Orders to Alight: Opening the Door to a New Traffic Stop Search and Seizure Rule

California has not yet decided whether to adopt the federal standard for traffic stop orders to alight. This comment examines the current federal and California law regarding orders to alight and suggests a California standard for these orders.

INTRODUCTION

The California Supreme Court has not decided whether a police officer may order a driver to alight from his car after a routine traffic stop. California does have a standard for "ordering-out" when an officer detains a motorist as a criminal suspect,[1] as well as guidelines describing the circumstances appropriate for pat-downs and auto searches following routine traffic stops.[2] At a minimum, these rules provide that the officer's invasion of the motorist's privacy must be warranted by fear for the officer's own safety.[3] California, however, has yet to determine directly the appropriate standard for an order to alight during a routine traffic stop.

In 1977, the United States Supreme Court first analyzed the

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[1] People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963). *See* notes 36-42 and accompanying text *infra*.

[2] People v. Superior Court (Keifer), 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970). *See* notes 30-35 and accompanying text *infra*.

[3] People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963).

Both the federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. CONST. amend. IV; CAL. CONST. art. 1, § 13. The basic purpose of the protection against unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). An unreasonable search occurs when one's reasonable expectation of privacy is violated by an unwarranted government intrusion. People v. Triggs, 8 Cal. 3d 884, 891, 506 P.2d 232, 237, 106 Cal. Rptr. 408, 413 (1973), *rev'd on other grounds*, 22 Cal. 3d 891, 587 P.2d 706, 150 Cal. Rptr. 910 (1978).

narrow traffic stop ordering-out issue.[4] The Court had previously required that some showing of objective suspicion precede any search and seizure of a motorist or his belongings.[5] Then, in *Pennsylvania v. Mimms*,[6] the Court ruled that an officer could order a motorist to alight from his car following a mere traffic stop, without a separate justification for the order. It held that such an order does not offend federal constitutional standards of reasonable search and seizure.[7] This decision allows police conduct performed in the preliminary stage of a search and seizure following a traffic stop to escape judicial overview. In doing so, the holding represents a dilution of the federal standards for reasonable search and seizure of motorists and their possessions.[8]

This comment explores the effect of *Pennsylvania v. Mimms* on California decisions. It begins with an analysis of the Supreme Court's holding in *Mimms* and an examination of its impact on other areas of search and seizure. It then traces the development of California's order to alight standard as reflected in pre- and post-*Mimms* cases. Finally, it argues that California

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[4] Prior to Pennsylvania v. Mimms, 434 U.S. 106 (1977), Adams v. Williams, 407 U.S. 143 (1972), represented the least restrictive standard for search and seizure of motorists. The *Adams* court held that a police officer making a reasonable investigatory stop may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. *Id.* at 146.

[5] *See, e.g.*, United States v. Robinson, 414 U.S. 218, 235 (1973) (where a lawful custodial arrest has been made, a full search of the person is a reasonable search under the fourth amendment); Adams v. Williams, 407 U.S. 143, 146 (1972); Terry v. Ohio, 392 U.S. 124 (1968) (where a reasonably prudent officer is warranted in the circumstances of a given case in believing his safety or that of others is endangered, he may make a reasonable weapons search of the person believed armed and dangerous).

[6] 434 U.S. 106 (1977).

[7] *Id.* at 111 n.6.

[8] U.S. CONST. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . ." *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (fourth amendment imposes limits on search and seizure power in order to prevent arbitrary and oppressive interference by enforcement officials with privacy and personal security of individuals); United States v. Ortiz, 422 U.S. 891, 895 (1975) (the central concern of the fourth amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials). *See also* notes 15-19 and accompanying text *infra*.

should retain and clarify its higher standard to protect the individual against unreasonable government intrusions.

I. PENNSYLVANIA V. MIMMS

A. The Decision

Early in 1975, two officers stopped Harry Mimms, intending to issue him an ordinary traffic citation for driving with an expired license plate.[9] Following their standard practice, the officers ordered Mimms to step out of his car. After Mimms alighted, one of the officers observed a bulge under Mimms' jacket. Suspecting that the bulge might be a weapon, the officer conducted a pat-down search and found a gun in Mimms' waistband.[10]

Two Pennsylvania courts considered the Mimms case. The trial court denied Mimms' motion to suppress the weapon, and convicted him on two counts involving illegal possession of a firearm.[11] On review, the Pennsylvania Supreme Court reversed, holding that the order to alight constituted an unreasonable seizure of Mimms.[12]

The United States Supreme Court disagreed with the Pennsylvania appellate court's analysis. According to the Supreme Court, the seizure of Mimms did not violate reasonable search and seizure standards. It reasoned that the officer's proffered reason for his practice, police safety, provided a general justification for the "de minimis" intrusion into the personal liberty of the driver.[13] The Court held that an order to alight following a

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[9] Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977).

[10] *Id.*

[11] Commonwealth v. Mimms, No. 746 (C.P. Philadelphia County, Pa., 1970). Defendant was convicted of carrying a concealed weapon and of unlawfully carrying a firearm without a license. *See* Commonwealth v. Mimms, 232 Pa. Super. Ct. 486, 335 A.2d 517 (1975).

