IN THE SUPREME COURT OF ALABAMA

June 12, 2020

1190019

Ex parte Derek Tyler Horton. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Derek Tyler Horton v. State of Alabama) (Mobile Circuit Court: CC-11-2588.80; Criminal Appeals : CR-17-0991).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 12, 2020:

Writ Denied. No Opinion. Shaw, J. - Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 12th day of June, 2020.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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September 27, 2019

CR-17-0991

Derek Tyler Horton v. State of Alabama (Appeal from Mobile Circuit Court: CC11-2588.80)

NOTICE

You are hereby notified that on September 27, 2019, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Michael A. Youngpeter, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Glenn L. Davidson, Attorney
Robert Bucky Thomas, Attorney
William Daniel Dill, Asst. Attorney General

REL: August 9, 2019

Court of Criminal Appeals

State of Alabama
Heflin-Torbert Judicial Building
300 Dexter Avenue
Montgomery, Alabama 36104

MARY B. WINDOM
Presiding Judge
J. ELIZABETH KELLUM
J. CHRIS McCOOL
J. WILLIAM COLE
RICHARD J. MINOR
Judges

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MEMORANDUM

CR-17-0991 Mobile Circuit Court CC-11-2588.80

Derek Tyler Horton v. State of Alabama

WINDOM, Presiding Judge.

In August 2012, Derek Tyler Horton was convicted of three counts of capital murder for the murder of Jeannette Romprey. The murder was made capital because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975; because it was committed during the course of an arson in the first degree, see § 13A-5-40(a)(9), Ala. Code 1975; and because it was committed during the course of a burglary in the first degree, see § 13A-5-40(a)(4), Ala.

Code 1975. The jury recommended that Horton be sentenced to death. On December 6, 2012, the circuit court followed the jury's recommendation and sentenced Horton to death. On direct appeal, this Court reversed Horton's convictions and death sentence. Horton v. State, 217 So. 3d 27 (Ala. Crim. App. 2016). In April 2018, Horton was subsequently retried on the same charges and was again convicted of three counts of capital murder. Horton was sentenced to life in prison without the possibility of parole.

On April 9, 2010, Romprey visited her friend, Deborah Ann Niven. Between 8:30 p.m. and 9:00 p.m. that evening, Romprey left Niven's house to return to her home in Grand Bay, which was approximately one hour away from Niven's home. At approximately 1:30 a.m. on Saturday, April 10, 2010, the Grand Bay Volunteer Fire Department received a report of a fire at a residence off Old Highway 90. When firefighters arrived at the scene, they found a mobile home engulfed in flames. Once the fire was out, firefighters discovered charred human and canine remains in the mobile home. The human remains were determined to be those of Romprey. The medical examiner determined that Romprey had been shot twice in the head, either of which would have been fatal. The medical examiner stated that Romprey's blood tested negative for carbon monoxide, indicating that Romprey was already dead when the fire started.

Deputy Fire Marshals investigated the fire at Romprey's mobile home. Given the fire patterns, the degree of destruction, the fact that there did not appear to be an accidental or weather-related cause, and that Romprey had been shot, the Deputy Fire Marshals determined that the fire had been intentionally set.

A crime-scene investigator surveying the scene of the fire discovered numerous household items at the bottom of a nearby embankment. These items included: two laptop computers; a desktop computer tower; a flat-screen television; jewelry boxes with jewelry in them, a tea-set box and several pieces of a tea set; a women's wallet, which held Romprey's Alabama driver's license; and two watches. The items, identified as belonging to Romprey, were tested for fingerprints; no usable fingerprints were found on any of the items. During the investigation, law enforcement determined

that Romprey's PT Cruiser vehicle was missing and entered the information regarding the PT Cruiser into the National Crime Information Center ("NCIC") database as a stolen vehicle.

Around 3:20 a.m. on the morning of April 10, 2010, the Conecuh County Sheriff's Department received a call from a motorist that there was a disabled vehicle on the side of Interstate 65 near mile marker 76. At 4:32 a.m., another motorist called the department and reported that a person was walking along the interstate in the same vicinity. Later, more calls came in reporting that there was a PT Cruiser in a ditch beside Interstate 65. The Conecuh County Sheriff's Department relayed the information from the reports to the Alabama Department of Public Safety.

State Trooper Cameron Fillingim was dispatched to investigate the PT Cruiser; he arrived around 8:00 a.m. The vehicle was unoccupied and was resting against a tree. The doors were open, the keys were in the ignition, the ignition was on, and the vehicle was in drive; however, the engine was not running. It was later determined that the vehicle was out of gas. After having the vehicle towed to Brewton, Trooper Fillingim learned that the vehicle had been reported as stolen by the Mobile County Sheriff's Office. Trooper Fillingim contacted the lead investigator, Corporal David Tunink, and informed him that the vehicle had been found and towed to a tow shop in Brewton.

Later that day, Investigator Robby Riddick of the Mobile County Sheriff's Department was sent to the tow shop in Brewton to secure the PT Cruiser. There, Investigator Riddick met with Investigator John Gleaton of the Escambia County Sheriff's Department and Trooper Fillingim and had the vehicle towed to Mobile. The three officers then went to the area where the vehicle had been found on Interstate 65 and examined the scene. A short distance from the vehicle, they discovered two separate debris fields containing personal items belonging to Romprey. Among the items were the vehicle's owner's manual, a revolver, Romprey's checkbook, a photo album, Romprey's notary seal, a personalized license plate with the name "NETTIE", and various identification cards. The items were processed for fingerprints, but no fingerprints were found on any of the items. The revolver was also tested for the presence of blood and DNA. No blood was found on the

weapon; a partial DNA profile was found but was too weak to do a comparison. Ballistics testing indicated that the revolver was the murder weapon. A friend of Romprey's testified that Romprey owned a revolver and that the revolver found near the PT Cruiser appeared to be Romprey's revolver.

