Searches by Civilians and Police Agents

"[T]he protection of the Fourth Amendment . . . does not extend to searches conducted by private persons."[1]

Civilians sometimes discover evidence of a crime and turn it over to officers. Usually it's a weapon, drugs, stolen property, or some type of document. But whatever it is, officers seldom need to worry about how the civilian located it or whether it will be suppressed. That's because, even if was acquired by means of an illegal search, it cannot ordinarily be suppressed unless it was obtained by a sworn officer or some other government employee.[2]

The main reason the law gives civilians a pass is that the threat of suppression would seldom deter them from looking through other people's property. Moreover, most of them don't know the rules of search and seizure, they have no reason to learn them, and they are not disciplined when they violate them. Officers, on the other hand, aren't so lucky. As the Court of Appeal observed:

> Where the exclusionary rule is directed to the police, we may assume that they will have knowledge of it, that there will result directives from the higher echelons designed to secure compliance and to institute acceptable alternative practices, and that both the discipline of an organized police force and the desire to secure convictions will produce compliance with those directives.[3]

Although there is little justification for applying the exclusionary rule to a search conducted by a civilian, the situation changes if he was functioning as a police agent. In that case, the officers' ability to direct and control his actions would give them a strong incentive to make sure that the search stands up in court. For this reason, the United States Supreme Court has ruled that evidence will be suppressed if it was obtained as the result of an unlawful search by a civilian who was functioning as an "instrument or agent of the Government."[4]

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[1] *People* v. *William G.* (1985) 40 Cal.3d 550, 558.

[2] See *United States* v. *Jacobsen* (1984) 466 U.S. 109, 113 ["[The Fourth Amendment] is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."]; *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 222 ["[A] motion to suppress evidence [obtained illegally by a private citizen] cannot be made on the ground that its acquisition constitutes an unreasonable search and seizure under Penal Code section 1538.5."]. BUT ALSO SEE *People* v. *Otto* (1992) 2 Cal.4th 1088 [suppression is required under federal law when the evidence was obtained by means of a civilian's illegal wiretap].

[3] *People* v. *Botts* (1967) 250 Cal.App.2d 478, 482. ALSO SEE *Dyas* v. *Superior Court* (1974) 11 Cal.3d 628, 632.

[4] *Skinner* v. *Railway Labor Exec. Assn.* (1989) 489 U.S. 602, 614. ALSO SEE *Coolidge* v. *New Hampshire* (1971) 403 U.S. 443, 487 ["The test [is whether the citizen] must be regarded as having acted as an instrument or agent of the state"].

The question, then, is what makes a civilian a police agent? As we will explain, it depends mainly on whether, and to what extent, an officer had some role in the search; and, of somewhat lesser importance, whether the civilian intended to assist officers.

We will also discuss a thorny issue that can arise when the evidence was inside a box or other container when officers received it from the civilian: Do they need a warrant to open it?

"POLICE AGENTS"

Virtually anyone can be a police agent, including security officers employed by malls and amusement parks, private investigators, motel managers, employees of package delivery companies, informants, and even off-duty officers. But in determining whether someone was a police agent it doesn't matter where he worked. What counts is whether, and to what extent, an officer played a role in his actions.[5] In the words of the United States Supreme Court:

> Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities.[6]

The officer's role

In determining whether a search conducted by a private citizen was a police search, the most important circumstance is whether an officer played a role in instigating or executing it. While a search that is orchestrated by an officer will certainly qualify, so

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[5] See *Lugar* v. *Edmondson Oil Co.* (1982) 457 U.S. 922, 937 [a person may be deemed a "state actor" because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."]; *People* v. *Fierro* (1965) 236 Cal.App.2d 344, 348 ["In brief, the question is one of the extent of government involvement in an invasion conducted by the private citizen."]. **NOTE**: As discussed below, the courts may also consider the civilian's primary motive for conducting the search. **NOTES**: **Defendant's burden**: The defendant has the burden of proving the citizen was a police agent. See *U.S.* v. *Reed* (9th Cir. 1994) 15 F.3d 928, 931; *U.S.* v. *Cleaveland* (9th Cir. 1995) 38 F.3d 1092, 1093; *U.S.* v. *Ginglen* (7th Cir. 2007) 467 F.3d 1071, 1074; *U.S.* v. *Shahid* (7th Cir. 1997) 117 F.3d 322, 325. **Totality of circumstances**: In determining whether a private citizen was a police agent, the courts must consider the totality of circumstances. See *Skinner* v. *Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 614. **Searches by non-law enforcement governmental employees**: Regardless of whether the search was initiated or facilitated by officers, the exclusionary rule applies to searches conducted by a government employee if he "acted with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose." See *U.S.* v. *Attson* (9th Cir. 1990) 900 F.2d 1427, 1431-2.

[6] *Skinner* v. *Railway Labor Exec. Assn.* (1989) 489 U.S. 602, 614. **NOTE**: The standards for determining whether a person was a police agent under the Fourth Amendment is different than those for determining common law agency, federal civil rights violations, and due process violations. See *Arpin* v. *Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 924 ["Unlike the 'state actor' standard of the Fourteenth Amendment or the 'color of law' standard of [the federal civil rights statute], the fourth amendment cannot be triggered simply because a person is acting on behalf of the government."]; *U.S.* v. *Koenig* (7th Cir. 1988) 856 F.2d 843, 847, fn.1 [rules of common law agency do not apply].

might a search in which the officer's role was more roundabout or subtle, maybe even if he merely "had a hand in it."[7]

REQUESTING, INDUCING, INSTIGATING: A search conducted by a civilian will be adjudged a police search if officers instigated it, participated in its planning or execution, or if they gave the citizen an incentive to search.[8] For example, in *Raymond* v. *Superior Court*[9] a 12-year old boy told an officer that he had found marijuana in his father's bedroom. The officer responded by asking him to try to get "a sample." He succeeded but, not surprisingly, the court suppressed it, saying, "Although the [boy] was the immediate actor, police participation in planning and implementation subjected the expedition and its product to [suppression]."

JOINT OPERATIONS WITH CIVILIANS: A search by a civilian that occurs during what amounts to a "joint operation" with officers will also be regarded as a police search.[10] For

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[7] See *Lustig* v. *United States* (1949) 338 U.S. 74, 78 ["[A] search is a search by a federal official if he had a hand in it"].

