Cross-Examination of Arresting Officer

Principles, custody, motor vehicle stops and searches, drug cases, search warrants, and searches incident to arrests

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Excerpted from Relentless Criminal Cross-Examination

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I. GOVERNING PRINCIPLES

§3:01 All-Too-Common Fact Pattern

The officer spies a teenage male driving a car down a leafy, upscale street. The male has done nothing wrong, committed no traffic offense, but he looks out of place—which is more than enough justification to pull him over. When the officer approaches the driver’s side door, he assesses the male. If everything is in order and the driver is dutifully submissive, the officer will let him drive on. If anything is amiss, or if the driver cops an attitude, that is grounds for a full-blown search of the car and its driver. Deciding that the driver is insufficiently grateful for the intrusion, the officer orders him from the car and, with the help of back-up, begins tearing apart the car’s interior. Unearthing a small bag of marijuana from beneath the passenger seat, the officer places handcuffs on the male and questions him about the grass. Figuring the officer has him, the male admits the marijuana belongs to him. Marching his arrestee toward his cruiser, the officer gives no thought to the constitutionality of the search. Later, he’ll draft his police report, knowing just enough law to construct a constitutionally valid search out of whole cloth. The kid, the officer supposes, will likely accept a tidy plea anyway. If the kid rejects a plea, the officer figures he can just take the stand and lie. The prosecutor will believe anything the officer tells him, and who is the judge going to believe—an 18-year-old kid who’s broken the law or an upstanding officer in a pressed uniform? Some months later, the officer takes the stand. The lies roll off his tongue. That he’s committing perjury troubles him not at all; the judge has no business interfering with police matters.

§3:02 Brazen Police Officers and the Forfeiture of Freedom

If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy. —James Madison

In my experience, brazen police officers so frequently abuse their power that no one—no motorist, no juvenile, no adult, no professional of any kind—could make a compelling argument that constitutional rights afford any real protection from the state. How is it that a nation that prides itself on freedom would allow thugs with badges to behave like the KGB? We are no longer the beneficiaries of the proud, brave and intellectually gifted Founding Fathers. We are no longer free men and women. Today, we are as free as penned sheep; free to crowd one another, to eat the garbage emptied into the trough, and to mindlessly bleat until the hour of reckoning.

Many would make the argument that the government has taken our rights from us. Others hold that only after a death struggle would we allow the government to tear our rights away from us as we clutched them to our bosom. For the government, a struggle that might have proved difficult or might have been lost was, indeed, unnecessary. The authorities needed to do no more than whisper, “Boo!” and we surrendered our rights. Like a schoolboy presenting his teacher with a shiny apple, we have scrubbed our faces clean, arranged our smiles, and, reaching way up, bestowed our precious rights on the government. We  are no longer fearless patriots, but well-behaved simpletons eager to please the master who has assured us that these rights make it more difficult to protect us. They appeal to us, “How can we possibly keep you safe and free if our efforts are forever being thwarted by antiquated, counterproductive rules? You do want to remain free, don’t you?” “Oh, yes,” we reply, “we love freedom; do whatever is needed to keep us free.” We are bleating sheep.

But your client, fresh from his arrest, bewildered and terrified asks, “Where have my rights gone?” It is only then, when he is in the custody or crosshairs of law enforcement, that he appreciates the magnitude and awesome power of government.

In my experience, by the time a client has reached a lawyer, the police likely have violated his constitutional rights. Most lawyers think of constitutional rights as something they assert on their client’s behalf in a courtroom. While the court might provide a remedy, these rights were designed to keep us free of government interference and intrusions as we go about our business, on the street and in our homes. Remarkably, although the Framers took great care to detail our rights, they included no remedy for the breach of these protections. The Framers included remedies for disgraced presidents, unethical congressmen, and dishonest judges, but no remedy for the violation of a citizen’s rights. These ideals—so novel, so uplifting, and so inspiring—were designed to symbolize, as much as safeguard, the dignity of the individual citizen. Having cherished, considered, and reserved these rights, this dignity, to their fellow citizens in the document from which they would manage this fledgling nation, perhaps the Founding Fathers believed that the men and women who had fought the British would respect the ideals that drove them to the fight. Just maybe, they believed so highly in these rights that they did not believe they needed to include a remedy; that those charged with enforcing the law would, as fellow citizens, respect these rights. Perhaps the Framers were under no illusions about their fellow citizens and simply wanted to leave it to the courts to fashion the appropriate
remedy. Whatever their opinions of their fellow man, none could have anticipated the degree to which, today, the law enforcement of a democratic nation would come to view its citizens as enemy combatants.

Law enforcement runs roughshod over our rights. Moronic television shows, celebrating the tough cop who punches a suspect in the head and remarks, “I just read you your rights,” encourage the abuse. Many, maybe most, police officers have nothing but derision for the rights of citizens they suspect of crimes. As instance after sickening instance of police brutality leads the evening news, one cannot help but conclude that the police administer “justice” before turning the suspect over to the system. At best, police officers reluctantly acknowledge our constitutional rights.

Where Revolutionary-era Americans once defiantly shed blood to wrestle their God-given rights from the King, Americans today are a gutless lot. As citizens, obligated to each other, we expect little from the police and demand even less. We are intimidated, both by the police and the nameless, ever-present threats that surround us. If the police transgress upon our rights, only the bravest—or drunkest—will protest. And it’s getting worse; unnerved by criminals, terrorists, and assorted bogeymen, we have forfeited our rights. To the extent that we have given this a modicum of thought, we have mistakenly concluded that when times improve, these rights can be reclaimed as easily as they were discarded. As we have done away with these rights—this foolish excess in a time of danger—we have screamed ourselves hoarse for the three prongs of hard justice: infinite accountability, trials tipped in favor of the government, and penalties ever escalating in length and severity.

§3:03 Judge Is Likely Just Another Frightened Citizen

Into this environment of suspicion, hatred, and fright wades defense counsel. To an audience of one, he must argue that the police are lying and are to be distrusted, and that to retroactively reinstate those rights, the evidence must be suppressed. Few judges are immune to the country’s determined shift to the right. They, too, are scared. For all their power, they are just as vulnerable as any other citizen when they walk the streets. In fact, many believe that their black robes place them at greater risk. They live in fear that some crazed criminal will waltz into the courtroom and shoot at them. The judges demand metal detectors, scanners, and additional court officers. They read the very newspapers that will praise them for their brand of hard justice and castigate them for their betrayal of the community-at-large in upholding some criminal’s half-baked right. They do not just live in this “betrayed” community, they depend on its police force for protection; judges call the police, not our clients, when they are under threat.

§3:04 Culture of Testilying

In my experience, most police officers will lie under oath in order to protect the fruits of legally questionable arrests or searches. To these officers, a “white” lie to prevent an “injustice”—the judge suppressing the evidence because of his interpretation of some vague constitutional precept—is morally acceptable. This lie includes fabricating the police report, lying to the prosecutor, lying to the grand jury, and lying to the trial jury. The lies sit easily upon these officers because the guilty receive the punishment they deserve. Defense counsel’s cross-examination at the hearing on a motion to suppress is part of the game. The officers are not so much lying, they reason, as matching wits against an adversary.

Many police officers, but maybe not most, will exaggerate, bend, or reorder the facts, falsely attribute statements to the accused, or lie about what they observed in order to convict a person they believe to be guilty. Few officers will lie to convict a person they believe is innocent. (Of course, to the police, every innocent act points toward guilt.)

How is it that the police, sworn to uphold the law, would come to so regularly, so blithely commit the criminal act of perjury? To understand the culture of testilying, consider the personality types commonly attracted to law enforcement: 1) the emotionally immature who view the world in black and white terms; 2) bullies attracted by the power; 3) those looking for a decent job with benefits; and 4) those who want to serve their fellow man. The officers who live in a black and white world would consider allowing the criminal to get away with his crime worse than a white lie to protect an arrest. To the bullies, lies are just another way to demonstrate their power over their victims. To the guy who wanted only a decent salary and benefits, lying is just part of the job. Those who wish to serve their fellow man are, in my opinion, the least likely to commit perjury.

Police recruits are not taught to lie at the Police Academy, and while there is no shortage of unethical prosecutors, I believe only a minority of prosecutors directly instruct police officers to lie. Prosecutors encourage the practice all the same by doing little or nothing to discourage testilying, or, worse, by asking leading questions with winks and nods. Rather than directly and formally encouraging these recruits and officers to commit perjury,
these academies and prosecutors teach the upstarts to view defense counsel as lying scoundrels. Cross-examination is a contest, and the outcome is presentation determinative—in other words, the best liar wins.

The real training is done off the official police grid. More experienced officers teach the newly minted officers how “real” police work is done, how order is maintained on the front lines and how to keep the bad guys off the street. To the experienced officers, perjury is no different from any other tool available to them—whether it be their firearm, their cruiser, or their badge—to combat crime. While no one has admitted as much, at least not to me, I’m convinced that before a hearing on a motion to suppress on an important case with “problems,” the police witnesses meet to map out their testimonies.

**PRACTICE POINT:**

*Subpoena additional police witnesses.*

In a serious case, one in which you anticipate the direct and cross-examination of the police witnesses produced by the prosecution will consume multiple days, plan to subpoena additional police witnesses—but do not disclose these witnesses to the prosecution until the prosecution’s final witness takes the stand. This will prevent the police and, possibly, the prosecution from including “your” witnesses in the pre-hearing meeting where they will “discuss” the “facts.” These witnesses, usually regular police officers, are not accomplished liars and, not knowing any better, may contradict the prosecutor’s police witnesses.

What have experienced police officers seen of society that impresses upon them to so prize the truth? Lying isn’t the exception, it’s the rule. From the president on down, it’s all spin, all the time. Officers are often on the receiving end of malicious, career-threatening lies. To extricate themselves from trouble, defendants manufacture outright lies against the officers who arrested them. Women who retreated to locked bathrooms, bruised and bloodied, to dial 911 and report their abusive husbands, later deny their husbands struck them and accuse the responding officers of brutality. Testilying is not excusable, but it is understandable.

In my experience, most judges are, at best, indifferent to police perjury. So untroubled are some judges by obvious perjury that there seems to be an unspoken agreement: the cop pretends he is testifying truthfully, and the judge pretends he believes the testimony. Other judges, feeling a small tug to act conscientiously, will do their best to reconcile the irreconcilable. In the end, despite your winning issue and blistering cross-examination, the judge’s findings mirror the officers’ testimony, and he denies the motion. To reach such absurd factual conclusions, this robed jurist, like a starving man in some third world country, must have sifted through a pile of testimonial excrement to find something edible. A judge willing to pick through the excrement is green-lighting perjury.

If testilying is, in the end, understandable, make it understandable to the judge and to the jury.

For example, often a police officer will wear civilian clothing to a jury trial, rather than his uniform. By civilian clothing, I mean a pair of dress slacks, a shirt and tie, and a sports jacket. In Massachusetts, the police academy issues DWI manuals that specifically instruct officers to wear their civilian clothing when testifying before a jury. Obviously, it is easier for jurors to relate to an officer who looks like a regular Joe than an officer in his stiff, not-so-friendly uniform. Indeed, when a juror sees the uniform he may recall a traffic ticket issued by someone wearing a similar uniform. In a real sense, the officer is trying to distance himself from who he really is — and that is manipulation, minor though it may be. In the appropriate situation (for example, where you are contending that the officer is dishonest and manipulative), exploit it.

Q: At that Clerk Magistrate’s Hearing you were dressed in your regular state trooper uniform?
A: Yes, I was.
Q: The blue-ish-grey uniform?
A: Yes.
Q: With the baggy, storm trooper-type pants?
A: The regular issued uniform.
Q: Knee-high black boots?
A: Yes.
Q: With the badge?
A: Absolutely.
Q: The State Police patch?
A: Of course.
Q: The thick, black belt?
A: Yes.
Q: With the handcuffs?
A: Yes.
Q: The places where you store additional ammunition?
A: Yes.
Q: And mace?
A: Yes.
Q: And the holster?
A: Yes.
Q: Your state issued handgun?
A: I . . . yes.
Q: The uniform of a State Police Trooper is militaristic looking?
A: It’s the standard uniform, Mr. Mahoney.
Q: It’s designed to intimidate?
A: No. It’s designed so people respect us.
Q: You mean obey you?
A: Yes.
Q: Because they fear you?
A: Because we’re uniformed officers.

**TECHNIQUE TIP:**

Call attention to the fact that the uniform makes a deliberate statement.

It’s not enough simply to ask the officer if he wore his uniform at other court appearances. Use your questions to detail just how intimidating the uniform is and that it is designed to intimidate.

Q: And then we had a motion, a hearing on a motion in the other courtroom down the hall back in May, didn’t we?
A: Yes, we did.
Q: And you wore your uniform that day as well, didn’t you?
A: Yes, I did.
Q: And then we had another hearing date and you wore your uniform on that date as well?
A: Yes.
Q: But today you are dressed in civilian clothing?
A: Yes, I am.
Q: You have learned that it is better to dress in civilian clothing when you are to testify before a jury? It’s a little bit less intimidating?
A: I do it out of respect for the court, Mr. Mahoney; I don’t do it for the jury. I mean, I do it for the — not to be less intimidating.
Q: You do it for the court?
A: Absolutely.
Q: But on the other occasions, you were present in court and dressed in your uniform?
A: I was not in a trial and not before a jury.
Q: But you were before the court?
A: Yes, I was.
Q: The difference between those other court appearances and this court appearance is the presence of a jury?
A: That’s one difference.
Q: At the police academy, they instruct you to wear civilian clothing when testifying before a jury?
A: I don’t recall.
Q: You wear civilian clothing because you hope the jury will relate better to you?
A: No. I do it out of respect for the court.
Q: Not to belabor this, but are you testifying that on those other occasions when you appeared in court wearing your uniform, you were displaying disrespect for the court?
A: No. Not at all.
Q: The only difference, really, is the presence of the jury?
A: No.

**PRACTICE POINT:**

*Defiance undermines officer’s credibility.*

I want the Trooper to disagree with me. The more he disagrees, the more obviously it is true. I would be disappointed if he agreed with me. But even if he agreed, he would be agreeing that he was trying to manipulate the jury. He’s in a no-win situation.

Q: You wear civilian clothing because you want to leave a more friendly impression with this jury?
A: No. No.
Q: You’re not wearing handcuffs?
A: No.
Q: Your badge?
A: No.
Q: Your handgun?
A: No.
Q: Your mace?
A: No.
Q: A badge, handcuffs, a handgun and a canister of mace don’t exactly make you appear very personable, do they, Trooper?
A: I’m not wearing them.
Q: I understand.

§3:05 Basic Strategy for Suppression Hearings

To win the motion to suppress, the issues must be well-researched and well-articulated, and the cross-examination must be first-rate. To the rare judge who refuses to turn a blind eye toward police perjury, it may be sufficient to demonstrate, through cross-examination, that the testimony is improbable. On the other hand, to wrest a decision from a judge who habitually finds in favor of the prosecution, it is not enough to discredit the lying officers; defense counsel must pull favorable facts from witnesses, even police witnesses, who are either uncomfortable committing perjury or too inexperienced to lie well. It is these contradictions—these facts—that force a judge to grant your motion.

In a large percentage of criminal cases, there is something that defense counsel can move to suppress. For the defense, the hearing on the motion offers twin opportunities: the suppression of troubling evidence and invaluable pre-trial cross-examination of the witnesses, particularly the police witnesses. In some cases, particularly drug cases and cases in which the defendant has given a detailed confession, the outcome of the motion to suppress is case determinant—the accused walks free or is forced to plead out his case. In other cases, where the evidence defense counsel seeks to suppress is not very incriminating or the legal grounds for suppressing the evidence are not very compelling, cross-examination should be used to unearth facts and commit witnesses to their version of the facts.

When the motion to suppress will determine the outcome of the charges, focus your cross-examination exclusively on winning the motion. When the hearing will be used primarily to explore the government’s case, freely use the open-ended question. While it remains important to shackle the witness to his testimony, it is equally important to elicit as much information from the witness as possible; the leading question is better at confining than freeing the witness to tell you all he knows. A witness reluctant to disclose anything valuable to the defense will interpret a leading question as narrowly as possible. The reluctant witness takes the stand anticipating a struggle and leading questions. Treat him as you would a witness you were deposing, instead of cross-examining. A series of open-ended questions will surprise him and, hopefully, result in him revealing information the prosecution had wanted to remain unknown.

