INTRODUCTION:

The phrase "probable cause" is a generic term arising from the fourth amendment provision that ". . . no warrants shall issue but upon probable cause . . ."

As used in the fourth amendment, it describes the amount of information required in order to lawfully undertake a search or seizure of persons or property.

"Probable cause" (or "reasonable" as it is also called) is not specific in definition. It varies according to the context in which it is being used. This multiple definition of the term has led to confusion among some legal practitioners who look upon "probable cause" as referring to one specific amount of evidence which is the same for all uses of the term. This is not correct. The probable cause necessary to justify the temporary detention of someone is different from the probable cause required to search him, which, in turn, differs from the probable cause necessary to place him under arrest.

The issue of probable cause may arise in any one of three general contexts. The recognition of each form of probable cause is necessary for a full understanding of the term.

These forms are:

A. Probable cause to stop and detain.

B. Probable cause to search.

C. Probable cause to arrest.

Probable cause to search may be further subdivided according to the type of search being conducted.

Following some introductory observations, we will explore each of these forms of probable cause.

PROBABLE CAUSE IN GENERAL TERMS:

The phrase "probable cause," standing alone, describes a quantity of information, which, when possessed, confers upon the possessor the lawful authority to take some legal action.

Certain aspects of this concept are generally applicable to all forms of probable cause; whether we are considering probable cause to detain, probable cause to search or probable cause to arrest.

First, probable cause is both subjective and objective.

It is subjective in that the officer conducting the search or making the arrest must honestly, subjectively believe that he has sufficient probable cause information to justify his actions. This belief must exist at the time of the arrest or search, and information acquired later cannot ratify the legality of the prior actions.

In People vs. Agar, 21 CA3 24, two officers stopped a reckless driver. As the vehicle was
approached, one officer observed the passenger throw a quantity of marijuana from the vehicle and placed him under arrest for drug possession. For some reason, he did not inform the other officer of his actions. The second officer was only aware of the reckless driving. He then searched the driver and found marijuana. The officer conducting this search had no knowledge of the marijuana found by the other officer. To his knowledge, the driver was being held only to complete the citation process and was to be released on the traffic violations. The marijuana was found by the second officer after an extensive search of the suspect's clothing. The court held the search to be invalid and would not accept the claim that the marijuana found by the first officer established probable cause for the second officer's search. The possession of the marijuana by the passenger might have established reasonable or probable cause for the first officer to search the driver, but the second officer had no knowledge of those facts, and without such knowledge he had no subjective belief in his own mind as to the existence of probable cause.

Probable cause is also objective. When an officer subjectively believes that probable cause exists, then the reasonableness of that belief must be tested by objective standards. Regardless of the officer's beliefs, objective facts must exist which would lead the average, reasonable, unbiased person to the same conclusion that the officer reached. And the officer must have those facts at the time that he takes action. He cannot rely on evidence acquired later. But neither can he be condemned by later information. He can only be judged by what information he had at the time he acted. If he did not have probable cause at the time of the arrest or search, no amount of information acquired later can improve the legal status of his actions; but, likewise, a valid arrest based on probable cause to believe the defendant to be guilty is not made unlawful by later information which proves the defendant to be innocent. In both instances, the officer's actions will stand or fall on the information known to him at the time he took action.

Second, the term "probable cause" means exactly that: probable cause. It does not mean absolute certainty. It means a set of facts which inclines the mind to believe but leaves some room for honest doubt. It is a degree of proof which would lead a man of ordinary care and prudence to believe in the conclusions which have been reached. The conclusions will differ in each form of probable cause: cause to detain, cause to search or cause to arrest, but in each case "probable cause" means that there is more evidence supporting the conclusion than there is to oppose it. Some doubt may exist because everything dealing with the proof of human actions may be open to question. To demand freedom from all possibility of error would be to demand the impossible.

Third, there is no restriction on the type of facts which may constitute probable cause. It is not limited to just legally admissible evidence. In the realm of probable cause, there are no rules of evidence. The probable cause inquiry is held outside the presence of the jury and therefore the court is not concerned with the rules of admissibility of evidence. The court is only concerned with determining the state of mind of the officer and in doing so will consider all of the facts which were available to him in making his decision, regardless of their source.

