

Search and Seizure

Fourth (4th) Amendment to the Constitution.

“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.”

Article II, Section 8 of the Arizona Constitution.

“No person shall be disturbed in his private affairs, or his home invaded without authority of law.”

Definition of search warrant – a search warrant is an order, in writing, issued in the name of the state of Arizona, signed by a magistrate, directed to a peace officer, commanding him/her to search for personal property, persons or items described in A.R.S. §13-3912.

The court assumes a search/seizure conducted with a warrant is “reasonable”.

- A. ***A search/seizure without a warrant is considered “unreasonable” absent a search warrant exception.***
- B. ***The burden of proving reasonableness lies with the state.***
- C. ***The preferred method of a search is with a warrant.***
- D. ***Requirements to obtain a search warrant:***
 - 1. There is probable cause to believe that the specific items being sought are evidence of criminal activity, AND.
 - 2. There is probable cause to believe that the specific evidentiary items are located at the place specified in the warrant.
 - 3. Signed by an impartial judge (Superior Court, Justice of the Peace, Magistrate, Court of Appeals or Supreme Court of Arizona).
 - 4. Affidavit documenting probable cause.
 - 5. Specific in date/time/location.
 - 6. Scope of search – detailed and adhered to.
 - 7. Search warrant return:

A search warrant must be executed with five (5) calendar days of being issued. An option to renew the warrant for five (5) calendar days is available with the judge’s authorization.

Once served, the search warrant must be returned to a magistrate within three (3) court business days after being executed.

8. Nighttime search (2200 – 0630) requires good cause.

Good cause is an articulable reason the warrant must be served between 10:00 p.m. and 6:30 a.m. This can include officer safety or evanescent evidence.

9. Hearsay can support the issuance of a search warrant.
10. Informant reliability issues.
11. Receipt for property: A detailed receipt for property shall be given, or left, where the property was taken from.
12. Retention of property: Seized property shall be retained by the seizing agency.
13. Unlawful procurement of a search warrant with intent to harass and without probable cause, causes the search warrant to be executed as a Class 2 misdemeanor.

E. Definitions.

1. Search: An “intrusion” by the “state” into an area where the person has a reasonable expectation of privacy.
2. Expectation of privacy – “What is sought to be preserved as private, even in an area accessible to the public, may be constitutionally protected.”

Expectation of privacy issues:

- a. Driveways.
 - b. Front yards.
 - c. Windows.
 - d. Neighbor’s property.
 - e. Open field.
 - f. Use of binocular A.R.S./visual aids (i.e., flashlights).
 - g. Aerial view.
 - h. Dog sniff.
 - i. Human sniff.
3. Seizure: A seizure relating to a person, at its lowest level, is a restraint where the detainee is not free to leave. This seizure must be justified by reasonable suspicion.

A seizure at its highest constitutional level is an arrest or custody, which can only be justified by probable cause.

F. Service of warrant.

1. Service by a police officer; may be assisted by non-sworn personnel so long as their participation is reasonably related to a law enforcement purpose.
2. Knock and announce requirements.
 - a. Reasonable time to respond must be given.
 - b. After notice of authority/presence and purpose of the search warrant, admittance is refused.
 - c. No knock requirements.
3. Items in "Plain View" may be seized based on probable cause even if an item was not enumerated in the warrant (contraband).
4. Photographs, measurements, impressions and scientific tests are permitted.
5. Searching persons found at the premises, or vehicle, is permitted if:
 - a. It is reasonably necessary to protect against the use of a concealed weapon.
 - b. It reasonably appears that property or items enumerated in the warrant may be concealed upon the person, or in the vehicle.

G. *Grounds for issuance.*

A search warrant may be issued upon any of six (6) grounds (list grounds in warrant).

1. Property to be seized was stolen or embezzled.
2. Used as a means of committing a public offense.
3. Property is in the possession of a person with the intent to use the property to commit a public offense or a person concealing property.
4. Property or items to be seized indicates a particular offense was committed or that a person has committed the offense.
5. Property is to be searched in the interest of public health.
6. The person sought is the subject of an outstanding arrest warrant.

H. *When is a search warrant necessary?*

1. If you are at all in doubt about the lawfulness of a search, then get a warrant. Failure to have a warrant puts the burden on the officer to justify an applicable exception to the warrant requirement.
2. Recognized exceptions.
 - a. Consent.
 - b. Exigent/emergency circumstances.
 - c. Incident to arrest.