§3:06 Sample Open-Ended Cross-Examination

In a drunk-driving case, for example, you may decide to move to suppress, based upon whatever legal theory, the client’s admission that he had been drinking. Naturally, you want to know at the hearing, not at the trial, everything the officer claims your client stated, so that you can flawlessly execute your cross at trial.

Q: Officer, you said Mr. McGowan admitted he had been drinking?
A: That’s right. He said he had been to a wedding and had been drinking at the wedding.
Q: What, exactly, did he say?
A: As I stated, I asked... well, I noticed the odor of alcohol and so I asked him if he’d been drinking. Mr. McGowan answered “yes,” he’d been drinking at a wedding in Boston.
Q: This was while he was seated in his car?
A: Yes.
Q: During the time that he’s seated in his car, did he make any other statements with regard to alcohol?
A: Ah... ah, not that I remember.
Q: Did you ask him how many drinks he’d had?
A: I don’t believe so.
Q: Did he tell you the number of drinks he had consumed?
A: No, I don’t think so.
Q: Did you ask him what he had been drinking?
A: No. Wait, no I did.
Q: What did you ask him?
A: I asked him, well, I asked him if he’d been drinking beer or something stronger.
Q: Why?
A: Because I wasn’t sure.
Q: Did he tell you what he was drinking?
A: Yes. He said he’d been drinking beer.
Q: Just beer?
A: Yes.
Q: Did you ask him when he had his last drink?
A: No, I don’t think so.
Q: Did he tell you when he had had his last drink?
A: Not that I recall.
Q: Did you ask him if he was intoxicated?
A: Yes, I did ask him that.
Q: What did he say?
A: He said, “No.”
Q: Did you ask any follow-up questions about being intoxicated?
A: No. I don’t believe I did.
Q: Have you told us everything you remember Mr. McGowan said about consuming alcohol?
A: That’s everything I recall.

**PRACTICE POINT:**

*Open-ended questions may give defense some breathing room at trial.*

Through a series of open-ended questions, defense counsel has elicited from the officer that he failed to ask the defendant, and the defendant never volunteered, how many drinks he had and when he drank his first and last drink. That would be powerful evidence at trial, especially if there is no breathalyzer result and the defendant’s performance on the field sobriety tests isn’t too bad. Such openings allow the defense some breathing room in explaining away a strong odor of alcohol (defendant recently drank one beer), a moderate odor of alcohol (defendant hadn’t had a drink in hours), etc.

[§§3:07–3:09 Reserved]

### II. WAS DEFENDANT IN CUSTODY?

#### A. Meaning of “In Custody”

In the movies or on television, the police give the suspect his *Miranda* Rights when they place him under arrest. In real life, the arrestee gets his rights at the station. According to *Miranda v. Arizona*, 384 U.S. 436 (1966), once
the police have taken the suspect into custody, they are required to advise the suspect of his rights before they question him. In practice, questioning, in some form or another, almost always precedes the Miranda Rights. Despite being able to recite their rights from memory, most suspects answer questions, to their detriment. At many hearings, the pivotal issue is, “Was the defendant in custody when the police interrogated him?” See generally Form 3-A, Motion to Suppress Statements; Unlawful Detention.

§3:10 Prosecutor’s Direct Examination

To the prosecutor, no interrogation is custodial. Surrounded by uniformed police officers, the accused was, naturally, free to walk away. If handcuffed, the defendant was simply being temporarily restrained (for his own good) while the police sorted things out. If escorted in a police cruiser to the station, the accused was simply cooperating, even if only moments before he had been in full flight from the police. An experienced prosecutor will identify every helpful fact that suggests the encounter was non-custodial, and twist the rest. On direct examination, the prosecutor will lead the officer through a series of easy questions:

  Q: Officer, why did you approach the defendant?
  A: Well, I thought he might have seen something.
  Q: When you approached him, did you have your gun out?
  A: No, of course, not.
  Q: Did you ask him any questions?
  A: I asked him what he was doing in the area.
  Q: What did he say?
  A: He said he was just walking home from work.
  Q: What happened next?
  A: I asked him where he lived.
  Q: Did he answer you?
  A: Yes. He said he lived at 101 Queen Street.
  Q: Did that have any significance to you?
  A: Yes. We were on Queen Street and 101 Queen Street was in the opposite direction.
  Q: So, what did you do?
  A: I asked, “Isn’t 101 back that way?”
  Q: Did he answer you?
  A: He said he was going to get a Coke at the convenience store at the corner.
  Q: Was there anything you noticed about his person?
  A: Yes. He was very nervous. Almost twitchy. He was speaking rapidly. He kept walking away from me...
  Q: Thank you, Officer. What else did he say?
  A: He said he was running late and had to hurry home.
  Q: Did you ask him anything further?
  A: Yes. I asked him if he was in such a hurry, why didn’t he go directly home?
  Q: What did he reply, if anything?
  A: He said he was thirsty.
  Q: What happened next?
  A: I finally asked him, ‘Do you know anything about the liquor store hold-up?’
  Q: What did he say?
  A: He said “no” and he was coming from work.
  Q: What happened next?
  A: I said, “Where do you work?”
  Q: And what did he say?
  A: He was unable to say where he worked. He said he just wanted to go home and did not know why I was bothering him.
  Q: What did you do? Was he under arrest at this point?
  A: Absolutely not.
  Q: Was he in custody?
  A: No.
  Q: Was he free to leave?
  A: He was, yes.
Q: What did you do next?
A: I asked him if he’d mind waiting while I got the liquor store owner to come down and ask him a few questions?
Q: Did he respond to that question?
A: Yes. He said, “I robbed the store. I’m sorry.”

§3:11 Defense Cross-Examination

The prosecutor, as prosecutors do, left out some very important facts, which demonstrate that the encounter was far more hostile and accusatory than the officer would have the judge believe. Underscore these facts:

§3:11.1 Store owner provided description of robber.
Q: Officer, you arrived only a few minutes after the liquor store was robbed?
A: Yes.
Q: Officer, you obtained a description of the robber?
A: Yes.
Q: You obtained that description from the liquor store owner?
A: Yes, I did.
Q: That’s Mr. Chin?
A: That’s right.
Q: Mr. Chin told you the robber was 5’11”?
A: Yes.
Q: A dark-skinned black male?
A: Yes.
Q: With cornrows?
A: Yes.
Q: He was wearing a black leather coat?
A: Yes.
Q: He left the store, and walked north on Queen Street?
A: Yes.

§3:11.2 Defendant, walking alone at night, two blocks from liquor store, raised officer’s suspicions.
Q: You drove your cruiser up Queen Street?
A: Yes.
Q: You saw people out and about?
A: Not really.
Q: You saw no people?
A: I don’t really recall.
Q: You saw my client?
A: Right.
Q: He’s 5’11”?
A: Could be.
Q: He had his hair in cornrows?
A: It was difficult to tell in the light.
Q: You couldn’t tell?
A: No.
Q: He wasn’t wearing a hat?
A: No.
Q: He’s black?
A: Right.
Q: He was wearing a black leather coat?
A: Yes.
Q: He was two blocks from the liquor store?
A: Yes.
Q: Walking away, rather than toward, the liquor store?
A: Yes.
§3:11.3 Officer stopped defendant and confirmed he matched description of robber.

Q: You activated your overhead lights?
A: Ah, yes.
Q: You pulled over?
A: I did.
Q: You got out of your cruiser?
A: Yes.
Q: You pulled out your service revolver?
A: No.
Q: You shouted at my client, “Hold it!”
A: I believe I said, “Hold on.”
Q: He kept walking?
A: Yes. Briefly.
Q: Briefly, until you shouted “Stop!”
A: I asked him to stop, yes.
Q: You shouted, “Stop!”?
A: I raised my voice.
Q: You shouted?
A: I made myself heard.
Q: And he complied?
A: He stopped.
Q: You approached him?
A: Yes.
Q: You were within two feet of him?
A: Yes.
Q: You saw he had cornrows?
A: Yes.
Q: That he’s 5’11”?
A: Yes.

§3:11.4 Officer ordered—did not ask—Defendant to spread eagle for a pat frisk.

Q: You ordered him to spread eagle with his hands against the cruiser?
A: For my safety, I asked him if he would allow me to pat frisk him.
Q: You ordered him to spread eagle?
A: No. I did not order him. I asked him.
Q: The liquor store owner told you the robber was armed with a handgun?
A: Yes.
Q: Had waved it in his face?
A: Yes.
Q: Had threatened to shoot him?
A: Yes.
Q: It’s dark?
A: Yes. Well, there are some street lights.
Q: And here you have my client who matches the description of the individual who robbed the liquor store and threatened to shoot the owner, and you claim you asked him to allow you to pat frisk him?
A: Yes.
Q: And, he refused?
A: Yes. He did.
Q: There was a real possibility that he was armed?
A: That was a possibility, yes.
Q: There was a real possibility that he would shoot you?
A: Yes.
Q: You had no back-up?
A: I’m sure other cruisers were on their way.
Q: You had no back-up present?
A: No, sir.
Q: You weren’t going to take any chances with your safety?
A: No foolish chances, no.
Q: When he refused to allow you to pat frisk him, that heightened your concern that he was armed?
A: It did.

§3:11.5 Officer used force and intimidation to prevent defendant from leaving.
Q: You pointed your handgun at him?
A: No.
Q: After he refused to allow you to pat frisk him, you grabbed him?
A: No. I asked him what he was doing there, and he claimed he was walking home from work, as I said.
Q: So, although your concern was heightened that he was armed, you took no steps to protect yourself?
A: I was talking to him in a conversational tone of voice so as not to excite him.
Q: He began to walk away from you?
A: He did. I asked him to hold on.
Q: Actually, you grabbed him?
A: No. He stopped on his own.
Q: You threw him against the cruiser?
A: No, sir, that’s not correct.
Q: You never touched him?
A: No.
Q: Never drew your gun?
A: No, sir.
Q: Never raised your voice?
A: No.

§3:11.6 Officer established control over situation and defendant “voluntarily” confessed.
Q: Never established control over the situation?
A: I... I acted within the parameters of my authority.

PRACTICE POINT:
Did officer “establish control” over the situation?

All police officers are trained, first and foremost, to take control of a potentially dangerous situation. Naturally, they put their safety before a suspect’s rights. In a dangerous situation, there are few parameters for the officer’s conduct. If the officer claims he acted within the parameters of his authority, he is lying. If he admits that there are no parameters, which is doubtful, it’s a huge concession for the defense. There is, therefore, no good answer to the question posed.

Q: What are those parameters?
A: I am allowed, if I have a reasonable suspicion, to stop an individual who might have been involved in a crime.
Q: In your opinion, you had the right to stop my client?
A: Yes.
Q: And you did stop my client?
A: Yes, I did.
Q: Then you two just enjoyed a pleasant conversation until he up and confessed?
A: Yes.
Q: And until he confessed, he was free to leave?
A: Yes, sir.
Q: Although he matched the description of the robber?
A: Yes.
Q: And was possibly armed?
A: Yes.
PRACTICE POINT:

Let the facts, even “bad” facts, expose holes in officer’s testimony.

These questions may seem ill-advised, as they may make the judge sympathize with the officer’s situation; but, at issue is whether the accused was in custody and given his rights before questioning, not whether the officer would have been remiss in not taking the steps necessary to protect himself. The officer was, especially after having taken the steps necessary to protect himself, well-positioned to abide by the rules and advise the accused of his rights before he questioned him. Furthermore, and most importantly, you never prevail before a judge, or a jury for that matter, by shying away from the truth. Your ability to elicit the truth gives you credibility.

B. Client Free to Leave House Surrounded by Armed Police

§3:12 Sample Fact Pattern

In a murder case, approximately eight detectives (all State Troopers) rushed into the suspects’ home with their guns drawn, threw the occupants to the floor, and began interrogating them. Each detective, naturally, testified that one suspect had opened the door and allowed the police to enter the home and, once inside, they had politely questioned the occupants about the murder. As one might anticipate, the suspects were delighted to accompany the detectives to the police station and avail themselves of all the benefits that accrue to those who unburden themselves.

According to the defendants, the police roughed them up and, by the arms, led them forcefully out of the house, through a blizzard, to the awaiting cruisers. My client, dressed in a T-shirt, was so “delighted” to go that he neglected his coat.

The detectives were in the process of securing a search warrant when they decided to enter and secure the home. Before bursting through the front door, they positioned members of the K-9 unit on each side of the home. On direct, each detective testified that each suspect was free to leave the home. If the occupants of the home were free to leave, why post the guards?

§3:13 Strategy

The goal of the defense was to demonstrate that the police had effectively arrested the suspects before dragging them into the storm. To accomplish that goal, we began by demonstrating, through cross-examination of the prosecution’s witnesses, the steps the detectives took to make sure no one escaped. But when our unexpected witnesses, all state troopers, recalled details that contradicted the testimony of the similarly positioned detectives, the judge was confronted with a factual dilemma. As a result, the judge suppressed major portions of the confessions of two defendants.

§3:14 Cross-Examination

§3:14.1 Officer contacted K-9 unit to help secure the residence.

Q: You believed the individuals inside the home were destroying evidence?
A: I did, yes.

Q: You decided against waiting for the search warrant?
A: Yes. We could not take the chance that... well, we couldn’t take the chance. We decided to secure the home until the warrant was issued.

Q: You contacted the members of the K-9 unit?
A: Yes.

§3:14.2 Members of K-9 unit surrounded the residence.

Q: You instructed them to surround the home?
A: No. We were going to enter the home and instructed the K-9 unit to take up positions at the rear of the home.

Q: There was a front door?
A: Yes.

Q: And you entered through that door?
A: Yes.

Q: Five of you altogether?
A: Yes. Eventually.

Q: So, you did not need a member of the K-9 unit positioned at the front of the home?
A: No.
Q: But, there was a side door?
A: Yes.
Q: That led to the driveway?
A: Yes.
Q: And you positioned Trooper McKenzie of the K-9 unit at that door?
A: Yes.
Q: There was also a back door?
A: Yes.
Q: You positioned Trooper Bailer at the back door?
A: Yes.
Q: With his canine?
A: I believe he had his dog, yes.
Q: There were windows along the opposite side of the home?
A: Yes.
Q: You instructed Trooper Black to watch those windows?
A: I don’t recall.
Q: Who did you instruct to watch the windows on the opposite side of the home?
A: I don’t recall.
Q: But you did assign someone to watch those windows?
A: Yes.

§3:14.3 K-9 officers positioned to prevent occupants from fleeing.
Q: You instructed these members of the K-9 unit to stop anyone who attempted to leave the premises?
A: No, sir. That was not the reason we asked them to take up those positions.
Q: Okay, Detective. None of these three Troopers was instructed to enter the home as you did?
A: No.
Q: Not instructed to enter the house at all?
A: No.
Q: So, Detective, why did you have them take up these positions?
A: Sir, we didn’t know what would happen when we entered the home.
Q: Why did you have them take up these positions?
A: Because we didn’t know what to expect.

**PRACTICE POINT:**

*If detective avoids the question, cross-examine on the facts to get the obvious answer you seek.*

Here, the detective attempts to avoid a question to which there is no good answer. Ask the question again, knowing he will repeat his answer, as detectives often do. Once he has refused to answer the question, cross-examine him on the obvious:

Q: Okay. Each of these Troopers was armed?
A: I’m sure they were, sir.
Q: There was a possibility when you entered the home that some of the occupants would decide to depart the premises?
A: Yes.
Q: Through the side door?
A: Yes.
Q: Through the backdoor?
A: Yes.
Q: Or out one of the side windows?
A: Yes.
Q: And at each of the possible avenues of egress, you positioned a Trooper?
A: Yes.
Q: To do what?
A: We didn’t know what was going to take place once we announced our presence.
Q: To do what?
A: As backup, sir.
Q: If Trooper Black saw someone scurrying out one of those windows, what was he supposed to do?
A: Ah, he would have informed us that someone was leaving.
Q: Trooper Black was to do nothing more than notify you that someone was leaving?
A: It would depend on the situation, sir.
Q: If Trooper Black saw someone crawling out a window, was he supposed to stop him?
A: No.
Q: You’re entering the home where you suspect the victim was murdered; you have three armed members of the K-9 unit posted around the home at spots of possible egress, but they are not supposed to stop occupants fleeing the home?

