PUBLIC DEFENDERS
DEPARTMENT OF PUBLIC ADVOCACY

THE SUPPRESSION MANUAL

SEARCH, SEIZURE, & MIRANDA IN KENTUCKY

Suppression Manual
Kentucky Department of Public Advocacy
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Commonwealth of Kentucky
Department of Public Advocacy
Damon Preston, Public Advocate

Cover Photo by Alaina R. Faust
The photo is an homage to the 1982 painting "*Assistance of Counsel*," by Robert L. Conely.

Preface to the DPA Suppression Manual, 1st Edition & Statement of Profound Gratitude

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth Amendment of the Constitution
of the United States of America

No person … shall be compelled to be a witness against himself;…

Fifth Amendment of the Constitution
of the United States of America

The passage of the Fourth Amendment, quoted fully above, was motivated by the British "Writs of Assistance," wherein the British Crown would grant overarching, non-specific search powers to British law enforcement officials. Nowhere was this blanket authority more abused than in the original thirteen colonies, where British-appointed regents exercised near absolute power over the colonists, appropriately termed "British subjects," who had neither legislative nor judicial recourse against the actions of the Monarchy. The right to be free from unreasonable searches and seizures is nearly sacred, and the Founding Fathers imbedded this right into its own Amendment, which – unliked the Fifth and Sixth Amendments – shares no space with other important constitutional rights.

The Fifth Amendment, which contains numerous protections including the right to be free from forced self-incrimination, was heavily influenced by the historical backdrop of the American Revolution, and America's stated desire to be free of

Yet, nearly a quarter of a millennium later, the right to be free from wrongful Governmental intrusion into the security of one's person, home or possessions requires continuous and vigilant oversight by the watchdogs of those who exercise policing powers in this Commonwealth and country. Nearly a quarter of a millennium later, the basic tenets of the meaning of the right to be free from self-incrimination are seemingly under constant debate, and require constant attention from those who would preserve these rights.

We are the watchdogs, the keepers of the Constitutional rights, the champions of liberty.

This DPA Suppression Manual, 1st Edition, puts into the print the collaborative efforts of many persons who have volunteered their time and effort to bring forth a guide to aid not only criminal defense attorneys everywhere, whether public defenders or private counsel, but also Judges, Prosecutors (who first are "Ministers of Justice"), and even Law Enforcement keep searches, seizures and confessions (whether true or false) that occur within these borders in compliance with the law.

Trial Lawyers, Appellate Lawyers and Trainers, from both the Department of Public Advocacy and the Louisville-Jefferson County Public Defender Corporation (a/k/a Louisville Metro Public Defender), which are at the time of this writing in the process of joining together into one public defender agency, have come together to research, write, edit

and produce this manual, bringing into it the ideas, thoughts, and excerpts from the best motions and briefs written on the subject of suppression of evidence obtained from a wrongful search and seizure, or a wrongfully obtained statement or confession of an individual in custody. These persons are owed a huge thank-you for the work they have put in individually and as a group. Without them, DPA and Louisville Metro Public Defender would continue on as they have for the past fifty-two years: Without a suppression manual, notwithstanding the fact that many times the only viable defense a citizen may have is that the Government broke the law in acquiring the evidence against them. Therefore, a huge shout-out to:

- Emily Croucher, DPA London Trial Office
- Ryan Dischinger, LMPD Adult Trial
- Amy Hannah, LMPD Education Supervisor
- Christy Hiance, DPA Capital Trial Branch
- Melanie Foote, DPA Education Branch
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- Emily Rhorer, DPA Appellate Branch
- Christine Madjar, DPA Education Branch
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- Duncan Varda, DPA Conflict Division
- Erin Yang, DPA Appellate Branch

As this manual gets used – and improved upon and corrected where due in the decades to come – others no doubt will join and step in to maintain this manual as a useful tool in representing our clients. Their contributions are acknowledged here in advance; but it will always be this core group of 13 original collaborators to whom I am forever indebted, the ones who brought into being the first ever DPA Suppression Manual.

Scott West
Deputy Public Advocate
May 2024

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Chapter 1: Filing the Motion

"The imperfect motion actually filed is better
than the perfect motion still in my head."

George Sornberger, Former DPA Trial Division Director

Often, the client does not have the best case on the merits. Maybe she was caught with a controlled substance on her person. Maybe the meth lab was found in his closet. Maybe the smoking gun was found in the trunk. The evidence in such cases can be overwhelming. Sometimes, the only way to win the case for the client is to persuade the courts that the state broke the rules in obtaining that evidence. When that is the case, you will want to develop and address any suppression issues as early in the case as possible.

1.1 File a suppression motion as soon as you have developed the facts sufficient to do so.

The quicker you can file a suppression motion, the better for a variety of reasons:

- **You want to convince the prosecution it has unfixable problems with the case as soon as possible, before they are invested too much in the case.** Before the prosecution puts too time and energy in the case, you want to show that the case may simply not be worth it. Bringing up suppression issues early can sow doubts about the strength of the Commonwealth's case, seeds that may sprout into good reasons to offer a better-than-standard offer, or a quicker-than-usual offer. Think of this poker analogy; it is must easier to fold at the ante than after you fed the pot several times.
- **The actual filing of a motion forces the Commonwealth to respond and puts the prosecution on the clock.** Having to research, write and respond to a suppression motion that facially appears meritorious may not be the highest and best use of the prosecutor's time. Dealing with a possession case that requires a lot of time to deal with a gaping suppression hole, and which detracts from the prosecutor's ability to deal with an upcoming murder trial, may be the incentive to enter into negotiations right away.
- **Filing early underscores to both the prosecution and the court that your motion has merit.** If you have a winning suppression point, isn't it more persuasive to bring it out first thing? You take away the impression that "if it is such a slam dunk, why did you wait

a year to file it?" The more a suppression motion looks like an afterthought, the more it will be treated that way.

- **Filing early may get you discovery earlier than you would otherwise be entitled.** RCr 7.26(1) provides:

  > Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

  In many instances, the defense will not get these statements until right at the 48th hour. However, once a motion to suppress is filed, both parties have an obligation to provide the other side with witness statements pertinent to the issues raised in suppression. (See Section 1.5 below). Almost always it will be the Commonwealth who has witness statements, but occasionally the defense will have a witness who has given the defense a statement (as where a "consent" search is in issue, and there were bystanders who heard what was said.)

- **Win or lose, potential error for appeal has been preserved.** If you end up having to try the case, what better way to go into it than knowing that you already have an issue for the appellate counsel to argue? Moreover, if the prosecution feels like they just dodged a bullet, the worry of a reversal on appeal may cause you to get a better offer if only because the state wants to preserve the win.

1.2 There is no such thing as a frivolous motion to suppress in the absence of a search warrant, and the Commonwealth bears the burden of proof.

Frequently, if you inform the prosecution that you are contemplating filing a suppression motion, you will hear a reply like "oh, that would be frivolous, it is obviously a consent search." Or, "this is an exigent circumstances search, you don't have any grounds to file a motion to

suppress." Such replies demonstrate a misunderstanding of who has the burden of proof in a *warrantless* search.

- **Where there is no warrant, the prosecution bears the burden of proving a warrantless search was reasonable**. *See Commonwealth v. McManus,* 107 S.W.3d 175, 177 (Ky.2003) (citing *Vale v. Louisiana,* 399 U.S. 30, 34, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970)).
- **Warrantless searches area *per se* unreasonable**. Do not worry that a motion to suppress a warrantless search will be regarded as a frivolous motion. "No right is held more sacred, or more carefully guarded, by the common law, than the right of every individual to the possession and control over his own person[.]" *Brooks v. Commonwealth*, 488 S.W.3d 18, 21 (Ky. Ct. App. 2016), *as modified* (Apr. 15, 2016), *referencing Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968). For this reason, warrantless searches are presumed unreasonable unless they fall within a clearly defined exception to the warrant requirement. *Katz v. U.S.,* 389 U.S. 347, 356–357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).
- **Even "Terry" stops are presumed unreasonable.** Note the above cite to *Terry v. Ohio*; this means that the presumed unreasonableness applies regardless of whether it is a home or residence being search (for which there must be "probable cause" to search), or whether it is a stop of someone's automobile or person (which requires the lesser standard of "reasonable articulable suspicion that criminal activity is afoot)."

- **It is ethical to require the Commonwealth to prove that the facts and law support a valid exception to the warrant requirement.** Lawyers defending a criminal case may always put the Commonwealth to their burden. **SCR 3.3.130(3.1)** provides:

  > A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. **A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding**

> **that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established**.
>
> [Emphasis added.]

1.3 Are there any good reasons one might wait to file a motion to suppress?

You might be in a jurisdiction where the prosecution threatens to – and does – pull all offers if you file a motion to suppress. (If so, that should tell you right there just how feared good suppression motions are.) On one hand, case law holds that they can do this ethically, as "[t]here is no constitutional right to plea bargain and it is within the prosecutor's discretion to decide whether to plea bargain or go to trial." *Porter v. Com.*, 394 S.W.3d 382, 388 (Ky. 2011).

On the other hand, the prosecution cannot use its discretion to commit constitutional abuses:

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446… There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.[9] And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.

Bordenkircher v. Hayes, 434 U.S. 357, 364–65, 98 S. Ct. 663, 668–69, 54 L. Ed. 2d 604 (1978) (holding that due process is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged.) Prosecutorial inducements to plea may have support in the law, even where the police have unreasonably searched a premises; but what happens when such inducements have the effect of protecting the police from having unusually egregious behavior exposed, such as, for example, a regular and routine police practice of conducting unannounced and unmarked road checkpoints only in areas in which the residents are predominantly black? Would this be an

example of precisely the kind of "institutional and individual abuse" to which *Bordenkircher* refers?

It may be a while before you find that perfect first candidate case in which to challenge the state's ultimatum. Case reviews can be a plus. Not only do they help you sharpen and refine your arguments and offer you encouragement, but they can offer discouragement on your issue, just in case you believe too much in it or are viewing the facts too favorably toward your client.

PRACTICE TIP: The prosecutorial practice of pulling offers or making no offers whenever a motion to suppress is filed brings to mind the words of Sandy Anderson, the vice-president of baseball operations for Major League Baseball, who famously responded in 1999 to the umpire's union's threat to pull all umpires off of the last month of the season if their demands were not met: "This is either a threat to be ignored, or an offer to be accepted." The fact is, pulling offers from cases only works if they only get to do this sporadically and in small numbers; but if motions to suppress are filed in a dozen or so cases in a short period of time, that means the prosecution would have to try a dozen cases, eventually.

In the end, the client may value the guarantee of a plea offer over a motion to suppress, and as the client is in charge of whether or not to accept a plea, the client's wishes must prevail. That said, once all negotiations have been exhausted and no acceptable plea bargain is being offered or likely to be offered, there is no reason not to file it. If the judge asks why a suppression motion is being filed so late in the case, you are within your rights to truthfully explain that the prosecution pulls offers when motions are filed, and you felt compelled, ethically, to explore all opportunity to settle the case prior to filing the motion.

1.4 Suppression motions generally are required to be filed prior to trial and cannot be filed during trial.

By rule, motions to suppress generally must be filed prior to trial. In the not-so-distant past, a motion to suppress could be filed any time before trial, or even during trial. However, in 2014, the Supreme Court of Kentucky amended the Criminal Rules and added the following:

- **RCr 8.18(1)(f)** which provides that, "[e]xcept for good cause shown, the following shall be raised before trial…a Rule 8.27 motion to suppress evidence."

- **RCr 8.27(1)** provides that "[a] motion to suppress evidence shall be filed by the deadline set by the court pursuant to Rule 8.20 for the filing of such motion. If the court has set no deadline under Rule 8.20, the motion shall be filed within a reasonable time before trial.
- **RCr 8.27(2)** provides that **t**he court shall conduct a hearing on the record and before trial on issues raised by a motion to suppress evidence. No jury and no prospective juror shall be present at any such hearing.
- **RCr 8.20** allows the court at arraignment or as soon afterward as practicable to "set deadlines" for the parties to make or assert pretrial motions, and may also schedule hearings on such motions.

1.5 Spotting suppression issues.

From the moment a defender is appointed to represent someone in district court, the defender should be looking for suppression issues. Every piece of alleged evidence seized in any case should be scrutinized to see (1) how the Commonwealth came to be in possession of the alleged evidence, (2) whether it was pursuant to a warrant or an authorized, well-established exception to the warrant requirement, and (3) the manner in which the alleged evidence was handled after seizure by law enforcement.

In order to quickly spot potential suppression issues, it can be helpful to include a **"Suppression Checklist"** in the file from the moment the file is created. (A copy of a sample checklist is included in the Appendix of this Manual.) It helps keep track of all potential issues and keep them fresh on one's mind.

Early sources of facts relevant to suppression can often be found in:

- Uniform Offense Citation
- Uniform Offense Report / KYIBRS (Kentucky Incident Based Reporting System) Report and any supplemental reports
- Your own Client's interview
- Any client's statements given to you in discovery

- Statements made by officers or witnesses in a preliminary hearing
- Statements made by officers or witnesses in a bail hearing
- Statements made by the officers during pre-court negotiations
- The Search Warrant and supporting Affidavit (if there is one)
- (After indictment) a transcript of the Grand Jury proceedings

1.6 Developing Suppression Issues

Happy is the criminal defense attorney who has all of the facts pertinent to suppression already locked down in a written report or citation. Sadly, the facts have to be better developed most of the time. There are opportunities to do this prior to a suppression hearing.

- **Preliminary Hearing.** Do not waive the preliminary hearing. Most of the time, the police officer will testify the manner in which he searched the person or premises and / or seized the alleged evidence at issue. Where the prosecutor asks questions that elicit such testimony (or the officer includes the testimony as an "extra" in an answer to a question that really does not pertain to the collection of the evidence), it is fair game to cross-examine on the answer given. By producing a witness, the Commonwealth places that witnesses' credibility and veracity in issue, and you should be able to cross-examine them as to any statements they say under oath. Should the Commonwealth object on the ground that this is a "probable cause hearing," not a "suppression hearing," you should reply that in fairness you ought to be able to challenge the Commonwealth as to any evidence they chose to put on the record, and that you will be brief. Then, be brief. Only ask one or two clarifying questions to get quickly to testimony that you are trying to develop.

> **PRACTICE TIP:** Once you have the statement from the witness that you want, leave it alone. Do not ask the witness to repeat the answer, or ask a follow up question that will give the witness an opportunity to modify or retract the answer already given. Once you have the hearing transcribed, you can read that answer as many times as needed.

- **Bail Hearing**. Witnesses can (and should) be called during an adversarial bail hearing under RCr 4.40. When a trial court refused to allow the defense to cross-examine the chief prosecuting witness in an assault case, Kentucky's highest court reversed with directions that the defendant be given a new bail hearing.

> The trial judge refused to permit appellant to examine this witness on the ground that such an examination would constitute an unauthorized discovery. It is the opinion of this court that appellant should have been permitted to examine the chief prosecuting witness at the hearing to reduce bail to the extent that the object of such an examination had any relevant bearing upon the factors which the court must consider under RCr 4.06 [now RCr 4.16] in determining the amount of bail. *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky.App. 1973).

Those factors in RCr 4.16 are the same factors contained in **KRS 431.425**:

> The amount of bail shall be:
>
> (a) Sufficient to insure compliance with the conditions of release set by the court;
>
> (b) Not oppressive;
>
> (c) Commensurate with the nature of the offense charged;
>
> (d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and
>
> (e) Considerate of the financial ability of the defendant."

The reasonably anticipated conduct of the defendant if released (especially with regard to fleeing the jurisdiction or not coming to court) could reasonably vary depending upon the strength of the case. A case in which unlawfully and unreasonably obtained evidence ought to be released weighs in favor of a client being more willing to come to court; certainly, a defendant reasonably would be more likely to return to court if suppression of evidence which could lead to a dismissal, a lessening of charges, or a more reasonable plea offer.

- **Pre-court negotiations**. Often, prior to cases being called by the court, the prosecutor and defense counsel, along with police officers and other witnesses, meet in a back room or jury room to discuss cases. Frequently, an officer will provide facts of the arrest. Where there are witnesses (including the prosecutor, on occasion), some things may be said that can be used in questioning during a hearing in open court, or as part of a "bystander affidavit," where persons are willing to attest to what was said and heard in the back room.

1.7 The parties' mutual discovery obligations with regard to witness statements upon the filing of a motion to suppress.

Prior to 2014, there were no discovery rules specific to suppression motion practice. Neither side had any obligation to give the other party information in their possession which bore on the issue. However, the Supreme Court changed that with the passage of RCr 8.27(3), which sets out the parties' mutual obligations with regard to witness statements.

> **(a) Production of Witness's Statements.** Except for good cause shown, not later than forty-eight (48) hours before a suppression hearing, a party who reasonably anticipates calling a person to testify as a witness at the suppression hearing shall furnish every other party with a copy of all statements of such person (other than the defendant) that relate to the subject matter of that person's anticipated testimony at the suppression hearing.
>
> **(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of such person's anticipated testimony as a witness at the suppression hearing, the court must order that the statement be delivered to the moving party.
>
> **(c) Producing a Redacted Statement.** If the party who called or anticipates calling such person as a witness at the suppression hearing claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony or anticipated testimony at the suppression hearing, the court must inspect the statement in camera. After excising any privileged or

unrelated portions, the court must order delivery of the redacted statement to the other party. If a party objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

More often than not, it is the Commonwealth that has the most witnesses to call with regard to an exception to the warrant requirement. If the exception is exigent circumstances, or a valid stop under *Terry v. Ohio*, it is the police officer who is claiming the exigency or the existence of a reasonable suspicion that criminal activity is afoot who must take the stand. After all, the state has the burden of proof, and so the state must come forward with evidence to support its burden.

On the other hand, the defense is not without responsibility. Assuming there are other witnesses who perhaps witnessed the search and seizure, and give testimony on whether it was a true "consent search," or were witnesses to the supposed exigency – and the defense is in possession of their statement – that must be handed over to the prosecution or the defense will possibly not be able to call that witness at the hearing (see subsection (e) below).

However, as shown by subsection (d) below, the rule contemplates that the exchange of statements could occur *even at the last minute* without a long delay of the proceedings:

(d) Recess to Examine a Statement. The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

(e) Sanction for Failure to Produce or Deliver a Statement. If the party who called the witness willfully disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record.

(f) Statement Defined. As used in this rule, a witness's statement means: (1) a written statement that the witness makes and signs, or otherwise adopts or approves; (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

1.8 What constitutes "good cause shown" for not filing a motion to suppress prior to trial?

RCr 8.18(1)(f) provides that a motion to suppress must be raised before trial, and 8.27(3)(a) provides that witness statements must be provided "except for "good cause shown." There is no case law on this issue as it pertains to attempting to argue for suppression of evidence during a trial, yet. At a minimum, one would presume that "I forgot" is insufficient to establish good cause. However, there are other areas of the law which impose deadlines which can be extended or suspended "for good cause shown." Chief among them would be a failure by the Commonwealth to perform one of its duties under the applicable rules of suppression.

Regardless, by analogy to these examples in other areas of the law, it would appear that "good cause shown" is not the most difficult threshold to meet. Note the examples below:

- **Late-produced witness statements**: In a criminal case, under **RCr 7.26(1)** the Commonwealth has a duty to produce "not later than forty-eight (48) hours prior to trial…all statements of any witness in the form of a document or recording in its possession… unless good cause is shown." Yet, in the unreported case of ***Smith v. Comm*., 2012 WL 4222211 (Ky. 2012)**, during the cross-examination of the defendant, the prosecutor asked about a phone call the defendant had made with his mother while awaiting trial. The phone conversation was one of approximately 100 recorded phone calls that was given to the defense on a disc on the first morning of trial. At the bench conference, the Commonwealth stated that it had "just received" the phone calls "over the weekend," and the specific phone call was made approximately six days prior to trial. Relying upon the fact that the call was made only six days earlier, that the prosecutor had not received the calls until the weekend, and thus finding a lack of bad faith on behalf of the Commonwealth, the trial court gave defense counsel time (the case doesn't say how much time) to review the particular phone call in question and confer with the defendant. The Supreme Court found no abuse of discretion based upon these findings and held that the Commonwealth's explanation for the lack of notice given to the defendant prior to trial constituted good cause. A WestLaw® search of "good cause shown" + "RCr 7.26(1)"

will yield other cases where the Commonwealth's failure to provide witness statements were excused upon "good cause shown."

- **Untimely disclosure of confidential informant activity**:

  In *Little v. Commonwealth,* 553 S.W.3d 220 (Ky. 2018), a confidential informant was used by the Covington Police Department to make buys off of drug traffickers in order to "work off" her drug charges. Little purchased a total of five buys from the CI, all of them on audio and video tape. Little was convicted of five counts of Trafficking in a Controlled Substance and sentenced to 20 years. Prior to trial, the court had ordered the Commonwealth to disclose the identity of the CI to the defendant at least 48 hours before trial, pursuant to KRE 508. However, the Commonwealth was eight hours late in making this disclosure. On the morning of trial, Little moved to exclude the informant's testimony due to late disclosure, and this motion was denied.

  The Supreme Court held that "withholding the identity of a material witness until less than two days before a trial was unacceptable." However, Little was unable to articulate any specific prejudice from the late disclosure, and while "some measure of prejudice can surely be presumed," the Court did not regard the lateness in this case as substantial enough to compel a new trial, especially where the Commonwealth had provided Little with all the audio and video recordings of the controlled buys with the CI 11 months before trial.

- **Default Judgments.** From the civil side, a person seeking relief from a default judgment against them has to show three things to the satisfaction of the court:

  > "[a] party seeking to have a default judgment set aside must show good cause; i.e., the moving party must show '(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.' " *Id*. at 530-31 (***quoting Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S.W.2d 856, 859 (Ky. App. 1995)).**

1.9 Reasons to file a full-fledged, fully briefed motion at the beginning.

Often, the criminal defense attorney has to decide whether to file a full brief of motions and facts along with the motion, or whether to file a generic, bare bones motion. The idea of filing a bare bones motion is that putting down all the reasons in support in advance of the hearing may "tip off" the other side, who will then be able to tailor testimony and proof in the best light to defeat suppression. However, it is the rare instance where the criminal defense lawyer will want to file a minimalist brief. Here are the reasons that you will want to put your best arguments forward and in detail in the initial filing.

- **You cannot be certain you will get a second chance to brief. RCr 8.27(4)** provides that "[t]he court shall allow a party to file a brief in support of or in opposition to any such motion or objection, either in advance of the hearing, upon its final adjournment, or both." This rule uses mandatory "shall" language, but also uses the term "allow." What does that mean? It could mean that the court must allow the parties to file briefs before or after the hearing, or both, *as decided by the court*, or it may mean that the court must *allow the parties to choose* whether they will file before or after the hearing or both. It is unclear what is intended by the rule and there is no caselaw on the point. For this reason alone, it is probably a good idea to go ahead and file a full-fledged brief concurrently with the motion. If you file a bare bones brief, the Court may decide that the parties can only file one brief, before the hearing, and then you will have to file a full-fledged brief anyway, or risk not have the best caselaw arguments in a written submission. Or, the court may decide the motion *was* the brief, and foreclose you from filing anything more.
- **Facts have been developed.** The best reason is that you hopefully, by this time, already have a fully developed set of facts, statements by the witnesses that cannot be easily retracted at this point because they were placed in a police report or were stated on the record under oath. If these facts support suppression, the other side cannot easily argue them away.

- **First chance at persuasion.** If you have really good arguments, the court may read them and be persuaded before the other side has even had a chance to respond. Again, this is especially so when the facts of record are already solidified and cannot be easily changed.
- **Looks less like a fishing expedition.** Filing a bare bones motion can be interpreted as "this person does not yet have a concrete theory why the evidence should be suppressed, and is hopeful that something will come up in the hearing that they can use." Failing or refusing to file an initial full-blown brief may irritate the judge. Do not discount this possibility; some judges believe that if you have something to say, you should say it up front.
- **If you ask for additional briefing, you may get it.** Because you did the work early, and informed the court of the facts and law, if something comes up in the hearing that was not available when you wrote the initial brief, the judge may allow extra briefing, because you have already shown that what you have to say is important to the issues. On the other hand, if you filed a bare bones motion, the court may view this as an ask for a bailout for not having fully briefed it in the first place.

1.10 Reasons to file a bare bones motion at the beginning.

It should be the extremely rare case that a defense attorney ever files a bare bones motion. That said, there can be reasons to do so.

- **The other party is not locked into a version of facts.** The first and most important reason to file a bare bones motion is when: (1) the Commonwealth is not already locked into a set of facts that support suppression, either through discovery or testimony, and (2) the attorney is convinced that one or more of the witnesses will be untruthful about what actually happened and will conform their testimony to what best supports a lack of suppression. Where this is the case, the attorney should try other means to lock in the need facts through other means, including, perhaps, sending an investigator to talk to the witness. But in the end, if facts simply need to be more fully developed and that can only happen on the stand, you may have to file a bare bones motion.

- **You are filing a "me too" motion.** Maybe the co-defendant filed a full-fledged brief which covers everything, and you have little to add. You can join in and file a "me too" brief which incorporates by reference everything the other side said. While not an optimum piece of advocacy, it may suffice if you are in a time crunch, like currently in trial, and have to get something out quickly. Also, if a co-defendant filed a motion to suppress before you are ready, because you don't have the facts particular to your client's situation fully developed, a "me too" motion will allow you to develop facts at the hearing. Be sure to ask for permission to file a post-hearing brief, and be sure to inform the court that the reason you did not fully brief the issue is because the other side already filed it, and you were unable to fully brief the issue in time for the hearing.

1.11 What should go in a fully briefed motion?

The following should be in an initial fully briefed motion:

- **Preamble / Introduction**. This is where you specifically ask for suppression of specific evidence. Do not leave any evidence you want excluded out. If there are "fruits of the poisonous tree," meaning any evidence later found as a result of what was found during the illegal search and seizure, include that here as well.
- **Citation to both Federal AND State Constitutional authorities.** Be sure to cite not only the Fourth Amendment or Fifth Amendment of the United States Constitution, as applicable, but also Section 10 of the Kentucky Constitution (which guarantees security from search and seizure and specifies the conditions of the issuance of a warrant), and Section 11 (which guarantees that a defendant cannot be compelled to give evidence against himself). Although many cases have held in many instances that the rights afforded by the Kentucky Constitution go no further than the United States Constitution, other cases have granted more protection under the state constitution.
- **Statement of facts.** Avoid the rote recitation of meaningless facts that include the date arrested, the date indicted, etc. Speak only to the facts relating to search and seizure, or

illegally produced confession, and tell the client's story in the most persuasive prose of which you are capable.

- **Burden of proof.** Always remind the court up front that in the absence of a search warrant, a search or seizure is presumptively unreasonable, and cite the cases. Where there is a warrant, it is okay to remind the court that, as you have the burden, you get to go first.
- **Argument**. This is where the case law meets the facts. Make the most persuasive argument you can that the case law supports suppression.
- **Request to file a post-hearing brief.** Face it, you are unlikely to get a favorable ruling from the bench immediately after the hearing. Judges like to fully process what they have just heard before granting relief to a defendant so damaging to the prosecution that it may gut the case. Give the judge the benefit of hearing additional argument from you after the fact, especially if new facts (good or bad) pertinent to suppression were brought up for the first time during the hearing:

  Example: The Commonwealth premised the validity of the search on the "plain view" exception to the warrant requirement, but at the hearing, switched midstream to an "exigent circumstances" exception. To the extent you did not brief exigent circumstances cases in your initial brief, you will want the opportunity to do it here.

1.12 Applicability to Fifth Amendment Suppression and Line-Ups.

Up to now, the emphasis has been on the Fourth Amendment, and suppressing evidence that was illegally seized due to an unreasonable search. However, the Rules of Criminal Procedure are clear that they apply to motions to suppress illegally obtained confessions procured in violation of a defendant's *Miranda* rights, as well as motions to suppress witness identifications that are too suggestive.

- **RCr 8.27(5) Applicability of Other Rules.** Rules 8.14, 8.18 and 8.20 apply to the suppression of evidence of alleged confessions, of the fact or the alleged fruits of a search or seizure and of a purported identification made by an alleged witness.

1.13 The ethical impact of a rocket docket.

In theory, a rocket docket offer not only gives the defendant a better option than would likely occur if he went to court and lost (all offers should do that), it should represent a substantial discount off of the normal, typical offer for such offenses. In exchange, however, the defendant is giving up valuable discovery and investigation rights, as well as giving up significant time in which a better defense could have been developed.