- d. Plain view.
- e. Open fields.
- f. Mobile vehicles.
- g. Inventory of a person's property.
- h. Abandoned property.
- i. Items for which an officer may search:
 - 1. Dangerous weapons. Terry v. Ohio.
 - 2. Fruits of a crime (stolen property). Ariz. v. Mahoney
 - 3. Instrumentalities of a crime. Abel v. U.S.
 - 4. Contraband (drugs). Minnesota v. Dickerson.
 - 5. Suspects and additional victims. Ariz. v. Mincey.

WARRANTLESS SEARCHES AND SEIZURES

A. Field interviews.

- 1. Reasonable suspicion: "More than a hunch and less than probable cause" are articulable reasons to suspect that criminal activity is ongoing and that the person stopped is involved in that criminal activity.
- 2. A non-consensual field interview is a seizure; a frisk is a search.

B. Terry stop.

- 1. Must have reasonable suspicion, based on articulable facts, that a crime has occurred or there is criminal activity "afoot." (Review Terry v. Ohio).
- 2. Can use reasonable force to detain (handcuffs, physical restraint) only if there is a reasonable risk of flight and/or articulable officer safety concerns.
- 3. Detention must be brief.
- 4. Cannot transport to a police station

Still, the best practice is to transport the witness to the detainee.

- 5. Any person may be contacted without reasonable suspicion, if the person voluntarily submits to the contact. The key is that it must be a consensual encounter.

However, if the person indicates they do not wish to talk to the officer, the person may not be detained and must be allowed to proceed on his/her way.

C. **Terry frisk.**

1. An officer may frisk (pat down) a person only if the officer has reasonable suspicion that the person is presently armed and dangerous.

2. Must first be a lawful detention based on reasonable suspicion that the person is involved in unlawful activity.

3. Scope of a Terry frisk.

a. Pat down (frisk) of outer clothing for weapons only.

b. If bulky is clothing and the officer cannot feel the contents, the officer may reach in to ensure there is no weapon.

c. If the officer feels what is believed to be a weapon, but upon removal discovers contraband, then the plain view doctrine applies.

d. If, during a lawful "frisk" an officer feels an object whose contour and mass makes its identity as contraband immediately apparent, it may be seized even though it is not believed to be a weapon.

e. A vehicle may also be subject to a frisk, if there is reasonable suspicion to stop and reasonable suspicion that the vehicle contains weapons.

In such a case, the officer may check the entire passenger compartment for weapons where a weapon may reasonably be hidden.

2. Vehicle stops.

a. Officer must have reasonable suspicion or probable cause of a traffic violation or criminal offense to stop vehicle.

A vehicle may also be stopped if probable cause exists to believe evidence or contraband is within the vehicle.

b. Officer can have driver and passengers exit the vehicle.

i. Can physically remove if necessary.

ii. Must have reasonable suspicion to pat down for weapons.

c. Stop of a motorist who violates traffic law is not unlawful even if officer has other motives for stop.

Profiling based solely on race is unconstitutional.

d. On traffic stop, officer may:

i. Immediately demand driver's license and vehicle registration.

ii. Run warrants check on driver.

- iii. Run warrants checks on passengers.
 - iv. Look for VIN.
 - v. If driver does not have registration or refuses to provide it, officer can conduct limited search of vehicle for proof of ownership.
 - a) Can only search in places where registration could be found.
 - vi. If driver's name does not match registered owner's name and there is a question as to driver's identity, officers can search car for evidence of identity.
 - vii. Can ask for consent to search vehicle. Officers do not have to advise that the subject is free to go before asking for consent, but doing so does add credibility to the consent.
3. Use of canine.
- a. Items, including a vehicle, may be detained for canine sniff if reasonable suspicion exists to do so.
 - b. Length of detention is judged on a case-by-case basis; officer must diligently pursue the investigation.

EXCEPTIONS TO SEARCH WARRANT REQUIREMENT

- A. Consent.
- B. Incident to arrest.
- C. Plain view (not a search).
- D. Inventory (not a search).
- E. Open fields (not a search).
- F. Mobile vehicle.
- G. Exigent/emergency circumstances.
- H. Abandoned property (not a search).
- I. Consent.
 - 1. Always ask, even if you have another exception that might apply; however, do not use this as a shortcut.
 - 2. Consent must be voluntary and intelligent; suspect must know/understand that rights are being waived.
 - 3. Consent must be clear and explicit.

