WARRANTLESS STOPS

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I. Generally.

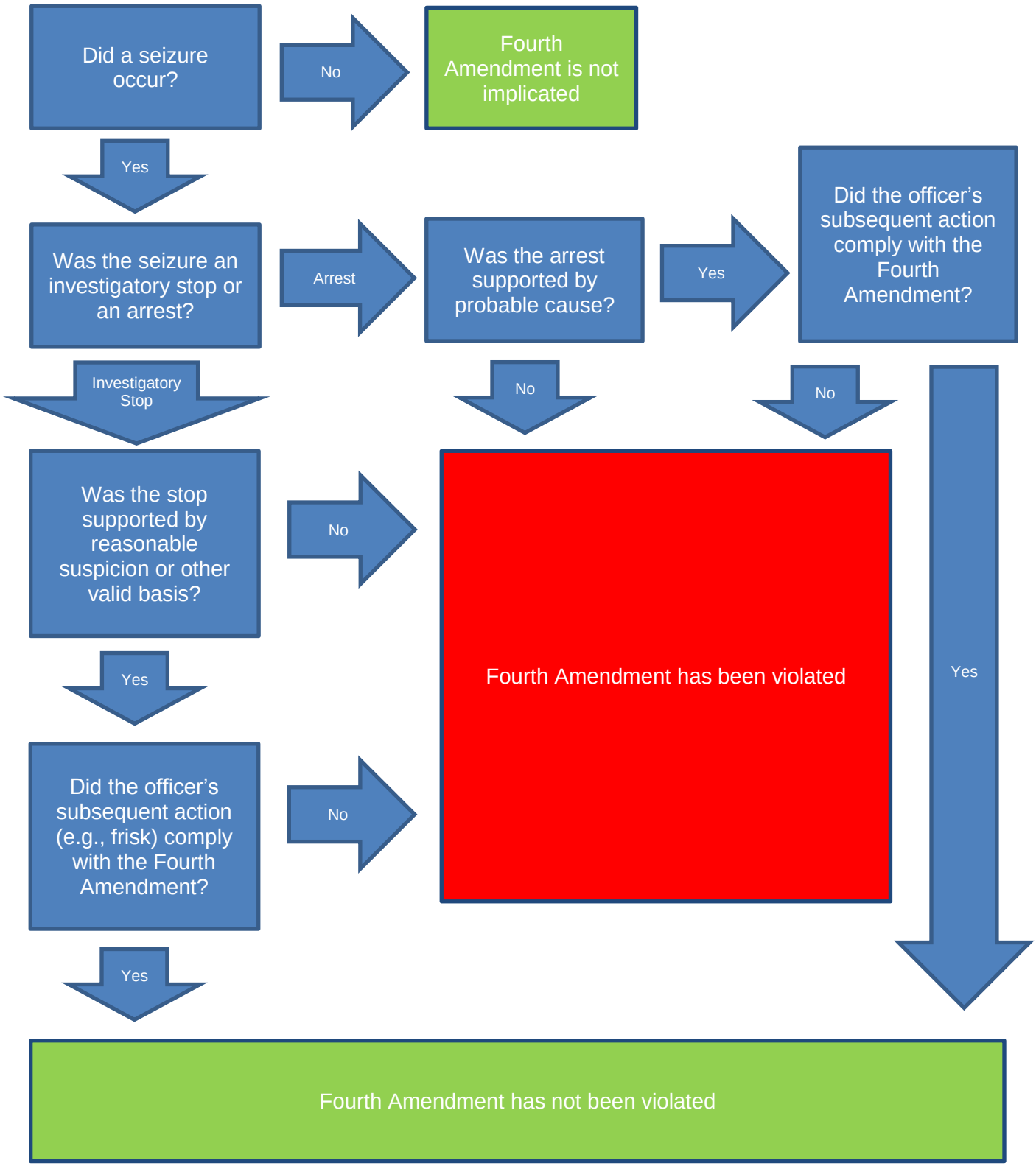
This section discusses Fourth Amendment issues that arise in connection with "on the street" warrantless stops by law enforcement officers. Traffic stops and motor vehicle checkpoints are not specifically addressed in this section, though a number of cases from those contexts are included. Related references include:

- Jeff Welty, *Traffic Stops*, in this Benchbook.
- Jeff Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2010/04 (UNC School of Government, Sept. 2010)
- ROBERT L. FARB, ARREST SEARCH AND INVESTIGATION IN NORTH CAROLINA (4th ed. 2011) [hereinafter FARB, ASI].
- Alyson Grine & John Rubin, *Stops and Warrantless Searches,* in 1 NORTH CAROLINA DEFENDER MANUAL (2nd ed. 2013).
- Jeff Welty, *Motions to Suppress*, in this Benchbook.

As a general rule, evidence obtained in violation of the Fourth Amendment must be suppressed. This section focuses on the Fourth Amendment to the U.S. Constitution. Note that in some respects, protections provided by the North Carolina Constitution differ from those provided under federal law. State v. Carter, 322 N.C. 709, 723-24 (1988) (rejecting the good faith exception to the exclusionary rule for purposes of state constitutional violations). Additionally, under certain circumstances, substantial violations of the North Carolina General Statutes may warrant suppression. G.S. 15A-974.

This section walks the trial judge through the Fourth Amendment analysis for on the street warrantless stops. Figure 1, below, illustrates the general analysis.

Figure 1. Analytical Flowchart



II. Did a Seizure Occur?

The first question in any Fourth Amendment analysis of a warrantless stop is: Did a seizure occur? If no seizure occurred, the Fourth Amendment is not implicated and the analysis is complete. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4, at 560 (5th ed.) [hereinafter LAFAVE]; *see, e.g.*, California v. Hodari D., 499 U.S. 621, 626 (1991) (because the defendant had not been seized when he discarded a rock of crack cocaine, the Fourth Amendment did not require suppression of the drugs); Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed."); *see also* United States v. Wilson, 953 F.2d 116, 120 (4th Cir. 1991) ("Only if a seizure took place does the Fourth Amendment come into play."); State v. Eaton, 210 N.C. App. 142, 147-48 (2011) (following *Hodari D.*). If a seizure occurred, the analysis must continue. The sections below explain what constitutes a seizure implicating the Fourth Amendment.

A. Free to Leave Standard.

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion) (the standard articulated in this case was later adopted by a majority of the Court in *Florida v. Royer*, 460 U.S. 491 (1983)). In certain situations a person may not feel free to leave for reasons unrelated to officers' conduct, such as when officers question passengers on a bus at a scheduled stop. The Court has explained that in these situations passengers do not feel free to leave for reasons independent of a law enforcement presence, namely that by leaving the passengers would risk missing the scheduled departure. Florida v. Bostick, 501 U.S. 429, 436 (1991). In these situations, the standard is whether a person would have felt free to decline the officer's request or to terminate the encounter. *Id.* at 436-37 (remanding for a determination under this standard). That standard also applies when the conduct occurs at a person's place of employment. I.N.S. v. Delgado, 466 U.S. 210, 218-19 (1984) (no seizure occurred when INS agents questioned workers at their place of employment; noting that "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers").

Note that the standard for determining whether a seizure has occurred is not the same as that used to determine whether a person is in custody for purposes of *Miranda*. United States v. Street, 472 F.3d 1298, 1309-10 (11th Cir. 2006) ("As some of our sister circuits have decided, a seizure does not necessarily constitute custody for *Miranda* purposes. The standards are different." (citations omitted)); *see also* State v. Buchanan, 353 N.C. 332, 339-40 (2001). Note also that the fact that a seizure has occurred does not mean that the person is entitled to *Miranda* warnings. Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984); *see also* State v. Braswell, ___ N.C. App. ___, 729 S.E.2d 697, 701 (2012). Thus, for example, although a short, routine traffic stop for issuance of a citation constitutes a seizure, the driver is not in custody for purposes of *Miranda. See generally* FARB ASI, *supra* p. 2 at 537-38.

B. Analysis is Objective.

When determining whether or not a seizure occurred, the court applies an objective analysis. Michigan v. Chesternut, 486 U.S. 567, 574 (1988). This means that the officer's subjective intent is irrelevant, except to the extent that it was conveyed to the defendant, 4 LAFAVE § 9.4(a), at 567-68, or speaks to the officer's credibility. Similarly, the test is objective vis-à-vis the person detained; that is, the court examines whether a reasonable person would have felt free to leave. *Chesternut,* 486 U.S. at 574 ("This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."); Florida v. Bostick, 501 U.S. 429, 438 (1991) (test is a "reasonable person" test). And in this respect, a reasonable person refers to a person who is innocent of any crime. *Bostick,* 501 U.S. at 438 ("the 'reasonable person' test presupposes an *innocent* person"). The Court has not yet decided whether the reasonable person standard for purposes of determining whether or not a seizure has occurred may take into account unique but known characteristics of the person detained that may affect the detainee's understanding of his or her freedom of action, such as age. *Cf.* J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 2406 (2011) (the age of a child subjected to law enforcement questioning is relevant to the *Miranda* custody analysis; "[S]o long as the child's age was known to the officer at the time of law enforcement questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.").

C. Relevant Factors.

When determining whether a person would have felt free to leave, a judge must consider all of the circumstances of the encounter. *Bostick*, 501 U.S. at 439; *Chesternut*, 486 U.S. at 572. As the Court has explained, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular law enforcement conduct at issue, but also with the setting in which the conduct occurs." *Chesternut*, 486 U.S. at 573. Among the relevant circumstances that may be considered are:

- *The threatening presence of several officers. Mendenhall*, 446 U.S. at 554.
- *An officer's display of a weapon. Mendenhall*, 446 U.S. at 554 (no seizure where, among other things, DEA agents did not display weapons); *Chesternut*, 486 U.S. at 575 (no seizure where, among other things, officers did not display any weapons); *see also Bostick*, 501 U.S. at 437 (although not deciding the issue, noting that there was "some doubt whether a seizure occurred" where, among other things, officers did not point their guns at the defendant). For relevant North Carolina cases, *compare, e.g.*, State v. Knudsen, __ N.C. App. __, 747 S.E.2d 641, 649-50 (2013) (the defendant was seized while walking on a sidewalk where, among other things, both officers wore weapons as part of their uniforms), *with* State v. Farmer, 333 N.C. 172, 188 (1993) (no seizure where, among other things, the officers who approached the defendant on a public street were not in uniform and displayed no weapons), *and* State v. Williams, 201 N.C. App. 566, 571 (2009) (no seizure where, among other things, the officer did not remove his gun from its holster).
- *An officer's physical touching of the person detained. Mendenhall*, 446 U.S. at 554; *see also* State v. Harwood, __ N.C. App. __, 727 S.E.2d 891, 897

(2012) (the defendant was seized where, among other things, an officer put the defendant on the ground).

- *An officer's use of language and/or tone suggesting that compliance with the officer's command might be compelled. Mendenhall*, 446 U.S. at 554; *Chesternut*, 486 U.S. at 575 (no seizure where among other things, officers did not command that the defendant halt); *see also* State v. Icard, 363 N.C. 303, 310 (2009) (the defendant, a passenger in a vehicle, was seized where, among other things, while blue lights and take-down lights were activated, an armed, uniformed officer opened the passenger side door, giving the defendant no choice but to respond to him and another officer told the defendant to exit the vehicle and bring her purse); *Harwood*, __ N.C. App. at __, 727 S.E.2d at 897 (the defendant was seized where, among other things, officers parked directly behind his stopped vehicle, drew their firearms, and ordered the defendant and his passenger to exit the vehicle).
- *Whether officers retained the person's identification papers or property.* Florida v. Royer, 460 U.S. 491, 501-02 (1983) (plurality opinion) (seizure occurred where, among other things, officers who approached the defendant at an airport told him that he was suspected of transporting drugs and asked him to accompany them to a police room while retaining his ticket and drivers' license).
- *Whether officers told the person that he or she was free to leave. Royer*, 460 U.S. at 504 (noting that if the officers had returned the defendant's airplane ticket and license and told him that he was free to go, "the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish"). But the fact that officers failed to expressly tell the person that he or she is free to leave is not dispositive of the inquiry. *Mendenhall*, 446 U.S. at 555 (no seizure where, among other things, the defendant was not so told).
- *Whether officers blocked the person's path. Chesternut*, 486 U.S. at 575 (no seizure where among other things, the officers did not use their car to block the defendant's course of travel or otherwise control the direction or speed of his movement; instead, officers merely drove parallel to the defendant, who was running). *Compare Knudsen*, __ N.C. App. at __, 747 S.E.2d at 650 (the defendant was seized while walking on a sidewalk where, among other things, one officer blocked the sidewalk with his bicycle and another blocked it with cruiser), *with Williams*, 201 N.C. App. at 571 (no seizure where, among other things, the officer did not use his patrol car to physically block the defendant's vehicle from leaving).
- *Whether officers activated sirens or lights. Chesternut*, 486 U.S. at 575 (no seizure where, among other things, the officers did not activate sirens or flashers). *Compare Icard*, 363 N.C. at 310 (seizure occurred where, among other things, the officer parked directly behind the vehicle in which the defendant was a passenger with his cruiser's blue lights activated; when a backup officer arrived in a marked law enforcement vehicle, he used his take-down lights to illuminate the defendant's side of the vehicle), *with* State v. Campbell, 359 N.C. 644, 663 (2005) (no seizure where, among other things, after the defendant stopped his car at a store, the officer pulled in behind him without activating his patrol car's blue light or siren), *and Williams*, 201 N.C. App. at 571 (no seizure occurred where, among other things, the officer did not activate his cruiser's siren or blue lights). For a fuller discussion of this

factor, see Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, NC CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010).

