# LEGAL UPDATE

Course Number 09-201


Municipal Police Officers'
Education and Training Commission

8002 Bretz Drive
Harrisburg, Pennsylvania 17112

Colonel Frank E. Pawlowski
Chairman

Major John M. Gallaher
Executive Director

Mr. Rudy M. Grubesky
Director of Training

# Editor's Preface

**This field guide is intended for police officers to use during the Municipal Police Officers' Education and Training Commission's (Commission) 2009 Mandatory In-Service Training (MIST) course titled, Legal Update: Best Practices and Current Issues for Law Enforcement. This manual can also be used as a source that police officers can refer to later to help them with legal issues, case preparation and courtroom testimony.**

**As in prior Commission courses, this publication is the result of a tremendous "team" effort. The committee was comprised of experienced and knowledgeable attorneys, police officers and professional police trainers who developed a high quality in-service training course that is practical, job related and one that will help Pennsylvania police officers to accomplish their law enforcement mission.**

**Many of the development team members have worked on other Legal Update courses and their dedication to the program has enabled the Commission to "raise the bar" again in setting the standard for continuing professional education of police officers in the Commonwealth of Pennsylvania. I would also like to thank the police chiefs, Commission members, police academy directors, District Attorneys and other agency heads that supported this project by allowing the committee members to serve on the course development team. I would like to acknowledge the assistance of the Pennsylvania District Attorney's Association and the Dauphin County District Attorney's Office in the designing of this year's Legal Update course.**

**I also want to express my sincere appreciation and gratitude to all of the course development committee members for their hard work and dedication over the past eight months developing the teaching materials and for conducting train-the-trainer seminars for our academy MIST instructors. I would also like to thank all of the other members of the MPOETC staff who work tirelessly "behind the scenes" to make our courses and publications a success.**

**Rudy M. Grubesky, M.A.**
**Editor**

| Legal Update Course Development Committee | | |
|---|---|---|
| **Sergeant Joseph Bressi**<br>Pennsylvania State Police Academy | **Katayoun M. Copeland, Esq.**<br>Delaware County District Attorney's Office | **Sergeant James J. Coughlin**<br>Philadelphia Police - ATU |
| **Lt. Jacqueline Y. Daley, Esq.**<br>Philadelphia Police | **Stephie-Anna Kapourales, Esq.**<br>Allegheny County District Attorney's Office | **Jaime M. Keating, Esq.**<br>Cumberland Co. District Attorney's Office |
| **Lt. (Ret.) Nicholas Mancini**<br>Philadelphia Police | **Tara L. Patterson, Esq.**<br>Pennsylvania State Police | **Thomas A. Placey, Esq.**<br>Magisterial District Judge |
| **Stuart B. Suss, Esq.**<br>PA Office of Attorney General | **Timothy R. Ebersole, M.S.**<br>M.P.O.E.T.C. | **Rudy Grubesky, M. A.**<br>M.P.O.E.T.C. |

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# Course Overview

Course Number and Title: 09-201 Legal Update:
Best Practices and Current Issues for Law Enforcement

Instructional Hours: Three (3) Hours

*Summary of Content:* *This is a required three-hour course for all MPOETC certified police officers in Pennsylvania. This course is designed to provide law enforcement officers with an update in the following areas:*

A review of significant law changes occurring between July 1, 2007 and June 30, 2008 in the following Commonwealth of Pennsylvania statutes:

- Crimes Code
- Vehicle Code
- Rules of Criminal Procedure
- Pennsylvania Code

A review of significant U.S. Supreme Court, PA Supreme Court, and PA Superior Court Case Law, based on decisions available from July 1, 2007 to September 1, 2008.

A ten-question examination will be administered at the end of the course to test the participant's knowledge. A minimum score of 70% is required in order to successfully complete the course. Scoring of the test will follow. Failure will result in the participant remaining for remedial training, a re-test with a different test, and depending on the results of the second test, returning to take the course over again.

Course Goals:

I. Identify major law changes that police officers need to know to accomplish their mission.

II. Analyze the court decisions that impact operational activities and the case preparation process of officers “on the street” as well as police investigators.

III. Provide MPOETC certified police officers with updated information on legal issues directly related to law enforcement in the Commonwealth of Pennsylvania.

Instructional Objectives - *Upon completion of this course, participants will be able to:*

1. Discuss the legal issues regarding eyewitness identification as they relate to show-ups, photo arrays and line-ups.

2. Review the case law changes involving five cases from prior year's courses that were affirmed or reversed by the Pennsylvania Supreme Court.

3. Explain the role of law enforcement agencies in the implementation of the Clean Indoor Air Act.

4. Summarize the key components of the Pennsylvania Statewide Automated Victims Information & Notification Service.

5. Summarize Rule 504, Rule 510 and Rule 543 as they related to fingerprinting requirements.

6. Explain the reason for Rule 212 as it relates to officer safety.

7. Complete a form to request that their local Magisterial District Judge to delay the release of arrest warrant information.

8. Recall the key elements of the offense of "Failure to comply with registration of sexual offenders requirements" as specified under Megan's Law in Pennsylvania.

9. Explain how substantial harm and serious inconvenience are key elements in the grading of the offense of Disorderly Conduct.

10. Breakdown the elements of Aggravated Assault and explain how the officer being in performance of his/her duty can impact on the classification and grading of the offense.

11. Given a scenario, determine if a defendant should be charged with manufacturing of marijuana or possession of marijuana.

12. Summarize the key points in the Pennsylvania Superior Court's opinion in the Commonwealth v. Deck decision.

13. Compare and contrast the types of Police-Citizen encounters in vehicle stop situations.

14. Differentiate a scenario to determine a police officer's power and authority beyond the territorial limits of his/her primary jurisdiction as specified in the Municipal Police Jurisdiction Act.

15. Differentiate a scenario to determine when police can search based on a third party's consent.

16. Develop a list of factors that courts may use to determine if a police officer's actions were consistent with a mere encounter situation or a custodial detention based on the Superior Court's ruling in the Commonwealth v. Moyer case.

17. List at least seven factors that police officers should take into consideration when assessing the presence of exigent circumstances.

18. Identify the factors that can be used to help police officers to develop a court record regarding their police experience in establishing probable cause to stop and search a suspect.

19. Explain when "Miranda Warnings" must be given to a suspect.

20. Summarize the key points in the Pennsylvania Superior Court's opinion in the Commonwealth v. Thevenin decision.

21. Choose the most appropriate course of action given an "Open Carry" situation in which there is no state or federal prohibition or violation of law occurring.

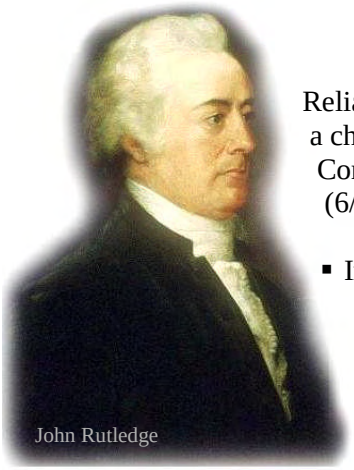
22. Breakdown the elements 18 Pa. C.S. § 912 and § 913 as they pertain to carrying a firearm or other dangerous weapon in the Commonwealth of Pennsylvania.

# Welcome to the 2009 Legal Update Course

Legal Update: Best Practices & Current Issues for Law Enforcement

## Course Opening - Connection Activity – Icebreaker

### Legal Issues Regarding Identification


John Rutledge

#### Eyewitness Identification

Reliability is the linchpin in assessing the admissibility of a challenged identification. See: McElrath v. Commonwealth, 405 Pa.Super. 431, 592 A.2d 740 (6/13/91)

- In gauging the reliability of identification testimony, the totality of the circumstances test is applied. Specific factors taken into account include:

(1) the prior opportunity of the witness to observe the criminal act
(2) the accuracy of photo array selection and other descriptions
(3) the lapse of time between the act and any line-up
(4) any failure to identify the defendant on prior occasions.

- Due process is violated, and the identification evidence will be excluded, if a pretrial identification procedure is impermissibly suggestive. *Burkett v. Fulcomer*, 951 F.2d 1431 (3rd Cir. 1991).

- If there is an inconsistency in the witness's ability to identify the accused, the inconsistency does not require the exclusion of the identification, but goes to the weight and credibility of the testimony of that witness. *Commonwealth v. Smith*, 540 A.2d 246 (1988).

#### Photographic Identification

- An accused is entitled to due process protection against unnecessarily suggestive photographic displays. *Moore v. Illinois*, 434 U.S. 220.

- A pictorial identification is unduly suggestive when it gives rise to a substantial likelihood or irreparable misidentification. *U.S. v. Wade*, 388 U.S. 218.

- Whether a photo array is unduly suggestive depends on several factors such as:

Show Slide 1

Explain the Historical theme of Supreme Court Justices for the 2009 Legal Update Course.

Show Slide 2 – Hyperlinks to "Grabber" and Scenario.

**Instructor Note:**
The MPOETC has included a parody of Indiana Jones titled "Susquehanna Bones and the Lost Legal Update Scrolls." The video is available as an icebreaker. However, due to time restrictions in a 3-hour course, the video may be better suited for playing while students are arriving to your class, during a break or over the lunch period.
**Susquehanna Bones**
**TRT: 12:16 minutes**

**Show Video Segment – Eyewitness Identification Scenario**
**TRT: 1:16 minutes**
Show PPT/Still Photo Collage/Voice and Questions scenario as a basis to discuss the Pennsylvania law on Show-ups, Photo Arrays and Live Line-ups.

**Instructor Note:**
The MPOETC uses a variety of subject matter experts as well as other professional sources to develop our courses. This section of the lesson plan on a current legal issue (eyewitness identification) and best practices was suggested by Commission member, Senator Stewart Greenleaf.

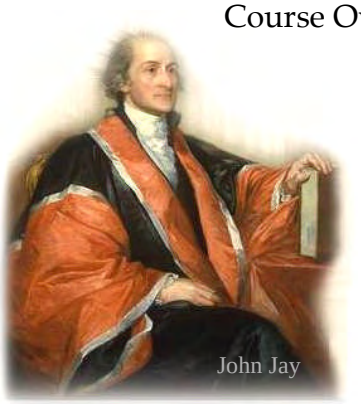
(1) the size of the array
(2) the manner of presentation
(3) its contents

- Absent prejudice in the manner of presentation, the primary question is whether the subject's picture is so different from the rest that it suggests culpability. *U.S. v. Maldonado-Rivera*, 922 F.2d 934, (2d Cir. 1990).

- Repetitive display of the subject's picture will probably constitute an unduly suggestive photographic identification therefore making the evidence inadmissible. *Commonwealth v. Fowler*, 352 A.2d 17 (1976).

- Although photographic evidence should not give rise to an inference of prior criminal activity, there is no "per se" rule against the use of mug shots as a method of identification. *Commonwealth v. Brown*, 512 A.2d 596 (1986).

## Course Overview


John Jay

A review of significant law changes occurring between July 1, 2007 and June 30, 2008 in the following Commonwealth of Pennsylvania statutes:

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- Identify major law changes that police officers need to know to accomplish their mission.

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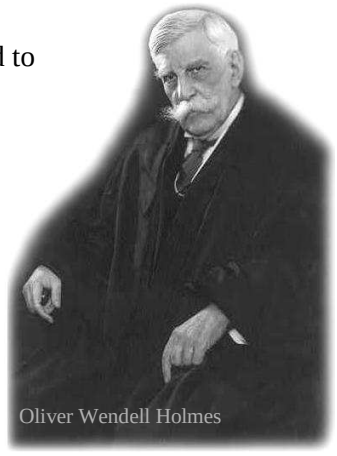

Oliver Wendell Holmes

Show Slide 3

**Instructor Note:**
The laws and court cases covered in this lesson plan are not intended to be a comprehensive list of every statutory change enacted by the Legislature or a complete review of every court decision in the timeframe listed. Our goal is to try to provide information on those laws and legal issues directly related to the duties and responsibilities of MPOETC certified police officers.

Show Slide 4

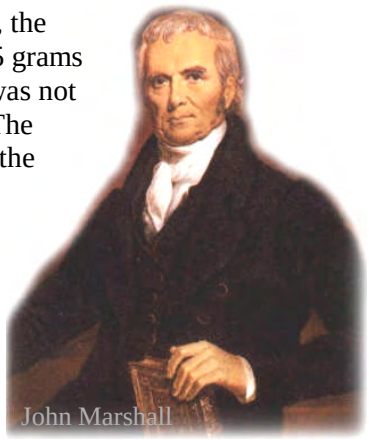
**Instructor Note:**
The versions of Crimes Code, Vehicle Code and Rules of Criminal Procedure on the CD are for teaching and reference purposes only. Instructors should consult professional publications or the PA Legislative Reference Bureau for the latest version of these statutes for the purposes of filing charges or prosecuting cases.

# I. Review of Case Law Changes

From Previous Legal Update Courses

Two years ago a group of cases were taught regarding possession with intent to deliver a controlled substance. In Commonwealth v. Ratsamy, the Superior Court held that the Commonwealth failed to prove that six grams of cocaine were possessed with intent to deliver. On appeal, the Supreme Court of Pennsylvania reversed the Superior Court and held that the evidence was sufficient to establish intent to deliver in light of Ratsamy's possession of a handgun, $349 in cash, and 199 Ziploc bags. Additionally, a police expert witness had testified that in his opinion the cocaine was possessed with intent to deliver.

In one of the other cases, Commonwealth v. Clark, the Superior Court had ruled that the possession of 2.5 grams of cocaine, a cell phone, and nine dollars in cash was not sufficient evidence to establish intent to deliver. The Supreme Court of Pennsylvania has now reversed the Superior Court and reinstated the conviction for possession with intent to deliver.


John Marshall

In 2007 the case of Commonwealth v. Hernandez was taught. This was a case where an employee of a package shipment company opened one of the boxes that was being shipped and discovered marijuana. Hernandez arrived to pick up the shipment while the police conducted surveillance outside. When Hernandez loaded the boxes into his truck, and drove away, the police stopped him. The police entered the cargo area of the truck and discovered the already opened box of marijuana. A search warrant was then obtained. The Superior Court had ruled that there was no exigent circumstance justifying an entry into the truck when there was no evidence that Hernandez was working with any accomplices who might be hiding out in the back of the truck. The evidence was ordered to be suppressed.

On appeal, the Supreme Court of Pennsylvania agreed with the Superior Court that there were no exigent circumstances and that the truck should not have been entered prior to the arrival of a search warrant. However, the Supreme Court ruled that the search warrant that was later obtained contained sufficient probable cause to justify the search of the truck even after eliminating from the search warrant affidavit any consideration of the evidence observed during the illegal entry into the cargo area.

Last year you saw the video reenactment of a search of a residence by probation officers and police officers. The officers had an arrest warrant for defendant's brother. Instead, they found defendant, J.E., who was also on probation, in a bedroom. When J.E. acted nervously, the police frisked him, then lifted the mattress on the bed, finding a concealed gun.

The Superior Court ruled that there were no reasonable grounds to believe that J.E. had either committed a crime or violated the terms of his probation.

