

CHARLOTTESVILLE POLICE DEPARTMENT

Note: This directive is for internal use only and does not enlarge an officer's liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense with respect to third party claims. Violations of this directive, if proven, can only form the basis of a complaint by the Charlottesville Police Department and then only in a non-judicial administrative setting.

Type of Directive: GENERAL ORDER	Number: 75-99
CONSTITUTIONAL PROCEDURES	Date: March 10, 2017
VLEPSC Number: ADM.02.02	Manual Number: 536.02
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Authorization: Chief A.S. Thomas <i>A. S. Thomas</i>	Follow-up Date: As Needed

I. POLICY

It is the policy of the Charlottesville Police Department to respect the rights of citizens of the United States of America as well as visitors and citizens of other countries. In doing so, members shall not violate these rights, and shall follow professional policing standards as promulgated within this policy.

II. PURPOSE

The purpose of this policy is to ensure that members of this agency conduct themselves in accordance with the United States Constitution at all times while they exercise their lawful duties and responsibilities as established by policy, law, and generally accepted policing practices. The United States Constitution provides citizens with certain rights and protections against unreasonable governmental interference or intrusion. Among those rights secured by the constitution, include those specific to the criminal justice system as enumerated in the 1st, 2nd, 4th, 5th, and 6th amendments of the United States Constitution as incorporated against the states through the 14th amendment due process clause.

III. DEFINITIONS

A. For the purpose of this directive, the following definitions shall apply:

1. Search- the examination of a person, an item of property, or a place, in order to find evidence of a crime or other contraband (e.g. search incidental to an arrest, search with consent, etc.). Such an examination can involve either an intrusion into an area where a person enjoys a reasonable expectation of privacy or a physical trespass onto personal or real property.¹

¹ See, Katz v. United States, 389 U.S. 347 (1967), and United States v. Jones, No. 10-1259 (2012).

- a. Strip Search– an intrusion whereby an arrested person is instructed to remove or re-arrange some or all of his/her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or under-garments of such persons for the purpose of detecting or recovering any evidence, contraband or weapon.
 - b. Body Cavity Search– the examination of any body cavity other than the mouth for the discovery of any evidence, contraband or weapon.
2. Seizure (of a person) - The United States Supreme Court has defined such a seizure as the physical acquisition of a person through a means intentionally applied², a submission to a show of authority by an agent of the government or someone acting at behest of the government³, or facts or circumstances that would cause a reasonable person to believe that they are no longer free to leave⁴. However, for purposes of 536.02 a seizure of the person may occur whether the officer intentionally or unintentionally creates such a circumstance.
- a. Seizure (of an article or item) - in the same way a person can be detained, personal property can be taken from a person or otherwise removed from an area where that person enjoys a reasonable expectation of privacy.

IV. APPLICABLE CONSTITUTIONAL PROVISIONS

A. First Amendment of the Constitution of the United States of America

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievance.

B. Second Amendment of the Constitution of the United States of America

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

C. Fourth Amendment to the Constitution of the United States of America

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 be issued, but upon probable cause, supported by Oath or affirmation, and

² See, Brower v. County of Inyo, 489 U.S. 593 (1989).

³ See, California v. Hodari D., 499 U.S. 544 (1991).

⁴ See, United States v. Mendenhall, 446 U.S. 544 (1980).

particularly describing the place to be searched, and the persons or things to be seized.

D. Fifth Amendment to the Constitution of the United States of America

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

E. Sixth Amendment to the Constitution of the United States of America

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

F. Fourteenth Amendment to the Constitution of the United States of America

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for

participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

*Changed by section 1 of the 26th amendment.

V. PROCEDURE

A. Interviews and Interrogations

Interviews and interrogations require Miranda Warnings when a subject in custody is being questioned.

1. Interview/Interrogations – Juveniles (See also General Order 534.00)

- a. The provisions that apply to the interview/interrogation of adults apply to the interrogation of juveniles with the following additions:

- (1) In some circumstances, a child's age can affect how a reasonable person would perceive his or her freedom to leave.⁵
- (2) Officers shall make a reasonable effort to notify the child's parent or guardian to be present during the interview and/or interrogation of their child.
- (3) The duration of the interview and/or interrogation shall be reasonable and the police personnel present should be limited to those assigned to the case and/or those whose technical expertise is required.
- (4) The officer shall explain any applicable police or juvenile justice system procedures to the child and the child's parent or guardian before employing such procedures.

