LEGAL UPDATE
FOR THE
INDIANA PATROL OFFICER

BY

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The materials, legal analyses, and comments made in this seminar are based upon general principles of Indiana and federal statutory and case law, and are solely those of the author. They are not intended to constitute legal advice nor apply to any specific fact situation. Moreover, many legal principles are subject to interpretation by judges. Officers should always obtain their prosecutor's opinion on each case.

INTRODUCTION TO COURSE:
PURPOSES AND OBJECTIVES

I. COURSE PURPOSE: To provide training, beyond law enforcement academy levels, for patrol officers in the State of Indiana on various legal topics that have undergone changes.

II. COURSE OBJECTIVES:

A. To provide reliable information about recent developments on topics important to patrol officers in Indiana;

B. To provide written materials that the patrol officer can review during and after the seminar;

C. To enhance the patrol officer's understanding and confidence when confronted with complicated legal issues; and

D. To aid in the capture of criminals in a legally acceptable manner, and ultimately to promote justice.

III. TECHNIQUES TO ENHANCE THE BENEFITS OF THIS SEMINAR:

A. Pay attention;

B. Ask questions;

C. Take notes during the seminar;

D. Review materials and notes in 24 hours; review again in 7 days; and review again in 30 days.

INDIANA CASE LAW UPDATE 2017

I. SUFFICIENT EVIDENCE FOR REFUSAL TO ID

A. Facts: Two years ago, Hendricks County Sheriff's Deputy Chandler stopped Weaver for an inoperative license plate light. Upon approach, Deputy Chandler requested drivers license and registration from Weaver, to which Weaver replied that he didn't know if he did or not. Weaver looked for his registration but could not produce it; he finally admitted to Deputy Chandler that he didn't have any form of identification with him.

Deputy Chandler then asked for Weaver's name, address and date of birth. Weaver led Deputy Chandler through a maze of deflection, misinformation, and refusal to respond. Ultimately, his response was that his address was "Indianapolis", and that he didn't have a particular name other than "Mr. Weaver." Deputy Chandler then asked what his mother calls him, and Weaver reluctantly said that his mother calls him "Corey". Weaver never provided his date of birth. After approximately 8 minutes of questioning, Deputy Chandler detained Weaver (handcuffs) until he could positively identify him. After another 8 minutes, Weaver finally provided his date of birth to Deputy Chandler.

Weaver's drivers license was suspended, so Deputy Chandler impounded the vehicle but allowed Weaver to leave the scene of his own accord. Weaver was charged with driving while suspended and also with failure to identify, under I.C. §34-28-5-3.5. Weaver represented himself at trial and was convicted of both charges by the trial court. He appealed the refusal to identify conviction. A divided panel of the Indiana Court of Appeals reversed, finding that there was insufficient evidence to support the refusal to identify conviction. The Court of Appeals reasoned that I.C. §34-28-5-3.5 does not have a time limitation, and that Weaver had ultimately complied (also finding that stating an address as only "Indianapolis" was also sufficient). Judge Altice dissented, stating that the intent of the Indiana Legislature was that detained persons must 'promptly' identify themselves in order to comply with the statute. The State appealed.

B. Result: The Indiana Supreme Court reversed the Court of Appeals and upheld the trial court's conviction.

C. Reason: The Indiana Supreme Court issued a 'per curiam' opinion, which means that it didn't engage in a lengthy legal discussion. In fact, the Supreme Court simply stated "[w]e agree with Judge Altice that the evidence was sufficient to support Weaver's conviction [for refusal to identify]…"

D. Practice Point: While reading between the lines of the Supreme Court's per curiam decision there are many messages in this case. For road officers, the takeaway points are that the refusal to identify statute requires 'prompt' information from subjects but also to expect that lawbreakers may be reluctant to provide identification information for fear of being arrested or ticketed. Where is the line? My opinion is that if a subject continues to refuse to provide identification information after the LEO explains the substance of the failure to identify statute, then the person is subject to arrest. Of course, each LEO must determine from the circumstances of each investigatory stop when the refusal to identify line has been crossed.

