

2009 IN-SERVICE TRAINING LEGAL UPDATES



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I. STRIP SEARCHES

You have already received strip search training in the course of this training day. Do you have any questions a result of the strip search training or just generally about strip searches? Do you feel confident you know what actually does or does not constitute a strip search? Do you know where the line is between a routine search incident to arrest and a strip search? Do you know what constitutes a body cavity search? Do you know the requirements to appropriately conduct a strip search in a misdemeanor/traffic situation and felony situation?

II. NEW LEGISLATION

Columbus City Code

Ord 0950-2008 – Bicycles

Effective Dates: 8/13/08 & 7/14/09

Relevant Codes: CCC 2173.02, 2173.04

Bicycles to be ridden near right side of roadway

Ord 0950-2008 adds the following language to CCC 2173.04, which generally requires bicycles to be ridden “as near to the right side of the roadway as practicable”. This portion of the ordinance was effective on 8/13/08.

2173.04(C) *This section does not require a person operating a bicycle to ride at the edge of the roadway when it is unreasonable or unsafe to do so. Conditions that may require riding away from the edge of the roadway include when necessary to avoid fixed or moving objects, parked or moving vehicles, surface hazards, or if it otherwise is unsafe or impracticable to do so, including if the lane is too narrow for the bicycle and an overtaking vehicle to travel safely side by side within the lane.*

Child bicycle helmet law

The ordinance also creates the child bicycle helmet law, which is reprinted below. Note that Section (B)(1) creates culpability for a child not wearing a helmet, and section (B)(2) creates culpability for a parent, guardian or custodian who knowingly permits a child to ride a bicycle without a helmet. Violations of this section are an MM on the first offense, an M4 on the second offense within one year, and an M3 on the third offense within one year. ***Pursuant to the ordinance, the child bicycle helmet law cannot be enforced until 7/14/09.***

2173.02 (B)(1) *No person under the age of eighteen (18) shall operate a bicycle or children's non-motorized vehicle within the City without wearing a protective helmet on the person's head, with the chin strap fastened under the person's chin. Such helmet shall be*

fitted to the size of the operator's head and shall meet or exceed the standards set forth by the U.S. Consumer Product Safety Commission (CPSC).

No person the age of one (1) or older but under the age of eighteen (18) shall ride as a passenger on a bicycle or non-motorized vehicle equipped with a firmly attached passenger seat or astride a regular seat on a tandem bicycle, within the City without wearing a protective helmet on the person's head, with the chin strap fastened under the person's chin. Such helmet shall be fitted to the size of the operator's head and shall meet or exceed the standards set forth by the U.S. Consumer Product Safety Commission (CPSC).

(B)(2) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen (18) years of age shall authorize or knowingly permit such child to violate any provision of this division.

Ord 1062-2008 – Aggressive Panhandling

Effective Date: 1/15/09

Relevant Statute: CCC 2333.02

Solicitation after Dark

Ord 1062-2008 creates the new offense of Solicitation after dark: No person shall solicit after 8:00 p.m. and before 7:00 a.m. on any dates on which Daylight Savings Time (DST) is in effect; or after 7:00 p.m. and before 7:00 a.m. during any dates on which DST is not in effect. Violations of this ordinance are an MM on the first offense, and an M4 for subsequent offenses.

"Solicit " is defined as asking in person and by words for an immediate grant of money, goods, or other property of value as a charity from another person(s) when the person making the request is not known to the person(s) who are the subject of the request. ***The term "solicit" shall not mean the act of passively standing or sitting with a sign or other indicator that a donation of money, goods, or any other property of value is being sought without any vocal request other than a response to an inquiry by another person.***

Aggressive Panhandling

The ordinance modifies the list of places that constitute prima facie evidence of aggressive panhandling to include all of the following:

- 1) Within twenty-five 25 feet of an entrance to or exit from a banking organization or licensed casher of checks during its business hours;
- 2) Within 25 feet of an ATM or the entrance to or exit from an ATM facility;

- 3) Within the physical confines of a bus stop area shelter or at the entrance to or exit from a bus stop shelter;
- 4) At the entrance to or exit from a bus stop area shelter;
- 5) Within 10 feet of a public parking meter or a public pay telephone;
- 6) Within 10 feet of the outside boundary of a parking lot where the deposit of funds in a public parking meter, the deposit of funds in a coin machine, or the payment of funds to a parking attendant is required for use of a particular individual parking space; or,
- 7) Within 25 feet of any outdoor patio, including, but not limited to, a sidewalk cafe.

Ohio Revised Code

HB 392 – Next of Kin Database

Effective Date: 7/31/08

Relevant Statute: RC 4501.81

HB 392 requires the Bureau of Motor Vehicles to establish a database of the next of kin of persons who are issued driver's licenses, temporary instruction permits, and state ID cards. Information in the database must be accessible only to employees of the Bureau and to criminal justice agencies, and it is not a public record. Law enforcement officers must make a good faith effort to notify the person specified in the database in the event of a motor vehicle accident (or emergency situation) in which a person dies or is seriously injured or rendered unconscious, and is unable to communicate with the contact person specified in the database. The BMV must have the database operational by January 31, 2009.

HB 46 – Public Records / Credit Report Security Freeze

Effective Date: 8/5/08

Relevant Statutes: RC 149.434, 149.45, 319.54, 1349.52, 2901.13

Requesting the redaction of protected individual's address

The act permits a protected individual (peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT) to request a public office **other than a county auditor** to redact that individual's address from any record made available to the general public on the internet. The request must be made in writing on a form developed by the Attorney General. A protected individual can also submit a written request by affidavit requesting the county auditor to remove the individual's name from the general tax list and general duplicate of real and public utility property, and to insert the individual's initials as the name that appears on the individual's deed. A public office must act on the request, or

explain why redaction is impracticable, within five business days of receiving the request.

Statute of Limitation for identity fraud

The act modifies the statute of limitations for identity fraud to permit prosecution to be commenced within five years after discovery of the offense by an aggrieved person (or that person's legal representative).

SB 150 – Liquor Sales

Effective Date: 9/1/08

Relevant Statutes: RC 4301.10, 4301.20, 4301.62

Military ID Cards as proof of age

SB 150 adds a "military identification card...that displays a picture of the individual" to the forms of identification that provide an affirmative defense to persons charged with selling alcohol to underage persons. In order for the affirmative defense to apply, the person buying alcohol must exhibit an ID card showing that he or she is at least 21 years of age at the time of the purchase.

Sale of beer and liquor at a private residence without a permit

The act permits alcohol sales, without a liquor permit, at a private residence, not more than five times per year at an event that has the following characteristics:

- it is for a charitable, benevolent, or political purpose, but no proceeds are for the profit or gain of any individual
- it has no more than 50 persons in attendance
- it does not exceed 12 hours
- alcohol sales do not take place between 2:30 a.m. and 5:30 a.m.

SB 184 – CCW / Self Defense

Effective Date: 9/9/08

Relevant Statutes: RC 2901.05, 2901.09, 2923.12, 2923.121, 2923.122, 2923.126, 2923.16, 2923.163

Carrying concealed weapons

SB 184 specifies that "carrying concealed weapons" (2923.12) does not apply to a person's transportation or storage of a firearm in a motor vehicle for any lawful purpose, if the firearm is not on the actor's person. The act also specifies that "carrying concealed weapons" does not apply to a person's storage or possession of a firearm in his or her own home for any lawful purpose.

Improperly handling firearms in a motor vehicle

The act modifies one of the permissible methods for any person to carry a firearm in a motor vehicle (2923.16). Under former law, one of the permissible methods was "in plain sight with the action open or the weapon stripped, or, if the

firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight". The act specifies that this method of transportation only applies "if the firearm is at least 24 inches in overall length as measured from the muzzle to the part of the stock furthest from the muzzle and if the barrel is at least 18 inches in length".

The act also modifies one of the permissible methods for CCW permit holders to carry a handgun in a motor vehicle. Under former law, one of the permissible methods was "securely encased by being stored in a closed, locked glove compartment or in a case that is locked". The act allows a handgun to be stored in a closed, **but unlocked**, glove compartment or vehicle console. However, a case containing a handgun must still be locked if that case is not in plain view.

The act redefines the term "unloaded" for purposes of improperly handling firearms in a motor vehicle, so that it means (1) no ammunition is in the firearm, and (2) no ammunition is loaded into a magazine or speed loader that may be used with the firearm and that is located anywhere within the vehicle.

Modified penalty for failure to inform

The act modifies the penalty for a CCW permit holder who fails to promptly inform a law enforcement officer that he or she is a permit holder and is carrying a concealed handgun when (1) the permit holder is stopped for any law enforcement purpose (2923.12(B)(1)), or (2) the permit holder is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop (2923.16(E)(3)). While the offense is typically an M1, the act makes it an MM if at the time of the stop, any law enforcement officer involved with the stop had actual knowledge that the offender was a permit holder. The act further specifies that the offender's permit may not be suspended for the violation.

Procedure for storing and returning surrendered firearms

The act requires a law enforcement officer who stops a person for a possible CCW or improper transport violation to return the firearm to that person unless (1) the person is charged with CCW or improper transport, (2) the person is arrested for any other offense, (3) the person is otherwise prohibited from possessing the firearm, or (4) the firearm is contraband. The act further provides that if a law enforcement officer otherwise seizes a firearm from a person, or the person surrenders a firearm for any other reason, the officer or other law enforcement personnel must maintain the firearm in a manner that it can be identified and returned to the person in the same condition as when seized. The act also requires a court to award reasonable costs and attorney's fees when it finds that an officer improperly failed to return a firearm.

Illegal possession of a firearm in liquor permit premises

The act modifies the offense of "illegal possession of a firearm in liquor permit premises" (2923.121) to prohibit possessing a firearm in "any room in which any person is consuming liquor" in a D permit premises (former law prohibited possession of a firearm in "any room in which liquor is being dispensed"). The

act also provides that "illegal possession of a firearm in liquor permit premises," does not apply to any of the following persons:

- the principal holder of a D permit who (1) is in the permit premises, (2) is a CCW permit holder, and (3) is not consuming liquor or under the influence of alcohol or a drug of abuse
- any off duty peace officer who (1) is an agent or employee of a D permit holder, (2) is in the permit premises, (3) is otherwise authorized to carry firearms while in the course of his or her official duties, and (4) is not consuming liquor or under the influence of alcohol or a drug of abuse
- any person in a retail store with D-6 and D-8 permits who: (1) is a CCW permit holder, and (2) is not consuming liquor or under the influence of alcohol or a drug of abuse.

Violations of this section are generally an F5, but they are an F3 if the offender commits the offense by "knowingly carrying or having the firearm concealed on the offender's person or concealed ready at hand".

Illegal conveyance or possession of a deadly weapon in a school safety zone

The act provides that "illegal conveyance or possession of a deadly weapon or dangerous ordnance in a school safety zone" and "illegal possession of an object indistinguishable from a firearm in a school safety zone" (2923.122) do not apply to a person who: (1) is a CCW permit holder, (2) is in a motor vehicle, (3) is in the process of picking up or dropping off a child, and (4) is not in violation of "improper transport" (2923.16).

Concealed handgun licensee--prohibited places

The act prohibits a CCW permit holder from carrying a concealed handgun in a "government facility of this state or a political subdivision of this state", unless the facility is used primarily as a shelter, restroom, parking facility, or rest facility.

The act prohibits a landlord from restricting a tenant, or a guest of a tenant, from lawfully carrying or possessing a handgun in a rented residential premises when: (1) the tenant or guest is a CCW permit holder, and (2) the tenant entered into a rental agreement with the landlord after 9/9/08. However, this provision does not apply to "a dwelling unit that is owned or operated by a college or university".

The act specifies when persons can be charged with criminal trespass for carrying a firearm onto private property (this also includes property owned by a governmental entity, but leased to a private person or entity). A person can be charged with criminal trespass for carrying a firearm onto private property if the owner or person in control of the property posts a sign in a conspicuous location prohibiting persons from carrying firearms onto the property. ***However, that person cannot be charged with criminal trespass if the private property is primarily a parking lot or other parking facility.***

Self-defense

The act provides that a person is presumed to have acted in self defense (or defense of another) when using deadly force, if the person against whom the force is used (1) is in the process of unlawfully entering, or has unlawfully entered, the residence occupied by the person using deadly force, or (2) is in the process of unlawfully entering, or has unlawfully entered, the vehicle occupied by the person using deadly force. However, a person using deadly force is not entitled to this presumption if: (1) the person against whom force is used has the right to be in the residence or vehicle, or (2) the person who uses force is unlawfully in the residence or vehicle. The act provides that a person who is lawfully in his or her residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence. The act also provides that a person who lawfully is an occupant of that person's vehicle, or a vehicle owned by an immediate family member, has no duty to retreat before using force in self-defense or defense of another.

SB 183 – Importuning / Compelling Prostitution

Effective Date: 9/11/08

Relevant Statutes: RC 2909.07, 2907.21, 2907.40

Importuning

SB 183 enhances the penalty for importuning when the offender has a prior conviction for any sexually oriented offense or child-victim offense. Specifically, violations of 2907.07(A) or (C) are an F3 on the first offense, and an F2 when the offender has a prior conviction for any sexually oriented offense or child-victim offense. Violations of 2907.07(B) or (D) are an F5 on the first offense, and an F4 when the offender has a prior conviction for any sexually oriented offense or child-victim offense. The act also requires a mandatory prison term for these offenders.

