WASHINGTON Search & Seizure Survival Guide

A FIELD GUIDE FOR LAW ENFORCEMENT

Anthony Bandiero, JD

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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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— Anthony Bandiero

Overview

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

— Brad Thor

Let’s Start with the Basics

Fourth Amendment

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

Legal Standard

The Fourth Amendment is best understood in two separate parts:

Search and seizure clause:

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

Search warrant clause:

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

Washington Constitution Art. 1, § 7

Washington's Constitution has been interpreted to offer significantly more protections than the Fourth Amendment. Therefore, when reading cases from states other than Washington, recognize that it may not be good law for Washington law enforcement officers.

Legal Standard

Under the Washington Constitution Article I, § 7, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment."[1]

[1] City of Seattle v. McCready, 123 Wash.2d 260, 267, 868 P.2d 134 (1994)

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.

Three Golden Rules of Search & Seizure

I want to share three overarching Golden Rules to help provide you with guidance in the field and to keep you out of trouble. These Golden Rules were developed after reading thousands of cases and I realized that there was a "theme" that developed when officers lost their cases or were successfully sued.

Embrace these Golden Rules and your career will benefit.

Three Golden Rules

The three Golden Rules of Search & Seizure are:

1. **The more you articulate why you did something, the more likely it will be upheld in court.**

   This is the first and most important Golden Rule. Every time you make an intrusion into a person's liberty or property interests (i.e. detain them or their property), you need to document why you did it. If not, you may be disciplined or successfully sued. Finally, you don't necessarily need to produce a formal report. CAD and dispatch notes are also effective documentation when a formal report is unnecessary.

2. **The more serious the crime, the more reasonable your actions are likely to be viewed.**

   The Fourth Amendment is like a human-sized rubber band around your body. It's naturally constricting. But when you are dealing with violent people, or emergencies, or rapidly evolving situations, the court will give you more room to breathe. For example, courts may let you enter homes to prevent the destruction of a kilo of cocaine, but will criticize you for entering the same home to prevent the destruction of a marijuana cigarette. Use good judgment. Be willing to back down and seek judicial approval for minor crimes - use good judgment!

3. **Conduct all warrantless searches and seizures in the same manner as if you had a warrant.**

Most searches and seizures are warrantless. But that doesn't mean that you get any extra leeway when you proceed without judicial pre-approval. In fact, you get less leeway.

When you take the time to get judicial pre-approval courts like it. They respect it. And when your case goes to trial there is a legal presumption that you did the right thing. Therefore, the defendant must present evidence that your warrant is invalid. Good luck. The judge presiding over the case is likely the same judge who signed off on your warrant. Do you think that same judge will now decide the warrant was improperly issued? Yeah right!

On the other hand, when you proceed without a warrant there is a legal presumption that your search or seizure was unlawful! It's not personal - it's business. Without a warrant you have the burden to prove that what you did, and how you did it, was reasonable and lawful. Most of the time you will win these arguments with proper articulation (think Golden Rule #1) and your search or seizure was no more intrusive than what a judge would have allowed you to do.

Keep these Golden Rules in mind while in the field and your courtroom experience should be a tad less stressful.

The Right 'To be Left Alone'

The Supreme Court has recognized another "right," though it is not solely defined in the Bill of Rights, and that is the right "to be left alone." (The original phrase is the right "to be let alone." Modern English prefers "left alone.")

Whatever its source, whether common law, civil tort law, or the Bill of Rights, professional law enforcement officers must realize, and accept, that citizens have the right to be left alone. This is especially true today because more and more citizens are refusing police consensual encounters. I witnessed this first hand when subjects, whom I wanted to talk with, in order to develop intel, would bluntly ask me if they were free to go. When I replied "Yes," a few would immediately leave (usually on their bicycle or moped). However, this country was founded on an unwavering respect for individual liberties. It's just one of many reasons why this country is the best.

As Justice Brandies wrote in a dissenting opinion that was later endorsed by courts around the country:

> *The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.*[1]

[1] Olmstead v. United States, 277 U.S. 438 (1928)

Decision Sequencing

Every search and seizure decision you make must be constitutional. If not, the evidence seized later will be "tainted" by the unconstitutional decision and the evidence may be suppressed. More importantly, an unconstitutional decision may have violated someone's constitutional rights. If true, you may be successfully sued even if the suspect suffered no real harm. For example, if you illegally searched a backpack and found cocaine. The suspect may be able to recover damages and attorney's fees even though they were never allowed to possess the cocaine in the first place.

A great way to conceptualize how this works is to think of constitutional decisions as upright dominos, each stacked next to each other.[1] Remember doing that as a kid...or last week? You line them up and when one falls, the rest fall *after* that one. In other words, if you just flicked the domino in the middle, only half the dominos would fall. Fourth Amendment decisions work the same way. For example, you make a *lawful* traffic stop (domino #1). You *lawfully* question the occupants about unrelated matters but it does not measurably extend the stop (domino #2). Eventually, you gain consent to search the trunk, but exceed the scope of search by searching inside the vehicle. This would violate the constitution and therefore that domino falls...and so do the decisions and evidence that come after it. Here, if you found drugs in the car, made an arrest, and found more drugs from a search incident to an arrest (another domino), that domino falls over too and that evidence is suppressed because it was tainted by a domino that fell over before.

Finally, remember everything that you found *before* the first domino that fell is constitutional. Any evidence discovered during that period would not be suppressed.

