Hot Topics in Fourth Amendment Law
Traffic Stops and Searches During Traffic Stops

By Kathryn Seligman, FDAP Staff Attorney
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HOT TOPICS IN FOURTH AMENDMENT LAW
TRAFFIC STOPS AND SEARCHES DURING TRAFFIC STOPS

By Kathryn Seligman, FDAP Staff Attorney
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Many of the appellate cases we see, raising suppression issues, involve traffic
stops. In the “typical” case, the police officer pulls the car over for an observed Vehicle
Code violation (no matter how minor). During the officer’s exchange with the driver –
either before or after he issues a citation for the Vehicle Code violation – the officer
obtains the driver’s consent to search the car. In the car, the officer finds drugs or
contraband. In these cases, the arguments available to the appellate advocate who wishes
to challenge the stop or the search are limited. Nevertheless, we still have some victories
in this area – mostly unpublished opinions.¹

I. WHREN V. UNITED STATES (1996) 116 S.CT. 1769: OBSERVE A
VEHICLE CODE VIOLATION - MAKE A TRAFFIC STOP

Seven years ago, the United States Supreme Court decided Whren and made it
much easier for police officers to make a traffic stop – to pull over a car and its
occupants. All the police need is an observed Vehicle Code violation, no matter how
trivial (e.g. expired registration, tailgating, defective tail light, dangling object handing
from the rear view mirror).

It no longer matters if the police are simply using the observed Vehicle Code
violation as an excuse or pretext to pull the car over because they have a hunch the driver
might be carrying drugs or contraband – a hunch based on the appearance of the car or its
occupants. The police can follow the car and look for an equipment violation or wait for
the driver to commit a traffic violation. Then they can pull the car over.

¹ These materials cover some significant recent changes in the law and many
of the issues we have raised in cases involving traffic stops. However, some topics are not
covered – e.g. traffic stops and vehicle searches justified by the driver’s parole or
probation search condition, inventory searches, and the rights of passengers during traffic
stops. If you have a case raising any of these issues, consult with your FDAP buddy or
assisting attorney.
In *Whren*, the Supreme Court did away with the “pretext stop doctrine”. Under that doctrine, a traffic stop could be illegal if the police officer used the observed Vehicle Code violation as a pretext to pull over the car. The defendant had to meet the difficult burden of proving that the officer’s primary motivation was to verify a hunch that the driver was carrying drugs or contraband – a hunch, not reasonable suspicion. In *Whren*, the Court held that pretext stops did not violate the Constitution. As long as the officer reasonably believes that the driver is in violation of the Vehicle Code, his/her subjective motivation is completely irrelevant.

II. CHALLENGING THE INITIAL TRAFFIC STOP: NO VEHICLE CODE VIOLATION – NO RIGHT TO STOP THE CAR

A. Deny the proscribed conduct:

In the trial courts, defendants occasionally challenge the claimed Vehicle Code violation – they assert that they weren’t really speeding or tailgating. Or they claim that the object dangling from the windshield did not actually obstruct their view. Such a challenge often triggers a credibility contest between the defendant-driver and the police officer. If the trial court believes the officer, it’s usually not worth repeating this argument on appeal. Remember: The officer only needs to have a reasonable suspicion that the driver is violating the Vehicle Code.

On the other hand, in certain circumstances it may be worth challenging the factual basis for the stop on appeal –e.g. when the officer’s claimed observations were proved physically impossible, or when the officer did not testify to the required elements of the claimed Vehicle Code violation. (See *People v. White* (2003) 107 Cal. App. 4th 636 [discussed below].)

B. The observed conduct or condition did not violate the law: *People v. White* (2003) 107 Cal. App. 4th 636: A traffic stop based solely on the officer’s mistake of law, even if made in good faith, is not based on reasonable suspicion.

The *White* case represents the most recent published victory in a traffic stop appeal. The opinion is from the First District, Division Three. The facts present a relatively common scenario: The defendants were driving down Highway 101 in Humboldt County at 3:30 in the afternoon. Mr. White was in the passenger seat, while Mr. Fishbain was driving. Officer Mertz pulled the car over for two observed Vehicle Code violations: 1) the car had no front license plate; and 2) there was an object (a tree-shaped air freshener) hanging from the rear view mirror. As soon as Officer Mertz
approached the car, he smelled the strong odor of both the air freshener and burnt marijuana. Because he suspected there was marijuana in the car, he ordered both White and Fishbain out of the vehicle and then searched the passenger compartment and the trunk. He found a glass pipe and some marijuana in the passenger compartment, and five pounds of marijuana and over $9,000 cash in the car’s trunk. The trial court denied both defendants’ suppression motions, holding that the officer had reasonable suspicion for the traffic stop.

