

OVERVIEW

Individual students playing a part or reading the scenario, co -judge (if applicable) and the two alternate students should receive the entire script. **Jurors should not be provided with any portion of the materials prior to the trial.**

A. **THE PLAYERS** (per courtroom)

(The roles will be played by court staff and students.)

Judge- The Honorable Harvey E. Schlesinger, Senior United States District Judge
The Honorable Henry Lee Adams, Jr., Senior United States District Judge
The Honorable Timothy J. Corrigan, United States District Judge
The Honorable Marcia Morales Howard, United States District Judge
The Honorable Monte C. Richardson, United States Magistrate Judge
The Honorable James R. Klindt, United States Magistrate Judge
The Honorable Joel B. Toomey, United States Magistrate Judge
The Honorable Patricia D. Barksdale, United States Magistrate Judge

Co Judge (if applicable)- Student _____

Courtroom Deputy Clerk- Student: Alex Kingsley

Court Reporter- Student: Jordan Hagan

Court Security Officer (CSO)- _____ and
Student: Morgan Ray

Assistant United States Attorney- Student: Peyton/Payton Hall

Defense Attorney- Student: Jamie/Jayne Arias

Special Agent Lisa Donald- Student _____

Special Agent Ryan Smith- Student _____

John Ellwood- Student _____

Trisha Zurich- Student _____

Tony Alto- Student _____

Thomas Smith- Student _____

Thomas Smith- Student _____

Gus Marcus- Student _____

Peggy Stone- Student _____

Daniel McPherson- Student _____

Student to read the Scenario _____

Two alternate students in case of emergency _____

B. THE PROPS (per courtroom): Each chambers will need to provide a backpack..

Photocopy of \$500.00 cash- Government's Exhibit 1

Backpack- Government's Exhibit 2

Ziplock bag with green leafy substance- Government's Exhibit 3

Stipulation- Government's Exhibit 4

Report Card- Government's Exhibit 5

Affidavit- Defendant's Exhibit's 1 (identified but not admitted)

Order of Trial

Judge's Instructions to the Jury

Prosecutor Opening

Defense Opening

Prosecutor Case in Chief

- W1, Special Agent Lisa Donald
 - Motion to Suppress within W1 testimony
- W2, John Ellwood
- W3, Trisha Zurich

Prosecution Rests

Defense Case in Chief

- W1, Tony Alto
- W2, Thomas Smith
 - Attempt to introduce affidavit of T&E attorney
- W3, Gus Marcus
- W4, Peggy Stone

Defense Rests

Prosecutor Closing (reserve time for rebuttal)

Defense Closing

Prosecutor Rebuttal

Jury Instructions

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1. **Special Agent Lisa Donald**
2. **John Ellwood**
3. **Trisha Zurich**
4. **Tony Alto**
5. **Thomas Smith**
6. **Gus Marcus**
7. **Peggy Stone**

SCENARIO

East Town High School has a long-standing reputation for excellence. Its students routinely score very high on state standardized tests and its athletic teams are some of the best in the state. Over the past few years, however, there has been an alarming increase in marihuana use among even the best students. Fearful that East Town High's reputation might be diminished, and that a ring of drug dealers, known as the East Town Gang, might be behind the criminal activity, concerned parents demanded that school administrators "do something." The principal and other administrators requested assistance from the East Town Police Department.

After an initial investigation, the police department learned that agents of the Federal Bureau of Investigation were conducting an investigation of drug trafficking by the East Town Gang. The police provided Special Agents Lisa Donald and Ryan Smith, the agents in charge of the FBI's investigation, with the information provided to them by the East Town High administrators. By the spring of 2008, the FBI had gathered evidence that for several years the East Town Gang had been selling marihuana throughout the East Town area. Witnesses estimated that the amount of marihuana sold in the previous five years exceeded 1000 kilograms.

A federal grand jury returned an indictment charging Tony Alto, the leader of the East Town Gang, and several of his high-ranking subordinates, including John Ellwood, with conspiracy to possess with intent to distribute and distributing marihuana in violation of 21 U.S.C. § 846. This offense carries a minimum mandatory term of ten years imprisonment up to life imprisonment. Alto was convicted, and is awaiting sentencing. Ellwood pleaded guilty pursuant to a plea agreement, and he agreed to cooperate with the FBI's investigation of lower level drug distributors in exchange for the possibility of a reduced sentence. He has not yet been sentenced.

Ellwood told the FBI that his main distributor of marihuana to students at East Town High was Daniel McPherson. He said that McPherson was an eighteen-year-old senior at the school, who was a member of the Honor Society, ran track and played basketball. He was very popular.

Ellwood accompanied agents of the FBI to a track meet at which he identified McPherson as one of the members of the East Town High track team. Thereafter, the FBI conducted surveillance of McPherson. They saw a steady stream of students coming and going from McPherson's house after school when his parents were at work. They also saw that McPherson worked part-time at Tom's Auto Shop. They observed that McPherson wore nice clothes, had recently put an expensive stereo system in his car, and that he always seemed to carry a large amount of cash.

Based on this information, the FBI sought a search warrant from a magistrate judge for the United States District Court for the Middle District of Florida to search McPherson's house for evidence of marihuana trafficking. The judge issued the search warrant.

Special Agents Donald and Smith accompanied by a team of FBI agents executed the warrant on April 21, 2008, at about 1:00 p.m. Upon approaching the house, the agents heard a lot of noise, as though a party were in progress. As Agent Donald was about to knock on the door, someone inside yelled "Cops! Hide the weed!" A second voice could be heard shouting "Ditch the beer!" At this moment, Agents Donald and Smith opened the door, which was unlocked, rushed into the living room, and ordered everyone to freeze. Although a few individuals managed to exit, most stayed where they were.

The agents searched the house and found a gallon-size baggie with about one-half pound of marihuana in a backpack on the dresser of the upstairs bedroom next to a wallet containing McPherson's drivers license. The wallet contained \$500.00 in cash. They found McPherson and two other people in the bathroom next to bedroom attempting to flush marihuana joints down the toilet. They found other marihuana joints throughout the house. They also found a keg of beer, and various cups containing beer throughout the house.

The FBI called the East Town Police Department, who arrived at the scene and cited some of the underage students for possession of alcohol, and some students with simple possession of marihuana.

Meanwhile, Agents Donald and Smith contacted the United States Attorney's Office and obtained authorization to arrest McPherson based on probable cause to believe that he possessed the marihuana with intent to distribute it, in violation of 21 U.S.C. § 841. They advised McPherson of his *Miranda* rights. Thereafter, McPherson told the agents that he and his friends did not have school that day because it was a teacher workday. He said that he invited friends over for a party and that he gave an older friend of his money to buy the keg of beer for them. He said another of his friends brought the marihuana joints to the house, and that the baggie of marihuana found in the backpack did not belong to him. He would not identify who brought the marihuana to the house.

A federal grand jury later returned an indictment charging McPherson with possession with intent to distribute and distribution of a quantity of marihuana in violation of 21 U.S.C. § 841. This statute provides in pertinent part as follows:

[I]t shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

This is a felony offense which carries a maximum possible penalty of five years in jail and a fine of up to \$250,000.

Section 841 also provides that "any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title" Simple possession of marihuana in violation of 21 U.S.C. § 844 is a misdemeanor offense, carrying a maximum possible penalty of one year imprisonment and a \$100,000 fine.

McPherson entered a plea of not guilty. He and his lawyer intend to pursue two legal strategies, as follows:

First, they will argue that since the FBI agents failed to "knock and announce" their entry before executing the search warrant, their entry and the subsequent search were unconstitutional and the evidence should be suppressed.

Second, McPherson intends to argue that the United States has not presented evidence that establishes beyond a reasonable doubt that he committed the crime. He will argue that there were many students' backpacks in the house, and that there is no direct evidence that the backpack containing the baggie of marihuana belonged to him. He will also argue that, even if the backpack was his, anyone could have put the baggie of marihuana in the unzipped pocket of the backpack when they saw the FBI agents approaching the house. He will present evidence that he earns a good salary working at Tom's Auto Repair. Finally, he will argue that the main witness against him, John Ellwood, is an admitted drug dealer who is falsely accusing him in an effort to receive a lighter sentence under the plea agreement.

The United States will argue in rebuttal that the jury should believe Ellwood because his testimony is consistent with the surveillance conducted by the FBI showing a steady stream of students going and coming from the Defendant's house, the amount of marihuana in the house, including the marihuana in McPherson's backpack, the amount of cash in the Defendant's wallet, and the testimony of Trisha Zurich. They will further argue that the jury has evidence of actual distribution based on McPherson's passing of a marihuana joint to Zurich at the party.