Legal Standard

Constitutional decisions are like upright dominos — an unconstitutional decision will cause the domino to fall over, knocking over (i.e. "tainting") all the dominos that come later.

[1] This concept came from Bruce-Alan Barnard, JD

C.R.E.W.

The Supreme Court stated that all Fourth Amendment searches are presumed unreasonable unless there is a warrant or recognized exception. There are several exceptions, including "consent." C.R.E.W. is an acronym to help you remember this important limitation.

The "C" stands for consent. "R.E." stands for recognized exceptions. "W" stands for, you guessed it, warrant.

Legal Standard

Whenever you conduct a search or a seizure you need one of the following:

1. Consent
2. Recognized Exceptions, examples include:
    - ☐ Exigency
    - ☐ Community caretaking
    - ☐ Reasonable suspicion
    - ☐ Probable cause arrest in public place
    - ☐ Mobile conveyance exception
    - ☐ Plain view (or smell, feel, hear)
    - ☐ Emergency searches
    - ☐ Hot/fresh pursuit
3. Warrant

Fourth Amendment Reasonableness

The ultimate touchstone of the Fourth Amendment is reasonableness.[1] In particular, the Fourth prohibits "unreasonable searches and seizures." In other words, if a search or seizure is reasonable, it's probably lawful.

Yet, how do we define what's reasonable? Most of our definitions come from case law. What we can, and cannot, do is usually spelled out by judges. But remember, courts don't expect you to do your job perfectly—cops are humans and make mistakes. But you must be able to articulate why you're doing something. If you cannot, then it's probably unreasonable.

Legal Standard

The "reasonable person" test asks, "not . . . what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."[2]

"An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner."[3]

Finally, the "Fourth Amendment does not mandate that police officers act flawlessly, but only that they act reasonably."[4]

[1] Riley v. California, 134 S. Ct. 2473 (2014)
[2] United States V. Goddard (11th Circuit, 2002)
[3] United States V. Jacobsen, 503 U.S. 540 (1992)
[4] United States V. Rohrig (6th Circuit, 1996)

Private Searches

The Fourth Amendment controls government officials, not private actors. Therefore, there's generally no restriction on using information gained from a private citizen's search as long as he was not acting as a government agent. This is true even when the private search was conducted in a highly offensive, unreasonable, or illegal manner.[1]

Remember, you may not exceed the scope of the original private search. The point here is that the suspect loses any reasonable expectation of privacy in those areas searched by the private person, so police can view the same evidence. But that doesn't mean the suspect lost his expectation of privacy in other, non-searched areas.

An agent is anyone who conducts the search or seizure on your behalf. Government agents must abide by the same rules you do, otherwise agents become a way to violate the Fourth Amendment. Again, as long as the person is not your agent, you can use any evidence they bring to you.

Legal Standard

Whether a private search becomes a government search depends on three factors:

- ☐ Did you encourage, **direct** or **participate** in the search or seizure? And,
- ☐ Did the private person conduct the search with the **intent to help police** or **discover evidence**? If so,
- ☐ Did you exceed the **scope** of the private search?

The first two factors must both be present for a private search to turn into a government search. The third factor will turn a private search into an unreasonable government search.

Case Examples

Government did not exceed private search by opening another box on the same pallet:

Private carrier's employee opened one of thirteen boxes on a pallet and discovered marijuana. Police later searched the other boxes

[1] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)

without a warrant. Typically, this would have exceeded the "scope" of the original private search. However, the government effectively argued that the additional boxes on the same pallet were essentially a "single" box. The court agreed and the search was upheld.[1]

No government search where wife simply handed over evidence:

Officers went to the defendant's home and questioned his wife. Officers asked if husband owned any guns and what clothes he had worn on the night of the crime. Wife then grabbed the items and gave them to police. This was a private search—no evidence that police *told* her to do it, she did it on her own to clear her husband's name.[2] That last part backfired!

Hotel manager was government agent while searching room for drugs:

Hotel manager called police and asked that police protect him while he searched a suspected drug dealer's room. The officers stood guard at the door and listened to the manager describe the drug evidence found. This was a government search because police participated in (i.e. stood guard) and the manager was motivated to help police (i.e. look at what I just found boys!).[3]

FedEx employee was not an agent despite wanting to find evidence for police:

A FedEx employee who previously found drugs in eight packages, and testified in court two times, was not a government agent simply because he wanted to find evidence to turn over to the government.[4]

Private search exceeded after laboratory tests performed:

Where a previous private search was limited to visual inspection of pills but the government subsequently had a series of tests performed on the material at a toxicology laboratory that revealed its precise molecular structure, the action was a search because of the danger that private facts about the items could be revealed and because the search exceeded the scope of the private search. The court distinguished a field test that would reveal only whether or not the pills were a particular contraband substance but would not otherwise reveal exactly what they were.[5]

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[1] U.S. v. Garcia-Bercovich, 582 F.3d 1234 (11th Cir. 2009)

[2] Coolidge v. New Hampshire, 403 U.S. 443 (1971)

[3] U.S. v. Reed, 15 F.3d 928 (9th Cir. 1994)

[4] U.S. v. Koenig, 856 F.2d 843 (7th Cir. 1988)

[5] U.S. v. Mulder, 808 F.2d 1346 (9th Cir. 1987)

No violation where police viewed same child pornography wife viewed:

Police officers who examined defendant's child pornography obtained and brought to the officers by defendant's wife, did not violate defendant's privacy expectations, where defendant's wife had performed a private search of the materials, and the police officers only viewed those materials that had already been viewed by defendant's wife.[1] Still, officers are highly encouraged to get a search warrant for electronic devices, especially those suspected of containing child pornography.

