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# Memorandum of Points and Authorities

A routine traffic stop is indisputably a seizure within the meaning of the Fourth Amendment. United States v. Rodriguez-Rodriguez, 550 F.3d 1223, 1226 (10th Cir. 2008) Cited by the 10th Circuit Court of appeals in U.S. v Jose Luis Pena-Montes Dec. 7, 2009.

## Plaintiff was seized

A person is seized and thus entitled to challenge the government's action when officers, by physical force or a show of authority, terminate or restrain the person's freedom of movement through means intentionally applied. *Florida* v. *Bostick*, [501 U. S. 429](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=501&invol=429), 434; *Brower* v. *County of Inyo*, [489 U. S. 593, 597](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=489&invol=593&pageno=597). There is no seizure without that person's actual submission. See, *e.g., California* v. *Hodari D.*, [499 U. S. 621, 626](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=499&invol=621&pageno=626), n.2.

A routine traffic stop is indisputably a seizure within the meaning of the Fourth Amendment. United States v. Rodriguez-Rodriguez, 550 F.3d 1223, 1226 (10th Cir. 2008) Cited by the 10th Circuit Court of appeals in U.S. v Jose Luis Pena-Montes Dec. 7, 2009.

## A seizure is anA**rrest**

The stopping of an automobile by a highway patrol officer for inspection of a driver’s license, or for any other purpose where it is accomplished by the authority of the officer, is an “arrest”.[[1]](#footnote-1)

**Arrest without warrant is presumed unlawful.**

“Any arrest made without a warrant, if challenged by the defendant, is presumptively invalid…the burden is upon the state” to justify it as authorized by statute, and as not violative of constitutional provisions.  
*State v. Mastrian*, 171 N.W.2d 695 (1969); *Butler v. State*, 212 So.2d 577 (Miss 1968)

**The burden of showing the arrest was lawful is upon the prosecution.**

It is true, as stated in Badillo v. Superior Court, 46 Cal.2d 269, 272 [294 P.2d 23]: "... the defendant makes a prima facie case when he establishes that an arrest was made without a warrant ..., and the burden then rests on the prosecution to show proper justification. People v. Holguin, 145 Cal.App.2d 520

**In order to show the police contact was valid the prosecution must show the deputy’s actions were authorized by statute.**

"'To be valid, administrative action must be within the scope of authority conferred by *the enabling statutes*. . . .' . . . 'If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void.'" (US Ecology, Inc. v. State of California (2001) 92 Cal.App.4th 113, 131-132.) *Hamilton v. Gourley* (2002), 103 Cal.App.4th 351  
[No. C038751. Third Dist. Oct. 31, 2002.]

“Any arrest made without a warrant, if challenged by the defendant, is presumptively invalid…the burden is upon the state” to justify it as authorized by statute, and as not violative of constitutional provisions.  
*State v. Mastrian*, 171 N.W.2d 695 (1969); *Butler v. State*, 212 So.2d 577 (Miss 1968)

A “peace officer” is either delegated with the authority to seize without a warrant or the arrest is not valid. People v. Horvath (1982) 127 Cal.App.3d 398 , 179 Cal.Rptr. 577.

**Procedure on arrests for traffic violations is specified in division 17, chapter 2 of the Vehicle Code commencing with section 40300 and not the Penal Code[[2]](#footnote-2).**

Procedure on arrests for traffic violations is specified in division 17, chapter 2 of the Vehicle Code commencing with section 40300 and not the Penal Code.[[3]](#footnote-3)

Vehicle Code §40300 tells us that the exclusive procedures applicable to peace officers who enforce provisions of the vehicle code for offenses not declared to be a felony are those provided by the Vehicle Code. The legislative delegation of authority provided for in the Vehicle Code is stated at 40300.5.

40300.5. In addition to the authority to make an arrest without a

warrant pursuant to **paragraph (1) of subdivision (a) of Section 836**

**of the Penal Code**, a peace officer may, without a warrant, arrest a

person when the officer has reasonable cause to believe that the

person had been **driving while under the influence** of an alcoholic

beverage or any drug, or under the combined influence of an alcoholic

beverage and any drug **when any of the following exists**:

(a) The person is involved in a traffic accident.

