Close Encounters of the Worst Kind: Streets to the Squad Car
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Every day we encounter clients that have been unlawfully stopped, seized, frisked, searched and arrested. We count on the courts we practice before to make the unlawful violations end and force the police to follow the Constitution. Sometimes we get a court that understands the Constitution. The 4th Amendment isn’t a shield for unlawful police conduct. The 4th Amendment isn’t an “ends justify the means” clause. The 4th Amendment is a shield from unlawful police conduct.

Our state courts and our federal courts have slowly stripped away the protections of the 4th Amendment. The first impulse of the courts we practice in is to protect the evidence or the police officers, not to protect the rights of the citizens, especially since most of the citizens that are subjected to the unlawful police conduct, the knock and talks, the “casual encounters”, and the constant harassment are disenfranchised clients. The citizens that are violated on a daily basis, whether evidence is recovered or charges are filed, are citizens of populated urban areas or poor neighborhoods.

We have all seen the stories about the stop and frisk policy in NY, Baltimore, Boston, and Ferguson, but these practices are happening every day in populated urban areas and poor neighborhoods. Clients are being stopped and seized for not having bike licenses, bike lights, obstructing traffic when crossing the street (although no traffic exists), sitting on porches, standing in alleys, walking down the sidewalk, getting in a car, getting out of a car, standing next to a car, etc. Our police departments will not stop with the unlawful 4th Amendment violations until the courts stop the practice.

The Supreme Court of the United States made a statement in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” Terry v. Ohio, 392 U.S. 1 (1968), marked a change in the law and the Court, for the first time, allowed a citizen to be stopped and seized without probable cause. We now have opinions like Hudson v. Michigan, 547 U.S. 586, 591 (2006), that, “Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs.’” Id. at 591. The 4th Amendment has been watered down since SCOTUS decision in Mapp, allowing for more exceptions which are slowing carving away the true protections of the 4th Amendment.

In 2016 the Supreme Court decision in Utah v. Streiff, 2016 WL 3369419 (2016) allows an unknown arrest warrant to absolve an officer’s illegal stop, adding to the 4th Amendment disintegration. Justice Clarence’s majority opinion, calling the officers behavior “two good-faith
mistakes”, favors the admission of illegally obtained evidence as a result of an unlawful stop because there was a valid arrest warrant that predated the illegal stop and search [which the officers didn’t know about at the time of the illegal stop.] Id. at 7. As Justice Kegan noted in her dissent, “this decision creates an incentive to stop people without reasonable suspicion because if there happens to be an outstanding arrest warrant for him, any evidence found will be admissible. That’s exactly the temptation the exclusionary rule is supposed to revoke. Kegan’s dissent at 6.

Each defense attorney must continue to fight to preserve what we have left of the 4th Amendment. We must find creative ways to challenge police officers and the illegal behavior courts continue to uphold. When arguing motions before the court, you need relevant case law to back up your arguments. Look at federal cases and other state Supreme Court cases. Look to the dissents to find language to cross examine officers during the motion hearing or to argue to the court in written motions and oral arguments. In Utah v. Strieff, Judge Sotomayor argues in her dissent that the majority opinion, “says that your body is subject to invasion while courts excuse the violation of your rights.” Sotomayor addresses the struggles people of color have worked as a prosecutor in NY. She wrote, “writing only for myself, and drawing on my professional experiences, I would add that unlawful ‘stops’ have severe consequences much greater than the inconvenience suggested by the name.”

We cannot just give up the fight as courts continue to diminish the rights provided by the 4th Amendment! We must continue to give a voice to people that have no voice in our criminal justice system. We must continue to work in the trenches, fighting for our and our client’s Constitutional rights.

My talk at the West Virginia Public Defender Conference concentrates on challenging stops on the street. Many of the stops I litigate now deal with officer’s claiming that the interaction between the officer and the client is a “casual encounter” or a “field interview.” Casual Encounters is a term used by police officers to bypass the reasonable suspicion requirement under Terry v. Ohio. Casual Encounters allow the officers to stop our clients and detain them to ask questions. Court’s believe that citizens would feel free to ignore the officer’s request to answer questions and leave. However, many “casual encounters” happen in populated urban areas on a daily basis. Our clients are being stopped by the police weekly, if not daily, just for the officers to ask questions. Our clients of color, based on the very real threats to his/her safety, do not feel free to ignore the officer’s request and continue to walk down the streets.
Some courts have started to look at stop and frisk and over-policing of populated urban areas when deciding cases. In *Commonwealth v. Jimmy Warren*, Massachusetts Supreme Judicial Court, decided September 20, 2016, found, “where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston.” (Page 17) The Court went on to say, “Flight is not necessarily probative of a suspect’s state of mind or consciousness of guilty. Rather, the finding that black males in Boston are disproportionately and repeatedly a target for FI encounters suggests a reason for flight totally unrelated to consciousness of guilt.” We must continue to bring challenges to unlawful stops and push the courts to recognize the history of our police departments when it comes to race and poverty.

