

Fourth Amendment Issues in Code Enforcement

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4th Amendment to the U.S. Constitution

The right of the 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 persons or things to be seized.

*The Florida Constitution has a search and seizure clause that is interpreted in the same way as the Federal Constitution under decisions of the U.S. Supreme Court.
Art. I, §12, Fla. Con.*



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The right to be protected against searches and seizures applies when a person has a legitimate **expectation of privacy** which includes both a subjective expectation and an objectively reasonable expectation. (known as the “Katz” test). *Katz v. U.S.*, 389 U.S. 347 (1967).

- ❖ “**Reasonable**” means the expectation is one an ordinary person would have and one society is prepared to accept.
- ❖ A “**subjective expectation**” means that the person actually believed the subject is private.
- ❖ **Expectation of privacy** is a fact-specific analysis.




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In the physical space...



The **home** is an area with the highest expectation of privacy. **Areas around the home**, sometimes referred to as “the curtilage” of the house (yards, porches, sheds) have a similar but more fact-dependent expectation of privacy. *Powell v. State*, 120 So. 3d 577 (Fla. 1st DCA 2013).

Motor vehicles have an established, but more limited, expectation of privacy. *Lake Butler Apparel Co. v. DACS*, 551 F.Supp. 901 (M.D. Fla 1982).

Personal effects (like bags) enjoy an expectation of privacy. *U.S. v. Place*, 462 U.S. 696 (1983).

Commercial areas accessible to the public have the least expectation of privacy. *See v. City of Seattle*, 387 U.S. 541 (1967).



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Physical Space Searches

Search Permissible

Search where object could be seen by person standing on front porch. *Davis v. State*, 763 So. 2d 519 (Fla. 5th DCA 2000).

Search following the detection of ammonia and ether vapors when police entered unfenced yard and approached front door. *State v. Kennedy*, 953 So. 2d 655 (Fla. 1st DCA 2007).

Search of hotel room with consent of hotel management after guest already vacated the room. *Abel v. U.S.*, 362 U.S. 217 (1960).

Search Impermissible

Peering in windows of a mobile home late at night. *Powell v. State*, 120 So. 3d 577 (Fla. 1st DCA 2013).

Use of high powered telescope. *State v. Barnes*, 390 So. 2d 1243 (Fla. 1st DCA 1980).

Entering private back yards and removing trees infected with citrus canker without a warrant (finding no exigent circumstances). *DACS v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2003).

Dog sniff test at front door of a home requires probable cause. *Jardines v. State*, 73 So. 3d 34 (Fla. 2011).



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Non-Physical Space Searches

Search Permissible

Office computer where the computer was shared and investigation target did not have exclusive use of the computer. *Kelly v. State*, 77 So. 3d 818 (Fla. 4th DCA 2012).

Carrier's data of cell tower pings was not a search. *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015). But see *Tracey v. State*, 152 So. 3d 504 (Fla. 2014)(real time tracking is a search).

Installing a "pen register" that records the numbers called from a telephone. *Smith v. Maryland*, 442 U.S. 735 (1979).

Computer surveillance showing only IP addresses. *U.S. v. Forrester*, 512 F.3d 500 (9th Cir. 2008).

Search Impermissible

Collection of video from witness's cell phone who observed accident. *Crocker v. Beatty*, 886 F.3d 1132 (11th Cir. 2018).

Installing a GPS unit on a suspect's vehicle is a search. *U.S. v. Jones*, 565 U.S. 400 (2012).

A warrant is required to search the data a social media has on an account holder. (i.e. Facebook). *U.S. v. Blake*, 868 F.3d 960 (11th Cir. 2017).

Use of thermal imaging device to see inside a home. *Kyllo v. United States*, 533 U.S. 27 (2001)

A warrant is required to obtain help unlocking tablet from manufacturer. *U.S. v. Blake*, 868 F.3d 960 (11th Cir. 2017).



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FACE BOOK POLICY:

U.S. Legal Process Requirements

We disclose account records solely in accordance with our terms of service and applicable law, including the federal Stored Communications Act ("SCA"), 18 U.S.C. Sections 2701-2712. Under U.S. law:

...A search warrant issued under the procedures described in the Federal Rules of Criminal Procedure or equivalent state warrant procedures upon a showing of probable cause is required to compel the disclosure of the stored contents of any account, which may include messages, photos, videos, timeline posts, and location information.

...

We will be unable to process overly broad or vague requests. All requests must identify requested records with particularity and include the following:

The name of the issuing authority, badge/ID number of responsible agent, email address from a law-enforcement domain, and direct contact phone number.