(b) The person is observed in or about a vehicle that is

obstructing a roadway.

(c) The person will not be apprehended unless immediately

arrested.

(d) The person may cause injury to himself or herself or damage

property unless immediately arrested.

(e) The person may destroy or conceal evidence of the crime unless

immediately arrested.

Penal Code §836. (a) A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:

(1) The officer has probable cause to believe that the person to

be arrested has committed a **public offense** in the officer's presence.

The above reflects the entire legislative authority delegated to a peace officer for arrest without warrant for Vehicle Code offenses not declared to be a felony. Warrantless arrest authority under the vehicle code rests entirely upon the narrow and specific authority expressed at 40300.5; (1) “Under the influence” and one of conditions (a) through (e) under 40300.5 can be said to be applicable or (2) under section 836(a)(1) of the Penal Code with probable cause or reasonable suspicion to believe “crime” was or is being committed, or is about to be committed in the officers presence.

An officer may not detain a motorist without a showing of a "particularized and objective basis for suspecting the particular person stopped of **criminal activity**." United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992) amended by 997 F.2d 1306 (9th Cir. 1993) (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)).  
*UNITED STATES OF AMERICA v. NAJ IVAN SIGMOND-BALLESTEROS*, (2001) No. 00-50408, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (emphasis mine)

**Due Process requires Notice**

The question of whether or not the legislature has delegated a peace officer with the authority to arrest without a warrant for a Vehicle Code infraction turns on the substantive nature of such infractions. The authorities are conflicting.

# Authorities supporting the rational that infractions are crimes:

## Penal Code §15

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;

2. Imprisonment;

3. Fine;

4. Removal from office; or,

5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

(Enacted 1872.)

## Penal Code §16.

Crimes and public offenses include:

1. Felonies;

2. Misdemeanors; and

3. Infractions.

(Amended by Stats. 1968, Ch. 1192.)

Penal Code §19.7

Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof. (Added by renumbering Section 19d by Stats. 1989, Ch. 897, Sec. 9.)

# Authorities supporting the rational that Infractions are not crimes

## Penal Code §689

No person can be convicted of a public offense unless by verdict of a jury, accepted and recorded by the court, by a finding of the court in a case where a jury has been waived, or by a plea of guilty. (Emphasis added)

## Penal Code §19.6

An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail. (Added by renumbering Section 19c by Stats. 1989, Ch. 897, Sec. 8.) (Emphasis added)

## Penal Code §§1042.5

## Trial of an infraction shall be by the court, but when a defendant has been charged with an infraction and with a public offense for which there is a right to jury trial and a jury trial is not waived, the court may order that the offenses be tried together by jury or that they be tried separately with the infraction being tried by the court either in the same proceeding or a separate proceeding as may be appropriate. (Emphasis added)

**People v Sava (1987) 190 Cal.App.3d 935, 235 Cal.Rptr. 694**

“Further, infractions are not crimes and the rule forbidding successive prosecutions of a defendant is not applicable when an infraction is one of the offenses involved. (People v. Battle (1975) 50 Cal.App.3d Supp. 1 [123 Cal.Rptr. 636].) [fn. 1](http://login.findlaw.com/scripts/callaw?dest=ca/calapp3d/190/935.html#B0441) [1b] Proceedings on infractions are not attended by the same constitutional safeguards as those attending felony or misdemeanor prosecutions. **The limitation on an accused's right to jury trial of infractions has withstood constitutional attack upon the rationale the Legislature did not intend to classify infractions as crimes. (See People v. Oppenheimer (1974) 42 Cal.App.3d Supp. 4 [116 Cal.Rptr. 795] and People v. Battle, supra, 50 Cal.App.3d Supp. 1.)** The only occasion when an accused might be afforded a jury trial on an infraction is when the accused is charged with both a misdemeanor and an infraction and jury trial of the misdemeanor charge is not waived. (Pen. Code, § 1042.5.)” People v Sava (1987) 190 Cal.App.3d 935, 235 Cal.Rptr. 694. (Emphasis added)

Courts that fail to follow the decisions of higher courts produce void judgments.