The students participating in the exercise will serve as witnesses and jurors. The judge will instruct the jury using the pattern criminal jury instructions for United States Court of Appeals for the Eleventh Circuit. The instructions will include the lesser included offense of simple possession. The jurors will be given a verdict form that asks the jury to render a verdict as to both the felony offense and the misdemeanor offense. Because of the limited time for jury deliberations, the verdict form will ask the jury to indicate the number of jurors who vote guilty and the number who vote not guilty as to each offense, if they are unable to reach a unanimous verdict.

COURT SECURITY OFFICER: All rise. LONG CALL.

The Honorable _____ presiding.
Please be seated

JUDGE HOWARD: Good morning ladies and gentlemen. This is Case No.
3:08-cr-125-J-34JRK. It is the case of the
United States of America v. Daniel McPherson.

I will ask the attorney's to introduce themselves.

Counsel for the United States of America.

Defense counsel, please introduce yourself and your client.

HOST JUDGE: We have previously selected the jury, so at this time,
I will ask our Courtroom Deputy to please swear the jurors.

COURTROOM DEPUTY: (Swears jury.) **SEE JURY EMPANELMENT OATH
highlighted in YELLOW**

HOST JUDGE: Preliminary Instructions.

**Preliminary Instructions Before
Opening Statements (Short Form)**

Members of the Jury:

Good morning, ladies and gentlemen. My name is **Judge** _____
_____. I will be the judge presiding over the trial in which
you have been selected as jurors. Let me introduce my courtroom staff-
_____ is our courtroom deputy clerk and the co-deputy clerk is
Alex Kingsley. **Jordan Hagan** is the court reporter who will be recording
these proceedings and _____ is the Court Security Officer and
his/her Co-CSO is **Morgan Ray** they are providing security for the
proceedings today. The case you have been selected to hear is a criminal
case. A federal grand jury returned an indictment charging the Defendant,
Daniel McPherson, with possessing marihuana, a controlled substance,
with intent to distribute it in violation of Title 21, United States Code,
Section 841.

Let me now give you some preliminary instructions to guide you as
you listen to the evidence.

You have now been selected as the jurors to try this case. By your
verdict, you will decide the disputed issues of fact. I will decide all
questions of law that arise during the trial, and before you retire to

deliberate together and decide the case at the end of the trial, I will
instruct you on the rules of law that you must follow and apply in
reaching your decision.

Because you will be called upon to decide the facts of the case, you should give careful attention to the testimony and evidence presented for your consideration during the trial, but you should keep an open mind and should not form or state any opinion about the case one way or the other until you have heard all of the evidence and have had the benefit of the closing arguments of the lawyers as well as my instructions to you on the applicable law.

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the lawyers are concerned, as well as others whom you may come to recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatsoever with those persons while you are serving on the jury.

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatsoever.

From time to time during the trial, I may be called upon to make rulings of law on motions or objections made by the lawyers. You should not infer or

conclude from any ruling I may make that I have any opinions on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not speculate on what answer might have been given, nor should you draw any inferences or conclusions from the question itself.

After all the testimony and evidence has been presented, the lawyers will then be given an opportunity to address you and make their summations or final arguments in the case. The statements that the lawyers throughout the trial, as well as the arguments they present at the end of the trial, are not to be considered by you either as evidence in the case (which comes only from the witnesses and exhibits) or as your instruction on the law (which will come only from me).

I will ask you now to give your attention to the attorneys who will present brief opening statements.

Prosecutor - please call your first witness.

Opening Statement
(Prosecution)

May it please the court, counsel, members of the jury. I want to start out by telling you a story about grass. Not grass like a name for marijuana, but grass like the kind that grows in your front yard. Well, one day I decided that the grass in my yard needed some help, so I went to a store and bought what I thought was grass seed and planted it. But when it started coming up it was all weeds. And not weed like the marijuana kind of weed, but weed like weeds that grow in your grass. So I started doing some research on the internet to see what had happened. What I learned was that weed seeds look the same as grass seeds. The point of this story is, bad seed can often look like good seed to begin with. But, apparently if you learn to spot the bad seed, you can keep it from taking root and suffocating all the good seed. Members of the jury, that is exactly what this case is about. Keeping a bad seed, Daniel McPherson, from taking root in our community and poisoning all the good seeds around him.

Good morning, my name is Peyton/Payton Hall and I represent the United States in this case. You are here today because the Government has evidence that the Defendant, Daniel McPherson, is a bad seed, and this time, I do mean in the marijuana sense. At first glance, you might think that the Defendant is a good seed. The Defendant is 18 years old and was a senior

at East Town High School. You could say he was the ideal All-American young man. He was a member of the honor society, had good grades, and was a star athlete on the track team and basketball team. All the girls wanted to date him. He was very popular. He had a part-time job, even. He looked like a good seed.

However, members of the jury, at 1:00p.m. in the afternoon on April 21, 2008, Daniel McPherson was not at school, at track practice, at an honor society meeting, or at his part-time job. He was at home, having a party, drinking, smoking pot, and selling it to his friends. You might want to say, well so what? Every 18-year old has a party once in a while. What's wrong with a little beer? Ladies and gentlemen, this case goes way beyond just a party with some beer. This case is about illegal drugs and a sophisticated drug-trafficking operation that went on for months, with the Defendant as a ring leader.

For years, the FBI has investigated a ring of drug dealers known as the East Town Gang. The East Town Gang has lots of bad seeds in it. The evidence will show that the Defendant was East Town Gang's "representative" or "contact" person for East Town High School. You will hear from John Ellwood, a former member of the East Town Gang, who was responsible for

getting drugs to the Defendant. You will hear from Trisha Zurich, a junior at East Town High who was at the party at the Defendant's house the day the FBI arrested him. Most importantly, you will hear from FBI Special Agent Lisa Donald, who after months of observing the Defendant's activities, got a search warrant to search the Defendant's house for evidence that Defendant was trafficking drugs.

You will hear that about 1 o'clock on Friday, April 21, 2008, Agent Donald led FBI agents to the Defendant's house to carry out the search warrant, at the same time that the Defendant was having his party. Picture it, the agents arriving at the McPherson house, in their raid jackets and hats with the FBI logo on them. When they get there they see that there are several cars in the driveway, which was very unusual for the middle of a school day. And what will the evidence show about what happened when the FBI agents went into the McPherson house?

Members of the jury, the evidence will show beyond a reasonable doubt that on that day, the FBI seized a large amount of marijuana from the McPherson house which belonged to none other than the Defendant, Daniel McPherson. The evidence will also show that Daniel McPherson used his connections as the big man on campus to sell marijuana to anyone who would

buy it, and that on April 21, 2008, he was selling it and giving it to his friends at a party at his house. And he was a great salesman, because he made a lot of money doing it. Members of the jury, the Defendant may have looked like a good seed, but he wasn't. He was a bad seed. And the bottom line is that Daniel McPherson's possession of marijuana with the intent of selling it to his friends is a crime.

The crime that the Defendant is charged with has various elements to it. After you have seen and heard all of the evidence in this case, the Judge will instruct you on those elements. But right now the burden of proving each of those elements lies with the United States. Ladies and gentlemen, we will meet that burden. We will make your job easy. We will present ample evidence to convince you beyond any reasonable doubt that Daniel McPherson committed this crime. And at the end of the case, we will ask you to return a verdict of guilty, and keep this bad seed from doing any more damage to the good seeds around him.

Opening Statement
(Defense)

May it please the Court, counsel, ladies and gentlemen of the jury, good morning. My name is Jamie/Jayme Arias and I represent Daniel McPherson in this case. We are here because on April 21, 2008, Dan McPherson threw a party for his friends that got out of hand. The Government wants to hold someone accountable and Dan is the easiest target.

What happened on April 21? Dan asked some friends over to his house on a day when school was out. He asked an of-age friend to buy beer. One of his friends brought some pot, and some of the kids, including Dan, smoked some of it. At some point, some of the kids inside heard FBI agents at the door and panicked. One guy tried to hide the beer, some people tried to run out of the house, and Dan and a couple of his acquaintances-who were upstairs at the time-attempted to flush marijuana joints down the toilet. The agents came upstairs and saw what was going on. They eventually found a half-pound of marijuana. Dan's parents own the house, so the Government has charged Dan.

