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SUPREME COURT

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

DAVID ZAC MILAM

APPELLANT

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

v.

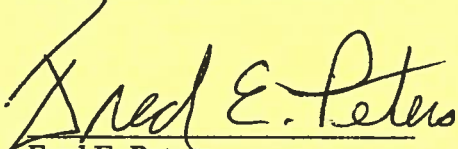
COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR THE APPELLANT  
DAVID MILAM

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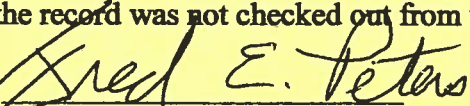
Respectfully submitted,



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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 5<sup>th</sup> day of November, 2014 to Susan Stokley Clary, State Capitol, 700 Capitol Avenue, Frankfort, KY 40601, Hon. James D. Ishmael, Judge, Fayette Circuit Court, 9<sup>th</sup> 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, and Hon. Ken W. Riggs, Assistant Attorney General, Capitol Suite #118, 700 Capitol Avenue, Frankfort, Kentucky 40601. I further certify that the record was not checked out from the Court of Appeals.

BY:   
Fred E. Peters

## PURPOSE

The Reply Brief of the Appellant is being filed to rebut the arguments made by the Appellee in its Response Brief and to ask that the Court make a ruling on the primary legal issue raised by this case, the status of fraternity houses in the Commonwealth for the purposes of the Fourth Amendment. The Appellee essentially has asked the Court to limit this case to its facts and affirm, but such a ruling will give inadequate guidance to both the lower courts and law enforcement.

## ARGUMENT

*I. The Courts of the Commonwealth Need Guidance on the Issue of the Status of a Fraternity House for the Purposes of Second Amendment Analysis, and all the Courts that Have Ruled on that Issue Found the House to be Analogous to a Private Home.*

The Appellee has urged this Court to follow the Majority Opinion of the Court of Appeals and refuse to give any ruling or guidance on the primary issue at hand by limiting the case to its facts. The status of a fraternity house for the purposes of entry and search under the Fourth Amendment was described by the Majority Opinion itself as “the crux of the issue.”<sup>1</sup> In issuing its Ruling, the Trial Court made a specific finding as a matter of law that a fraternity house was akin to an apartment complex, hotel, or duplex for the purposes of law enforcement entry and searches.<sup>2</sup> The arresting officers themselves testified that they debated the issue of whether a fraternity house was more like an apartment complex or a hotel, rather than a private residence, prior to executing the entry.<sup>3</sup>

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<sup>1</sup> Opinion of the Court of Appeals, p. 16

<sup>2</sup> Transcript, Segment 6, at 3:34:55

<sup>3</sup> Transcript, Segment 5-1, at 3:20:20

The determination of whether this entry was unconstitutional was made at every level, from the street to the appellate courts, with this question in mind. The Appellant respectfully submits that without a clear ruling from the Court on this issue, this complicated question of constitutional law will continue to be decided circuit-by-circuit, court-by-court, and officer-by-officer. The Commonwealth needs a uniform interpretation of the law that fraternity houses are either akin to apartment complexes or hotels, as the Trial Court has held, or akin to private residences, as the Dissenting Opinion of Judge Thompson has reasoned.

The solution put forth by the Majority Opinion simply is not practical for law enforcement. Analysis of the floor plan of the building, the lease agreements of the residents, the bylaws of the fraternity, the functionality of the security in the building, the knowledge of the residents as to the functionality of the security, etc. is not something an officer can do in the moments he or she has to make a decision whether to conduct a warrantless entry or get a warrant when a consensual knock-and-talk fails. In fact, in the time it would take to gather and analyze all the information needed for an officer to make the Majority Opinion's evaluation, a warrant could have been obtained.

While a case of first impression in the Commonwealth, several other jurisdictions have taken on cases that required a determination of the status of a fraternity house for the purposes of the Fourth Amendment. The First and Seventh Circuits, as well as the states of Ohio, Indiana, North Dakota, and Washington, have held that fraternity houses and in some cases dormitories, which are less restrictive about residents and guests, and similar homes with unrelated tenants should be considered private residences for the purposes of entry and search. See State v. Miller, WD-10-027 (Ohio App. 2011),

Reardon v. Wroan, 811 F.2d 1025 (7th C.A. 1987), State v. Houvener, 186 P.3d 370 (Wash. App. 2008), State v. Reining, 2011-Ohio-1545, 2011 Ohio App. LEXIS 1361, 2011 WL 1167181 (Ohio Ct. App., Mar. 31, 2011), United States v. Werra, 638 F.3d 326, 2011 U.S. App. LEXIS 5741 (1st Cir. Mass. 2011), City of Fargo v. Lee, 1998 ND 126, 580 N.W.2d 580, 1998 N.D. LEXIS 142 (N.D. 1998), 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), and Idol v. State, 233 Ind. 307, 119 N.E.2d 428, 1954 Ind. LEXIS 191 (Ind. 1954)

Not a single jurisdiction has held that fraternity houses are akin to apartment complexes, hotels, or duplexes. While a thorough breakdown of these cases can be found in the Appellant's brief, the basic reasoning of the Courts tends to be that, at the very least, fraternity brothers are roommates sharing a common home. More in-depth opinions discuss the fact that the exclusiveness of the organization enhances the expectation of privacy within its local headquarters. Regardless, each and every jurisdiction that has taken on this issue, as well as many that have taken on similar issues, have found fraternity houses to be akin to private homes.

