COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-00681
(2012-CA-00739)

DAVID ZAC MILAM — APPELLANT

v.

APPEAL FROM FAYETTE CIRUIT COURT
ACTION NO. 11-CR-0030

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR THE APPELLANT
DAVID MILAM

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Respectfully submitted,

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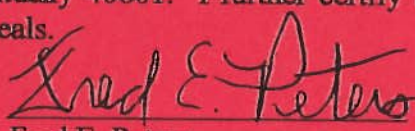
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Appellant's brief has been served on all parties by mailing or hand-delivering same this the 6th day of June, 2014 to Susan Stokley Clary, State Capitol, 700 Capitol Avenue, Frankfort, KY 40601, Hon. James D. Ishmael, Judge, Fayette Circuit Court, 9th Division, 120 N. Limestone, Lexington, KY 40507, and Hon. Bradley Bryant, Assistant Commonwealth Attorney, 116 N. Upper St., Lexington, KY 40507, and Hon. Jack Conway, Attorney General, Capitol Suite #118, 700 Capitol Avenue, Frankfort, Kentucky 40601. I further certify that the record was not checked out from the Cout of Appeals.

BY: 
Fred E. Peters

INTRODUCTION

The Appellant appeals the Order of the Court of Appeals, entered Augut 30, 2013, affirming the Conditional Guilty Plea and the Fayette Circuit Court's ruling denying the suppression of evidence obtained from a search, which was heard on August 12, 2011 and August 15, 2011. A supplemental hearing was held on December 22, 2011, but the Court did not change its ruling.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant believes that an oral argument would be helpful to the Court in deciding the issues of this case, as it involves a case of first impression in the Commonwealth of Kentucky.

TABLE OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellant, David Milam, was a fraternity brother at the Delta Tau Delta Fraternity at the University of Kentucky in the Fall of 2010. He leased a room on campus in a house owned by the fraternity. Consistent with the policies of both the University of Kentucky and the fraternity's national charter, the fraternity house is not accessible to the general public,[1] and the fraternity has taken affirmative steps to prevent entry to non-members. The fraternity installed a new security system, in which a numeric code must be entered into a keypad to unlock the door and gain access to the house.[2] Strict rules have been adopted and enforced that forbade access to the house to anyone but members and the invited guests who accompany them.[3] Permanent signs were displayed, indicating that the adjoining parking lot was private property,[4] and during football season, temporary signs were displayed to keep the public off of the surrounding property entirely.[5] In fact, the common area on the first floor included the "Nice Room," which was used for the fraternity's meetings, initiations, and rites and was where the Chapter's valuables were kept.[6]

On November 30, 2010, Det. John McBride of the Lexington Police Department received a tip that David Milam was selling marijuana from the fraternity house. Dets. McBride, Jason Beetz and David Saddler went to the fraternity house for a "knock-and-talk" encounter to investigate the tip. The "knock and talk" is an informal procedure requiring the consent of a citizen, which is used by law enforcement when there is insufficient evidence for a search warrant. They went to the back door of the fraternity

[1] Transcript, Segment 6, at 1:50:55
[2] Ibid, at 1:41:05
[3] Ibid, at 1:40:35
[4] Ibid, at 1:45:05
[5] Ibid, at 1:55:55
[6] Affidavits of David Milam and Fraternity President Nicolas Stewart, and Segment 10, at 1:56:30.

on Nicholasville Rd., which they mistakenly believed to be the front door.[7] The detecives knocked and rang the doorbell for anywhere from 30 seconds to 3 minutes, but there was no response.[8] The detectives then discussed the situation and decided that the fraternity house was no different from an apartment complex or duplex, and that they had the right to enter without consent, a warrant, or an exigency for warrantless entry.[9]

The detectives testified that they were able to enter the building without the code, because the door was ajar and unlocked, though there was no space between the door and the frame.[10] Upon entering the common area at the rear of the fraternity, referred to as the "breezeway" or "foyer" in the hearing, the detectives announced their presence and identified themselves as police officers. The president of the fraternity, Nicholas Stewart, would later testify that this breezeway or foyer was adjacent to the so-called "Nice Room" where the fraternity conducted its meetings, formal rites, initiation and where its valuables were kept.[11] The detectives testified that they were in the room either for a second or two or as long as a minute before a young white male appeared from around the corner of an adjoining common area.[12] The detectives did not ask the person his name, whether he had an affiliation with the fraternity, or whether he lived in the fraternity house.[13] Instead, the detectives testified that they asked him if David Milam lived there and asked to be shown to his room. At the time of the first suppression hearing in August, this young man's identity was unknown.

