Search & Seizure Survival Guide eBook

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.

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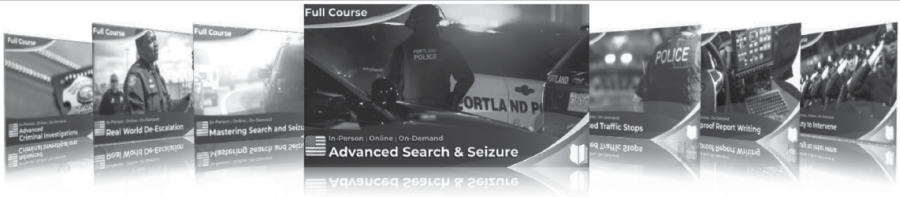

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We have an incredible warrior class in this country - people in law enforcement…, and I thank God every night we have them standing fast to protect us from the tremendous amount of evil that exists in the world.

— 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.

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 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 breath. 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, who 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, yep you guessed it, warrant.

Legal Standard

Whenever you conduct a search or 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 not 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]

---

[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]

---

[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 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]

Fact that car is parked in front of fugitives house not enough for stop:

"That on one occasion a car is parked on a street in front of a house where a fugitive resides is insufficient to create reasonable suspicion that the car's occupants had been or are about to engage in criminal activity."[4]

---

[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. Green, 111 F.3d 515 (7th Cir. 1997)

Probable Cause Defined

Articulating precisely the definition of "probable cause" or "reasonable cause" 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."[1]

Remember, evidence found *after* a search cannot be used retroactively to establish probable cause.[2] 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.[3]

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,"[4] and that the **defendant is the perpetrator**.[5]

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,"[6] and there is probable cause to believe the **things sought are**

[1] Illinois v. Gates, 462 U.S. 213 (1983)
[2] Maryland v. Garrison, 480 U.S. 79 (1987)
[3] United States v. Gaschler, 2009 U.S. Dist. LEXIS 48449 (N.D. W. Va. June 3, 2009)
[4] Draper v. United States, 358 U.S. 307 (1959)
[5] United States v. Watson, 423 U.S. 411 (1976)
[6] 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]

Probable cause defines the scope of search:

Smelling the odor of drugs can give probable cause to search for drugs. Scope is always an issue with probable cause. For example, the odor of burnt marijuana may give probable cause to search the passenger compartment while a powerful smell of unburnt marijuana may give probable cause to search the vehicle's trunk.[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] U.S. v. Downs, 151 F.3d 1301 (10th Cir. 1998)

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 that did, the stop and search were lawful.[1]

Intel from confidential information 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 is 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 the officer had probable cause under the collective knowledge doctrine.[3]

Collective knowledge doctrine can also be used for investigatory detentions:

Officer worked in a fast-paced, dynamic situation in an area known for drug sales, in which the officers worked together as a unified and tight-knit team. One officer developed reasonable suspicion to stop the defendant. A fellow officer, unaware of the officer's reasonable suspicion, stopped the defendant without his own individualized suspicion. The court upheld the stop under the collective knowledge doctrine.[4]

Supervisor's knowledge, not on scene, was too remote for collective knowledge doctrine:

Knowledge of all officers on the scene is imputed to each officer in determining whether "collective knowledge" provided probable cause but knowledge of a supervisor not on the scene cannot be imputed when the information was not communicated to those on the scene.[5]

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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. Whitfield, 634 F.3d 741 (3d Cir. 2010)
[5] U.S. v. Edwards, 885 F.2d 377 (7th Cir. 1989)

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" Under the Fourth Amendment?

