

KNOW YOUR RIGHTS

The Law Of Police Search, Seizure, & Arrest

Inside:
A guide
to vehicle
searches



EVOLUTION OF LAW



The Fourth Amendment...

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



KNOW YOUR RIGHTS!

- When can a police officer legally stop you?
- When can a police officer detain you, arrest you, or search your vehicle?
 - Can a police officer enter your home or business without a warrant?
 - Are you free to leave?
 - What if you're detained, but not arrested?

The legal rights and protections we possess were paid for by the blood and fortune of countless men and women over the past 230+ years. If you become entangled in the legal system, you will need them all.

This booklet is a first step to understanding when Law Enforcement Officers may search and seize you and your property with or without a warrant. It all starts with the legal concept enshrined in the 4th Amendment to the U.S. Constitution that individuals should be secure against unreasonable search and seizures. Over time the meaning of the 4th Amendment and its protections, or lack thereof, have been changed by courts, politics, technology, and even language. So what is the current state of the law? This booklet attempts to demystify some often misunderstood legal topics of search, detention and arrest.

This booklet, prepared by a team of lawyers and legal professionals, is the result of extensive legal research combined with real world experience dealing with the legal system. This booklet is designed as a first step to understanding some often complicated legal topics. The very terms of these legal topics such as "reasonable suspicion," "probable cause" or "officer safety" often seem more like riddles than legal standards. We have attempted to address these issues in a simple, understandable format, but understand that this is a starting point, not a substitute for a lawyer. If you have a real world situation check with a lawyer who does work in this area of the law!

Kirk W. Evans

President, Texas Law Shield
Firearms Legal Defense Program

WARRANT REQUIREMENTS



What is a warrant?

A warrant is a document issued by an authorized government official, typically a magistrate judge, authorizing a law enforcement officer (LEO) to arrest a person, search, and/or seize property.

When do the police need a warrant?

Unless a search, seizure, or arrest falls under one of the many exceptions, law enforcement officers need a warrant to search or arrest an individual. However, the exceptions often swallow the rule, making the rule somewhat meaningless.

WARRANT PROCEDURE



LEO observes or is made aware of activity that leads officer to believe a search or seizure can yield evidence of a crime.



LEO drafts a sworn statement (usually an affidavit) stating the facts and people or places to be searched with particularity.



LEO is then able to search or seize according to the terms of the warrant within a reasonable amount of time from the date of issuance.



Magistrate reviews request; if it properly demonstrates that there is probable cause that a crime has been or is being committed, then a warrant is issued.

How do the police obtain a warrant?

To obtain a warrant, a police officer must request an appropriate judge, typically a magistrate, to issue a warrant.

In the request, the police officer must show, by the sworn officer's statement, facts which demonstrate probable cause that a crime has been or is being committed in order to have a

warrant issued.

The judge is then supposed to review the request to determine whether the affidavit establishes probable cause to issue the warrant. If it does, the judge signs it and the police may act upon the warrant.

What can be searched or seized?

A warrant may describe either persons or property to be searched or seized. However, a valid warrant must describe with "particularity" the person or place to be searched or seized, in such a manner that the average person could find the location or identify the persons and places named in the warrant. The warrant must also specifically describe the property to be searched for and seized.

Once inside the premises to be searched, the police can identify and search all people named in the warrant as well as any person

present whom the police can establish probable cause of committing or participating in a crime. In the event that the police do not have probable cause to arrest or search other individuals present at the scene, they may be detained during the course of the search for purposes of controlling the scene, officer safety, the preservation of evidence, and checks for outstanding arrest warrants. If there exists no probable cause that a detained person (not named in warrant) is involved in criminal activity, they must be released.

Do the police have to knock first?



The requirement that police "knock and announce" that they have a warrant before entering a premises has largely been consumed by its exceptions. The law has evolved to create an exception to the "knock and announce" requirement altogether. If the police can state a reasonable suspicion that if they knocked or announced before entering it would be "dangerous, futile, or would frustrate the search's purpose," such as the possibility that evidence will be destroyed, then entry can be made without knocking or announcing. If the police write this concern into their affidavit, they can request a search warrant that specifically dispenses with the knock and announce requirement. Thus, the rule has been swallowed by the exceptions.