E. Citation: *Weaver v. State*, 56 N.E.3d 25 (Ind. 2016).

II. DISORDERLY CONDUCT

A. Facts: Day and his wife were experiencing marital discord. Their arguments were verbal only; no physical violence had occurred. Their most recent disagreement centered around the sale of the marital residence, with Day wanting to list the property with a realtor and the wife wanting to get legal advice before doing so.

On the fateful day, the wife failed to sign a listing contract at the realtor's office. Later she received a phone call from day, who simply said "You fucking bitch! I ought to kill you!" The wife then went to bed, leaving the parties' two children to watch television. When Day arrived he began screaming "You fucking bitch! You will sign these papers for the house!" At some point, Day spat in the wife's face; she called 911.

Upon arrival, LEOs could hear Day screaming at the wife and observed (through a glass door) that Day had cornered the wife in the kitchen and had his finger in her face. Day was charged with disorderly conduct under I.C. §35-45-1-3 for fighting and/or tumultuous conduct. At trial, Day admitted that he called the wife a "fucking bitch", but denied all other allegations and denied that he spat in her face. The trial court found him guilty of disorderly conduct and he appealed, arguing that no one in the public was disturbed and that there was no physical altercatrion, therefore he couldn't be convicted of disorderly conduct. The Court of Appeals upheld the conviction, and he requested transfer to the Indiana Supreme Court.

B. Result: The Indiana Supreme Court upheld the conviction.

C. Reason: I.C. §35-43-1-3(a)(1) states that a person who recklessly, knowingly, or intentionally engages in fighting or tumultuous conduct commits disorderly conduct,

a class B misdemeanor. Indiana's disorderly conduct statute is fashioned after the Model Penal Code. Disorderly conduct under the MPC does include a provision that the public peace be disturbed. Therefore, because the Indiana legislature didn't include the public disturbance language, the Court concluded that the legislature's intent was that the public need not be disturbed to commit the crime.

However, nowhere in the criminal code is the term "fighting" defined. Resorting to dictionaries and various other court opinions, both Indiana and other States, the term "fighting" has two interpretations, one limiting it only to physical confrontations and the other expanding the definition to include verbal disagreements. Because the definition of 'tumultuous conduct', as used in the disorderly conduct statute, requires physical confrontation, the Indiana Legislature must have intended that the term 'fighting' also include physical contact. In addition, Indiana's rules of statutory interpretation require that ambiguities in criminal statute be resolved in favor of the criminal; therefore, the term 'fighting' must include a physical component in order to resolve the ambiguity. Thus, fighting cannot be verbal and must include physical contact.

In this case, Day's act of spitting in the wife's face was sufficient physical contact to support the conviction.

D. Learning point: disorderly conduct now requires physical contact of some degree, and verbal arguments will not suffice. Further, the crime does not require that any member of the public be disturbed by the criminal's actions.

E. Citation: *Day v. State*, 57 N.E.3d 809 (Ind. 2016).

III. TRESPASS – CONTRACTUAL INTEREST IN PROPERTY

A. Facts: Francois (male) and Apollos (female) entered into a verbal agreement whereby Apollos agreed to rent a room in Francois' house. Apollos moved all of her belongings into the house, was given a key to the house, and received mail at the house. Not long thereafter, Francois and Apollos entered into a sexual relationship. Then Apollos' car was stolen and she lost her job. Unable to pay any rent to Francois, they modified their agreement such that Apollos would provide child care in lieu of monetary payment of rent.

Approximately three weeks later, Francois and Apollos engaged in a verbal argument, ultimately resulting in Francois ordering Apollos to leave the residence. Apollos refused. LEOs were called and, upon arrival, requested to view documents

that would verify Apollos' contractual interest in the premises. Apollos explained that the agreement was verbal and that no written documents existed. She refused the LEO's offer to transport her to a homeless shelter, and was then arrested for trespass, a class A misdemeanor. She was convicted by a jury and sentenced by the court. She appealed.

