

I. Fourth Amendment

A. **Seizure:** A reasonable person under the circumstances

1. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).
2. *United States v. Moreno*, 742 F.2d at 536 (1984) ("lack of familiarity with police procedures in this country, his alienage and his limited ability to speak and understand the English language contributed significantly to the quantum of coercion present" in the police encounter.)
3. A reasonable person who does not fully understand law enforcement questions or demands does not feel free to leave because she does not understand what is going on.

B. **Reasonable Suspicion:**

1. Ethnicity alone cannot form basis of reasonable suspicion supporting the stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975);
2. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.")

C. **Consent Searches**

1. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).
2. Knowing and voluntary waiver of privacy?
3. Miscommunication, hand gestures, "May I or Can I?" Rudimentary communication not knowing and voluntary. *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355, 359 (D. Or. 1993); *United States v. Gaviria*, 775 F. Supp. 495, 502 (D. R.I. 1991); *United States v. Suarez*, 694 F. Supp. 926, 939 (S.D. Ga. 1988), aff'd, 885 F.2d 1574 (11th Cir. 1989); *United States v. Gallego-Zapata*, 360 F. Supp. 665, 675 (D. Mass. 1986).

D. Waiver of Right to Refuse Breathalyzer

1. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).
2. N.C. Gen. Stat. § 20-16.2 requires that qualified chemical analyst: “shall inform the person **orally** and also give the person a **notice in writing** that: .”
3. Actual notice is tailored to the particular circumstances of the person with limited understanding is required. *State v. Young*, 140 N.C. App. 1, 7, 535 S.E.2d 380, 384 (2000) (quoting *In re Lamm*, 116 N.C. App. 382, 386, 448 S.E.2d 125, 128 (1994) stating “the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard”).
4. Failure to advise defendant of the rights makes the test inadmissible in court. *State v. Gilbert*, 85 N.C. App. 594 (1987), *State v. Shadding*, 17 N.C. App. 279, 194 S.E.2d 55 (1973).
5. A refusal must be knowing and voluntary. Defendant must understand rights to waive them. *Etheridge v. Peters*, 301 N.C. 76, 269 S.E.2d 133 (1980); *Mathis v. NCDMV*, 71 N.C. App. 413, 322 S.E.2d 436 (1984).
6. Whether there is a statutory violation in the administration of the rights does not depend on whether the defendant ultimately refused the test or blew into the intoxilyzer. *State v. Abdereazeq*, 122 N.C. App. 727; 471 S.E.2d 445 (1996).
7. Without an intoxilyzer result the case must be dismissed for failure to provide statutory and constitutional rights, prejudice is presumed as a matter of law. *State v. Ferguson*, 90 N.C. App. 513, 519, 369 S.E.2d 378, 382 (1988) (“The denial of access to a witness in this case -- when the State's sole evidence of the offense is the personal observations of the authorities -- would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under N.C. Const. Art. I Sec. 23 as a matter of law and would require that the charges be dismissed.”)

II. Fifth Amendment – *Miranda*

A. Custody

1. Specific kinds of threats can increase objective likelihood of custody: threats of deportation,
2. A reasonable alien under these circumstances would feel in custody

B. Warnings

1. Must basically apprise defendant of rights, slight deviations from *Miranda* alright, but not substantial defects in translation. *United States v. Hernandez*, 913 F.2d 1506, 1510 (10th Cir. 1990).
2. *United States v. Hernandez*, 913 F.2d 1506, 1510 (10th Cir. 1990)
3. Keep the Burden on the State to show knowing and voluntary waiver of rights. If Officer can't recall, or made insufficient notes regarding circumstances, then they failed to show constitutionality of waiver.
4. *Example of mistaken translation*: One problem in translating *Miranda* warnings is the problem of false cognates. The Spanish verb "apuntar" looks like the English word "to appoint." "Apuntar," however, does not mean "to appoint"; it means "to point to." The proper Spanish verb for "to appoint" is "otorgar."
5. *Battle of the Interpreters*: Get on record what was said and possible interpretations with regional variations.

C. **Co-Defendant Interpreters**: Due Process violation using potential co defendant as interpreter. *State v. Cervantes*, 814 P.2d 1232, 1234-35 (Wash. App. 1991).

D. **Police Interpreters**: Interpreter code of ethics requires impartiality, Due process violation when officer acts as translator.

III. Fifth Amendment – Equal Protection

- A. [T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. *Whren v. United States*, 517 U.S. 806, 813 (1996);
- B. Sixth Circuit Court of Appeals: right to be free from equal protection violation prior to seizure. Equal Protection applies during “pre-contact” phase of investigation.
 - 1. *United States v. Quarles*, 30 Fed. Appx. 404, 2002 U.S. App. LEXIS 2583 (6th Cir. 2002) (unpublished); *United States v. \$14,000 in United States Currency*, 2000 U.S. App. LEXIS 2429 (6th Cir. 2000) (unpublished); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995), cert. denied, 516 U.S. 1060 (1996); *United States v. Jennings*, 1993 U.S. App. LEXIS 926 (6th Cir. 1993) (unpublished).
- C. Keep Burden of Proof on the State. *State v. Villeda*, ___ N.C. App. ___, 599 S.E.2d 62 (2004).

IV. Evidentiary Issues

- A. Hearsay Within Hearsay: The Interpreter at the Scene
 - 1. Agency Relationship. *State v. Ysut Mlo*, 335 N.C. 353, 440 S.E.2d 98 (1994); *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992)
 - 2. *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Further Reading: A portion of this outline came from James G. Connell, III, and Rene L. Valladares, Cultural Factors in Motions to Suppress, 25 Champion 18 (2001)