

ANTHONY BANDIERO, ESQ.

FEDERAL

# Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT



Blue to Gold

# Federal Search & Seizure Survival Guide

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A FIELD GUIDE FOR LAW ENFORCEMENT



**Anthony Bandiero, JD, ALM**

Blue To Gold Law Enforcement Training, LLC  
SPOKANE, WASHINGTON

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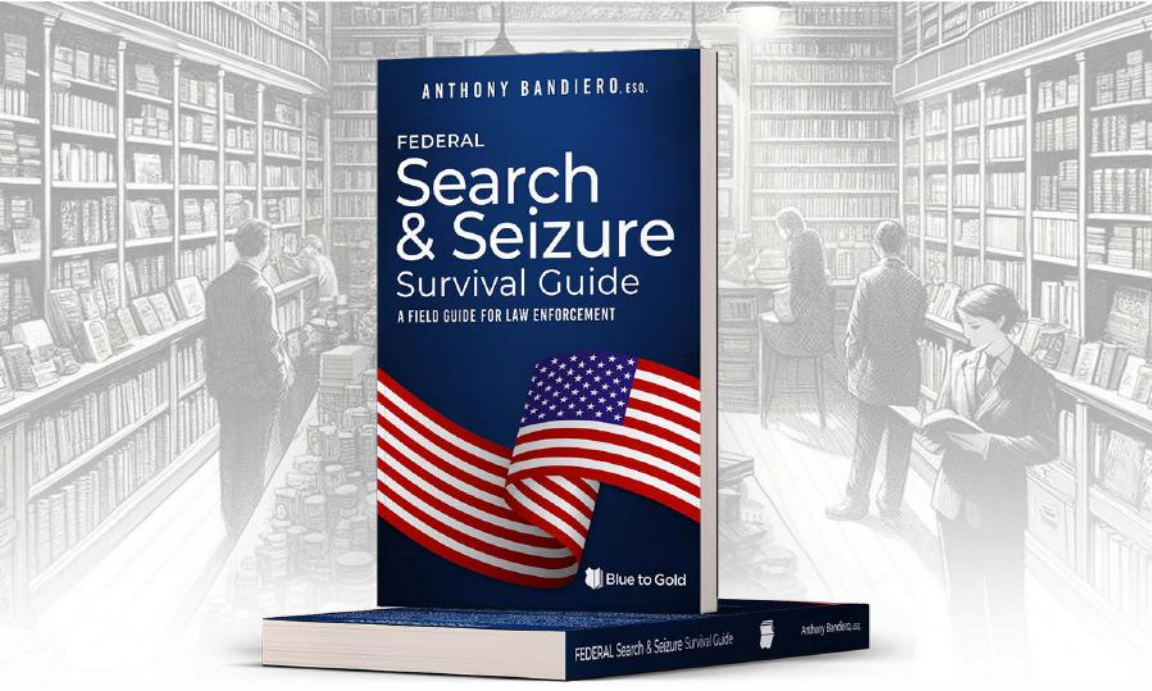
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Note: This is a general overview of the classical and current United States court decisions related to search and seizure, liability, and confessions. As an overview, it should be used for a basic analysis of the general principles but not as a comprehensive 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 and read the case completely and cite appropriately.



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# ***The Full Version of the Search & Seizure Survival Guide Includes All of These Legal Doctrines Faced by Officers Everyday***

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## Note about case citations:

The case names cited throughout this book are not formatted according to the Bluebook citation style, which is widely recognized in legal writing. Instead, these citations are presented in a more straightforward manner, primarily to facilitate ease of reference for readers who may wish to delve deeper into the cases themselves. This approach is adopted to enhance the accessibility of the material, especially for those who might not be familiar with the intricacies of legal citation formats. By presenting case names in a clear and direct way, the book aims to encourage readers to explore these cases further, providing a gateway to understanding the legal principles and precedents discussed more deeply.

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***"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."***

— James Madison, Father of the Fourth Amendment, 1788



**Let's Start with the Basics**



## Fourth Amendment

The Fourth Amendment to the United States Constitution, a crucial element of the Bill of Rights, was enacted as a reaction to the colonial grievances against British practices before the American Revolution. Central to its inception were the "writs of assistance," which were broad search warrants allowing British officials to search any premises for smuggled goods without specifying the location or goods. This practice was met with significant opposition in the colonies, notably challenged by James Otis in 1761, who argued that these writs violated constitutional rights, fueling widespread discontent.

Influential legal philosophers like John Locke, advocating for natural rights and property protection, also shaped the Founding Fathers' views. Post-Revolution, with the drafting of the Constitution, there was a heightened emphasis on individual rights and limiting government power, reflecting the experiences under British rule. The Fourth Amendment, introduced as part of the Bill of Rights in 1791, was a direct response to these concerns. It aimed to safeguard citizens from unreasonable government intrusions, necessitating judicial warrants and probable cause for searches and seizures.

This amendment was a manifestation of the American values of individual rights and privacy, addressing the Anti-Federalist worries about the new Constitution's lack of civil liberties protections.

### 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.

## Case Examples

### **The Supreme Court Emphasized the Flexible Nature of the Fourth Amendment's Reasonableness Requirement:**

"The Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only 'unreasonable searches and seizures.' The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by rules [per se]; each case must be decided on its own facts."<sup>1</sup>

### **The Supreme Court Clarified That the Assessment of Reasonableness Under the Fourth Amendment Is Based on Specific Case Facts:**

"The reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment."<sup>2</sup>

### **The Supreme Court Held That the Method of an Officer's Home Entry Is a Factor in Determining the Reasonableness of a Search Under the Fourth Amendment:**

"Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."<sup>3</sup>

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<sup>1</sup> Coolidge v. New Hampshire, 1971 U.S. LEXIS 25 (1971)

<sup>2</sup> Ker v. California, 10 L. Ed. 2d 726 (1963)

<sup>3</sup> Wilson v. Arkansas, 115 S. Ct. 1914 (1995)

## 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 them his Miranda rights after an arrest, even though you didn't interrogate him? 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,
2. 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;
3. nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;
4. **nor shall be compelled in any criminal case to be a witness against himself,**
5. nor be deprived of life, liberty, or property, without due process of law;
6. nor shall private property be taken for public use, without just compensation.



## **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. As the Supreme Court said, "Police officers act in full accord with the law when they ask citizens for consent."<sup>1</sup>

Start a consensual encounter by asking a question: "Can I talk to you?" Not, "Come talk to me." 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.

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

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### Legal Standard

A consensual encounter becomes a seizure when:<sup>2</sup>

- ☐ Under the **totality of the circumstances**;
- ☐ A reasonably **innocent** person;
- ☐ Believes they do not have the freedom to **terminate** the encounter or **leave**; and
- ☐ **Yields** to a show of authority or physical force.

