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CHAPTER 3 - WARRANTLESS SEARCHES

3. WARRANTLESS SEARCHES

3 .1 ENCOUNTERS AND SEARCHES WHICH DO NOT REQUIRE EITHER ARTICULABLE SUSPICION OR PROBABLE CAUSE

3 .11 **Tier 1 Encounters**- Police - citizen interaction with citizen not detained - Police may simply approach person (even in parked car) and engage in conversation without articulable suspicion [Palmer, 257 App. 650, 572 SE2d 27 (2002)]. Similarly, citizen may initiate conversation [Davidson, 257 App. 260, 570 SE2d 698 (2002)].

A. If officer turns on emergency lights, approaches with gun drawn, or hand on gun, that is a non-verbal indication that citizen not free to leave - thus a *Terry* stop (see **3.2**) [In re: M.J.H., 239 App. 894, 522 SE2d 491 (1999); *compare* Burks, 240 App. 425, 523 SE2d 648 (1999) ("'An ***investigatory stop is not automatically an arrest*** simply because an officer is armed with a shotgun.' ... [I]t is often necessary for the police to approach a person with a drawn weapon in a suspiciously dangerous situation to protect the physical well-being of both police officers and the public."); Collier 282 App. 605, 639 SE2d 409 (2006) (police bluelight approaching domestic call, odd maneuver of defendant into driveway leads to **Tier 1** approach on foot)].

B. Most questioning will not trigger a perception of detention, and police do not have to affirmatively inform citizens they are free to leave unless circumstances would otherwise trigger an impression of detention [INS v. Delgado, 466 U.S. 210 (1984) (questioning all workers at factory about immigration status and having uniformed agents at all exits did not trigger perception of detention); *accord,* Florida v. Rodriguez, 469 U.S. 1 (1984)].
- Questioning numerous pedestrians encountered late at night with video camera in area with burglaries - **Tier 1** encounters [Lucas, 284 App. 450, 644 SE2d 302 (2007)];
- Knocking on door and asking permission for entry is usually **Tier 1** [Bryant, 284 App. 867, 644 SE2d 871 (2007)];
- **Tier 1** questioning of driver in parking lot became *Terry* stop when driver asked to exit vehicle [Lanes, 287 App. 311, 651 SE2d 456 (2007)]; blocking passenger's attempted exit from car converted encounter into *Terry* stop and there is no right to search for weapons if there is not enough cause for *Terry* stop [State v. Jones, 303 Ga. App. 337, 693 SE2d 583 (2010)] - nor does refusal to answer questions provide grounds for stop [Jones].

- Tapping on window and motioning subject outside after she ignored earlier request to return for more questioning once the children in her charge were secured converted encounter into *Terry* stop [Johnson, 299 App. 474, 682 SE2d 601 (2009)].

C. Frequent ways in which probable cause develops to move up to *Terry* stop (**Tier 2** (see 3.2)) or arrest (**Tier 3** (see 3.3)):

1. May ask for ID [INS v. Delgado, 466 U.S. 210 (1984); *see* OCGA 16-11-36(b) (failure to provide ID as indicia of loitering)]
   - Holding ID and asking to step out of car converted Tier 1 encounter into Terry stop [Ward, 277 App. 790, 627 SE2d 862 (2006)];

CAUTION - ***Asking*** for ID is permitted in **Tier 1** encounter; ***requiring an answer*** is only permitted with **Tier 2** *Terry* stop (see 3.2) [*compare* Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004) *with* Brown v. Texas, 443 U.S. 47 (1979); *accord*, Smith, 281 Ga. 185, 640 SE2d 1 (2006) (request for ID ***consensual*** **Tier 1** unless contrary indicia); Lucas, 284 App. 450, 644 SE2d 302 (2007) (ID questioning of numerous pedestrians encountered late at night with video camera in area with burglaries].

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2. May ask for consent to search, even luggage, [Florida v. Bostik, 501 U.S. 429 (1991); Higdon, 261 App. 729, 583 SE2d 556 (2003); Varriano v. State (Ga.App. #A11A0944, 9/20/2011) (consent to search entire car, including containers, covered passenger's backpack on back seat (passenger didn't object)].
   - If defendant refuses to consent and attempts to disengage, police can not use this for their particularized indicia of criminality [Celestin, 255 App. 792, 567 SE2d 82 (2002) (request to search bus passengers - defendant did not consent to search and attempted to leave but police kept license and told cab driver he couldn't leave); *accord*, State v. Crumpton, 302 Ga. App. 602, 692 SE2d 39 (2010) (refusal to extend consent to body cavity)];
   - Likewise, if police request defendant to accompany them to another room and refuse to immediately return ticket, luggage or ID, *Terry* stop has occurred and consent to search during stop is invalid if stop is unsupported by particularized articulable suspicion [Florida v. Royer, 460 U.S. 491 (1983) (in this case the Supreme Court found a Terry detention to be warranted but found the encounter to have become an arrest)];

3. May trigger ***flight***, threatening action, or similar behavior justifying *Terry* stop: [*See, e.g.*, California v. Hodari D., 499 U.S. 621 (1991) (*dicta* that running upon sight of police may be enough for articulable suspicion); Illinois v. Wardlow, 528 U.S. 119 (1999) (unprovoked, "headlong" flight in high crime area sufficient for articulable suspicion); Lewis, 294 App. 607, 669 SE2d 558 (2008) (investigating tip on drugs, person reached into waistband justifying drawing weapon and protective search); McClary, 292 App. 184, 663 SE2d 809 (2008) (flight when officer calls dispatch); Burgess, 290 App. 24, 658 SE2d 809 (2008); Devine, 276 App. 159, 622 SE2d 854 (2005)(flight response to request for pat-down); Holmes, 222 App. 642, 476 SE2d 37 (1996) (told to leave premises by police, agreed to do so and walked in one direction, but seen minutes later going in opposite direction and attempting to hide when police called to him); *Pace*, 219 App. 583, 466 SE2d 254 (1995) (nervous behavior, ignoring police and walking away from them after called to, repeated attempts to reach inside pockets); Jones, 216 App. 449 (454 SE2d 631) (1995) (companion who was suspected drug dealer fled when police turned lights on occupants of car in vacant lot) (cases catalogued and cited with approval in Hughes, 269 Ga. 258, 497 SE2d 790 (1998))].

NOTE - not articulable suspicion to ***walk away*** from **Tier 1** encounter - Brown v. Texas, 443 U.S. 47 (1979); Holmes, 252 App. 286, 556 SE2d 189 (2001) (a good example of suspicious circumstances short of articulable suspicion); Strickland, 265 App.533, 594 SE2d 711 (2004) ("absolute right to walk away"); Walker, 299 App. 788; 683 SE2d 867 (2009) (continued walking away after officer said: "hey, hold on guys, come here, come here")); Brown, 301 Ga.App. 82, 686 SE2d 793, (2009) (quickly walking away after seeing officer, in "high drug" parking lot of apartment complex where subject didn't live didn't create articulable suspicion); Gattison v. State, 309 Ga.App. 382, 711 SE2d 25 (2011) (officer approached apparent "heated discussion" with blue lights and participants dispersed); *compare* Galindo-Eriza v. State, 306 Ga. App. 19, 701 SE2d 516 (2010) (*running* out back door when officers knock on front-no warrant, no probable cause) *with* Underwood, 266 Ga.App. 119, 596 SE2d 425 (2004); Sheats v. State, 305 Ga. App. 475, 699 SE2d 798 (2010) (fleeing site of search warrant justifies *Terry* stop); *compare* Prado v. State, 306 Ga. App. 240, 701 SE2d 871 (2010) (*Terry* stop while warrant application in process) with Hopper, 293 Ga.App. 220, 666 SE2d 735 (2008) (merely leaving after brief visit to suspected drug house)].

Flight from Tier 1 alone authorizes *Terry* stop, but *apparently* not arrest [*Compare* Dukes, 279 App. 247, 630 SE2d 847 (2006) (flight from Tier 1 only authorized stop, not arrest for obstruction) *with* Devine, 276 App. 159, 622 SE2d 854 (2005)(flight response to request for pat-down allowed stop, physical resistance after catching up and further commands was obstruction)]. See **3.28**B

Flight from traffic stop ***purges*** taint of lack of cause - See **3.28**A

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4. Incriminatory statement [White, 267 App. 200, 598 SE2d 904 (2004) (had "nick weed")].
5. Defendant may abandon or disclaim ownership of evidence which can be investigated [Gray, 254 App. 487, 562 SE2d 712 (2002)].

D. De-escalation from **Tier 2 or 3** to **Tier 1** (relevant to voluntariness of consent and statements) [State v. Woods (Ga.App. #A11A1199, 9/1/2011); State v. McMichael, 276 Ga. App. 735, 737 (1), 624 SE2d 212 (2005)] look at: "the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them or directed their movement, the content or manner of interrogatories or statements, and "excesses" factors stressed by the United States Supreme Court; geographic, temporal and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search. In general, a full examination must be undertaken of all coercive aspects of the police-citizen interaction."

3 .12 Consent (Does not require probable cause) [See Hall, 239 Ga. 832, 238 SE2d 912 (1977); Bumper v. N.C., 391 U.S. 543 (1968); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); U.S. v. Watson, 423 U.S. 411 (1976)]:

A. Freely and voluntarily given (tracks confession standards and viewed in totality of circumstances) and includes such factors as:
1. age of the accused,
2. his/her education,
3. his/her intelligence,
4. length of detention,
5. whether the accused was advised of constitutional rights,
6. the prolonged nature of questioning,
7. the use of physical punishment,
8. and the psychological impact of all these factors on the accused [Ray, 273 App. 656; 615 SE2d 812 (2005)] .

- Fact that police state that without consent they will obtain search warrant does not generally render consent invalid [Butler, 272 App. 557, 612 SE2d 865 (2005) (bedroom); Code, 234 Ga. 90, 93 (III), 214 SE2d 873 (1975) (automobile); *but see* Collier, 266 App. 762, 598 SE2d 373 (2004), aff'd 279 Ga. 316, 612 SE2d 281 (2005)(search warrant ***then*** unavailable for blood in DUI case, so threatening to get warrant invalidates implied consent warning)];
- Police statement that "We need to go inside" after defendant said he preferred to talk outside - no consent [Pando, 284 App. 70, 643 SE2d 342 (2007)].

9. Acquiescence to authority not same as consent [Jones, 289 App. 176, 657 SE2d 253 (2008)("do what you've got to do"); Felix, 290 App. 786, 660 SE2d 853 (2008) (officer steps inside door, asks if they can talk inside, defendant silently retreats, officer follows further)].

B. Is consent "fruit of poisonous tree"?
   - Consent following ***illegal entry or detention*** - State has the burden of proof to show consent not product of illegality [Pledger v. State, 257 Ga. App. 794, 797, 572 SE2d 348 (2002); *see* Wilson, 272 App. 291, 612 SE2d 311 (2005) (incriminatory statement and consent to search suppressed as product of unwarranted ***pat-down*** for weapons); *but see* Rogue v. State (Ga.App. #A11A1373, 8/16/2011) (improper pat-down did not taint consent to search wallet where nothing found in pat-down)]. Consent obtained as result of arrest invalid where no intervening circumstances [Black, 281 App. 40, 635 SE2d 568 (2006)] (see **3.11**D);
   - Consent from third party roommate attenuated illegal confession despite lack of independent probable cause where roommate *not target of investigation* and voluntary consent not caused by confession. [Spence, 281 Ga. 697, 642 SE2d 856 (2007)];
   - Whether illegal conduct attenuated to allow consent (or confession) be act of free will depends upon totality of circumstances, particularly: "the time elapsed between the illegality and the acquisition of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct."[Brown v. Illinois, 422 U.S. 590, 603-04 (1975); Spence].

C. Not always essential to advise of right to refuse under Fourth Amendment;

D. Does person have authority to consent - sufficient common authority over or relationship to premises? [U.S. v. Matlock, 415 U.S. 164 (1974); Pledger, 257 App. 794, 572 SE2d 348 (2002)]:
   - Child age 10 incapable of giving consent to search of parents' premises [Davis, 262 Ga. 578, 422 SE2d 546 (1992)];
   - Consent may be given for common areas for all ***absent*** co-inhabitants [U.S. v. Matlock, 415 U.S. 164 (1974)];
   - Consent by one co-inhabitant where other ***present*** co-inhabitant objects is not valid [Randolph, 278 Ga. 614, 604 SE2d 835 (2004), *aff'd sub nom*. Georgia v. Randolph, 547 U.S. 103 (2006)]; *compare* Spence, 281 Ga. 697, 642 SE2d 856 (2007) (consent of roommate authorized search despite illegality of search warrant where defendant absent through arrest for murder)*;* Rhone, 283 App. 553, 642 SE2d 185 (2007) (general rule that head of household can consent for search of entire house, including bedrooms - grandfather consents to 17-year old

grandson's bedroom); *and* Warner, 285 Ga. 308, 676 SE2d 181 (2009) (sporadic rent payments did not turn parents into landlords and police may act on ***reasonable belief*** as to head of household)];

- Good faith belief of authority to consent - "To resolve the issue of third party consent, we must determine 'whether the objective facts available to the officer at the time would warrant a person of reasonable caution to conclude that the third party had authority over the premises.'"[Gray, 285 App. 124, 127, 645 SE2d 598 (2007) (can't assume driver of resident's vehicle with automatic opener for locked gate on driveway has authority to consent to search); Brown, 261 App. 351, 354 (1), 582 SE2d 516 (2003) consenting person "appeared to have been living -- by his presence being there"- insufficient) *but compare* United States v. Garcia-Jaimes, 484 F.3d 1311 (11th Cir., 2007) (landlord stated person lived there)].