Show Slide 5

**Instructor Note:**
Commonwealth v. Ratsamy (pronounced: RAT-sum-me)

**Instructor Note:**
**Show Video segment: See hyperlink on Slide #5 for a link to show MPOETC - ABC 27 News segment. TRT – 4:25 minutes**

**Instructor Note:**
The citations for the cases are listed below:

Commonwealth v. Ratsamy, 594 Pa. 176, 934 A.2d 1233 (11/20/07)

Commonwealth v. Clark, 942 A.2d 895 (Pa. 2/27/08)

Commonwealth v. Hernandez,594 Pa. 319, 935 A.2d 1275 (11/21/07)

In re J. E., 594 Pa. 528, 937 A.2d 421 (12/27/07)

Russo, 594 Pa. 119, 934 A.2d 1199 (11/20/07)

The gun was ordered suppressed. In December of 2007 the Supreme Court of Pennsylvania agreed with the Superior Court that the search was conducted without reasonable suspicion and was illegal.

Finally, in a new development, the Supreme Court of Pennsylvania in Commonwealth v. Russo has held that a homeowner has no expectation of privacy in open fields, those areas beyond the curtilage of a residence. It does not matter if the open fields are privately owned, and it does not matter if the owner has posted "No Trespassing" signs. There is no expectation of privacy in open fields.

By this decision Pennsylvania law is the same as federal law which has always recognized the "open fields" doctrine. Although this case involved game law violations, and a search by wildlife conservation officers, the "open fields" doctrine applies to any offense and may be invoked by any law enforcement officer..

**Instructor Note:**
All law changes covered in Section II. are currently effective. This law was effective Sept 11, 2008.

## II. New Legislation

Show Slide 6

### Clean Indoor Air Act

Governor Rendell signed Senate Bill 246 into law on June 13, 2008. The legislation prohibits smoking in a public place or a workplace and lists examples of what is considered a public place. The bill allows for some exceptions, including a private residence (except those licensed as a child-care facility), a private social function where the site involved is under the control of the sponsor (except where the site is owned, leased, or operated by a state or local government agency) and a wholesale or retail tobacco shop. It also imposes penalties for those establishments in noncompliance, as well as those individuals smoking in prohibited areas.

**Instructor Note:**
Just prior to the publication of this lesson plan; important new legislation was signed by the Governor on Friday, October 17, 2008.

**This bill (HB 1845), which is effective on December 16, 2008, has an impact on the 2009 course including, but not limited to:**

Creates the crimes of assault and homicide on a law enforcement officer and promulgates a mandatory minimum sentence for the assault. Changes provisions of the Uniform Firearms Act in a way which may require changes to Section IX of this lesson plan. The MPOETC and Legal Update Committee will be publishing a Change Sheet for the lesson plan after carefully analyzing this new legislation.

**Section 5(b)(3):**

..." If the complaint is made to a law enforcement agency regarding a public place, the agency shall investigate the complaint and enforce the act."

**Section 6. Violations, affirmative defenses and penalties.**

(a) Violations.--It is a violation of this act to do any of the following:

(1) Fail to post a sign as required by section 4.
(2) Permit smoking in a public place where smoking is prohibited.
(3) Smoke in a public place where smoking is prohibited.

(b) Affirmative defenses.--Any of the following shall be an affirmative defense to a prosecution or imposition of an administrative penalty under this act:

(1) When the violation occurred, the actual control of the public place was not exercised by the owner, operator or manager but by a lessee.
(2) The owner or manager made a good faith effort to prohibit smoking.
(3) The owner, operator or manager asserting the affirmative defense shall do so in the form of a sworn affidavit setting forth the relevant information mentioned under paragraphs (1) and (2)…

(e) Criminal penalties.

(1) A person that violates this act commits a summary offense and shall, upon conviction, be sentenced to pay a fine of not more than $250.
(2) (2) A person that violates this act within one year of being sentenced under paragraph (1) commits a summary offense and shall, upon conviction, be sentenced to pay a fine of not more than $500.
(3) A person that violates this act within one year of being sentenced under paragraph (2) commits a summary offense and shall, upon conviction, be sentenced to pay a fine of not more than $1,000.
(4) The following apply to actions by law enforcement officers:

(i) Except as set forth in subparagraph (ii), the penalties collected under this subsection shall be retained by the municipality in which the law enforcement agency initiating the enforcement action is located.

(ii) If an enforcement action is initiated by the Pennsylvania State Police, the Pennsylvania State Police shall retain the penalties collected under this subsection. Effective date: September 11, 2008.

**THIS ACT DOES NOT INVALIDATE THE**
**PHILADELPHIA SMOKING BAN ORDINANCE 10-602**

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# Overview of PA SAVIN

Show Slide 7

**S**tatewide **A**utomated **V**ictim **I**nformation & **N**otification Service

- Service is delivered via a national notification center.
  - 24 X 7 Automated telephone and web access
  - 24 X 7 live operator assistance – work in concert with existing customer resources
  - Monitoring and support of data feed
- Victims query information – around the clock, to learn about the current custody status, location of the offender
- Victims subscribe for notification of change in custody status, transfer, escape, upcoming hearings, temporary releases, etc…
  - Notification via telephone and email
- Statewide PA SAVIN portal becomes a single source for promoting victims' access to offender and other critical information.
  - Service transcends state lines

**Instructor Note:**
See hyperlink - This mini PPT show is four slides.

**Instructor Note:**
*Regarding enforcement, police officers should:*

1. *Use Discretion*
2. *Follow Department Policy*
3. *Check with Chief, Legal Counsel and District Attorney*

**Instructor Note:**
The Dept. of Health will begin to educate both the public and merchants and devise a sticker or letter to go along with the LCB license that will be displayed in an obvious place in establishments, so police and others will be able to see if they must be smoke free or not.

It will take anywhere from 40-45 days until the program is implemented.

In the meantime, if the Dept. of Health receives calls about places that are in violation of the law, they will start by trying to educate the business and public and then go from there for reporting to the police.

**Instructor Note**: See Hyperlink. This mini-PPT show is four slides.

For more information, see:

www.pacrimevictims.state.pa.us
www.vinelink.com
www.pdaa.org
www.appriss.com/pavine

## Police Participation in SAVIN

**Instructor Note:** A copy of the Pennsylvania SAVIN Fact Sheet and brochure is in the participant's workbook.

- Police, as first responders, provide victim with SAVIN Information
  - Specific information will vary by county; may be a pamphlet, a SAVIN label or sheet from SAVIN Tear-off Pad to go along with victim rights information

- Instructions to victim: a victim can register for SAVIN almost right away – as soon as the offender has completed intake in the computer system at the jail. *The offender must be in the jail in order for the victim to register. If the inmate posts bond and is never incarcerated or if the inmate posts bond and is immediately released from jail before the victim registers registration will not occur. The offender's name will show up in the system for 2 weeks after release but the victim cannot register for notification.

- Law Enforcement should let victims know:

  – They should register as soon as the offender has completed intake
  – They can register via the toll free number – prompted system or live operator or via the internet
  – They should register multiple phone numbers and an e-mail address
  – They should encourage their family members or significant others to register as well
  – They must select a secure PIN
  – They should contact the County Victim Advocate as soon as possible for more detailed information

➢ **Law Enforcement can also register for notifications.**

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## III. Rules of Criminal Procedure Update Fingerprinting

Show Slide 8

Rules amended: 135, 504, 510, 543, 547
Comments revised: 109, 512, 527

FINAL REPORT [1]

**Instructor Note:** The updated Criminal Complaint form will permit police officers to designate whether or not person has been fingerprinted as required by Rule 504

**Effective date: February 1, 2009**

Proposed Amendments to Pa.Rs.Crim.P. 135, 504, 510, 543, and 547 and Revisions of the Comments to Pa.Rs.Crim.P. 109, 512, and 527

[1] The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

# FINGERPRINT ORDERS IN SUMMONS CASES

On July 10, 2008, effective February 1, 2009, upon the recommendation of the Criminal Procedural Rules Committee, the Court amended Rules 135 (Transcript of Proceedings Before Issuing Authority), 504 (Contents of Complaint), 510 (Contents of Summons; Notice of Preliminary Hearing), 543 (Disposition of Case at Preliminary Hearing), and 547 (Return of Transcript in Court Cases) and approved the revision of the *Comments* to Rules 109 (Defects in Form, Content, or Procedure), 512 (Procedures in Court Cases Following Issuing of Summons), and 527 (Non monetary Conditions of Release on Bail) to provide procedures for ensuring compliance with identification procedures, including fingerprinting, in summons cases.

These changes are in response to numerous communications received by the Committee, especially from magisterial district judges, questioning how the fingerprint requirements of the Criminal History Records Information Act (CHRIA), 18 Pa.C.S. §9112, are to be accomplished in cases initiated by summons. [2] Section 9112(B) (2) requires that, in cases initiated by summons, "the court…shall order the defendant to submit within five days of such order for fingerprinting…"

In summons cases, the defendant does not undergo the same type of identification processing that occurs in arrest cases since the defendant is not in custody and no preliminary arraignment is held. The first occasion in which the defendant comes before an issuing authority is usually at the preliminary hearing.

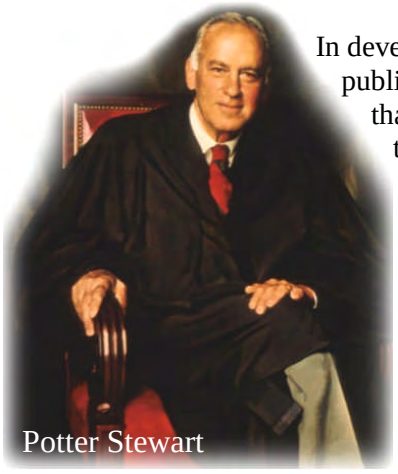
The Committee received reports that there is a divergence of practice regarding this question running the gamut from issuing authorities sending out fingerprint orders with the summons to issuing authorities who believe that, based on language in the *Comment* to Rule 510, fingerprints may only be ordered after the case is held for court at the preliminary hearing.

Initially, the Committee considered permitting an issuing authority the discretion to choose the procedure for the issuance of the fingerprint order. However, because the fingerprint requirements of CHRIA apply regardless of whether a case was bound over for court**,** the Committee concluded that permitting such discretion does not adequately address the problem. In other words, in those cases started by summons that are not held for court at the preliminary hearing, unless the fingerprint order has been issued with the summons, there would be no mechanism to have the defendant fingerprinted.

Therefore, the Committee concluded that the rules should require that in all cases, when a summons is issued, the issuing authority also would be required to send out a fingerprint order and would not have the option of waiting until the preliminary hearing to issue the order. To accomplish this, Rule 510 has been

[2] Unlike summons cases, in cases initiated by arrest with or without a warrant, compliance with the fingerprinting requirements of CHRIA is relatively straightforward, with the defendant's fingerprints being taken as part of the usual administrative processing following arrest.

amended to provide that the fingerprint order be attached to the summons, along with the copy of the complaint. Additionally, the language in the *Comments* to Rules 510 and 512 that suggests that the issuing authority must wait until the preliminary hearing to issue the fingerprint order has been deleted.


Potter Stewart

In developing this proposal and after reviewing the publication comments, the Committee recognized that there are circumstances that are exceptions to the requirement that the fingerprint order be sent out with the summons. First, when the defendant already has been processed, for example, when a defendant has been released following an arrest without a warrant as provided in Rule 519(B), the fingerprint order would not need to be sent with the summons. [3]

Another exception is when a case is initiated by private complaint, since CHRIA provides that in such cases the fingerprints would only be taken upon conviction. Therefore, language has been added to Rule 510 indicating that these exceptions exist with further elaboration about the exceptions in the *Comment.*

In considering the exception when the fingerprinting has already been completed, the Committee was concerned about how this information would be conveyed to the magisterial district judge so he or she will know that the fingerprint order is unnecessary. It was concluded that the police should provide this information at the time the complaint is filed. Accordingly, the content of complaints rule, Rule 504, is amended to require that a notation be added to complaints to indicate whether fingerprints have been taken.

Another issue that arose during the development of this proposal concerns the enforcement of the fingerprint order. Recognizing that, if the defendant fails to comply with the fingerprint order, the primary mechanism to enforce the fingerprint order is making compliance a bail condition following the preliminary hearing, new paragraph (C)(3) has been added to Rule 543 making it clear that compliance should be made a condition of bail. The *Comments* to Rules 510, 512, 527, and 543 have been revised to emphasize this required bail condition as well.

Finally, during the Committee's discussions on this issue, several members expressed concern about compliance with the fingerprint order in the situation when a case is held for court and transferred from the issuing authority to the court of common pleas. In these cases, there is a possibility that the fingerprint requirement might "get lost," especially in the situation in which the case is held for court in the defendant's absence as provided in Rule 543(D)(3). To address this situation, a provision has been added to Rules 543(D)(3)(b)(ii) and 547(C) that requires the issuing authority to send notice of the defendant's non-compliance to the court of common pleas. It is contemplated that the court of common pleas, once notified, will take whatever actions would be appropriate in the circumstances to ensure future compliance. To further assist in ensuring that

[3] Rule 519 provides that the defendant should be processed, which includes fingerprinting, prior to being released.

such cases do not "fall through the cracks" when transferred to the court of common pleas, the transcript content rule, Rule 135, is amended to include a requirement that the transcript form include a notation that fingerprints have not been taken. Since all district attorney's offices receive copies of the transcript, the district attorney's office is put on notice of the noncompliance and could pursue the matter further. A correlative change has also been made to the *Comment* to Rule 109 to reflect this additional Rule 135 requirement.

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RULE 212. DISSEMINATION OF SEARCH WARRANT INFORMATION.

The issuing authority shall not make any search warrants and any affidavit(s) of probable cause available for public inspection or dissemination until the warrant has been executed, but in no case shall the delay be longer than **48 hours** after the warrant has been issued.

COMMENT: Execution of search warrants carries the potential risk of hazard and premature dissemination of the intention to execute a warrant may greatly increase that risk. For this reason, this rule was adopted in 2008 to delay the dissemination of search warrant information to the general public until after execution or no longer than 48 hours after issuance, whichever is sooner. This rule does not deny disclosure of search warrant information to the public, but rather, temporarily delays the dissemination of that information in order to protect public safety.

Once the warrant is executed, the information may be disseminated unless sealed pursuant to Rule 211.

NOTES

Show Slide 9

**Instructor Note:**
On June 23, 2008, effective August 1, 2008, the Pennsylvania Supreme Court approved the adoption of new Rule 212 to provide for the temporary delay in dissemination of search warrant information.

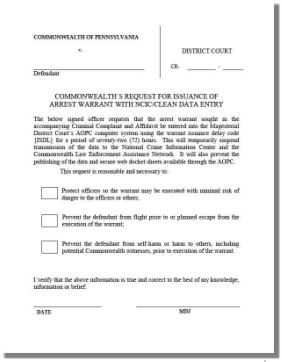
Rule 212 specifically prohibits the issuing authority from making any search warrant and any affidavit(s) of probable cause available for public inspection until the warrant has been executed, but in no case shall the delay be longer than 48 hours after the warrant has been issued.

The intent of the new rule is to limit the potential risks accompanying premature dissemination of the intention to execute a warrant. Accordingly, Rule 212 only provides a temporary restriction on dissemination and should not be confused with a search warrant sealed pursuant to Rule 211, providing for long-term restriction, up to the date of arraignment..

