**9.13 Particular Rights—Fourth Amendment—Unreasonable Search—Exception To Warrant Requirement—Search Incident To Arrest**

In general, a search of [a person] [a person’s [residence] [property]] is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant. [A “search warrant” is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if the search is incident to a lawful arrest.

[I instruct you that the arrest of the plaintiff was a lawful arrest.] [I instruct you that the arrest of the plaintiff was a lawful arrest if [*insert applicable legal standard; i.e., insert elements to show probable cause to arrest for a particular crime*]].

A search is “incident to” a lawful arrest if:

1. it occurs roughly contemporaneously with the arrest, that is, at the same time or shortly after the arrest and without any intervening events separating the search from the arrest; and

2. it is limited to a reasonable search of the person arrested and to the immediate area within which that person might gain possession of a weapon or might destroy or hide evidence at the time of the search.

In order to prove the search in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply; that is, that the search was not incident to a lawful arrest.

**Comment**

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally). When the search incident to arrest involves a vehicle, refer to Instruction 9.14 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant).

“A search incident to a lawful arrest is an exception to the general rule that warrantless searches violate the Fourth Amendment.” *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014); *see Arizona v. Gant*, 556 U.S. 332, 338 (2009). There are two general requirements of a valid search incident to an arrest. *Camou*, 773 F.3d at 937-38 (“The determination of the validity of a search incident to arrest in this circuit is a two-fold inquiry: (1) was the searched item ‘within the arrestee’s immediate control when he was arrested’; [and] (2) did ‘events occurring after the arrest but before the search ma[k]e the search unreasonable’?” (second alteration in original) (quoting *United States v. Maddox*, 614 F.3d 1046, 1048 (9th Cir. 2010)).

The first requirement is that the search must be “limited to the arrestee’s person or areas in the arrestee’s ‘immediate control’ at the time of arrest.” *Id.* at 937 (quoting *Gant*, 556 U.S. at 339). “Immediate control” means “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.” *Gant*, 556 U.S. at 335 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). “Those areas include the arrestee’s person and the inside pockets of the arrestee’s clothing.” *United States v. Williams*, 846 F.3d 303, 312 (9th Cir. 2016) (citing *United States v. Robinson*, 414 U.S. 218, 224-25 (1973)). But those areas do not “extend to ‘a strip search or bodily intrusion.’” *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (quoting *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984)).

The second requirement is that the search must be “spatially and temporally incident to the arrest,” and, to satisfy the temporal requirement, must be “roughly contemporaneous with the arrest.” *Camou*, 773 F.3d at 937 (quoting *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004) (per curiam)) (holding border patrol agent’s search of arrestee’s cell phone 80 minutes after arrest not roughly contemporaneous with arrest). A search remote in time or place from the arrest is not justified. *Id.* (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 580 (1991)). Further, “[m]ere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay.” *Maddox*, 614 F.3d at 1049 (holding that after arrestee was secured in patrol car, search of keychain that was within arrestee’s “immediate control” at the time of the arrest but subsequently tossed into arrestee’s car was invalid under search-incident-to-arrest exception because, at the time of the search, arrestee was “incapable of either destroying [the keychain] or presenting any threat to the arresting officer”).

An actual arrest is a prerequisite for this exception to the warrant requirement. *Menotti v. City of Seattle*, 409 F.3d 1113, 1153 (9th Cir. 2005) (holding probable cause to make arrest insufficient to trigger exception in absence of actual arrest).

If the court is able to determine as a matter of law that an arrest was lawful, the Committee recommends the court instruct the jury accordingly. However, when there are factual disputes about the lawfulness of an arrest, it will be necessary for the court to instruct the jury concerning the standards or elements for a lawful arrest under the facts of a particular case. *See* Instruction 9.23 (Particular Rights—Fourth Amendment—Unreasonable Seizure of

Person—Probable Cause Arrest).

The United States Supreme Court has held that officers may perform a warrantless breath

test as a search incident to arrest, but may not perform a warrantless blood test as a search

incident to arrest. *Birchfield v. North Dakota*, 579 U.S. 438, 474 (2016). The Court held that a breath test incident to a drunk driving arrest is categorically included within the search-incident-to-arrest exception.  *Id.* at 2176, 2179-80, 2183.

In *Riley v. California*, 573 U.S. 373 (2014), the Court considered the search-incident-to-arrest exception as it pertained to cell phones. The Court held that the phone

itself may be searched incident to an arrest, but officers must generally secure a search warrant

before conducting a search of the data stored on the cell phone. *Id*. at 401, 403.

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation

of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action “carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]”).

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