The Court of Appeal disagreed. First, as to the license plate, the Court held that the officer’s belief that two license plates were legally required was a mistake of law. The sole license plate was issued by the State of Arizona. Arizona law requires only one license plate – on the rear of the car. California law requires two. Relying on a Ninth Circuit case, United States v. Twilley (9th Cir. 2000) 222 F.3d 1095, Division Three held that Officer Mertz’s mistaken belief that Arizona law required two plates, although made in good faith, did not provide reasonable suspicion. Distinguishing a contrary California Court of Appeal opinion (People v. Glick (1988) 203 Cal. App. 3d 796), Division Three reasoned that Officer Mertz’s legal mistake was inexcusable because Arizona is a contiguous state and Arizona motorists frequently drive on California roads.

Second, the observation of the tree-shaped air freshener hanging from the rear view mirror did not provide a reasonable basis for the traffic stop because the officer did not testify that the air-freshener obstructed the driver’s view from the windshield. Apparently, the officer mistakenly believed that drivers could not hang any objects from their rear view mirrors. He erroneously relied on a section of the Vehicle Code which prohibits the affixing of objects to the car windows. In fact, a hanging object is only prohibited if it obstructs the driver’s view from the windshield (under another section of the Vehicle Code.) Here there was no evidence of any obstruction, so the hanging air freshener did not provide a legitimate basis for the traffic stop.

The message of People v. White is clear: Be sure to check that the “violation” observed by the officer who makes the traffic stop is actually against the law. If it is not, you may have a mistake of law argument. (In White, the mistake of law issue was raised in the trial court. If you attempt to raise this issue for the first time on appeal, you will likely confront a “waiver problem” unless you can show that all facts necessary to the resolution of this issue were adjudicated below.)
III. CHALLENGING THE SEARCH OF THE CAR THAT OCCURS DURING OR AFTER THE TRAFFIC STOP

A. Search Incident to Citation: Knowles v. Iowa (1998) 119 S.Ct. 484: No right to search incident to a traffic stop or following the issuance of a citation when the driver is not taken into custody

In a unanimous opinion, authored by Chief Justice Rehnquist, the Supreme Court, in Knowles, invalidated an Iowa statute that had permitted police officers in that state to conduct a full search of the vehicle after issuing a traffic citation. Neither probable cause nor consent was required. The statute had given the police the discretion to either make a custodial arrest or to issue a written citation when they stopped a driver for certain Vehicle Code violations, specifically including a speeding violation. Then, regardless of whether the officer issued a citation or made a custodial arrest, he/she had the right to do a full vehicle search.

The Court held that this Iowa statute, which allowed a “search incident to citation”, violated the Fourth Amendment. It didn’t matter that the officer could have made a custodial arrest of the driver; he chose not to do so. Therefore, the basic policies that permit a search of the car’s passenger compartment incident to arrest (pursuant to New York v. Belton (1981) 101 S.Ct. 2860) did not come into play. The two policies that permit a search incident to custodial arrest are: 1) the need to disarm the suspect to take him into custody; and 2) the need to preserve evidence that could be lost or destroyed.

When the officer merely issues a citation, rather than taking the driver into custody, the concern for officer safety diminishes. There is no need to make sure that the driver cannot grab a weapon from the car before taking him into custody. Also, the officer has other means available to deal with any reasonable belief that the driver might be armed or dangerous: 1) The officer can order the driver and any passengers out of the car during a traffic stop. (Pennsylvania v. Mimms (1977) 98 S.Ct. 330 [driver]; Maryland v. Wilson (1997) 117 S.Ct. 882 [passengers]) 2) If the officer reasonably believes the driver is armed, he can conduct a pat-search. (Terry v. Ohio (1968) 88 S.Ct. 1868) 3) If the officer reasonably believes that there is a weapon in the car, he can search the passenger compartment. (Michigan v. Long (1983) 103 S.Ct. 3469)

When the officer merely issues a citation for an observed Vehicle Code violation, like speeding, there is no risk that evidence may be lost or destroyed when the person is taken into custody. In summary, the Court held in Knowles, that the officer cannot search the car when he stops the driver for a Vehicle Code violation, issues a citation, and does not make a custodial arrest.
B. **Search Incident to Custodial Arrest:** The officer may search the passenger compartment of the car if the driver is taken into custody, and the Constitution permits a custodial arrest for a minor offense (*Atwater v. City of Lago Vista* (2001) 121 S.Ct. 1536) even if unauthorized by state statute. (*People v. McKay* (2002) 27 Cal. 4th 601.) Moreover, California law permits a custodial arrest if the person stopped for a Vehicle Code violation does not present a valid driver’s license or other satisfactory evidence of identification. (*McKay*)

What if the officer makes a custodial arrest of a driver for a Vehicle Code violation. Can the officer then search the passenger compartment of the vehicle pursuant to the driver’s arrest? The answer is yes. (See *New York v. Belton* (1981) 101 S.Ct. 2860)

Most people have heard of the Supreme Court case of *Atwater v. City of Lago Vista* (2001) 121 S.Ct. 1536. In that case, the high court upheld the custodial arrest of a Texas woman for a seatbelt violation. Under Texas law, if the driver fails to wear a seatbelt or secure a small child riding in front, this omission is a misdemeanor punishable by fine and by citation or arrest. The police pulled Ms. Atwater over because her two small children were not wearing seat belts. She was arrested and taken to jail for this offense.

