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Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

Blue to Gold

Michigan Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

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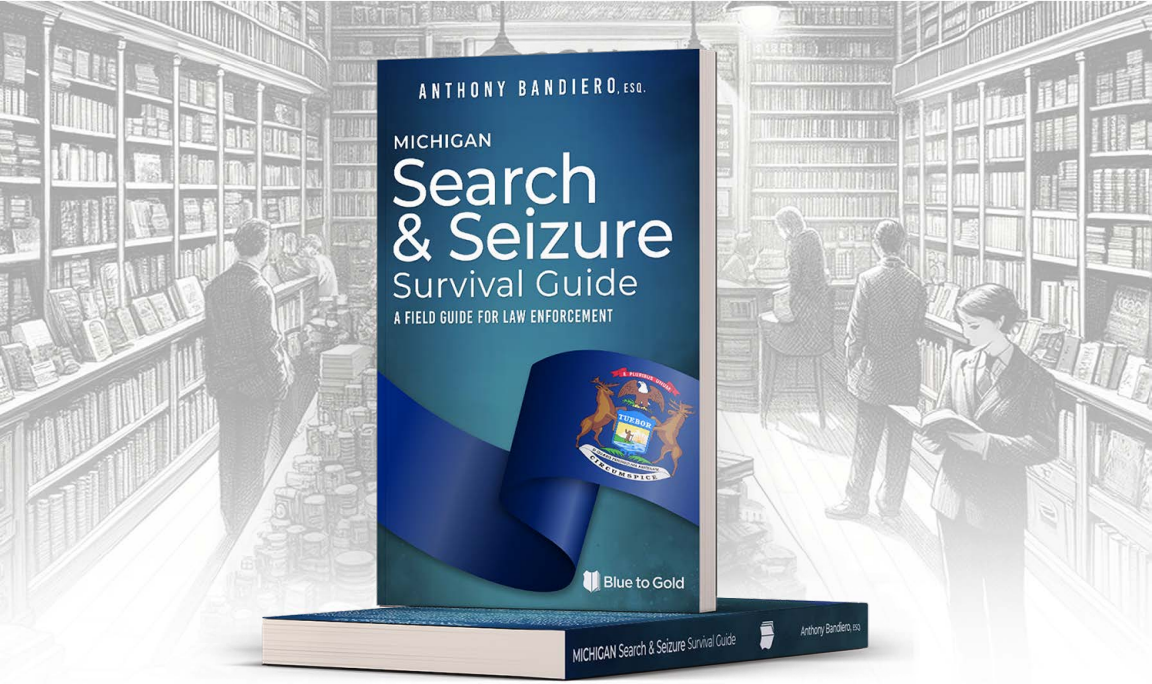
Michigan Search & Seizure Mini Survival Guide
Last updated 01-2024

Note: This is a general overview of the classical and current United States court decisions related to search and seizure, liability, and confessions. As an overview, it should be used for a basic analysis of the general principles but not as a comprehensive presentation of the entire body of law. It is not to be used as a substitute for the opinion or advice of the appropriate legal counsel from the reader's department. To the extent possible, the information is current. However, very recent statutory and case law developments may not be covered.

Additionally, readers should be aware that all citations in this book are meant to give the reader the necessary information to find the relevant case. Case citations do not comply with court requirements and intentionally omit additional information such as pin cites, internal citations, and subsequent case developments. The citations are intended for police officers. Lawyers must conduct due diligence, read the case completely, and cite appropriately.



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Let's Start with the Basics

- Fourth Amendment
- State Constitution
- Three Golden Rules of Search & Seizure
- The Right 'To be Left Alone'
- Decision Sequencing
- C.R.E.W.
- Fourth Amendment Reasonableness
- Private Searches
- "Hunches" Defined
- Reasonable Suspicion Defined
- Probable Cause Defined
- What is a "Search" Under the Fourth Amendment?
- What is a "Seizure" Under the Fourth Amendment?

Consensual Encounters

- Consensual Encounters
- Knock and Talks
- Investigative Activities During Consensual Encounter
- Asking for Identification
- Removing Hands from Pockets
- Transporting to Police Station
- Consent to Search
- Third-Party Consent
- Mistaken Authority to Consent

Investigative Detentions

- Specific Factors to Consider
- Detaining a Suspect
- Officer Safety Detentions
- How Long Can Detentions Last?
- Investigative Techniques During a Stop
- Identifications - in the Field
- Unprovoked Flight Upon Seeing an Officer
- Detentions Based on an Anonymous Tip
- Handcuffing and Use of Force
- Detaining Victims or Witnesses
- Patdown for Weapons
- Patdown Based on Anonymous Tips
- Plain Feel Doctrine
- Involuntary Transportation
- Detaining People Who Publicly Record Police Officers

Arrests

- Lawful Arrest
- Entry into Home with Arrest Warrant
- Warrantless Entry to Make Arrest
- Collective Knowledge Doctrine
- Meaning of "Committed in the Officer's Presence?"
- Line-Ups
- Protective Sweeps
- When to "Un-arrest" a Suspect
- "Contempt of Cop" Arrests
- Arrests at Public Protests
- Search Incident to Arrest
- Search Prior to Formal Arrest
- Search Incident to a "Temporary" Arrest
- Attempt to Swallow Drugs
- DUI Breath Tests
- DUI Blood Tests
- Searching Vehicle Incident to Arrest

Vehicles

- General Rule
- Scope of Stop Similar to an Investigative Detention
- Community Caretaking Stops
- Reasonable Suspicion Stops
- Stops to Verify Temporary Registration
- DUI Checkpoints
- Information Gathering Checkpoints
- Legal Considerations for Any Checkpoint
- Ordering Passengers to Stay in, or Exit Vehicle
- Consent to Search a Vehicle
- Frisking People Who Ride in Police Vehicle
- Searching Vehicle and Occupants for Weapons
- K9 Sniff Around Vehicle
- Searching Vehicle Incident to Arrest
- Searching Vehicle with Probable Cause
- Dangerous Items Left in Vehicle
- Inventories
- Identifying Passengers
- Unrelated Questioning
- Constructive Possession

Homes

- Overview & Standing
- Hotel Rooms, Tents, RVs, and so Forth
- Knock and Talks
- Open Fields
- Curtilage
- Plain View Seizure
- Trash Searches
- Consent to Search by Co-Occupants

- Parental Consent to Search Child's Room
- Mistaken Authority to Consent
- Protective Sweeps
- Warrantless Entry Under Hot and Fresh Pursuit
- Warrantless Arrest at Doorway
- Warrantless Entry to Make Arrest
- Warrantless Entry for an Emergency
- Warrantless Entry for Officer Safety
- Warrantless Entry for Arrest Team
- Warrantless Entry to Investigate Child Abuse
- Warrantless Entry to Protect Property
- Warrantless Entry to Investigate Homicide Crime
- Warrantless Entry to Prevent Destruction of Evidence
- Warrantless Entry Based on "Ruse" or Lie
- Convincing Suspect to Exit Based on "Ruse" or Lie
- Detaining a Home in Anticipation of a Warrant
- Surround and Call-Out

Businesses & Schools

- Warrantless Arrest Inside Business
- Customer Business Records
- Heavily Regulated Businesses
- Fire, Health, and Safety Inspections
- Government Workplace Searches
- School Searches
- Student Drug Testing
- SROs, Security Guards, and Administrators
- Use of Force Against Students

Personal Property

- Searching Containers
- Single Purpose Container Doctrine
- Searching Abandoned or Lost Property
- Searching Mail or Packages

Technology Searches

- Sensory Enhancements
- Flashlights
- Binoculars
- Night Vision Goggles
- Thermal Imaging
- Cell Phones, Laptops, and Tablets
- Cell Phone Location Records
- Aerial Surveillance

- Drones
- Pole Cameras
- Automatic License Plate Readers
- GPS Devices
- Obtaining Passwords

Miscellaneous Searches & Seizures

- Cause-of-Injury Searches
- Medical Procedures
- Discarded DNA
- Fingernail Scrapes
- Arson Investigations
- Airport & Other Administrative Checkpoints
- Border Searches
- Probationer & Parolee Searches

Search Warrants

- Overview
- Why Get a Warrant, Even if You Don't Need to?
- Particularity Requirement
- Anticipatory Search Warrant
- Confidential Informants
- Sealing Affidavits
- Knock and Announce
- Detaining Occupants Inside and in Immediate Vicinity
- Frisking Occupants
- Handcuffing Occupants
- Entry into Home with Arrest Warrant
- Wrong Address Liability
- Receipt, Return, and Inventory

Law Enforcement Liability

- Exclusionary Rule
- Exceptions to the Exclusionary Rule
- Fruit of the Poisonous Tree
- Standing to Object
- Good Faith Exception
- Attenuation
- Inevitable or Independent Discovery
- Duty to Protect
- Duty to Intervene
- Supervisor Liability
- Unequal Enforcement of the Law
- Behavior that "Shocks the Conscience"
- Deliberate Indifference
- Sharing Crime Scene Photos on Social Media

1983 Civil Rights Violations	Bringing Non-Essential Personnel Into the Home
242 Criminal Charges	Qualified Immunity

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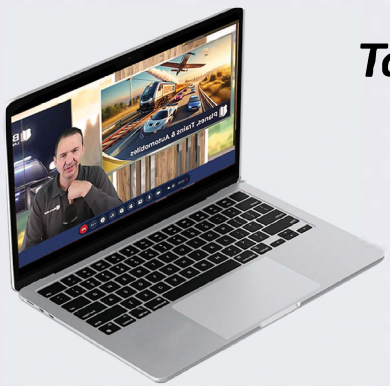

Topics Include

- *Traffic Stops*
- *Interview & Interrogation*
- *Consent Searches*
- *Homes and Curtilage*
- *DUI Report Writing*
- *Law Enforcement Liability*
- *Plain View and Plain Feel*
- *Warrantless Home Entries*
- *Reasonable Suspicion*
- *Probable Cause*
- *Arrests*
- *Search Warrants*
- *Use of Force*
- *Vehicles*
- *and more...*

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Table of Contents

We have an incredible warrior class in this
country - people in law enforcement…
and I thank God every night
we have them standing fast to protect us
from the tremendous amount of evil
that exists in the world.

— Brad Thor

Let's Start with the Basics

Fourth Amendment

Out of all of the Bill of Rights, the Fourth Amendment is the most litigated. It is also the most important when it comes to your job as a police officer. At the core of every police action is the Fourth Amendment and you need to understand case law in order to do your job effectively and lawfully. That's what this book is all about.

Legal Standard

The Fourth Amendment is best understood in two separate parts:

Search and seizure clause:

1. The right of the people to be secure in their
2. persons, houses, papers, and effects,
3. against unreasonable searches and seizures,
4. shall not be violated, and

Search warrant clause:

1. no Warrants shall issue, but upon probable cause,
2. supported by Oath or affirmation,
3. and particularly describing the place to be searched,
4. and the persons or things to be seized.

Michigan Constitution

Michigan Constitution Article 1 Sec. 11

The Michigan Constitution has its own search and seizure clause, similar in language to the Fourth Amendment. Interestingly, the last sentence of Article I § 11 has been held invalid as in conflict with the U.S. Constitution's 4th Amendment. After *Mapp v. Ohio*[1] held the 4th Amendment's exclusionary rule applies to the states through the 14th Amendment, Michigan's position that "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon" seized outside of a residence would be admissible as evidence in a criminal trial, regardless of the reasonableness of the search or seizure, was nullified.[2]

The Michigan Constitution's prohibition against unreasonable searches and seizures is construed as protecting the same interests as the Fourth Amendment of the United States Constitution.[3] Where differences exist between the federal standard and Michigan's state constitution, they will be identified. Keep in mind, your agency policy may be more restrictive than case law.

Legal Standard

CONSTITUTION OF MICHIGAN OF 1963 § 11 Searches and Seizures:

The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor

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1 Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).

2 Lucas v. People of State of Michigan, 420 F.2d 259, 263 (6th Cir. 1970) ("We hold that the last sentence of Article 1, § 11 of the Michigan Constitution of 1963 is in conflict with the Fourth Amendment to the Constitution of the United States as applied to the states in Mapp v. Ohio."); Winkle v. Kropp, 279 F. Supp. 532 (E.D.Mich.1968), rev'd on other grounds, 403 F.2d 661 (6th Cir. 1968) (Article 1, § 11 of the Michigan Constitution "collides directly with the teaching of Mapp."); Caver v. Kropp, 306 F. Supp. 1329 (E.D. Mich. 1969) ("In light of Mapp and the Supremacy Clause, the third sentence of Article 1, § 11 of the Michigan Constitution is unconstitutional.").

3 People v. Gingrich, 307 Mich. App. 656, 662, 862 N.W.2d 432, 436 (2014) (citing People v. Lemons, 299 Mich.App. 541, 545, 830 N.W.2d 794 (2013)).

without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Michigan Constitution of 1963, art. 1, Sec. 11 will be interpreted in keeping with the Fourth Amendment:

"Absent a compelling reason, Michigan courts must construe Const. 1963, art. 1, § 11 'to provide the same protection as that secured by the Fourth Amendment.'"[4]

[4] People v. Collins, 438 Mich. 8, 25, 475 N.W.2d 684 (1991); People v Perlos, 436 Mich. 305; 462 N.W.2d 310 (1990); People v Chapman, 425 Mich. 245; 387 N.W.2d 835 (1986); People v Catania, 427 Mich. 447, 465; 398 N.W.2d 343 (1986); People v Smith, 420 Mich. 1; 360 N.W.2d 841 (1984); People v Nash, 418 Mich. 196; 341 N.W.2d 439 (1983).

Fifth Amendment

The Fifth Amendment is the most famous - because of Hollywood, everyone seems to know their rights. Yet, the Fifth Amendment is extremely complex. For example, how many times has a suspect complained that you didn't read him his Miranda rights after an arrest, even though you didn't interrogate him?[5] Better yet, what if you forget to read someone his rights and he confesses? How do you fix that mistake? This book gives you these answers (Interview and Interrogation section).

Legal Standard

There are a lot of subsections to the Fifth Amendment, and you probably won't deal directly with any of them except #4, the right against self-incrimination (i.e. Miranda):

1. No person shall be held to answer for a capital, or otherwise infamous crime,
1. unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;
2. nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;
2. nor shall be compelled in any criminal case to be a witness against himself,
3. nor be deprived of life, liberty, or property, without due process of law;
4. nor shall private property be taken for public use, without just compensation.

5 Where could this misconception be coming from? When arrestees would say this to me, I would tell them, "Ahh. You must have gone to the 21 Jump Street School of Law!" – as stated by Deputy Chief Hardy, "The Department was forced to drop the charges, because you forgot to read him his Miranda rights. What possible reason is there for not doing **the only thing you have to do** when arresting someone?" (emphasis added).