B. Result: The Court of Appeals reversed the conviction.

C. Reason: A 'contractual interest' in property is the right to be present on the property owned by another person which arises from an agreement between the parties. *Semenick v. State*, 977 N.E.2d 7 (Ind.App. 2012). Indiana law observes both written and verbal rental agreements and leases of property. *Barber v. Echo Lake Mobile Home Community*, 759 N.E.2d 253 (Ind.App. 2001).

Even though the terms of the verbal rental agreement were sketchy, and the fact that Apollos provided services rather than money in exchange for residing at the residence, it was still a valid and binding agreement that gave her a contractual interest in the property. Therefore she could not be convicted of trespass.

D. Learning point: LEOs responding to a complaint of an unwanted person who claims to live at the residence must engage in a thorough investigation. As indicated by this case, not only may a binding agreement be made verbally, the agreement need not be extensive or detailed. It is sufficient if there is ***ANY*** indication that the defendant has a right to be on the property. Common indicators are receiving mail at the residence, utility bills in the defendant's name, the presence of items normally kept at a person's residence (e.g., toiletries, large quantities of clothing, mementos and keepsakes, etc.).

E. Citation: *Apollos v. State*, 59 N.E.3d 266 (Ind.App. 2016).

IV. OPERATION OF A VEHICLE FOR DUI AND RECKLESS HOMICIDE

A. Facts: Gutenstein was driving eastbound on I-74, weaving in and out of lanes, and driving at approximately 25 m.p.h. A semi driver following engaged his hazard lights and, when Gutenstein came to a complete stop in the right lane of the highway, also stopped his semi. Gutenstein got out of his vehicle and walked to the berm/ditch area; the semi driver followed Gutenstein on foot to investigate and get Gutenstein to move his car. Another semi-truck crashed into the rear of the first semi-trailer, causing the death of the driver of the second semi. Gutenstein later provided a blood test which indicated an ACE of .13%.

Gutenstein was charged with operating while intoxicated causing death and reckless homicide. He filed a motion to dismiss and a motion to suppress, arguing that he wasn't operating the vehicle at the time of the crash and therefore couldn't be charged with those crimes. The trial court denied the motions and he appealed.

B. Result: the Court of Appeals upheld the denial of the motions.

C. Reason: This is a case of first impression in Indiana, meaning that this precise issue has never come up before. The Court initially discussed the lack of evidence regarding the lapse of time between the time Gutenstein stopped his vehicle in the travelled portion of the roadway and the time of the fatal crash.

However, the Court determined that the time issue was not determinative of the question of whether or not Gutenstein operated the vehicle even though he was outside the vehicle when the crash occurred. It held that once a person has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate the vehicle until it is returned to a position posing no such risk, and that this rule applies even if the person is no longer in the vehicle.

D. Learning point: For purposes of criminal law and procedure, 'operation' of a vehicle continues until the driver has moved the vehicle to a location that removes any risk of injury to the general public.

E. Citation: *Gutenstein v. State*, 59 N.E.3d 984 (Ind.App. 2016).

V. "COLLECTIVE KNOWLEDGE RULE" FOR REASONABLE SUSPICION

A. Facts: Indy Metro officers were dispatched to a report of armed suspicious persons in a residential area. Officers interviewed an agitated female who was a victim of physical violence associated with the disturbance. The female victim exhibited bleeding cuts, a broken nose, portions of hair torn from her scalp, and footprints on her shirt. While the victim was conversing with the officers she observed the perp, later identified as Dunson, pass by on a motor driven cycle and pointed him out to the officers.

The officers radioed to other officers Dunson's physical description, a description of the motor driven cycle, and stated that the victim was "bleeding from the face" and that Dunson "may be involved". Dunson was stopped and detained by the other officers. One of the officers noticed an odd bulge in Dunson's waistband and, upon a pat-down, found and seized a Ruger 9mm semi-automatic pistol. Surprisingly,

Dunson didn't have a permit to carry a handgun and, even more surprisingly, had a prior conviction for carrying a handgun without a license.