A few days later, Investigator Riddick returned to the area where the debris fields had been found. Further south Investigator Riddick found what appeared to be a rearview mirror from the PT Cruiser and a blue nylon bag with a white knit cap inside. The hat was tested by the Department of Forensic Sciences. Three spots on the cap tested positive for the presumptive presence of blood. These spots, as well as a spot on the rim of the cap, were tested for DNA. All four spots contained Horton's DNA. Romprey's PT Cruiser was also processed for fingerprints and DNA. The driver's side door contained a partial palm print that matched Horton's palm print. A swab of the steering wheel was found to contain a mixture of the DNA of at least two people. One of the DNA profiles in the mixture matched Horton's DNA.

Investigators determined that Officer James Morrow of the State Capitol Police had dropped a male off at a gas station in the area of the abandoned vehicle. Officer Morrow told investigators that he had encountered a male walking on the side of Interstate 65 at approximately 7:30 a.m. on Sunday April 11, 2010. Officer Morrow was traveling northbound on Interstate 65 when he saw a man, whom he identified as Horton, walking on the side of the interstate around mile marker 80 or 81. Officer Morrow pulled over to offer Horton assistance. Horton's clothes were wet and muddy, and he was barefoot. Officer Morrow asked why Horton was walking on the side of the interstate, and Horton told Officer Morrow that he had been traveling with a friend from Pensacola, Florida, to Huntsville, Alabama, that Friday night and that the two had gotten into an altercation near Brewton. Horton said that his friend drove off and left him. Horton told Officer Morrow that he began walking through a swamp toward Interstate 65. When he reached Interstate 65, he continued walking northbound. Horton told Officer Morrow that he had lost his shoes and his wallet in the swamp. Officer Morrow told Horton that his statement about walking through a swamp to get to the interstate did not make any sense. According to Officer Morrow, Horton then shut down, making it difficult to

communicate with him.

Horton told Officer Morrow that he was from the Mobile area. Horton was initially adamant about going to Huntsville, but he later allowed Officer Morrow to assist him in finding a way home to the Mobile area. Officer Morrow drove to several exits in the area in an attempt to find Horton assistance. Finally, at a travel center at Exit 96 in Evergreen, Officer Morrow was able to find assistance for Horton. Customers and employees at the travel center provided Horton with dry clothes and shoes, fed him, and gave Horton access to the showers at the center. Officer Morrow telephoned Horton's girlfriend and grandmother and left messages for them. Morrow testified that Horton's grandmother returned his call and told him that she would be there to pick up Horton in about two hours. After speaking with the travel center employees to inquire about leaving Horton at the center, Officer Morrow left Horton there waiting for his grandmother to arrive.

Further investigation revealed that at approximately 8:00 p.m. the night of April 9, 2010, Horton had visited St. John the Baptist Catholic Church in Grand Bay, which was approximately 10 miles from Horton's house in Theodore and approximately 3 miles from Romprey's mobile home in Grand Bay. Katherine Comer was chaperoning a youth group at the church that night when a young man came to the church. Comer said that the man seemed disoriented and would not make eye contact. The man said that he was looking for the priest. Comer told the man that the priest was not there but informed him that he could leave his name and telephone number and the priest would contact him. The man wrote his name -- "Derek Horton" -- and telephone number on a piece of paper. Comer then wrote on the paper the day and time and for the priest to contact the man. Nick Switzer, a member of the youth group who was at the church that evening, identified the man he had seen at the church that night as Horton. Switzer testified that the white knit cap that had been found on the side of the interstate was the cap Horton had been wearing that night.

A few minutes after visiting the church, Horton went to a Chevron gas station on Old Highway 90, approximately one and a half miles from the church and one and a half miles from Romprey's mobile home. Surveillance video from the store

shows a man sitting on a curb at the store for approximately 18 minutes before getting up and walking away. Sarah Adams, Horton's girlfriend at the time, identified the man as Horton.

Adams testified that she was supposed to visit Horton on Friday, April 9, 2010, at his house, but, when she telephoned Horton's mother around noon that day, his mother informed her that Horton was not home. No one knew where Horton was and did not hear from Horton until Sunday April 11, 2010, when Officer Morrow contacted Horton's family. At Horton's mother's request, Adams returned Officer Morrow's call and spoke with Horton. Horton asked Adams not to tell his mother where he was and that he wanted her to send him some money so he could get away. Adams agreed not to tell his mother and to send him money; however, once she got off the phone, she called Horton's mother and told her where Horton was. Horton's mother and grandmother then drove to Evergreen, picked up Horton, and returned home.

When Horton returned home, Adams asked him how he had arrived in Evergreen. Horton said that he got "a car out of nowhere" and drove it until it ran out of gas. (R. 2358.) He said that angels then carried him the rest of the way. Horton, not making much sense, mentioned a Catholic church and that God wanted to use him to deliver judgment. The following day, Horton built a large fire in a fire pit in the backyard. Horton made Adams stay outside and read the Bible for hours while he threw things into the fire. Horton made Adams pray and accused her of being insincere in her prayers. Horton kept the fire going for several days. That Wednesday, Horton was arrested for domestic violence and placed in the Mobile Metro jail.

Following Horton's arrest, photographs were taken showing Horton with scratches on his arms and legs and with burn marks on his hands. The day after Horton's arrest, Corporal Tunink interviewed Horton. The interview was recorded and played for the jury. A transcript of the interview was also prepared and introduced into evidence. Corporal Tunink did not mention Romprey's murder or question Horton about the murder. Rather, Corporal Tunink asked questions about Horton's background and the events of the previous week. Corporal Tunink did ask questions about the vehicle Horton had traveled in the previous weekend and whether Horton had seen a fire. Horton

stated that he did not remember much of what had happened over the past weeks but that he did remember running in the woods in Evergreen on Sunday. Horton said that he had gotten a ride from someone, but when asked to describe the person, he said there were three different people and they were like angels. Horton said he had followed good voices, which had led him to the woods.

Horton's mother had filed a petition to have Horton involuntarily committed because she was concerned about Horton's mental well being. A hearing was held, and Horton was ordered to BayPointe Hospital for a mental evaluation. Horton was subsequently arrested for Romprey's murder on April 26, 2010.