These materials include an outline of cases to start your research and questions you can use during a motion hearing to challenge 4th Amendment violations. Keep fighting and litigating!
Close Encounters of the Worst Kind: Streets to the Squad Car

I. 4th Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Const. Amend. IV.

A. Standing: Is there an expectation of privacy?
   a) Standing is generally not an issue when dealing with the stop and seizure of a client. Standing is an issue when dealing with searches of car, house, apartments, motels, etc.

2. Burden of proof is on defendant to establish standing.

B. Casual Encounters:

1. No seizure occurs when a police officer approaches an individual, identifies themselves and asks questions concerning criminal activity - In these circumstances, the person is free to refuse to answer and leave. *California v. Hodari D.*, 499 U.S. 621 (1991).


4. The mere fact that the police-citizen encounter takes place in a public transportation setting, such as on a bus, does not turn the encounter into a seizure. *Florida v. Bostick*, 501 U.S. 429 (1991).
5. If surrounding conditions are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, then a seizure occurs. *Florida v. Royer*, 460 U.S. 491 (1983).

6. Different factors must be considered when an individual is already stationary, or "when an individual's submission to a show of governmental authority takes the form of passive acquiescence." *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). A fleeing man is not seized until he is physically overpowered, but a man “sitting in a chair may submit to authority by not getting up to run away." *Id.* at 262, 127 S.Ct. 2400.

7. Other indicia include some physical touching of the person of the citizen, or the use of language or a tone of voice indicating that compliance with the officer's request might be compelled. *Michigan v. Chesternut*, 486 U.S. 567 (1988).

8. The 7th Circuit found that the contact between police and Smith in an alley was not a consensual contact. “In the context of this highly charged encounter— which involved no pleasantries, the cornering of a lone citizen in an alley, and the posing of the sole question, ‘do you have a weapon?’—we find that a reasonable person in Smith’s position would believe he or she was suspected of some criminal wrongdoing, and as such, not at liberty to walk away. (The government conceded that the police officers did not have reasonable suspicion to seize Mr. Smith.) *U.S. v. Dontray Smith*, 7th Circuit Court of Appeals No. 14-2982, 7/20/15.

9. Alleys are distinguishable from the sorts of open, populated spaces in which police questioning is typically deemed consensual. *Id.*
10. In *US v. Dontray Smith*, the 7th Circuit addressed the defense argument that race is a factor to be considered when deciding whether a reasonable person in Smith’s position would feel free to walk away from the police. The court concluded, “We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while Smith’s race is ‘not irrelevant’ to the question of whether a seizure occurred, it is not dispositive either. Even without taking into account Smith’s race, we are able to find on the strength of the other factors discussed that this encounter constituted a seizure.”
CHAPTERS ON CASUAL ENCOUNTER

Officer’s Observations

Location of Stop

Officers Approach

Uniform/Squad Car Description

Purpose of Conversation

Number of Officers

Neighborhood/Racial Makeup

Basis for Officer at the location

Initial Contact with the client

Lights/Sirens

Uniformed Officers

Ordered client to a specific location

Client Race

History of stop/frisk of persons of color
Sample Cross Examination: Client is standing behind a garage in an alley at 8:30 p.m. The police claim it is a high crime area with a lot of drug and gang activity. The police had been investigating residential burglaries over the past month.

Q. You were working on 34th and North.

A. Yes because there have been a lot of residential burglaries.

Q. It was in the evening, 9:20 p.m.

A. Yes.

Q. You were working with a partner.

A. My partner was Officer Craig David.

Q. You were on routine patrol.

A. Yes. District 5, which is a high crime area.

Q. You hadn’t been called to a specific house.

A. Not at that time.

Q. No calls from anyone about suspicious behavior.

A. Not at that time.

Q. No calls for suspicious people in the neighborhood.

A. Not at that time.

Q. You saw Mr. Smith standing in the alley.

A. Alone, behind a garage, late at night.

Q. He was standing behind a garage, in the alley.

A. Yes.

Q. You never had any prior contact with Mr. Smith.

A Correct

Q. Don’t know if he lived at the address.

A Correct

Q. Didn’t know how long he had been standing in the alley.

A We observed him for approximately 30 seconds.

Q. Didn’t know how long he was in the alley prior to your squad entering the alley.
A. No

Q. Didn’t know how he came to be in the alley.
A. No we didn’t see him enter the alley.

Q. You were in a squad car.
A. Yes

Q. Marked squad car.
A. Yes

Q. Says Fontana Police Department on the side of the car.
A. Yes

Q. Light bar on top.
A. Yes.

Q. Spotlight on the side of the count.
A. Yes

Q. You drove the squad car towards where Mr. Smith was standing.
A. Yes.

Q. You parked your car in front of Mr. Smith.
A. Yes

Q. When you pulled your squad car in front of Mr. Smith, your spotlight was on.
A. Yes, but our red and blue lights and sirens were not on.

Q. As you pulled up in front of Mr. Smith, your spotlight was on him.
A. Yes to help us see Mr. Smith’s hands as we approached. It was dark in the alley.