[1] U.S. v. Starr, 533 F.3d 985 (8th Cir. 2008)

"Hunches" Defined

You cannot make a stop or detention based "on mere curiosity, rumor, or hunch...even though the officer [you] may be acting in complete good faith."[1] The solution is to work on converting those hunches into reasonable suspicion so they can make investigatory detentions. As the Court said:

> *The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause*[2]

Legal Standard

You **cannot seize** a person or property based merely on a **hunch**. Instead, you may make a consensual encounter or pursue other investigative techniques that are not prohibited by the Fourth Amendment.

Case Examples

Hunches can't support a stop, but are nevertheless valuable:

"A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction."[3]

Criminal history alone is a hunch, not reasonable suspicion:

During a traffic stop, the facts that a computer check reveals that driver had once been involved in a hit-and-run incident and had once been arrested on a drug charge did not provide reasonable suspicion for further detention. Officer was impermissibly acting on a hunch that defendant might presently be involved in criminal activity.[4]

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[1] In re Tony C. 21 Cal.3rd 888 (1978)
[2] U.S. v. Sokolow, 490 U.S. 1 (1989)
[3] United States v. Thomas, 211 F.3d 1186, 1191 (9th Cir. 2000)
[4] U.S. v. Sandoval, 29 F.3d 537, 543 (10th Cir. 1994)

Reasonable Suspicion Defined

You may conduct an investigative detention (i.e. Terry Stop) when you can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" you to detain the suspect for further investigation.[1]

Like probable cause, reasonable suspicion is fact-specific. Each situation is different. Therefore, the key is to articulate why this particular person appears to be engaged in criminal activity.

Legal Standard

Reasonable suspicion exists when:

- ☐ You can articulate **facts and circumstances** that would lead a **reasonable officer** to believe the suspect is, or is about to be, involved in **criminal activity**;
- ☐ If your suspicions are **dispelled**, the person must be **immediately released** or the stop converted into a consensual encounter.

Case Examples

Confidential informant may be used to build reasonable suspicion:

An informant known to the officer, who had provided him with information in the past, told him that a person seated in a car nearby was dealing drugs and was armed. Reasonable suspicion for an investigative stop was present.[2]

Being uncooperative is a hunch, not reasonable suspicion:

The mere fact that a suspect refuses to cooperate with police, when the suspect has no duty to do so, is insufficient to support reasonable suspicion.[3]

Reasonable suspicion supported protective sweep of car:

Officers had reasonable suspicion that defendant had access to a gun, and since a gun was not found on the suspect when he was frisked, the officers rightly searched the car, without a warrant, based on reasonable suspicion.[4]

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[1] Terry v. Ohio, 392 U.S. 1 (1968)

[2] Adams v. Williams, 407 U.S. 143 (1972)

[3] I.N.S. v. Delgado, 466 U.S. 210, 216 (1984)

[4] U.S. v. Vandergroen, 2020 U.S. App. LEXIS 21156 (9th Cir. 2020)

Probable Cause Defined

Articulating precisely the definition of "probable cause" or "reasonable cause"[1] is not possible. P.C. is a fluid concept and whether or not you had P.C. to arrest or conduct a search will be evaluated on a case-by-case basis. "On many occasions, we have reiterated that the probable-cause standard is a 'practical, nontechnical conception' that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[2]

Remember, evidence found *after* a search cannot be used retroactively to establish probable cause.[3] It may be tempting to try to cure an unlawful search by telling the prosecutor, "But I found 100 kilos of cocaine! There must have been probable cause!" That's a great argument, but it is legally flawed. Similarly, just because the evidence sought was not found does not mean that there was no probable cause at the beginning.[4]

Legal Standard

Probable cause to arrest:

> Probable cause to arrest exists "where 'the **facts and circumstances** within [the arresting **officer's] knowledge** and of which he had **reasonably trustworthy information** [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed,"[5] and that the **defendant is the perpetrator**.[6]

Probable cause to search:

> Probable cause to search, on the other hand, arises when there are r**easonable grounds to believe**, "not that the owner of the property is suspected of a crime, but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are **located** on the property to which entry is sought,"[7] and there is probable cause to believe the **things sought are**

[1] See Pen. Code § 836
[2] Illinois v. Gates, 462 U.S. 213 (1983)
[3] Maryland v. Garrison, 480 U.S. 79 (1987)
[4] United States v. Gaschler, 2009 U.S. Dist. LEXIS 48449 (N.D. W. Va. June 3, 2009)
[5] Draper v. United States, 358 U.S. 307 (1959)
[6] United States v. Watson, 423 U.S. 411 (1976)
[7] Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

evidence of a crime.[1] In fact, the identity of the offender need not be known.[2]

Case Examples

Officer had probable cause to search vehicle:

"There was probable cause to search a vehicle where police knew that a "blue compact station wagon" with four men in it had been circling a service station shortly before it was robbed by two men; and sped away from an area near the scene shortly thereafter; that one occupant wore a green sweater as did one of the robbers, [and] that there was a trench coat in the auto similar to that worn by another of the robbers."[3]

Officer had probable cause that tied-off balloon contained narcotics:

Where an officer observed a tied-off, uninflated opaque party balloon in a vehicle together with additional balloons, small plastic vials, and white powder in the glove compartment, and when the officer knew from his experience that such balloons were often used to deal drugs, probable cause existed to believe that the balloon contained narcotics.[4]