Compelling prostitution

The act adds several compelling prostitution offenses that effectively expand all offenses involving minors to also include persons “the offender believes to be a minor...whether or not the person is a minor”.

SB 220 – Prostitution

Effective Date: 9/30/08

Relevant Statutes: RC 2929.01, 2929.14, 2929.24, 2941.1421

SB 220 permits courts to impose additional jail time for persons convicted of prostitution-related offenses (promoting prostitution, procuring, soliciting, loitering to engage in solicitation, and prostitution), when the offense is "committed in proximity to a school". An offense is “committed in proximity to a school” when it is committed in a “school safety zone”, or within 500 feet of any school building or the boundaries of any school premises. A “school safety zone” consists of a school, school building, school premises, school activity, and school bus. See

RC 2925.01, 3301.07 and 4511.01 for definitions of these terms.

In order for the act to apply, the criminal complaint charging the prostitution-related offense must specify that the violation was "committed in proximity to a school". The specification must be stated at the end of the complaint, and must state: "the offense was committed in proximity to a school, to wit: (state distance between offense location and applicable school location)". However, additional jail time imposed pursuant to the act is not mandatory, so it may or may not be imposed at the discretion of the sentencing judge.

SB 17 – OVI

Effective Date: 9/30/08

Relevant Statutes: RC 4511.19, 4511.19.191

Mandatory testing for certain OVI offenders

Under current law, anyone arrested for OVI has a right to refuse to submit to a chemical test (blood, breath or urine). Absent a search warrant, an officer has no ability to compel a suspect to submit to a test. SB 17 abolishes this right for persons arrested for OVI, OVUAC, or Physical Control who meet any of the following criteria:

- 2 or more OVI or OVUAC convictions within the prior 6 years,
- 5 or more OVI or OVUAC convictions within the prior 20 years, or
- 1 or more felony OVI convictions within their lifetime.

Under the act, if an OVI suspect who meets any of these criteria refuses to submit to a chemical test, an officer may employ "whatever reasonable means are necessary" to ensure that the person submits to a blood test. The act provides immunity from criminal and civil liability for officers who use "reasonable means" to get a blood test unless the officer acted with "malicious purpose, in bad faith, or in a wanton or reckless manner". ***Officers should get a warrant prior to taking a nonconsensual blood draw, unless doing so would prevent the blood draw from occurring within 3 hours of operation.***

HB 195 – Drug Offenses

Effective Date: 9/30/08

Relevant Statutes: 2925.11, 2925.03, 2925.22

Penalty for possession of a Schedule III, IV, or V drug

HB 195 increases the base penalty for possession of a Schedule III, IV, or V drug from an M3 to an M1, when the amount of the drug is less than the bulk amount, and from an M2 to an F5 when the offender has a prior drug abuse offense conviction. The bill makes no changes to the penalty for possession of a Schedule III, IV, or V drug if the amount of the drug equals or exceeds the bulk amount.

Definition of "drug" for drug trafficking offenses

The act specifies that, for purposes of drug trafficking offenses, the term "drug" includes any substance that is represented to be a drug.

Deception to obtain a dangerous drug

The act provides a separate penalty for deception to obtain a dangerous drug when the offender possesses an uncompleted preprinted prescription blank. The act also changes the penalties for the offense of deception to obtain a dangerous drug depending on prior convictions, or on the amount of the drug involved (or the amount that could be obtained pursuant to the prescription).

HB 209 – Sexual Battery

Effective Date: 4/7/09

Relevant Statute: RC 2907.03

HB 209 expands the offense of sexual battery so that it prohibits a person from engaging in sexual conduct with another, not the spouse of the offender, when the other person is a "minor", the offender is a "peace officer", and the offender is more than two years older than the other person. A violation of this new prohibition is a felony of the third degree or, if the other person is less than 13 years of age, a felony of the second degree.

HB 215 – Vehicular Homicide

Effective Date: 4/7/09

Relevant Statute: RC 2903.06

HB 215 enhances the penalties for aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter if, at the time of the offense, the offender was driving under a suspension, so that the provision also applies if, at the time of the offense, the offender did not have a valid driver's license, and was not eligible for renewal of the offender's driver's or commercial driver's license or permit without examination.

HB 280 – Domestic Violence / Human Trafficking

Effective Date: 4/7/09

Relevant Statutes: RC 2151.421, 2903.11, 2903.12, 2903.13, 2905.01, 2905.02, 2907.21, 2907.22, 2907.323, 2919.22, 2919.25, 2923.32, 2929.01, 2929.13, 2929.14, 2929.18, 2929.24, 2941.1422, 2941.1423, 3701.791, 3702.30, 4731.22

Penalty for domestic violence when the victim is pregnant

HB 280 increases the penalty for domestic violence when the offender knew that the victim was pregnant at the time of the offense. The bill enhances M1's to F5's and M4's to M3's. . In order to increase the penalty, the indictment or affidavit charging the offense must specify that the victim of the offense was a woman that the offender knew was pregnant at the time of the offense.

Penalty for felonious assault, aggravated assault, or assault when the victim is pregnant.

HB 280 requires a mandatory prison/jail term for the offenses of felonious assault, aggravated assault and assault when the offender knew that the victim was pregnant at the time of the offense. In order to impose the mandatory prison/jail term, the indictment or affidavit charging the offense must specify that the victim of the offense was a woman that the offender knew was pregnant at the time of the offense.

Mandatory prison terms for certain offenses committed in furtherance of human trafficking

HB 280 requires that a person who is convicted of or pleads guilty to a felony offense of kidnapping, abduction, compelling prostitution, promoting prostitution, illegal use of a minor in a nudity-oriented material or performance committed in specified circumstances, endangering children committed in specified circumstances, or engaging in a pattern of corrupt activity; and who also is convicted of or pleads guilty to a specification that the offender knowingly committed the offense in furtherance of "human trafficking" be sentenced to a mandatory prison term and payment of restitution to the victim.

The bill specifies that, as used in its provisions, "human trafficking" means a scheme or plan to which all of the following apply: (1) its object is to compel a victim or victims to engage in sexual activity for hire, to engage in a performance that is obscene, sexually oriented, or nudity oriented, or to be a model or participant in the production of material that is obscene, sexually oriented, or nudity oriented, and (2) it involves at least two felony offenses to which all of the following apply: (a) each of the felony offenses is the offense of kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance, endangering children, or a violation of a law of any state other than Ohio that is substantially similar to any of the offenses identified in this clause, (b) at least one of the felony offenses was committed in Ohio, and (c) the felony offenses are related to the same scheme or plan, are not isolated instances, and are not so closely related to each other and connected in time and place that they constitute a single event or transaction.

The bill enacts a human trafficking specification to be used regarding its provisions described above. It specifies that imposition of a mandatory prison term under its provisions upon a person under its provisions is precluded unless the offender in question is convicted of or pleads guilty to kidnapping, abduction, compelling prostitution, promoting prostitution, illegal use of a minor in a nudity-oriented material or performance, endangering children, or engaging in a pattern of corrupt activity and unless the indictment, count in the indictment, or information charging the offense specifies that the offender knowingly committed the offense in furtherance of "human trafficking." The specification must be stated at the end of the body of the indictment, count, or information and must be stated substantially in a form specified in the bill.

HB 450 – Underage Purchase of a Handgun

Effective Date: 4/7/09

Relevant Statutes: RC 124.1311, 2923.125, 2923.211, 3333.31, 4506.07, 4506.11, 4507.06, 4507.13, 4507.51, 4507.52

Underage purchase of a handgun

HB 450 permits a person who is 18 or older, and under age 21, to purchase a handgun if the person is an active or reserve member of the armed services of the United States or the Ohio National Guard, or was honorably discharged from military service in the active or reserve armed services of the United States or the Ohio National Guard, and the person has received firearms training from the armed services or the National Guard or equivalent firearms training.

SB 320 – Organized Retail Theft

Effective Date: 4/7/09

Relevant Statute: RC 1333.851, 2913.01, 2913.02, 2913.72, 2923.31

SB 320 expands the list of offenses that are within the definition of "corrupt activity" under the Corrupt Activity Law to also include "organized retail theft." The act defines the following terms:

- (1) "Organized retail theft" means the theft of "retail property" with a "retail value" of \$500 or more from one or more retail establishments with the intent to sell, deliver, or transfer that property to a "retail property fence."
- (2) "Retail property" means any tangible personal property displayed, held, stored, or offered for sale in or by a retail establishment.
- (3) "Retail property fence" means a person who possesses, procures, receives, or conceals retail property that was represented to the person as being stolen or that the person knows or believes to be stolen.
- (4) "Retail value" means the full retail value of the retail property. In determining whether the retail value of retail property equals or exceeds \$500, the value of all retail property stolen from the retail establishment or retail establishments by the same person or persons within any 180-day period must be aggregated.

HB 320 – Child Restraint

Effective Date: 4/7/09 & 10/7/09 & 4/7/10

Relevant Statute: RC 4507.071, 4511.093, 4511.81, 4513.263

Under HB 320, a child who is less than eight years old and less than four feet nine inches in height, must be secured in a booster seat when being transported

in a motor vehicle (other than a taxi or public safety vehicle), if that child is not otherwise required to be transported in a child restraint system. Booster seats required under the bill must meet federal motor vehicle safety standards.

Enforcement of this provision by law enforcement officers is "secondary," so officers cannot stop a motor vehicle for the sole purpose of determining whether a booster seat violation has occurred.

Any child who is between 8 and 15 years of age must be properly restrained either in a child restraint system or in a seatbelt. For example, a child who is 7 years old and over four feet nine inches in height is not required to be in a booster seat, but is required to wear a seatbelt. A child who is 7 years old and less than four feet nine inches in height specifically would be required to be in a booster seat.

The child restraint provisions do not apply when an emergency exists that threatens the life of any person operating or occupying a motor vehicle that is being used to transport a child who otherwise would be subject to the child restraint provisions.

The child restraint provisions do not apply to a person operating a motor vehicle who has an affidavit signed by a licensed physician or chiropractor that states that the child who otherwise would be required to be restrained has a physical impairment that makes use of a child restraint system, booster seat, or occupant restraining device impossible or impractical. This exception applies only if the vehicle operator has safely and appropriately restrained the child in accordance with any recommendations of the physician or chiropractor as noted on the affidavit.

The bill deems it to be a single violation if the operator of a motor vehicle, at the same time, on the same day, and at the same location, fails to properly secure more than one child in a required child restraint system, booster seat, or occupant restraining device.

The effective date of the booster seat portions of the bill is delayed by six months, and for six months following that time any person who violates the booster seat requirements must be given a warning and not a ticket, citation, or summons.

HB 74 – Voyeurism
Effective Date: 4/7/09
Relevant Statute: RC 2907.08

HB 74 adds spying or eavesdropping to the number of ways to commit voyeurism when the victim is a minor. The complete subsection now reads: No person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously invade the privacy of another to videotape, film, photograph, otherwise record, or spy or eavesdrop upon the other person in

a state of nudity if the other person is a minor. The act increases the penalty for a violation of this prohibition from a misdemeanor of the first degree to a felony of the fifth degree.

SB 248 – Fail to Report Unauthorized Use of Electronic Property

Effective Date: 4/7/09

Relevant Statutes: RC 1345.51, 1349.80, 1349.82

SB 248 prohibits a person who knows that an unauthorized use of computer, cable, or telecommunication property has been or is being committed, or who has received information derived from such an unauthorized use, from knowingly failing to report the violation to law enforcement authorities. A violation of this provision is a misdemeanor of the second degree.

However, a person need not disclose the information required above if the information is privileged, would incriminate a member of the person's immediate family, would amount to revealing a privileged news source, would amount to disclosure of a confidential communication to a clergy member, or would amount to revealing information acquired in the course of the person's duties in connection with a drug treatment or crime victim program.

III. **TERRY STOPS AND PAT-DOWNS**

These may seem like the most basic of all law enforcement topics given that they have been around for so long and aren't complicated on the surface. However, as you know, these simple concepts continue to be the subject of countless suppression motions, lawsuits, and citizen complaints. Officers are still called upon in case after case to explain the legal basis for why they stopped a citizen and for how they conducted the stop.

U.S. v. Williams, 2008 U.S. Dist. LEXIS 86910

*This is a recent CPD case decided in Federal District Court which deals with the most basic question about officer/citizen contacts: When does an officer's interaction with a citizen become a *Terry* stop as opposed to being a consensual contact?

Critical Points of this case:

*Officers may have consensual encounters with citizens. In a consensual encounter officers may ask citizens general questions without having reasonable suspicion of criminal activity, so long as the officers refrain from the type of intimidating behavior that would lead a reasonable person to believe that the person was not free to leave.

*A person approached in this fashion need not answer any questions, and may continue on his or her way unfettered by any real or implied restraint, and he may not be detained even momentarily for his refusal to listen or answer.

*The following factors can turn a consensual encounter into an involuntary seizure for which you need reasonable suspicion: 1) The threatening presence of several officers, 2) the display of a weapon by an officer, 3) some physical touching of the person of the citizen, or 4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

*In this case the judge felt the immediate use of accusatory language toward a person who the officer had previously arrested was the key factor which turned this encounter into a *Terry* stop. This case was a close call! This might seem like semantics, but if the officer had approached the whole group and simply asked defendant what he was doing, and if he had any warrants, without accusing him of being a trespasser, this would have likely been seen as a consensual encounter by the judge.