NOTE - While a resident spouse could normally be presumed to have authority to grant consent, evidence may preclude good-faith reliance on that presumption. Where wife says items in locked gun cabinet belong to husband, doesn't say she has had access, husband is only one with key, and lock has to be broken to enter, consent to search by wife is invalid [State v. Parrish, 302 Ga. App. 838, 691 SE2d 888 (2010); *accord*, State v. Stewart, 203 Ga. App. 829, 418 SE2d 110 (1992) (agents could not reasonably believe that person giving consent possessed any authority over the premises when he informed the agents that he had no key or other means of access and the agents had to cut the padlock to gain entry)]. Also, 'if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.' [Burke v. State, 302 Ga. App. 469, 691 SE2d 314 (2010) (quoting Randolph)].

Similarly, where ***bond condition*** is signed by defense counsel and judge in court order, reasonable for police to presume defendant consented [Curry v. State, 309 Ga. App. 338, 711 SE2d 314 (2011) (not prohibited by Gary, 262 Ga. 573, 574, 422 SE2d 426 (1992), shows reasonableness and legality of search, not limit to exclusionary rule)].

E. Was consent given to search and seize?

NOTE - Seizure may be covered by "plain view" (see **3.14A** below) with contraband - often found in consent search.

F. Limitations on consent

1. The type, duration, and physical zone of intrusion is limited by the permission granted, and only that which is reasonably understood from the consent may be undertaken [Walker, 299 App. 788, 683 SE2d 867 (2009) (consent for pockets not for inside waistband); Shuler, 282 App. 706, 639 SE2d 623 (2006)]. Consent to search would not normally encompass body cavity search State v. Crumpton, 302 Ga. App. 602, 692 SE2d 39 (2010)].
2. Use - consent may be limited as to use of material seized [**Blood samples** - *compare* Gerace, 210 App. 874, 437 SE2d 862 (1993) *with* Holmes, 284 Ga. 330, 667 SE2d 71 (2008) (alleged "trickery" was not condition on use)].
3. But if probable cause develops during consensual search, police may extend search beyond scope of permission [Lord, 297 App. 88, 676 SE2d 404 (2009) (evidence in plain view during consensual sweep, could return for pictures after consent withdrawn); Hayes, 292 App. 724, 665 SE2d 422 (2008) (30 seconds after return of license); Medvar, 286 App. 177; 648 SE2d 406 (2007) (damaging car to search behind glove compartment). *Contrast* State v. Crumpton, 302 Ga. App. 602, 692 SE2d 39 (2010) (drug dog alert and refusal to extend consent to body cavity did not create probable cause)].

G. Consent continuous until revoked [Ferguson v. Caldwell, 233 Ga. 887, 213 SE2d 855 (1975); Bell, 162 App. 79, 290 SE2d 187 (1982)]; but if withdrawn, search must stop unless probable cause for warrantless search has already been discovered [Montero, 245 App. 181, 537 SE2d 429 (2000)];

H. Withdrawal of consent does not by itself provide probable cause for lengthy detention of defendant [Montero, 245 App. 181, 537 SE2d 429 (2000) (defendant refused search of taped package and was improperly held pending arrival of drug dog)].

I. Where consent for search comes from unrelated traffic stop [see Daniel, 277 Ga. 840, 597 SE2d 116 (2004) (good discussion of factors of totality of circumstances test, line between end of traffic stop and consensual encounter); *see also* Bibbins, 271 App. 90, 609 SE2d 362 (2004), ***rev'd*** *on procedural grounds* at 280 Ga. 283, 627 SE2d 29 (2006)(simple request with no lengthy questioning OK even after conclusion of traffic stop)]; Mauerberger, 270 App. 794, 608 SE2d 234 (2004) (may ask about drugs and for consent while awaiting license check - no prolongation of stop).

J. Implied consent entering prison - Prisons may condition entry of employees and visitors to search - entry past notice signs consents to random search [Bradley, 292 App. 737, 665 SE2d 428 (2008)].

K. Probation, Bond, Drug Court - Defendants may ***knowingly*** waive Fourth Amendment rights as a condition of probation, bond, or drug court contract, allowing searches based upon less than probable cause. Where such a waiver has been made, a search may be based upon "***reasonable and good-faith suspicion***" rather than probable cause [U.S. v. Knights, 534 U.S. 112 (2001) (probation); Hess v. State, 296 Ga. App. 300; 674 SE2d 362 (2009) (probation - under the totality of circumstances was there "a sufficiently reasonable or good-faith suspicion for the search so that the officers were not acting in an arbitrary, capricious, or harassing manner"); Reece, 257 App. 137, 570 SE2d 424 (2002) (probation); Rocco, 267 App. 900, 601 SE2d 189 (2004) (bond - consent never withdrawn, but search permitted based upon tip from informer of unknown reliability); Wilkinson, 283 App. 213, 641 SE2d 189 (2006) (drug court contract treated under Rocco standard, technical problems with search warrant directed against another suspect not a problem as conduct not arbitrary or intended as harassment)]. Probation arrest warrant or probation officer's arrest authority [under OCGA 42-8-38] only allows search or seizure of items in plain view or within defendant's reach [Jones, 282 Ga. 784, 653 SE2d 456 (2007)]. May search be based on valid waiver in *absence of any cause* ? [*compare* Adkins, 298 App. 229, 679 SE2d 793 (2009) *with* Brooks, 292 App. 445, 664 SE2d 827 (2008) aff'd 285 Ga. 424, 677 SE2d 68 (2009) (Supreme Court granted cert on whether valid waiver in sentence authorized groundless search, but did not reach issue except in concurrence)].

- Signature of defense attorney, other circumstances, and presumption of regularity may *prima facie* establish **knowledge** of condition and consent at suppression hearing in absence of rebuttal evidence [Curry v. State, 309 Ga. App. 338, 711 SE2d 314 (2011)];
- Also, where bond condition is signed by defense counsel and judge in court order, **reasonable for police to presume defendant consented** [Curry v. State, 309 Ga. App. 338, 711 SE2d 314 (2011) (not prohibited by Gary, 262 Ga. 573, 574, 422 SE2d 426 (1992), shows reasonableness and legality of search, not limit to exclusionary rule)].

L. Parole - There is no U.S. constitutional requirement for articulable suspicion for a search of parolees [Samson v. California, 547 U.S. 843 (2006)]. Georgia's standard is certainly no stricter than for probationers'"***reasonable and good-faith suspicion***"[Cauley, 282 App. 191, 638 SE2d 351 (2006)] nor is it unreasonable to require consent to search as a condition of parole [Dean, 151 App. 847, 848-849, 261 SE2d 759 (1979)].

M. Flight Response - If response to request for consent is flight (more than walking away), suspicion for stop will result (see **3.11**C3).

3 .13 Abandoned Property - Fourth Amendment does not apply when ownership disclaimed [See Hester v. U.S., 265 U.S. 57 (1923); Gray, 254 App. 487, 562 SE2d 712 (2002); Hawkins, 146 App. 312, 246 SE2d 343 (1978)].

- Lost/mislaid property is not necessarily abandoned - lost wallet police could only search for ID [Wolf, 291 App. 876, 663 SE2d 292 (2008)];
- Hastily leaving car improperly parked not abandonment [State v. Nesbitt, 305 Ga. App. 28, 699 SE2d 368 (2010)];
- Items left in woods or flushed down jail toilet [Williams v. State, 310 Ga. App. 90, 712 SE2d 113 (2011)] or left for 3 months after leaving residence [Driggers v. State, 295 Ga.App. 711, 673 SE2d 95 (2009)] are abandoned.

3 .14 No Expectation of Privacy - There is no longer automatic standing from ownership of items seized where one has no expectation of privacy in the area searched [Rawlings v. Kentucky, 448 U.S. 98 (1980)] (see also **4.14**F)

NOTE - ***Electronic location of a device*** (such as a beeper or GPS device on cell phone) may require a warrant if Defendant is in a private location such as his house [United States v. Karo, 468 U.S. 705 (1984)], but requires no warrant if he is in a public location such as a car on the highway [United States v. Knotts, 460 U.S. 276, 281 (II) (1983); Devega v. State, 286 Ga. 448, 453-54 (2010) (pinged cell phone).

A. Plain View (a seizure question) [See Coolidge v. New Hampshire, 403 U.S. 443; Smith, 158 App. 663, 281 SE2d 631 (1981); U.S. v. Hare, 589 F.2d 1291 (5th Cir. 1979); Lewis, 126 App. 123, 190 SE2d 123 (1972)]:

1. Immediately apparent as seizable (stolen, contraband, or evidence of crime). For ***documents*** "evidentiary value [must be] immediately apparent upon a mere glance or cursory inspection [Reaves, 284 Ga. 181, 664 SE2d 211 (2008)].

2. By officer having right to be present (no trespassing)?
   - Trickery used in luring person to open door and step out did not invalidate plain view into house [Herring, 279 App. 162, 630 SE2d 776 (2006)].
   - Police may approach residence on path to door used by mailman, guest, or other caller [Pickens, 225 App. 792, 793(1)(a), 484 SE2d 731 (1997); Gravitt, 289 App. 868, 658 SE2d 424 (2008)].

NOTE on backyards - Officers cannot go to backyard entrance as routine safety or security policy when coming to question resident about complaint; therefore, backyard contents would not legitimately be in plain view [Kirsche, 271 App. 729, 611 SE2d 64 (2005)]. But officer can go to back when no response at front, but resident believed to be home [Lyons, 167 App. 747, 748, 307 SE2d 285 (1983)] or approach to front door is blocked [Lyons, Zackery, 193 App. 319, 387 SE2d 606 (1989)].
Backyard described as "location undisputably within the curtilage surrounding the residence" [Morgan, 285 App. 254, 645 SE2d 745 (2007)].

NOTE - "[E]ven though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." [Horton v. California, 496 U.S. 128 (1990) (negating *dicta* in plurality decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971); Smithson, 275 App. 591, 621 SE2d 783 (2005)].

3. When protective frisk or sweep is justified, officer may seize weapon or likely contraband based upon "plain feel" [Johnson, 285 Ga. 571, 679 SE2d 340 (2009)] (see **3.26**). May link with extrinsic probable cause [State v. Cosby, 302 Ga. App. 204, 690 SE2d 519 (2010) (felt rings in weapon pat-down, other evidence to suspect subject of ring thefts)].

B. Open Fields (Not covered by Fourth Amendment [See Hester v. US, 265 U.S. 57 (1924); Giddens, 156 App. 258, 274 SE2d 595 (1980)]; open field is term of art - need not be open terrain nor a field [Minor, 298 App. 391, 680 SE2d 459 (2009) (heavy woods)]):
   1. Unoccupied or undeveloped area (includes fenced, posted area around house under construction [Morse, 288 App. 725, 655 SE2d 217 (2007)];

2. Outside of a residence and its **curtilage** (trash cans and bags outside curtilage unprotected) [*Compare* Scott, 270 App. 292, 606 SE2d 312 (2004) (kept in spot where garbage workers picked up (not curtilage)) and Locher, 293 App. 67, 666 SE2d 468 (2008) (curbside garbage cans (not curtilage)) *with* Espinoza, 265 App. 171, 454 SE2d 765 (1995) (garbage bag 7-8 feet from driveway and about 30 yards from defendant's house was within curtilage)]. Curtilage questions should be resolved with particular reference to four factors:
   - the proximity of the area claimed to be curtilage to the home,
   - whether the area is included within an enclosure surrounding the home,
   - the nature of the uses to which the area is put,
   - and the steps taken by the resident to protect the area from observation by passers-by [United States v. Dunn, 480 U.S. 294, 300 (1987); Gordon, 277 App. 247, 626 SE2d 247 (2006) (marijuana patch in kudzu field 30+ feet from house with mesh hog-wire fence not in curtilage); Scott, 270 App. 292, 606 SE2d 312 (2004)(*see* **3.14**A for ***path*** to house).

C. Fire-damaged Buildings [Michigan v. Clifford, 464 U.S. 287 (1984)]:
   1. Firefighters may ***remain*** on premises to investigate origins;
   2. Expectation of privacy depends on use of building and condition after fire:
      - collapsed walls - no privacy [Riley, 278 Ga. 677, 604 SE2d 488 (2004)];
      - secured premises with walls and roof - privacy [Clifford (securing by boarding); Carr, 267 Ga. 701(7), 482 SE2d 314 (1997)];
      - expectation of privacy strong in private offices and residences, diminished privacy in commercial premises;
   3. Where required, two types of warrants:
      - administrative - reasonable legislative, administrative, or judicially prescribed standards for conducting inspection to determine ***cause and origin*** of recent fire - need only show policy standards and recent fire of undetermined origins;
      - search for ***evidence of crime*** must meet normal probable cause standards..

D. Businesses
   - police may enter open door of commercial building at night to secure premises, but may ***not*** enter ***residence*** in daytime [Compare Banks, 229 App. 414, 493 SE2d 923 (1997), *overruled* on other grounds at Calbreath, 235 App. 638, 510 SE2d 145 (1998) with Sims, 240 App. 391, 523 SE2d 619 (1999); (see **3.35**)];

- may intrude on informal path on (at business) used by public [Smith, 276 App. 677, 624 SE2d 272 (2005)] or yard or parking lot [White, 267 App. 200 (1), 598 SE2d 904 (2004)];
- employee's privacy interest in workplace - absent consent from employer, reasonable expectation of privacy in unlocked desk in office shared with co-workers [Harper, 283 Ga. 102, 657 SE2d 213 (2008); *cf.* O'Connor v. Ortega, 480 U.S. 709 (1987) (discussing desks, file cabinets, etc. in offices with public access)]. Factors:
  1) no employer policy against personal effects;
  2) defendant had exclusive use of desk or cabinet;
  3) and defendant regularly kept personal items therein [O'Connor; Tidwell, 285 Ga. 103, 674 SE2d 272 (2009)].