Fourth, the existence of probable cause is a question of law and therefore is decided by a judge.

Probable cause is composed of bits of factual information. Whether the information actually existed and was known to the officer are factual questions determined by the evidence. But, whether those facts are sufficient to establish probable cause is a legal question determined by the law.
In determining the existence of probable cause, a judge must make two decisions. The first is a factual decision: "Is this officer telling the truth?" The second is a legal decision: "If the facts are true, are they sufficient to establish probable cause?" In the first decision there is little room for argument or appeal. Either the judge believes the officer or he does not. In the second decision however, the judge is bound by legal precedent, as he is in any other legal decision. The principle of stare decisis requires him to follow prior case law. Therefore, a study of probable cause decisions can establish workable guidelines for police to determine in advance whether probable cause exists in any particular factual situation. Although it is impossible to anticipate all the possible circumstances under which a detention, search or arrest might be made, certain fundamental rules can be distilled from the long line of cases which have developed around probable cause.

**REASONABLE SUSPICION TO STOP AND DETAIN:**

As described earlier, probable cause may appear in any one or a combination of three general contexts: probable cause to detain, probable cause to search, and probable cause to arrest. Of the three, probable cause to detain requires the least amount of factual evidence. In fact, it is sufficiently different to be referred to as reasonable suspicion, rather than probable cause.

Reasonable suspicion to detain requires three factors:

A. The existence of some suspicious or unusual activity.

B. The activity must reasonably appear to be related to criminal activity.

C. The party detained must be connected with the unusual activity.

As in other forms of probable cause, the totality of the circumstances must establish that there is more evidence supporting the belief of unusual criminal activity than there is opposing it. If the activity is as consistent with innocent behavior as it is with criminal behavior, then the detention is invalid (People vs. Irwin, 1 C3 423--detention and search of a person standing in an airport lobby).

A clear example of reasonable suspicion to detain may be found in People vs. Gaines, 55 CR 283. In Gaines, uniformed patrol officers received a call to investigate a disturbance in a parked vehicle. Arriving at the location, they observed a man and a woman in a vehicle engaged in a loud and animated argument. Pulling the man from the vehicle, they placed him in the police car and directed that he remain there while they questioned the woman. As they attempted to talk to the woman, the man stepped from the police car and walked away. He was stopped by the officers and returned over his protests. He asked if he was under arrest and was specifically told "No," that he was "being held" while they concluded their investigation. At this he claimed that they had no authority to detain him and that they must either arrest him or let him go. He then again attempted to leave and when they tried to stop him, he forcefully assaulted the officers. He was later charged with felony assault and resisting arrest. The court ruled that, although the officers might not have had sufficient grounds to arrest him when they first arrived, they definitely had cause to detain him while they continued their investigation and that, considering the circumstances, he was under a valid compulsion to remain even though he had not been arrested as yet.

Much of the authority for probable cause to detain appears to be based on dictum found in the case of People vs. Mickelson, 59 C2 448, in which the statement is made that "Circumstances short of probable cause to make an arrest may still justify officer's
stopping pedestrians or motorists on the streets for questioning."

The Mickelson case involved the stopping of an automobile, rather than a person, however the same basic rules of probable cause applicable to the stopping of vehicles also apply to the stopping or detention of persons. A greater variety of unusual circumstances may be associated with the operation of motor vehicles but the general concepts remain the same: unusual activity, related to crime, and involving the party to be detained.

A roadblock set up for the general purpose of stopping and searching all vehicles is invalid (People vs. Wirin, 85 CA2 497), however Customs and Immigration searches at the border are governed by federal law and require no probable cause whatever (People vs. Clark, 2 CA3 510 and People vs. Mitchell, 275 CA2 351).

The California Highway Patrol may establish checkpoints and stop vehicles for safety and registration inspections without probable cause (People vs. De La Torre, 257 CA2 162) but this does not apply to city police or Sheriff's Department (People vs. Grace, 32 CA3 447). However, with probable cause to believe that the vehicle is in an unsafe condition, any peace officer may stop and inspect (People vs. Gibbs, 16 CA3 758).