- **What ethical rules are at issue?** At a minimum, the duties of competence and diligence are at play; these duties would seem to require at least a cursory examination of the possibility of suppression of evidence; on the other hand, also at play is the allocation of authority, which allows the defendant to decide whether to take a rocket docket offer, even if there has been insufficient time to investigate suppression.

  SCR 3.130(1.1) Competence: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

  SCR 3.130(1.3) Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

  SCR 3.130(1.2) Scope of Representation and Allocation of Authority between Client and Lawyer:

  > (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the**

lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. [Emphasis added.]

- **What does the case law say about accepting plea bargains without investigating the case first?** The duties of competence and diligence imply a duty to fully investigate a case before advising a client whether to accept or reject a plea offer, or whether to take the case to trial. In ***Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015),** the Kentucky Supreme Court held:

> While the duty to investigate is not absolute, a less-than-complete investigation may be supported only by a reasoned and deliberate determination that further investigation is not warranted. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. ***Strickland v. Washington*, 466 U.S. at 690–91, 104 S.Ct. 2052**.

Though unpublished and therefore not authority, look at what the Court of Appeals had to say in a case where a defendant was offered nine years to serve on a case which potentially could have resulted in 30 years at trial. The offer was for less than the defendant could have received had he gone to trial, lost and got the minimum on each charge, with concurrent time. Sound good? Well, in order to accept the plea, the defendant had to give up discovery rights. When later he appealed an attempt to withdraw his plea, and won, the Court of Appeals used the following language:

> …hastily accepted rocket docket plea offer…in a case involving violent sex offenses…
>
> Lured by the Commonwealth's offer of a lesser sentence and accepting the plea offer just thirteen days after his initial arraignment… without the benefit of any discovery, investigation, or meaningful exploration of possible defenses. ***Huddleston v. Commonwealth*, 2015 WL 3429379 (Ky. App. 2015)**, *unpublished.*

After remand, Huddleston's new counsel (who was the same counsel who had successfully appealed the case), was able to investigate the case and as a result ended up pleading the client to twelve months on a non-sexual misdemeanor charge, resulting in the client's immediate release. The outcome shows the perils of what can happen when a seemingly good rocket docket offer is accepted, but later investigation reveals that the case was not as strong as the Commonwealth would lead one to believe at the time of the making of the rocket docket offer.

- **How does the ethical attorney strike the balance?** So, how does one protect oneself, ethically, and the client, when a rocket docket offer is made and there is no opportunity to investigate the case to see if the offer is any good? The best that can be done may be along the following lines:
    - Do your best to evaluate whether this truly is a better deal than can normally be gotten.
    - Explain everything the client is giving up to the best of your ability.
    - Get as much discovery, do as much investigation as you can.
    - Put it all in writing for the client.
    - Put on the Record, in front of client, that you have not been able to investigate or participate in full discovery.
    - Note that you CANNOT pre-waive Ineffective Assistance of Counsel Motions (*U.S. v. KBA*, 439 S.W.3d 136 (Ky. 2014).

Chapter 2: Conducting the Hearing

"In life, you throw the first punch, you don't get punched first.
It's the same on defense:
You've got to hit first. Do your work early.
That's what I was always taught.
If you don't do your work early, you're done."

Draymond Green, Golden State Warriors

In the ideal suppression hearing, the relevant facts supporting suppression should already be known and established in a way that they cannot be easily, if at all, refuted. The hearing should be where the judge gets to hear what the parties already know has happened, even if the parties disagree on the legal significance of those facts. In the best case scenario the defense attorney does not have to develop facts in addition to those which are already of record from preliminary hearing or other hearing transcripts, police reports, or witness statements.

2.1 Right to a Hearing.

Kentucky RCr 8.27(2) states that in a suppression hearing "[t]he court ***shall*** conduct a hearing on the record and before trial on issues raised by a motion to suppress evidence. No jury and no prospective juror shall be present at any such hearing." [Emphasis added.]

RCr 8.22 provides for hearings, generally, that:

> A pretrial motion raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue, but no such determination shall be deferred if a party's right to appeal is adversely affected. An issue of fact shall be tried by a jury if a jury trial is required, by law. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

2.2 The burden of proof falls upon the party who would lose were there no evidence adduced at the hearing.

The Kentucky Rules of Criminal Procedure are silent with regard of who has the burden of proof in a suppression hearing. However, RCr 13.04 provides that "[t]he Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal procedure. In turn, Kentucky CR 43.01 provides the following:

(1) The party holding the affirmative of an issue must produce the evidence to prove it.

(2) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

The origin of these two principles is from old case law. As stated in *Moss v. Mittel*, 69 S.W.2d 1046 (Ky. 1934), "[t]he burden of proof, and the right to the closing argument, is upon the party who will be defeated if no evidence is given. *Johnson v. Liggett's Adm'r*, 13 Ky. Law Rep. 831; *Kahn Bros. v. Simons*, 14 Ky. Law Rep. 201; *Monarch v. Carter*, 49 S. W. 953, 20 Ky. Law Rep. 1765."

From these two principles, the below rules are established.

2.3 The burden where there is a search or seizure without a warrant is on the Commonwealth, which will lose if there is no evidence adduced at the hearing.

Warrantless searches area *per se* unreasonable. Under CR 43.01, the defense would have the burden of filing the motion and asserting that the search and seizure was unreasonable, but once the motion is filed, the defense has the benefit of a presumption of unreasonableness which the Commonwealth then has to rebut. Given the presumption, were no evidence to be adduced from either party, then the Commonwealth would be defeated by the presumption. "No right is held more sacred, or more carefully guarded, by the common law, than the right of every individual to the possession and control over his own person[.]" *Brooks v. Commonwealth*, 488 S.W.3d 18, 21 (Ky. Ct. App. 2016), *as modified* (Apr. 15, 2016), *referencing Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968). For this reason,

warrantless searches are presumed unreasonable unless they fall within a clearly defined exception to the warrant requirement. *Katz v. U.S.,* 389 U.S. 347, 356–357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

See also *Com. v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003):

> The Commonwealth bears the burden to demonstrate that exigent circumstances were present justifying the warrantless entry. *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409, 413 (1970). "It is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant." *Cook v. Commonwealth*, Ky., 826 S.W.2d 329, 331 (1992). The Commonwealth also carries the burden to demonstrate that the warrantless entry into the McManus and Keister residence falls within a recognized exception. *Gallman v. Commonwealth*, Ky., 578 S.W.2d 47, 48 (1979).

- **Even "Terry" stops are presumed unreasonable.** Note the above cite to *Terry v. Ohio*; this means that the presumed unreasonableness applies regardless of whether it is a home or residence being search (for which there must be "probable cause" to search), or whether it is a stop of someone's automobile or person (which requires the lesser standard of "reasonable articulable suspicion that criminal activity is afoot)."
- **The burden of proof upon the Commonwealth has been described as a "heavy" burden.** *See Goodwin v. City of Painesville*, 781 F.3d 314 (6th Cir. – 2015).
- **There is never a reason for the criminal defense attorney to worry that a motion to suppress a warrantless search would be regarded as a frivolous motion. It is ethical to require the Commonwealth to prove that the facts and law support a valid exception to the warrant requirement.** Lawyers defending a criminal case may always put the Commonwealth to their burden. **SCR 3.3.130(3.1)** provides:

> A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. **A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established**.
> [Emphasis added.]

2.4 The burden when there is a search warrant is on the defense.

On the other hand, the Commonwealth has the advantage of a presumption of reasonableness once a warrant is procured from a judge. Both the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution set forth the express terms under which a search is valid. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Likewise, Section 10 of Kentucky's Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Substantively, the two provisions are identical, and in fact, have been interpreted by the Kentucky Supreme Court as providing nearly identical protection:

> The language of Section 10 of the Kentucky Constitution varies from the Fourth Amendment only in that it replaces the word *effects* with the word *possessions*.

> This Court has previously held that no substantial difference results from this variation in language.5 So this Court looks to the United States Supreme Court's interpretation and application of the Fourth Amendment for guidance in construing Section 10. *Commonwealth v. Reed*, 647 S.W.3d 237, 243 (Ky. 2022)

Thus, a warrant that allows the government to search for and seize the personal effect or possessions of a person that falls within the parameters of the Constitutions will be deemed sufficient security of the people's right to be secure. By the terms of the Constitutions, in order to attack the validity of a search issued under such a warrant, the defense must prove at a hearing at least one of the following:

- The affidavit was not sworn to or made under oath or affirmation;
- The affidavit was sworn to or made under oath or affirmation, but contains falsities pertinent to the issue of probable cause, and was done so with intentionality or recklessness with regard to the truth;
- The affidavit was sworn to or made under oath or affirmation, and the information therein is truthful, but it is insufficient to support probable cause to search;
- The affidavit was sworn to or made under oath or affirmation, contains truthful information, establishes probable cause to search, but the search went beyond the scope of what the warrant allowed.

As described in *Blane v. Com*., 364 S.W.3d 140, 146 (Ky. 2012), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015), "[w]hen an affidavit supporting a search warrant is challenged, it is presumptively valid… [citation omitted.]

The challenger must allege deliberate falsehood or reckless disregard for the truth, "and those allegations must be accompanied by an offer of proof…" [citation omitted]. If the challenger establishes this by a preponderance of the evidence, "and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks v. Delaware,* 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

2.5 The Defendant may have to testify, but doing so does not waive privilege or open up the Defendant to inquiry into other unrelated matters.

Even if the Commonwealth has the burden of proof and must go forward with evidence, the Defendant may have to testify. For instance, if the state's argument is that the Defendant consented to a warrantless search, the Commonwealth will have to adduce evidence that consent was freely given. After a police officer testifies that consent was given, and states into the record the words used by the officer and the Defendant which constitute consent, the defense attorney can argue to the court that the words do not show consent as a matter of law. However, if the Court disagrees, or if the Defendant says that he or she never uttered those words (or the police never asked), then the Defendant will have to testify.

> **Practice Tip:** Although KRE 104(d) is plain in its language, there have been occasions when a prosecutor has argued, successfully, that failure to claim this rule prior to the testimony waives the rule, and in any event, if the Defendant strays outside the scope of the preliminary matter, both KRE 104 and the Fifth Amendment have been waived. Defendant must be very careful in direct examination not to go outside the scope of the suppression facts.

Under KRE 104(d), "[t]he accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case." Although many practitioners are reluctant to put a defendant on the stand, this is an opportunity to see how your client performs under cross-examination, and may guide your advice and the client's decision whether or not to testify at trial.

2.6 Brush up on your impeachment and substantive use of prior statements skills.

Ideally, during any hearing the defense counsel will have available a transcript of the grand jury, the preliminary hearing, plus any other hearing (bail?), as well as the police officer's police report, and an affidavit of a warrant, if this was not a warrantless search. This is the opportunity to flip the Miranda script, and use anything the police officer has ever said against him in a court of law.

However, all impeachment does is impact the credibility of the witness. To get the substantive use, remember to claim and then lay the foundation for a "prior inconsistent statement" from KRE 801(a):

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony;

The difference lies in how the Court of Appeals (or Supreme Court) will review the record to see if the trial court made erroneous findings of facts. Prior inconsistent statements are evidence, whereas impeachment is not.

Chapter 3: Search Warrants: The Facial Challenge

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. 4.

All searches conducted without a validly issued warrant are unreasonable, unless shown to be within one of the exceptions to the warrant requirement. *Cook v. Commonwealth,* 826 S.W.2d 329, 331 (Ky. 1992). Both Federal and State Constitutions contain a nearly identical "warrant clause" which sets forth the technical requirements necessary for a valid warrant. U.S. Const. Amend. IV Ky. Const. Sec. 10.[1] Those technical requirements include the following: 1) a sworn oath and affirmation; 2) probable cause; and 3) necessary particularity as to the place to be searched or the thing to be seized.

3.1 Oath & Affirmation.

Typically, a search warrant will contain along with it one or more affidavits, where the affiant officer will swear under oath that they believe the facts contained in those affidavits are sufficient to establish that probable cause exists to believe both that the items sought are in fact evidence of criminal activity and that those items are presently located at the place to be searched. A facial challenge to a search warrant is exactly that, a challenge that the warrant and its accompanying affidavits, on their face, lack either probable cause or the necessary particularity to have been executed in the first place.

[1] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized*." U.S. Const. Amend. IV. Likewise, our State Constitution that "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; *and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation*. **Ky. Const. Sec. 10.**

You may hear a facial challenge of a search warrant referred to as a "four-corners" challenge. This is because the issuing judge and Court are bound by the four corners of the warrant and affidavit in making their determination as it pertains to probable cause or particularity. No extrinsic evidence can be used to supplement the basis for the search beyond what is contained therein. *Commonwealth. v. Pride*, 302 S.W.3d 43 (Ky. 2010); *Commonwealth v. Hubble*, 730 S.W.2d 532 (Ky. Ct. App. 1987). Even if the officer was in the possession of information or evidence that could have validated the warrant at the time they petitioned the issuing Court, such information or evidence cannot remedy an otherwise facially deficient search warrant if it was not contained in the four-corners of the warrant application. [2]

3.2 Probable Cause

Probable cause exists for the issuance of a search warrant if there is a fair probability, under the totality of the circumstances, that contraband or evidence of criminal activity will be found in the place to be searched. *Moore v. Commonwealth*, 159 S.W.3d 325 (Ky.2005) (quoting *United States v. Murphy*, 241 F.3d 447, 457 (6th Cir.2001); *United States v. Shamaeizadeh*, 80 F.3d 1131, 1136 (6th Cir.1996); and *United States v. Finch*, 998 F.2d 349, 352 (6th Cir.1993)). Probable cause is both an arbitrary line and a notoriously low standard, and Court's will never be able to delineate a tangible threshold for what constitutes a "fair probability" across the board. No two cases are the same, it is never that straightforward, and in the context of a search warrant each and every case demands a fact-specific analysis. However, consider some of the following as guidance for what may or may not satisfy probable cause:

- Shared Vehicle. In *Maryland v. Pringle*, the passenger in a vehicle containing three men and five plastic baggies of cocaine, accessible to all three men, challenged his arrest under the theory the police lacked probable cause. *Maryland v. Pringle*, 540 U.S. 366, 368 (2003) (see also *Com. v. Mobley* for similar facts, rationale, and outcome from the Supreme Court of Kentucky. *Com. v. Mobley* 160 S.W.3d 783 (Ky.2005)). The Court

[2] However, do keep in mind that if what is contained in the four-corners of the warrant is deemed to be insufficient for probable cause, but the prosecutor asserts the good-faith exception, they will be providing an explanation for why the evidence should not be suppressed for reasons that exist outside of the four-corners of the warrant and its affidavit. (see section 3.4).

thought it an "entirely reasonable inference" that any, or all three, of the occupants had knowledge of, and could have exercised dominion and control over the cocaine, and thus, a reasonable officer could conclude that there was probable cause to believe the challenging passenger committed the crime of possession of cocaine. *Id* at 371. In *Pringle*, a 33.33% chance the cocaine belonged to the accused was deemed to be sufficient for probable cause.

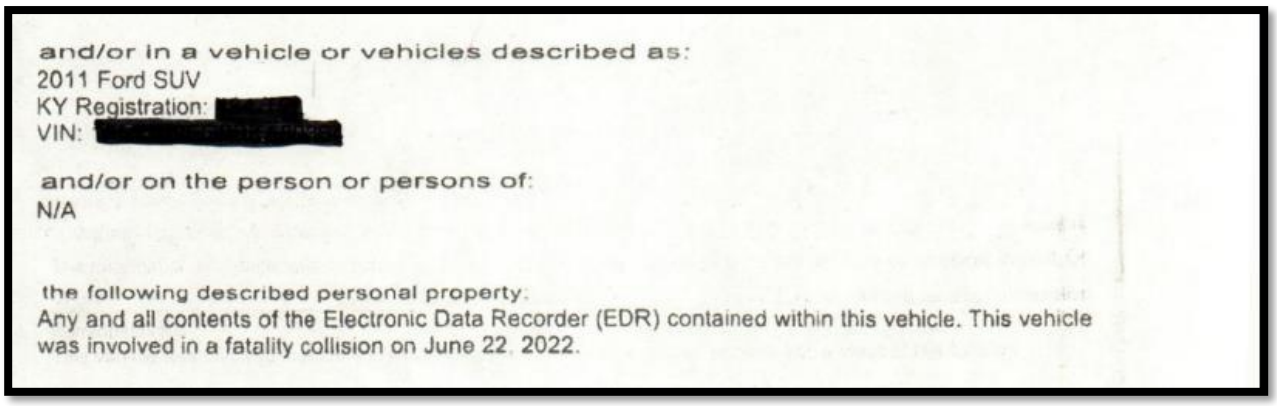
- Anonymous Tip. Would an anonymous tip contribute to a finding of probable cause? Maybe, if the anonymous tip contains information which has indica of reliability or components that can be independently corroborated by police observations. *Henson v. Commonwealth*, 245 S.W.3d 745 (Ky.2008); *Alabama v. White,* 496 U.S.325 (1990).
- High Crime Area. How about being in a "high crime area"? Alone, no, but such information, when combined with other purported evidence of wrongdoing, can give rise to reasonable suspicion, and enough reasonable suspicion can give rise to probable cause. *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000); *Com. V. Banks*, 68 S.W.3d 347 (Ky. 2001).

Upon presentation of affidavit seeking a warrant, the "task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him (or her), including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Beemer v Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984). This is aligned with the "totality of the circumstances" approach adopted by The United States Supreme Court in *Illinois v. Gates*. *Illinois v. Gates*, 462 U.S. 213 (1983). In *Com. v. Pride*, the Kentucky Supreme Court, applying the "totality of the circumstances" test adopted by our state in *Beemer*, affirmed a ruling whereby a circuit judge found that although each and every element contained in the affidavit was individually inadequate for probable cause, since the collective asserted a substantial basis for the conclusion probable cause existed, the warrant was proper. *Com. v. Pride,* 203 S.W.3d 43 (Ky.2010).

To search a place, probable cause needs not only exist that a crime was committed, but additionally that evidence of that crime will exist in the place to be searched. For example, *Guth*

v. Commonwealth, the affidavit in support of a warrant for the mobile home of Darain Guth stated "Darian Guth sell a eight ball of cocaine to Jeff Sullivan for $200.00. The transaction was made in a controlled environment and observed by Officers Kevin Johnson and Sam Davidson, and Randy Rader." [*sic*] *Guth v. Com.* 29 S.W.3d 809, 810 (Ky.App.2000). As is evident, the affidavit failed to specify where the drug transaction occurred, but in truth the case would suggest the transaction was purported to have taken place in a motel parking lot miles from Mr. Guth's residence. *Id* at 810. Accordingly, even though the officer had claimed to personally have seen Mr. Guth sell drugs in a motel parking lot, there was no probable cause asserted that evidence of that crime would be located at Mr. Guth's mobile home, the affidavit for search warrant lacked probable cause to search that mobile home. *Id* at 810.

Example of a warrant lacking in probable cause:


and/or in a vehicle or vehicles described as:
2011 Ford SUV
KY Registration: [redacted]
VIN: [redacted]

and/or on the person or persons of:
N/A

the following described personal property:
Any and all contents of the Electronic Data Recorder (EDR) contained within this vehicle. This vehicle was involved in a fatality collision on June 22, 2022.

In order for law enforcement to properly seize a thing, probable cause need exist 1) that a crime occurred; **and** 2) that the thing to be seized is evidence of that crime. In *Arizona v. Hicks*, the police responded to a call that a bullet was fired though the floor of an apartment, striking and injuring its occupant. 480 U.S. 321 (1987). The police arrived to search for evidence of the crime and an officer physically moved a turntable to continue searching the apartment for evidence of the shooting. *Id*. The officer was informed after calling into headquarters that the turntable he moved to get the serial numbers was evidence of an unrelated robbery, and then seized the turntable. *Id.* However, at the time the officer first seized the turntable it was not evidence of the shooting for which the officer was conducting a search of the apartment, rather it was evidence of an unrelated robbery. The officer's physical movement of the turntable to get the serial numbers constituted a search, which was unauthorized since the officer was there

to search the apartment for evidence of a shooting, not a robbery; the turntable was suppressed and excluded from evidence in the robbery case. *Id*.

Despite the low bar that is probable cause, it is always worth assessing the warrants in your discovery to ensure they would survive a facial challenge. In March of 2023, the United States Department of Justice released a report on their findings from a lengthy investigation into the Louisville Metro Police Department. The DOJ reviewed a sample of warrant applications by LMPD from 2016 to 2021 and concluded that their search warrant applications *frequently* lacked the specificity and detail necessary to establish probable cause for the search. [3] Consider the following excerpt from the report:

> For example, LMPD obtained a search warrant for a white man and his home without identifying any probable cause for the search. The officer used a standard warrant application that includes checkboxes to identify the probable cause for conducting a search. One option is "Other," and provides blank lines for an officer to explain any probable cause reasoning that does not fit into a standard category. This officer checked "Other" but left the lines next to it blank. He provided no other reason for probable cause. The court issued the search warrant anyway.[4]

In other words, the warrant and its affidavit were entirely blank, completely void of any assertion to support the existence of probable cause, and the reviewing judge signed and issued the warrant regardless.

3.3 Particularity

The third technical requirement of a lawfully issued search warrant is that the warrant and its affidavit particularly describe the place to be searched or the persons or things to be seized. The requirement for necessary particularity is most closely tied to the original purpose of the founders for introduction of the Fourth Amendment, to prevent the execution of general

[3] United States Department of Justice Civil Rights Division, "Investigation of the Louisville Metro Police Department and Louisville Metro Government" at 23. https://www.justice.gov/opa/pressrelease/file/1573011/download

[4] *Id* at 24

warrants. *Stanford v. State of Texas*, 379 U.S. 476, 480 (1965). The Fourth Amendment, in fact, was the founding generation's response to "general warrants" which allowed British Officers to rummage through homes in unrestrained searches for evidence of criminality. *Riley v. California*, 573 U.S. 373, 403 (2014). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. U.S.*, 275 U.S. 192 (1927).

It is paramount that a search warrant includes the necessary particularity as to the thing to be seized or the place to be searched. Consider the following scenarios:

- "Illegal Contraband." In *Crum v. Com*, a Kentucky State Trooper took out a search warrant for the defendant's home, but only described the evidence to be seized as only "illegal contraband**." 223 S.W.3d 109, 112 (2007).** The search itself revealed two-three pounds of marijuana. *Id* at 109. When considering the motion to suppress, the Court found that description to be facially deficient, because the term "illegal contraband" did not sufficiently describe the thing to be seized. *Id* at 112. Illegal contraband could mean any number of things: drugs, stolen property, a murder weapon, etc. Accordingly, the warrant was the equivalent of a general warrant in that it permitted unrestrained searches for evidence of criminality, and the marijuana seized needed to be suppressed.
- Multiple Occupancy Structure**.** For further demonstration, there is a general rule that a search warrant directed against a multiple-occupancy structure will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of other units. *Com v. Smith*, 898 S.W.2d 496 (Ky. App. 1995). Consider *Williams v. Commonwealth*, which invalidated a warrant describing the place to be searched as "the Ewen Hotel in Jackson Kentucky, now used and occupied by Morris Williams for hotel purposes" when many of the rooms were actually occupied by renters not the target of the search. *Williams v. Commonwealth*, 261 S.W.2d 416 (1953).
- Street Number. However, the Court reached the opposite conclusion in *Mcloud v. Com.*, where the home to be searched was described as "460 Claggett Road", but the defendant's home was in fact "456 Claggett Road." *McCloud v. Com.*, 279 S.W.3d 162

(Ky. App. 2007). In that case, the Court determined that the mistake in address was insufficient to invalidate the warrant, as it otherwise reasonably described the place to be searched as follows "Beginning at the Grayson County Courthouse, Public Square, Leitchfield, travel West on Highway 54 for 3.7 miles, turning right onto Claggett Road travel north 4.10ths of a mile. There are two mailboxes one numbered 424 and 460. Turn right into a gravel driveway and stay to the left for a 1/10th of a mile ending at the first trailer on the right." *Id* at 456. In sum, the particularity requirement is satisfied when the description in the search warrant enables the officer executing the warrant to identify the place to be searched with reasonable effort. *Duff v. Com*., 464 S.W.2d 264 (Ky.1971); *Com. v. Smith*, 898 S.W.2d 496 (Ky.App.1995).

Section 3.4 The Good Faith Exception

Practice Tip:

Have a plan for how to address the Good Faith Exception before you file your motion. Don't forego a motion because you worry about overcoming the exception but be sure to have the work done prior to the hearing, because if you are successful initially, the odds are this will be raised to try and save the evidence from suppression at trial.

Generally, there exists four situations where suppression remains the appropriate remedy for an unlawfully issued search warrant: 1) the affidavit failed to describe with particularity the place to be searched or the thing to be searched [5]; 2) the warrant includes false or misleading information[6]; 3) the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and 4) abandonment by the judge of their detached and neutral role. In 1984 the Supreme Court of the United States held that the United States Constitution, does not, per se, require suppression of evidence obtained in violation of the of the Fourth Amendment. In doing so, the Court recognized a "good-faith exception" to the exclusionary rule whereby evidence obtained unlawfully but done so by an officer who reasonably relies upon a warrant authorized by a detached and neutral magistrate is not subject to exclusion from trial. *U.S. v. Leon*, 468 U.S.

[5] (see Part I, Section 3.3)
[6] (see Section 3.6)

897, 924 (1984). The good faith exception is used broadly in response to Fourth Amendment challenges to an illegally issued search warrant.

The remedy of suppression, unfortunately, is not a creature of constitutional interpretation, but instead, "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, (1974); *Young v. Commonwealth*, Ky., 313 S.W.2d 580 (1958). The theory behind the good-faith exception is that there is no such deterrent effect on future police misconduct when the warrant would not have been issued but for judicial error: "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law, and penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon* at 921. In other words, if the judge approved the warrant's execution, it is not the officer's fault for then executing the warrant.

The Kentucky Supreme Court has also ruled that if the prosecution intends to rely on the good-faith exception, the trial court may consider matters outside of the four-corners of the search warrant and its affidavit in order to determine if the officer truly acted in good faith. *Moore v. Commonwealth*¸159 S.W. 325 (Ky. 2005). Accordingly, if the prosecutor intends to rely on the good-faith exception, they will seek to introduce non-evidentiary proof which is not contained in the warrant, including that the officer followed standard operating procedures, sought the approval of a prosecutor or in-house counsel before petitioning the Court, or maybe they just have had so many warrants signed in their careers that shouldn't have been that they never could have known any better.

The good-faith exception is perhaps more accurately referred to as the objectively reasonable conduct doctrine. To quote the Kentucky Supreme Court, "there is a popular but erroneous belief that the *Leon* Court eviscerated the exclusionary rule when the evidence is obtained pursuant to a search warrant." *Crayton v. Commonwealth*, 846 S.W.2d 684, 687-688 (1992). The *Leon* opinion, if read for what it truly is, instead provides concrete situations where

suppression and exclusion remain the appropriate remedy despite prior judge approval. "The Court imposed a standard of objective reasonableness on police activity and retained the suppression remedy when police conduct falls below that standard." *Crayton* at 688 (citing *Leon* at 922-924).

If a reasonable officer executing the search warrant would not have believed the affidavit was lawfully issued, the good-faith exception does not apply. Affidavits that are so lacking in indicia of probable cause have come to be known as "bare bones" affidavits. *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005). Such affidavits merit suppression. *Leon*, 468 U.S. 897 at 921. Put differently, a bare-bones affidavit is an affidavit that "states only the affiant's belief that probable cause existed." *United States v. Williams*, 224 F.3d 530, 533 (6th Cir. 2000). For example, the blank warrant addressed by the Department of Justice in section two of this chapter would constitute a warrant so lacking in indicia of probable cause to mean it's reliance wholly unreasonable, or a bare-bones warrant, and therefore, the prosecution would be unable to rely on the good-faith exception. In *Hensley v. Commonwealth*, a search warrant was issued in reliance on an affidavit containing only the following (248 S.W.3d 572, Ky.Ct. App. 2007):

> On the 5th of September 2004, at approximately a.m./p.m., affiant received information from/observed: Received [sic] several complaints of possible production of methamphetamine.
>
> Acting on the information received, affiant conducted the following independent investigation: on Sunday, September 5th 2004 this officer and Brian Reams to the residence. Upon speaking to the woman you could smell a strong smell of ether" *Hensley*, 572 at 575.

