

Waltham Police Department

CHAPTER 69

SEARCH AND SEIZURE

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Accreditation Standard #'s: 41.4.1, 74.3.1

POLICY:

The term searches and seizures include examination of persons or places for the discovery of property stolen or otherwise unlawfully obtained or held, or of evidence of the commission of crime, and the taking into legal custody of such property or evidence for presentation to the court. Failure to comply with the legal technicalities that govern these procedures results in more failures to obtain convictions than any other source. The Fourth Amendment to the United States Constitution has been interpreted by the United States Supreme Court to require that, whenever possible and practicable, with certain limited exceptions, a police officer should always obtain a valid search warrant in advance. Mincey v. Arizona, 437 U.S. 385, 89 S. Ct. 2408 (1978).

The Fourth Amendment of the United States Constitution declares:

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article XIV of the Massachusetts Constitution provides as follows:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his house, his papers, and all of his possessions. All warrants, therefore, are contrary to this right if the cause or foundation of them not previously supported by oath or affirmation; and if the order in the warrant to civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or object of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

The following procedures have been prepared to provide basic guidelines that are both legal and practical in their technical area of searches and seizures. In their implementation, all related department policies such as Arrest, Investigation, Detention, the Use of Informants, and the Handling and Preservation of Evidence should also be considered.

PROCEDURES:

1. SEARCHES WITH A WARRANT: [74.3.1-2B]

- a.** The general rule to be followed is that searches and seizures are reasonable and proper if they are based upon a valid search warrant, the issuance of which indicates that the police can demonstrate that probable cause exists that the evidence of criminal activity will be uncovered by the search.
- b.** With certain limited exceptions, therefore, a search shall always be conducted with a search warrant issued by a court of competent jurisdiction after the presentation of a properly executed affidavit:
 - 1.** This affidavit must contain the facts, information, and circumstances which have led a police officer to have probable cause to believe that a crime has been, is being, or is about to be committed, and that seizable evidence relating to that crime is present in the place or on the person to be searched.
 - 2.** "Probable Cause" is a phrase which describes the facts observed, information obtained from others, and personal knowledge and experience that is sufficient to lead a reasonable and prudent person to believe that seizable evidence of crime exists and that it will be found in a specific location or on the specific person, and which would justify a judge or magistrate to issue a search warrant.
 - 3.** Many cases have been lost because an officer had sufficient basis for probable cause but did not furnish enough information in their affidavit.
 - 4.** Any fact that is not set out in the affidavit cannot be inserted or used later for the purpose of establishing probable cause for a search.
 - 5.** It is most important that an affidavit describe with particularity the objects to be seized, as the search warrant must be sufficiently definite that the officer serving the warrant will not seize the wrong property and it must be sufficiently descriptive that an officer will identify the property to be seized with reasonable certainty.
- c.** The legal procedure specified by Massachusetts Statute for the issuance of a search warrant is as follows:
 - 1.** A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any

of the property or articles hereinafter named are concealed in a house, place, vessel, or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched, and commanding the person seeking such warrant to search for the following property or articles:

- a.** Property or articles stolen, embezzled, or obtained by false pretenses, or otherwise obtained in the commission of a crime.
- b.** Property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried, or otherwise used, changed, or marked in the preparation for or perpetration of or concealment of a crime.
- c.** Property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under sections 42 through 56, inclusive of chapter 138, regarding alcoholic beverages.
- d.** The dead body of a human being.
- e.** The body of a living person for whom a current arrest warrant is outstanding.

NOTE: The word "property" as used in this section shall include books, papers, documents, records, and any other tangible objects.

- d.** A search warrant may also authorize the seizure of evidence.
- e.** A search warrant shall designate and describe the building, house, place, vessel, or vehicle to be searched and shall particularly describe the property or articles to be searched for; the warrant shall be substantial in the form prescribed in M.G.L. Ch. 276, § 2A and shall be directed to the sheriff or their deputy or to a constable or police officer, commanding them to search in the daytime, or if the warrant so directs, in the nighttime, the building, house, place, vessel, or vehicle where the property or articles for which they are required to search are believed to be concealed, and to bring such

property or articles when found, and the persons in whose possession they are found, before a court having jurisdiction.