Consensual Encounters

Consensual Encounters

The most common police encounter is the consensual one. You don't need a specific reason to speak with people and consensual encounters are a great way to continue an investigation when you have neither reasonable suspicion nor probable cause.[6] As the Supreme Court said, "Police officers act in full accord with the law when they ask citizens for consent."[7]

Start a consensual encounter by asking a question: "Can I talk to you?" instead of giving an order, such as, "Come talk to me." Courts place a high premium on the determination that the interaction was "relaxed" and "conversational."[8] Also, your conduct during the encounter must be reasonable. Lengthy encounters full of accusatory questioning will likely be deemed an investigative detention, not a consensual encounter.[9]

Finally, your un-communicated state of mind has zero bearing on whether the person would feel free to leave. Therefore, even if you

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6 People v. Sinistaj, 184 Mich. App. 191, 196, 457 N.W.2d 36 (1990).

7 United States v. Drayton, 536 U.S. 194, 207 (2002).

8 Michigan v. Miller., No. 353843, 2021 WL 3234358, at *2 (Mich. Ct. App. July 29, 2021) ("Body-camera footage from one of the officers presented compelling evidence that defendant's statements regarding the gun and consent were voluntary and not coerced. When the relevant conversation occurred, only two officers spoke with defendant. They spoke in a calm and conversational tone; they did not have their weapons drawn; they never insinuated that defendant could not decline to consent to the search; they were not touching defendant, and the overall tenor of the conversation made it clear that they were merely asking defendant to tell the truth. The trial court did not clearly err by finding that the police did not coerce defendant into making the pertinent statements."). See also People v. Lucynski, 509 Mich. 618, 666, 983 N.W.2d 827, 852 (2022) (Zahra, J., dissenting) ("The officer did not turn on his emergency lights or siren, he did not draw his gun, and he did not give any orders or commands. The officer's tone was conversational and not harassing or overbearing. Under these circumstances, there is no seizure."); United States v. Preston, 579 F. App'x 495 (6th Cir. 2014) (The Sixth Circuit concluded a reasonable person would feel free to walk away, for purposes of Fourth Amendment, when defendant, who was convicted of possession of a firearm by a felon, voluntarily walked toward police vehicle and officer rolled down his window and asked, "What's up?" or "Where are you heading?" in a conversational tone, asked to see defendant's hands, and asked whether he possessed a weapon).

9 See United States v. Williams, 615 F.3d 657 (6th Cir. 2010) (Defendant was seized within meaning of the Fourth Amendment when two uniformed police officers exited a marked car, singled defendant out of a group, approached him, and immediately accused him of trespassing. Even though officers did not draw their weapons or touch defendant, the court determined a seizure occurred, as a reasonable person would not have felt free to leave under such circumstances).

had probable cause to arrest, this factor will not be considered as long as the suspect did not know that you intended to arrest him.[10]

Legal Standard

A consensual encounter does not violate the Fourth Amendment when:

- ☐ A reasonable person would believe he was free to leave or otherwise terminate the encounter.[11] In other words, a reasonable person would have believed he was not detained.

[10] People v. Lucynski, 509 Mich. 618, 638, 983 N.W.2d 827, 838 (2022) ("Because [the officer] did not outwardly communicate his subjective intentions to defendant, they are not relevant in determining when defendant's encounter with Robinson became a seizure.").

[11] Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991). See also People v. Shabaz, 424 Mich. 42, 66, 378 N.W.2d 451 (1985).

Case Examples

Factors relevant to a determination of whether a police-citizen encounter is a consensual encounter or a Fourth Amendment "seizure" include:

"[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[12]

Additional factors the 6th Circuit has identified as relevant:

"(1) [T]he purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as ... whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police."[13]

Suspect fit drug courier profile and police conduct was not a consensual encounter:

A suspect who fit the so-called "drug-courier profile" was approached at an airport by two detectives. Upon request, but without oral consent, the suspect produced for the detectives his airline ticket and his driver's license. The detectives, retaining the airline ticket and license, asked the suspect to accompany them to a small room approximately 40 feet away, and the suspect went with them. Without the suspect's consent, a detective retrieved the suspect's luggage from the airline and brought it to the room. When the suspect was asked if he would consent to a search of his suitcases, the suspect produced a key and unlocked one of the suitcases, in which drugs were found. Court found this was not a consensual encounter and suppressed the evidence.[14]

Consensual encounter and search valid after officer released driver following a traffic stop:

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[12] United States v. Cottrell, No. CR 21-20676, 2022 WL 13008904, at *3 (E.D. Mich. Oct. 21, 2022); United States v. Lewis, 843 F. App'x 683, 689 (6th Cir. 2021) (quoting United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980)). "Simple police questioning is insufficient to constitute a seizure." Florida v. Bostick, 501 U.S. 429, 434 (1991)).

[13] United States v. Lewis, 843 F. App'x 683, 688–89 (6th Cir. 2021); see United States v. Garcia, 866 F.2d 147, 151 (6th Cir.1989) ("[T]he one occurrence which seems to distinguish 'seizures' from casual contacts between police and citizens is when the defendant is asked to accompany the police or agents to a place to which the defendant had not planned to go.").

[14] Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983).

Where the officer stopped a vehicle to issue a traffic citation, concluded the traffic stop, indicated to the driver that she was free to leave, but then asked if the driver had drugs and whether or not the officer could search the vehicle, consent to search was voluntary.[15] Many cops call this move the "trooper two-step" – it's more than just a seductive dance move. After releasing the offender, the officer will turn towards his patrol car, stop, turn around, and in a Columbo-like manner say, "Sir, can I ask one more question before you leave..." It's a solid way to separate the stop from the consensual encounter.[16]

Blocking citizen vehicle supports the finding of a seizure:

Using a police vehicle to block a civilian's path will constitute a seizure.[17] However, if the police vehicle's positioning allows for the citizen's egress, even if it requires "some maneuvering", the police vehicle's position alone will not constitute a per se seizure.[18] Only if officers completely block a person's parked vehicle with a police vehicle is the person seized.[19]

Using overhead lights does not constitute a per se seizure:

Officers' use of overhead emergency lighting does not automatically constitute a seizure, but is just one factor in the totality of the circumstances a court will consider to determine if an objectively reasonable person would feel free to disregard the officer and go about his business – or if a seizure has occurred.[20]

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15 People v. Ramos, No. 329057, 2016 WL 7333424, at *3 (Mich. Ct. App. Dec. 15, 2016).

16 See United States v. Zapata, 180 F.3d 1237, 1240 (11th Cir. 1999).

17 See, e.g., United States v. See, 574 F.3d 309, 313 (6th Cir. 2009); United States v. Gross, 662 F.3d 393, 399-400 (6th Cir. 2011).

18 People v. Anthony, 327 Mich. App. 24, 39–40, 932 N.W.2d 202, 212 (2019), citing United States v. Carr, 674 F.3d 570, 573 (6th Cir. 2012) ("To conclude otherwise would be an endorsement of a 'simplistic, bright-line rule' that a detention occurs 'any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave.'").

19 People v. Anthony, 327 Mich. App. 24, 40, 932 N.W.2d 202, 212 (2019); United States v. See, 574 F.3d 309 (6th Cir. 2009).

20 "The officers' use of blue lights was not sufficiently coercive to transform this encounter into a compulsory stop." United States v. Carr, 674 F.3d 570, 573 (6th Cir. 2012). See O'Malley v. City of Flint, 652 F.3d 662, 669 (6th Cir.2011); People v. Anthony, 327 Mich. App. 24, 40, 932 N.W.2d 202, 212 (2019); People v. Phillips, No. 356255, 2022 WL 1591674, at *5 (Mich. Ct. App. May 19, 2022).

Knock and Talks

There is no Fourth Amendment violation if you try to consensually contact a person at his home. The key to knock and talks is to comply with social norms. Think about it this way - if the Girl Scouts could do it, you can too.

You must be reasonable when you contact the subject. Constant pounding on the door, for example, would likely turn the encounter into a detention if the subject knows that it's the police knocking (an objectively reasonable person would believe that police are commanding him to open the door). Additionally, waking a subject up at 4 a.m. has been viewed as a detention requiring reasonable suspicion (see below). In other words, if the Girl Scouts wouldn't do it, then it's probably unreasonable.

What about "No Trespassing" signs? You can usually ignore them because trying to have a consensual conversation with someone is not typically considered trespassing.[21] Same goes with "No Soliciting" signs.

Legal Standard

Knock and talks are lawful when:

- ☐ The path used to reach the door does not violate curtilage and appears available for uninvited guests to use;
- ☐ If the house has multiple doors, you chose the door reasonably believed to be available for uninvited guests to make contact with an occupant;
- ☐ You used typical, non-intrusive methods to contact the occupant, including making contact during a socially-acceptable time;
- ☐ Your conversation with the occupant remained consensual; and
- ☐ When the conversation ended or was terminated, you immediately left and didn't snoop around.

[21] United States v. Schultz, No. 13-20023, 2013 WL 2352742, at *5 (E.D. Mich. May 29, 2013) (holding that knock-and-talk entry via driveway was valid under the Fourth Amendment despite "No Trespassing" signs); United States v. Hopper, 58 Fed.Appx. 619, 623 (6th Cir. 2003) (holding that knock-and-talk was allowed despite several "No Trespassing" signs near driveway).

Case Examples

The Knock and Talk:

The "knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items."[22]

Knock and talk during the "predawn hours" rendered later consent invalid:

Police approached defendants' home in the "predawn hours" to seek information about marijuana butter. The court concluded they performed an illegal search in violation of the Fourth Amendment because the early hour was not within established social norms, rendering the subjects' later consent invalid.[23]

Knock and talk at 4 a.m. held invalid:

Officers went to suspect's residence at 4 a.m. with the sole purpose to arrest him. There was no on-going crime and the probable cause was based on an offense that occurred the previous night. Court found a violation of "knock and talk" because officers exceeded social norms.[24]

Knock and talk at 1:30 a.m. held to be valid:

Knock and talk at 0130 hours was held to be valid where officers were attempting to contact the owner of a motorcycle involved in a 90mph pursuit 30 minutes prior. In so holding, the court considered that the motorcycle's engine was still hot; the motorcycle appeared to be the same involved in a nearby, recent assault and battery with a loaded firearm; the motorcycle was

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[22] People v. Frohriep, 247 Mich.App. 692, 697, 637 N.W.2d 562 (2001).

[23] People v. Frederick, 500 Mich. 228, 895 N.W.2d 541 (2017).

[24] United States v. Lundin, 817 F.3d 1151 (9th Cir. 2016); see also French v. Merrill, 15 F.4th 116 (1st Cir. 2021) (Court found officers' conduct unlawful in going beyond a single warrantless knock-and-talk while attempting to get arrestee to come to door of his house, including four reentries onto property and attempts at a window in the early morning hours. This right was clearly established at the time of the event; thus, officers were not entitled to qualified immunity from arrestee's claim of violation of his Fourth Amendment rights; there was no implicit social license to invade the curtilage repeatedly, forcefully knock on front door and bedroom window frame, and urge arrestee to come outside, all in pursuit of a criminal investigation).

registered out of an adjoining city; the nearest apartment to the motorcycle was the only one that had lights illuminated; and the deputy delivered three to six raps on the door.[25]

Officers' trespassing rendered later consent invalid:

Police officers conducted a "knock and talk" with defendant regarding their suspicions that he was storing marijuana. Defendant requested that officers leave the premises, but they refused, instead continuing to question him. This violation of the knock-and-talk procedure rendered inadmissible the four pounds of marijuana and $6500 in cash later recovered.[26]

Officer's statement that he didn't need a warrant to talk with occupant found to have tainted consent to enter:

Officers made contact with a suspected alien at his apartment. The officers asked to enter the apartment, and the occupant asked whether they needed a warrant for that. The officers said they "didn't need a warrant to talk to him." Based on the totality of the circumstances, the consent was involuntary, since a reasonable occupant would have thought that police didn't need a warrant to enter and talk.[27]

Unless there is an express order otherwise, officers have the same right to knock and talk as a pollster or salesman:

Consensual encounters may also take place at the doorway of a home. A "knock and talk," when performed within its proper scope, is not a search at all. The proper scope of a knock and talk is determined by the "implied license" that is granted to "solicitors, hawkers, and peddlers of all kinds." "Thus, a police officer not

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25 Young v. Borders, 850 F.3d 1274, 1285–86 (11th Cir. 2017) ("Although the officers in this case positioned themselves in front of the only exit to Apartment 114 with their guns drawn, the LCSO officers did not order [residents] out of their apartment[.] [T]here is no evidence to show that [residents] even knew that the officers had their guns drawn. Further, there is no evidence presented... to show that the officers would not have permitted [residents] to stay in Apartment 114; to the contrary, the unrebutted testimony in this case is that the officers would have been required to leave if nobody answered the door. The only activity outside of the apartment that [residents] knew of was that someone had knocked on their door loudly. As discussed above, this is not such a 'show of authority' that would permit [residents] to believe they would not have been permitted to stay inside their apartment.").

26 People v. Bolduc, 263 Mich. App. 430, 688 N.W.2d 316 (2004).

27 Orhorhaghe v. I.N.S., 38 F.3d 488 (9th Cir. 1994).

armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[28]

Assuming a "tactical position"[29] does not invalidate a knock and talk where legitimate safety concerns are recognized:

Agents initiated an encounter to investigate an illegal alien's possession of a rifle. As agents approached, the defendant retreated back into his home and locked the door. The court concluded the agents' positioning themselves alongside the residence did not convert a consensual "knock and talk" into a contact implicating the Fourth Amendment.[30]

Approaching a subject in his front yard comports with the Knock and Talk procedure:

Police approached defendant as he was standing in his yard and asked defendant's permission to "look around". These actions were in keeping with the Knock and Talk Procedure, and there was no indication that defendant was not free to end the encounter.[31]

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[28] People v. Frederick, 500 Mich. 228, 234–35, 895 N.W.2d 541, 544 (2017) (citation and quotation marks omitted).

[29] Young v. Borders, 850 F.3d 1274, 1299 (11th Cir. 2017).

[30] United States v. Lara-Mondragon, 516 F. App'x 771, 773 (11th Cir. 2013).

[31] People v. Frohriep, 247 Mich. App. 692, 637 N.W.2d 562 (2001).

Investigative Activities During Consensual Encounter

Just because you're engaged in a consensual encounter doesn't mean you can't investigate; however, be careful as to how you go about it. Be cool, low key, and relaxed. Make small talk and just present yourself as a curious cop versus someone looking to make an arrest (though that may be your goal).

During a consensual encounter, there are really three investigative activities in which you can engage: questioning, asking for ID, and seeking consent to search.

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, and asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen."[32]

Asking for ID and running a subject for warrants doesn't automatically convert an encounter into a detention.[33]

[32] Florida v. Royer, 460 U.S. 491, 497 (1983).

[33] Florida v. Bostick, 501 U.S. 429, 437 (1991).

