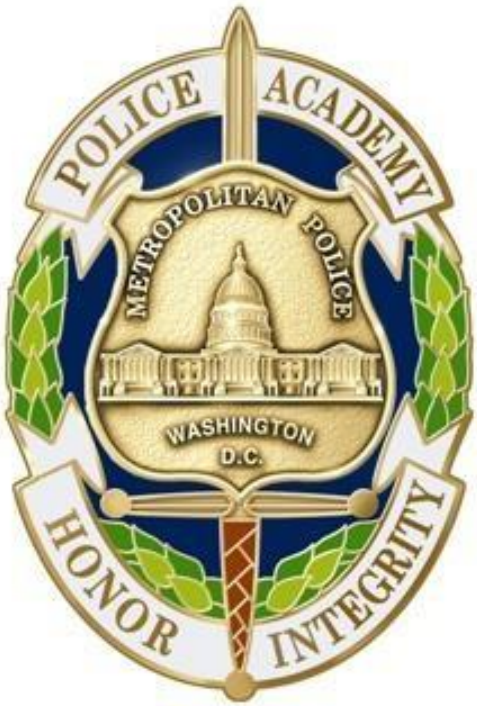
Metropolitan Police Academy



8.2 Constitutional Law

December 5, 2023

Introduction

The US Constitution governs law enforcement and analyzes our actions through the Bill of Rights. It is essential that law enforcement officers understand constitutional law and its application to situations from a radio-run to a long-term investigation. MPD trains its officers to understand this sufficiently to perform their duties. Constitutional law enables and requires MPD officers to conduct successful police work without violating the constitutional rights of the residents and visitors of the District of Columbia.

8.2.1 Define key terms relating to search and seizure

Search

According to USLegal.com, a **search** is an "examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law enforcement officer for the purpose of finding evidence of a crime." Black's Law Dictionary defines search as an "examination of a man's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilty to be used in the prosecution of a criminal action for some crime or offense with which they are charged." The Fourth Amendment protects a person from unreasonable searches, meaning that a search cannot ordinarily be conducted without probable cause. (Refer to 4.1 Criminal Law to review 4th Amendment.)

MPD Policy Search Definition GO-PCA-702.02 (Warrantless Searches)

A search occurs when a law enforcement officer intrudes on an individual's privacy or property interest. Searches shall be conducted in strict observance of the individual's constitutional rights and with due regard for the safety of all members, other persons, and property involved.

***Katz v. US*, 389 U.S. 347 (1967)**

This case expanded the Fourth Amendment's role regarding an individual's privacy. Katz was convicted of transmitting gambling bets across state lines. Charles Katz did this by having conversations on a public payphone. The FBI attached a listening device to the exterior of the phone booth that Katz used to record his conversations, and this was done without a search warrant. Katz was convicted based on the recordings. Katz appealed, alleging that the FBI violated his Fourth Amendment right to privacy by conducting a warrantless search.

In Katz's initial trial, the court admitted the evidence and determined that Katz could not allege a violation of the right to privacy because he was in a public space when the recordings were made. The US Supreme Court disagreed and overturned Katz's conviction, ruling that a search warrant is required to listen to private conversations held within a public telephone booth and that no exceptions to the warrant requirement apply. Because the FBI did not obtain a warrant for its listening device, the Supreme Court determined the search to be unconstitutional and tossed out the recordings as evidence in Katz's retrial. Henceforth, law enforcement is required to obtain a court-issued search warrant based on probable cause to wiretap phone conversations between people, even when those conversations occur within view of members of the public.

This case touches on what a reasonable expectation of privacy entails. Since a search only occurs where there is a reasonable expectation of privacy, it is important for law enforcement to understand what delineates this expectation. Before the Katz decision, law enforcement had always worked under the

premise that homes and workplaces had a reasonable expectation of privacy; however, *Katz v. US* shows that the expectation of privacy exists in public, too. This case illustrates that the US Constitution "protects people rather than places." It is less important *where* someone is located than whether or not the person has a reasonable expectation of privacy at the time. Searches can become seizures, which also creates challenges for law enforcement.

Seizure

A **seizure "**is defined as the exercise of dominion or control by the government over a person or thing because of a violation of the law." According to Black's Law Dictionary, a seizure involves "the act of taking possession of property" or taking a person into custody and detaining them. Examples of seizures include brief stops, arrests, and the confiscation of property. Like searches, seizures are governed by the Fourth Amendment. Reasonable articulable suspicion is required to conduct a stop; probable cause is required to make an arrest.

8.2.2 Explain the warrant requirement for searches

The Fourth Amendment of the US Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For law enforcement to conduct a search, officers generally must obtain a search warrant. To obtain a search warrant, a law enforcement officer must demonstrate probable cause that a search and seizure is justified. Both searches and seizures are unreasonable if police conduct either without a valid search warrant or if the search and seizure do not fall under an exception to the warrant requirement.

DC law governs the issuance of search warrants for MPD, and a judge or magistrate must authorize a search warrant. A search warrant authorizes law enforcement officers to search a particular location, property, or person and to seize specific items. To obtain a search warrant, police must show probable cause that a crime was committed and that items connected to the crime are likely to be found in the place specified in the warrant. This means that when law enforcement officers obtain a search warrant for premises, they may only search the location specified in the warrant and the persons located in the premises if specified in the warrant. Please note that unless the premises warrant specifically lists the persons to be searched, individuals found on the premises cannot be searched based on the premises warrant alone; instead, separate probable cause must be present to search them. ***NOTE:*** See also **Lesson 10 – Search Warrants**.

***Michigan v Summers*, 452 U.S. 692 (1981)**

You may *temporarily detain* anyone in the premises where a search warrant is being executed while it is being executed, but a search warrant does not give law enforcement authority to *search* anyone on the premises unless they are named in the warrant. If you want to search a person who is on the premises but not named in the warrant, you must articulate probable cause to search independent of that used to obtain the search warrant.

For example, if you have a search warrant for some narcotics at an apartment and you encounter two people there, you need separate probable cause to search each of them. However, the individuals may be temporarily detained for officer safety during the execution of the search warrant, and a frisk of their person may be conducted if reasonable articulable suspicion supporting such a frisk exists based on ***Terry vs. Ohio,* 392 U.S. 1 (1968)**.

8.2.3 Illustrate the permissible scope of searches

Now that we have established that a search warrant is ordinarily required for searches, knowing what exactly law enforcement can search for and seize is helpful. There are limitations to such searches and seizures.

Law enforcement may search for items that fall into at least one of the following categories:

- **W**eapons
- **F**ruits of a crime (the proceeds of the crime or items gained from the crime)
- **I**nstrumentalities of a crime (items used to commit a crime)
- **C**ontraband (items the mere possession of which is a violation of the law)
- **E**vidence

This list will be referenced as **WFICE** for the rest of this lesson.

Placement in just one category means law enforcement can search for and seize the item. Although an item only needs to fall into one category to justify a search or seizure, items can be part of several categories at once. For example, if Andrew commits a robbery with a handgun, the handgun is a weapon, an instrumentality, and evidence.

When you encounter an item subject to seizure during a search, the item may be lawfully seized. But what are the legal requirements to search and seize? The case of *Warden v. Hayden* provides guidance.

***Warden v. Hayden*, 387 U.S. 294 (1967)**
Mr. Hayden robbed a business establishment and fled, followed by two cab drivers. A description of Hayden and his clothing, along with the residence address where the cab drivers saw him enter, was relayed to police. Officers arrived at the door shortly after that, which was Hayden's home. Hayden's wife answered the door, and officers told her why they were there and asked to search the house. She didn't object. During the search, officers found Hayden and important evidence linking him to the robbery, such as weapons and ammunition. Clothing that matched the description of the lookout for the robbery was found in Hayden's laundry room. Police seized the clothing and other items of evidence and arrested Hayden.

Before *Warden v. Hayden*, the fact that something was evidence (the E in WFICE) was not enough to justify a seizure. Instead, only objects that were fruits of a crime, instrumentalities (e.g., weapons), or contraband could be seized. Clothing was considered mere evidence and could not be seized before this court case. The US Supreme Court found that to search officers need probable cause to believe that the object of the search is related to a violation of law and can be found where the officer is looking. The Court found no

constitutional difference between evidence, weapons, and contraband, allowing mere evidence to be seized and held as evidence in the trial.

The Court also noted that the Fourth Amendment does not require a police officer to delay an investigation and obtain a search warrant when doing so could place others in grave danger. This is an **exigent circumstance** and will be described further during this lesson.

As in any search, remember that the scope of the search must be reasonable. Reasonable means that the officer must reasonably expect to find the object that they are looking for where they are searching. Put another way, if an officer is searching for a refrigerator, it would not be reasonable to look in a handbag.