In sum, the officer purported to have received several claims of possible production of methamphetamine, and additionally to have visited the residence, and claimed to experience a strong smell of ether while present. The Court went on to consider, and reject, the application of the good-faith exception, and suppressed the evidence, citing specifically the "grossly deficient" affidavit of the police officer.

Section 3.5 Neutral and Detached

Finally, if the judge or magistrate is to have abandoned their detached and neutral role than the prosecution cannot rely on the good-faith exception. Consider the following:

- The Judge Who is Not Actually Neutral. In *Com. v. Brandenburg*, a Lee County police officer, with the assistance of a Lee County Commonwealth Attorney, prepared and submitted a warrant and affidavit for the search of the home of a defendant to a trial commissioner, the trial commissioner being married to a victim's advocate employed with the Lee County Commonwealth attorney's office. *Com. v. Brandenburg* 114 S.W.3d 830, 831 (2003). The trial commissioner authorized the execution of the warrant, and the defendant filed to suppress the evidence of the warrant, alleging that the trial commissioner's relationship meant that she was not so neutral and detached. *Id* at 831. The Supreme Court of Kentucky held, based solely on the appearance of impropriety created by the relationship between the trial commissioner and an employee of the Commonwealth Attorney's Office, that the trial commissioner did not exhibit neutrality and detachment and the evidence recovered from the search need be suppressed. *Id* at 835.
- The Judge Assists in the Warrant Preparation. Another way by which a presiding magistrate can loose their status as neutral and detached is when they assist not only in the issuance of the warrant, but also the process of gathering evidence for its application. In *Lo-Ji Sales, Inc. v. New York,* a New York State Police Officer determined two reels of film violated the state's obscenity laws and thereafter took them to the Town Justice to determine whether or not there existed cause to believe the store which sold the films should be charged. *Lo -Ji Sales, Inc. v. New York* 442 U.S. 319 (1979). The Town Justice viewed the films in their entirety, concluded they were obscene, and then signed a warrant authorizing a search be performed at the store to be charged. *Id* at 321. The defendant's motion to suppress the evidence of that search was ultimately granted as the "local justice here undertook to telescope the processes of the application for a warrant, the issuance of the warrant, and its execution." *Id*

The need for a lawfully issued warrant provides for the detached scrutiny of a neutral and detached magistrate which is a more reliable safeguard against improper searches than the hurried judgement of law enforcement. For that reason, it is crucial that the reviewing magistrate actually be neutral and detached from the case in which a warrant is sought.

Section 3.6 Franks Hearings

So, it appears that the police followed the proper procedures outlined in the previous section and went and got the warrant, but what if they lied, what options do I have to challenge it?

Franks v. Delaware, 438 U.S. 154 (1978) provides the procedure by which a challenge can be mounted to a warrant affidavit that appears on its face to be valid. However, successful challenges pursuant to Franks are rare, but that shouldn't prevent you from trying. The following sections will address the 3 categories of challenges that can be made: 1) lies in the warrant; 2) support for search warrant obtained by illegally obtained evidence; 3) executing warrant before it is signed/getting a warrant to cure an already served but deficient warrant

In *Franks*, officers attributed statements to two individuals who later were prepared to testify to not being interviewed by the officers as stated in the affidavit and that the statements attributed to them in support of the warrant were "somewhat different" than statements they provided to different officers. Id. at 158. The Court in Franks held:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of a reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that this claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent

> mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, and the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at the hearing is, of course, another issue." (Id. at 171-172).

The first requirement under *Franks* is that there must be allegations of deliberate falsehood or of reckless disregard for the truth and must be accompanied by an offer of proof. Id. An allegation alone is not sufficient. After that preliminary showing is made, you must demonstrate that without those statements the remaining portion of the warrant does not support a finding of probable cause in order to get the *Franks* hearing.

Practice Tip:

Example of a clear Franks Issue:

Breonna Taylor Warrant – Detective Jaynes goes to Judge for warrant including information about target of the warrant receiving packages at Taylor's apartment. Jaynes affidavit in support of the search warrant says information was verified by postal inspector and that Taylor's car had been parked in front of target's house several times. Postal inspector subsequently says there was never any information provided to Det. Jaynes.

Obviously, this case is different in that the information came to light only after national attention brought on by Breonna Taylor's tragic death. It should serve as a reminder to investigate all information contained in the affidavit, what can be verified? How do you verify it? Who can verify it? alleging lies in the warrant.

Kentucky requires defendant attacking the fruit of a search warrant based on the premise that the information supplied to the issuing magistrate is inaccurate, he must move the trial court to suppress the evidence in a hearing required by RCr 9.78, (now RCr 8.27). At that hearing, the defendant is required to show that: (1) the affidavit contains intentionally or recklessly *false* statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. *See Commonwealth v. Smith,* 898 S.W.2d 496, 503 (Ky. 1995)(*citing*, *Franks v. Delaware*, 438 U.S. 154 (1978)).

Proving the affidavit contains intentionally or recklessly false statements can be difficult as the cases below demonstrate:

- Allegation that detective stating that the target had prior convictions when in reality there was felony vehicular offense and promoting contraband along with omitting that the CI was a drug addict that provided information for an "implied" offer of immunity was insufficient to mount a successful Franks challenge. *Lovett v. Commonwealth*, 103 S.W.3d 72, (Ky. 2003).

Chapter 4: Search Warrants: Execution and Specific Issues

Like search warrant applications, search warrant executions are governed by the Fourth Amendment. Unfortunately, circumstances are limited when you will have the ability to suppress evidence based on police failure to correctly execute a search warrant. This part will address those circumstances.

4.1 Exceeding the Scope of the Warrant

A Motion to Suppress may be warranted in a case when the police, though purportedly acting pursuant to a warrant, conducted a search or seizure outside of the scope of that warrant. A search warrant, pursuant to the Fourth Amendment, must "particularly" describe the place to be searched and the persons or things to be seized.

Section 10 of the Kentucky Constitution contains a similar provision, stating that "(n)o warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be..." A search warrant "must contain such a description of the place, person or thing to be searched or seized as will reasonably identify them." *Williams v. Commonwealth*, 261 S.W.2d 416, 417 (Ky. 1953).

General searches are prohibited. Also prohibited is the "seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Berger v. New York*, 388 U.S. 41, 58 (1967) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

"If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional" and the evidence excluded. *Horton v. California*, 496 U.S. 128, 140 (1990).

If the warrant does not cover the search or seizure, the issue is ultimately analyzed as though the police conducted that search or seizure without a warrant. See Chapters X, Y, and Z, for specific justifications for a warrantless search or seizure.

However, an otherwise valid search is transformed into an impermissible general search only where the searching officers demonstrate a "flagrant disregard for the limitations of a search warrant[.]" *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985).

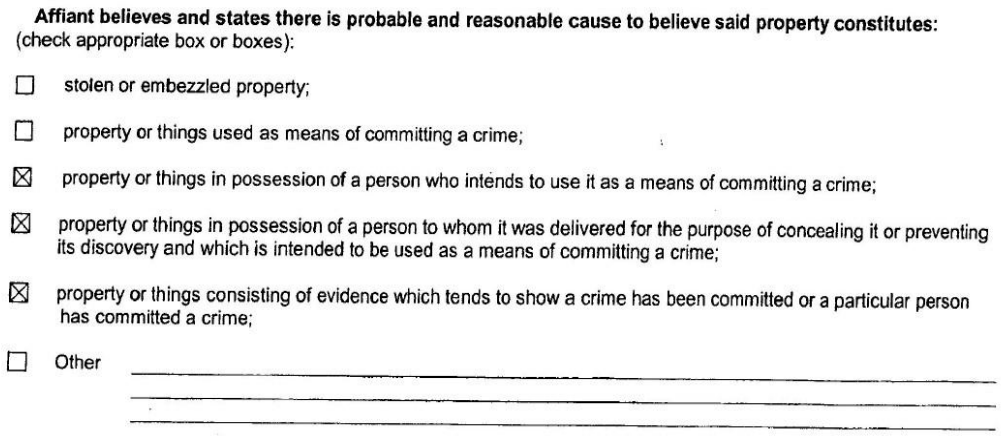
Searching persons or places not specifically described in the warrant:

Officers often use generic language in warrants to try to encapsulate additional people or places. In *Johantgen v. Commonwealth*, 571 S.W.2d 110 (Ky. 1978), the Kentucky Supreme Court considered whether "language in [a] warrant commanding the search of 'any other person present believed to be involved in the illegal use of, possession of, or trafficking in controlled substances' sufficient to cover the search" of an individual who arrived at the residence being searched during the execution of the warrant, as the passenger in the target of the warrant's car. This language was *not* sufficient to cover that person. The court concluded that the contraband found on that person should have been suppressed.

In *Evans v. Commonwealth*, 116 S.W.3d 503 (Ky.App. 2003), Officers obtained a warrant for Evans's apartment to search for "[c]ocaine, notes, letters, writings, documents, recordings, photos, monies, drug paraphernalia, or whatever type drug, presence of which may tend to indicate the illegal use of, possession of, or trafficking in a controlled substance[.]" *Id.* at 505. While searching, the officers found a locked fireproof safe and pried it open. Evans moved to suppress the illegal drugs and the digital scales found in the safe on the basis that the safe did not fall within the scope of the warrant. The Kentucky Court of Appeals affirmed the trial court's denial of Evans's motion to suppress. Pivotal to the *Evans* decision was the reasonableness of the officer's action. "It [was] obvious that the contraband specified in the search warrant could fit inside the safe and it was reasonable for the officers to search inside the safe for such contraband." *Id.* at 507.

Searching a person or place for items not specifically described in the warrant:

AOC's search warrant form itself ensures that police routinely do not specifically name the evidence they seek to find. Much of the analysis of the scope of the search, then, has to happen in combination with the specifics of the affidavit.



Affiant believes and states there is probable and reasonable cause to believe said property constitutes: (check appropriate box or boxes):

- ☐ stolen or embezzled property;
- ☐ property or things used as means of committing a crime;
- ☒ property or things in possession of a person who intends to use it as a means of committing a crime;
- ☒ property or things in possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;
- ☒ property or things consisting of evidence which tends to show a crime has been committed or a particular person has committed a crime;
- ☐ Other _____

The Supreme Court of Kentucky, in *Crum v. Commonwealth*, analyzed a warrant that described the location to search with particularity but described the object of the search only as "illegal contraband." *Crum v. Com.*, 223 S.W.3d 109, 112 (2007). The Court noted, "Failing to state what the object of the search is amounts to requesting permission to go on a fishing expedition." *Id.*

In *Lundy v. Commonwealth*, 511 S.W.3d 398 (Ky.App. 2017), a search warrant was issued permitting law enforcement officers to search premises described as a "[t]an metal building with attached garage and awning with red metal roof and out building." The warrant authorized the officers to seize "firearms and ammunition, firearm accessories, shell casings, projectiles, wine bottles and any blood evidence."

The officers in that case, after finding the firearm they wanted, searched (1) a locked freezer in the attached garage, and (2) an outbuilding approximately five parking spaces away from the garage. They found marijuana in both locations. The Court of Appeals held that the warrant issued to search the premises authorized officers to search for "firearms and ammunition, firearm accessories, shell casing, projectiles, wine bottles and any blood evidence" in the home, garage, and outbuilding. The items specified in the warrant were small in size and the officers were authorized to search anywhere those items might reasonably be found and

unlock anything that might contain those items. That the officers in *Lundy* found and seized marijuana instead of what they were looking for didn't matter to the Court of Appeals.

4.2 The Knock and Announce Requirement

Officers executing a warrant generally may not force themselves into a home without first knocking, announcing their identity and purpose, and waiting a reasonable amount of time for the people inside to let the officers into the home.

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the United States Supreme Court held that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. *Id.* at 933. The knock and announce rule has three purposes: (1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities. *Id.*

The Court in *Wilson* also noted that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, and left up "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Id.* at 936. Following *Wilson*, courts consistently acted to limit the knock-and-announce rule.

In *Hudson v. Michigan*, 547 U.S. 586 (2006), though, the United States Supreme Court held that a violation of the Fourth Amendment requirement that police officers knock, announce their presence, and wait a reasonable amount of time before entering a private residence not require suppression of the evidence obtained in the ensuing search.

Given the increased scrutiny on no-knock entry and the significant cost that failure to follow the knock and announce rule brings, it may be worth challenging the conclusions of *Hudson v. Michigan* – particularly if you can point to how, in your case, the lack of a proper knock and announce led directly to the evidence you seek to suppress.

4.3 No Knock Warrants

In 2021, in response to the Louisville Metro Police Department's killing of Breonna Taylor, the Kentucky state legislature passed a statute which severely limited the circumstances under which judges could authorize "no knock" warrants.

That law is codified in KRS 455.180, 455.190, and 455.200.

KRS 455.180 prohibits the issuance of a warrant authorizing entry without notice unless, the issuing court finds by clear and convincing evidence that,

(1) The crime alleged is a crime that would qualify a person, if convicted, as a violent offender under KRS 439.3401; the crime alleged is a crime designated in KRS 525.045, 527.200, 527.205, or 527.210; or the evidence sought may give rise to the charge of a crime that would qualify a person, if convicted, as a violent offender under KRS 439.3401 or may give rise to a charge of a crime designated in KRS 525.045, 527.200, 527.205, or 527.210; and

(2) As established by facts specific to the case, giving notice prior to entry will endanger the life or safety of any person, or result in the loss or destruction of evidence sought that may give rise to a charge of a crime that would qualify a person, if convicted, as a violent offender under KRS 439.3401 or may give rise to a charge of a crime designated in KRS 525.045, 527.200, 527.205, or 527.210.

The law enforcement officer seeking the warrant must also:

1. obtain the approval of his or her supervising officer, or have the approval of the highest ranking officer in his or her law enforcement agency;
2. consulted with the Commonwealth's attorney or county attorney for the jurisdiction for which the warrant is sought, or with an assistant Commonwealth's attorney or assistant county attorney for the jurisdiction for which the warrant is sought;
3. Disclose to the judge, as part of the application, any other attempt to obtain a warrant authorizing entry without notice for the same premises, or for the arrest of the same individual;

The warrant also must:

1. Require that the entry without notice occur only between the hours of 6 a.m. and 10 p.m., except in exigent circumstances where specifically finds by clear and convincing evidence that there are substantial and imminent risks to the health and safety of the persons executing the warrant, the occupants of the premises, or the public that justify the entry without notice occur during other hours designated by the court; and
2. If the warrant is not issued electronically pursuant to KRS 455.170, include the legibly printed name and signature of the judge.

Perhaps more importantly, KRE 410A provides an enforcement mechanism for these requirements, stating, "Evidence gathered by use of an arrest warrant or search warrant authorizing entry without notice that did not comply with applicable statutes; or…Evidence gathered by use of an arrest warrant or search warrant authorizing entry without notice that was obtained through perjury or material false statement."

It seems illogical that the police asking and receiving permission to enter a residence, but failing to first run it by a supervisor, results in suppression of the fruits of a search, while just failing to ask and entering unannounced anyway does not. As noted above, it may be worth bringing a challenge if the police entered without knocking and announcing.

Specifically in Jefferson County, Louisville Metro Council passed what they termed Breonna's Law, completely prohibiting no-knock warrants. That ordinance, in addition to completely forbidding no-knock warrants, requires that all law enforcement officers on scene activate their body cameras no later than five minutes prior to the execution of a search warrant.

4.4 Specific Scientific and Technological Issues

Cell Phone Extractions

It is common for the scope of a warrant authorizing a search of a person's cell phone to be overbroad. Cell phone extraction searches, by virtue of technology, can actually be limited in very specific ways. The scope of the search, then, should be challenged.

A cellular phone extraction, first, entails the police saving all of the data from a cellular phone. This data is, in its raw form, unreadable. It is only through the use of software, such as Cellebrite, that the police are able to generate reports that display the contents of a cellular phone. When using Cellebrite to analyze the data from a phone, police are able to select specific date and time ranges and specific types of data (that is, emails, call logs, text messages, photos, videos, etc.).

In *Tucker v. Commonwealth*, the Kentucky Court of Appeals analyzed a warrant to search an individual's cellular phone for evidence related to a string of burglaries. That warrant identified the defendant's cell phone and described the scope of the search as follows: "A complete forensic examination of the above listed Cellular telephone to include: phonebook, call history (including received, dialed and missed calls), incoming, outgoing and drafts of text messages, IMEI/ESN/IMSI number, pictures and images, video, audio recordings, ringtones, phone details, memory card and SIM card, for a full forensic examination by use of specialized software and techniques accepted by the computer forensic scientific community for the proper seizure and retention of digital evidence." *Tucker v. Com.*, 611 S.W.3d 297, 298-99 (Ky. Ct. App. 2020). The Court of Appeals affirmed the trial court's denial of Tucker's motion to suppress, stating, "The search warrant at issue in the instant case is arguably overbroad. Although it particularly describes the cell phone to be searched, it essentially allowed officers to search all the data on Tucker's cell phone. However, *when qualified by the limitations of the officer's affidavit, the necessary particularization restricts the search to evidence contained in the cell phone's 'phonebook, call history (including received, dialed and missed calls), incoming, outgoing and drafts of text messages, IMEI/ESN/IMSI number, pictures and images, video, audio recordings, ringtones, phone details, memory card and SIM card*." *Id.* at 301 (emphasis added).

Of course, language similar to what is below is regularly used by police to claim that they *cannot* meaningfully limit the scope of their search.

Based on the technology available to Affiant and/or the Affiant's designee, obtaining the above described data and information will necessarily require an initial extraction of all of the data from the phone. This data, in raw form, is unreadable without the use of specific software. The extraction of the data will involve processing the data through the software, and a report containing the data listed in the warrant will be produced.

In addition, based on the technology available to Affiant and/or the Affiant's designee, it is not possible to limit the data to be extracted by date range. It is also not feasible to limit the data to be parsed by date range. This is due, in part, to the fact that some data on the device may not contain time stamps, and/or time stamps may have been removed or altered by either the user of the device or the device's internal functioning which occurs when, for example, a file is deleted by the user but still present in the device and available for extraction. Although the data extracted from the device cannot be limited, the search of the data extracted from this device will be limited for the items described in the warrant and only the data listed in the warrant will be seized by Your Affiant and/or his or her designee.

This begs a question: if the data extracted cannot be limited, how would the police go about "seizing" only the data listed in the warrant?

DNA and Buccal Swabs

What can the police do with a buccal swab after they've collected it? Obviously, the collection of a buccal standard (generally by swabbing the inside of a person's mouth) is a search under the Fourth Amendment. "It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Schmerber v California*, 384 U.S. 757, 767 (1966). "[T]he taking of finger prints, blood samples and breath for criminal analysis are in fact searches of the person for evidence." *Newman v. Stinson*, 489 S.W.2d. 826 (Ky. 1972).

But what about when the police have collected a sample pursuant to a warrant and want to then use that sample to test against evidence in other cases? Fourth Amendment jurisprudence related to DNA testing largely accepts that intrusion of a person's body to collect a sample is a "search." However, the analysis itself seems to have escaped that same fate, despite the fact that a person has a significant privacy interest in their own genetic information.

The United States Supreme Court, in *Maryland v. King*, gestured to, but did not decide, an issue that is, in some ways, the stuff of nightmares, "If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary

factors not relevant to identity, that case would present additional privacy concerns not present here." *Maryland v. King*, 569 U.S. 435, 464–65 (2013). *Maryland v. King* sanctioned the entry of an arrestee's DNA into the CODIS database. Here in Kentucky, specific statutes govern the use of samples for CODIS. KRS 17.175. Those statutes also provide a mechanism for individuals to expunge their identifying profile from CODIS. KRS 17.175(5). Those profiles may only be used for certain purposes and are not public record. KRS 17.175(4). The statute further requires the Kentucky State Police to destroy any collected sample not entered into the database. KRS 17.175(7).

There is something of an open question, though, regarding what exactly the police could do with the genetic profiles obtained from individuals and whether a search warrant needs to specify what will happen with the information once testing is complete. Anything outside the bounds of what is specifically stated in the authorizing warrant, however, should be challenged.

Geofencing Warrants

A geofence warrant is a search warrant that allows law enforcement to search a database to find all active mobile devices within a particular area. These warrants must follow specific procedures, largely to appease Google rather than the courts.

They present, though, a great opportunity to challenge their validity.

4.5 Technical Requirements:

RCr 13.10 requires, "A copy of the search warrant and supporting affidavit shall be retained by the judge or other official issuing the warrant and promptly filed with the clerk of the court to which the warrant is returnable…[and] [t]he officer authorized to execute a search warrant shall make return thereof to the appropriate court within a reasonable time of its execution. The return shall show the date and hour of service."

However, failing to follow these technical requirements will not get you suppression, absent some sort of specific prejudice.

Chapter 5: Consent Searches

"In other words, consent searches are valuable tools for the police only because hardly anyone dares to say no."

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colourblindness* (2019).

5.1 What is Consent to Search?

Consent to search is the most common type of search. *Consent Searches: Evaluating the Usefulness of a Common and Highly Discretionary Police Practice,* available at https://www.marcelroman.com/pdfs/wps/consent.pdf. Consent is also an exception to the warrant requirement. A warrantless search may be conducted by the government based on voluntary individual or third-party consent. Typically, consent to search hinges on the authority of the person giving the consent. Requesting consent to search is not an interrogation, even if it comes after an unambiguous invocation of the right to remain silent. U*nited States v. Calvetti*, 836 F.3d 654, 663 (6th Cir. 2016).

- **NOTE -** Distinct from other constitutional waivers it is not required to give notice of the right to refuse consent. *But see* KRS 189A.105.
- **NOTE –** *Some police departments utilize consent waivers before they search a car or home. Consider looking into whether your local law enforcement uses such a form.*

Quick Checklist: What the heck did the client consent to?

- ☐ Did your client agree to be searched?
- ☐ Did someone living with the client or in the car agree to the search?
- ☐ Was it voluntary?
- ☐ What were the exact words used by your client when giving consent to search?
- ☐ What did the police find?
- ☐ Where was the item of evidence found?
- ☐ Did the consent extend to location where the item was found?
- ☐ Did the police search beyond the given consent?

The keystone to the applicability of this warrant exception is the voluntariness of the agreement to search. Where there is coercion, there cannot be consent.

5.2 Voluntariness of the Consent

Consent must be given voluntarily in the totality of the circumstances. The consent must be obtained freely. "The Commonwealth has the burden of showing by a preponderance of the evidence, through clear and positive testimony, that valid consent to search was obtained." *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky. Ct. App. 2005). The question of whether consent to a search was freely and voluntarily given "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte,* 93 S. Ct. 2041, 2048 (1973).

The Commonwealth must not use express or implied coercive tactics when obtaining consent. *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), held that a search cannot be justified when the consent has been given only after the official conducting the search has asserted that he possessed a warrant. Justice Stewart held that when a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. Where there is coercion, there cannot be consent.

Misinformation or deception by a law enforcement officer for purposes of obtaining consent to search will not be upheld. For instance, if an officer falsely assures a homeowner that he possesses a search warrant—when he does not—in order to gain consent to search, said search will be considered coercive and lacking sufficient consent. *Bumper v. North Carolina,* 391 U.S. 543, 549–50, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). *See Krause v. Commonwealth*, 206 S.W.3d 922, 926 (Ky. 2006), the Court found consent to be invalid due to the police use of deceptive tactics coerced the consent given. In *Krause*, the police arrived at the defendant's home at 4 a.m. and told the defendant hand his roommate a young girl had just been raped and the police needed to check their house to see if it was the placed described by the young girl. Shocked by the news and knowing they were not the perpetrators of the rape the defendant and roommate consented for their home to be searched. The Court found that the police showing up at 4 a.m. under the guise of investigating a horrific crime, rendered any consent given to be invalid.

Deception used by a police officer in obtaining a waiver of constitutional rights has been considered coercive for purposes of gaining consent. *Krause v. Commonwealth,* 206 S.W.3d 922 (Ky.2006).*Guzman v. Commonwealth*, 375 S.W.3d 805, 810 (Ky. 2012).

5.3 Scope of Consent

The search is limited to the consent given. If consent is given to search a home for a person, the police can only search places where a human being could possibly be. For example, Scott West had a case where the police received consent to search a home for a person, but they ended up looking inside of a Crown Royal Bag. That is an unacceptable practice.

- "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search." *United States v. Dichiarinte,* 445 F.2d 126, 129 (7th Cir. 1971).
- In *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), the Court held "it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs." If a suspect's "consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." 500 U.S. at 252.
- *Guzman v. Commonwealth*, 375 S.W.3d 805 (Ky. 2012) (consent by owner for police to enter home does not extend to entire house, even for a protective sweep).
- *Payton v. Commonwealth*, 327 S.W.3d 468 (Ky. 2010) ("come on in" response to police request to enter and search was effective consent both to enter and search, when there was no explicit denial or restriction on consent).

5.4 Implied Consent

Consent may be present as a condition to enter certain facilities. Like airports, jails, or other public facilities.

- The use of undercover agents and informants does not violate the Fourth Amendment. *Maryland v. Macon*, 472 U.S. 463, 470, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) ("An undercover officer does not violate the Fourth Amendment merely by accepting an offer to do business that is freely made to the public.").
- Voluntariness to consent is necessarily undermined when the police use trickery, fraud, or misrepresentation to obtain consent. *See Krause v. Commonwealth*, 206 S.W.3d 922, 927 (Ky. 2006) (deception of pretending to look for evidence of a rape when officer knowingly was looking for drugs was "so unfair and unconscionable as to be coercive").

5.5 Third Party Consent

A person other than the client may also consent to the search of the client's premises. A third-party cannot give consent to search absent actual or apparent authority. *Perkins v. Commonwealth*, 237 S.2.3d 215, 219 (Ky. App. 2007). Third-party consent is common authority or other sufficient relationship to the property by persons generally having joint access or control for most purposes.

Consent by a third party to search his car, even unbounded consent by the vehicle owner, does not authorize the search of someone else's purse inside of the car. *See U.S. v. Humphrey*, 30 F. App'x 596, 601 (6th Cir. 2002); *Colbert v. Commonwealth*, 43 S.W.3d 777 (Ky. 2001).

Kentucky case law places primary emphasis on the common possessory interest of the third person who consents. *Sanders v. Commonwealth*, 609 S.W.2d 690 (Ky. 1980) (third party with common authority over premises or effects to be searched may consent to search).
Among the persons who have been found to have an immediate possessory interest are:

- Resident owner; *Combs v. Commonwealth*, 341 S.W.2d 774 (Ky. 1960).
- Primary tenant; *Sarver v. Commonwealth*, 425 S.W.2d 565 (Ky. 1968).
- Co-occupant; *Sanders v. Commonwealth*, 609 S.W.2d 690 (Ky. 1980) (mother-in-law); *Commonwealth v. Sebastian,* 500 S.W.2d 417 (Ky. 1973) (spouse).

- Guest: *Garr v. Commonwealth*, 463 S.W.2d 109 (Ky. 1971) (temporary resident of home who was temporarily in charge of premises where appellant stayed on a casual basis had authority to consent to search).

A landlord not in possession, a hotel clerk, and a relative of the occupant having no identifiable relationship to the premises or property in question to consent to a search. *See Stoner v. State of Cal*., 376 U.S. 483 (1964); *Louisville Bd. of Realtors v. City of Louisville,* 634 S.W.2d 163 (Ky. App. 1982) (landlord cannot consent to inspection of premises occupied by a tenant).

What if one occupant consents to a search and the other refuses? In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held when a physically present co-occupant refuses to permit entry after another occupant has consented, any search would be warrantless, and any consent would be invalidated. Note that *Randolph* has been interpreted to be limited to situations where the co-occupants refusing to consent to search is present. *See Fernandez v. California,* 571 U.S. 292.

The Kentucky Supreme Court held in *Payton v. Commonwealth*, 327 S.W.3d 468 (Ky. 2010), *Georgia v. Randolph* is indisputably binding authority. In *Paton*, the defendant did not clearly revoke the consent to search that was given by his wife. Thus, the Court affirmed the denial of the defendant's motion to suppress.

5.6 Blood Draw DUI

KRS 189A.105(2)(a) is Kentucky's "Implied Consent" statute for blood, breath, or urine samples during a DUI investigation. The drawing of a blood sample is a search implicating the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767-68.