Government Code TITLE 2, DIVISION 3, PART 4, CHAPTER 5.

ARTICLE 1. General Provisions [13950 - 13951]

  ( Article 1 added by Stats. 2002, Ch. 1141, Sec. 2. )

13951.

As used in this chapter, the following definitions shall apply.

(b) (1) “Crime” means a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult.

(2) **“Crime” includes an act of terrorism, as defined in Section 2331 of Title 18 of the United States Code, committed against a resident of the state, whether or not the act occurs within the state.** (Emphasis added)[[4]](#footnote-4)

**One accused of crime is entitled to assistance of counsel at public expense and a jury trial.**

CALIFORNIA CONSTITUTION

ARTICLE 1 DECLARATION OF RIGHTS

SEC. 15. The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel. Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

***CALIFORNIA CONSTITUTION***

ARTICLE 1 DECLARATION OF RIGHTS

SEC. 16.

Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant’s counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute…

The Judicial Council of California sponsored the 1967 infraction legislation and continues to hail their “non-criminal infraction legislation” as a milestone in their annual reports.[[5]](#footnote-5) However, in the “Statewide Caseload Trends” statistics report infraction are grouped with misdemeanors in the criminal case category.[[6]](#footnote-6)

## Pretextual stops

Add the dishonesty of fabrication and using an alleged infraction as justification for seizure purposes and the acts are even more egregious. Infraction arrests are pretextual stops by definition as there is no probable cause of crime and thus no legislative authorization, any other conclusion runs headlong into conflict with our constitutions both state and federal.

In United States v. Guzman, 864 F.2d 1512 (10th Cir.1988), we defined a pretextual traffic stop as one in which "the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." Id. at 1515. We identified as the "classic example" of an unconstitutional pretext stop **the case of an officer stopping a motorist for a minor traffic violation in order to investigate the officer's "hunch" that the individual is engaged in other illegal activity**. Such a stop, we concluded, is not justified at its inception, and therefore violates the Fourth Amendment.

**The Vehicle Code is civil/regulatory**

Those engaged in a highly regulated trade or business, such as the transportation of persons or property for compensation or profit, have a reduced expectation of privacy but none-the-less enjoy the protections of the Fourth Amendment (&Cal. Const. Art. 1 Sect. 13) against arbitrary state interference.

The test for distinguishing between a criminal law and a civil regulatory law was set forth in California v. Cabazon Band of Mission Indians, supra, 480 U.S. 202:

“ . . . [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.” (Id. at p. 209.)

The Cabazon test has been applied in a variety of situations including State v. Barros (1998) 957 P.2d 1095 and State v. Warden (1995) 906 P.2d 133 holding that law prohibiting driving while intoxicated is criminal law.

**Distinguishing Authorities**

By treating court opinions as though they are general law, and not just law applicable to a particular case, attorney’s have become accomplices in delegating legislative powers to judicial officials, which is forbidden by Art. I Sec. 1 of the U.S. Constitution and similar clauses of state constitutions, which delegate legislative powers exclusively to the legislative branch allowing for no delegation of legislative power to the other two branches of government.

I’d like to begin with People v. Holguin, 145 Cal.App.2d 520 because it explains a mandatory presumption that aids in understanding the opinions that are based upon the presumption and why they are “distinguishable” from the case at bar.

Two key paragraphs from Holguin:

Appellant contends that the arrest was unlawful and therefore, the search incident to the arrest was unlawful and unreasonable, and the evidence obtained therefrom should have been excluded. Appellant claims that since the People [145 Cal.App.2d 522] introduced evidence tending to show the reasonableness of the search and seizure, the officers are precluded from relying on the presumption that they acted legally. It is true, as stated in Badillo v. Superior Court, 46 Cal.2d 269, 272 [294 P.2d 23]: "... **the defendant makes a prima facie case when he establishes that an arrest was made without a warrant ..., and the burden then rests on the prosecution to show proper justification." However, in the case before us a reading of the record does not disclose that the officers made the arrest without a warrant. The question of whether the officers had a warrant was never asked, nor raised in the trial court.** Appellant had ample opportunity to make the simple inquiry, but she apparently chose not to do so.