[12] Commonwealth v. Mimms, 471 Pa. 546, 548, 370 A.2d 1157, 1158 (1977). The court held that the seizure of Mimms was impermissible. It stated that the officer had no reason to suspect that criminal activity was afoot or that his safety was threatened when the traffic stop was made. The court said that the objective facts surrounding the detention of Harry Mimms did not suggest that Mimms presented a danger to the officers' well being or that Mimms was involved in any criminal conduct. *Id.* at 550, 370 A.2d at 1160.

[13] Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). The Court's reasoning suggests that an officer may issue an order to alight pursuant to any lawful detention of the motorist. Justice Stevens presented this reading of the major-

traffic stop may issue, despite a lack of objectively suspicious circumstances, without triggering judicial review of officer conduct.[14]

B. Implications of Mimms

A subsequent arrest does not supply probable cause for the preceding warrantless search.[15] Yet, in *Mimms,* the state conceded that the officer had no objective grounds to suspect criminal activity from the driver and that there was nothing unusual or suspicious about Mimms' behavior.[16] Nevertheless, the Court accepted the view that lack of suspicion should not block an order to alight, stating that "[w]e think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty."[17] The Court felt that an officer's safety was always threatened in the context of a traffic stop, even where there were no objective facts suggesting that the occupants were dangerous.[18]

By accepting an officer's subjective justification for an order to alight, the Court limits judicial supervision of police conduct following a traffic stop. This limited judicial review considerably relaxes constitutional standards designed to minimize intrusive police conduct. Thus, once a police officer lawfully detains a motorist for a traffic infraction, the officer may order the driver out. The officer need not have independent grounds for his order. The officer's awareness that he will not be called upon to explain his actions may remove a significant deterrent against uncalled-

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ity holding in his dissent. *Id.* at 122. In a footnote, the majority expressly objected to Stevens' interpretation, insisting that the holding pertains only to traffic stops. *Id.* at 111 n.6. *See* notes 24-26 and accompanying text *infra.*

[14] Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977).

[15] *See, e.g.,* Sibron v. New York, 392 U.S. 40, 63 (1968). In *Sibron,* an officer had observed the defendant, about whom he had no information, in the company of known narcotics addicts. Although a pat-down of defendant turned up heroin, the Court held that incriminating evidence discovered during the search could not be used to provide probable cause for conducting the pat-down. *Id. Accord,* Henry v. United States, 361 U.S. 98, 103 (1959); Johnson v. United States, 333 U.S. 10, 16-17 (1948).

[16] Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

[17] *Id.* at 110. The Court offered statistics to support its proposition that traffic stops pose a substantial threat to police officers. *Id.*

[18] For a detailed criticism of the Court's statistical authority for the proposition that officer safety is seriously threatened in the traffic stop situation, *see* Pennsylvania v. Mimms, 434 U.S. 106, 118-19, 119 n.9 (Stevens, J., dissenting).

for intrusions into motorists' privacy.[19]

The *Mimms* holding presents problems in addition to the invasion of the motorist's physical privacy interest. The order may lead to a frisk or auto search that could provide the justification otherwise unavailable to the officer for conducting a further search. For example, the driver's exit from the car fully exposes his person and opens to view the inside of the car.[20] The order also provides the officer further opportunity to observe the driver's behavior and actions. If the officer had an initial hunch that aroused his suspicion, the additional time and exposure resulting from the order to alight might reveal objective facts sufficient to justify a pat-down or auto search.[21] Yet both California

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[19] Justice Stevens' dissent reveals the potential extent of this intrusion:

> A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as no less than an arrogant and unnecessary display of authority.

Id. at 121. Under the *Mimms* holding, a motorist's ability to vindicate his constitutionally protected privacy interest depends on the stage at which the invasion occurs. Thus, a motorist's interest in remaining in the car cannot be vindicated even if the order to alight lacks factual justification. But a motorist subject to the same order to alight followed by a discovery of contraband during a warrantless pat-down may be able to vindicate his privacy right. The motorist can bring a motion for suppression of the evidence if the search was unreasonable under the fourth amendment, or under the California Constitution. Adams v. Williams, 407 U.S. 143, 149 (1972); People v. Superior Court (Keifer), 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970). In contrast, an unwarranted intrusion may occur at the order to alight stage, but if the pat-down is legitimate a court following *Mimms* would ignore the initial intrusion in granting or denying a suppression motion. *See* Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977).

[20] Once the driver is exposed by leaving the car, any suspicious lumps in his clothing may justify a search for weapons, as happened in *Mimms*. Increasing visibility of the car's interior serves the same purpose, since the "plain view" rule permits confiscation of any visible contraband and consequent search of all occupants. *See, e.g.*, People v. Lilienthal, 22 Cal. 3d 891, 899, 587 P.2d 706, 710, 150 Cal. Rptr. 910, 914 (1978) (warrantless search of defendant upheld when distinctively folded paper packet fell from defendant's wallet in plain view of officer and officer knew such packets were used to transport narcotics).

[21] With the additional time to observe the motorist, the officer may notice some suspicious activity giving cause to frisk the driver, his passenger, and search the vehicle. Adams v. Williams, 407 U.S. 143, 146, 149 (1972); Terry v. Ohio, 392 U.S. 1, 27, 30 (1968). In this manner, so long as a traffic infraction caused the initial detention, the *Mimms* rule permits an officer to engage in at

and pre-*Mimms* federal law have prohibited citizen detention based upon a mere hunch.[22] The unexplained order to alight may thus ease the requirement that objective grounds for suspicion must be present before a pat-down or auto search may occur.[23]

Finally, it is difficult to see how the problems raised by *Mimms*—intrusions upon motorists' privacy and unsupervised police conduct at the ordering out stage—can be confined to the traffic stop situation. There is no logical basis on which to distinguish other legitimate automobile detentions from traffic stops.[24] A vehicle code infraction by itself is entirely disassociated with criminally suspicious activity.[25] Therefore, orders to alight could be found permissible in all vehicle stops which fall short of criminal investigation.[26]

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least some investigation based upon a mere hunch.

