

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011  
EDITION



*Leadership is a behavior, not a position*

**POLICE EXECUTIVE COMMAND  
COURSE**

**CASE LAW UPDATES**

**KENTUCKY COURT OF APPEALS - KENTUCKY SUPREME COURT  
SIXTH CIRCUIT COURT OF APPEALS  
U.S. SUPREME COURT 2010-11 TERM**



John W. Bizzack, Ph.D.  
*Commissioner*



Department of  
**CRIMINAL JUSTICE TRAINING**

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# Advanced Individual Training and Leadership Branch

**J.R. Brown, Branch Manager**  
859-622-6591

**JamesR.Brown@ky.gov**

## Legal Training Section

**Main Number**  
**General E-Mail Address**

**859-622-3801**  
**docjt.legal@ky.gov**

**Gerald Ross, Section Supervisor**  
859-622-2214

**Gerald.Ross@ky.gov**

**Carissa Brown, Administrative Specialist**  
859-622-3801

**Carissa.Brown@ky.gov**

**Kelley Calk, Staff Attorney**  
859-622-8551

**Kelley.Calk@ky.gov**

**Thomas Fitzgerald, Staff Attorney**  
859-622-8550

**Tom.Fitzgerald@ky.gov**

**Shawn Herron, Staff Attorney**  
859-622-8064

**Shawn.Herron@ky.gov**

**Kevin McBride, Staff Attorney**  
859-622-8549

**Kevin.McBride@ky.gov**

**Michael Schwendeman, Staff Attorney**  
859-622-8133

**Mike.Schwendeman@ky.gov**

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**The case law summaries in this book have been edited from summaries available on the Department of Criminal Justice Training website.**

**For additional cases and other useful links and documents, please visit to the website at:**

**<http://docjt.ky.gov/legal/>**

## NOTE TO THIS EDITION

Because the following cases are quoted extensively, for brevity, they are not cited.

Miranda v. Arizona, 384 U.S. 436 (1966)  
Terry v. Ohio, 392 U.S. 1 (1968)

# KENTUCKY

## PENAL CODE - 503 - USE OF FORCE

### Swofford v. Com., 2010 WL 3810119 (Ky. App. 2010)

**FACTS:** Swofford was indicted on Assault 1<sup>st</sup> charges in Kenton County. He had shot Behanon, who had refused to leave Swofford's property. Swofford claimed immunity under KRS 503.085, and in the alternative, that he was entitled to a hearing on that issue. The trial court ruled that "Kentucky law did not require a pretrial hearing" on the claim and that the "court would rule on the claim at trial upon a motion for a directed verdict." After plea negotiation, Swofford took a plea to a lesser degree of Assault but retained his right to appeal the denial of an immunity hearing.

**ISSUE:** Is a defendant claiming immunity for a use of force entitled to a pre-trial hearing on the issue?

**HOLDING:** Yes

**DISCUSSION:** Swofford and the Court looked to Rodgers v. Com., in which the Kentucky Supreme Court concluded that a pretrial hearing was required when a defendant claimed immunity.<sup>1</sup> Specifically, that Court stated that "[b]ecause immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding." Further, it held that the standard to be used in an immunity hearing is probable cause on the immunity issue. The Court agreed that Swofford was entitled to a hearing. The Court vacated his conviction and remanded the case to Kenton County for a probable cause hearing.

## PENAL CODE - KRS 506 - ATTEMPT

### Williams v. Com., 2010 WL 2867823 (Ky. App. 2010)

**FACTS:** Williams was arrested "following a sting operation where an adult posed as a minor over a computer and Williams traveled to Williamsburg, Kentucky, to meet with that 'minor.'" He was indicted for Criminal Attempt of Unlawful Transaction with a Minor 1<sup>st</sup>. Williams requested the trial court dismiss the indictment because no actual minor was involved; that was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is a simple belief that one is communicating with a minor sufficient to charge with Attempt to commit Unlawful Transaction with a Minor?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the two statutes in question – KRS 530.064 and KRS 506.010. The Court noted, however, that although the substantive statute requires that "an actual minor be involved, the criminal attempt statute has no such requirement." It requires only that a "substantial step towards the commission of what would constitute a crime under those circumstances as Williams believed them to be." Since Williams believed he would be meeting with a minor, that belief was sufficient for a criminal attempt charge. Williams' plea was affirmed.

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<sup>1</sup> 285 S.W.3d 740 (Ky. 2009).

## PENAL CODE - KRS 508 - WANTON ENDANGERMENT / CRIMINAL ABUSE

### Cochran v. Com., 315 S.W.3d 325 (Ky. 2010)

**FACTS:** On December 29, 2005, Cochran gave birth to a child that tested positive for cocaine. Cochran also tested positive. Cochran was indicted in Casey County for wanton endangerment. She moved for dismissal, which was granted, but the Court of Appeals reversed the dismissal. Cochran appealed.

**ISSUE:** Does a mother's use of drugs prior to a baby's birth constitute wanton endangerment?

**HOLDING:** No

**DISCUSSION:** The Court reviewed a similar case in which a mother was convicted of Criminal Abuse<sup>2</sup> and concluded that an "identical analysis would apply to a construction of the wanton endangerment statutes to cover a pregnant woman's conduct." The Court agreed that the Maternal Health Act of 1992 indicated that the General Assembly "did not intend criminal sanctions for prenatal use of drugs and alcohol."<sup>3</sup> The Court reinstated the dismissal of the indictment.

### O'Conner v. Com., 2010 WL 1628050 (Ky. App. 2010)

**FACTS:** On August 24, 2007 Deputy Wesley (Pulaski County SD) responded to a 911 call from Wright, a social worker. Wright had been at the O'Conner home on a routine visit; she had knocked on the door but no one had answered. She stated that she had seen one of the children through a bedroom window. When the deputy arrived, O'Conner "opened the door and explained that he and his wife had been asleep." Wesley and Wright were permitted inside. They discovered that two boys (an infant and 3 year old) were "in a bedroom with its door jammed from the outside with a screwdriver." There was human waste and no means of "ventilation or sanitation" in the room. The oldest daughter was at school. Neither of the children was physically injured. Under questioning, O'Conner stated that he decided to lock the door because he'd taken medication and needed to rest. He felt that the children would be endangered if allowed to roam the house.

O'Conner was indicted and stood trial for Criminal Abuse, the jury was instructed on all three degrees. He was convicted on Criminal Abuse 1<sup>st</sup> and appealed the denial of a motion for a directed verdict on that count.

**ISSUE:** Is leaving a child locked in room for a long period of time, without food, water or access to a bathroom, Criminal Abuse?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the elements of Criminal Abuse 1<sup>st</sup>, and noted that "this case poses a novel situation where a parent has been prosecuted under our criminal abuse statutes on the theory that the children were confined in unsanitary and filthy rooms," but arguably sustained no physical injury. However, the statute does not require such injury. The Commonwealth was not required to show that the "children were in imminent danger, nor did it produce medical evidence reflecting the physical condition of the children." The case appeared to be under the "cruel confinement" section of the statute, as the children were "hungry, dirty, and had been without access to a toilet for a substantial period of time." Further, the "conditions inside were beyond deplorable."

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<sup>2</sup> Com. v. Welch, 864 S.W.2d 280 (1983).

<sup>3</sup> 1992 Ky. Acts, Ch. 442 (H.B. 192).

The Court focused on the mental state required for the charged offense. It noted that “it appears that the conditions in the home were the result of extreme poverty and a lack of parenting skills.” The Court found no “actual intent to cause the harm or potential harm.” Instead, this case arose from a “misguided decision” to “keep them from harm while he napped.” The Court reversed the conviction and remanded the case back for retrial under the lesser-included Criminal Abuse statutes.

## **PENAL CODE - KRS 509 – KIDNAPPING EXEMPTION**

Duncan v. Com., 322 S.W.3d 81 (Ky. 2010)

**FACTS:** Duncan was accused of a series of sexual assaults that occurred in Louisville in the fall of 2003. Duncan was convicted and appealed.

**ISSUE:** Is taking a victim from one location to another, over a substantial distance and time, for the purpose of a sexual assault, sufficient to charge with Kidnapping as well?

**HOLDING:** Yes

**DISCUSSION:** Duncan argued it was inappropriate to convict him of kidnapping. However, “to distinguish kidnapping from the restraint that is part-and-parcel of another offense,” the “kidnapping exemption” of KRS 509.050 might apply. The Court agreed that the exemption only applies if the restraint is “close in distance and brief in time.” If the “victim is restrained and transported any substantial distance to or from the place at which the crime is committed or to be committed,” unlawful imprisonment or kidnapping charges might apply.<sup>4</sup>

To satisfy the exemption, three requirements must be met.

- (1) that the underlying criminal purpose was the commission of a crime defined outside KRS Chapter 509;
- (2) that the interference with the victim's liberty occurred immediately with or incidental to the commission of the underlying intended crime; and
- (3) that the interference with the victim's liberty did not exceed that which is ordinarily incident to the commission of the underlying crime.<sup>5</sup>

The decision as to whether the exemption applies falls to the judge, not the jury. In this case, the victim was seized while walking down the street and was forced into an alley and then to a secluded area behind an abandoned house, which took over five minutes. The trial court properly did not apply the exemption statute.

