

IPA POLICY RECOMMENDATIONS

1

Track When an Officer Points a Firearm at a Persons As a Use of Force.

2

The Department Should Use Best Efforts to Track Data on Suspects Perceived Armed and Weapons Found.

3

The Duty Manual Should Provide Guidance That a Search of a Person Incident To Arrest Applies Only and Solely to Full Custodial Arrests.

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The Department Should Provide Guidance About Officer Discretion When Compelling Citizens to Exit Cars to Sign Citations.

5

The Department Should Obtain Devices to Verify Window Tint Prior to Issuing a Citation.

RECOMMENDATIONS

When the electorate of the City of San José amended the City Charter in 1996 to create the Independent Police Auditor's (IPA) Office, the vote mandated that the IPA recommend ways to improve how San José police officers perform their duties. The IPA has a unique perspective from which to make informed proposals to the Police Department based on our independent review of complaint investigations, information we learn from the public through community outreach and research on best practices from other jurisdictions.

#1 TRACK WHEN AN OFFICER POINTS A FIREARM AT A PERSON AS A USE OF FORCE

The IPA renews its 2018 recommendation that the SJPD track and document when an officer points a firearm at a person as reportable force. **We recommend:**

- *that the pointing of a firearm at a person be included in Duty Manual L 2644 reportable use of force defined.*
- *that such use would require the completion of the Department's Automated Use of Force Template*
- *that such use would cover any situation except that in which an officer's gun is pointed at a 45-degree angle or less and not at a person.*
- *that such use be reflected on the Department's Force Analysis Dashboard.*

The narrative from our 2018 Year End Report has been updated.

1. Over the intervening years, more law enforcement agencies included pointing a firearm as a Use of Force.



In 2021, the California Commission on Peace Officer Standards and Training (POST) issued its most recent Use of Force Standards and Guidelines.¹⁶ POST states that pointing a weapon is a use of firearms. POST outlines six separate elements under its *Use of Firearms Standard #6: An agency shall provide clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.* SJPD may benefit from reviewing these elements outlined by POST.

In June 2020, the **Philadelphia Police Advisory Commission** published its study of other U.S. police department that track pointed firearms events. Twelve law enforcement agencies were selected. Nine agencies deemed pointing a firearm as force. Agencies differed on how they use this information. Most use the information to review compliance with firearm/force policy. At least seven agencies release the data in their annual use of force report. A few used the data in their Early Intervention Systems.



Based on the June 2020 study,¹⁷ the Philadelphia Police Advisory Commission made eleven separate recommendations including:

- ▶ the Department's use of force policy be amended to include the pointing of a firearm as a use of force
- ▶ the pointing of a firearm should be categorized as *deadly force*
- ▶ when reporting pointed firearm incident, officers should first relay event over the police radio so that a supervisor may respond to the scene; these radio transmissions must be preserved
- ▶ ensure that reporting procedures are categories to make later evaluation on data and incidents accessible
- ▶ seek community feedback while amending these policies



After 18 months of collaboration and study, the **San Francisco Police Commission** adopted revisions to the Department's Use of Force policy in 2021.¹⁸ One key change was broadening categories of Reportable Force to include the intentional pointing of a firearm at the *low ready*.

The Commission approved additional revisions, including pointing firearms, in March 2022.

5.01.07 Section G.1, Handling, Drawing and Pointing Firearms

(d) *Pointing a firearm at a person* — the pointing of a firearm at a person is a seizure and requires legal justification. No officer shall point a firearm at or in the direction of a person or have the firearm at the low ready position unless they are objectively reasonable facts to believe the situation may escalate to justify deadly or lethal force. . . Officers shall document in their incident reports their justification for drawing exhibiting pointing their firearm or having their firearm at a low ready position.

(e) *Reporting* - when an officer intentionally points any firearm at a person (including low ready) it shall be considered a reportable use of force such use of force must be reasonable under the objective facts and circumstances and such justification and circumstances shall be documented in their incident report.

