



# Plain View & Plain Feel

1- Hour Course

Lesson Plan

Blue to Gold Law Enforcement Training  
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## Course Introduction – 10 minutes

- 1) Instructor introduction.
- 2) Explain the course objective.
- 3) Encourage attendees to ask questions and share feedback with other attendees.
- 4) Explain that certificates will be emailed after the class and each student will be registered in the Blue to Gold University.
- 5) Go over the three disclaimers:
  - a) Laws and agency standard operating procedures may be more restrictive. Blue to Gold teaching the federal standard unless otherwise stated. Therefore, students must know their state and local requirements in addition to the federal standard.
  - b) If students have any doubts about their actions, ask a supervisor or legal advisor.
  - c) The course is not legal advice, but legal education. Therefore, nothing we teach should be interpreted as legal advice. Check with your agency's legal advisor for legal advice.

## Module One: Plain View

1. Legal Rule : Plain view observations are not searches under the Fourth Amendment.
2. Pro Tip: Plain View including smell and hearing is nothing more than the right to be, right to see. But there are limitations.
3. The term “search” is said to imply some exploratory investigation, invasion, quest, looking for or seeking out. A search implies some sort of force. Implies a prying into hidden places for that which is concealed or hidden. Though searching relies mostly on sight, the mere looking at that which is open to view is not a Fourth Amendment search. A Fourth Amendment search involves a protected area...if not it's not a “search.”
4. Ask the class: Legally, there's plain view and open view. What's the difference? **Answer: Under plain view, there could be an issue of whether you're lawfully present. Under open view, your presence cannot be a Fourth Amendment issue.**

- a. Pro Tip: I usually use “plain view” for students and include “open view” in reports or when talking to lawyers.
- b. Ask the class: Why does it matter? **Answer: Plain view means you need to justify why you were lawfully present before there can be “plain view.” Open view implicates no privacy interest and therefore needs no additional justification.**
- c. Plain View you must be lawfully present. Example *U.S. v. Fisch* Cop held ear to the floor in a hotel. The officers were exercising their investigative duties in a place where they had a right to be and they were relying upon their naked ear. The defendants sought to keep their conversation private, and ‘did not expect that law enforcement officers would be located just a few inches away from the crack below the door connecting the two adjoining rooms.” Held: The conversations complained of were audible by the naked ear in the next room, thus no search occurred.
- d. Pro Tip: Courts don’t have a phrase for “open” hearing or smell. They call them plain hearing or smell regardless of the area.

#### 5. Curtilage

- a. Pro Tip – You must act in a socially acceptable manner while on curtilage unless you have exigency.
- b. Can you look under a garage door? What if you stood on chair to see inside garage? Think: “Artificial Vantage Point” or Peepin’ Tom rule!

#### 6. PC without manipulating item.

- a. Example #1: Cop moved stereo to see serial number, manipulation? Cop squeezed bag to smell for marijuana, manipulation? Yes! Per *Hernandez v. United States*: The contents of the bags were not exposed to Sergeant Butler’s sight or smell before the bags were squeezed. He detected the odor of marijuana as the result of an “exploratory investigation,” an “invasion or quest,” a “prying into hidden places for that which was concealed.” Conduct which has repeatedly said to characterize a “search.”
- b. Example #2: During weapons search cop moved bag and felt gun. Manipulation? Per *United States v. Russell*: The bag with the handgun, we believed, fell securely within the well-established “plain view” exception. The officer who came upon that

container indicted in his testimony that he felt the outline of the gun as he grasped the paper bag. "Plain view," we think it safe to say, encompasses "plain touch."

7. You had lawful access!
  - a. Pro Tip: Plain view allows you to grab and go if you don't need to make another constitutional intrusion.
  - b. Per Judge Moylan: "Seeing something in open view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly over-apply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson long since mastered by old hands at the burlesque houses, "You can't touch everything you can see. Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow."
  
8. Containers
  - a. Pro Tip: If you have PC for items inside a container, then you can seize it under plain view. But you need another reason to "search" the container. Plain view seizure may not work.
  - b. Container Requirements:
    - Search incident to arrest
    - Exigency
    - Consent
    - "Foregone conclusion" what's inside\*
    - "Single purpose container" doctrine
  - c. U.S. v. Williams: Courts have drawn a distinction between the plain view seizure of a container and the subsequent search of that container, because its seizure under the plain view doctrine "does not compromise the interest in preserving the privacy of its contents," while its search does. As a consequence, to protect the privacy interest of the contents of a container, courts will allow a search of a container following its plain view seizure only "where the contents of a seized container are a foregone conclusion."
  - d. Example: Crown Royal pouch: Per Matter of Welfare of GM: This is a mistaken interpretation of the plain-view doctrine, however. Under the plain-view exception to the warrant requirement, a police officer can seize an object in plain view without a warrant only if the object's incriminating

character is immediately apparent. In this case, the object in plain view was the pouch, not the contraband. Consequently, the plain-view exception will apply only if the pouch's incriminating nature was immediately apparent. Even though searching the pouch was not authorized under "plain view" they "could effect a warrantless seizure and warrantless search of the pouch under the 'search incident to arrests' doctrine." Evidence not suppressed.

