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SEARCHES WHILE IN CUSTODY

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Until recent years it was generally assumed that there was no "law" on searching prisoners, that prison and jail officials could pretty much do as they wished. That assumption is no longer correct, although the restrictions on custodial officials are still minimal. The purpose of this memorandum is to review the current law on searches of people who are in custody, emphasizing the kinds of facts that have prompted courts to limit the authority of officers and noting the areas in which some future limitations might be expected. There is little North Carolina law on most of these issues and sometimes the decisions in other jurisdictions are in conflict. An attempt has been made to state what appear to be majority views and what appear to be trends.

The memorandum goes somewhat beyond searches of prisoners and their cells. There is also discussion of searches incident to the initial taking into custody, searches of visitors and guards, and related matters such as eavesdropping on conversations of prisoners and taking their confessions. What all these subjects share in common is that they concern a person in custody. He may be in custody because he has been convicted of a crime or only because he has been arrested and is awaiting trial. For most issues discussed here it does not seem to matter to the courts which status the prisoner holds; the discussion notes the distinction when it is important.

Throughout this memorandum will be found short statements of the law printed in italics. Those summaries are intended to make it easier to come back to the memorandum later and locate particular points of law. A discussion of the case law supporting the italicized summary is found immediately after the summary.

One final point should be made. This memorandum generally states the maximum interference with prisoners that the courts will allow. Custodial officials will not always want to go to the limit. Sometimes the better policy will be to give more protection to the inmate than the court requires. For example, though the courts allow routine reading of all prisoners' mail, except to and from attorneys, most jail officials in North Carolina would consider reading mail unnecessary and burdensome to their officers and would be more likely to do nothing more than open envelopes to look for contraband. After reading this memorandum it should be clear that the courts allow custodial officials considerable discretion in matters of searches; each institution will need to set its own policies to use that discretion most wisely.

A. Searches of the prisoner and his possessions

When first taken into custody. *Each person arrested (taken into custody) may be searched thoroughly, no matter what he was arrested for, and any evidence found on him is admissible in court.* The courts have long recognized the need for an officer taking a person into custody to search to determine whether the person has a weapon or any evidence he might destroy. Such a search need not be limited to evidence of the crime for which the person was arrested. In two 1973 U.S. Supreme Court cases, United States v. Robinson, 414 U.S. 218, and Gustafson v. Florida, 414 U.S. 260, defendants were thoroughly searched after being arrested for driving without valid licenses. In each case, the search included looking inside a cigarette package. Heroin was found on Robinson; Gustafson had marijuana. The searches were held lawful as incident to the arrest even though the offense for which the defendant was

arrested involved no evidence that might have been found inside the cigarette package. A slightly older North Carolina statute holds even more explicitly that the search need not be limited to evidence of the crime for which the arrest was made. In State v. Jones, 9 N.C. App. 661 (1970), the defendant was arrested after a prison escape. He was frisked at the time of arrest and then taken to jail where he was interrogated and searched more thoroughly. That search included his wallet where a draft card and check were found linking Jones to a forgery. The Court of Appeals found the evidence admissible despite the officers' testimony they had been looking for evidence of any crime, not just what Jones had been arrested for. They also stated that this was routine for their department. The Court held that the search incident to arrest could be thorough and need not be limited to evidence of the crime for which the person was arrested.

A thorough search may be conducted at the jail whether or not the defendant was searched at the time of arrest. Sometimes the circumstances of the arrest may prevent as thorough a search as desired. For example, in State v. Parker, 11 N.C. App. 648 (1971), a strip search, which would not have been appropriate on Franklin Street in Chapel Hill where the arrest was made, was conducted after the defendant was taken to the police station. LSD tablets were found. In State v. Jackson, 280 N.C. 122 (1971), although police had information that drugs were hidden on the defendant they chose to wait until 30 to 45 minutes after she was taken to the county jail so that a matron could conduct the search (see below on searches of females). The wait was worthwhile as 13 bindles of heroin were found in the defendant's brassiere.

The authority to make a search of the prisoner at the jail is not affected by a long delay. The delay might be for one of the reasons just given or it might be because the need for the search does not become apparent until some time later. The defendant in United States v. Edwards, 415 U.S. 800 (1974), was arrested at night for breaking in a house. Later, police discovered that the break-in had been accomplished by prying open a wooden window. Ten hours after he had been put in jail, Edwards was given new clothes and his old clothes were taken and examined. Paint chips matching those of the window were found and used as evidence against him. A divided Supreme Court held the evidence admissible, the five-man majority determining that a search incident to arrest could extend to a later custodial setting and finding that the defendant's clothes had always been in custody. In any event, the police did not have much choice since a change of clothes was not available for Edwards at the time of arrest. One of the lower court decisions cited favorably by the Edwards majority was United States v. Caruso, 358 F.2d 184 (2nd Cir. 1966), where clothes were not taken from a defendant arrested for bank robbery until six hours after the arrest. The court in that case also noted that the clothes on the defendant had been in custody the whole time and that it would not be practical to require officers to either strip a defendant to the buff on the highway just after the arrest or risk forfeiting the opportunity for a thorough search of clothing. One court has held that a delay as long as six weeks is permissible in taking the shoes from a defendant being held in jail on an armed robbery charge. The case is United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978).

