
Fourth Waiver Search, Warrantless Search and Force Entry

363.1 PURPOSE AND SCOPE

Both the federal and state Constitutions provide every individual with the right to be free from unreasonable searches and seizures. This policy provides general guidelines for San Diego County Probation Department personnel to consider when dealing with search and seizure issues.

363.2 APPLICABILITY

This policy applies to all sworn Department Employees.

363.3 POLICY

It is the policy of the San Diego County Probation Department to respect the fundamental privacy rights of individuals. Members of this department will conduct searches in strict observance of the constitutional rights of persons being searched. All seizures by this department will comply with relevant federal and state law governing the seizure of persons and property.

The Department will provide relevant and current training to officers as guidance for the application of current law, local community standards and prosecutorial considerations regarding specific search and seizure situations, as appropriate. Because case law regarding search and seizure is constantly changing and subject to interpretation by the courts, each officer of this department is expected to act in each situation according to current training and his/her familiarity with clearly established rights as determined by case law.

Probation Officers are required to use all reasonable methods, not inconsistent with conditions imposed by the sentencing judge, to aid offenders and to bring about improvements in their conduct and condition.

363.4 SEARCHES

Searches of offenders may be conducted for reasons related to the rehabilitative and reformatory purposes of probation or other law enforcement purposes. Under the Fourth Amendment, a warrant is generally required in order for a search to be valid. However, there are several exceptions that permit a warrantless search. Prior to conducting a warrantless search, the P.O. should make every reasonable effort to verify that one of the following applies:

- A. The offender has waived his or her Fourth Amendment rights;
- B. The offender has voluntarily consented to a search;
- C. Another exception to the search warrant requirement (such as exigency) applies.

363.5 SEARCH BY WAIVERS

- A. **WAIVER OF FOURTH AMENDMENT RIGHTS:** The Fourth Amendment protects people from unwarranted governmental intrusions into the "privacy of life", but that right may be

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waived as a condition of supervision, as long as the waiver is known, understood and voluntary.

Officers generally may conduct a warrantless search of the person, property, and residence of an offender who has waived their Fourth Amendment rights. However, a waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons, or those motivated by personal animosity toward the offender. An excessive number of fruitless searches might indicate harassment. Additionally, the language of the waiver may limit the scope of the search, and any limitations are binding on the searching officer(s). Officers should make themselves aware of any such limitations prior to searching.

B. ELECTRONIC DEVICES: A waiver of Fourth Amendment rights does not necessarily apply to electronic devices. Due to recent changes in State law, officers may need specific consent from the offender or a warrant to search an offender's electronic devices, unless the court has expressly authorized a warrantless search of the offender's electronic device and/or accounts. Officers who are uncertain about their authority to search an electronic device should consult with a Supervisor.

363.6 SEARCH BY CONSENT

- A. **CONSENT:** The scope of a search obtained by consent, given other than as a condition of supervision, may be limited by the words the officer uses when requesting consent or the words of assent uttered by the individual. If a search is based on consent, the officer should understand that the search must be stopped once the consent is withdrawn.
- B. **THIRD PARTY CONSENT:** The more difficult situations involve consent by someone other than the subject being investigated. A consent given by a parent, spouse, roommate, lessor, landlord, etc., can be based on;
 - (a) **Actual authority:** This is demonstrated by evidence of a third party's shared use and joint access to or control over a searched area, or by evidence that the owner has expressly authorized a third party to consent to a search.
 - (b) **Apparent authority:** This is demonstrated by evidence that officers reasonably believed a third party had actual authority to consent to a search.

Factors affecting the scope of third party consent:

- (a) A third party with authority can consent to a search of common areas of a residence. However, this consent will not apply to a physically present co-occupant who expressly objects.
- (b) The California Supreme Court has held that a parent may not be able to give consent for the search of a minor child's personal property, unless the parent has dominion and control over that property. If the minor child has an expectation of privacy regarding that property and the parents do not have access or control over that property, their consent is not valid. For example: a locked tool box, to which the parents do not have a key, found in the minor's room cannot be forced open even though a parent gives permission to do so.

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- (c) A car owner's consent covers articles left in the vehicle by a third party, if it is reasonable to believe that the owner has authority over those articles.

363.7 EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT

A. PLAIN SIGHT SEIZURE: The "plain sight rule" permits an officer to seize contraband, stolen property, or evidence of a crime if the officer is able to reasonably identify such item from a position where the officer had a legal right to be, and the officer has a legal right to access the item.

1. An item is in plain sight as long as the officer has "probable cause" to believe that what he or she sees, without disturbing the item, is contraband, stolen property or evidence of a crime.

