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Legal Advisor's Update

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A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

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This is a big deal! If a non-resident has an invitation/permission from a tenant to come to the tenant's apartment, the non-resident cannot be charged with trespass for entering onto apartment complex property even if the non-resident has previously been given a trespass warning by officers not to be there. There is an exception to this rule if the tenant's lease specifically addresses this issue.

II. Exigent Circumstances and Obstructing Official Business Pages 5-10

Officer Deanna Brewer made a quick decision to protect children -- the type of tough close calls that make policing so hard -- the court called this decision a "close call." The City Attorney's Office then did a great job fighting for a victory in this case! The court ruled that sex abuse allegations involving children created exigent circumstances which permitted the officer to make a warrantless entry into defendant's home. The defendant's acts of pushing/grabbing the officer as she entered the defendant's home to check on the children's well-being amounted to obstructing official business.

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Police do not create an exigent circumstance by simply knocking and loudly announcing their presence at a door if they do not also demand entry while knocking and announcing. In such a situation, if after knocking and announcing, an exigency arises, such as noises indicating destruction of evidence, police may make warrantless entry based on the exigent circumstance. This case may not seem like a big deal, but it seems like a subtle change of thinking that benefits officers.

IV. Violation of Protection Order Allegations Page 12

Generally you should file charges for violating a protection order if the petitioner executes a statement indicating a violation of the order has taken place. However, if you have a specific factual basis for believing a violation did not occur, you should not file charges even if the written statement was executed.

I. Criminal Trespass and Trespass Warnings

City of Columbus v. Parks, 2011 Ohio 2164

Critical Points of this Case:

**This is a Franklin County Court of Appeals decision. It is a big deal especially for those of you who work at/near apartment complexes and use trespass lists or warnings to fight crime.*

**The basic holding/rule of the case: If a non-resident has an invitation or permission from a tenant to come to the tenant's apartment, you cannot charge the non-resident with trespass for entering onto apartment complex property to go to the tenant's apartment, even if the non-resident has previously been given a trespass warning. Under general property law an owner (meaning the landlord) sacrifices possessory interest in a property to the renter and thus cannot prohibit a tenant from inviting guests onto the property. Also, you cannot charge the non-resident with trespassing for being in a common area of the complex if this is a place the tenant is allowed to be and they have invited/permitted the non-resident to be in that area as well, even if you have warned the non-resident not to be there in the past..*

** There is one big exception to this general rule: If the tenant's original leasing agreement allows the landlord to restrict guests meaning it explicitly says the landlord/owner retains the right to prohibit the tenant from having guests in certain places, a non resident can be trespassed from the property, and charged with criminal trespass if they return, even if invited onto the property by the tenant. In these situations you should clearly tell the non-resident as part of their trespass warning that they are not allowed to return to the property even if invited by a tenant, and that if they return to the property they may be charged with criminal trespass. However, if the lease doesn't specifically include this type of provision you are stuck with the fact that a tenant can invite a non-resident to the property, and the non-resident cannot be charged with trespass, even if you have previously given them a trespass warning.*

Facts: On March 1, 2010, Defendant Parks was charged with criminal trespass on the premises of the Royal James Plaza apartment complex in violation of Columbus City Code 2311.21(A)(1). Columbus City Code 2311.21(A)(1) states, "no person, without privilege to do so, shall * * * knowingly enter or remain on the land or premises of another."

Everyone agreed that Parks knowingly entered or remained on the Royal James premises on March 1, 2010. The only question to be decided at trial was whether Parks lacked privilege to be on the property. The parties also agreed that the management company for the Royal James had hired police officers to issue trespass warnings and take action against alleged trespassers, and that **Columbus Police Officer Phillip M. Rogers** gave Parks notice not to be on the Royal James premises on April 26, 2009 and February 7, 2010.

