



Homeland Security

**FEDERAL LAW ENFORCEMENT
TRAINING CENTER
GLYNCO, GEORGIA**

LEGAL DIVISION HANDBOOK

(JUNE 2009 SUPPLEMENT)

This 2009 Supplement to the *Legal Division Handbook* is provided to reflect the changes brought on by several significant Supreme Court decisions:

Arizona v. Johnson, 129 S. Ct. 781, January 26, 2009
“Frisks” of passengers during a traffic stop.

Corley v. United States, 129 S. Ct. 1558, April 06, 2009
The timing of the Initial Appearance and the admissibility of statements.

Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009
Searches of vehicles incident to the arrest of an occupant.

Montejo v. Louisiana, 129 S. Ct. 2079, May 26, 2009
Interviewing suspects after the 6th Amendment right to counsel has attached.

Each part of this supplement references the sections and page numbers of the *Handbook* that are affected. If you have a hardcopy of the *Handbook*, you can print out this supplement and attach it to the inside back cover for easy access.

We hope to have the revised *Handbook* and *Reference Book* reprinted by October 2009.

VI.A. The Requirement and Timing of the Initial Appearance
(Continuation¹)

Rule 5a states that, upon arrest, a suspect must be taken to an initial appearance before a magistrate judge without unnecessary delay. Failure to do so can have an adverse effect on statements made during a post-arrest interview. First, of course, any statement taken has to be voluntary. Proper Miranda warnings must be given and a valid waiver obtained. Assuming this has been done, the courts may then look at whether there was a delay in getting to the magistrate.

By statute, Congress created a “safe zone” for the first 6 hours. Statements taken during the first 6 hours will not be suppressed because of any delay. That 6 hour safe zone can be extended if the delay is reasonable given means of transportation and distance to the magistrate. Thus, a statement taken 9 hours after arrest will still be usable if extensive travel was required to get to the magistrate for the initial appearance.

It should be noted that just because a statement is made after that 6 hour safe zone, it does not mean it will automatically be suppressed. After the 6 hours, courts will simply begin to assess whether any delay is reasonable and necessary. For example, if a defendant had to be taken to the emergency room for treatment, then the delay would be deemed necessary, and any statements made could still be used at trial. If there is a problem with availability of the magistrate, officers should coordinate with an AUSA as to what should be done.

It is important to understand that delays solely for the purpose of continuing or conducting an interrogation will be seen as unnecessary and statements may be lost. So, if a magistrate is readily available, and a 2 hour interview is begun 5 hours after an arrest, statements given during the first hour will be usable, but those made in the second hour might not be.

¹ This is a continuation to the “Requirement and Timing of the Initial Appearance” on page 261.

IV.A.3 A *Terry* “Frisk” (***Substitution***¹)

In *Terry*, the Supreme Court outlined the legal requirements for what has become known as a “*Terry* frisk.” If, during an investigative detention, you develop reasonable suspicion that the individual is presently armed and dangerous, you may conduct a limited pat-down search of the individual for weapons. This “frisk” is a pat-down search of a suspect’s outer clothing to discover weapons that could be used against you during an investigative stop. You may not utilize a *Terry* frisk to look for evidence of a crime. To justify a “frisk,” you must demonstrate two things: (1) first, the investigatory stop must be lawful; (2) and second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous. (*Arizona v. Johnson*.)

A “frisk” is limited search for weapons. It may be conducted even after the suspect has been handcuffed. You may check the outside of the suspect’s clothing for any hard objects that could potentially be a weapon concealed underneath. Once a hard object is encountered, you are then entitled to go inside the clothing and retrieve the item. When dealing with winter clothing, you may reach inside of a heavy jacket and frisk underneath it to avoid missing any weapons. You may also frisk any containers in the suspect’s possession. As with investigative detentions, you may establish reasonable suspicion that a suspect is presently armed and dangerous through a variety of different methods, including personal observations, information from other officers, and information from third-parties, such as informants.