Probable cause existed to arrest party-goers in near-empty house:

A reasonable officer could have concluded that there was probable cause to believe the partygoers knew they did not have permission to be in the house, and the officers had probable cause to arrest the partygoers because the officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police.[5]

Reasonably reliable information led to probable cause:

The court found the driving record provided to police from the Washington Department of Licensing, stating that the defendant's license was suspended, was reasonably reliable. Therefore the officers had probable cause to arrest the defendant for driving with a suspended license.[6]

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[1] State v. Tamer, 475 So. 2d 918 (Fla. Dist. Ct. App. 3d Dist. 1985)

[2] State v. Warren, 301 S.E.2d 126 (N.C. Ct. App. 1983)

[3] Chambers v. Maroney, 90 S. Ct. 1975 (1970)

[4] Tex. v. Brown, 103 S. Ct. 1535 (1983)

[5] District of Columbia v. Wesby, 138 S. Ct. 577 (2018)

[6] State v. Gaddy, 114 Wash. App. 702 (Wash. App. Div. One 2002)

Collective Knowledge Doctrine

The collective knowledge doctrine is one of the most powerful and important doctrines in law enforcement. It allows a single police officer to benefit from the collective knowledge of all officers working on a case. For example, if a detective asks another officer to search a vehicle for drugs, the search would be valid even if the officer conducting the search had no idea why he was authorized to search the vehicle, as long as the detective had probable cause.

The key with the collective knowledge doctrine is that officers communicate with each other. This doesn't mean officers have to know everything about the case, but they at least have to be working together.

Legal Standard

The collective knowledge doctrine has two requirements:

- ☐ The officers must be involved in the **same investigation**, but may be from different departments (i.e. task forces); and
- ☐ Officers must be in **communication** with each other related to the investigation.

Case Examples

Collective knowledge doctrine applied to officer who stopped vehicle:

A narcotics task force requested that an officer stop a vehicle for any observed traffic violation. Though the arresting officer only observed a traffic offense, the collective knowledge of the task force permitted the later arrest and warrantless search of the vehicle for drugs.[1]

Officer may wholly rely on the probable cause of a fellow officer:

A police officer relied on the instruction of a fellow officer, who had probable cause to believe that drugs were in a vehicle. The police officer stopped the vehicle and searched it under the automobile exception. Even though the initiating officer did not

[1] United States v. Thompson, 533 F.3d 964 (8th Cir. Mo. 2008)

have probable cause, because he was in communication with a fellow officer who did, the stop and search were lawful.[1]

Intel from confidential informant contributed to collective knowledge:

Officers who stopped defendant for a traffic violation had probable cause to arrest him for drug trafficking. At the time of the stop, law enforcement collectively knew that a confidential informant made a controlled drug purchase from defendant five days earlier, the informant made a controlled drug payment of $5,000 to defendant on the day of the stop, and defendant engaged in what appeared to be other drug transactions shortly before the stop.[2]

Collective knowledge doctrine controls even when agent told officer to develop his own probable cause:

A DEA agent had probable cause that the defendant was in possession of drugs. He told a local officer to watch out for the defendant, and to develop his own probable cause and stop the vehicle, but the officer had no knowledge of the facts underlying the DEA's probable cause. The officer stopped the vehicle and searched it. The court held that the officer had probable cause under the collective knowledge doctrine.[3]

Knowledge from drug enforcement officers:

The drug enforcement officers had gathered information about the suspect's SUV which had a secret compartment and they saw the suspect get into the car with a weighted-down gym bag. The drug enforcement officers instructed a uniformed officer to make a (legal) traffic stop, which led to the search of the vehicle and discovery of eight kilograms of cocaine by the uniformed officer, which was upheld due to the collective knowledge doctrine.[4]

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[1] U.S. v. Chavez, 534 F.3d 1338 (10th Cir. 2008)
[2] U.S. v. Nicksion, 628 F.3d 368 (7th Cir. 2010)
[3] U.S. v. Williams, 627 F.3d 247 (7th Cir. 2010)
[4] U.S. v. Ramirez, 473 F.3d 1026 (9th Cir. 2007)

What is a "Search" Under the Fourth Amendment?

It is important to understand that the term "search," as used in this book at least, refers to conduct that invokes the protections of the Fourth Amendment. Police may engage in hundreds of "searches" every day, and yet invoke the Fourth Amendment only a few times.

For example, when police look into a stopped vehicle, they may be searching for weapons or contraband, but that conduct is not protected by the Fourth Amendment. In other words, just using your senses while lawfully positioned somewhere is not a Fourth Amendment search. On the other hand, opening the trunk of that same vehicle and looking around for contraband would be a protected search because that area is protected as a closed container.

There are two constitutional searches: a "physical intrusion" search; or a search where a person has a "reasonable expectation of privacy."

Legal Standard

Physical intrusion:

A physical intrusion will be a search under the Fourth Amendment if:

- ☐ You make a **physical trespass** into a **constitutionally protected area** (i.e. persons, houses, papers, and effects); and
- ☐ You did it for the **purpose of obtaining information**.[1]

Reasonable expectation of privacy:

A reasonable expectation of privacy will be violated if:

- ☐ The person exhibited an actual (**subjective**) expectation of privacy; and
- ☐ His expectation is one that society is prepared to recognize as reasonable (**objective**).[2]

[1] U.S. v. Jones, 565 U.S. 400 (2012)
[2] Katz v. U.S., 389 U.S. 347 (1967)

What is a "Seizure?"