Officer Rogers testified that on the morning of March 1, 2010 when he drove by the 1139 building of the Royal James he observed through the building's windows three to four black males standing on the stairway landing between the second and third floors. Shortly thereafter, Officer Rogers returned to the Royal James and positioned his unmarked car where he could observe the individuals on the landing with

binoculars. Officer Rogers identified Defendant Parks as one of the individuals. Based on his previous interactions with Parks and the owner of the Royal James, Officer Rogers testified that Parks did not have permission to be on the premises.

A deadbolt lock secures the front door of the 1139 building. To the left of the door is a keypad and intercom. To the right of the door is a sign that states, "NO TRESPASSING, NO LOITERING, VISITOR PASSES REQUIRED." The rear of the building has a similar entrance. Inside both entrances are stairways. From the stairways, unsecured, steel doors lead to hallways on each floor, where the individual apartments are located.

After observing the individuals Officer Rogers and other officers decided to approach the individuals. Upon entering the front stairwell, the officers observed four individuals "hanging out; smoking a joint." None of the individuals attempted to leave or indicated he was permitted to be on the premises, and all four individuals were cited.

Officer Rogers testified that he previously encountered Parks on February 7, 2010, sitting inside apartment 24, which Parks claims was leased by his cousin. At that time, Officer Rogers spoke with the tenant of apartment 24, who did not indicate she wanted Parks to leave. Nevertheless, Officer Rogers issued Parks a trespass notice later that day. At trial, Officer Rogers could not initially recall the tenant's name, but he subsequently testified that her name was Ms. Butler. On March 1, 2010, while the officers were detaining Parks on the landing, the woman known by Officer Rogers as the tenant of apartment 24 walked up the front stairway, through the foyer, and into the hallway. Some time later, she walked back down the front stairway. The tenant did not make eye contact with any of the individuals or say anything either time she passed.

Parks testified on his own behalf. Although Parks admitted that he had previously been told that he was not permitted on the premises, he testified that, on March 1, 2010, he was visiting his cousin, Shawnee, who lived in apartment 24. Parks believed his cousin's last name was Walker, but stated that the name Butler could be "like a marital thing." He testified that he went to the Royal James, as he frequently did, to watch television and to use his cousin's telephone. Parks pushed apartment 24 on the keypad next to the front door, identified himself over the intercom, was buzzed in, and proceeded to the apartment. Parks claims he later exited the apartment to smoke, but that he planned to return to the apartment after smoking. Parks testified that his cousin did not permit him to smoke in the apartment and that the stairway was commonly used for smoking.

Parks also testified that his cousin was not present at the apartment when he arrived, but that his cousin's sisters and mother, as well as some children, were in the apartment. According to Parks, his cousin's sisters lived with her in the apartment. Parks did not specifically know who buzzed him into the apartment. Parks identified the woman who walked through the foyer, and whom Officer Rogers identified as the tenant in apartment 24, as his cousin. The trial court found that Parks did not have privilege to be at Royal James and found him guilty of criminal trespass. Parks appealed.

Issue: Did Parks have privilege to be on Royal James property given that a tenant had given him permission to come to their apartment, or was he without privilege to be there given that the management through a Police Officer had previously given him a trespass warning not to be there?

Holding and Analysis: The court held that Parks had privilege to be on the property due to the invitation/permission from a tenant to be there and thus should not have been convicted of criminal trespass.

Columbus City Code 2301.01(L) defines "privilege" as "an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity." In this context, privilege includes "permission to enter the premises given by a resident of the premises."

Parks argued that the trial court erred by finding he lacked privilege to be on the Royal James premises. The city argued there was no evidence that Parks' cousin invited him onto the premises and his cousin was not present when he entered the premises thus he had no privilege to be on the Royal James property, whether in an apartment, or in the common areas.

The appeals court agreed with Parks. The court held that the invitation from the tenant gave Parks privilege to be on the Royal James property and because of this Parks could not be convicted of trespass for being on the property even though the officer/management had previously given him a trespass warning. The court found that the record contained evidence that Parks had permission to be on the property, and that the evidence relied on by the city failed to establish a lack of privilege. The court held that the city failed to establish, beyond a reasonable doubt, that Parks lacked privilege to enter or remain on the Royal James premises on the date in question.

