

**THE POLICE
HOW-TO
GUIDES**

**HOW TO JUSTIFY
OFFICER SAFETY SEARCHES**

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HOW TO JUSTIFY OFFICER SAFETY SEARCHES

Ensure that your interactions with suspects are constitutionally justifiable, so you are never forced to choose between being safe and being sued

So far, 2007 is the deadliest year for law enforcement officers in nearly three decades. According to statistics compiled by the National Law Enforcement Officers Memorial Fund, more than 100 officers died in the line of duty during the first six months of this year—a 44-percent increase over the same period last year.

On average, 60,000 officers are assaulted on the job every year. That's an average of 164 per day. The risk level you face on the job makes it important not only to resist complacency and to follow prudent tactics, but also to understand how to ensure that your interactions with suspects are constitutionally justifiable, so that you are never forced to choose between being safe and being sued.

The Officer Safety Exception

In *Katz v. U.S.*, the U.S. Supreme Court ruled that warrantless searches are presumed to be unreasonable, "subject only to a few well-established and specifically-delineated exceptions." In *Terry v. Ohio*, the court said, "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."

To allow officers to carry out their dangerous duties with reasonable security, the court has established and specifically delineated the "officer safety exception" that sometimes permits limited warrantless searches. To bring your safety searches within this exception, you need to know when and where it applies, and how far you can go.

Weapons Frisk During Detentions

In *Terry*, a lone officer confronted three men he had watched casing a store for a planned robbery. Based on their behavior and his training and experience, he detained them, patted them down for weapons, and recovered handguns from two of them. Upholding the frisk in this case, the Supreme Court found that the circumstances supported a reasonable suspicion that the men were armed and dangerous, and this is enough to make the warrantless patdown search reasonable.

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Officers composing a report about a safety search during a detention should be very thorough and detailed in setting forth every factor that heightened the risk

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm," the court wrote.

The court has said that not every stop automatically justifies a frisk, even in locations where the odds of danger may be higher: "Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted." (*Maryland v. Buie*)

What kinds of factors could constitute the required level of suspicion to allow a weapons frisk? In *Terry*, those factors included the violent nature of the crime (robbery), the suspects' suspicious behavior (casing the store), the ratio of officers to suspects (one-to-three), and the officer's training and experience (which told him the men were likely to be armed).

In other cases, the Supreme Court has identified additional factors that could contribute to a reasonable suspicion that a suspect might be armed and dangerous. These include late hour and remote location (*Michigan v. Long*); a citizen informant's tip that a suspect was carrying a gun (*Adams v. Williams*); warnings in official bulletins that the suspect is armed and dangerous (*U.S. v. Hensley*); evasive actions by a man seen leaving a crack house (*Minnesota v. Dickerson*); sudden, unprovoked flight from police in a high-crime area (*Illinois v. Wardlow*); and a visible bulge under the clothing at the waistline (*Pennsylvania v. Mimms*).

Officers composing a report about a safety search during a detention should be very thorough and detailed in setting forth every factor that heightened the risk. All of the following circumstances that were present should be listed to justify a safety search:

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If you make a lawful custodial arrest, a more thorough search can be conducted

- Violent nature of the suspected crime
- Visible bulges, holsters, ammo, etc.
- Menacing gestures or verbal threats
- Citizen tips of weapons or violence
- Information from bulletins or broadcasts
- Prior experience with the suspect
- Number of suspects and officers
- Size of suspects and officers
- Remote location of the encounter
- Obscure location lacking public visibility
- Late-night or early-morning hour
- Evasive conduct by the suspect
- Metallic clicking sounds
- Suspect's attempt to hide something
- Resistant or obstructive behavior
- Unprovoked flight on approach of police
- High-crime nature of the area
- Refusal to ID
- Suspicious clothing (such as a long coat on a warm day)
- Your training and experience

Search Incident to Arrest

If you make a lawful custodial arrest, a more thorough search can be conducted. Whereas the weapons frisk justified by articulable suspicion that a detainee is armed and dangerous is limited to a pat down of the outer clothing, a contemporaneous search incident to arrest allows a full search of the arrestee's pockets and clothing (*U.S. v. Robinson*), everything he's wearing and carrying (*Gustafson v. Florida*), the area under his immediate control (*Michigan v. Long*), and—if he was the recent occupant of a vehicle—all of the contents of the passenger compartment. (*Thornton v. U.S.*)

Residential Search, Peek, and Sweep

When a lawful arrest occurs inside a residence, there are at least three separate safety concerns: (1) ensuring that the arrested person has no access to weapons during the arrest; (2) checking the immediate area for potential assailants who could jump you by surprise; and (3) trying to determine whether there

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In situations where you do not feel the circumstances independently justify a safety search, do not overlook the possibility of a consent search

are others present somewhere on the premises who might attack you. The first two of these concerns can be addressed automatically, with no stated suspicion; the third requires separate justification.

In *Chimel v. California*, the Supreme Court acknowledged the need to prevent an arrestee from gaining access to weapons or destructible evidence when he is arrested. The court said that this need justified searching the area under the suspect's immediate control (including possible hiding places within reaching or lunging distance).

In the later case of *Maryland v. Buie*, the court said that safety concerns would also justify routinely peeking into immediately adjoining rooms and spaces, to ensure that no potential assailant was lurking there, waiting for an opportunity to strike. This search is limited to a cursory look into possible hiding places in the room where the arrest takes place and opening any doors to that room for a quick peek. This search does not extend to the entire house.

The *Buie* opinion also held that officers lawfully inside a residence to arrest could search beyond the immediate area only if there was an articulable suspicion that a potential assailant was likely to be concealed somewhere on the premises. If the officer can point to specific reasons to believe a dangerous person is present, a safety sweep of the entire premises is justifiable. This would allow officers to go to floors and rooms throughout the premises to look for someone (but not to search into places too small to conceal an assailant).

Consent to Search

In situations where you do not feel the circumstances independently justify a safety search (or as a backup, even when they do), do not overlook the possibility of a consent search.

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If the suspect admits that he has weapons or harmful objects on him, this will normally provide probable cause to search

"In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." (*Scheckloth v. Bustamonte*)

To increase the chances of obtaining consent, it may be useful to first ask the suspect if he has any weapons or harmful objects on him. If he admits that he does, this will normally provide probable cause to search; if he denies possessing anything illegal or dangerous, he may find it harder to refuse consent, as in the following typical exchange:

Officer: "Danny, you got any guns or needles or anything dangerous on you tonight?"

Suspect: "No, no...nothing like that."

Officer: "OK if I search you, then?"

Note that you should not request consent in an ambiguous form, such as, "Do you mind if I search?" A suspect who answers "No" may tell the judge he meant "No," making it problematic to find valid consent.

Survival Perspective

When a situation arises, there are no lawyers or judges present to give you instant advice as to the constitutionality of a safety search. Do what you think is necessary in order to go home walking and talking at the end of watch.

Most courts are aware that your job is dangerous, and most judges and juries are reluctant to second-guess officers who must make split-second decisions about the risks they confront and the necessity for precautions to ensure their own safety and the public safety. If you simply take the time to write down all of the reasons why you felt it was dangerous to proceed without taking the steps you took to ensure your safety, most courts will not take a grudging view of your justifications.