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[7] Transcript, Segment 5-1, at 2:58:55
[8] Transcript, Segment 5-1, at 3:18:55 and Segment 5-2, at 3:54:35
[9] Transcript, Segment 5-1, at 3:20:20
[10] Transcript, Segment 5-1, at 3:18:05
[11] Segment 10, at 1:56:30.
[12] Transcript, Segment 5-1, at 3:47:40 and Segment 5-2, at 3:55:55
[13] Transcript, Segment 5-1, at 3:24:15

The young man led the detectives upstairs to room 204, which was David Milam's room. They knocked on the door, Mr. Milam answered, and the detectives testified that marijuana could be seen in plain view. Mr. Milam consented to a search and confessed to the detectives. He was charged with two counts of trafficking, possession of paraphernalia, and possession of a forged instrument, a fake ID.

Suppression hearings were held on August 12 and 15, 2011, and the Court upheld the warrantless entry into the fraternity house, specifically holding that a fraternity house is akin to an apartment complex or duplex, rather than a private residence for Fourth Amendment purposes.

Upon further investigation, the young man with whom the police spoke was identified as Matthew Neagli. The Court allowed a supplemental suppression hearing on December 21, 2011 in light of this new evidence. Mr. Neagli testified that he was in a study room on the first floor, and that though the detectives initially entered the building through the breezeway, they made contact with him past a second set of doors into the main facility,[14] and that it would have been impossible for him to hear the detectives in the study room if they had remained in the breezeway.[15] The detectives asked him if David Milam lived in the fraternity house, and Mr. Neagli said that he would check to see if he was available[16]. The detectives followed Mr. Neagli to the room without asking or receiving permission. They reached a closed door on the second floor, and as soon as Mr. Neagli opened it, the detectives went by him and started yelling for David Milam.[17]

The Court once again denied the motion to suppress, finding that the entry did not go beyond the breezeway in spite of contradictory testimony from Mr. Neagli, that the

[14] Segment 10, at 1:45:25
[15] Ibid, at 1:45:35
[16] Ibid, at 1:48:40
[17] Ibid, at 1:49:30

second door beyond the breezeway was open, and that implied consent was given by Mr. Neagli to go further into the building. However, the Court did specifically make a finding of fact that the entry to the breezeway was non-consensual.[18] A conditional guilty plea was entered on March 21, 2012. By split decision, the Court of Appeals affirmed the conviction by a 2-1 split decision on August 30, 2013. This Court granted discretionary review on April 9, 2014, and this appeal follows.

[18] Ibid, at 2:53:50

ARGUMENT

I. A Fraternity House is more closely related to a Private Residence than an Apartment, Duplex, or Hotel for Fourth Amendment Purposes, and the Appellant had a Reasonable Expectation of Privacy.

In denying the Motion to Suppress, the Circuit Court made a specific finding that for the purposes of the Fourth Amendment, a fraternity house is closely akin to an apartment building, hotel, or a duplex, rather than a private residence.[19] Though identifying this issue as "the crux of the dispute,"[20] the majority opinion of the Court of Appeals made no ruling on it, holding instead that this specific Movant had no subjective expectation of privacy based on the specific circumstances of the search. This Opinion was ordered To Be Published. Judge Thompson's dissenting opinion correctly pointed out that though the majority attempted to skirt the issue, its ruling suggests that fraternity houses are akin to apartment buildings or hotels, rather than private residences, and that this implicit holding is a misstatement of the law. The Movant agrees wholeheartedly.