- In *Commonwealth v. McCarthy*, the Kentucky Supreme Court, applying *Birchfield v. North Dakota*, 579 U.S. 438 (2015), held "a criminal defendant has the constitutional right to refuse consent to a blood test" in a DUI investigation. 628 S.W.3d. 18, 34 (Ky. 2021). Such a refusal of BLOOD cannot be used to enhance punishment or be used as evidence of guilt at trial. Breath and urine are still fair game.

But See KRS 189.105A(2)(b); There is a mandatory search warrant requirement for car accidents that end in fatality. "However, if the incident involves a motor vehicle accident in which there was a fatality, the investigating peace officer shall seek such a search warrant for blood testing unless the testing has already been done by consent."

5.7 Consent to search Computer

In *Trulock v. Freeh,* 275 F.3d 391 (4th Cir. 2001), the United States Court of Appeals recognized that a consent search of computer files may be given by a person other than the target of the search. "We conclude that, based on the facts in the complaint, Conrad lacked authority to consent to the search of Trulock's files. Conrad and Trulock both used a computer located in Conrad's bedroom and each had joint access to the hard drive. Conrad and Trulock, however, protected their personal files with passwords; Conrad did not have access to Trulock's passwords. Although Conrad had authority to consent to a general search of the computer, her authority did not extend to Trulock's password-protected files.

5.8 Consent to search not valid after illegal entry

Sometimes people consent to a search after the police have made an illegal entry into their home or other building. The Sixth Circuit held in *U.S. v. Chambers* that ""when an individual consents to a search after an illegal entry is made, the consent is not valid and 'suppression is required of any items seized during the search…, unless the taint to the initial entry has been dissipated before the "consents" to search were given." 395 F.3d 563 (6th Cir. 2005) (cleaned up).

In *Milam v. Commonwealth*, 483 S.W.3d 347, 352 (Ky. 2015), the Kentucky Supreme Court found third-party consent given after the police unlawfully entered a fraternity house could not cure the initial impermissible entry into the home.

5.9 Illegal/prolonged detention can taint consent.

Prolonged (or otherwise illegal) detention can taint any consent given, rendering it involuntary. *See United States v. Beauchamp*, 659 F.3d 560, 573 (6th Cir. 2011); *United States v. Lopez-Arias*, 344 F.3d 623, 629 (6th Cir. 2003). [See, Chapter 8].

Chapter 6: Exigent Circumstances

6.1 Exigent Circumstances as a Whole.

"Exigent circumstances" permit police officers to conduct an otherwise permissible search without first obtaining a warrant. "'The exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). In these circumstances, swift or immediate action is required on the part of law enforcement.

Courts typically hold that exigent circumstances are present if a reasonable person would believe that quick action was necessary so that law enforcement could prevent:

1) bodily harm to someone or the destruction of property; *Pate v. Commonwealth*, 243 S.W.3d 327 (Ky. 2007), as modified on denial of reh'g (Nov. 1, 2007), as corrected (Jan. 23, 2008).
2) The destruction of evidence; *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006) or
3) the escape of a suspect. *U.S. v. Bates*, 84 F.3d 790 (6th Cir. – 1996). *See* Chapter 11 – Hot Pursuit.

PRACTICE TIP: Do not make the Commonwealth's argument of probable cause for them. Know your jurisdiction. Does your judge 1) make you file an in-depth motion to suppress or file a "bare bones" motion stating the case specific issue; 2) allow you to do a full brief of the issue after a hearing if granted one; or 3) does your judge usually make a ruling from the bench after filing a motion to suppress? If granted a hearing and the Commonwealth fails to present evidence that probable cause exists, based on how your judges issue rulings argue for dismissal in your closing argument based on lack of PC or clarify in your brief that the Commonwealth failed to present any evidence that they had probable cause to stop or encounter your client in the first place.

To support a warrantless search of a private residence, the exigent circumstance must be coupled with probable cause. *Southers v. Commonwealth*, 210 S.W.3d 173, 176 (Ky. App. 2006); *King v. Commonwealth*, 302 S.W.3d 649 (Ky. – 2010).

The prosecutors bear the burden of proving that both probable cause and exigent circumstances exist. Do not make their argument for them. Even if the prosecutors present evidence that an exigent circumstance existed, they are not excused from showing that probable cause was present. A judge should make a ruling on a case-by-case basis after examining all of the facts in a case. Be sure that the ruling established both the existence of probable cause and a well-established exigent circumstance.

6.2 To prevent bodily harm to someone or the destruction of property.

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively*, justify the action. See *Bond v. United States*, 529 U.S. 334, 338, n. 2, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) ("The subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment ...; the issue is not [the officer's] state of mind, but the objective effect of his actions.")

It is important to keep in mind "how and why" the officers are in contact with the individual in the first place. Police officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicle or investigating accidents. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). In Caniglia v. *Strom*, 593 U.S. 194, 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021), Officers arrived at a private home responding to a request for a welfare check. The officers entered Caniglia's home and seized Caniglia and his firearms without a warrant. The Court held that these "caretaking" duties *do not* create a standalone doctrine that justifies warrantless searches and seizures in the home. Although *Caniglia* has received some negative treatment, courts must make a ruling on a case-by-case basis.

6.3 To prevent the destruction of evidence.

Where officers 1) have probable cause to believe that a crime has occurred and 2) that evidence from that crime is in imminent danger of being destroyed, it is reasonable for law enforcement officers to secure the place where the evidence is located in order to prevent its imminent destruction. *Posey v. Com*., 185 S.W.3d 170, 173 (Ky. 2006).

In *Posey,* the Supreme Court of Kentucky found that an exception to the warrant requirement was present when the officers made a warrantless entry into the home where marijuana was seen in plain view, and it was reasonable for them to believe that the drugs were in imminent danger of being destroyed in the absence of immediate action to secure the evidence. There was no dispute as to whether the officers had probable cause to believe that Appellant was in possession of a controlled substance. Posey, also, argued that while the imminent destruction of evidence can present exigent circumstances in the case of felony crimes, they should not constitute exigent circumstances in the case of misdemeanor crimes citing to *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), in support of his position. The Court was not persuaded by this argument as a conviction of misdemeanor crimes may result in the loss of one's freedom for as much as one year belies the contention that such crimes are "minor." *See Illinois v. McArthur*, 531 U.S. 326, 336, 121 S.Ct. 946, 952, 148 L.Ed.2d 838 (2001) (distinguishing between "jailable" and "nonjailable" offenses when determining importance of law enforcement's need to preserve evidence of those crimes).

6.4 To prevent the escape of a suspect.

See Chapter 11: Hot Pursuit for an in-depth analysis of this subsection.

6.5 Procurement of a Warrant Must not be Practical

U.S. v. Blanton, 520 F.2d 907 (6th Cir. – 1975): "The basic test for whether 'exigent circumstances' exist, and thus a warrant becomes unnecessary to conduct a lawful search, is whether 'it is not practicable to secure a warrant.'" *Carroll v. United States,* 267 U.S. 132, 153 (1925).

6.6 Law Enforcement May Not Create the Exigency.

The exigency cannot be "created" or "manufactured" by the conduct of the police. "Police officials…are not free to create exigent circumstances to justify their warrantless intrusions." *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. – 1984). "Police cannot create exigent circumstances even when they possess probable cause that a crime has been committed." *U.S. v. Williams*, 354 F.3d 497 (6th Cir. – 2003).

In *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010), the Supreme Court set out a two-part test: "1) Did the police deliberately create the exigent circumstances with the bad faith intent to avoid the warrant requirement?; or 2) even absent bad faith, was it reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry?" If so, then the police cannot rely upon the resulting exigency.

After reversed by the United States Supreme Court in *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) and on remand, *King v. Commonwealth*, 386 S.W.3d 199 (Ky. 2012), the Kentucky Supreme Court affirmed the suppression, and held that "no exigency is created simply because there is probable cause to believe that a serious crime has been committed… Exigent circumstances do not deal with mere possibilities, and the Commonwealth must show something more than a possibility that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure."

6.7 Exigent Circumstances Must Still Be Limited to Whatever is Necessary Under the Circumstances.

The exigent circumstances test balances the right of the individual to be free from unreasonable intrusions against the need of society to effectively investigate criminal offenses. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In *Chimel,* the court emphasized that warrantless searches, whether or not incident to arrest, are the exception and not the rule. A search of the person of an accused, and of the area within his immediate control, is only justified where the exigency of the situation demands it. Thus, for example, a warrantless search is permissible where it is necessary to prevent harm to arresting officers,

where there is the possibility that suspects will escape, or where evidence may be destroyed. See *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973).

Even when there is ample justification for permitting a limited warrantless search because of exigent circumstances, the *Chimel* court noted, at 89 S.Ct. 2040:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs or, for that matter, for searching, through all the desk drawers or other closed or concealed areas in the room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

6.8 Voluntariness

Under the Fourth Amendment, in the absence of consent, police may not conduct a warrantless search or seizure within a private residence without both probable cause and exigent circumstances; any other search is per se unreasonable. U.S.C.A. Const. Amend. 4.

If it is alleged that your client gave consent, first look at whether the consent was voluntary. In determining whether consent is truly voluntary or coerced through obvious or subtle means, the court is required to consider the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 229, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The Kentucky Supreme Court held that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a voluntary consent. *Id.* Courts must determine voluntariness of consent based upon "an objective evaluation of police conduct and not by the defendant's subjective perception of reality." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky.1992), citing *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

In *Payton v. Com*., 327 S.W.3d 468 (Ky. 2010), the officer acknowledged that the individual who gave consent to search the premise was apparently under the influence of drugs at the time but that she was not so intoxicated as to not know what she was doing. The Court noted that Kentucky precedent, at least implicitly, recognizes that at least in some cases, the fact that a defendant is under the influence of alcohol or drugs does not

necessarily mean that he or she is too intoxicated to be able validly to consent to a search. See Cook, 826 S.W.2d at 331.

At any point in time after consent is given and while the search is being conducted, an individual can withdraw that consent to search. Some federal cases recognize that revocation of consent must be established by "unequivocal" actions or statements. See, e.g., *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir.2004); *United States v. Alfaro*, 935 F.2d 64, 67 (5th Cir.1991). Although this rule may not have been previously clearly established in published Kentucky precedent, Kentucky case law recognizes that consent to search was withdrawn when one's conduct "obviously" or "clearly" indicated withdrawal of consent [See *Bowersmith v. Commonwealth*, No.2002–CA–000101–MR, 2003 WL 1343232 at *2 (Ky.App. Feb.21, 2003) (reversing denial of motion to suppress as "Bowersmith's oral request that the officer not go behind his counter was a clear revocation of any presumed consent to search behind the desk" and "Bowersmith acted in such a clear and obvious way as to indicate that he was withdrawing his consent to the search.")] or have described clear acts of revocation of consent despite not explicitly describing the acts as clear or unequivocal. [See *Commonwealth v. Fox*, 48 S.W.3d, 28 (Ky. 2001) (motion to suppress properly granted where consent effectively revoked as "a reasonable person would have understood that Fox was terminating the consent to search when he closed the bag and put it in the back of the truck.")].

Chapter 7: Plain View, Smell & Feel

7.1 What is the plain view exception?

The plain view exception generally arises as part of law enforcement's interaction with a citizen already in progress. This exception only excuses the seizure of evidence, not the warrantless search itself. *Pace v. Commonwealth*, 529 S.W.3d 747, 755 (Ky. 2017). There are three requirements for the plain view exception to apply. The object seized must be plainly visible; the officer is lawfully in a position to view the object; and the incriminating nature of the object is immediately apparent. All three must be satisfied. *Horton v. California*, 496 U.S. 128, 136-137 (1990). Inadvertent discovery by police is not required. In *Horton*, the Court made clear that while inadvertent discovery may be a feature of many plain view cases, it is not a requirement. 496 U.S. at 130. See *Chavies v. Commonwealth*, 354 S.W.3d 103, 109 (Ky. 2011).

7.2 Was the object plainly visible?

An object must be "clearly visible, open and obvious to anyone who even casually observes." *Nichols v. Commonwealth*, 408 S.W.2d 189, 192 (Ky. 1966). In *Nichols*, an officer looked inside an open paper bag, placed his hand in the bag, and asked another officer if that is what he was looking for. The evidence was suppressed. *Id.* at 191.

An officer can change his position and bend at an angle to improve his view. In *Texas v. Brown*, 460 U.S. 730, 740 (1983), the Court found that since an ordinary citizen could peer in the interior of a car, there was no reason an officer could not as well.

Eyesight can be enhanced by common objects. In *Texas v. Brown*, 460 U.S. at 740, the Court held "... the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." The Kentucky Supreme Court noted that a flashlight could be used to enhance viewing in *Commonwealth v. Johnson*, 777 S.W.2d 876, 879 (Ky. 1989). "We are now of the opinion that a determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day." *Id*. In *Johnson,* an officer used a flashlight to look through a partially opened

door into a darkened motel room. He then used the flashlight to look through an opening of a window curtain into the room. *Id*. at 878.

Police use of sense-enhancing technology must be reasonable. In *Kyllo v. U.S.*, 533 U.S. 27 (2001), the Court held that the use of a thermal-imaging device to determine if the amount of heat emanating from a home was consistent with high-intensity lamps typically used to grow marijuana indoors. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40. In *California v. Ciraolo*, 476 U.S. 207, 213-214 (1986), officers flew over Ciraolo's backyard to see if he was cultivating marijuana. The Court held that this use of aerial surveillance was reasonable. "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."

7.3 Did the officer have a right to be where he was when he saw the object in plain view?

Simply put, the officer cannot have violated the 14th Amendment to be at the place where the evidence is plainly viewed. *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992). There are many federal and state cases that have examined what this means. See *Texas v. Brown*, 460 U.S. 730 (1983) (officer's observation of narcotics in appellant's car during routine driver's license checkpoint did not violate Fourth Amendment); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view exception does not justify seizure of defendant's car when search warrant is invalid); *Johnson v. Commonwealth*, 296 S.W.2d 210 (Ky. 1956) (evidence seized was the product of illegal search when police, having an arrest warrant for a woman living in second floor apartment, entered and searched different second floor apartment); *Pace v. Commonwealth*, 529 S.W.3d 747 (Ky. 2017), as modified, (Sept. 28, 2017) (no prior justification for officers being on defendants' patio; officers not on patio pursuant to a warrant or under any exigent circumstances). *Krause v. Commonwealth*, 206 S.W.3d 922, 925 (Ky. 2006) (officers made up a story to enter a home. Once inside, they seized drugs that were in plain view.

Because the consent was obtained through a ruse, the evidence must be suppressed. Id., 926-927.)

There is often interplay between this requirement and the requirement that the incriminating object be apparent. For example, in *Commonwealth v. Hatcher*, 199 S.W.3d 124 (Ky. 2006), police went to a home to investigate the report of an abandoned minor. A minor answered the door. Through the open door, the officer saw a ceramic pipe with a stem two to four inches long and a large bowl on a table. The officer asked the minor for permission to enter which was granted. The officer entered, picked up the pipe, and detected the odor of marijuana. The Court held the officer did not have a warrant nor were there exigent circumstances. "As Officer Carr was not authorized to enter Hatcher's residence, the incriminating nature of the pipe must have been 'immediately apparent' from his vantage point in the doorway." *Id*., 127.

Police do not have to be investigating the particular case, and they can be there for non-investigatory reasons. In *Blankenship v. Commonwealth*, 740 S.W.2d 164, 166 (Ky.App. 1987), officers discovered a robbery note, "Be cool, give me all the money," in plain view on the dash of a car when trying to determine the identify of a man who had been shot. In *Washington v. Chrisman*, 455 U.S. 1 (1982), a university police officer arrested a student for underage drinking. The officer accompanied the student to his dorm room to retrieve his identification. Seizure of the roommate's pipe and marijuana in plain view did not violate the Fourth Amendment.

PRACTICE TIP: Listen closely to what officers testify to at a suppression hearing and use those facts to argue why the evidence should be suppressed. *Hatcher* could have had a different result if the attorney had not established for the record why the officer could not determine the pipe had an incriminating nature from the doorway.

Note that other state actors, not just police, are covered! *In Hazelwood v. Commonwealth*, 8 S.W.3d 886 (Ky.App. 1999), a fire was extinguished at Hazelwood's home. A procedure called "overhaul" is conducted by firefighters when a fire is extinguished; this is

making sure the fire has not spread to walls, ceilings, and the like. During the overhaul at Hazelwood's residence, a firefighter saw marijuana in an open kitchen drawer. *Id*. at 886. The Court of Appeals declined to suppress the drugs. "When the firefighters, legitimately upon the premises, make an inadvertent discovery of the contraband, they are allowed to seize the items or material. That initial intrusion being legitimately made, it is not unreasonable for a police officer to be called in to make the actual seizure. Such an entry and seizure by a police officer must be strictly limited." *Id*. at 887. In *Hallum v. Commonwealth*, 219 S.W.3d. 216, 221-223 (Ky.App. 2007), the Court of Appeals observed that an officer accompanying a child protective services worker on a home check could seize items in plain view in a room that had a closed door when they entered.

7.4 Was the incriminating nature of the item apparent to the officer?

There must be probable cause. In *Arizona v. Hicks*, 480 U.S. 321, 327 (1987), officers entered Hicks' apartment in search of a shooting suspect. An officer saw expensive stereo equipment and suspected the components were stolen. The officer moved the equipment to look for serial numbers to run and seized them when he learned they had been reported as stolen. The Court found this to be a search. "Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises."

As discussed in 4.3, the incriminating nature of the item must be immediately apparent from where the officer is legally allowed to be. In *Hatcher*, *supra*, the Court found the officer's presence in an apartment violated the Fourth Amendment. He was only authorized to be at the open door. Thus, the incriminating nature of the pipe had to be immediately apparent to the officer from the doorway. He had no probable cause to suspect the pipe was drug paraphernalia until he entered the apartment and smelled the pipe. *Id*., 127-128. But see *Neal v. Commonwealth*, 449 S.W.3d 370 (Ky.App. 2014), where an officer looked in a vehicle and saw a torn baggie in the front passenger seat. *Id.* at 373. The officer testified that this was consistent

with the use of marijuana; a piece would be torn off when the baggie was tied after the marijuana was placed inside the bag. Because of this testimony, the Court found that the evidence in plain view justified warrantless search of vehicle. *Id*., at 378.

7.5 The plain smell exception parallels the plain view exception.

Marijuana smell provides probable cause to search not only a vehicle, but also the people subject to a traffic stop. *Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky.App. 2006).

Plain smell can give rise to a finding of exigent circumstances. In *Bishop v. Commonwealth*, 237 S.W.3d 567 (Ky. 2007), officers were investigating a complaint that Bishop had stolen a license plate. Officers went to Bishop's car and confirmed the plate was registered to someone else. The trunk of the car was open 3 to 5 inches. When an officer stood by the trunk, he noted a strong chemical smell associated with the manufacture of methamphetamine. He opened the trunk and discovered active labs. *Id.,* 568. The chemical smell authorized seizing of the labs. The officers had a legitimate concern for public safety when methamphetamine is being produced. *Id*., 569.

PRACTICE TIP: We need to establish new law when medical marijuana becomes legal in Kentucky. In Pennsylvania, the Superior Court held that when medical marijuana became legal, officers could no longer search based merely on the smell of marijuana. *Commonwealth v. Barr*, 240 A.3d 1263 (Pa. Super. 2020). However, the odor was one of

However, officers cannot create the exigent circumstance. In *Hall v. Commonwealth*, 438 S.W.3d 387 (Ky.App. 2014), review denied, (Sept. 10, 2014), officers suspected the occupant of one side of a duplex was trafficking in marijuana. The officers went to the duplex for a "knock and talk," but there was no answer. However, the landlord lived in the other half of the duplex and opened the door and yelled for the occupant. When she came to the door, the officer said he smelled marijuana and entered the house. In the house was a quantity of marijuana. *Id*., 389. The Court of Appeals held the officers created the exigent circumstance when it allowed the landlord to impermissibly open the door. *Id.*, 391.

7.6 The plain feel or plain touch doctrine allows seizure of contraband during a frisk if it is immediately apparent the object is contraband.

The requirements of *Terry v. Ohio*, 392 U.S. 1 (1968), must be met. The officer must have reasonable suspicion that the individual is armed and a danger to the officer or others. If so, we can conduct a pat down search to determine if the individual is carrying a weapon. *Minnesota v. Dickerson*, 508 US 366, 373 (1993), relying on *Terry*, 392 U.S. at 24. In *Dickerson,* the Court found the officer exceeded the bounds of a *Terry* search. Dickerson was patted down, and no weapons were revealed. The officer then saw a small lump in the front pocket of Dickerson's jacket, and he reached in it and retrieved cocaine. 508 U.S. at 369. The officer did not recognize the lump was cocaine until he had manipulated it. 508 U.S. at 377-378. In *Pitman v. Commonwealth*, 896 S.W.2d 19 (Ky. App.1995), the Court of Appeals held the plain view exception was not available to the Commonwealth. Pitman was standing on the side of the road with two garbage bags as officers drove by. They found this suspicious so approached Pitman and asked what was in the bags. He said clothes. An officer picked up and felt the bags, determining they could not contain clothes because of the weight. He opened the bags, and it was 15 pounds of marijuana*. Id.*, 20. The Court held that *Terry* and the plain view exception were not available to the Commonwealth. "The Commonwealth's reliance on *Terry* is misplaced since neither Glass nor Bunch attempted a pat down or a search of Pitman for weapons at all, electing instead to search his bags on the theory that they might contain weapons." *Id.* at 20.

The object cannot be manipulated! The non-threatening contraband must be immediately apparent from the sense of touch. In *Dickerson*, the officer admitted he did not know a lump in the defendant's pocket was cocaine until he explored the pocket and its contents. The Court analogized the situation to that in *Hicks* where the officer got serial numbers from stereo equipment and ran them to see if they were stolen. *Minnesota v. Dickerson*, 508 U.S. at 378-379. The Kentucky Supreme Court applied *Dickerson* in *Commonwealth v. Crowder*, 884 S.W.2d 649, 650 (Ky. 1994), where the officer testified that he did not feel any weapons but felt "something" in Crowder's left pocket. The officer said, "it felt like it may have been a bindle of drugs," and he reached into the pocket to get it out. He said it felt "like a small gumball." It was cocaine. The Court suppressed the cocaine, finding that the

non-threatening contraband was not immediately apparent. In *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006), as corrected, (Dec. 1, 2006), the officer noticed a bulge in Jones' right front pants pocket. When he conducted the pat down, it felt like a prescription medicine bottle. After a struggle with Jones, the bottle was retrieved and determined to be a bottle of oxycontin prescribed to another. *Id.*, 192. The Court suppressed the evidence, noting, the criminal nature of the bottle was not apparent until it was manipulated or moved. It is not illegal to carry a pill bottle in one's pocket. The officer did not know it was contraband until he examined the bottle and saw it was oxycontin prescribed to someone else. *Id.,* 198. But see *Commonwealth v. Whitmore,* 92 S.W.3d 76 (Ky. 2002), where the officer testified that she had four years as an officer and over 100 drug arrest. When she did the pat down search, a bag of cocaine in Whitmore's jacket pocket was immediately recognizable. The Court said the plain feel exception was met. "The officer testified to specific and articulable facts that the bulge in the nylon jacket contained contraband. She described the amount, the shape and the packaging and the unique feel of the substance. She stated that these facts indicated to her, based on her experience, that the bulge was crack cocaine. Moreover, the substance was not in any container that shielded its identity." *Id.* at 80.

A search more invasive may become justified depending on what the pat down reveals. In *Commonwealth v. Marshall*, 319 S.W.3d 352, 360-361 (Ky. 2010), cert. denied, 131 S. Ct. 1793, 179 L. Ed. 2d 663 (2011), the Court held that where an officer felt a hard, rock-like substance that he knew was crack cocaine in Marshall's groin, he was authorized to conduct a more invasive search.

Chapter 8: Curtilage & Abandoned Property

This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."

Florida v. Jardines, 569 U.S. 1 (2013)
(*Citing California v. Ciraolo,* 476 U.S. 207 (1986))

8.1 Curtilage: Limitations on Searches

"Unless an officer has probable cause to obtain a warrant or exigent circumstances arise, the intrusion can go no further than the approach to the obvious public entrance of the house." *Quintana v. Com.*, 276 S.W.3d 753, 759–60 (Ky. 2008). This is because a police officer may only be where a reasonable person would believe they could enter. *Id*. If the police stray from the obvious entrance of the house to other parts of the curtilage to conduct surveillance, their conduct will be considered a search under the Fourth Amendment. Absent a warrant, consent, or exigent circumstances, that search is unlawful. *Id*.; *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214.

Even when police offices confine their approach to an obvious public entrance of the house, police must still limit their conduct to that which is "explicitly or implicitly permitted by the homeowner." *Florida. v. Jardines*, 569 U.S. 1, 5–12, 133 S. Ct. 1409, 1414–18, 185 L. Ed. 2d 495 (2013) (illegal search conducted where police used drug sniffing dogs during knock and talk procedure).

When looking at issues of Knock and Talk procedure and Plain View exceptions involving a dwelling or the areas surrounding the dwelling, an independent examination of curtilage protections must be conducted. In short, the police must have a "right to be" in the location that gives rise to their view discovery. *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2009). If the search conducted is in an area within the protected curtilage of a dwelling and there is no other reason to legally justify the search, any evidence thus illegally seized must be suppressed. *Quitana*, *supra* (*citing United States v. Jenkins*, 124 F.3d 768 (6th Cir. 1997). Likewise, if police

conduct goes beyond what is explicitly or implicitly permitted by the homeowner, illegally seized evidence must be suppressed. *Florida. v. Jardines*, 569 U.S. 1, 5–12, 133 S. Ct. 1409, 1414–18, 185 L. Ed. 2d 495 (2013).

8.2 What is Curtilage?

While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver v. United States*, 466 U.S. 170 (1984). Curtilage includes the land surrounding and associated with the home which "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300 (1987). "The area 'immediately surrounding and associated with the home'—the curtilage—is 'part of the home itself for Fourth Amendment purposes.'" *Fla. v. Jardines*, 569 U.S. 1, 1, 133 S. Ct. 1409, 1412, 185 L. Ed. 2d 495 (2013)(citing *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214). The right to privacy, even in one's curtilage, must be reasonable. *Oliver v. United States*, 466 U.S. 170 (1984).

8.3 Determining Curtilage: Constitutionally Protected Area

Any part of the curtilage may be protected, including driveways, depending on the circumstances of each case. United *States v. Smith*, 783 F.2d 648 (6th Cir. 1986). The extent of dwelling-house curtilage is determined by the non-exclusive four-factor test set forth in *United States v. Dunn*, 480 U.S. 294 (1987): 1) proximity to the dwelling-house; 2) whether th e area is enclosed with the house; 3) how the area is being used; and 4) what the resident has done to secure his privacy.

- **Proximity to the Dwelling:** 15 feet would generally be within the area of curtilage. *Commonwealth v. Dixon*, 482 S.W.3d 386 (Ky. 2016). A barn located 60 yards from the

PRACTICE TIP

Suppression issues involving a curtilage issue are fact specific and should be supported by independent investigation. Be sure to visit the property with your investigator, document the scene, and note: 1) how far were the police officers from the searched property; 2) was there a fence or other enclosure and were police officers within that enclosure; 3) how was the occupied area used by the residents; 4) how was the privacy interest protected; and 5) what other things show that this is not an area the occupant intended to be open to the general public. You should not go alone because you will need a testifying witness, but you should personally view the scene if.

dwelling is not within curtilage. Dunn, 480 U.S. at 302 (1987). A property consisting of 175 acres, with no buildings, bordered by a major state highway is not curtilage. *United States v. Rapanos,* 115 F.3d 367, 372 (6th Cir.1997).

- **Enclosure of the Area:** A fence is a strong indication of a boundary to curtilage but does not necessarily mark the boundary of the "intimate activity". *Young v. City of Radcliff*, 561 F. Supp. 2d 767, 784–85 (W.D. Ky. 2008). A home in an urban area that does not lend itself to enclosures will not prevent a finding of curtilage. *Commonwealth v. Ousley*, 393 S.W.3d 15, 27 (Ky. 2013).
- **Use of the Area:** Finding a picnic table, a fire pit, and pruned trees is sufficient to indicate that an area is curtilage. *Widgren v. Maple Grove Tp.,* 429 F.3d 575, 578 (6th Cir.2005). Evidence of laundry and gardening weigh in favor of finding an area to be within curtilage. *United States v. Jenkins,* 124 F.3d 768, 773 (6th Cir.1997).
- **Secured Privacy:** The backyard and area immediately surrounding the home is usually considered to be an extension of the dwelling itself. *Widgren v. Maple Grove Tp.,* 429 F.3d 575, 582 (6th Cir.2005); Daughenbaugh v. *City of Tiffin,* 150 F.3d 594, 601 (6th Cir.1998)

The *Dunn* factors are "not a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." Instead, the Dunn factors are a useful analytical tool when determining whether an area is protected by the Fourth Amendment. *Commonwealth v. Ousley*, 393 S.W.3d 15, 27 (Ky. 2013). As such, practitioners should include detail showing a reasonable and legitimate privacy right when showing that police have invaded the curtilage of a dwelling.