Stopping or detaining a vehicle on a "hunch" with no objectively reasonable belief that criminal activity exists is invalid. In People vs. Horton, 14 CA3 930, a 20-year-old was stopped solely because he was observed driving at 1:00 am. with a 10-year-old and a 15-year-old, and in People vs. Griffith, 19 CA3 948, the driver was stopped because of a broken window wing. In both cases, the court held that there was insufficient probable cause for the stop. However, a long line of cases establishes that almost any form of observed traffic or vehicle violation is sufficient probable cause to stop the vehicle. Likewise, any other circumstances which can reasonably be construed as related to any form of criminal activity will justify the stop of a vehicle. Examples of such activity are: parked in a dark alley in a burglary area at 2:00 am. (People vs. Flores, 23 CA3 23); attempting to avoid police vehicle (People vs. Williams, 274 CA2 709).

Removal of Suspects. Once the vehicle is validly stopped, the next action which may arise is the ordering of the subjects from the vehicle. The early cases are not entirely consistent on this point, however the dictum in the 1963 case of People vs. Mickelson, 59 C2 448, states: "If the circumstances warrant it, an officer may, in self-protection, request a suspect to alight from an automobile and to submit to a superficial search for concealed weapons." From this, a line of cases has developed which indicates that occupants cannot be ordered from a vehicle as a routine procedure in every vehicle stop (People vs. Cassel, 23 CA3 715, stopped for unlit taillight, driver and passengers ordered out, marijuana observed between seats—not admissible), but that such an order is justified if the officer has reason to believe the occupants are armed or dangerous, if it is necessary to examine the occupant's condition (i.e., sick, drunk, or under influence of drugs) or if circumstances indicate that there is evidence of some more serious crime and removal of the occupants is desirable to safeguard the officer or determine if a danger does exist.

Stop and Frisk. As in Mickelson, many of the temporary detention cases merge with the concept known as "stop and frisk." After a valid detention of either a vehicle and occupants or a person on foot, the next step which may be desirable is a superficial search over the outer surfaces of the person's clothing, commonly referred to as a "pat down" or "frisk."

Although commonly thought of as just one rule of probable cause, stop and frisk actually encompasses three separate phases and three
separate rules: a stop (what we have been calling a temporary detention); a search of the outer surfaces of the clothing (or "frisk"); and a more extensive search of the inside of the clothing, pockets and pocket contents.

The most definitive statement on stop and frisk is found in Terry vs. Ohio, 392 US 1, which holds that if there is a reasonable basis for believing the suspect to be armed and dangerous, an officer may stop him, pat down the outer clothing, and remove any weapons which are felt.

We have already examined the probable cause necessary to justify the "stop." We will now consider the additional probable cause needed to conduct the "frisk" and "search."

Although a suspect may be under valid detention, that alone does not justify a "frisk" (People vs. Lawler, 9 C3 156). The frisk is justified only if there is probable cause to believe that the suspect is armed and dangerous. Again, as in other forms of probable cause, the totality of the circumstances may be considered, and all sources of information leading to such a belief may be considered. But the focus of the information must be on evidence that this suspect is armed and dangerous.

In some situations this is a delicate decision for an officer. If alone officer stops someone in a remote or hazardous area, he may feel safer in frisking anyone he has stopped even where there are no objective indications that the subject is armed. In such cases, safety of the officer may be a higher consideration than the possible admissibility of evidence.

Once the frisk is conducted, the final phase of temporary detention is to remove any weapons from the suspect's possession. This normally requires the officer to reach inside the outer clothing, under jackets, or into pockets. This type of intrusion can ordinarily be justified by only one circumstance; that the prior frisk of the outside of the clothing disclosed a concealed object which was reasonably believed to be a dangerous weapon. Without this belief, the search of pockets or inside the clothing is usually held to be invalid (Sibron vs. New York, 392 US 40).

The only variation to this rule is a slight one. The normal sequence of events in a "stop and frisk" is: (1) a stop, (2) the frisk, (3) removal of a weapon. However, where the officer has established, through either personal observations or informant information, that there is a strong likelihood that the suspect is presently armed, he may forego the formality of a "frisk" and immediately reach under the clothing in order to obtain the weapon. (People vs. Superior Court-Holmes, 15 CA3 806. Officer was answering a "shots fired" report, observed suspect reaching for object in back pocket, officer immediately reached in pocket and removed gun.)