A seizure of a person occurs when a reasonable person would believe that he or she was not free to leave, even if for a brief period of time.

> *The test is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs....*[1]

There are two ways to seize a person. First, and most obviously, you may use physical force to make the seizure. For example, intentionally grabbing a person's shoulder or more drastically shooting him are both seizures. Alternatively, and more commonly, police may seize a person when there is a show of authority sufficient enough to lead a reasonable person to believe he was not free to avoid the officer without legal consequences and the person submits (i.e. doesn't run away).

A Fourth Amendment seizure of property occurs whenever you intentionally interfere with an individual's possessory interest in his property. The most important element here is intent. For example, if you blow a red light and run into another person's car, you have unintentionally interfered with his property and will be subject to tort liability, not a constitutional violation.

Remember you can be held vicariously liable if you "keep the peace" while someone takes another person's property. For example, if you're called to a civil standby while a subject removes property from a residence, it may be unwise to allow any disputed property to leave the residence.

Legal Standard

A seizure of a **person** occurs under the Fourth Amendment when:

- ☐ You **use force** on a person with the **intent** to restrain,[2] even with minimal force. Additionally, a seizure occurs even if

[1] Mich. v. Chesternut, 486 U.S. 567 (1988)
[2] Brower v. County of Inyo, 489 U.S. 593 (1989)

the suspect is trying to escape (submission is not required);[1] or

- ☐ There is a sufficient **show of authority** that would lead a **reasonable person** to believe he was **not free to leave** or avoid you without legal consequences, and **submits**.[2]

A seizure of **property** occurs under the Fourth Amendment when:

- ☐ You **intend** some **meaningful interference** with someone's **possessory interest** in his property.

Case Examples

No seizure by DEA agents airport:

The defendant was not seized under the Fourth Amendment when she was asked by airport DEA agents if she would accompany them back to their office to discuss some discrepancies with her plane ticket. Once there, they asked for consent to search and she was informed of her right to refuse. She agreed and a female officer asked her to partially disrobe, after which bundles of heroin were discovered. The whole encounter was consensual.[3]

Consensual contacts on a bus:

Narcotics agents boarded a Greyhound bus and without any reasonable suspicion asked various passengers for consent to search their luggage. Arrested smuggler later argued that he was not free to leave because he was stuck on the bus in order to complete his journey and therefore consent was tainted. The Supreme Court disagreed, and stated that the test for a consensual encounter is not only the ability to *leave*, but also the ability to *terminate* the encounter while staying on the bus (e.g. "Leave me alone officer").[4]

A "seizure" may occur even if the suspect flees:

The standard under article I, section 7 is a "purely objective" one. Police behavior that could amount to a show of authority constituting a seizure includes "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Accordingly, a person cannot avoid seizure by failing to yield to an officer's show of authority.[5]

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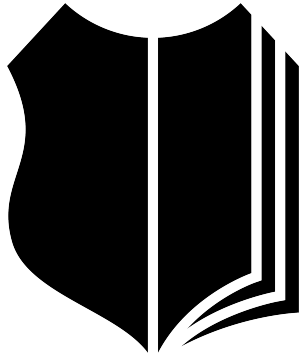
[1] Torres v. Madrid, 141 S. Ct. 989, 209 L. Ed. 2d 190 (2021)

[2] California V. Hodari 499 U.S. 621 (1991)

[3] United States v. Mendenhall, 446 U.S. 544 (1980)

[4] Fla. v. Bostick, 501 U.S. 429 (1991)

[5] State v. Patton, 167 Wash.2d 379 (2009)



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."[1]

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.[2]

Legal Standard

A consensual encounter does not violate the Fourth Amendment when:

- ☐ A reasonable person would believe he was **free to leave** or otherwise **terminate the encounter**.[3] In other words, a reasonable person would have believed he was not detained.

Case Examples

Asking for identification does not equal a detention:

"When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated. If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure."[4] However, do not hold on to ID longer than necessary. Also, seek consent to run for warrants or give information to back-up officer to run.

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[1] United States v. Drayton, 536 U.S. 194 (2002)
[2] Hoffa v. United States, 385 U.S. 293 (1966)
[3] Florida v. Bostick, 501 U.S. 429 (1991)
[4] State v. Mennegar, 114 Wash.2d 304 (1990)

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 suppressed.[1]

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.[2]

Even if police have probable cause, they can still seek a consensual encounter with the suspect:

“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.”[3]

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.[4] However, Washington state courts would likely hold otherwise under the State Constitution.

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[1] People v. Roth, 219 Cal. App. 3d 211 (Cal. App. 4th Dist. 1990)

[2] Fla. v. Royer, 460 U.S. 491 (1983)

[3] People v. Coddington, 23 Cal. 4th 529 (2000), as modified on denial of reh'g (Sep 27, 2000)

[4] U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000)

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 it, then it's probably unreasonable.