2. Research shows reporting such incidents reduces officers' use of firearms

Many departments restrict the display of firearms unless an officer has a reasonable belief that there is a substantial risk that deadly force may be justified. Common use-of-force policy language on this topic states that *unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of the citizens, and may result in an unwarranted or accidental discharge of the firearm.*¹⁹

A recent study²⁰ found that there is one policy associated with systematically reducing the rate of officer-involved shooting fatalities – a policy that requires officers to file a report when he/she points a gun at someone but does not fire. According to the study, Departments who have this policy in place have lower rates of officer-involved gun deaths. The study reviewed a large data set of officer-involved shooting incidents, department-level policy data, and community-level demographics to determine whether specific policies can be associated with higher or lower rates of officer-involved shooting deaths.

This study also noted a legitimate concern by law enforcement agencies: whether implementing this policy will endanger the lives of the officers because he/she will hesitate when drawing their firearms in situations that could be life-threatening. The research has shown that implementing this policy has **no effect** on the rate of gun deaths of police officers. The study did not examine whether the policy had an effect on the rate of serious injuries sustained by either the citizen or the officer.

3. State regulations mandate the documentation of pointing a firearm

The Department is already capturing this data to comply with state regulations. As of November 2017, the California Code of Regulations requires that any city or county law enforcement agency that employs peace officers must document all actions taken by them during a detention. The officer must document a variety of data values, including when a firearm is pointed at a person.²¹

4. Other agencies recognize pointing a firearm as a reportable use of force

We recommend that SJPD track and document pointing a firearm as a *reportable use of force*.²² Various law enforcement agencies in different parts of the country specifically include pointing a firearm, without discharging it, within the definition of *reportable* use of force. Officers are required to document all instances when a firearm is drawn and pointed at a citizen. A sample of agencies classifying a display of firearm as reportable force include:

- San Francisco Police Department
- Oakland Police Department
- San Diego Police Department
- Los Angeles Police Department
- Baltimore Police Department
- Cleveland Police Department
- Dallas Police Department
- Metropolitan Police Department in Washington, D.C.
- Portland Police Department
- Detroit Police Department
- Houston Police Department
- New Orleans Police Department
- Phoenix Police Department
- Seattle Police Department
- Denver Police Department

5. Other considerations:

- Case law recognizes that, depending on circumstances, an officer's pointing a firearm at a person is excessive force. *Thompson v. Rahr*, 885 F.3d 582 (9th Cir. 2018), *Robinson v. Solano City*, 278 F.3d 1007 (9th Cir. 2002)
- Prior to September 2022, an allegation that an SJPD officer improperly pointed his firearm was classified as a force allegation within the Department's complaint process.
- The community, particularly those who have experienced such conduct, generally consider pointing a firearm as a Use of Force. Community members have indicated that experiencing this kind of force can be traumatic and intense; the memory of the encounter can resonate for years. It is frightening and suggests the possible imminent use of deadly force.
- Documenting the conduct as a Use of Force would allow for the display of such conduct aside the other uses of force information already displayed on the SJPD Use of Force Analysis dashboard. Incorporating such data into the dashboard would allow one to more easily compare and contrast firearm

display with the other uses of force already captured (e.g., takedown, strike, impact weapon, canine, etc.).

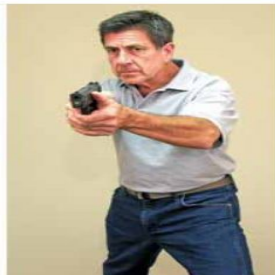
- Documenting the conduct as a Use of Force requires review of the conduct by the officer's immediate supervisor who can evaluate the circumstances, including review of body worn camera footage, and determine whether future action is necessary.

What is low ready and why is it important?

This term has been interpreted in a variety of ways. The highest threshold, and the one closest to deployment, is called *on target*.²³



Tactical positions lower than *on target* generally incorporate the word ready. Here are two versions of low ready. Note the angle of the gun varies dramatically.



The distinctions are important. A less than precise description of what positions are covered can result in under-reporting. For example, a 2018 study found that Oakland Police were under-reporting use of force incidents.²⁴ Upon further examination, it was revealed that there were two distinct definitions of the low ready positions.

