

# Citizens' Arrests

*“There have been citizen arrests for as long as there have been public police—indeed much longer.”<sup>1</sup>*

**W**hile citizens have been making arrests for centuries, their reason for doing so has changed. In the past, it was a matter of necessity because law enforcement was, for the most part, a do-it-yourself enterprise. In the wild west, for example, the task was frequently undertaken by cowboys, sidekicks, barber-dentists, drifters, and other good folk who, even back then, could be heard complaining, “There’s never a cop around when you need one.”

Although people today can quickly summon law enforcement officers from virtually anywhere by simply dialing 911 on their iPhones, citizens’ arrests are still necessary. This is because California and most other states have enacted statutes that prohibit officers from making arrests for misdemeanors and infractions that were not committed in the officers’ presence. As the result, the only people who can make many misdemeanor arrests are civilians, usually victims.

It might seem that officers would welcome this development because it allows them to avoid getting involved in some fairly minor flare-ups. But, as we will discuss, officers are hardly mere spectators in these matters. Not only must they frequently assume the role of referee between worked-up parties, they must make sure that the arresting citizen complies with an array of requirements set by statutes and case law. In addition, they may eventually have to determine whether the arrestee should be booked, cited and released, or released outright.

The first issue, however, is whether the crime actually occurred in the presence of the arresting person. So that’s where we’ll start.

## THE “IN THE PRESENCE” RULE

To arrest someone for a felony, an officer or civilian needs only probable cause.<sup>2</sup> The same is true if the crime was a “wobbler,” meaning an offense that can be prosecuted as either a felony or a misdemeanor.<sup>3</sup> But if the crime was a straight misdemeanor or an infraction, there is an additional requirement: **Unless exempt by statute**, the crime must have been committed in the “presence” of the arresting person, whether it was a civilian or an officer.<sup>4</sup> As the Court of Appeal observed, “It is well established that the power to

<sup>1</sup> *People v. Taylor* (1990) 222 Cal.App.3d 612, 622.

<sup>2</sup> See Pen. Code § 836(a).

<sup>3</sup> See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1144 [“[A] ‘wobbler,’ an offense that confers discretion as to felony or misdemeanor punishment, becomes a misdemeanor only *after* the judgment and hence retains its felony character for purposes of the limitations period.”].

<sup>4</sup> See Pen. Code §§ 837.1 [“A private person may arrest another . . . [f]or a public offense committed or attempted in his presence.”]; 16 [“public offense” include misdemeanors and infractions], 19.6 [“An infraction is not punishable by imprisonment.”]; 836(a)(1), *People v. Garcia* (1969) 274 Cal.App.2d 100, 103 [“The term ‘public offense’ includes misdemeanors.”]; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [“[I]f the driver does not move the vehicle in the officer’s presence, the officer is not committed in his presence.”]; *Arpin v. Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 920 [“[The officers] arrived after the alleged

arrest for commission of a misdemeanor is dependent on the offense having been committed in the arresting person's 'presence.'"<sup>5</sup>

What do the courts mean by "in the presence?" Although they have not had occasion to elaborate much, they have said that the crime must have been "apparent to the senses,"<sup>6</sup> but that this requirement should be interpreted "liberally."<sup>7</sup> Thus, it will be satisfied if the citizen was aware of circumstances from which he could reasonably infer that a crime was occurring in his presence. For this to happen, according to the Iowa Supreme Court, "the citizen must have observed conduct by the alleged offender that is sufficiently indicative of a crime in the course of its commission."<sup>8</sup>

This occurred in *People v. Lee*<sup>9</sup> after a security officer at an apparel store in Victorville saw Marcia Lee walk into a fitting room carrying five items of clothing. The officer, Diane Paul, then saw Lee exit the room carrying three items which she returned to the racks. Paul then checked the fitting room and found one item there, which meant that one item

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battery occurred. The officers could therefore not lawfully arrest Arpin for the battery."]; *Henslee v. DMV* (1985) 168 Cal.App.3d 445, 451; *People v. Cove* (1964) 228 Cal.App.2d 466, 469; *People v. Alonzo C.* (1978) 87 Cal.App.3d 707, 713 ]"The question of reasonable cause to believe that a misdemeanor is taking place in the officer's presence is measured by the events observable to the officer at the time of the arrest. If the officer cannot testify, based on his or her senses, to acts which constitute every material element of the misdemeanor, it cannot be said that the officer has reasonable cause to believe that the misdemeanor was committed *in his presence*."]. **NOTE:** The U.S. Supreme Court has not yet determined whether the "in the presence" rule is a requirement under the Fourth Amendment. *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 340, fn11.

