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LEGAL ISSUES

PRE-CLASS ASSIGNMENT

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KRS CHAPTER 503
GENERAL PRINCIPLES OF JUSTIFICATION

KRS 503.010 Definitions for chapter

The following definitions apply in this chapter unless the context otherwise requires:

(1) "**Deadly physical force**" means force which is used with the purpose of causing death or serious physical injury or which the defendant knows to create a substantial risk of causing death or serious physical injury.

(2) "**Dwelling**" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

(3) "**Imminent**" means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.

(4) "**Physical force**" means force used upon or directed toward the body of another person and includes confinement.

(5) "**Residence**" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(6) "**Vehicle**" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

KRS 503.020 Justification – A defense

In any prosecution for an offense, justification, as defined in this chapter, is a defense.

KRS 503.030 Choice of evils

(1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide.

(2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, or when the defendant is wanton or reckless in bringing about a situation requiring the conduct described in subsection (1), the justification afforded by this section is unavailable in a prosecution for any offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

KRS 503.040 Execution of public duty

(1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when it is required or authorized by a provision of law imposing a public duty or by a judicial decree.

(2) The justification afforded by subsection (1) applies when:

   (a) The defendant believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; or

   (b) The defendant believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

KRS 503.050 Use of physical force in self-protection – Admissibility of evidence of prior acts of domestic violence and abuse

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping,

sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

EDITOR'S NOTE: As used in this section, "sexual intercourse" includes "deviate sexual intercourse" as defined in KRS 510.010. **Boyle v. Com., 694 S.W.2d 711 (Ky App, 1985)**

(3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

KRS 503.055 Use of defensive force regarding dwelling, residence, or occupied vehicle - Exceptions

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(2) The presumption set forth in subsection (1) does not apply if:

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

(b) The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a peace officer, as defined in KRS 446.010, who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a peace officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

KRS 503.060 Improper use of physical force in self-protection

Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:

(1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful; or

(2) The defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person; or

(3) The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

(a) His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or

(b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

KRS 503.070 Protection of another

(1) The use of physical force by a defendant upon another person is justifiable when:

(a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and

(b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

(2) The use of deadly physical force by a defendant upon another person is justifiable when:

(a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055. and

(b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

(3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

KRS 503.080 Protection of property

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent:

(a) The commission of criminal trespass, robbery, burglary, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, in a dwelling, building or upon real property in his possession or in the possession of another person for whose protection he acts; or

(b) Theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that the person against whom such force is used is:

(a) Attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) Committing or attempting to commit a burglary, robbery, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, of such dwelling; or

(c) Committing or attempting to commit arson of a dwelling or other building in his possession.

(3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

KRS 503.085 Justification and criminal and civil immunity for use of permitted force - Exceptions

(1) A person who uses force as permitted in KRS 503.055 in KRS 503.050, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

KRS 503.090 Use of physical force in law enforcement

(1) The use of physical force by a defendant upon another person is justifiable when the defendant, acting under official authority, is making or assisting in making an arrest, and he:
   (a) Believes that such force is necessary to effect the arrest;
   (b) Makes known the purpose of the arrest or believes that it is otherwise known or cannot reasonably be made known to the person to be arrested; and
   (c) Believes the arrest to be lawful.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when:
   (a) The defendant, in effecting the arrest, is authorized to act as a peace officer; and
   (b) The arrest is for a felony involving the use or threatened use of physical force likely to cause death or serious physical injury; and
   (c) The defendant believes that the person to be arrested is likely to endanger human life unless apprehended without delay.

(3) The use of physical force, including deadly physical force, by a defendant upon another person is justifiable when the defendant is preventing the escape of an arrested person and when the force could justifiably have been used to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be necessary to prevent the escape of a person from jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

KRS 503.100 Prevention of a suicide or crime

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent such other person from:
   (a) Committing suicide or inflicting serious physical injury upon himself; or
   (b) Committing a crime involving or threatening serious physical injury to person, substantial damage to or loss of property, or any other violent conduct.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) (b) only when the defendant believes that the person whom he seeks to prevent from committing a crime is likely to endanger human life.