The main issue in this case is whether the half-pound of marijuana that FBI agents found belonged to Dan. The evidence will show that the agents found the marijuana in a plastic bag inside an open backpack in Dan's room. It will also show that Dan's wallet was near the backpack. And what it will show as well is that there were several other backpacks in Dan's room and that there were other backpacks strewn throughout the house. What the evidence won't show is any direct link that proves beyond a reasonable doubt that my client owned the backpack or the drugs inside it.

The FBI caught Dan and two others flushing joints down the toilet. Why did Dan do this? He panicked. He heard federal agents barging into his house. At that point, he knew he's messed up in throwing the party. He looked around, saw the beer and pot, and panicked. He screwed up in flushing the joints. But flushing joints is not the crime he is charged with.

Please remember that we, as the defense, don't have to prove anything. In a criminal case, the prosecution has the burden of proof. It's the prosecution that has to prove, beyond a reasonable doubt, that Dan committed the crime he is charged with.

In a criminal case, the prosecution presents evidence first. Only after the prosecution has presented its case will Dan have an opportunity to present his case. We ask that each of you waits until you have heard from all

the witnesses, ours as well as theirs, before deciding what really happened.

The evidence will show that Dan is a hard working student and star athlete who made the mistake of throwing a party and allowing people to bring drugs and alcohol into his home. But this mistake does not mean that Dan committed the crime he is charged with.

We expect that after you deliberate and carefully weigh all the evidence you will come to the same conclusion and will return the only possible verdict, a verdict of not guilty. Thank you.

TESTIMONY OF SPECIAL AGENT LISA DONALD¹
(Prosecution Main Witness)

U.S. Attorney: The United States calls Special Agent Lisa Donald.

(Agent Donald sworn by the courtroom deputy clerk)

Clerk: Please state your name for the record and spell your last name.

Donald: Lisa Donald. D-O-N-A-L-D.

U.S. Attorney: Your honor, may I inquire? Good morning Agent Donald. How are you employed?

Donald: I am a special agent with the Federal Bureau of Investigation.

U.S. Attorney: What are your job duties as a special agent with the FBI?

Donald: Currently, I am assigned to the Drug Enforcement Unit. In that capacity, I investigate violations of federal law that prohibit the possession and distribution of controlled substances, including marihuana.

U.S. Attorney: Were you involved in the investigation that lead to the indictment that was returned in this case?

Donald: Yes.

U.S. Attorney: Please tell us how the investigation began.

Donald: For several years, I have been involved in the investigation of large scale marihuana transactions being conducted by a group known as the East Town Gang. This investigation resulted in the arrest, prosecution and conviction of several members of the East Town Gang, including the leader, Tony Alto, and one of Alto's subordinates, John Ellwood. After Ellwood was arrested, he began to cooperate in our investigation. He told us . . .

Defense Attorney: Objection, hearsay. What Mr. Ellwood told Agent Donald outside of court is clearly hearsay.

¹ The same script can be used for Special Agent Ryan Smith, if a man will play the part of the Special Agent.

U.S. Attorney: Your honor, the information Mr. Ellwood provided is not being offered to establish that what Mr. Ellwood said was true, but merely to explain how the investigation lead to the prosecution of Defendant McPherson. The United States will call Mr. Ellwood to testify later in the case.

Judge: The objection is overruled. Please ask another question.

U.S. Attorney: Special Agent Donald, what information did Mr. Ellwood tell you that relates to the case before the Court today?

Donald: Ellwood told us that Daniel McPherson, an eighteen-year-old senior at East Town High School, worked for him selling marihuana to other high school students.

U.S. Attorney: What steps did you take to verify the information Mr. Ellwood provided about Daniel McPherson?

Donald: My partner, Ryan Smith, and I went with Ellwood to a track meet at East Town High, where Ellwood identified McPherson as one of the members of the East Town High team. After that, we conducted surveillance of McPherson's activities. We saw a steady stream of students coming and going from McPherson's house during weekdays after school let out, but before McPherson's parents came home from work. We also observed that McPherson wore very nice clothes, and that he recently had a very expensive stereo system installed in his car.

U.S. Attorney: Did you investigate whether Daniel McPherson had a job or other source of income?

Donald: Yes. We learned that McPherson worked at Tom's Auto Repair Shop, but it was only a part-time job. We did not identify any other legitimate source of income.

U.S. Attorney: Do you see Daniel McPherson in the courtroom today? If so, please point him out and indicate what he is wearing?

Donald: McPherson is seated at _____ and he is wearing _____.

U.S. Attorney: Your Honor, may the record reflect that Special Agent Donald has identified the Defendant.

Judge: The record will so reflect.

U.S. Attorney: Agent Donald, what did you do after you identified Daniel McPherson and conducted surveillance?

Donald: I obtained a search warrant from the Court to search McPherson's house for evidence of drug trafficking, including marijuana, paraphernalia such as baggies and scales, records of drug transactions, currency and any other evidence of the proceeds of drug sales.

U.S. Attorney: When did you execute the search warrant?

Donald: I went with other FBI agents to McPherson's house at approximately 1:00 p.m. on Friday, April 21, 2008.

U.S. Attorney: Agent Donald, just so we're clear, what is the address of the home that you went to on April 21, 2008?

Donald: 100 Gator Lane, Jacksonville, Florida 32202.

U.S. Attorney: That's in Duval County?

Donald: Yes.

U.S. Attorney: And in whose name is the home that was listed in the search warrant?

Donald: Daniel McPherson Sr. and Rhonda McPherson, the Defendant's parents.

U.S. Attorney: How were you and the other agents dressed on that day?

Donald: We all wore raid jackets that had FBI written in bold type on the back. We also wore hats with the FBI logo on them.

U.S. Attorney: What happened when you arrived at McPherson's house?

Donald: There were several cars in the driveway, which was unusual for the middle of a school day. As we walked up the steps to the front door, we heard sounds from inside the house. As we got closer, I heard voices say "Cops! Hide the weed! Ditch the beer!" Then I heard sounds of a toilet flushing. At that point, I opened the front door to the house, which was unlocked, and we entered the home.

Defense Moves to Suppress Evidence

Defense: Your honor, I object to any testimony about what occurred after the agents entered the house.

The U.S. Supreme Court held in the case of *Wilson v. Arkansas*, 514 U.S. 297 (1995), that the common law requirement that officers “knock and announce” their presence before executing a validly authorized search warrant is mandated by the “unreasonable search and seizure” clause of the Fourth Amendment to the United States Constitution.

The suppression of evidence taken in an unconstitutional manner is a remedy available to aggrieved defendants in order to prevent their trial from being “tainted” with evidence seized by illegal means and to serve as a deterrent for future police misconduct. *Weeks v. United States*, 232 U.S. 383 (1914). Suppression of evidence is typically used “where its deterrence benefits outweigh its ‘substantial social costs.’” *United States v. Leon*, 468 U.S. 897, 907 (1984).

The “knock and announce” rule is designed to protect individuals by giving them a chance to voluntarily allow the police into their residence so as to 1.) minimize the potential for violence and 2.) minimize property damage. The rule also protects the privacy rights of individuals by 3.) minimizing the chance that government agents will accidentally intrude upon them in an undignified state. None of these interests can adequately be protected in the absence of suppression.

As Agent Donald testified, the FBI violated the requirement that they knock and announce that they are FBI agents before they enter a house, even with a search warrant. Any evidence about what occurred after the agents illegally entered my client’s parents’ house was obtained in violation of his Fourth Amendment protection against unreasonable searches and seizures. It should not be admitted into evidence.

U.S. Attorney: Your Honor, In the case of *United States v. Leon*, 468 U.S. 897 (1984), the U.S. Supreme Court rejected calls for “the indiscriminate application” or the exclusionary rule, and stated that the rule would only be applied “where its deterrence benefits outweigh its ‘substantial costs.’”

The Government acknowledges that Federal Bureau of Investigation agents Lisa Donald and Ryan Smith failed to “knock and announce”

their presence while conducting a search on the Defendant's premises on April 21, 2006, in violation of the U.S. Supreme Court's command that such action was constitutionally required. *Wilson v. Arkansas*, 514 U.S. 297 (1995).

However, no deterrent effect would occur as the result of suppressing evidence in this case. The evidence was discovered during the execution of a validly authorized search warrant. The "knock and announce" rule was meant to protect the individuals and property from the potential harms that can occur during unannounced police searches, as laid out in Point 3 of Defendant's motion. It was not meant to provide criminals with a means to prevent evidence from being discovered and used at trial. The Defendant did not allege that any harm arose to himself, his property, or others as a result of Agents Lisa Donald and Ryan Smith's failure to "knock and announce" their presence.