The court held that an individual invited onto rental property by a tenant cannot be guilty of trespassing on the owner's premises even if the owner expressly instructed the individual not to come onto the property. This holding stems from the rationale that trespass is an invasion of the possessory interest in property, which a property owner sacrifices to a tenant, rather than an invasion of title. It has been held that an owner of rental property sacrifices his possessory interests to a renter and cannot prohibit a tenant from inviting guests to the tenant's abode. Applying that reasoning here, the court concluded that Officer Rogers' previous warnings to Parks did not preclude a finding of privilege because permission from a tenant would override those warnings and give Parks privilege to be on the property.

The city argued that there was no evidence that a tenant actually had invited Parks onto the premises. The city asserted that Parks did not specifically testify that his cousin invited him to her apartment on the date in question. However, the court noted that Parks testified that he frequently visited his cousin's apartment to watch television and use the telephone. He stated, "before that day, I could go use the phone in the apartment like every day." Officer Rogers had, himself, observed Parks inside the apartment where Parks testified his cousin lived. On March 1, 2010, Parks identified himself through the front-door intercom and was buzzed into the apartment building by someone in apartment 24. Parks proceeded to apartment 24 and was permitted inside. Parks also intended to return to the apartment after smoking. The court saw all of this as evidence that Parks had privilege to be on the property as a guest of the tenant. The court also pointed out that Parks was not required to prove the existence of privilege; it was the city's burden to establish, by proof beyond a reasonable doubt, that Parks lacked privilege.

The city also argued that based on the undisputed testimony that Parks' cousin, the tenant in apartment 24, was not in the building when Parks entered the premises, that Parks did not have privilege to be there on that day. The court first pointed out that it is possible for a tenant to grant a guest permission to enter or remain on the premises in the tenant's absence. The court then said that even assuming that the

tenant's absence refutes that she personally gave Parks permission to be there, a grant of permission need not come exclusively from the property owner or lessee. The court disagreed with the idea that only the lessee of apartment 24 could grant Parks permission to enter the Royal James premises. In this case, there was no evidence that the tenant had instructed Parks that he was prohibited from visiting or had instructed other residents to deny entry to Parks. Indeed, Parks testified that he visited the apartment frequently, and Officer Rogers previously observed Parks inside the apartment. Moreover, after Parks identified himself, someone in apartment 24 buzzed him into the building and admitted him to the apartment thus the court found this to be further evidence of privilege to be at the complex, or at least undercutting the city's argument of a lack of privilege.

Finally, the court said the fact that Parks was not in his cousin's apartment when he was charged with trespass but was instead in a common area did not affect the court's analysis. The court opined that in some cases maybe it could be established that a defendant, despite some privilege to be on property, has exceeded the scope of that privilege. Here, however, just as there was no evidence that Parks was without permission to be on the premises from a Royal James lessee or resident, there was no evidence to suggest that Parks' presence in the stairway to smoke, a common practice in the building, exceeded the scope of any such privilege.

II. Exigent Circumstances and Obstructing Official Business

City of Columbus v. Montgomery, 2011 Ohio 1332

Critical Points of this Case:

** Exigency" is defined as a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. The doctrine of exigency applies under two different sets of circumstances: (1) in order to prevent the imminent destruction of vital evidence; and (2) where the police encounter the need to protect or preserve life or avoid serious injury.*

** The exigent circumstances exception to the warrant requirement applies where police have a reasonable basis to believe someone inside the premises requires immediate aid.*

**Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception to the warrant requirement.*

**In this case, the totality of these circumstances related to sexual abuse allegations involving children indicated the existence of exigency and permitted the officer to make a warrantless entry into the home even over the homeowner's objection.*

**The defendant's acts of pushing and grabbing Officer Brewer, which caused the officer to nearly fall as the officer entered defendant's home to check on the well-being of the children amounted to the crime of obstructing official business.*