(3) The limitations imposed on the justifiable use of force in self-protection by KRS 503.050 and 503.060, for the protection of others by KRS 503.070, for the protection of property by KRS 503.080, and for the effectuation of an arrest or the prevention of an escape by KRS 503.090 apply

notwithstanding the criminality of the conduct against which such force is used.

KRS 503.110 Use of force by person with responsibility for care, discipline, or safety of others

(1) The use of physical force by a defendant upon another person is justifiable when the defendant is a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person or when the defendant is a teacher or other person entrusted with the care and supervision of a minor, for a special purpose, and:
   (a) The defendant believes that the force used is necessary to promote the welfare of a minor or mentally disabled person or, if the defendant's responsibility for the minor or mentally disabled person is for a special purpose, to further that special purpose or maintain reasonable discipline in a school, class, or other group; and
   (b) The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress.

(2) The use of physical force by a defendant upon another person is justifiable when the defendant is a warden or other authorized official of a correctional institution, and
   (a) The defendant believes that the force used is necessary for the purpose of enforcing the lawful rules of the institution;
   (b) The degree of force used is not forbidden by any statute governing the administration of the institution; and
   (c) If deadly force is used, its use is otherwise justifiable under this code.

(3) The use of physical force by a defendant upon another person is justifiable when the defendant is a person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers and the defendant believes that such force is necessary to prevent interference with its operation or to maintain order in the vehicle or other carrier, except that deadly physical force may be used only when the defendant believes it necessary to prevent death or serious physical injury.

(4) The use of physical force by a defendant upon another person is justifiable when the defendant is a doctor or other therapist or a person assisting him at his direction, and:
   (a) The force is used for the purpose of administering a recognized form of treatment which the defendant believes to be adapted to promoting the physical or mental health of the patient; and
   (b) The treatment is administered with the consent of the patient or, if the patient is a minor or a mentally disabled person, with the consent of the parent, guardian, or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the defendant believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

KRS 503.120 Justification – General provisions

(1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

(2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

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Selected Case Law Summaries

U.S. v. Fellers
124 S.Ct. 1019 (2004)

FACTS: Police went to Fellers' home with a warrant for his arrest, following an indictment. When they arrived, they asked if they could come in and speak with Fellers. They were let in, and they talked with Fellers for a while without mentioning the arrest warrant. At no time during the conversation at his house was Fellers given his Miranda warnings. The officers deliberately elicited incriminating statements from him before executing the warrant and arresting Fellers. He was subsequently Mirandized at the jail.

ISSUE: Should the suspect have been Mirandized prior to the non-custodial interrogation when he had already been indicted and a warrant issued for his arrest?

HOLDING: Yes.

DISCUSSION: The Court held that a suspect's 6th Amendment rights attached at the start of official proceedings against him. When Fellers was indicted, his 6th Amendment rights attached at that moment related to the offense charged, but no others. To interrogate such a person, even though they are not in custody, an officer must Mirandize them prior to interrogation.

Berghuis (Warden) v. Thompkins
130 S.Ct/ 2250 (2010)

FACTS: A shooting occurred in Southfield (Michigan) on January 10, 2000. Morris died from multiple gunshot wounds; France survived and later testified. Thompkins, the suspect, fled, but was apprehended a year later in Ohio. Southfield officers traveled to Ohio to question Thompkins, who was "awaiting transfer to Michigan." At the beginning of the interrogation, Officer Helgert provided Thompkins with his Miranda[1] rights, in writing. The officer had Thompkins read the last provision of the warnings out lout to ensure that Thompkins could read and presumably understand English. Helgert read the other four warnings to Thompkins and Thompkins signed the form. There was conflict in the record as to whether Thompkins was asked, or verbally confirmed, that he understood his rights.