2. Voluntary Statements

- a. Sworn personnel taking voluntary statements may use the Department's voluntary statement form to assist them in obtaining and documenting the statement.
- b. Voluntary statements may be taped, typed or handwritten by an officer, the subject, and complainant or witness and shall be maintained with the case file.
- c. Miranda Warnings are required prior to seeking statements from subjects who are in custodial situations.
- d. As in any case where written statements are taken, the person giving the statement should initial all mistakes and/or corrections and initial the beginning and end of the entire statement. The officer/investigator present during the statement will sign the statement as a witness to its authenticity.
- e. It is the policy of the Charlottesville Police Department to video record all statements taken from persons from whom custodial and non-custodial interviews are conducted when circumstances permit for such recording.

3. Miranda Warnings

- a. In order to achieve uniformity and ensure that all individuals receive the standard Miranda Warnings and Waiver, police officers will be issued

⁵ See, J.B.D. v. North Carolina, 09-11121 (2011).

cards (“Advisory card”) with the Miranda Warnings and Waiver on them. A Rights Advisory Form is also available for use.

- b. When advising a subject of his/her rights, the rights as set forth on the Charlottesville Police Department Rights Advisory card or the Rights Advisory form will be read aloud to the subject.
- c. The “Waiver” should be read aloud to the subject after the Miranda advisory warning. In order to secure a waiver, the following questions should be asked and an affirmative reply received:
 - (1) “Do you understand your rights and are you willing to talk to us about this case?”
- d. After the Miranda rights warning and waiver have been read to the subject, understood by the subject and the subject wishes to waive his/her rights, the officer should have the subject sign the “Charlottesville Police Department Rights Advisory” form.

4. Access to Counsel

Any person who lawfully asserts his right to counsel during any criminal investigation or proceeding conducted by a member of this Department shall not be denied that right.

B. Assuring Constitutional Guarantees to Hearing Impaired Persons

- 1. Officers shall ensure that a qualified interpreter is used in those incidents where issues of constitutional rights involving hearing impaired persons arise.
 - a. A telecommunications device (TDD) for the hearing impaired is located in the Emergency Communications Center. All dispatch personnel are qualified to operate the telecommunications device
 - b. Another option is the use of a sign language interpreter requested through the ECC and UVA.
- 2. A hearing impaired complainant, victim or arrested subject shall be made aware that the interpreter will be provided at no expense. The Department shall be the responsible party in payment for any interpreter that has been requested prior to trial.

C. Assuring Constitutional Guarantees to Viewing of Government Actions

- 1. Courts have decided that the United States Constitution, First Amendment guarantees that any person who wishes to observe, record, photograph, etc. any

government, including police action, may do so to gather and disseminate information on matters of public concern, to include video-taping, photographing and otherwise recording the conduct of government actors engaged in their governmental duties in public places.

2. Courts have further decided that the United States Constitution, First Amendment, guarantees that every person have access to property in the public domain to exercise the freedom of speech, assembly or press and to be secure of themselves and their property whenever there. ⁶
3. There are only two limitations to a person observing, recording, photographing or otherwise documenting government (police) action:
 - a. No person may engage in any activity, including observing, recording, photographing, etc. that jeopardizes the safety of any officer, any others in the vicinity, or any suspect, nor violate the law, or incite others to violate the law or towards acts of violence.
 - b. No person may remain illegally upon a premise or location to observe, record or photograph, etc. The person must have the right to be present at the location.
4. With this stated, it is noted that persons have a right to observe, record, photograph, or otherwise document the conduct of government actors engaged in governmental duties on, but not limited to, the following properties:
 - a. All public sidewalks, streets, parks, open spaces, etc.
 - b. Inside public buildings, schools, markets, sporting facilities,
 - c. Any private property that the public is generally allowed access, such as but not limited to:
 - (1) Shopping centers
 - (2) Parking lots,
 - (3) Access roads,
 - (4) Apartment buildings.
 - d. Any private property that the person has approval to be on such as but not limited to:

⁶ United States Constitution, Fourth Amendment

- (1) Common property
 - (2) Personal property
 - (3) Invited upon property
 - (4) Family property.
5. Officers must be aware that observing, recording, photographing, or otherwise documenting of officers while on duty or in the course of their duties includes but is not limited to the following:
- a. Patrolling
 - b. Traffic Stops
 - c. Detentions
 - d. Searches
 - e. Arrests
 - f. Uses of Force
 - g. Gathering
 - h. Conversing with the Public
 - i. Investigating
6. Officers are expressly prohibited from infringing upon the rights of persons observing, recording, photographing, etc. in any manner, such as, but not limited to the following:
- a. Blocking or obstructing the person, sight, lens, or device,
 - b. Discouraging the person in any manner,
 - c. Intimidating the person through looks, words or actions,
 - d. Touching the person or disabling the device,
 - e. Seizing the property for any purpose other than actual evidence,
 - f. Temporarily holding property and deleting any information,
7. Officers are reminded that there are times that a person may not observe, record photograph, or otherwise document police activity due to jeopardizing officers or

others safety or otherwise interfere with officers or other first responders in the performance of their duty. Examples of such situations are:

- a. Tampering with a witness by repeatedly instructing or advising them,
 - b. Interfering by repeatedly instructing a suspect in a course of action,
 - c. Inciting or encouraging any person towards violence against another,
 - d. Blocking the movement of officers rendering aid or investigating,
 - e. Blocking the movement of other first responders rendering aid,
 - f. Contaminating or destroying a crime or accident scene,
8. Officers are further reminded that it is their duty to uphold the absolute right of any individual to observe, record, photograph, or otherwise document any police activity, and to not hamper those rights, but advise them how to do so in a manner that protects their rights and assists those involved in the duties being performed, for example asking the person to move to a less intrusive location or to remain quiet.
9. If an officer believes that recordings or photographs potentially contain actual evidence the following procedure will be followed:
- a. A supervisor must be notified
 - b. Consent should be sought in reviewing or copying any evidence. This consent must not be coerced implicitly or explicitly and must be freely and voluntarily given. Where practical such consent should be documented in some fashion, preferably on video or digitally recorded.
 - c. If consent is not given, probable cause must exist that the item is, or contains contraband or evidence of a crime and the exigencies of the circumstances exist in that either may be easily destroyed if not seized.
- (1) Such a seizure must be temporary, limited to a reasonable amount of time, until a search warrant is obtained.
- (2) It must be noted that any seizure of a recording device is a First and Fourth Amendment issue and significantly different than other evidence as it may contain evidence of police misconduct and thus a heightened sense of review and justification required for such seizure.

10. It is further noted that the general public enjoy the same rights as any media service. No individual needs to present any “press credentials” in order to exercise his or her right to observe, record or photograph any activity taking place in accessible area or within view of the general public.

D. Search and Seizures

1. Temporary Detention (“Terry Stop”). Police officers are allowed to stop a person and detain him/her briefly for questioning upon a reasonable articulable suspicion that he/she may be involved in criminal activity ⁷
 - a. Temporary Detention– to lawfully stop an individual, an officer must be able to articulate reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime.
 - (1) Reasonable suspicion exists when an officer can articulate facts sufficient to cause a reasonably prudent person to suspect that criminal activity is, has or is about to occur. This is a higher standard than mere suspicion and less than probable cause.
 - (2) The scope of activities permitted during an investigatory stop is determined by the circumstances that initially justified the stop. Pertinent considerations a court will look to in determining whether an investigative stop is reasonable may include:
 - i. The amount of force used by police to detain the individual,
 - ii. The need for such force,
 - iii. The extent to which the individual’s freedom of movement was restrained, and
 - iv. The duration of the investigatory detention.
 - b. Grounds for Frisk – An officer must have reason to believe that a subject who has been stopped is armed and dangerous before the officer is able to perform a lawful frisk of that subject. An officer need not be absolutely certain that the individual is armed; the question is whether a reasonably

⁷ See, Terry v. Ohio, 391 U.S. 1 (1967).

prudent person in the same circumstances as the officer would believe that his/her safety or that of others is in immediate danger. Officers are entitled to draw reasonable inferences from the facts or circumstances presented by a particular situation, in light of his/her own past experience and training. The right to conduct a frisk of a person lawfully detained requires an independent justification beyond simply the reasonable suspicion that gave rise to the stop. In other words, an officer must be able to articulate the basis for their suspicion that the person is armed or poses a danger to the officer or others.

- c. Nature of Frisk – the search for weapons must be a limited intrusion. The scope of the frisk must be designed to discover hidden weapons or instruments, which might be used to harm the officer. Unless an officer can articulate an object is immediately apparent as a potential weapon without manipulation they cannot go further into pockets or clothing to investigate further.
- d. It shall be the policy of the Charlottesville Police Department to ensure that temporary detentions are properly recorded pursuant to departmental policy. In those circumstances where the involved officer is operating a departmental vehicle equipped with a mobile video camera, or is equipped with a body worn camera, the facts leading up to the stop and the entire citizen encounter up to the time that the citizen is free to leave or is turned over to either a transport officer or ACRJ personnel shall be recorded.