Facts: Columbus Police Officer Deanna Brewer testified that while working her evening midwatch shift, she was dispatched to the home of Cradecia Williams. Upon arrival at the residence, Ms. Williams advised the officer she believed her three-year old niece and five-year old nephew had been sexually assaulted by two of their maternal uncles. Ms. Williams indicated that while babysitting the two children,

they complained of pain. Ms. Williams checked the genital area of her niece and discovered severe tears, swelling and redness. Based upon her observations, Ms. Williams believed there had been penetration. Ms. Williams also informed Officer Brewer that her nephew indicated he had been touched inappropriately and that his uncles had touched him. Ms. Williams further advised that the two children, who were potty trained, were experiencing uncontrollable urination and bowel movements.

Officer Brewer testified she was advised that Ms. Williams had contacted the mother of the two children and instructed her that she needed to take the children to the hospital immediately for medical treatment, but that the mother refused to do so. Instead, Ms. Williams reported the mother picked up the children and stated she was taking them to the home of their two uncles who would watch them while she got "her drink on."

Upon speaking with Ms. Williams, Officer Brewer testified she contacted Franklin County Children's Services ("FCCS"), who advised her that they had an "open" case on the children, and that she should attempt to locate the children in order to get them medical treatment and place them in a safe environment until the FCCS case was investigated. Officer Brewer called the mother and asked her to bring the children to the hospital, but the mother refused. Because Ms. Williams indicated she knew where the uncles lived, Officer Brewer testified she followed Ms. Williams to the uncles' apartment on Oakland Park Avenue. Upon arrival at the apartment, Officer Brewer observed numerous people outside and spoke with one of the two uncles, who allowed her to search the apartment. Neither the two children nor the second uncle were located.

Upon returning to Ms. Williams' car to report that she had not located the children, Ms. Williams advised Officer Brewer she had witnessed Cloris Montgomery (the grandmother of the children) taking the children to Montgomery's apartment, which was located about 40 feet from the apartment of the two uncles. As a result of this information, Officer Brewer testified she proceeded to Montgomery's apartment, where Montgomery was sitting outside on a chair in front of the door to the apartment. The door to the apartment was open. She advised Montgomery she was investigating the well-being of the children due to some allegations and she needed to make sure the children were okay. Montgomery told Officer Brewer the children were not present and were with their mother. Officer Brewer testified she informed Montgomery she had a witness who had recently observed Montgomery taking the children into the apartment. Montgomery responded by telling Officer Brewer that she needed a warrant if she wanted to search her apartment.

Officer Brewer testified she then asked Ms. Williams to call out the names of the children, since the front door was open and she had observed movement upstairs inside the apartment. Upon doing so, Officer Brewer was able to partially observe the five-year old boy. As she stepped forward in order to enter the open door to the apartment, Montgomery informed Officer Brewer that she would not get to the children. Montgomery, who was sitting in a chair in front of the open door, got up and pushed Officer Brewer in an attempt to keep her from getting to the children. This caused Officer Brewer to lose her balance and almost fall. After regaining her composure, Officer Brewer went into the apartment to locate the children in order to get them medical treatment while the other officers took control of Montgomery. Officers Ryan Chrysler arrested Montgomery. Officer Brewer located the two children, as well as their mother, who was intoxicated. Officer Brewer turned the children over to the person designated by FCCS and Montgomery was cited for obstruction of official business.

When asked specifically why she wanted to get inside to see the children, Officer Brewer testified that, based upon Ms. Williams' description of her observation of the children, she knew the children needed medical treatment right away and the mother had refused to have the children evaluated or treated. Officer Brewer also testified she was seeking to prevent further abuse, since they did not know where the second uncle (the other alleged abuser) was at that time. Officer Brewer testified she was concerned that the second uncle might be at Montgomery's (his mother's) residence with the children.

