

Frisking and Searching

Facilitator Guide

Session Overview

Introduction & Learning Objectives	05m
Authority	20m
Scope of a Frisk / Plain Feel Doctrine	25m
Break	10m
Frisking Vehicles & Carry Items	10m
Frisk Factors	35m
Closing/Questions	05m
End of Session / Break	10m

Learning Objectives:

- Define the limitations of a frisk
- Recognize the US Court case that establishes frisk authority
- List items & places that fall within the scope of a lawful frisk

Total Session Time: 2 hours

Main Topics of Session:

- *Authority*
- *Relevant Court Cases*
- *Limits of a Frisk*
- *Plain Feel Doctrine*
- *Frisk Factors*

Facilitators Needed: #1 (CP)

Location: Classroom

Materials Needed:

- *PowerPoint – Frisking and Frisk Factors*
- *Mock weapons for practice*
- *MEDIA (6 min) – Highland Park Police Shooting*
- *MEDIA (2 min) – Near Miss Frisk*
- *MEDIA (2 min) – Officer Shoots Driver in Head*

Students Should Already Have:

[THUMB DRIVE]

- *HANDOUT – Procedures for Frisking*



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Frisking and Frisk Factors

"I should have checked the suspect for weapons....all of the signs were there."

Criminal Procedures



SAY TO CLASS – Frisking Authority

Introduce Facilitator and Objectives, explain class agenda and process:

- Inform the class that they will not be learning the physical act of frisking in this session. Instead, the materials will focus on discussing the legality of frisk and various case laws supporting it.



NOTE TO FACILITATOR

Use the notes in the PowerPoint - Frisking and Frisk Factors to guide the class through this session.



MEDIA (6 min) - Highland Park Police Shooting w/ Handcuffed Suspect

Show this clip to get the recruits thinking about how subjects we contact can be armed. Stress the importance of a thorough frisk and/or search incident to arrest.



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Warrantless Searches and Seizures *State v. Russell (2014)*

"As a general rule, warrantless searches and seizures are per se **unreasonable**, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution." *Id.*

There are several narrowly drawn exceptions to that rule, and the State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions. *Id.* at 249-50.

One exception to the warrant requirement is the so-called Terry stop and frisk that was first articulated by the Supreme Court of the United States in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 88g (1968).

Frisking Authority

Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. An officer who "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous to stop such person and to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, at 30-31.

A Terry stop alone is not enough to frisk - NOT automatic!



SAY TO CLASS - Frisking Authority

Authority for frisking comes from *Terry v. Ohio* and has been refined by various case law in this state. Be careful - just because you have a legal Terry stop doesn't automatically give you the right to frisk.

Refer to *State v. Collins*, *State v. Horrace* and *State v. Alcantara*



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Officer Safety

An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed or dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Terry*, 88 S. Ct. at 1883; *State v. Harvey*, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985); 3 W. LaFave, *Search and Seizure*, § 9.4(a) (2d ed. 1987).

Pat Down

- The court describes a frisk as “a minor inconvenience and petty indignity” which can be imposed upon the citizen in the interest of effective law enforcement and officer safety.
- Often called a “pat down.”
- “Stop and Frisk” is a misnomer. They must be independently justified.

WA Supreme Court

The Washington Supreme Court phrased the principle thusly: Courts are reluctant to substitute their judgment for that of police officers in the field. “A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.”

State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 919 (1993) (quoting *State v. Bellevue*, 112 Wn.2d 587, 601-02, 773 P.2d 416 (1989) quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)).



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Frisking for Weapons Only

- A FRISK is a patdown of a person's outer clothing, used to locate and neutralize weapons.
 - The officer must be able to articulate the reason(s).
 - Based upon the need for **officer safety**.
- This is **not** a search for evidence or contraband!
- Second frisks have been ruled as unreasonable.
WHY?



SAY TO CLASS

It is important for you to understand that this is NOT a search for evidence or contraband and you must be able to articulate the safety concern by identifying frisk factors that will be discussed later in the session.

NOT a search for evidence or contraband!

We are NOT the TSA

Second frisks have been ruled as unreasonable.