The email address, user ID number

(<http://www.facebook.com/profile.php?id=1000000XXXXXXXXX>) or username

(<http://www.facebook.com/username>) of the Facebook profile.



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The right to be free of unreasonable searches and seizures apply to all government action, not just criminal action.

Camara v. City of San Francisco, 387 US 523 (1967)

- Fourth Amendment applies to administrative searches.
- Administrative searches **do** require warrants.
- A warrant directed at a particular person requires probable cause.
- An inspection process not based on probable cause can be warranted, but must show reasonable standards.
 - In *Camara*, said can be based on
 - passage of time;
 - Nature of the building;
 - Condition of the entire area.



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In Florida, many of the concepts from *Camara* are captured in the administrative (inspection) warrant statute:

Florida Statutes §933.21. Requirements for issuance of inspection warrant:

- ❖ An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing
 - ❖ the place, dwelling, structure, or premises to be inspected;
 - ❖ the purpose for which the inspection is to be made;
 - ❖ In addition, the affidavit shall contain a statement that consent to inspect has been sought and refused;
 - ❖ or a statement setting forth facts or circumstances reasonably justifying the failure to seek such consent.



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Who can issue an inspection warrant? F.S. 933.01 - any judge.

What kinds of things can you get an inspection warrant for? An inspection “required or authorized by state or local law or rule relating to municipal or county **building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.**” F.S. 933.20.

What about a search warrant? For stolen property, for crimes, gambling, obscene prints, felony, alcohol laws, fish and game laws, food and drug laws, citrus disease, animal cruelty. F.S. 933.02. *State ex. rel. v. Quigg*, 154 Fla. 348 (1944).

What constitutes cause? Cause exists “if reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place...or if there is a reason to believe that a condition of nonconformity exists...” F.S. 933.22.

How long can an inspection warrant last? As specified in the warrant, but not more than 14 days without extension. F.S. 933.23.

Can I search a home with an inspection warrant? Owner-occupied residences are exempt from the inspection warrant process.



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What must be in the contents of the warrant? the warrant must describe - the place, dwelling, or structure to be inspected; the warrant must designate the purpose of the warrant and limitations, including the limitations required by the statute. F.S. 933.24.

What are the Rules for Conducting an Inspection?

- Cannot be done after 6 p.m. or before 8 a.m. or on the weekend or on a legal holiday.
- Cannot occur in the absence of the owner or occupant over 18 years old, unless the warrant expressly authorizes on a showing that it is reasonably necessary to effectuate the purpose.
- No forcible entry, unless judge expressly finds reasonable suspicion that would be an immediate threat to health and safety or previous warrant executions have been unsuccessful.
- Must give 24 hours notice if consent was sought and refused. Immediate execution of a warrant is prohibited unless necessary to prevent loss of life or property.

F.S. 933.26.



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What happens if someone refuses to allow the execution of a warrant? The person is guilty of a 2nd degree misdemeanor. F.S. 933.27.

What happens if someone misuses the ability to seek a warrant? If a person maliciously or with knowledge causes an inspection warrant to issue for cause that does not exist, by either executing the affidavit or directing someone else to do so, the person is guilty of 2nd degree misdemeanor. F.S. 933.28.

Are there restrictions on what an inspector can do with information revealed during a search? A person performing an inspection shall not give information as a confidential informer, testify as a witness, or execute an affidavit as predicate for the issuance of a criminal search warrant. F.S. 933.30.

How does the warrant statute relate to other statutes? The warrant statute does not restrict the powers granted by general law. F.S. 933.29



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Exceptions to the warrant requirement:

- Exigent circumstances. *A situation where the inevitable delay incident to obtaining a warrant must give way to an urgent needs for immediate action.* *DACS v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2003).
- Emergency exception: To preserve life or property, to render first aid and assistance...when there is an urgent need for such assistance and protective action - the intent should not be to search. *Brinkley v. County of Flagler*, 769 So. 2d 468 (Fla. 5th DCA 2000).



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Exceptions to the warrant requirement:

- Administrative inspection of closely regulated businesses:
 - Substantial government interest;
 - Warrantless search necessary to further scheme;
 - Must provide notice of time, place, scope (substitute for the warrant process).

New York v. Burger, 482 U.S. 691 (1987).

- Examples: pawn shops, adult entertainment, pest control.



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Consequences for Violating Fourth Amendment Rights:

- ❖ Exclusionary rule
- ❖ Civil liability under 42 U.S.C. §1983
- ❖ State Tort Claims (Trespass, Abuse of Process)
- ❖ Criminal Prosecution (Trespass)
- ❖ Potential for declaratory judgments and injunctive relief



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❖ Exclusionary Rule

The exclusionary rule is a judicially-created rule that excludes the use of information at trial, where the information was procured through an illegal search or seizure. The rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or “fruit of the poisonous tree.”