During the ensuing 3 hour interrogation, "at no point … did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." He was "largely silent," but did occasionally give a limited verbal response, such as yes, no or a comment such as "I don't know." He also refused a peppermint and mentioned that the chair he was sitting on was hard. Toward the end of the interrogation, one of the officers asked Thompkins if he believed in God and Thompkins's eyes "welled up with tears." Thompkins agreed he prayed to God. Officer Helgert then asked him, "Do you pray to God to forgive you for shooting that boy down?" Thompkins responded "yes" and looked away. He refused to give a written confession and the interrogation ended some 15 minutes later.

Thompkins was charged with murder, assault and related firearms offenses. He moved for suppression of his statements, arguing that he had invoked his Fifth Amendment rights and that interrogation should have then ended.[2] The trial court denied the motion.

Thompkins was convicted and appealed. The Michigan appellate courts denied his argument

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Michigan v. Mosley, 423 U.S. 96 (1975).

that the statements should have been suppressed, holding that he had "not invoked his right to remain silent." Thompkins filed a petition for habeas corpus in the U.S. District Court, which also rejected his claim, stating that the state court's decision was not "contrary to, or involved an unreasonable application of clearly established federal law."[3] "The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation."

Thompkins appealed to the U.S. Court of Appeals for the Sixth Circuit, which reversed. The Sixth Circuit "acknowledged that a waiver of the right to remain silent need not be express, as it can be 'inferred from the actions and words of the person interrogated.'"[4] However, it's recitation of the facts indicated that it believed that "Thompkins was silent for two hours and forty-five minutes" and that silence offered a "clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." (The Court also ruled in his favor on an unrelated assistance-of-counsel issue.) The Warden (as the respondent in a habeas petition) requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Must a suspect invoke his right to remain silent in an unambiguous and unequivocal manner?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the Miranda ruling and noted that all of the parties conceded "that the warning given in this case was in full compliance with these requirements." Instead, the dispute in this case "centers on the response – or nonresponse – from the suspect" following the warnings being given. Thompkins argued that he remained silent "for a sufficient period of time so the interrogation should have 'cease[d]' before he made his inculpatory statement."[5] However, the Court noted, in Davis v. U.S., it had "held that a suspect must do so 'unambiguously.'"[6]

The Court continued:

> The court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis.

Further, it ruled that "there is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." Such a requirement avoids forcing law enforcement officers "to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'"[7]

The Court then considered whether, in fact, Thompkins waived his right to remain silent.

The Court continued:

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the produce of a free and deliberate choice rather than intimidation, coercion, or deception," and

[3] 28 U.S.C. §2254(d)(1).
[4] North Carolina v. Butler, 441 U.S. 369 (1979).
[5] Mosley, supra.
[6] 512 U.S. 452 (1994).
[7] See Moran v. Burbine, 475 U.S. 412 (1986).

> "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[8]

Decisions since Miranda demonstrate "that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." The prosecution, as such, "does not need to show that a waiver of Miranda rights was express." Instead, an "implicit waiver" is "sufficient to admit a suspect's statement into evidence."[9] It is to the prosecution to make an adequate showing that the accused understood Miranda rights, as given. Once that is done, however, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent."

Further:

> Although Miranda imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a Miranda warning, it does not impose a formalistic wavier procedure that a suspect must follow to relinquish those rights.

Miranda rights can be waived through more informal means than a "typical waiver on the record," which generally requires a verbal invocation. The Court found no "contention" on the record that Thompkins did not understand his rights, but instead, found "more than enough evidence in the record" that he did. His response to the officer's final question was a "course of conduct indicating waiver" of the right to remain silent – he could have remained silent or invoked his Miranda rights at that time, or any time earlier, ending the interrogation. The fact that would have been three hours after the warning was given was immaterial and "police are not required to rewarn suspects from time to time." This is further confirmed in that he gave "sporadic answers to questions throughout the interrogation." The Court found no evidence of coercion or threat, as neither, the length of time nor the conditions of the interrogation were not such as would put him in physical or mental distress. Appealing to his religious beliefs (moral and psychological pressures) did not make the interrogation improper.[10]

Thompkins also contended that the police could not question him until they obtained a waiver, but again, the Court noted that Butler foreclosed this line of argument.