Some factors courts consider include:

- ☐ How the initial contact was made (was an order given?)
- ☐ Use of flashing lights or sirens
- ☐ Uniform versus plain clothes
- ☐ Number of officers
- ☐ Demeanor of officer (conversational v. accusations)
- ☐ Display of weapons

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<sup>1</sup> United States v. Drayton, 536 U.S. 194 (2002)

<sup>2</sup> CCDA Shanon Clowers

- ☐ Physical touching or patdowns
- ☐ Ordering person to move next to patrol car
- ☐ Blocking their vehicle
- ☐ Telling person they are free to leave
- ☐ Reading Miranda (not recommended for consensual encounters)
- ☐ Duration of the encounter
- ☐ Public versus private location
- ☐ And many others. Use common sense and talk to the person in a professional yet conversational tone.

## Case Examples

### **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, without returning 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.<sup>1</sup>

### **Order To Come Over and Talk Is Not Consensual:**

Suspect was observed walking in mall parking lot after stores were closed. Officer said, “Come over here, I want to talk to you.” Court held officer gave command to suspect and therefore needed reasonable suspicion. Evidence was suppressed.<sup>2</sup>

### **Even if Police Have Probable Cause, They Can Still Seek a Consensual Encounter With the Suspect:**

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<sup>1</sup> Fla. v. Royer, 460 U.S. 491 (1983)

<sup>2</sup> People v. Roth, 219 Cal. App. 3d 211 (Cal. App. 4th Dist. 1990)

“Therefore, even assuming that probable cause existed at some earlier time, there was no violation of the Fourth Amendment...No Fourth Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect.”<sup>1</sup>

### **Consensual Encounter and Search Valid After Officer Released Driver Following a Traffic Stop:**

Where the officer stopped a vehicle to issue a traffic citation, concluded the traffic stop, indicated to the driver that he 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.<sup>2</sup>

Many cops call this move the “two step.” 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.

### **Whether Someone Feels “Detained” Is Based on Objective Facts:**

“The test provides that the police can be said to have seized an individual ‘only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ As the test is an objective standard—looking to a reasonable person’s interpretation of the situation in question... This ‘reasonable person’ standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”<sup>3</sup>

### **Violation of a State Law Does Not Equal Automatic Fourth Amendment Violation:**

Although the officers may have violated state law requirements in not informing the person answering the door during “knock and talk” investigation that he had a right to terminate the encounter, that circumstance did not render the consent to talk involuntary under the Fourth Amendment.<sup>4</sup>

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<sup>1</sup> People v. Coddington, 23 Cal. 4th 529 (2000), as modified on denial of reh’g (Sep 27, 2000)

<sup>2</sup> U.S. v. Rivera, 906 F.2d 319 (7th Cir. 1990)

<sup>3</sup> State v. McKellips, 118 Nev. 465, 469 (2002)

<sup>4</sup> U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000)

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## CONSENSUAL ENCOUNTERS

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# 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. was viewed as a detention requiring reasonable suspicion (see below). In other words, if the Girl Scouts wouldn't do then it's probably unreasonable.

What about "No Trespass" signs? Trying to have a consensual conversation with someone is not typically considered trespassing. The same goes with "No Soliciting" signs. Still, there will be situations when a no-trespassing sign along with other factors will indicate to a reasonable person that no one should approach the front door and knock. Still, these rules don't apply to calls for service where there is an ongoing issue, like a domestic violence call or loud party complaint.

### 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**;
- ☐ When the conversation ended or was terminated, you **immediately left** and didn't snoop around.

## Case Examples

### **Knock and Talk at 4 A.M. Held To Be 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. This was a violation of knock and talk because officers exceeded social norms.<sup>1</sup>

### **Command to Open Door Was Not a Consensual Encounter:**

"Officers were stationed at both doors of the duplex and [an officer] had commanded [the defendant] to open the door. A reasonable person in [defendant's] situation would have concluded that he had no choice but to acquiesce and open the door."<sup>2</sup>

### **Constant Pressure To Consent To Search Held To Be Unlawful:**

During a knock and talk, officers continued to press the defendant for permission to enter and search. Later consent-to-search was the product of an illegal detention.<sup>3</sup>

### **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.<sup>4</sup>

### **Unless There Is an Express Order Otherwise, Officers Have the Same Right To Knock and Talk as a Pollster or Salesman:**

"One court stated more than forty years ago: 'Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.'"<sup>5</sup>

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<sup>1</sup> United States v. Lundin, 47 F. Supp. 3d 1003 (N.D. Cal. 2014)

<sup>2</sup> United States v. Poe, 462 F.3d 997 (8th Cir. Mo. 2006)

<sup>3</sup> United States v. Washington, 387 F.3d 1060 (9th Cir. Nev. 2004)

<sup>4</sup> Orhorgaghe v. I.N.S., 38 F.3d 488 (9th Cir. 1994)

<sup>5</sup> People v. Rivera, 41 Cal. 4th 304 (2007)

CONSENSUAL ENCOUNTERS

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## 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 you can engage in; 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."<sup>1</sup>

Asking for ID and running a subject for warrants doesn't automatically convert an encounter into a detention.<sup>2</sup> Hint, return ID as soon as possible so a reasonable person would still "feel free to leave."<sup>3</sup>

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### 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.

#### 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

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<sup>1</sup> Fla. v. Royer, 460 U.S. 491 (1983)

<sup>2</sup> People v. Bouser, 26 Cal. App. 4th 1280 (1994)

<sup>3</sup> United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. Ariz. 1997)

- ☐ 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, express or implied.

## **Case Examples**

### **Child Illegally Questioned at School While Officer Was Present:**

A child was illegally seized and questioned by a caseworker and police officer when they escorted the child off private school property, and interrogated the child for twenty minutes about intimate details of his family life and whether he was being abused. The government argued that this was a consensual encounter, but no reasonable child in that position would have believed they were free to leave.<sup>1</sup>

Note: This case may have come out differently if they did not remove the child from school grounds. Involuntary transportation usually converts an encounter into an arrest.

### **Consent to Search Was Involuntary After Arrest-Like Behavior:**

Suspect did not voluntarily consent to the search of his person, and suppression of a handgun discovered was warranted, where the suspect was in a bus shelter, was surrounded by three patrol cars and five uniformed officers, an officer's initial, accusatory question, combined with the police-dominated atmosphere, clearly communicated to the suspect that he was not free to leave or to refuse the officer's request to conduct the search. The officer never informed the suspect that he had the right to refuse the search, and the suspect never gave verbal or written consent, but instead merely surrendered to an officer's command.<sup>2</sup>

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<sup>1</sup> Doe v. Heck, 327 F.3d 492 (7th Cir. 2003)

<sup>2</sup> U.S. v. Robertson, 736 F.3d 677 (4th Cir. 2013)



## Investigative Detentions



## Specific Factors to Consider

In determining whether you have reasonable suspicion, consider the following factors. If one or more of these factors exist, articulate them in your report.