A North Carolina case with facts similar to Edwards and Caruso is State v. Tippett, 270 N.C. 588 (1967). In State v. Hopkins, 296 N.C. 673 (1979), a search of a female defendant six or seven hours after the arrest was still

considered incident to the arrest. A different situation occurs in State v. Ross, 269 N.C. 739 (1967), where the pants taken from the defendant were not worn at the time of arrest--he was undressed at the time--but were chosen by him to wear when taken to jail. The blood stain found in a pocket was useful evidence in connecting him with a burglary and assault with a knife. The court did not consider it important that the clothes taken from the defendant were not known at the time of the arrest to have any connection with the crime.

Inventory of personal belongings and automobiles. *When a person is committed to a custodial facility, his personal belongings may be taken from him and held in safekeeping until he is released. A routine inventory may include looking through clothes, handbags, wallets and similar belongings, and any evidence found during such an inventory may be used in court.* No legal questions seem to arise when the property is taken from the person himself or from his close personal possessions. An example where incriminating evidence was found in a wallet is State v. Jones, discussed on page 3, above. Another wallet case is United States v. Sheehan, 583 F.2d 30 (1st Cir. 1978). In that case lists of names found in the wallet of the defendant traffic offender were used to link him with other participants in a robbery. In State v. Francum, 39 N.C. App. 429 (1979), the North Carolina Court of Appeals upheld the inventory of a paper bag found inside a car that had overturned in an accident. The injured driver had been taken to the hospital before the Highway Patrol trooper came to investigate. The trooper opened the paper bag to see if it contained anything of value. He found various drugs which were used as evidence in a controlled substances prosecution.

An automobile taken into custody for forfeiture may be searched thoroughly and any evidence found in it may be used in court. Automobiles are subject to forfeiture only for certain offenses such as liquor and drug offenses, unlawful racing, and certain game law violations. Once a vehicle has been seized for forfeiture, it is no greater an invasion of the owner's privacy to search it. *An automobile taken into custody only for safekeeping may be subjected to a routine inventory; evidence discovered inadvertently may be used in court.* Sometimes officers may take custody of a vehicle because its owner has been arrested or is incapacitated. The vehicle is not evidence of an offense or subject to forfeiture, but is simply being held for safekeeping. Because of their responsibility for the vehicle, officers who have custody of an automobile in such a situation may look through it for valuables and remove them. If evidence of a crime is found inadvertently, it may be seized and used. For example, in the U.S. Supreme Court case approving such inventories, South Dakota v. Opperman, 428 U.S. 364 (1976), officers found marijuana in the unlocked glove compartment when they inventoried the car after towing it for a parking violation. The court stressed the routine nature of the inventory, making it clear that such a discovery would be unlawful if the officers had singled out a vehicle for an inventory that was not part of their routine. The North Carolina Court of Appeals recently approved an inventory that extended to the locked glove compartment. The defendant in State v. Phifer, 39 N.C. App. 278 (1979), had been stopped for a traffic violation then arrested for another outstanding traffic offense. As part of a routine inventory required by departmental policy, Charlotte officers began looking through the inside of the car. Cocaine was found inside the glove compartment, which was opened with a key the defendant had tried to throw away. The court decided that the inventory was not a subterfuge for a search of the car, and that it was limited to actions necessary to protect

the owner from loss and to avoid liability of the officers. The officer's good faith was further established by the fact that once cocaine was found he applied for a search warrant for the remainder of the car.

The most difficult question is whether an inventory of an automobile may include looking through a briefcase or suitcase or other closed container found in the vehicle. *As part of a routine inventory, briefcases, suitcases and similar containers should be removed from the vehicle and sealed but should not be opened unless there is some reason to believe a dangerous or perishable substance is inside.* Removing the suitcase and sealing it is all the officers need to do to protect themselves from liability. In a recent case involving a search incident to arrest, United States v. Chadwick, 433 U.S. 1 (1977), the United States Supreme Court established that it does not accept that seizure of a piece of luggage automatically gives authority to open it. Some courts in other states have held since Opperman and Chadwick that a routine safekeeping inventory may not include a briefcase or suitcase--examples are People v. Hamilton, 386 N.E. 2d 53 (Ill. 1979) and State v. Daniel, 589 P.2d 408 (Alaska 1979)--and others have said that no inventory is permissible unless the driver who has been arrested is first given a reasonable opportunity to make some disposition of the car other than having officers take custody. Examples of the latter rule may be found in State v. Slockbower, 397 A.2d 1050 (N.J. 1979); State v. Goodrich, 256 N.W.2d 506 (Minn. 1977); and Altman v. State, 335 So.2d 626 (Fla. Ct. App. 1976). As mentioned above, the North Carolina Court of Appeals held in State v. Francum that an inventory following a traffic accident could include looking in a paper bag found in the car. In Cady v. Dombrowski, 413 U.S. 433 (1973), officers who otherwise would not have made any inventory were allowed to open a locked car trunk when given information that it contained a gun. The officers were worried about someone else stealing or being injured by the gun, but it turned out that the weapon was important in a murder prosecution.