[Prior to questioning the police on the stop of Mr. Smith, I would set the scene with a description of the alley; pictures if appropriate, lighting in the alley from city light poles and garage lights.]

Q. It stayed on Mr. Smith as you pulled the car up to him.
A. Yes so we could see him when we spoke to him.
Q. After you pulled up to Mr. Smith, you and your partner went over to Mr. Smith.

A. Yes.

Q. You and your partner were dressed in standard Fontana Police Department uniform.

A. Yes

Q. Badge.

A. Standard uniform.

Q. Mace.

A. Part of standard uniform.

Q. Taser

A. Yes.

Q. Handcuffs.

A. Yes.

Q. Nightstick.

A. Yes, all required department gear.

Q. 9 mm automatic gun.

A. Yes.

Q. You and your partner walked up to Mr. Smith.

A. Yes

Q. You didn’t introduce yourself.

A. He could see we were police officers.

Q. You asked him his name.

A. Yes.

Q. He told you his name.

A. Yes.

Q. You then asked him why he was in the alley.

A. Yes.

Q. You wanted to see if he had a reason for being in the alley.
A. Yes we were concerned because of the burglaries.
Q. He told you he was visiting a friend.
A. Yes, that’s what he told us at the time.
Q. At that point you told him to down.
A. Yes, we needed to check his story.
Q. Next to the garage.
A. We wanted him to be comfortable and not have to stand while waiting for his ID to clear.
Q. So you could check his name.
A. Yes.
Q. His name came back clear of any warrants.
A. Yes, he had no warrants but he had a prior felony record.

[I would add a cross section on race. I would also cross on the statistics of the local police department regarding stops of people of color - if you have that information available or can get it through a subpoena.)

Argument: The seizure of Mr. Smith was not a casual police encounter. Officers saw my client standing in an alley behind a garage. The police had no information that my client was involved in any criminal activity. They hadn’t received any calls about burglaries on that night or of suspicious people in the neighborhood. They had never had previous contact with my client. The Government says that this was a casual encounter so the police didn’t need to believe there was reasonable suspicion that Mr. Smith was committing a crime. When you look at the circumstances surrounding this contact, it was a seizure. It happened in an alley (U.S. v. Dontray Smith, 7th Circuit Court of Appeals No. 14-2982, 7/20/15 - Alleys are distinguishable from the sorts of open, populated spaces in which police questioning is typically deemed consensual.) The police were dressed in typical police uniform with gun, maze, handcuffs, Taser. The police were in a squad car and initiated their spotlight when the spotted Mr. Smith. Michigan v. Chesternut, 486 U.S. 567 (1988). They turned on their spotlight and kept it on Mr. Smith when they came up to him and spoke to him. They asked him his name, never introduced themselves, exchanged no pleasantries (U.S v. Dontray Smith) and asked the client if he was involved in burglaries in the area. No reasonable person in Mr. Smith’s position would have felt free to leave when armed police officers approach, driving a squad car, with a spotlight on the person as the police approached. Mr. Smith was stopped, this was not a casual encounter under Florida v. Royer, 460 U.S. 491 (1983). Since the police did not have reasonable suspicion to conduct a stop, the evidence recovered must be suppressed.
C. **Terry Stop/Seizure** – for a court to make a determination on whether the stop of an individual is unlawful, the court will look at the “totality of the circumstances”

1. Reasonable suspicion must be based on a standard amounting to more than a mere hunch (but less than that which is required by probable cause). In other words, there must be “some objective manifestation that the person stopped is, or is about to be engaged in criminal activity.” *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999), (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)); *United States v. Brown*, 188 F.3d 860, 864 (7th Cir. 1999).

2. An inchoate and unparticularized suspicion or hunch will not suffice, *United States v. Quinn*, 83 F.3d 917, 921 (7th Cir. 1996), even if the hunch is an "inspired" one. *Ienco*, 182 F.3d at 524.


4. Regarding pedestrian stops, usually involving an officer requesting identifying information from an individual, refusal to produce identification may not alone form the basis for an arrest. *Wilmoth v. Gustke*, 179 W. Va. 771 (1988). However, if there is express statutory direction requiring one to do so, or if the officer communicates a specific reason why the information is being sought with respect to official duties of the officer, then the refusal may form the basis for a charge of obstruction. *State v. Srnsky*, 213 W. Va. 412 (2003).


7. A belief that one is seized is reasonable when police take actions such as activating sirens, commanding a person to stop, displaying weapons, blocking travel, or otherwise restricting a person’s movement. *Michigan v. Chesternut*, 486 U.S. 567 (1988).

8. Other indicia include some physical touching of the person of the citizen, or the use of language or a tone of voice indicating that compliance with the officer’s request might be compelled. *Id.* Ordering an individual to put his hands on a squad car was a seizure. *U.S. v. Brown*, 401 F3d 588, 594 (4th Cir. 2005).