**NOTE: No suppression:** Evidence will not be suppressed on grounds it was obtained as a result of a violation of the "in the presence" rule. See *People v. McKay* (2002) 27 Cal.4th 601, 605 ["[C]ompliance with state arrest procedures is not a component of the federal constitutional inquiry."]; *People v. Donaldson* (1995) 36 Cal.App.4th 532, 539; *Barry v. Fowler* (9th Cir. 1990) 902 F.2d 770, 772; *Higbee v. San Diego* (9th Cir. 1990) 911 F.2d 377, 379.

<sup>5</sup> *People v. Johnson* (1981) 123 Cal.App.3d 495, 499.

<sup>6</sup> See *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 725 ["And 'presence' . . . is not merely physical proximity but occurs when the crime is apparent to the officer's senses."]; *People v. Burgess* (1959) 170 Cal.App.2d 36, 41 ["The 'senses' include those of hearing and smell."]; *People v. Chew* (1956) 142 Cal.App.2d 400, 403 ["[T]he offense is committed in the presence of an officer when the officer receives knowledge of the commission of an offense in his presence through any of his senses and this includes the sense of smell."]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-4 ["'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses."].

<sup>7</sup> See *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1027 ["The requirement that the crime be committed in the officer's presence is construed liberally"]; *People v. Welsch* (1984) 151 Cal.App.3d 1038, 1042 ["The requirement of 'presence,' entitling an officer to make a valid misdemeanor arrest, is to be interpreted liberally."]; *People v. Burgess* (1959) 170 Cal.App.2d 36, 41; *McDonald v. Justice Court* (1967) 249 Cal.App.2d 960, 963 ["The term 'in his presence' is liberally construed."]; *People v. Goldberg* (1969) 2 Cal.App.3d 30, 33 ["The concept of a crime committed in the 'presence' of the officer has been liberally construed in California and includes perceptions by the use of all senses."].

<sup>8</sup> *Rife v. D.T. Corner, Inc.* (2002) 641 N.W.2d 761, 769.

<sup>9</sup> (1984) 157 Cal.App.3d Supp. 9. **NOTE:** When *Lee* was decided, evidence obtained by a security guard could be suppressed per *People v. Zelinski* (1979) 24 Cal.3d 357. *Zelinski* was subsequently abrogated. See *Collins v. Womancare* (9th Cir. 1989) 878 F.2d 1145, 1154 ["*Zelinski* directly conflicts with and is superseded by *Lugar*."].

was unaccounted for. So, when Lee left the store, Paul arrested her and found the missing item in her purse.

On appeal, Lee contended that the arrest was unlawful because Paul had not actually seen her conceal the merchandise in her purse. It didn't matter, said the court, because the term "in the presence" has "historically been liberally construed in this state and, thus, "[n]either physical proximity nor sight is essential." Consequently, the court concluded that Lee's act of closing the door to the fitting room "cannot be deemed such a removal of Lee from the 'presence' of Paul so as to strip her of authority to make the arrest."

### Exempt crimes

There are some misdemeanors that, because of their seriousness, are exempt from the "presence" requirement. Those crimes are as follows:

**ASSAULT ON SCHOOL PROPERTY:** Assault or battery on school property when school activities were occurring.<sup>10</sup>

**CARRYING LOADED FIREARM:** Carrying a loaded firearm in violation of Penal Code section 12031.<sup>11</sup>

**GUN IN AIRPORT:** Carrying a concealed firearm in an airport.<sup>12</sup>

**DOMESTIC VIOLENCE:** Assault on a spouse or cohabitant,<sup>13</sup> or a violation of a domestic violence protective order or restraining order if there was probable cause to believe the arrestee had notice of the order.<sup>14</sup>

**ASSAULT ON ELDER:** Assault or battery on any person aged 65 or older who is related to the suspect by blood or legal guardianship.<sup>15</sup>

**ASSAULT ON FIREFIGHTER, PARAMEDIC:** Assault on firefighter, EMT, or paramedic engaged in performance of his duties.<sup>16</sup>

**DUI PLUS:** Driving under the influence if there is reasonable suspicion to believe that one or more of the following circumstances existed:

- arrestee had been involved in auto accident
- arrestee was in or about a vehicle obstructing a roadway
- arrestee would not be apprehended unless immediately arrested
- arrestee might harm himself or damage property if not immediately arrested
- arrestee might destroy or conceal evidence unless immediately arrested
- an immediate arrest was necessary to accurately determine the arrestee's blood-alcohol level<sup>17</sup>

In addition, the "in the presence" rule does not apply if the arrestee was a minor.<sup>18</sup>

<sup>10</sup> Pen. Code § 243.5.