Searches after the defendant has been in custody some time. *A prisoner and his cell may be searched thoroughly and regularly, so long as the search is not for harassment.* It is only infrequently that a court places any limitation on searching a prisoner or his cell. The usual view is that a person held in jail or prison has no reasonable expectation of privacy or that any interest in privacy that he might have is more than outweighed by the security needs of the institution holding him. A fairly typical statement of this view is found in United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1973). The defendant was serving a life sentence for murder in the Arizona State Prison when a shakedown of his cell found evidence used to convict him of income tax fraud committed while in prison. The court found no reasonable expectation of privacy by the prisoner and held the evidence of tax fraud admissible. Another decision from the same court reaching the same result, but placing greater stress on the need for prison security, is United States v. Palmateer, 469 F.2d 273 (9th Cir. 1972). Sometimes courts state that the search may not be for harassment, though they seldom find that motive to exist. For example, in Moore v. People, 467 P.2d 50 (1970), the Colorado Supreme Court upheld a conviction for possession of marijuana, found in the daily search of a cell, but said: "Searches conducted by prison officials entrusted with the orderly operation of the prisons of this state are not unreasonable so long as they are not conducted for the purpose of harassing or humiliating the inmate in a cruel and unusual manner." [at 52].

In the very recent case of Bell v. Wolfish, 25 Crim. Law Rptr. 3053 (U.S. Supreme Ct. 5/14/79), a majority of the United States Supreme Court recognized the value of shakedown searches of prisoners' cells and held that such searches may be conducted within the discretion of custodial officials. A lawsuit had been brought by prisoners in a federal custodial facility in New York City. Lower federal courts had placed numerous restrictions on the operation of the facility, including a requirement that inmates be allowed to stay and watch searches of their cells unless the officials could show a "compelling necessity" for making them leave. The Supreme Court rejected the compelling-necessity test for this and various other practices in the facility (see the discussion below on searches of body cavities), finding that cell shakedowns were appropriate and served an obvious security interest, with the lower courts having gone too far in their oversight of prison operations. The court explicitly held that the same searches could be made of prisoners being held awaiting trial as were made of those serving sentences. This decision leaves little doubt as to custodial officials' authority to search prisoners and their cells so long as there is no evidence of harassment or similar abuse.

The Wolfish court did not have to decide whether prisoners retain any Fourth Amendment rights in their cells, whether they have any expectation of privacy--the majority held that even if there was any such expectation, it was minimal and was clearly outweighed by the security interests of the detention center--but the opinion referred to Lanza v. New York (see page 11), an earlier case that has often been cited as holding that a prisoner retains no expectation of privacy. Wolfish thus casts doubt on some of the lower federal court decisions of the last several years that speak of prisoners retaining a degree of privacy. For example, in Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), the federal district court had refused to hear a suit by a state prisoner who alleged that his constitutional rights had been deprived by a shakedown search of his cell during which his trial transcript allegedly was taken. The federal Court of Appeals decided that the prisoner had stated a claim of action, noting recent extensions of prisoners' rights in other areas:

> Respect for the dignity of the individual compels a comparable conclusion with respect to his interest in privacy. Unquestionably, entry into a controlled enviroment entails a dramatic loss of privacy. Moreover, the justifiable reasons for invading an inmate's privacy are both obvious and easily established. We are persuaded, however, that the surrender of privacy is not total and that some residuum meriting the protection of the Fourth Amendment survives the transfer into custody. [at 1316]

The court did not try to decide the extent to which the Fourth Amendment might apply to the prison, and also strongly implied that the prison regulation involved in the case would be considered reasonable. The opinion was written by Justice Stevens before he was appointed to the United States Supreme Court; he dissented in the Wolfish case.

Other federal circuit courts have concluded that the taking of contraband property such as cigarettes, cash, stamps and clothing, from a prisoner following a prison shakedown or search is not a deprivation of federal constitutional rights which would allow the prisoner to go into federal court under the federal Civil Rights Act (§ 1983). Two such decisions are Weddle v. Director, Patuxent

Institution, 436 F.2d 342 (4th Cir. 1970), and Urbano v. Calissi, 384 F.2d 909 (3rd Cir. 1967).

Prior to Wolfish, some lower federal courts had restricted searches of prisoners and cells, but generally those limitations were minimal. For example, in Giampetruzzi v. Malcolm, 406 F. Supp. 836 (USDC SNY 1975), the same court that was reversed in the Wolfish case had required custodial officials to give receipts for property taken during shakedowns (as well as requiring officials to allow inmates to watch such searches). After noting such cases, a Delaware federal district court came closer to anticipating the Wolfish decision. In Thornton v. Redman, 435 F. Supp. 876 (USDC Del. 1977), the Delaware court sided with prison officials who had been sued by maximum security prisoners seeking to recover property taken in a shakedown that followed a knife assault and reports of racial trouble. The court found that rules about receipts and allowing prisoners to watch searches were not constitutional requirements that invariably had to be followed by prison officials. The court upheld the prison officials' judgment that allowing prisoners to watch might lead to disruption and prolong what was already a 12-hour search.

Some courts have suggested that prison officials who find contraband property on a prisoner or in his cell may not be able to confiscate the property but perhaps have some duty to safekeep it and return it to the prisoner when he leaves. That implication was apparently based on an absence of state statutory authority for forfeiture of prisoners' property in Sell v. Parratt, 548 F.2d 753 (8th Cir. 1977), but was based on constitutional grounds in the order in Laaman v. Helgemoe, 20 Crim. Law Rptr. 2351 (order of USDC NH 12/30/76 -- the later, 1977 decision on the remainder of the case is found in 437 F. Supp. 269).

