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Legal Advisor's Update

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A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

Legislative Update:

This Update is mostly focused on legislation recently passed by the State of Ohio legislature, but also includes recent relevant legislation (Andre's law) passed by the Columbus City Council. Several pieces of legislation have been passed by the State legislature, which are not just relevant to officers, but require changes in how all Ohio Police officers perform their daily duties. To comply with the mandates found in these pieces of legislation, police departments will have to make significant changes to policies and procedures. Columbus City Code Sections 1914.02 and 1915.01 (Andre's Law) also obviously impacts how Columbus Division of Police Officers use their Body Worn Cameras, and when/how they must render aid to those people seriously injured by officers. We have included some limited legal commentary related to some of the legislation so the relevance of the legislation is completely understood at the outset. Finally, we have not included every piece of legislation from the past year as the Update would be too long—we focused on the most relevant legislation for the most officers in this Update, and will send some other more specialized pieces of legislation to officers who handle those matters. We also will send out a case law update in the next ten days, but felt it important to put out this stand-alone legislative Update now given the importance of the listed legislation.

I. Ohio Revised Code

SB-140 Effective Date 4/12/2021

Legal Commentary: This is a big change because a charge that has been used in the past is now off the table. A concealed knife/razor/cutting instrument can no longer be the basis for a CCW charge unless the item has been used as a weapon. So, for example, if an officer pats a person down, and finds a knife concealed in their waistband during the pat-down, and the person says, "Yeah, darn right it's a weapon, it wouldn't do me much good if it wasn't, I carry it for self-

defense," but the knife was not/has not been used as a weapon, you can no longer charge the person with CCW.

Summary: AN ACT To amend sections 2923.12,,, and 2923.20 of the Revised Code to exempt knives not used as weapons from the prohibition against carrying concealed weapons and to eliminate the prohibition against manufacturing, possessing for sale, selling, or furnishing certain weapons other than firearms or dangerous ordnance.

O.R.C 2923.12. Carrying concealed weapons.

(H) For purposes of this section, "deadly weapon" or "weapon" does not include any knife, razor, or cutting instrument if the instrument was not used as a weapon.

O.R.C 2923.20. Unlawful transaction in weapons. (section (A)(6) is now removed).

SB-175 Effective Date 4/6/2021 (Stand Your Ground)

Legal Commentary: This is the so-called "stand your ground" law. A person may use force to act in self-defense/defense of another, or defense of that person's residence, without retreating, if that person is in a place where they lawfully have a right to be. This is basically an extension of the "Castle Doctrine" to the outside. Under former law, meaning until 4/6/21, people were permitted to use deadly force in self-defense if they weren't the aggressor, believed they were in imminent danger, and were in their home or vehicle. The new law gets rid of the home or vehicle portion, and replaces that by simply requiring a person to be in a place where they lawfully have the right to be.

O.R.C 2901.09 No duty to retreat in residence or vehicle.

(A) As used in this section, "residence" and has the same meaning as in section 2901.05 of the Revised Code.

(B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence, if that person is in a place in which the person lawfully has a right to be.

(C) A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

*This wasn't changed by this legislation, but we thought this legislation best understood if the legal concept of self-defense/defense of others is fully understood: To establish self-defense/defense of others, a defendant must prove the following: (1) that he was not at fault in

creating the situation giving rise to the affray; and (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm. Stand your ground does not apply if the person who used force was at fault in creating the situation that led to the fight/use of force, or if they didn't believe they were in imminent danger.

HB 1 Effective Date 4/12/21

Legal Commentary: THIS IS A GAME CHANGER in its current form. This is also a really difficult piece of legislation for all law enforcement as it requires changes to policies and procedures as to how officers/jailers handle charged pregnant or recently pregnant juvenile or adult females. Stated succinctly: pursuant to the code sections listed below, officers generally cannot handcuff a charged pregnant/recently pregnant female unless there is an emergency situation, and even then, there are complex, sometimes impossible steps an officer must take to continue that type of restraint of a charged pregnant/recently pregnant female. We do not believe these sections apply to females who are the subject of a warrantless arrest. That seems to make little logical sense if the goal of this legislation is to protect pregnant females, but that is the way the code sections are written. However, bear in mind, that once a female is "charged," these code sections then apply immediately. So, if you make a warrantless arrest of a female, take her to the clerk's office to file the charge, then the dictates of these code sections apply because now the female is "charged." We have highlighted some of the critical language and phrases as these code sections are long and convoluted. Finally, the State Legislature has created a criminal penalty for officers who violate these code sections, and a civil claim for damages (money) for any female who is restrained in violation of these sections. The Columbus Division of Police leadership is aware of these code sections and are working on how to implement through policy.

Summary: To amend sections,,, 2921.45,,, 2152.75, and 2901.10 of the Revised Code to,,, prohibit restraining or confining a woman or child who is a charged, convicted, or adjudicated criminal offender or delinquent child at certain points during pregnancy or postpartum recovery.

O.R.C. 2152.75.

As used in this section:

(1) "Charged or adjudicated delinquent child" means any female child to whom **both** of the following apply:
(a) The **child is charged** with a delinquent act or, with respect to a delinquent act, is subject to juvenile court proceedings, has been adjudicated a delinquent child, or is serving a disposition.
(b) The child is in custody of any law enforcement, court, or corrections official.

(2) "Health care professional" has the same meaning as in section 2108.61 of the Revised Code.

(3) "Law enforcement, court, or corrections official" means any officer or employee of this state or a political subdivision of this state who has custody or control of any child who is a charged or adjudicated delinquent child.
(4) **"Restrain" means to use any shackles, handcuffs, or other physical restraint.**
(5) "Confine" means to place in solitary confinement in an enclosed space.
(6) "Unborn child" means a member of the species homo sapiens who is carried in the womb of a child who is a charged or adjudicated delinquent child, during a period that begins with fertilization and continues until live birth occurs.
(7) **"Emergency circumstance" means a sudden, urgent, unexpected incident or occurrence that requires an immediate reaction and restraint of the charged** or adjudicated delinquent child who is pregnant for an emergency situation faced by a law enforcement, court, or corrections official.

(B) Except as otherwise provided in division (C) of this section**, no law enforcement**, court, or corrections **official, with knowledge that the female child is pregnant or was pregnant**, **shall knowingly restrain or confine a female child** who is a charged or adjudicated delinquent child during any of the following periods of time:

(1) If the child **is pregnant**, at any time during her pregnancy;
(2) If the child is pregnant, during transport to a hospital, during labor, or during delivery;
(3) If the child was pregnant, during any **period of postpartum recovery up to six weeks** after the child's pregnancy

(C)(1) Except as otherwise provided in division (D) of this section, a law enforcement, court, or corrections official may restrain or confine a female child who is a charged or adjudicated delinquent child during a period of time specified in division (B) of this section if all of the following apply:

(a) The official determines that the child presents a serious threat of physical harm to herself, to the official, to other law enforcement or court personnel, or to any other person, presents a serious threat of physical harm to property, presents a substantial security risk, or presents a substantial flight risk.

(b)(i) **Except as provided in division (C)(1)(b)(ii) of this section**, **prior to restraining or confining the child, the official contacts a health care professional who is treating the child** and notifies the professional that the official wishes to restrain or confine the child and identifies the type of restraint and the expected duration of its use or communicates the expected duration of confinement.

(ii) **The official is not required to contact a health care professional who is treating the child prior to restraining the child in accordance with division (D) of this section if an emergency circumstance exists**. The use of restraint in an emergency circumstance shall be in accordance with division (D) of this section. **Once the child is restrained, the official shall contact a health care professional who is treating the child and identify the type of restraint and the expected duration of its use**.

(c) Upon being contacted by the official as described in division ©(1)(b)(i) of this section, the health care professional does not object to the use of the specified type of restraint for the expected duration of its use or does not object to the expected duration of confinement.

(2) A health care professional who is contacted by a law enforcement, court, or corrections official as described in division ©(1)(b)(i) of this section shall not object to the use of the specified type of restraint for the expected duration of its use, or the expected duration of confinement, unless the professional determines that the specified type of restraint, the use of that type of restraint for the expected duration, or the expected duration of confinement poses a risk of physical harm to the child or to the child's unborn child.

(D) A law enforcement, court, or corrections official who restrains a female child who is a charged or adjudicated delinquent child during a period of time specified in division (B) of this section under authority of division (C) of this section shall not use any leg, ankle, or waist restraint to restrain the child.

(E)(1) If a law enforcement, court, or corrections official restrains or confines a female child who is a charged or adjudicated delinquent child during a period of time specified in division (B) of this section under authority of division (C) of this section, the official shall remove the restraint or cease confinement if, at any time while the restraint is in use or the child is in confinement, a health care professional who is treating the child provides a notice to the official or to the official's employing agency or court stating that the restraint or confinement poses a risk of physical harm to the child or to the child's unborn child.

(2) A law enforcement, court, or corrections official shall not restrain or confine a female child who is a charged or adjudicated delinquent child during a period of time specified in division (B) of this section if, prior to the use of the restraint or confinement, a health care professional who is treating the child provides a notice to the official or to the official's employing agency or court stating that any restraint or confinement of the child during a period of time specified in division (B) of this section poses a risk of physical harm to the child or to the child's unborn child. A notice provided as described in this division applies throughout all periods of time specified in division (B) of this section that occur after the provision of the notice.

(F)(1) **Whoever violates division (B) of this section is guilty of interfering with civil rights in violation of division (B) of section 2921.45 of the Revised Code.**

(2) A female child who is restrained or confined in violation of division (B) of this section may commence a civil action under section 2307.60 of the Revised Code against the law enforcement, court, or corrections official who committed the violation, against the official's employing agency or court, or against both the official and the official's employing agency or court. In the action, in addition to the full damages specified in section 2307.60 of the Revised Code, the child may recover punitive damages, the costs of maintaining the action and reasonable attorney's fees, or both punitive damages and the costs of maintaining the action and reasonable attorney's fees.

Sec. 2901.10.

(A) As used in this section:

(1) "Charged or convicted criminal offender" means **any woman** to whom both of the following apply:

(a) The woman is **charged with a crime** or, with respect to a crime, is being tried, has been convicted of or pleaded guilty, or is serving a sentence.
(b) The woman is in custody of any law enforcement, court, or corrections official.

(2) "Health care professional" has the same meaning as in section 2108.61 of the Revised Code.
(3) "Law enforcement, court, or corrections official" means any officer or employee of this state or a political subdivision of this state who has custody or control of any woman who is a charged or convicted criminal offender.
(4) "**Restrain" means to use any shackles, handcuffs, or other physical restraint**.
(5) "Confine" means to place in solitary confinement in an enclosed space .
(6) "Unborn child" means a member of the species homo sapiens who is carried in the womb of a woman who is a charged or convicted criminal offender, during a period that begins with fertilization and continues until live birth occurs.
(7) **"Emergency circumstance" means a sudden, urgent, unexpected incident or occurrence that requires an immediate reaction and restraint of the charged** or convicted criminal offender who is pregnant for an emergency situation faced by a law enforcement, court, or corrections official.

(B) Except as otherwise provided in division (C) of this section, **no law enforcement**, court, or corrections **official, with knowledge that the woman is pregnant or was pregnant, shall knowingly restrain or confine a woman who is a charged** or convicted criminal offender during any of the following periods of time:

(1) If the woman is **pregnant**, at any time during her pregnancy;
(2) If the woman is pregnant, during transport to a hospital, during labor, or during delivery;

(3) If the **woman was pregnant, during any period of postpartum recovery up to six weeks** after the woman's pregnancy.

(C)(1) Except as otherwise provided in division (D) of this section, **a law enforcement, court, or corrections official may restrain or confine a woman who is a charged** or convicted criminal offender during a period of time specified in division (B) of this section if all of the following apply:

(a) The official determines that the woman **presents a serious threat of physical harm to herself, to the official, to other law enforcement or court personnel**, or to any other person, presents a serious threat of physical harm to property, presents a substantial security risk, or presents a substantial flight risk.

(b)(i) Except as otherwise provided in division (C)(1)(b)(ii) of this section, prior to restraining or confining the woman, the official contacts a health care professional who is treating the woman and notifies the professional that the official wishes to restrain or confine the woman and identifies the type of restraint and the expected duration of its use or communicates the expected duration of confinement.

(ii) **The official is not required to contact a health care professional who is treating the woman prior to restraining the woman in accordance with division (D) of this section if an emergency circumstance exists**. The use of restraint in an emergency circumstance shall be in accordance with division (D) of this section. **Once the woman is restrained, the official shall contact a health care professional who is treating the woman and identify the type of restraint and the expected duration of its use.**

(c)Upon being contacted by the official as described in division ©(1)(b)(i) of this section, the health care professional does not object to the use of the specified type of restraint for the expected duration of its use or does not object to the expected duration of confinement.

(2) A health care professional who is contacted by a law enforcement, court, or corrections official as described in division ©(1)(b)(i) of this section shall not object to the use of the specified type of restraint for the expected duration of its use, or the expected duration of confinement, unless the professional determines that the specified type of restraint, the use of that type of restraint for the expected duration, or the expected duration of confinement poses a risk of physical harm to the woman or to the woman's unborn child.

(D) A law enforcement, court, or corrections official who restrains a woman who is a charged or convicted criminal offender during a period of time specified in division (B) of this section under authority of division (C) of this section shall not use any leg, ankle, or waist restraint to restrain the woman.

(E)(1) If a law enforcement, court, or corrections official restrains or confines a woman who is a charged or convicted criminal offender during a period of time specified in division (B) of this section under authority of division (C) of this section, the official shall remove the restraint or

cease confinement if, at any time while the restraint is in use or the woman is in confinement, a health care professional who is treating the woman provides a notice to the official or to the official's employing agency or court stating that the restraint or confinement poses a risk of physical harm to the woman or to the woman's unborn child.

(2)A law enforcement, court, or corrections official shall not restrain or confine a woman who is a charged or convicted criminal offender during a period of time specified in division (B) of this section if, prior to the use of the restraint or confinement, a health care professional who is treating the woman provides a notice to the official or to the official's employing agency or court stating that any restraint or confinement of the woman during a period of time specified in division (B) of this section poses a risk of physical harm to the woman or to the woman's unborn child. A notice provided as described in this division applies throughout all periods of time specified in division (B) of this section that occur after the provision of the notice.

(F)(1) Whoever violates division (B) of this section is guilty of interfering with civil rights in violation of division (B) of section 2921.45 of the Revised Code

(2)A woman who is restrained or confined in violation of division (B) of this section may commence a civil action under section 2307.60 of the Revised Code against the law enforcement, court, or corrections official who committed the violation, against the official's employing agency or court, or against both the official and the official's employing agency or court. In the action, in addition to the full damages specified in section 2307.60 of the Revised Code, the woman may recover punitive damages, the costs of maintaining the action and reasonable attorney's fees, or both punitive damages and the costs of maintaining the action and reasonable attorney's fees.

(3) Divisions (F)(1) and (2) of this section do not limit any right of a person to obtain injunctive relief or to recover damages in a civil action under any other statutory or common law of this state or the United States.

Sec. 2921.45. (A) No public servant, under color of his the public servant's office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.

(B) No law enforcement, court, or corrections official shall violate division (B) of section 2152.75 or section 2901.10 of the Revised Code .

SB 284 Effective Date 3/24/2021

Legal Commentary: Telephone numbers of victims/witnesses to crimes listed on police reports, and telephone numbers of parties to a motor vehicle accident listed on reports, are no longer a matter of public record meaning that when someone makes a public records request for these reports, the phone numbers will be redacted meaning not given out, but to insurance investigators. This is an interesting change because we have been yelled at over the phone numerous times by people who had an accident, and then were contacted on their phone by attorneys, chiropractors, and body shops.

Summary: To amend sections 149.43, 3901.62, and 3901.64 and to enact sections 3902.36 and 5167.47 of the Revised Code to amend the law related to insurers receiving credit for reinsurance, mental health and substance use disorder benefit parity, and the release of the telephone number of a person involved in a motor vehicle accident.

O.R.C 149.43. (A) As used in this section:

(A) As used in this section:
(1) "Public record" does not mean any of the following:

(mm) Telephone numbers for a victim, as defined in section 2930.01 of the Revised Code, a witness to a crime, or a party to a motor vehicle accident subject to the requirements of section 5502.11 of the Revised Code that are listed on any law enforcement record or report, other than when requested by an insurer or insurance agent investigating an insurance claim resulting from a motor vehicle accident.

(18) "Insurer" and "insurance agent" have the same meanings as in section 3905.01 of the Revised Code.

SB 5- Effective date 3/12/2020:

AN ACT To amend sections,,, 2907.22,,, of the Revised Code to amend the penalties for promoting prostitution..

O.R.C. 2907.22. Promoting prostitution.

(B)(2) Except as provided in division (B)(3) of this section, promoting prostitution is a felony of the third degree if any of the following apply:

(b) The offender previously has been convicted of or pleaded guilty to a violation of this section or a substantially similar violation of a law of another state or the United States.

(c) The offender also is convicted of or pleads guilty to a violation of section 2925.03 of the Revised Code.

(3) If the offender previously has been convicted of or pleaded guilty to two or more violations of this section or two or more substantially similar violations of a law of another state or the United States, promoting prostitution is a felony of the second degree.

(5) If the offender in any case also is convicted of or pleads guilty to a firearm specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (B)(1)(a) of section 2929.14 of the Revised Code.

HB 431 Effective date 4/12/2021

Create Sexual Exploitation Database

O.R.C 2907.231 Inducing, enticing, or procuring engagement in sexual activity for hire.

(A) As used in this section, "sexual activity for hire" means an implicit or explicit agreement to provide sexual activity in exchange for anything of value paid to the person engaging in such sexual activity, to any person trafficking that person, or to any person associated with either such person.

(B) No person shall recklessly induce, entice, or procure another to engage in sexual activity for hire in exchange for the person giving anything of value to the other person.

(C) Whoever violates division (B) of this section is guilty of engaging in prostitution, a misdemeanor of the first degree. In sentencing the offender under this division, the court shall require the offender to attend an education or treatment program aimed at preventing persons from inducing, enticing, or procuring another to engage in sexual activity for hire in exchange for the person giving anything of value to the other person and, notwithstanding the fine specified in division (A)(2)(a) of section 2929.28 of the Revised Code for a misdemeanor of the first degree, the court may impose upon the offender a fine of not more than one thousand five hundred dollars.

O.R.C 2907.24 Soliciting - after positive HIV test - driver's license suspension.

(A) No person shall knowingly solicit another to engage in sexual activity for hire in exchange for the person receiving anything of value from the other person.

(C)(1) Whoever violates division (A) of this section is guilty of soliciting. Soliciting is a misdemeanor of the third degree.

HB-295 Effective Date 4/15/2021

Legal Commentary: These sections define and regulate low-speed electric scooters, *BUT* in O.R.C. 4511.514(F), the State legislature allows municipalities to set limits on the use of scooters in their jurisdictions basically as they see fit to do so. COLUMBUS HAS ALREADY DONE SO, AND YOU SHOULD CONTINUE TO APPLY THE CITY CODE TO SCOOTERS.

Establish requirements for low-speed electric scooters

"Vehicle" now includes low-speed micromobility devices for purposes of 4501.01, 4509.01, and 4511.01.

O.R.C 4501.01

(FFF) "Low-speed micromobility device" means a device weighing less than one hundred pounds that has handlebars, is propelled by an electric motor or human power, and has an attainable speed on a paved level surface of not more than twenty miles per hour when propelled by the electric motor.

O.R.C 4511.01 Traffic laws - operation of motor vehicles definitions.

(WWW) "Low-speed micromobility device" means a device weighing less than one hundred pounds that has handlebars, is propelled by an electric motor or human power, and has an attainable speed on a paved level surface of not more than twenty miles per hour when propelled by the electric motor.

O.R.C 4511.514

(A)

(1) A low-speed micromobility device may be operated on the public streets, highways, sidewalks, and shared-use paths, and may be operated on any portions of roadways set aside for the exclusive use of bicycles in accordance with this section.

(2) Except as otherwise provided in this section, those sections of this chapter that by their nature could apply to a low-speed micromobility device do apply to the device and the person operating it whenever it is operated upon any public street, highway, sidewalk, or shared-use path, or upon any portion of a roadway set aside for the exclusive use of bicycles.

(B) No operator of a low-speed micromobility device shall do any of the following:

(1) Fail to yield the right-of-way to all pedestrians at all times;

(2) Fail to give an audible signal before overtaking and passing a pedestrian;

(3) Operate the device at night unless the device or its operator is equipped with or wearing both of the following:

(a) A lamp pointing to the front that emits a white light visible from a distance of not less than five hundred feet;

(b) A red reflector facing the rear that is visible from all distances from one hundred feet to six hundred feet when directly in front of lawful lower beams of head lamps on a motor vehicle.

(C)

(1) No person who is under sixteen years of age shall rent a low-speed micromobility device.

(2) No person shall knowingly rent a low-speed micromobility device to a person who is under sixteen years of age.

(3) No person shall knowingly rent a low-speed micromobility device on behalf of a person who is under sixteen years of age.

(D) No person shall operate a low-speed micromobility device at a speed greater than twenty miles per hour.

(E)

(1) Whoever violates this section is guilty of a minor misdemeanor.

(2) Unless a mens rea is otherwise specified in this section, an offense established under this section is a strict liability offense and section 2901.20 of the Revised Code does not apply. The designation of that offense as a strict liability offense shall not be construed to imply that any other offense, for which there is no specified degree of culpability, is not a strict liability offense.

(F) Notwithstanding division (A)(1) of this section, a municipal corporation, county, township, metropolitan park district, township park district, recreation district, or any division of the department of natural resources if the division has the approval of the director of natural resources may do any of the following:

(1) Regulate or prohibit the operation of low-speed micromobility devices on public streets, highways, sidewalks, and shared-use paths, and portions of roadways set aside for the exclusive use of bicycles, under its jurisdiction;

(2) Include low-speed micromobility devices that are adapted to expand access for people with various physical limitations into a shared bicycle, shared electric bicycle, or similar vehicle sharing program, under its jurisdiction;

(3) Require the owner or operator of a low-speed micromobility device rental service or low-speed micromobility device sharing program to maintain commercial general liability insurance related to the operation of the devices, with limits of up to one million dollars per occurrence and two million dollars per aggregate.

SB-33 Effective Date 4/12/2021

Legal Commentary: This bill includes numerous code section changes to protect critical infrastructure—this is important because of the sheer scope of what is defined a critical infrastructure. We have greatly summarized these code section changes because they are so long. For example, the criminal trespass code has been changed to not only create new penalties, but also to define everything that is considered critical infrastructure. We have not included all of

these in this update. Please look at new O.R.C 2911.21(F)(3)(4) and (5) for the list of sites that are now defined as critical infrastructure—it is a list consisting of everything from ports to dams to refineries.

O.R.C 2909.07 Criminal mischief.

(A)(7) Without privilege to do so, knowingly destroy or improperly tamper with a critical infrastructure facility.

(C)(4) Criminal mischief committed in violation of division (A)(7) of this section is a felony of the third degree.

O.R.C. 2911.21 Criminal trespass.

(A) (5) Knowingly enter or remain on a critical infrastructure facility.

(D)(1) Whoever violates this section is guilty of criminal trespass. Criminal trespass in violation of division (A)(1), (2), (3), or (4) of this section is a misdemeanor of the fourth degree. Criminal trespass in violation of division (A)(5) of this section is a misdemeanor of the first degree.

O.R.C 2911.211 Aggravated trespass.

(A) (2) No person shall enter or remain on a critical infrastructure facility with purpose to destroy or tamper with the facility.

(B) Aggravated trespass in violation of division (A)(2) of this section is a felony of the third degree.

HB-33 Effective Date 4-12-2021

Legal Commentary: There is a lot here, but take notice that officers must report a violation involving a companion animal to the appropriate social service agency (orally or in writing) when there is a violation, and there is a child or older adult residing with the violator, and the child or older adult may be impacted by the violation. In other words, you should always make the report if there is a child or older adult residing with the violator. How this all works is explained below:

O.R.C 959.07.

(A) As used in sections 959.07 to 959.10 of the Revised Code:

(1) "Companion animal" has the same meaning as in section 959.131 of the Revised Code.

(6) "Older adult" means any person sixty years of age or older within this state who is handicapped by the infirmities of aging or who has a physical or mental impairment which

prevents the person from providing for the person's own care or protection, and who resides in an independent living arrangement.

(7) "Violation involving a companion animal" means any violation of section 959.01, 959.02, 959.03, 959.13, 959.131, 959.15, 959.16, or 959.21 of the Revised Code involving a companion animal.

(B)(1) No person listed in division (B)(2) of this section shall fail to immediately report a violation involving a companion animal to an officer who is not a dog warden or deputy dog warden when that person has knowledge or reasonable cause to suspect that such a violation has occurred or is occurring.

(2) Division (B)(1) of this section applies to all of the following operating in an official or professional capacity:

(a) A licensed veterinarian;

(b) A social service professional;

(c) A person licensed under Chapter 4757. of the Revised Code.

O.R.C 959.08.

No officer, dog warden, or deputy dog warden operating in an official or professional capacity, shall fail to immediately report a violation involving a companion animal to an appropriate social service professional when **all of the following apply**:

(A) **The officer**, dog warden, or deputy dog warden has knowledge or reasonable cause to suspect that a violation involving a companion animal has occurred or is occurring;

(B) The officer, dog warden, or deputy dog warden has knowledge or reasonable cause to suspect that a child or older adult resides with the alleged violator;

(C) The officer, dog warden, or deputy dog warden suspects that the violation involving a companion animal may have an impact on the child or older adult residing with the alleged violator.

O.R.C 959.09.

(A) (1) Except as otherwise provided in division (A)(2) of this section, a person required to make a report under section 959.07 or 959.08 of the Revised Code may do so **orally or in writing** and shall include all of the following in the report:

(a) If known, the name and description of the companion animal involved;

(b) The address and telephone number of the owner or other person responsible for care of the companion animal, if known;

(c) The nature and extent of the suspected abuse;

(d) Any other information that the person making the report believes may be useful in establishing the existence of the suspected violation involving a companion animal or the identity of the person causing the violation involving a companion animal.

(2) An officer, dog warden, or deputy dog warden required to make a report under section

959.08 of the Revised Code may exclude any information from the report that is confidential or that the officer, dog warden, or deputy dog warden reasonably believes could jeopardize a pending criminal investigation.

O.R.C 959.10.

The entity with responsibility for employment oversight of an officer, dog warden, or deputy dog warden shall issue that individual a confidential written warning if the entity discovers that the individual has violated section 959.08 of the Revised Code. The entity shall include in the warning an explanation of the violation and the reporting

HB 129- Effective date 5/22/2020:

AN ACT To amend section **4511.84** of the Revised Code to permit a person to wear earphones or earplugs for hearing protection while operating a motorcycle.

Summary:

(A) As used in this section:

(1) "Earphones" means any device that covers all or a portion of both ears and that does either of the following:

(a) Through either a physical connection to another device or a wireless connection, provides the listener with radio programs, music, or other information;

(b) Provides hearing protection.

"Earphones" does not include speakers or other listening devices that are built into protective headgear.

(2) "Earplugs" means any device that can be inserted into one or both ears and that does either of the following:

(a) Through either a physical connection to another device or a wireless connection, provides the listener with radio programs, music, or other information;

(b) Provides hearing protection.

(B) No person shall operate a motor vehicle while wearing earphones over, or earplugs in, both ears.

(C) This section does not apply to:

(6) Any person wearing earphones or earplugs for hearing protection while operating a motorcycle.

II. Columbus City Code

There have numerous other Columbus City Code changes over the past eight months that impact law enforcement. They are as follows: CCC Sections 1912.03 (Use of BWCs in execution of search warrants), 1912.01 (Use of No-Knock Search Warrants limited), 1912.02 (Execution of Search Warrants by City Employees), 1943 (Prohibition on Hate Group Affiliation), 217 (Restrictions on Acquisition/Possession of Certain Law Enforcement Equipment), 1903.01 (Allows External Investigations of Sworn Police and Fire Personnel). These were all previously covered in a Legal Update on 8/6/20, and even though Council did later amend some of these sections very slightly, those amendments are now available on-line. Finally, the Division has addressed the impact of these sections through Division Directives. Here is Andre's law:

1914.02 - Activation of body-worn camera (Andre's Law)

(A) Whenever a division of police officer who has been assigned a body-worn camera engages in an enforcement action, or intends to engage in an enforcement action, the officer shall activate their body-worn camera no later than when exiting their vehicle or approaching an individual(s). Enforcement actions shall be recorded unless otherwise prohibited by federal, state, or local law. Enforcement actions shall consist of:

(1) Calls for service and self-initiated activity

(2) All investigatory stops

(3) Traffic and pedestrian stops

(4) Pursuits by foot, vehicles, bicycle, or any other means of transportation available to division of police officers

(5) Any use of force

(6) Any arrest

(7) Any forced entry of a structure, vehicle, or other premises

(B) Division of police officers assigned a body-worn camera shall also activate the camera when an encounter becomes adversarial, or its use would be appropriate and/or valuable to document and in unless otherwise prohibited by federal, state, or local law.

(C) This section does not apply when:

(1) A division of police officer has not been assigned a body-worn camera; or

(2) A division of police officer has been assigned a body-worn camera but is working an assignment where a body-worn camera is not required; or

(3) A body-worn camera malfunctions.

1914.99 Penalty

Any division of police officer that violates any section of this chapter may be subject to disciplinary action as provided by the division of police, department of public safety, or any applicable collective bargaining agreement.

*** We have been asked this question: Is the only possible penalty for an officer, who fails to turn on their BWC, internal discipline? The answer is no. It is possible under O.R.C. Section 2921.44 Dereliction that an officer could be charged with a violation of that code section for a couple of reasons, but most importantly related to this new City Code section, there is a now a duty expressly imposed by law to activate your BWC, thus O.R.C. 2921.44(E) could apply based on this code section. There are other possible dereliction sections that could potentially apply to a failure to turn on BWC, but now there is an express duty in Columbus to do so. The same answer applies to the duty to call for EMS and to render aid. There are now duties expressly imposed by law to do those things.**

1915.01 – Rendering Aid Following Use of Force (Andre's Law)

(A) Following a use of force by one or more division of police officer(s) that causes serious bodily harm to an individual, a division of police officer(s) present at the scene shall summon, or cause to be summoned, emergency medical services to render aid to the affected individual. Division of police officers must do this immediately following the use of force, unless the affected individual, or other individuals, pose an imminent threat of serious bodily harm or death to the division of police officer(s) or other individuals.

(B) Medical aid must be rendered, by one or more division of police officers present at the scene, to an individual suffering serious bodily harm due to a use of force by the division of police, consistent with available equipment and the training the officer has received, as soon as the immediate area has been secured of imminent or probable threats. Any division of police officers engaged in rendering aid may cease rendering such aid upon the arrival of emergency medical personnel or other medical response

(C) The division of police shall require training for officers on cardiopulmonary resuscitation and basic medical aid in a manner to be determined by the division of police and/or the director of public safety. Initial training shall occur during academy training. The division of police shall also require of all officers no less than biennial re-trainings in cardiopulmonary resuscitation and basic medical aid.

(D) Any division of police officer that violates section 1915.01(A)-(B) may be subject to disciplinary action as provided by the division of police, department of public safety, or any applicable collective bargaining agreement.

(E) The requirements of section 1915.01(A) do not apply when 911 dispatchers are required by any standard operating procedure of the department of public safety to automatically summon emergency medical services upon a report of the discharge of firearms at the scene of an incident.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) June 28th, 2021

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

In this Edition:

I. U.S. Supreme Court Case Clarifies Whether Hot-Pursuit of a Misdemeanant Automatically Allows for a Home Entry (It does not any longer)

***Arthur Gregory Lange, Petitioner V. California*, 594 U. S. ____ (2021)**

***Critical Points of the Case*:**

- **The flight (and associated hot-pursuit) of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit (when the PC is for a misdemeanor) case to determine whether there is a law enforcement emergency.**

- **On many occasions, the officer will still have good reason to enter—to prevent imminent harm/violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled into a private place.**

- **It still appears that pursuit of a fleeing *felon* is itself an exigent circumstance *always* justifying warrantless entry into a home. So, if an officer has PC to believe a person has committed a felony, the officer attempts to make that felony arrest in public, and that person flees into a private place, the officer may pursue that person into the private place without a warrant to complete the arrest as long as the pursuit is continuous. However, if the officer only has PC to believe a misdemeanor has been committed, the officer must assess whether the flight into the private place constitutes an exigent circumstance—the flight and hot-pursuit by itself does not justify the entry.**

- **Bear in mind, the court acknowledges that many of these situations will still allow for a home entry to make the arrest because much of the time flight into a home, or other private place, will present an exigent circumstance, even when the flight is related to a misdemeanor. For example, if an officer has PC to arrest someone for misdemeanor domestic violence, attempts to arrest that person outside, but the person flees into a home before the officer can complete the arrest, the flight coupled with the nature of the crime and the associated danger, would very likely constitute an exigent circumstance. The possibility of escape also will justify many of these types of entries, especially when it is only one or two officers in pursuit, and the fleeing misdemeanant flees into a home from which they could easily escape before back-up may arrive. There are many scenarios that will justify an entry in these situations—the key is to go through the extra mental step beyond the fact you are in hot-pursuit of a misdemeanant.**

Facts: Arthur Lange was driving in Sonoma, California playing loud music and honking his horn when he passed by a California highway patrol officer. This prompted the officer to begin following Lange, and subsequently activate his overhead lights—signaling for Lange to pullover. However, Lange did not stop. He continued driving a short distance to his driveway and entered his attached garage. At which point, the officer followed Lange into his garage. Here, the officer questioned Lange and after observing signs of intoxication, put him through field sobriety tests. Later, a blood test showed that Lange's blood-alcohol content was three times the legal limit. The state charged Lange with the misdemeanor of driving under the influence of alcohol, plus a (lower-level) noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated his Fourth Amendment rights. The State contested the motion, arguing that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal and that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange's motion, and its appellate division affirmed.

The California Court of Appeal also affirmed: concluding Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal; stating that Lange could not defeat an arrest begun in a public place by retreating into his home; holding the pursuit of a suspected misdemeanant is always permissible under the "hot pursuit" exigent-circumstances exception to the warrant requirement.

Issue: Does the pursuit of a fleeing misdemeanor suspect always (categorically) qualify as an exigent circumstance, and is thus an exception to the warrant requirement of the Fourth Amendment? Does flight from an officer, when the underlying offense is a misdemeanor, always justify a warrantless entry into a home?

Holding and Analysis: No. The United States Supreme Court held that the mere existence of a fleeing misdemeanant does not, on its own, create an exigent circumstance that is an exception to the warrant requirement—there must be at least one other exigency present. That means that if an officer has a fleeing misdemeanant suspect, without any other exigencies, the officer must first obtain a warrant before following the suspect into a home. Pursuit of a fleeing misdemeanant does not trigger a categorical rule allowing a warrantless home entry.

This overrides any previous rule that hot pursuit of a fleeing suspect is an exigent circumstance—Ohio allowed for an automatic entry related to a hot-pursuit of a misdemeanant so that is now changed. Now, the Court holds that hot pursuit merely sets the table for other exigencies that may emerge to justify warrantless entry. Lange's counsel acknowledged this rule change will still allow the police to make a warrantless entry into a home "nine times out of 10

or more" in cases involving pursuit of a fleeing misdemeanant. Therefore, while the hot pursuit of a misdemeanant is no longer an exigent circumstance, police officers will often find that another exigent circumstance exists. As the *Brigham City* Court acknowledged; "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U. S. 398, 403 (2006). If an officer reasonably believes another exigent circumstance exists, they may bypass the warrant requirement.

Examples of exigent circumstances include: (1) pursuit of a fleeing felon; (2) emergency assistance to an injured occupant (*Brigham City*, 547 U. S., at 403; Riley, 573 U. S., at 388.); (3) to protect an occupant from imminent injury (*Brigham City*, 547 U. S., at 403); (4) "prevent the imminent destruction of evidence"; (5) to "prevent a suspect's escape (*Minnesota v. Olson*, 495 U. S. 91, 100 (1990).); if the delay required to obtain a warrant would bring about "some real immediate and serious consequences" (*Welsh v. Wisconsin*, 466 U. S. 740, 751 (1984).); (6) imminent harm/violence; (7) escape from the home**.**

II. Ohio Supreme Court Explains How to Assess Value of Face-to-Face Tip from an Unknown Person and Whether that type of Tip Supports a Stop

***State v. Tidwell*, Slip Opinion No. 2021-Ohio-2072**

***Critical Points of the Case*:**

- **This case has some relevance to information provided by any unidentified or unknown informants, but is it especially relevant to those who approach an officer face-to-face to report an ongoing crime. The United States Supreme Court has firmly rejected the argument that reasonable cause for an investigative stop can only be based on the officer's personal observation, rather than on information supplied by another person.**

- **While information from an identified citizen informant who comes forward to provide eyewitness information about a crime in progress may have a higher indicia of reliability than that provided by an anonymous informant, information from an unidentified citizen informant who initiates face-to-face public contact with the police to report criminal activity then occurring, with no attempt to conceal his identity, is not necessarily without investigative value. Moreover, face-to-face contact with an informant allows an officer to personally observe the informant's demeanor and evaluate his veracity.**

- **Even an unidentified informant who comes forward with accusatory information does so at some legal peril if he knowingly makes a false report. An informant's**

unidentified status does not necessarily extinguish all indicia of reliability from the informant's tip given the potential for subsequent positive identification.

Facts: Sherry Tidwell was backing her SUV out of a parking space outside of a Speedway store in Warren County, Ohio. Meanwhile, State-highway-patrolman, Sergeant Jacques Illanz was in this same parking lot completing a report from a separate incident. The Speedway's cashier, personally concerned by Tidwell's intoxication, communicated to an unidentified customer of the store, to alert the police. As a result, the unidentified customer, yelled to Sergeant Illanz while simultaneously directing the sergeant's attention to Tidwell's SUV: "Hey, you need to stop that vehicle. That lady is drunk." This prompted, Sergeant Illanz to begin observing the vehicle backing out of the parking space. Over a period of thirty seconds, Officer Illanz noted the unusually low speed of Tidwell's SUV and the blank stare on Tidwell's face, which the officer knew, based on his experience, may indicate impairment. Officer Illanz stepped in front of Tidwell's car and told her to stop out of concern for public safety—this was where the stop commenced.

During the stop, Illanz questioned Tidwell and noticed the following: a strong odor of alcohol; bloodshot, glassy eyes; slow, very slurred, and at times unintelligible speech; slow and exaggerated movements—all potential signs of impairment. Next, Hamilton County Deputy Sheriff, Randy Reynolds, having jurisdiction over the Speedway premises, arrived and took over the investigation. Reynolds also detected a strong odor of alcohol; watery and bloodshot eyes; droopy eyelids; and slow and slurred speech on Tidwell. Reynolds questioned Tidwell about whether she had been drinking and then performed field sobriety tests indicating that Tidwell was impaired and unable to legally operate a motor vehicle. As a result, Deputy Reynolds concluded that Tidwell was under the influence of alcohol or drugs, and her placed her under arrest. Tidwell was charged with operating a vehicle while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a) and (h).

Issue: Is an anonymous informant's, like the one in this case, indicating criminal activity sufficient to provide a police officer with reasonable suspicion to initiate a brief investigatory/Terry stop? Is simple face-to-face contact between an unnamed citizen and a police officer enough to remove the citizen from the category of "anonymous" and consider him a "citizen informant, "whose tip merits a high degree of credibility and value, rendering the tip sufficient to withstand a Fourth Amendment challenge without independent police corroboration?

Holding and Analysis: Yes. An anonymous informant's tip is just one factor in a "totality of the circumstances" approach used to determine the reasonableness of a *Terry* stop. The fact that an informant is anonymous is not dispositive of a *Terry* stop being reasonable. Utilizing the "totality of the circumstances" then confronting the officer, the Court held that the brief investigatory stop of Tidwell was reasonable and thus did not violate the Fourth Amendment to

the United States Constitution. Therefore, the rule is that the reasonableness of an investigatory stop is determined using a "totality of the circumstances" approach—and there is no requirement that an unidentified informant's tip be quantified with mathematical precision in order to possess investigative value.

Under the "totality of the circumstances" approach, reasonable suspicion to investigate is determined by the consideration of multiple factors. These factors include, but are not limited to whether: (1) the informant made open, public contact with the police officer; (2) the informant had face-to face contact with the police officer allowing the officer to personally observe the informant's demeanor and evaluate his veracity; (3) the potential for subsequent positive identification of informant existed; (4) the tip was about a possible present crime—thus, showing trustworthiness; (5) the police officer's observations corroborated the informant's tip; (6) the truth of the tip could be confirmed quickly by a *Terry* stop; (7) the criminal behavior being suspected is well recognized (e.g., does not necessarily require details and/or predictive information; drunkenness is commonly identifiable state); (8) the information was quality; (9) the quantity of the information; (10) the combined effect of the officer's experience and training; and (11) the category of informant that the informant falls into (e.g., anonymous informant [being the least reliable], known informant, identified citizen informant [being the most reliable]).

In this case, the information available to Sergeant Illanz prior to his investigatory stop of Tidwell's vehicle consisted essentially of two components, specifically (1) what he was told by the Speedway customer face to face as the crime was occurring—"Hey, you need to stop that vehicle. That lady is drunk.," and (2) what he observed—Sergeant Illanz's own observations of Tidwell and the way she operated her motor vehicle up until the time he walked in front of her car to make the stop. Based on the information then available to Sergeant Illanz, and reasonable inferences that could be drawn therefrom, the court concluded that the investigatory stop he initiated in this case was reasonable. Sergeant Illanz had reasonable suspicion to investigate whether Tidwell was driving while drunk based on the unidentified Speedway customer's tip and the officer's own partial corroboration of that tip.

III. New CPD Protective Sweep Case: When is a Protective Sweep of the Passenger Compartment of a Vehicle Justified?

***State v. Shalash*, 2021-Ohio-1034 (10th App. Dist.)**

***Critical Points of the Case*:**

- **Officers could undertake a protective sweep or search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably**

warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

- **When determining whether a protective search is justified, courts apply an objective standard to determine if the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate. Applying this objective standard, courts review the totality of the circumstances through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.**

- **Courts, in considering the totality of the circumstances to determine whether a warrantless search or seizure is appropriate, consider factors including the defendant's suspicious activities both before and during the stop.**

- **This case doesn't change the law or say anything legally different, but it highlights how courts look at these situations.**

Facts: At 3:05 p.m. on April 23, 2019 **Kurt Chapman, an officer with the Columbus Division of Police**, responded to a dispatch of a "gun run," where it was reported a male had threatened a female with a handgun. Officer Chapman testified that when he arrived at the residence on South Harris Avenue, he spoke with Pamela Rock, the victim of the incident and the 911 caller. Officer Chapman testified that Rock told him that a Hispanic man "showed up to her door, pointed a firearm and left the scene in a white BMW," and that there was a woman in the vehicle with him. Additionally, Officer Chapman testified that Rock told him the man had a black or silver handgun. Rock's neighbor, Dillon Coal, told Officer Chapman he had a surveillance camera on his vehicle and he was able to obtain a partial license plate number from the white BMW. Officer Chapman said that Rock informed him they would be able to find the man at the Wedgewood apartment complex.

Officer Chapman testified that after speaking to Rock and her neighbors, he drove to the Wedgewood apartment complex and observed a vehicle matching the description the neighbors provided at the north side of the apartment complex. As he approached the vehicle, Officer Chapman said he was able to match the dealer tag on the car with the partial license plate obtained from the surveillance video. Officer Chapman testified he then approached the vehicle and had a brief conversation with Belal M. Shalash, and there was also a woman in the vehicle with Shalash. Shalash denied having been on South Harris Avenue. Officer Chapman then asked Shalash to step out of the vehicle, and Shalash cooperated. Once he was out of the vehicle, Officer Chapman testified Shalash did not try to run and did not act in a furtive manner. By that

time, there were four officers on the scene. While Officer Chapman conducted a warrant check of Shalash's personal information, his partner conducted a pat-down of Shalash's person.

After the warrant check indicated Shalash did not have any outstanding warrants, Officer Chapman testified he planned to take a report of the incident and refer Rock to the prosecutor's office. However, before placing Shalash back in the vehicle, Officer Chapman testified his partner "conducted a protective sweep of the vehicle for any weapons," and during that sweep Officer Chapman's partner located a gun. After police found the gun in the vehicle, the officers placed Shalash in handcuffs. Officer Chapman testified that police officers sometimes use handcuffs for officer safety even if they do not ultimately arrest the person.

Columbus Division of Police Officer Jacob Pawlowski also testified at the suppression hearing. Officer Pawlowski stated he also responded to the gun run and encountered Shalash in the white BMW. It was Officer Pawlowski who conducted the pat-down of Shalash's person when Shalash first exited his vehicle. Officer Pawlowski testified he talked with Officer Chapman and they "both agreed that [they] had enough for a protective sweep" of the vehicle.

After conducting a protective sweep of the vehicle, Officer Pawlowski testified he found a handgun located underneath the front passenger seat. Officer Pawlowski testified he found the handgun first and then Shalash was detained in handcuffs while he finished the protective sweep of the vehicle which he said could have revealed additional firearms. After Shalash was placed in handcuffs, Shalash asked whether he was under arrest and Officer Pawlowski told him he was not yet under arrest but was being "detained." The officers then placed Shalash in the rear of a prisoner transport vehicle, and Officer Pawlowski found the magazine to the handgun.

Officer Pawlowski testified that had Shalash been able to get back in his vehicle, he would have been able to access the handgun. Shalash was indicated for two counts of aggravated menacing; and one count of improperly handling firearms in a motor vehicle.

Following the hearing, the trial court granted Shalash's motion to suppress. The trial court determined the protective sweep of the vehicle violated Shalash's Fourth Amendment rights, concluding there was no objective or subjective evidence that any of the officers involved believed Shalash to be dangerous before or during the stop. The trial court focused on the fact Shalash was cooperative, and to some extent, the fact the officers chose to issue a citation and refer the victim to the prosecutor's office, as evidence of lack of fear for safety. The County Prosecutor appealed this finding.

Issue: Was a protective sweep of the passenger compartment of the vehicle justified in this case?

Holding and Analysis: Yes. In *Michigan v. Long*, 463 U.S. 1032 (1983), the United States Supreme Court expanded the *Terry* warrantless search exception to protective searches of automobiles. In *Long*, the Supreme Court held that officers could undertake a protective sweep or search of "the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, * * * if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." The test for reasonableness of the search of the vehicle is "'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'"

When determining whether a protective search is justified, courts apply an objective standard to determine if the "'facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate.'" Applying this objective standard, courts review the totality of the circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86 (1991).

Here, the facts presented at the hearing established that when the officers initially approached Shalash and detained him, they had a reasonable suspicion based on specific, articulable facts that Shalash was engaged in criminal activity. The officers were responding to a dispatch of a "gun run," where a woman reported a man had threatened her with a gun. The officers had a physical description of the man with the gun, a description of his vehicle, a partial license plate number, and a report of a location in which he could be found, all of which matched Shalash and his white BMW when the officers approached him in the Wedgewood apartment complex.

Based on the information from the 911 call and the people at the scene when they responded, the officers' reasonable suspicion was that Shalash was dangerous and had a gun. That reasonable suspicion would not have disappeared once Shalash was out of the vehicle. And the fact that Shalash was cooperative during the length of his detention does not vitiate or diminish the reasonable suspicion the officers already had, and continued to have, both when they initially approached him and as long as they held him there.

Thus, the facts available to the officers at the moment they approached Shalash's vehicle, asked him to exit the vehicle, and conducted a pat-down of his person were sufficient to warrant a person of reasonable caution in the belief that it was necessary to conduct a *Terry* stop. Once the officers had Shalash out of the vehicle and the pat-down revealed he did not have a gun on his person, it was reasonable for them to believe the gun was in the vehicle, and they were therefore justified in doing a protective sweep of the vehicle before allowing Shalash to get back in the vehicle.

Here, the officers had credible information that Shalash had a gun inside the vehicle and that he had just threatened someone with that gun. Based on the report from the 911 caller, the officers had a reasonable belief both that Shalash was armed and that he was possibly dangerous. That information supported their reasonable belief, despite Shalash's cooperation with police, that a protective sweep was necessary.

The court also found that, to the extent the trial court concluded that the officers could no longer have had a reasonable belief that they were in danger once they decided to issue Shalash a citation and return him to his vehicle, neither the facts of this case nor the case law supported such a conclusion. Had police returned Shalash to his vehicle without conducting the protective sweep, he would have had immediate access to the weapon at the conclusion of the stop.

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Legal Advisor's Update – The Short North

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) August 6th, 2021

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

Introduction:

This very short edition is directed to those officers who work in the Short North area, whether on Patrol or Special Duty, and focuses on a few enforcement options/issues that are most applicable to some of the street/sidewalk level problems that have recently arisen in what is generally a safe neighborhood. We want officers to understand this message is coming not only from the City Attorney/Legal Advisor, but also from Chief Bryant, and Assistant Chief Potts. The leadership of the Division of Police wants these code sections enforced when appropriate. The leadership supports arrests being made when needed, and allowed for by Division Directives. The City Attorney's Office is committed to the prosecution of these violations, and also supports arrests being made when needed and within policy.

The Intersection of Division Directives and Law:

It is important to understand how Division Directive 3.02--Summons and Misdemeanor Citations, applies to non-violent misdemeanors situations. The general rule pursuant to 3.02 is that if an individual commits a non-violent misdemeanor, that person should not go to jail. However, if that person's behavior fits any of the exceptions listed in 3.02 II.C.2 they may be taken to jail. How do the exceptions work in these situations? For example, if a person has been thrown out of a bar for being disorderly, refuses to leave the area and continues to engage in disorderly conduct after being told by an officer to desist, that person may be arrested/slated for disorderly conduct pursuant to 3.02 II.C.2.a. Likewise, if a person trespasses in a business, and refuses to leave, they could be arrested/slated for criminal trespass pursuant to 3.02 II.C.2.e given the only way to end the situation, and protect the rights of the property owner, is through an arrest/slate, thus making that an exigent circumstance. If a person commits the same offense, or multiple offenses, several times in a short period of time, they may be slated as that too qualifies as an exigent circumstance since the only way to stop the mini-crime-spree, and protect the rights of others, is through an arrest/slate. If a person is disorderly, and too intoxicated to care for themselves, they could be arrested/slated

pursuant to 3.02 II.C.2.b. If a person who is disorderly has a history of non-appearance, they may be arrested/slated pursuant to 3.02 II.C.2.c. The gist of 3.02 is that officers will not arrest/slate a non-violent misdemeanant who has no history, who is fully able to care for themselves, and is fully compliant, but if a person fits any of the listed exceptions, they may be arrested/slated. We hope this helps officers feel comfortable using the exceptions to enforce the law.

There are two other critical things to understand about 3.02: 1) it does not apply to misdemeanor offenses of violence—assault, domestic violence, and aggravated menacing etc... Officers may always arrest/slate for those offenses, and in many situations, have a legal duty to do so; and 2) officers no longer need supervisory approval to arrest/slate pursuant to any of the listed exceptions in 3.02. This process has been streamlined so officers may more easily exercise their discretion.

City Code Interpretation Options/Examples:

There are obviously numerous City and State Code Sections that come into play when working in a busy entertainment area. We will focus on Disorderly Conduct for this short update. Disorderly applies to a multitude of situations, but we have had a few Short North situations brought to our attention that can lead to, or start other problems, we want to address.

One, if a person is ejected/ordered from a bar/restaurant, then stays in front of the bar/restaurant yelling at bar employees, and/or other patrons, in an abusive, taunting, or challenging manner, they may be charged with disorderly conduct. These situations can obviously escalate quickly from abusive language to more serious offenses. As stated, if they will not stop the conduct after reasonable warning to do so, they may be arrested/slated.

Two, if a person hinders or prevents exit or entrance to/from a bar/restaurant they may be charged with disorderly conduct. (See CCC 2317.11 below). A person may also be charged with Obstructing a City Right-of-Way (see CCC 2333.0 4below) if they obstruct/block a sidewalk or entrance—this too is an M-4. If an officer has probable cause to believe a citizen is obstructing a sidewalk, or entrance/exit, the officer may order/warn the person to move on from that place. Not only is it legally appropriate to tell the person to move on given obstructing the sidewalk is illegal, it may prevent a worse situation from occurring, and also a mitigate the need for a charge.

There are certainly other legal issues that will arise in this busy area. For example, there are issues related to food cart enforcement. We will get more information out on that issue in the near future.

Whenever you have enforcement legal questions, you may contact the Legal Advisor by email or phone. Jeff Furbee can be reached on his cell at 614-499-5304.

2317.11 Disorderly Conduct

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;
2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person;
3) Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response;
4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act which serves no lawful and reasonable purpose of the offender;
5) Creating a condition which is physically offensive to persons or which presents a risk of physical harm to persons or property, by any act which serves no lawful and reasonable purpose of the offender.

2333.04 - Obstructing City Right-of-Way

(A) A person commits an offense if, without legal privilege or authority to do so, the person recklessly:

1) **Obstructs a** highway, street, **sidewalk**, railway, waterway, elevator, aisle, hallway, **entrance, or exit** to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from the person's acts alone of from the person's acts and the acts of others; or
2) Disobeys a reasonable request or order to move issued by a person the actor knows to be or is informed is, a peace officer or a person with the authority to control the use of the premises when the request/order is made in order to prevent the obstruction of a highway or any of the areas mentioned in subsection (1).

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) August 26th, 2021

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

In this Edition—*Terry* Stops and Pat-Downs:

I. Introduction—*Terry* Stops and Pat-Downs

Terry stops and pat-downs are frequently litigated in Ohio courts thru motions to suppress and related appeals. Officers are often called to testify in order to justify a stop or pat-down that led to the discovery of a gun. Doing these stops within the legal boundaries is important. It is thus imperative officers fully understand the legal boundaries by understanding how Ohio courts currently view various *Terry* stop and pat-down concepts. While the basic stop/briefly detain/pat-down if armed and dangerous holding of *Terry* remains undisturbed, the manner in which these concepts are applied by Ohio courts requires occasional review. In this Update we try to give you some insights into how Ohio courts are currently evaluating some critical *Terry* issues.

One thing we have seen over the last few years is a greater emphasis on the concept of "particularized" or "individualized" reasonable suspicion. When courts use that phrase, they are essentially saying that not only does an officer need reasonable suspicion that criminal activity is afoot, but also reasonable suspicion that the specific individual stopped is in fact involved in that activity. To reinforce that point, courts point out that an individual's presence in, or proximity to, an area of suspected criminal activity, standing alone, is not enough to support a reasonable, particularized/individualized suspicion that the person is committing a crime. This issue comes up in the last three cases cited below, and I think if you read the cases, this concept will make more sense.

Another thing we are seeing more than ever in *Terry* stop cases is courts relying on BWC footage to decide when a detention/stop was actually initiated, and if the stop/detention, or pat-down, was supported by reasonable suspicion. Officer testimony as to how they perceived the situation at the time of the stop based on their experience as an officer is still very important, but the BWCs are playing a larger role in these cases. Bear in mind, conversations officers have with one another leading up to a stop/detention, which are captured on BWCs, may also be relevant to a court's assessment of a stop/detention. The *Walton* case below, which is a Columbus Division of Police case, is a prime example of how officer conversations can play a major role in a court's analysis of a stop/detention/pat-down.