Upon cross-examination, Officer Brewer admitted that all of her information regarding the condition of the children was presented to her by Ms. Williams, and that she herself had not observed the children prior to appearing at Montgomery's apartment. She also testified that she had contact with FCCS several times throughout the night, including two different times while she was at the apartment complex. Finally, Officer Brewer acknowledged that upon inquiring about the children, she did not ask Montgomery about the whereabouts of the second uncle, but stated her primary concern was locating the children and getting medical treatment for them.

Officer Chrysler also testified. He and the other officers arrived to assist and approached Montgomery's apartment where they listened as Officer Brewer explained that they wanted to look for the children to check on their well-being. Officer Chrysler also attempted to explain why they wanted to check on the well-being of the children, but was equally unsuccessful in gaining Montgomery's cooperation.

During the discussion with Montgomery, Officer Chrysler testified he and the other officers were standing within three feet of the door and could look up the steps into the apartment. He heard Officer Brewer asked Ms. Williams to call out the name of the little boy, who responded by appearing at the top of the steps. At that point, Officer Brewer took a step towards the door and Montgomery got up from her lawn chair and stood in front of the door. Officer Chrysler testified Montgomery and Officer Brewer were lined up face-to-face and he was standing behind Officer Brewer. He saw both women's arms come up. Then he saw Officer Brewer move to try to get around Montgomery through the doorway, and as she did so, Montgomery grabbed Officer Brewer's arm. Officer Chrysler explained that citizens should never touch a police officer.

After witnessing the physical contact, Officer Chrysler grabbed Montgomery, but she still had one arm free and was reaching towards Officer Brewer as Officer Brewer was going up the stairs. Officer Chrysler testified he restrained Montgomery because she was keeping Officer Brewer from locating and checking on the children. Officer Chrysler then placed Montgomery under arrest for obstructing official business.

On cross-examination, Officer Chrysler acknowledged that he and the other officers had not been accompanied by FCCS that night. He testified he did not recall Montgomery advising them of an investigation conducted by FCCS. Officer Chrysler also identified several acts by Montgomery that he believed constituted obstructing, which included standing up to block Officer Brewer, "a jostling and kind of a movement side to side for Officer Brewer to get around her," and grabbing Officer Brewer's arm. He testified he never observed Officer Brewer pull out her gun as she entered the residence.

Montgomery testified on her own behalf. She testified that Ms. Williams and Montgomery's daughter, Lynchella Montgomery (the mother of the children at issue), were involved in a dispute and that Ms. Williams brought the police to Montgomery's apartment complex. When the police approached her apartment and advised her that they wanted to check on the well-being of her grandchildren, she believed

the issue had already been resolved. Montgomery stated that earlier in the day and several hours prior to the arrival of the police at her apartment, a FCCS representative came to Lynchella's apartment to investigate allegations of sexual abuse involving the two children, but determined the allegations were unsubstantiated. However, Montgomery was not present during the investigation and only had limited information about it, based upon a phone conversation she had with a caseworker she believed was named Shelly Barker or Shelly Baker.

Montgomery testified she told the police the issue had already been resolved by FCCS. When the officers asked for documentation to back-up this assertion, Montgomery advised them the paperwork was at her daughter's residence, but the officers refused to take her there. Montgomery refused to let the police enter without a warrant and initially denied the children were present, but eventually called out their names and the children appeared at the top of the steps but were only partially visible. Then, Officer Brewer asked Ms. Williams to call out to the children. When one of them appeared, Officer Brewer began to unholster her gun. At that point Montgomery blocked Officer Brewer from entering the apartment.

Montgomery claimed that she placed her hand across the wall and blocked the doorway with her right arm to prevent Officer Brewer from entering, but denied pushing Officer Brewer. She testified Officer Brewer tripped over her leg and lost her balance. Officer Brewer recovered and ran upstairs with her gun in her hand. Another officer grabbed Montgomery's arm and Montgomery put up her leg to block it. Montgomery was upset that Officer Brewer entered the apartment with her gun. Soon thereafter she heard her grandchildren screaming and heard Officer Brewer swearing. Then Officer Brewer came back downstairs, swearing and spitting in her face. The jury returned a verdict finding Montgomery guilty of obstructing official business and Montgomery appealed.