While in jail, Horton made telephone calls to Adams. In one telephone call, made on April 22, 2010, Horton asked Adams to bond him out of jail, and Adams told Horton that she and his mother had tried to bail him out but had been told they could not. During this call, Horton said that he was "on the run" from a murder charge and that he had no one who would help him. (R. 2380.) During a later call that same day, Horton again asked Adams to bail him out of jail. Adams told Horton that she did not have the money. She said that she needed to work for a few days to earn the money to pay his bond. Horton became agitated and threatened that when he got out of jail on his own he would shoot everyone who had not helped him and burn down their houses.

On appeal, Horton argues: 1) that the evidence was insufficient to sustain his convictions; 2) that the circuit court should have suppressed evidence obtained after his arrest for a domestic-violence charge because, he says, his arrest was pretextual; 3) that the circuit court erred when it admitted into evidence the recorded phone calls he made from jail; 4) that the circuit court erred in granting the State's challenge for cause of a prospective juror; and 5) that the circuit court erred in refusing to dismiss the case as a sanction for the State's failure to maintain and preserve evidence that would have exonerated Horton.

I.

Horton argues that the evidence was insufficient to

sustain his convictions. Specifically, Horton contends that the "inferences permitted by the purely circumstantial evidence in this case allowed mere speculation, conjecture or surmise that Horton was guilty of the murder of Jeannette Romprey." (Horton's brief, at 17.) Horton argues that, at most, the evidence supported an inference that he had been a driver or a passenger of Romprey's vehicle at some point and could be guilty of receiving stolen property.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte

Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

> "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983)."

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), (quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

> "'"Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty." White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S. Ct. 373, 46 L. Ed. 2d 288 (1975). "Circumstantial evidence is in no way considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused." Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

Appendix A

Scott v. State, 163 So. 3d 389, 456 (Ala. Crim. App. 2012) (quoting White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989)).

In Bradford v. State, 948 So. 2d 574 (Ala. Crim. App. 2006), this Court explained:

> "'In reviewing a conviction based on circumstantial evidence, this court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. United States v. Black, 497 F. 2d 1039 (5th Cir. 1974); United States v. McGlamory, 441 F. 2d 130 (5th Cir. 1971); Clark v. United States, 293 F. 2d 445 (5th Cir. 1961).
>
> "....
>
> "'"The sanctity of the jury function demands that this court never substitute its decision for that of the jury. Our obligation is [to] examine the welter of evidence to determine if there exists any reasonable theory from which the jury might have concluded that the defendant was guilty of the crime charged." McGlamory, 441 F. 2d at 135 and 136.'"

948 So. 2d at 578-79 (quoting Cumbo v. State, 368 So. 2d 871, 874 (Ala. Crim. App. 1978)).

The jury found Horton guilty of the capital offenses of murder during the course of an arson, murder during the course of a robbery, and murder during the course of a burglary. See §§ 13A-5-40(a)(9), (a)(2), and (a)(4), Ala. Code 1975. A person commits murder if "[w]ith intent to cause the death of another person, he or she causes the death of that person." § 13A-6-2(a)(1), Ala. Code 1975. A person commits arson in the first degree if he, "intentionally damages a building by starting or maintaining a fire ... and: (1) [a]nother person is present in such building at the time, and (2) [t]he actor knows that fact." § 13A-7-41, Ala. Code 1975. A person

commits robbery in the first degree if he, "in the course of committing a theft ... [u]ses force against the person of the owner ... with intent to overcome his physical resistance or physical power of resistance; or ... [t]hreatens the imminent use of force against the person of the owner ... with intent to compel acquiescence to the taking of or escaping with the property," § 13A-8-43, Ala. Code 1975, and the person "[i]s armed with a deadly weapon or dangerous instrument; or ... [c]auses serious physical injury to another." § 13A-8-41, Ala. Code 1975. Section 13A-7-5, Ala. Code 1975, defines first-degree burglary, in pertinent part, as follows:

> "(a) A person commits the crime of burglary in the first degree if he or she knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, the person or another participant in the crime:
>
> "....
>
> "(2) Causes physical injury to any person who is not a participant in the crime."

Reviewing the evidence in the light most favorable to the State and according the State all reasonable inferences therefrom, we hold that the State presented sufficient evidence to submit the case to the jury. During its case in chief, the State presented evidence that around 8:00-8:30 p.m. on the night of the murder, Horton was seen at a church and a gas station not far from Romprey's residence. Horton was wearing a white knit cap at the time. Romprey, who had been visiting a friend, would have arrived home around 9:30-10:00 p.m. that evening. After Romprey arrived home, someone entered Romprey's home and shot her twice in the head with her own revolver. Romprey's residence was set on fire, and firefighters were dispatched to the residence around 1:30 a.m. Some of Romprey's belongings were strewn down an embankment near her home. Her vehicle was missing from the residence.

Less than two hours later, motorists along Interstate 65 began calling the Conecuh County Sheriff's Department to report that there was a disabled vehicle on the interstate

near mile marker 77, approximately an hour's drive north of Grand Bay. Motorists also reported a male walking along the interstate. The vehicle, Romprey's PT Cruiser, had run out of gas. Not far from the vehicle, investigators found some of Romprey's personal belongings. Among the items was a revolver determined to be the murder weapon and identified by a witness at trial as Romprey's revolver. A white knit cap was also recovered in the area near the vehicle. Horton's DNA was found on the PT Cruiser's steering wheel, and his palm print was discovered on the outside of the vehicle's driver's side door. Horton's DNA and his blood were found on the white knit cap.

On Sunday morning, April 11, 2010, Officer Morrow picked up Horton as Horton walked along the interstate near the abandoned PT Cruiser. Horton's clothes were muddy, and he was not wearing any shoes. His explanation as to how he came to be in the area was often conflicting and nonsensical. Horton claimed that he did not know how he had obtained the vehicle but said that he drove it until it ran out of gas and then angels carried him the rest of the way. Horton had told Officer Morrow that he was on his way from Pensacola to a party in Huntsville with an unnamed individual. They got into an argument near Brewton, and the individual abandoned him. He told Officer Morrow that he had walked through a swamp to get to the interstate. When later asked about his whereabouts around the time of the murder, Horton claimed he did not have a clear memory of that period.