[8] See *Lugar* v. *Edmondson Oil Co.* (1982) 457 U.S. 922, 937 [private citizen may be a police agent if he "obtained significant aid from state officials"]; *United States* v. *Jacobsen* (1984) 466 U.S. 109, 113 [private citizen may be a police agent if he acted "with the participation" of an officer]; *Jones* v. *Kmart Corp.* (1998) 17 Cal.4th 329, 333 [private citizen may be a police agent if he "obtained significant aid from state officials"]; *People* v. *McKinnon* (1972) 7 Cal.3d 899, 912 [Fourth Amendment applies if officers "hired and paid" the person to conduct warrantless searches," or if he were to "open and search a specific package at [their] express direction or request"]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 384, fn.3 [civilian was acting at an officer's request]; *Dyas* v. *Superior Court* (1974) 11 Cal.3d 628, 633, fn.2 [exclusionary rule will be applied if officers "requested the illegal search"]; *Stapleton* v. *Superior Court* (1968) 70 Cal.2d 97, 102 ["[The civilian] entered petitioner's house at the request and as an agent of the police."]; *People* v. *Tarantino* (1955) 45 Cal.2d 590 [officer requested a sound engineer to plant a bug in a suspect's hotel room]; *People* v. *Fierro* (1965) 236 Cal.App.2d 344 [officer requested motel manager to search the defendant's motel room]; *People* v. *North* (1981) 29 Cal.3d 509, 514 [search "performed in conjunction with, or cloaked in the authority of the state"]; *People* v. *De Juan* (1985) 171 Cal.App.3d 1110, 1120 [search at officers' "behest or instigation"]; *People* v. *Scott* (1974) 43 Cal.App.3d 723, 726 [citizen "hired and paid by the police"]; *People* v. *Leighton* (1981) 124 Cal.App.3d 497, 501 ["the police direct[ed] the private citizen to conduct the search"]; *U.S.* v. *Ziegler* (9th Cir. 2007) 474 F.3d 1184, 1190 [FBI agent asked company manager to provide him with a copy of an employee's hard drive]; *U.S.* v. *Ginglen* (7th Cir. 2006) 467 F.3d 1071, 1075 ["[T]here is no indication that the government encouraged or acquiesced in the brothers' decision to enter their parents' home."]; *U.S.* v. *Shahid* (7th Cir. 1997) 117 F.3d 322, 325 ["Other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward."].

[9] (1971) 19 Cal.App.3d 321, 325.

[10] See *Lugar* v. *Edmondson Oil Co.* (1982) 457 U.S. 922, 941 ["[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."]; *People* v. *North* (1981) 29 Cal.3d 509, 514 [search "performed in conjunction with" officers]; *People* v. *McKinnon* (1972) 7 Cal.3d 899, 912 [civilian would be deemed a police agent if officers were engaged in a "joint operation" with him]; *People* v. *Scott* (1974) 43 Cal.App.3d 723, 726 [a search would be a police search if a citizen "participates in planning or implementing a 'joint operation' with law enforcement authorities"]. COMPARE *People* v. *Mangiefico* (1972) 25 Cal.App.3d 1041, 1048 ["Berdan was not engaged in a joint operation with local authorities, but was conducting an independent investigation."].

example, in *Stapleton* v. *Superior Court*,[11] LAPD officers, accompanied by special agents from three credit card companies, went to Stapleton's home to arrest him on an outstanding warrant for credit card fraud. Some of the agents covered the back while the officers and one of the agents entered through the front. After Stapleton was arrested, one of the agents searched the trunk of his car and found several illegal tear gas canisters.

The California Supreme Court ruled the search was illegal and, although it was conducted by a civilian, it also ruled it was a police search because the officers, "by allowing [the agent] to join in the search and arrest operation, put [him] in a position which gave him access to the car keys and thus to the trunk of [Stapleton's] car."

FAILING TO INTERVENE: An officer's failure to intervene may convert a civilian's search into a police action if, (1) the officer knew that the search was impending or underway; and (2) he knew, or should have known, that it was unlawful.[12] As the court explained in *People* v. *De Juan*, "Suppression will be ordered when with the knowledge that a private citizen is violating or is about to unlawfully violate the privacy rights of another, the police sit idly by and do nothing."[13]

For example, in *U.S.* v. *Reed*[14] the manager of a Best Western motel in Alaska notified officers that he suspected Reed was using his motel room for "drug activities." He also asked the officers to stand by while he "checked the room." According to the court, the officers "stood guard" in the doorway as the manager went through Reed's dresser drawers and examined the contents of his briefcase. As it turned out, the search netted a gun and some drugs, but the court suppressed everything because the officers had failed to stop him. Said the court:

> [The officers] definitely knew and acquiesced in [the manager's] search. They were personally present during the search, knew exactly what [the manager] was doing as he was doing it, and made no attempt to discourage him from examining Reed's personal belongings beyond what was required to protect hotel property.

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[11] (1968) 70 Cal.2d 97, 100.

[12] See *People* v. *Yackee* (1984) 161 Cal.App.3d 843, 847 ["[T]he investigating officer knowingly allowed the airline to reopen the suitcase in his presence, for his benefit, without intervening to stop the search. Thus, what had heretofore been a purely private search became a joint operation with the police."]; *Dyas* v. *Superior Court* (1974) 11 Cal.3d 628, 633, fn.2 [exclusionary rule will be applied if officers "knowingly allowed [an illegal search] to take place without protecting the third party's rights"]; *Stapleton* v. *Superior Court* (1968) 70 Cal.2d 97, 103 ["[T]he police stood silently by while [the agent] made the obviously illegal search."]; *People* v. *McKinnon* (1972) 7 Cal.3d 899, 912 ["[A] private citizen may also be deemed to act as an agent of the police when the latter merely 'stand silently by'"]; *People* v. *North* (1981) 29 Cal.3d 509, 516 ["police foreknowledge or simultaneous awareness of a citizen entry, is wholly lacking in the case before us."]; *U.S.* v. *Walther* (9th Cir. 1981) 652 F.2d 788, 793 ["The DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity."]; *U.S.* v. *Shahid* (7th Cir. 1997) 117 F.3d 322, 325 [a "critical" factor is "whether the government knew of and acquiesced in the intrusive conduct"].

[13] (1985) 171 Cal.App.3d 1110, 1120.

[14] (9th Cir. 1994) 15 F.3d 928.

