A Guide for Department Personnel

- Instruction for performing searches, seizures, interviews, and interrogations.

This Field Guide is Prepared and Updated by the Virginia Beach Police Department,

Under the Approval of the Chief of Police
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Purpose

To establish a training manual for understanding constitutional issues of search and seizure and interview and interrogation.

Policy

Members of the Virginia Beach Police Department will scrupulously honor the United States Constitution, the Constitution of Virginia, and all statutory law and case law that govern this agency.

INTRODUCTION

Most of this field guide deals with interpretation of the Fourth Amendment to the United States Constitution – the law of “Search and Seizure”. Consequently, it should begin with definitions of those two terms, as used in Fourth Amendment constitutional law.

[Note: Some cited cases in this field guide are from courts that have no jurisdiction over the courts in Virginia. These case opinions should be viewed as persuasive but not controlling.]

What is a “Search”?

A search occurs whenever there is a governmental intrusion upon a reasonable expectation of privacy. If an officer walks by a car that is in a public place and looks into the car through the window, he has not conducted a search; a person cannot reasonably expect privacy in what he exposes to public view. On the other hand, if an officer opens the trunk of a car and merely looks into the trunk, a search has occurred because the officer intruded into a zone where privacy can reasonably be expected. The fact that the officer did not touch or move any item in the trunk is irrelevant. Once the officer has intruded upon a reasonable expectation of privacy, he has conducted a search. Unless a valid consent has been obtained, a search must be justified either by a search warrant or some recognized exception to the search warrant requirement.

What is a “Seizure”?  

A seizure of property occurs when an officer interferes meaningfully or significantly with another person’s possessor interest in property. Requiring that someone hand over a weapon during a brief detention is not a seizure because the “interference” with a “possessor interest” is not significant. Taking that same weapon (non-consensually) to the police department for “safekeeping” or for processing is a seizure.

A seizure of a person occurs when an officer says or does things that would cause a reasonable person to feel that he is not free to leave or otherwise to decline participation. So if a uniformed officer approaches someone on a sidewalk and says “Hold up there… I need to talk to you”, a reasonable person would feel he was being required to stop. Assuming he does stop (submits), as instructed, a seizure has occurred. In other words, a person is seized when, by means of physical force or a show of authority and a subsequent submission to that show of authority, his freedom of movement is restrained.

“Unreasonableness” and its Consequences

The Fourth Amendment prohibits “unreasonable” searches and seizures. To be reasonable, searches and seizures must be justified by facts and/or circumstances suggesting the need for them – probable cause, for example. Without such justification, searches and seizures are unreasonable and therefore

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unconstitutional. Any evidence that is the direct product of a violation of someone’s constitutional rights is inadmissible in a criminal prosecution of the person whose rights were violated. An officer who intentionally violates someone’s constitutional rights is guilty of a federal felony. 18 U.S.C. §§ 241 and 242 Civil lawsuits against police for alleged constitutional rights violations are commonplace across the United States. 42 U.S.C. § 1983

This field guide contains hundreds of examples of what courts find to be reasonable, and unreasonable, searches and seizures. In other portions of this field guide are discussions of the law of interview and interrogation – the Miranda Rule and interpretations of the Fifth and Sixth Amendments. The field guide begins with the law of officer-citizen contacts, seizures and non-seizures of persons.

**SEIZURE VS. NON-SEIZURE OF PERSONS**

The Fourth Amendment to the United States Constitution requires that all searches and seizures, including seizures of persons, be reasonable. Determining the reasonableness of a seizure involves balancing the individual’s right to be free and left alone by police with the occasional need of law enforcement to interfere with privacy and freedom in order to investigate crime and enforce laws. The following is an examination of the legal concepts involved in officer-citizen contacts, including seizures of persons.

For purposes of federal constitutional law, officer-citizen contacts fall into one of three legal categories (See also McGee v. Commonwealth, 25 Va. App. 193):

1. Voluntary Contact
2. Investigative Detention (“Terry Stop”)
3. Arrest

Investigative detentions and arrests are “seizures;” voluntary contacts are not. Black’s Law Dictionary defines, in part, an arrest as “the stopping, seizing, or apprehending a person by lawful authority; the act of laying hands upon a person for the purpose of taking the body into custody of the law.” Courts may use different words to describe these transactions but, ultimately, there are only three categories. Officers are required to control a contact so that it does not escalate into an intrusion (seizure) for which the officer may not have legal justification. Before it can be determined what legal justification, if any, is required for the contact, it is necessary to determine what type of contact is taking place. In order to do that, one must know the characteristics of each type of contact.

**The Voluntary Contact**

Where there is no “seizure” within the meaning of the Fourth Amendment, there is no Fourth Amendment requirement of “reasonable” factual justification for the contact. In a voluntary contact, police need not have or prove reasonable suspicion or probable cause.

While a “free to leave” inquiry is often determinative, it is not the sole test for whether an officer-citizen contact is a seizure. There are circumstances in which someone is not necessarily free to leave, but the contact still may be voluntary in the legal sense.

For example: Suppose in an attempted armed robbery of a convenience store clerk, the clerk and gunman scuffle. The perpetrator fires but only wounds himself. He flees but police find his blood and obtain his physical description. Thirty minutes later, police learn that a person has arrived at a nearby hospital with a gunshot wound; he matches the description of the robbery suspect. Police go to the...
hospital and obtain permission from the emergency room doctor to speak with the suspect while he is awaiting treatment in an examination room. The doctor tells police that the subject has not received any medication and that his wound is superficial. There ensues the following conversation with the suspect:

Officer: “Good afternoon. I’m Officer John Smith with the City Police Department. How are you feeling?”

Suspect: “O.K. A few stitches and I’ll be as good as new.”

Officer: “Great. Sir, may I have your permission to talk with you a moment? Would you allow me to do that?”

Suspect: “Sure. No problem. What’s up?”

In this scenario, the suspect arguably was not free to leave in that he was waiting in a hospital to receive treatment for his injury. Still, it appears he was free to decline the contact with the officer. Nothing in the officer’s communication indicated otherwise. He asked the suspect to participate in the transaction; there were no words of command, demand, requirement, or instruction. Though the suspect may not have been “free to leave,” circumstances indicated he was “free to decline.” Therefore, the contact is not a seizure. The “free to decline” test has been applied by the United States Supreme Court in several cases, including United States v. Drayton, 122 S. Ct. 2105 (2002), Florida v. Bostick, 111 S. Ct. 2382 (1991), and I.N.S. v. Delgado, 104 S. Ct. 1758 (1984).

More frequently, however, the “free to leave” test will be sufficient to govern the categorization of the contact. Example: An officer observes a young man walking in an area where a number of burglaries have occurred recently. With no other specific information in mind, the officer approaches the citizen and says, “Excuse me sir, may I speak with you for a moment?” The man stops and says, “Yeah, what is it?” The officer identifies himself and asks if he could see some identification, which the man agreeably produces. The officer reviews the identification, returns it to the man, and asks a few questions, and the two part ways. Because the officer said and did nothing that would cause a reasonable person to feel restrained or otherwise required to participate in the contact, this contact is entirely voluntary in the legal sense. See Richmond v. Commonwealth, 22 Va. App. 257 (1996) and Commonwealth v. Morton, 00 Vap UNP 0497002 (2000).

The United States Supreme Court has held that, if all a police officer does is approach a subject, identify himself as a police officer, and ask to talk to the subject in a manner that suggests an option, a reasonable person does not feel restrained or required to participate in the transaction. See, for examples, the Drayton, Bostick, and Delgado, decisions above as well as Florida v. Royer, 103 S. Ct. 1319 (1983). Of course, tone of voice and/or other conduct could change the result if used coercively. In Delgado, the Supreme Court held that law enforcement officers did not seize members of a factory work force even though officers were stationed near factory exits while others approached and questioned the workers inside.

For an officer, the key to creating a voluntary contact is to request cooperation in a manner that suggests an option or simply to strike up a normal, non-coercive conversation. The officer’s exact words are critical. The officer must request or invite the subject’s participation, not order, demand, require, instruct, or otherwise coerce it. Evidence of the officer’s exact words may include testimony by the officer, the subject, and other witnesses - as well as any recordings that may exist. Non-verbal communication will be relevant as well. While “kind tones” may help, they will not keep plain language from creating a seizure. See United States v. Richardson (CA 6 9/24/04)
The “Objective” Test

Officer-citizen contacts are legally voluntary if, in view of all circumstances surrounding the transaction, a reasonable person would have believed he was free to leave and/or decline the contact with law enforcement officers. The test focuses on what officers have actually said and/or done, and how reasonable people would interpret those words and actions. According to the Supreme Court, “Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” California v. Hodari D, 499 U.S. 621 (1991).

The test for seizure involves an objective standard - looking to a reasonable person’s interpretation of police behavior rather than to the suspect’s personal (subjective) view of it. This standard ensures that the scope of an officer’s Fourth Amendment authority does not vary with the state of mind of the particular individual approached by the officer. In Bostick, above, the Supreme Court specifies that the reasonable person is an innocent person and therefore presumably does not suffer guilt-induced paranoia every time police approach.

Whether the involved officer himself subjectively believed he was or was not seizing a person - and, if so, whether he was arresting or merely detaining him - is generally not relevant to the legal determination. An officer may believe that his action in seizing a person was only a detention, but a court may still decide that the objective facts showed that the officer’s action was an arrest and therefore required probable cause. Similarly, an individual suspect may feel and may testify that he was detained or arrested at a given point in time, but unless the officer has said or done something that would cause a reasonable person to feel that way, no seizure has occurred.

Effect of Miranda Warnings?

Miranda warnings may be counter-purposeful for the officer trying to achieve, and prove, a non-custodial (non-seizure) environment. Given that federal law requires Miranda warnings only in custodial interrogation, a reasonable person who is advised of Miranda rights might reasonably conclude that he is in custody, i.e. has been seized. To avoid this problem, some officers, instead of explaining custodial interrogation rights (Miranda rights) in a non-custodial setting, spend the same time explaining and assuring that the contact is in fact non-custodial. Example: “Billy, you are not under arrest and you’re free to leave at any time. We’re just asking for your voluntary cooperation. Would you be willing to discuss this matter with us?”

When circumstances would cause a reasonable person to feel that he is being subjected to the restraints normally associated with an arrest, interrogative questions require prior warning and waiver of Miranda rights. Interrogation of a suspect without Miranda warning and waiver is permitted as long as officers have not said or done anything that would cause a reasonable person to feel that he is under arrest at the time of the questioning. Berkemer v. McCarty, 104 S. Ct. 3138 (1984); Stansbury v. California, 114 S. Ct. 1526 (1994).

[Note: The law of interrogation, including Miranda principles, is covered more thoroughly in a later section.]
INVESTIGATIVE STOPS AND ARRESTS

If an officer-citizen contact creates a seizure within the meaning of the Fourth Amendment, it next must be determined what kind of seizure has occurred. There are two possibilities: arrest and investigative detention, or “stop”. In this discussion, the terms “investigative detention,” “detention” and “stop” are used interchangeably and have identical meanings. Such actions are also often called “Terry Stops”, referring to Terry v. Ohio, 392 U.S. 1 (1968), the original stop and frisk case.

Because investigative detentions and arrests are seizures, they must be “reasonable” under the Fourth Amendment. This means showing certain levels of factual justification: reasonable suspicion for stops, probable cause for arrests. But how does one determine whether a seizure is a stop or an arrest?

Is the Seizure a Stop or an Arrest?

Deciding whether a seizure is a stop or an arrest requires a determination of “whether...arrest-like measures implemented can nevertheless be reconciled with the limited nature of a Terry-type stop.” United State v. Acosta-Colon, 157 F. 3d 9 (1st Cir. 1998). Courts tend to isolate three issues in order to determine whether a seizure is “arrest-like” or “Terry-type”: 1) duration of seizure; 2) involuntary movement of the seized person; and 3) use of force and/or restraints.

- Duration of Seizure

Investigative detentions must be brief. Normally, issues involved in an investigative detention may be resolved in minutes (not hours) and should therefore be completed in that time. In some cases, particularly serious ones where investigation is progressing efficiently toward a determination of presence or absence of probable cause, a detention of an hour or more may be reasonable and therefore constitutional. See United States v. Gil, 204 F. 3d 1347 (11th Cir. 2000) (75 minutes) and United States v. McCarthy, 77 F. 3d 522 (1st Cir. 1996) (also 75 minutes), as examples. Stops of much more than an hour are likely to be re-categorized as arrests and would therefore require probable cause for their justification. For example, see United States v. Codd, 956 F. 2d 1109 (11th Cir. 1992) where the court found that a 2 ½ hour detention “went far beyond the boundaries of Terry.”

In the United States Supreme Court decision United States v. Sharpe, 105 S. Ct. 1568 (1985), law enforcement officers performing surveillance in an unmarked car developed reasonable suspicion that a particular pickup truck was illegally transporting drugs. A sedan was traveling in tandem with the truck. After following the vehicles for a number of miles, investigating officers decided to conduct an investigative stop and radioed another officer for assistance. When officers attempted to stop the two vehicles, the sedan stopped but the truck continued with the newly-joined assisting officer following.

The originally involved officers talked with the sedan driver and, after first obtaining his driver’s license, left the sedan and its driver with a third officer and begin looking for the truck and the assisting officer. They found that the assisting officer had stopped the truck and detained its driver. Twenty minutes after the truck was stopped, the initiating officers arrived, put their noses against the rear window of the truck and smelled marijuana. They then opened the rear camper shell and discovered a large quantity of marijuana. The issue: Was the detection of the marijuana odor part of a lawful investigative detention or had the stop at that point exceeded permissible time limits? The Court held that the truck transaction was a proper investigative detention. There was reasonable suspicion and the roughly twenty minute detention was reasonable; therefore, probable cause to search was developed during a lawful investigative detention.
In *United States v. Place*, 103 S. Ct. 2637 (1983), another Supreme Court decision involving time limits of investigative detention (of luggage, in this case), two officers on duty at a major airport approached a subject reasonably suspected of drug courier activity and requested permission to search his luggage. The suspect consented to the search but it was not conducted because the suspect’s flight was about to leave. The officers called drug interdiction agents at the destination city airport and informed them of their reasonable suspicion. Agents at the destination airport approached the suspect after he claimed his luggage. When the suspect refused to consent to a search of the bag, officers told him they were going to take his luggage and attempt to obtain a search warrant, and that he could accompany them if he desired. The suspect declined. They then took his luggage to another nearby airport where a trained narcotics detection dog was available to conduct a sniff test, which was positive. Approximately 90 minutes had elapsed between the time of the seizure of the bag and the time of the sniff test. The subject was subsequently arrested for possession of cocaine. The issue: Did the detention of the luggage (based on reasonable suspicion) exceed permissible time limits before the sniff test was performed and probable cause was established?

The Supreme Court concluded that the seizure of the bag exceeded permissible time limits for an investigative detention. The court noted that the agents knew the suspect would be arriving at the destination airport and they could have and should have arranged for the dog to be at that location. By showing such concern over the 90 minute detention of a piece of luggage (with reasonable suspicion but not probable cause), the court gave clear indication that the investigative detention of persons for such a period would be closely scrutinized and that investigative detentions must be limited to periods of diligent, active investigation. In less serious matters, even an hour could be too long for an investigative stop supported by less than probable cause. If initial investigation reveals the need for other or different investigation, the duration of the stop may sometimes be extended slightly. See, for example, *United States v. Soto-Cervantes*, 138 F. 3d 1319 (10th Cir. 1998) (one-hour stop okay).

- **Involuntary Movement of Detainee**

In *Florida v. Royer*, 103 S. Ct. 1319 (1983), the United States Supreme Court (in a plurality opinion) ruled that the involuntary movement of a detained subject from an airport concourse to a small, police-controlled room 40 feet away, for purposes of facilitating a luggage search, created an arrest and therefore required probable cause. However, the court went on to explain:

> “There are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area.”

Thus, movement of a detainee even a short distance, in the absence of legitimate and articulated safety and security justifications, may create an arrest requiring probable cause though the encounter only lasts a few minutes. For an example of the safety and security exception at work, see *United States v. $109,179 in U. S. Currency*, 228 F. 3d 1080 (9th Cir. 2000) (subject was moved from one motel room to another). Just saying the words “safety and security” may not suffice as the required articulation factual basis for the safety or security concern must be stated. *United States v. Acosta-Colon*, 157 F. 3d 9 (1st Cir. 1998).

In *Royer*, officers approached a subject in an airport concourse because particular aspects of his conduct and demeanor were consistent with a drug courier profile. The officers identified themselves and asked if the subject had a moment to talk. He responded affirmatively. Officers then asked to see his airline ticket and some other form of identification, which he produced. His airline ticket was in the name
“Holt” and his driver’s license in the name “Royer.” Asked to explain the two names, he became very nervous and failed to give a reasonable explanation. Officers then informed the subject that he was suspected of drug smuggling and, without returning his driver’s license or ticket, asked him to accompany them to a room approximately 40 feet away. There, officers obtained consent to search his luggage. Drugs were found during the consent search. Issue: Was the consent search the product of a lawful investigative detention or an unlawful arrest? The Court (plurality) held that the evidence from the consent search was the product of an illegal arrest. The involuntary movement of the subject to the room off the concourse turned what would have been a lawful stop into an unlawful arrest. However, as mentioned above, the Court noted that the result could have been different if the officers had explained in their testimony legitimate safety or security reasons for the short movement.

Two years later, in *Hayes v. Florida*, 470 U.S. 811 (1985), the Court dealt similarly with the issue of involuntary movement of a suspect. In a felony investigation, officers had a principal suspect but insufficient evidence to arrest him. When latent prints were found in the victim’s bedroom, officers decided to visit the suspect’s home to obtain his fingerprints. They did not seek a court order authorizing this procedure. The suspect spoke with officers on the front porch of his home and told them he did not want to go to the police station for fingerprinting. An officer responded, “Sirs, if you don’t come with me, I will have to place you under arrest.” The suspect replied, “In that case I will go.” He was then taken to the police station and fingerprinted. Issue: Was the resulting fingerprint evidence the product of a lawful investigative detention or an unlawful (arrest-type) transaction? The Court held that the transaction was, in essence, an illegal arrest. The officer’s method of getting the suspect to accompany him to the station was a seizure, (i.e., a reasonable person would have felt that he was required to go). Because the seizure involved involuntary movement from place to place, it was sufficiently like an arrest as to require probable cause to arrest at that point. Evidence resulting from the seizure was product of an illegality - fruit of a poisoned tree. Earlier, in *Dunaway v. New York*, 442 U.S. 200 (1979), the Supreme Court had reached a like decision on similar facts. Much more clearly and recently, in *Kaupp v. Texas*, 123 S. Ct. 1843 (2003), the Court (per curiam) restated its view that involuntary movement of a seized person to another place is, in essence, an arrest. Importantly, *Dunaway*, *Hayes* and *Kaupp* all involved requiring a person to accompany police to a law enforcement facility. Only *Royer* involved movement to some other place. Lower courts are split (as was the *Royer* court) on whether requiring a detained person to move to a non-police dominated location would be an arrest (for example, moving someone from one public location to another public location).

- **Use of Force and/or Restraints**

Non-deadly force and other restraints may be used as reasonably necessary to effect and safely maintain an investigative detention; such actions do not automatically convert the transaction into an arrest. In fact, in the original “stop and frisk” case, the United States Supreme Court approved the seizure of a person on less than probable cause where a police officer “grabbed [a subject] and spun him around” before proceeding with a frisk. *Terry v. Ohio*, 392 U.S. 1 (1968).

In a variety of lower court decisions, use of reasonable force in investigative stops has been approved up to and including stops conducted at gunpoint. Thus, even the show of deadly force does not necessarily convert a detention into an arrest, as long as there is strong justification for the force or show of force. See, as examples, *United States v. Heath*, 259 F. 3d 522 (6th Cir. 2001) and *United States v. Rousseau*, 257 F. 3d 925 (9th Cir. 2001). Similarly, blocking, handcuffing and/or locking the suspect in a police vehicle may be appropriate in some investigative detentions where compellingly necessary to ensure officer safety or security of the detainee. See *United States v. Felix-Felix*, 275 F. 3d 627 (7th Cir. 2001) and *United States v. Yang*, 286 F. 3d 940 (7th Cir. 2002).
So, in a number of cases, the United States Courts of Appeal have said that an officer may use force as reasonably necessary - including touching, grabbing, or pointing a gun - in order to stop a person. However, if there is more force than reasonably necessary, a court may determine that the seizure was an arrest and therefore required pre-existing probable cause. See Park v. Shiflett, 250 F. 3d 843 (4th Cir. 2001) as an example.

**Arrest Warrants (CALEA 74.3.1, 74.3.2)**

In Virginia, arrest warrants are controlled by § 19.2-71 et seq. Most often, officers will obtain an arrest warrant from a magistrate though § 19.2-71 allows for the process of arrest to “be issued by the judge, or clerk of any circuit court, any general district court, any juvenile and domestic relations district court, or any magistrate.”

§ 19.2-72 says, in relevant part, “The warrant shall (i) be directed to an appropriate officer or officers, (ii) me the accused or, if his name is unknown, set forth a description by which he can be identified with reasonable certainty, (iii) describe the offense charged with reasonable certainty, (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed, and (v) be signed by the issuing officer.”

Expanding on § 19.2-72, Rule 3A:3 of the Supreme Court of Virginia states, “The complaint shall consist of sworn statements of a person or persons of fact relating to the commission of an alleged offense. The statements shall be made upon oath before a magistrate empowered to issue arrest warrants. The magistrate may require the sworn statements to be reduced to writing and signed.”

§ § 19.2-75 and 19.2-76 govern the execution and return of an arrest warrant. In short, it mandates that the accused be brought before a judicial officer, the warrant be signed and dated by the executing officer, and a copy provided to the accused.

**Arrests in Virginia (CALEA 1.2.5, 1.2.6, 1.2.7, 61.1.2)**

Officers shall use their discretion when making a decision to arrest using relevant criteria including federal and state statutory law, applicable appellate court decisions, training, and supervision. While state law requires officers to issue summonses or make arrests for certain misdemeanor offenses, other discretionary alternatives could include a warning, referral to an appropriate authority or agency (e.g., Detox Facility, release to parents if a juvenile, etc.), or informal resolution strategies between the appropriate parties involved in the offense.

- For procedures regarding persons asserting diplomatic or other forms of immunity and requirements that pertain to arrestee rights see General Order 6.02 (Immunity From Arrest).

- Provisions for reporting arrests and the processing of arrestees for certain crimes are located in General Order 4.01 (Records Management).

When can a law enforcement officer make a physical arrest for a misdemeanor offense in the Commonwealth of Virginia?

The General Assembly enacted § 19.2-74, which announced their preference for the release of suspects on summonses over physical arrests for most misdemeanors thereby significantly restricting when law enforcement officers may take suspects into custody and transport them to appear before a magistrate.
Briefly, §19.2-74 provides that whenever any person is detained by, or is in the custody of, an arresting officer for any violation committed in such officer’s presence in which the offense is a violation of any county, city, or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor (and later in this section Class 3 and Class 4 misdemeanors) or any other misdemeanor for which he may receive a jail sentence the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody unless one of the following exceptions exists:

Exceptions listed in § 19.2-74:

- If any such person shall fail or refuse to discontinue the unlawful act,
- If any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection,
- If any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person,
- If the person refuses to give such written promise to appear,
- Specific provisions in § 46.2 (301 & 302)
- Public Drunkenness as defined in § 18.2-388,
- Remaining at a place of riot or unlawful assembly after having been warned to disperse in violation of § 18.2-407.

On August, 08, 2007, the Chief Judge of General District Court made it permissible for the physical arrest for the violation of Driving on a Suspended or Revoked OL [§ 46.2 (301 & 302)] when she signed the court order, pursuant to statutory authority (§ 46.2-936).

In addition to the exceptions listed in § 19.2-74, the General Assembly enacted § 19.2-81, which provides that law enforcement officers may, in short, make a physical arrest under the following circumstances:

- Any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence,
- DUI / BUI,
- At the scene of any accident involving a motor vehicle, watercraft as defined in § 29.1-712 or motorboat, or at any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present,
- You receive radio or other electronic transmission confirming that a warrant is on file,
• Or for any of these misdemeanors not committed in your presence:
  • Shoplifting,
  • Weapon on school property,
  • Assault and battery,
  • Brandish a firearm,
  • Destruction of commercial property,

It is important to note that, of the preceding 5 misdemeanors that you may physically arrest for, you may not release the suspect on a summons for an offense that was not committed in your presence with the exception of shoplifting.

All sworn officers will execute warrants, summonses, and other criminal processes in accordance with Code of Virginia § 19.2-81 and 19.2-82. Officers will be mindful of statutory jurisdictional limitations, which will vary depending on the circumstances of the arrest. All uses of force in connection with arrests will be in accordance with General Order 5.01 (Use of Force).

In accordance with applicable statutory law and appellate court decisions, only sworn law enforcement officers employed with this department will execute warrants and other criminal processes.

**Domestic Assault**

It is also important to note: § 19.2-81.3 and department policy mandate the custodial arrest in cases of domestic assault.

Additionally, § 19.2-81.3 states officers may arrest for an alleged violation of § 18.2-60.4 (violation of stalking protective order) or § 16.1-253.2 (violation of protective orders) regardless of whether such violation was committed in his presence.

Previously, if a law enforcement officer physically arrested a person when such arrest was not authorized under one of the conditions listed above, any incriminating evidence discovered during the search incident to arrest, according to the Virginia Supreme Court, would be inadmissible; however, in *Virginia v. Moore* 553 U.S.____ (2008), the United States Supreme Court reversed that ruling and stated “The police [do] not violate the Fourth Amendment when they [make] an arrest that is based on probable cause but prohibited by state law, or when they perform a search incident to the arrest.” Therefore, even though the arrest violates state law, the evidence can be admitted at trial as long as the arrest comports with the Fourth Amendment.

Officers are cautioned that, despite this victory for law enforcement from the Court, the physical arrest of a person in violation of § 19.2-74 could expose the officer to a tort action from the arrested person and discipline from the department for a rule violation of Conformance to Laws.

**Jurisdiction**

State code § 19.2-77 provides that “Whenever a person in the custody of an officer shall escape or whenever a person shall flee from an officer attempting to arrest him, such officer, with or without a warrant, may pursue such person anywhere in the Commonwealth and, when actually in close pursuit, may arrest him wherever he is found. If the arrest is made in a county or city adjoining that from which the accused fled, or in any area of the Commonwealth within one mile of the boundary of the county or city from which he fled, the officer may forthwith return the accused before the proper official of the
county or city from which he fled. If the arrest is made beyond the foregoing limits, the officer shall proceed according to the provisions of § 19.2-76, and if such arrest is made without a warrant, the officer shall procure a warrant from the magistrate of the county or city wherein the arrest was made, charging the accused with the offense committed in the county or city from which he fled.”

Additionally, state code § 19.2-76 provides that “A law-enforcement officer may execute within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth. A warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally.

If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in § 19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in § 19.2-129.

The law-enforcement officer executing a warrant or capias shall endorse the date of execution thereon and make return thereof to a judicial officer. The law-enforcement officer executing a summons shall endorse the date of execution thereon and make return thereof to the court to which the summons is returnable.

Whenever a person is arrested upon a warrant or capias in a county or city other than that in which the charge is to be tried, the law-enforcement officer making the arrest shall either (i) bring the accused forthwith before a judicial officer in the locality where the arrest was made or where the charge is to be tried or (ii) commit the accused to the custody of an officer from the county or city where the charge is to be tried who shall bring the accused forthwith before a judicial officer in the county or city in which the charge is to be tried. The judicial officer before whom the accused is brought shall immediately conduct a bail hearing and either admit the accused to bail or commit him to jail for transfer forthwith to the county or city where the charge is to be tried.”

Unarrest

Perhaps this strange word should be replaced with a phrase that sounds more “legal”: “discontinuation of arrest custody upon dissipation and/or evaporation of probable cause.” In any event, it is the view of many police law experts that if, after making an arrest, an officer discovers that probable cause did not exist in the first place or has now evaporated, the subject should be released as quickly as possible. This would occur, ideally, in a safe place, preferably of the arrestee’s choosing. It is not necessary or desirable that the arrestee be further processed or presented to a judicial official. Instead, the details of the arrest and unarrest should be thoroughly documented, along with the justifications for each.

A compelling argument exists that continued arrest custody, after the known evaporation of probable cause for that arrest, violates the Fourth Amendment. On those facts, “unarrest” may be a constitutional imperative. This may be true notwithstanding state statutory law requiring that “upon making an arrest, the officer shall present the arrestee to a judicial officer without unnecessary delay.” Such statutes exist to assure proper handling of people who are being kept in custody, not those being released from it.
Illegal Arrests

Making an illegal arrest brings with it numerous bad possibilities. Not only can it result in the suppression of evidence, depending on the facts of the case, but it can open the officer, and potentially the agency, to civil liability and criminal prosecution – an extreme, but not unheard of outcome. Further, in Virginia citizens have the authority to resist illegal arrests. See Commonwealth v. Hill, 264 Va. 541, 546, 570 S.E.2d 805, 807 (2002): “a citizen generally is permitted to use reasonable force to resist an illegal arrest.” Officers must act appropriately when employing their authority to make arrests and all arrests must be based on probable cause.

“Seizures” and the Miranda Rule

Ironically, the simplest part of the Miranda rule is the most frequently misunderstood. The rule applies only when a person is interrogated while in police “custody.” Miranda v. Arizona, 86 S. Ct. 1602 (1966). As is discussed elsewhere, the test for Miranda “custody” is objective: Would a reasonable person feel that he was subjected to the restraints normally associated with formal arrest? Berkemer v. McCarty, 104 S. Ct. 3138 (1984). The subjective feelings of a particular subject are of no consequence in deciding whether the subject is in custody for Miranda purposes. The question is: Has the officer said and/or done things that would cause a reasonable person to feel that he has been arrested?

When a subject comes to and remains at the interrogation site on a voluntary basis there is no Miranda custody, even when suspicion is “focused” and there is intense accusatory interrogation. Oregon v. Mathiason 429 U. S. 492 (1977). A roadside stop (investigative detention) is not “custody” for purposes of Miranda, but an arrest is. Berkemer v. McCarty, 104 S. Ct. 3138 (1984). Custody, not focus of suspicion, determines whether a person to be interrogated is entitled to Miranda warnings. Beckwith v. United States, 425 U. S. 341 (1976).

[Note: the Miranda rule is dealt with more thoroughly in another section.]

REASONABLE SUSPICION AND PROBABLE CAUSE

The Fourth Amendment to the United States Constitution requires that all searches and seizures be “reasonable.” Such police actions are “reasonable” only if there are facts and circumstances that justify them. Unless and until facts and circumstances combine in certain legally sufficient ways, a police officer has no authority to infringe upon anyone’s freedom or reasonable privacy expectations.

The factual combinations that justify various searches and seizures have been given names in the law. Some police actions - arrests and full searches, for example - require an amount of factual justification called “probable cause.” Certain limited police actions - investigative stops and weapons frisks, as examples - do not require as much factual justification. They are justified by combinations called “reasonable suspicion.”

Reasonable suspicion and probable cause are fluid and shifting concepts that depend on the individual facts and circumstances of a situation. Each case is unique. Probable cause and/or reasonable suspicion will crystallize only on the basis of the particular facts of a particular case.

Terminology

Terminology is important. The terms reasonable suspicion and probable cause should be used carefully and precisely. The term probable cause often is used loosely and mistakenly to describe any lawful basis for an investigative action. That is, when a prosecutor or a judge says that an officer lacked “probable cause” to stop a vehicle, that person often really means the officer did not “have authority” to

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Some working definitions:

1. **Probable Cause**: Facts and circumstances which, taken together with rational inferences therefrom, would cause a reasonable police officer to believe...
   
   a. (To arrest) ... that a crime has been committed and that a particular person committed it;
   b. (To search) ... that evidence of a crime is in the place to be searched.

   [Note: The term probable cause does not necessarily imply statistical likelihood or mathematical probability. Rather, the probable cause standard requires showing “a fair probability” measured in light of common sense and with benefit of the officer’s training and experience. *Illinois v. Gates*, 103 S. Ct. 2317 (1983).]