The Majority Opinion has sought to distinguish some of this authority by pointing to factual differences in the cases, but as the Dissenting Opinion states, the status of fraternity houses for Fourth Amendment purposes is a conclusion of law, not a finding of fact. Once that conclusion of law was made as to what level of protection a fraternity house has under the Fourth Amendment, which was uniformly found to be the same as a private residence, then the specific facts of the case and the entry are analyzed to determine legality. In this case, the fact that a door was ajar or a security keypad wasn't functional doesn't change the underlying nature of the structure itself. Rather, these facts

must be analyzed to determine whether they justified a warrantless entry and whether the constitutional boundaries of a knock-and-talk were exceeded.

The Trial Court in this case made a specific finding that a fraternity house is similar to an apartment complex or duplex, where the common areas are open to the public.<sup>4</sup> This conclusion of law colored every aspect of the Trial Court's Ruling. While the Appellant believes that the circumstances of this case warrant an outright reversal, at the very least, remand is necessary to hold a hearing under the proper legal standard.

*II. Even under the Majority Opinion's Holding that Courts and Law Enforcement Should Perform a Case-specific Analysis in all such Cases, the Appellant had a Reasonable Expectation of Privacy within his Fraternity House.*

In the alternative, should the Court adopt the multi-factor, case-by-case privacy analysis that the Majority Opinion favors, the facts of this specific case still show a reasonable and valid expectation of privacy. The fraternity is an exclusive organization. Only its members and invited guests are allowed on the premises. University regulations specifically lay out the exclusive nature of fraternity houses.<sup>5</sup> The fraternity posted privacy signs to warn the general public not to enter.<sup>6</sup> They even installed a security system with a key pad that was in plain sight to the public.<sup>7</sup> In fact, the fraternity was so secure in its privacy that it kept its valuables and conducted its rituals in a room immediately accessible from the foyer in question.<sup>8</sup> The door of the room where the fraternity's valuables are kept was left wide open.<sup>9</sup>

The Appellee has based much of its argument on the fact that the security system was broken and the door was ajar. This assertion is a complete misstatement of the law.

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<sup>4</sup> Segment 6, at 3:34:55

<sup>5</sup> Transcript, Segment 6, at 1:50:55

<sup>6</sup> Ibid, at 1:45:05 and 1:55:55

<sup>7</sup> Ibid, at 1:41:05

<sup>8</sup> Affidavits of David Milam and Fraternity President Nicolas Stewart, and Segment 10, at 1:56:30.

<sup>9</sup> Segment 10, at 2:50:50

This line of argument assumes that the general public has a right to enter places to which it is not invited, and that the residents of a building only have privacy to the extent that they have erected physical barriers to shield themselves from the public, and that those barriers are fully functioning.

If a person forgets to take their keys out of the front door to their home, has that person now forfeited any expectation of privacy? Has the fact that that person provided a means for the general public to gain entry now given the general public a right to enter the home? Taking it even further, let's assume the person was bringing in groceries and deliberately left the keys in the door. Did that act amount to a general invitation to the public to enter that person's living room or foyer? From another perspective, if you were walking by a house and saw that the occupant had left his/her keys in the door, would you feel entitled to enter his/her home without an invitation to do so, rather than knocking and ringing the doorbell? The Appellant respectfully submits to the Court that the answer to all these questions is no. A home is still a home, and privacy exists there regardless of whether the door is locked. The deciding factor is whether the public has been invited in. In the case of a fraternity house, the answer to that question is a resounding no, and that fact is common knowledge. One of the most basic features of a fraternity is exclusivity. The current status of its security doesn't change what a fraternity is by its nature.

*III. The Officers Exceeded the Scope of a Voluntary, Consensual Knock-and-Talk by Breaching the Entrance of the House without first Obtaining Consent.*

Looking to the conduct of the officers, the scope of a consensual knock-and-talk was exceeded. Obviously, the general public and law enforcement are allowed to approach a door and attempt to contact someone inside in order to engage in a consensual conversation. They may knock on the door and ring the doorbell in order to try to get the

occupant's attention. However, if the occupant does not come to the door for whatever reason, that is the end of any encounter that is based on consent. A citizen has a right not to answer the door just as he/she has a right not to answer the phone. Such conversations are entered into voluntarily and consensually. If consent is not given, the conversation does not occur at that time. As this Court stated in Quintana v. Commonwealth, 276 SW3d 753 (Ky. 2008.), "Just as no resident is required to answer his door or respond to questions when the general public comes calling, so it is with a police officer, regardless of whether the failure to answer the door is intentional or the result of the resident's inability to hear the knock." Ibid, at 760.

