

# Basic Principles of Search and Seizure Law

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- Fourth Amendment Protections
- Reasonable Expectations of Privacy
- Probable Cause vs Reasonable Suspicion
- Probable Cause to Search or Arrest
- Warrantless Search Exceptions

# 4<sup>th</sup> Amendment Protections

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- right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures
- no warrants shall be issued without probable cause supported by oath or affirmation
- particularly describing the place to be searched and the persons or things to be seized

# 4th Amendment

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- Does not give individuals an absolute right to privacy; neither does it prohibit all searches.
- Searches & Seizures by the state must be based on Probable Cause
- It limits only those searches conducted by the government that are considered “unreasonable” by the courts.

What is “REASONABLE” – the courts must look at the totality of the circumstances and balance the individual’s rights to privacy against the government’s need to gather evidence and apprehend criminals.

# What is a reasonable expectation of privacy?

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An expectation of privacy can exist almost anytime and any place as long as:

- individuals have indicated that they personally expect privacy in the object or area – (subjective expectation of privacy – state of mind demonstrated by affirmative action designed to protect their privacy – building a fence, closing window shades or locking compartment)
- their expectation is one which society is prepared to recognize as legitimate – (objectively reasonable)

# Fruits of the Poisonous Tree

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If courts find a search or seizure is not reasonable and a person's 4th Amendment rights have been violated, all items seized during the search could be ruled inadmissible or excluded as evidence at trial.

The exclusionary rule is not in the Constitution. This was created by the United States Supreme Court to encourage proper law enforcement conduct.

# Probable Cause vs Reasonable Suspicion

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- The only difference between the two is that *probable cause* requires information of a higher quality and/or quantity than that for *reasonable suspicion*
- Probable cause & reasonable suspicion are based on an assessment of the overall force of the facts

# Probable Cause vs Reasonable Suspicion

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## Probable Cause

Search = Enough facts or information to provide a fair probability, or a substantial chance, that the object sought is located in the place to be searched

Arrest = fair probability or substantial chance that arrestee committed the crime

## Reasonable Suspicion

### Detention

- Requires only a moderate chance
- Reasonable suspicion exists if the circumstances were merely consistent with criminal activity

# Probable Cause to Search

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To establish probable cause to search, peace officers must be able to articulate how and why they have a *fair probability* to believe:

- a crime has occurred or is about to occur
- evidence pertaining to the crime exists
- the evidence is at the location they wish to search

\*\*A peace officer's training and experience is relevant in establishing probable cause – facts must be seen and weighed as understood by a reasonable officer with that particular officer's training and experience.



# Probable Cause to Arrest

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Probable cause to arrest exists if there is a fair probability or substantial chance the arrestee had committed the crime under investigation

Probable Cause to Search vs Probable Cause to Arrest

Differ in content, but not in degree of certainty

# What is a Search Warrant

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A search warrant is:

- an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer
- commanding the officer to search for an individual or individuals, a thing or things, or personal property
- bring item or individual before the magistrate

# Need Probable Cause

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## Search Warrants

Peace officers must articulate probable cause that:

- a crime has been committed, and
- evidence concerning the crime or the identity of the perpetrator is located at the place to be searched

## Arrest Warrants

Peace officers must articulate probable cause that:

- a crime has been committed, and
- the individual to be arrested committed that crime

# General Rule With Warrant

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- Courts have found searches and seizures are reasonable and lawful when authorized by a valid warrant
- Leaves burden on the defendant to prove the search was illegal

# Search Warrants - 606

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- Officers should receive authorization from a supervisor
- Prepare affidavit & search warrant
- Submit to supervisor for review & approval prior to submitting to judge
- Risk Assessment, if determined high risk - consult SRT

**\*\*No-knock warrants shall not be prepared, authored, or executed by BPD\*\***

# Warrantless Search Exceptions

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Under 4th Amendment, warrantless searches of private property are presumptively illegal. However, case law has created some exceptions to the warrant requirement. Warrantless searches will be upheld if the peace officer's conduct came within one of these exceptions.