9. A suspect who attempted to flee police on a bicycle was not seized until physically restrained by police, and thus the attempt to flee was relevant to the determination of reasonable suspicion for the seizure. *United States v. Muhammad*, 463 F.3d 115, 122–23 (2d Cir.2006).

10. Facts considered by courts to support reasonable suspicion:

   a) Personal observations of the police officer.

   b) Information the police officer received from other officers/dispatch.

   c) Information the police officer received from citizen witnesses.
Running from police officers after officers started approaching. *Illinois v. Wardlaw*, 528 U.S. 119 (2000). In Contrast *Commonwealth v. Jimmy Warren*, Massachusetts Supreme Court, decided September 20, 2016, the MA Supreme Court found, “where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston.” (Page 17).

e) **High crime area or drug dealing neighborhood.**


g) Anonymous tips as long as the police corroborate information from the tipster. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412.

11. Facts considered by Courts that did not support reasonable suspicion to stop a person.

a) Failure to consent to search. *United States v. Manuel*, 992 F.2d 272, 274 (10th Cir. 1993).


c) No reasonable suspicion when the anonymous individual gave a bare bones tip that a young black man, in a plaid shirt, was standing at a bus stop with a gun. The tipster provided no information on how he knew about the young man or how he knew about the gun. *Florida v. J. L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).
12. In *United States v. Dontray Smith*, the 7th Circuit Court of Appeals found that contact between Smith and police was a seizure, not a consensual contact. The court stated, “In the context of this highly charged encounter— which involved no pleasantries, the cornering of a lone citizen in an alley, and the posing of the sole question, ‘do you have a weapon?’—we find that a reasonable person in Smith’s position would believe he or she was suspected of some criminal wrongdoing, and as such, not at liberty to walk away. (The government conceded that the police officers did not have reasonable suspicion to seize Mr. Smith.) *U.S. v. Dontray Smith*, No. 14-2982, (7th Cir. 2015).

13. Anonymous caller - The anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. *Alabama v. White*, 110 S. Ct. 2412 (1990); *U.S. v. Brown*, 401 F.2d 488, 596 (4th Cir. 2005). Although the caller’s tip was completely lacking in indicia of reliability, significant aspects of the information, as to the suspects future movements, provided by the tipster were sufficiently corroborated by the police to support reasonable suspicion for the stop. 110 S.Ct 2412.

14. Anonymous 911 call reporting an ongoing emergency is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality. *U. S. v. Simmons*, 560 F.3d 98 (2nd Cir. 2009).

15. In *Adams v. Williams*, the US Supreme Court sustained a *Terry* stop and frisk undertaken on the basis of a tip given in person by a known informant who had provided information in the past. The court concluded that while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient “indicia of reliability” to justify a forcible stop. 407 U.S., at 147, 92 S.Ct. at 1924.
16. Abandonment: what happens to the criminal goods when the client throws that gun, drugs, or theft proceeds when he/she is running from the police? Or before the client is stopped by the police?

   a) A person is not seized until the police make an order for an individual to stop (verbal or nonverbal) and the person stops. If the person doesn’t stop and abandons fruits of criminal activity, the fruits cannot be suppressed based on an unlawful stop motion since the person did not comply with the stop order. *California v. Hodari D.*, 499 U.S. at 629 (1991).

   b) Flight in response to an order to stop is relevant to the reasonableness of a stop because it precedes the seizure, which occurs when the fleeing suspect is physically apprehended. *See Hodari D.* 499 U.S. at 625–26.

   c) Some jurisdictions hold that a seizure has taken place even though the person has not actually been restrained by police action thereby rejecting *Hodari D.* modification of *U.S. v. Mendenhall*. (*West Virginia follows Hodari D.*) These include:


D. Terry Frisk:

1. The reasonable suspicion doctrine allows the officers to conduct a Terry frisk of a person. This frisk is a limited pat down for weapons when an officer is justified in the belief that a suspect may be armed and dangerous to the officer or others. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

2. Standard: A reasonable officer must be able to give specific and articulable facts that the officer reasonably believes the person is armed and dangerous. A valid Terry Stop does not automatically give the police a right to pat-down a person. *Arizona v. Johnson*, 555 U.S. 323 (2009).

3. A person’s mere presence in a place where a non-violent crime is occurring, such as drug trafficking, does not give rise to the right to conduct a pat-down. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

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4. The driving “rationale of the pat-down is self-defense or defense of others.” United States v. Brown, 188 F.3d 860, 864-65 (7th Cir. 1999).