Remember that courts use the “totality of the circumstances” test when determining whether you had reasonable suspicion to detain a person. Therefore, it is in your best interest to articulate as many factors as possible in your report. That way, courts have enough information to rule in your favor.

### Legal Standard

Specific factors you should consider include:

- ☐ **Physical descriptions and clothing:** Matching descriptions and clothing will certainly help, especially specific characteristics like logos on clothing;
- ☐ **Proximity to crime scene:** The closer the better;
- ☐ **Close in time:** The sooner the detention is made after the crime the better (along with other factors);
- ☐ **Nighttime:** Activity late at night, especially in residential areas, is often more suspicious than in daytime;<sup>1</sup>
- ☐ **High-crime area:** An area’s reputation for criminal activity is an appropriate factor in assessing R.S.;<sup>2</sup>
- ☐ **Identity profiling:** Race, age, religion, etc. may only be used to support R.S. if you have specific suspect attributes;
- ☐ **Unprovoked flight:** Flight is a significant factor in assessing R.S., and combined with another factor, like a high-crime area, may justify a detention;<sup>3</sup>
- ☐ **Training and experience:** Your training and experience is possibly one of the most important factors in assessing reasonable suspicion. For example, if you believe a suspect is lying, this can help establish R.S. or P.C.<sup>4</sup> Still, the key is to

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<sup>1</sup> See *People v. Souza*, 9 Cal.4th 224 (1994)

<sup>2</sup> See *People v. Souza*, 9 Cal.4th 224 (1994)

<sup>3</sup> See *Illinois v. Wardlow*, 528 U.S. 119 (2000)

<sup>4</sup> See *Devenpeck v. Alford*, 543 U.S. 146 (2004)

translate these experiences in your report. The court needs to know what you know. Otherwise, what separates you from John Q Citizen? Articulate, articulate, articulate!

- ☐ **Criminal profiles:** Courts are cautious about giving cops authority to detain a person simply because he fits a “criminal profile.” Therefore, use “criminal profiles” only in connection to contemporaneous facts and circumstances that would lead a reasonable officer to believe criminal activity is afoot, and don’t rely on race or ethnicity characteristics unless you have intel that a specific suspect possesses those traits;<sup>1</sup>
- ☐ **Information from reliable sources:** You can use information from reliable sources. Reliable sources include fellow police officers, citizen informers not involved in criminal conduct, confidential informants if proved reliable, and so forth;<sup>2</sup>
- ☐ **Anonymous tips:** If a reliable source provides information, but they don’t want to get involved or be known, they are not truly “anonymous” since you know who they are. A true anonymous tip is from someone whose identity is unknown. Before acting on anonymous tips, you need to prove the information is reliable through an independent investigation;<sup>3</sup>
- ☐ **9-1-1 calls:** The Supreme Court has held that 9-1-1 callers are rarely “anonymous” because dispatch can trace the call and tipsters can be charged with a false report.<sup>4</sup> Still, whether or not you can make the stop depends on the totality of the circumstances.

## Case Examples

### Reasonable Suspicion and Anonymous Tips:

In *Navarette v. California*, the Supreme Court addressed the issue of whether an anonymous tip can provide law enforcement officers with reasonable suspicion to conduct a traffic stop. The Court affirmed the decision, holding that under the totality of the circumstances, the anonymous tip in this case provided sufficient

<sup>1</sup> See *U.S. v. Sokolow*, 490 U.S. 1 (1989)

<sup>2</sup> See *People v. Stanley*, 18 Cal.App.5th 398 (2017)

<sup>3</sup> See *Alabama v. White*, 496 U.S. 325 (1990)

<sup>4</sup> See *Navarette v. California*, 134 S.Ct. 1683 (2014)

indicia of reliability. The Court stated, "By reporting that she had been run off the road by a specific vehicle, the caller necessarily claimed an eyewitness basis of knowledge." This decision underscores the Court's recognition of the practical realities faced by law enforcement and the need to balance public safety concerns with Fourth Amendment protections against unreasonable searches and seizures.<sup>1</sup>

### **Reasonable Suspicion and Corroborated Anonymous Tips:**

In *Alabama v. White*, the Supreme Court of the United States addressed the validity of an investigatory stop based on an anonymous tip. The Court held that an anonymous tip, as corroborated by independent police work, can exhibit sufficient indicia of reliability to provide reasonable suspicion for an investigatory stop. The case involved police receiving an anonymous tip about Vanessa White, predicting her departure from a specific location, the vehicle she would be driving, and her possession of cocaine. The Court stated, "Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car." This decision underscores the Court's approach in balancing the need for law enforcement to act on reasonable suspicion against the rights of individuals against unreasonable searches and seizures.<sup>2</sup>

### **Presence in a High-Crime Area, by Itself, Is Not RS:**

Officers did not have reasonable suspicion to detain or search the defendant on nothing more than the defendant's proximity to a high-crime area. The defendant's presence near a home in a high crime area where a search warrant was being executed carried little weight as the officers did not see the defendant flee from the home nor did they recognize him as a suspect in the investigation.<sup>3</sup>

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<sup>1</sup> *Navarette v. California*, 134 S.Ct. 1683 (2014)

<sup>2</sup> *Alabama v. White*, 496 U.S. 325 (1990)

<sup>3</sup> *State v. Anderson*, 415 S.C. 441 (2016)

INVESTIGATIVE DETENTIONS

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## Detaining a Suspect

If you have an articulable reasonable suspicion that a suspect is involved in criminal activity, you may briefly detain him in order to “maintain the status quo” and investigate.<sup>1</sup> 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’re 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 has, is, or is about to be, involved in **criminal activity**;
- ☐ You use the **minimal amount of force** necessary to detain a co-operative 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 31-minute wait for a drug dog was not unreasonable after trooper developed R.S. for narcotics, was denied consent, and acted diligently in pursuit of his investigation.<sup>2</sup>

#### Detention of Man With an Axe at 3 A.M. Was Reasonable:

Cops had reasonable suspicion 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.”<sup>3</sup>

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<sup>1</sup> Terry v. Ohio, 392 U.S. 1 (1968)

<sup>2</sup> U.S. v. Lyons, 486 F.3d 367 (8th Cir. 2007)

<sup>3</sup> People v. Forensic, 64 Cal.App.4th 186 (1998)

## 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 officer safety concerns is also lawful “when an individual’s actions give the appearance of potential danger to the officer.”<sup>1</sup> 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

#### Judges Should Be Cautious About Second Guessing Officer Safety:

In *Ryburn v. Huff*, the Supreme Court of the United States addressed the issue of officer safety and the reasonableness of police actions during a potentially volatile situation. The case involved Burbank Police officers who, after receiving a report that a student had threatened to “shoot up” a school, went to the student’s home to investigate. The situation escalated when the student’s mother, Mrs. Huff, abruptly ended the conversation with the officers and ran into the house after being asked about the presence of guns. The officers followed her inside, concerned for their safety and that of others. The Court held that the officers’ actions were reasonable under the Fourth Amendment, emphasizing the need to