Without any distinct harm arising to the Defendant as a result of Agents Donald and Smith's failure to "knock and announce" their presence while conducting a search otherwise authorized by a valid search warrant, the deterrent effect of suppressing the narcotic evidence gathered from the Defendant's premises would not outweigh the substantial social costs of preventing the Government from prosecuting a trial against the Defendant, an individual whom the Government has probable cause to believe engaged in several criminal narcotics activities.

Additionally, when law enforcement agents have reason to believe that evidence will be destroyed, they need not knock and announce their presence before entering a residence to execute a search warrant. Agent Donald testified that she heard statements about hiding drugs and heard the sound of a toilet flushing which is sufficient to allow a reasonable person to believe that the individuals inside the house were going to hide or destroy evidence by flushing it down the toilet. Furthermore, as the Court is aware, the United States Supreme Court recently held in *Hudson v. Michigan* that even if law enforcement agents were required to knock and announce, but did not do so, the evidence obtained from the search may still be admitted at trial.

Court:

The United States Supreme Court in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), held that evidence obtained pursuant to a validly issued search warrant may not be suppressed even if the law enforcement agents failed to knock and announce their presence before entering to execute a search warrant. This Court must follow the law as set

forth by the Supreme Court. Accordingly, the objection to testimony about what occurred after the agents entered the house is overruled.

Testimony Resumes

U.S. Attorney: Agent Donald, what did you observe when you entered the McPherson residence?

Donald: There were about a dozen people who appeared to be the age of high school students in the downstairs of the house. The smell of marihuana was strong. Agents told these people to be seated in the family room. Meanwhile, I went upstairs with other agents. Upstairs we found McPherson and two other people in the bathroom trying to flush something down the toilet. We directed these individuals to the family room.

U.S. Attorney: Did you find anything in the house that was within the scope of the search warrant?

Donald: Yes. In the upstairs bathroom where we found McPherson, we retrieved three marihuana joints from the toilet bowl. In McPherson's room, we found a wallet on the dresser that contained McPherson's driver's license and \$500.00 in cash.

U.S. Attorney: Did you find anything else?

Donald: Yes. There were some backpacks in McPherson's room. There was one backpack next to the dresser where we found McPherson's wallet. In the backpack we found a gallon-size Ziploc bag containing about one-half pound of marihuana. Downstairs we found a number of other marihuana joints, along with a keg of beer.

U.S. Attorney: Your honor, at this time I would like to read aloud to the jury what's been pre-marked as Government's Exhibit 4, which is a written stipulation prepared by counsel regarding the marijuana found in the McPherson house.

Judge: Has the defense agreed to this stipulation?

Defense: We have, your honor.

Judge: Members of the jury, a stipulation is simply an agreement between the parties that certain facts are true and are not in dispute. Counsel, read the stipulation.

U.S. Attorney: Members of the jury, this stipulation, or agreement between the parties, states as follows: [Read stipulation]. At the bottom is my signature as attorney for the United States, and the signature of counsel for the Defendant. Your honor I offer Government's Exhibit 4 into evidence.

Judge: Any objection? Government's Exhibit 4 is admitted into evidence.

U.S. Attorney: Agent Donald, I am now handing you what have been marked as Government's Exhibits 1, 2, and 3. Could you please identify these exhibits?

Donald: Exhibit 1 is a photocopy of the \$500.00 found in the wallet on the dresser that contained McPherson's driver's license. Exhibit 2 is McPherson's backpack. Exhibit 3 is the Ziploc bag full of marihuana found in the backpack.

U.S. Attorney: The United States offers Government's Exhibits 1 through 3 into evidence.

Defense Attorney: No objection other than those previously raised.

Judge: Government's Exhibits 1, 2, and 3 are admitted into evidence.

U.S. Attorney: Agent Donald, what else happened that day?

Donald: We contacted the East Town police department, who arrived at the residence and took custody of the individuals in the house other than McPherson. I contacted the U.S. Attorney's Office and received authorization to arrest Daniel McPherson based on probable cause to believe that he possessed marihuana with intent to distribute it. Thereafter, Agent Smith and I arrested McPherson and advised him of his *Miranda* rights.

U.S. Attorney: After that occurred, did Defendant McPherson tell you anything?

Donald: Yes. He said that he and his friends did not have school that day because it was a teacher workday. He said that he invited friends over for a party and that he gave an older friend of his money to buy the keg of beer for them. He said another of his friends brought the marihuana joints to the house, and that the baggie of marihuana found in the backpack did not belong to him.

U.S. Attorney: Who did Defendant McPherson say was the person who brought the marihuana to the house?

Donald: He refused to tell us. He said that he would not rat on his friends.

U.S. Attorney: Did anyone else who was in the house that day claim the backpack in which the baggie of marihuana was found or admit bringing the marihuana to the party?

Donald: No.

U.S. Attorney: Thank you, Agent Donald. Defense counsel, do you wish to examine this witness?

Cross Examination.

Defense Attorney: Ms. Donald, where is the upstairs bathroom where you saw my client in relation to the bedroom where you found the backpack?

Donald: McPherson's bedroom shares a common wall with the bathroom. The door to his bedroom opens into the hallway about three feet from the bathroom door, which also opens into the upstairs hallway.

Defense Attorney: Was the bedroom door open or closed when you went upstairs in the house?

Donald: Open.

Defense Attorney: Ms. Donald, you didn't find any identification in or on the backpack that has been admitted as Government's Exhibit 2, did you?

Donald: No.

Defense Attorney: How many other backpacks did you find in the bedroom in addition to Government's Exhibit 2?

Donald: Three or four.

Defense Attorney: Did you find any additional backpacks in other parts of the house?

Donald: Yes, there were a number of backpacks in various parts of the house.

Defense Attorney: Did you find any fingerprints on government's exhibit 2, the backpack, or Government's Exhibit 3, the baggie of marihuana?

Donald: No.

Defense Attorney: You found the baggie in the main pocket of the backpack, didn't you?

Donald: Yes.

Defense Attorney: And when you found the baggie, isn't it true that the main pocket of the backpack was unzipped and the pocket was open?

Donald: Yes.

Defense Attorney: I have nothing further for Ms. Donald. Prosecutor, any redirect?

Redirect Examination.

U.S. Attorney: Agent Donald, where were the backpacks that you saw in McPherson's bedroom?

Donald: As I testified, the backpack containing the marihuana was on the dresser next to McPherson's wallet. The other backpacks were tossed on the floor just inside the door to the room.

U.S. Attorney: I have nothing further for Agent Donald.

Judge: Agent Donald, you may be excused. Call your next witness please.

U.S. Attorney: The United States calls John Ellwood.

TESTIMONY OF JOHN ELLWOOD

Judge: Mr. Ellwood, please come forward and be sworn.

(Mr. Ellwood sworn by the courtroom deputy clerk)

U.S. Attorney: Please state your name and occupation for the record.

Ellwood: John Ellwood. I am a mechanic by trade, but I guess you could say that I'm, currently, unemployed. I am waiting to be sentenced to a federal prison on a couple of felony counts for dealing drugs.

U.S. Attorney: How are you connected with this case?

Ellwood: Well, I was a member of the East Town Gang. My job was to monitor drug transactions. By monitoring, I mean, it was my job to see that the shipments of drugs we received were distributed to street dealers. The defendant in this case, Dan McPherson, was a street dealer who worked my territory -- East Town High.

U.S. Attorney: Were you the only person in the East Town Gang that had East Town High as your territory?

Ellwood: Well, yeah, as far as I know.

U.S. Attorney: How did you come to know the Defendant?

Ellwood: About a year and a half ago, Dan hit me up at Tom's Auto Repair, where I worked. He waited till no one else was around, then asked if he could talk to me alone. All hush, hush. Said that he needed a way to make some extra money, and he heard that I could help him: Not knowing if I could trust him, I said that I didn't know what he was talking about. Finally, he came out with it. He said some guys told him I deal. He said that he thought East Town High was becoming a pretty hot market. The dude thought he was some kind of Big Man on Campus. Said he had a lot of connections.

U.S. Attorney: How did you respond?

Ellwood: You never trust anyone in this business. First, I asked him what was in it for him. He just said he needed some money. Later, after we got to know each other a little more, he admitted he was trying to impress some rich girl. I heard she blew him off. Anyways, I told him straight up I needed proof that he wasn't a narc. I told him to get me the names of five guys - and their money. Next day, he shows up with the names and the cash, so I unloaded

the drugs. I said he could keep 20%. I like to start out my business relationships with a decent commission. It builds loyalty. So that's how we started doing business.

U.S. Attorney: How often did you and the Defendant conduct business?

