

	<b>SAN MARCOS POLICE DEPARTMENT</b>	
	<b>Policy 7.4 Search Incident to Arrest and Other Searches Without a Warrant</b>	
	<b>Effective Date:</b> September 6, 2019 <b>Revised Date:</b> July 3, 2020	<b>Replaces:</b> GO 206, 207, 208
	<b>Approved:</b> _____ <i>Bob Klut</i> _____ <b>Chief of Police</b>	
	<b>Reference:</b> TBP: 7.07, 10.14, and 10.15	

**I. POLICY**

In order to ensure that constitutional rights are protected, officers will obtain search warrants upon probable cause in all appropriate criminal cases except for the following circumstances. (Search warrants are discussed under Policy 7.5 Search Warrants)

Searches without a judicial warrant are strictly limited to those circumstances where the courts have granted officers limited exceptions. One of those exceptions was described in Policy 7.2 Field Interviews and Detentions, where, if during an investigative stop (detention), an officer has reasonable suspicion that an individual may be armed, and is able to articulate that suspicion, the officer may conduct a limited pat-down of the individual's outside clothing to protect the officer. Other exceptions to the search warrant requirement are provided in this policy.

**II. PURPOSE**

The purpose of this policy is to establish guidelines for searches incident to arrest and other searches without a warrant.

**III. SEARCH INCIDENT TO ARREST**

- A. The general rule is that a reasonable search may follow a valid arrest. The officer has the authority to make a search that may extend to articles carried by the suspect and to the suspect's immediate surroundings. The purpose of this search is to remove any weapons from the arrested person that could be used against the officer while in custody, to remove any items that might facilitate an escape, and to prevent the destruction of any evidence by the arrested person.
- B. The search incident to an arrest must occur during the arrest process or within a reasonable time after the arrest. The arrest must be a full custodial arrest.
- C. An officer making a search incident to an arrest may search only the following places:
  - 1. The entirety of the person being arrested.
  - 2. The area within the immediate control of the person being arrested where the suspect might reach for a weapon or for evidence.

- D. Accessories, luggage or containers carried or possessed by the suspect may be searched incident to a full custodial arrest if they are within the area in which the defendant might reach to grab a weapon or an item of evidence.
1. A peace officer may not search a person's cellular telephone or other wireless communications device pursuant to a lawful arrest of the person without first obtaining a search warrant. Exceptions to this requirement are as follows:
    - a. The owner or possessor of the device gives consent for the police to search it,
    - b. The device is reported stolen,
    - c. The arrestee is a fugitive with an arrest warrant for a felony offense, or
    - d. There exists a life-threatening situation.
  2. An officer must apply for a warrant to search a cellular telephone or other wireless communications device as soon as practical after a search is conducted under Subsection 1.c. or 1.d above. If the judge declines to issue the warrant, any evidence obtained is not admissible in a criminal action.
- E. Vehicles may be searched incident to the arrest of the occupant or driver only in the following circumstances:
1. The arrested occupant of the vehicle is unsecured and within arm's reach of the passenger compartment at the time of the search, or
  2. The officer has a reasonable belief that evidence related to the crime for which the arrest was made is located within the passenger compartment.
  3. Once an occupant has been secured and is unable to effectively reach the passenger compartment, the authority to search the vehicle for safety reasons is removed.
- F. Strip Searches
1. Strip searches shall not be conducted unless the officer has an articulable, reasonable suspicion that the person is concealing a weapon or contraband. Reasonable suspicion may be based on, but is not limited to, the following criteria.
    - a. Nature of the offense.
    - b. Arrestee's demeanor and appearance.
    - c. Circumstances of the arrest or evidence of a major offense in plain view or during the course of the arrest.
    - d. Arrestee's criminal record, particularly a history of violence or of narcotics offenses.
    - e. Detection of suspicious objects beneath the suspect's clothing during a search incident to an arrest.
  2. No strip searches will be conducted in the field except in an emergency.
  3. In every case, the on-duty supervisor must review the need and expressly authorize the strip search.
  4. When authorized by the supervising authority, strip searches may be conducted only under the following conditions:

- a. In conformance with approved hygienic procedures and professional practices.
  - b. Except in an emergency or when necessary for the safe transport of a prisoner, the strip search will be conducted at the jail in a room specifically authorized for this purpose.
  - c. By the fewest number of personnel necessary and only by those of the same sex as the person arrested.
  - d. Where conditions provide privacy from all but those authorized to conduct the search.
5. Following a strip search, the officer performing the search shall include in the written report the details which include, at a minimum, the following:
    - a. Date and place of the search.
    - b. Identity of the officer conducting the search.
    - c. Identity of the individual searched.
    - d. Those present during the search.
    - e. The identity of the approving supervisor.
    - f. A detailed description of the nature and extent of the search.
    - g. The results of the search.
    - h. A description of the factors contributing to the probable cause that authorized the search.
  6. The above requirements shall not apply to arrested persons who have been released to the custody of a correctional facility. In those instances, the policies and procedures of the correctional facility shall apply.
- G. Body-Cavity Searches
1. Department personnel do not conduct body cavity searches other than a visual inspection of an individual's mouth. If an officer has reason to believe a body-cavity search is needed to detect weapons, drugs, or other contraband, the following procedures apply:
    - a. The on-duty supervisor is notified.
    - b. A search warrant authorizing the body cavity search is secured.
    - c. The detainee is transported to an appropriate medical facility.
    - d. The search is conducted by the on-duty emergency room physician, while officers stand by to take control of any evidence and provide security to the physician conducting the search.
    - e. Body cavity searches are documented in the officer's arrest report, which will detail the officer's justification for such search, the approving supervisor's name, the location and persons present during the search, and the results of the search. A copy of the report and the warrant are forwarded to the chief of police for review.
  2. Prior to transporting the prisoner to the medical facility, the officer shall inform the prisoner of his or her intention to conduct a body-cavity search, thus giving the

prisoner the opportunity to voluntarily surrender the suspected contraband.