- in deciding whether a warrantless search or seizure was legal, courts will always consider the totality of the circumstances
- peace officers must always have specific facts to demonstrate the search or seizure fell within one of the exceptions to the warrant requirement

# Warrantless Search Exceptions

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- Plain View
- Exigent Circumstances
- Cursory (Terry) Search/Pat Down
- Probable Cause
- Consent
- Search Incident to Arrest
- Inventory Search
- Probation Search
- Parole Search

# Plain View

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If an officer sees something in plain view, from a place the officer has a lawful right to be, no search has taken place.

- Owner has no expectation of privacy for items in plain view, so no 4<sup>th</sup> amendment protection



# Plain View Requirements

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To seize something in plain view, the officer must have:

- Probable cause to believe item is contraband or evidence of a crime
- A lawful right to be in the location
- Lawful access to the item

# Exigent Circumstances

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\*\*Compelling need for official action and no time to secure a warrant

An emergency situation requiring swift action to prevent:

- imminent danger to a person's life or safety
- serious damage to property
- imminent escape of a suspect
- imminent destruction or removal of evidence

\*\*Once emergency is resolved a warrant may be needed for further searching\*

# Exigent Circumstance

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Hot pursuit – officers with probable cause or reasonable suspicion attempt to detain or arrest the suspect in a public place, but the suspect flees inside a private area

Fresh pursuit – No physical chase, but an investigative pursuit. Officers are quickly responding to information concerning the suspect's whereabouts, and the officers reasonably believe the suspect's escape is imminent

\*Serious felony

# Examples Exigent Circumstances

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- Two officers were investigating a carjacking that occurred earlier in the day. When the officers arrested three of the known suspects outside of a residence, one of the suspects told the officers that the fourth suspect was inside the home. Entry into the residence by officers, without a warrant, was lawful to prevent the escape of the fourth suspect.
- A commercial property was found unlocked and unattended. The officer entered the property to locate the name and phone number of the owner and to see if there were any signs of someone inside. While inside, the officer discovered contraband in plain view. The entry was legal because the officer was attempting to prevent damage or further damage to the property.

# Example of Exigent Circumstances

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- While responding to a neighbor's complaint of strange noises coming from a nearby apartment, officers found a trail of fresh blood in the hallway leading to the apartment door. When the officers started to announce themselves, they heard vague moaning sounds from inside. The officers reasonably suspected that someone inside the apartment was in need of immediate medical attention and entered the property without a warrant or consent.

# Warrantless Search Exceptions

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## Cursory/Pat (Terry) Search Elements

- lawful detention (reasonable suspicion) and
- reasonable belief the person is dangerous or armed.
- Limited search for weapons, not a search for contraband or other evidence
- \*\* A generalized, non-specific concern for officer safety is not sufficient\*\*

# *Terry Search* – Reasonable Belief armed/dangerous factors

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- Clothing
- Actions
- Prior Knowledge
- Reason for Detention
- Companions
- Location
- Time of day/amount of light
- Ratio

# Reach Inside Clothing or Pockets

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Only if:

- object reasonably felt like a weapon or something that could be used as a weapon
- subject's clothing was so rigid or heavy that the officer could not rule out the possibility of a weapon or potential weapon



# Warrantless Search Exceptions – Vehicle Types

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## Probable Cause Elements:

- Vehicle must be lawfully stopped or accessible
- Probable cause to believe the item will be found inside

If officers believe they have enough information to obtain a search warrant for a vehicle, it is legal for them to search the vehicle without a warrant, “automobile exception” – potential mobility and reduced expectation of privacy

If vehicle is on private property, “belief of reasonable expectation of privacy” a warrant may be necessary to search to enter the property

# Warrantless Search Exceptions – Vehicle Types

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Odor of Marijuana Post-Prop 64.