With respect to a challenged identification procedure, the police first presented the victim with a photopak that included Duncan, but none of the photos showed a man wearing glasses. When she expressed doubt, a second photopak, with a more recent photo of Duncan and in which all of the subjects were wearing glasses, was presented. She then positively identified Duncan. The Court agreed that a second showing could, in some circumstances, be unduly suggestive, but that was not the case here, when the second showing was three days after the first. Duncan's photos, taken three years apart, were markedly different.

Although the Court found in favor of the Commonwealth in the issues above, the Court upheld his arguments that involved misconduct on the part of the prosecutor and remanded the case back for further proceedings.

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<sup>4</sup> Timmons v. Com., 555 S.W.2d 234 (Ky. 1977).

<sup>5</sup> Hatfield v. Com., 250 S.W.3d 590 (Ky. 2008).

**Payne v. Com., 2010 WL 1641117 (Ky. 2010)**

**FACTS:** When Conner approached her landlord, Payne, to tell him she and her husband would be moving from their rented home, Payne “grabbed her and kissed her twice on the mouth.” He then pulled Conner inside the building, backed her up against a bar and locked the door. Payne groped her until she was able to escape back to the rented trailer where she locked the door. Payne followed Conner and tried to get in. Conner called a family member, who told her to call the police. The family member then drove to the trailer, where she saw Payne leaving. Deputy Eubanks (Hancock County SO) arrived. He later testified that Conner was “very distraught and frightened.”

Payne was charged with Sexual Abuse, False Imprisonment and Kidnapping. He was convicted of Sexual Abuse and Kidnapping. Payne appealed.

**ISSUE:** Does the kidnapping exception apply when the restraint is incidental to the sexual assault?

**HOLDING:** No

**DISCUSSION:** Payne argued that he was entitled to the kidnapping exemption provided by KRS 509.050, because the restraint of the victim “did not go beyond that which occurred incidental to the sexual abuse.”

This Court employs a three-prong test to determine when the kidnapping exemption statute applies.<sup>6</sup> First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime. Essentially, “the appellant must jump through three hoops and the failure to jump through any one of the three hoops is a failure to establish his entitlement to the benefit of the exemption statute.” Application of the kidnapping exemption statute is determined on a case-by case basis.<sup>7</sup>

Since the underlying sexual charge was sexual abuse, which was “outside of the statute,” Payne satisfied the first prong. With respect to the second charge, the first act of sexual abuse occurred as soon as the victim approached Payne and he then dragged her inside and “locked the door, presumably so the second act of sexual abuse could be “perpetrated in a more clandestine manner.” She was not “restrained to achieve any separate objective.” It was “immediately with or incidental to” the initial sexual abuse. Payne satisfied the second prong. Finally, “interference with the victim's liberty must not go beyond that which would normally be incidental to the commission of the underlying crime.”

Reading the second and third prongs together:

... it seems evident that the intent of the latter two prongs is to ensure that the means of restraint effectuated in committing the underlying crime are of such a nature that they are a part of, or incident to, the act of committing the crime itself and, as such, temporally coincide with the commission of the crime. If the deprivation of liberty segues into a more pronounced, prolonged, or excessive detainment, then such restraint should no longer be within the confines of the exemption statute and the accused should be held separately accountable for those actions.

The “restraint was both brief in distance and close in time from the commission of the underlying offense.”<sup>8</sup> The Court agreed that Payne qualified for the exemption and reversed the conviction for kidnapping.

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<sup>6</sup> Griffin v. Com., 576 S.W.2d 514 (Ky. 1978).

<sup>7</sup> Gilbert v. Com., 637 S.W.2d 632 (Ky. 1982).

<sup>8</sup> Timmons v. Com., 555 S.W.2d 234 (Ky. 1977).

## PENAL CODE - KRS 511 - BURGLARY

### Paulley / Gunn v. Com., 323 S.W.3d 715 (Ky. 2010)

**FACTS:** Paulley and Gunn were accused of breaking into Stone's home, and during the break-in, murdering Brown. (Brown was holding the door from the inside to prevent the entry of multiple subjects who were trying to get in.) Several subjects involved took pleas; Gunn and Paulley stood trial for murder, burglary and related charges and were convicted. They appealed.

**ISSUE:**

- 1) Is crossing the threshold all that is required for a Burglary charge?
- 2) Is it appropriate to charge for Wanton Endangerment for every person in a household endangered by the conduct of the defendants?

**HOLDING:**

- 1) Yes
- 2) Yes

**DISCUSSION:** Paulley and Gunn both argued that "there was no evidence that either actually entered Stone's home." The evidence indicated that "at most, the front door of Stone's residence opened slightly when it was kicked by Gunn." As such, "Gunn's foot could have crossed the threshold when the door was ajar." The Court agreed that "the question of whether entry as slight as this" was enough for a burglary charge has not been adequately addressed in precedent, but the Court held that even such a slight entry was sufficient to support a burglary charge. The Court found only one case since the adoption of the current statute, Stamps v. Com., in which a suspect "penetrated in the 'air pockets of the concrete blocks' at the rear of the store" without actually entering the store.<sup>9</sup> In that case, the court found that no entry had occurred. However, the Court found that in this case, there was sufficient evidence to indicate that an entry, even if slight, had occurred and supported the conviction.

Gunn was also convicted of wanton endangerment, one count for each of the nine occupants of the house. The Court looked to West v. Com.,<sup>10</sup> in which the suspect fired three shots into a location occupied by seven people. The Court in that case agreed that when the situation was that "the shootings which endangered seven persons in total could be charged as seven separate offenses of wanton endangerment ." The Court noted that:

We have held that Kentucky's wanton endangerment statute is designed to protect "each and every person from each act coming within the definition of the statute. It is not a statute designed to punish a continuous course of conduct." So Gunn was properly charged with wanton endangerment as to each person who was inside Stone's home when Gunn fired into it.<sup>11</sup>

Gunn (alone) also argued that it was improper for the court to exclude a statement made by Paulley to the effect that another suspect (who had pled) fired the fatal shot. The trial court had ruled it to be inadmissible hearsay. Gunn argued that it should have been admitted under Chambers v. Mississippi,<sup>12</sup> but the Court noted that in that case, the statement was "self-incriminating," while in this situation, the statement incriminated another individual.

Although the Court found in favor of the Commonwealth in the above issues, the convictions were vacated due to unrelated errors in the jury selection. The cases were remanded for further proceedings.

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<sup>9</sup> 602 S.W.2d 172 (Ky.1980).

<sup>10</sup> 161 S.W.3d 331 (Ky. App. 2004).

<sup>11</sup> Hennemeyer v. Com., 580 S.W.2d 211 (Ky. 1979).

<sup>12</sup> 410 U.S. 284 (1973).

## PENAL CODE - 515 - ROBBERY

### Gamble v. Com., 319 S.W.3d 375 (Ky. 2010)

**FACTS:** On February 7, 2007, Gamble went into a Lexington bank “with his head and face covered.” The teller, Lindgren, pressed her silent alarm as the man approached her window. Dowdy, another bank employee, was nearby. Gamble passed Lindgren a note which indicated he had a gun and he also told her that verbally. She never saw a gun, however, but she placed money and a dye pack into a bag. Gamble’s hands were always visible during the exchange. Gamble was quickly captured and his aunt’s consent to search their shared apartment was obtained. Police found cash, the bait money and dye-stained clothing, along with the torn up note. No gun was ever found.

Gamble admitted to robbing the bank, but stated he did not actually have a gun. He denied making any verbal statements as well. He was indicted and tried, and the jury instructed on both degrees of robbery. He was convicted of Robbery 1<sup>st</sup> and appealed.

**ISSUE:** Does a statement that one has a gun raise the offense to Robbery 1<sup>st</sup>?

**HOLDING:** Yes

**DISCUSSION:** The Court found that it was reasonable for the jury to conclude that “Gamble specifically referenced a gun, threatened to use it, and implied that he would have used it had Lindgren not cooperated.” Although the Court agreed that the decision in Williams v. Com.<sup>13</sup> suggested otherwise, in that case, the suspect only implied the presence of a gun, while Gamble specifically stated he had a weapon.

The Court affirmed the conviction.

### Bryant v. Com., 2010 WL 1005902 (Ky. 2010)

**FACTS:** Bryant was charged with the Murder and Robbery of White, along with related charges. On the night of the murder, Bryant had spent the evening smoking crack; he left his apartment to meet White to obtain more. Bryant had been trying to get someone to front him some more cocaine and later admitted that he left the house without money. Bryant admitted to stabbing White, but claimed it was in self-defense. (A witness to the murder disputed that, and was later threatened by Bryant with the knife. The witness followed Bryant and directed responding officers to his location, which was the original apartment, apparently.) When officers entered the apartment, they found a knife (the murder weapon) under the bed. A twenty dollar bill was also found at the scene.

Bryant was indicted, convicted and appealed.