D. Consensual Encounters.

If the defendant's encounter with law enforcement is voluntary, no seizure has occurred. The Court has stated:

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

Florida v. Bostick, 501 U.S. 429, 434 (1991) (quotation and citation omitted). In fact, the Court has held repeatedly that "mere police questioning does not constitute a seizure." *Id.*; United States v. Drayton, 536 U.S. 194, 200 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."); I.N.S. v. Delgado, 466 U.S. 210, 216-221 (1984); *see also* State v. Campbell, 359 N.C. 644, 663 (2005) (no seizure occurred when the officer approached the defendant outside of a store, asked to speak with him and then inquired about his recent whereabouts and for his driver's license and vehicle registration); State v. Farmer, 333 N.C. 172, 188 (1993) (the defendant was not seized when officers approached him on a public street and asked him to identify himself and his place of residence, why he was covered in what appeared to be blood, and why he had given them a false name); State v. Price, __ N.C. App. __, 757 S.E.2d 309, 319 (2014) (the defendant was not seized when an officer found the defendant hunting in the woods with a rifle, approached him, identified himself, and asked the defendant to show his hunting license; once the officer was satisfied that the defendant held a valid license, he asked, without demanding, if defendant was a convicted felon and the defendant answered in the affirmative). Nor does a seizure occur when an officer asks to see the person's identification or asks for consent to search. *Bostick*, 501 U.S. at 437 ("As we have explained, no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required."); *Drayton*, 536 U.S. at 201. Because these questions occur in the context of a consensual encounter, the person approached need not answer them and is free to walk away; the fact that he or she does so does not provide reasonable suspicion for a stop. *Bostick*, 501 U.S. at 437 ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (quoting *Bostick*). Nor does a departure or flight from a consensual encounter with an officer constitute resisting, delaying or obstructing an officer. *See* JESSICA SMITH, NORTH CAROLINA CRIMES 567 (7th ed. 2012).

The fact that an officer identifies himself or herself as a law enforcement officer does not, without more, convert a consensual encounter into a seizure. Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion); *see also Farmer*,

333 N.C. at 188 (no seizure where plain clothed officers approached the defendant on a public street and identified themselves as law enforcement officers).

Distinguishing a consensual encounter from a seizure can be challenging, and necessarily will involve an examination of the totality of the circumstances. *Royer*, 460 U.S. at 506 ("We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure . . . ."; recognizing that "there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question"). Complicating the analysis is the fact that what begins as a consensual encounter can escalate into a seizure. I.N.S. v. Delgado, 466 U.S. 210, 215 (1984) (stating principle but finding no seizure occurred when INS agent questioned factory workers); *Royer*, 460 U.S. at 503 (so holding as to an airport encounter between the defendant and narcotics agents); United States v. Wilson, 953 F.2d 116, 120-123 (4th Cir. 1991) ("We hold that the officer's repeated requests to search the coats after [defendant]'s vigorous denials converted the encounter into a *Terry*-type seizure" (footnote omitted)). Section II.C. above discusses the factors to be considered when determining whether a person's counter with the law enforcement constitutes a seizure.

Note that an officer lawfully may seize any contraband seen in plain view during a consensual encounter, and observation of contraband may provide the heightened suspicion necessary to support a seizure. *See, e.g.,* Horton v. California, 496 U.S. 128 (1990) (discussing plain view generally); *see also Price*, __ N.C. App. at __, 757 S.E.2d at 319 (officer had authority to seize the defendant's hunting rifle during a consensual encounter after the defendant admitted that he was a convicted felon).

E. Chases.

The Court has rejected the argument that law enforcement chases always constitute Fourth Amendment seizures. Michigan v. Chesternut, 486 U.S. 567, 572 (1988). Instead, it has held that when officers chase a suspect, a seizure does not occur until the officers exercise physical force to restrain the person or the person submits to law enforcement authority by, for example, stopping and raising his or her hands. California v. Hodari D., 499 U.S. 621, 629 (1991) (holding that the defendant was not seized when he failed to comply with the officer's command to halt); *see also* State v. Eaton, 210 N.C. App. 142, 147-48 (2011) (citing *Hodari D*. and holding that the defendant was not seized when he discarded a plastic baggie containing contraband where he failed to comply with the officer's show of authority by submitting to the officer's request and returning to the patrol vehicle); State v. Mewborn, 200 N.C. App. 731, 735 (2009) (following *Hodari D.* and holding that no seizure occurred when the defendant began to run away as the officers exited their vehicle without first stopping or submitting to the officers' authority); State v. Leach, 166 N.C. App. 711, 716-17 (2004) (following *Hodari D*. and holding that officers did not seize the defendant until they detained him after high speed chase). Of course, once the defendant is captured or submits to the officers' authority, the encounter becomes a seizure. *See* Section III (discussing reasonable suspicion required for a stop); Section V (discussing probable cause required for an arrest).

III. Was the Stop Supported by Reasonable Suspicion or Other Valid Basis?

If the seizure was a stop and it was supported by reasonable suspicion or some other valid basis, the stop itself is constitutional and the only remaining issue is whether the officer's conduct exceeded the scope of the stop. If, however, the stop is not supported by reasonable suspicion or some other valid basis, it is unconstitutional. The sections that follow explore reasonable suspicion and other valid bases for a stop. Section IV. below explores the permissible scope of the stop.

A. Reasonable Suspicion.

1. *Generally*.

a. More Than a Hunch. An officer may make an investigatory stop when the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30 (1968). This standard is frequently known by the shorthand, "reasonable suspicion," although other terms such as "articulable suspicion," *see, e.g.,* Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion), or "founded suspicion", *see, e.g.,* United States v. Cortez, 449 U.S. 411, 417 (1981), are sometimes used. The standard requires the officer to articulate more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27; United States v. Sokolow, 490 U.S. 1, 7 (1989) (same; quoting *Terry*); Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1687 (2014) (a mere "hunch" is not enough). The "essence" of the standard is that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18.

b. Less than Probable Cause or Preponderance of the Evidence. The reasonable suspicion standard is less demanding than that required for a full-blown arrest—probable cause─because a *Terry* stop is a more limited intrusion. *Sokolow*, 490 U.S. at 7. The Court has explained:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990); *see* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("'reasonable suspicion'" is a less demanding standard than probable cause"). Likewise, it is "considerably less than preponderance of the evidence." *Id*.; *Sokolow*, 490 U.S. at 7.

c. Viewed from Law Enforcement Perspective. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."

Wardlow, 528 U.S. at 125. In applying the standard, the officer may make "inferences and deductions that might well elude an untrained person" and the evidence should be evaluated "as understood by those versed in the field of law enforcement." *Cortez,* 449 U.S. at 418. The Court has repeatedly instructed that a collection of facts that may seem innocent to the average lay person may provide a basis for reasonable suspicion by a trained officer. *See, e.g., id*. at 419 (noting that it is imperative to recognize that "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion"); United States v. Arvizu, 534 U.S. 266, 273 (2002) ("This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them . . . .).

d. **Objective Standard.** Reasonable suspicion is judged against an objective standard. Terry v. Ohio, 392 U.S. 1, 21-22 (1968) ("it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"); *Wardlow*, 528 U.S. at 123 ("the Fourth Amendment requires at least a minimal level of objective justification for making the stop"); Brown v. Texas, 443 U.S. 47, 51 (1979) ("we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity").

e. **Totality of the Circumstances Analysis.** When determining whether reasonable suspicion exists, the court must consider the "totality of the circumstances—the whole picture." *Cortez*, 449 U.S. at 417; *see* United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting *Cortez*); Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1687 (2014) (same). Whether reasonable suspicion exists depends on "both the content of information possessed by police and its degree of reliability." *Navarette*, 572 U.S. at __, 134 S. Ct. at 1687 (quotation omitted). While a collection of facts viewed separately may not establish reasonable suspicion, taken together they may do so. *Sokolow*, 490 U.S. at 9.

f. **Innocent Explanation Does Not Defeat Reasonable Suspicion.** The fact that the suspect's actions are capable of innocent explanation does not defeat a finding of reasonable suspicion. *Navarette*, 134 S. Ct. at 1691 ("[W]e have consistently recognized that reasonable suspicion need not rule out the possibility of innocent conduct." (quotation omitted)); Illinois v. Wardlow, 528 U.S. 119, 125 (2000) ("[E]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation."). *See also* Section III.A.12 (discussing when apparently innocent activities can support a finding of probable cause).

g. **Ongoing, Imminent and Completed Crimes.** Officers may effectuate a *Terry* stop when they have reasonable suspicion that

the person committed, is committing, or is about to commit a crime. United States v. Hensley, 469 U.S. 221, 227-29 (1985) (rejecting the argument that a *Terry* stop cannot be made for a completed felony in a case where officers stopped the defendant because a flyer indicated that he was wanted for a past robbery); *see generally* 4 LAFAVE § 9.2(a), at 373. The United States Supreme Court has noted that the "precise limits on investigatory stops to investigate *past* criminal activity are more difficult to define." *Hensley,* 469 U.S. at 228 (emphasis added) (noting that the proper way to identify the limits is to apply the Fourth Amendment's standard of reasonableness and "balance[] the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion"). It has however approved of a *Terry* stop to investigate a completed felony. *Id*. at 229, 233-34 (past robbery). Although the Court has made broad statements about the ability of officers to stop a person for past criminal conduct, *see* United States v. Cortez, 449 U.S. 411, 417 n.2 (1981) ("Of course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct."); United States v. Place, 462 U.S. 696, 702 (1983) (noting that the Court had previously acknowledged law enforcement authority to stop a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity"), whether a *Terry* stop is permissible for a completed non-felony offense is not entirely clear. *See, e.g.,* Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1690 n.2 (2014) (citing *Hensley* and noting that because the 911 call at issue created reasonable suspicion of an ongoing crime, "we need not address under what circumstances a stop is justified by the need to investigate completed criminal activity"). Some lower courts have eschewed a bright-line distinction between past felonies and past misdemeanors, focusing instead on the nature of the completed misdemeanor. *See* 4 LAFAVE § 9.2(a), at 375-76 & n.27. At least one North Carolina case approved of a *Terry* stop with respect to a past misdemeanor, although that decision did not discuss the fact that the crime was completed. In re V.C.R., __ N.C. App. __, 742 S.E.2d 566, 570 (2013) (officer had "reasonable suspicion to approach [a juvenile] and her companions" when the officer observed the juvenile smoking a cigarette and carrying a pack of cigarettes; "a reasonable person would find it more likely than not that a person in possession of a pack of cigarettes had 'accepted receipt'" of the cigarettes at a previous time which is a misdemeanor under G.S. 14-313(c) when the person is under the age of 18). And finally, some commentators argue that *Terry* stops should be limited in all situations to only serious offenses. 4 LAFAVE § 9.2(c), at 396-98.

h. **Stops of Potential Witnesses.** The United States Supreme Court has not decided the issue of whether *Terry* is limited to stops of suspects or whether it extends to stops of potential witnesses. One leading commentator suggests that the little authority on point

indicates that "the Fourth Amendment does not permit the stopping of potential witnesses to the same extent as those suspected of crime." *See* 4 LAFAVE § 9.2(b), at 378 (citing cases).