E. Motor Vehicle Exterior and Location - Exterior of vehicle not covered by Fourth Amendment [Cardwell v. Lewis, 417 U.S. 583 (1974)], and officer may always run tag history [Dawson, 271 App. 217, 609 SE2d 158 (2005)]. No expectation of privacy in location of car on highway [United States v. Knotts, 460 U.S. 276, 281 (II) (1983)] - therefore police can have cell phone provider "ping" cell phone of auto occupant to get GPS location [Devega v. State, 286 Ga. 448, 689 SE2d 293 (2010)]. Electronic monitoring of beeper in area not open to visual inspection does violate an expectation of privacy [United States v. Karo, 468 U.S. 705 (1984)].

F. Standing in car searches - a non-owner, non-possessory passenger has no standing to challenge the search ***of the auto***; passenger would still have standing to challenge search or ***detention*** of self [Rakas v. Illinois, 439 U.S. 128 (1978); *accord,* Keishian, 202 App. 718, 415 SE2d 324 (1992); *but see* Diaz, 191 App. 830, 383 SE2d 195 (1989) (*paying* passenger had possessory standing); McMichael, 276 App. 735, 624 SE2d 212 (2005) (detention)], including standing to challenge cause for initial ***Terry* stop** and length of stop (as opposed to search of auto) [Brendlin v. California, 551 U.S. 249 (2007); Davis, 283 App. 200, 641 SE2d 205 (2007)]. Similarly, there is no expectation of privacy in a stolen car [Sanborn, 251 Ga. 169, 304 SE2d 377 (1983)] or if passenger flees after car is stopped [Harper v. State, 300 Ga.App. 757, 686 SE2d 375 (2009)]; *but see* Nesbitt, 305 Ga.App. 28 (1, 3), 699 SE2d 368 (2010) (foot flight by *driver* after quick "parking" in lot) (1) no abandonment when parked in legal spot "kind of sideways" - (3) but arrest justified for eluding siren].

G. Guests in residence - an overnight guest has expectation of privacy [Minnesota v. Olson, 495 U.S. 91 (1990)] but friends visiting during day do not [*e.g.,* Todd, 275 App. 459, 620 SE2d 666 (2005)].
- Hotel rooms - occupied rooms are treated as residences [Elliot, 274 App. 73, 616 SE2d 844 (2005)]; overnight guest of registered guest has expectation also [Snider, 292 App. 180, 663 SE2d 805 (2008)], but defendant must make showing [Smith, 284 Ga. 17, 663 SE2d 142 (2008) (more than subjective intent)];
- Police may accompany hotel clerk evicting occupants - when hotel justifiably evicts occupants (e.g., for disruptive conduct - see O.C.G.A. 43-21-3.1(b)), guest loses expectation of privacy in room) [Johnson, 285 Ga. 571, 679 SE2d 340 (2008)];
- No payment, no privacy interest - hotel may evict without notice for non-payment and let police enter [State v. Delvechio 301 Ga.App. 560, 687 SE2d 845 (2009)];
- "loss of the expectation of privacy in the room does not mean that he had lost his expectation of privacy with regard to personal items in the room" [Johnson, 285 Ga. 571, 679 SE2d 340 (2008) (upheld patting bulge in jacket pocket as protective sweep (**3.25**) for weapon and then "plain feel" of baggie)].

H. School students - School (and college) officials, such as principals, have only minimal restraints on their searches to avoid arbitrary harassment [Young, 234 Ga. 488, 216 SE2d 586 (1975)], but if search is delegated to law enforcement officer assigned to school, then probable cause is required [K.L.M., 278 App. 219, 628 SE2d 651 (2006)] and there are limits on intrusiveness [Safford Unified School District v. Redding, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009) (strip search improper under facts)].

I. Governmental computer network [United States v. King, 509 F.3d 1338 (11th Cir., 2007) (hooking up personal computer to army network on base destroyed expectation of privacy since it gave everyone access).

J. Jails and prisons (see **2.15**F).

3 .15 No state action - Fourth amendment only restricts governmental action [Stinski, 281 Ga. 783, 642 SE2d 1 (2007) (citizens ***on their own initiative*** seize and turn over evidence)] (see **4.14**C).

3 .2 Tier 2 - TERRY STOPS [Terry v. Ohio, 392 U.S. 1 (1968)] - brief detention for investigation

3 .21 Standard for stop - "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant ... detaining officer [to] ha[ve] 'a particularized and objective basis for suspecting the particular person stopped of criminal activity'" [United States v. Cortez, 449 U.S. 411, 417-18 (1981); Terry; Vansant, 264 Ga. 319, 443 SE2d 474 (1994)].

- Officer's ***characterization*** of specific, articulable facts as "hunch" does not make them insufficient [Fitz, 275 App. 817, 622 SE2d 46 (2005)]..
- Objective facts justify stop even when officer states criminal activity is not suspected [Johnson, 299 App. 474, 682 SE2d 601 (2009) (failure to report assault at daycare in children's presence warrants articulable suspicion of reckless conduct despite officer's disclaimer of criminal suspicion); *accord*, Garmon, 271 Ga. 673, 678(3), 524 SE2d 211 (1999) (plan to stop all cars leaving house insignificant where facts justified stop in particular case)].

A. "General criminal activity" - *Terry* stop can be based on reasonable suspicion that "criminal activity is afoot" rather than evidence indicative of specific crime [Bothwell, 250 Ga. 573, 576(2), 300 SE2d 126 (1983), *see* Stephens, 278 App. 694, 629 SE2d 565 (2006)].

B. Exchange - Trained officer's observation may justify suspicion of drug transaction even when actual transfer cannot be seen [Darden, 293 App. 127, 666 SE2d 559 (2008); Holden, 241 App. 524, 526-527, 527 SE2d 237 (1999) (defendant's stop of vehicle in known drug area to speak with admitted drug dealer sufficient even though police did not see drugs change hands); *see also* Savage, 211 App. 512, 513, 439 SE2d 738 (1993) (officer's observation of truck's driver stopping to talk to pedestrian in known drug area and driving away after being alerted to officer's presence supported investigative stop of truck); Satterfield, 289 App. 886, 658 SE2d 379 (2008)(time in suspected drug house followed by traveling with drug offender to his house)].

C. "Collective articulable suspicion" - can rely on other police officer's articulable suspicion communicated to stopping officer [Daugherty, 291 App. 541, 662 SE2d 318 (2008) (successive officers taking up chase with generic description OK); Camp, 259 App. 228, 576 SE2d 610 (2003); Pennyman, 248 App. 446, 545 SE 2d 365 (2001)].

But officer proceeds at risk of reliability of underlying information - [U.S. v. Hensley, 469 U.S. 221 (1985) (seminal case - wanted flyer - can be relied upon ***if issuing*** police had articulable suspicion)]. But see **NOTE** on warrants and governmental data bases.

- basis of collective articulable suspicion must be shown at motion to suppress [Duke, 257 App. 609, 571 SE2d 414 (2002); *accord*, Fowler, 215 App. 524, 525, 451 SE2d 124 (1994)];
- where observing officer's articulable suspicion is rejected, arresting officer cannot rely on own good faith [*see* Hester, 268 App. 501, 602 SE2d 271 (2004) (U-turn at roadblock not illegal)].

NOTE - U.S. Supreme Court validates arrests based upon faulty information in ***governmental*** data banks controlled and maintained by ***non-police actors*** [Arizona v. Evans, 514 U.S. 1 (1995) (warrant actually quashed 17 days before arrest); *accord,* Anderson, 253 App. 338, 559 SE2d 85 (2002)].

As to errors in police data base (e.g., NCIC, GCIC), U.S. v. Herring, 555 U.S. 135 (2009) (another bench warrant recall case) finds an arrest based on a recalled warrant to be a violation of the Fourth Amendment, but that the exclusionary rule does not apply in cases of negligent police recordkeeping where the conduct is not deliberate, reckless, grossly negligent or systemic (Herring and Evans both are based on the good faith rule of United States v. Leon, 468 U.S. 897 (1984)) - Herring also reiterated that the good faith of the arresting officer would not protect an arrest based on a "bare-bones" warrant of the instigating officer. [*See* Whiteley v. Warden, 401 U.S. 560 (1971)) ("otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest"); *accord*, Register, 281 App. 822, 637 SE2d 761 (2006); *see* U.S. v. Hensley, and Arizona v. Evans].

There is no good-faith exception to this exclusionary rule in Georgia [Gary, 262 Ga. 573, 574, 422 SE2d 426 (1992); Beck, 283 Ga. 352, 658 SE2d 577 (2008); OCGA 17-5-30], at least with respect to the initial validity of the warrant [*compare* Harvey, 266 Ga. 671, 469 SE2d 176 (1996) (faulty information provided by dispatch about defendant (license suspension and bench warrant - ***distinguishes*** [Whiteley v. Warden, 401 U.S. 560 (1971)] by finding ***probable cause*** for ***arrest*** when initial warrant valid, but recalled)]. But in a 4-3 decision, Harvey refused to apply Gary to a situation where the initial warrant was valid. Subsequent Court of Appeals decisions have not consistently interpreted Harvey (*compare* Lucas, 284 App. 450, 644 SE2d 302 (2007) (validity of warrant immaterial, radio confirmation sufficient for a prudent officer to establish probable cause to arrest) *with* Register (Harvey limited to "administrative computer glitch" not "affirmative acts of the police"). Whether Herring changes the application of Harvey and the exact parameters of Harvey is unclear.

Gary did not apply to the development of independent evidence of a crime during *Terry* stop from allegedly invalid warrant [King v. State, 211 Ga. App. 12, 438 SE2d 93 (1993) (DUI)].

D. Police lookouts
   1. Underlying facts for lookout should provide articulable suspicion [Bright, 265 Ga. 265, 279 (5)(a), 455 SE2d 37 (1995)];
   2. Description should also be particular enough for stopping officer to have articulable suspicion [Brown, 278 Ga. 724, 609 SE2d 312 (2004) (Car's color, manufacturer, model, and missing gas cap, plus race and gender of occupants sufficient for lookout on ***next day***].

E. Information from non-police, non-government sources - U.S. Supreme Court has set forth fairly stringent requirements for crediting such information: generally, even for *Terry* stop, the police (collectively) must have information showing the reliability of the informant/tipster (concerned citizen, reliable past informant, or statement against penal interest by known source, prediction of future conduct showing inside knowledge) [Florida v. J.L., 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990)] (reliability, see **2.23**; prediction of future conduct, see **2.23**B).
   1. However, Court of Appeals decisions about information leading to *Terry* stops seem more liberal in permitting stops [Brown, 253 App. 741, 560 SE2d 316 (2002) (911 call from person saying they were behind DUI driver - fact that so-called "concerned citizen" was not identified at hearing and, as far as can be told from the opinion, no factual basis for conclusion that he was concerned citizen - did not affect reliability of articulable suspicion) - quotes Overand, 240 App. 682, 523 SE2d 610 (1999): "A dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report. Even if the dispatcher's information comes from a citizen or an unidentified informant, the investigatory detention is valid, for patrolling officers are not required to question dispatchers about the source of the information. . . . Further, corroboration only solidifies the existence of an articulable suspicion." *Accord,* Bingham, 283 App. 468, 641 SE2d 663 (2007); Gomez, 266 App. 423, 597 SE2d 509 (2004); Harden, 267 App. 381, 599 SE2d 329 (2004) (no need for corroboration of articulable suspicion if dispatcher's description is sufficient); *but see* Slocum, 267 App. 337, 599 SE2d 299 (2004); Prather, 279 App. 873, 633 SE2d 46 (2006)].

NOTE - The Georgia Court of Appeals appears to have created a "911 call-drunk driving" exception to the constitutional requirements of Florida v. J.L., 529 U.S. 266 (2000) where a 911 caller allegedly witnessing a crime is treated as a "concerned citizen" even though the reliability of the source or of the information provided is not verified - the fact that information came through police dispatch is enough [*See* Bingham, 283 App. 468, 641 SE2d 663 (2007); *but see* Slocum, 267 App. 337, 599 SE2d 299 (2004)].