**ISSUE:** May Robbery be argued as a motive even without evidence of an actual or intended theft?

**HOLDING:** Yes

**DISCUSSION:** Despite any direct testimony that White took, or attempted to take, anything from White, the Court agreed it was a “fair, reasonable inference” on the part of the jury that the murder took place during a robbery. The circumstantial evidence was sufficient to conclude that Bryant was trying to get drugs from White without paying. The bill found at the scene could have indicated that Bryant went through White’s pockets, although it could have also supported Bryant’s assertion that it was proof that he wasn’t trying to take anything.

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<sup>13</sup> 721 S.W.2d 710 (Ky. 1986).

The Court affirmed the conviction.

**Hobson v. Com., 306 S.W.3d 478 (Ky. 2010)**

**FACTS:** On July 11, 2005, Hobson broke into a truck and stole items, including credit cards and an OL. He used the cards at several Ohio Wal-marts and attempted to use it at a Wal-mart in Ashland. The clerk realized it was a stolen card and delayed the sale so she could report it to a manager. Officer Schoch (Ashland PD) was in the store on an “unrelated police matter” and was summoned by the manager. He approached Hobson, who identified himself as the person on the OL. “When challenged that he looked nothing like the person pictured on the license,” he claimed to be the individual’s cousin and that he had permission to use the card. He agreed to accompany Schoch to the office to make a phone call to the owner of the ID, leaving behind all the merchandise at the checkout counter. Hobson then “suddenly bolted through the shopping cart door into the parking lot, and Schoch gave chase.” They struggled and Schoch’s ankle was badly broken. With the help of others, he was captured and arrested.

Hobson was indicted for Robbery and related offenses. He was convicted and appealed.

**ISSUE:** Does force used after a theft attempt has been abandoned turn the crime into a Robbery?

**HOLDING:** No

**DISCUSSION:** Hobson argued that he could not be charged with Robbery because “at the time he used force against Schoch there had been an interruption of the theft, he had abandoned the theft, and thus the use of force did not occur during ‘the course of committing a theft.’” The Court noted that he was charged with First-Degree Robbery only because of the injury to Schoch – the “force he allegedly used to accomplish the theft was the force used against Schoch.”

The Court looked to earlier cases where the “use of force by the defendant did not occur prior to or contemporaneous with the attempted theft” but during the escape from the scene. Specifically, the Court looked at Williams v. Com., which was “squarely on point with the present case – the theft was unsuccessful, the use of force occurred during the escape phase after the stolen items had been abandoned, and after an expectation of accomplishing the contemplated theft had been given up.”<sup>14</sup> The court reviewed two other cases, Mack v. Com. and Bumphis v. Com., as well.<sup>15</sup> The Court agreed with the trio of cases “to the extent they recognize that an act of theft extends through the thief’s getaway attempt, or escape.” In this case, at the point he used force, he “knew that his purpose had been foiled” as the “merchandise he intended to steal had long been left at the checkout counter.” Hobson did not use force to accomplish the theft, but to “avoid arrest and prosecution.” The Court reversed the conviction. Since no instructions were given on other potential charges (such as Theft and apparently Assault in the 3<sup>rd</sup> Degree), the trial court was ordered to enter judgment in Hobson’s favor on the remaining issues.

**Hamm. v. Com., 2010 WL 1006279 (Ky. 2010)**

**FACTS:** Hamm was accused of robbing several persons at gunpoint in Lexington, on February 7, 2006. The gun was stolen from the father of a friend. Hamm was captured near the scene, arrested and ultimately charged with Robbery. He was convicted and appealed.

**ISSUE:** For a Robbery charge, is an inoperable antique weapon a deadly weapon?

**HOLDING:** Yes

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<sup>14</sup> 730 S.W.2d 935 (Ky. App. 1987).

<sup>15</sup> 136 S.W.3d 434 (Ky. 2004); 235 S.W.3d 562 (Ky. App. 2007).

**DISCUSSION:** Hamm argued that the weapon was a military relic that could not be fired, and thus could not be a deadly weapon under Kentucky law. The Court noted that the weapon "was not a toy gun; nor, was it a non-firing replica or facsimile of a gun." As such, an instruction on Robbery 1<sup>st</sup> was appropriate.

With respect to the show up, in which Hamm was identified, the Court agreed that:

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process.<sup>16</sup> "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive." If they were not, the analysis ends and the identification testimony is allowed. If the pretrial identification procedure is suggestive, "the identification may still be admissible if `under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive .' <sup>17</sup> Determining whether, under the totality of the circumstances, the identification was reliable requires consideration of five factors enumerated by the United States Supreme Court in Biggers. The five factors are : (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation . This Court adopted these factors in Savage v. Commonwealth.<sup>18</sup>

In this case, the Court found that the Biggers factors were properly applied and weighed heavily in favor of the reliability of the identifications. The Court upheld the denial of Hamm's motion to suppress. Hamm's conviction was affirmed.

#### Hill / Bonner v. Com., 2010 WL 1133231 (Ky. App. 2010)

**FACTS:** Hill and Bonner were arrested for Robbery 1<sup>st</sup> of three people in a vehicle in Louisville, witnessed by the officers. Both fled when confronted and were captured nearby. Two guns were found in the same area where the pair was captured. Both were convicted and appealed.

**ISSUE:** Is the operability of a firearm used in a Robbery an affirmative defense?

**HOLDING:** Yes

**DISCUSSION:** Hill and Bonner argued that the Commonwealth failed to prove the weapons were operable and as such, he should have received a directed verdict. The Court noted that in Merritt v. Com.,<sup>19</sup> it had ruled that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him is" a deadly weapon. Although Merritt had been criticized, the Court ruled it was up to the Kentucky Supreme Court to overturn the earlier rulings. But in this case, the Court ruled that Hill and Bonner clearly had firearms in their possession. Further, in Thacker v. Com., the Court had ruled that proving operability was not required of the prosecution in a robbery charge.<sup>20</sup> However, it could be argued as an affirmative defense.

Hill and Bonner's convictions were upheld.

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<sup>16</sup> Dillingham v. Com., 995 S.W.2d 377 (Ky. 1999).(quoting Stewart v. Duckworth, 93 F.3d 262 (7th Cir.1996) and Neil v. Biggers, 409 U.S. 188 (1972)) .

<sup>17</sup> Id.

<sup>18</sup> 920 S.W. 2d 512 (Ky. 1995)

<sup>19</sup> 386 S.W.2d 727 (Ky. 1965); Kennedy v. Com., 544 S.W.2d 219 (Ky. 1976).

<sup>20</sup> 194 S.W.3d 287 (Ky. 2006)

**Wilburn v. Com., 312 S.W.3d 321 (Ky. 2010)**

**FACTS:** Wilburn (along with his brother and another individual) was accused of robbing a liquor store in Louisville, on April 18, 2007. During the robbery, the assailants attempted to fire their weapon but were unsuccessful. The clerk, however, was more prepared and fired at the robbers, who immediately fled. Police fanned out and searched for the robbers. Wilburn's accomplice, Terrance, was apprehended; he quickly confessed and identified Wilburn as the gunman. No gun was located on the subjects but an unloaded revolver was found nearby. Ammunition matching the weapon was found in the getaway car, which suggested the "Wilburn brothers may have simply forgotten to load the gun before the robbery attempt."

Both were charged with Burglary, Robbery and PFO. Wilburn was convicted and appealed.

**ISSUE:** Is entering an open establishment to commit a crime a burglary?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Wilburn argued that the burglary charge was inappropriate "because he did not enter or remain unlawfully on the premises of the liquor store." "He argued] that the liquor store [was] a public place that he was licensed to enter, and that he immediately fled following Bussman's gunshots, and so did not unlawfully remain once his license was revoked."

The Court agreed that:

Wilburn agrees that Bussman's firing of the gun at him was the functional equivalent of a personally communicated lawful order by an authorized person not to remain in the store, and that at that point Wilburn's license to remain in the store was revoked. KRS 511.090(2). However, at that juncture, Wilburn did not remain upon the premises; rather, he fled immediately. Based upon this fact, we must conclude that once his license to remain was revoked, Wilburn did not "remain unlawfully" upon the premises of the liquor store with the intent of committing a crime. It follows that his conviction must likewise fail under this provision of the first-degree burglary statute. The Court reversed the Burglary conviction.

Wilburn also argued that Robbery 1st was an invalid charge, because the weapon was unloaded. The Court launched an extended discussion on the issue, and concluded that:

KRS 500.080(4)(b)'s definition of "deadly weapon" as a reference generally to the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury. A .38 caliber revolver, operable or not, falls into that class of weapons. A toy gun or a water pistol does not.

Therefore, Wilburn was armed with a deadly weapon within the meaning of 515.020(1)(b) and he was not entitled to a directed verdict. The Court affirmed his conviction for Robbery.

**PENAL CODE – KRS 520 – PROMOTING CONTRABAND**

**Taylor v. Com., 313 S.W.3d 563 (Ky. 2010)**

**FACTS:** Taylor was arrested and transported to the Montgomery County jail. The arresting officer asked him twice if he had marijuana (or presumably other contraband) on his person and warned him that taking it into the jail was a felony. Taylor denied it and the officer did not find any when he searched Taylor. Taylor was taken inside and the jailer searched him again, finding marijuana.

Taylor was indicted and tried for Promoting Contraband. He moved for suppression, which was denied. He was convicted and appealed. The Kentucky Court of Appeals affirmed his conviction. Taylor further appealed.