We recommend that whatever tactical positions are covered, low ready be defined as any situation in which an officer's gun is **pointed at a 45-degree angle or less and not at a person.**

#2 THE DEPARTMENT SHOULD USE BEST EFFORTS TO TRACK DATA ON SUSPECTS PERCEIVED ARMED AND WEAPONS FOUND

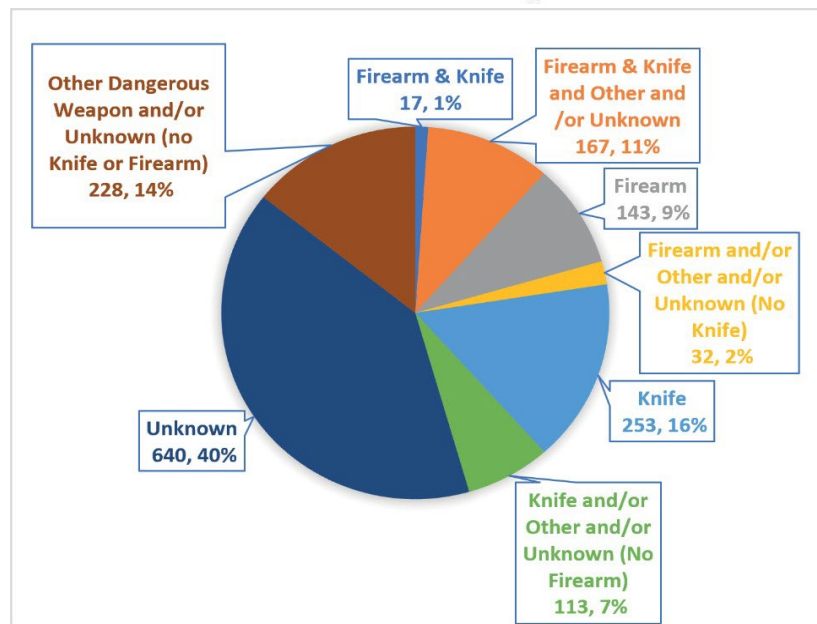
We recommend that:

- the Department direct its officers to, as accurately as possible, fill out these items in the force response report form and to use best efforts to confirm whether the suspect was armed:
 - Was suspect perceived armed? [YES] [NO]
 - If YES, indicate the weapon type (check all that apply)
 - Was the suspect confirmed armed? [YES] [NO]
 - If YES, confirm weapon type (check all that apply)
- the supervisor who reviews the officer's force response forms, ensures that the 4 questions listed above are completed before the supervisor signs off.

In our 2021 Year End Report, we focused on the particular aspect of the independent outside consultant (CNA) hired by the City to assess the Department's Use of Force. Of note was the CNA narrative addressing the officers' perception that a suspect was armed with a weapon. The threat of an armed suspect is certainly greater than that presented by an unarmed suspect. Additionally, the threat of a weapon provides substantial weight in justifying the use of force. How were those perceptions documented? The CNA report examined data from 2/17/17 to 2/27/27 reflecting 2,352 uses of force over roughly four years. This examination included data on those Use of Force events where the officer perceived a community member was armed (1,593 events relative to 2,352 total use of force events or 65%). Officers can conduct a frisk, or pat-down search, of a detainee to look for weapons if they have a justifiable belief that the person is armed and dangerous. An officer has the option to identify a **single perceived weapon** (e.g., a *knife* or a *firearm*) or **combinations** (e.g., *knife* and *firearm* or *knife* and *other*).

