LEGAL EAGLE

A Newsletter for the Criminal Justice Community

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Knock and Announce

In this issue:

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Law enforcement officers executed a search pursuant on a private dwelling occupied by James Carter. The search resulted in the seizure of five pornographic photographs of a minor on Defendant's laptop. Carter challenged the validity of the search's execution, claiming that the officers had failed to properly knock and announce pursuant to F.S. 933.09.

The defendant, who was asleep until officers entered his home, testified during the hearing on the motion to suppress that he was a light sleeper, and would have woken had the officers properly knocked and announced their purpose and authority. He also testified that his dog, a German shepherd, would have barked had the officers properly complied with the knock-and-announce statute. An officer who had participated in the search warrant's execution testified that although she could not remember this specific search, it was the routine of those in the Police Department to knock and announce their presence prior to entering a home.

The trial court determined that Defendant had the burden of proving a violation of the knock-and-announce statute, that he had failed to meet that burden with his speculative testimony that although he was asleep, he *would* have woken had officers knocked. On appeal to the 1st D.C.A., the defendant's conviction was upheld.

Issue:

What obligations does the knock-and-announce rule place on law enforcement? Does the State or the defendant have the burden of proving the statute was or was not complied with?

Knock and Announce:

"The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes. One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. … The knock-and-announce rule gives individuals 'the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.' And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance…'The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.' In other words, it assures the opportunity to

collect oneself before answering the door."

"What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, *the exclusionary rule is inapplicable*." *Hudson v. Michigan*, (S.Ct.2006).

Section 901.19(1), F.S. provides: "If a peace officer fails to gain admittance after she or he has announced her or his *authority and purpose* in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be."

A separate statute, section 933.09, F.S., parallels this language for search warrants: "The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer's authority and purpose he or she is refused admittance to said house or access to anything therein."

In 1964 the Florida Supreme Court decided *Benefield v. State*, (Fla. 1964), in which the Court held that a violation of Florida's knock-and-announce statute tainted the ensuing arrest and required the suppression of the evidence obtained as a result of the arrest. In yet another example of bad facts making bad law, the *Benefield* Court noted that "the officers totally ignored every requirement of the law…They barged into petitioner's home without knocking or giving any notice whatever of their presence; they did not have a search warrant or warrant to arrest anyone; they ransacked petitioner's home without the least semblance of any showing of authority." Under those facts the Court enforced the exclusionary rule.

The Florida Supreme Court went on to explain, "section 901.19, Florida Statutes, ... appears to represent a codification of the English common law which recognized the fundamental sanctity of one's home yet nevertheless provides that an arresting office 'may break open doors, if the party refused upon demand to open them.' "

"This sentiment has molded our concept of the home as one's castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly."

The Florida Supreme Court concluded that the U.S. Supreme Court's holding in *Hudson* was based on the Fourth Amendment, while their ruling in *Benefield* was premised upon Florida statute. As a consequence *Hudson* was not binding on Florida. "As a matter of state law, a state may provide a remedy for violations of state knock-and-announce statutes, and nothing in *Hudson* prohibits it from doing so. *Benefield* was based on state law grounds and not the Fourth Amendment."

Court's Ruling:

"The issue of which party shoulders the burden of proving a violation of the knock-and-announce statute has not yet been explicitly addressed in Florida. We determine that the burden initially falls on the defendant to prove a prima facie case of officer noncompliance with the knock-and-announce requirements. After the defendant makes that prima facie case, the burden then shifts to the State to prove compliance."

"A majority of federal courts likewise have determined that the burden of proving a prima facie case of noncompliance falls to the defendant

challenging the knock and announce. We believe that this well-reasoned approach strikes an appropriate balance between the presumptive reasonableness of searches conducted pursuant to a warrant and the protections afforded by the knock-and-announce statute. We, therefore, agree with those state and federal courts which have already considered this issue and determine that the initial burden of proving a prima facie case of noncompliance falls to the defendant. It is only then that the State must present evidence of compliance with the statute or demonstrate circumstances that excuse noncompliance."