State v. Amilcar, 2008 Ohio 6918

*This is a very recent CPD case. It is a classic reasonable suspicion vehicle stop situation. This case addresses a question we get: When can you stop a car for a *Terry* stop without viewing a traffic violation to justify the stop?

Facts -- Columbus Police Officer Ian Pruitt received a dispatch concerning "a green Toyota that was driving around shooting rounds off" in the Morse and Chesford area. He and his partner went to the area, looked for the car, and spoke to a witness who gave them a description of the car and people inside (three African-American males one of whom was wearing a yellow shirt). Officer Pruitt aired this description.

Officer Schwendeman stopped shortly thereafter stopped a car fitting this description. He testified he stopped the car because it matched the description of a green Toyota, it was close in location and time to where the shots had been fired, and there were three African-American males in the car. Schwendeman, upon stopping the car, told defendant Amilcar, who was the driver, why he had been stopped. Officer Schwendeman received permission to search the car and upon approaching the passenger side saw a gun sticking out from under the passenger seat. **Officer Daugherty**, who had heard the information aired by Officer Pruitt, arrived at the scene to assist. He stated that "Officer Schwendeman said that he had located the gun, and so I went up, saw the gun that was under the right front passenger's seat. And there was also the yellow shirt sitting kind of tucked under the seat, but still it was showing." Officer Schwendeman removed the gun and the shirt from the car. Officer Daugherty stated that the front passenger admitted "that they were driving around firing off shots."

Issue – Did Officer Schwendeman have reasonable suspicion for the stop?

Analysis and Holding – An automobile stop, with the attendant temporary detention of its occupants, constitutes a seizure under the Fourth Amendment. Police officers need not have probable cause to detain a person in an investigatory stop. Rather, they need only have a "reasonable and articulable suspicion that the person seized is engaged in criminal activity." In other words, a stop is reasonable under the Fourth Amendment when officers can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

The court first focused on the information aired by radio and Officer Pruitt. The court noted that Officer Pruitt received a dispatch concerning shots being fired. He and his partner went to the scene and interviewed a witness. Based on that interview, Officer Pruitt aired a description of the car (a green Toyota) and its occupants (three black males, one wearing a yellow shirt or a shirt with yellow sleeves).

The court then focused on the stop by Officer Schwendeman, which was based on that information. Schwendeman testified that he heard the call regarding shots being fired in the area in which he was patrolling. He also heard the description of the vehicle as a green Camry. When he came upon Amilcar's vehicle, a green Toyota Camry, in that area, he said, "'That's the car right there, a Camry, green Camry.' So we made a stop on it." Officer Schwendeman saw the car within minutes of the dispatch airing the description, and the area in which he saw the vehicle was in close proximity to the area where the shots were purportedly fired. The car matched the description, as did its occupants. Based on this evidence, the court concluded that Officer Schwendeman cited specific and articulable facts that gave rise to a reasonable suspicion that the occupants of the vehicle, including Amilcar were engaged or about to be engaged in criminal activity.

State v. Ross, 2008 Ohio 882 (Stark County) and Scott v. City of Cleveland, 555 F. Supp. 2d 890 (2008 U.S.D.C Northern District of Ohio) – These are cases which have recently interpreted the concept that unprovoked flight in a high crime area invites pursuit. *Ross* court reiterated holding of *Wardlow*: Headlong flight - wherever it occurs - is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. Allowing officers confronted with such flight to stop a fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning. However, the *Scott* court pointed out the following: While *Scott's* flight from the *unidentified* police officers would be a factor that could help support reasonable suspicion, this flight in a high crime area alone is not enough to create reasonable suspicion. *Wardlow* rested its decision on two facts that created reasonable suspicion: (1) "respondent's presence in an area of heavy narcotics trafficking; and "unprovoked flight upon noticing the police." The key differences between *Wardlow* and the *Scott* case are that the Plaintiff's flight was neither unprovoked

nor was it upon noticing the police. Flight is always a factor in determining reasonable suspicion and in some cases can be the only factor for the stop.

State v. Vaughn, 2008 Ohio 4585

*Cleveland police case answers this FAQ: When can you stop suspect suspected of having gun when tip is given to you in person by unknown citizen?

Critical Points of this case:

*You cannot stop based on an anonymous tip alone. You must corroborate some aspect of tip which indicates suspect is engaged in criminal activity. Anonymous tips given to you in person carry more weight than those given over the phone and thus seem to require less corroboration. This case is a good example of how much corroboration is needed when the tip is in-person. This case also shows that explaining your experience with certain behaviors helps bolster reasonable suspicion.

Facts: Officer John Lundy testified that in the early morning hours he parked his zone car at a problem corner. After the bars close, large crowds gather at the Marathon gas station at that corner and there are problems including felonious assaults and robberies. Between 4:00 and 4:30 a.m., an unknown male approached Officer Lundy's car and informed him that some males were getting ready to fight across the street from the gas station and that someone had a gun. Officer Lundy and his partner drove to that location and observed a black Jeep drive away upon their approach. Also, one male ran away, and defendant Vaughn began to walk away.

Officer Lundy testified that Vaughn never made eye contact with the police as he walked away. Officer Lundy stated that he observed what looked like a weapon inside the pants pocket or inside the hip area of Vaughn's pants. He also testified that Vaughn was walking with a limp, as if he had something in his pocket. Officer Lundy could see a bulge, which was in the shape of a gun. He later testified: "I've been doing this 18 years, you know. I've seen it before. That's what I told my partner. I said, it looks like he has a gun in his pants." This was also a high crime area. Officer Lundy approached Vaughn and told him to keep his hands up. Vaughn said: "Nothing's going on. I didn't do anything." Officer Lundy told him that they were just checking things out. Officer Lundy checked Vaughn for weapons. From the outside of Vaughn's clothes, Officer Lundy felt a gun. A gun was recovered.

Issue: Was there reasonable suspicion for the stop?

Analysis and Holding: The court found that based on the tip and what the officers observed there was reasonable suspicion. The court explained that the general rule is that you cannot stop and detain a person based purely on an uncorroborated anonymous tip – you must corroborate some aspect of the tip showing the suspect is or has engaged in crime. The court then applied this rule

to this case holding as follows: "We find that Officer Lundy had a reasonable suspicion that Vaughn was armed; therefore, a protective search was warranted. Here, the tipster reported that someone had a gun. He reported this information to the police in person, not by an anonymous phone call. This was a high-crime area, and all the individuals dispersed upon police arrival. Vaughn was observed walking with a limp, as if he had something in his pocket. Officer Lundy testified that he saw a bulge in Vaughn's pants in the shape of a gun. Finally, Lundy testified that in his 18 years on the force, he has seen this type of "limp" numerous times.

State v. Portis, 2009 Ohio 32

*This case analyzes a *Terry* stop and pat-down which were based on information given to the officer by a known citizen informant (who later recanted).

Facts -- Officer Frank Cruz testified that he received a dispatch about "shots fired." Officer Cruz responded to the scene, where he found a group of five people standing in a driveway. The people told the officer that a shooting had occurred. According to Officer Cruz, he spoke primarily with one "main person." This person told the officer his whole name, and the officer recorded his last name, "Roberts."

According to Officer Cruz, Roberts told him that a man named Glen Portis argued with some men in the driveway and shot at them. Roberts described Portis' vehicle and gave a description of his house on East 91st Street. Roberts told the officer that Portis had driven away in his tan car after the shooting. Finally, Officer Cruz testified that Roberts told him that Portis was his mother's "boyfriend or something like that." According to Officer Cruz, the other people in the driveway corroborated Roberts' story. This information was then broadcast.

Sergeant Butler was patrolling with Officer Sanders when they heard a dispatch about "shots fired." Subsequent dispatches informed them that the suspect was named Glen Portis, he was driving a tan Chevy or Buick, and he lived at an address on East 91st Street. Sergeant Butler drove to Portis' address and noticed a tan car parked on the street. He and Officer Sanders also saw a man matching Portis' description walking by a nearby abandoned building. Portis was suspiciously looking over his shoulder as he walked in a "hurriedly fashion"; therefore, the police followed him to a parking lot. Sergeant Butler approached Portis and inquired if his name was Glen, to which Portis responded "yes."

The officers exited their vehicles, and Officer Sanders patted down Portis. The pat down revealed a cell phone with a plastic bag of cocaine attached in Portis' pants pocket. According to Officer Sanders, while patting down Portis, he felt a hard object in his pocket. The object was shaped like "a magazine or the handle to a service weapon." When he pulled the object out of the pocket, it was a cell phone with a plastic bag that was knotted with a long open end. According to the officer, when he feels an object that he believes might be a weapon, he immediately pulls it out. Officer Sanders specifically testified that he did not

handcuff Portis until after the pat down.

Issues – Was there reasonable suspicion for the stop of Portis based on the information given by the known citizen? Did Officer Sanders have reasonable suspicion that Portis was presently armed thereby justifying a pat-down? Was this pat-down conducted in a legal manner?

Analysis and Holding – The police based their reasonable suspicion upon statements made by an informant (Roberts). Courts generally recognize three categories of informants: 1) identified citizen informants, 2) known informants, and 3) anonymous informants. The court found that Roberts was an identified citizen informant because Officer Cruz testified that he spoke to Roberts face-to-face in the driveway of his home immediately following the alleged shooting, obtained Roberts' name, and recorded his last name.

Even with known informants you must briefly analyze the information given to you as well as the information source to decide if it is trustworthy. Factors to consider include the following: 1) Whether the information was gained from the informant's personal observation, 2) whether the informant had continued contact with the police, and 3) what motivation prompted the tip. This is a totality of the circumstances test thus the factors are balanced by the court and there might be other factors too.

This was a good Terry stop. The court found that under the totality of the circumstances, Roberts' information was reliable. Roberts told police, face-to-face, that Portis had been shooting, left in a tan car, and had lived at the address on 91st Street. Roberts answered all of the officer's questions right at the scene. Finally, Roberts was motivated to inform the officers after they asked who had been shooting. In fact, the fact that the suspect was Roberts' stepfather makes the information even more reliable. It is unlikely that Roberts would purposely misinform the police that a family member had committed a crime. The court also found that based on the totality of the circumstances (all the information given and the circumstances the officers saw when contacting Portis), the police conducted an appropriate *Terry* stop.

There was a good legal basis for a pat-down. During a *Terry* stop, **an officer may perform a protective search for weapons if, based upon a totality of the circumstances, he has a reasonable suspicion that an individual is presently armed.** In this case the court said it was clear that the officers had a reasonable suspicion that Portis was armed and dangerous based on the type of call, what Robert's told the officers, and Portis' observed behavior.

The pat-down was done properly. During the patdown, Officer Sanders felt a hard object in Portis' pocket and, based on his experience, determined from the object's size and shape that it might be a gun. **During a protective pat down, if an officer feels an object whose size and density indicated it might be a weapon, he may remove the object.**

Arizona v. Johnson, 2009 U.S. LEXIS 868

*This is a brand new U.S. Supreme Court ruling on pat-downs of passengers in cars which have been stopped by the police. This is an important statement by the U.S. Supreme Court on officer safety. One thing to bear in mind about this decision – this case says you can pat-down passengers during a routine traffic stop if you have reasonable suspicion they are armed – it doesn't say you can automatically pat-down all passengers during routine traffic stops.

Facts -- Officer Maria Trevizo and Detectives Machado and Gittings were on patrol in Tucson near a neighborhood associated with the Crips gang. At approximately 9 p.m., the officers pulled over an automobile after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation. Under Arizona law, the violation for which the vehicle was stopped constituted a civil infraction warranting a citation. At the time of the stop, the vehicle had three occupants -- the driver, a front-seat passenger, and a passenger in the back seat, Defendant Lemon Montrea Johnson. In making the stop the officers had no reason to suspect anyone in the vehicle of criminal activity.

The three officers left their patrol car and approached the stopped vehicle. Detective Machado instructed all of the occupants to keep their hands visible. He asked whether there were any weapons in the vehicle; all responded no. Detective Machado then directed the driver to get out of the car. Detective Gittings dealt with the front-seat passenger, who stayed in the vehicle throughout the stop. While Machado was getting the driver's license and information about the vehicle's registration and insurance, Officer Trevizo attended to Defendant Johnson.

Officer Trevizo noticed that, as the police approached, Johnson looked back and kept his eyes on the officers. When she drew near, she observed that Johnson was wearing clothing, including a blue bandana that she considered consistent with Crips membership. She also noticed a scanner in Johnson's jacket pocket, which "struck her as highly unusual and cause for concern," because "most people" would not carry around a scanner that way "unless they're going to be involved in some kind of criminal activity or are going to try to evade the police by listening to the scanner." In response to Officer Trevizo's questions, Johnson provided his name and date of birth but said he had no identification with him. He volunteered that he was from Eloy, Arizona, a place Officer Trevizo knew was home to a Crips gang. Johnson further told Trevizo that he had served time in prison for burglary and had been out for about a year.

Officer Trevizo wanted to question Johnson away from the front-seat passenger to gain "intelligence about the gang Johnson might be in." For that reason, she asked him to get out of the car. Johnson complied. Based on Officer Trevizo's observations and Johnson's answers to her questions while he was still seated in the car, Officer Trevizo suspected that "he might have a weapon on him." When he exited the vehicle, she therefore "patted him down for officer safety." During

the pat-down, Officer Trevizo felt the butt of a gun near Johnson's waist. At that point Johnson began to struggle, and Officer Trevizo placed him in handcuffs. Johnson was charged in state court with possession of a weapon by a prohibited possessor and was convicted.

