached Mendoza and asked for a driver's license and registration. Mendoza handed the officer his license, and then spoke to Gallindo in Spanish. Gallindo gave the vehicle registration to the officer. After issuing Mendoza a citation for speeding, the officer asked him if there were any guns or drugs in the car. Mendoza responded, "No." The officer then asked for permission to search the car, and Mendoza said, "Sure, go ahead". The officer then had Mendoza and Gallindo, the registered owner, sign written consent forms before searching the car and finding drugs. (*People v. Gallindo, supra*., at 1534-1535.)

Co-defendants Mendoza and Gallindo conceded that they were legally detained until the officer issued the citation for speeding. They argued, however, that they were illicitly detained, without reasonable suspicion, when the officer obtained consent to search – after the completion of the traffic stop. The court rejected this argument, finding that the vehicle occupants were not seized, within the meaning of the Fourth Amendment, when the officer asked for consent. The Constitution does not prevent an officer from asking questions, after issuing the citation. "As long as the person to whom questions are put remains free to disregard the questions and walk away", there is no detention. The court believed that a reasonable person in the defendants' position would have felt free to ignore the officer's questions and proceed on their way. The court emphasized the circumstances of this case – the officer didn't display a weapon or raise his voice, and by proffering the written forms,

he made it clear that consent could be refused. (*People v. Gallindo, supra.*, at 1535-1536.)

There have been no published cases adopting the *Gallindo* reasoning, although unpublished decisions have found that individuals are not detained following a traffic stop when the officer does not threaten them, force them to answer questions, or prevent them from leaving the scene.

Once can challenge the reasoning of *Gallindo*, and argue that no reasonable person would feel free to refuse to answer the officer's questions or drive away moments after being issued a citation or warning for a Vehicle Code violation. A reasonable person would feel that she is still compelled to comply with the officer's requests.

However, the best strategy is to additionally argue that in the particular case, your client (usually the driver) did not reasonably feel free to disregard the police and proceed on his way. (*United States v. Mendenhall* (1980) 446 U.S. 544, 553-555; *Michigan v. Chesternut* (1988) 486 U.S. 567, 576; *Florida v. Bostick* (1991) 501 U.S. 429, 437; *In re Manuel G.* (1997) 16 Cal. 4th 805, 821.) Emphasize the totality of circumstances, including: the setting of the encounter; whether the questioning and request for consent followed immediately after the issuance of the citation or warning; the officers' positioning at the time of the request for consent; and whether the officer told the driver that he was free to leave or to refuse consent prior to requesting permission to search. Although the later advisement is not required, it can be a factor in determining whether the individual was detained. (See *Ohio v. Robinette* (1996) 519 U.S. 33; *United States v. Beck, supra., 140 F.3d at 1135-1136*; *People v. Spicer* (1984) 157 Cal. App. 3d 213, 219-220; *People v. Profit* (1986) 183 Cal. App. 3d 849, 856-866, 877-878.)[15]

The prosecution will likely claim that the Supreme Court's decision in *Ohio v. Robinette*, *supra.*, 519 U.S. at 33, supports the argument that a motorist is no longer detained after the officer issues a warning or citation for the Vehicle Code violation. However, this is a misinterpretation of the very narrow ruling of that case. In *Robinette*, the defendant was stopped for speeding. After returning the defendant's license and issuing a verbal warning, the officer said, "One more question before you get gone.". He then asked if the defendant was carrying any illegal contraband, drugs or weapons, in his car. The defendant answered "No", and the officer asked for consent to search the car. The

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[15] Remember that in *Gallindo*, both co-defendants were asked to sign written consent forms which made it clear that consent could be refused. Also both defendants examined the form carefully before signing it. (*People v. Gallindo, supra.*, 229 Cal. App. 3d at 1535-1536.) Most cases can be distinguished on this fact alone.

defendant consented, and drugs were found in the car. The Ohio Supreme Court held that the search resulted from an unlawful detention and interrogation. The Ohio court adopted a "bright- line prerequisite" for consensual interrogation following a lawful traffic stop. After completing the duties of the traffic stop, the officer was required to inform the driver "you are legally free to go" before attempting "consensual interrogation" or requesting permission to search. (*Ohio v. Robinette, supra.*, at 35-36.)

In a very brief opinion, the United States Supreme Court held that the Ohio court's bright line rule -- requiring this advisement prior to questioning -- is not mandated by the federal constitution. (*Ohio v. Robinette*, *supra.*, at 39-40.) The Court noted that it has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." (*Id.*, at 39.) The Court reiterated that it had previously rejected a rule requiring an officer to inform an individual of his right to refuse consent before such consent could be considered valid. (*Ohio v. Robinette, supra.*, at 39, citing *Schneckloth v. Bustamonte, supra.,* 412 U.S. at 227.) The court opined that "it would be unrealistic to require police officers to always inform detainees that they are free to go before a [subsequent] consent to search may be deemed voluntary". (*Ohio v. Robinette, supra.*, at 39-40). Finally, the Court remanded this case back to the Ohio court to determine, based on the totality of circumstances, whether the defendant's consent was voluntary. (*Id.*, at 40.)

The Supreme Court, in *Robinette*, did <u>not</u> hold that a driver stopped for a Vehicle Code violation is no longer detained after the officer completes the duties of the traffic stop and issues a citation or warning. The Court did not even hold that Mr. Robinette was not detained under the circumstances of the particular case; the Court remanded the matter to the Ohio court to make this determination without applying the improper bright-line rule. The Supreme Court merely held that a driver need not be told that he is legally free to go before the officer can ask any further questions.

The dissenting opinion of Justice Stevens is worth reading if one has a case that presents this issue. He agreed with the majority's narrow ruling, that "[t]he Federal Constitution does not require that a lawfully seized person be advised that he is 'free to go' before his consent to search will be recognized as voluntary". (*Ohio v. Robinette, supra.*, 519 U.S. at 45.) However, Justice Stevens did not agree that a remand was necessary as he believed the Ohio court had correctly determined that Defendant Robinette's consent to search his car was the product of an illegal detention. Justice Stevens explained, in some detail, that under the facts of this case, the Ohio court had correctly concluded that the defendant-driver was detained following the completion of the traffic stop, and that this

detention was not supported by reasonable suspicion of the defendant involvement in illegal activity separate from the traffic violation. (*Ohio v. Robinette, supra.*, at 45- 51)[16]

In most cases, one can make a strong argument that the vehicle driver is still "detained" following a traffic stop, at the moment when the officer asks for consent to search. But to establish that the driver's consent was invalid, you must also convince the court that the officer lacked the requisite reasonable suspicion to continue the driver's detention after issuing a warning or citation for the Vehicle Code violation.

b. Officer lacked reasonable suspicion for a detention following traffic stop

After completing the duties of the traffic stop, the officer may continue the driver's detention and undertake a general crime investigation only if he reasonably suspects that the driver is involved in criminal activity additional to the Vehicle Code violation. (*People v. McGaughran, supra.*, at 588, 591; *United States v. Mesa* (6th Cir. 1995) 62 F.3d 159, 162.) "The government bears the burden of proving the reasonableness of the officers' suspicion". (*United States v. Salzano*, *supra.*, 158 F.3d at 1111.) The state must point to specific facts, known to the officer at the moment he continues the detention, providing objective manifestation that the driver is committing a crime. (*United States v. Cortez* (1981) 449 U.S. 411, 417; *United States v. Wood* (10th Cir. 1997) 106 F.3d at 942, 946.)