- f. An officer requiring a search warrant shall consult with the Officer-In-Charge, and obtain their advice and guidance before proceeding to court. If the court is not in session, the officer should communicate with an authorized court official to make the necessary arrangements to secure a search warrant.
 - 1. If legal assistance is required for the preparation of the search warrant affidavit, the District Attorney's Office should be contacted.
 - 2. Every search warrant issued and any action taken on such warrant should be recorded by issuing an incident number, logging it in the daily police blotter, and subsequently by submission of a written report.
- g. After a search warrant is obtained, a police officer shall: **[74.3.1]**
 - 1. Check the warrant to ensure that it is signed and it clearly describes the place to be searched and the articles to be seized.
 - 2. Execute the warrant immediately, or within a reasonable time, but in any case, within seven days from date of issuance (Mass. Gen. Law, Ch. 276, Sec. 3A).
 - 3. Execute the warrant in the daytime unless it specifically provides for nighttime search - nighttime for this purpose begins at 10 p.m. and ends at 6 a.m.
 - 4. In executing a search warrant in the nighttime, all due care shall be taken to avoid any possibility of error.
 - 5. A search begun in the daytime may continue into the nighttime if such activity is reasonable and not for the purpose of harassment.
 - 6. Upon arrival, again check to make certain that the premises are in fact those described in the warrant.
 - 7. Officers shall first knock, identify themselves as police officers, announce that they have a warrant to search the premises, and demand entrance. The knock and announce rule serve three vital purposes:

- a. It decreases the potential for violent reactions by surprised occupants.
- b. It protects the privacy of those in their own homes.
- c. It prevents unnecessary damage to homes caused by forceful police entry.

Pursuant to case law, the failure of the police to knock and announce their identity in the absence of a No-Knock warrant, on scene emergency, or consensual entry, may INVALIDATE the entry and result in the exclusion of any evidence found during the ensuing search of the premises.

- 8. Upon entering, show a copy of the warrant to the person(s) lawfully on that premises unless the circumstances are such that this is not practical.
- 9. Officers shall always seek entry as peacefully as possible, but forcible entry is authorized if, after waiting a reasonable time, it becomes apparent:
 - a. That the officers will not be admitted voluntarily.
 - b. That the officers or any other persons are in danger of physical harm.
 - c. That the occupants are escaping.
 - d. That evidence is being, or is in danger of being, destroyed.

NOTE: What constitutes "a reasonable time" before making a forcible entry depends upon the circumstances of each case and the best judgement of the searching officers.

- 10. It is always a good police practice to gain entry without force, if possible, by deception or by means of a ruse, if this will result in a safe, practical, and successful execution of the search warrant with less destruction of property.
- 11. An immediate, forcible entry (or one gained by a ruse or trick) is authorized - and the usual knock and announce procedure may be disregarded - if the searching officers are in possession of reliable information that, to follow the knock and announce procedure:

- a. Would be likely to endanger their safety or the safety of others.
- b. Would be likely to enable the wanted person or persons to escape.
- c. Would be likely to result in the evidence being destroyed during the period between their announcement of purpose and subsequent forcible entry. Comm. v. Cundriff, 382 Mass. 137, 415 N.E. 2d 172 (1980), Comm. v. Scalise, 387 Mass. 413, 439 N.E. 2d 818 (1982).

12. [74.3.1] If, at the time the officers apply for the search warrant, they have reason to believe the knock and announce rule should not be observed when the warrant will be executed, they shall request that the Warrant be marked as a "No Knock and Announce" or words to that effect. According to Section 94 of MGL Chapter 6E of Section 30 of the JEAL ACT of 2020, a warrant that does not require a law enforcement officer to knock and announce their presence and purpose before forcibly entering a residence shall not be issued except by a judge and only if the affidavit supporting the request for the warrant: establishes probable cause that if the law enforcement officer announces their presence their life or the lives of others will be endangered; and includes an attestation that the law enforcement officer filing the affidavit has no reason to believe that minor children or adults over the age of 65 are in the home, unless there is a credible risk of imminent harm to the minor or adult over the age of 65 in the home [72.3.1-3A]. A police officer executing a search warrant shall knock and announce their presence and purpose before forcibly entering a residence unless authorized by a warrant to enter pursuant to subsection.

An officer shall not dispense with the requirements of subsections (a) and (b) except to prevent a credible risk of imminent harm as defined in section 1 of chapter 6E [72.3.1-3B]. Evidence seized or obtained during the execution of a warrant shall be inadmissible if a law enforcement officer violates this section [72.3.1-3C].

13. A no-knock warrant is permitted when the police inform the magistrate of circumstances providing probable cause to believe that the object of the search may be destroyed or their life or others will be endangered or violence may occur if officers knock and announce their presence. [74.3.1-3A] Comm. v. Rodriguez, 415 Mass. 447, 614 N.E.2d 649 (1993). However, if the circumstances

which would justify disregarding the knock and announce rule are no longer present when the warrant is executed, the knock and announce rule must be followed. Upon gaining entry in such cases, the searching officers should immediately identify themselves as police officers and should state that it is their purpose to serve a valid search warrant issued by the court.