<sup>11</sup> Pen. Code § 12031(a)(3).

<sup>12</sup> Pen. Code § 836(e).

<sup>13</sup> Pen. Code § 836(d).

<sup>14</sup> Pen. Code § 836(c)(1).

<sup>15</sup> Pen. Code § 836(d).

<sup>16</sup> Pen. Code § 836.1.

<sup>17</sup> See Veh. Code § 40300.5; *People v. Schofield* (2001) 90 Cal.App.4<sup>th</sup> 968; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029; *Music v. DMV* (1990) 221 Cal.App.3d 841; *People v. Ashley* (1971) 17 Cal.App.3d 1122, 1125. **NOTE:** While § 40300.5 states that officers must have "reasonable cause," the California Supreme Court has noted that reasonable cause and reasonable suspicion are the same. See *People v. Randy G.* (2001) 26 Cal.4<sup>th</sup> 556, 567.

<sup>18</sup> Welf. & Inst. Code § 625; *In re Samuel V.* (1990) 225 Cal.App.3d 511.

### **“Stale” misdemeanors**

In a few old California cases, the courts were somehow able to interpret the “in the presence” rule as prohibiting officers and civilians from making warrantless arrests for so-called “stale” misdemeanors. This catchy term was applied to misdemeanors that were committed in the presence of an officer or civilian, who, for whatever reason, delayed making the arrest an “unreasonable” period of time.

But the “stale misdemeanor” rule seems more akin to urban legend than a rule of law. As far as we could determine, the genesis was a comment in a 1907 case in which the court said—without citing any precedent—that “[i]t seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer.”<sup>19</sup>

It should be noted that, even if there is any validity to this “rule,” a violation will not result in the suppression of evidence.<sup>20</sup> Still, it would seem that an unreasonable delay by the citizen should be considered by officers in determining whether the suspect should be cited and released, or released without further action pursuant to Penal Code § 849(b).<sup>21</sup>

### **ARREST PROCEDURE**

If a citizen has a legal right to arrest a suspect and elects to do so, there is a procedure that officers should follow. This procedure can be divided into four parts: (1) taking the arrestee into custody, (2) arrest formalities, (3) disposition of the arrestee, and (4) searching the arrestee.

#### **Taking custody**

If the suspect is present when officers initially meet with the citizen, and if the citizen arrests him or has already done so, officers must “receive” him, meaning they must take custody of him.<sup>22</sup> The purpose of this requirement is to “minimize the potential for

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<sup>19</sup> *People v. Craig* (1907) 152 Cal. 42, 47. ALSO SEE *Hill v. Levy* (1953) 117 Cal.App.2d 667, 670 [“[A]n arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the person making the arrest.”]; *Jackson v. Superior Court* (1950) 98 Cal.App.2d 183, 188 [“[I]n order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant.”]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544 [“Promptness, clearly exhibited here, is the only remaining requirement of a valid citizen’s arrest for a misdemeanor without a warrant.”]; *People v. Hampton* (1985) 164 Cal.App.3d 27, 30-1.

<sup>20</sup> See *People v. Donaldson* (1995) 36 Cal.App.4th 532, 537 [per Proposition 8, evidence obtained in violation of the “in the presence” rule may not be excluded so long as exclusion is not federally compelled.]; *Barry v. Fowler* (9th Cir. 1990) 902 F.2d 770, 772 [“The requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment.”]; *Higbee v. San Diego* (9th Cir. 1990) 911 F.2d 377, 379, fn.2 [“[T]he Fourth Amendment interposes no barrier to a warrantless arrest for an offense committed outside of an officer’s presence.”].

<sup>21</sup> See, for example, *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788 [the defendant lost his right to arrest a prostitute for solicitation when, instead of arresting her, he extorted oral copulation].

