

# Search and Seizure Without a Warrant Review

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## **Search and Seizure Without a Warrant Review**

### **Introduction**

This document is based on TCLEOSE course number 2108 Intermediate Arrest, Search, and Seizure. It provides a review of some of the common exceptions to the warrant requirement.

It should be reaffirmed that when exercising any of the following exceptions, it is important to articulate all circumstances and facts to support the action.

Disclaimer: If you have a question about something covered or not covered in this document, you should consult your department SOP, a supervisor, or legal counsel for clarification.

### **Search Incident to a Lawful Arrest**

- Whenever an officer has sufficient probable cause to arrest someone for an offense that permits the officer to take the suspect into physical custody, and arrests that person, he/she may search the arrested person to protect the officer, to prevent the destruction of evidence, and to prevent escape by the person arrested.
- The arrest must be lawful. If for any reason the arrest is unlawful, the evidence obtained will be suppressed.
- The arrested person may be searched for weapons, contraband, fruits and instrumentalities of crimes, and evidence connected with any offense.
- The search must be made immediately or as soon as possible after the arrest.

### **Vehicle Exception**

- An officer may conduct a warrantless search of a readily movable vehicle (automobile, mobile home, boat, or airplane) if you have probable cause to believe that seizable items are inside, and that you cannot safely delay the search in order to obtain a warrant.
- The search should be made immediately.
- Passengers may only be searched if they are being arrested or if the officer has probable cause, except he may frisk if he has a reasonable fear for his safety. He must articulate specific safety concerns for each person frisked.
- If the vehicle is parked and unoccupied and circumstances permit, you should consider obtaining a warrant.
- You may search any area of a readily movable vehicle where you have probable cause to believe seizable items will be found.
- If the peace officer has or develops probable cause to believe a person possesses evidence of a crime or contraband, on or about his person, including a vehicle the person is occupying, the person or vehicle and all containers that might hold that evidence may be lawfully searched.
- The searching officer is not obligated to determine ownership of the various containers preceding the search.

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### Exigent Circumstances / Emergency

- A warrantless search or seizure may be conducted when an officer has probable cause to believe that a life-threatening or substantial property threatening situation exists, and there is no time to obtain a search warrant.
- The emergency exception to the search warrant requirement is most likely to be upheld by the courts in cases where you inadvertently discover evidence while dealing with:
  - An unconscious person
  - An incoherent person
  - A medical aid situation
  - Gun shots
  - Fight noises or screams
  - Fires, explosions, or natural disasters
- The scope of the search should include:
  - A complete search of the person
  - A search of the objects in the actual possession of the arrested person
  - A search of areas within the person's immediate control
  - The passenger compartment of a vehicle if the person is arrested out of the vehicle

### Hot Pursuit

- An officer in lawful fresh pursuit of a fleeing felon, may make a warrantless entry into any place where he seeks refuge and may conduct a warrantless search and seizure of the suspect, his clothing, and the area under his immediate control.
- The search authority and scope is as limited as a protective search and a search incident to lawful arrest.
- The more serious the crime and the shorter the time interval in an interrupted pursuit, the more likely the warrantless entry and search will be upheld.
- The more harmless the offense and the greater the interruption of the pursuit, the more likely a warrantless entry and search will not be upheld.
- Whenever circumstances and public safety permit obtain a warrant once your pursuit has been substantially interrupted. Usually this means more than a half hour depending on the circumstances.

### Community Caretaking Function

- For the community caretaking function to apply there must be some specific and articulable facts that would lead the officer to reasonably believe the citizen is in need of assistance

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### Consent

- A legally valid consent to search is a waiver of a person's Fourth Amendment rights to be searched and have property seized only on the authority of a lawful search warrant.
- A valid consent search requires that consent be given voluntarily and knowingly by a person with the authority and capacity to grant consent.
- The scope of the search is limited by the scope of the authorized consent.
- Consent is not voluntary if it is obtained by means of expressed or implied threats, or if it merely amounts to a peaceful submission to authority.
- Consent is not voluntary if the person who gives it does not understand the consequences of his consent and his right to refuse.
- General guidelines on who may consent to a search:
  - Generally, any adult who normally has regular unrestricted access to a place can usually grant consent for a search of that place, but not for a search of personal storage places of another.
  - Husband - wife. Either spouse can consent to a search of shared premises, but not to legally separate property.
  - Parent - child. A child cannot usually give valid consent for the search of his parents' property. A parent can usually give valid consent for the search of his resident child's property. There are exceptions to this based upon privacy expectations.
  - School official - student. A teacher, principal or other school official who retains combinations to students' lockers can consent to a search of these lockers. Since students do not have exclusive control over lockers, they do not have an absolute right to privacy.
  - Landlord - Tenant. A landlord cannot consent to the search of a paying tenant's premises.
  - Roommates. One person can consent to the search of commonly-shared portions of the premises, but not to a roommate's personal rooms, furniture or effects.
  - Host - Guest. The host can consent to a search of his non-paying guest's room, but not to closed personal effects (luggage, etc.).
  - Employer - Employee. An employer can consent to a search of his employee's work area, but not of the employee's desk drawers, locker, or personal tool box. An employee can only consent to a search of his employer's premises if he is in charge of the premises during a substantial period of time (manager, superintendent, director). The authority of an employer to search an employee's desk, locker, etc. may be granted depending on the wording of any relevant policy.
- The person who validly consents to the search can limit the areas of search and can revoke their consent at any time.
- Consent searches are the most difficult to prove in court.
- Documentation of the consent can be helpful in court.