[1] As was said in People v. Farrara, 46 Cal.2d 265, 268-269 [294 P.2d 21], "to reverse the judgment it would be necessary to presume that the officers acted illegally and that the trial court erred in admitting the evidence so obtained. It is settled, however, that **error will not be presumed on appeal (citing cases), and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. (Code Civ. Proc., § 1963 subds. 1, 15, 33**; [citing cases].)" And as stated in People v. Citrino, 46 Cal.2d 284, 287 [294 P.2d 32], "The record, however, is silent as to whether the officers had a search warrant, and in the absence of any evidence showing the illegality of the search, we must presume that the officers regularly and lawfully performed their duties." We believe that the **presumptions** above set forth apply under the facts of this particular case. People v. Holguin, 145 Cal.App.2d 520.

**People v. McKay (2002) 27 Cal.4th 601, 622**

McKay moved to suppress evidence under PC 1538.5 but waived challenge to the illegality of his arrest by failing to move to quash.[[7]](#footnote-7)

A Los Angeles County sheriff’s deputy stopped McKay for riding a bicycle in the wrong direction on a residential street.1 Intending to cite McKay, the deputy asked to see some ID. McKay said he had none in his possession, although he verbally identified himself and gave the officer an address and date of birth.

At this point, the deputy arrested McKay under the authority of Vehicle Code §40302(a) which allows—but does not require—officers to make a custodial arrest for a minor Vehicle Code violation if the person fails to present “satisfactory” ID.” During a search incident to the arrest, the deputy found a baggie containing methamphetamine in one of McKay’s socks.

The court stated that it was inarguable the officer had the authority to seize McKay. They later explain that it was inarguable because McKay never raised the argument in the trial court. All McKay had to do was ask the officer if he had a warrant but chose not to do so[[8]](#footnote-8).

Rather than challenge the initial police contact as a seizure without warrant or probable cause of crime and that such a seizure has not been authorized by our legislature, McKay argued the search incident to his arrest was improper because he should have been cited and released rather than taken before a magistrate.

McKay thus argued that he should have been arrested but that he should have been treated differently afterward.

Unlike McKay, defendant at bar was seized the instant she yielded to Deputy Morgado’s activated emergency lights and she challenges the initial police contact as an unwarranted seizure for a non-criminal infraction, an administrative act that has not been authorized by our legislature. This case is thus completely distinguishable from McKay.

### People v. Miranda (1993) 17 Cal. App. 4th 917 [21 Cal. Rptr. 2d 785

Like McKay, Miranda did not challenge the court’s jurisdiction over him by arguing the illegality of the arrest with a motion to quash [[9]](#footnote-9) but instead made a general appearance by filing a 1538.5 motion to suppress. [[10]](#footnote-10) Defendant here asks for no other relief other than to dismiss for want of jurisdiction.

Like the McKay Court, the Miranda Court clearly states the fact that Miranda did not raise the illegal arrest argument but chose to argue the post arrest search instead:

[2a] **Defendant concedes that Lucero's failure to signal her left turn provided a "nominal" basis for a traffic stop**. He contends, however, that Becerra used the stop as a pretext to investigate his suspicion of criminal [17 Cal. App. 4th 923] activity unrelated to the traffic violation. He argues that such a stop is unreasonable under the Fourth Amendment to the United States Constitution and that here the illegal stop vitiated Lucero's consent to search the car. Thus, he claims that the warrantless search of the trunk was illegal and the evidence found therein should have been suppressed. fn. 3

Defendant here concedes no such thing and quite the contrary alleges the police contact to have been illegal! The question of whether or not a peace officer has been legislatively delegated the authority to arrest without warrant for an alleged tail lamp malfunction turns on whether an infraction of the vehicle code is civil or criminal. The legislature has authorized a peace officer to apply the police power of the state to crime and only crime. Due process requires notice and the ambiguity surrounding the substantive nature of infraction legislation fails to provide notice at the first juncture.