A seizure of a person occurs when a reasonable person would believe that he or she is 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:

[1] Mich. v. Chesternut, 486 U.S. 567 (1988)

- You **use force** on a person with the **intent** to restrain,[1] even with minimal force. Additionally, a seizure occurs even if the suspect is trying to escape (submission is not required);[2] 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**.[3]

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 at 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.[4]

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").[5]

Officers that "kept the peace" liable for seizure of property:

Police were called to "keep the peace" while a trailer park manager illegally removed a mobile home for non-payment. The trailer was removed and the homeowner was told by police to not interfere with the park manager. The Court said police transformed the situation into a government seizure.[6]

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[1] Brower v. County of Inyo, 489 U.S. 593 (1989)
[2] Torres v. Madrid, 141 S. Ct. 989, 209 L. Ed. 2d 190 (2021)
[3] California V. Hodari 499 U.S. 621 (1991)
[4] United States v. Mendenhall, 446 U.S. 544 (1980)
[5] Fla. v. Bostick, 501 U.S. 429 (1991)
[6] Soldal v. Cook County, 506 U.S. 56 (1992)

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:

- **Nighttime**: Activity late at night, especially in residential areas, is often more suspicious than in daytime;[1]
- **High-crime area**: An area's reputation for criminal activity is an appropriate factor is assessing R.S.[2];
- **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;[3]
- **Training and experience**: Your training and experience is possibly one of the most important factors is assessing reasonable suspicion. For example, if you believe a suspect is lying, this can help establish R.S. or P.C.[4] Still, the key is to 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

[1] See People v. Souza, 9 Cal.4th 224 (1994)
[2] See People v. Souza, 9 Cal.4th 224 (1994)
[3] See Illinois v. Wardlow, 528 U.S. 119 (2000)
[4] Se Devenpeck v. Alford, 543 U.S. 146 (2004)

activity is afoot, and don't rely on race or ethnicity characteristics unless you have intel that a specific suspect possesses those traits;[1]

- **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;[2]

- **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 who's identity is unknown. Before acting on anonymous tips, you need to prove the information is reliable through an independent investigation;[3]

- **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.[4] Still, whether or not you can make the stop depends on the totality of the circumstances.

Case Examples

Presence in 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.[5]

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[1] See U.S. v. Sokolow, 490 U.S. 1 (1989)

[2] See People v. Stanley, 18 Cal.App.5th 398 (2017)

[3] See Alabama v. White, 496 U.S. 325 (1990)

[4] See Navarette v. California, 134 S.Ct. 1683 (2014)

[5] State v. Anderson, 415 S.C. 441, 447-448, 783 S.E.2d 51 (2016)

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.[1] 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 the suspect has, is, or is about to be involved in **criminal activity**;
- You use the **minimal amount of force** necessary to detain a cooperative suspect;
- Once the stop is made, you must **diligently pursue** a means of investigation that will **confirm or dispel** your suspicions;
- If your suspicions are **dispelled**, the person must be **immediately released** or the stop converted into a consensual encounter.

Case Examples

Long wait for K9 held reasonable under the circumstances:

A 31-minute wait for drug dog was not unreasonable after trooper developed R.S. for narcotics, was denied consent, and acted diligently in pursuit of his investigation.[2]

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

Cops had R.S. to stop 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."[3]

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

[2] U.S. v. Lyons, 486 F.3d 367 (8th Cir. 2007)

[3] 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 individuals actions give the appearance of potential danger to the officer."[1] These detentions are often for people connected to the target suspect, such as lookouts.

Legal Standard

A subject may be detained for officer safety when:

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

Case Examples

Detention based on legitimate officer safety 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.'"[2]

[1] People v. Mendoza, 52 Cal.4th 1056 (2011)
[2] Id.

How Long Can Detentions Last?

Whenever you detain someone for reasonable suspicion, you must diligently pursue a means of investigation that is likely to confirm or dispel the suspicion quickly.[1] Once your suspicion has been dispelled, the person must be allowed to go on his way.[2] At the same time, the Supreme Court has never provided a maximum duration for investigative detentions.[3] Rather, as long as you're diligently pursuing the investigation, it should not matter that the stop took ten minutes or, in an extreme case, two hours. Each investigation is unique and different. What's more, no violation occurs simply because a less intrusive investigation could have been utilized. Instead, the means chosen must be reasonable.

Finally, if you have dispelled your suspicions but still have a "hunch" you want to pursue, convert the stop into a consensual encounter or release the suspect. Failure to do so is a Fourth Amendment violation.