**TECHNIQUE TIP:**

*Long v. short questions on cross.*

It is usually recommended that you keep your questions short during cross-examination. Occasionally, however, tying together the points raised in the previous set of questions into one long question can be an effective way to emphasize the absurdity of the witness’s position.

A: It depends.
Q: It depends on what?
A: I cannot anticipate every set of circumstances that these Troopers might encounter.
Q: If they saw an individual fleeing the home, would you expect Trooper Black to take up pursuit?
A: Possibly. Trooper Black would likely follow the individual.
Q: Or release the dog?
A: Possibly. I don’t know.
Q: This is a trained canine?
A: Yes.
Q: Trained to stop a fleeing suspect?
A: Again, I didn’t instruct the Trooper to release his dog.
Q: These dogs are trained to stop a fleeing suspect?
A: Yes.
Q: Trained to bite the arm of the fleeing suspect?
A: That... yes, that... that’s possible.
Q: Bite and hold onto to that suspect until the Trooper calls him off?
A: That’s... yes. But, that didn’t happen.
Q: You decided to include the K-9 unit in this operation?
A: I did.
Q: You included the K-9 unit in this operation, obviously, because of these trained canines?
A: Partly. We didn’t know what to expect.
Q: You decided to include these canines because they are trained to catch fleeing suspects?
A: We didn’t know what to expect.
Q: You didn’t instruct the K-9 Troopers to keep their dogs in their cruisers?
A: No.
Q: When you told Trooper Black to take up the position to the right of the home, what were your instructions to him?
A: To watch the side of the home.
Q: Nothing more?
A: No.
Q: So, you left it to Trooper Black’s discretion how to handle any potential situation?
A: He’s well-trained.
Q: You left it up to Trooper Black’s discretion?
A: Yes.

C. **Suspect Voluntarily Accompanied Police to Station**

§3:15 **Key Facts**

In a continuation of the above example, State Troopers descended on the home. They tackled to the floor my client and the other two males they found in the home. Subsequently, my client and the other two males left with the officers for a round of questioning at the police station. My client informed me that the police grabbed him by the arms and dragged him out to the police cruiser.

§3:16 **Strategy**

In many suppression hearings, the officer testifies that the defendant, eager to cooperate, consented to the search or volunteered to give a statement at the police station. The officer’s recollection decidedly contradicts what your client told you. According to the client, he was rushed into a police cruiser and driven to the station where he later confessed. The client maintains that he believed he had no real choice in the matter, other than to physically resist the police. While the officers will never concede that the initial encounter was far more intimidation than cooperation, the circumstances may prove inconsistent with cooperation.

Here, I used cross-examination to demonstrate that the detective’s story made little sense in light of the circumstances. More precisely, my client had not exercised the prerogatives of a man voluntarily accompanying the police to the station—he had not grabbed his coat or his keys or driven his own car. In short, the police had taken my client into custody without the requisite probable cause. The detective did not anticipate the specificity of the questions.

§3:17 **Angles of Attack**

✓ Defendant ran away when officers entered the home [§3:18.1].
✓ Officer used physical force to detain defendant in the home [§3:18.2].
✓ Officers entered the home late at night, in blizzard conditions [§3:18.3].
✓ Even though defendant agreed to cooperate, he was given no opportunity to get his coat or hat [§3:18.4].
✓ Defendant was not given the option of driving his own car to the station [§3:18.5].
✓ Defendant left for the station without his keys and with no way of getting back home [§3:18.6].

§3:18 **Cross-Examination**

Q: You testified on direct that my client accompanied you to the police station voluntarily?
A: That’s right. We asked him if he would be willing to assist us with our investigation, and he said that he would.

Q: My client expressed no hesitation about going to the police station?
A: He said he would be willing to help us and we left.

Q: So he expressed no hesitation?
A: No.

§3:18.1 **Defendant ran away when officers entered the home.**

Q: When you first approached the home, you say you saw individuals at the front bay window?
A: Right.
Q: And you testified that they ran to the back of the home when they saw you and the others approaching?
A: Yes. They ran to the back of the house.
Q: When you entered the home, you saw my client going down the basement stairs?
A: Yes.
Q: He was running away from you?
A: Well... he was running. That’s right.
Q: He was running away from you, and by “you” I mean the men who were charging into the home?
A: Yes.
Q: He was trying to get away from you?
A: I suppose, yes.
Q: Not running to you?
A: No.
Q: You didn’t interpret his running away as an effort by him to cooperate?
A: No, I didn’t.
Q: He did not give the appearance of a person in a hurry to unburden himself?
A: No.

§3:18.2 Officer used physical force to detain defendant in the home.
Q: You grabbed him?
A: I did.
Q: You threw him to the kitchen floor?
A: Correct. Only to make sure he wasn’t armed.
Q: After you satisfied yourself that he wasn’t armed, you pulled him to his feet?
A: I helped him to his feet.
Q: He was hyperventilating?
A: He was a little nervous.
Q: He was shaking?
A: As I said, he was a little nervous.
Q: He was shaking?
A: Possibly.
Q: You told him to calm down?
A: I did.
Q: You asked him if he would be willing to come to the police station?
A: Yes, to assist us with our investigation.
Q: This conversation took place in the kitchen?
A: Yes, it did.

§3:18.3 Officers entered the home late at night, in blizzard conditions.
Q: Outside, it was blizzard conditions?
A: Yes.
Q: The wind was whipping?
A: Yes. It was windy.
Q: It was very windy?
A: Yes.
Q: It was snowing heavily?
A: It was snowing heavily, yes.
Q: There was at least two feet of snow on the ground?
A: From previous storms, yes.
Q: It was approximately 30 degrees out?
A: That sounds right.
Q: Without factoring in the wind chill?
A: I guess.
Q: It was damn cold out?
A: Yes.
Q: It was nearly 11:00 p.m.?
A: Yes.

§3:18.4 Even though defendant agreed to cooperate, he was given no opportunity to get his coat or hat.
Q: My client was dressed in jeans?
A: Yes. I believe so.
Q: And a T-shirt?
A: Ah, I believe he was wearing a T-shirt.
Q: And sneakers?
A: I’m not sure. I think so.
Q: You took my client by the arm and led him out of the house?
A: No. That’s not what happened. I asked him if he would be willing to come down to the police station to assist us with our investigation. I did not grab him by the arm.
Q: The weather was no secret?
A: Excuse me, Counselor?
Q: It was no secret that it was blizzard conditions outside?
A: It was no secret to me.
Q: My client agreed to cooperate?
A: Yes.
Q: Because he was cooperating, you didn’t mind if he got some warm clothing to wear outside?
A: I... he had the opportunity to grab a coat. He may have grabbed a coat.

**PRACTICE POINT:**

*Once officer starts to backpedal, you’ve got him.*

Here, the detective knows he hustled my client out the door. He starts to answer that my client had the opportunity to grab a coat, but then backpedals to say, “He may have grabbed a coat,” as if leaving the house was so casual he made no mental note of my client’s clothing. Now I trap the detective with a series of logical questions based on his claim that my client agreed to cooperate.

Q: So you let him wander around the home collecting his coat, his gloves, and his hat?
A: I don’t specifically remember what he did.
Q: You don’t remember if he grabbed a coat before departing?
A: He may have.
Q: You searched his jeans when you threw him to the floor?
A: Yes.
Q: Searched for weapons?
A: Right.
Q: So, if he grabbed a coat, you would have first searched it for weapons?
A: I might have.
Q: But you have no memory today?
A: No.
Q: This bag contains the clothing seized from my client that night?
A: Let me see. Yes, sir.
Q: A black T-shirt?
A: Yes.
Q: White socks?
A: Yes.
Q: Jeans?
A: Yes.
Q: Sneakers?
A: Yes.
Q: No hat?
A: Ah... I don’t believe so.
Q: No coat?
A: No. I don’t believe he was wearing one. I don’t... I’m not sure.
Q: No scarf?
A: No. No, sir.
Q: No sweater or sweatshirt?
A: No, sir.
Q: He decided to wear just a T-shirt, jeans, and sneakers out into a blizzard?
A: I don’t know what was going on in his mind. It was just a short walk to the cruiser.

§3:18.5 **Defendant was not given the option of driving his own car to the station.**

Q: The police station was at least a 25-minute drive from this home?
A: Right.
Q: A distance too great to walk?
A: I... I think it was quite a distance to walk.
Q: My client’s car was parked in the driveway?
A: Ah... there were a few cars in the driveway. I don’t know if one of these cars belonged to the defendant.
Q: Hadn’t you run the plates on these very cars earlier in the evening?
A: Yes. One did come back to someone with your client’s last name.
Q: Because he was coming to the station voluntarily to help you, you gave my client the option of driving his own car to the station?
A: That was never discussed. That never came up. I asked him if he’d be willing to come to the station with us, and we walked out to the cruiser.
Q: You never said to my client, “Would you like to come with me or take your own vehicle?”
A: I didn’t know if that was his car, but no, I never said that.

§3:18.6 Defendant left for the station without his keys and with no way of getting back home.
Q: My client left the home without his keys?
A: Ah... I don’t know the answer to that.
Q: No keys among the items inventoried?
A: Not that I’m aware of.
Q: Kevin Fulton was going to the police station, too?
A: Yes. He also came in my cruiser.
Q: So, Mr. Fulton did not have his vehicle either?
A: No. We decided to travel in my cruiser to the station.
Q: When you say “we decided,” you mean that you discussed travel options with my client and Kevin Fulton?
A: No. We just walked out to the cruiser.
Q: So, you decided?
A: It wasn’t discussed.
Q: So, when you said “we decided,” you meant there was no discussion?
A: It didn’t really come up.
Q: Did my client ask you if you would be giving him a ride home?
A: No. That never came up.
Q: Did Mr. Fulton ask you if you would be giving him a ride home?
A: Again, that was not discussed.
Q: So, according to you, my client left the home wearing only a T-shirt, jeans, and sneakers and walked into a raging blizzard, without his keys, without asking if you would be giving him a ride back home?
A: Yes. That’s how it happened.

[§§3:19–3:24 Reserved]

III. MOTOR VEHICLE STOPS AND SEARCHES
Because the police do not need a search warrant to search a motor vehicle, and the officers alone decide what constitutes probable cause, motor vehicle stops and searches are ripe for motions to suppress. It is often enormously difficult to successfully challenge the stop itself; a police officer need witness no more than a traffic violation to stop a motor vehicle. However, police officers sometimes admit that they stopped the vehicle, not because of a traffic violation, but because they believed the driver was engaged in drug dealing, the vehicle was stolen, or the occupants were casing the neighborhood. First, challenge the stop (see §§3:25, et seq.); then challenge the search (see §§3:40, et seq.). See generally Form 3-B, Motion to Suppress – Motor Vehicle Stop and Search.

A. Motor Vehicle Stops

1. Suspected Drug Deal in Vehicle

§3:25 Common Fact Pattern
In a typical case, the police observe the defendant sitting in his car in some fairly active parking lot. Along comes someone who opens the passenger side door and climbs in. The driver then leaves the parking lot and drives around the block, dropping off his passenger at the parking lot or nearby. The police recognize a drug buy when they see one. They pull the car over, pull the driver from the vehicle, and ransack the vehicle looking for the drugs.
§3:26  Prosecutor’s Direct Examination of Officer

On direct examination, the prosecutor and police officer will do their usual dance:

Q: Officer, what drew your attention to the black Honda Accord?
A: As I said, it was a Stop & Shop parking lot. It became a spot to buy and sell drugs. I, myself, was sitting and observing all the cars coming and going from the lot. The defendant pulled his car into a spot toward the back of the lot. That in itself was unusual, as most people who are there to shop want to park as close as possible to the store. I watched him. He didn’t move. He sat there five, maybe 10 minutes.

Q: Let me stop you there, Officer. During that five to 10 minutes did you observe him doing anything? I mean more than just sitting there?
A: Yes. He used his cell phone two or three times and kept looking around, as if he was expecting someone.

Q: What happened next?
A: A young man, perhaps 20 years old, approached the Accord. The defendant waved to him. The 20-year-old climbed into the vehicle and sat in the passenger’s seat. The defendant drove off. Within five minutes, 10 minutes at most, the defendant stopped along the street and let the passenger off. The passenger walked down the street, away from the Stop & Shop. The defendant drove down the street.

Q: Was this significant to you?
A: Yes.

Q: How so?
A: That’s a typical method for distributing drugs. The dealer and the buyer arrange to meet in a public parking lot. Usually, the buyer joins the dealer in the dealer’s vehicle. They drive away from the parking lot, so that it becomes difficult for the police to see that they are in fact doing a drug deal. The deal itself takes only a few minutes, so the dealer typically drives a short distance and returns to the parking lot, or nearby, and drops off the buyer.

Q: And is that what you saw here?
A: Yes.

Q: What did you do as a result of what you observed?
A: I pulled my unmarked cruiser behind the defendant’s vehicle and signaled him to pull over. He did pull over. I, together with my partner, approached the vehicle, ordered the defendant from the car... blah, blah, blah.

§3:27  Defense Cross-Examination

Obviously, the officer’s observations were consistent with a limitless number of innocent activities. Among other things, use your cross to highlight the innocent explanations the officer failed to consider.

§3:27.1 Local landmarks make it easier to give directions and arrange meetings.

Q: Officer, you had never before seen my client in that parking lot?
A: Not that I remember.

Q: Officer, you’ve invited people to your home before?
A: Yes.

Q: People who haven’t been to your home before?
A: Yes.

Q: You’ve given these people directions?
A: I have.

Q: As part of your directions, you give them landmarks to look for?
A: I do.

Q: For example, “Take a right at the Sunoco Station or the big yellow house”?
A: Yes.

Q: You do that because it’s easier for a person to see the Sunoco Station than, say, the name on the street sign?
A: It can be, yes.

Q: Or you might say, “You’ll know you’re on the right street because you’ll pass a Toyota dealership”?
A: Yes.

Q: Again, because the Toyota dealership is easy to spot?
A: Exactly.

Q: When giving someone directions, it makes sense to determine if he knows a landmark somewhere between where he’s starting and your home or wherever you’re directing him?
A: Yes.
Q: In other words, you might say, “Do you know where the Home Depot is?”
A: Yes.
Q: It’s much easier to identify a landmark that the individual is familiar with than to attempt to direct him from his point of origin to the destination?
A: Yes.
Q: It’s also easier to meet at familiar landmarks?
A: It can be.

§3:27.2 Stop & Shop is a landmark on this particular street.
Q: This Stop & Shop is on Columbus Drive?
A: Yes.
Q: Columbus Drive has got to be miles long?
A: Yes.
Q: A street address, such as 4135 Columbus Drive, wouldn’t be very helpful to some people?
A: That’s true.
Q: So if you wanted to meet someone on Columbus Drive, you might select a landmark that was familiar to the other person or something he could find easily?
A: Yes.

§3:27.3 Prearranged meeting at back of parking lot is not evidence of criminal activity.
Q: Now, if you were going to meet someone at the Stop & Shop, it would make more sense to park at the end of the parking lot, rather than in the middle among hundreds of other cars, so the individual could find you?
A: Yes, it would.
Q: There would be nothing suspicious about you parking at the back of the parking lot?
A: No. But there was more to this than just where he parked.
Q: Be patient, Officer, we’ll get there. That my client parked at the back of the parking lot was not a valid basis for stopping him?
A: That alone, no.
Q: If my client prearranged to meet this other gentleman in this parking lot, that is not evidence of criminal activity, is it Officer?
A: It is, sir. They left the parking lot to return within five or 10 minutes. That is evidence of drug dealing.