Officers may search a vehicle based on the odor of burnt marijuana that supports a reasonable inference the driver was *DUI* or driving while in possession of an *open container* of marijuana. However, you *cannot base* the vehicle search *solely on smell and an admission to possession*. Compliance checks based on legal possession of marijuana are no longer allowed.

If someone is in legal possession of marijuana, this alone will not support a probable cause search. Need additional evidence supporting it is illegally possessed.

Under age 21

# Warrantless Search Exceptions

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## Consent Elements:

- Voluntary &
- Obtained from a person with apparent authority

Must be of free will and not the result of duress or coercion. If consent is merely a submission to an assertion of authority or coercion, the consent is not voluntary.

Make it clear you are requesting permission to search and not demanding it

# Warrantless Search Exceptions – Vehicle

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Search Incident to Arrest elements:

Probable Cause for lawful custodial arrest and

- unsecured arrestee with reachable access to the vehicle or
- reasonable suspicion to believe evidence of arrest is to be found in the vehicle or
- reasonable suspicion there is a weapon in the vehicle

# Warrantless Search Exceptions – Vehicle

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## Inventory Search types:

- The vehicle must be in lawful custody and
- Search conducted pursuant to standard procedure

\*\*Vehicle inventory should never be undertaken for the purpose of finding evidence or contraband, but rather for taking note of personal property

# Warrantless Search Exceptions

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## Probation

- Sentencing alternative for a person convicted of a crime & is granted by a judge's discretion. Rather than incarceration, the individual remains under the authority of the probation department. It may be formal or informal
- Individual agrees to terms

## Parole

- Conditional release from state prison which allows an individual to serve the remainder of a sentence outside of prison

# Warrantless Search Exceptions

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Probation & Parole searches require the officer to know about the status in advance and the search cannot be conducted in an arbitrary, capricious or manner that would be considered harassment.

\* Cellular Phones and Electronic Devices may be searched when the subject is a parolee (includes PRCS, Post Release Community Supervision) or the person was on probation with a search condition that *expressly authorized* searches of electronic communications devices.

# Probation & Parole Law

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- Warrantless, suspicionless probation & parole searches are both reasonable under the 4<sup>th</sup> Amendment, according to the California Supreme Court –  
This differs from our BPD policy 311



# Update to 311- Search and Seizure

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- The discussion of asking if someone is on probation or parole was finalized in October in 2020 with PRC.
- The discussion and language on the specific circumstances warranting probation and parole searches were finalized in September of 2020 with PRC.



# Officers Should Only Ask - Are You On Probation Or Parole? In The Following 3 instances:

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- To protect the safety of others, the person detained, or officers.
  - During a critical incident where the officer doesn't have the ability to wait and conduct a records check.
- To further a specific law enforcement purpose.
  - When the officer conducts a check and receives several returns with a matching name.
- To confirm probation or parole status subsequent to a records check.
  - Just to confirm, you're still on probation/parole for XXX.
  - When asking or confirming if someone is on probation or parole, keep in mind that some people may take offense to this question, and to treat them with dignity and respect.



# Warrantless search of Probationers and Parolees

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- Under the new updates to 311, officers shall not search a probationer or parolee simply because of their status.
  - For example, an officer is driving and observes a known probationer (for PC 243(e)(1)) walk into Trader Joe's- under this new update to the policy, stopping and searching this probationer wouldn't be within policy without some other articulable facts that establish reasonable suspicion.



# Warrantless search of Probationers and Parolees

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- The decision to detain and conduct a probation or parole search of an individual should be done at a minimum, in connection with articulable facts that create reasonable suspicion that a crime has been committed, is about to be committed, or is currently being committed.
- For example, an officer conducts a traffic stop in the area of Ashby and Dohr Street. During a records check the officer learns the occupant is on parole for a firearm offense. The officer has knowledge that this is the area of recent shootings, and reasonably believes that this person may be in the area to commit a crime, a search would be within policy (just need articulable facts that establish reasonable suspicion).