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<sup>1</sup> *People v. Mendoza*, 52 Cal.4th 1056 (2011)

evaluate the reasonableness of police actions from the perspective of an officer on the scene and not with the benefit of hindsight. The Court stated, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." This decision underscores the Court's recognition of the challenges faced by law enforcement officers in rapidly unfolding situations and the importance of assessing their actions based on the information available to them at the time.<sup>1</sup>

### **Detention Based on Legitimate Officer Safety Concerns Upheld:**

"A consensual encounter may turn into a lawful detention when an individual's actions give the appearance of potential danger to the officer...There is no question that 'a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.'"<sup>2</sup>

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<sup>1</sup> *Ryburn v. Huff*, 565 U.S. 469 (2012)

<sup>2</sup> *Id.*



## Arrests

## Lawful Arrest

A lawful arrest under the Fourth Amendment of the United States Constitution is fundamentally based on the principle of "probable cause." This means that for an arrest to be considered lawful, law enforcement officers must have a reasonable basis to believe that a person has committed, is committing, or is about to commit a crime. The Fourth Amendment protects individuals from unreasonable searches and seizures, which includes arrests made without probable cause.

The determination of probable cause does not require the same level of proof necessary to convict a person of a crime. Rather, it hinges on whether the facts and circumstances within the arresting officers' knowledge, and of which they have reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.

The Supreme Court has clarified in various rulings that the constitutionality of an arrest is not contingent on the offense for which there is probable cause being closely related to the offense stated by the arresting officer at the time of arrest. As long as there is probable cause for any crime, the arrest is considered constitutional, regardless of the specific offense cited by the officer at the time of the arrest. This approach emphasizes an objective standard based on facts and circumstances, rather than the subjective intent or understanding of the arresting officer.

Moreover, the Court has upheld that warrantless arrests in public places, when supported by probable cause, do not violate the Fourth Amendment. This means that if officers have probable cause to believe a felony has been committed, they can lawfully arrest an individual without a warrant in a public setting or anywhere the officer has a lawful right to be.<sup>1</sup>

In summary, a lawful arrest under the Fourth Amendment is one that is supported by probable cause, irrespective of whether the specific crime cited at the time of arrest aligns with the crime for which there is probable cause. This standard ensures a balance between the need for effective law enforcement and the protection of individual rights against arbitrary police actions.

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<sup>1</sup> People v. Patterson, 156 Cal. Rptr. 518 (Cal. App. 2d Dist. 1979)



## 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 **effectuate an arrest**:

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

## Case Examples

### **Arrest for Even a Minor Violation Held To Be Constitutional:**

In the case of *Atwater v. City of Lago Vista*, case, Gail Atwater was driving in Lago Vista, Texas, with her two young children in the front seat, none of whom were wearing seatbelts. A police officer, observing this violation, pulled Atwater over and arrested her. Atwater and her husband filed a lawsuit under 42 U.S.C. § 1983 against the City of Lago Vista and the arresting officer, alleging a violation of her Fourth Amendment right to be free from unreasonable seizure.

The District Court initially ruled the Fourth Amendment claim meritless, and the Fifth Circuit Court of Appeals initially reversed this decision. However, upon rehearing en banc, the Fifth Circuit affirmed the District Court's summary judgment for the City. The case was then taken to the Supreme Court.

Justice Souter, delivering the opinion of the Court, concluded that the arrest of Atwater, although perhaps an example of poor judgment by the arresting officer, did not violate the Fourth Amendment. The Court held that if an officer has probable cause to believe that an individual has committed a minor criminal offense, they may arrest the offender without violating the Fourth Amendment.<sup>1</sup>

Note: Still abide by your agency/state rules.

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<sup>1</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)

## **Suspect Must Be Physically Touched or Submit to Your Authority:**

“There can be no arrest without either touching or submission.” Therefore, if a suspect runs away, he is not arrested until you catch him.<sup>1</sup>

## **Warrantless Arrest Inside a Private Office Was 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.<sup>2</sup>

## **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 that the vehicle was a rental), the tire was extraordinarily heavy, and the officer had experience with drugs being transported in spare tires.<sup>3</sup>

## **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.<sup>4</sup>

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<sup>1</sup> California v. Hodari D., 499 U.S. 621 (1991)

<sup>2</sup> People v. Lee, 186 Cal. App. 3d 743 (Cal. App. 4th Dist. 1986)

<sup>3</sup> U.S. v. Lyons, 510 F.3d 1225 (10th Cir. 2007)

<sup>4</sup> Gilliam v. U.S., 46 A.3d 360 (D.C. 2012)

## 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 articulated, **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

#### Entry into a Home for Arrest Requires Exigency:

In *Payton v. New York*, the Supreme Court of the United States addressed the constitutionality of warrantless and nonconsensual entries into a suspect's home to make a routine felony arrest. The case involved Theodore Payton, who was suspected of murder, and Obie Riddick, who was suspected of armed robbery. In both instances, New York police officers entered their homes without warrants to arrest them. The Court held that the Fourth Amendment, as applied to the states through the Fourteenth Amendment, prohibits police from making a warrantless and

nonconsensual entry into a suspect's home to make a routine felony arrest.

The Court distinguished between warrantless arrests in public places, which it had previously upheld, and warrantless entries into a home, emphasizing the heightened expectation of privacy within one's home. The Court stated, "The Fourth Amendment to the United States Constitution prohibits the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest." This ruling underscored the principle that the home is afforded special protection under the Fourth Amendment, and that warrantless entries for the purpose of making arrests are generally unconstitutional unless exigent circumstances exist.<sup>1</sup>

### **Unlawful Entry Into a Home for Third-Party Arrest:**

In *Steagald v. U.S.*, the Supreme Court of the United States dealt with the issue of whether law enforcement officers can legally search for the subject of an arrest warrant in the home of a third party without obtaining a search warrant. The case arose when DEA agents, possessing an arrest warrant for Ricky Lyons, a fugitive wanted on drug charges, entered the home of Gary Steagald without a search warrant, believing Lyons was there. The Court held that under the Fourth Amendment, a law enforcement officer may not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant, unless there are exigent circumstances or consent.

The Court emphasized the privacy interest of the third party (Steagald) in his dwelling, stating, "the search of petitioner's home was no more reasonable from petitioner's perspective than it would have been if conducted in the absence of any warrant. Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment." This decision underscores the principle that the Fourth Amendment protects individuals against unreasonable searches and seizures in their homes, and that an arrest warrant for a fugitive does not justify a warrantless search of a third party's home without exigent circumstances or consent.<sup>2</sup>

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<sup>1</sup> *Payton v. New York*, 445 U.S. 573 (1980)

<sup>2</sup> *Steagald v. U.S.*, 451 U.S. 204 (1981)

## Warrantless Entry to Make Arrest

Entering a home without a warrant to carry out an arrest is not permissible unless there is either consent or an urgent situation. This holds true regardless of the severity of the crime, such as a violent triple-murder; law enforcement must clearly establish either consent or an exigent circumstance before making such an entry.