"In the current case, we find that Defendant failed to meet the burden of proving a prima facie case of officer noncompliance with the knock-and-announce statute. … [W]e find that any testimony of Defendant, who was asleep when the police would have knocked and announced, was speculative. His testimony that his dog *would have* barked upon hearing a knock at the door was likewise speculative, as Defendant was not awake to determine whether the dog barked or not. Therefore, we hold that Defendant failed to meet the burden of proving a prima facie case of officer noncompliance with the knock-and-announce statute. As such, the ruling of the trial court is affirmed."

Lessons Learned:

It is clear that the Florida Supreme Court has drawn a line in the sand when it comes to entry into a citizen's private dwelling. Failure on the part of a LEO to announce both his purpose and authority that support a lawful entry will result in the suppression of the fruits of that entry.

The Florida Supreme Court in *State v. Cable*, (Fla. 2010), explained an officer's rights and obligations as such: "When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door and announce his name and authority, sheriff, deputy sheriff, policeman or other legal authority and what his purpose is in being there. If he is admitted and has a warrant, he may proceed to serve it. He is not authorized to be there to make an arrest unless he has a warrant or is authorized to arrest for a felony without a warrant. If he is refused admission and is armed with a warrant or has authority to arrest for a felony without a warrant, he may then break open a door or window to gain admission to the building and make the arrest. If the building happens to be one's home, these requirements should be strictly observed."

Lastly, in preparing a search warrant, reference to firearms possibly on the premises will assist in explaining a short knock-and-announce time frame. For a good discussion of the often found connection between drug trafficking, guns, and violence see *United States v. Cruz*, 805 F.2d 1464, 1474 (11th Cir.1986) ("Guns are a tool of the drug trade), and *Harmelin v. Michigan*, 501 U.S. 957, (S.Ct.1991) ("Studies ... demonstrate a direct nexus between illegal drugs and crimes of violence,").

Carter v. State
1st D.C.A. (July 21, 2015)

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3. New AELE Monthly Law Journal article:

**** What is Police Use of Force? A Focus on DoJ Settlement Agreements**

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FLORIDA CASE LAW UPDATE 15-03

Case: **Thompson v. State, 40 FLW D1614b (Fla. 2nd DCA)**

Date: **July 15, 2015**

Subject: **Officers' entry into home was not unlawful when they reasonably construed "gestures" from an occupant as an invitation to enter. Additionally, Defendant's spontaneous statements regarding the presence of drugs in his room were not the result of illegal interrogation, and were properly included as part of the probable cause for a search warrant**

FACTS: As part of a burglary investigation, officers tracked a cell phone found at the scene to the address of Thompson's sister. The officers testified that upon arrival the sister invited them into the home; however, she testified that upon answering the door, the officers asked her if Thompson was there, and she responded "yes," and pointed to him sitting on the sofa. She stated that the officers then forced themselves by her, entered the home, and walked up to Thompson. Thompson's testimony was consistent with the description provided by his sister. The officers asked Thompson for permission to search his bedroom, but he refused, stating that "he did not want his bedroom searched because there were needles with methamphetamine in the bedroom." Based upon this and other statements, the officers obtained a search warrant, which led to the discovery of stolen items as well as illegal drugs in the residence. Thompson was charged with numerous drug and theft offenses. Thompson moved to suppress the search on the grounds that the officers had no legal authority to enter the premises, and failed to include that information in their warrant application. The trial court denied the suppression, and Thompson was convicted. This appeal ensued.

RULING: The Second District Court of Appeal agreed with the trial court. As to the entry into the residence, the appellate court found that the officers could have reasonably concluded that they had been invited in. With regard to Thompson's statements, the court found that they were made voluntarily and spontaneously, and were not the result of police interrogation. Conviction affirmed.