[22] Terry v. Ohio, 392 U.S. 1 (1968). In *Terry,* defendants were observed walking up and down the street repeatedly, peering in store windows and conferring. The Supreme Court ruled that the officer's prolonged observation of defendants' objectively suspicious behavior justified the officer's reasonable belief that defendants were armed and the consequent frisk which revealed the contraband. California adopted a similar position in In re Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978) (motion to suppress should have been granted because "an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in good faith."). *See also* People v. Bower, 24 Cal. 3d 638, 644, 597 P.2d 115, 118, 156 Cal. Rptr. 856, 859 (1979) (fact that defendant was only white person seen in predominantly black neighborhood did not constitute an objective circumstance which could justify defendant's detention.).

[23] *See* note 21 and accompanying text *supra.*

[24] Other types of vehicle detentions open to the "ordering out" rule include requesting the driver of a stopped car to leave a restricted parking zone, or interviewing a motorist witness to a collision. *See* Pennsylvania v. Mimms, 434 U.S. 106, 122 (1976) (Stevens, J., dissenting).

[25] The California Supreme Court recognized this principle in People v. Superior Court (Keifer), 3 Cal. 3d 807, 829, 478 P.2d 449, 464, 91 Cal. Rptr. 729, 744 (1970). There, the court required a showing of facts independent of the stop itself to justify an auto search following a routine traffic stop. *Id.* at 815, 829, 478 P.2d at 453, 464, 91 Cal. Rptr. at 733, 744. *See* note 71 *infra.*

[26] Justice Stevens observed that "[m]ost narrowly, the Court has simply held that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." Pennsylvania v. Mimms, 434 U.S. 106, 122 (1976) (Stevens, J., dissenting). *But see,* the majority's rejoinder, *id.* at 116 n.6.

II. The California Standard For Motorist and Vehicle Searches and Seizures

California has a choice in its approach to the traffic stop search and seizure problem posed by *Mimms*. The courts may either subscribe to the federal constitutional standard formulated in *Mimms*, or establish an independent position based on the state's own constitutional search and seizure provision.[27]

Although the California courts have not adopted a firm position on whether to permit unjustified orders to alight after a traffic stop in California, there are strong reasons why they should not adopt the federal standard. First, California has repeatedly asserted its right to impose a higher standard of reasonable search and seizure than that provided by the federal courts' interpretation of the federal constitution.[28] Further, California courts already have a long-standing test by which to judge orders to alight in certain contexts.[29] By examining two related California Supreme Court decisions, a standard can be deduced for traffic stop orders to alight.

A. People v. Superior Court (Keifer)

The first case, *People v. Superior Court (Keifer)*[30] governs searches of the driver or his car during a traffic stop.[31] The

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[27] Cal. Const., art. 1, § 24 provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." *See, e.g.*, Cooper v. California, 386 U.S. 58, 61 (1967) (state has power to impose higher standards on searches and seizures than required by fourth amendment), *rehearing denied*, 386 U.S. 988 (1967).

[28] California has departed from the United States Supreme Court's search and seizure standards in adopting a vicarious exclusionary rule, People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955), and a stricter pat-down rule, People v. Brisendine, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1109-10, 119 Cal. Rptr. 315, 326 (1975). In *Brisendine*, the court declared that "California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the United States Constitution . . . ." *Id.* at 551, 531 P.2d at 1113, 119 Cal. Rptr. at 329.

[29] People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963) (order to alight permitted where officer detaining criminal suspect). *See* notes 36-42 and accompanying text *infra*.

[30] 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).

[31] In *Keifer*, a highway patrolman stopped a speeding motorist. While pulling the car over, the officer observed the passenger reach down as if to hide something. The officer walked to the passenger side and opened the door without any prior attempts to communicate with the passenger. The officer found

Keifer doctrine recognizes two grounds for a pat-down or vehicle search, separate from the traffic stop. The first permits a search of the motorist or vehicle if the officer has independent probable cause to believe that the car contains contraband.[32] To meet the required level of probable cause, the officer must be able to show that he had prior reliable information, personally observed contraband at the scene of the traffic stop, or personally observed a furtive gesture coupled with otherwise suspicious circumstances.[33] Second, the *Keifer* rule may permit a search if the officer has reasonable grounds to believe that the motorist is armed and presently dangerous. Again, the officer must have known specific facts or circumstances to justify the search.[34]

The thrust of the *Keifer* rule is that an officer must be able to articulate objectively suspicious circumstances revealing danger or illegal activities present during the detention.[35] The existence

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marijuana inside the car and arrested the two occupants. *Id.* at 811-12, 478 P.2d at 450, 91 Cal. Rptr. at 730.

Keifer itself involved only vehicle searches. People v. Superior Court (Simon) 7 Cal. 3d 186, 202, 205-206, 496 P.2d 1205, 1216-17, 1219, 101 Cal. Rptr. 837, 848-849, 851 (1972) extended the *Keifer* doctrine to permit a pat-down search of the occupants. These cases will be referred to jointly as *Keifer* when discussing the pat-down/auto search rule.