   a) Most courts have found that a law enforcement officer's fear of a suspect being armed is not dispositive in evaluating the reasonableness of the officer's frisk. United States v. Tharpe, 536 F.2d 1098 (5th Cir. 1976) (reversed on other grounds by United States v. Causey, 834 F.2d 1179 (5th Cir. 1987)). The court held that even though an officer's "subjective feelings may have been equivocally expressed . . . [w]e know of no legal requirement that a policeman must feel 'scared' by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement...” See also, United States v. Menard, 95 F.3d 9, 11 (8th Cir. 1996) (although defendant argued that officer "evidenced little if any concern for his safety . . . Fourth Amendment reasonableness does not require 'that a policeman must feel "scared" by the threat of danger.'"); United States v. Bonds, 829 F.2d 1072, 1074-75 (11th Cir. 1987) (follows Tharpe); United States v. Flett, 806 F.2d 823, 828 (8th Cir. 1986) (fact that suspect made no threatening moves or that officer did not notice bulge does not lessen reasonableness of officer's actions); United States v. Bell, 762 F.2d 495, 500 n.7 (6th Cir. 1985) (citing Tharpe for proposition that although officer did not view suspect as security risk, focus should be on whether officer reasonably perceived subject of frisk as potentially dangerous); Estep v. Peace, 1997 WL 33564933, *5 (N.D. Tex. Oct. 3, 1997) (same); People v. Galvin, 535 N.E.2d 837, 843 (Ill. 1989), (although "an officer's subjective feelings may not dictate whether a frisk is valid," officer's testimony as to his subjective feelings is one factor that may be considered in totality of circumstances known to officer at time of frisk); State v. Evans, 618 N.E.2d 162, 169-70 (Ohio 1993) (follows Tharpe); State v. Roybal, 716 P.2d 291, 293-94 (Utah 1986) (same); State v. Carter, 707 P.2d 656, 659 (Utah 1985) (same).
5. “Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered.” State v. Parr, 207 W. Va. 469, 534 S.E.2d 23 (2000); State v. Choat, 178 W.V. 607, 363 S.E.2d 493 (1987).


7. Balancing a government's interest in protecting officer safety and an individual's interest in exercising his or her Second Amendment right the Court finds Armed is therefore dangerous. U.S. v. Robinson, 817 F.3d 201 (4th Cir. 2017). (In Northrup v. City of Toledo Police Department the 6th Circuit ruled that police could not conduct a Terry Stop for open carriers, when the state law allows open carry. The court found that the legislature has allowed citizens to be entrusted with firearms in public and “the police have no authority to disregard this.” 785 F.3d 1128 (6th Cir. 2015)).

8. When police officers encounter suspected car thieves, the officers also may reasonably suspect that such individuals “might possess weapons.” United States v. Hanlon, 401 F.3d 926, 929 (8th Cir.2005), quoting United States v. Rowland, 341 F.3d 774, 784 (8th Cir.2003).
CHAPTERS FOR STOP AND FRISK

Gun Laws/CCW
Reason for the Stop
Location of the Stop
Reported Activity
Client Cooperation
Client Clothing
Weather
Neighborhood
Witness Description (if 911 caller)
Dispatch Description
Blading (means turning)
Client with a group or alone
Number of officers
Knowledge of weapons
Knowledge of client’s record
Answering questions
Plain feel – immediately apparent
Sample Cross Examination for a frisk challenge: client is stopped with four other individuals on a porch after officers smell marijuana. As the officers got out of the squad to approach the porch, the client walked off the porch. During the stop of the five young men on the porch, an officer conducts a frisk of your client.

Q. You approached the porch because you smell THC.
A. Yes.
Q. Fresh marijuana.
A. Burnt, it was very strong, like recently smoked.
Q. You observed 5 people on the porch.
A. Yes, but your client started to leave the porch when we made eye contact with him.
Q. Prior to the client leaving the porch, you observed the 5 people on the porch.
A. Yes.
Q. You didn’t observe my client smoking.
A. Not at that time.
Q. You didn’t observe him smoking as you approached the porch.
A. No.
Q. You didn’t observe him smoking when you got to the porch.
A. No.
Q. You didn’t observe anyone else smoking.
A. No.
Q. When my client was ordered to return to the porch, he did so.
A. Yes.
Q. He complied with your order immediately, right.
A. Yes.
(I would have a section on what the porch looked like with photos if it helps the case.)
Q. When you stepped up on the porch, you observed a blunt.
A. Yes. In a planter next to where your client was standing.
Q. You noticed a blunt in the planter?
A. Yes, next to your client.
Q. You had not seen my client ever touch that blunt.
A. No, I never did.

Q. You asked if it was his, and he said it was not.

A. I asked all of the persons present if it was theirs and they all denied it. It was clear to us that the subjects were not being truthful.

Q. You say that because you assume one of them had to have possessed the blunt.

A. Yes, it had to belong to one of them. It was recently burnt and the strong smell of burnt THC was in the air.

Q. But you never saw any person in possession of the blunt.

A. No, but it didn’t get there on its own.

Q. Nonetheless, you didn’t place anyone under arrest for possession, but instead continued your investigation?

A Yes.

(I would do a section about requesting identification from each of the persons on the porch and the client complying with the request and giving truthful information.)

Q. You continued to talk to the individuals on the porch.

A. Yes. I was trying to get the truth.

Q. As you talked to the individuals on the porch, another officer ran a record check on my client and found he had a previous conviction for carrying a weapon without a permit.

A. Yes.

Q. You didn’t know any of the facts or circumstances of the weapons conviction.

A. No.

Q. Or what he had done with his life since then?

A. No, but the fact that someone has a previous conviction for armed robbery makes me suspicious that the person may be armed.