- h.** The number of officers assigned to execute a search warrant should be dependent upon the particular circumstances, and it is a good practice for at least one of the searching officers to be in police uniform, unless this would jeopardize the success of the search.
- i.** A search warrant should not be executed in or on any premise in the absence of the owners, or occupants, unless there is good reason to believe that the occupants do not intend to return for an extended period of time (or that they do not intend to return at all); or that the property or articles designated in the search warrant will be removed or destroyed if the premises are not searched immediately. In all such cases, the manner of entry shall be made with the least possible destruction of property and a copy of the warrant left in a conspicuous place on the premises.
- j.** Although not specified in the search warrant, the following articles may be lawfully seized by an officer who observes them in plain view while serving a search warrant:

 - 1.** Instrumentalities or means by which any crime was committed (such as weapons, masks, tools, etc.).
 - 2.** Contraband (articles which may not be legally possessed, such as counterfeit money or controlled substances, etc.).
 - 3.** Fruits of any crime (such as stolen property).
 - 4.** Other evidence of any crime (such as clothing or other items fitting the description of the criminal offender).
 - 5.** Property, which bears a reasonable relationship to the purpose of the search (such as documents establishing who owns the premises searched if ownership is an element of the crime).

NOTE: Any item not named in the search warrant may be seized only if the police have probable cause to believe it is contraband, stolen property, or evidence of a known crime.

- k. In order to ensure an orderly and safe search, all persons present on the premises when the police arrive may be detained and prevented from moving about. The police may secure the premises prior to obtaining a search warrant, but must NOT begin their search until the warrant is issued and a copy presented to the owner/occupier, Comm. v. Yesilcimen, 406 Mass. 736, 550 N.E. 2d 378 (1990). In the execution of a search warrant, any person found on the premises may be frisked for weapons by a police officer, for their own protection and safety if the officer believes that such person is armed. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). It should be noted, however, that the Supreme Court ruled that this "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though such person happens to be on premises where an authorized search is taking place." Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338 (1979).
- l. If a police officer suspects that any person present during an authorized search would interfere with such search, the officer may direct such person to restrict their movements on the premises; however, at least one of the occupants should be permitted to witness all aspects of the search, if this is practical under particular circumstances.
- m. If during the execution of a search warrant it appears that there is probable cause to believe that seizable property is located in an area of the premises outside the scope of the present warrant, a new warrant should be obtained immediately, unless consent is granted or exigent circumstances are present. While the new warrant is being sought, any occupants of the premises may have their activities restricted. A warrant authorizing the search of a residence also gives police the right to search automobiles owned or controlled by the owner of such residence, which are located within the curtilage at the time the warrant is executed. Comm. v. Signorine, 404 Mass. 400, 535 N.E. 2d 601 (1989).
- n. A police officer responsible for the execution of a search warrant:
 - 1. Shall not exceed the authority granted by this warrant.
 - 2. Shall make diligent effort to find all the property listed in the warrant.
 - 3. Shall not search beyond the area described in the warrant unless consent has been obtained or exigent circumstances exist (if the warrant authorizes a search of the first floor of a building, a search of the second floor is unlawful). Kremen v. U.S. 353 U.S. 346, 77 S.

Ct. 828 (1957), Comm. v. Wills 398 Mass. 768, 500 N.E. 2d 1341 (1986).

4. Shall search only those areas capable of containing the property listed in the warrant (if the warrant authorizes a search for a large TV set, do not search in a small bureau drawer).
5. Shall carry out the search with the least possible damage to the premises.
6. Shall remain on the premises only for the time reasonably necessary to thoroughly search for and seize the property listed in the warrant.
7. Shall terminate the search when the listed property has been found or when it reasonably appears that such property is not on the premises.
8. Shall make adequate provisions for the security of the searched premises before leaving unless the person in control of such premises refuses or rejects such police protection.
9. Shall immediately and directly transport to the police station all seized property and ensure that it is properly marked, recorded, and safeguarded in accordance with departmental procedures for the care, handling, and security of evidence.
10. Shall complete the return section of the warrant and deliver it to the court as soon as reasonably possible after the completion of the search, and should be no later than seven days unless other circumstances exist. Comm. v. Cromer, 365 Mass. 579, 313 N.E2d 557 (1974).
11. Shall note on the warrant the action taken with an inventory of all property seized by authority of the warrant (if evidence not described in the warrant is seized, attach a separate sheet to the return listing all such property and state that it was seized during the execution of that warrant); failure to list some items will result in the suppression of the items left out, but not the items listed. Comm. v. Aldrich, 23 Mass. App. Ct 157, 499 N.E.2d 856 (1986).
12. Shall make a full departmental report of all action taken on a search warrant, to be submitted to the Officer-In-Charge, before returning the warrant to the court.