2. Show-Up

- a. A show up is a Terry Stop in which a subject is temporarily detained by law enforcement personnel to permit a complainant or witness of a crime with the opportunity to view only the detained subject and then be asked if the detained subject is the perpetrator of that crime.
- b. Extreme caution shall be taken to reduce the suggestive nature of the viewing, thereby reducing the victim or complaint's possibility of mistaken identity and/or an allegation of the unconstitutionality of the show-up procedure.
 - (1) Generally, the complainant or witness should be brought to the location of the subject's detention.
 - (2) The detention should be in the reasonable proximity to the crime (i.e., time and location) and the subject detained only for a reasonable amount of time.

- (3) If possible, subject should not be viewed in a police vehicle or be viewed while in handcuffs.
- (4) Conversation between officer and complainant/witness should be out of hearing range of the detained subject.
 - c. It shall be the policy of the Charlottesville Police Department to ensure that all show-ups are properly recorded and that an IBR be completed outlining the facts and circumstances that led to the show-up, the manner in which the show-up was conducted, and the results of the show-up. Mobile Video Recording equipment or body worn video equipment shall be used to record the instructions given to the witness prior to the show-up as well as the show-up itself.

3. Searches Incident to Arrest

- a. A warrantless search of a person and the areas within the immediate control of such person will be conducted at the time a subject is placed under arrest or as soon as possible afterwards, dependent on the totality of the circumstances (e.g. place of arrest, etc.).
- b. With regard to searches of a vehicle incident to arrest, officer's may search the vehicle of its most recent occupants after an 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 the arrest.⁸

4. Strip Searches (Virginia Code 19.2-59.1)

- a. No person under custodial arrest for a traffic infraction, Class 3 or Class 4 misdemeanor, or a violation of a city ordinance, which is punishable by no more than thirty days in jail shall be strip searched without an authorizing supervisor's confirmation that the law enforcement officer has probable cause to believe that the subject is concealing a weapon or contraband.
- b. Subjects under custodial arrest for a Class 1 or Class 2 misdemeanor, or for any felony, may be strip searched if the arresting officer reasonably believes the subject is concealing a weapon, contraband, stolen property or fruits of a crime.
- c. All strip searches conducted shall be performed by persons of the same sex as the person strip-searched and on a premise where the search cannot

⁸ See, Arizona v. Gant, 556 U.S. 332 (2009).

be observed by persons not physically conducting the search. The only exception is that there shall be at least one other officer of the same sex of the subject being searched present during the search to serve as a witness.

d. Following a strip search, the arresting officer shall document the following in the IBR report:

- (1) Date, time, and specific location of the search,
- (2) Identity of the officer conducting the search and those present during the search,
- (3) A detailed description of the nature, extent, and location of the search,
- (4) Any weapons, evidence or contraband found during the search,
- (5) Use of force, if any.

5. Body Cavity Searches

a. Should visual examination of a suspect during a strip search and/or other information lead an officer to believe that the suspect is concealing a weapon, evidence or contraband within a body cavity (excluding mouth), the following procedures shall be followed:

- (1) The officer shall consult with a supervisor to evaluate the existing probable cause that is required to seek a search warrant for a body cavity search.
- (2) An affidavit for the search warrant shall be prepared and presented to the magistrate or the court.
- (3) On the basis of a search warrant, a body cavity search shall be performed only by a physician or by other medically trained personnel authorized to do so.
- (4) The search will be conducted at a medical facility.
- (5) The authorized individual conducting a search shall file a report, to be attached to the search warrant documents. The witnessing law enforcement officer (same sex as subject of the search) shall sign that report and comply with IBR information required by IV.H. of this policy.