2. In-between cases [less than Alabama v. White, 496 U.S. 325 (1990) but more than Florida v. J.L., 529 U.S. 266 (2000)]:
   a. *anonymous* tipster - Daniels, 278 App. 263, 628 SE2d 684 (2006) (4-3 decision) (tipster provided description of car and occupants, path (along I-20 through Conyers), and arrival time at point on path (20-30 minutes) but no destination); Dominguez v. State, 310 Ga. App. 370, 714 SE2d 25 (2011) (***anonymous tip*** re drugs did ***not*** add ***justify*** prolonging stop to wait for drug dog); *compare* McSwain, 240 App. 60, 522 SE2d 553 (1999) (tip that 4 black males in well-described car heading north on interstate possibly had contraband - *insufficient*)]. (See also **2.23**B for reliability of information).
   b. *known witness* (greater credibility) - "When hearsay information is supplied by an identified interested citizen, the citizen's credibility is not as suspect and the analysis is not as stringent as when information is given by an anonymous tipster; a law-abiding concerned citizen has built-in credibility and is deemed to be reliable") [Yearwood, 239 App. 682, 521 SE2d 689 (1999) (reliability of witness known to officer - but general rule stated)]. Examples:
   - 911 complainant who gives name is an identified crime victim for articulable suspicion for stop, not tipster, even when he cannot later be found. Prolonged detention, however, became illegal arrest without probable cause after complainant failed to appear as promised for more than 40 minutes. [Grandberry, 289 App. 534, 658 SE2d 161 (2008)].
   - cashier at store reporting disorderly conduct [Morris, 239 App. 100, 520 SE2d 485 (1999];
   - false info through dispatcher from identified ex-spouse provided articulable suspicion for stop [Fisher, 267 App. 426, 599 SE2d 361 (2004)];
   - *known* source with known bias (ex-spouse in custody dispute who set up drug purchase) predicting future actions [Wright, 272 App. 423, 612 SE2d 576 (2005)];

- cooperative drug witnesses with no known record of reliability [*compare* Patton, 287 App. 18, 650 SE2d 733 (2007) (cooperating arrestee sets up drug transaction, police hear her side of set-up conversation, car, time and place of meeting as predicted) *and* Bryant, 284 App. 867, 644 SE2d 871 (2007) (one side of set-up conversation for drug buy and appearance at location with consistent behavior as predicted before frightened off) *with* St. Fleur, 286 App. 564, 649 SE2d 817 (2007) (*insufficient* - police hear informant's side of conversations about drug purchase, but no "meet" set up so no future conduct predicted (warrant))]. (See also **2.23**C for reliability of source).

3. Face-to-face reports - where police speak directly to person they can be treated as concerned citizen ***for purposes of "articulable suspicion"*** even though police do not choose to acquire identifying information [Riding, 269 App. 289, 603 SE2d 776 (2004); Noble, 179 App. 785, 347 SE2d 722 (1986); Williams, 225 App. 736, 738, 484 SE2d 775 (1997)]. (See also **2.23C** for reliability of source).

F. Commercial vehicles - Officers of the Motor Carrier Compliance Division of the Georgia Department of Public Safety may stop commercial vehicles to carry out safety inspections [Solano-Rodriguez, 295 App. 896, 673 SE2d 351 (2009)].

3 .22 Invalid statute - Fact that statute is later deemed unconstitutional ***does not*** negate officer's probable cause for stop in the absence of controlling authority at time of stop - "Police are charged to enforce laws until and unless they are declared unconstitutional" [Ciak, 278 Ga. 27, 597 SE2d 392 (2004); Michigan v. DeFillippo, 443 U.S. 31 (1979)].

3 .23 Insufficient Suspicion for Stop

A. Crime area (not tied to specific recent crime - a plus but not nearly enough) [Hughes, 269 Ga. 258, 497 SE2d 790 (1998) (crack cocaine sales); Peters, 242 App. 816, 531 SE2d 386 (2000) (know drug traffic area, defendant hurrying out breezeway towards car); Baker, 256 App. 75, 567 SE2d 738 (2002) (vehicle "route would have placed him in the back parking lot of a used car lot which had experienced numerous thefts"); Chinnis, 240 App. 518, 523 SE2d 924 (1999); *but see* Franklin, 281 App. 409, 636 SE2d 114 (2006) (vicinity of burglar alarm plus evasive response to questions OK); Sego, 279 App. 484, 631 SE2d 505 (2006) (drug sale area *plus* approach to car, walk away on seeing police, car passenger swallowing suspected rock - OK)].

B. Single lie about reason for being at location [Ward, 277 App. 790, 627 SE2d 862 (2006) (after approach to parked car, officer noted contradiction and defendant changed story about why she was there, after checking driver's license and determining no outstanding warrants, officer asked defendant to exit car)].

C. "Wrong" race for neighborhood - no help at all [*E.g.,* Hughes, 269 Ga. 258, 497 SE2d 790 (1998); Chinnis, 240 App. 518, 523 SE2d 924 (1999)].

D. Suspects disconnected from scene of crime - "white van" mile from hit and run with no damage yet observed and no traffic infractions [Vansant, 264 Ga. 319 , 443 SE2d 474 (1994); *accord*, Dias, 284 App. 10, 642 SE2d 925 (2007) (maroon or brown Mercury Topaz or Ford Taurus or Ford Tempo, driver with baseball cap, 2 miles away); Murray, 282 App. 741, 639 SE2d 631 (2006) (BOLO for "gold Ford pick-up truck" coming from right general direction); McNeece, 246 App. 720, 541 SE2d 696 (2000) (another white van 3/4 mile away). *Contrast* Vansant *with* Humphreys v. State, 287 Ga. 63, 694 SE2d 316 (2010) (make, model, color, paper tag and recent cell phone tracking localization to area); Cray, 291 App. 609, 662 SE2d 365 (2008) (make, model body and roof color, close proximity, description and "familiarity" of driver); Lacy, 285 App. 647, 647 SE2d 350 (2007) (dispatched to domestic call with red truck leaving, officer within 3 minutes encountered red truck leaving exit from subdivision on night with only 10 cars encountered in 8 minutes); Boone, 282 App. 67, 637 SE2d 795 (2006) (BOLO describing truck's color, number of occupants, road of travel, and direction of travel OK); Blount, 257 App. 302, 570 SE2d 705 (2002) (where investigation of area of crime revealed no movement for 30-60 minutes and then truck was seen coated with dew "making it appear as though the truck had been sitting stationary for quite some time") *and* McNair, 267 App. 872, 600 SE2d 830 (2004) (officer sees only one car in vicinity one minute after bank alarm and other officers stop car 5 minutes later based on description coming from direction of bank)].

NOTE - standard relied upon by both majority and dissent for linking observed suspect to possible flight from crime scene: "Professor LaFave, in his treatise on search and seizure, has recognized [the following] as being taken into account by courts throughout the United States in making the judgment whether reasonable suspicion to conduct an investigatory detention existed. Those factors are as follows:
(1) the particularity of the description of the offender or the vehicle in which he fled;
(2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
(3) the number of persons about in that area;
(4) the known or probable direction of the offender's flight;
(5) observed activity by the particular person stopped; and
(6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.
See 3 LaFave, Search and Seizure, A Treatise on the Fourth Amendment (2nd ed.), p. 461, § 9.3 (d)." Vansant, 264 Ga. 319 443 SE2d 474 (1994); *accord*, Dias, 284 App. 10, 642 SE2d 925 (2007). A good case on sufficient connection to flight by foot is Hamm, 259 App. 412, 577 SE2d 85 (2003) (positioned on a known flight path from one apartment to another is general direction of flight about 75 seconds after dispatch).

E. Drive-out tag no longer enough [Bius, 254 App. 634, 563 SE2d 527 (2002) (though outdated one may be); *but see* Green, 282 App. 5, 637 SE2d 498 (2006) (missing metallic strip OK); Amica v. State, 307 Ga. App. 276, 704 SE2d 831 (2010) (tag light hanging wrong)].

F. Timeliness - officer's personal knowledge that driver's license was suspended *4 months earlier* sufficiently current for articulable suspicion for traffic stop [Anderson, 265 App. 146, 592 SE2d 910 (2004)].

3 .24 "Criminality" in traffic enforcement context:

A. Public Safety - "The primary purpose of traffic enforcement is the protection of the traveling public. So long as the stop was based upon conduct the officer observed, not on a mere 'hunch,' and it was not pretextual, arbitrary, or harassing, an officer may act on a legitimate concern for public safety in stopping a driver" [Armstrong, 223 App. 350, 351-352 (2) (477 SE2d 635) (1996)]:
- Cracked windshield [Glenn, 285 App. 872, 648 SE2d 177 (2007)];
- Window tint - unable to see through window enough to stop [Simmons, 283 App. 141, 640 SE2d 709 (2006); *see* Ciak, 278 Ga. 27, 597 SE2d 392 (2004) (later measurement showing less tint doesn't invalidate stop - problem with constitutionality addressed later in amended statute)];

- Partially obscured tag [OCGA 40-2-41], including out-of-state tag, is sufficient [Davis, 283 App. 200, 641 SE2d 205 (2007)];
- Where officer witnesses ***any minor offense***, pretext not issue [Wright, 272 App. 423, 427, 612 SE2d 576 (2005) (***traffic***)]; officer need not issue citation for traffic citation which was the reason for the stop [McBee, 296 App. 42, 673 SE2d 569 (2009)];
- Stopping in middle of 2-lane residential street [Stafford, 284 Ga. 773, 671 SE2d 484 (2008) (OCGA 40-6-200 - driver in car, tried to pull away when police pulled behind)];
- Local noise ordinance [Hayward El, 284 App. 125, 643 SE2d 242 (2007)];
- Littering [OCGA § 16-7-43] by passenger throwing cigarette out of car [Hinton v. State, 289 Ga.App. 309, 656 SE2d 918 (2008)];
- Federal motor carrier regulations [Trujillo, 286 App. 438, 649 SE2d 573 (2007) (unsecured air hose)].

B. **Local ordinances** must be introduced into evidence to form basis for stop [Lucas, 284 App. 450, 644 SE2d 302 (2007)].

C. Short of Crime - Behavior giving rise to an officer's reasonable suspicion need not be a violation of the law. Even if the driver's actions do not amount to a per se traffic violation, an officer may have a reasonable, articulable suspicion that a traffic offense was being committed [Semich, 234 App. 89, 91-92 (b), 506 SE2d 216 (1998)]. "We cannot require an officer to make immediate judgments regarding whether every element of a particular crime has been established before making brief stops. And the fact that it is later shown that some element of the crime was not satisfied will not invalidate the stop if the officer acted in good faith in stopping the car because he believed an unlawful act was committed" [Calhoun, 255 App. 753, 566 SE2d 477 (2002)]. Examples of *good* cause:
- weaving within lane plus slow speed [Veal, 273 App. 47, 614 SE2d 143 (2005)];
- speeding less than ten miles per hour over limit provides grounds for ***stop*** by county, city or campus officer even though conviction cannot ensue [Berry, 274 App. 831, 619 SE2d 339 (2005); *see* OCGA 40-14-8(a)].
- honest mistake of fact that pipe (in plain view) was for marijuana [Glenn, 285 App. 872, 648 SE2d 177 (2007)];
- stopping car for no headlights approximately 4 minutes before headlights legally required OK [Hammang, 249 App. 811, 549 SE2d 440 (2001)];
- expired rental agreement justified prolonging traffic stop [*see* Tanner, 281 App. 101, 635 SE2d 388 (2006)];
- evasiveness and putting hand in pocket (possible weapon) when spotting officer plus fleeing when.officer shouted [Odom, 304 Ga.App.

615, 697 SE2d 289 (2010)];
- later acquittal of charge irrelevant [Ivey v. State, 301 Ga.App. 796, 689 SE2d 100 (2009).

But see examples of *insufficient* cause:
- "impeding traffic?" - 10 miles below speed limit in fast lane of interstate with no traffic close to driver [Whelchel, 269 App. 314, 604 SE2d 200 (2004); *accord*, Parke, 304 Ga.App. 124, 695 SE2d 413 (2010) (can't impede traffic if going speed limit even if faster cars passing on right)];
- 'out of place' car in empty truck plaza plus leaving when police pull behind [Groves v. State, 306 Ga. App. 779, 703 SE2d 371 (2010)];
- lawn mower in trunk at 1:30 am - "coming from an area where there had been reports of thefts" where no lookout or testimony about recent theft reports [Young, 285 App. 214, 645 SE2d 690 (2007)];
- attempting to exit car and ignoring questions about contents of bag [Jones, 303 Ga.App. 337, 693 SE2d 583 (2010)];
- running out house's back door when officers knock on front [Galindo-Eriza v. State, 306 Ga. App. 19, 701 SE2d 516 (2010)];
- "Flailing arms" suggesting to officer heated conversation where ***video*** showed only fleeting glimpse [Martin, 291 App. 548, 662 SE2d 316 (2008); *accord*, Gattison v. State, 309 Ga.App. 382, 711 SE2d 25 (2011) (officer approached apparent "heated discussion" with blue lights and participants dispersed)].

NOTE on pretext and "honest mistake" - Articulable suspicion is a standard designed to protect against arbitrary harassment. When officer has probable cause for a violation, no inquiry into the officer's motives is appropriate. See **3.24**A, **3.33 NOTE**. When officer is mistaken, however, motivation becomes relevant: "where an officer's honest belief that a traffic violation has actually occurred proves to be incorrect, the officer's mistaken-but-honest belief may nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for the stop. In that situation, we must then decide whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing." [Camacho, 292 App. 120, 663 SE2d 364 (2008) (following Worsham, 251 App. 774, 775, 554 SE2d 805 (2001))].

D. Honest mistake as to law - In some circumstances, officer has articulable suspicion although (honestly) mistaken about the law:
   1. "Technical legal distinction" mistakes OK:
      - belief that fog lights were mandatory equipment [Dixon, 271 App. 199, 609 SE2d 148 (2005)];
      - belief that light-dimming law applied to divided highway [McConnell, 188 App. 653, 374 SE2d 111 (1988)];

- few minutes off on time of sunset and thus time lights required [Hammang, 249 App. 811, 549 SE2d 440 (2001)];
- sawed-off shotgun mistakenly thought to be illegal but in fact 10 inches over limit [Castleberry, 275 App. 37, 619 SE2d 747 (2005)];
- Change in appellate law after incident? [Davis v. United States, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (search of "recent occupant" of car disallowed in later case); *see* King v. State, 211 Ga. App. 12, 438 SE2d 93 (1993) (evidence developed during *Terry* stop); *but see* Beck, 283 Ga. 352, 658 SE2d 577 (2008) (no good faith exception to exclusionary rule)].

