Criminal Case Law Update
2008 Fall District Court Judges Conference

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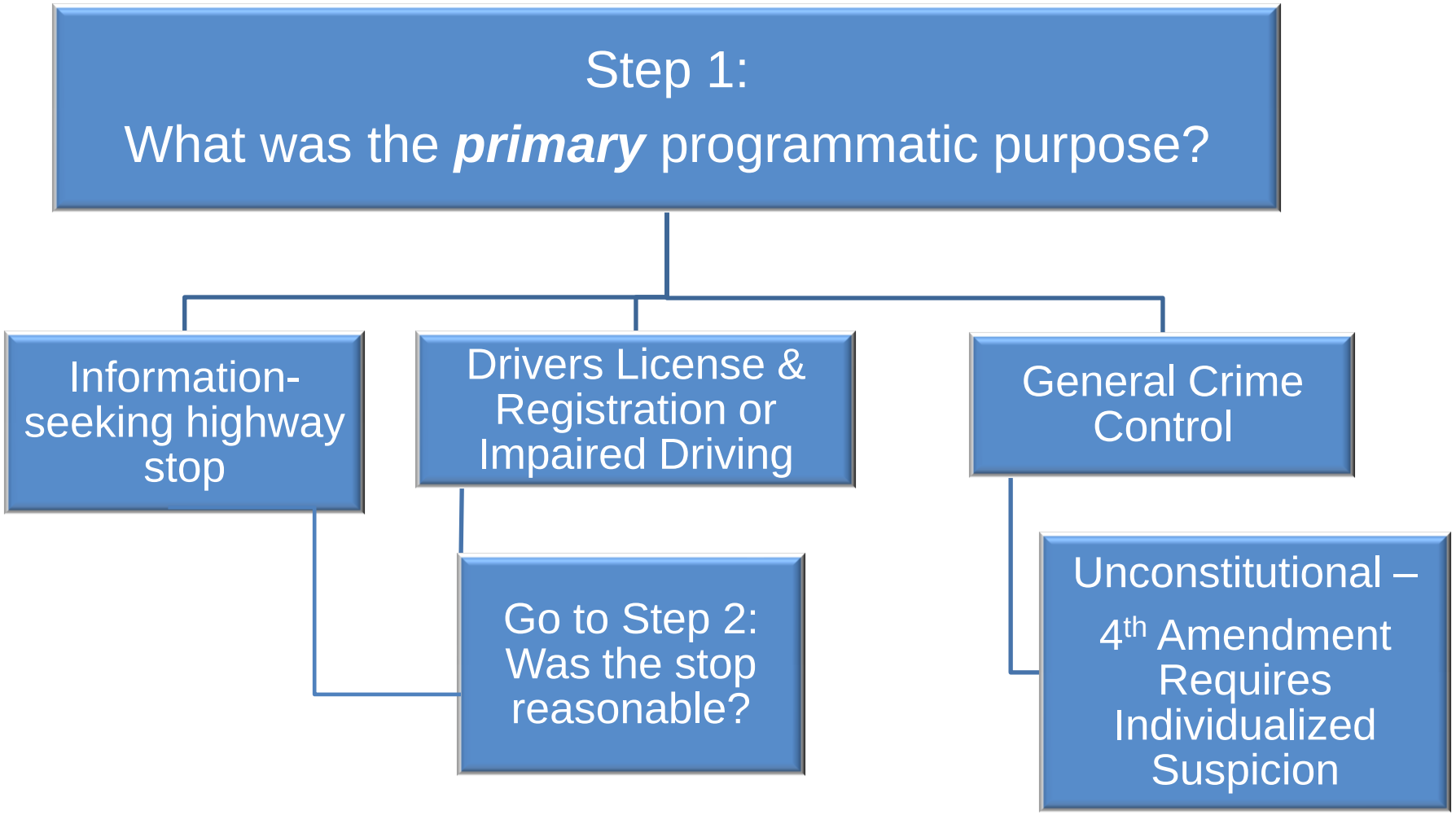
Fourth Amendment Seizures