6. Vehicle Stops

- a. It is recognized that whenever a vehicle is stopped for a traffic violation or suspicion of a crime, the driver of the vehicle is not free to leave and it is therefore a stop, detention or temporary seizure per this policy.
- b. During the course of a vehicle stop, all persons inside the vehicle are presumed stopped for 4th amendment purposes and have standing to challenge the basis for the stop.⁹
- c. An officer's order that the driver of a lawfully stopped vehicle exit the car applies to any and all passengers as well.¹⁰
- d. Where an officer has Reasonable Suspicion to believe that a person in a lawfully stopped vehicle is armed and dangerous, the officer may conduct a pat down of the subject without further justification¹¹
- e. The authorized individual conducting the stop shall document the reasoning either by Field contact card or IBR as described in V.H of this policy

E. Search/Seizure with Warrant

1. The Fourth Amendment guarantees the right for people to be free from unreasonable searches and seizures of their homes, person, and things. The Supreme Court is constantly interpreting the Fourth Amendment as it applies to police conduct. Illegally seized items of evidence may not be admitted against a defendant in a criminal case, and thus an otherwise successful prosecution may fail. Additionally, an illegally conducted search may result in civil suits in both state and federal court. In order to ensure that a citizen's Fourth Amendment rights against an unreasonable search and/or seizure are protected, Charlottesville police officers will apply for search warrants based on probable cause when conducting criminal investigations, except in limited situations where exigent circumstances or other lawful exceptions to the warrant requirement exist.
2. Legal Authority
 - a. Section 19.2-52 of the Code of Virginia states that a judge or magistrate may issue a search warrant when
 - (1) There is reasonable and probable cause to do so.

⁹ See, California v. Brendlin, 551 U.S. 249 (2007). Also see, Arizona v. Jones, 129 S.Ct.781 (2009).

¹⁰ See, Wilson v. Maryland, 519 U.S. 408 (1997).

¹¹ See, Arizona v. Johnson, supra.

¹¹

- (2) There is a complaint on oath supported by an affidavit.
- b. Section 19.2-53 of the Code of Virginia states that search warrants may be issued for the search of or for specified places, things or persons and seizure therefrom of the following things as specified in the warrant:
 - (1) Weapons or other objects used in the commission of a crime.
 - (2) Articles or things the sale or possession of which is unlawful.
 - (3) Stolen property or the fruits of any crime.
 - (4) Any objects, thing or person including documents books, records, paper or body fluids constituting evidence of a crime.
- 3. Legal Requirement
 - a. Affidavit Requirement – Section 19.2-54 of the Code of Virginia requires that prior to the issuance of a search warrant; an affidavit must be filed and sworn to before a judge or magistrate. The affidavit must contain the following information:
 - (1) The specific offense for which the search warrant is to be used.
 - (2) A description of the person, place or thing to be searched.
 - (3) The items to be searched for.
 - (4) Material facts constituting probable cause for the search. The officer must be specific in their facts.
 - (5) The officer must have personal knowledge of the facts set forth in the affidavit or be advised of the facts by an informant. When using an informant, the officer must establish credibility and reliability. This is most commonly done by stating the informant's past reliability in providing facts that have led to arrests and convictions.
 - (6) The magistrates must deliver the affidavit to the Clerk of the Circuit Court within seven days after the issuance of the search warrant.
 - (7) Section 19.2-56 of the Code of Virginia requires that a copy of the affidavit be attached to the search warrant.

- b. Search Warrant Requirement - Section 19.2-56 of the Code of Virginia defines the following requirements to be listed on the search warrant:
- (1) Location/description of the person, place or thing to be searched.
 - (2) The date and time of issuance.
 - (3) The date and time of execution.
 - (4) List of property seized. The list of property seized must be sworn to before a notary public.
 - (5) Execution of the search warrant must take place within fifteen days after the issuance, or it must be returned to, and voided by the issuing magistrate or judge.
 - (6) Section 19.2-57 of the Code of Virginia requires that the executed search warrant with list of property seized (or a notation that no property seized) must be filed in the Circuit Court within three days after execution excluding Saturdays, Sundays or any legal federal or state holiday.

F. Home Entries

1. Felony Warrants - Officers may not enter a person's home to make a felony arrest without a warrant. Implied in a felony arrest is the right to enter a home and to conduct a search for the person named in the warrant providing the following three things exist:
 - a. The existence of a valid arrest warrant in which the wanted subject has been named;
 - b. The address stated on the warrant is the named subject's address and not that of a third party;
and
 - c. There is probable cause to believe the named subject is at home at the time entry is made.¹²

While some courts may find that an officer need not have "special knowledge"¹³ as to whether the wanted person is, indeed, at home at the time the warrant is executed, this policy shall require that the officer point to articulable facts to support a belief that the person is at home at the time entry into the house is made.

The only other means by which officers may enter a person's home to affect an arrest is the existence of voluntary consent given by someone who has the actual or apparent

¹² Payton v New York, 445 U.S. 573 (1980)

¹³ 3 Wayne R. LaFave, *Search and Seizure* § 6.1 (4th ed. 2004)

authority to given such consent, or the presence of exigent circumstances. The severity of an offense does not create exigency.