NOTE: Rule 212 adopted June 23, 2008, **effective August 1, 2008.**

## Delay Release of Arrest Warrant Information
(Unpublished Procedure)

Show Slide 10


COMMONWEALTH OF PENNSYLVANIA
v.
Defendant
DISTRICT COURT
CR: ____ - ____
COMMONWEALTH'S REQUEST FOR ISSUANCE OF ARREST WARRANT WITH NCIC/CLEAN DATA ENTRY
The below signed officer requests that the arrest warrant sought in the accompanying Criminal Complaint and Affidavit be entered into the Magisterial District Court's AOPC computer system using the warrant issuance delay code [HOLD] for a period of seventy-two (72) hours. This will temporarily suspend transmission of the data to the National Crime Information Center and the Commonwealth Law Enforcement Assistance Network. It will also prevent the publishing of the data and secure web docket sheets available through the AOPC.
This request is reasonable and necessary to:
☐ Protect officers so the warrant may be executed with minimal risk of danger to the officers or others;
☐ Prevent the defendant from flight prior to or planned escape from the execution of the warrant;
☐ Prevent the defendant from self-harm or harm to others, including potential Commonwealth witnesses, prior to execution of the warrant.
I verify that the above information is true and correct to the best of my knowledge, information or belief.
DATE
MDJ

As part of the implementation of the [AOPC] warrant rollout project, the Attorney General's Office and the Pennsylvania State Police requested that AOPC provide functionality that permits, on a case-by-case basis, a court to order arrest warrant information "held" for **72 hours prior** to its release to CLEAN and NCIC. The immediate release of the warrant information could compromise the success of an ongoing operation or cause concern for the officer's safety.

The request for delay may be made by the district attorney, the Attorney General's Office, a PSP officer, or a **municipal officer.** The request must be in writing. If the issuing authority grants the motion, an Order is signed by the issuing authority. The Order is located on the MDJS portal under the "Forms" link for the Magisterial District Judge to sign.

**Instructor Note:**
There is a hyperlink to a sample form that police officers can use to make the written request to delay the release of the arrest warrant information to their local MDJ. In addition, a form is included in the participant's workbook

**Instructor Note:**
Refer to administrative Office of the Pennsylvania courts (AOPC) Laser fax Modification 5, Informational 5.107 dated August 29, 2008.

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# IV. General Criminal Case Law

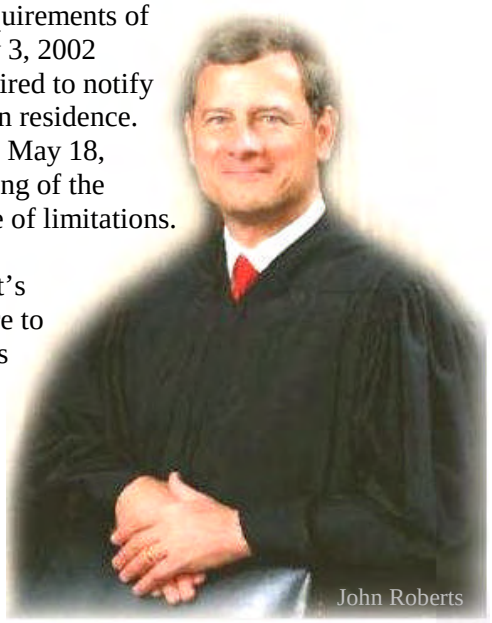
## CASES INTERPRETING STATUTES

Show Slide 11

### Statute of Limitations

Commonwealth v. Stitt, 947 A.2d 195 (Pa. Super. 3/26/08)

Defendant, who was subject to the requirements of Megan's Law, changed residences on July 3, 2002 without notifying the police. He was required to notify Authorities by July 14, 2002 of a change in residence. The criminal complaint was not filed until May 18, 2005 and defendant contended that the filing of the complaint was beyond the two year statute of limitations.


John Roberts

The Superior Court rejected defendant's argument by noting that defendant's failure to notify the police of his address change was an ongoing offense which continued for every day after July 14, 2002 on which defendant failed to notify the police.

Only after defendant registered his a address change would the statute of limitations begin running for the violations committed on previous days. Since defendant in this case never registered his address change, the statute of limitations never began running.

## DISORDERLY CONDUCT

Commonwealth v. Fedorek, 946 A.2d 93 (Pa. 4/30/08)

Show Slide 12

The victim was assaulted by Jack Schmader outside of a social club after the defendant, who is Schmader's sister, urged Schmader to "hurt him" and "f---- him up." The victim was dating Schmader's ex-wife at the time.

There is no question in this case as to what constitutes the *elements* of the offense of disorderly conduct. "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he" or she engages in certain enumerated activity. 18 Pa.C.S. § 5503(a).

**Instructor Note:**
**Show Video segment**
See hyperlink for a "You Make the Call" scenario based on the Fedorek case.

**Part 1 – 2:21 minutes**
**Part 2 – 00:36 seconds**

Defendant concedes that the Commonwealth established the necessary elements to support her conviction for disorderly conduct as defined by subsection (a) of the statute.

**Instructor Note:**
See hyperlink to Disorderly Conduct statute. See § 5503

Subsection (b) of the statute addresses the issue of how the offense, once established, is to be graded for purposes of sentencing. This subsection states in relevant part: "An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience," otherwise, it "is a summary offense." 18 Pa.C.S. § 5503(b). Conspicuously absent from this language is an expression that the actor must intend to cause substantial **public** harm or serious **public** inconvenience in order for the crime to be graded as a third-degree misdemeanor. The General Assembly plainly omitted the modifier "public" in subsection (b) while it plainly included that modifier in subsection (a). The language of Section 5503(b) plainly and explicitly does **not** require that the Commonwealth prove that the actor must intend to cause substantial **public** harm or serious **public** inconvenience in order for the crime to be graded as a third-degree misdemeanor.

## DISORDERLY CONDUCT

Commonwealth v. O'Brien, 939 A.2d 912 (Pa. Super. 12/18/07)

Show Slide 13

The victim was driving near his home on Shafran Drive in Lake Ariel, Pennsylvania, looking for his dog. Shafran Drive is a private road providing access to the community's residents and their guests. Defendant approached the victim, used profane language, reached through an open window in the victim's vehicle, removed the victim's gloves from the dashboard and then used then to slap the victim.

Shafran Road constituted "a place to which the public or a substantial group," namely the surrounding community's residents and their guests, have access. The size of any neighborhood, any premises or private community does not dictate whether or not that premises, neighborhood, or community is "public" for purposes of the disorderly conduct statute. Accordingly, defendant's claim his conviction cannot stand because his conduct failed to constitute a "public inconvenience or annoyance" must fail.

## ASSAULT

Commonwealth v. Lloyd, 948 A.2d 875 (Pa. Super. 5/14/08)

**Show:** In-car camera re-enactment of the Lloyd situation

**Ask Class:** Was this an assault? If so, was it a simple assault or an aggravated assault?

**Discuss - Answer:** This was an aggravated assault under 18 Pa.C.S. § 2702(a) (6). Defendant's conduct was an attempt by physical menace to place the officer in fear of imminent serious bodily injury, while the officer was in performance of his duty.

**Summary:** During a police pursuit of a pickup truck whose driver was suspected of drunk driving, the pickup truck swerved into the lane of travel of another officer who was driving toward the suspect, forcing that second officer to swerve onto the sidewalk in order to avoid a head-on collision. The Superior Court held that defendant's conduct was an attempt by physical menace to place the officer in fear of imminent serious bodily injury, while the officer was in performance of his duty. This was sufficient evidence to establish aggravated assault, 18 Pa.C.S. § 2702(a) (6).

Show Slide 14

**Instructor Note: Show Video segment**
See hyperlink for in-car camera footage of a recreation of the facts in the Lloyd case.

**TRT: 00:36 minutes**

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## MARIJUANA

Commonwealth v. Van Aulen, 952 A.2d 1183 (Pa. Super. 6/30/08)

Show Slide 15

During a consent search of a residence, police officers found in a bedroom closet four marijuana plants, lights and other paraphernalia for growing marijuana.

The CSDDCA provides, in relevant part:

§ 780-113. **Prohibited acts; penalties**
(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a) (30). This subsection of the CSDDCA criminalizes the "manufacture" of a controlled substance. The CSDDCA defines "manufacture" as "the **production,** preparation, propagation, compounding, conversion or processing of a controlled substance ..." 35 P.S. § 780-102(b) (emphasis added). The statute further defines "production" to encompass the "manufacturing, **planting, cultivation, growing** or harvesting of a controlled substance ..." *Id.* (emphasis added). Section 780-113(a) (30) of the CSDDCA clearly and unambiguously prohibits the unauthorized growing of controlled substances.

**Instructor Note:**
"The Controlled Substance, Drug, Device and Cosmetic Act (CSDDCA) is sometimes referred to as Act 64 or Controlled Substance Act.

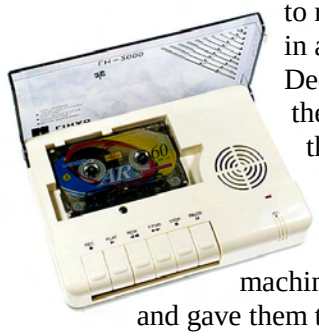
See Title 35. P.S. Health and Safety

## WIRETAP

Commonwealth v. Deck, 954 A.2d 603 (Pa. Super. 7/9/08)

Show Slide 16

Deck resided with his girlfriend and with C.P., the girlfriend's daughter. C.P. sought to prove to her mother and the police that Deck was engaging in sexual relations with her. C.P. knew that the police used recording devices to monitor conversations, based on her participation in a previous police investigation. C.P. telephoned Deck at his place of work. Deck was in his office with the door open when he took C.P.'s call. At the start of their conversation, C.P. told Deck that she had placed him on the speakerphone. Without Deck's knowledge or consent, C.P. recorded the conversation on a cassette tape in an answering machine. Later in the day, C.P. went to the police department and gave them the tape of the telephone conversation.



**Instructor Note:**
An appropriate investigative technique in this case would be to utilize a consensual wire. However, in this case, the suspect was already tipped off that the police were investigating this incident.

ISSUE: Is the tape recording of the conversation admissible in evidence?

RULING: No. The telephone conversation between C.P. and Deck was a wire communication under Section 5702 of the Wiretap Act. Section 5703 of the Wiretap Act prohibits the interception, disclosure or use of a telephone conversation as a wire communication under Section 5702.

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# V. VEHICLE CODE UPDATES

**There were no significant Vehicle Code changes to include in this year's course.**


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# VI. TRAFFIC CASE LAW

## Mere Encounter or Investigatory Stop?

Commonwealth v. Conte , 931 A.2d 690 (Pa. Super. 8/2/07)

Show Slide 17

Background: Defendant was convicted after a bench trial in the Court of Common Pleas, Berks County, of driving under influence of alcohol (DUI), highest rate. He appealed.

**Instructor Note:**
The full text of the cases in the lesson plan are on the Instructor's CD, but you can also use the www.aopc.org web site for more information.

FACTS: In the early evening of November 6, 2005, Wyomissing Borough Police Department Patrolman received a radio dispatch regarding a possibly disabled vehicle on the shoulder of a State Route 422 exit ramp. He drove to the scene and pulled up behind Defendant's parked Jeep Cherokee-the only vehicle there at the time and activated his overhead lights for safety given the nighttime, highway setting. Officer testified that Defendant's girlfriend arrived by car sometime after he had already encountered Defendant. The uniformed officer got out of his patrol car and walked toward Defendant, who had already exited his vehicle as well. In a

normal conversational tone, the officer asked Defendant "what had happened, [if] he was alright, did he need assistance, those sorts of things."


As Defendant replied that his jeep had a flat tire, Officer detected Defendant's bloodshot eyes and the odor of alcohol on his breath. Defendant also seemed confused about the cause of the flat tire and damage to the corresponding wheel, prompting Officer to request back-up patrol and to initiate field sobriety tests. The officers determined Defendant failed the tests and placed him under arrest. They transported him to a local hospital for a serum BAC test, which came back at .230%. Sentenced to serve a mandatory minimum sentence of 72 hours to six months' incarceration and pay a $1,000 fine, Defendant now contends the court erroneously denied his motion to suppress.

ISSUE: Was the officer's display of authority, particularly the use of overhead lights, a detention such that a reasonable person in his position believes he was not free to terminate the police-citizen encounter and therefore subject to an investigative detention?

RULING**:** In upholding the suppression court's decision, the Superior Court reasoned:

We recognize that flashing overhead lights, when used to pull a vehicle over, are a strong signal that a police officer is stopping a vehicle and that the driver is not free to terminate this encounter. The same is not necessarily true under the factual circumstances presented here. It is one traditional function of State Troopers, and indeed all police officers patrolling our highways, to help motorists who are stranded or who may otherwise need assistance. Such assistance is to be expected, and is generally considered welcome.

Often, and particularly at night, there is simply no way to render this aid safely without first activating the police cruiser's overhead lights. This act serves several functions, including avoiding a collision on the highway, and potentially calling additional aid to the scene. Moreover, by activating the overhead lights, the officer signals to the motorist that it is actually a police officer (rather than a potentially dangerous stranger) who is approaching.

Under the totality of evidence thus presented at the suppression hearing, the suppression court correctly determined that the initial interaction between Officer and Defendant was but a mere encounter for which no reasonable suspicion was required.

Commonwealth v. Collins, 950 A.2d 1041 (Pa. Super. 6/4/08)

Show Slide 18

BACKGROUND: Defendant charged with one count of possession of drug paraphernalia filed motion to suppress. The Court of Common Pleas, Centre County, granted motion. Commonwealth appealed.

FACTS: A Trooper of the Pennsylvania State Police Rockview Station testified on direct examination that he was on routine patrol on February 13, 2006, and at the time, he was with the State Police for approximately nine months. He was traveling southbound on State Route 150, at 7:00 p.m., and observed a vehicle parked at the Bald Eagle State Park overlook. The Trooper testified that he "always stops for vehicles parked along the roadway." His reasoning was to "stop and see if they're all right."

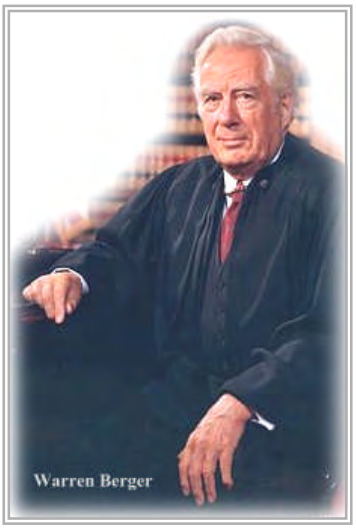
The Trooper explained that the vehicle was not moving when he first saw it, and the vehicle did not attempt to move as he approached. He further noted that he parked his car to the right of the vehicle, and his headlights were shining into the passenger compartment of the vehicle but he did not block the vehicle from leaving. Trooper testified that he first spoke with the front seat passenger of the vehicle, Defendant, and the Trooper noticed a bong between the seats and the smell of marijuana.

The Trooper used his flashlight when he approached the passenger side of the vehicle because his body blocked the light from his patrol car's headlights. After the approach, Trooper returned to his patrol car, turned on the in-car camera and called for backup. The bong was seized, and the Trooper received consent to search the vehicle. Upon questioning ownership of the bong, the driver of the vehicle pointed to Defendant, and Defendant stated it was his. Trooper stated that because Defendant claimed possession of the bong, Defendant would be arrested for drug paraphernalia. Defendant was not taken into custody at that time, and Defendant and the other occupants of the vehicle remained at the location after the State Police departed. A summons was sent to Defendant through the magisterial district justice, and Defendant was identified as the person cited by Trooper at the suppression hearing.