2. SEARCHES WITHOUT A WARRANT: [41.4.1-1]

- a.** The Fourth Amendment to the United States Constitution prohibits "unreasonable" searches and seizures, and the Supreme Court has consistently held that unless they come within one of the few carefully limited exceptions to the search warrant requirement, warrantless searches and seizures are considered unreasonable. Searches with prior judicial approval and a valid search warrant are preferred. Stoner v. Calif., 376 U.S. 483, 484, 84 S. Ct. 889, 890 (1964). The burden of showing that a valid exception exists rests upon the government when the circumstances of a warrantless search are challenged in the courts.
- b.** The following are the major exceptions to the search warrant requirement that have been recognized as constitutionally permissible by the court: **[41.4.1]**

 - 1. Warrantless stopping, questioning, and frisking (investigative detention) **[41.4.1-2B]**.
 - 2. Search incident to arrest (including protective sweep).
 - 3. Exigent or emergency circumstances search (including "hot pursuit").
 - 4. Consent searches **[41.4.1-2A]**.
 - 5. Motor vehicle searches under the movable vehicle exception **[41.4.1-2C]**.
 - 6. Plain view observations **[41.4.1-2G]**.
 - 7. Pre-incarceration and inventory searches.
 - 8. Protective custody searches.
 - 9. Administrative searches.
- c.** The following are not considered invasions of any privacy interest and do not come under the search warrant requirement of the Fourth Amendment **[41.4.1-2G]**:

 - 1. The "plain view" doctrine.
 - 2. Abandoned property.

3. Open field doctrine.

4. Search incident to arrest.

d. It should be carefully noted, however, that a police officer should never rely on one of these exceptions when it is possible, under the particular circumstances, to obtain a search warrant in advance. If a police officer is acting under the authority of a valid search warrant, they are acting on secure legal grounds.

e. In every case where a search is conducted without a warrant, the police officers involved shall make a written report of the circumstances to include all important facts relative to the incident and an inventory of any evidence seized [41.4.1-2F].

3. **WARRANTLESS STOPPING, QUESTIONING, AND FRISKING (INVESTIGATIVE DETENTION): [1.2.4b]** Both the Fourth Amendment and Mass. Gen. Law, Chap. 41, § 98, authorize police officers to briefly detain suspicious persons, to question such persons and, if the officer reasonably believes the person may be armed or dangerous, to frisk that person for weapons. These procedures are sometimes referred to as a "threshold inquiry.

4. **SEARCH INCIDENT TO LAWFUL ARREST: [41.4.1-2G]**

a. It is well accepted that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969).

b. A police officer is authorized to conduct a warrantless search of an arrested person under the following conditions:

1. The arrest is lawful and the search is reasonably related to the circumstances of the arrest.

2. The search is conducted only for the purpose of seizing fruits, instrumentalities, contraband, and other evidence of the crime for which the arrest was made, in order to prevent its destruction or concealment or to remove any weapons that the arrested person might use to resist arrest or to affect their escape; any evidence seized in violation of this statutory requirement will not be admissible in evidence in a criminal proceeding (Mass. Gen. Law, Chap. 276, § 1).

3. The search is limited in scope to the person of the arrestee and the immediate surrounding area. Immediate surrounding area means that area from which an arrestee can either obtain a weapon or destroy evidence. Chimel v. Calif. 395 U.S. 752, 89 S. Ct. 2034 (1969).
 4. The search is substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest. Shipley v. Calif. 395 U.S. 818, 89 S. Ct 2053 (1969). However, if safety requires, the officer may delay the search and conduct it at a safe location.
 5. Also, there is a separate exception to the search warrant requirement which allows police to conduct a warrantless search of a person who is about to be incarcerated in a police lockup.
 6. An officer conducting a search incident to an arrest (or by search warrant) may use the degree of force reasonably necessary to:
 - a. Protect themselves and others present.
 - b. Prevent escape.
 - c. Prevent the destruction of evidence.
 7. A search may also be made of articles actually in possession of the arrested person and clothing worn at the time of arrest, if such search is related to the offense for which the arrest was made.
- c. It has been recognized that in addition to a careful search of the area within the arrested person's immediate control, an examination of the entire premise may also be justified at the time of or immediately following a valid arrest if there is a reasonable belief that it was imperative for the officer's safety because of the presence of others in the house or apartment. Comm. v. Flowers, 1 Mass. App. Ct. 415, 298 N.E. 2d 898 (1973). This search, often termed a "protective sweep," is limited to areas where an accomplice or other person who might come to the aid of the arrestee might reasonably be hiding. Any item or object recognizable as criminal evidence discovered in plain view during a justifiable "protective sweep" may be properly seized. United States v. Bowdach, 561 F. 2d 1160 (5th Cir) (1977), (Comm. v. Bowden, 379 Mass. 472 (1980).
- d. It should be understood that an arrest must not be used as a pretext in order to make a search. South Dakota v. Opperman 428 U.S. 364 (1976). If the arrest is unlawful, the search is also unlawful. The courts have also ruled

that a lawful arrest must not be used as a pretext to search a suspect to uncover evidence of a totally unrelated crime. Any search made under a false or fictitious warrant, or under any pretended legal authority, is unlawful, even if as a result, consent for the search is obtained. Any evidence seized under these circumstances would be declared invalid.