<sup>22</sup> See Pen. Code § 142 [officer must “receive” the suspect]. ALSO SEE *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 769. **NOTE re use of force:** A citizen may use reasonable force to

violence when a private person restrains another by a citizen's arrest by requiring that a peace officer (who is better equipped by training and experience) accept custody of the person arrested from the person who made the arrest."<sup>23</sup> For example, when this issue arose in *Wang v. Hartunian*, the court pointed out that the officers "were in fact obligated to take custody of Wang merely at the direction of [the citizen], that is, when [he] informed the police that he had arrested Wang."<sup>24</sup>

Three things should be noted about this requirement. First, the officers' act of taking custody of the suspect does not constitute an arrest by the officers.<sup>25</sup> It is merely a transfer of custody following an arrest by the citizen.<sup>26</sup> Consequently, the officers cannot be held liable for false arrest.<sup>27</sup>

Second, officers must accept custody even if they don't know whether the citizen had probable cause.<sup>28</sup> In the words of the Court of Appeal:

A peace officer who accepts custody of a person following a citizen arrest is not required to correctly determine whether the arrest was justified, and cannot be held liable for the arrest if it was improper.<sup>29</sup>

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effect an arrest. See *People v. Randle* (2005) 35 Cal.4<sup>th</sup> 987, 1002 ["Had [the citizens] been attempting to effect a citizen's arrest, the use of reasonable force may have been permitted."]; *People v. Fosselman* (1983) 33 Cal.3d 572, 579 ["[The citizen] was entitled to use reasonable force to detain [the suspect]."]; *People v. Garcia* (1969) 274 Cal.App.2d 100, 105 [when assaulted by the suspect, the citizen "was justified in using such force as was reasonable for defendant's arrest"]; Pen. Code § 835 ["The person arrested may be subjected to such restraint as is reasonable for his arrest and detention."].

<sup>23</sup> 73 Ops. Cal. Atty. Gen 291, 295. ALSO SEE *Green v. DMV* (1977) 68 Cal.App.3d 536, 541 ["Very wisely, [the citizen] chose to enlist the aid of the police in effectuating the arrest rather than risking his own safety."]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544 ["Frequently . . . it is most prudent for a private citizen to summon a police officer to assist in making the arrest."].

<sup>24</sup> (2003) 111 Cal.App.4<sup>th</sup> 744, 750.

<sup>25</sup> See *People v. Harris* (1967) 256 Cal.App.2d 455, 460 ["[A citizen's arrest] continues through a transfer of custody of the accused from a citizen to a peace officer."]; *People v. Roland K.* (1978) 82 Cal.App.3d 295, 298 [the arrest by the citizen "continues even though he transfers custody of the accused to a peace officer."].

<sup>26</sup> See *People v. Roland K.* (1978) 82 Cal.App.3d 295, 298 [an arrest by a citizen "continues even though he transfers custody of the accused to a peace officer."].

<sup>27</sup> See Pen. Code § 847(b)(3) [no civil liability for officers when they receive custody pursuant to Pen. Code § 142]; *Hamburg v. Wal-Mart Stores* (2004) 116 Cal.App.4<sup>th</sup> 497, 511-2 ["[P]eace officers who take custody of a person arrested by a private person are not required to correctly adjudge whether the citizen who made the arrest was justified in doing so."]; *People v. Harris* (1967) 256 Cal.App.2d 455, 459-60; *In re Roland K.* (1978) 82 Cal.App.3d 295, 298; *Shakespeare v. City of Pasadena* (1964) 230 Cal.App.2d 375, 382; *People v. Pringle* (1984) 151 Cal.App.3d 854; *Arpin v. Santa Clara Valley Transportation Agency* (9<sup>th</sup> Cir. 2001) 261 F.3d 912, 920-1; *Meyers v. Redwood City* (9<sup>th</sup> Cir. 2005) 400 F.3d 765, 772 ["[A]n officer who makes an arrest [sic] pursuant to a citizen's complaint is not subject to liability for false arrest or false imprisonment."].

<sup>28</sup> See *Wang v. Hartunian* (2003) 111 Cal.App.4<sup>th</sup> 744, 750 ["[T]he police were in fact obligated to take custody of Wang merely at the direction of Hartunian, that is, when Hartunian informed the police that he had arrested Wang."]; *Kesmodel v. Rand* (2004) 119 Cal.App.4<sup>th</sup> 1128, 1137 ["Because the Rands effected the citizen arrest the officers were obligated to accept custody of Kesmodel"].

<sup>29</sup> *Kesmodel v. Rand* (2004) 119 Cal.App.4<sup>th</sup> 1128, 1137.

(As we will discuss later, however, officers who determine that probable cause does not exist may later release the suspect.)

Third, in the past, officers could be charged with a felony for refusing to take custody of a suspect who had been arrested by a citizen. This crime was deleted from the Penal Code in 2002.<sup>30</sup>

**DELEGATED AUTHORITY:** In many cases, the suspect will not be present when officers arrive. For example, he may have fled, or he may be unaware that the citizen intends to arrest him. If officers locate him, they may of course detain him until the citizen arrives and arrests him.