B. Intensive searches of the prisoner

Strip searches and rectal searches. *Jail and prison officials may require prisoners to strip as part of a search, unless the stripping is for harassment.* This is a common practice in some institutions, especially before and after transfers of prisoners. Several cases, including Daughtery v. Harris, 476 F.2d 292 (10th Cir. 1973), have stated a general rule that such searches are allowed in the discretion of prison officials except when done in a wanton manner or for purposes of humiliation or harassment. In Daughtery, a case involving Leavenworth prisoners, the court was persuaded by the routine nature of the procedure, the use of trained paraprofessionals and the lack of humiliation. The Leavenworth prisoners also questioned whether custodial officials could require prisoners to submit to anal searches. Both the Daughtery court and the court in Konigsberg v. Ciccone, 285 F.Supp. 585 (USDC WD Mo 1968), aff'd 417 F.2d 161 (1970), rejected the argument that medical personnel had to be used for such searches.

If prison officials consider it necessary for security, prisoners may be required as part of a strip search to expose body cavities. Courts will restrict such anal and vaginal searches if they are found to be unnecessary for security or if they involve harassment. The lower courts in the Wolfish case, discussed above, had limited anal and vaginal searches to situations where custodial officials could show probable cause to believe evidence was being concealed, but the United States Supreme Court by a five-four vote removed

that restriction. With little discussion, the majority found that contraband could be concealed in body cavities and held that the detention center's security interests outweighed any privacy interest retained by the prisoners, even though this is clearly a more intrusive and humiliating form of search than any other. The majority did not hold that these searches were always lawful, only that the lower courts were wrong in saying that body searches are never permitted unless officials have probable cause to believe something is concealed. The body cavity search must still be reasonable, as it was in Wolfish since it was only used after contact visits and was conducted in a dignified manner. Again, the court found no reason to treat pretrial detainees different from other prisoners.

Although they were decided before Wolfish, two federal district court decisions may still illustrate situations in which anal or vaginal searches could be considered unreasonable. In Hodges v. Klein, 412 F. Supp. 896 (USDC NJ 1976), the court allowed anal searches after contact visits but prohibited them when prisoners were simply moved from one segregated area to another. The anal search was found unreasonable in the latter situation since the prisoners were already subject to constant surveillance in segregation, their mingling with others was brief, and they were already scanned by metal detectors. In Frazier v. Ward, 426 F. Supp. 1354 (US DC NDNY 1977), the situation was similar to Hodges v. Klein, plus there was evidence that the six to eight guards present during the anal search frequently made derisive comments.

Two other pre-Wolfish cases recognizing that a body cavity search represents a greater intrusion than other kinds of searches and that it is more easily found unreasonable are Sostre v. Preiser, 519 F.2d 763 (2nd Cir. 1975) (case returned to lower court to determine prison policy) and United States v. Lilley, 576 F.2d 1240 (5th Cir. 1978) (prisoner to be given notice that participation in activity outside prison means she is subject to random body searches).

Searches of women prisoners. *Although most agencies have policies restricting searches of female prisoners by male officers, there is no law prohibiting such searches.* A male officer should not feel bound by a departmental rule against searching women to the point that he endangers his life.

The courts will not punish the male officer who delays making a search of a female prisoner until a female officer is available. For example, in State v. Jackson, 280 N.C. 122 (1971), a woman was arrested in a restaurant for drug offenses, the police having specific information that she hid drugs in her brassiere. After arrest she was taken to the county jail and held for 30 to 45 minutes until a matron arrived to make a search. The thirteen bindles of heroin found in her bra were held to be admissible by the North Carolina Supreme Court as part of a lawful search incident to the arrest even though that search took place some time after the arrest. The delay was reasonable since it would have "violated all concepts of decency" for the male officers to have searched inside the defendant's bra while she was still in the restaurant. In support of that decision the court cited a similar case, United States v. Robinson, 354 F.2d 109 (2nd Cir. 1965). Interestingly, though, when the police in Robinson delayed their search until a female officer could perform it, the woman defendant struggled so much that two male officers had to be called in to hold her down so the matron could remove 91 envelopes of heroin from her bra. These cases should be understood as permitting a delay in searching a woman prisoner but not prohibiting a male officer from making a thorough search if he believes it necessary to do so immediately for his safety.

Blood samples. *A blood sample may not be taken as part of an arrest unless there is a clear indication it will produce useable evidence. Although the law is not yet clear, it is likely that blood samples can be required as a matter of routine to determine drug use by prisoners in custody following conviction.* On occasion taking a blood sample from a prisoner might help determine his connection with a crime or whether he is using drugs. In Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court held that an intrusion could not be made into the body for evidence unless there was a "clear indication" that the search would be successful. This higher standard of justification for a search might not apply, however, if the person is already a prisoner. In Ferguson v. Cardwell, 392 F. Supp. 750 (USDC Ariz. 1975), a federal district court in Arizona found no Fourth or Fifth amendment violation in medical personnel taking blood samples from state prisoners to determine whether they were using drugs in violation of prison regulations. The court apparently was willing to accept the taking of blood samples even when there is no reason to suspect the particular prisoner of being a drug user.