¹ This is a substitute for IV.A.3 “A Terry Frisk” on page 321 and 322.

XIII. Searches Incident to Arrest (Replacement¹)

It has long been recognized that conducting a search incident to a lawful arrest is a ‘reasonable’ search under the Fourth Amendment and a valid exception to the warrant requirement.

A. Rationales for the Rule

In Chimel v. California, the Supreme Court outlined three distinct reasons for permitting searches incident to arrest: (1) to discover weapons; (2) to prevent the destruction or concealment of evidence; and (3) to discover any means of escape.

You do not have to specifically believe that the arrestee possesses evidence, weapons, or a means of escape on his person before a search incident to that arrest is justified. The fact the individual has been arrested enables you to conduct a search of that person.

B. Requirements for a Search Incident to Arrest

A search incident to arrest may only be conducted when three requirements have been met. First, there must be a lawful custodial arrest. This requires both probable cause that the arrestee has committed a crime and an actual arrest. A search incident to arrest may not be conducted in a situation where an actual custodial arrest does not take place. For example, you may not conduct a search incident to arrest in a Terry-type situation. A search incident to arrest is more intrusive than a frisk for weapons. A search incident to arrest is not authorized when an individual receives only a citation for an offense, such as a traffic violation, even if the individual could have been taken into custody. Knowles v. Iowa.

The second requirement for a lawful search incident to arrest is that the search must be “substantially

¹ This is a complete replacement for “XIII. Searches Incident to Arrest (SIA)” starting on page 357.

contemporaneous” with the arrest. New York v. Belton. The exact meaning of this phrase is open to interpretation, but it generally means that a search incident to arrest must be conducted at about the same time as the arrest. A search too remote in time or place from the arrest cannot be justified as incident to the arrest. “Substantially contemporaneous” is determined in light of the Fourth Amendment’s general reasonableness requirement, taking into consideration all of the circumstances surrounding the search. While a search conducted 10 minutes after an arrest might be valid, a search 30 to 45 minutes after the arrest might not.

The contemporaneous requirement does not have a major effect on the ability to search the suspect’s body (suspects are often searched at the scene, and again later as part of jail security measures). But it becomes a critical issue for searching the area surrounding the suspect, or searching through items that may have been within the suspect’s control, such as bags or cell phone call logs. These must be searched at the time of arrest in order to be valid.

There is a third requirement that the area to be searched has to be currently accessible, at least in some measure, by the defendant. If the defendant has been removed from the area of the search, the justification for finding weapons or destructible evidence is gone. Arizona v. Gant (“If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”) Some courts may even consider a well-secured suspect (handcuffed, with multiple officers present) to lack access to the surrounding area. At a minimum, officers should avoid performing a search incident to arrest once the suspect has been removed from the area.

In limited circumstances, the search may take place before the actual arrest occurs. “Where the formal arrest follow[s] quickly on the heels of the ... search of [the defendant’s] person,” it is not “particularly important that the search

preceded the arrest rather than vice versa.” Rawlings v. Kentucky. In such cases, none of the evidence found during the pre-arrest search may be used as probable cause for the arrest.

C. The Scope of a Search Incident to Arrest

The permissible scope of a search incident to arrest varies depending on the context of the arrest.

1. *The Person of the Arrestee*

When you make a custodial arrest of an individual, you are entitled to search the suspect’s person. In the case of a lawful, custodial arrest, a full search of the person is reasonable under the Fourth Amendment and a valid exception to the warrant requirement. You may search for weapons, evidence, and any means of escape. Any evidence found on the suspect -- even if unrelated to the basis of the arrest -- may be seized.

2. *The Area within the Arrestee’s “Immediate Control”*

In addition to the person of the arrestee, you are also entitled to search any area within the suspect’s immediate control. This includes any containers within the arrestee’s immediate control at the time of the arrest, such as a wallet, backpack, briefcase, or luggage. The phrase “immediate control” means the area from within which the arrestee might gain possession of a weapon or destructible evidence.