A citizen is afforded a degree of protection against police intrusion in the common areas of a private residence that is substantially higher than that of the common areas of an apartment building or hotel, and a determination on this legal issue is necessary before one of the two legal standards can be applied to the specific facts of the search. Moreover, in spite of its insistence that it has not made a ruling on the issue, the holding of the majority opinion is that fraternity brothers have no expectation of privacy in the common areas of their house gives fraternity houses, sorority houses, private clubs, and even rented houses with unrelated roommates the status of an apartment building or a hotel for the purposes of search and seizure by law enforcement.

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[19] Segment 6, at 3:34:55

[20] Opinion of the Court of Appeals, p. 16

As a question of law, this issue should be reviewed de novo. Ky. PSC v. Commonwealth ex rel. Conway, 324 S.W.3d 373 (Ky. 2010)

A fraternity house like Delta Tau Delta is more than just a group residence where strangers pay for rooms and share use of common areas. It is the residence hall of the local chapter of a national fraternal organization, often with a rich tradition and history, in which membership is carefully given out to selected individuals after a thorough screening process. Its members refer to one another as brothers and share bonds of friendship and trust that last for lifetimes. For many young men away form home for the first time at college, their fraternity becomes an extended family, and the house is that family's home.

Multi-unit rental property and hotels, on the other hand, handle public access in a completely different way. In multi-unit rental property and hotels, an assumption is made that the public is free to enter the property. The public is allowed on the property freely to visit residents or guests. The industry standard is for rental properties to advertise vacancies and invite the public to come inspect the units, discuss lease terms with landlords, etc. An open door policy is part of the standard business model in the rental market. Only when an owner takes affirmative steps to restrict access to the property is the assumption of openness replaced with an expectation of privacy.

By contrast, a fraternity house is designed to be an exclusive residence that is closed to the general public. The only people allowed to enter such property are members, who were chosen individually and put through a screening process before being allowed to join, and their invited guests. The exclusivity of access to the club and its facilities is a key feature of the organization. The assumption of openness to the

public that exists with standard multi-family rental units simply does not apply to a fraternity house. By the very nature of a fraternity, the general public is on notice that it is not invited to enter the property freely without an express invitation from a member in good standing.

Delta Tau Delta has rules at both the local and national level to bar the general public from entry. The policies of the University of Kentucky confirm this exclusivity of access.[21] In order to give effect to those rules, affirmative steps were taken to bar the general public from entry in the form of posting privacy signs, both temporary[22] and permanent, [23] and the installation of a security system with a keypad lock that was readily visible to the public.[24] An organization such as this one has every right to afford its members a cloistered home, where they can relax, socialize, and study in comfort and privacy, knowing that everyone inside is one of their brothers or a personal guest of one of their brothers.

Though the issue is a case of first impression in the Commonwealth, other jurisdictions have found that fraternity houses are akin to private homes for the purposes of search and seizure. In State v. Miller, WD-10-027 (Ohio App. 2011), a police officer entered and searched a fraternity house without consent or a search warrant and arrested individuals within the residence. The State claimed that fraternity members only had the reasonable expectation of privacy within their rooms, and not in the common areas of the house. The Court disagreed, finding that fraternity members are akin to "roommates living in the same house," and that "a fraternity, by definition, is something of an exclusive living arrangement with the goal of maximizing the privacy of its affairs." Ibid

[21] Transcript, Segment 6, at 1:50:55
[22] Ibid, at 1:55:55
[23] Ibid, at 1:45:05
[24] Ibid, at 1:41:05

at page 7, paragraph 21. The Court found that members had a reasonable expectation of privacy inside the house and suppressed the evidence against the fraternity members.

Likewise, in Reardon v. Wroan, 811 F2d 1025 (7th C.A. 1987), a fraternity challenged a warrantless entry to their house in a §1983 case. The Court held that a fraternity house is a private residence for the purposes of search and seizure, and that the entry into the home required either a warrant or exigent circumstances. The Court ultimately found that exigent circumstances existed to justify the entry, as the officers were responding to a burglary report and observed signs of a burglary in process. In the present case, however, no such exigency has been claimed.