- *State v. Styles*, ___ N.C. ___, 665 S.E.2d 438 (27 August 2008)
  - Reasonable suspicion is the standard for traffic stops
  - Wasn't this established in 1968? Terry v. Ohio, 392 U.S. 1 (1968)
    - *Whren v. United States*, 517 U.S. 806 (1996)
    - *State v. Ivey*, 360 N.C. 562 (2006)
    - Distinction developed requiring *probable cause* for traffic stops made on the basis of a readily observed traffic violation, but reasonable suspicion for investigatory stops
  - Why this case?
    - Judge Stephens' dissent in Court of Appeals found evidence "patently insufficient to permit even an inference" that GS 20-154 was violated
    - AG: "I am at war with those who say that probable cause is the standard rather than reasonable suspicion!"

Fourth Amendment Seizures

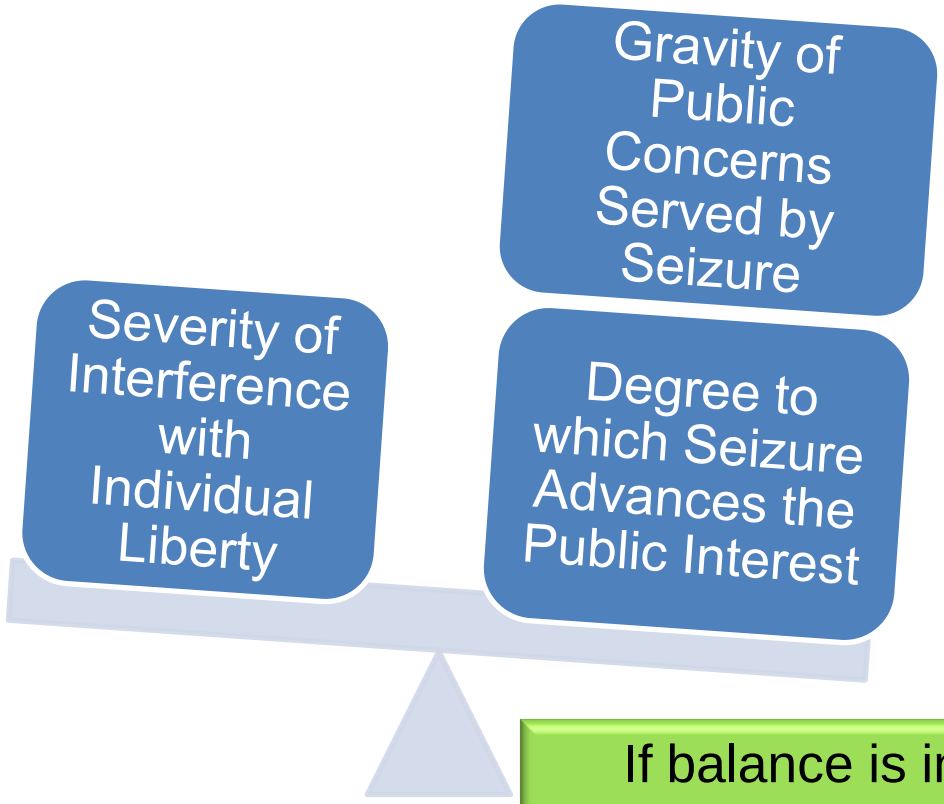
- *State v. Myles*, 362 N.C. 344, 661 S.E.2d 732 (12 June 2008) (per curiam):
  - Vehicle pulled over on I-40; weaving in lane, running off right-hand side of road
  - Officer asked driver to come with him to car so he could issue warning ticket; frisked defendant and noticed fast beating heart
  - Left driver in car and went to talk to passenger, whose heart he could see beating through his shirt
  - Called Highway Patrol Officer for assistance
  - Reasonable suspicion did not support continued detention of driver and passenger
  - Scope of detention must be tailored to underlying justification
    - No evidence of impairment
    - Driver had valid license
    - No weapons or contraband on driver
- *State v. Murray*, ___ N.C. App. ___, ___ S.E.2d ___ (16 September 2008):
  - No reasonable suspicion for stop where officer is performing property check in industrial park and stops car because it is in the area

Was the Checkpoint Constitutional?



Was the Checkpoint Constitutional?