The standard of reasonableness applies to all searches. It cannot be emphasized enough that the standard of proof required to search is probable cause that the object can be found in the search area. To seize the object, there must be probable cause that the item is connected with criminal activity. MPD policy GO-OPS-304.10 (Field Contacts, Stops, and Protective Pat Downs) defines reasonable as fair, proper, or moderate under the circumstances. Determining whether a member has behaved reasonably is an objective standard whereby the court will consider the circumstances, not the intent of the actor.

Generally, any search or seizure done without a warrant is assumed to be unreasonable. This is the default view taken by the courts because of the Fourth Amendment's warrant requirement, and law enforcement must always be mindful of it when determining probable cause to conduct a search. Reasonableness is very important because it is the ultimate measure of whether the Fourth Amendment has been violated. A landmark US Supreme Court case concerning reasonableness is *US v. Ross*.

***US v. Ross,* 456 U.S. 798 (1982)**
MPD received a tip from a reliable source that someone with the nickname of Bandit was selling drugs from a maroon car with DC tags. This was in front of 439 Ridge St. NW in what is today the Third District. Two detectives and a sergeant decided to check out the tip. What they found was promising. Pulling up to the street, they located a car matching the description of the tip, and a tag check revealed that the owner had the nickname of Bandit. Nobody could be found near the vehicle, so MPD left the area so as not to spook Bandit.

Five minutes later, the same officers encountered the vehicle moving, observed that the driver matched the informant's description, and conducted a traffic stop. They then searched the vehicle after finding a bullet on the front seat. Inside the glove compartment was a handgun, and Bandit, otherwise known as Albert Ross, was placed under arrest. Ross's keys were taken from him, and officers found suspicious bags inside the trunk. One such bag contained zips of a white substance. Officers closed the bag and drove the car to headquarters. A search there revealed $3,200 in cash. It was later determined that the zips contained heroin.

The trial court convicted Ross, but an appeals court reversed, stating that the officers conducted an unreasonable search. They had probable cause to search the car and its trunk but not inside the containers found in the trunk. The US Supreme Court disagreed, finding that officers had probable cause to search Ross's entire vehicle and that opening a paper bag in the trunk was no more an intrusion of privacy than searching the glove compartment or even opening the trunk itself. The Court noted that the very nature

of contraband goods means they are in a container of some sort. The Supreme Court reversed the appellate court's ruling, and Albert Ross' drug conviction was upheld.

Because of this decision, police can search containers inside vehicles as long as they have probable cause to search the vehicle and the containers could reasonably contain the object of the search. This case is a benchmark for the standard that when conducting a valid search, police officers may search anywhere that the object they are looking for could reasonably be concealed.

The police did not obtain a search warrant in the last two cases we discussed. Although the Fourth Amendment to the US Constitution establishes the requirement for a search warrant and the Supreme Court has held that searches can be conducted only after obtaining a search warrant, the Court has also recognized there are exceptions to the warrant requirement.

8.2.4 Analyze the key exceptions to the warrant requirement

There are specific circumstances where the courts have determined an officer may perform a search without a search warrant. The requirement for probable cause, however, is absolute, whether the search is warrantless or not.

The following circumstances are generally considered to be exceptions to the rule that searches must be done with a warrant:

- Plain View
- Abandoned Property
- Police Dogs
- Open Fields and Curtilage
- Exigent Circumstances
- Search Incident to Lawful Arrest
- Automobiles
- Consent (will be covered in the next section)

Plain View

The plain view doctrine allows officers who view something they believe to be contraband to seize such evidence without a warrant. Certainty is not a requirement. For an officer to seize an object without a warrant under the plain view exception, *all* of the following conditions must be met:

- The officer must be lawfully present where they observe the object. This means the officer must have a valid reason for being at the location. For example, being invited into a home makes the officer lawfully present. Being on or in a public space also makes an officer lawfully present.

- The object to be seized must be in the officer's line of sight.

- The officer must immediately recognize the object as subject to seizure.

The plain view exception is explained in the following case law:

- *Texas v. Brown*, 460 U.S. 730 (1983)

A Fort Worth police officer was conducting a routine traffic safety checkpoint when he encountered James Brown. Brown was observed to pull his hand out of his pants pocket with a small knotted balloon. Based on the police officer's experience, he strongly suspected the balloon contained drugs. The police officer looked into the glove box Brown opened after being asked for his driver's license and saw "several small plastic vials, quantities of loose white powder, and an open back of party balloons." Brown was ordered out of the car and arrested. Officers conducted an on-the-scene inventory of the vehicle, finding more items. The balloons were determined to contain heroin. The officer seized the items, believing he had probable cause to believe that the plastic containers contained heroin. He satisfied all three criteria (see above) in conducting this seizure. This plain-view seizure was ruled legal by the US Supreme Court.

Note that the plain view exception includes a "plain feel." When an officer is conducting a frisk and feels an object they know is not a weapon but is some other contraband, the officer may remove it for investigation. Officers must immediately know that it is contraband and may not manipulate it in any way to investigate it or try to figure out what it is.

For example, an officer frisks a suspect and feels a hard object, smaller than a marble, in the suspect's right front pocket. Not being sure exactly what the object is, the officer uses her fingers to squeeze and prod the item. She finally decides that it must be drugs. She removes it, and it is a rock of crack cocaine in clear plastic wrap. Here, the rock of crack cocaine was unlawfully seized because the officer did not know it was contraband until after it was removed from the suspect's pocket. Also, when the officer started to squeeze and manipulate the unknown object, her actions went from a frisk to a search. A frisk is just a pat-down down to check for weapons. Manipulation of objects in clothing that are not weapons constitutes a search.

Another example: During a traffic stop, the driver tells the officer he is opening his glove compartment to present his insurance information. Upon opening it, the officer observes a clear plastic bag containing crack cocaine.

The officer conducting the traffic stop has satisfied all three conditions (see above) for utilizing the plain view doctrine:

- They were lawfully present due to a legal traffic stop,
- The glove compartment was within the officer's line of sight (just as it would be visible to any member of the public),
- The officer immediately recognized the object as a clear plastic bag containing crack cocaine.

- ***Arizona v. Hicks*, 480 U.S. 321 (1987)**

Arizona police entered an apartment because of a negligent discharge of a firearm by Hicks, which injured a neighbor who lived one floor below. Officers entered to look for the shooter and weapons. They found and seized three weapons and saw a stocking cap. The officers also observed expensive stereo equipment in the otherwise squalid apartment. The expensive stereo equipment did not explain why the officers were inside the apartment.

Nevertheless, the officers on the scene felt the stereo equipment could be stolen, so they examined its serial numbers. One of the serial numbers was checked against a database, and it was found to be stolen property, so an officer seized it. After other items were also determined to be stolen, a warrant was obtained to seize them. Mr. Hicks was placed under arrest and charged for the robbery, and the stolen property was used as evidence against Hicks.

The US Supreme Court found that recording the serial numbers on the stereo equipment was not a seizure as it did not meaningfully interfere with Hick's possessory interests. The Court also found, however, that moving the equipment to read the serial numbers was a search. The question thus became whether the officers had probable cause to justify the search. Here, the police officers were lawfully present, and the object to be seized was in the officer's line of sight; however, the officers did not immediately recognize the object (a turn table) as stolen and thus subject to seizure (based on the fact that they had to closely examine the serial number of the device to determine it was stolen). The Court found that the Arizona officers had *reasonable suspicion* that the electronics were stolen but ***not*** *probable cause*. Since the search did not meet all the criteria of the plain view exception, the search was illegal and violated Mr. Hick's Fourth Amendment rights.

- ***Kyllo v. US*, 533 U.S. 27 (2001)**
  US Department of Interior agents suspected Danny Kyllo was growing marijuana in his large home and garage. Law enforcement agents determined that he had unusually large electricity bills. It is known that indoor marijuana growth requires high-intensity heat lamps. Using a thermal imager on Kyllo's home revealed elevated heat levels emanating from certain portions. A search warrant was obtained, and a large marijuana-growing operation was discovered.

  Kyllo's attorneys felt that the thermal imaging evidence of the heat emanating from his home and garage invaded his expectation of privacy. The US Supreme Court agreed, stating that the US Department of Interior should have obtained a search warrant before thermal imaging of Kyllo's home. The courts have found that using modern technology like RADAR, thermal imagers, and scanners violates a person's right to privacy inside their home.

Law enforcement officers are allowed to use flashlights to illuminate areas without nullifying the plain view doctrine, and it is also important to note using binoculars is not considered a search. However, using technology such as a thermal imager does constitute a search and is not covered under the plain view doctrine because it allows you to detect things you could not see with your own eyes. In other words, the courts have looked favorably upon plain view findings when it utilizes naked-eye sightings, even if assisted by artificial lighting or optical lenses. However, law enforcement must be mindful that non-naked eye findings such as thermal or radio imaging are considered searches and require probable cause.

Although plain view is the legal term, it can apply to detection by any of your senses, such as hearing, smell, or touch.