In a 5-4 decision, the Supreme Court held that her custodial arrest for this fine-only minor offense did not violate the Fourth Amendment’s proscription on unreasonable seizures. If the officer has probable cause to believe that an individual has committed a minor crime in his/her presence, a custodial arrest is constitutionally permissible.

Unlike Texas, California law does not authorize an arrest for a seatbelt violation or other minor Vehicle Code offenses. Does this matter? Apparently not.

Last year, in *People v. McKay* (2002) 27 Cal. 4th 601, the California Supreme Court

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2 According to *People v. McKay* (2002) 27 Cal. 4th 601, 619-20, our state law authorizes custodial arrests for felony violations of the Vehicle Code, but not for all non-felony violations. (See Veh. Code, § 40301) For certain enumerated nonfelony offenses, the officer has the discretion to take the driver into custody or to issue a citation. For other offenses, the driver must be cited unless he/she fails to present a driver’s license or other satisfactory evidence of identity, refuses to give a written promise to appear, or demands an immediate appearance before the magistrate. (See Veh. Code, §§ 40302, 40303, 40304). The Legislature thus presumes that the vast majority of Vehicle Code violators will not be taken into custody. (*People v. Superior Court (Simon)* (1972) 7 Cal. 3d 186, 199-200.)
followed *Atwater* to hold that when an officer makes a custodial arrest for a minor Vehicle Code violation, in violation of state procedures, that arrest does not violate the federal Constitution. Consequently, any evidence seized during a subsequent search incident to arrest would not be subject to exclusion. The only remedy for the arrestee is to file a civil action against the arresting authorities for injunctive and other relief.

In *McKay*, the defendant was stopped by the police for riding a bicycle the wrong way on a residential street, in violation of Vehicle Code section 21650.1. The officer asked the defendant for identification. He admitted he had no written I.D., but gave his correct name and date of birth. He was arrested for not have satisfactory evidence of identification (Veh. Code, § 40302(a)). In a subsequent search incident to custodial arrest, the officer found methamphetamine in the defendant’s sock.

Defendant McKay argued that his arrest was unauthorized by state statute. One cannot be arrested for the minor offense of riding a bike the wrong way, and because he provided satisfactory oral identification, his arrest was not authorized by section 40302(a). The Supreme Court first held that this really didn’t matter. After *Atwater*, an arrest for a minor traffic offense does not violate the federal Constitution – even if it violated state statutory procedures. Consequently, the evidence seized during the “search incident to arrest” was admissible.

However, the Court went on to hold that the arrest was authorized by Vehicle Code section 40302(a). Under that statute, an officer has the discretion to effect a custodial arrest unless the offender has presented a current and valid driver’s license or other reliable documentary evidence of identification.

Justice Werdegar wrote a concurring and dissenting opinion, in which she agreed with the majority’s interpretation of section 40302(a), but concluded that it was unnecessary to reach the question of whether an arrest that does not comply with state law is constitutional. Because Mr. McKay’s arrest did comply with California statutory authority, “[t]he majority’s extensive analysis of the question is thus no more than obiter dictum”. Justice Brown dissented from the majority opinion, and her dissent discussing the broad powers conferred on the police by this opinion, and the potential for abuse, is well worth reading.

After *McKay*, a police officer could make a custodial arrest for any Vehicle Code violation (e.g. tailgating) and then search the driver and the car’s passenger compartment incident to that arrest. Regardless of whether incriminating evidence was found, the driver’s only remedy would be to sue the police department. If incriminating evidence was found during the search incident to arrest, it would not be subject to the exclusionary rule.
C. Consent Searches: Challenging Consent Obtained During or After the Traffic Stop

In most of the traffic stop/search cases we see, the officer obtains the driver’s consent to search the car. When a person consents to the search of her car, the officer can search the entire car, including the trunk and any containers found therein – unless the person expressly limits the scope of the search to which she consents. (See Florida v. Jimeno (1991) 111 S.Ct. 1801; People v. Crenshaw (1992) 9 Cal. App. 4th 1403)

Here is a typical scenario: The police stop the car for a Vehicle Code violation (e.g. expired registration). Sometime in the course of the ensuing traffic detention, the officer asks the driver for consent to search the car. The driver says “yes”. The officer searches the car and finds drugs.