Infrared by police requires warrant.

Warrants or circumstances may eliminate knock requirement.

Encounters With Police

— Three Legal Categories —

Voluntary Encounters And The Right To Walk Away

A police officer can approach any person who is located in a “public place” and engage them in ordinary conversation, just as any other individual. This can be things like casual conversation; “how is the weather,” “nice day,” *etc.* A person who finds themselves in a voluntary encounter with a police officer is fully within their rights to not engage in conversation or to walk away. The courts have determined that the act of walking away from a police officer during a voluntary encounter does not create a reasonable suspicion that they are involved in criminal activity. However, any statements given during a voluntary encounter may establish reasonable suspicion to detain or probable cause to search and/or arrest a person. The evidence found during the person’s voluntary consent in encounter may be used against them in court based on the talking with the police officer.

Temporary Detentions (Requires Reasonable Suspicion)

A temporary detention occurs when a police officer stops and holds a person, restricting their right to walk away. During an encounter with an individual, a police officer is legally justified in stopping a person from walking away (“a temporary detention”) when the officer has “reasonable suspicion” that a person has broken, is breaking or will break the law (*see Stop & Frisk/Terry Stop* p.10). While detained, a police officer may check arrest warrants, frisk, remove weapons, handcuff, and even place a person in the back of a police car—all without the encounter legally qualifying as an arrest.

Police officers are not required to read a person their Miranda Rights during a detention. What a person says to the police and the surrounding circumstances of the detention may give rise to probable cause to arrest even if the detention was based on something completely different. Any evidence obtained during the temporary detention may be used against that person in court.

Arrest (Requires Probable Cause)

Police may arrest a person if they have probable cause to believe a crime has been or is being committed. In Texas, a formal arrest is being placed into custody in a manner such that a reasonable person would believe they have been deprived of their freedom. At the point of arrest, most of the person’s legal rights and protections are triggered, including the right to remain silent, the right to counsel, *etc.* Remember: Don’t waive your rights without talking to your lawyer!

LEVELS OF LEGAL PROOF



The Peak Of Mount Everest Is 29,029'

BEYOND REASONABLE DOUBT (REQUIRED FOR CONVICTION)

The highest level of legal proof is beyond a reasonable doubt. This is the standard of proof that must be established before a person may be convicted of a criminal act. It has been described as the level of certainty that a reasonable person would expect before unplugging a life support system for a loved one or the certainty a person would need in packing their parachute before jumping out of a perfectly good aircraft. The government must show this level of evidence before a conviction may occur.

REASONABLE SUSPICION (REQUIRED FOR DETENTION)

Reasonable suspicion is the legal standard that a police officer must have in order to legally stop and detain a person or "pat down" a person for weapons (a "Terry Stop"). What does this murky concept mean? It is a very low standard of proof. The courts have stated that this level of proof requires a minimal level of objective evidence ... more than a hunch.

PROBABLE CAUSE (REQUIRED FOR ARREST AND SEARCH)

Probable cause is the minimum legal standard of proof required by law before a police officer may lawfully arrest someone or search a home, business, or vehicle without a warrant, or, for a judge to issue a search or arrest warrant. This relatively low level of proof has been defined as facts available that would lead a reasonable person to believe that the person had committed or is committing an offense. Probable cause is evaluated on a case by case basis and has no precise formula.

Invoke Your Rights

— You May Need Them —

One of the fundamental rights guaranteed by the 5th Amendment to the U.S. Constitution is the protection that “NO person ... shall be compelled in any criminal case to be a witness against himself ...”



MIRANDA WARNING



Most of us have heard Miranda warnings being given to a person by a police officer on television or in the movies. The warning takes a form such as:

You Have The Right To Remain Silent.

Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided to you at government expense.

When Must Miranda Warnings be Given?