Hint: return ID as soon as possible so that a reasonable person would still "feel free" to leave.[34]

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34 United States v. Drayton, 536 U.S. 194, 200-01 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized"); see also United States v. Clariot, 655 F.3d 550, 554 (6th Cir. 2011) ("[E]ven if we assume the officers seized the men while they held the defendants' identifications and ran a warrant check, any seizure became consensual once they returned the identifications and commenced a conversation that had no threatening or incriminating overtones to it."); United States v. Alston, 375 F.3d 408 (6th Cir. 2004) (Defendant's encounter in airport with police officers, who approached her after she exited airplane after learning that circumstances surrounding purchase of her ticket indicated that she might be involved in drug trafficking, did not constitute a "seizure." Defendant was asked if she would speak to them, officers spoke in a non-threatening manner and did not display any weapons, requested identification and ticket which were immediately returned, and encounter was brief and occurred in atmosphere that was not police-dominated); United States v. Bueno, 21 F.3d 120 (6th Cir. 1994) (Approaching defendant in airport was a consensual encounter, where sergeant identified himself as a police officer, asked defendant about identity and travel itinerary, did not display weapon or physically touch defendant, and promptly returned ticket and identification); United States v. Blount, No. 09-20536-11-BC, 2011 WL 3426189, at *3 (E.D. Mich. Aug. 5, 2011) ("The officers did not ask Defendant for permission to return with his identification to the patrol car to conduct the check. When the officer left with the identification, Defendant was no longer free to leave."); United States v. De La Rosa, 922 F.2d 675, 678 (11th Cir. 1991)("Factors relevant to this inquiry include, among other things: 'whether a citizen's path is blocked or impeded; **whether identification is retained**; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.'") (emphasis added).

Legal Standard

Questioning:

Questioning a person does not convert a consensual encounter into an investigative detention as long as:

- ☐ Your questions are not overly accusatory in a manner that would make a reasonable person believe they were being detained for criminal activity.[35]

Identification:

Asking a person for identification does not convert a consensual encounter into an investigative detention as long as:

- ☐ The identification is requested, not demanded; and
- ☐ You returned the identification as soon as practicable; otherwise, a reasonable person may no longer feel free to leave.

Consent to search:

Asking a person for consent to search does not convert the encounter into an investigative detention as long as:

- ☐ The person's consent was freely and voluntarily given;
- ☐ He has apparent authority to give consent to search the area or item; and
- ☐ You did not exceed the scope provided, expressed or implied.

Case Examples

Questioning:

At approximately 12:55pm, officers working an interdiction task force observed a subject arrive at the last minute to catch a bus. As two officers approached the subject, he began moving away from his bag as he walked toward the ticket counter. When officers attempted to speak with him, he began asking them questions and

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[35] United States v. Williams, 615 F.3d 657, 665 (6th Cir. 2010) ("[A] criminal accusation by law enforcement [has been cited] as a factor indicating that an individual is seized"). See United States v. Tyler, 512 F.3d 405, 410 (7th Cir.2008) (holding that defendant with open beer bottle in hand was seized by officers who "told him he was violating the law"); United States v. Smith, 423 F.3d 25, 30 (1st Cir.2005) (In support of holding that defendant was not seized during encounter, the court cited the fact that officers "did not accuse him of any crime"); Jordan v. City of Eugene, 299 Fed.Appx. 707, 708 (9th Cir.2008) (unpublished opinion) (holding that encounter "became a non-consensual seizure when the officer told the plaintiff he needed to speak with him because the officer believed the plaintiff was carrying a gun").

looked around the station frantically. The subject did not answer officers when they asked him why he had left his bag behind, and why he needed to purchase a ticket when he had one in his hand. According to the officers, the subject appeared nervous and evasive, behavior they found "consistent with subjects who are attempting to traffic narcotics when they come in contact with law enforcement." Ultimately, the court concluded that a subject is not seized when officers approach him and "simply [ask] to see his bus ticket, train ticket, or other identification, whether he had any luggage, and his purpose for travel." If a subject is unable to present evidence of "coercive activity" on the part of the officers, "the stop remain[s] a consensual encounter, which does not require reasonable suspicion for Fourth Amendment purposes."[36] A subject is not seized if officers approach and request to speak with him[37] or if officers inquire whether they can ask the subject some questions.[38]

Identification:

Where officers contact a subject and request identification in such a manner that does not imply compliance is mandatory, no seizure will be found for purposes of the Fourth Amendment.[39] The Supreme Court has noted that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."[40]

Consent to Search:

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36 United States v. Vining, No. 221CR20715TGBDRG1, 2023 WL 3720911, at *1–2 (E.D. Mich. May 30, 2023).

37 See United States v. Peters, 194 F.3d 692, 694, 698 (6th Cir.1999).

38 See United States v. Frazier, 936 F.2d 262, 265 (6th Cir.1991); United States v. Moore, 675 F.2d 802, 808 (6th Cir.1982) (DEA agent did not seize defendant when he approached him and inquired in a non-threatening manner, "Can I ask you a few questions?").

39 United States v. Campbell, 486 F.3d 949, 956 (6th Cir. 2007) ("[Officer's] first statement was that he would like to see [the subject's] ID. The use of the word 'like,' as opposed to 'need' or 'want,' suggests that a reasonable person would feel free to decline this request and leave the scene. Moreover, [the officer] had not yet called for backup. He was alone with [the suspect] at this point in the encounter and had neither drawn his weapon nor activated his emergency lights or siren."); United States v. Peters, 194 F.3d 692, 698 (6th Cir.1999) ("Absent coercive or intimidating behavior which negates the reasonable belief that compliance is not compelled, the [officer's] request for additional identification and voluntarily given information from the defendant does not constitute a seizure under the Fourth Amendment.").

40 INS v. Delgado, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).

The government has the obligation to prove consent was voluntary and not "mere acquiescence to claims of lawful authority".[41] Bus passengers were determined to have voluntarily consented to a search of their luggage and persons by officers who had boarded a bus as part of a routine drug and weapons interdiction effort, notwithstanding officers' failure to explicitly inform passengers that they were free to refuse to cooperate. This was determined to be a consensual encounter, as officers did not draw or brandish their weapons, made no intimidating movements, left aisle free so that passengers could exit, and spoke to passengers one by one and in polite, quiet voices.[42]

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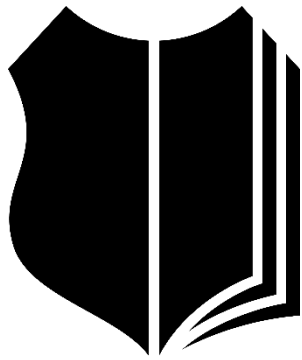
[41] People v. Farrow, 461 Mich. 202, 208, 600 N.W.2d 634 (1999), quoting Bumper v. North Carolina, 391 U.S. 543, 548–549, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

[42] United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002).



Investigative Detentions

Detaining a Suspect

If you have an articulable reasonable suspicion that a suspect is, was, or is about to be involved in criminal activity, you may briefly detain him in order to "maintain the status quo" and investigate.[43] Courts use the "status quo" language because it implies that you are not really doing anything to the suspect, besides taking some of his time. This distinction is important because all Fourth Amendment intrusions must be reasonable. If all you are doing is temporarily detaining a suspect, versus conducting a full search or other arrest-like behavior, then it's more likely to be considered reasonable.

Legal Standard

A suspect may be detained when:

- ☐ You can articulate facts and circumstances that would lead a reasonable officer to believe that the suspect is, was, or is about to be, involved in criminal activity;
- ☐ You use the minimal amount of force necessary to detain a cooperative suspect;
- ☐ Once the stop is made, you must diligently pursue a means of investigation that will confirm or dispel your suspicions;
- ☐ If your suspicions are dispelled, the person must be immediately released or the stop converted into a consensual encounter.

Case Examples

Long wait for K9 held reasonable under the circumstances:

A 30 to 45-minute wait for a drug dog was not unreasonable after trooper identified R.S. for narcotics and acted diligently in pursuit of his investigation.[44]

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[43] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

[44] United States v. Davis, 430 F.3d 345, 356 (6th Cir. 2005) (The court held that a 30 to 45-minute wait for a drug dog, based on reasonable suspicion, was not unreasonable; there was no evidence that the officer did not diligently pursue his investigation. Unfortunately, after the first K9, Rocky, did not alert, the officers continued to detain the subject for another hour to await the arrival of a second dog, Sabor, which did alert. For all involved, the sweet "sabor" of justice was short-lived. The court held the initial detention was for a reasonable amount of time, but the continued detention after the officers' "suspicions had been dispelled" was a violation of the subject's 4th Amendment rights).

Detention of man walking near a school after an alarm activation at approximately 0200 hours constituted R.S.:

After officers received a burglar alarm notification at a school at 0200 hours, they responded to the area and, twenty minutes later, encountered defendant walking away from building. The officers articulated that the area surrounding the school was undeveloped, leaving scant possibility the subject was coming from any other location. These factors justified the subject's detention and subsequent investigation. A box containing property stolen from the school was located about 15 feet from where the defendant was contacted and, as no one but defendant and his companion was in area at the time, there was sufficient basis to support defendant's conviction of breaking and entering a building with intent to commit larceny therein.[45]

Time of day, recent criminal activity, and unusual circumstances all contribute to reasonable suspicion:

Officer observed defendant's vehicle parked off the side of a rural road, late at night, apparently abandoned, near to where several break-ins had occurred, and when the officer returned a short time later after checking the surrounding houses to find the vehicle was gone, the officer's actions in stopping the vehicle were based upon objective factors which led to his suspicion that vehicle could have been involved in or connected to the burglaries. Thus, the subsequent brief detention of the defendant, which was limited to an investigation of the circumstances which initially aroused the officer's suspicions, was justified under the Fourth Amendment.[46]

Detention of man with an axe at 3 a.m. reasonable:

Cops had R.S. to stop a man with an axe at 3 a.m., though no "axe crimes" were reported. "Some activity is so unusual... that it cries out for investigation."[47]

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[45] People v. Johnson, 137 Mich. App. 295, 357 N.W.2d 675 (1984).

[46] People v. Bowers, 136 Mich. App. 284, 356 N.W.2d 618 (1984).

[47] People v. Foranyic, 64 Cal.App.4th 186 (Cal. Ct. App. 1998) ("A consensus seems to have developed that recognizes the inadvisability of wielding an ax in darkness. Nor can we ignore the long history of the ax as a weapon. While no one refers to a 'gun-murderer' or 'knife-murderer' or 'crowbar-murderer', the equivalent usage with regard to an ax is well ensconced in American usage. The ax, like the machete and the straight razor, is an implement whose unfortunate utility as a weapon sometimes overshadows its value as a tool"); Shaw v. City of Selma, 241 F. Supp. 3d 1253, 1271 (S.D. Ala. 2017), aff'd, 884 F.3d 1093 (11th Cir. 2018) ("[I]t is abundantly clear from the photograph that the hatchet in question was not a toy and not an implement to be trifled with. It was obviously a deadly weapon, capable of inflicting severe bodily harm or death.").

Officer Safety Detentions

The vast majority of investigative detentions occur because you believe the person detained is involved in criminal activity. However, a detention based on a concern for officer safety may also establish reasonable suspicion to support an investigatory stop.[48] These detentions are often for people connected to the target suspect, such as lookouts.

Legal Standard

A subject may be detained for officer safety when:

- ☐ You can articulate facts and circumstances that would lead a reasonable officer to believe the subject is a potential danger;
- ☐ You use the minimal amount of force necessary to detain the subject; and,
- ☐ Once a patdown is conducted and no weapons are discovered, the subject should be released or the encounter converted to a consensual one, unless the subject poses another risk, such as wanting to physically attack the officers.

Case Examples

Detention based on legitimate officer safety concerns upheld:

Although general concern about safety won't suffice, a temporary detention of an individual may be justified by an officer's specific concern for his own safety. "A concern for officer safety permits a variety of police responses in differing circumstances, including ordering a ... passenger out of a car during

[48] "[T]he [United States] Supreme Court has recognized limited situations at the scene of police activity in which it may be reasonable for police to detain people not suspected of criminal activity themselves, so long as the additional intrusion on individual liberty is marginal and is outweighed by the governmental interest in conducting legitimate police activities safely and free from interference." People v. McCloud, No. 352158, 2021 WL 1596498, at *5 (Mich. Ct. App. Apr. 22, 2021) (Riordan, J., dissenting), appeal denied, 978 N.W.2d 109 (Mich. 2022), and cert. denied sub nom. Michigan v. McCloud, 143 S. Ct. 375, 214 L. Ed. 2d 183 (2022); see also United States v. Lewis, 674 F.3d 1298, 1306 (C.A. 11, 2012) ("[F]or safety reasons, officers may, in some circumstances, briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid Terry stop as to other related individuals.").

a traffic stop, ... and conducting pat-down searches upon reasonable suspicion that they may be armed and dangerous."[49] Concerns for officer safety also permit an officer to "ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions."[50]

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49 United States v. Campbell, 549 F.3d 364, 372 (6th Cir.2008) (quoting Bennett v. City of Eastpointe, 410 F.3d 810, 822 (6th Cir.2005)) (emphasis in original).

50 United States v. Bah, 794 F.3d 617, 627 (6th Cir. 2015) (quoting United States v. Butler, 223 F.3d 368, 374 (6th Cir.2000)).

Arrests

Lawful Arrest

Officers make millions of warrantless arrests every year. Though there may be additional state laws in play (e.g. cannot arrest for misdemeanor not committed in your presence), the 4th Amendment is not violated as long as you have probable cause, authority to make the arrest, and lawful access to the suspect.[51]

You are not required to obtain an arrest warrant when the suspect is located in a public place.[52] A public place is any place you have a lawful right to be.[53]

Additionally, the arrest is lawful even if the charged offense is dropped for lack of probable cause, as long as there was probable cause for another offense, even if uncharged.[54]

Legal Standard

A lawful arrest has three elements:

- ☐ You must have probable cause that a crime has been committed;
- ☐ You need legal authority to make the arrest; and
- ☐ You must have lawful access to the suspect.

There are two ways to effect an arrest:

- ☐ You use any physical force with the intent to arrest; or
- ☐ You make a show of authority sufficient that a reasonable person would believe he was under arrest.

Case Examples

If the arrest is based on probable cause, arrest is constitutional:

"The standard of probable cause applies to all arrests, without the need to 'balance' the interests and circumstances involved in

[51] Virginia v. Moore, 553 U.S.164 (2008).

[52] United States v. Watson, 423 U.S. 411 (1976).

[53] People v. Patterson, 156 Cal. Rptr. 518 (Cal. App. 2d Dist. 1979).