Issue – Did the officer have a legal basis to pat-down Johnson?

Holding and Analysis – The answer is yes! This case is really the culmination of a series of cases from over the past several years. The Supreme Court has held previously that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the *driver* to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." Citing *Terry* as controlling, the Court further held that a *driver*, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the *driver* "might be armed and presently dangerous." The Supreme Court then later held "an officer making a traffic stop may order *passengers* to get out of the car pending completion of the stop." Finally, the Supreme Court has held that a *passenger* is seized, just as the driver is, "from the moment a car stopped by the police comes to a halt on the side of the road."

The Court, combining the reasoning of all these prior cases, held that officers who conduct "routine traffic stops" may "perform a 'patdown' of a driver **and any passengers** upon reasonable suspicion that they may be armed and dangerous." The court summed this case and all its prior holdings by stating that a lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. A traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will. Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free "to depart without police permission." Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.

State v. Davis, 2008 Ohio 5756

*This is a CPD case. It brings a lot of *Terry* related concepts together and answers when you may handcuff during *Terry* stop and how you may use force to remove drugs from a detainee's mouth?

Critical Points of this Case:

*Use of the handcuffs to carry out this *Terry* stop was reasonable based on circumstances because defendant's actions indicated he was flight risk – YOU CANNOT HANDCUFF ALL DETAINEES!

*Officer had probable cause to search defendant's mouth because officer believed defendant was attempting to conceal drugs in his mouth based on mumbled speech and cellophane baggy in his mouth.

*These circumstances compelled immediate action (exigent circumstance) thus immediate search of the mouth was valid. The amount and type of force (pain compliance) used was not excessive.

Facts: Around 3 a.m. **CPD Officer Matthew Liford** and his partner, **Officer Berger**, were on patrol on Mount Vernon Avenue in the near-east side of Columbus, when they passed a stopped vehicle in which a man was leaning into the passenger-side window. The officers drove around the block and pulled up behind the vehicle without turning on a siren or flashing the vehicle's lights. The two men who were in the vehicle quickly and immediately exited the vehicle and walked in opposing directions. The engine of the vehicle was still running, and the vehicle was at least partially blocking the roadway, with the front end of the vehicle angled toward the curb. Defendant had been sitting in the passenger seat of the vehicle. Officer Liford told defendant to come with him and that he was being detained. Officer Berger detained the vehicle's driver. Due to how quickly defendant and the driver exited the vehicle, the officers decided to handcuff them. The officers were unable to detain the person who had been leaning into the vehicle when they originally passed the vehicle. Defendant briefly choked on something that he was trying to swallow, and Officer Liford walked defendant over to the cruiser to question him. Officer Liford did not frisk defendant for weapons.

Officer Liford questioned defendant about his identity, why he exited the vehicle so quickly, and whether the vehicle was stolen. After Officer Liford began to converse with defendant, he noticed that defendant was mumbling, as if his mouth was full of something. He also noticed a cellophane bag in defendant's mouth. Based on his nine years of experience as a police officer, Officer Liford has learned that people attempt to hide drugs by using cellophane in their mouths and other areas of their bodies. Officer Liford instructed defendant to spit out what was in his mouth, and defendant refused to comply. In view of the circumstances, Officer Liford believed that defendant was attempting to conceal drugs. Officer Liford held defendant and signaled for Officer Berger to assist him. Officer Berger performed "basic pain compliance" on defendant's jaw as a means to get him to open his mouth. The "pain compliance" technique involved the application of pressure on the part of defendant's jaw near his ear. Defendant spit out what was in his mouth, which was determined to be a cellophane bag containing crack cocaine.

Issues: Was this a good *Terry* stop? Was handcuffing the defendant a reasonable part of this *Terry* stop? Did the officer have probable cause to search defendant's mouth? Was there an exigent circumstance supporting the immediate search? Was the amount of force used to do search reasonable?

Analysis and Holding: *The court found that there were specific and articulable facts to justify an investigatory detention in this case.* Officer Liford and his partner passed a vehicle with a person leaning in the passenger-side window. They pulled their cruiser behind the vehicle, and defendant and the driver hastily exited the still running vehicle that was positioned in a manner that at least partially blocked the roadway. Defendant and the driver began walking in opposite directions. These circumstances, viewed in totality, provided reasonable suspicion that a crime had been committed or was about to be committed.

The use of the handcuffs was a reasonable restraint on defendant's liberty in view of the circumstances that provided the basis for the investigatory stop. It was reasonable for Officer Liford to believe that defendant was a flight risk considering defendant's immediate actions after the officers pulled up in their cruiser. Defendant and the driver, in the words of the officer, "jumped out" of the still-running vehicle, and then started walking away from the vehicle in opposite directions. Using handcuffs as a method of detaining defendant and the driver served the purpose of preventing flight during the investigatory stop. The court also noted that handcuffing was reasonable in that it allowed the officers to safely question the two detainees separately and without putting them in the cruiser.

The facts and circumstances were sufficient to warrant a reasonable belief that defendant was attempting to conceal drugs in his mouth. Deciding if the search of defendant's mouth was reasonable is really a three step process: **1)** Did the officers have probable cause to believe defendant had concealed drugs in his mouth; **2)** Was there an exigent circumstance justifying an immediate search of his mouth; **3)** Was the amount of force used to search reasonable under the circumstances?

First, the court found there was probable cause for the search based on these facts: Although the officer did not observe the cocaine in defendant's mouth, the observance of the cellophane bag in defendant's mouth was significant under the surrounding circumstances. Attempted concealment of the contents of a cellophane bag would seem to be the only plausible explanation for why a person would place such an item in one's mouth. **Second**, the court found this was an exigent circumstance. The circumstances compelled immediate action, especially considering defendant had already demonstrated intent to ingest the contraband. The exigent circumstances supporting immediate search were the need to stop the imminent destruction of evidence and the need to prevent injury to the arrestee. **Third**, the court found the amount and type of force (pain compliance) used to be reasonable amount of force to carry out search of defendant's mouth.

IV. VEHICLE SEARCHES

Passenger's Belongings

State v. Mercier, 177 Ohio St.3d 1253

Facts: On July 17, 2005, at about 6:40 p.m., Mercier was a passenger in Charles Hagedorn's car. Hagedorn exited from his car, approached the vehicle of a confidential informant, and sold the informant about a half pound of marijuana. Mercier stayed in Hagedorn's car while the sale took place. Hagedorn returned to his car and drove away with Mercier still in the front passenger's seat.

Police stopped Hagedorn's car approximately one to two minutes after the sale. Lieutenant Zumbiel questioned Hagedorn, who admitted that there was marijuana in his car. Hagedorn opened a middle console and handed Zumbiel marijuana. Police removed Hagedorn from the car and patted him down, recovering the buy money and some rolling papers. Hagedorn was then placed in a police cruiser.

After arresting Hagedorn, the police ordered Mercier, who was holding her purse on her lap, to get out of the vehicle and leave her purse behind. Zumbiel searched Mercier's purse. He found an Advil bottle, which he opened. The bottle contained four Adderall pills, a form of amphetamine.

Issue: Did officers have probable cause to search Mercier's purse?

Holding: Yes. Police officers with probable cause to search a car may search a passenger's belongings found in the car that could conceal the object of the search.

Plain Smell

State v. Gonzales, 2009 Ohio 168 (Wood Co.)

Facts: While on patrol northbound on highway Interstate 75, Sergeant Gazarek of the Perrysburg Township Police Department saw a Jeep Cherokee with Kansas license plates without an illuminated rear license plate light. For the license plate illumination violation, he initiated a stop. Gonzales was driving and a female passenger was in the front passenger seat. He testified that as he approached the passenger side of the vehicle, he smelled a strong odor of raw marijuana emanating from the passenger compartment. Gazarek testified that the odor was strong enough to lead him to believe the car contained a large amount of marijuana. The trial court determined that Gazarek's training and experience qualified him to recognize the odor of raw marijuana.

Gazarek asked Gonzales for her driver's license; she produced a Texas driver's license. Gazarek asked Gonzales who owned the vehicle; Gonzales responded

that it belonged to a friend and retrieved the paperwork from the glove compartment. Gazarek noted that Gonzales' hand was "visibly shaking" as she did.

Gazarek then asked Gonzales to step from the vehicle and together they walked to the rear of the Jeep. Gazarek "didn't beat around the bush" and first asked her, "How much marijuana is in the car?" Gonzales reportedly responded with a "1,000 yard stare" and said, "I don't know." Gonzales also told Gazarek, in response to a question, that they were going to Detroit. Gazarek asked her to sit in the rear of his patrol car and he informed her he was going to search her vehicle.

Just then, Officer Monica Gottfried, the backup Gazarek called, arrived; Gazarek told Gottfried he had smelled raw marijuana in the Jeep. Gazarek then walked up to the passenger, still in the Jeep, and asked her where they were heading. The passenger told him they were going to Denver. Gazarek then asked the passenger to get out of the Jeep and he seated her in Gottfried's patrol car.

Gazarek and Gottfried then began their search of the Jeep. Looking through the Jeep's rear window, down into the cargo area, they saw a vinyl cover stretched from the back of the back seat to the Jeep's back hatch. The vinyl cover appeared factory-installed, and it was mounted and attached to the back seat and hooked to the back hatch and sides. Using his flashlight, Gazarek could see a gap of a few inches on each side of the vinyl cover, and could only see that "something was underneath."

The first thing Gazarek and Gottfried did was open the rear hatch of the Jeep. Through the open rear hatch, they opened the vinyl cover over the cargo area. They found duffel bags in the cargo area underneath the vinyl cover. They opened the duffel bags, and found approximately 150 pounds of marijuana packed in bricks.

Issue: Did officers have probable cause to search the cargo area of the Jeep?

Holding & Analysis: Yes. The scope of a vehicle search is defined by the places in which an officer has probable cause to believe contraband exists -- not by the particular type of container or compartment.

The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of a vehicle. This proposition is established by the common sense observation that an odor of burning marijuana would not create an inference that burning marijuana was located in a trunk. In contrast, the odor of raw marijuana provides different probable cause than the odor of burnt marijuana. The odor of raw marijuana -- especially an overwhelming odor of raw marijuana -- creates probable cause to believe that a large quantity of raw marijuana will be found. An officer may rationally conclude that a large quantity of raw marijuana would be located in a vehicle's trunk.

If, during a valid stop, an officer qualified to recognize the smell of raw marijuana detects an overwhelming odor of raw marijuana, the officer is justified in believing that the vehicle contains a large amount of raw marijuana. If no large amount of raw marijuana is seen in the passenger compartment, the officer is justified in believing that a large amount of raw marijuana may be found in a container or compartment -- including the trunk.

Protective Sweeps

State v. Haidet, 2009 Ohio 205 (Stark Co.)

Facts: On June 10, 2008, at approximately 2:30 a.m., Officer Zachary Taylor and his partner, Officer Michael Volpy, observed Haidet make an illegal u-turn. The officers followed the vehicle and observed "erratic driving behavior." Once he stopped, Haidet exited his vehicle and told the officers he was at the location to visit a friend, Mark Weigand. Upon investigation, the occupants of the residence denied knowing Haidet or Mr. Weigand. Haidet was patted down and placed in the back of the cruiser "because of his evasive behaviors and the way he was acting. His story wasn't adding up. Just for our safety as well. We checked the exterior of his clothing, make sure he does not have any weapons on his person." During the pat down, Haidet was "continually moving, asking several questions. He would not comply with our -- us telling him to keep his hands on the car, stop moving around."

Officer Taylor testified they were going to issue a traffic citation for the illegal u-turn and release Haidet. However, Officer Taylor thought a "Terry pat down" on Haidet's vehicle was warranted: "Because of his actions, the story not adding up. If he was lying about where he was going, what he was doing at that house, his immediate evasive actions and his change of behavior, his driving behavior was changed when we observed him and he observed us. Um, just his whole -- the whole situation of him being evasive. Wanted to ensure our own safety and the public safety that he did not have a weapon or anything in that car that we needed to know about."

Haidet refused to give the officers consent to search his vehicle, and claimed the keys were locked inside the car. Officer Taylor knew from the pat down search that the keys were in Haidet's pocket, "which again sets off a red flag that something is not right here." As Officer Taylor spoke with Haidet about the keys, Officer Taylor observed Haidet "reach down near his foot, place what appears to be a set of keys on the floor of the back of the police car. At that time I pull him out of the police car. The keys are laying right there on the floor of the police car." Upon unlocking the vehicle and opening the door, Officer Taylor noticed a "strong smell of raw marijuana."

Issue: Did officers have reasonable articulable suspicion to support the protective sweep of Haidet's vehicle?

Holding & Analysis: Yes. Haidet's driving behavior was erratic, he lied to the officers about visiting a friend, he was evasive during the pat down search of his person, and he lied about the car keys. Considering that the officers were about to release Haidet to return to his vehicle, all of the cited facts support the conclusion that officer safety was an issue.

State v. Caulton, 2008 Ohio 6090 (Hamilton Co.)

Facts: Caulton was driving a car that had darkly tinted windows and no license-plate light. Police pulled him over. Officer Lori Smith approached Caulton's car and saw him making suspicious movements in the area of the car's center console. Smith had had prior contact with Caulton--a passenger in Caulton's car had shot Smith's partner.

Police handcuffed Caulton and put him in the back of a police cruiser. Smith testified that, based on Caulton's behavior during the stop and on her prior contact with him, she decided to look inside the car's center console, suspecting that Caulton may have been hiding a gun. In the console, Smith found a small scale with white residue on it.