Dunson was charged with, and convicted of, a level 5 felony for carrying a handgun without a license, and was sentenced to the Indiana DOC. He appealed, arguing that the LEOs who patted him down had no reasonable suspicion for an investigatory stop.

B. Result: the Court of Appeals upheld the conviction.

C. Reason: The Court first acknowledged that the 'collective knowledge rule' holds that information known by one LEO "may be relied upon by other law enforcement officers called upon to assist in the investigation of a suspect."

In this case, Dunson challenged the LEO's statement over the radio that the victim was injured and that "Dunson may be involved" as being too vague and lacking in articulable suspicion to establish reasonable suspicion to stop him.

Normally, the 'collective knowledge rule' requires that the information conveyed must include specific and articulable facts known by the originating LEO that would establish reasonable suspicion to conduct an investigatory stop. *Jamerson v. State*, 870 N.E.2d 1051 (Ind.App. 2007). However, today's LEOs operate in a technological society where information is conveyed by the simple keying of a microphone (*Griffith v. State*, 788 N.E.2d 835 (Ind. 2003)) and, sometimes, the totality of the circumstances demand immediate action to detain lawbreakers.

The Court held that, for purposes of the 'collective knowledge rule', the specific and articulable facts necessary to justify an investigatory stop may be supplied at a later time, and need not be conveyed over the radio in order to justify a stop.

D. Learning point: Under the 'collective knowledge rule', LEOs may rely on a sister/brother LEO's statement to stop a suspect, and the reasonable suspicion for the stop may be supplied later. This is a variation of the 'good faith' rule.

E. Citation: *Dunson v. State*, 64 N.E.3d 1051 (Ind.App. 2016).

VI. COMMUNITY CARETAKING FUNCTION: CASE #1

A. Facts: LEOs were dispatched to a local gas station to investigate a report of a woman "stuck under her vehicle in the parking lot." However, before LEOs arrived, the subject, later identified as Osborne, apparently freed herself and drove away. LEOs stopped the vehicle on the roadway although he observed no traffic

violations, but rather to check on Osborne's welfare and to determine if she needed medical assistance.

As the LEO conversed with Osborne, he noted indicators of intoxication. She failed FSFTs and PBT was 0.12. Certified breath test results were 0.10. Arrest followed.

Osborne moved to suppress the evidence arguing that the investigative stop violated her rights guaranteed by the 4th Amendment and Article 1, Section 11, of the Indiana Constitution. The trial court denied the motion on the theory that the LEO was justified under the community caretaking function. Osborne appealed. The Court of Appeals reversed the trial court and ordered suppression.

B. Result: The Indiana Supreme Court upheld the reversal by the Court of Appeals.

C. Reason: The Court eschewed the analysis of the Court of Appeals, that the issue was part of the community caretaking function, and instead analyzed the case under more general search and seizure precedent.

The Court identified the principle of *Michigan v. Fisher*, 558 U.S. 45 (2009), that exigent circumstances permitting entry into a residence without a warrant includes "an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger." *Id.*, at 49. Then the Court likened the present case (the call that a person was trapped under a vehicle) to other cases involving a call for a welfare check for persons in vehicles and noted that reasonable suspicion ends when the emergency situation no longer exists.

Because the LEO received a subsequent dispatch that Osborne had freed herself and was driving away, the LEO's stated purpose for the stop, that he wanted to see if Osborne required medical assistance, was unsupported. Further, the fact that she exhibited no erratic driving behavior also suggested that she wasn't in any medical distress. Thus, there was no objective justification for the investigatory stop.

D. Learning point: An investigatory stop is justified only if the reason for the original report is not dispelled either by subsequent reports or by LEOs observations.