Before Horton was charged with Romprey's murder, he was arrested on an unrelated charge. While he was in jail, he contacted his girlfriend demanding that she bond him out of jail. When his girlfriend stated that she had tried but was told that she could not post a bond, Horton responded that he did not have anyone who would even give him five dollars when he was "on the run" for a murder charge. Testimony was presented, though, that Horton had not yet been questioned about the murder or told that he was a suspect at the time of the telephone call. During another telephone call Horton placed from jail to his girlfriend, he again asked his girlfriend to bond him out of jail. When his girlfriend stated that she did not have any money, Horton became agitated and said, "I swear to God and everybody who -- everybody who said that they gave a fuck, I'm shooting them and I'm burning

their fucking house down." (R. 2385.)

The evidence in this case -- physical evidence linking Horton to Romprey's vehicle, his inconsistent explanations about how he came to be in Romprey's vehicle and on the interstate shortly after Romprey's murder, his presence in the area of the murder shortly before the murder, the fact that the murder weapon was found in the area near the abandoned PT Cruiser, his claim that he was "on the run" for a murder charge prior to being charged with or questioned about the murder, and his threatening statement that he would shoot those who had not helped him get out of jail and burn their houses down -- was sufficient evidence from which the jury could have reasonably concluded that Horton murdered Romprey in her residence, set fire to the residence, and then left the scene in her vehicle. Accordingly, Horton is entitled to no relief on this claim.

II.

Horton argues that his arrest for domestic violence was an unlawful pretextual arrest; therefore, he says, the arrest was illegal and all evidence obtained as a result of that arrest -- the statements made to Det. Tunink and the recorded telephone calls from jail to his girlfriend -- should have been suppressed. Horton contends that the arrest was a pretext, "meant to give [Corporal] Tunink the opportunity to question Horton ... as a suspect in the murder case." (Horton's brief, at 26.) He claims that the charge, involving an altercation with his mother, had not been pursued by either his mother or Sergeant Steven Welch, to whom the case had been assigned. Horton states that it was only after another detective involved in the murder investigation contacted Sergeant Welch that Sergeant Welch issued the arrest warrant. Horton requests that this Court revisit existing precedent and establish a new standard in reviewing claims of pretextual arrests.

> "It is well established that '[a]n arrest may not be used as a pretext to search for evidence.' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L. Ed. 877 (1932). A pretextual arrest has been defined as 'the use of some minor offense, typically a traffic violation, as a tool

for obtaining evidence or statements relating to a greater offense for which the police lack the required probable cause or reasonable suspicion otherwise to obtain.' Jonas, Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power, 137 U. Pa. L. Rev. 1791, 1792 n. 5 (1989)."

Scarbrough v. State, 621 So. 2d 996, 1002-03 (Ala. Crim. App. 1992). However, the Alabama Supreme Court has held:

"Recently, the [United States] Supreme Court again reiterated its preference for an objective test in the context of the Fourth Amendment. 'Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 2308-09 (1990) (holding that the Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent).

"Following the Supreme Court's preference for an objective standard, we adopt the objective test for determining whether an arrest was pretextual and therefore unlawful. As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant."

Ex parte Scarbrough, 621 So. 2d 1006, 1009-10 (Ala. 1993). See also Webster v. State, 662 So. 2d 920 (Ala. Crim. App. 1995).

The circuit court, using the objective test, found that the State presented sufficient evidence -- the complaint by Horton's mother of a "choking incident" and "evidence about choke marks" on the victim -- establishing probable cause to arrest Horton for domestic violence. (R. 261.) Whatever the detective's subjective intent, he possessed an objective legal basis to issue the arrest warrant. Because the arrest was legal, the circuit court properly denied Horton's motion to suppress the evidence.

Appendix A

Further, this Court is bound to follow Ex parte Scarbrough as precedent of the Alabama Supreme Court unless and until it is overruled by that Court. See § 12-3-16, Ala. Code 1975; Jones v. City of Huntsville, 288 Ala. 242, 244, 259 So. 2d 288, 290 (1972) (Court of Criminal Appeals "is without authority to overrule the decisions of [that] court"). Thus, this Court cannot, as Horton requests, abandon the objective standard adopted by the Alabama Supreme Court in that case, nor are we inclined to do so.

III.

Horton argues that the circuit court erred when it allowed into evidence recordings of telephone calls he made from jail to his girlfriend in which he made a threat to shoot those who did not help him get out of jail and burn their houses down. Specifically, Horton contends that the recordings should not have been admitted under the identity exception to the exclusionary rule prohibiting collateral-act evidence and that its prejudicial effect outweighed any probative value.

In this Court's opinion in Horton's direct appeal following his first trial, this Court addressed the admissibility of the recordings. This Court concluded that the recording containing the threat to shoot anyone who did not help Horton get out of jail and to burn down their houses was admissible. This Court stated:

> "... Horton's threat to shoot anyone who did not help him get out of jail and to burn their houses down was ... relevant to consciousness of guilt. See, e.g., People v. Evans, 209, Ill. 2d 194, 222, 808 N.E.2d 939, 955, 283 Ill. Dec. 651, 667 (2004) (statement by accused that if he prevailed on his criminal case he would kill his grandmother because she had helped the police in the murder investigation held admissible as evidence of accused's consciousness of guilt); People v. Turner, 128 Ill. 2d 540, 561-62, 539 N.E.2d 1196, 1205, 132 Ill. Dec. 390, 399 (1989) (statement by accused that he would kill his cellmate if cellmate interfered with his escape was admissible as evidence of accused's consciousness of guilt); and Abram v.

State, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145 (1979) (statement by accused that he was 'going to get' his girlfriend for 'turning state's evidence against him' was admissible as evidence of accused's consciousness of guilt).

"We recognize that in Alabama '[i]t is a basic and fundamental principle of evidence that in a murder prosecution, it is not permissible to show a difficulty between the accused and a third person not connected with the victim or the offense.' Caylor v. State, 353 So. 2d 8, 10 (Ala. Crim. App. 1977). '"However, where their connection with the offense sufficiently appears, evidence of prior [or subsequent] difficulties between [the] accused and a third person is admissible."' Hellums v. State, 549 So. 2d 611, 614 (Ala. Crim. App. 1989) (quoting 40 C.J.S. Homicide § 209 (1944)) (emphasis omitted). The test to be applied in determining whether a defendant's threat to kill a person other than the murder victim is admissible 'is whether there was a reasonable and sufficient connection between the threat to the third person and the killing.' State v. Ramirez, 116 Ariz. 259, 266, 569 P.2d 201, 208 (1977). In this case, we believe there was a sufficient connection between Romprey's murder and Horton's threat to kill people and burn their houses down. ... [T]he threat to shoot people and then burn their houses down involved the same unique circumstances as Romprey's murder -- Romprey was shot and her mobile home was then burned down.