2. **Reasonable Suspicion**: Facts and circumstances which, taken together with rational inferences therefrom, would cause a reasonable police officer to suspect...
   
   a. (To detain or “stop”) ... that a person is, has been, or is about to be, involved in criminal activity;
   b. (To frisk a person) ... that a person subject to lawful detention is armed and constitutes a danger to the officer;
   c. (To frisk other areas) ... that an area within the immediate control and access of a person lawfully detained contains weapons and that the detainee might use those weapons against the officer;
   d. (To conduct a “protective sweep”) ... that a place in which an officer is already lawfully present contains would-be assailants that would constitute a threat to the officer.

**Establishing Reasonable Suspicion and Probable Cause**

Establishing these legal justifications requires that facts, circumstances, and inferences be articulable. The officer must be able to explain them verbally. Neither probable cause nor reasonable suspicion may be based solely on an unexplainable “hunch” or feeling. For this reason, reasonable suspicion is sometimes referred to as “articulable suspicion.” In developing inferences, a police officer’s training and experience may be, and should be, taken into account. Well-trained and/or experienced officers can detect criminal suspiciousness from circumstances that would appear meaningless to untrained and/or inexperienced observers. See, for example, *United States v. Cortez*, 101 S. Ct. 690 (1981).

Probable cause and reasonable suspicion may be transferred or “imputed.” The officer taking an investigative action need not have all operative facts and circumstances in his mind as long as that information is in the mind(s) of others in the chain of investigative action. In fact, an arrest on one matter without probable cause can be saved, legally, by the existence of probable cause to arrest on another matter. *Devenpeck v. Alford*, 125 S. Ct. 588 (2004). Whatever legal complexities may exist in establishing probable cause, it is clear that reasonable suspicion may be established on the basis of less information and through less reliable sources.
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In Draper v. U. S., 79 S. Ct. 329 (1959) and Illinois v. Gates, 103 S. Ct. 2317 (1983), the United States Supreme Court found that probable cause could be developed through an officer’s corroboration of certain neutral details of an anonymous tip regarding criminal activity. Since that is enough, in some circumstances, to establish probable cause, then obviously reasonable suspicion sometimes may be established by a partially corroborated anonymous tip. See, for example, Alabama v. White, 110 S. Ct. 2412 (1991), but compare Florida v. J. L., 120 S. Ct. 1375 (2000) for a contrary result in light of a differing fact pattern.

If reasonable suspicion may sometimes be based on an anonymous tip, then obviously it does not require a high degree of informant reliability when information comes from a known source. For example, in Adams v. Williams, 92 S. Ct. 1921 (1972), the United States Supreme Court found a stop and frisk to be justified based on a tip from an informant, though his information was never verified, but where certain neutral details of the tip were corroborated upon the officer’s arrival at the detention scene.

Some courts have commented that in situations where personal danger to police is great and/or the offense under investigation is very serious, stops and particularly frisks may be justified by a very low level of suspicion. However, in 2000, the Supreme Court held that an anonymous tip which loosely described a particular person standing at a bus stop as a black male teenager wearing a plaid shirt and added “he’s got a gun” did not by itself establish reasonable suspicion for a stop and frisk action. Florida v. J. L., above See also Ramey v. Commonwealth, 35 Va. App. 624, 547 S.E.2d 519 (2001).

Conceptualizing Reasonable Suspicion and Probable Cause

The concepts of probable cause and reasonable suspicion may be viewed as part of a spectrum that could be called a “factual justification continuum.” The spectrum might range from “0” (zero) – knowing nothing about a situation – to 100%, being sure or certain of something. It is helpful to look at various factual justifications as they might fall on such a scale.

Absolute certainty is never required in our criminal justice system, even to convict a person in court of a crime. To convict and punish a person for a criminal offense requires “proof beyond a reasonable doubt.” If one were to attach a “percentage of certainty” to that, perhaps it might be “98% sure” that a particular person committed a crime.

Below that on a spectrum might be a standard of factual justification called “clear and convincing” evidence. This is the amount of factual justification required in many states to subject a person to involuntary mental commitment. That is, before a person may be involuntarily hospitalized for a mental condition, many states require that there be clear and convincing evidence that a person is a danger to himself or others. This standard might fall somewhat above the 50% marker, but below “proof beyond a reasonable doubt.”

Just above 50%, but below “clear and convincing,” is a standard called “preponderance of the evidence” or the “greater weight of the evidence.” It is the standard used in most civil and administrative actions. For the plaintiff to prevail in a civil action, he must prove his case by the preponderance of evidence. If one were attaching a numerical percentage to that concept, it might be roughly “51% sure” - literally the “greater weight.”

The preponderance or greater weight standard was traditionally taught to law enforcement officers as the meaning of probable cause. The concept of probable cause was equated to the phrase “more likely that not,” which was often illustrated as “51%” or “the greater weight.” Since Illinois v. Gates, it has become clear that probable cause does not require a showing that something is mathematically
probable, or more likely than not. Probable cause may require (at its lowest levels) something near 50%, but not necessarily 51% or higher. Probable cause can exist even when something is slightly less than mathematically “likely.” See Maryland v. Pringle, 124 S.Ct. 795 (2003), where the United States Supreme Court stated that the preponderance of the evidence standard “has no place” in a probable cause determination. See also United States v. Montgomery (CA 6 7/27/04) and United States v. Chauncey (CA 8 8/25/05), applying Pringle.

Beneath probable cause on the scale is reasonable suspicion, sometimes called “articulable suspicion.” Reasonable suspicion is more than unexplainable hunches or feelings, but less than probable cause. Perhaps reasonable suspicion might be shown at “30 - 40% likely” on the scale.

Reasonable suspicion and probable cause do not necessarily require lots of facts. Courts look not only at the number of facts, but the weight of each fact or circumstance, together with inferences and/or deductions that are reasonable in light of the officer’s training and experience. Probable cause or reasonable suspicion could come from just one or two factors if they were strong enough. It is not a matter of just counting factors. Instead, it is a matter of looking at all the factors, assessing the importance of each in the totality of circumstances, and making a common sense judgment in light of training and experience. United States v. Arvizu, 122 S. Ct. 744 (2002). Only then does the officer decide whether there is reasonable suspicion or probable cause. There is no precise formula. Illinois v. Gates, 103 S. Ct. 2317 (1983).

Sources of Information

Where and how is information for reasonable suspicion and probable cause gathered? How does one weigh source information for purposes of reaching conclusions? How does one use sources of information to develop reasonable suspicion and probable cause?

There are two ways one gains information, generally speaking. One is personal observation or knowledge. That is, we know it ourselves or we see it, smell it, taste it, or hear it ourselves. Firsthand knowledge obviously is normally most useful. See, for example, United States v. Bishop, 264 F. 3d 919 (9th Cir. 2001). If information does not come from personal observation, then it came from somewhere else. This might be a document or another person, for example. Such information is called “hearsay.” Hearsay is something that is not personal knowledge or first-hand observation but is told to us by some other source. Many officers have been led to believe that hearsay cannot be used in a court proceeding. However, for purposes of establishing probable cause and/or reasonable suspicion, the use of hearsay information is permitted and normal. See Draper v. United States, 358 U. S. 307 (1959) and Jones v. United States, 362 U. S. 257 (1960).

But not all hearsay is useful for probable cause or reasonable suspicion. If a drunken person who suffers from various mental conditions were to approach an officer and tell him that something happened, the officer might not assign the information much weight. To be the basis for probable cause, hearsay must be reasonably reliable.

To establish reasonable suspicion, supporting hearsay information need not be quite so reliable as that required for probable cause. Because reasonable suspicion represents a lower standard of evidence than probable cause, it requires less information and demands less in terms of the reliability of the information source. See, for example, Alabama v. White, 110 S. Ct. 2412 (1990).

To assess the reliability of hearsay, one looks mainly at two things:

1. How reliable is the information provider?
2. How does he know?

For example, suppose a person reports to police that there is marijuana growing in John Smith’s enclosed backyard patio. One first asks whether that information has come to us from a reliable person, a person who generally should be believed. If the information has come from a reliable person, one still needs to know how the reliable person came by the information. Did he himself see the marijuana growing in that backyard patio or is he reporting something that he has heard from someone else? If a very reliable person tells an officer something, but the reliable person is only passing on what he has heard from an extremely unreliable or unknown source, the information is not necessarily reliable. One must watch for “layers” of hearsay and look for the reliability of information at each level, or layer. When one attempts to establish probable cause, these questions must be asked more precisely and answers will be judged more critically than when trying to develop reasonable suspicion.

Although they are hearsay, police reports and other official police documents are generally presumed to be reliable because they are usually made by other police officers. However, police documents and reports can and often do include layers of hearsay. Often, reports merely document what someone told another police officer. So, if the report is telling one officer what someone told another police officer, there are two layers of hearsay. If a person telling something to a police officer (completing a report) is merely relating something that the person did not see himself, but heard from someone else, there are three layers of hearsay:

1. The report itself
2. The person providing information to the reporting officer
3. The person who provided the original information

The officer seeking to use the report for purposes of reasonable suspicion and/or probable cause must consider the reliability of the information at each layer. When one presumes that police reports and documents are reliable, one is only presuming that the reporting officer has accurately and truthfully documented what he has been told. That is not necessarily the same thing as believing what he was told.

Source Credibility: Why should this source be believed?

- Police Officers

If Officer A tells Officer B that A saw something himself, it is reasonable for B to believe it. In the absence of any reason to disbelieve Officer A, if he says he saw it, heard it, tasted it, smelled it, or felt it himself, it is reasonable to believe that Officer A is telling the truth and that it is an accurate report of a personal observation. This issue is long settled. *United States v. Ventresca*, 85 S. Ct. 741 (1965). Thus, reasonable suspicion and probable cause generally may be transferred, or “imputed,” from one officer or police workgroup to another. See *Whiteley v. Warden*, 401 U. S. 560 (1971), *United States v. Fiaconaro*, 315 F. 3d 28 (1st Cir. 2002) and *United States v. Sandoval-Venegas*, 292 F. 3d 1101 (9th Cir. 2002), as examples.

- Concerned Citizens

What about other people - just concerned, regular citizens - who state to police that they saw or heard things? May these people be believed for purposes of establishing reasonable suspicion and probable cause? To answer that question, one asks another. Does the source (the ordinary concerned citizen)
have any known reason to lie to the police? If the answer to that question is “no,” then courts usually presume the information to be reliable. See Guzelt v. Hiller, 223 F. 3d 518 (7th Cir. 2000). Again, one must be alert for layers of hearsay. If a concerned citizen source tells police that something occurred, police must ask whether the source was the one who heard, saw, tasted, touched, or smelled it himself - or is he merely reporting what some other person observed? Assuming that the ordinary concerned citizen is reporting a personal observation and has no apparent reason to lie, it is reasonable to believe that the observation is accurate and/or that the statement is likely true. This would be “reasonably reliable” hearsay. See United States v. Harris, 91 S. Ct. 2075 (1971) and Kiser v. Huron, 219 F. 3d 814 (8th Cir. 2000). See also Guzewicz v. Commonwealth, 212 Va. 730, 735, 187 S.E.2d 144, 148 (1972): “Public-spirited citizens should be encouraged to furnish to the police information of crimes. Accordingly, we will not apply to citizen informers the same standard of reliability as is applicable when police act on tips from professional informers or those who seek immunity for themselves. . . .”

- **Criminal Informants**

Criminal informants are a different matter. There is reason to suspect or doubt information that is given by people who are known to be involved in criminal activity. Reasonably reliable information can come from criminals but more must be done to verify the information - to establish reasons to believe it. See, for example, United States v. Barnes, 195 F. 3d 1027 (8th Cir. 1999).

Several factors may make it reasonable to believe information provided by criminal informants. Some criminal informants are paid, which provides at least some incentive to tell the truth. Most such informants realize that if they are not truthful and accurate, they are not likely to continue to be paid for their information.

In establishing probable cause from a criminal informant (even a paid informant) one typically looks for some sort of “track record” – a history of that informant being reliable and providing accurate information in the past. A history or track record of reliability furnishes a basis for believing that the source is reliable. It helps even more if that information has led to arrests, seizures of evidence, and/or convictions in court.

Another way to establish reliability is to verify details of what the informant says. If he tells police that certain facts (x, y, z) are true, and if x and y can be verified as accurate information, it becomes more reasonable to believe that z is also likely to be true. That sort of verification, checking to see if information is accurate, is called “corroboration.” Corroboration can be important and is sometimes required in establishing reasonable suspicion and probable cause. However, if an informant has a sufficient track record of providing accurate information, little or no corroboration may be necessary. See, e.g. U. S. v. Riley, F. (CADC 12/19/03).

- **Confidential Informants**

Some informants are willing to have their names used in connection with their information and some are not. This is true for both criminal informants and concerned citizen informants. The primary reason that people, ordinary concerned citizens and criminals alike, are unwilling to have their names used is that they fear repercussions and/or retaliation. In some cases, they fear for their safety and their lives. Because police know who the source is, it is often permissible to use such information to establish reasonable suspicion and probable cause even though the source is unwilling to have his name disclosed.

In such a case, however, it is critical to document (and explain in court, if necessary) why the source does not wish to be named. It may also be necessary to provide information confirming that the
informant, though unnamed, does in fact exist. If the informant is also a witness to the crime being prosecuted, it may be necessary for the prosecution to either identify the witness or dismiss the case. See *Roviaro v. United States*, 353 U. S. 53 (1957).

- **Anonymous Tips**

Because it is unlikely that an anonymous source will have a track record of reliability, in order to form probable cause from an anonymous tip one would need significant corroboration of certain types of information provided. Some facts would have to be verified in order to believe that other facts provided were likely to be true. So, an anonymous tip can provide the starting point but the amount and type of tip information that can be corroborated will determine whether the tip ultimately leads to reasonable suspicion or probable cause. Anonymous tips that accurately predict future behavior seem to have the best chance of measuring up to legal standards. See, for example, *Alabama v. White*, 110 S. Ct. 2412 (1990) (anonymous tip plus corroboration enough for reasonable suspicion) and *Illinois v. Gates*, 103 S. Ct. 2317 (1983), (anonymous tip plus corroboration good for probable cause.) But in *Florida v. J. L.* (2000), the United States Supreme Court held that an anonymous tip that a described person at a described public place is carrying a gun is not, without more, sufficient for reasonable suspicion to stop and frisk, even though corroboration of description, time and place occurred. See again *Ramey v. Commonwealth*, 35 Va. App. 624, 547 S.E.2d 519 (2001).

**Suspicion Factors**

**Geographical Location of the Subject**

In developing probable cause and/or reasonable suspicion, it is appropriate to consider a person’s location if it is very unusual or suspicious. Suppose a person is walking down a sidewalk at night. Walking on a sidewalk is not itself unusual or suspicious. There is no reason to suspect the person of criminal activity based on his location. But suppose a person is hidden in the bushes behind a warehouse in the shadows. In the latter situation, the subject’s location is appropriately a suspicion factor. If a subject’s geographical location is very close to the scene of a crime then typically the location factor grows in its significance.

**High Crime Area**

Suppose the subject is in a neighborhood or an area of town that has been experiencing a very high crime rate. Suppose the subject is on a particular street corner that is very well known for hand-to-hand sales of drugs in the street and on the sidewalk. Of course the subject’s location would become a suspicion factor.

If a person is walking down the sidewalk, at 3 a.m., in an otherwise deserted neighborhood in which there has recently been a rash of nighttime crime, those factors could all be considered in measuring for reasonable suspicion. Officers may take into account all the factors present and judge them in their totality, all things considered. *United States v. Arvizu*, 534 U. S. 266 (2002).

**A Caution on the “High Crime Area”**

The fact that there have been crimes in the past in a given area does not make that area forever thereafter a high crime area. For an area to be labeled a “high crime area,” that label needs to be true in an objective sense - in a way that can be articulated and justified - that there has been some sort of spree or real history of continued crime in this particular area. Statistical comparison to other areas might
make the high crime area label more appropriate and significant. It is important that officers not fall into the habit of describing all parts of the community as high crime areas just because there has been some crime in those areas over a period of time.

**Time Factor**

When is a subject observed? If he is observed very near the place of a crime, very soon after a crime has been committed, those two factors combine to assume greater importance. The longer after the crime a person is observed the less significant the location factor becomes.

Presence of a person in public, even late at night, is not enough by itself to justify an investigative detention or arrest. There is no hour of the night so late that people are generally subject to seizure just for being in public (possible exceptions include emergency or youth curfews). If a person is walking down a sidewalk at 4 o’clock in the morning, that by itself does not justify an investigative detention. Of course, an officer may approach a person and attempt to engage that person in voluntary contact and conversation. The officer must take care, however, not to allow the contact to escalate into a seizure unless reasonable suspicion or probable cause develops.

**Sensory Perceptions**

Obviously, seeing something suspicious should cause suspicion. Hearing suspicious noises should do likewise. Importantly, though, an officer’s sense of smell may be extremely useful. If, with benefit of training and/or experience, an officer is able to recognize certain odors as suggesting the presence and/or use of illegal drugs, that sensory perception by itself may establish reasonable suspicion or probable cause. Similarly, if during a lawful weapons frisk an officer should touch or feel objects that, though hidden from view, are recognizably a form of contraband (like illegal drugs), the sensory perception may be used for or toward conclusions of reasonable suspicion or probable cause. See *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

**Suspect and Criminal Description Similarities**

Obviously, if a person closely resembles the description of a person who has committed a crime, there may be reason to believe or suspect that the person might have been the one who committed the crime. But how close a fit must there be between the subject’s appearance and the reported description? Certainly, a tighter fit is required in order to establish probable cause. A looser or more general similarity can sometimes be sufficient to establish reasonable suspicion.

Just one aspect of a physical description could be enough to justify a seizure of a person if the descriptor were sufficiently rare. If the only thing known about the person who committed a crime ten minutes ago is that he was wearing pink high top tennis shoes with purple stars drawn on them, that in itself would likely provide lawful basis for a seizure of a person who fit this one factor description, because the factor is so particular and so unusual.

But what if the perpetrator of a summertime, midmorning crime was reported to have been a white male in his mid-twenties wearing blue jeans and a T-shirt? If you were to see, a half-mile from the crime scene, an hour after the reported crime, in a densely populated urban setting, a person who fit that description, the description match might be of little significance. But that same description, at a different time of day, a different location relative to a crime scene, and in an area of lesser population density, might provide the basis for probable cause or reasonable suspicion.
The Suspect’s Observed Behaviors

Another important factor is the suspect’s behavior before he knows police are present. Is the subject observed, for example, carrying a bag of tools to the back of a warehouse? Is he carrying a gas can to the back of a closed and inactive business late at night? Extreme nervousness and “furtive” gestures also may be considered.

Also significant is a subject’s behavior after he sees or is contacted by the police. Again, extreme and unusual nervousness may be considered. Attempts to evade contact with police and certainly out-and-out flight - running in apparent panic at the sight of police - may be considered strong suspicion factors. Suppose a patrol officer pulls behind a closed and inactive warehouse at two o’clock in the morning and a man standing behind the warehouse runs when he sees the officer. These facts and circumstances taken together almost certainly form reasonable suspicion that this person is involved in criminal activity.

Running at the sight of police is not likely, by itself, to establish reasonable suspicion. In California v. Hodari D., 111 S. Ct. 1547 (1991), the United States Supreme Court approached this issue but did not settle it. It is best to assume that at least one additional suspicion factor is required to establish reasonable suspicion, especially in light of Illinois v. Wardlow 528 U. S. 119 (2000), where it took a 5 - 4 decision of the United States Supreme Court to find that running at sight of police, plus presence in an area well known for illegal drug activity, were together enough for reasonable suspicion. See also U. S. v. Mayo 361 F.3d 802 (4th Cir. 2004). A passenger “bolting” from a car stopped for a traffic violation is reasonable suspicion, according to a federal appeals court in U. S. v. Bonner, F. (3rd Cir. 3/30/04).

Knowledge of a Subject’s Criminal History or Past Criminal Behavior

What if an officer sees a person walking down the street late at night that the officer knows has a lengthy criminal record of house-breaking and store-breaking offenses? While knowledge of the subject’s history and/or criminal record may be taken into account as a suspicion factor, it usually cannot be the exclusive basis for a stop. A person who in the past has been convicted of crime does not lose forever his right to walk freely in public. He may not be stopped solely because he has a record. But suppose an officer is patrolling a part of town where there has been a recent crime spree involving break-ins? Suppose it is late at night and the officer sees a person the officer knows has a lengthy history of break-in and related offenses. In those circumstances, the subject’s record could be strongly considered in the development of reasonable suspicion or probable cause.

Profiling

As an officer gains training and experience, it becomes possible to form reasonable inferences from certain characteristics and behavioral patterns, which the trained, experienced officer recognizes as consistent with statistical “profiles” of certain types of criminals and/or criminal behavior. In particular, profiling is often successful in drug enforcement, where some officers possess an enormous backlog of experience and insight, which, through training, may be extended to other officers. The United States Supreme Court held in U. S. v. Sokolow, 109 S. Ct. 1581 (1989), that it is possible to form reasonable suspicion from factors all of which come from a profile, and from behaviors which, taken individually, are entirely innocent.

It is critical that officers evaluate profile matches in light of all surrounding circumstances and common sense. Profiling should not be done rigidly or mechanically as if it were a simple checklist. Given its general inappropriateness as well as socio-political (and sometimes legal) sensitivities to the use of race, ethnicity, national origin, religion, age, gender, gender identity/expression, sexual orientation,
immigration status, disability, housing status, occupation, or language fluency as a factor in profiling (and in some states its statutory prohibitions), officers must stay closely apprised of both law and policy in this turbulent area. “Profiling,” absent illegal discrimination, is not unconstitutional. General Order 6.04

Unusualness

In the past, some case law and a considerable amount of police training suggested that it is “suspicious” if someone is “out of place” or “unusual” in a particular neighborhood, particularly during nighttime hours. The conclusion that someone “doesn’t belong in” a certain neighborhood also feeds this notion of “suspiciousness.” Obviously, one way someone could be judged “unusual” or “out of place” is that his race is inconsistent with neighborhood demographics. Because such judgments, whether reached by “concerned citizens” or by officers, create much potential for racially discriminatory police actions, it is probably wise for police to discount this factor, however “common-sensical” some might feel it to be.

The fact that something or someone is unusual in a particular setting is not necessarily criminally suspicious. Any number of things or people are unusual. People wearing top hats and riding unicycles are unusual but presumably not, thereby, criminally suspicious. In the desert southwest, both rain and rainbows are unusual – but neither is criminally suspicious. For the “unusual” consequently to be judged suspicious, two more dots must be connected. The particular “unusualness” must also suggest criminal involvement. While some forms of unusualness will satisfy this criterion, a person’s skin pigmentation will not likely do it.

Uncooperativeness

What about a person who is very uncooperative when confronted by police? Suppose, for example, that an officer (without reasonable suspicion) walks up to a person and attempts a voluntary contact. The officer says, “Excuse me sir, do you have a moment I could speak with you?” The subject responds, “No way, I’m in a big hurry. I’ve got to go.” Suppose the police officer walks along with him (which is permitted) and says, “Sir, where are you going in such a hurry?” Suppose further that the person now gets verbally abusive toward the officer, questioning the officer’s motives, saying, “Look Butthead, why are you harassing me?” The officer replies, “Sir, do you mind if I see some identification?” The man refuses to produce identification, saying, “I’m not showing you any identification. I told you I was in a hurry.” and turns to walk away.

In such a situation, lack of cooperation cannot serve as the foundation for reasonable suspicion or probable cause. The pedestrian is normally under no legal obligation to cooperate with police, to answer any questions, or to provide any documentation of his identity. In general, people are under no obligation to cooperate with police and they may not be detained or arrested for their lack of cooperation. Even if there is reason to suspect a person of criminal activity and that person is detained (stopped), that person generally possesses a constitutionally guarded right of privacy in respect to the contents of his or her pockets, wallet, or purse. The refusal to relinquish a constitutionally protected right cannot be used by police as justification for the seizure of a person or for a police ordered inspection of personal documents. Similarly, a person generally cannot be stopped or arrested for his failure to “explain himself” (i.e., to “justify” his presence in a given place) or even verbal abuse (including profanity and vulgarity) toward the officer. See, e.g. Johnson v. Campbell, 332 F. 3d 199 (3rd Cir, 2003). A state or local law that requires, in the context of a lawful investigative detention, that a subject verbally identify himself upon demand of police may be constitutional. Hiibel v. District Court of Nevada, 124 S. Ct. 2451 (2004). Also, if a person is engaged in activities requiring a privilege license (driving, hunting, fishing as examples) an officer may require production of a privilege license,
assuming the officer is not inappropriately singling people out for such contacts. See, e.g. Delaware v. Prouse, 99 S. Ct. 1391 (1979).

**Officers’ Collective Knowledge**

Who must have reasonable suspicion or probable cause? Can this be a group activity or must reasonable suspicion or probable cause ultimately be consolidated within the mind of an individual officer? The United States Supreme Court has not addressed the issue, and lower courts are fragmented. Some state appeals courts have held that factual justification must exist, at least based on collective knowledge, within the work group of the officer ultimately taking action. In such analysis, reasonable suspicion or probable cause could exist even though it has not crystallized in the thoughts of any one officer and even though no one particular officer has the whole fact situation in mind.

If, however, one officer does have reasonable suspicion or probable cause and he asks or orders another officer to make a stop or arrest, the officer taking the action is factually justified based on the theory of transferred or “imputed” justification. The acting officer does not have to learn all the facts and circumstances that are known to the originating (requesting) officer. If the officer initiating the request or order to arrest has reasonable suspicion or probable cause and another officer acts on that officer’s request, the second officer is deemed to have acted with benefit of the first officer’s knowledge.

Obviously, for there to be the necessary trust relationship between the officer requesting or demanding and the officer who is taking the action requested or demanded, there must be a basis for that trust. This requires that officers making such requests or demands be certain of the appropriate, required level of factual justification before making the request or demand of another officer. See United States v. Colon, 250 F. 3d 130 (2nd Cir. 2001) for an unsuccessful attempt to impute probable cause from a 911 operator to police officer.

**“NON-SEARCHES”**

A “search” is an intrusion upon a “reasonable expectation of privacy.” For a privacy expectation to be “reasonable” it must be one that society (in the eyes of the court) recognizes as reasonable. So an individual person might subjectively feel an expectation of privacy but not have one objectively - because under the circumstances it would be unreasonable.

Police actions that do not intrude on reasonable privacy expectations (or possessory interests in property) are neither search nor seizure and do not implicate the Fourth Amendment. Some such actions involve the type of “looking around” by police that in lay definition would be called “searches” - but in the Constitutional sense they are “non-searches” - because they do not intrude upon reasonable privacy expectations.

A search may or may not involve a physical intrusion. It may occur without entering any private premises or touching any person or property. A search might be the utilization of a bugging device to hear a private conversation, the use of an unlikely vantage point to gain a visual observation, or the use of intrusive technology not in common public use. A search is a government intrusion upon a concept – the reasonable expectation of privacy.

The United States Supreme Court has developed a two-part test for whether a privacy expectation is reasonable under the Fourth Amendment:

1. Did a person actually, in fact, expect privacy?
In *Katz v. United States*, 88 S. Ct. 507 (1967), the United States Supreme Court states a fundamental legal principle:

“What a person knowingly exposes to the public even in his own house or office is not the subject of Fourth Amendment protection.”

Law enforcement officers are permitted to take advantage of this principle in order to facilitate criminal investigations, but there are rules. Following is a discussion of some of them.

**Consent (CALEA 1.2.4)**

Asking for consent to search is in fact asking a person to give up a reasonable expectation of privacy. If a valid consent is obtained, an officer may search the item in question without any other Fourth Amendment justification. Because it does not involve an intrusion upon a reasonable expectation of privacy, a “consent search” is really a non-search.

For consent to be valid it must be voluntary, given without undue coercion or duress. *Schneckloth v. Bustamonte*, 412 U. S. 218 (1973). Officers may not threaten a person with police action in order to obtain consent to a search. However, a truthful statement like, “If you don’t consent, I am going to apply for a search warrant” generally is permitted. See *United States v. Garcia*, 890 F. 2d 355 (11th Cir. 1989). Stating, “If you don’t consent, I’m just going to get a search warrant and search anyway,” is generally considered too coercive and invalidates a resulting consent. See *United States v. Boukater*, 409 F. 2d 537 (5th Cir. 1969). Differences are subtle but important.

No person should be subjected to arbitrary stops and/or searches by an officer unless the officer has some articulable reason that the individual has, or is about to, violate the law.

**Deception to Obtain Consent**

Courts, including federal courts, are divided on the questions of what types and degrees of deception are permitted in order for police to facilitate a consent process. Obviously, undercover work involves constant deception and often results in officers being admitted into private premises where, if the truth were known, they would never have been invited. Such scenarios rarely result in legal controversy – courts universally accept such undercover work and its necessary deceptions. “Misplaced confidence” does not violate the Constitution. *Hoffa v. United States*, 385 U. S. 293 (1966). But what about officers posing as phone company employees going to someone’s door and explaining a need to come in the house to check for a system problem? Or posing as gas company employees needing to check inside for hazardous conditions that represent an emergency threat to the safety of the residents? These are the questions that divide the courts – unfortunately, to the extent that no discernible trend can be identified. Creating a ruse outside private premises to draw occupants outside is generally permitted. False representation of legal authority to search voids a consent, according to the Eight Circuit in *United States v. Escobar*, 389 F. 3d 781 (8th Cir. 2004), where officers falsely claimed that a drug dog had alerted to the suspect’s property. Most courts agree in regard to false claims of legal authority. Creating a ruse in order to facilitate service of warrant is different, of course, and is generally permitted. See, for example, *United States v. Alejandro* (CA 2 5/13/04).

It is the policy of the Virginia Beach Police Department and the opinion of the Commonwealth’s Attorney that officers will not use ruses that represent an emergency or threat to the safety of residents in order to gain consent to enter a home.

*Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training*  
Who Can Consent?

Generally speaking, a valid consent must be obtained from someone who has a reasonable expectation of privacy in the property to be searched. Either spouse living in a home may consent to search of the areas commonly and mutually used. See United States v. Matlock, 415 U.S. 164 (1974) and United States v. Solis, 299 F. 3d 420 (5th Cir. 2002). However, in cases where both spouses are present, one spouse cannot give a valid consent to search over the objections of the other spouse. In such a case any evidence that is recovered during a consent search with the permission of one party and over the objections of the other party will render that evidence inadmissible as it pertains to the party that objected. This, of course, does not pertain to cases of domestic abuse. In domestic abuse cases, officers may make a warrantless entry into a home with the consent of one party and over the objections of the other party. If evidence is found in plain view it may be used against the person that objected provided the other legal elements are satisfied. See Georgia v. Randolph, 547 U.S. 103 (2006). Roommate situations are treated much like spouses.

A parent generally may consent to the search of the bedroom of a child. See United States v. Rith, 164 3d 1323 (10th Cir. 1999). However, there are situations where such consent may not be valid. Factors such as age, no regular access by the parent to the room, and/or rent being paid by the child may change things. The “child” could be an adult living in the parent’s home. A “child” may reach an age and a status such that he may actually be able to give a valid consent to search the common area of a home (like spouses or roommates). Young children generally cannot validly consent to a search of their parents’ home although there is a federal appeals court decision saying a 9 year old could consent to entry. Lenz v. Winburn, 51 F. 3d 1540 (11th Cir. 1995).

In almost all cases involving landlord-tenant relationships, the consent must be obtained from the tenant - the person with the reasonable expectation of privacy. See Chapman v. United States, 365 U. S. 610 (1961). This being the case, a tenant may consent to a search of the property he rents even over the objections of the landlord. A landlord generally may not consent to the search of the tenant’s residence, even if there is a lease provision that allows him to inspect the property for maintenance or other purposes. See United States v. Warner, 843 F. 2d 401 (9th Cir. 1988).