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

Legal Standard

Knock and talks are lawful when:

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

Case Examples

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

Officers went to suspect's residence at 4 a.m. with the sole purpose to arrest him. There was no on-going crime and the probable cause

was based on an offense that occurred the previous night. Violation of knock and talk because officers exceeded social norms.[1]

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."[2]

Constant pressure to consent to search held unlawful:

During knock and talk officers continued to press defendant for permission to enter and search. Later consent-to-search was product of illegal detention.[3]

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

"Consensual encounters may also take place at the doorway of a home. In a frequently cited opinion, one federal appeals 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.'"[4]

Officers must inform residents of their right to refuse consent:

"[W]hen officers conduct a knock and talk, they must inform residents of their right to refuse consent, revoke consent, and limits the scope of the search before entering the home."[5]

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[1] United States v. Lundin, 47 F. Supp. 3d 1003 (N.D. Cal. 2014)

[2] United States v. Poe, 462 F.3d 997 (8th Cir. Mo. 2006)

[3] United States v. Washington, 387 F.3d 1060 (9th Cir. Nev. 2004)

[4] People v. Rivera, 41 Cal. 4th 304 (2007)

[5] State v. Budd, 185 Wash. 2d 566 (2016)

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."[1]

Asking for ID and running a subject for warrants doesn't automatically convert an encounter into a detention.[2] Hint: return ID as soon as possible so that a reasonable person would still "feel free to leave."[3]

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

[1] Fla. v. Royer, 460 U.S. 491 (1983)

[2] People v. Bouser, 26 Cal. App. 4th 1280 (Cal. App. 4th Dist. 1994)

[3] 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, expressed 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.[1]

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.[2]

[1] Doe v. Heck, 327 F.3d 492 (7th Cir. 2003)

[2] U.S. v. Robertson, 736 F.3d 677 (4th Cir. 2013)

Asking for Identification

If you make a consensual encounter, you can always request that the subject identify themselves. But remember, there is no requirement that he do so. Additionally, there is likely no crime if the subject lied about his identity during a consensual encounter (however, possession of a fraudulent ID may be a crime).

I know a lot of officers don't understand how a person can lie about his identity and get away with it. But think about it, what law requires a person to identify himself during a consensual encounter? There may be a requirement the suspect identify himself during an investigative detention, but not a consensual one. Therefore, lying about ones' identity while engaged in a consensual conversation with a police officer is not against the law.

On the other hand, lying about ones' identity may help develop reasonable suspicion that the person is engaged in criminal activity, but this can't be the sole reason to detain or arrest the person.

Legal Standard

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

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

Case Examples

Don't demand ID without reasonable suspicion:

"[T]he law requires that court to look at the totality of the circumstances under a reasonable person standard to determine whether the officer's inquiry was, in the first place, a demand or request. This is the initial question that must be answered. It is after a determination that the inquiry was a demand, and therefore a seizure, that a court must ascertain whether the officers in a given case had an articulable suspicion of criminal activity or other reasonable rationale for the seizure."[1]

[1] State v. Rankin, 151 Wash.2d 689 (Wash. 2004)

Detaining a subject for identification requires reasonable suspicion:

"When the officers detained [suspect] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.[1]

Providing a false name not a crime unless lawfully detained or arrested:

Defendant's arrest was premised on his giving a false name. The state statute criminalizes a person's false representation or identification of himself or herself to a peace officer "upon a lawful detention or arrest of [that] person ...." The law applies only where the false identification is given in connection with lawful detention or arrest, and does not apply to consensual encounters with police. Since defendant's subsequent arrest was based upon an unlawful detention, and the search incident to the arrest was likewise unlawful, suppression is required of contraband seized after search incident to unlawful arrest.[2]

Consent to search for identification valid:

Following a patdown of defendant, and after defendant was not "immediately forthright" about his identity, giving only his first name and providing several false dates of birth, the officer asked defendant if he had any identification. Defendant indicated that it could be found in his back pocket. The officer asked for, and was granted, consent to retrieve the identification from defendant's back pocket, but the pocket turned out to be empty. When asked if the identification might be located elsewhere, defendant suggested that it might be in his left front pocket, where the officer found not only an identification card, but what appeared to be cocaine.[3] Double prizes!

Holding passenger's identification while seeking consent to search from driver, held to be an unlawful detention:

After stopping a car, the trooper obtained the driver's license and the passenger's identification card. After writing the citation, the trooper spoke to the driver outside the car. He handed the driver a citation and his license, but held onto the passenger's identification. The trooper sought and obtained consent to search. The court held that since the passenger's ID was still being held, the driver was not truly free to leave and the search was suppressed.[4]

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[1] Brown v. Tex., 99 S. Ct. 2637 (1979)

[2] People v. Walker, 210 Cal. App. 4th 165 (Cal. App. 6th Dist. 2012)

[3] U.S. v. Chaney, 647 F.3d 401 (1st Cir. 2011)

[4] United States v. Macias, 658 F.3d 509, 524 (5th Cir. 2011)

Removing Hands from Pockets

Generally, you may ask a subject to remove his hands from his pockets without worrying about converting the encounter into a detention. Courts understand the importance of officer safety.[1] What if the subject refuses to comply? If you can articulate a legitimate officer safety issue, then ordering a suspect to show his hands may be deemed reasonable.

Moreover, an order to show hands may not even implicate the Fourth Amendment, because the interference with a person's freedom is so minimal it may fall under the "minimal intrusion doctrine."

What if the suspect still refuses to show his hands and tries to leave? Remember, this is a consensual encounter and if you decided to detain the subject you would need reasonable suspicion. An order to show hands may be a minimal intrusion, but a detention is not.