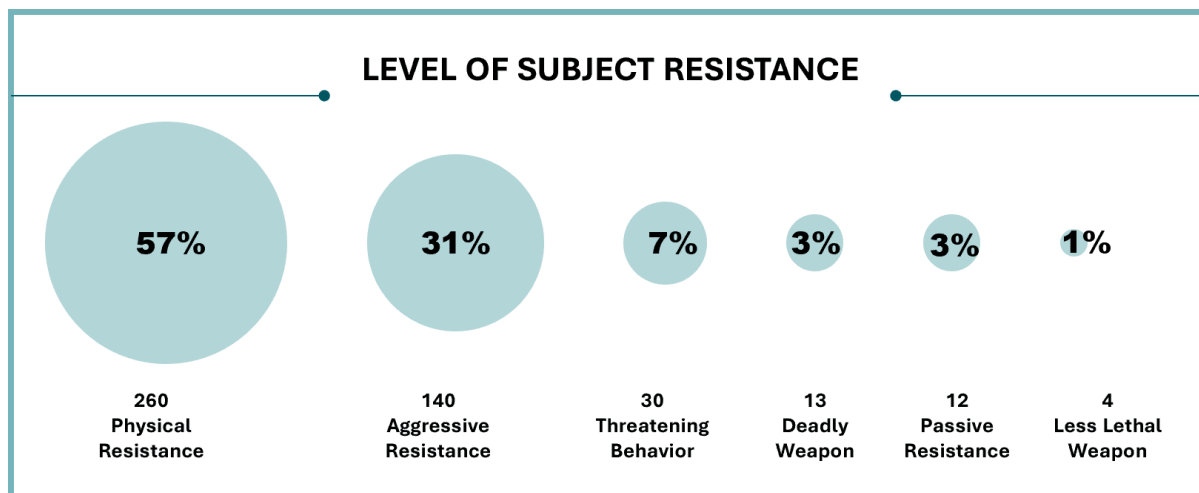
- By far the most frequent weapon type option reported by officers was *unknown*. In 640 (40%) of the 1,593 events, the officers reported the weapon was *unknown*.
- Officers in 253 events (16 percent) reported a knife, blade, or stabbing instrument as the only weapon.
- Officers in 182 events (11 percent) reported that another *dangerous weapon* was the only weapon.
- In over half of the events (868 out of 1,593 or 54%), the officers reported the perceived weapon either as *unknown* (640 or 40%), *other dangerous weapon* (182 or 11%), or *other and unknown* (46 or 3%).

Perceived Weapons



Number of Use of Force Reports with Listed Weapon
Compiled by CNA

This data warrants closer examination regarding the accuracy of the officers' perceptions of persons being armed and/or the diligence of officers in completing the forms with sufficient detail. It is also important to ensure that the entry entitled ***weapons found*** be accurately completed. CNA did not provide data reflecting weapons found. The SJPD Force dashboard provides this information for calendar year 2021. Suspects armed with weapons, deadly or otherwise, were found in only 4% of use of force incidents. The CNA data reflecting officers' perceptions of suspects armed with weapons differs markedly from the SJPD dashboard data reflecting actual weapons found by the officers.



We believe that the accuracy of the officers' perceptions of persons being armed and whether those perceptions are confirmed is important, especially for training purposes. Additionally, the accuracy is important to members of the community who may be subject to searches/force because the officer perceives a weapon. This data may also provide some insights on the prevalence of the types of weapons in the community.

#3 THE DUTY MANUAL SHOULD PROVIDE GUIDANCE THAT A SEARCH OF A PERSON INCIDENT TO ARREST APPLIES ONLY AND SOLELY TO FULL CUSTODIAL ARRESTS

- We recommend that Duty Manual section L 4901 should expressly limit search incident to arrest to those situations in which a full custodial arrest is made. The current language does not make this requirement clear.
- Alternatively, if the Department deems that an officer can search for a bookable offense when there is no custodial arrest, we recommend that this be memorialized in the Duty Manual so there is no ambiguity about officers' engaging in such conduct.

The Fourth Amendment of the U.S. Constitution controls when police can search persons. The police are allowed to conduct a *frisk* or *pat search* of detained persons. To conduct a *pat search*, the officer must have articulable facts that reasonably support a belief that the suspect is armed and dangerous. *Terry v Ohio* (1968) 392 U.S. 1, 21. The *pat search* is limited to an exploration of the outer clothing to determine whether the suspect is carrying weapons, such as guns, knives or other hidden instruments. *People v Collins* (1970) 1 Cal.3d 658, 662. *Pat searches* are generally viewed as minimally intrusive searches which ensure officer safety.

To reduce the dangers posed by a suspect whose freedom of movement will be clipped by an arrest, and to make it harder for arrestee to destroy evidence, the courts allow officers to make a search known as *search incident to arrest*. *United States v. Robinson* (1973) 414 U.S. 218, 235. *Knowles v Iowa* (1998) 525 U.S. 113, 116. A search *incident to arrest* is entirely distinct from a *pat search*. A search *incident to arrest* is more intrusive; officers can search the entire person, including outer/inner clothing, and remove items from pockets. It extends to any container or article in the suspect's possession.