[32] People v. Superior Court (Keifer), 3 Cal. 3d 807, 815, 478 P.2d 449, 453, 91 Cal. Rptr. 729, 733 (1970).

[33] *Id.* at 816-817, 478 P.2d at 454, 91 Cal. Rptr. at 734.

[34] *Id.* at 829, 478 P.2d at 464, 91 Cal. Rptr. at 744. This ground derives from the U.S. Supreme Court's decision in Terry v. Ohio, 392 U.S. 1, 27 (1968). For the California Supreme Court's discussion of *Terry*, *see* People v. Superior Court (Keifer), 3 Cal. 3d 807, 829, 478 P.2d 449, 464, 91 Cal. Rptr. 729, 744 (1970).

[35] *See* notes 31-34 and accompanying text *supra*. The California standard for ordering criminal suspects to alight also requires suspicion that the motorist may be dangerous. People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963). But an order to alight does not constitute an intrusion of the same magnitude as a frisk or a search of the inside of a car. The order to alight is instead an incremental seizure. *See* notes 19-21 and accompanying text *supra*. The officer examines that which has been made visible to the plain eye by the order to alight: the driver's person, the inside of his car and his behavior and actions. The Supreme Court characterized this level of investigation as "de minimis." Pennsylvania v. Mimms, 434 U.S. 107, 111 (1976). Although that characterization might be challenged as frivolous (*see* note 20 *supra*), the order to alight is not likely to be found as offensive to the motorist as a pat-down of his person or a search of the inside of his car. It would therefore be reasonable to impose a less stringent standard to regulate police activity in ordering a driver from his car than in conducting a pat-down

of such facts will sustain a search of the motorist or his vehicle and a consequent seizure of incriminating evidence.

B. People v. Mickelson

In *People v. Mickelson,* the California Supreme Court established a standard of review for orders to alight after motorist detention for criminal investigation.[36] In *Mickelson,* the defendant was detained in an investigatory vehicle stop because his description matched that of a suspect in a recent robbery in the vicinity.[37] The officer ordered the defendant from his car and, upon searching the car, found evidence implicating the defendant in the robbery.

The superior court set aside the information against the defendant on the ground that the evidence was seized illegally.[38] The People appealed. The California Supreme Court found that the officer did not have probable cause to search the defendant and upheld the judge's order to set aside the information.[39] However, the court stated in dicta that, pursuant to a legitimate investigatory stop, ". . . [i]f the circumstances warrant it, [the officer] may in self-protection request a suspect to alight from an automobile."[40]

Under its own facts and as applied by the courts, *Mickelson*'s broad "under the circumstances" test stands in contrast to the

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of his person. *Mimms,* however, imposes no standard for review. It instead permits orders to alight regardless of the facts attending the order. Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1976).

[36] 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). That standard has not been formally adopted where the order is based on a traffic infraction. *See* notes 47-59 and accompanying text *infra.*

[37] People v. Mickelson, 59 Cal. 2d 448, 452-53, 380 P.2d 658, 661, 30 Cal. Rptr. 18, 21 (1963).

[38] *Id.* at 449, 380 P.2d at 658, 30 Cal. Rptr. at 20.

[39] *Id.* at 454, 380 P.2d at 662, 30 Cal. Rptr. at 22.

[40] *Id.* at 450, 380 P.2d at 660, 30 Cal. Rptr. at 20.

The *Mickelson* rule has retained its vitality. In the recent case of People v. Rico, 97 Cal. App. 3d 124, 131, 158 Cal. Rptr. 573, 576 (2d Dist. 1979), the court of appeal cited *Mickelson* in endorsing an officer's order that the driver alight. The officer had made the initial stop because the car and its occupants matched a witness' description of suspects in a recent shoot-out. The court found the order to alight justified by the officer's avoidance of exposure to "unnecessary danger." *Id.* at 131-132, 158 Cal. Rptr. at 577. Application of the rule is thus still premised on the notion that under certain circumstances, concern for officer safety will justify an order to alight.

exacting "articulable facts and circumstances" language of the *Keifer* rule. The relaxed standard and judicial application of *Mickelson* is partly explained by the less serious privacy invasion it involves.[41] Another important explanation for the courts' approach is the fact that the cases commonly reviewed under *Mickelson* involve motorists detained as criminal suspects.[42] An individual suspected of recent or future criminal activity is likely to be a high safety risk. Under such circumstances, the order to alight for the officer's self-protection is directly related to the

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[41] The *Mickelson* and *Keifer* rules respectively entail inherently different limits to the permissible scope of the search and seizure involved. The limits differ because the pat-down/auto search intrusion is of a more serious nature than the order to alight intrusion. *See* note 35 *supra*.

[42] *See, e.g.*, People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970) (burglary); People v. Diamond, 2 Cal. App. 3d 860, 83 Cal. Rptr. 11 (5th Dist. 1969) (arson); People v. Wigginton, 254 Cal. App. 2d 321, 62 Cal. Rptr. 104 (2d Dist. 1967) (robbery); People v. McVey, 243 Cal. App. 2d 215, 52 Cal. Rptr. 269 (5th Dist. 1966) (burglary).