E. Citation: *Osborne v. State*, 63 N.E.3d 329 (Ind. 2016).

VII. COMMUNITY CARETAKING FUNCTION: CASE #2

A. Facts: On December 29, 2014, at approximately 6:45 a.m., Indy Metro Officer Alyer was dispatched to investigate a suspicious vehicle. Upon arrival, Officer Alyer observed the reported vehicle parked on the street in front of a residence with the engine running. He observed the driver, later identified as Cruz-Salazar, either sleeping or passed out in the driver's seat. When his effort to rouse the driver

failed, and fearing a medical emergency for the driver, Officer Alyer opened the door and shook Cruz-Salazar.

After successfully awakening Cruz-Salazar, Officer Alyer noted classic intoxication indicators: watery, bloodshot eyes; slurred speech; unsteady balance; memory lapse regarding how Cruz-Salazar wound up at that location. PBT results were .184% ACE. Officer Alyer's attempts to contact friends/relatives of Cruz-Salazar to transport him failed. He then arrested Cruz-Salazar for public intoxication. In the search incident to the arrest, Officer Alyer found a baggie of cocaine in Cruz-Salazar's pocket. He was charged with public intoxication and possession of cocaine.

Cruz-Salazar filed a motion to suppress, arguing that Officer Alyer had no reasonable suspicion that he (Cruz-Salazar) had engaged in, was engaging in, or was about to engage in criminal activity, and therefore the search that resulting in finding the cocaine was a violation of the 4th Amendment and Article I, §11. The trial court denied the motion, found him guilty of possession of cocaine as a class A misdemeanor, and he appealed. The Court of Appeals affirmed the conviction.

B. Result: The Indiana Supreme Court affirmed the Court of Appeals.

C. Reason: This case was decided at the same time as the *Osborne* case, and the Supreme Court simply referred to its legal analysis there in reaching its conclusion.

The Court stated that Cruz-Salazar had **SOME** expectation of privacy while sleeping in his car in a public place, but Officer Alyer's concern for Cruz-Salazar's well-being supplied sufficient justification for opening the car door to check on him under the *Michigan v. Fisher* medical distress/exigent circumstances exception to the warrant requirement.

D. Learning point: On the subject of the community caretaking function, compare the facts of *Osborne*: LEOs were dispatched to investigate a report of a woman trapped beneath her car at a gas station. Upon arrival, Osborne had apparently freed herself and drove away. LEOs stopped the vehicle on the roadway although they observed no traffic violations, but rather to check on Osborne's welfare and to determine if she needed medical assistance. The *Osborne* court held that, while checking on the welfare of persons is within the community caretaking function, the fact that Osborne was driving herself away meant that if she needed medical attention that she could get it for herself.

In the *Cruz-Salazar* case, Cruz-Salazar was still (apparently) suffering from the effects of a possible medical condition. So if a subject is able to care for

themselves, the need for LEOs to take care of them is removed; it is only when the subject may still suffer that action by LEOs is justified.

E. Citation: *Cruz-Salazar v. State*, 63 N.E.3d 1055 (Ind. 2016).

F. Note: See also *McNeal v. State*, 62 N.E.3d 1275 (Ind.App. 2016)[Following *Kramer* factors, Court of Appeals held that aiding someone in medical distress is a community caretaking function].

VIII. INVENTORY

A. Facts: Sams had finished his work shift remodeling homes and drove away in a pickup truck owned by a family member. Unfortunately, his drivers license had been suspended. Due to the late hour, Sams went through a fast food drive-through and was eating his meal at the time of the traffic stop.

LEOS Jones and Tate were patrolling and observed Sams' pickup's taillights weren't functioning. After stopping for the LEOs, Sams produced a registration and an Indiana ID card, but continued eating his hamburger during the stop. At this moment, the fast food bag was on the console between the two front seats. His criminal history indicated a prior DWS conviction, making this offense a misdemeanor.

The LEOs decided to summons Sams for the misdemeanor but to impound and inventory the truck. After receiving the paperwork, Sams walked to a nearby gas station to await a ride. In the meantime, another LEO, Lee, arrived to assist. Jones and Lee performed the inventory. The officers noticed that the fast food bag had been neatly folded several times and placed on the back passenger side floor. Jones told Lee to be certain to examine the bag "just to be sure nothing's in it." Lee found a hamburger box inside the bag, and inside the hamburger box was lettuce, ketchup, and 25 grams of methamphetamine.