With regard to entering the home of a third party (i.e. not the subject expressly named in the warrant), absent exigency or voluntary consent, officers must obtain a search warrant before entering the home of a third party. An arrest warrant is insufficient when the subject of the warrant is in a third party's home.¹⁴

Under no circumstances shall an officer enter the home of a person wanted for a misdemeanor absent voluntary consent, exigency, or a valid search warrant.¹⁵

2. Limits on Home Curtilage:

The area immediately surrounding and associated with a home is known as the curtilage. Like the home, it is protected by the Fourth Amendment.

An officer not armed with a warrant may approach a home and knock like any other person may do. However, the implied invitation to knock does not carry with it the further authorization to conduct a search while on the property unless the officer has a valid warrant, voluntary consent, or exigency.¹⁶

3. Canine Sniff of a Home:

The use of a properly trained canine to sniff for contraband within the curtilage of a home is a search under the Fourth Amendment. As such, the search must be supported by a valid warrant, voluntary consent, or exigency. The implied invitation which exists for anyone to knock on someone's front door does not authorize officers to bring a properly trained drug-sniffing canine on to the property to sniff the air while the officer is knocking.¹⁷

G. Search and Seizure without Warrant

All officers should be guided by the general rule that when there is doubt as to the legality of an impending warrantless search, when time allows, the City of Charlottesville Commonwealth Attorney's office should be consulted or a search warrant should be applied for. With that said, there are several categories where searches without a warrant have been deemed acceptable:

1. Search Incident to Lawful Arrest

¹⁴ Steagald v. U.S., 451 U.S. 204 (1981)

¹⁵ In U.S. v Hall, *supra*, 4th Circuit found that Payton's authority applied to the execution of misdemeanor warrants as well. This policy expressly prohibits such an application.

¹⁶ Florida v. Jardines, 133 S.Ct. 1409 (2013)

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A search incident to lawful arrest does not require issuance of a warrant. If someone is lawfully arrested, an officer may search the person and any area surrounding the person that is within reach, or their lunge-able area. The rationale is that the search is permissible as a protective measure from weapons or other dangerous instruments to include devices used to remove restraints. (See, *Chimel v. California*, 395 U.S. 752 (1969).

2. Plain View Exception

No warrant is required to seize evidence in plain view if an officer is legitimately in the location from which the evidence can be viewed. For example, an officer cannot illegally enter a suspect's back yard and then use the plain view exception to seize illegally growing marijuana. But, if on the premises to answer a call for service the officer sees the marijuana plants in plain view, they can rightly be seized. After securing said location a search warrant should be obtained for further searching.

3. Consent Search

If consent is given by a person reasonably believed by an officer to have authority, and mental capacity, to give such consent and the consent is not coerced, no warrant is required for a search or seizure. For example if a suspect is asked if their person, or property under their control, may be searched, even lacking any probable cause, and receive consent, the search may take place. If consent is removed the search would have to stop immediately. Factors to consider in voluntariness are:

- a. The number of officers present at the time of consent;
- b. The subjective state of mind, intelligence and age of the consenting person (including the individual's knowledge of his right to refuse to consent; however, the voluntariness of a person's consent does not depend on his having been specifically informed of his right to refuse);
- c. The length of any detention involved. (See, *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

4. Temporary Detention

Police may stop a suspect for investigative purposes so long as there is a reasonable suspicion of a criminal act. The evidence necessary for reasonable suspicion is more than mere suspicion, but is less than the level required for probable cause. If there is reason to believe that the person may be armed and dangerous,

the police can also frisk the suspect. Also see section C.1 above. (See, *Terry v. Ohio*, 392 U.S. 1 (1968).

5. Automobile Exception

Because vehicles are highly mobile, a warrant is not required in most circumstances. Any vehicle may be searched without a warrant if there is probable cause to believe that evidence, instrumentalities, etc. are present in the vehicle, unless the securing of a warrant is reasonably practicable. (See, *Carroll v. United States*, 267 US. 132 (1925).

6. Hot Pursuit

While in the course of the pursuit of a suspect, if an officer sees evidence of a crime, it may be secured and seized. Furthermore, if a suspect enters private property while being pursued by an officer, no warrant is required to enter that property in order to continue pursuit, even if the suspect is in no way connected with the property owner, and anything that is seen while in pursuit may be seized.

