

Arrest, Search and Seizure/Constitutional Law

BLET: 04Z

TITLE: ARREST, SEARCH AND SEIZURE/CONSTITUTIONAL LAW

Lesson Purpose: To familiarize the student with constitutional law and the laws of arrest, search, and seizure so that the student may recognize those laws' appropriate application in enforcement situations.

Training Objectives: At the end of this block of instruction, the student will be able to achieve the following objectives by information received during the instructional period.

1. Name and describe, in writing, the three (3) sources of law.
 - a) Constitutional law
 - b) Statutory law
 - c) Common law
2. State how the First Amendment affects the law enforcement function.
3. State the criminal and civil consequences law enforcement officers may face as it relates to violating a citizen's constitutional rights.
4. Identify how law enforcement authority is affected by subject matter and territorial jurisdiction.
5. State the definitions of "reasonable suspicion" and "probable cause."
6. State the North Carolina statutory requirements for:
 - a) G.S. 15A-401 – making a warrantless arrest;
 - b) G.S. 15A-404 – a citizen detention;
 - c) G.S. 15A-405 – assistance to enforcement officers by private persons to effect arrest or prevent escape.

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7. State the role of law enforcement as it relates to ~~in~~ the issuance of various forms of criminal process.
8. Identify the following police-citizen encounters:
 - a) Voluntary contact
 - b) Investigative detention
 - c) Arrest
9. State the statutory procedures officers must follow after making an arrest.
10. State the statutory requirements for conducting an arrest with a warrant.
11. Identify the appropriate level of force when given fact scenarios involving deadly and non-deadly force situations.
12. State the scope of the following warrantless searches:
 - a) Consent searches of persons, premises, or vehicles
 - b) Searches based on probable cause and exigent circumstances
 - c) Searches and seizures based on the plain view doctrine
13. State the legal requirements for conducting searches of motor vehicles.
14. Identify the legal requirements governing preparation and execution of a search warrant for a suspect's premises, vehicle, or person.
15. Identify the special search warrant concerns in obscenity, crime scene, and financial crime situations.
16. Identify the situations when only a District Attorney's Office may apply for a warrant or order.

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17. Identify the legal concepts of “custody” and “interrogation” as they relate to the requirements of the United States Supreme Court decision, *Miranda v. Arizona*.
18. Recite the four (4) *Miranda* warnings, as well as the additional juvenile warning under G.S. 7B-2101.
19. Identify and explain the exceptions to the *Miranda* requirement.
20. State how non-custodial interview techniques can be used to obtain lawful confessions.
21. State how the Fifth Amendment and Sixth Amendment rights protect suspects during interrogation by law enforcement officers.
22. Identify the procedures for conducting a photographic lineup under the North Carolina Eyewitness Identification Reform Act.

Hours: Twenty-eight (28)

Instructional Method: Lecture, Discussion

Testing Requirement(s): End of block test

Training Environment(s): Classroom

Materials Required: Audio-visual classroom equipment
Miranda Rights Warning Cards (available from the Legal Center at the North Carolina Justice Academy)
Current edition and supplements of Farb textbook
Handouts

References: Farb, Robert. *Arrest, Search, and Investigation in North Carolina*, 4th ed., Chapel Hill, NC: School of Government, University of North Carolina at Chapel Hill, 2011.

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North Carolina, General Statutes. (2019) 7B-1900, "Taking a juvenile into temporary custody."

North Carolina, General Statutes. (2019) 7B-1901, "Duties of person taking juvenile into temporary custody."

North Carolina, General Statutes. (2019) 7B-2103. "Authority to issue nontestimonial identification order where juvenile alleged to be delinquent."

North Carolina, General Statutes. (2019) 7B-3100. "Disclosure of information on juveniles."

North Carolina, General Statutes. (2019) 7B-3101. "Notification of schools when juveniles are alleged or found to be delinquent."

North Carolina, General Statutes. (2018) 14-190.20, "Warrants for obscenity offenses."

North Carolina, General Statutes. (2019) 15A-284.52. "Eyewitness identification reform."

North Carolina, General Statutes. (2018) 15A-303, "Criminal summons."

North Carolina, General Statutes. (2018) 15A-401, "Arrest by law enforcement officer."

North Carolina, General Statutes. (2018) 15A-404, "Detention of offenders by private persons."

North Carolina, General Statutes. (2018) 15A-501, "Police processing and duties upon arrest generally."

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North Carolina, General Statutes. (2018) 15A-503, “Police assistance to persons arrested while unconscious or semiconscious.”

North Carolina, General Statutes. (2018) 15A-505, “Notification of parent and school.”

North Carolina General Statutes. (2018) Chapter 15A, “North Carolina Criminal Procedure Act.”

Sharps, Matthew J., and Adam B. Hess, “To Shoot or Not to Shoot: Response and Interpretation of Response to Armed Assailants.” *The Forensic Examiner*. Last modified December 2008. Accessed March 2014. <http://www.forcescience.org/articles/study%20shoot-or-not.pdf>.

State v. Blackstock, 165 N.C. App. 50 (2004).

State v. Johnson, 627 S.E.2d 488 (2006).

State v. Murphy, 342 N.C. 813 (1996).

State v. Stone, 362 N.C. 50 (2007).

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Date Revised: July 2014
January 2015
January 2016
July 2016
January 2017
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TITLE: ARREST, SEARCH AND SEIZURE/CONSTITUTIONAL LAW – Instructor Notes

1. This lesson plan must be presented by an instructor currently certified by the North Carolina Criminal Justice Education and Training Standards Commission as a General Instructor. Due to the intricate nature of this material, it is recommended that this block of instruction be taught by an attorney who is very familiar with criminal law and procedure.
2. Every student must have a copy of the current edition and supplements of Robert Farb's textbook, *Arrest, Search, and Investigation in North Carolina*.
3. It is recommended for the instructor to review the supplemental documents authored by Robert Farb to further prepare themselves for class discussion regarding recent law changes.
4. To promote and facilitate law enforcement professionalism, three (3) ethical dilemmas are listed below for classroom discussion. At their discretion, instructors must provide students with each ethical dilemma listed below. Sometime during the lecture, instructors should "set the stage" for the dilemma before taking a break. Instructors are encouraged to develop additional dilemmas as needed.
 - a) An arrest warrant is issued by a judicial official. The officer knows this is for the wrong person. Should he serve the warrant anyway and explain it to the magistrate, or should he refuse to serve the warrant? Why or why not?
 - b) The level of force used by a law enforcement officer is excessive. The officer knows no one saw what happened. Should he write the report favorably toward himself or tell the truth, knowing it could result in disciplinary action?
 - c) A patrol officer encounters an individual in a public place who curses at the officer in a threatening manner. The officer draws his weapon and tells the suspect he is going to kill him. You are his partner; what is your response?

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I. Introduction

A. Opening Statement

NOTE: Show slide, “Arrest, Search & Seizure/Constitutional Law.”

The United States Constitution guarantees citizens various rights and freedoms and provides them certain protections in their dealings with the government. Because of the Constitution, and the various amendments discussed in this lesson plan, the government is limited in its ability to restrict a citizen’s freedom of speech; citizens are protected against unreasonable searches and seizures by government agents, and citizens cannot be forced to incriminate themselves in a criminal proceeding. These are just a few of many freedoms and protections afforded citizens by our Constitution. North Carolina, through its Constitution and legislation, has also provided its citizens certain rights and protections when dealing with law enforcement officers, as government agents, to comply with both Constitutional and statutory requirements when engaged in official duties. Failure to do so may lead to adverse consequences for the officer who engages in the illegal conduct, including criminal prosecution, civil liability, suppression of evidence recovered from the suspect, and department discipline. Furthermore, the citizens whom you are sworn to protect and serve deserve to have their rights respected and honored.

B. Training Objectives

NOTE: Show slides, “Training Objectives.”

1. Name and describe, in writing, the three (3) sources of law.
 - a) Constitutional law
 - b) Statutory law
 - c) Common law
2. State how the First Amendment affects the law enforcement function.
3. State the criminal and civil consequences law enforcement officers may face as it relates to violating a citizen’s constitutional rights.
4. Identify how law enforcement authority is affected by subject matter and territorial jurisdiction.

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5. State the definitions of “reasonable suspicion” and “probable cause.”
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20. State how non-custodial interview techniques can be used to obtain lawful confessions.
21. State how the Fifth Amendment and Sixth Amendment rights protect suspects during interrogation by law enforcement officers.
22. Identify the procedures for conducting a photographic lineup under the North Carolina Eyewitness Identification Reform Act.

C. Reasons

Law enforcement officers must be knowledgeable in the laws about arrest, search, and seizure to lawfully apprehend criminal offenders and obtain evidence for use in prosecution. Knowledge of the laws and legal issues involving arrest, search, and seizure will help you effectively and quickly command criminal investigations, assert control over dangerous situations, and protect yourself, other officers, and citizens while engaged in law enforcement. Further, successful prosecution of criminals requires you to properly apply the laws of arrest, search, and seizure in the field.

II. Body

A. Introduction to Constitutional Law

This introduction to constitutional law will cover the three (3) sources of law, a brief overview of the United States Constitution, and the consequences of violating constitutional rights.

1. Historical background

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NOTE: Show slide, “Historical Background.”

Americans were always greatly concerned with the concept of law and freedom. Several of the American colonies were established to gain individual freedoms and rights, such as the freedom of religion. These colonies considered basic freedoms inalienable or not subject to change. When these rights were threatened, the colonists acted to protect them. They acted by writing down the concepts or principles in a document called the United States Constitution.

2. Sources of law

NOTE: Show slide, “Sources of Law.”

a) Constitutional law

The basic law of the land is the United States Constitution. This document sets forth the fundamental principles for government, including grants and limitations of power. Constitutional provisions have greater permanence, are broader in application, and concern more fundamental issues of law than statutes enacted by the legislative branch of government or rules created by decisions of the judicial branch. Thus, it is said that Constitutional law is the supreme law of the land. All other laws must comply with the basic constitutional provisions. Next in importance is statutory law, and then common law.

Each state also has its constitution, generally modeled after the United States Constitution. A typical state constitution:

- (1) Describes the basic organization of the state government, including the legislative, judicial, executive, and administrative branches;
- (2) Establishes basic rights of citizens of the state; and
- (3) Makes provisions for amendments and legislative enactments.

Constitutional law is more than just the written document; it also includes judicial interpretations of the constitution, which are outlined in judicial decisions. Such decisions may address the authority and duties of the President, Congress, courts,

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public officials, and may also affect governmental habits and customs.

b) Statutory law

Written laws enacted by the legislative branches of the state or federal governments are called statutes. Statutory law declares, commands, or prohibits something. It is the written will of the politically elected legislature, which in this state is the North Carolina General Assembly. Courts interpret the meaning of the statutes. Written laws of local governments (cities and counties) are called ordinances. Examples of statutes are 18 United States Code (“U.S.C.”) 2510, the Omnibus Crime Control and Safe Streets Act of 1968, North Carolina General Statute (“G.S.”) 15A-251 (Entry by Force) and 20-138.1 (Driving While Impaired).

c) Common law

(1) Common law is judge-made law. Judicial decisions may establish rules and principles where the legislature has not enacted statutes, or where a statute needs clarification or interpretation. Common law is frequently referred to as case law.

(2) Common law developed over many years in England based on court decisions and custom. Colonists imported England’s common law to what became the United States, and it survives today, greatly expanded and changed by the published decisions of our courts. Many common law principles have been codified in state statutes.¹

(3) Legislatures and voters must enact or ratify constitutions or statutes for them to become effective. However, common law is binding and effective unless expressly abandoned by statute or court decision (G.S. 4-1.) In our history, common law precedes both statute and constitutional law. Although there is a strong preference in the United States to codify criminal law and procedure rather than to leave the common law as the controlling authority, some common law crimes remain. Some North Carolina examples are conspiracy and involuntary manslaughter.

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3. Types of law

NOTE: Show slide, “Types of Law.”

a) Substantive law

Substantive law defines the rights and duties of citizens. It is created by legislative or judicial action. It prohibits conduct such as robbery, larceny, or assault.

b) Procedural law

Procedural law specifies the method whereby substantive law is enforced. The statutes concerning issuance, execution, and return of search warrants are examples of procedural laws.

B. United States Constitution

NOTE: Show slide, “United States Constitution.”

Our Constitution is a concise document. However, the U.S. Constitution was not intended to cover every detail of law or scenario which might arise in the future. It is a flexible, dynamic document subject to judicial decisions, legislative enactments, custom and usage, and to a lesser degree, the formal process of amendment provided for in the document itself.

1. The U.S. Constitution is divided into seven (7) major articles:

a) Article I establishes the structure and functions of Congress.

The legislative powers of the United States government are vested in a Congress made up of two (2) chambers: the Senate and the House of Representatives.

b) Article II establishes the executive branch of government and provides that the executive powers are vested in the President.

This Article also provides the qualifications of the President and Vice President, the method for their election, and their oaths of office. There are also provisions on the method and grounds for removal (impeachment).

c) Article III vests the judicial powers of the United States in the Supreme Court of the United States and any inferior courts established by Congress.

d) Article IV defines the duties that states owe each other.

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- e) Article V provides the procedures to amend the Constitution.
 - f) Article VI contains the Supremacy Clause, which says that the Constitution, laws, and treaties of the United States are the **Supreme Law** of the land. Judges of every state are bound by the U.S. Constitution regardless of contrary state law. This article also requires all legislative, executive, and judicial officers of both the states and the United States to take an oath to support the Constitution.
 - g) Article VII contains the requirements for the original ratification of the Constitution. It is of historical importance only.
2. The Constitution grants four (4) procedural safeguards to persons accused of crimes.

NOTE: Show slide, “Procedural Safeguards.”

- a) Habeas corpus

Article I, Section 9 provides: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.” A writ is an order of a court commanding a government official to perform an act. “*Habeas corpus*” is a Latin phrase meaning, “have the body.” This provision allows issuance of a Writ of Habeas Corpus. This writ is directed to the person detaining the subject of the writ (a prisoner) and requires that custodian to bring the prisoner before a judge for a determination upon the legality of the detention. The objective of the writ is the fast release of an illegally detained person. Failure to comply with the order is a crime. Judges must review petitions for a writ of habeas corpus when asked.

- b) Jury

Article III, Section 2, requires that all criminal cases except impeachment be tried by a jury.
[The Sixth Amendment supersedes this provision.]

- c) Bills of attainder

Article I, Sections 9 and 10, prohibit Congress and the states from enacting “Bills of Attainder.” A bill of attainder is a

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special act of the legislature inflicting punishment on a person without a conviction through judicial proceedings. The legislature improperly acts as a court and pronounces the guilt of a person without any of the common forms, procedures, or safeguards of a trial.

d) Ex post facto laws

Article I, Sections 9 and 10 forbid the enactment of “*ex post facto*” laws. Such laws are illegal because they attempt to make certain conduct illegal after the fact. This provision prohibits any law which makes criminal an act which was innocent when done or which inflicts a greater punishment than allowed at the time of the prohibited action.

3. Amendments

a) Bill of Rights

NOTE: Show slide, “Bill of Rights.”

The first ten (10) amendments to the Constitution are called the “Bill of Rights.” During the battle over ratification of the Constitution, one (1) of the strongest objections raised by its opponents was its lack of a Bill of Rights. Several states ratified the document but urged the Continental Congress to reconvene and propose the needed amendments to protect individual rights. These states proposed a total of 124 amendments. Ten (10) were finally approved and became our “Bill of Rights.”

The Bill of Rights was written to protect certain guarantees or immunities the colonists felt were fundamental and not subject to change. Originally, the Bill of Rights only restricted the federal government. The framers of the Constitution specifically rejected several amendments which directly applied these restrictions to the states. The framers wanted to prevent the strong central government they created from violating certain individual rights. Over time, though, the Supreme Court decided that most of the protections in the Bill of Rights apply to the states as well as the federal government.

b) Selective incorporation

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For many years, there was a double standard in the courts regarding individual rights. Courts applied one (1) standard to the federal government and another standard to the states. Gradually, through the **Due Process Clause** of the Fourteenth Amendment, the United States Supreme Court applied most of the safeguards in the Bill of Rights to the states.

Without the Fourteenth Amendment due process and equal protection clauses, the United States Supreme Court could not review state decisions on search and seizure, self-incrimination, and the right to counsel.

C. The Bill of Rights and the Fourteenth Amendment as They Affect Law Enforcement

1. The First Amendment

NOTE: Show slide, “First Amendment.”

The First Amendment establishes rights that we consider basic in a free society. These rights are the freedoms of religion, speech, press, assembly, and petition.

a) Religion

Congress cannot make any law concerning the establishment of religion or prohibiting the free exercise of religion. These two (2) clauses prevent the federal government from establishing a national church (requiring support by taxation) or from intruding on personal religious beliefs

(1) Establishment clause

The government may not require or enforce religious observations. The government may not compel citizens to follow any particular religion, either through law or spending of tax dollars. Judicial interpretation of this clause has, for example, led to restrictions on government maintained holiday displays which contain religious symbols. Such displays are permissible only when they do not appear to endorse religion. *County of Alleghany v. A.C.L.U.*, 492 U.S. 573, (1985).

(2) Free exercise clause

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Citizens have a right to worship God, a Supreme Being, or hold any other belief in compliance with their conscience (or not to hold such beliefs). However, states may prohibit most criminal acts even if they are performed under the guise of religious ceremony (such as, for example, the use of peyote during a religious ceremony). *Employment Division v. Smith*, 494 U.S. 872, (1990).

b) Speech

The First Amendment protections for speech and press are directed toward the right to criticize and publish freely. While First Amendment rights are not absolute—they are subject to reasonable time, place, and manner limitation by the federal and state government—the Amendment bars most prior restraints of expression and punishment of all but a narrow range of expression. “Prior restraint” means prohibiting speech before it is made. An example of prior restraint is England’s use of censorship of the press to suppress criticism of the crown at the time of the American Revolution. The English government burned books, destroyed printing presses, and sent “subversive” authors to prison. They suppressed political dissent with “seditious libel” laws. This offense consisted of speaking out against public officials. A person committed this offense by reading objectionable material, hearing it read, laughing about it, or repeating it to others. The colonists’ revulsion toward such laws led in part to the Revolutionary War.

(1) Belief

Freedom of expression begins with freedom of belief or non-belief. The government cannot coerce its citizens to affirm or disavow a belief. A right to believe or not to believe has little value without the corresponding right to express that belief or lack thereof. Again, though, freedom of expression is subject to reasonable “time, place, and manner” restrictions by the government. The government can, for example, prohibit participants in an otherwise lawful pro-abortion demonstration from lying down in the street and blocking traffic. (G.S. 20-174.1 Standing, Sitting or Lying Upon Highway or Streets Prohibited).

(2) Symbolic speech

Protected speech includes the spoken and written word, the act of not speaking, and symbolic conduct. The First Amendment may also protect actions intended to convey meaning or symbolic speech. The United States Supreme Court has ruled, for example, that burning the American flag is symbolic speech and protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397, (1989). In a similar vein, the United States Supreme Court has upheld the right of a Vietnam War protester to wear a jacket with the phrase “f--- the draft” inscribed on the back. *Cohen v. California*, 403 U.S. 15, (1977).

(3) Restrictions on free speech

Certain methods of communication may conflict with the goals and values of society. For example, mass pickets, street rallies, marches, and demonstrations can cause serious traffic problems, elevate noise levels, inconvenience other citizens, and provoke riots. The government may require compliance with reasonable time and place restrictions by citizens who use public areas. These restrictions must be content-neutral (meaning the subject of the speech cannot be screened by the government), narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.

The Constitution does not give everyone an unqualified right to speak out on any conceivable subject at all times and places. Falsely shouting “fire!” in a crowded theater or auditorium with the likely result of causing panic is not protected.

(3) Examples of reasonable government “time, place, and manner” regulation of speech include prohibition of:

- i) Certain activities involved with anti-abortion protests. In a series of decisions, the federal courts have allowed restrictions on the activities of anti-abortion protestors to ensure access

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to abortion facilities and to limit interference with patients of such clinics.

- ii) “Offensive” or “indecent” speech on a public medium such as the radio. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, (1978).

The following types of speech have no First Amendment protection and thus may be barred by the government:

- (b) Obscenity

Obscenity is a depiction of sexual conduct that taken as a whole, by the average person, applying contemporary community standards, appeals to the prurient interest in sex, portrays sex in a patently offensive way, and does not have serious literary, artistic, political, or scientific value. In North Carolina, the sale, creation, or possession for sale of obscene materials is a Class I felony. G.S. 14-190.1.

- (c) Fighting words

Words addressed to an ordinary citizen which are intended and are likely to incite immediate physical retaliation are not protected by the First Amendment. Note that insults alone are not “fighting words” unless they are so provocative as to incite violence. The United States Supreme Court has stated that because of the nature of the job, law enforcement officers are expected to endure greater verbal abuse than the ordinary citizen (the Court reasoned that an officer’s professionalism and training make him much less likely to be incited to a violent reaction). *Lewis v. New Orleans*, 415 U.S. 130, (1974).

- (d) Threats

Threats, which are utterances calculated to intimidate, provide no social benefit. The threat must be genuine, and the person making the

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threat must be reasonably capable of carrying it out for the threat to lose First Amendment protection. See, e.g., G.S. 14-118 (Blackmailing).

(e) Incendiary speech

Incendiary speech advocates the imminent violent use of force against the government. Protests against the government are, of course, lawful unless and until the speaker encourages the protesters to engage in violent, lawless action, and such lawlessness is likely to occur. *Brandenburg v. Ohio*, 395 U.S. 444, (1969). As an example, an intoxicated person muttering to himself in a bar that “the government should be overthrown” is not unlawfully speaking. On the other hand, it would be illegal for a member of a hate group to urge receptive fellow members to bomb federal or state property. See, e.g., G.S. 14-11 (Activities aimed at overthrow of government).

c) Press

The First Amendment protects the right to gather and receive information. Members of the organized press often assert this right. However, the press has no more right of access to information than the individual citizen, and the government may lawfully limit access to information in certain circumstances. Members of the press may not, for example, demand access to crime scenes or disaster areas when their presence could disrupt law enforcement efforts. Also, in some circumstances, law enforcement officers may recover information held by the press. For example, law enforcement officers may obtain search warrants for newspaper files when evidence of criminal conduct is present.

d) Assembly and petition

The First Amendment protects the right to peaceably assemble and petition the government for a redress of grievances. With one (1) major exception—the years 1861-1865—our nation has experienced over two (2) centuries of internal stability under one (1) Constitution. One (1) reason for this peace is the First

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Amendment. When citizens can openly criticize their government and advocate change, the chances of an orderly political process are maximized. Dissident and radical groups will always exist, but the First Amendment provides a safety valve for them to express discontent (within reasonable constitutional limits).

2. The Second Amendment

NOTE: Show slide, “Second, Third, and Fourth Amendments.”

The Second Amendment states that Congress shall not infringe on the right of the people to keep and bear arms. It was intended to protect the **individual’s** right to possess personal firearms for lawful purposes. See *District of Columbia v. Heller*, 554 U.S. 570, (2008).

3. The Third Amendment

The Third Amendment prevents the quartering of troops in private homes without legally approved procedures.

4. The Fourth Amendment

a) History

The Fourth Amendment prohibits unreasonable searches or seizures by the government. This amendment originally addressed the issuance of general search warrants—called “writs of assistance”—by the English kings. These writs authorized the holder to enter any house or other place to search for and seize “prohibited and unaccustomed” goods. They commanded all loyal subjects to assist in these searches. Once issued, the writs remained in force until six (6) months after the death of the sovereign. A more detailed discussion of the officer’s rights and responsibilities under the Fourth Amendment appears later in this block of instruction.

b) Exclusionary rule

The U. S. Supreme Court created the “exclusionary rule” to enforce the Fourth Amendment’s prohibition against “unreasonable searches and seizures.” The exclusionary rule makes any evidence obtained by the government through an illegal (unreasonable) search and seizure inadmissible in court. *Mapp v. Ohio*, 367 U.S. 643, (1961).

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5. The Fifth Amendment

NOTE: Show slide, “Fifth Amendment.”