Finally, and this isn't new, but it bears repeating: officers must have reasonable suspicion the person they are detaining is armed and dangerous to justify a pat-down for weapons. Officers cannot pat-down everyone they stop/detain, and absent reasonable suspicion a person is armed and dangerous, a weapon should never be pointed at a detainee. As you can see from the cases in this Update, courts are still mindful of officer safety, but they require justification for that second or extra step of a detention. Three of the cases in this Update were decided in the past year, and one in 2019, thus this Update should give you some sense for how Ohio courts currently feel about various *Terry* stop issues.

II. Columbus Police Stop and Pat-Down Supported by Reasonable Suspicion

***State v. Howard*, 2021-Ohio-1792 (10th App. Dist.)**

***Critical Points of the Case*:**

- **This is simply good observant police work by a veteran officer. Also, as you can see, the BWC footage played a big role in the court's decision.**

- **An investigatory stop is permitted to stop and detain an individual when the officer has a reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot.**

- ***Terry v. Ohio* permits a police officer to conduct a brief warrantless search of an individual's person for weapons if the officer has a reasonable and articulable suspicion that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others. The purpose of such a limited search is not intended to discover evidence of a crime, but to allow the officer to pursue his duties without fear of violence.**

Facts: At approximately 10 p.m. on May 17, 2018, **Columbus Police Officer Michael Shannon** and his partner were engaged in a "proactive bicycle patrol" of a residential area in the Hilltop. Officer Shannon is a 17-year patrol officer and had been working as a bicycle patrol officer in that area for the preceding ten years. Officer Shannon and his partner were riding east on Olive St. when they noticed a young man on the corner of Olive St. and South Terrace Avenue, pacing back and forth. As they approached the corner, the man apparently noticed them and walked away. He walked south from the corner down South Terrace Avenue, and up onto the porch of the second house from the corner, 125 South Terrace Avenue. Officer Shannon was familiar with the residence and knew that the occupants were an elderly couple who were unlikely to have a young visitor at that time of night. He also observed that it was a quiet night, that the man did not knock on the door, and that it did not seem he had rung a doorbell either. Officer Shannon and his partner decided to approach the man and ask questions. They were subsequently able to identify the man as Kamashon D. Howard.

Officer Shannon's bodycam video of the encounter with Howard was admitted at a hearing on Howard's motion to suppress. Because Officer Shannon did not turn on his bodycam until he walked up and began asking questions of Howard, there is no audio for the first minute of the video—this was within policy at the time. During the video, Officer Shannon—apparently positioned at the entryway to the porch—can be heard questioning Howard, who is sitting on the porch railing in front of the door to the residence.

Officer Shannon first asks Howard whose house this is, and Howard replies that he does not know whose house it is but that he is "waiting on a girl." Howard could not tell the officers the girl's last name. Howard claims that his car is "right there" on the street, and repeatedly attempts to put his left hand into his pocket. Officer Shannon asks him several times not to put his hand in his pocket. Then, in response to Officer Shannon's question whether he has his driver's license, Howard attempts to retrieve his keys from his right pocket, and Officer Shannon again tells him not to put his hands in his pockets. It was also apparent from the BWC footage that Howard was attempting to shield one side of his body from the officers' view.

Howard indicates that his ID may be in his car, and that he wants to reach into his right pocket to get his keys. Officer Shannon indicates that he will pat Howard down, stating that "I'm just going to make sure you don't have any weapons and then you can grab your key." He retrieves Howard's cell phone from his hand and places it on the ledge behind him and begins to pat Howard down. Officer Shannon retrieves the keys from Howard's right pocket, but notices that Howard also has a visible and large wad of cash in that same pocket.

Officer Shannon places the keys on the ledge with Howard's phone and continues the pat-down. Within a few seconds, he feels a firearm at the bottom of Howard's right leg, and immediately tells Howard not to move. Officer Shannon handcuffs Howard and he and his partner arrest him; Officer Shannon then retrieves the gun from Howard's leg and calls for a cruiser. Officer Shannon's partner can then be heard on the bodycam video stating that he felt a baggie in Howard's left pocket, and Officer Shannon states "yeah, I felt that too." That bag is retrieved after Howard is removed from the porch (search incident to arrest), and after testing is found to contain a quantity of cocaine. Howard was charged with carrying a concealed weapon and possession of cocaine with a firearm specification.

Issue: Was the detention and pat-down of Howard, which led to the discovery of the gun and cocaine, warranted under *Terry v. Ohio*?

Holding and Analysis: Yes. Officer Shannon's detention and pat down of Howard were justified by his reasonable suspicion that Howard was engaged in illegal activity, and that he was armed and dangerous.

As an initial matter, Howard argued that "the officers did not have reasonable suspicion to approach him based on their hunch that he was waiting to conduct a drug deal." The court pointed out that Howard's argument misstates the law—officers generally do not need "reasonable suspicion to approach," as police encounters with the public generally begin as consensual. The court found that Howard provided no basis to suggest that the initial approach by Officers Shannon was anything other than a consensual encounter.

However, Howard certainly was seized later during the encounter, and reasonable suspicion supported the seizure. Given the time of night, Howard's actions in walking onto the porch without knocking on the door, the bodycam video demonstrating that Howard was shielding half his body from view, and Howard's inability to answer Officer Shannon's basic questions—who lived in the house, the last name of the girl he claimed to be meeting, whether he had his ID on his person—created a reasonable suspicion justifying further investigation and a detention.

Moreover, Officer Shannon's initial pat-down of Howard is closely tied to *Terry's* underlying safety rationale. Howard was shielding part of his body from the view of the officers, had reached into his pockets several times during the initial questioning despite being asked not to do so, and Officer Shannon gave Howard the specific warning that he was patting down Howard simply to ensure that he didn't have weapons.

III. Columbus Stop Lacking Individualized/Particularized Reasonable Suspicion

***State v. Walton*, 2020-Ohio-5062 (10th App. Dist.)**

***Critical Points of the Case*:**

- **Officers cannot stop someone solely because that person is near a suspected crime location, and when a caller gives a specific description of a suspect, officers must consider that description when deciding whether to make a stop of an individual.**

- **Reasonable suspicion is sometimes called "particularized" or "individualized" because it must be directed toward a particular individual in order to be legally effective. For this precise reason, the U.S Supreme Court has held, an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.**

- **Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.**

- **Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity may be afoot and the individual detained is involved in the criminal activity.**

Facts: On March 31, 2018, **Officers A and E of the Columbus Division of Police** were dispatched to 1034 South Kellner Avenue. In relevant part, the dispatcher said, "Ten thirty-four South Kellner, male black, maroon jogging suit, supposedly has a 33 standing outside of a blue

Honda." The "PatrolView" log revealed that the caller to the police dispatcher had not seen the gun firsthand but that her daughter had. The log also revealed the first name and phone number of the caller and alleged that the black fellow in the maroon jogging suit was "trying to harm the caller." Officer A confirmed at a hearing that the dispatch constituted the entirety of the information he and his partner had when they approached the area of 1034 South Kellner Avenue.

According to Officer A, he and Officer E encountered defendant approximately 40 or 50 yards from the steps of 1034 South Kellner Avenue. Body camera videos from both Officer A and E, show what occurred. As the officers drove to the scene, Officer E said, "Blue Honda." Officer A responded, "Straight ahead. See it?" As they got closer and could see people standing near a Honda, Officer E objected, "That's not any of our people, though. No track suit." Officer A responded, "That's a light blue Honda, though." Officer E then mused, "Maroon jogging suit. Where's a maroon jogging suit?"

Video shows that the police officers parked near two Hondas (one silver and one, parked several feet behind it, which was light blue). Two black men were standing at the trunk of the silver car eating chicken wings from a container perched on the trunk lid. One wore a red-hooded sweatshirt and jeans. The other, defendant, wore a gray-hooded sweatshirt and jeans. Immediately upon approaching the men, Officer A said, "What's up, guys? Were you guys in a dispute earlier? (Pointing toward houses behind the men.) With them?" Defendant gestured in the same direction and responded, "No, sir. No. I know them, we're fine." After confirming that defendant lived in the area and owned the blue Honda, Officer A inquired, "Why did they say you have a gun?" Defendant asked, "Who?" A number of voices then spoke at once but Officer A responded, loudly over the rest, that the police had received a call saying someone near a light blue Honda had a gun. Defendant denied it, saying, "No, sir. No. No, sir. No." Officer A responded, "None of you guys?" Then he began to move toward the men saying, "Alright. I'm just gonna check you real quick. Okay, just keep your hands up." Defendant and the others were detained at this time.

As Officer A approached, defendant slid both hands down the sides of his gray sweatshirt toward the center pocket. Officer A reacted by repeating the command to defendant to keep his hands raised. As defendant stood with his hands raised, Officer E approached, held defendant's hands behind his back, and, withdrew a pistol from the front pocket of defendant's sweatshirt. Ultimately, the police handcuffed and detained defendant, the man in the red sweatshirt, and a black woman who had been seated in the Honda.

Officers A's testimony during the hearing generally agreed with the body camera footage. He agreed, for example, that neither defendant nor the other man had been wearing a maroon jogging suit. He agreed that the tip was not for multiple persons near a blue Honda but rather just a single black male in a maroon jogging suit. However, he stated that he stopped because there was a black male next to a blue Honda in the suspect area.

Officer A confirmed that neither defendant nor the other man made furtive movements when he and the other officer initially approached—the two simply carried on eating chicken wings from the container on the back of the car. Officer A also agreed that, when he asked defendant if he had a gun and made the decision to check him, he did not know if defendant had a gun. He only noticed the heavily laden pocket of defendant's sweatshirt *after* he told defendant he was going to pat him down, approached in order to do so, and defendant appeared to make a move toward that pocket. Officer A admitted that, when he spoke to the 911 caller after arresting defendant, the caller asked why defendant had been arrested and indicated that the police had arrested the wrong person. Defendant was arrested/charged for CCW.

Issue: Was there reasonable suspicion to detain Defendant?

Holding and Analysis: No. A 911 caller informed police that a man in a maroon jogging suit standing near a blue Honda near 1034 South Kellner Avenue and, according to her daughter, had a gun, and she believed he was trying to harm her. The police responded and detained two men and one woman, none of whom were wearing anything resembling a maroon jogging suit, all clustered around a silver Honda eating chicken wings. Even assuming the 911 caller's tip was a sufficient basis for reasonable suspicion to stop and frisk a black male in a maroon jogging suit in the area of 1034 South Kellner Avenue, that is not who the officer in this case stopped and frisked. Because the subsequent observations about defendant's pocket, the pat-down, and the search were all obtained by exploiting the illegal detention, meaning *after* defendant was already detained without reasonable suspicion, the evidence obtained (in this case, the gun) was suppressed.

Based on the caller being identified, the court assumed that the caller's tip was a sufficient basis for developing reasonable suspicion to briefly detain a person matching the description given by the caller and investigate the situation. However, the court found there was a problem with how the police applied the information given to them by the caller. Reasonable suspicion is sometimes called "particularized" or "individualized" because it must be directed toward a particular individual in order to be legally effective. For this precise reason, the United States Supreme Court has held, "an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." In this case, as noted, the officers did not see an individual in a maroon jogging suit—the only thing that would have allowed the officers to differentiate between the defendant, and several other people standing around or near the general location. Defendant, in particular, was wearing a gray sweatshirt and jeans at the time the officers confronted him, and there were also several other men nearby who fit the same general description as defendant. The detention of defendant was not supported by reasonable suspicion because there was nothing to say the defendant, that specific person, was involved in the criminal activity that was afoot nearby.

IV. Columbus Stop Where Suspect Proximity to Shots Fired Was Relevant

***State v. Hairston*, 156 Ohio St. 3d 363 (2019)**

***Critical Points of the Case*:**

- **This was a close call, but the officer did a good job articulating why he did what he did. This case is a lot different than the last one because here the officer heard the shots fired himself, knew exactly where they came from, went immediately to the location (took about 30-60 seconds to get there), it was a high-crime area, and the defendant was the *only* person anywhere near where the shots came from, thus making it reasonable to think he was the individual involved. This stop was supported by individualized reasonable suspicion because of all of these factors.**

- **The determination whether an officer had reasonable suspicion to conduct a Terry stop must be based on the totality of circumstances viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. An assessment of the totality of the circumstances does not deal with hard certainties, but with probabilities. A court considers the cumulative facts not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.**

- **Police officers may take steps that are reasonably necessary to protect their personal safety and to maintain the status quo during the course of a stop. The mere use or display of force in making a stop will not necessarily convert a stop into an arrest. Whether an investigative stop is converted into an arrest depends on, first, whether the officers had reasonable suspicion to make the stop, and second, whether the degree of intrusion into the suspect's personal security was reasonably related to the officers' suspicions and the surrounding circumstances.**

Facts: At about 9:20 one evening in March 2015, **Columbus Police Officer Samuel Moore** and his partner responded to a police dispatch about a domestic dispute. As they were getting out of their police cruiser, they heard the sound of four or five gunshots. The shots "weren't faint"; rather, "they appeared to be close." The officers immediately jumped back in their car and rushed to the area where the shots seemed to be coming from—outside a nearby elementary school.

It took the officers about 30 to 60 seconds to get to an intersection just outside the school—a distance by car of about four-tenths of a mile. As they approached the intersection, they spotted an individual whom they later identified as Jaonte Hairston, walking away from the school into a

crosswalk while talking on a cell phone. There was no one else around. The officers got out of the car and with weapons drawn ordered Hairston to stop. Officer Moore asked Hairston if he had heard the gunshots. Hairston replied that he had. Officer Moore then asked Hairston whether he was carrying any weapons. Hairston said he had a gun and nodded toward his jacket pocket. Officer Moore patted Hairston down and retrieved a handgun from his jacket. According to Officer Moore, at the time of the stop, Hairston talked to the officers calmly but "was somewhat nervous."

Following the arrest, Officer Moore wrote a police report stating that when the officers were exiting their cruiser, "they heard 4 to 5 gun shots west of their location" and that they "responded to the area where they heard the gun shots from." In explaining his actions, Officer Moore testified that he had patrolled the zone where he was working that night for his entire six-year police career. Drug activity—as well as assaults, robberies, and domestic violence—frequently occurred in the area around the school during the evening hours. He had previously made arrests there for those types of crimes, including gun-related arrests. Hairston was charged with carrying a concealed weapon.

Issue #1: Was there reasonable suspicion to stop Hairston?

Holding and Analysis: Yes. The cumulative facts support the conclusion that the officers had a reasonable suspicion to stop Hairston. First, Officer Moore personally heard the sound of gunshots—the gunshots were not faint and sounded close-by. This is not a case in which the officers relied on a radio dispatch or other secondhand information about shots being fired, but one in which they heard and immediately reacted to the sound of nearby gunfire.

Second, Officer Moore knew from personal experience that crime often occurred at night in the area where the stop took place. Officer Moore had worked the same beat for six years. He was familiar with drug and other criminal activity near the school, and he had made arrests for illegal weapons and other crimes there in the past. An officer's experience with criminal activity in an area and an area's reputation for criminal activity are factors we have found relevant to the reasonable-suspicion analysis. Further, the stop occurred after dark—another circumstance we have found to be of some significance in the reasonable-suspicion analysis.

But the most important considerations here are that the stop occurred very close in time to the gunshots and Hairston was the only person in the area from which the shots emanated. Officer Moore testified that upon hearing the shots, the officers immediately jumped in the cruiser and that it took them only 30 to 60 seconds to get to the intersection outside the school. When they arrived, Hairston—and no one else—was there.

The court concluded that these facts, taken together and viewed in relation to each other, rise to the level of reasonable suspicion. The Ohio Supreme Court pointed out that part of police work is

investigating criminal activity that officers detect while out on patrol. Here, the officers did exactly what one would expect reasonable and prudent police officers to do in their situation. Upon hearing gunshots, they proceeded immediately to the location they believed the shots to be coming from to investigate. Finding only Hairston in the area and knowing that criminal activity frequently occurred there, the officers were not required to ignore Hairston's presence, nor was it necessary for them to attempt to speak to him without taking precautions for their own safety. To the contrary, it was reasonable and prudent for the officers to stop Hairston to see if he was the source of or had information about the gunshots. And because the gunshots gave the officers reason to suspect that Hairston was armed, they were justified in patting him down for their safety.

Issue#2: Was this detention done in a reasonable manner? Was this a *Terry* stop, or did the amount and type of force make this an immediate arrest?

Holding and Analysis: Yes, this was a *Terry* stop, and it was done in a reasonable manner given the nature of the stop. Hairston argued that by approaching him with their guns drawn, the officers placed him under arrest and that they lacked probable cause for the arrest. The court disagreed. The officers' suspicions and the surrounding circumstances warranted approaching Hairston with weapons ready. And because the officers were justified in having their weapons drawn, the showing of firearms did not convert the stop into an arrest.

Police officers may take steps that are "reasonably necessary to protect their personal safety and to maintain the status quo during the course of a stop." The "mere use or display of force in making a stop will not necessarily convert a stop into an arrest." Whether an investigative stop is converted into an arrest depends on, first, whether the officers had reasonable suspicion to make the stop, and second, whether the degree of intrusion into the suspect's personal security was reasonably related to the officers' suspicions and the surrounding circumstances.

Investigating gunshots and suspects who are potentially armed presents a dangerous situation for the responding officers. Here, the officers were in an area known for criminal activity and they had just heard someone fire a gun. Their suspicions that it was Hairston who had fired the shots and that he was still armed justified the precautions they took in approaching him with their weapons drawn. Because the officers had legitimate safety concerns, the fact that they had their guns drawn when they approached Hairston did not convert the investigative stop into an arrest.

V. Again,,, Reasonable Suspicion must be Particularized/Individualized—Officers Cannot Detain Solely because a Person is Close to Law Breakers

***State v. Mosby*, 2021-Ohio-2255 (6th App. Dist. 2021)**

***Critical Points of the Case*:**

- **Officers cannot detain everyone near crowd where criminal activity is occurring—there must be particularized suspicion as to each individual detained.**

- **In order to pass constitutional muster, an investigative stop must be premised upon an officer's reasonable, articulable suspicion of criminal activity. Such suspicion must be objective, particularized, and based on the totality of the circumstances confronted by the officer prior to the stop. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.**

- **For purposes of examining the propriety of an investigative stop that took place in a high crime area, and stated that factor alone is not sufficient to justify an investigative stop. To hold otherwise would result in the wholesale loss of the personal liberty of those with the misfortune of living in high crime areas. Being in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that an appellant himself was engaged in criminal conduct. Further, defendant's mere proximity to others independently suspected of criminal activity does not, without more, provide a sufficient constitutional basis to stop that person.**

Facts: Sgt. Melvin Stachura of the Toledo Police Department gang unit testified that he was on duty on the morning of August 16, 2019, and participated in detaining defendant Timothy Mosby at a parking lot located adjacent to an apartment complex known as the Greenbelt Place Apartments, which are also known as the Cherrywood apartments. According to Stachura, the parking lot at which the stop was initiated is known as the Wayne Lot. Stachura testified that the Cherrywood apartment complex is a high crime area.

Stachura indicated that the Cherrywood Crips had an ongoing feud with the Gear Gang Crips in Toledo, which led to frequent police calls to the area around the Greenbelt Place apartments. According to Stachura, police "were in that area every night" in response to reports of disorderly conduct, open containers, drinking, drug use, loitering, and shots fired. These encounters, according to Stachura, led to the confiscation of "a lot of weapons."

Stachura patrolled the area around the Wayne Lot earlier in his shift on August, 16, 2019, taking note of the large crowd that had gathered there. Upon his return to the Wayne Lot at 2 a.m., Stachura observed that there were "at least 25 people" in the parking lot. He testified that he observed "open alcohol consumption" and detected the odor of burnt marijuana in the area. He further explained that the individuals in the parking lot were "hanging out," which he determined met the definition of loitering. Stachura explained that loitering was a "huge problem" at the Wayne Lot, where Stachura frequently encountered "from 20 all the way up to a hundred people * * *, and there would be several fights that would break out."

Before engaging the crowd at the Wayne Lot, additional police units were requested. Stachura explained that the request for additional units was made out of concern for officer safety based upon prior incidents of violence and the prevalence of weapons confiscations in that area. Moreover, Stachura stated that the decision to engage in the crowd was made by law enforcement and was not the product of any citizen complaints of criminal activity occurring at that location.

When he arrived on the scene, Stachura noticed that there were "two or three cars" parked with the engines not running, around which there were individuals who were drinking alcohol. He stated that "at that point we were going to make a stop on everybody." He proceeded to the vehicle where Mosby was seated as a rear passenger, and "asked all the occupants of that vehicle to please exit their vehicle." He stated at the suppression hearing that he ordered the occupants out of the vehicle for officer safety in light of the "type of activities that go on in that area," which he again identified as "several instances of weapons and shootings even with police on scene." He further elaborated that he wanted to detain everyone at the scene so that he could "find out who is actually doing the open consumption of alcohol, all the other various criminal activity that's going on at that moment." Moreover, Stachura indicated that he wanted to check everyone's identification so that he could ascertain who belonged at the apartment complex and who was loitering.

Mosby initially ignored the command to exit the vehicle. Eventually, Mosby was removed from the vehicle by police, at which point Stachura overheard other officers stating that they saw a firearm. Thereafter, officers removed Mosby from the vehicle, confiscated a firearm from his waistband, and arrested him.

On cross-examination, Stachura was pressed on his claim that the individuals, including Mosby, were loitering at the Wayne Lot. He acknowledged that one of the passengers in the vehicle was a resident of the apartment complex, and was thus permitted to be there at the time. He also admitted that the vehicle was not impeding access to the parking lot or denying anyone passage.

As to his observation of criminal activity, Stachura stated that the odor of burnt marijuana was not localized to the subject vehicle, and he acknowledged that the odor of burnt marijuana "can carry"

over a distance depending on the wind and "several factors." Stachura testified that he did not see Mosby or any of the occupants of the vehicle drinking alcohol, using marijuana, or engaging in any specific criminal activity. Nonetheless, Stachura indicated that he stopped the vehicle "because there [were] several individuals around it drinking and smoking marijuana." Several other officers testified consistent with Stachura, and also acknowledged the gun was not seen until *after* the detention of Mosby had started. Mosby was indicted for carrying a concealed weapon, having weapons while under disability and other offenses.

Issue: Was there reasonable suspicion to detain Mosby?

Holding and Analysis: No. Because the officers failed to articulate an objectively reasonable basis to suspect that Mosby was engaged in criminal activity, relying instead on the fact that Mosby was sitting in a parked car in a high crime area, the court held that reasonable suspicion was lacking here. The court said the following about this stop: Were we to hold otherwise, we would obliterate the particularization requirement set forth in *Terry* and its progeny, and establish an "unwise precedent that a police officer may conduct an investigative stop of any person present in a so-called 'high crime' area * * *, without any specific and articulable facts pointing more directly to that particular person's being engaged in criminal activity."

The court said, to be sure, an investigative stop cannot be "based on nothing more substantial than inarticulate hunches * * *." Rather, "before stopping a person, the officers must have an objective basis for suspecting that *that* particular person was involved in the criminal activity. In determining whether or not the officer has a reasonable suspicion we look at the totality of the circumstances and not to any one factor.

The investigative stop at issue in this case took place upon officers' arrival at the Wayne Lot. Bodycam footage of the encounter with Mosby and testimony from the officers reveals that the vehicle in which Mosby was a passenger was targeted for detention almost immediately upon officers' arrival on the scene, without any observation of criminal or even suspicious conduct on Mosby's part.

The investigative stop began, and Mosby was detained, at the moment he was ordered out of the car. Mosby's suspicious activity occurred *after* the investigative stop was already underway. Mosby's actions in response to the officers' commands, whether suspicious or not, are irrelevant to the question of whether the investigative stop was supported by reasonable suspicion.

The court agreed that the testimony of the officers established that the stop was initiated by experienced officers, in a high crime area, late at night. However, these factors alone do not support the initiation of an investigative stop, because the officers who responded to the Wayne

Lot did not possess the requisite reasonable suspicion to believe that *Mosby* was engaged in criminal activity.

According to Stachura and the other officers, a large crowd of individuals were gathered at the Wayne Lot upon his arrival on the scene. Some of these individuals were openly consuming alcohol, but Mosby and the other occupants of the vehicle were not. Further, there was an odor of burnt marijuana in the air, but none of the officers testified that it was emanating from the vehicle, and the officers acknowledged that they did not see the vehicle's occupants using marijuana.

Rather than limit their encounter to the individuals who were engaged in criminal activity, Stachura decided to "make a stop on everybody" so that he could "find out who is actually doing the open consumption of alcohol, all the other various criminal activity that's going on at that moment." Stachura indicated that he stopped the vehicle "because there were several individuals around it drinking and smoking marijuana."

The court found this testimony revealing (in a bad way), because it demonstrates that officers lacked any particularized suspicion that the occupants of the vehicle (including Mosby) were engaged in, or about to be engaged in, any criminal activity. In essence, the investigative stop at issue here was premised upon officers' knowledge of historical criminal activity in this high crime area, and observations of conduct of other individuals outside the vehicle, not any observations specific to Mosby or the other occupants of the vehicle. Mosby's "mere proximity to others independently suspected of criminal activity does not, without more, provide a sufficient constitutional basis to stop that person."

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) and Jennifer Grant (JLGrant@columbuspolice.org) October 7th, 2021

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

In this Edition:

I. Enforcement of Post-Conviction No Contact Orders (NCO)

The Supreme Court of Ohio recently created Form 10-G for No Contact Orders ("NCO"). This new form is a more formalized version of the "stay away" orders routinely put in place as a condition of community control—so we are talking about **post-conviction** NCOs. Sup.R. 10(A)(1)-(2) state that any time a protection order or NCO is issued, modified, or terminated the court must complete a "Protection Order Notice to NCIC" using Form 10-A. The completed Form 10-A must be sent to law enforcement to be entered into the National Crime Information Center ("NCIC"). Entering the NCO into NCIC is intended to "facilitate nationwide enforcement of the order."

Although Form 10-A refers to giving notice of a protection order, the NCO is not technically a "protection order" for purposes of state law. Violation of an NCO may **not** be prosecuted under R.C. 2919.27 (Violation of a Protection Order); rather, an alleged violation of an NCO must be addressed through probation revocation proceedings based on a statement of violation. In this context, the revocation process may be initiated a couple of different of different ways by an officer who encounters an NCO violation: arrest or report and referral to probation.

An arrest for a violation of an NCO is authorized (not required) by R.C. 2951.08(A). A new charge will not be filed for the violation of the NCO, unless of course the defendant has committed other offenses in addition to violating the NCO. For example, if a defendant has prohibited contact with a victim, thereby violating the post-conviction NCO, and also threatens to kill the victim, the defendant would receive a fresh charge for aggravated menacing, but not for violating the NCO. Under R.C. 2951.08(A), law enforcement officers may arrest defendants, without a warrant, if they have reasonable grounds to believe they have violated certain conditions of community control, including orders to not contact or communicate with specified individuals. So, yes, an officer may arrest for a violation of an NCO, without filing a new charge, if the defendant's sole infraction is violating the NCO.

An officer may also take a report and refer victim to the Franklin County Municipal Court Probation Department, or whatever is the appropriate probation department depending on from where the NCO emanates. Defendant's probation officer will then investigate the alleged violation and may file a Statement of Violation if merited. The police report should list all relevant evidence, and witnesses with contact information so probation may meaningfully follow-up.

Officers will likely learn about existence of NCOs from LEADS, Courtview, or victims. If an officer encounters an NCO, Officers shall verify the existence of the NCO by having the FCMC Clerk, or the appropriate clerk, contacted. If Law Enforcement makes an arrest for a violation of probation, the Clerk's office should be contacted to request an order-in warrant under the arrestee's probation case number; the order-in warrant will facilitate booking the defendant into jail. The Deputy Clerk will send a copy of the warrant to the jail for slating.

Law enforcement is required by R.C. 2951.08(B) to notify Probation within 3 days of arrest. The appropriate way to do that relative to NCOs from the Franklin County Municipal Court will be to email your report to the Municipal Court Probation Department. A separate Division wide email will be sent out with that email address once it is live and being regularly checked by probation. If an officer chooses not to arrest for an NCO that emanates from FCMC, the officer should take a report and send that report to the same email address so probation can follow-up.

Finally, the DVTPO, CRPO, and NCO forms also allow Judges to order the defendant to not possess, use, carry, or obtain deadly weapons, including firearms and ammunition. All three forms have been updated to include instructions that explain to defendants the specific steps they need to take to comply with the order to surrender deadly weapons. Defendants may call the Columbus Division of Police if CPD filed the underlying charges. In all other cases, defendants may call the Franklin County Sheriff's Office, and FCSO will connect them with the correct law enforcement agency. The appropriate agency will give the defendant specific instructions for how to surrender their deadly weapons if they have been ordered to do so.

II. Hazing (Collin's Law) *In effect* 10/7/21

Introduction: Collin's law attacks hazing in several ways. One, ORC § 2903.31, which has been Ohio's anti-Hazing law for several years, has been amended to expand the definition of hazing and what types of organizations are covered by the law. Two, ORC § 2903.31 has been amended to more explicitly outlaw certain hazing activities, such as coerced consumption of alcohol or drugs of abuse. Three, penalties for hazing have been increased. It is now a felony if the coerced consumption of alcohol or drugs results in serious physical harm. Collin's law also has created new Revised Code Section § 2902.311, which requires administrators and others to report hazing to law enforcement. If an administrator, or others, acting in an official or professional capacity recklessly fail to report hazing to the police, it is a criminal offense. OSU and others are of course being diligent in assuring any hazing incident is reported to the police. Given many OSU students live off-campus, within the City of Columbus, these reports will be made to the Columbus Division of Police. The Division is currently adjusting polices to assure these reports are taken and investigated. If an officer is dispatched to a hazing incident, or is at the scene of an incident where it becomes apparent hazing has occurred, the officer should collect/preserve relevant evidence. Officers should also identify suspects involved in the hazing, and witnesses to the hazing, and assure this information is documented for any needed follow-up investigation.

Changes to ORC 2903.31 under Collin's Law

- Expands the definition of hazing to specifically include coercing another to do any act of initiation, or any act to continue or reinstate membership in an organization, **including coercing another to consume alcohol or a drug of abuse.**

- **Added:** teacher, consultant, alumnus, or volunteer to administrator, members, and employees who shall not permit hazing to occur.
- **Added:** Subsection (C)(1) which prohibits recklessly participating in hazing involving coerced consumption of alcohol or drugs resulting in the serious physical harm of another person. Subsection (C)(2) applies this to administrators, employees, faculty members, teachers, consultants, alumnus, and volunteers.
- **Increased Penalties:** Subsection (D) increases the penalties for violation of this code section:
    - **Violations of (B)(1) or (B)(2) are 2nd Degree Misdemeanors**
    - **Violations of (C)(1) or (C)(2) are 3rd Degree Felonies**

New Section: ORC 2903.311 applies directly to administrators, employees, faculty members, teachers, consultants, alumni and volunteers and gives them a **mandatory duty to report** knowledge of hazing to a law enforcement agency.

- Duty to report to law enforcement immediately
- Duty to report only applies if they are in an official or professional capacity
- Hazing conduct can be reported in the county the victim of the hazing resides, where the hazing occurred or where the hazing is occurring.
- Failure to immediately report the knowledge of hazing is a 4th Degree Misdemeanor
    - Unless the hazing involved serious physical harm in that case the failure to report is a 1st Degree Misdemeanor.

Subsection (2): Applies the hazing law to **all** primary, secondary, post-secondary schools **and** any other educational institution public or private.

- Which means you may receive reports from institutions other than colleges and universities, based on this subsection the code applies to any and all manner of educational institutions (i.e. trade schools, culinary arts schools, cosmetology schools)

III. Show-Ups/One Person Identification Procedures

In a "cold stand," or "show-up," a victim or witness, in a relatively short time after the incident, is shown only one person and asked whether they can identify the perpetrator of the crime. ***State v. Lewis*, 2019-Ohio-3660 (8th App. Dist. 9/12/19).** While this one-person show-up identification procedure is inherently suggestive, a witness's identification from such a show up is admissible if the identification is reliable. ***State v. Kozic*, 2014-Ohio-3807 (7th App. Dist. 2014).**

We have had a number of concerns raised relative to these processes over the past few years, and we can see that officers sometimes don't completely understand the finer points of how to conduct these identification procedures. So, what makes one of these procedures reliable? (Most of this is

also available in the Training Supplement to the Division Directives Manual in Chapter 4, Issue 3, tilted Creation and Administration of Photo Lineups and Show-ups).

1) The officer needs to find out if the victim/witness saw the suspect, how they saw them, from what vantage point they saw them, and if they were paying close attention to the suspect/details of the confrontation/incident, ***before*** you do a "show-up." In other words, the officer needs to take steps to make sure the victim/witness can, with some level of confidence, identify the perpetrator.
2) The officer needs to get a specific detailed description of the suspect, based on what the victim/witness saw during the confrontation, ***before*** the "show-up."
3) The officer needs to ascertain the length of time between the confrontation and the proposed "show-up." The "show-up" should be close in time to the confrontation. If an unreasonable amount of time has passed, then a different I.D. procedure should be used, such as a photo-array.
4) The officer should transport the victim/witness to the suspect for the "show-up" to avoid any unlawful arrest claims in the event the detained person is not the suspect.
5) The victim or witness should be advised how the process will work. They should be told that the person detained may, or may not, be the suspect, and that they should carefully look at the person before indicating if they believe the detained person was involved in the incident. The victim/witness should be told they do not have to make an identification.
6) The suspect should not be seated in the cruiser for this process, and if they are handcuffed, the handcuffs should be hidden.
7) Suspects should not be required to put on clothes worn by the perpetrator. They can be requested to speak, but they do not have to do so.
8) THIS IS A BIG ONE WHERE WE HAVE SEEN ISSUES LATELY: Show-ups should not be conducted with more than one victim and/or witness present at a time. If there is more than one victim and/or witness, the show-up shall be conducted separately for each victim and/or witness, and victims/witnesses should not be permitted to communicate before or after any show-up regarding the identification of the suspect. The same suspect should not be presented to the same victim and/or witness more than once. If there are multiple suspects, the suspects shall be separated and subjected to separate show-up procedures. You should not show multiple suspects to a witness at the same time.
9) The officer should record victim and/or witness statements during (BWC) and immediately following the show-up identification. Make note of the victim's/witness' remarks and his or her level of confidence, and any additional statements regarding the suspect(s) identified.
10) Suspects do <u>not</u> have a right to counsel before or during a show-up.

IV. ShotSpotter, Reasonable Suspicion and Stops

We have gotten several good questions from officers about ShotSpotter and *Terry* Stops. The two cases cited below analyze *Terry* stops related to ShotSpotter alerts. While the cases are not from our jurisdiction, we think the way the courts analyze these *Terry* stops is the way in which our courts will analyze ShotSpotter related *Terry* stops. There are several things for officers to take from these cases:

- The time that elapses between the alert, and when an officer arrives at the location of the alert, is really important. In other words, the faster an officer gets there, the more likely an officer can justify a stop of someone at or near the location of the alert. Having said that, an alert by itself will generally not support a stop of someone at or near the location of the alert, but the quicker an officer arrives, the less other information the officer needs.
- Being really observant on the way to the scene, and while entering the scene, is really important. An officer should be able to note if they saw anyone else on the way into the scene, or upon arriving at the scene. Were other cars or pedestrians leaving the area? It is helpful to scan the whole area upon arrival so an officer can explain if there was anyone else on the street, in nearby yards, or on porches. A court will find it compelling is an officer is able to testify they got there quickly, and that Joe Suspect was the only person at or near the location of the alert, especially late at night when people are generally unlikely to be out and about.
- As with any other suspect, it is really important to observe the suspect's behavior *before* giving an order to stop. Are they walking quickly or running from the alert area? Are they acting evasively? If they are leaving in a car, is the driving erratic or suspicious? Is it the only moving car seen at or near the location? Do they have any of the telltale signs of having a gun? What is the nature of the neighborhood?
- If 911 shots fired calls are also being received in conjunction with the alert, the information in those calls ought to be considered as well as they too may help support reasonable suspicion.
- Finally, an officer should be able to describe the basic manner in which ShotSpotter works, especially as to location accuracy. If an officer has been on multiple ShotSpotter runs at or near the location, this is also helpful information.

A. *United States v. Jones*, 2021 U.S. App. LEXIS 17756 (USDC Dist. of Columbia)

***Critical Points of the Case*:**

- **A *Terry* stop, which constitutes a Fourth Amendment seizure, occurs when physical force is used to restrain movement or when a person submits to an officer's show of authority. It is the government's burden to show that officers had evidence to support a reasonable and articulable suspicion at the time of a stop. Such evidence must include more than mere presence in an area of expected criminal activity.**

- **A defendant's presence in the precisely identified area where a crime has recently occurred and officers' observation of his suspicious behavior there raise reasonable suspicion.**

Facts: On the night of April 6, 2019, the Metropolitan Police Department (MPD) alerted police officers Jasmine Turner and Brianna Ennis that its ShotSpotter system had identified the sound of gunshots in the 3500 block of 13th Street Southeast in Washington, D.C. The officers arrived on the block *a minute and a half* after receiving the alert from MPD. They saw Chauncey Jones walking quickly and observed that there was no one else outside on the block. While the officers checked for victims, a dispatcher reported over their radio that citizens on neighboring blocks were calling 911 to report gunshots heard at either end of the 3500 block. The officers believed these were the same shots reported by ShotSpotter, because they had heard no additional shots since arriving on the block.

Finding no victims, Officers Turner and Ennis decided to stop Jones. They followed him around the corner onto Trenton Place, where Officer Damien Williams joined them. Turner got out of the patrol car and pursued Jones on foot. Jones continued to walk away as she called out to him: "Hello, how ya doin'? Hello. Excuse me! Hello. You don't hear me talking to you?" Jones was wearing a hooded jacket. After ten seconds, Jones stopped and turned back toward the officers, removing the headphones he was wearing under the jacket's hood. Ennis also approached. Turner testified that Jones "kept moving, like moving a lot," and his "hand kept moving, gravitating towards his waistband area." Turner grabbed Jones's hand and told him to stop moving. Williams and two other officers then converged on Jones. Observing an item jostle in Jones's waistband, Williams tackled Jones and, after a struggle, recovered the item, a pistol.

Issue: Did the officers have reasonable articulable suspicion that crime had occurred at that location and that Jones was the individual engaged in the criminal activity at the time of the stop?

Holding and Analysis: Yes. The totality of the information known to Officer Turner when she stopped Jones amounted to reasonable suspicion. The totality of the circumstances were as follows: The ShotSpotter alert and dispatcher report from MPD indicated that shots were fired in the 3500 block of 13th Street Southeast. Officers Turner and Ennis arrived at the location of the reported gunshots within a minute and a half of the MPD call. Officer Turner testified that they saw that Jones was the only person on that block. Jones was walking quickly away from the location of the shooting. He did not initially respond to Turner's repeated efforts to get his attention. When Jones did pause and look back towards Officer Turner, reaching up in a gesture suggesting he was removing earbuds, Officer Turner could have drawn an alternative, non-suspicious inference from Jones's failing to respond and continuing to walk away from her: He could have been listening to loud music and initially failed to hear her calling out. But the court found that when Turner commanded Jones to stop she could not see that Jones was wearing headphones, and the court determined that it was reasonable for her to treat Jones's non-responsiveness as grounds for suspicion.

This court has previously held that a defendant's presence in a precisely identified area where a crime has recently occurred, and officers' observation of suspicious behavior by the person upon arrival, support reasonable suspicion--the gunshots reported here were pinpointed to a single block. Here, the officers arrived quickly, and there was no one besides Jones outdoors on the block. Jones was walking swiftly away from the site of the shots and failed to respond to Turner's requests that he stop, all of which Officer Turner could reasonably perceive as evasive.

Defendant Jones raised several objections to this holding. First, he argued that his presence on the block was not a basis for reasonable suspicion because others could have been outside when the shots were fired and escaped into a building or driven away in a car before the officers arrived. However, the court pointed out that officers need not rule out all innocent possibilities before making a stop. Here, Officers Turner and Ennis arrived on the block within a minute and a half of MPD's call reporting the ShotSpotter alert, and a dispatcher reported further calls from neighbors as they arrived, so the officers could reasonably infer that the shots had been fired very recently. The officers also observed Jones behaving evasively.

Second, Jones asserted that ShotSpotter identifies only a "radius of unspecified size," so the officers could not know that he was on the precise block where shots were fired. But the court accepted the government's factual claim that ShotSpotter identified the 3500 block of 13th Street Southeast as the site of the gunshots. Jones offered no reason why that finding was clearly erroneous.

Third, Jones contended that he was not walking quickly when the officers saw him. The court reviewed the body camera footage and concluded that the district court's finding was not clearly erroneous. Theo court also pointed out that, even if Jones' pace was not suspicious, his initial

failure to respond to Turner was evasive conduct that, together with the other facts, supported a finding of reasonable suspicion.

Finally, Jones argued that the officers had no reason to think the gunshots were fired by someone outdoors rather than indoors, so his presence outdoors on the block could not be grounds for reasonable suspicion. But as the government explained, the fact that residents of neighboring blocks could hear the shots made it more likely that they were fired outside. The officers' evidence sufficed to provide reasonable suspicion even if it left some residual possibility that the shots were fired indoors.

B. *United States v. Diaz*, 2020 U.S. Dist. LEXIS 191250 (USDC S.D. New York)

***Critical Points of the Case*:**

- **Individuals are not seized under the Fourth Amendment every time they stop and cooperate with police officers. An officer's conduct rises to the level of a seizure when (1) a person obeys a police officer's order to stop or (2) a person that does not submit to an officer's show of authority is physically restrained.**

- **In reviewing whether a *Terry* stop was supported by reasonable suspicion, a court must ask "whether there was a particularized and objective basis' for suspicion of legal wrongdoing under the totality of the circumstances.**

- **A single ShotSpotter alert, standing on its own, generally does not amount to reasonable suspicion. However, the ShotSpotter alert can be a critical part of the totality of the circumstances when coupled with other factors.**

Facts: The court in this case described ShotSpotter in the following manner: "ShotSpotter" is a GPS enabled sound detection system that the New York Police Department ("NYPD") uses to identify and locate gunfire within the city of New York. Essentially "a surveillance system," ShotSpotter "uses sophisticated microphones to record gunshots in a specific area." When ShotSpotter detects a sound that may have been a gunshot, a report is broadcast to NYPD officers on patrol that includes the approximate location of the alleged gunfire, the elevation at which it was detected, and the number of rounds apparently discharged.

On the evening of October 20, 2019, two nearly identical ShotSpotter reports were broadcast to NYPD officers on patrol in the Bronx. The first report, broadcast around 7:40 PM, stated that one round of apparent gunfire was detected at roof-level at 940 Reverend James A. Polite Avenue. Officers who responded to the address encountered a three-story, single family home (the "940 Building"), which shared a wall with a six story, walk up apartment complex at 936

Reverend James A. Polite Avenue (the "936 Building"). According to officers who testified at the suppression hearing, the neighborhood around the buildings is high in criminal activity, and the 936 Building in particular has been the subject of numerous police calls.

The officers who responded to the first ShotSpotter report observed that the 940 Building appeared to have "no rooftop access." The 936 Building, however, had a flat roof that the officers knew from prior experience was accessible by internal stairwell. Understanding that ShotSpotter locations are accurate to about a "half a block radius," the officers determined that the 936 Building was more likely than the 940 Building to have been the location of roof level gunfire and searched it from top to bottom. Finding no evidence to corroborate the ShotSpotter report, they departed.

Around 8:51 PM, a second ShotSpotter report was broadcast again stating that one round of apparent gunfire was detected at roof level at 940 Reverend James A. Polite Avenue. This time, Officers Stephen Bonczyk and Cynthia Lopez—both of whom heard the first ShotSpotter report but did not respond to it - immediately drove to the address in a marked police car. Like the officers who responded to the first report, Officers Bonczyk and Lopez were familiar with the neighborhood, understood ShotSpotter locations to be approximate, and knew from experience that the 936 Building had a roof accessible by internal stairwell.

As Officers Bonczyk and Lopez pulled up to the 940 Building — about "two to three minutes" after the second ShotSpotter report was broadcast—they saw Caesar Diaz and Michael Hawkins exiting the front door of the 936 Building and entering a gated, "open-air vestibule area." The officers saw no one exiting or entering the 940 Building, which they noticed had a roof that appeared partially slanted. From their moving police car, the officers observed Diaz — who had his hood on and his hands in his sweatshirt pockets - "turn his body slightly." They observed also Hawkins "pivot" and "hurry," as he walked toward the vestibule's front gate. Officer Lopez testified that she thought Hawkins's body pivot may have been an effort to hide himself when he saw their police car.

Officers Bonczyk and Lopez parked and approached the 936 Building on foot. As they approached the vestibule, Officer Bonczyk observed that Diaz and Hawkins were still walking towards its front gate, and that both had their hands in their sweatshirt pockets. The government introduced security footage from the 936 Building showing the defendants exiting the 936 Building into the vestibule. According to Officer Bonczyk, Diaz was "creating a tension" in his sweatshirt with his hands, which Officer Bonczyk intepreted as an effort to "conceal his midsection." Officer Lopez testified that, once the officers got to the gate, she recognized Diaz as having been arrested for assaulting a police officer in the past.

While standing outside the vestibule's front gate, Officer Bonczyk asked Diaz and Hawkins to take their hands out of their sweatshirt pockets, which they did. When Diaz removed his hands

from his sweatshirt, Officer Bonczyk saw the garment shift up, revealing a "bulge in his center waistline area" that Officer Bonczyk thought was a weapon. Officer Bonczyk testified that he then asked for consent to search Diaz and Hawkins. Diaz responded, in sum and substance, "Don't fucking touch me. I'm going to sue you." Diaz and Hawkins then tried to exit through the front gate but were blocked by the officers.

Seconds later, six additional officers joined Officers Bonczyk and Lopez at the gate. The group included Officer Cristian Hemandez and Sergeant Alejandra Perez, both of whom had responded to the first ShotSpotter report. Two of the officers entered the 936 Building to investigate. After about five to ten minutes, they found a shell casing on the roof. On the sidewalk, Sergeant Perez spoke to a man walking his dog who said he lived in the 936 Building and heard a gunshot. According to Sergeant Perez, the man "motioned with his head" toward Diaz and Hawkins - both of whom the man said that he saw coming down from the roof — and told her to "check them." Meanwhile, Officers Bonczyk, Lopez, and Hernandez separated Diaz and Hawkins and began questioning them on opposite sides of the front vestibule. Diaz and Hawkins both told the officers that they did not live in the 936 Bulding, but they provided conflicting information regarding what they had been doing inside.

After being informed about the shell casing discovery and the dog-walking witness, Officer Bonczyk frisked Diaz. He began with his center waistband area, where he had seen the bulged. He recovered an unloaded gun inside a plastic bag in Diaz's groin area and arrested him. Subsequently, Hawkins was arrested by Officer Hernandez. When Hawkins asked why he was being arrested, Officer Hernandez told him it was because he was "together" with Diaz. Hawkins was frisked at the scene after his arrest, but no weapons were found. After searching Hawkins at the police precinct, officers found a loaded gun in his groin area. The gun recovered from Hawkins matched the shell casing officers found on the roof of the 936 Building.

Issue #1: When were Diaz and Hawkins detained?

Holding and Analysis: The defendants effectively obeyed an "order to stop" when Officers Bonczyk and Lopez physically blocked them from leaving the front vestibule, and they cooperated without struggle. The question thus becomes whether the officers' conduct *before* they blocked the defendants - *i.e.*, when the officers asked the defendants to remove their hands from their sweatshirt pockets and to consent to a search - amounted to a prior "order to stop'" that the defendants obeyed.

The court found that these initial requests did not amount to an "order to stop" implicating the Fourth Amendment. An officer's "order to stop constitutes a seizure 'if a reasonable person would have believed that he was not free to leave, and the person complies with the officer's order. Officers need not expressly demand that the individual "Halt!" for their conduct to constitute an order to stop - for instance, "loud" and "commanding" demands that an

individual stop using a cell phone can suffice. The key question "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." If so, the conduct did not amount to a seizure.

The court found that there was nothing to indicate that a reasonable person would not have "felt free to decline" the officers' requests and "terminate the encounter" when the officers approached the defendants at the front gate. Officer Lopez testified that the officers interacted with the defendants for all of 15 seconds before they blocked the defendants from leaving. During those 15 seconds, Officer Bonczyk asked the defendants to remove their hands from their sweatshirt pockets, which they obliged, and for consent to search, which they did not oblige. These requests were more indicative of "initial contact between . . . officers and individuals" that is "the sort of consensual encounter that implicates no Fourth Amendment interest" than of an order to stop that amounts to a seizure. The requests were not repeated, "loud, commanding," or made in a "coercive" manner. The defendants clearly felt free to decline at least one of the requests, because both refused - Diaz "somewhat colorfully" - to consent to a search. Likewise, both felt free to terminate the encounter, which they attempted to do before the officers blocked them.

Issue #2: Once Diaz and Hawkins were detained by the officers by blocking them from leaving the front vestibule, was there reasonable suspicion to detain them?

Holding and Analysis: Yes. By the time the officers blocked the defendants from leaving the front vestibule, Officers Bonzcyk and Lopez had an objectively reasonable and particularized basis to suspect them of shooting a gun off the roof of the 936 Building.

The court said the following about the detention: To begin, the ShotSpotter reports, coupled with the officers' familiarity with and observations of the area, provided "reasonable suspicion that criminal activity may have been afoot" in the 936 Building. Before Officers Bonczyk and Lopez arrived on scene, two ShotSpotter reports detected gunfire at roof-level near the 940 Building, which appeared to have no roof access. The officers' testimony established that, in their experience, the address in a ShotSpotter report is approximate: it merely "gets you to about the right block." Knowing this, it was reasonable for them to shift their focus to the 936 Building, which they knew from experience shared a wall with the 940 Building, had a history of crime, and had an accessible roof. This finding is bolstered by the fact that the officers who responded to the initial ShotSpotter report, Sergeant Perez and Officer Hernandez, did the very same thing. Finally, the timing of the defendants' departure from the 936 Building, their body movements while they departed, and Diaz's concealment of a bulge in his groin area provided an objective and individualized basis for stopping the defendants.

The defendants argue that a ShotSpotter report, "standing on its own," cannot be the basis of "individualized suspicion." However, the court found that the ShotSpotter reports are only two

pieces of the calculus. Officer Lopez testified that the timing of Diaz's and Hawkins's departure from the 936 Building linked them to the suspected crime: if a gunshot had been fired at roof level, she thought, it would have taken the shooter about a few minutes to walk down six flights of stairs and exit the building. That is the approximate amount of time that it took Officers Bonczyk and Lopez to drive to the area and see the defendants exiting. Moreover, both officers testified that they observed the defendants engage in "nervous, evasive" behavior as they exited: the officers saw Diaz turn his body slightly and Hawkins pivot and hurry as their police car passed. Subsequently, Officer Bonczyk observed Diaz, whom Officer Lopez recognized from a prior arrest for assaulting an officer, creating tension with his sweatshirt that revealed a bulge that Officer Bonczyk thought was a gun. These observations provided the officers with reasonable suspicion that, of all the people coming and going from the area that night, Diaz and Hawkins were particularly suspect.

Issue # 3: Did the officers possess reasonable suspicion Diaz and Hawkins were armed and dangerous, thus justifying a pat-down?

Holding and Analysis: Yes. The facts described above provided the officers with reasonable suspicion to believe the defendants were "armed and dangerous," justifying the officers in "proceeding from a stop to, a frisk." Moreover, by the time of Diaz's frisk - about ten to twenty minutes after the officers arrived — the officers had gathered additional incriminating information. The officers conducting the frisk were aware that a shell casing had been found on the roof of the 936 Building. This discovery corroborated the second ShotSpotter report and confirmed officers' suspicions that a gunshot had been fired from of the 936 Building, from which the defendants had exited, rather than, the 940 Building. The officers' suspicions were heightened when the defendants provided inconsistent answers about what they had been doing in the building. Finally the dog walking witness, who said he heard gunshots and saw the defendants coming down from the roof, provided additional individualized suspicion that connected the defendants to the suspected crime.

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Legal Advisor's Update

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A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

In this Edition:

I. Can an Officer Make a *Warrantless* Arrest for a Felony Several Days after the Felony Occurred?

Ohio v. Jordan, 2021-Ohio-3922 (Ohio S. Ct 11/9/21)

***Critical Points of the Case*:**

- **ORC 2935.04, Ohio's felony-arrest statute, authorizes a warrantless arrest when a felony has been committed, or there is reasonable ground to believe that a felony has been committed and there is reasonable cause to believe that the person being arrested is guilty of the offense.**

- **The Ohio Supreme Court has held that a warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment to the United States Constitution.**

- **The Ohio Supreme Court held in this case that neither a showing of exigent circumstances nor a showing of the impracticability of obtaining an arrest warrant is necessary to sustain the constitutionality of a warrantless arrest.**

- **Bear in mind this holding is applicable to arrests made in a public place. If the arrest is to be made, after the fact, in a private place, such as in the suspect's home, an arrest warrant will very likely be necessary in order to make that arrest given a home entry will be needed to effect the arrest. In order to enter a home to make a warrantless arrest, an officer must possess PC, <u>and</u> either an arrest warrant, consent, or an exigent circumstance. It would be a rare circumstance that an arrest several days after an incident would allow for a warrantless entry to effect the arrest—it would be very difficult to argue that an exigent circumstance existed days later, thus there would be a need to get an arrest warrant to make the in-home arrest.**

Facts: On December 12, 2016, someone broke into James and Emiko Locke's Cincinnati home through a bedroom window and stole a safe that contained $40,000. Cincinnati Police Detective Mark Longworth, who investigated the burglary, characterized it as "unusual in that really only the safe was taken," as only a few people knew of the safe's location and contents. James Locke told Detective Longworth that other than Locke and his wife, only his son Michael and godson Demarco knew about the safe.

The Lockes suspected that Michael had been involved in the burglary. They told Detective Longworth that they had thrown Michael out of the house but that he had "recently come back around." They were suspicious of Michael because he had telephoned them around the time of the

burglary to determine whether they were home. Michael then arrived at his parents' home shortly after they discovered the burglary, "fishing around for information about what had happened" and what they knew. When a neighbor stopped by and reported that he had seen a suspicious vehicle—a cream-colored Chrysler 300—parked near the Lockes' house around the time of the burglary, Michael became upset and told the neighbor to leave.

The Lockes believed that the vehicle the neighbor had described belonged to Michael's friend "Dre"—appellant, LeAndre Jordan—whom they described to Detective Longworth and characterized as "trouble." They told Detective Longworth that Jordan worked at a barbershop near the Kroger store on Warsaw Avenue. Detective Longworth located a cream-colored Chrysler parked in the Kroger parking lot, across the street from the barbershop; it was registered to Jordan's mother.

Detective Longworth interviewed Michael a couple of days after the burglary, and Michael confirmed that Jordan drove the car that Detective Longworth had located in the Kroger parking lot. Michael's cell-phone call log confirmed calls to his parents at 4:23 p.m. and 4:29 p.m. on December 12, 2016, shortly before the burglary, as well as multiple calls between Michael and Jordan around the time of the burglary.

As a result of his investigation, Detective Longworth believed that Jordan was involved in the burglary. For several days, he observed Jordan coming and going between the cream-colored Chrysler, parked in the Kroger parking lot, and the barbershop. On December 20, eight days after the burglary, Detective Longworth and another officer arrested Jordan as he exited a cell-phone store.