Issue: Did Officer Smith have reasonable articulable suspicion to support the protective sweep of Caulton's vehicle?

Holding & Analysis: Yes. The police officer's prior contact with Caulton, as well as the Caulton's furtive movements during the stop, gave the officer the necessary reasonable suspicion to conduct a limited search of the car for her own safety, and this remained so even after Caulton had been removed from the car and placed in a police cruiser.

State v. Wilcox, 177 Ohio App.3d 609 (Montgomery Co.)

Facts: On March 4, 2007, just before midnight, Officers Saunders and Dedrick were finishing their shift in Dayton's Fifth District when they observed a black Chevy Tahoe parked along the curb near the intersection of Faulkner and Riverview. The back door of the Tahoe was ajar and a man was observed backing cautiously away from the Tahoe, diagonally across the adjacent parking lot. The officers saw the back door of the Tahoe close. The officers testified that the area where the Tahoe was observed was a high crime area, and they found the situation to be suspicious. Believing that a robbery had occurred or was about to occur, the officers made a U-turn and went back to investigate. As they were passing the Tahoe, they observed that the windows appeared to be tinted in excess of the legal limit. The officers decided to pull over the Tahoe for the equipment violation.

Officer Detrick called the stop into headquarters and was advised that the previous night a black SUV in that area had fled from police. The brake lights of the Tahoe were still engaged which indicated to the officers the Tahoe was still in gear. Officer Saunders used the cruiser's PA system to order the driver to turn off the car and come back to the police cruiser. The driver complied and was patted down and placed in the rear seat of the cruiser. Officers Orick and Matthews then arrived at the scene in response to the dispatcher's call for assistance.

The officers approached the vehicle and saw that there were two passengers inside, including Wilcox, who was the rear seat passenger. Wilcox was removed by Officer Orick and patted down and the front seat passenger was removed by Officer Detrick and patted down. Officer Saunders testified that it was his practice to remove everyone from an automobile prior to conducting a window tint test for his and the other officers' safety when the windows were too dark to see inside. He also testified that it was his practice to perform a "lunge" area search before allowing the passengers to return to the vehicle. He defined this as a search of the areas of the car within reaching distance of the occupants of the car. During the "lunge" area search, Officer Saunders found a loaded semiautomatic handgun in the console area, which was reachable by any of the occupants of the car.

Issue: Did officers have reasonable suspicion to support the protective sweep of the vehicle?

Holding & Analysis: No. The burden is on the state to show that an officer's suspicion of criminal activity was objectively reasonable based on the totality of the circumstances. No such compelling factor exists in this case. The factors cited by the trial court include the sighting of the man walking in a diagonal away from the Tahoe, the high crime nature of the neighborhood, the vague information of a black SUV fleeing police officers in the area on the prior day, and the fact that the brake lights were still engaged when the Tahoe stopped for the police.

The trial court correctly acknowledges in its decision that Officer Saunders' "standard" search of the lunge area of a car with tinted windows before allowing occupants to reenter it, without more, is unconstitutional. When asked by the prosecution at the motion to suppress hearing why he performed a search of the vehicle, Officer Saunders initially responded that it is his practice to always search the "lunge area" of a vehicle stopped for a window tint violation "[p]rior to letting anybody back in the vehicle, especially a vehicle we can't see in, that's standard." It was not until questioning by the court that Officer Saunders indicated that another reason they searched the vehicle was because they suspected a robbery of the man in the parking lot.

While the nature of an area as a high crime area is a factor to be considered in determining whether a protective search is warranted, that factor alone is insufficient to justify a protective search. The State presented nothing which

would reasonably indicate that the man backing away from the Tahoe was being robbed or about to be robbed. Notably, Officer Saunders testified that the parking lot the man was backing across was large and the man was approximately in the middle of the lot. The back door of the Tahoe was ajar, but was not completely open. No weapons were observed. No investigation was undertaken regarding the incident. The man was not questioned either before or after the Tahoe was stopped. The court stated that this incident led to the reasonable conclusion that there had been some illegal interaction or some attempted illegal interaction. However, Wilcox points out that this behavior is also consistent with someone yelling to a friend as they back away. The fact that it was cold and snowing that night and the fact that the person was walking backwards could very well account for the cautiousness of the individual's steps. At best, this may contribute to a hunch that something illegal had happened or was about to happen, but a hunch does not rise to the level of particularized suspicion required to search the passenger compartment of the vehicle.

The State points to no suspicious activity by the occupants of the vehicle other than the car's brake lights remaining lit once the car stopped along with information that a black SUV had fled from officers in the area the prior night. While the officers attributed the lit brake lights to the car remaining in drive once it stopped, the trial judge noted that it could simply mean the driver's foot remained on the brake pedal once the car was in park. The driver was cooperative when the police ordered him to turn off the car and walk to the police cruiser. All of the passengers were cooperative when they were removed from the car, and no weapons or drugs were found during the pat-down search of the car's occupants. The record is devoid of any evidence that the occupants were known to be violent. The state has pointed to nothing in the behavior of any of the occupants that w

V. CCW AND IMPROPER HANDLING

NO CCW PERMIT

§ 2923.12. Carrying concealed weapons

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

- (1) A deadly weapon other than a handgun;
- (2) A handgun other than a dangerous ordnance;
- (3) A dangerous ordnance.

(C) (1) This section does not apply to any of the following:

(c) A person's transportation or storage of a firearm...in a motor vehicle for any lawful purpose if the firearm is not on the actor's person;

(D) It is an affirmative defense to a charge under division (A)(1) of this section of carrying or having control of a weapon other than a handgun and other than a dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon and that any of the following applies:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of a character or was necessarily carried on in a manner or at a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor's family, or the actor's home, such as would justify a prudent person in going armed.

§ 2923.16. Improperly handling firearms in a motor vehicle

(A) No person shall knowingly discharge a firearm while in or on a motor vehicle.

(B) No person shall knowingly transport or have 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.

(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless the person may lawfully possess that firearm under applicable law of this state or the United States, the firearm is unloaded, and the firearm is carried in one of the following ways:

(1) In a closed package, box, or case;

(2) In a compartment that can be reached only by leaving the vehicle;

(3) In plain sight and secured in a rack or holder made for the purpose;

(4) If the firearm is at least twenty-four inches in overall length as measured from the muzzle to the part of the stock furthest from the muzzle and if the barrel is at least eighteen inches in length, either in plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight.

(K) As used in this section:

(5) "Unloaded" means any of the following:

(a) No ammunition is in the firearm in question, and no ammunition is loaded into a magazine or speed loader that may be used with the firearm in question and that is located anywhere within the vehicle in question, without regard to where ammunition otherwise is located within the vehicle in question.

CCW PERMIT w/ LOADED HANDGUN

§ 2923.16. Improperly handling firearms in a motor vehicle

(A) No person shall knowingly discharge a firearm while in or on a motor vehicle.

(E) No person who has been issued a license or temporary emergency license to carry a concealed handgun...shall do any of the following:

(1) Knowingly transport or have a loaded handgun in a motor vehicle unless one of the following applies:

(a) The loaded handgun is in a holster on the person's person.

(b) The loaded handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle, which lid, cover, or closing mechanism must be opened for a person to gain access to the handgun.

(c) The loaded handgun is securely encased by being stored in a closed glove compartment or vehicle console or in a case that is locked.

(2) If the person is transporting or has a loaded handgun in a motor vehicle in a manner authorized under division (E)(1) of this section, knowingly remove or attempt to remove the loaded handgun from the holster, case, bag, box, container, or glove compartment, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers while the motor vehicle is being operated on a street, highway, or public property unless the person removes, attempts to remove, grasps, holds, or has the contact with the loaded handgun pursuant to and in accordance with directions given by a law enforcement officer;

(3) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose...and if the person is transporting or has a loaded handgun in the motor vehicle...in any manner, fail to do any of the following that is applicable:

(a) If the person is the driver or an occupant of a motor vehicle stopped as a result of a traffic stop or a stop for another law enforcement purpose, fail to promptly inform any law enforcement officer who approaches the vehicle

while stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then possesses or has a loaded handgun in the motor vehicle;

(4) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose and if the person is transporting or has a loaded handgun in the motor vehicle in any manner, knowingly fail to remain in the motor vehicle while stopped, or knowingly fail to keep the person's hands in plain sight at any time after any law enforcement officer begins approaching the person while stopped and before the law enforcement officer leaves, unless the failure is pursuant to and in accordance with directions given by a law enforcement officer;

(5) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose, if the person is transporting or has a loaded handgun in the motor vehicle in a manner authorized under division (E)(1) of this section, and if the person is approached by any law enforcement officer while stopped, knowingly remove or attempt to remove the loaded handgun from the holster, case, bag, box, container, or glove compartment, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers in the motor vehicle at any time after the law enforcement officer begins approaching and before the law enforcement officer leaves, unless the person removes, attempts to remove, grasps, holds, or has contact with the loaded handgun pursuant to and in accordance with directions given by the law enforcement officer;

(6) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop or a stop for another law enforcement purpose and if the person is transporting or has a loaded handgun in the motor vehicle in any manner, knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the motor vehicle is stopped, including, but not limited to, a specific order to the person to keep the person's hands in plain sight.

WEAPONS UNDER DISABILITY

§ 2923.13. Having weapons while under disability

(A) Unless relieved from disability..., no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation.

CASELAW

State v. Edmonds, 2009 Ohio 231 (Cuyahoga Co.)

Facts: Patrolman Lawrence Smith of the Cleveland Police Department testified that he stopped Edmonds on August 18, 2007 after observing appellant weaving in and out of traffic with a broken rear window covered in plastic. Edmonds was removed from the vehicle and found to be wearing an empty holster on his right side attached to his belt loop. Edmonds was also wearing a bulletproof vest. Officer Mazur removed a firearm from the vehicle, and identified it in court as a "chief's special" Smith and Wesson. Officer Mazur further testified that the gun was loaded with a round in the chamber when he recovered it.

Issue: Was there sufficient evidence to convict Edmonds of CCW?

Holding & Analysis: Yes. Significant evidence establishing Edmonds's guilt was presented at the trial court level. At the time Edmonds was arrested he did not immediately pull his vehicle over and continued slowly for 200 to 300 feet after the officers activated lights and siren. Officers Smith and Mazur testified that Edmonds was making movements on the right side of his body as they approached the vehicle. Officer Smith testified that these movements were consistent with an attempt to hide or conceal an object.

The firearm was located immediately to the right of Edmonds, tucked inside a piece of carpeting that had been pulled away from the console. In addition, Edmonds was wearing a holster on his right side when he was arrested. Edmonds's holster was attached to his belt and he was wearing a bulletproof vest at the time of his arrest. Moreover, Officer Smith testified that the recovered firearm fit into the holster Edmonds was wearing at the time of his arrest.

Amber Raglin testified that the Infiniti vehicle was in Edmonds's exclusive possession from June 24, 2007 until the date of his arrest on August 18, 2007. Amber Raglin also testified that she had previously consented to allowing Edmonds to use her vehicle for approximately eight months. Edmonds testified that he had a purported title to the vehicle, and he also testified that he cleaned Amber Raglin's personal belongings out of the vehicle before he was arrested on August 18, 2007.

State v. Brown, 168 Ohio App.3d 314 (Trumbull Co.)

Facts: On October 16, 2004, Brown was stopped by Sergeant Merkel of the Warren Police Department for speeding. Sergeant Merkel ran a check on Brown's driver's license. At that time, the dispatcher informed Sergeant Merkel that Brown possessed a concealed carry license. Upon returning to Brown's vehicle to issue the speeding citation, Sergeant Merkel asked Brown if he had a firearm in the car. Brown replied that there was a gun in the glove compartment. After removing Brown from the vehicle, Sergeant Merkel searched the glove compartment of Brown's vehicle. Sergeant Merkel discovered a loaded, nine-millimeter handgun in the glove compartment, which was unlocked.

Issue: Is the requirement that a CCW permit holder promptly inform an officer that the permit holder possess a firearm unconstitutionally vague?

Holding & Analysis: No. This section requires an individual with a concealed carry license to "promptly" notify the officer, upon being stopped in a traffic stop, that a firearm is in the vehicle. The only provision of this statute that is arguably ambiguous is the term "promptly." "To do something 'promptly' is to do it without delay and with reasonable speed." Thus, a person of common intelligence would readily understand this term, as it is used in this situation, to require the license holder to inform the officer about the weapon as soon as possible. Certainly, the notification should occur during the initial encounter with the officer. We do not find this term, or the remaining terms in this section, to be ambiguous.

VI. INTERIOR CRIME SCENES

Recently we have had a number of questions about how several interrelated legal concepts work together. The questions have mainly focused on the following problem issues: When do you need a search warrant to enter/search a crime scene which is in a house, and what can you do when you see an item in plain view in the in-home crime scene?