Legal Standard

The duration of an investigative detention is determined by these factors:

- 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

Extending stop for 25 minutes was reasonable:

Original stop was for erratic driving but was appropriately extended for 25 minutes to investigate trafficking due to conflicting answers, masking odor, and other circumstances.[4]

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[1] United States v. Sharpe, 470 U.S. 675 (1985)
[2] Terry v. Ohio, 392 U.S. 1 (1968)
[3] United States v. Sharpe, 470 U.S. 675 (1985)
[4] People v. Russell, 81 Cal.App.4th 96 (101)

Investigative Techniques During a Stop

If you make a stop based on reasonable suspicion, you may perform various investigative techniques as long as they are reasonably related to why you stopped the person and are minimally intrusive. The techniques may also be used to continue your investigation after the person is released, not just to build probable cause to arrest. For example, you may take the suspect's picture, or quickly take in-field fingerprints, and then release the suspect and use the photo and prints to continue your investigation.

Legal Standard

You may conduct **investigative techniques** in the field when:

- ☐ The suspect is still **lawfully detained**; and
- ☐ The technique employed is **minimally intrusive**.

You may **demand identification** if:

- ☐ The suspect is still **lawfully detained**;
- ☐ You need the identification to **pursue your investigation**;

You may capture a suspect's **fingerprints** in the field when:

- ☐ You have **reason to believe** fingerprints may have been left at the scene;
- ☐ **Minimally intrusive** means were used to recover the suspect's fingerprints; and
- ☐ The fingerprints will **aid your investigation** after the suspect is released.

Case Examples

Police may obtain fingerprints with reasonable suspicion

"There is support... that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime."[1]

[1] Hayes v. Florida, 105 S. Ct. 1643 (1985)

Officers may open door if they cannot see through tinted windows:

During a lawful traffic stop, where the vehicle's windows were so heavily tinted that the officer could not see inside, it is reasonable to open the vehicle's door in order to be able to observe the interior. The court adopted this proposition as a "bright-line" rule.[1]

Collective knowledge doctrine applies to Terry Stops:

An Illinois state police officer had reasonable suspicion that a suspect was transporting drugs in his airplane. He passed this information onto Federal Homeland Security...who passed it on to a Wyoming officer who stopped the suspect at the airport. The court found that there was significant communication between all of the officers and that they functioned as a team. Therefore, the collective knowledge doctrine applies and the stop was lawful.[2]

Statute requiring people stopped to supply "credible and reliable" ID struck down as vague and gave police too much discretion:

A California statute required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer. The statute was struck down, among other reasons, because it vested virtually complete discretion in the hands of the police to determine whether the suspect had supplied "credible and reliable" identification.[3]

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[1] U.S. v. Stanfield, 109 F.3d 976, 981 (4th Cir. 1997)

[2] United States v. Latorre, 893 F.3d 744 (10th Cir. 2018)

[3] Kolender v. Lawson, 461 U.S. 352 (1983)

Identifications - in the Field

Courts are scrutinizing police identification procedures more than they have in the past. One reason is because research has shown that eyewitnesses are easily swayed by suggestive practices. For example, if police make an investigative detention on an armed robbery suspect, it would be improper to say to the victim, "We have the perpetrator, but we still need you to ID him."

You may also conduct a "show-up" between the suspect and witness under a few circumstances. Usually, these show-ups are conducted soon after the crime has occurred when police have detained a suspect (on-scene or in the vicinity).

Remember, it's vital that you stay as neutral and detached as possible when it comes to identification procedures.

Legal Standard

A suspect may be required to participate in solo **in-field "show-up"** if:

- ☐ The procedure is not **overly suggestive** of guilt (e.g. not surrounding suspect with cops; if safe, removing handcuffs, and not telling the witness that the suspect is the perpetrator).

Case Examples

In field show-up was not overly suggestive:

Where victim was around assailant for about thirty minutes, and could see him under artificial lighting, described him before show-up, said "I don't think I could ever forget" his unique appearance, and so forth, the following in field show-up was not overly suggestive.[1]

[1] Neil v. Biggers, 409 U.S. 188 (1972)

Unprovoked Flight Upon Seeing an Officer

If you are patrolling a "high crime" area and a person suddenly, and without provocation, runs upon seeing you, then these may be sufficient conditions to conduct an investigative detention in order to determine whether or not he is involved in criminal activity. Unprovoked flight, by itself, doesn't provide sufficient reason to conduct a patdown. You need to articulate something more, such as a known gang member, history of violence, or possible drug dealer (not just drug user).