§3:27.4 Officer did not follow defendant’s vehicle.
Q: Let’s examine that brief trip away from the parking lot, okay?
A: Yes.
Q: You did not follow my client out of the parking lot?
A: I attempted to, but because of some traffic within the parking lot, I was unable to catch up with the defendant’s vehicle. I radioed for another vehicle to follow the defendant’s vehicle, but it was too late. But the defendant returned within minutes. So it wasn’t actually necessary to follow him.
Q: Because you didn’t follow him, you don’t know where he drove to, do you?
A: Given that he was only gone minutes, it was more likely that he drove around for a few minutes, to make the deal, and return to the parking lot.
Q: You don’t know where he drove to?
A: You mean which particular streets?
Q: Yes.
A: I know he drove down Columbus Avenue. Once he was out of sight, I can’t say exactly what streets he took before he returned.
Q: You don’t know the streets he took?
A: No.
Q: You also don’t know if he stopped along the way?
A: No, I don’t know. But I doubt it.
Q: Within a two-minute drive of this Stop & Shop, there are hundreds of homes?
A: Yes.
Q: Hundreds of businesses?
A: Yes.
Q: At least a half dozen liquor stores?
A: Yes.
Q: A CVS?
A: Yes.
Q: A Brooks Pharmacy?
A: Yes.
Q: A post office is less than a mile away?
A: Ah, yes.
Q: You have no idea if my client stopped at any of these homes, businesses, or this post office?
A: No. I just know he was back within minutes.

§3:27.5 Officer saw no direct evidence of a drug deal.
Q: Before searching my client’s vehicle, you never saw any drugs in his vehicle?
A: No.
Q: While the passenger was in my client’s car, you did not overhear their conversation?
A: No.
Q: You saw no money exchange hands?
A: No, I didn’t.
Q: You saw no drugs, or even packaged drugs, pass between these two individuals?
A: No.
Q: You did not see them exchange anything at all?
A: No.
Q: You saw no hand-to-hand contact?
A: No.

§3:27.6 Officer did not stop or search the passenger in the car.
Q: Before stopping my client and searching his car, you didn’t question this other individual?
A: No. He was gone.
Q: So you have no idea whether he had drugs on his person?
A: No, I don’t.
Q: Or what he says he was doing in that car?
A: No, I don’t.

§3:27.7 Even after defendant’s arrest, officer had no direct evidence of drug deal.
Q: My client made no statement to you, correct?
A: Right. We asked him if he wanted to make a statement, and he refused.
Q: So, even after the arrest, you had no evidence my client sold drugs to this individual?
A: I don’t know for sure, but I’m... I’m pretty sure.
Q: Or bought drugs from this individual?
A: I... I don’t... it was clear to me your client was the dealer.
Q: It was clear to you that my client was a drug dealer?
A: Yes.
Q: Clear that he had just sold some drugs?
A: Yes.
Q: Clear, although you had never seen my client or the car before?
A: Yes.
Q: Clear, although you had never seen the individual who entered the car before?
A: Yes, it was clear to me.
Q: Clear, though you did not overhear any conversation between my client and this other individual?
A: Yes.
Q: Clear, though you had not followed my client as he drove away?
A: Yes.
Q: Clear, though you witnessed no exchange?
A: Yes.
Q: Clear, though you had not stopped the other individual?
A: It was.
Q: Clear, though you had no evidence the passenger even had drugs on his person?
A: Ah, yes.

2. **Casing the Neighborhood**

§3:28 **Common Fact Pattern**
The police are notorious for pulling over motor vehicles for essentially being in the “wrong” neighborhood. The officer will often testify that the defendant was driving 10 mph, went up and down the street more than once, and “looked away” when the officer passed the defendant in his cruiser. Such stops are often based on race, although no police officer will admit as much. Perhaps appreciating that he had little reason to pull over the motor vehicle, one police officer testifying at a motion to suppress claimed he had stopped the vehicle only to offer the driver directions because he believed the driver was lost.

§3:29 **Strategy**
On direct examination, and in his police report, the officer will cite the reasons for stopping your client’s car. List those reasons and attack each reason individually and thoroughly. If the reasons conflict, juxtapose them. If the reasons are consistent with innocent behavior, cross-examine the officer on every innocent explanation the facts will support.

§3:30 **Angles of Attack**
✓ Defendant’s junky vehicle was out of place in pricey neighborhood [§3:31.1].
✓ Residents of pricey neighborhood might have visitors who drive junky cars [§3:31.2].
✓ Three factors drew officer’s attention to defendant’s car: time of night, speed of travel, turning around in driveway [§3:31.3].
✓ No law against driving at 3:00 a.m. [§3:31.4].
✓ No other vehicle on the road at that hour suspected of casing the neighborhood [§3:31.5].
✓ No law against driving below the speed limit [§3:31.6].
✓ Driver must drive at speed safe for road conditions [§3:31.7].
✓ A driver might drive below the speed limit for a number of reasons that have nothing to do with casing the neighborhood [§3:31.8].
✓ Officer watched defendant pull into driveway, turn around, and drive slowly away, and concluded defendant was casing that particular house [§3:31.9].
✓ Defendant had to pull into driveway to turn around because a U-turn would have been illegal [§3:31.10].

§3:31 **Cross-Examination**

§3:31.1 **Defendant’s junky vehicle was out of place in pricey neighborhood.**
Q: Lexington is a pricey neighborhood?
A: I don’t know about that, Counselor, we have families of every socio-economic background. It is a nice town.
Q: Lexington is one of the wealthiest towns in the Commonwealth? [The judge knows this is true; he probably lives there.]
A: I don’t know. I can’t say. I’m sure there are wealthier towns.
Q: You stopped my client on Merriam Street?
A: That’s correct.
Q: Merriam Street leads into Lexington center?
A: Yes.
Q: It’s lined with million-dollar homes?
A: Ah, yes. Very likely.
Q: The residents of Merriam Street drive very nice cars?
A: I can’t say. I don’t know.
Q: The residents own million-dollar homes, but don’t drive nice cars?
A: I don’t understand the question. Most of the residents on that particular street probably drive decent cars.
Q: You testified that you noted my client’s car?
A: Yes.
Q: A white Honda Civic?
A: Right.
Q: With a few dents?
A: Yes.
Q: Some rust?
A: I didn’t notice the rust.
Q: A car that hadn’t been washed in some time?
A: Maybe not. I don’t know.
Q: It was the type of car that did not fit with the neighborhood?
A: No. I did not say that.

§3:31.2 Residents of pricey neighborhood might have visitors who drive junky cars.
Q: Merriam Street is not restricted to Lexington residents?
A: No.
Q: Drivers from all over the Commonwealth use that street?
A: Yes.
Q: Drivers from less well-to-do neighborhoods?
A: Yes.
Q: From Burlington?
A: Very likely, yes.
Q: Waltham?
A: Yes.
Q: Boston?
A: Yes.
Q: Residents of Merriam Street don’t just associate with well-to-do people, do they?
A: I’m not... I can’t say.
Q: You allow for the possibility that Merriam Street residents might have visitors who drive junky cars?
A: Yes.
Q: That residents of Merriam Street may have sons or daughters who drive junky cars?
A: Yes.
Q: You’re not empowered, as a Lexington police officer, to pull over a car because it’s not typical for that particular neighborhood?
A: No. But there were other reasons.

§3:31.3 Three factors drew officer’s attention to defendant’s car: time of night, speed of travel, turning around in driveway.

Q: Okay. What drew your attention to my client’s car?

TECHNIQUE TIP:
Use open-ended question.

An open-ended question forces the officer to give you his reasons for the stop, rather than having him just shoot down each reason you suggest in a leading question. Make the officer commit to a specific number of reasons and then attack each reason separately.

A: As I said, it was 3:00 a.m., it was... the car was driving below the speed limit. He—the car—stopped, then pulled into a driveway and turned around and began slowly driving back the way it came. I thought it was unusual. I thought he might be casing the neighborhood.
Q: So, there were three circumstances that drew your attention to the car?
A: If those are three reasons.
Q: The time?
A: Yes.
Q: His speed?
A: Yes.
Q: That he turned around in a driveway?
A: Yes.
Time of Travel

§3:31.4 No law against driving at 3:00 a.m.
Q: The road is open at that hour, no?
A: Yes.
Q: There are no restrictions on traveling on that street at that hour?
A: No.
Q: There’s no municipal regulations that prohibit travel down that road at that hour?
A: No.
Q: You’re not instructed by your superiors to stop every car that drives down Merriam Street at 3:00 a.m.?
A: No.
Q: You don’t pull over every car that drives down Merriam Street at 3:00 a.m.?
A: No. I don’t.
Q: It’s not unusual for a car to travel down Merriam at that hour?
A: No.
Q: You don’t conclude, do you officer, that the driver of a vehicle traveling on Merriam is up to no good because it’s 3:00 a.m.?
A: It’s a factor.

§3:31.5 No other vehicle on the road at that hour was suspected of casing the neighborhood.
Q: You’re familiar with the traffic on Merriam during the early morning hours?
A: Somewhat.
Q: How many vehicles do you estimate travel down Merriam between 1:00 a.m. and 5:00 a.m.?
A: I don’t know.
Q: Is it more than 500?
A: No. Less. Much less.
Q: More or less than 100?
A: Less.
Q: More or less than 50?
A: Less.
Q: More or less than 25?
A: I don’t know. Maybe more. I’ve never counted them.
Q: Of the 25 or more vehicles that travel down Merriam between the hours of 1:00 a.m. and 5:00 a.m., how many of those drivers do you believe are casing the neighborhood?
A: Usually none.
Q: You usually pull over none of these vehicles because of the hour?
A: That’s correct.

Speed of Travel

§3:31.6 No law against driving below the speed limit.
Q: You said the car was traveling below the speed limit?
A: Yes.
Q: It was dark?
A: Yes.
Q: You did not cite my client for driving too slow?
A: No, I did not.
Q: Drivers are prohibited from exceeding the speed limit?
A: That’s correct.
Q: They are not required to drive at the speed limit?
A: No.
Q: They are allowed to drive below the speed limit?
A: Yes.
Q: By driving below the speed limit they can avoid inadvertently driving above the speed limit?
A: I don’t know.
Q: Some people are more comfortable driving below the speed limit?
§3:31.7 Driver must drive at speed safe for road conditions.
Q: The speed limit is the top speed a driver is permitted to drive when conditions are optimal?
A: Right.
Q: A driver is always required to take into consideration conditions when choosing his speed?
A: Yes.
Q: A driver, in fact, is never to drive at a speed greater than is reasonable?
A: That’s correct.
Q: It was dark?
A: It was.
Q: Obviously, when it’s dark it’s more difficult to see pedestrians?
A: There were no pedestrians.
Q: It’s more difficult to see pedestrians when it’s dark?
A: Not always. It can be.
Q: Okay. You allow for the possibility it’s more difficult for some drivers to see pedestrians in the dark?
A: Yes.
Q: And such drivers might drive more slowly because of such a difficulty?
A: It’s possible.

§3:31.8 A driver might drive below the speed limit for any number of reasons.
Q: As a police officer, and as a driver yourself, you concede that drivers drive more slowly when they are lost?
A: Sometimes.
Q: Or when they are searching for a landmark?
A: Yes.
Q: Or a street sign?
A: Yes.
Q: Or the number on a house?
A: Yes.
Q: Or referring to directions?
A: Yes.
Q: Or just trying to remember directions?
A: Yes.
Q: Because something is wrong with the car?
A: Yes.
Q: Or just plain tired?
A: I don’t know about that.
Q: There’s any number of reasons that a driver might drive below the speed limit?
A: Yes.
Q: That have nothing to do with casing a neighborhood?
A: Not here.

Turning Around in Driveway

§3:31.9 Officer watched defendant pull into driveway, turn around and drive slowly away, and concluded defendant was casing that particular house.
Q: You saw the vehicle slow down?
A: Yes.
Q: Pull into a driveway?
A: Yes.
Q: Back out?
A: Yes.
Q: And begin driving back the way he came?
A: Yes.
Q: You thought this was suspicious?
A: Yes. Taken together with the time, the area, and the slow driving, I decided to determine what his purpose was.

Q: You suspected, from these facts, that the driver was casing the neighborhood?
A: Or deciding what home to burglarize that night.

Q: So, he pulled into the driveway to get a better look at this particular house?
A: He could have been. He may have been checking out all the homes on the street.

Q: Let’s focus on the first part of your answer — that he could have been checking out this particular house.
A: Okay.

Q: My client didn’t shut off his headlights when he pulled into the driveway?
A: Ah, no he didn’t.

Q: He didn’t roll down his window?
A: I don’t know if he did.

Q: He didn’t leave the vehicle?
A: No.

Q: Never even opened the door?
A: Not that I’m aware of.

Q: He began to back out of the driveway the moment he came to a stop.
A: No. He lingered there for a moment.

Q: You didn’t note in your report that my client “lingered for a moment”?
A: Ah, no, I don’t believe I did.

Q: He didn’t linger long enough for you to pull up behind him?
A: I didn’t pull up behind him. I waited for him to pull out and then I pulled him over.

Q: If he had lingered for an appreciable amount of time, you would have pulled up behind him?
A: I might have. I don’t know.

Q: Had he lingered for an appreciable amount of time, you couldn’t be sure that he would be backing out of the drive way?
A: I can’t say what I would have thought.

Q: After a moment, he began backing out?
A: Yes.

Q: After a brief moment, he began backing out?
A: Like I said he lingered.

Q: He lingered for 10 minutes?
A: No.

Q: He lingered for five minutes?
A: No.

Q: He lingered for two minutes?
A: No.

Q: He lingered a minute?
A: About that, I... it... maybe a minute.

Q: He lingered there in the driveway for a minute and you didn’t approach him?
A: No.

Q: He lingered in the driveway for a minute and you didn’t include that in your report?
A: No, I didn’t, sir.

Q: He lingered in the driveway for a minute and you didn’t testify to this lingering during direct examination?
A: I wasn’t asked, sir.

Q: You never told the prosecutor that he lingered?
A: I may have. I don’t recall.

§3:31.10 Defendant had to pull into driveway to turn around because U-turn would have been illegal.

Q: For a driver who wants to change directions, it is safer to pull into a driveway than to make a U-turn?
A: Not always.

Q: This section of Merriam Street has double-yellow lines?
A: Yes.

Q: It’s illegal to make a U-turn there?
A: Yes.
Q: If he had made an illegal U-turn there, would you have pulled him over for that traffic offense and ticketed him?
A: Possibly. I cannot speculate.

**TECHNIQUE TIP:**

Don’t accept “I can’t speculate.”

Never let the officer get away with saying he can’t speculate on something he would do under the circumstances. You are asking him to speculate only if you ask him what someone else would do under the circumstances. If the officer says he “can’t speculate” as to what he would do “if” such-and-such occurred, ask him what he has done on other occasions under similar circumstances.

Q: If I asked you to tell me what another officer would do under those circumstances, I would be asking you to speculate, no?
A: Yes.
Q: But I’m asking if it is your practice to ticket drivers who make illegal U-turns?
A: Not always.
Q: You have ticketed drivers for making an illegal U-turn in the past?
A: Yes.
Q: But here, you can’t say whether you would have pulled my client over for making an illegal U-turn, when you pulled him over for turning around legally?
A: I can’t say.

3. **Suspected Stolen Car**

§3:32 **Strategy**

I have had a number of cases in which a police officer decided on scant evidence that the vehicles my clients were driving were stolen. Not once was the vehicle stolen. Yet, during the stop the police discovered that my client was unlicensed, under the influence, or possessed drugs. There appears to be little disincentive for police officers to follow a hunch that a vehicle is stolen. After pulling the vehicle over, the police officer approaches the driver, requests his license and registration and, if everything checks out, simply verbally warns the driver to obey the speed limit. Not only is the operator unlikely to complain to the officer’s superiors that he was wrongly stopped, he may drive away believing he just caught a break from a swell cop. If, on the other hand, the officer’s hunch is on the money or he discovers that the driver’s license has lapsed or the car reeks of marijuana, he makes an arrest and, if he’s dishonest and thinking, throws in a traffic citation for good measure. If the officer is honest and unthinking, he will admit he believed the vehicle was stolen. This officer is ripe for cross-examination.

§3:33 **Sample Fact Pattern**

In the following example, taken from a real case, the officer saw my client driving away from a shopping mall in his old clunker. The paint was badly faded, the quarter panels were dented and rimmed with rust, the bumper was freckled with rust, the tires were worn, and the trunk lock was missing. You couldn’t give this car to a car thief. My client resembled the car—mid-60s, lots of wear and tear, and graying. To the officer, my client was a car thief who had cherry-picked this magnificent piece of machinery from a shopping mall parking lot overflowing with new Toyotas, Hondas, BMWs, and Audis. When I exposed the ridiculousness of the officer’s “professional car thief” theory, he had to come up with other grounds for probable cause—kids out joyriding; the popped trunk lock—which were equally ridiculous and unfounded in light of the facts of the case.