The LEOs found Sams at the gas station and arrested him for the dope. They then returned and completed the inventory form for their department. The LEOs replaced the items where initially found to take photographs. Sams was convicted of class A misdemeanor DWS and level 4 possession of methamphetamine. He appealed, arguing that the methamphetamine was discovered as the result of an illegal search and seizure.

B. Result: The Indiana Court of Appeals reversed the conviction.

C. Reason: The Court reviewed several cases on inventory and grouped them into three broad categories: the 'no policy' inventory cases, the 'minor deviation' cases, and the 'major deviation' cases. The Court stated:

> "The State almost always prevails in the "minor deviation" cases because there is no basic inference of pretext. The State always loses the "no policy" cases because the search is totally, and therefore excessively, discretionary. The "major deviation" cases are difficult to generalize about, turning on whether the search nonetheless fulfilled its administrative purposes and on whether the State can dispel inferences of pretext."

The evils identified by the Court was unbridled discretion of LEOs and failure to follow departmental SOPs to the letter. In this case, because the SOP required that "all" items be listed on the inventory, the Court hammered the LEOs because they didn't list "all" personal property and "all" vehicle accessories. The LEOs listed only those items that they believed were "valuable", not all items regardless of value. Moreover, the Court criticized the SOP for failing to define what was 'valuable', which allowed the LEOs too much discretion. Further, because the inventory SOP stated that an inventory is triggered only by an arrest of the subject, yet they began this inventory BEFORE Sams was arrested, the LEOs violated the SOP.

The LEOs' stated procedure was to only inventory items that were 'valuable', or as one LEO put it, "stuff that you would be liable for." The Court believed that a used fast food bag would not be considered 'valuable' and therefore the LEOs should not have looked inside of it because it was the equivalent of trash. Finally, as to the opening of containers, the Court found it inconsistent that the LEOs opened a used fast food bag (a container) but didn't open the orange gasoline can with spout (a container). The Court determined that either no containers should be opened or all containers must be opened for inventory purposes.

As a result, the Court held that the inventory was a pretextual search and ordered the dope suppressed and the conviction reversed.

D. Learning points:

1. Departmental inventory SOPs **MUST** be in writing.

2. Departmental inventory SOPs must be specific enough to eliminate a LEO's unbridled discretion, at least specifying when a vehicle should be impounded, what areas to search, which items must be specifically described (definition of 'valuable'), whether closed/locked containers must be opened, and the specificity of description of items on the inventory.

3. LEOs must follow the inventory protocol without deviation.

4. Ensure that an inventory report form is completed appropriately and submitted.

5. Testify to all of the above in the suppression hearing and at trial.

E. Citation: Sams v. State, ___ N.E.3d ___ (Ind.App. February 21, 2017).

IX. USE OF FORCE: CIVIL LIABILITY

A. Facts: Evansville SWAT team was activated to address a barricaded, possible 10-96, subject. Three LEOs were positioned at the corner of the entrance: Knight held a ballistic shield; Montgomery positioned himself behind and to the right of Knight; and Taylor staged behind and to the left of Knight. Taylor was armed with his issued H&K .45 rifle and carried a 40mm with sponge rounds in a duffle bag.

Taylor began to unzip the duffle and retrieve the 40mm just as the subject came out of the door. Other LEOs began shouting "Drop the gun!" as Taylor swung back around and brought his H&K to bear. The subject was bladed with his right side ahead of his left and held an object near his thigh that appeared to several on scene as a two-tone silver over black pistol. Taylor pointed his rifle at the subject and ordered him to drop the gun. The subject gave no response and remained motionless. Taylor fired one shot to the subject's chest, a wound from which he died. The time lapse from the first order from LEOs to 'drop the gun' to the shot fired by Taylor was approximately 5-6 seconds. The object was, in reality, a home telephone handset.