At the time of his arrest, Jordan was carrying his girlfriend's identification and keys that had an apartment number on them. Detective Longworth determined that Jordan was staying with his girlfriend at that apartment. Based on that information, Detective Longworth obtained a warrant to search the apartment for evidence related to the burglary. The search did not uncover evidence that could be definitively linked to the burglary, but officers found and seized approximately $2,100 in cash, as well as heroin, cocaine, an electronic scale, and a handgun. Jordan's drug charges stemmed from the evidence seized. Jordan filed a motion to suppress. He argued that his arrest was unconstitutional and that the evidence should be suppressed as the fruit of that constitutional violation.

Issue: Was this a good warrantless arrest given the crime had occurred eight-days prior to the arrest? Was Officer Longworth required to obtain an arrest warrant to make this arrest?

Holding and Analysis: This arrest was constitutionally valid. A warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment. The Ohio Supreme Court has never held that something more than probable cause is required to render constitutional a felony arrest conducted in public.

II. Arrest Warrants, Home/Motel Entries, and Plain View

State v. Hahn, 2021-Ohio-3789 (3rd App. Dist.)

***Critical Points of the Case*:**

- **Generally, officers may <u>not</u> lawfully make a warrantless and non-consensual entry into a suspect's home to make an arrest. The warrantless arrest and non-consensual rule applies with equal force to a properly rented hotel room during the rental period.**

- **An arrest warrant founded on PC implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.**

- **Importantly, because an arrest warrant is issued by a neutral judicial officer based upon a finding of PC regardless of whether the warrant is for a misdemeanor or a felony, there is no basis to conclude that a misdemeanor arrest warrant provides less authorization to enter a suspect's home to arrest that suspect than a felony arrest warrant provides.**

- **Generally, the police are free to observe whatever may be seen from a place where they are entitled to be. If a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them. Mere observation of an object in plain view does not constitute a search.**

- **Recording of visual images of a scene by means of photography does not meaningfully interfere with any possessory interest. Provided that they occupy a lawful vantage point, law enforcement officers can record by photography scenes presented to their plain view.**

Facts: On November 8, 2020, Hahn entered a Walmart store in Napoleon, Ohio with his face and head partly obscured by a cloth facemask and a baseball cap. Due to an earlier theft incident at a Walmart store in Holland, Ohio, Hahn had been issued a trespass order barring him from entering "all Walmart and Sam's Club Property." Hahn was thus not lawfully permitted to enter the Napoleon Walmart.

Inside the store, Hahn proceeded to the electronics department, where he selected a Vizio brand television and placed it into a shopping cart. Hahn then pushed the cart to a side aisle in the housewares department and attempted to remove the security device from the television. Failing to take off the security device, Hahn left the cart with the television, walked to the hardware department, and retrieved a pair of wire cutters. After returning from the hardware department, Hahn guided the shopping cart to a different side aisle in the housewares department. There, Hahn succeeded in using the wire cutters to remove the security device from the television. Having set off

an audible alarm while removing the security device, Hahn took the television from the shopping cart and hurried out of the store. Hahn loaded the television into his vehicle and drove away. He was not apprehended that day.

On November 13, 2020, Detective Jamie Mendez of the City of Napoleon Police Department received a phone call from Henry County Assistant Prosecuting Attorney Katie Nelson. Nelson advised Detective Mendez that she was in a video conference with Hahn. She told Detective Mendez there was an active warrant for Hahn's arrest and that he was in Room 24 at the Napoleon Motor Inn. After confirming that there was indeed an active warrant for Hahn's arrest, which was issued in a misdemeanor case unrelated to the November 8, 2020 incident at the Napoleon Walmart, Detective Mendez and three other law enforcement officers went to the Napoleon Motor Inn to arrest Hahn.

When they arrived, they knocked and announced themselves at the door to Room 24, but received no answer. Detective Mendez called Nelson to verify they were knocking on the correct door. Nelson informed Detective Mendez that during the video conference with Hahn, she could hear Detective Mendez and the other officers knocking on the door to Hahn's room and talking amongst themselves. She also told Detective Mendez that Hahn had walked away from his video camera. At that point, Detective Mendez located the manager of the Napoleon Motor Inn, who confirmed that Hahn was residing in Room 24. Detective Mendez explained to the manager that there was an active warrant for Hahn's arrest and that he needed to enter Hahn's room. Using a key provided by the manager, Detective Mendez and the other officers entered Hahn's motel room and found him in the bathroom. Hahn was then placed under arrest.

Inside of Hahn's motel room, Detective Mendez and the other officers observed a number of items in plain view, including a Vizio brand television that was mounted on the wall in a corner of the room. Detective Mendez was aware that a Vizio brand television had recently been stolen from the Napoleon Walmart, and he asked the manager of the motel whether the television belonged to the motel. The manager advised that the television was bigger than the televisions ordinarily provided by the motel and that the motel did not own the television. The officers then took photographs of the room and of the television. Other than Hahn, nothing was seized from the motel room.

Issue #1: Was the entry into Hahn's motel room legally valid?

Holding and Analysis: Yes. The Court assumed the arrest warrant was valid (the arrest warrant was not submitted, but defendant did not dispute it was valid), and stated that the only remaining questions about the entry pursuant to the arrest warrant that needed answered were as follows: (1) did Detective Mendez and the other officers have reason to believe that Hahn resided in Room 24 at the Napoleon Motor Inn, and (2) did the officers have reason to believe that Hahn was in fact in

the room at the time the arrest warrant was executed. On both counts, the court answered in the affirmative.

Generally, officers may not lawfully make a warrantless and nonconsensual entry into a suspect's home to make an arrest." This rule "applies with equal force to a properly rented hotel room during the rental period." However, the Supreme Court has held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Importantly, because an arrest warrant is issued by a neutral judicial officer based upon a finding of probable cause regardless of whether the warrant is for a misdemeanor or a felony, there is "no basis to conclude that a misdemeanor arrest warrant provides less authorization to enter a suspect's home to arrest that suspect than a felony arrest warrant provides."

In this case, based on Nelson's report that Hahn was in Room 24 during the video conference and on the manager's confirmation that Hahn was staying in Room 24, Detective Mendez and the other officers had ample reason to believe that Hahn resided in Room 24. In addition, based on Nelson's statement that she could hear Detective Mendez and the other officers knocking on Hahn's door and announcing their presence while she talked to Hahn during the video conference, there was reason to believe that Hahn was actually in Room 24 when Detective Mendez and the other officers went to serve the arrest warrant. Thus, the entry into Hahn's motel room pursuant to the arrest warrant did not infringe Hahn's Fourth Amendment rights—it was a legally valid entry because there was an arrest warrant and reason to believe he lived in the room and was present at the time of the entry.

Issue #2: Were the officers permitted to photograph the TV that was in plain-view in the room?

Holding and Analysis: Yes. Hahn's 4th Amendment rights were not violated when Detective Mendez and the other officers observed the Vizio brand television or when they photographed Hahn's room. Generally, the police are free to observe whatever may be seen from a place where they are entitled to be. "If a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them." "Mere observation of an object in plain view does not constitute a search * * *."

In serving the arrest warrant, Detective Mendez and the other officers attained a lawful vantage point inside of Hahn's motel room. From that lawful vantage point, they were free to observe whatever objects happened to be in plain view. The mere observation and inspection of the television in plain view did not constitute an independent search because it "produced no additional invasion of Hahn's privacy interest." Likewise, taking photographs of Hahn's room and of the television did not amount to an unconstitutional "seizure" because "the recording of visual images of a scene by means of photography * * * does not 'meaningfully interfere' with any possessory

interest." Provided that they occupy a lawful vantage point, law enforcement officers can "record by photography scenes presented to their plain view."

III. Traffic Stops, Gun Possession and Gun Operability

***Ohio v. Marneros*, 2021-Ohio-2844 (8th App. Dist.)**

***Critical Points of the Case*:**

- **A permissible traffic stop occurs when a police officer has probable cause to reasonably believe a traffic violation has occurred or was occurring.**

- **The State can prove that a firearm was operable or readily rendered operable in a variety of ways. When determining the operability of a firearm, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm. The Ohio Supreme Court has held that the State can rely upon all of the surrounding facts and circumstances in order to demonstrate that a certain object at issue constitutes a firearm and that proof of the existence of a firearm may be based on lay testimony, and is not dependent on an empirical analysis of the gun.**

- **As for possession, a defendant can either actually or constructively possess a firearm. Actual possession entails ownership or physical control, whereas constructive possession is defined as knowingly exercising dominion and control over an object, even though that object may not be within one's immediate physical possession.**

- **Fingerprint or DNA testing is not required to prove a defendant's possession of a firearm. You certainly do not need to print or DNA a gun to prove possession if a person is seen in possession of the firearm, or they admit to possession.**

- **We have gotten a lot of questions over the years about how to prove that a person possessed a firearm found in a vehicle, but that was not on a person's person, especially when there are multiple people in the vehicle. For example, there are three people in a car, and a gun is found under the middle of the front seat. How can an officer establish possession by a certain person in that circumstance? We covered the "constructive possession" issue at length in our 11/27/19 Legal Update, which is available on the Division intranet, but here are a few reminders about what to consider or how to establish "constructive possession" of a firearm in a vehicle:**

(1) question (*Mirandize* if in custody)) all the occupants of the vehicle separately and ask about possession—an admission of possession or a witness statement can prove possession; (2) is the registered owner of the vehicle in the vehicle, or if not, is the driver of the vehicle a person who regularly uses the vehicle, or are they related to the owner in some manner; (3) did anyone make a furtive movement toward the location the firearm as the stop was being made or during the stop? (4) was any part of the firearm visible from within the car; (5) if someone was sitting near the firearm, did they position or move their body in a way that seemed designed to hide or obscure the firearm; (6) was the suspect very slow to stop the car once signaled to do so, and overly nervous upon contact? (7) where did the stop occur? (8) was the firearm in or under an article of clothing or other item that can be tied to one of the occupants of the vehicle? There are numerous ways to prove possession, but if the gun is not on a person, and not in plain view of that person in a car, you cannot prove possession just because it is near a person. You would need something else, like the above listed factors, to prove possession.

Facts: On April 4, 2019, Marneros was driving with codefendant Wayman Kent in the front passenger seat to a gas station located at the intersection of East 131st Street and Harvard Avenue in East Cleveland. The vehicle belonged to his fiancée Terancita Jones-Geen, a retired Cleveland police officer. Earlier that morning, Marneros had dropped her off at church.

The gas station had been reported for high drug activity to the Cleveland Police Vice Unit. In response to the reports, several vice officers were detailed to that area to conduct surveillance for drug activity. That day, Sergeant Jarrod Durichko was conducting surveillance with Detective Daniel Hourihan, Detective Robert Kowza, and Detective Matthew Pollack. They are not a traffic enforcement unit and generally do not stop vehicles for traffic violations. Durichko testified that the vice unit focuses mostly on drug enforcement, but also handles cases dealing with prostitution as well as liquor and gambling enforcement.

The unit was conducting surveillance at the intersection of East 131st Street and Harvard Avenue, which included the gas station Marneros had pulled into. According to Hourihan, they were there specifically looking for drug activity and drug dealers. Durichko was undercover at the intersection, observing the gas station and looking for drug activity. The other detectives were in a takedown capacity, which means they were equipped to take action if Durichko viewed any criminal activity. Hourihan was in an unmarked car facing west on East 136th Street and Kowza and Pollack were in another vehicle together behind Hourihan.

During their surveillance, Durichko witnessed Marneros's vehicle pull into the gas station next to a gas pump, where three separate individuals each came up to the car, briefly leaned into the driver's side window, and then walked away. Durichko testified that it was the three individuals

approaching Marneros's vehicle and sticking their head in the window that were "red flags" for him that there was likely a drug exchange occurring. However, no actual hand-to-hand exchange of drugs or money was witnessed by the officers.

As Marneros was leaving the gas station parking lot, he turned left to head east on Harvard Avenue without using his turn signal. Because Marneros did not use a turn signal, Durichko radioed Hourihan, who was on East 136th Street, to conduct a traffic stop of Marneros's vehicle for a traffic violation. As Marneros passed East 136th Street, Hourihan pulled Marneros over. Upon stopping the car, Hourihan spoke with Marneros and learned his driver's license was under suspension. Hourihan removed Marneros from the vehicle and conducted a pat-down, finding a small bag of marijuana. At this time, Hourihan radioed Pollack and Kowza to assist him with the stop. They arrived and Pollack began speaking with Kent.

While detained in handcuffs, Marneros called Green to inform her about the traffic stop of her vehicle. After speaking with her, Marneros informed the officers that there was a firearm in the vehicle. Green claimed she had placed her firearm in between the driver's seat and the center front console, which Marneros conveyed to the officers. Upon learning this, the officers searched the vehicle and found the firearm and a box of ammunition under the driver's seat. The firearm's serial number was scratched off. Marneros was issued a citation for violating CCO 431.14, signals before changing course, turning or stopping, a minor misdemeanor, and CCO 435.07(A), driving under a suspended/revoked license, a first-degree misdemeanor. A Cuyahoga County Grand Jury late indicted Marneros for having weapons while under disability, improperly handling firearms in a motor vehicle, carrying a concealed weapon, and possessing a defaced firearm.

A jury trial commenced for Marneros, and the state called the officers, and amongst other witnesses, Mallory Foran, an employee of the Cuyahoga County Regional Forensic Science Laboratory in the firearm and toolmark section. She testified regarding the operability of the firearm found in Green's vehicle, which she found to be operable as designed. Marneros wsa convicted and appealed.

Issue #1: Was this a good traffic stop? Was there PC to justify the stop?

Holding and Analysis: Yes. Once Sgt. Durichko witnessed Marneros pull out of the gas station without using his turn signal, a traffic violation of CCO 431.14, the officers had probable cause to effectuate a valid traffic stop of Marneros's vehicle. A permissible traffic stop occurs when a police officer has probable cause to reasonably believe a traffic violation has occurred or was occurring. The Ohio Supreme Court has held that "as long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." Here the officer did in fact witness Marneros commit a traffic offense.

Issue #2: Was there sufficient evidence the firearm was operable?

Holding and Analysis: Yes. Mallory Foran, an employee of the Cuyahoga County Regional Forensic Science Laboratory in the firearm and toolmark section, who was qualified as an expert witness to testify regarding the firearm, testified in detail as to how she normally tests the firearms by firing bullets into a water tank and how results are documented in lab reports. She then explained how she tested the operability of the firearm found in Marneros's vehicle and that the results of the test indicated the firearm was operable.

The court explained that the state had the burden of proving that the "firearm" found in Marneros's vehicle, as used in R.C. 2923.13, was operable or readily capable of being rendered operable. The court explained that the state can prove that a firearm was operable or readily rendered operable in a variety of ways. When determining the operability of a firearm, "the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm. The Ohio Supreme Court has held that "the state can rely upon all of the surrounding facts and circumstances" in order to demonstrate that a certain object at issue constitutes a firearm and that "proof of the existence of a firearm may be based on lay testimony, and is not dependent on an empirical analysis of the gun."

Here, the state met its burden of proving the gun operable through the testimony of the expert. The court also noted in this case operability could have been proven through the statements of Marneros' fiancé, Green, who identified the firearm as her firearm.

Issue #3: Was there a sufficient evidence that Marneros "possessed" the firearm? In other words, did the state prove that knowingly possessed the firearm found in the vehicle?

Holding and Analysis: Yes. As for possession, a defendant can either actually or constructively possess a firearm. "Actual possession entails ownership or physical control, whereas constructive possession is defined as knowingly exercising dominion and control over an object, even though that object may not be within one's immediate physical possession."

A review of the state's evidence makes it clear that the state provided sufficient evidence to conclude that Marneros knowingly possessed this firearm. Officer Pollack testified that Marneros informed Pollack about the firearms location in between the driver's seat, where Marneros sat, and the center console. The firearm being found in his vehicle next to the driver's seat, along with the likely visibility of the gun due to its location, was sufficient evidence for a jury to find that Marneros knew of the firearm and at the very least constructively possessed it by having the firearm in his vehicle which he was exercising control over while operating it. Contrary to Marneros's arguments, fingerprint or DNA testing is not required to prove a defendant's possession of a firearm.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) and Jennifer Grant (JLGrant@columbuspolice.org) December 9th, 2021

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

In this Edition: *Alsaada et al., v. City of Columbus, et al.*, U.S.D.C. S.D. of Ohio, E.D. Case No. 2:20-CV-3431, Permanent Injunction:

This Update is designed to explain a Permanent Injunction that impacts policing/crowd control in Columbus. However, we thought before we get into the nuts and bolts of the Permanent Injunction, it would help to first give some context so everyone understands how we ended up at this injunction. The *Alsaada* lawsuit stems from the protest activity, and the related police responses, which occurred in and around downtown Columbus during late spring and early summer of 2020. The lawsuit was filed on July 8th, 2020, and ultimately it involved thirty-two (32) plaintiff/protestors suing the City and twenty-seven (26) individually named Division of Police Officers. There also were eleven different attorneys representing the various plaintiffs. The plaintiffs sought extensive monetary damages for various claimed injuries, including broken bones, and for alleged constitutional violations as well. The plaintiffs also sought an injunction to enjoin the City, the Division of Police, and individual Officers from engaging in various actions/uses of force/crowd control techniques.

A hearing was held relative to the requested injunction from February 22nd to March 2nd, 2021, wherein the plaintiffs and the City presented evidence, and called witnesses, including former Chief of Police Thomas Quinlan, related to, or involved in the protests. During the course of the hearing, there were uses of force that could not be fully explained, or to some extent defended, because the officer who used the at-issue force was unknown due to a lack of identifying badge numbers/names on their Division issued riot-gear. After hearing all of the evidence and testimony, United States District Court Judge Algenon L. Marbley granted a Preliminary Injunction enjoining the City/Division of Police/Officers. The Division was apprised as to the parameters of the Preliminary Injunction at that time, and made various appropriate adjustments to assure compliance. The lawsuit has now been fully

settled, and as a result of the settlement, a Permanent Injunction will be issued enjoining the City of Columbus/Division of Police from engaging in various activities. The individually named officers are not a party to the Permanent Injunction. A monetary settlement has also been agreed to that will resolve the entire case, and release all of the individually named officers from any civil liability related to any of the named plaintiffs.

In order to aid with implementation of the Permanent Injunction, we provide guidance below relative to the various portions of the Permanent Injunction. Generally speaking, the Injunction is meant to protect *non-violent* protestors engaged in First Amendment-protected activities from having force used against them. Non-violent protestors may still be detained and/or arrested for violations of law, and if force is necessary to effect those detentions or arrests, it may be used as allowed by the law and Division Directives.

The Permanent Injunction is not meant to protect those who commit or imminently threaten acts of physical harm, or those who engage in property destruction, from arrest and reasonable force used to effect those arrests. We cannot say this enough, and this really is the central focus of not only this Injunction, but also of Judge Marbley's overall reasoning in this case: if there is a crowd, some of which is unruly, or that has occupied the street, the focus should be on charging and/or arresting individual lawbreakers, or those who fail to heed warnings to disperse, as opposed to using force to disperse the whole crowd. Please bear in mind this Permanent Injunction may now be enforced by Judge Marbley through contempt proceedings. This is a breakdown of the separate parts of the Permanent Injunction with our legal advice interspersed after each paragraph of the Permanent Injunction:

1. Defendant City of Columbus, including its Division of Police, is restrained from using non-lethal force, including tear gas, pepper spray, flash-bang grenades, rubber bullets, wooden pellets, batons, body slams, pushing or pulling, or kettling[1], on nonviolent protestors to enforce dispersal orders, traffic laws, such as clearing the streets or sidewalks, and/or misdemeanors, that were not committed with actual or imminently threatened physical harm or property destruction or with attempted or actual criminal trespass on private property or secured government buildings/facilities, areas, or structures;

- Officers shall not use any of the listed means/modes/types of force to disperse non-violent protestors for violation of traffic/pedestrian laws, in order to clear streets/sidewalks, or relative to the commission of non-violent misdemeanors that do not cause property damage. This is the heart of the Injunction, and stated simply, if protestors are in the street, or on a sidewalk, and their only crimes are related to being in the street, or on the sidewalk, or for refusing to leave such places, the means/modes/types of force listed may not be used to disperse such people.

[1] For purposes of this agreement, "kettling" is defined as a tactic where law enforcement officers surround a crowd of nonviolent protestors who have been ordered to disperse in a manner which prohibits them from having a reasonable route of exit (such as an unobstructed sidewalk, street, or alley) to comply with the dispersal order.

- Officers may give dispersal orders to a crowd relative to any crime involving occupation of the street. Dispersal orders may be given before arrests are attempted or made. However, and this is again really the heart of the Injunction, the means of enforcing the dispersal order is through arrests of individuals, and reasonable force to make those arrests, as opposed to wide-spread use of dispersal agents against the whole crowd.

- Officers may, as described in paragraph # 3 below, cite/summons and/or arrest non-violent protestors for refusing to follow dispersal orders, or for other traffic/pedestrian, or other misdemeanors, if there is probable cause for such charge/arrest and arrest is allowed for by Division policy.

- If protestors/rioters are causing or imminently threatening physical harm, or causing property destruction, officers may arrest those people. If those people are within a crowd, and dispersal orders have been given to the crowd due to the physical harm and/or property damage, officers may enter the crowd to charge/arrest those individuals engaging in acts/threats of physical harm or property damage. Officers should use the least amount of force needed to reach and arrest those committing acts/threats of physical harm, or property damage. It may be that officers are required to push or pull their way through the crowd to reach those who are to be arrested. (See paragraph #4 below).

- If officers are protecting buildings or freeways or expressways (Pursuant to ORC 4511.01, St. Rt. 315, St. Rt. 104, I-670, I-70, I-71 and I-270 are expressways and/or freeways), and protestors physically assault officers protecting such places, those people may be arrested and reasonable force may be used to effect those arrests and stop assaults.

- However, if a crowd is in the roadway/street, and is heading toward an expressway or freeway, but is not committing any acts/threats of physical harm, or property damage, none of the listed means/modes of force may be used to deter or disperse the crowd, unless there is an attempt to occupy the expressway or freeway. Access to a freeway or expressway may be blocked by officers or the City—that does not violate the Injunction. Stated another way, this Permanent Injunction does not permit protestors to enter or occupy an expressway or highway.

2. Defendant City of Columbus, including its Division of Police, is required to recognize that, for purposes of the injunction, "nonviolent protestors" includes individuals who are chanting, verbally confronting police, sitting, holding their hands up when approaching police, occupying sidewalks or streets, apart from expressways or freeways, and/or passively resisting police orders in connection with the exercise of rights of free speech and association under the First Amendment;

- "Verbally confronting" police means engaging in protected 1st Amendment activity/speech while speaking to/yelling at officers. It does not mean threatening an officer with physical harm. Thus if a protestor, in the course of verbally confronting an officer, said "I will kill

you," that is not protected speech and that person is not a non-violent protestor. However, if the protestor said, "you stink," that is protected speech.

- "Occupying streets" means being in the street without committing crimes consisting of actual or imminently threatened physical harm or property destruction. "Occupying streets" would include blocking roadways/sidewalks, use of shields or other devices that prohibit/prevent movement on roadways/sidewalks, if done without causing/threatening physical harm or property destruction. Officers may arrest the individuals committing those illegal acts.

- Occupying an expressway or freeway does not constitute non-violent protest.

3. Defendant City of Columbus, including its Division of Police, may only enforce dispersal orders, traffic laws, such as clearing the streets or sidewalks, and/or misdemeanors in a manner and under the circumstances described in Paragraph 1 against nonviolent protestors, to the extent practicable, through citations or arrests, based on probable cause.

- As stated, if protestors are breaking the law, they may be cited and/or arrested, and if force is necessary to effect those arrests, it shall be used in accordance with the law and Division Directives.

4. Defendant City of Columbus, including its Division of Police, is prohibited from using the infliction of pain to punish or deter "nonviolent protestors" and is directed to avoid infliction of pain on any nonviolent protestor when incidental to a use of force necessary to prevent or effectuate an arrest for crimes committed involving the actual or imminent threat of physical harm or property destruction or attempted or actual criminal trespass on private property or secured government buildings/facilities, areas, or structures, and/or when arresting, based on probable cause, an individual who allegedly committed such an offense. For purposes of this order and this provision, reasonable incidental contact with individuals in connection with entering into or moving through a crowd to effect an arrest does not constitute the infliction of pain to punish or deter nonviolent protestor action and does not violate Paragraph 1 of this Agreed Order.

- Officers should not use the LRAD, Mark 9s, knee-knockers, or similar devices that impact large groups, to disperse a *non-violent* crowd, or to disperse protestors when there are *non-violent* protestors intermingled with people causing/threatening physical harm to others or causing property damage. There is simply no way to use those devices in such situations without inflicting pain on *non-violent* protestors or unintended targets.

- Officers may use reasonable force to arrest protestors who are committing crimes involving actual or imminently threatened physical harm or property destruction. Officers may use chemical agents in these situations, if that is reasonable force based on the circumstances, but

must attempt to limit the application of the chemical agent to the person being arrested so no incidental pain is caused to others.

5. Defendant City of Columbus, including its Division of Police, must ensure that body and vehicle cameras are in good working order and used during every interaction with "nonviolent protestors" and badge numbers and/or identity cards are prominently displayed in each such interaction, even when riot gear is being worn. Plain clothes or undercover officers, are not required to wear a body worn camera, but shall not engage in enforcement action, including, but not limited to, arresting or detaining a suspect, or using force, unless exigent circumstances of actual or imminently threatened physical harm to officers or others exist;

- Interaction is defined as meaning communication or direct involvement. Thus, officers who are not equipped with BWCs in good working order, shall not communicate with or become directly involved with non-violent protestors. Officers in cruisers, which are not equipped with cameras in good working order, shall not communicate with or have direct involvement with non-violent protestors. Can officers be present at protests in cruisers without working cameras? Yes, but they should not interact with non-violent protestors while in those cruisers, and those cruisers shall not be used for detentions or transports or blocking or to make dispersal orders. Same goes for other police vehicles—they shouldn't interact with protestors if they don't have a working camera.

- Can plain clothes officers be in the crowd for surveillance purposes without wearing BWCs? Yes, but they cannot interact with non-violent protestors meaning they may not take any enforcement action, and should not communicate with non-violent protestors. They must be passive observers, unless exigent circumstances of actual or imminently threatened physical harm to officers or others exist.

- Officers will be in violation of the Permanent Injunction if their badge numbers and/or identity cards are not prominently displayed on their person, even when in riot gear, when interacting with protestors. In other words, an officer should not engage in crowd control at a protest unless they are displaying their badge numbers or other identifying information on their person.

6. Defendant City of Columbus, including its Division of Police, must recognize that individuals legitimately displaying "press," "media," "reporter," "paramedic," "medic," "legal observer," or similar words and/or symbols are permitted to be present in a position enabling them to record at protests and/or to intervene to assist individuals who appear to have been injured so long as their presence does not physically interfere with a lawful arrest, involve entering a closed or cordoned-off crime scene, or physically interfere with medical aid already being rendered by an officer or an EMT/Firefighter and that all individuals, regardless of their occupation or nonviolent activity, are permitted to record at protests or whenever any police officer interacts with the public; and

- Any person displaying such words/symbols are protected by this Injunction. Any such person shall be permitted to record at protests, and assist those who appear to have been injured. They are not required to carry or produce any credentials. Perhaps the best way to interpret the phrase "legitimately displaying" is to think of it as clearly displaying.

- This should be applied in a common sense manner. For example, while such people are allowed to be present, they may be ordered out of a marked crime scene, or they may be ordered to stand back a safe distance from an arrest. However, they may not be ordered so far back that they cannot film. If they refuse to move out of a crime scene, or to a safe distance, after being validly ordered to do so, they may be charged/arrested. A medic may be asked to move out of traffic to a safe place to render medical aid if this may be safely done with an officer's assistance. A self-described medic may be ordered to stand back if a first responder is giving aid. Nothing in this Injunction permits any of the listed persons to interfere in a lawful arrest. The bottom-line is that you may not order such people to leave or interfere with them reasonably conducting the listed activities.

- There will be those who find this frustrating, but it is not much different than the advice we have given for years: any citizen can film an officer performing their duties in a public place as long as they do not obstruct the officer in performing their official duties. The only real difference is that if a dispersal order is given, the listed individuals (medics, observers, reporter etc…) must be allowed to stay in the area as long as they do not obstruct.

7. Defendant City of Columbus' Division of Police must request that mutual aid law enforcement personnel who cooperate with them adhere to the foregoing restraints or standards on the use of non-lethal force and enforcement, infliction of pain, cameras and identification, and recognition of "nonviolent protestors" and individuals assisting or observing them. If a mutual aid entity does not have body worn cameras, its personnel must either be assigned to peripheral traffic control operations where interaction with protestors during actual protests are unlikely or, if the mutual aid request relates to SWAT or other similar tactical units, mutual aid personnel must be embedded with CPD officers that have body worn cameras, and who are recording in accordance with this Order and Columbus Division of Police Directives.

- This is pretty self-explanatory. We have a duty to request our mutual aid partners adhere to the Permanent Injunction. We also shall not use mutual aid partners who lack BWCs for direct contact with protestors—they must be assigned to peripheral operations. If we use SWAT type units from other agencies pursuant to mutual aid, and they lack BWCs, they must be embedded with CPD personnel with BWCs. Please note that FCSO and OSHP are not mutual aid partners as they have concurrent jurisdiction on the streets of Columbus.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org)and Jennifer Grant (JLgrant@columbuspolice.org) May 1st, 2022

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

Our next Update will be on Senate Bill 215: Concealed Handgun Carry without License. This goes into effect June 13th and impacts Improper Handling and CCW.

In this Edition:

I. Favorable Jury Verdict for Columbus Officers Deadly Force Case

***Hood v. Officers Bare and Rosen*, Case No. 2:17-cv-47 (U.S.D.C, S.D. Ohio)**

Critical Points of the Case:

- **This case has had a long painful history for everyone involved, and a person lost their life, thus we do not want to report this outcome in a celebratory tone. However, it is important to report that a federal jury, after hearing all of the evidence in this case, found that Officers Rosen and Bare were justified in using deadly force to subdue Henry Green V on June 6th 2016. In other words, the jurors found that the officers acted reasonably in deploying deadly force against Mr. Green on that day.**

- **As stated, this case had a long history. This incident occurred in 2016. We previously reported the facts related to this incident in our *October 24th, 2019 Legal Update*. At that time, the case had been dismissed based on the City's Motion for Summary Judgment, and we reported that outcome in our Legal Update. The plaintiff (Mr. Green's mother) appealed that outcome to the 6th Circuit Court of Appeals. The Court of Appeals reversed the grant of summary judgement in part, and sent the case back to the U.S. District Court for trial on the remaining claims against Officers Bare and Rosen. The Court of Appeals held that the evidence supported a finding that Mr. Green pulled a gun on the officers, fired at the officers six-times, nearly striking Officer Rosen several times, and that the majority of the officers' shots were justified because Green was a threat of serious physical harm to the officers. However, the appeals court believed there was a question of fact for the jury to decide as to whether the final shots fired by the officers were justified.**

- **The City believed all the shots fired by the officers were justified, and believed a jury, once they heard the under-oath testimony, and the facts, would find for the officers relative to this entire incident. A first trial was held in November 2021. After the case was presented, the jury was unable to reach a verdict, and a mistrial was declared.**

- **The case then again went to trial starting 4/18/22. That trial ended 4/25/22 with the jurors this time unanimously finding for the officers on all remaining claims. Officers Rosen and Bare handled themselves with professionalism throughout this long difficult process, and obviously the jurors ultimately credited their testimony. Assistant City Attorneys Wes Phillips and Alana Tanoury diligently worked this case for years, and did an excellent job assuring the Court, and the jurors, heard and saw all relevant evidence, which led to this outcome.**

II. Traffic-Stops, Pat-Downs/Plain-Feel, *Miranda* Issues, and Evidence of Trafficking

***State v. Kent*, 2022-Ohio-834 (8th App. Dist.)**

Critical Points of the Case:

- **This is a good case that covers a lot of important legal topics related to traffic stops. Please read the facts and consider how it impacts your work.**

- **A police officer may initiate a traffic stop of any motorist for any traffic infraction. An officer making a traffic stop may order passengers to get out of the car pending completion of such a stop.**

- **To justify a pat-down of the driver or a passenger during a traffic stop, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. An officer may not pat-down a driver or passenger simply because they stopped that person for a traffic violation, or because that person was removed from a vehicle, or because the officer wishes to place the person in a cruiser for convenience.**

- **Under the plain-feel doctrine, if a police officer lawfully pats down a suspect's outer clothing, and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified. If the illegal nature of the suspicious object is not immediately apparent, police are not permitted to continue touching, feeling, or manipulating the object to identify its nature. In other words, if you do not reasonably suspect the item is a weapon, and it is not immediately apparent it is contraband, you cannot remove the item. BUT, you may ask them what it is, typically without Miranda warnings.**

- **In the context of a pat-down search, immediately apparent means that the officer must have probable cause to believe the item is contraband. The investigating officers are not required to accurately predict the specific chemical-makeup of the discovered contraband for the plain-feel doctrine to be applicable.**

- **Persons temporarily detained pursuant to *Terry* stops are not in custody for the purposes of *Miranda*. They may be questioned without *Miranda* warnings.**

- **Circumstantial evidence has long been used to successfully support drug trafficking convictions. The convergence of illegal drugs, drug paraphernalia, including baggies,**

and large sums of cash permit a reasonable inference that a person is preparing drugs for shipment. Numerous courts have determined that items such as plastic baggies, digital scales, and large sums of money are often used in drug trafficking and may constitute circumstantial evidence.

Facts: Cleveland Police Sergeant Jarrod Durichko testified that he and members of the vice unit were surveilling a high-crime area that is "known for drug sales and drug activity." During the surveillance, Sgt. Durichko observed a white vehicle pull into the parking lot of a nearby gas station. The vehicle was at the gas station for about 10-15 minutes. While the vehicle was parked at the gas station, Sgt. Durichko witnessed that "three completely separate individuals approached the driver's side of the vehicle, reached into the driver's window for a brief exchange, and then parted ways." The three individuals each stayed at the vehicle for less than a minute. Durichko testified that when the white vehicle left the gas station, it turned eastbound on Harvard Avenue without using a turn signal. Durichko notified other units in the area to "approach and conduct a traffic stop of the vehicle." Sgt. Durichko did not participate in the subsequent traffic stop of the white vehicle.

Detective Daniel Hourihan testified that he received a radio dispatch from Sgt. Durichko instructing him to initiate a traffic stop of the white vehicle seen leaving the gas station. Det. Hourihan confirmed that he initiated the traffic stop because the vehicle pulled out of the gas station without using its turn signal. Det. Hourihan requested identification from the driver of the vehicle, but the driver informed him that he did not have a valid driver's license. Once Det. Hourihan confirmed that the driver of the vehicle, later identified as Michael Marneros, had a suspended driver's license, he performed a pat-down search of the driver and advised him that he was under arrest. While detained, Marneros notified Det. Hourihan that there was a firearm inside the vehicle. A loaded firearm was later discovered in between the driver's seat and center console of the vehicle.

While Det. Hourihan was speaking with Marneros, Detective Matthew Pollack was dealing with the vehicle's passenger, who was later identified as defendant Wayman D. Kent. Det. Hourihan observed Det. Pollack perform a pat-down search of Kent. Det. Pollack then advised Det. Hourihan that he "had found something" on Kent and "needed gloves."

Det. Pollack confirmed that while he was performing a pat-down search of Kent for officer safety, he "felt something that had the consistency of contraband" hidden in Kent's groin area. Pollack explained that the contraband was located in an area that was inconsistent with a person's "anatomy." Based on his training and experience, Det. Pollack expressed that he "knew what he felt," and "had no doubt in his mind" that Kent was in possession of contraband. Det. Pollack asked Kent what he had felt during the pat-down, and Kent claimed it was part of his anatomy. Det. Pollack handcuffed Kent, and while he waited for gloves, he observed Kent "digging in his

underwear, even though he was handcuffed, in an effort to either further conceal the drugs or destroy them." Det. Pollack then removed a large plastic baggie from Kent's underwear. Separate, individual plastic baggies containing various drugs were discovered within the larger plastic baggie removed from Kent's person. Additionally, $1,008.00 was found in Kent's pocket, and two cell phones were found in the car.

Det. Hourihan read Kent his *Miranda* rights immediately after the drugs were removed. After being read his rights, Kent continued to speak with the detectives and admitted that there was cocaine, percocet, fentanyl, and heroin in the bags of drugs discovered by the detectives.

Issue #1: Did the detective exceed the permissible scope of a *Terry* pat-down for weapons by retrieving the drugs found/felt on defendant's person? Did the plain-feel doctrine allow the drugs to be seized? For plain-feel to apply, does the officer conducting the pat-down have to be able to say it was immediately apparent a certain type of illegal drug was suspected, or is it simply enough for the officer to be able to say it was immediately apparent it is contraband?

Holding and Analysis: The court found that Det. Pollack did <u>not</u> exceed the scope of a permissible *Terry* search during the pat down of Kent--the seizure of contraband was warranted under the plain-feel doctrine. Contrary to defendant Kent's position, investigating officers are not required to accurately predict the specific chemical-makeup of the discovered contraband, such as whether the bulge contained "crack as opposed to heroin," for the plain-feel doctrine to be applicable. Det. Pollack testified that it was immediately apparent to him that the bulge had the consistency of "illegal narcotics." Det. Pollack's testimony and the immediacy of his conclusions were also corroborated by the video footage captured by his body camera.

Even though the court addressed the basis for the traffic stop and the pat-down itself, Kent did not challenge the legal basis for the stop, or the fact he was patted-down. He instead argued the officer was not permitted to retrieve the drugs found/felt during the pat-down for weapons because the officer only had a hunch he felt contraband, and because the detective could not say exactly what type of contraband he suspected. As stated, the court disagreed, explaining that "although *Terry* limits the scope of a pat-down search to weapons, the discovery of other contraband during a *Terry* search will not necessarily preclude its admissibility." The United States Supreme Court has previously adopted the plain-feel doctrine in *Minnesota v. Dickerson*, where the court held:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

"If the illegal nature of the suspicious object is not immediately apparent, police are not permitted to continue touching, feeling, or manipulating the object to identify its nature." "' Immediately apparent' means that the officer must have had probable cause to believe the item was contraband." "'Probable cause to associate an object with criminal activity does not demand certainty in the minds of police, but instead merely requires that there be a fair probability that the object they see [or feel] is illegal contraband or evidence of a crime.'"

In this case, Kent asserts that the plain-feel doctrine is inapplicable because Det. Pollack "could not identify the character of the object with any particularity, asserting that it was some variety of contraband without any specificity." Kent contends that Det. Pollack's conduct was prompted by a mere hunch and that his "bare bones identification" was insufficient to warrant a finding of probable cause.

The court found that the evidence presented at trial refuted defendant Kent's position that Det. Pollack acted on a mere hunch. At the suppression hearing, Det. Pollack testified that while performing a pat-down search of Kent for officer safety, he "felt something that had the consistency of contraband in Kent's groin area." (THIS IS THE KEY TESTIMONY) Based on the location of the "golf-ball sized" bulge, and his training and experience in the vice unit, Det. Pollack testified that it was ***immediately apparent*** to him that the bulge had the consistency of "illegal narcotics." Contrary to Kent's position, investigating officers are ***not*** required to accurately predict the specific chemical-makeup of the discovered contraband, such as whether the bulge contained "crack as opposed to heroin," for the plain-feel doctrine to be applicable.

Issue #2: Was defendant Kent interrogated in violation of *Miranda*?

Holding and Analysis: No. Kent argued that statements collected from him during the pat-down, and taken from him after the drugs were removed, should be suppressed. One, defendant Kent was not in custody for the purposes of *Miranda* at the time Det. Pollack posed relevant questions to him regarding the items he felt during the pat-down of Kent's person. It is well settled that "persons temporarily detained pursuant" to *Terry* stops "are not 'in custody' for the purposes of *Miranda*," and thus may be asked incriminating questions during this time without *Miranda* warnings. Two, once the drugs were removed, and Kent was under arrest, Kent was immediately *Mirandized*, and indicated he understood his rights, *before* he was asked any other incriminating questions. After he was properly *Mirandized*, and acknowledged he understood his rights, he admitted the items in the baggies were various illegal drugs.

Issue #3: Was there sufficient evidence to convict Kent of drug trafficking?

Holding and Analysis: Yes. Based on the facts, the jury reasonably found the essential elements of drug trafficking proven beyond a reasonable doubt.

Kent was convicted of drug trafficking in violation of R.C. 2925.03(A)(2), which provides that no person "shall knowingly * * * prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance * * * when the offender knows or has reasonable cause to believe that the controlled substance * * * is intended for sale or resale by the offender or another person."

Kent argued the evidence supporting his drug trafficking convictions was wholly insufficient and failed to establish his involvement in the sale of drugs. He stated that the observing officers did not witness a hand-to-hand transaction take place inside the white vehicle, "nor could they provide testimony to support violations based upon any one of the six enumerated sections of R.C. 2925.03(A)(2)."

The court pointed out that circumstantial evidence has long been used to successfully support drug trafficking convictions. "The convergence of illegal drugs, drug paraphernalia (including baggies), and large sums of cash permit a reasonable inference that a person was preparing drugs for shipment."

At trial, Det. Pollack provided extensive testimony regarding his training and experience as a member of the vice unit. Relevant to this case, Det. Pollack testified that there are differences between a person who merely possesses drugs and a person who is engaged in trafficking. He explained that a person who uses drugs usually carries just enough substance on their person for one or two uses, such as "a quarter of a gram to a gram" of crack or heroin, or "one or two pills."

In contrast, a drug trafficker typically carries a large amount of cash and anywhere from 5 to 30 grams of drugs at a time. Det. Pollack further testified that while drug users typically possess small single-use packages, drug traffickers "typically carry large amounts [of drugs] in a sandwich baggy." If the trafficker has more than one drug, "they'll carry three or four different sandwich baggies of additional drugs to satisfy their multitude of customers." Det. Pollack further testified that drug traffickers "typically have multiple cell phones — one personal phone and one drug phone."

In this case, Kent was observed in a high crime area known for drug activity. Members of the vice team testified that the individuals inside Marneros's white vehicle acted in a manner that raised their suspicions of criminal conduct. Although the detectives did not observe a hand-to-hand transaction, Kent was subsequently found in possession of a large quantity of drugs that exceeded an amount indicative of personal use. Collectively, the money and cell phones recovered from Kent, along with the manner in which the drugs had been separated and packaged, supported the

inference that Kent knowingly transported the contraband with the intent to sell. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of drug trafficking proven beyond a reasonable doubt.

III. Consent to Search and Answers to Common Consent Questions

***United States v. Campany*, 2022 U.S. App. LEXIS 9518 (6th Circuit)**

Critical Points of the Case:

- **A warrant is not required to conduct a search of the defendant's residence if a person with authority over the residence gives consent to the search. Such a person can be a fellow occupant who shares common authority over property, when the suspect is absent. Common authority is the mutual use of the property by persons generally having joint access or control for most purposes. Co-inhabitants, including this defendant, assume the risk that one of their number might permit the common area to be searched.**

- **Typically, all family members have common authority over all of the rooms in a family residence. Family members may be deprived of such common authority and access to an enclosed space if one family member has clearly manifested an expectation of exclusivity—such as when an adult child locks a bedroom indicating no one else, including parents, can enter, thus it is like an apartment. Nevertheless, a family member can retain common authority over the defendant's bedroom if the family member has regular access to the bedroom and has title to the entire residence, including the bedroom itself. Therefore, family members are deemed to have "common authority" over all areas in the home unless another family member has clearly manifested an intent to exclude others from an enclosed space.**

- **Even when actual authority does not exist, a warrantless search can be constitutional based on apparent authority. Law enforcement officers can conduct a search based on the permission of a co-inhabitant whom they reasonably, even if erroneously, believed to have authority to consent to the search. Officers can rely on the assumption that one co-inhabitant can permit the search of common areas against the wishes of the absent defendant, and they do not have the burden of considering the possibility of an atypical shared-occupancy arrangement unless there is reason to doubt that the regular scheme is in place.**

- **However, certain container types historically command a high degree of privacy. These containers include valises, suitcases, footlockers, and strong boxes, and a cohabitant's consent may not be sufficient for a search. In other words, even if a cohabitant may consent to the entry and search of another co-habitant's bedroom, or other room, that doesn't automatically mean they may consent a search of a closed suitcase or sealed/locked box that belongs the other cohabitant. An officer would need to ask questions to ascertain if the cohabitant had common-authority over the closed container.**

- **OTHER CONSENT ISSUES/ANSWERS:**

    - **The State bears the burden of establishing that common authority exists—this means that an officer has to know who gave them consent, and have asked enough questions to have reasonably believed the person who gave consent had common-authority over the place/item that was searched for the consent to have been valid. A third-party's consent is valid if an officer looking at the then-available facts could reasonably conclude that the third-party had apparent authority to consent. An officer's belief is unreasonable if the surrounding circumstances would lead a reasonable person to doubt the authority of the third party. *State v. Holland*, 2019-Ohio-2351 (2nd App. Dist.).**

    - **A parent who owns or controls the premises in which a child resides has the right to consent to a search thereof even though such search may produce incriminating evidence against the child. Parents can consent to a search of a child's room. *State v. Iacona*, 93 Ohio St. 3d 83 (2001).**

    - **Minor children have authority to provide consent to the police to enter the premises, as opposed to authority to enter for purposes of conducting a search pursuant to a search warrant, when the police are simply there to investigate. In other words, officers may ask minor children to enter a home to investigate or to speak to someone. The courts look more closely at whether children may consent to a more extensive search beyond an entry. *State v. Gibson*, 164 Ohio App. 3d 558 (4th App. Dist.). The younger the child, the less likely he or she can be said to have the minimal discretion required to validly consent to a search of a parent's home. Much like with *Miranda*, courts are going to take a hard look at whether a minor can understand their rights, and freely voluntarily consent to a search of their parent's home.**

- **The fact of arrest does not necessarily render a consent involuntary. The fact of custody alone has never been enough in itself to demonstrate a coerced consent to search. The question becomes whether the duress present in a particular case exceeds the normal duress inherent in any arrest. Stated another way, an officer may ask for consent to search a home from a person who is detained or arrested. We suggest that when someone is detained, or arrested, and you are asking for consent to search from them, you make it clear to them they do not have to consent—that way if they consent, it will be clear they did so fully understanding their rights, even though they were in custody. Even after a suspect has invoked his right to counsel, the police are not prohibited from asking a suspect to consent to a search, as a request for consent to search is not an interrogation under *Miranda*. *Miranda* warnings are not required to validate consent searches, even when the consent is obtained after the defendant is effectively in custody. *State v. Riedel*, 2017-Ohio-8865, (8th App. Dist.).**

- **Consent to search obtained through deception has been deemed not freely and voluntarily given. In other words, you cannot lie to get consent to search/enter. An officer cannot tell a person, in order to get consent, that the police have a warrant to enter, or legal authority to enter, or PC to get a warrant, if those statements are untrue. Lying to get consent invalidates consent. *State v. Brittain*, 2018-Ohio-4136 (2nd App. Dist.).**

- **The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. However, a physically present inhabitant's express refusal of consent to a police search of his home is dispositive as to him, regardless of the consent of a fellow occupant. But, an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason. So, stated another way, if two people with joint-authority/control over a home, and one consents to an entry/search, and the other one objects/refuses to consent, an officer must listen to the non-consenter. However, this only applies to the present non-consenter. If only one person with joint authority and control is present, and they consent, this is good consent—you do not need to seek out the other person with joint-authority and control to ask them for consent. Also, in the same vein, if a non-consenter is removed from the scene due to arrest, or leaves for some other legitimate reason, an officer may ask again for consent to search from the present person with joint-authority and control, and if they consent, this is now good consent even if the other cohabitant had refused consent before leaving. *Fernandez v. California*, 571 U.S. 292 (2014).**

Facts: Local law enforcement officers went to William Campany's residence in October 2019 to investigate a report of suspected drug activity there. Campany was not at home, but his father was. Campany's father explained to the officers that he, his wife, and his son lived together at the residence. The officers, who did not have a search warrant, asked Campany's father if they could search the residence. Campany's father consented to the search and signed a form memorializing the consent. The door to Campany's bedroom was open, and the officers could smell a strong odor of marijuana from the bedroom. A search of the bedroom resulted in the discovery of marijuana, drug paraphernalia, and a closed and unlocked gun box. The gun box was in plain view next to the bed. When the officers opened the gun box, they discovered a firearm inside. Campany's father did not withdraw his consent to the search of the residence at any time, and he did not testify at the hearing. Campany was indicated for being a felon in possession of a firearm based on the firearm in his bedroom. Campany filed a motion to suppress the firearm as evidence, arguing that his father did not actually consent to a search of the bedroom and, in the alternative, that his father did not have authority, whether actual or apparent, to consent to the search.

Issue #1: Did the defendant's father have authority to consent to an entry/search of defendant's bedroom?

Holding and Analysis: Yes. The court determined that Campany's father had authority to consent to the search of the bedroom because he had access to the bedroom and the bedroom's door was open.

A warrant is not required to conduct a search of the defendant's residence if a person with authority over the residence gives consent to the search. Such a person can be "a fellow occupant who shares common authority over property, when the suspect is absent, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." Common authority is the "mutual use of the property by persons generally having joint access or control for most purposes." Co-inhabitants, including the defendant, "assume the risk that one of their number might permit the common area to be searched."

Typically, all family members have common authority over all of the rooms in a family residence. Family members may be deprived of such common authority and access to an enclosed space if one family member has "clearly manifested an expectation of exclusivity." Nevertheless, a family member can retain common authority over the defendant's bedroom if the family member has regular access to the bedroom and has title to the entire residence, including the bedroom itself.

In this case, Campany's father had both actual and apparent authority to consent to the search, was informed of his right not to have the search conducted, gave consent for the search of the entire

residence, and directed officers to the bedroom. The officers thus encountered nothing to suggest the possibility of an atypical arrangement that could undermine their reliance on the consent given by Campany's father. Campany left his bedroom door open and took no measures to prevent or limit the odor of marijuana from leaving his bedroom; there was no clear manifestation of an expectation of exclusivity.

Issue #2: Did Campany's father have authority to consent to a search of the closed unlocked gun-box?

Holding and Analysis: No, the officers in this case reasonably relied on his apparent authority. The court pointed out that containers such as "valises, suitcases, footlockers, and strong boxes," have a heightened level of protection, and that a cohabitant's consent may not be sufficient for a search of those things. The court said that in this case, the gun box—fitted with a lock and found in Campany's bedroom—warranted the same level of privacy as those types of items, thus the officers in this case should have gotten Campany's consent (or a warrant) to search his gun box. So, as you read this case, and see that the gun was admissible, bear in mind the best practice, and right legal answer when you have consent to search a common area like a bedroom, and come upon a closed case, is to not assume that a cohabitant's consent to search the family common areas extends to the closed case of another person. If the defendant had done a better job arguing this case, he might have gotten the gun suppressed.

The court found that even though Campany's father did not have actual authority to consent to the search of the bedroom, he had apparent authority on which the officers reasonably relied in this case. The court explained that even when actual authority does not exist, a warrantless search can be constitutional based on apparent authority. Law enforcement officers can conduct a search based on the permission of a co-inhabitant whom they reasonably, even if erroneously, believed to have authority to consent to the search. The court based this on the fact that Campany's bedroom door was open, the gun box was in plain view next to the bed, and it was not concealed or obscured by clothing, nor was it hidden inside a closet, or locked.

IV. Home Entry Based on Exigent Circumstances—A DV Run

***State v. Rowley*, 2022-Ohio-997 (12th App. Dist.)**

***Critical Points of the Case*:**

- **An exception to the warrant requirement is when officers encounter exigent circumstances. The Fourth Amendment does not bar police officers from making warrantless entries into a home when the officers reasonably believe a person within the**

home is in immediate need of aid or there is a need to protect or preserve life or to avoid serious injury.

- **A warrantless entry must be strictly circumscribed by the exigencies which justify its initiation as well as the reasonableness of the belief that it was necessary to investigate an emergency to protect life or prevent serious injury. What does this mean? You may only enter to deal with the exigency—you may only enter to check on the well-being of those inside, and once that is done, you should not do any other searches/sweeps without other legal justification. In other words, entering to check on someone is not license to search the whole home. However, what you see in plain-view, while attempting to check on a person, is fair game.**

- **In evaluating the circumstances related to an exigency, appellate courts are reminded: the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process.**

Facts: November 19, 2020, Blanchester Ohio Sergeant Brian Noah and Officer Kristen Jeffers were dispatched to 126 South Broadway to investigate a report of domestic violence involving a man and a woman. The location is a two-story building that contains two apartments on the second floor separated by a short landing.

When the officers arrived, they entered a narrow corridor and climbed the stairs. When they reached the landing, the officers observed a large hole in the dry wall roughly the size of a human torso. The officers also observed that Ronald Rowley's door was severely damaged. According to Sergeant Noah, the door was so damaged that it could not be latched or fully closed and therefore sat slightly ajar. The officers knocked on the door several times. Rowley came to the door but did not open it wider. He instead applied pressure to the door to close it as much as possible. Sergeant Noah testified that he then placed his hand on the door and applied sufficient pressure on the door to keep it from closing further to communicate with Rowley.

Sergeant Noah identified himself as a police officer and stated the reason for his presence. Rowley told Sergeant Noah to "hold on" and claimed to be getting dressed; however, Sergeant Noah stated that Rowley was clearly not getting dressed because there was no other movement behind the door. At some point, Rowley released pressure on the door and the door slightly opened more. Sergeant Noah then observed fresh blood droplets on the floor. Sergeant Noah testified that Rowley had a bloody nose and had blood on his face. He then noticed that the apartment was "disheveled" with strewn furniture and overturned plants. After observing this situation, Sergeant Noah entered the apartment to locate the female involved in the disturbance and to determine her status. Before locating the female, however, Sergeant Noah observed items in plain view that were indicative of

drug use, i.e., pills, torn baggies, and hypodermic syringes. The officers then located the female but determined that she did not appear to have any significant injuries. Rowley was placed under arrest and a search incident to arrest revealed that he was in possession of additional narcotics and approximately $500 in cash.

Issue: Did exigent circumstances support the initial entry into the apartment? Did the officers, *before* crossing the threshold into the apartment, reasonably believe someone in the apartment was in need of immediate aid?

Holdings and Analysis: Yes. The court found that not only was the officers' warrantless entry permissible, it was necessary. The officers had probable cause to believe that domestic violence recently occurred *before* they entered the apartment to investigate if anyone needed medical assistance, thus exigent circumstances justified the warrantless entry into Rowley's apartment.

A warrantless search (or warrantless home entry) is per se unreasonable unless it falls within a recognized exception to the warrant requirement. An exception to the warrant requirement is when officers encounter exigent circumstances. "The Fourth Amendment does not bar police officers from making warrantless entries into a home when the officers reasonably believe a person within the home is in immediate need of aid or there is a need to protect or preserve life or to avoid serious injury." A warrantless entry must be strictly circumscribed by the exigencies which justify its initiation as well as the reasonableness of the belief that it was necessary to investigate an emergency to protect life or prevent serious injury.

In this case, the officers were responding to an active emergency call of domestic violence. When they arrived, they observed conditions consistent with a physical altercation. There was a large torso-sized hole in the hallway along with obvious damage to Rowley's door which essentially rendered the door non-functional. When the officers knocked on the door and announced their presence, they were met with resistance as Rowley attempted to close his broken door as much as possible. Sergeant Noah testified that when the door opened, he observed fresh blood droplets on the floor and noticed the apartment was in significant disarray with overturned furniture and plants. Rowley had also been dishonest with the officers when he claimed to be getting dressed. All of this was known or observed prior to entering the apartment it check on the well-being of the female. As the court stated, the duty to protect persons and preserve the peace is not just a moral obligation but one grounded in the law. *See* R.C. 109.71(A)(1).