2. Certain containers are so distinctive in nature that an experienced officer would have probable cause to search or seize them when found in plain sight. i.e., paper bindles, heroin balloons or brick-shaped objects smelling like marijuana.

3. The use of flashlights is permitted by the plain sight rule. The use of binoculars is also permitted, if used to aid what was seen by the naked eye.

4. The plain sight rule also extends to "plain hearing" and "plain smell."

B. WEAPONS: Weapons, even if not connected to a crime, can be temporarily seized for safety purposes.

C. ABANDONMENT: Abandoned property (for example, trash placed in front of a home) can be searched without a warrant.

D. DOGS: A dog sniff is generally not considered a search. However, the item subjected to the sniff must not be illegally seized. Moreover, a search warrant or waiver is required prior to use of a canine within the curtilage (e.g. front porch) of a home. A dog's positive reaction can give the officer probable cause to search. The officer has to establish the dog's reliability and the officer's (or trainer's) expertise.

E. MINIMAL INTRUSION: In a narrow class of searches, an individual's privacy interest may be so small that officers do not need a search warrant (or even probable cause) to conduct the search. One example of such a search would be inserting and turning a key in a lock.

363.8 SEARCH BY EXIGENCY

An exigency can justify search and seizure without a warrant. However, an officer cannot create the exigency that justifies a search or seizure. Before entering a home on the basis of exigency, the officer should evaluate the following factors to determine if a true exigency exists:

1. The gravity of the offense.
2. Whether the subject is armed.
3. The level of probable cause.

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4. Whether the subject will be found on the premises.
5. The likelihood of the suspect escaping if not promptly arrested.

363.8.1 EXAMPLES OF EXIGENT, WARRANTLESS ENTRIES INTO HOMES LIKELY ENCOUNTERED BY PROBATION OFFICERS:

- (a) Fleeing suspect/hot pursuit; Case law finds that a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place.
- (b) Medical aid; Numerous state and federal decisions have recognized that the Fourth Amendment does not bar warrantless entries and searches when reasonably conducted with the belief that a person within is in need of immediate aid.
- (c) Destruction of evidence/contraband; When a warrantless entry, based on exigency, is made to prevent the destruction of evidence, it must be shown that it is reasonable to anticipate that such destruction would occur in such a short time that it is not feasible to obtain a search warrant.

363.9 DOMINION AND CONTROL

Prior to conducting a warrantless search authorized by any of the previously discussed reasons, it is incumbent that the officer make all reasonable efforts to establish the subject's dominion and control regarding the location and/or items to be searched.

These efforts may include a thorough review of applicable law enforcement information that is reasonably available from local sources. For example; probation files, computer records and personal knowledge.

In ascertaining a probationer's true address, the offender's statements to the Probation Officer and the most current written 406 forms must be given great weight. Mail known to have been received by the probationer at the address, ARJIS entries, police reports, citations, or the statements of cohabitants may also assist in establishing dominion and control at a particular address.

When evaluating information used to verify dominion and control, care should be taken to utilize sources that are current. Further, the evaluation should attempt to separate fact from fiction.

When the above conditions have been met, a search can be considered reasonable. While searching, the officer should make every effort to collect and/or document any item that would verify the original assessment that the subject has dominion and control.

363.10 FORCED ENTRY

Forced entries are inherently dangerous for officers and members of the public. While there are times when a forced entry is necessary, officers shall evaluate the circumstances and need to conduct a forced entry. Planned forced entries require approval of a Supervisor.

A. SITUATIONS THAT MAY REQUIRE FORCED ENTRY INCLUDE, BUT ARE NOT NECESSARILY LIMITED TO THESE EXAMPLES:

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1. The offender's life is in danger following a suicide attempt, accidental drug overdose or other life threatening emergencies.
2. The offender's activities are such that the safety of the probationer or others is in immediate jeopardy.
3. Any delay in making the arrest or detention would jeopardize the safety of the probationer or others.
4. The probationer is thought to be engaged in the destruction of evidence.

B. KNOCK AND NOTICE RULE: An officer, prior to forcing (i.e., non;-consensual) entry into a house for the purpose of effecting an arrest or executing a search, must comply with the "knock-notice" rule, which requires the officer to:

1. Knock
2. Identify him or herself,
3. Demand admittance.
4. Explain the purpose for which admission is desired.
5. Be refused admittance or wait a reasonable amount of time.
6. In arrest situations, the officer must have reasonable grounds for believing that the person to be arrested is inside, per PC 844. The officer should be prepared to give notice prior to making a non-exigent, forcible entry into an occupied bedroom or bathroom with closed doors. In other words, if there is still a possibility that a reasonable expectation of privacy may be intruded upon, notice must be given unless it would cause imminent danger to the officer.