These requirements must be met:²⁵

#1 Lawful arrest:
the suspect must have
been lawfully arrested.

#2 Custodial arrest:
the arrest must have
been custodial in
nature

#3 Contemporaneous
search:
the search must have
been contemporaneous
with the arrest

If these three requirements co-exist, the officer may conduct a search of the person. A lawful search incident to arrest is usually limited to the person and immediate surroundings of a suspect who is being lawfully arrested.

#2 Custodial arrest:
the arrest must have
been custodial in
nature

Our concern focuses on the second element – custodial arrest. A custodial arrest means that the officers must have decided to transport the arrestee to jail, a police station or other place of confinement or treatment, i.e., he will not be cited and released at the scene. This requirement was imposed because the main justification for these searches is the increased danger that necessarily results from the extended exposure

which follows the taking of a suspect into custody and the attendant proximity, stress and uncertainty.²⁶

The key California case is Macabeo in which the California Supreme Court concluded plainly: There is no exception for a search incident to citation.²⁷ The court analyzed precedent and concluded the authority to search *derives from* taking a defendant into custody. Courts have since reaffirmed Macabo's central holding.

The elemental requirement of a custodial arrest is outlined by the Alameda County District Attorney in their 2021 publication *Point of View*. The full article is provided in the appendix.

Because an arrest becomes *custodial* when the officers decide **to transport the arrestee**, the search will also be permitted if officers had decided to take the arrestee to a detox facility, mental health facility, or hospital. An arrest of a minor is *custodial* if the arrestee will be taken to school, home, a curfew center; or will be taken into protective custody. Even if an arrestee is transported despite no statutory authorization, the arrest is nevertheless *custodial* because

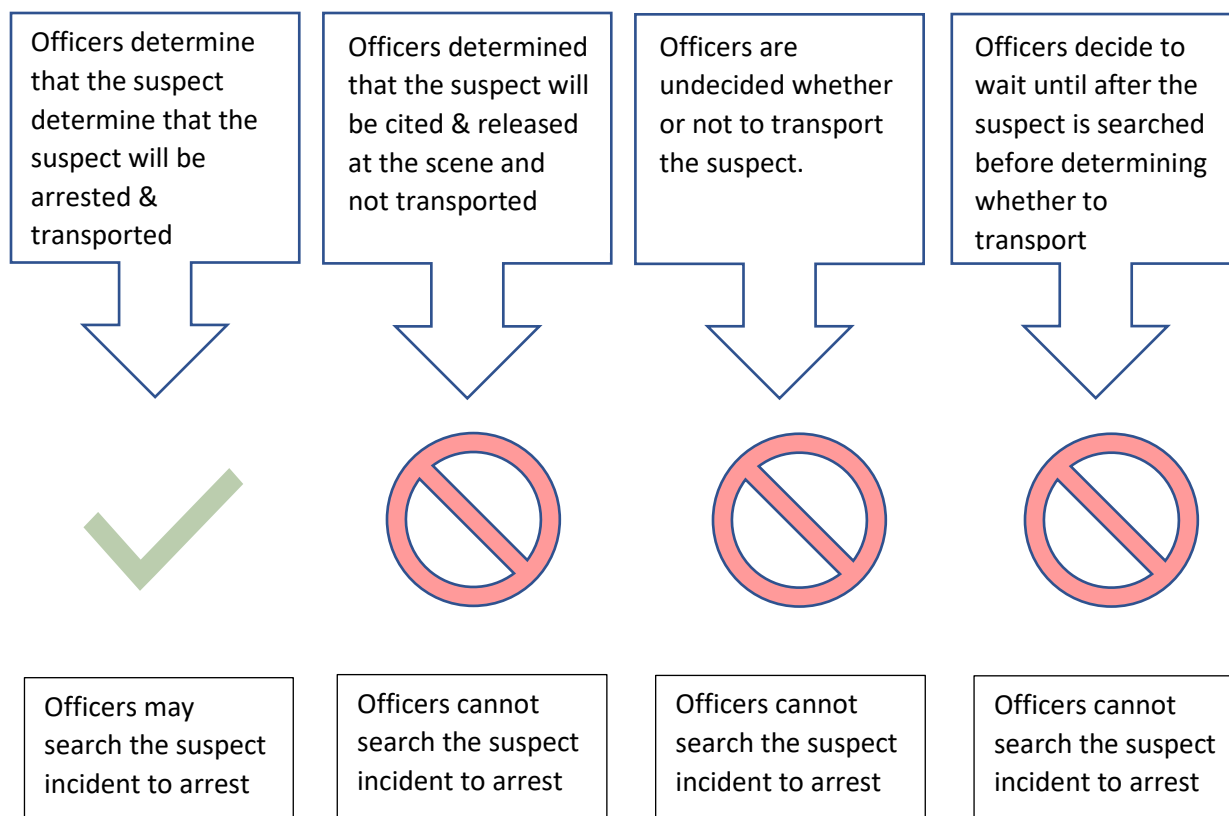
it is the decision to transport the arrestee - not the statutory authority - to do so **that justifies the search**.