The Court stated:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the

[8] Id.

[9] Butler, supra.

[10] Oregon v. Elstad, 470 U.S. 298 (1985).

> suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

The Court affirmed that in order for a statement (under interrogation) to be admissible, the accused must have been properly given, and understood, the Miranda warnings. The Court would then look for an express or implied waiver but the Court agreed that officers need not obtain a waiver before commencing an interrogation.

The Court agreed that the statements were admissible and reversed the decision of the Sixth Circuit on the issue. The Court also ruled on an unrelated question with respect to jury instructions, and found no prejudice to Thompkins. The Court remanded the case to the lower court to deny the habeas petition.

Horton v. California
469 U.S. 128 (1990)

FACTS: Officers executed a search warrant at Horton's home. Horton was a suspect in an armed robbery. The robbers were described by the victim as having been armed with a "machine gun" and a stun gun. The warrant failed to list the weapons, but only listed the stolen jewelry. While executing the warrant, the officers found weapons that matched the description of what the victim had said the robbers used. The weapons were seized, even though they were not listed on the warrant.

ISSUE: May evidence or contraband that is seen in "plain view" be seized without a warrant?

HOLDING: Yes, if it meets the test of plain view.

DISCUSSION: The Court held that officers may seize evidence or contraband without a warrant under circumstances it defined as plain view. (1) The officer must lawfully be in the location he is at when he observes the item. (2) The officer must immediately have probable cause to believe it is evidence of a crime. (3) The officer may seize it without a warrant if he has lawful access to the item. Here, the officers were lawfully on the premises pursuant to the search warrant. They immediately had probable cause to believe the weapons they saw were evidence of a crime as they matched the description given by the victim. They had right of access to the weapons because they were in a location where the officers had access due to the search warrant

Hudson v. Michigan
126 S.Ct. 2159 (2006)

FACTS: Officers entered Hudson's dwelling to execute a search warrant. The state of Michigan conceded that the officers had not waited a reasonable amount of time after knocking and announcing before they entered. Michigan argued that the penalty for such a failure should not be suppression of the evidence.

ISSUE: Is the appropriate penalty for failing to properly knock and announce suppression of the evidence when the officers had what was otherwise a valid warrant?

HOLDING: No.

DISCUSSION: The Court strongly reaffirmed that the requirement to knock and announce is a constitutional requirement, and must be fulfilled. However, the Court held that hereafter the remedy for failure to knock and announce would no longer be application of the exclusionary rule. The Court noted that the

warrant was supported by probable cause and valid in all respects, and it made little sense to suppress evidence that the police would have been entitled to seize had they waited a few seconds more. Therefore, the remedy for a failure to properly knock and announce will hereafter be limited to civil liability under 42 U.S.C. § 1983.

Chimel v. California
395 U.S. 752 (1969)

FACTS: Officers went to Chimel's home with a warrant for his arrest on charges of theft of old collectible coins. He was arrested in the living room, and the officers then searched the rest of the house and outbuildings without a search warrant. They found various pieces of evidence during the search. Chimel wanted the evidence suppressed.

ISSUE: Is the search of an arrestee's entire house justified incident to his arrest?

HOLDING: No.

DISCUSSION: When an arrest is made, it is reasonable to search his person for any weapons or evidence he may have on him. Likewise, the officer may search the area within the arrestee's immediate control. In most buildings, that will be the entire room in which he is arrested. If he has a weapon hidden in the room he is arrested in, he may be able to access it and attack the officer if he has a brief distraction. The same logic does not apply to the entire structure the arrest takes place in.

Carroll v. U.S.
267 U.S. 132 (1925)

FACTS: Prohibition agents stopped Carroll on the road between Detroit and Grand Rapids, Michigan. They had probable cause to believe Carroll was smuggling illegal liquor in his vehicle. They did not have a warrant. Taking a knife, they cut his back seat apart, and discovered 68 bottles of illicit whiskey. Carroll sought suppression of the evidence, arguing the search without a warrant was in violation of the 4th Amendment.