In overnight house guest situations, the homeowner’s consent is required for search of the house in general. However, the overnight house guest who has sole use of a bedroom has a reasonable expectation of privacy in that room. Consent to search that room must be obtained from the house guest. Minnesota v. Olson, 110 S. Ct. 1684 (1990).

In an employer - employee situation, consent of the employer is generally required but employees may have a personal reasonable expectation of privacy in some areas within the workplace. Some employers reduce or eliminate reasonable privacy expectations of employees by notifying them that areas such as lockers, desks, and offices belong to the employer, are subject to inspection at any time, and that lock combinations must be filed with the employer. In such cases, the employer may conduct a “non-search” of an employee’s “personal area” because, in fact, the employee does not have a reasonable expectation of privacy in that area. However, the way an area is actually used over a period of time can change the result. See, for example, O’Connor v. Ortega, 107 S. Ct. 1492 (1987).

In owner - custodian relationships where the owner leaves an object in the care of another, federal case law is unclear. Relevant questions include whether the custodian appears to have lawful authority to access the areas as to which consent is being requested or his role is just “storage” of the object? “Access authority” makes it more likely a valid consent can be obtained from the custodian, but does
not necessarily settle the issue. See United States v. Basinski, 226 F. 3d 829 (7th Cir. 2000).

In general, an officer must reasonably believe that the person who is giving the consent to search has the authority to grant consent over the area or item in question. Usually, this involves common sense judgments under the totality of the circumstances but there may be very reasonable mistakes in this area. As long as the mistake is objectively reasonable, a resulting consent is still valid. Illinois v. Rodriguez, 110 S. Ct. 2793 (1990).

Other Consent Considerations

Officers should ask for consent in a way that clearly indicates a real choice, make their requests clear, and may also wish to define the scope of the search they wish to conduct. When asking to search a vehicle, good words would be: “May I have permission to search you, your vehicle, and its contents?” In that case, there is no question that a consent to search is being requested for the person, the vehicle and the contents of the vehicle, and that the person has a choice.

 Officers are not required to advise of the right to refuse consent. United States v. Drayton, 122 S. Ct. 2105 (2002). However, there may be cases involving mental impairment, age, or other circumstances in which an officer would want to advise a person of his right to refuse so that the consent is strengthened.

A person who has been stopped need not be informed that he is free to leave in order to get a valid consent to a search. In Ohio v. Robinette, 117 S. Ct. 417 (1996), Robinette was stopped for traffic law violation. The officer asked for consent to search after issuing a warning and returning Robinette’s driver’s license, but without saying “You’re free to leave.” The resulting consent was valid, according to the Court.

Consents are not required to be in writing. Proving a valid consent requires testimonial credibility, whether or not a form is used. Recording the consent conversation provides better documentation than does a form and is helpful where state law permits.

Officers are not required to describe what they are searching for in order to obtain a valid consent. However, if the officer does not identify small objects of search or request permission to conduct a “complete” search, the scope of the consent could be unclear; a resulting search could exceed the scope of the consent. For a discussion of this issue, see Florida v. Jimeno, 111 S. Ct. 1801 (1991). A person in lawful custody may give a valid consent provided no other coerciveness would render the consent involuntary. See United States v. Watson, 423 U. S. 411 (1976) and United States v. Burns, 298 F. 3d 523 (6th Cir. 2002), where a consent from a handcuffed person was found to be valid.

The Consent Itself

Officers may wish to clarify any ambiguous response given by the person from whom consent is requested but a non-verbal gesture may be a sufficient consent, under some circumstances. United States v. Drayton, above See also, United States v. Carter (CA 6 8/16/04) (en banc). Consent may be limited. Someone may allow an officer to search a car except for the trunk. He may limit the officer to three minutes searching time. Consent may be given and then revoked. The officer must abide by the limitations placed on the consent unless alternate legal justification exists for a search action.

Consent may be and often should be utilized in conjunction with Fourth Amendment justifications such as probable cause and search warrants. An officer who has probable cause to search a vehicle stopped on a public street may wish to obtain consent to search the vehicle, even though a warrantless search is already authorized under another exception to the warrant requirement. A valid consent on top of the alternate search justification simply makes police victory in court more likely. If there is something
Plain View Doctrine

The “plain view doctrine,” widely misunderstood and commonly misused, is better described as the “plain view doctrine of warrantless seizure.” For purposes of this discussion, the term “seizure” is defined as a significant (meaningful) interference by government with a person’s possessory interest in property. The plain view doctrine of warrantless seizure deals not just with seeing things, but with seizing them. Just because an officer can see an item doesn’t mean an immediate warrantless seizure is permitted. The plain view doctrine of warrantless seizure may be stated as follows:

An officer lawfully present in a given location who sees in plain view an item which is immediately apparent to be evidence of a crime may seize that item without a warrant provided no further intrusion upon a reasonable expectation of privacy is required in order to accomplish the seizure.

Example: Suppose an officer walking down a common corridor outside a row of motel rooms looks into an uncurtained window and sees illegal drugs and related paraphernalia on a table. Most would agree that there is a reasonable expectation of privacy within a motel room; however, there is no reasonable expectation of privacy in what one knowingly exposes to the public. The question then becomes, “Is the room occupant knowingly exposing his activity in that room to public view?” In this case, the answer is “yes.” Therefore, it is not a search for a police officer to stand outside and look inside. This sensory perception is a “non-search”; it is often called a “plain view observation” but it does not involve the plain view doctrine of warrantless seizure. Thus, while the officer now possess probable cause that a crime is occurring, the officer would not be justified in making a warrantless entry into the room in order to seize the contraband.

The plain view doctrine of warrantless seizure has to do with seizing items, not just seeing them. When only seeing is involved, there is only one pertinent constitutional question: “Does anyone have a reasonable expectation of privacy in respect to this particular sighting?” If the answer is “no,” the Fourth Amendment does not apply to the visual observation because it is neither search nor seizure. But for the officer in this hypothetical situation to enter the motel room to seize the evidence, he would have to comply with the Fourth Amendment, using either a warrant or an exception (if one exists) to the warrant requirement.

Compare, though, the Supreme Court decision in Minnesota v. Carter, 525 U. S. 83 (1998) where an officer looked into an apartment window from outside and saw two men packaging drugs inside. Without addressing whether such an observation into an apartment would ever infringe upon a reasonable expectation of privacy, the Court held that the two temporary visitors, there for illegal commercial purposes, did not have a reasonable privacy expectation in that apartment. Therefore, the Fourth Amendment was not implicated, much less violated, in respect to those two men.

As stated above, the plain view doctrine of warrantless seizure involves several requirements. First, the officer must be lawfully present in the position from which a plain view observation (sighting) is made. Second, the item observed must be “immediately apparent” to be evidence of a crime. “Immediately apparent” means there is, upon sighting, probable cause to believe it is evidence of a crime. If these two requirements are satisfied, the officer may seize the item, provided no further privacy intrusion is required. A further intrusion, for example, would be going from outside a motel room to inside. In the earlier motel room scenario, the officer making the plain view sighting was not in a position from which a seizure could be accomplished. An additional intrusion would be necessary to accomplish the seizure. The officer’s sighting of items in “plain view” would provide probable cause but would not activate the plain view doctrine of warrantless seizure. The plain view doctrine of warrantless seizure is
These same principles are operative in respect to entering motor vehicles. For example, consider the frisk of the passenger compartment of a lawfully stopped vehicle based on reasonable suspicion that weapons are present. During the frisk, should an officer observe a bag of cocaine on the floorboard of the car, under the driver’s seat, the officer may utilize the plain view doctrine of warrantless seizure to seize the cocaine. The officer was lawfully present in the vehicle, the cocaine was in plain view, the cocaine was immediately apparent to be evidence of a crime, and no further intrusion was necessary to effect the seizure. But if an officer standing outside a vehicle parked on a street were to look into the car and see a bag of cocaine on the seat, the officer has made a lawful plain view observation but a further intrusion (going into the car) would be required to accomplish the evidence seizure. That further intrusion would require Fourth Amendment justification beyond the “plain view doctrine.” In this case, the “Carroll Doctrine” (the vehicle exception to the search warrant requirement) would be available.

Prior to 1990, the United States Supreme Court had held that the plain view doctrine required an officer’s sighting to be “inadvertent” – unplanned, unanticipated. In Horton v. California, 110 S. Ct. 2301 (1990), the United States Supreme Court eliminated the inadvertence requirement. Now an officer may use the plain view doctrine of warrantless seizure even when the officer observes items he was fully expecting to see, provided the seizure meets the other requirements of the doctrine.

Also, important is the United States Supreme Court decision in Arizona v. Hicks, 107 S. Ct. 1149 (1987). In that case, an officer was lawfully present in a home, based on consent. While waiting there, the officer noticed expensive-looking stereo equipment in the otherwise very inexpensive-looking quarters. The officer picked up a stereo item and turned it over in order to record the serial number for comparison to stolen property records. The Court determined that the officer’s action was a warrantless search, without probable cause, and not an application of the plain view doctrine. The serial number was not in plain view. The object had to be moved and manipulated in order to see the serial number. Because the serial number had not been exposed to public view, it was within a reasonable expectation of privacy. The officer’s intrusion upon that expectation of privacy was therefore, a search -- in this case unlawful for want of probable cause and a warrant.

**Sensory Perceptions**

For the most part, sensory perceptions have little to do with the plain view doctrine. The sense of sight or visual observation is only one of the five sensory perceptions available to an officer. When an officer, during the course of a lawful frisk for weapons, feels an item that is immediately apparent to the officer to be crack cocaine, the officer has used the sensory perception of touch or feel. Although the plain view doctrine of warrantless seizure is not available because an additional intrusion (going into the pocket) is necessary, the sensory (touch) perception may furnish probable cause to arrest and search. But see the cases of Minnesota v. Dickerson, 508 U. S. 366 (1993) and Bond v. United States, 529 U. S. 334 (2002) on when too much manipulation of an item becomes a search.

Sensory perceptions often require evaluation of the concept of reasonable expectation of privacy and application of the definition of search. In the Hicks case, above, the officer lifted a stereo component to see a part that had not been exposed to public view. That was a “search.” The smelling of an odor (coming from a building) by an officer lawfully present on the exterior is not a search and may establish reasonable suspicion or even probable cause. There is generally no reasonable expectation of privacy regarding odors escaping into the public domain; therefore, smelling such an odor usually is not a search. The Fourth Amendment simply does not apply.

Understanding when sensory observations are and are not searches can be difficult. Consider an actual
trial court decision where an officer received an anonymous tip that an individual was cutting drugs on a table inside a seventh floor apartment. The window curtains were open. There were no other buildings nearby from which the officer could observe the interior of the suspected apartment so the officer went up a small mountain several miles away, used his binoculars, but could not see much detail. The officer then went to a nearby NASA station and borrowed a high powered telescope. He returned to the mountain from which he could now clearly see the activities inside the suspected apartment. (In fact, the officer could read the title of the paperback novel the suspect was reading at the time.) The officer observed drugs, obtained a search warrant and, upon its execution, seized a large quantity of narcotics.

The case hinged on whether the observation from the mountainside with the high powered telescope was a search regulated by the Fourth Amendment. In this case the court held that the visual observations (as aided by the telescope) were an illegal search. The residents of this seventh floor apartment, though the curtains were wide open, had a reasonable expectation of privacy according to this court, considering that the only way to see in the windows was to station a high powered telescope on a mountain several miles away. Therefore, the sensory perception (sight) in this case would be a search requiring prior probable cause and a warrant. The subsequent search warrant would be invalid because it was based on an illegal prior search (the visual observations into the apartment.) Generally, though, should the resident or occupant of a building choose to leave the curtains open although there is a public area or neighboring property from which someone can look into the building through the windows, there would not be reasonable expectation of privacy and such a visual observation (from neighboring property) would therefore be a “non-search.”

**Enhancement Tools**

Enhancement tools are those used to increase or improve sensory perceptions and abilities. Examples include magnification and illumination devices like binoculars, telescopes, flashlights and night scopes. Drug and bomb sniffing dogs enhance the ability to detect certain odors. Certain microphones and audio equipment can enhance the ability to hear. Overflight surveillance from aircraft allows sightings that otherwise could not be made.

When determining whether use of a particular enhancement tool is lawful, an officer again must consider the concept of reasonable expectation of privacy. In respect to sight, if an unaided observation from the same location would be allowed, then enhancement tools usually are allowed. However, several questions must be considered:

1. Are the activities occurring in a public area? For these purposes a public area includes parking lots, street corners, common areas of apartment complexes and other locations where no one in particular has a reasonable expectation of privacy. In observing such areas, visual enhancement tools almost always are allowed. Consider the use of the telescope from the mountainside discussed earlier. Had the surveillance been of activity taking place on a street corner, the officer could have used the NASA telescope with no legal problems because there would be no intrusion upon a reasonable expectation of privacy.

2. Are the activities, though in a private area, knowingly exposed to public view? If yes, generally there is no reasonable expectation of privacy and no Fourth Amendment problems with visual observations.

3. Does the observation require use of an enhancement device that is especially sophisticated or unusual? If the required enhancement device is uncommon in society, one might have a reasonable expectation of privacy based on the notion that a device of that kind was unlikely to be used. If a device is highly sophisticated and/or almost nobody has it, it might be reasonable to expect that it...
4. Is the vantage point remote or unusual? The more remote and/or unusual the required vantage point, arguably the more reasonable is an expectation of privacy. Theory: It is reasonable to expect that people will not use highly remote and/or unusual vantage points.

Generally, officers should not go onto the curtilage (yard) of a private residence in order to gain sensory observations. Going onto a curtilage may be a search in and of itself. “Because expectations of privacy are inherent in the common law concept of “curtilage,” we have recently reiterated that absent exigent circumstances a warrantless search of one’s home or its curtilage, when effected through trespass, violates the fourth amendment.” United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981).

It is usually permissible, however, to use walkways that are in common public use. For example, an officer may use a commonly-traveled walkway to reach the front door of a private residence. A visual observation or other sensory perception made while on that walkway usually would not be considered a search, even though it was made from within the curtilage. (See earlier discussion of Open Field and Woods.)

Proper analysis of these issues requires evaluation of each individual situation. There are few absolutes. If a visual observation is of activity occurring in an area where no one has a reasonable expectation of privacy, the observation generally would not be a search. If the activity is occurring within an area of reasonable expectation of privacy, visual observations may very well be a search and further consideration is required. Generally, the more remote or unusual the vantage point and the more sophisticated and unusual the enhancement tool(s), the more likely it is that the officer’s actions would be considered a search requiring prior probable cause and a warrant.

**General Notes on Surveillance, Enhancement Tools and Electronic Eavesdropping**

While the law in this is not completely clear or entirely logical, certain generalizations are possible. Binoculars are commonly available; use of them is generally lawful. Flashlights and night scopes, like binoculars, are lawful in almost all circumstances. Using aircraft to fly over suspect locations to look down into an area generally does not implicate the Fourth Amendment even if sophisticated enhancement tools are used, at least as long as the aircraft remains in lawfully navigable airspace. See California v. Ciraolo, 106 S. Ct. 1809 (1986), Dow Chemical v. United States, 106 S. Ct. 1819 (1986) and Florida v. Riley, 109 S. Ct. 693 (1989). Use of telescopes may or may not be considered a search, depending on analysis of reasonable expectation of privacy discussed earlier. Use of scent detection canines in public areas is generally permissible. United States v. Place, 103 S. Ct. 2637(1983); Illinois v. Caballes, 125 U. S. 834 (2004). Tracking devices (like “beepers”) are generally permissible except when used to monitor continued activities inside private premises. In the latter event, a search warrant is needed or the monitoring device must be turned off. See United States v. Knotts, 460 U. S. 276 (1983) and United States v. Karo, 468 U. S. 705 (1984).

[Note: The action necessary to install the transmitter may be a search regulated by the Fourth Amendment. Sliding a transmitter under the bumper of a car parked in a public area is not a search. See Cardwell v. Lewis, 417 U. S. 583 (1974). However, if the car were in an area where privacy is reasonably expected, such as in the driveway of a private residence, the installation action might well be a search requiring a warrant.]

In Kyllo v. United States, 533 U. S. 27 (2001), the Supreme Court held the use of thermal imaging equipment to discern home place activity to be an unlawful search, even though the measurement was made from off the curtilage. The decision relied significantly on the “uncommonness” of thermal
imaging equipment and the fact that it could reveal non-criminal activity.

Wiretapping, electronic eavesdropping, etc., are generally prohibited under federal law unless state law permits. In those areas, inquiry into state law is essential. Federal law permits the interception of oral or wire communication as long as one party to the conversation consents to monitoring. Hoffa v. United States 385 U. S. 293 (1966); U. S. v. Lee, (3rd Cir. 2/20/04). Some state law varies and requires notification and/or all party consent. The interception of oral communication in which there is a reasonable expectation of privacy is a federal felony.

Abandoned Property

“Abandoned” property is not protected by the Fourth Amendment because it does not involve a reasonable expectation of privacy. The signs of property being abandoned are often matters of common sense. When property is discarded, thrown away, left unattended, unprotected and exposed to the public, it often becomes unreasonable to expect privacy in regard to that property. Such a forfeiture of one’s reasonable expectation of privacy is an abandonment. Once property is abandoned, it is not a search for a law enforcement officer to inspect it. If the action is not a search, no Fourth Amendment justification is required.

Abandoned Residential Property

In general, residential property is abandoned only if it is clearly unoccupied and shows obvious signs of non-use, such as broken windows, open doors, no power connections, etc. Usually, in such circumstances, there would be no reasonable expectation of privacy in the property.

Where a person has rented a hotel or motel room but check out time has come and gone, so has his reasonable expectation of privacy, according to United States v. Kitchens, 114 F. 3d 29 (4th Cir. 1997) and several other cases. This rule might not apply where a person has merely held his room a few hours beyond the required check-out time or where there exists a practice of allowing guests to “stay-over.” See United States v. Dorais, 241 F. 3d 1124 (9th Cir. 2001). For an apartment (or other longer-term rental property) to be considered abandoned, the renter must have clearly vacated the apartment or been evicted by lawful authority and process. See, for example, United States v. Hoey, 983 F. 2d 890 (8th Cir. 1993).

Abandoned Vehicles

The Fourth Amendment concept of abandonment is not necessarily the same as “abandoned vehicles” under state and local laws allowing removal of vehicles for reasons of public health, safety, or aesthetics. The signs of abandonment in the constitutional sense are much like those discussed above regarding residential property. The location of the vehicle will often be a guiding factor. For example, in U. S. v. Gillis, F. (6th Cir. 2/12/04), a federal appeals court found no reasonable expectation of privacy in a wrecked and unlocked vehicle in a driveway but so close to the street that anyone walking down the street could have easily reached into the car. See United States v. Ramirez, 145 F. 3d 345 (5th Cir. 1998), for a general discussion of these issues.

Trash & Garbage

When trash has been placed in a public area for pick up, a reasonable expectation of privacy no longer exists. When a person who lives in an apartment complex puts his garbage into a plastic bag, carries that bag to the common dumpster, and deposits it inside, the contents of the bag thereafter may be
inspected without Fourth Amendment implications because there is no longer a reasonable expectation of privacy in the contents of the bag. The garbage bag is abandoned and the inspection of the contents would not be a search. See California v. Greenwood, 108 S. Ct. 1625 (1988). When a trash can is placed for pickup on the curb next to the street (although still on the curtilage) it generally becomes unreasonable to expect privacy in its contents. See United States v. Bowman, 215 F.3d 951 (9th Cir.2000). The contents would be considered abandoned. However, a trash can located next to the house and not yet “put out” by the street, would still involve a reasonable expectation of privacy. Examination of the contents would be a search requiring consent or other Fourth Amendment justification.

Abandonment by Verbal/Non-Verbal Interaction

Suppose an officer who suspects that a person may be transporting cocaine in a briefcase simply walks up to that person and asks him if the briefcase is his. The person (in fact transporting cocaine) says the briefcase is not his, places it on the ground, and walks away from it. The officer calls out, “Do you know whose it is?” The person responds, “It’s not mine and I don’t know whose it is.” The officer may now open the briefcase without a search warrant or other Fourth Amendment justification because the possessor has voluntarily relinquished any once-held reasonable expectation of privacy. The briefcase is abandoned. “One who voluntarily abandons property forfeits any expectation of privacy he or she may have in it” and all standing to complain of its warrantless search and seizure. Commonwealth v. Holloway, 9 Va. App. 11, 18, 384 S.E.2d 99, 103 (1989) (citing United States v. Thomas, 864 F.2d 843, 845 (D.C. Cir. 1989); United States v. Kendall, 655 F.2d 199, 200 (9th Cir. 1981)).

For such an abandonment, there must be an affirmative denial of ownership and possessory interest. If that occurs, and if the object is located in an area where there is no other reasonable expectation of privacy, the object may be opened and inspected without satisfaction of Fourth Amendment requirements. In those situations where the totality of circumstances suggests that someone else may have a reasonable expectation of privacy in the item in question, special care must be taken to ensure that any abandonment comes from the right person or persons. Although the bag may be near one person, the bag may actually belong to someone else standing nearby or someone who is not present at all. For example, society would generally recognize an ongoing reasonable expectation of privacy in luggage that is still within the control and caretaking function of a common carrier such as a bus company – even if the item has been placed in a luggage retrieval area and persons nearby disclaim interest in the item. See United States v. Garzon, 119 F. 3d 1446 (10th Cir. 1997). Of course, where someone clearly discards or intentionally leaves behind an item in a public area, it is abandoned. See United States v. Liu, 180 F. 3d 957 (8th Cir. 1999).

Open Fields and Woods

Perhaps the best way to discuss this legal concept is to study a fact situation. Suppose a person buys a 100 acre plot of land and builds a house in the middle of the land in a grove of trees. He then surrounds the property with a barbed wire fence, the type normally used to keep farm animals contained. This person then posts “no trespassing” signs every 25 feet, all the way around the property. A gate is placed on the driveway; the gate has openings on each side that will allow people to enter but keep farm animals inside.

Under these circumstances many people would feel a subjective expectation of privacy in regard to the interior portions of this acreage. But there is no constitutionally protected privacy expectation in the property except for that portion of the property that immediately surrounds the home. The United States Supreme Court has held that the outlying areas are “open fields and woods” despite fencing and other barriers. The “no trespassing” signs may create a criminal or civil obligation but they do not create a
Curtilage normally equates to the “yard.” Not all farmland would be considered the yard of the farmhouse even though the farmland surrounds the farmhouse. Privacy interests inside one’s home receive the maximum protection of the Fourth Amendment. The area immediately surrounding the home (curtilage) gets privacy protection that is similar but not identical. Areas surrounding buildings that are seldom-used, non-dwellings within open fields and woods are not protected in the same ways. See, e.g. U. S. v. Barajas-Avalos F. (9th Cir. 3/10/04).

When a law enforcement officer walks onto private rural property, perhaps through a gate, passing through open fields and woods toward a residence, he will reach a point where a curtilage begins. An intrusion upon or into the curtilage may be considered a search and therefore may require Fourth Amendment justification, such as probable cause, a search warrant, exigent circumstances, or consent. Several factors are considered when determining if portions of a property are curtilage:

1. Proximity to the home: The closer the area is to the home, the more likely it is to be curtilage.

2. Enclosures associated with the home: Privacy screens, interior fences or thick bushes, often define the yard and are often indicators of curtilage.

3. Nature and use of the area: If the area (or outbuilding) is used for purposes normally associated with family life, such as a garage or carport where the family car is normally parked, the area is likely to be curtilage. United States v. Dunn, 107 S. Ct. 1134 (1987).

Not all intrusions onto a curtilage intrude upon reasonable privacy expectations. The use of common entrance ways such as driveways or sidewalks to go directly to a front door usually does not violate a reasonable expectation of privacy. These are the entrance ways used by those who would go to the door to knock or deliver packages or mail for example. Because they are commonly used, it would be unreasonable to expect privacy in regard to visual or other sensory observations from those pathways. See, for example, United States v. French, 291 F. 3d 945 (7th Cir. 2002). The United States Supreme Court has not addressed what expectation of privacy a resident of a dwelling has in those areas of the curtilage, such as driveways and sidewalks, that are generally used by the public to contact the resident. State and federal appellate courts have held that a resident of a dwelling impliedly consents to a police officer entering the curtilage to contact the dwelling’s residents, and that this implied consent has the effect of deeming such an entry into the curtilage a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment. These courts further recognize that such implied consent can be negated by obvious indicia of restricted access, such as posted “no trespassing” signs, gates, or other means that deny access to uninvited persons. Robinson v. Commonwealth, 273 Va. 26, 639 S.E.2d 217 (2007).

A nonconsensual entry into a secure building within open fields and woods is likely to be considered a search. See United States v. Pennington, 287 F. 3d 739 (8th Cir. 2002). However, if the windows or door were left open it would not be a search to look into the interior of a barn through those openings. See Pennington above. But looking through an open back door of a home from inside the fenced-in back yard would be a search because there is a reasonable expectation of privacy within the curtilage that protects against such a visual observation. See Dunn, above, and Daughenbaugh v. City of Tiffin, 150 F. 3d 594 (6th Cir. 1998).
The concepts of open fields and woods and curtilage are not hard and fast absolutes and must be considered in light of the totality of the circumstances. Ultimately, resolution involves a common sense judgment as to which concept applies to the area in question and as to the reasonableness of any expectation of privacy. Unfortunately, the law in this area is not crystal clear or entirely logical.

4th Amendment Waivers

There will be times when the Commonwealth’s Attorney will offer a 4th Amendment Waiver to a defendant as part of his/her plea agreement. In short, this waiver of 4th Amendment rights will allow officers to conduct a seizure and search of the person without requiring the necessary factual justification to support the action. See Anderson v. Commonwealth, 256 Va. 580, 507 S.E. 2d 339 (1998).

Officers must exercise great caution in utilizing this exception to the search warrant requirement. Specifically, officers must give great consideration to seizing and searching an uncooperative individual and whether or not the application of force would be necessary. Generally, if an officer confronts a person on the street who has a valid waiver on file, the officer may conduct a seizure and search. But if the person refuses the police action, the officer should record the details of the encounter and contact the Commonwealth’s Attorney’s Office to determine whether or not to pursue the individual for violating the conditions of their probation.

What if the person is in a vehicle? If the person with the valid waiver is the driver and he is the sole occupant, the officer may initiate the traffic stop without developing any additional reasonable suspicion; however, if there are other occupants and the stop is based solely on the valid waiver and not reasonable suspicion, it is unlikely any evidence of criminal activity recovered from the stop will be admissible against any other occupants. See Brendlin v. California, 551 U.S. 132, 127 S. Ct. 1769 (2007). Because a seizure of a person that is not based on at least reasonable suspicion is a violation of the Constitution, officers should develop reasonable suspicion and not use the existence of the waiver to initiate stops when other occupants are present.

Even greater caution should be used by officers when the encounter will involve a private residence. Officers should receive a supervisor’s approval before seeking to use a valid waiver as justification for entry into a private residence. Officers must be aware that there may be other people who have a 4th Amendment interest in the residence, such as a spouse of a person with a valid waiver, whose rights may be infringed upon once an entry is made. Further, officers must be aware of the tactical disadvantage they place themselves at when entering an unfamiliar location. Finally, officers should not use the existence of a valid waiver as the sole justification for forcing an entry into a private dwelling. As stated above, if an officer confronts a person who has a valid waiver on file at the person’s home, but the person refuses to allow entry for a search, the officer should record the details of the encounter and contact the Commonwealth’s Attorney’s Office to determine whether or not to pursue the individual for violating the conditions of their probation.

A final note on 4th Amendment Waivers: Officers should exercise sound judgment when deciding to employ this exception to the search warrant requirement. Specifically, officers should be mindful that repeated searches of the same person simply because the person has a waiver on file may be harassment and violate departmental rules and our core values, thus subjecting the officer to disciplinary measures.
Officers must continue to employ the highest possible ethics, professionalism, and sensitivity when using these waivers and be prepared to justify its use. Just like the use of requests for consent, no person should be subjected to arbitrary stops and/or searches by an officer unless the officer has some articulable reason that the individual has, or is about to, violate the law.

**SEARCHES OF PERSONS**

Searches of persons involve substantial risks, physical and legal, to the law enforcement officer. They also involve some of America’s most valued freedoms.

**Frisk Searches (CALEA 1.2.4)**

The landmark case dealing with frisk searches is the United States Supreme Court decision in *Terry v. Ohio*, 88 S. Ct. 1868 (1968). In *Terry*, the Court defined an officer’s authority to conduct a limited search of a person for weapons during some investigative detentions, or “stops.” For such a weapons “frisk” to be reasonable (and constitutional under the Fourth Amendment) the preceding seizure of the subject’s person (the stop) generally must be lawful and there must be an objectively reasonable basis for the frisk itself.

A frisk is a limited search of outer clothing (and sometimes carried belongings) for weapons. The main purpose and justifying theory of a frisk search is officer protection. The United States Supreme Court has characterized the frisk as a “search” because it constitutes an intrusion upon a person’s reasonable privacy expectations. The Court has recognized that it is sometimes reasonable for an officer to conduct a protective search for weapons even when the officer does not have probable cause to arrest.

Just as an investigative stop must be supported by articulable circumstances that establish reasonable suspicion of criminal activity, a frisk must be supported by an articulable reasonable suspicion that a person (lawfully stopped) is armed and constitutes a threat to the officer. As is true also for stops, reasonable suspicion to conduct a frisk may be based on the officer’s own knowledge and personal observations (plus reasonable inferences which training and experience allow) or from reasonably reliable information supplied by others. Information from anonymous sources is not considered reliable without additional indicators of credibility. In *Florida v. J. L.*, 120 S. Ct. 1375 (2000) the United States Supreme Court held that an anonymous tip that a particular person at a particular place is carrying a gun is not, without more, sufficient for reasonable suspicion to stop and frisk.

**Suspicion Factors**

The justification for an investigative stop is not necessarily also justification for a frisk. In each case, an officer conducting a frisk must be prepared to point to the specific, articulable facts that justified that particular frisk. Possible (articulable) justifications (or factors) for a frisk search include:

1. Specific Information: Information received from witnesses or other sources that a person is armed. Anonymous source information may be considered if circumstances indicate reasonable trustworthiness of the information. See *Florida v. J. L.*, above.

2. Visual Observations: Observation and articulation of bulges in a suspect’s clothing consistent with the presence of weapons. Typically, the observation of such a bulge in a suspect’s clothing will be sufficient by itself to justify a protective frisk during a lawful stop. But caution must be used: “An officer may not, simply by observing some item causing a “bulge” in one’s clothing,
conduct a general frisk where the nature of the bulge or the surrounding circumstances do not reasonably support the conclusion that criminal activity is afoot or that the person is armed and dangerous.” *Stanley v. Commonwealth*, 16 Va. App. 873, 433 S.E.2d 512 (1993). See also *United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991): “Our decisions that mention bulges as a factor in the reasonable-suspicion analysis all involve attempts by a suspect to hide the bulge and/or the observation of a bulge in an unusual location.” See *United States v. Harrison*, 667 F.2d 1158 (4th Cir.) (4-6 inch bulge on suspect's back under his coat a factor lending support for “reasonable suspicion”), *cert. denied*, 457 U.S. 1121, 102 S. Ct. 2937, 73 L. Ed. 2d 1335 (1982); *United States v. Lehmann*, 798 F.2d 692 (4th Cir. 1986) (officer's observation of rounded corners of a package showing through suspect's pants in the crotch area, plus suspect's attempts to conceal the bulge by pulling down his jacket in front, justified seizure); *United States v. Aguiar*, 825 F.2d 39 (4th Cir. 1987) (large bulge on suspect's ankle one factor adding up to probable cause for arrest); *United States v. Powell*, 886 F.2d 81 (4th Cir. 1989) (softball-sized bulge in front pocket one of numerous drug profile characteristics met by suspect; these characteristics, in conjunction with suspect's attempted flight and statement that “it's [the bulge] bad,” gave police probable cause for an arrest), *cert. denied*, 493 U.S. 1084, 110 S. Ct. 1144, 107 L. Ed. 2d 1049 (1990). In *Powell*, the bulge caused the suspect to walk in “an awkward, bowlegged fashion, typical of one carrying concealed illicit drugs,” id. at 82, so the elements of attempted concealment and unusual location were both present.