### 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 intention** to arrest the suspect.

#### Hot Pursuit:

- ☐ You are in **hot pursuit** of a suspect believed to have committed an **arrestable offense**, you have some form of exigency, and he runs into a home (a surround and call-out may also be done for officer safety purposes). See Hot and Fresh Pursuit chapter for more information.

#### 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**. See Hot and Fresh Pursuit chapter for more information.

#### 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; and you must re-enter as soon as it is reasonably safe to do so.

## 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."<sup>1</sup>

### **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 police officers entered the residence and arrested defendant.<sup>2</sup>

### **Delayed entry unlawful without exigency:**

"In a prosecution arising out of the purchase of stolen weapons from an undercover police officer in defendants' home: although the undercover officer had been voluntarily admitted into the home, he had walked outside of the house to signal uniformed officers to arrest the defendants. The officers then arrested defendants within the house without first obtaining an arrest warrant, seized the weapons sold, and uncovered a rifle in their subsequent search of the house. The court held that despite the legality of the officer's initial entry, his reentry without consent and in the absence of exigent circumstances rendered the arrest and the search incident thereto unlawful."<sup>3</sup>

### **Immediate re-entry lawful:**

Warrantless arrest of defendant in his residence upheld when defendant had consented to initial entry by police officer, during which time defendant committed crime in officer's presence, after which officer left and immediately re-entered with other officers to arrest defendant.<sup>4</sup>

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<sup>1</sup> United States v. Reed, 572 F.2d 412, 423 (1978)

<sup>2</sup> Toubus v. Superior Court, 114 Cal. App. 3d 378 (Cal. App. 1st Dist. 1981)

<sup>3</sup> People v. Garcia, 139 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super. Ct. 1982)

<sup>4</sup> 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 pursued a *hunch*. If you develop 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 Example

### Stop by undercover narcotics officers for a minor traffic 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.<sup>1</sup> And a violation of a department policy does not affect Fourth Amendment analysis.

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<sup>1</sup> 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.”

It also makes sense that a DUI stop will take longer than an equipment violation. And 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.<sup>1</sup>

Finally, you may ask miscellaneous questions without additional reasonable suspicion, but those inquiries 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 **measurably extend** the stop unless additional reasonable suspicion or probable cause develops.

### Case Example

#### **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 reasonable suspicion leading to the stop concerned a robbery. Based on the driver’s answers, reasonable suspicion developed for drug possession.<sup>2</sup>

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<sup>1</sup> United States v. Salzano, 1998 U.S. App. LEXIS 17140 (10th Cir. Kan. 1998)

<sup>2</sup> Medrano v. State, 914 P.2d 804 (Wyo.1996)

## 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. DUI) or other criminal involvement (e.g. domestic violence).

Stranded motorists fall under this rule. It's 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's a reason to believe they would have impliedly consented to police assistance. Once there's no more consent, the occupants must be left alone.

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### 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 Example

#### **Community Caretaking Stop on a Passenger Who Appeared Extremely Drunk Was Unreasonable:**

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 medical attention. The court held that the stop was unreasonable, since he was not the driver and did not appear to be in medical distress.<sup>1</sup>

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<sup>1</sup> People v. Madrid, 168 Cal. App. 4th 1050 (Cal. App. 1st Dist. 2008)

## Reasonable Suspicion Stops

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

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### 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 has been, is, 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

#### Stop of Possible Stolen Truck, Even With Different Plates, Was Reasonable:

Observation of a truck that matched the description of one that had just been stolen in a carjacking, but with a different license plate that appeared to be recently attached, and with two occupants who generally matched the suspects' description, constituted the necessary reasonable suspicion to justify the defendant's detention.<sup>1</sup>

#### Terry Stop Conducted After 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."<sup>2</sup>

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<sup>1</sup> United States v. Hartz, 458 F.3d 1011 (9th Cir. Wash. 2006)

<sup>2</sup> U.S. v. Young, 707 F.3d 598 (6th Cir. 2012)



**Homes**

## Overview & Standing

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

#### The Home Is First Among Equals:

"[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"<sup>1</sup>

#### Hotel Rooms Have Similar Protections as Homes:

The rule that a warrantless entry by police into a residence is presumptively unreasonable applies whether the entry is made to

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<sup>1</sup> Fernandez v. California, 134 S. Ct. 1126 (2014)

search for evidence or to seize a person. It applies no less when the dwelling entered is a motel.<sup>1</sup>

### **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 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.”<sup>2</sup>

### **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.”<sup>3</sup>

### **Tent Over Vehicle at Music Festival Was a Home:**

Suspect went to a music festival and pitched a ‘10x30’ 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.” Tent was similar to a garage.<sup>4</sup>

### **Frequent Visitor May Have Privacy Inside Friend's Home:**

A frequent visitor, with free reign of the house despite the fact that he did not stay overnight, might also have standing to contest an allegedly illegal entry of a third person's home.<sup>5</sup>

### **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 and said the officer's behavior was similar that of a “police state.”<sup>6</sup>

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<sup>1</sup> People v. Williams, 45 Cal. 3d 1268 (Cal. 1988)

<sup>2</sup> People v. Hughston, 168 Cal. App. 4th 1062 (Cal. App. 1st Dist. 2008)

<sup>3</sup> People v. Nishi, 207 Cal. App. 4th 954 (Cal. App. 1st Dist. 2012)

<sup>4</sup> People v. Hughston, 168 Cal. App. 4th 1062 (Cal. App. 1st Dist. 2008)

<sup>5</sup> People v. Stewart, 113 Cal. App. 4th 242 (Cal. App. 1st Dist. 2003)

<sup>6</sup> 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

The following rules apply to hotel rooms:

- ☐ Hotel rooms are **considered a home** for the person who rented the room and any invited overnight guests;
- ☐ Police should consider **standard operating procedures** before determining whether a room has been abandoned, such as grace periods or mutual understanding by occupant and hotel management (e.g. late payments accepted);
- ☐ Hotel rooms that were procured **fraudulently** (i.e. stolen credit card) are not protected under the Fourth Amendment. However, the court may want evidence that the defendant knew or should have known about the fraud.

The following rules apply to tents:

- ☐ 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.

The following rules apply to RVs:

- ☐ Recreational Vehicles are often 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.);
- ☐ Even if an RV is considered a “home” under the circumstances, they may still be searched if the officer has **probable cause and exigency** (e.g. solo park ranger with no time to go into town and procure a warrant).

## Case Examples

### **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.<sup>1</sup>

### **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.”<sup>2</sup>

### **Blocking Front Door With a Foot Is Considered a Warrantless Entry:**

It has also been found that police blocking the door of a home with a foot constituted entry. Further, that lack of a warrant, probable cause, exigent circumstances or consent rendered the seizure unlawful.<sup>3</sup>

Note: In my experience officers too often refuse to allow occupants to close the door in either a hotel room or home. If police prevent the door from closing they should have probable cause and some exigent circumstance (e.g. on-going nuisance or potential violence).