7. Abandoned Property

Any property left alone and abandoned with no one claiming ownership is considered abandoned and may be searched.

8. Open Fields

Search and seizure laws cover real and personal property, such as homes, business, papers, and vehicles, as well as a person; however, it does not cover open fields. If an officer is legally present in such a field and locates evidence, contraband or other it may be seized.

9. Special Needs Searches

Workplace searches that are conducted for the purpose of determining administrative rule or policy violations, as opposed to violations of criminal law, are an example of a Special Needs Search. Special Needs Searches of this kind require reasonable suspicion of workplace misconduct, but do not require a search warrant.¹⁸

Such searches must be reasonable at the inception, and reasonable as to scope. Workplace searches conducted during the course of an Internal Affairs Investigation

¹⁸ See, *O'Connor v. Ortega*, 480 U.S. 709 (1987), and *City of Ontario v. Quon*, 560 U.S. ____ (2010).

for the purpose of uncovering a violation of policy must, absent exigent circumstances, be approved by the Chief of Police or his/her designee.

Another example of a Special Needs Search is vehicle check-points or road blocks. These are typically regulatory in nature.

Drunk/Impaired driving road-blocks are Constitutional as long as they are conducted according to pre-set guidelines which limits discretion and arbitrariness of officers involved with respect to which vehicles are stopped.¹⁹

It shall be the policy of the department not to conduct drunk/impaired driving road-blocks without the authority of the Chief of Police and without approval of an operational plan that is consistent with generally accepted policing practices and whatever guidance and direction, if any is provided by the Virginia State Police, the Virginia Department of Transportation, and/or the Highway Safety Administration.

Roadblocks that are conducted for general crime control are run afoul the United States Constitution and are prohibited.²⁰

Information road blocks are Constitutional²¹, but it shall be the policy of the department that any such road blocks must be preceded by an operational plan that sets out both the purpose and staffing requirements and must be approved by the Chief of Police.

10. Administrative

Businesses that are regulated by the government, such as nursing homes, restaurants, power plants, etc., as well as other property under regulatory authority may be subject to administrative searches and inspections, without a warrant. For the most part, these types of searches are considered “Special Needs” searches and are not intended to be investigatory in nature. In the event such a search produces a police response, evidence or contraband may be secured and seized. To the extent such a search provides probable cause to believe further investigation will result in evidence of a crime, an application for a search and seizure warrant shall be required.

¹⁹ Michigan v. Sitz, 466 U.S. 444 (1990).

²⁰ See, Indianapolis v. Edmond, 531 U.S. 32 (2000) (Road blocks conducted for the purpose of drug interdiction held to be unconstitutional since the purpose behind such road blocks is general crime control and not highway safety).

²¹ See, Illinois v. Lidster, 540 U.S. 419 (2004) (Informational road block that sought assistance of motorists in the area of a hit and run fatality held to be Constitutional.)

11. Border Searches

Although rarely used by a municipal officer, a search may be conducted to any person or article coming across the international border into the United States without any probable cause or suspicion for various reasons pertaining to sovereignty and security (see Title 19 § 1581 of the United States Code. 12).

12. Inventory Search

An officer may secure personal property contained in an impounded vehicle, or off an arrested person as part of a caretaking responsibility. This type of search is called an inventory search and is for the purpose of taking inventory of and securing personal effects. An inventory of personal property at the time of a person's arrest is an inventory similarly allowed to be conducted without a warrant.

13. Exigent Circumstances

Exigent circumstances are emergencies that a reasonable exemption may apply. Some of these are:

- a. Evanescent searches- This may allow police to make a warrantless search of both people and residences when the evidence is considered fleeting and may disappear after a short period of time.
- b. Securing and searching of people- officers must have probable cause to arrest a subject, although they haven't done so yet, and must reasonably believe the subject is destroying other evanescent evidence, e.g. caked blood under fingernails.
- c. Securing and searching of a residence- police can enter without a warrant when they have reasonable cause to believe that:
 - (1) *Evidence of a crime is about to be or is being destroyed;*
 - (2) *People inside are in imminent danger of death or grievous bodily harm and a delay would further endanger them;*
 - (3) *Dangerous materials (e.g. explosives) inside are imminently likely to kill, seriously injure, or destroy property;*

- (4) *Weapons inside will be used to kill or seriously injure unless they are seized immediately.*

H. Conducting Searches

1. According to state, federal and case law, officer(s) may not use a search warrant to conduct a search that goes beyond the parameters of the requested search. Basically, an authorized search must cease once the property being search for is found
2. When executing a search warrant, the person searched or owner of the place searched or thing to be searched must receive a copy of the search warrant with the affidavit attached.
3. A search warrant for premises does not necessarily authorize a search of a person(s) at the residence unless specially specified in the warrant.