Finally, this rule may also include wealthy areas where a rash of recent burglaries have occurred, or a business district when all the stores are closed. Articulate, articulate, articulate.

Legal Standard

A suspect that flees upon seeing you, may be detained if:

- ☐ You are patrolling a **high-crime area**;
- ☐ Upon seeing you or a readily-apparent police vehicle, the **suspect suddenly**, and **without provocation**;
- ☐ Engages in a **headlong flight** commensurate with evasion; and
- ☐ You use a **reasonable amount of force** necessary to detain the suspect.

Note: Unprovoked flight alone does not justify a patdown.

Case Examples

Unprovoked flight away from police may be suspicious evasive behavior:

"Refusal to cooperate, by itself, does not furnish reasonable suspicion. But unprovoked flight is simply not a mere refusal to cooperate. Flight by its very nature, is not 'going about one's business'; in fact, it is just the opposite."[1]

[1] Illinois v. Wardlow, 528 U.S. 119 (2000)

Detentions Based on an Anonymous Tip

You may make an investigative detention based on an anonymous tip if the information has some indicia of reliability and, where appropriate, the information is independently corroborated. The courts will use the totality of the circumstances test and it's vital you articulate all pertinent facts and circumstances in your report.

One of the best methods to corroborate information is to determine whether the tipster shared something unknown to the general public and therefore represents "inside" knowledge. For example, if a tipster shared that a red Chevy truck was going to buy drugs at a particular gas station at 1 p.m., this information is easily corroborated. If the truck shows up at the time and place stated, that is not something the general public would know.

On the other hand, if the tipster said the red Chevy truck in the Walmart parking lot is dealing drugs, you would need to know more. Any member of the public could see the truck. It doesn't predict any future conduct.[1]

Legal Standard

A suspect may be detained based an anonymous tip if:

- The tip had an **indicia of reliability**;[2] and
- The tip was **sufficiently corroborated**[3] to show that the caller had information not readily available to the general public.

Case Examples

Anonymous report that 25 people were being loud and displaying handguns justified Terry Stop, despite group being smaller and quieter:

An anonymous 911 call, reporting that a group of 25 people were being loud and displaying handguns in a parking lot at a location where violent crime and drug activity were regularly reported, supported a reasonable suspicion that a crime was in progress or

[1] Florida v. J.L., 529 U.S. 266 (2000)
[2] Navarette v. California, 134 S. Ct. 1683 (2014)
[3] Alabama v. White, 496 U.S. 325 (1990)

about to be committed and justified a Terry Stop. Even though the group at the scene was smaller and quieter than reported, and was not brandishing weapons, nature of call required a lower level of corroboration. Additionally, five-minute response time could have accounted for the change in the number of people present and their activities.[1]

Reality that some facts could not be corroborated due to dark tinted windows was considered in whether stop was reasonable:

Reasonable suspicion existed when an anonymous tip stated that three black males, one of whom had a gun and wore a hooded sweater, would be found in a four-door gray Cadillac in the parking lot of a particular fast food restaurant. The officers corroborated the presence of the vehicle at that location, but could not corroborate more due to the vehicle's darkly tinted windows and its unusual location in a distant area of the parking lot.[2]

Generalized tip was not enough for reasonable suspicion stop:

Police officers did not have a reasonable, articulable, and individualized suspicion that the suspect was engaged in criminal activity, where they only had an anonymous tip that a male matching the suspect's description was in possession of a gun. The suspect was located in a high-crime neighborhood in which a shooting had occurred over one hour earlier, and it was late at night; the suspect's failure to comply with the order to show his hands could not be considered because it occurred after the moment of the seizure, and his few steps backward were entirely consistent with a surprised reaction and even acquiescence.[3]

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[1] U.S. v. Williams, 731 F.3d 678 (7th Cir. 2013)

[2] U.S. v. Bold, 19 F.3d 99 (2d Cir. 1994)

[3] U.S. v. Lowe, 791 F.3d 424 (3d Cir. 2015)

Handcuffing and Use of Force

Generally, if you handcuff a suspect, point a firearm, or use force during an investigative detention, it will likely be deemed an arrest requiring probable cause. Exceptions exist, but you need to have legitimate reasons. If you make a reasonable suspicion stop on a suspect you believe is about to pull a gun on you, then of course you get to point your firearm on them and conduct a patdown! Your safety comes first, but articulate that in your report. Similarly, if you believe a suspect is about to run, then handcuff him. Again, articulate why in your report.