The officer must have a <u>particularized</u> suspicion that the individual detainee is involved in criminality. (*United States v. Cortez, supra.* 449 U.S. at 418; *United States v. Chavez-Valenzuela, supra.*, 268 F.3d at 724.) Consequently, the courts reject broad profiles that are "likely to sweep many ordinary citizens into a generality of suspicious appearance". (*United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1129-30; *Reid v. Georgia* (1980) 448 U.S. 438, 441.) Moreover, a single factor is not determinative; rather, the government must rely on the totality of the circumstances. (*United States v. Arvizu*

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[16] In affirming that Defendant Robinette was still detained after the officer issued a warning for speeding, Justice Stevens concluded:

> "The Ohio Supreme Court was surely correct in stating: 'Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks the legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.'"(*Ohio v. Robinette, supra*, 519 U.S. at 47.)

(2002) 534 U.S. 266, 273; *United States v. Cortez, supra.*, at 417.)

In many cases, the officer will testify that the driver was nervous during the traffic stop – he was fidgeting, sweating or avoiding eye contact. Because of this nervousness, the officer suspected that the driver was transporting drugs or engaged in some other crime. Standing alone, a driver's nervousness (even extreme, increasing or unusual nervousness) does not provide a reasonable suspicion that he is engaged in criminal behavior additional to the Vehicle Code violation. The courts have recognized that nervousness is a common and understandable response to being pulled over and questioned by the police. (See, e.g., *People v. Loewen* (1983) 35 Cal.3d 117, 125; *People v. Lawler* (1973) 9 Cal.3d 156, 162; *United States v. Chavez-Valenzuela, supra.,* 268 F.3d at 725-26; *People v. Wood, supra.*, 106 F.3d at 948.) Consequently, the government's reliance on the driver's nervousness as a basis for reasonable suspicion must be treated with caution. Standing alone, or in combination with other innocuous factors, the motorist's nervousness does not provide reasonable suspicion to continue a driver's detention after the traffic stop has ended. (*United States v. Chavez-Valenzuela, supra.*, at 726; *United States v. Fernandez* (10th Cir. 1994) 18 F.3d 874, 875-76,880; *United States v. Salzano, supra.*; 158 F.3d at 1113.)

Most officers will testify to additional factors – combined with nervousness – which led them to suspect that the driver was transporting drugs or involved in some other crime. These factors include: unusual aspects of the motorist's travel plans (e.g. a quick overnight trip to an area known for drug dealing or cultivation; a misstatement regarding travel plans; the odor of air freshener (sometimes used to mask the smell of marijuana); a back seat full of luggage (indicating that the trunk was used for some other purpose); hesitant answers to the officer's questions; or an attempt to evade the initial stop.

One can argue that these factors are innocuous. After all, many people who are not drug dealers hang air fresheners in their cars. However, this argument has been made more difficult due to two principles recently emphasized by the Supreme Court in *United States v. Arvizu* (2002) 534 U.S. 266 (a case involving reasonable suspicion to stop a driver near the border for suspected drug smuggling): 1)The court, in assessing reasonable suspicion, looks at the totality of the circumstances. Although each factor taken alone may appear innocent, the factors taken together may cast suspicion on the driver. 2)The court must defer to the expertise of a trained and experienced officer in considering whether the factors suggest criminal activity. Despite these obstacles, it is still worth arguing that a continued detention, following a traffic stop, was not justified by reasonable suspicion.

c. Remember that the traffic stop does not always end with the issuance of a citation or warning

As discussed above (section IIE), the legitimate traffic stop may terminate without the issuance of a citation or warning. This happens when the officer discovers, after pulling the car over, that the driver had not violated the Vehicle Code (e.g. there is a valid temporary operating permit on the vehicle, the dangling object does not obstruct the driver's view). In these cases, the legitimate basis for the stop has been dispelled and the officer has no right to detain the driver. The officer can contact the driver to explain the reason for the stop, but he cannot further detain the driver. If he does so – for example, by asking for a driver's license and registration – that detention is illegal. If the officer obtains consent to search during that illegal detention, the search is invalid. (*United States v. McSwain, supra.*, 29 F.3d at 559-564; *United States v. Edgerton, supra.*, 438 F.3d at 1043.)

C. IDENTIFICATION SEARCHES: THE OFFICER CAN SEARCH THE VEHICLE FOR REGISTRATION OR A DRIVER'S LICENSE IF THE DRIVER FAILS TO PRODUCE THESE DOCUMENTS (*ARTURO D.*)

In 2002, in *In re Arturo D.* (2002) 27 Cal. 4th 60, the California Supreme Court provided law enforcement officers with another justification for searching a vehicle during a traffic stop. If the driver fails to produce vehicle registration, a driver's license or other satisfactory written identification upon demand – as required by the Vehicle Code -- the officer can search all locations in the vehicle where one might reasonably suspect such documentation to be found. This includes the glove compartment and the area under the driver's and front passenger's seats. It could also include the entire passenger compartment and possibly even the trunk. An officer who has properly stopped a vehicle for a traffic or equipment violation needs to determine the identities of the driver and the vehicle owner in order to include that information on a citation. (*In re Arturo D., supra*., at 67.)

The Supreme Court issued one decision in two consolidated cases, *In re Arturo D.* and *People v. Hinger*. The two cases presented the same issue, but on different facts. Arturo D. was stopped for speeding. He was driving a truck with both a front and back seat. During the traffic stop, when asked for a license, Arturo admitted that the truck was not his, and that he had no driver's license. He provided no written identification, but supplied his correct name, date of birth, and address. The officers ordered Arturo and his two passengers out of the truck. In an alleged search for identification, the officer entered the truck cab and looked under the driver's seat. He found a glass pipe and box with a minimal amount of methamphetamine. Arturo's motion to suppress the evidence found in the truck was denied by the trial court, but granted by the Court of Appeal (First District. Division Four); Division Four found that the officer had exceeded the scope of a lawful search for

registration by looking under the seat. (*In re Arturo D.*, *supra.*, 27 Cal. 4th at 65-66.)