Based upon these facts, the court concluded that the officers' warrantless entry was not only permissible, it was necessary. The officers had probable cause to believe that domestic violence recently occurred before they entered the apartment to investigate if anyone needed medical assistance.

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Legal Advisor's Update -- Senate Bill 215: Concealed Handgun Carry without License

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org)and Tyler McCoy (TJMcCoy@columbuspolice.org) June 7th, 2022

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for legal advice.

I. New Assistant Legal Advisor

Before we plow into SB 215, we want to introduce new Assistant Police Legal Advisor Tyler "Ty" McCoy. Tyler was born and raised in Grove City. Two weeks after graduating, Tyler enlisted in the United States Marine Corps for a four-year term. After honorably serving his term, Tyler attended The Ohio State University where he graduated in two and a half years. Tyler then attended Capital University Law School, graduating with Summa Cum Laude recognition. Ty worked as a law clerk for the Franklin County Public Defender's, and Samuel H. Shamansky, Co. LPA. Tyler took the tools he learned from working for these defense organizations to successfully prosecute countless cases as an Assistant City Prosecutor for the Columbus City Attorney's Office. Tyler also became the OVI liaison with the Division of Police for the CAO. Please welcome Tyler to his new role!

II. Senate Bill 215 – Permitless Concealed Carry

There is a cheat sheet at the end of this Update that was developed by the Director of the Franklin County Prosecutor's Office Gun Unit, John Gripshover. We vetted this Update through County to assure our advice was consistent with how they view the new gun laws.

A. Introduction

Senate Bill 215, which goes into effect **June 13th, 2022**, will allow qualified Ohioans to carry a concealed handgun without first obtaining a concealed handgun license (CHL). **Ohio Revised Code Section 2923.111** permits all qualified adults (*21 years of age or older*) to carry concealed, non-restricted firearms, without a license, or without any firearms training, or without a background

check. Stated another way, moving forward, any qualified adult may now carry a handgun in the same manner someone with a concealed carry permit has been allowed to carry in the past. Also, significantly, SB 215 eliminates the requirement that a person with a concealed handgun proactively and promptly inform law enforcement they possess a concealed handgun; rather, they are now only required to inform an officer of the handgun if the officer asks the person if they have a handgun on their person or in their vehicle. Please keep in mind as you read this Update, the new law applies only to handguns, not long guns or rifles.

Regardless of how one feels about any of this philosophically, this new law changes the dynamics between an officer and a citizen during a traffic or *Terry* stop. It also makes it more difficult to initiate some *Terry* stops. We do not want to overreact to this new law, but officers must adjust to how they handle stops, especially traffic stops, based on this new reality. We say this for several reasons.

One, officers will have less certainty when they initiate a stop. In the past, when an officer initiated a traffic stop, the officer often knew prior to approach of the vehicle if the registered owner had a CHL, and thus it was possible there was a handgun in the vehicle. Plus, if the CHL holder had a handgun in their possession, they had to proactively and promptly tell the officer about the handgun. Officers also had pretty high confidence that a person with a CHL was legally allowed to possess a handgun, and due to the fact they had went through the process to get a CHL, had training and knew how to interact with law enforcement while in possession of their handgun. Now, given any qualified adult may carry concealed without a CHL, training, or a background check, officers will not have this knowledge or confidence at the outset of a stop.

Two, as officers and Ohioans get used to this new law, there are going to be some uncomfortable situations for officers. For example, an officer initiates a traffic stop. Upon approach, the officer views a handgun laying on the front-seat right beside the driver's leg or in a holster on the driver's person. The driver stares straight ahead and says nothing as the officer approaches. In the past, the officer likely would have known the registered owner had a CHL and was allowed to possess a handgun. Plus the driver, if they were a CHL holder, would have promptly said something to the effect of, "hey, I've got a permit and my handgun on me." Under the old law, the CHL, or lack thereof, also would have resolved most legal questions very quickly. Either the person had a CHL and was thus acting within the law in possessing that handgun on their person or in the car, or they didn't, and were detained/arrested for CCW or Improper Handling. However, going forward, that person, if a qualified adult, will not need to have a CHL, or tell the officer they have a gun until the officer asks. Thus, during the initial contact, an officer will likely not know with any certainty if that person is really allowed to possess the handgun. The default in Ohio now will be that a person is allowed to carry concealed unless they are disqualified, thus the person described in the scenario above was acting legally unless they were not a qualified adult. These situations could remain

uncomfortable because an officer may not know for a fairly lengthy time during the stop if the person is a qualified adult or not. It might take multiple record checks to ascertain if the person is a qualified adult, or due to the limited time allowed for traffic stops, an officer may not figure out if the person is a qualified adult before the stop has to constitutionally terminate.

Three, the new law is confusing. The disqualifiers for permitless carry are more extensive than the disabilities listed in the Ohio Weapons Under Disability statute. The disqualifiers are listed below and can be found in R.C. 2923.125(D), while the Ohio WUD Statute is R.C. 2923.13. A person could be disqualified from permitless carry, but not be under a disability under Ohio law. Because of this, and the lack of the CHL requirement, it may be difficult to figure out if someone is allowed to possess a concealed handgun on their person or a loaded handgun in their vehicle during a stop. While we think there are strategies to deal with this, traffic stops cannot be unreasonably extended. We discuss this below in the 4th Amendment section (II. D).

Four, there are additional changes brought on by this new law, that are less obvious, but nonetheless important, because everywhere Ohio guns laws say something like, "this section does not apply to any person who has been issued a concealed handgun license," this exception also now applies to any qualified adult. These are covered in Section II. E. below.

Five, some things haven't changed. Persons stopped for a law enforcement purpose who are carrying a concealed handgun still must keep their hands in plain sight, follow lawful orders, and are prohibited from touching the handgun while stopped. Private entities/businesses may still ban firearms from their premises, and a qualified adult is not authorized to carry a concealed handgun into a police station, school safety zone, courthouse, college campus (but for locked in car), any place of worship, or in government buildings that are not shelters or parking facilities. (See R.C. 2923.126(B)) for the list of prohibited places).

Sixth, if a person is carrying a concealed handgun, and they don't have a CHL, and are not a qualified adult, then they would be charged with whatever section is applicable to the situation. For example, if the person is carrying a loaded handgun on their person in a car, and don't have a CHL, and has a pending assault charge, they thus are not a qualified adult, and that person may be charged with Improper Handling and/or CCW.

B. Bullet Points

Here are some important bullet points about the new law (R.C. 2923.111):

- A "qualifying adult" is **not** required to obtain a concealed handgun license in order to carry a concealed handgun in Ohio, so long as the handgun is not a "restricted firearm."
- A "qualifying adult" can carry a concealed handgun anywhere in Ohio in which a licensee could carry such a handgun

- Right of "qualifying adult" to carry a concealed handgun = same right as a person who was issued a concealed handgun license
- Right of "qualifying adult" to carry a concealed handgun is subject to the same restrictions as a person who was issued a concealed handgun license.
- Requirement to carry the valid concealed handgun licenses is completely erased.
- The duty to "promptly notify" law enforcement that a person has a handgun has been completely erased.
- Concealed handgun license holders and Qualified Adults now simply have an obligation to truthfully disclose that they are carrying a handgun **when asked by law enforcement.**

So, you initiate a traffic stop of a vehicle, and upon being asked if they are carrying a weapon, the driver informs you that he/she is carrying a concealed handgun but does not have a concealed handgun license. Under the new law, you must now determine if the driver is a "qualifying adult" under R.C. 2923.111, which is a 20 some part test. How do you figure this out?

C. Qualified Adult Checklist—With Some Explanations

In an effort to make determining if someone is a "qualifying adult" here is a simplified checklist you can use as to what is a disqualifier (See R.C. 2923.125(D)):

- Must be AT LEAST 21 years old
- No felony convictions; no drug offense convictions under section 2925.
    - **This includes any misdemeanor drug conviction other than an MM.**
    - **This includes juvenile adjudications.**
- No pending felony charges; drug offense charges; misdemeanor offense of violence charges; negligent assault charges; or falsification of CHL charges.
    - **This includes any pending misdemeanor drug charges other than an MM.**
    - **The full list of "Offenses of Violence" can be found in R.C. 2901.01(A)(9) — this list includes, but is not limited to, the following misdemeanors: Assault, Ag. Men, Menacing, Menacing by Stalking, Arson, Inciting to Violence, Riot, Inducing Panic, DV, Witness Intimidation, Escape, and Endangering Children (B)(1) violation.**
- Not a fugitive from justice (warrant for arrest)
- Not addicted to a controlled substance or unlawful drug user

- **This means any illegal drug user.**

- Not adjudicated mental defective or committed to mental institution
- U.S. Citizen or legally residing in the United States
- Not dishonorably discharged from the military
- No Domestic Violence convictions

  - **This includes juvenile adjudications for DV.**
  - **This also includes DV related convictions that fit the federal definition of DV, which is a misdemeanor that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. An assault or an aggravated menacing plea could fit this disqualifier as well if committed in the defined relationship.**

- Within 3 years: No misdemeanor offense of violence convictions
- Within 5 years: No convictions of (2) or more violations of assault under R.C. 2903.13 or negligent assault under R.C. 2903.14

  - **This includes juvenile adjudications.**

- Within 10 years: No Resisting Arrest convictions under R.C. 2921.33

  - **This includes juvenile adjudications.**

- Not currently subject to CPO; TPO (DV related protection order) or other Protection Order issued by another state
- Not be Under a Disability as described in R.C. 2923.13—in addition to all the disqualifiers listed above, the Ohio WUD statute also prohibits a **chronic alcoholic** from possessing any firearm, including a handgun.

  - **If an officer comes upon a person engaging in permitless carry of a concealed handgun, and they have a history of alcohol related offenses, such as multiple OVIs, this should merit some questions, like, "are you an alcoholic?"**

D. Fourth Amendment Concerns/Strategies

Some of this is complicated, while some of it is not. To start, the easiest answer to all questions about permitless carry is to treat qualified adults like they have a CHL. However, this simple answer leaves too many questions unanswered. Presumptions related to concealed carry have been changed by this law, which means how officers view some stops must change.

We will start with the easiest 4th Amendment issues: Officers may immediately ask every person they stop, either for a traffic violation or due to reasonable suspicion that the person otherwise is engaged in crime, if they currently possess a firearm either on their person or in their vehicle. Specifically, if an officer asks a person stopped for a traffic violation if they have a concealed handgun, that person is required to tell the officer if they have a loaded handgun in the vehicle at that time. If a person is stopped for another law enforcement purpose, and they are asked if they are carrying a concealed handgun, they must disclose if they have a concealed handgun. (See R.C. 2923.12(B)(1) and 2923.16(E)(1)). If the stopped person indicates they have a handgun, the officer may also ask *a limited number* of other questions to attempt to ascertain if the person is in fact a qualified adult. These questions should be focused on the list of disqualifiers above. We would suggest officers ask some general questions (like, are you allowed to carry a handgun?) and some specific ones focused on those disqualifiers that might not readily show up in a records check (do you have any pending felony/DV/drug charges? Do you have a resisting arrest conviction? Are you subject to a protection order?). A law enforcement officer does not violate the Fourth Amendment merely by asking a detained motorist extraneous questions, so long as those questions do not unnecessarily prolong the detention and the detainee's responses are voluntary and not coerced. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. ***United States v. Aguilera-Pena*, 2011 U.S. App. LEXIS 11329 (6th Cir.).**

We do not know how many questions are too many, or in other words, how many questions would be seen as unnecessarily prolonging a routine traffic stop. However, an officer cannot turn a speeding stop into a full-scale investigation into whether the person is a qualified adult. The questions should be limited and brief, and an officer should be able to say the stop was not meaningfully longer due to questions unrelated to the original reason for the stop.

Two other things: 1) if the person says things in response to an officer's questions that gives an officer reasonable suspicion they are breaking the law, an officer may then extend the stop to further investigate; and 2) officers can ask people during consensual encounters if they have a concealed handgun, but those people are not considered stopped for a law enforcement purpose, so they do not have to disclose and failing to disclose is not illegal.

Harder 4th Amendment questions: How does an officer now handle a person with a handgun in a vehicle, or on their person, during a stop? Again, the easiest answer is that unless an officer reasonably suspects the person they wish to stop, or have stopped, is not a qualified adult, the officer should treat that person the same way the officer would have treated someone with a CHL in the past, but that is a bit disingenuous. During a traffic stop, a person with a handgun has to keep their hands in plain sight, cannot touch the handgun with their hand during the stop, and thus they may be given orders consistent with these requirements. An officer may also always order a driver or passenger to get out of a vehicle, and the person with the handgun must follow these orders. (See 2923.16). Thus, in a traffic stop situation, if the officer approaches and sees a gun on the seat or on the driver's person, the officer may order the person to keep their hands on the steering wheel in plain-sight and to get out of the vehicle. The same holds true for a non-traffic *Terry* stop—if an officer stops a person based upon reasonable suspicion, the person is not allowed to touch the handgun, and must follow all orders. (See 2923.12).

Now, the hardest questions: What does an officer do while interacting with this citizen, and what else may the officer do to this citizen, besides giving them lawful orders? May an officer stop a citizen because the officer sees a bulge under the citizen's clothes consistent with a concealed handgun? If it is a driver of a vehicle, who has a handgun on their person, and the officer does not know if they are a qualified adult, or not, may the officer seize this person at gunpoint? May the officer remove the person from the vehicle, pat-them down, and handcuff them? May the officer conduct a protective sweep of their vehicle? Again, the short answer to these questions is that you should treat them as you would have treated a person with a CHL, unless you have reasonable suspicion they are not a qualified adult. The other short answer is **"NO,"** not solely based on possession of the firearm.

The 6th Circuit Court of Appeals (our federal court) previously held in an open-carry case that where it is lawful to possess a firearm, unlawful possession is <u>not</u> the default status. The court reiterated there is no automatic firearm exception to the *Terry* rule. So, even though in an open carry situation, it is possible the person could be under a disability, the person openly carrying cannot be forcibly stopped, disarmed, or handcuffed, absent reasonable suspicion they were under a disability or otherwise breaking the law. ***Northrup v. City of Toledo Police Dep't*, 2015 U.S. App. LEXIS 7868 (6th Cir.).** The same reasoning now holds true as to concealed carry—the default in Ohio now is that all citizens may carry a concealed handgun on their person or carry a loaded handgun in their vehicle, unless they are disqualified. The court stated the following in ***Northrup***, and we think they would likely say the same about the new concealed carry laws in Ohio: "While open-carry laws may put police officers in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. A police department has no authority to disregard that decision--not to mention the

protections of the Fourth Amendment--by detaining every gunman who lawfully possesses a firearm. It has long been clearly established that an officer needs evidence of criminality or dangerousness before he may detain and disarm a law-abiding citizen." Also, keep in mind that the 6th Circuit has also held that "A police officer may approach a suspect with a weapon drawn during a *Terry* stop when the officer reasonably fears for his safety. When the surrounding circumstances give rise to a justifiable fear for personal safety, a seizure effectuated with weapons drawn may properly be considered an investigative stop. ***Wright v. City of Euclid*, 2020 U.S. App. LEXIS 19095 (6th Cir.).**

We thus do not believe a citizen in a vehicle may be removed at gunpoint *solely* because they have a loaded handgun---the presumption now is that this is legal behavior in Ohio. We do not believe a citizen may be stopped *solely* because they have a bulge under their clothing consistent with a handgun, unless they are in a prohibited place. This is a change. Under the old Ohio concealed carry law (pre 6/13/22), courts looked at *Terry* stops and concealed carry in the following manner: "Police officers are not required to verify the existence of a concealed carry license prior to a lawful *Terry* stop. Where a police officer has reasonable suspicion that an individual has committed a violation of the concealed carry laws, the officer is entitled to detain the individual in order to investigate that possibility, including whether the individual possesses a valid concealed carry license. The defendant bears the burden of establishing that he had a valid concealed carry license with him at the time he was stopped." ***State v. Higgins*, 2016-Ohio-7890 (8th App. Dist.)**. With "Constitutional Carry" now the presumption in Ohio, we do not believe this line of reasoning holds. Given that citizens are generally allowed to carry without a permit, how can an officer argue they have reasonable suspicion of crime solely because someone has a handgun?

Thus, moving forward, how officers interact with citizens with concealed handguns should be more focused on the "totality of the circumstances." If an officer stops a person, and the officer views or learns of a handgun in the vehicle, the officer should base how they handle the person on the "totality of the circumstances." They cannot be ordered out of the car at gunpoint just because they have a gun. Keep in mind, the stopped person with a handgun cannot touch the gun, and must keep their hands in plain-view, thus failure to follow these rules certainly impacts how you handle them. They must follow your orders, and of course there are all the other normal things an officer considers during a stop to decide if there is reasonable suspicion a person is armed and dangerous. How long did they take to stop? Did they make a furtive movement? Are they unusually nervous? What is the nature of the location? Do you know them and suspect based on your knowledge they are disqualified from permitless carry? The same thought process should take place relative to whether an officer initiates a *Terry* stop of someone who appears to have a concealed handgun and is not in a prohibited place—an officer cannot make the stop solely based on the concealed handgun—the officer should consider the totality of the circumstances. At the

end of the day, officers need to accept that if a person stopped for a traffic violation, upon being asked, says, "I have a handgun on me, I don't have a permit, but I am constitutionally carrying," and they have done nothing else suspicious, that person cannot be forcibly removed from their vehicle at gun point, handcuffed or patted-down, and a protective sweep would not be justified.

E. Other Changes Brought on by Permitless Carry: Bars and Restaurants, and Other Places Where Qualified Adults May Now Carry

Under R.C. 2923.121, a CHL holder **and qualified adult** are now permitted to carry a concealed handgun into a bar, restaurant or other place in which alcohol is sold for consumption on the premises as long as:

1. The license holder has not already consumed alcohol and does not consume alcohol on the premises (or is under the influence of a drug of abuse), and
2. Firearms are not prohibited on the premises.

Keep in mind, under the new version of this law, a qualified adult will be treated the same as a concealed handgun license holder. If a qualified adult has not consumed alcohol at the bar or prior to going to the bar, has a concealed handgun, and the bar or restaurant does not have a prohibition against firearms on the premises by way of a sign or notice, then that person is permitted to carry the firearm at the restaurant, bar, or other non-prohibited location that is not specified in R.C. 2923.126(B). If the qualified adult or licensee is on the premises with a handgun and consumes alcohol in the establishment or is under the influence of alcohol or a drug of abuse while doing so, then that would be a violation of R.C. 2923.121(A) as the exception in R.C. 2923.121(B)(1)(e) would not apply. If the individual is drinking or under the influence of alcohol and or drugs at the place serving alcohol, it would be an F5 if the firearm is not concealed and an F3 if concealed on their person or concealed ready at hand.

If the establishment—whether alcohol is sold there or not—prohibits weapons on its premises with a conspicuous sign that informs people that firearms and/or concealed handguns are prohibited, then that person can be charged with criminal trespass if they negligently fail or refuse to leave upon being notified by the signage or owner or agent of owner of the prohibition. It would be an M4. *See* Columbus City Code 2311.21 (A)(4) and R.C. 2911.21(A)(4). This would apply even if the person is a CHL holder or a qualified adult. *See* R.C. 2923.126(C)(3)(a). Additionally, any instrumentality that has been used in a violation of the city criminal trespass code can be seized and is subject to forfeiture. *See* Columbus City Code 2311.21(E). In other words, you could seize the gun in this scenario.

So, how should an officer react if the officer sees a person in a bar, restaurant, or other place in which alcohol is sold for consumption on the premises, and the officer somehow discerns

or is told that person is carrying a concealed handgun? Again, the presumptions have changed as to concealed carry of a handgun. In the past, if an officer saw the person described above in a bar carrying a concealed handgun, the presumption was that person was not allowed to be there carrying a concealed handgun unless they had a CHL. Now the presumption is they are allowed to be there, unless they are not a qualified adult. This means that if an officer sees a person in a bar, who has a concealed handgun, the officer would need to have reasonable suspicion they were/had been drinking, or had entered even though there was a sign prohibiting firearms, or were not a qualified adult in order to justify a detention of the person. To develop reasonable suspicion, an officer could ask the bartender/waiter if the person has been drinking, and/or ask to see video to see if they had been drinking, or have a consensual contact with the person to find out if they had been drinking.

While private employers may prohibit firearms on their premises, be aware that R.C. 2923.1210 states that a business entity, property owner, or public or private employer is not permitted to establish, maintain, or enforce a policy prohibiting a person who has been issued a valid CHL **and now who is a qualified adult,** from transporting or storing a firearm or ammunition when both of the following conditions are met:

1. Each firearm and all of the ammunition remains inside the person's privately owned motor vehicle while the person is physically present inside the motor vehicle, or each firearm and all of the ammunition is locked within the trunk, glove box, or other enclosed compartment or container within or on the person's privately owned motor vehicle;
2. The vehicle is in a location where it is otherwise permitted to be.

R.C. 2923.126(C)(3)(a) provides that a person who knowingly violates a posted prohibition of a parking lot or other parking facility is not guilty of criminal trespass; however, that person would be liable for a civil cause of action for trespass.

In order for the criminal trespass scenario to come into play, someone must enter the premises (not in their car) with a firearm, and there must also be either a conspicuously placed sign that notifies people entering that firearms are prohibited in that location, or the owner must tell people they cannot enter with a firearm. If that person negligently fails to leave or remains on the premises despite notice of the prohibition, then they could be charged with a criminal trespass.

Furthermore, a landlord may not prohibit or restrict a tenant who has a **CHL or is a qualified adult** from lawfully carrying or possessing a handgun on those residential premises. (See R.C. 2923.126(C)(3)(b)).

F. Specific Code Section Impact—Comparisons of New and Old Law

We know this might seem redundant, or perhaps confusing, but we want to make sure all of this is fully understood, plus there also have been some penalty changes.

2923.12 Carrying Concealed Weapons

- **Old Law: R.C. 2923.12(A)(2)**: No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, a handgun other than a dangerous ordinance.
    - New Law: Now, a "qualifying adult" is deemed to have been issued a concealed handgun license.

R.C. 2923.12(B)(1):

- "Promptly inform" (old law) vs. "Tell if asked" (new law)
    - New Law: Person has to notify officer that he/she is carrying a concealed handgun only if the officer asks whether there is a concealed handgun. "Tell if asked."

- Old law: (B)(1): person stopped for law enforcement purpose + carrying concealed handgun = must *promptly inform* law enforcement officer that: person has been issued a concealed handgun license + person is carrying concealed handgun.
    - Penalty: M1 + suspension of concealed handgun license
    - Officer had actual knowledge that offender had been issued concealed handgun license = MM + no suspension of concealed handgun license

- New law: (B)(1): person stopped for law enforcement purpose + carrying concealed handgun + law enforcement officer *asks* if person is carrying a concealed handgun + person *knowingly* fails to disclose that he/she is carrying a concealed handgun.
    - Penalty: M2. Suspension language deleted.

- Subsection (C)(2) of 2923.12 specifically states that concealed handgun licensees and qualified adults are **exempt** from the prohibition on carrying concealed handguns.

- The code section also changed some of the requirements and penalties associated with concealed handgun licenses. CCW holders are no longer required to carry their valid license with them so flowing from that, you are no longer permitted to arrest someone for a violation of (A)(2) simply for failing to produce a permit.

- The code section changes included various scenarios where if certain factors exist the crime is a different level offense.
  - If the Offender is charged with and convicted or pleads guilty to a violation of (A)(2) →M1.
  - (Unless the offender has: a previous conviction for this offense or any offense of violence; the firearm was loaded or ammunition was ready at hand; or if the weapon was a dangerous ordnance → F4
  - If the offense is committed aboard an aircraft → F3
  - If a person is charged with a violation of (A)(2) and within 10 days of the arrest the offender presents a concealed handgun license that was valid at the time of the arrest and the offender was not knowingly in a place described in section 2923.126 → MM
  - If a person had previously been issued a concealed handgun license that expired within two years of the date of arrest and within 45 days the offender presents a current concealed handgun license; waives their speedy trial rights on the charge, and were not knowingly in a place described in section 2923.126 → Unclassified Misdemeanor with a mandatory $500 fine.
  - A CCW violation under subsection (B)(1) Failing to disclose to law enforcement → M2
  - A CCW violation under subsection (B)(2) Failing to keep hands in plain sight or (4) Failing to obey lawful orders →M1 (unless they have a previous conviction under this same section →F5)
  - A CCW violation under subsection (B)(3) Attempting to remove or touch the weapon (unless specifically told to do so by law enforcement officers) → F5)

- The CCW code section goes on to state that if you stop a person for any law enforcement purpose, and they surrender a firearm to you, either voluntarily or pursuant to a request from you AND you do not charge them with a violation of this statute, they are otherwise not prohibited from possessing the firearm, and it's not contraband the firearm MUST be returned to the citizen at the termination of the stop.

2923.16 Improper Handling Firearms in a Motor Vehicle

- This new statutory scheme applies to the offense of improper handling. R.C. 2923.16 generally prohibits persons from transporting or having a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle. The code goes on to further discuss the ways a firearm is to be transported in a vehicle. However, those provisions DO NOT apply to a person carrying a valid concealed handgun license, and now DO NOT apply to a "qualifying adult" either.

- ***Qualifying Adults are deemed to have a valid CCW license***

- Divisions (B) and (C) DO NOT apply to individuals who have been issued a concealed handgun license that is valid at the time.
- (B) No person shall knowingly transport or have a loaded firearm in a vessel in a manner that the firearm is accessible to the operator or any passenger.
- (C) No person shall knowingly transport or have a firearm in a vessel unless it is unloaded and is carried in one of the following ways: (1) In a closed package, box, or case; (2) In plain sight with the action opened or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or that cannot easily be stripped, in plain sight.

What the legislature is saying with this change is that concealed handgun license holders and qualifying adults are NOT required to transport their handguns in the manner prescribed in subsection (C) and that in fact they are allowed to transport a loaded firearm in a vessel in a manner that they have access to the loaded firearm

So because "Qualifying Adults" are to be treated as if they have a valid concealed handgun license all of the requirements placed upon a concealed handgun licensee in subsection (E) apply also to "Qualified Adults". Which means that they are required to:

1.) **Disclose that they are carrying a loaded firearm (when asked by an Officer)**
2.) **Remain in the vehicle unless ordered by the Officer to get out**
3.) **Keep their hands in plain sight at all times including upon Officer's approach until the Officer has left**
4.) **Have NO contact with the loaded handgun by touching it with their hands or fingers unless ordered to do so by the Officer**
5.) **Comply with any and all lawful orders given by any law enforcement officer for the duration of the traffic stop.**

So what does that mean for Officers in the course of a traffic stop with either a concealed handgun licensee or a qualified adult, you can order them to get out of the car (*Mimms* Order), you can ASK them to let you hold onto the gun for safety during the course of the traffic stop, but you cannot force them to do so, unless you have established some reasonable articulable suspicion that would demonstrate you were in fear for your safety (i.e. they were not following lawful orders, they were touching the handgun, or some other dangerous behavior).

Guidelines for application of "Constitutional Carry" effective June 14, 2022:

"Qualified Adult" excludes:	
Anyone under 21	
Prior adult convictions	Any felony
	Any DV based misdemeanor conviction – including DV, Assault, Aggravated Menacing, etc.
	Misdemeanor drug offense (except MM)
	Misdemeanor offense of violence (other than Resisting Arrest) within 3 years
	Misdemeanor Falsifying a Concealed Handgun license within 3 years
	Misdemeanor assault if victim is a peace officer (other than MM)
	2 prior Assault/Negligent Assault offenses within 5 years
	Resisting Arrest within 10 years
Pending adult charges/indictments	Any felony
	Misdemeanor offense of violence
	Misdemeanor drug offense
	Negligent assault
	Falsifying a Concealed Handgun License
Prior juvenile adjudications	Any felony
	Misdemeanor drug offense (other than MM)
	Misdemeanor assault of victim is a peace officer (other than MM)
	Misdemeanor offense of violence (other than Resisting Arrest) within 3 years
	Misdemeanor Falsifying a Concealed Handgun license within 3 years
	2 prior Assault/Negligent Assault offenses within 5 years
	Resisting Arrest within 10 years
Other disqualifiers	Is a fugitive from justice (has a warrant)

	Unlawful user or addicted to any controlled substance
	Drug dependent, in danger of drug dependence, or a chronic alcoholic
	Dishonorable discharge from military
	Illegal alien or in country on a non-immigrant visa
	Renounced US citizenship
	Under CHL suspension
Protection order based disqualifiers	Under a DV based protection order
	Under a CPO/TPO

The "Qualified Adult" carry law only applies to handguns (does not apply to "long guns"). Concealed Handgun Licensee's and "Qualified Adults" are still prohibited from carrying a concealed long gun or transporting a loaded long gun in the cabin of the vehicle

2923.121 Illegal Possession of a Firearm in a liquor Permit Premises:

- Cannot charge this if individual is a "Qualified Adult"/CHL permit holder and are not drinking
- If the bar/restaurant has a posted no firearms allowed sign, the appropriate charge is Criminal Trespass, R.C. 2911.21 (M-4)
- If individual is drinking, the charge is F-3 (F-5 if the firearm is not concealed)

2923.122 Illegal Conveyance or Possession of a Deadly Weapon in a School Safety Zone:

- Remains an F-5, however a "Qualified Adult"/CHL permit holder can transport a gun onto school property in a car, but the firearm must be left in the car

2923.16 Improper Handling a Firearm in a Motor Vehicle

- Still generally an F-4 to discharge a firearm from a motor vehicle
- Still an F-5 to have a loaded gun ANYWHERE in the car while under the influence (F-4 if the gun is on the person)

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Legal Advisor's Q&A on SB 215 and Gun Issues

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org)and Tyler McCoy (TJMcCoy@columbuspolice.org) September 19th, 2022

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for legal advice.

As we expected, we have gotten a lot of follow-up questions relative to SB 215, and related gun issues. Here are some of the questions we have gotten, and our best answers to those questions:

1. Consensual Encounters:

Q. Is a person required to tell an officer they have a firearm, when the officers asks, during a consensual encounter?

A. **No!** The duty to disclose does not kick in, or start, until a person is, ***stopped*** for a law enforcement purpose, which means they are, at the very least, detained either during a traffic or *Terry* stop. A consensual encounter, by definition, is not a stop.

Q. If someone lies to an officer during a consensual contact/encounter about possessing a firearm when an officer asks the person if they possess a firearm, can that person be charged with lying/falsification?

A. **No.** While people can sometimes be charged for lying/falsification during a consensual encounter, we do not think this is a good idea in this context. The legislature has not only changed the duty to notify of a firearm, to a duty to disclose when asked, but has also made clear that this duty does not start until there is a stop. Given that "the knowingly fail to disclose" provision of the new CCW law ***does not*** apply to consensual encounters, we do not think it a good idea to charge someone for a violation of R.C. 2923.12(B)(1), or for any behavior related to that section, including falsification, when there is not a legal ***stop*** in the first place. The legislature has greatly regulated the way law enforcement

interacts with citizens with guns, and we think it best to follow the letter and spirit of the law in this area. An officer may still ask if the person possess a firearm, and may ask for consent to conduct a pat-down or search, but we just think it a bad idea to treat a lack of honesty or candor in these situations as a criminal falsification.

2. Fugitive from justice:

Q. Does the permitless carry disqualifier, "fugitive from justice," include traffic violation warrants?

A. No. The concept of a fugitive from justice ***only applies to criminal offense warrants***, not traffic offense warrants.

Q. Does a fugitive from justice need to be aware of/have knowledge of the warrant in order to treat them as disqualified for the purposes of permitless carry?

A. No. The police ***do not*** have to prove the person knew they were a fugitive from justice. There must be evidence the defendant knowingly possessed the gun, but the defendant does not need to know there is a warrant out for their arrest to treat them as disqualified from permitless carry due to being a fugitive.

3. Under indictment:

Q. Would someone who was arrested for a felony, who then had those charges dismissed at a Municipal Court arraignment, but who had not yet had the charges presented in Common Pleas for indictment, be considered "under indictment" for the permitless carry disqualifiers?

A. No, because the person is not under indictment if the charges were dismissed for future indictment. Since they have yet to be indicted, they are not under indictment during the interim period. It is thus important the officer knows if the person is currently under indictment or not in determining if the person is allowed to engage in permitless carry.

4. NICS Checks:

Q. If someone was recently denied through NICS (National Instant Criminal Background Check System) from buying a firearm, is that, by itself, enough for an officer to presume that person is disqualified from permitless carry in Ohio?

A. No. NICS only searches for federal disqualifiers, and is not always accurate, or at least not accurate as to whether a person is really disqualified or not. If an officer runs a NICS check, and it comes back "delayed," that by itself, means very little. Approximately 30% of NICS checks are delayed, but only 1.5% are denied. Moreover, of the appealed NICS denials in 2021, 30% were eventually overturned. While a valuable tool, a NICS check *alone* is not enough to determine if a person is disqualified from permitless carry in Ohio. It certainly allows for further questions to determine if a person is a qualified adult.

5. Gun Seizure

Q. Can an officer seize/retain a firearm during a stop?

A. It depends. An officer may seize a firearm if the officer charges the person for a weapons related offense, such as CCW or Improper Handling, or for some other offense where the firearm is evidence of the crime committed (DV, Assault, Aggravated Menacing, Robbery etc.). However, if the person is not charged, or otherwise taken into custody, or if the firearm is not otherwise evidence, the officer must return the firearm to its owner at the termination of the stop. This does not preclude a firearm being taken for "safe-keeping" if the facts and circumstances apply to that concept.

6. Protection Orders:

Q. How should an officer handle a stop involving a possible protection order, and a person engaging in permitless carry?

A. One, if an officer saw/learned there was a protection order, the officer would be able to detain the person engaging in permitless carry longer, meaning the officer could extend the stop, because the indication of a protection order would create reasonable suspicion that the person was not a qualified adult, and was thus not allowed to engage in permitless carry. **Two**, an officer would need to determine that the protection order is currently valid. **Three**, the officer would then need to verify the person had notice of the protection order. This could be established by verifying the order had been served upon the person, or that the person had been told about the order by an officer, or that anyone had shown the person the order. It seems the first step in trying to ascertain if the person had notice would be to ask them, "do you know about the protection order?" If there is a valid order of which the person engaging in permitless carry had notice, they may then be charged and arrested for CCW and/or any other

applicable charges, such as improper handling, given they are not a qualified adult by virtue of the protection order.

7. Drug Dependent/Drug User/Chronic Alcoholic:

*This is a difficult concept that requires some work, curiosity and thoughtful questions. This part of the law is also vague:

Q. What does "drug-dependent" mean?

A. A drug-dependent person is someone who uses a drug of abuse and loses their self-control regarding using the drug, so they are psychologically or physically dependent on it.

Q. What is an unlawful drug user?

A. An unlawful drug user is a person who uses illegal drugs consistently, over a prolonged period of time, and close enough in time to gun possession so that they are aware that they are violating the law by possessing a gun. It also means that they still use the drug on a regular basis while they possess the gun. While there is no period of time that is required to determine if someone is a repeated drug user, it typically means that they have used illegal drugs on a regular basis for months or years, and possesses the gun during this period. Using controlled substances only once, or a few times, is insufficient to establish that someone is an unlawful drug user. Additionally, someone who used to be addicted to drugs, but is not anymore, is not a disqualified adult; they are allowed to carry a gun.

Q. How can an officer figure out, or have PC to believe, if someone is an unlawful drug user, and therefore is a disqualified adult?

A. An unlawful drug user is someone who exhibits a pattern of drug use, over an extended period of time, while they possess the firearm. That can mean using drugs several times over the course of a few months to using for years. This does not mean the person must be high during their drug possession, it means that there must be an established pattern of drug use that covers the time the defendant possessed the gun.

Asking these questions will help determine if someone is disqualified:

1. Do you smoke/use weed/marijuana/cannabis?

2. How often do you use/smoke?
3. Do you use/smoke every day?
4. When was the last time you used/smoked marijuana?
5. How long have you been a cannabis/weed/marijuana user?
6. Do you have a valid medical marijuana card?
7. Do you use regularly with that card?

This can help establish the time period in which that person has used marijuana or another drug. The goal is to establish whether there was repeated use over a period of a few months to many years, and that the person possessed the gun during that time. Additionally, having a medical marijuana card, and using, is enough to show that someone is an unlawful drug user because marijuana is federally prohibited, even though medical marijuana is legal at the state level.

So, for example, if someone admits to smoking weed every day, repeatedly posts images on social media with marijuana, or has a medical marijuana card and uses, these facts indicate repeated use. A medical marijuana card is helpful in this evaluation, but still requires an admission of repeated use from the individual. So, ask, "I see you have a medical marijuana card… are you using marijuana currently with that card?"

In *United States v. Bowens*, officers initiated a traffic stop and discovered the defendant in possession of a blunt and two firearms. They arrested him and charged him possession of firearms while being an unlawful drug user. To prove this, the officers found posts from the defendant's Facebook that showed him smoking marijuana and discussing his cannabis use. He posted videos of himself smoking blunts and posted statements including "too high last night," "getting high and drunk da whole day," and "smoking dope wit da demons" over the course of seven months leading up to the arrest.

The issue was whether or not the defendant qualified as an unlawful drug user. The court held that the social media evidence of the defendant's drug use over the seven months was sufficient to categorize him as an unlawful drug user. Because he was smoking marijuana, a federally banned substance, repeatedly over an extended period of time and possessed the firearm during that period, he was an unlawful drug user.

Q. Does possessing drugs, alone, indicate that a person is an unlawful user?

A. Not on its own. One instance of possession does not establish a repeated pattern of drug use. If the person has been charged with multiple instances of possession over a period of months or years and admits that they have used the drug for an extended period of time, then that indicates they are an unlawful user and therefore a disqualified adult.

Q. Is the quantity of the drug found on the person useful in determining if they are an unlawful user?

A. Possibly, but again some work needs done and questions asked. If the person has a quantity indicating extensive personal use, that is helpful, but mere possession of a controlled substance, on its own, does not show that the person is a disqualified adult. What matters here is an established period of drug use over the course of months or years.

Q. Does the presence of drug paraphernalia mean that person is a disqualified adult?

A. Not by itself. Finding drug paraphernalia, particularly if it has residue on it, indicates a recent use. If an officer finds a firearm, plus paraphernalia, plus the individual admits that they have used the drug frequently, over a period of a few months to years, then that is sufficient.

For example, if an officer conducts a traffic stop and finds a marijuana pipe and a gun, a follow-up question is required. Asking "do you smoke marijuana?" and "for how long have you been a smoker?" would help establish that the person is a regular user. These factors together would be enough to establish that the person is a disqualified adult. But possessing paraphernalia alone is not enough to indicate that person is a habitual user.

Q. If an officer finds suspected marijuana on an individual, does it need to be tested to disqualify that person?

A. It depends. If the person admits that the substance is marijuana, testing it could helpful to show that the individual used illegal drugs while they possessed the firearm. What is most important, however, is establishing a pattern of repeated use, and that they possessed the firearm during that timeframe. If they do not admit that

the substance is marijuana, or the substance cannot be tested, it does not mean that an officer cannot find other indications that the person is a disqualified user.

Q. Can using the totality of the circumstances be enough to show that someone is a drug user? For example, if they leave a known drug house after a short period of time, a K9 alerts an officer that there are drugs in the car, and the car contains paraphernalia?

A. Possibly. These factors show that the individual possesses or uses drugs, but are not enough together to show that they are a habitual and repeated user. While one instance of possession is insufficient to show a pattern of use, it may provide a basis to ask more questions. If the person admits to using the drug for months or years, and admits to recent use, then that would establish that they are a disqualified adult.

Q. Is someone who drinks alcohol daily a disqualified adult?

A. Maybe… but it will be difficult to find evidence of it. If they admitted to being an alcoholic, have repeated DUI citations, or had prior criminal offenses directly related to alcohol abuse, then that could indicate they are an alcoholic. However, this needs to be an extensive history of alcohol consumption and abuse over a significant period of time.

For example, if an officer pulls over a car after running the plate, and because the driver's license was suspended for a DUI, and finds a firearm in the car, that alone is not enough to establish that the driver is a chronic alcoholic. That person would need multiple convictions for alcohol-related crimes and evidence of recent alcohol consumption, like an open container.

Q. If an officer knows an individual is intoxicated and possesses a gun, does that make that person a disqualified adult?

A. No, not necessarily. In order to be a disqualified adult, the person must exhibit a pattern of drug or alcohol abuse that spans a significant period of time. Even if an officer has seen this person intoxicated before, the individual is not disqualified until the officer establishes a pattern of repeated drug use over months or years. One instance of intoxication is not sufficient to show repeated drug use.

However, this person is breaking the law, and ***an officer may seize the firearm*** if someone is intoxicated with alcohol or a drug of abuse. **R.C. 2923.15** provides that,

"no person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance." Violation of this statute is a first degree misdemeanor. An officer may also see his as an opportunity to ask further questions/do further research to determine if the person is also a disqualified adult.

8. Seizing Guns in Plain View in Vehicles

Q. Can an officer retrieve a firearm from an unattended motor vehicle (locked or unlocked) when the firearm is in plain view?

A. This doesn't relate directly to permitless carry, but the answer is complicated by permitless carry. If the gun is in plain view in an unlocked car in a place open to the public, and it is a handgun, and an officer believes that handgun presents a safety issue/exigent circumstance due to its accessibility, it can be seized *temporarily* for community caretaking reasons. However, if the car is locked, and it is a handgun, it likely cannot be seized unless you have PC to believe the weapon is illegal for some other reason. If the weapon in plain-view is a rifle (see ORC 2923.16(C) (4) for rifle specifics) or dangerous ordnance, and it is on the seat unattended, it can be seized. We say all of this because a handgun on the front seat, by itself, is not illegal, and thus to seize it would have to pose a safety concern.

The plain view exception permits an officer to seize an object without a warrant as long as (1) the officer is lawfully positioned in a place from which the object can be plainly viewed; (2) the incriminating character of the object is immediately apparent; and, (3) the officer has a lawful right of access to the object itself. *United States v. Bishop*, 338 F.3d 623 (6th Cir. 2003), *Citing Horton v. California*, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

The 6th Circuit has also held that a police officer who discovers a weapon in plain view **may at least temporarily seize** that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety. *United States v. Bishop,* 338 F.3d 623 (6th Cir. 2003). In addition, that court upheld the precedent that an officer's seizure of a weapon that was not obvious contraband based on an officer's reasonable belief that the weapon posed a threat to officer safety.

An unlocked car is dangerous because anyone could come and open the door, take the weapon, and use it in a criminal situation. *State v. Hoyer*, 9th Dist. Wayne, 30 Ohio App. 3d 130. When "facts indicate to an officer that a gun is loose in a public area or in an unattended automobile, which is subject to intrusion by vandals or

thieves, the public safety concerns involved justify an easing of both the Miranda requirements and the requirements for search and seizure."

Therefore, if the car is unlocked, the officers may seize the weapon temporarily unless they discover evidence that would permit them to retain the weapon for longer. For example, if the serial number is scratched off or there are drugs in the car with the guns, then that would change the situation and the officers could retain the gun.

If the car is locked, the officers may not seize the handgun because the plain view doctrine does not permit seizing evidence "whose criminal nature is not immediately apparent." ." *Bishop*, F.3d 623. Simply having a loaded hand gun on the seat is not illegal in Ohio. In fact, the presumption in Ohio now is that a person may engage in pemitless carry unless disqualified. Unless the officers know that the person who owns the car or the gun is a disqualified adult, or under a disability, they cannot seize the hand gun from the locked car. Therefore, in short: any firearm left in an unlocked car in plain view in a public place can be seized for safety reasons, but a handgun in a locked car, unless the officer has further reason to suspect criminal activity, may not be seized.

9. Traffic Stops Based on Running Plates—Extending the Stop

Q. This isn't strictly a gun issue, but these stops sometimes lead to the discovery of a gun, or drugs, and the case we cite below in the answer is a traffic-stop gun case. We often get this question, or some variation thereof: if an officer stops a vehicle because the license plate on the car is registered to a person not permitted to drive, but upon contact, the officer discovers the driver is not the registered owner, may the officer continue to detain the driver/vehicle long enough to ask for and check identification of the driver? In other words, ay the officer detain the person after they figure out they are not the registered owner?

A. No. When reasonable suspicion ceases to exist, there is no basis to ask for identification in these situations, and absent some other facts, reasonable suspicion ceases to exist as soon as the officer realizes the driver is not the registered owner. The extension of an otherwise legitimate stop to investigate a person's license status is impermissible.

***State v. Lewis*, 2022-Ohio-3006 (11th App. Dist.)**

Facts: Patrolman Andrew Centrackio of the Chester Township Police Department testified that for the entirety of his shift on March 15, 2021, he was in a parking lot running random registration checks on passing vehicles. He entered the tag of a Kia

Forte into the Law Enforcement Automated Data System (LEADS), which showed the registered owner, Jessica Dunlap, was a suspended driver. At that time, he had not yet observed the driver but had reviewed Dunlap's identifying information in LEADS, including her height, weight, and gender. Centrackio performed a traffic stop of the vehicle.

Upon approaching the vehicle, Centrackio observed that the driver did not match Dunlap's description, whom he knew to be a white female, and was instead an African American male, later identified as defendant Lewis. A female, later identified as Dunlap, was in the passenger seat. Centrackio informed Lewis that the reason for the stop was the invalid license of the registered owner. Centrackio asked Lewis if he had a valid license. Lewis responded that he believed his license was valid, pointed to the passenger, and stated he believed she had a valid license. Centrackio then asked for Lewis' license and was provided a state identification card. The dash cam video recording shows that upon taking the identification, Centrackio indicated "if you're valid, you guys are good to go." Centrackio testified that he requested identification to document the driver in his report and to confirm that Lewis was legally able to drive the vehicle. Centrackio entered Lewis' information into LEADS and determined he had a suspended driving status and outstanding warrants.

Since there was no valid driver, Centrackio contacted a tow truck for the vehicle. As the warrants indicated the potential that Lewis was armed, Centrackio asked him whether there was a weapon in the vehicle. Lewis confirmed that there was and, when asked of its location, he pointed to the front passenger side door compartment, said it was unloaded, and granted permission to enter the vehicle. A firearm was recovered as well as a loaded magazine.

Issue: Should the officer have released Lewis once the officer realized Lewis was not the registered owner, given the sole basis for the stop was suspicion the registered owner was illegally driving, or was it legally permissible to continue to detain him in order to ask him if he was licensed, and to ask for the license?

Holding: Lewis should have been released as soon as the officer realized Lewis was not the registered owner. Although the initial stop was justified, the continued detention to verify his driving status was impermissible. There was no legally justifiable reason for continuing the detention/stop because reasonable suspicion no longer existed once the officer knew with certainty that the registered owner was not driving the vehicle. Thus, the gun that was found as a result of the continued unlawful detention was suppressed.

Please bear in mind that if an officer, in these situations, develops independent reasonable suspicion or probable cause upon contact, but before or simultaneous with realizing the driver is not the registered owner, the officer may then continue the detention. For example, if upon contact the officer smells burning marijuana emanating from the car, the officer could then continue the stop given the officer developed independent reasonable suspicion of drug activity, and/or PC to search the passenger compartment of the vehicle, before or at the same time as realizing the registered owner is not the driver. Also bear in mind that if an officer makes such a stop, and upon contact isn't certain if the driver is the registered owner, but still has reasonable suspicion based on appearance they may be the registered owner, the officer may ID the driver.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) and Ty McCoy (tjmccoy@columbus.police.org) October 31st, 2022

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

ELECTION DAY ISSUES

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I. INTRODUCTION AND IMPORTANT PHONE NUMBERS

Columbus Division of Police Emergency Operations personnel, as well as Ty McCoy and myself (Jeff Furbee), will be available throughout **Election Day/November 8th, 2022,** at the numbers listed below—we will all be working closely with the Board of Elections to assure any questions are quickly answered, and any conflicts quickly resolved:

Columbus Division of Police Emergency Operations Center -- 645-4449/4451 or 4419 & EOC Dispatchers 645-1799

Legal Advisor Jeff Furbee – (c) 614-499-5304 (Office) 645-4523

Legal Advisor Ty McCoy (c) 614-774-7605 (Office) 645-2606

II. ELECTION DAY LEGAL ISSUES

A) Officers should charge a citizen for violating the election laws found in O.R.C Title 35 *only* if personnel from the Franklin County Board of Elections, or the presiding election official at the polling place, requests or orders such a charge be filed:

We want to start out by saying that you should attempt to avoid filing charges pursuant to Title 35. Police officers should deal with disturbances at or near polling places, whenever reasonably possible, by trying to stop the behavior without filing a charge, or by filing a criminal charge pursuant to ORC Title 29 or the Columbus City Code. The only time a police officer should enforce the laws found in Title 35 through a charge is if personnel from the Franklin County Board of Elections, or the presiding election official at the polling place, specifically requests or orders an officer to do so. The presiding election official at each polling place has the authority to *order* an arrest of a violator in certain circumstances pursuant to ORC § 3501.33. You as an officer have a legal duty to follow such an order pursuant to ORC § 3599.31. You as an officer also have legal duty pursuant to ORC § 3501.34 to arrest anyone "found violating" Title 35. These ORC sections, which explain the authority of election officials, are at the end of this section.

In light of the fact that officers have a legal duty to enforce ORC Title 35, we are not suggesting you ignore conduct you observe, or otherwise learn of, which you believe could be an election law violation. We simply advise that rather than filing the charge on your own, you immediately report the conduct to Board of Election personnel, and/or the presiding election official at the polling place, so that they can analyze whether a violation of Title 35 has in fact taken place. You should also advise the CPD EOC of the situation. If you have any legal questions you can of course contact your Legal Advisors.

§ 3501.33. Authority of precinct officers

All precinct election officials shall enforce peace and good order in and about the place of registration or election. They shall especially keep the place of access of the electors to the polling place open and unobstructed and prevent and stop any improper practices or attempts tending to obstruct, intimidate, or interfere with any elector in registering or voting. They shall protect observers against molestation and violence in the performance of their duties, and may eject from the polling place any observer for violation of any provision of Title XXXV of the Revised Code. They shall prevent riots, violence, tumult, or disorder. In the discharge of these duties, they may call upon the sheriff, police, or other peace officers to aid them in enforcing the law. They may order the arrest of any person violating Title XXXV of the Revised Code, but such an arrest shall not prevent the person from registering or voting if the person is entitled to do so. *The sheriff, all constables,* ***police officers****, and other officers of the peace* ***shall immediately obey and aid in the enforcement*** *of any lawful order made by the precinct election officials in the enforcement of Title XXXV [35] of the Revised Code.*

§ 3501.34. Duty of police

The officer or authority having command of the police force of any municipal corporation or the sheriff of any county, on requisition of the board of elections or the secretary of state, shall promptly detail for service at the polling place in any precinct of such municipal corporation or county such force as the board or secretary of state considers necessary. On every day of election such officer or authority shall have a special force in readiness for any emergency…. At least one policeman shall be assigned to duty in each precinct on each day of an election, when requested by the board or the secretary of state. ***Such police officer*** *shall have access at all times to the polling place, and he* ***shall promptly place under arrest any person found violating*** *any provisions of Title XXXV [35] of the Revised Code.*

§ 3599.31. Failure of officer of law to assist election officers

No officer of the law shall fail to obey forthwith an order of the voting location manager and aid in enforcing a lawful order of the voting location manager at an election, against persons unlawfully congregating or loitering within one hundred feet of a polling place, hindering or delaying an elector from reaching or leaving the polling place, soliciting or attempting, within one hundred feet of the polling place, to influence an elector in casting the elector's vote, or interfering with the registration of voters or casting and counting of the ballots. Whoever violates this section is guilty of a misdemeanor of the first degree.

B) If on Election Day an Officer is confronted with the possibility of filing a charge pursuant to ORC Title 35, they should act as follows:

One, the officer should ask the presiding election official which section of Title 35 is allegedly being violated and what facts establish probable cause for such a violation. The most likely sections an officer would be asked/ordered to enforce are ORC § 3501.35 – No loitering or congregating near polling places, and/or § 3599.24 -- Interference with conduct of election. These provisions are included at the end of this section.

Two, the officer should then ask the presiding election official if they already have ordered the alleged offender to desist from the offending conduct. If they have not yet done so, the officer should ask the presiding election official to first do that with the hope that enforcement action can be avoided. An officer can certainly assist the presiding election official in giving the order to the alleged offender, and/or the officer can give follow-up orders to gain compliance. If the offender continues their conduct after being ordered to desist, then an officer should confirm if the presiding election official is ordering the officer to pursue a charge pursuant to Title 35. If the presiding election official orders a charge be filed, the officer should complete the charging instrument, and then have the presiding election official sign the affidavit. If the offender is "found violating" any provision of Title 35, their arrest is mandated by ORC § 3501.34. An officer could of course choose to later release that person on a summons. If a citizen is arrested for any offense under Title 35, the officer must assure the offender gets to vote if they are an eligible voter at that polling place. Finally, all if these interactions should be done in the least obtrusive and least visible manner as is reasonably possible.

§ 3501.35. No loitering or congregating near polling places.

(A) During an election and the counting of the ballots, no person shall do any of the following:

(1) Loiter, congregate, or engage in any kind of election campaigning within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line;

(2) In any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector's ballot;

(3) Give, tender, or exhibit any ballot or ticket to any person other than the elector's own ballot to the precinct election officials within the area between the polling place

and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line;

(4) Exhibit any ticket or ballot which the elector intends to cast;

(5) Solicit or in any manner attempt to influence any elector in casting the elector's vote.

(B) (1) Except as otherwise provided in division (B) (2) of this section and division (C) of section 3503.23 of the Revised Code, no person who is not an election official, employee, observer, or police officer shall be allowed to enter the polling place during the election, except for the purpose of voting or assisting another person to vote as provided in section 3505.24 of the Revised Code.

(2) Notwithstanding any provision of this section to the contrary, a journalist shall be allowed reasonable access to a polling place during an election. As used in this division, "journalist" has the same meaning as in division (B) (2) of section 2923.129 of the Revised Code.

(C) No more electors shall be allowed to approach the voting shelves at any time than there are voting shelves provided.

(D) The precinct election officials and the police officer shall strictly enforce the observance of this section.

**** ORC § 3599.40 makes violation of § 3501.35 a first degree misdemeanor.***

§ 3599.24. Interference with conduct of election

(A) No person shall do any of the following:

(1) By force, fraud, or other improper means, obtain or attempt to obtain possession of the ballots, ballot boxes, or pollbooks;

(2) Recklessly destroy any property used in the conduct of elections;

(3) Attempt to intimidate an election officer, or prevent an election official from performing the official's duties;

(4) Knowingly tear down, remove, or destroy any of the registration lists or sample ballots furnished by the board of elections at the polling place;

(5) Loiter in or about a registration or polling place during registration or the casting and counting of ballots so as to hinder, delay, or interfere with the conduct of the registration or election;

(6) Remove from the voting place the pencils, cards of instruction, supplies, or other conveniences furnished to enable the voter to mark the voter's ballot.

(B) Whoever violates division (A) (1) or (2) of this section is guilty of a felony of the fifth degree. Whoever violates division (A) (3), (4), (5), or (6) of this section is guilty of a misdemeanor of the first degree.