ISSUE: May officers make a warrantless search of a vehicle in a public place if they have probable cause to believe it is or contains evidence of or instrumentalities of a crime?

HOLDING: Yes.

DISCUSSION: The Court held the situation was analogous to a warrantless search of a ship in harbor by customs officials. In such cases, customs agents had long been permitted to make warrantless searches of ships in harbor so long as they had probable cause to believe the ship was carrying contraband. The warrantless searches were permitted in such cases because the ship was mobile, and could leave port before the agents got back with a search warrant and would be therefore out of reach. Similarly, a vehicle is mobile, and if an officer had to go to the judge to get a warrant, it could be gone and out of the jurisdiction before the officer got back. The vehicle has to be in a public place, which is simply a location where the owner/operator of the vehicle has no reasonable expectation of privacy. The Vehicle Exception Search requires the same probable cause that an officer would need to get a warrant. It is not a lower standard. An officer is allowed to do a complete search of the vehicle, interior, trunk, under the hood, everything and everywhere.

Illinois v. Caballes
543 U.S. 405 (2005)

FACTS: Caballes had been stopped for a traffic violation. There was no reasonable suspicion to believe that he was engaged in drug trafficking. A canine officer nearby heard

the stop called in, and went over there on his own volition. He arrived while Caballes was still dealing with the officer who stopped him. The dog alerted on the vehicle, and a search revealed contraband.

ISSUE: Is a sniff by a drug canine, which reveals nothing but the presence of contraband, during a lawful stop a search?

HOLDING: No.

DISCUSSION: The Court held that there was no privacy interest in the air surrounding the vehicle. So long as the vehicle was lawfully stopped, there was not an issue. However, the Court also made it clear that, absent reasonable suspicion, an officer cannot compel a person to wait for the drug dog. Dragging out the stop to give a drug dog time to arrive would be an unlawful seizure, and any drugs found would be suppressed as a result.

Warden of Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967)

FACTS: About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took $363 and ran. Two cab drivers in the vicinity, attracted by the shouts of "hold-up", followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to the police who were proceeding to the scene of the robbery. In less than five minutes, the police arrived at the house. An officer knocked and announced their presence. Mrs. Hayden answered the door, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection. (The court held that the issue of consent by Mrs. Hayden for the entry need not be decided because the officers were justified in entering and searching for the felon, for his weapons and for the fruits of the robbery.)

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile, an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer, who was "searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All of these items were introduced against Hayden at his trial.

ISSUES:
1) Were the entry into the house and the search for the robber, without a warrant, legal?
2) Even if the search was lawful, was the seizure of the items of clothing ("mere evidence") legal?

HOLDINGS:
1) Yes
2) Yes

DISCUSSION:
1) When police were informed that armed robbery had taken place and that a suspect had entered a certain house less than five minutes before they reached it, officers acted reasonably when they entered the house and began to search for the suspect and for weapons which he had used in robbery or which might be used against them.

The permissible scope of the search was as broad as reasonably necessary to prevent danger that suspect at large in house might resist or escape.

The Fourth Amendment does not require police to delay in course of investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect escape.

2) Language of the Fourth Amendment does not support distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband.

Terry v. Ohio, 392 U.S. 1 (1968)

FACTS: Cleveland Police Detective Martin McFadden had been a policeman for 39 years, a detective for 35 years, and had been assigned to his beat in downtown Cleveland for 30 years. At approximately 2:30 p.m. on October 31, 1963, Officer McFadden was patrolling in plain clothes. Two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue, attracted his attention. McFadden had never seen the men before and he was unable to say precisely what first drew his eye to them. His interest aroused, Officer McFadden watched the two men. He saw one of the men leave the other and walk past some stores. He paused and looked in a store window, then walked a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. Then the second man did the same. This same trip was repeated approximately a dozen times. At one point, a third man approached them and engaged them in conversation. This man then left. Chilton and Terry resumed their routine for another 10-12 minutes, then left to meet with the third man.