The police are required to give a person a Miranda warning when a person would reasonably believe that they are under arrest or are not free to leave police custody and are being asked specific questions designed to illicit incriminating information or evidence.

**CUSTODY + INTERROGATION
= MIRANDA WARNING**

Voluntary Statements

Voluntary statements can almost always be used against a person. Also, if a person is not in custody, almost all statements are considered to be voluntary and can be used against that person; for example, statements to friends, the media, etc.

Invoking Your Rights



**INVOKE YOUR
LEGAL RIGHTS!**

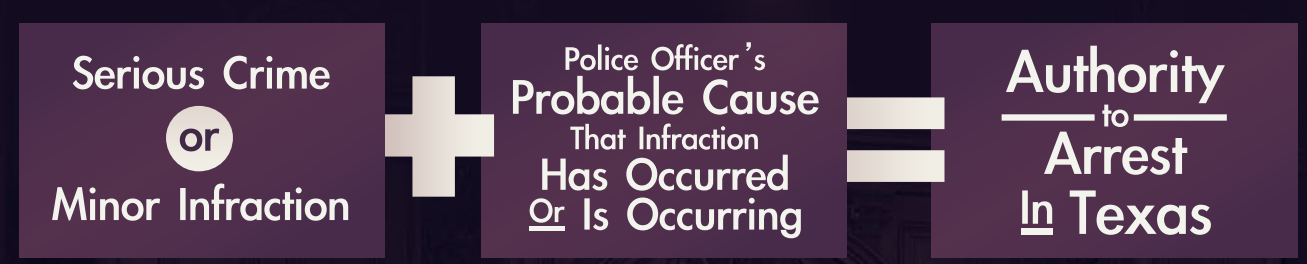
The U.S. Supreme Court has ruled that to invoke your rights and stop a police interrogation you must clearly tell the police you are invoking your right to remain silent and that you want your lawyer. Otherwise, the police interrogation may go on indefinitely! Silence by itself is not enough.

**NO
WARRANT
REQUIRED**

**NO
WARRANT
REQUIRED**

ARRESTABLE OFFENSES IN TEXAS

In Texas, the police have been given broad powers of arrest any time a police officer has probable cause to believe someone is violating almost any law regardless of how minor—from serious felonies to minor municipal ordinances.



Two notable exceptions

Texas law specifically provides two notable exceptions to the ability of a police officer to arrest. A person must be given a summons and

cannot be arrested for 1) speeding less than 25 miles over the speed limit, or 2) having an open container of alcohol in their car.

Thousands of arrestable offenses

Because the police in Texas may arrest when they have probable cause that almost any infraction has occurred or is occurring, there are literally thousands of criminal offenses for which a person can be arrested. Almost everyone who drives a car or walks around in public violates some minor law on a daily basis and is subject to arrest if a police officer so desires. For example, if you are driving an automobile, you can be arrested for having a burnt out light around your license plate, an expired inspection sticker, crossing a solid line of the freeway, failing to signal a lane change, or

hundreds of other infractions. This can be equally true if you are on a bicycle or even on foot because the Texas Transportation Code regulates pedestrian and bicycle riders in public. Arrestable offenses include crossing a street in the wrong place, stepping out of a crosswalk, walking in the street where a sidewalk is provided, crossing against a “Don’t Walk” sign, riding a bicycle without proper safety equipment and hundreds of other offenses. This simply illustrates that police power and discretion for arrest in Texas is extremely broad.

WARRANTLESS SEARCHES



Exceptions
No Warrant Required



General Rule
Must Have Warrant

The general rule that police must have a warrant prior to conducting a search or seizure has many exceptions. These exceptions have mostly been created by courts (in case law) interpreting and deciding what is and is not reasonable for the police to search and seize without a warrant. These exceptions are articulated by the courts in legalese phrases that become exceptions to the requirements of warrants. These exceptions then become the subject of further cases to determine what the legalese of the exception should be taken to mean and whether a particular

warrantless search fell within that exception.