**People v. Battle (1975) 50 Cal.App.3d Supp. 1 [123 Cal.Rptr. 636]**

Some prosecutors’ cling to the Las Angeles Superior Court Appellate Division in People v. Battle, supra, 50 Cal.App.3d Supp. 1 for the proposition that Penal Code sections 19.7 and 1042.5 are the “pertinent amendments” to section 689 and qualify Penal Code section 689 in so far as infractions are concerned.

Such concept not only ignores the invalidity of the underlying theory of statutory “amendment by implication”, it also ignores that the Fourth District Court of Appeals in People v Sava cites to People v Battle in support of its holding that infractions are not crimes and that the legislature never intended to classify infractions as crimes.

It should be further noted that such a theory is indefensible in the face of Joint Legislative Rule 8.5 and the absence of Penal Code 689 from the table of sections affected by the 1968 infraction legislation. If Penal Code section 1042.5 amended or affected Penal Code 689 in any way it would be required to show in the table of sections affected and it does not.

## Joint Legislative Rule 8.5 & Digest of Bills Introduced

8.5. A bill may not be introduced unless it is contained in a cover attached by the Legislative Counsel and it is accompanied by a digest, prepared and attached to the bill by the Legislative Counsel, showing the changes in the existing law that are proposed by the bill. A bill may not be printed where the body of the bill or the Legislative Counsel's Digest has been altered, unless the alteration has been approved by the Legislative Counsel. If any bill is presented to the Secretary of the Senate or Chief Clerk of the Assembly for introduction that does not comply with the foregoing requirements of this rule, the Secretary or Chief Clerk shall return it to the member who presented it. The digest shall be printed on the bill as introduced, commencing on the first page thereof.

## Statutes do not trump the constitution

"A statute does not trump the Constitution."[[11]](#footnote-11) A theory of amendment by implication not only guarantees ambiguity but also embraces the notion that the legislature can do by implication what they cannot do directly, and that is to amend the constitution by statute. Even more ironic, the ultimate goal of the Oppenheimer Court, to avoid the conclusion that the legislature acted improperly in enacting conflicting statutes, is undermined by the implications inherent in the notion that the legislature failed to follow the applicable rules in enacting the legislation and was therefore incompetent in doing so at the onset. Defendant here disagrees!

Jury trial is guaranteed to one accused of crime by California Constitution Article 1 section 16 and does not depend upon Penal Code 689. If infractions are not crimes then they are civil. What is the substantive nature of the vehicle code? What is the substantive nature of a vehicle code infraction?

### Atwater v Lago Vista 532 U.S. 318

Atwater was stopped for unrestrained child in a pickup truck. She argued she should not have been arrested for a fine only offense. However, the offense for which Atwater was seized was a minor misdemeanor.

The opening sentences in Atwater are as follows: (Emphasis added)

“Texas law makes it a **misdemeanor**, punishable only by a fine, either for a front-seat passenger in a car equipped with safety belts not to wear one or for the driver to fail to secure any small child riding in front. **The warrantless arrest of anyone violating these provisions is expressly authorized by statute**, but the police may issue citations in lieu of arrest.”

Misdemeanors are crimes under Texas law regardless of the punishment and the officers’ actions in that case were expressly authorized by statute. Atwater was also entitled to appointed counsel and a jury trial for the offense for which she was arrested. This case is distinguishable from Atwater on every point.

Defendant here was arrested for a non-criminal infraction of a civil regulatory code. Unlike in Atwater such an arrest has never been expressly authorized by statute and unlike Atwater defendant here does not get a jury trial or assistance of counsel for the infraction for which she was arrested without warrant or probable cause of crime.

**Void for Vagueness**

An infraction of the Vehicle Code is either conduct rising to the level of crime or it is not. If men of ordinary intelligence must necessarily argue as to its meaning and differ as to its application it violates the first fundamental of due process which is notice.

If an infraction of the Vehicle Code is not a crime within the meaning of California Constitution Articles 15 & 16 and not a crime within the meaning of their federal cousins the Fifth, Sixth and Seventh Amendments it necessarily follows that an infraction of the Vehicle Code is not a crime within the meaning of California Constitution Article 1 section 13 nor within the meaning of the federal Fourth Amendment.