The facts of the companion case, *People v. Hinger*, are slightly different. Mr. Hinger, driving alone in his car, was stopped for an unsafe lane change. When asked for documentation during the traffic stop, Hinger said that he did not have his driver's license with him and he had no documents for the car as he was in the process of buying it. He gave the officer his correct name. Hinger exited the car. When the officer said he was going to search the vehicle for registration and identification, Hinger said he might have a wallet in the glove compartment. The officer went through loose papers in the glove compartment, but found no wallet or identification documents. He then looked under the driver's seat, and did not find a wallet there. Finally, he looked under the passenger seat and discovered a wallet. Inside the wallet, was an identification card with Hinger's photograph and a baggie of methamphetamine. The trial court upheld the search and the Court of Appeal (Fourth District, Division Three) affirmed. (*In re Arturo D., supra.*, 27 Cal. 4th at 66-67.)

Eleven years before *Arturo D.*, the California Supreme Court had decided *People v. Webster* (1991) 54 Cal.3d 411. In that case, the driver had been unable to produce registration or proof of vehicle ownership during a traffic stop. The Supreme Court had held that it was permissible for the police officer to enter the vehicle to conduct an immediate limited search for the required registration documents. The Court emphasized that the officer had confined his search to the visor and the glove compartment – traditional repositories for the vehicle registration. (*People v. Webster, supra.*, at 430-431.)[17]

Consequently, the main issue in *Arturo D.* was whether the officers had exceeded the scope of a permissible *"Webster* search" by looking under the front driver's seat (in *Arturo D.*) and under the passenger's seat (in *Hinger*). First, in both cases, the officers were looking for more than registration; they were looking for proof of identification – a driver's license, a wallet, or some other proof of ID. The defense argued that *Webster* had only approved a limited search for registration.

Second, the defendants asserted that even if the officers were permitted to look in the vehicle for identification documents (as well as registration), they exceeded the scope of the permissible *Webster* search by looking under the seats, locations that were not

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[17] In *Arturo D.*, the Supreme Court listed the many California cases, prior and subsequent to *Webster*, which have approved a limited warrantless search of a vehicle for the purpose of locating registration and other related identifying documentation. (*Arturo D., supra.*, 27 Cal. 4th at 71.) The Court also acknowledged sister-state and federal authority which allow officers to search vehicles for registration documents. (*Id.*, at 76.)

"traditional repositories" for registration or identification documents. Does the typical "reasonable person" place his/her wallet under the driver's or front passenger's seat?

The final argument in *Arturo D.* was that the searches violated *Knowles v. Iowa.* In *Knowles*, the United States Supreme Court had condemned a full search of the vehicle incident to the issuance of a traffic citation. (*Knowles v. Iowa, supra.*, 525 U.S. at 113.) The defense, in *Arturo D.*, argued that *Knowles* had either implicitly overruled *Webster* or limited it to its facts – permitting only a limited search of traditional repositories for registration rather than an extended search of the vehicle.

The California Supreme Court rejected all defense arguments. The gist of the Court's decision is that when a driver fails to produce a license or other written proof of identification during a traffic stop, the officer – who needs to know who he is dealing with before issuing a citation – is entitled to enter the vehicle to make a limited search for I.D. as well as vehicle registration. (*In re Arturo D., supra.*, 27 Cal. 4th at 77-78.)

How limited is the permitted "identification search"? Is it limited to "traditional repositories" where registration is usually found (the glove compartment or sun visor)? Not according to the Supreme Court. Because the officer is looking for both vehicle registration and the driver's identification, he can search anywhere in the car where the driver's wallet or these documents might reasonably be expected to be found. The officer can search any location where a man or woman driver might reasonably have put his/her wallet. According to the Supreme Court, this includes the glove compartment, the area under the driver's seat, and the area under the passenger seat. This could include any location in the passenger compartment and possibly even the trunk.[18] (*In re Arturo D., supra.*, at 78-82; 85-87)

Finally, the Supreme Court distinguished *Knowles,* which had condemned a full search of the vehicle for contraband following a traffic stop and incident to the issuance of a traffic citation. The Court emphasized that *Arturo D.* authorized only a limited search of the vehicle for registration or identification during a traffic stop. In *Knowles*, the full vehicle search was conducted after the traffic stop was completed, even though the driver

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[18] In response to the defense assertion that there were no limits to the "identification search" approved by the Court,, the Supreme Court stated that the trunk would usually be off limits: "[T]he trunk of a car is not a location where required documentation reasonably would be expected to be found, absent specific information known to the officer indicating the truck as a location where such documents reasonably may expected to be found - e.g., as when a driver has told an officer that his registration or license is inside a jacket located in the trunk." (*In re Arturo D., supra.*, at 86, n. 25.)

had provided sufficient identification documentation. (*In re Arturo D., supra.*, at 75-77.)[19]

Unpublished Court of Appeal cases have applied the rule of *Arturo D.* to uphold searches of vehicles for identification and registration. These cases have approved: a search of a zippered bag located in the vehicle's center console area for satisfactory identification; a search of the driver's purse for keys to the locked glove box, in order to look in the glove box for registration and car ownership documentation; a search of a backpack, reachable from the passenger compartment, for vehicle registration; and a search of a jacket located on the backseat, after the driver indicated that his identification was in the back. The courts, in each case, found that the officer looked in a location where identification or registration documents reasonably might be found.

Finally, if the driver indicates that he has a driver's license and/or registration, but then reaches towards the glove compartment or into the backseat to retrieve it, the officer doesn't have to allow the driver to retrieve the documents himself. The officer can order the driver to exit the car, and he can then search in the vehicle for the documentation. The officer can do this only when the circumstances of the stop reasonably suggest that allowing the driver to rummage through the glove box or passenger compartment poses a threat to officer and public safety. (*People v. Faddler* (1982) 132 Cal. App. 3d 607; *People v. Hart* (1999) 74 Cal. App. 4th 479, 489-491; *People v. Webster, supra.*, 54 Cal. 3d at 431; *In re Arturo D., supra.*, 27 Cal. 4th at 70, 87.)