The *Keifer* pat-down rule demands and has exacted close judicial scrutiny of the circumstances surrounding a traffic stop to ascertain whether a search is justified. *See* notes 32-35 and accompanying text *supra*. The *Mickelson* doctrine has had no comparable effect on officer discretion in orders to alight. *Cf.*, People v. Superior Court (Keifer), 3 Cal. 3d 807, 817-18, 478 P.2d 449, 454-455, 91 Cal. Rptr. 729, 734-35 (1970). Courts rely on *Mickelson* to sustain orders to alight without analysis of the underlying facts, often merely referring to the *Mickelson* language allowing an officer to so order "if the circumstances warrant it." People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 660, 30 Cal. Rptr. 18, 20 (1963). *See, e.g.*, People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970). In *Nickles*, the court first found the officer's detention of defendant for criminal investigation valid and then sustained the order to alight since, under *Mickelson*, an officer may order a motorist to alight if the circumstances justify his investigation of the motorist-suspect. *Id.* at 991, 88 Cal. Rptr. at 766. *See also* People v. Robles, 28 Cal. App. 3d 739, 746, 104 Cal. Rptr. 907, 911 (3d Dist. 1972) (officer's observation of defendant along with prior knowledge of defendant's activities constituted objective facts sufficient to supply reasonable suspicion of illicit activities and therefore justified the defendant-motorist's detention. Suspicious circumstances warranting detention also warrant order to alight), *rev'd on other grounds*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

Furthermore, of all the California decisions purporting to review a seizure of evidence and consequent arrest and conviction of the motorist-suspect, not one has resulted in a reversal on the grounds of an unwarranted order to alight. *But see* People v. Adam, 1 Cal. App. 3d 486, 81 Cal. Rptr. 738 (2d Dist. 1969), in which the court stated that it was not sure whether or not the order to alight was proper but that it did not have to reach the issue since it found the subsequent pat-down search illegal. *Id.* at 489 n.3, 81 Cal. Rptr. at 739.

cause of the original detention. So, too, the California ordering out rule has generally operated in a context which inherently involves a certain degree of danger. Thus, facts found by a court sufficient to warrant a detention for criminal investigation are also sufficient to justify an order to alight.[43]

In contrast, *Mimms* permits the order to alight without any threatening circumstances. Some post-*Mimms* California cases have adopted the Supreme Court's position.[44] However, since an ordinary traffic stop does not pose an inherent danger to the officer,[45] the standard of review applied to California traffic stop orders to alight should be closer to *Keifer's* search standard than to the *Mickelson* order to alight rule.[46]

C. People v. Figueroa: *Recognizing the Distinction in the Traffic Stop Order to Alight*

Unlike a *Mickelson*-type criminal detention, a routine traffic

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[43] This point is illustrated by the court's analysis in People v. Nickles, 9 Cal. App. 3d 986, 991, 88 Cal. Rptr. 763, 766 (1st Dist. 1970), where defendant was ordered to alight from his car after being detained as a robbery suspect. The court listed several facts it found to render the detention legitimate, including (1) the vehicle was parked in an area where a burglary had just occurred, (2) its occupants remained in the car, (3) the time was 2 a.m., (4) the vehicle then moved to another location where a pedestrian approached it and entered it, and (5) defendant made a "furtive gesture" toward his pocket when the officer approached. *Id.* at 991-92, 88 Cal. Rptr. at 766-67. The court held these facts to be suspicious enough to justify the stop, citing the safety of the officers and the *Mickelson* "under the circumstances" test to sustain the order to alight. *Id.* at 991, 88 Cal. Rptr. at 766.

[44] *See* notes 61-71 and accompanying text *infra.*

[45] *See* notes 17-19 and accompanying text *supra.*

[46] The traffic stop order to alight is similar to and different from both the criminal investigatory order to alight and the traffic stop pat-down/automobile search. The level of seizure involved in a traffic stop order to alight is comparable to that covered by the *Mickelson* criminal investigation rule. The cause of the detention, a traffic infraction, is equivalent to that of the *Keifer* traffic stop pat-down cases. Yet the order to alight is distinguishable from the pat-down since the magnitude of the ordering out intrusion is significantly less than that of the pat-down. *See* note 35 *supra.* Similarly, the traffic stop order to alight is distinct from the investigatory order since the facts underlying a *Mickelson* detention suggest criminal involvement. A further distinction between *Mickelson* and *Keifer* is that although a traffic stop may result in apprehension of a crime or even violence, the probability of these consequences arising from a traffic stop may be lower than in the context of suspect detention. *See* notes 17-19 *supra.* A helpful study in this area would be an assimilation of statistics on the relative dangers of traffic stops and criminal investigatory stops.

stop is made simply to issue a citation for a violation of the vehicle code. Since risks to officer safety are lower in the traffic stop situation,[47] the corresponding standard for reasonable seizure should require a higher level of justification than that of the criminal investigation detention. Yet the level of judicial scrutiny need not be equal to that of the traffic stop pat-down rule of *Keifer* where a greater privacy interest is at issue.