On cross-examination, Trooper testified that the vehicle was parked overlooking the lake, that is, where people park when they chose to park at the overlook and that he has previously seen people parked there. Trooper stated on the record that his reason for approaching this vehicle was because it was too close to the street; he thought it was broken down, and he does not usually see vehicles parked at the overlook after dark. The Trooper testified there is nothing wrong with parking at that particular location after dark. Moreover, he stated the vehicle was not parked in any unusual manner, and no parking violations were present.

The Trooper testified that it did not appear to him that there was any outward sign of distress from the occupants of the vehicle and that he did not observe anything that led him to believe that there was something illegal going on at that particular time.

When asked if it is more common to approach the driver of the vehicle first, the Trooper replied that no, it was not, and that he routinely approaches the passenger side, especially during traffic stops. He stated that was his practice and that the passenger side in this case was the closest side to him. The Trooper testified that the car window was rolled up when he first approached the vehicle and then, simultaneously as he walked up to the vehicle, Defendant rolled down the window. The interior lights in the subject car were off. When asked about the dialogue between the Trooper and the occupants, The Trooper stated that he walked up to the vehicle, asked if everything was okay, and in response, Defendant blurted out that the occupants had been smoking marijuana. Not until his question was answered did he discover the occupants' activities and see the bong resting between the car seats. The Trooper also stated that he did not see any signs that the occupants were scrambling around trying to get away because a trooper was approaching them. The Trooper stated that he did not feel a search warrant was necessary. The court asked the Trooper if the car was able to back out, and the Trooper stated it was. The Trooper stated he was twenty feet from the vehicle when he pulled over. On cross examination, The Trooper was asked hypothetically if the driver had pulled out before the Trooper reached the vehicle, would the Trooper have followed him; The Trooper explained that he would not have been able to stop them unless they committed some type of violation. After the engagement, the troopers told the occupants to wait a few minutes and then they could drive back to Lock Haven University.




ISSUE: The question of law is whether the initial interaction between the Trooper and Defendant was a mere encounter or an investigative detention.

RULING: The Superior Court held that initial interaction between state trooper and defendant, a vehicle passenger, following trooper's approach of vehicle in order to conduct a safety check of its passengers after noticing vehicle parked legally after sundown at roadside location, was mere encounter, and thus did not need be supported by any level of suspicion.

REASONING: To determine whether a mere encounter rises to the level of an investigatory detention, we must discern whether, as a matter of law, the police conducted a seizure of the person involved. To decide whether a seizure has occurred, a court must consider all the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person that he or she was not free to decline the officer's request or otherwise terminate the encounter.

Thus, the focal point of our inquiry must be whether, considering the circumstances surrounding the incident, a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes.

A reasonable person in Defendant's position would be free to terminate the encounter. The record indicates for example, that The Trooper parked twenty feet away from the rear of the vehicle. The record does not indicate that the overhead lights where turned on in the patrol car. The vehicle in question was not obstructing traffic or in violation of any traffic regulations. Although people parked at this location regularly, they did not do so as frequently after dark.

Thus, the Trooper was concerned enough to check on the condition of the vehicle and safety of its occupants. Moreover, the Trooper testified that no outward sign of distress emanated from the vehicle, and he did not observe anything that would lead him to believe that illegal activity was occurring. Further,

The Trooper explained on cross-examination that the occupants were not scrambling around as if they were trying to get away because a state trooper was approaching them. Instead, The Trooper approached the vehicle requesting information, asked if "everyone was ok" and then Defendant blurted out that they were smoking marijuana. The Trooper at that point smelled burnt marijuana and observed the bong in the vehicle.

"Because the level of intrusion into a person's liberty may change during the course of the encounter, we must carefully scrutinize the record for any evidence of such changes." The facts do not suggest that the Trooper acted in a coercive manner and spoke forcefully to Defendant. Nor do the facts indicate that the Trooper initially had a reasonable suspicion to believe that Defendant and the occupants were committing any illegal activities. Rather, during the initial approach by The Trooper, facts that typify a mere encounter are present, not an investigative detention.

A reasonable person would have interpreted the Trooper's actions as an act of official assistance and not an investigative detention.

Indeed, our expectation as a society is that a police officer's duty to serve and protect the community he or she patrols extends beyond enforcement of the Crimes Code or Motor Vehicle Code and includes helping citizens.... Given this expectation, a citizen whose vehicle sits apparently disabled along a highway would justifiably experience disbelief or even outrage if a law enforcement officer not otherwise engaged in official response drove by without pulling over and offering assistance.

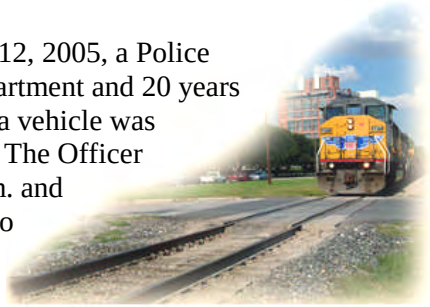
As the vehicle was parked after dark, at a scenic location, most commonly used in the daylight, The Trooper had an elevated concern for the safety of the vehicle's occupants. In carrying out a duty to check on the safety of motorists, The Trooper discovered Defendant was engaged in illegal activity. We find that The Trooper's interaction with Defendant in the within case was in accordance with the law.

# DUI – Probable Cause to Arrest and Miranda

Commonwealth v. Williams, 941 A.2d 14 (Pa. Super. 1/3/08)

Show Slide 19

BACKGROUND**:** Following a trial, defendant was convicted in the Court of Common Pleas, Mercer County, of driving under the influence (DUI) and careless driving. Defendant appealed.



FACTS: At approximately 6:12 a.m. on June 12, 2005, a Police Officer with Hempfield Township Police Department and 20 years experience, received a dispatch from 911 that a vehicle was stuck on the tracks on Kennard-Osgood Road. The Officer arrived on the scene at approximately 6:13 a.m. and observed a Ms. Donahoe with [Defendant] who was lying on or near the roadway, about fifty (50) feet from the railroad tracks and the car.

Prior to the Officer's arrival, Ms. Donahoe had observed Defendant's vehicle stuck on the railroad tracks and stopped to offer assistance. The engine was running and the front wheels of the vehicle were still turning when Ms. Donahoe arrived on the scene. There was no one in the driver's seat, and Defendant was sleeping in the back seat. Ms. Donahoe attempted to arouse Defendant unsuccessfully, and then called 911 to report the incident.

Ms. Donahoe turned the engine off in Defendant's vehicle and put the transmission in park. Shortly thereafter, a passerby arrived and assisted Ms. Donahoe in removing Defendant from the vehicle and sat her alongside the roadway. Defendant never awoke during this time. Ms. Donahoe remained at the scene until the arrival of the Officer.

The Officer attempted unsuccessfully to wake Defendant who was lying on the ground on a chilly morning. The Officer leaned over to detect Defendant's pulse and smelled a strong odor of alcoholic beverages, which he believed to be beer, on Defendant's breath.

The officer called for an ambulance and a tow truck. Prior to the arrival of the ambulance, Defendant sat up and the Officer escorted her back to her vehicle, and asked her to produce her driver's license and registration. When she was unable to produce the requested documents, the Officer told her it was unimportant at the moment, and to "sit tight" until the ambulance arrived. The Officer asked her what had happened, and if she was the only person involved in the accident. Defendant admitted that she had been alone and that she was the operator of the vehicle.

Defendant's vehicle had to be removed from the railroad tracks by a tow truck. There were indications on the ground in the ballast around the railroad tracks that Defendant's vehicle made attempts to drive off the railroad tracks. The railroad crossing was in disrepair at its intersection with the paved roadway. No field sobriety tests were administered by the Officer, in part out of his concern for Defendant's safety, and because Defendant was too unsteady at the time. The Officer was unaware how long the vehicle was on the tracks or how long

[Defendant] was asleep in the back seat of the vehicle prior to the arrival of Ms. Donahoe.

**ISSUES:**

(1) Is there probable cause to arrest Defendant for DUI when she is found sleeping in the back seat of a disabled motor vehicle for an unknown time, along railroad tracks?

(2) When a suspect is moved by the police to another location, and told to "sit tight" and wait for an ambulance, and police are looking through her vehicle, is such a suspect in custody requiring Miranda warnings to be given prior to elicitation of statements?

**RULING:** The en banc Superior Court held that:

(1) Defendant had "actual physical control" of vehicle for purposes of DUI statute, and thus police officer had probable cause to arrest defendant; and

(2) Defendant was not "in custody," for Miranda purposes, when she admitted to police officer that she had been driver of vehicle.

**REASONING (#1):** Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the "Totality of the Circumstances." Furthermore, probable cause does not involve certainties, but rather "the factual and practical considerations of everyday life on which reasonable and prudent persons act."

Defendant here was not legally parked and, upon discovery by a passerby, the engine was running, the car was in gear and the wheels were spinning while Defendant was apparently passed out in the backseat. Furthermore, the car was straddling a set of railroad tracks, perpendicular to and completely off a nearby blacktop road, and it appeared as though it was driven down the railroad tracks a short distance. In addition, Defendant had a strong odor of alcohol on her breath and could not be aroused by two innocent bystanders when they carried her 50 feet away from the car to remove her from harm's way on the railroad tracks. The police officer upon his arrival at the scene also had a difficult time awakening Defendant, which in conjunction with the strong odor of alcohol on her breath, leads to the reasonable inference that she was extremely impaired by alcohol. Furthermore, the positioning of the vehicle with the engine running and still in gear also leads to the inference of driving under the influence of alcohol to the degree that she was not able to safely operate her vehicle as well as the inference that it had been driven onto the railroad tracks in an area where there were no commercial establishments and very few residences. It also appeared to The Officer that the driver mistook the railroad tracks for a nearby intersecting road.

The only other critical fact left to be determined by the Officer at the scene was who operated this motor vehicle or was in actual physical control of its movements.

The Officer after arousing Defendant at the scene walked her back to her car because it was cold outside and she needed to be removed from the roadway. So he walked her back to her car and she had difficulty walking without his assistance. She was also unable to find either her driver's license or registration information once in her car, but the Officer was informed by 911 that she was the registered owner of this vehicle. Furthermore, when asked by the Officer, Defendant advised that she was alone in the vehicle and that no one else had been with her. In addition, this experienced police officer observed that Defendant was confused, disoriented and had difficulty answering some of his questions. In short, all of the above facts support a reasonable inference that Defendant had operated and/or was in actual physical control of the movement of her vehicle while she was under the influence of alcohol to the degree that it rendered her incapable of safe driving in support of probable cause to arrest her for DUI. Hence, the arrest of Defendant was supported by probable cause, whether or not Defendant's pre- Miranda admission that she was the operator is considered in the probable cause equation.

**REASONING (#2):** Defendant was not "in custody" when she admitted to driving the car.

1. No restraints were used.

2. The Officer did not draw or threaten to draw his weapon.

3. No field sobriety tests had yet been administered.

4. The length of the traffic stop was less than 30 minutes.

For these reasons, the traffic detention did not become a formal arrest or constitute sufficient custody as to have required the officer to read Miranda warnings.

NOTES

# Municipal Police Jurisdiction Act

Show Slide 20

**Instructor Note: Show Video segment MPJA** Cases

**Taylor, Part 1 – 1:07 Minutes**

**Taylor, Part 2 – 00:21 seconds**

Taylor v. Commonwealth [PennDOT], 948 A.2d 189 (Pa. Commonwealth 3/20/08)

BACKGROUND: PennDOT appealed from an order of the Court of Common Pleas, Delaware County, granting driver's appeal from a one-year suspension of his operating privileges.

FACTS: At the hearing before the trial court various officers testified from several departments. On November 19, 2005, at approximately 2:50 AM., Upper Darby Township Police Department was conducting a DUI checkpoint in Upper Darby Township. Defendant's vehicle was stopped as it was going through the checkpoint and discussion with the Defendant was initiated. Officer noted that there was a strong odor of alcohol emanating from Defendant. Also noted that Defendant's speech was slurred and that Defendant had red, glassy, bloodshot eyes. Officer instructed Defendant to park his vehicle in the lot of an automotive business and to speak to one of the officers in the lot. He testified that he did not place the Defendant under arrest at that time.

Another officer from Nether Providence Township (NPT) Police Department had been asked by an officer of the Brookhaven Borough (BB) Police Department to work at the DUI checkpoint. The officer saw Defendant pull into the parking lot and was advised by the Upper Darby officer that Defendant had an "odor of alcohol." When Defendant exited the vehicle, NPT officer noted that Defendant had glassy, bloodshot eyes and slurred speech and appeared intoxicated. The NPT officer conducted a breath test on Defendant, using a portable breath test unit. The test revealed an alcohol content of .15%. Defendant performed the "walk and turn" test. Defendant failed both tests, the NPT officer placed him under arrest and advised him of the obligation to submit to chemical testing. Defendant was then turned over to another officer and was transported to the Upper Darby Township Police Department. The breath test was deemed a refusal by Defendants failure to provide a sufficient sample.

ISSUE**:** Did the trial court err in ruling that the NPT officer was the arresting officer?

RULING: The Commonwealth Court held that:

(1) officer's directing driver to park his vehicle in a nearby parking lot because he exhibited signs of alcohol use did not constitute an arrest, as would require probable cause, rather than reasonable suspicion;

(2) DOT failed to demonstrate that arresting officer was authorized to conduct arrest outside his jurisdiction.

REASONING: The Pennsylvania Supreme Court has ruled that a police officer acting outside of his jurisdiction lacked the ability to act as a police officer and would not be treated as such. *McKinley*, 576 Pa. at 94, 838 A.2d at 706.

The second officer did not have the authority to act as a police officer as was not acting pursuant to an authorized request by police department where checkpoint was being conducted to make the arrest. PennDOT failed to establish that Defendant was arrested by a police officer who had reasonable grounds to believe Defendant was DUI. Thus, they concluded that the trial court did not err in granting Defendant's appeal from the suspension of his operating privilege.

Commonwealth v. Henry, 943 A.2d 967 (Pa. Super. 2/19/08)

Show Slide 21

**Instructor Note: Show Video segment: MPJA Cases**

**Henry, Part 1 – 1:18minutes**

**Henry, Part 2 – 00:32 seconds**

BACKROUND: Defendant charged with driving under the influence of alcohol (DUI) and failure to stop filed a pre-trial motion to suppress, alleging arresting officer did not have requisite jurisdiction to effectuate an arrest. After a hearing, the Court of Common Pleas, Westmoreland County, granted motion. Commonwealth appealed.

FACTS: On the early morning of October 5, 2006, a South Greensburg police officer assigned to his routine patrol was driving in a northerly direction on Spruce Street. As the officer approached the intersection of Spruce and Bridge Streets he noticed a car driving in an easterly direction on Bridge Street run a stop sign, drive through an intersection, and continue on its way. The officer initiated a traffic stop approximately one-eighth (1/8) of a mile east of the intersection. This intersection is located in Hempfield Township, which is outside of the officer's primary jurisdiction. The officer approached the vehicle and, when he got near the driver, noticed a strong stench of alcohol. The officer instructed Defendant to exit the vehicle. Defendant stumbled while doing so and subsequently, failed a breathalyzer test and a series of field tests. He was placed into custody.

ISSUE: Did the police have the requisite jurisdiction over the intersection of Spruce and Bridge streets necessary to effectuate an arrest?

RULING: The Superior Court held that:

1) Arresting officer violated the Municipal Police Jurisdiction Act (MPJA), but
2) Officer's violation of the MPJA did not warrant application of the Exclusionary Rule.