What if the person, stopped for a Vehicle Code violation, states that he has no identification? Can the officer pat-search the person for identification? No, according to a recent Court of Appeal case. (*People v. Garcia* (2006) 145 Cal. App. 4th 782.) An officer stopped the defendant for riding his bicycle without a headlamp, a violation of Vehicle Code section 21201(d). The officer asked the defendant for identification. The defendant, who spoke limited English, said that he had none. The officer then pat-searched the

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[19] *Arturo D.* was a 4-3 opinion. Justice Werdegar and Justice Kennard (with Justice Brown) filed dissenting opinions. These opinions are well worth reading, particularly Justice Kennard's final words in concluding her dissent. She states that in the modern world, following the events of September 11, 2001, it is particularly important to protect the principles upon which our nation was founded, specifically including the Fourth Amendment right to be free of unreasonable search and seizures. Justice Kennard stated that the majority rule of Arturo D., permitting a search of the car's interior for identification, "disregards the high court's decision in *Knowles* and chips away at one of the fundamental freedoms guaranteed by our federal Constitution." (*In re Arturo D, supra.*, 27 Cal. 4th at 100-102.)

defendant for identification so that he could issue him a citation for the Vehicle Code violation, ultimately discovering methamphetamine in his pocket. The court held that the search was illegal. An officer can pat-search an individual only if he has a reasonable belief that the suspect is armed and dangerous. An officer is not authorized to do a pat-down search for evidence of identification. (*People v. Garcia, supra*., citing *People v. Lawler* (1973) 9 Cal. 3d 156, 161 [holding that a pat-down search is "only" for weapons].)

The court, in *Garcia*, discussed what the officer should have done in this situation: He could have called for the assistance of a Spanish-speaking officer. "The officers then could have questioned appellant and perhaps ascertained his identity without resorting to the use of force, handcuffs, and search". (*People v. Garcia, supra*.) Of course, after *People v. McKay* (2002) 27 Cal.4th 601), the officer had another option. He could have arrested the defendant for the Vehicle Code violation upon his failure to provide a driver's license or written identification. Then, he could have searched the defendant incident to that arrest.

D. SEARCH OF THE VEHICLE INCIDENT TO THE ARREST OF A RECENT OCCUPANT

1. The basic rules governing searches incident to arrest

An officer can arrest an individual and take that person into custody if he has probable cause to believe the individual has committed a crime. (*People v. McKay* (2002) 27 Cal.4th 601, 607; *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354. Upon making a lawful custodial arrest of a vehicle occupant, the officer can search incident to that arrest. The lawful arrest establishes the authority to search; no additional justification is needed. (*United States v. Robinson* (1973) 414 U.S. 218, 235.)

The scope of a search incident to the arrest of a vehicle occupant is also well defined. The officer can search the person arrested and the area within that person's reaching distance. The officer can open and search any personal effects found on the arrestee. (*Chimel v. California* (1969) 395 U.S. 752; *Robinson, supra.*, at 236.) The officer can search the passenger compartment of the vehicle, and he can also search any closed containers found in the vehicle. (*New York v. Belton* (1981) 453 U.S. 454, 460; *Thornton v. United States* (2004) 541 U.S. 615, 617.) Finally, the officer can search the car's passenger compartment if the person arrested is a recent occupant. It doesn't matter that he is out of the vehicle at the time of the arrest. (*Thornton*, *supra*., 541 U.S. at 617.) However, the search must be contemporaneous with the time and place of the arrest. (*United States v. Vasey* (9th Cir. 1987) 834 F.2d 782; *United States v. McLaughlin* (9th Cir. 1999) 170 F.3d 889; *United States v. Weaver* (9th Cir. 2006) 433 F.3d 1104.)

A search "incident to arrest" can legally be made before the actual arrest takes place. (*Rawlings v. Kentucky* (1980) 448 U.S. 98.) In *Rawlings*, the Court upheld the search of appellant's person as a search incident to arrest, even though the officer did not formally arrest the defendant until after the search. The Court noted that at the time of the arrest, the officer had probable cause to place the defendant under arrest and the formal arrest followed quickly on the heels of the challenged search of the defendant's person. California courts have also approved searches preceding arrest, if the officer had probable cause. These cases have typically relied on the "plain feel" doctrine to justify the expansion of a pat-down search for weapons into a full search. (See *People v. Dibb* (1995) 37 Cal.App.4th 832; *People v. Limon* (1993) 17 Cal.App.4th 524; *In re Lennies H.* (2005) 126 Cal.App.4th 1232; and *People v. Gonzales* (1989) 216 Cal.App.3d 1185.)

The ostensible justification for a search incident to arrest is to protect the police and prevent the destruction or concealment of evidence. (*Chimel*, *supra.*, 395 U.S. at 763.) The scope of the permissible search is defined by this justification. The officer is permitted to search areas under the arrestee's "immediate control" into which he or she could reasonably reach for a weapon or destructible evidence. (*Id.* at 763.) When the arrestee is a recent vehicle occupant, the entire passenger compartment is deemed to be an area within her immediate control. (*New York v. Belton, supra.*, 453 U.S. at 460.)

In the context of vehicle searches, however, courts have not insisted on a very tight connection between this rationale and the actual practice of investigating officers. The passenger compartment can be searched incident to arrest even if the defendant was already out of the car at the time the officer first contacted her. (*Thornton v. United States, supra.*, 541 U.S. at 622.) A vehicle search can be conducted "incident to" an arrest even if the defendant has already been removed from the scene. (*See McLaughlin*, 170 F.3d at 890.) Virtually the only limitation on police action in this regard is *Knowles v. Iowa*, which concluded that a full search of a vehicle was not appropriate when an officer chose to issue a citation for speeding rather than carrying out an arrest, even though Iowa law gave the officer the option to cite or to arrest. (*Knowles v. Iowa, supra.*, 525 U.S. at 113.) The Supreme Court concluded that when an officer elects to cite the driver rather than take him into custody, there is no justifiable reason to search the vehicle for weapons or for evidence of the traffic violation. (*Knowles v. Iowa, supra.*, at 116-118, see Section IIIA, above.)

In summary, when the officer – during a legitimate traffic stop – acquires probable cause to believe that a vehicle occupant has committed a crime, or when the officer discovers an outstanding arrest warrant, he can arrest the occupant and search both the occupant and the vehicle's passenger compartment. In recent cases, the United States Supreme Court and the California Supreme Court have greatly expanded the officer's authority to make a custodial arrest of the driver during a routine traffic stop. (*Atwater v.*

City of Lago Vista (2001) 532 U.S. 318; *People v. McKay* (2002) 27 Cal. 4th 601.)