3. Nature of the Suspected Criminal Activity: Although the reasonable suspicion that justifies an investigative stop does not automatically justify a frisk, in some instances the very nature of the suspected criminal activity may suggest the presence of weapons. For example, officers normally would be justified in conducting a frisk of a person stopped on reasonable suspicion of armed robbery. The potential presence of weapons is reasonably inferred from the nature of the suspected criminal activity. In some areas, the same may be true in regard to street level drug dealers.

4. Discovery of Weapons: When an officer observes a weapon in the vicinity of a person who has been lawfully stopped, the officer may reasonably suspect that other weapons are present and pose a threat. It is usually reasonable for an officer to take preventive measures to ensure that there are no other weapons within the person’s reach.

5. Officer Knowledge of Area and/or Groups: Officers often have considerable knowledge and/or experience regarding certain places and/or groups. Example: An officer stops a person coming out of an illegal nightclub well known for its armed patrons. See also *El-Amin v. Commonwealth*, 269 Va. 15, 607 S.E.2d 115 (2005): “Any implication that the defendant's companionship status alone was sufficient to authorize a pat down search in this case or that an officer's generalized concern for his safety alone under the circumstances of this case would validate such a search under the Fourth Amendment is expressly rejected. The totality of the facts in this case — place, time, discovery of a weapon, and group activity — validates the pat down search under the principles utilized by the United States Supreme Court when considering Fourth Amendment challenges to searches and seizures.”

6. Suspect Behavior: Suspicious movements and other non-verbal behavior may sometimes be a basis for suspecting that weapons are present. Failure to comply with an officer’s command to remove one’s hand from a pocket might reasonably cause suspicion that a weapon is present. Extreme suspect nervousness may count toward reasonable suspicion of the presence of weapons in some situations. But see *United States v. McKoy* (CA 1 11/1/05), where a motorist
was stopped in the daytime, for a parking violation, in a “high-crime” area, was nervous, avoided eye contact, and twice leaned toward the center console, was not enough for a frisk.

Scope and Nature of the Frisk Search

The frisk of a person may not go further than is necessary to accomplish its purpose. The sole object of a frisk is to determine whether a weapon is present and to neutralize the threat of physical harm to the officer and others. Therefore, the scope of the frisk is limited to the area from which weapons could be immediately accessed. Quick accessibility is the key concept in determining the scope of a frisk search. Generally this concept implies that no damage or breakage be done to carried belongings or containers. Generally, if one has to break open a container to reach its contents, those contents would not considered immediately accessible. Reaching into the instep of a high top tennis shoe is permissible as part of a frisk search, according to United States v. Barboza (CA 1 6/15/05).

Plain Feel

Manipulation of clothing and objects is allowed only to the extent necessary to confirm or dispel suspicion that an object is a weapon. Once a determination is made by the officer that the object is not a weapon, manipulation of that object (as part of a frisk search) must immediately cease but the officer is not required to ignore sensory perceptions gained prior to that moment (feel of drugs, for example). Minnesota v. Dickerson, 113 S. Ct. 2130 (1993). See also United States v. Bustos-Torres (CA 8 2/2/05), where the officer felt “wads of cash” during a weapons frisk of a suspected street drug dealer. The officer may attempt to obtain consent from the person to retrieve the item or the officer may proceed under a different search theory, if available (probable cause theory, for example). Pursuant to frisk authority, the officer may remove any item or object that he reasonably believes to be weapon. If the object or item removed is not a weapon but is immediately apparent to be evidence of a crime, it may be seized under the plain view doctrine of warrantless seizure (discussed in a later section). However, “It is not sufficient probable cause to seize an item from inside the suspect's clothing if the officer has no more than an educated “hunch” based upon the “plain feel” that the item might be contraband.” Cost v. Commonwealth, 275 Va. 070496, S.E.2d (2008). See also Harris v. Commonwealth, 241 Va. 146, 151, 400 S.E.2d 191, 194 (1991) (addressing officer's “hunch” that a closed canister contained illegal drugs).

An officer is not required to ignore what the officer perceives through the sense of touch. See Minnesota v. Dickerson, above. This “plain feel” concept is consistent with the general principle that probable cause may be based, in whole or in part, on the sensory perceptions of an officer as interpreted in light of the officer’s training and experience. Therefore, if an officer touches an object during a lawful frisk search, determines that the item is not a weapon but perceives through the sense of touch that the item likely is contraband, the officer may make a warrantless seizure of that item based upon probable cause.

Probable Cause and Exigent Circumstances

“Exigent circumstances” is a clearly established exception to the search warrant requirement and may be used in situations where an officer has probable cause to believe that a person located in a public place is in possession of contraband or other evidence of crime. In such circumstances, a warrantless, probable cause-based, exigent circumstances search would be lawful because of the inherent mobility of the evidence and the likelihood it would be gone (along with the suspect) if the officer left to obtain a search warrant. See, for example United States v. Banshee, 91 F. 3d 99 (11th Cir. 1996). If the suspect
were detained while a warrant was sought, the time passage involved usually would render the
detention an arrest by the time a warrant were returned to the detention scene. So to detain the subject
for the time necessary to obtain a search warrant would almost always amount to an arrest in any event.

Fortunately for police, in respect to possession of contraband, the same probable cause that could be
used to obtain a search warrant usually would also form the basis for a probable cause arrest and
associated search incident to arrest. So either exigent circumstances or search incident to arrest would
furnish the warrantless search justification in such situations. Training Bulletin 07-13

[Note: the term “exigent circumstances” has different (and less demanding) meaning here and in
vehicle searches than it does in connection with entries and searches of homes.]

Search Incident to Arrest

The landmark United States Supreme Court decision on search incident to arrest is Chimel v.
California, 89 S. Ct. 2034 (1969). A search incident to arrest is permitted automatically pursuant to
every lawful arrest. The Court held, in part: “An arresting officer may search the arrestee’s person to
discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may
search the area “within the immediate control” of the person arrested, meaning the area from which he
might gain possession of a weapon or destructible evidence.”

This includes the search of cell phones and pagers explicitly, and might apply to all electronic storage
devices such as laptops, flash drives, PDAs, etc.

The United States Court of Appeals for the Fourth Circuit held in United States v. Murphy, 552 F.3d
405 (4th Cir. 2009) held: “Citing the “manifest need . . . to preserve evidence,” this Court has held on at
least two prior occasions, albeit in unpublished opinions, that officers may retrieve text messages and
other information from cell phones and pagers seized incident to an arrest.” See United States v. Young,
278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008) (per curiam) (holding that officers may retrieve
text messages from cell phone during search incident to arrest), cert. denied_, U.S., 129 S. Ct.
(holding that officers may retrieve telephone numbers from pager during search incident to arrest).
Similarly, the Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence
justifies the retrieval of call records and text messages from a cell phone or pager without a warrant
during a search incident to arrest. See United States v. Finley, 477 F.3d 250, 260 (5th Cir.), cert. denied,
549 U.S. 1353, 127 S. Ct. 2065, 167 L. Ed. 2d 790 (2007); see also United States v. Ortiz, 84 F.3d 977,
984 (7th Cir. 1996).

The Court has held that a search may occur prior to the arrest of a person. “Where the formal arrest
followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it
particularly important that the search preceded the arrest rather than vice versa.” Rawlings v. Kentucky,
448 U.S. 98 (1980); see also United States v. Smith, (CA 9 11/23/04) for a recent application of this
principle.

Probable cause to arrest is required for a search incident to arrest, but the search may be conducted
whether or not there is any reason to believe evidence and/or weapons will be found. United States v.
Court held that issuance of a traffic citation (even for an arrestable offense) does not justify a search
incident to arrest. A custodial arrest must be in progress before there can be a search incident to arrest.
At least one federal appeals court has limited the Knowles rule to traffic citations and allowed a “search incident to citation” of a pedestrian. *U. S. v. Pratt* (CA 8 1/27/04). However, there is no trend supporting this approach.

**Scope and Nature of Search Incident to Arrest**

A search incident to arrest is a full and complete search for evidence and weapons within the area of immediate control of the arrestee. Damage or breakage generally is not permitted because this would be contrary to the concept of immediate control. The search may extend to the person, his/her clothing and carried belongings, and other areas within the immediate control of the arrestee. Example: If the arrest occurs in a motel room, a search incident to arrest may be conducted of the area immediately surrounding the arrestee. This may include looking in drawers, closets, under furniture, and in other places that could have been reached by the arrestee in one quick movement. Additionally, The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Maryland v. Buie*, 494 U.S. 325, 325 (1990).

In the event that an arrestee wants or needs access to particular areas for his or her convenience and/or comfort, the officer may inform the arrestee that such access is conditional upon the arrestee’s consent to a prior search by the officer of the areas to which access is requested. *Washington v. Chrisman*, 102 S. Ct. 812 (1982). If consent is withheld, the arrestee normally would be denied access to that particular area. Subsequent access to toilets and such then would be allowed in facilities where the subject did not have a reasonable expectation of privacy - public facilities, for example, where the officer could conduct a prior search of the area to be accessed by the arrestee.

**Search Incident to Arrest in Motor Vehicles**

Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

[Note: this is discussed in the Vehicle Stops and Searches section.]

**Search Incident to Change of Custody**

A search incident to arrest is also authorized upon a change of custody, consistent with the Fourth Amendment’s requirement that searches and seizures be reasonable. It is reasonable that the police officer acquiring custody of an arrestee be allowed to insure that his prisoner does not have a weapon and/or evidence hidden on or around him, even if another officer may have conducted an earlier search incident to arrest. See *United States v. Avila-Domínguez*, 610 F. 2d 1266 (1980), for example.

**Strip Searches/Body Cavity Searches (CALEA 1.2.8 LE1)**

Full strip and/or body cavity searches are rarely allowed. Except in jail intake procedures, strip searches and visual body cavity inspections should be reserved for truly exigent circumstances involving high levels of probable cause to believe that weapons and/or critical evidence of serious crimes are present and that the only means reasonably available to remove the threat of access by the arrestee is to conduct such a search. In such cases, the officer should make every reasonable effort to maximize the personal
privacy of the arrestee.

Officers shall utilize a professional and courteous line of questioning, outlined below, in order to ascertain the sex of ALL persons subject to a strip search or cavity search, regardless of the appearance or gender identity of the person to be searched. Officers shall explain the probable cause behind the search, and the process by which the search will be conducted.

At the conclusion of this explanation, officers shall ask the following questions to identify the sex of the subject to be searched:

1. Were you born with male or female genitalia?
2. Do you identify as a male or female?
3. Have you had transition surgery?

The search shall be conducted by an officer of the same sex as the person being searched. Sex will be determined by the genitalia a person physically possesses, not their gender identity or expression.

Virginia State Code § 19.2-59.1 provides that “No person in custodial arrest for a traffic infraction, Class 3 or Class 4 misdemeanor, or a violation of a city, county, or town ordinance, which is punishable by no more than thirty days in jail shall be strip searched unless there is reasonable cause to believe on the part of a law-enforcement officer authorizing the search that the individual is concealing a weapon. All strip searches conducted under this section shall be performed by persons of the same sex as the person arrested and on premises where the search cannot be observed by persons not physically conducting the search.” Additionally, Virginia State Code defines a strip search as “having an arrested person remove or arrange some or all of his clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts, or undergarments of such person.”

Body cavity intrusions are authorized only upon very high levels of focused probable cause to believe a weapon or evidence of crime is concealed in the body cavity. The Virginia Court of Appeals has defined strip searches, visual body cavity searches, and manual body cavity searches. A “strip search” is “an inspection of a naked individual, without any scrutiny of his body cavities.” Kidd v. Commonwealth, 38 Va. App. 433, 446, 565 S.E.2d 337, 343 (2002). A “visual body cavity search” is more intrusive and “extends to a visual inspection of the anal and genital areas.” Id. (citation omitted). Finally, a “manual body cavity search” involves “some degree of touching or probing of body cavities” and is the most intrusive type of body search. Id. (citation omitted). Winston v. Commonwealth, 51 Va. App. 74, 79, 654 S.E.2d 340, 340 (2007). Absent consent or dire exigent circumstances compelling immediate warrantless action, body cavity probes should be performed pursuant to a search warrant and only by qualified medical personnel. “Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search “be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” The importance of informed, detached and deliberate determinations of the issue whether or not to invaded another's body in search of evidence of guilt is indisputable and great. Based on these principles, we hold that a warrantless search involving a bodily intrusion, even though conducted incident to a lawful arrest, violates the Fourth Amendment unless (1) the police have a “clear indication” that evidence is located within a suspect's body and (2) the police face exigent circumstances.” Commonwealth v. Gilmore, 27 Va. App. 320, 330, 498 S.E.2d 464, 464 (1998). See again Virginia State Code § 19.2-59.1. A visual inspection of the inside of the mouth probably would not be considered a cavity probe.

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Constitutional Issues Field Guide

In all cases where a member conducts a strip search or body cavity search, that member will provide a written memorandum to the Office of Professional Standards (via the chain of command) containing the facts surrounding the need for the search. In the case of a body cavity search, a copy of the search warrant affidavit will be attached to the memorandum (or justification concerning the exigent circumstances of the situation).

Search and Inventory of Personal Possessions of Person in Custody

The United States Supreme Court has made clear that it is reasonable to inventory the carried possessions of a person upon his or her entry into a detention facility. The primary justification for this action is the caretaking responsibility of law enforcement agencies in regard to the valuables and possessions of arrestees. The inventory assures that valuables are identified and helps protect against claims of theft or mismanagement of property. Lastly, the inventory protects officers and the detention facility against introduction of dangerous instrumentalities (bombs, toxic materials, etc.). In order for an inventory search to be lawful, the arrest and commitment into the detention facility must be lawful and there must be departmental policy requiring such an inventory. A leading United States Supreme Court decision in this area is *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983). In *United States v. Edwards*, 415 U. S. 800 (1975), the United States Supreme Court held that a “second look” at areas and/or items previously searched may be permitted during continuous custody.

VEHICLE STOPS AND SEARCHES

Though the United States Supreme Court has explained this area of the law in more than two dozen cases, considerable confusion still exists in lower courts concerning when a vehicle may be stopped, when it may be searched without a warrant, and exactly what portion of the vehicle may be searched. Following is a discussion of vehicle stops, the various types of warrantless vehicle searches, the justification required to conduct each search, and the scope of lawful search, including whether a closed container may be searched. Throughout this discussion, the term “closed container” refers to any container, open or shut, the contents of which are concealed from view and are not readily apparent.

Stopping a Vehicle

The same factual justification necessary to validate an investigative detention of a pedestrian justifies the stop of a vehicle to detain an occupant. A stop of a pedestrian or vehicle may not be conducted randomly or whimsically; it must be based on reasonable and articulable suspicion of criminal activity. See *Bass v. Commonwealth*, 259 Va. 470, 525 S.E.2d 921 (2000). Though probable cause is sometimes required to search a vehicle, it is not required to stop one. For Fourth Amendment purposes, when police stop an automobile and detain its occupant, this constitutes a “seizure” of the person, even though the purpose of the stop is limited and the detention brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). As relevant to these facts, a suspect may be detained briefly for questioning by an officer who has “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51 (1979). See *Simmons v. Commonwealth*, 217 Va. 552, 554-55, 231 S.E.2d 218, 220-21 (1977). The test is less stringent than probable cause. See *Terry v. Ohio*, 392 U.S. 1 (1968). In order to determine what cause is sufficient to authorize police to stop a person, cognizance must be taken of the “totality of the circumstances—the whole picture.” *United States v. Cortez*, 449 U.S. 411, 417 (1981). Assessing that whole picture, “the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” 449 U.S. at 417-18. *Leeth v. Commonwealth*, 223 Va. 335, 340, 288 S.E.2d 475, ____ (1982)
Checkpoint

Even stops without any particularized suspicion are lawful under some circumstances. “In order to avoid arbitrary invasions of privacy, a seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers.” *Low v. Commonwealth*, 230 Va. 346, 346, 337 S.E.2d 273, ___ (1985). Vehicle “checkpoints,” for example, may be permitted in certain regulatory situations, like driver’s license and drunk driving checkpoints, truck weigh stations, and border enforcement. However, checkpoints which have as their primary purpose enforcement of criminal law more generally – like “drug checkpoints” – were outlawed by the Supreme Court in *Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). More recently though, the Supreme Court decided that specific information gathering checkpoints can be lawful and speculated that other checkpoints would be lawful in order to prevent people (terrorists, for example) from entering certain areas and to prevent people (perpetrators) from leaving certain areas. *Illinois v. Lidster*, 124 S. Ct. 885 (2004). Also some courts have held that even though most criminal investigative checkpoints are prohibited by *Edmond*, “fake checkpoints” – signage indicating the impending presence of an in-fact non-existent checkpoint may be permitted in order to allow police to scrutinize people’s driving behavior upon seeing the signage. See, e.g. *United States v. Martinez*, F. (8th Cir. 3/2/04) and *United States v. Williams*, F. __ (8th Cir. 3/15/04).

Pretext

“Pretextual stops” are those in which the officer’s true investigative motives are not reflected in the “objective” basis for the stop. In *Whren v. U. S.*, 116 S. Ct. 1769 (1996), the United State Supreme Court held that the Fourth Amendment does not prohibit pretextual stops of motor vehicles as long as there is an objectively lawful justification for the stop. For example, the fact that the officer’s real motivation for stopping the vehicle was suspicion of drug involvement does not invalidate a traffic stop that is otherwise lawful for, say, an inoperative taillight. An officer’s subjective motivation is irrelevant to the Fourth Amendment validity of an objectively lawful (though pretextual) stop. See *Glasco v. Commonwealth*, 257 Va. 433, 448, 513 S.E.2d 137, 146 (1999).

[Note: In *Arkansas v. Sullivan*, 532 U. S. 769 (2001), the Supreme Court extended this rule to a pretextual arrest and in *United States v. Petty* (CA 8 5/18/04) one federal appeals court extended it to inventory searches.]

In 1996, the United States Supreme Court ruled that a pretextual traffic stop does not necessarily have to be ended by the words “you’re free to leave now” before an officer moves forward with a request for consent to search. The Fourth Amendment test for a valid consent to search is whether the consent is voluntary, and voluntariness is a question of fact to be determined from all of the circumstances. Police officers are free to engage in consensual encounters with citizens, indeed, it is difficult to envision their ability to carry out their duties if that were not the case. See *Parker v. Commonwealth*, 255 Va. 96, 101-02, 496 S.E.2d 47, 50 (1998). The United States Supreme Court ruled that “it would be unrealistic to require officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.” *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

It is not permissible, though, for officers to extend the duration of a pretextual stop in order to investigate a matter as to which they do not have reasonable suspicion. The pretextual stop must be ended, and voluntary contact established, if such investigation is to ensue.

Related Actions

Once a vehicle is stopped, ordinary rules of arrest, detention, and search apply, including frisk and plain
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view doctrines. At the officer’s option, occupants may be lawfully ordered out of the vehicle, for reasons of effectiveness and safety. See Pennsylvania v. Mimms, 98 S. Ct. 330 (1977) and Maryland v. Wilson, 117 S. Ct. 882 (1997). An officer may enter a lawfully stopped vehicle to search for a VIN number even though he has no reason to believe or suspect that the car is stolen, provided the VIN number cannot be viewed from outside the vehicle. New York v. Class, 106 S. Ct. 960 (1986). Such an action to determine a VIN number is a reasonable search, though without warrant or probable cause, because:

1. The entry is limited in purpose and scope to discovery of a number as to which there is no reasonable expectation of privacy;

2. The entry is into an area (a vehicle in a public place) in which expectations of privacy are much diminished;

3. The governmental interest in regulating vehicles and requiring VIN numbers to be readily visible justifies a limited intrusion to assure the presence of a VIN number, and learn what the number is.

**Consent to Search**

[Note: Although consent searches are dealt with elsewhere, applications specific to vehicle situations are re-stated here.]

In order to be valid, a consent to a vehicle search must be obtained from someone who has apparent authority to consent and it must be given voluntarily. In a series of decisions, however, the Supreme Court has limited lawful “consensual encounters” to circumstances in which “a reasonable person would feel free ‘to disregard the police and go about his business.’” Reitinger, 260 Va. at 236, 532 S.E.2d at 27 (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)). The “reasonable person” test is objective, and presumes an innocent person rather than one laboring under a consciousness of guilt. Bostick, 501 U.S. at 437-38. The consensual encounter becomes a seizure “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” Id. at 434. Malbrough v. Commonwealth, 275 Va. 163, 169, 655 S.E.2d 1, ____ (2008). It is not necessary to advise the subject of his right to refuse. The required justification for a consent search of a motor vehicle is voluntary permission from the apparent owner and/or person in control of the vehicle to conduct the search. The scope of such a search is anywhere in the vehicle that could reasonably be thought to be within the consent. Containers within the vehicle may be searched if it is reasonable to believe that the container is within the bounds of the consent. Breakage would generally require special permission.

The person consenting to the search may limit his consent to certain areas of the vehicle and may withdraw his consent at any time. If consent is withheld or withdrawn, no warrantless search may be conducted unless it can be justified based on one or another of the exceptions to the search warrant requirement. Refusal to consent or withdrawal of consent may not be used as a factual justification for conclusions of reasonable suspicion and/or probable cause. A person’s refusal to relinquish a constitutional right may not be used as a basis for police action against him.

In Florida v. Jimeno, 111 S. Ct. 1801 (1991), the United State Supreme Court discussed the theory of consent as it related to the search of a container within the vehicle, stating:

“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness. What would the typical reasonable person have understood by the exchange between the officer and the suspect? The question before us, then, is whether it
is reasonable for an officer to consider a suspect’s general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.”

The Court continued:

“The scope of the search is generally defined by its expressed object. In this case, the terms of the search’s authorization were simple. Respondent granted [the officer] permission to search his car, and did not place any explicit limitation on the scope of the search. [The officer] had informed respondent that he believed respondent was carrying narcotics, and that he would be looking for narcotics in his car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondent’s car included consent to search containers within that car which might bear drugs.”

The Jimeno case does not hold that every consent to search a motor vehicle extends to every closed container inside. Rather, the consent to search the car will extend only to those closed containers which it is reasonable to believe were included. If the subject is told what the object of the search is and the particular container could be concealing the object of the search and can be searched without damage, the search is likely lawful, based on the Jimeno decision. In United States v. Garrido, (CA 2/20/04), a federal appeals court applying Jimeno found that searching a gas tank was permissible, given consent to search “the car”.

**Frisk of Vehicle for Weapons**

Car “frisks” are lawful on essentially the same basis as would allow the frisk of a person. A warrantless weapons frisk of the passenger compartment of a lawfully stopped vehicle is permissible if the officer has reasonable suspicion that a dangerous weapon is immediately accessible within the passenger compartment. See Washington v. Commonwealth, 29 Va. App. 5, 14, 509 S.E.2d 512,___(1999) “frisking for weapons based upon the exigency of protecting an officer's safety is not limited to a pat-down of the suspect but may extend to nearby vehicles…” The frisk is limited to places in the interior passenger compartment in which a quickly accessible weapon could be placed or hidden. A closed container found in the passenger compartment may be opened and checked for weapons as long as the contents of the container are immediately accessible to vehicle occupants (i.e., the container could be opened quickly without breakage).

The trunk usually may not be searched during a frisk of a vehicle for weapons (because the contents of the trunk normally are not immediately accessible to vehicle occupants) but where the trunk is accessible through a rear seat “fold-down” a frisk of the trunk may be permissible. See, for example, United States v. Arnold (CA 7 11/12/04). Once established, authority to frisk the vehicle remains even though the suspect is removed from the car and kept nearby. Michigan v. Long, 103 S. Ct. 3469 (1983) is the leading case on frisking a vehicle.

**Frisk of Vehicle Occupants**

The frisk of occupants is regulated by frisk law in general, beginning with Terry v. Ohio, 88 S. Ct. 1868 (1968). Terry defined a frisk as “a carefully limited search of the outer clothing...to discover weapons...” and indicated that such searches are justified if two conditions are present:

1. Lawful basis for investigative detention;
2. Reasonable suspicion the suspect is armed and constitutes a potential danger to the officer.
Although a number of state courts, legal scholars and commentators disagree, it appears that carried articles and belongings may be “frisked” upon the same justification as would support a lawful body frisk. Quickly accessible articles and areas within the immediate control of the detainee may be secured and frisked. It does not matter that the item could be moved away from the detainee and thereby secured. In *Michigan v. Long*, 463 U. S. 1032 (1984), although it involved a frisk of someone’s vehicle, rather than a “carried belonging” per se, the Court made clear that police are not required to “adopt alternate means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.” See also *United States v. Rhind*, 289 F. 3d 690 (11th Cir. 2002) and *United States v. Williams*, 962 F. 2d 1218 (6th Cir. 1992).

**Search Incident to Arrest of Vehicle Occupant**

In *Chimel*, the United States Supreme Court held that a search incident to arrest may only include “the arrestee's person and the area ‘within his immediate control’ — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. (Noting that searches incident to arrest are reasonable “in order to remove any weapons [the arrestee] might seek to use” and “in order to prevent [the] concealment or destruction” of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *E.g.*, *Preston v. United States*, 376 U.S. 364, 367-368 (1964).

“Police may search the passenger compartment of a vehicle incident to a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.” *Arizona v. Gant*, 556 U.S. ___07542 (2009).

In *Knowles v. Iowa*, 525 U. S. 113 (1998), the Supreme Court held that mere issuance of a traffic citation (even for an arrestable offense) does not justify a search incident to arrest. Searches incident to arrest must be “substantially contemporaneous” with the arrest. *Chimel v. California*, 395 U. S. 752 (1969). In plainer English: the search must occur at the time of, or very soon after, the arrest. Other theories (discussed elsewhere) may authorize the later search of an arrestee and his transported belongings.

In *New York v. Belton*, 453 U.S. 454, the United States Supreme Court announced, clearly and unequivocally, that a closed container may be searched incident to an arrest. The question with respect to closed containers is whether the contents of the container were within the immediate control of the arrestee before he was removed from his car. Of course, articles like handbags, wallets, and clothing worn by the arrestee, which are associated with the person, and move with the arrestee, may be searched at the time of, or after, the arrest.

Any article or closed container found inside the motor vehicle may be searched at or near the time of arrest. Breakage of locked containers is usually not permitted in a search incident to arrest. However, if circumstances are such that a locked container could be quickly assessed using a key that is (or was) readily available to the arrestee, a search of the container incident to arrest probably would be lawful.

**Carroll Search (Probable Cause Search) (CALEA 1.2.4)**

An officer who has probable cause to believe that contraband or other evidence of a crime is in a moveable (i.e., operable) vehicle that is in a public area may conduct a warrantless search of any part of
the vehicle that could contain the object of the search. This includes any closed container, locked or unlocked, that could conceal the item to be seized. Public areas of course include public streets and roadways and usually include privately owned properties, which are commonly used by the public for vehicular movement (e.g., shopping center and even apartment complex parking lots).

Many officers have been taught that federal constitutional law requires that, whenever it is practical to do so (i.e., absent an “exigency” or emergency), a search warrant should be obtained before conducting a probable cause vehicle search. In fact, federal constitutional law rarely requires a warrant for a vehicle search. A search warrant is required to search a motor vehicle only when that vehicle is not in a publicly accessed vehicular area, and then only when exigent circumstances do not justify immediate warrantless action. The Fourth Amendment to the United States Constitution does not require a search warrant for vehicles in public areas and never has, insofar as United States Supreme Court decisions are concerned.

Even when police have ample opportunity to obtain a search warrant before searching a vehicle in a public area, the Fourth Amendment does not require a warrant. Though there exists a pervasive myth to the contrary, the United States Supreme Court has never held that a search warrant is necessary to conduct a probable cause search of a vehicle in a public place. Rather, in a long line of decisions beginning with Carroll v. U. S., 45 S. Ct. 280 (1925), the Court has decided consistently that a motor vehicle is not subject to the warrant requirement when it is in a public area. Motor vehicle privacy rights in public areas are simply not as significant as when the motor vehicle is on private property that is not open to public vehicular access.

In two 1985 decisions, the United States Supreme Court reaffirmed its then six decade old unwillingness to extend to vehicles in public areas as much Fourth Amendment privacy protection as is accorded homes and other private areas; it also made crystal clear that exigent circumstances need not be shown to justify warrantless vehicle searches.

In California v. Carney, 105 S. Ct. 2066 (1985), the United States Supreme Court upheld a warrantless search of a mobile motor home parked in a publicly accessible parking area and restated that such warrantless searches do not require proof of an emergency or of lack of opportunity to obtain a warrant. According to the Court, such warrantless searches are reasonable (upon probable cause) because of either the vehicle’s mobility or the reduced expectation of privacy accorded it. Describing what has become known as the “vehicle exception” to the search warrant requirement, the Carney Court stated:

“Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office. Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception.”

In U. S. v. Johns, 105 S. Ct. 881 (1985), the United States Supreme Court made its clearest statement regarding exigent circumstances:

“A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify a warrantless search.”

Today, nearly two-dozen decisions of the United States Supreme Court testify that there is a vehicle exception to the search warrant requirement and that it does not depend on exigent circumstances, lack of time to obtain a warrant, or other impracticalities in obtaining a warrant. The notion that warrantless probable cause searches of vehicles in public areas require special justification (i.e. beyond probable
cause) is simply incorrect. A warrantless “Carroll” search may be conducted at the place of the initial contact, or later at a different location. Neither the passage of time nor the relocation of the motor vehicle by officers (even to secure custody) creates a need for a search warrant. See Florida v. Meyers, 104 S. Ct. 1852 (1984) and Michigan v. Thomas, 458 U. S. 259 (1982). Two late ‘90s Supreme Court decisions re-affirm the continued validity of the now eight-decade-old “Carroll Doctrine.” Pennsylvania v. Labron, 518 U. S. 938 (1996) and Maryland v. Dyson, 527 U. S. 465 (1999). Also, in 1999, the Supreme Court held that, in the course of a traffic stop where an officer noticed the driver had a syringe in his pocket and he admitted using it to take illegal drugs, an ensuing warrantless search of a female passenger’s wallet type container was lawful under the Carroll Rule. See Wyoming v. Houghton, 526 U. S. 295 (1999). If, however, the vehicle is located on private property, rules respecting homeplace and curtilage privacy may, and typically would, generate a warrant requirement. See, e. g., Coolidge v. New Hampshire, 403 U. S. 443(1971).

Probable Cause Searches of Containers within Vehicles

In 1991, the United States Supreme Court announced that, if probable cause to search exists, a closed container found inside a motor vehicle in a public place may be searched without a warrant, just as the motor vehicle may be. The only requirement for the search is probable cause to believe that evidence or contraband may be inside that container. This decision reversed a long standing rule (known as the Chadwick-Sanders Rule) that a warrant was necessary to search a closed container which officers had specific probable cause to believe contained evidence or contraband. In that case, California v. Acevedo, 111 S. Ct. 1982 (1991), the Supreme Court states:

“Until today, this court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret Carroll as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”

The Carroll line of cases, including the Acevedo decision, creates a simple, easily applicable rule. If an officer has probable cause to believe that evidence or contraband is located inside a moveable motor vehicle, which is in a public place, a warrantless search for that contraband or evidence is lawful - even if the probable cause information involved a container.

Inventory Searches (CALEA 1.2.4)

According to the Supreme Court, warrantless inventory searches of impounded motor vehicles serve several important societal interests: they protect the owner’s property while it is in police custody; they protect officers against false claims of lost, stolen or damaged property, and; they protect the police and community from dangerous instrumentalities. These strong interests make inventory searches reasonable even when there is no reason to believe, or even suspect, that the vehicle contains evidence of a crime, valuables or hazardous materials.