In State v. Houvener, 186 P3d 370 (Wash. App. 2008), law enforcement entered a dormitory without a warrant and conducted a search of the hallways of the building while investigating a burglary. The Trial Court suppressed the evidence and the Court of Appeals affirmed, holding that a resident of a dormitory has a privacy interest in the hallways of a dormitory. The Houvener Court noted that while access to dormitories is not as restrictive as fraternity houses, access to the hallways of each floor is restricted to residents and their invited guests. Therefore, citing Reardon, supra, the Court held that Houvener had an expectation of privacy in his dormitory hallway similar to that held by fraternity brothers throughout their house.

In State v. Reining, 2011-Ohio-1545, 2011 Ohio App. LEXIS 1361, 2011 WL 1167181 (Ohio Ct. App., Mar. 31, 2011), an officer observed two people on the balcony of a fraternity house and a cloud of smoke that he suspected as marijuana. He entered the fraternity house and made his way to the balcony, where he smelled marijuana smoke and witnessed one of the defendants holding a marijuana pipe. On appeal, the defendants

argued the entry into the fraternity was unlawful. The Court of Appeals agreed, reversing the conviction. The Court specifically held that, "the shared living arrangement at a fraternity house supports treating residents as 'roommates in the same house' We conclude that appellants met their burden of showing a reasonable expectation of privacy throughout the house *and that the fraternity house should be treated as a home for purposes of [the] Fourth Amendment* " (emphasis added) Ibid, at P22. In that case as in the present one, a key issue is the classification of a fraternity house for 4th Amendment purposes. Where multiple roommates live, share common areas, and restrict the entry of uninvited outsiders as a precursor to entering into the living arrangement, that house is properly deemed to be a home for the purposes of unlawful search and seizure.

In United States v. Werra, 638 F.3d 326, 2011 U.S. App. LEXIS 5741 (1st Cir. Mass. 2011), police officers entered the foyer of a house, which was occupied by unrelated tenants, without a warrant. The officers had been told by an informant that the home had become a "drug house," and the officers believed a suspect with an outstanding warrant was inside the home. After the entry, the officers stopped and frisked the defendant, an occupant of the house, and found a firearm in his possession. As the defendant had a prior felony, he was charged and convicted of possession of a firearm. On appeal, the First Circuit reversed his conviction, holding that, "As other courts have held with respect to rooming houses and fraternities, an unconventional household does not necessarily diminish the protection afforded the residents of the house." Ibid, at 332. The Court further held that, unlike multi-unit apartment buildings where each living unit is self-contained, rooming houses and fraternities have common areas that are shared by

all tenants as a part of their home, and thus each tenant has a reasonable expectation of privacy in those areas.

Furthermore, in City of Fargo v. Lee, 1998 ND 126, 580 N.W.2d 580, 1998 N.D. LEXIS 142 (N.D. 1998), law enforcement was responding to a complaint of a loud party at a fraternity house. The officers went to the front door and tried to ring the doorbell, which was not working. The officers then knocked and pounded on the door until it opened. Once the door was open, officers saw what looked like underaged people drinking alcohol and told them to get a resident of the house. The parties dispute whether that resident who spoke to the police consented to any further entry, but regardless the officers went further into the fraternity and made arrests for alcohol and marijuana. The Supreme Court reversed the convictions, finding that the warrantless entry was unlawful and making a specific finding that, "A fraternity house is afforded the same Fourth Amendment status to its residents as a home." Ibid, at P8, citing Reardon v. Wroan, 811 F.2d 1025, 1987 U.S. App. LEXIS 2152 (7th Cir. Ill. 1987).