2. The Constitution permits a custodial arrest for a minor traffic offense (The rule of Atwater)

In *Atwater*, the Supreme Court upheld the custodial arrest of a Texas woman for a seatbelt violation that was punishable only by a fine. (*Atwater v. City of Lago Vista, supra*., 532 U.S. at 323, 354.) Under Texas statutory law, the driver must make sure that all front seat passengers, including small children, are secured in seatbelts. Violation of this statute is punishable by a fine of twenty-five to fifty dollars. An officer who observes a seatbelt violation is authorized to either arrest the driver or to issue a citation. (*Ibid.*)

Gail Atwater was driving her pickup truck through the streets of Lago Vista, Texas. An officer pulled her over because her two young children were not wearing seatbelts. The officer arrested Atwater and took her to the police station where she spent an hour in jail before being released on bond. Ultimately, she pled no contest to the misdemeanor seat belt offense and paid a fifty dollar fine. Thereafter, Atwater filed a civil rights suit against the City of Lago Vista, alleging that the officer had violated her Fourth Amendment rights by arresting her for this minor, non-violent fine-only offense. (*Id.*, at 323-325.)

In a 5-4 decision, the Court held that Atwater's custodial arrest, without a warrant, for this fine-only offense did not violate the Constitution's proscriptions on unreasonable seizures. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Atwater v. City of Lago Vista, supra*., at 354.)[20]

The Court rejected all of Atwater's arguments, based on history, precedent and policy. Atwater had argued that officers should not be permitted to arrest individuals, even with probable cause, for offenses that were not ultimately punishable by jail time unless the government showed a compelling need for immediate detention. The Court acknowledged that there was no compelling need to take Atwater into custody, under the uncontested facts: "In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment." (*Atwater v. City of Lago Vista, supra*., at 346-347.) The Court, however, refused to adopt a rule that would require the police to make a case-by-case judgment as to whether arrest was necessary. And barring all arrests for fine-only offenses would require police officers to have a sophisticated understanding of the details of "frequently complex penalty schemes".

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[20] The majority opinion was written by Justice Souter, joined by Chief Justice Rehnquist, and Justices Scalia, Kenned and Thomas. Justice O'Connor filed a dissenting opinion, joined by Justices Stevens, Ginsburg and Breyer.

The Court did not believe that it was confronting "an epidemic of unnecessary minor-offense arrests" or endorsing a practice that would be widely applied. It noted that individual states were free to pass statutes limiting warrantless custodial arrests for minor offenses. The Court predicted that states would likely adopt such legislation as it is in the government's interest "to limit petty-offense arrests, which carry costs that are simply to great to incur without good reason." (*Atwater v. City of Lago Vista*, supra., at 352-354.)

In *Arkansas v. Sullivan, supra.*, 532 U.S. 769, decided one month after *Atwater*, the Supreme Court made clear that it meant what it had said. The driver had been arrested, under the Arkansas law, for speeding, driving without registration, carrying a roofing hatchet, and improper window tinting. In addition to rejecting the Arkansas Supreme Court's holding that this was an improper pretextual arrest (the officer had a hunch the driver was carrying drugs), the Court affirmed the officer's authority to take the driver into custody: "[T]he Arkansas Supreme Court never questioned Officer Taylor's authority to arrest Sullivan for a fine-only traffic offense (speeding) and rightly so." (*Arkansas v. Sullivan*, supra., 532 U.S. at 771, citing *Atwater, supra*, 532 U.S. at 318.)

In her concurring opinion in *Arkansas v. Sullivan*, Justice Ginsburg offered an observation.[21] She noted that the Arkansas Supreme Court had expressed an unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the drive for speeding, and conduct a full-blown inventory search of the vehicle with impunity." (quoting from the Arizona Supreme Court opinion). Justice Ginsburg noted that, according to the United States Supreme Court's current case law, "such exercises of official discretion are unlimited by the Fourth Amendment". (*Arkansas v. Sullivan, supra.*, 532 U.S. at 773.) Justice Ginsberg concluded with a concern:

> "In *Atwater*, which recognized no constitutional limit on arrest for a fine-only misdemeanor offense, this Court relied in part on a perceived "dearth of horribles demanding redress"Although I joined a dissenting opinion questioning the relevance of the Court's conclusion on that score,, I hope the Court's perception proves correct. But if it does not, if experience demonstrates "anything like an epidemic of unnecessary minor-offense arrests", I hope this court will reconsider its recent precedent." (*Arkansas v. Sullivan*,

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[21] Justice Ginsburg's concurring opinion was joined by Justice Stevens, Justice O'Connor and Justice Breyer. These were the same four justices who had dissented in *Atwater*.

supra., 532 U.S. at 773 [citations to *Atwater v. Lago Vista* omitted].)

3. *In California, a custodial arrest for a fine-only Vehicle Code arrest is illegal but not unconstitutional. California law permits a custodial arrest if the person stopped for a Vehicle Code violation does not present a driver's license or other satisfactory documentary evidence of identification (The rule of McKay)*

Unlike Texas, California statutory law does not authorize an arrest for a seatbelt violation or most other minor Vehicle Code offenses. In fact, California statutes limit police officer's authority to arrest for fine-only offenses.[22] Does this matter? Would an arrest for a minor fine-only traffic offense by a California police officer violate the Constitution? Not according to *People v. McKay* (2002) 27 Cal. 4th 601, 605.)

In *McKay*, the California Supreme Court followed *Atwater* to hold that when an officer makes a custodial arrest for a minor Vehicle Code violation – even in violation of state statutory procedures -- that arrest does not violate the federal Constitution. Consequently, any evidence seized during a subsequent search incident to arrest would not be subject to exclusion. (*People v. McKay, supra*., at 605, 607-619.) After Proposition 8, the California courts are not free to exclude evidence merely because it was seized in violation of state statutory or state constitutional provisions. Exclusion is only required if that remedy is mandated by the federal Constitution, as interpreted by the United States Supreme Court. (*Id*., at 608.)

Thus, a California police officer could arrest a driver for a minor Vehicle Code offense and search incident to that arrest. The arrest would be illegal, under state law, but it would not violate the Fourth Amendment. If the individual were charged with a crime, he could not bring a motion to suppress the seized evidence. The only remedy for the arrestee would be to file a civil action against the arresting authorities for injunctive and other relief. "Eliminating the sanction of exclusion does not mean that affected individuals are without

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[22] According to *People v. McKay*, *supra*, at 619-20, our state law authorizes custodial arrests for felony violations of the Vehicle Code, but not for all non-felony violations. (See Veh. Code, § 40301) For certain enumerated nonfelony offenses, the officer has the discretion to take the driver into custody or to issue a citation. For other offenses, the driver must be cited unless he/she fails to present a driver's license or other satisfactory evidence of identity, refuses to give a written promise to appear, or demands an immediate appearance before the magistrate. (See Veh. Code, §§ 40302, 40303, 40304). The Legislature thus presumes that the vast majority of Vehicle Code violators will not be taken into custody. (People v. Superior Court (Simon) (1972) 7 Cal. 3d 186, 199-200.)

remedy against a wayward officer". (*People v. McKay, supra*., at 619.)