2. Relevant Factors—Generally.

As noted above, the reasonable suspicion analysis requires an examination of the totality of the circumstances. Among the factors that may be considered are:

- *The officer's personal observations. See, e.g.,* Terry v. Ohio, 392 U.S. 1, 30 (1968) (officer personally observed the defendants' suspicious behavior).
- *Information the officer received from others, including witnesses, informants, tipsters, and other law enforcement officers. See, e.g.,* Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1688 (2014) ("We have firmly rejected the argument that reasonable cause for an investigative stop can only be based on the officer's personal observation, rather than on information supplied by another person" (quotation omitted)); Adams v. Williams, 407 U.S. 143, 147 (1972) ("[W]e reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person."); United States v. Cortez, 449 U.S. 411, 418 (1981) (noting that information from law enforcement reports may be considered); United States v. Hensley, 469 U.S. 221, 227-29 (1985) (officers properly stopped the defendant because a wanted flyer indicated that he was wanted for a robbery); *see* Sections III.A.3. (discussing anonymous tips) and III.A.4. (discussing confidential informants tips), both below.
- *The officer's corroboration of information provided by witnesses, informants and tipsters. See, e.g.*, Alabama v. White, 496 U.S. 325, 332 (1990) (anonymous tip plus officer corroboration provided reasonable suspicion).
- *The suspect's presence in a high or drug crime area. See* Section III.A.5. below.
- *The suspect's proximity to the crime scene near the time of the crime. See* Section III.A.6. below;
- *The suspect's reaction to the officer's presence, including flight. See* Section III.A.7. below.
- *The officer's knowledge of the suspect's prior criminal record.* United States v. Sprinkle, 106 F.3d 613, 617 (1997) (while a prior criminal record is not, standing alone, enough to create reasonable suspicion, it can, "couple[d] . . . with more concrete factors," provide a basis for a stop).
- *The officer's knowledge of patterns or modes of behavior of certain types of criminals. See, e.g., Cortez*, 449 U.S. at 417-18 (proper to consider the "modes or patterns of operation of certain kinds of lawbreakers"); United States v. Sokolow, 490 U.S. 1, 9-10 (1989) (agents believed that the defendant's behavior was consistent with that of a drug courier).
- *The detainee's similarity to a sought-for suspect on the loose. See* United States v. Seelye, 815 F.2d 48, 51 (8th Cir. 1987) (investigative

stop of defendant was justified where the officer "confirmed that [the defendant's] appearance closely matched the description" of the suspect). For North Carolina cases on point, *compare* State v. Williams, 195 N.C. App. 554, 559-60 (2009) (stop proper where, among other things, the defendant substantially matched a "be on the lookout" (BOLO) report following a robbery and he was found a few blocks from the crime scene, minutes after the crime occurred and travelling in the same direction as the robber; "there is no requirement that the individual stopped must match precisely the description of the suspect"), *and* State v. Hemphill, __ N.C. App. __, 723 S.E.2d 142, 145 (2012) (stop proper where, among other things, responding to a report of suspicious activity, the officer saw the defendant, who "generally matched" the description of one of the perpetrators, peering from behind a parked van), *with* State v. Huey, 204 N.C. App. 513, 523 (2010) (stop improper where the robbery suspects were described as being approximately 18 years old and the defendant was 51 years old), *and* State v. Cooper, 186 N.C. App. 100, 107 (2007) (stop improper where the officer detained the defendant, a black male, 5-10 minutes after a robbery and within a quarter mile of the crime scene; a BOLO identified the suspect only as black male, and provided to further description as to age, physical characteristics or clothing).

3. Anonymous Tips.

In *Florida v. J.L.*, 529 U.S. 266, 268 (2000), the United State Supreme Court held that an anonymous tip that a person is carrying a gun, standing alone, is insufficient to provide reasonable suspicion for a stop. In that case, an anonymous caller reported that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and saw three black males. One of them—the defendant—was wearing a plaid shirt. An officer stopped and frisked the defendant, finding a gun in his pocket. The Court concluded that the tip in question lacked even a "moderate indicia of reliability." *Id.* at 271. It noted that the call "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id.* It continued: "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant]." *Id.*

However, the Court has held more recently, in *Navarette v. California*, 572 U.S. __, 134 S. Ct. 1683, 1690 (2014), that an anonymous 911 call reporting that a driver had run the caller off the road provided reasonable suspicion for a vehicle stop. In *Navarette*, the caller provided a description of the truck in question and its license plate, its location on a specified highway, and its direction of travel. An officer located the vehicle, observed it driving for five minutes and saw nothing significant. He stopped the vehicle, smelled marijuana, searched the vehicle and found thirty pounds of marijuana in the bed. The occupants of the truck were arrested and charged with drug offenses. The defendants argued at trial and on appeal that the stop was not supported by reasonable suspicion. Acknowledging that the case was a close one, *id.* at __, 134 S. Ct. at 1692, the Court found that the stop was valid. The Court reasoned

that the anonymous tip was reliable. First, the caller claimed eyewitness knowledge of the alleged dangerous driving, and that basis of knowledge provided "significant support to the tip's reliability." *Id.* at __, 134 S. Ct. at 1689. Second, the call was contemporaneous with the event. The Court noted that officers located the vehicle where it would be expected to be based on the caller's information and the time that had elapsed since the call was made. This fact, the Court reasoned, made the call "especially reliable." *Id.* And finally, the tip's reliability was bolstered by the fact that it came in through the 911 system with its recording and caller identification features that allow for identifying and tracing callers. This, the Court reasoned, provided "some safeguards against making false reports with immunity." *Id.* Having determined that the tip was reliable, the Court then held that it provided reasonable suspicion that the driver was impaired. The Court determined that "[r]unning another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues." *Id.* at __, 134 S. Ct. at 1691. The court conceded the reported behavior also might be explained by a driver responding to a misbehaving child or other distraction. But it dismissed this issue, noting that it had consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." *Id.* (quotation omitted). Finally, the Court rejected the argument that the absence of additional suspicious conduct after the vehicle was spotted by the officer negated reasonable suspicion. Acknowledging that "[e]xtended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication," the Court concluded that the five-minute period of observation in this case "hardly sufficed in that regard." *Id.; see also* Alabama v. White, 496 U.S. 325, 332 (1990) (in this case, cited by *Navarette,* the Court held that an anonymous tip plus officer corroboration provided reasonable suspicion).

Navarette calls into question earlier North Carolina decisions that had held insufficient anonymous tips on virtually indistinguishable fact patterns. *See, e.g.,* State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616, 620 (2013) (officers did not have reasonable suspicion to stop the defendant based on an anonymous tip from a taxicab driver that a red Mustang convertible with a black soft top, license plate XXT-9756, was driving erratically, running over traffic cones and continuing west on a specified road).

A tip is anonymous when the identity of the tipster is unknown. Like courts in other jurisdictions, North Carolina courts have held that a face-to-face anonymous tip carries greater reliability because the tipster has put his or her anonymity at risk and the nature of the encounter allows the officer to assess the tipster's credibility. *See* State v. Maready, 362 N.C. 614, 619-20 (2008) (unidentified driver who approached officers in person to report alleged traffic violations "was not a completely anonymous informant"; "[n]ot knowing whether the officers had already noted her tag number or if they would detain her for further questioning, and aware they could quickly assess the truth of her statements by stopping the [other vehicle], the . . . driver willingly placed her anonymity at risk" and this circumstance "weighs in favor of deeming her tip reliable"); State v. Allen, 197 N.C. App. 208, 213 (2009) (tip was reported in a face-to-face encounter with officers; "A face-to-face encounter . . .

affords a higher degree of reliability than an anonymous telephone call."); State v. Allison, 148 N.C. App. 702, 705 (2002) (tip came through a "face-to-face" encounter; by engaging directly with the officer the tipster "significantly increased the likelihood that she would be held accountable if her tip proved to be false"); *see also* State v. Hudgins, 195 N.C. App. 430, 435 (2009) (tipster placed his anonymity at risk by remaining on his cell phone with the dispatcher for eight minutes and remaining at the scene long enough to identify person stopped by the officer). *See generally* United States v. Valentine, 232 F.3d 350, 354-55 (3d Cir. 2000) (so holding and citing similar federal circuit court cases).

4. Confidential Informants.

A confidential informant's tip may provide reasonable suspicion for a *Terry* stop. In *Adams v. Williams*, 407 U.S. 143, 144-45 (1972), for example, a person known to an officer approached him and reported that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The officer then stopped the suspect and located the gun in the precise location specified by the informant. After an arrest, drugs were found on the suspect and in his car. The Court upheld the initial stop, reasoning:

> The informant was known to [the officer] personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under [applicable state] law, the informant might have been subject to immediate arrest for making a false complaint had [the officer's] investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop . . . .

Id. at 146-47 (footnote and citation omitted). The Court recognized however that "[i]nformants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability" and that "[o]ne simple rule will not cover every situation." *Id.* at 147. Thus the Court has rejected rigid tests for assessing confidential informants' tips and has insisted that factors such as the tipster's reliability and basis of knowledge be considered in the totality of the circumstances when assessing whether reasonable suspicion exists. *See* Illinois v. Gates, 462 U.S. 213, 234-38 (1983) (so concluding in the context of probable cause determinations).

5. High Crime Area.

The fact that a stop occurred in a high crime or drug area can contribute to reasonable suspicion. *See, e.g.,* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("we have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis"; holding that unprovoked flight in heavy drug trafficking area provided reasonable suspicion). However, a person's presence in a high

crime or drug area, standing alone, does not constitute reasonable suspicion. *See* Brown v. Texas, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."); *Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (citing *Brown*)). For North Carolina cases, compare, for example, *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39, 45 (2014) (no reasonable suspicion where the stop occurred at approximately 9:00 pm in an area known for illegal drug transactions and the defendant twice walked away from a companion in the presence of an officer), *temporary stay allowed*, __ N.C. __, 758 S.E.2d 859 (June 6, 2014), *State v. White*, 214 N.C. App. 471, 479 (2011) (no reasonable suspicion where officers responded to a complaint of loud music in a high crime area but did not see the defendant engaged in any suspicious activity or any device capable of producing loud music), and *State v. Hayes*, 188 N.C. App. 313, 315-17 (2008) (no reasonable suspicion where the defendant and another man were in an area where drug-related arrests had been made, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe either man lived in the neighborhood, and the officer observed a gun in the car they had exited), with *State v. Butler*, 331 N.C. 227, 233-34 (1992) (reasonable suspicion existed where the defendant was on a corner known for drug activity and the scene of multiple recent arrests for drugs and he immediately moved away after making eye contact with uniformed officers), *State v. Sutton*, __ N.C. App. __, 754 S.E.2d 464, 472-74 (2014) (reasonable suspicion existed where the defendant was in a high crime area and grabbed at his waistband "to clinch an item," which the officer interpreted as trying to hide something), *State v. Mello*, 200 N.C. App. 437, 446-47 (2009) (reasonable suspicion existed where the defendant was in a drug-ridden area and when the officer approached, the people who had been interacting with the defendant in what appeared to be a drug transaction fled), and *In re I.R.T.,* 184 N.C. App. 579, 585-86 (2007) (reasonable suspicion existed where the stop occurred in a high crime area, officers had received complaints of drug activity in the area, and the juvenile appeared to be concealing something in his mouth).

6. Proximity to Crime Scene.

As noted above, a suspect's proximity to the crime scene near the time of the crime is a relevant factor in the reasonable suspicion analysis. *See, e.g.,* United States v. Goodrich, 450 F.3d 552, 562 (3d Cir. 2006) (so holding and citing similar cases from other circuits). For relevant North Carolina cases, see *State v. Rinck*, 303 N.C. 551, 559-60 (1981) (reasonable suspicion to stop where defendants were found walking along the road at an unusual hour within a few hundred feet of where a homicide had occurred within the last hour); *State v. Buie*, 297 N.C. 159, 162-63 (1979) (reasonable suspicion to stop where, among other things, at 4:30 am, shortly after receiving a report of a burglary, the officer saw the defendant near the crime scene; the defendant roughly matched the description of the suspect and his clothing was wet as if he had been running or perspiring heavily); *State v. Hemphill*, __ N.C. App. __, 723

S.E.2d 142, 145-46 (2012) (reasonable suspicion where, among other things, when responding to a nighttime report of suspicious activity at a business, the officer found the defendant peering around a van at the business, which was closed); *State v. Williams*, 195 N.C. App. 554, 557-60 (2009) (reasonable suspicion existed where the defendant, who substantially matched a "be on the lookout" report following a robbery, was located 1-2 blocks from a robbery crime scene minutes after the crime occurred and he was travelling in the same direction that the suspect was reportedly traveling); and *State v. Douglas*, 51 N.C. App. 594, 596-97 (1981) (reasonable suspicion supported a stop of the defendant's vehicle at 12:34 am; the officer noticed a washing machine in the trunk and a dryer in the vehicle's rear passenger area and he was aware of several prior thefts of washers and dryers in the area).

However, this factor is unlikely to be enough on its own to provide reasonable suspicion. *See* State v. Campbell, 188 N.C. App. 701, 706-08 (1988) (finding reasonable suspicion in this case but agreeing with the defendant that proximity to a crime scene, time of day, and the absence of other suspects in the vicinity "are insufficient, in and of themselves, to establish reasonable suspicion"; noting however that while insufficient alone, "taken together, such factors certainly may suffice"); *see also* State v. Brown, 217 N.C. App. 566, 571-73 (2011) (no reasonable suspicion existed where the officer stopped a vehicle after spotting it in the area where a robbery had occurred four hours earlier; the officer had received no information about the suspects' direction of travel, only that they fled on foot; "If we were to decide in the State's favor, we could potentially set a precedent allowing law enforcement to pull over any citizen driving without exhibiting any traffic violations in the vicinity of a break-in or robbery with the most minimal suspicion of involvement in the crime."); State v. Chlopek, 209 N.C. App. 358, 359-64 (2011) (no reasonable suspicion to stop a truck that drove into a portion of a subdivision under construction and exited 20-30 minutes later; officers knew that there had been a large number of copper thefts from subdivisions under construction in that part of the county but no such thefts had been reported in the subdivision in question, nor had any other crimes been reported in that subdivision); State v. Murray, 192 N.C. App. 684, 686-690 (2008) (no reasonable suspicion to stop a vehicle at 3:41 a.m. near an industrial park where there had been past break-ins of vehicles and businesses; no break-ins were reported that night and there was nothing suspicious about the vehicle or the driver's driving; "To hold otherwise would make any individual in the . . . Industrial Park subject to arbitrary invasions solely at the unfettered discretion of officers in the field." (quotation omitted)); State v. Cooper, 186 N.C. App. 100, 103-08 (2007) (no reasonable suspicion where at 6:30 pm the officer stopped the defendant, a black male, after hearing a radio report that an armed robbery had occurred at a nearby convenience store five minutes earlier and the report described the robber as a black male but provided no further description as to age, physical characteristics, or clothing; "If we were to uphold the decision below, then we would, in effect, be holding that police, in the time frame immediately following a robbery committed by a black male, could stop any black male found within a quarter of a mile of the robbery.").