The Fifth Amendment specifies the rights of persons accused of crimes and thus has a special significance for law enforcement officers. There are five (5) different provisions in this amendment, but this block of instruction will only examine: the double jeopardy, self-incrimination, and the due process clauses.

a) Double jeopardy

The provision against double jeopardy protects an individual against the hazards and pressures of repeated trials and possible conviction for the same offense. Jeopardy is the danger of conviction and punishment when an accused is placed on trial in a criminal action. There is no protection against double jeopardy in a civil action. In a jury trial, jeopardy attaches when the court impanels and swears in the jury. In non-jury trials, jeopardy attaches after the first witness is sworn. Where the same conduct violates the laws of two (2) States or of a state and the federal government, each of the sovereign entities may separately try and punish for the violation of its laws.

b) Self-incrimination

This provision preserves the common law rule that the State cannot compel a person to furnish statements against one self. This protects a witness against the danger of giving forced testimony that leads to infliction of criminal penalties. This right to silence attaches when a person who is in custody is interrogated by law enforcement. Persons may waive this right after they are notified of their rights under the United States Supreme Court case, *Miranda v. Arizona* (discussed at length below). The remedy for such government compelled self-incrimination is that the compelled statements may not be used in any criminal prosecution.

The U. S. Supreme Court has also ruled that, in addition to the right not to speak, an accused has the right to the presence of counsel during custodial interrogation.

c) Due process

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The Fifth Amendment due process clause applies only to the federal government, not the states. Therefore, the “due process” officers must be most concerned with is found in the Fourteenth Amendment. The concept remains the same, even though the amendment number may be different. The Supreme Court defined due process as “a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society. . . Due Process is that which comports with the deepest notions of what is fair and right and just.”

6. The Sixth Amendment

NOTE: Show slide, “Sixth Amendment.”

The Sixth Amendment gives an accused certain fundamental rights in criminal prosecutions. It grants the right to a speedy and public trial and information about the nature and cause of the accusation, to confront the witnesses against him, to compulsory process for attaining witnesses in his favor, and to the assistance of counsel for his defense.

- a) The right to a speedy trial applies to both federal and state prosecutions. It attaches after formal charging. It is important to prevent delays because of negative effects on a person who is presumed innocent. The accused may suffer prolonged detention, psychological and emotional damage, and the reduced capacity to prepare a meaningful defense.
- b) A public trial helps ensure procedural due process. A court may exclude spectators from the courtroom to prevent disruptions. There is no right to radio and television coverage of a trial. However, the United States Supreme Court decided that people could videotape trials if allowed by the state, and the taping followed the State’s procedures.
- c) The existence of an impartial jury allows citizens to contribute in the administration of justice, raises public trust of the criminal justice system, reflects the conscience of the community, and safeguards against a miscarriage of justice.
- d) The right to face accusers prevents the use of written depositions or affidavits rather than personal testimony of witnesses. When a witness appears in court, the accused may test his recollection, and the jury may judge his credibility.

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- e) An accused has the right to be informed of the nature and cause of the accusation and a right to legal process to compel the appearance of witnesses. These two (2) rights help the defendant prepare a meaningful defense.
- f) The Sixth Amendment guarantees an accused the right to counsel. A detailed discussion of the Sixth Amendment follows later in this lesson plan.

7. The Seventh Amendment

NOTE: Show slide, “Seventh, Eighth, Ninth, and Tenth Amendments.”

The Seventh Amendment preserves the right of trial by jury in civil cases. This right provides for a trial by twelve people under the supervision of a judge who instructs them on the law, advises them on the facts, and sets aside their verdict if it is against the law or the evidence.

8. The Eighth Amendment

The Eighth Amendment protects people from excessive bail, excessive fines, and cruel and unusual punishment. It does not require bail in every case. Bail is excessive when the amount is higher than an amount reasonably calculated to ensure that the accused comes to trial and submits to sentencing if found guilty. The death penalty is not cruel and unusual punishment, but it cannot be imposed upon an offender who was under 18 when the crime was committed. However, the Supreme Court has struck down statutes which were coercive, discriminatory, or unduly restrictive on the jury (for example, the Court ruled a statute mandating the death penalty for certain offenses unconstitutional.) This amendment preserves the basic concept of the dignity of man by assuring that the power to impose punishment is exercised by the state in a lawful manner.

9. The Ninth Amendment

The history of the Ninth Amendment reveals the belief of the framers of our Constitution that there are additional fundamental rights not listed in the first eight (8) amendments which are protected from governmental infringement. These additional rights include the right of privacy in marriage, the right of interstate travel, and the right to participate in political activities.

10. The Tenth Amendment

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The Tenth Amendment reserves the powers not granted to the United States government to the states or the people. Some powers reserved for the states are laws regulating marriage, educational systems, corporate charters, voting qualifications, and police powers. The police power of a state refers to law enforcement and regulations designed to promote the public convenience, the general prosperity, public safety, health, and morals. This power is not restricted to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state.

11. The Fourteenth Amendment

NOTE: Show slide, “Fourteenth Amendment.”

Two (2) of the three (3) key phrases in the Fourteenth Amendment affect the government’s law enforcement function: due process of law and equal protection of the laws.

a) Due process

The due process clause is used to protect the rights of citizens against infringement by the states. This clause extends the same protection against arbitrary state legislation affecting life, liberty, and property, as is offered by the Fifth Amendment due process clause against federal legislation.

(1) There are two (2) types of due process

- (a) Procedural due process guarantees that the government will not take a person’s life, liberty, or property interest without notice and a meaningful opportunity to be heard. For example, if the state attempts to suspend driving privileges, the driver must be given notice of why and an opportunity to rebut the state’s evidence.
- (b) The more vague substantive due process guarantees that the notice, hearing, and result is fair. It is also a source of rights the Court has deemed fundamentally fair in a civilized society, like abortion, contraception, or the right to marry.

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The Fourteenth Amendment provides that: “No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . .” In the context of interrogation law, this Amendment forbids law enforcement officers from using physical coercion to extract a statement. It is also a due process violation for officers to make promises ***which they cannot keep*** to obtain a statement. Officers may not, for example, promise a suspect that he will not be indicted as a habitual felon should he confess, as the indictment decision is within the sole authority of the district attorney and the grand jury. *State v. Sturgill*, 469 S.E. 2d 557, (1996).

- (2) Effect
 - (a) Due process requires that a defendant receive adequate notice of the offense charged.
 - (b) Due process requires certain basic guarantees of a fair trial such as:
 - i) A right to counsel
 - ii) A right to a speedy and public trial
 - iii) A right to be free from the use of unlawfully seized evidence and unlawfully obtained confessions.
 - (c) A defendant may be entitled to plea bargain by entering a guilty plea to obtain a less severe sentence. However, the plea must be voluntary, knowing, and understood.
 - (d) Due process requires the state to prove a defendant’s guilt beyond a reasonable doubt.
 - (e) Due process requires that a convicted prisoner be sane or competent before being executed.
- b) Equal protection

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This provision requires equal protection of the laws. It applies to government actions only, not private conduct. It requires the government to apply its laws equally. Exclusion of an identifiable racial or ethnic group from a grand jury or petit jury is an example of denial of equal protection of the laws.

D. Constitutional Law Summary

By applying the Bill of Rights to the states, the United States Supreme Court greatly enlarged the powers of the federal courts. State officers must protect both state and individual federal rights. For this reason, it is extremely important that law enforcement officers stay informed about both State and Federal court decisions that affect criminal justice. We never know when the Supreme Court may decide the next *Miranda v. Arizona* [requirement to warn of right to silence and counsel before interrogating a person in custody], *Mapp v. Ohio* [exclusionary rule], *Terry v. Ohio* [stop and frisk], or *Delaware v. Proust* [prohibiting random vehicle stops]. Without this legal foundation, the laws of arrest, search, and seizure are difficult to apply. Remember, law enforcement is designed to protect our constitutional rights as citizens as well as to protect society as a whole. Insufficient comprehension and application of the rules described herein can lead to adverse consequences for officers and citizens alike.

E. Jurisdiction²

NOTE: Show slide, “Jurisdiction.” This is not a complete list of all agencies.

1. Territorial – Territorial jurisdiction refers to the geographical area in which a law enforcement officer is empowered to act.

Note: This is a basic overview of the territorial jurisdiction of the below agencies. Officers may have jurisdiction outside their ordinary geographical area under mutual aid agreements. Officers must consult their agency for specific guidance concerning their territorial jurisdiction.

- a) Statewide – Officers may arrest anywhere within the state.
 - (1) North Carolina State Highway Patrol (SHP) officers
 - (2) North Carolina Division of Motor Vehicles (DMV) officers, agents, and inspectors
 - (3) North Carolina State Bureau of Investigation (SBI) agents

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- (4) North Carolina Alcohol Law Enforcement (ALE) agents
 - (5) North Carolina Wildlife enforcement officers
 - (6) North Carolina Probation and Parole officers
- b) Local
- (1) Sheriffs and their deputies – may arrest within the county, on county property outside the county, and anywhere in the state for felony committed in the county. Consolidated county-city law enforcement agencies also have this jurisdiction.
 - (2) City police officers – may arrest in the city in which they serve, in the area within one (1) mile of the city limits, and on city property outside the city
 - (3) Alcohol Beverage Control (ABC) officers employed by county or city ABC boards – ABC officers employed by county may arrest anywhere in the county in which they are employed. ABC officers employed by the city may arrest anywhere in the county in which they are employed unless limited by a special legislative act that governs the city’s ABC system.
 - (4) Company police officers – may arrest on property owned or possessed and controlled by their employer. Company police of college campuses are discussed below.
 - (5) Campus police officers. The territorial jurisdiction of campus police of private colleges and universities, UNC system institutions, and community colleges, includes the property owned or leased by the educational institution that employs them, and the portions of public roads passing through or immediately adjoining their property.
- c) Immediate and continuous pursuit

If an offender has committed any criminal offense for which the officer can arrest within his or her jurisdiction, the officer can pursue the offender anywhere in North Carolina and make

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the arrest. G.S. 15A-402.³ To maintain the power to arrest the offender, the officer must continue the pursuit and not stop to do something else. The officer does not have to keep the offender in sight at all times.

Officers may pursue and arrest outside North Carolina only under the following circumstances:

- (1) In Georgia, Virginia, South Carolina or Tennessee; and
 - (2) For a suspected felony committed in North Carolina.⁴
- d) A law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place in the state.
2. Subject matter – Subject matter jurisdiction refers to the types of crimes for which officers are authorized to arrest.
- a) Arrest for any crime
 - (1) ALE agents
 - (2) SBI agents
 - (3) Sheriffs and their deputies
 - (4) City police officers
 - (5) Local ABC officers
 - (6) Company police officers
 - (7) Campus police officers
 - b) Limited subject matter jurisdiction
 - (1) Highway Patrol officers
 - (2) DMV officers, agents, and inspectors
 - (3) Wildlife enforcement officers

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- (4) Probation and Parole officers
3. Mutual aid agreements – “Several statutes authorize the head of one law enforcement agency to provide temporary assistance to another agency upon its written requires. If this assistance includes officers working temporarily with the other agency, the officers have the jurisdiction and authority of both the requesting agency and their own agency.”⁵
4. Crimes committed in other states
 - (a) “North Carolina law enforcement officers may arrest a person who flees to North Carolina after the person has committed a misdemeanor or felony in another state if the officers obtain a fugitive warrant for the person’s arrest from a North Carolina judicial official.”⁶
 - (b) Officers may arrest without a fugitive warrant if the person has been charged in the other state with any crime punishable by more than one (1) year imprisonment.
5. Foreign diplomats

Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of the local courts and authorities. Diplomatic agents and designated members of their administrative and technical staff enjoy the highest degree of these immunities. These persons may not be arrested or detained; their residences may not be entered subject to ordinary procedures; they may not be subpoenaed as witnesses, and they may not be prosecuted. They may be issued traffic citations. The names of the persons enjoying these immunities are published on a “Diplomatic List” by the Office of Protocol of the United States Department of State. Changes on this list occur daily, and the status of personnel should be verified with the Office of Protocol. Other embassy staff and consular staff not on this list do not enjoy the same degree of immunity. A summary of immunities is available from the Office of Protocol, and there is a brief statement on the personal identification cards issued solely by the Office of Protocol as to the bearer’s immunity.

Note: Some countries’ consulates must be notified when one (1) of their nationals is arrested or detained. This will be addressed when discussing arrest procedures later in this lesson plan.

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F. Voluntary Encounters, Investigative Stops and Arrest

NOTE: Show slide, “Voluntary Encounters, Investigative Stops, Arrest.”

The Fourth Amendment requires searches and seizures to be reasonable. If officers are not conducting a search or seizure, then the Fourth Amendment requirements do not apply. It is important for officers to know when their conduct is regulated by the requirements of the Fourth Amendment.

1. Overview

- a) A person has been “seized” when, under the circumstances, a reasonable person in his position would not feel free to walk or drive away from the law enforcement officer. *Florida v. Royer*, 460 U.S. 491, (1983). A person is seized at the point that he submits to an officer’s command to stop or when he is stopped—physically restrained—by an officer. *California v. Hodari D.*, 499 U.S. 116, (1991). A seizure can also occur when a reasonable person in the suspect’s position would not feel free to terminate an encounter with a law enforcement officer. *Florida v. Bostick*, 501 U.S. 429, (1991).
 - (1) The test for whether a person is seized is an objective one: would a reasonable person in the suspect’s position feel that the officer deprived his freedom of movement. Thus, it is legally irrelevant that a person believes he is not free to leave the officer unless there are objective facts that make such belief reasonable. Further, it is legally irrelevant that the law enforcement officer believes that a person is seized, unless the officer says or does something which would indicate to a reasonable person in the suspect’s position that he was not free to leave.⁷
 - (a) The chase of a suspect, for example, is not a seizure until the suspect stops or is stopped; thus, any property thrown away by the suspect during the chase is admissible in court even if the officer had no reason to chase in the first place. (Note: Officers should not attempt to seize a suspect without the legal authority to do so.) *California v. Hodari D.*, 499 U.S.116, (1991). Once, however, the suspect stops running in response to a police order to halt, then there is a seizure at that moment, and there

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must be at least reasonable suspicion to justify the stop. (Probable cause is needed for an arrest; only reasonable suspicion is needed for a temporary detention.)

- (b) A person is arrested either when he is told he is under arrest by the officer or when the person's freedom of movement has been significantly deprived (this is called the functional equivalent of an arrest). A person is under arrest, for example, when the police place her in a police vehicle and drive her to a police facility—assuming she did not consent to this activity—even though the police never tell the suspect that she is under arrest.
- (2) The more intrusive the government conduct, the more proof of criminal activity is required for the reasonableness standard of the Fourth Amendment to be met. For example, more proof of a crime is needed to arrest a person (probable cause) than to merely detain him for a few minutes to investigate a possible crime (only reasonable suspicion is needed to detain).
- b) Not all police contacts with citizens are seizures. Law enforcement frequently involves contact short of a seizure where no justification for the police action is required since the Fourth Amendment is not implicated. Such encounters are known as “voluntary encounters” or “consensual encounters.”
- c) When an officer begins to investigate a crime, the encounter with the citizen can become more invasive, such that a reasonable person in the suspect's position would not feel free to leave or terminate the encounter with the police—a seizure. The officer must meet some level of legal standard to justify the restriction of the citizen's liberty.

An officer's level of suspicion determines the extent to which she can intrude on the right of a person to move about freely. Remember these basic rules, which will be expanded upon shortly:

- (1) Officers need **no** suspicion to approach people in public and talk to them (this is a voluntary encounter having

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no Fourth Amendment implications). The person cannot be compelled to respond.

- (2) Officers need reasonable suspicion to detain a person, that is, to forcibly restrain a person while the officer investigates possible criminal activity. Only reasonable force may be used to affect the stop (use of force is addressed later in this block of instruction).

2. “Voluntary encounters” or “consensual encounters”

NOTE: Show slide, “Voluntary Encounters.”

Officers need no justification to approach a citizen. However, during these voluntary encounters, officers must limit their actions toward the citizen to avoid creating a seizure. These encounters should involve non-confrontational language. Officers should avoid physical contact with or movement of the citizen. Officers should not frisk citizens during these encounters. Officers should take steps to let the citizen know they are free to leave and are not under arrest. This type of encounter is useful in conducting a “non-custodial” interview with a suspect. An officer can simply request the suspect speak to her, with the suspect arranging the time and location the conversation will take place. This type of encounter can also provide the officer with a good opportunity to ask for consent to search.

- a) In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court wrote: “Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, injuries, or loss of life . . . [e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.”

Therefore, law enforcement officers need no justification to speak to or look at anyone in a public place. In the area of voluntary encounters, officers have all of the rights of an ordinary citizen.

- b) In *Florida v. Royer*, 460 U.S. 491, (1983), the United States Supreme Court stated: “Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting

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questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” Because these encounters are entirely voluntary, officers may not compel cooperation. The Court further stated, “The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.”

- c) Modern community policing expands voluntary contacts with citizens. Most contacts will be positive, but some will develop facts that justify a seizure, like a frisk or arrest. Officers who employ voluntary encounters will become more productive as they will develop information that may lead to investigations, detentions, and arrests.
- d) To lawfully conduct a voluntary encounter, an officer need only approach a citizen and engage in conversation, including asking questions to get information. It is important to let the citizen control her environment to keep the encounter wholly voluntary. Use language that makes the citizen feel at ease. Reiterate, if necessary, that the citizen is free to leave at any time. Do not confine the citizen in any way, e.g., block a doorway, or traffic lane, or by surrounding the citizen with several officers. Do not threaten or suggest sanctions should the citizen not want to continue the conversation or encounter.

3. Introduction: seizures

NOTE: Show slide, “Investigative Stops/Seizures.”

- a) Unlike a voluntary encounter, where a reasonable person would feel free to leave or otherwise terminate the encounter with the officer, some interactions between citizens and police are not voluntary.
- b) A seizure occurs when a law enforcement officer:
 - (1) Applies physical force to a suspect, or
 - (2) Issues a show of authority (commands to stop, activates blue lights, etc., and the suspect submits to this show of authority).
 - (3) A seizure also occurs when the officer’s conduct “would have communicated to a reasonable person that

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he was not at liberty to ignore the police presence and go about his business.”⁸

- c) If an officer seizes a suspect, the officer must meet the legal requirements of the Fourth Amendment for the seizure to be lawful. These legal requirements are known as legal standards. In other words, some legal justification, based on objective factors, must exist for before conducting a seizure.

- d) Officers must become familiar with the objective factors that justify seizures of any type, whether it is an investigative stop requiring reasonable suspicion or a full custodial arrest requiring probable cause. The following list contains numerous factors courts have considered in determining whether a seizure is objectively justified, and thus reasonable under the Fourth Amendment. This list is useful as a guide. However, this list is not complete. An officer is free to use any observation or factor that in his training and experience, raises suspicion of criminal activity.
 - (1) Officer’s observation in light of training and experience
 - (2) Information received from other officers or citizens
 - (3) Time of day or night
 - (4) Whether area is a high crime area
 - (5) Proximity to crime
 - (6) Whether suspect is a stranger to area
 - (7) Reaction to officer, including flight
 - (8) Officer’s knowledge of suspect’s prior criminal activity or record
 - (9) Flight from scene of crime
 - (10) Actions matching a profile of criminal behavior

See State v. Fleming, 106 N.C. App., (1992); *U.S. v. Sharpe*, 470 U.S. 675, (1985).⁹

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There is no magic number of the above factors that must be present to establish reasonable suspicion or probable cause; the more factors you have and the stronger they are, the greater your proof will be. However, reasonable suspicion and probable cause may be established with only one (1) of those factors. The courts will look at the “totality of the circumstances”—all the factors present in the particular case—to determine whether the seizure was legally justified. Thus, it is critical that officers be aware of the level of suspicion needed to establish reasonable suspicion necessary for an investigative stop, and probable cause required for arrests. These standards will be discussed below.

4. Investigative stop

NOTE: Show slide, “Reasonable Suspicion/Investigative Stop.”

a) Purpose

The purpose of the investigative stop is to determine whether there is probable cause to believe that

- (1) A crime has or is being committed; and
- (2) The suspect has probably committed the crime.¹⁰

This type of police action is commonly called a “Terry Stop,” named after the United States Supreme Court case. *Terry v. Ohio*, 392 U.S. 1, (1969). In *Terry*, a plainclothes officer observed defendant Terry and another person walking back and forth in front of a store. Each of the suspects made five (5) or six (6) trips past the store window and back. The officer had also been in law enforcement for over thirty-nine years and had been assigned to patrol the vicinity for shoplifters and pickpockets. The officer, suspecting that the men were planning to rob the store, approached. The officer asked Terry for his name, but Terry only mumbled an answer. Fearing for his safety, the officer spun Terry around and felt the outside of his coat. The officer felt a gun in the coat and removed it. The United States Supreme Court ruled that the officer had reasonable suspicion, though no probable cause, to believe Terry was about to commit a crime. Given the violent nature of the crime being investigated—possible armed robbery of the store—the officer had reason to fear for his safety. (Terry’s many trips by the store and unresponsiveness to questioning added to the legitimacy of the officer’s fear.)

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- b) Legal standard for investigative stops – reasonable suspicion
 - (1) Terry established that when an officer develops reasonable suspicion to believe criminal activity is afoot, he can conduct a brief investigative stop. Officers must understand this legal standard—reasonable suspicion—necessary for an investigative stop to be legal.
 - (2) Reasonable suspicion is a “minimal level of objective justification”—more than a hunch, but less than probable cause.¹¹
 - (3) “In ascertaining whether an officer had a reasonable suspicion to make an investigatory stop, the court must consider the totality of the circumstances. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.”¹²
 - (4) A generalized suspicion, or hunch, is insufficient to justify an investigative stop.
- c) An investigative stop has limitations. Even though it is a type of seizure, the length of the detention should be limited to that time, which is reasonably necessary to determine if probable cause exists. Twenty minutes has been used as a general rule to govern the length of an investigative stop. “Generally an officer will be permitted more time to conduct an investigative stop involving a serious crime or dangerous offender than one involving a minor crime or non-dangerous offender.”¹³
 - (1) During the investigative stop, officers should try to gather information to determine whether or not there is probable cause to believe the suspect committed a crime.
 - (2) Since the suspect is not yet under arrest during an investigative stop, officers should avoid moving the suspect against his will from one (1) location to another, absent strong justification for doing so, such as weather or safety. Generally, when a show-up is necessary, the victim/witness should be brought to the location of the suspect.

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Note: Show-ups are discussed later in this lesson plan.

- (3) An officer may normally question the suspect during a routine investigative stop without the need for the reading of *Miranda* rights. However, the suspect does not have to answer those questions. (Questioning and Interrogation will be discussed in greater detail in later sections of this material.)
- (4) During the investigative stop, if an officer can articulate that his safety is in jeopardy and the suspect may be armed, he may frisk the suspect. (Frisks and other types of searches will be discussed in later sections of this material.)

5. Arrest

NOTE: Show slide, “Arrest.”

a) Purpose

- (1) An arrest is a more intrusive seizure on a citizen’s liberty than an investigative stop; therefore, more proof is required to justify an arrest. An arrest is a seizure for the purpose of initiating criminal prosecution (bringing a person to court to face charges).
- (2) An arrest is complete when “the person submits to the control of the arresting officer who has indicated his intention to arrest, or the arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force.”¹⁴
- (3) Since the purpose of an arrest is much different than an investigative stop, officers may move a suspect against his will, restrain a suspect, transport a suspect, and search a suspect during the arrest process. The type and extent of the searches that can be conducted of a suspect and his property after an arrest will be discussed later in this material.
- (4) Unlike an investigative stop, an officer may not interrogate a suspect without reading *Miranda* and obtaining a valid waiver. This issue will also be discussed in greater detail later in the material.

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- b) Legal standard for arrests – probable cause
- (1) To be lawful, arrests must be supported by probable cause. “Probable cause requires a showing—considering the totality of the circumstances—that a crime was probably committed and the defendant probably committed it. Thus, the degree of certainty that corresponds to probable cause is fair probability; that is, the required amount of proof is more than [reasonable suspicion] but less than for such other legal evidentiary standards as preponderance of the evidence, more probable than not, [or] more likely than not . . .”¹⁵
 - (2) “The United States Supreme Court has defined probable cause to arrest as follows: whether at the moment the arrest was made, the facts and circumstances within [the officer’s] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.”¹⁶
 - (3) Private citizens authority to detain offenders and to assist law enforcement officers¹⁷

Note: This section discusses citizens’ authority to detain offenders, and to assist law enforcement officers. Officers who are outside their jurisdiction have this authority.

- c) Authority to detain offenders¹⁸

NOTE: Show slide, “A Citizen May Detain an Offender.”

- (1) A private person may detain another person when he has probable cause to believe that person detained has committed in his presence:
 - (a) A felony
 - (b) A breach of the peace
 - (c) An offense involving physical injury to another person, or

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- (d) An offense involving theft or destruction of property.
 - (2) The private person must immediately notify law enforcement and must, unless he releases the person earlier as required, surrender the person to the law enforcement officer.
 - (3) The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.
- d) Private citizen's assistance to law enforcement officers—G.S. 15A-405

NOTE: Show slide, "Private Citizen's Assistance to Law Enforcement."