But they may also arrest him themselves if the citizen, in addition to declaring his intention to arrest the suspect, had delegated to them his right to take the suspect into physical custody.<sup>31</sup> As the Court of Appeal explained:

It is well established that a citizen in whose presence a misdemeanor has been attempted or committed may effect a citizen's arrest and in so doing may both summon the police to his aid and delegate to police the physical act of taking the offender into custody.<sup>32</sup>

Delegations of authority can occur in two ways. First, the citizen may make an express delegation by uttering some sufficiently magisterial words such as, "Go get him!" Second, a delegation will be implied if the citizen's actions demonstrated an intent to have the suspect arrested. As the court said in *Padilla v. Meese*,<sup>33</sup> "[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect." Thus, the courts will ordinarily find that a delegation of authority occurred if:

- (1) POLICE SUMMONED: The citizen, or someone at his direction, summoned officers; and
- (2) ATTEMPT TO LOCATE OR IDENTIFY: The citizen took steps to keep the suspect on the scene, follow him, identify him, or learn his whereabouts—any of which could reasonably indicate that he wanted to have the officers arrest him when they arrived.

For example, in *Green v. DMV*<sup>34</sup> a man named Baughn saw Imogene Green driving erratically. Suspecting that she was drunk, Baughn followed her until she pulled into the

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<sup>30</sup> See Pen. Code §§ 142(c); Assem. Bill No. 1835 (2002 Reg. Sess.).

<sup>31</sup> See *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1030 ["[The citizen] may delegate the act of taking the suspect into physical custody."]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544 ["[T]he authority of Officer Smith to make the arrest at the request of Mrs. Morales is well established."]; *People v. Campbell* (1972) 27 Cal.App.3d 849, 854 ["[The citizen] had the right to delegate the physical act of taking an offender into custody to the other persons summoned"]; *People v. Johnson* (1969) 271 Cal.App.2d 51, 53 ["[A] lawful citizen's arrest had been made, with the officers making the arrest for and at the direction of [the citizen]."]; *Meyers v. Redwood City* (9<sup>th</sup> Cir. 2005) 400 F.3d 765, 772 ["A private person making a citizen's arrest need not physically take the suspect into custody, but may delegate that responsibility to an officer, and the act of arrest may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."].

<sup>32</sup> *People v. Johnson* (1981) 123 Cal.App.3d 495, 499.

<sup>33</sup> (1986) 184 Cal.App.3d 1022, 1030. ALSO SEE *Arpin v. Santa Clara Valley Transportation Agency* (9<sup>th</sup> Cir. 2001) 261 F.3d 912, 920 [a citizen's arrest "may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."].

<sup>34</sup> (1977) 68 Cal.App.3d 536.

driveway of her home and stopped. At that point, he decided to arrest her but “was afraid to drag [her] out of her car and arrest her unassisted.” So he went looking for an officer and, when he found one, explained what he had seen. Other officers were dispatched to Green’s home where, having found her asleep in her car, they arrested her for DUI.

Green contended the arrest was unlawful because the arresting officers had not seen her driving the vehicle; i.e., the crime had not occurred in their presence. But the court ruled that it didn’t matter because it was apparent that Baughn had, and that he had delegated to the officers his authority to make the arrest. Said the court, “[T]he police were acting as agents assisting in effectuating Baughn’s citizen’s arrest . . . . The entire sequence of events beginning when Baughn decided to arrest respondent and went to get help constitutes the arrest.”

Similarly, in *People v. Johnson*<sup>35</sup> a man named Weatherford happened to be looking out a window of his home in San Jose when he saw Johnson carrying a club and prowling around the homes of his neighbors. While Weatherford’s wife reported the incident to the police, Weatherford followed Johnson for a while then, having returned home, told the responding officers what he had seen. He also told them where he had last seen Johnson. The officers spotted him a few minutes later, arrested him, and transported him back to Weatherford who made the arrest.

On appeal, the court ruled that Weatherford’s conduct clearly demonstrated an implied delegation of authority to the officers. Said the court:

Weatherford’s actions in summoning police, following the suspect, pointing the suspect’s whereabouts to police, and thereafter effecting a citizen’s arrest, reasonably support the inference that it was his intention that the prowler be arrested and that had he known at the outset that it was necessary for him to effect the arrest, he would have delegated that authority to the police, as the law allows him to do.