§3:34 **Angles of Attack**

✓ Driver did nothing to evade officer following him [§3:35.1].
✓ Vehicle was clearly old and beat up [§3:35.2].
✓ Professional car thief would never steal junky old Chevy in parking lot full of newer, more expensive cars [§3:35.3].
✓ “Kids joyriding” not a reasonable suspicion [§3:35.4].
✓ Popped trunk lock not unusual on old, beat up car [§3:35.5]
 ✓ Owner of old car sometimes has to pop trunk lock to access trunk [§3:35.6].
 ✓ Officer did not examine lock or car interior to test his stolen car theory [§3:35.7].

§3:35  Cross-Examination

§3:35.1 Driver did nothing to evade officer following him.
Q: It was broad daylight?
A: Yes.
Q: You spotted this Chevrolet in front of you?
A: Yes.
Q: It was being driven at or below the speed limit?
A: Yes.
Q: During the time that you were behind the vehicle, the driver did nothing to try to evade you?
A: Not that I could tell. I didn’t see anything like that.

§3:35.2 Vehicle was clearly old and beat up.
Q: This Chevy was at least 10 years old?
A: I wasn’t sure. Probably.
Q: You weren’t sure?
A: No.
Q: The paint was faded?
A: Yes, in spots.
Q: The right quarter panel was dented?

TECHNIQUE TIP:
Ask the question directly, without qualification.

Do not ask, “You could see, as you were following the vehicle, that the quarter panel was dented,” because it may not have been visible to the officer. Let him answer the question and, if he thinks of it, add the caveat that he had not seen the dents until he approached the vehicle on foot.

A: Yes.
Q: The edges were rimmed with rust?
A: I didn’t notice.
Q: The bumper was speckled with rust?
A: Again, I didn’t notice.

TECHNIQUE TIP:
Refresh the officer’s recollection.

Don’t let the officer off the hook on this key point. Refresh his recollection with photos of the car. Make sure at least one photo shows the license plate so that the officer cannot credibly claim he isn’t sure it’s the same car.

Q: Now, before you pulled this vehicle over, you called in the license plate number?
A: I did, yes, sir, but sometimes that takes a minute or two.
Q: And you didn’t bother to wait?
A: No. He would have crossed into Lexington and out of my jurisdiction.
Q: You decided, rather than wait, that you would act on the evidence available to you?
A: Yes.
Q: Foremost, that the trunk lock was missing?
A: Yes. It was also being driven away from the mall, and we’ve had a lot of vehicles stolen from that parking lot. We consider it a high-crime area.
Q: This car was ready to be morgued at the nearest junkyard?
A: I don’t know about that.
§3:35.3 Professional car thief would never steal a junky old Chevy in parking lot full of newer, more expensive cars.

Q: On a typical day, the mall parking lot has thousands of cars parked in it?
A: Yes.
Q: And you know from personal experience, that the lot contains cars much newer than Mr. Smith’s Chevy?
A: Yes.
Q: More expensive cars?
A: Yes.
Q: It’s your understanding that car thieves target particular cars?
A: They can.
Q: Because they take them to a chop shop?
A: Yes.
Q: Or just resell them?
A: Yes.
Q: A car thief gets more money for some cars than other cars?
A: I’m sure that’s true.
Q: A mint BMW would likely bring a car thief more money than a junky old Chevy?
A: That’s probably true.
Q: The Burlington Mall is surrounded by some fairly affluent towns?
A: Yes.
Q: It’s not unusual to see BMWs at the Mall?
A: No, it’s not.
Q: Or Mercedes, Lexus, or Audi?
A: Again, no it’s not.
Q: With all these choices, you did not believe the car was being stolen by a professional car thief?

§3:35.4 “Kids joyriding” not a reasonable suspicion.

Q: When you signaled my client to pull over, you did not believe that you were pulling over a professional car thief?
A: No, I didn’t. I thought it might be kids.

TECHNIQUE TIP:
Use language the judge will remember.

The officer will never agree to this “morgued” characterization of the car, but ask the question anyway because it will stick in the judge’s mind.

Systematically attack and eliminate the officer’s reasons for stopping the vehicle, one by one, beginning with the weakest reason. That this junky car could have been heisted by a professional car thief was the weakest reason alluded to by the officer. This attack puts his credibility in jeopardy. His “reasons” for having suspected the car had been stolen now narrow to two.

Q: When you signaled my client to pull over, you did not believe that you were pulling over a professional car thief?
A: Not necessarily, no.
Q: When you signaled my client to pull over, you did not believe that you were pulling over a professional car thief?
A: No, I didn’t. I thought it might be kids.

TECHNIQUE TIP:
Attack officer’s weakest reasons for the stop first.

Q: When you say you thought it might be kids, you mean kids taking the car for a joyride?
A: Possibly. It was not possible to say.
Q: So to check the validity of your suspicion against reality, you pulled up alongside the vehicle to determine if, in fact, the car was being driven by a kid?
A: No.
Q: You said, “kids”?
A: Yes.
Q: From your vantage point, you could see into the car’s interior?
A: More or less.
Q: You saw no one in the backseat?
A: No.
Q: No one in the front passenger seat?
A: No.
Q: So it could not have been kids?
A: I didn’t know. It could have been stolen earlier in the day. It was impossible to say.
Q: Impossible to say is not probable cause is it, Officer?
Prosecutor: Objection!
Q: You saw only the driver?
A: Yes.
Q: The back of the driver’s head?
A: Yes.
Q: You didn’t see the clothes he was wearing?
A: No.
Q: The color of his hair?
A: No.
Q: Whether it was grey?
A: No.
Q: You did not know the driver’s age?
A: No, I didn’t.
Q: So, you just assumed it was a kid?
A: I thought that was a reasonable conclusion.
§3:35.5 Popped trunk lock not unusual on old, beat up car.
Q: Let’s focus on the trunk lock, okay?
A: Yes.
Q: As we established earlier, this was a car at least 10 years old?
A: Yes.
Q: And it was showing its age?
A: Yes.
Q: People with beat up cars sometimes neglect to repair them?
A: True.
Q: Might decide the car’s not worth the investment?
A: True.
Q: You might expect the owner of a new car, especially an expensive car, to repair a broken trunk lock?
A: Yes.
Q: But you would not necessarily expect the owner of an older, beat up, car to replace a missing trunk lock?
A: I disagree. Any owner would realize that he can’t store items in a trunk with no lock. I think he would replace it.
Q: Did it appear to you, Officer, that the owner of this car possessed many valuables?
A: I don’t know.
Q: So for you, the condition of the car is irrelevant if the lock is missing?
A: That’s correct.
§3:35.6 Owner of old car sometimes has to pop trunk lock to access trunk.
Q: When you noticed this popped trunk lock, you did not know when the lock had been popped?
A: I had probable cause to believe it had been popped recently. As I indicated earlier, the owner would likely replace a popped lock.
Q: When you noticed this popped trunk lock, you did not know who popped the lock?
A: No. I did not. But it seemed obvious at the time it was the driver.
Q: And in this case, the driver was the owner?
A: I had sufficient reason to believe the driver had stolen the car.
Q: The driver was the owner?
A: Yes.
Q: Sometimes, in older cars, the locks stop working?
A: That’s possible.
Q: Sometimes the owner has to pop his own trunk lock to access his trunk?
A: It’s more indicative of a stolen car.
Q: Sometimes the owner has to pop his own trunk lock to access his trunk?
A: Sometimes, yes.

§3:35.7 Officer did not examine lock or car interior to test his stolen car theory.
Q: You were at some distance from the vehicle when you signaled it to pull over?
A: About 15 feet behind it.
Q: Far enough away, that you could not see whether or not the hole where the lock had been had accumulated any rust?
A: No.
Q: When you first approached the Chevy on foot, you didn’t bother to take a look at the hole in the trunk?
A: No, I didn’t. There was no need to.
Q: No need to see if there was any rust?
A: No.
Q: Any fresh pry marks?
A: No. The lock had been popped.
Q: Now, because the lock had been popped, you concluded that the thief had accessed the car’s interior through the trunk?
A: That would be one way, yes.
Q: Well, if you’re a thief trying to steal a car, would there be any other reason you would pop the trunk?
A: To steal the contents of the trunk.
Q: Couldn’t you, as the thief, simply pull the trunk release from inside the car?
A: That’s possible.
Q: That would attract a lot less attention than popping a trunk lock in broad daylight?
A: I’m sure it would.
Q: So, you suspected when you saw this popped trunk lock, that the thief had popped the lock and crawled through the trunk to the car’s interior?
A: Yes.
Q: As you were driving behind my client’s car, were you aware of whether or not the back seats of this Chevy could be pushed forward?
A: No. I wasn’t.
Q: So, you did not know if your theory was even possible?
A: No. I don’t have to be positive, sir.

§§3:36–3:39 Reserved

B. Motor Vehicle Searches

1. Based on Odor of Marijuana

§3:40 Strategy

Having stopped a vehicle or approached a residence, the police need some excuse to conduct a search. Often, they claim to have smelled the odor of burnt marijuana. For the very reasons that make it a meaningless claim, it is a claim that cannot be disproved. After all, the odor of burnt marijuana clings for hours to clothing, hair, and upholstery. An individual about whom the odor lingers need not have smoked or possessed marijuana, he need only have been in the presence of someone using it some time in the past 12 hours. That someone may not even have smoked marijuana in the vehicle or the home is irrelevant. Because most state courts will hold that the odor gives the officer probable cause to search the vehicle’s interior, the officer’s inability to distinguish the odor of burnt marijuana from myriad similar odors must be revealed, and the conclusions he drew from that odor must be challenged.

Begin by asking the officer if he has ever used marijuana. The prosecutor (who very likely at least tried marijuana in high school, college, or at last week’s Rolling Stones concert), will jump to his feet to object, claiming
that whether the officer has used marijuana in the past is irrelevant to the proceedings; that the officer has already testified that the sergeant at the Police Academy burned marijuana to familiarize the recruits with the odor; and, most importantly, that it could raise Fifth Amendment issues. Defense counsel should point out that almost the entire point of the hearing is to test the officer’s ability to distinguish the odor of burnt marijuana from any number of other similar odors, and any interference with the cross-examination, such as the officer’s exercise of his Fifth Amendment right, on such a central issue is a violation of the defendant’s Sixth Amendment right to cross-examination.

§3:41 Angles of Attack

✓ Officer was never tested to determine if he can distinguish odor of freshly burned marijuana from similar odors [§3:42.1].
✓ No evidence in car of anyone smoking marijuana [§3:42.2].
✓ Officer was never tested to determine if he can distinguish stale odor of burnt marijuana from similar odors [§3:42.3].
✓ Stale odor of burnt marijuana is insufficient evidence of possession [§3:42.4].

§3:42 Cross-Examination

§3:42.1 Officer was never tested to determine if he can distinguish odor of freshly burned marijuana from similar odors.

Q: Officer, you have never used marijuana, have you?
Prosecutor: Objection!
Court: Overruled.
Q: Officer?
A: No, I haven’t. [What else is he going to say?]
Q: Have you been in the presence of friends or people smoking marijuana?
A: No, sir. [That’s a lie.]
Q: You testified on direct examination that you attended the police academy?
A: Yes, sir.
Q: And that to familiarize you and the other recruits with the odor of burnt marijuana, the staff sergeant burned some marijuana?
A: That’s correct.
Q: That demonstration lasted how long, Officer?
A: It lasted a few minutes.
Q: That was the only demonstration?
A: Yes.
Q: The sergeant burned marijuana in your presence?
A: Yes.
Q: So, it was fresh?
A: Yes, you could say that.
Q: After this demonstration, did the academy make any effort to determine if you could reliably distinguish the odor of burning marijuana from other odors?

CAUTION:

Don’t specify other odors.

If you name the other odor, such as tobacco or cigar smoke, the officer will automatically say he can distinguish between the two.

A: No, sir.
Q: We have no way of knowing, therefore, if you can reliably distinguish between the odor of burnt marijuana and similar odors?
A: No.

§3:42.2 No evidence in car of anyone smoking marijuana.

Q: You didn’t see my client smoking marijuana?
A: No.
Q: You didn’t find the remains of a marijuana cigarette in the ash tray?
A: No.
Q: Or anywhere else in the vehicle?
A: No, I didn’t.
Q: You found no pipe for smoking marijuana?
A: No.
Q: No bong?
A: No.
Q: No rolling papers?
A: None.
Q: No lighter, other than the car lighter?
A: No.
Q: So, there was no evidence that my client or anyone else recently smoked marijuana the vehicle?
A: No.

§3:42.3 Officer was never tested to determine if he can distinguish stale odor of burnt marijuana from similar odors.

Q: So, at best, you’re claiming you smelled the stale odor of marijuana, rather than freshly smoked marijuana?
A: I smelled the odor of marijuana. I cannot tell you exactly when the marijuana was smoked.
Q: At the academy, the sergeant did not produce clothing from someone who had smoked marijuana earlier in the day?
A: No, he didn’t.
Q: So the sergeant did not demonstrate the stale odor of burnt marijuana?
A: No, he didn’t.
Q: Didn’t produce a sweater or a jacket that had been exposed to burning marijuana 24 hours earlier?
A: No.
Q: He didn’t demonstrate how the odor of burnt marijuana changes over time?
A: I don’t know that it does, sir.
Q: You believe there is no difference between the odor of freshly burnt marijuana and the days-old stale odor of marijuana that might cling to a person’s clothing?
A: There’s no difference that I know of.
Q: Cigar smoke and cigarette smoke also cling to clothing?
A: Yes, they do.
Q: That’s the smell of stale burnt tobacco?
A: Yes.
Q: There’s a difference between the smell of burning tobacco and stale burnt tobacco?
A: Not that I’m aware of.
Q: You have not noticed any difference between the odor of stale burnt tobacco clinging to clothing and burning tobacco?
A: There’s some difference, yes.
Q: There are differences between the odors of stale burnt tobacco from a cigarette and a cigar?
A: Yes.
Q: At the academy, you weren’t tested to determine if you could reliably distinguish between the odor of stale burnt marijuana and the odor from a stale burnt cigar?
A: No, I wasn’t.
Q: So we have no way of knowing if you can?
A: Based upon my experience and training, I am confident I can.
Q: Some people smoke cigarettes or cigars and smoke marijuana?
A: I’m sure there are.
Q: These people would have both odors on them?
A: They could.
Q: We have no way of knowing if you can reliably distinguish between the odors of stale burnt marijuana and stale burnt tobacco?
A: I’ve never been tested, no.

§3:42.4 Stale odor of burnt marijuana is insufficient evidence of possession.

Q: There were four individuals in the vehicle?
A: Yes, sir.
Q: The driver and three passengers?
A: Yes.
Q: So, for the moment, let’s say you did smell the odor of burnt marijuana?
A: Yes.
Q: When you approached the vehicle and first smelled this odor, you did not know if marijuana had been smoked inside the vehicle?
A: No, I did not.
Q: And if it had been smoked inside the vehicle, when it was smoked?
A: No, I could not offer a timeframe.
Q: You cannot say if it was smoked within an hour or several hours of your stopping the vehicle?
A: It would be difficult for me to say.
Q: Or even if it was smoked that day?
A: That’s true.
Q: It was winter?
A: Yes.
Q: It was cold out that day?
A: Yes.
Q: When you first approached the vehicle, the windows were up?
A: Yes.
Q: Odors linger longer in a vehicle that has the windows up, rather than down?
A: I’m sure that’s true.
Q: You didn’t know, when you smelled this odor, if any of the occupants of the vehicle had smoked marijuana?
A: I’m sure one of them did.
Q: It’s also possible that the marijuana had been smoked by an individual long since departed?
A: It’s possible.
Q: Or if it had been smoked by one of the occupants before he entered the vehicle?
A: No, I did not, sir.
Q: It’s illegal to possess marijuana?
A: That’s correct.
Q: But it’s not illegal to be under the influence of marijuana?
A: Ah, I’m not sure. I don’t believe it is.
Q: You didn’t charge anyone with being under the influence?
A: Ah, no I didn’t.
Q: You didn’t know when you smelled this odor if someone in the vehicle had simply been in the presence of someone who had been smoking marijuana?
A: Correct.
Q: It’s not illegal to be in the presence of someone who is smoking marijuana?
A: No, I don’t believe it is.
Q: So, you don’t know who smoked it?
A: No.
Q: If it was one of these occupants or someone else?
A: No, I don’t.
Q: You don’t know when he smoked it?
A: No.
Q: If he smoked in front of any of these occupants?
A: No.
Q: You don’t even know if he smoked the only joint he had?
A: No, I don’t.
Q: So, there are almost a limitless number of explanations for the odor of marijuana?
A: Yes, there are.
Q: A limitless number of explanations that would make it no more likely that you’d find marijuana in the vehicle than anywhere else?
A: I disagree.