Ellwood: That first transaction was January something, 2006. I would say that we seen each other every few weeks since then, until my arrest in April 2008. He just kept the names and the money coming and I kept my part of the bargain.

U.S. Attorney: About how much money would you say the Defendant made?

Ellwood: I would say, over the course of a couple months, maybe \$10,000. For a high school kid, that's decent. He's a hustler. The guy knows everybody.

U.S. Attorney: Thank you, Mr. Ellwood. Why did you decide to testify against your former partner the Defendant?

Ellwood: Well, after I got arrested, my kid sister went to one of Dan's parties. She never used, but she got on the back of a motorcycle with a guy who was high. He slammed into a tree and she died of a head injury - no helmet. My sister and I was tight. I was really torn up about it. I felt responsible, in a way. So I decided to clean up my act and see what I could do to prevent something like that from happening to somebody else's sister. I knew that McPherson was selling to the students. Although I supplied him, I knew that, even if I was arrested, there would be another gang member who would continue to take care of him. The only way to shut down the operation at East High was to turn him in.

U.S. Attorney: Was the Defendant the only student drug dealer?

Ellwood: I'm not sure. I mean, there's always the possibility that other gang members had their own contacts. Dan is the only one I am aware of, and he was the only one I supplied.

U.S. Attorney: Thank you, Mr. Ellwood. No further questions.

Judge: Does Defense Counsel have any questions for this witness?

Defense: Yes, Your Honor. Mr. Ellwood, did the U.S. Attorney's Office offer you any incentive for your testimony today?

Ellwood: I was offered a plea bargain. If I agreed to plead guilty and to name my contact at East Town High, I might receive a lighter sentence.

Defense: How much lighter?

Ellwood: They didn't say, exactly. But they led me to believe it'd be worth it to cooperate.

Defense: Did the Defendant ever meet you for reasons other than providing him with drugs to sell?

Ellwood: Yes. I worked on his car a few times when he was souping it up for the girlfriend. I guess you could say that I was his mechanic. I also worked on his parents' cars.

Defense: Did the Defendant ever work for you?

Ellwood: Not full time. He wanted to learn some stuff about cars. Said he wanted to drive a NASCAR someday. Girlfriend was into them. You know how chicks are about NASCAR these days. Wanted to know everything about cars, so he'd be successful on the circuit. So, I let him help out on a few jobs. Since I'm paid piece work, it helped me knock out more work and make more money. I gave him a cut and still came out ahead.

Defense: Ahh ... so that is what Dan meant when he asked if there was anything you could do to help him get some extra money.

U.S. Attorney: Objection! Calls for speculation.

Defense: Withdrawn. No further questions.

Judge: Redirect?

U.S. Attorney: In connection with your upcoming sentencing for drug-related offenses, you have made an agreement with the Government to testify about your drug dealing in exchange for a more lenient sentence. Do you know what happens to that agreement if you do not testify truthfully here today?

Ellwood: If I don't tell the truth the agreement won't do me any good and you guys will prosecute me for perjury.

U.S. Attorney: Mr. Ellwood, did the fact that the Government offered you a plea bargain have any impact on your testimony against the Defendant today?

Ellwood: No.

U.S. Attorney: Even when the Defendant was assisting you with auto repairs, did you still provide him with marijuana?

Ellwood: Yeah.

U.S. Attorney: Thank you. No further questions.

Judge: Re-cross?

Defense: Yes, Your Honor. Did you tell anyone else that you were Dan's contact person?

Ellwood: No. I didn't tell anyone else. So long as he didn't, it was just between us.

Defense: I see. So no one else can corroborate whether or not you are telling the truth. No further questions.

Judge: Very well. Mr. Ellwood, you may step down. (He is returned to the custody of the U.S. Marshal).

U.S. Attorney: Your Honor, I would like to call my next witness, Ms. Trisha Zurich.

Judge: Ms. Zurich, please come forward and be sworn.

TESTIMONY OF TRISHA ZURICH
(Prosecution Witness)

(Clerk administers oath to witness)

Clerk: Please state your name and spell your last name for the record.

Zurich: Trisha Zurich. Z-U-R-I-C-H.

AUSA: Ms. Zurich, where do you work or attend school?

Zurich: I am a junior at East Town High School.

AUSA: Do you know the Defendant, Daniel McPherson?

Zurich: Yes, and I'm sorry I ever met him. The only reason I know Dan is because I made a very big mistake earlier this year.

AUSA: Would you please explain that?

Zurich: I've always been a good student and have kept out of trouble, but I wasn't what you'd call one of the popular girls. Everybody liked Dan. Athletic, smart, cool – the whole package. Last year, it seemed like more and more kids were talking about pot parties. I never got invited to any of them until one day Dan asked me to meet him at one. I thought that he kind of liked me, so I went. That's when we got busted. I felt so used. He just wanted me to buy pot from him. I need scholarships to go to college. He could have wrecked that for me.

AUSA: Where was the party?

Zurich: At Dan's house.

AUSA: Did you use any marihuana at the party?

Zurich: Yes. Dan was smoking a joint, and he persuaded me to try it. I only took a couple of puffs.

AUSA: Thank you, Ms. Zurich. No further questions.

Judge: Cross-examination?

CROSS EXAMINATION

Defense: Ms. Zurich, were you ever prosecuted for your drug use?

Zurich: No. I only tried it once at the party. I didn't like it. It gave me the munchies. I don't think the police knew I had taken a couple hits the day of the bust. They say you don't get high the first time. The U.S. Attorney's office said I had nothing to fear if I testified – something about immunity.

Defense: Did Mr. McPherson ever do anything to upset you?

Zurich: Well, he acted like I didn't exist after the party. That's when I realized that he was just using me, so that didn't make me feel too good. Yeah, I guess I was upset at him for that.

Defense: Anything else?

Zurich: Yeah, I asked him to go to the girls' choice dance, but he told me to get lost – right in front of his friends. He was a real jerk about it.

Defense: No further questions.

Judge: Re-direct?

AUSA: No, your Honor:

Judge: Thank you, Ms. Zurich. You may step down. Prosecution, you may call your next witness.

AUSA: Your Honor, the United States rests.

Judge: Defense counsel?

Testimony of Tony Alto
Defense Witness

Defense: The Defense calls Mr. Tony Alto.

Clerk: Do you swear that the testimony you are about to give in this case is the truth, the whole truth, and nothing but the truth, so help you God?

Alto: I do.

Clerk: You can have a seat. Please state your name and spell your last name for the record.

Alto: Tony Alto. A-L-T-O.

Defense: Your honor, may I inquire?

Judge: You may proceed.

Defense: Mr. Alto, what do you do?

Alto: I am a truck driver by trade.

Defense: Are you currently employed?

Alto: No. I am currently serving a 10-year sentence in federal prison for drug and assault charges.

Defense: What is your connection to this case?

Alto: Well, I was one of the members of the East Town Gang. The FBI busted me in connection with their raid on McPherson's house. They said they had so much evidence against me that I pleaded guilty and was sentenced to 10 years in the slammer. Unlike Ellwood, I was never offered a sweetheart deal. But the U.S. Attorney's Office said they would go lighter on me if I didn't "drag this out." So I took the deal and went to the Big House.

Defense: You said you were a member of the East Town Gang. What role did you have in the gang?

Alto: You could say my job in the East Town Gang was sort of like recruiting. I reeled in the school-based dealers. I was actually pretty good at it. I liked to set them up for success. Like Junior Achievement.

Defense: Please explain what "reeling in the school-based dealers" means?

Alto: It means I was the one who set up contact people at the schools, like I would get one student who I would deal with, I'd get them the drugs, and then they would sell them to their friends.

Defense: Was East Town High one of the schools you were responsible for?

Alto: Yes. I was responsible for any drugs going into East Town High.

Defense: Was Daniel McPherson one of your contacts at East Town High?

Alto: I never saw him in my life.

Defense: Did you ever work with John Ellwood?

Alto: Ellwood? No way. Everyone knows that he was only out for himself and would backstab his best friend, if he ever had a friend. He doesn't know the meaning of loyalty. He was an untouchable. No one in the gang wanted to work with him. Actually it's probably good he got arrested. He probably would have gotten himself roughed up.

Defense: Mr. Alto, is there any possibility that Ellwood could have been selling drugs to Daniel McPherson without you knowing about it?

Alto: Not a chance. East Town High was my territory. Nobody cuts in to Tony Alto's turf. I don't know where he would have got the drugs anyways.

Defense: Mr. Ellwood testified earlier today that he supplied Daniel McPherson with marijuana. He also stated that he offered to name Daniel in return for a plea bargain. What do you think of this?

