

# TRAINING



# BULLETIN

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*"Department Training Bulletins shall be used to advise members of current police techniques and procedures and shall constitute official policy."*

## CONSENT SEARCHES

### Introduction

Law enforcement officers have a variety of methods available to enforce and prevent crime. One such method that is often overlooked is the consent search.

If an officer obtains valid consent, the officer may conduct a search without a warrant, probable cause, exigent circumstances, or parole/probation conditions.

With valid consent, the officer is entitled to seize contraband and the fruits or instrumentalities of a crime as well as any other item the officer reasonably believes will aid in a suspect's apprehension or conviction.

Consent to search not only applies to suspects, but also to victims who similarly retain a reasonable expectation of privacy.

When seeking consent to search, the officer must explicitly ask the suspect or victim for their consent and advise they have the right to refuse pursuant to DGO M-19.

Officers shall document in their respective reports that they explicitly asked the suspect/victim for consent, state whether consent was implied or expressed, and that they were advised they had the right to refuse consent.

In addition to explicitly asking a suspect or victim consent to search, consent will be valid if all of the following apply:

- The consent is voluntary and a product of the subject's free will.
- It is not coerced by force, threats, tricks, promises, or the exertion of an officer's authority.
- The person providing the consent has the authority or apparent authority to provide the consent.
- The search does not exceed the scope or limits of the consent given.

This Training Bulletin examines each of these criteria.



### **Consent is Voluntary**

A person may give either express or implied consent.

Express consent is verbal consent given with words, such as “Yeah,” “Go ahead,” or “Do what you want.”

Implied consent is consent given through physical gestures or acts, such as pointing or waving.

Because a subject has the right to remain silent and refuse consent, silence in response to an officer’s request for consent **does not** constitute implied consent. (*Pavao v. Pagay* (9<sup>th</sup> Cir. 2002) 307 F3 915, 919)

Factors that may impair a subject’s decision making capability—such as medication, age, intoxication, and mental condition—are considered by the court, and the court may rule such factors make a subject’s consent unknowing and less than voluntary. A suspect’s consent, for example, was ruled involuntary when he was in critical condition and in pain in a hospital emergency room. (*George* (9<sup>th</sup> Cir. 1993) 987 F.2d 1428, 1431)

#### *An Officer’s Display of Intimidating Conduct or Force can Affect the Validity of a Consent Search*

By exhibiting force while seeking consent, an officer takes a risk that the consent will be ruled involuntary. The courts also consider whether weapons have been drawn. In order for consent to be valid, it must be uncontaminated by duress, intimidating conduct, or other pressure tactics, whether direct or indirect. (*People v. Challoner* (1982) 136 CA3 743, 758)

#### *An Officer’s Words can Affect the Validity of a Consent Search*

The words an officer uses in seeking consent are often decisive in determining if consent is voluntary.

An officer must avoid commanding a subject to perform an act that permits the officer’s search or facilitates the officer’s access. Instead, an officer must ask the subject for permission to perform the search.

For example, an officer does not command a subject to “open the door.” Instead, the officer asks, “Would you mind opening the door?” An officer does not command a subject to “open a car trunk.” Instead, the officer asks, “Would you mind if I looked in the trunk?”

If a subject aids an officer in a search by obtaining evidence or by opening a door, trunk, or purse, it is more likely the consent will be ruled voluntary. An officer, however, must not command a person to perform these acts.

The court will ask if the officer made the subject feel he or she had a choice or if the officer made the subject feel he or she had to give consent. By asking for and receiving permission, the officer obtains a valuable indication that the subject’s consent was voluntary.

While not mandatory, an officer obtaining a subject’s written waiver of Fourth Amendment rights in order to establish consent can help show that the consent was voluntary.



### *An Officer's Misrepresentation can Affect the Validity of a Consent Search*

An officer shall not misrepresent his/her identity or purpose for seeking consent. An officer may not misrepresent his/her authority by stating he/she has a warrant when he/she does not. (*Bumper v. North Carolina* (USSC 1968) 391 US 543, 550). Additionally, an officer may not state he/she wants to enter for one reason and then enter for another. (*US v. Harrison* (10C 2011) 639 F3 1273, 1280).