2. Search of Trunk Based on Odor of Marijuana

§3:43 Common Fact Pattern
In the following examination, the officer has smelled the odor of burnt marijuana and found the remains of a marijuana cigarette in the ashtray. Having found the joint, the officer searches the interior of the vehicle, which is reasonable. Finding no other marijuana or drug paraphernalia in the interior, the officer expands his search to the vehicle’s trunk. There is no reason to believe the trunk would contain drugs, since no one smokes marijuana in a trunk and there is no evidence whatsoever that the driver has stored additional marijuana in the trunk.

§3:44 Cross-Examination
Q: Based upon the strength of the odor, you concluded that my client had recently smoked marijuana in the vehicle?
A: That’s correct.
Q: So, you searched the ashtray?
A: I did.
Q: You found some ashes?
A: Yes.
Q: And the remains of a marijuana cigarette?
A: Correct.
Q: And that explained the odor?
A: Yes.
Q: You seized the roach?
A: That’s correct.
Q: A person found with the tiny remains of marijuana cigarette might have no other marijuana?
A: That’s possible.
Q: You had no evidence that there was marijuana stashed somewhere in the car?
A: I had reasonable suspicion to believe there might be.
Q: You had no evidence that there was marijuana stashed somewhere in the car?
A: I had the remains of the marijuana cigarette.
Q: But nothing else?
A: No.
Q: You then looked under the driver’s side seat?
A: Yes. The driver could have stashed marijuana under the seat.
Q: You looked in the glove compartment?
A: Yes.
Q: After you found the roach?
A: Yes.
Q: You looked under the passenger side seat?
A: Yes.
Q: Then you searched the rear compartment area?
A: Yes.
Q: Then you popped the trunk?
A: That’s correct.
Q: And you searched the trunk?
A: Right.
Q: When you smelled the odor of marijuana coming from within the vehicle, you believed my client had been smoking marijuana inside the passenger compartment?
A: Right.
Q: You did not believe he had been smoking marijuana in the trunk?
A: No, I did not.
3. **Search Based on Strong Odor of Marijuana, But Suspect Not High**

§3:45 **Strategy**

If the officer is suggesting that because the odor was strong, the driver had recently smoked marijuana, begin your cross-examination by demonstrating that the driver drove well, making it unlikely that he was high. Use the sample cross-examinations in Chapter 9, Cross-Examination in DWI Cases, as a guide. See §§9:01-9:07. Amusingly, while the officer describes a strong odor of burnt marijuana, he often does not charge the driver with operating under the influence of drugs or even ask him to perform field sobriety tests. If the odor is that strong or fresh, and the officer finds marijuana during the search, why would he not give field sobriety tests to the driver?

§3:46 **Angles of Attack**

- Marijuana affects driving skills [§3:47.1].
- The law treats driving under influence of drugs equal to driving under influence of alcohol [§3:47.2].
- Nothing in police report to indicate driver intoxicated [§3:47.3].
- Officer did not administer field sobriety tests [§3:47.4].

§3:47 **Cross-Examination**

§3:47.1 Marijuana affects driving skills.

Q: You described the odor of marijuana as “strong”?
A: Yes. It was.
Q: Which you concluded meant it had been recently smoked?
A: Yes.
Q: And by recently, you meant within a half-hour?
A: Yes. Maybe longer.
Q: Marijuana is an intoxicant?
A: Yes.
Q: It gets people high?
A: Yes.
Q: And from your training and experience, you know it can affect a person’s judgment?
A: Yes.
Q: Impairs his ability to perceive?

**TECHNIQUE TIP:**

*Mirror language of DWI.*

Use words, such as “impair” and “intoxication,” that are consistent with driving under the influence. Later, ask the officer why, if recent marijuana use impairs driving ability, he did not bother to have your client perform field sobriety tests.

A: Yes.
Q: Impairs his motor skills?
A: Yes.
Q: His reflexes?
A: Yes.
Q: Impairs his judgment?
A: Yes.
Q: Driving requires judgment?
A: Yes, it does.
Q: It requires the ability to properly perceive?
A: Yes.
Q: Sharp motor skills?
A: Yes.
Q: Sharp reflexes?
A: Yes.
§3:47.2 The law treats driving under influence of drugs equal to driving under influence of alcohol.

Q: And from your training and experience, you know that a person who smokes marijuana an hour earlier can remain under its influence?
A: That’s true.
Q: Driving while under the influence of marijuana is illegal?
A: Yes. It is.
Q: It’s a criminal offense?
A: Yes.
Q: A criminal offense as serious as drunk driving?
A: Yes.
Q: In fact, the punishment for driving while under the influence of a drug like marijuana is identical to the punishment for driving while under the influence of intoxicating liquors?
A: That’s correct.
Q: In the past, you have arrested drivers for driving while under the influence of drugs?
A: That’s correct.

§3:47.3 Nothing in police report to indicate driver intoxicated.

Q: Going back to the strong odor of marijuana, you were on the alert for signs that my client was impaired?
A: I... I wondered if he might be. That occurred to me.
Q: Because, in your opinion, someone who had been in the car had recently smoked marijuana?
A: Ah, yes.
Q: My client was the only occupant of the car?
A: Right.
Q: You charged only my client with possession of that marijuana cigarette?
A: That’s correct.
Q: You examined my client for signs of intoxication?
A: It occurred to me. I don’t remember if I looked for signs of intoxication.
Q: If he had had red eyes, you would have noted that?
A: Yes.
Q: And included it in your police report?
A: Yes. I probably... yes.
Q: You’ve had the chance this morning to read your report?
A: I have.
Q: And you don’t reference red eyes in your report?
A: No. I don’t believe so.
Q: If my client had demonstrated any difficulty with his motor skills, you would have taken note of that?
A: More than likely.
Q: And noted it in your report?
A: Yes.
Q: It’s not noted in your report, is it?
A: No.
Q: If there was something amiss with my client’s judgment, you would have noted it?
A: If I noticed it, yes.
Q: And if you noticed it, you would have included a reference to it in your report?
A: I might have.
Q: It’s not noted in your report?
A: No.

§3:47.4 Officer did not administer field sobriety tests.

Q: You use field sobriety tests to determine if a driver is under the influence?
A: Yes.
Q: You’ve given these field sobriety tests hundreds of times?
A: Yes.
Q: They take only a few minutes to administer?
A: Yes.
Q: You administer these tests any time you suspect a driver is under the influence?
A: Yes.
Q: Whether it’s under the influence of liquor or drugs?
A: Right.
Q: By “suspect,” we mean just a suspicion, not probable cause?
A: Yes.
Q: And it’s always better to be safe?
A: Yes.
Q: There was nothing preventing you from administering field sobriety tests to my client?
A: No.
Q: Had you had any suspicion whatsoever that my client was under the influence of marijuana, you would have asked him to perform field sobriety tests?
A: Yes. I would have.
Q: But, you did not take the few minutes to administer these tests to my client?
A: No.
Q: Because you did not suspect my client was under the influence?
A: Correct.
Q: Yet, you claim that an occupant of the vehicle had recently smoked marijuana?
A: Yes.
Q: Within the hour?
A: Yes.
Q: Recently enough to be under the influence?
A: Well, I don’t know how much he smoked.
Q: Recently enough to be under the influence?
A: Maybe.
Q: And my client was the only occupant?
A: Yes.

4. Search Based on Furtive Movements

§3:48 Strategy

The catch-all excuse for automobile searches is the vague, but always suspicious or threatening, “furtive movement.” In reality this movement may be nothing more than the driver searching for his registration in the glove compartment or putting something personal away that he did not wish the officer to see. The officer may have conjured up this movement out of his imagination to justify a search lacking probable cause. Examine the car to determine how likely it is that the officer saw what he claimed to have seen from his vantage point. If needed, take photographs. To the extent available in your case, demonstrate through cross-examination that the driver pulled over immediately and without incident, that he waited patiently while the officer called in the license plate, that the occupants’ actions were consistent with innocent activity and/or that the officer’s view was obstructed.

§3:49 Angles of Attack

✓ Driver pulled over immediately and without incident [§3:50.1].
✓ Officer’s view into the vehicle was obstructed [§3:50.2].
✓ Numerous innocent explanations might explain passenger bending over [§3:50.3].
✓ Challenge officer’s suspicion: hiding a gun beneath the seat [§3:50.4].
✓ Challenge officer’s suspicion: hiding a knife beneath the seat [§3:50.5].
✓ Challenge officer’s suspicion: hiding contraband beneath the seat [§3:50.6].

§3:50 Cross-Examination

§3:50.1 Driver pulled over immediately and without incident.
Q: You were behind the vehicle on Rt. 95?
A: Yes.
Q: You noticed the vehicle traveling over the speed limit?
A: Yes.
Q: You activated your blue lights?
A: Yes.
Q: The driver pulled into the breakdown lane?
A: Yes.
Q: Immediately?
A: After a little ways, yes.
Q: He pulled over without incident?
A: I don’t know what you mean, Counselor.
Q: He used his direction to signal that he was pulling over?
A: I don’t recall.
Q: He slowed down gradually?
A: I believe so.
Q: He gradually entered the breakdown lane?
A: Yes.
Q: He didn’t strike the guardrail?
A: No.
Q: He came to a stop?
A: Yes.
Q: He had centered the vehicle within the breakdown lane?
A: Yes.
Q: He did this without incident?
A: Yes.
Q: There was nothing about the way my client pulled over that caused you to suspect that he was committing a crime?
A: No.
Q: Or a threat to you?
A: No.
Q: Or that he would attempt to evade you?
A: No.
Q: Before approaching the vehicle, you called in the vehicle’s registration number?
A: Yes.
Q: There was nothing about the car that caused you to suspect any wrongdoing?
A: No.
Q: How long did it take before you exited your cruiser and approached the vehicle?
A: A minute, maybe less.
Q: During this minute or so, my client waited for you?
A: Right.
Q: He made no attempt to exit his vehicle?
A: No.
Q: You did not see him discard anything out a window?
A: No.
Q: This is, so far, a typical stop?
A: Yes.
Q: Nothing, so far, has aroused your suspicion?
A: No, sir.

§3:50.2 Officer’s view into the vehicle was obstructed.
Depending on the circumstances, it may have been impossible, or at least unlikely, that the officer was able to discern what was going on inside the vehicle during the short walk from the cruiser to the client's vehicle.
Q: You exited your vehicle?
A: Yes.
Q: It was dark?
A: Yes.
Q: The blue lights are still flashing?
A: Yes.
Q: And the wig-wags?
A: Yes.
Q: And these lights were bouncing off my client’s vehicle?
A: Not really.
Q: You did not notice blue lights reflecting off the vehicle’s rear window?
A: Not much. [Sometimes, the officer testifies that he adjusted the overhead light switch so that the lights flash toward the rear only.]
Q: Or the wig-wags reflecting off the rear window?
A: Not really, no.
Q: Not at all?
A: Not really.
Q: On direct, you testified that as you approached the vehicle you noted movement within the vehicle?
A: Yes. There was a lot of activity within the vehicle. I could see someone bend over. I was concerned that there was gun within the vehicle. With my handheld radio, I called for back-up.
Q: You described it in your report as a furtive movement?
A: Yes.
Q: Not furtive movements?
A: Yes. To me, it means the same thing.
Q: It’s dark, as we’ve established?
A: Yes.
Q: You were parked about 10 feet from the rear of the vehicle?
A: Yes.
Q: And to walk those 10 feet would take about two to three seconds?
A: Approximately. Maybe longer.
Q: And another four to five feet from the driver’s door?
A: Yes.
Q: You testified you saw the furtive movement before you reached the rear of the vehicle?
A: As I was reaching it. I stopped at the rear of the vehicle.
Q: You’re about six feet tall?
A: Yes. Six one.
Q: You could see the roof of the car?
A: Yes.
Q: The rear window was beneath you?
A: Yes.
Q: You were looking down into the car?
A: Yes.
Q: The interior light of my client’s car was not on?
A: No.
Q: You could only see the outline of the two occupants?
A: That’s correct.
Q: Who were both seated in front?
A: Yes.
Q: By outline, just their heads?
A: And shoulders.
Q: And the passenger bent over?
A: Yes.

**TECHNIQUE TIP:**

*Don’t bother challenging claim that passenger bent over.*

Most attorneys would contest the officer’s claim that he saw the passenger bend over. If the passenger is moving at all, other than swaying side to side, he can only bend over. There are too many innocent reasons a passenger might bend forward [see §3:50.3] to bother challenging the claim.
Q: How long was he bent over?  
A: A few seconds.  
Q: During that few seconds, the seat makes it impossible for you to see what he’s doing?  
A: Yes.  
Q: And what did you believe he was doing?  
A: I thought he might be concealing a weapon, accessing a weapon, or hiding evidence.

§3:50.3 Numerous innocent explanations might explain passenger bending over.

**TECHNIQUE TIP:**

*Necessary to challenge officer’s observations?*

If the officer’s observations are relatively innocuous, it may not be worth challenging his ability to see inside the car. It may be better simply to draw out of the officer the many innocent explanations for the movement inside the car.

Q: So, you believed there were three explanations?  
A: I thought those were three likely possibilities.  
Q: And it was possible that the passenger was doing nothing threatening?  
A: I doubt it, but anything is possible. [Standard police answer.]  
Q: When you approach a driver that you’ve stopped, you ask for his license and registration?  
A: Yes.  
Q: That’s standard procedure?  
A: Yes.  
Q: It’s so common that some driver’s have their license and registration in hand when you reach them?  
A: Yes.  
Q: Between the time you signaled them to pull over and reached the driver’s side door, they had retrieved their license and registration?  
A: Yes.  
Q: Many people store their registration in the glove compartment?  
A: Yes.  
Q: The glove compartment is usually in front of the front seat passenger?  
A: Yes.  
Q: It was possible that the front seat passenger was retrieving the registration?  
A: I don’t think so.  
Q: It’s not possible that the front passenger bent forward to see or reach into the glove compartment?  
A: That’s not consistent with what I saw, Counselor.  
Q: Robbie Smith was the passenger?  
A: Yes.  
Q: I have his booking sheet. He’s 5’6” tall?  
A: About that.  
Q: Let’s say that he was bent over to place something in the glove compartment, okay?  
A: Yes.  
Q: Do you believe he would have to bend over further to conceal or retrieve something beneath the seat?  
A: Yes, I do.  
Q: And with the passenger seat obstructing your view, you can tell just how far he was bending over?  
A: Yes. He was not looking into the glove compartment. [This is a lie. There is no way he could tell how far the passenger was bending over.]  
Q: From your vantage point, you couldn’t see the glove compartment, could you?  
A: Ah, no.  
Q: So you didn’t know if the glove compartment door was open or closed as he bent over?  
A: No.  
Q: But you’ve absolutely ruled out the possibility that the passenger was bending forward to see into or reach into the glove compartment.
A: Yes.

§3:50.4 Challenge officer’s suspicion: hiding a gun beneath the seat.

Q: Let’s say he was placing something beneath the seat? What did you believe he was storing beneath the seat?

TECHNIQUE TIP:

Open-ended question.

You can use an open-ended question here because whatever the officer says—“a gun,” “a knife,” “drugs”—can be revealed as foolish through cross-examination.