#### **IV. OTHER WARRANTLESS SEARCHES**

##### **A. Consent Searches**

1. The Fourth Amendment test for a valid consent to search is that the consent must be voluntary, and the voluntariness of the consent granted is a question of fact to be determined from all the circumstances. Consent is not voluntary if it is obtained by threat, force, or by falsely claiming that the search can be conducted without consent.
2. A person's knowledge of their right to refuse to consent to a search is not a prerequisite of voluntary consent. However, if an officer does advise a person that they are free to refuse the officer's request to search, this will be a factor that weighs heavily in favor of the voluntariness of any subsequent consent.
3. To mitigate claims of threats or coercion by officers, consent search investigations should be video or audio recorded.
4. Though not required, police officers can also gain written consent to search from the person or persons.
5. Police officers should ascertain that the person giving consent to search has authority to give consent to search the vehicle, item or location.
6. To better define the scope of a subject's consent, and when tactically sound, police officers should state to the person the items that they are searching for.
7. In order to obtain consent to search, no police officer will represent to any person that a search warrant has been issued in a particular case, knowing that such is not true.
8. When conducting a consent search at a suspect's residence or premises under the suspect's control, a minimum of two police officers should be present so the contact/cover principle can be utilized.

##### **B. Exigent Circumstances**

1. Probable cause that a crime has occurred, along with exigent circumstances, may justify a search or entry without a warrant.
2. Circumstances relevant to whether exigent circumstances exist to justify a warrantless entry include:
  - a. The reasonable belief that a person is in need of immediate aid or protection from harm.
  - b. The protection of property, such as extinguishing a fire or stopping a burglary.
  - c. Pursuing a fleeing felon or dangerous person.
  - d. Preventing the destruction of evidence. When deciding to conduct a search or entry to prevent the destruction of evidence, police officers should consider:
    - i. The seriousness of the offense

- ii. The strength of the probable cause
    - iii. The likelihood that the evidence will be destroyed or removed from the scene if the search is delayed until a warrant is obtained.
  - 3. The authority to enter a place or premise under exigent circumstances is limited to handling the emergency or exigency and officers may not search further without a warrant. Other exceptions to the search warrant requirement may apply. For instance, evidence or contraband in plain view may be seized.
  - 4. After the emergency or exigency has passed, if probable cause to search still exists, police officers may secure the scene for the time it takes to get a warrant.
- C. Plain View
- 1. The plain view doctrine states that items that are within the sight of an officer who is legally in a place from which the view is made may be seized without a warrant.
  - 2. The four requirements of plain view are:
    - a. The officer conducting the seizure must lawfully arrive at the position from which the object is plainly seen.
    - b. The object must be in plain view.
    - c. The object's incriminating character must be so immediately and sufficiently apparent that the officer has probable cause to believe the object is contraband or evidence of a crime.
    - d. The officer must have a lawful right of access to the object itself, apart from lawfully viewing the object. For example, an officer might view contraband from outside a window but still need a search warrant to go inside the residence in order to seize the contraband.
- D. Abandoned Property, Open Fields, and Curtilage
- 1. A search warrant is not required for property that has been abandoned. For property to be considered abandoned the following three conditions must apply:
    - a. The property was voluntarily and intentionally abandoned.
    - b. The abandonment was not a result of police misconduct.
    - c. The property was discarded outside the area in which the subject has a reasonable expectation of privacy.
  - 2. Open fields are not protected by the Fourth Amendment as there is no expectation of privacy in those areas regardless of fences, signs or the property's secluded location, especially when the property can be viewed by the public. However, officers must remain aware that under Texas law, a trespass on an open field could implicate Texas' exclusionary rule under CCP Article 38.23 and result in any seized evidence being ruled inadmissible.
  - 3. Curtilage is the land and areas immediately surrounding the home and so closely associated with the home that it receives the same Fourth Amendment protections as the home. Police officers need a search warrant to search curtilage. The extent of curtilage of a private residence is determined by the following:
    - a. Whether the area is enclosed.

- b. The nature and use of the area.
  - c. The proximity of the area to the home.
  - d. Any measures taken by the owner to protect the area from observation.
- E. Vehicle Exception – Carroll Doctrine
1. Officers who have probable cause to believe that a readily movable vehicle contains (or is) contraband or evidence of a crime may seize the vehicle or stop and search the vehicle without a warrant under the vehicle exception.
  2. If probable cause exists to search a readily movable vehicle, there is no requirement for independent exigent circumstances. The officer's determination of probable cause must be based on objective facts that could justify the issuance of a search warrant by a magistrate.
  3. The scope of the search is as thorough as a magistrate could authorize in a search warrant. The officer may conduct a search of all locked and unlocked containers and compartments in the vehicle that may reasonably contain the object(s) for which they are searching. However, if probable cause to search is only for a specific container in the vehicle, then police cannot search the rest of the car.
  4. Even if the vehicle has been towed, impounded or otherwise secured, as long as probable cause still exists, the vehicle may be searched at a later time or at another place. For example the vehicle may be moved off the roadway for safety reasons, taken to an auto maintenance shop for a more detailed examination, or impounded at the police station or an impound lot.
  5. Officers should note that vehicles that are crashed and incapable of being driven, vehicles which are junked, wrecked or permanently immobilized or vehicles such as RV's that are stationary and being used as a residence might not be considered a "readily movable vehicle" for Fourth Amendment purposes.