Issue # 1: Did exigent circumstances justify a warrantless entry into the home by Officer Brewer?

Holding and Analysis: Yes, the totality of the facts/circumstances known to Officer Brewer gave rise to exigent circumstances and/or the need for emergency aid, thus justifying the warrantless entry into Montgomery's home.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. In order for a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement is applicable. Absent exigent circumstances, searches conducted without a warrant are per se unreasonable. One such well-established exception is a search based upon exigent circumstances. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. The court noted that "exigency" is defined as "a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action."

The Fourth Amendment does not require police officers to delay in the course of an investigation if doing so would gravely endanger their lives or the lives of others. As a result, the exigent circumstances exception to the warrant requirement applies where police have a reasonable basis to believe someone inside the premises requires immediate aid. Therefore, when officers have reasonable grounds upon which to believe that an emergency exists, they have a duty to enter the premises and investigate, provided that the warrantless search is "strictly circumscribed by the exigencies which justify its initiation." A reasonable belief is determined based upon the facts and circumstances known to the officers and from their point of view.

Montgomery argued that the perceived gravity of child abuse did not, by itself, give rise to exigent circumstances. Montgomery asserted Officer Brewer was not responding to a call for help and there was no reason to believe that the children, at that very moment, were suffering abuse at the hands of their uncles, particularly given that the whereabouts of at least one uncle were known to police. Montgomery argued that the information conveyed by Ms. Williams did not indicate the children were in need of urgent medical care and, further argued, that Ms. Williams herself failed to seek treatment for them when they had been in her care. Montgomery further argued the police could have simply guarded the entrances and exits to the apartment until a warrant or court order was obtained.

The court disagreed with Montgomery finding the officer was faced with an exigent circumstance that allowed her to make a warrantless entry into the house. The court noted that this determination could arguably be considered a close call. Some of the typical indicia of injury and violence, such as blood or an ongoing fight or ongoing violence, were not readily visible to police upon their approach. However, "officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception."

Here, Officer Brewer was advised by Ms. Williams, who had been with the two young children in the hours prior to the search, that the three-year old girl had gone to the restroom and was crying in pain. Upon checking the young girl's genital area, Ms. Williams observed severe tears, swelling, and redness and believed someone had penetrated the little girl. The girl's five-year old brother had alleged he also had been touched inappropriately on his genital area and both children were unable to control their bodily functions. Ms. Williams reported she had contacted the mother of the children, advising her that they needed to take the children to the hospital immediately, telling her that the little girl looked horrible and that the kids needed help and medical treatment. Instead of taking the children to the hospital as one might expect, the mother reportedly picked up the children and took them to the home of the two men who allegedly abused them. Then, when Officer Brewer contacted the mother and asked her to bring the children to the hospital, she again refused.

While Officer Brewer was able to locate one of the alleged abusers and confirm that the children were not presently in his care, she was not able to locate the second alleged abuser. At the same time, she learned that Ms. Williams had observed Montgomery running with the children to Montgomery's apartment. Still concerned about the welfare of the children, who purportedly needed medical treatment due to their physical conditions, Officer Brewer was also now concerned that the second alleged abuser might be at the home of his mother (Montgomery) and thus have access to the children. Officer Brewer was unwilling to rely upon Montgomery's assertions that the children were not present, and they were soon found to be present in the apartment, along with their mother, who was highly intoxicated, and thus presumably unable to provide protection or care for the children.

In the instant case, the reporting person, Ms. Williams, was identified and even accompanied officers to the scene. She also claimed to have first-hand knowledge of the injuries to the children, based upon her own personal observations, and gave a detailed description of the injuries to the children. Given this information, along with the unknown whereabouts of one of the alleged perpetrating uncles, as well as appellant's lies about the location of the children and her uncooperative attitude at a time when most grandparents would be concerned about the welfare of their grandchildren, and considering there was also evidence the children had been shuttled from one place to another, thereby supporting the likelihood that they would be removed again, Officer Brewer had reasonable grounds to believe that emergency aid

might be warranted.