AUSA: Objection. Calls for improper character evidence & opinion; invades the province of the jury.

Defense: Your Honor, I'm asking the witness if Mr. Ellwood's testimony is consistent with his personal knowledge of Mr. Ellwood's role in the East Town Gang.

Judge: Objection sustained.

Alto: Look, I have nothing to gain. I'm in for at least 10 years. I'm a bad apple, I admit that. But I'm not proud of the fact that I sold pot to kids. Adults can make their own choices, but kids—that's something else. I'm sorry and I'm trying to get right with myself in prison.

Anyway, ask anybody, I'm all about loyalty. I don't know this McPherson kid. He really means nothing to me, but I'm not going to see someone go to prison just so a low-life snitch like Ellwood can knock a few years off the sentence he deserves!

Defense: Thank you, Mr. Alto.

Judge: Cross-examination?

CROSS-EXAMINATION

AUSA: Mr. Alto, you are a convicted drug dealer. You broke the law for a living. Correct?

Alto: Yes.

AUSA: You don't like Mr. Ellwood, do you?

Alto: Sorry, I thought I'd spelled that out pretty clear already.

AUSA: Please just answer the question yes or no.

Alto: No.

AUSA: Is this your way of getting back at Mr. Ellwood?

Alto: You can connect the dots any way you want. What do I have to gain by lying? You're not taking any years off my sentence. Anyway, how I feel about Ellwood has nothing to do with this kid McPherson.

AUSA: Were you offered a plea bargain?

Alto: Yeah, but I turned it down.

AUSA: You just testified that you were not offered a deal. If you were offered a deal, why didn't you take it?

Alto: Let's just say I'm loyal. I'm not a rat. I could have coughed out kids' names, but they're no different than my own brother who got caught with drugs a few years back. I'm not a worm like Ellwood. It's just kids sowing wild oats; they'll grow out of it. I'll take my medicine, but I won't bring anybody else down with me, especially a young guy.

AUSA: I guess that makes you a real hero then?

Defense: Objection!

AUSA: Withdrawn.

Judge: Watch it counselor.

AUSA: Sorry, Your Honor. No further questions.

RE-DIRECT

Judge: Re-direct?

Defense: Just one question, your honor. Mr. Alto, do you think your sentence was just?

Alto: It fits the crime. I'd rather be in the Bahamas, but I knew the risks and I got caught.

Defense: Thank you. No further questions.

Judge: Re-cross?

AUSA: No, your honor.

Judge: Very well. Mr. Alto, you may step down. Counsel, call your next witness.

Defense: The Defense calls Thomas Smith.

Testimony of Thomas Smith
(Defense Witness)

Clerk: Do you swear that the testimony you are about to give in this case is the truth, the whole truth, and nothing but the truth, so help you God?

Smith: I do.

Clerk: You can have a seat. Please state your name for the record.

Smith: Thomas Smith.

Defense: Your honor, may I inquire?

Judge: You may proceed.

Defense: Mr. Smith, what do you do?

Smith: I am the owner of Tom's Auto Repair shop.

Defense: Does your auto shop have any employees?

Smith: Not right now, just me. But John Ellwood used to work for me, and Dan McPherson helped out too.

Defense: How long did Daniel McPherson work for you?

Smith: Let's see, Dan just graduated, so, about a year and a half. He started by helping out John to learn the ropes. He caught on so fast, I hired him to work full time during the summer, and on and off during the school year. Full time during school breaks.

Defense: John Ellwood testified that he hired Daniel, and only on a part-time basis. Is this true?

Smith: That's just not true. John did not have any authority to hire or fire—only I could do that. Quite frankly, John was not a very good mechanic. It was more like he was assisting Dan, not the other way around. Dan is a natural—and very motivated. Wants to get into NASCAR someday. Dan is like the son I never had. He'd do anything for me.

Defense: Did you ever have any problems with John Ellwood?

Smith: He wasn't a model employee, if that is what you are getting at. As I said, he wasn't a very competent mechanic, at least not in my mind. More than that, he just wasn't a very good employee. I mean, he would show up late to work, or sometimes never show up at all. When I asked him where he was, he would dodge and weave and come up with some half-baked story. I don't know how many times I've caught him in a lie.

Defense: Why didn't you fire him?

Smith: I wanted to for some time, and eventually did. But I kept him longer than perhaps I should have because we were short staffed. I was glad when Dan could help out. He made John less necessary.

Defense: Why did you eventually fire John?

Smith: I caught him smoking pot in the garage one day. I can't have that. If a customer suspects that the mechanic is high, what do you think that would do to my business. People trust us with their lives. The word would spread like wildfire.

Defense: About how much money would you say that Daniel made while he was employed by you?

Smith: I don't know the exact figure off the top of my head, but it was pretty decent money, I mean for a high school kid. He did a good job, so I paid him close to a regular mechanic's wage. All in all, I think from January 2006 to April 2008 when he was arrested, it

was somewhere in the ballpark of \$6,000 to \$7,000 dollars. But you have to remember that most of the work was only part-time. Since it was nights and weekends, I paid him overtime. On vacations, he racked up the dough.

Defense: [Attempt to introduce affidavit] Your Honor, may I approach the witness? [hand copy of affidavit to AUSA and then to witness] Mr. Smith, I'm now showing you what has been pre-marked as Defense Exhibit 1.

AUSA: Your Honor, before defense counsel begins questioning the witness, I object to this document on the basis of lack of foundation and hearsay. Also, this document purports to be an affidavit of an attorney who is not a witness at this trial and who I have not had the opportunity to cross-examine.

Defense: Your Honor, this affidavit establishes that Dan's grandmother bequeathed to him \$10,000 one month before the FBI raid. It establishes one source of Dan's income. This affidavit has independent legal significance as the sworn testimony of the attorney who drafted Dan's grandmother's will, and is nonhearsay.

AUSA: This document does not meet an exception to the hearsay rule because it has no legal significance on its own. It is classic hearsay.

Judge: Objection sustained. The jury will disregard anything counsel said regarding the content of the Affidavit. You are instructed that it is not evidence in this case.

Defense: Mr. Smith, one more question. Did you ever hear Daniel talk about drugs, or see him use or distribute drugs, particularly marijuana?

Smith: Absolutely not. Regardless of how good a mechanic he may have been, if he did drugs, I would have fired him on the spot.

Defense: Thank you. No further questions.

Judge: Cross-examination?

AUSA: Yes, your honor.

CROSS-EXAMINATION

AUSA: Mr. Smith, you seem to be very tough on crime, especially drugs. Have you ever been convicted of a crime?

Smith: No.

AUSA: Have you ever been investigated for a crime?

Smith: Ummm...

AUSA: Mr. Smith?

Smith: A few years back, the FBI investigated my shop based on a false rumor that several mechanics were resetting odometers for people before they sold their cars to bump up the resale value. Rumor had it that the car owners would give the guys at the shop what you might call a tip, for the extra work. No charges were ever filed.

AUSA: Was Mr. Ellwood involved in this matter?

Smith: I heard from a reliable source that he was the one who made up this lie in the first place. I wanted to fire him for it right then and there. But, I felt if I did that, it would only look suspicious. I didn't do anything illegal, but it could look like I did, if I fired the guy who some might have considered an informant in the whole mess. I kept him on because I couldn't prove it was him, and he never admitted it. Anyways, the FBI gave up its investigation, because I was innocent.

AUSA: No more questions.

Judge: Re-direct?

Defense: One question, your honor.

RE-DIRECT

Defense: Could Daniel McPherson be the "reliable source" who implicated John Ellwood, thus triggering Mr. Ellwood to turn in my client?

AUSA: Objection. Calls for speculation.

Defense: The witness knew each man personally and worked closely with them for at least a year and a half. I'm asking if he perceived Dan to be a reliable employee and individual. Also, the witness's opinion on this issue is helpful to the determination of a fact in dispute.

Judge:

Defense: [if sustained] No further questions your honor.

[if overruled, re-ask the question]

Smith: [if overruled] It's possible that Dan was the source. But I have no idea why Ellwood would turn in Dan.

Defense: No further questions, your honor.

Judge: Re-cross?

AUSA: No, your honor.

Judge: You may step down. Defense counsel, please call your next witness.

Defense: The Defense calls Gus Marcus.

TESTIMONY OF GUS MARCUS

(Defense Witness)

Clerk: Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Marcus: I do.

Clerk: You may take a seat. Please state your name and spell your last name for the record.

Marcus: Gus Marcus. M-A-R-C-U-S.