Officer McFadden testified that he suspected the men were "casing a job, a stick-up," and that he feared "they may have a gun." Officer McFadden approached the three men, identified himself and asked for their names to which the men "mumbled something." Officer McFadden grabbed Terry, spun him around and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, Officer McFadden felt a pistol, which he retrieved. Officer McFadden proceeded to pat down Chilton, felt and retrieved another revolver from his overcoat. Officer McFadden patted down the third man, Katz, but found no weapon. Chilton and Terry were charged with carrying concealed weapons. (Chilton died before his conviction could be appealed.) Both were convicted, and appealed, and the appellate courts affirmed the conviction. Upon appeal, the U.S. Supreme Court accepted certiorari.

ISSUES: 1) May an officer stop an individual briefly on reasonable suspicion that they are involved in illegal activity?

2) May an individual be frisked if the officer has reasonable suspicion that they are armed and present a danger?

HOLDINGS: 1) Yes
2) Yes

DISCUSSION: The Constitution forbids not all searches and seizures, but unreasonable searches and seizures. There is a "seizure" whenever police officer accosts an individual and restrains his freedom to walk away, and "search" when officer makes careful exploration of outer surfaces of person's clothing to attempt to find weapon.

> In justifying a particular intrusion, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, that reasonably warrants that intrusion. Those facts must be judged against an objective standard of whether the facts available to officer at moment of seizure or search would warrant man of reasonable caution in belief that action taken was appropriate. Intrusions must be based on more than hunches. Simple good faith on the part of the officer is not enough.

A police officer who had observed persons go through series of acts, each of them perhaps innocent in itself, but when taken together warranted further investigation, was discharging legitimate investigative function when he decided to approach them. The officer in this case had reasonable cause to believe that defendants were contemplating a crime, and thus had cause to stop and speak to them. Because he suspected them of intent to commit armed robbery on the business, there was cause to believe they may be armed, thus the officer had cause to search them for weapons. McFadden did not exceed the reasonable scope of a proper search in patting down their outer clothing,

The sole justification for an officer's search of a person whom he has no cause to arrest is protection for officer and others nearby, and it must be confined in scope to intrusion reasonably designed to discover weapons. Although the facts of the Terry case involved a pat down of the outer clothing, the language of the court's decision did not limit a frisk to the outer clothing, such as a coat. The court said, "...it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. "The scope of the search must be strictly tied to and justified by the circumstances that rendered its initiation permissible."

The U.S. Supreme Court affirmed the decision.

See also: *U.S. v. Reed, 220 F.3d 476 (6th Cir. 2000)*
U.S. v. Harris, 192 F.3d 580 (6th Cir. 1999)
Pitman v. Com., 896 S.W.2d 19 (Ky.App., 1995)
Com. v. Banks, 68 S.W.3d 347 (Ky., 2001)
U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995) – Terry traffic stop
U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000) - Terry traffic stop
Adkins. v. Com., 96 S.W.3d 779 (Ky. 2003)

Ybarra v. Illinois
444 U.S. 85 (1979)

FACTS: Officers executed a search warrant at the Aurora Tap Tavern for controlled substances. The warrant specified that Greg the bartender could also be searched. When officers executed the warrant, they lined up everybody who was in the bar and patted them down. The officer who patted down Ybarra felt a cigarette pack in his pocket that felt as if something other than cigarettes was in it. After patting down the others, he returned to Ybarra, and removed the cigarette pack from him. It contained heroin. Ybarra argued the officers had no right to frisk him in the first place, and wanted the evidence suppressed.

ISSUE: May officers do a precautionary frisk of persons who happen to be at the scene when a search warrant is served, absent any reasonable suspicion that the person may be armed and dangerous?

HOLDING: No.

DISCUSSION: The Court held that the mere fact of a person's presence at the scene of execution of a search warrant does not, without more, justify a *Terry* frisk. To do otherwise would be to do away with the requirement of an individualized reasonable suspicion that the person was armed and dangerous. Just as a search warrant does not give you the right to search everybody who happens to be there when officers arrive, neither does it justify a frisk.