DISCUSSION: As we know, warrantless searches are generally prohibited; however, they may be validated when they fall into one of the established constitutional exceptions, such as consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Whether consent is freely and voluntarily given is a question of fact to be determined considering all of the facts and circumstances. "Police may accept an invitation to make a warrantless entry into premises only under circumstances that would cause a man of reasonable caution to believe that the person making the invitation is authorized to do so." *Illinois v. Rodriguez*, (497 U.S. 177). The court found that while there was conflicting evidence as to whether Thompson's sister had in fact invited the officers into the home, sufficient evidence existed to support a finding that the officers reasonably perceived her gesture as an invitation to enter. As to the suppression of Thompson's statements, the court found that they were volunteered by the defendant. "Incriminating statements are admissible where they are made voluntarily and spontaneously and are not the product of interrogation." *Hayward v. State*, 24 So.3d 17 (Fla. 2009). In this case, the officers asked Thompson for consent to search his room, and he responded with information regarding the presence of needles and drugs. As the court points out, he did not provide the information in response to a question about the contents of his room. Thompson was free to simply say "no" to the search request rather than volunteering information about illegal items or evidence therein.

COMMENTS: Note that if the officers had in fact asked Thompson what was in the room, they would have been required to perform a Miranda analysis and proceed as the facts and circumstances may have required.

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Recent Case Law

Mere Presence

A narcotics detective working undercover called a known drug line phone number to order heroin. The person who answered the phone told the detective to go to a specific area. The detective rode a bicycle to that location and saw a blue Buick pull up with two men inside. The driver motioned to him to come over. The detective handed the driver $200 and said he needed "twenty," meaning twenty ten-dollar bags of heroin. The driver made no effort to conceal his words from Charles Gary, the passenger, who was talking intermittently on a cell phone. The driver gave the detective two ten-dollar bags of heroin and motioned him to follow the car around the corner. The detective followed, but the Buick drove away. The detective was in contact with other officers conducting surveillance and relayed a description and tag number of the blue Buick.

Gary was later seized by two officers following a traffic stop of the Buick requested by the narcotics detective. During the stop, the officers discovered heroin on the driver of the car during a frisk for weapons. Gary was also patted down. One of the officers making the traffic stop spoke with Gary's parole officer, who asked to see Gary. The police officer at the scene then handcuffed Gary and searched him—turning up two cell phones. It was later discovered that the UC deal with the drug dealer was made on that phone. The arresting officer admitted that the sole reason he seized Gary was to bring him to speak with his parole officer at the police station. The government acknowledged that this seizure of Gary amounted to an arrest.

Gary moved to suppress the seizure of the cell phone and its contents arguing there was no probable cause for his arrest and removal to the police station. The trial court denied his motion. On appeal to the U.S. Court of Appeals Gary's conviction was affirmed.

Issue:

Was the defendant's mere presence in the vehicle during the sale of heroin sufficient to sustain his later seizure and removal to the police station? **Yes**.

Mere Presence:

Case law makes clear that merely knowing an offense is being committed, is not equal to participating in the crime "with the requisite criminal intent." Furthermore, being present at a scene and fleeing from the scene when an offense is committed also does not sufficiently establish participation. See, *A.S.F., a child, v. State*, (4DCA 2011).

"Before an accused may be convicted as an aider and abettor, it must be shown not only that he assisted the actual perpetrator but that he intended to participate in the crime." *Collins v. State*, (3DCA 1983). Moreover, mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation. *J.W. v. St*ate, (3DCA 1985).

To secure a conviction on an aider and abettor theory, the state must establish (1) that the defendant helped the person who actually committed the crime by doing or saying something that caused, encouraged, incited or otherwise assisted that person to commit the crime; and (2) that the defendant intended to participate in the crime.

To convict someone as a principal, "the defendant must have intended that the crimes be committed and have done some act to assist another in committing the crimes." To prove these elements, circumstantial evidence may be presented, but that evidence must rebut every reasonable hypothesis of innocence. *Garcia v. State*, (4DCA 2005).