REASONING: The arresting officer in this case entered the Pennsylvania State Police's jurisdiction after determining he had probable cause to stop Defendant for violating the Motor Vehicle Code. If Defendant had run the stop sign while traffic was heavy, the officer would have arguably been authorized by section 8953(a)(5) to enter the State Police's jurisdiction. 42 Pa.C.S.A. 8953(a)(5) (providing that extraterritorial pursuit is warranted when, inter alia, an officer has probable cause to believe a suspect has committed any "act which presents an immediate clear and present danger to persons or property."). The stop sign Defendant ran was within the officer's ordinary patrol route, although the sign was located outside the officer's jurisdiction. Indeed, if the officer had been present in the intersection at the point in time when Defendant ran the stop sign,

he would have been on "official business" in the State Police's jurisdiction and would have been authorized to pursue Defendant until detention.

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While there is no question the officer failed to follow the appropriate procedure after detaining Defendant, there is no indication within the record this failure was volitional. Furthermore, this failure did not prejudice Defendant in that it was presumably immaterial to him as to whether he was detained by a South Greensburg Police officer or a Pennsylvania State Police trooper-the end result would have been identical.

In conclusion, the arresting officer did not enter the State Police's jurisdiction to conduct an extraterritorial patrol or to embark on a fishing expedition in hopes of gathering more evidence to reach a determination of probable cause. To the contrary, the officer was on routine patrol in his own jurisdiction when he determined he had probable cause to initiate a traffic stop. The officer was in technical violation of the MPJA; however, this violation was unintentional and, when viewed in light of all the circumstances, does not warrant the application of the exclusionary rule. The suppression court's ruling "impose[s] an unreasonable burden on the police and endow[s] the criminal with an incredible advantage." Accordingly, the suppression court's Order is reversed.

Commonwealth v. Hilliar, 943 A.2d 984 (Pa. Super. 2/21/08)

Show Slide 22

BACKGROUND: Defendant was convicted in the Court of Common Pleas, York County, of driving under the influence (DUI). Defendant appealed.

**Instructor Note: Show Video segment: MPJA Cases**

**Hilliar, Part 1 – 1:45 minutes**

**Hilliar, Part 2 – 00:22 seconds**

FACTS: The arresting police officer's attention was called to the defendant's vehicle as he proceeded east on Market Street in West York Borough. The police officer ran the defendant's license plate, and determined that the owner of the vehicle's license was under suspension. The officer also discovered the owner's age *988 and that he was a male. From his observation of the driver the officer believed that the defendant was male, and was about the same age as the owner. Based on the officer's conclusion that it was likely that the person operating the vehicle was the owner because he was a male of the same age as the owner and had possession of the owner's vehicle, the police officer decided to stop the vehicle for suspicion of driving on a suspended license. The police officer made the decision to stop the defendant while the defendant was still within the West York Borough limits. However, by this time the defendant was approaching the Borough line. It was the officer's conclusion that it would be safer to permit the defendant to cross the Borough line, proceed through an upcoming traffic light, and then be able to make the stop with less interference to traffic and with more safety for both the officer and the defendant.

Therefore the stop actually occurred after defendant's vehicle had crossed the line into the next jurisdiction. Through sheer happenstance another officer from the same jurisdiction was traveling an opposite direction, and had a view of the defendant's vehicle from the front. Therefore the arresting officer contacted the officer while waiting for the light to change, and received confirmation from that officer that he also believed the driver matched the age provided by PennDOT of the owner prior to the stop.

After the defendant proceeded through the light, the officer turned on lights and sirens to pull the defendant over. The defendant failed to pull over immediately, and proceeded slowly for several more blocks before he pulled into a parking lot. When the officer talked to the defendant after the stop, the defendant exhibited the classic signs of intoxication, such as odor of alcohol, slurred speech, etc. Based on the foregoing, the officer took Defendant into custody and transported him to York Hospital for a blood test. Defendant submitted to the blood test which revealed a blood alcohol content of .256%.

ISSUE**:** Whether the stop was not conducted within the primary jurisdiction of the Officer and the Officer lacked probable cause to be in fresh pursuit of the vehicle, the Officer had neither authority nor jurisdiction to stop Defendant and the stop was in violation of the Statewide Municipal Police Jurisdiction Act, the Constitution of Pennsylvania and the Constitution of the United States and the illegal stop warrants suppression of all evidence gained as a result.

RULING: The Superior Court held that:

(1) officer's suspicion that driver of vehicle was the vehicle's registered owner whose license had been suspended did not rise to the level of probable cause necessary to pursue vehicle outside officer's primary jurisdiction under the Municipal Police Jurisdiction Act (MPJA);

(2) officer's minor infraction of MPJA did not necessitate exclusion of evidence resulting from stop.

REASONING: While in his primary jurisdiction, the officer in this case observed Defendant driving a vehicle whose owner had a suspended license. As we now know, Defendant was the owner and driver, but the officer did not know this for a fact. However, the officer did observe that the driver, i.e. Defendant, was a middle aged man, which matched the description of the owner of the vehicle. Based on this information, the officer decided to initiate a traffic stop.

Pursuant to 75 Pa.C.S. § 6308(b), a police officer may stop a vehicle anytime the officer possesses reasonable suspicion of a motor vehicle violation.

In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. In making this determination, we must give due weight ... to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience. Also, the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

We conclude that under the facts of this case, the officer's suspicion that the driver of the vehicle was also the owner was a reasonable one because the driver matched the description of the owner as a middle aged man. Consequently, had the officer initiated a traffic stop while in his primary jurisdiction it would have been entirely legal. However, due to traffic considerations, the officer waited just a few moments to execute the stop and by this time he was outside his primary jurisdiction.

The articulable and reasonable grounds standard, which our Supreme Court equated with probable cause, see Commonwealth v. Whitmyer, 542 Pa. 545, 668 A.2d 1113, 1116 (1995), emanated from the prior version of Section 6308(b), which was revised in 2003 when the legislature replaced it with the less stringent standard of "reasonable suspicion."

Nonetheless, the MPJA requires probable cause that a violation has occurred within the officer's primary jurisdiction in order for the officer to carry out his or her law enforcement duties outside the primary jurisdiction. In this case, the officer did not possess probable cause to believe that an offense had been committed in his primary jurisdiction and consequently, there was a plain violation of the MPJA. But see Commonwealth v. Arroyo, 455 Pa. Super. 76, 686 A.2d 1353, 1354 (1996) (stating, "We hold that when an officer activates his emergency lights and initiates a stop of a vehicle within his primary jurisdiction, the fact that the vehicle eventually comes to rest beyond the limits of the officer's jurisdiction does not establish a violation of the Statewide Municipal Police Jurisdiction Act. This is so even when the stop was initiated based upon a reasonable suspicion of a violation, rather than based upon probable cause."). However, we conclude this does not mean that Defendant was entitled to suppression of the inculpatory evidence that resulted from the stop, as such a remedy is not warranted by the officer's relatively minor infraction of the MPJA.

One of the principal purposes of the MPJA is to promote public safety while placing a general limitation on extraterritorial police patrols. It is in the interest of promoting public safety, therefore, that the MPJA exceptions contemplate and condone extra-territorial activity in response to specifically identified criminal behavior that occur[s] within the primary jurisdiction of the police.

Because of this purpose, our Supreme Court has explained that suppression of evidence is not always an appropriate remedy when there has been a violation of the MPJA. As we have already concluded, the officer in the instant case formed a reasonable suspicion to conclude that Defendant was driving under suspension while Defendant and the officer were still in the officer's primary jurisdiction. Thus, it would have been entirely legal for the officer to execute a traffic stop at that time and at that location. However, because of the traffic at that location, the officer decided to wait until he reached a less congested area, which occurred just seconds later. To permit suppression of the evidence under these facts would be to grant Defendant a technical windfall for no good reason. Defendant argues that his "Constitutional rights" were somehow violated by the traffic stop. Defendant does not elaborate on this claim, and so far as we can discern, the MPJA does not bestow any additional constitutional rights upon the citizens of our Commonwealth. We conclude that to grant suppression of the evidence obtained as result of the stop would be a remedy out of all proportion to the crimes for which Defendant was convicted. Like some scene out of the movie Smokey and the Bandit, Defendant would have this Court hold that law enforcement officers should step on the brakes at the borough line and watch the suspected criminal drive away on safe ground. In our Commonwealth, where the lines of the numerous municipalities sometimes meet and intersect in odd and sometimes confusing ways, this would too often lead to ineffectual law enforcement. The MPJA was not enacted to afford criminals or drunk drivers this protection. Consequently, we conclude that the trial court correctly denied Defendant's motion to suppress.

# Justification for Vehicle Stop

Show Slide 23

Commonwealth v. Bailey, 947 A.2d 808 (Pa. Super. 4/25/08)

BACKGROUND: Defendant was convicted in a bench trial in the Court of Common Pleas, Somerset County, of driving while imbibing and driving under the influence of a high rate of alcohol. Defendant appealed.

FACTS: On June 13, 2006, at approximately 7 p.m., Officer Rice of the Windber Borough Police Department observed a black Pontiac TransAm being operated "at a high rate of speed." Officer Rice further testified that he noticed that the TransAm exhaust system was "very loud." The vehicle looked similar to a vehicle Officer Rice knew as being owned by a party with a suspended driver's license.

Acting on this suspicion, Officer Rice radioed Officer Walls of the Paint Township Police Department. Officer Rice testified that he asked Officer Walls to keep a lookout for a TransAm "with [an] extremely loud exhaust." Officer Rice also informed Officer Walls that he suspected the TransAm was being operated by a driver with suspended operating privileges.

Approximately seven hours after receiving this information, Officer Walls spotted a black TransAm. Officer Walls testified that he received a radio call from Officer Rice informing him to be on the lookout for a TransAm with "no exhaust" system. Officer Walls also testified that when he spotted the TransAm, he noticed the exhaust system of the vehicle was louder than the exhaust systems of other TransAms he had been around. Officer Walls testified that he then pulled over the TransAm because he had a reasonable suspicion the vehicle was equipped with what he deemed to be a "faulty exhaust," based on the noise the system was making, and because he thought "the person operating the vehicle was under suspension."

Upon pulling over the TransAm, Officer Walls discovered Defendant driving the vehicle and the unlicensed party Officer Rice had suspected was driving the vehicle was sitting in the passenger seat. Officer Rice arrived at the scene of the stop within minutes. He confronted Defendant and immediately detected a strong odor of alcohol emanating from the vehicle. He ordered Defendant out of the vehicle and then administered a series of sobriety tests, which Defendant failed. Defendant also failed a breathalyzer test administered at the police station. On June 15, 2006, Defendant was charged accordingly.

ISSUE: Did the lower court err in denying the Defendant's motion to suppress blood alcohol result evidence seized by the police because the police lacked requisite suspicion to initiate the traffic stop?

RULING: The Superior Court held that officer's belief that vehicle was being operated with faulty exhaust system was sufficient to establish reasonable suspicion to justify stopping vehicle.

REASONING: The information accumulated by the police prior to stopping Defendant came from two sources, i.e., Officers Rice and Walls. Thus, although Officer Walls ultimately stopped Defendant, he did so, in part, based upon the information received from Officer Rice. A police officer, however, need not personally observe the illegal or suspicious conduct, which forms the basis for the reasonable suspicion, but may rely, under certain circumstances, on information provided by third parties. Pennsylvania law also permits a vehicle stop based upon a radio bulletin if evidence is offered at the suppression hearing to establish reasonable suspicion. The mere fact that the police receive their information over the police radio does not, of itself, establish or negate the existence of reasonable suspicion.


Earl Warren

The "regulations promulgated by the department" referenced in section 4523(a) are set forth over a twelve page span in Title 67 of the Pennsylvania Code. Section 157.11, Vehicular noise limits, (a) Prohibition, provides, in pertinent part, any motor vehicle weighing under 6,000 pounds must be equipped with an exhaust system that emits noise within the following limits: 1) 76 decibels for a motor vehicle traveling 35 miles per hour (m.p.h.) or less on a "soft site;" 2) 82 decibels for a motor vehicle traveling 35 m.p.h. or above on a "soft site;" 3) 78 decibels for a motor vehicle traveling 35 m.p.h. or less on a "hard site;" and, 4) 84 decibels for a motor vehicle traveling 35 m.p.h. or above on a "hard site."

The regulations provide: "Any police officer shall be authorized to inspect, examine and test a motor vehicle in accordance with the procedures specified in this chapter." 67 Pa.Code § 157.21. The regulations further provide: "Police officers selected to measure sound level of vehicles operated on highways shall have received training in the techniques of sound measurement and the operation of sound measuring instruments." 67 Pa.Code § 157.21(c). The regulations set forth intricate testing procedures for law enforcement to follow in determining whether an exhaust system comports with the section 157.11(a) sound limits.

There is no doubt that if the Commonwealth, in its discretion, decides to prosecute an individual for a sound violation under section 4523(a), it must adduce sufficient evidence, produced in accordance with the regulations set forth in Title 67, that would establish beyond a reasonable doubt that a violation has occurred. However, that is not the case before us. Here, Officer Walls suspected a violation of section 4523(a), and when he stopped Defendant, he and Officer Price found that Defendant had committed an offense of much greater gravity, i.e., DUI. Thus, the Commonwealth never prosecuted Defendant for a violation of section 4523(a).

The question remains though whether Officer Walls was justified in stopping Defendant based upon a suspected violation of section 4523(a) even though Officer Walls had neither the training nor the instrumentation to establish beyond a reasonable doubt that the sound emitted by Defendant's vehicle exceeded the prescribed sound levels. We now hold that while such evidence is necessary to establish guilt beyond a reasonable doubt, it is certainly not a necessary pre-cursor to a traffic stop and the concomitant investigative detention.

To hold otherwise would be the equivalent of requiring law enforcement officers of our Commonwealth to be certified as lab technicians before they stop a suspected perpetrator for a drug or DUI violation. Thus, were we to accept Defendant's position, a vehicle's exhaust system could be so loud that it shakes the officer out of his or her boots, and yet the officer would not be able to stop the vehicle because the officer does not have the technical training to establish a sound violation beyond a reasonable doubt. And so while the citizens of our Commonwealth are regularly assaulted by sounds emanating from amplified exhaust systems, officers will not be permitted to stop such vehicles, even when basic common sense would lead them to reasonably suspect that there has been a violation.

We do not hold law enforcement officers to the high technical standard espoused by Defendant because we know that through their experience and their observations in any given case, they may be able to articulate observations that lead them to the reasonable conclusion that criminal activity is afoot. In the instant case, Officer Walls testified that he heard Defendant's vehicle emitting a sound through its exhaust system that was louder than other cars of this make and that this led him to suspect a faulty exhaust system. Furthermore, Officer Rice testified that he instructed Officer Walls to stop Defendant because the vehicle had an "extremely loud exhaust." We conclude that such testimony was sufficient to establish a reasonable suspicion that the vehicle was in violation of section 4523(a).

While Officer Rice made this observation several hours before Officer Walls made the stop, we conclude that under these circumstances, the elapsed time does not diminish the value of this information, as it was unlikely that the vehicle's exhaust system was repaired during non-business hours between 7:00 P.M. and 2:00 A.M., when the stop occurred. Furthermore, when Officer Walls encountered the vehicle it was still emitting a loud sound.

Similarly, we conclude that if an officer hears an unusually loud exhaust, the officer may reasonably infer that there is a problem with the muffler and initiate a stop based upon a reasonable suspicion that the muffler is not "in good working order." 75 Pa.C.S. § 4523(c). In the instant case, Officer Walls testified that he suspected a faulty exhaust system based upon the loud exhaust. It was not necessary for him to visually observe a defective muffler before initiating a stop on this basis.