I. No-knock Entry to Search

1. There can be certain incidents when police officers executing a search warrant(s) may have to exercise the no-knock rule when entering premises. The practice of using the no-knock entry is authorized by certain recognized exceptions to the standard warrant execution procedure.
2. When using no-knock entry, an officer shall have reasonable suspicion to believe that announcing his/her presence would:
 - a. Lead to destruction of evidence.
 - b. Pose a danger to the officer or someone else.
 - c. Aid in suspects escaping.

J. Reasonable Suspicion Temporary Detention and Consent Search Reporting Requirements

1. Whenever a person is stopped based on reasonable articulable suspicion or probable cause and property is not seized, the reasonable suspicion or probable cause must be fully articulated in an IBR, reported via UTS, or otherwise recorded in a FCC (Field Contact Card)/warning ticket.
2. Whenever property is seized or the person is arrested as a result of detention, an IBR must be completed.
 - a. If the seized property involves a person observing, recoding or photographing, the responding police a supervisor must include a

supplement which clearly articulates his or her evaluation as to the officer's basis for the stop and the seizure of any property.

3. All contacts and calls shall be properly recorded in accordance with this policy and cleared through ECC with the appropriate disposition code.
4. Temporary Detention/Consent Searches
 - a. ALWAYS require an IBR
 - (1) Offense 1 will always be the offense that you were investigating that led to the stop/stop and frisk, or solicitation for consent to search.
 - (2) Offense 2 will be one of the following
 - i. 980- stop without search or frisk: for suspicion of a crime as explained in the IBR
 - ii. 981- stop with search or frisk: for suspicion of a crime as explained in the IBR
 - (3) The narrative must articulate the officer's reasonable suspicion leading to the stop/frisk/search and the events surrounding the incident.
 - (4) The reviewing supervisor and shift commander shall ensure that the facts and circumstances provided by the officer meet the requisite legal standard prior to approving and further processing the report.
 - (5) The Field Operations Division Commander, along with the shift lieutenants and to the extent possible, a representative from the Commonwealth's Attorney's office, shall conduct an inspection of all such reports at least once a quarter. Those reports which have failed to meet the requisite legal standard shall be returned to the approving supervisor for explanation, investigation, and appropriate remedial training or disciplinary action as deemed appropriate.
 - (6) A report shall be submitted to the Chief of Police quarterly with respect to all reasonable suspicion based stops, stops and frisks, and consensually based searches.

- b. Police and Sheriff's departments must comply with VA code 15.2-1722 which states:

15.2-1722. Certain records to be kept by sheriffs and chiefs of police.

It shall be the duty of the sheriff or chief of police of every locality to insure, in addition to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency. Failure of a sheriff or a chief of police to maintain such records or failure to relinquish such records to his successor in office shall constitute a misdemeanor. Former sheriffs or chiefs of police shall be allowed access to such files for preparation of a defense in any suit or action arising from the performance of their official duties as sheriff or chief of police. The enforcement of this section shall be the duty of the attorney for the Commonwealth of the county or city wherein the violation occurs.

- (1) For purposes of this section, the following definitions shall apply:

"Arrest records" means a compilation of information, centrally maintained in law-enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, and the charge, if any.

"Investigative records" means the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed.

"Noncriminal incidents records" means compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths.

"Personnel records" means those records maintained on each and every individual employed by a law-enforcement agency which reflect personal data concerning the employee's age, length of service, amount of training, education, compensation level, and other pertinent personal information.

"Reportable incidents records" means a compilation of complaints received by a law-enforcement agency and action taken by the agency in response thereto.

5. Vehicle Stops

- a. If the vehicle stop is based on a traffic violation and no ticket is issued the stop shall be documented on a Warning Ticket.
 - (1) The Warning Ticket shall contain: the Reasonable Suspicion leading to the stop, the date, time and location, and the personal identifiers of the driver, to include sex, race, DOB and DL or SSN.
 - (2) A Warning Ticket is not required if the stop results in the issuance of a traffic summons or arrest.
- b. If the vehicle stop is based on reasonable suspicion related to the officer's investigation of a crime, (i.e. matches suspect identifiers, etc.) an IBR is required for documenting the reason for the stop.