Q. As you talked to my client, he answered your questions.

A. Yes.

Q. He answered you truthfully.

A. He answered my questions but he kept looking down and avoiding eye contact.

Q. But while he was looking down or sideways, he gave you responses to all your questions.

A. Yes.

Q. And the responses your partner checked were truthful.
A. Yes.

Q. On direct you stated he was nervous. You concluded this because of his lack of eye contact.
A. That and his hands were shaking.

Q. You stated his hands were in his pockets, and you ordered him to show you his hands.
A. Yes. I was afraid he would pull out a gun and I wanted to see his hands so he couldn’t do that.

Q. When you ordered him to removed his hands from his pockets, he did so?
A. Yes.

Q. There were no weapons in his hands.
A. No.

Q. And you didn’t see any weapon protruding from his pockets.
A. No.

Q. You didn’t observe any unusual bulge from his pocket.
A. No. He had a puffy coat.

Q: He didn’t make any threatening moves towards you?
A: No.

Q. Or take any actions that were aggressive or frightening?

Q. He didn’t do a weapons check or a security check when you were talking to him.
A: No, but I felt it was necessary to pat him down for my safety due to the high crime area, the presence of several males together on the porch, his previous record, the fact he had his hands in his pocket and his nervous behavior.

Q: And those are all of the reasons you patted him down?
A: Yes.
Argument: The police did not have a basis to frisk my client. In order for the police to conduct a frisk of my client, the police must have reasonable suspicion that the client is armed and dangerous. None of the factors testified to by the officer give rise that a reasonable police officer would believe that Mr. Smith was armed and dangerous. Just because someone is the subject of a Terry stop does not give the police the right to conduct a frisk of Mr. Smith, an extremely intrusive violation of my client. None of the factors cited by the prosecution here supports any reason to believe my client was armed and posed a threat to the officers. He was not stopped for a violent crime. The officers were investigating the smell of marijuana. There were no bulges in his pockets or at his waistband. He did not make any furtive gestures or sudden unexplained movements. He didn’t conduct a weapons check. When the police asked him to return to the porch, he did so immediately. When the police asked his identification and identifying information, Mr. Smith gave the information and gave truthful information. When the police asked Mr. Smith to remove his hands from his pocket, he did so immediately. Presence in a high crime area is not sufficient to justify a pat down or the police would be able to frisk anyone they encounter in these areas, no matter why a police stop occurred. Lack of eye contact by a cooperative subject is not a reason to conduct a frisk. United States v. Massenburg, 654 F.3d 480 (4th Cir. 2011). Nervous behavior is a factor that can be considered under all the circumstances but alone doesn’t rise to reasonable suspicion. United States v. I.E.V., 2012 U.S. App. LEXIS 24426 (9th Cir. 2012). There is a reason for this rule: many people are intimidated or nervous when they have an encounter with the police. A prior criminal record for violent crime is also insufficient. United States v. Powell, 666 F.3d 180 (4th Cir. 2011). The officer did not have reasonable suspicion to conduct a pat down of my client and all evidence seized as a result of that unlawful pat down must be suppressed.
E. Detention:

1. A seizure during an investigative detention may last “no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983).

2. What begins as a reasonable seizure is transformed into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *United States v. Sharpe*, 470 U.S. 675 (1985).

3. Officers during a traffic stop have a mission to partake in checks that serve the same objective as enforcement of the traffic code: “ensuring that vehicles on the road are operated safely and responsibly.” *Rodriguez v. US*, 135 S. Ct. 1609, 1611. Even if the Government has an interest in non-traffic related matters, even a de minimis intrusion or on-scene investigation into other crimes that “detours from the officer’s traffic-control mission” is unreasonable. *Id.*

4. Questioning can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *U.S. v. Sharpe*, *Id.*

CHARTERS FOR UNLAWFUL DETENTION

Initial Purpose of the stop

Purpose of the stop fulfilled

Extension of the stop

Basis for the continued stop

Time lapse waiting for the drug dog

Client’s cooperation
F. Arrest:

Definition of “under arrest”: When a reasonable person in the defendant’s position would consider themselves to be in custody given the degree of restraint, the circumstances of the situation and words or actions by police.

1. Probable cause to arrest a citizen exists where the police officer reasonably believes he/she possesses trustworthy information, such that the facts and circumstances are sufficient to warrant a reasonable person to believe that an offense was or is being committed. *Draper v. United States*, 358 U.S. 307 (1958).


3. Police may make a warrantless arrest of an individual in a public place provided they have probable cause to believe the person committed a crime. *United States v. Watson*, 423 U.S. 411 (1976).


5. Probable cause must be more than mere suspicion or a hunch. It must be a fair probability determined by the totality of the circumstances. *Illinois v Gates*, 462 US 213 (1983).