5. CRIME SCENE SEARCHES: [41.4.1-2D]

- a. Homes, rooms, offices, or premises where lawful arrests have been made may be subjected to limited sweeps or searches for other persons if circumstances give the involved officers reason to believe that there are other individuals on the premises who may pose a danger to those at the arrest scene.
- b. Crime scene searches of homes, rooms, offices, or premises for evidence of crimes generally require a search warrant or consent.
- c. Participation in crime scene searches should be limited to only those individuals that have been designated and deemed necessary to complete a proper crime scene search. All individuals in the crime scene area will be documented. All property removed from the crime scene will be properly documented and stored until it can be properly released.

6. SEARCH IN EMERGENCY OR EXIGENT CIRCUMSTANCES (INCLUDING HOT PURSUIT): [41.4.1-2E]

- a. A police officer is authorized to conduct a search without a warrant when faced with an emergency situation where delay would endanger theirs or the public's safety or might result in the escape of the offender or the destruction of evidence.
- b. Many emergencies justifying a warrantless entry and search do not necessarily involve criminal acts; for example, when a police officer hears a call for assistance, when they observe smoke or flame, or when they learn of an actual or potential natural or man-made calamity or disaster, they have the duty and obligation to respond immediately.
 - 1. The authority of the police to make warrantless entries in emergency situations, whether criminal or non-criminal, is based upon their fundamental responsibility to preserve the peace and to protect the public safety. Thurlow v. Crossman, 336 Mass. 248, 143 N.E. 2d 812 (1957), (Comm. v. Bates 28 Mass. App. Ct. 217 (1990).

2. The doctrine that permits warrantless entries and searches because of exigent circumstances requires justification by the police that it was impracticable for them to obtain a search warrant in advance and that the warrantless search was truly necessitated by the emergency circumstances, which could not have been anticipated. Comm v. Collaza, 29, 34 Mass. App. Ct. 79, 607 N.E.2d 418 (1993).
 3. While conducting a lawful search justified by emergency circumstances, a police officer may seize any incriminating evidence inadvertently discovered in plain view.
 4. A warrantless entry into a burning building is permissible in an emergency, and officials may remain for a reasonable time to investigate the cause of the fire and any evidence of arson discovered is admissible at trial; but any re-entry after the fire has been extinguished and officials have left the scene should be made pursuant to a search warrant, unless re-entry is justified by a recognized exception to the warrant requirement, such as consent, emergency, or abandonment. Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1422 (1978), Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641 (1984).
 5. It has been said that an officer who has reasonable cause to believe premises contain things imminently likely to burn, explode, or substantial destruction of property may, without a search warrant, enter and search such premises to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction. Comm. v. Marchione, 384 Mass. 8, 422 N.E. 2d 1362 (1981).
- c. The Supreme Court addressed the issue of immediate need to protect public safety by supporting the "hot pursuit" exception to the search warrant requirement. The Court ruled that when the police are in hot pursuit of a criminal suspect, they may make reasonable warrantless entries to apprehend the suspect, to seize weapons, and to secure evidence of that crime. Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642 (1967). The Court stated that "the exigencies of the case made that course imperative... and the Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. McDonald v. United States, 335 U.S. 451, 69 S. Ct. 191 (1948)
- d. Justification for a warrantless search under the "hot pursuit" doctrine exists when there is a definite need for immediate police action. The test to be applied is whether the safety of the police and the public is immediately

threatened or that evidence is in the immediate process of being destroyed. U.S. v. Santana, 427 U.S. 38, 96 S. Ct. 2406 (1976). If there is an indication that there was no emergency involved and that the search warrant could have been obtained, the "hot pursuit" doctrine will not justify a warrantless search.

- e. The Supreme Judicial Court outlined some factors that would support justification of exigent circumstances under "hot pursuit" doctrine, as follows: Comm. v. Moran, 370 Mass. 10, 345 N.E. 2d 380 (1976):
 - 1. The officers were on fresh and continued pursuit of the suspect.
 - 2. A crime of violence was involved.
 - 3. There was a strong possibility that the suspect was armed.
 - 4. The suspect was known or reasonably believed to be in the building.
 - 5. There was the likelihood that the suspect might escape unless immediately apprehended.
 - 6. There was sufficient justification for failure to obtain a search warrant.
- f. Where the above or other emergency factors are not present, police may stake out the building or premises until a warrant is obtained. U.S. v. Adams, 621 F. 2d 41 1st Cir. (1980).