General Rule and the Exceptions to the General Rule

As you know, the general rule is that you should have a search warrant in order to conduct a search – searches inside a home without a warrant are presumptively unreasonable. The only time you don't need a warrant to do any

sort of search is if one of the exceptions to the warrant requirement is present. There are several recognized exceptions to the warrant requirement, meaning times when you can conduct a search without a search warrant. The exceptions are as follows:

- **Searches Conducted Incident to Lawful Arrest** (these include searches of the person incident to arrest and protective sweeps in a home)
- **The Motor Vehicle Exception**
- **Consent Searches**
- **The Stop-and-Frisk doctrine**
- **Hot-Pursuit** (allows an entry and limited search for the fleeing person)
- **Probable Cause to Search and the Presence of Exigent Circumstances** (an entry to stop the imminent destruction of evidence is the primary example)
- **Reason to Believe Someone inside Dwelling is in Danger and in Need to Immediate Aid Allows Brief Entry to Render Such Aid or to stop the safety threat** (another type of exigency)
- **The Plain View Doctrine**
- **Inventory Search of Automobile**
- **Administrative Search**

As you will notice, there is no recognized exception to the warrant requirement for the search of a crime scene which is in a home or another private place. The United States Supreme Court and the Ohio Supreme Court have expressly rejected a "crime scene" exception to the warrant rule, and have ruled that a warrant must be obtained to search a crime scene unless a warrantless search is justified. Thus in other words, if a crime scene is a place where a person would have an expectation of privacy, such as in a home, you cannot enter and search that place without a search warrant unless one of the exceptions to the search warrant requirement applies.

If you have consent then you don't need a search warrant. We also know that in any many situations an exigent circumstance will exist which justifies at least the initial warrantless entry into the home. In that case you don't need a search warrant, at least for the initial entry which relates to the exigent circumstance. However, we would caution that if you enter a home due to an exigent circumstance, the search you conduct in the home is limited to addressing the exigent circumstance.

The Plain View Exception

Ok, so you are in a crime scene in a home and see something illegal in plain view, then what? Under the plain view doctrine if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. The phrase "immediately apparent" simply means the

police have probable cause to associate an object with criminal activity. An officer may rely on training and experience in recognizing evidence of a crime.

Examples of How These Concepts Work Together

Ohio v. Sage (1987), 31 Ohio St.3d 173 -- An officer responding to a shooting found a note on the door that read "call the law." Upon entering the house found two bodies in an upstairs bedroom, one alive, one wounded. After transporting the surviving victim to the hospital, police officers collected bullets and a gun from the bedroom. Later the police returned to the scene to continue "processing" it without obtaining a warrant. They located two more bullets. The Court held that the evidence initially collected when the officer had, due to exigent circumstances, *lawfully entered the premise*, fell under the plain view doctrine and was admissible. The bullets collected when the police re-entered the scene later *after the emergency had passed* were not admissible, because the police were not lawfully on the premise and had not obtained a warrant.

State v. Price (1999), 134 Ohio App. 3d 464 -- A man was convicted of child endangerment after police entered his home because he did not respond to their knocks on the door. They were knocking on the door because loud noise was coming from his house in violation of a city noise ordinance. Once inside they found the man, in plain view, passed out in a chair with his two infants, one in each arm. The Court held that from "the exterior of the house, there was no indication that anyone inside was in, or posed an, immediate danger of serious injury...[and] loud music, in and of itself, does not indicate the kind of immediate physical danger that justifies entry into a private home without a warrant." All evidence of child endangerment was suppressed.

State v. Hedrick, 2008 Ohio 1455 -- Two police officers, following up on a tip, visited Hedrick's trailer and asked to step inside to speak to him. Upon entering the premises one of the officers went to check on the occupant in the bathroom and observed drug paraphernalia on the sink. The evidence was later suppressed because the officers went outside of the scope of consent by looking in the bathroom and violated the "lawful intrusion" prong of the plain view doctrine. Had the officers observed the drug paraphernalia simply upon entering the trailer, the plain view doctrine would have been satisfied.

State v. Wilson, 2007 Ohio 353 -- Upon responding to an anonymous tip that a burglary was occurring, two officers observed a broken window and a man moving around inside of the residence. The officers entered the premises, put 3 people into investigative custody and observed syringes on the floor which were seized as evidence. They then retrieved a search warrant to search the remainder of the premises. The court stated that "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....exigent circumstances includes the risk of undetected escape by a suspect within a

residence and a threat of harm posed by the suspect to either himself, the public, or police.... Under the exigent circumstances doctrine, the officers' entry in to the home was lawful, therefore, the syringes that were in plain view on the floor were admissible.

State v. Sutcliffe, 2008 Ohio 6782 -- A firefighter responded to a fire at defendant's residence. After extinguishing the fire, the firefighter vented the home and used his ax to break into a locked room. He entered the room and observed "growing supplies." The sheriff's office was contacted. After the fire was out and the house was vented, an officer entered the house, identified the plants in the room as marijuana, and seized various items found in the room. The court held that the trial court properly granted defendant's motion to suppress the evidence seized from his house. While the fireman had the right to enter the locked room without a warrant for the purpose of checking for additional hot spots and ensuring that the fire was not spreading to additional areas of the home, the police officer was not permitted to enter the residence without a warrant because the sole purpose of his search of the residence was to gather evidence of criminal activity. The officer was not at the scene to investigate the cause of a fire or to assist in putting out the fire itself; instead, he specifically responded to the scene to investigate a possible marijuana grow. Moreover, there was no risk of destruction or loss of evidence.

Hypothetical – Patrol officers are dispatched to house on shots fired call. Officers find home owner in front yard bleeding. His wife is with him, but is uninjured. Homeowner is coherent and states that an unidentified white male tried to break into his home. Homeowner brandished a gun at the assailant from inside the front door, and assailant shot him through the door. Homeowner fired back from inside house, and then ran outside and fired off more rounds at assailant before collapsing in yard. Homeowner thinks he hit assailant but assailant got away. Homeowner says no one else is in his house and wife confirms this as well. Homeowner is transported by squad to hospital with his wife. Patrol officers then secure scene, but do not enter house. Detectives are dispatched to hospital where they interview homeowner and wife. Wife saw nothing, and homeowner claims he has no idea why this occurred and that he does not know identity of assailant. Detectives then leave hospital and go to crime scene. This is about two hours after the shooting. Upon arrival they speak to patrol and are told neighbors have indicated (anonymously of course) they think that homeowner is a drug dealer and this shooting was related to this activity. The patrol officers then tell detectives they have not went in house, there has been no sign of activity in the house, nor has anyone else been in or out since the shooting. The detectives then enter the house to investigate the interior crime scene. Upon walking into the kitchen, the detectives see a lot of marijuana as well as various types of drug paraphernalia and thousands of dollars in cash on the kitchen table. The officers also see what appears to be a substantial amount of crack cocaine on the kitchen counter with more paraphernalia as well as a handgun. What do you make of this situation and any potential criminal charges against homeowner?

VII. PROTECTION ORDERS

PROTECTION ORDERS ENFORCEABLE BY ARREST

O.R.C. 2919.26 DOMESTIC VIOLENCE TEMPORARY PROTECTION ORDER (DVTPO) (Formerly TPO)

O.R.C. 2903.213 CRIMINAL PROTECTION ORDER (CRPO) (Formerly Stalking Protection Order or SPO)

O.R.C. 3113.31 CIVIL PROTECTION ORDER (CPO)

O.R.C. 2903.214 CIVIL STALKING or SEXUALLY ORIENTED OFFENSE PROTECTION ORDER (SSOOPO) (Formerly CSPO)

Basic Important Points About Protection Orders

Protection orders are not the same as “stay away” orders. Judges often order defendants to stay away from the victim in a case as a condition of their bond or probation. These orders are enforceable by the judge and **are not enforceable by arrest – you cannot enforce these orders by arresting the person who has “violated” the “stay away” order.** Officers should document the incident and tell the victim to follow-up with the prosecutor or probation officer.

Protection orders are not the same as “Restraining Orders”. Restraining Orders are issued in divorce cases and function to prevent either party from selling assets of the marriage prior to the final disposition of the divorce. Restraining orders might also say the parties cannot harass one another. In other words they could contain some language that sounds a little like a protection order. However, **“restraining orders” are not enforceable by arrest – you cannot enforce these orders by arresting the person who has “violated” the “restraining order.”** Officers should document the incident and tell the victim to follow-up with their attorney or the court.

A protection order **cannot be waived or nullified by an invitation** to the alleged offender from the complainant or from a family or household member. Each protection order has the following warning to the defendant/respondent:

NOTICE TO DEFENDANT/RESPONDENT: THE PERSONS PROTECTED BY THIS ORDER CANNOT GIVE YOU LEGAL PERMISSION TO CHANGE OR VIOLATE THIS ORDER. IF YOU VIOLATE ANY TERMS OF THIS ORDER, EVEN WITH THE

PROTECTED PERSON'S PERMISSION, YOU MAY BE ARRESTED. ONLY THE COURT CAN CHANGE THIS ORDER. IF THERE IS ANY REASON WHY THIS ORDER SHOULD BE CHANGED, YOU MUST ASK THE COURT TO CHANGE IT. YOU ACT AT YOU

The Ohio Supreme Court has ruled that **the party listed as the victim or petitioner or as the protected person on a protection order cannot be charged with violating the protection order**, even if they encouraged the contact.

There are **two kinds** of enforceable CPOs (when we say enforceable we mean you can arrest if you have PC to believe the order has been violated): the **ex parte CPO** is a temporary, short-term order the Court issues upon petition by the victim, out of the presence of the respondent. This order generally lasts only about 7-10 days, or until the full hearing. The expiration date appears on the order. The **full hearing CPO** is granted after the judge/magistrate holds a hearing where the respondent has the opportunity to contest the order.

NOTE: the full hearing may be continued several times. Despite the original expiration date on the ex parte CPO order, it remains in effect until the full hearing.

A full hearing CPO remains in effect until a date certain, not to exceed five years.

A CPO is available even when there are criminal charges pending and a criminal DVTPO is in place [ORC 3113.31(g)]. The domestic violence statute provides however, that the issuance of a CPO automatically terminates the effectiveness of a criminal TPO. O.R.C. 2919.26(E)(2)(b).

Violation of a CPO is a separate criminal offense pursuant to 2919.27 O.R.C. **and the offender should be arrested**. [See Directive 3.50(IV)(C)(1)]. **If you have probable cause to believe the respondent has violated the terms and conditions of the CPO, you should enforce the CPO by arresting the respondent.**

IF THE VICTIM HAD A DVTPO AND GETS A CPO, THE OFFICER SHOULD FILE A VIOLATION OF A CPO, NOT THE DVTPO, BECAUSE THE CPO NEGATES THE DVTPO.

A SSOOPO is limited in scope but can order the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household members.

There are **two kinds** of enforceable SSOOPOs: the **ex parte SSOOPO** is a temporary, short-term order the Court issues upon petition by the victim, out of the presence of the respondent. This order generally lasts only about 7-10 days, or until the full hearing. The expiration date appears on the order. The **full**

hearing SSOOPO is granted after the judge/magistrate holds a hearing where the respondent has the opportunity to contest the order.

The full hearing may be continued several times. Despite the original expiration date on the ex parte SSOOPO order, it remains in effect until the full hearing. A full hearing SSOOPO remains in effect until a date certain not to exceed five years.

Violation of a SSOOPO is a separate criminal offense punishable pursuant to 2919.27 O.R.C. **and the offender should be arrested. [Directive 3.50(IV)(C)(1)]. If you have probable cause to believe the respondent has violated the terms and conditions of the SSOOPO, you should enforce the SSOOPO by arresting the respondent.**

Enforce a protection order issued in another jurisdiction when:

The order appears to be valid. There is probable cause to believe that a violation of the order occurred in the enforcing jurisdiction. In 1994, the federal government enacted 18 USC 2265 directing jurisdictions to give full faith and credit to valid protection orders issued by other jurisdictions. This means that an offender can be arrested for violating a protection order wherever it is violated, not limited to the issuing jurisdiction. And, law enforcement must enforce the terms of the order as written, even if some of the conditions would not be allowing in the enforcing jurisdiction. For example, some states grant lifetime protection orders. Protection orders last only up to five years in Ohio. You would still enforce the lifetime protection order if that order is valid in the issuing jurisdiction.

Officers are not required to know the law of the issuing jurisdiction. An order from another jurisdiction is enforceable if it is valid on its face and there is probable cause to believe that a violation of that order has occurred. The best practice is to make reasonable attempts to verify that order.

Failure to enforce a valid protection order from another jurisdiction could leave you liable.

The following shall not be required concerning the victim's copy of the order:

- An attached certification form
- An original signature of the issuing authority
- A raised seal or stamp of the issuing court
- The victim registered the order in the enforcing jurisdiction

VIOLATION OF PROTECTION ORDER CHARGE

This would be the appropriate charge for violating any of the protection order listed above – just make sure you select the correct subsection based on the type of order:

2919.27 O.R.C.

No person shall recklessly violate the terms of any of the following:

- (1) A protection order issued pursuant to 2919.26 (DVTPO) (formerly TPO) or 3113.31 (CPO)
- (2) A protection order issued pursuant to 2903.213 (CRPO) (formerly SPO)
- (3) A protection order issued pursuant to 2903.214 (SSOOPO) (formerly CSPO)
- (4) A protection order issued by a court of another state

VPO SCENARIOS

For the following scenarios, assume Jane Doe has a protection order against John Doe (Jane will be listed on the order as the Petitioner and John will be listed on the order as the Respondent).

Scenario #1

Facts: John runs into Jane at a bar.

Question: When is this a violation? What questions should you ask?

Answer: It depends. What does John do? If he approaches Jane, it is a violation. Did John know Jane was there? If not, and John does not approach Jane, then it is probably not a violation. Did John leave? It may not seem fair that John should have to leave, but most protection orders include this condition: If Respondent accidentally comes in contact with protected persons in any public or private place, Respondent must depart *immediately*. This order includes encounters on public and private roads.