Just as an officer may conduct an investigative detention when he or she smells burning marijuana emanating from the direction of someone smoking a hand-rolled cigarette or "blunt," so can an officer stop a vehicle when he or she hears what sounds like a faulty muffler. While such a subjective impression is insufficient to establish guilt of a violation, it is sufficient to support an

**Instructor Note:**
Petition for allowance of appeal was denied by PA Supreme Court on October 16, 2008.

investigative detention. We also note, as dicta, that even though Defendant was not prosecuted for a section 4523 violation, the vehicle owner testified at trial that the vehicle in fact was missing a muffler.

NOTES

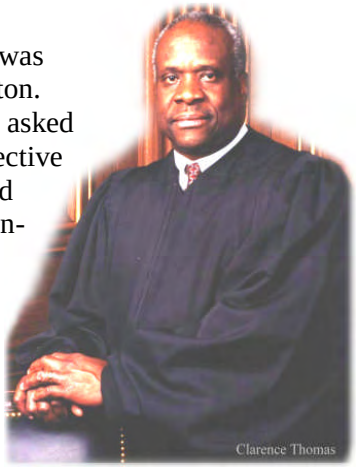
# VII. SEARCH & SEIZURE

## CONSENT - 3RD PARTY

Show Slide 24

Commonwealth v. Strader, 931 A.2d 630 (Pa. 9/26/07)

FACTS: A detective with the Wilkinsburg Police Department Police received a tip from a state parole officer that Cecil Shields, a parole absconder subject to an active warrant, was residing at 400 Swissvale Ave., Apartment 15, Wilkinsburg, Pa. The detective, along with other officers, went to the apartment in search of Shields. The detective knew, from prior contacts, that Strader was the leaseholder of the apartment.




The detective knocked on the apartment door and it was answered by a man who identified himself as Thornton. Thornton was shown a wanted poster of Shields and asked whether he knew him. He stated he did not. The detective then asked whether Strader was in the apartment, and Thornton said "No, he would be back shortly." Thornton stated he and another man in the apartment had been there for about a day. The detective asked Thornton if he was in charge of the apartment, to which Thornton responded "yes." The detective asked Thornton's permission to search the apartment for Shields; Thornton consented.

The detective and his partner entered the apartment and in the living room observed one or two plastic baggies containing a light brown substance and a digital scale in the kitchen sink, with white residue on it. These items were immediately seized and field tests performed came back positive for the presence for heroin. Thereafter, the detective secured a search warrant for the apartment, which yielded cocaine, more heroin, a handgun, and other items associated with packaging drugs. After defendant Strader's motion to suppress items seized during the warrantless search of his apartment was denied, a jury convicted him of three drug offenses. He appealed and the Pennsylvania Superior Court affirmed. Pennsylvania Supreme Court affirmed.

ISSUE: Can the police reasonably believe that a person answering a door has the authority to allow them to enter, when they know who lives in the apartment and that person is not present; that the legal tenant is expected back shortly and the person present only recently arrived at the apartment?

RULING: There is a consent exception to the warrant requirement and valid consent can be given by a person with apparent authority over the area to be searched. Police here had a reasonable belief Thornton had authority to consent to the search.

REASONING: Apparent authority turns on whether the facts available to the police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. Here police spoke with Thornton, an adult, who obviously was inside the apartment they sought to

search. Police did not immediately ask Thornton if they could enter; instead they spoke with him and determined the defendant was not present. Before police sought permission to enter the apartment, they asked Thornton whether he had authority to control who entered the apartment. When Thornton indicated he was in control, police asked him, as an occupant who expressly claimed authority to control the apartment, whether they could enter. Therefore, police here had a reasonable belief Thornton had authority to consent to the search.

Commonwealth v. Graham, 949 A.2d 939 (Pa. Super. 5/13/08)

Show Slide 25

FACTS: On the morning of March 11, 2004 a Sergeant and his partner traveled to the home rented by the defendant and his roommate, Dave Gruseck, for the purpose of speaking with the defendant. When they arrived, Gruseck was in the driveway, and told the officers the defendant was not home. The Sergeant also told Gruseck he was interested in the Chevy Blazer parked in the driveway, and asked Gruseck, "what he knew about the vehicle." Gruseck told the Sergeant the Blazer belonged to him, that the defendant had given it to him as payment for a debt owed.

The Sergeant relied on the statement of Gruseck claiming ownership, walked around the vehicle and was able to see some construction type materials and some tools. Receiving permission from Gruseck, he opened the car doors to look inside and took pictures of the items in the car. These pictures were shown to the victim/homeowners who positively identified some of items as belonging to them. The Sergeant obtained a search warrant that same day and served it on the defendant, as the titled owner of the car, and the car was towed to police barracks.

Defendant's motion to suppress evidence obtained from the warrantless search of his vehicle, as well as a subsequent search of this same vehicle with a warrant was denied. He was convicted by a jury of arson, burglary, criminal trespass, criminal mischief, theft by unlawful taking, and receiving stolen property. The Pennsylvania Superior Court affirmed the denial of the motion to suppress.

ISUUE: Was the initial warrantless search legal and the items seized as a result of the subsequent search, conducted with a warrant, "fruit of the poisonous tree?"

RULING: Based on Gruseck's claim he owned the car, the officer reasonably concluded that roommate Gruseck had, at a minimum, **apparent authority** to give consent for the search of, and intrusion into, the Chevy Blazer. For this reason, the Court found the subsequently seized items were not "fruit of the poisonous tree," and therefore were properly not suppressed.

REASONING: A third party with apparent authority over the area to be searched may provide police with consent to search. Third party consent is valid when police reasonably believe a third party has authority to consent. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. If the person asserting the authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such

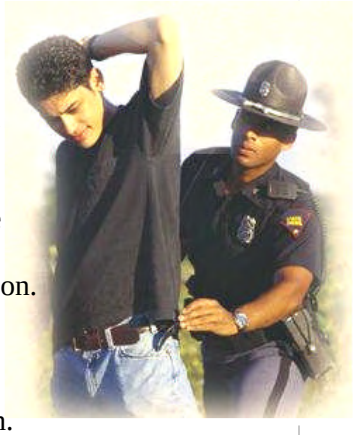
authority and police acted on facts leading sensibly to their conclusions of probability. The reasonable mistake of the police officer must be judged from an objective standard based upon the totality of the circumstances. Based on the representation by Gruseck, the Sergeant acted reasonably in seeking consent to search the automobile from Gruseck.

## FRISK

Commonwealth v. Powell, 934 A.2d 721 (Pa. Super. 10/9/07)

Show Slide 26

FACTS: On May 27, 2006, at approximately 3:48AM, a Philadelphia Police Officer was on routine patrol in the 5400 block of Gibson Drive. This area is a high crime area where the Officer had made numerous narcotics and firearms arrests. The officer passed a blue Kia SUV legally parked with its lights on. The Officer observed two individuals in the vehicle that appeared to be unconscious. One male sat in the driver seat, while the defendant sat in the passenger seat.



The Officer approached the driver's side of SUV and knocked on the window to investigate. The Officer observed the male in the driver seat move and also observed a bulge on the individual's left waistband. Believing the bulge was consistent with a concealed firearm, the officer called for backup officers. A backup officer approached the driver's door, opened the door, pulled the male in the driver seat out of the vehicle and recovered a firearm from his person.

At this time the defendant was still asleep in the passenger side of the SUV. Officers pulled the defendant out of the passenger seat and conducted a protective frisk of his person. During the frisk, the officers recovered a Smith & Wesson semi-automatic handgun loaded with fourteen live rounds and one in the chamber from his right rear pants pocket. Passenger's motion to suppress the gun, claiming insufficient cause to pat him down was denied. He was convicted for carrying a firearm without a license and carrying a firearm on the street or public property in Philadelphia. The Pennsylvania Superior Court affirmed the lower court.

ISSUE: Did police have sufficient reasonable suspicion to conduct a pat down of the passenger?

RULING: Yes. Based on the totality of the circumstances, through the eyes of highly trained officers, they properly searched the defendant for their own safety.

REASONING: While the Court acknowledged that Pennsylvania has no "automatic companion" rule, there were far more reasons to pat down Powell than the mere fact he was the companion of the driver. In this case, there was a crime going on at the moment, the possession of a loaded firearm by the driver. Coupled with the fact that the men appeared to be sleeping in a car with the lights on in a high crime area, it was logical for the police to realize they were "up to no good" and to suspect if the driver had a loaded gun, the passenger did as well.

# CONSENT – WAS DEFENDANT ABLE TO LEAVE

Show Slide 27

**Instructor Note:**
**Show Video segment:**
**Moyer Case Overview**
**TRT: 16:41 minutes**

Commonwealth vs. Moyer, 954 A.2d 659 (Pa. Super 8/1/08)

FACTS: June 28, 2005 at 11:20 p.m. the defendant was pulled over for a defective tail light - "one tail light with a hole in it and it was exposing white light to the rear, a good amount of white light to the rear". The trooper was armed and in full uniform in a marked cruiser. The defendant was informed about the reason for the stop and his license and registration card were requested. The trooper issued a warning and showed the hole in the taillight. The defendant was instructed he was free to leave, but as the defendant reached his door, the trooper call out the defendant's name and asked if he minded answering a few questions. The trooper did not advise the defendant he did not have to answer the questions.

After the defendant agreed to respond, the trooper revealed he was aware of the defendant's past arrest for Act 64 violations. Additionally, the trooper told the defendant that he had observed his movements in the car. The trooper asked the defendant if there were any drugs or paraphernalia in the car. When the defendant said no, the trooper asked if the defendant had any of those items on his person. The defendant replied no. The trooper asked the defendant if the trooper could check the vehicle to make sure. The defendant was not told that he could deny consent. The defendant consented. A crack pipe was found on the defendant's person and in the car.

The defendant filed a motion to suppress, which was granted. The Commonwealth appealed. A panel of the Superior Court of Pennsylvania affirmed the order suppressing the evidence. A nine member en banc panel also affirmed the order suppressing the evidence. An appeal to the Supreme Court of Pennsylvania has been filed.

ISSUE: Was there a sufficient break from the initial valid detention, making the subsequent interaction a custodial detention or a mere encounter?

RULING: No. A mere encounter does not need to be supported by any level of suspicion and does not carry any official compulsion to stop or respond. The crucial inquiry is an objective test, in view of all surrounding circumstances a reasonable person would have believed that he was free to leave. A non-exclusive list of factors to be used in assessing whether police conducted a mere encounter after a traffic stop includes:

1) the presence or absence of police excesses;
2) whether there was physical contact;
3) whether police directed the citizen's movements;
4) police demeanor and manner of expression;
5) the location of the interdiction;
6) the content of the questions and statements;
7) the existence and character of the initial investigative detention, including its degree of coerciveness;

8) "the degree to which the transaction between the traffic stop/investigative detention and the subsequent encounter can be viewed as seamless, …thus suggesting to a citizen that his movements may remain subject to police restraint";
9) the presence of an express admonition to the effect that the citizen-subject is free to depart is a potent objective factor; and
10) whether the citizen has been informed that he is not required to consent to search.

In concluding that under the circumstances a reasonable person would not feel free to leave; the court observed: 1) there was an initial traffic stop; 2) the defendant was ordered out of the vehicle but not for officer safety; 3) the police confronted the defendant about his past Act 64 arrest; 4) the rural nature of the road and the time of night; 5) the police were armed and in uniform; 6) the traffic stop and the encounter were only a "few steps away" making the stop and the encounter "seamless"; 7) the express admonition that the defendant is free to depart in and of itself is not sufficient; and 8) the defendant was not informed he is not required to consent to search.

The Court also relied heavily on the defendant's testimony that he felt that he was not free to leave. The Court concluded that this was in investigative detention; it needed to be supported by reasonable suspicion. Thus, the Court held that the consent give by the defendant was not voluntary. The lesson we can take from this case is this: if you are going to conduct these types of consent searches it is advised that you articulate and document the factors listed and be as specific as possible, using non-conclusionary language.

NOTES

# PLAIN VIEW

Show Slide 28

Commonwealth v. Newton, 943 A2d 278 (Pa. Super. 2008)

FACTS: Newton was suspected of dealing drugs out of his hotel room. During their investigation, officers came into contact with a woman exiting Newton's hotel room. Upon questioning, the woman reported that she had just purchased drugs from Newton in the hotel room. The police then proceeded to Newton's hotel room and conducted what they characterized as a "knock and talk", a mere encounter that Newton could have refused. The officers knocked on the door and then began to question him.

According to the testimony, the police did not step into Newton's room; rather, they asked Newton to step into the hallway. During that exchange, one of the officers observed a cylindrical object on a tabletop inside the door that appeared burned at the bottom and had a white substance caked on the side. This officer recognized this item as a measuring cup used to heat cocaine. Newton was arrested and the police then entered the room and seized the cup.

During a suppression hearing, the trial court denied Newton's suppression motion determining that the police officers possessed probable cause to seize the item pursuant to the plain view doctrine. On appeal, the Superior Court of Pennsylvania reversed this decision.

ISSUE: Whether the police were authorized to enter Newton's hotel room and seize the drug paraphernalia pursuant to the "plain view" doctrine?

RULING: The "plain view" doctrine by itself is not an exception to the warrant requirement. It merely excuses the requirement of an additional warrant where circumstances demonstrate that a warrant has already been obtained or a valid exception in the form of exigent circumstances or consent. The "plain view" doctrine would apply to the following two possible scenarios:

**One (after intrusion)**
The first scenario arises when the officers' view of contraband or some other illegal object occurs after they have first entered a constitutionally protected space and the intrusion was justified by consent, hot pursuit or a warrant. Because probable cause has been satisfied, officers on the scene may seize the item they observed without further recourse to the warrant process.

**Two (pre-intrusion)**
The second scenario arises when the officers' view occurs *before* they have physically entered the constitutionally protected area. In situations where the police officers' view precedes an intrusion into a constitutionally protected area, the officer must be able to rely on exigent circumstances or he/she must obtain a warrant before seizing the evidence.

Since the record failed to indicate the existence of any exigent circumstances or Newton's consent to enter the hotel room, the police officers' entry into the hotel room without a warrant was illegal.

# Exigent Circumstances

Show Slide 29

Commonwealth v. Dean, 940 A.2d 514 (Pa. Super. 1/4/08)

FACTS: Narcotics agents from the Attorney General's Office arrested Dean's cousin, Conklin, in Room 309 of the Country Inn and Suites in Franklin Township, Carbon County, PA. During the arrest, Conklin told the narcotics agents that Dean was in Room 211 of the same hotel with marijuana and methamphetamine. Agents confirmed with the hotel manager that Dean had been a registered guest at the hotel for some time. The agents, along with the hotel manager, went to Room 211 and knocked on the door. While standing outside of the hotel room, the manager and the agents could smell burnt marijuana coming from inside of the room. There was, however, no answer to the numerous knocks. The agents, therefore, had the manager use her key to open the door to the hotel room. Upon entry, the agents observed a marijuana joint, loose marijuana and crystal methamphetamine in plain view. Pursuant to the search, narcotic agents discovered 40.86 grams of crystal methamphetamine, 3 marijuana joints and three thousand two hundred twenty dollars ($3,220.00). Following a suppression hearing, the trial court suppressed all of the evidence obtained during the search of Dean's hotel room, in addition to an inculpatory statement that Dean made during the search, stating that the search was based on invalid consent.