On the other hand, a failure to intervene will not change the character of the search if the officers reasonably believed the civilian was acting lawfully.[15] As the Ninth Circuit observed:

> The presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search has been held insufficient to implicate fourth amendment interests, especially where the private party has had a legitimate independent motivation for conducting the search.[16]

For example, in *People* v. *Minervini*[17] a motel desk clerk in Santa Barbara suspected that two men who had rented two rooms were part of a gang that had been stealing television sets from motels in the area. When he saw one of the men removing a "large box" from his room, he notified the police and the motel's manager. When officers arrived, they accompanied the manager as he opened the door to one of the rooms and found the television was gone. The manager and the officers then went to the other room which the manager opened with a key. As he looked around the room, he saw that the television set had been placed in a cardboard box. The men were later arrested.

On appeal, they claimed the motel manager was functioning as a police agent when he opened the doors to their rooms. But the court pointed out that the manager "went to the rooms and opened them on his own initiative." More important, he had a right to do so and "that right would not be diminished if he sought police assistance in exercising that right or even if he was encouraged by the police to so exercise it."

Similarly, in *U.S.* v. *Cleaveland*[18] an investigator for the Portland General Electric Company (PGE) received a tip that someone was diverting electricity to a certain residence. So he asked a detective to accompany him while he checked the meter. The detective waited in his car while the investigator searched the meter housing and discovered evidence of illegal diversion. In ruling that the search was not a police search, the court noted:

> It was PGE, not the police, who initiated the plan to inspect the meter. There was no reason why the detective should have restrained [the investigator] or discouraged him in his search because [the investigator] never exceeded his authority under the Customer Service Agreement to go on the property and inspect the meter.

REQUEST TO FOLLOW "ROUTINE" PROCEDURES: An officer's request that a civilian, such as a motel desk clerk or housekeeper, follow "routine" procedures while the officer stands by will not convert those procedures into a police search.[19] For example, in *U.S.* v. *Andrini*[20] ATF agents were conducting surveillance on a motel room rented by Andrini who was suspected of setting fire to an office building. As the result of a mix-up in room

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[15] See *People* v. *Thompson* (1972) 25 Cal.App.3d 132, 142 ["The police officer who was present at the [search] believed reasonably and in good faith that the conduct of the airline official was lawful"].

[16] *U.S.* v. *Walther* (9th Cir. 1981) 652 F.2d 788, 792.

[17] (1971) 20 Cal.App.3d 832.

[18] (9th Cir. 1994) 38 F.3d 1092.

[19] See *People* v. *Minervini* (1971) 20 Cal.App.3d 832, 839; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 706 ["These private employees are not transformed into government agents merely because the police took an interest in the items they planned to remove from the room during their normal cleaning activities"].

[20] (9th Cir. 1982) 685 F.2d 1094, 1098.

assignments, Andrini's suitcase was sent to the wrong room, then returned to the front desk. Although an ID tag was not attached to the bag, both the desk clerk and the ATF agent (who happened to be present) suspected that it belonged to Andrini. When the clerk asked the agent what he wanted him to do with the bag, he told him to follow "routine" procedures. So the clerk opened it to try to determine the identity of its owner. Inside, he saw a gun. Continuing to follow routine procedures, he notified local police who arrested Andrini for being a felon in possession of a firearm. During a search incident to the arrest, the officers found a pyrotechnic fuse similar to the one used in the arson.

On appeal from his arson conviction, Andrini contended the search of his suitcase should be deemed a police search but the court disagreed, noting, "[The ATF agent] did not instruct the motel clerk to open the bag. To the contrary, he advised the clerk to follow routine motel procedure."

Similarly, in *U.S.* v. *Bruce*[21] the manager of an Extended Stay America hotel in Ohio notified police that employees had detected the odor of burning marijuana coming from one of two rooms that had been rented by Bruce and his friends. So a police sergeant asked the manager to tell the housekeepers to segregate the trash from the two rooms "during their regular cleaning." While searching the trash, officers found marijuana.

On appeal, Bruce contended the housekeepers were police agents, but the court disagreed, noting:

> [T]he cleaning staff were not asked to *search* for evidence, but merely to *preserve* any possible evidence they might otherwise have removed from the room and discarded in the course of their ordinary cleaning duties. There is no evidence that the staff were asked to look around the rooms, report any suspicious items, or otherwise deviate from their typical cleaning routine.

BE ON THE LOOKOUT: A search conducted by a civilian will not be attributed to officers merely because they had asked him to be "on the alert" and report any suspicious circumstances. As the California Supreme Court explained in *People* v. *McKinnon*, "When the authorities respond to [public interest in apprehending criminals] with drug education programs and generalized appeals for the assistance of the citizenry, they do not automatically 'deputize' all those who may have occasion to act on the information thus provided."[22]

PRIOR CONTACTS, COOPERATION: Although it is relevant that officers had spoken with the civilian in the past about crime problems or investigations, or that the civilian had previously cooperated with officers, these circumstances do not establish an agency relationship.[23] As the Ninth Circuit put it:

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[21] (6th Cir. 2005) 396 F.3d 697.

[22] (1972) 7 Cal.3d 899, 914.

[23] See *People* v. *Mangiefico* (1972) 25 Cal.App.3d 1041, 1046-7 [private investigator did not become a police agent merely because he notified the police chief and fire marshal that he was working on an arson case that he and they were investigating]; *People* v. *North* (1981) 29 Cal.3d 509, 629, 516 ["Citizen cooperation with the police in a criminal investigation, standing alone, does not invoke the exclusionary rule."]; *U.S.* v. *Lambert* (6th Cir. 1985) 771 F.2d 83, 89 ["A person will not be acting as a police agent merely because there was some antecedent contact between that person and the police."]; *U.S.* v. *Koenig* (7th Cir. 1988) 856 F.2d 843, 848 ["Since Zito began his employment with Federal Express, he has contacted the DEA at least eight times. . . [B]ut he never worked as an informant for the DEA, has never been rewarded by the DEA for his

> While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny.[24]

For example, in *People* v. *Warren*[25] the defendant argued that Alvarez, the owner of a parcel delivery service, was a police agent when he searched a package that Warren had dropped off. His argument was based on Alvarez having been an officer in the past, and having previously notified officers when he found drugs in packages. But this was immaterial, said the court, because "the evidence supports the trial court's finding that Alvarez was acting as a responsible employee and on behalf of the mail companies, and not as an agent of the government." Similarly, in *U.S.* v. *Koenig* the court ruled that Federal Express did not function as an agent of the DEA merely because DEA officials had "aided Federal Express in the development of a drug shipper profile.""[26]

LICENSING: Finally, a civilian does not become a police agent merely because he was licensed by a state or local government agency; e.g., security officers, private investigators, taxi drivers.[27]

The citizen's motivation

In close cases, the courts may look to see whether the civilian conducted the search for personal reasons. If so, it's a circumstances that may tend to prove he was not a police agent, even if he also intended to assist officers.[28] As the court explained in *U.S.* v.