[54] Devenpeck v. Alford, 543 U.S. 146 (2004).

particular situations. If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Note: still abide by your agency/state rules.[55]

Warrantless arrest inside private office unlawful:

It was illegal for police, without consent, exigent circumstances, or a warrant, to go past a receptionist and enter the locked office of an attorney to arrest him for selling cocaine.[56]

Probable cause existed to search based on belief that spare tire contained drugs:

A police officer had probable cause to lower the spare tire on defendant's vehicle and cut it open, where the tire was hanging lower than normal, it was clean while the rim was salty and dirty, the tire had fingerprints and tool marks where the rim and tire met, the tire was a different brand and larger than the other four tires on the vehicle, the results of the "echo test" performed on the spare tire were consistent with the presence of contraband hidden therein, there were four cans of Fix-A-Flat Tire Sealant in the vehicle (which was unusual, considering the vehicle was a rental), the tire was extraordinarily heavy, and the officer had experience with drugs being transported in spare tires.[57]

Probable cause existed based on smelling "burnt" marijuana even though only "fresh" marijuana was discovered:

A police officer's testimony that he smelled the odor of burning marijuana and saw smoke coming out of the truck parked in defendant's driveway, was not required to be corroborated by physical evidence of burnt marijuana from inside the truck in order to show that the officer had probable cause to conduct the warrantless search of the truck, where the officer's failure to locate ash or burnt marijuana cigarettes inside the truck did not render his testimony inherently incredible, since officers did find over 350 grams of non-burnt marijuana inside the truck.[58]

Suspect must be physically touched or submit to your authority:

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[55] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[56] People v. Lee, 186 Cal. App. 3d 743 (Cal. App. 4th Dist. 1986).

[57] U.S. v. Lyons, 510 F.3d 1225 (10th Cir. 2007).

[58] Gilliam v. U.S., 46 A.3d 360 (D.C. 2012).

"There can be no arrest without either touching or submission." Therefore, if suspect runs away, he is not arrested until you catch him.[59]

[59] California v. Hodari D., 499 U.S. 621 (1991); People v. Lewis, 199 Mich. App. 556, 559–60, 502 N.W.2d 363, 364 (1993) (defendant was not seized until officer actually laid his hands on him outside the door of an apartment building. Even where an officer's pursuit of a subject amounts to a show of authority, where the defendant does not submit to that show of authority, no seizure has occurred until the officer physically takes hold of the defendant).

Entry into Home with Arrest Warrant

An arrest warrant allows an officer to not only arrest the suspect in a public place, but inside his home as well. In essence, the arrest warrant is really two warrants: a warrant to arrest the suspect and a warrant to search for the suspect at his home. However, before entering a suspect's home you must have reason to believe he is presently home and knock and announce before entering. Of course, the warrant does not authorize a search for evidence, but plain view seizures are permissible.

Make no mistake, arrest warrants are powerful tools for law enforcement officers to arrest wanted suspects. Finally, these rules apply equally to all criminal arrest warrants, whether for a misdemeanor or felony.

Legal Standard

Entry into a home based on an arrest warrant is lawful when:

- ☐ You have probable cause that this is the suspect's home, and not a third party's home (get a search warrant for third party homes);
- ☐ You have reason to believe the suspect is home;
- ☐ You knock and announce;
- ☐ If appropriate, protective sweeps are permissible; and
- ☐ You may look for the suspect in people-sized places, but not search for evidence; however, plain view seizure applies.

Case Examples

Arrest warrant allows entry into suspect's home, not third party's:

"Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within... [but] is plainly inapplicable when the police seek to use an arrest warrant as legal authority to enter the home of a third party to conduct a search.[60]

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[60] Steagald v. U.S., 451 U.S. 204, 215 (1981); People v. Clement, 107 Mich. App. 283, 309 N.W.2d 236 (1981) (reiterating the holding of Steagald that "absent exigent circumstances or consent, a search warrant is needed before the home of a third party may be searched for a suspect named in an arrest warrant").

Warrantless Entry to Make Arrest

You cannot make a warrantless entry into a home to make an arrest without consent or exigency.[61] Even if the arrest was for a violent triple-murder, you would have to articulate consent or exigency before entering.

Legal Standard

A warrantless entry into a home to make an arrest may be made under five circumstances:

Consent:

- ☐ You may enter if you have consent from an occupant with apparent authority over the premises and you make known your intent to arrest the suspect.

Hot Pursuit:

- ☐ You are in hot pursuit of a suspect believed to have committed an arrestable offense and he runs into a home (a surround and call-out may also be done for officer safety purposes).

Fresh Pursuit:

- ☐ You are in fresh pursuit of the suspect after investigating a serious violent crime and quickly trace the suspect back to his home.

Suspect will Escape:

- ☐ You have probable cause that the suspect committed a serious violent crime, and you reasonably believe he will escape before obtaining a warrant.

Undercover Officer - Immediate Re-entry with Arrest Team:

- ☐ You are an undercover officer and conduct a narcotics transaction inside the home. You may leave and immediately re-enter with an arrest team when two conditions are met. First, there must be a legitimate officer safety reason why you had to leave before summoning the arrest team into the home. Second, you must articulate that an exigency exists, such as destruction or loss of evidence.

Remember, for all Uninvited Entries:

- ☐ Knock and announce rules apply; and

[61] Payton v. New York, 445 U.S. 573 (1980); People v. Clement, 107 Mich. App. 283, 287 (1981) (reiterating the holding of Payton that "the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.").

☐ You cannot search for evidence but may make a plain view seizure.

Case Examples

Entry to make any arrest, even for murder, requires consent, exigency, or a warrant:

"To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present."[62]

M.C.L. § 764.21 is inapplicable when it conflicts with Payton v. New York:

"To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building in which the person to be arrested is or is reasonably believed to be if, after he has announced his purpose, he is refused admittance."[63] MCL 764.21 does not provide independent authority for police officers to enter the home of a third party to search for a suspect named in an arrest warrant, absent either (1) exigent circumstances, (2) consent, or (3) a search warrant.[64]

Additional officers may enter if undercover officer is inside the residence:

An informant and undercover police officer went to defendant's residence to arrange a drug transaction. Defendant showed the pair a bag containing cocaine. The pair left the residence and returned with another agent, who was the purported purchaser. The door had been left ajar, so officers entered the residence and arrested defendant.[65]

Delayed entry unlawful without exigency:

An undercover officer was voluntarily admitted into a home to purchase illegal firearms, but he walked back outside to signal

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[62] United States v. Reed, 572 F.2d 412, 423 (2d Cir. 1978).

[63] Mich. Comp. Laws Ann. § 764.21 (West).

[64] People v. Swiental, No. 357024, 2021 WL 5225955, at *2 (Mich. Ct. App. Nov. 9, 2021).

[65] Toubus v. Superior Court, 114 Cal. App. 3d 378 (Cal. App. 1st Dist. 1981).

uniformed officers. Officers entered to arrest defendants within the house without obtaining arrest warrants and seized the weapons in their subsequent search of the house. The court held that the officer's re-entry without consent, in the absence of exigent circumstances, rendered the arrest and the search incident thereto unlawful.[66]

Immediate re-entry lawful:
A warrantless arrest of defendant in his residence was upheld when defendant consented to initial entry by police officer, during which time defendant committed a crime in the officer's presence, after which officer left and immediately re-entered with other officers to arrest defendant.[67]

[66] People v. Garcia, 139 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super. Ct. 1982).

[67] People v. Cespedes, 191 Cal. App. 3d 768 (Cal. App. 1st Dist. 1987).

Vehicles

General Rule

You may stop a vehicle if you have reasonable suspicion or probable cause that an offense has been, or will be, committed. It doesn't matter what you subjectively thought about the driver or passengers (unless racial profiling). What matters is objective reasonableness. However, it would be unlawful to unreasonably extend the stop while you pursue a hunch. If you identify reasonable suspicion that the occupants are involved in criminal activity, then you may diligently pursue a means of investigation that will confirm or dispel those suspicions.

Legal Standard

A vehicle may be lawfully stopped if:

- ☐ There is a community caretaking purpose;
- ☐ You have reasonable suspicion for any occupant; or
- ☐ You have probable cause for any occupant.

Note: The scope of a traffic stop is similar to an investigative detention. Therefore, the officer must diligently pursue the reason for the stop and not measurably extend the stop for reasons unrelated to the original reason for the stop unless additional reasonable suspicion or probable cause develops.

Case Examples

Stop by undercover narcotics officers for minor violation upheld:

D.C. detectives in an unmarked vehicle had a hunch that two suspects were dealing narcotics. The only violation they observed was failure to use a turn signal. The stop violated a policy that unmarked vehicles could only make stops for serious crimes. Drugs were observed in plain view. The Supreme Court held that the subjective mindset of the officers was irrelevant as long as the initial stop was legal[68] - and a violation of a department policy does not affect Fourth Amendment analysis.

[68] Whren v. United States, 517 U.S. 806 (1996).

Scope of Stop Similar to an Investigative Detention

The scope of a routine traffic stop is similar to an investigative detention. As one court stated, this is because "the usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest."[69]

It also makes sense that a DUI / OWI stop will take longer than an equipment violation. Also, a traffic stop will last longer if you're writing a ticket rather than just giving a verbal warning. Remember, as long as you're diligently working on the original reason for the stop you should be fine. However, once that reason for the stop is over, the driver must be allowed to leave.[70]

Finally, you may ask miscellaneous questions without additional reasonable suspicion, but those inquires must not measurably extend the stop.

Legal Standard

The duration of a traffic stop is determined by these factors:

- ☐ Once the stop is made, you must diligently pursue the reason for the traffic stop;
- ☐ Unrelated questioning must not prolong the stop unless additional reasonable suspicion or probable cause develops.[71]

Case Examples

Stop was not measurably extended by asking about drug possession:

Officer did not exceed the scope of the stop by inquiring if defendant had drugs or weapons in his possession even though the

[69] Berkemer v. McCarty, 468 U.S. 420 (1984).

[70] United States v. Salzano, 1998 U.S. App. LEXIS 17140 (10th Cir. Kan. 1998).

[71] In determining whether the extension of a stop is justified by reasonable suspicion of criminal activity, a court "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273 (2002).

reasonable suspicion leading to the stop concerned a robbery. Based on the driver's answers, reasonable suspicion existed for drug possession.[72]

A traffic stop can be prolonged even if it is completed expeditiously – basically, the "measurably extend" standard established by *Arizona v. Johnson*[73] has been replaced by *Rodriguez's* "prolong" standard[74]:

A traffic stop is unlawfully prolonged when an officer, without reasonable suspicion, diverts from the original mission of the traffic stop and adds time to the stop to pursue other crimes; in other words, to unlawfully prolong, the officer must (1) conduct an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion.[75]

25-second extension of traffic stop to ask about contraband held to be unreasonable prolongation of traffic stop:

"[Do you have] any counterfeit merchandise that you are taking to your relatives over there in Augusta? And what I mean by that is—any purses? Shoes? Shirts? Any counterfeit or bootleg CDs or DVDs or anything like that? Any illegal alcohol? Any marijuana? Any cocaine? Methamphetamine? Any heroin? Any ecstasy? Nothing like that? You don't have any dead bodies in your car?"

The "mission" of this traffic stop was to address a malfunctioning turn signal and crossing the fog line; these questions extended the stop by approximately twenty-five seconds, and unlawfully prolonged the stop.[76]

When determining if reasonable suspicion existed to extend a traffic stop, the court will consider the totality of the circumstances[77]:

Factors the court will consider include, but are not limited to, "having no proof of ownership of the vehicle, having no proof of authority to operate the vehicle, and inconsistent statements about

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[72] Medrano v. State, 914 P.2d 804 (Wyo.1996).

[73] Arizona v. Johnson, 555 U.S. 323, 325 (2009).

[74] Rodriguez v. United States, 575 U.S. 348, 350 (2015).

[75] United States v. Campbell, 26 F.4th 860, 884 (11th Cir. 2022).

[76] Id. at 885.

[77] United States v. Patterson, 607 F. Supp. 3d 754, 759 (E.D. Mich. 2022).

destination."[78] Other factors include apparent dishonesty in response to questions asked,[79] furtive movements,[80] "driving with a

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[78] United States v. Pruitt, 174 F.3d 1215, 1220 (11th Cir. 1999).

[79] United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998).

[80] As far back as 1933, the Supreme Court of Michigan recognized the investigatory value of recognizing, and investigating, furtive movements. In People v. Stein, 265 Mich. 610, 618–19 (1933), Chief Justice McDonald wrote, "Some persons are naturally more observant than others. They notice everything which occurs in their presence, and their minds, unconsciously perhaps, seek the reason therefor. A police officer, if not endowed with this faculty by nature, has been taught to acquire it by instruction and experience, and, when he sees anything unusual or suspicious occur, he at once seeks to satisfy himself of the reason therefor. The defendant Stein doubtless saw the police car as it came up to the side of the cab and recognized it, as some of the officers in it were in uniform. His action cannot be otherwise accounted for. While Sullivan was not permitted to state the 'impression' he had when he saw Stein remove something from his pocket and place it on the seat behind him, the movement attracted his attention, and to his observant mind there was a reason therefor, and that reason he at once ascribed to a desire on the part of Stein to conceal a revolver. There was no opportunity to investigate the cause of such action, or to secure a warrant to search the car. If a revolver was being concealed by Stein, he was violating the law. Immediate action was necessary. It was taken. Stein was arrested, and, after search, the revolver was found in the car where Sullivan had seen him place it.").

suspended license" and "reluctance to stop."[81]

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81 United States v. Ledbetter, 929 F.3d 338, 347–48 (6th Cir. 2019) ("Given the totality of the circumstances, the officers reasonably concluded that Ledbetter might be armed and presently dangerous. The Terry frisk was therefore proper. See Arizona v. Johnson, 555 U.S. 323, 331, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) (citing Pennsylvania v. Mimms, 434 U.S. 106, 112, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam)). First, the officers testified (and the district court found) that Ledbetter did not immediately stop after the officers activated their lights and siren. Instead, Ledbetter completed a turn, "slowed down in an apparent feint to pull over, sped up, and then finally pulled over for good" at the next intersection. The initiating officer testified that this behavior was "a huge red flag" because "[w]hen we've seen that before in the past, that's somebody who is trying to hide a gun, or do something to harm us." Second, as the officers approached the car, Ledbetter was facing the passenger seat with his hands toward the center console (rather than looking back at the officers or straight ahead with his hands on the wheel)—an action that the officer testified was consistent with reaching for or hiding a weapon. Third, the officers noticed that Ledbetter was sweating profusely, breathing heavily, and had glassy eyes and "uncontrollably" shaky hands. These facts, taken together, support a reasonable suspicion that Ledbetter might have been armed and dangerous. This court has held repeatedly that a driver's behavior—most notably, the failure to immediately pull over and any attempts to evade officers—can support a reasonable suspicion. See, e.g., Hoover v. Walsh, 682 F.3d 481, 495 (6th Cir. 2012); United States v. McCauley, 548 F.3d 440, 445 (6th Cir. 2008); Watkins v. City of Southfield, 221 F.3d 883, 889 (6th Cir. 2000). This court has also found reasonable suspicion where a defendant reaches his hand between the center console and the passenger seat as officers approach. See United States v. Bost, 606 F. App'x 821, 825 (6th Cir. 2015). Ledbetter's overly nervous behavior, although less probative and thus less relevant, see United States v. Noble, 762 F.3d 509, 522 (6th Cir. 2014), may also contribute to a reasonable suspicion, see Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Finally, it is relevant that the stop occurred at night in a high-crime area. See Hoover, 682 F.3d at 495 (citing Wardlow, 528 U.S. at 124, 120 S.Ct. 673). Though individually these facts might not support a reasonable suspicion, together they do.").