Fingernail scrapings and hair samples. *When a defendant is first taken into custody, and after he has been committed to a custodial institution, searches of him may include scraping fingernails and cutting hair samples.* Obviously this should not be done unless there is some reason to believe useful evidence will be found. In the case of fingernail scrapings, the justification may disappear if the action is not taken quickly. The only United States Supreme Court case on the subject is Cupp v. Murphy, 412 U.S. 291 (1973), where blood and skin tracings found by fingernail scraping shortly after arrest helped convict the defendant of a strangulation killing. The Court accepted the search but emphasized the emergency circumstances which made it likely the defendant would have destroyed the evidence if the officers had been required to wait for a search warrant or some other form of process before taking the scrapings.

A case involving an inmate is Hayes v. United States, 367 F.2d 216 (10th Cir. 1966). The federal Court of Appeals found it reasonable to search a prisoner without a warrant when he was seen near the scene of a prison murder, then, when blood stains were noticed, to seize his clothes and take scrapings from his body. In a recent North Carolina case, State v. Sharpe, 284 N.C. 157 (1973), fingernail scrapings and hair samples were taken from the defendant soon after his arrest. At trial it was brought out that the hair found under the defendant's fingernails was similar to arm hair on the murder victim, a cripple who had been beaten to death with a tire iron and set on fire, all for $30 he had in his wallet. The Court considered the fingernail evidence to be in plain view when the defendant was arrested, with the officer's seizing of it only a minor additional intrusion.

The taking of a pubic hair sample from a rape defendant was upheld by the North Carolina Supreme Court in State v. Cobb, 295 N.C. 1 (1978). In Bouse v. Bussey, 21 Crim. L. Rptr. 2453 (9th Cir., 7/21/77), however, a federal Court of Appeals held that a rape suspect could sue police officers in federal court for violating his constitutional rights by forcibly unzipping his pants and pulling pubic hairs. The court considered this a "painful and humiliating invasion upon the most intimate parts of his anatomy," noting the failure to show it likely that the evidence would have been destroyed if the officers had not acted as they did. This decision of course established only that the rape suspect could file his federal suit, it did not judge the merits of any defenses the officers might make at trial.

Nontestimonial identification order. North Carolina has a procedure, the issuance of a nontestimonial identification order (see G.S. 15A-271 through -282), to require a person not yet under arrest to submit to certain tests such as blood and hair samples to determine whether he committed a crime. Such an order should be unnecessary if the defendant is already under arrest, but its use might be considered if the defendant balks at submitting voluntarily. Only a prosecutor may apply for such order and it may be issued only by a judge. It is appropriate only when the crime is punishable by more than a year's imprisonment, the person to be tested is a suspect, and the test would materially aid in solving the case. Failure to comply with the order is punishable as contempt of court.

C. Communications between prisoners and others

Mail. The law concerning prisoners' mail has been well summarized in a July 1977 Administration of Justice Memorandum, "Mail Regulation in Jails" by Anne Dellinger. What is said here is mostly a summary of that earlier publication.

Mail to and from a prisoner may be opened and inspected to determine whether it contains escape tools, plans for escape or any other form of contraband. Correspondence to or from an attorney or court official may not be read but may be opened in the prisoner's presence. To read such mail would interfere with the prisoner's constitutional right of access to an attorney and to the courts. Censorship of mail has been the subject of considerable litigation and has resulted in a United States Supreme Court decision, Procunier v. Martinez, 416 U.S. 396 (1974), setting out these rules: *Prisoners' mail may be censored for legitimate security purposes such as removing escape plans or proposals of criminal activity or coded messages, but not simply to remove unflattering or unwelcome opinions; and if mail is being censored or not delivered, the prisoner must be notified and given a chance to protest the decision to some custodial official other than the one who censored the mail.* As said earlier, the rules would be different for mail to and from an attorney or court.

The Martinez decision concerned only censorship, though it seems logical that if some forms of censorship are permissible then inspection of mail generally is acceptable. An earlier United States Supreme Court decision, long before prisoner's rights litigation became popular, found no problems in routinely intercepting prisoners' mail and reading it. Several letters the defendant had written in prison were part of the evidence used to convict him of murder in Stroud v. United States, 251 U.S. 15 (1919). The letters had been turned over to the warden as part of prison routine and then sent to the district attorney. The Court found nothing wrong with the seizure and use of the letters, rejecting claims of self-incrimination and unreasonable search and seizure. Because the Martinez decision did not refer to Stroud it is still reliable law and Martinez should be read as placing limits only on censorship, not on the routine practice of opening and reading and checking for contraband. This view is consistent with the rules recently established in Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978), for review of correspondence to and from Texas inmates. A similar state court decision from Kansas is State v. Matthews, 538 P.2d 637 (Kan. 1975). There it was decided that prison officials could read an inmate's letter to a girlfriend and use information from the letter to prosecute him for possession of a firearm in jail. The officials did not censor the letter, they went ahead and mailed it after reading it, so the Kansas court found Martinez inapplicable.

In another case decided after Martinez, a federal district court in New York held that the security considerations are the same for pretrial detainees and convicted prisoners and the mail of both may be inspected in the same manner. The case is Giampetruzzi v. Malcolm, 406 F. Supp. 836 (USDC SDNY 1975).

Messages between prisoners. *Custodial officials may seize and use as evidence messages passed between inmates.* This has been found necessary to prison security in Denson v. United States, 424 F.2d 329 (10th Cir. 1970) and in United States v. Dawson, 516 F.2d 796 (9th Cir. 1975). In the first case the prisoner was serving a sentence, but in the second he was simply awaiting trial.