A warrantless inventory search is permissible if a vehicle has been lawfully impounded and the agency conducting the inventory has a standard departmental policy requiring inventory searches of all impounded vehicles. The entire vehicle (including the trunk, if it can be opened without damage) may be searched during the inventory. Closed containers that can be opened without breakage may also be searched in the inventory, pursuant to department policy. If contraband is discovered, probable cause to search for more is created and other vehicle search rules become applicable.
The scope of the inventory search is limited to those parts of the vehicle, which are likely locations for important or valuable items or any dangerous instrumentality. Any closed container found may be examined pursuant to a departmental policy if the container is a likely repository for important items or dangerous instrumentalties. The guiding principle regarding scope of inventory is its care taking purpose; neither the vehicle nor any container should be damaged during an inventory search, unless necessary to deal with dangerous instrumentalties.

If these requirements are satisfied, evidence of crime and/or contraband, which is discovered during inventories, may be seized and used in a resulting criminal trial. The United States Supreme Court decisions which govern this area are South Dakota v. Opperman, 96 S. Ct. 3092 (1976) and Florida v. Wells, 110 S. Ct. 1632 (1990). However, see Pruitt v. Commonwealth, 274 Va. 382, 382, 650 S.E.2d 684. (2007) “where the evidence showed that [defendant] placed a pistol in a closed console of his vehicle after a traffic accident, got out of the car, and closed the driver’s door behind him with the windows in the “up” position” did not meet the code requirements for a violation of § 18.2-308.

[Note: For an inventory search to be lawful, the impoundment (i.e., police-ordered tow) must be lawful. Not every arrest of a vehicle occupant or discovery of evidence justifies an impoundment of a vehicle. Officers should consult local counsel and state law to determine when vehicles may be lawfully impounded. Also, in Florida v. White, 526 U. S. 559 (1999) the Court held that the same principles that underlie the vehicle exception to the search warrant requirement also apply to the warrantless seizure of a vehicle, when it itself is evidence or subject to forfeiture.]

Community Caretaker Doctrine

Under the community caretaker exception, the police may conduct a warrantless inventory search of a vehicle provided the following conditions are met: 1) the vehicle must be lawfully impounded; 2) the impoundment and subsequent search must be conducted pursuant to standard police procedures; and 3) the impoundment and subsequent search must not be a pretextual surrogate for an improper investigatory motive. Williams v. Commonwealth, 42 Va. App. 723, 731, 594 S.E.2d 305. (2004).

Tracking Devices

In 2012, the United States Supreme Court tackled the issue of affixing a tracking device to a privately owned vehicle. In United States v. Jones, 565 U.S. 101259 (2012), the court ruled that “the Government’s attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment.” Pp. 3-12. In response to this ruling, Virginia’s General Assembly enacted legislation to provide law enforcement with a mechanism to use tracking devices. Officers have available a distinct search warrant affidavit for obtaining a search warrant for the use of tracking devices. Refer to the Code of Virginia § 19.2-56.2.

Summary

In sorting out and applying the various theories of warrantless vehicle search, it is important to keep in mind a basic tenet of the Fourth Amendment - searches must be reasonable. A search is reasonable only when its scope is reasonable, i.e., consistent with its underlying justification. For example, if the justifying theory is suspicion that dangerous weapons might be quickly reached by a suspect, the search may be no more extensive or intrusive than is reasonably necessary to check for weapons, which are immediately accessible to the suspect.
If, during a lawful warrantless search, items that are immediately apparent to be evidence of crime are discovered, those items may be seized then and there under the plain view doctrine of warrantless seizure even if they are unconnected to the evidence and/or crime(s) that were the original justification for the warrantless search. Finding some quantity of illegal drugs in a motor vehicle typically establishes probable cause to believe that more drugs are present. See, for example, United State v. Rosborough (CA 10 5/3/04) where even a drug dog alert to the passenger compartment allowed a probable cause search of the trunk. But see United States v. Jackson (CADC 7/22/05), where finding a stolen tag in the passenger compartment plus the driver didn’t have a registration was not probable cause to search the trunk.

It is important for officers to understand each theory of warrantless vehicle search and how far each theory can take the officer conducting the search. One type of warrantless search may lead to justification for another type of warrantless search that will permit an even broader, more extensive search.

**FORCED ENTRY INTO PRIVATE PREMISES**

Privacy rights surrounding private premises, particularly homes, are fundamental under our Constitution. Improper police entries into private premises can cause serious civil liability, massive problems with evidence suppression, and even criminal prosecution of officers. Use of force risks, notably including deadly force, increase dramatically when an officer makes nonconsensual entry into a home. Because the risks in this area of policing are so great, this subject should be studied extra carefully, and fully understood, by every law enforcement officer.

**Terminology**

The term “forcible” (as used in this discussion) means without voluntary consent. “Forcible entry” may involve kicking doors, breaking locks, splintering wood, shattering glass, or it may not. A forcible entry is any entry that is made without voluntary consent from someone who has the authority (capacity) to consent. For purposes of this discussion, “private premises” are residential premises - homes. This term includes rental housing, including hotel and motel rooms. While private offices and other private premises are generally protected by the Fourth Amendment in approximately the same fashion as homes, this discussion will focus on forcible (i.e. non-consensual) entries by police into peoples’ homes.

**The General Rules**

The rule is, to force an entry into a home, a warrant is required. An exception to that rule exists in the case of “exigent circumstances,” which will be discussed later. If an officer is forcing an entry into a home for the purpose of arresting someone thought to be inside, there are two additional legal requirements, whether or not a warrant is used. First, there must be probable cause to arrest the person believed to be inside. Second, there must be reason to believe that the person to be arrested is actually currently present in the private premises being entered. A warrant does not automatically give the officer the right to enter private premises to look around to see if the person to be arrested is present.

**Liability Warning**

If an officer is executing an arrest warrant he knows nothing about, it is reasonable for him to assume that the warrant is valid unless there is something on the face of the warrant that clearly indicates it is defective. However, if the officer is aware of the underlying facts and circumstances which give rise to the arrest warrant, and the officer knows those facts and circumstances do not add up to probable cause
to believe a crime has been committed by the person subject to the arrest warrant, the officer should not execute that arrest warrant. Instead, the officer should notify prosecutors and/or the court of the issue and seek guidance. (The same is true for a search warrant which one has reason to believe is invalid.) In *Malley v. Briggs*, 106 S. Ct. 1092 (1986), the United States Supreme Court decided that a warrant for arrest immunizes a police officer from liability for that arrest only if the officer reasonably believes that warrant is valid - that the warrant is supported by probable cause to arrest. An arrest made with a warrant that a reasonable, well-trained officer would know was not supported by probable cause can be the basis of civil liability for the police officer making the arrest. Making a forcible entry into private premises based on such a warrant compounds legal problems dramatically.

**Reasonable Belief in Arrestee’s Presence**

As mentioned, before forcing entry into private premises to arrest, the officer must have a reasonable belief, prior to entry, that the person to be arrested is present at that time in the premises. The Fourth Amendment requires that all search and seizures be reasonable. It is not reasonable to enter and search a home for someone unless there is reason to believe that person to be present. See *Payton v. New York*, 445 U. S. 573 (1980) and *United States v. Clayton*, 210 F. 3d 841 (8th Cir. 2000). See also *Barnes v. Commonwealth*, 234 Va. 130, 135, 360 S.E.2d 196, ___(1987) “Although they had no search warrant for the premises, the police had valid arrest warrants for Barnes. They had reason to believe that Barnes was staying in the apartment and was actually present, and the arrest warrants gave them the limited authority to enter the apartment, search for the person described in the warrants, and arrest him.” Though some courts differ, the term reasonable belief, as used here, is used by most courts to be synonymous with probable cause. See *United States v. Gorman*, 314 F. 3d 1105 (9th Cir. 2002), for example.

**Exigent Circumstances (CALEA 1.2.4) and Hot Pursuits**

There is an exception to the earlier stated rule - that a warrant is required to enter a home - in the case of exigent circumstances. Over the years, courts have refined the meaning of the term “exigent circumstances” (in respect to entering private premises) and have made it a stricter and more demanding standard. Some still mistakenly characterize exigent circumstances as any kind of time-critical circumstances. In the past, a common teaching example of “exigent circumstances” might have been “hot pursuit.” Today, it is clear that not every hot pursuit involves exigent circumstances. The seriousness of the underlying offense or matter is a major factor in determining whether or not there are exigent circumstances. *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984). Because the exigent circumstances requirement has become more demanding, and because improper warrantless entries into private premises cause such serious risks to officers and to the public, officers should be especially cautious in this area.

While the courts have not developed an exhaustive list on which conditions will constitute an exigency, they have recognized the following as relevant factors in the determination: (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit. *Robinson v. Commonwealth*, 273 Va. 26, 28, 639 S.E.2d 217 (2007)
Entry to Arrest

Clearly, officers may enter private premises without a warrant or consent in order to arrest someone in the premises if:

1. Someone is likely to be killed or seriously injured unless immediate warrantless action is taken; or

2. A serious and/or dangerous criminal offender is likely to escape apprehension and/or prosecution unless immediate warrantless action is taken; and

3. There is probable cause to arrest the person sought; and

4. There is probable cause to believe that the person to be arrested is physically present in the premises at the time of the entry.

Not all crimes or matters are serious enough to present “exigent circumstances.” The United States Supreme Court made clear in Welsh v. Wisconsin, above, that the seriousness of the underlying offense is an important factor in determining whether or not there are exigent circumstances. In that case, the Court commented that:

“...It is difficult to conceive of a warrantless home entry that would not be unreasonable when the underlying offense is extremely minor.”

“...Application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense... has been committed.”

In light of the Welsh decision, officers are best advised not to force a warrantless entry to arrest unless:

1. The offense is a serious and/or dangerous crime and there is a lack of time to obtain a warrant because the subject is likely to escape or to injure someone; or

2. The arrest process began in a public place and there is an immediate, continuous hot pursuit of the suspect into his home. U. S. v. Santana, 96 S. Ct. 2406 (1976), is authority for the proposition that, once the arrest has begun in public, the arrestee cannot thwart the arrest by simply beating the officer to a doorway.

More on Hot Pursuit

As stated above, “hot pursuit” involves an arrest process that began in a public place and cannot be thwarted by simply beating the officer to a doorway. The United States Supreme Court has formally recognized “hot pursuit” as an exception to the search warrant requirement. See United States v. Santana, 427 U.S. 38, 42-43 (1976): “The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not. In Warden v. Hayden, 387 U.S. we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons. This case, involving a true “hot pursuit,” is clearly governed by Warden; the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that “hot pursuit” means some sort of a chase, but it need not be an extended hue and cry “in and about [the] public streets.” The fact that the pursuit here ended almost as soon as it began did not render it any the less a “hot pursuit” sufficient to justify the warrantless entry into
Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. See Vale v. Louisiana, 399 U.S. 30, 35 (1970). Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified. United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752, 762-763 (1969).”

If an officer makes a warrantless entry into a private residence to effect an arrest under this doctrine, the officer may then seize evidence pursuant to other judicially-recognized exceptions to the search warrant requirement such as consent, search incident to arrest, or plain view. However, officers are cautioned (see, in relevant part, Code of Virginia below) that unless such an exception exists, a search warrant will be required.

§ 19.2-59. Search without warrant prohibited; when search without warrant lawful. — No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.

Entry to Preserve Evidence

If there is probable cause to believe that critical evidence of a serious and/or dangerous offense is located within private premises and that the evidence is very likely to be destroyed or removed unless immediate warrantless action is taken, the officer may enter without a warrant or consent to secure the premises while awaiting the arrival of a search warrant. See, for example, United States v. Ruiz-Estrada, 312 F. 3d 398 (8th Cir. 2002). Once the premises are secured, no further search should be conducted unless or until:

1. A search warrant for the premises is on scene; or
2. Consent to search has been obtained; or
3. New or additional emergency circumstances arise necessitating additional warrantless search.

There is some risk of evidence loss virtually every time an officer takes the time to obtain a warrant. This does not mean there are always exigent circumstances. To the contrary, only the very likely loss of critical evidence in serious cases will create legally sufficient “exigent circumstances.” See United States v. Rubin, 474 F. 2d 262 (3rd Cir. 1973) and consider the Welsh decision, discussed above.

Crime Scenes

For purposes of this discussion, a “crime scene” is defined as a location where a crime has very recently occurred or been discovered and where there is an apparent need for investigative action and/or emergency services. Examples include: homicide scenes, fire scenes, scenes of burglaries or break-ins. The mere presence of contraband or evidence in private premises does not make those premises a “crime scene” for purposes of this discussion.

Upon arriving at a crime scene in private premises, officers may enter the premises without a warrant or consent in order to:
1. Locate and secure perpetrators (However, see also Smith v. Commonwealth, 41 Va. App. 704, 589 S.E.2d 17 (2003) where re-entry into a home that was the scene of a homicide to search for additional dangers after the suspect was removed was determined to be unlawful.); and/or

2. Provide assistance to injured or others requiring emergency assistance; and/or

3. Locate and secure evidence that is likely to be lost or destroyed by the mere passage of time. Again, see Smith v. Commonwealth, 41 Va. App. 704, 589 S.E.2d 17 (2003) regarding the preservation of evidence.

Once the actions described in the preceding paragraph are completed, no further search should be conducted unless or until:

1. A search warrant for the premises is on scene; or

2. Consent to search has been obtained; or

3. New or additional emergency circumstances arise necessitating further search.

In Mincey v. Arizona, 98 S. Ct. 2408 (1978) and Michigan v. Tyler, 98 S. Ct. 1942 (1978), the United States Supreme Court established the above requirements - that crime scene searches are governed by the same rules that govern other searches of private premises. Once exigencies end, consent or a warrant is required. In Flippo v. West Virginia, 528 U. S. 11 (1999) the Court restates that there is no such thing as a general crime scene exception to the search warrant requirement.

Community Caretaker Doctrine

Officers may enter private premises without a warrant or consent if it reasonably appears that such action is urgently necessary in order to:

1. Prevent death or serious physical injury; and/or

2. Provide needed emergency medical assistance; and/or

3. Guard against the imminent threat of substantial property damage.

Such actions are “reasonable” under the Fourth Amendment in view of society’s interest in police “community caretaking.” See Cady v. Dombrowski, 413 U. S. 433 (1973). See also Commonwealth v. Waters, 20 Va. App. 285, 290, 456 S.E.2d 527,____(1995) “The appropriateness of applying the community caretaker doctrine to a given factual scenario is determined by whether: (1) the officer's initial contact or investigation is reasonable; (2) the intrusion is limited; and (3) the officer is not investigating criminal conduct under the pretext of exercising his community caretaker function. Police officers have an obligation to aid citizens who are ill or in distress, as well as a duty to protect citizens from criminal activity. The two functions are unrelated but not exclusive of one another. Objective reasonableness remains the linchpin of determining the validity of action taken under the community caretaker doctrine.” Other courts allow similar action under what they call an “emergency aid” doctrine. See United States v. Martins (CA1 6/27/05).

What if There Are No Exigent Circumstances?

If one does not have an exception to the rule, one is left with the rule - that a warrant is required. If Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training Original: 01-15-2010 Effective: 02-15-20 Amends: 11-18-2019 Review: 2020
there is no consent, no hot pursuit, no exigent circumstances, and no other judicially-recognized exception, a warrant is required. The question then becomes: what kind of warrant? The two basic possibilities are arrest warrant and/or search warrant. For purposes of this discussion, the term “arrest warrant” includes any judicial order authorizing arrest.

**What Kind of Warrant?**

If an officer has probable cause to believe that the home to be entered is the arrestee’s residence and that the arrestee is present there, an arrest warrant is sufficient and no search warrant is required. *Payton v. New York*, 100 S. Ct. 1371 (1980). See also *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987). If the officer wants to enter a home in which the person to be arrested is merely a visitor and not a resident, a search warrant is required. Such homes are sometimes called “third-party premises.” That is, the person to be arrested is a visitor in the residence of a third party. In those cases, if there is no consent, no hot pursuit, and no exigent circumstances, a search warrant is required. *Steagald v. U. S.*, 101 S. Ct. 1642 (1981).

Officers are reminded that it is the policy of the Virginia Beach Police Department that officers will not use the authority of an arrest warrant to force entry into a suspect’s residence if the arrest warrant is for a misdemeanor or a non-violent felony. In many cases, alternative and less obtrusive means are available to effect the arrest of the suspect without needlessly putting officers at risk by forcing entry into a dwelling.

There may be limited occasions where exceptions to this policy are necessarily. If officers feel that an exception is justified, the officer will contact a supervisor prior to making entry. The supervisor will evaluate all of the facts and circumstances surrounding the case, and in particular, the manner in which entry into the residence will be made. [Training Bulletin 04-03](#)

**Officer-Created Exigencies**

Generally, officers may not intentionally cause or create exigent circumstances and then, thereby, avoid the requirement of obtaining a warrant. For example, suppose an officer has probable cause to believe that a person to be arrested is at a particular home. Instead of getting a warrant, though he has time to do so, the officer simply goes to that home, knocks on the door, and announces his presence and purpose. No one will come to the door. Can the officer now avoid the warrant requirement by claiming it is likely the offender will get away and/or destroy evidence if the officer leaves to get a warrant? Does the officer now have exigent circumstances? Most courts say no. See *United States v. Chambers* (CA 6 2/2/05). Exigent circumstances must arise in the regular course of events. They cannot be created by an officer and then made the basis for a warrantless intrusion into a home. See, for example, *United States v. Vega*, 221 F. 3d 789 (5th Cir. 2000).

**Addresses on Warrants**

On many arrest warrants there is an address. That address theoretically is the current address of the person to be arrested. However, in many jurisdictions, the process by which addresses get put on arrest warrants is not particularly reliable. For this reason, it is best that, in deciding that a particular place is currently the residence of a particular person, officers do not rely exclusively on the address on an arrest warrant and instead confirm that address as being the current residence of the person to be arrested. Obviously, this can be done in a number of ways, some as simple as checking with a neighbor or calling the power company or the phone company to see who currently has service at the address.
The Knock, Announce, and Wait Requirements

In Wilson v. Arkansas, 115 S. Ct. 1914 (1995), the United States Supreme Court ruled that the Fourth Amendment prohibits a “no-knock” forced entry of private premises unless an exigency exists. In Richards v. Wisconsin, 117 S. Ct. 1416 (1997), the Court clarified Wilson and held that notice before forced entry is constitutionally required unless the officer has reasonable suspicion that giving notice would:

1. Endanger someone; or
2. Be futile; or
3. Inhibit effective investigation

See United States v. Musa (CA 10 3/21/05) for a good example of a permissible no-knock entry. The entry and search were for drugs and guns and the suspect had a felony record for violent crimes.

In United States v. Banks, 124 S. Ct. 2058 (2003), the Court held that when executing a search warrant for a comparatively small amount of easily disposed of narcotics, a 15 - 20 second wait after knocking and announcing was sufficient before entering the small apartment where they believed a suspect to be present.

[Note: The Announcement Doctrine is discussed in greater detail in a later section. Further, state law is frequently more demanding than the Fourth Amendment regarding “no-knock” entries.]

Protective Sweeps

Protective sweeps involve moving through private premises to determine the presence of would-be assailants and other security threats. In Maryland v. Buie, 494 U.S. 325 (1990), the Supreme Court held that “sweeps”, like frisks, may not be performed automatically as “routine officer safety precautions.” Instead, also like frisks, a (non-consensual) sweep requires at least reasonable suspicion of the presence of a threat in the area(s) to be swept. This suspicion must be articulable and it must be particular. See, for example, United States v. Moran-Vargas (CA 2 7/16/04). A general concern for officer safety based on a speculative possibility of a threat is not enough. See Commonwealth v. Robertson, ___Va. ___ (2008) “In this case, Robertson was arrested outside of his home. Given the information provided to the police by Robertson and Cobbs, and the officers’ observations during their extended standoff with Robertson, once Robertson was arrested, there were no articulable facts to indicate that Robertson’s home harbored anyone posing a danger to the individuals present at the arrest scene. The protective sweep exception is not applicable in this instance where the officers broke through the barricaded door of Robertson’s home, after apprehending Robertson.” However, in Buie, the Court made clear that if an officer is lawfully present in a room, it is permissible to glance into adjacent spaces for security reasons – even if there is no particularized suspicion. See also United States v. Thomas (CADC 11/18/05).

Apparently, the working definition of “protective sweep” is a room to room search for security threat – not just taking a quick look into areas adjacent to where the officer is working. A sweep is permitted (upon reasonable suspicion of a threat) even when the officer is in the home for reasons other than arrest. See United States v. Miller (CA 2 11/16/05) and United States v. Gould (CA 5 3/28/03) (en banc). For an example of what is enough for a sweep, see United States v. Cash (CA 8 8/4/04).

SEARCH WARRANTS

Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training
Constitutional Issues Field Guide

Why get a Search Warrant?

Search warrants are very powerful tools. A search warrant allows the government to search for and seize, using reasonable force if necessary, items listed on the warrant. Absent a judicially-recognized exception to the search warrant requirement a search warrant is required in all cases where law enforcement wishes to conduct a search where a person has a reasonable expectation of privacy. Officers are reminded (again) that Virginia has a statute concerning searches conducted without the authority of a warrant:

§ 19.2-59. Search without warrant prohibited; when search without warrant lawful. — No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.

The law of search warrants is always a combination of federal constitutional principles and state law requirements. State law usually has much to say regarding search warrant application and execution procedures. This discussion focuses on federal constitutional requirements, while noting frequently recurring state law issues.

United States Constitution, Amendment IV

“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 warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

So, the Fourth Amendment requires that:

1. All searches and seizures be “reasonable.”

2. Warrants are based on “probable cause.”

3. Warrants are supported by “oath or affirmation.”

4. Warrants “particularly describe” the place to be searched and person or things to be seized.

Exceptions to the Warrant Requirement (CALEA 1.2.4G)

As earlier discussed, not every search and/or seizure requires a search warrant. There are a variety of searches that fall within well-established exceptions to the warrant requirement. Examples include frisks, the “plain feel” doctrine, the Carroll doctrine, searches incident to lawful arrests, exigent circumstances not created by the officer, hot pursuits, the community caretaker doctrine, and inventory searches. Certain other police actions do not require a warrant because they are not searches as that term is defined in Fourth Amendment law. Examples include consent “searches,” observations in open fields and woods, certain other observations/perceptions in or of public areas such as the “plain view” doctrine (including aerial observations) and “plain smell” (your perception or a canine’s), and abandoned property (such as garbage that is placed out for collection).
A brief discussion regarding the use of police canines. On March 26, 2013, the United States Supreme Court decided the case of Florida v. Jardines, 569 U.S.____11564 (2013). The issue in Jardines was the use of a drug-sniffing dog at Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Court ruled “the investigation of Jardines' home was a “search” within the meaning of the Fourth Amendment.” And while a police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because that is “no more than any private [Slip Op. II] citizen might do, (Kentucky v. King, 563 U.S.____091272,____) the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search. Pp. 5-8.

The Benefits of a Warrant

Where the law is unclear as to whether or not a warrantless search is permitted, officers might consider:

1. A search warrant will sometimes permit a more extensive search than would be the case if a warrantless search were conducted.

2. Obtaining a warrant often will help protect an officer from civil liability and/or criminal prosecution.

3. There is a procedural advantage in obtaining a warrant. The criminal defendant has the burden of showing lack of probable cause or other defect when trying to suppress evidence seized pursuant to a warrant. The prosecution has the burden of proving probable cause when searches and seizures are made without a warrant and of proving that the warrantless search was lawful.

4. Evidence seized pursuant to a warrant is sometimes admissible even when it is ultimately determined that probable cause was lacking. Under Federal law, there is a partial “good faith” exception to the exclusionary rule when an officer reasonably relies on an apparently valid search warrant. See Massachusetts v. Sheppard, 468 U. S. 981 (1984) and United States v. Leon, 468 U. S. 897 (1984). See also Colaw v. Commonwealth, 32 Va. App. 806, 531 S.E.2d 31 (2000).

Definitions

What is a search warrant?

A search warrant is a judicial order. Typically, it commands that a law enforcement officer (with territorial jurisdiction) conduct the search and seizure action(s) authorized by the warrant. A more accurate name for a search warrant would be a “search and seizure” warrant because nearly all search warrants command a seizure.

What is a seizure?

Generally, a seizure is a significant governmental interference with someone’s possessory interest in property. It is possible, though, that a search warrant could command a seizure of a person, such as where a search warrant authorizes entry into private premises to search for a person to be arrested. Arrests are seizures of persons. The thing to be seized, whether an item of property or a person, is almost always the ultimate goal of a search warrant.
What is a search?

A search is a governmental intrusion upon a reasonable expectation of privacy. When an officer intrudes upon a reasonable expectation of privacy, a search warrant will be required, unless the action falls within a recognized exception to the search warrant requirement.

What is Involved in Applying for a Search Warrant?

A search warrant application consists mainly of several descriptions and a probable cause statement. Every jurisdiction publishes forms that guide the application process.

Descriptions

The Fourth Amendment explicitly requires that search warrants particularly describe both the places to be searched and the person(s) and/or thing(s) to be seized. This is the first major component of a search warrant application. If this requirement is not met, the warrant is constitutionally defective, resulting evidence will usually be suppressed, and liability exposures are created. There are actually three things that must be sufficiently described:

1. The Crime (that is believed to have occurred)

2. The Evidence (that is to be seized)

3. The Place (that is to be searched)

In describing the crime, it is best to use a plain-language reference. See Carratt v. Commonwealth, 215 Va. 55, 205 S.E.2d 653 (1974). The affiant may choose to include the state code citation. “Rape” would be a sufficient crime description.

In describing the things(s) to be seized (evidence), the effort is to describe the item (or person) well enough to make it unlikely that the wrong thing (or person) will be seized. See Morke v. Commonwealth, 14 Va. App. 496, 419 S.E.2d 410 (1992). Looser descriptions are accepted when the item(s) to be seized may not be lawfully possessed because all contraband is subject to seizure. So, for example, “cocaine” might be a sufficient description even though there was no description of the variety or packaging. To use such a generic description of an item that may be lawfully possessed (e.g. “television”) generally would not be sufficiently particular. More descriptive information would be required. Persons should be described by name (if known), age, race, gender, and as detailed a physical description as is available.

Additionally, § 19.2-53 specifies what may be seized under the authority of a search warrant:

Search warrants may be issued for the search of or for specified places, things or persons, and seizure therefrom of the following things as specified in the warrant:

(1) Weapons or other objects used in the commission of crime;

(2) Articles or things the sale or possession of which is unlawful;

(3) Stolen property or the fruits of any crime;

(4) Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime.
In describing the place(s) to be searched, a rule of thumb should be considered: Describe the place well enough that a person (officer) unfamiliar with the case could take the description, go out into the world, and find the right place. See Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970) “… a search warrant must describe with specificity the premises to be searched. All that is required, however, is that the description be such that the officer. . . can, with reasonable effort, ascertain and identify the place intended.” The same principle would apply to vehicle tag numbers and physical descriptions. If it is known that vehicles and outbuildings are to be included in a search of certain premises, they should be mentioned and described as well as possible.

**The Probable Cause Statement**

The second major component of a search warrant application is the probable cause statement. The key to success in writing a probable cause statement is organizing information on paper before writing out the probable cause statement and completing the application. Such an outline or worksheet might start this way:

1. List each item of information by date received.
2. For each item of information, identify the source(s).
3. In respect to each source, state why the source should be believed.

Addressing these issues in writing is the first step toward writing a good probable cause statement. Ultimately, the probable cause statement must link the crime, the place to be searched, and the evidence to be seized by credible information sufficient to form at least a fair probability that the evidence to be seized is in the place to be searched.

**Why Should the Information be Believed?**

“Hearsay” is information from a source other than the officer’s personal observations. For all hearsay information in a search warrant application, there ideally will be information showing:

1. How the source obtained the information; and
2. Why the hearsay source should be believed.

Prior to Illinois v. Gates, 103 S. Ct. 2317 (1983), satisfying this two-prong test was a strict requirement for establishing probable cause on the basis of information supplied by an informant. In Gates, the United States Supreme Court abandoned the requirement that this two-part test be satisfied and held that the informant’s reliability and personal basis of knowledge are simply relevant factors to consider when making a probable cause determination. According to Gates, probable cause does not depend on a rigid test. Instead, it involves a common sense judgment based on the “totality of the circumstances.” Although satisfying the two-prong test (informant’s reliability and basis of knowledge) is no longer strictly required, it remains an extremely valuable drafting technique. Usually, it is possible to give some reason why a hearsay source should be believed. If the source is a law enforcement officer, that is usually enough. If the source is a regular citizen reporting a crime or an eyewitness, the search warrant application should say things like: “This source is simply a concerned good citizen, is not a paid police informer, is gainfully employed, and has no known reason to lie to police.”

If the source is a regular police informant (and a criminal himself), the source’s record, if any, for...
providing accurate information in the past should be recited. If the informant admits participating in the crime, that fact should be included.

**Corroboration**

“Corroboration” is verifying the accuracy of information received. This can establish a basis for believing a source of whom little or nothing is known and/or who has no history of providing accurate information. Anything that can be corroborated adds strength to the source’s information. Even an anonymous tip often can be corroborated by checking out the details received. Particularly if the anonymous source can predict accurately future events or provide accurate detailed information that requires insider knowledge, there is reason to accord the tipster heightened credibility. See, as examples, *Alabama v. White*, 110 S. Ct. 2412 (1990) and *Illinois v. Gates*, 103 S. Ct. 2317 (1983). If, however, all an anonymous tipster can do is describe a person who is already in a public place - something anyone can do - and then add a conclusory statement of criminal involvement, that is not enough even to establish reasonable suspicion. See, for example, *Florida v. J. L.*, 529 U. S. 266 (2000).

**What is Enough for Probable Cause?**

There is no legal formula or scientific test for how much is enough to establish probable cause. Probable cause is ultimately a matter of opinion. As a practical matter, if enough judges agree that the information is sufficient, then there is probable cause. Still, it may help to conceptualize a bit. Establishing probable cause does not require satisfying a mathematical “more likely than not” standard. In other words, probable cause may not require a 51% likelihood. It requires more than just reasonable suspicion but may be less demanding than the preponderance, or greater weight, of the evidence. See *Maryland v. Pringle*, 124S. Ct.795 (2003), in which the Court states that the preponderance of the evidence standard “has no place” in a probable cause determination.

Probable cause admits to the possibility of error. Even at 51% likelihood, the potential for mistake is almost as high as the likelihood of correctness. Probable cause is only a fair probability, not a certainty or proof beyond a reasonable doubt. It is ultimately a common sense judgment made in light of the officer’s training and experience and based on the “totality” of the circumstances. See *Garza v. Commonwealth*, 228 Va. 559, 323 S.E.2d 127 (1984). “Probable cause, as the very name implies, deals with probabilities. These are not technical; they are the factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act. Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed.”

**Obtaining the Warrant**

When the application form is completed satisfactorily, it may be taken to a neutral, detached judicial official (judge, magistrate, or other person who has authority under state law to issue search warrants). In the presence of that official, the applicant must swear or affirm that the application (often called the “affidavit”) is true. If the reviewing official finds the application to be satisfactory, a search warrant (usually on the same form or set of forms) will be issued. Law enforcement officials then must “execute” the warrant.

**Search Warrant Execution**

While the process of executing a search warrant is partly a matter of state law, certain aspects of the process are fundamental to Federal constitutional law. For example, the scope of the search must be based on the probable cause and can be no more expansive (or intrusive) than the probable cause would
Following are some questions and considerations that should be part of search warrant “execution”:

1. The “Look Right” Test
Does the warrant “look right”? Is the application signed and dated by the applicant and by the issuing judicial official? Does the document contain all its parts? Are all the blocks filled in? Does it look like something’s missing? Do the dates make sense? Does the document make sense when you read it? An officer may be held civilly liable for executing an obviously defective warrant. Groh v. Ramirez, 540 U.S. 551 (2004).

2. Jurisdictional Issues

Does the judicial official issuing the warrant have both territorial and subject matter jurisdiction to issue this warrant? Do the officers who will execute this warrant have both territorial and subject matter jurisdiction to do so?