In State v. Pi Kappa Alpha Fraternity, 23 Ohio St. 3d 141, 491 N.E.2d 1129, 1986 Ohio LEXIS 619, 23 Ohio B. Rep. 295 (Ohio 1986), state liquor control agents gained entry to a fraternity party through subterfuge in order to investigate whether alcohol was being served on the premises. The defendants were convicted of violations of liquor laws, but prevailed on appeal. The Court held that because the consent was involuntary, the intrusion into the fraternity house was unlawful. In reaching this conclusion, though, the Court referred to the entry onto the premises as the entry into a "private home"

In Idol v. State, 233 Ind. 307, 119 N.E.2d 428, 1954 Ind. LEXIS 191 (Ind. 1954), the police were searching for a hit-and-run suspect and noticed a car matching the

description in the garage of a fraternity. The officers entered the garage to get a closer look at the vehicle. Afterward, the officers found a member of the fraternity and gained consent to enter the garage. The defendant was later arrested and convicted and appealed on the grounds of an illegal entry. The Supreme Court reversed, holding that the defendant's/appellant's permissible use of the garage as part of his residence in the fraternity rendered the garage, "a part of the appellant's premises as to fall within the constitutional immunity from unreasonable search and seizure." Ibid, at 314. Thus, the Court recognized the fraternity's adjacent garage as a constitutionally protected part of the home, and that protection extended to all members of the fraternity.

The Court of Appeals attempted to distinguish several of these cases based on the circumstances leading up to the search, but as Judge Thompson correctly states, the finding of these courts that fraternity houses are comparable to private residences was a legal conclusion made independently of the specific facts surrounding the search.[25] Before applying the law to the facts, courts must determine which legal standard will be applied. The private nature of a fraternity house, persuasive foreign caselaw, and common sense dictate that the search of a fraternity house should be analyzed under the same standard as a search of a private residence.

The Commonwealth has not cited a single case in which a fraternity house has been held to be the Fourth Amendment equivalent of an apartment, duplex, or hotel from this or any other jurisdiction. The primary case relied upon by the Commonwealth, United States v. Dillard, 438 F.3d 675 (6th Cir. Ohio 2006), involved an entry into the common areas of a duplex, which is a fundamentally different living arrangement than that of a fraternity house, and is distinguishable on two grounds.

[25] Opinion, p. 28

First, an apartment complex, duplex, or other multi-unit rental property and the property of a private club handle public access in very different ways. In multi-unit rental property, an assumption is made that the public is free to enter the property. The public is allowed on the property freely to visit residents. The industry standard is for rental properties to advertise vacancies and invite the public to come inspect the units, discuss lease terms with landlords, etc. An open door policy is part of the standard business model in the rental market. Only when an owner takes affirmative steps to restrict access to the property is the assumption of openness replaced with an expectation of privacy.

The property of a private club creates the exact opposite assumption. The only people allowed to enter such property are members, who were chosen individually and put through a screening process before being allowed to join, and their invited guests. The exclusivity of access to the club and its facilities is a key feature of the organization. The assumption of openness to the public that exists with standard multi-family rental units simply does not extend to private club property. The assumption with a private club is the exact opposite. By the very nature of the organization, the general public is on notice that it is not welcome onto the property without an express invitation from a member in good standing.

When the general public is invited onto the property, an unlocked, slightly ajar door creates a reasonable assumption that one may enter at will. When the general public is restricted from the property, an unlocked, slightly ajar door creates a reasonable assumption that someone forgot to lock the door. The public does not gain general access to restricted property by virtue of a mistake or a defect in security.

Second, the Court's ruling in Dillard was premised on the fact that physical entry was the only way for officers to alert residents to their presence. Though the officers were located at the front entrance of the building, the defense presented no evidence of a doorbell, an intercom, or any other means to contact tenants without physically entering the property and knocking on the doors of individual residences. Ibid, at 682-683. In the present case, the officers were mistakenly located at the rear entrance of the building. Even so, every officer present testified that they rang a doorbell at that entrance and waited for a response anywhere from 30 seconds to 3 minutes.[26] Thus, physical entry was not necessary to alert their presence. The fact that an occupant does not answer a doorbell or intercom buzz does not alter the analysis of an entry for Fourth Amendment purposes. Such encounters are consensual in nature, and as such, an occupant of private property has every right to answer or disregard any attempts at contact by the general public or by members of law enforcement, unless and until the police officers have obtained a search warrant or can show exigent circumstances for a warrantless entry.