Monitoring conversations in jail. *Unless the prisoner has been led to believe that his conversations are private, custodial officials may listen in on conversations between prisoners and visitors other than attorneys.* The United States Supreme Court took that position in 1962 in Lanza v. New York, 370 U.S. 139. There it upheld a conviction for refusing to testify in a legislative hearing. The questions asked by the legislative committee were based on information obtained by prison officials recording conversations the defendant had with his brother in prison. Two Supreme Court justices did not take part in the decision and three others considered the majority's remarks about the inapplicability of Fourth Amendment protections to the prison to be an unwarranted extension of the actual holding of the court, so there is some question about the force of this case as precedent. However, Lanza has been cited often by lower courts and the secret recording of prison conversations has been upheld often.

The most notorious recent recording of a prisoner's conversation occurred in the Patty Hearst case. Soon after Miss Hearst was taken into custody, she was visited by a childhood friend and made various incriminating statements to her, all of which were duly recorded by prison officials and turned over to the prosecution to be used at trial. Finding that the childhood friend was not an agent of the police (see the section below on planting agents in cells), the federal Court of Appeals for the Tenth Circuit held the conversations to be admissible evidence in United States v. Hearst, 563 F.2d 1331 (1978). The Second Circuit Court of Appeals, relying primarily on Lanza, reached a similar result in Christman v. Skinner, 468 F.2d 723 (1972), when it decided that a county jail inmate had no civil rights action against jail officials for monitoring his conversations with visitors.

The California courts seem to have faced more monitoring cases than any other jurisdiction and have consistently approved the recording of conversations. For example, in People v. Califano, 5 Cal. App. 3rd 476, 85 Cal. Rptr. 292 (Cal. Ct. App. 1970), the monitoring of a conversation between a prisoner and an accomplice who were talking in the police building interview room was accepted, the court repeating its usual statement that a prisoner has no reasonable expectation of privacy. (In this case there was rather solid evidence of the absence of an expectation of privacy since the defendant was recorded as saying that the police "are probably listening right now.") The general rule can change, however, if police or custodial officials create an expectation of privacy. For that reason the statements recorded in North v. Superior Court, 502 P.2d 1305 (Cal. 1972), were excluded from evidence. The defendant was left alone in the detectives' office with his wife after the detectives made an obvious show

of closing the door and supposedly leaving them alone. Of course the detectives were recording the conversation, which the court said was not proper since they had created an expectation that the conversation was confidential.

Creation of an expectation of privacy might explain the strong language of the North Carolina Supreme Court in condemning the recording of a conversation in State v. Jones, 293 N.C. 413 (1977). The defendant, charged with murdering her three-year old daughter to collect insurance money, was in an interview room in the Wake County sheriff's office when her father came to talk with her. The deputies left them alone and closed the door but watched and listened to the conversation from behind a one-way mirror. On appeal the defendant did not argue that the deputy's testimony resulted from an illegal search--the only objection was to the deputy summarizing the conversation rather than giving the exact words--so the court did not have to decide whether the eavesdropping was unlawful. However, the majority opinion specifies that the justices "are not to be understood as condoning this unfair tactic of the investigating officers" [at 430]. It appears that the justices might have considered the unfairness to arise primarily from the officers making it look like the meeting between the defendant and her father would be confidential. On the other hand, the case may be an indication that the North Carolina appellate courts may not accept the recording of prisoners' conversations as readily as have the courts in other states.

Custodial officials may not listen to a conversation between a prisoner and an attorney. G.S. 14-227.1 makes it a misdemeanor to eavesdrop on such a conversation and courts in other states have held that to do so is a denial of a defendant's Sixth Amendment right to counsel and is sufficient grounds for dismissal of the charges against the defendant (see, for example, State v. Cory, 382 P.2d 1019 (Wash. 1963)).

D. Consent to search given while in custody

When a person voluntarily consents to a search of his premises or his automobile or any other possession, the evidence found there is admissible in court even if the officer lacked probable cause or any other justification for making the search. In North Carolina the legality of consent searches has been codified in G.S. 15A-221 through -223. Generally, the Miranda warnings are not required to make a consent to search lawful--see State v. Virgil, 276 N.C. 217 (1970)--and the person consenting need not necessarily have been told that he could refuse, although whether he was told that will be considered in determining whether the consent was voluntarily and intelligently given. The latter rule comes from Schneckloth v. Bustamante, 412 U.S. 218 (1973).

Sometimes the person whose consent is sought may be in custody. *A person in custody may consent to a search of his premises, automobile or belongings just like any other person, though the fact that he is in custody will be considered by the court in deciding whether his consent was voluntary.* In United States v. Watson, 423 U.S. 411 (1976), the defendant's consent to search his car was obtained after he had been placed under arrest, though he had not yet been taken to the stationhouse. The United States Supreme Court held that the mere fact that Watson was in custody was not enough to establish that the consent was involuntary. This general rule was also stated in State v. Cobb, 295 N.C. 1 (1978). A similar case occurred earlier in North Carolina, State v. Hauser, 257 N.C. 158 (1962). Hauser, who was stopped for speeding and

running a stop sign, failed to give the information required for a traffic citation, and he was placed under arrest. When first asked for permission to search the car trunk he said he did not have a key, but then when he emptied his pockets at the stationhouse a key was seen and he gave his consent. The officer found in the trunk property that had been stolen from the drugstore where the defendant worked. The consent was found by the court to be voluntary and the evidence admissible even though Hauser was in custody at the time. In a 1971 case, State v. Shedd, 10 N.C. App. 139, the defendant, on work release, was at police headquarters when he consented to a search of his home for goods taken in a breaking and entering of a drugstore. It was not clear whether the defendant was under arrest at the time, and he apparently stated that only his wife lived at the house, but, in any event, the Court of Appeals found the waiver of his Fourth Amendment rights valid, attaching no particular significance to the fact that the defendant was in custody.