C. EXCEPTION TO KNOCK-NOTICE RULE: An officer has substantially complied with the knock and announce rules when the occupants have indicated by conduct that no further explanation or information is desired and that entry is being refused without regard to the officer's reason or purpose. An officer is excused from giving notice when the officer acts on a reasonable good faith belief that compliance would increase his or her peril, frustrate an arrest, or permit the destruction of evidence.

363.11 PROTECTIVE SWEEPS

Upon entry into a home for the purpose of executing a search or to make an arrest, the officer is permitted to make a cursory search for other persons who could present a danger to the officer or interfere with the lawful process. Protective sweeps may extend to a cursory inspection of places where a person may be hiding. The sweep shall last no longer than is necessary to confirm that the area does not contain a person. A protective sweep of a residence, where the resident is subject to search is lawful with or without suspicion that others might be present.

A corollary of the plain sight rule is that during a lawful search of premises for persons believed to be hiding, officers may seize contraband and evidence in plain sight.

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363.12 DETAINING OCCUPANTS WHILE EXECUTING A SEARCH OR ARREST

During a search or arrest, the officer may encounter persons not subject to arrest or search. In these cases, the person may not be detained after their status is determined as this would lead to an unlawful detention or false arrest. However, officers may detain the occupants of a home while conducting a probation compliance search.

Absent consent, only a patdown of a detained occupant may be conducted for officer safety. Although a patdown is considered a limited search for weapons, the officer is not permitted to put his or her hands into pockets, or under clothing; nor can the officer open purses or attached cases. The officer is only permitted to touch, from the outside. An officer may seize an object that he/she believes to be a weapon. However, the officer must be able to articulate facts which reasonably support a belief that the thing felt like an object useable as an instrument of assault. An officer may seize contraband during a legal frisk for weapons when the officer feels an object whose contour or mass makes its identity immediately apparent. The officer is not permitted to manipulate, squeeze, or move the object to determine what it might be. However, if the officer has the expertise, and can tell immediately upon touching the shape of the object that it is a controlled substance, the officer would have probable cause to make the arrest and conduct a search incidental to the arrest. The officer should consider all the circumstances, including what was legally felt, in determining what the object might be. The officers should be able to testify about the circumstances which could have caused them to believe that such a container had contraband inside.

If a person arrives at the premises while the search is being conducted, and that person's identity and connection to the premises are unknown and cannot immediately be determined without detaining the person, the officers may detain such person long enough, and in the manner necessary, to make those determinations and protect the safety of all present during the detention. If the person is determined to be an occupant of the home being searched, he or she may be detained for the duration of the search. If the person is determined not to be an occupant, that person may not be detained unless there are specific, articulable facts connecting him or her to criminal activity suspected on the premises or when there is reason to believe the person could be a danger to the officers if allowed to leave.

The same rule applies to the execution of arrest warrants, except that the relevant connection by the occupants is to the individual who is the subject of the warrant, rather than the premises. This can also be true for a probation compliance search; for example, when officers are detaining an individual for the purpose of determining whether a probationer has violated a condition against associating with known felons.

A person who is leaving a place where an arrest or search is about to be conducted may be detained within the immediate vicinity if the officer can articulate facts connecting the person to the premises (or relevant individual) or establishing a danger to officers.

Entry into a Third Party Residence: A search warrant is required for a non-consensual, non-exigent entry into a "third party's" home to arrest a suspect, even though there is a valid arrest warrant for the suspect.

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363.13 REPEAT VISITS TO "STALE" PROBATIONER ADDRESS

Some offenders are transient in their lifestyles and move residences frequently. It is imperative for probation officers planning to conduct a Fourth Waiver Search to make the effort to investigate all applicable law enforcement and probation records to ascertain the probationer's true current address.

Probation Officers should exercise due diligence to ensure they don't keep going back to "stale," unverified addresses where they have been told previously by the occupants that the probationer no longer resides there.

Experienced officers know that friends and relatives of offenders are certainly capable of lying to protect the probationer. Knowing this, if probation officers have current verifiable information that a probationer still resides at that "stale" address, a soft knock Fourth Waiver Search is appropriate.

363.14 DOCUMENTATION

Officers are responsible to document any search on the Probation Case Management System (PCMS) and to ensure that any required reports are completed with documented information including, at minimum, documentation of the following:

- Reason for the search
- Any efforts used to minimize the intrusiveness of any search (e.g., asking for consent or keys)
- What, if any, injuries or damage occurred
- All steps taken to secure property
- The results of the search, including a description of any property or contraband seized
- If the person searched is the opposite sex, any efforts to summon an officer of the same sex as the person being searched and the identification of any witness officer.

Supervisors shall review reports and any subsequent contact notes on PCMS to ensure the reports/notes are accurate, that actions are properly documented and that current legal requirements and department policy have been met.