An undercover officer may legally misrepresent his/her identity and purpose for obtaining consent. This only applies when the undercover officer enters a residence for the purpose of buying or selling contraband or engages in other illegal conduct. (*U.S. v. Lopez* (USSC 1963) 373 US 427, 438)

### **The Person Providing the Consent has the Authority**

A person may consent to the search of property he/she owns or occupies.

A joint or co-occupant of a premises may consent only to the search of his/her exclusively owned property, shared property, or common areas. Before searching questionable areas, an officer needs to ask if the person giving consent has free access to the object or area in question.

One spouse may consent to the search of the other spouse's property only if the spouse giving consent has joint access or joint control over that property AND the other spouse does not object. Officers do not have to seek consent from the other spouse and the objecting spouse must be on scene to object. (*Georgia v. Randolph* (USSC 2006) 547 US 103, 120)

Parents may consent to the search of areas or property that has not been "staked out" by a child as his/her own. For example, an officer may search a juvenile's room with parental consent if a parent cleans the room and the juvenile does not pay rent. However, a parent cannot give consent for an officer to search a juvenile's personal effects, such as a suitcase or toolbox, if the parent makes no claim or right of control over the object even if the object is in the parent's bedroom.

In some circumstances, a teenager may possess sufficient authority to allow an officer to enter and look about common areas. As children advance in age, they acquire greater discretion to admit visitors on their own authority. (*People v. Jacobs* (1987) 43 C3 472, 483)

An owner of property may give authorization to a third party to give consent to a search.

A host may consent to the search of a room where a non-paying guest is staying; however, the host does not have authority to consent to the search of the guest's personal property.

A property owner may not consent to the search of premises rented by a tenant.

A motel owner or employee may not consent to the search of a guest's room. Although motel employees may enter a rented room to clean, an officer may not send an employee in as the officer's agent to look for crime related evidence.

An employer or employee may consent to the search of areas and items, such as file cabinets, over which he/she has common authority or control.

A real estate agent may not consent to the entry of listed houses by persons whom the agent knows to be police officers looking for evidence.



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Under the rule of “apparent authority,” courts will uphold a search as valid if an officer had a reasonable, good-faith belief, based on all the circumstances, that the consenter had the authority to give consent. (*U.S. v. Matlock* (USSC 1974) 415 US 164, 171)

If an officer has questions about authority, the officer must ask questions to determine whether the person giving consent shares the use of and has joint control over the area or object to be searched.

### **The Search Does Not Exceed the Scope of Consent Given**

The places where an officer may search are limited entirely by the scope of the consent given.

It is the officer’s responsibility to ensure the consenter has given consent for the officer to search the areas where he/she is looking.

Consent to look for a person is not consent to look in a place where a person could not be located. Consent to search a house is not consent to answer the telephone. Consent to search a suitcase, however, includes consent to look inside the suitcase compartments and containers.

As long as an officer remains within the scope given, the officer may seize any crime related evidence in plain view.

### **Additional Information about Consent Searches**

- Custody tends to show a suspect’s consent is not voluntary. However, custody alone does not necessarily destroy an otherwise valid consent search.

It is possible to get a valid consent from someone who is arrested and handcuffed.

- Miranda warnings are not required prior to requesting consent to search.

A voluntary consent may be obtained even after a person has asserted his/her Miranda right to remain silent or his/her right to an attorney.

- A subject may withdraw his/her consent at any time during a search.

When a subject withdraws consent, an officer must immediately stop the search.

Actions inconsistent with consent may act as withdrawal of consent. For example, if a suspect gives consent and then attempts to hamper or thwart the search, by throwing away a car’s keys, for example, the consent may be ruled involuntary.

- After formal charges have been filed against a suspect and an attorney has been appointed or retained, it is improper for an officer to conduct a search without also obtaining the consent of the suspect’s counsel or a search warrant. An officer shall not contact the suspect without first contacting the suspect’s attorney.
- All factors of consent are scrutinized at many different levels in the court system and, in some cases, by multiple judges.

The preferred method for an officer to document consent is on an audio/video device or in writing.