7. Reaction to Officers, Including Flight.

The Court repeatedly has stated that a refusal to cooperate with law enforcement officers during a consensual encounter, standing alone, "does not furnish the minimal level of objective justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437 (1991).

However, a person's evasive behavior in response to law enforcement officers' presence can be a factor supporting reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (so stating). Headlong flight, the Court has instructed, "is the consummate act of evasion." *Id.* at 124-25 (unprovoked flight in heavy drug trafficking area provided reasonable suspicion); *see also* State v. Butler, 331 N.C. 227, 233-34 (1992) (reasonable suspicion existed where the defendant was on a corner known for drug activity and he immediately moved away after making eye contact with uniformed officers); State v. Hemphill, __ N.C. App. __, 723 S.E.2d 142, 145-46 (2012) (reasonable suspicion where, among other things, the defendant fled after spotting the officer). Flight by persons seen associating with the defendant can support reasonable suspicion to stop the defendant if the circumstances show that the defendant was engaged in criminal activity with those persons. *See* State v. Mello, 200 N.C. App. 437, 446-47 (2009) (reasonable suspicion existed where the defendant was in a drug-ridden area and when the officer approached him, the people who had been interacting with the defendant in what appeared to be a drug transaction fled, with one of them quickly entering a house).

Simply walking away from the location where an officer is present does not constitute flight. In re J.L.B.M., 176 N.C. App. 613, 617-22 (2006) (no reasonable suspicion to stop a juvenile; the officer pulled his patrol car up to a gas station in response to a report of a suspicious person, identified only as a Hispanic male; when the juvenile, who matched the description of the suspicious person, saw the officer he walked over to a vehicle in the parking lot, spoke to someone, and then walked away from the officer's patrol car); State v. Fleming, 106 N.C. App. 165, 168-171 (1992) (no reasonable suspicion where after watching officers standing on the street near a high drug area public housing project at 12:10 am, the defendant and his associate, who were unknown to the officers, turned and started walking out of the area; "Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a 'high drug area.' This would not be reasonable."); *see also* State v. Jackson, __ N.C. App. __, 758 S.E.2d 39, 45-46 (2014) (no reasonable suspicion where stop occurred around 9:00 pm in an area known for illegal drug transactions and the defendant twice walked away from a companion in the presence of an officer), *temporary stay allowed*, __ N.C. __, 758 S.E.2d 859 (Jun. 6, 2014). Nor does being seen running in the area constitute flight when there is no connection between the running and the law enforcement presence. State v. White, 214 N.C. App. 471, 480 (2011) ("There was no testimony to indicate whether Defendant knew the police were present before he began running. . . . To conclude the officers were justified in effectuating an investigatory stop, on these facts,

would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running.").

Cases have held that a defendant's attempt to hide something from an officer can contribute to reasonable suspicion, *see, e.g.*, State v. Sutton, __ N.C. App. __, 754 S.E.2d 464, 472-74 (2014) (reasonable suspicion existed where the defendant was in a high crime area and grabbed at his waistband "to clinch an item," which the officer interpreted as trying to hide something); In re I.R.T., 184 N.C. App. 579, 586 (2007) (reasonable suspicion existed where, among other things, the juvenile turned away from the officer and did not open his mouth while speaking, leading the officer to conclude that the juvenile was hiding drugs in his mouth), as can "freezing" in the presence of officers. State v. Williams, 195 N.C. App. 554, 559-60 (2009) (among other things, the defendant froze when confronted by the officer).

8. Nervousness.

Nervousness can be a relevant factor contributing to reasonable suspicion, although the cases tend to require more than the ordinary nervousness that most people may display when dealing with law enforcement. State v. McClendon, 350 N.C. 630, 638-39 (1999) ("[N]ervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists."; reasonable suspicion existed where the defendant "exhibited more than ordinary nervousness" and was "fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer"); State v. Brown, 213 N.C. App. 617, 620 (2011) (reasonable suspicion existed where, among other things, "[w]hen defendant realized the individuals in the vehicle were police officers his 'demeanor changed' and he appeared to the officer to be very nervous. [The officer] testified that defendant started to sweat, began stuttering, and would not talk very loud."). *See generally* United States v. Simpson, 609 F.3d 1140, 1147-48 (10th Cir. 2010) (noting that "nervousness is of limited significance in determining whether reasonable suspicion exists" but that "[e]xtreme and persistent nervousness, however, is entitled to somewhat more weight"; holding that the defendant's extreme nervousness, along with other factors supported the detention (quotations omitted)); United States v. Massenburg, 654 F.3d 480, 490-91 (4th Cir. 2011) (similar but holding that there was no reasonable suspicion; "If the ordinary response of the innocent upon being asked to consent to a search—some mild nervousness—sufficed to create reasonable suspicion, then *Terry*'s reasonable suspicion requirement would become meaningless").

9. Collective Knowledge of Officers.

Sometimes officers will stop a person based on a request of another officer or agency. If the requesting officer's or agency's information establishes reasonable suspicion, the stop may be justified even though the stopping officer does not know the facts possessed by the requesting officer or agency. United States v. Hensley, 469 U.S. 221, 232-235 (1985) (in a case involving a stop on the basis of a wanted flyer indicating that the defendant was sought in connection with a robbery, the Court stated: "[a]ssuming the police make a Terry stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who issued the flyer or bulletin possessed a

reasonable suspicion justifying a stop"; rejecting the argument that the flyer must contain the facts providing reasonable suspicion); United States v. Smith, 648 F.3d 654, 659 (8th Cir. 2011) ("Police officers may rely upon notice from another police department that a person or vehicle is wanted in connection with the investigation of a felony when making a *Terry* stop, even if the [notice] omits the specific articulable facts supporting reasonable suspicion." (quotation omitted; citing *Hensley*)); *see also* State v. Battle, 109 N.C. App. 367, 371-72 (1993) (stop was valid where officer who issued a "be on the lookout" radio request was in possession of facts establishing reasonable suspicion but stopping officer did not know those facts); *see generally* FARB, ASI at 29. But if the requesting officer or agency did not have reasonable suspicion to issue the request, a stop made in reliance on the request violates the Fourth Amendment. *Hensley*, 469 U.S. at 232. Likewise, a stop based on information that has been fabricated by the requesting officer or agency cannot support reasonable suspicion. State v. Watkins, 120 N.C. App. 804, 809 (1995) (holding that because information provided to the stopping officer by the requesting officer was fabricated it could not provide reasonable suspicion for the stop, even if the stopping officer knew nothing of the subterfuge; "evidence which will support reasonable suspicion . . . must be genuine and not contrived misstatements by law enforcement officers").

"If the collective knowledge of several officers or agencies working together on an investigation establishes reasonable suspicion, that generally may justify an investigative stop by one of the officers," FARB, ASI at 29, though some have questioned or rejected such a result, at least in certain circumstances. *See, e.g.,* 4 LAFAVE § 9.5(j), at 823 (questioning application of this doctrine when reasonable suspicion is shown only by "aggregating bits and pieces of information from among myriad officers" (quotation omitted)); United States v. Massenburg, 654 F.3d 480, 493-96 (4th Cir. 2011) ("the collective-knowledge doctrine simply directs us to substitute the knowledge of the *instructing officer or officers for the knowledge of the acting officer*; it does not permit us to aggregate bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions"; but noting cases that have held otherwise).

10. Pretext.

If a stop is supported by reasonable suspicion, the officer's subjective motivation is irrelevant, Whren v. United States, 517 U.S. 806, 813 (1996); *see also* State v. McClendon, 350 N.C. 630, 636 (1999) (the officer's subjective motive for the stop is immaterial); State v. Lopez, __ N.C. App. __, 723 S.E.2d 164, 168-69 (2012) (rejecting the defendant's argument that the traffic stop was a pretext to search for drugs as "irrelevant in light of the fact that defendant was lawfully stopped for speeding"); State v. Ford, 208 N.C. App. 699, 701-04 (2010) (rejecting the defendant's argument that a stop for an alleged violation of G.S. 20-129(d) (regarding lighting of motor vehicle's rear plate) was pretextual; under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved), except to the extent it is pertinent to the officer's credibility.

11. Dangerous Weapon Exception.

In *Florida v. J.L.*, 529 U.S. 266, 272 (2000), the Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal gun would justify a stop and frisk even if the tip itself fails the standard test for reasonable suspicion. The *J.L.* Court expressly declined to rule on a "bomb exception," stating:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

J.L., 529 U.S. at 273-74.

12. Innocent Activities.

The facts supporting reasonable suspicion need not directly relate to criminal activity. The Court has explained that a series of acts, each of them perhaps innocent if viewed separately, can provide a basis for reasonable suspicion when considered together. United States v. Sokolow, 490 U.S. 1, 9-10 (1989) (noting that *Terry* involved this precise situation); United States v. Arvizu, 534 U.S. 266, 274 (2002). The issue is not whether the conduct in question is "innocent" or "guilty," but rather "the degree of suspicion that attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10. Thus, for example, a series of seemingly innocent activities that lead officers to believe that a person fits a drug courier profile can support a finding of reasonable suspicion. *Id.* However, the prosecution cannot "simply label a behavior as 'suspicious' to make it so"; the prosecution "must . . . be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance. United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011) ("We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity."); *see also* United States v. Mason, 628 F.3d 123, 136-38 (4th Cir. 2010) ("[e]ven when viewed holistically, the facts . . . simply do not exclude enough innocent travelers to justify reasonable suspicion"; noting that the "government conceded that every factor that it used to justify reasonable suspicion could apply to either every car on [the highway] or at least millions of them").

Terry permits stops even when the circumstances are "susceptible of an innocent explanation." Illinois v. Wardlow, 528 U.S. 119, 125-26 (2000); *see also Arvizu*, 534 U.S. at 277 ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.").

13. Mistake of Law or Fact.

A stop based on an officer's incorrect assessment of the facts does not violate the Fourth Amendment if the officer's mistake was reasonable. *See, e.g.,* United States v. Coplin, 463 F.3d 96, 102 (1st Cir. 2006) (citing prior case law as standing for the proposition that "an objectively reasonable suspicion, even if found to be based on an imperfect perception of a given state of affairs, may justify a *Terry* stop" and holding that the officer's mistake of fact as to whether defendant's driver's license was suspended did not invalidate the stop at issue); United States v. Jenkins, 452 F.3d 207, 212 (2d Cir. 2006) ("The constitutional validity of a stop is not undermined simply because the officers who made the stop were mistaken about relevant facts."; "In this case, because the officers had a reasonable but mistaken belief that the SUV lacked license plates, stopping the vehicle was 'justified at its inception.'" (quoting *Terry*)); *see also* State v. Williams, 209 N.C. App. 255, 264-65 (2011) (officers had reasonable suspicion to stop a vehicle based in part on the officers' good faith but mistaken belief that the driver had a revoked license where the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

With respect to mistakes of law, in *State v. Heien,* 366 N.C. 271, 279-80 (2012), the North Carolina Supreme Court held that an officer's objectively reasonable but mistaken belief that a traffic violation has occurred can provide reasonable suspicion for a stop. Applying this standard to the facts at hand, the court found the officer's mistake objectively reasonable and that the stop was justified. *But see* State v. Coleman, __ N.C. App. __, 743 S.E.2d 62, 66-67 (2013) (distinguishing *Heien* and concluding that the officer's mistaken belief that the defendant was violating the open container law, which served as the basis for his stop, was unreasonable). As of the writing of this chapter, the United States Supreme Court had granted certiorari on that issue. Heien v. North Carolina, 134 S. Ct. 1872 (2014).

14. Less Intrusive Means.

The fact that means less intrusive than a stop are available to officers to verify or dispel their suspicions is irrelevant to the determination of whether the stop itself is constitutional. United States v. Sokolow, 490 U.S. 1, 10-11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques."). The issue of using the least intrusive means comes into play only with regard to the scope of the officer's investigation after the stop. *See* Section IV. below.