Is there any way to challenge the driver’s consent? An argument that the driver did not in fact consent may be raised in the trial court, but is rarely viable on appeal. An argument that driver’s consent was involuntary rarely succeeds unless the circumstances of the traffic stop were extraordinarily coercive.

Usually, the only potential argument is that the driver’s consent was obtained during an unlawful detention. The viability of this argument depends on when the officer asked for consent. If he asked during the traffic detention – i.e. before he issued a citation or warning – the appellate attorney usually has no argument. If the officer asked for consent after he issued the citation, the argument succeeds if you can establish that: 1) appellant was still detained when the officer requested consent; and 2) that the officer had no reasonable suspicion for this continued detention.

1. The basic law governing the officer’s conduct during a traffic stop

The basic law governing traffic stops is well-established: The stop of a vehicle by the police and the consequent detention of the driver constitutes a Fourth Amendment seizure. (Whren v. United States (1996) 116 S.Ct. 1769, 1772.) A traffic detention is a brief and limited seizure. It must be “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place”. (Terry v. 

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

As noted above, a traffic stop is justified at its inception when the police observe or reasonably suspect a Vehicle Code violation. (See Whren v. United States, supra., 116 S.Ct. at 1772.) The scope of the ensuing detention is limited by this justification: “An investigative detention must be temporary, lasting no longer than necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification.” (United States v. Wood, supra., 106 F.3d at 945 [citing Florida v. Royer (1983) 103 S.Ct. 1319, 1325-26].)

Consequently, after initiating a traffic stop, the police officer can briefly detain the driver while he investigates the Vehicle Code violation and expeditiously performs the duties incident to the citation process. (People v. McGaughran, (1979) 25 Cal.3d 577, 584; People v. Miranda (1993) 17 Cal.App.4th 917, 926-27; United States v. Bloomfield (8th Cir. 1994) 40 F.3d 910, 915.) Specifically, these duties include: examining the motorist’s license, vehicle registration and proof of insurance; discussing the violation with the motorist and listening to any explanation; running any necessary computer checks (e.g. warrant and license checks) in a timely fashion; inquiring about the motorist's travel plans; and writing out a citation or issuing a warning. (See People v. McGaughran, supra., at 584, 586; People v. Miranda, supra., at 927; United States v. Bloomfield, supra., at 915.) During a routine traffic stop, the police also may order the driver and passengers to exit the vehicle. (Pennsylvania v. Mimms (1977) 98 S.Ct. 330 [driver]; Maryland v. Wilson (1997) 117 S.Ct. 882 [passengers])

2. Challenging consent obtained during the traffic stop

Years ago, there used to be arguable limitations on the “scope” of the lawful traffic detention. We used to be able to assert that during a traffic detention, the officer could not ask questions about matters unrelated to the Vehicle Code violation (e.g. “Are you carrying drugs?”), and she could not ask for consent to search during the traffic stop. (See, e.g. People v. Lingo (1970) 3 Cal. 3d 661; People v. Grace (1973) 32 Cal. App. 3d 447, People v. Lusardi (1991) 228 Cal. App. 3d Supp 1.) However, this “beyond the scope of the traffic stop” argument has gone the same way as the pretext search doctrine.

The modern rule, expressed in cases like People v. Brown (1998) 62 Cal. App. 3d 493 [Fifth District], People v. Bell (1996) 43 Cal. App. 4th 754 [Fourth District] and United States v. Shabazz (5th Cir. 1993) 993 F.2d 431 is as follows: During the traffic detention – the police officer can do anything (e.g. run a warrant check, ask for consent to
search) and ask about any topic so long as her conduct and questions “do not prolong the stop beyond the time it would otherwise take”. (People v. Brown, supra., at 498.) Questioning during the routine traffic stop on subjects unrelated to the Vehicle Code violation does not violate the Fourth Amendment. While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. (Id., at 499.)

Notice that these modern cases imply the continuing viability of a “prolonged detention” argument. (See also People v. McGaughran, supra., 25 Cal. 3d at 587; Williams v. Superior Court (1985) 168 Cal. App. 3d 349) If the officers take longer than reasonably necessary to perform the duties incident to the traffic stop, or if additional unrelated questioning or a wait for back-up officers prolongs the stop beyond the time it would otherwise take, you might have an argument that the traffic detention was unlawfully prolonged. If the driver consented to a search of the car during the prolonged period of detention, you might be able to challenge the consent.