Community Caretaking Stops

You may make a traffic stop on a vehicle if you believe any of the occupants' safety or welfare is at risk. If you determine that the occupant does not need assistance, you must terminate the stop or transition the stop into a consensual encounter; otherwise, you would need to articulate reasonable suspicion (e.g. OWI) or other criminal involvement (e.g. domestic violence).

Stranded motorists fall under this rule. It is not illegal for a vehicle to break down, so you cannot demand ID or otherwise involuntarily detain stranded motorists unless you can articulate that they are involved in criminal activity.

Remember, these are essentially "implied" consensual encounters unless you have a reasonable suspicion of criminal activity. In other words, if someone needs help there is a reason to believe they would have impliedly consented to police assistance.[82] Once there is no more consent, the occupants must be left alone.

Legal Standard

A vehicle may be stopped if:

- ☐ You have a reason to believe one of the occupants needs police or medical assistance; and
- ☐ Once you determine that no further assistance is required, the occupant must be left alone or the encounter converted to a consensual one.

Case Examples

Community caretaking stop unreasonable based on passenger who appeared extremely drunk:

An officer observed a staggering suspect get into the passenger seat of a car. The officer wanted to make sure he was not in need of

[82] See Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, 2 Criminal Procedure § 3.7(e) (4th ed. Supp. 2022) ("And if the police find a person unconscious or disoriented and incoherent in a vehicle, it is reasonable for them to enter the vehicle for the purpose of giving aid to the person in distress and of finding information bearing upon the cause of his condition.").

medical attention. The court held the stop unreasonable, since he was not the driver and did not appear to be in medical distress.[83]

The Sixth Circuit has stressed the importance of less-intrusive measures, absent articulable safety concerns:

After a blizzard, a patrol officer observed a parked and running Chevy Malibu on the side of the road at 5:00am, and the driver "appeared to be passed out." Fearing overdose or intoxication, the officer decided to check on him. The officer stated he did not activate his overhead lights or knock on the window prior to opening the car door, based on his concern that the driver would "hit the gas" if startled. The driver awoke and began reaching into a cardboard box on the passenger seat, ignoring the officer's repeated requests to exit the vehicle. A struggle ensued, and the driver was eventually removed from the vehicle and handcuffed. The driver had fentanyl, methamphetamine, heroin, and cocaine on his person, and a semi-automatic pistol was in the cardboard box. The 6th Circuit recognized the importance of conducting community caretaking stops, but could not "overlook the myriad, less intrusive paths available" to the officer, and could not "understand why he did not take one of many steps before opening the door unannounced: say turning on the police car's emergency lights; shining a flashlight into [the driver's] face; calling out to [the driver]; or knocking on the window." The court was dismissive of the officer's concern for the vehicle pulling away suddenly. Chief Judge Sutton reasoned it was contradictory for the officer to justify his actions as an attempt to avoid startling the driver, when opening the car door without warning was the surest way to do so.[84] This is a tough one, and I can't say the court got it right or the officer should have done anything differently than what he did (especially now knowing what was in the cardboard box). Bottom line – if you are going to claim community caretaking and are unable to articulate reasonable suspicion, act in accordance with responding to an emergency, not as if you are conducting an investigation. In the absence of articulable exigency, use less-intrusive measures when possible. If not possible, tell me why! And be safe.

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[83] People v. Madrid, 168 Cal. App. 4th 1050 (Cal. App. 1st Dist. 2008).

[84] United States v. Morgan, 71 F.4th 540, 545–46 (6th Cir. 2023).

Reasonable Suspicion Stops

You may stop a vehicle if you have individualized reasonable suspicion that any occupant may be involved in criminal activity.[85] Probable cause is not required.

Legal Standard

A vehicle and its occupants may be detained if:

- ☐ You can articulate facts and circumstances that would lead a reasonable officer to believe that one of the occupants is, was, or is about to be involved in criminal activity;
- ☐ Once the stop is made, you must diligently pursue a means of investigation that will confirm or dispel your suspicions;
- ☐ If your suspicions are dispelled, the occupants must be immediately released or the stop converted into a consensual encounter.

Case Examples

Short stop at a known drug house:

Police were justified in stopping three defendants as they left a known drug house after a brief visit. Defendants drove up to the house, and remained for only four minutes. The house was a known drug house that had been under surveillance for two weeks. Information from a reliable informant indicated that the house was still being operated as a drug house, and that the supply of drugs had diminished and was about to be replenished. At the time of the stop, other officers were in the process of obtaining a search warrant for the house, and the detective watching the house testified "that on the basis of his twenty-three years' experience, the defendants' behavior was characteristic of a 'crack-house' buy: 'a short visit, in/out, back in the car and down the road.'" The Court concluded that this knowledge, coupled with the other information the police had regarding the house, formed the basis for reasonable suspicion.

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85 "[F]ewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house". People v. LoCicero, 453 Mich. 496, 502, 556 N.W.2d 498, 500 (1996); People v. Whalen, 390 Mich. 672, 682, 213 N.W.2d 116 (1973).

Reasonable suspicion determinations are to be based on "common sense":

In determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed "as understood and interpreted by law enforcement officers, not legal scholars".[86] Also, "[c]ommon sense and everyday life experiences predominate over uncompromising standards."[87]

Unusual behavior is suspicious:

An officer observed a man using the change machine at a carwash after midnight. When the officer drove into the parking lot, the man entered a vehicle driven by another and left abruptly, leaving several dollars' worth of quarters in the change tray of the money changer. The defendants' car returned a few moments later, as if to determine whether the officer had left. The officer conducted a traffic stop of the vehicle and then learned from another officer that the car wash owner had complained of theft from the changers.

The Court of Appeals determined the totality of the circumstances - including the time of night, the appearance that the money changer had not been used for the purchase of car wash services, the hurried retreat from the area when the officer arrived, the abandonment of quarters in the change tray, the subsequent drive past the car wash, and the officer's involvement the previous night in the arrest of other individuals suspected of defrauding vending machines in a similar manner - was sufficient to constitute reasonable suspicion.[88]

Contacted became a Terry stop when officer told driver, "Sit tight":

Suspect was subjected to a Terry stop at the time the police car parked behind the car in which he sat, where three officers shined their flashlights into the car, and one officer told the suspect to "sit tight."[89]

Eight years of experience and sufficient articulation supported reasonable suspicion that defendant's tint violated statute:

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[86] People v. Nelson, 443 Mich. 626, 632, 505 N.W.2d 266 (1993).

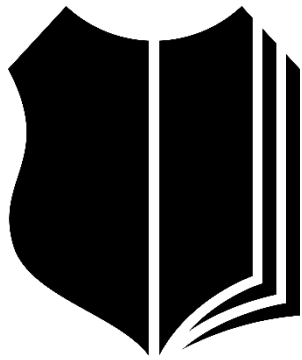
[87] People v. Nelson, 443 Mich. 626, 635-36 (1993).

[88] People v. Yeoman, 218 Mich.App. 406, 554 N.W.2d 577 (1996).

[89] U.S. v. Young, 707 F.3d 598 (6th Cir. 2012).

Based on officer's eight years of experience enforcing the window tint statute, reasonable suspicion existed when officer could not (1) see the front passenger's facial features or (2) determine the number of passengers in the back seat.[90]

90 United States v. Moody, 240 F. App'x 858, 859 (11th Cir. 2007).



Homes

Warrant Requirement

A person's home is the most protected area under the Fourth Amendment. Therefore, tread lightly whenever you make a warrantless search or seizure inside a home.

Whether a particular place is deemed a "home" will depend upon whether the place provides a person with a reasonable expectation of privacy, such that he would be justified in believing that he could retreat there and be secure against government intrusion. In simple terms, where a person sleeps is usually his home.

Legal Standard

When an unlawful search and seizure occurs, only persons with "standing" may take advantage of the exclusionary rule. Generally, standing exists based on the following factors:

- ☐ The defendant has a property interest in the thing seized or the place searched;
- ☐ He has a right to exclude others from the thing seized or the place searched;
- ☐ He exhibited a subjective expectation that the item would remain free from governmental intrusion; and
- ☐ He took normal precautions to maintain privacy in the item.

Case Examples

Hotel rooms have the same protections as homes:

The rule that a warrantless entry by police into a residence is presumptively unreasonable applies whether the entry is made to search for evidence or to seize a person, and applies no less when the dwelling entered is a hotel room.[91]

A lawfully erected tent is equivalent to a home:

"The thin walls of a tent are notice of its occupant's claim to privacy unless consent to enter be asked and given. One should be free to depart a campsite for the day's adventure without fear of his expectation of privacy being violated. Whether of short or longer-

[91] People v. Oliver, 417 Mich. 366, 338 N.W.2d 167 (1983); People v. Thurmond, No. 361302, 2023 WL 7093946 (Mich. Ct. App. Oct. 26, 2023).

term duration, one's occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms."[92]

Subject had no reasonable expectation of privacy in his campsite:

"Defendant had no authorization to camp within or otherwise occupy the public land. On at least four or five recent occasions he had been cited by officers for "illegal camping" and evicted from other campsites in the preserve. Thus, both the illegality, and defendant's awareness that he was illicitly occupying the premises without consent or permission, are undisputed. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[93]

Tent over vehicle at music festival was a home:

Suspect went to a music festival and pitched a 10'x30' tent-like structure over his SUV. Suspect was later arrested for dealing drugs. Police conducted warrantless search on vehicle. Court held it was an illegal search inside "home." The tent was concluded to be similar to a garage.[94]

Officer could not crouch under home's window and listen to conversation:

An officer, unable to see inside the home from the sidewalk, crossed a ten-foot strip of grass and crouched under a window. He then heard a telephone conversation about a narcotics transaction. The court suppressed the evidence, likening the officer's behavior to that of a "police state."[95]

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[92] People v. Hughston, 168 Cal. App. 4th 1062 (Cal. App. 1st Dist. 2008).

[93] People v. Nishi, 207 Cal. App. 4th 954 (Cal. App. 1st Dist. 2012).

[94] People v. Hughston, 168 Cal. App. 4th 1062 (Cal. App. 1st Dist. 2008).

[95] Lorenzana v. Superior Court, 9 Cal.3d 626 (Cal. Sup. Ct. 1973).

Hotel Rooms, Tents, RVs, and so Forth

Generally, hotel rooms receive full Fourth Amendment protections. You cannot enter a room without consent, recognized exception, or a warrant (C.R.E.W.).

Additionally, a hotel manager may not give authorization to search a room while the occupants are gone. Again, the room is treated like a temporary home. However, once the room has been vacated, police may search anything abandoned, like trash containers.

Finally, if a person is lawfully evicted by hotel management (police should not be involved in this decision), usually due to non-payment or consuming drugs inside the room, police may assist in evicting the occupants. Remember, you cannot instantly enter the room or search for evidence. Under normal circumstances, let management provide the occupants with a reasonable amount of time to pack up and leave.

The exception is if there is legitimate exigency to immediately remove the occupants, such as damage to the premises or a violent act between the remaining occupants. Either way, tread lightly here and if you're unsure, ask a supervisor.

Legal Standard

Hotel rooms, tents, overnight guests, and so forth are protected by the Fourth Amendment when:

- ☐ Hotel rooms are considered a home for the person who rented the room and invited overnight guests;
- ☐ Tents are considered a home when lawfully erected, or if unlawfully erected, in an area where a person would have a reasonable expectation of privacy, such as an area frequented by transients;
- ☐ Recreational vehicles are considered homes whenever they are hooked up to a utility, setup in a camping configuration, or not readily mobile (e.g. side skirts, no tires, etc.).

Case Examples

Police may assist in evicting occupants:

"A defendant, justifiably evicted from his hotel room, has no reasonable expectation of privacy in the room under the Fourth Amendment and police may justifiably enter the room to assist the hotel manager in expelling the individuals in an orderly fashion."[96]

Hotel manager may not authorize search of occupant's room:

Defendant was a suspect in an armed robbery. After police officers obtained information about where the defendant was staying, they went to the hotel and received permission from a hotel clerk to enter the defendant's room, where they seized evidence without a warrant. The search was held to be a violation of the Fourth Amendment.[97]

Blocking front door with foot considered a warrantless entry:

It has also been found that police blocking the door of a home with a foot constituted entry. Lack of a warrant, probable cause and exigent circumstances or consent rendered any seizure unlawful.[98]

Guest did not inform hotel he was extending room, therefore abandoned:

The defendant rented a motel room for a single night, paid only for one night, and never informed the desk that he wished to stay beyond that time. After check-out time the following day, the manager entered the room, saw a weapon, and summoned the police. In upholding the police entry of that room, the court reasoned: "[W]hen the term of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel then has the right to enter the room and may consent to a search of the room and the seizure of the items there found."[99]

No warrantless entry into motel room to make arrest absent exigency:

No exigency existed to justify defendant's arrest in his motel room without a warrant where, while defendant had committed the serious crimes of robbery and assault and defendant was believed to

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[96] United States v. Molsbarger, 551 F.3d 809 (8th Cir. N.D. 2009).

[97] Stoner v. California, 376 U.S. 483 (1964).

[98] State v. Larson, 266 Wis. 2d 236 (Ct. App. 2003).

[99] United States v. Parizo, 514 F.2d 52 (2d Cir.1975).

be armed with scissors, one arresting officer indicated there was no reason to believe that suspect was even in the motel room at the time of arrest, nothing indicated the suspect would have escaped if not swiftly apprehended, there was nothing to support destruction of evidence, nor was there a basis to believe the safety of officers or anyone else was in jeopardy, and the entry into the motel room was made at 2200 hours.[100]

No abandonment where hotel did not strictly enforce checkout time:

Where the hotel did not strictly enforce a noon checkout and the defendant indicated that he would stay until 12:30, abandonment occurred only after the later time and therefore the police search of the room was held to be unlawful.[101]

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[100] People v. Oliver, 417 Mich. 366, 338 N.W.2d 167 (1983).

[101] United States v. Dorais, 241 F.3d 1124 (9th Cir. 2001).

Open Fields

Open fields are those areas that don't receive any Fourth Amendment protections. Typically, these areas are literally "open fields," and there are no structures on them (like sheds). Sometimes police will commit a technical trespass in order to reach open fields and view evidence (e.g. marijuana grows). The Supreme Court has held that there is no constitutional violation because the open field itself is not a "house" or "effect" or an area where a person has a reasonable expectation of privacy.[102]

If you want to inspect something that is on private property, you may do so without a warrant as long as the property is not within the curtilage of a home. Also, just because there is a physical structure on the open field doesn't mean it's curtilage (e.g. tool shed 300 feet away from home). You cannot enter any structure unless it is abandoned, even on open fields.