Abandoned Property

Abandonment is the act of giving up the right to a thing or item absolutely, without the intent to claim it again, and without limitation to any particular person or purpose. An abandoned item is not subject to any reasonable expectation of privacy, and it can be searched and seized without probable cause or a warrant.

Two basic guidelines are used to determine whether the property is abandoned:

1. Where has the property been left? Was the property left in an open field or some public space?

2. Did the person reasonably intend to abandon the item? Officers must determine if the person reasonably meant to abandon an item on an objective basis. If the person throws the item away or denies ownership, that item can generally be considered abandoned.

In ***California v. Greenwood*, 486 U.S. 35 (1988)**, police encountered Billy Greenwood, a suspected drug dealer. They did not have enough evidence against him to get a search warrant for Greenwood's home; however, an investigator at the Laguna Beach police department thought they might find evidence of drug dealing in the garbage bags Billy Greenwood set outside his home. The investigator had the trash collector collect Greenwood's bags without commingling them with other trash and turn them over to her. A search of the garbage bags revealed evidence of drug trafficking, and a search warrant was obtained for Greenwood's residence.

During a search of Greenwood's residence pursuant to the warrant, police recovered a large quantity of drugs and arrested Greenwood for felony drug charges. The trial court suppressed the evidence obtained from inside the home because courts in California agreed that warrantless trash searches violate the Fourth Amendment. The prosecutor's office appealed to the US Supreme Court. The Supreme Court reversed, reasoning that people who abandon trash and leave it on or at the side of a public street have no reasonable expectation of privacy in the trash because discarding the trash there makes it readily accessible to all manner of people and animals, any of which might go through it. The only requirement for the police was to prove that the property was abandoned and trash (in this case) met that standard.

Police Dogs (K-9s)

Similar to abandoned property, the courts have determined that there is no expectation of privacy when using police dogs. Police dogs only sniff the air; they do not enter any containers they are sniffing. No one has a right to privacy in the air, so a canine sweep of the exterior of a car or bag is not considered a search. This means that as long as your initial stop was valid, a K-9 dog sweep needs nothing additional (i.e., probable cause). However, also note that pursuant to GO-OPS-304.10 (Field Contacts, Stops, and Protective Pat Downs) and ***Rodriguez v. US*, 135 S. Ct. 1609 (2015)**, a completed traffic stop may not be extended to obtain a police dog and conduct a K-9 search absent reasonable suspicion.

Open Fields and Curtilage

The US Supreme Court has held that in some cases, the Fourth Amendment does not apply to wide open fields but to the curtilage surrounding a house. **Curtilage** is defined as the land and buildings that are in close proximity to a dwelling and are necessary to the daily functions of life. Older cases involving curtilage involved farms that contained homes, open fields, and outbuildings. The last of DC's farms ceased

operating in the 1950s, and few large parcels of land are privately owned. Nonetheless, whether something falls within the protected curtilage of a home can become important in certain investigations here in DC.

In ***US v. Dunn*, *480* U.S. 294 (1987)**, the Supreme Court created a test to determine what curtilage is. Listed below are factors to consider, though *you do not need all of them* to be present. You can use the totality of the circumstances in determining if a particular area is within the curtilage of a home:

1. The proximity of the area to the home: Although no particular distance is required, the further the area is from a house, the less likely the area will be considered curtilage.

2. Whether the area is within an enclosure surrounding the home: Is the area surrounded by a fence or other structure designed to prevent access?

3. The nature and purposes for which the area is used: Are the activities that take place in the area in question those that are generally considered private, such as playing games or grilling?

4. The steps the resident has taken to protect the area from observation by passersby: Are fences, hedges, doors, or other structures or methods used to prevent visual observation?

For example, if an officer believes that someone is keeping stolen property in his backyard, they need probable cause to search it. If the officer does not have sufficient probable cause to obtain a search warrant and is not able to gain consent, they must investigate further. If a tall fence surrounds the backyard in question, an officer could ask a neighbor for access to view the backyard from the neighbor's home. This may allow the officer a good view of the backyard.

If the officer discovers numerous pieces of stolen property in the backyard, can the officer's observation of the stolen property be considered plain view (an exception to the warrant requirement that justifies seizing the items), or is a search warrant needed to enter and inspect the yard? In this situation, we have to decide whether the backyard containing the stolen property can be considered curtilage. Let us use the Dunn test to analyze the situation:

- *Proximity of the area to the home:* In this particular case, the area is close to the home, making a stronger case for considering the yard curtilage.
- *Whether the area is within an enclosure surrounding the home:* A fence is designed to prevent access to the backyard.
- *Nature and purposes for which the area is used:* Storage of stolen property is not using a backyard for the normal activities of life.
- *Steps taken by the resident to protect the area from observation by passersby:* Although the fence prevents a casual observer (a public member) from seeing the yard, additional steps were not taken to prevent a neighbor from seeing the backyard full of stolen merchandise.

Under these circumstances, a totality of the circumstances weighs in favor of the fenced backyard constituting curtilage. Therefore, the officer should seek a search warrant with the observations of the stolen property by way of the neighbor's property, constituting probable cause. Observations made by officers on higher ground to obtain a view over a fence have been deemed an acceptable basis for

establishing probable cause by the Court in such cases as Minnesota v. Dickerson, 508 U.S. 366 (1993), and *California v. Ciraolo.*

***California v. Ciraolo*, 476 U.S. 207 (1986)**

Police officers in California used an airplane flying at 1,000 feet to make naked-eye observations of marijuana plants growing in a backyard after receiving a tip about the plants but not being able to see them due to a high fence. Police used the observations to obtain a search warrant and gained a guilty plea for marijuana cultivation. The defendant appealed his conviction, stating that the plant cultivation was inside his curtilage and, therefore, the warrantless search violated his Fourth Amendment right. The US Supreme Court disagreed and found that people cannot expect privacy from a plane flying 1,000 feet overhead. The Court noted that the fact that something is located within the curtilage [of a home] does not itself bar all police observation. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Exigent Circumstances

This exception covers the situation when obtaining a search warrant is dangerous, impractical, or unnecessary due to the nature of fast-evolving events. There are three (3) general categories of situations considered exigent circumstances:

1. **Destruction of evidence**: Officers must reasonably believe evidence will be destroyed before a warrant can be obtained.

   In ***Green v. United States* 231 A.3d 398 (D.C. 2020),** Derek Williams was shot, killed, and robbed in front of his home in SE Washington, DC. A few days later, US Marshals executed an arrest warrant for Green and, upon entering, removed him and all other people in the home. An MPD detective arrived on the scene and was told by the Marshal Service there was a cell phone on the couch inside the residence. Upon his sweep of the dwelling, he did not find the phone. The MPD Detective called the phone and found it in the hands of Green's girlfriend outside, who identified it as Green's phone. The MPD Detective seized the phone. Green argued that his 4th amendment right was violated because officers did not have a warrant to seize the phone. Still, the government argued that exigent circumstances justified the warrantless seizure due to the reasonable belief that the phone (evidence) was in danger of being destroyed before a warrant could be obtained.

   "The judge found that "it seem[ed] as though the intention of law enforcement" at the time Detective Barton entered the residence "was to seize the scene to make sure that they could locate any evidence that may be connected to the offense." The judge ruled that law enforcement was "certainly in a position to do that under the Fourth Amendment." He further ruled that once Detective Barton discovered that appellant's cell phone was not on the couch, "the exigency seem[ed] clear." Concluding that this exigency—the risk that valuable evidence might be lost if the police could not find and recover the cell phone immediately—justified the detective's warrantless seizure of the phone, the judge denied the motion to suppress the phone and the evidence obtained from it. The prosecution presented and relied on that evidence at trial."

2. **Danger of physical harm and danger to a third person**: Here, the officer must reasonably believe that one or more officers or a third party must be in imminent danger of physical harm. The Fourth Amendment does not require police officers to delay the course of an investigation if doing so would gravely endanger the life of one or more others. When an officer reasonably believes that another person is in danger, the officer may conduct a search without a warrant to prevent or limit the danger.

   In ***Brigham City v. Stuart,* 547 U.S. 398 *(2006),*** police were called to a loud noise complaint and, upon arriving around 3 a.m., heard shouting from inside the residence. Officers walked down the driveway to investigate and observed through a screen door and windows four adults attempting to forcefully restrain a juvenile who was fighting back. Officers entered the residence and announced their presence and were finally noticed by the home's occupants. Brigham police arrested the home's occupants, who were upset at the police for entering their home without a warrant or permission. The Utah courts agreed with the arrested partygoers, and the charges, including Contributing to the Delinquency of a Minor, were dropped. Brigham City appealed to the US Supreme Court.

   The Supreme Court overturned the Utah courts and found that the Brigham City police could enter the premises due to the exigent circumstance's exception. The exigent circumstance's exception applied because the officers heard "thumping and crashing" and yelling and reasonably believed that:

   > Both the injured adult [whom the juvenile punched and was bleeding] might need help, and the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse, before entering. The role of a peace officer includes preventing violence and restoring order.