Legal Standard

If a suspect **fights** or **flees** during an investigative detention, then:

- You may use a **reasonable amount** of force to detain the suspect;
- The suspect's flight upon a lawful order to stop, or a battery upon an officer, **may be probable cause to arrest**; and
- **Deadly force cannot be used** to detain a suspect, unless the suspect poses a deadly force threat to you or others.

Handcuffing a suspect is appropriate when:

- The suspect appears to be a **flight** risk; or
- The suspect appears to be a **danger** to himself or others.

Case Examples

Frisk may still be reasonable, even if suspect is handcuffed:

Where there is reasonable suspicion that a suspect is armed (thus justifying a frisk under Terry) and where the facts make it reasonable to handcuff the suspect during the investigative seizure, the fact that the suspect is handcuffed does not negate the right of the officer to conduct the frisk.[1]

Mere handcuffing does not always indicate an arrest:

The court stated that, "handcuffing a suspect does not necessarily dictate a finding of custody." The use of handcuffs "does not necessarily convert a Terry stop into an arrest."[2]

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[1] U.S. v. Sanders, 994 F.2d 200 (5th Cir. 1993)

[2] U.S. V. Bravo, 295 F.3d 1002 (9th Cir. 2002)

Detaining Victims or Witnesses

Generally, you cannot force a victim or witness to cooperate with your investigation. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes, they have no right to compel them to answer."[1]

If you have located an uncooperative witness, and they are *vital* for your investigation, then identify them. Give this information to the prosecutor and let him decide whether or not the witness should be subpoenaed.

Legal Standard

A witness may be detained if:

- He is a **material witness** for your investigation;
- The detention should last no **longer than necessary** to determine his **identification** and whether he's **willing to cooperate** with your investigation;
- If the witness is **uncooperative**, **identify and release**. Contact your prosecutor and get advice on how to proceed.

Case Examples

Detaining victim in order to continue investigation unreasonable:

It would be an unreasonable detention for an officer, after investigating and determining that a person was an injured victim rather than a suspect, to continue to detain him and to prevent him from being taken to a hospital. The officer required that he wait for an ambulance and would not allow others who had been trying to take him to a hospital to do so.[2]

[1] Davis v. Mississippi, 394 U.S. 721 (1969)

[2] Eubanks v. Lawson, 122 F.3d 639 (8th Cir. 1997)

Patdown for Weapons

A patdown (or "Terry frisk") is a limited search of a suspect's outer clothing for weapons. You must articulate two things before you can conduct a patdown. First, the investigative stop itself must be lawful (based on individualized reasonable suspicion). Second, you must articulate that the person is armed and dangerous.

Additionally, if you feel an object that may be a weapon, but you're not positive, you may retrieve and inspect it.

Legal Standard

A suspect may be frisked for weapons under the following circumstances:

- If the suspect is lawfully or unlawfully **armed with a weapon**, the weapon may be secured and a patdown of **outer clothing** conducted for additional weapons;
- If no weapon is visible, and you believe the suspect is **armed and dangerous**, a patdown of **outer clothing** may be conducted; or
- If the suspect was stopped for a violent crime or one involving weapons, an **automatic patdown** may be conducted.