In *McKay*, the defendant was stopped by the police for riding a bicycle the wrong way on a residential street, in violation of Vehicle Code section 21650.1. This infraction is punishable by a fine of up to $100. The officer asked the defendant for identification. He admitted he had no written I.D., but gave his correct name and birth date. He was arrested and taken into custody for not having satisfactory evidence of identification. (Veh. Code, § 40302(a).) In a subsequent search incident to custodial arrest, the officer found a baggie of methamphetamine in the defendant's sock. The defendant was charged with possession of methamphetamine. He filed a motion to suppress evidence, arguing that his arrest was unauthorized by state statute; one cannot be arrested for the minor offense of riding a bike the wrong way, and because he provided satisfactory oral identification, his arrest was not authorized by section 40302(a). His motion to suppress the drugs, as the product of an illegal search incident to arrest, was denied by the trial court, and this ruling was affirmed by the California Supreme Court. (*People v. McKay, supra.*, 27 Cal. 4th at 606-607.)

As noted above, the Court held that appellant's contention – that he could not be arrested for the fine-only offense of riding his bike on the wrong side of the street – was foreclosed by *Atwater*. After *Atwater*, an arrest for a minor traffic offense does not violate the federal Constitution – even though it violated California statutory procedures. Consequently, because the officer had probable cause to believe that the defendant had violated the Vehicle Code, the evidence seized during the search incident to arrest was admissible. (*People v. McKay, supra*., at 607-619.)[23]

However, the Court alternatively held that the arrest was authorized by Vehicle Code section 40302(a). Under that section, a police officer has the discretion to take into a custody a person arrested for a non-felony Vehicle Code offense who fails to present "his driver's license or other satisfactory evidence of his identity for examination". The question presented in *McKay* was whether the defendant's verbal statement of his name and birth date – statements subject to verification – qualified as "other satisfactory evidence of

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[23] *McKay* was a 6-1 decision. Justice Baxter wrote the majority opinion. Justice Werdegar wrote a separate concurring opinion, and former Justice Brown wrote a concurring and dissenting opinion. Justice Werdegar agreed with the majority's interpretation of Vehicle Code section 40302(a), but concluded that it had been unnecessary to reach the question of whether an arrest that does not comply with state law is constitutional. Because Mr. McKay's arrest did comply with California statutory authority, "[t]he majority's extensive analysis of the question is thus no more than obiter dictum". (*People v. McKay, supra*., at 625-626.)

identity". (*People v. McKay*, supra., at 620.) According to the Court, in *McKay*, only documentary evidence of identity qualifies. A document that is the "functional equivalent of a driver's license" (e.g. a state-issued identification card, or a reliable document bearing the person's photograph, physical description, mailing address and signature) would certainly qualify.) As for other documentary evidence and all oral evidence of identification, the officer has discretion as to whether to accept the proffered evidence as "satisfactory". An officer's discretionary decision could only be challenged if it was based on invalid criteria, such as race, religion or other arbitrary classification. (*Id.*, at 620-622.)

The Court acknowledged that persons (other than those driving motor vehicles) are not legally required to carry driver's licenses or documentary identification. Nevertheless, the Court rejected Defendant McKay's contention that he'd been improperly arrested for failing to carry an I.D. while riding a bike. According to the Court, the defendant was not arrested for failing to produce a license or identification. He was arrested for violating the Vehicle Code. "At that point, the need to obtain reliable evidence of identification and ensure compliance with a promise to appear is equally great for a bicyclist as for the driver of a motorized vehicle.... both are required to produce satisfactory evidence of identity for examination when stopped for a violation of the law." (*People v. McKay, supra.*, at 625.)

The lesson of *McKay* is clear. We are nearing the time when we may all be required to carry written identification when we venture out in public, and to submit it to authorities on demand. We are not there yet, but if you ride a bike or jog or walk along the streets, you would be well advised to carry your license or documentary identification. After all, you could be stopped for riding your bicycle on the wrong side of the street, or for jaywalking.

Former Justice Brown's dissent in *McKay*, along with Justice Kennard's dissent in *Arturo D.*, are essential reading for anyone concerned about recent decisions which encroach upon our Fourth Amendment rights. Justice Brown confronted head-on the disparate impact of these decision, giving police officers sweeping power to arrest and search, on persons of color: "Anecdotal evidence and empirical studies confirm that what most people suspect and what many people of color know from experience is a reality: there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver". (*People v. McKay, supra.*, 27 Cal. 4th at 640.) Justice Brown stated that although she did not know Mr. McKay's ethnic background, she would bet that "he was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes – places where no resident would be arrested for riding 'the wrong way' on a bicycle whether he had his driver's license or not." (*Id.*, at 641-642.) Justice Brown cautioned that persons most impacted by decisions allowing pretextual stops and searches would lack the means to challenge these actions in civil harassment suits: "[m]ost victims of pretextual stops will barely have enough money to pay the traffic

citation, much less be able to afford an attorney." (*Id*., at 640.)

Finally, Justice Brown warned of the consequences of giving police officer both the authority to arrest for trivial infractions, and broadened power to conduct searches incident to arrest:

> "To permit both full custodial arrest for minor offenses and virtually unlimited authority to search incident to such arrest allows officers to push past the boundaries of the Fourth Amendment. When officers may arrest for minor offenses, conduct virtually unlimited searches, and are granted unbounded and unreviewable discretion to select the target of such enforcement activity, the resulting search cannot be constitutionally permissible. (*People v. McKay, supra.*, at 642.)

Following *Atwater* and *McKay*, we have seen some cases where drivers are arrested and taken into custody for failing to provide a drivers license or other satisfactory identification after being stopped for a Vehicle Code violation. However, we have not yet seen cases, in California, where motorists are taken into custody for committing minor fine-only Vehicle Code offenses. Nevertheless, as noted above, there are cases holding that a prolonged detention during a stop for a Vehicle Code violation, need not be justified by reasonable suspicion or probable cause to believe that the driver has committed another criminal offense. If the officer has probable cause to believe that the driver has violated the Vehicle Code, the officer can effect a custodial arrest. Thus, a detention so prolonged as to constitute a de facto arrest, is not unconstitutional. (See *People v. Gomez, supra.*, 117 Cal. App. 4th at 538-540; *People v. Gallardo, supra.*, 130 Cal. App. 4th at 239, n.1.)