- (1) North Carolina law allows a private citizen to assist law enforcement officers in making arrests and preventing escapes from arrest when requested by a law enforcement officer.
- (2) The citizen is not legally obligated to assist.
- (3) If the citizen chooses to assist, that citizen has the same power as the officers to arrest and prevent escape.
- (4) The citizen is not subject to criminal or civil liability when lawfully providing this assistance, and is entitled to worker's compensation coverage if injured.

5. Arrest – statutory requirements

NOTE: Show slide, "Arrest – Statutory Requirements."

Note: Arrests of adults are covered by G.S. 15A-401, discussed below. Juveniles that fall within the jurisdiction of juvenile court are not "arrested" but are taken into "temporary custody" under G.S. 7B-1900 and the following statutes.¹⁹ Taking a delinquent juvenile into temporary custody under G.S. 7B-1900 is similar to a warrantless arrest of an adult; therefore, you do need to know the contours of warrantless arrests under G.S. 15A-401(b) (discussed below in subsection b)(3).

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The authority to make a warrantless arrest of an adult is referenced in G.S. 7B-1900(1) and specifically incorporated into that authority. However, when you take a delinquent juvenile into temporary custody, there are different procedures that must be followed and different obligations than the arrest of an adult in similar circumstances. For the best discussion of those different requirements, see Section 11 – *Juvenile Laws and Procedures*.

- a) Statutory requirements for arrests by law enforcement officers—G.S. 15A-401
 - (1) Arrest warrants in general—G.S. 15A-401
 - (a) Valid throughout the state
 - (b) Issued and signed by a judicial official
 - (c) Names or describes defendant
 - (d) States the offense
 - (e) Must be returned after 180 days if not served, but still valid after that
 - (f) A state automated electronic repository exists for criminal process that includes arrest warrants. The electronic repository does **not** apply to search warrants. G.S. 15A-101.1; G.S. 15A-301; G.S. 15A-301.1.
 - (g) If a warrant exists only in paper form (is not in the electronic repository), it must be returned after 180 days if not served. Failure to return the warrant does not invalidate the warrant, nor does it invalidate service or execution made after 180 days. G.S. 15A-301.
 - (h) If a warrant exists in electronic form and a copy printed from electronic repository is not served within 24 hours, must record lack of service in the repository, and all paper copies must be destroyed. Warrant may again be printed in paper form at later times. Failure to comply does not invalidate the warrant, nor does it

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invalidate service or execution made after 24 hours. G.S. 15A-301.1.

(2) Arrests with an arrest warrant

NOTE: Show slide, “Arrests With an Arrest Warrant.”

(a) When the officer has the warrant in his possession

“An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer’s territorial jurisdiction.”²⁰

(b) When warrant exists but is not in the officer’s possession

“An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible.”²¹ This applies even though the arrest process has been returned to the clerk.

Note: Special rules apply to entering private premises to arrest, even with an arrest warrant. These will be discussed below.

(3) Arrest without an arrest warrant—G.S. 15A-401

Note: This section deals with the authority to arrest where an arrest warrant does not exist, also known as a “warrantless arrest.”

NOTE: Show slide, “Arrests Without a Warrant.”

(a) Offense committed in the presence of the officer:

An officer may arrest without a warrant any person who the officer has probable cause to

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believe has committed a criminal offense in the officer's presence.

- (b) Offense committed out of the presence of the officer:

An officer may arrest without a warrant any person who the officer has probable cause to believe:

- i) Has committed a felony; or
- ii) Has committed a misdemeanor, and:
 - Will not be apprehended unless immediately arrested, or
 - May cause physical injury to himself or others, or damage to property unless immediately arrested; or
- iii) Has committed the misdemeanor offense of concealment of merchandise, domestic criminal trespass, impaired driving, or impaired driving in a commercial vehicle; or
- iv) Has committed the misdemeanor offense of simple assault, simple assault and battery, simple affray, assault inflicting serious injury or using a deadly weapon, assault on a female, or assault by pointing a gun when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in the domestic violence statute; or
- v) Has committed the misdemeanor offense of violation of a valid domestic violence protective order; or
- vi) Has violated a pretrial release order entered under G.S. 15A-543 (Procedure

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for determining conditions of pretrial release) or G.S. 15A-534.1(a)(2) (“Crimes of domestic violence; bail and pretrial release”).

(4) Statutory requirements upon arrest: 15A-401(c)

“Upon making an arrest, a law enforcement officer must:

- (a) Identify himself as a law enforcement officer unless his identity is otherwise apparent,
- (b) Inform the arrested person that he is under arrest, and
- (c) As promptly as is reasonable under the circumstances, inform the arrested person of the cause for the arrest, unless the cause appears to be evident.”²²

(5) Other types of process

(a) Criminal summons²³

Charges a crime and orders the accused to appear in court on a designated time and date to answer to the charges against him. The accused is not arrested on a criminal summons but instead served the summons to appear in court on a specified date.

(b) Magistrate’s order²⁴

“An officer must take a person arrested without a warrant to a magistrate so that the magistrate may determine whether to issue a magistrate’s order. A magistrate’s order is a document that charges a person with a criminal offense; it is issued only if the magistrate determines that probable cause exists to believe that a criminal offense was committed, and that the defendant committed that offense.”

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The uniform traffic citation in paper form may be converted to a magistrate's order when an officer decides to arrest a person instead of charging the person by using a citation.

Note: For example, when an officer charges DWI, the officer will arrest the suspect; the magistrate will sign the portion of the citation that converts that citation into a "magistrate's order" upon a finding of probable cause.

(c) Order for arrest

Process issued by a judicial official that orders a law enforcement to take a named person into custody.

Note: For example, it may be issued in certain circumstances where a defendant fails to appear in court, or when a person is indicted.

(d) Citation

A directive issued by a law enforcement officer that a person appear in court and answer a misdemeanor or infraction charge or charges.

Note: For example, when an officer writes a ticket for a routine traffic violation or decides to cite a defendant to court on a misdemeanor instead of making an arrest. This is often one when officers do not have the authority to arrest for certain misdemeanors that were not committed in the officer's presence.

(6) Officer's role in seeking an issuance of criminal process

Officers usually appear in person before a magistrate to present under oath the facts which justify the issuance of the warrant or other process charging a criminal offense or offenses. The facts presented must support every element of the criminal offense for which the process issued. The magistrate's role is to make an independent judgment as to whether probable cause

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exists to issue the warrant or other process, not to just issue it because an officer is requesting that it be done.

- b) Entering private premises to arrest

NOTE: Show slide, “Entering Private Premises.”

- (1) Enter defendant’s home or residence to arrest

Without consent or exigent circumstances, the arresting officer must: have an arrest warrant in her possession and probable cause to believe the defendant is inside.

By North Carolina General Statute 15A-401(e):

A law enforcement officer may enter the defendant’s private premises to make an arrest when:

- (a) The officer has in his possession the original warrant for arrest or order for arrest.

A copy of the warrant or order will be sufficient only if the original warrant or order is in the possession of a member of a law enforcement agency located in the county where the officer is employed, and the officer verifies with the agency that the warrant is current and valid.

- (b) The officer has reasonable cause to believe the person to be arrested is present.

- (c) The officer must give, or make a reasonable effort to give, notice of his authority and purpose to an occupant of the premises to be entered.

Such notice need not be given only when the officer has reasonable cause to believe that the giving of such notice would present a clear danger to human life.

- (d) The officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or where he is not required to give

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notice of his authority and purpose when he has reasonable cause to believe that giving such notice would present a clear danger to human life.

- i) If an officer has a printed warrant or order for arrest from the electronic repository (NCAWARE), a faxed copy, or a certified copy from the Clerk of Court, then the process is valid as the original. The word “copy” means a photocopy.²⁵
 - ii) Under North Carolina law, officers must knock and announce even though there is reason to believe that doing so will increase the chance of evidence being destroyed. If officers have such a belief, they may enter shortly after the knock and announce. *State v. Gaines*, 33 N.C. App. 66, (1977).
 - iii) “Notice of identity” means that before entering, the officer must state in a voice loud enough to be heard inside the house, “Police, open up, search (or arrest) warrant.” The officer may forcibly enter if entry is unreasonably delayed or denied.
- (2) Enter third party’s home or residence to arrest defendant
- (a) Absent consent or exigent circumstances, the officer must have a search warrant (to protect the privacy interests of the third party) in addition to an arrest warrant (to allow the arrest of the suspect within residence of the third party).
 - (b) The notice and entry requirements are the same as above.

Note: Search warrant drafting and execution rules are reviewed later in this lesson plan.

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- c) Enter home or residence with Consent to arrest defendant
 - (1) “When officers want to enter the defendant’s or a third party’s home to arrest the defendant, they may not need an arrest or search warrant if they receive consent to enter from someone who has the authority to give it.
 - (2) If officers want to enter the defendant’s home, they normally may receive consent from the defendant’s spouse, mother, father, adult sibling, or live-in friend or any other person who has equal privacy interests in the defendant’s home.”²⁶
 - (3) “When officers want to enter the home of a third party to arrest a person who does not live there, they must receive consent from a person who has a privacy interest in that home—generally, an adult who lives there.”²⁷
Note: Even when consent is given, officers will still need an arrest warrant to arrest the defendant for certain misdemeanors that were not committed in their presence, as set forth previously in the warrantless arrest section of this lesson plan.
- d) Enter home with exigent circumstances to arrest defendant
 - (1) “When exigent circumstances exist to make an arrest, officers may enter the defendant’s or third party’s home or other place of residence even though they do not have an arrest warrant, search warrant, or consent. Although the term “exigent circumstances” is not easily described, it generally means that officers need to act immediately.”²⁸
 - (2) Factors to consider in determining if exigent circumstances exist include:²⁹
 - (a) Hot pursuit of a suspect;
 - (b) Danger to the public or law enforcement officers outside or inside the dwelling of an immediate, warrantless entry is not made;
 - (c) The need to prevent the imminent destruction of evidence;
 - (d) The need to prevent the suspect’s escape;

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- (e) Whether the suspect is armed;
- (f) The gravity of the offense for which the suspect is being arrested; exigent circumstances will rarely be found to justify entry into a home to arrest for extremely minor offenses, particularly offenses not punishable by imprisonment.

e) Procedures following arrest:³⁰

NOTE: Show slide, “Procedures Following Arrest.”

- (1) The officer takes the arrested person to a magistrate or judicial official without unnecessary delay:
 - (a) To determine whether probable cause exists for a warrantless arrest
 - (b) To set pre-trial release conditions

Note: Delay is reasonable to conduct interviews, certain identification procedures, searches, intoxilyzer and sobriety tests, and other procedures incident to arrest.

Note: In the context of taking temporary custody of a juvenile, the judicial official before which the juvenile would be taken is the juvenile court counselor, not the magistrate.³¹ The juvenile court counselor will decide if a juvenile petition should be filed (equivalent of the magistrate’s probable cause determination reference above) and whether there may be need for secure or non-secure custody for the juvenile (equivalent of the magistrate’s pre-trial release decision).³²

- (2) The officer must, without unnecessary delay, allow defendant to communicate with lawyer, family, and friends.
- (3) Notify juvenile’s parent or guardian—G.S. 7B-1901; notify the minor’s parent or guardian—G.S. 15A-505
 - (a) An officer who takes a juvenile who is alleged to be undisciplined or delinquent into custody without a court order must notify the juvenile’s

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parent, guardian or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian or custodian of the right to be present with the juvenile until a determination is made as to the need for secure or non-secure custody. (See G.S. 7B-1901.)

- (b) An officer who charges a minor with a criminal offense must notify the minor's parent or guardian of the charge, as soon as practicable, in person or by telephone. If the minor is taken into custody, the officer or the officer's immediate supervisor must notify a parent or guardian in writing that the minor is in custody within 24 hours of the minor's arrest. Notification is not required under this statute if the minor is emancipated; the minor is not taken into custody and has been charged with a motor vehicle moving violation for which three (3) or fewer points are assessed, except an offense involving impaired driving; or the minor has been charged with a motor vehicle offense that is not a moving violation. (See G.S. 15A-505.)
- (4) Notification to the principal of the secondary school at which the arrestee attends. It does not apply to juveniles taken into custody as a result of delinquency allegations. This notification must be made within five (5) days of the arrest.

Note: Limited to non-chapter felony arrests. (See G.S. 15A-505.) If the offender is a minor, this notification should be made by the officer **only** in two circumstances:

- a) When the minor has a previous district or superior court conviction for a felony, non-Chapter 20 misdemeanor, or impaired driving offense as defined in G.S. 20-4.01(24a) and is being charged or arrested for a non-Chapter 20 felony committed after that conviction,³³ or
- b) When the juvenile is emancipated, married or in the military and is being charged or arrested for a non-Chapter 20 felony.

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For a minor who is being processed as a juvenile for an allegation of delinquency, the juvenile court counselor has the legal duty to notify the principal verbally and in writing should such notification be required.³⁴ Law enforcement is not legally authorized to make any school notification regarding a minor being processed as a juvenile.

- (5) Seek medical assistance for suspect if necessary, and otherwise monitor the physical well-being at all times the suspect is in your custody.

Further, whenever an officer arrests a person who is unconscious, semiconscious, or apparently suffering from some disabling condition, and who is unable to provide information on the cause of such condition, officers are required to look for a bracelet or necklace containing the Medic Alert Foundations symbol indicating the person suffering diabetes, epilepsy, a cardiac condition, or any other form of illness which would cause loss of consciousness. If so, officers must make a reasonable effort to have appropriate medical care provided.³⁵

- (6) When a law enforcement officer arrests an adult who is supervising minor children who are present at the time of the arrest, the minor children must be placed with a responsible adult approved by the parent or guardian of the minor children. If this is not possible within a reasonable period, the law enforcement officer shall contact the county department of social services. (G.S. 15A-401(g).)
- (7) Consular notification and access for foreign nationals. A “foreign national” is anyone who is not a United States citizen who is on United States land. Foreign nationals who are arrested or detained in this country enjoy privileges provided by the federal government by the provisions of the Vienna Convention on Consular Relations, just as United States citizens are entitled to the same provisions when arrested or detained in another country. Local law enforcement officers must recognize these privileges.

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The United States State Department does not consider brief routine detentions, such as traffic violations and traffic crash investigations, to initiate the requirements of the treaty. On the other hand, certainly, an arrest or requiring a foreign national to accompany an officer to a place of detention would trigger the requirements.

- (a) Mandatory notification of consulate. It is mandatory that some countries' consulates be notified when one (1) of their nationals is arrested or detained, regardless of the foreign national's wish. A list of these countries is available from the United States Department of State. Notification of the consulate should occur as reasonably as possible, and there should be no deliberate delay in doing so. The State Department normally expects notification within 24 hours. The foreign national is to be advised that his consulate will be notified and confirmed when it has been.
- (b) Requested notification of consulate. Even if their country is not on the mandatory notification list, foreign nationals who are arrested or detained must be advised of their right to have their consulate notified. If so requested, notification should occur as reasonably as possible.
- (c) Communication between foreign nationals and their consulates. Once notified, consular officials are entitled to visit and communicate with their detained nationals and are entitled to provide consular assistance.
- (d) Deaths of foreign nationals. When a government official, including a law enforcement officer, becomes aware of the death of a foreign national, the nearest consulate of that national's country must be notified.

Note: Further and complete information on consular notification may be obtained from the Department of State at http://travel.state.gov/law/consular/consular_753.html

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NOTE: Instructors are encouraged to obtain Consular Notification and Access Reference Cards from the State Department. These pocket-sized cards include instructions and a list of the mandatory notification countries.

- (8) If a deaf person is arrested for an alleged violation of a law or local ordinance, the arresting officer shall immediately procure a qualified interpreter from a qualified court for any interrogation, warning, notification of rights, arraignment, bail hearing, or other preliminary proceeding (G.S. 8B-2(d).)

Once an arrest is made, it is important to properly disclose all evidence to the prosecutor's office. Because of the importance in disclosing information as required by law, as well as protecting certain information not subject to discovery, law enforcement officers should work closely with the prosecutor to assure full compliance with this pre-trial process. Failing to provide discovery can jeopardize the case, and even result in criminal penalties against the violating party, to include the officer.

N.C. General Statute 15A-903 states the "law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant..." Additionally, any person who willfully omits or misrepresents evidence or information required to be disclosed by the State to the defendant the complete files of the law enforcement agencies involved in the investigation of the crimes committed or the prosecution of the defendant shall be guilty of a Class H felony. Any person who willfully omits or misrepresents evidence on information required to be disclosed under any other provision such as notice of expert witness testimony or opinion, written list of the names of all witnesses to be called during the trial, etc. shall be guilty of a Class 1 misdemeanor.

Additional information on discovery is provided in the "Responding to Victims and the Public" block of instruction.

G. Force

The use of force is a "seizure" under the Fourth Amendment, and thus, must be reasonable. What is a reasonable use of force under the Fourth Amendment will depend on the facts and circumstances of every particular case.

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1. Non-deadly force

NOTE: Show slide, “Non-Deadly Force.”

Officers are often required to use non-deadly force. Using force is a matter of quick personal judgment shaped not only by an understanding of law but by other training you will receive in BLET.

a) Use of non-deadly force – G.S. 15A-401(d)(1)

G.S. 15A-401(d)(1) provides that an officer is justified in using force—not deadly force—when and to the extent, he reasonably believes it necessary to:

- (1) Prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense unless the officer knows the arrest is unauthorized; or
- (2) Defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to arrest or while preventing or attempting to prevent an escape.

b) Case law – objective reasonableness and *Graham v. Connor*, 490 U.S. 386, (1989).

The overriding test for all use of force, whether deadly or not, is whether the use of force was *objectively reasonable* under the circumstances and at the time the force was used. Like all Fourth Amendment claims, the standard is objective, not subjective. Thus, it does not matter what a particular officer thought at the time force was used. The court must look at what a reasonably well-trained police officer could have done.

The court will balance the nature and extent of the intrusion upon the citizen’s Fourth Amendment interests against the government’s need to investigate criminal offenses and enforce the laws. The court must review the totality of the circumstances known to the officer at the time the force was used and consider the following factors:

- (1) The type of crime for which the stop or arrest is being made;

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- (2) Whether the suspect is an immediate threat to the safety of the officers or others;
- (3) Whether the suspect is actively resisting;
- (4) Whether the suspect is attempting to evade arrest or detention by flight.

2. Deadly force

NOTE: Show slide, “Deadly Force.”

- a) Legal authority for use of force

NOTE: Refer to 15A-401 in *North Carolina Criminal Law and Procedures*.

G.S. 15A-401(d) defines the legal authority for the use of force in North Carolina.

- b) Use of deadly force – G.S. 15A-401(d)(2)

The use of deadly force is much more restrictive, as shown by subdivision (2) of G.S. 15A-401(d). The authority to use deadly force depends on the nature of the circumstances the officer faces at the time such force must be used. The use of deadly force must be “reasonably necessary” under the circumstances.

- (1) In other words, the officer must believe:
 - (a) That the use of deadly force is necessary; and,
 - (b) The officer’s belief must be reasonable.
- (2) An officer’s belief that deadly force is “reasonably necessary” must be based on facts and circumstances which reasonably appear to present an imminent threat of death or serious bodily injury to the officer or a third party. The apparent threat must be immediate, not remote, and must call for immediate action to prevent life-threatening injury. If a realistic and effective alternative to deadly force exists, and such alternative will prevent the life-threatening injury, officers must not use deadly force. An imminent threat of serious physical harm may be created by an armed suspect

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trying to escape by threatening the use of a dangerous weapon, or by an unarmed but aggressive and strong suspect who is overpowering an officer and trying to get the officer's handgun. An imminent threat of serious physical harm may also be created by an armed individual threatening the use of what reasonably appears to be a dangerous weapon.

- (3) An officer attempting to make an arrest does not have to retreat when the suspect is threatening to use deadly force.
- (4) Deadly physical force is authorized in any of four (4) situations. (G.S. 15A-401(d)(2).)
 - (a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.
 - (b) To prevent the escape of a suspect from custody who he reasonably believes is attempting to escape by using a deadly weapon.
 - (c) To effect an arrest or prevent an escape from custody of a person who, by his conduct or any other means, indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay.
 - (d) To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.
- (5) The U. S. Supreme Court reinforced the prohibition against using deadly force to arrest fleeing felons in the absence of a deadly threat in 1985 when it decided the case of *Tennessee v. Garner*, 471 U.S. 1 (1985). The facts of that case are as follows:
 - (a) Police officers responded to a prowler call. Upon arriving, they heard a door slam and saw someone running across the backyard. One (1) of the officers identified himself and told the suspect to halt. When the suspect, fifteen-year-

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old Edward Garner, attempted to climb over a fence, the officer shot and killed him. The officer later testified that he was “reasonably sure” that Garner was unarmed but that he knew if Garner made it over the fence he would not be captured. Tennessee had a statute that authorized the officer’s action in using deadly force against a fleeing felony suspect.

- (b) The U. S. Supreme Court ruled that the use of deadly force to prevent the escape of a suspected criminal is unconstitutional if the suspect appears to be neither armed nor dangerous. They held that deadly force may not be used unless necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.
- (6) The safest and clearest authority for the use of deadly force is in defense of self or others. However, deadly force should only be used when necessary to prevent death or serious injury while confronting an immediate threat. The consequences of being wrong in the use of deadly force are too serious to permit any other interpretation. The amount of force used must always be reasonable under the circumstances, but the officer may rely on appearances (e.g., a realistic looking toy pistol or pistol carved from a soap bar could meet the reasonable belief requirement).
- (7) G.S. 15A-401 also authorizes an officer to use deadly force to prevent the escape of a suspect who is attempting to escape by means of a deadly weapon. Attempting to escape “by means of a deadly weapon” means using a deadly weapon as an instrument or tool to aid in escaping. This section clearly states that if the suspect is using a deadly weapon to escape, the officer may use deadly force to counteract the effect of the suspect’s use of force.
- (8) The fourth situation which authorizes the use of deadly force is deceptively simple. An officer is authorized to use deadly force when reasonably necessary to prevent the escape from custody of a convicted felon. To use

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deadly force in this situation, the officer must know the escapee is trying to escape from custody after being sentenced to custody for a felony.

Note: This situation would primarily apply to correctional officers in preventing an escape from a prison unit, although concurrent authority rests with law enforcement officers with territorial and subject matter jurisdiction. Many agencies throughout North Carolina prohibit officers from using this statutory authority by policy. Officers must be thoroughly familiar with their agency's use of force and related policies.

The rules on use of deadly force under North Carolina law will not permit the use of deadly force against a person accused or suspected of committing a crime who is attempting to escape from custody or arrest unless his conduct presents an immediate threat of death or serious injury. Persons seen running from a building or the scene of a crime may be subject to arrest for a felony, but deadly force cannot be used to prevent the escape unless a serious threat is presented as a means of escape.

- c) Circumstances involving potential excessive use of force
 - (1) The officer uses substantial force against a passively resisting, verbally-protesting suspect – little or no force is needed.
 - (2) The officer validly uses substantial force against an actively resisting suspect and continues after the suspect ceases resistance - force began as a necessity but did not stop when the suspect was, in fact, subdued.

- d) Use of deadly force decision-making

Sometimes an officer confronts an obvious immediate threat to life from an armed suspect pointing a gun or a suspect trying to stab the officer with a knife. But some threats are not so clear. Circumstances may require an officer to decide exactly when a deadly threat is imminent so that deadly force is authorized by law. The exact moment a deadly threat becomes imminent may be uncertain.

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Suppose officers approach a car to arrest the driver and passenger after they sold an undercover officer a kilo of cocaine. The officers know drug dealers are often armed, but no weapons are in plain view. An officer orders the passenger to raise his hands, but the passenger does not. The passenger refuses to comply with a second order to raise hands. The passenger then turns and reaches with his left hand toward the floor behind his seat. The passenger then raises his arm and starts to turn toward the officer. The officer sees an object in the passenger's left hand but does not know what it is. The officer then sees the object looks like a gun. Passenger points gun at officer.

NOTE: Show slide, "When Can the Officer Shoot?"

- (1) Exactly when is an officer first authorized to shoot?
 - (a) Time 1: Passenger refuses to raise hands.
 - (b) Time 2: Passenger non-compliant second time.
 - (c) Time 3: Passenger reaches toward floor.
 - (d) Time 4: Passenger turns toward officer.
 - (e) Time 5: Officer sees unknown object in hand.
 - (f) Time 6: Object is gun.
 - (g) Time 7: Gun is pointed at officer.
- (2) Dilemmas:
 - (a) The sooner the officer shoots, the greater the chance the officer will survive the encounter.
 - (b) The sooner the officer shoots, the more difficult it is to justify use of deadly force.
 - (c) The longer the officer waits, the easier to justify use of deadly force – the deadly threat becomes clear.