C) Columbus City Code 2317.52—Harassment of Election Officials

This new City Code section is in many ways an expansion of the state code election officer intimidation section listed above in ORC § 3599.24(A)(3). It specifically prohibits intimidation, coercion, threats or harassment of election officers, or their family members, though any means, including telecommunications. Violation of this section is an M-1 that carries three-days of mandatory jail time. The listed victim for this charge will be the actual Election Officer, or the family member of the election officer, who was harassed, intimidated, coerced, or threatened. As with the codes listed above, if enforcement/arrest is needed, the alleged offender should be afforded the ability to finish voting if at a polling place, and any enforcement action should be taken in the least conspicuous manner possible.

(A) As used in this section:

(1) "Election officer" has the same meaning as in section 3501.27 of the Ohio Revised Code.

An election officer should have a certificate of appointment from the Board of Elections.

(2) "Telecommunication" has the same meaning as in section 2913.01 of the Ohio Revised Code and shall include, but not be limited to, any email, voicemail, fax, text, instant message, communication over or through any social media platform, and any other form of digital, electronic, or telephonic communication.

(3) "Telecommunications device" has the same meaning as in section 2913.01 of the Ohio Revised Code.

(4) "Communication" shall include any other method of communication not set forth above including, but not limited to, any communication via U.S. Mail, private mail service, private delivery service, by in-person conduct, or through any other method intended to communicate with an election officer.

(B) No person shall knowingly cause or permit a telecommunication to be made to an election officer or their family to threaten, intimidate, coerce, or harass that person in connection with their election responsibilities;

(C) No person shall directly communicate or encourage someone else to communicate with an election officer or a family members to threaten, intimidate, coerce, or harass that person in connection with their election responsibilities;

(D) No person shall recklessly attempt to hinder or interfere with an election officer in the execution of their duties including the limitations enumerated in R.C. §§ 3501.35 and 3501.90.

(E) Any person who violates this section is guilty of election interference, a misdemeanor of the first degree with a mandatory jail term of at least three days. These days may not be suspended, and during the consecutive confinement the defendant is not eligible for probation, house arrest, or work release.

D) If an Officer is called to a polling place over a disturbance of some sort the Officer should attempt when possible to deal with the observed criminal behavior without reference to Ohio election laws (Title 35):

For example, if an officer is called to a disturbance, and the person is acting in a disorderly manner in or about the polling place, and the presiding election official does not request/order a charge be pursued pursuant to Title 35, the Officer should focus on Disorderly Conduct and warn/cite the person for that offense if need be. As stated, only refer to the election laws if that specific direction comes from Board of Elections Officials or the presiding election official. If an officer charges a citizen with a non-election offense in or about the polling place, even though the person is not being charged under Title 35, the officer should still make all reasonable efforts to assure the person gets to vote if they are in fact eligible to vote at that location.

If an officer sees behavior at or near a polling place, which would be criminal in any setting (for example; an assault, or theft, or criminal damaging) the officer should deal with that behavior as they would any other time. Officers should make all reasonable efforts to minimize the impact their presence in or about the polling places. However, the bottom-line is that an officer still must do normal police work in a safe manner, even if it happens to be at or near a polling place. For example, if an officer saw an individual assaulting another person in the parking lot of a polling place outside the flags, the officer would enforce the criminal law at that time just as they would any other time.

E) Police Officers, while acting within the scope of their duties on Election Day, and while performing their duties related to the election, are <u>not</u> allowed to attempt to influence voters:

§ 3599.38. Illegally influencing voters

(A) No election official, observer, deputy sheriff, special deputy sheriff, or ***police officer,*** while performing that person's duties related to the casting of votes, shall do either of the following:

(1) Wear any badge, sign, or other insignia or thing indicating that person's preference for any candidate or for any question submitted at an election;

(2) Influence or attempt to influence any voter to cast the voter's ballot for or against any candidate or issue submitted at an election.

(B) Whoever violates division (A) of this section is guilty of a misdemeanor of the first degree.

F) The Role of "Election Observers" at Polling Places:

There may be "observers" in and about polling places pursuant to ORC 3505.21. Observers cannot just show up to watch the election or to make sure things are done fairly—if someone claims to be an observer or monitor, but is not properly appointed, they cannot loiter in and about the polling place when they aren't in the process of actually voting. Observers must have been properly appointed prior to the day of the election—election officials will determine if they are properly appointed. In other words, someone cannot decide on election-day they are a self-appointed observer and are going to hang out in and about the polling place—that would be illegal. If properly appointed, and carrying appropriate papers, "observers" are permitted to be in and about the polling places throughout the day of the election, and to observe the proceedings. There should be a limited number of them at any polling place. Observers are prohibited from campaigning, influencing/attempting to influence voters, or wearing any sign or insignia indicating a preference for any candidate. Observers are also prohibited from hindering an elector, interfering with the election, carrying a firearm, or filming in the polling-place. An election official could <u>order</u> you to eject an observer. Finally, election officials have a legal duty to protect official observers from molestation or violence.

G) Members of the media are allowed in and about the Polling Places to report on the conduct of the election:

Our Federal Appeals Court has ruled in *Beacon Journal Publ. Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004), that the media shall have reasonable access to any polling place for the purpose of news-gathering and reporting so long as they do not interfere with poll workers and voters as voters exercise their right to vote. In other words, members of the media may loiter in and about the polling places to gather news.

H) Exit Polling done inside the flags at a polling place, meaning within 100 feet of the polling places, is permissible:

Exit polling is permitted at polling places inside of the campaign free zone, which is the area between the polling place and the flags. Generally those doing exit polling will stand just outside of the polling place, meaning inside of the flagged area, and ask exiting voters a series of questions about how they voted. Participation by the voter in this process is purely voluntary. Exit polling involves no form of electioneering or campaigning or intimidation. Exit polling, on the surface, might seem to violate ORC § 3501.35(A) (1) and/or 3599.24(A) (5), which prohibits any person to loiter between the flags or in or about the polling place. However the 6th Circuit Court of Appeals in *ABC v. Blackwell*, 479 F. Supp. 2d 719 (6th Cir. 2006), stated that exit polling does not violate this section. This decision only applies to exit polling. Campaigning inside of the flags violates the law.

I) Property owners who have polling places on their private property still have property rights:

Private property owners, schools and churches do not surrender all of their property rights just because they have a polling place on their property. What do we mean by this? If a church, school, or another private property is used as a polling place, and the flags extend one hundred feet from the actual building being used to vote, but the property of the church, school or other private property extends further beyond the flags until reaching the public right-of-way, the church, school or other private property owner may exclude campaigners and/or protestors from their private property between the flags and right-of-way. In *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), the 6th Circuit Court of Appeals basically ruled that just because a non-public building (a non-public forum) is used as a polling place does not convert those portions of the property not used for voting into a public forum. So unless the government has taken steps to open up the private areas of these entities (schools, churches, private buildings) outside of the flags as public forums, they are not. Thus if the school officials, church leaders, or

private property owners ask you to tell campaigners or protestors to move off of their private property onto the public sidewalks or public right of way, you can tell the campaigners or protestors to do so under threat of a criminal trespass charge.

CAUTION: One, these restrictions must be content neutral, meaning all campaigners or protestors would have to be excluded from the private property, or none. Two, this should only happen at the request of the person in charge of the property. Three, this has to be considered on a case by case basis because the basic nature of property vs. public-right-of-way can be confusing.

J) No campaigning or electioneering of any kind is allowed within 100 feet of the polling place, even if it is done on a traditional public forum such as a sidewalk. Campaigning is also not allowed within 10 feet of the line of voters if the line extends beyond the 100 foot campaign free zone around polling places:

This was also a part of the ruling in *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004). The court in that case reiterated that some restricted zone around polling places is necessary to protect the fundamental right to vote, even when that right conflicts with the exercise of free speech. In Ohio, that restricted zone is 100 feet from the polling place and 10 feet from the line of voters if the line extends beyond the flags. If the protestors or campaigners are within the public right of way, and aren't violating any election laws, and don't present a danger to the public, they can generally campaign, protest, and even erect small non-obstructive temporary signs in the right-of-way.

K) If you are dispatched on a claim of voter fraud, you should confer with elections officials, and if need be, take a report, which will then be forwarded to the County Prosecutor:

There are voting fraud sections in Title 35, such as ORC § 3599.12 - Illegal voting, which prohibits voting more than once or impersonating another to vote. These sections require further investigation and analysis before a charge would ever be filed.

L) Weapons in or about Polling Places:

There is no blanket prohibition against carrying a weapon in a polling place in Ohio, *BUT* given that most polling places are in School Safety Zones, Courthouses/buildings in which a Courthouse is located, Churches, other Government Buildings, or private property that bans weapons, weapons are generally barred at those locations. **(See ORC 2923.126 below for**

list of prohibited places). Private property owners have the right to ban all weapons on their property. It was held in *Dressler v. Rice,* 739 Fed. Appx. 814 (6th Cir. 2018) that nothing suggests the Second Amendment or Ohio Rev. Code Ann. § 9.68 prevents a private landowner from excluding people from carrying guns on their land. Like most rights, the right secured by the Second Amendment is not unlimited. The right is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. Election observers cannot have weapons in polling places. Finally, if the rare circumstance exists that a polling place happens to be in a place where weapons are not barred, it would be illegal to use the weapon to intimidate or hinder in any manner.

Plus, keep in mind, no one, who is not an election official, employee, observer, or police officer shall be allowed to enter the polling place during the election, except for the purpose of voting or assisting another person to vote. (See ORC 3501.35(B) (1)). No one, but for proper observers, and media members, are allowed to loiter between the flags and the polling place, or within 10 feet of the line of voters. So, if someone, who is not a voter at that location, or who has already voted, attempts to enter or remain in the polling place, or within the flagged areas, while carrying a weapon, they may be ejected as would anyone loitering. Once again, always seek guidance from the election official at the polling place if you are called on for such an issue.

2923.126 Prohibited places:

(B) A valid concealed handgun license (*nor permitless carry*) does not authorize the licensee to carry a concealed handgun in any manner prohibited under division (B) of section 2923.12 of the Revised Code or in any manner prohibited under section 2923.16 of the Revised Code. **A valid license does not authorize the licensee to carry a concealed handgun into any of the following places:**

(2) A **school safety zone** if the licensee's carrying the concealed handgun is in violation of section 2923.122 of the Revised Code;

(3) A **courthouse** or another building or structure in which a courtroom is located if the licensee's carrying the concealed handgun is in violation of section 2923.123 of the Revised Code;

(4) Any premises or open air arena for which a D permit has been issued under Chapter 4303 of the Revised Code if the licensee's carrying the concealed handgun is in violation of section 2923.121 of the Revised Code;

(5) Any premises owned or leased by any public or private college, university, or other institution of higher education, unless the handgun is in a locked motor vehicle or the person is in the process of placing it into the locked vehicle, or unless the person is carrying the concealed handgun pursuant to a written policy, rule, or authorization adopted by the institution's board of trustees or other governing body and that authorizes specific individuals or classes of individuals to carry a concealed handgun on the premises;

(6) Any church, synagogue, mosque, or other place of worship, unless the church, synagogue, mosque, or other place of worship posts or permits otherwise;

(7) Any building that is a government facility of this state or a political subdivision of this state and that is not a building that is used primarily as a shelter, restroom, parking facility for motor vehicles, or rest facility and is not a courthouse or other building or structure in which a courtroom is located that is subject to division (B)(3) of this section, unless the governing body with authority over the building has enacted a statute, ordinance, or policy that permits a licensee to carry a concealed handgun into the building;

(8) A place in which federal law prohibits the carrying of handguns.

§ 2923.122 Illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of object indistinguishable from firearm in school safety zone.

(A) No person shall knowingly convey, or attempt to convey, a deadly weapon or dangerous ordnance into a school safety zone.

(B) No person shall knowingly possess a deadly weapon or dangerous ordnance in a school safety zone.

M) Intimidation or Interference:

ORC § 3501.35(A)(2) prohibits any person from, in any manner, hindering or delaying an elector in reaching or leaving the place fixed for casting of ballots. ORC § 3599.24(A)(3) prohibits any person from attempting to intimidate an election official, and ORC § 3599.24(A)(5) prohibits any person from loitering in or about a polling place during the casting of ballots so as to hinder, delay or interfere with the election. ORC § 3501.33 requires precinct election officials to keep the place of access of the electors to the polling place open and unobstructed and prevent and stop any improper practices or attempts tending to obstruct, intimidate, or interfere with any elector in registering or voting.

Pursuant to these ORC sections, precinct election officials certainly have the ability to control activities in the polling place, and in the area within the flags. However, precinct election officials may also prevent behavior, which occurs outside the flags, if this behavior is done in an attempt to obstruct, intimidate or interfere with an elector who is trying to vote, or if it is done to intimidate an election official. Under the ORC election officials are also called upon to regulate some behaviors, which occur "in or about" a polling place. Depending on the design of the voting location, this too could contemplate areas outside the flags, but near voters.

So, if a group of individuals congregate together on the sidewalks, or other areas, leading up to, or adjacent to the polling location, but outside the flags, and they engage in behavior deemed intimidating or obstructive, an election official could ask officers to confront those individuals. If an officer is called upon for such a situation, the officer should speak to the election officials at the location, and if need be, speak to any victims, and suspects.

As stated above, the City of Columbus recently enacted an ordinance that makes it a first degree misdemeanor to harass an election official verbally or through electronic communications. It carries a mandatory minimum jail time, and can be found in Columbus City Code § 2317.52- Harassment of Election Officials, on page 6 in this document.

N) Opening and Closing of Polls:

Pursuant to ORC 3501.32, polls shall remain open until seven-thirty p.m., or until the voters waiting in line at seven-thirty p.m., are permitted to vote. In other words, if a polling place has a long line of person waiting to vote at 7:30 p.m., that polling location will remain open until after 7:30 until those people in line get to vote. *Officers have no role in making decisions about such issues*, but if an officer is curious or asked about why a polling place remains open, this is one possible reason.

O) There are numerous sections of Title 35 which regulate conduct of elections officials, especially at polling places. If you see anything which appears to be irregular, contact the CPD EOC (4449) in order to have this concern brought to the attention of the Board of Elections.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org)and Ty McCoy (tjmcoy@columbuspolice.org) December 20th, 2022

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

In this Edition:

The flight of a suspected misdemeanant does ***not*** always justify a warrantless entry into a home. A warrantless home arrest cannot be upheld simply because evidence of the suspect's blood alcohol level might have dissipated while the police obtained a warrant. An officer must consider all circumstances in a (misdemeanor) pursuit case to determine whether there is an emergency/exigency.

Good CPD case! Inventory search of a lawfully impounded vehicle is reasonable under the 4th Amendment when performed in good faith pursuant to standardized police policies/procedures. An area can be reasonably accessible even if not designed or typically utilized for storage.

While not all traffic stops trigger *Miranda*, if a motorist who has been detained pursuant to a traffic stop is subjected to treatment that renders him in custody, he will be entitled to *Miranda* warnings before questioning. Questioning suspect during a traffic stop in the front seat of a police vehicle does not rise to level of a custodial interrogation when: (1) the intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or non-intimidating.

I. When Can an Officer Enter a Home when in Hot-Pursuit of an OVI Suspect?

City of Westlake v. Roberts, **2022-Ohio-3675 (8th App. Dist.)**

Critical Points of the Case:

- **The flight of a *suspected misdemeanant does not always justify a warrantless entry* into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter, to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so even though the misdemeanant fled.**

- **A warrantless home arrest cannot be upheld simply because evidence of the suspect's blood alcohol level might have dissipated while the police obtained a warrant. Application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is PC to believe that only a minor offense is involved.**

- **Practical legal advice: if you are in pursuit of a suspect who has committed a misdemeanor offense, and they flee into a home, you should immediately consider if there is *another* exigent circumstance to justify the entry. For example, if the fleeing misdemeanant fled into a darkened home with which they had no known association, that situation likely would be an exigent circumstance due to the danger the flight and entry would pose to anyone present in the home.**

Facts: Patrolman Thomas Patrick Cummings of the City of Westlake Police Department testified that on December 18, 2020, at approximately 8:45 p.m., police dispatch broadcasted a report of a "possible intoxicated driver." The dispatch information included a description of the vehicle, the license plate number, and the listed address on Dover Center Road associated with the registered owner of the vehicle. Patrolman Cummings proceeded to the area of Dover Center Road and Detroit Road. After observing the suspect's vehicle stop for a red light and turn north on Dover Center Road, Patrolman Cummings got behind the vehicle and activated his overhead lights. The suspect then pulled in the driveway of the residence associated with the vehicle and pulled up by the house. Patrolman Cummings testified that from the point of activating the marked police cruiser's overhead lights to the point of the suspect pulling into the driveway was approximately the distance of one residence, which was only about 60 or 70 feet. Patrolman Cummings expressed with regard to initiating the stop, he "would not say that the suspect had fled from us in his vehicle. He was just delayed in his stopping." Patrolman Cummings did not observe any firsthand signs of impairment.

Patrolman Cummings followed the suspect's vehicle into the driveway. He testified that once the suspect exited his vehicle, he fled into the home, even though the officer told him to stop several times. Patrolman Cummings confirmed that although he originally responded to investigate a report of a possible intoxicated driver, he did not believe he had probable cause to make an arrest for operating a vehicle under the influence ("OVI") at the point the suspect exited the vehicle. However, he testified that regardless of whether the suspect was impaired, he fled from the lawful order of a police officer.

Patrolman Cummings testified that the suspect, Roberts, after momentarily fumbling at the door, gained entry to the house. Patrolman Cummings proceeded to testify as follows:

> The male did gain entry into the house. At which point, the door that enters into the house closed behind him. [Patrolman Cummings and Patrolman Carmen, who was with him,] were close enough that we opened the door in pursuit of the male. There was a gentleman standing in the hallway area right there at the door. At which point, he was not the male that I had observed flee from the vehicle, so I stopped to speak briefly with him, asking where the male had gone. Patrolman Carmen went behind me in pursuit of the male into the house, and I followed Patrolman Carmen. At which point, Patrolman Carmen located the male that we had pursued into the house sitting on the couch in the living room area. He was told to stand up. There were several people in the living room area including some small children. The male was secured for our safety and for the safety of the people in the house, and he was escorted out of the residence.

Patrolman Cummings testified that Roberts denied driving the vehicle and stated that he had been drinking at his mother's house and that he had not been driving. Patrolman Cummings described Roberts as "hurriedly moving" into the house upon exiting the vehicle. He testified that the individual who opened the door for Roberts appeared to be an occupant of the home and that the individual had a hand on the door handle. Roberts gained entry immediately before Patrolman Cummings reached him. Patrolman Cummings caught the screen door as it was closing and chased Roberts into the home. Patrolman Cummings did not ask to enter; he only asked the individual at the door where the person he was chasing went. Roberts was secured within "a couple seconds" of the police entering the home.

Patrolman Cummings indicated that he did not know whether Roberts was a threat; however, he testified that Roberts did not have anything in his hands and did not make any threatening moves towards the officers. Also, Patrolman Cummings did not feel the need to pull his taser or his own weapon for self-defense. Patrolman Cummings was aware the vehicle was registered to a residence in the approximate area on Dover Center Road, and there was no indication that Roberts did not belong at the house. Patrolman Cummings acknowledged that no one invited the officers into the

home, the individual at the door did not ask the officers for any help, and none of the occupants in the home were asking for assistance.

When asked why a warrant to enter the home was not obtained, Patrolman Cummings responded as follows:

> I felt we had exigent circumstances. We had an unknown male. We had a reported possible intoxicated driver. We had a gentleman fleeing from us into a residence. We were directly behind the male. I believe that we were at the time in hot pursuit of that male into the home.

Patrolman Cummings conceded on cross-examination that he easily could have stopped and knocked on the door and asked for the person he was chasing to come out. He also stated that he had the ability to contact his supervisor by phone or radio that night to obtain a warrant and that the process takes several hours. However, he also conceded it could possibly be a short delay, or a few minutes longer delay, to obtain the warrant.

Additional evidence was obtained by the police after the initial entry. According to the investigative report, Patrolman Cummings observed Roberts was slurring his words, had a strong odor of alcohol, admitted he had been drinking a few beers at his mother's house, and denied driving the vehicle. Reportedly, Roberts also had a hard time seeing the officer's stimulus pen, recited letters from the alphabet in random order, and refused further field sobriety testing. The police arrested Roberts for misdemeanor OVI.

Issue: Was this a good/legally valid warrantless home entry? Was there an exigent circumstance allowing the officer to pursue the fleeing misdemeanant into the house?

Holding and Analysis: No. Under the particular facts of this case, the city did not demonstrate an exigency that created a compelling law enforcement need for officers to make a warrantless home entry while in pursuit of the misdemeanant suspect. Because the nature of the crime, the nature of the flight, and surrounding facts presented no such exigency, the warrantless home entry by police in this case violated the Fourth Amendment. Although the police were pursuing a possible intoxicated driver who fled into his home, the totality of the circumstances shows no exigency to justify the warrantless home entry in this case.

"One important exception to the Fourth Amendment's warrant requirement is for exigent circumstances," which "enables law enforcement officers to handle 'emergencies'—situations presenting a 'compelling need for official action and no time to secure a warrant.'" *Lange v. California*, 141 S.Ct. 2011 (2021). In *Lange*, the United States Supreme Court rejected establishing a categorical warrant exception when a suspected misdemeanant flees from police into a home. The United States Supreme Court had previously found the warrantless entry into a home by police in

hot pursuit of a fleeing felon suspected of dealing drugs was justified in *United States v. Santana*, 427 U.S. 38 (1976), but *Santana* addressed a police pursuit of a *felony* suspect. Since *Santana* was decided in 1976, Ohio Courts have expanded the Santana holding and held that a fleeing misdemeanant could be categorically chased into a home during a hot-pursuit so they could not avoid arrest. See *Middletown v. Flinchum*, 95 Ohio St.3d 43 (2002). However, in 2021, the *Lange* decision undermined the holding in *Flinchum* and similar cases.

In *Lange*, the Supreme Court concluded as follows:

> The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.

Looking at the facts of this case, the court held as follows:

Once the police followed the suspect into the driveway and he exited his vehicle, the public danger posed by the potential OVI was over. Without diminishing the seriousness of drunk driving, we (the court) must uphold the constitutional protections afforded by the Fourth Amendment, which "draws a firm line at the entrance to the house." Although "a great many misdemeanor pursuits involve exigencies allowing warrantless entry," "whether a given one does so turns on the particular facts of the case." The city had the burden of showing that the warrantless entry fit within the exigent-circumstances exception to the Fourth Amendment's warrant requirement. Although the police were pursuing a possible intoxicated driver who fled into his home, the totality of the circumstances shows no exigency to justify the warrantless home entry in this case.

> The record shows that Patrolman Cummings had initiated a traffic stop after a motorist report of a possible intoxicated driver. After Roberts pulled into the nearby driveway, he exited his vehicle and hurriedly entered the home that was associated with the vehicle. Patrolman Cummings testified that he did not have probable cause for an OVI arrest when Roberts exited his vehicle. Patrolman Cummings, without asking for consent to enter, caught the door to the home as it was closing and entered immediately after Roberts. Patrolman Cummings testified that he entered the home because he was in hot pursuit of a possible intoxicated driver. He pointed to no exigent circumstances that would justify the warrantless entry. Although he testified that he did not know whether anyone was in harm's way, he conceded that he was responding to a suspected OVI, the suspect did not appear to have anything in his hands and made no threatening moves, the officers followed immediately behind Roberts into the home and did not feel the need to pull a taser or a handgun or to radio for backup, nothing indicated Roberts did not belong at the home, there were

no signs of distress in the home, none of the occupants were asking for help in the home, and there was no testimony that the police were concerned about Roberts's escape. Patrolman Cummings conceded that he could have asked for the person he was chasing to come out of the home and that he had the ability to contact his supervisor to obtain a warrant.

Although the flight may well have been an attempt to evade the police investigation of a potential OVI, this did not justify police conduct that violated constitutional protections. Relatedly, in *Missouri v. McNeely*, 569 U.S. 141 (2013), the United States Supreme Court rejected an argument that the natural dissipation of alcohol in a drunk-driving suspect's bloodstream constitutes a per se exigency that categorically justifies warrantless BAC testing. Thus, dissipation of alcohol, by itself, would not justify a warrantless entry pursuant to a loss of evidence exigency.

II. Where may an Officer look During an Inventory Search of a Vehicle? If an Officer finds Contraband during Inventory, can that Contraband be used for PC for immediate more Extensive Warrantless Search of Vehicle?

***State v. Johnson*, 2022-Ohio-1733 (10th App. Dist.)**

Critical Points of the Case:

- **This is good case law involving Columbus Police Officers. The inventory-search exception is a well-defined exception to the Fourth Amendment's warrant requirement. Under this exception, when a vehicle is lawfully impounded, police are permitted to follow a routine practice of administrative procedures for securing and inventorying the contents of the vehicle. An inventory search is intended to (1) protect an individual's property while it is in police custody; (2) protect police against claims of lost, stolen, or vandalized property; and (3) protect police from dangerous instrumentalities.**

- **An inventory search of a lawfully impounded vehicle is reasonable under the Fourth Amendment when it is performed in good faith pursuant to standardized police policies and procedures. A search which is conducted with an investigatory intent, ***and*** which is not conducted in the manner of an inventory search, does not constitute an inventory search, and may not be used as a pretext to conduct a warrantless evidentiary search. Similarly, an inventory search may not be used as a ruse for a general rummaging in order to discover incriminating evidence.**

- **An inventory search policy need not include every detail of search procedure. Inventory search policies may provide officers discretion in deciding which areas to search during an inventory. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.**

- **An area can be reasonably accessible even if not designed or typically utilized for storage. And the rationales behind the inventory-search exception support adopting policies to search areas that are not designed or typically utilized for storage but nonetheless may contain valuables, contraband and/or dangerous items.**

- **The reasonableness requirement would prohibit searches of those parts of a vehicle that require special tools or cameras (such as the inside of the gas tank) or that can be accessed only by damaging or substantially altering the vehicle (such as pulling up the carpet).**

- **An inventory search is not pre-textual simply because an officer expects or hopes to find contraband. The fact that an officer suspects that contraband may be found does not defeat an otherwise proper inventory search.**

Facts: At 1:26 a.m. on September 4, 2020, **Columbus Police Officer Kenneth Sanders** was on patrol when he observed a vehicle with only one functioning headlight traveling westbound on Sullivant Avenue. Sanders ran the vehicle's license plate through LEADS and discovered that the driver's license of the vehicle's registered owner was suspended. Based on that information, Sanders initiated a traffic stop of the vehicle. Sanders approached the vehicle, informed the driver of the reason for the stop, and asked him to produce his driver's license. After verifying that the driver, identified as Johnson, was the registered owner of the vehicle, Sanders placed him under arrest for driving under suspension.

During a search of Johnson's person incident to the arrest, Officer Sanders found a large sum of cash and an empty cellophane baggie in Johnson's pocket. Officer Sanders testified that when he removed the baggie from Johnson's pocket, Johnson said that it was an empty "bag of weed." Sanders did not inquire about the contents of the baggie and could not recall if the baggie contained any marijuana residue, seeds, or stems. The cash was separated into "small bundles" consisting of "a couple hundred bucks" per bundle; when questioned by Sanders, Johnson stated that he did not know how much money he had on him. Sanders asked Johnson where he was employed; Johnson responded that he was a self-employed painter.

Sanders cited Johnson for the headlight violation and driving while under FRA and OVI suspension and impounded Johnson's vehicle pursuant to Section II (A)(1) of the CPD policy. That section permits the impounding of a vehicle for "any of the reasons stated in the Columbus City Code Section 2107.01." Columbus City Code Section 2107.01(c) authorizes law enforcement officers to impound "any vehicle from which the driver has been arrested."

At the suppression hearing, Officer Sanders explained that when a registered owner of a vehicle is arrested for driving under suspension, impounding the vehicle is "part of the seizure packet."

According to Officer Sanders, "we always impound if we place the driver under arrest for driving with no license." Sanders outlined the process involved in inventorying an impounded vehicle pursuant to the CPD policy. To that end, Sanders testified that "you go through the vehicle's contents, any containers inside the vehicle that are reasonably accessible. You document it and go through its contents, see if there's anything of value that needs to be removed, to prevent accusations of theft. That's a primary use of our body cameras, to show that the officers are not destroying property or taking property."

The CPD policy referenced by Sanders sets forth specific procedures to be followed after a vehicle is impounded. As relevant here, officers must "conduct an inventory of the contents of all *reasonably accessible* areas and *containers* in the vehicle, and complete an Impounded Vehicle Inventory, form A-32.107." Officers must also "list the inventoried property in the Property in Vehicle section of the form, and mark its disposition." In addition, officers must "retrieve the following property from the vehicle for submission to the PCU: (1) Contraband, (2) Weapons, (3) More than $20 in currency bills, and (4) Any other property of high value or subject to theft, unless it can be secured in a locking compartment or trunk."

At Officer Sanders' request, **Officers Robert Franklin and Jared Randall** performed the inventory search of Johmson's vehicle. Franklin testified that he first checked the front passenger area, including the door, the floor, the glove compartment, and "containers in the vehicle that are accessible." Franklin's testimony in this regard is consistent with the footage from his body camera. He also testified that he "thumbed through the pages" of the vehicle manual located in the glove box because he "didn't want to be responsible for missing cash or anything like that." After Officer Randall told Officer Franklin he had discovered a "ton more cash" on the driver's side of the vehicle, Franklin began searching the center console. In doing so, he noticed that an access panel located on the lower portion of the passenger side of the center console was "sitting ajar," in that "the bottom of it was not fully in place." Upon closer inspection, Franklin noted that the area around the access panel was covered in grime; however, the edge of the panel appeared to be lighter in color, "like it had been opened and closed." Officer Franklin testified that he normally does not inspect access panels during an inventory search; however, he did so in this case because it "was sitting open" and appeared to have been "manipulated" and "used as a container frequently."

Franklin touched the access panel with his finger "for the purpose of trying to open it"; however, he did not "manipulate" or "grab" it. When he touched the access panel, it "fell off." Officer Franklin surmised that the access panel detached so easily because the latch had been "[worn] down" from "multiple" usage.

Officer Franklin assumed the access panel was designed for maintenance purposes. After the access panel detached, he illuminated the opening with his flashlight. He did not observe anything inside the opening that he thought might be illegal contraband; rather, he observed "a metal piece

kind of across the top right corner of that panel and a large opening underneath." He then reached inside the opening, "patted around," and discovered what he believed from his training and experience to be a bag of heroin. He recovered a second bag of heroin a few seconds later. Following discovery of the heroin, Officer Franklin remarked to Randall, "Finally, one of the good hiding places." At the hearing, Franklin explained this statement to mean that when conducting an inventory search he imagines where he would hide contraband; however, until the discovery in the instant case, what he imagined to be good hiding places had never been utilized. When he put his hand in the opening, he was "not really expecting to find anything," which made the discovery "even more surprising for me."

Franklin placed the bags of heroin on the dashboard and notified Sanders of the discovery. Sanders took photographs of the inside of the vehicle, including the bags of heroin on the dashboard. Due to the large volume of drugs recovered, Sanders sought, and ultimately obtained, authorization from the narcotics bureau to continue the search. Thereafter, Franklin and Randall noticed that the instrument panel surrounding the radio and heating/cooling controls appeared to be loose, "like it had been removed and put back into place." Randall removed the instrument panel and found another bag of narcotics "behind the plastic surrounding the heater unit."

On cross-examination, Officer Franklin acknowledged that footage from his body camera reveals statements he made indicating that he did not believe that Johnson owned a painting business or that the cash recovered from Johnson's person and vehicle derived from that enterprise. He also averred that he examined the vehicle manual and other documents while "looking for money." He further testified that he read paperwork discovered in the vehicle "to make sure I'm not leaving behind any kind of important documentation that he may want out of the vehicle." He denied, however, that he was searching for drugs while conducting the inventory search. He admitted that he was "excited" when he discovered the drugs because it was such a large amount. He testified that he relied on the CPD policy to support his decision to reach inside the access panel after it detached.

Following the inventory search, Officer Sanders completed the inventory form to "document any items removed from the vehicle, any valuable items in the vehicle, and document any damage outside the vehicle and inside the vehicle" in order to safeguard officers from accusations of theft or property damage.

At the hearing, Sanders testified that the search of the vehicle was "initially, * * * purely an administrative inventory" and not a probable cause search incident to arrest. He further testified that cash recovered from Johnson's person and vehicle totaled $3,156.38; the CPD's investigative summary packet confirms Sanders' testimony. Sanders conceded that at the time he placed Johnson under arrest, no evidence established that the cash found in Johnson's pockets was tied to illegal activity.

Issue #1: Was the officer legally permitted, pursuant to the inventory-search exception, to look behind, and reach into, the access panel located toward the bottom of the center console?

Holding and Analysis: Yes. The inventory search of Johnson's lawfully impounded vehicle was objectively reasonable and performed in good faith in accordance with the CPD policy. While acknowledging that CPD policy does not define either "reasonably accessible areas" or "containers," the court pointed out that an inventory search policy need not include every detail of search procedure. Inventory search policies may provide officers discretion in deciding which areas to search during an inventory. In this case, the CPD policy provides officers with discretion to determine what constitutes "reasonably accessible areas" subject to an inventory search, and giving that discretion in that manner is not legally unreasonable.

The court also pointed out that the inventory search was not unlawful simply because the area behind the access panel was not designed to be a storage area. CPD policy does not limit an inventory search only to "reasonably accessible areas" that are designed for storage. An area can be "reasonably accessible" even if not designed or typically utilized for storage. The rationales behind the inventory-search exception support adopting policies to search areas that are not designed or typically utilized for storage, but nonetheless may contain valuables, contraband and/or dangerous items. Here, just because it appears the space behind the access panel was not designed for storage does not mean it was not used for storage. In fact, the evidence indicates the area was used for storage. As Officer Franklin testified, and as footage from his body camera reveals, the bottom portion of the access panel was not in place and appears to have been opened and closed repeatedly. Indeed, Officer Franklin testified that the cover looked like it had been "manipulated." The latch that would normally hold the access panel in place was no longer functional, as evidenced by the easy detachment of the access panel upon the touch of Franklin's finger. Given these circumstances, Franklin reasonably could conclude that the area behind the access panel was being used as a storage area.

The court also found that the inventory search of the console area was valid even though the drugs found during the search of the space behind the access panel were not in plain view. "The scope of an inventory search is not restricted to items in plain view." Further, CPD policy does not limit an inventory search only to items that are in plain view; rather the policy requires the search of "reasonably accessible areas." In other words, the policy is concerned with accessibility, not visibility. Items can be reasonably accessible, even if not plainly visible in the space.

The court also did not believe Officer Franklin's search behind the access panel constituted a pre-textual evidentiary search. One, just because the officer, after seeing that the area behind the access panel was not a designed storage area, and seeing there were no items in plain view, still reached into that reasonably accessible space did not render this search pre-textual or too expansive. CPD policy necessitated careful examination of items in the vehicle in order to determine whether those items contained personal property to be included on the inventory form. Two, the officers'

comments made during the inventory did not render the search pre-textual. The officers' subjective motivations are irrelevant in a reasonableness analysis. An inventory search is not pre-textual simply because an officer expects or hopes to find contraband. The Supreme Court has not required an absence of expectation of finding criminal evidence as a prerequisite to a lawful inventory search. When officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence, the officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes. Under the Supreme Court's precedents, if a search of an impounded car for inventory purposes is conducted under standardized procedures, that search falls under the inventory exception to the warrant requirement of the Fourth Amendment, notwithstanding a police expectation that the search will reveal criminal evidence.

Here, it is undisputed that pursuant to CPD's policy, Johnson's vehicle was lawfully impounded following his arrest for driving under suspension and was thus subject to an inventory search of all "reasonably accessible areas." While the officers could also have had an investigative motivation to search Johnson's vehicle, such motivation did not disqualify the legitimate inventory search performed under the CPD's reasonable standardized policy.

Issue #2: Was the warrantless search behind the vehicle instrument panel legally valid?

Analysis and Holding: Yes. The search of the area behind the instrument panel was lawful pursuant to the automobile exception to the Fourth Amendment warrant requirement. Discovery of the bags of heroin in the space behind the access panel pursuant to the lawful inventory search of the vehicle provided the officers with probable cause to believe that the vehicle contained additional contraband. Accordingly, subsequent warrantless search of the area behind the instrument panel was lawful under the automobile exception.

III. When is a Person in Custody for the purposes of *Miranda* during a Traffic Stop/Detention?

***State v. Bailey*, 2022-Ohio-4028 (1st App. Dist.)**

Critical Points of the Case:

- **Generally, when police take a suspect into custody and then ask him questions without informing him of his rights, his responses cannot be introduced into evidence to establish his guilt. Derivative evidence when obtained by exploitation of the illegal search or seizure, known as fruit of the poisonous tree, also cannot be introduced.**

- **While not all traffic stops trigger *Miranda*, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. Questioning a suspect during a traffic stop in the front seat of a police vehicle does not rise to the level of a custodial interrogation when: (1) the intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or non-intimidating.**

- **Practical legal advice: When possible and safe, keep motorists in their cars, or on the roadside, so they are not in *Miranda* custody. Also, if you can safely do so, avoid handcuffing during a traffic detention if you wish to question without first giving *Miranda* warnings. The interaction is very likely not going to be seen as minimal or non-threatening if the person is placed in handcuffs in a cruiser. If you need to take those steps during a traffic detention due to the circumstances, you should *Mirandize* the person before asking incriminating questions. Finally, don't threaten the detainee with searches, or Canine sniffs, as you are asking them questions about what is in their vehicle.**

Facts: At the suppression hearing, Officer Tom Chiappone testified that members of the gun task force had been dispatched to the parking lot around 11:30 p.m. to disperse "a large group gathering, of people using marijuana in the open." Officer Chiappone's partner, Trent Meucci, testified that Defendant Ryan Bailey caught the attention of an officer because he was trying to exit the lot "in a hurry." Suspecting his exit was precipitated by the police presence, an officer communicated this information over the radio. Officers Chiappone and Meucci heard the call, saw the car, activated their lights, and positioned their cruiser to block Bailey from exiting the parking lot. The officers testified that they had observed a broken headlight on Bailey's car prior to the stop.

After relaying Bailey's information to dispatch, officers learned that Bailey had several open capiases for traffic offenses. Meucci asked Bailey to step out of his vehicle and he placed Bailey in handcuffs while the capiases were being investigated. Meucci testified that during the walk to his police cruiser, he advised [Bailey] that we were going to call and confirm the warrants; that he wasn't necessarily going to go to jail * * * I did ask him, maybe twice, if there was anything in the vehicle. I made him aware that there was a K-9 officer that was on scene. And I simply asked, if the K-9 did an open-air sniff, would he hit on your vehicle? And he said, "Yes, I have weed in the car."

The body-camera footage, which was played at trial, largely confirms Officer Meucci's account of the interaction and shows that there were at least three marked police cruisers and five uniformed officers at the scene. While handcuffing Bailey, Meucci can be heard saying, "Doesn't mean you're going to jail or anything, my friend. We gotta at least check everything out." Then, Meucci led

Bailey towards his police cruiser. On the way to the cruiser, Bailey was patted down and Officer Meucci asked him various questions about what was in the car, where it would be found, while also telling him a K-9 would be run around the car.

Bailey was then placed in the back of the police cruiser, still in handcuffs. Around the same time, police searched his vehicle and, in addition to the marijuana, found a handgun under the driver's seat that was discovered to be stolen. Approximately 90 seconds ***after*** being put in the backseat, he was advised of his *Miranda* rights.

Issue: Was Defendant Bailey in custody after he was removed from his vehicle, handcuffed and questioned? In other words, when he was asked questions after being removed from his vehicle, was this custodial interrogation requiring *Miranda* warnings?

Analysis and Holding: Yes. Bailey was in custody when asked questions outside his vehicle, and these questions were incriminating. His statement about the marijuana in his vehicle was obtained in violation of *Miranda* and should have been suppressed, along with the firearm found during the subsequent search. Generally, when "police take a suspect into custody and then ask him questions without informing him of his *Miranda* rights, his responses cannot be introduced into evidence to establish his guilt." Derivative evidence when "obtained by exploitation of the illegal search or seizure," known as fruit of the poisonous tree, also cannot be introduced.

The United States Supreme Court has reasoned that traffic stops are generally unlike other forms of police questioning because (1) the stops are "presumptively temporary and brief," and (2) the stops are "substantially less 'police dominated.'" Thus questioning during traffic stops, especially that which occurs when the suspect is in their vehicle, or at roadside, generally does not require *Miranda* warnings.

However, when the Ohio Supreme Court applied these principles in *State v. Farris*, 109 Ohio St.3d 519 (2006), it held that a defendant <u>was in custody</u> after a routine traffic stop because the officer patted him down, took his car keys, instructed him to sit in the front seat of his police car, and told the subject that he was going to search his car because he smelled marijuana. The court reasoned that the defendant was "in custody for practical purposes" because "he had no car keys and reasonably believed that he would be detained at least as long as it would take for the officer to search his automobile." Thus, the defendant's admission about drug paraphernalia in the car, along with the paraphernalia itself, was inadmissible.

The Ohio Supreme Court revisited this issue again in *City of Cleveland v. Oles*, 152 Ohio St.3d 1, (2017). In *Oles*, the court identified three factors to consider when faced with custodial interrogation issues related to traffic stops/detentions: questioning a suspect during a traffic stop in the front seat of a police vehicle does not rise to the level of a custodial interrogation when (1) the

intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or non-intimidating.

In this case, applying the case law listed above, the court found that Bailey was in *Miranda* custody and thus should have been read his rights before being questioned about what was in his car. It is undisputed that after Bailey exited his vehicle, he was handcuffed, searched, and taken away from his vehicle to a police cruiser. At the time of this interaction, there were at least five police officers and three police cruisers at the scene. Bailey's car was entirely blocked in. Despite the officer's assurances that Bailey was not necessarily going to jail, considering the totality of the circumstances, a reasonable person would have understood themselves to be in custody at the time of Bailey's admission.

The intrusion here was not minimal. Although the interaction was brief, Bailey was handcuffed, patted down, led away from his vehicle, and subjected to repeated questioning about the contents of his vehicle, while headed for a police cruiser. The environment was also threatening and intimidating because the police presence at the scene was significant. Moreover, Bailey only admitted to having marijuana in the vehicle after he was threatened that police would run a K-9 unit around his car.

While the state contends that a K-9 open-air sniff is not the same as a search, it is still reasonable to conclude that it would evoke a similar response from someone in Bailey's position. Unlike a typical traffic stop, this was precisely the "kind of interrogation—designed to pressure a suspect to confess to illegal conduct—that was of particular concern to the Supreme Court in *Miranda*."

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org)and Ty McCoy (tjmcoy@columbuspolice.org) January 26, 2023

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

In this Edition—Traffic Issues:

I. Definition of Operate in 4511.01(HHH) applies to Driving Under OVI Suspension

***State v. Wilson*, Ohio Supreme Court, 2022-Ohio-3202**

***Critical Points of the Case*:**

- **Although the definition of operate in R.C. 4511.01(HHH) applies by its own terms to only R.C. Chapters 4511 and 4513, the Ohio Supreme held that the operation element in the charge of driving under an OVI suspension under R.C. 4510.14(A) necessitates evidence that the defendant cause or had caused movement of the vehicle.**

- **To "have caused" movement of a vehicle is a fact that can be proven by circumstantial evidence, which possesses the same value as direct evidence.**

Facts: Katherine Wilson, and three of her friends were up late and were thrown out of one of the friends' house by the friend's parent. They then decided to sleep in a car parked near the house. Wilson occupied the driver's seat and, because it was cold outside, turned the car on and ran the heater. That is how the four friends were discovered hours later, all asleep, by a police officer responding to a call from a concerned neighbor. There was no evidence that Wilson had moved the car that morning. But because she was in the driver's seat while the car was running and her license was suspended at the time due to a prior conviction for operating a vehicle while under the influence of alcohol or drugs ("OVI"), the officer cited her for driving under a suspended license.

Despite there being no evidence that Wilson had moved the car, the trial court found her guilty of driving under an OVI suspension. Wilson appealed, and the First District reversed her conviction. The court noted that under R.C. 4510.14(A), a person whose license is suspended for an OVI offense shall not "operate any motor vehicle upon the public roads or highways." The Ohio Supreme Court accepted the state's discretionary appeal. The Ohio Supreme affirmed the reversal of the conviction.

Issue: In proving if defendant has violated law by operating a motor vehicle under one of suspensions set forth in R.C. 4510, is definition of "operate" in R.C. 4511.01(HHH) applicable?

Holding and Analysis: Yes. R.C. 45011.01(HHH) defines "operate" as "to cause or have caused movement." The definitions section in R.C. 4511.01 expressly states that the definitions listed are for purposes of Chapters 4511 and 4513. This means that this is not necessarily the definition for operate or operation in other chapters in Title 45. The Supreme Court cleared this up by concluding that though the definition of "operate" in R.C. 4511.01(HHH) is not facially applicable to R.C. 4510.14, the definition is relevant when, as in this case, "operate" is not specifically defined in the statute under which the offense was charged. The Court determined that in order for a person whose license is suspended for an OVI offense to be guilty of driving under an OVI suspension, the person must cause movement of a motor vehicle on the public roads or highways within this state.

In other words, an officer cannot cite an individual for driving under OVI suspension if they are merely in physical control of their vehicle, and, in this case, there was no evidence from the circumstances that defendant Wilson caused the vehicle to move to that location where the car was parked. Therefore, the Ohio Supreme Court affirmed the appellate court's decision to vacate the conviction.

This case is important because some statutes in the Ohio Revised Code, especially those relating to DUS and No Ops do not actually define the term operate as is done for OVI. It also serves as a reminder to review the definition sections to understand the meaning of the "terms of art" used in the particular offenses you are citing under.

Importantly, however, if you are citing for a DUS-related offense or No Ops under the Columbus City Code, then the above-mentioned issue does not exist. Under the Columbus City Code, the definitions listed in Chapter 2101.01 apply to all violations listed in Title 21 (the Traffic Code). "Operate" is defined in Columbus City Code 2101.201 as "to cause or have caused movement." The same definition as in R.C. 4511.01(HHH).

The operation element is a fact that can be proven by circumstantial evidence. However, it can sometimes be tricky to prove when there is not an admission or eyewitness. For example, when a person is parked on the side of the road even if the keys are in the ignition, and the car is on that doesn't necessarily prove that the person moved or caused movement of the vehicle. The vehicle's location can sometimes provide an inference that one moved the vehicle but, like in this case, that leap cannot always be made. On the other hand, if the vehicle is in the middle of an intersection, and the person in the driver's seat is slumped over the wheel with the car in drive, it provides evidence to support the inferential leap that the person moved the car to that location from another. The takeaway is that officers may sometimes need to put forth more effort to obtain facts supporting the operation element of an offense.

II. Opening Car Door After Lawful Order To Exit Vehicle Not a Search

***State v. Jackson*, Ohio Supreme Court, Slip Op. No. 2022-Ohio-4365.**

Critical Points of the Case

- **Police may order occupants out of a car without violating the Fourth Amendment so long as the initial stop is lawful. There is no relevant difference between ordering the occupant out of the car and opening the door as part of a lawful order.**

- **Opening a car door <u>after</u> lawfully instructing an occupant to exit is <u>not</u> a search if the officer is not acting with the purpose of finding out what is inside the car. An officer's intent is determined through an objective inquiry by looking at the words and actions of the officer.**

- **A person does not have a legitimate expectation of privacy in an object that is in plain view. In the context of automobiles, if an officer observes contraband in plain view then an officer will have PC to search the vehicle and any containers therein where that contraband may be hidden.**

Facts: Officers from the Cincinnati Police Department pulled Jackie Jackson over for a window tint violation. The validity of the traffic stop was not at issue in this case. When told why he had been pulled over, Jackson began to "argue" with the officers. The lead officer asked him if he had his license or insurance, but Jackson did not reply and continued to "argue." The lead officer again asked him if he had his license and registration. Jackson did not answer the question and instead got out his phone. The lead officer informed Jackson that if he did not provide his ID, he would be asked to exit the car. Jackson did not provide his ID, so the lead officer opened the driver-side door and asked Jackson to step out of the car. He complied with the request but continued to argue with the officer.

At the rear of the car, officers patted Jackson down and spoke with him. Another officer walked to the driver-side door, which was open, and saw a "marijuana cigarette" in plain view between the door and the seat. This led to a search of the car, and officers discovered a handgun inside a basket of laundry.

Issue #1: Did the lead officer conduct an illegal search when he initially opened the car door?

Holding and Analysis: No. When the officer opened the door, he did not do so with the purpose of finding out what was in the car. Instead, he intended to secure Jackson, who was being uncooperative. The Court looked at the words and actions of the officer. To inquire into the officer's intent, the Court leaned on the following facts: (1) the officer ordered Jackson to remove the keys from the ignition; (2) the officer opened the car door; and (3) removed the keys from the ignition. Because the officer acted with the intent to secure Jackson and not with the intent to obtain information, he did not conduct a search.

Issue #2: Did the second officer conduct an illegal search by looking into the open car door?

Holding and Analysis: No. Based on the plain view doctrine, the officer did not conduct a search when he saw the "marijuana cigarette" in plain view. While the officer did linger and peer into the car with the intent to obtain information, he did not physically touch anything in the car. Without a physical trespass, the officer's conduct is not a search. Because the door was open and the marijuana cigarette was in plain view, the officer did not search the car by peering into the car from outside of the car (lawful vantage point).

Issue #3: Did the officers conduct an illegal search when they searched the defendant's car after seeing the marijuana cigarette in plain-view?

Holding and Analysis: No, they did not conduct an illegal search of the car. Under the automobile exception to the Fourth Amendment's warrant requirement, officers may search a vehicle and containers therein when they have probable cause to believe the automobile contains contraband. The officer's observation of the marijuana cigarette from a place he was permitted to be provided the officer with probable cause to search the automobile and any containers where marijuana could be found. The Court concluded that the search was reasonable.

III. Drug OVI Conviction Reversed

***State v. Love*, 2022-Ohio-1454 (7th App. Dist.)**

Critical Points of the Case:

- **Without a chemical test, clear admission, or any contraband found, proving drugged driving cases can be extremely difficult. Prosecution needs to show that the person was under the influence of a drug of abuse and the drug of abuse was impairing that person's ability to drive.**

- **The state does not have to prove actual impaired driving; instead, it need only show impaired driving ability. The state is not required to prove the quantity of a drug of abuse or even the timing of when the drug was administered; it is only necessary for the state to show the defendant's use of the drug and impairment.**

Facts: On July 8, 2019, at approximately 8:25 P.M., Bryan Granchie, an officer with the Columbiana Police Department, responded to a dispatch of an impaired person pumping gas. The attendant provided to dispatch the license plate number of the impaired person's car. Officer Granchie testified that when he arrived at the gas station, he saw the driver, later identified as Stacy Love, pull out of the parking lot. He made eye contact with Mrs. Love, and saw that she was having uncontrollable body tremors. After observing Mrs. Love make an abrupt right-hand turn without using her turn signal and crossing the center line, Officer Granchie initiated a traffic stop. Upon his contact with the driver, he noticed her speech was slurred, but he did not attribute the slurring to the use of alcohol, based on his other observations. Officer Granchie also noticed that Mrs. Love continued to have uncontrollable body tremors, which he associated with drug use. She informed him that she was upset because she just learned from receiving a telephone call while at the gas station that her husband was having an extramarital affair.

Patrolman Granchie conducted field sobriety tests which Mrs. Love did not successfully complete (no analysis as to how she performed on the SFSTs). Patrolman Granchie offered to have Mrs. Love take a urine test, which she refused. She told him that she had a prescription for Suboxone but had taken something "not prescribed" the day before. She did not specify what she had taken and did

not enlarge her statement beyond saying that whatever she took was not prescribed. Patrolman Granchie placed her under arrest and transported her to the police station. He searched Mrs. Love's person and her vehicle, but did not find any contraband. He did not seek a warrant to have a blood test performed on Mrs. Love.

Ohio State Patrol Trooper Timothy Myers, a drug recognition expert ("DRE"), was called in to observe Mrs. Love. Based on his evaluation, Trooper Myers believed Mrs. Love had taken a CNS Stimulant, namely methamphetamine. He testified that methamphetamine would be expected to show its effects on a user for up to twelve hours after use. He testified that the traffic stop occurred at 8:25 p.m. The state introduced and heavily relied on Mrs. Love's comment that she had "slipped up" and taken something "not prescribed" the previous day.

After a one-day trial, a jury convicted Love on the OVI charge. After the jury's verdict, the trial court separately convicted Love on the turn signal violation. Love appealed.

Issue: Was there sufficient evidence to convict the defendant for operating a vehicle while under the influence of a drug of abuse?

Holding and Analysis: No. The state failed to establish a nexus between the unidentified drug of abuse and Love's impairment.

To support a conviction of operating a vehicle while under the influence of a drug of abuse, the state must prove, beyond a reasonable doubt, that the defendant was (1) operating a vehicle, and (2) doing so while under the influence of a drug of abuse. The state must establish a nexus between the impairment and a drug of abuse.

Any alleged admission must refer to a specific drug of abuse. Her statement that she "slipped up" and taken something "not prescribed" the previous day does not constitute evidence that she took a drug of abuse or was under the influence of a drug of abuse as it is wholly speculative, thus was deemed irrelevant for purposes of R.C. 4511.19(A)(1)(a).

According to the appeals court, testimony that a defendant's behavior was consistent with use of a drug is also insufficient to support conviction under this statute. There was no evidence in this case that Mrs. Love's behavior could only be caused by methamphetamine, despite evidence of clear impairment. And a search of Mrs. Love's vehicle and person did not reveal any contraband. An important takeaway from this case is that an officer needs to be able to link the vehicle operator's impairment to the consumption of a drug of abuse.

IV. OVI-Related Issues

A. OVI- Test Refusal Charge

An OVI-Test Refusal charge under C.C.C. 2133.01(A)(2) or R.C. 4511.19(A)(2) is only applicable when all of the following elements are present:

1. the person is operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them;
2. refused to submit to a chemical test after being arrested for OVI and advised of the consequences of refusing or submitting to the test; **AND**
3. has a prior OVI conviction within the previous 20 years of the current violation.

Officers should not be charging for a test refusal violation unless the person has a prior OVI conviction. If no OVI priors within the previous 20 years, this charge is not appropriate. A prior physical control or ROMV conviction reduced from an OVI *does not* count as a prior. It is not a violation of the OVI-Test Refusal statute if the person refuses to submit to field sobriety tests or a portable breath test.

Relatedly, if a defendant commits an OVI, refuses a chemical test, and has a prior OVI conviction within 20 years, charge the defendant with **both** R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2). Do not only charge with R.C. 4511.19(A)(2).

B. When Operation is not readily apparent, charge with Physical Control and OVI

As shown in the *Wilson* case above, operation is an element that sometimes can be tricky for prosecution to prove beyond a reasonable doubt if the officer does not see the defendant move or cause the vehicle to move as well as in instances where there are no witnesses and no admissions to operation.

Thus, if a defendant is found parked in the driver's seat, has possession of the car's keys, and is under the influence, best practice would be to charge with both physical control, R.C. 4511.194, and OVI, R.C. 4511.19(A)(1)(a). Prosecution has had cases where the defendant was only charged with OVI, and prosecution could not prove that the defendant operated the vehicle.

Because physical control is not necessarily a lesser-included offense of OVI, the OVI complaint could not be amended to physical control. By charging with both physical control and OVI, prosecution will have more leverage if there is contention regarding the operation element in an OVI case.