In *People v. Figueroa*,[48] the court of appeal for the second district implicitly acknowledged that the traffic stop order to alight requires an analysis distinct from that of *Mickelson*. *Figueroa* involved a traffic stop order to alight that resulted in a seizure of narcotics and the arrest of the defendant motorist.[49]

At trial, the defendant objected to the admission of the narcotics, arguing that the officer could not legally order the passengers to alight, because such an order violated the passengers' right to be protected from unreasonable searches and seizures.[50] The court of appeal agreed that the defendant's ownership papers had resolved the question whether the vehicle was stolen, thus eliminating suspicion of felonious activity.[51] It also agreed that an officer's authority to encroach upon a motorist's privacy rights during a simple traffic stop is very limited.[52] Nonetheless, it held that the officer properly exercised his discretion under the circumstances,[53] since he was alone in confronting the three occupants of the car.[54] The court believed that this fact triggered an "unparticularized suspicion" that it would be safer for the officer if the occupants were grouped together while the

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[47] *See* notes 17-19 and accompanying text *supra*.

[48] 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (2d Dist. 1969).

[49] Figueroa and his two passengers were stopped in midday for an outdated license registration. Figueroa left his vehicle and walked to the patrol car. Figueroa's ownership of the car was confirmed, but the officer decided to write up a citation for the vehicle code infraction. The officer asked the two passengers to alight from the car and, after doing so, saw a cellophane bag containing marijuana in plain view on the seat of the car. All three occupants were arrested. *Id.* at 723, 74 Cal. Rptr. at 75.

[50] *Id.* at 726, 74 Cal. Rptr. at 77.

[51] *Id.* at 725, 74 Cal. Rptr. at 77.

[52] *Id.* at 726, 74 Cal. Rptr. at 77.

[53] *Id.*

[54] "Since the officer, being alone, felt it a disadvantage to have two persons in the car and one outside, he asked Pryor and the other passenger to step out of the car." *Id.* at 723, 74 Cal. Rptr. at 75.

paperwork was completed.[55] Further, the court cited the United States Supreme Court's opinion in *Terry v. Ohio*[56] as permitting other action on the basis of such a hunch.[57]

The *Figueroa* analysis correctly recognizes the narrow confines of police discretion during the traffic stop. It properly acknowledges the need for the presence of suspicious circumstances independent of the traffic violation to justify the police action. However, its holding retreats from these guidelines. It permits the officer's order to alight on the basis of an "unparticularized suspicion."[58] By the court's analysis, an officer need only profess feeling insecure under the circumstances to justify an order to alight.[59] The court's acceptance of such a subjective standard renders the purportedly narrow confines of police discretion very broad indeed.

III. Post-*Mimms* California Orders To Alight

A sound test for the traffic stop order to alight is still lacking in California law. *Figueroa* did not go far enough in its analysis of the expediencies of a traffic stop order to alight. Officers in California should be required to articulate more than a mere hunch to justify actions taken beyond those needed to issue a

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[55] *Id.* at 726, 74 Cal. Rptr. at 77.

[56] 392 U.S. 1 (1968).

[57] People v. Figueroa, 268 Cal. App. 2d 721, 726, 75 Cal. Rptr. 74, 77 (2d Dist. 1969). *See* note 2 and accompanying text *supra*, and note 51 *infra*.

[58] Neither Terry v. Ohio, 392 U.S. 1 (1968), nor California case law supports the notion that such investigatory detentions may be ordered on the basis of an officer's hunch. *See* note 23 and accompanying text *supra*. In *Terry*, the court said that "due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts." 392 U.S. at 27. *Accord*, In re Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978).

[59] The presence of three motorists could be used to justify an order to alight every time the number of occupants of the detained vehicle outnumber the number of detaining officers. *See, e.g.*, People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (2d Dist. 1969). Without further circumstances rendering the presence of three occupants dangerous, their mere presence should not constitute sufficient suspicious circumstances to justify an officer's order to alight. Additional circumstances could include a poorly lit street or the occupants' lack of cooperation in the traffic stop. The inadequacy of the unparticularized suspicion standard is in fact illustrated by the holding in *Figueroa*. The opinion sustains an order to alight in broad daylight, in the absence of the slightest indication of motorist criminal involvement, and where all occupants of the car acted in cooperation with the officer.

traffic citation.[60] But while the post-*Mimms* California cases involving orders to alight have not yet wholly embraced the *Mimms* rule, they also have not extended the objective facts and circumstances standard to the traffic stop order to alight situation. California should definitively articulate and retain such a higher standard for traffic stop orders to alight.

*A. The Post-*Mimms *Cases*

The first California case since *Mimms* in which a defendant challenged an order to alight is *People v. Loyd.*[61] The officer made the stop because defendant's car had no license plates.

The court of appeal in *Loyd* upheld the officer's order to alight, but found the action permissible only because the unusual width of the car made it unsafe for the officer to stand at the driver's window.[62] The court in fact stated that the absence of license plates was insufficient to justify the order: indeed that " . . . it was impermissible under California law to order defendant from the car simply because of the missing plates."[63] Thus, the California court was unwilling to accept the *Mimms* decision's complete deference to officer discretion. It recognized, however, that objective circumstances such as traffic hazards raise legitimate safety concerns.[64]

In *People v. Satchell,*[65] the appellate court commented on *Mimms,* but avoided the order to alight issue by upholding the subsequent pat-down of the defendant. In dicta the court noted that " . . . we simply do not know whether *Mimms* will be held to accord with" California search and seizure standards.[66]

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[60] *See* notes 22 & 58 and accompanying text *supra.*

[61] 78 Cal. App. 3d Supp. 1, 144 Cal. Rptr. 606 (1978).

[62] The court explained that the vehicle was a Volkswagen bug, converted in the rear into a camper. It was dangerous for the officer to be standing so far into the street. *Id.* at 3, 144 Cal. Rptr. at 607.