3. **Hot Pursuit of dangerous suspects**: When officers pursue a dangerous suspect, the delay required to obtain a warrant would be impractical and dangerous. For example, a foot chase of a suspect ends in the suspect's home. Police can continue chasing the suspect into the home. Waiting for a warrant as the suspect is inside potentially destroying evidence is impractical. This brings us back to the *Warden v. Hayden* case, where officers were in hot pursuit of a robbery suspect. Time was of the essence, and it was impractical to stop the pursuit of a dangerous subject to find a judge to issue a warrant. Searches and seizures following hot pursuit situations are reasonable under the Fourth Amendment. *Review: U.S. v Santana, 427 U.S. 38 (1976) and U.S. v. Harris, 629 A.2d 481, 487 (D.C. 1993).*
   - A grave offense is involved, particularly a crime of violence
   - The suspect is reasonably believed to be armed
   - A clear showing of probable cause
   - A strong reason to believe that the suspect is in the dwelling
   - The likelihood of escape if not swiftly apprehended
   - A peaceful entry as opposed to a "breaking"
   - The time of entry (night or day)

When evaluating whether or not a situation qualifies as an exigent circumstance, officers must be objective. This means, would a reasonable officer, having the same knowledge, conclude that the circumstances were exigent in nature? Notably, the inconvenience or trouble involved with obtaining a warrant is never a factor in determining exigent circumstances. The courts will not uphold the actions of officers who claim exigent circumstances as a pretext to avoid the process of obtaining a warrant and will exclude any evidence obtained when it was feasible to get a warrant. MPD policy, GO-PCA-702.02 (Warrantless Searches), states that members shall not make a warrantless hot pursuit entry when there is only probable cause of a misdemeanor or a minor offense (e.g., traffic offenses, curfew violations, citation offenses, and non-arrestable violations).

Search Incident to Arrest

When a person has been placed under arrest, a search of the arrestee may be conducted to remove any weapons and recover any evidence on the arrestee. There is no requirement that the arresting officer fears for their safety or that the officer believes they will find evidence of a crime. We learned this in **Lesson 6.2 - Handling Prisoners** and in ***US v. Robinson*, 414 U.S. 218 (1973*),*** in which MPD arrested a subject of whom all officers on the scene stated they had no fear whatsoever. Once a person is under arrest, no further standard of proof is required to conduct a search of the person. The only restriction is that any custodial search must be *reasonable*. We learned this in **Lesson 6.2 - Handling Prisoners** and ***US v. Edwards*, 415 U.S. 800 (1974)**.

Further, the search can precede the lawful arrest so long as there is probable cause to arrest. *Ellison v. United States*, 238 A.3d 944, 950 (2020).

We've learned that property in the direct possession (on the body) of an arrestee is allowed to be searched and seized, but what about property that is *close* to the arrestee?

Wingspan Search

***Chimel v. California.* 395 U.S. 752 (1969)** gives law enforcement guidance on what, located around an arrestee at the time of their arrest, can be searched and seized. Orange County, California, police had an arrest warrant but not a search warrant for Ted Chimel. They entered his home and arrested him. At the time of his arrest, the police decided to do a search incident to arrest of Chimel's entire home. Their search found crucial evidence in the burglary listed on Chimel's arrest warrant. After California courts upheld Chimel's burglary conviction, his lawyers appealed to the US Supreme Court. The Supreme Court found that

> The area into which an arrestee might reach to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of 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.

The Court determined, however, that a search incident to arrest cannot go beyond what was under the immediate control of the arrestee at the time. Immediate control is the area under which a suspect can obtain a weapon or destroy evidence.

This is frequently referred to as the **Chimel Doctrine** or **wingspan rule** and **allows officers to also search the area under the immediate control of an arrestee.** For example, someone placed under arrest while seated on a living room sofa would be subject to a search incident to arrest his body and directly hold property. In addition, the police would be justified in looking underneath the sofa cushion, the part of the sofa underneath the arrestee, or even a drawer in front of the arrestee from which he might gain possession of a weapon or evidence that he could destroy.

Because the authority to conduct a warrantless search applies to areas under an arrestee's immediate control, this warrant exception no longer applies once the arrestee is removed from the scene. In ***Arizona v. Gant*, 556 U.S. 332 (2009)**, the US Supreme Court held that "[p]olice 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. Gant had been handcuffed and secured in a patrol car before officers searched his vehicle. The Court determined that "Gant clearly could not have accessed his car at the time of the search," and an evidentiary basis for the search was lacking because Gant had been "arrested for driving with a suspended license—an offense for which police could not reasonably expend to find evidence in Gant's car."

Say you arrest a driver for *operating after suspension* and place him in your custody. Could you find further proof of this crime with a by searching the vehicle? Of course not, so you cannot search the vehicle. What if you find illegal drugs on an arrestee in a vehicle? You can likely articulate that it is reasonable to expect further illegal drugs to be found inside the vehicle, justifying a search.

How does the search incident to arrest exception apply to traffic stops?
(Class discussion)

As officers, we must ensure that no one in the custody of law enforcement is deprived of any rights protected by the Constitution. Remember that officers have a duty to act, intercede, and subsequently report misconduct. You must take an active role in the intervention of wrongful conduct by others on the force.

For example, you arrive at a scene where an officer has asked for an additional unit. Upon your arrival, you observe an officer standing next to a handcuffed subject who is seated on the curb. You observe two other officers going through the subject's car. What should your first question be to ensure they have reason to search the car?

(Class discussion)

Read the scenario below and answer the following question:
Suppose that while standing there and discussing the situation, you hear the handcuffed subject say several expletives directed at the arresting officer. The arresting officer immediately punches the arrested

subject in the side of the head. What should you do? You must intervene and protect the arrested subject from any further physical retaliation. Additionally, you must notify a supervisor about what you observed.

NOTE: Scenes can change dramatically, and you must protect arrestees, yourself, and your fellow officers at all times by ensuring everyone properly conducts themselves.

Automobile Exception

For law enforcement purposes, the term "automobile" includes any motor vehicle that travels our roadways. This includes, but is not limited to, cars, pickup trucks, SUVs, motorcycles, self-propelled motor homes, tractor-trailers, scooters, and vans. Although terms usually associated with cars will be used in this lesson plan section, the concepts apply to all motor vehicles unless specifically noted.

In ***Carroll v US*****, 267 U.S. 132 (1947)**, the US Supreme Court recognized that cars are quickly mobile by their very nature, and, therefore, an exception to the requirement for a warrant should apply in certain circumstances. In this case, officers had convincing evidence to believe that the defendants were bootleggers involved in the illegal sale of liquor. The officers were found to have probable cause to believe the defendants were transporting alcohol when they were seen in their car. Based on this, the officers stopped and searched the vehicle; illegal liquor was recovered. In ruling the evidence was properly admitted at trial, the Supreme Court held that:

> The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

As a result, the Supreme Court crafted the automobile exception to the warrant requirement: contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, provided an officer can show probable cause.

We learned in *US v. Ross* that if an officer develops probable cause of WFICE in a vehicle, the officer may then conduct a lawful search for that item. The search for this item may be identical in intensity to one conducted with a warrant. Officers must remember that the scope of the search must remain reasonable to find the object of the search. This does not mean that officers can go on fishing expeditions. If you are looking for a machete, a search of a 2-inch matchbox would not be considered permissible in court.

- **Closed Container in an Automobile**

  In ***California v. Acevedo*****, 500 U.S. 656 (1991)**, the police searched a container inside the trunk of a vehicle after FedEx packages known to contain marijuana were shipped to an apartment from Hawaii. Acevedo was observed by police leaving the apartment with a brown bag of the approximate size of one of the FedEx packages and placing it in the trunk of a car. Officers stopped the car, fearing the loss of evidence, and immediately opened the trunk and found the container (a paper bag) in question. The US Supreme Court found that a search warrant was not required

here due to the automobile exception to the warrant requirement. This decision solidified the idea that containers within vehicles may be searched by police who have probable cause.

We learned in ***US v. Ross*** that probable cause to search a car allows you to search the containers within. In ***California v. Acevedo***, the Supreme Court found that you do not need probable cause to search a car to search a container inside of it when you have *probable cause to search the container*. The search does not begin or end depending on the container type or the vehicle's whereabouts. If there is probable cause that a container has evidence, the police may search a vehicle to locate it.

- **Weapon in an Automobile**

  In ***Michigan v. Long*****, 463 US 1032 (1983)**, the US Supreme Court found that an officer may perform a limited search of a vehicle for weapons based upon reasonable, articulable suspicion, the standard required by *Terry v. Ohio* for a protective search. Here, officers observed a driver in Michigan lose control of his vehicle and end up in a ditch. Officers stopped to investigate. Long met them by the car trunk, leaving the driver's side door open. Officers thought Long might be under the influence of something and followed him as he walked toward his open car door. Officers saw a hunting knife on the driver-side floorboard and then decided to look inside the vehicle for more weapons. An object was found to be protruding from under the front seat armrest, so an officer lifted the armrest. He found a bag of marijuana. Long was arrested and a search of the car's interior and glovebox revealed no further contraband.