C. Establish Time of Operation in Single Car Accident Cases Involving OVI

R.C. 4511.19(A)(1) states that no person shall operate any vehicle if, *at the time of operation*, the person is under the influence of alcohol/drugs of abuse or has a prohibited concentration in his blood, breath, or urine.

In any criminal prosecution for OVI, the court may admit evidence on the concentration of alcohol/drugs of abuse in the defendant's blood, breath, or urine at the time of the alleged violation as shown by a chemical analysis of the substance withdrawn within 3 hours of the time of the alleged violation. R.C. 4511.19(D)(1)(b). A blood, breath, or urine sample acquired within three hours of the time of the violation constitutes the level of alcohol at the time of operation without the requirement of expert testimony.

If the defendant is in a one-car accident, and there are no witnesses to the accident, ask the defendant what time the accident occurred. The time when the accident occurred is an important factor, especially in a chemical test case. Prosecution needs to know how long ago the person operated the vehicle. Determination of whether defendant submitted to chemical test with 3 hours of operation is fact-driven and each situation is unique. As fact gathers, officers need to ask probing questions. When did the accident occur? Was it 20 minutes ago, 10 minutes ago, 2 hours ago, etc.?

If the defendant takes a chemical test, prosecution must prove that the bodily substance was withdrawn within 3 hours of the time of operation/the accident. If the time in which the offender last operated the vehicle is unknown, then expert testimony may be necessary. Knowing the time of an offender's last operation will foreclose any argument defense counsel may have regarding this element.

V. Other Traffic Issues

A. Proper citation section for speeding in a School Zone

There has been some confusion with regard to the proper citation section for speeding violations. There are two potential chargeable sections for speed. Speeding tickets should be cited under the (A) section or (D) section. They **should not** be cited under the (B) section or (C) section as those sections **do not** cite an offense. The (B) and (C) paragraphs establish the *prima facie* lawful and *prima facie* unlawful speed limits, respectively. To prove a violation of law for one of the limits stated in (B), prosecution would be able to use a speed in excess of the posted speed as *prima facie* evidence of an unreasonable speed, but that evidence would not be conclusive on the element of unreasonableness.

If the violation is cited as speed in excess of a posted 55 or 65 mph zone, it is a *per se* speed violation that should be cited under the (D) section. Any other posted speed should be cited under the (A) section.

When citing for speeding in a school zone, Officers should be citing the defendant with violating Columbus City Code 2133.03(A). The appropriate charging section is Columbus City Code 2133.03(A) if a defendant is traveling over 35 miles per hour in a 20 mph school zone. Though C.C.C. 2133.03(G)(2) seems to be the appropriate charging section, it is not as it does not state an offense; rather, it merely elevates the penalty to an M4 if going the requisite speed during the timeframe that the school zone is active. To avoid confusion with the clerk's office—in the notes section of the ticket—indicate that the defendant was speeding in the school zone during the requisite timeframe listed in the statute (recess or while children are going to or leaving school during the school's opening or closing hours), and also cite to C.C.C. 2133.03(G)(2) to show that the penalty is elevated to an M4. An officer could even cite as C.C.C. 2133.03(A), C.C.C. 2133.03(G)(2) to indicate that it was an M4 violation. The important thing is that the (A) subsection is listed as the charge for this offense.

B. Probable Cause Affidavit Required For Traffic Citations When An Officer Does Not Personally Serve The Traffic Violator With the Ticket

When it comes to misdemeanor traffic offenses, the general rule is that a law enforcement officer who issues a ticket shall complete and sign the ticket, serve a copy of the completed ticket on the defendant, and, without unnecessary delay, file the court record with the court. If the issuing officer personally serves a copy of the completed ticket on the defendant, the issuing officer shall note the date of personal service on the ticket in the space provided. Ohio Traffic Rule (3)(E)(1).

Under the general rule, there is no requirement that a traffic ticket be accompanied by a probable cause affidavit when personally serving the defendant (unlike in Crim.R. 4(A)(1)). In traffic cases, the complaint and summons shall be the Ohio Uniform Traffic Ticket. Thus if the officer personally serves the defendant with the traffic ticket, then no probable cause affidavit is required.

Although personal service is easily accomplished at roadside when a typical traffic citation is issued, compliance is difficult in "hit-skip" cases and other situations where the offender is not cited at the time of the violation or in cases where the defendant resides outside the jurisdiction in which the offense occurred.

So what happens if an officer is unable to personally serve the purported traffic violator when they have probable cause to believe a traffic offense has occurred?

Traffic Rule 3(E)(1) has an answer for that question and provides an alternative means of serving the defendant with a completed ticket. Under Traffic Rule 3(E)(1), if the issuing officer is unable to personally serve the ticket on the defendant, service may be accomplished through issuance of a warrant or summons pursuant to Criminal Rule 4.

In other words, this means that a probable cause affidavit must accompany the traffic ticket when personal service is not possible. Just like in a regular misdemeanor case, the clerk will review the ticket and affidavit and determine if there is probable cause to issue a summons.

C. R.C. 4513.241, Ohio's Window Tint Law, Only Applies to Vehicles Registered or Required to be Registered in Ohio

R.C. 4513.241 makes driving an Ohio registered vehicle with tinted glass, as outlined in Ohio Administrative Code 4501-41-03, illegal. The window and windshield tint specifications in Ohio Adm. Code 4501-41-03(A), promulgated pursuant to R.C. 4513.241, apply to any vehicle that is required to be registered in Ohio. Under R.C. 4503.111(A), new Ohio residents must register their vehicle with the state within thirty days.

The reach of R.C. 4513.241 is expressly limited to vehicles registered in the State of Ohio. Officers are chargeable with knowledge of this requirement. *United States v. Mackey*, S.D.Ohio No. 3:17-cr-85, 2019 U.S. Dist. LEXIS 234851, at *9 (Aug. 13, 2019) (The officer's mistaken belief that he had authority to stop Mackey because of excessive window tinting cannot be deemed "objectively reasonable.").

Moreover, the *Mackey* Court indicated that an officer would need facts prior to initiating the traffic stop that lead him or her to reasonably believe that the vehicle was "required to be registered" in the State of Ohio, if the justification for making the stop was that the person was required to register their vehicle within 30 days of becoming a resident and the vehicle did not comply with the window tint regulations.

The *Mackey* court further held that an officer cannot rely on R.C. 4513.02(A) (Unsafe Vehicle) to establish reasonable suspicion for the traffic stop of an out-of-state vehicle with excessive window tinting. The takeaway is that an officer cannot make a traffic stop based solely on a window tint violation, if the vehicle is not registered in Ohio or required to be registered in Ohio.

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2023 Columbus Division of Police In-Service Legal Updates

by Jeff Furbee (Jfurbee@columbuspolice.org)and Ty McCoy (tjmccoy@columbuspolice.org) February-May 2023

A summary of laws that may be of interest to you. If you receive this document, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

Table of Contents:

The 2022 Detective School Handouts related to Search Warrants, and Miranda Issues are available on the Division Intranet. They cover those topics in depth.

I. Columbus Division of Police Civil Rights Cases

***Cooper v. City of Columbus,* 2023 U.S. App. LEXIS 2629 (6th Cir.): *Appeals Court Affirms Summary Judgment for Officers on 2/1/23*.** Officers Baase and Narewski did not engage in excessive force when they shot decedent Deaunte Bell-McGrew on 10/29/15 because decedent failed to follow the officer's commands to keep his hands where the officers could see them, decedent had reached for a pocket where an officer saw a gun, and there was an escalating physical interaction between decedent and officer. There was thus PC under the 4th Amendment to believe decedent posed serious threat of physical harm to the officers.

***Adrienne Hood v. City of Columbus, et al.* United States District Court Case No. 2:17-cv-471: *Defense Jury verdict at trial on 4/26/22*.** On 6/6/16, Officers Jason Bare and Zach Rosen shot Henry Green at the intersection of Ontario Street and Duxberry. Green died of his wounds at hospital later. Officers were members of Summer Safety Initiative working a plain clothes assignment. They first encountered Green, who was intoxicated and armed with stolen gun, when he walked in front of their SUV and pointed a gun at them as they drove past a house where a drive-by shooting had occurred previous day. The officers aired what occurred over the police radio and circled the block in an attempt to relocate Green. As officers approached Green's location, Green pulled out his gun and engaged officers in a gunfight, firing six shots directly at Rosen. Both officers shot Green in response to the threat.

***Dearrea King v. City of Columbus, et al*. United States District Court Case No. 2:18-cv-1060: *Defense verdict at trial on 1/26/23*.** On 9/14/16, Decedent Tyre King, along with a group of four others, used a realistic looking BB gun to commit a robbery to get gas money for a stolen car. 19-year old Demetrius Braxton pointed the gun at the victim and immediately handed the gun back to 13-year old Tyre King with the police responding to the scene. CPD Officer Bryan Mason was one of the responding officers. King ignored Mason's commands to get down on the ground and instead pulled the gun from his waistband while resisting arrest. Mason shot and killed King.

***Wiley v. City of Columbus*, 36 F.4th 661 (6th Cir. 2022): *Appeals Court Affirms Summary Judgment for Officers on 6/2/22*:** Where Officers Pinkerman, Shaffner, Darren Stephens, and Michael Alexander were accused of allegedly using excessive force on a man believed to be overdosing, resulting in his death, the 6th Circuit held the officers were entitled to qualified immunity because officers' use a maximum resistor technique and placement of knee in the lower back/hip area to restrain an individual who was overdosing did not violate clearly established law.

***Cameryn Standifer v. Brandon Harmon*, United States District Court Case No. 2:19-cv-3803: *Settled during trial for $440,000*.** Level-One takedown during an arrest (with a warrant) over an unpaid traffic ticket. Plaintiff came down with MRSA a few days later. Plaintiff brought excessive force and malicious prosecution claims.

Timothy Davis v. City of Columbus, et al.,* USDC Case No. 2:17-cv-823**: ***Settled $225,000. On 9/1/17, six officers with the Zone 5 Violent Crime Work Group (Connair, Everhart, Johnson, Morefield, Baker & Reffitt) forcibly arrested a resistive Timothy Davis at the Livingston Market while executing felony arrest warrants. Additional officers responded, and two uniformed officers (Bennett & Steele) also used force. The incident was recorded on BWC and citizen mobile phone. The case was tried and jury found the officers' uses of force to be objectively reasonable based on the totality of the circumstances. Judge Marbley set aside a portion of the jury's verdict and ordered a retrial. The parties settled the case for $225,000 before the retrial occurred.

Hawkins v. Bryan Williams, et al.*, USDC Case No. 2:21-cv-4291: *Settled for $375,000. This case included 4th Amendment claims for wrongful arrest/malicious prosecution. Based on a robbery victim's identification of Timothy Hawkin, Det. Williams filed a warrant for the arrest of Hawkins, charging two counts of Aggravated Robbery. Hawkins (who had moved to Florida), was arrested in Orange County, Florida by U.S. Marshals on this warrant and transported to the Orange County Correctional Facility to await extradition to Ohio. The Franklin County Prosecutor dismissed the charges several days later. The only evidence linking Hawkins to the robbery was identification by the victim (the victim provided Hawkins' name and identified Hawkins in a photo array). The victim, however, had made inconsistent statements regarding name and description of suspect and had known special needs. Other than the victim's ID, no other evidence linked Hawkins to the crime. Hawkins did not match the physical descriptions of the suspect and did not live in the area where the suspect reportedly lived. Further, the victim originally provided a different name for the suspect. An arrest based only on unreliable eyewitness account is insufficient to establish PC.

***Karen Heeter v. Kenneth Bowers et al.*, USDC Case No. 20-cv-6481**: Bill Heeter's wife called 911 with concerns that Heeter was suicidal and stating that he had a gun inside the home. CPD Officer Kenneth Bowers, along with other officers, responded to this call. Different officers had been to the house earlier that same day when Heeter had threatened suicide. When Ofc. Bowers and the other officers responded, they set up position around Heeter's home and eventually made contact with Heeter's wife. She informed the officers that Heeter was seated at the kitchen table and that his gun was in his coat pocket. Eventually Ofc. Bowers, with additional backup, entered the home while other officers were positioned outside. Sgt. Redding, positioned outside, could clearly see Heeter through a window and informed the officers that Heeter had a gun in his right hand. Officers asked Heeter to place the gun on the table and back away. Heeter backed away and Ofc. Bowers entered the room. Ofc. Bowers saw both of Heeter's hands in his pockets and did not see the gun on the table. Heeter expressed agitation with the officers and then quickly moved forward while bending at the waist. Ofc. Bowers fired his rifle five times and struck Heeter. A gun was immediately recovered next to Heeter's body. **This case is set for oral argument in March on the City's motion for summary judgment.**

Administrator of the Estate of Deborah Saenz, v. City of Columbus, et al., **FCCP Case No. 21-cv-424:** Wrongful death case set for **mediation in March 2023**. On July 11, 2019, the decedent, Deborah Saenz, called 911 and reported that her husband/ boyfriend, Marcos Solis, assaulted her and had a gun. She was distressed during 911 call. Defendant officers arrived at the house and talked to both Saenz and Solis separately. Plaintiff asserts that the officers did not adequately separate the parties, failed to run a LEADS check on Solis, failed to give a lethality assessment to Ms. Saenz, and left without arresting Solis. During the run, at least one officer saw an open (empty) gun case on the bed. Additionally, the decedent told an officer that she was scared of Solis and told another officer to take Solis to jail. The officers took a report and left. After the officers left, the decedent called 911 and hung up. That dispatcher did not air the 911 hang up call. The following morning, Solis shot and killed decedent Deborah Saenz.

***Abdur-Rahim, et al. v. City of Columbus, et al.,* USDC Case No. 2:22-cv-2286.** 2020 George Floyd Protest Litigation with 11 plaintiffs. We are currently in the discovery stage.

James England v. City of Columbus, et al.* USDC Case No. 2:19-cv-1049: *Motion for Summary Judgment denied. Currently awaiting decision on Appeal. This a federal civil rights action arising out of the February 6, 2015, non-fatal police-involved shooting of James England. The involved Columbus police officers were Keith Abel, Douglas Fulwider, Amando Dungey, and Kenneth Griffis (Sgt.). They went to England's house to serve warrants for felonious assault. He tried to sneak out the back, where officers were waiting. He was inside a plywood/vinyl type of enclosed porch with two pit bulls. The officers tried to cuff him while he was inside the enclosure and they were outside. He tried to pull one of the arresting officers into the enclosure with the barking pit bulls. Officer Abel shot him twice. He later pled guilty to resisting arrest during the incident. He was sentenced to 13 years for the underlying felonious assaults for which he was arrested. Claims against Fulwider, Dungey, and Griffis have been dismissed. The remaining claims are against Officer Abel and Plaintiff's Monell claim against City.

***James Burk et al. v. City of Columbus et al.*, USDC Case No. 20-cv-6256**: Burk was an ATF agent at the time of this incident and was in Columbus to retrieve a firearm. Burk arrived at the house where he believed the firearm to be and knocked on the door. Burk was in plain clothes and kept his badge in his pants pocket, though he did provide his badge number to the occupant. The occupant was incredulous as to Burk's status as law enforcement and called 911. As a result, CPD Officers Joseph Fihe and Kevin Winchell were dispatched to a burglary in progress call. Ofc. Fihe arrived first, with his firearm drawn and pointed, and found Burk on the porch. Burk failed to comply with orders to get on the ground but did put his hands in the air. Ofc. Winchell arrived on scene and gave additional commands to get on the ground. Burk eventually complied. Burk then failed to comply with orders to place his hands behind his back and together for handcuffing. Ofc. Fihe utilized his TASER once and Ofc. Winchell successfully handcuffed Burk. **This case is in the discovery process and dispositive motions due May 15.**

III. Police/City Legal Initiatives/Successes

A. Prosecution

Charging Decisions: have charged approximately 90% of cases submitted to us **via Matrix** by CPD for review. For summons situations patrol can simply send their paperwork to prosecution for review and charging. Prosecution staff will draft the complaints and summons and save the patrol officers time and effort. If there are questions or follow up information needed, prosecution will reach out to the patrol officers directly.

Operation Wheels Down: Prosecution worked hand in hand with CPD to address the problem of reckless driving on city streets involving motor cycles, cars and ATV type vehicles. Prosecution joined CPD to lobby city council to pass stricter traffic ordinances to address ATV vehicles specifically. For each Wheels Down enforcement operation, the City Attorney and prosecution staff attended the roll call and made sure that communication channels were clear and reiterated to CPD staff **that non-evidentiary plea bargains would not be offered.** Prosecution coordinated with CPD to collect the names of every violator cited during the operation and prosecution staff flagged each case at the arraignment stage. Prosecution also worked with CPD to develop policy and protocol that allowed officers to seize the ATV/vehicles at the scene and hold them until the case was resolved

CPD Specialty Units: Prosecution has been proactive in setting up regular meetings with specific CPD units to allow officers to provide input/feedback and ask questions about the types of cases they are working. Accident Investigation, Special Victims Bureau, and the Zone Investigation Unit are examples. We meet every 2-3 months to go over cases, answer questions, listen to concerns, etc.

Procedural Justice Prosecutor: Jennifer Grant works closely on many of the prosecution division's diversion/mental health programs. She is available to patrol to reach out to if officers are encountering chronic problem suspects who are in critical need of mental health/substance abuse assistance early on in their criminal cases. She's willing to brainstorm/coordinate with patrol officers on possible non-traditional pathways to work with these individuals at street level if feasible**. Jen's cell phone number is 937-248-1519, and her email is jlgrant@columbus.gov.**

Prosecutor Suggestion: Check emails for subpoenas. Extra effort for 3rd shift personnel as that is the only good way to reach them.

B. City Attorney's Zone Initiative

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- Alison Ortega, Environmental Prosecutor, 645-0771, amortega@columbus.gov

CPD Nuisance Abatement Investigators

- Sgt. Steve Oboczky
- Ofc. Josh Gantt, Liquor
- Ofc. Ken Lawson, Hotels
- Ofc. Heidi Malone, Houses
- Ofc. Chris Riley, Apartments

C. Blue-Print for Safety

Columbus Division of Police (CPD) is an integral and active partner on the U.S. Department of Justice, Office on Violence Against Women funded ***Blueprint for Safety: Interagency DV Response*** project. Blueprint is a City Attorney (CA) and Franklin County (FC) supported initiative designed to guide a coordinated DV response from 911 call to police on scene through jail booking, prosecution and community supervision. The model promotes cross-agency information sharing, training and giving justice professionals the equipment and tools needed to hold offenders accountable, keep victims safe and keep officers safe.

- CPD was an active participant in Blueprint for Safety justice system DV safety audit and integral in crafting recommendations that will be presented to City, County and justice agency leadership for review and feedback
- CPD developed firearm surrender procedures for court ordered DV weapons surrenders; CA created instruction sheets for Municipal Court judges on how to initiate surrender procedures

- CPD partnered with CA victim advocates on the Division's DV warrant pilot. Advocates provided information on offenders' locations and risk behaviors (i.e. access to guns). CPD connected high-risk victims to advocates for safety planning
- CA helped connect CPD with the U.S. Attorney Office for federal firearm charges (3 cases from the warrant pilot, alone, were accepted for felony prosecution)
- CPD, The Center for Family Safety and Healing and CA are piloting a CPD +Victim Advocate co-response effort.

Over the last four years, the City Attorney's Office worked with Columbus Division of Police to apply for and receive over $5.7 million in competitive federal grant funding.

IV. Street-Level/Patrol-Level Policing

***State v. Keister*, 2022-Ohio-856 (2nd App. Dist.):** The law recognizes three types of police-citizen interactions: (1) a **consensual encounter**; (2) a brief investigatory **stop or detention**; and (3) an **arrest**.

A. Consensual Encounters

State v. Hall-Johnson*, 2022-Ohio-3512 (10thApp. Dist.): *Good work by CPD Officers Dover and Davis. Officers generally do not need reasonable suspicion to approach members of the public. So long as **the person is free not to respond and walk away** no 4th Amendment interest is engaged. Officer Davis approached defendant, who had exited a parked car playing loud music in a public place. Officer noticed window tint was too dark, detained defendant, impounded car for equipment violation, and found illegal gun in the car.

***State v. Collins,* 2022-Ohio-4353 (1st App. Dist.):** Officer did not need reasonable suspicion to knock on defendant's window to ask for his identification. Generally, **when an officer merely approaches and questions persons seated within parked vehicles, a consensual encounter occurs** that does not constitute a seizure.

***State v. Jackson*, 2022-Ohio-187 (8th App. Dist.):** There are **several factors that indicate that a police-citizen encounter is no longer consensual and, correspondingly, that Fourth Amendment guarantees are implicated.** These factors include the following: the threatening presence of several officers, the officers' wearing of a uniform, the display of a weapon, the physical touching of the person, **the use of language or <u>tone of voice</u>** indicating that compliance with the officers' requests are compelled, and the contact occurring in a nonpublic place. In this case, body-camera evidence showed that the encounter was neither friendly nor consensual--the officer told Jackson he had to talk to him in a commanding **tone**

of voice and there were **multiple officers** present—thus this was not a consensual encounter.

B. *Terry* Stops/Detentions

***State v. Wright*, 2022-Ohio-2161 (1st App. Dist.):** A police officer may perform a brief investigative stop of a person when the officer has **reasonable, articulable suspicion** that the person has been, is, or is about to be engaged in **criminal activity**.

Precisely defining reasonable suspicion is not possible, and as such, the reasonable-suspicion standard is not readily, or even usefully, reduced to a neat set of legal rules. **Reasonable suspicion is a less demanding standard than PC, but demands more than a hunch**. The officers must have a ***particularized and objective*** **basis for suspecting the particular person stopped of criminal activity.**

In this case, the investigative stop was proper based on the totality of the circumstances--it was reasonable for the officers to prevent defendant and his companion from leaving the hotel until they could investigate further. Officers were called to hotel to break up a fight, and officers had reasonable, articulable suspicion to make the initial stop because defendant exited an elevator from which officers could hear an ongoing fight.

***United States v. Faught*, 2022 U.S. App. LEXIS 20078 (6th Cir.):** The **reasonable-suspicion test does not demand much**. To put things in perspective, the probable-cause standard necessary for a more invasive search or seizure is not a high bar, requiring only a probability or substantial chance of criminal activity.

An officer's observation of a **hand-to-hand transaction** that looks like a drug deal can help establish the reasonable suspicion required for a stop to investigate the parties**.** Officers may frisk a suspect for a weapon when they reasonably believe that the suspect possesses illegal drugs or has engaged in an illegal drug transaction.

If a suspect stands in a **bladed position** by turning away from an officer as if to conceal something, that positioning can add to the reasonable suspicion suspect might have a weapon.

***United States v. McCallister*, 39 F.4th 368, 373-74 (6th Cir. 2022)**: Here there was an anonymous tip of weed smoking, and officers corroborated tip by approaching group and smelling odor of burning marijuana. Defendant and others tried to walk away. Defendant also turned away from officers as if to hide a visible bump under his shirt. He was patted down and had a Glock that had been modified to be automatic.

***State v. Henson*, 2022-Ohio-1571 (1st App. Dist.):** An individual's **presence in a high-crime or high-drug area, by itself, is insufficient to justify the stop and frisk of a person**, especially when the officer indicated that the offender did nothing to make him worry that the offender would harm him. Shot-Spotter case!

***State v. Rogers*, 2022-Ohio-4535 (1st App. Dist.):** Investigative stop must be both **justified at its inception** due to reasonable suspicion of criminal activity and **reasonably related in scope to the circumstances that justified the interference in the first place**. The investigative methods employed should be the **least intrusive means** reasonably available to dispel the officer's suspicion in a **short period of time.**

***State v. Keister,* 2022-Ohio-856 (2nd App. Dist.):** The **duration of a *Terry* stop is determined by the purpose for which it is initiated**, and the detention may not last longer than is necessary to accomplish that purpose. The reasonableness of the detention depends on what the police in fact do, and the officer's diligence is measured by noting what the officer actually did and how he did it. An **officer may not prolong a stop** even if the overall duration of the stop remains reasonable compared to the duration of other stops involving similar circumstances.

***United States v. Biggs*, M.D.Tenn. 2023 U.S. Dist. LEXIS 10070 (Jan. 20, 2023)**: **Handcuffing is ordinarily not incident to a *Terry* stop**, and tends to show that a stop has ripened into an arrest. In considering whether the use of handcuffs is reasonable, the relevant inquiry is whether police have a reasonable basis to think that the person detained poses a present physical threat and handcuffing is the least intrusive means to protect against threat.

C. Pat-Downs

***State v. Withrow*, 2022-Ohio-2850 (7th App. Dist.):** A **pat-down for weapons** must be limited to that which is necessary for the discovery of weapons. If a police officer lawfully pats down a **suspect's outer clothing** and feels an object whose contour or mass makes its **identity immediately apparent**, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context. The **manipulation of a suspect's pocket** beyond the sense of touch permitted (placing hands on the outer clothing) is a violation of *Terry* and becomes a full-blown search.

***United States v. Faught*, 6th Cir. No. 21-6123, 2022 U.S. App. LEXIS 20078, (July 19, 2022)**: Officers may frisk a suspect for a weapon when they reasonably believe that the suspect

possesses illegal drugs or has engaged in an illegal drug transaction. If a suspect stands in a **"bladed" position by turning away** from an officer as if to conceal something, that positioning can add to the reasonable suspicion that the suspect might have a weapon.

***State v. Kent*, 2022-Ohio-834 (8th App. Dist.):** To justify **a pat-down of the driver or a passenger during a traffic stop,** the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. An officer may not pat-down a driver or passenger simply because they stopped that person for a traffic violation, or because that person was removed from a vehicle, or because the officer wishes to place the person in a cruiser for convenience.

Under the **plain-feel doctrine**, if the illegal nature of the suspicious object is not immediately apparent, police are not permitted to continue touching, feeling, or manipulating the object to identify its nature.

In the context of a pat-down search, **immediately apparent means that the officer must have probable cause to believe the item is contraband**. The investigating officers are **not required to accurately predict the specific chemical-makeup** of the discovered contraband for the plain-feel doctrine to be applicable.

D. Shot-Spotter

***State v. Carter*, 2022-Ohio-91 (2d. App Dist.):** The trial court properly overruled defendant's motion to suppress, because it was **reasonable for police officers to initiate a *Terry s*top and pat-down** under as they were responding to an alert of shots fired (ShotSpotter), an inherently dangerous circumstance beyond general criminality. Meth found on suspect.

Critical facts justifying stop: Alert at 1:00 AM, a ShotSpotter: officers arrived at the area in less than **four** minutes; Carter was about **50-59 feet** from the area where the ShotSpotter alerted; No one else in area; Officer able to explain how ShotSpotter works, area covered and had experience finding guns relative to ShotSpotter alerts; Carter informed officers that he was coming from a friend's house but could not provide the friend's name or address; Carter's voice was "shaky," and he was obviously nervous.

***State v. Henson*, 2022-Ohio-1571 (1st App. Dist.):** Certainly the Shot Spotter alert gave the officers a justifiable concern for their safety. But the need to act out of concern for officer safety **does not legitimize the "indiscriminate stop and frisk" of the first person observed** on the scene.

ShotSpotter alerted officers to shots fired in a neighborhood well-known for gun activity. An undercover officer arrived on the scene five minutes later and stated that there was one person, alone, at the scene. Uniformed officers arrived on the scene about **seven minutes** after the ShotSpotter alert. When officers arrived, Henson was putting his children into the back of his car. Officers approached him and informed him they were going to pat him down for weapons. The officers found a loaded handgun, cocaine, and methamphetamine on Henson's person. **No testimony as to the size of the radius from which the shots could have come from**.

An individual's **presence in a high-crime area, alone, is not enough to justify a *Terry* stop**. Furthermore, a ShotSpotter alert creates a justifiable concern for safety, but it does not legitimize the "indiscriminate stop and frisk' of the first person observed at the scene. Because there was nothing additional besides the defendant's presence in the area where the ShotSpotter alerted previously, that is not enough on its own to justify a *Terry* stop.

E. Vehicle Stops

***State v. Kent*, 2022-Ohio-834 (8th App. Dist.):** A police officer may initiate a traffic stop of any motorist for **any traffic infraction**. An officer making a traffic stop **may order passengers to get out of the car pending completion of such a stop**. To justify a pat-down of the driver or a passenger during a traffic stop, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

An officer **may not pat-down a driver or passenger** simply because they stopped that person for a traffic violation, or because that person was removed from a vehicle, or because the officer wishes to place the person in a cruiser for convenience.

***State v. Johnson*, 2023-Ohio-30 (6th App. Dist.)** Defendant's convictions of willfully eluding or fleeing a police officer, tampering with evidence, possession of heroin, and aggravated possession of drugs were upheld as the **initial traffic stop was justified because defendant's failure to signal** when changing lanes provided the highway patrol trooper with sufficient facts to reasonably suspect that defendant violated R.C. 4511.39.

Sufficient evidence supported defendant's enhanced felony conviction for **willfully eluding or fleeing a police officer under R.C. 2921.331(B)** since his high speed flight and traffic weaving caused a substantial risk of serious physical harm to persons and property.

***State v. McCarthy*, 2022-Ohio-4738 (2ND App. Dist.):** Under the **community-caretaking/emergency-aid exception**, a law enforcement officer with objectively reasonable

grounds to believe that there is an immediate need for his or her assistance to protect life or prevent serious injury may conduct a community caretaking/emergency-aid stop. **Community caretaking functions** are divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

State v. Bailey*, 2022-Ohio-4028 (1st App. Dist.):** While not **all traffic stops trigger *Miranda, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. Questioning a suspect during a traffic stop in the front seat of a police vehicle does not rise to the level of a custodial interrogation when: (1) the intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or non-intimidating.

***State v. Clinger*, 2022-Ohio-723 (6th App. Dist.)**: A peace officer's **extension of a consensual encounter to request that a driver perform field sobriety tests must be separately justified** by specific, articulable facts showing a reasonable basis for the request. Officer's reliance on the odor of raw marijuana and the condition of a suspect's eyes, without further indicia of intoxication, are insufficient to show that he had a reasonable, articulable suspicion that the person was OVI.

***State v. Wilson*, 2023-Ohio-135 (5th App. Dist.):** furtive movements as if to conceal something in the vehicle, acted excessively nervous and contradicting own story, and attempting to hide face from officer during a traffic stop supported reasonable, articulable suspicion of drug activity necessary to **prolong the traffic stop**.

***State v. Crane*, 2023-Ohio-188 (5th App. Dist.):** The actions of the police officer in asking the detective to prepare the citation so that he might conduct the **K-9 sniff of the vehicle** did not add time to the stop because the dog was already on the scene at the time of the initial stop.

Even if the stop was delayed, **no constitutional violation had been demonstrated because the officers were justified in continuing defendant's detention** beyond the normal period required to issue a citation because the officers had a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop.

When detaining a motorist for a traffic violation, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning. This measure includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates. In determining if an officer completed these tasks within a reasonable length of time, a court

must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.

In order to justify a continued detention beyond the normal period required to issue a citation the officer must have a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop.

F. Vehicle Searches

***State v. Jackson*, Ohio Supreme Court, Slip Op. No. 2022-Ohio-4365:** Police may order occupants out of a car without violating the Fourth Amendment so long as the initial stop is lawful. There is no relevant difference between ordering the occupant out of the car and opening the door as part of a lawful order. **Opening a car door <u>after</u> lawfully instructing an occupant to exit is <u>not</u> a search if the officer is not acting with the purpose of finding out what is inside the car.** An officer's intent is determined through an objective inquiry by looking at the words and actions of the officer. A person does not have a legitimate expectation of privacy in an object that is in plain view. In the context of automobiles, if an officer observes contraband in plain view then an officer will have PC to search the vehicle and any containers therein.

***United States v. Haworth*, 2022 U.S. App. LEXIS 2858 (6th Cir.):** Under the **automobile exception** to the Fourth Amendment's warrant requirement, officers may search a vehicle and containers therein when they have **probable cause to believe the automobile contains contraband**. Probable cause exists when there is "a fair probability that contraband or evidence of a crime will be found in a particular place."

***United States v. Loines*, 2023 U.S. App. LEXIS 319 (6th Cir.):** Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Here officer was on public street looing in car window from outside. Under the **plain view doctrine**, four factors must be satisfied: (1) the item seized must be in plain view, (2) the item's incriminating character must be immediately apparent, (3) the officer must lawfully be in the place from where the item can be plainly seen, and (4) the officer must have a lawful right of access to the item.

To determine whether an **object's incriminating nature is "immediately apparent,"** the Court looks to four instructive factors: (1) a nexus between the seized object and the items particularized in the search warrant; (2) whether the 'intrinsic nature' or appearance of the seized object gives probable cause to believe that it is associated with criminal activity; (3) whether the executing officers can *at the time* of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature; and (4) whether the officer can

recognize the incriminating nature of an object as a result of his immediate or instantaneous sensory perception. **Innocuous items (seen thru a car window in this case) that could be used for criminal activity are not enough to establish probable cause—here a bag of dope.**

State v. Bergk, 2022-Ohio-578 (5th App. Dist.): No violation of defendant's 4th Amendment rights had been demonstrated because nothing in the record suggested officer unduly delayed or extended duration of the traffic stop as officer was still waiting for defendant to provide proof of insurance when defendant granted **consent for a search** of vehicle.

State v. Rogers*, 2022-Ohio-4535 (1st App. Dist):** A **protective search for weapons** may occur at the end of a stop because an officer may reasonably fear that a suspect in the officer's control during the ***Terry detention may use the weapon to injure the officer if permitted to reenter his vehicle at the conclusion of the stop.

The trial court did not err by denying defendant's motion to suppress a firearm that the police found in the **glove box** of his vehicle during a search after a roadside stop that lasted over 11 minutes because the firearm was located during a *Terry* investigative stop for carrying a concealed weapon, the scope and duration of which were reasonable under the totality of the circumstances, and therefore, defendant's constitutional rights were not violated.

***United States v. Ralston*, N.D.Ohio, 2022 U.S. Dist. LEXIS 6405 (Jan. 12, 2022):** A **search incident to arrest** is an exception to the well settled law that warrantless searches are *per se* unreasonable under the Fourth Amendment. In *Gant*, the United States Supreme Court clarified the two situations when a vehicle may be searched without a warrant incident to an arrest. First, police may search, without a warrant, those portions of a vehicle immediately accessible by a person following his arrest "from which he might be able to gain possession of a weapon or destructible evidence." Second, "circumstances unique to the automobile context justify a search incident to arrest **when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle**."

Here, officers had communicated to arrange a drug deal with Ralston through the use of a cell phone provided by a drug user's girlfriend. Upon his arrest, Ralston did not have a cell phone on his person. Moreover, the prior text messages indicated that Ralston was present at the Arby's at the time of the drug deal. Accordingly, it was reasonable for officers to believe that evidence of the offense — the cell phone — would be found in the vehicle. As such, Ralston's Fourth Amendment rights were not violated when the vehicle was searched incident to his lawful arrest.

Note: This case does not stand for the proposition that you can search the cell phone incident to the lawful arrest. You would still **need to get a search warrant to search the phone** unless you have consent or an exigent circumstance.

***State v. Johnson*, 2022-Ohio-1733 (10th App. Dist.):** This is good case law involving **CPD Officers Kenneth Saunders, Robert Franklin and Jared Randall**. The inventory-search exception is a well-defined exception to the Fourth Amendment's warrant requirement. Under this exception, when a vehicle is lawfully impounded, police are permitted to follow a routine practice of administrative procedures for securing and inventorying the contents of the vehicle. An inventory search is intended to (1) protect an individual's property while it is in police custody; (2) protect police against claims of lost, stolen, or vandalized property; and (3) protect police from dangerous instrumentalities.

An inventory search of a lawfully impounded vehicle is reasonable under the Fourth Amendment when it is performed in good faith pursuant to standardized police policies and procedures. A search which is conducted with an investigatory intent, ***and*** which is not conducted in the manner of an inventory search, does not constitute an inventory search, and may not be used as a pretext to conduct a warrantless evidentiary search. Similarly, an inventory search may not be used as a ruse for a **general rummaging** in order to discover incriminating evidence.

An area can be **reasonably accessible** even if not designed or typically utilized for storage. And the rationales behind the inventory-search exception support adopting policies to search areas that are not designed or typically utilized for storage but nonetheless may contain valuables, contraband and/or dangerous items.

The **reasonableness requirement would prohibit searches** of those parts of a vehicle that require **special tools or cameras** (such as the inside of the gas tank) or that can be accessed only by **damaging or substantially altering** the vehicle (such as pulling up the carpet).

An inventory search is **not pre-textual simply because an officer expects or hopes to find contraband.** The fact that an officer suspects that contraband may be found does not defeat an otherwise proper inventory search.

G. Specific OVI/Traffic Concerns

***State v. Love*, 2022-Ohio-1454 (7th App. Dist.):** Without a chemical test, clear admission, or any contraband found, **proving drugged driving cases can be extremely difficult**. Prosecution needs to show that the person was under the influence of a drug of abuse and the drug of abuse was impairing that person's ability to drive.

The state does not have to prove actual impaired driving; instead, it need only show impaired driving ability. The state is not required to prove the quantity of a drug of abuse or even the timing of when the drug was administered; it is only necessary for the state to show the defendant's use of the drug and impairment.

***State v. Wilson*, Ohio Supreme Court, 2022-Ohio-3202:** Although the **definition of operate in R.C. 4511.01(HHH)** applies by its own terms to only R.C. Chapters 4511 and 4513, the Ohio Supreme held that the operation element in the charge of driving under an OVI suspension under R.C. 4510.14(A) necessitates evidence that the defendant cause or had caused movement of the vehicle. **To "have caused" movement of a vehicle is a fact that can be proven by circumstantial evidence, which possesses the same value as direct evidence.**

OVI- Test Refusal Charge

An OVI-Test Refusal charge under C.C.C. 2133.01(A)(2) or R.C. 4511.19(A)(2) is only applicable when all of the following elements are present:

1. the person is operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them;
2. refused to submit to a chemical test after being arrested for OVI and advised of the consequences of refusing or submitting to the test; ***AND***
3. has a **prior OVI conviction within the previous 20 years** of the current violation.

A prior physical control or ROMV conviction reduced from an OVI *does not* count as a prior. It is not a violation of the OVI-Test Refusal statute if the person refuses to submit to field sobriety tests or a portable breath test. Relatedly, if a defendant commits an OVI, refuses a chemical test, and has a prior OVI conviction within 20 years, charge the defendant with **both** R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2). Do not only charge with R.C. 4511.19(A)(2).

When Operation is not readily apparent, charge with Physical Control and OVI: If a defendant is found parked in the driver's seat, has possession of the car's keys, and is under the influence, best practice would be to charge with both physical control, R.C. 4511.194, and OVI, R.C. 4511.19(A)(1)(a). Prosecution has had cases where the defendant was only charged with OVI, and prosecution could not prove that the defendant operated the vehicle.

Establish Time of Operation in Single Car Accident Cases Involving OVI: R.C. 4511.19(A)(1) states that no person shall operate any vehicle if, *at the time of operation*, the person is under the influence of alcohol/drugs of abuse or has a prohibited concentration in his blood, breath, or urine.

In any criminal prosecution for OVI, the court may admit evidence on the concentration of alcohol/drugs of abuse in the defendant's blood, breath, or urine at the time of the alleged violation as shown by a chemical analysis of the substance withdrawn **within 3 hours of the time of the alleged violation.** R.C. 4511.19(D)(1)(b). A blood, breath, or urine sample acquired within three hours of the time of the violation constitutes the level of alcohol at the time of operation without the requirement of expert testimony.

If the defendant is in a one-car accident, and there are no witnesses to the accident, ask the defendant what time the accident occurred. The time when the accident occurred is an important factor, especially in a chemical test case. Prosecution needs to know how long ago the person operated the vehicle.

If the defendant takes a chemical test, prosecution must prove that the bodily substance was withdrawn within 3 hours of the time of operation/the accident. If the time in which the offender last operated the vehicle is unknown, then expert testimony may be necessary.

H. Miscellaneous other Traffic Issues

Proper citation section for speeding in a School Zone: There are two potential chargeable sections for speed. Speeding tickets should be cited under the (A) section or (D) section. They **should not** be cited under the (B) section or (C) section as those sections **do not** cite an offense. The (B) and (C) paragraphs establish the *prima facie* lawful and *prima facie* unlawful speed limits, respectively. To prove a violation of law for one of the limits stated in (B), prosecution would be able to use a speed in excess of the posted speed as *prima facie* evidence of an unreasonable speed, but that evidence would not be conclusive on the element of unreasonableness.

If the violation is cited as speed in excess of a posted 55 or 65 mph zone, it is a *per se* speed violation that should be cited under the (D) section. Any other posted speed should be cited under the (A) section.

When citing for speeding in a school zone, Officers should be citing the defendant with violating Columbus City Code 2133.03(A). The appropriate charging section is Columbus City Code 2133.03(A) if a defendant is traveling over 35 miles per hour in a 20 mph school zone. Though C.C.C. 2133.03(G)(2) seems to be the appropriate charging section, it is not as it does not state an offense; rather, it merely elevates the penalty to an M4 if going the requisite speed during the timeframe that the school zone is active. To avoid confusion with the clerk's office—in the notes section of the ticket—indicate that the defendant was speeding in the school zone during the requisite timeframe listed in the statute (recess or while children are

going to or leaving school during the school's opening or closing hours), and also cite to C.C.C. 2133.03(G)(2) to show that the penalty is elevated to an M4. An officer could even cite as C.C.C. 2133.03(A), C.C.C. 2133.03(G)(2) to indicate that it was an M4 violation. The important thing is that the (A) subsection is listed as the charge for this offense.

Probable Cause Affidavit Required For Traffic Citations When An Officer Does Not Personally Serve The Traffic Violator With the Ticket: When it comes to misdemeanor traffic offenses, the general rule is that a law enforcement officer who issues a ticket shall complete and sign the ticket, serve a copy of the completed ticket on the defendant, and, without unnecessary delay, file the court record with the court. If the issuing officer personally serves a copy of the completed ticket on the defendant, the issuing officer shall note the date of personal service on the ticket in the space provided. Ohio Traffic Rule (3)(E)(1).

Under the general rule, there is no requirement that a traffic ticket be accompanied by a probable cause affidavit when personally serving the defendant (unlike in Crim.R. 4(A)(1).

Under Traffic Rule 3(E)(1), if the issuing officer is unable to personally serve the ticket on the defendant, service may be accomplished through issuance of a warrant or summons pursuant to Criminal Rule 4. In other words, this means a **probable cause affidavit must accompany the traffic ticket when personal service is not possible.** Just like in a regular misdemeanor case, the clerk will review the ticket and affidavit and determine if there is PC to issue a summons.

R.C. 4513.241, Ohio's Window Tint Law, Only Applies to Vehicles Registered or Required to be Registered in Ohio: R.C. 4513.241 makes driving an Ohio registered vehicle with tinted glass, as outlined in Ohio Administrative Code 4501-41-03, illegal. The window and windshield tint specifications in Ohio Adm. Code 4501-41-03(A), promulgated pursuant to R.C. 4513.241, **apply to any vehicle that is required to be registered in Ohio. Under R.C. 4503.111(A), new Ohio residents must register their vehicle with the state within thirty days.**

The reach of R.C. 4513.241 is expressly limited to vehicles registered in the State of Ohio. Officers are chargeable with knowledge of this requirement. An officer would need facts prior to initiating the traffic stop that lead him or her to reasonably believe that the vehicle was "required to be registered" in the State of Ohio. An officer cannot make a traffic stop based solely on a window tint violation, if the vehicle is not registered in Ohio or required to be registered in Ohio.

I. Permitless Carry (Covered Fully in *6/7/22 and 9/19/22 Legal Updates*)

Senate Bill 215, which went into effect **June 13th, 2022**, allows qualified Ohioans to carry a concealed handgun without first obtaining a concealed handgun license (CHL). **Ohio Revised Code Section 2923.111** permits all qualified adults (*21 years of age or older*) to carry concealed, non-restricted firearms, without a license, or without any firearms training, or without a background check. Stated another way, moving forward, any qualified adult may now carry a handgun in the same manner someone with a concealed carry permit has been allowed to carry in the past. Also, significantly, SB 215 eliminates the requirement that a person with a concealed handgun proactively and promptly inform law enforcement they possess a concealed handgun; rather, they are now only required to inform an officer of the handgun if the officer asks the person if they have a handgun on their person or in their vehicle. Please keep in mind as you read this Update, the new law applies only to handguns, not long guns or rifles.

Some things haven't changed. Persons stopped for a law enforcement purpose who are carrying a concealed handgun still must keep their hands in plain sight, follow lawful orders, and are prohibited from touching the handgun while stopped. Private entities/businesses may still ban firearms from their premises, and a qualified adult is not authorized to carry a concealed handgun into a police station, school safety zone, courthouse, college campus (but for locked in car), any place of worship, or in government buildings that are not shelters or parking facilities. (See R.C. 2923.126(B)) for the list of prohibited places).

Also, if a person is carrying a concealed handgun, and they don't have a CHL, and are not a qualified adult, then they would be charged with whatever section is applicable to the situation. For example, if the person is carrying a loaded handgun on their person in a car, and don't have a CHL, and has a pending assault charge, they thus are not a qualified adult, and that person may be charged with Improper Handling and/or CCW.

J. Other Weapon/Gun Issues

***Ohio v. Marneros*, 2021-Ohio-2844 (8th App. Dist.):** When determining the **operability** of a firearm, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the **representations and actions of the individual exercising control over the firearm**. The Ohio Supreme Court has held that the State can rely upon all of the surrounding facts and circumstances in order to demonstrate that a certain object at issue constitutes a firearm and that proof of the existence of a firearm may be based on lay testimony, and is not dependent on an empirical analysis of the gun.

As for possession, a defendant can **either actually or constructively possess a firearm**. Actual possession entails ownership or physical control, whereas constructive possession is

defined as knowingly exercising dominion and control over an object, even though that object may not be within one's immediate physical possession. Fingerprint or DNA testing is not required to prove a defendant's possession of a firearm.

***United States v. Rahimi*, 2023 U.S. App. LEXIS 2693, *1, __ F.4th __:** The question presented in this case is *not* whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional under the Second Amendment of the United States Constitution. 18 U.S.C.S. § 922(g)(8)'s ban on possession of firearms is an outlier that our ancestors would never have accepted. 18 U.S.C.S. § 922(g)(8)'s ban on possession of firearms is an outlier that our ancestors would never have accepted.

K. Patrol Arrests/Arrest Processes

***United States v. Pippins*, S.D. Ohio, 2022 U.S. Dist. LEXIS 226562 (Dec. 15, 2022)**: For a warrantless search to be justified **incident to arrest**, the Government must show (1) that there was **PC** to arrest, (2) that **an arrest preceded or quickly followed the search**, and (3) that neither the arrest nor probable cause to arrest were contingent on the fruits of the search incident to arrest.

***State v. Reed*, 2022-Ohio-3986 (1st App. Dist.):** The police officer had PC to arrest him following the observed transaction at the gas station, and when the officer communicated the basis for his probable cause to the uniformed officers, any of the officers could lawfully stop defendant and initiate his arrest. When a person is lawfully arrested, an officer may conduct a full search of the arrestee's person to search for evidence. Further, a search-incident-to-arrest need not follow the formal arrest but may precede the arrest, so long as **probable cause for arrest existed at the time of the search** and the search was contemporaneous with the arrest.

L. Mental Health Seizures

***Caniglia v. Strom*, 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021)**: U.S. Supreme Court held that a police department's noncriminal community "caretaking" duties do not "create a standalone doctrine that justifies warrantless searches and seizures in the home." The Court thus held that police officers violated the suicidal petitioner's Fourth Amendment rights when they entered his home without a warrant and seized his firearms after he was taken away in an ambulance for a psychiatric evaluation.

***In re N.E.,* 2022 Ohio App. LEXIS 1099 (1st App. Dist.):** There are two involuntary commitment procedures contemplated in R.C. Chapter 5122: **emergency hospitalization,**

pursuant to R.C. 5122.10, and nonemergency hospitalization, pursuant to R.C. 5122.11. In an emergency hospitalization, pursuant to R.C. 5122.10(A)(1), a police officer or other individual designated by the statute: who has reason to believe that a person is a mentally ill person subject to court order and represents a substantial risk of physical harm to self or others if allowed to remain at liberty pending examination may take the person into custody and may immediately transport the person to a hospital.

The transporting individual ***must provide a written statement*** to the hospital detailing the circumstances under which such person was taken into custody and the reasons for the belief that the person needs to be hospitalized. R.C. 5122.10(B).

Once at the hospital, the hospital staff **must examine** the individual within **24 hours.** R.C. 5122.10(E). After the exam, if the chief clinical officer believes that the person is **not a mentally ill person** subject to court order, the chief clinical officer **shall release** or discharge the person immediately unless a court has issued a temporary order of detention. If the chief clinical officer believes the person is a mentally ill person subject to court order, he or she may detain the person for not more than **three court days** following the day of the examination and during such period admit the person as a voluntary patient or file an affidavit under R.C. 5122.11.

R.C. 5122.11 sets forth two requirements for the affidavit: The affidavit shall contain an **allegation** setting forth the specific **category or categories** under R.C. 5122.01(B) upon which the jurisdiction of the court is based and a **statement of alleged facts sufficient to indicate probable cause** to believe that the person is a mentally ill person subject to court order.

An individual's **lack of insight into his or her mental illness** and reality have been hold to be evidence of behavior that creates a grave and imminent risk to the substantial rights of himself or herself or others.

II. Domestic Violence/Protection Orders, IWC, Stalking and Menacing

A. City Prosecutor DV and Stalking Unit

The DV and Stalking Unit is located on the **17th floor of 375 South High Street**:

- There are 6 specialized domestic violence prosecutors
- 20 victim advocates who guide and notify victims through the criminal case including: arraignment, TPO hearing, pretrial, bond/motion hearings, trial and appeal. They also connect victims with community resources. They welcome walk-ins.
- Also, on the 17th floor is the Capital Law Clinic – they can help victims obtain CPOs

Mary Lynn Caswell mlcaswell@columbus.gov is the Director of the DV and Stalking Unit, and her office phone is **614-645-6413**. Please feel free to reach out to her with questions. She checks her email daily, but feel free to also call her with any DV related questions.

As to **potential stalking cases**, if you can see that a victim had had calls for service multiple times about the same suspect: violation of protection order, repeated criminal damaging, telecommunications harassment, dissemination of intimate images OR the victim is describing for you stalking – please feel free to reach out to our Stalking Unit or directly to the stalking detectives.

Stalking Advocate: Keionna Ashcraft : KPAshcraft@columbus.gov 614-645-8970

Stalking Detectives: Wayne Wright: WWright@columbuspolice.org

Adam Richards: ARichards@columbuspolice.org

B. Basics for DV/Protection Order Enforcement

Domestic Violence, Domestic Violence threats and Violation of Protection Orders are **preferred arrest offenses**. If you have probable cause, please arrest, or issue warrants if defendant is no longer on scene.

- Please make an attempt to look for and **speak to the defendant**
- **File companion charges**:
  Assault with DV
  Aggravated Menacing – if the threat is serious physical harm (ie. Kill, cut your head off, break your neck etc); Menacing if threat is physical harm

  ** Please ask the victim what she/he believes the defendant's threat meant

  PLEASE COLLECT EVIDENCE

- Witness statements – check for phone number and email
- Take PHOTOS with a camera – body worn camera is not good at capturing injuries
- If there is a voicemail, video, screenshots of text messages or other social media have the victim email the evidence to your work email right on scene: this our best chance to get this evidence
- Call a medic when needed (this is admissible in court)
- Encourage the victim to take photos as the injuries develop
- If given the opportunity please use **the advocate in the pilot program** – if we can provide the victim with advocacy early and often, victims are significantly more likely to follow through with prosecution

- We practice **evidence based prosecution** – this means we work hard to get convictions even when the victim is not willing or able to cooperate

  Please **do <u>not</u> tell the defendant** the **case will be dismissed** if the victim does not appear in court.

  When charging DV/VPO, please **charge all the offenses,** you have including but not limited: telecommunications harassment, criminal damaging, theft, OVI, resisting arrest, obstruction of official business, etc…

  PROTECTION ORDERS: always check with records to verify the order is valid. Best practice is to ask what kind of protection order is it. If the order is from **out of state** the order is **presumed to be valid**, even if you cannot verify it.

  JURISDICTION:

  -Agg Men/Men/DV M4: must be able to prove that threats were made OR received in the City of Columbus for us to have jurisdiction
  -Telecommunications Harassment: must be able to prove that communication was made OR received in the City of Columbus
  -VPO: must be able to prove that violation occurred within City of Columbus
  -Keep in mind, for charges under 2919.25(C), that there has to be an "imminent" threat, so if the victim is aware that the person making the threat is out-of-state at the time the threat is made, DV M4 would be an inappropriate charge.

C. Domestic Violence Law

DOMESTIC VIOLENCE R.C. 2919.25

-"No person shall knowingly cause or attempt to cause physical harm to a family or household member" (A) = M1

-"No person shall recklessly cause serious physical harm to a family or household member" (B) = M1

-"No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member" (C) = M4

***State v. Diroll*, 2007 Ohio 6930:** For purposes of a prosecution for domestic violence, under <u>R.C. 2919.25(C)</u>, **"imminent" means "threatening to occur immediately."** A definition of "imminent" as **"about to occur at any moment"** has also been applied. The evidence was insufficient because it did not show the victim thought defendant's threat was imminent, as,

after it was made by phone, the victim called defendant, told him to get his property from her home, put the property on her porch, locked the doors, and left the house.

***Effective April 4, 2023, the following provision will be added to the DV statute**

- "No person shall knowingly **impede the normal breathing or circulation of the blood of a family or household member by applying pressure to the throat or neck**, or by covering the nose and mouth, of the family or household member" **(D) = F3**

- If the offender previously has pleaded guilty to or been convicted of a violation of this section, or if the offender previously has pleaded guilty to or been convicted of two or more offenses of violence, a violation of division (d) of this section is a felony of the second degree.
- It is not required in a prosecution under division (d) of this section to allege or prove that the family or household member who is the victim suffered physical harm or serious physical harm or visible injury or that there was an intent to kill or protractedly injure the family or household member.

Related to DV--INTIMATE PARTNER VIOLENCE—Columbus City Code 2319.25

- No person shall knowingly cause or attempt to cause physical harm to an intimate partner (D) = M1

- No person shall recklessly cause serious physical harm to an intimate partner (E) = M1

- No person, by threat of force, shall knowingly cause an intimate partner to believe that the offender will cause imminent physical harm to the intimate partner (F) = M4
    - M3 if Def knew victim of the violation was pregnant at the time of the violation.

<u>Definitions</u>:

Family or Household Member

1. IS or HAS resided with Def. AND is a
2. Spouse of Def OR a former spouse
3. Person living as a spouse
    a. Common law spouse
    b. Cohabitating with Def or has cohabitated with Def within the last 5 years prior to the incident
4. Parent or Foster parent of Def
5. Child of Def
6. Blood relative to Def
7. Relative by marriage to Def
8. Parent of a spouse/former spouse/person living as spouse of Def

9. Child of a spouse/former spouse/personal living as spouse of Def
10. Has a child in common with Def (natural parent of)
    a. NOTE – no residency requirement!
    b. Therefore, two people who have never lived together but have a child together ARE considered family/household members under Ohio law

CONFUSION–officers sometimes are confused about the time period with which people have to have lived together or how recently when they're trying to determine if two parties have a DV (Family/household) relationship. Questions to ask that will help:

1. Are the two parties married or were they married at one time?
    a. Yes
        i. Are they living together now or have ever lived together (even for a day)?
            1. Yes = DV relationship
            2. No = No DV relationship
    b. No
        i. Are they living together now or have they lived together within the last 5 years?
        ii. Yes
            1. Are they in a romantic relationship together?
                a. Yes = DV rel'p
                b. No = no DV rel'p (ex. Roommates)

2. Are the parties' parents/children/blood relations/marriage relations to each other?
    a. Yes
        i. Are they living together or have they ever lived together?
            1. Yes = DV rel'p.
            2. No = no DV rel'p
3. Do the parties have a child in common? Yes = DV rel'p.

