SEARCHES WITHOUT WARRANTS

Honorable Mark J. McGinnis

OBJECTIVES:

After this session, you will be able to:

1. Identify the *Terry v. Ohio* frisk, plain view and plain feel, protective sweeps, exigent circumstances, and inventory exceptions to the search warrant requirement;

2. Analyze the different approaches to searches without warrants as distinguished from searches with warrants and the primary United States Supreme Court cases that establish each of the exceptions;

3. Determine and describe when a “frisk” pursuant to *Terry v. Ohio*, and the protective sweep exception to the search warrant requirement are constitutional;

4. Define the “plain view,” “plain feel” and exigent circumstances exceptions to the search warrant requirement;

5. Describe the inventory exception to the search warrant requirement as it pertains to arrestees and their effects, and determine when it is constitutional;

6. Identify the community caretaking doctrine and apply it to searches or seizures without a warrant; and

7. Apply the *Terry v. Ohio* frisk, plain view and plain feel, protective sweeps, exigent circumstances, and inventory exceptions to the search warrant requirement to fact patterns.

REQUIRED READING:

Mark J. McGinnis, *Searches Without Warrants* (May 2012) [NJC PowerPoint].........................1
Searches Without Warrants

Hon. Mark J. McGinnis

Overview
Our discussion regarding searches without a warrant will be covered in the next three sections. The first two sessions include eight exceptions to the warrant requirement.

Overview
The third session will be on the search incident to arrest exception as applied to automobiles and the automobile exception to the warrant requirement.
Overview
All three sections presume the following:
1) There was government activity.
2) There was a search/seizure.
3) There was not a warrant.
4) There is standing.

Issue Presented
The issue for trial judges is whether the warrantless search or seizure by governmental action violates the Fourth Amendment of the United States Constitution and/or your State’s Constitution.

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 ... “.
General Rule

The general rule is that warrantless searches are presumed unlawful.

The government has the burden to establish that the warrantless search is constitutional and does not violate the Fourth Amendment.

Exceptions to Search Warrant Requirement
1) Terry Frisks;
2) SITA (SITA Autos in Divider 11);
3) Plain View/Plain Feel;
4) Exigent Circumstances;
5) Emergency Aid Doctrine;
6) Community Caretaking Function;
7) Inventory Searches;
8) Protective Sweeps;
9) Consent (Divider 6);
10) Automobile Exception (Divider 11).

Problem #1

Officer observes three individuals staking out a business. Reasonable suspicion to stop based on officer’s experience and all observations. Officer stops all three individuals to obtain information.
Q: May officer perform a Terry frisk?
Problem #2
Officer observes D meet briefly with 6-8 drug addicts over an 8 hour period. D is in restaurant with three other drug dealers. Officer does not hear any conversation and does not observe anything pass between people.
Q) May officer perform Terry stop?
Q) May officer perform Terry frisk?
Q) May officer reach into D’s pocket?

Problem #3
Officer executes legal traffic stop of D’s vehicle. D exits vehicle. Officer observes bulge in D’s clothing.
Q) May officer frisk D?

Problem #4
D leaves building known for cocaine traffic. D makes evasive action when he observes police. Officer stops D based on reasonable suspicion. Police execute a Terry frisk of outer clothing. No weapons. Officer felt small bag in D’s front pocket, squeezed and slid it, and believed it was lump of crack cocaine. Officer reached in pocket and seized the bag.
Q) Should you suppress the search/seizure?
Problem #5
May Terry frisks extend beyond the person (i.e. the armrest of a vehicle)?

Problem #6
May an officer conduct a Terry frisk of a passenger in a vehicle during a valid traffic stop?

Problem #7
Confidential informant informs officer that D seated in a nearby car had handgun in waistband. Officer approaches car and requests D to open door. D lowers window. No weapon visible to officer.

Q) May officer reach in to D’s waistband for gun?
Problem #8
Officer can articulate reasonable suspicion that person lawfully seized is armed and dangerous. However, the officer has no basis to believe the person has engaged in criminal activity.
Q) May officer frisk person?

Terry Frisks
A “frisk” is a protective search of a person for weapons.

A “frisk” is a limited intrusion designed to insure safety of officer and others while officer is conducting a criminal investigation.