Legal Standard

Asking a person to remove his hands from his pockets does not convert a consensual encounter into an investigative detention as long as:

- ☐ You **requested** that he remove his hands from his pockets; and
- ☐ You did it for **officer safety** purposes.[2]

Ordering a person to remove his hands from his pockets may not convert a consensual encounter into an investigative detention if:

- ☐ You had a **legitimate safety reason** for ordering it; and
- ☐ You articulate that ordering the person to remove his hands was a **minimal intrusion** of his freedom.[3]

[1] People v. Franklin, 192 Cal. App. 3d 935 (Cal. App. 5th Dist. 1987)
[2] State v. Harrington, 167 Wash.2d 656 (2009)
[3] United States v. Enslin, 327 F.3d 788 (9th Cir. Cal. 2003)

Transporting to Police Station

There is no Fourth Amendment violation if you consensually transport a subject to the police station for a consensual interview or to a crime scene. The key is that the subject's consent must be freely and voluntarily given.

Do a good job articulating in your report that under the totality of the circumstances, the transportation was consensual.[1]

Legal Standard

You may voluntarily transport a person in a police vehicle. However, if the person is a suspect to a crime and you are transporting the person for an interview, remember:

- ☐ Make it clear to the person that he is **not under arrest**;
- ☐ Seek **consent to patdown** the suspect for weapons; if the patdown is denied, do not patdown and you probably should not transport.

Case Examples

No violation when a person agrees to accompany police:

Appellate courts have held that when a person agrees to accompany the police to a station for an interrogation or some other purpose, the Fourth Amendment is not violated.[2]

No seizure after agreeing to accompany police to the station and staying for five hours:

No seizure where defendant went with police to station and stayed there five hours before probable cause developed for his arrest.[3]

Detention ended when suspect consented to go to police station:

Law enforcement officer's Terry stop of automobile ended when defendant, who was riding in the automobile, agreed to go to police station, rather than when defendant was arrested several hours later.[4]

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[1] Hartfield v. Besner, 2012 U.S. Dist. (Org. Port. Div. 2012)

[2] In re Gilbert R., 25 Cal. App. 4th 1121 (Cal. App. 2d Dist. 1994)

[3] Craig v. Singletary 27 F.3d 1030 (11th Cir.1997)

[4] United States v. Kimball, 25 F.3d 1 (1st Cir. 1994)

Consent to Search

Absent good reason, you should routinely seek consent to search a person or his property even if you have reasonable suspicion or probable cause. Why? Because this will add an extra layer of protection to your case. For example, let's imagine you have probable cause to search a vehicle for drugs but still receive consent to search, the prosecution essentially needs to prove that consent was freely and voluntarily given.[1] If that fails, the prosecutor can fall back on your probable cause.

Without consent your case depends entirely on articulating P.C. Why not have both? Plus, juries like to see officers asking for consent. Either way, do your prosecutor a solid and write a complete and articulate report.

Legal Standard

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 had **apparent authority** to give consent to search the area or item; and
- ☐ You did not exceed the **scope** provided, expressed or implied. Courts may look at four factors when evaluating whether or not the scope of search was exceeded: **time**, **duration**, **area**, and **intensity**. See case examples below.

Case Examples

9th Circuit five factor test in determining whether person freely consented:

"(1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was told he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained."[2]

Patdown of suspect who wanted to get out of vehicle upheld:

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[1] Bumper v. North Carolina, 391 U.S. 543 (1968)

[2] United States v. Cormier, 220 F.3d 1103 (9th Cir. 2000)

Vehicle was stopped for an equipment violation. Driver wanted to get out and see proof that his taillight was broken. Officer said only on the condition that he be subject to a patdown. Suspect said, "that was fine" and stepped out. Patdown revealed drugs. Suspect voluntarily consented to patdown.[1]

Duration: Request for a "real quick" search exceeded after 15 minutes and unscrewing speaker box:

With defendant agreeing to the officer's request to "check (defendant's car) real quick and get you on your way," the scope of that consent was exceeded at some point before the search had continued for fifteen minutes without finding anything, and certainly when the officer later pulled a box from the trunk and removed the back panel to the box by unscrewing some screws.[2]

Area: Directly "touching" genitals outside implied consent:

Officer got consent to search for drugs and "within seconds" reached down the defendant's crotch and felt the suspect's genital area searching for drugs. This area was not included in the consent to search. Note, searching "near" genital area is often upheld.[3]

Unlawful entry negated a signed consent to search form:

The court found that officers were unconstitutionally inside the defendant's room. The unconstitutional entry into the room, leading to unconstitutional recovery of the defendant's methamphetamine negated the signed consent to search form, so the court saw the signature as being coerced.[4]

Consent to search home must be preceded by Ferrier warnings:

Washington requires that occupants know they have the right to refuse consent to search a home.[5]

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[1] State v. Cunningham, 26 N.E.3d 21 (Ind. 2015)

[2] People v. Cantor, 149 Cal.App.4th 961 (2007)

[3] U.S. v. Blake, 888 F.2d 795 (11th Cir. 1989)

[4] United States v. Washington, 387 F.3d 1060 (9th Cir. 2004)

[5] State v. Ferrier, 136 Wash.2d 103 (Wash 1998)

Third Party Consent

You may seek consent to search a residence from co-occupants. However, the situation changes when there is a present non-consenting co-occupant. If one occupant tells you to "Come on in and bring your friends!" and another yells "Get the hell out, I'm watching Netflix!" Well, you must stay out.

What about areas under the exclusive control of the consenter? For example, the "cooperative" tenant says you can still search his bedroom? Or a shed that he has exclusive control over in the backyard? There is no case that deals directly with this issue, but if the area is truly under the exclusive control of the consenting party, and you can articulate that the non-consenting party has no reasonable expectation of privacy in that area, it would likely be reasonable to search just that area. But one thing is certain, you still may not be able to access the area under the cooperative tenant's control without walking through common areas—common areas would still be off limits.