  The trial court admitted the marijuana found in the car, holding that the search of the car was a valid protective search under *Terry v. Ohio*. The Michigan Supreme Court disagreed and reversed the conviction. The US Supreme Court reinstated the conviction, finding that a protective search for weapons is not just limited to a search of a person. The Court ruled that:

  > Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

  The Court stated that the scope of a protective search is limited to only those locations inside the passenger compartment from which it is reasonably likely for a person to gain control of a weapon, which includes the floorboard. Should an officer encounter other contraband within plain view during this limited search, it may be seized and the appropriate law enforcement action taken. For example, if a law enforcement officer observes any weapon indicators in a vehicle, they may search that vehicle for weapons. The weapons must be in a place that is readily accessible to the offender. The law enforcement officer must have a reasonable, articulable belief that there is a

weapon or a readily accessible container inside the vehicle. This is the legal standard we discussed in an earlier lesson about what is needed to pat down an individual for weapons.

8.2.5 Illustrate the principles governing consent searches

Consent searches are an important component of good police work. A consent search is a search of a person, vehicle, home, or property based solely on the subject's consent to that search, not executed pursuant to a warrant, and not conducted pursuant to an applicable exception to the warrant requirement as described in United States or District of Columbia case law, excluding the exception for consent searches. With the consent of an authorized person, you can conduct a search and seize WFICE without a warrant or even probable cause. There are important requirements with consent searches, such as that the consent must be voluntary and have been obtained from an authorized person.

You do not need to ask for consent if you have a 4th Amendment basis to conduct the search, meaning a warrant or an exception to the warrant requirement, as we have already discussed. Consent searches are a last resort if you do not have a 4th Amendment basis for the search.

MPD policy governs consent searches:

1. "Members may search any object, place, or person if given lawful consent. Consent search requirements are:
    a. Must be authorized by a person who has the legal authority to give the consent
    b. Must be limited to the exact words or meaning of the consent
    c. May be withdrawn at any time

2. Before conducting a consent search, members shall:
    a. Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;
    b. Advise the subject that a search will not be conducted if the subject refuses to provide consent to the search and that the subject has a legal right to decline to consent to the search;
    c. Obtain consent to search without threats or promises of any kind being made to the subject;
    d. Confirm that the subject understands the information communicated by the member; and
    e. Use interpretation services when seeking consent to conduct a search of a person who cannot adequately understand or express themselves in spoken or written English or is deaf or hard of hearing.

3. Members who are unable to obtain lawful consent from the subject shall not conduct a consent search.

4. When practicable, there shall be at least one BWC-equipped member present with their BWC activated before conducting a consent search.
    a. Members not equipped with a BWC shall request that a BWC-equipped member respond to the scene.

b. In cases when it is not practicable to have a BWC-equipped member present, members shall document the subject's consent using a PD Form 781 (Consent to Search). No consent searches shall be conducted without documented consent on BWC or a signed PD Form 781.
c. Members shall capture their explanation of the consent search, including their notification that the subject may decline and the subject's voluntary consent, on their BWC or in writing.
d. Members shall ensure completed PD Forms 781 are emailed to the Records Division at Records.adminbox@dc.gov.
e. There shall be a presumption that the subject did not voluntarily consent if the evidence of consent, including warnings required in this order, is not captured on BWC or in writing."

In short, officers should never use any type of coercion to obtain permission to search. No expressed or implied threats can factor into being granted permission to search. Coercion means that the consent to search was not voluntary.

The best proof of consent is a recording by a body-worn camera. A BWC-equipped member should be on the scene, and their camera should be activated before consent is obtained and the search is conducted. Consent in writing with a **Consent to Search (PD 781)** and notes in a field notebook can also be used. A video recording and a Consent to Search (PD 781) can also be used.

Members should memorize the language below, which meets the new law's requirements. This language should be said to a citizen when requesting consent to search.

"Sir/Miss, I would like to search your [bag, car, person, etc.]. I am requesting that you voluntarily, knowingly, and intelligently consent to a search. You have a legal right to decline consent to this request and the search will not be conducted if you refuse to provide consent. Do you understand?"

NOTE: The scope of the search cannot expand beyond the consent given.

Authority to Consent

This brings us to the important question of who has the *authority* to consent to a search. There is a basic rule that the officer must obtain permission from someone who controls the area to be searched. In ***Illinois v. Rodriguez*, 497 U.S. 177 (1990)**, the police spoke to an injured woman who said the defendant beat her. She escorted the police to Mr. Rodriguez's apartment and said that it was "our apartment" and that she had belongings there. She opened the apartment with a key that, unbeknownst to the police, was never given to her by Mr. Rodriguez, who gave police permission to enter. Once inside, police saw drugs in plain view in the living room and seized them, arresting Rodriguez, who was asleep in the bedroom, as a result. Before trial, the court determined that the victim had no authority to consent to the entry. She did not

have common authority over the apartment because she was an infrequent visitor, not a resident, and suppressed the drug evidence. The case made its way to the US Supreme Court, which eventually ruled that as long as police reasonably believe that a third-party lives at or has common authority over the premises, then that third party may provide consent to enter the premises. The Court also ruled that:

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment. . . `warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises? … If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Generally, consent must be obtained from an adult. Consent obtained from a minor might still be valid if their residence at issue, such as if you wanted to search a dorm room. The burden falls on the officer to prove that the minor is legally able to give consent.

What about specific offender relationships in consent searches?

- Family members may generally give consent to search a shared residence. However, just because they are family members does not mean they have the automatic ability to give consent. There must be *common authority* over the area at issue. Keep in mind that parents may generally consent to a search of their minor child's room, even over the objection of the child. With adult children, unless the adult child is present to specifically deny permission, parents can generally allow police to search. This is true unless the adult child pays rent or has specifically barred family members from entering their room.

- Housemates and roommates can give consent to search in the areas they have common authority over. These include laundry facilities, kitchens, shared bathrooms, etc. What if one roommate present gives permission to search the kitchen, but the other denies permission? In ***Georgia v. Randolph*, 547 U.S. 103 (2006)**, the U.S. Supreme Court ruled that officers cannot conduct the search if one person consents to the search and the other does not. This ruling only applies to those who have an equal private interest in the area to be searched.

  In the case, the US Supreme Court had to consider the following: Scott and Janet Randolph were separated but living together in their home in Sumter, Georgia. Police were called to their address because the two were involved in a domestic dispute. In the presence of the police, Scott and Janet accused each other of abusing drugs. Janet gave consent to police to search the entire house for evidence of Scott's drug use. At this point, Scott pointedly refused to give permission to the police to search his bedroom. With just Janet's permission, police searched Scott's bedroom and found evidence of cocaine usage. This led to his indictment for possession of cocaine. The Supreme Court ruled that the search by police was unlawful in that Janet could not give permission to search Scott's bedroom.

- College and university administrators *cannot* provide consent to law enforcement to search any student's dorm room. The administrator's ability to search is for health and safety purposes only and may not be delegated to law enforcement.

- High school, middle school, and elementary school administrators *cannot* give police permission to search lockers, book bags, and other items on school property. Instead, school administrators can search themselves based on mere reasonable suspicion of a violation of school rules.

- Consent by a minor student's guardian is sufficient to permit the search of the student.

- Employers can only consent to searches of common work areas. This means an employer *cannot* give police permission to search an employee's desk, locker, etc., without that employee's consent.

- Property owners *cannot* consent to the search of their rented property even if the rental agreement or lease is no longer valid.

- Hotel/motel clerks *cannot* give police consent to search a room that has been rented. Of course, if the cleaning staff finds contraband during the course of their normal duties, police can be invited to seize it.

8.2.6 Explain the legal justifications for the other types of searches performed by law enforcement officers

There are other kinds of searches available to law enforcement:

- **Crime Scenes** will typically be searched based on the consent of the victim, subject to the recognition that the victim's authority to consent may be limited, such as discussed in the previous section when the suspect, when known, has a reasonable expectation of privacy in the place to be searched. For example, if someone calls to report a burglary at their residence, police will be allowed to search and seize whatever they wish by the reporting party. Police may also be able to rely on the exigent circumstances exception early on in the investigation. However, once the exigency has passed, permission by the applicable party or a search warrant is required. Members will be guided by **GO-PCA-702.02 (Warrantless Searches)**:

    - "Members responding to a reported crime who determine that the crime scene is located inside a dwelling shall adhere to the procedures regarding warrantless searches outlined in this order.
    - Whenever practicable, at least one member shall remain within the crime scene while emergency activities are ongoing in accordance with department procedures.
    - Once the emergency activities surrounding the entry have ended and the premises has been secured, no further entry into the residence shall be made by anyone until valid consent or a search warrant has been obtained."