[63] Note, however, that since the alleged danger in *Loyd* did not come from the motorist himself, the facts are not those typically involved in the traffic stop order to alight. *Id.*

[64] *Id.*

[65] 81 Cal. App. 3d 347, 146 Cal. Rptr. 307 (2d Dist. 1978).

[66] *Id.* at 353, 146 Cal. Rptr. at 310. The court also noted that the facts were substantially different from those in *Mimms.* The defendant was a passenger, rather than the driver, and the order to alight was admittedly issued with the further intent of conducting a pat-down. *Id.*

In 1980, *People v. Superior Court (Galbreath)*[67] finally cited *Mimms* in support of the arresting officer's conduct.[68] However, the reference is minimized because of factual and procedural problems that make the case weak precedent. First, the court's reliance on *Mimms* was misplaced because the driver left his car voluntarily, with the challenged order occurring at a later stage of the confrontation.[69]

In addition, the defendant made no appearance at the appeal, in which the favorable lower court ruling was reversed.[70] Since no argument was offered for defendant in a proceeding directly affecting his rights, the decision raises constitutional due process questions.[71]

B. The Traffic Stop Order to Alight Test

The groundwork for a California traffic stop order to alight rule exists. But the application of diverse standards and the lack of uniformity in the outcome of both pre- and post-*Mimms* cases

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[67] 104 Cal. App. 3d 988, 164 Cal. Rptr. 116 (2d Dist. 1980).

[68] *Id.* at 990-91, 164 Cal. Rptr. at 117.

[69] Galbreath was pulled over when officers observed his car weaving down the street. One of the officers, Tamayo, was an acquaintance of the motorist. When Galbreath recognized Tamayo, he voluntarily left his car and began a casual conversation with the officer. The other officer then asked that all parties move to the curb to be safe from oncoming traffic. As they moved toward the curb, the second officer saw Galbreath toss a vial to the ground. It contained narcotics. *Id.* at 989-90, 164 Cal. Rptr. at 117.

The trial court suppressed evidence of the narcotics on the ground that the officer had exceeded his authority when he asked Galbreath to move to the curb. *Id.* at 990, 164 Cal. Rptr. at 117. On appeal, the appellate court dissolved the suppression order, holding that the California rule "confirmed by *Mimms*," allows a police officer to order a traffic violator from his car under any circumstances. *Id.* The court cited only one case, People v. Nickles, 9 Cal. App. 3d 986, 88 Cal. Rptr. 763 (1st Dist. 1970), for the asserted California rule. *Nickles*, however, involved not a traffic violator, but a suspect detained for investigation of a burglary. *See* note 43 *supra*. The *Galbreath* court concluded that the law could not reasonably expect driver and officer to stand in the road once the officer had exercised his right to order the driver out. People v. Superior Court (Galbreath), 104 Cal. App. 3d 988, 991, 164 Cal. Rptr. 116, 117 (2d Dist. 1980).

[70] People v. Superior Court (Galbreath), 104 Cal. App. 3d 988, 989, 164 Cal. Rptr. 116, 116 (2d Dist. 1980).

[71] Defendant has a right to counsel and hearing at any stage of the prosecution where counsel's absence might adversely affect defendant's right to a fair trial. *See, e.g.*, United States v. Wade, 388 U.S. 218, 223 (1967) (line-up); Escobedo v. Illinois, 378 U.S. 478, 485 (1963) (station house interrogation).

suggest a need for clarification of the standard to be used in traffic stop orders to alight. Equating the traffic stop order to alight with the criminal investigatory order to alight would result in an unsatisfactory standard.[72] So too, precluding review of police conduct at the ordering out stage of an auto stop would seriously undermine the California standard for reasonable search and seizure.[73]

Clarification of California's guidelines for officer conduct in traffic stops is essential to redressing unwarranted intrusions on motorists' rights of privacy.[74] California courts should approach this problem by employing two separate tests. First, if the cause for detention inherently carries a substantial degree of risk, such as identifying a suspect or terminating a high-speed chase, the traditional *Mickelson* doctrine should apply.[75] In such situations, the facts precipitating the detention are sufficient cause to order a motorist to alight. The second cause for detention is issuing an ordinary traffic citation, such as for a faulty brake light or an illegally parked car. In these circumstances, the officer should be required to cite objective facts which reasonably suggested that the order to alight was necessary for his self-protection.[76]

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[72] *See* notes 41-46 and accompanying text *supra*.

[73] *See* notes 16-26 and accompanying text *supra*.

[74] Before *Mimms*, the lack of definite limitations on officer conduct in the ordering out situation posed no threat to California's search and seizure standards. The general right of the court to oversee and evaluate the officer's actions was recognized in California. Although no convictions were reversed on the basis of abusive police discretion in ordering a driver from his car and in fact the standard for traffic stop orders to alight was low, the courts took the time to cite circumstances and facts which justified the order. *See, e.g.*, People v. Adam, 1 Cal. App. 3d 486, 487-88, 81 Cal. Rptr. 738, 738 (2d Dist. 1969) (defendant's pupils dilated and speech slurred); People v. Lockwood, 253 Cal. App. 2d 75, 77-78, 61 Cal. Rptr. 131, 133 (3d Dist. 1967) (victim found in defendant's residence, speech slurred). By preserving the process of review, the courts implicitly reserved the opportunity to reverse a conviction on the grounds of unreasonable search and seizure in the face of an inappropriate order to alight. In order to avoid the transformation of this passive judicial attitude into an adoption of *Mimms*, a stronger assertion of the independent California rule is necessary.

