

## SEARCH WARRANT EXCEPTIONS

### When can the police conduct a search without a warrant?

Throughout the years, the courts have recognized and adopted numerous circumstances as to when either obtaining a warrant is unnecessary or unreasonable. These provide the exceptions as to when the police can perform searches without first obtaining a warrant.

1. **Consent** – If you voluntarily consent to a police search, then you have no grounds to challenge the search. However, the consent must be freely and voluntarily given without any coercion or trickery on the part of the police. The police must either be wearing a police uniform or otherwise properly identifying themselves as a police officer. If the officer is undercover or in plain clothes and somehow tricks you or gets you to give “consent,” it is not a valid search.

**Caveat:** The police do not have to tell you that you have the right to refuse a consent search. There is no *Miranda* equivalent in the search and seizure area. As long as the police have made lawful contact with you, then they can ask you to consent to a search.

*Can I Limit the Scope of the Search?* Yes. You may consent to a search of one area and not another and that may not be used against you absent any other behavior that would establish probable cause.

*Can I Revoke Consent During the Search?* Yes. You may revoke consent at any time and this revocation cannot be used against you (unless your other actions are so suspicious that they amount to probable cause).

2. **Plain View**—If the officer is in a place he is lawfully permitted to be in, any evidence that is in the officer’s “plain view” or plain sight may be confiscated. The officer must be able to immediately recognize what ever it is as something illegal without any further probing or questioning. This also applies to “plain smell.” In other words, if an officer after lawfully pulling your car over immediately recognizes an odor of marijuana and knows for sure from his experiences that’s what the smell is, then the officer can seize the marijuana.
3. **Search Incident to Arrest**—After a lawful arrest has been made, a police officer may search the arrested suspect in order to protect themselves from any dangerous weapons the suspect may have on them. The officer may also perform such a search to protect evidence from being destroyed that the suspect may have on them as well.

**Protective Sweeps**—When being placed under arrest, the officer may search anywhere that is within reasonable reach of the suspect. For example, if the officer is arresting you in your home, the officer may search any desk or cupboard drawers that may be within reach of the suspect in order to search for any weapons that the suspect may try to get and harm the officer with.

4. **Terry Stops**—These stops are named after the procedure first used in the US Supreme Court case of *Terry v Ohio* (1968). If an officer after observing a suspect or suspects, believes that there is a “reasonable suspicion” that criminal activity is occurring or is about to occur, then the officer may perform what is called a “stop and frisk.” This is a patdown of the outer layer of clothing in order to check for weapons to ensure the officer’s safety before questioning the suspects. It is not a full scale search. The officer cannot reach inside the clothing or pockets unless they immediately recognize a weapon or contraband.

What is “reasonable suspicion?” We know that it’s more than a mere hunch or mere suspicion and distrust and it isn’t quite as high a standard as “probable cause.” Police and the courts look to what they call the “totality of the circumstances,” kind of the “big picture” approach to determine if reasonable suspicion exists. Police will look at all the circumstances combined together as a whole to determine if reasonable suspicion exists.

5. **Automobile Exception**—Automobiles are not given the same level of privacy as a home or dwelling is. Since cars are so readily mobile and have the ability to be long gone by the time a search warrant is obtained, cars can be searched when probable cause exists to search them. A *Terry* frisk can take place if reasonable suspicion for weapons exists. The police can search closed and even locked containers in the vehicle if they have probable cause to believe that contraband is in them. This includes footlockers, briefcase, purses, etc. The officer can also search the car’s passengers and their belongings if the contraband could reasonably be contained there.

*Watch Out for Trickery*—Don’t let the cops fool you by telling you to “consent or else I’ll get a warrant.” They don’t need to get a warrant if probable cause exists to search the vehicle and therefore they wouldn’t need your consent. If they try that you know they are just bluffing.

**Pretext Stops**—The police cannot use a routine traffic stop to launch an extensive criminal investigation when no probable cause exists.

6. **Open Field**—Open fields such as meadows, open waters, woods, and pastures may be searched without a warrant because the reasoning is that there is no expectation of privacy in such wide open areas.

**Curtilage**— This is the area immediately surrounding your home and there is an expectation of privacy in curtilage. Therefore, the police need to obtain a warrant to search your curtilage. Exactly how far does the curtilage extend to? It depends. It’s a case-by-case determination. While it’s not an exact way to determine curtilage, think of it as the area you mow.

7. **Exigent Circumstances**—AKA “Emergency Circumstances.” The police may make warrantless searches when the time it would take to get a warrant would jeopardize public safety or could lead to the imminent destruction of evidence. In other words, there just isn’t enough time to get a warrant without bad things happening.
  - a. **Hot Pursuit**—A police officer may continue to chase a fleeing suspect even into a place where such a search would be exempt but for a warrant, such as a home. It doesn’t necessarily have to be a “high speed” pursuit either just as long as a pursuit is taking place, i.e. think OJ and the “slow speed chase.”
  - b. **Imminent Destruction of Evidence**— If the police are in fear that evidence may be destroyed before obtaining a search warrant, the police may proceed without a warrant.
  - c. **Public Safety**—The police may seize and search someone without a warrant if they believe that the safety of the public is in jeopardy and no time remains to get a warrant. For example, if an officer hears screams for help coming from a house, the officer may enter without a warrant, or if the police believe that a suspect has a bomb the police may search him.
8. **Border Searches**—These entail searches at the US border or the equivalent (i.e. customs at an international airport). These searches may be conducted without a warrant and without probable cause. They may also be conducted at random with absolutely no suspicion at all. However, overly intrusive searches such as strip searches and body cavity searches require reasonable suspicion. Some judicial circuits have held that electronic materials, such as laptops and blackberries, may be searched without suspicion.

### **Miscellaneous**

**Telephones**—The police need a search warrant to tap your telephone because there is an expectation of a right to privacy for telephone calls.

**Trash**—No search warrant is required as long as the trash is set out for collection. If it is setting by the curbside for pick-up, then yes it’s fair game. If it’s on your back porch, then no the police may not search without a warrant.

**Public Schools**—Students have fewer rights than adults. Probable Cause is not needed to search students, their possessions, or their lockers. There just needs to be a reasonable basis and appropriate means which will be based on the age of the student and what is being sought form the search.

**Drug Testing for Extra-Curricular Activities**—Students who participate in extra-curricular activities may be searched and be required to submit to drug tests without reasonable suspicion or a warrant.

**High Tech Devices to Search Homes**—High tech devices designed to monitor amounts of heat emanating from someone’s house is an intrusive search and a warrant must be obtained to conduct such a search. Heat emissions do not count as “plain view.”

**Private Security Guards**—Security Guards are not police officers and therefore are not subject to the same requirements as police officer so they may perform searches on patrons detained on a suspicion of shoplifting. There may come a day in the near future when the courts rule otherwise, but not for now.

**Probation**—You are afforded less privacy protections and Constitutional safeguards when placed on probation. Sometimes the conditions of probation that you agree to call for random searches without the necessity of probable cause.

**If the police obtain evidence illegally does that mean that it cannot be used against me in court?** Not necessarily. Ordinarily if evidence is obtained illegally (i.e. without a search warrant, beyond the scope of the search warrant, no probable cause), then the evidence is suppressed and cannot be used against you under the doctrine that it the evidence stems from the “fruit of the poisonous tree.” But, there is something called “inevitable discovery.” If the police would have discovered the evidence eventually anyway, then the evidence can be used against you. In other words, if the police would have discovered the evidence eventually in a legal way, then it doesn’t matter that the method they obtained it was illegal because it would have inevitably been discovered.

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