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- Written consent should be obtained where possible. Your prosecutor's office may have sample forms they want you to use.
- Use available officers and citizens as witnesses.
- Another option is audio and/or video tape recording.
- Procedural steps to obtain a valid consent to search (local agency policy and procedures may vary).
  1. Advise the person whose consent is being sought of the general nature of the investigation if you can and the purpose for the search.
  2. Advise the person whose consent is being sought that under the Fourth Amendment of the U.S. Constitution the right exists to be searched only on the authority of a search warrant issued by a judge.
  3. Do not claim authority to search.
  4. Be sure to advise the person from whom consent is being sought that they can refuse to permit the search.
  5. Avoid any show of force or anything that could be interpreted as even the mildest or slightest coercion. It is essential that consent be freely and voluntarily given.
  6. Get consent from the right person. Consent must be obtained from the person who has a right to privacy in the area to be searched or against who the incriminating search is directed, or from a person who has a valid and equal right to privacy in the area to be searched.
  7. Obtain a written consent in preference to an oral consent whenever possible.

## Border Searches

- Coast guard, customs officers, border patrol officers, and other officials of the Immigration and Naturalization Service and the Treasury Department have increased search-and-seizure powers over person and property coming into the country.
- If an officer gets word of incoming contraband, it may be useful to contact one of these federal agencies in order to obtain their assistance in using their inspection powers.

## Imminent Destruction of Evidence

- An officer may make a warrantless entry and search if it reasonably appears necessary to prevent the imminent destruction of evidence. (Officers should check local policy on these types of cases.)
- The officer cannot create the situation in order to avoid search warrant requirements.
- The search must end when the threat of destruction has been neutralized.
- Texas courts have not clearly ruled on this situation.

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### Open Fields

- Definitions:
  - Open fields begin where the curtilage ends.
  - Curtilage is generally considered to be that area of open space surrounding a dwelling which is so immediately adjacent to the dwelling that it is considered part of the house.
- Criminal activity conducted in an open field that is not part of the curtilage of a house is not protected by the Fourth Amendment.
- Obtain a search warrant if there is time or there is any question that the activity is occurring in the curtilage.
- Extent-of-curtilage questions should be resolved with particular reference to the following four factors, at least to the extent that they bear upon whether the area claimed to be curtilage is so intimately tied to the home itself that it should be placed under the home's umbrella of protection:
  - The proximity of the area to the home;
  - Whether the area is within an enclosure surrounding the home;
  - The nature and uses to which the area is put; and
  - The steps taken by the resident to protect the area from observation by passers-by.

### Abandoned Property

- "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered." (United States v. Colbert, 474 F.2d 174)
- A person who has abandoned property can no longer claim a reasonable expectation of privacy to that item.
- When property is abandoned, no one has any further privacy right in it and it may be seized by law enforcement officers without probable cause or a search warrant.
- If unlawful police activity causes a person to abandon property, the evidence may be excluded.

### Plain View

- A seizure of contraband or instrumentalities of a crime in plain view is not a violation of the 4th Amendment when the officer has a lawful right to be where he is to observe the contraband, etc.
- A person who exposes an item to open view does not have a reasonable expectation of privacy.

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### Inventories

- An inventory is a legitimate law enforcement activity that is not a search, which sometimes incidentally results in the discovery of evidence.
- During booking of an arrested person, a standard inventory inspection of the arrestee's clothing and personal property should be made to document items being kept by the jail for safe-keeping. These inventories should be uniformly conducted in accordance with an agency's written procedures. Recommended procedures include:
  - Performed at the jail.
  - Performed by the same person, i.e., arresting officer, booking officer, or property officer.
  - Listing inventoried items on the agency's standard form.
  - Storing inventoried property in a separate place from evidence.
- When an automobile is to be towed or impounded (to remove a traffic hazard, due to parking violations, etc.) an officer may conduct a standard inventory inspection for the protection of the owner, the officer, and the department.
- Inventories should be conducted consistently according to the agency's written directives that clearly spell out the agency's legitimate government interest in conducting this administrative activity.