Case Examples

Officer doesn't need to be certain:

"The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[1]

Relevant considerations:

Relevant considerations may include: observing a visible bulge in a person's clothing that could indicate the presence of a weapon; seeing a weapon in an area the suspect controls, such as a car; "sudden movements" suggesting a potential assault or "attempts to reach for an object that was not immediately visible;" "evasive and deceptive responses" to an officer's questions about what an individual was up to; unnatural hand postures that suggest an effort

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

to conceal a firearm; and whether the officer observes anything during an encounter with the suspect that would dispel the officer's suspicions regarding the suspect's potential involvement in a crime or likelihood of being armed.[1]

Refusal to remove hands is a factor justifying frisk:
"The officers, after initiating the stop, twice ordered that [defendant] remove his hands from his pockets, which he refused to do. The report of an assault in progress, the matching description, and the additional factors that supported the stop provided the officers with reason to believe that [defendant] was armed and dangerous, and that the refusal to remove his hands was an effort to conceal a weapon.[2]

Stop in gang-ridden area helped justify patdown:
"[T]the area in which the incident occurred gave police officers particular reason to be concerned about the possibility of gun-related violence. The neighborhood was known as a high-crime area of the city; but more importantly, there were indications of gang activity, recent reports of shots fired, and the occurrence of a drive-by shooting with two victims two days earlier and one block away from the location where the men were discovered drinking. These specific and recent indicia of violence, including gun-related violence, increased the odds that an individual detained at this location for apparent criminal activity (even a petty offense like the one at issue here) might be armed."[3]

"Tap" by officer to open hand was a frisk requiring justification:
Police officer's "tap" of the defendant's wrist to open closed hand was a frisk that constituted a search subject to the protections of the Fourth Amendment.[4]

Drug dealing and weapons go hand-in-hand:
"Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."[5]

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[1] Thomas v. Dillard, 818 F.3d 864 (9th Cir. Cal. 2016)
[2] United States v. Simmons, 560 F.3d 98 (2d Cir. 2009)
[3] United States v. Patton, 705 F.3d 734 (7th Cir. Ill. 2013)
[4] U.S. v. Camacho, 661 F.3d 718 (1st Cir. 2011)
[5] People v. Simpson, 65 Cal. App. 4th 854 (1998)

Patdown Based on Anonymous Tips

A patdown (or "Terry frisk") is a limited search for weapons. If you receive an anonymous tip that someone is illegally carrying a weapon, you must prove that the tip is reliable.[1] Typically, this means that the tipster has an indicia of reliability and the information is independently corroborated. See previous sections on how to do this.

Here's what to watch out for in this area: citizens boldly claiming that someone illegally possesses a weapon, without evidence, should not be used to detain people. Otherwise, a person could easily harass someone he didn't like by claiming, without proof, that someone is illegally carrying a gun. This doesn't mean the tipster has to see the gun with his own eyes. But he would need to provide you with inside information, information that the general public would not know.

For example, a tipster tells you that he overheard that John Doe is going to burglarize ABC jewelry store at two p.m., and he is armed with a gun. You look up John Doe and he's on parole for robbery. You then see John Doe walking up to ABC jewelry store at 3:30 (criminals have horrible time management). You could lawfully detain and frisk Doe based on this tip, even though the tipster never saw the gun and remained anonymous.

Legal Standard

A suspect may be frisked based an anonymous tip if:

- ☐ The call states or implies that the suspect is **engaged in criminal activity**;
- ☐ The tip indicates the suspect is **armed and dangerous**;
- ☐ The tip had an **indicia of reliability**; and
- ☐ The tip was **sufficiently corroborated** to show that the caller had information not readily available to the general public.

[1] Fla. v. J.L., 529 U.S. 266 (2000)

Plain Feel Doctrine

Under the plain feel (or "touch") doctrine, you can seize any item that is immediately apparent as contraband or evidence if you are conducting a lawful patdown for weapons.[1]

Legal Standard

Evidence or contraband discovered during a frisk is admissible if:

- ☐ Your frisk was **lawfully conducted** and limited to weapons;
- ☐ When you felt the item, it was **immediately apparent** that the item was contraband or evidence of a crime; and
- ☐ You did not build probable cause by **manipulating** the item.