The Appellee cites US v. Dillard, 438 F3d 675 (6<sup>th</sup> Cir. 2006) in support of its position, but Dillard is distinguished by a key factual difference that drives this point home. In Dillard, the Court found that "without being able to pass through the hallway and stairway, there was no visible way for the police or anyone else to alert the duplex tenants of their presence." Ibid, at 682. The duplex did not have an intercom system or a doorbell. Put simply, a request for a consensual knock-and-talk interaction could not be made, because there was no door on which to knock.

In the present case, the officers approached what a door, knocked on it, and rang the doorbell. A request was made by law enforcement for a consensual encounter with the occupants of the building, and that request was met with silence. Without consent to initiate the encounter and question the occupant, the officer's options are to come back later, to continue the investigation through other avenues, or to obtain a search warrant. See United States v. Gomez-Moreno, 479 F.3d 350, 355-356, 2007 U.S. App. LEXIS 3251 (5th Cir. 2007). Opening the door and walking into the residence without

permission invalidates the “knock” aspect of the procedure and takes consent out of the equation. Without the consent of an occupant, entry into the house exceeds the scope of a proper knock-and-talk, and the evidence taken as a result of this improper entry should be suppressed. Hall v. Commonwealth, 438 SW3d 387 (Ky. App. 2014).

*IV. The Ruling on Consent was that Neagli's Silence as the Officers followed him through the House was Sufficient to Establish Consent, which is a Misstatement of the Law.*

Finally, consent to enter further into the building was neither requested nor obtained by law enforcement. The Appellee has argued that under the officer's version of events, consent was given by Mr. Neagli, but this argument ignores the actual holding of the Trial Court,<sup>10</sup> which was acknowledged by the Majority Opinion of the Court of Appeals.<sup>11</sup> The holding in this case was that following a person inside the house without asking for nor receiving consent is proper.

The case of United States v. Little, 431 Fed. Appx. 417 (6th Cir. 2011) addresses this question directly. In Little, the officers initiated a knock-and-talk, then followed the suspect inside the house without asking for or obtaining permission. The entry was held to be improper, because in order to obtain consent to enter, it must first be requested by the law enforcement. See also Mullane v. Kassinger, 107 F. Supp. 2d 877, 2000 U.S. Dist. LEXIS 14481 (N.D. Ohio 2000). Having law enforcement officers follow a person into his house and putting the burden on him to object and force the police to leave is a misstatement of the law and a misunderstanding of the essential nature of consent. Voluntary consent is not obtained by forcing or intimidating a citizen into a situation,

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<sup>10</sup> Segment 10, 2:56:30

<sup>11</sup> Milam v. Commonwealth, 2013 Ky. App. Unpub. LEXIS 992 at \*27.



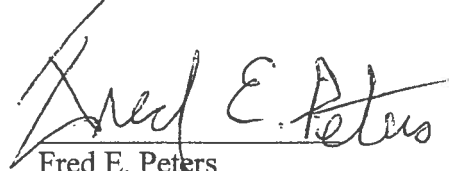
then placing the burden on the citizen to tell a police officer that the officer is not allowed to do what the officer is already doing.

The other grounds under which the consent was invalid is that Neagli did not have authority to consent. Interestingly, the positions of the Appellee on this issue and the issue of the entry lack internal consistency. As the case cited by the Majority Opinion, Perkins v. Commonwealth, 237 S.W.3d 215 (Ky. App. 2007), states, consent is valid when the person giving consent can reasonably be assumed to have “common authority over the premises” to provide that consent, i.e. a resident of the premises or someone with similar authority to a resident. The officers were allowed to enter the building because any member of the public was allowed to do so, yet when they saw a person inside the building, he can safely be assumed to have the authority to consent to the search, because he's obviously not some random person who wandered into the building from off the street. The exclusivity of access to the fraternity house supplies the basis for the validity of Neagli's consent, yet this same exclusivity is ignored for the purposes of the original entry. Officers cannot stop a random person walking through a hotel lobby and ask for consent to search the premises based on the assumption that he is an agent or employee of the hotel simply by virtue of his presence inside. Likewise, Neagli can either be assumed to be a guest or a member of the fraternity with authority to consent or he can be assumed to be a general member of the public, walking around a common area where everybody has the right to go. If the consent was valid, the entry was improper; and if the entry was proper, the consent was invalid. The fraternity house cannot be both exclusive to its members and their guests and open to the general public at the same time.

**Conclusion**

For the reasons stated above, the Appellant respectfully requests that his conviction be reversed on the grounds that its Motion to Suppress was improperly denied.

Respectfully submitted,

A handwritten signature in black ink that reads "Fred E. Peters". The signature is written in a cursive style with a long horizontal stroke extending to the left.

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