Defense: Good morning Mr. Marcus. Can you please tell the jury what you do for a living?

Marcus: I am the track coach at East Town High. Have been for 10 years.

Defense: Do you know Daniel McPherson?

Marcus: I have coached Daniel McPherson in different events on the track team for the past three years.

Defense: How well do you know Mr. McPherson?

Marcus: I would say that I know him better than most of my young men. Dan went out for cross country. That was my event in high school and college. I could relate to him because he had the same kind of drive and endurance that I did. He was very dedicated so I spent extra time working with him.

Defense: How would you describe Mr. McPherson's character?

Marcus: Dan is a very disciplined guy. Very team-oriented, but, at the same time, doesn't give in to peer pressure. Willing to work hard and pay the price. Dan was elected captain of the track team. He had a way of bringing out the best in people and inspiring their confidence. He always set a good example for the other athletes by getting the grades and doing well on the field.

Defense: Thank you, Mr. Marcus.

Judge: Cross-examination?

Cross-Examination

AUSA: Yes, your honor. Mr. Marcus, did you observe, firsthand, any changes in Daniel or his performance in the first semester of his senior year?

Marcus: Yes, Dan missed a lot of practices and when he did show up, he wasn't himself. He didn't push himself the way he used to. So I talked with him man-to-man about what I saw as a general apathy that had come over him. He, finally, broke down and told me that his grandmother had died suddenly. She was like a mother to him. Showed up at every meet. That explained why he was checked out. He hasn't really pulled out of it, yet.

AUSA: How much time did you spend with Dan, on average, each week?

Marcus: Well, track practice is about two hours a day, four days a week.

AUSA: Did you ever spend time with Dan off the track field?

Marcus: No.

AUSA: That's all, Your Honor.

Judge: Very well. Mr. Marcus, you may step down. Defense counsel, call your next witness.

Defense: The Defense calls Peggy Stone.

TESTIMONY OF PEGGY STONE

(Defense Witness)

Clerk: Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Stone: I do.

Clerk: Please state your name for the record.

Stone: Peggy Stone.

Defense: Ms. Stone, what do you do?

Stone: I am the Classics teacher at East Town High and the advisor to the Mica Alpha Delta Honor Society.

Defense: Is Dan McPherson a member of the Honor Society and, if so, for how long?

Stone: He was inducted last year – in his junior year – with five other students.

Defense: What are the requirements for acceptance into the Honor Society at East Town High?

Stone: Students must maintain a grade point average of 3.5 or above for four consecutive semesters. They must be leaders in extracurricular activities and be of good character.

Defense: How do you test for good character?

Stone: One teacher and two students must write a letter to the selection committee.

Defense: Apparently, Daniel met the criteria in his junior year.

Stone: Yes. That's right.

Defense: Thank you, Ms. Stone. No further questions.

Judge: Cross-examination?

Cross-Examination

AUSA: Ms. Stone, you said that Daniel McPherson met the Honor Society requirements at the end of his junior year. However, there is no system in place for monitoring the members' qualifications once they are inducted, correct?

Stone: We rely on the honor system. Each student self reports his grades and extracurricular activities every semester after induction.

AUSA: It's a fact that you've never had a student self report bad grades, inappropriate behavior, or criminal charges, have you?

Stone: No.

AUSA: Why do you think that is, Ms. Stone?

Defense: Objection. Calls for speculation.

Judge:

AUSA: [if overruled ask question again]

Stone: [if overruled answer] We trust that our students would report if there were anything to report.

AUSA: At this time, Your Honor, I would like to enter into evidence Government's Exhibit 5 – Daniel McPherson's report cards over the past two years that the Defense and the Prosecution have stipulated to.

Judge: Any objection? So received.

AUSA: Are you aware, Ms. Stone, that Daniel McPherson's grade point average plummeted from 3.5 in his last semester of his junior year to 2.5 in the first semester of his senior year and that he dropped out of all extracurricular activities?

Stone: Umm.

AUSA: Ms. Stone?

Stone: I know Daniel to be a fine young man. The Honor Society is a

student-run organization. It is up to the members to hold each other accountable.

AUSA: Thank you, Ms. Stone. I have no further questions.

Judge: Defense counsel, re-direct?

Defense: Your honor, the Defense rests.

Closing Statement
(Prosecution)

May it please the court, counsel, members of the jury. At the beginning of this case, I told you that this case was about keeping a bad seed from taking root in our community and poisoning all the good seeds around him. The Defendant, just looking at him from the outside, looks like a good kid. But throughout this case, you have learned how to spot a bad seed. You now know the truth, which is that the Defendant, Daniel McPherson, is a bad seed.

It's no surprise that Daniel McPherson was admired and well-liked by his teachers, friends, and his employer. The Defendant was a smart, good-looking, star athlete, made good grades, was a member of the honor society, had a part-time job, and the list goes on. At 18 he had every opportunity in the world available to him. So many young people would have killed to trade places with him and have those kinds of opportunities. But the Defendant didn't care about all that because he was more interested in selling drugs. His grades dropped, he stopped showing up for track practice, and dropped out of activities. You heard that from his honor society advisor and track coach. Most of the Defendant's friends and people around him were fooled by his charm, but you members of the jury are smarter than that. You recognize Defendant as a bad seed.

I told you at the beginning of this case that the Government had the burden of proving beyond a reasonable doubt that the Defendant committed each element of the crime charged. In a few minutes the Judge is going to talk to you about the elements and what they all mean, but I'm going to talk to you about the evidence you saw today and what it means.

Through the evidence you've seen and heard here today, the Government has proved to you that Daniel McPherson voluntarily and intentionally had marijuana in his possession. And not only did he intend to give it to his friends, but he actually did so, not only over several months but at a party at his house on April 21, 2008.

You heard Agent Lisa Donald testify about how on Friday, April 21, 2008, FBI agents went to the Defendant's house to execute a search warrant. The FBI happened to arrive at the same time that the Defendant was having a party. Agent Donald told you that when the agents went into the house, they smelled the strong smell of marijuana and found marijuana joints downstairs, and upstairs they found the Defendant and several of his friends flushing

something down the toilet. What was he flushing? marijuana joints. That is undisputed. Clearly, the Defendant had physical control over the marijuana he was flushing down the toilet. It was no mistake or accident that the Defendant had the marijuana. He knew what he was doing, because he tried to get rid of the evidence. Also, remember Trisha Zurich, a junior at East Town High who was at the party that day. She told you that the Defendant was smoking a joint at the party. Again, another credible eyewitness who saw the Defendant with marijuana in his possession.

Then, Agent Donald told you that when the agents searched the Defendant's room, where they found Defendant's wallet with about \$500 in it, and a backpack had a 1/2 pound of marijuana in it. The Defense has tried to raise questions about whether this backpack belonged to the Defendant. Ladies and gentlemen, based on the evidence you heard, it is obvious that this backpack was the Defendant's. How do we know this? Agent Donald testified that this particular backpack was found right next to the Defendant's wallet, leaned up against his dresser. The other backpacks were tossed in a pile across the floor. Why would anyone but the Defendant lean their backpack neatly up against the Defendant's dresser, right beside the

Defendant's wallet, which also happened to have \$500 in cash in it? It is common sense that backpack and the 1/2 pound of marijuana in it belonged to the Defendant.

Now, not only did the Defendant have a boatload of marijuana in his possession, but he sold it and gave it to his friends. How do we know this? First, you heard from John Ellwood, a member of the East Town Gang who worked with the Defendant at Thomas Smith's autobody shop. Ellwood told you about how he supplied the Defendant with drugs for months. The defense tried to raise questions in your mind about Ellwood's testimony by offering the testimony of Tony Alto. Well, guess what. Tony Alto is also a convicted drug dealer. Alto also testified that he wasn't offered a plea deal by the Gov't, only to turn around and say he was, just that "he's not a rat." If Tony Alto is stubborn enough to take a longer prison sentence instead of telling the truth about his suppliers, then of course he's not going to say that the Defendant was his contact person for East Town High.

Also consider Agent Donald's testimony about the amount of marijuana found in the Defendant's backpack. 1/2 pound. 250 grams. That is a lot of marijuana for one person to keep for himself. Why would the Defendant have

such a large amount unless he was selling it to his friends at school. Finally, remember Trisha Zurich? who was at the party on April 21? She testified that the Defendant was smoking a joint and persuaded her to try it. He gave it to her, and she took a couple of puffs. Members of the jury, the sole act of passing Ms. Zurich a joint means that the Defendant distributed an illegal substance, and he did so voluntarily. No one was holding a gun to the Defendant's head when he was flushing joints down the toilet or passing a joint to Trisha Zurich.

