**9.14 Particular Rights—Fourth Amendment—Unreasonable Search—Exception To Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant**

In general, a search of a person’s vehicle 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 of the vehicle 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 of a vehicle [*specify area searched*] is “incident to” the arrest of a recent occupant of the vehicle only if:

1. The person is arrested but is not securely in police custody and the [*specify area searched*] is “within the reaching distance” of the person arrested; or

2. It is reasonable to believe the vehicle contains evidence of the offense that is the subject of the arrest.

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 of the vehicle 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).

“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). For a discussion of the search incident to a lawful arrest exception generally, see Comment to Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest).

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court held that an officer can search the passenger compartment of a vehicle when the officer has made a lawful custodial arrest of its recent occupant, so long as the passenger compartment of the vehicle is within reaching distance of the arrestee. *Id*. at 460 (holding also that the officer may search containers in the passenger compartment because “if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach”).

In *Arizona v. Gant*, 556 U.S. 332, 335 (2009), the Supreme Court narrowed the search-incident-to-arrest exception as applied to vehicle searches in *Belton*. *Id.* at 335. *Gant* held that a warrantless search of a vehicle, incident to the arrest of a driver or recent occupant, is constitutionally permissible only if: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Id.* at 351. Thus, when the arrestee is secured by police, and there is no reason to believe the vehicle contains relevant evidence, officers may not rely on the search-incident-to-arrest exception to justify the search of a vehicle. *Id.* at 335 (“*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.”).

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. When, however, 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 plaintiff may not always be the same person who was

the subject of the arrest giving rise to the search. *See e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 134

(1978). In such cases, the instruction should be altered as appropriate.

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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