The exclusionary rule was articulated in the criminal context, but has been applied to certain civil contexts. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982) (applying rule in OSHA context) but *U.S. v. Janis*, 428 U.S. 433 (1976) (holding that the rule does not apply to civil tax assessment).



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- ❖ Civil liability under 42 U.S.C. §1983
- ❖ 42 U.S.C. §1983 creates civil liability for the violation of any civil right conferred under the federal constitution or federal law done “under color of state law.”
- ❖ Can obtain damages and attorney’s fees.
- ❖ Can be brought against the local government if pursuant to a custom or policy. *Monell v. Dep’t Soc. Svc of N.Y.*, 436 U.S. 658 (1978).
- ❖ Can be brought against an individual if that person is the final policy-maker. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).



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- ❖ Civil liability under 42 U.S.C. §1983 (con.)

Wilson v. County of Orange, 881 So. 2d 625 (Fla. 5th DCA 2004). Trailer park owner brought Section 1983 claim against County, alleging that county imposed liens and fines without a hearing...conducted warrantless searches and did not train inspectors to avoid these violations.

Trial court dismissed the case with prejudice.

The Fifth District Court of Appeal held that the owners adequately stated a claim on the basis of these allegations.



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Criminal Trespass - Fla. Stat. §810.08 - without being authorized, licensed, or invited willfully enters or remains...is warned...and refuses to leave. (1st or 2nd degree misdemeanor).

State v. Santiago, 218 N.J. Super. 427 (N.J. Sup. Ct. 1986).

Facts: A DEP inspector was charged with criminal trespass for entering a licensed pesticide applicator's business premises and examining records. She went into an unoccupied building and searched through drawers containing DEP required records.

- The criminal law in New Jersey required a criminal practice to be made with knowledge that the person is not licensed or privileged to enter the structure.
- The court held that, under the State's Pesticide Control Act, it was not clear that the DEP inspector required permission, and the criminal conviction was reserved.
- The Court highlighted the closely regulated nature of the pesticide business.

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Civil Trespass and Abuse of Process

City of Cape Coral, Florida v. The Nelsen Residence, Inc. (Fla. Cir. Ct., June 15, 2017).

Facts: Code enforcement case enforcing zoning regulations gave rise to a variety of civil claims, including takings, RLUIPA violations, equal protection violations, trespass and abuse of process.

- The trespass claim was defeated because the City was able to show that one of the building residents invited the code enforcement officers in.
- Abuse of process claim (which requires a showing of willful and intentional misuse of process for some wrongful and unlawful object or collateral purpose).



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Civil Trespass.

DEP v. Hardy, 907 So. 2d 655 (Fla. 5th DCA 2005)

Acknowledged that a cause of action for trespass can exist for state environmental inspectors who trespass, but finding no trespass in the specific case because the property was a commercial entity open to the public.

Jury had found, prior to appeal, for landowner and awarded \$1.5 million for negligence, negligent supervision, and \$100 for nominal trespass.

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❖ Invasion of Privacy

Steppe v. City of Miami, 2011 WL 13217972 (S.D. Fla. 2011).
Alleged warrantless searches as part of a suit for invasion of privacy, trespass, negligence, denial of due process and estoppel.

Common law action for Invasion of privacy - intrusion into a person's physical or electronic into one's private quarters.



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❖ Potential for declaratory judgments and injunctive relief

Marshall v. Barlow's, Inc., 436 U.S. 307, 307, 98 S. Ct. 1816, 1818, 56 L. Ed. 2d 305 (1978), obtained a declaratory judgment and injunctive relief against a warrantless inspection of its business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations.

Miami-Dade County v. Concrete Structures, Inc., 114 So.3d 333 (Fla. 3d DCA 2013), the court vacated a temporary injunction that precluded local inspectors from making permit compliance inspections at a concrete casting plant.



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Search and Seizure Take Aways

- Would I be comfortable viewing the premises in this way if I were acting as a private citizen? Put another way, could a private citizen see what I am seeing from a place where the public has a right to be?
- Is there a way for me to obtain (and document) consent to search?
- Is there an exception to the warrant requirement that I can use?
- Can I get an Inspection Warrant for this Activity?
- Have I listed everything on my warrant application required by the statute?
- Am I within the scope of my warrant as to: 1) area; 2) things I'm looking for; 3) other restrictions such as date, time of day?
- Have I documented what information came from where, in the event of an exclusionary rule finding?



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Any questions?

Thank you!

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