A: As I said, a weapon of some kind or contraband of some kind.
Q: Can you be more specific?
A: No.
Q: What kind of a weapon?
A: I don’t know. A handgun or a knife.
Q: Citizens of the Commonwealth who are properly licensed can carry handguns on their person?
A: Yes, sir.
Q: There’s no law against storing a properly licensed gun beneath a car seat?
A: No, sir. But he wouldn’t be hiding it if it was a licensed gun.
Q: So, if it was a handgun, it must be illegally possessed?
A: More than likely.
Q: Before searching the vehicle, you did not determine whether either the driver or the passenger was licensed to carry a firearm?
A: No, I did not.
Q: From what you describe as a “furtive movement” you have extrapolated that if there was a handgun in the vehicle, it is more than likely illegally possessed?
A: Yes.
Q: If you were pulled over in your personal car and you noticed your service revolver on the front passenger seat, you would be a little concerned with how the officer who is approaching the car might react to it?
A: Yes. But I would not conceal it beneath the passenger seat.
Q: Because you could flash your badge to your brother police officer?
A: Ah, yes.

§3:50.5 Challenge officer’s suspicion: hiding a knife beneath the seat.

Q: You said it also might be a knife?
A: Yes.
Q: You need no license to possess a knife?
A: No.
Q: It’s not illegal to store a knife beneath a seat?
A: No.
Q: But you felt threatened?
A: Yes.
Q: You had your service revolver on your person?
A: Yes, of course.
Q: If somebody came at you with a knife, you would have sufficient time to fire your weapon?
A: Not necessarily.
Q: What do you mean?
A: I might not see the knife until it’s too late. It could be concealed.
Q: Both men were wearing jackets?
A: Yes.
Q: You approached the driver’s side door?
A: Yes.
Q: It would have been difficult for the passenger to reach across the driver and stab you?
A: Yes, it would have.
Q: So the driver would pose the most danger, if there’s a knife in the car?
A: Yes.
Q: Wouldn’t it be easier for the driver to stab you with a knife concealed in the driver’s jacket or down by his feet, rather than one stashed beneath a passenger seat?
A: I don’t know.

§3:50.6 Challenge officer’s suspicion: hiding contraband beneath the seat.
Q: By contraband, you mean drugs?
A: Or anything else that’s illegal to possess.
Q: You thought it might be contraband because it appeared someone was reaching beneath the seat?
A: Yes. Someone wouldn’t bother to try to conceal something legal.
Q: No?
A: No.
Q: Some people view police officers as authority figures?
A: Okay.
Q: In your experience, you have encountered individuals who are embarrassed to be seen by authority figures doing something not illegal, but morally questionable?
A: I’m not sure.
Q: Men may be embarrassed to have a Playboy magazine in their vehicle?
A: I doubt it. I don’t know.
Q: They might be embarrassed to have you learn that they are taking prescription drugs, for whatever ailment?
A: Okay.
Q: Or a prior speeding ticket?
A: That’s possible.
Q: Or a restraining order?
A: I suppose.
Q: There are, in fact, Officer, innumerable legal items that an individual might choose to store beneath a seat because he didn’t want a police officer to see it?
A: I don’t think so.

[§§3:51–3:54 Reserved]

IV. DRUG CASES

In the 1970s, alarmed by the nation-crippling consequences of the drug trade, the federal and state governments rushed to enact severe penalties for those caught possessing, distributing, or trafficking drugs. Upping the penalties was not enough; in the 1980s, President Reagan declared a “War on Drugs.” That war drags on. The War on Drugs is not a war on drugs at all, but a war on the citizens suspected of illegally importing, distributing, and possessing drugs. It is no longer enough for law enforcement to police citizens, it now goes to war against them. Law enforcement views the Fourth Amendment as civil war breastworks—a defense to be overrun and smashed. In most drug offense cases, the motion to suppress is the trial. There is little to be gained from simply eliciting facts to be used later, because usually there is no later.

§3:55 Strategy: Hand-to-Hand Drug Deal

Experienced police officers can spot a hand-to-hand drug deal from a hundred feet away, or so they would have you believe. It’s tempting to believe the officer; after all, the officer found the drugs on your client’s person. How many individuals has the officer stopped and searched who possessed no drugs whatsoever? How was it that the officer was able to distinguish this hand-to-hand drug deal from a brief encounter between friends or acquaintances? Can an officer really differentiate a handshake from a drug deal? More than likely, the officer is going on no more than a hunch—the neighborhood, the dress of the individuals involved, and the manner in which the two individuals interacted. In a high-crime neighborhood, a hunch will pay off frequently. A hunch is not, however, probable cause or even reasonable suspicion.

§3:56 Angles of Attack

✓ Law-abiding citizens live and work in “high-crime” area. [§3:57.1]
Under the law, no grounds to assume money exchanged for drugs. [§3:57.2]
Not all conduct is “suspicious.” [§3:57.3]

§3:57 Cross-Examination

§3:57.1 Law-abiding citizens live and work in “high crime” area.
Q: You testified that the corner of Blue Hill Avenue and Washington Street is a high-crime area?
A: Yes. It is.
Q: And by “high-crime,” you mean that it has a higher rate of crime than other areas of the city?
A: That’s correct.
Q: In a non-high-crime area, the vast majority of people walking the streets are law-abiding citizens?
A: I... that’s probably true.
Q: Within a tenth of a mile of the corner of Blue Hill Avenue and Washington Street, there are a number of businesses?
A: Yes.
Q: There’s a Citizen’s Bank?
A: Right.
Q: People coming and going from the Citizen’s bank?
A: Yes.
Q: Legitimate customers?
A: I guess.
Q: A Store 24?
A: Yes.
Q: Law-abiding citizens doing some shopping there?
A: Yes.
Q: Coming and going from the store?
A: Yes.
Q: There’s an apartment complex at this corner?
A: Yes.
Q: Law-abiding citizens live at this complex?
A: Not all of them.
Q: There are law-abiding citizens living in this apartment complex?
A: Yes.
Q: And you can tell the difference between the law-abiding citizens in this complex from the criminals?
A: Well, it’s an apartment complex that generates a certain amount of criminal activity.
Q: There are law-abiding citizens coming and going from that complex?
A: Yes.
Q: Most of the people walking on the street near or at that corner are, in your experience, Officer, law-abiding?
A: Most? That’s true.
Q: Law abiding citizens greet their friends and acquaintances on the street?
A: Yes.
Q: Some of these greetings last minutes?
A: They can, yes.
Q: Some last only seconds?
A: Yes.
Q: Some men shake hands?
A: Right.
Q: Some just nod?
A: Yes.
Q: Some playfully bump shoulders?
A: Yes.
Q: Some hug?
A: Yes.

§3:57.2 Under the law, no grounds to assume money exchanged for drugs.
TECHNIQUE TIP:
Eliminate every observation that might give authority for stop and search.

When constructing your cross-examination of an officer who claims he saw an exchange of money for drugs, review the case law in your jurisdiction closely and determine what, exactly, the officer must have seen to give him the requisite reasonable suspicion to stop your client and/or probable cause to search him. Systematically eliminate every observation that gives the officer the authority to do either.

Q: On this street corner, you observed a man standing by the mailbox?
A: Yes.
Q: Not illegal to stand by the mailbox?
A: No.
Q: He stood there for a few minutes?
A: Yes, that’s correct.
Q: Nothing unusual about a person standing on a busy street corner?
A: No.
Q: Even for a few minutes?
A: For a few minutes, no.
Q: Another man approached?
A: Yes.
Q: This second man said “hi” or “hello”?
A: He said something, but I was too far away to hear what was said.
Q: The second man came right up to the first man?
A: Yes.
Q: He was within a foot and a half of the first man?
A: Yes.
Q: Both men were wearing coats?
A: Yes.
Q: They turned?
A: Yes.
Q: Their backs were to you?
A: Yes.
Q: Because their backs were to you, you did not see what they exchanged?
A: No.
Q: You saw no hand-to-hand contact?
A: No. I did not.
Q: You saw no money pass between them?
A: No.
Q: Saw no drugs pass between them?
A: No. I never said that I did.
Q: Saw nothing packaged as drugs are commonly packaged pass between them?
A: No.
Q: Never saw either man extract anything from a pocket?
A: No.
Q: Saw neither man stuff anything into a pocket?
A: No.
Q: And then, after about a minute, they parted?
A: Yes.

§3:57.3 Not all conduct is “suspicious.”

PRACTICE POINT:
Uncover the facts underlying the officer’s suspicion.
To an officer, all conduct is suspicious. There isn’t an innocent act that the average knucklehead officer cannot construe as indicative of criminal activity or intent. As a personal example, my car broke down on the highway. A State Trooper pulled up behind me, approached my car, and told me to lower my window. Since my car was dead, the power windows wouldn’t work, and I had to open the door instead. My “refusal” to obey the officer so unnerved him, he put his hand on his holster and shouted at me, “Do you have a firearm in the car?”

To an officer conducting surveillance in a “high-crime” area, anything a potential target does is “suspicious.” In the example below, the officer believed that because the two individuals turned away from him, they must be engaged in a drug deal. For that to be more than a hunch, a number of underlying facts must be true. Use cross-examination to demonstrate to the judge that the “suspicious conduct” was based mostly on the officer’s factually unsupported assumptions.

Q: You stated on direct examination that you believed they did this so you would not see what they were doing?
A: Absolutely.
Q: You believed, therefore, that at least one of the individuals had seen you?
A: Yes.
Q: Had not only seen you, but was suspicious of you?
A: Yes.
Q: Suspected you were a cop?
A: Yes.
Q: You were undercover, no?
A: Yes. I indicated that earlier.
Q: The goal of an officer working undercover is to go unnoticed?
A: Yes.
Q: To arouse no suspicion?
A: Yes.
Q: Toward that end, you dressed in casual clothing, not your uniform?
A: Correct.
Q: Clothing that would allow you to blend in with the people in the neighborhood?
A: Yes.
Q: In fact, you deliberately dressed a little shabbily?
A: Yes.
Q: And to this neighborhood, you didn’t drive your police cruiser?
A: No.
Q: Or any vehicle that looked like a police cruiser?
A: Right.
Q: You drove a beat up old Honda?
A: Yes, sir.
Q: With no police antenna?
A: Right.
Q: Or any other police apparatus that would give you away?
A: Correct.
Q: You were parked more than 50 yards from the defendant?
A: Yes.
Q: There was traffic coming and going?
A: Yes.
Q: Cars pulling in and pulling out?
A: Yes.
Q: Cars similar to your car?
A: Yes.
Q: And as you sat in this vehicle conducting surveillance, you did as little as possible to draw attention to yourself?
A: Yes.
Q: You didn’t want to spook any potential criminals?
A: That’s correct.
Q: You’ve conducted hundreds of surveillance operations?
A: Yes.
Q: And during these surveillance operations, because you’re good at your job, you went undetected?
A: Not always, but most of the time.
Q: Most of the time. The second individual, who approached my client, had only just arrived at the intersection?
A: Yes.
Q: Only a few seconds before turning away from you?
A: Yes.
Q: My client had been at the mailbox only a few minutes?
A: That’s correct.
Q: Neither individual pointed at you?
A: No.
Q: You never heard either one of them say, “That’s a cop over there?”
A: No.
Q: You indicated that there were times that a target spotted you?
A: Yes.
Q: Made you for a cop?
A: Yes.
Q: And the target immediately left the area?
A: Yes.
Q: Without doing a drug deal?
A: Yes.
Q: There’s nothing that you’re aware of that requires drug dealers to make deals at that mailbox?
A: I don’t follow you.
Q: You’re claiming, are you not, that my client made you?
A: Yes.
Q: That’s why he turned his back?
A: Correct.
Q: According to your theory, he decided to proceed with the drug deal, despite knowing that he was under police surveillance?
A: Yes.
Q: Again, there was nothing that required a drug dealer to do the deal at this mailbox?
A: No.
Q: A drug dealer, if he’s spooked, can walk away?
A: Yes, but he didn’t.
Q: A drug dealer, if he’s spooked, can just walk away?
A: He can.
Q: And meet his customer later at a safer spot?
A: Nothing prevents that, no.

V. SEARCH WARRANTS

A. Failure to Include Evidence

§3:60 Strategy

When drafting his affidavit in support of a search warrant, the officer has every incentive to include every bit of reliable evidence. He wants the magistrate to issue the search warrant and wants a judge, if it ever comes to that, to uphold the validity of the search warrant. Yet, occasionally, officers leave out evidence that, if it were credible, you would expect them to include. The officer may have decided against including it because he knew, if challenged, it
wouldn’t hold up and might undermine the value of the remaining evidence. The missing evidence might, indeed, contradict the representations the officer makes in the affidavit.

See generally Form 3-C, Motion to Suppress – Warrant Obtained by Pretext

§3:61 Cross-Examination

Q: Officer, when you apply for a search warrant, you file an affidavit in support of the application?
A: Yes.

Q: In that affidavit you have to prove to the magistrate that you have sufficient evidence to believe the fruits of a crime will be located at the particular address?
A: Yes.

Q: And by sufficient evidence, we mean probable cause?
A: Yes.

Q: There’s no way of knowing, is there, Officer, when you have enough evidence to meet the probable cause standard?
A: I believe I possessed enough evidence for probable cause.

Q: Let me focus my question. There’s no checklist that tells you, as an officer, if you check five out of seven boxes you have probable cause?
A: No.

Q: You may believe you have probable cause, and the magistrate could disagree?
A: That’s possible.

Q: Two magistrates looking at the same evidence could reach different conclusions—meaning one magistrate might find you had shown probable cause while another magistrate, looking at the same evidence, might find that you had not shown probable cause?
A: That’s true.

Q: And, as an experienced police officer, you were aware when you drafted this affidavit that a judge may eventually review this application and your affidavit?
A: Yes.

Q: To determine whether or not you possessed probable cause?
A: Right.

Q: And, you understood, when you drafted this affidavit, that if a judge later determined that you did not have probable cause, he could throw the evidence out?
A: Yes.

Q: You understood that a judge could throw out a portion of the evidence you included in your affidavit?
A: Yes, I did.

Q: And then decide if the remaining evidence rose to the level of probable cause?
A: Yes.

Q: So, when you drafted this affidavit, you wanted this search warrant issued?
A: Yes.

Q: And you wanted the issued search warrant to survive a challenge by the defense and, of course, judicial scrutiny?
A: Yes, I did.

Q: So, you had every reason to include every bit of credible evidence you were aware of in your affidavit?
A: Yes.

B. Confidential Informants

§3:62 Strategy

Detectives frequently rely on a confidential informant (“CI”) in drafting their affidavit in support of an application for a search warrant. To satisfy the constitutional probable cause standard, the Supreme Court ruled in Illinois v. Gates, 462 U.S. 213 (1983), that the totality of circumstances available for the officer to assess must add up to probable cause for a search warrant to properly issue. Nevertheless, the Supreme Court specifically noted that a confidential informant’s veracity and reliability, as well as his “basis of knowledge,” remained highly relevant to determining whether the search warrant should have been issued. For purposes of cross-examination of the detective who relied on the confidential informant, it is better to focus on these categories.
Cross-examining experienced police detectives about a confidential informant is no easy task. Since the informant’s identity is not disclosed, there is almost never a witness that the defense could call to refute what the officer says on direct examination. But there are conclusions we can reliably draw about this CI. First, he doesn’t want his name used, ostensibly for fear of retribution. More than likely, the CI is a degenerate drug addict or small-time drug dealer whose story, past associations, and frequent departures from the truth won’t bear close inspection. He is likely so unsavory a character that the police would rather leave him unnamed than risk having him stagger or oil his way up onto the witness stand.

§3:63 Angles of Attack

✓ Affidavit contains no information about CI that makes him credible and, therefore, reliable. [§3:64.1]
✓ Omitted information reveals CI not reliable and, therefore, not credible. [§3:64.2]
✓ Officer knows CI will never be questioned under oath. [§3:64.3]
✓ CI’s basis of knowledge comes from his own illegal conduct. [§3:64.4]

§3:64 Cross-Examination

[Note: In the following cross-examination, the officer submits his request for a search warrant to a clerk magistrate, which is typical in Massachusetts. In your jurisdiction, the courts may follow a different procedure.]

§3:64.1 Affidavit contains no information about CI that makes him credible and, therefore, reliable.