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- (d) The longer the officer waits, the more difficult to survive the threat – suspect may be able to shoot back even if officer shoots first.

The officer wants to survive and wants to justify the decision to use deadly force. No one can decide for the officer. Several court cases find an officer justified in shooting at Time 5, but many officers prefer to wait until Time 6. The difference could be critical.

“When a police officer confronts an armed suspect, the officer’s choice of response must be made swiftly. Frequently, such decisions must be made in less than a second. During that time, many factors in the scene must be evaluated: the suspect’s motions; where the weapon is aimed; the presence of other people, including other potential suspects, and whether or not they are in the officer’s probable field of fire; and other potential sources of hazard, to self, to others, and to the suspect, in the immediate environment.”³⁶

H. Warrantless Searches

NOTE: Show slide, “Warrantless Searches.”

The Fourth Amendment protects a citizen from government interference when the citizen has a reasonable expectation of privacy in the area or thing searched or seized.

1. Overview of the Fourth Amendment

The Fourth Amendment of the United States Constitution restricts the power of the government, particularly law enforcement officers, to search and seize a person or a person’s property. The Amendment does not apply to a private person’s actions searching or seizing another’s property unless that person is acting as an agent of the government/officer or with the government’s knowledge.³⁷

- a) The Fourth Amendment reads, in full: “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,

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supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.” (United States Constitution, Amendment IV).

Thus, under the Fourth Amendment, all searches and seizures must be reasonable. This includes warrantless searches.

Note: It is important to remember the definition of search since it triggers the requirements of the Fourth Amendment. A search occurs when an officer intrudes into a place where the citizen has a reasonable expectation of privacy. This will be discussed further in this lesson plan.

- b) The United States and North Carolina Constitutions set the minimum standard for protecting privacy. Courts have developed case law, and legislatures have enacted statutes for determining when a warrantless search is justified and, therefore, legal. The stronger the justification for the invasion of privacy, the greater the interference with a person’s privacy that is allowed. The determination is made using a balancing approach—weighing the individual’s right to be free and left alone, against the law enforcement officer’s need to protect the public, investigate a crime, or enforce the law.³⁸
2. The Fourth Amendment only protects a reasonable expectation of privacy.
- a) Fourth Amendment and expectation of privacy

If the person has no reasonable expectation of privacy in the place or person searched, then the rules of the Fourth Amendment do not apply, and the suspect will not be able to argue a Fourth Amendment violation in court. Subject to some exceptions, such as overnight guests, a person does not have a reasonable expectation of privacy in someone else’s home, person, or property. Therefore, defendants must prove that their rights protected by the Fourth Amendment were violated to allege a constitutional violation.³⁹
 - b) No reasonable expectation of privacy

There are certain circumstances where individuals cannot assert an expectation of privacy. When something has been placed out in the open, abandoned, or left in plain view, the courts have generally found that there is no objectively

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reasonable expectation of privacy in those circumstances, even if the suspect in his mind has a subjective expectation of privacy. In other words, any subjective expectation of privacy in those circumstances is not one which society would recognize as reasonable.⁴⁰

Note: The Fourth Amendment's protections do not apply the places and things where there is no reasonable expectation of privacy.

- (1) Open fields – outside the curtilage

NOTE: Show slide, “Open Fields.”

People have a reasonable expectation of privacy for their home and the curtilage of the home, or area immediately surrounding the home. Examples of curtilage include the driveway, a back deck, a flower or vegetable garden just next to the home, or a swimming pool. Structures such as an unattached garage or a storage shed are generally considered part of the curtilage. The legal test for whether an area is part of the curtilage focuses on the proximity to the home and whether the structure frequently serves the needs of the homeowner.

There is no “bright line” judicial rule for determining where curtilage begins and ends; thus, officers who are unsure of whether a particular area or structure is within the curtilage should obtain a search warrant, or act under a recognized exception to the warrant requirement, discussed in this lesson plan.

Conversely, areas outside of the curtilage, such as open fields where crops are being cultivated, are not protected by the Fourth Amendment **even though** the fields are owned by the homeowner. The reason for this rule is that the courts have decided that society does not recognize a privacy interest in open fields easily viewed from the ground or air. Officers may seize illegal items which are plainly viewed during the inspection of the open field.⁴¹

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Note: The presence of “no trespassing” signs will not affect the admissibility of evidence seized from an open field in plain view.

(2) Abandoned property

NOTE: Show slide, “Abandoned Property.”

Abandoned property is property in which a person has intentionally relinquished any interest. If a person has relinquished his rights to a piece of property, he cannot later assert that there was any legitimate expectation of privacy in that abandoned property.⁴²

(a) Real property

It is often difficult to determine whether real property has been abandoned. Therefore, it can be difficult to justify searching real property on the assumption that it is abandoned. An example of real property that is probably abandoned would be a building that has been unoccupied for a long time and gutted by vandals with no sign of anyone asserting any protection or ownership over it. If real property has been rented, then the owner may not normally consent to a search of a rented room or building. If the lease has ended and the renter has left the premises with her belongings—thus indicating intent not to return—then the renter has abandoned the property, and any expectation of privacy in the premises is gone.

(b) Personal property

Personal property, which is voluntarily discarded, is considered abandoned. The former owner of such property loses any expectation of privacy in it once it is thrown away. Since legally the property belongs to no one, it may be recovered by the police without a search warrant. When a person affirmatively denies any possessory or ownership interest in an item, that person has abandoned it.

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(c) Garbage

NOTE: Instructor should draw curtilage on the flipchart while explaining the below.

Once a person places garbage outside the curtilage for collection, the homeowner or renter loses his expectation of privacy in the garbage, and it can be searched by the police without a search warrant. If however, the garbage has been placed within the curtilage for collection, then the garbage can be searched without a search warrant under the following conditions:

- i) The regular garbage collector picks up the garbage on the regular collection day; the person picking up the garbage has been authorized to enter the defendant's property.
- ii) It is picked up in the usual manner, at the usual time (a separate trip to pick up garbage "after hours" would likely be disapproved by the Courts;
- iii) The garbage is searched by law enforcement officers after it has been removed from the premises.

Note: Officers who wish to recover garbage should stress to the collector that the garbage must be kept separate from the other collected trash.

(3) The plain-view doctrine

NOTE: Show slide, "Plain View."

- (a) There are three (3) basic requirements for a legitimate plain view seizure:
 - i) The officers are lawfully in a position from which they view an object; and

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- ii) The incriminating character of the object is immediately apparent (i.e., they have probable cause); and
- iii) The officers have a lawful right of access to the object.

What is knowingly exposed to public sight, hearing, or smell lacks constitutional protection. There is no reasonable expectation of privacy in, for example, marijuana smoke exhaled in public.

Note: The plain view rule does not necessarily authorize a warrantless entry into private premises. The plain view merely provides an observation an officer can use to establish probable cause (see (a) 2), below).

(b) Examples of plain-view observations

- i) Observation from a private place after legitimate access

An officer may enter a private area by consent, to execute a search or arrest warrant, to respond to a call for service, or because of exigent circumstances. If the officer's entry is lawful, he or she may lawfully seize illegal items in plain sight, even if the items seized are not related to the reason for the entry.⁴³

- ii) Observation into a home from a public place

An officer standing on a sidewalk or in a public hallway of an apartment complex may observe illegal items through an open doorway or an unobstructed window. Even when her training and experience tell her what she is observing is unlawful (and in plain view), the

officer still needs a search warrant to seize it, unless there are exigent circumstances or the officer obtains consent to enter the premises. For example, an officer driving by observes a marijuana plant growing inside someone's residence. The officer may not enter the residence to seize the plant unless there are exigent circumstances or the officer first obtains a search warrant, or the officer has valid consent to enter.⁴⁴

Note: The North Carolina Court of Appeals decided that it was unlawful for the officer investigating a recent robbery to walk up to the suspect's porch, lean over a couch, and look through a three (3) inch opening in a drawn curtain to view the suspect counting money (the officer did not have a search warrant). The Court reasoned that such a small opening in the curtain was not the kind of exposure to public view, which would eliminate the suspect's right to privacy.

Officers should note that neither this nor any other North Carolina case limits the right of law enforcement officers to "knock and talk," that is, to knock on the front door of a residence and engage in a voluntary talk with the homeowner or resident.⁴⁵ When officers go to a house using a common entranceway for a legitimate purpose, such as to question the suspect in a criminal investigation, they are not conducting a search under the Fourth Amendment.

iii) Observation into a car

If a car is in a public place, and the officer sees an object that is evidence of a crime, the officer may seize the object without a search warrant.⁴⁶

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iv) Plain view and plain touch

The plain view doctrine also applies to smell and touch. The odor of marijuana emanating from a car establishes probable cause to believe that marijuana is in the vehicle.

Note: In *Minnesota v. Dickerson*, 508 U.S. 366, (1993), the United States Supreme Court created the “plain feel” or “plain touch” exception to the Fourth Amendment’s warrant requirement. *Dickerson* holds that if officers are conducting a lawful frisk for weapons and feel an object which is probably contraband, officers may seize the object *even though they do not believe it is a weapon*. North Carolina has adopted the plain touch exception. The critical inquiry is whether at the time the officer felt the object it was “immediately apparent” that it was contraband. “Immediately apparent” means probable cause to believe that the item is illegal to possess.

(c) Using special devices to enhance perception

NOTE: Show slide, “Special Devices.”

Plain view observations can sometimes be enhanced with the assistance of special devices.⁴⁷

- i) Binoculars and flashlights are usually allowed to clarify an object, but a sophisticated high-power telescope could not be used to look into a home. However, that same telescope could be used to observe activities in an open field or other place where there is no reasonable expectation of privacy.⁴⁸

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- ii) Aircraft surveillance has been allowed, if made from lawful navigable airspace, using the unaided eye, especially over open fields. In *U.S. v. Breza*, 308 F.3d 430, (4th Cir., 2002), aerial surveillance of the defendant's property was a valid warrantless search when officers flew at 500 feet and descended to 200 feet, and similar flights were a regular occurrence over the property.
 - iii) *U.S. v. Kyllo*, 121 S.Ct. 2038, 150 LE2d 94, 2001 U.S. LEXIS 4487, involved the use of a thermal-imaging device from a public street to detect relative amounts of heat within the home. The court ruled that obtaining information by sense-enhancing technology regarding the home's interior that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area" is a search (at least where the technology in question is not in general public use).
 - iv) Police canines can be used in public places, such as airports or to walk around a car, without violating the Fourth Amendment. A canine "sniff" is not a search under the Fourth Amendment since persons have no expectation of privacy in the air around their car or luggage. Remember that there must be justification for detaining the suspect during the sniff. A canine may not enter a private place unless the officer controlling the canine has the right to enter.⁴⁹
- c) Consent by a person who has a reasonable expectation of privacy

NOTE: Show slide, "Consent Searches."

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A person may waive his Fourth Amendment right to privacy if he voluntarily consents to a law enforcement officer's entry into a protected place or examination of an object. Once valid consent has been given, an officer may then invade that person's privacy to the extent that the person gave consent.⁵⁰

Note: Consent searches involve officers intruding into places where a citizen has a reasonable expectation of privacy. However, with consent, officers do not need probable cause or a warrant to search.

(1) Authority to consent

Only a person who has apparent authority to control a given area can give an officer consent to search that area. Because more than one (1) person may have apparent authority to control a given area, any of those parties may give consent to search such areas in the absence of the other; however, when two (2) people with an equal expectation of privacy in a home are present, and one (1) objects, the objection of one (1) party overrides the consent of the other, and the search cannot be conducted as a consent search.

Note: This rule only applies to consent searches. Thus, such an objection has no impact on a law enforcement officer's authority to enter premises under other legal authority, such as exigent circumstances or to execute a search warrant.

- (a) A spouse or roommate may give consent to a search of common areas within a home which she shares with another. However, she may **not** consent to a search of a particular place in which the other person has an **exclusive** privacy interest (such as a separate bedroom or office).⁵¹
- (b) Parents generally have authority to consent to a search of a minor child's room; **but**, the older the child, the less clear the parents' authority. However, the parent does **not** have the authority to give consent to search the personal possessions that are within that child's room, if the child has exclusive access and use of those items.⁵²

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- (c) Only the tenant, not the landlord, may consent to a search of a rented room, apartment, or house. Only when the tenant has abandoned or permanently left the place, may the owner or landlord give consent.⁵³
- (d) The homeowner can consent to a search of his home but **may not** consent to a search of an area set aside for the exclusive use of the guest, such as a bedroom.⁵⁴ Officers who wish to search a bedroom used by an overnight guest, or a guest's personal belongings such as a suitcase, must have consent **of the guest**, an emergency, or a search warrant before searching the bedroom or the belongings.
- (e) Employers may give consent to search their entire property, except for areas where the employer has relinquished control, such as a desk or locker set aside for the exclusive use of the employee. Employees may only give consent to search the work area if their authority extends to control over the property (for example, a store manager).⁵⁵
- (f) Officers cannot rely on the consent of a school principal to search a student's locker (a school official, i.e., administrator or principal, can search the locker without a search warrant if there is reasonable suspicion to believe it contains illegal items). Law Enforcement officers are **not** "school officials." *New Jersey v. T.L.O.* 469 U.S. 325, (1985). Similarly, college or university officials have no authority to consent to a search of a student's dormitory room.⁵⁶
- (g) G.S. 15A-222(2) allows the driver **or** registered owner of an automobile to consent to a search of the vehicle. If the person driving is not the owner, and she gives consent, the search is lawful **even if** the registered owner is not present to give consent. Conversely, the registered owner's consent allows for the search even if the driver refuses consent. If the driver

and the owner are in the vehicle and the driver gives consent but the owner will not (or vice versa), you should follow the wishes of the owner because the owner's expectation of privacy is greater than the driver.

(2) Consent must be voluntary

A valid consent must be voluntary. The consent must be clearly expressed (although there is no legal requirement for a written consent, written consent makes proving consent easier) and made with the knowledge that a search would follow. Courts will invalidate a "consent" that was obtained through coercion or duress. However, consent may be valid even if officers tell a person that if he does not consent, they will apply for a search warrant if officers have the legal authority to obtain the warrant. Officers need not tell the person of the right to refuse consent, but the person's actual knowledge may later be a factor in determining whether the consent was voluntary.⁵⁷

(3) Scope of search and revocation of consent

(a) The scope of the search depends on the terms of the consent given to the officers. A person giving consent may also limit that consent in any manner, including limiting the duration, location, and scope of the search. ("You may search the first floor of my house, but nowhere else.") Also, during a consent search, the person who gave consent may tell the officers to stop at any time.⁵⁸

(b) In the event general consent is given – in other words, no specific scope of consent is established—then the scope of the search may extend to areas in which a reasonable person would expect officers to search.⁵⁹

For example, general consent to search a vehicle does not extend to the dismantling of the vehicle absent additional authority, such as specific consent or probable cause. Similarly, general

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consent to search a person does not extend to conducting a strip search.⁶⁰

Note: Officers may consider requesting additional, specific consent to search areas that fall outside the scope of a general consent.

3. Warrantless searches when there is a reasonable expectation of privacy and no consent

NOTE: Show slide, “Warrantless Searches.”

- a) Exigent circumstances when there is probable cause to search

- (1) What are “exigent circumstances?”

Officers may make a warrantless search when there are exigent circumstances. Exigent circumstances exist when there is **BOTH (a) PROBABLE CAUSE TO SEARCH AND (b) a likelihood that absent immediate action officers could be endangered or evidence could either be destroyed or removed from the jurisdiction.**⁶¹

Factors to consider when determining whether exigent circumstances exist to enter and search a home are:

- (a) Whether officers had probable cause to obtain a search warrant before the exigency was created;
 - (b) Whether officers had an objectively reasonable belief that destruction or removal of the evidence was imminent
 - (c) The seriousness of the offense for which the officers are searching; and
 - (d) How long it would have taken to obtain a search warrant.
- (2) Once the officers have entered a home and secured the area such that exigent circumstances no longer exist, they then must obtain a search warrant.⁶²
 - (3) The following are circumstances in which the courts *have* found exigent circumstances:

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- (a) In *Ward v. Hayden*, 387 U.S. 294, (1967), five (5) minutes after receiving a 911 call that a suspect had committed an armed robbery and run into his home, police entered the home to search for the suspect and evidence.
 - (b) In *State v. Wallace*, 71 NC App 681, (1984), an accomplice of a robbery suspect informed the police that the suspect was staying at a motel. Before the police could obtain a warrant, the motel clerk called to advise the officers that the suspect was preparing to check out of the motel. The police entered the hotel room and arrested the suspect.
- (4) Courts *did not* find exigent circumstances in the following situations:
- (a) Four (4) days after a murder, police make warrantless entry into the suspect's home. *Payton v. New York*, 445 U.S. 573, (1980);
 - (b) Electronic surveillance reveals that inhabitants of a house are about to smoke one (1) joint of marijuana, following delivery of 50 pounds of marijuana to the house.
 - (c) Crime/fire scene: See page 74 for a discussion of searching a crime scene
- (5) Urgent necessity
- (a) Officers may enter a home without a warrant or consent if entry is required because of an exigent circumstance or to save life, prevent injury, or protect property.
 - (b) G.S. 15A-285 provides the following emergency authority:

"When an officer reasonably believes that doing so is urgently necessary to save life, prevent serious bodily harm, or avert or control public catastrophe, the officer may take one or more of the following actions:

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- i) Enter buildings, vehicles, and other premises.
 - ii) Limit or restrict the presence of persons in premises or areas.
 - iii) Exercise control over the property of others. An action taken to enforce the law or to seize a person or evidence cannot be justified by authority of this section.”⁶³
- (c) Examples of situations where officers may consider this authority include:

Note: These are just a few examples. Officers must be able to articulate a reasonable belief that action is necessary to prevent bodily harm or avert a catastrophe.

- i) Officer observes flames and smoke coming from burning dwelling. Entry may be necessary to save lives.
- ii) Officer notices fighting from the outside of a home and observe individuals injuring each other. If officers do not see fighting, but hears threats, screaming, loud banging sounds, and the sound of fighting or other violence from inside may justify forced entry to prevent serious injury to someone inside.
- iii) Officer responds to a 911 call for help from a victim of domestic violence. Admittance is being denied by one (1) who is the aggressor.

While in the home under G.S. 15A-285, officers may seize illegal items in plain view.

- (6) The motor vehicle exception – “The Carroll Doctrine.”

If officers have probable cause to search a vehicle for evidence, and the vehicle is in a public place, the

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officers may seize and search the vehicle without a search warrant. If the officers have probable cause to search a vehicle, they may also search containers within the vehicle if it would be reasonable to find the object of the search in the container. Containers and vehicles may be searched regardless of ownership.

The rationale for this exception lies in the reduced expectation of privacy within a vehicle, the inherent mobility of the vehicle, and the subsequent ease with which evidence could be destroyed, made to disappear, or the possible removal of the entire vehicle from the jurisdiction.

Note: Various searches of motor vehicles are discussed in more detail later in this lesson plan.

- b) Searches incident to arrest and protective searches and frisks
 - (1) Search of a person incident to arrest

Regardless of the offense leading to the arrest, officers have the **automatic** right to search the arrested person and her lungeable area incident to the arrest. (This automatic right to search the lungeable area does not extend to the interior of a vehicle. The authority to search a vehicle incident to arrest of an occupant will be discussed later.) The search incident to arrest must be accomplished in close proximity in time and place to the arrest. The scope of the search incident to arrest is limited to the arrested person (but not body cavities), and the area and objects within the arrested person's immediate control ("grab" or "lunge" area). Therefore, an arrest at the front door of a residence does not justify a search of the entire home, unless it is reasonable to believe that there are weapons or people inside who pose a danger.

- (a) Protective sweep of home

When officers arrest a person in his home, they may perform a "protective sweep" of the premises. Such a sweep is limited to areas from which an attack could be launched. Such a search is authorized if the officers have an

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articulable, reasonable suspicion to believe that the place to be searched may harbor a dangerous person.⁶⁴

- (b) Search of motor vehicle incident to arrest of occupant

If a person is arrested in a vehicle, the entire passenger compartment of the vehicle may be searched incident to arrest only in two (2) circumstances:

First, such search incident to arrest may occur automatically only when the person is unsecured, and within reaching distance of the passenger compartment at the time, the search is conducted. The courts have stated that this will be very rare. From an officer's safety perspective, if subjects are under arrest, yet still not fully secured, the officer's primary concern should be securing the arrestees rather than searching the vehicle.

Second, such search incident to arrest may occur if the officer reasonably believes there is evidence in the vehicle which is relevant to the crime being charged (this includes the front and back seats, glove compartment, and all containers—open or closed, locked or unlocked—within the interior).

Note: For example, an arrest for a misdemeanor license violation nor speeding offense probably would not authorize a search of the vehicle incident to arrest. On the other hand, officers who arrest for DWI may articulate reason to believe more evidence relevant to that offense may be in the vehicle, such as open containers.

Officers must consider the nature of the offense, and the type of relevant evidence involved, in determining a reasonable belief that such evidence may be in the vehicle. Officers who are not authorized to search the vehicle incident

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to arrest may seek alternative search authority, such as consent.

- (c) Officers have no right to search incident to citation, although a person may be asked to consent to such a search.

(2) Frisk of a person

Once a suspect has been validly stopped, such as an investigative stop, an officer may frisk a person when he has an articulable reasonable suspicion the person may be armed and dangerous, but the officer does not have probable cause to arrest or search the person. *Terry v. Ohio*, 392 U.S. 1, (1968). A frisk is a limited pat-down of outer clothing to determine whether the person has any weapons. If the officer reasonably believes that he has felt a weapon during a frisk, the officer may reach into the suspect's clothing or possessions and seize the object.⁶⁵

- (a) The authority to stop a suspect does not automatically give officers the authority to frisk. The officer must articulate why the frisk was necessary, i.e., why she believed that the detained person was armed and dangerous.
- (b) Persons stopped on reasonable suspicion that they may have committed a violent crime, i.e., murder, kidnapping, robbery, serious assault, and drug sale, are presumed to pose a threat to officers. Such persons may be frisked with or without additional factors indicating that they may be armed and dangerous.
- (c) During a frisk, an officer may feel an item that is not likely to be a weapon but is contraband. If at the time he first felt the object the officer had probable cause to believe it is contraband; the object may be seized even though the officer has no reason to believe it is a weapon. This is known as the "plain feel" doctrine. The incriminating nature of the object must be "immediately apparent" based on plain feel during the frisk.

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(d) An officer may always ask for consent to search if he is unsure of what he felt.

(3) Protective sweep of a building

An officer may conduct a “protective sweep” or a “frisk” of a building in conjunction with an arrest when the searching officer reasonably believes that potentially dangerous individuals may be hiding or present in the building. Remember, a protective sweep is not a search for evidence. Its purpose is to ensure officer safety. However, evidence in plain view may be seized if it is viewed while the officer is looking in a place where a person could be hiding.

(4) Car frisk

Officers may look for weapons in a vehicle when they have a reasonable suspicion that an occupant is armed and dangerous and may gain access to weapons. This is called a “car frisk” because it is limited to looking for weapons based upon reasonable suspicion, as opposed to searching for evidence, which requires probable cause. Therefore, officers may only look in locations or containers that may contain a weapon and are within the immediate reach of the suspect.

4. Specific rules involving search of vehicles

- a) If officers have probable cause to believe there is evidence of crime in the vehicle, and the vehicle is located in a public place (including public vehicular area), they may search anywhere in the vehicle where the evidence could be located, including the trunk (the vehicle must be stopped in a public place). This is known as the motor vehicle exception to the Fourth Amendment’s warrant requirement. It is also known as “the Carroll Doctrine.” A search warrant (or consent or an emergency) is required before searching a vehicle within the curtilage of the owner’s home.
- b) Officers may order the driver and passengers either to remain in or move out of the vehicle with or without suspicion that such persons are a threat.

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- c) An arrest of an occupant of a vehicle authorizes officers to search the **passenger** compartment of the vehicle incident to arrest only if the arrested person is unsecured and within reaching distance of the passenger compartment, or the officer reasonably believes there is evidence in the vehicle relevant to the crime for which the person is arrested. The authority to search a vehicle incident to arrest was discussed in detail previously.
- d) During the search of the passenger compartment, officers may discover illegal items which in turn may lead to probable cause to believe that additional evidence may be discovered in the trunk. If so, officers may search the trunk at the scene of the stop without a warrant. The motor vehicle exception was discussed in detail previously.
- e) Vehicles may sometimes be impounded. Reasons for impoundment may be to protect the vehicle and its contents or to prevent the vehicle from becoming a safety hazard. The search of an impounded vehicle must be done by the impoundment and inventory procedures of the law enforcement agency.