Officers may not do a second "more intensive" frisk of a person once the initial pat down is completed and there are no objective grounds for the officer to believe that the suspect, at the time of the second frisk, is presently armed or dangerous. See *State v. Xiong*, 164 Wn.2d 506, 191 P.3d 1278 (2008) (improper for officer to reach into a suspect's pocket as part of a more intensive frisk, when the initial frisk produced no weapons, and the suspect was handcuffed and cooperative).



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SAY TO CLASS

The courts have ruled that a second frisk is unreasonable and constitutes a search. If the officer did not find a/the weapon during the first frisk, then it was not easily accessible enough to the detainee. Frisks should be thorough but cannot be as intrusive as a search.

State v. Xiong, 64 Wn.2d 506, 191 P.3d 1278 (2008)

You only get one chance to frisk - be thorough but not as intrusive as a search!!

Frisking Limits

What's a weapon?

If the officer **feels an item of questionable identity that has the size and density such that it might or might not be a weapon**, the officer may only take such action as is necessary to examine such object." *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994).

Frisking Limits

What are the limits?

*Upon recognizing a possible weapon, the officer may intrude further into the protected area in order to identify the object.... **if the item is accessible.***

What if you feel contraband?



PLAIN FEEL- State of Washington

- If an officer encounters a soft item during a frisk that cannot contain a weapon, the officer may not manipulate the item in order to determine whether the item may be drugs, etc. *See State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009) (“it is unlawful for officers to continue squeezing—whether in one slow motion or several—after they have determined a suspect does not have a weapon, to find whether the suspect is carrying drugs or other contraband”).

**SAY TO CLASS**

If, during your search for weapons, you identify something that is not a weapon, but it is *immediately recognizable* as contraband (i.e. a baggie of crack cocaine), you can secure the item(s) and make an arrest.

However, the burden of proof required by case law to prosecute these types of cases is almost impossible for the prosecution to meet. The Court recognizes that we do not have x-ray fingers and can't tell if the soft substance we feel is narcotics.

With this in mind, it is always better to attempt to get consent for the item and develop PC on what you were originally investigating...then retrieve the suspected narcotics (or other item) on a search incident to arrest.

“Plain Feel” - difficult to articulate and prove.
(*State v. Hudson*)

PLAIN FEEL- State of Washington

- An officer may, however, seize the item under the “plain feel” doctrine if the officer was immediately able to recognize the item as contraband. *See Sate v. Hudson*, 124 Wn.2d 107, 874 P.2d 160 (1994).
- **This burden, however, is virtually impossible for the prosecution to meet.**



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What's a Weapon?

- Not merely the *obvious* knife or gun.
- Hard objects that have reasonable size and density:
 - Pens (may contain spikes or tear gas)
 - Cellphones (may be makeshift guns)
 - "Credit cards/Belt buckles (knives may be concealed behind them)
 - Keys
 - Marijuana pipe?

How reasonably accessible was the item?

If the officer has possession of the item that may contain a weapon, it is no longer "accessible" to the person being detained. *State v. Russell*.



BREAK

Frisk Scope

The scope of a valid Terry frisk is limited to protective purposes. *Garvin*, 166 Wn.2d at 250. The frisk must be brief and nonintrusive. *Id.* at 254. "If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object." *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994).

"Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent." *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980).



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Frisk Scope

What else falls into the scope of a lawful frisk?



SAY TO CLASS

Frisk is transferrable to vehicles and carry items with articulation. The Court's rationale is that the officer might not get to probable cause on the lawful stop and they may have to give back the carry item or let the subject back in the vehicle.

Accord State v. Chang, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008). *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989)

Frisks should start with the subject first, then extend to the car or carry item.

When frisking a carry item, start with a pat down of the outside of the item. You may NOT manipulate the contents. If you feel something that may be a weapon, then you can proceed to retrieve and secure it. You are NOT permitted to just open the item for a visual inspection first or dump the contents out.

Frisk is transferrable to vehicles & carry items - **must articulate.**



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Frisking a Vehicle

Vehicles –

“Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect’s vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.” *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997).



SAY TO CLASS

When frisking a carry item, start with a pat down of the outside of the item. You may NOT manipulate the contents. If you feel something that may be a weapon, then you can proceed to retrieve and secure it. You are NOT permitted to just open the item for a visual inspection first or dump the contents out.