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aid, nor even discussed with law enforcement authorities what to look for in Federal Express shipping."]; *U.S.* v. *McAllister* (7th Cir. 1994) 18 F.3d 1412, 1418.

[24] *U.S.* v. *Walther* (9th Cir. 1981) 652 F.2d 788, 791.

[25] (1990) 219 Cal.App.3d 619.

[26] (7th Cir. 1988) 856 F.2d 843, 849.

[27] See *People* v. *De Juan* (1985) 171 Cal.App.3d 1110, 1122; *People* v. *Christopher H.* (1991) 227 Cal.App.3d 1567, 1574-5.

[28] See *People* v. *Minervini* (1971) 20 Cal.App.3d 832, 840 ["[I]t is significant that any 'search' by the manager was . . . to secure the premises themselves and to prevent theft of property belonging to the motel."]; *Arpin* v. *Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 924 ["[F]or the conduct of a non-law enforcement governmental party to be subject to the Fourth Amendment, Arpin must show that Ruiz acted with the intent to assist the government in its investigatory or administrative purposes, and not for an independent purpose."]; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 705 ["[T]wo elements must be shown in order to treat ostensibly private action as a state-sponsored search: (1) the police must have instigated, encouraged, or participated in the search; and (2) the private individual must have engaged in the search with the intent of assisting the police." Citation]; *People* v. *Warren* (1990) 219 Cal.App.3d 619, 622 ["The relevant factors used in determining whether the governmental participation is significant, or de minimis, are (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search."]; *U.S.* v. *Attson* (9th Cir. 1990) 900 F.2d 1427, 1433 [the citizen "must have acted with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose."]; *U.S.* v. *Ginglen* (7th Cir. 2006) 467 F.3d 1071, 1075 ["[T]heir primary objective was to protect the community from harm, not to assist law enforcement."]; *U.S.* v. *McAllister* (7th Cir. 1994) 18 F.3d 1412, 1418 [there is substantial evidence "that the CI was working primarily to further his own interests"]; *U.S.* v. *Shahid* (7th Cir. 1997) 117 F.3d 322, 325 [a "critical" factor is "whether the private party's purpose in conducting the search was to assist law enforcement agents or to further [his] own ends."]; *U.S.* v. *Cleaveland* (9th

Shahid, "[T]hat a private party might also have intended to assist law enforcement does not transform him into a government agent so long as the private party has had a legitimate independent motivation for engaging in the challenged conduct."[29]

An example is found in *U.S.* v. *Cleaveland,*[30] the PGE case we discussed earlier. Some additional facts: The PG&E investigator suspected that Cleaveland was diverting power to grow marijuana; and he wanted the detective to stand by "in the event the situation became dangerous." Furthermore, he said that if he discovered a power diversion "he wanted the police to be able to get a warrant to search the house to confirm the power theft." Based on information obtained during the investigator's search, the detective obtained a warrant which netted marijuana, a firearm, and evidence of power diversion.

On appeal, Cleaveland argued that the evidence should have been suppressed because the investigator's objective was to uncover evidence of a crime. That was true, said the court, but he also had a significant interest in preventing a further loss of electricity and revenue to his employer. As the court explained, "[The investigator's] motive to recover for PGE's loss of power was a legitimate, independent motive apart from crime detection or prevention. That motivation was not overridden by the fact the police stood by during the search, and used the fruits of that search to obtain a warrant to search Cleaveland's house."

In contrast, in *U.S.* v. *Reed*[31] (also discussed earlier) the court ruled that a motel manager's search of the defendant's room was conducted solely to assist narcotics officers—not to protect motel property. Said the court, "[The manger] called the police in order to let them know that he felt he had a room and a guest that was 'involved in activity they would want to be aware of,' and because he suspected that Reed was involved in drug activity."

Applying the principles

Having explained the basic principles, we will now look at how the courts have applied them in specific situations.[32]

Cir. 1995) 38 F.3d 1092, 1093 ["[T]he relevant inquiry is: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends."]; *U.S.* v. *Lambert* (6th Cir. 1985) 771 F.2d 83, 89 ["First, the police must have instigated, encouraged or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts."].

[29] (7th Cir. 1997) 117 F.3d 322, 326.

[30] (9th Cir. 1994) 38 F.3d 1092.

[31] (9th Cir. 1994) 15 F.3d 928.

[32] **NOTE**: In *People* v. *Zelinski* (1979) 24 Cal.3d 357 the California Supreme Court ruled that private security personnel who were fulfilling a public function, such as making arrests, were police agents and that evidence illegally obtained as a result of such activities must be suppressed. That ruling is no longer the law, having been abrogated by the passage of California's Proposition 8. See *Collins* v. *Womancare* (9th Cir. 1989) 878 F.2d 1145, 1154 ["*Zelinski* directly conflicts with and is superseded by *Lugar*."]; *People* v. *McKay* (2002) 27 Cal.4th 601, 608 ["With the passage of Proposition 8, we are not free to exclude evidence merely because it was obtained in violation of some state statute or state constitutional provision."]. Consequently, this determination will be based on federal law which does not view private security officers as police agents. See *People* v. *Taylor* (1990) 222 Cal.App.3d 612, 621 ["Under federal law, searches and seizures by private security employees have traditionally been viewed as those of a private citizen and consequently not subject to Fourth Amendment proscriptions."]. **NOTE**: Although some of the following

MALL AND STORE SECURITY: Although mall and store security personnel make citizens' arrests and engage in other activities that are related to law enforcement (and some are even licensed by the state[33]), they seldom qualify as police agents. This is mainly because they are not supervised or otherwise controlled by police officers, and their primary objective is to protect their employer's property.[34]

For example, in *People* v. *Christopher H.*[35] two security officers employed by the Los Cerritos Mall saw two juveniles walking along an access road on mall property. When the juveniles stopped, looked around, and walked into some bushes, the officers decided to investigate. After ordering them out, they noticed that one of the juveniles, Christopher, was wearing a sweatshirt that was covering a "large bulge" around his waist. At the request of one of the officers, he lifted up his sweatshirt, exposing a loaded .357 magnum handgun.

On appeal, the court ruled that, even if the search was unlawful, the gun could not be suppressed because the security officers were not police agents. Among other things, the court pointed out that they "obtained no aid from state officials in stopping and searching defendants," and that "the state had no part in [the investigation] until after the stop and search had been completed."