But how long is too long? The courts have refused to set a time limit (e.g. ten minutes, fifteen minutes.) Instead, each case must be decided on its own facts. (See Williams v. Superior Court, supra., at 358.) In our experience, “prolonged detention” arguments very rarely succeed unless there are very unusual circumstances.

However, there are some cases where one can attempt to argue that the defendant’s consent was obtained in the course of an unlawful detention even if the consent was asked and given before the officer issued a citation or a warning for the Vehicle Code violation.

Let’s say the officer pulls over the car for a suspected Vehicle Code violation and then discovers, after stopping the car, that no violation has in fact been committed. The legitimate basis for the traffic detention terminates at that moment, and the driver should be given a brief explanation and sent on his way. (See United States v. McSwain (10th Cir. 1994) 29 F.3d 558, 561-62; People v. Grace (1973) 32 Cal.App.3d 447, 450-52.)

For example, in McSwain, the highway patrol officer stopped the defendant’s car because he suspected that the registration sticker, posted in the car’s rear window, might have expired. As the officer approached the car on foot, he was able to read the sticker’s expiration date and note that it was still valid. Thereafter, the officer had no reasonable basis for continuing the traffic detention; the reasonable suspicion that justified the initial stop was “completely dispelled”. The officer should have explained the reason for the stop to the defendant-driver and then allowed him to continue on his way. (United States v. McSwain, supra., 29 F3d. at 561-62.)
In cases like *McSwain*, the officer discovers the absence of a Vehicle Code violation as he exits his patrol car and walks toward the stopped vehicle. (In addition to cases involving registrations stickers, this might also happen in a case where the officer pulls over the car for an object dangling from the rear view mirror. As he approaches the car on foot, he realizes that the object does not obstruct the driver’s view through the windshield.) In other cases, the officer stops the car for a possible registration violation (i.e. no current sticker on the license plate), and then discovers – after asking the driver for license and registration – that the vehicle in a rental car. The person who drives a rental car is not responsible for the car registration. (See Veh. Code, § 40001(b) and(e)) Consequently, as soon as the officer sees the rental agreement, he should return that agreement and the driver’s license to the driver and send him on his way. The legitimate basis for the traffic detention has ceased.

In these cases, where the officer realizes there is no Vehicle Code violation or no offense for which the driver may be cited, and yet he continues with the traffic detention (asking for documents, running a warrant check, questioning the driver about travel plans, and requesting consent to search), one can viably argue that the consent was given in the course of an unlawful detention. (See *United States v. McSwain*, supra.)

What if the officer stops the car for a Vehicle Code violation, but does not perform the duties incident to the traffic stop? For example, he pulls over the car for tailgating, tells the driver this and asks for license and registration. However, at this point, he shows no further interest in the traffic offense and no inclination to write out a citation. Instead, the officer questions the driver about drugs and asks for consent. One can try and argue that the legitimate traffic detention (the lawful investigation of the Vehicle Code violation) was abandoned, and that thereafter, the officer initiated an independent investigative detention without reasonable suspicion. You would then argue that the consent to search was obtained during this unjustified detention, and not in the course of a legitimate traffic stop.

3. Challenging consent obtained after the traffic stop

If the officer issues a warning or citation for the Vehicle Code violation and then asks the driver for consent to search the car, you have a much better chance of challenging that consent as the product of an unlawful detention.

Again, the governing law is clear: After the traffic stop is completed, the driver and any passengers must be “released forthwith”. (*People v. McGaughran*, supra., 25 Cal. 3d at 586.) “The justification for the original [traffic] detention no longer supports its continuation”. (*United States v. Shabazz*, supra., at 436; see also *People v. Grace*, supra., 32 Cal.App. 3d at 452.) Absent independent justification, no further detention is
The police officer may renew the driver’s detention and undertake a general crime investigation only if he reasonably suspects that the driver is involved in criminal activity additional to the Vehicle Code violation. (People v. McGaughran, supra., at 588, 591; United States v. Mesa (6th Cir. 1995) 62 F.3d 159, 162.) “The government bears the burden of proving the reasonableness of the officers’ suspicion”. (United States v. Salzano, supra., 158 F.3d at 111.) The state must be able to point to specific facts, known to the officer at the moment he continues the detention, providing some objective manifestation that the driver is committing a crime. (United States v. Cortez (1981) 101 S.Ct. 600. 695; People v. Souza (1994) 9 Cal.4th 224, 231; United States v. Wood (10th Cir. 1997) 106 F.3d at 942, 946.)

So if, after issuing the citation, the officer does not send the driver “on his way”, but instead asks questions about drugs and asks for consent to search, you may be able to challenge the consent. However, you must make two arguments that have proven to be more challenging than one might suppose. First, you must establish that the driver was still “detained” at the moment he gave consent. Second, you must show that this continued detention was not supported by reasonable suspicion.