Warrantless search exceptions can be very confusing when put into practical application and are always subject to being modified by the courts as society dictates, technology advances, and the desire by a nation to be free from warrantless searches declines or rises. The general rule requiring a warrant for a search currently includes numerous exceptions which have largely swallowed the general rule that police must obtain a warrant.



Consent To Search
Plain View
Stop And Frisk
Probation Search
Administrative
Abandoned Property
Borders
Inventory
Incident To Arrest
Protective Sweep
Vehicle
Exigent Circumstances
Open Fields
Fourth Amendment
Protections

— What The Courts Say About — Privacy In Public

Stop & Frisk

A Stop & Frisk is also known as a *Terry* stop. If a police officer has a reasonable suspicion that a person may have committed an offense, the officer may stop (legally detain) and pat down that person in a search for weapons. The courts have explained that this exception is for “officer safety.” In addition, any contraband or evidence found may be used in a prosecution. No Miranda rights are required during a *Terry* stop.

Plain View

Plain view allows an officer to seize, without a warrant, evidence or contraband that is immediately apparent and lawfully viewable by an ordinary person.



Search Incident To Arrest

Regardless of what the arrest was for, it is an exception to the warrant requirements that permit an officer to perform a warrantless search during or immediately after a lawful arrest. The exception is limited to the person arrested and the area immediately surrounding the person in which the person may gain possession of a weapon, in some way effect an escape, or destroy or hide evidence.

Consent

If consent is given by a person, law enforcement may conduct a search of a person to the extent consent is given. The officer is under no obligation to tell the individual they have a right to refuse. Consent may be retracted in most instances after a search has begun, except in cases of airport or prison security.

— What The Courts Say About — Automobile Searches

Wheel Wells & Body Panels

A police officer must have probable cause that the wheel wells or body panels of a vehicle contain contraband in order to justify a warrantless search of those areas.

Plain View

A police officer may search the inside of a vehicle and seize any evidence or contraband that may be visible to the ordinary person.

Tracking Devices

The installation and tracking of a GPS device on a vehicle is a 4th Amendment search, requiring a warrant. However, the Supreme Court has not issued any guidelines as to what conditions are required for the issuance of a warrant in this instance.

Inventory Search

The inventory search is the all-encompassing catch-all that will allow a thorough search of the vehicle. If a person who is arrested is found in an automobile, the police are authorized to remove the car and impound it for "safekeeping." The contents of the car must be "inventoried" to protect the property of the person arrested as well as protecting the police from any false allegations of stealing or losing the property. The police department must have procedures in place for performing inventories of automobiles. Many times, the police will use this opportunity to perform a thorough search of the car, its trunk, and all of its contents. The courts have determined that this "inventory" can be done without a warrant and any contraband or other evidence of criminal activity can be lawfully obtained and used against the person.

Containers

A police officer may search any closed containers in the passenger compartment, including glove boxes, consoles, coat pockets, bags, or boxes if it is supported by probable cause that they contain evidence of a crime or a weapon. A warrantless search of these containers may also be made incident to arrest under certain circumstances.

Trunk

A police officer search of the trunk requires probable cause that the trunk will yield evidence of the suspected crime for which the person was arrested.

Containers in the trunk may be searched as well based upon probable cause that they contain evidence of contraband.

— What The Courts Say About — Driver And Passenger Searches

In the 1925 case of *Carroll v. United States*, the Supreme Court reasoned that a car's mobility makes it more difficult for the police to secure a warrant to search, and since automobiles are already subject to increased government regulation, people should not expect the same security against warrantless searches that they have in their homes. The law of warrantless searches of vehicles has continuously evolved since *Carroll* and continues to be litigated.

Consent

A police officer may search an individual with their permission. A police officer does not have to advise that person of the right to refuse before giving consent. However, the consent searches can be examined based upon the voluntariness of the consent, the scope of the consent, and the authority of the person to give consent for the searched areas.

The rules of consent apply to passengers as well as drivers.