"Therefore, we hold that the trial court properly admitted evidence ... that [Horton] had threatened to shoot anyone who did not help him get out of jail and to burn their houses down."

Horton v. State, 217 So. 3d 27, 50 (Ala. Crim. App. 2016).

Although this Court reversed Horton's convictions on another issue and the admissibility of the recordings was not necessary to the disposition of the case, because the issue was likely to arise again during Horton's retrial, this Court addressed it. Despite this Court's ruling that the recordings

were admissible, the circuit court requested that the State present another ground for their admissibility. The State argued that the threat Horton had made during one of the recorded calls was admissible to prove identity, and the circuit court allowed the recordings to be admitted on that ground.

Since the issue was briefed and argued by the parties on direct appeal following Horton's first trial, this Court's pronouncement that the recordings were admissible is judicial dictum, rather than mere obiter dictum. See People v. Williams, 204 Ill. 2d 191, 206, 273 Ill. Dec. 250, 788 N.E.2d 1126 (2003). Judicial dictum is not a binding decision; however, it provides guidance to lower courts and must be given considerable weight. See United States v. Bell, 524 F.2d 202, 206 (2nd Cir. 1975). Given that the issue and evidence remains the same, this Court adopts our previous finding that the recordings were admissible as consciousness of guilt; therefore, we need not address whether the circuit court properly allowed the recordings into evidence under the identity exception to the exclusionary rule. "[W]e may affirm the trial court's judgment 'on any valid ground or rationale, even one rejected or not considered by the trial court, so long as notice of the ground, and an opportunity to respond is shown by the record to have been available, to satisfy the minimum requirements of due process.'" Tolbert v. State, 111 So. 3d 747, 750 (Ala. Crim. App. 2011) (quoting Ex parte Kelley, 870 So. 2d 711, 714 (Ala. 2003)). Further, the prejudicial effect did not substantially outweigh the evidence's probative value. See Rule 403, Ala. R. Evid. Thus, Horton is entitled to no relief on this claim.

IV.

Horton argues that the circuit court erred by granting the State's challenge for cause with respect to prospective juror R.P. Horton asserts that R.P. indicated that she could consider imposing a death sentence in an appropriate case.

> "The test for determining whether a strike rises to the level of a challenge for cause is 'whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence.' Marshall v. State, 598 So. 2d 14, 16

(Ala. Cr. App. 1991). 'Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause.' Ex parte Nettles, 435 So. 2d 151, 153 (Ala. 1983). 'The decision of the trial court "on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion."' Nettles, 435 So. 2d at 153."

Dunning v. State, 659 So. 2d 995, 997 (Ala. Crim. App. 1994).

In Revis v. State, 101 So. 3d 247 (Ala. Crim. App. 2011), this Court stated:

> "'"'A trial judge is in a decidedly better position than an appellate court to assess the credibility of the jurors during voir dire questioning. See Ford v. State, 628 So. 2d 1068 (Ala. Crim. App. 1993). For that reason, we give great deference to a trial judge's ruling on challenges for cause. Baker v. State, 906 So. 2d 210 (Ala. Crim. App. 2001).'
>
> "'"Turner v. State, 924 So. 2d 737, 754 (Ala. Crim. App. 2002).
>
> "'"'The "original constitutional yardstick" on this issue was described in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Under Witherspoon, before a juror could be removed for cause based on the juror's views on the death penalty, the juror had to make it unmistakably clear that he or she would automatically vote against the death penalty and that his or her feelings on that issue would

> therefore prevent the juror from making an impartial decision on guilt. However, this is no longer the test. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court held that the proper standard for determining whether a veniremember should be excluded for cause because of opposition to the death penalty is whether the veniremember's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [Quoting Adams v. Texas, 448 U.S. 38, 45 (1980).] The Supreme Court has expressly stated that juror bias does not have to be proven with "unmistakable clarity." Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).'
>
> "'"Pressley v. State, 770 So. 2d 115, 127 (Ala. Crim. App. 1999), aff'd, 770 So. 2d 143 (Ala. 2000). See also Uttecht v. Brown, 551 U.S. 1, 9, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007) ('[A] juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.')."
>
> "'Saunders v. State, 10 So. 3d 53, 75-76 (Ala. Crim. App. 2007), cert. denied, Saunders v. Alabama, 556 U.S. 1258, 129 S.Ct. 2433, 174 L.Ed. 2d 229 (2009).'"

Revis, 101 So. 3d at 307 (quoting Johnson v. State, 120 So. 3d

1130, 1212 (Ala. Crim. App. 2009)).

R.P. indicated on her juror questionnaire that she was opposed to capital punishment "except in a few cases where it may be appropriate." (R. 1090-91.) She indicated that she was not completely opposed to capital punishment but that her position depended on the nature of the crime. When asked by the circuit court to clarify what she meant by "the nature of the crime," R.P. responded, "If it's premeditated and a gruesome crime ... [a]nd it's proven that, you know, the person actually did it." (R. 1091.) R.P. also indicated on her questionnaire that she had a religious belief that would prohibit her from sitting in judgment. During further questioning by the circuit court, R.P. stated that she was generally opposed to the death penalty, that she could impose the death penalty, but that she would not want to do it. The circuit court asked R.P. if she would be able to impose the death penalty if the State put on evidence that would suggest that the death penalty is the appropriate penalty. R.P. replied, "It would be hard. It would be hard. ... It would be hard for me to take someone's life." (R. 1095.) When asked if she could vote for death by lethal injection, she said, "I can't say that I can do that." (R. 1098.) After further questioning, R.P. stated that she could follow the law and choose between the death penalty and life in prison without the possibility of parole. The questioning concluded with the following:

> Court: "Could you choose the death penalty?"
>
> R.P.: "I'm not for certain. I haven't heard the facts or the evidence, so I can't say that I can."
>
> Defense: "It just depends on what you hear?"
>
> R.P.: "Yes, sir."