Issue #2: Was there sufficient evidence to charge Montgomery with Obstructing Official Business?

Holding and Analysis: Yes. Obstructing official business as a violation of Columbus City Code 2321.31(A) states as follows: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties."

Obstructing official business has five essential elements: "(1) an act by the defendant, (2) done with the purpose to prevent, obstruct, or delay a public official, (3) that actually hampers or impedes a public official, (4) while the official is acting in the performance of a lawful duty, and (5) the defendant so acts without privilege."

Did Montgomery Commit an Affirmative Act? To prove the crime of obstructing official business, there must be proof of an affirmative act that hampered or impeded the performance of the lawful duties of a public official. Here, there was testimony that Montgomery pushed Officer Brewer, causing her to lose her balance and nearly fall, as well as testimony from a second witness that Montgomery grabbed Officer Brewer's arm and continued to reach towards Officer Brewer as she ascended the stairs, even as she was being restrained by a second officer. These acts constitute an affirmative acts.

Was Officer Brewer Carrying out an Official Duty at the Time of the Alleged Obstructing? Officer Brewer testified she sought to check on the well-being of two young children and to obtain medical treatment for them, which she described as typical in an investigation involving child sexual assault allegations. Due to the existence of these exigent circumstances, the court found Officer Brewer was acting in the performance of her lawful duty in entering the residence.

Did Montgomery Act with Purpose to Prevent or Obstruct and Did She Hamper or Impede the Officer: Montgomery argued this element was not proven as the officer was undeterred and was able to access the children inside the apartment.

Intent to impede may be inherently found in the affirmative words and actions of the accused. If an individual specifically intends a particular obstructing effect and accomplishes that purpose, a violation has occurred. However, a violation does not require the accused to be successful in her efforts to prevent the officers from doing their job. In addition, where an individual takes affirmative action to hamper or impede the police, she may be found guilty of obstructing official business. "Hamper" is defined as "to hold back; hinder; impede" or "to interfere with; curtail." "Impede" is defined as "to retard in movement or progress by means of obstacles or hindrances; obstruct; hinder." The Court said it was evident that Montgomery's physical actions against Officer Brewer interfered with the officer's entrance into the residence and impeded the officer from moving forward into the apartment.

Privilege: Montgomery argued there weren't exigent circumstances and thus argued she was privileged to resist the officer's warrantless entry into her homes. The court disagreed finding this was an exigent circumstance and thus Montgomery had no privilege to stop or impede the officer from entering her home.

III. Brand New U. S. Supreme Court Case on Exigent Circumstances

Kentucky v. King, 563 U.S. ____ (2011)

Critical Points of this Case:

** Conduct that does not violate the Fourth Amendment or threaten to violate the Fourth Amendment is not considered part of police-created exigent circumstances. Knocking and announcing in this case (without demanding entry) was reasonable and did not create the exigent circumstances which justified the entry.*

**If the officers had demanded entry while knocking and announcing that likely would have been seen as creating the exigent circumstance because that would have been unreasonable under the Fourth Amendment because the officers had no basis to demand entry until they heard people acting in a way that was indicative of destruction of evidence.*

Facts: Police officers set up a controlled buy of crack cocaine outside an apartment complex in Lexington, Kentucky. After the buy, an undercover officer radioed that the dealer was moving quickly into the breezeway of an apartment building and urged the uniformed officers to hurry to the scene and grab the dealer before he entered an apartment. When uniformed officers arrived at the breezeway they heard a door slam. In the breezeway there were two doors, and the officers had no knowledge of which the suspect had entered, but they smelled marijuana smoke coming from the apartment on the left side of the hallway. [Note: suspect had actually entered the apartment on the right, which the undercover officer radioed to the uniformed officers; they did not receive this information because they had already left their car.]