I. Search Warrants

NOTE: Show slide, "Search Warrants."

- 1. Drafting search warrants
 - a) General requirements
 - (1) The officer who executes a search warrant does not have to be the officer who applies for the warrant. Therefore, the descriptions of the premises, persons, or vehicles to be searched and property to be seized must be sufficiently detailed so that an officer executing the search warrant does not search or seize the wrong person or property.
 - (2) It does not matter who completes the application for the search warrant as long as it accurately represents the facts known to the applicant. Thus, an officer may (and usually does) fill out most or all of the application before bringing it to the magistrate for approval. The justice, judge, or magistrate before whom the warrant is

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brought for signature will question the applicant under oath about the circumstances giving rise to her belief that there is probable cause to believe illegal items are located in a certain place.

- (3) In addition to the applicant officer, other officers, informants, and citizens may come before the judicial official to testify in support of the warrant application. Instead of such testimony, civilians and/or officers can sign affidavits which must be attached to the warrant application.
- (4) Who may issue a search warrant?

NOTE: Show slide, “Who May Issue a Search Warrant?”

- (a) Only judicial officials may issue a search warrant.
- (b) Appellate and superior court judges may issue search warrants that are valid anywhere in the state.
- (c) District court judges may issue warrants valid within their district.
- (d) Clerks and magistrates may issue search warrants valid within their county.

Note: Officers are cautioned to avoid “boilerplate,” or prewritten, generic language in search warrant applications. There is nothing wrong with referring to past warrant applications for appropriate language, but each search warrant application must be geared to the specific facts of the investigation at hand.

b) Application

- (1) The AOC form
 - (a) Original – Execute, sign, and return to clerk.
 - (b) Defendant’s copy – Give to the person in apparent control of premises.

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- (c) Clerk's copy – Sent to clerk's office by the issuing official.
- (d) Officer should make a photocopy for her file.
- (2) Description of property to be seized
 - (a) The Fourth Amendment requires that a warrant must particularly describe the items to be seized. The warrant application must establish that the item to be seized is:
 - i) Stolen
 - ii) Contraband (unlawful to possess)
 - iii) Used or possessed to commit or conceal the commission of a crime
 - iv) Evidence of a crime or identity of a suspect
 - (b) The description should be sufficient, so an officer unfamiliar with the investigation will be able to seize the appropriate property. Generally, drugs do not require as much detail as other crimes, because possession of narcotics is unlawful. However, warrants alleging that stolen property is in a certain location require greater detail, because, for example, a bald description in the warrant that a "stolen television" will be found at a premises does not adequately describe the item to be seized (many if not most residences contain more than one (1) television set.)
 - (c) Specific items to be described:
 - i) Stolen property
 - Serial numbers
 - Detailed description of property
 - Inventory from reports

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- Photos from victim
- ii) Weapons
 - Manufacturer
 - Model
 - Serial number
 - Identifying features
- iii) Evidence of ownership or possession
 - Letters, checkbooks, bills, leases, and other documents
 - Keys to premises or vehicle
 - Prescription bottles
 - Officers may wish to include language such as the following: “Items or articles of personal property tending to show ownership, dominion, or control of the premises.” Including this language broadens your search to anywhere in the premises where, for example, utility bills or other documents could be found to prove that the defendant is the homeowner or resident.
- iv) Controlled substances
 - Specific drugs should be stated, “to include, but not limited to . . .” Do not limit yourself to seizing only one (1) type of drug.
 - No specific amount should be identified.

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- Officers may also wish to include language such as the following: “records of illegal drug activities, documents, photographs, letters, drug paraphernalia, money, beepers, telephone records, and other evidence of drug trafficking.” Such language will allow officers executing the warrant to seize “trafficking” evidence.

v) Persons

- Include, if possible, name and alias, sex, race, height, weight, hair color, eye color, scars, and tattoos.
- A photograph may be attached so an officer unfamiliar with the suspect may identify him.

(3) Identifying the crime that was committed⁶⁶

Use a short phrase like “armed robbery” or “possession of controlled substances.” Give the statutory citation if possible. The description of the crime does not have to be as detailed as an arrest warrant because a search warrant does not charge a crime. Also, there may be evidence of a homicide, but officers may end up charging a different version, like second-degree murder instead of first-degree murder.

(4) Describing the property to be searched⁶⁷

NOTE: Show slide, “Describe the Property.”

Again, the description must be accurate enough so that an officer unfamiliar with the case should be able to find the location. Although not legally required, maps and photographs are helpful and are encouraged.

(a) Premises

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A street address is legally sufficient. However, officers should include a physical description and directions or map in case the street number is wrong, missing, or deliberately altered. Apartments should be described by location in the building, rather than just the apartment number for the same reason.

(b) Vehicles

Vehicles under control of one (1) of the occupants or parked in an outbuilding do not have to be identified on the warrant, although it is preferable to do so. Officers should note that a vehicle owned by or under control of an occupant of the subject property may be searched under the authority of the warrant as long as the vehicle could contain the contraband named in the warrant. *State v. Reid*, 286 N.C. 323, (1974). Officers should, however, include vehicles in the warrant in the event the vehicle is located somewhere else at the time that the search is carried out.

Include make, model, year, color, license number, VIN, and any unique characteristics like damage or a special paint job.

(c) Other

This block on the form should be used to identify containers like luggage, briefcases, or footlockers that are not otherwise subject to a warrantless search.

c) The probable cause affidavit

(1) Officer's background

NOTE: Show slide, "Officer's Background."

(a) Agency and background

(b) Years in law enforcement

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- (c) Years in current assignment
 - (d) Certification and special training
 - (e) Education
 - (f) Knowledge of particular offense
- (2) Sources of information
- (a) Personal observation - state where, when, how, and what you saw.
 - (b) Hearsay information - what someone else told you. A statement by someone other than the affiant officer

- i) Other officers
- ii) Citizen informants

Citizen informants must be identified by name. Once identified, a named citizen's information is generally deemed reliable by the courts.

- iii) Confidential informants

Because confidential informants generally are not viewed as being as credible as citizen informants, officers drafting a search warrant based in part on information from a confidential informant should strive to explain fully: **why** the officer believes the informant is credible; **and** why the officer believes that the information provided by the informant is trustworthy.

- The informant's credibility

The best way to indicate why the informant is credible is to show that he or she has given previous information which has led to

arrests, convictions, and seizures of property **of the type described in the instant warrant application**. While this “track record” is not a requirement for establishing probable cause, previous good information from an informant will go a long way to convincing the judicial official that there is probable cause in the warrant application at hand.

A statement against penal interest is another way to establish the credibility of a confidential informant. Thus, where an informant tells an officer that the informant knows what he says to be true because he was engaged in the criminal activity that is a statement against penal interest (an example would be an informant who tell officers that he just purchased narcotics at a certain location). The reason why such an informant is probably telling the truth is that most people do not admit to criminal activity without there being some basis in fact for the admission.

- Totality of the circumstances:
Illinois v. Gates

In *Gates*, the police received an anonymous note detailing Lance and Sue Gates’ trip to Florida to buy and transport marijuana. The writer predicted the travel dates and the vehicle to be used to transport the contraband. The police corroborated the activities predicted in the note and then obtained a search warrant for the

Gates' car and home. The United States Supreme Court held that although the credibility of the informant could never be established—the note was anonymous—the police nevertheless had probable cause based on their corroboration of the details of the note. Officers should be careful not to misinterpret *Gates*. It does not reduce the officer's burden of probable cause; it merely changes the test that will be used to determine whether that burden has been met. Whenever possible, officers should continue to outlined in the warrant application why the informant and his information are credible. North Carolina Courts have adopted the "totality of the circumstances" test. *State v. Riggs*, 328 N.C. 213, (1991); *State v. Beam*, 325 N.C. 217, (1989).

A confidential informant becomes more reliable as the amount of credible detail he or she gives to the police increases. In *Gates*, for example, if the anonymous note had only read that "Lance and Sue Gates are drug dealers," the police would have been hard pressed to obtain a valid warrant. The note, however, gave much more detail concerning travel plans, dates of arrival in Florida, and the vehicle to be used by the Gates' to transport the marijuana. Critical in *Gates* and any warrant using information from a confidential informant is that law

enforcement **corroborates the information**. This means that officers must conduct an independent investigation to determine whether the informant has given accurate information.

The basis of knowledge—why the information provided by the confidential informant is credible—can be established in several ways:

The affidavit should indicate *how* the informant has knowledge; for example, did he see narcotics in the subject location?

How does she know it is narcotics?

When did the informant see the contraband?

Where in the premises were the drugs located/sold?

How soon after observing criminal behavior did the informant come to the police?

Is the informant aware that narcotics are sold from the subject location daily?

The officer's corroboration of the information should also be included in the affidavit.

- iv) Anonymous tips (see discussion of *Illinois v. Gates* above)
 - Information contained in anonymous tips should be

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corroborated to the extent possible.

- Anonymous tips predicting future behavior are more credible than tips which state existing facts, especially after the predicted future behavior occurs.

v) Records

- Conviction and arrest records
- Utility records (water, cable, phone, and property tax records) indicating that the suspect owns, lives in or works at the subject location.
- DMV records
- Reputation and character

d) Presentation of warrant to judicial official

- (1) The judicial official must make an independent judgment that there is probable cause. The search warrant must advise the judicial official of facts sufficient to establish probable cause to believe the items sought will be located in the place to be searched, not merely an officer's conclusions.
- (2) Additional affidavits from witnesses and/or officers may be attached to the search warrant. Occasionally, a witness provides oral testimony to the judicial official in support of the warrant.
- (3) An officer should be careful to include all relevant information in the search warrant, as the officer does not get a second chance to "add" to it once it is issued. G.S. 15A-245(a).⁶⁸

2. Execution of search warrant

NOTE: Show slide, "Execution of Search Warrant."

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- a) G.S. 15A-247 specifies who may execute a search warrant (subject matter and territorial jurisdiction), and G.S. 15A-248 states that a search warrant must be executed within 48 hours after it is issued or it is void.

The warrant may be executed at any time during the day or night, but officers should be prepared to testify why it was necessary to execute the warrant at night.

- b) Entering premises

- (1) Notice (G.S. 15A-249)

“The officer executing a search warrant must, **before entering the premises**, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.”⁶⁹

Note: N.C. G.S. 15A-251(2) authorizes forced entry without knocking and announcing “... if the officer has probable cause to believe the giving of notice would endanger the life or safety of any person.”⁷⁰ The threat to life may occur suddenly during the search warrant execution, or officers may be aware of “threat to life” information received from credible informers or may be inferred from the violent nature of the crime suspect committed. If possible, officers should include in the search warrant affidavit any factual information they have indicating probable cause to believe life will be threatened by suspect if officers comply with the notice rules of G.S. 15A-249.

- (2) Service

Officers may secure the premises and occupants after making entry. Before searching, officers must read the warrant (just the order, not the affidavit) to the occupant. If nobody is present, the officers do not have to read the warrant out loud to a silent home but must leave a copy affixed to the premises or vehicle searched.

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Note: A copy of the warrant should be left in a conspicuous place.

(3) Scope of the search (G.S. 15A-253)

The search may include any area within the premises, including outbuildings, and any containers that may contain the items to be seized. Evidence not named in the search warrant but inadvertently seen in plain view may also be seized if it is immediately apparent that it is evidence or contraband.

(4) Persons on the premises (G.S. 15A-255 and 256)

(a) Public places

During execution of the search warrant, officers may detain individuals named in the warrant. Officers *may not* detain or frisk other persons unless officers have reasonable suspicion that the person is armed or dangerous. For example, suppose an officer is executing a search warrant at a restaurant. The owner/bartender is the only person named on the warrant (there is probable cause to believe he is selling cocaine behind the bar). May the patrons of the bar, or its employees, be frisked? They may not be searched unless the officer develops reasonable suspicion once inside, that a patron or employee is engaged in criminal activity and is armed and dangerous.

(b) Private places (G.S. 15A-256)

During execution of the search warrant, officers may detain anyone on the premises. Officers may frisk anyone who they reasonably suspect is armed or dangerous (a full search may only be performed under the circumstances outlined in the “Note” just below). Officers may conduct a full-blown search—not just a pat-down—of persons named in the warrant (Officers may, of course, conduct a full search of any person should the search be based on consent).

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Officers may also search, incident to arrest, anyone that they arrest during the search.

Note: A detained person not named on the warrant *may* be fully searched if 1) officers have executed the warrant but have not discovered the named contraband; and 2) the contraband could reasonably be found on the person of the detainee. This rule only applies where the search warrant is executed in a private place.

Note: Under G.S. 15A-254, the officer who executes a search warrant must give to the owner of the premises or vehicle searched a signed receipt listing all items taken during the search. If the owner is not present, the receipt may be left with a person in control of the premises present at the time of the search. If no one is present, the receipt should be affixed to the home or vehicle.

(5) Return of the executed warrant (G.S. 15A-257)

Once the officer executes the search warrant, he or she must, without unnecessary delay, return the warrant to the clerk of the issuing court together with a written inventory of items seized. The officer who executed the warrant must sign and swear to the truth of the inventory form. The phrase “unnecessary delay” means that absent special circumstances, the warrant should be returned to the clerk on the date of execution or, if the clerk’s office is closed, the next day it is open.

Note: The warrant must be returned to the clerk of the issuing court whether or not items were seized.⁷¹

(6) Disposition of seized property (G.S. 15A-258)

Property seized under a search warrant must be held in the custody of the officer who applied for or who executed the warrant. The officer may use his department’s facilities to store the property. The officer may deliver the property to another law enforcement agency for testing or analyzing the property.

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Note: The rules discussed above specifically apply to search warrants. They do not apply to administrative inspection warrants or special inspection warrants issued under G.S. 14-288.11 during riots or states of emergencies.

3. Special cases

NOTE: Show slide, “Special Cases.”

a) Obscenity offenses (G.S. 14-190.20)

Only upon the request of a district attorney or assistant district attorney can an officer apply for a search warrant to search for and seize obscene materials.⁷²

b) Crime scene search warrant problems

The United States Supreme Court has rejected a “crime scene exception” to the Fourth Amendment’s search warrant requirement. *Mincey v. Arizona*, 437 U.S. 385 (1978); *Flippo v. West Virginia*, 528 U.S. 11 (1999). In *Mincey*, the Court ruled that it was unconstitutional for the police to conduct a warrantless four-day search of a scene where an undercover police officer had been killed. Students should note that the Court recognized that the entry into *Mincey*’s home was justified given the exigent circumstance of an officer just being shot. Once lawfully inside, the officers were allowed to conduct a protective sweep of the premises to check for victims and perpetrators. *Maryland v. Buie*, 494 U.S. 325 (1990). A “sweep,” though, is more limited than a search; once the officer’s protection is assured, a search warrant (or consent) is needed before looking for evidence of a crime.

Officers must note the distinction between a lawful warrantless entry based on exigent circumstances and the right to search the premises entered. As a general rule, law enforcement officers are allowed to make a warrantless entry into a possible crime scene if consent is obtained from one with apparent legal authority to grant consent or exigent circumstances exist.⁷³

Exigent circumstances are those that create a reasonably objective belief that absent immediate action, officers could be endangered or there is an imminent risk that evidence could either be destroyed or removed. Factors to consider when

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determining whether such circumstances exist to enter and search a home are:

- (1) Whether officers had probable cause to obtain a search warrant before the exigency was created;
- (2) Whether officers had an objectively reasonable belief that destruction or removal of the evidence was imminent;
- (3) The seriousness of the offense for which the officers are searching and
- (4) How long it would have taken to obtain a search warrant.
- (5) Exigent circumstances could also include danger to human life, such as a hostage situation or to find a victim of a recent violent act.⁷⁴ *State v. Allison*, 298 N.C. 135, (1979).

Once this initial sweep for perpetrators and victims is complete, and any imminent risk to evidence controlled, absent valid consent or truly exigent circumstances, an officer should obtain a search warrant before searching further. The crime scene may be physically secured by officers while a search warrant is sought. Remember, the fact that an officer is at a crime scene does not give him the automatic right to search for evidence. Consent to search beyond the existence of exigent circumstances should not be presumed because the officers have responded to a call from a resident of private property. Sufficient contact should be made with the person able to give lawful consent and consent obtained.

Officers searching crime scenes may not be sure of the types of evidence that will be found therein. While the Fourth Amendment requires that the items sought under a search warrant must be “particularly described,” the courts will accept a crime scene warrant where, by necessity, the applicant officer cannot be specific. Thus, a general list of items to be seized is acceptable. Robert L. Farb suggests that the following language be used as a guide in this circumstance: “fingerprints, bloodstains, fired and unfired bullets and casings, footwear impressions, trace hair and clothing fibers, physical layout of

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the premises” and “any and all evidence that may relate to a suspected murder, [including a knife or other weapon].”⁷⁵

c) Anticipatory search warrants

An anticipatory search warrant is a warrant that is issued before all of the facts or events taking place that create the probable cause to search. Essentially, the officers are telling the court what is going to happen in the future and are asking for permission to search once the future events take place. Suppose, for example, the police arrange for a confidential informant to purchase narcotics at a certain location. The police are concerned that in the time from the purchase to obtaining a search warrant, the seller either will not be present or his narcotics will be gone. In such a case, officers could apply for an anticipatory search warrant which would state that on a future date the informant will purchase narcotics at a premises and at that time there will be probable cause to believe that narcotics will be found at the location. Such warrants are authorized in North Carolina provided officers follow strict requirements:

- (1) An anticipatory search warrant must set out explicit, clear, and narrowly drawn triggering events that must occur before execution of the warrant may take place.
- (2) These triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, that is, the property is on a sure and irreversible course to its destination.
- (3) A search may not occur unless and until the event occurs.
- (4) The warrant should state on its face, “Anticipatory Search Warrant.” *State v. Smith*, 124 N.C.App. 565, (1996).

d) Searching and seizing electronic equipment

- (1) A search warrant may issue for the search, seizure, and examination of electronic evidence requested in the warrant.

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- (2) Search warrants for electronic storage devices typically focus on two (2) primary sources of information:
 - (a) Electronic storage device search warrant – This warrant covers search and seizure of hardware, software, documentation, user notes, and storage media. It also allows for the examination and search and seizure of data.
 - (b) Service provider search warrant – This warrant covers service records, billings, and subscriber information.

- (3) Other electronic devices which may contain important evidence of criminal activity are:
 - (a) Wireless telephones
 - (b) Cordless telephones
 - (c) Answering machines
 - (d) Caller ID devices
 - (e) Electronic paging devices
 - (f) Facsimile machines
 - (g) Smart cards & magnetic stripe cards
 - (h) ID card printers
 - (i) Scanners
 - (j) Printers
 - (k) Copiers
 - (l) Compact disk duplicators and labelers
 - (m) Digital cameras/video/audio
 - (n) Electronic game devices
 - (o) Global positioning system

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- (p) Personal data assistants/hand held computers
 - (q) Security systems
 - (r) Vehicle computer devices
 - (s) Storage media
- e) Financial records
- (1) Government access to financial records in a financial institution is limited by the North Carolina Financial Privacy Act, G.S. 53B-1 to 53B-10, and the federal Right to Financial Privacy Act, 12 U.S.C. 3401-3422.
 - (2) Law enforcement can access a customer's financial records held by a financial institution by five (5) methods:
 - (a) Customer authorization. G.S. 53B-4(1).
 - (b) Search warrant. G.S. 53B-4(3).
 - (c) Pending litigation. G.S. 53B-4(8).
 - (d) State grand jury subpoena or court order. G.S. 53B-4(9).
 - (e) Other court order or subpoena. G.S. 53B-4(11).
 - (3) Further information and detail is available in Chapter 53B of the North Carolina General Statutes and Farb's book.⁷⁶
- f) Search warrants for body cavity searches

A search warrant authorizing a health professional to search a body cavity for concealed drugs is recognized by case law. A credible informer's information may indicate the suspect conceals drugs in a balloon or condom in the anal or vaginal cavity. A search warrant may authorize an X-ray procedure to verify presence in a body cavity and also authorize extraction by a health professional.

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Occasionally, a drug suspect will try to eat drugs to prevent a seizure. Reasonable force is authorized to prevent swallowing, but great care should be used to avoid unintended neck injury. A drug suspect who swallows drugs should be taken immediately to a hospital emergency room to treat a possible overdose.

J. Administrative Inspections

NOTE: Show slide, “Administrative Inspections.”

1. General administrative inspection authority

Many state and local agencies are given statutory authority to inspect certain businesses, specified records, and a variety of activities. These inspections may be part of a system of inspections or may be in response to specific information concerning possible administrative violations at a specific location. (G.S. 15-27.2(c)(1).)

Most administrative inspections are accomplished by consent. If consent is not given or not an appropriate option in a particular case, then most nonconsensual administrative inspections are conducted by use of an administrative inspection warrant. (G.S. 15-27.2.)

Administrative inspection warrants are applied for and executed by officials designated to carry out the particular administrative inspection. The process for applying for administrative inspection warrants is explained in G.S. 15-27.2 and Farb’s book.⁷⁷

However, these officials applying for administrative inspection warrants are not normally law enforcement officers and may call on law enforcement officers for assistance when they execute the warrant.

If present during an administrative inspection, the officer’s responsibility is to stand by and keep the peace, that is, to ensure that the inspection can proceed in an orderly fashion. The officer’s role is not to conduct the inspection, but only to insure the inspection proceeds by the administration inspection warrant. The statutory provisions related to execution of search warrants do not apply to administrative inspection warrants. (G.S. 15A-259.) Anyone who willfully interferes with officers entering the premises or with inspectors conducting the inspection may be charged with G.S. 14-223, resisting officers, a misdemeanor.

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Evidence of a crime recovered during execution of an administrative inspection warrant is inadmissible in court, G.S. 15-27.2(f) unless the evidence relates to the purpose of the inspection. For example, an inspector is in a home to check for a vermin condition. He enters with an administrative inspection warrant and sees cocaine on the kitchen table. He informs officers of this discovery. May the police use this information to obtain a search warrant? The answer is no.

Note: The statute does *not*, however, prevent the officer from seizing the illegal item(s) or from accepting contraband discovered by the inspector.

Note: Most administrative inspectors are given consent to enter a premise by the homeowner or renter. Criminal evidence observed during such a consent entry *may* be the basis for a search warrant or seized under plain view.

2. Fire scenes

While fire suppression activities are continuing and government officials retain control of the fire scene on private premises, warrantless inspection of the fire scene to determine cause and origin of the fire is permitted. Once the fire suppression activities are terminated or government officials have relinquished control of the fire scene, entry to inspect the premises to determine cause and origin of the fire requires consent, an administrative inspection warrant, or a search warrant.⁷⁸

3. Inspections without an administrative inspection warrant

For certain highly regulated industries and activities, warrantless administrative inspections are authorized.⁷⁹

G.S. 18B-502 authorizes ***alcohol law enforcement agents*** to conduct warrantless inspections of premises selling alcoholic beverages. This section does ***not*** apply to other law enforcement officers ***unless*** their department has contracted to provide alcohol beverage control enforcement services. G.S. 113-136 authorizes marine patrol officers to conduct warrantless inspections of commercial fishing operations and persons transporting or selling seafood products.

K. Nontestimonial Identification

NOTE: Show slide, “Nontestimonial Identification.”

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1. Purpose

Nontestimonial identification evidence is physical evidence taken from the body of a person for comparison with evidence found at the crime scene to develop probable cause that this particular suspect committed the offense.

2. Seizing body evidence

NOTE: Show slide, “Body Evidence.”

In determining how to lawfully seize body evidence from an adult suspect, the custody status of the suspect and whether the type of evidence sought is body fluids (requiring intrusion into the body), or other types of nontestimonial evidence must be considered.

a) Suspect in custody

For a suspect in custody, there are three (3) options in obtaining nontestimonial evidence. Nontestimonial identification orders are not one of the options available when dealing with suspects in custody. The three (3) options are:

(1) Voluntary consent

Voluntary consent is a lawful manner of obtaining any type of nontestimonial identification evidence, including blood. However, the consent can be withdrawn at any time. Documenting the consent in writing is best because **there may be arguments later about the scope of the consent.** Remember, if the defendant has already appeared before a magistrate, been to a first appearance, or has been indicted, you may also have a right to counsel issue under the Sixth Amendment.