The final problem related to temporary detention and stop and frisk is one which the casual observer would probably believe to be a secondary consideration, but which, in actuality, is a vital factor. The entire stop and frisk sequence of events is directed toward the objective of finding and removing a weapon. In fact, no other objective will legally suffice to justify such action. But what if the object which is found and removed turns out to be drugs or evidence of some other crime, rather than a weapon? In actual fact, most of the stop and frisk cases end in this situation. One of the leading cases of this type is Peters vs. New York, in which an off-duty officer observed a suspected burglar. When approached by the officer, the suspect ran. After a brief chase, the officer caught him and quickly frisked the outside of his clothing. Feeling a hard object which he believed to be a weapon, the officer reached into the suspect's inner jacket pocket and removed the object. The object turned out to be a set of burglar tools. The U.S. Supreme court ruled that the officer had a valid reason to frisk, that the results of the frisk allowed removal of the object and that the tools were admissible evidence against the suspect.
Practically all similar cases have had the same result. As long as each step in the "frisk" and "search" sequence is based on probable cause to believe that the suspect is armed, any evidence found is admissible.

But what if the object removed is some type of an opaque container rather than a weapon? Can the container be opened? There are conflicting decisions on this question but the trend seems to indicate that the container may be opened if either of two conditions exist: first, where there is probable cause to believe that it contains either a weapon or contraband; and second, where the suspect attempts to conceal the container (People vs. Taylor, 275 CA2 146, People vs. Weitzer, 269 CA2 274).

It is interesting to note that a suspect cannot be searched on mere probable cause to believe that he is carrying contraband or evidence of a crime, however if there is probable cause to believe that he is carrying a weapon, he may be searched for the weapon, and if the search produces a container rather than a weapon, then the container may be searched if there is a reasonable basis to believe that it contains contraband.

PROBABLE CAUSE TO SEARCH:

Searches are generally classified according to four possible locations subject to a search: the search of private premises, search of vehicles, search of personal effects, and searches of persons.

The authority to conduct a search may be established in any one of several ways. The most legally acceptable authorization for a search is a search warrant issued by a magistrate. But the mere fact that a search warrant has been issued does not conclusively prove its validity. It may still be scrutinized to determine if the magistrate had sufficient probable cause for its issuance.

The issuing magistrate must have knowledge of sufficient facts to establish a reasonable belief that the premises to be searched contain stolen property, evidence of crimes or contraband. This knowledge is normally based on an affidavit of probable cause which accompanies the application for the warrant. If this affidavit is given by an officer who describes facts which are based on his own personal knowledge, there is little difficulty.

A more difficult situation is presented when the officer is reciting facts which have been given to him by another. Hearsay evidence is sufficient to provide probable cause for the issuance of a search warrant but it must meet a two-pronged test: that the affidavit contains a description of some of the underlying facts from which the informant reached his conclusions, and that it contains some reasons for believing that the informant is credible and his information is reliable (Aguilar, 378 US 108; Spinelli, 393 US 410).

A second method of obtaining authority to search is through consent of someone who has control of the premises or thing to be searched. Although there are a number of legal problems surrounding this form of authority, they do not normally involve problems of probable cause and therefore will not be discussed further here.

Each of the four types of searches will now be examined for the applicability of the concepts of probable cause.

Search of Private Premises. The concept of probable cause has little relationship to the search of buildings or other private premises. Regardless of the amount or type of probable cause, private premises cannot be searched on that basis alone. A building search generally requires either a search warrant or consent of the person in charge of the premises. There are exceptions to this, such as searches under emergency conditions and searches incident to a lawful arrest (both of which will be
discussed later), but these exceptions are quite limited. The common rule is that a building or any similar location where there is a reasonable expectation of privacy cannot be searched on mere probable cause.