Search Incident To Arrest

Police may search an individual during their arrest. This search may include the person or areas where they could lunge or grab nearby weapons or evidence. This area is commonly referred to as their wingspan. The police officer may arrest a driver for any suspected crime he views or for outstanding warrants. If this arrest occurs while the driver is still inside the vehicle, the passenger compartment and any containers therein may be searched. In 2009, the U.S. Supreme Court held that if a person is arrested outside the vehicle, the police officer must develop probable cause that evidence supporting the arrest can be found in the vehicle in order to justify the search.

The rules of search incident to arrest apply to passengers as well as drivers.

— What The Courts Say About — Searches Of The Home

A person's home is their castle and the Supreme Court has recognized a person's home is where he or she has the highest reasonable expectation of privacy. Therefore, a person's home should be given the highest degree of protection against warrantless searches and seizures. However, there exists numerous exceptions to the warrant requirements to search a person's home.

Abandoned Property

No warrant is required to search abandoned property such as trash or items dropped by a fleeing suspect.

Open Fields And Land

These areas are not protected under the Fourth Amendment against warrantless searches.

Curtilage

Curtilage is a word describing the area immediately surrounding a house that is protected from warrantless searches. The term is ambiguous and subject to much debate, and divergent courts have differing opinions of the exception.

Plain View

Police officers without a warrant may look through a window or over a fence, and may seize visible evidence or contraband. There is no Fourth Amendment protection if evidence is seen from a lawful vantage point. Police may use publicly available devices such as binoculars or flashlights, and even helicopters.

Exigent Circumstances

Probable cause plus emergency conditions may allow for a warrantless search of a home or business. For example, emergencies to protect life, hot pursuit of a fleeing felon, or to prevent destruction of evidence.

Consent

If consent is given by a person, law enforcement may conduct a search of a person's premises to the extent consent is given—the officer is under no obligation to tell the individual they have a right to refuse—consent may be retracted in most incidences.

— What The Courts Say About — RVs, Boats And Planes



Motor Homes

For purposes of warrantless searches, does the law treat an RV like a house (higher legal expectation of privacy) or like a vehicle (with a lower expectation of privacy)? In answering this question, courts have looked at the use of the motor home at the time the warrantless search took place. For example, a motor home travelling down the highway will be considered to be a vehicle and not a home and will fall under the automobile exception to warrantless searches. However, one court found a motor home that was connected to utilities to be a home which required a warrant, because it was not being utilized as a vehicle, and was not readily mobile.

Boats

Boats are also considered vehicles; however, like RVs, when it comes to houseboats, the courts have looked at how the houseboat is being used at the time of the search. Courts have not come to a clear consensus; however, there appears to be, under the right circumstance, a judicial recognition of an expectation of privacy in the living quarters of a houseboat, when not being used as a vehicle.

Airplanes

Courts have decided that warrantless searches under the vehicle exceptions apply similarly to airplanes. Thus, under many circumstances, they may also be searched without a warrant.

— What The Courts Say About — Other Warrantless Searches

Borders/Airports

Warrantless searches are permitted at borders and airports because the law implies that individuals have implicitly consented to be searched while traversing an international border or getting on an airplane. Further, warrantless searches are justified by public interest and the great risk to public safety in these areas.

Administrative

Warrantless searches have been permitted by the courts if carried out by the state's administrative agents in any business or activity that is highly regulated by the government. For example, agents from the Bureau of Alcohol, Tobacco, Firearms & Explosives may conduct an audit of a gun store, or the Texas Alcoholic Beverage Commission may send their agents to inspect liquor stores or bars.

Inventory Search of People in Custody

No warrant is required to search individuals in custody (jail, prison, etc.).

Probationers/Parolees:

Probationers and Parolees may be searched, their homes included, on reasonable suspicion alone because of their lessened expectation of privacy due to their increased governmental supervision.