- **Mail Searches** cover items transported by US Mail, UPS, FedEx, etc. This means that, generally, a search warrant is necessary to conduct a search of a package or envelope. Unlike goods in transit,

mail is addressed to a specific person from a specific person, and both the sender and receiver have an expectation of privacy as to the contents of the mail.

- **Airport/Border Searches** do not require a warrant or even probable cause. If a person wishes to fly or cross a border, they must permit a search of their person and property, or they are can be denied access. As crossing a national border is an activity that implicates our national security, the federal government is permitted to enact reasonable requirements on border crossers, such as permitting one's person and property to be searched. When a person volunteers to fly or cross a border, they are not compelled to do so. If it is required to submit to a search to fly or cross a border, one must agree to the required searches and scans. If one does not wish to submit to the required searches and scans, then they do not have to fly or cross a border.

- **Searches and seizures by private persons generally do not require a warrant.** This is because the Fourth Amendment only applies to actions taken by the government and its agents. However, a law enforcement officer cannot request that a private person perform a search or seizure that the officer could not perform themself. This would make the citizen, in effect, a government agent because the person is acting on the government's behalf. For example, Joe observes Officer Barnes arresting his roommate for drug possession outside their house. Joe gives a cigar box full of drugs to Officer Barnes, saying that they belong to his roommate. The drugs would likely be admissible in court even though they were obtained without a warrant as long as Joe recovered them from a common area within the residence. However, if Officer Barnes asked Joe to retrieve the drugs from the roommate's room or Joe did so on his own, they would not be admissible.

8.2.7 Define the Exclusionary Rule

Something we take for granted today is the application of the Fourth Amendment to state judicial proceedings. Before the US Supreme Court's case in 1961 of *Mapp v. Ohio*, the Fourth Amendment only applied to federal court proceedings. This Supreme Court decision also extended Fourth Amendment protections to state court trials. The result is that local law enforcement has to account for Fourth Amendment protections whenever conducting searches and seizures in both state and federal cases.

We have learned much about the protections of the Fourth Amendment, but what happens when violations occur? ***Weeks v. US*, 232 US 383 (1914)** introduced the exclusionary rule. If an officer acting under the color of his office makes an arrest, conducts a search, and/or seizes an item without probable cause, then that action and all resulting events and items seized are inadmissible in court. This concept of exclusion is referred to as the fruits of the poisonous tree, with the poisonous tree being the improper government action taken upon a defendant. The exclusionary rule is applied whenever officers take police action without the required level of proof.

***Wong Sun v. US*, 371 US 471 (1963)** illustrates the fruits of the poisonous tree rule in a case where police illegally searched a laundromat for drugs. Officers recovered illegal drugs and made incriminating statements implicating Wong Sun as a drug dealer. This took place hours before police even encountered Wong Sun. The illegal entry into the rear of the laundromat made all evidence obtained afterwards inadmissible in court.

Police need to be mindful of this when gathering evidence in cases. For example, if you search a car without probable cause and find a loaded handgun in the glove compartment, that evidence will not be allowed at trial. The evidence will not be usable even if you shortly afterwards obtained a full confession from the car's occupant.

8.2.8 Explain department policies in conducting identification procedures

There are several different ways the Department conducts identification procedures.

On-Scene Identification

An **on-scene identification** can be made of a person reasonably suspected of having committed a crime, provided that the suspect is located within an area reasonably close to the scene of the offense and the identification occurs within a reasonable time period. This kind of identification is also known as a show up. You *must* obtain the assistance of a detective when conducting an on-scene identification of a Part I felony. If one is not available, the member will be responsible for conducting the show up themselves.

In terms of a reasonable time period, sixty (60) minutes is generally considered appropriate. A show up can still be conducted past sixty (60) minutes from the crime's occurrence if extenuating circumstances can be articulated.

General procedure for conducting on-scene identification:

- Secure the scene.
- Bring witness(es) to the suspect(s)' location.
- Document actions taken with witnesses, including during the identification procedure.
- Document actions taken with the suspect, including whether the suspect was handcuffed at the time of the identification procedure.
- Document whether an identification is made or not made.
- Document the entire circumstances surrounding the identification, including the time of day, lighting conditions, exact words stated to and by the witness(es), etc. Officers should use landmarks, such as fire hydrants or particular houses, to describe the distance between the witness and the subject at the time of the identification procedure.

An on-scene identification should be made even if evidence of any type would link the suspect to the offense. It is an especially effective identification when the victim or witness identifies a piece of evidence from the crime that is in possession of the suspect at the time of the identification procedure.

Officers must remain neutral when presenting a suspect for identification. Other than actions needed to maintain control of the suspect, officers should take no other actions, such as trying to "cue" the witness

or shaking or nodding their head. No officer involved in on-scene identification should do anything that might indicate:

- The suspect has admitted guilt.
- Evidence was recovered from the suspect.
- The officer's belief about whether the suspect is guilty.
- Other witnesses or victims have or have not positively identified the suspect.

Remember that the primary purpose of an identification procedure is to obtain evidence against the suspect. Therefore, if certain items of clothing are used as the basis of the identification, those items should be seized as evidence. For example, if the lookout was for a suspect wearing a distinctive jacket and the witness identifies the suspect by the jacket, that jacket should be seized as evidence.
Unless the person to be identified is already under arrest for another matter or there are extenuating circumstances like hospitalization of the victim, officers should try to bring the victim (or witness) to the location of the suspect and not the suspect to the victim (or witness). Remember, you must have probable cause to make an arrest. When a person who is a suspect is transported from where they are stopped to another location, an argument can be made that the person is not free to leave and is under arrest, limiting the admissibility of the identification and anything resulting from it, including the identification procedure.

A "show up" can be conducted at a hospital if the victim or suspect requires emergency hospitalization. Any possible issues with hospital staff, privacy, etc., must be handled beforehand. Typically, this is done by speaking to the attending physician during medical treatment. Multiple witnesses and suspects must be separated from each other.

NOTE: Officers must write down in their notebook what exactly was stated during the identification procedure by the victim (if no detective is available).

Second Sightings
A **second sighting** occurs when the victim or witness to an offense sees the perpetrator(s) of a crime later than when the offense occurred. Officers are allowed a reasonable amount of time from the time of the reported second sighting to attempt to locate the suspect. Before an arrest is made following a report of a second sighting, every effort should be made to determine if there is a police report of the offense. The witness should have the original report number; however, that is not always the case, and the officer must then research (i.e., request information from the dispatcher) to obtain it. If no original report was taken, the responding officer must assess whether or not to take the second sighting report and make an arrest. Here, the victim's reasoning as to why the original report was not made earlier is important. Reasons may include hospitalization, fear, shame, etc.

Often, the longer it takes the complainant to file a report, the more important evidence is unavailable, and recollections fade. Police may find delayed reports to be incomplete or not credible.

Line-ups
A **line-up** is a procedure wherein the suspect in a crime is placed in a room with several people of a similar description to be identified by a victim (or witness) to an event.

Photo Arrays

A **photo array** is a collection of photographs shown to a victim or witness to identify an involved person in an event. When showing the photo array, a detective will either have nine (9) or more photos on a single sheet or as individual photos shown separately. If a photo is identified, the witness will sign and date the photo that they have identified. MPD established a policy that we use either a blind or a modified blind method as outlined in **GO-PCA-304.07 (Procedures for Obtaining Pretrial Eyewitness Identification)**.

8.2.9 Define key terms related to questioning

Officers will need to ask people questions for a variety of reasons. You may be interviewing a victim so they can tell you what happened, or you may need to interview witnesses in an effort to corroborate the story or stories of people involved in an incident or traffic crash. Many of the questions we ask are for information gathering purposes only. There are times, however, when our questions become investigatory in nature. For instance, you want to ask a suspect a question, and the answer could assist in establishing probable cause for their arrest. When this occurs, you have moved into another area of questioning that is referred to as interrogation.

Interrogations by law enforcement officers are governed by very specific rules that the U.S. Constitution and the Supreme Court have established. How do we define interrogation? According to Black's Law Dictionary, **interrogation** is the formal or systematic intensive questioning by the police of a person arrested for or suspected of committing a crime. It is an inquiry into that person's criminal behavior. This includes express questioning and any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

A **custodial interrogation** occurs whenever law enforcement initiates questioning after a person is under arrest or deprived of their freedom in a significant way. The US Supreme court defined this in its landmark *Miranda v. Arizona* decision. According to **GO-SPT-304.16 (Electronic Recording of Custodial Interrogations)**, "custodial interrogations are words or actions that the police should know are reasonably likely to elicit an incriminating response from a person who is suspected of having committed a crime of violence …, or other crimes as determined by the Chief of Police, and who is under formal arrest, or whose freedom of movement has been restrained to the degree associated with a formal arrest." (Refer to 4.1 – Criminal Law for review of 5th Amendment).