B. Other Valid Bases for a Stop.

1. Community Caretaking.

In *State v. Smathers*, __ N.C. App. __, 753 S.E.2d 380, 384 (2014), a case in which the State conceded that the officer had neither probable cause nor reasonable suspicion to seize the defendant, the court decided an issue of first impression and held that the officer's seizure of the defendant was justified by the "community caretaking" doctrine. In *Smathers*, the officer stopped the defendant to see if she and her vehicle were "okay" after he saw her hit an animal on a road. Although the defendant's driving did not give rise to any suspicion of impairment,

during the stop the officer determined the defendant was impaired and arrested her for impaired driving. The court noted that in adopting the community caretaking exception, "we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion." *Id.* at 384. It went on adopt the following test for application of the doctrine:

> [T]he State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

Id. at 386. The court explained that "[r]elevant considerations in assessing the weight of public need against the intrusion of privacy include, but are not limited to:"

- *The degree of the public interest and the exigency of the situation.*
- *The attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed.*
- *Whether an automobile is involved.*
- *The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished*.

Id. at 386. The court rejected the notion that the doctrine only applies when there is imminent danger to life or limb but held that the doctrine "should be applied narrowly and carefully to mitigate the risk of abuse" *Id.* at 386.

Applying the test to the case at hand, the court held that the stop fell within the community caretaking exception. First, it was uncontested that the stop was a seizure. *Id.* at 387. Second, because the officer saw the defendant strike the animal and sparks fly when her car struck the road, "there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was predicated on the community caretaking function of ensuring the safety of defendant and her vehicle." *Id.* Finally, it held that "the public need and interest in having [the officer] seize defendant outweighed [the defendant's] privacy interest in being free from the intrusion." *Id*. In this regard the court noted that because the defendant was able to drive properly after the collision, "the circumstances lacked an exigency that would weigh in favor of police intervention." *Id.* Additionally, the seizure was a "substantial intrusion on defendant's liberty" in that the officer did not approach an already stopped vehicle, but rather stopped a vehicle that was travelling on the road. *Id.* Although these factors supported the conclusion that the stop was unreasonable, other factors supported a contrary conclusion. Specifically,

because the seizure occurred at night on a rural road, the defendant might not have gotten help had the officer not acted; because the officer saw the collision and sparks fly when her car bounced on the road, specific facts supported the officer's belief that the driver might need help; and the seizure occurred when the defendant was in a car, not in her home or other place where persons have greater privacy. *Id.* And finally, the court noted various state statutes regarding reportable crashes created a "statutory duty" for the officer to "ascertain the nature and extent of the damage to the defendant's vehicle." *Id.* at 388.

For a collection of cases from other jurisdictions applying this doctrine, see 4 LAFAVE § 9.2(b), at 382-87.

2. Service of Process & Execution of a Search Warrant.
Under North Carolina, officers may lawfully stop a person to serve various types of legal process, such as a criminal summons. FARB, ASI at 47. Also, in some circumstances individuals may be briefly detained when officers are executing a search warrant. *Id.* at 48.

3. Public Emergency.
During emergencies and disasters, certain state statutes allow officers to detain individuals without reasonable suspicion that criminal activity is afoot. FARB, ASI at 48.

4. Wildlife & Marine Fisheries Officers.
Under N.C. law, Wildlife and Marine Fisheries officers have authority to stop persons to, among other things, inspect licenses. FARB, ASI at 50.

IV. If Reasonable Suspicion Supported the Stop, Was the Officer's Subsequent Conduct Sufficiently Limited in Scope?

Even if an investigative stop is supported by reasonable suspicion, evidence obtained as a result of the stop may be subject to suppression if the officer's subsequent conduct exceeded the scope of his or her stopping authority. Terry v. Ohio, 392 U.S. 1, 19-20, 29 (1968) ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."); United States v. Sharpe, 470 U.S. 675, 682 (1985) (same). The limitation on scope refers to both the duration of the seizure, the force used, and the manner in which the officer carries out the investigation. *See, e.g.*, Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty., 542 U.S. 177, 186 (2004) (noting that a *Terry* stop cannot "continue for an excessive period of time or resemble a traditional arrest" (citation omitted)). It is generally understood that:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). The standard is reasonableness. *Terry,* 392 U.S. at 20. Defining what is reasonable can be difficult, however, and challenging line-drawing problems arise when trying to determine whether or not a stop was transformed into an arrest, requiring probable cause. United States v.

Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994) ("Subtle, and perhaps tenuous, distinctions exist between a *Terry* stop, a *Terry* stop rapidly evolving into an arrest and a de facto arrest."); *see also* 4 LAFAVE § 9.2(f) at p. 424. "Given the 'endless variations in the facts and circumstances,' there is no 'litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop' and becomes an arrest." *Tilmon,* 19 F.3d at 1224 (quoting *Royer*). In the end, the question comes down to balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703 (1983). The subsections that follow explore this balancing with respect to specific techniques commonly used during *Terry* stops.

A. Frisks.

1. When Permitted.

Once a valid stop has been made, if an officer reasonably "conclude[s] in light of his experience . . . that the person with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, 392 U.S. at 30; Arizona v. Johnson, 555 U.S. 323, 327 (2009) (frisk is proper when stop is valid and officer reasonably suspects that the person stopped is armed and dangerous). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. When determining whether an officer acted reasonably in conducting frisk, "due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* Note, however, that the frisk only is authorized when the officer reasonably has a concern for safety; an officer's suspicion that the stopped person possesses contraband will not suffice. Sibron v. New York, 392 U.S. 40, 64-66 (1968) (in a *Terry* companion case the Court held that the frisk of defendant Sibron was improper where the officer was seeking drugs, not acting out of fear for his safety).

Like the reasonable suspicion analysis for the initial stop, this analysis examines the totality of the circumstances. *See, e.g.,* United States v. George, 732 F.3d 296, 299 (4th Cir. 2013) (case from North Carolina so concluding and citing similar cases from other jurisdictions). Evidence suggesting that the person is or was in possession of a weapon is a relevant circumstance. *See, e.g.,* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (officer was justified in frisking the defendant during a traffic stop where the officer observed a large bulge in the defendant's jacket which "permitted the officer to conclude that [the defendant] was armed and thus posed a serious and present danger to the safety of the officer"); Adams v. Williams, 407 U.S. 143, 147-48 (1972) (frisk proper where, among other things, the person in question was reported to be carrying narcotics and a gun); *see also* State v. King, 206 N.C. App. 585, 589-90 (2010) (frisk during a traffic stop was proper where the defendant told the officer that he had a gun on the dashboard). *But see* United States v. Powell, 666 F.3d 180, 188 (4th Cir. 2011) (during a *Terry* stop of a vehicle, a frisk of a passenger was not justified by law enforcement "caution data" indicating that passenger had "priors" for armed robbery;

the caution data did not provide any detail concerning when the priors occurred or whether they involved convictions; "The striking lack of specificity of the information in this case draws no distinction between, for example, a recent armed robbery conviction and a decades-old wrongful armed robbery charge . . . . Without more, the caution data certainly does not justify a reasonable suspicion that [the passenger] was armed and dangerous on the night of the traffic stop.").

Also relevant is the nature of the criminal activity in question. For example, weapons frisks are often upheld when the crime under investigation involves violence or drugs. *See, e.g.*, *Terry*, 392 U.S. at 28 (robbery); *Adams*, 407 U.S. at 147-48 (frisk proper where, among other things, the person in question was reported to be carrying narcotics and a gun); United States v. Mouscardy, 722 F.3d 68, 75 (1st Cir. 2013) (officers were responding to a report of a man beating a woman in the street; "When an officer has a reasonable suspicion that a crime of violence has occurred, the same information that will support an investigatory stop will without more support a frisk." (quotation omitted)); United States v. Pontoo, 666 F.3d 20, 30 (1st Cir. 2011) ("In cases in which the individual stopped is suspected of having just committed a murder, it is reasonable for an officer to conclude that he may be armed and dangerous. A pat-down for weapons is, therefore, warranted." (citation omitted)); United States v. Glover, 662 F.3d 694, 700 (4th Cir. 2011) (case from North Carolina; frisk proper where officers were investigating a possible robbery); United States v. Sakyi, 160 F.3d 164, 169 (4th Cir. 1998) (frisk of passenger permissible where the officer had an objectively reasonable suspicion that drugs were present in the vehicle); *see also* State v. Butler, 331 N.C. 227, 234 (1992) (frisk proper where the defendant was suspected of drug activity). Similarly, knowledge or suspicion that the defendant is a gang member or involved in gang activity may support a weapons frisk. *See, e.g.*, United States v. Hernandez-Mendez, 626 F.3d 203, 212 (4th Cir. 2010) (frisk was proper where the defendant was suspected of being involved in gang activity).

Sometimes the detainee's behavior during the stop will contribute to the conclusion that the person is armed and dangerous. Relevant behavior includes:

- *Refusing to comply with officers' commands. See, e.g., Williams*, 407 U.S. at 148 (frisk proper where the defendant rolled down the car window "rather than complying with the [officer's] request to step out of the car so that his movements could be more easily seen"); *Mouscardy*, 722 F.3d at 75-76 (frisk proper where the defendant refused to identify himself and refused to remove his hand from his pocket despite several requests to do so); United States v. Dubose, 579 F.3d 117, 122 (1st Cir. 2009) (frisk proper where the defendant refused to remove his hand from his pocket after being ordered to do so); United States v. Harris, 313 F.3d 1228, 1236 (10th Cir. 2002) (same); *see also* State v. Miller, 198 N.C. App. 196, 199-200 (2009) (frisk proper where, among other things, the defendant denied having something in his hand when the officer could see otherwise and the defendant refused to show the officer what was in his hand).

- *Engaging in furtive movements. See, e.g.,* United States v. Graham, 483 F.3d 431, 439 (6th Cir. 2007) (frisk proper where, among other things, the defendant engaged in furtive movement suggesting that he was attempting to conceal a firearm); United States v. Raymond, 152 F.3d 309, 312 (4th Cir. 1998) (frisk proper where the defendant appeared to be trying to conceal something under his jacket while exiting the vehicle); United States v. Moorefield, 111 F.3d 10, 14 (3d Cir. 1997) (frisk proper where, among other things, the defendant leaned back and appeared to shove something down toward his waist, in a manner consistent with trying to hide something); *see also Miller*, 198 N.C. App. at 199-200 (frisk proper where, among other things, the defendant attempted to evade the officer by stepping towards his vehicle and attempted to hide something in his hand).
- *Acting in a threatening manner towards the officer. Miller*, 198 N.C. App. at 199-200 (frisk proper where, among other things, the defendant raised his fist in a manner that suggested he was about to strike the officer).

Because the analysis considers the totality of the circumstances, other factors may of course be relevant. *See, e.g.,* Adams v. Williams, 407 U.S. 143, 147 (1972) (frisk proper where, among other things, the suspect was sitting alone in a car in a high-crime area at 2:15 am). However, officers must be able to articulate specific facts supporting their belief that the person is armed and dangerous. Ybarra v. Illinois, 444 U.S. 85, 92-94 (1979) (frisk improper where "the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that [the defendant] was armed and dangerous"); *see also* State v. Pearson, 348 N.C. 272, 275-77 (1998) (frisk improper where the officer stopped the defendant-driver after observing the vehicle drift in its lane and travel below the speed limit; among other things, the defendant was polite and cooperative and displayed only ordinary nervousness); State v. Phifer, __ N.C. App. __, 741 S.E.2d 446, 449 (2013) (frisk improper where no facts other than nervousness suggested that the defendant was armed and dangerous); State v. Rhyne, 124 N.C. App. 84, 90 (1996) (frisk improper where officers received an anonymous tip that several black men were dealing drugs in a breezeway where the defendant was located; among other things the defendant was cooperative and did not flee; the defendant was wearing a jersey and shorts, neither of which could easily conceal a weapon, and when asked whether he had a weapon, the defendant lifted his shirt to show that he did not).

2. Scope of the Frisk.

a. For Weapons Only. A *Terry* frisk is less than a full-out search for evidence. Terry v. Ohio, 392 U.S. 1, 26 (1968). The latter more intrusive search typically only can be done pursuant to a search warrant, incident to arrest, or with consent. The *Terry* frisk "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. More specifically, it must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29; *see also* Adams v. Williams, 407 U.S. 143, 146 (1972) (frisk must be limited to the "protective purpose" of looking for weapons that might be used to harm the officer); *Ybarra*, 444 U.S. at 93-94 ("Nothing in *Terry* can be understood to allow . . . any search whatever for anything but weapons.").