4. Authority to search: A valid consent to search may only be given by a person who has a right to the “lawful use and control of the property at the time of the consent.”

a. The words “use and control” do not necessarily imply ownership of the property.

b. If two people have joint control over the property or area to be searched and one person denies the officer consent, no search may be made.

J. Search incident to arrest.

1. Chimel v. California – prior to this case, search of an entire home incident to arrest was lawful; however, Chimel defined the requirements and narrowed the scope.

Permissible scope of the search – if the lawful custodial arrest takes place within the premises, the officer may search the arrestee and the area under his/her immediate control for weapons, fruits of the crime and evidence of the crime and any areas immediately adjacent from which an attack could be launched; additionally any other areas of the home for which there is reasonable suspicion to believe a suspect is present.

K. Search of a motor vehicle incident to lawful, custodial arrest.

A. Police may search the passenger compartment of a vehicle incident to a recent occupant’s custodial arrest ONLY in one of two circumstances:

1. “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or

2. “when it is reasonable to believe evidence relevant to the crime of arrest may be found in the vehicle.”

B. Reasonable to believe is a standard that is less than probable cause.

C. The scope of the search includes the entire passenger compartment and may include glove box and console, but not the trunk.

D. The search must be made within the immediate vicinity of the arrest contemporaneous in time to the arrest.

E. Emphasize this is a search incident to arrest, not a vehicle search based on another legal basis.

F. Plain view doctrine.

1. If the officer is where he/she has a right to be, whatever is observed in the open where it can be seen by anyone who cares to look, is in plain view and it is not a search to observe it.

L. Inventory.

1. Vehicle – inventory of vehicle is proper if the vehicle is lawfully taken into custody and if the following circumstances exist:
 - a. Inventory is done with the intent to protect the owner’s property and/or the officer from allegations of theft.
 - b. Good faith is essential.
 - c. Agency must have a written policy concerning inventory and policy must be complied with.
2. Inventory search of person – personal property of subject taken into custody can/should be inventoried to protect the officer from allegations of theft and to safeguard the owner’s property.
3. Locked containers should be opened only if department policy directs such.

M. Open fields.

The Fourth (4th) Amendment does not protect open fields, only curtilage.

N. Emergency/exigent circumstances.

1. Emergency: Entry may be made if the officer has probable cause to believe an emergency exists. The emergency cannot be created by the officer for purposes of making entry.
 - a. Once the emergency is resolved, obtain consent or warrant.
 - b. An “emergency” created by the officer is not a real emergency.
2. Exigent circumstances: Probable cause to believe that evidence is present in the area and that the evidence will be lost or destroyed without immediate action.
 - a. Hot pursuit: If police are pursuing a subject who they have probable cause to arrest for a felony, immediately after commission of the crime and the subject runs into a home, officers can enter the home if they are in the midst of the chase.
 - b. Bomb searches/investigation.
 - c. Protective Sweep. A protective sweep is lawful in two situations: One, when officers are searching the area immediately adjacent to the place of arrest from which an attack can be immediately launched. Two, when officers are searching adjoining areas (including a home) where a person posing a danger might be found. Officers must have a reasonable belief supported by specific and articulable facts that a home harbors persons posing a danger to the officers.

O. Abandoned property.

Under this exception, property abandoned or thrown away may be searched or seized by police officers without a warrant because there is no reasonable expectation of privacy.

- P. Other “exceptions”:
 - 1. Airport/border searches.
 - a. Conducted as a matter of public safety.
 - b. Conducted by special authorities.
 - 2. Parolee/probationer.
 - a. Agreed to by suspect as condition for release.
 - b. If authority is not specifically provided by the court, the search must be done by parole / probation officer, not by police officer.

EXCLUSIONARY RULE

- A. If evidence or contraband is obtained in violation of the 4th Amendment, the evidence may be suppressed. The state is not allowed to use the evidence at trial against the defendant.
- B. Purpose of the exclusionary rule.
 - 1. The primary purpose is to deter unlawful searches and seizures by peace officers.
 - 2. The secondary purpose is to maintain the dignity and integrity of the courts by keeping “tainted” evidence out of the courtroom.
- C. Good faith exception to exclusionary rule.
 - 1. If an officer is acting in good faith on a warrant which is later held to be invalid, evidence may be used.
 - 2. If officer acts in good faith based on law later determined to be unconstitutional, evidence may be used.