3. Time Frames
How long is allowed to execute this order? Is this order still valid? States typically have laws that a warrant must be executed within a particular period of time following its issuance. So police may have to begin (or complete) the search within a prescribed period of time under state law. Some states require that certain kinds of warrants be executed only during certain daylight hours. Code § 19.2-56 contains two time limitations, a fifteen-day bar and a “forthwith” requirement. The fifteen-day bar “serves to extinguish absolutely the viability of a search warrant if not executed within fifteen days, regardless of circumstances.” Turner v. Commonwealth, 14 Va. App. 737, 420 S.E.2d at 237. The “forthwith” requirement, on the other hand, “has an independent substantive meaning,” id. at 742, 420 S.E.2d at 238, and is intended to “define the policy of the Commonwealth that search warrants be executed as soon as reasonably practical [and] while probable cause continues to exist.”

4. Check of Probable Cause
Has probable cause evaporated? Has the passage of time changed things? Has something new been learned that has caused deterioration of the probable cause? If probable cause has evaporated, the warrant should not be executed but should be returned to the issuing authority for further instructions.

5. Re-Check Description(s)
What is the scope of the authorized search? Care must be taken not to search areas which are not within the probable cause or that are outside the description of places to be searched under the warrant. What are the items to be seized under the warrant? Seizures of items not described in the warrant may sometimes be lawful under the plain view doctrine of warrantless seizure. Consideration should include any state law rules regarding items seized while executing a search warrant. Also, a United States Supreme Court decision, Arizona v. Hicks, 107 S. Ct. 1149 (1987), makes clear that, to seize an item under the plain view doctrine, one must have probable cause to believe that it is evidence of a crime. It is not enough just to suspect that it is. So, if an item is not listed as an item to be seized in the warrant application, and it is going to be seized, there must be probable cause to believe it is evidence of a crime. That probable cause must exist before the seizure occurs.

6. Knock and Announce Requirements
The Fourth Amendment and most states usually require giving notice of identity and purpose prior to entry. These are commonly referred to as “knock and announce” rules. In Virginia the Announcement Doctrine requires “that the police, prior to forcing entry into a dwelling: (1) knock; (2) identify themselves as police officers; (3) indicate the reason for their presence; and (4) wait a reasonable period
of time for the occupants to answer the door.” *Gladden v. Commonwealth*, 11 Va. App. 595, 598, 400 S.E.2d 791, 793 (1991). However, both Federal and state law may permit “no knock” entries under certain circumstances. The Fourth Amendment allows a “no knock” entry if the officer has reasonable suspicion that giving notice would:

1. Endanger someone, or
2. Be futile, or
3. Inhibit effective investigation.


The Supreme Court first announced a “no-knock entry” in the execution of a search warrant in *Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972). The Court acknowledged that no statute existed relating to “no-knock entries.” *Id.* at 103, 189 S.E.2d at 679. Therefore, the validity of the search must be judged according to its reasonableness within the meaning of the fourth amendment to the United States Constitution and article 1, § 10 of the Constitution of Virginia. Subsequently, in *Heaton v. Commonwealth*, 215 Va. 137, 207 S.E.2d 829 (1974), the Court articulated the circumstances in which a “no-knock entry” would be considered reasonable for fourth amendment purposes:

“Generally, police officers, before resorting to forced entry into premises to be searched under warrant, must attempt to gain admittance peaceably by announcing their presence, identifying themselves as police officers and stating their purpose. Exceptions to the general rule, however, permit officers to make an unannounced entry where they have probable cause to believe that their peril would be increased if they announced their presence or that the unannounced entry is necessary to prevent persons within from escaping or destroying evidence. Unless an exception can be established by the prosecution, evidence seized after a “no-knock” entry is excluded under the Fourth Amendment.”

See also *United States v. Beckford*, 962 F.Supp. 767 “…under both Virginia and federal law, police officers may effect ‘no knock’ entries based on exigent circumstances only as they exist at the time of entry as opposed to the time when the search warrant was issued.”

7. **Wait Time**
What is the appropriate “wait time” after the knock and announcement? In some drug cases, a 15 – 20 second wait time is sufficient. See *United States v. Banks*, 124 S.Ct. 2058 (2003). A shorter time than that could be enough under some circumstances. The required “wait time” is not dependent on how long it would take someone to get to the door but rather how long it would take to destroy the evidence sought.

8. **“Outside” Assistance**
What about “outside” assistance in the execution of the warrant? There are times when a private person could assist dramatically, allowing searches to proceed more quickly, more efficiently, and with less damage. It is also possible that use of a scent detection dog could help in searches. It is best to have specific judicial authorization (in the warrant) if a non-police person is to assist in the search. See § 19.2-56: “No other person may be permitted to be present during or participate in the execution of a warrant to search a place except (i) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the conduct of the search and (ii) persons designated by the officer in charge of the conduct of the search to assist or provide expertise in the conduct of the search.”
9. Detaining and Restraining Persons Present

The United States Supreme Court holds in *Michigan v. Summers*, 101 S. Ct. 2587 (1981) that persons present at the scene of a search warrant execution usually may be detained during the search. However, it is possible that, under some circumstances, it would be unreasonable (and unconstitutional) to detain such persons, even if a state statute would permit the detention. For example, following a person from the location of a search warrant execution and conducting a stop and frisk based on the authority of the search warrant when the person is stopped some distance from the location to be searched. See *Bailey v. United States*, 568 U.S. 11770 (2013).

Movement within the premises of persons present may be restricted and/or required as reasonably necessary for the safe and effective conduct of the search. See, for example, *Illinois v. McArthur* 531 U. S. 326 (2001). It is advisable, when possible, to show consideration for personal and/or emotional needs of persons present. In situations where the search is likely to take a great deal of time, special additional thought should be given to whether or not detention of all persons present is reasonable. Decisions should be made accordingly. In inherently dangerous search warrant executions (involving drug dealers, weapons, etc.) occupants may be restrained in handcuffs. *Muller v. Mena*, 125 U. S. 145 (2005).

10. Protective Sweeps

Thought should be given, in advance if possible, to the extent and nature of any “protective sweep” that is likely to be required. Circumstances on scene could change the plan, of course, but it is still a good idea to have a plan. A protective sweep search presents no legal problems unless it extends to areas that would not be searched anyway under the search warrant. These questions should arise, and be resolved, when determining the scope of the search under the warrant. Naturally, officers are permitted to take reasonable protective actions as circumstances arise and shift during the execution of the warrant. Reasonable suspicion is the factual justification requirement for protective sweeps of areas that are not already covered by the search warrant or immediately adjacent to the areas covered. See *Maryland v. Buie*, 494 U. S. 325 (1990).

11. Special Tools and Tactics

To what extent is it appropriate (or not appropriate) to involve the SWAT team in the warrant execution? What about the use of diversionary devices and distracters like “flash-bangs,” etc? Would they create unreasonable dangers under the circumstances or do clear and present risks justify their use? What about gun-pointing, putting people on the floor, and handcuffing? Will those measures likely be reasonable or might they be excessive given the circumstances?

12. Searches of Persons Present

What about searching persons present or who arrive at private premises during the execution of the warrant? A United States Supreme Court decision, *Ybarra v. Illinois*, 100 S. Ct. 338 (1979), holds that persons in a public area (a bar, in that case) may not be automatically frisked just because police are executing a search warrant in the premises. Instead, officers must adhere to normal legal requirements for non-consensual frisks -- reasonable suspicion of the presence of weapons. It is advisable to follow the same rule in private premises searches, even though some states have statutory law that purports to allow essentially automatic frisks in such cases. Upon entering the premises, a full search of persons present may be conducted if the persons are described as “places” to be searched under the warrant or if there is already probable cause to arrest those persons. In other situations, it is sometimes advisable to postpone the decision as to full search of persons present until the premises search is complete. At that time, it may be easier to determine whether or not there is probable cause to search and/or arrest the persons present and a better decision can be made. Persons present are not necessarily subject to frisk and/or full search just because they are on the premises where a search warrant is executed. Any such
searches must be carefully conformed to the reasonableness requirement of the Fourth Amendment, even if state statutory law purports to authorize “automatic” searches.

[Note: The term “full search” used in the above paragraph means the kind of search typically conducted by an officer in a thorough search incident to arrest. It would not usually include strip searches, complete or partial, and would definitely not include body cavity searches except under the most compelling exigent circumstances. Body cavity probes should be conducted only by certified medical personnel.]

13. Media Involvement
In 1999, the United States Supreme Court decided in two cases that the Fourth Amendment prohibits taking or allowing news media representatives into private premises with a search team. This method of creating publicity is now clearly unconstitutional. See Hanlon v. Berger, 526 U. S. 808 (1999) and Wilson v. Layne, 526 U. S. 603 (1999). Of course these holdings do not eliminate the possibility of a voluntary consent from residents/occupants to the media intrusion. In seeking such a consent police would have to communicate very carefully, in order to avoid coerciveness that could otherwise be present in such a transaction.

14. Length of Search
The search pursuant to warrant should be terminated when all items subject to seizure under the warrant have been located or when it has become apparent that a search of reasonable scope and duration will not disclose the items to be seized. In some cases, it may be necessary and/or desirable to seek the issuance of a second warrant so that additional search action may be lawfully conducted.

15. Securing Premises
When leaving the search scene, particularly one that is (or will be, because of arrests) unoccupied, reasonable steps should be taken to assure that the premises are protected and/or secured. This may sometimes require providing police protection of the premises until repairs can be made or other security measures can be arranged and completed.

16. Care of Evidence
Great care should be taken to assure that items seized during the search are protected and accounted for through a strict chain of custody. State law and agency policy should be reviewed to assure compliance with inventory and receipt requirements.

17. “Return” of Warrant
Virginia Code § 19.2-57 requires that “The officer who seizes any property shall prepare an inventory thereof, under oath. An inventory of any seized property shall be produced before the court designated in the warrant. The officer executing the warrant shall endorse the date of execution thereon and shall file the warrant, with the inventory attached (or a notation that no property was seized) and the accompanying affidavit, unless such affidavit was made by voice or videotape recording, within three days after the execution of such search warrant in the circuit court clerk's office, wherein the search was made, as provided in § 19.2-54. Saturdays, Sundays, or any federal or state legal holiday shall not be used in computing the three-day filing period.”

18. After Action Report
Although not a legal requirement, a thorough documentation of the activities surrounding search warrant execution is a good idea, both to minimize liability exposure and to further other organizational work - policy making, training etc.
The term “good faith” (also the good-faith exemption or good-faith doctrine) is a term that gets tossed about, sometimes recklessly and without a full understanding of the concept, in the law enforcement arena. Often officers think that if they do something wrong their actions can automatically be saved by the “good faith” doctrine. This is not necessarily the case. We will examine the concept of “good faith” as it relates first to actions taken under the authority of a search warrant, second arrests, and finally as it relates to case prosecution.

What is “good faith”?

Within constitutional law, “good faith” is a doctrine providing an exemption to the long-standing exclusionary rule. This exemption allows evidence collected in violation of the Fourth Amendment to be admitted at trial if police officers acted in “good faith;” that is, they had reason to believe their actions were legal (measured under the reasonable person test). “The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.” Michigan v. Tucker, 417 U.S. 433, 447 (1974). See also Herring v. United States, 555 U.S. 07513.

As stated by Devalis Rutledge in his article The “Good Faith” Doctrine, “The good faith rule does not apply merely because an officer was unaware of a court ruling holding that particular conduct violates the Fourth Amendment. Rather, it must appear to the court not only that the officer had a subjective “good faith” belief that his or her actions were lawful, but also that it was objectively reasonable for the officer to hold that belief. A mistaken belief based on inadequate training or a lack of awareness of legal requirements for valid searches and seizures does not qualify as “good faith.” Just as a suspect's ignorance of the law is no excuse for violating a statute, an officer's ignorance of the law is no excuse for violating the Constitution.”

Search Warrants

The landmark case regarding “good faith” is United States v. Leon, 468 U.S. 897, 923 (1984), in which the United States Supreme Court decided that “The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.” Fortunately, “The good faith exception to the exclusionary rule has been adopted in Virginia.” Polston v. Commonwealth, 255 Va. 500, 500, 498 S.E.2d 924,____(1998). So the critical question in the “good faith” analysis is “… whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.” Adams v. Commonwealth, 275 Va. 260, 261, 657 S.E.2d 87,____(2008). If that can be answered in the negative, then, generally speaking, “good faith” can save the actions of the officer(s). Because, “The exclusionary rule is designed to deter police misconduct, and this deterrent is not applicable when a police officer, acting in objective good faith, obtains a search warrant from a magistrate and conducts a search within the scope of the warrant.” Polston v. Commonwealth, 255 Va. 500, 500, 498 S.E.2d 924,____(1998).

Officers should be aware that there are “Four circumstances in which the good-faith exception to the exclusionary rule would not apply are: (1) When the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) when the issuing magistrate wholly abandoned his judicial role; (3) when an affidavit is so
lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.” Ward v. Commonwealth, 273 Va. 211, 213, 639 S.E.2d 269,____(2007) quoting Leon.

Arrests

Arrests must be based on probable cause, but, within the construct of the Fourth Amendment, probable cause is all that is needed. A lack of probable cause will not be rehabilitated by “good faith”. Take, for example, what the Court had to say when agents made an arrest on less than probable cause: “Evidence required to establish guilt is not necessary. Brinegar v. United States, 338 U.S. 160; Draper v. United States, 358 U.S. 307. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.” Stacey v. Emery, 97 U.S. 642, 645. And see Director General v. Kastenbaum, 263 U.S. 25, 28; United States v. Di Re, supra, at 592; Giordenello v. United States, supra, at 486. “It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. Carroll v. United States, 267 U.S. 132, 156. And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause.” Carroll v. United States, supra, at 155-156. This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. We turn then to the question whether prudent men in the shoes of these officers (Brinegar v. United States, supra, at 175) would have seen enough to permit them to believe that petitioner was violating or had violated the law. We think not.” Henry v. United States, 361 U.S. 98, 102 (1959).

“A warrantless arrest that is not based upon probable cause is unconstitutional and evidence seized as a result of an unconstitutional arrest is inadmissible, without regard to the officer’s good faith and reasonable belief that he was not factually or legally mistaken.” Ford v. City of Newport News, 23 Va. App. 137, 145, 474 S.E.2d 848, 852 (1996). “An arrest not supported by probable cause is not made lawful by an officer’s subjective belief that an offense has been committed.” Golden v. Commonwealth, 30 Va. App. 618, 625, 519 S.E.2d 378,____(1999). ‘The officers’ mistaken belief that appellant was the person named in the capias did not make the capias an instrument upon which the police could lawfully arrest appellant, even if that mistake was made in good faith. The police officers became aggressors when they attempted to arrest a person not named in the capias upon which they relied for the arrest, and they were at fault in the confrontation. See Foote, 11 Va. App. at 69, 396 S.E.2d at 856. Appellant was not required to surrender to the officers based on the capias issued for another person's arrest. Because the arrest was unlawful, appellant had the right to resist upon self-defense principles. The Commonwealth cannot expunge that right even by showing the officers acted in “good faith.”’ Brown v. Commonwealth, 27 Va. App. 111, 117-118, 497 S.E.2d 527,____(1998).

Fortunately, however, the courts do allow some room for error on the part of the police. Even the arrest of the wrong person, so long as the arrest was based on probable cause, can possibly be saved by the “good faith” of the officers. See Brinegar v. United States, 338 U.S. 160, 176 (1949). “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” See also Hill v. California, 401 U.S. 797, 803-804 (1971) where the police arrested the wrong individual and conducted a search incident to arrest: “The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search.” But, “Here there was probable cause to arrest Hill and the
police arrested Miller in Hill’s apartment, reasonably believing him to be Hill. In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed.”

Less intrusive seizures are not significantly different. “An officer's detention of an individual based on a mistaken view that he or she has witnessed a violation of law is not objectively reasonable, however, and, therefore, is unlawful.” See United States v. Lopez-Valdez, 178 F.3d 282, 288-89 (5th Cir. 1999) (holding that an officer's detention of the accused for what the officer mistakenly believed was a violation of the Code was unreasonable). Likewise, “An officer's good intentions cannot convert an objectively unreasonable view of the law into a lawful detention. “”[G]ood faith on the part of the arresting officer is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects, only in the discretion of the police.’” Terry, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)) (internal quotations and citations omitted). “[I]f officers are allowed to stop [individuals] based upon their subjective belief that . . . laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of . . . infractions as pretext for effecting [detentions] seems boundless and the costs to privacy rights excessive.” Lopez-Valdez, 178 F.3d at 289. Hamlin v. Commonwealth, 33 Va. App. 494, 505, 534 S.E.2d 363,____(2000).

Prosecution

Officers bear a significant responsibility when it comes to the prosecution of their cases. Specifically, “good faith” will not be a defense for failing to turn over favorable evidence. “The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Muhammad v. Commonwealth, 269 Va. 451, 461, 619 S.E.2d 16,____(2005) quoting Brady. And later, “Whether evidence is material and exculpatory and, therefore, subject to disclosure under Brady v. Maryland, 373 U.S. 83, 87 (1963), is a decision left to the prosecution. Inherent in making this decision is the possibility that the prosecution will mischaracterize evidence, albeit in good faith, and withhold material exculpatory evidence which the defendant is entitled to have under the dictates of Brady. If the defendant does not receive such evidence, or if the defendant learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in Brady are violated.”

Summary

While the “good faith” doctrine may exist in certain situations to rehabilitate an officer’s actions, it is not a legal concept that officers should consistently rely upon when performing their duties. Virginia Beach Police Officers are viewed as reasonably well-trained officers and are expected to thoroughly and thoughtfully consider their actions to ensure they are lawful.

USE OF FORCE

The Fourth Amendment Standard of “Objective Reasonableness”

Allegedly excessive force by police has long been the subject of lawsuits and litigation and for many years there was a split in the federal appeals courts as to what constitutional standard should be used to measure such matters. The question was answered by the United States Supreme Court in Graham v. Connor, 490 U.S. 386 (1989). In Graham, the Court held that police use of force to seize people (who are not already jailed or imprisoned) should be analyzed under the Fourth Amendment’s “objective
Until *Graham*, two leading cases guided use of force analysis and both used subjective tests. In *Rochin v. California*, 342 U. S. 165 (1952), the Court concerned itself with behavior that “shocks the conscience.” In *Johnson v. Glick*, 481 F. 2d 1028 (2nd Cir. 1973), the focus was whether the force was applied in a good faith effort to maintain order or sadistically and with malice for the very purpose of causing harm. These cases created tests, which turned on the involved officer’s state of mind and heart and/or the sensibilities of a particular judge or jury. *Graham v. Connor* (addressing field police activities) erased these comparatively subjective standards and replaced them with one that does not involve subjective inquiries into the law enforcement officer’s thoughts, feelings, and motivations. Instead, *Graham* requires examination of only objective circumstances and a “reasonable” officer’s response to them.

On November 12, 1984, Dethorne Graham (the plaintiff) was driven by a friend, William Berry, to a convenience store near his (Graham’s) home. Graham quickly entered the store but immediately left again in a hurried manner, getting back into the car with Berry, who quickly drove away. M.S. Connor, a Charlotte police officer, saw all of this. His suspicions aroused, he followed Berry and Graham in his patrol car. Approximately one-half mile from the convenience store, Officer Connor stopped the car containing Berry and Graham to ascertain what, if anything had happened at the convenience store. When Connor approached the car, Berry told Connor that Graham was simply having a “sugar reaction.” Connor directed them to wait. After Connor told him he had to wait, Graham got out of Berry’s car, running around it twice. Berry asked for Connor’s help and, together, they caught Graham and held him, though he was still struggling. In the meantime, four other uniformed Charlotte police officers arrived in response to Officer Connor’s request for assistance. They struggled with Graham, before eventually handcuffing him and placing him in a police car. When Officer Connor learned that Graham had committed no crime in the convenience store, police took Graham home and released him. At some point during this contact with police, Graham broke his foot, received cuts on the wrists, bruises on his forehead, and a shoulder injury. He also claimed to have developed a loud ringing in his ear.

As bad luck would have it, he was indeed an insulin dependent diabetic suffering an insulin reaction. Graham sued the five officers and the City of Charlotte under Section 1983, alleging excessive force in the investigatory stop. The case was tried before a jury but, at the close of plaintiff’s evidence, the trial court directed verdicts for defendants, using a partly subjective test (pursuant to *Johnson v. Glick*) and finding no evidence of malice or bad faith. An appeal by plaintiff to the United States Court of Appeals for the Fourth Circuit was unsuccessful; the directed verdict for defendants was affirmed. Plaintiff then appealed to the United States Supreme Court, which accepted the case for review. Without holding police liable, the Supreme Court found that the lower courts had applied an incorrect standard, then set a new one, referring initially to its 4 year old deadly force decision in *Tennessee v. Garner*, 471 U. S. 1 (1985):

> “Today we make explicit what was implicit in Garner’s analysis, and hold that all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach...”

> “Legal analysis in this area requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”
Adding to the picture, the *Graham* Court continued:

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Noting that other areas of Fourth Amendment law allow an officer leeway for imperfect decision making, especially given the difficulties of police work, the Court then observes, quoting in part from *Johnson v. Glick*:

“...with respect to a claim of excessive force, the same standard of reasonableness at the moment applies: ‘Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,’ violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.”

“As in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

...The Fourth Amendment inquiry is one of ‘objective reasonableness’ under the circumstances, and subjective concepts like ‘malice’ and ‘sadism’ have no proper place in that inquiry.”

Because the District Court and the Court of Appeals erroneous applied a subjective standard, the case was sent back for reconsideration under the newly prescribed Fourth Amendment standard of objective reasonableness. In the ensuing new trial using the objective standard, police defendants again won - this time in a jury verdict in their favor.

The use of force by police officers to seize “free men” (as opposed to persons already confined in jails and prisons) is regulated by the reasonableness standard of the Fourth Amendment. This standard is objective - could a reasonable, well trained officer think it necessary to use a like amount of force under like circumstances? If the answer is “yes,” the force is reasonable and therefore constitutional.

However, the Supreme Court of Virginia has said this about using unreasonable force: “when an officer attempts to arrest a person charged with a felony and uses more force than is reasonably necessary to make the arrest, the officer himself becomes a wrongdoer and the person whose arrest is sought, if himself without fault, can resist such excessive force and even kill the officer if necessary to preserve his own life.” *Palmer v. Commonwealth*, 143 Va. 592, 602-603, 130 S.E. 398, 401 (1925).

**Deadly Force**

*Tennessee v. Garner*, 471 U. S. 1 (1985) established a federal constitutional standard for police use of deadly force to prevent the escape of suspected criminals. The language of the Court’s opinion also shed some light on the issue of deadly force use by police in self-defense. According to the Supreme Court, the facts of *Tennessee v. Garner* were as follows:

At about 10:45 p.m. on October 3, 1974, two Memphs Police Officers, Hymon and Wright, were dispatched to answer a “prowler inside” call. Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that “they” or “someone” was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene. Hymon went behind the house. He heard a door slam and saw someone run across
the backyard. The fleeing suspect, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner’s face and hands. He saw no sign of a weapon and, though not certain, was “reasonably sure” that Garner was unarmed. He also thought Garner was 17 or 18 years old and 5’5” or 5’7” tall. (In fact, Garner turned out to be a 15 year old eighth grader, 5’4”, about 100 - 110 pounds.) While Garner was crouched at the base of the fence, Hymon called out “Police, Halt!” and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would escape, Hymon shot him. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found with him.

In using deadly force to prevent the escape, Hymon was acting under authority of a Tennessee statute and pursuant to Police Department policy, both of which allowed deadly force to prevent escape of (at least some) felony suspects. The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. The incident was reviewed by the Memphis Police Firearm’s Review Board and presented to a grand jury. Neither took action against Officer Hymon. When asked at trial why he fired, Hymon basically explained in detail why, had he not fired, the suspect likely would have gotten away. While today many would scoff at such a limited rationale, at the time of the incident much police policy and training embraced state statutory law, which in turn reflected the common law “fleeing felon rule” - all of which allowed use of deadly force in such circumstances. The United States Supreme Court decided to step in.

The issue in this case, according to the Court, was “the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon.” The Court held that “such force may not be used unless it is necessary to prevent the 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.”

“The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

“Where the officer has probable cause to believe…that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escapes by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

Analysis of the Garner opinion is aided by breaking down the immediately preceding paragraph into its subparts:

1. Life-threatening Escape. “Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.” This language focuses on the manner of escape and the threat posed by that escape. If the manner of the escape itself creates an imminent threat of death or serious physical harm to the officer or others, the Fourth Amendment permits deadly force to prevent the escape - without regard (necessarily) to the type of crime originally committed.
2. Life-threatening Felony. “...if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” (emphasis added) Here, the language (after the disjunctive “or”) focuses not on the manner of escape but on the nature of the crime that the suspect has apparently committed. It appears from this language that the Fourth Amendment permits deadly force to prevent escape of certain criminals, even if they are unarmed and non-threatening at the time of their escape efforts. See, for example, Forrett v. Richardson, 112 F. 3rd 416 (9th Cir. 1997).

3. Some Warning Where Feasible. In the clause analyzed immediately above, the Court creates a constitutional requirement that “some warning” be given prior to the use of deadly force “where feasible.” Because many states do not have such a state law requirement, this federal “warning” requirement is an important addition to the law. The absence of this warning, where feasible, could make an otherwise constitutional shooting unconstitutional. Presumably, the warning referred to is in the nature of “Police! Stop or I’ll shoot!”

4. If Necessary to Prevent Escape. These words impose what is known as the “reasonable necessity” rule. In order for deadly force to be constitutionally permissible, there must be probable cause to believe that the use of deadly force is “reasonably necessary” - that if deadly force is not employed, the escape will probably succeed. In some cases, “reasonable necessity” will mean that foot pursuit plus non-deadly force would not likely result in apprehension. In other cases, it will mean that delay in apprehension would create substantial and unreasonable risk to the police or others of death or serious physical injury.

What manner of escape activity will permit deadly force under the constitutional standard? What types of crimes will, in and of themselves, justify the use of deadly force to prevent escape of the perpetrator? Certainly the use or threatened use of a deadly weapon by the suspect in his escape effort creates constitutional authority to use deadly force to prevent the escape. Hostage taking and/or life-threatening attacks during escape efforts (even by unarmed suspects) would likely permit deadly force. Crimes that would seem to qualify as involving the infliction or threatened infliction of serious physical harm include homicides, armed robberies, and life threatening felonious assaults, as well as certain forms of kidnapping, arson, and rape. Although the Garner case does not make it clear, caution dictates that its rule regarding deadly force to apprehend these certain types of criminals probably should be applied only during the suspect’s immediate and continuous flight from the crime scene or area. Use of deadly force to prevent his escape when spotted two weeks (or two hours) after the crime is highly questionable, at best.

Federal constitutional law permits law enforcement officers to use deadly force to apprehend criminal suspects when there is “probable cause to believe that the suspect poses a threat of serious physical harm...to the officer or to others...” and if deadly force “is necessary” to effect the apprehensions. So two factors - dangerousness and necessity - are relevant to the question whether deadly force is constitutionally permissible.

[Note: Some state law and most police department policies are considerably more restrictive of deadly force than is the federal constitutional standard.]

No Requirement of Least Intrusive Alternative

Because the Graham v. Connor use of force standard has been so helpful to police in civil lawsuits, plaintiff’s attorneys often challenge officer decision-making on peripheral and preceding matters in an effort to make them the focus of constitutional concern. Such claims include:
1) Less intrusive alternatives were available and should have been used; therefore, the force actually used was not reasonable; or

2) The officer made choices and took actions that were not necessary, thereby creating the “necessity” for the use of force.

Fortunately for police, federal appeals courts have established a clearly discernible trend that an officer is not required by the Constitution to use the least intrusive force alternative, only a “reasonable” one. Also, the fact an officer could have made better choices or decisions in the events that preceded the application of force will not render the officer’s force response unconstitutional. So at least a trend in the federal courts would indicate.

In Cole v. Bone, 993 F. 2d 1328 (8th Cir. 1993), the Eighth Circuit United States Court of Appeals stated, “The Constitution...requires only that the seizure be objectively reasonable, not that the officer pursue the most prudent course of action as judged by 20/20 hindsight.” In Illinois v. LaFayette, 462 U. S. 840 (1983) (an inventory search case), the United States Supreme Court held that the Fourth Amendment does not require selection of “the least intrusive alternative, only a reasonable one.” In Plakas v. Drinski, 19 F. 3d 1143 (7th Cir. 1994), plaintiffs argued that the officer should have used non-deadly alternatives, such as chemical mace or a canine, to defeat the threat caused by a handcuffed but fireplace poker wielding assailant. The appellate court explained:

“There is no precedent in this Circuit (or any other) which says that the Constitution requires police to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases that support the assertion that where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.

“As [the suspect] moved toward [the officer], was he supposed to think of an attack dog, of...CS gas, of how fast he could run backward? Our answer is, and has been, no, because there is too little time for the officer to do so and too much opportunity to second-guess that officer.”

Responding directly to the plaintiff’s contention that police should have had, and used, non-deadly or “less-lethal” force equipment:

“There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator’s equipment list.”

Then rejecting the argument that the officer was constitutionally required to have acted differently in the events preceding the use of force, the court found that such analysis would “nearly always reveal that something different could have been done if the officer knew the future before it occurred…” and stated:

“Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.”

Likewise in Scott v. Henrich, 39 F. 3d 912 (9th Cir. 1992), the plaintiff claimed that the officers should have proceeded differently and thereby might have avoided the need for deadly force. The appellate
court rejected plaintiff’s argument and had this to say:

“Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.”

A more recent adoption of these principles is found in Scott v. Edinburg, 973 F. 2d 1328 (7th Cir. 1992). In that case, the Court noted that Section 1983 protects plaintiffs from constitutional violations - not violations of state law, departmental regulations, or best practices.

Another example of this line of decision making is Carter v. Buscher, 973 F. 2d 1328 (7th Cir. 1992). In that case, police created a plan to arrest a man who had contracted to have his wife killed. When the plan was executed, the suspect was able to shoot and kill one officer and wound another before being killed himself. Ironically (in the extreme), the deceased suspect’s wife (who was the intended victim of her husband’s contract murder plan) then sued police, alleging that they should have planned differently (and better) and thus would not have provoked her husband into firing on police and getting himself shot. The reviewing appeals court first found that “pre-seizure conduct is not subject to Fourth Amendment scrutiny,” then held: “Even if [officers] concocted a dubious scheme to bring about [the suspect’s] arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment.”

In some states, state law is more restrictive of police authority to use force than is the federal constitutional standard. In others, the state standard may be looser - purporting to allow officers greater authority to use force than would the Constitution - and is therefore unconstitutional. Also possible is a mixture; state law may impose certain rules to which must be added one or more federal constitutional requirements. In any event, the starting point is to understand the federal constitutional standard. It establishes the baseline: no state law (or agency policy) may be more permissive than is the Constitution. Then, officers must consider whether their state law or agency policy creates higher, i.e. more restrictive, standards which must be met, as well. Of course, in most states, nothing prevents a plaintiff from also bringing a force claim under a state law tort theory alleging (civil) assault, battery, and wrongful death, as examples. Given federal constitutional law in this area, many plaintiff’s attorneys will do just that.

**Deliberate Indifference**

In Canton v. Harris, 489 U.S. 378, 379 (1989) the United States Supreme Court ruled that “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact.” And that “the focus must be on whether the program is adequate to the tasks the particular employees must perform, and if it is not, on whether such inadequate training can justifiably be said to represent “city policy.” Moreover, the identified deficiency in the training program must be closely related to the ultimate injury.”  

**General Order 5.01**

Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training  
INTERVIEWS & INTERROGATIONS

Why Interview?

No one would argue against the need to interview victims, witnesses, and suspects of a crime. It is possibly the quickest way to determine the “who, what, where, when, and why” of a crime. Information gathered from interviews and interrogations can exonerate the innocent and implicate the guilty. As such, officers must be aware of the difference between inculpatory statements (admitting blame or otherwise implicating oneself or another) and exculpatory statements (clearing oneself or another from guilt or blame) and the critical need to document both.

RULE 7C:5 of the Supreme Court of Virginia provides that:

(c) Upon motion of an accused, the court shall order the prosecuting attorney or representative of the Commonwealth to permit the accused to hear, inspect and copy or photograph the following information or material when the existence of such is known or becomes known to the prosecuting attorney or representative of the Commonwealth and such material or information is to be offered in evidence against the accused in a General District Court:

(1) any relevant written or recorded statements or confessions made by the accused, or copies thereof and the substance of any oral statements and confession made by the accused to any law enforcement officer.