Court's Ruling:

The Court of Appeals in sustaining the trial court's ruling emphasized that the issues raised here involved "probable cause" for an arrest; a much lower standard than "proof beyond a reasonable doubt" required to sustain a conviction.

"Evaluating objectively the facts and circumstances known to the police at the time of the arrest, we agree there was probable cause to believe that Gary was committing a crime… Gary was a passenger sitting right next to the driver when the driver sold the detective heroin without any attempt to conceal the transaction. In such close quarters, it was reasonable to infer that Gary and the driver were probably engaged in a common enterprise. The police here relied on more than the 'mere propinquity to

others independently suspected of criminal activity.' *Ybarra v. Illinois*, (S.Ct.1979)."

"A passenger in a car 'will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing.' *Maryland v. Pringle*, (S.Ct.2003) (finding probable cause for the arrest of the front-seat passenger in a car with drugs and cash hidden throughout the passenger compartment), quoting *Wyoming v. Houghton*, (S.Ct.1999). This is particularly true when the driver is engaged in drug dealing, 'an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.'"

"Given the reasonable inference that Gary was engaged in a common and unlawful enterprise with the driver, he was not arrested due to his mere presence in the car. See *United States v. Di Re*, (S.Ct.1948) (no probable cause to arrest passenger due solely to presence in a car with another person independently suspected of a crime). In contrast to *Di Re*, where the passenger would not necessarily have known about the illegal nature of the contraband the driver was selling (counterfeit ration coupons) and had not been present when the driver sold the contraband, the illegality of the driver's conduct here was apparent. The sale of heroin is unmistakably illegal, and Gary was very close by when the driver sold heroin to an undercover agent. It is hard to imagine that the driver would have made no attempt to hide this from Gary unless he was involved in the drug-dealing enterprise."

"In addition, the person who answered the drug line repeatedly used the pronoun 'we,' implying that one or more other persons were involved. That provided an additional indication that Gary could be the person answering the drug line when he was seen talking on the phone in the passenger seat while the driver sold the heroin. *There could have been innocent explanations for Gary's phone use, of course, but the inference of the criminal activity was* ***reasonable for purposes of probable cause***. See *United States v. Funches*, (7th Cir. 2003) (finding probable cause where 'the inference of illegal conduct by trained and experienced officers is at least as probable as any innocent inference'). The district court correctly denied Gary's motion to quash the arrest."

Gary also argued that the arresting officer's intent was to bring him to the police station in order for his parole officer to meet with him, was an insufficient basis for his seizure. The Court of Appeals disagreed.

"The district court was correct to find that this seizure was a lawful arrest. … As the district court recognized, the arresting officer's subjective justification is irrelevant as long as there was objective probable cause for the arrest. See, *Whren v. United States*, (S.Ct.1996)."

Lessons Learned:

The Court of Appeals also addressed a side issue, the legality of the traffic stop at the request of the UC detective. "The officers who pulled over the car had no personal knowledge of [the drug] investigation. They stopped the vehicle at the direction of a narcotics detective. But knowledge of the investigation can be imputed to the arresting officers through the collective knowledge doctrine, under which the court will consider the information known to the officers collectively to determine if there was probable cause for the arrest. See *United States v. Randall*, (1991) ('The police who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of another officer or police agency. In that case, the arrest is proper so long as the knowledge of the officer directing the arrest, or the collective knowledge of the agency he works for, is sufficient to constitute probable cause.'), quoting *United States v. Valencia*, (7th Cir. 1990)."

U.S. v. Gary

U.S. Court of Appeals – 7th Cir.
(June 19, 2015)

Faint Odor of Marijuana

While on routine traffic patrol an officer observed a blue Dodge Charger traveling at 41 mph in a 30 mph zone. The Officer initiated a traffic stop, approached the Charger, and asked the driver, Mario Smith, to provide a driver's license and proof of insurance. While speaking with Smith, the Officer noticed a "slight odor of marijuana" coming from inside the car. The Officer informed Smith that he could smell marijuana coming from the car and asked permission to search the Charger. Smith stated that he would not consent because the vehicle belonged to his aunt.