**ISSUE:** Is the taking of contraband (drugs) into a detention facility during an arrest considered voluntary?

**HOLDING:** Yes

**DISCUSSION:** Taylor argued that “a person does not knowingly and voluntarily take contraband into a detention facility when he is taken involuntarily into the facility.” The Court found that he “voluntarily took possession of and hid the contraband, and he could have disposed of it before entering the facility.” The Court agreed it put Taylor in a Catch-22 situation, but this did not make his actions involuntary. Had he disclosed the marijuana as a result of the arresting officer’s questioning, he would have incriminated himself, but he “made a conscious choice ... a gamble, and he lost.” “Asserting his right to not incriminate himself does not prevent the further investigation, nor the use of the fruits of that investigation.”

Taylor’s conviction was affirmed.

## **PENAL CODE- KRS 520 - FLEEING & EVADING**

### **Hooker v. Com., 2010 WL 4860672 (Ky. App. 2010)**

**FACTS:** On April 18, 2009, Officers Tye and Knuckles (Knox County agency) spotted a “motorbike driving toward them.” When it got to within 100 feet, it came to a stop and tried to turn around. Officer Tye approached to investigate. He pulled alongside and recognized Hooker, ordering him to stop. Hooker took off and sped past Officer Knuckles, who also recognized Hooker. Both officers pursued Hooker, who drove up onto a sidewalk, “almost wrecking, and disregard[ed] a stop sign without slowing down.” He drove alongside his mother’s house, “at which point Hooker’s brother ran off the front porch of the house in front of Officer Knuckle’s cruiser, yelling at cursing at him.” He chased the “cruiser down the street, yelling at [the officer].” The officers were not able to locate Hooker that day, but did make an arrest later.

Hooker was charged with Fleeing and Evading 1<sup>st</sup> and running the stop sign. He moved for suppression, which was denied. He was convicted and appealed.

**ISSUE:** Is a reasonable risk of potential harm sufficient for Fleeing and Evading 1<sup>st</sup>?

**HOLDING:** Yes

**DISCUSSION:** Hooker argued that the officers lacked a reasonable and articulable reason to stop him. The Court, however, noted that “no actual stop occurred” and therefore, “any evidence of illegal conduct on behalf of Hooker during the chase should not have been suppressed.” Looking to Taylor v. Com.<sup>21</sup> for guidance, the Court agreed that with the trial court’s rationale, since he did not stop he was not seized. With respect to the Fleeing and Evading charge, Hooker argued that there was insufficient evidence to find him guilty of creating a “substantial risk of serious physical injury or death to any person or property as a result of his flight.” He claimed that there were “no people or cars ... on the road or sidewalk that morning and no property was damaged.” The Court looked to Bell v. Com.<sup>22</sup> and Lawson v. Com.<sup>23</sup> and found the situation more similar to the latter. The Court agreed that his actions “created more than a ‘hypothetical’ risk that his flight could have resulted in serious physical injury or death. Hooker’s conviction was affirmed.

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<sup>21</sup> 125 S.W.3d 216 (Ky. 2003).

<sup>22</sup> 122 S.W. 3d 490 (Ky. 2003).

<sup>23</sup> 85 S.W.3d 571 (Ky. 2002).

## PENAL CODE - KRS 524 - INTIMIDATING A PARTICIPANT

### Moreland v. Com., 322 S.W.3d 66 (Ky. 2010)

**FACTS:** On November, 23, 2001, S.C. was sexually assaulted. On January 23, 2002, C.C. was also sexually assaulted, in essentially the same manner. Finally, on March 1, 2004, K.P. was sexually assaulted in the same area. Four years later, Moreland's mother sought an EPO against Moreland. She told the police that she thought he was responsible for the unsolved sexual assaults. She gave consent for a search of the home she had shared "on and off for several years" with her son. Officers collected a toothbrush and obtained a DNA sample which matched the semen found on all three victims. They obtained a search warrant and obtained a buccal (cheek) swab for DNA from Moreland. That profile also matched that of the DNA found on the victims.

Moreland was convicted of Burglary, Rape, Sodomy, Intimidating a Witness and Tampering with Physical Evidence. He appealed.

**ISSUE:** Must a person actually be a participant in a legal process in order for a threat to be sustained as Intimidating?

**HOLDING:** Yes

**DISCUSSION:** Moreland first argued that the charge of Intimidating a Participant was inappropriate. The Court noted that all three victims were threatened "to the effect that he would kill them if they called police." Moreland argued that the threats were "made to effectuate the sexual assaults and, therefore, could not sustain an independent intimidating charge." Further, there were "no legal proceedings in existence at the time the threats were made." The Court noted that the statute in question was amended between the second and the third crime. Prior to 2002, it was enough that the accused believe the individual may be called as a witness, "regardless of whether actual proceedings had been initiated or the defendant's knowledge of those proceedings." The current version, however, requires that the person actually be a participant in the legal process "at the time the offense is committed." The instructions were thus faulty with respect to the first two victims. As such, Moreland was entitled to acquittal on all three charges of Intimidating a Participant. The Court affirmed the remaining convictions for unrelated arguments relating to the jury.

## NON PENAL CODE – 218A - FIREARMS ENHANCEMENT

### Lee v. Com., 2010 WL 199402 (Ky. App. 2010)

**FACTS:** On July 6, 2004, KSP troopers "attempted to serve an emergency mental petition at Lee's residence" in Adair County. "Lee was not cooperative and even stated he wanted a 'shoot out' with police." Captain Hancock set up a command post and negotiated for ten hours. Eventually Lee surrendered, but not until he admitted he had guns in his home. Captain Hancock obtained an arrest warrant for Lee and a search warrant for his home.

During the search, a number of guns were found, including one sitting on the table next to the telephone Lee used during his negotiations. Only that weapon was proven to have been loaded at the time. KSP also located a large number of marijuana plants near the home. Lee was indicted on marijuana cultivation charges and that charge was elevated because of the proximity of the weapons.

Lee was convicted and appealed.

**ISSUE:** Does the proximity of operable weapons elevate the penalty in a KRS 218A offense?

**HOLDING:** Yes

**DISCUSSION:** Lee was given the firearms enhancement available under KRS 218A.992(1)(a). This statute requires that the weapon be possessed “in furtherance of the offense” - in this case, the marijuana cultivation. One of the ways to prove that nexus is to prove that Lee was in actual or constructive possession of a gun when arrested. Although the evidence did not prove actual possession, there was a reasonable inference that Lee had constructive possession of the guns in his home. Further, Lee had “expressed his willingness to use his firearms against law enforcement.” Lee argued that the guns were at some distance from the marijuana, which was outside. In addition, Lee argued that only one of the weapons was proven to be loaded, but the Court found that an “unloaded weapon is not the equivalent of an inoperable one.” There was nothing to indicate that the weapons were inoperable, although there was no proof that any but the handgun on the table was loaded.

Lee’s conviction was affirmed.

## **DOMESTIC VIOLENCE**

### **Hunter v. Mena, 302 S.W.3d 93 (Ky. App. 2010)**

**FACTS:** Candice (Mena) and Hunter lived together in Louisville for about 18 months. Hunter’s minor children and nephew (Christopher) also lived with them. Hunter discovered that Christopher and Mena “were involved in a romantic relationship” – and they left to stay with Christopher’s mother, who was Hunter’s sister. The next day, Hunter tried to convince Mena to return; she refused. . Hunter then, allegedly, stole Mena’s purse and had his niece physically attack and harass her. Hunter left the house and Mena fled to officers working an unrelated incident nearby. The officers moved her to a local shelter, but when Hunter pursued her, she called her mother. Her mother picked her up and they returned to her mother’s house in Indiana.

A few days later, Mena requested an EPO from Jefferson County. It was granted. A DVO hearing was held, resulting in the issuance of a DVO. An amended DVO was entered several days later. Hunter appealed.

**ISSUE:** Does leaving the state temporarily fleeing a relationship prevent someone from filing for a DVO?

**HOLDING:** No

**DISCUSSION:** Hunter argued first that Mena’s DVO could not be extended to protect Christopher. Due to the unusual nature of the relationships of the parties involved, and because Christopher’s mother, who did not live in Kentucky and thus could not file as his “next friend” under the statute (which requires that a “next friend” be a resident of the state), the Court agreed that Christopher could not be covered by Mena’s petition. (The Court noted that it did not believe the legislature had this situation in mind, and that it “more likely envisioned the protection of the child of a domestic violence perpetrator by the perpetrator’s partner who was not related to the child.”) As such, it struck provisions in the DVO protecting Christopher.

The Court, however, did not agree that the Family Court lacked jurisdiction since Mena had fled to Indiana and then returned to file the petition. The Court noted that she had been a resident of Kentucky and did not lose that status when she fled to Indiana. The Court noted that there is a difference between domicile and residence, and although she had temporarily changed her residence to her mother’s home, there was no indication she intended to abandon her legal domicile and legal status as a Kentuckian. In fact, Mena went to two other Kentucky locations before being driven to her mother’s house in Indiana. The Court agreed the Family Court had jurisdiction. The Court also agreed that there were sufficient facts to support the issuance of the DVO, with Mena’s and Christopher’s

testimony. Although Hunter provided conflicting evidence, the Court agreed that it is within the discretion of the trial court to “observe the parties and assess their credibility.”