The members of a fraternity join an organization that prides itself on selectivity and exclusiveness. Privacy is a founding principle of such organizations, as they engage in rites and rituals that are intentionally kept secret from the public, rituals that the Delta Tau Delta fraternity performed in the Nice Room adjacent to the breezeway. Strict rules are made and enforced to keep the general public out of the organization's private home, and in this case, affirmative steps were taken to enforce those rules. Fraternities have every right to restrict access to their facilities to their brothers and their invited, accompanied guests, and their members are perfectly reasonable in expecting that their privacy will be respected within the fraternity house in a way comparable to that of a

[26] Transcript, Segment 5-1, at 3:18:55 and Segment 5-2, at 3:54:35

private residence, rather than that of an apartment building open to the general public. The expectations of the members of fraternities that their privacy will be protected in their home are not in any way unreasonable.

As such, the Appellant respectfully requests that the Court address this important issue of law and submits to the Court that the Motion to Suppress was decided on an improper legal standard, and thus the conviction of the Appellant should be reversed

II. The Warrantless Entry into the Facility Exceeded the Parameters of a Consensual Knock-and-Talk.

The law enforcement officers in this case testified that they approached the back door of the Delta Tau Delta fraternity, knocked on the door, rang the doorbell, and announced themselves as police officers. This attempt at a consensual knock-and-talk encounter was made around 10pm on November 30, 2010,[27] a Tuesday during the Fall 2010 semester. When nobody responded to the knock or the doorbell, the officers opened the door and entered the facility. The parties have disputed whether the door was closed or slightly cracked, though still touching the frame,[28] and whether the officers entered the breezeway only or went beyond the breezeway through the second door. However, even resolving every factual dispute in favor of the Commonwealth, as the Circuit Court did, the encounter still went beyond a consensual knock-and-talk encounter.

The proper procedures for a consensual knock-and-talk were covered in great detail in the recent case of Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2008). In Quintana, the officers went to the front door for a knock and talk, but there was no answer, they then went around to the back of the house to look for a back door. While in the back yard, they smelled marijuana, and the officers used this information to obtain a

[27] Citation of November 30, 2011, prepared and signed by Det. Beetz.
[28] Transcript, Segment 5-1, at 3:18:05

warrant to search the premises. The Court held that the officers had gone beyond the area where the public was allowed to go, and suppressed the evidence. As the Quintana Court stated, "The crux of the validity of the knock and talk procedure is that it is a consensual encounter in a place where the officer, like the public, has a right to be." Ibid, at 759.

The Quintana Court went on to hold that, as the entire basis of the encounter are consensual, so the police are restricted from taking invasive steps to make contact, even if they have reason to believe that someone is home and not answering, and that "unless an officer has probable cause to obtain a warrant or exigent circumstances arise, the intrusion can go no further than the approach to the obvious public entrance." Ibid, at 759. In other words, a citizen has a right not to answer his door, for whatever reason, even if the police are the ones knocking on it. See also United States v. Gomez-Moreno, 479 F.3d 350, 355-356, 2007 U.S. App. LEXIS 3251 (5th Cir. 2007) ("When no one answered, the officers should have ended the "knock and talk" and changed their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.")

If there is no answer to the attempt to establish contact, the officers must obtain a warrant, find exigent circumstances, try again later, or in this case, find where the actual front entrance was and try knocking there. Instead, the officers simply opened the unanswered door and entered the house. Even assuming the door was just slightly ajar and the officers never went past the breezeway, as the detectives testified, they exceeded the area to which the general public could reasonably have had access. In fact, the president of the fraternity at the time, Nicolas Stewart, testified that the area just past the second door was the fraternity's "Nice Room," where valuables are kept and meetings, initiations, and fraternity rites are conducted. [29] Regardless of whether the detectives

[29] Segment 10, at 1:56:30.

actually did enter this room the Court made a finding of fact that the door to this room was wide open.[30]