The Officer spoke with Smith for about 1 ½ minutes, and then returned to his car to call for a K-9 unit to conduct a dog sniff outside the vehicle. As the K-9 unit approached, Smith sped away from the scene in

the Charger. The K-9 unit arrived 17 minutes after the initial traffic stop and 11 minutes after the Officer requested Smith's permission to search the Charger.

Smith led the officers on a high-speed chase that lasted several minutes, which was terminated by a well-placed "PIT" maneuver. Smith then exited the vehicle, jumped over a fence, and ran across the Interstate highway. The Officer retained possession of Smith's driver's license. The Charger was seized and later searched *pursuant to a search warrant* which revealed two brick-shaped packages wrapped in black electrical tape. The DEA laboratory tested the packages, which were found to contain approximately one kilogram of cocaine each. Other evidence found in the car included $6,000 in U.S. currency and a Glock .40 caliber hand gun. At the time of the incident, Smith was on supervised release as a result of a prior conviction for distribution of controlled substances.

Smith was charged with multiple felonies. Eighteen months later he was arrested. At trial he filed a motion to suppress alleging that the faint smell of marijuana was insufficient to extend and delay the traffic stop. The trial court denied his motion and the Court of Appeals affirmed his conviction.

Issue:

Did the officer impermissibly extend the traffic stop based on the faint odor of marijuana emanating from the vehicle? **No**.

Traffic Stop:

A traffic stop constitutes a seizure within the meaning of the Fourth Amendment, which protects against "unreasonable searches and seizures." To satisfy constitutional concerns, a traffic stop requires either probable cause to believe a traffic violation occurred or reasonable suspicion of criminal activity.

Where the initial traffic stop is legal, the officer has the duty to investigate suspicious circumstances that then come to his attention. To justify a detention of the driver longer than is required to issue the citation an officer must have reasonable suspicion based upon articulable facts that criminal activity "maybe a foot." The officer's actions are evaluated using the totality of the circumstances based upon the officer's experience, knowledge, and training. As long as the officer acts diligently there is no magic time or on/off button that will invalidate the stop.

"When a driver is lawfully stopped for a traffic violation, once the purpose of the initial stop and detention has been satisfied, *absent a reasonable, articulable suspicion of illegal activity,* the officer no longer has a legal basis to continue to detain the motorist. However, 'during a valid traffic stop, or even if a valid traffic stop has had its lawful function completed and turns into a citizen encounter, there is no reason a law enforcement officer cannot ask for consent to search.' If a driver freely and voluntarily consents to a search of himself or the vehicle, the detention may continue." *State v. Boles*, (4DCA 2007).

Court's Ruling:

The Court of Appeals ruled that the odor of marijuana constituted probable cause for a search. The court made no distinction between a strong or faint smell. "The Supreme Court has recognized that the odor of an illegal drug can be highly probative in establishing probable cause for a search. *Johnson v. United States*, (S.Ct.1948). This court has held numerous times that the smell of marijuana coming from a vehicle during a proper traffic stop gives an officer probable cause to search for drugs. See, *United States v. Peltier*, (8th Cir. 2000) (deputy had probable cause to search a truck where the deputy smelled odor of burnt marijuana coming from the cab)."

"Smith asks this court to distinguish between a faint smell and a strong smell in determining whether the marijuana odor is enough to prolong a stop. However, we find the smell of marijuana, along with the credible testimony by the officer, is sufficient to establish probable cause to search an automobile and its contents. Here, Officer testified that he had been trained in the detection of controlled substances, including the odor of both raw and burned marijuana. The lower court credited Officer's testimony and noted that, while he had probable cause to search the vehicle, Officer took the less intrusive approach and called the K-9 unit. … Because the prolonged stop was justified, the district court did not err in denying Smith's motion to suppress evidence retrieved from the car."