Examples of the Dunn factors application include:

- **Unkempt Area Around a Trailer Home.** Applying the 4 factor *Dunn* Test, the Kentucky Supreme Court in *Commonwealth v. Dixon*, 482 S.W.3d 386 (Ky. 2016) held that police officers were "outside the curtilage" of the home when walking around the perimeter of a trailer home suspected to contain a methamphetamine lab. The Court concluded that the proximity of 15 feet would generally be within the curtilage, but that proximity must be taken in context. The area was also not enclosed, was not maintained and appeared

to be used as a dumping ground, and there were no efforts of security. Based on this analysis, under the totality of the circumstances, there was no intrusion by the police into the curtilage of the house.

- **Back Door of a Dwelling-House.** In *Young v. City of Radcliff*, 561 F. Supp. 2d 767, 784–85 (W.D. Ky. 2008)[7], the Western District of Kentucky, applying the 4 factor Dunn Test, held that police had unlawfully intruded into the curtilage of Youngs home. Police went to Youngs home erroneously after mistaking his license plate for one involved in shoplifting. Police officers went to his home, 2 at the front door and 2 at the back door. The police at the back door peered into the back window of Youngs home seeing that he was wearing a holster containing a firearm. Police at the back alerted police at the front to the firearm. Police startled Young who feared an intruder, and he pulled his weapon. Police then shot and arrested Young. The Court held that police had intruded upon the curtilage of Youngs home because: 1) police were 15-20 feet from the back door of Youngs home; 2) while police stood behind a fenced area, the fence did not mark the boundary of "intimate activity" because the enclosed area was a very small area directly adjacent to the house; 3) items such as a grill, table and chairs occupied the area where police invaded; 4) the area was a backyard where Young had an actual and reasonable expectation of privacy.
- **Trash & Trash Cans.** Trash cans positioned "very close" to the side of a townhouse were within protected curtilage where there was no fence due to conditions in an urban area that does not easily facilitate use of a fence, the collected trash was in a closed container, the area locating the trash cans was used for home storage, staging yard work, and parking his car, and the area was used for private living purposes. *Commonwealth v.*

[7] While the search in *Young* was determined to be a Fourth Amendment violation and therefore unlawful, the ultimate issue in *Young* was one of qualified immunity. The Court held that "[b]ecause it was not unreasonable for Defendants to conclude that the area outside a fenced enclosure in a rural area was not within the curtilage, they are entitled to qualified immunity for the Fourth Amendment violation resulting from the unreasonable search." *Young v. City of Radcliff*, 561 F. Supp. 2d 767, 790 (W.D. Ky. 2008).

Ousley, 393 S.W.3d 15, 27 (Ky. 2013). However, trash cans deposited for collection outside the curtilage are not protected by the Fourth Amendment. *Dunn v. Commonwealth*, 360 S.W.3d 751 (Ky. 2012); *Ashlock v. Commonwealth*, 403 S.W.3d 79 (Ky. App. 2013).

8.4 Unlicensed Physical Intrusion: Front Entrances

The front porch of a home is a "classic exemplar of an area adjacent to the home and 'to which the activity of home life extends'" and is therefore constitutionally protected curtilage. *Florida. v. Jardines*, 569 U.S. 1 (2013). That privacy right, however, must be reasonable. *Oliver v. United States*, 466 U.S. 170 (1984). The general rule has therefore become that the main entrance to a home is commonly perceived by the public as a point of access for the public engaged in legitimate business, and it is therefore appropriate for the police to enter this area of protected curtilage. *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2009).

The extent of the license given by a homeowner for others to approach their home "may be implied from the habits of the country." *McKee v. Gratz,* 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922). The "front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds." *Florida. v. Jardines*, 569 U.S. 1 (2013) (citing *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951)). This license gives the public, and police, the right "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave. *Florida. v. Jardines*, 569 U.S. 1 (2013). A police officer that is not armed with a warrant may approach a residence and do "no more than any private citizen may do."[8] *Kentucky v. King*, 563 U.S. 452, 469–70, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865 (2011).

"The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Florida. v. Jardines*, 569 U.S. 1, 9 (2013). In ***Jardines***[9], the United States

[8] See Generally, *Kentucky v. King*, 563 U.S. 452 (2011).

[9] In *Jardines*, police officers received an unverified tip that the home of Jardines was being used to grow marijuana. Two police officers with a trained detection dog approached the residence and entered the front porch area, where the Detectives smelled marijuana and the dog signaled it detected the smell of narcotics. The alert by the trained detection dog and personal observations of the officers were then used to obtain a search warrant.

Supreme Court held that the government's use of trained dogs to investigate the curtilage of a dwelling constituted an unlawful search under the Fourth Amendment. *Florida. v. Jardines*, 569 U.S. 1, 5-12 (2013). The court reasoned:

> [I]ntroducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.[3] To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.

Florida. v. Jardines, 569 U.S. 1, 9 (2013). The core of the analysis is "social norms that invite a visitor to the front door" which would not include an invitation to "conduct a search." Id.

8.5 Abandoned Property & Standing

There is limited authority discussing the abandonment of one's residence within the context of the Fourth Amendment. *Mackey v. Com.,* 407 S.W.3d 554, 557 (Ky. 2013). While not the holding, the Court in *Mackey* did express having "serious questions" about the lower court's reasoning that a warrantless search was permitted when a police officer believed property to be abandoned and the person claiming ownership resided elsewhere at the time of the search. The Kentucky Supreme Court stated that, "certainly the law does not deem property abandoned simply because the owner is residing in another location" as such a holding would "open the door for law enforcement throughout this Commonwealth to conduct warrantless searches of other types of dwellings, such as uninhabited houses converted to storage buildings." *Mackey v. Com.*, 407 S.W.3d 554, 557 (Ky. 2013).

However, abandoned property may give rise to a standing issue. In *Mackey v. Com.*, 407 S.W.3d 554, 557 (Ky. 2013), the Kentucky Supreme Court ultimately held that Mackey did not have sufficient standing to raise the Fourth Amendment violation due to failure to establish a

possessory or ownership interest over the searched property where his only showing of property interest was the address on his driver's license and he resided at a separate property at the time of the search. *See also, Ordway v. Commonwealth,* 352 S.W.3d 584, 592 (Ky.2011) (holding that appellant failed to establish standing to challenge search of an apartment where he was a frequent visitor); *Sussman v. Commonwealth,* 610 S.W.2d 608, 612 (Ky.1980) (concluding that appellant lacked standing to challenge search of girlfriend's apartment, though she gave him a key to the residence for limited use); *Combs v. Commonwealth,* 341 S.W.2d 774, 775 (Ky.1961) (finding that appellant lacked standing to challenge search of residence owned by grandfather, though he lived in the home).

Chapter 9: Terry Stops

The terms "Terry stop" and "stop and frisk" are analogous terms and both originate from *Terry v. Ohio*, 392 U.S. 1 (1968). The holding in *Terry* is that when a police officer has a reasonable suspicion that an individual is armed, engaged in, or about to be engaged in criminal conduct, the officer may briefly stop and detain the individual for the purpose of a pat-down search of their outer clothing. A Terry stop (or stop and frisk) is a seizure in the context of the Fourth Amendment.

In the seminal *Terry* decision, the United States Supreme Court held "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search, or a "frisk," of the individual in order to "determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." The *Terry* pat-down search allows the officer to determine if the suspect is unarmed before continuing his investigation and is, therefore protective in nature. If a pat-down search for weapons goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and any evidence obtained will be suppressed. Frazier v. Commonwealth, 406 S.W.3d 448, 453 (Ky. 2013)(internal citations omitted)

The purpose of a Terry frisk is protective, not investigative and to that end, the requisite reasonable suspicion must logically relate to the frisk's *protective* objective. *Frazier v. Commonwealth*, 406 S.W.3d 448, 454–55 (Ky. 2013) Citing *Minnesota v. Dickerson*, 508 U.S. 308, 377 (1993).

"If a seizure involves only a brief investigatory detention and frisk, the officers need only have a reasonable suspicion of criminal activity to satisfy Fourth Amendment requirements." *Id.* "When a seizure rises to the level of a formal or informal arrest, however, it must be supported by probable cause, which consists of In a recent knowledge of facts and circumstances that 'are sufficient to warrant a prudent person, or one of reasonable caution, [to believe], in the circumstances shown, that the suspect has committed, is committing, or is about to commit an

offense.'" *Id.* (internal citations omitted) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)).

Stop and frisk policies that result in increased stops and frisks for Black and Hispanic individuals are a violation of the Fourth Amendment. *Floyd v. City of New York*, 813 F. Supp.2d 417 (2011).

9.1 Distinguishing Terry Stops from consensual stops

An officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment. A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave. Where a seizure has occurred, "if police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony," they may make a Terry stop to investigate that suspicion. Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003).

Asking a person questions would not constitute a Terry stop. On the other hand, handcuffing or restraining a person could exceed the scope of Terry and require probable cause versus reasonable suspicion.

9.2 Reasonable Suspicion

An officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Reasonable suspicion is the lowest tier of the pyramid comprised of probable cause (level two) and preponderance of the evidence (level three): "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the

evidence standard." *Baker v. Commonwealth*, 475 S.W.3d 633, 634–35 (Ky. App. 2015) *citing* United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

The court must consider the totality of the circumstances in determining whether a police officer had a particularized and objective basis for suspecting that a person stopped may be involved in criminal activity. *Bauder v. Commonwealth*, 299 S.W.3d 588, 591 (Ky. 2009) *citing United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Officers engaged in an illegal frisk certainly cannot create reasonable suspicion *during* the course of the frisk. A *Terry* frisk focuses on the facts "available to the officer at the moment of the seizure or the search. *Frazier v. Commonwealth*, 406 S.W.3d 448, 457 (Ky. 2013)

Anonymous tips cannot form the basis for reasonable suspicion absent independent corroboration of criminal activity. For example, tip that individual at bus stop had a gun was insufficient, it did not predict any future actions. *See, Florida v. J.L.*, 529 U.S. 266, 271 (2000).

9.3 Frisks

For the plain feel doctrine to apply, the incriminating nature of item must be obvious. "Simply put, once an officer, **without manipulating an object**, identifies it by touch as a weapon or contraband, he has the requisite probable cause to perform a more invasive search of the individual's person and seize the object." *Frazier v. Commonwealth*, 406 S.W.3d 448, 456 (Ky. 2013)**.** Under the plain feel doctrine, "[w]hen a police officer lawfully pats down the outer clothing of a suspect and feels an object whose contour or mass makes its identity immediately apparent, there is no violation of privacy beyond that already permitted by the pat down search for weapons. *Commonwealth v. Jones*, 217 S.W.3d 190, 195 (Ky. 2006).

There is nothing inherently incriminating about carrying a pill bottle in one's pocket, thus removal was an illegal search. *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006). Plain feel did not apply when the Officer did not know whether suspect had a valid prescription for medicine in a pill bottle, thus the contraband nature of the item was not readily apparent."

Unconstitutional search occurred when officer manipulated item and pulled the item out of suspect's pocket. "While he described the object as 'long,' 'coarse,' and 'hard in nature,' he did not testify to recognizing the object as either drugs or a weapon. In fact, he explained that he

opened Frazier's pocket in order to "make sure [there wasn't] a weapon or some other object in there." *Frazier v. Commonwealth*, 406 S.W.3d 448, 457 (Ky. 2013).

9.4 Stop & Search of Individuals on Foot

To stop and search a pedestrian, the police must have a sufficient basis for reasonable suspicion of criminal activity.

- Presence in a public area known for criminal activity, late at night, standing near a pay phone that has sometimes been used in drug transactions, and quickly walking in the opposite direction of police officers is insufficient basis for reasonable suspicion. *Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008).
- Conversely, sufficient basis for reasonable suspicion when officer did not recognize defendant as a resident and he was present at an apartment complex with "No Trespassing" sign posted, the defendant walking in the opposite direction of officers, and had bulge in his pocket. *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001)

9.5 Stop and Search of Individuals in a Vehicle

A *Terry* stop in a traffic (vehicle) stop context consists of stopping a vehicle and its occupants pending inquiry into a vehicular violation. The police do not need to believe that any occupant of the vehicle is involved in criminal activity. For example, it is constitutionally permissible to stop and detain a drive under suspicion of not wearing a seatbelt, which is a violation and not criminal behavior.

- Stop illegally extended when officer took passengers' identification and asked the driver for permission to search for several minutes until driver relented. *Williams v. Commonwealth*, 2021 WL 840344 (unpublished).
- "Travel plan" questions initially asked to driver, and inquiry into occupants' criminal history were appropriate and related to the traffic stop's mission. The Court would not consider whether these inquiries prolonged the duration of the traffic stop by any length of time. *Carlisle v. Commonwealth*, 601 S.W.3d 168, 179 (Ky. 2020)

- Trooper's purpose for the stop was to stop a speeder with an improperly illuminated plate, and to verify his sobriety, identity, and registration. Once that task was completed, officer had no authority to further detain the vehicle and its occupants. The continued detention of Appellant and his passengers was never justified by any form of articulable suspicion. Indeed, based upon Trooper Knight's suppression hearing testimony, we in fact know why the policeman continued his control over Appellant and the passengers. *Turley v. Commonwealth*, 399 S.W.3d 412, 422 (Ky. 2013)

9.6 Kentucky has adopted the automatic passenger rule:

When a driver of a car has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle, an officer may conduct a brief pat-down for weapons (not a full-blown search) of the vehicle's passengers, regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion. *Owens v. Commonwealth*, 291 S.W.3d 704, 712 (Ky. 2009).

Chapter 10: Dog Sniffs

"A police stop exceeding the time needed to handle the matter for which a stop is made violates the Fourth Amendment's proscription of unreasonable seizures." *Rodriguez v. U.S.,* 135 S.Ct. 1609 (2015). If the officer stops working on the traffic citation, even momentarily, to pursue an investigation, suppression may be warranted. For example, the act of calling for drug dog, may in and of itself, illegally extend a stop.

- Officer abandoned writing citation to call for drug dog, explain basis of call, and explain procedure to defendant. *Commonwealth v. Clayborne*, 635 S.W.3d 818, 828 (Ky., 2021)
- Unreasonable delay when officers spent time discussing whether to call a canine unit. *Commonwealth v. Mitchell*, 610 S.W.3d 263, 272 (Ky. 2020)

10.1 Multitasking

Court requires investigation of criminal activity to be a "simultaneous mission. *Commonwealth v. Clayborne*, 635 S.W.3d 818, 828 (Ky. 2021). Investigative Pursuits Must be Pursued Concurrently:

- "If discussions are unrelated to the original purpose of the stop, officers may still have such conferences if the officers continue to exercise reasonable diligence in completing the purpose of the initial stop. When it comes to pursuing unrelated investigative issues, officers must be able to do so while simultaneously completing the purpose of the stop. *Commonwealth v. Mitchell*, 610 S.W.3d 263, 272 (Ky. 2020)
- In *Commonwealth v. Smith*, 542 S.W.3d 276, 279(Ky. 2018), no dog was called-the officer who pulled Smith over had one in his cruiser and deployed it almost immediately. Although the sniff was brief, it added time to the stop because it was conducted *before* the purpose of the stop was addressed. *Id.* at 282.

10.2 Dog Sniffs in a Post-Strieff World

Even if reasonable suspicion to initiate a stop is lacking, the discovery of an arrest warrant may attenuate the connection between the unlawful stop and the evidence seized incident to arrest. *Utah v. Strieff*, 579 U.S. 232, 233, 136 S. Ct. 2056, 2058, 195 L. Ed. 2d 400 (2016)

If the client has a pending warrant, the warrant gives officers an independent reason to maintain control of the scene because the arrest warrant is new fact which provided independent probable cause to extend the stop. However, the officer must not entirely abandon the purpose of the initial stop. See, *Rhoton v. Commonwealth*, 610 S.W.3d 273, 279 (Ky. 2020)

Again, Timing is Everything:

- Important to establish **when** in the process the warrant was discovered
- When officer has abandoned any traffic-stop-related inquiries and switched to an investigation into drug activity well before he discovered defendant had an outstanding arrest warrant, the dog sniff was suppressed
- *Commonwealth v. Conner*, 636 SW3d 464 (Ky. 2021)

10.3 Challenging the Collective Knowledge Doctrine

- Important Questions How much corroboration? Information itself must be based on reasonable suspicion. For example, if a narcotics officer asks patrol to watch a particular house or car, they should offer reasoning as to why they are under investigation. *Giles v. Commonwealth*, 620 S.W.3d 204 (Ky. App. 2021).
- Officer's testimony that he heard Defendant was trafficking methamphetamine with another specific individual was not suitably corroborated to carry sufficient indicia of reliability. *Commonwealth v. Conner*, ___S.W.3d __,2020-SC-0099-DG, 2021 WL 5984708, at *10 (Ky. 2021)
- Inconsistent Results when officers discover a Suspended License Supreme Court found it was permissible to extend a detention of both passenger and driver when the driver has suspended license o faulty equipment, *see Carlisle v. Com*monwealth, 601 S.W.3d 168 (Ky. 2020) (officer needed to maintain control of the situation until the vehicle was

safely off the road and the passenger and driver left the scene on foot or by other means); *see also Rhoton v. Commonwealth*, 610 S.W.3d 273 (Ky. 2020).

- The dissent's argument that the search was proper because the driver could not legally drive his car away due to a suspended license is misplaced, and again, the Commonwealth does not raise such an argument. In the instant case, the Commonwealth did not elicit testimony about Officer Nichols' need to move the vehicle or find a new driver, as was the case in *Carlisle v. Commonwealth*, 601 S.W.3d 168. *Commonwealth v. Clayborne*, 2020-SC-0058-DG, 2021 WL 4487288, at *8 (Ky. 2021)

10.4 **Challenging prior drug offenses, movement inside car as basis for suspicion:**

Ask for more scrutiny into "totality of the circumstances"

- See, *Commonwealth v. Conner*, 636 S.W.3d 464 (Ky. 2021)- "[Defendant's]behavior in placing something into the backseat during the traffic stop, even coupled with the anonymous tip and knowledge that Conner was prohibited from driving, does not create a reasonable, articulable suspicion that Conner was then and there engaged in drug activity."

10.5 Nervousness of Vehicle Occupants

In *Moberly v. Commonwealth*, 551 S.W.3d 26, 32 (Ky. 2018), the Kentucky Supreme Court acknowledged that "heightened nervousness is common among drivers detained by a police officer for a traffic violation." Post-Moberly, officers are arguing that defendants were "unusually" nervous in order to justify extending stops where the occupants of the vehicle were "above and beyond nervous to the point of manifesting fear."

Also see, *Love v. Commonwealth*, 2021-CA-1245-MR, (Ky. App. Mar. 17, 2023) occupants of the vehicle were "above and beyond nervous to the point of manifesting fear; *Warfield v. Commonwealth*, 2021-CA-1404-MR (Ky. App. Mar. 31, 2023) "Hulett exhibited a greater than expected level of nervousness." (review granted on a separate issues.

10.6 Challenges to the Handler and the Dog

When evaluating the handler in a dog sniff case, ask questions about the handler-cues given, technique, positive reinforcements for alerting, and related issues. If the dog alerts by sitting (passive) or barking (aggressive), how do they distinguish this from any other time a dog sits or barks?

The handler must undergo her own training that teaches her how to properly interpret her canine's signals, become familiar with the canine's particular pattern of communicating an alert, and avoid mistaking her dog's reaction to distractions as indications of narcotics. Such training is an incredibly important part of the handler's position, and without proof of the handler's training and annual recertification, the court has no way to determine whether or not the handler is adequately qualified to make a final decision of whether the dog actually indicated to the scent of narcotics. Monica Fazekas, "Pawing Their Way to the Supreme Court: The Evidence Required to Prove A Narcotic Detection Dog's Reliability," 32 *N. Ill. U.L. Rev*. 473, 494–95 (2012)

A defendant must have an opportunity to challenge a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. *Florida v. Harris*, 568 U.S. 237, 247(2013). The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. "A sniff is up to snuff when it meets that test." Id. at 248.

In *Harris*, dog had completed 120 hour program two years prior to alert, and separately obtained a certification from an independent company. The dog completed another 40 hour program prior to the search. *Id.* To be sure, Harris's briefs in *this* Court raise questions about that training's adequacy—for example, whether the programs simulated sufficiently diverse environments and whether they used enough blind testing (in which the handler does not know the location of drugs and so cannot cue the dog). Similarly, Harris here queries just how well

Aldo performed in controlled testing. But Harris never voiced those doubts in the trial court, and cannot do so for the first time here. Id. at 249.

The *Harris* Court expressly held that those opposing introduction of evidence of a drug-dog alert "must have an opportunity to challenge ... evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing [their] own fact or expert witnesses." The Court therefore plainly contemplated expert challenges to the reliability of dog alerts and, moreover, said nothing that can be read to preclude any sort of challenge to the scientific reliability of dog-alert evidence generally, or to dog alerts to currency specifically. *United States v. Funds in the Amount of One Hundred Thousand and One Hundred Twenty Dollars ($100,120.00),* 127 F. Supp. 3d 879, 883–84 (N.D. Ill. 2015); See, *State v. Olip*hant, 133 So. 3d 1255, 1260 (La. 2014)

- Dogs was product of bloodhound who mated with unknown dogs living in correctional institutes but "very good in my book" per its handler.
- No records as to dogs' experience or rate of success.
- Given the complete lack of verifiable information relating the dogs training, experience, or abilities, the court erred by admitting the evidence.

Chapter 11: Search Incident to Arrest

"The criminal justice system, like any system designed by human beings, clearly has its flaws."

Ben Whishaw

11.1 The Arrest

The police may, incident to arrest, search not only the person but the area in a person's immediate control. **U.S.C.A. Const. Amend. 4.** The legality of the search depends on the legality of the arrest.

11.2 Arrested on A Warrant

A peace officer may make an arrest in obedience to a warrant. KRS 431.005(1)(a). Sometimes, a client can be arrested on an old bench warrant for a failure to appear, even though he had already been arrested on that warrant before or had taken care of it. In those instances, it is often the case that one police department simply did not know that another police department had already served the warrant but had not removed the warrant from a database used by multiple police departments. In *Commonwealth v. Vaughn*, 117 S.W.3d 109 (Ky. App. 2003), the Court of Appeals adopted the "collective knowledge" doctrine. That is, where a warrant has already been served or is otherwise invalid, "law enforcement officers can be held to the collective knowledge of other officers." *Id.* at 111.

11.3 Arrested on A New Offense

KRS 431.005(1) states that a peace officer may make an arrest without a warrant when:

(b) a felony is committed in his or her presence; or

(c) he or she has probable cause to believe that the person being arrested has committed a felony; or

(d) a misdemeanor, as defined in KRS 431.060, has been committed in his or her presence; or

(e) a felony is committed in his or her presence; when he or she has probable cause to believe that the

PRACTICE TIP: Focus on the crime your client is alleged to have committed. This will be an important factor to analyze when considering the scope of the search incident to arrest.

person being arrested has committed a felony; when a misdemeanor, as defined in KRS 431.060, has been committed in his or her presence; when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his or her presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his or her presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person being arrested has violated KRS 189A.010 or KRS 281A.210;

(f) a violation of KRS 508.030 has occurred in a hospital without the officer's presence if the officer has probable cause to believe that the person being arrested has violated KRS 508.030. As used in this paragraph, "hospital" includes any property owned or used by a hospital as a parking lot or parking garage; or

(g) a violation of KRS 235.240(2) has occurred causing an accident, occurring outside of the peace officer's presence, involving a motorboat or vessel on the waters of the Commonwealth, and resulting in a physical injury or property damage, and a commissioned peace officer has probable cause to determine who the operator of the motorboat or vessel was and that operator was intoxicated or under the influence of any substance that impairs one's ability to operate the motorboat or vessel at the time of the accident.

KRS. 431.005(2)(a) states that any peace officer may arrest a person without warrant when the peace officer has probable cause to believe that the person has intentionally or wantonly caused physical injury to a family member, member of an unmarried couple, or another person with whom the person was or is in a dating relationship.

KRS 431.005(3) states that a peace officer may arrest a person without a warrant when the peace officer has probable cause to believe that the person is a sexual offender who has failed to comply with the Kentucky Sex Offender Registry requirements based upon information received from the Law Information Network of Kentucky.

KRS 431.005(5) states that if a law enforcement officer has probable cause to believe that a person has violated a condition of release imposed in accordance with KRS 431.064 and verifies that the alleged violator has notice of the conditions, the officer shall, without a warrant, arrest

the alleged violator whether the violation was committed in or outside the presence of the officer.

KRS 431.005(7) states that if a law enforcement officer has probable cause to believe that a person has violated a restraining order issued under KRS 508.155, then the officer shall, without a warrant, arrest the alleged violator whether the violation was committed in or outside the presence of the officer.

11.4 The Scope of the Search

The scope of a search incident to arrest depends on the nature of the arrest. The general rule is that "incident to arrest" exception to search warrant requirement allows for the warrantless search of an arrestee's person and of the area within his immediate control. *Commonwealth v. Wood*, 14 S.W.3d 447 (Ky. App. 1999). An arrest for a minor traffic violation does not justify a search of the vehicle as incident to the arrest after the driver is removed from the vehicle. *Lane v. Com*., 386 S.W.2d 743, 10 A.L.R.3d 308 (Ky. 1964).

If the statute states "may," the officer has the discretion whether or not to make an warrantless arrest.

11.5 The Search of a Person

If a client is being arrested, the officer may pat-down the client for safety reasons or to search for and seize any evidence on the client's persons in order to prevent its concealment or destruction.

The "time of arrest" rule is well-reasoned and common-sense way to determine whether such a container is considered part of an arrestee's person and therefore subject to being searched. To be considered part of an arrestee's person, a container must be in the arrestee's actual and exclusive possession, as opposed to constructive possession, at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody. *Commonwealth v. Bembury*, 677 S.W.3d 385 (Ky. 2023).

11.6 The Search of a Person's Surroundings

When conducting a search incident to arrest, police may search items within the "immediate control" of the person arrested. *Chimel v. California*, 395 U.S. 752, 762–63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The Supreme Court has construed the area within a person's immediate control to include the "area from within which he might gain possession of a weapon or destructible evidence." *Id.* While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.

Over the years, courts continued to establish a workable definition of "the area within the immediate control of the arrestee." The right to search an item incident to arrest has been extended to included items no longer accessible to the defendant while the search is being conducted. So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to arrest. *United States v. Nelson*, 102 F.3d 1344, 1347 (4th Cir.1996) (upholding search of the defendant's shoulder bag after agents had removed it from him and taken him to another room for questioning); *United States v. Mitchell*, 64 F.3d 1105, 1110–11 (7th Cir.1995) (upholding search of item after defendant was handcuffed).

In *New York v. Belton*, 453 U.S. 454, 461–62 n. 5, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court held that a search of a jacket located in vehicle's passenger compartment where defendant sat just prior to his arrest was a lawful search incident to arrest. The jacket was ruled to have been "within the arrestee's immediate control" within the meaning of the *Chimel* case. *Belton* claims to do "no more than determine the meaning of Chimel 's principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." There was no contention that a lawful custodial arrest was made of Belton. The Court held that police, as a contemporaneous incident to a lawful arrest, may search the passenger compartment of the vehicle and the contents of the containers (i.e. an object capable of

holding another object) found within the passenger compartment, regardless if it's opened or closed.

PRACTICE TIP: Once the client is arrested, focus on what areas the officer searches and where the client is physically located. If the client is in handcuffs and in the back of the patrol vehicle, it is unlikely that he or she will gain access to the vehicle. What is the Commonwealth's reasoning for the further search at this point? Search for weapons? Possible destruction of evidence? Search for implements of the crime? Evidence in plain view? Do not let this get carried away.