Q: You included in your affidavit what you claim the CI told you about Mr. Black’s drug trafficking activities?
A: I did.
Q: But what he told you would be worthless, unless he was reliable?
A: Yes.
Q: You could not march into the clerk’s office, hand him an affidavit in which you describe the CI as “unreliable” and expect him to issue you a search warrant?
A: No. I couldn’t.
Q: To get a search warrant, you have to convince the clerk that the CI’s information is credible?
A: Yes.
Q: To do that, you have to convince the clerk that the CI is reliable?
A: Yes.
Q: To convince a clerk that an individual is reliable, you want to include in your affidavit everything that you know about the CI that makes him credible?
A: Yes.
Q: You did not include your informant’s name in your affidavit?
A: No. I was afraid for his safety.
Q: Or his address?
A: Okay.
Q: Or even his home town?
A: Right. I didn’t.
Q: Or where he works?
A: No.
Q: Or what he does for a living?
A: No.
Q: Or if he’s even employed?
A: No. I didn’t.
Q: Or if he has a criminal record?
A: No.
Q: Or if he’s on parole?
A: No.
Q: Or on probation?
A: No.
Q: Or if he has pending criminal charges?
A: No.
Q: Or if you’ve arrested him in the past?
**TECHNIQUE TIP:**

*Ask questions based on information omitted from affidavit.*

Because the officer responds to these questions with denials, you can be very confident that the CI has no job, but does have a criminal record and, perhaps, pending criminal charges, or is on parole or probation. Now, ask questions based on those assumptions (*e.g.*, “You’ve never arrested...,” not “Have you ever arrested...”) and force the officer to either admit the truth about his CI or lie under oath.

§3:64.2 Omitted information reveals CI not reliable and, therefore, not credible.

Q: So, you’ve never arrested this CI?
A: No.
Q: Never been present when he was arrested?
A: I don’t recall. I don’t believe so.
Q: But he does have a criminal record?
A: I’m not sure. I don’t recall.
Q: You’ve checked his criminal record?
A: I probably did. I don’t remember.
Q: At the time that he gave you this information, he was on parole?
A: He may have been.
Q: Was he on parole, Officer?

**TECHNIQUE TIP:**

*If you get an honest prosecutor...*

It is my long-held suspicion that many prosecutors are not just indifferent to police perjury, but are active participants in the deceptions their police witnesses perpetuate on the courts. If you are fortunate, you’ll be up against an honest prosecutor, a straight arrow who won’t tolerate testifying. Since the officer isn’t sure the honest prosecutor won’t rat him out, he will be far more forthcoming. To drive home the point, position yourself just behind the prosecutor, so that the officer must look at you and the prosecutor simultaneously, or simply give the prosecutor a look of incredulity or disgust.

A: He was either on parole or probation.
Q: So he did have a criminal record?
A: To what extent, I don’t know.
Q: A minute ago, you did not recall if he had a criminal record?
A: I believe I said I wasn’t sure.
Q: But now you’re sure he was on parole or probation?
A: For what, I don’t know.
Q: But now, you are sure?
A: Yes.
Q: You wrote in your affidavit that the CI had provided you with valuable information in the past?
A: That’s correct.
Q: Information that you had relied upon?
A: Yes.
Q: Information that you had learned, through whatever means, was credible?
A: Yes.
Q: But you don’t identify the cases by name?
A: I did not wish to endanger him, so no.
Q: There’s no identifying information in here at all?
A: No.

§3:64.3 Officer knows CI will never be questioned under oath.

Q: You understood when you drafted this affidavit that this unnamed individual would never come into court?
A: True.
Q: Never be called to the witness stand?
A: Right.
Q: Never be questioned about what you wrote about him?
A: That’s correct.
Q: Never be questioned about his help in other, earlier cases?
A: Right.
Q: About other cases in which his information was proven not credible?
A: That’s not true.
Q: Never questioned about why he had helped you with those other cases?
A: No.
Q: Never be questioned about what he told you about Mr. Black?
A: Right.
Q: Never asked, sitting on this witness stand, to read the affidavit and answer questions about that affidavit under oath?
A: No.
Q: You understood when you drafted this affidavit that this CI would never be in a position to contradict you?
A: I did not include his information because I did not want to endanger him.
Q: He would never be called as a witness?
A: No.
Q: And never, therefore, be in a position to contradict you?
A: That’s true.
Q: Never be asked why he told you about Mr. Black?
A: Okay.
Q: Never cross-examined about his criminal record?
A: Yes.
Q: Never cross-examined about his parole status?
A: Right.
Q: Never cross-examined about his probation status?
A: Correct.
Q: Never asked about his more recent criminal behavior?
A: I can’t answer that.
Q: About his current drug use?
A: I have no reason to believe he is on drugs.

§3:64.4 CI’s basis of knowledge comes from his own illegal conduct.

Q: This CI has provided you with information on drug dealers in the past?
A: Yes.
Q: And in this case, according to you, this CI provided you with information about my client’s drug dealing?
A: Correct.
Q: So, this CI regularly associates with drug dealers?
A: Well, he has on occasion. I don’t know about regularly.
Q: According to you, he regularly provides information about drug dealers, but he doesn’t regularly associate with drug dealers?
A: I don’t know his personal habits.
Q: He’s a drug user?
A: I don’t know if I’d say that.
Q: To your knowledge, has he used drugs?
A: Yes.
Q: What drugs?
A: Marijuana. Maybe cocaine.
Q: To your knowledge, has he dealt drugs?
A: Yes.
Q: Was he dealing drugs at the time he provided the information regarding my client?
A: I don’t believe so, no.
VI. SEARCH INCIDENT TO ARREST

To many police officers, the right to prevent the arrestee from accessing a weapon or some bit of evidence translates not just into a right to conduct a post-arrest sweep of the area surrounding the arrestee, but into a constitutional carte blanche to search every nook and cranny of the room in which the arrest took place, if not the entire apartment or home. This exception to the probable cause standard was carved out by the courts for the protection of police officers arresting someone who might access a weapon from a drawer, etc. Chimel v. California, 395 U.S. 752 (1969). It limits the search to those areas within the immediate reach of the arrestee, from which he could realistically obtain a weapon or contraband, not what the Flash, a member of the Peking Acrobats, or Harry Houdini could theoretically put his hands on. To the testifying officer, there is always a realistic possibility that the handcuffed arrestee, secured in the backseat of the police cruiser, could access a kitchen drawer. The judge, who can’t imagine confronting such criminals himself and who doesn’t want your client coming within 10 feet of his bench, is most likely going to believe your client posed a danger to the officers—after all, you’re trying to suppress evidence of wrongdoing.

§3:70 Strategy

Except in the most extreme cases—where the client is wheelchair-bound, nearly fossilized, or an elementary school kid—resist the temptation to challenge the possibility that your client posed a risk to the officers. Instead, use cross-examination to demonstrate that the officers did consider your client a threat and took every precaution possible to minimize any danger by immediately ordering the client to the floor and handcuffing him. At an arrest, the officers’ first goal is not to search a drawer or handbag, but to so quickly intimidate the arrestee into submission that he never considers, or quickly abandons, his options, including accessing a weapon. Then the officers immediately immobilize him. If the arrestee resists, the officers will concentrate their efforts on subduing him, not searching the drawers, etc. It is only after the danger passes that the officers have the luxury of searching the area within the reach of the arrestee. It is this point on which you should focus your cross-examination.

§3:71 Angles of Attack

✓ Officers approached premises in stealth. [§3:72.1]
✓ Initial goal at arrest: surprise and overwhelm suspect. [§3:72.2]
✓ Officers entered premises with guns drawn and quickly subdued suspect. [§3:72.3]
✓ Fellow officer properly and securely handcuffed suspect. [§3:72.4]
✓ Fellow officer properly and safely escorted suspect from premises. [§3:72.5]
✓ Search conducted after suspect handcuffed and danger had passed. [§3:72.6]

§3:72 Cross-Examination

§3:72.1 Officers approached premises in stealth.
Q: You had an arrest warrant for Mr. Walsh?
A: Yes.
Q: You knew where he lived?
A: Yes.
Q: In fact, you had his residence under surveillance?
A: Yes.
Q: You and the other officers traveled to Mr. Walsh’s home?
A: Yes.
Q: To arrest him?
A: Correct.
Q: You had reason to believe he was a drug dealer?
A: That’s right, Counselor.
Q: And hot-tempered?
A: Yes.
Q: At times, irrational?
A: Yes.
Q: You wanted to have a sufficient number of police officers with you to effect this arrest?
A: Of course.
Q: That was a total of eight officers?
A: About that. I’m not sure.
Q: Roughly eight officers?
A: Yes.
Q: You brought a battering ram?
A: Yes.
Q: To use to break the door down, if necessary?
A: Yes.
Q: You drove to Mr. Walsh’s house in unmarked cars?
A: Yes.
Q: You did not use your sirens when approaching the home?
A: No.
Q: Or your overhead lights or wigwags?
A: No.
Q: Because you did not want him to know you were coming?
A: That’s correct.
Q: Because if he knew you were coming, he might flee?
A: Yes.
Q: Or prepare himself to resist?
A: Yes.
Q: By potentially arming himself?
A: Yes.
Q: So, you approached the home with as much stealth as you could?
A: Right.
Q: Mr. Walsh lived on the second floor?
A: Yes.
Q: You and your fellow officers took out your handguns?
A: We did. Or at least I did. I can’t be sure what the other officers did.
Q: You crept up the stairs as quietly as you could?
A: Yes, sir.
Q: When you reached his door, you paused to let everyone get ready?
A: Yes.
Q: You used hand signals?
A: Yes.
Q: So that Mr. Walsh did not hear you?
A: Right.
Q: Then you tried the door?
A: Yes, sir. It was unlocked.
Q: And then the eight of you rushed into the apartment?
A: We did. That’s correct.

§3:72.2 Initial goal at arrest: surprise and overwhelm suspect.
Q: Now, you had your gun out?
A: That’s correct.
Q: Your goal was not to shoot Mr. Walsh?
A: No, of course not.
Q: Your goal was to make an efficient arrest?
A: Yes.
Q: An efficient arrest would, as much as possible, reduce the danger that Mr. Walsh posed?
A: Yes.
Q: The goal is to go home in one piece at the end of the shift?
A: Exactly.
Q: Not to engage in a shooting match?
A: Right.
Q: And by bursting into the room, you hope to catch Mr. Walsh off guard?
A: That’s true.
Q: To overwhelm him with numbers?
A: Yes.
Q: To give him no time to react?
A: Yes.
Q: No time to consider resisting?
A: That’s the goal.
Q: No time to consider arming himself?
A: Right.

§3:72.3 Officers entered premises with guns drawn and quickly subdued suspect.
Q: You were the lead man?
A: Yes.
Q: You had your handgun out?
A: Yes.
Q: You saw Mr. Walsh?
A: I did.
Q: In the living room?
A: Yes.
Q: The room that you had just accessed from the hall?
A: Yes.
Q: A room about 14 feet by 14 feet?
A: Yes.
Q: Mr. Walsh was less than 10 feet from you?
A: Yes.
Q: You pointed the gun at him?
A: Momentarily.
Q: You wanted to let him know that you were serious?
A: Yes. And to protect myself in the event he was armed.
Q: That it would be a mistake to resist?
A: Correct.
Q: You shouted at him to get down on the floor?
A: Yes.
Q: He got down on the floor?
A: He did.
Q: Within a second you reached Mr. Walsh?
A: Yes.
Q: What did you do?
A: I grabbed one of his arms and pressed my knee against his back.
Q: Why?
A: To keep him on the floor until we could handcuff him.
Q: You weren’t taking any chances?
A: No.
Q: Within a few seconds, you or another officer handcuffed him?
A: Yes. It was Detective Barnes who secured the handcuffs.

§3:72.4 Fellow officer properly and securely handcuffed suspect.
Q: Detective Barnes has handcuffed arrestees in the past?
A: Yes.
Q: He’s an experienced officer?
A: Yes.
Q: You had no reason to believe that Detective Barnes had improperly secured the handcuffs?
A: No.
Q: You trusted Detective Barnes to properly handcuff Mr. Walsh?
A: Yes.
Q: You saw no need to check to see if Barnes had properly handcuffed Mr. Walsh?
A: No.
Q: None of the other officers saw any need to check those handcuffs?
A: Not that I saw.
Q: Because you trusted Detective Barnes, you did not believe Mr. Walsh would just slip right out of those handcuffs?
A: No.
Q: Barnes handcuffed him behind his back?
A: Yes.
Q: Why? Is that good police practice?
A: Yes, it is good police practice.

§3:72.5 Fellow officer properly and safely escorted suspect from premises.
Q: Then you and Barnes lifted Mr. Walsh to his feet?
A: Yes.
Q: Who escorted Mr. Walsh from the premises?
A: Detective Barnes.
Q: What is considered the best method for escorting a handcuffed arrestee from the premises?
A: There’s really not... well, to keep a hold of the arrestee by his arm so that he doesn’t run.
Q: And as he escorted Mr. Walsh from the premises, did Barnes do so in a safe and professional manner?
A: Yes.

**TECHNIQUE TIP:**

*Play officers off one another.*

When possible, play the officers off one another. At trial or at a hearing on a motion to suppress, they will rarely criticize one another. If I asked, “Did you believe Mr. Walsh could slip out of those handcuffs?” the officer would have answered, “Yes. Anything is possible.” By making it about Detective Barnes’ competence and the trust one officer places in another, you stand a much greater chance of getting the answers you want from the officer.

Q: Never did Detective Barnes put any of the other officers in danger?
A: No.
Q: By mishandling Mr. Walsh?
A: No.
Q: Between the time that Barnes first handcuffed Mr. Walsh and the time that he escorted Mr. Walsh from the apartment, how much time passed?
A: Two minutes. Maybe less.
Q: During this two minutes, Barnes and you hauled Mr. Walsh to his feet?
A: Yes.
Q: Explained to him that he was under arrest?
A: Yes.
Q: Did you have a conversation with Mr. Walsh?
A: No. We didn’t ask him any questions.
Q: You didn’t advise him of his Miranda rights?
A: No.
Q: So, once you hauled Mr. Walsh to his feet, you advised him of the charges, and Detective Barnes escorted him from the apartment?
A: Yes.

§3:72.6 Search conducted after suspect handcuffed and danger had passed.
Q: It was only after Mr. Walsh had been escorted from the apartment that you searched the chest of drawers?
A: No. I believe we looked through the drawers while Mr. Walsh was in the room.
Q: In the room, but after you had pointed a handgun at him?
A: Yes.
Q: In the room, but after you ordered him to the floor?
A: Yes.
Q: In the room, but after you had placed your knee in his back?
A: Yes.
Q: After Barnes had handcuffed him?
A: Yes.
Q: Behind his back?
A: Yes.
Q: After you and Barnes lifted him to his feet?
A: Yes.
Q: You conducted this search after the threat had passed?
A: Not so. He could have resisted. Mr. Walsh was screaming his head off. It’s happened before, Counselor.

**TECHNIQUE TIP:**
*Push officer into a corner: concede or blame fellow officer.*

While the witness concedes Detective Barnes had professionally secured the handcuffs about the defendant’s wrists and properly escorted him by the arm from the apartment, he claims that the risk had not yet passed. Slyly, the witness claims the search began before the defendant was hustled out of the apartment. So I ask him again about Detective Barnes’s ability to contain the defendant, putting the onus on the witness to concede the point or blame his fellow officer.

Q: You were searching for weapons?
A: As I’m allowed to do.
Q: But your search for weapons began only after Mr. Walsh had been handcuffed?
A: Right.
Q: You discovered the gun in the top drawer?
A: Yes.
Q: That top drawer was approximately four feet from the floor?
A: Approximately. I don’t know.
Q: Was Detective Barnes so incompetent that he could not prevent the handcuffed Walsh from opening this drawer and extracting the firearm?
A: No.

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Kevin J. Mahoney has won 36 of his last 38 trials. Since 1993 he has practiced solo, specializing entirely in criminal defense. He recently persuaded juries to acquit a broken man of motor vehicle homicide, a father wrongly accused of rape, a woman wrongly accused of bank robbery, a young man falsely accused of assault with intent to rape, and a decent man maliciously charged with assault and battery with a dangerous weapon. He is the author of *Relentless Criminal Cross-Examination*, from which this article is excerpted.