4. An individual may be arrested for violating a state law requiring him to disclose his name during a lawful detention (The rule of Hiibel)

In 2004, the Supreme Court upheld the constitutionality of a Nevada "stop and identify" statute. (*Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177.) The Nevada statute authorizes officers to request that an individual identify himself in the course a lawful investigative detention, supported by reasonable suspicion of criminal activity. As interpreted, the statute only requires a detainee to state his name; he does not have to give the officer a driver's license or any other document identification. Also, the statute states that the detainee "may not be compelled to answer any other inquiry of any police officer." If the individual refuses to tell the officer his name, he can be arrested. (*Hiibel v. Sixth Judicial Dist. Court, supra.*, 542 U.S. at 181-185.)[24]

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[24] The Supreme Court noted that numerous other states have similar "stop and identify statutes". In some states, a suspect's refusal to identify himself during a lawful

In *Hiibel*, the police detained the defendant to investigate a report that he had assaulted a woman. Upon approaching the defendant, the officer believed that the defendant was intoxicated. The officer asked the defendant for identification eleven separate times, and each time, the defendant refused to identify himself. The defendant asked why the officer wanted to see his identification, and the officer explained that he wanted to find out who the man was. The defendant was ultimately arrested of willfully obstructing the officer in the discharge of his duties, and he was convicted of this offense. (*Hiibel v. Sixth Judicial Dist. Court, supra.*, at 181-182.)

The Supreme Court reiterated its long held position that an officer can request the suspect's identification in the course of a lawful investigative stop. Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or that he is on probation or parole, has a record of violence, or a mental disorder. Also, knowledge of identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. (*Hiibel v. Sixth Judicial Dist. Court, supra.*, at 185-186.)

The issue in *Hiibel*, however, was not whether an officer could request the detainee's identification, in the course of a legal *Terry* stop, but whether state law could require a suspect to disclose his name. Can a suspected be arrested for failing to answer a request for identity? The answer is yes. The request for identity, authorized by the Nevada statute, "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop, [and] [t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. Requiring a detainee to give his name does not alter the nature of the stop nor change its duration. (*Hiibel, supra.*, at 188.)

The Court stated that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." The Court held "it was clear in this case" that the officer's request for the defendant's identification met this requirement. It was not merely an attempt "to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence". (*Hiibel v. Sixth Judicial Dist. Ct., supra.*, at 188.) Presumably, the Court is stating that an arrest for

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detention is a misdemeanor offense or civil violation. In other states, a suspect may decline to identify himself without penalty. (See *Hiibel v. Sixth Judicial Dist. Ct., supra.*, at 182-183.) California does not have a "stop and identify" statute. However, as discussed in *McKay*, an individual who is stopped for a Vehicle Code violation may be required to produce his driving license or other satisfactory evidence of his identity. And he may be taken into custody if he fails to provide reliable proof of identity.

failure to identify would only be justified if the detention was lawful – i.e. if the officer had a reasonable suspicion that the individual had committed a crime at the time of the request.

E. PROBABLE CAUSE SEARCHES AND DOG SNIFFS

Police officers can search a legally stopped vehicle, without a warrant, if they have probable cause to believe that the vehicle contains contraband. (*Carroll v. United States* (1925) 267 U.S. 132; *United States v. Ross* (1982) 456 U.S. 798, 799-800.) The probable cause determination must be based on objective facts that would reasonably support the issuance of a warrant by a magistrate. (*United States v. Ross, supra.*, at 808.)

1. The scope of the probable cause search

The scope of the warrantless search of a vehicle is no broader and no narrower than the search that a magistrate would authorize by warrant if presented with the same showing of probable cause. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States v. Ross, supra.*, at 825.) In other words, if the police have probable cause to believe that there are drugs concealed in a vehicle, they can search anywhere in the vehicle that might contain the drugs, including closed containers and the trunk. Moreover, if the officers have probable cause to believe that drugs are located in a closed container inside a car, they can open and search the container without a warrant. And they can search this container even if they lack probable cause to search the entire vehicle. (*California v. Acevedo* (1991) 500 U.S. 565.)

The discovery of drugs or contraband in the vehicle's passenger compartment may provide probable cause to search the trunk. In *People v. Dey* (2000) 84 Cal. App. 4th 1318, the officers searched a car's passenger compartment, incident to the arrest of a passenger. While doing so, the officers found a marijuana bud in the driver's day planner. They then searched the trunk and found additional marijuana. Applying the rule of *United States v. Ross*, the court held that the officers had probable cause to search the trunk for drugs after finding marijuana in the passenger compartment. Even though the small amount found in the day planner suggested only personal use, the officer could reasonably believe that additional quantities for further use might be found in other parts of the car, including the trunk. (*People v. Dey*, supra., at 1320-22.) The court declined to follow earlier appellate decisions which had held that evidence of personal drug use, found in a vehicle's passenger compartment, did not provide probable cause to search the trunk. (*Wimberly v. Superior Court* (1976) 16 Cal. 3d 557 and *People v. Gregg* (1974) 43 Cal. App. 3d 137.) *Dey* expressly held that these earlier decisions were no longer controlling authority in light of the Supreme Court's subsequent decision in *Ross*. (*People v. Dey, supra.*, at 1321.)

In *People v. Hunter* (2005) 133 Cal. App. 4th 371, the First District, Division Two expressly adopted the reasoning of *People v. Dey* and also agreed with the rejection of *Wimberly* and *Gregg*. In *Hunter*, the officers ordered the driver and two passengers out of a car during a traffic stop. One officer recognized the front seat passenger as "a street drug dealer". As the passengers exited the from the car, one officers saw a knotted baggie containing suspected marijuana on the backseat. When he entered the car to seize the baggie, he saw a second baggie of suspected marijuana in the dashboard ashtray. The officers then searched the trunk and found a backpack containing 14 additional bags of marijuana and a loaded gun. (*People v. Hunter, supra.*, at 374-375.) The court held that the officers had probable cause to search the trunk. They noted that in addition to the two baggies found in the passenger compartment, which may have suggested personal use, one of the officers recognized the front seat passenger as a known drug dealer. (*People v. Hunter, supra.*, at 381-382.)[25]

When an officer has probable cause to search a vehicle for drugs or contraband, the officer can search any containers in the vehicle that might contain the object of the search, including the passenger's belongings. (*Wyoming v. Houghton* (1999) 526 U.S. 295, 302, 307 [approving search of passenger's purse found on the back seat of the vehicle].) However, probable cause to search a car for contraband or drugs does not justify the search of a passenger merely because she is present in the vehicle. The officer cannot search the passenger unless specific facts provide probable cause that the passenger is engaged in the suspected criminal activity. (*People v. Temple* (1995) 36 Cal. App. 4th 1219, 1226-1227; *Wyoming v. Houghton, supra.*, at 303; *United States v. Di Re* (1948) 332 U.S. 581.)