ISSUE: Whether the trial court erred in suppressing evidence obtained from the search of Dean's hotel room immediately following a warrantless entry by agents from the Attorney General's Office?

RULING: Warrantless searches and seizures inside a home (hotel room) are presumptively unreasonable unless the occupant consents or probable cause and exigent circumstances exist to justify intrusion.

The following factors need to be taken into account when assessing the presence of exigent circumstances:

1) the gravity of the offense
2) whether the suspect is reasonably believed to be armed
3) whether there is a clear showing of probable cause
4) whether there is a strong reason to believe that the suspect is within the premises being entered
5) whether there is a likelihood that the suspect will escape if not swiftly apprehended
6) whether the entry is peaceable
7) the timing of the entry
8) whether there is hot pursuit of a fleeing felon
9) whether there is a likelihood that evidence will be destroyed if police take the time to obtain a warrant; and
10) whether there is a danger to police or other persons inside or outside of the dwelling to require immediate and swift action

Applying the factors listed above, our Superior Court held that the entry of the agents into the Dean's hotel room was not supported by an exigency justifying

**Instructor Note:**
See hyperlink to the 10 factors.

1. gravity of the offense: 2. armed: 3. probable cause: 4. suspect: 5. likelihood:
6. peaceable: 7. timing: 8. hot pursuit: 9. likelihood: 10. immediate and swift action

the warrantless intrusion. The Court determined that the only exigency in this case was created by the actions of the agents. The Court further opined that the plain view doctrine does not apply in this case since the agents were not entitled to be in the position that they were when they observed the narcotics.

## FRISK OF VEHICLE – MIRANDA WARNINGS

Show Slide 30

Commonwealth v. Murray, 936 A.2d 76 (Pa. Super. 10/12/07)

FACTS: While on patrol at night in "well-known" narcotics area, Philadelphia police officers stopped a car for a Motor Vehicle Code violation. Upon approaching the car, one officer observed "a lot of movement in the vehicle" but due to the tinted windows, he was unable to actually see what Murray was doing. Due to the excessive movement in the vehicle, the officer pulled Murray out of the vehicle and frisked him to make sure he had no weapon. Finding no weapon, but still concerned for his safety and that of his partner, the officer then entered the vehicle and checked the immediate area where Murray was sitting, pulled the top of the arm rest up, and found a loaded .40 caliber Glock. Immediately upon finding the weapon, the officer asked the defendant why he had the gun and Murray responded, "you know how it is." Murray was later arrested and charged with weapons related offenses.

ISSUE #1: Did the circumstances of the traffic stop provide the officer with a reasonable belief that the defendant was dangerous so as to justify searching for weapons in the passenger compartment of the car?

RULING: The Superior Court held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible **if** the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

In this case the court ruled that the officer articulated sufficient facts to lead him to properly conclude that Murray could have been armed and dangerous, thus justifying a limited search for weapons in the passenger compartment of the vehicle even after the frisk of Murray turned up no weapon. Specifically, the knowledge of the neighborhood being a well-known narcotics area, when coupled with the excessive movement inside the vehicle and hour of night, raised serious and obvious safety concerns that justified a limited search for weapons within the vehicle.

**Instructor Note:**
See hyperlink to the interest of OJ case.

**Instructor Note:**

On October 1, 2008, the Superior Court, in a case called *In the Interest of O. J.*, relied on *Commonwealth v. Murray*, to uphold the police conduct in the following situation:

The officers attempted to make a traffic stop of defendant's vehicle which was driving at 40 miles per hour in a residential neighborhood with a speed limit of 25 miles per hour. The defendant ignored the siren and continued to drive for several blocks before stopping. After defendant's vehicle was stopped, the officers

observed defendant engaging in "a lot of movement of the arms and the hands in the center area of the vehicle which would have been the console." Defendant and his passenger were removed from the vehicle and placed in the patrol car.

The Superior Court ruled that it was permissible for the officers to have conducted a protective weapons search of the console, which was partially opened, the area of the vehicle where they had observed the hand movements by defendant. The officers had completely opened the console and discovered cocaine. The search was permitted because defendant's conduct had given the officers reasonable grounds to believe that a weapon might have been hidden in the console. It was important that the police search was specifically confined to the area of the vehicle where the hand movements had occurred.

Even though the defendant and his passenger were secured in the patrol car when the search occurred, the occupants were not going to be taken into custody, but were going to be permitted to return to the vehicle. Any weapon might have been accessed at that point.

ISSUE #2: Did the officer need to advise Murray of his *Miranda* rights prior to questioning him?

RULING: As the officer was conducting a limited search for weapons- a *Terry* search – Murray was the subject of an investigatory detention when the officer asked him the why he had the handgun. The dictates of *Miranda* do not attach during an investigatory detention.

NOTES

# PROBABLE CAUSE TO ARREST

Commonwealth v. Dunlap, 941 A.2d 671 (12/28/07)

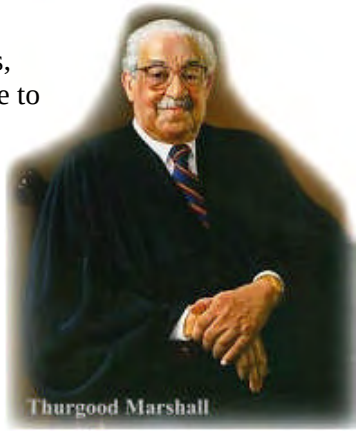
Show Slide 31

FACTS: An officer of the Philadelphia Police Department and his partner were conducting plainclothes surveillance at 2700 North Warnock Street in North Philadelphia. The officer watched as Nathan Dunlap approached another individual. After approaching, Dunlap engaged in a brief conversation with the man, handed him money, and was, in return, handed "small objects." After Dunlap walked away, Officer Devlin broadcasted Dunlap's description over police radio. Dunlap was apprehended a short distance away and a search of his person revealed three packets of crack-cocaine.

The officer testified that he had been a police officer for almost five years and a member of the drug strike force for nine months. During this time, he testified that he had conducted "about fifteen to twenty" narcotics arrests in the general geographic area. According to him, the area residential neighborhood that suffers from a high rate of nefarious activity, including drug crimes. Based on his experience and his characterization of the neighborhood, the officer believed that the transaction he witnessed involved illegal drugs.

ISSUE: Did the officer possess the sufficient probable cause to arrest Dunlap?

RULING: The court reviews probable cause pursuant to the totality of the circumstances test. In applying this test to warrantless arrests, probable cause "is to be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his training and experience." While police training and experience in and of itself does not establish probable cause, it should be delineated as the Courts will use it as an aid in assessing probable cause.




The Supreme Court recognized that many officers, particularly those with specialized training, are able to recognize trends and methods in the commission of various crimes. For instance, an officer who has specialized in drug crimes may be more suspicious that a package contains illegal narcotics because of the form of packaging used to conceal those drugs. The Court, however, cannot simply conclude that probable cause existed based upon nothing more than the number of years an officer has spent on the force. Rather, the officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence.

By doing so, a court aware of, informed by, and viewing the evidence as the officer in question, aided in assessing his observations by his experience, may properly conclude that probable cause existed. This is true even where the court may have been unable to perceive the existence of probable cause had the court viewed the same evidence through the eyes of a reasonable citizen untrained in law enforcement.

**Instructor Note:**
Be advised that on October 14, 2008 a writ of certiorari was denied by the United States Supreme Court. The Supreme Court did not affirm the ruling of the Supreme Court of Pennsylvania in Dunlap; they merely declined to review that ruling. However, Chief Justice Roberts, with whom Justice Kennedy joined, dissented from the denial of certiorari. See hyperlink to the Chief Justice Robert's dissenting opinion.

Here, the officer observed a single, isolated transaction. The transaction occurred in what officer described as a high crime area - a factor, which in and of itself does not give rise to probable cause. Based on this limited information, the officer's actions were based only on mere suspicion, not probable cause. It is well-settled that mere suspicion alone will not support a finding of probable cause.

**Instructor Note:**

On October 13, 2005, narcotics agents were on patrol in a marked police vehicle near 22nd and Catherine Streets in Philadelphia. At approximately 8:15 p.m., while stopped at a traffic light, the officers observed defendant and an unidentified individual standing in the rain at the mouth of an alley approximately fifty feet away. After receiving money from the unidentified individual, defendant pulled a clear plastic bag from his waistband. The officers immediately approached defendant, who quickly shoved the clear plastic bag back in his pants and attempted to enter a nearby car, but was apprehended before he could drive away. They searched defendant and recovered a bag containing eight packets of cocaine and $82.

At trial, one of the agents testified that he had spent the majority of his nine years as a Philadelphia police officer as a narcotics agent, and that he was familiar with the area around 22nd and Catherine Streets. Between 1997 and 2000, he was assigned to the neighborhood's immediately adjacent district and has continually patrolled the area since 1997. Officer McCauley has conducted over 100 narcotics surveillances during his career and made numerous narcotics arrests in this vicinity. Previously, the local drug trade operated openly on the neighborhood's street corners, resulting in the categorization of the area as a locus of high crime and drug-trafficking. However, improvements to this area over the past six to seven years have caused drug transactions to move to more secluded locations. Currently, agents of the Narcotics Bureau, routinely patrol, conduct surveillances, and make drug arrests in this community.

In Commonwealth v. El, 933 A.2d 657 (Pa. Super. 8/31/07), the Superior Court held that the agents had probable cause to search the defendant. Although this case was decided by the Superior Court prior to the Supreme Court's decision in Dunlap, the Supreme Court, in a ruling made since the decision in Dunlap, allowed this decision to stand.

NOTES

**Instructor Note:**
See also:
Commonwealth v. El, 933 A.2d 657 (Pa. Super. 8/31/07).

# Distinguishing what could be a Legal Transaction from an Illegal Transaction

1. Do you have training in the packaging and distribution of illegal narcotics? What did that training involve?

2. What were you taught regarding the packaging of illegal narcotics? How does that compare to the packaging in this case?

3. What were you taught regarding the distribution of drugs on the street? (Be specific about hand to hand sales.)

4. Can you tell us specifically about your experience in terms of observing transactions like you observed in this case? (hand to hand for currency)

5. How many times have you seen such transactions?

6. How many times have you stopped people and found illegal narcotics?

7. What information did you have about illegal narcotics transactions in this specific area where you observed the defendant?

8. Did you have any previous observations in this area as to illegal narcotics transactions?

9. Did you have any information from informants, citizens, or other police officers concerning illegal narcotics sales in this area?

NOTES

**Instructor Note:** Hyperlink to more information. See questions 1-9 to help officers to develop the court record regarding their police experience articulating probable cause to stop and search the defendant.

## PROBABLE CAUSE FOR SEARCH WARRANT

Show Slide 32

Commonwealth v. Wallace, 953 A.2d 1259 (Pa. Super. 7/3/08)

FACTS: An affidavit of probable cause for a search warrant was presented to the issuing authority contained the following information provided by a police officer:

> On Wednesday, 09-07-05, the affiant received information from C/I#1 about the sales of cocaine from a black male who is known to the informant as "GREG" and operates a Gold colored Mercedes used to deliver narcotics. The informant stated that he/she can purchase 4 ounces of cocaine from "GREG" this date (09-08-05) between the hours of 7:00pm-10:00pm. The informant also supplied the cellular and home phone number of "GREG" which is (215) 514-7235 (cellular) and (215) 462-4450. This affiant debriefed this informant again on 09-08-05, at which time the location for the sale was determined to be at 635 Morris Street.
>
> Your affiant conducted an investigation of the residence of 635 Morris Street. Voter's registration identified Gregory Wallace (DOB 02281971) as a registered voter at the location. A Bureau of Motor Vehicles investigation showed Gregory Wallace having a valid PA DL# 28390984 at the location of 635 Morris Street. A Criminal History Check of Philadelphia Photo Number # 0978274 give [sic] the address of 635 Morris Street listing the phone number of (215) 462-4450 same home phone number given to police by C/I#1 on 9-07-05.
>
> C/I#1 has been used in the past (refer to DC# YYYYY) yielding approx. 60 grams of cocaine with a street value of 6,000.00 and drug paraphernalia. After interviewing the informant and conducting an investigation of the premises, your affiant is requesting an anticipatory search warrant for the location of 635 Morris St upon completion of a controlled purchase of cocaine by this confidential informant.

On September 7, 2005, the search warrant was signed by an issuing authority. On that same date, under the supervision of the officer, CI#1 used pre-recorded buy money and made a controlled purchase of cocaine and methamphetamine pills from the residence of 635 Morris Street. The police thereafter executed the search warrant and found the pre-recorded money,

**Instructor Note:**
The information provided in the Facts section is an exact quote from the court's opinion

ISSUE: Did the search warrant establish sufficient probable cause to believe that evidence of a crime would be seized from within the residence?

RULING: The above affidavit explains the manner in which the matter was brought to the attention of investigating authorities, the steps taken by the officer to corroborate and verify the information supplied by the informant, the timing of the investigation, and the exact nature of the triggering event, namely the controlled buy. Once the controlled buy was made, probable cause was established. Based on the totality of circumstances, the court found that the affidavit revealed a fair probability that the controlled buy would take place, and that controlled substances would be found at the location in question. Accordingly, finding that the search warrant possessed the requisite probable cause, the court held that the evidence seized from the residence pursuant to the search warrant was lawfully obtained.

# VIII. CONFESSIONS & STATEMENTS

## CONFESSIONS
## ASSERTION OF RIGHTS

United States v. Lafferty, 503 F.3d 293 (3rd Cir. 9/28/07)

Show Slide 33


Sandra Day O'Connor

Amy Lafferty and her boyfriend, David Mitchell, were suspects in the burglary of a firearms dealer. They were interrogated separately by ATF agents. After approximately twenty minutes of questioning, Lafferty said: "[I]f you're going to charge me, charge me. I'm not going to sit here for four to five hours like last time."

At that point, the interrogation ceased, and police officers put Lafferty in another interrogation room. Lafferty waited for more than two hours while the police interrogated Mitchell.

State troopers drove Lafferty and Mitchell to the courthouse for arraignment. As they drove into the courthouse's parking lot, Mitchell told the troopers that, if they took him and Lafferty back to the police station and let them talk privately, they would tell the police about the burglary. They returned to the police station. An agent then began the second interrogation of Lafferty and Mitchell about the burglary. *Miranda* warnings were provided.

During the course of the ensuing hour-long interrogation, Mitchell answered most of the questions. In doing so, he managed to incriminate both himself and Lafferty. Although Lafferty was silent for the most part, she did respond to questions directly addressed to her. She also occasionally explained and/or clarified answers that Mitchell gave, and indicated that she agreed with some of Mitchell's answers by nodding her head.

The court held that putting Lafferty together in the same interrogation room with Mitchell, after she had invoked her right to remain silent was inconsistent with the police obligation to honor her assertion of a right to remain silent. It did not matter that the joint interrogation was Mitchell's idea and not the agents' idea.

## NOTES

# VOLUNTARINESS

Commonwealth v. Thevenin, 948 A.2d 859 (Pa. Super. 5/8/08)

The officers obtained a search warrant for 2303 East Cambria Street, arrested Thevenin at a different location and transported him back to 2303 East Cambria Street where the warrant was being executed. Although he had been arrested, Thevenin had not been read the *Miranda* warnings. When at the house, the officers told him they had a search warrant and were going to start taking the property apart looking for narcotics until they found some. Rather than having his house torn apart, Thevenin told the officers how to find the drugs.