Step 2: Balancing Test



If balance is in favor of public interest, checkpoint is constitutional

Step 1: Determining primary programmatic purpose

- Trial court may rely on purpose testified to by police officer if there is no contradictory evidence
  - *State v. Burroughs*, 185 N.C. App. 496 (2007)
- But if there is evidence that could support a finding of an unlawful purpose, trial court must closely review scheme at issue
  - *State v. Veazey*, ___ N.C. App. ___, 662 S.E.2d 683 (2008).
  - Officer testified that purpose was "[t]o enforce any kinds of motor vehicle violations" and that he was "looking for all violations"
  - Also testified that primary purpose was to check for driver's license, registration and insurance violations
  - *State v. Gabriel*, ___ N.C. App. ___, ____ S.E.2d ___ (2008).

Step 2: Evaluating Reasonableness of Checkpoint

Three-prong inquiry [Brown v. Texas, 443 U.S. 47 (1979)]

1. Gravity of Public Concerns
   - License and registration checkpoints advance an important purpose
   - States have vital interest in ensuring compliance with motor vehicle laws that promote public safety on roads
2. Degree to which Seizure Advances Interest
   - Did the police tailor checkpoint to serve primary purpose?
   - Did police spontaneously decide to set up checkpoint?
   - Did police offer a reason why a particular road was chosen?
   - Did checkpoint have a set starting or ending time?
   - Did police offer a reason why the time span was selected?

Step 2: Evaluating Reasonableness of Checkpoint

1. Gravity of Public Concerns
2. Degree to which Seizure Advances Interest
3. Severity of Interference with Individual Liberty

- What was the checkpoint's potential interference with legitimate traffic?
- Did police put drivers on notice of an approaching checkpoint?
- Was the location selected by a supervising official rather than by field officers?
- Did the police stop every vehicle or stop vehicles pursuant to a pattern?
- Could drivers see visible signs of officer's authority?
- Did police operate the checkpoint pursuant to oral or written guidelines?
- Were the officers supervised?
- Did a supervising officer authorize the checkpoint?

Step 3: Were Requirements of G.S. 20-16.3A met?

If law enforcement agency conducts checking stations to determine compliance with Chapter 20, it must:

1. Designate in advance pattern for stopping vehicles and for requesting drivers that are stopped to produce drivers license, registration, or insurance information
2. Operate under a written policy that provides guidelines for the pattern, which need not be in writing
   - May operate under another agency's policy, but that must be stated in writing
3. Mark checkpoint with at least one law enforcement vehicle with its blue light in operation

Searches & the Fourth Amendment

- State v. McBennett, ___ N.C. App. ___, 644 S.E.2d 51 (5 August 2008):
  - Hotel personnel can come in; but it is a Fourth Amendment search if they bring the police with them

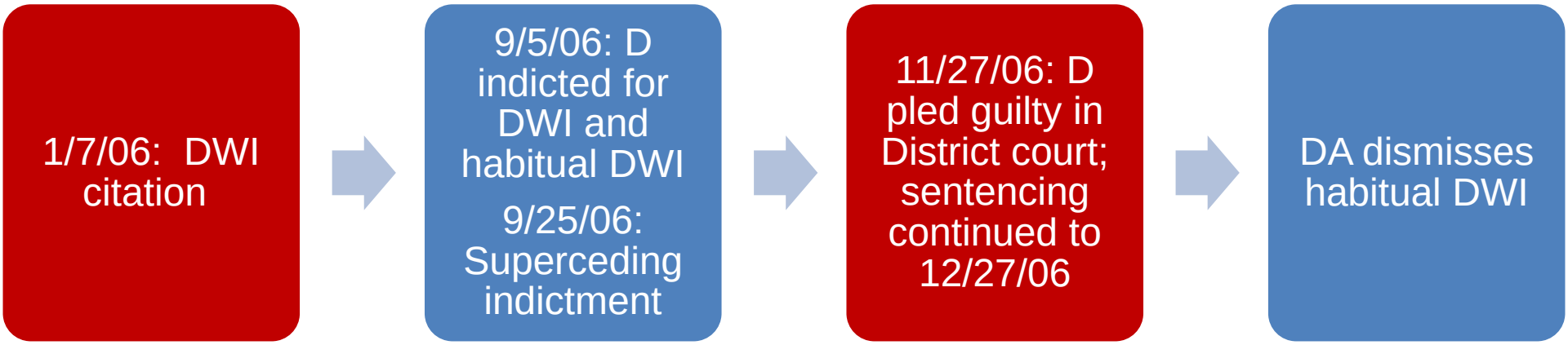
- State v. Carter, ___ N.C. App. ___, 661 S.E.2d 895 (17 June 2008):
  - Officer may search entire interior of vehicle including containers incident to arrest
  - Search is not confined to property connected to crime with which defendant is charged
  - Illegal nature of evidence does not have to be readily apparent