2. Not technical distinction - not OK:
   - Interstate highway restriction to riding in truck bed applied off interstate [Interest of B.C.G., 235 App. 1, 508 SE2d 239 (1998)];
   - Belief that 1995 model "Euro" lights violated vehicle standards based upon personal research that 1998-2001 models did [Keddington, 264 App. 912, 592 SE2d 532 (2003)].
   - Failure to use turn signal when no traffic [Jones, 214 App. 593, 448 SE2d 496 (1994); *compare* Morgan v. State, 309 Ga. App. 740, 710 SE2d 922 (2011) (good discussion of requirements of turn signal stop)].

CAUTION - There are numerous cases on both sides and the standards for determining which mistakes are "technical legal distinctions" is obscure.

3 .25 Standard for frisk and "protective sweeps"

A. Reasonable belief that the person is armed and poses a danger [Edgell, 253 App. 775, 777-778, 560 SE2d 532 (2002) (can't automatically pat down passengers any time officer asked them to exit)]; absence of articulable suspicion of threat requires suppression [*E.g.,* Jones, 289 App. 176, 657 SE2d 253 (2008)(looked in car under clothes while securing hunting rifle after defendant outside); [State v. Jones, 303 Ga. App. 337, 693 SE2d 583 (2010)(subject attempting to exit car to leave **Tier 1** encounter); Wilson, 272 App. 291, 612 SE2d 311 (2005); *but see* Megesi, 277 App. 855, 627 SE2d 814 (2006)].
   - Can't base on "dangerous area" where no individual suspicion of detainee [Perez, 284 App. 212, 643 SE2d 792 (2007)]; reaching into car which then drove away in "drug area" parking lot insufficient - even if there is articulable suspicion of drug transaction, that alone is insufficient for safety pat down [Thomas v. State, 301 Ga.App. 198, 687 SE2d 203 (2009)];
   - Can't search for weapons if detention unwarranted [Jones, 303 Ga.App. 337, 693 SE2d 583 (2010)];

- No protective search of acquaintance of murder suspect in own hotel room just because he had recently been with murder suspect and police had cause to believe murder suspect might soon appear there [Suluki, 302 Ga.App. 735, 691 SE2d 626 (2010)];
- Sufficient jumpiness - "moving and reaching around the inside of the vehicle . . . appeared very nervous; his hands and voice were shaking, he was breathing quickly, and his heart was beating so hard that it was visible to the officer through his shirt" [O'Quinn v. State, 303 Ga. App. 657, 695 SE2d 60 (2010)];
- Articulable suspicion that person is burglary suspect, plus officer's experience with burglary tools used as weapons justifies pat down [State v. Cosby, 302 Ga. App. 204, 690 SE2d 519 (2010)];
- Arrest at door of residence justifies protective sweep of house based upon suspicion of presence of accomplice to armed robbery [Lawson, 299 App. 865, 684 SE2d 1 (2009)];
- ***Passenger*** of car in traffic stop may be ordered from car and temporarily detained - is subject to frisk on same individualized "reasonable belief" standard as driver [Arizona v. Johnson, 555 U.S. 323 (2009); may ask for consent to pat down without suspicion - Stagg, 297 App. 640, 678 SE2d 108 (2009)].

B. Lookout based on articulable suspicion for suspects for violent crime automatically justifies search for weapons ***and temporary*** separated ***detention*** [Brown, 278 Ga. 724, 609 SE2d 312 (2004); *but see* [Suluki, 302 Ga.App. 735, 691 SE2d 626 (2010) (couldn't search person who ***had been*** with murder suspect even though it was suspected murder suspect might appear soon]..

C. "Protective sweep is a limited search of the premises conducted primarily to ensure the safety of police officers by detecting the presence of other occupants" [*Compare* Clark, 239 App. 569, 510 SE2d 319 (1998) (invalid sweep of bar patrons) *and* Pando, 284 App. 70, 643 SE2d 342 (2007) (smell of marijuana, invalid sweep where no arrest, no articulable suspicion of weapons or other occupants) *with* Brown 283 App. 250, 641 SE2d 551 (2006) (looking for shooter and smell of marijuana)].

1. Normally part of in-home arrest when police possess articulable facts (plus rational inferences) warranting "a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene" [Maryland v. Buie, 494 U. S. 325, 334(III) (1990); Nelson, 271 App. 658, 610 SE2d 627 (2005) (drugs plus individuals fleeing scene as police approach enough); Moorer, 286 App. 395, 649 SE2d 537 (2007) (protective sweep for accomplice and weapons arresting armed robber in face of wife's objections); *compare* Gray, 285 App. 184, 645 SE2d 598 (2007) (no protective sweep when suspect arrested in car and transported to residence to talk to car

owner)].

2. Securing for search - may be justified on same basis when officers secure a scene pending obtaining search warrant [Nelson; *compare* Minor, 298 App. 391, 680 SE2d 459 (2009) (2-hour ***detention*** pending warrant as arrest)].

NOTE - Megesi, 277 App. 855, 627 SE2d 814 (2006) permitted temporary seizure of weapon in traffic stop *without evidence of criminality or dangerousness*, but is *not controlling precedent* due to concurrence.

3 .26 Scope of frisk

A. Normally, this search involves following a two-step process where the officer must first conduct a nonintrusive pat-down of the surface of the suspect's clothing and then intrude beneath the surface only if he feels something that could be a weapon [Barrett, 212 App. 745, 443 SE2d 285 (1994); *accord,* Sibron v. New York, 392 U.S. 40 (1968)];
   - reaction may justify intrusion: failure to remove hand from pocket [Thomas, 231 App. 173, 498 SE2d 760 (1998)], failure to answer question about hard object [McGugan, 215 App. 535, 451 SE2d 460 (1994); *but see* Castleberry, 275 App. 37, 619 SE2d 747 (2005) (hard object not enough)].

B. Pat down may lead to probable cause for drugs, etc. under "plain feel" doctrine - but may not continue to squeeze or manipulate after determining it is not a weapon [Minnesota v. Dickerson, 508 U.S. 366 (1993)].
   - Hard object insufficient [Castleberry, 275 App. 37, 619 SE2d 747 (2005); *but see* McGugan, 215 App. 535, 451 SE2d 460 (1994)].
   - Cigar not clearly contraband based on feel - extracting it exceeds scope of pat-down [Foster, 285 App. 441, 646 SE2d 302 (2007)].

- Combined with prior knowledge - feel of marijuana bags alone insufficient, ***combined*** with other suspicious factors sufficient [Patman, 244 App. 833, 537 SE2d 118 (2000); *accord* State v. Cosby, 302 Ga. App. 204, 690 SE2d 519 (2010) (felt rings in weapon pat-down, other evidence to suspect subject of ring thefts)].

C. Automobiles - search of passenger compartment and containers that could hold weapons [Michigan v. Long, 463 U.S. 1032 (1993)].

3 .27 Duration and scope of detention - brief stop

A. Removal from Car - officer can order defendant out of car on valid ***Terry*** stop for any offense [Pennsylvania v. Mimms, 434 U.S. 106 (1977) (expired license tag - intended to write ticket)].

B. Too long [Radowick, 145 App. 231, 238-39, 244 SE2d 346, 353 (1978) (physical precedent only) ("tortures English language" to say 40 minutes is brief); Jackson, 191 App. 439, 382 SE2d 177 (1989) (almost 2 hours); *but see* Harper, 243 App. 705, 534 SE2d 157 (2000) (waiting an hour for DUI task force officer OK when articulable suspicion was for DUI)]; State v. Long, 301 Ga.App. 839, 689 SE2d 369 (2010) (20 minute wait for drug dog after refusal of consent search and nervousness)];
- OK to wait for DUI specialist officer when articulable suspicion of DUI [Harper, 243 App. 705, 534 SE2d 157 (2000) (hour); Waters v. State, 306 Ga. App. 114, 701 SE2d 550 (2010) (25 min.)];

C. Time elapsed is less important than reason for delay - standard no longer than required to investigate relevant suspicion. Thus, the United States Supreme Court has held that "the scope of the detention must be carefully tailored to its underlying justification." [Florida v. Royer, 460 U.S. 491, 500 (1983); *accord, e.g.*, Dominguez v. State, 310 Ga. App. 370, 714 SE2d 25 (2011) (apparently through with turn signal stop - improper to wait 10 minutes for drug dog - ***anonymous tip*** re drugs did ***not justify*** prolonging stop); Smith, 216 App. 453; 454 SE2d 635 (1995) (DUI stop did not warrant holding defendant to get drug dog when consent to search refused); Migliore, 240 App. 783, 785, 525 SE2d 166 (1999) (traffic stop did not warrant use of dog that was already there just because occupants were nervous and initial cause for stop was exhausted - questionable in light of **3.27**D below)].

D. OK to detain while running license and criminal history [Williams, 264 App. 199, 590 SE2d 151 (2003)].

- Use of ***drug dog*** to smell exterior of car during a traffic stop and "the ordinary inquiries incident to such a stop" is ***not*** a ***search*** and need not be supported by articulable suspicion of drugs [Illinois v. Caballes, 543 U.S. 405 (2005) (search by second officer); Simmons, 283 App. 141, 640 SE2d 709 (2006); Bowens, 276 App. 520, 623 SE2d 677 (2005)]; but prolonged detention awaiting dog *may* not be justified [*see* State v. Long, 301 Ga.App. 839, 689 SE2d 369 (2010) (deferred to trial court determination that refusal of consent to search didn't warrant 20 minute delay waiting on drug dog); Montero, 245 App. 181, 537 SE2d 429 (2000) (defendant refused search of taped package and was improperly held pending arrival of drug dog); Smith, 216 App. 453; 454 SE2d 635 (1995) (DUI stop did not warrant holding defendant to get drug dog when consent to search refused); *compare* Andrews, 289 App. 679, 658 SE2d 126 (2008) (minimal suspicion suffices when dog already present - no delay); Wilson, 293 App. 136, 666 SE2d 573 (2008) (same-delayed completing warning); Bowden, 279 App. 173, 630 SE2d 792 (2006) (can hold for arrival when articulable suspicion of drugs present].

E. OK to wait for witnesses [Lane, 248 App. 470, 545 SE2d 665 (2001) (20 minutes waiting on arrival of eyewitness)].

F. "**Tier 2 ½**" - continuing detention and investigating other matters

1. "An officer must have ***reasonable suspicion*** of [other] criminal conduct before conducting additional questioning and searching a vehicle once a normal traffic stop has ended and the officer has told motorists they are free to go" [Simmons, 223 App. 781, 782 (2) (479 SE2d 123) (1996); Gonzales, 255 App. 149, 564 SE2d 552 (2002) (return of driver's license and insurance card and giving warning the same)].
2. During stop ***limited*** questioning on subjects not germane to stop which ***does not prolong*** it is acceptable [Muehler v. Mena, 544 U. S. 93 (2005) (ID questions including place of birth and immigration status); Wesley, 275 App. 363, 620 SE2d 580 (2005) (why so nervous? - no prolongation of stop); Mauerberger, 270 App. 794, 608 SE2d 234 (2004)].
   - ***Passenger*** can be questioned on subject ***unrelated to stop*** as long as questioning ***does not measurably prolong*** stop [Arizona v. Johnson, 555 U.S. 323 (2009) (2nd officer quizzed passenger about gang membership and police scanner)].
   - 911 complainant who gives name is an identified crime victim for articulable suspicion for stop, not tipster, even when he cannot later be found. Prolonged detention, however, became illegal arrest without probable cause after complainant failed to appear as promised for more than 40 minutes. [Grandberry, 289 App. 534, 658 SE2d 161 (2008)].

3. What if the officer doesn't punctuate the end of the traffic stop? [Faulkner, 256 App. 129, 567 SE2d 754 (2002) (holding completed ticket and continuing to interrogate driver - insufficient suspicion); *compare* Bibbins, 271 App. 90, 609 SE2d 362 (2004), ***rev'd*** *on procedural grounds* at 280 Ga. 283, 627 SE2d 29 (2006) ("the 'scope' of a traffic detention has never been limited to the isolated traffic offense that led to the pull-over, but is broad enough to encompass identified, legitimate law enforcement goals relating to highway public safety, as long as the pursuit of those goals does not unreasonably prolong the duration of a valid, ongoing stop.") *with* Daniel, 277 Ga. 840, 597 SE2d 116 (2004)]; Dominguez v. State, 310 Ga. App. 370, 714 SE2d 25 (2011) (apparently through with turn signal stop - improper to wait 10 minutes for drug dog - ***anonymous tip*** re drugs did ***not justify*** prolonging stop).

NOTE - Salmeron 280 Ga. 735, 632 SE2d 645 (2006) (4-3 decision) ***limits*** Daniel, ***accepting*** that: "the officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention;" while ***rejecting*** "extraneous questioning" without prolongation of the investigation must be justified by articulable suspicion of another offense. Follows Muehler v. Mena, 544 U. S. 93 (2005) holding that: "mere police questioning does not constitute a seizure." Thus, officer can get driver out of car for safety and conduct "small talk" and "extraneous questioning" while checking out license, registration, and insurance [*Accord*, Arizona v. Johnson, 555 U.S. 323 (2009) (unrelated questioning even of passenger without articulable suspicion not an issue if it does not measurably prolong stop].