The best practice is to wait until the non-consenting occupant has left the residence and then seek consent from the cooperative occupant. In other words, if the non-consenting occupant goes to work, a store, or is lawfully arrested, the remaining occupant can consent to a search. Still; do not search areas under the exclusive control of the non-consenting party. This may include file cabinets, "man-caves," purses, backpacks, and so forth.

Finally, if the consenting party has greater authority over the residence, then police may rely on that consent. For example, if a casual visitor or babysitter objected to police entry, it may be overruled by the homeowner. Remember, you may not search personal property under the exclusive control of the visitor or babysitter.

Legal Standard

Spouses and Co-Occupants:

Spouses or co-occupants may consent to search inside a home if:

- ☐ The person has **apparent authority**;
- ☐ Consent is only given for **common areas,** areas under his **exclusive control,** or areas or things the person has **authorized access** to; and

- ☐ A **non-consenting** spouse or co-occupant with the same or greater authority **is not present.**

Articulating Greater Authority:

An occupant with greater authority over the premises may consent to search over areas either under his exclusive control or common areas if:

- ☐ The co-occupant had **greater authority** over the area searched;
- ☐ You did not enter or walk through **any area** where the non-consenting occupant had **equal** or **greater authority**;
- ☐ You **did not search** any property under the **exclusive control** of the non-consenting occupant; and
- ☐ Your search **did not exceed the scope** provided by the consenting occupant.

Case Examples

If non-consenting occupant is arrested or leaves, remaining occupant may consent to search despite prior objection:

Police could conduct a warrantless search of defendant's apartment following defendant's arrest, based on consent to the search by a woman who also occupied the apartment, although defendant had objected to the search prior to his arrest and was absent at the time of the woman's consent because of his arrest.[1]

If an occupant invites police inside, police may assume other occupants wouldn't object:

"[S]hared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, police need not assume that's the case"[2]

Third party did not have a key to apartment, and did not have authority to give consent:

Officers should have been alerted to the necessity for further inquiry when the third party did not have a key to the apartment that the officers requested consent to search.[3]

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[1] Fernandez v. California, 571 U.S. 292 (2014)

[2] Georgia v. Randolph, 547 U.S. 103 (2006)

[3] State v. Holmes, 108 Wash. App. 511 (Wash. App. Div. One 2001)

Mistaken Authority to Consent

If you're a prudent officer you normally ask for consent to search, even if you have P.C.. Why? Because valid consent adds an extra layer of protection for your criminal case.

But sometimes you may think you're dealing with an occupant who has the authority to consent, but later find out you were wrong. For example, the consent was received from a guest, not homeowner. Here, courts will look to see if your mistake was reasonable.

Legal Standard

If you mistakenly receive consent from a person who had "apparent authority," courts will employ a three-part analysis to determine if your mistake was reasonable:

- ☐ Did you believe some **untrue fact**;
- ☐ Was it **objectively reasonable** for you to believe that the fact was true under the circumstances at the time; and
- ☐ If it was true, would the consent giver have had **actual authority?**

Case Examples

Police may assume that the adult who answered the door had authority:

Police were trying to locate a robbery suspect and knocked on his door. A visitor answered and consented to their request to enter. "Police may assume, without further inquiry, that [an adult] person who answers the door in response to their knock has the authority to let them enter."[1]

Simply claiming to live at a home may not be enough without more info:

Even if person claims to live at a home, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."[2]

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[1] People v. Ledesma, 39 Cal. 4th 641 (Cal. 2006)

[2] Ill. v. Rodriguez, 497 U.S. 177 (1990)

Qualified Immunity

You work in a dynamic and unpredictable environment. Therefore, you encounter situations where you are tasked to solve unique problems despite no direct training or case law to guide them. Qualified immunity protects you whenever you venture into constitutionally-unchartered territories.

Legal Standard

Even if a constitutional violation occurred and evidence is suppressed under the exclusionary rule, there is no § 1983 violation when:

- ☐ You **violated a constitutionally or federally right**; but
- ☐ That right was **not clearly established** at the time of the violation.

Case Examples

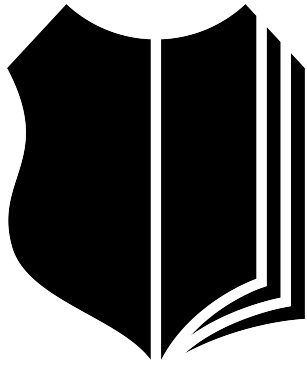
Officer who attempted knock and talk on side door, versus front door, entitled to qualified immunity:

It is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "knock and talk" at other than the front door. A trooper was sued by homeowners because he knocked on a side door, instead of the front door. The Supreme Court determined that the officer was entitled to qualified immunity in that the issue is the subject of conflicting authority.[1]

No qualified immunity for prison guard who obviously violated rights:

Guard who handcuffed a shirtless prisoner to a hitching post as punishment was not eligible for qualified immunity since it obviously violated the Fourth Amendment.[2]

[1] Carroll v. Carman, 135 S. Ct. 348 (2014)
[2] Hope v. Pelzer, 536 U.S. 730 (2002)



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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

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. And 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 does have one serious competitive advantage: It was written by a retired police officer turned attorney who's been in your shoes and knows what you need to know.

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