Officers should know that all statements that are made by victims, witnesses, and suspects of a crime will be surrendered to the defense upon the application of a motion for discovery; therefore, officers must keep detailed and accurate notes of all statements that are made.

Miranda Warnings

The United States Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966) has become part of American culture. The Miranda decision is derived from the Fifth Amendment, which (in pertinent part) prohibits government (and government agents) from “compelling” someone to incriminate himself in a criminal proceeding. In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court held “that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.” The Miranda decision requires that, in certain situations, police inform (advise) people of certain rights in order to undo some of the inherent coercion in some such situations. The Miranda rule is not offense-specific; it applies the same way to all criminal interrogations, whether they involve felonies or misdemeanors. In Dickerson v. United States, 530 U. S. 428 (2000), the Supreme Court held for the first time that the Miranda rule is part of the constitutional fabric of the United States and is not merely a technical safeguard. However, in 2003, in Chavez v. Martinez, 123 S. Ct. 1994 (2003), the Court held “mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.”

The Court then made clear that its decision does “not mean that police torture or other abuse that results in confession is constitutionally permissible as long as the statements are not used at trial.” So, a “mere” Miranda violation is unlikely to cause a constitutional rights deprivation unless it is coupled with other serious abuse or unless the statements are used at criminal trial against the person whose Miranda rights were violated. Intentional Miranda violations (to obtain “strategic” advantages) are prohibited even where the subject is subsequently advised of, and waives, Miranda rights. For example, if an investigator chooses to conduct an intentionally illegal (“un-Mirandized”) custodial interrogation to
“get the cat out of the bag” and then takes a “Mirandized” version of the same confession, both statements are inadmissible. Missouri v. Seibert, 124 S. Ct. 2601 (2004). If the preceding Miranda violation is unintentionally, a second statement can be saved by the proper use of Miranda warning and waiver procedures. Oregon v. Elstad, 470 U. S. 298 (1985). See also United States v. Fellers, (CA 8 2/15/05). And where physical evidence is derived from an illegally “un-Mirandized” custodial interrogation, that physical evidence may nonetheless be admissible. United States v. Patane, 124 S. Ct. 542 (2004).

[Note: While the Miranda Rule itself is a federal law principle, it is possible that a state could create, by statute or interpretation of state constitution, stricter “Miranda-type” requirements than exist under Federal law. For example, virtually every state has statutory law governing the interrogation of juveniles. Such law often includes special statutory requirements that go further than the federal Miranda Rule.]

The “Custody” Principle

In Miranda, the United States Supreme Court was concerned that the dynamics of custodial police interrogation create an “inherently coercive environment.” The Court therefore designed the Miranda rule to help protect a person’s Fifth Amendment privilege against compelled self-incrimination in that inherently coercive environment. So the Court, in Miranda, requires that an in-custody suspect be advised of his rights before police interrogation efforts may precede. Then, the subject can knowingly decide whether or not he or she wishes to assert (invoke) the rights or to waive them. A “waiver” is a voluntary relinquishment (giving up) of known rights.

The United States Supreme Court believed in 1966 (and apparently still does) that in the inherently coercive circumstances of police custody, a person could easily forget that he has the right to remain silent and to counsel and therefore a reminder is necessary. This reminder procedure (Miranda) has been called a “prophylactic” rule. It is a protective measure that helps shield the subject from the inherent coercion of custodial interrogation.

A pre-Miranda decision of the Supreme Court, Escobedo v. Illinois, 378 U.S. 478 (1964), resulted in what is today a pervasive myth some call “the focus of suspicion” test. This myth has been furthered by lawyers, judges and law enforcement officers. The myth has it that, when suspicion has focused on a particular person and/or when questioning has become accusatory in nature that person has become a suspect in a criminal investigation and Miranda warnings are therefore required prior to interrogation. The United States Supreme Court has squarely rejected the suspect/focus of suspicion test for Miranda. In the case of Beckwith v. U. S., 96 S. Ct. 1612 (1975), the Court announced and clearly settled that “custody, not focus of suspicion,” triggers the Miranda requirements. Miranda applies only when there is both custody and interrogation. So, if there is interrogation but no custody, or custody but no interrogation, the Miranda rule does not apply. The rule applies only when a person is in custody and is about to be interrogated by someone he knows to be a police officer. See Illinois v. Perkins, 110 S. Ct. 2394 (1990).

What is “Custody”? 

Understanding the concept of custody is essential to the proper application of Miranda rule. The decision of the United States Supreme Court in Berkemer v. McCarty, 1045 S. Ct. 3138 (1984), sets out an inquiry to determine whether or not a person is in custody for purposes of the Miranda requirement: Would a reasonable person feel he was subjected to those restraints normally associated with formal arrest? Ten years later, the Court re-stated this definition in Stansbury v. California, 114 S. Ct. 1526 (1994). See also Wass v. Commonwealth, 5 Va. App. 27, 359 S.E.2d 836 (1987) “It is only when a suspect’s freedom of movement is curtailed to a degree associated with a formal arrest that the suspect
is entitled to the full protection of *Miranda*; in making that determination, the situation must be viewed from the vantage point of how a reasonable man in the suspect's position would have understood his situation.”

In *Florida v. Bostick*, 111 S. Ct. 2382 (1991), though a Fourth Amendment “seizure” case rather than a *Miranda* “custody” decision, the United States Supreme Court made clear that a “reasonable” person is an innocent person. Presumably, an innocent person does not suffer the anxieties (and associated altered perceptions) that a guilty person does. The test for *Miranda* custody is an objective test. Therefore, presumably it does not matter if a guilty person may have felt he was in arrest custody as long as officers did not do or say anything that would cause an innocent person to feel that he was restrained to the degree normally associated with a formal arrest.

As discussed earlier, the United States Supreme Court recognizes three forms of officer-citizen contact: voluntary contact, investigative detention, and arrest. *Miranda* “custody” is most easily explained in terms of these three categories. A “voluntary contact” is consensual. The officer has not said or done anything that would cause a reasonable (innocent) person to feel he was being required to participate in the contact. Obviously, voluntary contacts are not custodial and, therefore, in such contacts interrogation is permitted without *Miranda*. *Miranda* is simply not applicable. Officers who work carefully and artfully through voluntary (non-custodial) contact can conduct a large percentage of their interrogations of criminal suspects without *Miranda* warnings or waiver requirements.

The second form of officer-citizen contact is the investigative detention or “*Terry Stop*.” It is a limited seizure of a person based on reasonable suspicion that the person is, has been, or is about to, engaged in criminal activity. The United States Supreme Court has squarely addressed the question of the applicability of the *Miranda* rule to interrogation during investigative detention. In two cases, *Berkemer v. McCarty*, 1045 S. Ct. 3138 (1984) and *Pennsylvania v. Bruder*, 109 S. Ct. 205 (1988) the Court has held that *Miranda* warnings are not required for interrogation in a field stop or investigative detention.

Even though an investigative detention is a seizure under the Fourth Amendment and the subject clearly is not free to leave, it is not the type of custody that the *Miranda* rule was designed to cover. See also *Dixon v. Commonwealth*, 270 Va. 34, 35-36, 613 S.E.2d 398. (2005) “Because both ordinary traffic stops and “*Terry stops*” are comparatively brief and noncoercive in nature, the United States Supreme Court has held that persons temporarily detained pursuant to such stops generally are not “in custody” for purposes of the *Miranda* rule.” Both *Berkemer v. McCarty* and *Pennsylvania v. Bruder* involved roadside interrogation of a detained motorist, but principles derived from those cases are applicable to other kinds of investigative stops based upon reasonable suspicion.

The third form of officer-citizen contact, arrest, is generally synonymous with “custody” for purposes of *Miranda*. An arrest is any seizure of a person that goes beyond the limits of a “*Terry Stop*” or investigative detention. While a “*Terry Stop*” is generally a brief, one location field contact, an arrest typically involves seizures of longer duration or in which persons are required by officers to move involuntarily from one location to another. Involuntary movement of a seized person from one place to another is a hallmark characteristic of an arrest in the constitutional sense. Use of force or restraints that are lawfully part of some investigative detentions may nonetheless cause a reasonable person to feel he has been subjected to restraints normally associated with formal arrest. While the term “custody” under *Miranda* has much the same meaning as the Fourth Amendment concept of “arrest,” *Miranda* “custody” likely includes the more intrusive *Terry* stops in which force and/or physical restraints are used and continued. See, for example, *United States v. Newton* (CA 2 5/26/04), involving a handcuffed detainee. See again *Dixon v. Commonwealth*, 270 Va. 34, 35-36, 613 S.E.2d 398. (2005) “While the presence of either of these factors (being restrained in handcuffs and being locked in a police patrol car), in the absence of the other, may not result in a curtailment of freedom ordinarily associated with a formal arrest, the presence of both factors compels the conclusion that a reasonable person subjected to

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*Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training*  
Intent to Arrest

The United States Supreme Court’s decision in Berkemer v. McCarty, discussed earlier, is perhaps the most important decision ever rendered regarding the Miranda rule. That case answers almost all of the most difficult questions concerning custody and the application of the rule. Berkemer clearly settles Miranda questions concerning situations where probable cause to arrest exists prior to the interrogation or is developed during the interrogation. In either case, the officer’s uncommunicated intent to arrest has absolutely no bearing or relevance on the question of Miranda custody. If the officer has not said or done anything that would cause a reasonable (innocent) person to believe that he is in arrest-type custody, it does not matter that the officer has abundant probable cause and intends to arrest the individual at the conclusion of the interview. What an officer is subjectively thinking or feeling concerning prospects of arrest are irrelevant, as long as they are not communicated to the subject. This remains true even when the suspect is a juvenile. Yarborough v. Alvarado, 541 U.S. 652 (2004).

What is “Interrogation”?

Even when a suspect is in custody, there is no Miranda requirement unless the suspect is exposed to police “interrogation.” The United States Supreme Court did not deliver the modern definition of interrogation until the case of Rhode Island v. Innis, 100 S. Ct. 1682 (1980). Interrogation is express questioning or its functional equivalent, words or conduct by police that they should know are reasonable likely to elicit an incriminating response from the suspect. Since words or conduct can constitute interrogation, apparently interrogation can occur without any questions being verbalized.

For example, suppose an officer places a suspect in a situation in which an incriminating response is very predictable by confronting him with an item of physical evidence from a crime scene (e.g., a robbery surveillance photograph) that ties him to the crime. This would likely be considered police interrogation even though no questions were verbalized. If the suspect is in custody, such “interrogation” would likely require prior Miranda warning and waiver.

Miranda applies only to police interrogation. In the case of Illinois v. Perkins, 110 S. Ct. 2394 (1990), the United States Court held that, if an in-custody suspect does not know his questioner is a police officer, there is no “inherent coercion” potential and Miranda does not apply. The reasoning: A person can not be coerced by police interrogation if he does not know his questioner is a police officer. Illinois v. Perkins involved the insertion of an undercover police officer into a jail facility to attempt to elicit incriminating information from a jail prisoner in regard to a crime with which he had not yet been formally charged.

[Note: The Sixth Amendment right to counsel provides additional legal protection to a person who has been formally charged with a crime. In that case, police are prohibited from deliberately eliciting incriminating evidence in regard to the formally charged offense, unless a valid waiver of Sixth Amendment rights has first been obtained. See United States v. Henry, 447 U. S. 264 (1980).]

The literal Miranda Warning

There is no magical written or verbal recipe for Miranda warnings. Rather, the Miranda rule simply requires that the following “message” be conveyed to anyone who is about to be subjected to custodial police interrogation:

1. You have the right to remain silent;
2. Anything you say can and will be used against you in court;

3. You have the right to talk with a lawyer and to have a lawyer with you during any questioning;

4. If you want a lawyer and cannot afford one, one will be appointed to represent you at no cost to you.

This is one version of a Miranda warning. All versions must convey these messages or they will be deemed insufficient. However, there is not an exact set of words that must be read verbatim in order to convey the Miranda message. The United States Supreme Court only requires that the Miranda message be conveyed in an understandable way. California v. Prysock, 101 S. Ct. 2806 (1981).

Additionally, it is the policy of the Virginia Beach Police Department that officers/detectives will advise a suspect of the following right after advising of the above listed four rights and before securing a waiver:

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

The United States Supreme Court ruled in Colorado v. Spring, 107 S. Ct. 851 (1987), that an officer does not have to inform a person of “all possible topics” or of the nature of the investigation as part of an advice of Miranda rights. However, it is not advisable for an officer to deceive the suspect concerning the subject matter of the pending custodial interrogation. While courts generally allow certain kinds of deception by police during interrogation (provided the suspect is mentally competent), the type of deception that must always be avoided is that which could affect the voluntariness of a waiver of rights. For example, a suspect who believed he was being questioned on a misdemeanor matter might waive his rights when, had he known the questioning actually concerned a murder, he instead might have chosen to remain silent and/or to seek legal counsel.

Re-Warnings

Periodically, questions arise as to when and if Miranda “re-warnings” are necessary. The United States Supreme Court has not addressed this issue but lower courts set out factors to consider in deciding whether a “re-warning” of Miranda rights is necessary following a break in interrogation:

1. The time span since the last Miranda warning;

2. Is the same or a different location being utilized for the interrogation?

3. Is the same or a different officer conducting the interrogation?

4. Are there apparent changes in the suspect’s mental or emotional state?

5. Is the same or different subject matter being discussed?

The threshold issue regarding re-warnings is whether the suspect is still aware that his earlier understood Miranda rights are still in effect. No one factor will necessarily be conclusive. The greater the uncertainty, the greater the need for a Miranda re-warning (and possibly re-waiver). See United States v. Gell-Iren, 146 F. 3d 827 (10th Cir. 1998) for a modern discussion of this issue, and United States v. Pruden (CA 3 2/23/05) where a 20 hour break in the interrogation did not necessitate a Miranda re-warning because all other factors had remained constant (the court noted this was a “close
The **Miranda Waiver**

A *Miranda* warning, standing alone, is legally insignificant. A valid *Miranda* waiver, however, allows interrogation to proceed and is of great legal consequence. The significance, then, of giving a *Miranda* warning is that it puts the officer in a position to obtain a valid waiver of those rights. A waiver (in this context) is a voluntary relinquishment of a known right. The *Miranda* warning is necessary to establish this known set of rights.

A typical waiver question is: “Having these rights in mind, are you willing to answer questions now without a lawyer present?” An affirmative response generally shows a voluntary relinquishment of known rights assuming, of course, that no unlawful coercion occurs during this process. A waiver of *Miranda* rights does not have to be in writing or even explicit. Any clear expression of willingness to have questioning proceed without a lawyer present may show a waiver. *New York v. Butler*, 99 S. Ct. 1755 (1979). See also *Burket v. Angelone*, 208 F. 3d 172 (4th Cir. 2000) as an example.

The waiver should be obtained before asking any interrogative questions of an in-custody subject. An officer should not begin interrogative questions until there has been a clear indication that the subject understands his rights and is willing to have questioning proceed without a lawyer. If a suspect’s reply is ambiguous, the officer should ask clarifying questions. Some lower courts have held that when a subject who understands his rights responds to interrogative questions, the fact that he is responding (when he knows he does not have to) shows a waiver of *Miranda* rights. This view seems inconsistent with the notion that waiver must precede interrogation. However, courts (and other experts) continue to disagree over this question.

It is the policy of the Virginia Beach Police Department that in order to secure a knowing, intelligent, and voluntary waiver of rights, the following questions should be asked and an affirmative response secured for each question:

1. Do you understand each of these rights I have explained to you?
2. Having these rights in mind, do you wish to talk to us?

**Exceptions to the Miranda Requirement**

There are generally two situations in which an in-custody suspect may be questioned without *Miranda* warnings and waiver. The first is the “public safety exception” to the *Miranda* rule. In the case of *New York v. Quarles*, 104 S. Ct. 2626 (1984), the United States Supreme Court made clear that when there is an objectively reasonable need for an officer to protect himself or the public from immediate danger associated with weapons, prompt questioning of the suspect regarding the location of the weapon(s) may occur without a *Miranda* warning and waiver. See *Benton v. Commonwealth*, 40 Va. App. 136, 578 S.E.2d 74 (2003) and *Shelton v. Commonwealth*, 34 Va. App. 109, 538 S.E.2d 333 (2000).

Also, standard booking questions may be asked of an in-custody suspect without the need for *Miranda* warnings and waiver although it is possible to obtain incriminating information from such questions (e.g. nicknames, aliases, home addresses for a subsequent search, etc.). Booking questions are not within the *Miranda* rule because they are not the type of questions that the *Miranda* decision was designed to cover. See *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). See also, *Rosa v. McCray* (CA 2 1/27/05) where the suspect was asked his “real hair color.” Booking “type” questions may be permitted without *Miranda* even if the booking process is not underway, see, e.g. *U. S. v. Gaston* (DC Circuit,
Volunteered Statements

Volunteered statements, sometimes called “spontaneous utterances”, are words or statements from a subject that are not prompted by interrogation. Only custodial interrogation requires a Miranda warning and waiver. So, if a subject is volunteering information without interrogative stimuli, Miranda is simply not applicable. Resulting statements are admissible in evidence whether or not Miranda warnings were given and a waiver obtained. The Miranda decision itself makes this point clear. In the event that a subject begins volunteering information, officers may simply listen carefully and are not required to interrupt. Short clarifying questions concerning a volunteered statement also may be permissible without Miranda warnings or waiver. For example, suppose an in-custody armed robbery suspect spontaneously asks his arresting/transporting officer, “Have you guys found the gun yet?” The officer responds, “What gun are you talking about?” The suspect replies, “You know, my gun, the one from the robbery.” [Note: This exchange is from a real case.] See United States v. Rhodes, 779 F. 2d 1019 (4th Cir. 1985) and United States v. Cordova, 995 F. 2d 1035 (8th Cir. 1993) as other examples.

Custodial and Non-custodial Interview of a Juvenile Suspect:

A juvenile suspected of a crime that is contacted by an authority figure such as a police officer may be intimidated and frightened. Except for those children who have had more frequent contact with the criminal justice system, juveniles may not be able to distinguish between the legal differences of a custodial versus a non-custodial interview. Whether or not a juvenile suspect believed at the time of the interview that he or she was in custody will receive a high level of consideration and scrutiny from the court. Therefore, when conducting an interview with a juvenile suspect, the issue of custody, from the perspective of the child considering age, maturity, emotional state, timing and location of the interview, experience with the juvenile justice system, should be carefully considered prior to initiating questions. Generally, to withstand the considerations and scrutiny of the judicial processes that follow an arrest, it is suggested that investigating officers should approach an interview with a juvenile suspect as though it is a custodial interview with the accompanying requirements of the reading of Miranda Rights. Such an approach may not be appropriate for more mature juvenile suspects, who are experienced with the juvenile justice system. Juveniles who are interviewed or interrogated by the police are afforded the same Fifth and Sixth Amendment protections as adults. The physical size of the juvenile, the seriousness of the offense, or whether or not the juvenile is considered a suspect does not change the legal requirements during interviews and interrogations.

Advisement of Miranda Rights

The goal of a custodial interview of a juvenile suspect is to obtain an accurate and truthful statement regarding the criminal offense under investigation. Success in this endeavor requires the investigator not only to garner the information needed to proceed further with the investigation, but also to respect the rights and protections afforded to the arrested juvenile. The minimum requirements to ensure these protections are clear in Virginia apply equally to all arrested suspects, adult and juvenile. There is no distinction in the law that requires different treatment or prescribes a different course of action for juveniles in this area. While the requirements to treat juveniles differently have not been specified in the law, courts are focusing increasing scrutiny on the facts and circumstances under which juveniles are interviewed while in custody. Research, advances in understanding the adolescent brain, and the resulting publications indicating the differences between an adult and a juvenile’s ability to understand the legal consequences of a custodial interview are well known to defense attorneys and the court. This increased scrutiny has resulted in the suppression of evidence, dismissal of charges, findings of not guilty, and civil suits against police departments alleging civil
Officers should recognize that juveniles are generally more impressionable than adults and may be more susceptible to intimidation caused by the situation and/or presence of police officers. When determining the voluntariness of statements made by juveniles, courts will examine all of the circumstances surrounding the encounter between the officer and the juvenile. Some of the factors the court will consider include the following (See Roberts v. Commonwealth, 18 Va. App. 554, 445 S.E.2d 709 (1994):

- The environment where the interview or interrogation is conducted.
- Any prior experience the juvenile has with the criminal justice system.
- The juvenile’s maturity, education, and intelligence level.
- Whether or not a parent or guardian and/or legal counsel were notified and permitted officers to question a juvenile; or the parent and/or counsel was present during the interview or interrogation. While there is no legal requirement that a parent and/or counsel be notified (see Grogg v. Commonwealth, 6 Va. App. 598, 613, 371 S.E.2d 549, 557 (1988) and Novak v. Commonwealth, 20 Va. App. 373, 387, 457 S.E.2d 402, 409(1995)) or be present, this is an important factor the court will weigh when determining the voluntariness of a confession or waiver of Miranda rights by the juvenile. If in doubt, officers should consult with a supervisor or the Commonwealth Attorney’s Office.

- The juvenile’s capability to understand his/her legal rights and the consequences of waiving those rights.

Prior to the custodial interrogation of a juvenile the officer shall make every effort to contact the parent or guardian of the juvenile in custody and advise them of the status and location of the juvenile. No more than two officers will conduct a custodial interrogation of a juvenile unless authorized by a supervisor. Interrogations of juveniles should be limited to the minimum amount of time required to obtain the information needed. While there are no rigid time periods established for the interrogation of juveniles, officers should be cognizant that the courts will closely examine extended interrogations of juveniles. Officers should make complete notes concerning all the circumstances and events surrounding the interview or interrogation of a juvenile. Whenever possible, interrogations of juveniles will be videotaped. Officers who make custodial arrests of juvenile suspects, whether the juvenile is returned to a parent or guardian or turned over to Juvenile Intake or the court, shall explain police department and juvenile justice system procedures to the juvenile and, if possible, the parent or guardian. Such notification shall take place whether or not the juvenile suspect is interrogated.

Prior to advising a juvenile of his or her constitutional rights against self-incrimination and his or her right to an attorney (Miranda Rights), officers or investigators should get a sense of the juvenile’s mental and physical state and education level and document the reasons of this inquiry. If a juvenile is determined to be in need of medical assistance, this will be sought prior to any questioning. As with adults Miranda Rights will be advised as follows (Note: this can be facilitated by the use of a department issued rights card or a PD Form 13 – Advisement of Rights Form):

The Miranda rule simply requires that the following “message” be conveyed to anyone who is about to be subjected to custodial police interview:

1. You have the right to remain silent;
2. Anything you say can and will be used against you in court;
3. You have the right to talk with a lawyer and to have a lawyer with you during any questioning;
4. If you want a lawyer and cannot afford one, one will be appointed to represent you at no cost to you.

As each of the rights are advised, the officer or investigator shall ask the juvenile if he or she understands each right and if he or she has any specific questions about each right advised.

Additionally, it is the policy of the Virginia Beach Police Department that officers/detectives will advise a suspect of the following right after advising of the above listed four rights and before securing a waiver:

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

It is the policy of the Virginia Beach Police Department that in order to secure a knowing, intelligent, and voluntary waiver of rights, the following questions should be asked and an affirmative response secured for each question:

1. Do you understand each of these rights I have explained to you?  
2. Having these rights in mind, do you wish to talk to us?

Again, after each right is explained, the officer or detective shall ask the juvenile being questioned if he or she understands each right and if he or she has any questions about each right that is read. Officers and detectives shall then document the responses received prior to the beginning of any permissible questioning.

**Presence of a Friendly Adult**

It is recommended, but at the discretion of the investigator to involve a “friendly adult” in the juvenile interview process and to allow him or her meaningful opportunities to privately consult with the juvenile throughout the custodial interview. Traditionally, the friendly adult is a parent or guardian, although each presents different challenges.

- **Parent or Guardian** – The presence of a parent or guardian during a custodial interview of a child is not required in Virginia and is a discretionary decision by the investigator. The presence or absence of a parent or guardian may impact a judicial review of the admissibility of a statement. Investigators are still required, however to notify parents as soon as possible after taking a child into custody, providing information regarding the condition, whereabouts, and legal status of the child. The presence of a parent or guardian during the interview can have a positive effect on the course of the interview, or alternatively, a negative effect. Parents who pressure a child to confess can increase the risk that the child will give a false or involuntary statement. If this happens, the officer should call for a break in the interview so the parent can calm down.

**Length of Questioning**

The length and conditions of a juvenile interview will receive considerable scrutiny in subsequent court hearings. Typically, juveniles can tolerate only about an hour of questioning before a substantial break.
should occur. Investigators should be mindful of the duration of interviews between breaks, as well as the overall duration of the interview. Careful documentation of the interview progress and the timing of breaks is essential to the integrity of the case. The Virginia Beach Police Department sets no definitive time restrictions in matters involving the interview of juvenile offenders. However, interviews of juvenile offenders suspected in serious criminal offenses (likely to result in incarceration or detention) or interviews that exceed one hour of questioning shall be closely monitored by a supervisor. As is delineated in other Department directives, investigators should be mindful of the needs of the juvenile, allowing for breaks as needed, access to the restroom, and should offer drinks or snacks if it is determined that the child has not eaten in the previous four hours.

**Time of Questioning**

Officers should be wary of questioning juvenile suspects, especially younger teens and children, in the middle of the night. Even a few hours of sleep deprivation, combined with the stress of interview, may increase the risk of problematic statements. And courts tend to disapprove of late night interviews, particularly when children are involved.

**Avoid Use of Deception**

Currently, the use of deception during a custodial interview – such as a false claim that police possess evidence incriminating the suspect – is permissible. However, the changing nature of the legal landscape should make officers think twice before using this technique during juvenile custodial interview. The presentation of false evidence may cause a young person to think that the interviewer is so firmly convinced of his guilt that he will never be able to persuade him otherwise. In that event, the young person may think that he has no choice but to confess – whether guilty or innocent – in a perceived effort to cut his losses. For this reason, the use of false evidence during juvenile interviews, may be problematic to the integrity of the case. The use of deception also may cause an innocent juvenile – even one who initially had a clear recollection of not committing a crime – to mistrust his memory, accept that the “evidence” proves his guilt, and eventually confess to a crime that he did not commit. These types of false confessions are known as “coerced internalized” confessions. In such situations, the pressures of deception-driven custodial interview can actually cause a juvenile to believe that he must have committed the crime but suppressed all memories of it.

**Avoid Promises of Leniency and Threats of Harm**

Many officers are trained to indirectly suggest during custodial interviews that the suspect will avoid trouble or get help if he confesses. Even these indirect promises of leniency and threats of harm can be inappropriate when the suspect is a juvenile. They can trigger involuntary or false confessions by presenting the juvenile with an offer he can’t refuse: say what the police want to hear or face negative consequences. Investigators should avoid offering a suspect help in the course of an interview. In expressing sympathy and understanding toward a suspect during an interview, it is tempting for an investigator to state that it is his desire to “help” the suspect in some way. This may be in the form of an ambiguous statement, such as, “I want to help you out of this thing,” or “I can’t help you unless you help me first.” In other instances the reference to help may be quite specific, such as, “If you tell me what happened, I can get you psychological help,” or “I can get you help for your addiction, if you work with me on this.” Such statements may be interpreted as an implied promise of leniency; therefore, investigators should refrain from any references to “helping a suspect out.” In particular, some juveniles who have falsely confessed have explained that they confessed under the mistaken belief that they would be able to end the custodial interview and immediately go home. To that end, interviewers must take special care to ensure that nothing they say could be interpreted as suggesting that the juvenile could go home if he confesses. An innocent youth might jump at such a chance and
Investigators should also avoid using the suspect’s juvenile status to persuade him to confess under the pretense that he or she won’t be punished as severely as an adult.

When conducting a custodial interview of a juvenile, officers should follow these guidelines:

- Avoid communicating that the suspect will avert or face reduced charges if he confesses.
- Stay away from unclear or technical language that could be interpreted by a young person as a promise of leniency.
- Ensure that the suspect understands the consequences of confessing.
- Refrain from suggesting that you can help the suspect if he confesses.

Questioning Style

How do juveniles who falsely confess know what to say? Many glean information about the crime from their investigators’ leading questions. An interviewer who asks a juvenile “The clerk was standing by the cash register when the hold-up happened, right?” has inadvertently educated him about how the police think the crime took place. An interviewer who takes a young suspect to a crime scene or shows him photographs of it has done the same thing. In this way, the disclosure of crime scene facts during custodial interview can ultimately render a subsequent confession worthless. When a juvenile who has been interviewed with leading questions later describes the crime scene accurately, it is impossible to know whether he or she is speaking from firsthand experience or repeating his investigators’ words.

When questioning juveniles, officers should observe the following:

**DO:**

- Start by using open-ended, free-recall questions that ask the child to produce a narrative: “What did you do last night?”
- Use targeted but open-ended questions to get more information: “You said you were at home last night. Tell me about that.”
- Probe while avoiding outright accusations and deception, if you suspect the juvenile is lying: “Can you help me understand why your mom says that you were out with your friends last night?”
- Use questions beginning with “who,” “what,” “where,” “when,” and “how” to get more information about specific parts of the juvenile’s story: “Where was the clerk standing?”

**DON’T:**

- Offer the juvenile options: “Where was the clerk standing, in the back of the store or by the cash register?”
- Use leading questions: “The clerk was standing by the cash register, wasn’t he?”
- Show the suspect crime scene photographs or other pieces of evidence, prior to exhausting all other interview strategies.
Electronic Recording

When an interview is electronically recorded from start to finish, police have a complete record that can be used to convict the guilty and to ensure that every statement is reliable and voluntary. A recording can also provide officers with invaluable protections against frivolous allegations of abuse. Most electronic recording systems pay for themselves by greatly reducing the need for and duration of costly pretrial hearings about what happened inside the interview room. For these reasons, and whenever possible, investigators conducting custodial interviews of children will videotape or, alternatively, audiotape these interviews from the reading of Miranda rights until the end.

Recording is particularly essential when the person undergoing a custodial interview is a juvenile. The Wisconsin Supreme Court, for instance, has required all juvenile interviews to be recorded in their entirety, when feasible, because of the particular vulnerabilities of juveniles during custodial interviews (In the Interest of Jerrell C.J., 283 Wis. 2d 145, 699 N.W.2nd 110 (2005.) The same reasoning holds true in every jurisdiction. While the requirement to videotape is not a matter of law in Virginia, rules mandating the electronic recording of custodial interviews exist in 16 states and the District of Columbia and nearly every other state is currently considering legislation. In addition, with the proliferation of reality crime television, the public and juries expect to see electronic recording at every trial.

Interviewing and Interrogating Mentally Ill Persons (CALEA 41.2.7)

Interviewing or interrogating a mentally ill individual presents its own unique issues. The number of persons with mental illness who encounter the police as suspects is not inconsequential. Confessions can be excluded from legal proceedings if it can be shown that suspects did not understand or appreciate their Miranda rights and mentally ill defendants, particularly defendants with psychotic disorders, are significantly less likely to understand their interrogation rights than defendants who are not mentally ill. Some interviewing techniques train officers and to take into account nonverbal behavioral cues, such as hesitant speech, sweating, or dry mouth, as indicators of deception. However, these cues, in addition to being general indicators of stress, may appear more frequently among persons with mental illness because of their illness or the medications they are taking.

Officers interviewing a mentally ill person must guard against obtaining a false confession. Characteristic traits of mentally ill persons, such as disorganization of thought, deficits in executive functioning and attention, and impaired decision making, could contribute to self-incrimination. For example, compared with persons without mental illness, persons with mental illness may be more likely to confess, because they believe that the police officer is truly a friend who understands and "has been there" or because they believe that they will be able to go home after confessing.