The Court reversed the part of the DVO that applied to Christopher but allowed the remainder to stand. (The Court noted that during the pendency of the action, Christopher had turned 18 and could presumably file an action on his own behalf, should he believe it to be necessary.)

### **Duncan v. Tillis, 2010 WL 4026102 (Ky. App. 2010)**

**FACTS:** Duncan and Tillis were involved in a relationship in Indiana that resulted in the birth of a daughter, Brooklyn, in May, 2009. During their time together, Tillis allegedly “screamed and shoved Duncan onto a couch” causing pain. Tillis also, allegedly, struck the child “lightly on the mouth when she cried.” In November, 2009, Duncan returned to Kentucky and Tillis followed her to Lewis County, where they lived separately.

On February 17, 2010, Duncan requested a DVO, alleging:

*Zachary S. Tillis called my house threatening to come and take my daughter. He said that he didn't care who tried to stop him, he would f\*\*\* anyone in his way up. So I ask him to stop calling. He proceeded to call me 6 more times. I didn't answer the phone. Then on the 13<sup>th</sup> he continued to try and call from his cell phone number so I blocked that number then he started calling me from the B-mart [a convenience store] so I blocked that number. He keeps calling me from different numbers. I called and let the sherriffs (sic) office know. He is still calling and threatening me. He told me the last time that he called and I answered because he called from a different number, that him and his mom know people that wouldn't hesitate to kill me and my family and if Brooklyn got hurt in the process o (sic) well that is something I would have to live with if I lived becused (sic) I shouldn't be such a b\*\*\*\*.*

Duncan received an EPO. At the hearing, she testified as to the facts above, including alleged physical abuse that occurred in Indiana. She also testified that he “threw things and punched a hole in a closet door.” Tillis agreed he had pushed her onto the couch but denied physical abuse. The Court agreed that conduct met the prerequisites for filing a petition. The Court found that the only proof of domestic violence was the push onto the couch that occurred in Indiana. It agreed she could complain in Kentucky about what had occurred in Indiana “so long as she was a Kentucky resident at the time of her complaint.” The trial court, however, questioned Duncan's credibility concerning the alleged threats and found Duncan had not met her burden proving domestic violence.

Duncan appealed.

**ISSUE:** May minor incident that occurred in the past be sufficient to prove future potential for domestic violence?

**HOLDING:** No

**DISCUSSION:** The Court looked to KRS 403.750(1). it noted that the standard was whether Duncan had proven that “domestic violence and abuse have occurred and may again occur.” The Court reviewed the hearing record and the Court found no testimony of anything more than an allegation of a shove that had occurred more than three months earlier and which was not even mentioned in the EPO petition. The Court listened to recordings of some of the calls, the court “heard nothing but a father seeking information about his daughter” and it was “unimpressed.” The Court affirmed the dismissal of the petition.

**Harris v. Harston, 2010 WL 4026102 (Ky. App. 2010)**

**FACTS:** Harris and Harston lived together in Bowling Green.<sup>24</sup> Their relationship fell apart in March, 2010, when Harris moved in with his brother, who apparently lived next door to Harston. During numerous email and text messages, Harris accused Harston of “unethical practices and behavior relating to her duties as a physician.” He communicated with parties in cases in which Harston was involved. On April 17, he communicated with the DEA about accusations of Harston’s behavior and sent her a “barrage of text messages telling her that she would be arrested and would be unable to practice medicine.” He “called her names and indicated that he knew she was out in her daughter’s car while her daughter was at home.” He also stated that “you [are] history as a physician; and your suit [concerning her firing from a practice] is over.”

Harston sought and received an EPO. Because the order required Harris to be 1,000 feet from her, Harris was forced to move from his brother’s home. During the time between the EPO and the DVO hearing, Harris filed a complaint on Harston with KASPER and the Kentucky Board of Medical Licensure. At the hearing, Harston alleged four specific acts of domestic violence: that Harris “threw a king-sized Reese’s Cup at her,” that he “grabbed her arm and pushed her away from him,” that he “cornered her in the kitchen without touching her,” and that he “raised his arms while retrieving his personal belongings from her office.” She admitted that she invited him to spend the night after the third situation and that he accepted.

A DVO was issued and Harris appealed.

**ISSUE:** Are threats affecting someone’s business and license sufficient for domestic violence?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the standard for the issuance of a DVO under KRS 403.750. The Court found the situations listed to not rise to the level of domestic violence. Harston testified that he never physically harmed her and failed to prove any imminent fear “by evidence of a past pattern of serious abuse.” The Court noted that “logic dictates that if she had been fearful of [Harris], she would not have invited him to spend the night with her.” The alleged threats related to her medical practice and license, not to her person. There was some conflict about a personal threat (blowing her head off) but the person who reportedly repeated it to Harston denied having heard that statement. The Court also noted that it had “recently held that unwanted touching ‘alone does not satisfy the definition of domestic violence and abuse.’”<sup>25</sup> The Court acknowledged that her true motive seemed to be to prevent Harris from communicating his concerns to other agencies and that she asked for the order to be less restrictive (permitting him to return to his brother’s home next door), and to prohibit him from contacting the DEA and other agencies. The trial court “properly told [Harston] that that sort of protection from harassment does not come within the scope of Kentucky’s domestic violence statutes.”

The Court found the “statutory elements” to be “wholly absent” and noted that “harassing communications involving business relationships do not come within the scope of domestic violence protection.” The Court acknowledged the substantial impact the hasty issuance of an EPO or DVO could have. The Court vacated the order and remanded it for an order to dismiss the DVO.

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<sup>24</sup> Harston had been an attorney in Florida, Harris was a Kentucky physician who had been fired from the practice with which she was affiliated.

<sup>25</sup> Caudill v. Caudill, 318 S.W.3d 112 (Ky. App. 2010).

## DRIVING UNDER THE INFLUENCE

### Helton v. Com., 299 S.W.3d 555 (Ky. 2010)

**FACTS:** Helton was convicted of multiple counts of wanton murder and related charges, resulting from a car accident in which she was driving while under the influence of alcohol. At issue was the taking of a blood sample while she was unconscious at the hospital, at the request of responding Jessamine County deputy sheriffs. The sample tested at .16%. At trial, Helton moved for suppression, arguing that the taking of blood was in violation of KRS 189A.105(2)(b), but the Court found that her condition made her consent “statutory” under KRS 189A.103. She took a conditional guilty plea and appealed.

**ISSUE:** Is the Kentucky implied consent statute unconstitutional?

**HOLDING:** No

**DISCUSSION:** Helton argued that the two statutes were in conflict and that as a result, the deputies should have sought a warrant. The Court, however, noted that if a driver actually refuses the test, they have withdrawn consent, but that would subject them to other sanctions. “KRS 189A .105(2)(b) comes into play by requiring the officer to obtain a warrant before testing the suspect when a motor vehicle accident results in a fatality, as is the case here, unless the blood test ‘has already been done by consent’” The Court noted that consent is the “default rule,” and found a “statutorily implied consent” in that by driving in the state, a driver has given consent, unless explicitly revoked. A person physically unable to revoke is deemed “not to have withdrawn consent.” The Court then moved to her second argument, which is that implied consent testing is unconstitutional. The Court looked to Breithaupt v. Abram, in which the Court had held that the taking of a blood sample was a slight intrusion.<sup>26</sup> The closest case to the facts is Schmerber v. California, in which the Court had rejected non-search and seizure related arguments.<sup>27</sup> However, in Schmerber, the officers had other indicia of alcohol intoxication prior to forcing the test.

In the past, Georgia has held unconstitutional a similar statute that “allowed for testing of any person who had been involved in an accident resulting in serious injuries or fatalities.”<sup>28</sup> However, Kentucky’s case applies only when an officer has “reasonable grounds” to believe the subject has been driving under the influence, in contrast to Georgia’s, which permitted it with “any sufficiently serious accident.” “Nothing in the Kentucky implied consent statute allows it to be invoked merely because a person is involved in a serious accident” - “there must be some suspicion of driving under the influence before implied consent can be invoked.” The Court noted that “to pass constitutional muster, ‘reasonable grounds’ must equate at least to probable cause.” Because no testimony was taken on that issue, no proof was taken “about what the police knew at the time of the accident that gave them reasonable grounds to require such a test,” the Court did not rule on that issue. The Court agreed that if the officers had probable cause, the test was lawful, but since the “trial court did not engage in the whole analysis necessary,” it was required to vacate the decision and remand the case for a new suppression hearing to address that issue.

### Cowles v. Com., 2010 WL 392006 (Ky. App. 2010)

**FACTS:** On August 8, 2007, Cowles was riding his motorcycle home after drinking with a friend. He was clocked by Trooper Garyantes (KSP) at the speed of 85 mph in a 55 mph zone. The trooper went in pursuit.

When Cowles entered one of the busiest intersections in the county, he encountered two staggered vehicles in the two lanes in front of him. Cowles passed one vehicle and then switched lanes, without signaling, to pass the other vehicle. At this point, Garyantes’ radar showed Cowles was traveling at 90

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<sup>26</sup> 352 U.S. 432 (1957).