Scenario #2

Facts: John goes to Jane's house when she is not home.

Question: When is this a violation? Is there anytime this is/is not a violation?

Answer: The ONLY time John may be at Jane's home is when she is not there and John has the express permission of the court. Most protection orders include a condition that the Respondent: **SHALL NOT ENTER** the residence, school, business, place of employment, or child care providers of the protected persons named in this Order, including the buildings, grounds and parking lots at those locations. Defendant may not violate this order even with the permission of a protected person.

Scenario #3

Facts: John is stopped for a traffic violation. Jane is in the car. The protection order is discovered through a record check.

Question: What charges should you file? Against Whom?

Answer: Violation of Protection Order and the traffic violation against John. You cannot charge Jane for willingly being with John, despite the existence of the protection order. ONLY the judge may modify the protection order.

Scenario #4

Facts: Jane invites John to come back home. They get into an argument and the police are called.

Question: What do you file? Against whom?

Answer: Violation of Protection Order against John, at least. File other charges (DV/Assault, for example) should your investigation reveal probable cause for additional charges. You can not charge Jane for willingly being with John, despite the existence of the protection order. Again, both the Respondent and the Petitioner are told that ONLY the judge may modify the protection order.

VIII. MIRANDA

State v. Hale, 119 Ohio St.3d 118

Facts: Sergeant Pestak arrested Hale at approximately 2:30 p.m., June 28, and informed Hale of his *Miranda* rights, which Sergeant Pestak recited from memory. Hale was then driven to the Euclid police station, arriving at 3:35 p.m. Before his shift ended at 5:00 p.m., Sergeant Pestak asked Sergeant Baird to "get a personal history" from Hale.

Pestak's request referred to the standard personal-history form used by the Euclid detective bureau. The form contains such information as the arrestee's

name, address, age, phone number, Social Security number, physical description, employer, education, and the names of his immediate family members. The detective bureau routinely obtains this information from every felony suspect and uses it to complete the form. The bureau gathers this information for police records and to verify the arrestee's identity.

At 7:50 p.m., Baird had Hale escorted from his cell to the detective bureau. For 20 to 25 minutes, Baird questioned Hale to obtain information for the personal-history form. When questioning finished, Baird told Hale that he (Baird) "was going to talk to him briefly about the crime that he was being charged with, and that before Baird asked him any questions or talked to him at all about it, that Baird had to advise him of his rights." Baird asked Hale to read a form containing the *Miranda* warnings. Baird then read the *Miranda* form aloud to him. Baird asked if Hale understood his rights. Hale said yes and signed the form, acknowledging that he understood them. Baird then showed Hale the waiver portion of the *Miranda* form and told Hale that if he wanted to talk to Baird, he needed to sign the waiver. Hale signed the *Miranda* waiver at 8:22 p.m.

Baird explained to Hale that he was under arrest for murder, then began what Baird described as a "soft interrogation." Baird discussed the case with Hale for about 20 minutes. Hale then orally stated his version of the events of June 21. When Hale finished, Baird said, "I'd really like to get this on paper so we can have your side of the story." At 8:53 p.m., Baird gave Hale a statement sheet and asked him to write his statement in his own words. Over the next two hours, Hale wrote out a four-page statement, which was ultimately introduced at trial.

Issue: Were the *Miranda* warnings given by Baird ineffective because Baird questioned Hale about his personal history before giving those warnings?

Holding & Analysis: No. The personal-history questions were routine booking questions, and the requirement that police administer *Miranda* warnings before questioning a suspect in custody does not apply to routine booking questions. Thus, no reason exists to suppress Hale's statement. Baird was not required to administer *Miranda* warnings any sooner than he did. By giving complete *Miranda* warnings and obtaining an express waiver before asking Hale any questions about the crime, Baird complied fully with the relevant constitutional requirements.

State v. Chester, 2008 Ohio 6679 (Franklin Co.)

Facts: Chester began the interview by stating: "Before I say anything, I need somebody to call Detective Dan McGahhey from homicide and let him -- let him tell you what I done for him, so wherever they take me to, whatever jail they take me to, they can house me properly. Before I can say anything, I need that to happen. I need somebody be aware of it for when we go to the jail. I'm not talking until that happens." Chester had worked as an informant for McGahhey in another case, and Chester claimed McGahhey told him that he should contact McGahhey if he were ever arrested so that precautions could be taken for his

safe imprisonment. After Patete and Chester discussed McGahhey at length, Patete then asked Chester, "are you going to talk to me or not?" Chester replied he would talk if Patete would contact McGahhey. Patete replied he would call McGahhey and tell him what was happening after they "took care of what's going on here at headquarters, but right now I'm not going to do anything because I want to figure out -- I want to hear your side of what's going on here."

At this point, Patete told Chester he was going to read him his rights, and then stated, "you can answer questions; you cannot answer questions," to which Chester replied "I'm not signing nothing." Patete replied, "it's up to you." Chester then said again, "I'm not answering your questions. I'm not signing nothing and no tape recorder, so read me my rights." Patete replied "Okay," and asked Chester to stand up. Chester then talked about contacting McGahhey again so that Chester would not have any problems in jail. Patete again assured Chester that he would contact McGahhey after they were done. After assuring Chester it was not a problem to contact McGahhey, Patete stated, "all right. All right. This is a constitutional rights waiver I'm going to read to you, okay? I'm going to get a little background here from you real quick." Patete then asked Chester a few questions regarding his ability to read and write, whether he was under the influence of any drugs or alcohol, and whether he had any impairments before reading the constitutional rights waiver form to Chester. After Patete read Chester his rights, Chester replied that he had read and been read his rights, he understood his rights, he did not want a lawyer at that time, he was willing to answer questions, he knew what he was doing, no promises or threats had been made, and no pressure had been used against him. Chester then signed the waiver of rights form.

Issue: Was Chester's decision to waive his rights voluntary?

Holding & Analysis: Yes. The first three-quarters of the interview consisted mostly of Chester's pleas for Patete to contact McGahhey. At no point during this period did Chester seek to stop the interview or request an attorney. To the contrary Chester specifically stated that he would speak with Patete if Patete would agree to contact McGahhey. Patete agreed to contact McGahhey after he and Chester were finished talking. When Patete brought up the waiver of rights form, Chester stated he would not sign anything and he would not answer his questions. Thus, this appears to be the critical point of the interview for determining the voluntariness of the statement.

Immediately after telling Patete that he would not sign anything and would not answer his questions, Chester stated "so read me my rights." Chester requested to have his rights read to him, and he subsequently waived them after being so informed. At no time after Patete informed Chester of his rights did he explicitly ask to stop the interview or request an attorney. Although Chester did say he was not going to answer any of Patete's questions, it appears that Chester's statements in this respect were based on his desire for Patete to first speak to McGahhey. After Patete reassured Chester that he would speak to McGahhey,

Chester signed the waiver of rights. Patete's assurances, in this regard, were not coercive. An investigator's offer to help if a defendant confesses is not improper.

Furthermore, after stating he was not going to answer anymore questions, it appears from the transcript that Chester was the one who initiated further conversation with Patete, telling the detective that he was not going to run away from the situation and that he wanted to get it resolved. It was after Chester made these statements that Patete assured Chester he would contact McGahhey, and Chester waived his *Miranda* rights. The transcript reveals no hesitation or reluctance on behalf of Chester during the reading of his rights or his signing of the waiver form. There is nothing in the record to suggest that the wavier was anything other than Chester's free and deliberate choice.

In addition, the other circumstances surrounding Chester's statements do not reveal any indicators of involuntariness. Chester's age did not impact his statement, he had a college degree, he had prior criminal experiences, the interview at issue was no more than one hour, Patete noted that Chester had been cooperative, there is no indication in the transcript that the interview was unusually combative or intense, there was no evidence of physical deprivation or mistreatment, and Patete never threatened Chester. Also important is that there is no evidence in the record that he continued to say "no" to Patete after *Miranda* warnings were given.

State v. Santiago, 2008 Ohio 4545 (Franklin Co.)

Facts: In the first moments in the interview room, Detective Donna Welch introduced both herself and Detective Jerry James, told Santiago she wanted to get his side of the story, and asked him if he wanted to make a statement about the burglary that occurred on campus that morning. After some verbal exchange, Welch asked Santiago if she could advise him of his constitutional rights. Santiago responded that "they did that already, so that is why I was wondering because, see, basically I guess I have to talk to the lawyers because I don't know what to answer yes or no."

Welch advised Santiago that "we will just put you down for refusal, and we will just go ahead and charge you with the burglary and we will sort it all out in court." Santiago responded to Welch's statement by asking Welch "what happened to the lawyer and their asking questions?" Welch advised they did not wait for lawyers to come to the interview room, but if Santiago wanted to answer questions later "you can bring your lawyer at any time." Santiago then asked, "So you guys are together, right? Basically this is what I am looking at. There is crooked cops; there is good cops, right? So I don't know who I am talking to, because I don't know who knows who. That is - - what you think, it don't happen?" Welch responded "it happens. Go ahead." Santiago then stated that, "like I said, I just want two things. I want to know what you want. I know you want a conviction because basically the shit."

Welch told Santiago she was not concerned about a conviction, but had a job to

do. She noted Santiago "asked for a lawyer like three or four times." She advised Santiago "we had better wait until you get a lawyer because I don't want to violate your constitutional rights." Santiago responded, "If you want. I just need to know where this is heading. Am I going to jail?" Welch advised Santiago he was going to jail regardless of his statement.

Santiago stated, "Okay, I understand that. I'm getting charged with - -." Welch interrupted and stated, "Burglary, F-2, a felony of the second degree. If you would like to talk some more about this, we can sit down and read you your rights, have you sign a rights statement, and then we can start from the beginning. You seem to be very concerned about an attorney, so - -." Santiago responded, "Because I am on (unintelligible). Okay? I could be shot easily just the same as out there. I am very detailed in what I do." Santiago then engaged in a discourse about street shootings. Welch stopped him and advised him of his Miranda rights. Santiago waived them. He then conceded he walked into the front door of the residence where the burglary occurred and took the items recovered.

Issues:

- 1.) Did Santiago unequivocally request an attorney when he stated, "I guess I have to talk to the lawyers because I don't know what to answer yes or no"?
- 2.) Even if Santiago invoked his right to an attorney, did Santiago initiate conversation with the detectives?

Holdings & Analysis:

1.) No. The United States Supreme Court concluded that "maybe I should talk to a lawyer" was not an unequivocal and unambiguous request for an attorney. Similarly, this court concluded a defendant did not unambiguously invoke his right to counsel when he stated, "I think I need a lawyer, because if I tell everything I know, how do I know I'm not going to wind up with a complicity charge?"

Santiago's statement to the detectives does not differ significantly from these statements. Santiago's statement to the detectives incorporates ambivalence. The trial court properly concluded Santiago's statement did not constitute an unambiguous and unequivocal request for an attorney.

2.) Yes. Even if Santiago unequivocally invoked his right to counsel in the police interview room, he initiated the subsequent conversation with law enforcement. Santiago initiated further discussion when he asked, "What happened to the lawyer and their asking questions?" Were that not sufficient to initiate the conversation with the detectives, Santiago, after further statements to the detectives, asked, "I just need to know where this is heading. Am I going to jail?" The detective answered the question and brought up the waiver, noting Santiago seemed to be concerned about an attorney. Santiago nonetheless continued to

talk to the detectives. Given those circumstances, the trial court did not err in concluding Santiago's statement evinced a willingness and desire for generalized discussion.

IX. USE OF FORCE AND CIVIL LIABILITY

Dixon v. Donald, 2008 FED App. 0546N (6th Cir.) – This is a recent excessive force case wherein the court took issue with the manner in which an officer handcuffed an obviously injured arrestee. The court said that absent exigent circumstances, an officer choosing to handcuff a peaceable arrestee in a manner likely to cause serious harm amounts to excessive force. The court held the Constitution forbade the officer from making a cursory examination of a severe and obvious medical injury and nevertheless choosing to handcuff the arrestee in a manner likely to cause serious harm. In this case the officer handcuffed the man in the back even though he had a severe and obvious abdominal injury. You have a duty to use alternative methods of restraint if handcuffing a prisoner behind their back would aggravate an existing injury or condition.

Landis v. Baker, 2008 FED App. 0622N (6th Cir.) – This is a positional asphyxia case that should be discussed with officers. In this case, decedent drowned after he was beaten with a police baton, held down, and tasered while he was in approximately two feet of water, mud, and sediment. Court found several bases for excessive force claim, but said this about positional asphyxia: “It is clearly established that putting exceptional pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated, constitutes excessive force.” Court also said this about the liability of the officers present: It not necessary, in order to hold a police officer liable under 42 U.S.C.S. § 1983, to demonstrate that the officer actively participated in using force against a plaintiff. This case should scare officers.

Knight v. Canter, 2008 U.S. Dist. LEXIS 103472

Facts – This is a CPD lawsuit. The City was represented in this lawsuit by **Assistant City Attorney Tim Mangan**. Plaintiff Kenneth Knight was riding his bike on 8th Avenue near Hamlet. **Columbus Police Officers Cory Canter and Nathan Komisarek** were working patrol and identify this area as a high crime area where both officers have made numerous narcotics related arrests and seizures. At approximately 3:15 p.m., the officers observed an individual, later identified as Plaintiff, riding his bicycle eastbound on the sidewalk of E. 8th Avenue, in violation of a Columbus city statute. The officers then observed Plaintiff stop at Hamlet Street and talk to a known dealer of crack cocaine for less than five seconds. After the brief conversation, Plaintiff proceeded riding his bicycle on the sidewalk eastbound on E. 8th Avenue and entered the D & J Carryout, located on N. 4th Street. Approximately five seconds later, the known drug dealer began walking eastbound on E. 8th Avenue and also entered the D & J Carryout.