The Court of Appeals addressed the issue of the scope of "knock and talk" encounters in the recent case of Hall v. Commonwealth, 2014 Ky. App. LEXIS 6, 2014 WL 92262 (Ky. Ct. App. Jan. 10, 2014). In Hall, officers went to the residence of a suspect and attempted to initiate a knock and talk. When the defendant did not answer, the oficers had his landlord open the door and let them into the apartment. The officers knocked on the door, and no one answered. The Court found that, "When [the detective] opened the door, the scope of a knock and talk was exceeded." Ibid, at *7. Once law enforcement officers have knocked or rang a doorbell, they have attempted to make contact with the citizen. If the citizen does not answer, the consent requirement, which is the entire basis of the knock and talk, is not satisfied, and the officers must advance their investigation using some other means. See also Powell v. State, 120 So. 3d 577, 2013 Fla. App. LEXIS 8166, 38 Fla. L. Weekly D 1140, 2013 WL 2232319 (Fla. Dist. Ct. App. 1st Dist. 2013) (officers exceeded scope of knock and talk by peering in side windows after citizen did no answer).

When one takes into account the security system on the outside door, the privacy signs, the policies of exclusive access by fraternity members, the widely-held public perception of fraternities as exclusive clubs, and the fact that the fraternity's most prized possessions were just a few feet away from the entrance behind a door that had been propped open, it becomes clear that the general public was not welcome to pass through the outer door and into the breezeway. As the Quintana Court held, when a resident takes "obvious steps" to bar the public, that area is not accessible to law enforcement in a

[30] Segment 10, at 2:50:50

consensual knock-and-talk, and as such the entry was improper, and all evidence that resulted from this constitutional violation should be suppressed.

III. Even should the Court find that a Fraternity does not have a Reasonable Expectation of Privacy, Consent was not Given to the Police to Enter the Residential Area of the Building.

On the issue of whether Matthew Neagli gave consent to the officers to enter the stairwell and residence hallway, the parties once again agree on some facts and disagree on others. Both parties maintain that the officers announced themselves as police officers, encountered Mr. Neagli, and asked him whether David Milam lived in the fraternity house. Mr. Neagli said, "Yes." Unfortunately, the agreement on the facts ends there. Mr. Neagli testified that he then told the officers, "I'll go get him" and proceeded up the stairs, and the officers followed him.[31] After he opened the door to the residence hall, the officers went past him and started yelling for David Milam. [32] Dets. Beetz and McBride testified that after Mr. Neagli indicated that David Milam lived there, they asked if he would take them to him. Mr. Neagli agreed and led the detectives upstairs and pointed to Mr. Milam's room.[33]

The Court made no finding of fact in regards to what was actually said between Neagli and the detectives, as it found that regardless of what was said, Neagli's failure to object to the officers following him up the stairs constituted implied consent to enter and search the premises.[34] The basis of this finding of consent was Neagli's failure to object when the officers followed him, and the issue of whether they asked permission to enter or not was immaterial.[35]

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[31] Segmetn 10, at 1:48:40
[32] Ibid, at 1:49:30
[33] Segment 5-1, at 3:26:15, and Segmetn 5-2, at 3:59:10
[34] Segment 10, at 3:00:20
[35] Segment 10, 2:56:30

Implied consent was claimed under similar circumstances in United States v. Little, 431 Fed. Appx. 417 (6th Cir. 2011). In that case, an officer went to the home of a suspect's mother to look for him. The suspect came to the door, and the officer told him that he was suspected of a crime, and that a detective wanted to speak to him. The suspect agrred to speak to the detective, but asked if he could put on a shirt first. The officer "agreed and followed defendant into the house without asking permission to enter." Ibid, at 418. The suspect did not object to the entry.

While inside the home, the officer took the suspect's phone, which later revealed incriminating evidence. On appeal, the Court suppressed the evidence, holding that that, while nonverbal conduct may provide the basis for a finding of implied consent, there can be no such consent if the officer never affirmatively asked for permission. Specifically, the Court held that, "logic dictates that a person cannot consent to a request that has not been made – particularly in light of the fact that the government bears the burden of showing that consent was given voluntarily." Ibid, at 420. In the present case, Mr. Neagli testified that the officers never asked him for permission to enter, nor did he give it to them. Under Little, Neagli could not have given his voluntary consent, since he was never given the opportunity to do so.