8.2.10 Analyze when Miranda warnings need to be given to a suspect

The Miranda case is famous in American law enforcement culture with the standard warning of "You have the right to remain silent; you have the right to an attorney present during questioning; if you cannot afford an attorney, one will be appointed for you." ***Miranda v. Arizona*, 384 U.S. 436 (1966)** is one of the most momentous cases in US Supreme Court history. The case rose to the Supreme Court after Ernesto Miranda appealed his conviction for rape.

Ernesto Miranda was 23 years old, uneducated, poor, and suspected of rape by Arizona police. They conducted a successful interrogation of him and obtained a full written confession. The interrogation went so well that the police were done within two hours, and the confession helped Miranda's conviction. The Supreme Court, however, ruled that police did not lawfully obtain the confession.

Due to Miranda's socioeconomic status, the Court determined that he did not know that he did not have to answer any questions and could speak with an attorney. The Supreme Court felt that it was unfair that other people in Miranda's position knew to request a lawyer and that there was no requirement to speak to police. The Supreme Court felt that the police should have informed him of these rights before interrogating. The confession was, therefore, ruled inadmissible at a re-trial.

NOTE: Even without the confession, Miranda was convicted of rape by an Arizona jury following a re-trial. Within a year of his release from prison, he was stabbed to death in a dispute that erupted between himself and other patrons at a bar.

The Miranda warning utilized by MPD is formerly known as **form PD 47**. To determine whether you are required to advise a person of their Miranda rights, you must ask the following:

- Is the person in custody or, could they view him or herself as being in custody?

- Is the person the subject of an interrogation?

Custody
When questioning occurs, "custody" is far broader than simply asking if the person is under arrest. Custody occurs whenever someone has been deprived of their freedom in a significant way. This does not, however, include temporary detentions (Terry stops). The Supreme Court has ruled that it does not matter what the police officer thought or meant to do. The standard to determine custody is what a reasonable person would believe if put into that situation with the police.

Interrogation
Direct questioning by one or more police officers is obviously an interrogation, but what is the functional equivalent of an interrogation? The US Supreme Court has also addressed this issue.

- ***Brewer v. Williams*, 430 U.S. 387 (1977)**
  A ten-year-old girl went missing from a Des Moines YMCA. Williams, a resident of the YMCA, was the prime suspect because a boy saw Williams place a bundle with two legs sticking out of it in his car soon after her disappearance. A warrant for his arrest was obtained the next day after his car was found abandoned in another county. William's attorney called him from the station and officers heard the attorney tell him that he should not answer any questions. Williams was arrested, and the transport officer was told that Williams had an attorney and there was to be no questioning during the ride. The police officer transporting Williams made a statement during the ride that struck an emotional chord with Williams, who then led the police to where he buried the 10-year-old. The reason the officer's statement impacted Williams was due to the transporting officer's knowledge of Williams' claim of being a devout Christian. The transporting officer gave a Christian burial speech where he appealed to Williams' faith as a Christian in allowing the dead 10-year-old a Christian burial. Although not direct questioning, the US Supreme Court ruled that police making emotional statements that result in a confession is the functional equivalent of an interrogation without an attorney present.

The police here used their knowledge of William's religious beliefs to their advantage. The functional equivalent of an interrogation includes playing on a suspect's fears or political or religious beliefs to obtain an incriminating statement. In general, any words used to elicit a statement by police while the defendant is in custody and represented by counsel are inadmissible in court.

- **Rhode Island v. Innis, 446 U.S. 291(1980)**
  Innis was placed under arrest for robbing a taxi-driver. The police knew that a sawed-off shotgun was used during the crime. However, they were unable to find the weapon. Three different officers advised Innis of his Miranda rights, and transport officers were directed not to question him. During transport, the police officers in the vehicle with Innis discussed among themselves how they hoped that a young boy would not come upon the sawed-off shotgun and hurt himself. This made Innis feel guilty, and took the officers to the murder weapon. Unlike in *Brewer v. Williams*, the police in this case had no idea that Innis would be influenced by their talking to one another. That is why the US Supreme Court allowed the evidence in this case. The Court ruled that "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

  If you were *to try* to have an innocent conversation similar to the one in *Innis,* it would be considered an interrogation. This is because you had the conversation with the intent to obtain information from the suspect, which is an interrogation. To avoid potential evidence issues, officers should not have unnecessary conversations around suspects, especially in an attempt to get them to volunteer information. In other words, conversations between officers in front of defendants should be avoided because the statements made by defendants in response are generally inadmissible in court.

When Miranda Rights Are Not Required

There are instances where Miranda warnings are not required:

- **No interrogation of the suspect** – If the police do not question the suspect about a crime, then no Miranda warning is needed. Asking for identifying information such as name and date of birth does not count as an interrogation.

- **General questioning at a crime scene** – This includes the initial arrival when a police officer is just trying to figure out what is going on. Here, nobody is in custody yet. General questions are intended to discover if an offense has taken place and identify what safety measures need to be taken. Since no suspect has been identified, you would have no way to know that the person you are asking these general questions of is the suspect.

- **Witness statements –** Statements given by individuals who are *not in custody* do not need Miranda protections.

- **Voluntary statements –** If a suspect makes a spontaneous statement not solicited by the police, no *Miranda* has occurred. Since the person who gives a voluntary statement was not interrogated or compelled to give the statement, there is no legal protection for the voluntary statement.

- **Statements to a Private Party –** These are not statements that need a *Miranda* warning. Miranda does not protect any statement a person makes to a private party who is not a law enforcement officer. This includes statements made to those considered government agents at the time of the conversation, such as private parties who are asking questions for the government. **Miranda** doesn't apply because a private party does not have the authority to hold the person being questioned in custody.

- **Terry stops –** A Terry stop is a temporary detention and not custody. For example, traffic stops and stops and protective pat downs are not taking one into custody. DUI stops are also considered merely temporary detention.

- **Questioning in an individual's office, other place of business, or home** – If the person is free to leave, then *Miranda* is not applicable. In addition, the police must leave if asked by the person they are questioning. If officers are not going to leave when asked, then *Miranda* does apply. It should be noted that in all non-custodial circumstances, it depends on whether it is *reasonable* for the suspect *to believe* they are free to go.

- **Noncustodial questioning by probation/parole officer –** Probation and parole officers are not considered to be law enforcement officers in the context of posing questions to those they are assigned to oversee.

After being advised of *Miranda* warnings, a citizen has the choice either to waive their constitutional rights or to invoke them. If a citizen invokes their constitutional rights, all law enforcement members must immediately cease any questioning until the citizen has secured legal representation and that attorney is present. Once someone has requested a lawyer or expressed that they do not wish to speak to the police, you are not required to find them a lawyer or provide them the ability to retain a lawyer at that time. You must not ask any questions pertaining to the criminal activity in question.

If an individual waives their constitutional rights, you may ask any questions you have involving criminal activity. Be sure that the suspect has waived their rights with certainty.

8.2.11 Explain Miranda exceptions

Public Safety Exception

The public safety exception to the *Miranda* warnings was introduced in ***New York v Quarles*, 467 US 649 (1984)**. During this case, the question arose when the officer's questions related to a genuine concern for public safety and not the gathering of evidence. Here, we learn that genuine public safety worries can make the Miranda warning inapplicable.

In *New York v. Quarles*, a suspect in a supermarket matched a lookout for an armed subject who had just committed rape. Police apprehended the subject inside the supermarket but noticed that he had an empty

gun holster attached to his body. Police then asked Mr. Quarles about the gun's location. Mr. Quarles answered, and police found the gun. He was in police custody when the police asked him this potentially incriminating question. Police argued that they had a public duty to find this gun in the interest of public safety. The US Supreme Court agreed, and the public safety exception to the Miranda rule was a result.

Why should we be concerned about the empty holster? Why does this piece of information allow us to question the suspect without providing the Miranda warnings? With this set of facts: that there was an armed robbery, the suspect matches the lookout and the discovery of the empty holster, and law enforcement had a reasonable belief that there was a gun nearby. Since the questions were intended to recover the weapon, not necessarily as evidence, but to prevent someone else from being hurt, the Miranda Warnings are not required.

Spontaneous Utterances Exception

Another Miranda exception is the spontaneous utterance. The suspect makes a statement without interrogation from police. For example, you are putting a suspect who is under arrest for shooting into your transport cruiser. A citizen yells at the suspect, and the suspect yells back, "Yeah, I shot him. I should have killed him." Or, when you put the person in the back of your car, you tell him to watch his head, and he replies, "Yeah, I shot him. I should have killed him."