Generally, while the interior of the vehicle may be searched incident to arrest, the trunk of the vehicle cannot. Of course, the search of the interior may produce evidence for probable cause to search the truck. In *Arizona v. Gant*, 129 U.S.1710 (2009), the United States Supreme Court held that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

The Kentucky Supreme Court, applying *Gant*, has directed as follows: "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Com. v. Elliott*, 322 S.W.3d 106 (Ky. Ct. App. 2010) [citing to *Owens v. Com., 291 S.W.3d 704 (Ky. 2009)*].

11.7 Automatic Companion Rule

Sometimes our clients will be the passenger in an automobile involved in a traffic stop. An officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop. Therefore, it logically follows that an officer may order a passenger to exit a vehicle while that vehicle is searched incident to the lawful arrest of the driver.

The Supreme Court ruled in *Berryhill* that "all companions of arrestee within immediate vicinity, capable of accomplishing a harmful assault on officer, may be constitutionally subjected to a cursory "pat-down" reasonably necessary to give assurance that they are unarmed." *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971). Historically, the

Commonwealth adopted the "automatic companion rule" in *Owens v. Com*., 291 S.W.3d 704 (Ky. 2009) citing *Berryhill*. The Commonwealth added in *Owens* that they decided to adopt the automatic companion rule in the narrow realm of cases involving facts similar to the case at hand: involvement of illegal narcotics. *Id.* at 710. The "compelling" concern for officer safety addressed in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is magnified by the fact that cases involving illegal narcotics bring into play "the indisputable nexus between drugs and guns, which presumptively creates a reasonable suspicion of danger to the officer." *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir.1998).

11.8 "Protective Sweep" Doctrine

There are two types of protective sweeps (for officer safety) that are reasonable and lawful under the Fourth Amendment. The first type allows officers as a precautionary matter and without probable cause or reasonable suspicion to look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. The second type allows officers to undertake a broader search of places not adjacent to the place of arrest if there are articulable facts, which taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Brumley v. Commonwealth*, 413 S.W.3d 280 (Ky. 2012).

Where arrestee was arrested outside his mobile home, with no attachments other than a few stairs, it was improper to hold that any room or space whatsoever found inside the adjoined the place of arrest. Further, even though the mobile home was run down, with poor lighting, the fact that the officers were there to serve a felony arrest warrant was irrelevant.

See also *Pace v. Commonwealth* and *Collins v. Commonwealth*, 529 S.W.3d 747 (Ky. 2017) where a "protective sweep" was just one of the issues where the police was trying to salvage an unconstitutional search. While on a stakeout investigating a potential retaliation for a murder, Sergeant Jared noticed a group of several individuals loitering by an apartment building. Shortly thereafter, a car pulled into a driveway next to the left side of the apartment building. Two men and one woman exited the car and walked to the side of the apartment building, whereupon

the loiterers made their way to the back right side of the apartment building. Sergeant Jared suspected obviously that some kind of brawl or drug transaction must be in the works. Consequently, he called for backup, searched one of the men, and found a gun and narcotics on his person. A search of the car uncovered another gun. Further investigation revealed that one of the car's occupants had been smoking marijuana in Apartment 14, appellant's apartment. Numerous officers responded to the scene and required the loiterers to move to the front of the apartment building. Officers asked the crowd who lived in Apartment 14, to which no one responded. One of the officers, Officer Shepherd, proceeded to Appellants' apartment to conduct a "knock and talk." To no avail, Officer Shepherd entered the atrium of the apartment building and knocked on the front door of Appellants' first floor apartment. Officer Shepherd then exited the inside atrium and walked around the outside of the building to Appellants' back door. The back door was a sliding glass door, which was ajar, unobstructed, and located within a partially enclosed patio. The patio enclosure consisted of a brick wall standing approximately five feet tall. Two other officers were already standing within the enclosure and looking through the sliding glass door. The officers notified Officer Shepherd that they could see baggies of marijuana sitting on an inside table. Officer Shepherd was unable to view the baggies of marijuana until she was standing within the patio enclosure.

Without a warrant or Appellants' consents, Officer Shepherd and the two officers entered Appellants' apartment through the sliding glass door and conducted a search. Concurrently, other officers entered the front door of the apartment and joined the search. It is unknown which officer ordered the entry and search. Officer Shepherd testified that she entered the apartment because she was fearful someone may have been injured inside and in need of assistance. During the search, officers found three baggies of marijuana, eight marijuana plants, and other drug paraphernalia. Officers did not seize the evidence upon discovery.

The Supreme Court found that the "protective sweep" doctrine was not applicable: According to our highest court, law enforcement officers are permitted to perform a protective sweep of a residence under two limited circumstances, both of which are preceded by an in-home arrest. *Buie*, 494 U.S. at 333-35, 110 S.Ct. 1093; see *Guzman v. Commonwealth*, 375 S.W.3d 805, 808 (Ky. 2012). The first type of protective sweep provides that officers may "as a

precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013) (quoting *Buie*, 494 U.S. at 334, 110 S.Ct. 1093). The second type of protective sweep allows officers to perform a broader search of the premises if the officer has reasonable suspicion "that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. The exigency in these situations is the safety of the officers. *Guzman*, 375 S.W.3d at 807.

The trial court ruled that this exception permitted officers to enter Appellants' apartment in order to conduct a protective sweep of the premises. The trial court stated that "the officers had the potential to be in imminent danger," and were, therefore, entitled to conduct a "protective sweep" of the apartment. The Court of Appeals quickly disposed of this argument since there were no arrests made, thereby negating the need for a protective sweep of the apartment. Based on the factual context predicating the officers' entry into Appellants' apartment, we can find no identifiable basis for the performance of a protective sweep. The only arrests made prior to the officers' search of Appellants' apartment occurred outside the front of the apartment building. Moreover, those individuals were safely detained away from the apartment building when officers decided to enter Appellants' apartment. There were no other factors present which placed the safety of the officers or those on the arrest scene in danger. The protective sweep exception to the warrant requirement simply did not arise in this situation.

Chapter 12: Vehicle Checkpoints

Red Light, Green Light

"There is simply no reasoning with the unreasonable."

Emily H. Rhorer & Frank Riley,
DPA Staff Attorneys

12.1 Vehicle checkpoints, generally

The text of the Fourth Amendment expressly imposes two requirements: (1) all searches and seizures must be reasonable, and (2) a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.

- **"First, all searches and seizures must be reasonable."** *King v. Commonwealth*, 563 U.S. 452 at 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). Carefully consider the language the High Court has chosen to use as the lynchpin for interpreting 'hot pursuit' law. The judicially approved formula reversed "The right of the people to be secure…against unreasonable searches and seizures, shall not be violated…" language to instead analyze the police behavior from a perspective of reasonableness. It sounds reasonable, yet it is not a good thing as doing so exposes a creeping implicit bias invading our legal analytical thinking. In the sage words of George Bernard Shaw: "The reasonable man adapts himself to the world; the unreasonable one persists to adapt the world to himself. Therefore all progress depends on the unreasonable man." Your motions must start from your client-centered vested right and explode against the unreasonableness of the police conduct—from your client's perspective!
- **Where no warrant issues the prosecution bears the burden of proving a warrantless search was reasonable**. Of course this notion seems commonplace. Rudimentary even. But is it real? Could it be that this is just one step in the process. Isn't justifying a search based on reasonableness just a restatement of the first requirement? The problem is the second requirement and why did no warrant issue! Herein lies the entrance to a

judicially carved world of exceptions to the warrant requirement. In the remainder of this article, we will talk about two of the many exceptions: Checkpoints and Hot Pursuits.

- Like all suppression issues these matters should be presented at the earliest possible time for your client. The early filing puts quick pressure on the state to evaluate their case and expend their resources. It sends a clear message to the prosecution and court that you and your client highly value the right which you are accusing the police of violating. Your client knows that you are taking the good fight to the state. And you are fully preserving issues prior to trial. All good reasons to make the record.

12.2 Checkpoints should be fully vetted.

Practice Tip:

Emphasize the importance of law enforcement following the law, when enforcing the law.

The analysis of checkpoint law is interesting. It starts with whether the infraction was unreasonable and then bleeds into the requirement of particularity of purpose. It is the red light for police conduct. You can see from the decisions that the particularity of the scope as applied to the probable cause for the searches is a key concern and can even outweigh the reasonableness of the offered police intrusion.

Commonwealth v. Buchanon, 122 S.W.3d 565, 570 (Ky. 2003), as amended (Jan. 12, 2004), is a powerful weapon for the defense practitioner. The Court loaded the opinion with broad language and hefty references that will give you fruitful avenues to pursue suppression. Of primary importance in relation to checkpoint is the four factors discussed at 571:

> First, it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field. Any lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials. Locations should be chosen so as not to affect the public's safety and should bear some reasonable relation to the conduct law enforcement is trying to curtail.

Second, the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner. Officers in the field should not have unfettered discretion in deciding which vehicles to stop or how each stop is handled.

Third, the nature of the roadblock should be readily apparent to approaching motorists. At least some of the law enforcement officers present at the scene should be in uniform and patrol cars should be marked in some manner. Signs warning of a checkpoint ahead are also advisable.

Fourth, the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.

We reiterate that the above list of factors is not exhaustive. Also, a mere violation of one factor does not automatically result in a violation of constitutional proportions. The guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each roadblock.

A good practice tip is to draw attention through the evidence to ways that your general public—and indeed your factfinder—might be at unreasonable risk of this same police practice. It is the ever powerful but for the grace…go I. You can find support from the legal language used for the development of the rationale for *Buchanon*. You can find it in seminal decisions like *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), wherein the High Court found a traffic checkpoint set up for general crime control to be violative of the right to privacy under the Fourth Amendment. In *Edmonds* the police simply took it too far in the Court's opinion. The breadth of actions like peering into stopped motorists' windows and circling the cars with drug dogs made the seizure indistinguishable from a generalized interest in crime control which cannot be supported due to the Fourth Amendments requirement of an individualized suspicion.

- *Singleton v. Commonwealth*, 364 S.W.3d 97 (Ky. 2012), wherein the Court extended the *Edmond* rule to strike down the use of checkpoint to enforce a city municipal ordinance as lacking a valid purpose rationally related to the need for highway safety.
- *Monin v. Commonwealth*, 209 S.W.3d 471, 473 (Ky.App. 2006), is an exemplar case wherein the checkpoint was not considered constitutionally valid due to the failure of proof on the four factors set forth in *Buchanon* for the reason that the governmental intrusion was on a generalized rather than individualized reasonable suspicion. [Beware: the courts can use the ever powerful "unpublished" decision to distinguish any question as seen in *Kilburn v. Commonwealth.*, No. 2007-CA-001776-MR, 2009 WL 484981, at *4 (Ky.App. Feb. 27, 2009) and it could happen to you. Craft your questions carefully and clearly within the protection granted by your supporting case.]
- *Commonwealth v. Cox*, 491 S.W.3d 167, 173 (Ky. 2015), reh'g denied (June 16, 2016), is a great exemplar case demonstrating the key concept of adequate notice of police intent to search via a roadblock.

You can locate information on the approved checkpoint sites and even advance notice of the intended police action on state, county and local police department websites or social media outlets and news media outlets. Here is a link to an example publication from the Perry County Sheriff Department. Traffic Safety Checkpoints (perrysheriff.org) Here is a link to an

example from KSP Post 9 Kentucky State Police which in long form is found at https://www.kentuckystatepolice.ky.gov/post9checkpoints.

12.3 Unreasonable Delay.

"Hot pursuit" means pursuit without unreasonable delay but it does not have to be an immediate pursuit. It functions as a green light for the police to circumvent Fourth Amendment protections and can leach across jurisdictional boundaries. It has strong roots grown from felony pursuits in the common law into a categorically recognized exemption. The analysis centers on privacy interests in relation to particular property interests.

Hot pursuit can be tricky. The police wish to rely upon the pace and dangers associated by the public and even the court with the perception of their daily activities. It is often easy and exciting evidence for the prosecution to muster. Hot pursuit evidence dovetails nicely into other exigency exceptions evidence such as 'destruction of evidence', 'search incident to arrest' and 'officer or citizen safety'. The first and often most difficult attack will be on the heat of the pursuit. You should attack each step and isolate the action on the grounds of time, reasonableness, probable cause for procurement of a warrant and grounds for particularity of the subsequent search. A good practice tip is to draw attention through the evidence to ways that your general public—and indeed your factfinder—might be at risk of this same police practice. It is the ever powerful but for the grace…go I.

Use "Jill's Law" (HB 298) and make sure to get a copy of your local agency's policy in your discovery practice!

Hot pursuit will frequently be the lynchpin for analysis with reference to other police exemptions such as officer or citizen safety, destruction of evidence, plain view, or the ilk. The hot pursuit exception to the 4th Amendment is fundamentally judicial sanctioning of policing behavior and is an important weapon in the arsenal of the civil advocates determining police civil liabilities. See, Richard G. Zevitz, "Police Civil Liability and the Law of High Speed Pursuit", Marquette Law Review, Vol. 70, Issue 2, Winter 1987, Article 3. Use this to your advantage to illustrate how the police are trying to cover their civil flanks and why that is not reasonable in this prosecution.

“Jill’s Law” -- HB 298 POLICY REQUIREMENTS

The policy shall create guidelines for determining when the interests of public safety and effective law enforcement justify the initiation or termination of a vehicular pursuit. The policy shall address the following subjects:
(a) The definition of pursuit that will be governed under the law enforcement agency's policy;
(b) Decision-making criteria or principles that are designed to assist peace officers in determining whether to initiate a pursuit. The criteria or principles may include but shall not be limited to: 1. The potential for harm or potential danger to others if the fleeing individual evades or escapes immediate custody; 2. The seriousness of the offense committed or believed to be committed, by the fleeing individual or individuals, prior to the officer activating emergency equipment; 3. If the officer has a reasonable and articulable suspicion that the driver or an occupant of the vehicle in which they are fleeing represent a clear and present danger to the public safety; 4. Safety factors that pose a risk to peace officers, other motorists, pedestrians, or other third parties; 5. Vehicular or pedestrian traffic safety and volume; 6. Weather and vehicle conditions; 7. Potential speeds of the pursuit; and 8. Consideration of whether the identity of an offender is known and could be apprehended at a later time;
(c) Responsibilities of the pursuing peace officer or officers, including pursuit tactics and when those tactics are appropriate for use by the officer or officers;
(d) Procedures for designating the primary pursuit vehicle and for determining the total number of vehicles that are permitted to participate at one (1) time in the pursuit;
(e) Coordination of communications during the pursuit, including but not limited to responsibilities of the pursuing officer to communicate with his or her communications center at the commencement of a pursuit regarding the location, direction of travel, reason for the pursuit, and ongoing status reporting during the pursuit;
(f) A requirement that there is supervisory control of the pursuit, including the responsibilities of command staff or other supervisors during the pursuit, if a supervisor is available;
(g) The circumstances and conditions where the use of pursuit intervention tactics, including but not limited to blocking, ramming, boxing, and roadblock procedures may be employed;
(h) Decision-making criteria or principles that are designed to assist peace officers in making an ongoing determination during the course of the pursuit of whether to continue the pursuit or to terminate or discontinue it. The criteria or principles may include but shall not be limited to:1. The potential for harm or potential danger to others if the fleeing individual evades or escapes immediate custody; 2. The seriousness of the offense committed or believed to have been committed by the individual or individuals that are fleeing; 3. Safety factors that pose a risk to peace officers, other motorists, pedestrians, or other third parties; 4. Vehicular or pedestrian traffic safety and volume; 5. Weather and vehicle conditions; 6. Speeds of the pursuit; 7. Consideration of whether the identity of an offender is known and could be apprehended at a later time; or 8. Where the officer has a reasonable and articulable suspicion that the driver or an occupant of the vehicle in which they are fleeing represent a clear and present danger to the public safety;
(i) Procedures for coordinating the pursuit with other law enforcement agencies, including procedures for interjurisdictional pursuits; and
(j) A process for reporting and evaluating each pursuit by the law enforcement agency.

U.S. v. Santana, 427 U.S.38 (1976), is an important case. Santana was being sought for suspicion of felonious trafficking and being in possession of marked money. She was seen by the approaching police in her doorway holding a brown paper bag. The police jumped out of the car while identifying themselves, she retreated into the home. They followed through the still open door. The arrest and seizure of evidence was justified on the basis that the police had started the "arrest" while she was in a public place and that since they needed to act quickly due to possible destruction of evidence, this was a true hot pursuit and warrantless entry into the home to effectuate the arrest was justified. The rationale is interesting in that says that although the common law of property holds that a threshold is private, cases interpreting 4th Amendment law clearly shows it is a public place, alluding to the privacy interest at stake.

"One important exception is for exigent circumstances. It applies when 'the exigencies or the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.' *King*, 563 U.S. at 460.

Practice Tip:
You should seriously consider raising this challenge when you have reason to suspect that law enforcement may have tacked on a felony fleeing or tampering charge to avoid the warrant requirement.

In hot pursuit cases, your strongest legal position is when you can link it to the home by virtue of a privacy interest. The home is first among equals. *King.* But, remember, the home is not impenetrable. Underlying each of these cases is the premise that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. U.S.,* 389 U.S. 347, 351 (1967).

Hot pursuit extends to safety and security officers. KRS 183.881(2)(a). And all peace officers under KRS 164.955(2)(a). So, make sure to attack your oddball agency officer on the grounds of the "Jill's Law" policy requirement, or at least argue to umbrella them in to being covered under the primary agency's policy.

There is room to maneuver in the hot pursuit exigency. Consider the recent case of *Lange v. California*, 594 U.S. ----, 210 L.Ed.2d 486 (2021), wherein the High Court declined to apply the

requested categorical exigent circumstances exemption to the warrant requirement in a misdemeanor case where the police followed a suspected drunk driver into his attached garage while in hot pursuit for alleged wholly misdemeanor infractions. The court recognized the categorical exigent circumstances exemption applied to felony pursuits from the common law but found no such basis for the lesser crimes and deferred to a 'totality of circumstances' analysis. However, in so doing, the High Court discussed how the felony crime classification has expanded to encompass many crimes formerly falling under the misdemeanor subset and has given us ground to fight back against the common law felony hot pursuit rationale.

12.4 The ethical and practical impact of a rocket docket offer.

The speed and streamlined procedures for the rocket docket could mean that many of these issues evade review. It is important for you to have adequately reviewed the charging documents and met with your client to discuss their concerns so that the two of you can adequately evaluate whether a rocket docket is a suitable means for the case to proceed given the potential for challenge on hot pursuit or checkpoint grounds. You may even wish to try to craft a plea resolution with a conditional right to review on the suppression issue. If your prosecutor does not allow this, make it known on the record and that you and your client express some reservation to the plea based upon the contingency, and that the court could have easily heard and decided this evidentiary issue and protected the public from a forced flush of policing misconduct.

Chapter 13: Miranda Rights

It has been held that "*Miranda* and its progeny in this Court [the Supreme Court of the United States] govern the admissibility of statements made during custodial interrogation in both state and federal courts. *Miranda* is not just a prophylactic rule but is rather a constitutionally-based rule of law." *Welch v. Commonwealth*, 149 S.W.3d 407, 410 (Ky. 2004) quoting *Dickerson v. United States,* 530 U.S. 428, 431 (2000). The next few chapters examine how *Miranda* has been treated in Kentucky Courts, in conjunction with interpretations of Kentucky's § 11, which has been held to extend *Miranda* rights co-extensive to that extended by the Fifth Amendment.

13.1 Miranda, Generally, and the KY Constitution § 11

The landmark case *Miranda v. Arizona*, 384 U.S. 436 (1966), interprets the Fifth Amendment of the Constitution of the United States, which provides in pertinent part that "[n]o person… shall be compelled in any criminal case to be a witness against himself…" There are two rights within the Fifth Amendment that *Miranda* highlights: the right to remain silent and the right to counsel during interrogation. The Supreme Court believed that "custodial questioning is inherently coercive, and protection against this inherent coercion is what *Miranda* intended to prevent." *Michigan v. Mosley,* 423 U.S. 96, 112, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). *Smith v. Commonwealth*, 312 S.W.3d 353, 358 (Ky. 2010). The *Miranda* "right to counsel" should not be confused with the Sixth Amendment right to counsel. While the Sixth Amendment affords the right to counsel when formal criminal proceedings have begun, the *Miranda* "Fifth Amendment right to counsel" created the right to counsel for individuals being interrogated by state actors while in custody, well before the Sixth Amendment right to counsel would attach.

The Kentucky Constitution mimics the *Miranda* rights found in the Fifth Amendment. *Newman v. Stinson*, 489 S.W.2d 826 (1972). ("The Fifth Amendment and Section 11 of the Kentucky Constitution provide identical protection against self-incrimination.") However, the wording is slightly different. Section 11 of the Kentucky Constitution reads in part, "In all criminal prosecutions the accused has the right to be heard by himself and counsel… He cannot be compelled to give evidence against himself…" This small difference does not change the rights inherent in the Fifth Amendment.

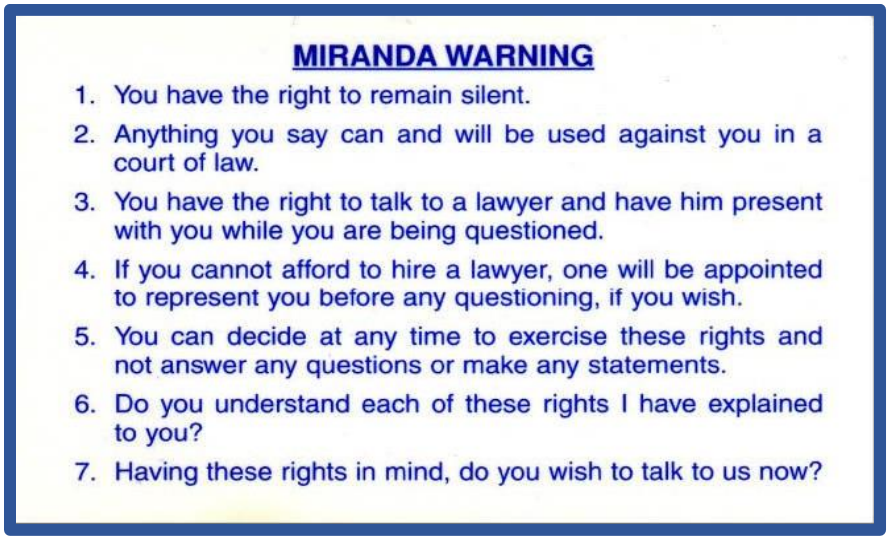
13.2 The *Miranda* Warnings

Miranda warnings have also been called "*Miranda* rights" or simply "rights" or "*Miranda*." Regardless of the terminology used, *Miranda v. Arizona* sets out the 5 warning requirements for reading an individual their Fifth and Sixth Amendment rights to remain silent, and to have counsel present, respectively:

> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way…
>
> **[Warning 1]** He must first be informed in clear and unequivocal terms that he has the right to remain silent.

> **[Warning 2]** The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it.
>
> **[Warning 3]** [W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer…
>
> **[Warning 4]** …and to have the lawyer with him during interrogation…
>
> **[Warning 5]** [I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. *Miranda*, 467-473.

Note that sometimes you may see or hear the *Miranda* Warnings worded differently or with more than five warnings. This is simply because the Supreme Court in its *Miranda* decision did not indicate precise language or verbiage to be used in every case. Therefore, that particular police department or that officer may have adopted what has come to be known as the "traditional *Miranda* rights." These warnings are a staple of TV crime dramas and many (including potential jurors) are quite familiar with what these warnings are. One example of a *Miranda* Warnings card that officers carry is below:



13.3 When are *Miranda* warnings required?

Your analysis should always begin with the inquiry: Are *Miranda* warnings **required** to be read in this situation? Remember that *Miranda* sought to protect individuals from the inherently coercive nature of interrogations. There are three elements required to trigger *Miranda*: (1) the individual is in *Miranda* custody, (2) the individual is being interrogated, and (3) the interrogation was conducted by a state actor. Thus, these warnings **must** be read to anyone who is interrogated by a state actor while in *Miranda* custody.

The inquiry can be as simple as asking three questions: Was your client in *Miranda* custody? Was your client being interrogated? Was the person doing the interrogation a state actor? If you answer yes to all three questions, *Miranda* is required to be read. Often times, however, this analysis is not as straightforward as yes, yes, and yes. The subsequent chapters of this manual dive into the nuances and Kentucky interpretations of these elements to help you better and more effectively answer this inquiry and build your suppression challenge.

13.4 *Miranda* does not require that these rights be read verbatim

Unfortunately, a *Miranda* suppression issue does not arise when an officer fails to read the *Miranda* warnings verbatim. Similarly, there are no "magic words" that must be uttered in order for *Miranda* warnings to be properly given. The Supreme Court of the United States ruled in multiple cases that it "has never indicated that the 'rigidity' of Miranda extends to the precise formulation of the warnings given a criminal defendant." *California v. Prysock,* 453 U.S. 355, 359 (1981), *quoted in Duckworth v. Eagan,* 492 U.S. 195, 202–03 (1989). The Kentucky Supreme Court agreed with this ruling in *Rivera-Reyes v. Commonwealth*, No. 2005-SC-000488-MR, 2006 WL 2986495, at *5 (Ky. Oct. 19, 2006).

Chapter 14: Miranda – In Custody

14.1 Custody: one of the three requirements to trigger *Miranda*

One of the three requirements to trigger *Miranda* warnings is that the individual be *in custody* for the interrogation. In order for *Miranda* to apply, "the suspect must either be actually taken into custody or the restraint on his freedom must rise to the level associated with a formal arrest." *California v. Behler*, 463 U.S. 1121 (1983). Kentucky echoes this requirement in *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (2006) (*Miranda* warnings are required "only where there has been such a restriction on the freedom of an individual as to render him in custody.")

14.2 Arrest = in custody

An individual who is arrested is automatically in custody. "It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420 (1984). In contrast, an individual who was not formally arrested but instead had come voluntarily to the police station where they gave incriminating statements was determined not to be in custody. And because he was not in custody, *Miranda* warnings were not required to be given. *Commonwealth v. Lucas*, 195 S.W.3d 403 (Ky. 2006).

There is quite a bit of gray area between a consensual encounter with police as in *Lucas* and a formal arrest in *Berkemer v. McCarty*.

|----------|

Consensual encounter with police — Arrest

The Court looks at the totality of the circumstances to determine if:

(1) The person was under formal arrest,
(2) There was a restraint of his freedom **OR**
(3) There was a restraint on freedom of movement to the degree associated with formal arrest. *Thompson v. Keohane*, 516 U.S. 99 (1995). See also, *United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999).

The presence of handcuffs does little to prove that your client is in custody. "While handcuffing will necessarily weigh strongly that there is custody for *Miranda* purposes, we are not willing to adopt a bright-line rule that it always is. Again, all relevant factors must be weighed, and then an ultimate determination made based upon the totality of circumstances." *Smith v. Commonwealth*, 312 S.W.3d 353, 359 (Ky. 2010). It is common to see this type of seizure during a *Terry* stop, where handcuffing may be used for officer safety but does not rise to the level of custody necessary for *Miranda*.

14.3 The reasonable person standard

The general rule is that a person is "in custody" if a **reasonable person** would not believe they are free to leave, that is, an **objective standard**. A subjective standard from the point of view of either the interrogating officer or the individual being arrested would be arbitrary, as each would believe the side that would benefit themselves/ their position more. In *Berkemer v. McCarty*, the Supreme Court emphasized this objective standard:

> It has been held that a policeman's unarticulated plan to take a defendant into custody has no bearing on the question of whether a subject was in custody at a particular time. The only relevant inquiry is how a reasonable person in the position of the suspect would have understood the situation. 468 U.S. 420 (1984), *quoted in Commonwealth v. Lucas*, 195 S.W.3d 403, 406 (Ky. 2006), as modified (Aug. 2, 2006).

In order to determine how a reasonable person would gauge their level of freedom to leave, Kentucky Courts utilizes what is known as the *Salvo* test to examine the **totality of the circumstances** surrounding the interrogation. Relevant factors of the *Salvo* test include:

(1) The location of the questioning,
(2) The duration of the interrogation,
(3) Officer statements made during the interview,
(4) The presence or absence of physical restraints during the questioning, and
(5) The release of the interviewee at the end of the questioning.

United States v. Salvo, 133 F.3d 943, 948 (6th Cir. 1998).

One obvious aspect of the "objective" reasonable person test and the *Salvo* factors is that the police are often in control of every one of those factors: They can ask nicely; They can make sure the environment is not lonely or coercive; They can use the "good cop" routine to put people at ease; or They can decide to forgo the use of handcuffs. However, unless your client at some point does something to suggest they are uneasy or uncomfortable with the questioning or asks whether they can leave, Kentucky courts are likely to find that an objective person would not know they were in custody, because they were never led to believe they were not free to go.