Remember – In Ohio, same sex partners who are living together in a romantic relationship are legally considered family/household members. The relevant factors to consider are whether the two parties are sharing family or financial responsibility and whether there is consortium (i.e. sex) between them.

ORC definition – Family/Household Member:

(A) a person who (is residing with the defendant) (has resided with the defendant) AND who is a (spouse of) (person living as a spouse of) (former spouse of) (parent of) (child of) (person related by consanguinity to) (person related by affinity to) (parent of a spouse of) (child of a spouse of) (parent of a person living as a spouse of) (child of a person living as a spouse of)(parent of a former spouse of) (child of a former spouse of) (person related by consanguinity to a spouse of) (person related by affinity to a spouse of) (person related by consanguinity to a person living as a spouse of) (person related by affinity to a person living as a spouse of)

(person related by consanguinity to a former spouse of) (person related by affinity to a former spouse of) the defendant.

OR

(B) the natural parent of a child of whom the defendant is the (other natural parent) (putative other natural parent).

ORC Definitions:
1. "Person living as a spouse" means a person who ([is living] [has lived] with the defendant in a common law marital relationship) (is cohabiting with the defendant) (has cohabited with the defendant within five years before the commission of the act in question).

2. "Cohabit" means the sharing of family or financial responsibilities and consortium

3. "Family or financial responsibilities" may include such things as providing shelter, food, clothing, utilities, and (commingling) (combining) assets.

4. "Consortium" may include such things as mutual respect, fidelity, affection, society, cooperation, solace, aid to each other, friendship and (conjugal) (sexual) relations.

5. "Consanguinity" means a blood relationship (as opposed to a relationship by marriage).

6. "Affinity" means a relationship by marriage (as opposed to a relationship by blood).

7. "Threat of force" means any violence, compulsion or constraint threatened to be used by any means upon or against a person.

8. "Imminent" means about to happen.

9. "Reside" means to live in a place on an ongoing basis.

10. "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

11. "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. Does NOT include wear and tear occasioned by normal use.

12. "Serious physical harm to persons" means any of the following:
(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity
(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

13. "Serious physical harm to property" means any physical harm to property that does either of the following:
(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;
(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

14. "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

15. "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist

16. "Offense of violence" means a violation of Agg. Murder, Murder, Voluntary Manslaughter, Involuntary Manslaughter, Felonious Assault, Agg. Assault, Assault, Permitting Child Abuse, Agg. Menacing, Menacing by Stalking, Menacing, Kidnapping, Abduction, Extortion, Trafficking in Persons, Rape, Sexual battery, Gross Sexual Imposition, Agg. Arson, Arson, Terrorism, Agg. Burg, Inciting to Violence, Agg. Riot, Riot, Inducing Panic, Domestic Violence, Intimidation, Intimidation of Atty, Victim, or witnesss in Criminal Case or Delinquent Child Proceeding, Escape, Patient Abuse, Improperly Discharging Firearm, Burglary ((A)(1), (2), or (3)), Endangering Children (B)(1), (2), (3), or (4), and any conspiracy or attempt to commit, or complicity in committing, any of the above-mentioned offenses.

17. "Intimate Partner" (C.C.C. 2319.25(K)(3)) means a person with whom the offender is or has been in a dating relationship but who does not meet the definition of family or household member.

DV ENHANCEMENTS:

If Def knew that the victim was pregnant at the time of the violation
- a violation of 2919.25(A) or (B) = F5 (mandatory prison time)
- a violation of R.C. 2919.25(C) = M3

Crimes that qualify for felony enhancement:

1. DV (either M1 or M4)
2. Endangering Children (M1)

3. Criminal Mischief (either M1 or M3)
4. Criminal Damaging (M1 or M2)
5. Neg. Assault (M3)
6. Agg. Trespass (M1)
7. Burglary (any degree)
8. Any offense of violence (See R.C. 2901.01(A)(9))

NOTE: Can only be used for enhancement if there was a conviction for any of the above offenses **AND** the victim of the offense was a family or household member AT THE TIME OF THE VIOLATION

If 1 prior conviction AND victim is a F/H member at the time of the violation:
-a violation of 2919.25(A) or (B) = F4; AND if Def knew victim was pregnant at the time = mandatory prison time if convicted
-a violation of 2919.25(C) = M2
If 2 prior convictions AND victim is a F/H member at the time of the violation:
-a violation of 2919.25(A) or (B) = F3; AND if Def knew victim was pregnant at the time = mandatory prison time
-a violation of 2919.25(C) = M1

Important things to remember:

1. When officers bring a DV packet to the Municipal Court Clerk's office (even if simply dropping off the packet for another officer), you must take the complaints out of the packet and make sure that case numbers get assigned by the clerk's office before leaving. Otherwise, the warrants never become active because there is no case number in the system and the clerk's office will not open the packets to get the complaints.

2. From time to time the DV and Assault complaints will be notarized by a police officer but the officer swearing to the complaints never signed them. These are making it up to the DV Unit with no case numbers and no signature by the officer. The DVU then has to track down the officer(s) and get this taken care of. The biggest issue with this is the same as above, where we have a suspect that should have active warrants for his arrest running around for several days following a DV incident without the warrant having been issued.

3. **BACK-UP CHARGES** (Part 1): Whenever officers are filing a DV M1 charge, they should always be filing the back-up Assault charge. On the off-chance that there is a misunderstanding about the relationship between the parties, we need the Assault charge to prove the case. ALSO, whenever officers are filing a DV M4 (threat) charge, they should always be filing either the M4 Menacing or M1 Agg Men too. Same rationale, in case there is a problem down the line with proving the relationship between the parties.

4. **BACK-UP CHARGES** (Part 2): Unfortunately, one of the realities of DV is that sometimes the victims are unwilling to come to court after the charges are filed or they are unwilling to testify against their abuser should the case go to trial. This is where back-up charges can be very helpful. If the defendant commits others crimes at the time of the DV offense, and the officers determine that PC exists for additional charges, we would encourage officers to file those charges. Typical examples include: Resisting Arrest, Obstructing Official Business, Disorderly Conduct, mm Drug Abuse, Falsification, etc.

Multiple times we have seen the defendant lie to officers about their name/ID info, or run/hide from officers, flail around acting disorderly, or resist arrest when the officers are trying to execute the DV warrant, etc. and the only charges filed are DV and Assault against the defendant. Then when the case gets to court, if the prosecutors can't prove the charges without the victim, the case MUST be dismissed. If there are other charges, it gives the prosecutor more ability to make the case or help them get a plea. You may think to yourself, "but I already charged him with two M1s, why should I bother with an M2 or M4?" Because the prosecutor might only be able to prove the OOB/RA/DC if the victim does not come to court, based on the officers' testimony alone. And if the defendant ends up pleading and being placed on probation, they can be ordered to have no contact with the victim or engage in and complete a counseling program.

D. Protection Orders

VIOLATING A PROTECTION ORDER (VPO) 2919.27

(A) "No person shall recklessly violate the terms of any of the following:
(1) A protection order issued or consent agreement approved pursuant to R.C. 2919.26, 2919.261[1], or 3113.31
(2) A protection order issued pursuant to R.C. 2151.34, 2903.213 or 2903.214
(3) A protection order issued by a court of another state
=M1

VPO Enhancement:

The next VPO charge can be enhanced to an F5 if:

- If Def has a prior conviction or juvenile adjudication for VPO, or
- Two or more prior convictions or juvenile adjudications of Agg Men, Menacing, Menacing by Stalking, or Agg. Trespass, or any combination of those offenses, that involved the same person who is subject of the protection order or consent agreement.

[1] Effective April 4, 2023, R.C. 2919.261 (Emergency Protection Order) will be added to the VPO statute as an order that an individual can violate.

The VPO charge can be enhanced to an F3 if:

- Def violates a protection order or consent agreement while committing a felony offense.
    - E.g., Def is not a qualified adult and not permitted to have a firearm pursuant to a protection order. Def violates terms of protection order and is within 500 feet of victim with a loaded concealed handgun in his waistband. The defendant would be committing a felony of the third degree violation of a protection order.

Different kinds of protection orders:

Municipal court may issue a Domestic Violence Temporary Protection Order (DVTPO) or a Criminal Protection Order (CRPO) depending on the type of charge and the relationship of the victim to the defendant. Civil (Domestic) Court issues Civil Protection Orders (CPO) victim is a family or household member of the defendant. If victim is being stalked, Common Pleas Court may issue a Civil Stalking or Sexually Orientated Offense Protection Order (SSOOPO). There is also an Ex-Parte CPO which is can be granted before a full hearing can be held to determine whether a CPO will be issued. CPO's are typically valid for 5 years.

DVTPO's issued in arraignment court have same effect as CPOs, etc. while the case is pending (they are sometimes granted by consent, sometimes contested, which involves a hearing in arraignment court)

- Prevents any contact between defendant and PW while case is pending. Once case is resolved, DVTPO goes away.
- IS enforceable by arrest

*__Protection Orders ONLY apply to the defendant NOT to the protected party__: one common refrain heard by officers/lawyers/judges is that the protected party "can't violate the order either" – THIS IS NOT LEGALLY CORRECT. The person against whom the protection order is valid (defendant) is the ONLY one who is subject to that order. He is not allowed to violate the order even with the permission of the protected party.

Example: Jane files for a CPO against her husband Jon. Among others, the conditions include that Jon is prohibited from having any contact with Jane and that he must stay at least 500 feet from her residence. The order is granted and Jon is served with his copy of the CPO and the terms and conditions are explained to him. The CPO is now considered "good" or "valid" and he has been served. The next week, Jane calls Jon with a question about their kids. Jon answers the phone and agrees to come over to Jane's house and deal with the situation. While Jon is at Jane's house that night, they get into a fight and Jon punches Jane in the mouth. Officers are called to the scene and make contact with Jane and Jon.

1. Based on these facts, is there PC to believe that Jon has violated the protection order?
2. Based on these facts, is there PC to believe that Jane has violated the protection order?

3. What crimes, if any, would you charge Jon with and why?

Is Service of a Protection Order Required?

Not necessarily.

In 2017, a new provision was added to R.C. 2919.27. Acts 2017, SB 7, § 3 provides: Section 3. The amendments made by this act to R.C. 2919.27(D) are intended to supersede the holding of the Ohio Supreme Court in *State v. Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698, so that unperfected service of a protection order or consent agreement does not preclude a prosecution for a violation of division (A) of that section.

R.C. 2919.27(D) states that in a prosecution for a violation of this section, it is not necessary for the prosecution to prove that the protection order or consent agreement was served on the defendant if the prosecution proves that the defendant was shown the protection order or consent agreement or a copy of either or a judge, magistrate, or law enforcement officer informed the defendant that a protection order or consent agreement had been issued, and proves that the defendant recklessly violated the terms of the order or agreement.

This provision makes it unnecessary for the prosecution to prove that a defendant has been served with the protection order if the prosecution can otherwise prove that a law enforcement officer informed the defendant that the protection order had been issued.

In other words, proper service is not an element of the offense pursuant to R.C. 2919.27(A).

Officer's Questions:

We have been asked two questions about probable cause to charge for a violation of a protection order: 1) Is a written statement by the petitioner, which alleges conduct which would be a violation of the protection order, sufficient by itself to file a charge; and 2) Does an officer always have to file a violation of protection order charge if the petitioner executes a statement indicating a violation has occurred.

1) First, yes you may file, and the vast majority of the time you should file, charges for violating a protection order if the petitioner executes a written statement indicating a violation of the order has taken place. Bear in mind that you may continue to further investigate even though a statement has been executed by the petitioner. You may strengthen the basis for the charge or find there is no basis for the charge. You should also file charges if you have other knowledge/facts of a violation of the order even if a statement has not been executed. (See **R.C. 2935.03** for further explanation of the basis for filing violation of protection order charges) **Keep in mind there is a preferred policy of arrest for violations of a protection order just as with Domestic Violence.**

2) Second, you do not have to file a charge for violating the protection order when a statement is executed by the petitioner if you have a specific factual basis for believing the written statement is untrue. In other words, if you have a factual basis for doubting a violation of the order took place as alleged in the statement by the petitioner you do not have to file charges even though the statement has been executed by the petitioner. For example, if the petitioner executes a written statement indicating a violation, but an independent witness indicates the story is untrue, this would be a legitimate reason not to file despite the written statement.

PLEASE FILE VIOLATION OF A PROTECTION ORDER (VPO) ON A WARRANT : what kinds of orders do you file VPO

1. TPOs – temporary protection orders : (have a CRB or CR case number with NO EXPIRATION DATE)
2. CPOs – civil protection orders: (have a DV case number with an expiration date) an ex parte (1 year) or full order (6 months to 5 years), BOTH EX PARTE AND FULL ORDERS ARE ENFORCEABLE
3. CSPO – Civil Stalking or Sexually Oriented Protection Orders (have a CV case number with an expiration date) an ex parte (1 year) or full order (6 months to 5 years), BOTH EX PARTE AND FULL ORDERS ARE ENFORCEABLE

NO CONTACT ORDERS ALSO CALLED POST CONVICTION ORDERS – LOOK A LOT LIKE A TPO, CPO, AND CSPO BUT THEY ARE SAME AND DIFFERENT

1. You can NOT file a violation of a protection order charge on an No Contact Order/Post Conviction Order – not one of the types of orders listed in the statute
2. This will look like a CRB case WITH AN EXPIRATION DATE 2022 CRB 00001 5/1/22- 5/1/24.
3. TIP: CRB with an expiration date ask records to open up to see what kind of protection order it is – if they say no contact order do not file a VPO.
4. If defendant committed another crime while violating NCO ie: Ag Men, DV threats, Assault, Criminal Damaging please file charges for what is appropriate. Especially, if the defendant is on scene and YOU witness a violation of the no contact order
5. You can make an arrest solely on an NCO. You would then ask the clerk for NCOOI code – this will allow you to slate the defendant without filing a new charge. I would recommend also filing at a minimum criminal trespass here, if you are witnessing the NCO and you are slating the defendant.
6. If NCO violation and D not on scene please make a written report and submit it to the municipal probation department.

Stay Away Orders

-Conditions of bond or probation
-Violations of a Stay Away are NOT enforceable by arrest

Example 1: Joe Smith is arrested for M1 DV and M1 Assault against his wife, Sally Smith. Joe goes through 4D arraignment court the next morning and the judge sets a bond. As a condition of the bond, Joe is ordered not to have any contact with Sally while the case is pending. The judge tells Joe to "stay away" from Sally until the case is resolved. Joe posts the bond and is let out of jail. He calls Sally after he's released and asks her to come pick him up.
1. Has there been a violation? If so, what was the violation?
2. What can Sally do with this information? Who can she contact?
3. What is the remedy for what Joe has done?

Restraining Orders
-Typically part of divorce or separation agreements
-Prevents parties from disposing of assets, selling or removing items from family home, etc.
-NOT enforceable by arrest

E. Aggravated Menacing

AGGRAVATED MENACING 2903.21 AND MENACING 2903.22

Agg Men: "No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." = M1 (can be enhanced to felony)

Menacing: "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." = M4

Threats against officers and their families:
- Still have to meet the statutory elements
- If the officer does NOT believe that the person will carry out the threats, then the officer should not file the charge
- If the officer DOES believe that the person will carry out the threats, then which crime to charge hinges on the specific language used by the offender

REMEMBER: The **threats must be BELIEVED** in order to satisfy the statutory elements. If the victim reports that "he threated to kill me but I didn't think he really would, he was just mad…" then the elements have NOT been met. THIS IS ALSO TRUE FOR ANY CHARGE OF DV M4 (THREATS). Also, threats to PROPERTY also qualify, not just threats to persons

Weapon Use:

- **Gun**: If the offender threatens the victim with a gun, there is NO requirement that the gun be operable or loaded in order to satisfy the elements for Agg Men.

- **Knife:** If the offender threatens the victim with a knife, there is NO requirement that the knife actually be used to satisfy the elements for Agg Men
- Threats without weapons: CAN still satisfy elements for Agg Men/Men if the offender knowingly causes the victim to believe the offender will carry out his threat, even if he does not have the ability to actually do so. So if I tell someone "I am going to shoot you in the head," and they believe me, I can be charged with Aggravated Menacing even if I don't have a gun on my person.
- **Back-up charges:** If you charge a defendant with Domestic Violence (M4) for threats such as "I am going to kill you," or "I will shoot you," and/or "I will stab you," you should also file an Aggravated Menacing charge with the DV charge. Lately we have seen officers either not charge anything besides the DV, or file just a Menacing charge. Threats to kill, shoot, cut in half, or other smaller pieces, are threats to cause serious physical harm thus they merit the filing of an Aggravated Menacing charge along with the DV. Some officers seem confused by this because the DV threat section (2919.25(C)) is an M-4 while Aggravated Menacing is an M-1. This is not a problem and is not a bar to filing both charges.

F. Interference With Custody

INTERFERENCE WITH CUSTODY 2919.23 (M1 generally but can be a felony)

-(A) No person, knowing the person is without privilege to do so or being reckless in that regard, shall entice, take, keep or harbor a person identified in division (A)(1),(2) or (3) of this section from the parent, guardian or custodian of the person defined in division (A)(1), (2) or (3) of this section:

(1) a child under the age of eighteen, or a mentally or physically handicapped child under the age of twenty-one

(2) a person committed by law to an institution for delinquent, unruly, neglected, abused, or dependent children

(3) a person committed by law to an institution for the mentally ill or the mentally retarded

Where we see this most:

- Mom and Dad have a child together but are never married. Mom and Dad have an "understanding" regarding shared parenting time/visitation. Mom gives child to Dad who then does not bring the child back when he's supposed to. Mom calls the police.

- Issues: If Mom and Dad are not married, then Mom has SOLE custody and rights to the child. It does not matter if Dad's name is on the birth certificate or if Mom swears that he is the father. It

also does not matter if Mom gave child to Dad voluntarily. Unless Dad has gone to DR court and established paternity through the court system, he has NO legal rights to the child and must give the child back immediately. If Dad feels that the safety or welfare of his child is compromised by being with Mom, he can apply for emergency custody through DR court. Until then, he must give the child back to Mom. See **R.C. 3109.042** Custody rights of unmarried mother: "An unmarried female who gives birth is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian…"

- If paternity has been established and there is a shared parenting or visitation schedule set up, and Dad has failed to return the child in accordance with the schedule, then Dad may be subject to a Contempt of Court action instead of criminal charges. This will be a case-by-case analysis based on any paperwork Mom can provide from DR court. Also keep in mind that what may look like an IWC could be a Kidnapping or Abduction instead.

G. Menacing By Stalking

MENACING BY STALKING (MBS) 2903.211

"No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person." (A)(1) = M1

"No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section;
(b) Urge or incite another to commit a violation of division (A)(1) of this section." (A)(2) = M1

"No person, with a sexual motivation, shall violate (A)(1) or (2)" (A)(3) = M1
Enhancement: MBS can be an F4 if:
1. Offender has a previous MBS conviction
2. Offender made a threat of physical harm to or against the victim (or induced a 3rd party to make a threat of physical harm)
3. Offender trespassed on land of victim's home, work or school (or induced 3rd party to trespass)
4. Victim is a minor
5. Offender has history of violence toward victim OR any other person OR a history of other violent acts against victim or any other person
6. Offender had deadly weapon on or about his person or under his control at time of offense

7. Offender was subject to a protection order at time of the offense (victim of offense does NOT have to be the protected party)
8. Offender caused serious physical harm to property/premises of victim (any real/personal property or premises) or induced 3rd party to cause serious physical harm to same
9. Offender, prior to committing offense, had been determined to represent a substantial risk of physical harm as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.
10. F5 if: Victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the victim's performance or anticipated performance of official responsibilities or duties UNLESS offender previously has been convicted of or pleaded guilty to an offense of violence and the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties then = F4

ORC Definitions:
(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device.

(2) "Mental distress" means any of the following:
(a) Any mental illness or condition that involves some temporary substantial incapacity;
(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

<u>Columbus City Attorney's Office Domestic Violence and Stalking Section (for Referrals):</u> Mary Lynn Caswell is Section Chief 645-6232; Dave Fox (Cyber Crime) 645-3144, Keionna Ashcraft (Stalking Advocate) 645-8970.

CASE LAW EXAMPLES OF WHAT CONSTITUTES SUFFICIENT EVIDENCE OF MBS

***State v. Sherman*, 2021-Ohio-4532 (10th App. Dist.)**: Evidence was sufficient for support defendant's conviction for menacing by stalking because the victim provided detailed testimony about the number of phone calls and unsolicited encounters she had with defendant, including

his threats to "go ballistic," "snap her neck," and make her "unrecognizable" with a gas can. The evidence also demonstrated that Sherman set fire to T.J.'s apartment front door, supporting the conviction as a fourth-degree felony.

***State v. Blackwell*, 2012 Ohio App. LEXIS 2863, 2012 Ohio 3253, (July 19, 2012):** Defendant's menacing by stalking conviction was supported by evidence that, over a three-day period, defendant damaged the victim's car, set fire to the car the following day, and called her and threatened to throw a Molotov cocktail into her apartment. State set forth sufficient evidence of the victim's mental distress to support defendant's conviction of menacing by stalking, as the victim stated several times during the victim's testimony that the victim felt threatened by defendant, including when the victim had the victim's child in the car with the victim and discovered defendant was following behind.

III. Miscellaneous other Criminal Code Section Concerns

***State v. Craig*, 2022-Ohio-1219 (10th App. Dist.): CPD Officer Miracle and Det. McCotter.** Evidence was sufficient and the manifest weight of the evidence supported the defendant's conviction for **tampering with evidence under R.C. 2921.12** because the defendant admitted that he stabbed the victim, took the knife from the scene of the stabbing, and threw the knife out of the vehicle while the victim chased him.

R.C. 2921.12(A)(1) defines tampering with evidence and provides no person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall alter, destroy, conceal, or remove any thing, with purpose to impair its value or availability as evidence in such proceeding or investigation**. In determining whether a person know an official investigation is likely to be instituted, likelihood is measured at the time of the act of alleged tampering.** The law has long recognized that intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof. The trier of fact may consider the entire set of circumstances surrounding the event and infer intent from the facts.

***State v. Whitaker*, 2022-Ohio-2840 (Ohio S. Ct):** In the context of aggravated burglary, a structure which is dedicated and intended for residential use, and which is not presently occupied as a person's habitation, but, which has neither been permanently abandoned nor vacant for a prolonged period of time, can be regarded as a structure maintained as a dwelling within the meaning of R.C. 2909.01(A). **Even homes undergoing major renovations have been found to be occupied structures,** because the definition of occupied in the Revised Code is far broader than in ordinary usage.

***State v. CSX Transp., Inc.*, 2022 Ohio LEXIS 1672 (Ohio S. Ct):** The trial court had correctly dismissed the State's charges against defendant for violating R.C. 5589.21 because it regulated, managed, and governed rail traffic in Ohio by prescribing how long a train may stay stopped while blocking a crossing, which conflicted with and was expressly preempted by the Interstate Commerce Commission Termination Act, thereby violating the Supremacy Clause, U.S. Const. art. VI, cl. 2, and neither of the Federal Railroad Safety Act savings clauses in 49 U.S.C.S. 20106(a)(2) applied because § 5589.21 did not address essentially local safety hazards.

***State v. Campbell*, 2022-Ohio-3626 (Oh. S. Ct): R.C. 2951.02(A)** authorizes a probation officer to search a probationer if there are **reasonable grounds to believe that the probationer is violating the law or the terms of his community control**. Under established case law, probationers who sign a **consent-to-search agreement** as a condition of community control may be subjected to random searches. There is no Fourth Amendment violation when a probation officer conducts a suspicionless search pursuant to a consent-to-search provision agreed to as a condition of community control.

IV. Home Entries, Searches and Sweeps

A. Consent to Enter and Search

***United States v. Campany*, 2022 U.S. App. LEXIS 9518 (6th Circuit):** A warrant is not required to conduct a search of the defendant's residence if a person with authority over the residence gives **consent to the search**. Such a person can be a fellow occupant who shares common authority over property, when the suspect is absent. **Common authority is the mutual use of the property by persons generally having joint access or control for most purposes**. Co-inhabitants, including this defendant, assume the risk that one of their number might permit the common area to be searched.

Typically, all family members have common authority over all of the rooms in a family residence. Family members may be deprived of such common authority and access to an enclosed space if one family member has clearly manifested an **expectation of exclusivity**—such as when an adult child locks a bedroom indicating no one else, including parents, can enter, thus it is like an apartment. Nevertheless, a family member can retain common authority over the defendant's bedroom if the family member has regular access to the bedroom and has title to the entire residence, including the bedroom itself. Therefore, family members are deemed to have "common authority" over all areas in the home unless another family member has clearly manifested an intent to exclude others from an enclosed space.

Even when actual authority does not exist, a warrantless search can be constitutional based on apparent authority. Law enforcement officers can conduct a search based on the permission of a co-inhabitant whom they reasonably, even if erroneously, believed to have authority to consent to the search. Officers can rely on the assumption that one co-inhabitant can permit the search of common areas against the wishes of the absent defendant, and they do not have the burden of considering the possibility of an atypical shared-occupancy arrangement unless there is reason to doubt that the regular scheme is in place.

However, **certain container types historically command a high degree of privacy. These containers include valises, suitcases**, **footlockers, and strong boxes, and a cohabitant's consent may not be sufficient for a search**. In other words, even if a cohabitant may consent to the entry and search of another co-habitant's bedroom, or other room, that doesn't automatically mean they may consent a search of a closed suitcase or sealed/locked box that belongs the other cohabitant.

***United States v. Watkins*, N.D. Ohio, 2022 U.S. Dist. LEXIS (Sep. 14, 2022)**: Case law confirms a statement to the effect **"I don't care" constitutes affirmative consent** to a search.

***State v. Seem*, 2022-Ohio-3507 (6th Dist.)**: **Acquiescence** to a claim of lawful authority is **not sufficient to constitute consent**. To acquiesce means to accept, comply, or submit tacitly or passively. "Lawful authority" is an express or implied false claim by police that they can immediately proceed to make the search in any event.

***State v. Marshall*, 2022-Ohio-1533 (6th Dist.):** officers cannot reasonably rely on a hotel employee's consent in entering the room without actual or implied knowledge that the occupant's status as a guest has been terminated.

OTHER CONSENT ISSUES/ANSWERS:

- The **State bears the burden of establishing that common authority exists**—this means that an officer has to know who gave them consent, and have asked enough questions to have reasonably believed the person who gave consent had common-authority over the place/item that was searched for the consent to have been valid. **A third-party's consent is valid if an officer looking at the then-available facts could reasonably conclude that the third-party had apparent authority to consent.** *State v. Holland*, 2019-Ohio-2351 (2nd App. Dist.).

- A **parent who owns or controls the premises** in which a child resides **has the right to consent to a search** thereof even though such search may produce incriminating evidence against the child. Parents can consent to a search of a child's room. *State v. Iacona*, 93 Ohio St. 3d 83 (2001).

- **Minor children have authority to provide consent to the police to enter** the premises, as opposed to authority to enter for purposes of conducting a search pursuant to a search warrant, when the police are simply there to investigate. In other words, officers may ask minor children to enter a home to investigate or to speak to someone. The courts look more closely at whether children may consent to a more extensive search beyond an entry. *State v. Gibson*, 164 Ohio App. 3d 558 (4th App. Dist.). The younger the child, the less likely he or she can be said to have the minimal discretion required to validly consent to a search of a parent's home. Much like with *Miranda*, courts are going to take a hard look at whether a minor can understand their rights, and freely voluntarily consent to a search of their parent's home.

- The fact of arrest does not necessarily render a consent involuntary. **The fact of custody alone has never been enough in itself to demonstrate a coerced consent to search**. The question becomes whether the duress present in a particular case exceeds the normal duress inherent in any arrest. Stated another way, an officer may ask for consent to search a home from a person who is detained or arrested. We suggest that when someone is detained, or arrested, and you are asking for consent to search from them, you make it clear to them they do not have to consent—that way if they consent, it will be clear they did so fully understanding their rights, even though they were in custody. Even after a suspect has invoked his right to counsel, the police are not prohibited from asking a suspect to consent to a search, as a request for consent to search is not an interrogation under *Miranda.* ***Miranda*** **warnings are not required to validate consent searches, even when the consent is obtained after the defendant is effectively in custody**. *State v. Riedel*, 2017-Ohio-8865, (8th App. Dist.).

- Consent to search obtained through deception has been deemed not freely and voluntarily given. In other words, **you cannot lie to get consent to search/enter**. An officer cannot tell a person, in order to get consent, that the police have a warrant to enter, or legal authority to enter, or PC to get a warrant, if those statements are untrue. Lying to get consent invalidates consent. *State v. Brittain*, 2018-Ohio-4136 (2nd App. Dist.).

- The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.

However**, a physically present inhabitant's express refusal of consent to a police search of his home is dispositive as to him, regardless of the consent of a fellow occupant**. But, an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason. So, stated another way, if two people with joint-authority/control over a home, and one consents to an entry/search, and the other one objects/refuses to consent, an officer must listen to the non-consenter. However, this only applies to the present non-consenter. If only one person with joint authority and control is present, and they consent, this is good consent—you do not need to seek out the other person with joint-authority and control to ask them for consent. Also, in the same vein, if a non-consenter is removed from the scene due to arrest, or leaves for some other legitimate reason, an officer may ask again for consent to search from the present person with joint-authority and control, and if they consent, this is now good consent even if the other cohabitant had refused consent before leaving. *Fernandez v. California*, 571 U.S. 292 (2014).

B. Arrest Warrants

***United States v. Dunbar*, 2022 U.S. App. LEXIS 32858 (6th Cir.)**: An arrest warrant imbues officers with the limited **authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.** In other words, to execute an arrest warrant officers must have a "reasonable belief" based on "common sense factors" and "the totality of the circumstances" that (1) the person named in the arrest warrant lives at the place and (2) they would find the person inside. In this case, officers surveilled the home early in the morning for several hours, a time when it likely he would be home and asleep, and no one left the home. The **officers heard rustling and coughing inside when they went to the door and knocked, but no one came to door**, which was indicative the wanted person was inside. Thus this was a good entry because there was reason to believe the wanted person was inside.

When conducting an arrest, officers may look in closets and other spaces **immediately adjoining the place of arrest** from which an attack could be immediately launched, even without reasonable suspicion. **But to sweep beyond those immediately adjoining areas, officers must have a reasonable belief** of finding a dangerous individual.

C. Hot-Pursuit

***City of Westlake v. Roberts*, 2022-Ohio-3675 (8th App. Dist.):** The **flight of a *suspected misdemeanant does not always justify a warrantless entry* into a home**. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter, to prevent imminent

harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so even though the misdemeanant fled.

A warrantless home arrest cannot be upheld simply because evidence of the suspect's blood alcohol level might have dissipated while the police obtained a warrant. Application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is PC to believe that only a minor offense is involved.

Practical legal advice: if you are in pursuit of a suspect who has committed a misdemeanor offense, and they flee into a home, you should immediately consider if there is *another* exigent circumstance to justify the entry. For example, if the fleeing misdemeanant fled into a darkened home with which they had no known association, that situation likely would be an exigent circumstance due to the danger the flight and entry would pose to anyone present in the home.

***Grant v. Wilson*, 2022 U.S. App. LEXIS 23207 (6th Cir.):** For purposes of the hot pursuit exception to the Fourth Amendment warrant requirement, the pursuit begins when police start to arrest a suspect in a public place. For purposes of the hot pursuit exception to the Fourth Amendment warrant requirement, hot pursuit occurs when the emergency nature of the situation necessitates immediate police action to apprehend the suspect, and courts decline to apply the exception when the sequence of events lacked an emergency. **The pursuit must actually be hot, rather than lukewarm at best.**

D. Exigent Circumstances

***State v. Rowley*, 2022-Ohio-997 (12th App. Dist.):** An exception to the warrant requirement is when officers encounter **exigent circumstances**. The Fourth Amendment does not bar police officers from making warrantless entries into a home when the officers **reasonably believe** a person within the home is in immediate need of aid or there is a need to protect or preserve life or to avoid serious injury.

A warrantless entry must be strictly circumscribed by the exigencies which justify its initiation as well as the reasonableness of the belief that it was necessary to investigate an emergency to protect life or prevent serious injury. What does this mean? **You may only enter to deal with the exigency**—you may only enter to check on the well-being of those inside, and once that is done, you should not do any other searches/sweeps without other legal justification. In other words, entering to check on someone is not license to search the whole home. However, what you see in plain-view, while attempting to check on a person, is fair game.

In evaluating the circumstances related to an exigency, appellate courts are reminded: the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process.

***United States v. Hill*, 2023 U.S. App. LEXIS 785 (6th Cir.):** The need for exigent circumstances can "be particularly compelling where narcotics are involved, for narcotics can be easily and quickly destroyed while a search is progressing." To justify a warrantless entry into a home based on the **exigency of imminent destruction of evidence,** an officer must show a reasonable belief that third parties were inside and that loss or destruction of evidence was imminent. Mere possibility that evidence may be destroyed is not enough.

E. Curtilage

***Alberts v. Perry*, 2021 U.S. App. LEXIS 29927 (6th Cir.):** There are **four factors** that serve as a guidepost to determining whether an individual has a reasonable expectation of privacy in an area, placing it within **the home's curtilage**: (1) proximity to the home; (2) whether the area is within an enclosure around the home; (3) uses of the area; and (4) steps taken to protect the area from observation by passersby

***United States v. Trice*, 966 F.3d 506 (6th Cir.):** For the purposes of the Fourth Amendment, **the area immediately surrounding and associated with the home—what the U.S. Supreme Court calls the curtilage—is regarded as part of the home itself.** When it comes to the Fourth Amendment, the home is first among equals. Curtilage is the area that is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened. It is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life.

Readily visible common areas do not constitute curtilage of an apartment. The Fourth Amendment does not preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. This is because there is no reasonable expectation of privacy in what one knowingly exposes to the public.

F. Search Warrants

***State v. Schubert*, Ohio Supreme Court, 2022-Ohio-4604**—The warrant to search the three cell phones was **not supported by probable cause, but rather mere conjecture**. The simple truth that cell phones are likely to be found at the scene of any car crash and that without an affidavit's presenting specific, case-related facts showing a fair probability that evidence of the crime will be found on the phones, it can only be speculated that the phones played any role in the crash.

***United States v. Sumlin*, 956 F.3d 879, 887 (6th Cir. 2020):** finding sufficient **nexus** where affidavit verified allegations of drug trafficking, provided probable cause to believe the defendant lived at the residence to be searched, was home when he received a text requesting drugs and left from his home to deliver the drugs.

V. Use of Force

A. Non-Deadly Force

***Meadows v. City of Walker*, 2022 U.S. App. LEXIS 23022 (6th Cir.):** In a § 1983 case involving plaintiff's claim that officers used excessive force to detain him during a traffic stop, the district court permissibly determined that a jury could find facts that, from the officers' perspective, showed no **active resistance**. Sixth Circuit precedent clearly established that **taking plaintiff to the ground, beating him, and fracturing his wrist when he did not actively resist arrest constituted excessive force.**

***Shumate v. City of Adrian*, 2022 U.S. App. LEXIS 22093 (6th Cir.):** Excessive force during an arrest is unreasonable and violates the Fourth Amendment. **This test of reasonableness has us consider three factors:** (1) the **severity of the crime** at issue; (2) whether the suspect posed an **immediate threat** to the officer or others; and (3) whether the suspect was **actively resisting arrest or attempting to evade arrest** by flight. These factors are non-exhaustive, and the ultimate question is whether the totality of the circumstances justifies the particular sort of seizure that took place.

Gauging the **severity of an offense is not always a straightforward task,** and the case law from this Circuit and our sister circuits employs various methods to determine an offense's severity. Many courts begin this inquiry by focusing on the **classification of the offense, i.e., misdemeanor or felony.**

Even if an exchange containing the use of profanity amounts to resisting arrest under a state statute, such crime is not particularly severe**. Disorderly conduct is not a violent or serious**

crime, and this fact weighs in favor of using less force in arresting a suspect. Conduct that is not a violent or serious crime does not permit an officer to use increased force absent other factors.

The severity of a crime weighs in favor of a finding that the use of force was not excessive where an individual is suspected of being involved in an **underlying felony**, such as when an officer responds to an emergency call or is in pursuit of a known felon.

An **officer's use of a Taser is permissible** where a suspect poses an **immediate threat in** the form of violent thrashing, an attempt to hit officers, or by making a display of force When a suspect actively resists arrest, the police can use a **Taser (or a knee strike)** to subdue him; but when a suspect does not resist or has stopped resisting, they cannot.

Active resistance has been found where some outward manifestation—either verbal or physical—on the part of the suspect had suggested volitional and conscious defiance. Conversely, if there is a common thread to be found in our case law on this issue, it is that **noncompliance alone does not indicate active resistance**.

It is settled in the Sixth Circuit that **noncompliance alone, without other acts of defiance, is not sufficiently active opposition to justify the use of a Taser** to subdue a subject who does not otherwise present any immediate threat to officer safety. Indeed, the **fact that a suspect does not immediately surrender does not inherently mean that he is resisting**

NOTICE: The general consensus among Sixth Circuit cases is that **officers cannot use force on a detainee who is <u>not</u> told he is under arrest, or is not resisting arrest**.

***Sevenski v. Artfitch,* 2022 U.S. App. LEXIS 20108 (6th Cir.):** The district court properly denied the officer summary judgment based on qualified immunity on plaintiff's excessive force claim because a reasonable factfinder, taking into consideration the totality of the circumstances, could find **that plaintiff did not pose a threat to the officers and was not resisting or attempting to evade arrest or attempting to flee**, and that the significant use of force against plaintiff was more than was necessary for the officer to take control of the situation, and an objectively reasonable officer would have been on notice **that throwing plaintiff to the ground with enough force to cause the significant injuries he suffered constituted excessive force.**

The ultimate question on an excessive force claim is whether the totality of the circumstances justified the force that was used**. The inquiry is not whether any force was justified, but whether the officer could reasonably use the degree of force that was employed.**

A direct refusal to follow an officer's commands does not preclude a finding that a takedown was excessive. It is well-established that a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force. **Even if a suspect was under arrest, cases in the Sixth Circuit clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest.**

***Bell v. City of S.field*, 2022 U.S. App. LEXIS 16348 (6th Cir.):** Officer's tasing plaintiff was not excessive because plaintiff failed to show that the officer violated his clearly established rights; **plaintiff was on the ground for several seconds and moved his arm away from the officer several times before the officer tased him, and the officer warned plaintiff that he would taser him if he did not comply.**

Qualified immunity protects officials who must make split-second decisions while protecting the public. That is why an appellate court views officers' actions from the perspective of a reasonable officer in the particular situation that officer confronted. Officers are entitled to qualified immunity unless they**: (1) violated a constitutional right; (2) that was clearly established at the time of the wrongdoing.**

***Hoogland v. Maryville*, 2022 U.S. App. LEXIS 15201 (6th Cir.):**
Citizen's excessive force claim under the Fourth Amendment failed; she had flouted deputies' commands to get her hands in the air, and that type of **noncompliance, when combined with the objective threat of a gun, justified the force required to incapacitate her**.

The totality of the circumstances gave the officer compelling grounds to believe that the citizen was armed, as her daughter had said that the citizen owned a gun but that it was missing from their home, plus the citizen's email implied that she was armed because it indicated that she had a bag with "an arsenal to exit life;" thus, there was no unreasonable search.

The Fourth Amendment's ban on unreasonable seizures also applies when officers seek to detain people for **mental-health treatment** out of concern that they may harm themselves or others. To detain a person on that ground, officers must have probable cause that the person might engage in harmful behavior.

Officers may use significant force to gain control of mentally unstable individuals who may pose a threat to themselves or others, but they may not use gratuitous force against such individuals if they have not resisted.

***Grinnell v. City of Taylor*, 2022 U.S. App. LEXIS 13540 (6th Cir.):** An officer may be liable for **failing to intervene when**, (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring. Where the act of excessive force unfolds in a matter of seconds, the second requirement is generally not satisfied. An excessive use of force lasting ten seconds or less does not give a defendant enough time to perceive the incident and intervene to stop such force.

***Laplante v. City of Battle Creek*, 2022 U.S. App. LEXIS 9453 (6th Cir.):** The district court properly denied the first officer's motion for summary judgment because there was a genuine dispute as to his use of force, both as he engaged in the takedown maneuver and as he proceeded to put pressure on plaintiff's back, upper body, arms, and the side of his head.

On an excessive force claim, a court must (1) assess an officer's use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and (2) defer to the clear, unaltered depiction of the facts displayed in a video.

The use of a takedown maneuver by a police officer, in a variety of scenarios, can amount to excessive force. **Takedown maneuvers are excessive when officers deal with a generally compliant suspect, and that the police may not use physical force against a subdued, non-resisting subject.** Such a maneuver is excessive when a suspect surrenders to the police, does not offer resistance, and/or when the interaction happens in the presence of multiple officers

As to the second officer, the district court erred when it determined that he was not entitled to qualified immunity on plaintiff's **failure to intervene claim**. An officer's mere presence during an altercation, without a showing of some direct responsibility, cannot suffice to subject him to liability. **Officers are not liable under failure-to-intervene claims when the ostensible opportunity and means to intervene does not last long enough for the officer to both perceive what was going on and intercede to stop it**.

***Palma v. Johns*, 2022 U.S. App. LEXIS 5252 (6th Cir.):** Officers may tase a person who actively resists arrest, or who resists an officer's commands even if the officers are not attempting to arrest him. Resistance includes physically struggling with, threatening, or disobeying officers. But not all disobedience justifies the use of force. **An officer may not tase a citizen not under arrest merely for failure to follow the officer's orders when the officer has no reasonable fear for his or her safety.**

If an officer knows that person is suffering from some mental illness, the officer must consider that fact and respond accordingly. Stated differently, behavior that ordinarily seems threatening may present a lower risk of harm if the officer has reason to believe that the behavior is a symptom of a mental condition. The diminished capacity of an unarmed person must be taken into account when assessing the amount of force exerted by an officer.

***Dallas v. Chippewa Corr. Facility*, 2022 U.S. App. LEXIS 5381 (6th Cir.):** A **handcuffing claim survives summary judgment if a genuine dispute of material facts exists as to whether**: (1) the handcuffed person complained that the handcuffs were too tight; (2) the handcuffing officer ignored those complaints; and (3) the handcuffed person experienced a physical injury resulting from the handcuffing. Bruising and wrist marks can be sufficient physical injuries for a handcuffing claim. The fact of noncompliance can amount to a critical difference that justifies greater use of force than if the handcuffed person had been compliant.

***Puskas v. Del. Cnty.*, 2023 U.S. App. LEXIS 186 (6th Cir.):** Deployment of a well-trained **police dog** is among the various forms of force available to law enforcement, that is a **comparatively measured application of force**, which **does not carry with it a substantial risk of causing death or serious bodily harm.** But only if it's reasonable under the circumstances as measured by the factors.

B. Deadly Force

***Puskas v. Del. Cnty.*, 2023 U.S. App. LEXIS 186 (6th Cir.):** It's true that officers cannot shoot a suspect **merely because he has a gun**.

***Cooper v. City of Columbus*, 2023 U.S. App. LEXIS 2629 (6th Cir.):** Roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. **It is permissible for an officer to grab an individual's arm when the officer suspects he is reaching for a weapon.**

Tennessee v. Garner's probable cause standard governs whether an officer who uses deadly force violates U.S. Const. amend. IV: an officer acts reasonably when deploying deadly force if the officer has **probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others**. This objective test requires courts to judge the use of force from the **perspective of a reasonable officer on the scene**, in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. And the appellate court must apply a **segmented approach** to the analysis: it evaluates the split-second judgments made immediately before the officer used allegedly excessive force.

The Supreme Court has identified three non-exclusive factors that lower courts should consider in determining the reasonableness of force used: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight. **The threat factor is a minimum requirement for the use of deadly force**, meaning deadly force may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.

Because the mere possession of a weapon is not sufficient to justify the use of deadly force, the court requires additional indicia that the safety of the officer or others is at risk. **This often turns on whether an armed suspect pointed her weapon at another person, but aiming a weapon is not a minimum requirement. An officer need not face the business end of a gun to use deadly force.** In sum, probable cause exists when officers could reasonably conclude that a suspect might fire a gun at them or use another dangerous weapon against them (even if they turned out to be wrong).

When an individual stops following officer commands and instead grabs a readily accessible firearm, an officer need not wait for the suspect to open fire on him before the officer may fire back. It is not wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him.

There is **no rule that officers must wait** until a suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force

When an officer acts within just a few seconds of reasonably perceiving a threat of serious physical harm, he is entitled to use deadly force, even if in hindsight the facts show that the persons threatened could have escaped unharmed. An officer may use deadly force when a confrontation unfolds in such rapid succession that he has no chance to realize that a potentially dangerous situation has evolved into a safe one.

***Francis v. Huff*, 2022 U.S. App. LEXIS 28595 (6th Cir.):** Officer's use of deadly force was reasonable, his actions did not violate the passenger's Fourth Amendment rights, and the officer was entitled to qualified immunity. The officer reasonably believed that the driver's vehicle was an imminent threat to him, as the driver had just led police on a high-speed chase and refused to comply with the officer's order to stop and instead hit him with her vehicle. **When the officer saw her wheels and headlights turn in his direction, he had to make the split-second choice of how to respond.**

Having already been hit by the vehicle once, **it was objectively reasonable for the officer to believe that the vehicle presented an imminent danger to himself**, and in this tense, uncertain, and rapidly evolving situation, officer's multiple shots were not excessive**.**

When deadly force is used against a fleeing vehicle, the court asks whether the officer had reason to believe that the fleeing car presented **an imminent danger to officers and members of the public in the area.** For example, deadly force is reasonable when a driver appears ready to hit an officer or bystander with his vehicle. It is generally no longer reasonable once the vehicle has moved away and the officer or bystander has reached a position of safety.

However, even if there is no one in the direct path of a fleeing vehicle, an officer still may use deadly force if the officer's prior interactions with the driver suggest that the driver will **continue to endanger others with his car**.

***Lee v. Russ*, 2022 U.S. App. LEXIS 12281 (6th Cir.):** In a 42 U.S.C.S. § 1983 action that alleged excessive force, summary judgment that granted defendant qualified immunity was improper because a reasonable jury could have found that defendant violated the victim's constitutional rights since the **victim did not pose an imminent and serious risk** when defendant fired his weapon as he stood **30 feet away**, and another officer provided cover with his firearm from behind the victim; thus, the victim's actions in the moments before the shooting did not justify lethal force.

***White v. City of Detroit*, 2022 U.S. App. LEXIS 16876 (6th Cir.):** The district court properly granted summary judgment in favor of defendants on the federal constitutional claims because under the Fourth Amendment the officer acted reasonably at each turn, the threat had imminence written all over it. The officer immediately and sensibly reacted to the trained canine dog's yelp and its cause, a pit bull's clenched-down grip on his nose. The threat also appeared severe and unrelenting. Within seconds, as the video footage confirmed, the pit bull began thrashing back and forth, pivoting solely on canine dog's hapless snout. Thrashing of this sort, as the record and common sense confirmed, means a dog had a good hold of something. The officer fairly believed that the trained canine dog faced serious, if not deadly, consquences if she did not act. **An officer may reasonably use lethal force against a pet that poses an imminent threat.**

C. Summoning/Rendering Medical Aid

1915.01 - Rendering aid following use of force

(A) Following **a use of force** by one of more division of police officer(s) **that causes serious bodily harm** to an individual, a division of police officer(s) present at the scene **shall summon**, or cause to be summoned, **emergency medical services** to render aid to the affected individual. Division of police officers must do this **immediately** following the use of force, **unless** the affected individual, or other individuals, pose an **imminent threa**t of serious bodily harm or death to the division of police officer(s) or other individuals.

(B) **Medical aid must be rendered**, by one or more division of police officers present at the scene, to an individual suffering serious bodily harm due to a use of force by the division of police, **consistent with available equipment and the training** the officer has received, **as soon as the immediate area has been secured of imminent or probable threats**. Any division of police officers engaged in rendering aid may cease rendering such aid upon the arrival of emergency medical personnel or other medical response.

VI. Investigative Issues

A. *Miranda* Rights

***Vega v. Tekoh*, 142 S. Ct. 2095 (2022)**: A violation of the *Miranda* rules does not provide a basis for a §1983 claim. The United States Supreme Court reasoned that a violation of Miranda is not itself a violation of the Fifth Amendment.

- **Note: Evidence in a criminal case can still be suppressed.**

***State v. Madden*, 2022-Ohio-2638 (1st App. Dist.):** If a defendant **requests counsel**, the **police must stop all questioning** and interrogation immediately. This rule involves two distinct inquiries.

First, courts must determine whether the accused **unequivocally invoked** his right to counsel. Second, if the accused invoked his right to counsel, a court may admit the accused's statements into evidence only if he initiated further discussions with the police, and knowingly and intelligently waived the right he had invoked.

***State v. Withrow*, 2022-Ohio-2850(7th Dist.):** The **public safety exception** allows officers to temporarily forego *Miranda* to ask questions necessary to securing their own immediate safety or the public's safety. The test, under the Ohio Supreme Court's decision in *Maxwell*, to determine if this questioning falls under the public safety exception has two prongs: (1) did the suspect have, or recently have, a weapon, and (2) is it possible that someone other than the police will gain access to the weapon.

***In re T.N.R.*, 2023-Ohio-85 (8th App. Dist.):** To determine whether a valid waiver occurred, courts should "'consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'"

***State v. Sommerville*, 2022-Ohio-4168 (5th App. Dist): CPD Det. Federer.** *Miranda* requires police to give a suspect certain prescribed warnings before custodial interrogation commences and provides that if the warnings are not given, any statements elicited from the suspect through police interrogation in that circumstance must be suppressed. **If a suspect provides**

responses while in custody without having first been informed of his or her rights, the responses may not be admitted at trial as evidence of guilt. If after warnings are given, the suspect indicates that he or she wishes to remain silent, or if the suspect states that he or she wants an attorney, the interrogation must cease

A request for an attorney must be clear and unambiguous such that a reasonable police officer in the circumstances will understand the statement to be an invocation of the right to counsel. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. Whether a suspect has unequivocally invoked his right to counsel is an objective inquiry

A defendant claiming **self-defense concedes that he has the purpose to commit the act, but asserts that he is justified in his actions.** Self-defense presumes intentional, willful use of force to repel force or to escape force. Self-defense is a confession and avoidance defense in which appellant admits the elements of the crime but seeks to prove some additional element that absolves him of guilt

B. Search and Seizure

***State v. Burroughs*, 2022-Ohio-2146 (Ohio S. Ct):** A trial court erred in failing to grant defendant's motion to suppress evidence discovered without a search warrant while police were executing an arrest warrant because the U.S. Const. amend. IV **"single-purpose-container exception"** to the warrant requirement did not apply because the illegal nature of the contents, illegal drugs, of a closed bookbag with a plastic baggie stuck in its zipper was not readily apparent based on the distinctive characteristics of the package since a bookbag could hold a variety of items, some illegal, some not, and the visible part of the baggie was empty. Under these circumstances, the contents of the bookbag could not be said to have been so obvious that they may as well have been in plain view.

When there is probable cause to believe that the closed container holds evidence of criminal activity, the owner's interest in possession is outweighed by the risk that the contents may disappear or be put to their intended use before a warrant may be obtained. Thus, police may seize the container. On the other hand, once the container has been seized, those risks disappear. **There is no justification for allowing the officer to forego a warrant before opening the closed container**. This limitation protects the owner's privacy interest.

Under the **plain-view doctrine**, an officer may seize an object in plain view without a warrant if (1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be viewed, (2) the object's incriminating nature is immediately apparent, and (3)

the officer has a right to access the object where it is located. There is simply no reasonable expectation of privacy in the outward appearance of an object that has been left in plain view.

C. Identifications/Photo Arrays

***State v. Aekins*, 2023 Ohio App. LEXIS 301 (10th App. Dist.):** In determining the admissibility of challenged identification testimony, courts apply a two-prong test: (1) did the defendant demonstrate that the identification procedure was unnecessarily suggestive, and, if so, (2) whether the identification, viewed under the totality of the circumstances, was reliable. Thus, even if police use an unnecessarily suggestive identification procedure, exclusion is appropriate only when the improper police conduct creates a "'substantial likelihood of misidentification.'"

R.C. 2933.83 requires any law enforcement agency or criminal justice entity that conducts live or photo lineups to "adopt specific procedures for conducting the lineups." R.C. 2933.83(B). **Such procedures, at a minimum, must include the use of a blind or blinded administrator. R.C. 2933.83(B)(1).**

An administrator is the person who conducts a live or photo lineup. R.C. 2933.83(A)(1**). A "[b]lind administrator" is an administrator who "does not know the identity of the suspect."** R.C. 2933.83(A)(2). **A "[b]linded administrator" is an administrator who "may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness."** R.C. 2933.83(A)(3).

The administrator of the photo lineup must make a written record that includes the following information:

(a) All identification and nonidentification results obtained during the lineup, signed by the eyewitnesses, including the eyewitnesses' confidence statements made immediately at the time of the identification;
(b) The names of all persons present at the lineup;
(c) The date and time of the lineup;
(d) Any eyewitness identification of one or more fillers in the lineup;
(e) The names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup.

As required by R.C. 2933.83(B), the CPD has adopted specific procedures for conducting live and photo lineups, which are contained in the CPD Training Supplement. The Training Supplement instructs officers that an "important aspect of any photo *lineup* or show-up is the independent, uninfluenced identification of the suspect by a victim or witness." The Training Supplement provides that, unless impractical, a blind or blinded administrator shall conduct a photo lineup, and defines a blind administrator as "[a]n administrator who does not know the identity of the suspect." Under a section titled "Avoid Suggestion and/or Feedback," the Training Supplement instructs officers that there "shall be no pre-view consultation with the victim and/or witness. Do not be suggestive regarding ***a*** suspect's photo."

CPD Det. Mall testified at the suppression hearing, explaining he had administered hundreds of photo arrays throughout his 25-year employment with CPD. Det. Mall stated his only involvement with the present case was interviewing Mora at the hospital and presenting her with the photo array. Det. Mall did not create the photo array. Det. Mall explained he was a blind administrator in this case because he "had no knowledge of who the possible suspect was in the incident."

CPD Det. Mall had Mora circle the number six and place her initials next to the number six photograph on the array. Det. Mall noted that Mora's "handwriting was shaky" as she wrote her initials. After watching Mora's difficulty writing her initials, Det. Mall decided "that she was not going to be able to, you know, write a full sentence." Det. Mall did not have Mora write a statement or sign the photo array form "due to the position that she was laying in" and because she had on a "neck brace * * * and was not mobile."

Det. Mall wrote "unable to complete" next to the section titled "Viewer's Statement" on the photo array form, and wrote "unable to sign" next to the section titled "Viewer's Signature." Under the section titled "Administrator's Comments," Det. Mall wrote the following: "Viewed the array — did not recognize anyone initially. I put the array away, Ms. Mora stated 'the one' photo is similar to the suspect. I brought the array back out, she then identified #6 saying if he had bushier facial hair and a hoodie on its 'probably' the suspect."