E. Confessions while in custody

Volunteered confession. *Confessions by prisoners to other prisoners, guards, doctors and others are admissible; a confession to an undercover agent planted in the cell is not admissible.* (Use of plants is discussed in the next section.) In State v. Spence, 271 N.C. 23 (1967), judgment vacated and remanded on other grounds, 392 U.S. 649 (1968), the defendant told his cellmate all the details of the murder he committed, including how the victim begged for life. The testimony of the cellmate was admitted, the Court holding that the Miranda warnings were not necessary in the case of a free and voluntary confession to a fellow prisoner. The same is true when the confession is made to someone else the prisoner meets, such as the emergency room doctor in State v. White, 3 N.C. App. 31 (1968). In response to the doctor's question, the defendant stated he had consumed a fifth of whiskey before driving that night, a statement used in court to help convict him. In State v. Johnson, 29 N.C. App. 141 (1976), the robbery confession was made to the Rockingham police dispatcher. The dispatcher happened to be visiting a friend in jail and casually asked the defendant what he was arrested for and whether he had actually committed the crime. The court stressed that the dispatcher was not a sworn officer, did not make investigations, and in no way was acting as an officer in the questioning of the defendant. If the prisoner does call in an officer and confesses, the officer may testify to the confession. Such a case is State v. Muse, 280 N.C. 31 (1971). The defendant, awaiting trial on burglary and larceny charges, asked for an SBI agent to come to his cell, then made his confession in hopes the agent would help get his bond reduced (the agent refused to make any promises). The Miranda warnings were not required because the confession did not come in response to questioning by the agent.

If the defendant's custody is based on an illegal arrest, the confession may not be admissible. In Wong Sun v. United States, 371 U.S. 471 (1963), the confession was allowed in evidence even though the defendant had been arrested unlawfully. The confession actually took place several days after the defendant's release from the illegal arrest, a sufficient break in time and circumstance to indicate that the confession was an act of free will. However, in Brown v. Illinois, 422 U.S. 590 (1975), a confession made only two hours after an unconstitutional (no probable cause) arrest was inadmissible. The defendant had even been given the Miranda warnings, but that by itself was not enough to remove the taint of the unlawful arrest.

The circumstances of the prisoner's confinement may affect the voluntariness of a confession. A confession of participation in a prison riot was held inadmissible in Brooks v. Florida, 389 U.S. 413 (1967), because the prisoner had been placed naked in a windowless cell with two other men for two weeks, given only 12 ounces of thin soup per day, and allowed no outside contacts.

A "confession" might be a voluntary display of evidence rather than a statement of guilt. The defendant in State v. Colson, 274 N.C. 295 (1968), was not under arrest but was being questioned at police headquarters about the butcher knife slaying of his wife when he made an offer to show the officers a scar on his stomach. As Colson raised his shirt, the officers could see his bloody undershorts, which were seized. The blood matched that of the wife and was used as evidence for conviction.

Planting an agent in the cell. *A confession to an undercover agent who has been planted in a prisoner's cell is not admissible at trial.* If the defendant has already been indicted, as would usually be the case, the confession may be inadmissible because of the Massiah rule, discussed below. Even if there is no Massiah problem, the confession of the person in custody would not be admissible unless he had been told the Miranda warnings and waived his rights. In Massiah v. United States, 377 U.S. 201 (1964), the defendant was free on bail on drug charges. Federal officers convinced a friend of Massiah to cooperate--the friend had also been indicted--and wired his car to record conversations with Massiah. The evidence obtained in this manner was held inadmissible as a violation of the defendant's Sixth Amendment right to counsel. Once a person has been indicted, he may not be interrogated in the absence of counsel. If the defendent has not yet been indicted, and is not in custody, an agent might record conversations with him and use any incriminating statements; for example, in Hoffa v. United States, 385 U.S. 293 (1966), an undercover agent testified to Jimmy Hoffa's plans to bribe jurors in another case. And in United States v. White, 401 U.S. 745 (1971), the Court allowed use of a conversation recorded between a suspected narcotics dealer and a police informer. In Milton v. Wainwright, 407 U.S. 371 (1972), the United States Supreme Court assumed that the Massiah rule prohibits the use of a confession by a prisoner to an officer posing as a fellow prisoner, though the use of the confession was considered harmless error since the defendant had made several other confessions.

There are some cases holding that the Massiah rule does not prevent an undercover agent from testifying to conversations he overheard between inmates. Two such cases are Brown v. State, 271 A.2d 182 (Md. App. 1970) and Montgomery v. State, 288 A.2d 628 (Md. App. 1972). Likewise, there is no constitutional problem with someone other than a police agent testifying to a confession made by a prisoner. A North Carolina case, discussed above, where the defendant confessed to his cellmate is State v. Spence. In the Patty Hearst case, also discussed above, a conversation in her cell between Miss Hearst and a childhood friend was recorded and used as evidence. Since the friend was not a government agent and had not been directed by the government to interrogate Patty Hearst, the recording was lawful.