On the other hand, an arrest will not be deemed *custodial*
(1) if the officers had decided not to transport the suspect or
(2) if the officers had not yet decided to what to do.



Thus, an officer cannot support his decision as to whether to transport the suspect based on the results of his search. If the officers are undecided as to whether to transport, that determination does not allow the officers to search incident to arrest.

The sequence is simple yet critical.



We recommend that language be added to the Duty Manual Section L 4900 to make clear these requirements. In particular, **L 4901 should expressly limit search incident to arrest to those situations in which a full custodial arrest is made.** The current language does not make this requirement clear.

L 4901 When an arrest occurs, the officers making the arrest may perform a limited search with the areas under control of the arrestee. This means an area within which the arrestee could obtain a weapon or gain possession of evidence. Lacking the presence of emergency circumstances, further warrantless search will not be conducted.

This recommendation does not apply to searches of vehicles after the driver and/or passenger has been arrested. The guidelines of searching a car do not precisely overlap with those a searching an arrestee.²⁸

#4 THE DEPARTMENT SHOULD PROVIDE GUIDANCE ABOUT OFFICER DISCRETION WHEN COMPELLING CITIZENS TO EXIT CARS TO SIGN CITATIONS

We recommend that the Department should provide guidance to its officers on how to exercise discretion when compelling citizen to exist car to sign citations.

- That guidance should include the principle that officer discretion should be exercised judiciously and uniformly throughout the city.

- In addition, the practice of directing drivers to exit cars in order to sign traffic citations should be equal throughout the city.

If a car has been lawfully detained for a traffic violation, the police officers can order drivers to get out of the car without violating the Fourth Amendment proscription of unreasonable search and seizure. According to the Supreme Court, during a traffic stop the concerns about the safety of the police officer are legitimate and substantial; the intrusion placed upon the driver exiting the car is a *mere inconvenience*. *Pennsylvania v. Mimms* (1977) 434 U.S. 106.

Officers can and often do ask occupants out of cars at beginning of stop. At this stage, the officer's subjective opinion concerning his safety is legitimate and substantial.

Less frequently, officers can and do ask occupants out of car *during* the car stop. At this stage, the officer may have developed concern about his safety based on the interaction with the occupants and/or plain view search.

Even less frequently, officer can and do ask occupants out of car at the *end* of the stop and direct them to the patrol car to sign the citation. Why is this concerning? Because the longer the driver sits in the car, the officer's concerns about his safety are more attenuated. Common sense dictates that, had the officer felt unsafe, he would have removed the occupants from the car at the start of the encounter or soon thereafter. Likewise, the intrusion placed on the driver is now more than a mere inconvenience. The location at which a citation is signed should be the place most expedient to terminating the encounter. Ordering a driver out of the car and to the patrol car unleashes a cascade of potential consequences:

- It unduly prolongs the detention
- May result in the officer's prerogative to conduct a pat search of the driver for weapons
- The officer's placing hands on the driver may result in the driver's tensing and/or pulling away
- The driver's tensing and/or pulling away may result in the officer using more force and/or handcuffing the driver and/or criminal charges for resisting arrest.