Members of the jury, the evidence in this case proves beyond a reasonable doubt that the Defendant, Daniel McPherson, was voluntarily in possession of an illegal drug which he sold and gave to his friends and classmates. That's a crime, and it is up to you to hold the Defendant accountable for his actions. The Defendant may have looked like a good seed, but he wasn't. He was a bad seed. Now, it's your job to keep this bad seed from taking root and destroying the good seeds in this community. So we are asking you to do the only thing you possibly can in this case and return a verdict of guilty.

Sample Closing Argument
(Defense)

May it please the court, counsel, ladies and gentlemen of the jury,
hello again.

At the beginning of this case, when his/her Honor, _____,
was questioning you, he/she asked you whether you would follow
the law, whether you would be fair, and whether you would hold the
prosecutors to its burden. There was a lot of talk about that and each of
you indicated and promised that you would. Judge _____
also asked you whether you would presume Dan innocent
throughout this entire trial and through your deliberations and
presume him so unless the Government was able to prove him guilty
beyond a reasonable doubt. All of you indicated that you presumed him
innocent.

Additionally, ladies and gentlemen, you were asked to use your
common sense and experiences in life in evaluating the testimony of the
witnesses. Based upon your responses: "Yes, I can follow the law," "Yes, I
will hold the prosecutors to their burden of proof beyond a reasonable
doubt," "Yes, I will presume the defendant innocent unless he is proven
guilty beyond a reasonable doubt," you were selected as jurors in this

case. We are calling upon you now, ladies and gentlemen, to abide by those promises that you made. Let's now look at the evidence and see why the prosecution failed to prove Dan McPherson guilty beyond a reasonable doubt. As I told you at the beginning, we do not contest the fact that Dan threw a party and allowed people at the party to bring beer and pot. But this is not the issue. The issue is whether the marijuana the FBI agents found in the house belonged to Dan. Our answer is that the evidence indeed shows that the Government failed to prove Dan McPherspn guilty beyond a reasonable doubt, because they did not prove, beyond a reasonable doubt, that the marijuana belonged to Dan. You heard from Special Agent Donald that the FBI found pot at Dan's house.

We stipulate to this. Specifically, you heard that the FBI found a large amount of pot in an unzipped backpack that was propped against a dresser in Dan's room. On top of that same dresser, the agents found Dan's wallet. There was no identification in the backpack, or in any of the others the FBI found in

Dan's room. There were at least a dozen kids in the house; in fact, you heard testimony that backpacks were strewn all over the house.

According to Special Agent Donald, the FBI also found Dan in the upstairs bathroom with two of his acquaintances, and they were attempting to flush marijuana joints down the toilet. Why would Dan worry about flushing a joint if the one-half pound of pot were his? And do you remember Trisha Zurich? The girl with a grudge against Defendant for turning her down for a date? She testified that Dan was smoking a joint at the party and persuaded her to try it. Only this circumstantial evidence from the April 21, 2008 raid of my client's house ties him to the drugs.

The Government argues that the testimony of John Ellwood also substantiates their case against my client. John Ellwood is an admitted gang member and a convicted felon. As you heard this morning, Mr. Ellwood cut a deal with the prosecution. The deal was, if he agreed to identify his source at East Town High, he would receive a reduced sentence. Otherwise, Mr. Ellwood was staring down the possibility of life in prison. So Mr. Ellwood accepts the deal and implicates the only high school kid he knows, his co-worker at Tom's Auto Shop, Dan McPherson. You heard Thomas Smith, the owner of Tom's Auto Shop who eventually fired Ellwood, testify that Dan was a better mechanic than Ellwood. In fact, he testified that Dan was the son he never had. Ellwood is a scorned, angry man who took the opportunity to bring down an innocent person with him.

The fact is, Mr. Ellwood's testimony is the only evidence the Government has linking Dan to an alleged drug ring at East Town High. You heard Ms. Zurich testify that Dan is the "perfect package" – athletic, smart, and cool. He was popular and often invited friends over to his house. This does not make him a drug dealer.

Now, why did Dan have \$500.00 cash in his wallet? He had been working at Tom's Auto Shop at night and on weekends. You heard Mr. Smith say that he paid Dan overtime, and that Dan made as much as a regular mechanic. The last time I took my car in to be serviced, I noticed that mechanics get paid very well. And Mr. Ellwood testified that he gave Dan a cut of his side jobs on cars, too. This is a lot of money, especially for a student living at home with very low expenses.

The evidence is that Dan is an honor student whose grades and athletic

performance slipped his senior year. The explanation for this is so simple that I feel silly saying it: Dan was enjoying his senior year. He had worked hard all of his life, both in school and on the field, and was cutting loose a little before graduation. In hindsight, this was a mistake. Dan's decision to live a little led him to throw a party at his parents' house on a school holiday in April, one month before graduation. From his one poor decision, others followed: he asked a 21-year-old friend to bring beer to the party, and some people brought pot. When law enforcement arrived at the party, Dan, in his panic, attempted to flush some joints before the agents found them. However, this is where the trail of evidence ends.

The Government, at the beginning of this case, told you that Dan is a bad seed. The evidence shows this to be wrong. He was a good seed surrounded by bad seed. This does not make him a criminal.

We ask you to hold the prosecution to its burden and return a verdict of not guilty.

Thank you.

Closing Rebuttal
(Prosecution)

Members of the jury, don't be fooled like the Defendant's teachers were. Don't be fooled like the Defendant's employer Thomas Smith was. Don't be fooled like Trisha Zurich was, who thought the Defendant really liked her. Don't look at the weed seed and think it's grass seed just because it looks good from the outside. You've learned how to tell the difference between good seeds and bad seeds. You've learned to do that because the evidence you've seen in this case makes it clear that the Defendant committed the crime charged. Unlike the people who were fooled by the Defendant you know the Defendant for who he really is- a bad seed. Show the Defendant that he cannot fool you and return a verdict of guilty.

Thank you.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

-vs-

Case No. 3:08-cr-125-J-34JRK

DANIEL MCPHERSON

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence that is to be received in this trial and each of the arguments of counsel, it becomes my duty to give you the final instructions of the Court as to the law that is applicable to this case. You should use these instructions to guide you in your decisions - what we call your deliberations.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced

in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all; and if a Defendant elects not to testify, you cannot consider that in any way during your deliberations. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is

proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

Similarly, a witness who was using addictive drugs during the time he or she testified about may have an impaired memory concerning the events that occurred during that time.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

At this time I will explain the indictment which charges the Defendant with knowingly and willfully possessing with intent to distribute and distributing a quantity of marihuana, which is a controlled substance.

Title 21, United States Code, Section 841(a)(1), makes it a Federal crime or offense for anyone to possess a "controlled substance" with intent to distribute it and to distribute a "controlled substance."

Marihuana is a "controlled substance" within the meaning of the law.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully possessed marihuana as charged; and

Second: That the Defendant possessed the substance with the intent to distribute it or that the Defendant actually distributed it;

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction. Similarly, to distribute means to deliver or transfer possession of a controlled substance to another person, with or without financial interest in the transaction.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who knowingly has direct physical control of something is then in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.

Whenever the word "possession" has been used in these instructions it includes constructive as well as actual possession, and also joint as well as sole possession.

The word "knowingly," as that term is used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

In some cases the law which a Defendant is charged with breaking actually covers two separate crimes - - one is more serious than the second - - and the second crime is generally called a "lesser included offense."

So, in this case, with regard to the offense charged in the Indictment, if you should find the Defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the Defendant is guilty or not guilty of the lesser included offense of simple possession of marihuana. The lesser included offense would consist of proof beyond a reasonable doubt that the Defendant possessed marihuana without the intent to distribute it OR that the Defendant distributed a small quantity of marihuana without any payment or other remuneration.

The defendant in a criminal case has an absolute right under our Constitution not to testify.

The fact that Defendant McPherson did not testify must not be discussed or considered in any way when deliberating and arriving at your verdict. No inference of any kind may be drawn from the fact that a defendant decided to exercise his privilege under the Constitution and did not testify.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form and then return to the courtroom. If you are unable to reach a unanimous agreement in the time permitted for you to complete your deliberations, please indicate on the verdict form how many jurors would vote to find the Defendant guilty and how many jurors would vote to find the Defendant not guilty. Do not list the names of the jurors, however.

If you should desire to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the Court representative who will assist you with your deliberations. The Court representative will bring your note to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell

me your numerical division at the time.

Please escort the jury to the jury room to begin their deliberations