Legal Standard

An area is considered an "open field" not protected by the Fourth Amendment when:

- ☐ The area is not enclosed by a building or other structure (unless the building is abandoned); and
- ☐ The area is not curtilage (discussed next).

Case Examples

The Fourth Amendment does not protect open fields:

"[T]he special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[103]

In 1980, without a warrant DEA Agents crossed a perimeter fence, several barbed-wire fences, and a wooden fence to look into a barn, whereupon they observed a meth lab. The barn was approximately 60 yards from the nearest residence, and separated from that residence by a fence. The Supreme Court determined that the

[102] Oliver v. United States, 466 U.S. 170 (1984).

[103] Hester v. United States, 44 S. Ct. 445 (1924).

evidence was admissible, as the agents did not physically enter the barn and, as non-residential structures do not have curtilage, the agents were standing in "open fields."[104]

The Fourth Amendment protects "persons, [structures and curtilage], papers, and effects":[105]

In keeping with *Dunn*, an officer can stand outside and look into a non-residential structure without offending the Fourth Amendment, but the Supreme Court "did not hold that the police could enter the barn itself."[106] Where a search warrant authorized a search of defendant's home, evidence was suppressed after an animal control officer proceeded to two barns outside the curtilage of the home and recovered 23 dogs, several cows, and a raccoon, all kept in deplorable conditions. The barn was locked and had no windows, and no argument was made that exigency existed to preserve the lives of the animals heard inside.[107]

Seizure of victim wife's skull and bones from manure pile occurred in an "open field":

While spreading manure on farmland, a citizen located a human skull and other bones. The citizen contacted the detective investigating defendant's wife disappearance. The detective then entered onto defendant's property without a warrant and viewed the bones. The Court of Appeals of Michigan determined the detective's actions were clearly the permissible investigation of an "open field," rather than an illegal invasion of defendant's curtilage. The skull, which had been thrown on the ground after it was discovered in a manure spreader, was located in a field approximately one-quarter mile from road, the field was fenced on only two sides, and was not obstructed by gates or signs.[108]

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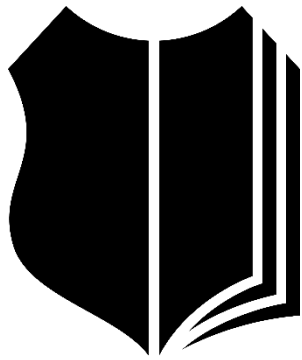
104 United States v. Dunn, 480 U.S. 294, 295 (1987).

105 Hester v. United States, 265 U.S. 57, 59 (1924); People v. Pitman, 211 Ill.2d 502, 518-519, 286 Ill.Dec. 36, 813 N.E.2d 93 (2004) ("The fourth amendment protects structures other than dwellings, and those structures need not be within the curtilage of the home.").

106 Siebert v. Severino, 256 F.3d 648, 654 (C.A.7, 2001), citing United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

107 People v. DeRousse, No. 358358, 2022 WL 1438628 (Mich. Ct. App. May 5, 2022).

108 People v. Rotar, 137 Mich. App. 540, 357 N.W.2d 885 (1984).



Businesses & Schools

Warrantless Arrest Inside Business

Generally, you may enter "public areas" of a business to make an arrest. However, you don't have an automatic right, even when you possess an arrest warrant, to enter business offices and other private areas where there is a reasonable and legitimate expectation of privacy.[109] These areas are typically private offices to which the public does not have access.

Legal Standard

A warrantless arrest inside a business is lawful when:

- ☐ You make the arrest in a public area of the business; or
- ☐ If the suspect is in a private area where he has a reasonable expectation of privacy, consent to enter is given by someone with apparent authority and the suspect does not object before entry.

Case Examples

Entry into closed portion of business unlawful:

Officers entered a casino bingo hall that was presently closed to the public. Officers saw evidence of illegal gambling. Since bingo hall was not presently accessible to the public, the court suppressed the evidence.[110]

Forced entry into private area of dental office unlawful:

Police officers, who were investigating a claim that the dentist had sexually assaulted his receptionist, could not make an unannounced forcible entry into a private area of the business without exigency.[111]

Entry into public areas does not require a warrant:

A warrant was not necessary to enter a reception area through an unlocked door during business hours, as there was "no reasonable expectation of privacy there."[112]

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[109] Steagald v. United States, 451 U.S. 204 (1981).

[110] State v. Foreman, 662 N.E.2d 929 (Ind. 1996).

[111] People v. Polito, 42 Ill.App.3d 372, 355 N.E.2d 725 (1976).

[112] United States v. Little, 753 F.2d 1420 (9th Cir.1984).

Customer Business Records

Generally, a customer has no reasonable expectation of privacy in information kept by a third party.[113,114] Therefore, you may request access to business records. However, if access is denied, then a court order, subpoena, or search warrant is required. You cannot demand that a business hand over its records.

Legal Standard

Police may request or subpoena customer records without a warrant if:

- ☐ The company consents to provide the records; or
- ☐ You receive a subpoena for the records; and
- ☐ If the records are digital tracking data, such as cell phone location records, which would violate the suspect's reasonable expectation of privacy in his movements or activities, a search warrant is required.

Case Examples

Customer has no reasonable expectation of privacy in banking records:

"The Fourth Amendment protects against intrusions into an individual's zone of privacy. In general, a depositor has no reasonable expectation of privacy in bank records, such as checks, deposit slips, and financial statements maintained by the bank. Where an individual's Fourth Amendment rights are not implicated, obtaining the documents does not violate his or her rights, even if the documents lead to indictment."[115]

Tracking suspect through cell-site records requires a warrant or exigency:

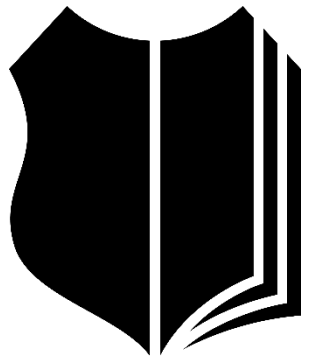
[113] Smith v. Maryland, 442 U.S. 735 (1979).

[114] United States v. Miller, 425 U.S. 435 (1976).

[115] Marsoner v. United States (In re Grand Jury Proceedings), 40 F.3d 959 (9th Cir. Ariz. 1994).

The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.[116]

[116] Carpenter v. U.S., 138 U.S. 2206 (2018) (use of cell site location information emanating from a cell phone in order to track defendant in real time was a search within the purview of the Fourth Amendment for which probable cause was required; as no recognized exception existed, nor was a warrant based on probable cause issued authorizing the use of defendant's real time cell site location information to track him, the evidence obtained as a result of that search was subject to suppression).



Personal Property

Searching Containers

If you develop probable cause that a container (package, luggage, etc.) contains evidence or contraband, you may seize it in order to apply for a search warrant.[117] Remember, the length of the detention must be reasonable and the more "intimate" the container, the more courts will scrutinize the detention.

For example, detaining a woman's purse is more intimate than seizing an undelivered UPS parcel. A nine-hour detention on the purse may be struck down as unreasonable, where a two-day detention on the parcel may not. Either way, diligently seek the warrant unless you're relying on a recognized exception to the warrant requirement.

Legal Standard

A container seized with probable cause that it contains contraband or evidence may not be searched without a warrant unless:

- ☐ Someone with apparent authority gave you consent to search; or
- ☐ The container was seized from a vehicle; or
- ☐ The container's contents were obvious under the single purpose container doctrine; or
- ☐ The container was in the suspect's possession and searched incident to arrest; or
- ☐ You conducted a legitimate inventory; or
- ☐ The container was searched under the community caretaking doctrine; or
- ☐ You had exigent circumstances.

Remember, container plus probable cause does not equal warrantless search. You need C.R.E.W — consent, recognized exception, or a warrant (C.R.E.W. is explained in the first section of this book).

[117] United States v. Hernandez, 314 F.3d 430 (9th Cir. Cal. 2002).

Single Purpose Container Doctrine

The single purpose container doctrine is an extension of the plain view doctrine. Here, an officer sees a container and knows instantly what's inside—a gun case, or a balloon containing heroin, or kilos of packaged cocaine. If officers see these items in plain view, and have lawful access, they can seize them as evidence and search the container without a warrant because there is no expectation of privacy in the container.[118]

Legal Standard

A container may be seized and searched without a warrant if:

- ☐ You were lawfully present when you observed the container;
- ☐ Even though the container's contents were not visible, based on the shape, weight, size, material, and so forth, the contents were obvious (i.e. drugs);
- ☐ These observations gave you probable cause; and
- ☐ You had lawful access to the container when it was seized.

Case Examples

Convicted felon had no privacy in a container labeled "gun case":

Defendant had no reasonable expectation of privacy in the contents of a case located in his residence and labeled as "gun case." Thus, police officers' warrantless search of the case after officers' valid entry into the residence did not violate the Fourth Amendment, where officers knew that the defendant was a convicted felon prohibited from possessing guns.[119]

A "drug bindle" is a single-purpose container:

Due to it being immediately apparent to experienced officers that a paper bindle viewed in the defendant's identification folder contained contraband, defendant did not have a reasonable

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[118] Arkansas v. Sanders, 442 U.S. 753, 766 (1979) ("[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.").

[119] United States v. Meada, 408 F.3d 14 (1st Cir. Mass. 2005).

expectation of privacy preventing the opening of the bindle or the field testing of it.[120]

A "foil packet" is not a single-purpose container, absent some other supporting facts:

Defendant was involved in a collision and was transported, unconscious, to the hospital. While inventorying the defendant's property, several small foil packets were located by a nurse. The nurse believed them to contain narcotics, and showed them to a police officer, who concurred. The officer then opened them without a warrant, confirming the packets contained heroin. The Court of Appeals of Michigan concluded, "A foil packet is simply not a container used for the singular purpose of transporting narcotics. Rather, tin foil is a common material used for packaging many legitimate items. Thus, the contents of a packet wrapped in foil are only arguably realized when the container plus another fact is present, e.g., a suspicious locale, a defendant's furtive gestures, an officer's experience in narcotics enforcement. A foil packet alone does not announce its contents."[121]

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120 State v. Courcy, 48 Wash. App. 326, 739 P.2d 98 (1987); see also Arkansas v. Sanders, 442 U.S. 753, 764–765 (1979). While it is inarguable "a suitcase or a paper bag may contain an almost infinite variety of items, a balloon of this kind might be used only to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin itself."

121 People v. Bickel, No. 210688, 1998 WL 1990380, at *2 (Mich. Ct. App. Sept. 11, 1998).

Searching Abandoned or Lost Property

A person has no reasonable expectation of privacy in abandoned, lost, or stolen property. The courts have broadly defined abandonment for search and seizure purposes. Abandonment occurs whenever a person leaves an item where the general public (or police) would feel free to access it. It can also occur whenever a person disowns property.

When it comes to abandonment, traditional property rights don't matter (i.e. a person could legally own an item, but still "abandon" it).[122] If abandonment occurs after an illegal detention, the evidence would be tainted and inadmissible.[123]

Additionally, if the defendant stole the item, like a purse or vehicle, he would not have a reasonable expectation of privacy in that item (but may have a privacy interest in his own containers).

Legal Standard

A container is considered abandoned when:

- ☐ Based on the totality of the circumstances, a reasonable person would believe that it was intentionally abandoned; or
- ☐ Based on the totality of the circumstances, it appears that the container was inadvertently abandoned, but the container's owner would not have a reasonable expectation of privacy that a member of the general public, including a police officer, would not search it; and
- ☐ If the container was inadvertently abandoned (e.g. accidentally left at the crime scene), your scope of search was similar to what a member of the public could have done (e.g. no forensic analysis).

Case Examples

No privacy in stolen property:

"The Fourth Amendment does not protect a defendant from a warrantless search of property that he stole, because regardless of

[122] Stoner v. California, 376 U.S. 483 (1964).

[123] People v. Verin, 220 Cal. App. 3d 551 (Cal. App. 1st Dist. 1990).

whether he expects to maintain privacy in the contents of the stolen property, such an expectation is not one that 'society is prepared to accept as reasonable.'"[124]

Dropping paper bag and running equals abandonment:

Police got a tip that the defendant was selling drugs and patrolled the area. They saw defendant leaning into a car, so the officers pulled over and walked in a "semi-quick" pace towards the defendant. In response, the defendant dropped a bag full of drugs and ran. The bag was abandoned and could be searched without a warrant.[125]

Search of burglar's cell phone six days after crime was committed was reasonable:

The suspect forgot his cell phone at the crime scene. Police later searched it without a warrant, finding evidence. The court held the phone was abandoned because the "idea that a burglar may leave his cell phone at the scene of his crime, do nothing to recover the phone for six days, cancel cellular service to the phone, and then expect that law enforcement officers would not attempt to access the contents of the phone to determine who committed the burglary, is not an idea that society will accept as reasonable."[126]

Suspect threw pill bottle containing crack cocaine on the ground after ignoring officers' order to "Stop, police!"

Defendant ignored police but threw a pill bottle containing rocks of cocaine on the ground. The court declared the evidence admissible, holding, "Only when the police begin an actual physical search of a suspect does abandonment become involuntary and tainted by an illegal search and seizure."[127]

Abandonment is clearer when it occurs before the suspect was seized by police:

When the officer entered the bar, defendant dropped a crumpled cigarette package on the floor, under the table, and turned away. The officer retrieved the package, which contained illegal drugs, and arrested the defendant.[128]

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[124] United States v. Caymen, 404 F.3d 1196 (9th Cir. Alaska 2005).

[125] In re Kemonte, 223 Cal.App.3d 1507 (1990).

[126] State v. Brown, Opinion No. 27814 (S.C. 2018).

[127] Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990).

[128] Cooper v. State, 806 P.2d 1136 (1991).

Reclaiming ownership revokes abandonment:

Although defendant initially vacillated on whether he owned the bag or not, by the time the search was conducted he had claimed ownership, which police knew, and therefore had not abandoned the bag.[129]

[129] U.S. v. Grant, 920 F.2d 376 (6th Cir. 1990).

Technology Searches

Sensory Enhancements

Generally, you may use sensory enhancements if they are in general public use (like binoculars and flashlights). Remember, you must be reasonable, especially when you use sensory enhancements to observe inside protected areas, like a home. If not, your actions may be classified as a warrantless search requiring exigent circumstances.

Legal Standard

If sensory enhancements are used to view public areas, then:

- ☐ There are essentially no restrictions unless the enhancement captures information where a person would have a reasonable expectation of privacy (e.g. microphone that can detect two people whispering in a park).

If sensory enhancements are used to observe inside a home, then:

- ☐ The technology used must be in general public use; and
- ☐ Only enhance that which was seen with the naked eye or heard with the naked ear (e.g. binoculars used to confirm that motorcycle in garage is similar to stolen motorcycle).