**ENTERING THE SUSPECT’S HOME:** The question arises: What if the suspect is inside his home when officers arrive? Can they enter to arrest him? The answer is usually no. This is because such an entry is permitted only if officers have a warrant, consent, or there were exigent circumstances. And although there is an exigent circumstance known as “fresh pursuit” that might seem to apply, the courts do not usually permit officers to invoke it unless the suspect was wanted for a dangerous felony.<sup>36</sup>

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<sup>35</sup> (1981) 123 Cal.App.3d 495.

<sup>36</sup> **NOTE:** There seem to be four requirements for an entry based on “fresh” pursuit: (1) there must have been probable cause to arrest the suspect for a serious felony, usually a violent one; (2) after probable cause was established, officers must have been diligent in attempting to apprehend the suspect; (3) there must have been reason to believe the suspect was inside the house or other private structure; and (4) there must have been circumstances indicating the suspect was in active flight or soon would be. *People v. Manderscheid* (2002) 99 Cal.App.4<sup>th</sup> 355, 363; *People v. Williams* (1989) 48 Cal.3d 1112, 1139; *People v. Amaya* (1979) 93 Cal.App.3d 424, 428 [“Thus, officers need not secure a warrant to enter a dwelling in fresh pursuit of a fleeing suspect believed to have committed a grave offense and who therefore may constitute a danger to others.”]; *People v. Jessie L.* (1982) 131 Cal.App.3d 202, 214 [“Immediate flight was a reasonable possibility in light of the seriousness of the crime involved, murder.”]; *People v. Escudero* (1979) 23 Cal.3d 800, 811 [nighttime residential burglary]; *People v. Superior Court (Dai-re)* (1980) 104 Cal.App.3d 86, 90 [nighttime commercial burglary].

**TRANSPORTING THE SUSPECT TO CITIZEN:** If officers arrest the suspect based on an express or implied delegation of authority, they may transport the suspect to the citizen for the purpose of having the citizen complete the formalities of the arrest.<sup>37</sup> If, however, officers are unsure whether there is sufficient proof that the citizen intended to delegate his authority to arrest, they should probably detain the suspect until the citizen arrives and clears up the matter.<sup>38</sup>

### **Arrest formalities**

Although there are no “magic words” that must be recited,<sup>39</sup> officers should make sure that the following formalities are observed.

**YOU'RE UNDER ARREST:** The suspect must be notified that he is under arrest.<sup>40</sup> Although this is usually done by the citizen, he may also delegate this duty to officers so long as he understands that, under the law, *he* is the person making the arrest—that he is simply delegating to officers his authority to do so.

For example, in *People v. Sjosten*<sup>41</sup> a woman in South San Francisco saw a prowler outside her home at about midnight and immediately notified the police. A little later, officers detained a suspect nearby and asked the woman to look out her window to see if he was the prowler. She positively identified him, but because she was wearing a robe and nightgown, she requested that one of the officers make the arrest. On appeal, the court ruled the arrest was lawful, explaining, “The fact that she did not physically confront appellant is not significant. It is sufficient that she directed the officer to make the arrest and observed him doing so from her window.”

One other thing. Neither the citizen nor the officers are required to formally arrest the suspect if, under the circumstances, a reasonable person in the suspect's position would have known he was under arrest. This has happened, for example, when the citizen took the defendant “by the arm and told him he was going to call the police,”<sup>42</sup> and when the citizen pursued the suspect and held him until officers arrived.<sup>43</sup>

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<sup>37</sup> See *People v. Johnson* (1981) 123 Cal.App.3d 495, 500.

<sup>38</sup> See *Kaupp v. Texas* (2003) 538 U.S. 626, 630 [“involuntary transport” of a detainee “is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause”]. ALSO SEE *People v. Daugherty* (1996) 50 Cal.App.4<sup>th</sup> 275, 287 [not unlawful to transport detainee 60 yards].

<sup>39</sup> See *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1032 [“In considering whether a citizen's arrest was made, and the legality thereof, it is the substance and not any ‘magic words’ which we must consider.”]; *Johanson v. DMV* (1995) 36 Cal.App.4<sup>th</sup> 1209, 1217.

<sup>40</sup> See Pen. Code § 841 [“The person making the arrest must inform the person to be arrested of the intention to arrest him”]. **NOTE:** Notifying suspect he is under arrest is not required when the suspect was taken into custody during the commission of the offense or in fresh pursuit afterwards. See *People v. Harris* (1967) 256 Cal.App.2d 455, 459 [informing the suspect he is under arrest is not required “where the accused is pursued immediately after the offense.”]; *People v. Campbell* (1972) 27 Cal.App.3d 849, 854; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 545.