14.4 Considerations for the reasonable person test

But who is this reasonable person they speak of? Should we tailor the reasonable person in order to consider certain characteristics of our clients? Should we consider:

1. Age
2. Race
3. Mental capacity
4. Prior criminal history or interaction with police
5. Race of the state actor conducting the interrogation
6. Intellectual disability
7. If the individual is drunk, high, or otherwise under the influence?

Age of the client

The Supreme Court gives us a hint that there is some tailoring that is done when it comes to determining the reasonable person: **age**. See *J.D.B. v. North Carolina,* 564 U.S. 261 (2011). The main question addressed was, can a child be in custody for *Miranda* purposes? The answer is yes. Citing the *J.D.B.* decision, the Kentucky Supreme Court said, "Taking for granted that *Miranda* applied if the child were in custody, the [Supreme] Court specifically held that a child's age is a factor that must be considered in doing the *Miranda* custody analysis, and essentially approved an 'all relevant circumstances' test that is broader than a totality of the circumstances test." *N.C. v. Commonwealth,* 396 S.W.3d 852, 861 (Ky. 2013). Five years later, in *E.C. v. Commonwealth*, 565 S.W.3d 171 (Ky. Ct. App. 2018), the court held that the child was in custody at the time he was interrogated by the officer. The court reasoned, "Given the circumstances, Detective Day should have recognized the custodial nature of her interrogation and given E.C. proper *Miranda* warnings. Her failure to do so renders his confession inadmissible." *Id*. at 181. Thus, when it comes to representing kids, an 'all relevant circumstances' test is used.

PRACTICE TIP

When determining any *Miranda* factor, a winning suppression motion relies on the specific details and facts surrounding your client's interrogation. You must develop your facts and argue why suppression of statements is required in this case. Don't rush to make your argument until you have developed all necessary facts.

Level of Drunkenness

This concept was addressed in *Smith v. Commonwealth*, 410 S.W.3d 160 (Ky. 2013) in the context of waiver and voluntariness of statements. See Chapter 16.

Already Aware of Miranda Rights

Some individuals may already be familiar with the *Miranda* warnings. However, it is not a requirement of the reasonable person standard that the individual is **aware** of their Fifth Amendment rights not to incriminate themselves or have a lawyer present for custodial interrogation if they choose. Rather, if an individual is **in custody** and subject to **interrogation** by a **state actor**, they must read the *Miranda* warnings!

14.4 What does it mean to be "in *Miranda* custody"?

Much like the other requirements of *Miranda*, the "in custody" factor must be for *Miranda* purposes. It is possible to be in custody but not be "in custody" to trigger *Miranda* warnings. *Wells v. Commonwealth*, 512 S.W.3d 720 (Ky. 2017), is a great example of this. The facts of *Wells* are as follows: Lexington Police Detective James Jeffries went to the residence Wells shared with his girlfriend and her children. Detective Jeffries asked Wells if he would come to police headquarters to answer some questions about allegations made against him. Wells agreed. Because Wells did not have a valid driver's license, he rode to police headquarters in the back of Officer Sisk's cruiser. Even though Wells was not in handcuffs, Detective Jeffries failed to clarify to Officer Sisk that Wells was not in custody. When Officer Sisk and Wells arrived at police headquarters, Officer Sisk placed Wells in a holding cell. During the brief five minutes Wells was

in the holding cell before Detective Jeffries arrived, Wells was in custody as it is normally defined. No questioning or interrogation took place.

When Wells was moved to an interview room, Detective Jeffries never placed Wells in handcuffs or restrained him. During the interview, Detective Jeffries said that:

1) Police would provide Wells a ride home after the interview;
2) Wells had the right not to talk to him;
3) He would not harm Wells, and he could not beat Wells into talking to him;
4) Wells could end the interview at any point;
5) Wells was not in custody; and
6) If Wells decided he was done with the interview, Jeffries could not stop him from leaving. In fact, Detective Jeffries had Wells physically get up out of his chair and walk to the door of the interview room as if he were leaving to illustrate the point that Wells was not in custody. Only after making the aforementioned statements and having Wells enact leaving the interview room did Detective Jeffries begin the interrogation.

PRACTICE TIP

When determining any *Miranda* factor, a winning suppression motion relies on the specific details and facts surrounding your client's interrogation. You must develop your facts and argue why suppression of statements is required in this case. Don't rush to make your argument until you have developed all necessary facts.

The Court held that based on the totality of the circumstances test, a reasonable person in Wells' position would have felt he had the liberty to terminate the interrogation and leave before making incriminating statements. Therefore, the interrogation was non-custodial and *Miranda* warnings were not required.

14.5 Must you have a "coercive environment" to be in *Miranda* custody?

The Supreme Court has distinguished between "custodial interrogation" and the mere questioning of a suspect in a "coercive environment":

> "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). *See also, United States v. Phillip,* 948 F.2d 241, 247 (6th Cir.1991) ("Coercive environments not rising to the level of formal arrest ... do not constitute custody within the meaning of *Miranda.*").

Ultimately the court asks whether the relevant environment presented the ***same*** inherently coercive pressures at the type of station house at issue in *Miranda*. For example, in *Howes v. Fields*, 565 U.S. 499 (2012), Fields was a state prisoner taken from his cell to a conference room for questioning. Although he was separated from the general prison population, questioned for 5-7 hours and in multiple instances, told deputies that he no longer wished to speak with them, the Court determined that he was not in custody for the purposes of *Miranda* and therefore, no *Miranda* warnings were necessary. Applying a totality of the circumstances test, the question became whether the relevant environment presented

the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. Here, it did not. So, while Fields was in custody under its general definition (a prisoner serving a sentence and not freely able to leave), Fields was not in the type of custody necessary to trigger *Miranda*.

It is also worth noting that Fields may have had difficulty in leaving (having to ask to be returned to his cell, being handcuffed, having to be escorted to another area of the prison that may have been some distance away from the conference room, etc.) but such difficulty does not render him to be in custody. Stick to the reasonable person and totality of the circumstances tests! For a Kentucky case with a similar fact pattern to *Howes v. Field*, 565 U.S. 499 (2012), look to *Buster v. Commonwealth*, 406 S.W.3d 437 (Ky. 2013).

It should also be noted that a police station or similar location is not necessary to be in custody. In *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004), the Supreme Court held that the child who was committed by the court to the Department of Juvenile Justice and placed in a juvenile sex offender program at a treatment facility, and for whom his participation was involuntary, was in "state custody" for purposes of *Miranda*. Hence, his inculpatory statements made during class had to be suppressed for lack of *Miranda* warnings. Key to this holding is the fact that the classes were involuntary. Not only was he expected to attend, but he was also expected to participate.

14.6 Determining the custody factor using Kentucky case law

Two Kentucky cases highlight the distinction of "not in custody" and "in custody": *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008) and *Senseman v. Commonwealth*, 2012 WL 2053357 (Ky. App. 2012)(unpublished[10]). Because FACTS MATTER and the court uses a totality of the circumstances test, a summary of each case is given.

In *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008), the Kentucky Supreme Court held that after considering the totality of the circumstances, Beckham was not in custody for *Miranda* purposes. Beckham became the prime suspect in the murder of a woman found badly beaten in a motel room. Officers obtained a search warrant for samples of blood, saliva, body hair, head hair, and pubic hair from Beckham and to take nude photographs of him. Officers found Beckham at his cousin's house and wanted to "ask" him if he would speak with them. He apparently agreed to speak to the officers, whereupon they transported him in a police vehicle to a local probation and parole office. There he was questioned for two hours, and then agreed to make a written statement, at which time he was left alone to write it out. It took 30 minutes to write. Shortly thereafter, he also gave police permission to retrieve his clothes, and he was driven back to this cousin's home in a police vehicle to get them. Then, for the first time, they told him about the search warrant, and they took him to the hospital to obtain the evidence specified in the search warrant. He did not object. By this time, the police had also viewed

[10] Kentucky CR 76.28(4)(c) Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

surveillance video which corroborated part of his statement. A few hours later, the police told Beckham that there had been a "dramatic turn of events" or a "dramatic discovery" and asked him if he had anything he needed to say to them. Beckham then said something about needing help, after which the police first read him his *Miranda* rights. Being informed of his rights, Beckham exercised his right to counsel, thereby ending the interrogation nearly seven hours after the police first encountered Beckham at his cousin's house.

Beckham argued that because he interacted with officers for six hours before he was given his *Miranda* warnings and multiple officers were present, he must have been in custody. However, the length of interrogation and the number of officers present are only two factors to be considered. The Court relied on the totality of the circumstances. Specifically, the officers testified that they informed Beckham he was free to leave, and that Beckham never showed any inclination to leave or otherwise to stop speaking and cooperating with them. Further, Beckham offered nothing at the suppression hearing to rebut the officers' testimony. So, using the totality of the circumstances test, Beckham was not in custody for the purpose of *Miranda*.

Contrast this case with *Senseman v. Commonwealth*, 2012 WL 2053357 (Ky. App. 2012)(unpublished), where the Court of Appeals found that the defendant was in custody for *Miranda* purposes. In that case, Senseman was charged with the murder of his young daughter who he claimed to have found lying limp in her playpen. Tshe died of Sudden Infant Death Syndrome (SIDS). An autopsy was said to have revealed a severe brain injury caused by blunt force trauma which was estimated to have taken place between minutes and two hours of Senseman finding his daughter unresponsive. On his way home from making funeral arrangements for his daughter, he agreed to meet the detective at the sheriff's office to discuss the autopsy. Senseman was alone in the interrogation with the detective while his wife and son waited in the waiting room. The detective proceeded to tell Senseman the findings of the autopsy, that his child's injuries had been incurred close to the time of her death, and that because he was the only adult with her, he must have caused her death. Although Senseman repeatedly denied hurting his daughter, the detective said that "the science is 100%" and that Senseman must have caused the head injury.

Then, another detective aggressively leaned into Senseman's face, pointed his finger, hit the table, yelled at him, and left. Finally, Senseman speculated that maybe he had pushed her head into the side of the playpen and that he was afraid that perhaps he may have handled her too roughly. The first detective then asked him to make a written statement so that his wife would know what happened in his own words. Only after the detective obtained this statement did he read *Miranda* warnings to inform him of his rights. He immediately placed him under arrest.

The Court of Appeals relied upon the *Salvo* test to determine whether, under the facts, a reasonable person would think he was in custody. These include:

> (1) the purpose of the questioning;
> (2) whether the place of the questioning was hostile or coercive;
> (3) the length of the questioning; and
> (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the

officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police"
***U.S. v. Salvo*, 133 F.3d 943, 950 (6th Cir.1998).**

Applying those factors to the facts of the case, the Court of Appeals found that Senseman was *in custody* because:

- The purpose of the questioning was admittedly to elicit a confession from the defendant. The detective testified at the suppression hearing that he was a suspect in the child's death, that he believed that the defendant had either caused the injuries or that he was concealing information about the perpetrator.
- The detective admitted (and so testified) that he did not know whether the defendant would be allowed to leave when the interview began.
- The place of the questioning was hostile, intimidating, and coercive. Furthermore, although his wife and son had accompanied Senseman to the sheriff's office, Detective Wilson separated him from his family and placed him in a small, windowless "criminal investigation" room.
- Significantly, Detective Wilson, who initiated the contact, did not advise Senseman that he was free to leave or that the interview was voluntary. The detective testified that he did not advise Senseman that he had a choice, and he never offered to postpone the interview until after the child's funeral. He also did not inform Senseman that he was free to leave after arriving or at any point in the questioning. Moreover, at two different points during the interview, Detective Wilson stepped out of the room. Both times he instructed Senseman "to stay put" in the room.

This is a prime of example of why developing the facts of your case is crucial!

14.7 Situations in which the individual is determined not to be in custody

Of course, there are well-established distinctions between being under arrest and being stopped by a police officer.

Traffic Stops: The Supreme Court held in *Berkemer v. McCarty*, 468 U.S. 420 (1984), that traffic stops are not custody for *Miranda* purposes. While a traffic stop curtails one's freedom of movement, the traffic stop is temporary and brief and the circumstances surrounding the typical traffic stop are not such that the motorist feels completely at the mercy of the police. Moreover, a traffic stop occurs in public and less police-dominated than the typical kinds of surroundings for interrogation at issue in *Miranda*.

Public Arrest: Arresting someone in a public place or in a person's home or office is not custodial for purposes of *Miranda*.

Probation Interviews: Because such routine interviews are not the type of inherently coercive situations and interrogations that *Miranda* warnings were designed to protect against, *Miranda* warnings are not required. The Supreme Court in *Minnesota v. Murphy*, 465 U.S. 420 (1984) laid out this reasoning:

> "Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. *Miranda v. Arizona,* 384 U.S. 456–457. It is unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression. Moreover, custodial arrest thrusts an individual into "an unfamiliar atmosphere" or "an interrogation environment ... created for no purpose other than to subjugate the individual to the will of his examiner." *Id.,* at 457. Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. *Id.,* at 468, 86 S.Ct., at 1624. Since Murphy was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator."

Terry stops: Terry stops are viewed similarly to traffic stops. *Terry* stops are temporary and short in duration and therefore do not trigger the type of custody necessary for *Miranda* purposes.

Chapter 15: Miranda –Interrogation

15.1 What is *Miranda* Interrogation?

Interrogation at its core means being asked questions. The most common scenario of "interrogation" is the questioning of an individual in an inherently cohesive environment, equivalent to that in *Miranda*. But much like the phrase "in custody," the meaning of "interrogation" is not always so straightforward. "Interrogation," as conceptualized in *Miranda*, must reflect a measure of compulsion above and beyond that inherent in custody itself. For *Miranda* purposes, the term interrogation refers to any words or actions on the part of the police/state actor other than those normally attendant on arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the individual.

15.2 Direct Questioning, Functional Questioning, or Neither?

Direct questioning is easy to conceptualize because it retains its plain meaning: questions are directed at the individual in custody. Functional questioning, on the other hand, is more nuanced. While the officers may not be asking direct question, they may still talk or act in a way which they know would still elicit incriminating statements from the individual in custody.

There are two forms of questioning that can occur during interrogation:

1. Direct/Express Questioning
2. Functional Questioning

The Supreme Court of the United States tackled this question in *Rhode Island v. Innes,* 446 U.S. 291 (1980). A taxi driver was murdered, and Innes was identified as a suspect. Officers located Innes, placed him under arrest, put him in the backseat of their cruiser, but had not located the murder weapon yet. The two officers begin discussing the area with each other, stating that there is a school for handicapped children in the area and they would hate if one of those children found the gun. The officer never directed any questions or comments to Innes. At some point, Innes instructs the officers to stop the car and leads them to the murder weapon.

The Court determined that neither express nor functional questioning took place and therefore, *Miranda* was not triggered. They reasoned:

(1) The conversation was between only the two officers
(2) No direct questions were asked to Innes
(3) The record did not indicate that the officers should have known that their conversation would elicit an incriminating response. "Nothing in the records suggests that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children or that the police knew that the respondent was unusually disoriented or upset at the time of his arrest." *Id*. at 292.

The Kentucky case *Wells v. Commonwealth*, 892 S.W.2d 299 (Ky. 1995), is factually similar to *Innes*. A detective made statements to other officers that additional charges may be coming for Wells. These statements, the Court determined, were not the functional equivalent of questioning because such

statements are "normally attendant to arrest and custody." *Rhode Island v. Innes*, 446 U.S. 291, 301 (1980). Ultimately the Court determined Wells' statements to be voluntarily, not warranting *Miranda*.

Wells, however, does not stand for the proposition that it is impossible for an affirmative statement to be the functional equivalent to interrogation. While in *Wells* the Court decided that the statements were normally attendant to arrest and custody, one can easily imagine a fanciful assertion from one officer to another which has no reasonable or plausible purpose other than to induce a reaction and statement. For instance, what if one officer says "Well, Joe, he must be guilty, because if I were innocent and I were being charged, I'd for sure be denying everything, and telling the police where I actually was."

15.3 Even if it is Considered Interrogation, there may be an Exception

There are a number of instances in which the court will find that the individual was interrogated for the purposes of Miranda, but such an interrogation falls under an exception. Thus, allowing incriminating statements to be admissible without the reading of *Miranda* rights.

Exception #1: Safety of the Officer

Questions uttered to an individual designed to ensure officer safety can be an "interrogation" for *Miranda* purposes. The focus is on the subjective perceptions of the suspect, rather than the intent of the police. For example, in *Smith v. Commonwealth*, 312 S.W.3d 353 (Ky. 2010), the individual was arrested after a search warrant was executed on her home, and upon entering the residence, the police immediately handcuffed her and, without advising her of her *Miranda* rights asked her if she had any drugs or weapons on her. Smith replied to the effect that "she had something in her pocket." Based upon this response, the detective found and removed a packet containing four rocks of crack cocaine from Smith's pants pocket. This cocaine served as the sole basis of her indictment for trafficking in cocaine and her eventual conviction for possession of the drug.

The Commonwealth argued, and the Court of Appeals agreed, the question by the officer was not "custodial interrogation" even if the person being "handcuffed" was held to be in custody. With regard to the "interrogation," the Court stated:

> Interrogation has been defined to include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect ... focus[ing] primarily upon the per*ceptions of the suspect, rather than the intent of the police." Rhode Island v. Innis*, 446 U.S. 291, 301, (1980); *Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky.1995). It is self-evident that Gentry's unambiguous question ("Do you have any drugs or weapons on you?") intended to illicit, and indeed did illicit, an incriminating response, the statement, "yes, in my pocket."

Exception #2: Public Safety Exception

The Supreme Court determined that incriminating statements were admissible, even if *Miranda* warnings were not read, because such information was necessary to keep the public safe. Police officers in *New York v. Quarles*, 467 U.S. 649 (1984) questioned Quarles about the location of the gun used in a robbery and alleged rape. Quarles was found to be in custody, was interrogated (the

direct question of "where is the gun?") by a state actor (the officer). This case presents a situation "where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*. *New York v. Quarles*, 467 U.S. 649, 649 (1984).

Similarly, and relying in *New York v. Quarles*, the Kentucky Supreme Court opined in *Henry v. Commonwealth*, that questions asked by the officer prior to giving Miranda warnings were reasonable in light of public safety concerns. Officers had believed that Henry had abandoned a handgun in an area accessible to the public, therefore, Henry's incriminating statements were admissible under the public-safety exception to Miranda. *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008), overruled on other grounds by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010)

Exception #3: Routine Booking Questions

In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), Muniz was arrested on suspicion of a DUI. He was arrested and taken to the police station where he was told that his interrogation would be videotaped and recorded. He was not given *Miranda* warnings. Aside from asking a series of standard questions (name, address, height, weight and current age), the officer asked, "what is the date of your sixth birthday?" Routine booking questions are simple demographic information that is necessary for law enforcement to bring an individual into the prison/jail system. However, the real issue was the question "what is the date of your sixth birthday?" because the answer depends on how the listener interprets that answer. Because this may illicit a potentially incriminating statement and does not directly relate to booking, the Court determined that this question was interrogation. The other statements, however, were not because they are "normally attendant to arrest and custody," falling under the routine booking questions exception.

Chapter 16
Miranda: State Actor

Being in custody is not enough. The custodial interrogation being conducted must also be done *by the state*, but not necessarily the police or a state employee.

> **PRACTICE TIP**
>
> The state actor requirement must be a state actor ***for Miranda purposes***. The test is "whether the interrogation was such as to likely result in disclosure of information which would lead to facts that would form the basis for prosecution." Do your due diligence to determine if the state actor in your case is a state actor or simply a state employee/ has some other link to the state.

16.1 Who is considered a "State Actor"?

The third requirement of *Miranda* is state action. Questioning by state actors is required to trigger the necessity for *Miranda* warnings. Generally questioning is conducted by law enforcement as they are the primary "state actors" that the U.S. Supreme Court had in mind. In *Miranda* and the three companion cases, all four defendants were in custody and interrogated by the police. It is easy to determine that the police are state actors.

16.2 If you are employed by the state, are you automatically considered a state actor?

Not necessarily. It is important to note that in order to trigger *Miranda* warnings the state actor must be a state actor **for *Miranda* purposes**. Thus, even if the questioning individual may have a job within a state agency or their job is directly linked to the state, they may not be a "state actor" under *Miranda*.

Take the case of *Jackson v. Commonwealth*, 468 S.W.3d 874 (Ky. 2014). The Supreme Court of Kentucky held that a psychiatric doctor, although employed by Western State Hospital (a state agency), was not a state actor for *Miranda* purposes when he was treating Jackson. They reasoned that the psychiatric doctor was not present for the purpose of aiding the prosecution and not working with law enforcement. Furthermore, there is nothing in the record to suggest that the circumstances were likely to result in "disclosure of information which would lead to facts that would form the basis for prosecution." *Welch v. Commonwealth*, 149 S.W.3d 407, 410 (Ky. 2004). Because the psychiatric doctor was responding to Jackson's immediate psychiatric needs, he was not a state actor and Miranda warnings were not required.

Similarly, the EMT in *Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000) was not a state actor for *Miranda* purpose because he was present for the purpose of treating Fields immediate physical needs, was not working for or with the prosecution or police officers and was not seeking disclosure of information for prosecution of a crime.

16.3 Those Considered State Actors that Are *NOT* the Police or State Employees

The test for determining if the questioner/interrogator is a state actor is found in *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004):

> "The title and employer of the questioner are not the sole basis for determining state action; rather courts must determine whether the interrogation was such as to likely result in disclosure of information which would lead to facts that would form the basis for prosecution."

Therefore, there is no blanket role or occupation that the court has deemed to be or not to be a state actor. Rather, it is once again a test that must be applied to each individual case based on the facts presented. The Supreme Court of Kentucky tackled this question in the following cases:

(1) Program Counselors:

In *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004), the Supreme Court of Kentucky held that program counselors who questioned the client (a child) in a sex offender treatment program, which he was required to attend, were "state actors" in spite of the fact they were not law enforcement officers:

> "Another *Miranda* requirement is state action. The counselors who questioned Appellant were employees of the treatment facility, not law enforcement officers. Generally, questioning by law enforcement is required to trigger the necessity for Miranda warnings. On the other hand, the Supreme Court of the United States has recognized the applicability of Miranda in situations not involving law enforcement."

Therefore, he should have been given *Miranda* warnings.

(2) **Psychiatrist**:

In *Estelle v. Smith*, 163 F.3d 499 (8th Cir.1998), the Court held that a psychiatrist, who performed an involuntary evaluation of the defendant, could not testify regarding information that had been gathered by questioning during the evaluation, because the defendant had not been Mirandized. The examining physician was not a law enforcement officer, but the Court held that the doctor went beyond a routine examination and gathered information during the evaluation to testify concerning the defendant's future dangerousness and to assist the prosecution in seeking the death penalty. Here, the counselors gathered information regarding previously undisclosed sexual misconduct and delivered that information to law enforcement officers. Because the interrogation conducted by a court-appointed competency psychiatrist was "a phase of the adversary system," Miranda was triggered. *Id*.

(3) Private Entities:

There are two primary situations in which questioning by a private entity (not law enforcement) will be considered a "custodial interrogation" and the private entity is deemed to be a state actor.

(1) The private entity is operating in accordance with a court order or governmental regulation; OR
(2) when the government otherwise "exercised such coercive power or such significant encouragement that it is responsible for the private party's conduct."

Adkins v. Commonwealth, 96 S.W.3d 779, 791 (Ky. 2003)(quoting *United States v. Garlock*, 19 F.441, 443 (8th Cir. 1994).

An interesting situation arose in *Burdette v. Commonwealth*, 664 S.W.3d 605 (Ky. 2023) where the questioner was found to be a state actor but a *Miranda* exception applied. Burdette was indicted for murder, wanton endangerment, DUI and failure to yield to a stopped emergency vehicle which arise after an alleged DUI accident. Nurse McCarthy drew Burdette's blood pursuant to a search warrant and conducted a routine medical intake assessment during which Burdette gave incriminating statements. The Court found Nurse McCarthy to be a state actor because the intake assessment was conducted at the Louisville Metro Detention Center and directly pertained to its penological interests. However, *Miranda* was NOT triggered because the questioning fell under the "booking exception" of *Miranda*. The Kentucky Supreme Court relied on two out-of-state cases: *Henderson v. State*, 248 So.3d 992 (Ala. Crim. App. 2017) ("questions asked as part of the routine booking procedure do not fall within the protections of *Miranda*") (citing ***Pennsylvania v. Muniz***, 496 U.S. 582 (1990)) and ***State v. Montiel-Delvalle***, 304 Or. App. 699, 714 (2020) (if the questioner has reason to believe that a person is injured or suffering from a medical condition, such questions serve a reasonable administrative purpose and does not require Miranda warnings.)

16.4 When the state actor requirement may look like *Miranda* and may sound like *Miranda* but is actually ***not*** *Miranda* at all.

Who is doing the questioning?:

If the one doing the questioning is not a state actor, the questioning cannot be considered an interrogation. In *Terry v. Commonwealth*, 535 S.W.3d 321 (Ky. Ct. App. 2017), the Court ruled that Terry, the defendant, was not being interrogated when he made the statement to the officers in the detention center. Rather, it was Terry who was asking the officers questions as they sought to obtain his buccal swab pursuant to the warrant. When the officer responded with details about the date and location of the incident, Terry voluntarily offered the information about a potential alibi (that he could not be a suspect because he was in Atlanta, not Kentucky, at the time of the home invasion). The Court hold that the officer's responses to Terry's questions, and Terry's responses to his answers, did not constitute a custodial interrogation in violation of *Miranda*. *Id.* at 328.

In *Arizona v. Mauro*, 481 U.S. 520 (1987), a husband and wife were arrested for homicide and separated for questioning. The wife asked to speak with her husband. An officer placed a tape recorder on the table as the two talked. The husband makes incriminating statements. The statements were admitted at trial because although the two were in custody, there from no questioning conducted by a state actor. The police officer may have been present in the room and left a recording device on the table, he was not the one eliciting any statements. Because the wife is not a state actor, *Miranda* has not be triggered and any statements made by the husband are admissible.

Rember that the purpose of *Miranda* is to protect individuals against the inherently coercive environment of a custodial interrogation by police! So even though you have what looks like a situation designed to get an incriminating statement, it is not the police officer doing the interrogation and therefore, this is not a *Miranda* case. Furthermore, this case does not include an interrogation. The wife instigated the situation by requesting her husband be brought the room and she proceeded to make statements at her husband. Neither direct nor functional interrogation took place.

Undercover police officers: In *Illinois v. Perkins*, 496 U.S. 292 (1990), an undercover police officer was placed into Mr. Perkins cell. When asked direct questions, Perkins made incriminating statements about his guilt. Under the *Miranda* analysis, Perkins is in custody and was asked direct questions from a police officer, however, because Perkins did not know he was speaking with an officer, the inherently coercive nature of a custodial interrogation was not present. Since there was no interrogation, *Miranda* warnings were not necessary. See also, *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002) and *Adkins v. Commonwealth*, 96 S.W.3d 779, 792 (Ky. 2003).

Citizen's arrest: *Miranda* will not apply in a citizen's arrest because this individual is not a state actor. *Hood v. Commonwealth*, 448 S.W.2d 3288 (Ky. 1969).

Chapter 17: Waiver and Invocation of Miranda Rights

17.1 What is waiver?

Any individual who is subjected to custodial interrogation by a state actor has the option to waive their right to remain silent or right to have counsel present during interrogation. Because this is a substantive waiver under the Fifth Amendment of the United States Constitution, the waiver must be knowing, intelligent, and voluntary. But what does that mean?

Knowing → The individual knows and understands what their rights are.

- This is one reason why *Miranda* warnings are given: to inform the person of their rights!
- Actual ability to understand is not the question here; rather, whether or not the individual **appears** to have the ability to understand

Intelligent → "Intelligent" in this context is not the plain meaning. The intelligent factor under *Miranda* does not mean intellect or that waiver is the wise thing to do. Rather it simply means that the individual is capable of thinking and actually considers this decision to waive.

Voluntary → Much like in the context of the Fourth Amendment, voluntary means that the waiver is not coerced in any way. This is perhaps the most important factor as there is much more case law on this factor than the others.