(2) Warrantless seizure incident to lawful custody

This is an area to pursue cautiously. While legally you can seize all kinds of nontestimonial identification evidence (such as fingerprints, hair, fingernail scrapings) other than blood for typing purposes from an adult prisoner without a warrant or court order, and there is no right to refuse, the better option is to obtain a court order. The complications start to arise if the

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suspect is not cooperative and resists. As a policy matter, the court order is the safest route.

(3) Search warrant

A search warrant is required if you are seeking blood. A search warrant is an option for other types of nontestimonial identification evidence and has many advantages, but the problem is that you are usually seeking the nontestimonial identification evidence to develop probable cause and probable cause must already exist for a search warrant to be issued.

b) Suspect not in custody

For a suspect not in custody, there are also three (3) options. The three (3) options are:

(1) Voluntary consent

As with the suspect in custody above, voluntary consent is always an option, but as discussed above and in the discussion of consent in the search and seizure section, there are limitations with consent.

(2) Nontestimonial identification order

This option cannot be used to obtain blood but can be used for all other types of nontestimonial evidence from a suspect not in custody. Nontestimonial identification orders are covered in the next section.

(3) Search warrant

As discussed above, a search warrant is required if you are seeking blood and is an excellent tool for other types of nontestimonial identification evidence if you have probable cause.

3. Nontestimonial identification orders

a) General

(1) Nontestimonial identification orders can be an effective investigative tool if the suspect is not in custody.

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- (2) Nontestimonial identification orders are only to be used for obtaining nontestimonial identification.

G.S. 15A-279(d) prohibits the use of nontestimonial identification orders as a method of getting a suspect in to the station to be interviewed by preventing the use of any statements made during the nontestimonial procedure unless the suspect's attorney is present.

- (3) What is nontestimonial evidence?

NOTE: Show slide, "What Is Nontestimonial Evidence?"

For nontestimonial identification orders, G.S. 15A-271 provides that nontestimonial evidence includes:

- (a) Fingerprints, palm prints, footprints
 - (b) Dental characteristics, tooth impressions
 - (c) Hair samples, urine specimens, saliva samples
 - (d) Handwriting and voice samples
 - (e) Photographs, measurements, and skin characteristics
 - (f) Lineups
 - (g) Or similar identification procedures requiring the presence of a suspect
- b) When can a nontestimonial identification order be requested?
- (1) The nontestimonial identification order can be requested before arrest, after arrest, or before trial. G.S. 15A-272.
 - (2) The nontestimonial identification order cannot be requested if the suspect is in custody. *State v. Welch*, 316 N.C. 578, (1986).
- c) Who can request a nontestimonial identification order?

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A nontestimonial identification order must be requested by a prosecutor. Officers should, therefore, contact their District Attorney's Office when seeking such order.

- d) Who can issue a nontestimonial identification order?
 - (1) Any judge can issue a nontestimonial identification order.
 - (2) A magistrate or clerk cannot issue a nontestimonial identification order. G.S. 15A-271
- e) Sufficiency of the affidavit
 - (1) The affidavit must show all three (3) of the following:
 - (a) Probable cause to believe a felony offense or a Class A1 or Class 1 misdemeanor has been committed; and
 - (b) Reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and
 - (c) Results of the specific nontestimonial identification procedures will materially aid in determining whether the person named in the affidavit committed the offense. G.S. 15A-273.
 - (2) The affidavit form on the reverse side of the application for a nontestimonial identification order (AOC Form AOC-CR-204) is designed to include all three (3) requirements. The Administrative Office of the Courts has separate forms for adult and juvenile suspects. The adult forms are "AOC-CR-204," and "AOC-CR-205," and the juvenile forms are "AOC-J-204" and "AOC-J-205."
- f) The 72-hour rule
 - (1) A nontestimonial identification order must be served at least 72 hours before the time designated for the nontestimonial identification procedure to be conducted. G.S. 15A-274.

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- (2) Request for modification of the 72-hour rule:
 - (a) If the nature of the evidence sought makes it likely that delay will adversely affect its probative value, or when it appears likely that the person named in the order may destroy, alter, or modify the evidence sought or may not appear, the prosecutor may request modification of the 72 hour notice requirement. G.S. 15A-274.
 - (b) The application form includes a section on modification of the 72-hour rule. Facts supporting the reason for modification must be set forth, and the prosecutor must appear before the judge to be duly sworn as to the basis for modification.
 - (c) The person ordered to appear may also request modification of the time or place if reasonable under the circumstances to do so. G.S. 15A-275.

- g) Service of the nontestimonial identification order
 - (1) Service of the nontestimonial identification order must be made by personal delivery to the person ordered to appear. G.S. 15A-277.
 - (2) Service must be accomplished at least 72 hours in advance of the procedure unless the order modifies the 72-hour requirement. G.S. 15A-277.

- h) The right to counsel
 - (1) The right to counsel during nontestimonial identification procedures is set out in G.S. 15A-279(d) and 15A-278(5).
 - (2) The right:
 - (a) The right to an attorney is a statutory right unless the Sixth Amendment right to counsel has attached by appearance before a magistrate, indictment, or first appearance.

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- (b) The statutory right to counsel requires:
 - i) Advice of the right to counsel.
 - ii) The right to have counsel present during the procedure.
 - iii) The appointment of counsel if the person cannot afford to retain counsel.
 - iv) The suppression of any statement made during the procedure in the absence of counsel.
- (3) The role of counsel
 - (a) Counsel's role is to advise the client, not to interfere with the procedure.
 - (b) If you anticipate problems with an attorney interfering with the procedure, contact the district attorney's office.
 - (c) The right to counsel can be waived.
- i) Implementation of the nontestimonial identification order
 - (1) Who may conduct the procedure? (G.S. 15A-279(a))
 - (a) Any law enforcement officer or other person designated by the judge issuing the order.
 - (b) A qualified member of the health profession must extract body fluids authorized by a nontestimonial identification order.
 - (2) Use of force (G.S. 15A-279(b) and (c))
 - (a) Reasonable or necessary force may be used to conduct the procedure.
 - (b) The person cannot be detained longer than is reasonably necessary and in no case, more than six (6) hours unless the person is arrested.

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- (3) Resistance (G.S. 15A-279(e)(f))
 - (a) A person who resists compliance with the order **MAY** be held in contempt by the judge under G.S. 5A-12(a) and 5A-21(b).
 - (b) Resisting compliance with the order is not itself probable cause to arrest.

- (4) Later nontestimonial identification orders (G.S. 15A-279(f))

A nontestimonial identification order may not be issued against a person previously subjected to a nontestimonial identification order unless based on different evidence which was not reasonably available when the previous order was issued.

- j) Return of the nontestimonial identification order
 - (1) Within 90 days the order must be returned to the judge who issued it or a judge designated in the order. G.S. 15A-280.
 - (2) The person must set forth an inventory of the products of the procedure.
 - (3) Under G.S. 15A-282, a copy of any results from the nontestimonial procedure must be provided to the suspect as soon as available.

4. Juvenile nontestimonial identification

- a) In dealing with nontestimonial identification of juveniles, you do not have options as you do in dealing with adults. The procedure for obtaining nontestimonial evidence from juveniles is set forth in G.S. 7B-2103, which provides that a nontestimonial identification procedure **SHALL NOT** be conducted on any juvenile without a court order under Article 21 of Chapter 7B of the North Carolina General Statutes unless the procedure falls within one of two statutory exceptions or the matter is transferred to superior court for trial as an adult or originally charged as an adult.

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b) The two exceptions to the requirement for a court order prior to a nontestimonial identification procedure are the requirement to fingerprint and photograph certain juveniles pursuant to G.S. 7B-2101 and the requirement to photograph certain juveniles at the time and place of a show-up pursuant to G.S. 15A-284.52(c1). Both of these exceptions will be explained shortly.

c) The criteria for juvenile nontestimonial orders is different.

For a juvenile, the offense must be one which, if committed by an adult, would be a felony. G.S. 7B-2105.

d) When can a juvenile nontestimonial identification order be obtained?

A nontestimonial identification order can be obtained before taking the juvenile into custody or after custody and before the adjudicatory hearing. G.S. 7B-2104.

e) The procedure: The procedure for obtaining and executing a juvenile nontestimonial identification order is the same as for an adult, except for additional requirements set out in G.S. 7B-2105 to 7B-2107.

f) The authority to fingerprint and photograph a juvenile without a court order is addressed by G.S. 7B-2102(a) and (b), which reads as follows:

(1) A law enforcement officer or agency shall fingerprint and photograph a juvenile who was 10 years of age or older at the time the juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701, when a complaint has been prepared for filing as a petition, and the juvenile is in physical custody of law enforcement or the Division of Adult Correction and Juvenile Justice of the North Carolina Department of Public Safety.

(2) If a law enforcement officer or agency does not take the fingerprints or a photograph of the juvenile pursuant to subsection (a) of this section or the fingerprints or photograph have been destroyed pursuant to subsection (e) of this section, a law enforcement officer or agency shall fingerprint and photograph a juvenile who has been adjudicated delinquent if the juvenile was 10 years

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of age or older at the time the juvenile committed an offense that would be a felony if committed by an adult.

g) Penalty for violation

Violation of the juvenile nontestimonial identification procedures is a Class 1 misdemeanor. G.S. 7B-2109.

h) Consent

G.S. 7B-2103 provides that nontestimonial identification procedures **SHALL NOT** be conducted on **ANY** juvenile unless provided for by law. Unlike the adult nontestimonial identification procedure, there is no provision allowing consent in the juvenile procedure.

L. Interrogation Law

NOTE: Show slide, “Interrogation Law.”

A suspect’s spoken, or written statement is important evidence. To lawfully obtain statements from a suspect, officers must understand the various interrogation rights of a suspect. These rights come from the constitution and case law interpretations of those constitutional rights, as well as statutes. Failure to follow these rules may result in exclusion of the defendant’s statement from court.

1. Whenever a suspect gives a written or oral statement to law enforcement officers, the statement is either *inculpatory* or *exculpatory*. An exculpatory statement is one which denies guilt; an inculpatory statement tends to establish guilt.
2. Officers should note that the rules discussed herein relate to questioning by law enforcement officers. With a few exceptions, civilians are not bound by the *Miranda* case or any of the limitations placed on the police by the legislature and the courts. Officers may not, however, make civilians agents of the police in an effort to get a statement where the police are barred from further questioning (Police could not, for example, use store security to question a shoplifting suspect who is under arrest and has just indicated to the police that she wishes to consult with an attorney before talking.)
3. In our justice system, a defendant cannot be forced to testify against himself. Many defendants choose to avail themselves of this right. However, a confession or admission, allows the jury, through the

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officer who took the statement, to, in effect, “hear” from the defendant. Some cases are won or lost with a statement. This is why it is so important for officers to know and follows these rules.

M. Constitutional and Statutory Sources of Interrogation Law

Four (4) amendments to the United States Constitution provide the primary limitations on the government’s ability to obtain and use statements from a suspect:

1. The Fourth Amendment

A statement obtained during an unlawful arrest or investigative detention is inadmissible under the Fourth Amendment.

2. The Fifth Amendment

The Fifth Amendment provides that: “No person . . . shall be compelled in any criminal case to be a witness against himself. . .”⁸⁰ Officers should first note that the Amendment does not prohibit self-incrimination, but only incrimination *compelled* by a government official such as a law enforcement officer. The right not to self-incriminate applies not only to the trial itself but also to most (but not all) interrogations of suspects after an arrest. *Miranda v. Arizona*, 384 U.S. 436, (1966). In *Miranda*, discussed at length below, the United States Supreme Court established strict rules for law enforcement to follow before interrogating a suspect in custody.

3. The Sixth Amendment

The Sixth Amendment provides that: “In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense.”⁸¹ The United States Supreme Court has ruled that the right to counsel attaches, or begins, at a “critical stage” of the prosecution. *Kirby v. Illinois*, 406 U.S. 682, (1972).⁸² In North Carolina, a critical stage of the prosecution is a defendant’s initial appearance before the magistrate, or the first appearance in ***District Court*** or his or her indictment, whichever comes first. *State v. Tucker*, 331 N.C. 12 (1992)⁸³ *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

4. The Fourteenth Amendment – voluntariness

NOTE: Show slide, “Voluntariness = Totality of the Circumstances.”

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Contained within the “due process” clause of the Fourteenth Amendment, is the judicially created rule that the only voluntary statements are admissible in court. This is true for any statements made to law enforcement, regardless of whether the suspect is in custody or out of custody at the time the statement is made. Courts determine the “voluntariness” issue by applying the “totality of the circumstances” test: given the circumstances of the statement, did the defendant speak or write with an understanding of what he or she was doing? *Mincey v. Arizona*, 437 U.S. 385 (1978)

Examples of factors going into the “totality of the circumstances test” are:

- a) The officer’s conduct during the interrogation
- b) The suspect’s mental and physical condition
- c) The suspect’s prior contact with law enforcement officers
- d) The interrogation environment, including whether the suspect was afforded food, beverages, and if needed, rest
- e) The number of officers present during the interrogation
- f) Whether the officers used deception or threats or made promises.⁸⁴

Note: In *State v. White*, 291 N.C. 118, 229 (1976), the defendant’s inability to read or write did not render an otherwise voluntary confession inadmissible.

A suspect’s contention that an alleged “inner voice” made the suspect confess is without legal merit since law enforcement officers were in no way involved with “forcing” the confession. *Colorado v. Connelly*, 479 U.S. 157 (1986). In short, the Courts will not scrutinize a suspect’s motivations for confessing; the issue is whether law enforcement officers caused a suspect to confess against his or her free will.

Officers may neither threaten nor use physical abuse to induce a statement.⁸⁵ The law also prohibits officers from using veiled threats to urge a suspect to confess (for example, informing a suspect that if he does not confess his wife will be arrested). *Rogers v. Richmond*, 365 U.S. 534 (1961). The law **does**, however, allow officers to “match wits” with the suspect to obtain a confession. Here are some examples of acceptable tactics during an interrogation:

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Example #1: Officers inform the suspect that the officers will tell the district attorney that the suspect was cooperative; or

Example #2: Officers request that the suspect tell the truth.⁸⁶

Officers may not, however, promise a reduced charge or sentence if the suspect confesses, or tell the suspect that things will be “harder” for him if he does not confess. *State v. Pruitt*, 286 N.C. 442, (1975).⁸⁷

Note: The fact that officers lie to the suspect about the existence of evidence or witnesses against him **does not** mean the subsequent confession is automatically involuntary. Rather, the court will include the use of deception as one (1) factor in the “totality of the circumstances” test. *State v. Jackson*, 308 N.C. 549, (1983).⁸⁸

6. The *Miranda* decision – custodial interrogation

NOTE: Show slide, “*Miranda v. Arizona*.”

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court decided that to protect the Fifth Amendment self-incrimination rights of a suspect, law enforcement officers who wish to interrogate the suspect in custody must administer “*Miranda* warnings” and obtain a waiver of those rights. The adult *Miranda* warnings and juvenile rights will be discussed later in this section.

- a) A statement obtained during custodial interrogation from a person who is 18 years of age or older, or who is under 18 but emancipated, is not admissible unless he is informed that:
 - (1) “You (the suspect) have the right to remain silent;
 - (2) What you say will be used against you in court;
 - (3) You have the right to an attorney present during interrogation;
 - (4) You have the right to an appointed lawyer if you cannot afford one.”⁸⁹

Note: A juvenile (in this context, a person under the age of 18) in custody must be advised of the warnings listed in G.S. 7B-2101 before questioning. This includes the additional right to have a parent, guardian, or custodian present during questioning.

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Note: To conduct a custodial interrogation, officers must not only read the warnings but must also obtain a *waiver* from the suspect of the rights recited in the warnings. The suspect must acknowledge the rights and agree to be questioned anyway. The waiver may be written, oral, or both.⁹⁰

b) When are *Miranda* warnings required?

NOTE: Show slide, “When Is *Miranda* Required?”

- (1) With some exceptions, *Miranda* warnings (and a waiver) are required when two (2) elements are present—custody AND interrogation. *Berkemer v. McCarty*, 468 U.S. 420 (1977); *State v. Braswell*, 78 N.C. 498, (1985). A suspect in custody who is not interrogated should not be read the warnings. Conversely, *Miranda* warnings are not required for a suspect who is being interrogated while not in custody. This rule is of critical importance because officers should not advise suspects of their interrogation rights until and unless those rights exist.

Note: Officers must be familiar with the legal definition of “custody” and “interrogation” for purposes of the *Miranda* rules. These will be discussed below.

- (2) Custody

A suspect is in “custody” for *Miranda* purposes when he has been formally arrested or when his freedom of movement has been restrained to the extent associated with a formal arrest. *State v. Buchanan*, 352 NC 489 (2001); *Oregon v. Mathiason*, 429 U.S. 492 (1977).⁹¹

Note: There is a difference between a “seizure” under the Fourth Amendment, and “custody” under the Fifth Amendment. They are not always the same thing. As you learned previously, not all seizures are arrests. A person may not be free to leave yet not be under arrest. For instance, during the typical investigative stop, the suspect is seized, but not under arrest. Take a routine traffic stop as an example. The motorist is “seized” within the meaning of the Fourth Amendment but is not in “custody” for Fifth Amendment purposes. Custody for Fifth Amendment purposes is restraint on freedom

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of movement to the level of an arrest. Thus, officers do not have to read *Miranda* warnings during the ordinary traffic stop. An arrest is a more severe intrusion on a person's liberty than a mere detention.

The custody test is an objective one: would a **reasonable person** in the suspect's position believe that he was under arrest? *Pennsylvania v. Bruder*, 488 U.S. 9 (1989). It is not legally relevant that either the suspect or the officer "believes" that there is custody—the test focuses on whether the words and **conduct** of the officers would lead a reasonable person to believe he or she is under arrest. *State v. Brooks*, 337 N.C. 132, (1994).⁹²

Note: The standard for juveniles is whether a reasonable child of that age would have believed themselves to be under arrest or restrained from movement to the degree of arrest. *See J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

The most obvious example of "custody" is where an officer tells a suspect that she is under arrest. Even without these words, a person can be in custody; for example, suppose an officer handcuffs a suspect and drives her to the police station. This would be taking the suspect into custody in that the suspect's freedom of movement has been restrained to the extent associated with a formal arrest. Here are some situations where the courts have considered whether the suspect was in custody for purposes of *Miranda*:

- (a) Voluntary encounter – Suspect approached on the street by officers, who ask the suspect his name. Held: no custody. *State v. Farmer*, 333 N.C. 172 (1993);
- (b) Voluntary interview – Suspect voluntarily accompanies officers to the police station for questioning and is never told he is under arrest or not free to leave. Held: no custody. *Stansbury v. California*, 114 S. Ct. 1526 (1994);
- (c) Traffic stop – Motorist stopped for weaving in and out of lane. Officer asks suspect if he has

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had anything to drink, suspect replies, “two beers.” **Held:** no custody, since suspect had not yet been arrested. *Berkemer v. McCarty*; 468 U.S. 420 (1984); *State v. Beasley*, 104 N.C. App. 529, (1991).

Note: Stops for traffic violations are not normally considered custodial for *Miranda*. The average motorist knows that the stop will be brief while a citation (or warning) is issued. For example, a reasonable person would not believe she is under arrest for an “ordinary” speeding or stop sign violation situation. Thus, although the motorist is “stopped” or “seized” within the meaning of the Fourth Amendment, she is not in custody for purposes of the Fifth Amendment *Miranda* rules. (*Berkemer v. McCarty*, supra.)

- i) Hospital room interview – *State v. Sweatt*, 333 N.C. 407, 427 S.E.2d 112 (1993). Defendant was interrogated by an officer at the hospital while he was being treated for injuries received in an automobile accident. No police guard was placed at the door of his hospital room to prevent him from escaping. **They are held:** no custody.
- ii) Transportation in police vehicle – *State v. Bromfield*, 332 N.C. 24, (1992). Defendant was approached by officers at the bus station in Raleigh and was told he was not under arrest. Officers asked him if he would come to the Raleigh Police Department. Defendant agreed and later confessed. **Held:** no custody.

State v. Hicks, 333 N.C. 467, (1993). Officers asked a seventeen-year-old defendant to take a polygraph examination. Defendant agreed and was driven to the police station, about an hour from his home. Once there, defendant changed his mind and on three (3) occasions refused to take the test.

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Officers did not tell defendant he was not under arrest or offer the defendant a ride home. Defendant later confessed. Held: defendant in custody.

- iii) Unarrest – *State v. Medlin*, 333 N.C. 280, (1993). Defendant lawfully arrested but later told he was no longer under arrest. The defendant allowed cigarettes and phone access after being told he was no longer under arrest. Defendant later confessed. Held: no custody after the “unarrest.”
- iv) Constant police supervision – *State v. Dukes*, 110 N.C.App. 695, (1993). Defendant, a homicide suspect, was escorted to his trailer by the officers. One (1) officer told the other officer, in the defendant’s presence, to stay with the defendant and not permit him to change clothing or wash. Defendant was then asked about the death of the victim, and he confessed. They have held: defendant in custody at the trailer.
- v) Handcuffing – *State v. Greene*, 332 N.C. 565, (1992). Defendant handcuffed to a chair at the police station and told he was not free to leave. He was held: defendant in custody.

Note: Greene was “unarrested” after being handcuffed and later questioned. The North Carolina Supreme Court ruled that statements made after the “unarrest” were admissible.

- vi) Suspect in patrol car – *State v. Washington*, 330 N.C. 188, (1991). Defendant stopped for traffic violation and ordered to sit in the officer’s vehicle. Held by North Carolina Supreme Court: custody.

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- vii) Two (2) hour interview at police station – *State v. Sanders*, 122 N.C. App. 691. Defendant voluntarily came to police station to be questioned. He was never told he was under arrest. Held: no custody.

- (e) A noncustodial interrogation does not require *Miranda* warnings and a waiver. It is thus to an officer's advantage to keep a suspect out of custody, since should the warnings have to be administered the suspect may choose to exercise his right to silence and/or counsel. Here are some ways to help avoid a finding of custody:

NOTE: Show slide, "Noncustodial Interrogation."

- i) Inform the suspect that she is not under arrest;
- ii) Do not surround the suspect with officers;
- iii) Do not display weapons during the questioning;
- iv) Inform the suspect that she is free to discontinue the interview and leave at any time; document all facts in your notes that support noncustody;
- v) Allow the suspect to make phone calls, have a cigarette, and have food and beverage; if applicable, offer her a ride home; do not over-supervise the defendant;
- vi) Interview the suspect in an environment familiar to her (note that questioning at the police station is *not* automatically custodial); do not use an interrogation room setting;
- vii) Allow the suspect to have family members or friends present during

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questioning; (See, e.g., *State v. Allen*, 322 N.C. 176, (1988).⁹³

- viii) If “non-custody” is challenged at a suppression hearing, the officers should encourage the district attorney to insist on detailed “findings of facts.”
- ix) Consider interviewing the person at a neutral place – a coffee shop, etc.

c) Interrogation

NOTE: Show slide, “Interrogation.”

- (1) Interrogation means statements or questions designed to elicit an incriminating response; “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda v. Arizona*. Interrogation usually occurs through directly questioning the suspect, but the courts have ruled that officers can engage in the “functional equivalent” of questioning by words not overtly directed toward the suspect. Examples are “words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response . . .” *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, the United States Supreme Court decided that no interrogation occurred when officers had a conversation among themselves, in the suspect’s presence, about the dangers of an unrecovered gun.
- (2) The *Miranda* requirement is not charge specific. In other words, if the suspect is in custody, *Miranda* warnings must be given and waived before interrogation concerning the offense charged or any unrelated or uncharged offenses for which the defendant may make an incriminating statement.
- (3) Exceptions to the *Miranda* rule – warnings not required
 - (a) Routine booking questions

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Questions designed to further the arrest process are, by definition not designed to incriminate the suspect. For example, officers must fill out arrest forms which include questions about the physical characteristics of the suspect. In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the police arrested a suspect for DWI. At the police station, the suspect, without first being advised of his interrogation rights, was asked his height, weight, eye color, and **his age on his fifth birthday**. The highly intoxicated suspect responded that he did not know how old he was on his fifth birthday. The United States Supreme Court ruled that the suspect's answers to the first three (3) questions were admissible since they were a legitimate part of the booking process. Muniz's answer to the last question was, however, suppressed, since the police had no reason to ask the question other than to get an incriminating response (had *Miranda* been read and waived, the police could, of course, have asked the "fifth birthday" question).

Note: "Routine" booking questions do not include those reasonably likely to elicit an incriminating response. If, for example, a person is arrested for statutory rape, he must be given (and waive) the *Miranda* warnings before being asked his date of birth (since the defendant's age is an element of the crime). *State v. Locklear*, 531 S.E.2d 853 (2000).