### **Guest Did Not Inform the Hotel That He Was Extending the Room Rental; Therefore It Was Abandoned:**

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<sup>1</sup> Id.

<sup>2</sup> United States v. Molsbarger, 551 F.3d 809 (8th Cir. N.D. 2009)

<sup>3</sup> State v. Larson, 266 Wis. 2d 236 (Ct. App. 2003)



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."<sup>1</sup>

### **No Abandonment Where the Hotel Did Not Strictly Enforce Checkout Time:**

Where hotel did not strictly enforce noon checkout and defendant indicated he would stay until 12:30, abandonment occurred only after the later time and therefore police search of the room was held to be unlawful.<sup>2</sup>

### **Officers Violated the Fourth Amendment While Processing a Murder Scene Inside a Tent:**

The defendant called police and said that he found his female companion shot dead inside their tent. Police arrived and entered the tent without a warrant and found the victim and observed other evidence in plain view. Detectives were summoned and they later entered the tent and processed the crime scene without a warrant. The court held that the police lawfully entered the tent initially under the emergency doctrine but the second warrantless entry by detectives was unlawful.<sup>3</sup> Remember, if the defendant has a privacy interest in the place searched, police will need valid consent or a warrant. There is no "murder scene" exception.<sup>4</sup>

### **The Fact That Defendant Could Not Pay for Additional Nights Due to Being in Jail Doesn't Defeat Abandonment:**

After an arrestee's hotel rental had expired, police obtained the manager's permission to search it. Evidence was discovered and the court held that the defendant abandoned the room even if no payment was made due to being locked up.<sup>5</sup>

Note: Cops could still not search closed containers belonging to the defendant. The room was abandoned, not backpacks and so forth.

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<sup>1</sup> United States v. Parizo, 514 F.2d 52 (2d Cir.1975)

<sup>2</sup> United States v. Dorais, 241 F.3d 1124 (9th Cir.2001)

<sup>3</sup> Alward v. State, 112 Nev. 141 (1996)

<sup>4</sup> See Mincey v. Arizona, 437 U.S. 385 (1978)

<sup>5</sup> U.S. v. Huffhines, 967 F.2d 314 (9th Cir. 1992)

# 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.<sup>1</sup>

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 was 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 Example

### Open Fields Are Not Protected by the Fourth Amendment:

In *Hester v. United States*, the Supreme Court addressed the conviction of Hester for concealing distilled spirits. The key legal question was whether the evidence obtained by revenue officers, who observed Hester's actions without a warrant and on his father's land, violated the Fourth and Fifth Amendments of the U.S. Constitution. The Court stated, "...the 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."<sup>2</sup>

<sup>1</sup> *Oliver v. United States*, 466 U.S. 170 (1984)

<sup>2</sup> *Hester v. United States*, 265 U.S. 57 (1924)



## **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. These areas are typically private offices where the public doesn't have access and the arrest warrant would have to be issued for those private offices.

### 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; or
- ☐ You have a **search/arrest warrant** for that location.

### Case Examples

#### Entry Into a Closed Portion of a Business Is 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.<sup>1</sup>

#### Forced Entry Into Private Area of Dental Office Was 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.<sup>2</sup>

#### Entry Into Public Areas Does Not Require a Warrant:

Warrant not necessary to enter reception area through unlocked door during business hours, as there was "no reasonable expectation of privacy there."<sup>3</sup>

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<sup>1</sup> State v. Foreman, 662 N.E.2d 929 (Ind. 1996)

<sup>2</sup> People v. Polito, 42 Ill.App.3d 372, 355 N.E.2d 725 (1976)

<sup>3</sup> 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.<sup>1,2</sup> 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.
- ☐ You comply with **state law**.

### Case Examples

#### Customer Has no Reasonable Expectation of Privacy in Business 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."<sup>3</sup>

#### Tracking Suspect Through Cell-Site Records Requires a Warrant or Exigency:

The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.<sup>4</sup>

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<sup>1</sup> Smith v. Md., 442 U.S. 735 (1979)

<sup>2</sup> United States v. Miller, 425 U.S. 435 (1976)

<sup>3</sup> Marsoner v. United States (In re Grand Jury Proceedings), 40 F.3d 959 (9th Cir. Ariz. 1994)

<sup>4</sup> Carpenter v. U.S., 138 U.S. 2206 (2018)



## 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.<sup>1</sup> 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 first section of this book).

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<sup>1</sup> 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 who 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 it as evidence and search the container because there is no expectation of privacy in the container.

### 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** (e.g. 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 Container Labeled “Gun Case”:

Defendant had no reasonable expectation of privacy in the contents of a case 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.<sup>1</sup>

#### A “Drug Bindle” Is a Single-Purpose Container:

Because it was immediately apparent to experienced officers that a paper bindle viewed in the defendant's identification folder contained contraband, defendant did not have reasonable expectation of privacy which would have prevented opening of the bindle or the field testing of it.<sup>2</sup>

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<sup>1</sup> United States v. Meada, 408 F.3d 14 (1st Cir. Mass. 2005)

<sup>2</sup> State v. Courcy, 48 Wash. App. 326, 739 P.2d 98 (1987)



## Searching Abandoned or Lost Property

A person has no reasonable expectation of privacy in abandoned, lost, or stolen property. The courts have defined abandonment broadly 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).<sup>1</sup> If abandonment occurs after an illegal detention, the evidence would be tainted and inadmissible.<sup>2</sup>

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 privacy in his own containers).

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### 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).

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<sup>1</sup> Stoner v. California, 376 U.S. 483 (1964)

<sup>2</sup> People v. Verin, 220 Cal. App. 3d 551 (Cal. App. 1st Dist. 1990)

## 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 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.'"<sup>1</sup>

### **Dropping Paper Bag and Running Equals Abandonment:**

Police got a tip that the defendant was selling drugs and patrolled the area. They saw the 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 the bag full of drugs and ran. The bag was abandoned and could be searched without a warrant.<sup>2</sup>

### **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."<sup>3</sup>

### **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.<sup>4</sup>

### **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.<sup>5</sup>

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<sup>1</sup> United States v. Caymen, 404 F.3d 1196 (9th Cir. Alaska 2005)

<sup>2</sup> In re Kemonte, 223 Cal.App.3d 1507 (1990)

<sup>3</sup> State v. Brown, Opinion No. 27814 (S.C. 2018)

<sup>4</sup> Cooper v. State, 806 P.2d 1136 (1991)

<sup>5</sup> U.S. v. Grant, 920 F.2d 376 (6th Cir. 1990)



## Technology Searches

TECHNOLOGY SEARCHES

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## Sensory Enhancements

Generally, you may use sensory enhancements if they are in general public use (like binoculars and flashlights). But, 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 Example

#### Use of a Thermal Imaging Device Against a Home Is an Unreasonable Search:

In *Kyllo v. United States*, the case involved the use of a thermal imager by the Department of the Interior to detect heat emanating from the petitioner Kyllo's home, which led to the suspicion of marijuana growth. The Court held that the use of such technology constituted a search under the Fourth Amendment and was presumptively unreasonable without a warrant. The Court stated, "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."<sup>1</sup>

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<sup>1</sup> *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 a 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 occupants reasonable expectation of privacy; but
- ☐ This restriction does not apply when conducting an investigation with **exigency** (burglary, shots fired, etc.).