Frisking a Carry Item

Carry items to include purses, hand bags, back packs and alike.

How do you do that? You must start with a pat down of the outside of the item. You may not manipulate the contents. If you feel something that may be a weapon then you can proceed and to retrieve and secure it. You are not permitted to just open the item for a visual inspection first or dump the contents out.

May NOT manipulate, open the item or dump out its' contents.



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Frisking and Frisk Factors

- Contact is for a suspected crime of violence
- Officer is alone
- Subject is agitated
- Subject is intoxicated
- Subject is wearing bulky clothing
- Subject has prior history of being armed
- Contact during darkness and/or isolated location
- Subject is nervous
- Subject is mentally challenged
- *Hands in pockets

NO automatic frisk factors.

Frisking and Frisk Factors

- Suspicious bulges
- Weighted pocket
- Threats/hostility from suspect
- Suspicious clothing
- Witness information
- History of area
- Furtive movements
- Suspect's associates are armed

Some factors may stand alone (like contact for a violent crime) - more common to have a combination of factors.

Factors that will support a frisk for weapons include

Suspect refuses to keep hands in plain view. *See, e.g., State v. Harper*, 33 Wn. App. 507, 655 P.2d 1199 (1982) (frisk justified where defendant thrust his hands into his coat pockets during questioning).



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Factors that will support a frisk for weapons include

Suspect's clothing would allow for concealment of weapon. *See, e.g., State v. Xiong*, 137 Wn. App. 720, 154 P.3d 318 (2007) (bulge in front pocket of suspect who had no identification and who resembled his brother who had outstanding felony arrest warrants).

Factors that will support a frisk for weapons include

Departmental policy requires frisk prior to transporting in patrol car. *State v. Wheeler*, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987).

Factors that will support a frisk for weapons include

Reported crime involved the use of a weapon. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989) (report of numerous burglaries where guns were stolen); *State v. Harvey*, 41 Wn. App. 870, 873, 707 P.2d 146 (1985) (frisk upheld where detainee was stopped near the scene of a burglary because "[i]t is well known that burglars often carry weapons.").



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Factors that will support a frisk for weapons include

Past experience with suspect. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).

Factors that will support a frisk for weapons include

Discovery of one weapon. *See, e.g., State v. Olsson*, 78 Wn. App. 202, 895 P.2d 867 (1995) (officer who was informed by a driver that he was carrying a knife had grounds for frisking the driver to determine whether he was carrying additional weapons); *State v. Swaite*, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (officer was justified in conducting frisk for additional weapons where detainee had a knife in his belt).

Factors that will support a frisk for weapons include

A peculiar way of opening a car door with the farther hand, while keeping the hand closest to the door near his pocket. *United States v. Burkett*, No. 09-30260, ___ F.3d ___ (9th Cir. Jul. 20, 2010)



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Factors that will NOT support a frisk

Close Quarters. A frisk may not be conducted of a suspect merely because the officer will be confronting the suspect with suspicions that the suspect has engaged in a non-violent offense in a small room. The officer must, in order to conduct a frisk, have a basis to believe that the suspect is armed or dangerous. *United States v. Flatter*, 456 F.3d 1154 (9th Cir. 2006).

Factors that will NOT support a frisk

Presence in Stolen Vehicle. The mere fact that someone is a passenger in a stolen car does not provide an officer with grounds to conduct a frisk. *State v. Adams*, 144 Wn. App. 100, 181 P.3d 37, review denied, 164 Wn.2d 1033 (2008).

Factors that will NOT support a frisk

Presence in High Crime Area. The fact that a detention occurs in a high-crime area is not in itself sufficient to justify a search. See *State v. Smith*, 102 Wn.2d 449, 452-53, 688 P.2d 146 (1984) (holding that the inquiry must focus on the defendant and his actions, not the area where he was found).



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Factors that will NOT support a frisk

Intoxication. An officer who encountered an individual who appeared to be under the influence of methamphetamine in a public area of the DSHS building had no basis for conducting a frisk as the intoxicated individual offered no threatening gestures or words and remained seated during the encounter. The fact that the individual seemed nervous and fidgety and lied about his name did not provide a basis for conducting a frisk. *State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008). See also *Ramirez v. City of Buena Park*, 560 F.3d 1012 (9th Cir. 2009) (being "testy" and suspected of illicit drug use does not support a finding that an individual may be armed or dangerous).