7. SEARCH BY LAWFUL CONSENT: [41.4.1-2A]

- a. In many cases this recognized exception to the search warrant requirement may be the quickest and easiest way for the police to gain lawful access to premises in the investigation of crime. A "consent search," however, is based on a voluntary relinquishment of a fundamental constitutional protection and will be carefully scrutinized by the court.
- b. Because such issues as who may give lawful consent to a police entry and search or whether the consent was given voluntarily may arise at trial, police should not unduly rely on such consent. On the other hand, when properly elicited, consent to a search may expedite a criminal investigation. In fact, police may engage in a warrantless search after obtaining consent even in circumstances where they do not have probable cause. The Supreme Court summarized these police procedures as follows Schneckloth v. Bustamonte, 421 U.S. 218, 93 S. Ct 2041, (1973):

In situations where the police may have some evidence of illicit activity, but lack probable cause to arrest, a search authorized by valid consent may be the only means of obtaining important and reliable evidence. A search pursuant to consent may result in considerably less inconvenience for the subject of the search, and properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

- c. Consent is a question of fact to be determined by the circumstances in each case.
 - 1. In a consent search there are two vital elements. First, the consenting party must have sufficient lawful authority over the premises or property to be able to give consent to a search of that premise or property. (For example, a landlord may give consent to searches of common areas such as hallways, stairwells, etc., but, generally, has no legal right to give consent to a police search of a tenant's apartment.) Second, consent must be freely and voluntarily given.
 - 2. Although there is no legal requirement that a person be advised of their right to refuse to give consent to a police search, this is one of the factors that the court will consider in determining whether the consent was voluntarily given. Officers shall, therefore, so notify the person from whom consent is sought.
- d. A consent to search may be given orally, but preferably, it should be in writing.
 - 1. Consent cannot be presumed from silence.
 - 2. Consent is to be specifically and intelligently given.
 - 3. Consent is to be voluntary, free of any coercion, intimidation, or threat (officers must avoid even the appearance of intimidation or duress).
 - 4. Consent may be obtained from any person who has the right of ownership, possession, or control of the premise or property. If there is serious doubt, a search warrant should be obtained. Generally, if property, such as a house, apartment, or business, is owned jointly by two or more persons, any one of them may consent to a search of the common areas of the premises. For example, a spouse may give consent to a police search of a jointly owned home. However, if police receive consent from a suspect's roommate, that roommate may be able to give consent to a police search of common areas of

the apartment, but the roommate probably cannot give consent to a search of areas exclusively reserved for the suspect, such as their bedroom or their luggage or closet. Generally, a landlord cannot give consent to a search of a tenant apartment; nor can a hotel or motel owner or manager give consent to a search of a guest's lodgings.

5. Consent is to be free of misrepresentation or fraud.
6. Consent is to be obtained prior to search and after the police officers have identified themselves.
7. A consent search is limited to the area specified. Consent may be revoked at any time and the search should cease upon revocation, unless additional factors or information have come to light which justify a continued warrantless, non-consensual search. For example, evidence found prior to revocation of consent may be retained and used as a basis for an immediate arrest or as probable cause for a further search (if exigent circumstances exist) or for obtaining a search warrant.

8. MOTOR VEHICLE SEARCHES (INCLUDING ROADBLOCKS): [41.4.1-2C]

- a. Although motor vehicles are considered "effects" within the meaning of intent of the Fourth Amendment, the courts have not considered motor vehicles in the same category as other property and have upheld searches of motor vehicles where searches of a dwelling house or other structure would have been prohibited. The Supreme Court has observed that "the inherent mobility of automobiles often makes it impracticable to obtain a warrant and, in addition, the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property. (Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, (1979))
- b. If it is at all possible and practicable, a search warrant should always be obtained in the prescribed manner in advance of a motor vehicle search, as the courts always prefer this procedure.
- c. The practical considerations of police work, however, often require that a warrantless search of a motor vehicle be conducted under the following circumstances:

