



GENERAL ORDER

**DURHAM POLICE DEPARTMENT
DURHAM, NC**

NUMBER:

4005 R-4

ADVICE & WAIVER OF RIGHTS

Effective Date: 12/15/1995

Revision Dates: R-1 11/16/2009; R-2 06/06/2011; R-3 12/01/2015; **R-4
12/01/2023**

INTRODUCTION

It is the policy of this Department to adhere to the provisions of the United States and North Carolina Constitutions, as well as North Carolina General Statutes, which affect an officer's authority to interview criminal suspects.

VOLUNTARINESS

A defendant's statement is not admissible at trial for any purpose unless it was made voluntarily and with understanding. The totality of the circumstances surrounding the statement will be considered in determining whether the statement was improperly induced by hope or fear. Factors include, but are not limited to:

- The officer's conduct before and during the interview;
- The defendant's physical and mental condition;
- The defendant's prior history of involvement with law enforcement officers;
- The environment in which the interview occurred;
- Whether officers made promises or threats to the defendant or used deception.

Officers may not use physical threats or engage in other conduct that might induce a suspect to make a statement in fear of what might happen if the suspect does not do so. Officers also may not make promises to induce the suspect to talk. For example, officers should avoid making statements that promise a reduced charge or sentence or better treatment if the suspect will give a statement, tell the suspect that the officers will testify in court for the suspect if he or she gives a statement, or tell the suspect that it will be harder on the suspect if he or she does not cooperate.

5TH AMENDMENT MIRANDA RIGHTS

Rights and Warnings

Before interviewing an in-custody suspect, 18 years of age or older, an officer must advise the suspect and obtain a valid waiver of the following rights:

- You have a right to remain silent;
- What you say may be used in court against you;

- You have a right to have a lawyer present during interrogation;
- You have a right to an appointed lawyer during the interrogation if you cannot afford to hire one.

Before interviewing an in-custody suspect, 16 or 17 years of age, an officer must advise the suspect and obtain a valid waiver of the following rights:

- You have the right to remain silent;
- Any statement you make can and may be used against you;
- You have a right to have a parent, guardian, custodian or caretaker present during questioning;
- You have a right to consult with an attorney and one will be appointed for you if you are not represented and want representation.

Before interviewing an in-custody suspect, under the age of 16, an officer must advise the suspect and obtain a valid waiver of the following rights:

- You have the right to remain silent;
- Any statement you make can and may be used against you;
- You have the right to have a parent, guardian or custodian present during questioning;
- You have the right to consult with an attorney and one will be appointed for you if you are not represented and want representation.

Waiver

A suspect's waiver of *Miranda* rights and any applicable statutory rights must be knowing and voluntary.

Advisement of both the *Miranda* and statutory rights, and a suspect's waiver, may be oral or written, although written is preferred. ***Officers attempting to obtain a written waiver shall use the applicable attached Rights Waiver form only.*** A suspect's waiver may be explicit or implicit, although explicit is preferred.

If an in-custody suspect, 16 or 17 years of age, requests that a parent, guardian or custodian be present during questioning, an officer shall make a reasonable effort to contact the parent, guardian or custodian. If a parent, guardian or custodian is not available, a caretaker may be present during questioning. A caretaker is any person, other than a parent, guardian or custodian who has responsibility for the health and welfare of the juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, a foster parent, an adult member of the juvenile's household, an adult entrusted with the juvenile's care, a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

If the person taken into custody is less than 16 years of age, the child's parent, guardian, custodian or attorney must be present during any interview. If an attorney is not present, the parent, guardian or custodian must also be informed of the child's rights.

A parent, guardian, custodian or attorney may not waive the child's rights on behalf of the child. Any waiver must be obtained from the juvenile.

Invocation of Rights

If, at any time, a suspect unequivocally expresses an unwillingness to be questioned or to continue with questioning or asserts the right to counsel, questioning (or the functional equivalent) which is likely to elicit an incriminating response may not begin or, if already begun, must immediately stop.