We are not disputing the discretion of the officer to ask the driver to exit the car to sign a citation. However, some in the community might view this conduct as harassment or a pretext to engage in a pat search or to gain a wider plain view search of the car's interior.²⁹ We are asserting that the Department and its officers should be aware of the public's perception of this conduct when instructing its officers how to exercise discretion in such situations. An officer's discretion should be exercised judiciously and uniformly throughout the city. In addition, the practice of directing drivers to exit cars in order to sign traffic citations should be equal throughout the city.

As one subject officer explained, *I ask **everyone** outside to my vehicle to sign citations, I like to get people out of their comfort zones due to officer safety concerns and case law.*

Duty Manual C 1305 EQUALITY OF ENFORCEMENT

People throughout the city have a need for protection, administered by fair and impartial law enforcement. As a person moves about the city, that person must be able to expect a similar police response to his/her behavior — wherever it occurs. When laws are not evenly enforced, a reduction in respect and resistance to law enforcement follows. The element of even handedness is implicit in uniform enforcement of law. The amount of force or the method employed to secure compliance with the law is governed by the particular situation. Similar circumstances require similar treatment — in all areas of the city as well as for all groups or individuals. In this regard department members will strive to provide equal service to all persons in the community.

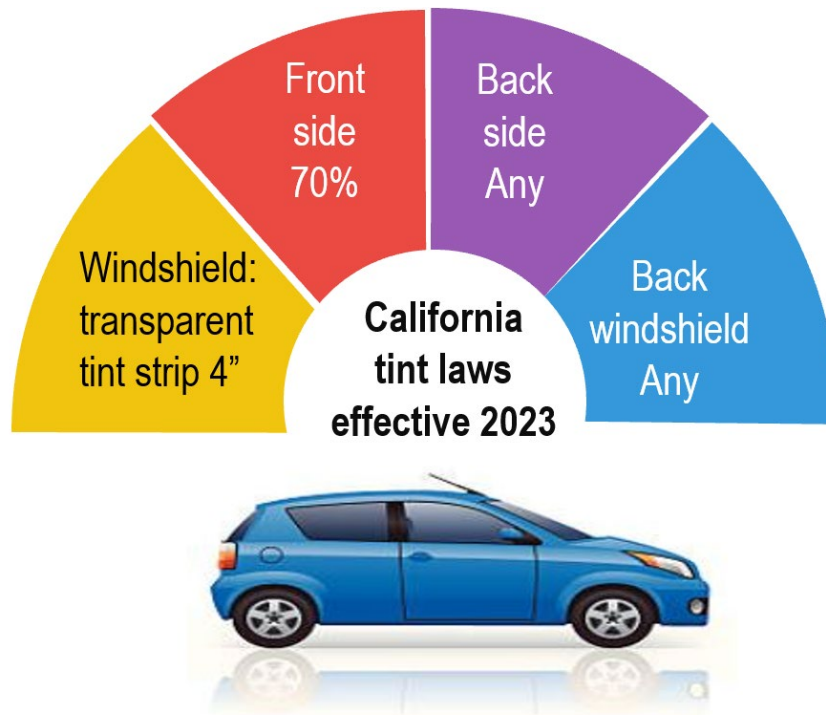
#5 THE DEPARTMENT SHOULD OBTAIN DEVICES TO VERIFY WINDOW TINT PRIOR TO ISSUING A CITATION

- We recommend that the Department obtain window tint measuring devices.
- We recommend that Department require the use of such a device as objective measure to determine whether a citation should be issued.
- We recommend that the Department track (a) stops based on window tint (b) the device results (c) whether a ticket or a warning was issued.

We hear both in complaints and anecdotally that officers often detain and then cite cars based on the tint of the windows or windshield.

In the state of California, there are very specific laws governing the percentage of window tint darkness and reflection an automobile is allowed to have.³⁰ The amount of light which passes through the window of an automobile is measured in Visible Light Transmission (VLT)³¹ percentage. This refers to the amount of light that can pass through the glass as well as the tint film. The 2023 California window tint laws requirements are for the front

windshield and front side windows to have a 70% VLT. California car window tint law has no restriction on how dark the tint on the rear and back side windows can be. However, if the rear window of a vehicle is tinted, it has to have dual side mirrors.