Case Examples

Use of a thermal imaging device against home unreasonable search:

"We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search - at least where (as here) the technology in question is not in general public use."[130]

[130] Kyllo v. U.S., 533 U.S. 27 (2001).

Flashlights

Generally, you may use flashlights to enhance your vision. There are two good reasons for this: First, something visible during the day should not get additional protections simply because it was concealed by darkness. Second, flashlights are in "general public use" and the public expects police officers to use them, wherever a police officer has a lawful right to be.

Still, flashlights can violate a person's reasonable expectation of privacy if the flashlight is used in an unreasonable manner. Take, for example, a police officer who is conducting a knock-and-talk. It would be unlawful to shine your high-powered LED flashlight through closed blinds in order to illuminate the inside of the home. On the other hand, if the blinds were open, then a person would lose his reasonable expectation of privacy and enhancing your view with a flashlight would be lawful.

Legal Standard

If a flashlight is used to view public areas, then:

- ☐ There are no restrictions.

If a flashlight is used to observe inside a home, then:

- ☐ You may use the flashlight to observe that which would have been observable in broad daylight. In other words, if you use a flashlight to observe something inside the home which would not have been visible in full daylight, then it likely violated an occupant's reasonable expectation of privacy; but
- ☐ This restriction does not apply when conducting an investigation with exigency (burglary, shots fired, etc.).

Case Examples

Typical use of flashlight does not violate Fourth Amendment:

An officer's use of a flashlight to illuminate the interior of a driver's car "trenched upon no right secured... by [the] Fourth Amendment."[131]

[131] Texas v. Brown, 460 U.S. 730 (1983.

The Supreme Court of Michigan has repeatedly supported the idea that a flashlight does not transform "plain view" observations into a search requiring justification:

The "plain view rule does not slink away at sunset to emerge again at break of day", and this rule, which permits the seizure of objects within the plain view of an officer who is lawfully in a place where he has a right to be, can be applied even if the officer's "view" was obtained solely with the aid of an officer's flashlight.[132]

Officer who shined flashlight into vehicle and observed deer foot jutting out from under car's seat did not conduct a search under the Fourth Amendment or the Michigan Constitution:

Officers were responding to a report that occupants of a car were spotlighting deer in a field and that a shot had been heard. Officers located the vehicle, conducted a traffic stop, and ordered the occupants out of the car. One officer shone a flashlight into the interior and saw the leg of a deer protruding out from under the front seat. The Supreme Court of Michigan stated, 'Trooper Righter's first observation of the deer leg protruding from underneath the front seat of defendants' car was not a search as that term normally is defined in search and seizure cases."[133]

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132 People v. Whalen, 390 Mich. 672, 213 N.W.2d 116 (1973).

133 People v. Kuntze, 371 Mich. 419, 425 (1963).

Binoculars

You may use binoculars to enhance your vision to view items or people if they are in a public place, such as parks, sidewalks or streets.[134] You may not, however, use binoculars to view items or people inside private areas that would otherwise be completely indistinguishable by the naked eye. For example, if you were investigating a jewelry heist and you saw a "gold glint" coming through the suspect's open apartment window, you may lawfully use binoculars to confirm what you saw.[135]

On the other hand, it would be unlawful to use binoculars to peer into a suspect's apartment window from 200-300 yards away to determine whether he was viewing child pornography. In this case, there was no way an officer could see any incriminating evidence with the naked eye and therefore the suspect does not lose his reasonable expectation of privacy.[136]

Legal Standard

If binoculars are used to view public areas, then:

- ☐ There are no restrictions.

If binoculars are used to observe inside a home, then:

- ☐ You may use binoculars to observe that which would have been observable with the naked eye. You only need to be able to see the item, not necessarily know what it is. However, if the item is completely hidden from view, using binoculars to view the item likely violates an occupant's reasonable expectation of privacy; but
- ☐ This restriction does not apply when conducting an investigation with exigency (hot pursuit, fresh pursuit, surround and call-out, etc.).

Case Examples

Use of binoculars from open field not a Fourth Amendment search:

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[134] United States v. Shepard, 1995 U.S. App. LEXIS 23118 (9th Cir. Ariz. 1995).

[135] Cooper v. Superior Court, 118 Cal. App. 3d 499 (Cal. App. 1st Dist. 1981).

[136] People v. Arno, 90 Cal. App. 3d 505 (Cal. App. 2d Dist. 1979).

"At the trial, Special Investigator Griffith testified that through binoculars, he observed the appellant, a known liquor violator, placing two large cardboard boxes (each of which contained six gallons of untaxed whiskey), into a 1961 Buick. The observations were made from a field belonging to another, about 50 yards from the appellant's house. This did not constitute an illegal search."[137]

Use of high-power telescope to see inside a hotel room was an unlawful search:

Police looked into a hotel room through the un-curtained window by means of a powerful telescope from a hilltop a quarter of a mile from the hotel, which allowed them to see a gambling sheet. There were no buildings or other locations closer to the hotel. The defendant had a reasonable expectation that no one could see into his room under these circumstances: "[I]t is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search."[138]

Use of binoculars to see something in suspect's hand was not a search:

The police officer became suspicious that a drug transaction was underway. He parked his vehicle, walked back to the alleyway and, with the aid of binoculars, saw defendant display metal slugs to his companion in his upturned hand, then entered a casino abutting the alleyway. The officer followed him, and Barr was arrested for possession of a cheating device.[139]

Climbing on fellow officer's shoulders to see into a backyard was a search:

An officer on a neighboring property climbed three-quarters of the way up a fence, braced himself on a fellow officer's shoulder, and then, using a 60-power telescope, was able to see marijuana plants in the defendant's back yard. This was determined to be a search.[140]

Use of binoculars to confirm stolen car in open garage did not constitute a search:

A police officer, who lived across the street from the defendant, observed, through his use of binoculars, a stolen car in defendant's

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[137] United States v. Grimes, 426 F.2d 706 (5th Cir. Ga. 1970).

[138] United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976).

[139] State v. Barr, 98 Nev. 428, 651 P.2d 649 (1982).

[140] State v. Kender, 60 Haw. 301, 588 P.2d 447 (1978).

garage. When the defendant opened his garage door, the defendant did not have a reasonable expectation of privacy with respect to the vehicle in his open garage, and the use of binoculars by the officer did not constitute a search.[141]

141 People v. Clark, 133 Mich. App. 619, 350 N.W.2d 754 (1983).

Miscellaneous Searches & Seizures

Cause-of-Injury Searches

You're allowed to conduct a limited "medical search" of an unconscious person or someone in serious medical distress in order to determine the cause of injury (if unknown) and to ascertain his identification to help render aid.

Your search should be objectively reasonable under the circumstances. An example of a lawful search would be when a victim was found unconscious and there were no clear signs of why. It would be lawful to look for a medical alert bracelet, identification, medicines, or even illegal drugs on which he may have overdosed, in order to provide that information to medical. Any contraband or evidence found in plain view could be admitted into evidence.

Legal Standard

A limited search of a suspect's backpack or purse may occur if:

- ☐ You have a reason to believe the person is in medical distress;
- ☐ Finding medications, medical-alert bracelet, or a reason for the overdose will assist in the medical response;
- ☐ A search of belongings is limited in scope and terminates once items are found or are not present.

Case Examples

Search of purse while driver getting x-rays unreasonable:

A driver was transported to the hospital after an accident. The officer took her purse to the hospital and looked inside for ID in order to finish his report. He found drug paraphernalia. The court found the search was not needed and suppressed the evidence.[142]

Search of locked briefcase was reasonable:

Driver was found passed out, foaming at the mouth. Officers opened two locked briefcases to look for ID or medicines. Instead, they found money from a recent bank robbery. Court upheld the search as reasonable.[143]

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[142] People v. Wright, 804 P.2d 866 (Colo.1991).

[143] United States v. Dunavan, 485 F.2d 201 (6th Cir.1973).

Search Warrants

Overview

There are four core requirements of a search warrant. If any of these elements are later found to be missing, the evidence discovered may be suppressed.

Legal Standard

The four requirements of a search warrant are:

- ☐ You must establish probable cause within the affidavit and cannot add information later;
- ☐ The warrant must be supported by oath or affirmation;
- ☐ You must particularly describe the people or places to be searched; and
- ☐ You must particularly describe the things to be seized.

Case Examples

Warrantless searches of home are presumptively unreasonable:

No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.[144]

Courts grant search warrants great deference:

An officer obtained a warrant to search a suspected gang member's house for firearms. The trial court later found that the warrant was defective. However, the Supreme Court held that, because the officer acted in good faith and was not "plainly incompetent", the exclusionary rule did not apply.[145]

[144] Groh v. Ramirez, 540 U.S. 551 (2004).

[145] Messerschmidt v. Millender, 132 S. Ct. 570 (2011).

Why Get a Warrant, *even if* You Don't Need to?

A search warrant is given significant deferential treatment by the courts. In other words, if you take the time to obtain pre-authorization from a neutral and detached magistrate before conducting a search or seizure, the defendant will have a hard time proving that the warrant was invalid.

The defendant would usually have to prove that the officer was plainly incompetent, knowingly violated the law, or reckless with his facts,[146] and that an objectively reasonable officer would know that the warrant did not establish the necessary probable cause.

Legal Standard

For a search warrant to be invalid, the defendant would need to prove:

- ☐ The magistrate was not neutral or detached; or
- ☐ The search warrant did not particularly describe the place to be searched or the things to be seized; or
- ☐ The officer was plainly incompetent or reckless with his facts; and
- ☐ An objectively reasonable officer would know that the warrant did not establish the necessary probable cause.

Case Examples

Courts grant search warrants great deference:

An officer got a warrant to search a suspected gang member's house for firearms. The trial court later found that the warrant was defective. However, the Supreme Court held that, because the officer acted in good faith and was not "plainly incompetent," the exclusionary rule did not apply.[147]

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[146] Tlapanco v. Elges, 969 F.3d 638, 649 (6th Cir. 2020).

[147] Messerschmidt v. Millender, 132 S. Ct. 570 (2011).

Particularity Requirement

All search warrants must describe, with particularity, the places to be searched and the things or people to be seized. This ensures that officers executing the warrant know where to go, where to look, and what to seize. Otherwise, the warrant becomes more like a "general search warrant," which is forbidden by the Fourth Amendment.

Legal Standard

All search warrants must:

- ☐ Particularly describe the people or places to be searched; and
- ☐ Particularly describe the things to be seized.

Case Examples

Warrant must be described with particularity:

The uniformly-applied rule is that a search conducted pursuant to a warrant which fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. That rule is in keeping with the well-established principle that, except in certain carefully-defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.[148]

Facially invalid warrant will not be saved by Good Faith reliance:

The officer "contends that the search in this case was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity." But "a warrant may be so facially deficient (i.e. in failing to particularize the place to be searched or the things to be seized) that the executing officers cannot reasonably presume it to be valid. This is such a case."[149]

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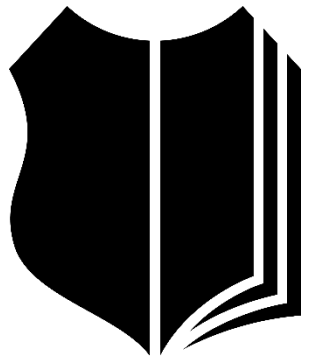
[148] Groh v. Ramirez, 540 U.S. 551 (2004).

[149] Id. (where affidavit described items sought with particularity but warrant did not, the warrant was invalid and officers were denied qualified immunity; because of the particularity requirement stated in the text of the Fourth Amendment, "no reasonable officer could believe that a warrant that did not comply with that requirement was valid").



Use of Force

Non-Deadly Force

Whenever police use non-deadly force, it must be objectively reasonable. The key is to articulate every material fact in the report. Police should not add important details later; this undermines credibility.

Legal Standard

Factors to consider when determining whether non-deadly force was reasonable include:[150]

- ☐ How serious was the offense you suspected had been committed?
- ☐ Did the suspect pose a physical threat to you or some other person present at the scene?
- ☐ Was the suspect actively resisting or attempting to evade arrest?
- ☐ Reasonable force will be judged by the totality of the circumstances.
- ☐ Courts must step into the shoes of the officer, and not use 20/20 hindsight.

Case Examples

Trooper liable after using pepper spray on handcuffed suspect:

When trooper "maced" the motorist, she was handcuffed and standing beside his cruiser. He admitted he had no fear for his own safety at that time. There was no indication that the motorist actively resisted or attempted to flee, or that she was physically aggressive. Thus, there was no stressful and dangerous condition forcing the trooper to make a split-second judgment on what to do.[151]

In Michigan, a defendant may be entitled to resist an illegal arrest:

While one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest, the basis for such

[150] Graham v. Connor, 490 U.S. 386 (1989).

[151] Martinez v. New Mexico Dept. of Public Safety, 47 Fed. Appx. 513 (10th Cir. 2002).

preventive or resistive action is the illegality of an officer's action, to which defendant immediately reacts.[152] However, this right to resist an illegal arrest does not extend to third-party intervenors, such as a citizen's arrest.[153]

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[152] People v. Krum, 374 Mich. 356, 361, 132 N.W.2d 69, 72 (1965).

[153] People v. Wess, 235 Mich. App. 241, 244–45, 597 N.W.2d 215, 216–17 (1999) (The Court of Appeals of Michigan recognized that courts and legislatures in other jurisdictions "have found the right to resist an unlawful arrest to be outmoded in our contemporary society." Listing examples, the court looked to State v. Valentine, 132 Wash.2d 1, 935 P.2d 1294 (1997), in which the Washington Supreme Court examined the common-law right to resist unlawful arrest – ultimately finding that the policy concerns that once supported the right were antiquated and outmoded, as they arose at a time when mere imprisonment often resulted in death or serious physical harm. In contrast, modern judicial processes have been reformed to the point that arrestees enjoy the right to reasonable bail, the right to counsel at all critical stages of the trial, and the right to a prompt judicial determination of probable cause. State v. Thomas, 262 N.W.2d 607, 611 (Iowa, 1978). According to the Washington Supreme Court in Valentine, since 1966 the number of states permitting resistance to an unlawful arrest has declined from forty-five to twenty. In those states where the common-law rule has been overturned by judicial decision rather than statute, courts have regularly voiced concern that allowing this kind of "outmoded common law rule ... fosters unnecessary violence in the name of an obsolete self-help concept[.]" As recently as 2020, the Supreme Court of Georgia reaffirmed the common law right to use proportionate force to resist an unlawful arrest in Glenn v. State, 310 Ga. 11, 12 (Ga. 2020).