## Case Example

**Typical use of flashlight does not violate the Fourth Amendment:**

Officers use of a flashlight to illuminate interior of driver's car, “trenched upon no right secured...by [the] Fourth Amendment.”<sup>1</sup>

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<sup>1</sup> Texas v. Brown, 460 U.S. 730 (1983)

TECHNOLOGY SEARCHES

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## 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

### 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.).

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<sup>1</sup> United States v. Shepard, 1995 U.S. App. LEXIS 23118 (9th Cir. Ariz. 1995)

<sup>2</sup> Cooper v. Superior Court, 118 Cal. App. 3d 499 (Cal. App. 1st Dist. 1981)

<sup>3</sup> People v. Arno, 90 Cal. App. 3d 505 (Cal. App. 2d Dist. 1979)

## Case Examples

### **Use of Binoculars From Open Field Is Not a Fourth Amendment Search:**

“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.”<sup>1</sup>

### **Use of High-Power Telescope To See Inside a Hotel Room Is an Unlawful Search:**

Police made a binocular search of a hotel room through the uncurtained window by means of a powerful telescope on a hilltop a quarter of a mile from the hotel. There were no buildings or other locations closer to the hotel from which anyone could see into the hotel room. By using the telescope, the police observed a well-known gambling sheet. The court held 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.”<sup>2</sup>

### **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 Barr display metal slugs to his companion in his upturned hand. The officer was no more than seventy-five feet from Barr when he saw the slugs. Barr then entered a casino abutting the alleyway. The officer followed him, and Barr was arrested for possession of a cheating device.<sup>3</sup>

### **Climbing on Fellow Officer's Shoulders To See in Backyard Was a Search:**

Where an officer on 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 a search.<sup>4</sup>

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<sup>1</sup> United States v. Grimes, 426 F.2d 706 (5th Cir. Ga. 1970)

<sup>2</sup> United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976)

<sup>3</sup> State v. Barr, 98 Nev. 428, 651 P.2d 649 (1982)

<sup>4</sup> State v. Kender, 60 Haw. 301, 588 P.2d 447 (1978)



## **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 why. It would be lawful to look for a medical alert bracelet, identification, medicines, or even illegal drugs he may have overdosed on, 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** that the person is in medical distress;
- ☐ Finding medications, medical-alert bracelet, or reason for overdose will **assist in the medical response**;
- ☐ 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 Is 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.<sup>1</sup>

#### 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.<sup>2</sup>

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<sup>1</sup> People v. Wright, 804 P.2d 866 (Colo.1991)

<sup>2</sup> United States v. Dunavan, 485 F.2d 201 (6th Cir.1973)



## **Search Warrants**

## Overview

The four essential elements of a search warrant, crucial for its validity, include establishing probable cause within the affidavit without adding information later, supporting the warrant with an oath or affirmation, specifically describing the people or places to be searched, and precisely detailing the items to be seized. If any of these requirements are found lacking after the fact, the evidence obtained through the search 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 Example

#### The Warrant Must Particularly Describe What Is Sought in the Search:

In the case of *Groh v. Ramirez*, the Supreme Court addressed the particularity requirement in search warrants. The case revolved around a search conducted by Jeff Groh, a Special Agent for the ATF, at the home of Joseph Ramirez and his family. Groh had obtained a warrant, but it failed to specifically describe the items to be seized, instead only detailing the description of the house. The Court held that this lack of particularity violated the Fourth Amendment, emphasizing that "a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."<sup>1</sup>

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<sup>1</sup> *Groh v. Ramirez*, 540 U.S. 551 (2004).

SEARCH WARRANTS

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## 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.

This is no easy task. The defendant would usually have to prove that the officer was plainly incompetent or reckless with his facts, 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 Example

#### 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.<sup>1</sup>

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<sup>1</sup> 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 Example

#### The Warrant Must Particularly Describe What Is Sought:

In the case of *Groh v. Ramirez*, the Supreme Court addressed the particularity requirement in search warrants. The case revolved around a search conducted by Jeff Groh, a Special Agent for the ATF, at the home of Joseph Ramirez and his family. Groh had obtained a warrant, but it failed to specifically describe the items to be seized, instead only detailing the description of the house.

The Court held that this lack of particularity violated the Fourth Amendment, emphasizing that "A search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. 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."<sup>1</sup>

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<sup>1</sup> *Groh v. Ramirez*, 540 U.S. 551 (2004)



## 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, otherwise it loses credibility.

### Legal Standard

Factors to consider whether non-deadly force was reasonable include:<sup>1</sup>

- ☐ 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 Example

#### **Trooper liable after using pepper spray on handcuffed suspect:**

When the 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.<sup>2</sup>

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<sup>1</sup> Graham v. Connor, 490 U.S. 386 (1989)

<sup>2</sup> Martinez v. New Mexico Dept. Of Public Safety, 47 Fed. Appx. 513 (10th Cir. 2002)

USE OF FORCE

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## 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. 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.

### 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 Example

**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 rather 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 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.”<sup>1</sup>

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<sup>1</sup> Tennessee v. Garner, 471 U.S. 1 (1985)



## Deadly Force During Vehicle Pursuit

Police may use reasonable force to end a dangerous pursuit. This may include deadly force if the fleeing suspect poses an imminent threat of serious bodily harm or death to innocent people. Still, this area of the law is not completely settled.<sup>1</sup>

Therefore, best police practices must be considered. The Supreme Court cannot prevent suspects and innocent people from suing you and your agency. These lawsuits could easily drain your agency of hundreds of thousands of dollars in legal fees. Therefore, only use deadly force when necessary.

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### Legal Standard

Deadly force may be reasonable against a fleeing motorist where:

- ☐ The fleeing suspect poses an imminent **threat of serious bodily harm** or **death** to others outside his vehicle;
- ☐ A **warning**, if feasible, is given before deadly force is used (probably not feasible while chasing a suspect, but it's required by *Tenn. v. Garner*).

### Case Example

#### No violation after using deadly force to end dangerous pursuit:

“[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious what perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.... Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”<sup>2</sup>

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<sup>1</sup> *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014)

<sup>2</sup> *Scott v. Harris*, 550 U.S. 372 (2007)



## **Interview and Interrogation**

## When Miranda is Required

Two requirements must be met before you are required to tell a suspect his Miranda rights. The requirements are that the suspect must be “in-custody” and “interrogation” must be imminent.<sup>1</sup> Additionally, these requirements must be present at the same time. Otherwise, Miranda is not required.