In North Carolina, a *Terry* frisk does not include an "identification search." In re D.B., 214 N.C. App. 489, 495-96 (2011) (officers may not search person during investigative stop to determine his or her identity). But as discussed below, the officer may ask the defendant about his or her identity. *See* section IV.C.1. below.

b. Limited Exploration of Defendant's Person. A *Terry* frisk typically involves a pat down of the person's outer clothing. In *Terry*, the Court held that the scope of the frisk was proper, stating:

> Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

Terry, 392 U.S. at 29-30. In contrast, in *Sibron v. New York*, 392 U.S. 40 (1968), a companion case to *Terry,* the Court held that even if the officer had grounds to frisk the defendant, his conduct exceeded the permissible scope of a frisk where he made "no attempt at an initial limited exploration for arms" but instead "thrust his hand" into the defendant's pocket. *Id.* at 65. This does not mean however that every *Terry* frisk must begin with a pat down. *Adams*, 407 U.S. at 147-48 (when the officer had information that the defendant was carrying a gun at his waistband and defendant refused to comply with the officer's order to exit his vehicle, the

officer's "action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety" and was reasonable).

c. Examination of Items Held by Defendant. Many lower court opinions approve of a *Terry* frisk that includes items carried by the person in question, such as a purse or briefcase. 4 LAFAVE § 9.6(e), at 920-21 & n.315; *see also* United States v. Hernandez-Mendez, 626 F.3d 203, 213 (4th Cir. 2010) ("It should be noted that the distinction between a pat down of Hernandez–Mendez's clothing and a pat down of her purse is not meaningful in this particular context. At the time she was detained, Hernandez–Mendez was wearing a tank top shirt and shorts and was carrying a purse. Given her clothing, there were few places that she could conceal a weapon other than in her purse, making it objectively reasonable to frisk her purse in addition to her person.").

For a discussion of "car frisks" in connection with vehicle stops, see Jeff Welty, *Traffic Stops*, at 9-10 in this Benchbook.

d. Retrieval and Manipulation of Objects. If the officer feels what he or she reasonably believes to be a weapon during a valid *Terry* frisk, the officer may retrieve the item. Adams v. Williams, 407 U.S. 143, 148 (1972). If the item turns out not to be a weapon but rather contraband or evidence of a crime, the frisk is not made improper on this basis. 4 LAFAVE § 9.6(c), at 911-13. If the object turns out to be a container, cases hold that the container may be opened if it might contain a weapon. *Id.* § 9.6(d), at 916-17 & accompanying footnotes. If the officer feels something and is unsure whether it is a weapon, the officer may manipulate the object, but must stop doing so once the officer determines that the object is not a weapon. *Id.* § 9.6(b), at 906; *see also* State v. Beveridge, 112 N.C. App. 688, 695-96 (1993) (once the officer determined that a rolled up plastic bag in the defendant's pocket was not a weapon, he was not authorized to search it further), *aff'd per curiam*, 336 N.C. 601 (1994). However, once the officer realizes that the object is not a weapon, the officer may ask the detainee about the object without offending the Fourth Amendment, provided the questioning does not unduly prolong the stop. *See, e.g.,* United States v. Griffin, 696 F.3d 1354, 1363 (11th Cir. 2012) ("*Dickerson* does not preclude an officer from asking about objects which he knows are not weapons."); *see also* Section IV.C.3. below (discussing the scope of questioning that may be done during a *Terry* stop).

If the officer feels an object that is not a weapon but its "contour or mass" make it "immediately apparent" to the officer that the object is contraband, it may be lawfully seized under what is known as a the "plain feel doctrine." Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993); *see also* State v. Morton, 204 N.C. App. 578, 579-80 (2010) (when conducting a frisk of a defendant thought to be involved in the sale of illegal drugs, the officer did not exceed the scope of the frisk by confiscating a digital scale from the defendant's pocket; the officer knew the object was a

digital scale based on his pat-down without manipulation of the object).

However, if the officer feels the object and determines that it is not a weapon, the officer cannot continue to manipulate the object. *Dickerson*, 508 U.S. at 377-79 (holding that the officer exceed the scope of a *Terry* frisk when he continued exploring an object after having concluded that it was not a weapon).

If the *Terry* frisk reveals no weapons, the officer cannot continue to search the detainee's person. 4 LAFAVE § 9.6(b), at 905-06 & n.253.

B. Use or Show of Force.

To be permissible and within the scope of the *Terry* stop, any force used during a stop must be reasonable in light of the circumstances. If the force is unreasonable, it will transform the *Terry* stop into a de facto arrest. 4 LAFAVE § 9.2(d), at 401-02; *see, e.g.*, United States v. Smith, 648 F.3d 654, 659 (8th Cir. 2011) ("A *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force." (quotation omitted)); *see also* State v. Carrouthers, 213 N.C. App. 384, 388 (2011) ("The seizure may become a de facto arrest if an officer exceeds the scope of a permissible investigatory stop."). As with all arrests, a de facto arrest must be supported by probable cause. *See* Section V. below. Cases have evaluated the following types of force used during a *Terry* stop:

- *Drawing of weapons. Compare, e.g.,* United States v. Pontoo, 666 F.3d 20, 30-31 (1st Cir. 2011) (stop of murder suspect at gunpoint was permissible), *Smith*, 648 F.3d at 659-60 (stop of bank robbery suspect with weapons drawn was proper), *and* United States v. Taylor, 162 F.3d 12, 20-22 (1st Cir. 1998) (drawing of weapons was proper where information suggested detainees were armed drug dealers engaged in a drug transaction), *with* United States v. Melendez-Garcia, 28 F.3d 1046, 1053 (10th Cir. 1994) (officers exceeded the scope of a *Terry* stop in a drug trafficking case when they used a "felony stop" protocol that included, among other thing, training their weapons on the stopped vehicles; there was no evidence that the suspects had guns or were violent, the officers outnumbered the suspects, the stop was accomplished on an open highway during the day, and the suspects complied with the officers).
- *Use of handcuffs. See, e.g.*, *Pontoo*, 666 F.3d at 30-31 (handcuffing of murder suspect was permissible); Young v. Prince George's County, 355 F.3d 751, 755 (4th Cir. 2004) (handcuffing proper where officer stopped an automobile carrying two passengers, one of whom admitted that he was armed); State v. Carrouthers, 213 N.C. App. 384, 390-91 (2011) (handcuffing was reasonable where the officer witnessed the defendant engage in a narcotics transaction and felt an item consistent with drugs when frisking the defendant, there is a linkage between drugs and violence, and the officer was outnumbered three to one); State v. Campbell, 188 N.C. App. 701, 708-10 (2008) (handcuffing was proper where officers knew that the defendant had previously fled from law enforcement); State v. Sanchez, 147 N.C. App. 619, 625-26 (2001) (proper to handcuff multiple occupants of a vehicle for five minutes while officers frisked for weapons where officers had information that

the defendant might be heavily armed and in possession of explosives; once the officers ensured their safety, they removed the handcuffs).

- *Forcing or ordering an individual to the ground. See*, *e.g., Pontoo*, 666 F.3d at 30-31 (forcing a murder suspect to the ground was reasonable); United States v. Taylor, 162 F.3d 12, 20-22 (1st Cir. 1998) (proper where information suggested detainees were armed drug dealers engaged in a drug transaction); United States v. Tilmon, 19 F.3d 1221, 1227-28 (7th Cir. 1994) (proper where the defendant was suspected to have robbed a bank and considered to be armed and dangerous).
- *Surrounding or blocking an individual. See, e.g., Taylor*, 162 F.3d at 20-22 (blocking the detainees' vehicle with two cruisers was proper where information suggested that they were armed drug dealers engaged in a drug transaction); United States v. Perate, 719 F.2d 706, 709 (4th Cir. 1983) (vehicle stop was not transformed into an arrest by the fact that after pulling over the vehicle, two unmarked cars blocked the vehicle's forward and rear paths); United States v. Manbeck, 744 F.2d 360, 377 (4th Cir. 1984 ("This Court has already rejected the notion that officers transform a *Terry* stop into an arrest by virtue of blocking the progress of a vehicle . . . .").
- *Moving the individual a short distance. Compare, e.g., Manbeck*, 744 F.2d at 377-78 (putting suspect in a patrol car was proper where, among other things, there was inclement weather and the officers had no feasible alternative), *with* United States v. Thompson, 906 F.2d 1292, 1296-97 (8th Cir. 1990) ("We hold that placing the suspects in separate squad cars was not within the scope of a *Terry*-type stop, and therefore constituted an arrest."). *See generally* Florida v. Royer, 460 U.S. 491, 504 (1983) ("[T]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention. . . .").

C. Investigation.

As noted above, even if an investigative stop is supported by reasonable suspicion, evidence obtained as a result of the stop may be subject to suppression if the officer's subsequent conduct exceeded the scope of his or her stopping authority. Terry v. Ohio, 392 U.S. 1, 19-20, 29 (1968) ("in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place"); United States v. Sharpe, 470 U.S. 675, 682 (1985) (same). The scope of the stop refers to both its length, *see* Section IV.E. below, as well as the nature of the investigation engaged in by the officer. Florida v. Royer, 460 U.S. 491, 500 (1983) ("[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."). The subsections below explore the proper scope of an officer's investigation during a stop.

1. Asking for Identification.

During a lawful stop, an officer may ask the detainee for identification. *See, e.g.,* United States v. Hensley, 469 U.S. 221, 234-35 (1985) (proper to check suspect's identification); Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty., 542 U.S. 177, 186 (2004) ("Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops."). This includes asking the detainee for his or her name as well as asking for identification to confirm the

veracity of the detainee's answer. *See, e.g.,* United States v. Burleson, 657 F.3d 1040, 1048 (10th Cir. 2011).

Note that in North Carolina, individuals who are operating motor vehicles may be required to provide their names to law enforcement officers. G.S. 20-29. However, no other state statutes require a person who has been stopped by an officer to identify himself or herself. Thus, *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt Cnty.*, 542 U.S. 177 (2004), does not support the notion a North Carolina officer can require a person to provide his or her name. *See id.* at 188-89 (upholding a Nevada conviction based on a state statute that requires a person subject to an investigative detention to disclose his or her name).

2. Document Check & Verification.

During a lawful stop, an officer may communicate with others to verify information provided by the detainee, *see, e.g.,* Schubert v. City of Springfield, 589 F.3d 496, 503 (1st Cir. 2009) (holding in this § 1983 case that after stopping an individual for openly carrying a firearm, it was proper for the officer to confirm the validity of the person's gun license; "we do not agree with [plaintiff's] contention that the gun license was valid on its face and therefore the several minute delay during which [the officer] attempted to confirm the validity of the license was unreasonable"), and determine whether or not the detainee is wanted on criminal process. *See, e.g.,* United States v. Burleson, 657 F.3d 1040, 1044-52 (10th Cir, 2011) (proper for officer to request a warrants check on three stopped pedestrians during a lawful Terry stop). For a discussion of license and records checks in connection with traffic stops, see Jeff Welty, Traffic Stops, at 10-11 in this Benchbook.

3. Asking Questions.

An officer may question the person detained during a *Terry* stop. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." Berkemer v. McCarty, 468 U.S. 420, 439–40 (1984); *see, e.g.,* United States v. Garcia, 646 F.3d 1061, 1069 (8th Cir. 2011) (an officer's request for the defendant's phone number was properly within the scope of the investigative stop of a vehicle related to a drug investigation where transactions had been arranged by phone and the officers knew the phone number of at least one of the suspects; the officers "could reasonably conclude that learning the phone numbers of the occupants of the [vehicle] might establish or negate their connection with the crime" (quotation omitted)); State v. Sutton, 167 N.C. App. 242, 249 (2004) (questioning of the defendant during a stop was permissible where the questions were "brief and directly related to suspicion that gave rise to stop").

An officer may, in certain circumstances, ask questions unrelated to the initial stop. Specifically, "[a]n officer's inquiries into matters unrelated to the justification for [a] . . . stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009); *see also* United States v. Griffin, 696 F.3d 1354, 1361 (11th Cir. 2012) ("We concur with the Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, and hold—consistent with [*Muehler v.*

Mena, 544 U.S. 93, 101 (2005)] and *Johnson*—that unrelated questions posed during a valid *Terry* stop do not create a Fourth Amendment problem unless they 'measurably extend the duration of the stop.'" (quoting *Johnso*n, 555 U.S. at 333)).

However, under North Carolina law, once a lawful stop ends, an officer cannot continue to detain a person to ask questions unrelated to the stop's original purpose absent reasonable suspicion or consent supporting further detention. *See, e.g.,* State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274, 279-81 (2014) (relying on *State v. Myles,* 188 N.C. App. 42 (2008), ***aff'd*** 362 N.C. 344 (2008) (per curiam), and holding that the officer completed the original purpose for the stop—a headlights infraction and a potential noise violation—once the defendant had turned on his headlights, had been warned about his music, and the officer verified that his license and registration were valid and that he had no outstanding warrants; the fact that the defendant had a history of drug charges and felonies and that the officer thought that the defendant had employed a drug "cover scent" in his vehicle did not provide reasonable suspicion to extend the duration of the stop to ask the questions unrelated to the original purpose of the stop). Further inquiry is permissible, however, if the detainee's responses to initial questions do not dispel the officer's suspicions or if reasonable suspicion exists. *See, e.g., Cottrell,* 760 S.E.2d at 280 (noting that once the original purpose of the stop ended, the officer could have extended the detention if he had reasonable and articulable suspicion to do so); State v. Hodges, 195 N.C. App. 390, 396-99 (2009) (distinguishing *Myles* and holding that the officer had reasonable suspicion to extend the stop's duration after returning the defendant's license and rental contract and issuing him a verbal warning for speeding, ending the original purpose of the stop). *See generally,* section IV.E below (discussing duration of the stop).