For years when we raised this argument (that the driver gave his consent during an unlawful detention following the completion of the legitimate traffic stop), the state focused on arguing that the continued detention was supported by reasonable suspicion. However, recently, in a few First District cases, we have seen a new argument – that the driver’s detention ended at the moment when the officer returned his paperwork and issued a warning or citation; thereafter, he was merely subject to a consensual encounter and legally free to go if he chose to do so. If the driver elects to stay, answer the officer’s questions and consent to a search of his car, that consent is valid.

The authority for this argument – that a traffic detention transforms into a consensual encounter at the moment when the officer issues a citation – is People v. Galindo (1991) 229 Cal. App. 3d 1529. The reasoning of Galindo is that after the officer issues the citation and returns the driver’s license and the car registration, a reasonable person would feel free to leave the scene (drive away) and ignore the officer’s questions. Obviously, this reasoning is subject to challenge. Also, in Galdino, the officer made it abundantly clear to both the driver and the passenger (the owner of the vehicle) that they had the right to refuse consent to search. Nevertheless, the Attorney General is raising the argument and some of the appellate courts are adopting this reasoning in cases where the officers do not threaten the drivers, force them to answer questions or prevent them from
driving away. Petitions for Review to the Supreme Court on this issue have so far been rejected.

There are many responses to the Galindo argument. Most particularly, no reasonable person who has been stopped, questioned, and cited for a Vehicle Code violation would feel free to ignore the officer’s continuing questions or to drive away merely because his paperwork has been returned. (See, e.g. Michigan v. Chesternut (1988) 108 S.Ct. 1975, 1977-79 [test of detention].) Moreover, Galindo is an anomaly in the published case law. Numerous cases have held, expressly or implicitly, that the driver’s detention continues after the completion of the traffic stop because the driver is still subject to the officer’s control. (See, e.g. United States v. Chavez-Valenzuela (9th Cir. 2001) 268 F. 3d 719, 724-25; People v. McGaughran, 25 Cal. 3d at 586-87; United States v. Salzano, supra., 158 F.3d at 1107; United States v. McSwain, supra., 29 F.3d at 558; United States v. Wood, supra., 106 F.3d at 942.)

The state claims to find support for this “consensual encounter” argument in Ohio v. Robinette (1996) 117 S.Ct. 417. However, they misread the very narrow holding of that case. In Robinette, the United States Supreme Court rejected a bright line rule established by the Supreme Court of Ohio, holding that it was not mandated by the federal constitution. The Ohio court had required the officer, after completing the duties of the traffic stop, to tell the driver that “he was legally free to go” before the driver’s submission to interrogation and permission to search would be deemed consensual. The United States Supreme Court neither held nor implied that the driver’s detention transforms into a consensual encounter at the moment the officer issues a warning or citation and returns the driver’s license. Rather, the Court reaffirmed that whether the driver’s detention continued, and the related question of whether his subsequent consent was valid, turned on the assessment of the totality of the circumstances.

In summary: In most cases, I think one can make a strong argument that the vehicle driver is still “detained”, after the traffic stop, at the moment when the officer asks for consent to search. However, you may not convince the Court of Appeal, and as of now, the California Supreme Court is not interested.  

The second part of the “consensual encounter during unlawful continued detention” argument is

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In some cases, you may not even need to make this argument. If the District Attorney did not argue, in the trial court, that the driver was not detained after the traffic stop, you might want to wait and see if the Attorney General raises this argument in the Respondent’s Brief.
equally challenging – establishing that observations made by the officer during the traffic stop did not provide a reasonable suspicion for continuing the driver’s detention.

In almost every traffic stop case that I have seen, the officer (who stopped the car and questioned the driver) testifies that the driver was nervous during the traffic stop. Usually, but not always, the officer bases this assessment on his observation of a combination of physical symptoms (e.g. the driver’s hands shook, he was fidgeting, he was sweating, he avoided eye contact).

Standing alone, a driver’s nervousness (even extreme, increasing or unusual nervousness) does not provide a reasonable suspicion that he is engaged in criminal behavior additional to the Vehicle Code violation. The courts have long recognized that evident nervousness is a common and understandable response to being pulled over and questioned by the police. (See, e.g., People v. Loewen (1983) 35 Cal.3d 117, 125; People v. Lawler (1973) 9 Cal.3d 156, 162; United States v. Chavez-Valenzuela, supra., 268 F.3d at 725-26; People v. Wood, supra., 106 F.3d at 948.) Consequently, the government’s reliance on the driver’s nervousness as a basis for reasonable suspicion must be treated with caution. Standing alone, or in combination with other innocuous factors, the motorist’s nervousness does not provide reasonable suspicion to renew a driver’s detention after the legitimate traffic stop has ended. (United States v. Chavez-Valenzuela, supra., at 726; United States v. Fernandez (10th Cir. 1994) 18 F.3d 874, 875-76,880; United States v. Salzano, supra.; 158 F.3d at 1113;United States v. Tapia (11th Cir. 1990) 912 F.2d 1367, 1371.)