If an infraction is conduct rising to the level of crime, within the meaning of Article 1 §13 of the California Constitution, yet somehow not conduct rising to the level of crime within the meaning of Article 1 §§15 & 16 of the California Constitution for post arrest due process safeguards, the act is unconstitutional on its face. Oh but let’s not let law get in the way of the municipal corporate lust for filthy lucre.

1. Terry v. Ohio, 392 U.S. 1, 16 [20 L.Ed.2d 889, 902-903, 88 S.Ct. 1868, Robinson v. State, 198 S.W.2d 633, 635, 184 Tenn. 277, United States v. Mendenhall, 446 U.S. 544, 554 100 S.Ct 1870, 64 Led. 2d 497 (1980); State v. Young, 135 Wn.2d 498, 509, 957 P.2d 681 (1998). [↑](#footnote-ref-1)
2. People v. Wohellben (1968), 261 Cal.App.2nd 461, People v. Superior Court (Simon) (1993), 7 Cal.3d 186 [↑](#footnote-ref-2)
3. VC 40300 at interpreted in People v. Superior Court (Simon) (1993), 7 Cal.3d 186 citing to People v. Wohellben (1968), 261 Cal.App.2nd 461 [↑](#footnote-ref-3)
4. Section 2331 of Title 18 of the United States Code is the codification of section 804 of the USA Patriot Act. [↑](#footnote-ref-4)
5. 2001 Annual Report of the Judicial Council of California page 8 under “Milestones” list “1967 Council-sponsored legislation [↑](#footnote-ref-5)
6. 2013 Annual Report of the Judicial Council of California page 5 and all throughout statistics for traffic and non-traffic infractions are listed with criminal process statistice.

   “Criminal: The criminal case category is made up of felonies, misdemeanors, and infractions. The filing totals for the individual case types are as follows: felony filings represented 243,270 cases, misdemeanor filings totaled 1,047,594 cases, and infraction filings accounted for 5,607,727 cases.” [↑](#footnote-ref-6)
7. As a defendant may waive his right to prevent the introduction of illegally seized evidence by failure to object, he may, by failure to move to quash the indictment or information, waive the illegality of an arrest. People v. Garcia (1959), 174 C.A.2d 525 [↑](#footnote-ref-7)
8. People v. Holguin, 145 Cal.App.2d 520 (1956) see also People v. Farrara, 46 Cal.2d 265, 268-269 [294 P.2d 21] [↑](#footnote-ref-8)
9. As a defendant may waive his right to prevent the introduction of illegally seized evidence by failure to object, he may, by failure to move to quash the indictment or information, waive the illegality of an arrest. People v. Garcia (1959), 174 C.A.2d 525 [↑](#footnote-ref-9)
10. The designation of the paper or the proceeding as a special appearance (supra, §124) is -9 useful and desirable procedure, but it is not Conclusive ill its effect. If the moving party does not confine himself to the objection of lack of jurisdiction of the person, but seeks relief on the merits, his application may be deemed a general appearance regardless of its designation. As the court said in Security Loan & T. Co. v. Boston & S. Riverside Fruit Co. (1899) 126 C. 418, 422, 58 P. 941: "[W]here the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special appearance or not."

    A fuller exposition appears in the case of In re Clarke (1889) 125 C. 388, 392, 58 P. 22: "On general principles, a statement that a defendant or party makes a special appearance is of no consequence whatever, If he appears and objects only to the consideration of the case. or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required or could nave any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case. or which itself would be a regular proceeding in the case, it is a general appearance no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material." (See also Milstein v. Ogden (1948) 84 C.A.2d 229, 232, 190 P.2d 312; 5 Am.Jur.2d 490, 508; Rest., Conflict of Laws 2d (Prop. Off. Draft) §81, Comment c.) [↑](#footnote-ref-10)
11. People v. Ortiz, (1995) 32 Cal.App.4th at p. 292, fn. 2 Conway v. Pasadena Humane Society (1996) 45 Cal.App.4th 163, UNITED STATES OF AMERICA, v. JERRY ARBERT POOL, C.A. No. 09-10303, IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Opinion filed September 14, 2010), On Appeal From The United States District Court For The Eastern District of California. [↑](#footnote-ref-11)