The rules appear to be the same with respect to asking for consent to search: An officer's request for consent to search during a lawful stop is valid if it does not unduly prolong the detention. *See* United States v. Smith, 645 F.3d 998, 1002 (8th Cir. 2011) (officer reasonably asked the defendant for consent to search his person and his car during a stop based on reasonable, articulable suspicion that the defendant was in possession of a gun and drugs); *see also* United States v. Davis, 460 F. App'x 226, 231-32 (4th Cir. 2011) (unpublished) (officer did not unduly prolong the stop by asking for consent to search). However, under North Carolina law once a lawful stop ends an officer cannot continue to detain a person to ask for consent to search, absent reasonable suspicion supporting further detention. *Cottrell,* 760 S.E. 2d at 281-85.

Note the United States Supreme Court recently granted certiorari in a case that may bear on whether officers can continue the investigation after the stop ends and without reasonable suspicion. In *Rodriguez v. United States* (No. 13-9972) (docket here), the Court will consider whether after a stop has concluded an officer may continue to detain a person, without reasonable suspicion, for a short period of time to conduct a canine sniff.

Once the detention ends and the person is free to leave, the encounter becomes consensual and the officer may continue to speak with the person and request consent to search. *See* Section II.D. above

(discussing consensual encounters). The determination of whether the defendant's consent to search—given during a *Terry* stop or a consensual encounter—is voluntarily is a separate inquiry beyond the scope of this section.

4. Dog Sniffs.

The Supreme Court has held that *during* a lawful traffic stop an officer may use a drug dog to sniff the exterior of a vehicle. Illinois v. Caballes, 543 U.S. 405, 408-10 (2005). For a discussion of whether a traffic stop may be extended for purposes of conducting a dog sniff, see Jeff Welty, *Traffic Stops*, at 12-13 in this Benchbook. Note however that the United State Supreme Court recently granted certiorari on that very issue. *See* Rodriguez v. United States (No. 13-9972) (docket here).

The Court has held that exposing a person's luggage, which is located in a public place, to a dog sniff is not a search. United States v. Place, 462 U.S. 696, 707 (1983). The Supreme Court has never ruled on whether dog sniffs of people are reasonable in the context of a Terry stop. A dog sniff of one's person is arguably more intrusive than a dog sniff of one's inanimate objects (such as a car or suitcase) and thus the rules applying in the latter context may not automatically apply to the former. See Doe v. Renfrow, 451 U.S. 1022, 1025-27 & n.4 (1981) (Brennan, J., dissenting to denial of cert.) (arguing in this pre-*Caballes* and *Place* § 1983 case that school officials' use of trained police dogs to sniff a student constituted a search and that cases involving "sniffing of inanimate and unattended objects rather than persons . . . are inapposite").

Note that when a trained drug dog alerts on property, that ordinarily provides probable cause to search the item. *See* Florida v. Harris, 568 U.S. ___, 133 S. Ct. 1050, 1058 (2013) (holding than an alert by a drug dog during a traffic stop provided probable cause to search the vehicle).

D. Interactions with Colleagues of the Seized Person.

In the interest of officer safety, an officer may order any or all of a stopped vehicle's occupants out of the vehicle and may order the vehicle's occupants to remain in the vehicle. *See* Jeff Welty, *Traffic Stops*, at 9 in this Benchbook. With respect to *Terry* stops of pedestrians, some case law suggests that in certain situations officers may engage individuals connected to the person who is the subject of the investigative detention. *Compare, e.g.,* United States v. Lewis, 674 F.3d 1298, 1305-09 (11th Cir. 2012) (concluding that the detention of the defendant was proper when the officers had reasonable suspicion with respect to two of his associates but not as to him; while engaged in a consensual encounter with the defendant and three other men at night in a high crime area and "hotbed" of drug and gun activity, two of the men other than the defendant admitted to having guns; the officers drew their weapons and ordered all four men to the ground; "officers may, in some circumstances, briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop as to other related individuals"; the reasonableness of detention was "heightened greatly by . . . [the] serious risk to the safety of the officers as well as the other individuals present in the crowded parking lot"), *with* United States v. Navedo, 694 F.3d 463, 468-69 (3d Cir. 2012) (officers had no reason to detain the defendant based on the fact

that they saw another individual show him a gun; the officers "could not detain [the defendant] merely because their reasonable suspicions justified a brief investigative detention of [the person with the gun]"; "the stop here appears to be based on nothing more than an attempt to transfer the reasonable suspicion" from the person with the gun to the defendant).

E. Duration.

As noted above, the stop must be reasonable in scope. Florida v. Royer, 460 U.S. 491, 499-500 (1983) (plurality opinion) (stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; officers here exceed the scope of a *Terry* stop). How long is too long? The United States Supreme Court has declined to adopt a bright-line rule, United States v. Sharpe, 470 U.S. 675, 686 (1985) (declining to adopt a per se rule that 20 minutes is too long); United States v. Place, 462 U.S. 696, 709-10 (1983) ("although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case" (footnote omitted)), and the lower courts have followed suit. *See, e.g.,* United States v. McCarthy, 77 F.3d 522, 530 (1st Cir. 1996) ("there is no talismanic time beyond which any stop initially justified on the basis of *Terry* becomes an unreasonable seizure" (quotation omitted)); United States v. Davis, 430 F.3d 345, 354 (6th Cir. 2005) ("no rigid time limitation on the lawfulness of a *Terry* stop" (quotation omitted)); United States v. Mayo, 394 F.3d 1271, 1275-76 (9th Cir. 2005) ("Although the duration of detention bears on whether a *Terry* stop is justified, there is no strict time requirement."). Thus, determining whether the duration of the stop was reasonable is a fact dependent inquiry that must account for all of the circumstances. *See, e.g., McCarthy*, 77 F.3d at 530-31 ("whether a particular investigatory stop is too long turns on a consideration of all relevant factors"; holding that 75 minute stop was not unreasonable). Relevant factors include, but are not limited to:

- *Whether the officer's suspicions are confirmed and whether new suspicions of criminal activity are generated during the stop. See Mayo*, 394 F.3d at 1276 (40-minute detention was proper where "new grounds for suspicion of criminal activity continued to unfold"); *McCarthy*, 77 F.3d at 531 (75-minute detention was proper where the detainee's incomplete and vague responses reasonably heightened the officers' suspicion that [he] had participated in the [robbery in question]" and also "made the attempt to dispel that suspicion more difficult"); United States v. Christian, 43 F.3d 527, 530 (10th Cir. 1994) (continuation of an impaired driving stop to ask about drug trafficking was justified by a variety of facts, including conflicting information from the suspects about their possession of the vehicle and its true owner). For relevant North Carolina cases, compare *State v. Williams*, 366 N.C. 110, 117-18 (2012) (extension of a stop was justified where, among other things, the defendant gave information about her route of travel that was inconsistent with her direction of travel, she and the driver gave inconsistent responses about where they were coming from, the driver could not say where they were going, and the two initially claimed to be cousins but later admitted that to be false); *State v. Fisher*, __ N.C. App. __, 725 S.E.2d 40, 44-45 (2012) (reasonable

suspicion justified extending a seatbelt infraction stop for the arrival of canine unit where, among other things the car had an overwhelming odor of air freshener and the defendant claimed to have made a five-hour round trip to go shopping but had not purchased anything, and was nervous, driving a car registered to another in a pack of cars, never asked why he had been stopped, and was "eating on the go"); *State v. Lopez*, __ N.C. App. __, 723 S.E.2d 164, 169-70 (2012) (stop was properly extended where, among other things, the defendant did not have a valid driver's license, was not the owner of the car and said that he was not sure of the owner's name, and claimed to have just finished a construction job but was well kept with clean hands and clothing, and was visibly nervous); *State v. Hodges*, 195 N.C. App. 390, 396-99 (2009) (reasonable suspicion supported prolonging the detention of the stop for approximately 10 minutes after the officer issued a verbal warning for speeding where the defendant misidentified a passenger and was nervous and the officer knew officers had been conducting narcotics surveillance of the vehicle, saw the passenger appear to place something under his seat which the officer believed to be drugs or a weapon, and had been told by another officer to be careful in conducting the stop), with *State v. Huey*, 204 N.C. App. 513, 523 (2010) (where the officer knew that the suspects he was looking for were approximately 18 years old, the officer should have ended his stop of the 51-year-old defendant as soon as the officer examined the defendant's identification card and learned his date of birth).

- *The officer's diligence.* United States v. Sharpe, 470 U.S. 675, 686 (1985) (with regard to the duration of the stop, the court examines "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant"). *Compare, e.g.*, United States v. Mayo, 394 F.3d 1271, 1276 (9th Cir. 2005) (40-minute detention was proper where "officers pursued their multiple inquiries promptly as they arose"), United States v. McCarthy, 77 F.3d 522, 530-31 (1st Cir. 1996) (quoting *Sharpe* and holding that a 75-minute stop was not unreasonable where "[t]he excessive length" of the stop was not the result of the officers' dilatory tactics "but, instead, because their investigative efforts, though reasonable under the circumstances, failed to dispel the suspicion that gave rise to the stop"), *and* United States v. Acosta, 363 F.3d 1141, 1146 (11th Cir. 2004) (stop was proper where "[n]othing in the record indicates that the police were less than prompt in carrying out their on-the-scene investigation. Each investigatory act logically led to the next act which was done without delay."), *with* United States v. Digiovanni, 650 F.3d 498, 509-10 (4th Cir. 2011) (although an officer may ask questions unrelated to the purpose of the stop if those questions do not unduly extend the stop, here the stop exceeded an acceptable duration where the officer "failed to diligently pursue the purposes of the stop and embarked on a sustained course of investigation into the presence of drugs in the car that constituted the bulk of the encounter between" the officer and the defendant).

- *The number of suspects involved in the stop. See, e.g.,* United States v. Odgen, 703 F.2d 629, 634 (1st Cir. 1983) (30 to 45-minute stop was justified by the fact that four tractor-trailers and 10 people were involved in the stop); *see also* United States v. Brigham, 382 F.3d 500, 510 (5th Cir. 2004) (holding that traffic stop "required as long as it did" in part because there were four occupants in the stopped vehicle).
- *The need for additional assistance, such as an interpreter, to resolve matters related to the stop. See, e.g.,* United States v. Mendoza, 677 F.3d 822, 828 (8th Cir. 2012) (not unreasonable to detain the defendant for 20-25 minutes so that a translator could be brought to the scene).
- *The seriousness of the suspected criminal activity. See, e.g., McCarthy*, 77 F.3d at 532 (the length of the detention was proper where the governmental purposes were substantial in that the criminal conduct involved a "daylight armed robbery of a bank involving physical threats to both customers and bank personnel").

The above discussion pertains to the overall duration of a warrantless stop. A separate issue, discussed briefly above in Section IV.C.3, is whether or not once the original purpose of the stop has been completed the stop may be extended absent reasonable suspicion. On this issue, North Carolina cases hold that once the original purpose of the stop has been addressed, the stop may not be extended absent consent or reasonable suspicion. *See* State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274, 279-81 (2014) (holding that the officer completed the original purpose for the stop—a headlights infraction and a potential noise violation—once the defendant had turned on his headlights, had been warned about his music, and the officer verified that his license and registration were valid and that he had no outstanding warrants; the fact that the defendant had a history of drug charges and felonies and that the officer thought that the defendant had employed a drug "cover scent" in his vehicle did not provide reasonable suspicion to extend the duration of the stop to ask the questions unrelated to the original purpose of the stop); State v. Jackson, 199 N.C. App. 236, 242-43 (2009) (because there were no grounds providing reasonable and articulable suspicion for extending a vehicle stop once the original purpose of the stop—suspicion that the driver was operating the vehicle without a license—had been addressed, the extended detention was unconstitutional); State v. Myles, 188 N.C. App. 42, 45-50 (stop was unduly prolonged where the officer initiated it because the vehicle weaved in its lane, indicating a possible DWI; the officer did not detect an odor of alcohol in the car, on the driver or on the passenger, both the driver and passenger were cooperative, and a license check revealed that the driver had a valid license; the driver's nervous behavior did not create reasonable suspicion to continue the detention), *aff'd per curiam*, 362 N.C. 344 (2008); State v. Falana, 129 N.C. App. 813, 817 (1998) (the fact that the defendant was nervous and that a passenger was uncertain as to what day their trip had begun were insufficient to create additional reasonable suspicion and support a further detention of the defendant once a warning ticket was issued and the defendant's papers were returned). Note the United States Supreme Court recently granted certiorari in a case that may bear on whether officers can extend a stop after its original purpose has been addressed and without reasonable suspicion. In *Rodriguez v. United States* (No. 13-9972) (docket here),

the Court will consider whether after a stop has concluded an officer may continue to detain a person, without reasonable suspicion, for a short period of time to conduct a canine sniff.

If a suspect voluntarily remains with the officer after the stop has ended, the encounter will be deemed consensual and not subject to the Fourth Amendment. *See* Section II.D. above (discussing consensual encounters).