Resumption of Interview After Assertion of Rights

If an in-custody suspect asserts both the right to remain silent and the right to counsel, the rules which apply to the resumption of questioning after assertion of the right to counsel will govern.

- **Assertion of the Right to Remain Silent**

An in-custody suspect's assertion of the right to remain silent must be scrupulously honored by waiting a significant period of time before any second or subsequent interview is attempted. If an in-custody suspect asserts the right to remain silent and then changes that decision on his or her own initiative, the suspect may be immediately interviewed. However, officers must advise the suspect of *Miranda* and any applicable statutory rights, and obtain a valid waiver, prior to any second or subsequent interview.

- **Assertion of the Right to Counsel**

Once an in-custody suspect asserts the right to counsel, a second or subsequent interview about any crime may not be attempted until the suspect has been released from custody imposed for any offense for more than 14 days, or the suspect's attorney is present, or the suspect initiates further communication. Officers must advise the suspect of *Miranda* and any applicable statutory rights, and obtain a valid waiver, prior to any second or subsequent interview.

Exceptions

- **Public Safety**

A person's statement during custodial interrogation that was given without *Miranda* warnings may be admissible when officers have an objectively reasonable need to protect themselves or the public from an immediate danger associated with a weapon. Once the necessary information has been obtained, or the immediate danger is over, the officer must advise the arrestee and obtain a valid waiver of *Miranda* rights if the officer intends to continue questioning the suspect.

- **Booking-Questions**

Routine booking questions may be asked and answered without *Miranda* warnings and a waiver. However, if the defendant's answer to a routine booking question is likely to establish an element of the crime to be charged, in order for the defendant's answer to be admissible at trial, the officer must advise the defendant and obtain a valid waiver of *Miranda* rights prior to asking the particular booking question.

Volunteered Statements

An in-custody suspect's volunteered statements may be admissible in court, even if *Miranda* warnings have not been provided nor a waiver received, provided the statements were not made as a result of interrogation.

Request for Consent Search

A request of an in-custody suspect for consent to search is not interrogation. An officer may approach an in-custody suspect, even if the suspect has asserted the right to remain silent or counsel, and ask for consent to search.

6TH AMENDMENT MASSIAH RIGHTS

Rights and Warnings

A defendant's 6th Amendment rights begin at the time the defendant has an initial appearance before a magistrate, a first appearance in district court, or is indicted. Once a defendant's 6th Amendment rights have begun, an officer must advise the defendant of his or her rights and obtain a valid waiver prior to deliberately eliciting information from the defendant by interrogation or conversation about the pending charge.

Waiver

A defendant's waiver of the 6th Amendment right to counsel must be knowing and voluntary.

Miranda warnings and waiver are sufficient to waive the 6th Amendment right to counsel. Therefore, officers wishing to obtain a written waiver shall use the applicable attached Rights Waiver form.

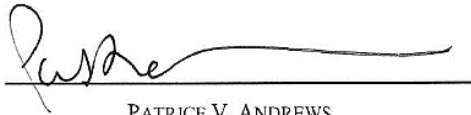
There is not a specific age at which a non-custodial juvenile is barred from waiving the 6th Amendment right to counsel. However, the age of the child will likely be considered in determining whether a waiver was knowingly made. A parent, guardian, custodian or attorney may not waive the child's rights on behalf of the child. Any waiver must be obtained from the juvenile.

Assertion of Rights

If an officer seeks to interview a defendant and the defendant, after being advised of his or her rights, refuses to waive the 6th Amendment right to counsel, neither that officer nor any other officer shall attempt to initiate a second or subsequent interview about the offense for which the 6th Amendment has attached unless the defendant has initiated further communication or his or her attorney is present.

Volunteered Statements

A defendant's volunteered statements may be admissible in court, even if 6th Amendment rights warnings have not been provided nor a waiver received, provided the statements were not the result of an officer's deliberate efforts to elicit information from the defendant by interrogation or conversation.


PATRICE V. ANDREWS
CHIEF OF POLICE