(R. 1104.)

The State moved to stike R.P. for cause. The circuit court granted the motion, explaining that when asked if she could impose a death sentence if she found that the aggravating circumstances outweighed the mitigating

circumstances, she would not say she could do it. The circuit court said,

> "She would just say I'd have to think about it. And I'd have to know what the evidence is. She went back to that. She just wouldn't say she would impose a death penalty in my opinion. I think that's -- it's close, I agree, and she did say [she] could give fair consideration.
>
> "But, ultimately, again, I mean, I'm just trying to be fair to both sides in this thing. I don't think she ever said she would. And she definitely said she wouldn't, initially, in response to initial questioning by [the State]."

(R. 1106.)

Defense counsel argued that R.P. had stated that she could decide. The circuit court responded:

> "No, she would not on death. She said I could make a choice. And I'd said, well, okay, could you make a choice of death? Oh, I'd have to hear all the evidence. I mean, she just wouldn't say 'yes' to that question.
>
> "And then given her other responses, given the questionnaire responses, I think just in fairness to both sides, I'm going to grant the challenge for cause."

(R. 1107.)

Although R.P. stated that she could follow the law, her answer to whether she could impose the death penalty should it be appropriate under the law was equivocal. The circuit court, which was in the best position to assess R.P.'s credibility, was within its discretion to find that she could not perform her duty as a juror. As such, the circuit court did not abuse its discretion in granting the State's motion challenging R.P. for cause.

V.

Horton claims that the circuit court erred when it refused to dismiss the cases against him. Horton argues, as he did at trial, that he was entitled to dismissal because the State returned the victim's computers to her family after the first trial, and the computers were not available to him for inspection prior to his second trial. Horton speculates that because Romprey had used dating websites at some point, evidence pointing to other suspects may have been on her computer. Horton contends that the return of the computers was an act of bad faith.

> "The Alabama Supreme Court, in Ex parte Gingo, 605 So. 2d 1237 (Ala. 1992), adopted the United States Supreme Court's position in Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), regarding the allegations that the state failed to preserve evidence potentially useful to the defense:
>
> > "'"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58, 109 S. Ct. at 337. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Youngblood, 488 U.S. at 57 (footnote), 109 S. Ct. at 337 (footnote), citing Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959).'
>
> "605 So. 2d at 1240-41. Gingo additionally recognized that a defendant's right to due process can be violated when the loss or destruction is of evidence so critical to the defense that its loss or destruction makes the trial fundamentally unfair. Id. (citing Youngblood, 488 U.S. at 67, 109 S. Ct. at 342)."

May v. State, 710 So. 2d 1362, 1369 (Ala. Crim. App. 1997).

Initially, this Court notes that the computers were available to Horton prior to the first trial and were not used in the prosecution of Horton. Moreover, Horton has not shown that the State's inability to produce the computers was a result of the State's acting in bad faith. Further, he has not presented any evidence that the State or law enforcement knew that the computers contained exculpatory information at the time they were returned to the victim's family. Horton relies on conjecture and speculation that the computers may have contained information pointing to other suspects. Horton has not shown that the computers were so critical to his defense that their absence made his trial fundamentally unfair. Therefore, the circuit court did not err in denying Horton's motion to dismiss.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Kellum, McCool, Cole, and Minor, JJ., concur.

IN THE CIRCUIT COURT OF MOBILE COUNTY,

STATE OF ALABAMA *

v. * CASE NO. CC-2011-2588.80

DEREK TYLER HORTON *

ORDER

Sentencing hearing held today.
There are no changes to the presentence report.
It is ordered by the Court that the Defendant is now sentenced as follows:
Count I - Capital Murder (robbery) - Life without Parole;
Count II – Capital Murder (arson) – Life without Parole; and
Court III – Capital Murder (burglary) – Life without Parole.
Sentences are to run concurrent.
The Court, due to family hardship, recommends that the Defendant be incarcerated at Holman Prison.
Defendant to be given credit for time served.
Remit costs of court.

Defendant gives written notice of appeal.

It is ordered by the Court that **Glenn Davidson and Robert Thomas**, licensed attorneys, are hereby appointed to represent, assist and defend the Defendant in this appeal in this matter.

TRAVIS ATKINS, ALISA DORILMA, LYNNE FRANTZ, and SANDRA PRESLEY, Official Court Reporters, are hereby ordered to transcribe testimony and proceedings had at the trial of this case and to file Transcript of Testimony and proceedings with the Clerk of the Circuit Court of Mobile County, Alabama to be paid by the State of Alabama.

IN COURT: Defendant, Defendant's shadow counsel Glenn Davidson and Robert Thomas, Assistant District Attorneys JoBeth Murphree and Jennifer Wright.

Dated: June 27, 2018.

Lynne Frantz
Ct Reporter

Judge Youngpeter

The Element in the Room: Requiring Probable Cause of Every Element of a Crime

proceedings.nyumootcourt.org/2017/12/the-element-in-the-room-requiring-probable-cause-of-every-element-of-a-crime/

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PROCEEDINGS

By Kimberly La Fronz[1]

The Fourth Amendment aims to strike a balance between the fundamental right to be free from unreasonable searches and seizures and allowing law enforcement officers to take effective action to protect the public interest.[2] Yet, because the standard for effecting warrantless arrests relies on a nebulous "totality of the circumstances" analysis,[3] exactly what information a police officer must consider before effecting such an arrest is unclear. While much of the probable cause calculation is settled law at this point[4], it remains undecided whether an officer must have probable cause for every element of a crime, including mens rea, and how much attention officers must pay to evidence tending to negate that mens rea. Ultimately, this Contribution will argue that in order to effect a warrantless arrest a police officer must have probable cause with respect to every element of the crime in order to effect a warrantless arrest and must not ignore exonerating evidence in their totality of the circumstances analysis.