CAUTION - reevaluate earlier cases in light of Salmeron and Muehler v. Mena - for instance, Salmeron impliedly overruled Swords, 258 App. 895, 575 SE2d 751 (2002) and Joyner, 270 App. 533, 607 SE2d 184 (2004) [Matthews, 294 App. 836, 670 SE2d 520 (2008) (full court opinion)]. Nevertheless, failing to start normal processing of stop or dragging it out at the end (e.g., to get drug dog) remains problematic [Nunnally v. State, 310 Ga.App. 183, 713 SE2d 408 (2011) (after observing nervousness didn't start processing ticket but waited on drug dog - reversal based on de novo review of officer's undisputed conduct); Dominguez v. State, 310 Ga. App. 370, 714 SE2d 25 (2011) (apparently through with turn signal stop - improper to wait 10 minutes for drug dog - ***anonymous tip*** re drugs did ***not justify*** prolonging stop)].

4. "Launching into drug investigation" ***before*** proceeding with license check on seat belt stop shown by asking driver to step out of car to quiz him about passenger's ID without passenger hearing [Habib, 260 App. 229, 581 SE2d 576 (2003) (insufficient suspicion); Nunnally v. State, 310 Ga.App. 183, 713 SE2d 408 (2011) (after observing nervousness didn't start processing ticket but waited on drug dog - reversal based on de novo review of officer's undisputed conduct); *but see* Salmeron, 280 Ga. 735, 632 SE2d 645 (2006) (getting driver out of car and questioning ***while*** documents being run OK)].
   Investigation of ***change of Georgia address*** without questioning about reasons for stop, ***waiting for written warning form*** instead of giving citation or verbal warning ***not*** good grounds for prolongation of stop (while drug dog coincidentally arrived) [Bennett, 285 App. 796, 648 SE2d 126 (2007) (questions whether failure to correct Georgia license address is law violation - reversed trial court)].
5. Nervousness, even extreme nervousness, is not enough for reasonable suspicion [Jones, 259 App. 849, 578 SE2d 562 (2003); Cooper, 260 App. 333, 579 SE2d 754 (2003); *see* Bennett, 285 App. 796, 648 SE2d 126 (2007)], but movements suggestive of hiding something add enough for cause [Jones]. Likewise, conflicting accounts of travel itinerary or why driver and passenger are there are enough, coupled with nervousness, to give articulable suspicion [Akins, 266 App. 214, 596 SE2d 719 (2004); Anderson, 261 App. 657, 583 SE2d 511 (2003)] or with circumstantial incongruities about travel plans and "drug profile" (new car and route) [Giles, 284App. 1, 642 SE2d 921 (2007)].
   - Nervousness as a symptom of drug impairment by training and experience [Robinson, 295 App. 136, 670 SE2d 837 (2008), and although nervousness (see **3.27D**, **F5**), crime area (see **3.23A**), *single* conflict in story explaining presence (see **3.23B**), and presence of air freshener are each insufficient to justify detention, combing such factors justifies prolongation of stop for drug investigation [Wilson v. State, 306 Ga. App. 286; 702 SE2d 2 (2010)].

6. Officer training about specific clues or profiles may justify continued detention [Rosas, 276 App. 513, 624 SE2d 142 (2005) (type of car and apparent tampering with armrest)].
7. Smell of alcohol alone justifies DUI investigation [Blankenship v. State, 301 Ga.App. 602, 688 SE2d 395 (2009) (roadblock); Hinton v. State, 289 App. 309, 656 SE2d 918 (2008) (littering)]

G. Asking for ID

1. OCGA 16-11-36(b) makes failure to answer question about ID a circumstance supporting "alarm" as a basis for arrest under loitering statute;
2. Failure to give name in investigation may sometimes be considered obstruction [*compare* Bailey, 190 App. 683, 379 SE2d 816 (1989) *with* Johnson, 264 App. 889, 592 SE2d 507 (2003); *see* Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004) (penalizing refusal to ID self permissible in *Terry* stop ***if*** reasonable suspicion exists)];

H. Can ask for consent to search at end of *Terry* stop investigation [Ohio v. Robinette, 519 U.S. 33 (1996); *accord*, Medvar, 286 App. 177; 648 SE2d 406 (2007); Noble, 283 App. 81, 640 SE2d 666 (2006) (10 minute wait for drug dog ***after*** consent OK); Garvin, 283 App. 242, 641 SE2d 176 (2006); Milsap, 243 App. 519, 528 SE2d 865 (2000); *see* Bibbins, 271 App. 90, 609 SE2d 362 (2004), ***rev'd*** *on procedural grounds* at 280 Ga. 283, 627 SE2d 29 (2006); Mauerberger, 270 App. 794, 608 SE2d 234 (2004) (may ask about drugs and for consent while awaiting license check - no prolongation of stop); *but see* Felton, 297 App. 35, 676 SE2d 434 (2009) (asking defendant to exit vehicle after ticket written and immediately before serving citation vitiated consent)]:
1. *See* White, 258 App. 700, 574 SE2d 892 (2002) (minimal time between completion of ticket and request);
2. Officer cannot use denial and nervousness ***alone*** as grounds for continued detention [Parker, 233 App. 616; 504 SE2d 774 (1998) (less questionable when officer makes decision to investigate other issues before announcement); *but see* Pitts, 221 App. 309, 311 (2), 471 SE2d 270 (1996) (nervousness plus travel itinerary contradictions from brief questioning); Whitt, 277 App. 49, 625 SE2d 418 (2005) (nervousness plus lack of info about destination and passenger plus designated driver on rental agreement not present)];
3. Padron, 254 App. 265, 562 SE2d 244 (2002) (after 6 minute wait to check on license, another officer questions and obtains consent to search - thrown out because continued questioning without "reasonable cause" and officer said driver not free to leave).

3 .28 Resistance to a illegal *Terry* stop/command

A. When driver fails to pull over for blue light, this provides new grounds for stop and lack of articulable suspicion in initial stop will not be considered [Hardnett, 285 Ga. 470, 474-475(6), 678 SE2d 323 (2009); Stilley, 261 App. 868, 584 SE2d 9 (2003); Eichelberger, 252 App. 801, 557 SE2d 439 (2001); Nesbitt, 305 Ga.App. 28(3), 699 SE2d 368 (2010) (foot flight after quick "parking" in lot) (all relying on OCGA § 40-6-395(a)); *see also* United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982) (cited with approval in Stilley and Strickland, 265 App.533, 594 SE2d 711 (2004); *but see* Newton, 227 App. 394, 397 (4), 489 SE2d 147 (1997) (physical precedent only) (declining to follow due to Georgia rule that one may forcibly resist an illegal arrest).

B. Physical resistance - Court of Appeals recently ruled that physical resistance to an invalid *Terry* stop may grant probable cause for an arrest [Strickland, 265 App.533, 594 SE2d 711 (2004) (shoving) (pointing out that O.C.G.A. 16-5-23(e) does not speak of lawful discharge of duties ("any person who commits the offense of simple battery against a police officer . . . engaged in carrying out official duties shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature"). Important to note, however, the Court points out there was no *physical* detention in Strickland, defendant was *asked* to empty his pockets. Thus, this case does not seem to overrule the long line of Georgia cases allowing physical resistence to unlawful physical detention, but that rule appears to be disfavored so that if the facts or statutes allow a loophole, the loophole will be used].

3 .29 A special *Terry* stop - executing a search warrant (see **2.45**) - may stop to question and request aid but may not frisk for weapons in absence of articulable suspicion of reasonable fear).

- Arrival and departure from house subject to drug-related search warrant not enough suspicion for stop [*Compare* Hopper, 293 App. 220, 666 SE2d 735 (2008) *with* Satterfield, 289 App. 886, 658 SE2d 379 (2008) (driving away with passenger under surveillance for drug activity to passenger's residence enough); *accord* Mallard, 246 App. 357, 541 SE2d 46 (2000) *see* Garmon, 271 Ga. 673, 678(3), 524 SE2d 211 (1999) (***plan*** to stop all persons leaving not problem where individualized suspicion of person actually stopped justified by objective facts).

3 .3 Tier 3 - ARREST

3 .31 Probable cause required (*See generally* **2.2**) - particular crime must be specified and some circumstances reflecting the elements of that crime must be present [Stephens, 278 App. 694, 629 SE2d 565 (2006)].

- Later acquittal of charges irrelevant [White v. State, 310 Ga.App. 386, 714 SE2d 31 (2011)];
- Effect of flight (*see* **3.11C**3) - from traffic stop (*see* **3.28**A)

NOTE - Probable cause, like articulable suspicion, may be based upon **collective police knowledge** (*See generally* **2.22**). If the alert or warrant of the other police department or officer is not based upon probable cause, then the arrest is normally invalid [Whiteley v. Warden, 401 U.S. 560 (1971) ("Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.")]. Officer can also follow direction of other officer on probable cause without knowing details [Hannah, 280 App. 230, 633 SE2d 800 (2006)].

U.S. Supreme Court validates arrests based upon faulty information in governmental **data banks** controlled and maintained by **non-police actors** [Arizona v. Evans, 514 U.S. 1 (1995) (bench warrant actually quashed 17 days before arrest - "exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees"); *accord,* Anderson, 253 App. 338, 559 SE2d 85 (2002); Buchanan, 259 App. 272, 576 SE2d 556 (2002); Harvey, 266 Ga. 671, 469 SE2d 176 (1996) (faulty information provided by dispatch about defendant (license suspension, NCIC listing of contempt of court warrant and bench warrant) provides ***probable cause*** for ***arrest*** - language in Harvey may be misleadingly broad)]. In contrast, arrest based on a recalled warrant in NCIC is a 4th Amendment violation, but exclusionary rule does not apply under "good faith"exception where negligent police record-keeping is not deliberate, reckless, grossly negligent or systemic [U.S. v. Herring, 555 U.S. 135 (2009)]. Georgia, however, generally has no good faith exception [*see* Gary, 262 Ga. 573, 577, 422 SE2d 426 (1992); *but see* Harvey].

The Court of Appeals found no 4th Amendment violation for arrest based on NCIC entry without any distinction between police and non-police actors [Howard, 273 App. 667, 615 SE2d 806 (2005) (re-arrest on an already executed warrant)], but this may run afoul of [Whiteley v. Warden, 401 U.S. 560 (1971) ("otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest"); U.S. v. Hensley, 469 U.S. 221 (1985) (wanted flyer provides articulable suspicion only if issuing agency had articulable suspicion) and Arizona v. Evans]. Harvey should perhaps be limited to situations where the initial warrant was good but then was recalled/satisfied.

NOTE on Loitering - person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. OCGA § 16-11-36(a). Safety issues includes concern about drug sales.

Factors that an officer may consider in determining whether an alarm is warranted is whether the person takes flight when police arrive, refuses to identify himself, or tries to conceal himself or any object.

In addition, if circumstances allow, the officer should allow the person the opportunity to dispel any such alarm by asking that the person identify himself and explain his presence and conduct. [Boyd, 290 App. 34, 658 SE2d 782 (2008); Griffin, 223 App. 796, 797(1), 479 SE2d 21 (1996)].

3 .32 What is arrest - test is an objective one [Kaupp v. Texas, 538 U.S. 626 (2003): "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (quoting a long line of decisions)]:

A. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

B. Handcuffs - "Nor is it significant, as the state court thought, that the sheriff's department 'routinely' transported individuals, including Kaupp on one prior occasion, while handcuffed for safety of the officers, or that Kaupp 'did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation.' [cits.] The test is an objective one, [cit.] and stressing the officers' motivation of self-protection does not speak to how their actions would reasonably be understood. As for the lack of resistance, failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer."[*Accord*, Suluki v. State, 302 Ga. App. 735, 691 SE2d 626 (2010) (gun exhibited, companion to murder suspect fell to floor and was handcuffed "for officer safety"); Mayberry, 267 App. 620, 600 SE2d 703 (2004); Norris, 281 App. 193, 635 SE2d 810 (2006) ("turn around and put hands behind back" suggests arrest to normal citizen); *but see* State v. Austin (Ga.App.

A11A0601, 7/13/2011) (rev'd finding of arrest when officer handcuffed belligerent suspect in shots fired call and told suspect it was for safety and not arrest; ***but after*** defendant led officer in house and ***officer saw marijuana*** and said "you can't have that," suspect would reasonably conclude was then under arrest); Reggler v. State, 307 Ga. App. 721, 706 SE2d 111 (2011) (burglary suspect handcuffed, not transported, but placed in car, adjacent to scene of burglary and his own house while awaiting backup, told conduct was suspicious, upheld finding of no arrest); Sosniak, 287 Ga. 279, 695 SE2d 604 (2010) (advisement of no arrest, transported to police station in handcuffs in early morning hours, asked about going to tomorrow's classes, no hostile, accusatory tone - no arrest); Smith, 281 Ga. 185 (2006) (advisement of no arrest, handcuffs for transport to police office for voluntary statement not arrest); Holsey, 271 Ga. 856, 861(6), 524 SE2d 473 (1999) (drawn weapon and prone search for weapons in ***Terry*** stop investigating shooting); Gray, 296 App. 878, 676 SE2d 36 (2009) (individualized danger concern (pursuing evidence linking to violent armed robbery next door) permitted handcuffs without transforming Terry stop into arrest); Muehler v. Mena, 544 U.S. 93 (2005) (securing persons on scene for 2-3 hours in handcuffs during search OK)] (see **2.45**C); *see also* State v. Padidham (Ga.App. A11A0678, 7/13/2011) (suspect told officer "thought he was too intoxicated to drive, but that he was going to verify this suspicion;" suspect was in own car and not in handcuffs, reversed finding of arrest)]. Officer's suspicions are irrelevant since test is objective one view from person in defendant's situation [Sosniak, 287 Ga. 279, 695 SE2d 604 (2010)].