In Henry v. United States, 590 F.2d 544 (4th Cir. 1978), the federal Court of Appeals for this area held that Massiah prevented the use at trial of a statement made by a prisoner to another prisoner who had been paid by the FBI to listen for admissions of guilt. Although the FBI had instructed their

informer not to initiate conversations with Henry and not to question him, the court decided that there was no real difference between interrogating a prisoner and placing an agent near him to gain his confidence and extract information through conversation. This case makes it unlikely that any worthwhile use can be made of an undercover agent in prison or jail.

F. Searches of people other than prisoners

Visitors. *Custodial officials may search visitors and belongings brought into the institution.* This is clearly necessary for security reasons. An example of how evidence might result from a routine search such as this is State v. Ray, 274 N.C. 556 (1968). A Durham woman had just finished buying cigarettes at an Eckerd's drugstore when a man forced his way into her car, made her drive away, and raped her. Ray was arrested and was in jail six days later when his landlord picked up a paperbag containing cigarettes and took them to Ray at the jail, thinking they belonged to Ray. As a matter of routine, the police looked through the bag before it was given to Ray. Recognizing the connection of the Eckerd's sales slip to the crime, the officers seized it and used it to help convict Ray.

A search of a visitor will be questioned by a court only when the search is used discriminately or is too extensive or serves no apparent security purpose. Big Black v. Amico, 387 F. Supp. 88 (USDC WDNY 1974) is an example of such a situation. Big Black was an Attica prisoner on parole who regularly visited other Attica-riot defendants at the Erie County Holding Center to discuss mutual legal problems. That detention center had no rules on searches of prisoners and apparently Big Black was the only visitor subjected to strip searches. The New York federal district court prohibited strip searches of Big Black unless the prison officials could give specific reasons for suspecting he was carrying contraband. Even without such suspicion, he had to submit to pat-down searches, removal of outer clothing (coat, etc.), inspection of personal belongings such as his briefcase, and screening by a metal detector.

Guards and other employees. *Guards and other custodial employees may be searched as part of institutional security.* Two cases involving guards are fairly typical. In United States v. Kelly, 393 F. Supp. 755 (USDC WD Okla. 1975) a federal reformatory guard was convicted for possession of marijuana found in his lunchbox after a warrantless search. The federal district court in Oklahoma held that prisons are not protected by the Fourth Amendment and the defendant had no reasonable expectation of privacy, especially since there were signs posted in the reformatory warning of unannounced searches. In this case the prison officials had four tips that the guard was bringing marijuana into the reformatory, but the court did not think that it was at all necessary to show probable cause for the search. A similar situation was faced by the Arizona Supreme Court in State v. Paruszewski, 466 P.2d 787 (Ariz. 1970), and that court found nothing wrong with the warrantless search of a prison guard. The search disclosed marijuana and brass knuckles he was bringing into the prison. The court noted that security was essential to the prison and stated, "We believe this security can only be achieved by enforcing continuous checks on all persons and places within the prison walls, including employees. We therefore believe that under prison circumstances, this search was reasonable and did not violate the Constitution." [at 789].

The same reasoning has been extended to employees other than guards and has been used to justify strip searches. In Gettleman v. Werner, 377 F.

Supp. 445 (USDC WD Penn. 1974), a library and teaching employee of a state prison brought a federal civil rights action against prison guards who had strip-searched him looking for contraband. The federal district court sided with the guards, stating that a prison employee such as the plaintiff had given up his Fourth Amendment rights. "Of course, a prison employee retains a right to be free from oppressive or unreasonable searches which shock the conscience of the court, but in the totality of the circumstances involved in the case sub judice, the search of the plaintiff does not appear to be shocking or unreasonable." [at 452]. The court noted that the employee had been given a copy of the prison regulations, including a statement that employees were subject to search; that he had signed an agreement to abide by the regulations; that he had been searched many times before without objecting; that he had been seen recently handing contraband to a prisoner; and that he had been mentioned in a prisoner's letter as being helpful in transferring contraband money. In no way was this employee singled out or harassed. (It might be noted in passing that after leaving his prison work the plaintiff went to law school.)

The strip search may be used for female employees as well. In Shaw v. Hutto, 22 Crim. Law Rptr. 2021 (USDC ED Va. 9/1/77), a federal civil rights action by two female employees of a state prison hospital was dismissed by the federal district court. The women had been subjected to strip searches as part of a crackdown on drug trafficking. The court found that there was no reasonable expectation of privacy on the part of prison employees or visitors and did not consider it important that these employees had not been told that they were subject to search.

G. Conclusion

This survey shows that there are few restrictions on searches by custodial officials. Generally the courts do not recognize that prisoners have any significant Fourth Amendment right to privacy, but judges' opinions often leave open the possibility that a person in custody may retain some minimal privacy interest. Courts do limit officials when their actions might interfere with other, important rights of the prisoner, such as the right to counsel. Most often, though, judicial intervention comes when the custodial officials' action is discriminatory or apparently done for harassment. Considerable leeway is given for the exercise of discretion by jail and prison officials and in close cases the courts will be persuaded by the fact that what the official is doing is a matter of routine, that it is stated in written regulation, and that notice has been given of the regulation.