<sup>27</sup> 384 U.S. 757 (1966).

<sup>28</sup> Cooper v. State, 587 S.E.2d 605 (Ga. 2003).

m.p.h. With his lights and siren still activated, Garyantes continued to pursue Cowles, who turned around and looked at him. Garyantes signaled for Cowles to pull over, yet Cowles instead turned into a residential area, where he traveled at approximately 45-50 m.p.h. in a 25 m.p.h. speed zone. At the top of a hill, Cowles pulled over, turned off his engine, and dismounted his motorcycle. Garyantes exited his patrol car and approached Cowles, noticing a strong odor of alcohol on him. Garyantes then conducted three field sobriety tests, which Cowles failed. Garyantes, who said Cowles admitted to consuming beer, described Cowles as uncooperative and verbally combative. Cowles was arrested and taken to Hardin Memorial Hospital, where a blood sample was drawn. Subsequent testing revealed a blood alcohol (B.A.) level of 0.22.

Cowles was charged with Wanton Endangerment 2<sup>nd</sup>, DUI, Speeding and related traffic offenses.<sup>29</sup> He was convicted and appealed.

**ISSUE:** May a DUI case be made without Intoxilyzer results?

**HOLDING:** Yes

**DISCUSSION:** Cowles argued that it was hearsay for the trooper to state who drew the blood at the hospital and that it was not shown that a non-alcohol substance was used to clean the skin prior to the blood draw. The Court looked to Matthews v. Com.<sup>30</sup> and agreed that a proper foundation was laid to introduce the evidence. The Court ruled that it was properly established that the blood draw was presumed to be regular. Further, the Court noted, there was sufficient evidence even without the blood to indicate that Cowles was intoxicated and that prior case law had supported DUI charges even in the absence of breath testing results. Cowles's conviction was affirmed.

#### **Loveless v. Com., 2010 WL 2540179 (Ky. App. 2010)**

**FACTS:** On October 25, 2008, Loveless attended a party in Boone County. His friend, Adams, picked him up at about 11:30 p.m. Two cousins followed in another vehicle. As Adams entered the highway, he sped up to avoid being rear-ended but lost control of his vehicle and flipped over in a ditch. The people in the vehicle behind them stopped to render aid and observed both men get out of the car, but they could not tell which was driving. When police arrived, they "detected the odor of alcoholic beverages on or about Adams." Loveless appeared intoxicated. Adams stated the Loveless had been driving. Loveless first denied but eventually admitted he had been driving. He failed field sobriety tests and admitted to having taken Adderall.

Loveless was charged with DUI under aggravating circumstances along with a suspended license charge. The two trials were severed with the suspended OL charge tried first. However, although the only issue in that trial was whether Loveless was driving, the prosecution introduced evidence in that case as to his "lack of sobriety." Loveless was convicted and appealed.

**ISSUE:** Is intoxication relevant evidence in a suspended OL charge?

**HOLDING:** No

**DISCUSSION:** Although Loveless's attorney did not object at the time, Loveless argued that the admission was palpable error. The Court noted that:

KRS 189A.090 provides in relevant part that a person guilty of driving on a revoked or suspended license, third or subsequent offense within a five-year period, shall be guilty of a Class D felony and have his

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<sup>29</sup> He was charged with First Degree, but instructions on both were properly given to the jury.

<sup>30</sup> 44 S.W.3d 361 (Ky. 2001).

license revoked by the court for two years “unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of five (5) years.” KRS 189.090(2)(c). The indictment charged Loveless with the aggravating circumstance of operating while revoked or suspended while under the influence.

However, the presentation and instructions did not address the aggravating circumstances, The Court agreed that “evidence of Loveless’s lack of sobriety might ordinarily have been admissible to prove the aggravating circumstance (and to prove the DUI charge), but the Commonwealth moved to sever the DUI charge and then forego prosecution of the aggravating factor in the trial of the suspended license charge.” The Court found no relevance to the revoked or suspended charge in the case at bar since they were not pursuing the aggravating circumstances. The Court agreed that the evidence of intoxication may have swayed the jury to find against him on the suspended OL charge, as the “evidence was not overwhelming.” (The Court agreed, as well, that it was error to allow a “deputy sheriff to testify as to the effects of Adderall on the body of a person who has ingested it.”) Loveless’s conviction was reversed and the case remanded.

### Lee v. Com., 313 S.W.3d 555 (Ky. 2010)

**FACTS:** On November 28, 2007, at about 6:50 p.m., Lee was stopped in Hardin County. He was arrested for DUI and the Intoxilyzer returned a reading of .209. He requested a blood test and was taken to Hardin Memorial Hospital. The doctor refused to do the blood draw as there was “no medical basis” to do so. Lee was returned to jail. Ultimately he took a conditional plea after his motion to suppress was denied, the trial court ruling “that the police officer had made reasonable allowances for [Lee] to have a blood alcohol test and, therefore, was in compliance with the statute.” Lee appealed and the Circuit Court affirmed the trial court’s decision. Lee further appealed.

**ISSUE:** Must an officer take a subject for an independent test when the first location refuses to do the test, when the individual does not ask to be taken to another location?

**HOLDING:** No

**DISCUSSION:** The issue before the Court was whether the “actions of the police officer were sufficient to accommodate [Lee’s] right under KRS 189A.103(7) to have an independent blood test performed by ‘a person of his own choosing.’” In Com. v. Long, the court had “adopted the ‘totality of the circumstances’ approach to determine whether the officer made a reasonable effort to accommodate the request for independent testing.”<sup>31</sup> The Long Court had also approved five factors that were developed in a non-Kentucky case: “(1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused’s requests; (3) availability of police time and other resources; (4) location of requested facilities; and (5) opportunity and ability of accused to make arrangements personally for the testing.” In this case, the court noted, there was no indication that Lee “requested a particular medical provider for the test.” Nothing suggested that the officer “had reason to suspect that that hospital or that doctor would refuse to perform the test.”

The Court continued:

Two pivotal facts loom over this case:

First, there is no evidence that [Lee] requested a second test. Had he done so, then the five factors in Long would have been implicated. Secondly, there was no evidence of bad faith of the officer. More

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<sup>31</sup> 118 S.W.3d 178 (Ky. App. 2003).

particularly, there was no showing that the officer knew, or even had reason to know, that the doctor at Hardin Memorial would refuse to administer the test. Obviously, the officer had no authority over the refusing physician.

The Court also agreed that a subject charged with DUI is “required to be informed of their right to an independent test at least two different times.” But that was not an issue in this case because Lee “obviously knew of his rights by requesting an independent test.” The decision of the lower court was upheld.

**Sigretto v. Com., 2010 WL 1508166 (Ky. App. 2010)**

**FACTS:** On August 29, 2008, an Owen County deputy saw Sigretto driving erratically and stopped her. She was ultimately arrested for DUI and taken to the Owen County Hospital for a blood test. Sigretto was given 15 minutes to try to contact a lawyer and was unsuccessful, although she did talk to her brother. She was then asked to consent to a blood test and refused. About 5 minutes later she got a call back from an attorney, who advised her to take the test. She then told the deputy she would take the test but he did not allow her to do so. Sigretto argued at a subsequent hearing that she changed her mind within five minutes and that they were still at the hospital. When the trial court denied the motion, she took a conditional guilty plea and appealed. The Circuit Court upheld the trial court’s ruling and Sigretto further appealed.

**ISSUE:** Does a single refusal invoke the additional penalty?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the statute and noted that “a single refusal triggers the adverse consequences which are intended to promote compliance.” Nothing in the statute provided for a second chance. The Court agreed that the trial court “noted that if Sigretto were allowed to change her mind after 5 minutes, the question would be raised whether 7 or 9 or 11 minutes would also be close enough to allow for a recantation of an initial refusal.” The Court found requiring an officer “to wait for an accused to change his or her mind” ... “would lead to an absurd result by rendering the statutory language meaningless.” The court upheld the decisions of the lower courts.

**Com. v. Rhodes, 308 S.W.3d 720 (Ky. App. 2010)**

**FACTS:** On September 11, 2008, Officer Felinski (Lexington PD) stopped Rhodes and arrested her for DUI. As he was putting her in the car, “she became combative,” and fought against the seat belt. It took two officers to secure her. She was taken to the jail and into the Intoxilyzer room. She became belligerent and broke free from the officers holding her; they had to chase her down. She refused to walk back and fought being put into a chair. At one point, a third officer had to assist. “Officer Felinski testified that it was impossible for him to complete a reading of the implied consent warning to Rhodes despite trying on multiple occasions.” He stated that he “felt” that she would refuse to take the test even though he was never able to actually make the request. The trial court ruled that her actions constituted a refusal but the Circuit Court reversed that decision. The Commonwealth appealed.

**ISSUE:** Is a full reading of the implied consent required?

**HOLDING:** Yes

**DISCUSSION:** The Commonwealth sought an exception for a full reading of the implied consent warning for officers faced with unruly, belligerent subjects. The Court noted that the language of the statute made it mandatory to read the warning, but also noted “there is no statutory requirement that the defendants understand or acknowledge the reading of the implied consent warning.”