In summary, if observations made during the traffic stop provide the officer with probable cause to believe that there are drugs or contraband in the vehicle, they can search any part of the car that might contain the drugs or contraband. This might occur if the officer smelled the strong odor of marijuana during the traffic stop, or if he saw drugs or paraphernalia in plain view inside the car.

If these observations are made during a legitimate traffic stop, it is extremely

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[25] What if the officer observes or discovers evidence of personal use of marijuana in the passenger compartment (e.g. a small amount of marijuana or a pipe), and the driver shows the officer documents indicating that he has the authority to use marijuana for medical purposes – a legal use, at least under California law. Would the officer still have probable cause to search the vehicle's trunk? This and other issues involving the interplay between the medical marijuana laws and the Fourth Amendment are currently being litigated.

difficult to challenge a "probable cause search". However, if the observations are made after the legitimate traffic stop is concluded (e.g. after the officer issues a warning or citation), then one could argue that the acquired probable cause was the tainted product of the illegal continued detention. As with challenging consent obtained after the traffic stop, one would have to argue that the driver was still detained, and that this continued detention was not supported by reasonable suspicion of criminal activity. (See section IIIB3, above)

2. Dog sniffs are not searches requiring probable cause

Often the officer acquires probable cause to search a vehicle for drugs as a result of a dog sniff. Here's the usual scenario: Before or after completing the traffic stop and issuing the citation, the officer tells the driver that he is going to bring out a drug sniffing dog. Either the officer retrieves the dog from his own patrol car, or he requests a "K-9 unit" by radio. The dog sniffs the exterior of the vehicle and "alerts" to the trunk, thus providing probable cause to believe that drugs are concealed inside the trunk. The officer then opens the trunk and finds drugs.

Is there any way to challenge this procedure? You cannot directly challenge the dog sniff itself – i.e. by arguing that the officer lacked probable cause to "bring out the dog" - because a "sniff" by a trained dog of the exterior of the car in a public place is not a "search within the meaning of the Fourth Amendment. Thus, a dog sniff needs no objective justification. (*Illinois v. Caballes* (2005) 543 U.S. 405, 408-410; *United States v. Place* (1983) 462 U.S. 2637; *People v. Bell*, supra., 43 Cal. App. 4th at 768-773)[26] Moreover, if the driver consents to a search of the vehicle, the officer can bring out a drug detection dog to sniff the exterior, particularly if the driver does not object to the use of the dog at the scene. (*People v. Bell, supra.*, at 770-772.)

In *Caballes*, the Supreme Court reaffirmed this rule and the reasoning behind it: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." (*Illinois v. Caballes, supra.*, 543 U.S. at 410.) The Court explained that a sniff by a well-trained narcotics detection dog discloses only the presence or absence of narcotics, illegal activity. It does not expose non-contraband items or lawful

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[26] One might be able to challenge a dog-sniff it was conducted in an unreasonable manner, or if the officer opened the doors and let the dog into the interior of the vehicle without probable cause of consent. (See People v. Bell, supra., at 769-770.)

private activity. (*Illinois v. Caballes, supra.*, at 409-410.)[27]

The only way to challenge a dog sniff would be to argue that the driver was unlawfully detained at the point when the officer brought out the drug-detection dog.(See *People v. Bell, supra.*, at 769.) Once again, the viability of this argument might depend on when the dog started sniffing. If the officer brought out the dog after the legal traffic stop terminated, then one could challenge the dog sniff, and the resulting probable cause, if one could show that the driver was still detained without reasonable suspicion at that critical moment. (See Section IIIB3.)

Alternatively, if the officer brings out the dog before issuing the citation or warning, one could try and establish that the dog sniff commenced during an illegally prolonged detention – that the officer "had improperly extended the duration of the stop to enable the dog sniff to occur". (See *Illinois v. Caballes, supra.*, 543 U.S. at 408.) One might try and make this argument if the officer who conducts the traffic stop has to radio for a unit with a drug-detection dog, and it takes considerable time for the K-9 unit to arrive. However, the recent case of *People v. Gomez, supra.*, 117 Cal. App. 4th at 538-540, exemplifies the difficulties involved in raising this argument. (See section IIC, above.)

F. PROBATION AND PAROLE SEARCHES

An unjustified traffic stop and consequent detention of the driver, and/or an unjustified vehicle search cannot be validated after-the-fact by the officer's subsequently obtained knowledge that an occupant of the vehicle is on parole or on probation with a search condition. And this rule applies to both adults and juveniles. (See *In re Jaime P.* (2006) 40 Cal. 4th 128; *People v. Saunders* (2003) 31 Cal. 4th 318; *People v. Hester* (2004) 119 Cal. App. 4th 376.) The officer must know that the person is on parole, or on probation with a search condition, before he pulls the car over.[28] Only then can the officer stop the car without reasonable suspicion of a Vehicle Code offense or other criminal violation. And only then can the officer search the car without consent, probable cause, or other

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[27] Thus, a dog sniff is different than the thermal-imaging device that was characterized as a search in *Kyllo v. United States* (2001) 533 U.S. 27. The thermal imaging device could detect both illegal marijuana growing and lawful activity. (*Illinois v. Caballes, supra.*, 543 U.S. at 409-410.)

[28] For a juvenile or adult probationer, the officer must know beforehand that the individual is on probation with a search condition. However, for the parolee, the officer need only know that the individual is on parole. (*People v. Middleton* (2005) 131 Cal. App. 4th 732.)

justification. (*Samson v. California* (2006) 547 U.S. __ [126 S.Ct. 2193] [suspicionless search of parolee is constitutional]; *In re Jaime P., supra*., 40 Cal. 4th at 134 [officer relying on search condition may act reasonably without particularized suspicion or criminality].)

If the officer legally stops the car to investigate a Vehicle Code violation, and then discovers during the legitimate traffic stop that the driver or a passenger is on probation with a search clause or on parole, the officer can then perform a probation or parole search. And remember, the officer can ask about parole or probation status during the lawful traffic stop. (See *People v. Gallardo, supra.*, 130 Cal. App. 4th at 238-239.)

What if the officer stops the car illegally, but then discovers -- during the illicit detention -- that the driver is on parole or probation with a search condition? Can the officer then perform a probation or parole search of the driver or the vehicle? According to a recent unpublished First District opinion, the answer is no. In these circumstances, the officer discovery of the individual's probation search condition is not an intervening circumstance sufficient to purge the taint of the impermissible detention. The knowledge that the individual is on probation or parole, as well as the subsequent search, is the product of the illegal detention, and the seized evidence must be suppressed.