F. Requiring the Suspect to Empty Pockets.

As noted above, under certain circumstances an officer can frisk a person who has been stopped with reasonable suspicion. *See* Section IV.A.1. above (discussing when frisks are permissible). But can the officer order the person to empty his or her pockets? At least one North Carolina case has held that such an order is impermissible in the context of a *Terry* stop. In re V.C.R.,__ N.C. App. __, 742 S.E.2d 566, 571 (2013); *cf.* State v. Beveridge, 112 N.C. App. 688, 696 (1993), *aff'd*, 336 N.C. 601 (1994); *see generally* Orin Kerr, *Do Orders to Empty Pockets Exceed the Limits of* Terry v. Ohio*?*, THE VOLOKH CONSPIRACY (Sept. 27, 2011) (suggesting that the lower courts are divided on the issue).

G. Seizing Evidence/Contraband in Plain View.

If a suspect has been lawfully detained, law enforcement officers may seize evidence or contraband that is in plain view in the course of the lawful stop. United States v. Hensley, 469 U.S. 221, 235 (1985).

See Section IV.A.2.d. above for a discussion of the plain feel doctrine, which applies during a *Terry* frisk.

H. Arresting Suspects.

If during a lawful stop the officer's investigation develops probable cause that a crime has been committed and that the detainee perpetrated that offense, the officer may arrest the person detained. *Hensley*, 469 U.S. at 235.

V. If the Seizure Was an Arrest, Was it Supported by Probable Cause?

If the seizure is an arrest it must be supported by probable cause. *See, e.g.,* Beck v. State of Ohio, 379 U.S. 89, 91 (1964). If an arrest is not supported by probable cause, the arrest is unconstitutional and any evidence seized as a result of that arrest is subject to suppression. *See, e.g.*, *id.* at 92-93 (evidence seized pursuant to a search incident to an arrest that was not supported by probable cause should have been suppressed); *see also* State v. Joe, ___ N.C. App. ___, 730 S.E.2d 779, 782-83 (2012) (because the officer lacked probable cause to arrest, any evidence found during a search incident to that invalid arrest must be suppressed). If the arrest is supported by probable cause, the arrest itself is proper and the only question is whether the officer's subsequent conduct was within the proper scope of the arrest. These issues are discussed in the sections that follow.

A. Distinguishing Between a Stop and an Arrest.

As noted above, a person has been "seized" within the meaning of the Fourth Amendment when "a reasonable person would have believed that he was not free to leave." *See* Section II.A. above. In some cases, a seizure clearly constitutes an arrest. Such is the case where an officer witnesses the defendant commit a crime, apprehends the defendant, cuffs him, tells the defendant that he is under arrest and transports him to the station house for processing. In this scenario there is no credible argument that the seizure was anything other than arrest. But in a great many cases, the fact patterns will be more subtle and the

trial judge will be required to distinguish between an investigative detention (a *Terry* stop), which need only be supported by reasonable suspicion, *see* Section III.A. above, and an arrest, which requires probable cause. This analysis is murky; as the courts have acknowledged, "[t]here is no bright line that distinguishes a valid *Terry* stop from its invalid counterpart (commonly known as a de facto arrest)." United States v. Pontoo, 666 F.3d 20, 30 (1st Cir. 2011) (citing Florida v. Royer, 460 U.S. 491, 506–07 (1983)); *see also* United States v. Maguire, 359 F.3d 71, 77 (1st Cir. 2004) ("There is no scientifically precise formula that enables courts to distinguish between investigatory stops ... and ... 'de facto arrests.'" (quotation omitted)). Complicating the analysis is that during a lawful *Terry* stop officers may use practices associated with a formal arrest, such as handcuffing the defendant. As one court put it, "[t]he critical consideration is whether the arrest-like features can be reconciled with the limited nature of a *Terry* stop." *Pontoo*, 666 F.3d at 30. Section IV.B. above explored various activities, including use of force and investigative techniques, that can transform a *Terry* stop into an arrest.

B. Probable Cause Defined.

As noted above, to be valid, a warrantless arrest must be supported by probable cause. The United States Supreme Court has defined probable cause to arrest as "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck v. State of Ohio, 379 U.S. 89, 91 (1964) (going on to hold that the facts were insufficient to establish probable cause in that case); Adams v. Williams, 407 U.S. 143, 148 (1972) (quoting *Beck*). The degree of certainty required for probable cause is sometimes referred to as a "fair probability." FARB, ASI at 37. The standard is stricter than reasonable suspicion but lower than proof beyond a reasonable doubt, *id.*; United States v. Sokolow, 490 U.S. 1, 7 (1989) (reasonable suspicion is less demanding than probable cause); *Williams*, 407 U.S. at 149 ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."), and preponderance of the evidence. *See, e.g.,* Florida v. Harris, 133 S. Ct. 1050, 1055 (2013).

As with reasonable suspicion, the probable cause determination is based on the totality of the circumstances. *Harris*, 133 S. Ct. at 1055; *see* Section III.A.1.e. above (discussing that the totality of the circumstances must be evaluated when deciding whether there was reasonable suspicions for a stop). The factors considered in assessing probable cause are similar to those considered in assessing whether reasonable suspicion exists, with the only difference being the quantum of proof required. FARB, ASI at 37; *see* Section III.A.2. above (discussing the factors considered in assessing whether reasonable suspicion exists). Likewise, the principles about collective knowledge of officers, pretext, and innocent activities that apply to the reasonable suspicion analysis, *see* Sections III.A.9., III.A.10., III.A.12., apply equally to the probable cause determination. *See* FARB, ASI at 38 (collective knowledge doctrine applies to probable cause determination); Arkansas v. Sullivan, 532 U.S. 769, 771-72 (2001) (officer's subjective motivation for making an arrest is irrelevant to the Fourth Amendment probable cause inquiry); *Sokolow*, 490 U.S. at 10 (principle that innocent activities can support a conclusion of reasonable suspicion applies equally to probable cause determination).

C. N.C. Law Requires a Warrant in Certain Circumstances.

While a warrantless arrest supported by probable cause is proper under the Fourth Amendment, North Carolina statutory law requires a warrant in certain circumstances. G.S. 15A-401(b) (listing the circumstances when an officer may arrest without a warrant for offenses that were not committed in the officer's presence). While an arrest in violation of state statutory law would not violate the Fourth Amendment, *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (even though state law did not authorize an arrest, officers did not violate the Fourth Amendment by arresting the defendant for a misdemeanor when they had probable cause to do so), suppression may be appropriate if there is a substantial violation of state law. G.S. 15A-974(a).

VI. If the Arrest Was Supported by Probable Cause, Was the Search Permissible?

Even if officers have probable cause to arrest, constitutional issues may arise regarding their action after the arrest. For example, *Miranda* issues may arise with respect to the interrogation of an in-custody defendant. *See generally* Jeff Welty, *The Law of Interrogation*, in this Benchbook (discussing *Miranda* issues). The most common Fourth Amendment issue that arises with respect to an officer's conduct subsequent to a lawful arrest is the scope of a search incident to the arrest. The remainder of this section is devoted to that issue.

A. Authority to Search Incident to Arrest.

Officers may search a person incident to a lawful arrest. *See* United States v. Robinson, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."). This exception to the warrant requirement "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." Arizona v. Gant, 556 U.S. 332, 338 (2009). No additional justification is needed beyond the probable cause required for the arrest, *Robinson*, 414 U.S. at 235; a search incident to arrest is permissible irrespective of whether the officer suspects the person to be armed and irrespective of the seriousness of the offense. Gustafson v. Florida, 414 U.S. 260, 266 (1973). However, a valid arrest must actually occur; the fact that the officer could have arrested the defendant does not support a search incident to arrest. Knowles v. Iowa, 525 U.S. 113, 115-16 (1998) (a search incident to arrest cannot occur when the officer could have but did not arrest the defendant and merely issued him a citation). *But see* Cupp v. Murphy, 412 U.S. 291, 296 (1973) (although suggesting that a full search would not have been justified without a formal arrest and without a warrant, the Court upheld as valid the "very limited search" in this case involving the taking of fingernail scrapings when law enforcement officers had probable cause to arrest but did not do so).

B. Timing of Search Incident to Arrest.

As a general rule, a search incident to a lawful arrest may be made before, during or after the arrest, so long as it is contemporaneous with that action. *Compare, e.g.,* Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."), *with* Preston v. United States, 376 U.S. 364, 367 (1964) (holding that a search of an arrestee's vehicle after the arrestee was taken to the police station and the car was towed to the garage was not valid as

a search incident to arrest; noting that the justifications for a search incident to arrest "are absent where a search is remote in time or place from the arrest" and that "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest"). One caveat to this rule is that searches conducted well after the arrest are sometimes justified on the basis that they could have been made at the time of arrest or as inventory searches. United States v. Edwards, 415 U.S. 800, 803 (1974) (warrantless search of the defendant's clothing 10 hours after his arrest was not improper; search that could have been made "on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."); Illinois v. Lafayette, 462 U.S. 640, 646-47 (1983) (warrantless search of the defendant's shoulder bag when he arrived at the police station to be jailed after an arrest was justified as a valid inventory search).

Note that if a search occurs before the arrest, any evidence discovered during the search cannot provide evidence of probable cause for the arrest. Sibron v. New York, 392 U.S. 40, 63 (1968) ("[A]n incident search may not precede an arrest and serve as part of its justification.").

C. Scope of Search Incident to Arrest.

1. Objects Sought.

A search incident to arrest may be a full search—for weapons and evidence—and is not limited to the type of protective frisk or pat down that is permitted in connection with a *Terry* stop. Preston v. United States, 376 U.S. 364, 367 (1964) ("Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime."); *see generally* Section IV.A.2. above (discussing the scope of a *Terry* frisk).

2. What Can Be Searched.

As a general rule, a search incident to arrest may include a search of the person and of the area within the arrestee's control. *Robinson*, 414 U.S. at 224; *Preston*, 376 U.S. at 367. Although the Supreme Court has not ruled on the issue, cases acknowledge that strip searches are substantial intrusions and are not automatically permissible incident to arrest. FARB, ASI at 226-28 (discussing the factors that courts consider when determining whether strip searches are reasonable and citing legal resources addressing the separate issue of strip searches of jail and prison inmates).

As just noted, the permissible search includes not only the arrestee's person but also the area within his or her control. The area within the arrestee's control is generally understood to include areas where he or she might be able to reach in order to grab a weapon or evidence. Arizona v. Gant, 556 U.S. 332, 339 (2009). "That limitation . . . ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Id.* As the Supreme Court has stated:

> [I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the

> area into which an arrestee might reach in order 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.

Chimel v. California, 395 U.S. 752, 763 (1969). Thus, the Court has held that when officers arrest a person at the front door of his house, a search of the entire house cannot be justified as a search incident to arrest. *Id.* at 768 (improper to search the defendant's entire three-bedroom house, including the attic, the garage, and a small workshop as a search incident to arrest).

As a general rule, the permissible search includes a search of objects on the defendant's person and within his or her immediate control, such the defendant's pockets, handbag, and similar items. *Robinson*, 414 U.S. at 234 (search of pocket incident to arrest was proper); United States v. Perdoma, 621 F.3d 745, 750-53 (8th Cir. 2010) (search of bag incident to arrest was proper); United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986) (search of handbag incident to arrest was proper). Although some federal cases approve of searching locked items carried by the defendant, *see, e.g.,* United States v. Tavolacci, 895 F.2d 1423, 1428 (D.C. Cir. 1990) (search of bag incident to arrest was valid even though bag was locked and was opened by the defendant only at the officers' direction), the North Carolina Court of Appeals held in one case that the officer impermissibly searched a locked container incident to arrest. State v. Thomas, 81 N.C. App. 200, 211 (1986) (search of the defendant's locked suitcase was not justified as a search incident to arrest). The Supreme Court has held that law enforcement officers may not search digital information on a cell phone as a search incident to arrest. Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court limited the scope of a vehicle search incident to arrest of one of its occupants. *Gant* held that officers may search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted or it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Id.* at 343. The *Gant* Court reasoned, in part, that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339. It went on to hold that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343. It added that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the

> crime of arrest might be found in the vehicle.'" *Id.* Note that *Gant* did not limit other established exceptions to the warrant requirement that might authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand; it spoke only to the issue of a vehicle search incident to arrest. *Id.* at 346.
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> *Gant* clearly limits the automatic authority to search a vehicle, as an area within the arrestee's control, in connection with an arrest of an occupant of the vehicle. Although the Court has not addressed whether the limitations established in *Gant* apply outside of the vehicle context, *see* FARB, ASI at 223 & n.326, this is an area of some litigation in the lower courts. *See id.*

D. Protective Sweeps.

In addition to a search of the arrestee's person and items within her or her immediate control, the Fourth Amendment also allows a "protective sweep," a quick and limited search of premises, incident to an arrest. Maryland v. Buie, 494 U.S. 325, 327 (1990). The purpose of a protective sweep is to protect the safety of the officers or others and "[i]t is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* With regard to the scope of such a protective sweep of premises, the Court has explained:

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . .
>
> We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Id. at 334-36 (1990) (footnote omitted).