6. Merely matching the general description of a suspect does not give rise to probable cause; police must have more individualized facts to make an arrest. *Davis v. Mississippi*, 394 US 721 (1969).
7. Arrest by Known Citizen: When an individual has given information to the police and that information provides probable cause to arrest, a court will analyze the informant’s veracity, reliability, and the basis for the informant’s knowledge as relevant factors when making a decision, under the totality of circumstances test, in determining if the arrest is valid. \textit{Illinois v. Gates}, 462 U.S. 213, 103 S.Ct. 2317 (1983).


9. When police reasonably, but mistakenly, believe they have probable cause to arrest an individual, and the information later turns out to be erroneous, the arrest is still valid. \textit{Brinegar v. United States}, 338 U.S. 160 (1949); \textit{Saucier v. Katz}, 533 U.S. 194, 206 (2001).

10. Any traffic violation, no matter how minor, provides probable cause for arrest; an officer is not required to issue a citation, even though that is an available option, in lieu of arrest. \textit{Atwater v. City of Lago Vista}, 532 U.S. 318 (2001).


\textit{a) } An odor of a controlled substance may provide probable cause to arrest a suspect when the odor is unmistakable and it can be linked to a specific person or persons because of the circumstances in which the odor is discovered, or other evidence links the odor to the persons. \textit{United States v Humphries}, 372 F.2d 653 (4th Cir. 2004).
CHAPTERS FOR CHALLENGING THE ARREST

Training and Experience

Difference between citizen and anonymous witness

Type of witness in current case

Observations of the Officers

Crime allegedly committed

“Hand to hand” transactions

Drug House – length of time observing the house

Drug House – Observations of the officer

Chapters for Arrest – Drug Odor

Drug Odor

Fresh or Burnt

Type of Neighborhood – Business v. Residential

Type of THC

Group v individual (sourcing the odor to the client)

Training and Experience
**Sample Cross Examination** – challenging the probable cause to arrest client. Police arrest the client because he was leaving the area of a known drug house with a package.

Q. Officer you were conduct surveillance on September 1, 2015.
A. Yes.

Q. Surveillance of a drug house.
A. Yes.

Q. A house known to you and other officers.
A. Yes.

Q. A house where people buy drugs.
A. Yes.

Q. Sell drugs.
A. Yes.

Q. Use drugs.
A. Yes.

Q. You had known targets of the surveillance.
A. Yes.

Q. Drug dealers who had contact with in the past.
A. Yes.

Q. Drug dealers you had information on from informants.
A. Yes.

Q. My client, Mr. Smith, was not one of the people who you were watching.
A. No, but he was around the drug house with the people who were under surveillance.

Q. You had no prior contact with Mr. Smith.
A. No

Q. No information on Mr. Smith from informants.
A. No

Q. You had the names and descriptions of specific people you were watching.
A. Yes
Q. He wasn’t one of them.
A. He wasn’t known to us yet at that time.
Q. He wasn’t one of the names of the people you were watching.
A. Correct.
Q. You had never seen him with any of the known suspects.
A. No, we hadn’t seen him until today.
Q. Now when Mr. Smith came thru the gangway, between the two houses, you didn’t see which house he came from.
A. Correct, but he came from the direction of the drug house.
Q. The drug house was in a residential neighborhood.
A. Yes. A high crime residential neighborhood, where drug dealing and gun crime occurs every day.
Q. But not all houses or residents in that area are drug dealers.
A. Correct.
Q. Or drug users.
A. Correct.
Q. Or involved in criminal activity.
A. Correct.
Q. So you didn’t see him come from the drug house you were watching.
A: No, not directly.
Q. You were not the only officer in the surveillance team.
A. Correct.
Q. You had a partner.
A. Yes. Officer Davis.
Q. And other police officers were conducting surveillance from other locations in the neighborhood.
A. Yes.
Q: Your partner hadn’t seen him come from there.
A: No.
Q. No other officers saw him come from that drug house.
A. No not directly.
Q. No officers saw him come in or out of the drug house.

A. Correct.

Q. Now about the gangway, there are other houses that one can come from to use this gangway.

A. The gangway is between two houses.

Q. And there are two other houses opposite the gangway on the other side of the alley, right.

A. Yes, but occupants of those houses would be trespassing.

Q. If a person goes through this unobstructed gangway it can be used as a shortcut.

A. Under some circumstances.

Q. On direct examination you stated that you felt my client was acting suspiciously when he looked both ways down the street after he left the gangway before he got in his car.

A. Yes.

Q. The street is a two way street where traffic goes in both directions, correct.

A: Yes.

Q. Mr. Smith was crossing the street.

A. Yes.

Q. To a car.

A. Yes.

Q. He had to go across both lanes of traffic.

A. Yes.

Q: You also thought it was suspicious that he put his bag in the trunk of his car.