1. **WARRANTLESS STOPPING, QUESTIONING, AND FRISKING OF MOTOR VEHICLE OPERATOR OR OCCUPANTS:** A "stop and frisk" type of protective search is to determine whether a suspect is armed, with the search confined to the area of the motor vehicle from which a suspect might gain possession of a weapon.
2. **SEARCH OF MOTOR VEHICLE INCIDENT TO ARREST OF OCCUPANT OR OPERATOR:** [41.4.1-2G] A search incident to a lawful arrest limited to the area from which the person could obtain a weapon or reach destructible evidence. If it is impractical to conduct the search immediately at the scene, the vehicle should be towed to a police facility to be searched later.
3. **EXIGENT CIRCUMSTANCE SEARCH:** A search on probable cause to believe that there is incriminating evidence in the vehicle and that exigent circumstances exist, which justify a warrantless search.
4. **CONSENT:** A search conducted with the voluntary consent of the person in lawful control of the vehicle.
5. **ROADBLOCKS:** [41.2.3] Due to the inherent danger associated with roadblocks, under normal circumstances, it is not the general policy of the Waltham Police Department to utilize them. However, under highly unusual circumstances, (such as the apprehension of a violent felon who poses a significant risk to the public), they are permissible. When implemented, personnel will ensure that the selection of motor vehicles to be stopped is not arbitrary, the safety of the public is assured by taking necessary precautions, the motorists' inconvenience is minimized, and the roadblock is conducted pursuant to a plan devised by law enforcement supervisory personnel. In addition, if police have a description of a suspect vehicle, they may stop all vehicles fitting that description, Comm. v. Cameron 407 Mass. 1005, 553 N.E.2d 898 (1990). In any instance when a roadblock is utilized, a written report must be submitted and reviewed by the Officer in Charge.
6. **PLAIN VIEW OBSERVATIONS:** [41.4.1-2G] If a police officer has lawfully stopped a motor vehicle and is questioning the operator, any incriminating item in or on the vehicle observed in plain view, including anything observed with the use of a flashlight, may furnish probable cause to search the vehicle and seize the items observed without a warrant.

7. **INVENTORY:** Inventory searches shall be conducted in accordance with Department procedures outlined in the Waltham Police Department Manual, Patrol, Sec. 49. [41.4.1-2F]

8. **ADMINISTRATIVE SEARCHES:** [41.4.1-2G] Motor vehicles are subject to various types of administrative searches, which do not require search warrants.

d. It should be noted that "random" stops of motor vehicles in the absence of reasonable suspicion of criminal activity or motor violations constitutes an unreasonable seizure in violation of the Fourth Amendment, and any evidence obtained as a result of such impermissible stops is subject to exclusion in court.

e. All police officers should be especially watchful and alert when stopping and searching a motor vehicle or its occupants, as many officers have been seriously injured, or killed, in taking this police action which should never be considered "routine".

1. In stopping and searching motor vehicles, all officers shall take all reasonable precautions for their personal safety such as directing the occupants to alight from the vehicle and frisking them for weapons when justification for that frisk exists.

2. Even after frisking the occupants, if the officers reasonably believe that there is still a possible danger, they shall inspect those areas of the motor vehicle readily accessible to an occupant that may contain a dangerous weapon. Officers frisking the interior compartment of a motor vehicle are subject to the same conditions that exist for frisking a person.

9. **THE "PLAIN VIEW" DOCTRINE:** [41.4.1-2G]

a. The so called "plain view" doctrine has often been relied upon by both state and federal courts to uphold seizures of evidence observed by police officers legitimately carrying out their duties. This "plain view" exception of the warrant requirement is permissible if the following conditions are met:

1. The officer is lawfully on the premises.

2. The item is in plain view.

3. The discovery of the item is inadvertent.

4. The item seized must be immediately apparent as contraband or evidence of a crime. Comm. v. Laplante, 416 Mass. 433, 622 N.E.2d 1357 (1993).
- b. The term "inadvertent" has been interpreted to mean that a police officer did not have probable cause to believe or suspect that such evidence would be found on the premises. To satisfy the condition of being "immediately apparent" as seizable evidence, the officer must have probable cause to believe that the evidence observed in plain view was incriminating.
1. **EXAMPLE:** An officer lawfully enters private premises to execute a valid search warrant for designated property or articles; while conducting this lawful search, they inadvertently discover within plain view other evidence which they immediately recognize as incriminating. These items may be properly seized.
 2. The courts have also upheld the seizure of incriminating evidence, inadvertently found in plain view, when a police officer entered the premises to make a lawful warrantless arrest; or entered as a result of lawful consent; or entered in an emergency to render necessary aid or assistance.
- c. When police officers lawfully enter a dwelling, they may seize objects in plain view if such seizure was not anticipated and if they have reasonable cause to believe that there is a connection between the objects seized and criminal behavior. Items discovered by a police officer "inadvertently and without particular design" and reasonably believed by them to be connected with criminal activity may be seized if in plain view even though not mentioned in the search warrant. Comm. v. Bond, 375 Mass. 201, 375 N.E. 2d, 1214, (1978)
- d. Whenever an officer, in good faith, enters upon private premises as authorized or required by their duties, they are not a trespasser and, therefore, anything that they inadvertently observe in plain view that is subject to seizure may be seized without a warrant. In such cases the usual requirements for search and seizure are not necessary because no "search" is conducted. A "search" implies a prying into hidden places for concealed items, but it is not a "search" to observe articles that are open to plain view. It is also permissible for an officer to use a flashlight to make such observations. An observant officer, utilizing this "plain view" doctrine, can often be successful in recovering stolen property, and seizing contraband or weapons used, or intended to be used, in the commission of a crime.