Similarly, in *People* v. *Leighton*[36] security officers at the Nordstom store in Costa Mesa received information that Leighton, a store employee, had stolen some refund slips which she had taken to her apartment. The officers went there and spoke with Leighton's roommate who, apparently at their request, went into Leighton's bedroom and retrieved the slips from a desk drawer. The officers later gave the slips to police, who arrested Leighton.

Leighton claimed the security officers and her roommate were working as police agents because they acted "with the specific objective of assisting law enforcement officials." But even if that were true, said the court, they would not have been police agents because "t]here is no evidence of prior consultation [with police officers] before seizure of the incriminating documents nor is there any evidence the police had any part in the direction of this investigation."

AMUSEMENT PARK SECURITY: While private security officers at amusement parks perform a service that is related to law enforcement, they are not usually police agents because, like mall security, they are not supervised or controlled by police officers. For

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examples were based, at least in part, on *Zelinski*, we included them because the courts' analysis would be valid under current law.

[33] See Bus. & Prof. Code §§ 7580 et seq.

[34] See *People* v. *Taylor* (1990) 222 Cal.App.3d 612, 625 ["[T]he mere fact that California licenses security guards and regulates their conduct does not transform them into state agents."]; *People* v. *Leighton* (1981) 124 Cal.App.3d 497, 503 [the security officer's "interests were directed towards protecting her clients'—the store's—interests"]; *U.S.* v. *Shahid* (7th Cir. 1997) 117 F.3d 322, 326 ["[T]he security officers' primary role is to provide safety and security for all persons on mall property."].

[35] (1991) 227 Cal.App.3d 1567. ALSO SEE *People* v. *Brouillette* (1989) 210 Cal.App.3d 842, 847 ["There was evidence to support the findings that the security guards dressed like police and are looked upon by others as representing police authority, and that they assisted the police . . . [But there] was nothing to show that they made the inspection of the wallet as agents of the state."].

[36] (1981) 124 Cal.App.3d 497.

example, in *People* v. *Taylor*[37] two security officers employed by the Santa Cruz Seaside Company saw four men drinking beer under the boardwalk. They also saw that one of the men, Taylor, was holding a baggie of marijuana. After seizing the baggie, they obtained Taylor's consent to search his clothing for more. The search netted four more baggies of marijuana and several sheets of LSD. The officers then placed Taylor under citizen's arrest and notified Santa Cruz police.

Taylor contended the boardwalk security officers were police agents mainly because they worked closely with Santa Cruz police, they wore uniforms with shoulder patches, a duty belt and badge; they carried handcuffs, batons, and two-way radios, including a police radio; and their purpose in searching Taylor was to enforce the drug laws, not protect boardwalk property.

Nevertheless, the court ruled they were not police agents mainly because there was "no evidence from which this court can infer a prearranged plan, customary procedure, or policy that substituted the judgment of a private party for that of the police," and there was no indication that police officers "coerced or encouraged the security guards to effect the citizen's arrest."

It has been argued that security officers employed by the larger amusement parks should be deemed police agents because these parks are the functional equivalent of a small city. But so far, these arguments have been rejected. For example, in *U.S.* v. *Francoeur*[38] security officers at Walt Disney World detained and searched the defendant who was suspected of passing counterfeit currency. The court ruled that even if the search was unlawful, the evidence could not be suppressed because Disney World is "not an open town fully accessible and available to all commerce. This private property is an amusement park to which admission is charged."

PRIVATE INVESTIGATORS: Even though private investigators are licensed by the state, they are not police agents when they obtain evidence in the course of an investigation if, as is usually the case, their objective was to obtain information or evidence for their client.[39]

For example, in *People* v. *De Juan*[40] private investigators, some of whom were retired police officers, were hired to find two brothers missing under suspicious circumstances. In the course of their probe, some of them illegally detained the defendant and obtained his consent to search his car which, as it turned out, contained evidence linking him to the murder of the brothers. Although the search was unlawful, the court refused to suppress

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[37] (1990) 222 Cal.App.3d 612. ALSO SEE *Ecker* v. *Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1329, fn.3 ["Even in a criminal prosecution, the action of a private security guard in searching an individual is not subject to the proscriptions of the Fourth Amendment unless the private security guard may fairly be said to be a state actor."].

[38] (1977) 547 F.2d 891.

[39] See *People* v. *Mangiefico* (1972) 25 Cal.App.3d 1041, 1048 [the private investigator "was not engaged in a joint operation with local authorities, but was conducting an independent investigation"]; *People* v. *Sahagun* (1979) 89 Cal.App.3d 1 [security consultant hired to investigate thefts at a laundry was not a police agent when he searched a shed owned by the suspect]; *People* v. *De Juan* (1985) 171 Cal.App.3d 1110, 1122 ["Although several of the private investigators involved in this case were retired policemen, their testimony was that they did not display . . . any badge or other identification indicating they were policemen"]. **NOTE re bail bondsmen**: Bail bondsmen are not police agents when they make an arrest pursuant to their statutory authority. See *People* v. *Houle* (1970) 13 Cal.App.3d 892, 895; Pen. Code § 1301.

[40] (1985) 171 Cal.App.3d 1110.

the evidence because the investigators "were not acting as agents of the police or in concert with the police . . . [and the police] had no knowledge of the investigators' plan to intercept and interrogate defendant . . . "

The court also ruled, however, that the private investigators *were* acting as police agents when, after discovering the evidence, they received authorization from police officers to transport the defendant to the police station. Consequently, statements made by the defendant during the trip were suppressed.

HOTEL AND APARTMENT EMPLOYEES: Security officers and employees of hotels, motels, apartments, and condominiums who are acting on their own initiative and without police supervision are deemed civilians when taking action to protect people and property on the premises, or to prevent the premises from being used for illegal activities.[41]

For example, in *Emslie* v. *State Bar*[42] the California Supreme Court ruled that security officers at Caesar's Palace in Las Vegas were acting as civilians when, after detaining Emslie (a suspected hotel burglar and confirmed lawyer), they searched him and found eight hotel room keys which they gave to the police. Said the court:

> The initial apprehension and detention of Emslie by the hotel security officer was in the nature of a citizen's arrest for a public offense committed or attempted in his presence. The hotel security officers were not acting under the authority of the state in apprehending, detaining, searching or questioning Emslie at Caesar's Palace Hotel.