Content of Smart Phones

In 2014, the U.S. Supreme Court held that police may not search digital information on a cell phone without a warrant. The Court recognized that cell phones are a device carried by a person that has an immense storage capacity and collects personal, detailed information, and therefore there is a reasonable expectation of privacy. The Court explained that unlike other exceptions to the 4th Amendment, data stored on a cell phone cannot be used as a weapon to harm an arresting officer or to effectuate an arrestee's escape (normally the purpose of a search incident to arrest). Officers may examine the phone's physical aspects to make sure that it cannot be used as a weapon, but they cannot go through the cell phone's contents because the contents do not present a danger to anyone. However, the Court did leave the door open that exigent circumstances may be a justification for a warrantless search of a cell phone.



Recommendations on Police Encounters

When someone is stopped by the police, anxiety can be high for both the officer and the individual being stopped. Many people find it intimidating and very hard to talk to the police. You may or may not have any idea why the police officer is stopping you. Likewise, a police officer's job is hard and he or she never knows exactly what they are walking into during a stop, especially of a vehicle. The police officer wants to go home safe and sound just like you do. What follows are some recommendations from attorneys and police officers on appropriate ideas for personal conduct when stopped by a police officer.



- 1. Stay Calm** – a police officer may interpret your nervousness as suspicious behavior.
- 2. If you're in a vehicle, pull over as soon as safe** – consider turning on your interior light if at night – so that the officer can see your movements. Remain in your vehicle where the officer can see your hands until requested otherwise.
- 3. Be Courteous.**
- 4. Before you make movements with your hands** – inform the officer so there is no miscommunication of your actions.
- 5. Use common sense and remember do not waive your legal rights without speaking to an attorney** – you may need them.

My Rights Were Violated! Now What?

Exclusionary Rule: THE SHIELD

If the police obtain evidence from an illegal search in violation of the Fourth Amendment, or illegal questioning in violation of the Fifth Amendment, that evidence can be viewed in the legal sense as “fruit from a poisonous tree.” This means that the evidence will be excluded in the criminal trial against the person whose rights were violated. This rule is called the “Exclusionary Rule.” It is designed to help prevent abuses of individual rights by the police.

However, the courts have created several exceptions that allow the use of evidence, even though it may have been obtained unlawfully or in violation of an individual’s rights. The exceptions include:

- Evidence obtained in “good faith” reliance on a defective or illegal warrant
- Evidence obtained in an illegal manner, but also obtained from another legal source
- Evidence obtained in a manner sufficiently disassociated from the illegal police activity
- Evidence that would have been “inevitably discovered” through legal police activities
- Incriminating statements extracted due to an immediate need for public safety
- Incriminating statements used to challenge the credibility or validity of the defendant’s testimony
- Incriminating statements used in a prosecution for perjury
- If the defendant “opens the door” during a trial by introducing or even mentioning the issue, the inadmissible evidence can then be considered admissible



Alert! Texas Has Better Protections

Texas has its own version of the Exclusionary Rule found in the Texas Code of Criminal Procedure §38.23. Texas’ exclusionary rule gives greater rights to an accused person than the federal exclusionary rule. Texas law will exclude any evidence illegally obtained by both

the police and private citizens, where the federal exclusionary rule applies only to government action. Also, Texas Criminal Procedure §38.23 **does not** recognize the inevitable discovery exception.

My Rights Were Violated! Now What?

§1983 Claims: THE SWORD



When a person's civil rights, including their rights against illegal searches, are violated by a police officer, a person may file a civil lawsuit under Title 42 United States Code §1983, which is commonly referred to as a "§1983

Claim." The United States Supreme Court has ruled that a police officer and his or her department may be liable for monetary damages if a person's civil rights are violated.

To bring a successful §1983 Claim, a person must show:

1. A person acting under the color of law (for example, a police officer acting within the scope of their employment as a police officer)
2. Deprived the individual of rights guaranteed by the U.S. Constitution or laws of the United States

Examples of §1983 Claims include:

1. Excessive Force
2. Unreasonable Search
3. Unreasonable Seizure

If the court finds a reasonable police officer could have believed a search or seizure was lawful, a police officer will be cloaked with qualified immunity, legally excusing the officer from civil

liability. This means a plaintiff will have to show that a police officer **knew** his or her conduct was against the law, which can make a §1983 Claim an uphill battle.

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