8.2.12 Explain how a suspect can waive his or her Miranda rights

Law enforcement officers have the burden of proof to show that any waiver of Miranda rights was done appropriately. If the waiver is not **intelligent** and **knowing**, any information obtained from the interrogation will be excluded. Officers may not, at any time, make any threats, coerce in any way, promise leniency, or use force to obtain a waiver. The person must make the waiver of their own free will.

Knowing means that the person is aware of their rights contained in the **Miranda** warnings and chooses not to exercise those rights. At MPD, **Miranda** rights are waived via the **Victim's Rights Card (PD 47)**. A detective will ask the suspect to sign such a card before interrogation.

Intelligent means that the person has the intellectual capacity to be able to surrender those rights. Further, intelligent means the person must not be unreasonably impaired (note that in DUI cases, the fact that the person is intoxicated does not affect consent) or medically or physiologically incapable of understanding and waiving their rights.

The waiver does not need to be explicit. Much like when advising a person of their rights, there are no magic words a suspect must speak to constitute a valid waiver. Remember that *a person's silence is the equivalent of a waiver*. For example, if the suspect is quiet while their *Miranda* rights are being read to them, indicates they understands what was said (e.g., nods), and readily answers questions during interrogation, the interrogation would be deemed legal. Similarly, courts have held that answering questions after refusing to sign the rights card is a valid waiver.

A judge will carefully evaluate various factors to decide if a suspect's action constitutes a valid waiver. Some of those factors are the individual's age, education, and mental/medical condition.

If the suspect has not requested a lawyer, the fact that another person has retained a lawyer for that person has no bearing on the waiver's validity. Officers are not even required to notify the suspect that a lawyer has been retained for him. The Constitution neither protects nor permits a third party to try to assert another's rights, and an individual does not have a right for a third party to obtain an attorney for them. The individual in police custody must *ask for* an attorney. However, once the suspect asks for an attorney, he is considered to have invoked his rights, and all questioning must cease until he is provided with a lawyer.

Once given, the suspect may withdraw the waiver at any time.

If the suspect asks to make a statement after invoking their rights, they *must* be re-advised of the *Miranda* warnings and waive them. This must occur without any prodding, enticement, or other encouragement from police officers.

8.2.13 Describe the departmental policy regarding electronic recording of custodial interrogations

MPD requires custodial interrogations for the below listed crimes of violence. Custodial interrogation includes words or actions that officers should know are reasonably likely to elicit an incriminating response from a person suspected to have committed a crime and who is under formal arrest or whose freedom of movement has been restrained to the degree associated with a formal arrest.

Electronically recorded interrogations *shall* take place for any person who is a suspect for any of the following offenses:

- Murder, including Manslaughter, AWIK, or any offense with a traffic fatality
- Child Sex Abuse, 1st-3rd Degree Sex Abuse
- Acts of Terrorism
- Theft, Attempted Theft of a Motor Vehicle, UUV
- Aggravated Assault, ADW, Malicious Disfigurement, assault with intent to commit any other offense
- APO
- Arson
- Burglary and Attempt Burglary
- Carjacking
- Robbery
- Firearms violations
- Extortion or Blackmail
- Kidnapping
- 1st Degree Cruelty to Children
- Any crime where the offense is punishable by imprisonment of more than one (1) year
- Gang Recruitment
- Interrogations for other offenses as determined by the watch commander

Interrogations are to be conducted by detectives. *No patrol officer absent special circumstances will give the **Miranda** warnings to a suspect*. Detectives handle this responsibility. Remember that Miranda cards and copies of interrogations must be submitted to the prosecutors for papering.

In summary, an officer's actions will be considered the functional equivalent of an interrogation if it is believed that the officer knew or had reason to believe that their actions would lead to a confession.

8.2.14 Adhere to departmental policy regarding the photography and video recording of members engaged in their duties

The Metropolitan Police Department recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or acting in an official capacity in any public space unless such recordings interfere with police activity. Officers must allow photography and videotaping in areas open to the public.

Members shall allow bystanders the same access to buildings, structures, and events that are common and lawful activities in Washington, DC. If a person is taking photographs or recording from a place where they have a right to be, officers are reminded that this activity by itself does not constitute suspicious conduct. If photography or video recording occurs and suspicious activity is suspected, then a suspicious activity report must be completed.

When Photography and Video Recordings are Allowed

Officers must allow the public to photograph and video record in public unless it interferes with a police investigation:

- A bystander has the same right to take photographs or make recordings as a media member, as long as the bystander has a legal right to be present where they are located at the time.
- A bystander has the right under the First Amendment to observe and record members in the public discharge of their duties.
- Public settings include parks, sidewalks, streets, and locations of public protests.
- The protection for taking photographs and making recordings also extends to an individual's home or business, the common areas of public and private facilities and buildings, and any other public or private facility where the individual has a legal right to be present.
- The fact that a bystander has a camera or other recording device does not entitle the bystander to cross a police line, enter an area that is closed to the public, or enter any area designated as a crime scene.

As long as the photographing or recording takes place in a setting that does not interfere with police work, MPD officers cannot interfere with the photography and/or videotaping.

When Photography and Video Recordings Can Be Prohibited

Situations where photography or videotaping poses an obstacle to police work include the following situations:

- When a person is photographing or recording police activity **from a position that impedes or interferes with the safety of members or their ability to perform their duties**, a member may direct the person to move to a position that will not interfere. However, a member shall not order the person to stop photographing or recording.

- If a person is photographing or recording police activity **from a position that impedes or threatens the safety of members of the public**, a member shall direct the person to move to a position that will not interfere. However, members shall not order the person to stop photographing or recording.

A person's recording of members' activity from a safe distance and the absence of any attendant action that obstructs the activity or threatens the safety of the member(s) does *not* constitute interference.

A person has the right to express criticism of the police activity being observed. So long as that expression does not jeopardize the safety of any member, suspect, or bystander and so long as that expression does not violate the law or incite others to violate the law, the expression does not constitute interference.

Photographs and Recordings as Evidence

There are, however, instances where civilians have recordings that become important evidence. If a member has probable cause to believe that a camera or other recording device contains images or sounds that are evidence of criminal acts, the officer:

- Will request that the person voluntarily provide the device or recording medium.

- Where possible and practicable, will transmit the evidence to an MPD government email account or memory card.

- Must remember that consent to take possession of a recording device or medium must be given voluntarily. An officer cannot implicitly or explicitly coerce consent and take possession of any recording device or any information thereon.

If the civilian is cooperative and allows you to have the recording device or a memory card of the evidence:

- Exercise due care and caution with the individual's property.

- Obtain a CCN for the evidence obtained and provide the CCN to the individual.

- In the Property Listing/Evidence Recovered section of any applicable field report(s), document the item(s) surrendered by the individual in the **Property Records (PD 81)** in accordance with MPD procedures.

- Document the member's request and the individual's response in the narrative of applicable field reports and other documents.

- Submit the device(s) to the Electronic Surveillance Unit to access any relevant material as quickly as practicable.

- Do not attempt to view, download, or otherwise access any material contained on the device.

If the individual declines to voluntarily provide the device or recording medium, or to electronically transmit the sound and/or images where possible and practicable and the member believes that exigent circumstances exist such that the evidence of criminal activity will be lost absent a seizure of the device, the MPD officer must contact the Watch Commander, Criminal Investigations Division (CID). The officer must also raise for an official. The officer must also inform the watch commander of their element, who must be present at the scene before any member takes any significant action involving a person's using recording device. This includes the warrantless search or seizure of a camera or recording device or an arrest.

If the Watch Commander, CID, finds that exigent circumstances exist for the seizure of the recording device, the officer can seize the device. The officer will then obtain and provide a CCN to the civilian whose recording device is taken.

Any such seizure must be a temporary restraint intended only to preserve evidence. Both of the following must be true:

1. Probable cause to believe that the property holds contraband or evidence of a crime; and

2. The exigencies of the circumstances demand that it or some other recognized exception to the warrant requirement is present.

NOTE: Officers shall not, under any circumstances, erase or delete recordings. Officers shall not require any other person to erase or delete any recorded images or sounds from any camera or other recording device in the possession of a non-member or that has been voluntarily turned over to or seized by MPD.

Other issues for officers to keep in mind:

- Absent exigent circumstances, members must obtain a search warrant before viewing photographs or listening to recordings on a camera or memory chip seized as evidence.

- In exigent circumstances where there is reason to believe that an immediate search of the seized material is necessary to prevent death or serious injury, members must contact the Watch Commander, CID, for authorization to review photographs or recordings without a warrant. The Watch Commander, CID, in consultation with the Commander, CID, may authorize such review without a warrant.

- Photographs or recordings seized as evidence and not directly related to the exigent purpose *shall not* be reviewed.

Summary

Having a working knowledge of constitutional law will prove essential in the career of law enforcement and will be utilized daily. This knowledge forms the backbone of MPD police officer's investigative skills. A good understanding of constitutional law allows an MPD officer to be an effective police officer who does not violate the Fourth and Fifth Amendments to the US Constitution.

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