17.2 The Nuances of *Miranda* and Waiver

But of course, there are nuances that we have to consider:

1. ***Must the Officer Give a Verbatim Recitation of the Miranda warnings for them to be valid?***

   No. In *Duckworth v. Eagan*, 492 U.S. 195 (1989), the police officer did not state the *Miranda* warnings verbatim. Instead, he informed Duckworth that he had the right to an attorney and that an attorney would be appointed for him "if and when you go to court." Duckworth subsequently admitted to stabbing his wife. The Supreme Court determined that the variation of Miranda including "if and when you go to court" did not render the Miranda warnings inadequate. *Id*. at 195.

   Thus, even if warnings are not verbatim, there must still be a knowingly, intelligently, and voluntary waiver.

2. **Must the officer inform the individual of the topic of questioning in order for a valid waiver of the right to remain silent?**

   No. In *Colorado v. Spring*, 479 U.S. 564 (1987) Spring was arrested on suspicion of illegal gun sales. He is interrogated and given warnings. When asked if he understands his rights, he agrees. Then they ask him if he shot his wife and he says, "what? Yes. What?"

   The question is: Is this a valid waiver? He has been arrested for illegal gun sales and the police wanted to talk to him about shooting his wife. *Miranda* is a global right. The individual doesn't have to answer any questions (except booking questions) regardless of the topic. They don't even have to know what the officers want to interrogate them about.

This is the Miranda analysis you should conduct:

- Does the individual know their rights (knowingly)? Yes
- Did the state actor mirandize the individual? Yes
- Does that tell the individual what their rights are? Yes
- Did the individual think about it (intelligently)? Yes
- Did they appear to have the capacity to make a decision? Yes
- Did they voluntarily waive (voluntary)? Yes

3. <u>Must the waiver for the right to counsel be knowingly, intelligently, and voluntarily given?</u>

Yes! The best example of this is in *Moran v. Burbine*, 475 U.S. 412 (1986). Mr. Burbine is arrested on suspicion of murder. The police read him his Miranda warnings and ask him if he is willing to talk to them. The police then give him a waiver form to sign and he refuses to sign it. The interrogation ends. In the meantime, Burbine's sister, finding out that he has been arrested, calls the public defender. The public defender calls down to jail and asks, "are you talking to Burbine?" and the police say "nope." PD asks, "Will you talk to him tonight? Promise me you won't interrogate him until I get down there." The police then reply, "[w]e promise we don't talk to him." Cops go back into the holding cell and give Burbine a new set of *Miranda* warning and ask if he will agree to talk to them. Burbine gives three written statements. This was determined to be a knowingly, intelligent and voluntary waiver. Here is the sample analysis:

- Does Burbine know his rights? Yes
- How do we know that? He was read his rights
- Is he capable of making an intelligent decision to waive those rights or not? Yes
- Does he make a non-coerced waiver? Yes

But you might be thinking: his lawyer is standing outside ready to come in and save him! This is a fact that is not known by Burbine. Thus, things he doesn't know cannot affect his knowingly, intelligent, and voluntary waiver.

4. <u>If a client is mentally ill and answers the police questions, is this a knowing, intelligent, and voluntary waiver?</u>

The Court says yes. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), Thompkins was a severely mentally ill individual that was subjected to hours of interrogation. He was in custody and was Mirandized by officers. The officers continued to question him but Thompkins was unresponsive except for a few mumbles. After approximately 6 hours, Thompkins agrees to talk and makes incriminating statements. Here is a sample analysis for determining if the waiver of the right to remain silent was knowingly, intelligently, and voluntarily made:

- KNOWING: Thompsons was given warnings so we assume that he is now aware of this rights
- INTELLIGENT: A argument can be made that he was so catatonic during the interrogation that a waiver was not intelligently waived
- VOLUNTARY: **Waiver occurred when he answered the questions**.

There is no magic statement that must be made before giving an incriminating statement. Simply answering the questions in and of itself is a waiver. If Mr. Thompkins or your client didn't want to waive, they should have remained silent.

5. How drunk does a person have to be in order for the statement to be rendered involuntary?

Really, really, really, really, very, very drunk. In *Smith v. Commonwealth*, 410 S.W.3d 160 (Ky. 2013), the Supreme Court reaffirmed the principle that a person has to be really *really* drunk to render a statement to the police involuntary. In this case, Smith was charged with the wanton murder of a woman whom he had shot while being drunk on a bucking horse. Smith said that if he had shot somebody he could not remember doing so. Thereafter, he signed a waiver form, and stated that he did nothing more than set off an M-80 firecracker. But then he testified that he had let off the firecracker in response to someone pointing a rifle at him. Still later, he testified that he had set off the firecracker, but omitting the detail of a gun being pointed at him. All parties conceded he was drunk. Quoting Justice Palmore in *Britt v. Commonwealth*, 512 S.W.2d 496, 500 (Ky. 1974), the Supreme Court held "[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."

Thereafter, the Court gave two instances where a drunk person might have a confession suppressed due to intoxication. The first is where the investigating officers reasonably should have known that a suspect is so under the influence of drugs or alcohol that a **lesser quantum of coercion** may be sufficient to call into question the **voluntariness** of the confession. The second is where a defendant is "intoxicated to the degree of mania," or **hallucinating**, to the extent of being functionally insane, or otherwise unable to understand the meaning of his statements. In this case, suppression may be warranted because of the **unreliability** of the statement.

6. *Miranda* rights can be impliedly waived by voluntarily submitting to a polygraph test and signing a form waiver.

In *Wise v. Commonwealth*, 422 S.W.3d 262 (Ky. 2013), the defendant agreed to take a polygraph examination. The examination included a form that the client signed waiving her rights. If you have a case involving a form waiver, then this would be a good case to read. "As noted earlier, the form the Appellant signed was not a waiver of her constitutional rights; it was merely an advisement and acknowledgment that she understood these rights. While it cannot be said that she *expressly* waived her *Miranda* rights, her actions after reviewing and signing the form amounted to an *implied* waiver. Her proceeding with the polygraph examination after being advised of her rights was "inconsistent with their exercise" and her actions can be interpreted as "a deliberate choice to relinquish the protection those rights afford."

7. Coercion sufficient to vitiate voluntariness of a confession does not have to be physical.

In *Dye v. Commonwealth*, 411 S.W.3d 227 (Ky. 2013), the police lied to the Appellant about the possibility of the death penalty, implied that he would be assaulted and raped in prison, and told him that if he confessed then he would avoid the death penalty. Of course, if he invoked his right to counsel then the possibility of confessing would go away. The Kentucky Supreme Court suppressed the Appellant's confession. However, the Court heavily emphasized the age of the Appellant (17 at the time):

> Each death penalty reference was immediately followed by an officer asserting that the only way for Appellant to avoid execution was to confess to the murder. Not only did the officer erroneously convey that Appellant was death-eligible, but also that he was certain to receive a death sentence unless he confessed to his sister's murder… We hold that repeatedly threatening a seventeen-year-old with the death penalty is 'objectively coercive….
>
> We hold that attempting to persuade a seventeen-year-old that a confession is the only way he will avoid daily prison assault—sexual or otherwise – is 'objectively coercive. ... When considered in context of the entire conversation, we believe that the intended effect of this exchange (and similar exchanges) was to alert Appellant, a seventeen-year-old, that if he did invoke his right to an attorney his opportunity to confess—and thereby avoid the death penalty and prison violence—would be lost. We hold that this is 'objectively coercive.

The fruits of an illegally obtained confession should also be suppressed, unless they can be introduced through other means (i.e. inevitable discovery).

8. <u>Police may not manufacture expert evidence in order to procure a confession.</u>

In *Gray v. Commonwealth*, 480 S.W.3d 253 (Ky. 2016), Defendant was charged and convicted the double murder of his parents. Because of tumultuous relationship between the victims and their son, and the fact that their wills were missing which purportedly had disinherited their son, police made the defendant an immediate person of interest and ultimately the prime suspect. During the investigation, the sheriff's office called the defendant in ostensibly for questioning about the missing wills, and after giving him Miranda warnings, "shifted gears" and started asking him about his parents' murders. Five and a half hours of unrecorded interrogation followed. Investigators used a number of different ruses and forms of trickery, including (1) presenting a forged lab report of DNA evidence linking Gray to the murders, (2) telling him that an eyewitness and a videotape recording placed him at the scene, and (3) telling him his parent's blood and gunshot residue was found on his clothing. Shortly after, the cameras came back on and he confessed to murdering his parents, and was arrested. The trial court refused to suppress the confessions, and eventually the Defendant was convicted. The Supreme Court reversed:

> Police trickery is not new to our criminal procedure jurisprudence, but today's actions exceed any reasonable leeway our case law has previously afforded law enforcement…
>
> In determining whether a confession was coerced, a court considers: (1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has shown that the coercive activity was the "crucial motivating factor" behind his confession. In reaching our decision on the voluntariness of Gray's confession, we must view the facts and evidence under the "totality of [the] circumstances…"

> While the mere employment of a ruse, or "strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion, the falsification of documents purporting to represent the official results of a state-police lab's DNA examination violates the test. While fabricating documents is not necessarily per se objectively coercive, the fabricating of EXPERT documents which misrepresents scientific or DNA evidence at least creates a presumption in favor of defendant that the defendant's will was overcome that the Commonwealth must rebut.

The Supreme Court did not buy the Commonwealth's assertion on appeal that the DNA was a "bad fake." Defendant was a mechanic with limited education.

9. **Police may not lie and say that a statement is "confidential" to induce a waiver of *Miranda*.**

In *Leger v. Commonwealth,* 400 S.W.3d 745 (Ky. 2013), the Court held that it is not permissible for the police to lie in order to induce an arrestee to waive their *Miranda* rights. In this case, after being read his *Miranda* rights and answering a few questions, Leger asked the police "what I am telling you now is between us, right. It ain't goin' [unintelligible]." Thereupon, the state trooper answered "right." The Court held: "The trooper's affirmative answer was the exact opposite of what the proper *Miranda* warning requires. It informed Appellant that what he said to the officer would remain confidential, and, therefore, would not be used against him in court… When that occurs, as it did in this case, the warnings required by the United States Supreme Court in *Miranda* are vitiated. Statements made in response to such assurances of confidentiality are statements made in violation of *Miranda* and must be suppressed.

10. **Police may not misrepresent whether an arrestee needs an attorney in order to induce a waiver of *Miranda*.**

In *Crews v. Commonwealth*, 2013 WL 6730041 (Ky. 2013), unpublished, see Ky St. RCP 76.28(4) before citing), the Supreme Court underlined the concept that police officers should not be allowed to dissuade someone from getting or using an attorney. The facts of the case are unique (hopefully). "Following his arrest, Crews was interviewed by Detective Matthew Sharp, wherein Detective Sharp properly read Crews his *Miranda* rights prior to the interview and asked Crews if he understood those rights. Crews replied: "Yeah, uh, well do you think I need an attorney?" Sharp responded, "Nah." Sharp then proceeded to interview Crews." The Court held "it is obvious beyond question that Crews indeed needed a lawyer under these circumstances. It would defy common sense to believe that Detective Sharp did not know Crews needed a lawyer. Very recently, in the case of *Leger v. Commonwealth,* we held that lying to persons being interrogated in order to induce them to waive their rights under *Miranda* is not permitted. 400 S.W.3d 745 (Ky. 2013). We cannot distinguish the misrepresentation of informing a criminal defendant who is being interrogated that his statements would remain confidential, as in Leger, from misrepresenting to Crews that he did not need a lawyer. Accordingly, we hold that the confession should have been suppressed under our *Leger* ruling."

11. **When an accused receives the *Miranda* warnings' implicit promise that any silence will not be used against her, it is a violation of due process to then use that silence against her.**

In *Bartley v. Commonwealth,* 445 S.W.3d 1 (Ky. 2014), the defendant was convicted of second-degree manslaughter for killing her husband and was sentenced to 8 years in prison. During her trial, the trial court had admitted into evidence a recorded conversation between the defendant and a police detective in which the defendant was repeatedly silent in the fact of accusatory questions. This interview took place inside a police car, about a month after the murder, when the police detective was at her residence in response to an event that had occurred that very day. The defendant was read her *Miranda* warnings, and indicated that she would speak with the detective, but only about the events which occurred that day, not the day of the murder a month earlier. The detective said he understood the limited scope of the conversation. During the conversation, however, the Detective began asking pointed questions about her involvement in her husband's murder, including where she kept her gun, what time she left for her daughter's house on the day before the husband's body was found, etc.

At trial, the Commonwealth sought to introduce the entirety of the tape, including the portions concerning her unwillingness to talk about anything other than the events of the day, arguing that introduction of the entire tape would impermissibly allow the Commonwealth to comment on her right against self-incrimination under the Fifth Amendment and Kentucky Constitution Section 11. Nearly the entirety of the tape was admitted, including the portions relating to her silence in response to questions, and her insistence on remaining silent as to questions regarding the murder. In reversing, the Supreme Court held:

> [W]e believe that the giving of Miranda warnings generally bars the use of any ensuing silence. When an accused receives the Miranda warnings' implicit promise that any silence will. not be used against her, it is fundamentally unfair and a violation of due process to then use that silence against her. We believe this is true even where the Miranda warnings are given unnecessarily. Cf. *Doyle*, 426 U.S. at 619 n. 9, 96 S.Ct. 2240 (discussing *Johnson v. United States*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943), in which the erroneous grant of a privilege "made it error for the trial court to permit comment upon the defendant's silence").

12. **Police techniques did not vitiate voluntariness of confession.**

In *Bond v. Commonwealth*, 453 S.W.3d 729 (Ky. 2015), the defendant was charged with sodomizing and murdering his roommate's girlfriend. During a police interrogation, the defendant gave incriminating statements. Bond did not challenge the fact that he had been advised he had the right to remain silent and to counsel and that he waived those rights before agreeing to speak with the detectives. However, he argued that the detectives intentionally minimized the significance of the warning about the implications of waiving his rights so as to negate the knowingness of his waiver. He also argued that police conduct during the interviews was unduly oppressive and coercive, thus negating the voluntariness of his waiver. Among the things that Bond complained of were:

- The detective, prior to reading Bond his rights asked Bond if he had ever watched true crime stories on TV, and after confirming that he had, stated "Okay, I'm gonna read you your rights, we do this all the time. It's no big deal, okay?

- The detectives told bond that he was being audio recorded, but did not tell him he was also being video recorded by a separate recording device.

- One of the detectives described his own wife to be a "freak" during sex, and began describing his own sex life. When Bond said "turn that off," referring to the digital recorder, the detective stated "Oh, I don't care about that. It's just for me….That's just for me to remember."

The Court held that while some of what the detectives said may have been "deceptive," especially the part about the wife being a "freak" when it came to sex, they were "not beyond the bounds of acceptable 'clever investigative devices.'" As far as the reference to the recorder being "just for" the detective, the Court drew a line between that case and *Leger v. Commonwealth*, 400 S.W.3d 745 (Ky. 2013), because in *Leger* the officers specifically stated that the conversation was going to be kept confidential or between the officer and the defendant, whereas in the instant case the detective did not state that anything that Bond said would be confidential or be just between them. "It is the statements a defendant makes that 'can and will be used against' him, not necessarily the recording of those statements. The Court was troubled by the use of the phrase "we do this all the time, it's no big deal," and said that "taken out of context" it could be construed as minimizing the significance of the rights that Bond was being asked to waive. However, given the context, i.e., "Bond's familiarity with the process form watching true crime television shows," the court could not say that it vitiated his knowing rights.

17.3 Invocation of the right to an attorney

When determining if a client has invoked their right to an attorney, the court looks to the totality of the circumstances. The test for determining if an individual has invoked their rights is a **reasonable officer test**: a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, questioning needs not end. Davis v. United States, 512 U.S. 452 (1994) is a great example of this. Davis was a naval officer accused of murder. After being Mirandized, Davis says:

- "maybe I should talk to a lawyer"
- Police then say, "do you want a lawyer?"
- Davis says, "No I don't want a lawyer, I am not asking for a lawyer"
- They take a short break in the interrogation, and when the officers return they re-Mirandize Davis and the interrogation last another hour
- Then Davis says "I think I want a lawyer before I say anything"

It's important for the court that the cops asked him directly "do you want a lawyer" and he says no. This is why Davis loses his Miranda challenge: the Court applied the totality of the circumstances and reasonable officer tests and based on what was said in the first instance, the reasonable officer would think that Davis might be invoking his right to counsel rather than actual and direct invocation. And

because this is a "might be invoking", officers don't have to do anything about the possibility that he is invoking.

The Kentucky case that addresses this issue is *Cox v. Commonwealth*, 641 S.W.3d 101 (Ky. 2022). Here**,** Cox entered a conditional plea to first degree sexual abuse and second degree persistent felony offender (PFO) reserving for appeal the denial by the trial court of two motions to suppress a police interview wherein he confessed. The Court of Appeals affirmed the trial court, and the Kentucky Supreme Court granted discretionary review. Detectives had responded to a call regarding sexual abuse of a child, and after hearing from witnesses, when to Cox's home to speak with him, which he did so willingly. Cox was Mirandized. Cox waived his rights and eventually confessed he "made a mistake" and "probably" touched the victim on her vagina.

Cox filed a new suppression motion, urging that the police should have ceased questioning because Cox alleged he had asked for a lawyer, or alternatively, because Cox did not provide a valid waiver of *Miranda*. When asked what he heard Cox state during a certain portion of the interview, the detective testified that he could not always understand Cox due to his country accent, and responded:

> It's very hard to understand. He does mention something, something, something, about a lawyer or an attorney. I couldn't understand what was before and what was after it, so I continued on with the interview.

He said however he did not hear the word "lawyer" in real time and he did not understand Cox to have asked for a lawyer. The judge found the detective to have acted reasonably, as the defendant's words were not clear and unequivocal in light of the circumstances.

The Supreme Court affirmed the trial court's ruling that Cox had adequately waived his Miranda rights but stated that the trial judge had incorrectly applied a subjective standard rather than an objective standard when it came to interpreting what Cox meant when he asked for a lawyer. Cox's statement almost immediately after he was Mirandized that included the phrase "talk to a g___ damn lawyer" was an unequivocal request for a lawyer, and the court's finding that it was not unreasonable for the detective either to have misheard or mischaracterized the requests was a subjective analysis and was in error. The focus should have been on whether a reasonable officer under the circumstances would have heard and understood Cox's statement to be a request for counsel." The case was remanded for a hearing on what a reasonable officer would have done.

Chapter 18: Daubert

When looking at evidence that is considered scientific in nature always consider whether a *Daubert* hearing may be a path to suppression of faulty scientific evidence, faulty expert testimony, or a way to limit the introduction of either.

Pursuant to KRE 702, If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

The Kentucky Supreme Court restated the law interpreting and applying this rule in *Futrell v. Commonwealth*, 471 S.W.3d 258 (Ky. 2015):

> Our rule is identical to its federal counterpart, Rule 702 of the Federal Rules of Evidence. Both rules incorporate guidance provided by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Under *Daubert*, a trial court's task in assessing proffered expert testimony is to determine whether the testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. In making its reliability determination, the trial court must consider "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.'" *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35,39 (Ky. 2004)(*quoting Daubert*, 5009 U.S. at 592-93). As the United States Court of Appeals for the Sixth Circuit has noted, "*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *Best v. Lowe's Home Ctrs., Inc.,* 563 F.3d 171, 176-77 (6th Cir. 2009). The court's role is not to judge the correctness of the expert's conclusions; that assessment is for the jury. The court's gatekeeping role, rather, is to "focus…solely on [the] principles and methodology" employed to generate the conclusions, and to ensure that those principles and methods are reliable. *Daubert*, 509 U.S. at 595.

Futrell v. Commonwealth, 471 S.W.3d 258, 282 (Ky. 2015)(footnote omitted).

Daubert set forth four factors for a trial court to evaluate when determining the admissibility of an expert's proffered testimony. They are:

(1) Whether a theory or technique can be and has been tested;
(2) Whether the theory or technique has been subjected to peer review and publication;
(3) Whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and
(4) Whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

THE DAUBERT FACTORS
Can be remembered by **SWEPT**
1. Theory or technique in question can be and has been **tested**
2. Subjected to **peer review** and publication
3. Known or potential **error rate**
4. Existence and maintenance of **standards** controlling operation
5. Attracted **widespread acceptance** within a relevant scientific community

Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 578-79 (Ky. 2000)(citing *Daubert*, 509 U.S. at 592-94). A trial court's factual finding on reliability is reviewed for clear error, which occurs when evidence is introduced of substance and relevant consequence having the fitness to induce conviction in the mind of a reasonable person; a trial court's decision regarding the admissibility of evidence is reviewed for abuse of discretion, which occurs when the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

When confronted with evidence that is scientific in nature, always consider challenging admissibility under *Daubert*. Try to exclude the expert, the underlying findings of the expert, or the scientific science as a whole. When challenging under Daubert, remember to use the President's Counsel of Advisors on Science and Technology report ON Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods[11], National Academy of Sciences report, Strengthening Forensic Science in the United States: A Path Forward[12], and other available writings challenging the reliability of certain sciences.

Tips for Daubert Motions and Hearings:

As Peter Neufeld from the Innocence Project said, "Historically we had a situation where two scientifically illiterate lawyers argued the bona fides of scientific evidence for a scientifically illiterate judge so that 12 scientifically illiterate jurors could decide the weight of that evidence." You may be the only knowledgeable person in the courtroom on this topic! So take the mindset that you are explaining this complex scientific concept to someone who has never heard of it before. Assume the judge KNOWS NOTHING about this topic.

☐ Lay a firm foundation of your concept before bringing in details.

[11]https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf
[12] https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf

☐ Speak in human term, stepping away from legalese and complicated scientific jargon. If the judge can understand your argument, the easier it will be for them to rule in your favor.

☐ Be persuasive. You are arguing that all certain scientific evidence is excluded or in the alternative that a full *Daubert* hearing should be held.

Chapter 19: Fruit of the Poisonous Tree

Either make the tree good, and his fruit good;
or else make the tree corrupt, and his fruit corrupt:
for the tree is known by his fruit.

Matthew 12:33 (KJV)

"Fruits of the poisonous tree" is a doctrine which basically means that a bad search renders all evidence obtained after an unreasonable search is tainted by the bad search, and must also be excluded as evidence.

19.1 First use of the term "fruit of the poisonous tree."

Justice Felix Frankfurter first used the term in *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 268, 84 L. Ed. 307 (1939), a wire-tapping case. Justice Frankfurter also set out the burden of proof necessary in order to exclude evidence obtained after an illegal search:

> In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

19.2 Exceptions to the doctrine.

The doctrine is subject to four main exceptions. The evidence is admissible if:

(1) it was discovered in part as a result of an independent, untainted source; or

(2) it would inevitably have been discovered despite the tainted source; or

(3) the chain of causation between the illegal action and the tainted evidence is too attenuated; or

(4) the search warrant was not found to be valid based on probable cause, but was executed by government agents in good faith (called the good-faith exception).

19.3 Independent, Untainted Source Exception.

In *Nix v. Williams*, 567 U.S. 431, 443-44 (1984), the United States Supreme Court admitted tainted evidence using the independent source doctrine:

> The independent source doctrine teaches us that the interest of society in deterring unlawful conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.

Suppose the evidence of a conspiracy is contained in the texts of two phones owned by Able and Baker. Two investigative teams simultaneously search the homes of Able and Baker. Able's home is searched without warrant and without a valid exception to the warrant requirement. The police seize the phone and get a warrant to examine its contents, which results in the police discovering the texts proving the conspiracy. Since the initial entry and search into the home was illegal, the subsequent search of the seized phone is "fruits of the poisonous tree."

However, suppose Baker's home search was done pursuant to a warrant based on probable cause, and the affidavit and warrant supported seizure of the phone. In turn, the Baker investigative team procures a valid warrant to search the phone and finds the damning texts. In this instance, the independent source doctrine would permit the texts found on Baker's phone to be admitted into evidence. But key to this result is the fact that the *Able and Baker teams were working independently.*

Supposed instead that there is no independent Baker investigative team, but the Able investigative team realizes their mistake, and so applies for and procures a warrant from a

magistrate for Baker's phone in the hopes that this will constitute an independent, valid source of the evidence. That will not work.

In *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 2535–36, 101 L. Ed. 2d 472 (1988), the Supreme Court held that a state may not rely upon the independent source doctrine if the subsequent search were not truly independent:

> So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.
>
> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

19.4 Inevitable Discovery Exception.

In *Nix v. Williams*, 467 U.S. 431, 447, 104 S. Ct. 2501, 2511, 81 L. Ed. 2d 377 (1984), the defendant gave a statement to the police which was challenged as being in violation of the Sixth Amendment right to counsel, in which he revealed the location and condition of a victim's body. Because the body was found in the very location in which a "massive search" was already underway, the court found that the tainted evidence would have been inevitably discovered anyway, and upheld the admissibility of the evidence.

Obviously, key to the admissibility is whether the evidence would have actually been discovered inevitably. In *Nix*, the Supreme Court placed the burden on the state to prove that it would have actually been discovered.

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.

19.5 Attenuation Doctrine Exception.

Under the attenuation doctrine, evidence obtained after an unlawful arrest can be introduced if the connection between the police misconduct and the confession or other evidence has become so attenuated as to dissipate the taint.

An example of the application of this doctrine occurred in *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001). Bardstown police officers discovered a small spiral notebook in a wrecked truck at the scene of an accident. The notebook contained names of a suspected drug trafficker's buyers, their telephone numbers, the amount of drugs purchased and the amount owed. The defendant in the case was listed in the book. Following a long investigation, a grand jury was convened and the defendant, along with others, learned that the police had used grand jury subpoenas to obtain the telephone records of persons listed in the spiral notebooks, even though the grand jurors themselves had neither seen nor requested the phone records prior to or during their deliberations. Thus, the phone records were obtained in violation of the Fourth Amendment. The phone records were suppressed, but the defense moved to suppress also the information and evidence seized as a result of the investigation.

Upholding the admissibility of the other items, the Kentucky Supreme Court pointed to four items of evidence that were "independent" of the phone records, including Wilson's admissions that she was a marijuana, her possession of rolling papers, and vehicular patterns observed at her house as a result of finding her name in the notebook.

The connection between the police conduct in obtaining the telephone records and the evidence seized during the search of Wilson's residence is so attenuated that the primary "taint" of the police conduct has been dissipated. Although the records provided Wilson's name and address, surveillance of her residence was based not only upon this information, but upon complaints from her neighbors and an anonymous tip. Thereafter, police noticed traffic patterns at her residence that were consistent with drug dealing, i.e., vehicles would stop there for a short time and then leave. Also, Wilson's vehicle was seen at the residence of the suspected drug trafficker. Finally, when Detective Royse conducted a valid traffic stop of Wilson, he saw drug paraphernalia in her purse. At police headquarters, Wilson admitted to drug use and made an implicitly incriminating

comment about her involvement in drug dealing. *Wilson v. Com*., 37 S.W.3d 745, 749 (Ky. 2001)

19.6 "Good Faith" Exception.

Where there has been a search warrant executed but is lacking in probable cause, but nevertheless was obtained in "good faith" by the police, the otherwise tainted evidence will not be excluded. The exception derives from *United States v. Leon*, 468 U.S. 897, 915, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677 (1984), where the police used information obtained from a confidential informant of "unproven reliability" which stated that "Armando and Patsy" were selling large quantities of cocaine and Quaaludes, and that the CI had himself seen shoeboxes of cash in the possession of Patsy. Using this information to stake out Armando and Patsy, police were led to a man named Castillo, whose probation and parole records led the police to Leon, who was listed as Castillo's employer. Subsequent investigation led the police to stop two other persons at an airport, where they found the pair in possession of marijuana. To say the least, the allegations against Leon were so sparse that when his address was listed as a place to be searched, there was a lack of probable cause to search his home. Nevertheless, a detached magistrate signed the search warrant and the police relied upon it. Upon a search of Leon's residence, they found large quantities of illegal drugs. Though the search was tainted by a lack of probable cause, the Supreme Court refused to suppress the evidence:

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,' we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.

Nevertheless, reliance upon a magistrate's neutrality is "not boundless." First, the Court was clear that the finding of probable cause does not preclude inquiry into "the knowing or reckless falsity of the affidavit on which that determination was based," quoting *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Second, the neutral magistrate must actually perform the duties of a neutral magistrate and "not serve merely as a rubber stamp for the police," *quoting Aguilar v. Texas*, 378 U.S. at 111 (1964)(*abrogated by Illinois v. Gates*, 462 U.S. 213 (1983).

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S., at 239, 103 S.Ct., at 2332.

PUBLIC DEFENDERS

DEPARTMENT OF PUBLIC ADVOCACY

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