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

One can argue that these factors are innocuous and innocent. After all, many people who are not drug dealers take short trips to Humboldt and Mendocino Counties, and hang air fresheners in their cars. However, this argument has been made more difficult due to two principles recently emphasized by the Supreme Court in United States v. Arvizu (2002) 122 S.Ct. 744 (a case involving reasonable suspicion to stop a driver near the border for suspected smuggling): 1)The court, in assessing reasonable suspicion, looks at
the totality of the circumstances. Although each factor taken alone may appear innocent, the factors taken together may cast suspicion on the driver. 2) The court must defer to the expertise of a trained and experienced officer. It may appear innocent to a lay person that a driver keeps all of her luggage in the back seat of a car that smells strongly of air freshener. However, to an officer stationed in Humboldt County and trained in marijuana interdiction, these factors are not innocent.

Despite these obstacles, we have had some success in arguing that a continued detention, following a traffic stop, was not justified by reasonable suspicion. So in the appropriate case, where the driver gave consent to search after the traffic stop was concluded, one should certainly raise this argument.5

D. Probable Cause Searches and Dog-Sniffs

If the police have probable case to believe that there are drugs or contraband in the vehicle, they can search the entire vehicle without a warrant, including any closed containers inside that could contain the contraband. (United States v. Ross (1982) 102 S.Ct. 2157.) If they have probable cause to believe that the drugs are in a container inside the automobile, they can search that container. (California v. Acevedo (1991) 111 S.Ct. 1982.)

Consequently, if observations made before and/or during the legitimate traffic stop provide the officers with probable cause to believe that there are drugs or contraband in the vehicle, they can search without consent or a warrant. This might occur if the officer smells a strong odor of marijuana during the traffic stop, or if he sees drugs or paraphernalia in plain view inside the car.

However, if the observations that provide probable cause are made after the legitimate traffic stop are concluded – during a period of continued detention – then you might be able to attack the “probable cause search” just as you attacked the “consent search” – by arguing that the probable cause was the tainted product of the illegal detention. (This assumes that you can argue that the officer did not have reasonable suspicion to continue the driver’s detention after he completed the duties incident to the traffic citation process.)

This happens most frequently in cases with drug sniffing dogs. In the usual case, after completing the traffic stop and issuing the citation, the officer tells the driver he is

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5 Sample briefing is available from Kathryn Seligman at FDAP.
going to bring out his drug sniffing dog. He then retrieves the dog from the car, the dog sniffs the exterior of the car and “alerts” to the trunk, the officer opens the trunk and finds drugs therein. Essentially, the dog, by alerting, has provided probable cause of the presence of contraband to justify the search of the trunk.

How can you challenge this procedure? You cannot directly challenge the dog-sniff itself (e.g. by arguing that it was unsupported by probable cause or reasonable suspicion) because a “sniff” by a trained dog of the exterior of the car in a public place is not a “search” within the meaning of the Fourth Amendment. Thus, it needs no objective justification. (See People v. Bell, supra., 43 Acl. App. 4th at 768-773; United States v. Place (1983) 103 S.Ct. 2637; United States v. Jacobson (1984) 104 S.Ct. 1652.)

However, you can argue that the officers unlawfully detained the driver and his vehicle in order to conduct the dog sniff. As discussed above, this involves proving that the driver was detained following the traffic stop, and not merely subject to a consensual encounter, and that the officer lacked reasonable suspicion to continue the driver’s detention.

**E. Identification Searches: In re Arturo D. and People v. Hinger (2002) 27 Cal. 4th 60**

Just last year, the California Supreme Court provided law enforcement officers with another justification for searching a vehicle during a traffic stop. If the driver fails to produce vehicle registration, a driver’s license or other written identification, the officer can search all locations in the vehicle where one might reasonably suspect such documentation to be found. This includes the glove compartment and the area under the driver’s and front passenger’s seats. It could also include the entire passenger compartment and even the trunk of the car.