The Court continued:

In defending the decision not to read the implied consent warning to Rhodes, Officer Felinski stated that given Rhodes' conduct, he feared for his safety and that of the other officers. While [the Court] certainly sympathize[d] with the officers and under[stood] that their safety is of utmost importance, Rhodes was in handcuffs with three officers present, and [the Court did] not see how reading the warning to a handcuffed defendant would put the officers at any further risk.

The Court found the argument to be without merit and ruled that given that she "was never presented with the implied consent warning, she simply could not have refused to submit to the exam." The Court reversed the ruling against Rhodes.

**Steen v. Com., 318 S.W.3d 116 (Ky. App. 2010)**

**FACTS:** On May 4, 2007, Steen gave Lyle a ride home from work in Jefferson County. "That ride ended abruptly and tragically" with Lyle dead and Steen badly injured. At the hospital, Steen's blood alcohol was tested. The first sample was taken about an hour and twenty-five minutes after the wreck and the results were between .083 and .089. A second test by KSP was based on a sample taken 2 hours and ten minutes after the wreck, with a result of .07. The Medical Examiner extrapolated, using three different methods, what she believed Steen's BA was at the time of the collision, finding it to be somewhere between .10 and .11. She acknowledged that the calculations do not reflect the possibility that he ingested the alcohol just prior to the wreck and continued to absorb it afterwards but that it was the best she could do because they didn't have a more timely sample.

Steen was charged, and ultimately convicted, of Manslaughter. He appealed.

**ISSUE:** Is the actual level of intoxication critical for a charge under the wanton state of mind?

**HOLDING:** No

**DISCUSSION:** The Court found that despite the ME's ability to be more specific, that there was sufficient evidence to support a conviction for wanton conduct. Further, the Court noted, the "per se level of intoxication is not to be introduced in any case outside a prosecution for driving under the influence."<sup>32</sup> The Court noted that "there is no magic number for intoxication, the jury must determine based upon the facts and circumstances of the case if the driver was 'under the influence' sufficiently to have constituted wanton conduct."<sup>33</sup> Steen's conviction for Manslaughter 2<sup>nd</sup> was affirmed.

**Williams v. Com., 2010 WL 3927733 (Ky. App. 2010)**

**FACTS:** On November 6, 2005, Officer McLeod (Radcliff PD), saw a vehicle stopped in the road. He turned on his in-car camera and stopped to investigate. He learned the vehicle was registered to Williams. Because he had received no complaints about the car, Officer McLeod believed it had been there for only a short time. The car was unoccupied but Williams was standing outside the driver's side door. Young was standing outside the car on the passenger side. They admitted having been at a club, but explained they were arguing when the Officer McLeod arrived. Officer McLeod saw that the car was not running but the key was in the ignition. Williams sat in the driver's seat while the officer talked to Young. Eventually he gave Williams a PBT and field sobriety tests. When Williams failed both, he was arrested for DUI. He did not agree to Young (who was apparently sober enough to drive) having his car keys, but did agree she could wait in the car for a ride. While the officer was booking Williams, he also watched the video and noticed that while the officer had been talking to

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<sup>32</sup> Cormney v. Com., 943 S.W.2d 629 (Ky. 1996); Walden v. Com., 805 S.W.2d 102 (Ky. 1991).

<sup>33</sup> Overstreet v. Com., 522 S.W.2d 178 (Ky. 1975).

Young, Williams had “reached into his front pocket and tossed an object into a nearby field.” Officers subsequently found a small bag of marijuana where Williams had tossed the unknown object. Williams was indicted and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** May someone standing outside a car when first observed be shown to have been in sufficient control for a DUI charge?

**HOLDING:** Yes

**DISCUSSION:** Williams argued that the Commonwealth could not prove that he was “actually in control of the car.” He focused on the four elements laid out in Wells v. Com.:

... whether the person in the vehicle was asleep or awake; whether the vehicle's motor was running; the location of the vehicle and the circumstances surrounding how the vehicle arrived at the location; and the intent of the person behind the wheel.<sup>34</sup>

The Court, however, noted that the factors in Wells are not exclusive, but “merely suggestive and exhibit the need for a totality of the circumstances analysis.” The Court agreed that in this situation, there was a “fair probability” that Williams was driving the car. The Court found that although the “evidence may not amount to proof of DUI beyond a reasonable doubt, it certainly establishes a reasonable inference that Williams drove the car while intoxicated.” The Court affirmed the denial of Williams' suppression motion.

## FORFEITURE

Keeling v. Com., 326 S.W.3d 822 (Ky. App. 2010)

**FACTS:** Keeling was arrested (pursuant to a warrant) at a hotel room in McCracken County, for thefts that occurred in Hardin County. Drugs and items that had been recently purchased (using credit cards and checks taken in the thefts) were found in the room as well and the items were seized. Keeling was indicted on numerous offenses in McCracken County and took a plea agreement. (He was also indicted in Hardin County.) He then requested that all the property be returned to him. The Court denied that motion and Keeling appealed.

**ISSUE:** May forfeiture be ordered by a court in a different county from the initial crime?

**HOLDING:** Yes

**DISCUSSION:** Keeling argued that the items in question lacked any connection to McCracken County and that only Hardin County had jurisdiction to order the items forfeited. The Court, however, noted that since McCracken had *in personem* (personal) jurisdiction over Keeling, that was all that was required. He also argued that there was no proof that the items were connected to the thefts but the Court noted that Keeling had admitted to the arresting officer that “the property seized from his hotel room had been purchased with stolen credit cards and/or checks.” The Court found sufficient nexus between the items and the crime and upheld the seizure of the items.

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34709 S.W.2d 847 (Ky. App. 1986).

## CONTROLLED SUBSTANCES

### Saxton v. Com., 315 S.W.3d 293 (Ky. 2010)

**FACTS:** On January 7, 2006, an informant arranged for Saxton to meet them at a motel that was close to the county high school. Saxton was convicted on multiple counts of Trafficking, including one count of Trafficking within 1,000 yards of a School, in Graves County. He appealed.

**ISSUE:** Must a drug seller know that there is a school nearby to be charged with Trafficking near the school?

**HOLDING:** No

**DISCUSSION:** Saxton argued that the prosecution was required to prove that he “knowingly” did the sale within the prohibited distance from a school. The Court found there to be no mens rea (state of mind) requirement in KRS 218A.1411, and found that to be a deliberate action. Despite a lengthy argument, the Court agreed that the mental state according to trafficking was enough, and that it was unnecessary to prove that the actor knew of the proximity of the school, as that was not “conduct” in the usual meaning of the term. The Court concluded that “discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction.”<sup>35</sup> The Court would not read into the statute something that the General Assembly did not place there. He also argued that he was entitled to an entrapment argument since he did not select the location. The Court agreed that the “mere fact that the confidential informants set up the drug transaction for a location within 1,000 yards of a school does not suffice as probative evidence of entrapment to drug traffic in violation of KRS 218A .1411 .” The Court agreed that he was not entitled to an entrapment instruction to the jury. His conviction was affirmed.

**NOTE:** *The 2011 General Assembly amended KRS 218A.1411 and the prohibited distance from a school is now 1,000 feet.*

### Finn v. Com., 313 S.W.3d 89 (Ky. 2010)

**FACTS:** Finn was stopped in Laurel County and eventually convicted of DUI. The officers found a cigarette pack inside a work glove which contained marijuana and a glass pipe with suspected cocaine residue, along with a scouring pad. They also found a pen casing with residue. Finn agreed that he'd been smoking cocaine but stated that it was all gone. No drugs were found in his blood but urine tests were positive for cocaine. At trial, the lab technician testified that both items were positive for cocaine, but that “because police put the glass pipe and the pen casing inside the same evidence bag, it was possible that one had contaminated the other.” He also stated that the “actual amount of cocaine was on a microscopic level and could not be seen by the naked eye.” Finn was charged with Possession of a Controlled Substance and Paraphernalia. He was convicted of possession and appealed.

**ISSUE:** Is there a minimum amount of a controlled substance required to place a Possession charge?

**HOLDING:** No

**DISCUSSION:** Finn argued that the amount was so small that he could not be charged with its possession. The Court, however, stated that the “law did not require that the amount of cocaine or other controlled substance exceed some minimum quantity threshold.” “Possession of any amount -- no matter how small --- of a controlled substance suffices for a first-degree possession of controlled substances conviction so long as the person has knowingly and unlawfully possessed the substance.”

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<sup>35</sup> Toy v. Coca Cola Enterprises, 274 S.W.3d 433 (Ky. 2008).

The Court continued:

We recognize that the mere possession of microscopic amounts of a controlled substance, by itself, without evidence that the defendant knew he possessed such a substance, would not satisfy the statutory elements of first degree possession of a controlled substance. But when a defendant possesses even a microscopic trace or residue of a controlled substance and the evidence shows that the defendant knowingly possessed it, we find no error in the defendant being convicted of first-degree possession of a controlled substance.

The Court agreed that it was not necessary for the prosecution to “directly prove that the defendant was in possession of the substance in a measurable quantity or a quantity visible to the naked eye when other evidence shows that the defendant knowingly possessed a controlled substance without legal justification.” Finn’s conviction was affirmed.