Remember that you don’t 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. This is why booking-type questions are not normally considered interrogation, because they seek inmate information and not particular information related to his 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

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

Handcuffing and putting an un-cooperative suspect in the backseat of a patrol car while the officer checks the vehicle for weapons is

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<sup>1</sup> Miranda v. Ariz., 384 U.S. 436 (1966)

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.”<sup>1</sup>

Still, this confinement is usually an arrest.

**Miranda not necessarily required after detaining a suspect with handcuffs:**

“Handcuffing a suspect during an investigative detention does not automatically make it [a] custodial interrogation for purposes of Miranda.”<sup>2</sup>

**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.<sup>3</sup>

**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.<sup>4</sup>

**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.”<sup>5</sup>

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<sup>1</sup> Haynie v. County of L.A., 339 F.3d 1071 (9th Cir. Cal. 2003)

<sup>2</sup> People v. Davidson, 221 Cal. App. 4th 966 (Cal. App. 2d Dist. 2013)

<sup>3</sup> Salinas v. Texas, 133 S.Ct. 2174 (2013)

<sup>4</sup> Arizona v. Mauro, 481 U.S. 520 (1987)

<sup>5</sup> Rhode Island v. Innis, 446 U.S. 291 (1980)

**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-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.<sup>1</sup>

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<sup>1</sup> Com. v. Burgos, 470 Mass. 133 (2014)

INTERVIEW AND INTERROGATION

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## Miranda Elements

The following Miranda warnings are required when you interrogate an in-custody suspect.<sup>1</sup> Additionally, you must read a suspect his entire Miranda rights, even if they cut you off and tell you they already know their rights.<sup>2</sup> 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, be prepared to be slammed in court by a decent defense attorney because you don't remember exactly what you said to the defendant.

### Legal Standard

Miranda requires the suspect to 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 Example

**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.’”<sup>3</sup>

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<sup>1</sup> Miranda v. Ariz., 384 U.S. 436 (1966)

<sup>2</sup> United States v. Patane, 542 U.S. 630 (2004)

<sup>3</sup> Powell v. Florida, 130 S.Ct. 1195 (2010)

# Coercive Influences and De Facto Arrests

You may unintentionally create a coercive environment when you detain a suspect. For example, you may need to draw your firearm or use handcuffs for safety purposes. If you intend to obtain a voluntary statement you should minimize those coercive influences and articulate your actions in your report.

Remember, an arrest occurs when a *reasonable* person would believe he was “in-custody.” It doesn’t matter what you “believed.” Instead, courts will focus on the environment, what you did, what you said, and how you said it. If courts decide that a “de facto” arrest occurred, Miranda would be required.

For example, if police made a highly-intrusive detention based on legitimate safety concerns, e.g. pointing a firearm to detain a violent-crime suspect, then police should try to minimize those coercive activities before they conduct an interview.

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## Legal Standard

A person’s statement is admissible in court if:

- ☐ It was **voluntary and not coerced**; and
- ☐ If under arrest, he **waived** his Miranda rights.

## Case Examples

### Subjective intentions don’t matter:

An individual is deemed “in custody” where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest, so that a reasonable person would not feel free to leave. A suspect’s or the police’s subjective view of the circumstances does not determine whether the suspect is in custody.<sup>1</sup>

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<sup>1</sup> Stansbury v. Cal., 511 U.S. 318 (1994)

**Lying about the purpose of an interview is not per se coercive:**

The Court has held that failing to tell a suspect what it is they intend to question him about is irrelevant to the issue of the voluntariness of a Miranda waiver. Still, be careful here...honesty is often better.<sup>1</sup>

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<sup>1</sup> Colorado v. Spring, 479 U.S. 564 (1987)





## 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.”<sup>1</sup>

The Fourth Amendment also seeks to “safeguard the privacy and security of individuals against arbitrary invasions by government officials.”

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 so, the evidence may still be used against the suspect. But remember, 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. So use this book, get additional training, and comply with the Constitution.

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### 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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<sup>1</sup> United States v. Calandra, 414 U.S. 338 (1974)

## Case Examples

### **Exclusionary Rule Doesn't Apply if Police Rely on Binding Legal Authority:**

If police search or seize in an objectively reasonable reliance on binding court authority, which is later overruled, the exclusionary rule doesn't apply because there is no need to deter unlawful police activity.<sup>1</sup>

For example, where police placed a GPS-tracker on a vehicle without a warrant in reliance of then Supreme Court precedent involving "homing beacons," tracking data should not be suppressed even though the Court later held warrantless GPS tracking offended the Fourth Amendment.<sup>2</sup>

### **The Fact That Evidence Is Vital for a Prosecution Does Not Weigh On the Exclusionary Rule:**

Federal prosecutors argued that if 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.<sup>3</sup>

### **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.<sup>4</sup>

Additionally, even if a violation of state law requires suppression, that same law has no effect on federal court proceedings.<sup>5</sup>

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<sup>1</sup> Davis v. U.S., 564 U.S. 229 (2011)

<sup>2</sup> U.S. v. Aguiar, 737 F.3d 251 (2d Cir. 2013)

<sup>3</sup> U.S. v. Marts, 986 F.2d 1216 (8th Cir. 1993)

<sup>4</sup> Penn. Steel Foundary and Mach. Co. v. Sec. of Labor, 831 F.2d 1211 (3d Cir. 1987)

<sup>5</sup> 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.<sup>1</sup> But, 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;<sup>2</sup>
- ☐ Foreign searches;
- ☐ Forfeiture proceedings;<sup>3</sup>
- ☐ Inevitable discovery;<sup>4</sup>
- ☐ Deportation proceedings;
- ☐ Grand juries;<sup>5</sup>
- ☐ Civil tax proceedings.

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<sup>1</sup> United States v. Janis, 428 U.S. 433 (1976)

<sup>2</sup> United States v. Leon, 468 U.S. 897 (1984)

<sup>3</sup> One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)

<sup>4</sup> Not followed under state law: See 38.23 CCP

<sup>5</sup> 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.<sup>1</sup>

#### All Evidence Tainted by 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.<sup>2</sup>

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<sup>1</sup> Murray v. United States, 487 U.S. 533 (1988)

<sup>2</sup> United States v. Nora, 765 F.3d 1049 (9th Cir. Cal. 2014)



## ABOUT THE AUTHOR

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Anthony is an attorney and retired law enforcement officer with experience as both a municipal police officer and sergeant with a state police agency. Anthony has studied constitutional law for over twenty years and has trained countless police officers around the nation in search and seizure.

View his bio at [BlueToGold.com/about](http://BlueToGold.com/about)

FEDERAL

# Search & Seizure Survival Guide

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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