<sup>41</sup> (1968) 262 Cal.App.2d 539. ALSO SEE *Johanson v. DMV* (1995) 36 Cal.App.4<sup>th</sup> 1209, 1217.

<sup>42</sup> See *People v. Garcia* (1969) 274 Cal.App.2d 100, 105 [“When Edwards took defendant by the arm and told him he was going to call the police he effected a citizen's arrest”].

<sup>43</sup> *People v. Harris* (1967) 256 Cal.App.2d 455, 459 [“[The citizen] did not state that defendant was under arrest, but such is not required where the accused is pursued immediately after the offense.”]. ALSO SEE *Johanson v. DMV* (1995) 36 Cal.App.4<sup>th</sup> 1209, 1217 [“[The citizen] witnessed the offense, summoned the officer, reported his observations, and pointed out the



**IDENTIFY THE CRIME:** If the suspect says he wants to know the specific offense for which he is being arrested, the citizen or officer must tell him.<sup>44</sup> Note, however, that if they were mistaken as to the offense that was committed, the arrest will not be invalidated so long as the citizen could have lawfully arrested him for some other crime.<sup>45</sup>

### Disposition of the arrestee

Even though officers must initially take custody of the suspect, they may ordinarily exercise discretion in determining what should be done with him. Specifically, they will usually have the following options.

**TRANSPORT:** The first option is to transport the suspect to jail.<sup>46</sup> There are, however, two situations in which they must do this:

(1) **DUI:** When the suspect was arrested for DUI.<sup>47</sup>

(2) **DV:** The suspect was arrested for domestic violence or for violating a domestic violence protective order. They need not, however, transport him to jail if they determine “there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested.”<sup>48</sup>

**CITE AND RELEASE:** Unless officers are required by statute to transport the suspect, they may cite and release him.<sup>49</sup>

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suspect. While [he] did not utter or write the ‘magic words,’ the substance of his actions constituted a valid citizens arrest.”]; *People v. Campbell* (1972) 27 Cal.App.3d 849, 854 [“Nor under the circumstances of immediate pursuit was [the citizen] required to tell defendant that he was under arrest.”]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 545 [“[I]t is well settled that where a party is apprehended in the commission of an offense or in fresh pursuit afterwards, failure to comply with section 841 does not invalidate the arrest.”].

<sup>44</sup> See Pen. Code § 841. **NOTE:** A failure to comply with this requirement does not invalidate the arrest or render the citizen civilly liable. See *Gomez v. Garcia* (1980) 112 Cal.App.3d 392, 398.

<sup>45</sup> See *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1217 [arrest for DUI was valid even though the citizen arrested the suspect for vandalism]; *People v. Kelley* (1969) 3 Cal.App.3d 146, 151 [“The officer’s announcement of the wrong offense did not make the arrest unlawful.”]; *Gomez v. Garcia* (1980) 112 Cal.App.3d 392, 397 [“[I]f that conduct in fact constituted a public offense, the [citizen] is not liable simply because he was mistaken as to which particular penal statute was violated.”]; *People v. White* (2003) 107 Cal.App.3d 636, 641 [“[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.”].

<sup>46</sup> See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354 [because the officer had probable cause to arrest the suspect for a misdemeanor seatbelt violation he was “accordingly authorized (but not required, but authorized) to make a custodial arrest”]. **NOTE:** If officers transport the suspect to jail in violation of the state law, they may be sued. See *People v. McKay* (2002) 27 Cal.4th 601, 618 [“By this decision, we in no way countenance violations of state arrest procedure. As we explained at the outset, Proposition 8 left intact the substantive scope of state statutory and constitutional rights against arrest for minor offenses. Violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief.”].

<sup>47</sup> See Veh. Code § 40302(d).

<sup>48</sup> Pen. Code § 853.6(a). ALSO SEE Pen. Code § 13701.