The situation would be different, of course, if officers played a role in the search. For example, in *U.S.* v. *Reed*[43] the manager of a Best Western motel in Alaska had reason to believe that two guests might be selling drugs out of their room. So he asked police officers to stand by while he entered the room to check it out. When no one responded to his knocking, he unlocked the door with a master key and entered. Then, while the officers "stood guard" in the doorway, the manager searched the room and found guns and drugs.

Not surprisingly, the court ruled the evidence should have been suppressed because the officers played a "vital" role in the caper—they were the lookouts. Moreover, said the

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[41] See *People* v. *Bennett* (1998) 17 Cal.4th 373, 383, fn.2 [at the request of police, motel manager placed cuff lock on suspect's door]; *People* v. *Ingram* (1981) 122 Cal.App.3d 673, 677 [hotel manager found drugs in a guest's suitcase and showed the open suitcase to officers]; *People* v. *Robinson* (1974) 41 Cal.App.3d 658 [landlady who discovered a murder weapon in her tenant's coat pocket, gave the coat to a police investigator]; *People* v. *Johnson* (1971) 21 Cal.App.3d 235, 242 [apartment maintenance supervisor was not a police agent when he lawfully entered an apartment in the course of his duties and saw a large quantity of drugs and a machine gun]; *People* v. *Minervini* (1971) 20 Cal.App.3d 832, 839; *U.S.* v. *Andrini* (9th Cir. 1982) 685 F.2d 1094 ["The officer did not instruct the motel clerk to open the bag. To the contrary, he advised the clerk to follow routine motel procedure."]; *U.S.* v. *Reed* (9th Cir. 1994) 15 F.3d 928 ["[The officers] definitely knew of and acquiesced in [the manager's] search. They were personally present during the search, knew exactly what (the manager) was doing as he was doing it, and made no attempt to discourage him from examining [the] personal belongings beyond what was required to protect hotel property. (The manager) reported his findings to them as he searched."]; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 705 [cleaning personnel were not police agents when, at officer's request, they segregated trash taken from suspect's room]; *U.S.* v. *Bomengo* (5th Cir. 1978) 580 F.2d 173, 175 [apartment building security director].

[42] (1974) 11 Cal.3d 210.

[43] (9th Cir. 1994) 15 F.3d 928.

court, they were "personally present during the search, knew exactly what [the manager] was doing as he was doing it, and made no attempt to discourage him from examining [the] personal belongings beyond what was required to protect hotel property."

SHIPPING EMPLOYEES: Parcels that are shipped by UPS, Federal Express, the airlines, and other carriers will sometimes be opened by employees intentionally for inspection or as the result of a mishap.[44] In any event, evidence discovered as the result will not be suppressed because these employees are plainly not police agents.[45] For example, when this issue was raised in *U.S.* v. *Koenig* the court responded, "Nothing in the record suggests that Federal Express searched Koenig's package, or any other package, for reasons other than what it perceived as its own business interest in safety and security."[46]

EMPLOYERS: While an employer who searches an employee's desk, files, computer, or personal property at the workplace is ordinarily not a police agent, he effectively becomes one if he works for an agency of the government—whether federal, state, or local. This is because all government agencies are subject to the Fourth Amendment's restrictions on searches and seizures. As the United States Supreme Court said in *O'Connor* v. *Ortega*,[47] "Searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment."

INFORMANTS: Even though informants often have an ongoing working relationship with officers, are not police agents if they conducted the search on their own initiative.[48]

OFF-DUTY POLICE OFFICERS: The courts have rejected the argument that officers are always *on duty* for Fourth Amendment purposes. Instead, it appears to be the rule that a search conducted by an off-duty officer will be deemed a private search if, (1) he was

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[44] See *People* v. *McKinnon* (1972) 7 Cal.3d 899, 913 ["[B]ecause a common carrier has a general duty of care towards all the goods it transports. it also has the right to open and inspect a package which it suspects contains a dangerous device or substance which may damage other goods in the shipment or the vehicle carrying them."].

[45] See *United States* v. *Jacobsen* (1984) 466 US 109, 115 ["Whether [the initial opening of the package by Federal Express employees was] accidental or deliberate, and whether [it was] reasonable or unreasonable, [it] did not violate the Fourth Amendment because of their private character."]; *Miramontes* v. *Superior Court* (1972) 25 Cal.App.3d 877, 884 [when airline employees discovered marijuana in a package, it was reasonable for them "to call on the police for expert assistance."]; *People* v. *McKinnon* (1972) 7 Cal.3d 899, 914 [a request by BNE agents to "be alert" for suspicious packages "does not ipso facto create a police agency relationship."]; *People* v. *Sapper* (1980) 102 Cal.App.3d 301, 305 [shipper did not become a police agent merely because government regulations encouraged, but did not mandate, searches of suspicious packages]; *People* v. *Superior Court (Evans)* (1970) 11 Cal.App.3d 887, 891 ["[T]he original opening was conducted by Grantham solely as the agent of United Airlines and not as an agent of the police."]; *U.S.* v. *Parker* (8th Cir. 1994) 32 F.3d 395, 399 ["Here, the government did not direct UPS to open the package . . . UPS opened the package pursuant to its police to inspect the packaging of packages insured for more than $1,000."]. COMPARE *U.S.* v. *Walther* (9th Cir. 1981) 652 F.2d 788, 792-3 [shipper was police agent based largely on "extensive contact" with the DEA which caused his to expect a reward for finding drugs].

[46] (7th Cir. 1988) 856 F.2d 843, 849.

[47] (1987) 480 US 709, 715.

[48] See *U.S.* v. *McAllister* (7th Cir. 1994) 18 F.3d 1412, 1417-8 ["Other useful criteria in our analysis include whether the informant performed the conduct at the request of the government and whether the government offered him a reward."]; *U.S.* v. *Bomengo* (5th Cir. 1978) 580 F.2d 173, 175 [former police officer was not a police agent merely because "he previously had supplied [the officer] with reliable information regarding criminal activity"].

acting on his own initiative, and (2) his primary motivation for searching was personal in nature.[49] For example, in *People* v. *Wachter*[50] an off-duty Kern County sheriff's deputy and a friend were on a fishing trip when, while trespassing on Wachter's property, they spotted some marijuana plants. The deputy notified an on-duty deputy who obtained a warrant to search the property. On appeal, the court ruled that, even if the trespass constituted an illegal search under the Fourth Amendment, the evidence could not be suppressed. Said the court:

> The defendant contends that there is no such thing, in fact, as an off-duty police officer. He urges that since a police officer is required in many situations to take police action, even during off-duty hours, he never really loses his status as such police officer during any 24-hour period. Such a rule, however, finds no support in California case law.