* * * * *

Precedent is clear that, in order to make a valid arrest without a warrant, the arresting officer must analyze probable cause at least as stringently as the warrant process would[5] since an arrest without a warrant "bypasses the safeguards provided by an objective predetermination of probable cause."[6] To meet this requirement, the officer is required to consider the "totality of the circumstances," a standard first instituted by the United States Supreme Court in *Illinois v. Gates* to determine whether probable cause existed to search a house.[7] The Court emphasized that the totality of the circumstances analysis was meant to be a "commonsense, practical" analysis.[8]

Yet case law is often unclear as to what information must be considered in the totality of the circumstances analysis and what officers must have probable cause of in order to arrest a person. Prior to *Illinois v. Gates*, the Supreme Court held that a warrantless arrest was unconstitutional absent "information hinting further at the knowledge and intent

required as elements of the felony under the statute."[9] In *United States v. Di Re*, the officer made an arrest because he saw illegal gambling coupons in a car, but the Court noted that presence alone did not speak to the knowledge and intent requirements of the statute.[10] Yet, subsequently in *Maryland v. Pringle*, where multiple men were found in a car with controlled substances, the Court permitted the arresting officers to infer the knowledge mens rea for each individual.[11] While officers need not have trial-level proof of every element of the crime at the moment of arrest,[12] the *Pringle* and *Di Re* decisions indicate that mens rea must play a part in the totality of the circumstances analysis in some way. The remaining question is whether officers must have specific facts indicating the requisite mens rea or whether a mere inference will always suffice.

Though *Pringle* seemed to suggest that an inference is sufficient, circuit courts have split on the issue. The Fourth, Seventh, and Ninth Circuits hold that an officer need not establish probable cause for each element of an offense,[13] while the Third, Sixth, Eighth, and D.C. Circuits hold that probable cause must extend to every element of an offense.[14] One of the earliest cases to adopt the understanding of probable cause as not requiring probable cause for every element, *United States v. Sevier*, focused on the idea that probable cause should be practical and nontechnical.[15] But as the Eighth Circuit said, "[f]or probable cause to exist, there must be probable cause for all elements of the crime, including mens rea."[16]

By its very nature, the totality of the circumstances test requires an officer to consider all circumstances related to a possible crime. A number of the circuit courts have emphasized that law enforcement cannot ignore or disregard exculpatory facts in their probable cause analysis.[17] Necessarily, the totality of the circumstances analysis, while providing that law enforcement officers can look at the entirety of the circumstances surrounding the alleged crime, also requires that they consider facts tending to dissipate probable cause.[18] To hold otherwise would render probable cause analysis a nullity, because officers could claim probable cause despite significant facts to the contrary.

It is a necessary aspect of the totality of the circumstances analysis that "police officers may not ignore easily accessible evidence and thereby delegate their duty to investigate and make an independent probable cause determination based on that investigation."[19] The probable cause inquiry "requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of a warrantless arrest and detention."[20] Failure to investigate exculpatory or other information prior to arrest can prevent the establishment of probable cause.[21]

In *BeVier v. Hucal*, the Seventh Circuit held that an arrest was not valid without evidence of the requisite mens rea and that an officer's decision to ignore information tending to negate mens rea opened him up to a valid § 1983 claim.[22] The Seventh Circuit does not

require probable cause of every element of the crime[23] yet still prohibits officers from ignoring exculpatory evidence on the subject of mens rea. And circuits on both sides of the split agree that it is in keeping with law enforcement's duty to examine the totality of the circumstances that officers may not close their eyes to facts that would clarify the circumstances of an arrest, particularly where it is unclear whether a crime had taken place or where further investigation may exonerate the suspect.[24] While law enforcement need not have proof beyond a reasonable doubt at the time of arrest,[25] they must at least conduct a reasonably thorough investigation where there are no exigent circumstances[26] or where minimal, reasonable further investigation would shed light on the events.[27] This logic demonstrates that the workable solution to questions of mens rea at the moment of arrest is to return to a more robust understanding of the totality of the circumstances analysis that focuses on the actual *totality*, both exculpatory and inculpatory.

* * * * *

Advocates of not requiring probable cause for mens rea argue that asking officers to look into the state of mind would frustrate legitimate law enforcement purposes.[28] However, under the probable cause of mens rea standard, officers need not peer into suspects' minds in order to ascertain their mental state at the time of a possible crime. While officers cannot know what a suspect's exact state of mind is, they also may not ignore evidence suggesting a suspect lacks the requisite mens rea. For most crimes, a guilty mens rea is what makes otherwise innocent behavior into criminal action. Without evidence of that mens rea, criminal suspects risk having their lives disrupted by court proceedings or pretrial detention despite having engaged in behavior not specifically criminalized by the statute.

Evidence tending to support or negate the existence of the requisite mens rea is often readily available at the time of arrest. As a start, criminal suspects may make statements either inculpating or exculpating themselves. Yet officers do not have to just take suspects at their words.[29] As was the case in *Maryland v. Pringle*, officers make inferences about whether knowledge or intent existed by, for example, looking at how visible the illicit substances were or how obvious the criminal behavior was.[30] The key point here is that officers must not only look at evidence that supports the guilty mens rea; the totality of the circumstances analysis necessarily requires them to also examine evidence tending to negate mens rea, just as they must for any other piece of exculpatory or undisputed information.

In order to abide by this proposed standard, law enforcement officers do not need to conduct an exhaustive investigation prior to arrest. Instead, effective and constitutional law enforcement includes learning "what easily could have been learned, and in common prudence should have been,"[31] or performing minimal investigation that "would have reduced any suspicion created by the facts police had discovered."[32] Already, law enforcement offi-

cers check the Vehicle Identification Number of a car or ask its driver for the vehicle's registration papers prior to concluding that a car is stolen. It is not unreasonable to ask that an officer similarly ask suspects about the circumstances of the alleged crime or consider information easily produced or readily available at the scene that sheds light on a suspect's state of mind. That basic level of inquiry would satisfy the proposed inquiry into the suspect's mens rea.