"Further, the district court found that suppression was not warranted where Smith fled from the scene of a lawful traffic stop, led officers on a high-speed chase, and abandoned the vehicle. Search of abandoned property does not implicate the Fourth Amendment because Smith relinquished any legitimate expectation of privacy he may have had in the Charger and its contents. *United States v. Smith,* (8th Cir. 2011). Like-

wise, Smith's resistance by fleeing the scene 'provided independent grounds for his arrest, and the evidence discovered in the subsequent searches of his . . . automobile is admissible.' *United States v. Dawdy*, (8th Cir. 1995)." Affirmed.

Lessons Learned:

In a case decided by the 4th D.C.A. the court found no distinction between raw and burnt marijuana. See, *State v. Sarria*, (4DCA 2012). "For the purpose of providing a basis for probable cause, we see no reason to distinguish the odor of burnt marijuana from the odor of raw marijuana."

"In fact, the smell of burnt marijuana coming from a car window is consistent with personal use of marijuana in the passenger compartment, raising the possibility that all of the drug has been consumed by combustion. On the other hand, the overpowering smell of raw marijuana raises a fair probability that the car is being used to transport large quantities of marijuana thereby providing an even stronger basis for a search than exists when the odor of burnt marijuana is present."

The Florida Supreme Court said in *State v. Betz,* (Fla.2002), "We conclude that the police officer here had probable cause to search both the passenger compartment and the trunk of Betz's automobile. First, of course, Officer Harrold smelled 'a very strong odor of marijuana coming directly out' of the respondent's car window. As the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent's vehicle. To a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle gives the police officer probable cause to search the person or the vehicle."

See, "Marijuana Odor on a Person," LEGAL EAGLE, March, 2011; "Odor of Raw Marijuana," LEGAL EAGLE, December 2012.

Lastly, it is important to remember that the U.S. Supreme Court has recently ruled in *Rodriguez v. U.S.*, (S.Ct.2015), that a motorist may be detained only for the time necessary to conduct the tasks associated with the traffic stop, i.e. verifying paperwork, issuing the traffic citation or warning, and checking warrants status. Absent probable cause or reasonable suspicion of illegal activity, the driver may not be detained even for a minimal time to allow for canine to arrive and search. See, "Traffic Stop Dog Sniff," LEGAL EAGLE, May 2015.

U.S. v. Smith
U.S. Court of Appeals – 8th Cir.
(June 19, 2015)

Excessive Force

Deputy Lauren Miley received a dispatch regarding a "Hispanic looking male with no shirt" that was "yelling and cussing at passing cars." Deputy Miley found Vincent Salvato along the side of the road. He was alone, walking in the road, shirtless, with nothing in his hands. Miley instructed Salvato to come to her car, and he complied. He did not have a weapon nor was he aggressive as he walked over. Without being asked, he put his hands on the hood of the car and spread his legs apart. Miley did not handcuff him *because she did not perceive him to be a threat*. Miley did not pat him down, but she saw that there were no weapons tucked inside his waistband. According to Miley, Salvato "was just talking irrationally." He tried to walk away twice, but both times Miley placed her hand on his chest to keep him from leaving. Miley felt intimidated and called for expedited backup. Deputy Brown arrived on scene.

When Brown exited the vehicle he did not communicate with Miley but instead drew his gun and ordered Salvato to the ground. Salvato looked surprised but immediately complied. Brown pulled Salvato's arms backwards. When Miley attempted to handcuff Salvato, he began to struggle. He rose to his knees, and both deputies attempted to wrestle him to the ground. They exchanged blows. Salvato broke free and stepped backwards, away from the officers. Deputy Brown then began to reach for something from his belt, and Salvato rushed towards Brown and hit him again. Miley attempted to intervene, and Salvato hit her in the head, knocking her down. Salvato again retreated, this time far enough that he was outside of the view of the in-car camera, *around 10 to 15 feet away* from Miley. Miley drew her handgun and shot Salvato in the abdomen without giving him any verbal warning.