**Search of Persons.** Except for the rules applicable to "stop and frisk" cases, the search of a person must be based on the concept of being "incident to a lawful arrest." A person and his property may be searched as part of an arrest in order to protect the arresting officer and others and to prevent the destruction of evidence. This search may be made either before or after the actual arrest (People vs. King, 5 C3 458), but authority to make the arrest must exist prior to the search and none of the results of the search may be used to establish authority for the arrest.

The extent of a search incident to an arrest is limited to the person of the arrestee and anything within his immediate reach. It does not extend to the entire building or even to the entire room where the arrest was made. (People vs. Chime], 395 US 752.)

This authority to search a person as part of a lawful arrest even extends to traffic violations where the arrestee is expected to post bail and be released within a short time. This was not always true. Prior to the 1973 case of Florida vs. Gustafson, 414 US 260, traffic violators could not be searched unless they were being held for a substantial period of time in lieu of posting bail. In Gustafson, the U.S. Supreme Court reversed this rule, holding that 4th amendment protections do not prevent the search of any arrestee, regardless of the crime for which he has been arrested. It should be noted that the California Supreme Court has refused to adopt the Gustafson case. In California, the pre-1973 rule that traffic violators in temporary custody cannot be searched, is still true.

**Search of Personal Effects.** The rules for search of personal effects are similar to the rules for search of a vehicle. Personal effects include objects such as purses, suitcases, packages, etc.

First, as incident to a lawful arrest, including physical custody arrests for traffic violations, the personal effects in the arrestee's possession at the time of the arrest may be seized and searched. The location of the property must be on the suspect's person or within his immediate reach; that is, within the limits established by the Chimel decision.

Second, such personal effects may not be seized during a mere temporary detention of the suspect unless there is probable cause to believe that they may contain a weapon.

Third, personal effects may be searched when there is probable cause to believe that they contain contraband and there is an emergency situation which calls for immediate action, such as a threat of their imminent removal or destruction.

Fourth, personal effects may be seized and searched if they have been abandoned or obviously thrown away, except that individual trash containers cannot be searched as there is still the expectation of privacy until the trash has been dumped into a common receptacle (People vs. Krivda, 5 C3 357).

**Search of Vehicles.** Because of their mobility, vehicles present a slightly different problem than the search of buildings or other premises. Probably the best approach is to consider that vehicle searches are illegal without a search warrant except for some clearly defined exceptions (Coolidge, 403 US 443). The exceptions may be described as loosely falling into three categories: searches incident to an arrest, searches based on probable cause and inventory searches.

The rules pertaining to the search of a vehicle incident to an arrest are practically the same as those applying to an arrest in a house. Once a lawful arrest has been made, the interior of the vehicle may be searched within the limitations imposed by Chimel vs. California. The crime must be one in which there is a reasonable possibility of finding
weapons or evidence of the crime in the vehicle. Therefore, a search of the vehicle is not permitted in mere traffic violation arrests.

This authority to search a vehicle appears to somewhat exceed the normal limits established by Chimel. The rationale allowing the Chimel type search is to prevent the suspect from reaching a weapon or destroying evidence. However, in the vehicle searches, supposedly based on the same concept, a search of the driver's compartment is allowed after the driver is out of the vehicle and therefore no longer presenting the risk which Chimel intended to overcome. (People vs. Williams, 67 C2 226-Defendant ran from his auto when followed by police. A quick search of his vehicle disclosed evidence of burglary. He was later arrested a block away. Evidence was admitted.)

The most clearly distinguishable characteristic between searches of buildings and searches of vehicles is the vehicle search based on probable cause. A building cannot be searched on the reasonable belief of what it contains no matter how substantial that belief may be. However, a vehicle may be searched when there is probable cause to believe that it contains contraband or evidence of a crime if one other factor is present; that conditions exist which make it impractical to seek out a search warrant. The conditions referred to most commonly are simply that the vehicle is occupied by a driver and must be searched on the spot or that there is reason to believe that it will be moved.

The probable cause necessary to initiate this search must be sufficient to establish that the occupants are engaged in some unusual conduct and that the conduct is related to some criminal activity. Suspicious movements (or what are called "furtive gestures") are not alone sufficient to establish such probable cause (People vs. Gallik, 5 C3 855).