C. Detention pending search warrant: 2 hour detention outside of home awaiting search warrant where not free to leave is an arrest [Minor, 298 App. 391, 680 SE2d 459 (2009); *compare* Muehler v. Mena, 544 U.S. 93 (2005) (prolonged detention and handcuffing during ***execution*** of search warrant OK)]. See **3.27** (prolonged detention in traffic stop).

D. Following ***not arrest***:
   1. Reading *Miranda* rights and implied consent warning ***alone*** does not result in an arrest [Oliver, 261 App. 599, 583 SE2d 259 (2003)].
   2. Standard ***not*** the slightest restraint contemplated by OCGA § 17-4-1 [Evans, 267 App. 706, 600 SE2d 671 (2004)].
   3. Asking defendant to exit vehicle, retaining driver license, ***and telling him he would not be permitted to drive*** in his condition temporary detention rather than arrest [Keller, 286 App. 292, 648 SE2d 714 (2007)].

4. Decision to arrest not communicated to Defendant does not require *Miranda* warning [Dixon, 267 App. 320, 599 SE2d 284 (2004) (***subjective*** intent of officer irrelevant to ***objective*** test); *but see* In re J.D.G., 278 App. 672, 629 SE2d 397 (2006) (State may justify search based upon uncommunicated arrest where probable cause present)].
5. Apprehension on civil commitment order - *Terry* weapons pat down permitted before placing committed person in car, but no inventory search [Lindsey, 282 App. 644, 639 SE2d 584 (2006) (soft baggie not possible weapon)].
6. Interrogation at defendant's home at 5:30 a.m. where mother let officers in and woke defendant up, and officers directed defendant to come outside with them to examine vehicle damage together [Curles, 304 Ga.App. 235, 696 SE2d 89 (2010)].

3 .33 **Search incident to arrest** - "Every arrest must be presumed to present a risk of danger to the arresting officer" [Washington v. Chrisman, 455 U.S. 1 (1982) - justified by danger to officer (arms) and securing evidence; U.S. v. Robinson, 414 U.S. 218 (1973)].

A. Motivation of search irrelevant [Wade, 184 App. 97, 360 SE2d 647 (1987); Carson, 241 Ga. 622, 247 SE2d 68 (1978)].

B. **Full search is warranted** on the most minor of cases where there is an arrest [U.S. v. Robinson, 414 U.S. 218 (1973) (searching inside of cigarette box); Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (non-jail offense - full search, but less than strip search or body cavity); Bobbitt, 195 App. 566, 394 SE2d 385 (1990).

NOTE on strip searches - ***At a minimum***, a strip search incident to arrest must be justified by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing" the search was necessary for evidentiary purposes [Evans v. Stephens, 407 F.3d 1272, 1279-1280 (11th Cir., 2005)(officer liable despite claim of official immunity); *see* Bobbitt, also language in Atwater and Whren]. Body cavity searches likely require full probable cause, but jail administration searches ***may*** not require articulable suspicion [Evans (neither issue decided in case)].

C. Can't search incident to arrest based on probable cause for crime if no arrest [Knowles v. Iowa, 525 U.S. 113 (1998)]:
   - But State may claim probable cause for arrest to justify search despite not proclaiming arrest [In re J.D.G., 278 App. 672, 629 SE2d 397 (2006); Lane, 275 App. 781, 621 SE2d 862 (2005); *but see* [Dixon, 267 App. 320, 599 SE2d 284 (2004) (***subjective*** intent of officer irrelevant to ***objective*** test for ***Miranda*** warnings)].

Note on "pretext" in arrest context - U.S. v. Lefkowitz, 285 U.S. 452 (1932) ('an arrest may not be used as a pretext to search for evidence') and later cases were silently vitiated by a unanimous court in Whren v. U.S., 517 U.S. 806 (1996) following Gustafson v. Florida, 414 U.S. 260 (1973) (full search for minor traffic offense), *U.S. v. Robinson*, 414 U.S. 218 (1973) and ***flatly rejected*** in Arkansas v. Sullivan, 532 U.S. 769 (2001), and Atwater v. City of Lago Vista, 532 U.S. 318 (2001). Thus, using a ***valid arrest warrant*** for passenger ***as*** cause ("***pretext***") to stop car is ***OK*** even if motivation was to facilitate drug investigation including driver [Somesso v. State, 288 App. 291, 653 SE2d 855 (2007)]. Outside of traffic stop context, arrest warrant does not provide authority of detention of another person, and officer proceeds at own risk as in any warrantless stop [Suluki v. State, 302 Ga. App. 735, 691 SE2d 626 (2010)]. Pretext may still be an issue on a traffic stop where suspicion does not specifically relate to a particular crime. (See **3.24**)

Note on minor traffic arrests - arrest on traffic - some states (Washington and Michigan) reject while others provide for automatic bail and limit inventory searches in those cases; Georgia has not - ***Georgia gives officer option of arrest or citation in traffic cases*** [Lopez, 286 App. 873, 650 SE2d 430 (2007)]. Other states choose not to follow the Atwater rule (allowing arrests in non-jailable offenses) - Georgia is yet to rule on this. Atwater itself encourages states to go ahead and adopt more restrictive limits on arrests and searches in minor offenses. Practical difficulty pointed out - many offenses on national level are jailable conditional on certain previous offenses.

Effect of state law limitation on arrest - Where officer actually arrests for crime, a state law requirement of citation rather than arrest does not make the resulting search violate 4th Amendment [Virginia v. Moore, 553 U.S. 164 (2008)]. Pre-Moore Georgia law has suppressed evidence for arrest unlawful under state law [*see* Torres, 290 App. 804, 660 SE2d 763 (2008) (suppressed evidence due to unlawful arrest after officer botched citation process); numerous cases imply that officer stopping or arresting outside of his jurisdictional powers requires suppression of evidence [Margerum, 260 App. 398, 579 SE2d 825 (2003); Page, 250 App. 795, 553 SE2d 176 (2001); Gehris, 242 App. 384, 528 SE2d 300 (2000); Williams, 171 App. 807, 321 SE2d 386 (1984)] unless justified by "hot pursuit" or the arrest powers of a private citizen, but these cases do not analyze whether suppression is independent of the 4th Amendment.

D. Area to be searched - non-automobiles - Area within immediate control of arrestee [Chimel v. California, 395 U.S. 752 (1969)].

E. Automobiles
   1. May search entire passenger compartment and containers therein; locked glove boxes; consoles, pick-up beds (no camper cover)***; may not*** search trunk [New York v. Belton, 453 U.S. 454 (1981); *see* Boyd, 168 App. 246, 310 SE2d 619 (1983) (overnight bag in truck bed OK)]; *but see* **3.36** when police officer has ***probable cause*** to look for contraband or evidence of crime in car.
   2. Recent occupant - No longer may search car where arrestee is recent occupant of car - such as after defendant is secured in patrol car -unless there is an independent bases for the search [Arizona v. Gant, 556 U.S. 332 (2009)]. Independent bases for a search include probable cause for evidence of a crime (mobility exception - see **3.36**), probable cause that weapon needs to be secured, inventory search (see **3.41**), or protective sweep based on individualized suspicion that person not secured (e.g., passenger) is dangerous (**3.25**).

NOTE - Inevitable discovery rule may operate to save search invalid under [Arizona v. Gant, 556 U.S. 332 (2009)] based upon likelihood that evidence would have been obtained in inventory search after arrest [Humphreys v. State, 287 Ga. 63, 694 SE2d 316 (2010)].

NOTE - standing in car searches - a non-owner, non-possessory passenger has no standing to challenge the search ***of the auto***; passenger would still have standing to challenge search or ***detention*** of self [Rakas v. Illinois, 439 U.S. 128 (1978); *accord,* Howren, 271 App. 55, 608 SE2d 653 (2004); Keishian, 202 App. 718, 415 SE2d 324 (1992); *but see* Diaz, 191 App. 830, 383 SE2d 195 (1989) (*paying* passenger has possessory standing)], including standing to challenge cause for initial ***Terry* stop** and length of stop [Brendlin v. California, 551 U.S. 249 (2007); Davis, 283 App. 200, 641 SE2d 205 (2007)]. There is no longer automatic standing from ownership of items seized where one has no expectation of privacy in the area searched [Rawlings v. Kentucky, 448 U.S. 98 (1980)]. Similarly, there is no expectation of privacy in a stolen car [Sanborn, 251 Ga. 169, 304 SE2d 377 (1983)].

F. Time - search must be contemporaneous - before removal of defendant (and car) from scene [US v. Edwards, 554 F2d 1331 (5th Cir. 1977); *compare* Thornton v. U.S., 541 U.S. 615 (2004) (may search car incident to arrest after defendant exits it)], but may precede formal arrest when officer already has cause for arrest [Rawlings v. Kentucky, 448 U.S. 98

(1980)].

3 .34 Hot Pursuit [See Warden v. Hayden, 387 U.S. 294 (1967)]:

A. Was there immediate and continuous pursuit from scene of crime?

B. Does not require uninterrupted eye contact.

C. May include entire house or building (individual apartment requires separate suspicion) [Hall, 135 App. 690, 218 SE2d 687 (1975); [Anderson, 265 App. 428, 594 SE2d 669 (2004)].

D. Seriousness of crime is factor in whether may arrest pursued person in ***house*** without warrant - will not normally be permitted on "minor" misdemeanors [Welsh v. Wisconsin, 466 U.S. 740 (1984) (DUI - but police didn't know Defendant's record to determine whether jailable or non-jailable offense for this Defendant); Hamrick, 198 App. 124, 401 SE2d 25 (1990) (no headlights, speeding, p.c. for DUI developed after entry)].

E. Headlong flight is not required; reason to believe person is aware pursuit and does not stop is enough [Anderson, 265 App. 428, 594 SE2d 669 (2004)].

3 .35 Exigent Circumstances (real emergency) [See: Brewer, 129 App. 118, 347 SE2d 607 (1973)]:

A. Was there reasonable belief of need to act in emergency to protect life and property?
- Police may enter building with an objectively reasonable basis for believing a person within is in need of immediate aid [Michigan v. Fisher, 130 S.Ct. 546, 175 L. Ed. 2d 410 (2009) (objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger); Brigham City, Utah, v. Stuart, 547 U.S. 398, 403-404 (2006); *accord*, Austin, 286 App. 149, 648 SE2d 414 (2007) (911 call)] or, at the scene of a homicide, to search the area for the presence of other victims or the killer [Mincey v. Arizona, 437 U. S. 385, 392-393 (1978); *accord*, Teal, 282 Ga. 319, 647 SE2d 15 (2007)].
- Woman yelling and sounds of struggle sufficient [Daniel v. State, 303 Ga. App. 1, 692 SE2d 682 (2010)].
- Evidence of abduction and possible presence of victim - eyewitnesses saw man forcibly drag woman from car to trailer, couldn't find him there at first, but investigation placed him at trailer later, on final approach to trailer saw power cords down to crawlspace through access door. Officers could open access door, seeing to forms under blanket,

order persons to exit crawlspace [Clark v. State, 302 Ga.App. 156, 690 SE2d 466 (2010); *compare* Watson v. State, 302 Ga. App. 619, 691 SE2d 378 (2010) (mother's suspicion that runaway juvenile "might be" with adult man did not justify entry into house where there was no sound in response to repeated knocking and no indicia of danger to someone within)].

- Open door of residence in daytime insufficient [Sims, 240 App. 391, 523 SE2d 619 (1999)], but additional factors may justify emergency [Love, 290 App. 486, 659 SE2d 835 (2008) (911 call from neighbor, cold winter night, car in driveway, no lights, no response to calls at door); Banks, 229 App. 414, 493 SE2d 923 (1997), *overruled* on other grounds at Calbreath, 235 App. 638, 510 SE2d 145 (1998) (business door open at night)].
- If protection of animal life [*see* Morgan, 285 App. 254, 258-59, 645 SE2d 745 (2007)].
- Murder/crime scene not alone exigent circumstance to dispense with warrant [Reaves, 284 Ga. 181, 664 SE2d 211 (2008)].

CAUTION - Some earlier authority would suggest that the subjective motivation of the officer to seize evidence rather than to render aid could justify suppression. Michigan v. Fisher, 130 S.Ct. 546, 175 L. Ed. 2d 410 (2009) makes clear that: "This 'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises."

B. Children's safety - 'Knowledge or the reasonable belief that minor children in a residence are without adult supervision is an exigent circumstance that authorizes police entry to help those believed to be in need of immediate aid. The temporary care of minor children left without adult supervision by police action requires police to care for the children until responsibility for their care and custody is undertaken by a responsible adult. Indeed, for law enforcement officers to leave minor children unattended after removing the person providing the children with adult supervision may violate the children's right to due process.' (Citations omitted.) [State v. Peterson, 273 Ga. 657, 659–660(2), 543 SE2d 692 (2001) (other children in home after death of child from apparent abuse); Staib v. State, 309 Ga. App. 785, 711 SE2d 362 (2011) (young children asleep without other adult when father arrested)].

- Witnesses adamant that they heard child being beaten sufficient to justify full search despite contrary indications that no children were present [Richards, 286 App. 580, 649 SE2d 747 (2007)].
- Alcohol consumption by ***minors*** [Burk, 284 App. 843, 644 SE2d 914 (2007) (both protection of minor's health and preservation of evidence

where drove to party), *but see* Ealum, 283 App. 799, 643 SE2d 262 (2007) (suspects apparently under 21 but not apparently under 18 - no exigency)].