A: Yes, I thought he had drugs concealed in that bag, and drug users and dealers are known to put bags in their trunks because they think we can’t search a locked trunk.
**Argument:** The police officers did not have probable cause to arrest my client based on the fact that he went through a gangway, from one of the houses in the area, with a bag in his hand. He then crossed the street after looking in both directions. After getting to his car, he placed his bag in the truck. There were no facts and circumstances from which a reasonable officer could infer that my client was involved in criminal activity. The officer testified that he never had contact with the client in the past. The officer never saw the client at the drug house on any previous occasions. The client was not a known drug dealer or user. No informants gave information on my client. The officers had known suspected drug dealers, and my client was not one of the known suspects. They never saw him engaged in drug selling or buying. They didn’t see him associate with the persons they had under surveillance. The gangway was accessible to four different homes, anyone in the neighborhood could use it as a shortcut, and the officers never saw which residence Mr. Smith left. There is nothing suspicious about looking both ways before crossing a street with two-way traffic; to the contrary, it is normal behavior taught to every child to ensure one’s safety, as pointed out in *United States v. Ingrao*, 897 F.2d 860,864 (7th Cir. 1990). It is not illegal to carry a bag or put in in a trunk; it is not a sign of suspicious behavior without some specific association between the bag and unlawful behavior. *United States v. Ceballos*, 654 F.2d 177, 185 (2nd Cir. 1981). Nor does placing a bag in a trunk constitute probable cause to believe that one is engaged in criminal behavior; if it did, we could arrest half of America. The police violated my client’s Fourth Amendment and the evidence seized must be suppressed.
G. Search:


3. The odor of marijuana may provide probable cause that marijuana is present, it does not of itself authorize the police to search any place or arrest any person in the vicinity. *U.S. v. Humphries*, 372 F.3d 653 (4th Cir. 2004). The smell of marijuana could give the officer probable cause to arrest an individual if the police can localize the source of the smell to a person. *Id.*

4. An officer did not need a search warrant to enter a motel room after smelling marijuana through an open doorway after the motel room occupant opened the door to talk to the police because the police could smell marijuana and exigent circumstances justified warrantless entry. *U.S. v. Grissett*, 925 F.2d 776 (4th Cir. 1991).

5. Possession of ammunition can establish probable cause when police are aware that the subject is a convicted felon, or police know it is linked to crime being investigated. *United States v. Blom*, 242 F.3d 799 (8th Cir. 1999). Suspect’s status as convicted felon must be known to police at the time in order for this to be a factor in determining if bullets are contraband; hindsight is not acceptable. *United States v. Blom*, 242 F.3d 799, 808 (8th Cir. 1999).

6. Compare to *United States v. Lemons* in which the Court found that bullets in a suspect’s possession do not automatically confer probable cause to search; there must be probable cause to believe that the bullets are linked to criminal activity. *United States v. Lemons*, 153 F. Supp.2d 948 (E.D. Wis.2001).
H. Consent:

If an officer can get a citizen to consent to a search, the officer doesn’t have to have an arrest warrant, probable cause to arrest or reasonable suspicion to conduct a pat down search.


2. The Government must show by clear and convincing evidence that consent to the warrantless search was freely and voluntarily given. *United States v. Mendenhall*, 446 U.S. 544 (1980).


4. Law enforcement must ask for consent to search before it can be given; mere acquiescence to a police officer’s stated intent to search is not sufficient. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

5. Police can ask for consent to search without having any grounds to believe the person has committed a crime. *United States v Liss*, 103 F.3d 617 (7th Cir 1997).

6. Police are not required to inform a person that consent can be refused. *United States v. Drayton*, 536 U.S. 194(2002).

7. The police are not required to inform a lawfully seized person that he is free to leave before he gives consent to search. *Ohio v. Robinette*, 519 U.S. 33 (1996).
8. The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse. *Florida v. Bostick*, 501 U. S. 429 (1991).

I. Attenuation:

1. Evidence is still admissible when the “chain of causation has become so attenuated by some intervening circumstance as to remove the ‘taint’ of the initial illegality.” *United States v. Ceccolini*, 435 U.S. 268 (1978). Most often occurs in cases in which a client tries to have a statement suppressed as the fruit of an unlawful arrest.


3. SCOTUS allowed the admission of illegally obtained evidence as a result of an unlawful stop because there was a valid arrest warrant that predated the illegal stop and search [which the officers didn’t know about at the time of the illegal stop.] *Utah v. Strieff*, 2016 WL 3369419 (2016).

4. When litigating attenuation in cases where the stop, seizure or frisk is unlawful, the defense will have to discuss the three factors set for in *Brown v. Illinois*, 422 U.S. 590, specifically concentrating on the third factor, which is the purpose and flagrancy of the official misconduct. *Brown* at 604.
CHAPTERS FOR ATTENUATION

Observations – No suspicious behavior

Home not under surveillance

No complaints of illegal activity at the location

Not a drug house

If it is a drug house, chapter on the many people who can go to a house, not just people who do drugs (i.e. Girl Scout with cookies, mailman, cable or dish installer, home improvement, family, etc.)

Not an area where criminal conduct occurred

Time elapsed since Officer knew about a warrant (was it the same day or weeks/months earlier??

No knowledge of warrant prior to the stop.

Police did not mistake the client for another person

Police only obtained the client’s name by stopping the client and asking for identity