The subject's widow, for herself and on behalf of their son, sued Taylor, the department, and others for excessive force, arguing, in essence, that the subject never made a threatening move toward the LEOs to place them in fear of death or serious bodily harm and, therefore, the use of deadly force violated the subject's 4th Amendment rights. The defendants moved for summary judgment.

B. Result: Summary judgment granted for Taylor by the U.S. District Court for the Southern District of Indiana.

C. Reason: The District Court first stated the obvious. Whether or not the subject actually held a gun is irrelevant; what is relevant to a claim of excessive force is whether or not the LEO's *belief* that he or another is in immediate danger of death or serious bodily harm.

In this case, the shouts of "drop the gun' by the other LEOs while Taylor was attempting to access his 40mm, coupled with his own observations of what he thought was a pistol, were sufficient on this point.

The District Court had little difficulty with the fact that the subject did not move to point the 'gun' at LEOs. The Court quoted *Henning v. O'Leary*, 477 F.3d 492, 496 (7th Cir. 2007): "[p]olice officers cannot be expected to wait until a resisting arrestee has a firm grip on a deadly weapon…before taking action to ensure their safety." In this case, the subject did not need to point the 'firearm' at anyone to justify the use of deadly force. The only effort that was needed to place the LEOs in the path of deadly force was for the subject to raise his hand with the 'firearm'. The Court also cited to cases that held courts must give 'considerable leeway' to LEOs' assessments of appropriate use of force in dangerous situations.

D. Learning points: LEOs don't need to take the first bullet to return fire; in fact, LEOs may employ force, including deadly force, when there is a reasonable belief that the subject presents a danger. "If an officer reasonably, but mistakenly, believed that a subject was likely to fight back…the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S.194, 205 (2001).

E. Citation: *McKnight v. Taylor*, ___ F.Supp.3d ___ (S.D.Ind. September 29, 2016).

X. USE OF FORCE: SUSPECT NON-COMPLIANCE

A. Facts: Brown was engaged in the renovation of his home and stored materials and supplies in a detached garage at the edge of his property. He had been the victim of burglaries/thefts in the past and was dissatisfied with local law enforcement's response and results. Across the alley from the garage was a residence that, unbeknownst to Brown, had been rented. Brown surveilled the female as she cleaned up trash in her back yard, and a verbal argument followed between the male and female renters and Brown regarding Brown's surveillance. During the course of the argument Brown put his hand in his pocket and stated that if the male came across the alley he would "blow your brains out." LEOs were called.

Brown answered his door when LEOs arrived. However, Brown kept his right hand behind the door jamb. When asked what was in his right hand, Brown responded "Nothing. It's lying on the counter right now and it's a .357." Despite loud verbal requests to show his hands, Brown insisted that his hands were "visible." The LEOs

believed that his failure to show his right hand constituted resisting law enforcement and, intending to arrest him on that charge, used a 'stun gun' on Brown. The 'stun gun' had no effect but Brown took a step back and tried to close the door. The LEO's forced their way in and observed a .357 revolver on the counter, within Brown's reach. During handcuffing, Brown punched one of the officers and pushed him into the wall. Ultimately, the LEOs succeeded in handcuffing Brown.

Brown was charged with battery on a public safety officer but was not charged with resisting law enforcement. He was convicted at a bench trial, but the judge entered a conviction for a class A misdemeanor and suspended all jail time. Brown appealed claiming self-defense/defense of property.

B. Result: Indiana Court of Appeals affirmed the conviction.

C. Reason: The Court resolved the case by addressing the matter of the LEOs' entry into Brown's home under Article I, §11, of the Indiana Constitution (the trial court found that their entry was unconstitutional). The Court stated that "…Hoosiers are concerned not only with personal privacy but also with safety, security, and protection from crime." [citing *Holder v. State*, 847 N.E.2d 930 (Ind. 2006). Logically, then, Article I, §11, does not prohibit ***all*** intrusions. The standard is reasonableness under the totality of the circumstances.