[75] *See* notes 36-43 and accompanying text *supra*.

[76] The traffic stop order to alight, like the traffic stop search, should require justification by facts and circumstances surrounding the stop. These facts must give rise to the officer's reasonable suspicion that the occupants of the car may pose a threat to his safety. The officer should be able to explain his decision to

Ordinarily, a traffic infraction alone will not offer necessary justification, since it is not a criminal violation.[77] It may, however, provide sufficient suspicious circumstances if, for example, the stop brings a high speed chase to a halt.[78] But where the stop follows an ordinary infraction, facts independent of the violation must support the officer's order to alight.[79] The essential point is that a court must examine and weigh all the facts in assessing a traffic stop order to alight. In doing so, it must determine whether the officer's action was a reasonable measure taken for self-protection, in light of the resultant invasion to a motorist's privacy. The facts considered on the officer's behalf must objectively point to the reasonableness of his belief that such precautions were appropriate.

The test for traffic stop orders to alight should be structured to require a showing of specific facts. As with all seizures, an officer may not issue an order to alight on the basis of his general inclination to further investigate the detainee.[80] To avoid circumvention of the stricter standards of the *Keifer* traffic stop/pat-down search, a court must seriously scrutinize articulated facts to determine if the order to alight was indeed justified.[81] A

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take precautions in terms of objective facts. *See* notes 30-35 and accompanying text *supra*.

[77] *See, e.g.*, People v. Superior Court (Simon), 7 Cal. 3d 186, 193-195, 496 P.2d 1205, 1210-12, 101 Cal. Rptr. 837, 842-44 (1972).

[78] *E.g.*, People v. Knight, 20 Cal. App. 3d 45, 47, 97 Cal. Rptr. 413, 414 (2d Dist. 1971) (court upheld officer's action in opening defendant's car door after high speed chase).

[79] For example, escalated activity within the car after the officer's red light comes on, evasive action in pulling over, or the presence of several occupants in the detained car at an early morning hour may support the officer's order.

[80] *See* notes 23 & 51 and accompanying text *supra*.

[81] Thus, a legitimate detention of a motorist might occur as follows: Two officers on patrol in the early morning hours stop a motorist for an illegal left turn. The car has four occupants. It continues for two blocks before responding to the patrol car's red light and pulling over. As the officers approach, they observe one occupant reach under the seat and hide an unidentified object in a rip in the seat. One of the officers asks for the vehicle registration and is told that there is none. At this point, the first officer decides to ask all occupants to alight, feeling that he and his partner will be safer if they are grouped together while paperwork is being completed. Once they leave the car, narcotics are plainly visible on the seat.

Defendants claim that the evidence should be suppressed because they were illegally ordered from the car. In justification of his order to alight, the officer can cite (1) the lateness of the hour, (2) the presence of four occupants, (3) the

traffic stop order to alight test so fashioned will maintain California's high standard for limited officer interference in motorists' activities.

CONCLUSION

Police authority to order automobile occupants to alight after a traffic stop is still restricted in California. Officers should not be granted complete discretion in this area. To meet the challenge presented by *Mimms*, California must clarify its guidelines for officer conduct in the traffic stop situation. The courts should require the officer to articulate objective facts justifying suspicion of the motorist. The courts may thus preserve their traditionally high standard of reasonableness for search and seizure incidents.

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failure to stop promptly, (4) the motion to hide something, and (5) the failure to present car registration. These facts put together justify an order to alight, though under *Keifer* they may not support a pat-down. *See, e.g.*, People v. Cassel, 23 Cal. App. 3d 715, 100 Cal. Rptr. 520 (2d Dist. 1972) (officer stopped defendant at 4 a.m. for broken tail-light, asked defendant to get out of car to point out to defendant the defective light. Officer found fact that defendant rushed back into car and move as if to hide something sufficiently suspicious to order defendant from car and conduct search. Court of appeal reversed on ground that pat-down search was unreasonable); Gallik v. Superior Court, 5 Cal. 3d 855, 489 P.2d 573, 97 Cal. Rptr. 693 (1971) (officer's pat-down of defendant after observing motion to hide something was unreasonable). Of course, once the narcotics are discovered, the detainees may be frisked as an incident to the arrest. Chimel v. California, 395 U.S. 752, 762-63 (1969), *rehearing denied*, 396 U.S. 869 (1969).

The second district court of appeal's analysis in People v. Figueroa, 268 Cal. App. 2d 721, 726, 74 Cal. Rptr. 74, 77 (2d Dist. 1969), indicated that the court perceived the logic of such a continuum, *i.e.*, that increasingly significant suspicions justify increasingly intrusive searches and seizures. The court held that while a pat-down was not justified, the facts were sufficient to warrant an order to alight. *Id.* at 726-27, 74 Cal. Rptr. at 77. Although the court recognized an essential principle, it failed to establish a sufficiently strict standard of reasonable facts or circumstances for review of the order to alight following a traffic infraction detention. The officer's action must be justified by the presence of objective facts which distinguish the situation from an ordinary traffic stop and give rise to a reasonable fear for the officer's own safety. *See* notes 48-59 and accompanying text *supra*.