Further, in Mullane v. Kassinger, 107 F. Supp. 2d 877, 2000 U.S. Dist. LEXIS 14481 (N.D. Ohio 2000), a citizen sued two officers for wrongful entry and excessive force. The officers were looking for the plaintiff's brother, who was a suspect in a theft. The first officer on the scene initiated a knock and talk with the plaintiff, asking to see his brother. The plaintiff told the officer that he would go get him and went into the house. The officer followed him, and the plaintiff did not object. After his brother's arrest, the

plaintiff told the officers to leave, which resulted in an altercation in which the plaintiff was beaten and arrested. The defendants sought summary judgment, but this motion was denied. Finding the entry to be unlawful, the Court held that a citizen's consent must be "unequivocal, specific, and intelligently given," and that "free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority." Ibid at 882. In other words, the law does not place the burden on a citizen to stop a law enforcement agent from overstepping his or her bounds. Rather, the burden of obtaining free and voluntary consent prior to an entry or a search is placed on law enforcement.

This ruling makes perfect sense when you consider the balance of power in such situations. An officer showing up at a person's door and seeking entry as part of a criminal investigation would be an extremely stressful and intimidating situation for the average person. While those in the legal profession are aware of their rights, the average citizen may not know that they can refuse warrantless entry to the police if it is requested or even demanded. If an officer brazenly enters a home unlawfully and initiates a search while the intimidated citizen remains silent, can it be said that that citizen has freely and voluntarily waived his or her rights and consented to have his or her home intruded upon by law enforcement without a search warrant? The Appellant respectfully submits to the Court that both common sense and fundamental fairness say no, that citizen has not given free and voluntary consent.

Moreover, in finding valid consent in the present case, the Court held that under the totality of the circumstances, Mr. Neagli had the authority to consent to an entry and search of the premises up to the door of the Appellant's bedroom based on common authority under United States v. Matlock, 415 U.S. 164 (U.S. 1974).[36] The logic of this

[36] Segment 10, at 2:57:50

ruling seems sound, but it does not square well with the Court's ruling on the legal nature of a fraternity house.

A fraternity house is an exclusive residence, and if someone is inside, one can make a logic assumption that he is affiliated with the fraternity in some way, and thus has the authority to give consent to a search. However, if a fraternity house is the equivalent of an apartment building, duplex or hotel, and the general public may access common areas freely, then a person's mere presence inside the facility is not sufficient to confer authority on him to consent to a search. The Court's rulings contradict one another.

Though the Court erroneously stated at one point that Mr. Neagli identified himself as a fraternity member, the detectives in this case testified that they did not ask Mr. Neagli who he was, but simply asked whether David Milam lived there.[37] The Court's earlier summary of the testimony was an accurate rendition of the testimony.[38] The detectives assumed he had authority to consent by virtue of his presence in the common areas, as did the Circuit Court. While such an assumption is reasonable in a private residence, in the context of an apartment complex, duplex, or hotel, law enforcement would need to take some small step to determine whether the person is authorized to consent or just a member of the general public.

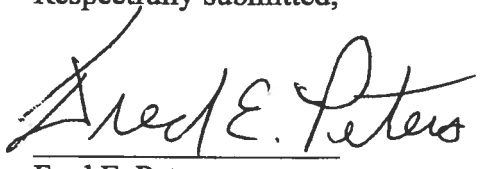
Thus, the Appellant respectfully requests that the Court reverse the ruling that an unlawful entry combined by the silence of a possible resident is sufficient to show free and voluntary consent.

Closing

[37] Segment 5-1, at 3:24:15
[38] Segment 10, at 2:54:30.

Law enforcement's entry into the Delta Tau Delta fraternity house was an improper and overly broad use of the consensual knock-and-talk, the lower courts mischaracterized the Appellant's fraternity house as being akin to an apartment complex, rather than a private residence, and voluntary and free consent to expand the intrusion was not obtained. For the reasons stated above, the Appellant respectfully requests that the Court reverse his conviction.

Respectfully submitted,



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