C. Exigency can be to ***preserve*** status quo and ***prevent destruction of evidence*** while warrant is obtained [United States v. Young, 909 F.2d 442, 446 (11th Cir., 1990); Land, 265 App. 859, 861(1), 595 SE2d 540 (2004) (suspected drug dealer's refusal to open door principle reason justifying entry to preserve evidence); *compare* Alvarado, 271 App. 724, 610 SE2d 675 (2005) *with* Curry, 271 App. 672, 610 SE2d 635 (2005) (cell phone calls as possible tip-offs with different outcomes); *compare* Venzen, 286 App. 597, 649 SE2d 85 (2007) (police executing arrest warrant saw different party with marijuana cigarette who answered door - exigent circumstances to prevent destruction of evidence) *and* David, 269 Ga. 533, 536(2), 501 SE2d 494 (1998) (act of concealment showed suspect knew that police saw contraband) *with* Pando, 284 App. 70, 643 SE2d 342 (2007) (smell of unburned marijuana - no exigent circumstances), Carranza, 266 Ga. 263, 266-268 (1) (n.2), 467 SE2d 315 (1996) (no indication that suspects knew they were observed - no exigent circumstances), *and* Schwartz, 261 Ga. App. 742, 746 (2), 583 SE2d 573 (2003) (same)].Was there probable cause to associate searched area with that emergency? ***and***

D. No opportunity to get search warrant.
   - May not enter curtilage of residence if no emergency even if criminal conduct is in plain view [Morgan, 285 App. 254, 645 SE2d 745 (2007)); *accord*, Pando, 284 App. 70, 643 SE2d 342 (2007) (smell of unburned marijuana)].
   - Reaching from outside through doorway to grab defendant for warrantless arrest exposed officer to civil liability where no exigent circumstances [McLish v. Nugent, 483 F.3d 1231 (11th Cir., 2007)].

E. Additional officers - Once one officer enters residence from exigency, others may join even after exigency over [State v. Peterson, 273 Ga. 657, 659, 543 SE2d 692 (2001)], but re-entry after leaving not OK [State v, Driggers, 306 Ga. App. 849, 702 SE2d 925 (2010). .

F. Police creation of exigency -"Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment [e.g., threatening entry without warrant], warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." [Kentucky v. King, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (knocking on door right after controlled drug buy); *but see* State v. Peterson, 273 Ga. 657, 659, 543 SE2d 692 (2001) ("This court would be remiss in its duty if it permitted artificially created exigent circumstances."]

3 .36 Mobility exception to search warrant requirement - if a police officer has ***probable cause*** to look for contraband or evidence of crime in car or other mobile vehicle, then may search entire car, ***including trunk***, packages and containers, and even take things apart without search warrant [U.S. v. Ross, 456 U.S. 798 (1982); Pennsylvania v. LaBron, 518 U.S. 938 (1996); *see* Carroll v. U.S., 267 U.S. 132 (1925); Autry, 277 App. 305, 626 SE2d 528 (2006); U.S. v. Olson, 670 F2d 185 (11th Cir. 1982)].

- Exigent circumstances may permit seizing and holding car legally parked while seeking search warrant [Warner, 285 Ga. 308, 676 SE2d 181 (2009)].

B. ***Requirements*:**

1. Is there probable cause to believe contains contraband or evidence of crime (totality of circumstances) [Cook, 136 App. 908, 222 SE2d 656 (1975)]?
2. Is vehicle in mobile condition?
3. Is it not practical to wait to get search warrant? ***or***
   Is vehicle in public place [Florida v. White, 526 U.S. 559 (1999)(parked); Maryland v. Dyson, 527 U.S. 465 (1999)(driving); *accord*, Lejune, 276 Ga. 179, 576 SE2d 888 (2003) (apartment parking lot not public place), *but see* Massa, 273 App. 596, 615 SE2d 652 (2005) (questionable extension of Lejune to car parked on dirt drive off road in rural area while defendant was fishing)]?

C. Includes motor home [California v. Carney, 471 U.S. 386 (1985)].

D. Probable cause for presence of contraband in vehicle allows search of all containers, including passenger's, but does not allow search of passenger's person without probable cause particular to passenger [Wyoming v. Houghton, 526 U. S. 295, 302 (II) (1999)].

E. Search may be delayed until vehicle moved to another location [Chambers v. Maroney, 399 U.S. 42 (1970)].

NOTE - "Automobile exception" is exception to need for warrant, not exception to need for probable cause. Exception does not apply to vehicle legally parked at residence [Lejune, 276 Ga. 179, 576 SE2d 888 (2003)]. For many traffic offenses, it is not probable that there would be evidence of that crime in the car - therefore the cause for search would need to be probable cause developed during the *Terry* stop of an independent crime for which there is likely to be evidence present.

3 .4 SEIZURES NOT REQUIRING PROBABLE CAUSE

3 .41 Inventory search - not based upon probable cause, instead based upon [Colorado v. Bertine, 479 U.S. 367 (1987)]:

A. Lawful custody - Was it lawful to impound vehicle or other property? If not, no search [Dunkum, 138 App. 321, 226 SE2d 133 (1976)];
- Police may impound vehicle without arresting person [Colzie, 257 App. 691, 572 SE2d 43 (2002) (car on interstate on-ramp and driver without insurance card but only given citation); *accord*, Stringer, 285 App. 599, 647 SE2d 310 (2007) (impoundment of vehicle for lack of insurance justified immediate steps at scene to unload weapons, secure valuable property and contents of car)];
- includes standard search of arrestee's person and property at jail book-in [Morrison, 272 App. 34, 611 SE2d 720 (2005)] (see **2.15**F).

B. Standardized policy

C. Prompt inventory search
- May include closed luggage without probable cause showing [Colorado v. Bertine, 479 U.S. 367 (1987)]

D. Georgia, like most States, ***requires additionally*** (for car searches):
- No reasonable alternate arrangements made by driver, such as available passenger to drive away:
  "When the driver of a motor vehicle is arrested and a reliable friend is present, authorized and capable to remove an owner's vehicle which is capable of being safely removed; or where the arrestee expresses a preference as to towing service and designates an appropriate carrier and destination for the vehicle, it is unnecessary for the police to impound it. In either of these instances, the rationale for an inventory search does not exist" [Fortson, 262 Ga. 3, 412 SE2d 833 (1992) quoting Ludvicek, 147 App. 784, 250 SE2d 503 (1978) (non-owner driver wished to entrust to roomate); *but see* Mooney, 243 Ga. 373; 254 SE2d 337 (1979) (person left with must be willing); Carlisle, 278 App. 528, 629 SE2d 512 (2006) (police authorized to impound vehicle in commercial parking lot over objection where potential driver over 20 minutes away)];
- Was vehicle parked on private property with permission or without objection? If yes, no search [Creel, 142 App. 158, 235 SE2d 628 (1977)].

NOTE - Neither an inventory search nor a search incident to an arrest would normally be available when the defendant is issued a citation and not yet arrested - therefore any search of the automobile would require independent probable cause [Knowles v. Iowa, 525 U.S. 113 (1999); *but see* Colzie, 257 App. 691, 572 SE2d 43 (2002) (car on interstate on-ramp and driver without insurance card but only given citation)]

3 .42 Boats - Probable cause not needed for authorized enforcement officers [See OCGA 52-7-25; Jackson, 214 App. 726, 448 SE2d 761 (1994)].

3 .43 Roadblocks

A. Permissible purposes for roadblocks are:

1. To check licenses, insurance and registration [Delaware v. Prouse, 440 U.S. 648, 658 (1979); LaFontaine, 269 Ga. 251, 497 SE2d 367 (1998)].
2. Check for sobriety [Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990); LaFontaine, 269 Ga. 251, 497 SE2d 367 (1998)].
3. Information inquiry about specific recent crime in vicinity [Illinois v. Lidster, 540 U.S. 419 (2004) (a hit-and-run, police had flyer they were handing out - where all cars are stopped is OK); *followed but criticized* in Strickland, 270 App. 187, 605 SE2d 890 (2004)]. Court indicated important primary purpose was not to seek to find crimes committed by car occupants but to develop public knowledge about crime presumably committed by others.
4. State-wide enforcement campaign legitimate primary purpose [Bennett, 283 App. 581, 642 SE2d 212 (2007)].

B. Not permissible for purposes of "general crime control" such as checking for drugs. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)*; but see* McCray, 268 App. 84, 601 SE2d 452 (2004) (police may have drug dogs present to check cars of those validly detained for further investigation at checkpoint for license/registration/insurance/seatbelt/impaired driver checkpoint - parts of license were missing and illegible)].

C. Criteria in Execution of Roadblocks - Roadblocks are "satisfactory" where [LaFontaine, 269 Ga. 251, 497 SE2d 367 (1998) (3 judges dissented urging ***stricter*** guidelines)]:

1. Decision to implement the roadblock was made by supervisory personnel rather than the officers in the field:

- "The state has the burden of presenting some admissible evidence, testimonial or written, that supervisory officers decided to implement the roadblock, decided when and where to implement it, and had a legitimate primary purpose for it" [Blackburn, 256 App. 800, 570 SE2d 36 (2002)]. This usually requires testimony of the supervising officer that made the decision - hearsay is insufficient even if unobjected to. Primary purpose described by supervisor not contravened by screening officer's recognition of general responsibility to enforce laws [Britt, 294 App. 142, 668 SE2d 461 (2008)].
- Perdue, 256 App. 765, 578 SE2d 456 (2002) stretches what a supervisor is. A sergeant was found to be both a supervisor and a field officer. Opinion discusses that Georgia authority *may* be at odds with U.S. Supreme Court analysis [*compare* Thomas, 277 App. 88, 625 SE2d 455 (2005) (corporal making decision in field was field officer even though also shift supervisor)].
- "It is not necessary ... that supervisory personnel determine the precise location for a roadblock, so long as the decision to implement the roadblock was made by supervisory personnel rather than officers in the field" [Hardin, 277 Ga. 242, 587 SE2d 634 (2003)].

2. All vehicles are stopped as opposed to random vehicle stops;
   - Georgia follows the majority of states in allowing temporary suspension of roadblock to relieve traffic "'common sense recognizes the reasonableness of some type of procedure to suspend or halt a roadblock where the flow of traffic overwhelms the resources dedicated to that roadblock and poses a threat to public safety'" [Ross, 257 App. 541, 573 SE2d 402 (2002). Sitz and Lidster, however, speak of approving roadblocks that stop all traffic].
3. Delay to motorists is minimal;
   - No additional seizure occurs when a car is diverted from the road to another nearby location such as a parking lot [Simmons, 255 App. 336, 565 SE2d 549 (2002)].
   - Simmons also appears to endorse asking a driver to step out of the car without a need for additional cause but the case is not altogether clear on that point (speaks about the officer having "reasonable grounds" if not "articulable suspicion.) It seems clear from Simmons that some additional reasonable cause is required to request field sobriety exercises but it is not clear that it arises to articulable suspicion.
4. Roadblock operation is well identified as a police checkpoint;
   - daytime roadblocks are adequately identified by uniformed police and marked police vehicles [Overton, 270 App. 285, 606 SE2d 306

(2004)];
- nighttime roadblock adequately marked by cars with blue lights, officers with reflective vests, and orange cones [Brent, 270 Ga. 160, 162(2), 510 SE2d 14 (1998)].

5. "Screening" officer's training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.

NOTE - Powers, 261 App. 296, 582 SE2d 237 (2003) states that the LaFontaine criteria are not absolute, rather the court looks to the totality of the circumstances. This case should probably be used cautiously in view of the close division in LaFontaine and the fact that most of the other cases appear to discuss the factors as if they are all required.

D. Evading roadblock

1. Abnormal or unusual actions taken to avoid a roadblock may give an officer a reasonable suspicion of criminal activity even when the evasive action is not illegal [Taylor, 249 App. 733, 549 SE2d 536 (2001) (sudden turn into side street followed by bouncing over curb into parking lot); Richards, 257 App. 358, 549 SE2d 536 (2002) (abrupt stop, backed 50 feet, turned into side street); Webb, 193 App. 2, 386 SE2d 891 (1989) (u-turn in front of roadblock); *see generally* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (referring to lower court discussion of making U-turns or turnoffs to avoid the checkpoints). Courts are divided as to whether Sitz's language suggests that "normal evasion" does not provide cause for stop].
2. By contrast, "completely normal driving," even if it incidentally evades the roadblock, does not justify a Terry-type "Tier-2" stop [Jorgensen, 207 App. 545, 428 SE2d 440 (1993) (normal turn into apartment parking lot in front of roadblock)].
   - a U-turn on flat terrain without traffic viewed as legal normal driving [Hester, 268 App. 501, 602 SE2d 271 (2004); *but see* Webb, 193 App. 2, 386 SE2d 891 (1989) ("possibly illegal" U-turn); Terry, 283 App. 158, 640 SE2d 724 (2007) (pull into closed business, backed into street - 'honest belief' maneuver illegal)].
3. Where the abnormal behavior gives articulable suspicion for a *Terry* stop, the driver cannot challenge the propriety of the roadblock [Richards, 257 App. 358, 549 SE2d 536 (2002)].
4. If driver stops car, officer may approach and conduct "Tier-1" encounter [Vaughn, 243 App. 816, 534 SE2d 513 (2000)].

3 .5 **RETURN** - List of items seized by virtue of a warrantless search must be given to person arrested and copy to the judicial officer before whom said arrested person is taken for appearance. Failure to do so, however, does not invalidate search [See OCGA 17-5-2; Carson, 241 Ga. 622, 247 SE2d 68 (1978)].

3.6 **PROBATION REVOCATION HEARINGS - EXCLUSIONARY RULE NOT APPLICABLE** [State v. Thackston, 289 Ga. 412 (2011)].