How do officers discern when the tint exceeds state law? SJPd does not require the use of a Window Tint Card or window tint measuring device before issuing a citation for window tint. Furthermore, the Department does not have any of these devices for an officer to use, including those officers in the Traffic Enforcement Unit (TEU).

We are not questioning an officer's discretion to use his/her visual assessment of tint when stopping a car for tint. If the officer has reasonable suspicion to believe the tint is unlawful, he/she may stop the car.

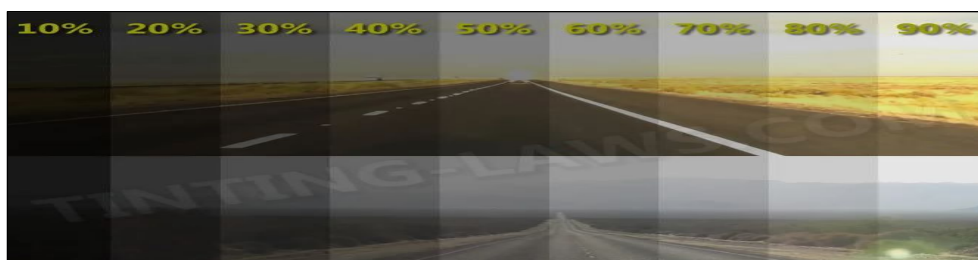
Officer may use **reasonable suspicion** to stop and temporarily detain the car to determine if the tint is unlawful.

However, requiring the use of such a device would provide an objective measure to determine whether a citation should be issued. Using such a device would allow greater confidence in the public that an officer's concerns about the amount of tint is legitimate. The results would provide immediate feedback to the officer on whether probable cause to cite exist. Documenting the results of the device on the officer's BWC and on the ticket would provide data dispelling concerns about the detention being harassing or pretextual.³² Such documentation could lead to the difference in the driver being cited with a fix-it ticket or infraction which entails money, time and effort or being released without a ticket. Once the tint level is confirmed, the officer should not unduly prolong the detention.

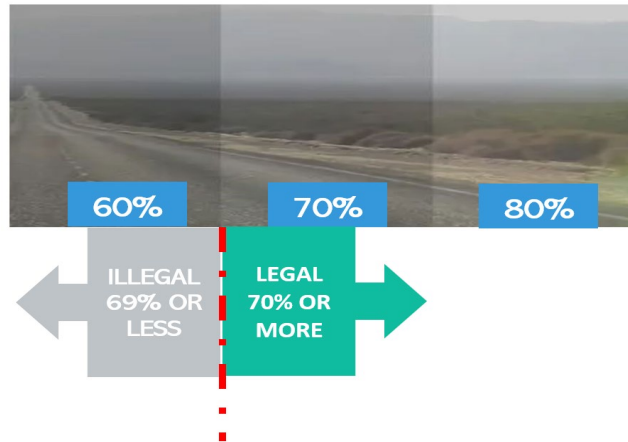
Officers should use a tint measuring device to confirm the tint level before issuing a citation based on **probable cause**.



While the range of VLT from 10% to 90% tint is fairly obvious:



The range of VLT from 60% to 80% is not as obvious.³³ Mechanical devices provide a method to precisely measure what the human eye may not readily discern. This is particularly true if the detention occurs at night, or in poor lights or bad weather.



We recommend that the Department research how other law enforcement entities train and deploy window tint measuring devices. These battery-powered devices appear to be both small and lightweight. The price for one device purchased on-line is approximately \$150.³⁴ Presumably the Department would be able to find a lower price if purchasing in bulk.



Inspector II tint meter
\$179
Product Dimensions:
3.75 x 1.25 x 1.75 inches;
3.2 Ounces



Inspector II tint meter
\$179
Product Dimensions:
3.75 x 1.25 x 1.75 inches;
3.2 Ounces



RockRose portable solar
tester meter
\$109.95
7.13 x 4.17 x 1.93 inches;
5.82 Ounces