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

Terry Frisks
Two Considerations
1. Officer must have reasonable suspicion that person is armed and dangerous; and
2. Officer cannot exceed the scope of the “frisk” unless the officer feels a hard object that may be a weapon.
**Terry Frisks**

To determine whether officer had reasonable suspicion to believe that person was armed and dangerous, Courts must consider:

1. The officer’s specific and articulable facts; and
2. The rational inferences from those facts.

**Terry Frisks**

A frisk does not require the police believe that the person engaged in criminal activity. A frisk only requires that the investigatory stop be lawful and the officer must reasonably suspect that the person is armed and dangerous.


**Terry Frisks**

Officer may seize the object without a warrant if the initial frisk provides probable cause to believe the object is a weapon or other item subject to seizure.
**Terry Frisks**

Contraband detected during a weapons frisk may be seized only when the officer’s sense of touch makes it immediately apparent that object is contraband.

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**Search Incident to Arrest**

I. *Weeks v. United States*, 232 U.S. 383 (1914) provided the “right of the Government, always recognized under English and American Law, to search the person of the accused when legally arrested”.

II. *Robinson v. United States*, 414 U.S. 218 (1973) held that in a case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a “reasonable” search under the Fourth Amendment (emphasis added).
Search Incident to Arrest

Scope
Officer may search the arrestee’s body and the area within the arrestee’s immediate control.


“Immediate control” is measured at the moment of arrest (not the moment of search).

Problem #9

**Facts:**
D arrested in front hallway of home. Officers do not have a warrant to search home.

Problem #9

**Question #1:**
Can officer “search” inside D’s wallet in back pocket?
Problem #9

Question #2:
Can officer “search” inside drawer six feet from D?

Search Incident to Arrest

Timing of Search

The formal arrest can come before or after the search incident to arrest.

The search must be contemporaneous to the lawful custodial arrest.
United States v. Edwards, 415 U.S. 800 (1974);
Problem #10
Officer is walking in front of D’s house on the public sidewalk and clearly sees in plain view a marijuana plant through the living room window and another marijuana plant in D’s vehicle parked in the driveway.

Problem #10
May the officer seize the plant in the home?

Problem #10
May the officer seize the plant in the vehicle?
Problem #11
Officer observes THC from aircraft flyover. The THC is in the curtilage area of D’s property.

Q) May the officer seize the THC based on the plain view observation?

Plain View Doctrine
I. If officer is making “plain view” observation from a legitimate location outside a person’s reasonable zone of privacy, then the plain view may establish probable cause to entitle the officer to take the next step (obtain a warrant or conduct a search of a vehicle).

II. If officer is making “plain view” observation from a legitimate location within a person’s reasonable zone of privacy, then the plain view may establish the basis to seize the object or take the next step (secure the premises to obtain a warrant). Incriminating nature of object must be “immediately apparent”.
Plain View Doctrine

If officer is in a position where she has the right to be and sees something in plain view, the observation is not a “search” pursuant to the Fourth Amendment.

Officer cannot physically manipulate or move the item. If so, then there is a “search”.


Plain View Doctrine

The main function of the plain view doctrine is to permit the warrantless seizure of an object.

This main function does not allow law enforcement to make an additional intrusion to seize the object.

Plain View Doctrine

Inadvertent discovery by officer is not a necessity for plain view.

Plain Feel Doctrine

Same as plain view doctrine, except “plain feel” is the sense of touch instead of sight.
Contraband may be seized by touch if touch was lawful and identity of contraband was immediately apparent.

Plain Smell/Sniff

Plain smell analysis is the same as plain view. Consider whether officer is in legitimate location, if item is in a reasonable zone of privacy, and then determine next step.

Plain Smell/Sniff

The United States Supreme Court held that a “dog sniff” of luggage in a public place is not a search within the meaning of the Fourth Amendment.


The rationale is that the sniff will only identify the presence of narcotics. All other information about lawful activity will remain private.
Flashlight/Searchlight
“use of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.”

U.S. v. Lee 274 U.S.559 (1927)

Shining flashlight to illuminate interior of car does not constitute ‘search’... it triggers no 4th Amend. Protection.

Problem #12
Fire in furniture building at 2:00 a.m. Potential arson. Officers arrive and enter building. Stay for two hours. Leave based on poor visibility. Officers return four hours later, enter building, and take pictures. Enter building a third time 26 days later with State arson investigator. All entries were without a warrant and without consent.
Problem #12
May officer enter at 2:00 a.m.?