Factors that will NOT support a frisk

Nervousness. Person appears nervous and lies about his or her name. *State v. Xiong*, 164 Wn.2d 506, 512-13, 191 P.3d 1278 (2008).

"Miniature Weapons" State V. Russell (2014)

In a frisk.....The search of the container in this case violated Russell's constitutional right to be free from police intrusion. The officer felt a small container, removed it, and then opened it without a warrant. He admitted that the contents of the container weighed only a fraction of what the pistol weighed. Therefore, we conclude that no reasonable person could believe that the container housed a gun. At the point at which he discovered that the container did not house a weapon, his authority to invade Russell's privacy and search the container any further ended.



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"Miniature Weapons" State V. Russell (2014)

This case is similar to *Allen*, where this court held that the warrantless search of a wallet found during a stop and frisk was unconstitutional. *id.* The court determined that once the officer discovered that the wallet was not a weapon, the permissible scope of the frisk ended.

The Court of Appeals applied similar logic and held that the warrantless search of a cigarette pack found during a Terry frisk was unconstitutional in *State v. Horton*, 136 Wn. App. 29, 38-39, 146 P.3d 1227 (2006).

"Miniature Weapons" State V. Horton

However, in cases where a pat-down is inconclusive, an officer may reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. See *Hudson*, 124 Wn.2d at 112-13. Under this rule, courts have held that it was proper to remove a cigarette pack, a wallet, and a pager. See *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); and *State v. Fowler*, 76 Wn. App. 168, 170-72, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995).

"Miniature Weapons" State V. Horton

Once a container is removed, an officer may only open the item if it is large enough to contain a small or normal sized weapon. A container that can only accommodate a "miniature weapon" may not be opened. *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2007). A razor blade is properly classified as a "miniature weapon". *Id.* A container the size of a cigarette pack or smaller is deemed only capable of holding a "miniature weapon." *Id.* An officer may separate the suspect from containers that are only capable of holding miniature weapons until the conclusion of the stop.)



Passengers in Vehicles

See the Mendez Checklist.

Frisks on Social Contacts?

- Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying "hello" to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., *Terry* stop). While the term "social contact" suggests idle conversation about, presumably, the weather or last night's ball game -- trivial niceties that have no likelihood of triggering an officer's suspicion of criminality -- social contacts in the field may include an investigative component.

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009).

Frisks on Social Contacts?

- Restrictions on Social Contacts-**

The following conduct is beyond the scope of a social contact or consensual encounter:

Requesting permission to frisk or search. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009); *State v. O'Day*, 91 Wn. App. 244, 252, 955 P.2d 860 (1998).



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Frisking and Frisk Factors

What are some of the ethical considerations an officer may have to deal with when deciding to conduct a frisk and when doing a frisk?

The US and WA State Constitution

Frisking and Frisk Factors

Source-

CONFESSIONS, SEARCH, SEIZURE, AND ARREST A GUIDE FOR POLICE OFFICERS AND PROSECUTORS June 2014- Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys



NOTE TO FACILITATOR

As time permits, take a student volunteer to be the officer out into the hall and have another student volunteer to play the role of a suspect. Have the officer student return to the classroom where the "suspect" will demonstrate some frisk factors. Walk the "officer" through being able to articulate why he/she conducted a frisk of the "suspect."



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IMPORTANT POINT

Remember to **force** a frisk, you must first have a lawful detention. Sometimes this is a hard concept to grasp. Some students will ask “if a suspect has his hands in his pockets during a social contact and will not take them out of his pockets when the officer requests, can you force a frisk?” The answer is....IF the officer can articulate using their training and experience and the totality of the circumstances that, by the suspect’s behavior (whether it be hands in pockets, fighting stance, etc.) they feared they were about to be the subject of an assault then you are no longer at a social contact. NOW you have reasonable suspicion (a lawful detention is justified based on the officer’s articulation that he/she was about to be the victim of the crime of assault) and can frisk.



MEDIA (2 min each) - Near Miss Frisk / Officer Shoots Driver in Head

If time allows, play one or both video clip to further emphasis the importance of thorough frisks and searches.



BREAK/END OF SESSION