Rights of the Accused

Patrol officers and investigators often want to use, as evidence in criminal trials, statements that were made by the defendant and are incriminating in nature. Whatever the degree to which a defendant’s prior statements are incriminating, it is likely that the prosecutor’s efforts to use the statements at trial will be met with defense objections, often in the form of pretrial motions to suppress the evidence. When these defense objections and/or motions are argued, often at pretrial suppression hearings, the defense attorney will try to show that the incriminating statements were obtained illegally. If the prosecution cannot prove the contrary, the statement generally may not be used at trial, because of the
“exclusionary rule” or “fruit of the poisonous tree” doctrine. Of course, the same constitutional rights violations may result in police civil liability, as well.

Evidence and liability problems regarding a suspect’s incriminating statements usually fall into one or more of four categories - each involving a claim that the defendant’s constitutional rights were violated. They are:

1. The statement was the product of an unlawful Fourth Amendment seizure of the defendant’s person - an arrest without probable cause or investigative detention without reasonable suspicion (as earlier discussed).

2. The interrogation did not comply with the Miranda rule (as earlier discussed) and/or the associated protections of the rights to silence and counsel, if asserted.

3. The statement was obtained in violation of the defendant’s Sixth Amendment right to counsel.

4. The statement was product of unlawful coercion in violation of the Fifth Amendment protection against compelled self-incrimination and the Fourteenth Amendment requirement that, to be admissible, an incriminating statement must be voluntary.

Although these four claims involve interrelated legal theories, each represents a separate, independent constitutional issue. Each represents a liability threat to police as well as the obvious threat to evidence admissibility.

This discussion focuses on two questions:

1. Whether or not police may attempt interrogation after a person attempts to assert a right; and

2. What procedure must be followed to obtain a valid waiver of a right, if a waiver is required.

What Rights have “Attached”?

Some constitutional rights apply only in certain limited circumstances. A person does not always “own” every constitutional right. For example, a person does not own the Sixth Amendment right to counsel unless and until he is formally charged in a criminal proceeding. When a constitutional right has become applicable in a certain situation, that right has “attached.” The significance of attachment is twofold:

1. Once a right has attached, a valid waiver of that right must occur before any interrogation (or, in the case of the Sixth Amendment right to counsel, “deliberate elicitation”) takes place; and

2. Once a right has attached, a suspect may assert that right and thereby impose special additional restrictions on further interrogation efforts by police. It is critical to understand when various rights attach.

Right to Silence

This right is a function of the Fifth Amendment privilege against compelled self-incrimination. For purposes of police interrogations, it should be assumed that every person always has the right to remain
silent. However, it is only when a person is in arrest-type (Miranda) custody and/or has been formally charged that interrogators need be concerned with obtaining a waiver in the usual sense of that word. When a person who is not in custody and has not been formally charged voluntarily chooses to talk with police about a matter under investigation, he need not be advised of his rights and a waiver of his right to silence is implied from his choice to remain with police and talk to them. If, however, an in-custody suspect asserts to would-be interrogators the right to silence, that right must be “scrupulously honored.” See Michigan v. Mosley, 96 S. Ct. 321 (1975). Additionally, the invocation to remain silent must be unambiguous. See Berghuis v. Thompkins, 560 U.S. 707 (2010) (the Mosley court mentioned five factors that related to the evidence in that case. First, whether defendant “was carefully advised” before the initial interrogation “that he was under no obligation to answer any questions and could remain silent if he wished.” Id. at 104. Second, whether there was an immediate cessation of the initial interrogation, and no attempt to persuade defendant to reconsider his position. Id. Third, whether the police resumed questioning “only after the passage of a significant period of time.” Id. at 106. Fourth, whether Miranda warnings preceded the second questioning. Id. at 104. Fifth, whether the second interrogation was limited to a crime that had not been the subject of the earlier interrogation. Id.) See also Weeks v. Commonwealth, 248 Va. 460, 471, 450 S.E.2d 379, 380 (1994) and Boone v. Commonwealth, 00 Vap UNP 0934991 (2000). This means, at a minimum, that police must temporarily back off their interrogation efforts.

Right to Counsel Issues

The right to counsel comes in two varieties. One is the right to counsel created in the Miranda decision. It is associated with the Fifth Amendment right to remain silent and is designed to help protect a person subject to in-custody interrogation from being compelled to incriminate himself. This Fifth Amendment based right to counsel is separate and distinct from the better known Sixth Amendment right to counsel. The differences between the two rights are important. The Fifth Amendment or Miranda right to counsel is present any time there is police interrogation of a person who is in arrest-type custody. The Sixth Amendment right to counsel, though it does not take effect until formal charging occurs, protects the defendant even in many non-custodial settings and may impose different waiver requirements. Also, rules regarding interrogation after assertion of rights vary according to which right has been asserted.

Fifth Amendment Right to Counsel

The Fifth Amendment right to counsel was created by the United States Supreme Court as part of the Miranda rule. Because it is a Miranda right, it attaches only when a person is in arrest-type custody and is to be interrogated by police. A waiver of this right is therefore unnecessary unless those two conditions (custody and interrogation) occur simultaneously. Arrest alone does not trigger this protection, nor does non-custodial interrogation. See again Berkemer v. McCarty, 468 U.S. 420 (1984).

Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel attaches only when someone is “formally charged” with a crime. Formal charging occurs when someone is indicted by grand jury or is “arraigned.” Arraignment is a formal, in-court notification to a defendant that he is charged with a particular crime. In many states, this court appearance is commonly referred to by other names, like “preliminary hearing” or “first appearance.” Whatever name it goes by, formal charging is generally characterized by the involvement of a prosecutor who brings the charge(s) formally against the defendant, thus marking the
commitment of the government to prosecute. Merely taking an arrestee to a magistrate or similar judicial official for jailing or bonding generally is not formal charging, even though the arrestee may be informed by a judicial official of the charges against the arrestee.

Right to Confront One’s Accuser

The Sixth Amendment guarantees a defendant the right to confront his or her accuser, commonly referred to as the Confrontation Clause. In this vein, an accuser would be any person who will offer any testimonial evidence against the defendant. In Melendez-Diaz v. Massachusetts, 557 U.S. ___ 07591 (2009), the United States Supreme Court held that certificates of analysis, such as laboratory reports for drugs or breath test analyses, fall within the “core class of testimonial statements” and their admission at trial violated the defendant’s right to confront the witnesses against him or her. The United States Supreme Court described the class of testimonial statements covered by the Confrontation Clause as follows:

“Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford v. Washington, 541 U.S. 36, 51-52

The requirement then is that officers either subpoena every chemist, breath test technician, or other person who will issue a document that meets the definition given by the Court or in some way comply with the Sixth Amendment and provide the opportunity for cross-examination as mandated.

If an Attached Right has been Asserted, What Then?

The rules regarding interrogation after an assertion of rights vary according to what right is asserted. It is therefore critical that officers listen carefully to the exact words of a suspect as he asserts or attempts to assert rights. Ambiguous statements that resemble assertions of rights may be clarified by questions or discussion concerning the suspect’s wishes. Notes and/or recordings should be kept documenting the suspect’s exact words, whenever possible.

If a suspect says, “I don’t want to talk about this anymore,” the right to silence has been asserted. This assertion imposes different restrictions on further interrogation than if the right to counsel had been asserted. A statement, “I’m not sure I want to talk about this, I may need a lawyer,” is ambiguous and equivocal. “Can I have a lawyer?” was an unambiguous assertion, says United States v. Lee (CA 7 6/28/05). Only an unequivocal assertion of the right to counsel triggers its protection. See Davis v. United States, 518 U. S. 938 (1994) and Paulino v. Castro (CA 9 6/14/04) (applying Davis). Officers may wish to resolve ambiguity by attempts to clarify but federal law does not mandate such efforts. See Commonwealth v. Redmond, 264 Va. 321, 568 S.E.2d 695 (2002), Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), Midkiff v. Commonwealth, 250 Va. 262, 462 S.E.2d 112 (1995), and Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815 (1985) for examples of ambiguous assertions of the right to counsel.
If an attached right has been asserted, then three questions must be answered:

1. When, if at all, may police later attempt to obtain a waiver and proceed with interrogation efforts?

2. If further interrogation efforts are lawful, what crimes may police bring up for discussion?

3. What, exactly, is necessary for a valid waiver of any rights which have attached?

More on the Two Rights to Counsel

The United States Supreme Court held in *Michigan v. Jackson*, 106 S. Ct. 1404 (1986), that once the Sixth Amendment right to counsel is asserted at or after formal charging, police are prohibited from further attempts to interrogate regarding the formally charged matter unless the defendant initiates the communication concerning the case or counsel has been made available to the defendant. Put another way: the Sixth Amendment right to counsel prohibits police from deliberately eliciting incriminating information from a criminal defendant in any matter in which he has been formally charged, unless he has validly waived that right and initiated the conversation. See *Fellers v. United States*, 540 U.S. 519 (2004). However, in *Montejo v. Louisiana*, 556 U.S.____ 071529 (2009), the United States Supreme Court overruled *Jackson* and eliminated the mandate that an interview with a defendant who has a Sixth Amendment right to counsel be initiated by the defendant for it to be admissible at trial. Further, assertions of the Sixth Amendment right to counsel do not block interrogation efforts on matters that are not yet the subject of formal charging, even though factually related. See *Texas v. Cobb*, 532 U. S. 162 (2001) for guidance on this technical issue. An assertion of the Sixth Amendment right to counsel may be valid and binding on police even though the assertion is not made directly to a law enforcement officer. Such assertions often occur at first appearances in court, for example. See *McNeil v. Wisconsin*, 501 U. S. 171 (1991). Additionally, the Court held in *Massiah v. United States*, 377 U.S. 201 (1964) that deliberately elicited statements obtained through the use of a transmitter used by an informer during conversations with an accused, who had retained a lawyer and was free on bail after indictment, violated the accused’s Sixth Amendment right to counsel.

The Sixth Amendment right to counsel is separate and distinct from the Fifth Amendment right to counsel created by the United States Supreme Court in *Miranda v. Arizona*. A defendant has the Sixth Amendment right to counsel only in those matters in which he has been formally charged. In contrast, the Fifth Amendment right to counsel protects a suspect in any custodial interrogation, whether or not he has been formally charged with the matter to be discussed. See *Edwards v. Arizona*, 101 S. Ct. 1880 (1981). A valid waiver of the Fifth Amendment right to counsel is therefore necessary prior to any custodial interrogation.

Once an in-custody suspect has asserted his Fifth Amendment right to counsel, police are prohibited from all further interrogation efforts on all crimes unless the suspect initiates the communication concerning his criminal involvement OR counsel has been made available to the suspect OR when *Miranda* custody is discontinued and fourteen days have elapsed during which the suspect was able to re-acclimate to his normal life, consult with friends and counsel, and shake off any residual coercive effects of the prior custody. See *Maryland v. Shatzer*, 559 U.S.____ 08680 (2010). This rule applies even when follow-up interrogators are completely unaware of the earlier assertion of rights. The burden has been placed on the law enforcement community to devise a system for warning investigators of earlier assertions. See *Arizona v. Roberson*, 108 S. Ct. 2093 (1988). It is also important to note that a person’s “release back into the general prison population constitutes a break in *Miranda* custody. Lawful imprisonment imposed upon conviction does not create the coercive pressures produced by

Prepared and updated by the City of Virginia Beach Police Department Office of Professional Development and Training
investigative custody that justify Edwards.” Shatzer at____. In fact, in Howes v. Fields 565 U.S. ____ 10680 (2012) the United States Supreme Court held that “questioning a person who is already in prison does not generally involve the shock that very often accompanies arrest; a prisoner is unlikely to be lured into speaking by a longing for prompt release; and a prisoner knows that his questioners probably lack authority to affect the duration of his sentence. Thus, service of a prison term, without more, is not enough to constitute Miranda custody. The Court noted the relevant factors in were that Fields was questioned for between five and seven hours; Fields was told more than once that he was free to leave and return to his cell; the deputies were armed, but Fields remained free of restraints; the conference room door was sometimes open and sometimes shut; and though several times during the interview Fields stated that he no longer wanted to talk to the deputies, he did not ask to go back to his cell. It is important to note that a person serving a sentence after trial is significantly different in these circumstances than a defendant awaiting trial.

The United States Supreme Court made clear in Minnix v. Mississippi, 111 S. Ct. 486 (1990), that “counsel has been made available” means counsel must be actually present at any subsequent police-initiated interrogation.

What is Necessary to Prove a Waiver of the Sixth Amendment Right to Counsel?

The question of what constitutes a valid waiver of Miranda rights, including the Fifth Amendment right to counsel, has been fairly well settled for some time. Officers are familiar with Miranda warning and waiver forms and procedures. Until 1988, however, the United States Supreme Court had not furnished any significant guidance regarding the requirements for a valid waiver of the Sixth Amendment right to counsel. Lower courts had been divided on the subject, but the United States Supreme Court decision in Patterson v. Illinois, 108 S. Ct. 2389 (1988) cleared the air, holding that a standard Miranda-style waiver procedure is sufficient to produce a valid waiver of the Sixth Amendment right to counsel, at least if the suspect is also advised that he has been formally charged with the specific crime that police wish to discuss.

Summary

The law regarding attachment, waiver, and assertion of interrogation rights is evolving, growing, and sometimes confusing. More than one right may be in play at any given time. The suspect’s rights, and rules concerning them, may come and go as conditions change during investigation and prosecution. Without close attention to these developments, the criminal investigator is almost certain to make dangerous constitutional errors in the interrogation process. The best way to avoid such errors is to consider each of the three possible rights individually and systematically, one by one, in light of the factual situation in a particular case, at a particular time.

Following is a re-statement of the constitutional rules for police dealing with assertions of various interrogation rights.

Assertion of Right to Silence by In-Custody Suspect

Cease all interrogation efforts immediately.

No further interrogation efforts on anything until:

   The suspect has been left alone by police for at least several hours, or
The suspect initiates new discussion with police of his involvement in criminal activity, or
The suspect leaves custody.

If further in-custody interrogation becomes lawful, a waiver of rights, using standard *Miranda* warning
and waiver procedures, will still be necessary. (If the suspect is no longer in custody, there is no
requirement of a *Miranda* warning and waiver. The suspect’s choice to meet and talk with police will
show his waiver.)

[Note: When a suspect who is not in custody chooses to meet with and talk to police, it is clear that he
is not asserting his right to remain silent. Therefore, if during non-custodial interrogation a suspect
asserts his right to remain silent, police may continue to attempt questioning. The suspect is free not to
respond and free to leave, if he wishes. His decision to remain and to respond to further questions
indicates his choice to speak with police rather than to assert his right to silence. Where an in-custody
suspect asserts the right to silence, the assertion must be scrupulously honored.]

**Assertion of Fifth Amendment (*Miranda*) Right to Counsel by In-Custody Suspect**

Cease all interrogation efforts immediately

No further interrogation efforts on anything until:

- Counsel is actually present at any subsequent interrogation, or
- The suspect initiates new discussion with police of his involvement in criminal activity, or
- The suspect leaves custody.

If further in-custody interrogation becomes lawful, a waiver of rights, using standard *Miranda* warning
and waiver procedures, will still be necessary. (If the suspect is no longer in custody, this right is no
longer applicable and no waiver of it is necessary.)

[Note: This protection is a creation of the *Miranda* rule and applies only when *Miranda* applies.
*Miranda* rights do not attach unless a person in arrest-type custody is exposed to police interrogation;
therefore, they may not be validly asserted in non-custodial interrogation. In a non-custodial
interrogation, if the suspect would prefer to consult with a lawyer rather than continue talking to police,
the suspect has the option of leaving and going to see a lawyer. The Sixth Amendment right to counsel,
if attached, may be validly asserted by persons who are not in custody.]

**Assertion of Sixth Amendment Right to Counsel by Formally Charged Suspect**

Cease interrogation regarding the formally charged crime immediately.

No further interrogation efforts regarding the formally charged crime until:

- Counsel is actually present at any subsequent interrogation, or
- The suspect again waives the right to counsel.

If further interrogation becomes lawful, a waiver will still be necessary. A waiver may be obtained by
advising the suspect that he has been formally charged with a particular (named) offense, that police
wish to discuss the formally charged matter, then using standard *Miranda* warning and waiver procedures.

[Note: This right has nothing to do with custody or non-custody. The Sixth Amendment right to counsel applies only to matters in which a suspect has been formally charged. Assertion of this right blocks further interrogation efforts only on the formally charged offense. Police may still approach the suspect in an effort to discuss uncharged crimes. (Warning: Sometimes a suspect will assert other rights that may protect him from all interrogation efforts during a period of custody.]

**“Voluntariness”**

To be admissible in evidence, an incriminating statement must not only clear the above discussed hurdles, it must be made “voluntarily” and not be “compelled” by unlawful government coercion. Determination of what is unlawful coercion and when a statement is voluntary tend to involve the interplay of three factors: 1) the conduct of the government agent (interrogator); 2) the susceptibilities of the subject (confessor); and 3) the environment in which the activity (interrogation) occurs. Some coercions are so extreme and obvious that virtually any resulting statement would be judged involuntary. Physical abuse and/or deprivation, threats and/or promises in exchange for confession, and other extreme forms of will-bending are all likely to fall into this category. But what about comparatively innocuous statements like “you’ll feel better if you get this off your chest – that’s a promise.” In fact, within a certain spectrum of government behavior there is a sliding scale of acceptability that depends substantially on the two other factors.

For example, deceptive interrogative tactics like pretending to have evidence which, in fact, does not exist may well be permitted if the suspect is intelligent, criminally experienced, “used to” playing such games. See *Arthur v. Commonwealth*, 24 Va. App. 102, 480 S.E.2d 749 (1997). Used on an inexperienced, mentally retarded juvenile, such deception would almost certainly be impermissible. The susceptibilities of the individual suspect to a particular form of coercion will often decide whether that coercion is legally acceptable. Other “susceptibilities” could include cognitive impairments stemming from drunkenness, drug, heavy medication, pain, and the like.

Similarly, the environment of the interaction will significantly influence whether certain level and types of coercion will be permitted on certain types of suspects. Perhaps the most coercive environment is police custody – because any coercion is inescapable. In fact, the Supreme Court’s reason for creating the *Miranda* rule was the “inherently coercive” effect of police custody. As a single factor, of course, custody does not render a derivative statement involuntary.

In any event, determining “voluntariness” involves a few absolutes and many variables. Telling someone that, if he confesses, he will receive a lighter sentence or no imprisonment is too much. Telling someone “I don’t make the deals, the prosecutor does. If you cooperate, I’ll make sure the prosecutor knows it” is usually permitted. Like many other areas of police law, legal determinations of voluntariness are heavily fact dependent.

**NON-TESTIMONIAL IDENTIFICATION PROCEDURES**

The Fifth Amendment protects people from being compelled to give testimonial evidence against themselves in a criminal proceeding. Non-testimonial identification evidence (such as fingerprints, handwriting samples, and body fluids, as examples) may be taken from suspects under certain circumstances without violating Fifth Amendment rights but may still involve Fourth Amendment
rights. This discussion helps answer three questions: 1. What are non-testimonial identification procedures? 2. Which of these procedures are permissible incident to arrest and/or custody? 3. How, if at all, may lawful non-testimonial identification procedures be accomplished out of custody?

What are Non-Testimonial Identification Procedures?

As the name indicates, non-testimonial identification procedures involve identification evidence other than a subject’s own testimony. The retrieval of non-testimonial identification evidence from criminal suspects is vitally important to the successful resolution of many criminal investigations. Oftentimes, a thorough processing of a crime scene and/or victim’s body will yield fingerprints, palm prints, footprints, hair, or body fluid evidence. These evidentiary items may be compared later with samples obtained from suspects. In some investigative scenarios where there are eyewitnesses to a crime, a lineup or show-up (one-on-one identification) involving the suspect may be arranged. In other situations, a suspect’s voice may be compared by witnesses to the remembered sound of a perpetrator’s voice. A suspect’s handwriting may be compared, in some cases, to evidentiary documents containing the perpetrator’s handwriting. These are all examples of non-testimonial identification procedures. The evidence comes from the suspect and may be self-incriminating but it does not involve his testimony. Therefore, it is not Fifth Amendment protected. Although line-ups conducted after formal charging will involve a right to counsel (see below), most identification procedures do not. See, for example, Gilbert v. California, 388 U. S. 263 (1967) (no right to counsel at handwriting exemplar process).

The use by police of non-testimonial identification procedures may involve a variety of legal rights, which could protect a suspect and create issues for the investigating officer. Violation of a suspect’s rights in non-testimonial identification procedures can create civil liability exposure for officers and agencies and can cause suppression (exclusion) of resulting derivative evidence. Rights that could be involved include:

1. State law rights. Note that state law may be more restrictive/demanding than the Federal Constitution and often is particularly so in the case of juvenile suspects.

2. Fourth Amendment (search and seizure). If non-testimonial identification evidence is derived from an illegal detention, arrest, search, or use of force, it may be excluded from trial consideration. See Hayes v. Florida, 470 U. S. 811 (1985), for example. Obviously, civil liability exposure is also present in such circumstances.

3. Sixth Amendment Right to Counsel (after formal charging). Certain non-testimonial identification procedures require involvement of a defendant’s lawyer, if they occur after formal charging (indictment or arraignment) and if the defendant does not waive (voluntarily relinquish) the right. Kirby v. Illinois, 406 U. S. 682 (1972) and United States v. Wade, 388 U.S. 218 (1967).

4. Fourteenth Amendment (Due Process). Due process of law includes the concept of “fundamental fairness.” This would require, for example, that a lineup identification process not be unduly “suggestive” of any particular suspect, i.e., that it be “fair.”

Since the retrieval of non-testimonial evidence from suspects does not involve compelled testimony, the Fifth Amendment prohibition against compelled self-incrimination is not implicated by non-testimonial identification procedures. If a person were to voluntarily consent to a non-testimonial identification procedure, the procedure would not implicate the Fourth Amendment.
Search Incident To Arrest

A lawful, custodial arrest carries with it the authority to retrieve, in a search incident to that arrest, certain non-testimonial evidentiary items from the person of the arrestee. See Cupp v. Murphy, 93 S. Ct. 2000 (1973). This non-testimonial evidence may include lineup identification, fingerprints, palm prints, footprints, photographs, body measurements, head hair samples, fingernail scrapings and gunshot residue. If a person in arrest custody resists these processes, reasonable force may be utilized to overcome the resistance and recover the desired non-testimonial evidence. Typically, this force would involve utilizing several officers and/or special equipment (restraints) to reduce or eliminate risk of injury to the arrestee. Ideally, it would also involve a court order directing the use of that force reasonably necessary to accomplish the procedure.

Body Searches

Significant bodily intrusions (nonconsensual withdrawal of blood, stomach pumping, and surgical procedures, as examples) typically require a search warrant or similar court order. Occasionally, exigent circumstances may excuse the warrant requirement, possibly as where there is an immediate need to gather evidence of rapidly changing blood alcohol content of a (reasonably believed) drunk driver after an accident involving serious injuries or fatalities. See, as examples, Schmerber v. California, 86 S. Ct. 1826 (1966) and Winston v. Lee, 470 U.S. 753 (1985).

Non-testimonial Identification Orders

A much different situation exists when police do not have probable cause to arrest. It appears that the Federal Constitution permits (as does state law in many states) a court-ordered requirement that a person submit to non-testimonial identification procedures based upon a government showing of reasonable suspicion. In some states that court order is called a “non-testimonial identification order.” Even if there is not a statutory procedure in a particular state, a judge or other judicial official could have inherent common law judicial power to issue an order “in the interest of justice” that would permit such a procedure. Such a procedure involves a requirement that a suspect briefly present himself to police or medical personnel for the limited purpose of collecting physical evidence from that person or participating in an identification process.

Usually, states have two criteria built into their statutory procedures for the issuance of a non-testimonial identification order:

1. Probable cause to believe that a crime has been committed; plus

2. Reasonable suspicion that the person (from whom the government seeks to retrieve non-testimonial evidence) committed the crime.

Naturally, there also must be reason to believe the identification process would be useful, given existing evidence, in identifying the perpetrator.

An officer seeking a non-testimonial identification order typically must construct a “reasonable suspicion statement” using the same principles as in drafting a probable cause statement in a search warrant application. The principal difference is that only reasonable suspicion must be demonstrated. Of course, if probable cause were already present, officers could use a search warrant for non-testimonial identification procedures or in some cases simply make an arrest and conduct a search incident to arrest.
Service (Execution) of Non-Testimonial Identification Orders

Because only reasonable suspicion of a person’s involvement in a crime has been shown, service (execution) of non-testimonial identification orders differs dramatically from the service (execution) of an arrest warrant. Service of a non-testimonial identification order typically does not involve taking the subject into custody. Instead, it consists only of delivering the court papers and notifying the suspect that he/she must appear at a specific place (usually police or medical facilities) within or at a specified time. The non-testimonial identification order specifies what non-testimonial evidence and/or procedures will be retrieved or conducted. A suspect’s failure to obey the non-testimonial identification order is contempt of court in most states that have such procedures.

Consent or Search Warrants

Obtaining a person’s consent to the recovery of non-testimonial identification evidence is always an option in lieu of seeking a court order. Seeking a search warrant for the retrieval of non-testimonial identification evidence is also an option, if probable cause exists. In such cases, probable cause often would also exist to arrest the suspect for the crime and some non-testimonial evidence might be recovered without a search warrant in a search incident to the custodial arrest.

Juveniles

There are often additional state statutory provisions governing non-testimonial identification procedures involving juveniles. Such statutes are usually more restrictive of police procedure than is federal constitutional law. It is possible that even consensual recovery of non-testimonial identification evidence (like fingerprints) may be restricted or prohibited under state law regarding juveniles.

Lineups and Photographic Arrays

Lineups involve displaying a suspect’s person and/or photograph, along with those of others, to a victim or witness for possible identification of the perpetrator. “Lineups” come in two varieties: physical lineups involving actual people (sometimes called “corporal” or “body” lineups) and photographic lineups or “arrays.” There is no constitutional requirement that a body lineup or photographic array contain a certain number of participants or photos. Rather, the requirement is simply that the procedure be “fair,” i.e. not unduly suggestive. Generally, five or six photographs or persons would be adequate. Smaller numbers usually increase the “suggestiveness” of the array. There are several fundamental principles that reduce suggestiveness in both photographic and physical lineups. The witness or victim should be informed that the perpetrator may or may not be in the lineup and that the witness or victim is under no obligation to identify anyone. The witness or victim should not be informed that he or she has identified the “right” person. Witnesses should not be allowed to collaborate. Witnesses should view the lineups separately and individually. Whenever possible, the person conducting the body or photo lineup should be someone other than the primary investigator assigned to the case. Of course, the people utilized to form the lineup or array should be somewhat similar in appearance to the suspect. There is no right to counsel in photographic lineups or arrays. United States v. Ash, 413 U. S. 300 (1973). General Order 8.03

Right to Counsel

The Sixth Amendment right to counsel “attaches” (comes into play) upon formal charging. After formal charging has occurred, the suspect has a right to counsel at all critical stages of adversary judicial proceedings. A suspect’s participation in a physical (body) lineup is considered a “critical stage.” Kirby
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v. Illinois, 406 U. S. 682 (1972). The conduct of a photographic lineup or array is not. See United States v. Ash, above. In many states, formal charging is called “arraignment” or “first appearance.” It is generally marked by the first time the defendant appears in court before a judge and prosecutor. The person usually is informed of the charges against him, asked how he pleads, and an inquiry is made concerning appointment of counsel. This signals the initiation of adversary judicial proceedings - the state has committed its resources to prosecute the suspect. Formal charging also has occurred if there has been a grand jury indictment.

The suspect’s right to counsel at a physical (body) lineup conducted after formal charging may be waived. United States v. Wade, 388 U. S. 218 (1967). To obtain a waiver, the officer should explain the following to the suspect:

1. He will be placed in a lineup with several other people.

2. A witness will view this lineup in an attempt to identify the perpetrator of a crime.

3. In respect to this lineup he has a right to have a lawyer present to observe the lineup and to advise him.

4. If he cannot afford a lawyer and wants one, one will be appointed to represent him during the lineup.

The officer may then solicit a waiver of rights:

“Do you understand the rights I have explained to you?”
“Do you wish to have an attorney represent you during this lineup?”

If the suspect says “No” (verbally, to second question) and/or signs a waiver statement, there is a valid waiver, assuming, of course, that the waiver is voluntary in the legal sense.

Officers should consider having a lawyer present at lineups even when there have not yet been formal charges. Though the right to counsel does not exist prior to formal charging, the presence of the suspect’s attorney may quiet later allegations of unfairness and due process violations.

[Note: As mentioned, the Sixth Amendment right to counsel applies only to formally charged matters. If a person has been formally charged in one matter, but a lineup involves a different offense, there usually would be no Sixth Amendment right to counsel in the lineup involving the uncharged matter.]

Suggestiveness

An impermissibly (or unnecessarily) suggestive identification procedure may violate the Fourteenth Amendment due process clause thus creating liability exposures and problems with later in-court identification. What is impermissible suggestiveness is judged by a “totality of circumstances” test. See Stovall v. Denno, 388 U. S. 293 (1967). If the identification procedure is unconstitutionally suggestive, the court will examine the following factors in deciding whether or not to allow an in-court identification:

1. The quality and length of the original viewing (i.e. at the crime) of the suspect by the eyewitness.

2. The degree of attention shown by the eyewitness at the original viewing.
3. The accuracy of the prior description given by the eyewitness.

4. The percentage of certainty in the identification procedure.


The key question the court will decide is:

Did a tainted identification procedure create a substantial risk of misidentification in court? If the answer is “yes,” in-court identification would not be permitted.

It is quite possible that answer may be “no” given analysis of the above factor, and that in-court identification may be allowed notwithstanding the impropriety of the earlier identification process.

**Show-ups**

A show-up is display of just one person or photograph to an eyewitness. The witness is asked, simply, “Do you recognize this person?” Show-ups should be used very carefully and only soon after a crime occurs (within a few hours, usually). Such procedures (though obviously suggestive) have been approved by the courts because:

1. The victim/witness memory is the best it will ever be.

2. There is a strong need to ascertain if the detained person is in fact the perpetrator.

3. The suspect is not as likely to have altered his appearance (as he might later) and an appropriate identification may be facilitated.

4. If it is determined that the wrong person has been detained, then that person may be quickly released and search for the actual perpetrator may be swiftly resumed.

See *United States v. King*, 148 F. 3d 968 (8th Cir. 1998) where the United States Court of Appeals noted “quick, on-the-scene identification” is “essential to free innocent suspects and to inform police if further investigation is necessary.” Suggestiveness may be reduced somewhat by advising the victim/witness that the subject to be viewed “may or may not” be the perpetrator.

**Uncooperativeness**

If a person subject to a valid non-testimonial identification court order refuses to cooperate with the procedure, several possibilities exist:

1. The Court issuing the order could hold the subject in contempt of court and attempt thereby to force his cooperation.

2. The prosecutor may be able to comment and/or produce evidence in court that the subject was uncooperative, as evidence of guilt.

3. If, given its nature, the identification procedure could be appropriately accomplished by force,
If a person who is in custody refuses to submit to a procedure (which reasonably could be completed forcibly) police may use limited force as reasonably necessary to accomplish the procedure. If it is a body line-up that is refused, police may resort to a photo array. Some have suggested that refusal to participate in a line-up could make a show-up “necessary.” In such a conflicted situation obtaining legal advice and/or judicial guidance would be wise.
GLOSSARY

The following terms are defined according to Black’s Law Dictionary (Abridged, 9th Ed. Bryan A. Garner, Editor in Chief):

**Arrest**: The taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge; specif. the apprehension of someone for the purpose of securing the administration of the law, esp. of bringing that person before a court.

**Consent**: Agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent.

**Exigent Circumstances**: A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside.

**Investigative Detention**: The holding of a suspect without formal arrest during the investigation of the suspect’s participation in a crime.

**Probable Cause**: A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause – which amounts to more than a bare suspicion but less than evidence that would justify a conviction – must be shown before an arrest warrant or search warrant may be issued.

**Reasonable Person**: A hypothetical person used as a legal standard, esp. to determine whether someone acted with negligence; specif., a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others’ interests.

**Reasonable Suspicion**: A particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.