(b) Public safety exception

Even if custodial interrogation occurs, questions involving the location of a dangerous weapon or instrumentality which threatens public safety may be permitted under the public safety exception. *New York v. Quarles*, 467 U.S. 649 (1984).

(c) Spontaneous, volunteered statements that are not the result of custodial interrogation do not require *Miranda* warnings. *State v. Edgerton*, 328 N.C. 319, (1991). In *Edgerton*, the

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defendant confessed while officers were reading the *Miranda* warnings. The North Carolina Supreme Court ruled that the defendant's statement was spontaneous and therefore admissible.

- (d) Custodial or noncustodial questioning by non-law enforcement persons who are not acting as agents of the police or by undercover officers also does not require *Miranda* warnings. *Illinois v. Perkins*, 496 U.S. 292 (1990).

d) What warnings must be given?

- (1) A suspect who is 18 years of age or older, and is entitled to *Miranda* warnings (*i.e.*, he is in a custodial interrogation setting) must be advised of the following:

NOTE: Show slide, “*Miranda* Warnings.”

- (a) You have the right to remain silent,
- (b) What you say may be used in court against you,
- (c) You have the right to have a lawyer present during questioning, and
- (d) You have the right to an appointed lawyer during interrogation if you cannot afford to hire one.

Note: For the juvenile *Miranda* warnings subsection (d) as written above is inapplicable. The juvenile's ability to afford a lawyer is NOT a factor to be considered or advised. N.C.G.S. 7B-2101 provides that the juvenile must be advised that he has a right to counsel and that one will be appointed for him if he is not represented and wants representation. There is no requirement of indigency or financial need for a juvenile to obtain a court-appointed attorney. Anyone under the age of 18 must also be warned that he has the right to have a parent, guardian, or custodian present during questioning.

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- (2) After receiving these warnings, the suspect may not be questioned until he has a lawyer present, or he knowingly and voluntarily waives these rights.
- (3) Interrogation must stop immediately if at any time during the interrogation, the suspect expresses an unwillingness to continue with questioning or asserts the right to counsel (that is, requests an attorney).
- (4) Even though a small number of 16 and 17-year-olds are considered adults for criminal justice purposes, they are still considered juveniles for the G.S. 7B-2101 warnings. Everyone under the age of 18 **must** be given the additional juvenile warning. *State v. Fincher*, 309 N.C. 1 (1983).
- (5) Minors who are 16 and 17 are allowed to waive their rights under the law as long as the waiver is done knowingly, willingly, and understandingly. Minors under the age of 16 can never waive these rights. Parents, guardians, and custodians are also prohibited from waiving these rights for youth. G.S. 7B-2101.
- (6) Regardless of whether a 16 or 17 year-old juvenile is being processed through juvenile court as a juvenile delinquent or through criminal court as an adult, they must be advised of the juvenile *Miranda* rights in G.S. 7B-2101 prior to any custodial interrogation. *See State v. Fincher*, 309 N.C. 1 (1983).

NOTE: Show slide, “Juvenile *Miranda*.”

- (7) “When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile’s parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian, as well as the juvenile must be advised of the juvenile’s rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.”⁹⁴

Note: N.C.G.S. 7B-2101 does not apply to a juvenile not in custody, or to a juvenile witness or victim. If any

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of these conditions change, the warnings must be given, and the proper waiver obtained before questioning.

(8) The following warnings must be read to anyone under the age of 18 who is in custody before questioning:⁹⁵

- (a) That the juvenile has a right to remain silent;
- (b) That any statement the juvenile does make can be and may be used against the juvenile;
- (c) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
- (d) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

e) Waiver of *Miranda* rights

(1) To interrogate an in-custody suspect, the officer must obtain a **knowing, voluntary, and intelligent waiver** from the suspect. **Knowing** relates to whether the suspect has been properly informed of his rights and whether he understands those rights. **Voluntary** relates to whether the waiver was obtained without force or coercion. **Intelligent** refers to the capacity and competency of the suspect to understand his rights and the effect of a waiver of those rights.

(2) Was the suspect properly advised of his rights?

- (a) If the *Miranda* warnings are required, the rights should be read verbatim from the form or card rather than relying on memory.
- (b) A signed waiver form is preferred. A person signing a document is presumed to know the contents of that document. If a person refuses to sign but is willing to talk with you, indicate on the form not only that the person refused to sign but also indicated their willingness to talk. If possible, have a witness to the waiver.

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(c) *Miranda* warning cards are available free of charge to law enforcement agencies from the North Carolina Justice Academy, ATTN: Legal Department, Post Office Box 99, Salemburg, North Carolina 28385, 910-525-4151.

(3) What constitutes a valid waiver of *Miranda*?

The Fifth Amendment rights are so important that the suspect must waive them before any statements he makes during custodial interrogation may be used in prosecution. Officers have the burden, in court, of showing that the suspect was administered the *Miranda* warnings, and voluntarily and knowingly waived those rights before being questioned.⁹⁶

Note: The Supreme Court has held that a suspect, after being read the *Miranda* warnings and acknowledging that he understood them, proceeded to give a statement without explicitly waiving the *Miranda* rights. The Court held this was an implied waiver. The safest practice for officers is to get an explicit waiver. Seek clarification from the suspect if you are not sure whether he is waiving or invoking. On the other hand, if it is clear that the suspect is invoking his rights, interrogation must cease. Officers may not try to convince the suspect to change his mind.

(a) A person may waive her *Miranda* rights over her attorney's objections if the waiver is knowing, voluntary, and intelligent. An attorney may advise her client, but the decision belongs to the client, not the attorney. *Moran v. Burbine*, 475 U.S. 412, 106 (1986); *State v. Reese*, 319 N.C. 676, (1987).

(b) If the suspect's decision to waive her rights is ambiguous, questions can be asked to clarify whether or not the suspect wishes to talk. *State v. McKoy*, 332 N.C. 639, (1993).

(c) If a previous interview violated *Miranda*, subsequent interviews with proper warnings and a valid waiver may be permissible if the interviews are voluntary. Officers should never

deliberately violate someone's rights in hopes of getting a confession during a second interrogation. This is risky to the officer in terms of civil liability and puts the statement at risk of exclusion in court. *Oregon v. Elstad*, 470 U.S. 298 (1985); *State v. Hicks*, 333 N.C. 467 (1993); *State v. Barlow*, 330 N.C. 133, (1991). A second interview would not be admissible if the officer intentionally uses a "2-step" process and deliberately interviews without *Miranda*, followed soon after that by interviews with proper warnings. *Missouri v. Seibert*, 542 US 600 (2004).

f) Invocation of right to silence only

(1) Invocation

A suspect has invoked his right to remain silent when he unequivocally asserted his right to remain silent. "Generally a defendant's statement that he or she does not want to talk is an unequivocal assertion of the right to remain silent, including a statement, 'I got nothing to say.' However, if a defendant simply remains silent or fails to answer some questions while continuing to answer others, generally is not an assertion of the right to remain silent. An unclear statement such as, 'I'm not sure I want to answer any more questions,' would not qualify as an assertion. An officer may need to clarify whether the defendant is willing to waive the right to remain silent and the right to counsel before obtaining a valid waiver."⁹⁷ This is the best practice.

Once the suspect invokes his right to remain silent, officers must "scrupulously honor" that request, by immediately ceasing interrogation.

(2) Subsequent interrogation after the request to remain silent

While officers must **scrupulously honor** the suspect's wish to remain silent, officers may approach again if the suspect invoked the right to silence only.

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Note: If the suspect invoked the right to counsel, the rules on subsequent interrogation are different. These rules will be discussed later.

- (a) Re-initiation of interrogation after significant period of time

After a “significant period of time” has passed, officer may reinitiate interrogation of a suspect who has invoked his right to remain silence only when they “scrupulously honor” that request. This is true regardless of whether the offense is the one for which the suspect is in custody or an unrelated or uncharged offense for which the suspect may make an incriminating statement. Courts decide whether the officers have scrupulously honored the assertion on a case by case basis. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the defendant indicated that he did not wish to speak to the officer (but the defendant did not ask for a lawyer). Two (2) hours later, a **different** officer approached Mosley to discuss a **different crime**. The subsequent confession was admissible since the officers had “scrupulously honored” the suspect’s right to remain silent. The North Carolina Supreme Court held illegal a subsequent interrogation that occurred 15 minutes after the defendant asserted the right to remain silent.⁹⁸ If the passage of time is not deemed long enough, the court will find the officer illegally re-initiated interrogation of the suspect after he invoked his right to silence.

Note: Officers should re-administer *Miranda* warnings to the suspect upon beginning the second questioning. *State v. Murphy*, 342 N.C. 813, (1996). The suspect must waive *Miranda* rights before the second questioning may proceed. *Michigan v. Mosley*, 423 U.S. 96 (1975); *State v. Fortner*, 93 N.C.App. 753 (1989).⁹⁹

Note: Fifth Amendment rights apply only while the suspect is in custody. A suspect who invokes

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the right to silence while in custody loses the benefit of the assertion once he is no longer in custody.

(b) Suspect initiates communication

Once the suspect invokes the right to silence, officers may initiate custodial questions on any criminal matter, whether it be about the case for which the suspect was arrested or any unrelated investigation, if the suspect himself initiates further communication, exchanges, or conversation with the officer about the case. In such case, the officer should repeat the *Miranda* rights to the suspect and obtain a waiver before he resumes interrogation. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

g) Invocation of the right to counsel

NOTE: Show slide, “Invocation of the Right to Counsel.”

(1) Invocation

Once a suspect in custody unequivocally invokes his *Miranda* right to counsel (asks for an attorney before being questioned), all questioning must cease immediately. Officers **may not** initiate **custodial** interrogation once the suspect indicates that he needs the assistance of counsel. The following have been ruled to be requests for counsel: “I want an attorney,” or in response to a question about counsel, “Uh, yeah. I’d like to do that.” However, if a suspect makes an equivocal or unclear request for counsel, officers may continue to ask questions. *Davis v. U.S.*, 512 U.S. 452 (1994).

The *Edwards* rule controls questioning by all law enforcement officers in North Carolina. Once a suspect invokes her *Miranda* right to counsel, all officers in the state are presumed to know of the invocation. *State v. Pope*, 333 N.C. 106, (1992).¹⁰⁰ Officers who intend to interrogate a suspect but who were not present at the time of arrest must determine if the suspect has previously invoked their *Miranda* right to counsel

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(inquiring of the arresting officer is a logical place to begin such an inquiry).

(2) Subsequent interrogation

Once a suspect has invoked his right to counsel under *Miranda*, officers may re-initiate further custodial interrogation only in one (1) of the following circumstances:

(a) Lawyer present

Once the suspect invokes the right to counsel, officers may initiate custodial questioning on any criminal matter, whether it is about the case for which the suspect was arrested or any unrelated investigation, if the suspect's lawyer is physically present. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Arizona v. Roberson*, 486 U.S. 675 (1988). In such case, the officer should repeat the *Miranda* rights to the suspect and obtain a waiver before he resumes interrogation.

(b) Suspect initiates communication

Once the suspect invokes the right to counsel, officers may initiate custodial questions on any criminal matter, whether it be about the case for which the suspect was arrested or any unrelated investigation, if the suspect himself initiates further communication, exchanges, or conversation with the officer about the case. In such case, the officer should repeat the *Miranda* rights to the suspect and obtain a waiver before he resumes interrogation. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

(c) Custodial interrogation following 14 day break in custody

Once the suspect invokes the right to counsel, officers may initiate custodial questioning on any criminal matter, whether it is about the case for which the suspect was arrested or any unrelated investigation, if there has been a break

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in custody for at least 14 days or more. In such case, the officer should repeat the *Miranda* rights to the suspect and obtain a waiver before he resumes interrogation. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

Note: The *Shatzer* rule would apply where, for example, the defendant requested his *Miranda* right to counsel in his first period of custodial interrogation; he is then released from custody for at least 14 days. He is later taken back into custody for some reason. Officers would not be prohibited from reinitiated interrogation, even though the defendant requested counsel during his first period of custody, so long as a fresh *Miranda* waiver is obtained. Again, there may be Sixth Amendment issues, as addressed later in this lesson plan.

(3) Non-custodial interrogation

Officers must remember that the *Miranda* rights to counsel only exist and apply while the suspect is in custody. As with the invocation of the right to silence, Fifth Amendment counsel rights disappear once a suspect is no longer in custody. Thus, if the suspect is out of custody, the protections afforded under *Miranda* no longer apply, and officers may reinitiate questioning without violating the Fifth Amendment and without having to secure a Fifth Amendment waiver. The Sixth Amendment protections will exist; however, if adversarial judicial proceedings have commenced on the charge in question. This will be discussed in further detail later in this lesson plan.

7. The Sixth Amendment right to counsel

a) Attachment of the right

- (1) The Sixth Amendment gives defendants a right to counsel at any *critical stage* of a prosecution at or after *adversary judicial proceedings* have begun. *Kirby v. Illinois*, 406 U.S. 682 (1972).

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- (2) In North Carolina adversary judicial proceedings for a felony begin at an initial appearance before a magistrate, at the first appearance in district court (when a judge informs the defendant of the charge and determines whether the defendant has counsel) or when an indictment has been issued, whichever occurs *first*.¹⁰¹ The mere fact that a warrant has been issued does not trigger the defendant's Sixth Amendment right to counsel unless the person has been indicted. *State v. Stokes*, 150 N.C. App. 211, (2002). The appointment of an attorney on a *civil* matter related to a criminal investigation does not trigger the Sixth Amendment right to counsel. *State v. Adams*, 483 N.C. 156, (1997).
- (3) Once adversarial judicial proceedings have begun—appearance before a magistrate, indictment or first appearance in District Court—the Sixth Amendment right to counsel is *attached*. The right stays with the defendant until he is sentenced, found not guilty, or the case is dismissed. ***Whether he is in or out of custody, the defendant has a Sixth Amendment right on the charges for which he has appeared before a magistrate, been indicted, or appeared in District Court.***

Note: Unlike the Fifth Amendment rights during custodial interrogation, which protect the suspect regardless of whether the interrogation is concerns the charged offense or unrelated charge, the Sixth Amendment protections are charge-specific; protecting the charge itself once an adversary judicial proceeding has begun.

- b) The Sixth Amendment protections – Massiah rule

NOTE: Show slide, “Sixth Amendment – Massiah Rule.”

The Sixth Amendment protects against the government deliberately eliciting information,—interrogation, for example—on the charge after the right has attached. Thus, if a government officer or his agent **deliberately elicits** incriminating information from a suspect after his Sixth Amendment right to counsel has attached, the statement will, absent a valid waiver, be suppressed. *Massiah v. United States*, 377 U.S. 201 (1964).

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- (1) For example, in a famous case which informally known as the “Christian burial speech” case officers improperly engaged in the functional equivalent of questioning by telling the defendant, a deeply religious former mental patient who had invoked his Sixth Amendment right to counsel, that he should lead the officers to the body of the child he had murdered on Christmas Eve so that the parents could give the child a Christian burial. This was a violation of defendant’s rights due to failure to obtain a valid waiver of the Sixth Amendment right to counsel, which attached to the charge about which the officers were eliciting information. *Brewer v. Williams*, 430 U.S. 387 (1977).

- (2) Officers may not “deliberately elicit” information from a defendant surreptitiously (i.e., use an undercover officer or informant to question the defendant about the charge) once his Sixth Amendment right has attached, whether or not he has invoked that right.

Note: If a government officer or his agent deliberately elicits incriminating information from a suspect after his Sixth Amendment right to counsel has attached, the statement will, absent a valid waiver, be suppressed. *Massiah v. United States*, 377 U.S. 201 (1964).

- c) Assertion of the Sixth Amendment right to counsel

Once the right to counsel has attached, the defendant may invoke that right. A defendant invokes this right by hiring counsel, obtaining appointed court counsel, or requesting the assistance of counsel.¹⁰²

Note: Unlike the Fifth Amendment *Miranda* rights, which can only be invoked incident to custodial interrogation, the defendant may invoke his Sixth Amendment rights in or out of custody, so long as the rights have attached—at or after an adversarial judicial proceeding on that charge. Further, unlike the Fifth Amendment, where the defendant either invokes or waives his rights to a law enforcement officer, the Sixth Amendment right is often invoked out of the presence of officers, such as when the court appoints an attorney.

- d) Waiver of the Sixth Amendment rights before questioning by law enforcement

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(1) Questioning or the functional equivalent of questioning by law enforcement officers or their agents after adversary judicial proceedings have begun is always a critical stage and requires a waiver of rights once the Sixth Amendment right to counsel has attached to the charge about which officers seek to question the defendant.

(2) Out of custody defendant

If defendant, who is not in custody, has not invoked his Sixth Amendment right to counsel, the officer may approach the defendant, advise him of his rights, and seek a waiver.

(3) In-custody defendant

If an in-custody defendant has not invoked his Sixth Amendment or Fifth Amendment right to counsel, the officer may approach the defendant, advise him of his rights, and seek a waiver.

Note: Officers must be sure they are not barred by the Fifth Amendment from initiating interrogation of an in-custody defendant. Recall that once an in-custody suspect has invoked their Fifth Amendment right to counsel, officers are prohibited from initiated interrogation except in certain limited circumstances discussed in the *Miranda* section of this lesson plan. Thus, so long as the defendant remains in custody, a Fifth Amendment request for counsel effectively prevents officers from approaching to seek a Sixth Amendment waiver and interrogation unless the suspect himself initiated the communication with officers, or counsel is present. This will be discussed in more detail in the next section of the lesson plan.

(4) The standard *Miranda* rights form is sufficient to obtain a Sixth Amendment waiver. The courts do not require a different form for waiver of the Sixth Amendment right [*Patterson v. Illinois*, 487 U.S. 285 (1988)]; however, some agencies do use special forms, and it may be prudent to at least include the name of the defendant's attorney or the organization, such as the public defender, on the waiver forms.

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- e) Initiation of interrogation by officers after the Sixth Amendment right to counsel has been invoked.¹⁰³

When can law enforcement officers initiate interrogation about the charge on which the Sixth Amendment has attached, and for which the defendant has invoked the right to counsel?

- (1) Even if the defendant has invoked the Sixth Amendment right to counsel, officers may still initiate interrogation, assuming there is no Fifth Amendment bar to the officers approaching defendant. Officers must obtain a valid waiver for any statement to be used against the defendant.¹⁰⁴

- (a) For example, suppose a defendant arrested for burglary refuses to talk to the officers but does not ask for a lawyer. Thus, the suspect did not invoke his Fifth Amendment right to counsel. The defendant appears in District Court and is appointed a public defender. The Sixth Amendment right is attached, due to the adversarial judicial proceeding; the right has been invoked with the appointment of counsel. The next day, officers arrest the defendant on an unrelated car theft under investigation. Officers obtain a *Miranda* waiver, and the defendant confesses to stealing the car.

Was the questioning proper? Yes.

In this scenario, the defendant invoked his Sixth Amendment right to counsel on the burglary charge. Since there is no Fifth Amendment bar to approaching the defendant, officers may initiate questioning about the burglary if they obtain a Sixth Amendment waiver on that charge.

Note: While case law is not clear, it would appear that a second attempt to initiate interrogation after a refusal to waive counsel would be questionable.¹⁰⁵

- (b) Remember, for purposes of applying these rules, the Sixth Amendment right to counsel is

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offense-specific; it **does not** apply to **uncharged** crimes. *State v. Harris*, 111 N.C. App 58, (1993). For example, in *Texas v. Cobb*, 532 U.S. 162 (2001), the United States Supreme Court decided that officers may seek to question the defendant about matters relating to, but not charged in, the indictment. In *Cobb*, the defendant was indicted for burglary and was appointed an attorney. Law enforcement officers later approached Cobb to discuss two (2) murders which occurred during the burglary. (Cobb had not been indicted on the murders.) Cobb confessed to the murders. The United States Supreme Court upheld the admission of the confession because Cobb did not have Sixth Amendment rights as to those crimes.

(2) Suspect initiates communication

Even if the defendant has invoked the Sixth Amendment right to counsel, officers may interrogate if the defendant approaches the police. However, a valid waiver must first be obtained for those statements to be admissible in court.

Note: The interrogation would be permissible even if an in-custody defendant invoked his Fifth Amendment right to counsel. Recall that officers may reinitiate interrogation under the Fifth Amendment if the suspect initiates the communication with the officers.

(3) Use of undercover officers and informants

- (a) Even if Sixth Amendment rights have attached, undercover officers (or agents of the police) may be planted inside of a jail cell **to listen** in the event the defendant confesses to the crime for which she stands indicted. *Kuhlmann v. Wilson*, 447 U.S. 436 (1986).¹⁰⁶
- (b) Neither the undercover officer nor a jailhouse informant may question the defendant about any charges where Sixth Amendment rights have attached. *U.S. v. Henry*, 447 U.S. 264 (1980).¹⁰⁷

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- (c) Undercover officers or jailhouse informants *may* question the suspect about unrelated, uncharged crimes. *Miranda* warnings do not have to be read in such a circumstance. *Illinois v. Perkins*, 496 U.S. 292 (1990).

NOTE: Show slide and refer students to the handout in the form of a memorandum from the North Carolina Police Attorneys' Association on the effect of the *Rothgery* decision and how it applies to the attachment and assertion of Sixth Amendment rights. Also, refer to Bob Farb's Summary of the US Supreme Court's ruling in *Montejo v. Louisiana*.

- 8. Applying the Fifth Amendment and Sixth Amendment rules together – Questions for the class

NOTE: These questions are designed to make the students think about the interrogation rights of a suspect. The questions show how the Fifth Amendment rights and the Sixth Amendment rights may exist independently, or at the same time. Officers may analyze the rules to determine if they may initiate interrogation with the suspect consistent with these rules. Ask students if the suspect has Fifth or Sixth Amendment rights, or both, or neither, in the following fact patterns:

- a) Officers arrest suspect on an arrest warrant. Suspect is to see magistrate in the morning. Answer: Fifth Amendment rights.

Note: Since suspect is in custody, his Fifth Amendment rights attached to interrogations concerning any offense. The Sixth Amendment right has not attached to the specific charge for which suspect was arrested since the charge has not passed an adversary judicial proceeding (i.e., initial appearance before the magistrate).

- b) Suspect sees magistrate the next morning, is then released. Answer: Sixth Amendment rights.

Note: No Fifth Amendment rights, since defendant is not in custody. Sixth Amendment right attached on the charge due to the initial appearance before the magistrate.

- c) Suspect sees magistrate, goes back to jail. Answer: Fifth and Sixth Amendment rights.

Note: Fifth Amendment rights have attached regarding interrogations on any charge since defendant is back in custody. Sixth Amendment right has attached on the specific

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charge for which there was an initial appearance before the magistrate.

- d) Suspect appears in District Court, refuses an attorney, goes back to jail. Answer: Fifth and Sixth Amendment rights.

Note: Fifth Amendment rights since defendant remains in custody. Sixth Amendment rights are still attached but have not yet been invoked, since defendant did not ask for any attorney.

- e) Suspect appears in District Court, released on bail. Answer: Sixth Amendment rights.

Note: Fifth Amendment rights no longer attached since defendant is out of custody. Sixth Amendment rights are still attached. Remember, once attached; they remain with the charge until final disposition.

- f) Suspect's case dismissed by District Court, district attorney re-indicts. Answer: Sixth Amendment rights.

Note: Fifth Amendment rights no longer attached since defendant is out of custody. Sixth Amendment rights are attached due to the indictment, which is an adversary judicial proceeding.

- g) Harry indicted for drug sale. Officers go to Harry's house to arrest based on an arrest order in the indictment. Once inside, officers see Joe, Jane, and Harry in possession of narcotics. Answer: Harry has Fifth and Sixth Amendment rights; Joe and Jane have Fifth Amendment rights.

Note: Harry's Fifth Amendment rights attached to interrogation concerning any offense, since he is in custody. Harry's Sixth Amendment right attached to drug charge, since that charge was indicted (adversary judicial proceeding).

Joe and Jane have Fifth Amendment protections against interrogation since they are in custody, but no Sixth Amendment rights since their charges did not pass any adversary judicial proceeding.

Note: Use the fact pattern in "g" when answering "h," "i," and "j."

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- h) Officers let Joe go home after he agrees to work as an informant. Answer: no interrogation rights.

Note: No Fifth Amendment rights since he is out of custody.

- i) Harry sees the magistrate and then is returned to jail. Answer: Fifth and Sixth Amendment rights.

Note: Harry's Fifth Amendment rights attached to interrogation concerning any offense, since he is in custody. Harry's Sixth Amendment right attached to drug charge, since that charge was indicted (adversary judicial proceeding).