10. PRE-INCARCERATION AND INVENTORY SEARCHES:

Refer to Waltham Police Department Manual:

- a. Chapter 71 (Transportation of Detainees).
- b. Chapter 72 (Holding Facility/Detainee Processing).
- c. Chapter 49 (Patrol re: motor vehicle inventory searches).

11. PROTECTIVE CUSTODY SEARCHES:

Refer to Waltham Police Department Manual:

- a. Chapter 71 (Transportation of Detainees).
- b. Chapter 72 (Holding Facility/Detainee Processing).
- c. Chapter 49 (Patrol re: motor vehicle inventory searches).
- d. Mass. Gen. Law, Chap. 111B, Sec. 8.

12. ADMINISTRATIVE SEARCHES: [41.4.1-2G] Police may, under certain circumstances engage in warrantless searches or inspections as part of their administrative functions. For example, it is proper to search a person who is about to visit an arrestee in a cell if the visitor would otherwise be able to smuggle a weapon or contraband to the arrestee. (Refer to the Waltham Police Department Operations Manual.)

13. ABANDONED PROPERTY: [41.4.1-2G]

- a. Experienced police investigators are fully aware that highly incriminating evidence may often be found in wastebaskets, trash receptacles, garbage barrels, etc. Garbage or trash that has been left in an area particularly suited for public view and inspection, for the express purpose of having strangers take it and dispose of it, is property which no longer enjoys the protection associated with the property that individuals associate with a reasonable expectation of privacy.
- b. The United States Supreme Court observed that once Abel had vacated the premises (a hotel room) (Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, (1960):

...that it was not unlawful to seize (without a warrant) the entire contents of a wastebasket, even though some of the contents had no connection with the

crime. So far as the records show, the petitioner (Abel) had abandoned these articles. He had thrown them away. So far as he was concerned, they were abandoned goods. There can be nothing unlawful in the Government's appropriation of such abandoned property.

Pursuant to Comm. v. Pratt 407 Mass. 647 (1990), a person has no privacy interest in their trash under Article 14 of the Massachusetts Declaration of Rights once the trash has been placed at the curbside to await collection. In Calif. v. Greenwood 108 S. Ct. 1625 (1988), the U.S.S.C. held that the Fourth Amendment to the United States Constitution does not prohibit the warrantless search or seizure of garbage left for collection outside the curtilage of a home. The court ruled there is no Fourth Amendment protection once one exposes their garbage to the public.

- c. With regard to abandonment of premises such as an apartment or hotel room, the courts have noted that abandonment consists of the act of leaving coupled with an intention not to return. Comm. v. Lanigan, 12 Mass. App. Ct. 913, 423 N.E.2d 800, (1981).

- 14. **OPEN FIELDS: [41.4.1-2G]** Open fields may be searched without a warrant even though the terrain in question is not easily accessible to the public and even though the owner may have posted "No Trespassing" signs and may even have locked a gate, Oliver v. U.S. 466 U.S. 170 (1984).

- 15. **SEARCHES BY PERSONS OTHER THAN LAW ENFORCEMENT OFFICERS: [41.4.1-2G]** Generally, a private individual may deliver to the police items or evidence which that person obtained by searching someone else's property.

For example, in one case, the mother of a 16-year-old girl (who was the suspect's girlfriend) opened a letter from the suspect to the daughter, read it, and handed it over to the police.

Comm. v. Richmond, 379 Mass. 557, 399 N.E. 2d 1069, (1980). The Fourth Amendment did not apply to this search by a private individual. A search of the defendant's basement by city gas company inspectors was held to be outside the scope of the Fourth Amendment (that search revealed gas used via unmetered pipes.) Comm. v. Cote, 15 Mass. App. Ct. 229, 444 N.E. 2d 1281, (1983).

However, the Fourth Amendment does apply to searches conducted by a police officer acting as a private security guard if they act beyond the scope of the private employer's business. However, a private security guard acting within the scope of their employer's business activity is not governed by the Fourth Amendment. Comm. v. Leone, 386 Mass. 329, 435 N.E. 2d 1036, (1982).