After approximately one minute had passed, the officers observed the known drug dealer exit the carryout with nothing in his hands. The officers observed Plaintiff Knight exit the carryout a few seconds later, also without any items from the store. Based upon prior experience with the enforcement of narcotics laws in that neighborhood, the officers were aware that oftentimes drug deals occur in the D & J Carryout as opposed to the middle of the street or on a street corner.

After exiting the D & J Carryout, Plaintiff proceeded to ride his bicycle westbound on the sidewalk of E. 8th Avenue in violation of a City of Columbus statute. Officer Canter pulled the cruiser alongside Plaintiff and ordered him to stop. Plaintiff responded by saying "What for? I didn't do shit!" Plaintiff then got off his bicycle and walked toward the officers. The officers describe that as they approached Plaintiff, they asked him to produce identification and Plaintiff responded by saying "Fuck you!" and assumed what the officers recognized as a fighting stance.

In response to Plaintiff's actions, Officer Canter tried to close this distance between himself and Plaintiff. Officer Canter attempted to grab Plaintiff, but Plaintiff was extremely sweaty and ran away, stopped in the middle of 8th Avenue and raised his fists. Officer Komisarek exited the cruiser and came around the back and was able to grab Plaintiff. Plaintiff attempted to pull away and wrestled with Officer Komisarek. The Officers described it as a rapidly evolving situation that lasted approximately five to eight seconds after their initial contact with Plaintiff.

Plaintiff describes the encounter differently. Plaintiff states that Officer Canter "grabbed me by the wrist and arm was pushing and twisting my arm and at some point was blindsided by the 2nd officer was knocked about slammed to the hot asphalt while being yelled at to spit out the crack spit it out spit."

The officers further described that while on the ground, Plaintiff continued to struggle with them, trying to get up, thrashing, kicking his legs, and refusing to respond to verbal commands to give the officers his hands. Despite the officers informing Plaintiff he was under arrest and despite the order to quit resisting arrest, Plaintiff continued to resist. The officers, however, were having difficulty controlling Plaintiff and called for backup officers, who arrived approximately two minutes after Officer Komisarek's call. The backup officers helped Officer Canter and Officer Komisarek handcuff Plaintiff. Plaintiff was also put in a hobble strap to control his legs because of his combative attitude. Plaintiff was then placed in a PTV and moved him to complete his arrest report.

The officers state that all of the force used was in response to Plaintiff's behavior and resistance to the officers' attempt to take him into custody and effect his arrest. Plaintiff was charged with violating Columbus City Code Chapters 2173.10(A) (riding his bicycle on the sidewalk); 2171.04(A) (stepping into the street); 2321.31(A) (obstructing official business); and 2321.33(A) (resisting arrest). A Franklin County Municipal Court Judge conducted a motion hearing on the criminal charges against Plaintiff. **Assistant City Attorney Jody Spurlock**

was the prosecutor on the criminal case. The judge held that "based on the totality of the circumstances there was reasonable suspicion for the stop, probable cause for the arrest." Plaintiff later sued.

Issues – Did the officers use excessive force in effecting Knight's arrest? Did the officers violate Knight's rights by denying him medical treatment?

Analysis and Holding – The Fourth Amendment requires that an officer's use of force be objectively reasonable. Reasonableness is evaluated from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight. Courts evaluating the reasonableness of force used should pay particular attention to the 1) severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officers or others, and 3) whether he is actively resisting arrest or attempting to evade arrest by flight.

The Court found that Plaintiff's actions were reasonably construed by the officers as resisting arrest thereby justifying the use of force to restrain him. The court noted that officers even had to call for back-up officers to be able to restrain Plaintiff. The court went on to explain that regardless of the type of offense Plaintiff was stopped for, courts have held that the use of force is necessary in situations where an individual is resisting arrest. This is true even when the underlying offense is a misdemeanor, meaning the crime at issue is not that severe. It was thus reasonable for Officers Canter and Komisarek to believe that Plaintiff could pose a threat in that he was resisting arrest. The court found that Plaintiff's continued failure to respond and to comply with the officers' instructions then justified an escalation of the use of force.

Plaintiff also claimed he was denied medical treatment. Plaintiff claimed that after he was arrested he sat in a parking lot for what seemed like an hour without getting treatment and that he was denied medical treatment. However he then later admitted that he was taken to Grant Hospital before he entered the county jail. Furthermore, Plaintiff admitted that he never asked the officers for medical treatment. The court explained the standard for a denial of medical treatment claim: 1) Plaintiff must allege that the medical need at issue was sufficiently serious--that he was detained "under conditions posing a substantial risk of harm; and 2) That the officers subjectively had "a sufficiently culpable state of mind in denying medical care." In other words, Plaintiff must show that the Defendants were deliberately indifferent to his medical needs. Deliberate indifference requires that the officers knew of and disregarded a substantial risk of serious harm to Plaintiff's health and safety. The Court found that Plaintiff could not satisfy either part of the standard. He was taken to Grant Hospital and there was no evidence that the delay in getting him to the hospital had a detrimental effect on his health.

A.T. v. City of Columbus, 2008 U.S. Dist. LEXIS 70905

Facts – The officers in this case were represented by **Assistant City Attorney Paula Lloyd**. A.T., a thirteen year old African American male, got into a fight with another child in his neighborhood, Shahrone Polk (Polk). Fearing for A.T.'s safety, his mother called the police. **Columbus Police Officers Kowalski and France** were dispatched to the scene and met A.T. and his mother on their front porch. Apparently, Polk had been harassing A.T. for the preceding few weeks and Ms. Taylor wanted the police to speak to Polk's guardians so that they could stop him from bothering A.T. During the interview, Ms. Taylor noticed that Polk and some other minors were standing at the end of the street, and pointed them out to the officers.

Officer Kowalski left the porch and went to interview the individuals who had been identified by Ms. Taylor as having been involved in the fight with A.T. Officer France stayed behind on the porch with Ms. Taylor and A.T. Ms. Taylor then left the porch and began running down the street towards Officer Kowalski, Polk, and the group of minors. Officer France did not order Ms. Taylor to stay on the porch. As Ms. Taylor was running she tripped and fell, causing the group of minors to laugh at her. When he saw his mother fall, A.T. became upset and ran from the porch in the direction of his mother, Officer Kowalski and the group of minors. A.T. left the porch despite being told not to by Officer France. A.T. alleges that he ran towards the group because he was worried for his mother's safety.

When Officer Kowalski saw A.T. running towards the group, he gave A.T. loud, verbal commands to stop and return to the porch. Although A.T. admits that he heard Kowalski's order, he refused to comply. Officer Kowalski testified that when he attempted to grab A.T.'s arm, A.T. pulled away from him. At that point, Kowalski grabbed A.T. by the arms, swung him around, slammed him to the ground and put a knee in his back. Although A.T. was only thirteen years old, he was approximately six feet tall and 200 pounds. Officer Kowalski asserts that he believed that A.T. was going to attack Polk for laughing at his mother, and that he therefore used an "arm bar takedown to get him on the ground" in order to prevent an assault on Polk or someone else. A.T. was then handcuffed and placed in the back of the cruiser. As a result of the takedown, the plaintiff suffered a dislocated shoulder which required surgery. Neither A.T. nor his mother were charged with any crimes.

Issue – Was A.T. seized by Officer Kowalski's actions? Was there reasonable suspicion or PC to support the seizure? Did the way in which the seizure was conducted amount to excessive force?

Analysis and Holding – **This was a seizure, but there was probable cause for the seizure!** This was undoubtedly a seizure of A.T. by Officer Kowalski. The seizure of an individual takes place when "by means of physical force or a show of authority, his freedom of movement is restrained." However, the court didn't resolve what type of seizure actually took place in this situation. The court found

that A.T. was seized, but said that the fact that A.T. was handcuffed did not automatically mandate a finding that he was under "arrest" instead of temporarily detained pursuant to an investigatory Terry stop. The court said it was not convinced that A.T. was effectively under arrest when the officers handcuffed him and placed him in the cruiser. However, the court said that it really didn't matter for the purposes of this lawsuit whether A.T. was under arrest, or just detained, because even if A.T. was under arrest, the officers had the requisite probable cause to do so.

A.T. admitted that Officer France told him to stay on the porch and that he refused to do so, choosing instead to leave the porch and run through the field toward his mother, Officer Kowalski, and the other kids. A.T. also agreed that as he was running in Officer Kowalski's direction, Officer Kowalski told him to "Get back up there" at least twice. Officer Kowalski testified that when his orders to stop were ignored by A.T., he attempted to grab him and then used the arm-bar take down technique. A.T. has provided no evidence to contradict the officer's testimony that A.T. pulled his arm away leading the officer to then employ the arm-bar take down. A.T. does not dispute that he failed to stop when ordered to do nor does he assert that Officer Kowalski grabbed him before he was able to stop. Rather, his testimony essentially echoes that of Officer Kowalski. A.T. was ordered to stop, he did not stop, and that is when Officer Kowalski grabbed him and took him to the ground. The parties agree that at that point, Officer France helped handcuff A.T. and A.T. was placed in the back of the cruiser.

When A.T. refused to stop after being ordered to by two different officers, and was running straight towards the group of juveniles who were laughing at his mother, the officers had probable cause to believe that A.T. was about to instigate another fight. The officers knew that A.T. had just been in a fight with Shahrone Polk who was now among the group laughing at his mother. There is no evidence that A.T. was slowing down as he approached the group or that he intended to respond in any way to the verbal commands of the officers. Under these circumstances, the officers had probable cause to conclude that A.T. was about to assault a third party and properly detained A.T. in order to prevent an assault.

The court found that the manner in which the seizure was done was not excessive force! The court based this decision on the following facts: The officers had been called to the scene of a reported fight between A.T. and another juvenile in the neighborhood. When A.T.'s mother fell while running towards Officer Kowalski and the group of minors, everyone in the neighborhood started to laugh, including the young people with whom A.T. had just been involved in a fight. Against this backdrop, A.T. ran from the porch, against Officer France's orders, and headed directly towards the group. A reasonable officer, seeing A.T., who weighs over 200 pounds and is over six feet tall, charging towards the group of laughing kids, could reasonably conclude that A.T. was about to attack one or more of them. It was objectively reasonable for Officer Kowalski to make the split second decision to stop A.T. before he could attack someone. Officer Kowalski attempted to stop A.T. with verbal commands, which

were ignored. He then attempted to simply grab A.T.'s arm, but A.T. managed to pull free of the Officer. It was therefore reasonable for Officer Kowalski to employ a standard arm-bar take down technique to bring A.T. to the ground so he could be restrained and prevented from harming anyone else.

Vance Van Dyke v. City of Columbus and Officer Michael Shannon

*Notice in this case that the road/environmental conditions were a big deal in how the court ruled and should be a big deal in how you decide to drive. Generally the lack of lights and sirens will be very detrimental to the City's case in these situations but we were able to overcome that in this case because every other factor weighed in our favor.

Facts – The officer was represented in this lawsuit by **Assistant City Attorney Westley Phillips**. At the time of the crash **Columbus Police Officer Michael Shannon** was responding at a speed in excess of the speed limit. Accident reconstruction set a speed of between 47 to 50 miles per hour at the point of collision. It was night and as stated Officer Shannon was responding without lights and sirens, but he did have his headlights activated. The section of Broad Street where the accident occurred was described as a well-lit six-lane roadway with sparse traffic at the hour. Officer Shannon was proceeding with the right-of-way, and Van Dyke faced a stop sign with the obligation to yield. There were flat approaches on either side of the intersection thus Van Dyke could see for some distance in both directions.

Attorney Phillips asked the trial court to dismiss this case, which they did. Mr. Van Dyke then appealed to the Franklin County Court of Appeals claiming the trial court should have let this case proceed to trial. Attorney Phillips opposed this argument. The appeals court had the following issues to resolve.

Issues – 1) Was this an emergency call? 2) Was Officer Shannon's driving willful, wanton, malicious or reckless given the circumstances?

Analysis and Holding -- ORC 2744.02(B)(1) states that political subdivisions may be held liable for "injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." However, under ORC 2744.02(B)(1)(a) the City is not liable when the employee in question (Officer Shannon in this case) is operating a motor vehicle in response to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct.

The first question the court had to answer was whether Officer Shannon was on an emergency run at the time of the crash. The court found that the call in question, a call by another officer for assistance during a foot chase of a suspected felon, constituted an emergency call.

The Court then had to decide if Officer Shannon's driving at the time of the crash was willful, wanton, malicious or reckless. The court found that given the wide, broad, and well-lit roadway, flat approaches on either side of the intersection, and the fact that Officer Shannon was proceeding with headlights, Van Dyke was not deprived of the opportunity to yield even if Officer Shannon was proceeding at a speed in excess of the posted limit and without lights or sirens. The court noted that Van Dyke's own deposition described his view in all directions as unobstructed by traffic or other features. The appeals court thus upheld the trial court's finding that Officer Shannon was not proceeding in a manner arising to willful, wanton, malicious or reckless misconduct.