Problem #12
May officer enter four hours later?

Problem #12
May officer enter 26 days later?
Problem #13
Underage drinking party. Officer observes physical altercation take place inside the residence from his position outside the home.
Q) May officer enter home?

Problem #14
Neighbors call 911. Officer is told that person “is going nuts”. Observes damaged car and fence near driveway, blood on vehicle, clothes, and door handle to home. Windows are shattered. D tells police to get warrant. Officer enters home.
Q: May officer enter home?


Exigent Circumstances
Not just “hot pursuit”
Exigent Circumstances

Two Considerations

1) There must be probable cause for a search or seizure; and
2) There must be an exigent circumstance.

Probable cause is necessary, but is not sufficient by itself.

The rationale for the exigent circumstance doctrine is in the meaning of exigency. There must be an immediate, urgent and compelling need for police action; there is no time to obtain a warrant.


Exigent Circumstances

The U.S. Supreme Court will be deciding the following issue:
“When does lawful police action impermissibly “create” exigent circumstances which preclude warrantless entry?”

_Kentucky v. King_, oral arguments January 12, 2011
Exigent Circumstances

Examples of exigent circumstances:
1) Imminent destruction of evidence.
2) Immediate danger to person.
3) Hot pursuit of a fleeing felon. Requires close and continuous pursuit.
4) Preventing a suspect’s escape.

Exigent Circumstances

DESTRUCTION OF EVIDENCE
A warrantless search is lawful to preserve evidence if officer has probable cause to believe evidence is located in place searched and officer reasonably believes destruction of evidence is imminent.

Exigent Circumstances

Danger to Persons
A warrantless search is lawful if the police reasonably believe that person or items are dangerous to others. The search is limited to specific areas where there is reasonable belief that the person or items are located. Courts consider totality of circumstances, including seriousness of crime, if person is armed, and nature of event.
Exigent Circumstances

Preventing a Suspect’s Escape

Government must establish that officer reasonably believed that it was likely suspect would flee before a warrant could be obtained.


Emergency Aid Exception

The emergency aid exception is one type of exigency that may make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.

Subjective intent of officer or seriousness of any crime does not matter for this exception.

Brigham City.
Community Caretaking Function

There is some effort to define the CCF as depending on the type of activity the police are engaged in – assistance as opposed to criminal investigation. This distinction was unanimously rejected in *Brigham City v. Stuart*, 547 U.S. 398 (2006).

Community Caretaking Function

The CCF is mentioned in only three United States Supreme Court cases. All three cases involved vehicle searches. The last two cases involved vehicle inventory cases, which simply referred to the first case. The first case involved the search of an off-duty officer's personal car to secure his service revolver after he was arrested for drunk driving. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

Community Caretaking Function

It is important for state trial judges to understand their state's cases regarding the community caretaking function and the emergency aid doctrine. These doctrines are usually not the same as exigent circumstances.
Inventory Searches

Inventory searches are lawful if:
1) Person is lawfully in police control; and
2) The search is conducted pursuant to a routine administrative policy, not done solely to look for evidence of criminal conduct.

Inventory Searches

State must establish that police agency had established procedure for inventory search and that the procedure was followed by the officer.

Inventory Searches

Factors supporting inventory searches include:
1) Protecting suspect’s property;
2) Guarding against false claims of stolen property; AND
3) Removing dangerous instrumentalities.
Inventory Searches
The United States Supreme Court held that a warrantless inventory search by police of an arrestee’s personal effects, as an incident to incarceration, was consistent with the Fourth Amendment. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

It is an incidental administrative step following arrest and preceding incarceration.

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Inventory Searches
Inventory searches of vehicles is covered in Divider 11.

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Protective Sweeps
Protective Sweeps
The United States Supreme Court held that protective sweeps are constitutional when:
1) As an incident to arrest, officers can look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Reasonable suspicion or probable cause are not needed; OR

Protective Sweeps
2) Officer provides articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area harbors a person posing a danger to those on the arrest scene. The officers may go beyond the area listed (1) above.


Protective Sweeps
Officer must only be looking in places where people may be found. The protective sweep can last no longer than is necessary to dispel the reasonable suspicion of danger. Cannot last beyond the time of the arrest and departing the premises.
Thank you!