Case Examples

Suspect has no reasonable expectation of privacy in item immediately apparent as contraband during patdown:

"The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment...The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."[2]

Officer reasonably believed "cylindrical-shaped" object was crack pipe:

During a patdown, "the officer felt an object which, based on its contour and mass and based on his experience with such contraband, he correctly believed to be a crack pipe."[3]

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[1] Horton v. California, 496 U.S. 128 (1990)

[2] Minnesota v. Dickerson, 508 U.S. 366 (1993)

[3] Ingram v. City of Los Angeles, 418 F. Supp. 2d 1182 (C.D. Cal. 2006)

Involuntary Transportation

Typically, involuntarily transportation of a suspect back to the crime scene for identification[1] will be considered a formal arrest requiring probable cause.[2] But like all good rules, there are exceptions.

During some particularly serious investigations you may have no choice but to transport the suspect. Just like the use of firearms or handcuffs will not always convert an investigative detention into an arrest, transporting a suspect against his will doesn't always equal arrest (though it usually does, so be careful here).

In practice, involuntary transportation occurs with some frequency. Sometimes a suspect is found a couple of blocks from the crime scene and then (involuntarily) transported back for an interview or witness identification.

Remember, without consent, probable cause, or exigency, this is an arrest. If this happens, one doctrine may save the day — the collective knowledge doctrine (in this book). If another officer on-scene developed probable cause before the transportation took place, the transportation is lawful even though the transporting officer did not have his own P.C. You may still have a Miranda issue.[3] But at least you wouldn't have an illegal arrest.

Legal Standard

Police may **not involuntarily transport** a suspect away from the location where he was stopped unless:

- ☐ You have **legitimate exigent circumstances** (rare). Involuntary transportation without exigency is an arrest, requiring probable cause.

Case Examples

Transport away from "hostile crowd" upheld:

A hostile crowd, in a high-crime area, gathered around detention stop. Officer's involuntary movement away from scene upheld.[4]

---

[1] Hayes v. Florida, 470 U.S. 811 (1985)

[2] Dunaway v. New York, 442 U.S. 200 (1979)

[3] Kaupp v. Texas, 538 U.S. 626 (2003)

[4] People v. Courtney, 11 Cal. App. 3d 1185 (Cal. App. 1st Dist. 1970)

Valid transportation to find out what happened to children:
A female walked into the police station and said that she had "done something very bad" to her children. An officer then told her she was not under arrest, but that he would drive her home to find out what happened. Officer discovered three of the six children were shot and killed. This was a lawful detention, not an arrest.[1]

Transport to ID suspect upheld in gang rape:
An officer investigating a brutal gang rape stopped two suspects. They did not speak English and the officer handcuffed them and transported them to the hospital for identification. The involuntary transport was reasonable under the circumstances and evidence was not suppressed.[2]

Involuntary transportation for questioning unlawful:
Officers picked up suspect, took him downtown for questioning, and eventually obtained a confession. The officers contended that the suspect was just being "detained" for questioning, but the Supreme Court disagreed, ruling that the movement resulted in the arrest of the defendant—Confession suppressed.[3]

Moving high-level trafficking suspect from sidewalk into surveillance house was justified for safety concerns:
"The most compelling factor supporting a finding that Medina was arrested was the agents' transport of Medina from the street to the surveillance residence for questioning...Even so, an officer may move a suspect or use greater force against a suspect, without probable cause, if safety concerns justify such precautions."[4]

Transportation reasonable where lack of officers and desire to not leave patrol vehicles unattended:
Police acted reasonably in transporting suspect brief distance to scene of reported burglary in patrol car as part of Terry stop, where it was reasonable to believe that victim might be able to identify perpetrator, and, although officers could have walked witness to scene, doing so would have required more officers, and might have required leaving patrol car unattended in high-crime area.[5]

---

[1] United States v. Charley, 396 F.3d 1074 (9th Cir. Cal. 2005)
[2] In re Carlos M., 220 Cal. App. 3d 372 (1990)
[3] Dunaway v. New York, 442 U.S. 200 (1979)
[4] United States v. Lopez-Medina, 461 F.3d 724, 740 (6th Cir. 2006)
[5] U.S. v. McCargo, 464 F.3d 192 (2d Cir. 2006)

Detaining People Who Publicly Record Police Officers

Generally, you have no right to stop a person from recording your public activities. Do not detain the person unless you have specific articulable reasonable suspicion he is engaged in criminal activity. This is rarely the case and 99% of the time these people want to catch you doing something stupid and have it go viral on YouTube. Don't fall for it.