Use of Force to Prevent Escape

You may use deadly force in order to protect yourself or others from imminent or immediate serious bodily harm or death.[154] Additionally, you may use deadly force to "arrest" a violent fleeing felon who would pose a significant risk to others if not captured immediately. Finally, you must give a warning, if feasible, before using deadly force.[155]

Legal Standard

Deadly force to prevent an escape may be reasonable, if:

- ☐ The suspect poses an imminent threat of serious bodily harm or death; or
- ☐ You have probable cause that the suspect has committed a violent felony; and
- ☐ If the suspect escapes, he will pose an imminent threat of serious bodily harm or death to others; and
- ☐ A warning, if feasible, is given before deadly force is used.

Case Examples

It is better that a non-violent felony suspect get away than be shot dead:

"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It

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154 People v. Collins, No. 348591, 2021 WL 3438826, at *3 (Mich. Ct. App. Aug. 5, 2021), appeal denied, 969 N.W.2d 37 (Mich. 2022) (MCL 780.971 does not define "deadly force" or "nondeadly force." The Court of Appeals of Michigan has defined deadly force as "an act for which 'the natural, probable, and foreseeable consequence ... is death.' " People v Anderson, 322 Mich App 622, 629; 912 NW2d 607 (2018), quoting People v Pace, 102 Mich App 522, 534; 302 NW2d 216 (1980). Black's Law Dictionary defines nondeadly force as "[f]orce that is neither intended nor likely to cause death or serious bodily harm; force intended to cause only minor bodily harm." Black's Law Dictionary (11th ed.)).

155 Guider v. Smith, 157 Mich. App. 92, 107, 403 N.W.2d 505, 513 (1987), aff'd, 431 Mich. 559, 431 N.W.2d 810 (1988).

is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead."[156]

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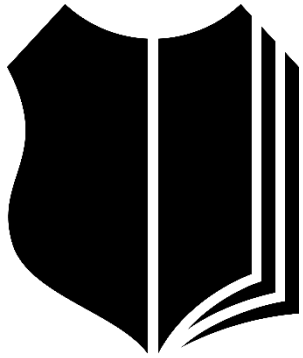
[156] Tennessee v. Garner, 471 U.S. 1 (1985). Michigan follows the common-law rule concerning the use of deadly force which permits the use of deadly force in pursuit of a fleeing felon. Werner v. Hartfelder, 113 Mich.App. 747, 753, 318 N.W.2d 825 (1982). The reasoning of Tennessee v. Garner must be taken into consideration when analyzing the constitutionality of state law. Guider v. Smith, 157 Mich. App. 92, 108, 403 N.W.2d 505, 513 (1987), aff'd, 431 Mich. 559, 431 N.W.2d 810 (1988).



Interview and Interrogation

When Miranda is Required

Two requirements must be met before you are required to tell a suspect his Miranda rights. The suspect must be "in-custody" and "interrogation" must be imminent.[157] Additionally, these requirements must be present at the same time. Otherwise, *Miranda* is not controlling.

Remember that you do not need to formally tell a suspect they are under arrest for him to be in-custody. Instead, courts look at whether an objectively reasonable person would have believed he was under arrest based on the totality of the circumstances, even if you never intended to arrest him (referred to as a "de facto arrest").

Miranda also requires that you interrogate the suspect. In other words, when you're seeking "testimony" from the suspect. Testimony means a statement which tends to prove, or disprove, the crime in question. Booking-type questions are not normally considered interrogation because they seek inmate information and not particular information related to the arrestee's crime.

Note: a suspect cannot pre-invoke Miranda. For example, if you arrest a suspect and he says, "I want my lawyer!", but you haven't even started to interrogate him, then it's not a valid Miranda invocation because he's not being interrogated.

Legal Standard

Miranda rights are required when:

- ☐ A person is in-custody (i.e. arrested);
- ☐ You are interrogating him (i.e. "Tell me why you committed this crime");
- ☐ The person knows he is talking to an agent of the government.

Case Examples

Miranda not necessarily required after detaining a suspect with handcuffs:

[157] Miranda v. Arizona, 384 U.S. 436 (1966).

"Handcuffing a suspect during an investigative detention does not automatically make it (a) custodial interrogation for purposes of Miranda."[158]

Temporarily placing a suspect in a patrol car is not an arrest:

Handcuffing and putting an uncooperative suspect in the backseat of a patrol car while the officer checked the vehicle for weapons was held not to be an arrest. "A brief, although complete, restriction of liberty, such as handcuffing (and, in this case, putting into a patrol car), during a Terry stop is not a de facto arrest, if not excessive under the circumstances."[159] Still, this confinement is a substantial factor indicating an arrest.

Interview at police station is not per se custody for purposes of Miranda:

Defendant was not "in custody" during questioning at the police station, and Miranda warnings were not required, where defendant picked the time of the interview in response to a police letter requesting one, drove himself to the station, and was left alone and unrestrained in the interview room. Defendant initially refused to make a statement, and was allowed to leave after giving written answers to some questions. Investigators testified that they informed the defendant at the outset of the interview that he was not under arrest, and the entire interview lasted approximately 1½ hours.[160]

Officers are not required to tell suspect an attorney is available and attempting to contact him:

Police officers are not constitutionally required, under either the federal constitution or the Michigan state constitution, to promptly inform a suspect facing custodial interrogation that an attorney is available, even when that attorney attempts to contact the suspect. Failure to do so will not render a suspect's waiver of Miranda rights invalid. The Supreme Court of Michigan has recognized that the state constitutional provision addressing this issue is identical to the federal constitutional provision, and the federal provision has been interpreted to not require police to inform a suspect of the presence of an attorney. These provisions protect a suspect only from the use of confessions or incriminating statements obtained by coercion, violence, force, or pressure, and Miranda warnings

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[158] People v. Davidson, 221 Cal. App. 4th 966 (Cal. App. 2d Dist. 2013).

[159] Haynie v. County of L.A., 339 F.3d 1071 (9th Cir. Cal. 2003).

[160] People v. Mendez, 225 Mich. App. 381, 571 N.W.2d 528 (1997).

provide a suspect with the necessary information both to understand their rights and to make an intelligent and knowing waiver of the rights if he so chooses.[161]

Police may use a suspect's awkward silence during questioning if he's not in custody:

Officers interviewed the suspect who was not in custody. He answered most questions but, when asked about the gun used in the crime, he became suspiciously silent, as if he knew about it (because he did!). His silence was properly used against him at trial because he wasn't in custody and under these circumstances, there was no attempt to invoke his 5th Amendment rights.[162]

No violation where the suspect invoked right to counsel but subsequently made incriminating statements to his wife:

The suspect was accused of murder and child abuse. He was arrested and read Miranda. He subsequently invoked his right to counsel and all questioning ceased. The suspect asked to speak with his wife, and police agreed. An officer remained in the room while the couple spoke and openly tape recorded the conversation. The Supreme Court held there was no violation since police did not ask the wife to speak with the suspect. They simply agreed to allow it.[163]

Prohibited interrogation also refers to its "functional equivalent":

"For purposes of the Miranda rules, the term 'interrogation' refers not only to express questioning but also to any words or actions on the part of the police, other than those normally attendant upon arrest and custody [booking questions], that the police should know are reasonably likely to elicit an incriminating response from the suspect; the latter portion of this definition focuses primarily on the perceptions of the suspect, rather than on the intent of the police."[164]

Miranda not required when the suspect talks to an undercover agent:

The Supreme Court emphasized that Miranda sought to protect or preserve a suspect's ability to exercise his right against self-

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161 People v. Tanner, 496 Mich. 199, 853 N.W.2d 653 (2014).

162 Salinas v. Texas, 133 S.Ct. 2174 (2013).

163 Arizona v. Mauro, 481 U.S. 520 (1987).

164 Rhode Island v. Innis, 446 U.S. 291 (1980).

incrimination in the "inherently compelling" atmosphere of a police-dominated official interrogation, and concluded that under the Fifth Amendment, incriminating statements made during a voluntary conversation between a suspect who was incarcerated on other charges and his cellmate - an undercover officer posing as an inmate - were not rendered inadmissible because of the absence of Miranda warnings.[165]

[165] Com. v. Burgos, 470 Mass. 133 (2014).

Miranda Elements

The following Miranda warnings are required when you interrogate an in-custody suspect.[166] Additionally, you must read a suspect his entire Miranda rights, even if they cut you off and tell you they already know their rights.[167] This is true even if you arrest a judge! All warnings must be given. Period.

Keep in mind that courts don't require these rights to be read verbatim. But police must inform the suspect of all four and articulate the fifth. It's highly suggested that you read Miranda from a pre-printed pocket card. Otherwise, if you don't remember exactly what you said to the defendant, be prepared to be slammed in court by a decent defense attorney.

Legal Standard

Miranda requires the suspect understand the following rights:

- ☐ He has the right to remain silent;
- ☐ That any statements made may be used against him in court;
- ☐ That he has the right to consult with an attorney and to have that attorney present during questioning;
- ☐ That if he cannot afford an attorney, one will be appointed to represent him prior to questioning; and
- ☐ The suspect must knowingly and intelligently waive rights.

Case Examples

The Miranda decision does not require precise words:

"The four warnings Miranda requires are invariable [plus articulating the waiver], but this Court has not dictated the words in which the essential information must be conveyed... The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'"[168]

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[166] Miranda v. Arizona, 384 U.S. 436 (1966).

[167] United States v. Patane, 542 U.S. 630 (2004).

[168] Powell v. Florida, 130 S.Ct. 1195 (2010).

Law Enforcement Liability

Exclusionary Rule

The exclusionary rule states that evidence obtained in violation of the Fourth Amendment (and in extreme circumstances Due Process) is inadmissible in a criminal trial. The purpose of the rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[169]

The Fourth Amendment also seeks to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."[170]

Before a suspect may rely on the exclusionary rule, they must have "standing" to object. In other words, the suspect must have a legitimate privacy interest in the place or thing searched or seized. Without this "skin in the game," the suspect lacks standing and the exclusionary rule will provide no relief.

Finally, even when police violate the Fourth Amendment, and the suspect has standing to object to using the evidence, there are many exclusionary rule exceptions that may come into play. If one or more applies, the evidence may still be used against the suspect. Never forget, since using an exception typically means that a Fourth Amendment violation occurred, the suspect may still be able to sue you in a 1983 lawsuit. You don't need that stress. Accordingly, use this book, get additional training, and comply with the Constitution.

Legal Standard

Evidence obtained by police may be excluded if:

- ☐ You obtained the evidence illegally, particularly in violation of the Fourth Amendment;
- ☐ Excluding evidence will serve a deterrent effect for future unlawful police conduct; and
- ☐ The evidence is primarily introduced as evidence in a criminal trial against the defendant.

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169 United States v. Calandra, 414 U.S. 338 (1974).

170 Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

Case Examples

Despite unlawful detention, evidence of assault on LEO will not be suppressed as fruit of poisonous tree:

"There are limitations to the exclusionary rule which are largely based on common sense. One such limitation is that the rule does not immunize crimes of violence committed on a peace officer, even if they are preceded by a Fourth Amendment violation."[171]

Fact that evidence is vital for a prosecution does not weigh on the exclusionary rule:

Federal prosecutors argued that, if the evidence was suppressed under the exclusionary rule, they would not be able to prosecute the case. The court dismissed this "necessity" argument. If there is a violation, the exclusionary rule applies no matter the consequences.[172]

The exclusionary rule does not apply to violations of state or federal statutes unless the state legislature or congress specifically required exclusion:

The Fourth Amendment is controlled by the Constitution, not by statutes. Therefore, even when police violate a statute, the result is not automatic exclusion of evidence unless the legislature intended that result.[173] Additionally, even if a violation of state law requires suppression, that same law has no effect on federal court proceedings.[174]

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[171] In re Richard G., 173 Cal. App. 4th 1252 (2009), as modified (May 20, 2009).

[172] U.S. v. Marts, 986 F.2d 1216 (8th Cir. 1993).

[173] Pa. Steel Foundry Mach. v. Sec. of Labor, 831 F.2d 1211 (3d Cir. 1987).

[174] U.S. v. McMurray, 34 F.3d 1405 (8th Cir. 1994).

Exceptions to the Exclusionary Rule

The exclusionary rule states that evidence obtained as a result of an illegal search and/or seizure is inadmissible in a criminal trial. This rule is meant to deter police misconduct.[175] However, there are several exceptions.

Legal Standard

Some of the exceptions to the exclusionary rule, include:

- ☐ The defendant has no standing to object;
- ☐ Evidence can be used to impeach a defendant;
- ☐ Good faith exception;[176]
- ☐ Foreign searches;
- ☐ Forfeiture proceedings;[177]
- ☐ Inevitable discovery;[178]
- ☐ Deportation proceedings;
- ☐ Grand juries;[179]
- ☐ Civil tax proceedings.

[175] United States v. Janis, 428 U.S. 433 (1976).

[176] United States v. Leon, 468 U.S. 897 (1984).

[177] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[178] Nix v. Williams, 467 U.S. 431 (1984); but see Hazelwood v. State, 912 P.2d 1266, 1276 (Alaska Ct. App. 1996), rev'd in part on other grounds, 946 P.2d 875 (Alaska 1997) (holding that Alaska prosecutors are required to "prove exactly how" the evidence would have been discovered); State v. Ault, 150 Ariz. 459 (1986) (Arizona Supreme Court refused to apply the inevitable discovery exception to the exclusionary rule, holding that evidence obtained during a warrantless entry into a defendant's home will be inadmissible at trial).

[179] United States v. Calandra, 414 U.S. 338 (1974).

Fruit of the Poisonous Tree

The exclusionary rule forbids the admission of illegally obtained evidence. The "fruit of the poisonous tree" doctrine says that any evidence found as a consequence of the first illegal search or seizure will also be suppressed.

This can get a little confusing but remember this: all illegally obtained evidence will usually be suppressed.

Legal Standard

Derivative evidence will be excluded as evidence if:

- ☐ You discovered evidence subject to the exclusionary rule;
- ☐ That evidence led you to discover additional (i.e. derivative) evidence; and
- ☐ There are no applicable exceptions.

Case Examples

Observations after unlawful entry cannot be used:

Observations made after an unlawful, warrantless entry into a structure cannot be used to establish probable cause for later obtaining a search warrant.[180]

All evidence tainted after unlawful arrest:

Where the defendant was unlawfully arrested, evidence recovered from his person, incriminating statements, and the products of a search warrant that used all the above as part of its probable cause, were subject to being suppressed.[181]

[180] Murray v. United States, 487 U.S. 533 (1988).

[181] United States v. Nora, 765 F.3d 1049 (9th Cir. Cal. 2014).

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MICHIGAN

Search & Seizure
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Your job as an officer is almost completely controlled by the Fourth and Fifth Amendments. Therefore, you need a reference that can break down these important constitutional doctrines into easy-to-apply checklists. That's what this book does. If you need guidance in the field, pick up this book. When you get back to the station and need help articulating the legal standards for your report, pick up this book.

There are other legal references out there and I highly recommend you read them. But this book has one serious competitive advantage: it was written by a retired police officer-turned-attorney who has been in your shoes, and knows what you need to know.

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