<sup>49</sup> See Pen. Code § 835.5; *Wang v. Hartunian* (2003) 111 Cal.App.4th 744, 750 [“[A] police officer is never obligated to arrest someone merely at the direction of a private citizen”]. **NOTE:** The arresting citizen may not issue a citation or notice to appear. See 74 Ops.Cal.Atty.Gen. 37 [“[A]

**OUTRIGHT RELEASE:** Officers may also release the suspect without having him sign a notice to appear if they are satisfied that probable cause does not exist.<sup>50</sup> As the Court of Appeal explained:

[California law] permits a peace officer, when a person has been arrested by a private citizen and delivered to him to release the arrested person from custody if he, the peace officer, is satisfied that there is no ground for making a criminal complaint against the person arrested.<sup>51</sup>

The question remains: To what extent must officers investigate the matter to make a probable cause determination? In other words, can officers just assume that the citizen's allegations are true? While there is little case law on this subject, the Ninth Circuit in *Fuller v. M.G. Jewelry*<sup>52</sup> ruled that, at a minimum, officers must question the citizen about the underlying facts of the case. Said the court, "We decline to adopt [the officer's] argument that merely because citizen witnesses are presumptively reliable, the officers in this situation had no duty to examine further the basis of the witness' knowledge or talk with any other witnesses."

### Searching the arrestee

One last issue: May the citizen or officers search the arrestee? The answers are as follows:

**SEARCH BY CITIZEN:** A citizen may seize any weapons in the arrestee's possession, and any evidence in plain view.<sup>53</sup> He may not, however, conduct a search incident to the arrest or otherwise search for evidence unless it's a "merchant" search."<sup>54</sup>

**MERCHANT SEARCH:** A merchant who arrests a suspect for theft, may request that he surrender the stolen property. If he refuses, the merchant may conduct "a limited and reasonable search" for the stolen property in "packages, shopping bags, handbags or

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private security guard is not authorized to issue a citation to a suspect under citizen's arrest for shoplifting."].

<sup>50</sup> See Pen. Code § 849(b)(1); *People v. Pringle* (1984) 151 Cal.App.3d 854, 857-8 [requiring that officers transport the arrestee "would create an untenable conflict with Penal Code section 849, the purpose of which is to vest peace officers with discretion to release persons arrested by officers or citizens when the situation and circumstances dictate."]; 73 Ops.Cal.Atty.Gen. 291.

<sup>51</sup> *Kinney v. Contra Costa County* (1970) 8 Cal.App.3d 761, 767.

<sup>52</sup> (9<sup>th</sup> Cir. 1991) 950 F.2d 1437, 1444 [court rejects the argument that "the officers in this situation had no duty to examine further the basis of the witness' knowledge or talk with any other witnesses."]. ALSO SEE *People v. Ramey* (1976) 16 Cal.3d 263, 269 [although a crime victim may qualify as a presumptively-reliable citizen informant, this does not "dispense with the requirement that the informant . . . furnish underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator."].

<sup>53</sup> See Pen. Code § 846; *People v. Crowder* (1982) 136 Cal.App.3d 841, 844 ["Like all private persons, security employees can arrest or detain an offender and search for weapons"]; *People v. Martin* (1964) 225 Cal.App.2d 91, 94-5.

<sup>54</sup> See *People v. Zelinski* (1979) 24 Cal.3d 357 363 ["A citizen effecting such an arrest is authorized only to take from the person arrested all offensive weapons which he may have about his person, not to conduct a search for contraband"]; *People v. Sandoval* (1966) 65 Cal.2d 303, 311, fn.5 [court rejects the idea that "the search of one private individual or his premises by another is lawful simply because 'incidental' to a lawful citizen's arrest."]; *People v. Crowder* (1982) 136 Cal.App.3d 841, 844 ["Absent statutory authorization, private citizens are not permitted to take property from other private citizens."]; *People v. Martin* (1964) 225 Cal.App.2d 91, 95.

other property in the immediate possession of the [suspect], but not including any clothing worn by the [suspect].”<sup>55</sup>

**SEARCH BY OFFICERS:** If officers transport the suspect to jail for booking, they may conduct a standard search incident to arrest.<sup>56</sup> Regardless of whether the suspect will be transported, an officer who accepts custody of a person arrested by a merchant having probable cause to believe the suspect had stolen retail merchandise may search the suspect “for any item or items alleged to have been taken.”<sup>57</sup> POV

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<sup>55</sup> See Pen. Code § 490.5(f)(4); *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 589; *People v. Carter* (1982) 130 Cal.App.3d 690, 692 [store security “merely retrieved from the box the items he saw Carter place there.”]; *People v. Carter* (1981) 117 Cal.App.3d 735, 738 [“The seizure of the cardboard box and inventorying of its contents were authorized by the merchant’s privilege”].

<sup>56</sup> See *United States v. Robinson* (1973) 414 U.S. 218, 235; *Gustafson v. Florida* (1973) 414 U.S. 260, 265.

<sup>57</sup> See Pen. Code § 490.5(f)(6).