Fifth Amendment – Double Jeopardy

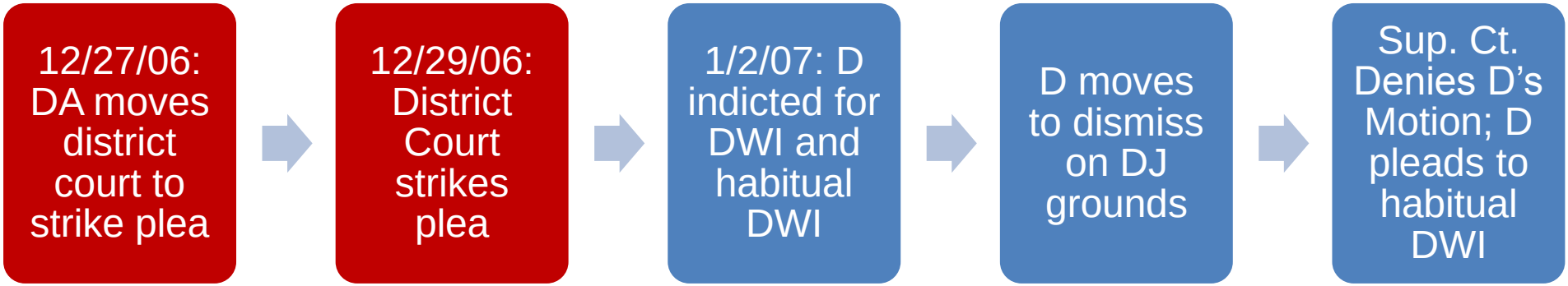
- State v. Hinchman, __ N.C. App. __, ___ S.E.2d ___ (16 September 2008):
  - Civil revocation of defendant's license 140 days after offense was not punishment barring further prosecution of defendant for DWI
  - Criminal or civil nature of a sanction is determined on the face of the statute rather than on an individual basis

- State v. Corbett, ___ N.C. App. ___, 661 S.E.2d 759 (17 June 2008):
  - DJ clause does not bar prosecution in Superior Court for DWI to which Defendant pled guilty in District court where defendant was indicted for misdemeanor DWI and Felony Habitual DWI in superior court before defendant pled guilty to misdemeanor DWI for same offense conduct in district court
  - Please, allow me to explain . . . .

State v. Corbett, N.C. App. (17 June 2008)



State v. Corbett, N.C. App. (17 June 2008)



State v. Corbett, N.C. App. (17 June 2008)

- Court of Appeals determined Corbett waived right to appeal by pleading guilty, based on *State v. Hopkins*, 279 N.C. 473 (1971)
- But see *Menna v. New York*, 423 U.S. 61 (1975), says dissent
  - Menna indicted in state court for refusing to testify before grand jury
  - Had previously been adjudicated in criminal contempt for same conduct
  - Moved to dismiss on DJ grounds; trial court denied; Menna pled
  - U.S. Supreme Court:
    - Conviction must be set aside if constitution prevents state from "hauling a defendant into court on a charge" – even if conviction entered pursuant to counseled guilty plea

Sixth Amendment Right to Counsel

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

- This right to counsel attaches upon the initiation of *adversary judicial criminal proceedings*. This is the point at which:
  - the government has committed itself to prosecute
  - the adverse positions of the government and the defendant have solidified, and
  - the accused is faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive & procedural criminal law
- Do adversary judicial criminal proceedings begin at the initial appearance before a magistrate?
  - Yes
  - *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (23 June 2008)