# Warrantless search of Probationers and Parolees

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- A car stop alone of a probationer or parolee doesn't satisfy the articulable fact portion of this updated policy.
- Another example, bike officers observe a known probationer (PC 484) with a history of stealing from 2300 Shattuck (the victim location) standing in front of 2300 Shattuck Ave. A detention and search based on the officers' articulable facts the probationer may have just committed a crime (theft), or is about to commit a crime (theft) based on their knowledge would justify a search in this new policy update (established reasonable suspicion).



# Warrantless search of Probationers and Parolees

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- Officers conduct a traffic stop in the Berkeley Hills at 3 AM and learn the driver is on parole for PC 211. The parolee doesn't have a viable reason for being in the Berkeley Hills at this hour. The officer is aware that this area has been plagued with catalytic convert thefts in the recent weeks. Exercising the parolees search conditions would be appropriate and within policy. Also note the underlying crime the probationer or parolee has committed may or may not be a contributing factor to the officers' articulable facts that a crime has been, is being, or is about to be committed..

# Warrantless search of Probationers and Parolees

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- While doing a security check in the marina, officers contact a probationer (for PC 314) sleeping in his car. The officer learns the probationer has a four way search clause. Without any other facts this would not be within policy to exercise the probationers' search terms. However the officer may ask for consent. Additionally, if the officer develops or has knowledge of any articulable facts such as recent PC 314 reports in the area, a reporting party complaining of PC 314 instances with the aforementioned person, or any other articulable facts that led the officer to develop reasonable suspicion that a crime has been, is being, or is about to be committed then the search would be within policy.

## Warrantless search of Probationers and Parolees

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- Another example, an officer conducts a traffic stop. A records check reveals the driver is on parole. The officer lacks any articulable facts that would allow a search under the conditions of this new update to the policy. The officer may ask the driver if they would consent to a search (one that conforms to the conditions of their parole). Nothing in this policy prohibits and officer's ability to seek consent searches.



# Update to 311- Consent Searches

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- A revised Berkeley Police Department Consent Search Form was created. It was designed to be in alignment with the occasions that consent might be sought, and has a place for initials/signature. When appropriate, complete the necessary sections, including the case number on the top and route the paperwork to Report Review.



# Update to 311- Consent

**Q-**When exactly should I complete this form, and when isn't it necessary.

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**A-**Officers shall complete this form when conducting a consent search, without any other legal search justifications. When an officer safety or exigency exists, rely on your BWC to capture consent. For example, if you seek a consent search on an individual whom you suspect has a weapon, do **NOT** pull out the consent form and have it signed prior to conducting a consent search. Simply capture the individual's consent on BWC. Explain in your report (MDT/incident/case) the reason for not obtaining a written consent.



# Update to 311- Consent

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**Q-**What if I conduct a car stop, and I develop probable cause, and the individual is on searchable probation. Should I still seek consent? And if so, do I need to get this consent signed on a Consent Search Form?

**A-**Yes, if you're about to conduct a search, and you are exercising the individual's search conditions, you may seek consent too. It is always good practice to seek consent coupled with your other legal authority for searching. In these instances, continue to rely on your BWC to capture your consent, and just document this in your report.



# Update to 311- Consent

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- The most notable deviation from past practice is going to be in a consent search by itself. When you are seeking consent, with no other legal grounds for a search, and there isn't an officer safety or exigency component, the updated policy requires a signed consent search form.

**Q-**Do I need to get this signed before I search?

**A-**Officers should get the form signed before a search, so long as there isn't an officer safety or exigency component.



# Update to 311- Consent

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**Q-**What if someone gives consent but refuses to sign the Consent Search Form?

**A-**Just note the refusal on the form, and in your report. For the purposes of court it's "relevant but not significant." Again, your body worn camera (BWC) should be sufficient in this circumstance for the purposes of court.