Whether an area is within an arrestee’s immediate control is determined on a case-by-case basis, and should take into consideration a variety of factors, including: (a) the distance between the arrestee and the place to be searched; (b) whether the arrestee was handcuffed or otherwise restrained; (c) whether the police were in a position to block the arrested person’s access to the area in question; (d) the ease with which the arrested person could access the area; and (e) the number of law enforcement officers present at the scene.

The reference point for the area within the arrestee's immediate control is the location of the person at the time of the search, not where the person may later be moved. Generally, this should also be the location of the arrest, absent some extenuating circumstance. Once removed from that location, the right to conduct a search incident to arrest of that area is lost (but not for the suspect's body).

This rule does not allow you to move the arrestee from one place to another within the house simply to justify a search incident to arrest of a different area. Obviously, the arrestee can be moved from a room as needed for safety and control reasons, or perhaps to obtain clothing, but this does not justify a search of the new location. You may accompany the arrestee, of course, and seize evidence observed in plain view during the relocation. Should he need to obtain clothing items, or perhaps be placed on a couch, the item or area could be checked prior to allowing the subject access. Arrest outside of a home will not justify a search incident to arrest inside of the residence itself.

3. *Vehicles and Search Incident to Arrest*

The rule that allows officers to search the area within the immediate control of an arrested suspect also applies to vehicles. Custodial arrest of an occupant of the vehicle is required. There is no search incident to citation. There is no requirement that the occupant arrested be the owner or driver of the vehicle. The term "occupant" could include someone located outside the vehicle at the time of the arrest, so long as the person arrested is a "recent occupant" of the vehicle. Thornton v. United States.

As with other searches incident to arrest, the purpose is to search for potential weapons and evidence that could be destroyed. This includes the entire passenger compartment of the vehicle, along with containers in that part of the car. As stated above, however, when "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search... the rule does not apply." Arizona v. Gant. A "container" is any object capable of holding another object, and

includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. While this definition does not expressly address “locked” containers, several federal circuits have held that locked containers are within the scope of a lawful search incident to arrest. The inaccessible trunk of a vehicle, however, is not within the immediate control of an arrestee and cannot be searched incident to arrest.

The Supreme Court also created a second rule that applies just to vehicles. It may allow for a search incident to arrest even when the standard Chimel rule does not. So there are two possible situations when the passenger compartment of a vehicle can be searched incident to arrest.

The first situation exists when the arrestee is close to the vehicle and can readily access the passenger compartment. This will be fairly rare in practice, as safety and good sense dictate controlling the defendant early, often by securing him in handcuffs and taking him away from the car. But where circumstances dictate that he remains nearby, not fully secured, a search incident to arrest can be done. For example, with just one officer present, even a handcuffed suspect could conceivably access the interior. But, when there are multiple officers present, or once the suspect is secured in the back of a patrol car, the search will not be allowed. A suspect should not be intentionally detained next to the vehicle for the sole purpose of justifying this type of search.

If the suspect is no longer in a position to access the car, there is a second situation in which a vehicle can be searched incident to arrest. This occurs when it is reasonable to believe the vehicle contains evidence of the crime. This only applies to the crime of arrest, and not other conceivable crimes the defendant may have committed. For example, if the arrest is for passing counterfeit currency, it is reasonable to think the vehicle contains evidence of that crime (additional notes, etc.). If, however, the arrest was for driving on a suspended license, no

additional evidence would be found within the car, and a search incident to arrest would not be justified this way.

If neither of these rules applies, the search incident to arrest cannot be done, but this does not stop an officer from applying other exceptions to the Fourth Amendment warrant requirement. For example, if there was a reasonable suspicion that an individual still close enough to access the car was armed and dangerous, a frisk could still be conducted of the passenger compartment. And, where there is probable cause to believe the car contains evidence of a crime, it could be searched based on the *Carroll* doctrine. Finally, if the vehicle is being lawfully impounded, officers may conduct an inventory search.