- j) Harry is released from jail pending trial. Answer: Sixth Amendment rights.

Note: No Fifth Amendment right, since he is out of custody. His Sixth Amendment right attached with the indictment and remains with the charge until final disposition.

- k) Carol is asked by officers to come to the police facility to talk about an arson case. The officers tell her that she is free to leave at any time. Answer: no interrogation rights.

- l) Carol confesses, is indicted, hires a lawyer, and is released. Answer: Sixth Amendment rights.

Note: Sixth Amendment right attached when the charge was indicted. She invoked that right by hiring an attorney. No Fifth Amendment rights since she is not in custody.

Under the *Montejo* ruling, an officer could approach and attempt an interrogation. Officer use the *Miranda* card to obtain a Sixth Amendment waiver from Carol.

- m) Police question Carol about an unrelated embezzlement investigation while her arson case is pending. Answer: permissible, as Carol's Sixth Amendment rights are offense-specific.

- n) Tom is arrested on possession of cocaine. He asks for an attorney when *Miranda* is read to him. He goes to District Court and then back to jail. Answer: Fifth and Sixth Amendment rights.

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Note: Fifth Amendment rights attached due to custodial interrogation. Tom invoked his right to counsel. Tom's Sixth Amendment rights attached since the charge went before an adversary judicial proceeding.

So long as Tom remains in continuous custody, officers may be barred by the Fifth Amendment from approaching him to ask questions on any offense, unless Tom initiates the communication with officers, or the attorney is present.

- o) Tom is released after appearing in District Court. Answer: Sixth Amendment rights. Officers may approach but use a waiver.
- p) Jill is arrested for possession of marijuana. She does not ask for a lawyer when questioned by the police. Jill goes to District Court, is appointed a lawyer, and then goes right back to jail. Answer: Fifth and Sixth Amendment rights.

Note: Under the *Montejo* ruling, an officer could approach and attempt an interrogation. Even though Jill has Fifth Amendment rights since she is in custody, she has not yet invoked those rights (she did not "lawyer-up" at the first interrogation). Therefore, officers are not barred by the Fifth Amendment rules from initiating interrogation. Officers can use the *Miranda* card to obtain a Sixth Amendment waiver.

- 9. Electronic recording of custodial interrogations at a place of detention
 - a) G.S. 15A-211 requires electronic recording of custodial interrogations at a place of detention for investigations related to any Class A, B1, or B2 felony and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.
 - b) The statute also requires electronic recording of all custodial interrogations of juveniles in criminal investigations conducted at any place of detention; this provision is not limited to specific offenses.
 - c) This recording requirement applies when the custodial interrogation take place at a jail, police or sheriff's station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges.

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- d) The recording may be an audio or visual recording. A visual and audio recording shall be simultaneously produced whenever reasonably feasible. In its “entirety” means the beginning of when a person is advised of their rights and continues with all questioning until the conclusion of the interrogation.

N. Eyewitness Identification

“The 2007 North Carolina General Assembly passed the Eyewitness Identification Reform Act (House Bill 1625). This Act requires that certain steps be taken to administer line-ups in criminal investigations conducted in North Carolina. The materials in this document are provided to help law enforcement officers to comply with this law.”¹⁰⁸

- 1. Definition of terms
 - a) Types of identification procedures

NOTE: Show slide, “Identification Procedures.”

(1) Eyewitness

An eyewitness is defined as “a person, including a law enforcement officer, whose identifications by sight of another person may be relevant in a criminal proceeding.”¹⁰⁹

(2) Filler

“A person or a photograph of a person who is not suspected of an offense and is included in a line-up.”¹¹⁰

(3) Independent administrator

“A line-up administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the line-up is the suspect.”¹¹¹

(4) Line-up

Line-ups can be conducted with photographs or live individuals.

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- (a) Photo line-up – “a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.”¹¹²
 - (b) Live line-up – “a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.”¹¹³
- (5) Show-up

A “show-up” is “a procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime.”¹¹⁴

- (a) “A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.
- (b) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.
- (c) Investigators shall photograph an adult suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.”¹¹⁵
- (d) It is permissible to conduct a show-up with a juvenile. *See In re Stallings*, 318 N.C. 565 (1986). Investigators must photograph any juvenile ten (10) years-of-age or older at the time of the show-up who is reported to have committed common-law robbery or any non-divertible offense in G.S. 7B-1701.¹¹⁶ Any other juvenile who is part of a show-up shall not be photographed during a show-up unless there is a non-testimonial order allowing it.¹¹⁷

A juvenile below the age of ten (10) may still be subjected to a show-up without a non-testimonial identification order. *See In re Stallings*, 318 N.C. 565 (1986). It is just that they may not be photographed on the show-up without a non-testimonial identification.

b) Other definitions related to eyewitness identification

(1) In-court identification

Testimony by a witness at trial or in a court proceeding that she observed at the time and place of the crime. The identification of the defendant as the person committing the crime is a key element of proof for the prosecution, which makes the in-court identification often crucial to a case.

(2) Out-of-court identification

Testimony by a witness at trial or in a court proceeding that the witness selected the defendant at an identification procedure held before trial, such as a lineup, show-up, or photographic identification.

(3) Unduly suggestive

An identification procedure which improperly focuses suspicion or attention on the suspect and encourages the witness to pick the defendant. Suggestiveness could be in the way the procedure is conducted, the comments of officers conducting the procedure, or a variety of other forms. An example of undue suggestiveness would be a lineup where the participants are of a different race from the suspect. Along this line, suppose a robbery victim describes the suspect as having a wandering eye. Placing the suspect in a lineup with fillers who do not have that condition is suggestive (one solution to the problem would be to have all lineup participants cover one (1) eye).

(4) Reliable identification

An identification procedure that is suggestive may still be reliable and admissible in court. For example, a one-

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on-one show-up is suggestive, but if done properly, will not be deemed “unduly suggestive.” Since a show-up occurs almost immediately after the crime (before the victim’s memory has faded), the show-up may be a reliable identification procedure. Reliability is determined by several factors, which include:

- (a) Opportunity to view
- (b) Degree of attention
- (c) Accuracy of description
- (d) Level of certainty
- (e) Time between the crime and the confrontation

Neil v. Biggers, 409 U.S. 188 (1972).

- (5) Independent basis or origin

If the witness participated in an illegal or “unduly suggestive” or unreliable out-of-court identification procedure, the witness may still be able to make an in-court identification of the defendant. To do this, the in-court testimony should be based upon recollection from the time of the crime rather than an irreparable improper identification based upon the suggestive procedure.

2. The impact and importance of perception

Perception is a dynamic process of interpreting sensory data. This process is affected by many factors. Personal differences among individuals are influenced by physical factors, emotional states, prejudice and bias, sexual differences, education, and previous experience. Environmental factors also influence perception, as do a variety of other factors.

Eyewitness testimony is often closely scrutinized by attorneys, especially where there are inconsistencies among multiple eyewitnesses. Even though there may be reasonably valid explanations for the differences in an identification (such as one (1) of the eyewitnesses being color-blind and calling the green jacket the wrong color), inconsistencies may reduce the credibility of the eyewitness

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testimony. Therefore, it is helpful to identify the inconsistencies before the eyewitness testifies.

3. Legal concerns

- a) The two (2) primary constitutional concerns in eyewitness identification cases are:
 - (1) Due process (under the Fifth and Fourteenth Amendments)
 - (2) Right to counsel (under the Sixth Amendment)
- b) There are also some statutory concerns which arise primarily from the North Carolina General Statutes related to nontestimonial identification (G.S. 15A-271 to 15A-282) and juvenile nontestimonial identification (G.S. 7B-2103 to 7B-2109),¹¹⁸ as well as the “Eyewitness Identification Reform Act” (G.S. 15A-284).
- c) To determine if eyewitness identification evidence is admissible in court, the courts generally apply a three-part analysis. *Neil v. Biggers*, 409 U.S. 188 (1972).¹¹⁹
 - (1) **Step One:** Is the identification procedure unduly suggestive?
 - (a) **If No:** If the identification procedure conducted out-of-court is not unduly suggestive, then testimony concerning both the out-of-court and an in-court identification will be allowed.
 - (b) **If Yes:** If the identification procedure is suggestive, then proceed to Step Two.
 - (2) **Step Two:** Did the out-of-court identification procedure cause an unreliable identification of the defendant?
 - (a) **If No:** If the out-of-court procedure is reliable, then testimony regarding both the out-of-court and in-court identifications will be admitted.
 - (b) **If Yes:** If the identification procedure is unreliable, then proceed to Step Three.

- (3) **Step Three:** If the identification procedure is both unduly suggestive and unreliable, is there still an independent basis or origin for an in-court identification?
- (a) **If No:** If no independent basis exists, then testimony will not be permitted regarding the out-of-court identification, and an in-court identification will not be allowed.
- (b) **If Yes:** If an independent basis is shown, then only an in-court identification will be permitted. Testimony concerning the out-of-court identification will not be admitted.

d) Another legal concern is the right to counsel

- (1) Statutory right to counsel

If an eyewitness identification procedure is conducted under a nontestimonial identification order (this would usually apply to a lineup conducted when the defendant is not in custody), the person ordered to appear has a statutory right to counsel under G.S. 15A-279(d).

- (2) The Sixth Amendment right to counsel¹²⁰
- (a) In North Carolina, the Sixth Amendment right to counsel attaches at appearance before a magistrate, at first appearance, or when an indictment is issued, whichever occurs first. *State v. Nations*, 319 N.C. 318, (1987). Once the Sixth Amendment right to counsel attaches, a LIVE, in-person lineup may not be conducted without the defendant's attorney present, unless the defendant voluntarily waives the presence of his or her attorney.
- (b) Neither the Sixth Amendment right to counsel nor the statutory right to counsel apply to photographic identification procedures such as a photo array, or photo lineup procedure where the defendant is not physically present.

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- (c) The role of the attorney is to advise his client and observe the procedure, not to interfere with the procedure. If you are dealing with an attorney that you anticipate will interfere, discuss the matter with your legal advisor or district attorney's office before the procedure to determine the best course of action.

4. Conducting eyewitness identification procedures

NOTE: Practical exercises in the use of these procedures are included in the "Criminal Investigation" topic area of BLET.

- a) Conducting a show-up

NOTE: Show slide, "Show-Up."

- (1) A show-up is a one-on-one viewing between a victim or eyewitness and the suspect. The nature of this procedure is viewed with caution by the courts due to the risk of being overly suggestive and risk of misidentification resulting from an officer's influence. Any show up must be conducted as close in time to the offense as possible. The show-up should take place near the scene of the crime and not at a law enforcement office.

If the suspect is merely being detained and not transported, it is preferable to have the victim or witness transported to view the suspect. Of course, in certain circumstances, this may be impractical (ex. critically injured eyewitnesses), necessitating transporting the suspect to the witness's location.

- (2) As with any identification procedure, the officer must be cautious not to say anything that would be suggestive or influence the witness in making an identification, i.e., "we found the person who hurt you."

- b) Conducting a live and/or photo lineup

Article 14A of NC General Statutes Chapter 15A is entitled the "Eyewitness Identification Reform Act." It was enacted into law in 2007, "to help solve crime, convict the guilty, and

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exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects.”¹²¹

NOTE: Show slide, “Lineup.”

Note: Photo lineups are also called “photo arrays.” Most lineup procedures are conducted as photo lineups rather than live lineups.

- (1) A lineup (live or photo) must be conducted by an independent administrator or by an alternative method approved by the North Carolina Criminal Justice Education and Training Standards Commission.
- (2) “Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after being viewed before the next individual or photo is presented.
- (3) Before a lineup, the witness shall be instructed that:
 - (a) The perpetrator might or might not be in the lineup,
 - (b) The lineup administrator does not know the suspect’s identity,
 - (c) The eyewitness should not feel compelled to make an identification,
 - (d) It is as important to exclude innocent persons as it is to identify the perpetrator, and
 - (e) The investigation will continue whether or not an identification is made.

The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.”¹²²

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- (4) “In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect’s appearance at the time of the offense.
- (5) The lineup shall be composed so that the fillers generally resemble the eyewitness’s description of the perpetrator while ensuring that the suspect does not unduly stand out from the fillers. In addition,
 - (a) All fillers selected shall resemble, as much as practicable, the eyewitness’s description of the perpetrator in significant features, including any unique or unusual features.
 - (b) At least five (5) fillers shall be included in a photo lineup, in addition to the suspect.
 - (c) At least five (5) fillers shall be included in a live lineup, in addition to the suspect.
 - (d) If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.
- (6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.
- (7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction shall be visible or made known to the eyewitness.
- (8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.
- (9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.
- (10) Only one (1) suspect shall be included in a lineup.

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- (11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.
- (12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.
- (13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.
- (14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record is practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup."¹²³
- (15) "Whether video, audio, or in writing, the record shall include all of the following information:
 - (a) All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.
 - (b) The names of all persons present at the lineup.

- (c) The date, time, and location of the lineup.
 - (d) The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.
 - (e) Whether it was a photo or live lineup and how many photos or individuals were presented in the lineup.
 - (f) The sources of all photographs or persons used.
 - (g) In a photo lineup, the photographs themselves.
 - (h) In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup."¹²⁴
- (16) Alternative methods for identification
- (a) Independent administrator is not used
 - i) "In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified by the North Carolina Criminal Justice Education and Training Standards Commission.
 - ii) Any alternate method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure."¹²⁵
 - iii) Other alternatives may be used when an independent administrator is not available as long as the requirements of the Eyewitness Identification Reform Act are followed.

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- (b) “Alternative methods may include any of the following:
 - i) Automated computer programs that can administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.
 - ii) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to an eyewitness until after the procedure is completed.
 - iii) Any other procedures that achieve neutral administration.”¹²⁶

- (17) Compliance or noncompliance with the statutory requirements may be used in court to consider motions to suppress an eyewitness’s identification, claims of eyewitness misidentification, and reliability of eyewitness identifications.

III. Conclusion

A. Summary

NOTE: Show slides, “Training Objectives.”

1. Name and describe, in writing, the three (3) sources of law.
 - d) Constitutional law
 - e) Statutory law
 - f) Common law
2. State how the First Amendment affects the law enforcement function.
3. State the criminal and civil consequences law enforcement officers may face as it relates to violating a citizen’s constitutional rights.

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4. Identify how law enforcement authority is affected by subject matter and territorial jurisdiction.
5. State the definitions of “reasonable suspicion” and “probable cause.”
6. State the North Carolina statutory requirements for:
 - a) G.S. 15A-401 – making a warrantless arrest;
 - b) G.S. 15A-404 – a citizen detention;
 - c) G.S. 15A-405 – assistance to enforcement officers by private persons to effect arrest or prevent escape.
7. State the role of law enforcement as it relates to ~~in~~ the issuance of various forms of criminal process.
8. Identify the following police-citizen encounters:
 - a) Voluntary contact
 - b) Investigative detention
 - c) Arrest
9. State the statutory procedures officers must follow after making an arrest.
10. State the statutory requirements for conducting an arrest with a warrant.
11. Identify the appropriate level of force when given fact scenarios involving deadly and non-deadly force situations.
12. State the scope of the following warrantless searches:
 - a) Consent searches of persons, premises, or vehicles
 - b) Searches based on probable cause and exigent circumstances
 - c) Searches and seizures based on the plain view doctrine
13. State the legal requirements for conducting searches of motor vehicles.

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14. Identify the legal requirements governing preparation and execution of a search warrant for a suspect's premises, vehicle, or person.
15. Identify the special search warrant concerns in obscenity, crime scene, and financial crime situations.
16. Identify the situations when only a District Attorney's Office may apply for a warrant or order.
17. Identify the legal concepts of "custody" and "interrogation" as they relate to the requirements of the United States Supreme Court decision, *Miranda v. Arizona*.
18. Recite the four (4) *Miranda* warnings, as well as the additional juvenile warning under G.S. 7B-2101.
19. Identify and explain the exceptions to the *Miranda* requirement.
20. State how non-custodial interview techniques can be used to obtain lawful confessions.
21. State how the Fifth Amendment and Sixth Amendment rights protect suspects during interrogation by law enforcement officers.
22. Identify the procedures for conducting a photographic lineup under the North Carolina Eyewitness Identification Reform Act.

This block of instruction explored the fundamental laws of our country. You learned that the constitution requires you to conduct reasonable searches and seizures. You reviewed the laws concerning arrest warrants and search warrants and learned about various searches and seizures that can be conducted with either reasonable suspicion or probable cause. You also learned how excessive force is unreasonable under the Fourth Amendment while at the same time learning how to use appropriate force to make an arrest, as well as to protect yourself and others. Additionally, you reviewed protections afforded to suspects during interrogation, including the Fifth Amendment rights during custodial interrogation, and Sixth Amendment rights to counsel that protect a charge during various stages of prosecution, along with various statutes. Finally, you observed how various state statutes serve to protect the suspect's due process rights. The North Carolina's Identification Reform Act is one such example, requiring you to follow certain procedures in conducting identification, to avoid being unduly suggestive in the manner in which you conduct the procedure.

B. Questions from Class

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NOTE: Show slide, “Questions.”

C. Closing Statement

The material discussed in this block of instruction is the basis of criminal procedure and is the foundation on which much of the other legal instruction contained in this course rests. A clear understanding and proper application of the legal principles offered in this block of instruction is essential to your effective performance as a law enforcement officer. Without such an understanding and application, there is a substantial risk that evidence you collect will be excluded, that civil damages will be imposed against you, or even that you will be criminally prosecuted. You will use this material every day as a law enforcement officer, and a firm grasp of this material will be one (1) of the keys to your success.

NOTES

- ¹ Nolo's Plain-English Law Dictionary.
- ² Farb, *Arrest, Search and Investigation in North Carolina*, 14-20.
- ³ Farb, *Arrest, Search and Investigation in North Carolina*, 160.
- ⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 160.
- ⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 23.
- ⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 22.
- ⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 159.
- ⁸ *Florida v. Bostick*, 501 U.S. 429, 437 (1991).
- ⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 28.
- ¹⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 36.
- ¹¹ *Illinois v. Wardlow*, 528 U.S. 119 (2000).
- ¹² *State v. Blackstock*, 165 N.C. App. 50 (2004).
- ¹³ Farb, *Arrest, Search and Investigation in North Carolina*, 44.
- ¹⁴ N.C.G.S. § 15A-401(c) (2018).
- ¹⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 37.
- ¹⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 37.
- ¹⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 24 and 64.
- ¹⁸ N.C.G.S. § 15A-404 (2018).
- ¹⁹ N.C.G.S. § 7B-1900, *et seq.* (2019).
- ²⁰ N.C.G.S. § 15A-401(a)(1) (2018).
- ²¹ N.C.G.S. § 15A-401(a)(2) (2018).

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²² N.C.G.S. § 15A-401(c)(2) (2018).

²³ N.C.G.S. § 15A-303 (2018).

²⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 80.

²⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 67.

²⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 69.

²⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 69.

²⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 60.

²⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 73.

³⁰ N.C.G.S. § 15A-501 (2018).

³¹ N.C.G.S. § 7B-1901 (2019).

³² *See* N.C.G.S. § 7B-1901 (2019).

³³ *See* N.C.G.S. §§ 15A-505; 7B-3100, 7B-3101 (2019); N.C. Session Law 2019-186.

³⁴ N.C.G.S. § 7B-3100 (2019).

³⁵ N.C.G.S. § 15A-503 (2018).

³⁶ Sharps and Hess.

³⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 173.

³⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 173.

³⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 361.

⁴⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 175-182.

⁴¹ Farb, *Arrest, Search and Investigation in North Carolina*, 175-182.

⁴² Farb, *Arrest, Search and Investigation in North Carolina*, 175.

⁴³ Farb, *Arrest, Search and Investigation in North Carolina*, 182.

⁴⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 181.

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- ⁴⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 181.
- ⁴⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 182.
- ⁴⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 183.
- ⁴⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 183.
- ⁴⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 186.
- ⁵⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 199.
- ⁵¹ Farb, *Arrest, Search and Investigation in North Carolina*, 199.
- ⁵² Farb, *Arrest, Search and Investigation in North Carolina*, 200-201.
- ⁵³ Farb, *Arrest, Search and Investigation in North Carolina*, 201.
- ⁵⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 201.
- ⁵⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 201.
- ⁵⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 201.
- ⁵⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 203.
- ⁵⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 205-206.
- ⁵⁹ *State v. Johnson*, 627 S.E.2d 488 (2006).
- ⁶⁰ *State v. Stone*, 362 N.C. 50 (2007).
- ⁶¹ Farb, *Arrest, Search and Investigation in North Carolina*, 66-73.
- ⁶² Farb, *Arrest, Search and Investigation in North Carolina*, 218.
- ⁶³ N.C.G.S. § 15A-285 (2018).
- ⁶⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 233.
- ⁶⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 229-231.
- ⁶⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 372.
- ⁶⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 372-376.

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- ⁶⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 365.
- ⁶⁹ N.C.G.S. § 15A-249 (2018).
- ⁷⁰ N.C.G.S. § 15A-251(2) (2018).
- ⁷¹ Farb, *Arrest, Search and Investigation in North Carolina*, 397.
- ⁷² N.C.G.S. § 14-190.20 (2018).
- ⁷³ Farb, *Arrest, Search and Investigation in North Carolina*, 66-73.
- ⁷⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 217-218.
- ⁷⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 368-369.
- ⁷⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 196-197.
- ⁷⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 413-416, 425-428.
- ⁷⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 235, 354, 489-492.
- ⁷⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 425.
- ⁸⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 5.
- ⁸¹ United States Constitution, Sixth Amendment.
- ⁸² Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸³ Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸⁴ Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸⁵ Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 664-665.
- ⁸⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 534.
- ⁸⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 534.
- ⁹⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 542.

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- ⁹¹ Farb, *Arrest, Search and Investigation in North Carolina*, 594.
- ⁹² Farb, *Arrest, Search and Investigation in North Carolina*, 587-588.
- ⁹³ Farb, *Arrest, Search and Investigation in North Carolina*, 598.
- ⁹⁴ N.C.G.S. § 7B-2101 (2018).
- ⁹⁵ N.C.G.S. § 7B-2101 (2018).
- ⁹⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 542.
- ⁹⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 543-544.
- ⁹⁸ *State v. Murphy*, 342 NC 813 (1996).
- ⁹⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 620.
- ¹⁰⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 521, 628.
- ¹⁰¹ Farb, *Arrest, Search and Investigation in North Carolina*, 550-557.
- ¹⁰² Farb, *Arrest, Search and Investigation in North Carolina*, 552.
- ¹⁰³ Farb, “The United States Supreme Court Ruling in *Montejo v. Louisiana*.”
- ¹⁰⁴ Farb, “The United States Supreme Court Ruling in *Montejo v. Louisiana*.”
- ¹⁰⁵ Farb, “The United States Supreme Court Ruling in *Montejo v. Louisiana*.”
- ¹⁰⁶ Farb, *Arrest, Search and Investigation in North Carolina*, 652.
- ¹⁰⁷ Farb, *Arrest, Search and Investigation in North Carolina*, 652.
- ¹⁰⁸ North Carolina Department of Justice, Eyewitness Identification Reform Act.
- ¹⁰⁹ N.C.G.S. § 15A-284.52(a)(7) (2018).
- ¹¹⁰ N.C.G.S. § 15A-284.52(a)(2) (2018).
- ¹¹¹ N.C.G.S. § 15A-284.52(a)(3) (2018).
- ¹¹² N.C.G.S. § 15A-284.52(a)(7) (2018).
- ¹¹³ N.C.G.S. § 15A-284.52(a)(6) (2018).

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¹¹⁴ N.C.G.S. § 15A-284.52(a)(8) (2018).

¹¹⁵ N.C.G.S. § 15A-284.52(c1) (2018).

¹¹⁶ N.C.G.S. § 15A-284.52 (2019).

¹¹⁷ *See* N.C.G.S. §§ 15A-284.52; 7B-2103 (2019).

¹¹⁸ Farb, *Arrest, Search and Investigation in North Carolina*, 557.

¹¹⁹ Farb, *Arrest, Search and Investigation in North Carolina*, 557.

¹²⁰ Farb, *Arrest, Search and Investigation in North Carolina*, 559.

¹²¹ N.C.G.S. § 15A-284.51 (2018).

¹²² N.C.G.S. § 15A-284.52(b)(3) (2018).

¹²³ N.C.G.S. § 15A-284.52(b)(4)-(14) (2018).

¹²⁴ N.C.G.S. § 15A-284.52(b)(15) (2018).

¹²⁵ N.C.G.S. § 15A-284.52(c) (2018).

¹²⁶ N.C.G.S. § 15A-284.52(c)(1)-(3) (2018).