The trial court denied the motion to suppress at the conclusion of the hearing. The court stated it found **"Detective Mall to be extremely credible,"** that Det. Mall was a blind administrator, and he "fully complied with the statute in this matter and how they conducted the interview."

Appellant does not contend that the actual photo array was unnecessarily suggestive of his guilt. Rather, appellant contends that the manner in which Det. Mall presented the photo array was

unnecessarily suggestive. Appellant notes that Det. Mall questioned Mora about the facts of the incident for 13 minutes before presenting her with the photo array. Appellant contends Det. Mall's interview with Mora prior to showing her the array constituted a **"pre-view consultation" prohibited by the Training Supplement at III(A)(1).**

At the suppression hearing, Det. Mall explained that the pre-view consultation prohibited by the Training Supplement meant he "should not have any conversation or allow the witness to view the photo array or have any comments or conversation with them about that photo array prior to reading the instructions and showing them the array." Det. Mall stated the prohibition against pre-view consultations did not prevent him from discussing the underlying incident with the witness before administering the photo array. As such, Det. Mall stated he did not conduct a pre-view consultation with Mora because he simply "conducted an interview with her concerning the facts of the incident" and "did not pre-view the photo array or consult with her about the photo array prior, at any point in that interview prior to providing the photo array information to her." The court concluded Det. Mall had not conducted a pre-view consultation with Mora.

Appellant also asserts the definitions of blind and blinded administrator in R.C. 2933.83 demonstrate the "General Assembly's intent that the administrator of the photo lineup not be an investigating detective." We (the court) disagree. The statute provides specific definitions for the terms blind and blinded administrator, and the definitions do not address the administrator's role in the investigation. R.C. 2933.83(A)(2) and (3). The trial court properly found Det. Mall to be a blind administrator because he did not know the identity of the suspect.

Appellant next contends Det. Mall's response to Mora's question "implicitly assured Mora of the suspect's presence in the array." After Det. Mall read the photo array instructions to Mora, Mora asked, **"but why, why would you guys have pictures today of him?" Det. Mall responded stating, "well, based on information that the primary detective got from officers at [the] scene, they were able to put some things together."** This court has observed that "]n most photo array situations, the victim of a crime knows someone in the array is a likely suspect, otherwise the police would not be asking them to look at photos." **Considering the facts and circumstances of this case, we find (the court) Det. Mall's response to Mora's question did not render the photo array unnecessarily suggestive of appellant's guilt.** Immediately before Mora asked the question, Det. Mall informed Mora that "the subject of this investigation may or may not be included in the photographs," that she was "not required to select any of the photographs," and that he did "not know who the suspect of this investigation [was]." Det. Mall's response to Mora's question did not directly inform Mora that the suspect's photo was included in the array, as the response

merely indicated that officers created the array based on information gathered at the scene. The response thus permitted the conclusion that officers created the array using the description of the suspect Mora had provided at the scene. The response also did not inform Mora that a suspect had been apprehended or taken into custody.

Det. Mall's response to Mora's question also did not steer Mora toward any particular photograph in the six-person photo array. As Det. Mall's response to Mora's question did not make it any more likely that Mora would select appellant's photograph over one of the other photographs, appellant fails to demonstrate that the response rendered the identification procedure unnecessarily suggestive of his guilt.

Appellant further notes that, after Mora initially failed to identify anyone from the photo array, Det. Mall "continued to question Mora, as if he wanted Mora to reconsider and still make an identification." **After Mora indicated she did not recognize anyone, Det. Mall put the photo array away and asked her, "is there anything else that I haven't asked you about or talked to you about that you think would be important for us to know?" Det. Mall's question was open-ended and did not direct Mora back to the photo array. Rather, Mora then directed Det. Mall back to the photo array. Det. Mall's final, open-ended question to Mora did not render the presentation of the photo array unnecessarily suggestive.**

Appellant lastly contends that Det. Mall violated R.C. 2933.83(B)(4)(a) as he failed to record Mora's confidence in the identification or have Mora sign the photo array form. However, Det. Mall did record Mora's confidence statement, as he wrote on the photo array form that Mora "identified #6 saying if he had bushier facial hair and a hoodie on its 'probably' the suspect." Appellant contends this statement was insufficient because Det. Mall only recorded Mora's statement that the photo was "probably" the suspect. R.C. 2933.83 directs the administrator to record the witness's confidence statements "made immediately at the time of the identification." R.C. 2933.83(B)(4)(a). The Training Supplement specifically directs the administrator **to not "*ask the witness 'How sure are you?' to solicit a confidence level*,"** and to instead "***record any unsolicited, specified level of confidence***." Thus, Det. Mall complied with the statute and the Training Supplement by not soliciting a specific confidence level from Mora, and instead recording Mora's unsolicited confidence statement made at the time of her identification.

Although Mora initialed the photo array, she did not sign the photo array form. *See* R.C. 2933.83(B)(4)(a) (stating that "[a]ll identification and nonidentification results obtained during the lineup," including the witnesses "confidence statements," must be "signed by the eyewitnesses"). The trial court concluded that Mora's failure to sign the photo array form while

she was "in the emergency room on medication, in restraints, [and a] neck brace," did not amount to a material violation of R.C. 2933.83. We (the court) find the trial court's ruling reasonable under the facts of the present case.

VII. First Amendment Issues Related to Policing

***Wood v. Eubanks*, 2022 U.S. App. LEXIS 3427 (6th Cir.):** Police officers lacked probable cause when they arrested plaintiff for disorderly conduct because, while his speech was profane, the circumstances did not create a situation where violence was likely to result; therefore, the First Amendment protected plaintiff's speech.

Because there was no probable cause to arrest plaintiff for his conduct, and because his right to be free from arrest was clearly established, the officers were not entitled to qualified immunity.

Profanity alone is insufficient to establish criminal behavior. Ohio's disorderly conduct statute and the First Amendment require more than the uttering, or even shouting, of distasteful words. The Ohio cases are clear that use of profanity alone or generalized derogatory statements are insufficient to support a conviction for disorderly conduct.

Both the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit have made clear that police officers are expected to exercise greater restraint in their response than the average citizen. **Police officers are held to a higher standard than average citizens, because the First Amendment requires that they tolerate coarse criticism**. The freedom of individuals verbally to oppose or to challenge police action without thereby risking arrest is one of the principal characteristics by which courts distinguish a free nation from a police state.

VIII. Public Records and Policing

***State ex rel. Myers v. Meyers*, 2022-Ohio-1915 (Oh. S. Ct.):** The Ohio Supreme Court held that when a police department maintains both incident-report forms and investigatory work product as part of the same overall investigatory record, **officers' reports that contain their observations at the time that they are responding to an incident, along with initial witness statements taken at the time of the incident or immediately thereafter, are incident-report information that is a public record** and may not be withheld from disclosure as specific investigatory work product under R.C. 149.43(A)(2)(c);

The Supreme Court of Ohio has consistently held **that routine offense-and-incident reports do not fall under the exception for specific investigatory work product**, and are therefore public records.

Ohio Supreme Court case law provides two bases for determining whether documents qualify as part of the public-record incident report. The first is whether the document constitutes a regular incident-report form on which officers have filled in blanks with information**. The second is whether the information provided initiates the investigation, as opposed to constituting work product generated after the investigation is under way.**

When a city invokes the confidential law-enforcement investigatory record (CLEIR) exception to disclosure here, it bears the burden of production to plead and prove facts clearly establishing the applicability of the exception**. And because exceptions to disclosure under R.C. 149.43 are strictly construed against the public-records custodian**, the custodian does not satisfy its burden if it has not proven that the requested records fall squarely within the exception.

***State ex rel. Standifer v. City of Cleveland*, 2022-Ohio-3711 (Oh. S. Ct):** The Supreme Court concluded that the confidential law-enforcement investigatory records (CLEIR) exception from disclosure under the Public Records Act does not apply categorically to the use-of-force (UOF) reports.

IX. Exculpatory Evidence

***State v. McNeal*, 2022-Ohio-2703 (Oh. S. Ct.)**: In *Brady*, the Supreme Court of the United States recognized that the **prosecution has an affirmative duty to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment**. That duty encompasses impeachment evidence as well as exculpatory evidence, and it **encompasses evidence known only to police investigators and not to the prosecutor**, The Brady rule applies regardless of whether evidence is suppressed by the state willfully or inadvertently.

The United States Supreme Court has explained that **evidence is favorable to the accused under Brady when it is exculpatory or impeaching.** And, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A different result is reasonably probable when the government's evidentiary suppression undermines confidence in the outcome of the trial.

X. Legislative Update

A. Ohio Revised Code

SB-16 [Effective: 4/2/2023]

Legal Commentary: This bill creates a few new criminal charges and modifies some existing ones. The biggest change is that if someone obstructs an officer's way while they are responding to an emergency, that person may be arrested and charged with an M1. It changes the definition of importuning from four years older than the person to ten years older than the person. It expands the definition of voyeurism and prevents sex offenders from volunteering with children.

Unlawfully impeding the passage of an emergency service responder (2917.14):

> 2903.13(E) (21)"Emergency service responder" means any law enforcement officer, first responder, emergency medical technician-basic, emergency medical technician-intermediate, emergency medical technician-paramedic, firefighter, or volunteer firefighter.
>
> (A) No person, without privilege to do so, shall recklessly obstruct any highway, street, sidewalk, or any other public passage in such a manner as to render the highway, street, sidewalk, or passage impassable without unreasonable inconvenience or hazard if both of the following apply:
>
> (1) The obstruction prevents an emergency vehicle from accessing a highway or street, prevents an emergency service responder from responding to an emergency, or prevents an emergency vehicle or an emergency service responder from having access to an exit from an emergency.
>
> (2) Upon receipt of a request or order from an emergency service responder to remove or cease the obstruction, the person refuses to remove or cease the obstruction.
>
> (B) Division (A) of this section does not limit or affect the application of section 2921.31 of the Revised Code or any other section of the Revised Code. Any conduct that is a violation of division (A) of this section and that also is a violation of section 2921.31 of the Revised Code or any other section of the Revised Code may be prosecuted under this section, the other section, or both sections.
>
> (C) Whoever violates this section is guilty of unlawfully impeding public passage of an emergency service responder, a misdemeanor of the first degree.
>
> (D) As used in this section, "emergency service responder" has the same meaning as in section 2921.01 of the Revised Code.

Importuning (R.C. 2907.07): The bill increases the penalty for importuning to an F3 if the offender arranged to meet the person for the purpose of engaging in sexual activity. It is an F5 the offender is ten or more years older than the person, if an officer posed as someone aged 13-16 and

the offender is 10 or more years older than the officer claimed to be, and the offender both solicited and arranged to meet the other person for sex.

Voyeurism (R.C. 2907.08): The bill expands the definition of voyeurism to include broadcasting, streaming, or recording someone in a place where the person has an expectation of privacy for viewing that person's "private areas."

Volunteering with children (R.C. 2950.035): No sex offender may volunteer with minor children if they will be in an unaccompanied setting with children or would have supervision or disciplinary power over them, including providing goods and services to the children. Violating this section is an M1, a second offense is an F3, and a third offense is an F1.

SB-288 [Effective 4/2/2023]

Legal Commentary: This bill creates significant changes to the criminal law, including making strangulation a felony and creating increased penalties for texting while driving. These changes become effective at the beginning of April.

Strangulation:

The goal of the strangulation provision is to take a stand against domestic violence, so the statute contains increased penalties for attacking a family member or significant other who the offender lives with.

Drug Use:

The law also contains provisions protecting people who call 911 on others who are suffering an overdose. This expansion of the "Good Samaritan Law" applies to everyone, including parolees, who call 911 on someone who is experiencing an overdose.

Moreover, the law explicitly excludes fentanyl test strips from the definition of drug paraphernalia. This means that if an officer finds fentanyl testing strips, while it might provide a suspicion that illegal drugs are present and provide probable cause for a search, it is not sufficient to arrest and conduct a search incident to arrest for more illegal drugs.

Texting while Driving:

This bill also contains the texting while driving provisions. It contains many exceptions, which may complicate things for officers initiating traffic stops to write tickets under this law.

The bill explicitly states that officers ONLY have probable cause if they see the cell phone of someone who appears to be texting while driving. If someone is stopped at a traffic light or pulled over, the officer may not initiate a traffic stop. The individual must be in a moving car and typing numbers or symbols into the device. The statute does NOT provide probable cause to search the

cell phone of an individual who has been pulled over for a traffic stop. Officers may only open the phone with the person's unequivocal consent.

If an officer sees someone who appears to be texting while driving, they may initiate a traffic stop when they see the person holding or supporting a cell phone or other device while driving. The officer may write a ticket for texting while driving unless the person is calling 911, using Google Maps, or another exception applies.

Strangulation: RC 2903.18:

Strangulation is any act that impedes the normal breathing or circulation of the blood by applying pressure of the throat or neck by covering the nose and mouth.

(B) No person shall knowingly do any of the following:

(1) Cause serious physical harm to another by means of strangulation or suffocation; (F2)

(2) Create a substantial risk of serious physical harm to another by means of strangulation or suffocation; (F3)

(3) Cause or create a substantial risk of physical harm to another by means of strangulation or suffocation. (F4, unless the victim is a family or household member or a current or former dating partner, then F3)

Drug Use: 2925.12, 2925.14, 2924.141

This provision applies R.C. 2925.11(B) (2), which releases individuals from criminal liability, if they are obtaining medical assistance for another person experiencing an overdose.

2925.12 (A)(2): Division (B)(2) of section 2925.11 of the Revised Code applies with respect to a violation of this section when a person seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person experiences a drug overdose and seeks medical assistance for that overdose, or a person is the subject of another person seeking or obtaining medical assistance for that overdose.

R.C. 2925.14 (D)(3): Division (B)(2) of section 2925.11 of the Revised Code applies with respect to a violation of division (C)(1) of this section when a person seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person experiences a drug overdose and seeks medical assistance for that overdose, or a person is the subject of another person seeking or obtaining medical assistance for that overdose.

R.C. 2925.141 (E)(2): Division (B)(2) of section 2925.11 of the Revised Code applies with respect to a violation of this section when a person seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person experiences a drug overdose and

seeks medical assistance for that overdose, or a person is the subject of another person seeking or obtaining medical assistance for that overdose

If a person on probation calls for medical assistance for an overdose, they will not be penalized for doing so. (2929.141(B)).

2925.14(D)(4): Division (C)(1) of this section does not apply to a person's use, or possession with purpose to use, any drug testing strips to determine the presence of fentanyl or a fentanyl-related compound.

Texting while Driving: R.C. 4511.204(A)

Summary:

No person may drive while holding a cell phone unless they are: using it for emergency purposes, on a phone call (regular or speakerphone), using Google Maps (or an equivalent). They may not manually enter letters, numbers, or symbols into the cell phone unless they are using Maps or for emergency purposes. If the driver is stopped at a traffic control signal or stopped due to an emergency road closure, it also does not apply. This does not apply to law enforcement.

Officers do not have probable cause to stop the car unless they visually observe the person holding the phone. The officer may not access the device without consent from the driver or confiscate the phone before he or she has a warrant. Consent by the operator must be "voluntary and unequivocal" before the officer can access the device without a warrant. Officers may not pull over a truck driver for using a two way radio. Violating the statute results in an unclassified misdemeanor. The offender's race must be reported on the ticket.

4511.204. (A) No person shall drive operate a motor vehicle, trackless trolley, or streetcar on any street, highway, or property open to the public for vehicular traffic while holding, or physically supporting with any part of the person's body an electronic wireless communications device.

(B): Exceptions

(1) A person using an electronic wireless communications device to make contact, for emergency purposes, with a law enforcement agency, hospital or health care provider, fire department, or other similar emergency agency or entity;

(2) A person driving a public safety vehicle who uses a handheld while using an electronic wireless communications device in that manner in the course of the person's duties;

(3) A person using a handheld an electronic wireless communications device in that manner whose when the person's motor vehicle is in a stationary position and who is outside a lane of

travel, at a traffic control signal that is currently directing traffic to stop, or parked on a road or highway due to an emergency or road closure;

(4) A person reading, selecting, or entering a name or telephone number in a handheld using and holding an electronic wireless communications device directly near the person's ear for the purpose of making or , receiving, or conducting a telephone call, provided that the person does not manually enter letters, numbers, or symbols into the device;

(5) A person receiving wireless messages on a an electronic wireless communications device regarding the operation or navigation of a motor vehicle; safety-related information, including emergency, traffic, or weather alerts; or data used primarily by the motor vehicle, provided that the person does not hold or support the device with any part of the person's body;

(6) A person receiving wireless messages via radio waves using the speaker phone function of the electronic wireless communications device, provided that the person does not hold or support the device with any part of the person's body;

(7) A person using an electronic wireless communications device for navigation purposes, provided that the person does not do either of the following during the use:

(a) Manually enter letters, numbers, or symbols into the device;

(b) Hold or support the device with any part of the person's body;

(8) A person conducting wireless interpersonal communication with a device that does not require manually entering letters, numbers, or symbols or reading text messages, except to activate, deactivate, or initiate the device or using a feature or function of the electronic wireless communications device with a single touch or single swipe, provided that the person does not do either of the following during the use:

(a) Manually enter letters, numbers, or symbols into the device;

(b) Hold or support the device with any part of the person's body;

(9) A person operating a commercial truck while using a mobile data terminal that transmits and receives data;

(10) A person operating a utility service vehicle or a vehicle for or on behalf of a utility, if the person is acting in response to an emergency, power outage, or circumstance that affects the health or safety of individuals;

(11) A person using a handheld an electronic wireless communications device in conjunction with a voice-operated or hands-free device feature or function of the vehicle or of the device without the use of either hand except to activate, deactivate, or initiate the feature or function

with a single touch or swipe, provided the person does not hold or support the device with any part of the person's body;

(12) A person using technology that physically or electronically integrates the device into the motor vehicle, provided that the person does not do either of the following during the use:

(a) Manually enter letters, numbers, or symbols into the device;

(b) Hold or support the device with any part of the person's body.

(13) A person storing an electronic wireless communications device in a holster, harness, or article of clothing on the person's body.

(G)(1) A law enforcement officer does not have probable cause and shall not stop the operator of a motor vehicle for purposes of enforcing this section unless the officer visually observes the operator using, holding, or physically supporting with any part of the person's body the electronic wireless communications device.

(2) A law enforcement officer who stops the operator of a motor vehicle, trackless trolley, or streetcar for a violation of division (A) of this section shall inform the operator that the operator may decline a search of the operator's electronic wireless communications device. The officer shall not do any of the following:

(a) Access the device without a warrant, unless the operator voluntarily and unequivocally gives consent for the officer to access the device;

(b) Confiscate the device while awaiting the issuance of a warrant to access the device;

(c) Obtain consent from the operator to access the device through coercion or any other improper means. Any consent by the operator to access the device shall be voluntary and unequivocal before the officer may access the device without a warrant.

A violation of this statute results in an unclassified misdemeanor, up to a $150 fine, or two points on a license.

2917.12- Disturbing a lawful meeting is an M1 if: it is committed at a church, or committed with the intent to interfere with a virtual gathering. Otherwise, it is an M4.

Effective April 4, 2023 under S.B. 288,

A conviction for Operating a Vehicle after Underage Consumption (OVUAC) under R.C. 4511.19(B) will no longer be counted as a prior OVI conviction for purposes of an OVI- Test Refusal Charge or for enhancement purposes (priors relating to the 10 year and 20 year look back

periods). As a result of this charge, the OVUAC language will be removed from the consequences of refusal section of the BMV 2255. *See* R.C. 4511.192.

Note: If an officer has probable cause that an underage age person (under 21 years old) is impaired by alcohol, a drug of abuse, or a combination thereof, charged the underage person with violating the OVI Impaired offense under R.C. 4511.19(A)(1)(a). And if the underage person is over one of the *per se* limits in R.C. 4511.19(A)(1)(b)-(j), then charge them under the requisite OVI *Per Se* offense. If convicted of one of the above-mentioned offenses, it would still count as a prior conviction for purposes of a test refusal charge and enhancement purposes even if the person was under 21 years old. **This change only affects cases where the underage person is not necessarily impaired but has consumed alcohol and is over the OVUAC *Per Se* limits in section R.C. 4511.19(B) but under the *Per Se* thresholds in (A). In those cases, the conviction *will not* count as a prior OVI offense under any statute that refers to prior OVI offense.**

Other Relevant Bills:

HB- 99 Signed 1/2/2023, effective 4/1/2023: Authorizes the peace office training commission to train candidates (including police officers) to convey deadly weapons in school zones. The identities of these individuals are exempted from public record.

It also creates the Ohio Mobile Training Team (R.C. 5502.70) that provides safety services to schools.

HB. 392: Signed 1/2/2023; effective 4/1/2023

4513.24: an injured police dog may be transported in an ambulance if a veterinarian is present and if no other person needs the ambulance at that time.

B. Columbus City Code

Columbus City Code 2323.32—Unlawful Possession of a Large Capacity Magazine

- C.C.C. 2323.32(A) prohibits a person from knowingly possessing, purchasing, keeping for sale, offering or exposing for sale, transferring, distributing, or importing "large capacity magazines."

- A "large capacity magazine" is defined in Columbus City Code 2323.11(N) as any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, thirty (30) or more rounds of ammunition for use in a firearm.
    - A "large capacity magazine" does not include any of the following: (1) A feeding device that has been permanently altered so that it cannot accommodate more than thirty rounds of ammunition; (2) A .22 caliber tube ammunition feeding device; (3) A tubular magazine that is contained in a lever-action firearm; (4) A magazine that is permanently inoperable.
- This section does not apply to any individual or entity that is referenced in subdivision (B), which includes, but is not limited to, federal and state agents, armed services members, as well as state and local law enforcement.

- If the large capacity magazine belongs to a firearm or which is possessed by an owner of a firearm which is registered with federal authorities under the National Firearms Act (26 U.S.C. Secs 5801-5871), then a person could possess the large capacity magazine. *See* C.C.C. 2323.32(B)(2).
- It is an affirmative defense that the person knowingly possessed, kept for sale, transferred, distributed, or imported a large capacity magazine solely for the purpose of transporting the large capacity magazine in a motor vehicle for an otherwise lawful purpose through the municipal limits of the city. This defense only applies if the large capacity magazine is not on the actor's person or within the passenger area of the motor vehicle.
- Violations are an unclassified misdemeanor, resulting in a mandatory 180 consecutive day jail sentence without work release. There is a potential penalty of up to one year in jail, and a maximum allowable fine of $1,500.
- Any instrumentality that has been used in violation of this section shall be seized and is subject to forfeiture pursuant to Chapter 2981 of the O.R.C.

Alternative "large capacity magazine" definition in C.C.C. 2323.321 if R.C. 9.68 is reinstated or if the definition of large capacity magazine in C.C.C. 2323.11(N) is ruled unconstitutional. If R.C. 9.68 is reinstated or if the definition of Large Capacity Magazine in C.C.C. 2323.11 (30 rounds or more) is deemed unconstitutional, then the new definition of large capacity magazine would be any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, 100 or more rounds of ammunition for use in a firearm other than a handgun.

Columbus City Code 2323.20(A)—Unlawful Transactions in Weapons

- C.C.C. 2323.20(A)(1) prohibits anyone from recklessly selling, lending, giving or furnishing a firearm to any other person who is known or there is reason to know they cannot legally possess it under the Weapons Under Disability provisions in R.C. 2923.13 or C.C.C. 2323.13.

- C.C.C. 2323.20(A)(2) prohibits anyone from recklessly purchasing or attempting to purchase any firearm for, on behalf of, or at the request or demand of any other person knowing or having reasonable cause to believe that such other person cannot legally possess it under the Weapons Under Disability provisions in R.C. 2923.13 or C.C.C. 2323.13.
- Violations of C.C.C. 2323.20(A) are a misdemeanor of the first degree.
- Any instrumentality that has been used in violation of this section shall be seized and is subject to forfeiture pursuant to Chapter 2981 of the O.R.C.

Columbus City Code 2323.191—Negligent Storage of a Firearm.

C.C.C. 2323.191(A)(1) prohibits a person from negligently storing or leaving a firearm in a manner or location in the person's residence where the person knows or reasonably should know a minor is able to gain access to the firearm.

- It is not a violation if a person stores or leaves a firearm in the person's residence if the firearm is kept in safe storage as defined in C.C.C. 2323.11(O), the firearm is on their person or within their immediate control, or if a minor gains access to the firearm as a result of any other person's unlawful entry into the residence.
    - "Safe storage" is defined in Columbus City Code 2323.11(O) as: (1) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device; (2) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or (3) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.
- Violations are generally a misdemeanor of the fourth degree. If a minor gains access to a firearm as a result of an individual's violation of this section, it is a misdemeanor of the third degree. If a minor gains access to a firearm as a result of a violation of this section and uses the firearm to cause any personal injury or death, other than in self-defense, a violation of this section is a misdemeanor of the first degree.
- This section shall not apply if the circumstances indicate that the firearm was unlawfully furnished to the minor, e.g., R.C. 2923.21**,** violation of which would be prosecuted under applicable state law.
- Any instrumentality that has been used in violation of this section shall be seized and is subject to forfeiture pursuant to Chapter 2981 of the O.R.C.

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Legal Advisor's Update

by Jeffrey S. Furbee (Jfurbee@columbuspolice.org) June 30th, 2023

A summary of laws that may be of interest to you. If you receive this Update, and are not a member of the Columbus Division of Police, this should not be viewed as legal advice. We hope you find the contents helpful, but you should consult your own legal counsel for advice.

I. Does Plain-Smell of Marijuana Permit a Search of Occupants of a Car? Pgs 2-6

An officer's detection of the odor of marijuana in a car *does not, alone,* establish PC sufficient to search an occupant of that car. Even in cases where PC for a vehicle search exists, law enforcement must independently justify a warrantless search of the vehicle operator or other occupants.

II. Court Explains Parameters/Limits of Community Caretaking Pgs 6-10

The courts have been careful not to allow the community caretaking exception to the warrant requirement to overrun core Fourth Amendment protections.

III. Deadly Force, a Rapidly Evolving Situation, and Mental Illness Pgs 10-13

Officers have the PC that makes their shooting lawful when they can reasonably conclude that a suspect may fire a gun at them or use another dangerous weapon against them.

IV. Imminent Destruction of Evidence and Warrantless Entries Pgs 13-14

Exigent circumstances excuse the search warrant requirement in certain situations when immediate police action is needed, including when there is the danger of lost evidence. The need for exigent circumstances can be particularly compelling where narcotics are involved, for narcotics can be easily and quickly destroyed while a search is progressing.

I. Does Plain-Smell of Marijuana Permit a Search of Occupants of a Car?

***State v. Oliver*, 2023-Ohio-1550 (10th Dist.)**

***Critical Points of the Case*:**

- **As you read this case, think back to your training, and how you were trained to use correct legal language and to articulate why you took certain actions. Words matter! Pat-downs/frisks are for weapons! To justify a pat-down/frisk you must articulate why you believe the person you detain is armed and dangerous. Pat-downs are never done to find evidence/contraband—they are done solely to find weapons.**

- **Courts generally recognize the need for a pat-down/frisk where drugs are involved. The 6th Circuit Court of Appeals recently stated: "The illicit drug trade is a dangerous business, so those engaged in it commonly possess firearms to protect themselves, their drugs, or their proceeds. We thus have repeatedly held that officers may frisk a suspect for a weapon when they reasonably believe that the suspect possesses illegal drugs or has engaged in an illegal drug transaction." *United States v. Faught*, 2022 U.S. App. LEXIS 20078 (6th Cir.). However, you as an officer still need to explain, based on your experience and/or training, the nexus between drugs and weapons in your reports and testimony. Also, if you believe the totality of circumstances supports a belief the person being detained is involved in trafficking, or has committed a drug transaction, then you need to articulate that belief because that strengthens the case for a pat-down.**

- **In determining whether a defendant violated R.C. 4511.33(A)(1), the single solid white longitudinal line on the right-hand edge of a roadway—the fog line—marks the edge of the roadway and that such a marking merely discourages or prohibits a driver from crossing it, not driving on or touching it. Generally, crossing the double-yellow lines is a violation of R.C. 4511.33(A)(1). An officer has reasonable and articulable suspicion to stop a driver when an officer observes a vehicle's driver's side tires completely cross the double solid yellow centerline to the point that the tires were not touching the lines.**

- **An officer's detection of the odor of marijuana in a car ***does not, alone,* establish PC sufficient to search an occupant of that car. PC for a search of a person must be particularized with respect to that person. Even in cases where PC for a vehicle search exists, law enforcement must independently justify a warrantless search of the vehicle operator or other occupants. So, if you have plain smell of marijuana emanating from a**

vehicle, and you remove an occupant from the vehicle, take the time to note if the odor is also emanating from their person once they are outside of the vehicle. Also, ask questions about the source of the odor, and note other relevant behaviors. Plain-smell can be a part of the totality of the circumstances supporting PC to search that person.

- **An officer may perform a pat-down of a suspect's outer clothing to protect the safety of himself and others. The purpose of such a frisk is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.**

- **An officer cannot conduct a protective search as a pretext for a search for contraband, a search for convenience, or as part of his or her normal routine or practice. The sole justification of the search is the protection of the police officer and others nearby.**

Facts: Whitehall Police Officer Runyan testified that he was driving his cruiser in the inner eastbound lane of East Main Street shortly after midnight on August 18, 2019, when he came upon a blue Hyundai Sonata traveling in the outer (curb) eastbound lane of the road. There were five people in the Hyundai, including Ja'Braelin D. Oliver, who was driving. Officer Runyan drove his cruiser parallel to the Hyundai, slowed down, and then pulled behind the Hyundai in the outer eastbound lane.

After several seconds, Officer Runyan observed the Hyundai's left tires drive on the lane divider (broken white) line for about one second. Instead of conducting a traffic stop of the Hyundai for what he believed was a marked lanes violation, Officer Runyan continued to follow behind the Hyundai. Officer Runyan testified he did this because he thought the driver "may be impaired." Officer Runyan watched the Hyundai drive within its lane "for a long period of time." Then, he saw the Hyundai's left turn signal illuminate before the vehicle properly crossed the lane divider line to move into the inner eastbound lane.

Not long after the Hyundai properly moved into the inner eastbound lane, Officer Runyan observed the vehicle's left tires drive on (or possibly over) the two-way left-turn center line for approximately two seconds. Believing he had just witnessed the Hyundai commit a second marked lanes violation, Officer Runyan initiated a stop of the car.

Officer Runyan testified that when he approached the Hyundai, he immediately smelled "an odor of raw marijuana emanating from the open driver's window." Officer Runyan also testified that, upon smelling raw marijuana, he "already knew that he would be detaining everyone in that car." In order to detain all five people in the car, he explained, he needed assistance from at least two other officers. So, Officer Runyan radioed for backup. While he waited for additional officers to arrive, Officer Runyan learned Mr. Oliver did not "have an ID on him" and did not have a license.

Officer Runyan also discovered the Hyundai was owned by the female front passenger, who was a licensed driver but was not driving that night because she was tired. Officer Runyan asked whether "anybody had IDs," and multiple passengers answered in the affirmative. Officer Runyan stated he did not need the front female passenger's license because he could obtain her information "from the thing," likely referring to the Hyundai's license plate number. He did not ask anyone to produce their IDs or identifying information at this time. Nor did he make any further inquiry into the status of Mr. Oliver's license—for instance, whether it was valid but not on Mr. Oliver's person at the time of the stop, it had expired, it had been suspended or revoked, or Mr. Oliver never had a valid driver's license.

Instead, Officer Runyan asked Mr. Oliver—who was tapping through programs on his cell phone—why he was "so nervous." After Mr. Oliver denied that he was, Officer Runyan commented: "Your hands are shaking, bro." Mr. Oliver responded by gesturing in disbelief. Officer Runyan's body-worn camera is unclear and inconclusive as to whether Mr. Oliver's hands were, in fact, shaking at that time.

When backup officers arrived, Officer Runyan advised them of a "49 smell." At the hearing, Officer Runyan explained this was his way of conveying to the other officers (without Mr. Oliver and the other passengers knowing) that the officers would be detaining the people in the vehicle to further investigate the raw marijuana odor coming from the Hyundai. Significantly, Officer Runyan repeatedly described the odor of marijuana coming ***from the car***, ***but he never described the odor as coming from Mr. Oliver*** (or any other particular person in the car). Officer Runyan testified that he was "looking specifically for marijuana" when he decided to remove Mr. Oliver from the vehicle and search him.

Prior to the warrantless search of his person, Mr. Oliver (and the passengers) answered Officer Runyan's questions and were compliant with his requests. No one made any sudden or furtive movements, attempted to flee the scene, or acted in a hostile or threatening manner toward Officer Runyan or any other officers at the scene. Officer Runyan also did not ask Mr. Oliver (or any of the vehicle's occupants) whether they had weapons or drugs in their possession before he ordered Mr. Oliver to exit the vehicle for the pat-down search.

At Officer Runyan's direction, Mr. Oliver exited the Hyundai and turned around. At this point, two other officers were at the scene. Officer Runyan immediately handcuffed Mr. Oliver and began a pat-down search of his person. At the suppression hearing, Officer Runyan conceded Mr. Oliver was not free to leave after he was handcuffed. After running his hand over Mr. Oliver's left jacket pocket, Officer Runyan testified he "felt the [marijuana] grinder and immediately knew," what it was. Officer Runyan pulled the grinder out of Mr. Oliver's pocket and told him: "That's

what I can smell." He asked Mr. Oliver if there was any additional marijuana or other illegal drugs in the vehicle, and Mr. Oliver stated there was not.

Officer Runyan placed the unopened grinder on the trunk of the vehicle and continued searching Mr. Oliver's person. A gun containing five rounds of ammunition in the magazine was recovered from the right pocket of Mr. Oliver's jacket, and Mr. Oliver was placed in Officer Runyan's cruiser. After the other four passengers were removed from the Hyundai, Officer Runyan searched it for contraband. He only recovered "minute particles of marijuana" from the car. No "collectible amounts" of marijuana were recovered from the grinder found in Mr. Oliver's pocket or the Hyundai. Officer Runyan did not send any of the marijuana particles he recovered in connection with this case to the lab for testing. And Mr. Oliver was not charged with marijuana possession.

Officer Runyan took Oliver into custody for felony gun charges. He was later indicted by a Franklin County Grand Jury with improper handling of a firearm in a motor vehicle, and carrying a concealed weapon. Oliver moved to suppress the firearm, lost at the trial court, was convicted, and appealed.

- As an initial matter, the Franklin County Court of Appeals ("appeals court") found that Officer Runyan had PC to believe Mr. Oliver committed a marked lanes violation based on the second violation—this was hotly debated, and a lengthy part of this opinion was on the traffic stop issue, but we thought the plain-smell/search issue was the more important part of the case. The *critical points* explains when an officer can/cannot stop for a marked lane violation.

Issue: Was there PC to search defendant Oliver's person based on the plain-smell of raw marijuana emanating from the car?

Holding and Analysis: No. Officer Runyan did <u>not</u> testify he could reasonably attribute the odor of raw marijuana to <u>any</u> one of the five people in the car before he searched Mr. Oliver. Mr. Oliver's mere presence in the car <u>did not</u>, under the particular facts and circumstances presented in this case, provide Officer Runyan with probable cause to believe Mr. Oliver possessed marijuana at the time he was searched. Accordingly, the appeals court found that Officer Runyan did not have probable cause to search Mr. Oliver's person based solely on the odor of raw marijuana emanating from the car. The appeals court also noted that Officer Runyan did not claim to see any marijuana-related contraband before he frisked Mr. Oliver, nor did he ask any of the vehicle's occupants about the marijuana odor before searching Mr. Oliver. Thus, Officer Runyan did not gain any insights through investigation—e.g., admissions or voluntary surrenders—concerning which of the five occupants might actually be in possession of the raw marijuana he smelled.

So, you are probably asking: why wasn't this just a good pat-down based on a drug stop where a weapon was found? Well, the appeals court explained that they did not think it was ever claimed that the search of defendant Oliver's person was a pat-down for weapons in the trial court. The appeals court highlighted the fact that Officer Runyan did not testify that he believed Mr. Oliver to be armed and dangerous prior to the pat-down search. Nor did Officer Runyan testify that he searched Mr. Oliver due to "officer safety" concerns. The appeals court explained that to the contrary, Officer Runyan repeatedly stated that he searched Mr. Oliver's person because he was looking for marijuana, not firearms. The court also believed the officer's body camera footage indicated defendant Oliver was frisked for drugs, not weapons.

In his report, Officer Runyan stated: "In my experience, when illegal drugs are present, there is a high probability that weapons are also present. For this reason, I secured the driver in handcuffs, and conducted a search of his person for illegal contraband." However, according to the appeals court, at the hearing, Officer Runyan testified that he was "looking specifically for marijuana" when he decided to pull Mr. Oliver (and the other passengers) out of the vehicle to search them. Officer Runyan clarified that he included the "high probability of weapons" language in his report "because I'm putting somebody in handcuffs because I'm concerned that they might have an illegal drug, so I'm more justifying the handcuffing of the suspects as opposed to saying what I'm searching for."

The appeals court explained that, "'an officer cannot conduct a protective search as a pretext for a search for contraband, a search for convenience, or as part of his or her normal routine or practice.'" "The sole justification of the (pat-down) search * * * is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." The appeals court thus found the warrantless search of defendant Oliver's person violated the Fourth Amendment. The appeals court held that because the firearm was a fruit of that unconstitutional search, it should have been suppressed by the trial court.

II. Court Explains Parameters/Limits of Community Caretaking

***United States v. Morgan*, 2023 U.S. App. LEXIS 16039 (6th Cir.)**

***Critical Points of the Case*:**

- **If an emergency or other exigency exists, officers do not need to get a warrant and may provide "emergency assistance to an injured occupant or to protect an occupant from imminent injury." Not all police work seeks to prevent, investigate, or ferret out crime.**

Much of an officer's day-to-day work in truth involves community service of a different order. Community caretaking occupies much of a police officer's day.

- **But the Supreme Court and the 6th Circuit have been careful not to allow this historically grounded, and usually welcome, explanation for police work to overrun core Fourth Amendment protections. Both courts limit its application to the considerations that gave it birth. Community caretaking, for example, does not amount to a reasonable ground for entering a house without a warrant or without some other well-delineated and carefully cabined exigency. Even outside the home, community caretaking permits only the use of evidence duly discovered in the course of advancing the caretaking function at hand.**

- **In this case, the officer likely would have been legally justified in opening the car door, if he had first taken other less invasive steps to attempt to wake up/check on the defendant. If the officer had yelled to him, and knocked on the window, without a response, then opening the door would have likely been seen as a reasonable next step. Basically the court believed that the officer should have given the defendant a chance to respond *before* entering the vehicle, which amounted to a search and seizure.**

Facts: After a nighttime blizzard, Officer James Zolnai received an early morning dispatch call in February 2021. A Northeast Lansing civilian located at the dead end of Leslie Street needed help getting his car out of a snowbank. As Officer Zolnai made his way down the street, he passed a parked and running Chevy Malibu around 5:00 a.m. The driver, Jaron Morgan, "appeared to be passed out" with his head tilted back.

After Officer Zolnai assisted the civilian with the snow-encumbered car, he made a U-turn back down Leslie Street, and again noticed the seemingly passed-out occupant in the Malibu 11 minutes later. Suspecting that an overdose or intoxication had incapacitated Morgan, Officer Zolnai decided to check on him. Officer Zolnai parked about 15 feet away, turned on his body camera, did not turn on the police car's flashing lights, and told the police dispatch what he was doing.

As Officer Zolnai walked towards the Malibu, he noticed that the civilian he had just assisted stood nearby, potentially in the path of the vehicle. In his experience, intoxicated individuals or those on opiates might "hit the gas" if startled. Without first trying to arouse Morgan by knocking on the door or shining a light in the car, Officer Zolnai opened the car door. He asked if Morgan was okay. Morgan responded in a "groggy" way. He asked Morgan for "ID," and Morgan moved his hand between the front seat and center console. Worried that Morgan might be reaching for a firearm, Officer Zolnai asked him to step out.

Morgan refused to get out of the car. A struggle followed. Officer Zolnai grabbed Morgan's arms. Morgan banged his head on the car horn. Officer Zolnai called for backup. Morgan reached towards a cardboard box in the passenger seat. Officer Zolnai ordered him to put his hands behind his back and told Morgan he was under arrest. Another officer arrived and struggled alongside Officer Zolnai to remove Morgan from the car.

The two officers eventually handcuffed Morgan. More officers arrived. In searching him, the officers found plastic bags on Morgan filled with fentanyl, methamphetamine, heroin, and cocaine. They also found a semi-automatic pistol in the cardboard box.

Issue: Did Officer Zolnai violate the Fourth Amendment by unreasonably searching and seizing defendant Morgan when he opened the car door?

Holding and Analysis: Yes. Officer Zolnai unreasonably seized and searched Morgan in violaton of the Fourth Amendment when, without warning, he opened Morgan's car door to check on him. Officer Zolnai argued he was acting in a community care-taking function, and thus was justified in opening the car door to check on Morgan's well-being. While the court believed Officer Zolnai was well intentioned, and acknowledged community-caretaking is an important part of policing, the court disagreed with how the officer handled this situation, and thus suppressed the evidence discovered as a result of the Fourth Amendment violation.

The court, in analyzing this case, noted that not all police work seeks to prevent, investigate, or ferret out crime. Much of an officer's day-to-day work in truth involves community service of a different order. Officers help lost children return home, find missing persons, rescue pets, deal with domestic disputes before they get out of hand, keep an eye on a home when the resident travels, lock an unlocked door, arbitrate disagreements between neighbors about loud music, respond to health emergencies, check in on the elderly or those facing addiction challenges on behalf of their relatives, and help inebriates by preventing them from placing others at risk and by ensuring that they get home safely. The court explained that law enforcement has served these "'watchman's' roles" long before the dawn of the Republic.

The Supreme Court first acknowledged "community caretaking" of this sort in *Cady v. Dombrowski.* In view of *Cady* and the "watchmen's" tradition, the 6th Circuit, along with "nearly every other circuit," have rejected challenges to evidence obtained in the course of "community caretaking" in at least some settings. But the Supreme Court and the 6th Circuit have been careful not to allow this historically grounded, and usually welcome, explanation for police work to overrun core Fourth Amendment protections. Both courts limit its application to the considerations that gave it birth. Community caretaking, for example, does not amount to a reasonable ground for entering a house without a warrant or without some other well-delineated and carefully cabined exigency. Even outside the home, community caretaking permits only the use of evidence duly

discovered in the course of advancing the caretaking function at hand. Concerns about the health of a driver by themselves generally do not permit the unannounced opening of a car door. The scope of any search or seizure must reasonably match its function, and concerns about the health of a driver generally do not stand in the way of announcing oneself or otherwise trying to alert the driver before suddenly opening a car door. Only "when delay is reasonably likely to result in injury or ongoing harm to the community at large" and only when the officer's actions advance that public service will a seizure of evidence be reasonable.

Judged by these standards, the court found that Officer Zolnai unreasonably seized and searched Morgan in violation of the Fourth Amendment when, without warning, he opened Morgan's car door to check on him. The court acknowledged that Officer Zolnai reasonably thought something was amiss and decided to do something about it. Morgan appeared unconscious at the wheel of a running vehicle for over ten minutes, which, based on Officer Zolnai's experience, raised a concern of intoxication or overdose. Opting not to check on Morgan—surely the easiest path for Officer Zolnai to take that day—would have created potential peril for the driver. The court stated, to the officer's credit, he did not walk away.

However, the court then stated the following: just as we appreciate Officer Zolnai's attentiveness, we cannot overlook the myriad, less intrusive paths available to him for addressing his concerns about Morgan. If the officer's concern was a potentially overdosed or intoxicated driver, it is difficult to understand why he did not take one of many steps before opening the door unannounced: say turning on the police car's emergency lights; shining a flashlight into Morgan's face; calling out to Morgan; or knocking on the window. In this caretaking setting, as in all of them, the intrusion must reasonably match the problem at hand. In the absence of any time exigency or other emergency, it is difficult to understand why the officer did not take advantage of any of these or similar less-intrusive measures, all well suited to checking on Morgan's safety. Community-caretaking actions, in short, are permitted when reasonable, but only when reasonable. Well intended though Officer Zolnai's actions may have been, the court found that they exceeded the limits of the Fourth Amendment.

To avoid confusion, this case is completely different than ***State v. Jackson**, 2022-Ohio-4365 (Ohio Supreme Court)**, a case we highlighted in our 1/26/23 Legal Update. The following was held in the *Jackson* case**:** Police may order occupants out of a car without violating the Fourth Amendment so long as the initial stop is lawful. There is no relevant difference between ordering the occupant out of the car and opening the door as part of a lawful order. **Opening a car door <u>after</u> lawfully instructing an occupant to exit is <u>not</u> a search if the officer is not acting with the purpose of finding out what is inside the car.** In the *Jackson* case, there was already a lawful traffic stop, thus the officer had legally seized the vehicle, and the driver, and had the right to order the driver from the car as part of the stop. The court did not see opening the door

after the lawful stop/order to get out, in order to simply facilitate getting the person out of the car, as any more of an intrusion.

III. Deadly Force, a Rapidly Evolving Situation, and Mental Illness

***Sawyer v. City of Soddy Daisy*, 2023 U.S. App. LEXIS 3108 (6th Cir.)**

***Critical Points of the Case*:**

- ***Tennessee v. Garner's* probable cause standard governs whether an officer who uses deadly force violates the Fourth Amendment—an officer acts reasonably when deploying deadly force if the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.**

- **Because the mere possession of a weapon is not sufficient to justify the use of deadly force, an appellate court requires additional indicia that the safety of the officer or others is at risk. This often turns on whether an armed suspect pointed their weapon at another person. The Sixth Circuit has recently summarized its case law as follows: officers have the PC that makes their shooting lawful when they can reasonably conclude that a suspect may fire a gun at them or use another dangerous weapon against them.**

- **When an individual stops following officer commands and instead grabs a readily accessible firearm, an officer need not wait for the suspect to open fire on them before the officer may fire back.**

- **It is true that deadly force is permissible against mentally ill individuals only in *extreme cases*. The *Graham* factors do not readily apply to cases involving medical or mental-health emergencies so an appellate court considers additional factors in such situations. These additional factors include (1) whether the person was experiencing a mental health or medical emergency, and whether that emergency created an immediate threat of serious harm to themselves or others; (2) whether some degree of force was reasonably necessary to ameliorate the immediate threat; and (3) whether the force used was more than reasonably necessary under the circumstances**

Facts: Jack Sawyer and his girlfriend, Patti Grimm, lived together in Grimm's house. He had dementia and Alzheimer's. To protect him and others, Grimm removed all the guns from the home save a pistol that she had unloaded. After doing so, Grimm did not see the pistol again until the night of Jack's death, about two months later.

On September 19, 2019, Jack grew frustrated with the TV and pointed the gun at Grimm from about three feet away. She fled to her daughter and son-in-law's house. Once there, Grimm called the police and asked them to perform a wellness check on him. Defendant police officers Eric Jenkins, Matthew Thomas, and Eric Hindmon responded. Grimm and her son-in-law informed the officers of Jack's diagnoses, his pointing of the gun, Grimm's fear of returning home, and the removal of the guns and bullets. When asked if Grimm removed all the bullets from the gun, Grimm's son-in-law said "she says" with voice inflection that made him sound skeptical. So the officers proceeded to Grimm's house.

The officers attempted to contact Jack at the front of the house and by having dispatch call him. After a few minutes without response, Ms. Grimm gave them access to her house. They entered with their guns drawn while calling out Jack's name and announcing themselves as police. During their sweep of the house, Officers Thomas and Jenkins approached a closed door. Officer Thomas opened the door, revealing a short hallway leading to Jack's bed. Jack was sitting on his bed with his back to Thomas and Jenkins in a dimly lit room. Without identifying himself as a police officer, Thomas approached the bed and again called Jack's name. Jack responded by standing up, turning to his right towards the officers, and raising his right hand holding a gun from the left of his lap up and across his body in the officers' direction. One of the officers shouted "put it down" as Jack stood up, but Jack did not drop the gun. Jenkins fatally shot Jack eight seconds after Thomas entered the bedroom and only two seconds after Jack stood up. Jack was found wearing a sleep mask, and his pistol was cocked, but unloaded.

On behalf of Jack's estate, his son, John Sawyer, sued the officers alleging various Fourth Amendment claims.

Issue: Did Officer Jenkins act reasonably when he shot Jack Sawyer?

Holding: Yes. Officer Jenkins's use of deadly force was reasonable regardless of Jack's mental health because Jack pointed a gun at Jenkins and Thomas from mere feet away. Officer Jenkins thus had probable cause to believe that Jack posed a threat of serious physical harm, either to Officer Jenkins or Thomas.

The *Tennessee v. Garner'*, 471 U.S. 1 (1983), probable cause standard governs whether an officer who uses deadly force violates the Fourth Amendment—an officer acts reasonably when deploying deadly force if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. This objective test requires courts to judge the use of force from the perspective of a reasonable officer on the scene, "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Because the "mere possession of a weapon is not sufficient to justify the use of deadly force," we (the 6th Circuit) require "additional indicia that the safety of the officer or others is at risk." This "often turns on whether an armed suspect pointed her weapon at another person." We (6th Circuit) recently summarized our case law as follows: "We have found that officers had the probable cause that made their shooting lawful when they could reasonably conclude that a suspect might fire a gun at them or use another dangerous weapon against them (even if they turned out to be wrong)."

The estate admits that Jack had a gun when he was shot, and the officers' bodycams show Jack pointed the gun—despite instructions to drop it—at Thomas and Jenkins immediately before he was shot. When an individual "stops following officer commands and instead grabs a readily accessible firearm, an officer need not wait for the suspect to open fire on him before the officer may fire back."

The court found that the gun was ultimately found to have been unloaded was of no moment. Officer Jenkins was not required to risk his life and Thomas's life on the untested assumption that Jack had not reloaded the gun in the two months since Grimm unloaded it, nor was he presented with an opportunity to confirm whether Jack had done so. Indeed, Officer Jenkins knew of Grimm's son-in-law's skeptical response to Grimm's statement about unloading the gun, as well as Grimm's reaction to Jack's pointing the gun at her, suggesting she too thought the gun posed a serious threat. It was not unreasonable for Jenkins to view the gun in the same way, even if it turned out afterwards that he was wrong.

Jack's mental-health status also did not render Officer Jenkins' use of force unreasonable. The *Graham* factors do not readily apply to cases involving mental-health emergencies so we (the 6th Circuit) consider additional factors in such situations. These additional factors include (1) whether the person was experiencing a mental health or medical emergency, and whether that emergency created an immediate threat of serious harm to themselves or others; (2) whether some degree of force was reasonably necessary to ameliorate the immediate threat; and (3) whether the force used was more than reasonably necessary under the circumstances."

Viewing the evidence in the light most favorable to the Estate, Jack was experiencing a mental-health emergency because of his dementia and Alzheimer's diagnoses, as well as his unusual actions leading to him aiming the gun at Grimm. That said, the second and third factors support Jenkins's use of force because Jack pointed a gun at Officer Jenkins and Thomas from only a few feet away. This action posed an immediate threat that non-deadly force might not have prevented.

The court explained that it is true that deadly force is permissible against mentally ill individuals "only in extreme cases." But Officer Jenkins was confronted with an extreme situation. He was

searching a house for an individual who had pointed a gun at his girlfriend. Then, when Jenkins entered the bedroom, Jack stood up, turned, and pointed his gun at Jenkins and Thomas. The situation was undoubtedly "tense, uncertain, and rapidly evolving" in the moments after Thomas and Jenkins entered Jack's bedroom.

IV. Imminent Destruction of Evidence and Warrantless Entries

***United States v. Hill*, 2023 U.S. App. LEXIS 785 (6th Cir.)**

***Critical Points of the Case*:**

- **Courts generally require a warrant before searching or seizing persons or property but will excuse the requirement if a valid exception to the warrant requirement exists.**

- **Exigent circumstances excuse the search warrant requirement in certain situations when immediate police action is needed, including when there is the danger of lost evidence. In the context of warrantless search, the need for exigent circumstances can be particularly compelling where narcotics are involved, for narcotics can be easily and quickly destroyed while a search is progressing.**

Facts: In 2018, defendant William Hill's friend, James Sneed, checked into a hotel room with his girlfriend, Haley Sweat. Hotel staff began receiving complaints of the smell of marijuana and heavy foot traffic to and from the room.

The next day defendant Hill and his girlfriend, Daphne Cook, arrived from Texas and stayed with Sneed and Sweat in their hotel room. Hill made the trip so Sneed could connect him with a drug buyer. The morning after Hill arrived, Sneed and Sweat left the hotel, although they intended to return. After Sneed and Sweat left, Cook went to the front desk, walking unsteadily and spilling things. She said she was Sweat and paid for another night. Hotel staff, recognizing that Cook was not Sweat, informed the manager, who called the police. Officers arrived at the hotel and asked if the staff wanted to evict the room's occupants, which they did. Under the hotel's policies, unregistered guests and smoking were prohibited, and the hotel staff could evict people who violated these policies or otherwise broke the law.

The officers accompanied hotel staff to the room and could smell marijuana from the door. The housekeeper knocked and received no response. She opened the door and said "housekeeping" but received no answer. From the door, she could hear water running. As the housekeeper entered the room, she could identify the shower running and saw a meth pipe on the bed. At that point, she left the room and told the officers what she had seen.

The officers then entered the room and found Hill and Cook in the bathroom. En route to the bathroom, they saw the glass pipe with residue on the bed and money and marijuana in an unlocked safe. The officers exited the room while a colleague applied for a warrant. The officers executed the warrant and seized small amounts of marijuana, cocaine, heroin, and pills; over 400 grams of meth; baggies, scales, cutting agent, and the pipe; and $2,530 in cash.

Issue: Was the entry into the hotel room/sweep valid under the Fourth Amendment? Were the officers required to have a warrant or consent to enter the hotel room, or was this entry permitted due to an exigent circumstance?

Holding and Analysis: The officers' warrantless entry into and protective sweep of the hotel room was justified by exigent circumstances Courts generally require a warrant before searching or seizing persons or property but will excuse the requirement if a valid exception to the warrant requirement exists.

Exigent circumstances excuse the warrant requirement in certain situations when immediate police action is needed, including when there is the danger of lost evidence. Here, the government argued the entry was justified based on the danger of lost evidence, which means it had to show that the officers had "a reasonable belief that third parties were inside" and that "loss or destruction of evidence was imminent." Defendant Hill conceded that the officers had a reasonable belief that people were inside the hotel room. As for the destruction of evidence, the officers could hear running water from the bathroom, knew a meth pipe was in the room, and could smell marijuana coming from the door. Because a common method of drug disposal is flushing it down a toilet or drain, the court found that the officers had an objectively reasonable basis to think that the destruction of evidence was not just possible, but, in fact occurring while they were standing in the hallway. The court explained that he need for exigent circumstances can "be particularly compelling where narcotics are involved, for narcotics can be easily and quickly destroyed while a search is progressing."

When the officers entered the hotel room, they conducted what amounted to a protective sweep to check for weapons, secure the drug evidence, and locate Hill and Cook. Because the entry was focused on securing evidence and ensuring officer safety, the "warrantless entry was limited in scope and proportionate to the exigency excusing the warrant requirement." Once the area was secured, the officers then waited outside while another officer secured a warrant. For these reasons, the officers conducted both the initial entry and protective sweep under a valid warrant exception, thus the Fourth Amendment was not violated, and the court refused to suppress the evidence.