The officers approached the left door, knocked loudly and stated that they were the police. After announcing their presence, the officers heard “people inside moving” and “things being moved inside the apartment.” Because they believed that evidence was being destroyed the officers announced their intention to enter the apartment. They kicked in the door and during a protective sweep of the apartment found marijuana and powder cocaine in plain sight, and crack cocaine, money, and drug paraphernalia after a subsequent search of the apartment.

Issue: Did the police create or manufacture the exigency in this case by knocking and very loudly announcing their presence at the door?

Holding and Analysis: No, the police did not create the exigency in this case, and the evidence should not be suppressed if what occurred upon knocking and announcing amounted to an exigent circumstance. The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment and knocking and announcing did not impermissibly create the exigent circumstance in this situation.

In order to decide if officers create an exigency the court asks the following question: was the conduct objectively reasonable under the Fourth Amendment? If the police conduct does not violate, or threaten to violate, the Fourth Amendment then the conduct is reasonable and a warrantless search is permissible. Banging on the door and announcing their presence was objectively reasonable under the Fourth Amendment. Every person, private or public, has the right to knock and announce their presence to the occupant of a residence. Simply because some individuals will panic when the police knock on their door, does not make that conduct unreasonable under the Fourth Amendment. There was also no evidence of a “demand” to enter the apartment made by the police. If an officer threatens to enter the apartment when it would be unreasonable to do so under the Fourth Amendment, then they have gone outside the bounds of reasonable behavior under the Fourth Amendment. However, in this case, the

officers stated that they were going to enter after the exigency had arose – they were not going to demand entry initially but rather decided to after they heard the commotion upon their knocking and announcing; therefore, the officers had the ability to enter the apartment without a warrant under the exigency exception.

Simply because an officer has probable cause and time to get a warrant does not make an officer's conduct without a warrant unreasonable. Requiring law enforcement to pause an investigation and get a warrant every time they have sufficient probable cause and time, would “interfere with legitimate law enforcement strategies.” The Court has never held that law enforcement is required to stop their investigation merely because they can get a warrant.

Because all of the officer's conduct was reasonable under the Fourth Amendment, their actions did not impermissibly create an exigency -- the evidence could be used at court as long as what occurred after the knock and announce really was an exigent circumstance – this case was sent back to the State court to decide if what the officers heard inside the room after knocking and announcing was really an exigent circumstance.

IV. Violation of Protection Order Allegations

We have recently been asked two questions about probable cause to charge for a violation of a protection order: 1) Is a written statement by the petitioner, which alleges conduct which would be a violation of the protection order, sufficient by itself to file a charge; and 2) Does an officer always have to file a violation of protection order charge if the petitioner executes a statement indicating a violation has occurred.

1) First, yes you may file, and the vast majority of the time you should file, charges for violating a protection order if the petitioner executes a written statement indicating a violation of the order has taken place. Bear in mind that you may continue to further investigate even though a statement has been executed by the petitioner. You may strengthen the basis for the charge or find there is no basis for the charge. You should also file charges if you have other knowledge/facts of a violation of the order even if a statement has not been executed. (See *ORC § 2935.03* for further explanation of the basis for filing violation of protection order charges) Keep in mind there is a preferred policy of arrest for violations of a protection order just as with Domestic Violence.

2) Second, you do not have to file a charge for violating the protection order when a statement is executed by the petitioner if you have a specific factual basis for believing the written statement is untrue. In other words, if you have a factual basis for doubting a violation of the order took place as alleged in the statement by the petitioner you do not have to file charges even though the statement has been executed by the petitioner. For example, if the petitioner executes a written statement indicating a violation, but an independent witness indicates the story is untrue as to the violation, this would be a legitimate reason not to file despite the written statement. Probable cause must exist for the filing of any criminal charge and evidence that an incident did not occur, or occurred differently than alleged, would certainly undercut probable cause.