Rothgery v. Gillespie County, 128 S. Ct. 2578 (23 June 2008)

- Rothgery arrested on July 15, 2002, for being a felon in possession of a firearm (even though he was not a felon).
- Rothgery appeared before a magistrate, who found probable cause for the arrest, informed Rothgery of the charges against him, and set bail.
- Rothgery was released after posting a surety bond..
- Rothgery made several requests for appointed counsel, which were ignored.
- In January 2003, Rothgery was indicted for being a felon in possession. He was arrested, and his bail was increased to $15,000. He could not post bail, so he sat in jail for three weeks.
- Rothgery was appointed counsel on January 23, 2003, who obtained a bail reduction and demonstrated to the DA that Rothgery was not a felon.
- The DA filed a motion to dismiss the indictment, which was granted.

Rothgery v. Gillespie County, 128 S. Ct. 2578 (23 June 2008)

- Rothgery sued the county pursuant to 42 U.S.C. 1983.
  - If an attorney had been appointed, I would not have been indicted, rearrested, or jailed for three weeks.
  - Pointed to county's unwritten policy of denying appointed counsel to indigent defendants out on bond until the entry of an information or indictment
- Fifth Circuit affirmed summary judgment for county, holding:
  - Sixth Amendment right to counsel did not attach at initial appearance because the prosecutor did not know of Rothgery's arrest or appearance.
  - Arresting officer could not "commit the state to prosecute without the knowledge or involvement of prosecutor"

Rothgery v. Gillespie County, 128 S. Ct. 2578 (23 June 2008)

- Supreme Court held:
  - Brewer v. Williams, 430 U.S. 387 (1977) and Michigan v. Jackson, 475 U.S. 625 (1986), control
  - Those cases held that 6th Amendment right to counsel applies at the first appearance before a judicial officer at which a defendant is told of the formal accusations and restrictions are imposed on his liberty
  - An accusation filed with a judicial officer is sufficiently formal and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty
  - From that point on, defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"
  - In essence, state has committed to prosecute every suspect arrested by the police, subject to the option to change its official mind later

Rothgery v. Gillespie County, 128 S. Ct. 2578 (23 June 2008)

- Supreme Court noted:
  - 6th Amendment attachment question differs from critical stage question
  - Once attachment occurs, defendant is entitled to the presence of appointed counsel during any *critical stage* of the postattachment proceedings
    - Thus, counsel must be appointed *within a reasonable time after attachment* to allow for adequate representation at any critical stage before trial
    - Critical stages are "trial-like confrontations" in court and out at which counsel would help the defendant "in coping with legal problems or . . . meeting his adversary"
      - Probable cause hearing, Pretrial lineup, Pretrial interrogation

How does *Rothgery* affect criminal procedure in North Carolina?

- First, a few words about the Sixth Amendment right to counsel:
  - Sixth Amendment right to counsel applies regardless of whether defendant is in custody
    - Differs from 5th Amendment right that applies to "custodial interrogations
    - If defendant requests counsel, state cannot initiate questioning of defendant
  - Sixth Amendment right is offense-specific and does not extend to crimes factually related to those charged

How does *Rothgery* affect criminal procedure in North Carolina?

- Some unanswered questions:
  - Must magistrates advise defendants of their right to counsel?
  - What if a defendant requests that counsel be appointed?
  - What if a defendant does not have a first appearance (misdemeanor charge) or does not have a first appearance in 96 hours (felony defendant released on bond)?

Crawford v. Washington, continued . . .

- *Giles v. California*, 128 S. Ct. 2678 (25 June 2008)
  - Doctrine of forfeiture by wrongdoing requires evidence that the defendant engaged in wrongdoing intended to prevent the witness from testifying
  - Merely causing the witness to be unavailable to testify is insufficient
    - Where an abusive relationship ends in murder, the evidence may support a finding that the crime was committed to isolate the victim and to stop her from reporting abuse
    - This would satisfy forfeiture by wrongdoing doctrine
    - Earlier abuse intended to dissuade the victim from seeking help would be relevant as would evidence of ongoing criminal proceedings at which the victim would be expected to testify