If probable cause exists but there is no danger of the vehicle being moved, then a search warrant must be obtained (People vs. Chambers, 399 US 42).

The "inventory search" is not based on probable cause at all. It is based on the responsibility of police to safeguard the contents of impounded vehicles. In carrying out this responsibility, police are permitted to make an inventory of the contents of the vehicle. Any criminal evidence discovered during such inventory is admissible, except that this inventory does not allow the opening of closed containers or the search of concealed areas of the vehicle. A right to inventory does not equal a right to search (People vs. Mozzetti, 4 C3 699).

**PROBABLE CAUSE TO ARREST:**

Probable cause to arrest is the most widely recognized form of probable cause. In fact, there is a common misconception that the term "probable cause" refers only to an arrest. This, of course, is not true.

The authority to arrest on probable cause originated in the earliest common law and was later incorporated into the statutes of every state. Today, it represents one of the few uniform national legal standards.

According to section 836 (3) of the California Penal Code, an officer may make an arrest for a felony "whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

This means that in a felony arrest by a peace officer, probable cause must exist to believe two things: first, that a felony has been committed; and second, that the person arrested has committed that felony. As in other forms of probable cause, this need not be proven to a certainty or even beyond a reasonable doubt. There simply must be more evidence for such a belief than against it.

One of the earliest California interpretations of probable cause to arrest can
be found in the 1894 case of People vs. Kilvington, 104 C 86. Kilvington, a police watchman employed by the city of San Jose, was making his nightly rounds when he observed two men, one chasing the other. The pursuer was shouting "stop, thief!" Kilvington, assuming that the pursued had committed a crime, joined the chase, attempting to stop the man in front. After identifying himself as a police officer and ordering the man to stop, Kilvington shouted a warning that he would shoot if the man did not surrender. The man continued running and Kilvington drew his pistol and fired. Kilvington later testified that his only intent was to shoot over the man's head as a means of intimidating him into stopping, however the shot struck the man and killed him. Later investigation could establish nothing more than that the man had been trespassing in a rear yard and had fled when challenged. There was no evidence whatever that he had committed a felony.

Kilvington was charged with manslaughter and the crucial issue which developed in the case was whether he had probable cause to arrest the man for a felony, because if he did, he would be justified in using deadly force to effect the arrest. The court held that the facts were sufficient to justify the belief that a felony had occurred and that the deceased had committed it. There was some argument that the phrase "stop, thief" did not sufficiently specify that a felony had occurred. However the majority of the court held that the phrase could just as reasonably be interpreted to mean a grand theft as a petty theft. The court ruled that probable cause to arrest existed but pointed out that this was probably the bare minimum amount of evidence which would support such a finding. Considering present judicial attitudes it is questionable whether such a shooting would be supported on such minimal evidence today, however the decision has never been expressly overruled.

Immediately upon seeing the police car, the man turned and ran. The officers pursued him, caught him, and then immediately handcuffed him and searched him. The search uncovered a quantity of marijuana hidden under the man's jacket and he was charged with possession of drugs. In answer to the defense objection that the marijuana had been illegally seized, the prosecutor argued that it had been found as part of a lawful arrest. The court ruled for the defendant, holding that mere running from police, although it might establish probable cause to detain and question a suspect, was not sufficient probable cause to arrest. Obviously, the officers had acted too swiftly in consummating the arrest rather than making use of their authority to detain while conducting a further investigation.

As in other forms of probable cause, probable cause to arrest requires an officer to establish a reasonable basis for his actions. Although police must occasionally act swiftly and decisively, there are times when an officer should proceed slowly, building his evidence of probable cause as he progresses. He must then be able to articulate the reasons for his belief with such clarity that a judge will be convinced that the facts were sufficient to establish probable cause.

Some officers are convinced that the rules of probable cause are too complex and arbitrary to fully comprehend, and that there is little which they can do to affect the outcome of a probable cause determination. As the cases described here point out, much can be done by an alert officer to protect the admissibility of evidence if he is familiar with the case decisions interpreting the fourth amendment probable cause provisions.

Compare Kilvington with the 1969 L.A.P.D. case in which uniformed officers observed a person walking along a sidewalk.