VII. D. Offense Specific(***Substitute***¹)

In the prior sections, it was noted that Miranda rights are not offense specific; that is, they apply to any custodial interrogation by law enforcement, regardless of the offense for which the suspect is being held. By contrast, the Sixth Amendment right to counsel is offense specific. Because the Sixth Amendment right applies only when adversarial proceedings are initiated, the right attaches only as to the charged offenses. Still, when dealing with a subject in custody, the rules remain just the same. Read Miranda and get a waiver, and then the subject can be questioned. Stop and do not question further about *any crimes* if an attorney is requested, unless initiated by the subject. This is true whether or not the defendant has retained counsel.

However, for an accused not in custody, Miranda must still be read, and a waiver obtained, to question about a charged offense (see below). But it would not need to be read to question with respect to any offenses not yet charged- even if they stem from the same criminal incident. There is, however, no bar to re-approaching a charged defendant *not* in custody, even if they have requested or retained counsel. Statements that are otherwise voluntary could still be used.

E. Waiver and Invocation (***Substitute***)²

1. *Waiver*

Once the right to counsel has attached, the government may not attempt to elicit information from the accused without first advising him of his right to have counsel, and then obtaining a voluntary, intelligent waiver. Although Sixth Amendment rights differ somewhat from the Fifth Amendment Miranda rights, the Supreme Court held that the same warnings can be used to get a waiver of either of these rights. There is no requirement to inform the accused that he has been charged, or as to the nature of the charge.

¹ This is a substitute for subsection VII.D, E, and F on pages 500-502.

² See Footnote # 1.

2. *Undercover Agents and Informants*

Unlike a Miranda situation, once the Sixth Amendment right has attached, the government can no longer use an undercover officer or confidential informant to question, or otherwise elicit information, from a defendant about the charged crime. This form of government questioning is still considered a critical stage, and it is not possible to obtain a proper waiver. However, covert agents who merely listen to the accused, without actively eliciting the information, or who discuss *other* crimes, do not violate the right. The undercover operative must be careful not to discuss the charged crime with the accused, because even absent any actual questions, it could be seen as an attempt to elicit information.

3. *Invoking the Right*

The Sixth Amendment does not prohibit an officer from interrogating a suspect, represented or not, about charged offenses, so long as the officer first advises the suspect of his Sixth Amendment right to have counsel present and the suspect provides a voluntary waiver. Attempts to invoke Sixth Amendment rights in anticipation of future questioning are not valid. The defendant can only invoke when approached by officers intending to question him. If he invokes at that point, questioning must cease, unless initiated by the defendant.

F. The McDade Amendment (**Substitute**³)

A federal statute, 18 U.S.C. § 530B, commonly referred to as the “McDade Amendment”, subjects federal prosecutors to the general ethical obligations of the members of the legal profession while in performance of their federal duties. Included in the common ethical rules that apply to attorneys are: (1) a “no contact rule” that bars communications by a lawyer with a person represented by another lawyer in a matter that concerns the representation, and (2) a rule that can hold a government attorney responsible for the actions of others (such

³ See Footnote #1

as federal investigators) they direct, which would violate an ethical rule if done by the attorney.

As a result of the interplay of these rules, a prosecutor may be reluctant to make contact, or to direct federal agents to make contact, with any witness or suspect known to be represented by an attorney in the matter under investigation. When the ethical obligation applies, the prosecutor may insist that agents make the contact only if the witness/suspect's counsel is present or otherwise permits the contact.

Violation of the "no contact" ethical requirement could subject the prosecutor to discipline by state bar authorities - even in situations when it was actually the investigator that made the contact. As non-attorneys, investigators cannot be subjected to such discipline themselves. Due to the concerns involved, however, investigators should consult with the prosecutor assigned to the case prior to making any investigative contacts with a party that is believed to be represented by an attorney.