Additionally, if you lawfully detain a person who is recording you, and you have R.S. that he is dangerous, you can order him to put his phone away for officer safety purposes. But don't order him to stop recording unless you can articulate legitimate officer safety reason or distraction (e.g. Facebook live).

If a non-detained person is interfering with your investigation, like yelling or too close to the scene, give him orders to quiet down or move back. But be professional and explain what you want done and why.

Legal Standard

A person may video or audio record if:

- ☐ He is recording a **public officer**;
- ☐ In a **public place**;
- ☐ Doing his **public duties**; but
- ☐ A lawfully stopped person may be ordered to put the device away or stop recording for **legitimate safety** or **investigative purposes.**

Case Examples

Filming a public officer, doing a public act, in a public place, is protected:

Filming or videotaping of government officials engaged in their duties in a public place, including police officers performing their responsibilities, is protected by First Amendment.[1]

[1] Glik v. Cunniffe, 655 F.3d 78 (1st Cir. Mass. 2011)

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.

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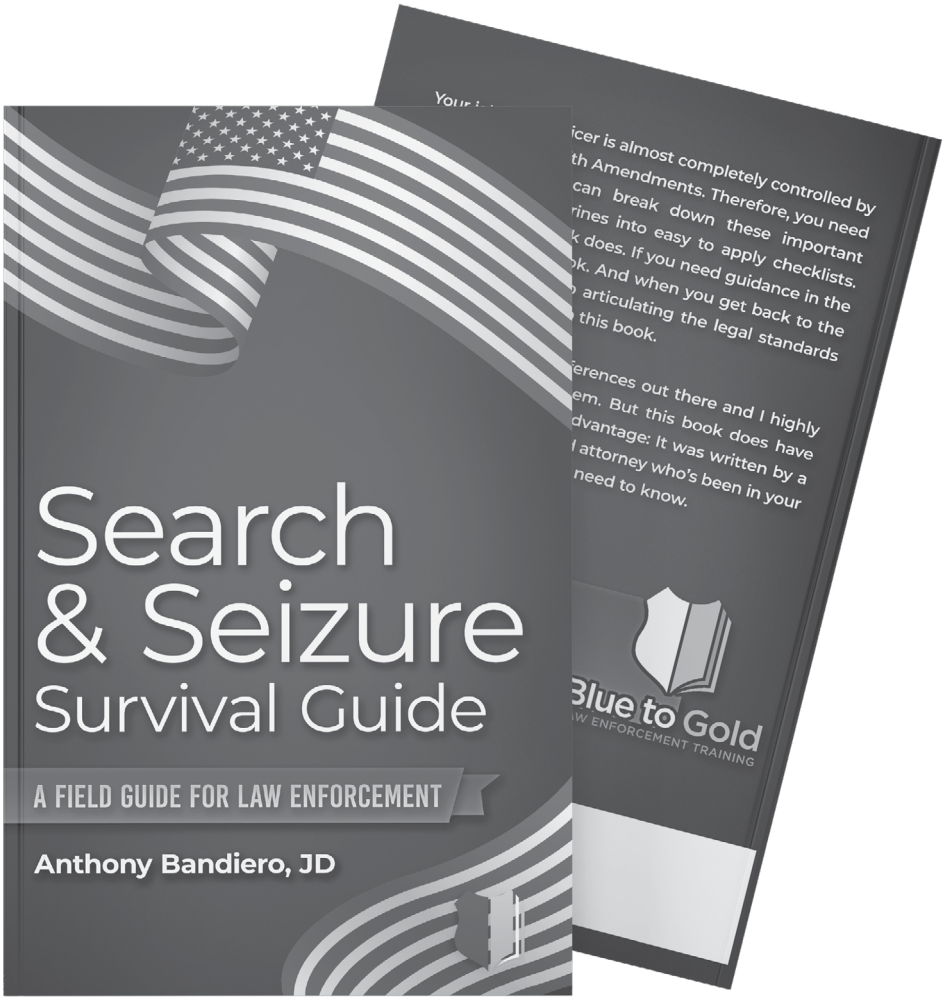

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