The first of the two companion cases was *Arturo D.*. Arturo was a minor stopped for speeding in Suisun City, just before midnight. He was driving a truck with both a front seat and a back passenger seat, and he had two passengers – one in the front and one in the back. During the traffic stop, when asked for license and identification, Arturo admitted that the truck was not his and that he had no valid driver’s license. He provided no written identification, although he supplied his correct name, date of birth, and address. The

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6 One might only be able to challenge a dog-sniff if it is conducted in a private place or in an unreasonable manner, or if the officers open the vehicle doors and let the dog into the interior of the car without probable cause or consent. (See People v. Bell, supra., at 769.)
Arturo and his passengers out of the truck. In an alleged search for identification, the officer entered the truck cab and tried to feel under the driver’s seat. Not feeling any documents under the seat, he went into the back of the cab and looked under the seat. He found a glass pipe and box with a minimal amount of white powder, methamphetamine. (Because the box didn’t belong to Arturo, he was ultimately only charged with possession of the pipe.)

Arturo’s motion to suppress the evidence found in the truck was denied by the trial court, but granted by the Court of Appeal (First District. Division Four), who found that the officer had exceeded the scope of a lawful search for registration by looking under the seat. The Supreme Court upheld the search.

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

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

Consequently, the main issue in Arturo D. was whether the officers had exceeded the scope of a permissible Webster search by looking under the front driver’s seat (in Arturo D.) and under the passenger’s seat (in Hinger). First, in both cases, the officers were looking for more than registration; they were looking for proof of identification – a driver’s license, a wallet, or some other proof of ID. Webster had only approved a limited search for registration. Second, even if the officers were permitted to look in the vehicle
for identification documents (as well as registration), they exceeded the scope of the permissible *Webster* search by looking under the seats – locations that were not traditional repositories for registration or identification documents. (Recall that in *Arturo D.*, the officer had actually accessed the area under the front seat from the back.) Does the typical “reasonable person” place his/her wallet under the driver’s or front passenger’s seat of the vehicle?

The second issue raised in *Arturo D.* was that the searches violated *Knowles v. Iowa*. In *Knowles*, the Supreme Court had condemned a full search of the vehicle incident to the issuance of a traffic citation. The defense, in *Arturo D.*, argued that *Knowles* had either implicitly overruled *Webster* or limited it to its facts – permitting only a limited search of traditional repositories for registration.

The California Supreme Court rejected both arguments. The gist of the Court’s decision is that when a driver fails to produce registration, a driver’s license or other written proof of identification during a traffic stop, the officer – who needs to know who he is dealing with before issuing a citation – is entitled to enter the vehicle to make a limited search for I.D.

How limited is the permitted “identification search”? The officer can search any area of the car where the driver’s wallet or these documents might reasonably be expected to be found. In other words, the officer can search any location where a man or woman driver might reasonably be expected to have put his/her wallet. According to the Supreme Court, this includes the glove compartment, the area under the driver’s seat, and the area under the passenger seat. It could also include any location in the passenger compartment and possibly the trunk.

The Supreme Court distinguished *Knowles v. Iowa* which condemned a full search of the vehicle for contraband following a traffic stop. *Arturo D.* and *Hinger* merely involved a limited search of the vehicle for identification during a traffic stop. However, in practice, the scope of the searches may be the same.
Arturo D. was a 4-3 opinion. Justice Werdegar and Justice Kennard (with Justice Brown) filed dissenting opinions. These opinions are well worth reading. Here are Justice Kennard’s final words in concluding her dissent:

Who among us can ever forget the horrendous events of September 11, 2001, when our nation suffered the most destructive terrorist assault in our history? As this opinion is being written, our nation is undergoing a painful recovery from the devastating physical and psychological effects of that day. One part of this recovery process has been an effort to devise and implement more effective methods of law enforcement to protect the security of our citizens and our institutions. Another and equally important part of this process must be a rediscovery of and rededication to the principles upon which our nation was founded and which have made it a true beacon of liberty throughout the world.

One principle, so basic to our personal liberty, is the prohibition that the Fourth Amendment to the United States Constitution places on unreasonable searches and seizures. In determining whether a search is "unreasonable," a court must adhere to the decisions of the United States Supreme Court articulating the meaning of that word in a similar case. Virtually identical to the two cases here is the high court's unanimous decision in Knowles v. Iowa, supra, 525 U.S. 113. There, the court held that when a police officer has stopped a motorist for a routine traffic violation, and the officer has not arrested the motorist, the officer may not rummage through the vehicle.

Today's majority decision does nothing to enhance our security and does much to erode our Fourth Amendment rights. Under California law, an officer making a routine stop for a traffic violation may arrest a motorist who fails to produce proof of identity and, within the limitations of the Fourth Amendment, may search the vehicle incident to the arrest. Given this ability, there is no justification for the warrantless, nonconsensual search of a car's interior when the officer has made no arrest and the officer lacks probable cause to believe that the car contains contraband. In announcing a blanket rule authorizing such searches, the majority disregards the high court's decision in Knowles and chips away at one of the fundamental freedoms guaranteed by our federal Constitution. (In re Arturo D, supra., 27 Cal. 4th at 100-102.)