The Commonwealth conceded that Thevenin was in custody and was entitled to *Miranda* warnings. Since warnings were not read, Thevenin's statement, disclosing the location of the drugs, should have been suppressed. The next issue was whether the drugs found in the house should also have been suppressed.


The law is that physical evidence, obtained from a *Miranda* violation is not automatically suppressed. Suppression of physical evidence is required only if the defendant's statement was both obtained in violation of *Miranda* and was also coerced and involuntary.

The court ruled that the statement was not involuntary. There is a proper motive for asking if the suspect wish to cooperate-there is nothing wrong with giving a person the opportunity to avoid the unnecessary disturbance or destruction of property.

This cannot be the sole basis for determining whether the statement was coerced. Giving a property owner the opportunity to avoid a destructive search does not convey a threat. Rather, the police are stating a simple fact.

Pursuant to a valid search warrant, the police are authorized to thoroughly search a property, which may well entail ceilings, walls, floors and/or stairs. This is not a situation, for example, where the police are threatening a person with actions that they have no authority to undertake.

There are no suggestions of physical coercion or threats of violence to the person. There is no suggestion that the police will otherwise harass the suspect's family. Rather than a threat, this is a statement of fact regarding the limits of authority of the police and an opportunity to avoid the full exercise of that authority.

The court did not decide what the legal consequences would have been if the police had conducted a destructive search after promising not to do so.

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**Instructor Note:**
**Show Video segment** "MPOETC Legal Theater" which is a parody of the PBS Masterpiece Theatre program is being used to teach this case in a standardized presentation.

**Part 1 – 2:42 minutes**
**Part 2 – 1:24 minutes**
**Part 3 – 3:12 minutes**

**Class Discussion:**

ISSUE:
There was a *Miranda* violation. Did the police also coerce defendant's statement admitting that he knew the location of the drugs?

RULING:
No.

# IX. UNIFORM FIREARMS ACT UPDATE: "OPEN CARRY"

Show Slide 35

Question #1 - What is "open carry"?

Answer #1 - Open carry can be defined as carrying a legal firearm, loaded or unloaded, on your person unconcealed, with or without a valid and lawfully issued license to carry a firearm.

**Instructor Note:** There is a hyperlink to the District of Columbia et al. v. Heller, from Washington, D.C. in the event that you get questions from the class on this recent U.S. Supreme court case.

Question #2 - Is "open carry" legal in Pennsylvania?

Show Slide 36

**Answer #2 –** Yes, but with several exceptions: The Pennsylvania Uniform Firearms Act is silent on the specific issue of open carry. §6106 only prohibits carrying a firearm in a vehicle or concealed on or about one's person, except in the person's place of abode or fixed place of business, without a license and when no exemption applies.

**Instructor Note:** General firearms restrictions under §912 and §913 will be covered later in this lesson plan.

Carrying a firearm unconcealed on one's person does not violate §6106. However, a person who is engaging in "open carry" of a firearm violates §6106 when that person enters a vehicle with the gun in his possession and the person does not possess a valid and lawfully issued license to carry a firearm and is not exempt from licensing. Also, a firearm cannot be open carried in an area where firearm possession is generally restricted (i.e. courts, schools, state parks or where restricted federally).

**The exceptions to open carry are as follows:**

There is a restriction on open carry during a declared state of emergency. In this situation the person must be actively engaging in a defense of that person's life or property from peril or threat and possesses a valid and lawfully issued license to carry a firearm or is exempt from licensing. (§6107).

There is a restriction on open carry in a City of the First Class (Philadelphia). (§6108).

**Instructor Note:** Philadelphia is the only City of the First Class in Pennsylvania.

## PENNSYLVANIA CRIMES CODE - SELECTED SECTIONS

**§6106. Firearms not to be carried without a license.**

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm **concealed** on or about his person, **except** in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

(2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm **concealed** on or about his person, **except** in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

**LICENSING EXEMPTIONS UNDER §6106**

(1) Constables, sheriffs, prison or jail wardens, or their deputies, policemen of this Commonwealth or its political subdivisions, or other law-enforcement officers.

(2) Members of the army, navy, marine corps, air force or coast guard of the United States or of the National Guard or organized reserves when on duty.

(3) The regularly enrolled members of any organization duly organized to purchase or receive such firearms from the United States or from this Commonwealth.

**(4) Any persons engaged in target shooting with a firearm, if such persons are at or are going to or from their places of assembly or target practice and if, while going to or from their places of assembly or target practice, the firearm is not loaded.**

(5) Officers or employees of the United States duly authorized to carry a concealed firearm.

(6) Agents, messengers and other employees of common carriers, banks, or business firms, whose duties require them to protect moneys, valuables and other property in the discharge of such duties.

(7) Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person, having in his possession, using or carrying a firearm in the usual or ordinary course of such business.

(8) Any person while carrying a firearm which is not loaded and is in a secure wrapper from the place of purchase to his home or place of business, or to a place of repair, sale or appraisal or back to his home or place of business, or in moving from one place of abode or business to another or from his home to a vacation or recreational home or dwelling or back, or to recover stolen property under section 6111.1(b)(4) (relating to Pennsylvania State Police), or to a place of instruction intended to teach the safe handling, use or maintenance of firearms or back or to a location to which the person has been directed to relinquish firearms under 23 Pa.C.S. §6108 (relating to relief) or back upon return of the relinquished firearm or to a licensed dealer's place of business for relinquishment pursuant to 23 Pa.C.S § 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or back upon return of the relinquished firearm or to a location for safekeeping pursuant to 23 Pa.C.S. § 6108.3 (relating to relinquishment to third party for safekeeping) or back upon return of the relinquished firearm.

**Instructor Note**: Because of the specific language used in §6106, carrying a firearm concealed or in a vehicle requires a license or an exemption from licensing, except in a person's home or fixed place of business. In the absence of an express prohibition in §6106, the law presumes that unconcealed or open carry is lawful except to the degree regulated by §6107 and §6108.

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**Instructor Note:**

"LOADED." A firearm is loaded if the firing chamber, the nondetachable magazine or in the case of a revolver, any of the chambers of the cylinder contain ammunition capable of being fired. In the case of a firearm which utilizes a detachable magazine, the term shall mean a magazine suitable for use in said firearm which magazine contains such ammunition and has been inserted in the firearm or is in the same container or, where the container has multiple compartments, the same compartment thereof as the firearm.

(9) Persons licensed to hunt, take furbearers or fish in this Commonwealth, if such persons are actually hunting, taking furbearers or fishing or are going to the places where they desire to hunt, take furbearers or fish or returning from such places.

(10) Persons training dogs, if such persons are actually training dogs during the regular training season.

(11) Any person while carrying a firearm in any vehicle which, person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

(12) A person who has a lawfully issued license to carry a firearm pursuant to section 6109 (relating to licenses) and that said license expired within six months prior to the date of arrest and that the individual is otherwise eligible for renewal of the license.

(13) Any person who is otherwise eligible to possess a firearm under this chapter and who is operating a motor vehicle which is registered in the person's name or the name of a spouse or parent and which contains a firearm for which a valid license has been issued pursuant to section 6109 to the spouse or parent owning the firearm.

(14) A person lawfully engaged in the interstate transportation of a firearm as defined under 18 U.S.C § 921(a)(3) (relating to definitions) in compliance with 18 U.S.C. § 926A (relating to interstate transportation of firearms).

(15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:

(i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.

(ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

**§6108. Carrying firearms on public streets or public property in Philadelphia.**

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

(1) such person is licensed to carry a firearm; or

(2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

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**Question #3-** What can police legally do when they observe a person engaging in open carry?

**Answer #3-** In most cases, the police cannot engage the person in anything other than a mere encounter. Unless the person engaged in lawful open carry is in violation of a specific State or Federal firearm prohibition or is carrying in a restricted area (For example: prohibitions contained in §6105, possession by a minor §6110.1, possession on school property §912, possession in a court facility §913, carrying in Philadelphia §6108, carrying in a vehicle, carrying during a declared state of emergency §6107), the officer would not have specific reasonable suspicion of criminal activity merely based on observing a person engaged in open carry. Therefore, a stop and frisk or any other seizure would not be legally justified.

**§ 912. Possession of weapon on school property.**

**Instructor Note:**
See hyperlinks to:
§ 912 and § 913.

(a) DEFINITION.-Notwithstanding the definition of "weapon" in section 907 (relating to possessing instruments of crime), "weapon" for purposes of this section shall include but not be limited to any knife, cutting instrument, cutting tool, nunchuck stick, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury.

**(b) OFFENSE DEFINED.-A person commits a misdemeanor of the first degree if he possesses a weapon in the buildings of, on the grounds of, or in any conveyance providing transportation to or from any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school.**

(c) DEFENSE.-It shall be a defense that the weapon is possessed and used in conjunction with a lawful supervised school activity or course or is possessed for other lawful purpose.

**§ 913. Possession of firearm or other dangerous weapon in court facility.**

(a) OFFENSE DEFINED.-A person commits an offense if he: (1) knowingly possesses a firearm or other dangerous weapon in a court facility or knowingly causes a firearm or other dangerous weapon to be present in a court facility; or

(2) knowingly possesses a firearm or other dangerous weapon in a court facility with the intent that the firearm or other dangerous weapon be used in the commission of a crime or knowingly causes a firearm or other dangerous weapon to be present in a court facility with the intent that the firearm or other dangerous weapon be used in the commission of a crime.

(b) GRADING.-

(1) Except as otherwise provided in paragraph (3), an offense under subsection (a) (1) is a misdemeanor of the third degree.

(2) An offense under subsection (a)(2) is a misdemeanor of the first degree.
(3) An offense under subsection (a)(1) is a summary offense if the person was carrying a firearm under section 6106(b) (relating to firearms not to be carried without a license) or 6109 (relating to licenses) and failed to check the firearm tinder subsection (e) prior to entering the court facility.

(c) EXCEPTIONS. - Subsection (a) shall not apply to:

(1) The lawful performance of official duties by an officer, agent or employee of the United States, the Commonwealth or a political subdivision who is authorized by law to engage in or supervise the prevention, detection, investigation or prosecution of any violation of law.

(2) The lawful performance of official duties by a court official.

(3) The carrying of rifles and shotguns by instructors and participants in a course of instruction provided by the Pennsylvania Game Commission under 34 Pa.C.S. 2704 (relating to eligibility for license).

(4) Associations of veteran soldiers and their auxiliaries or members of organized armed forces of the United States or the Commonwealth,including reserve components, when engaged in the performance of ceremonial duties with county approval.

(5) The carrying of a dangerous weapon or firearm unloaded and in a secure wrapper by an attorney who seeks to employ the dangerous weapon or firearm as an exhibit or as a demonstration and who possesses written authorization from the court to bring the dangerous weapon or firearm into the court facility.

(d) POSTING OF NOTICE.-Notice of the provisions of subsections (a) and (e) shall be posted conspicuously at each public entrance to each courthouse or other building containing a court facility and each court facility, and no person shall be convicted of an offense under subsection (a)(1) with respect to a court facility if the notice was not so posted at each public entrance to the courthouse or other building containing a court facility and at the court facility unless the person had actual notice of the provisions of subsection (a).

**(e) FACILITIES FOR CHECKING FIREARMS OR OTHER DANGEROUS WEAPONS. - Each county shall make available at or within the building containing a court facility by July 1,2002, lockers or similar facilities at no charge or cost for the temporary checking of firearms by persons carrying firearms under section 6106(b) or 6109 or for the checking of other dangerous weapons that are not otherwise prohibited by law. Any individual checking a firearm, dangerous weapon or an item deemed to be a dangerous weapon at a court facility must be issued a receipt. Notice of the location of the facility shall be posted as required under subsection (d).**

(f) DEFINITIONS.-As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"COURT FACILITY." The courtroom of a court of record; a courtroom of a community court; the courtroom of a magisterial district judge; a courtroom of the Philadelphia Municipal Court; a courtroom of the Pittsburgh Magistrates Court; a courtroom of the Traffic Court of Philadelphia; judge's chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices of court clerks, the district attorney, the sheriff and probation and parole officers; and any adjoining corridors.

"DANGEROUS WEAPON." A bomb, grenade, blackjack, sandbag, metal knuckles, dagger, knife (the blade of which is exposed in an automatic way by switch, push-button, spring mechanism or otherwise) or other implement for the infliction of serious bodily injury which serves no common lawful purpose.

"FIREARM." Any weapon, including a starter gun, which will or is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas. The term does not include any device designed or used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

Act 1995-66 (S.B. 282), § 2, approved Nov. 22, 1995; Act 1995 Special Session-17 (H.B. 110), § 1, approved June 13, 1995, eff. in 120 days; Act 1999-59 (S.B. 167), § 1, approved Dec. 15, 1999, eff. in 60 days; Act 2004-207 (S.B. 904), § 2, approved Nov. 30, 2004, eff. in 60 days.

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If an officer can develop reasonable suspicion that criminal activity is afoot, by a person engaged in open carry, then the temporary seizure of the person and confiscation of the firearm would be justified, because the person is known to be armed and dangerous based on the suspected criminal activity and visible possession of a firearm. A further frisk would also be warranted to ensure the person was not in possession of any other weapons. If the officer's investigatory detention leads to probable cause, then the person may be placed under arrest for the crime that has been committed. However, if the officer's suspicion is allayed then any seized firearms must be returned to the citizen and the citizen must be released from the investigatory detention. A firearm may be seized from a person who the officer knows to be prohibited from possessing a firearm under State or Federal law.

Officers should be aware that citizens may become alarmed or concerned when they witness persons engaged in open carry. This may be due in part to individual sensibilities regarding firearms and the fact that persons engaged in open carry are infrequently encountered in Pennsylvania. However, a citizen's alarm or concern does not alone negatively impact the rights of a person engaging in the lawful open carrying of a firearm. Officers receiving citizen reports of a "man with a gun" would be prudent to respond to determine the nature of the report. However, the rights of any person engaged in the lawful open carrying of a firearm must be carefully considered when interacting with such person. Persons engaged in the lawful open carrying of a firearm are not subject to seizure of their person or property based solely on the fact that they are engaging in open carry, nor may they

be required to produce identification or other documents. A person who is engaging in open carry in Philadelphia or in an area of declared emergency may be required to produce a valid and lawfully issued license to carry a firearm or establish an exemption. Of course, a person engaged in the open carrying of a firearm may engage in violations of other laws or handle the firearm in an inappropriate manner which could constitute offenses such as: disorderly conduct, reckless endangerment, simple assault by physical menace, etc. However, merely engaging in the open carrying of a firearm would not necessarily constitute such an offense.

An officer who observes a person who is engaged in the open carrying of a firearm in the vicinity of a public event attended by the President or other persons under the protection of the Secret Service must consider whether any violation of Pennsylvania law is occurring, If there is not a clear violation of the law, it would be prudent to bring the presence of this person to the attention of the Secret Service who is empowered under various federal statutes to regulate the possession of firearms in the vicinity of persons under Secret Service protection.

## X. Course Summary

### Course Summary and Testing

A. Conduct a Review Session
B. Allow time for student questions
C. Administer test in accordance with MPOETC MIST Testing procedures.

*Testing shall be conducted outside the three instructional hours established for this course.*

**Instructor Note:** When conducting a review, instructors are expected to teach to the instructional objectives, conduct a brief review of the major topic areas and re-emphasize the main ideas of the course.

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Thank the course participants for attending and for their attention during this MPOETC program.