* * * * *

An understanding of the totality of the circumstances analysis that considers both inculpatory and exculpatory information with regards to the suspect's mens rea and requires minimal investigation in unclear circumstances bridges the gap between the inability of law enforcement officers to read the minds of criminal suspects and the right of people to be free from unreasonable arrests. By doing so, it still allows law enforcement to do their jobs quickly and on the scene but prevents wrongful arrests and the many consequences that can accompany such unlawful arrests. In the compromise between these important interests, requiring law enforcement officers to examine the true totality of the circumstances strikes the right balance.

Notes:

1. Kimberly La Fronz is a 3L at New York University School of Law. This piece is a commentary on a problem written for the 2017 Herbert Wechsler National Criminal Moot Court Competition at the University of Buffalo School of Law. The issue in the problem centered on whether law enforcement officers must have probable cause of the requisite mens rea to effect an arrest and how much investigation officers must do for that element of the crime. The views expressed in this article do not necessarily represent the views of the author on this point. Rather, this article is a distillation of one side of an argument assigned to the team.

2. Brinegar v. United States, 338 U.S. 160, 176 (1949) (The probable cause requirement of the Fourth Amendment is a compromise that "seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. [It] also seek[s] to give fair leeway for enforcing the law in the community's protection.").

3. Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.").

4. Corbin Houston, *Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense,* 2016 Univ. of Chicago Legal Forum 809, 809 (2016) ("While many of the nuances of probable cause are settled law, there still remains much ambiguity surrounding the doctrine's application by law enforcement in the area of warrantless arrests.").

5. Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("Whether or not the require-

ments of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.").

6. Beck v. Ohio, 379 U.S. 89, 96 (1964).

7. *See* Illinois v. Gates, 462 U.S 213, 230–31 (1983).

8. *Id.* at 230.

9. United States v. Di Re, 332 U.S. 581, 592 (1948).

10. *Id.* ("at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.").

11. Maryland v. Pringle, 540 U.S. 366, 373 (2003) ("Here we think it was reasonable for the officer to infer a common enterprise among three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.").

12. Adams v. Williams, 407 U.S. 143, 149 (1972) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.").

13. *See* Houston, *supra* note 4, at 809; Cilman v. Reeves, 452 F. App'x 263, 270–71 (4th Cir. 2011); Spiegel v. Cortese, 196 F.3d 717, 724 n.1 (7th Cir. 1999); Gasho v. United States, 39 F.3d 1420, 1428 (9th Cir. 1994).

14. *See* Houston, *supra* note 4, at 809–10; Williams v. City of Alexander, 772 F.3d 1307, 1312 (8th Cir. 2014); Wesby v. District of Columbia, 765 F.3d 13, 20 (D.C. Cir. 2014); United States v. Joseph, 730 F.3d 336, 342 (3d Cir. 2013); Thacker v. City of Columbus, 328 F.3d 244, 256 (6th Cir. 2003).

15. United States v. Sevier, 539 F.2d 599, 603 (6th Cir. 1976) (citing Beck v. Ohio, 379 U.S. 89 (1964)). *See also* Houston, *supra* note 4, at 814 ("The *Sevier* court likely seized on *Beck*'s language that 'the rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating...often opposing interests.'").

16. *Williams*, 772 F.3d at 1312.

17. *See, e.g.,* Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988) (officers "may not disregard facts tending to dissipate probable cause"); BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986) ("The continuation of even a lawful arrest violates the Fourth Amendment when police discover additional facts dissipating their earlier probable cause"); Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) ("An officer contemplating an arrest is not free to disregard plainly exculpatory evidence"); Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1259 (10th Cir. 1998) (officers "may not ignore available and undisputed facts").

18. *Bigford*, 834 F.2d at 1218 ("As a corollary...of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.").

19. *Baptiste*, 147 F.3d at 1259.
20. Romero v. Fay, 45 F.3d 1472, 1476–77 (10th Cir. 1995).
21. *See, e.g.*, United States v. Ramirez-Rivera, 800 F.3d 1, 28 (1st Cir. 2015) (failure to attempt to corroborate informant's tip vitiated probable cause); Sevigny v. Dicksey, 846 F.2d 953, 958 (4th Cir. 1988) (failure to learn what easily could have been learned vitiated probable cause); *Bigford*, 834 F.2d at 1218 (failure to complete minimal investigation vitiated probable cause); *BeVier*, 806 F.2d at 128 (failure to pursue reasonable avenues of investigation vitiated probable cause); *Kuehl*, 173 F.3d at 650 (failure to conduct a reasonably thorough investigation vitiated probable cause).
22. 806 F.2d at 128 ("Because this information [about the child's condition and parents' behavior] could have been easily obtained and was necessary before concluding that Robert and Annette had intentionally neglected their children, Hucal was unreasonable in not making those inquiries.").
23. Spiegel v. Cortese, 196 F.3d 717, 724 n.1 (7th Cir. 1999).
24. *See, e.g., BeVier*, 806 F.2d at 128 ("A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had even taken place."); *Kuehl*, 173 F.3d at 650 (citing*BeVier*, 806 F.2d at 128).
25. Brinegar v. United States, 338 U.S. 160, 174 (1949) ("If those [guilt beyond a reasonable doubt] standards were to be made applicable in determining probable cause for an arrest or for search and seizure...few indeed would be the situations in which an officer... could take effective action.").
26. *Kuehl*, 173 F.3d at 650 ("law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances.").
27. *Id.* ("probable cause does not exist when a 'minimal further investigation' would have exonerated the suspect.").
28. Houston, *supra* note 4, at 830 ("A major reason for the development of the some-elements approach was the view that requiring probable cause for each element would frustrate law enforcement even when conducting warranted searches.").
29. Criss v. Kent, 867 F.2d 259, 263 (6th Cir. 1988) ("A policeman, however, is under no obligation to give any credence to a suspect's story.").
30. Maryland v. Pringle, 540 U.S. 366, 372 (2003) (where Pringle was one of three men in the car at 3:16 am, there was $763 of rolled-up cash in the glove compartment directly in front of Pringle, there were five baggies of cocaine accessible to all three men, and the three men failed to offer any information about the ownership of the cocaine or money, "[w]e think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.").
31. Sevigny v. Dicksey, 846 F.2d 953, 958 (4th Cir. 1988).
32. Bigford v. Taylor, 834 F.2d 1213, 1219 (5th Cir. 1988).