Although he had been shot, Salvato continued to walk on the road. Deputy Brown ordered Salvato to get on the ground, and when Salvato did not comply, Brown discharged his Taser into Salvato. Salvato fell to the ground on his back after the Taser discharged. Brown ordered Salvato to roll onto his stomach and discharged the Taser again when Salvato did not immediately comply. Brown ordered Salvato to show his

hands, and Brown again discharged the Taser when Salvato did not comply. As Brown continued to discharge the Taser, Miley communicated for emergency medical assistance, retrieved her flashlight from the ground, and took Brown's handcuffs to restrain Salvato. The internal memory of the Taser recorded 12 discharges during the incident. Brown discharged the Taser multiple times *after Miley handcuffed* Salvato. At no point did either deputy check Salvato's back pockets or search him. Salvato was unarmed. Salvato died at the scene from internal bleeding.

Issue:

Under the totality of the circumstances confronting the officers was the use of deadly and other force (Taser) reasonable? **No**.

Objective Reasonableness:

"We analyze a claim of excessive force under the Fourth Amendment's 'objective reasonableness' standard." *Oliver v. Fiorino*, (11th Cir.2009) (quoting *Graham v. Connor*, (S.Ct. 1989)). "To determine whether the use of force is 'objectively reasonable,' we carefully balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing governmental interests at stake' under the facts of the particular case."

"We measure the quantum of force employed against these factors—the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect actively resisted arrest or attempted to evade arrest by flight."

"The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." See, *Graham*. The use of deadly force is "more likely reasonable if: the suspect poses an immediate threat of serious physical harm to officers or others; the suspect committed a crime involving the infliction or threatened infliction of serious harm, such that his being at large represents an inherent risk to the general public; and the officers either issued a warning or could not feasibly have done so before using deadly force." *Tennessee v. Garner*, (S.Ct.1985).

Court's Ruling:

"When we view the facts in the light most favorable to Salvato's estate, we conclude that Miley's use of deadly force was excessive. The initial 'crime' for which she seized Salvato was only 'yelling and cussing' at passing cars, and when Miley shot Salvato, he was not an 'immediate threat,' to either officer. Salvato was retreating, apparently unarmed, and outside of striking distance. Miley argues that Salvato had backed up once before, so his retreat was more akin to the 'stance' of a 'trained fighter,' but the video evidence establishes that Salvato's second retreat was further than the first. Moreover, Miley did not give any warning, though a jury could find that the distance between her and Salvato establishes that it was 'feasible' for her to do so. Miley had no reason to believe Salvato was a danger to the general public, and if Miley's fear was that Salvato would escape, her use of deadly force was clearly unreasonable."

"Federal law clearly established that Miley's actions were unreasonable. **Using deadly force, without warning, on an unarmed, retreating suspect is excessive**. See *Garner.* And although 'officials must have fair warning that their acts are unconstitutional, there need not be a case on all fours with materially identical facts, ... so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights.' Because the standard for excessive force is clearly established and our precedents and those of the Supreme Court make clear that firing without first warning on a retreating, apparently unarmed suspect is excessive, Miley had 'fair warning' that her actions were unconstitutional."

"Salvato's estate argues that Miley is also liable for her failure to intervene when [Deputy] Brown repeatedly discharged his Taser into Salvato, and we agree. 'An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for her nonfeasance.' Miley does not contest that Brown's use of force was unreasonable. Because the record, viewed in the light most favorable to Salvato, establishes that Miley was 'in a position to intervene,' but failed to do so, the district court did not err when it denied her qualified immunity."

See, "Taser as Excessive Force," LEGAL EAGLE, April 2013 and July 2013. "Taser as Reasonable Force," LEGAL EAGLE, April 2012 and September 2012.

Salvato v. Miley
U.S. Court of Appeals—11th Cir.
June 25, 2015