The Court found the officers' entry reasonable under the three *Litchfield* factors: 1) the degree of concern, suspicion, or knowledge that a criminal violation has occurred; 2) the degree of intrusion imposed by police on the person's ordinary activities; and 3) the extent of law enforcement needs. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). As to the first factor, the Court said that although a crime hadn't actually been committed, the *threat* by Brown to commit a crime was sufficient [although I believe that the crime threatened, that is to use deadly force, was a factor as well]. Regarding the second factor, the fact that Brown opened the door he "willingly surrendered his privacy to whoever stood outside." Coupled with the LEOs' carefully tailored responses to Brown's escalation, this factor was not heavily weighted in Brown's favor.

Finally, as to the third factor, the Court had powerful language supporting the LEOs' actions. It acknowledged prior case law that has held that officer safety is ***ALWAYS*** a 'legitimate concern'. *State v. Atkins*, 834 N.E.2d 1028, 1033 (Ind.App. 2005); *Woodson v. State*, 966 N.E.2d 780, 786 (Ind.App. 2012). The Court then stated:

> "It would be entirely unreasonable to require the Officers to turn their backs on a man whom they believed to be armed, who was totally noncompliant in response to their commands, and who had threatened just hours earlier to commit a horrific act of violence on two innocent neighbors."

Furthermore, the Court found that Brown's refusal to show his hands upon LEOs' requests, along with the proximity of the .357 revolver, was an 'emergency' situation for themselves and the neighbors that the LEOs were required to resolve. The Court added some pointed, pro-law enforcement statements:

> "Finally, a contrary holding would not serve our shared goal of community policing. *See R.H. v. State*, 916 N.E.2d 160, 268 (Ind. Ct. App. 2009) (Mathias, J., concurring) ("A healthy, civil society is most robust when it feels safe and when that feeling of safety is validated through interaction with vigilant and responsive law enforcement engaged in the important business of policing neighborhoods within a community."). To require the Officers to turn their backs on an armed and potentially unstable man was not safe for the Officers, would not promote a feeling of safety in Brown's small-town community, and would deprive innocents like Moore and Smith of the "vigilant and responsive law enforcement" which is a necessary condition of a healthy, civil society."

D. Learning points: First, citizens must obey the lawful commands of LEOs. Second, LEOs must see suspects hands for officer safety. Third, when suspects threaten others with deadly force, and has the means to carry out the threat, but refuses to cooperate and thereby creates an 'emergency' situation, LEOs must resolve it.

E. Citation: *Brown v. State*, 62 N.E.3d 1232 (Ind.App. 2016).

QUICKIES

NOTE: "Quickies" are case summaries that aren't fact sensitive, tend to present a 'bright line rule' usable by road officers, and can be expressed in a few sentences.

1. The crime of forgery does not require that the document or instrument used be inauthentic or bogus. Impersonating another person so as to use an authentic written instrument without authorization is sufficient. Thus, a person attempting to withdraw funds from an ATM using the victim's legitimate debit card without authority is forgery. *Anthony v. State*, 56 N.E.3d 670 (Ind.App. 2016)[Entering a PIN number is the same as signing another person's name for purposes of forgery].

2. When a drug dog alerts to a vehicle but no drugs on found after searching the vehicle, must have the dog sniff each occupant to engage in searching of the person

(due to higher expectation of privacy); probable cause for search must be particularized to the place or the person to be searched. *Thomas v. State*, 65 N.E.3d 1096 (Ind.App. 2016).

3. Photograph of signed copy of search warrant for blood draw, forwarded to arresting officer's cell phone, was sufficient even though hard copy wasn't given to defendant. *Taylor v. State*, ___ N.E.3d ___ (Ind.App. January17, 2017).

4. Juvenile adjudication of child molest for boy, age 9, of a girl, age 3, upheld. *C.S. v. State,* ___ N.E.3d ___ (Ind.App. February 24, 2017).

5. A detention at a sobriety checkpoint isn't sufficiently 'custodial' so as to trigger the need for *Miranda* warnings before questioning. *State v. Brown*, ___ N.E.3d ___ (Ind. March 2, 2017).