- e. Example: Officer saw closed clothes bag next to shooting suspect in hospital. He opened and retrieved the clothes. Per U.S. v. Davis: "We agree with the district court that "the totality of the circumstances , taking into account Officer King's experience with the hospital's practices regarding patients' property, the appearance of the Defendant the time Officer King spoke with him, and the obvious fact that the Defendant had been shot in an area of the body usually covered by clothing" support the conclusion the bag under Davis' hospital bed contained the clothing he wore when he was shot.
  - f. Legal Rule – There is an exception for single purpose containers. A single purpose container "announces" its contents in way that a reasonable officer knows only contraband is inside.
  - g. Pro Tip: If you can see inside the container there is no additional intrusion.
9. Sensory Aids – Did suspect expect privacy? Would society consider it reasonable? Both are required!
- a. Review the slides with officer looking at a building versus officer using binoculars to look at a building. What about thermal imaging?
  - b. Can you shine a flashlight into a garage? Legal rule: Using flashlight to look inside a home falls under the "sunlight rule." Per Marshall v. U.S.: When the circumstances of a particular case are such that the police officer's observation would not have constituted a search had it occurred in daylight, then the fact the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned. The plain view rule does not go into hibernation at sunset.

- c. Example: Cop shined a light between the truck bed and the camper...search? When a person has taken affirmative measures to safeguard his property within an area from public view, a minute crack on the surface of such area can hardly be regarded as an implied invitation to any curious passerby to take a look.
10. Inadvertent – Legal Rule: Some states require that the observation be “inadvertent.” Essentially, you cannot use another warrant exception with the intent to view other evidence.
- a. Example: Cops have PC Johnny sells drugs from his apartment but get no warrant. They hear a medical call for his apartment and “assist” the Fire Department with intent to see plain view evidence. Lawful? Answer: Most states yes if the assistance was objectively reasonable. No in some restrictive states.

### **Module Two – Plain Feel**

Lawful patdown, immediately apparent, and probable cause as evidence.

1. Example: Minnesota v. Dickerson: The officer’s continued exploration of respondent’s pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under Terry...the protection of the police officer and others nearby.
2. Manipulation Issues:
  - a. Weapons have some wiggle room.  
Example: U.S. v. Rogers: During patdown an officer felt. Rolled up pack and wasn’t sure it contained a weapon. He then manipulated it to make sure. Held: We conclude that the police were acting well within the bounds of Terry. Sergeant Mason was conducting a lawful protective patdown search when he felt the heavy object in Roger’s coat pocket. He manipulated the object for a “few seconds” to determine what it was and felt “a hard object then a softer object.” At that point Mason was not yet able to exclude the possibility that there was a weapon in the pocket, so that the search was still within the bounds of Terry.
  - b. Contraband; no wiggle room. Legal Rule: Courts will provide no “wiggle room” if you don’t believe

- the item could be a weapon. At that point, it's either immediately apparent as evidence or it's not.
- c. Example: You lawfully begin to patdown a suspect who was alleged to have been involved in narcotics sales. During patdown officer felt "hard but flexible" object and removed it. Plain fees? Held: No, it needs to be "immediately apparent" as contraband.
  - d. Example: Officer lawfully patted down suspect and felt a Tic Tac container. Based on training and experience he knew that many people kept drugs in these containers. Good? Held: Evidence suppressed. Officer needed to articulate why THIS container likely contained contraband.
  - e. Example: Trooper lawfully conducts patdown and feels "large bulge" in suspect's pocket that based on training and experience was narcotics. Good? Held: Yes, the trooper immediately knew what it was.
  - f. Pro Tip: Immediately apparent is based on the totality of the circumstances.

3. Consider:

- Prior history
  - High drug area
  - Admissions
  - Evasiveness & nervousness
- a. What would you do? You detain a suspect because he may have robbed a suspect's watch. During a patdown, you feel a watch in his right front pocket. Can you size it? Answer:
  - b. What would you do? Passenger fled stop and driver was fidgeting with something near floorboard. During patdown cop felt a pill bottle in sock. Answer: Held: Flight, fidgeting, and add location for a pill bottle equaled PC.
  - c. What would you do? Officer saw someone had something to the suspect. The suspect looked around when putting item in his pocket. Suspect gave consent tot patdown and rock substance was recovered. Held: These additional facts help provide PC that the item was contraband.
  - d. Pro Tip: Ask for consent to "search" versus a "patdown."

End of class.