Consequently, the court examined the surrounding circumstances and concluded that the deputy's "conduct up to and including the time of discovery of the marijuana in the field was that of a private citizen and not that of a police officer."

Similarly, in *People* v. *Wolder*[51] an off-duty LAPD officer named Donnelly was talking with the owner of a Long Beach apartment complex in which Donnelly's daughter, Margaret, lived. After Donnelly mentioned that he was concerned that Margaret was hanging out with "bad companions," the owner informed him that Margaret's "Uncle Bob" had stored "a bunch of cases of something" in the garage. Donnelly was suspicious because Margaret did not have an Uncle Bob.

So, at Donnelly's request, the owner permitted him to look inside the boxes which contained typewriters and burglar tools. Looking further into the matter, he determined that "Uncle Bob" was Bob Wolder, a well-known "office machine burglar." He also learned that the typewriters had been taken in a commercial burglary in Long Beach. On appeal, Wolder contended that Donnelly was a police agent when he opened the boxes, but the court disagreed:

> The record discloses that Mr. Donnelly, although a police officer for the City of Los Angeles, acted as a private citizen when he sought and obtained permission to enter [the] garage and to examine the boxes which he was informed his daughter had stored there. He was concerned about his daughter's association with "bad companions."

In the above cases, it was apparent that the officers were primarily motivated by personal interests when they conducted the searches. In contrast is the case of *People* v. *Millard.*[52] Here, two off-duty LAPD officers were working as store security at a J.J.

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[49] See *People* v. *Peterson* (1972) 23 Cal.App.3d 883, 884 ["It fairly appears he entered the garage out of concern for his own safety as a tenant of the apartment complex, and was acting as a private citizen only."]; *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378 ["Here [the off-duty officer] was for all intents and purposes a private citizen. He was off-duty and not engaged in active police work at the time. He simply acceded to the request of his friend to accompany him to the house."] *U.S.* v. *Ginglen* (7th Cir. 2006) 467 F.3d 1071, 1076 [off-duty officer was deemed a private citizen because of his "uniquely personal motivation"].

[50] (1976) 58 Cal.App.3d 911.

[51] (1970) 4 Cal.App.3d 984.

[52] (1971) 15 Cal.App.3d 759. ALSO SEE *U.S.* v. *Schleis* (8th Cir. 1976) 543 F.2d 59, 61 [off-duty federal marshal was functioning as a peace officer because "he identified himself to appellant as

Newberry store when they noticed that a man in the store, Millard, appeared to be drunk. As they approached him, one of them identified himself as a police officer, displayed his badge, and placed him under arrest. During a pat-search, he found marijuana. But the court suppressed it, pointing out that "[t]he search was incident to the arrest which had just preceded it and [the officer] had made this arrest ostensibly and expressly as a police officer and not as a private person."

LATER SEARCH BY POLICE

When a civilian finds evidence and gives it to officers, they do not, of course, need a warrant to inspect it if it was not in a container or wrapper.[53] But if it was not in plain view, a warrant may be necessary to remove it unless, (1) the citizen had previously observed it, or (2) the officers had probable cause to search the container or wrapper.

Evidence previously observed

Officers may open a container or wrapper and remove the evidence inside if the citizen had already seen it.[54] This is because the evidence, having already been revealed, cannot support a reasonable expectation of privacy.[55] As the Court of Appeal observed,

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such, read appellant his *Miranda* warnings, and may have coerced submission to the search by reason thereof."].

[53] See *United States* v. *Jacobsen*(1984) 466 US 109, 120; *Arizona* v. *Hicks* (1987) 480 U.S. 321, 325; *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 346, fn.12. **NOTE**: Nor would a warrant be necessary if officers reasonably believed the owner of the item had abandoned it. See *People* v. *Ayala* (2000) 24 Cal.4th 243, 279; *People* v. *Baraka H.* (1992) 6 Cal.App.4th 1039, 1048.

[54] See *People* v. *Haugland* (1981) 115 Cal.App.3d 248, 256-7 ["[W]hen the officers opened Haugland's briefcase, they were not 'searching' for anything; they *knew* it contained a loaded gun and went about *retrieving* the weapon. . . . Haugland gave up any reasonable expectation of privacy when he told the officers the briefcase contained a loaded gun."]; *U.S.* v. *Koenig* (7th Cir. 1988) 856 F.2d 843, 852 ["[O]nce a private actor has legally opened a package, has found suspected contraband within the package, and has notified the government of the discovery, the government need not obtain a search warrant before examining and field testing the contents."]; *U.S.* v. *Runyan* (5th Cir. 2001) 275 F.3d 449, 458 ["[A] police view subsequent to a search conducted by private citizens does not constitute a search . . . so long as the view is confined to the scope and product of the initial search."]; *U.S.* v. *Koenig* (7th Cir. 1988) 856 F.2d 843, 852 ["[T]he private, legal search [by the citizen] has destroyed any legitimate expectation of privacy in the package's contents."]; *U.S.* v. *King* (6th Cir. 1995) 55 F.3d 1193, 1196 [warrantless police search permitted if it did not "exceed the scope of the private search"]; *People* v. *Houle* (1970) 13 Cal.App.3d 892, 895 ["When [the citizen] informed Officer Sanchez that the contraband had been found, the intrusion into appellant's right of privacy had already occurred."]; *People* v. *Shegog* (1986) 184 Cal.App.3d 899, 904 ["[A]ny expectation of privacy by the defendant had already been frustrated by the time Detective Kostella arrived to view the property"]; *People* v. *Ingram* (1981) 122 Cal.App.3d 673, 677 [the briefcase "had already been opened" by the hotel manager].

[55] See *U.S.* v. *Runyan* (5th Cir. 2001) 275 F.3d 449, 461 [the "critical inquiry" is "whether the authorities obtained information with respect to which the defendant's expectation of privacy has not already been frustrated."]; *People* v. *Brouillette* (1989) 210 Cal.App.3d 842, 848 [because the security guards had seen the drugs inside the defendant's wallet, "the later actions of the police in repeating the inspection of the contents of the wallet did not infringe any constitutionally protected private interest that had not already been frustrated as the result of private conduct"]; *People* v. *Warren* (1990) 219 Cal.App.3d 619, 623 ["(I)nsofar as the governmental search is nothing more than a reexamination of matter uncovered in a search by a private citizen, it involves no impermissible infringement of a privacy interest."]; *People* v. *Baker* (1970) 12 Cal.App.3d 826,

"No real purpose is served by precluding police examination of what has already been discovered."[56]

For example, in *United States* v. *Jacobsen*[57] a cardboard box that was being shipped to Jacobsen via FedEx was inadvertently damaged while in transit. Pursuant to company policy, FedEx employees opened the package to see if the contents had also been damaged. Inside was an object wrapped in duct tape. The employees cut open the duct tape and found four zip-lock plastic bags containing white powder. Suspecting drugs, they notified the DEA. But before the first DEA agent arrived, the employees resealed the plastic bags in duct tape and put everything back into the cardboard box. When the DEA agent arrived, he removed the four plastic bags, opened each of them and field tested some of the powder. It was cocaine, and Jacobsen was arrested.

The United States Supreme Court ruled the agent's opening of the bags was lawful because the FedEx employees already knew that they contained white powder. Said the Court:

> [T]he removal of the plastic bags from the tube [of duct tape] and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment.

Similarly, in *People* v. *Yackee*[58] an airline baggage agent in Atlanta discovered two pounds of a "flour-like substance" inside a suitcase. The suitcase had been addressed to Yackee for pickup at LAX. The baggage agent notified Atlanta police who opened it and, after confirming it was cocaine, arranged with LAPD officers to have it sent to LAX for a controlled delivery.[59] Yackee was arrested when he claimed it. On appeal, he contended that the warrantless search in Atlanta was unlawful, but the court disagreed, pointing out that the Atlanta officer had "infringed no constitutionally protected privacy that had not already been negated by the previous private search."

Finally, in *People* v. *Robinson*[60] the defendant's landlady was removing his belongings from her house in Sacramento when she discovered a gun in his coat pocket. For various reasons, she suspected the gun had been used to murder a friend, so she notified Sacramento police. When a detective arrived, she handed him the coat, saying, "The gun is in the pocket." He then removed it. Robinson, who was subsequently charged with the murder, argued that the detective needed a warrant to remove the gun, but the court disagreed, pointing out that his privacy was "originally invaded" by the landlady.

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838 ["A distinction between material seized by the private searcher, and material restored to concealment in a place over which he has dominion and control has no rational justification. The owner's privacy has already been invaded."].

[56] *People* v. *Baker* (1970) 12 Cal.App.3d 826, 838.

[57] (1984) 466 US 109. ALSO SEE *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 346, fn.12 ["If Mr. Choplick could permissibly search T.L.O.'s purse for cigarettes, it hardly seems reasonable to suggest that his natural reaction to finding them—picking them up—could be a constitutional violation."].

[58] (1984) 161 Cal.App.3d 843.

[59] **NOTE**: The court noted that, technically, the luggage was opened by an airline employee; but because officers were present, it deemed the opening a police search.

[60] (1974) 41 Cal.App.3d 658.

Probable cause

Even if the citizen had not actually seen the evidence, officers may open the container without a warrant if, based on the totality of circumstances, they had probable cause to believe it was, in fact, evidence of a crime.[61] For example, in *People* v. *McKinnon*[62] a BNE agent was dispatched to an air freight facility where employees had discovered what appeared to be marijuana inside a carton. When he arrived, the carton was on the floor and open. Inside he saw several "brick-shaped packages wrapped in red cellophane" which had a "distinctive" odor of marijuana. He then opened one of them and confirmed that it was marijuana. One of the men who dropped off the carton, McKinnon, was arrested at the airport a few minutes later.

On appeal, the court ruled that because the BNE agent had probable cause to believe that all the packages contained marijuana, he did not need a warrant to open them. Said the court, "Predicated on such probable cause, the officer's subsequent search of the packages before him and the remaining four cartons in the shipment was constitutionally reasonable."

Similarly in *People* v. *Leichty*[63] an air cargo supervisor at Ontario International Airport opened a suspicious package and found that it contained two Pepsi bottles filled with a "yellowish liquid" which he thought was drugs. So he notified officers who opened one of the bottles and, based on the "strong, ether-like odor," concluded that it contained PCP. The defendant contended that the PCP should have been suppressed because the officers did not have a warrant to open the bottles. The court responded that a warrant was not required because "[t]he facts which they possessed concerning the bottles would have led any person of reasonable caution to believe that the bottles contained contraband drugs."

Testing drugs

FIELD TESTING: If an officer suspects that evidence in plain view or evidence in a container is an illegal drug, the officer may promptly subject it to presumptive field testing. In the words of the United States Supreme Court, "A [field] chemical test that

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[61] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 325-6; *California* v. *Acevedo* (1991) 500 U.S. 565, 580 ["The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."]; *People* v. *Howard* (1971) 21 Cal.App.3d 997, 1000 [packages smelled of marijuana]; *People* v. *Cohn* (1973) 30 Cal.App.3d 738, 746 ["[The officer's] conduct in opening the matchbox, although it was state action, was clearly based on probable cause to believe that the box contained contraband and, therefore, was proper."]; *People* v. *Superior Court (Evans)* (1970) 11 Cal.App.3d 887, 893 ["[T]he seizure of the contraband is validated since [the officer] possessed overwhelming probable cause to believe that the package in the United Airlines office contained hashish"]; *People* v. *Ingram* (1981) 122 Cal.App.3d 673, 677 [the briefcase "had already been opened" by the hotel manager, and each of them contained white powder in plastic bags that the officer, "as an experienced narcotic officer believed to be cocaine"]. **NOTE:** In *U.S.* v. *Runyan* (5th Cir. 2001) 275 F.3d 449 the court ruled that officers must be "substantially certain" that the items they view are evidence of a crime. We must assume this "substantially certain" standard of proof was the equivalent of probable cause. But if the court was creating a brand new standard of proof that is higher than probable cause but less than proof beyond a reasonable doubt, it failed to provide any authority or analysis for such a dramatic change in the law.

[62] (1972) 7 Cal.3d 899.

[63] (1988) 205 Cal.App.3d 914.

merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."[64]

LABORATORY TESTING: If a field test confirms a substance was an illegal drug, a warrant is not required to subject the substance to laboratory testing.[65] If, however, the field test was negative or inconclusive, laboratory testing is permitted only if officers obtain a search warrant.[66] POV

[64] *United States* v. *Jacobsen* (1984) 466 U.S. 109, 123.
[65] *People* v. *Warren* (1990) 219 Cal.App.3d 619, 623-4.
[66] *People* v. *Leichty* (1988) 205 Cal.App.3d 914, 923-4.