## ARREST

### Neal v. Com., 2010 WL 890033 (Ky. App. 2010)

**FACTS:** On December 11, 2007, Officer Kirk (Clay City PD) responded to a possible DUI call. He found the vehicle in a parking lot but first observed Neal standing on the front porch of his apartment. Officer Kirk saw Neal put a small cooler down and reach into a pocket for a key. Officer Kirk approached and smelled the odor of an alcoholic beverage. Neal admitted he’d consumed several drinks on his way home, his eyes were “red, glassy, and blood-shot and ... his speech was slurred.” The hood of the vehicle was still warm. Officer Kirk arrested Neal for Alcohol Intoxication but agreed to let Neal go inside to use the bathroom and call his girlfriend. However, Officer Kirk observed Neal take a “small bundle from his trouser pocket and slide it under the bed sheet.” Kirk retrieved it, finding 100 Xanax pills, and Neal was charged accordingly. At trial, Neal argued the officer lacked probable cause to arrest him and that as such, the drugs were inadmissible. The trial court disagreed. Ultimately, Neal took a conditional guilty plea and appealed.

**ISSUE:** Is the front porch a public place for purposes of an Alcohol Intoxication arrest?

**HOLDING:** Yes

**DISCUSSION:** Neal argued that Officer Kirk could only lawfully arrest him for AI if the violation had been committed in Kirk’s presence. Since that was not the case, he argued the arrest, and subsequent discovery of the pills, was unlawful. The Court concluded that a front porch, although on private property, was a public place under the meaning of the statute in question, pursuant to Quintana v. Com.<sup>36</sup> There was nothing on the front porch that would have impeded the public’s ready access to his front door - “no fence, no gate, no dog, no signage.” Since the Court found that arrest lawful, the evidence subsequently collected was admissible. Neal’s plea was affirmed.

### Ball v. Com., 2010 WL 1005944 (Ky. 2010)

**FACTS:** On August 5, 2007, at about 1 a.m., Deputy Allison (Bath County SD) responded to a disturbance call at a local BP station which was closed. As he arrived, he spotted a person later identified as Ball walking through the parking lot and entering what was later determined to be his own property. There Ball took a drink, poured some of the liquid on the ground and took another drink. Allison intended to leave, but then saw that Bath was sitting on his front porch drinking a beer. He apparently believed that to be illegal (Bath is dry) so he went back. He got out of his car to talk to Ball and another individual Albertson, who was also sitting on the porch steps.

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<sup>36</sup> 276 S.W.3d 753 (Ky. 2008).

As Allison questioned the men, he noticed that Ball smelled of alcohol, that his speech was slurred, that he was uncooperative in answering questions, and that his answers were "nonsensical." Based upon these factors, Allison concluded that Ball was intoxicated. Although Ball was on his own porch, according to his suppression hearing testimony, it appears that Allison believed that the appellant was in violation of the public intoxication statute, KRS 222.202 .

Ball decided he needed a cigarette and stated he was going inside. Allison told him to stay where he was; he'd made the decision to arrest Ball - although he had not yet told him so. Ball went into the house and Allison followed him, attempting to handcuff him. "Ball pulled away, took a few steps back, and removed a knife from his back pocket." The ensuing struggle took them "out the front door, off the porch, and into the yard." Both men were injured and Ball was taken to the hospital. He was indicted for Wanton Endangerment and Assault, as well as PFO. Ball moved for suppression, arguing that Allison had illegally entered the residence. At a hearing, the court returned a confusing order. When asked to clarify, the Court "reversed itself" and denied the motion. Ball was tried and convicted of Assault 3<sup>rd</sup> and PFO; he appealed.

**ISSUE:** May a subject being arrested use force to resist the arrest if they believe the arrest is unlawful?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Among other issues, the Court discussed the "imperfect self defense" argument - that Ball was allowed to use force to defend against Allison's entry and allegedly illegal arrest.

The Court continued:

An examination of KRS 503 .120(1) discloses that it contains no reference to its availability when, during the course of resisting arrest, the actor uses physical force upon an officer. On the other hand, KRS 503.060(1) specifically addresses this situation. Under established rules of statutory construction, "when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails"<sup>37</sup>

Because KRS 503.060(1) specifically addresses the use of force by a person against a police officer in the course of an arrest, it follows that it must prevail over the more general statute, KRS 503.120(1) . Moreover, because 503.060(1) does not contain an exception for a wantonly held belief by an arrestee that he is entitled to use self-protection against an arresting officer, the imperfect self-defense provisions contained in KRS 503.120(1) are not applicable under the circumstances described in KRS 503.060(l)<sup>38</sup> .

Since there was no indication Allison was using unreasonable force, Ball had no legal right to resist that arrest, even if it proved to be unlawful. With respect to the statements he made inside the house and pulling the knife, the Court noted that Ball had pointed to no specific statements and would not address that issue. With respect to the knife, the Court noted that even if the entry and arrest were unlawful, the pulling of the knife was not the "fruit" of those illegalities. The knife was not the result of the "primary taint." After resolving several unrelated issues, the Court affirmed Ball's conviction.

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<sup>37</sup> Land v. Newsome, 614 S.W.2d 948 (Ky.1981); Com. v. Phon, 17 S.W .3d 106 (Ky. 2000); Withers v. University of Kentucky, 939 S.W .2d 340 (Ky. 1997).

<sup>38</sup> See also Baze v. Com., 965 S.W.2d 817, 822 (Ky. 1997); Stopher v. Com. , 57 S.W. 3d 787 (Ky. 2001) ("There is no right to use self-defense during an arrest. ") .

## SEARCH & SEIZURE – SEARCH WARRANT

Com. v. Pride, 302 S.W.3d 43 (Ky. 2010)

**FACTS:** On November 9, 2006, KSP requested a search warrant for Pride's residence. "The search warrant affidavit, given by Detective Sean McKinney, stated the following in support of the warrant:"

*On the 6th day of September, 2006, at approximately 11:00 a.m., affiant received information from: A Confidential Source of illegal narcotic activities in the Commonwealth of Kentucky. The Confidential Source stated that he knew a man by the name of Leslie Pride and that Pride was selling marijuana. The Source stated that Pride lived in Union County and told him that he had 240 female marijuana plants and priced the marijuana at \$600.00 per quarter pound. The Source stated that he knew Pride from previous employment and that the information received was told to him by Pride last summer (2005). The Affiant states that the Confidential Source has provided information on at least 3 marijuana investigations and that that information has resulted in ongoing criminal investigations and controlled purchases (not related to Pride). The Confidential Source has proven to be a reliable source of narcotics related information to the Kentucky State Police.*

*Acting on the information received, affiant conducted the following independent investigation: Affiant states he and Det. Matt Conley through vehicle and driver's license checks confirmed that Leslie Pride lived in Union County, KY and resided at 681 SR 365 in the Sturgis area. Affiant states that on November 7, 2006 Det. Conley and Det. Louis Weber drove back to the residence and obtained information from it and two comparison homes in the area for a utility records subpoena. Affiant states that he went to the Union County PVA Office and obtained property cards and information on three residences for comparison. Affiant states that he chose the two comparison homes based on geographic location, same utility company service, and being similar structures in both construction and size. Affiant states that he served a subpoena on Kentucky Utilities on November 7, 2006 for the utility records on all three residences.\*46 Affiant states that on November 8, 2006 he received faxed copies of those records from Kentucky Utilities. Affiant states that he provided those records to Det. Weber for review and graphing. Det. Weber is assigned to the Kentucky State Police Drug Enforcement/Special Investigations Section and has investigated several dozen indoor marijuana grow operations and has created a graphing system for the utility records. Affiant states that Det. Weber prepared the graphs for 2005 and 2006, and prepared a structural comparison on all three residences. Det. Weber concluded that based on the extremely high electric usage and indicative spiking of electric at 681 ST RT 365, it was his opinion that the records were consistent with an indoor marijuana grow. Det. Weber consulted with retired KSP Det. Mark Moore on November 9, 2006 regarding this investigation. Det. Moore, who is now assigned as a KSP Drug Task Force Officer, was assigned to the KSP Marijuana Operations Section from 1995 until his retirement in 2003. Det. Moore was provided copies of the graphs and structural comparison worksheet. Det. Moore also concluded that based on his experience and training, that the extremely high electrical usage was indicative of and consistent with an indoor marijuana grow....*

*Affiant further states that he has checked Leslie Pride's criminal history and determined that he was charged and convicted in Union County in 1995 for Trafficking in a Controlled Substance 1st Degree and sentence to 10 years. Affiant further states that Pride was charged and convicted in Union County in 1995 for 2-counts of Trafficking Controlled Substance 1st degree and possession of a handgun by a convicted felon. Pride was sentenced to another 10 years to run concurrent with the previous indictment....*

Pride's home was searched and a large amount of marijuana, along with other items related to marijuana trafficking, were found. Pride was indicted and moved for suppression, arguing, among other issues, that the testimony by a KU energy analyst on his behalf concerning the normal use of electricity for the area should have been given credibility. Further, the testimony from a KSP detective, that "had he known about the number of appliances" at Pride's home, he would have changed his opinion concerning the likelihood of a marijuana growing operation there, also fatally flawed the warrant. (The opinion also noted that there were issues with the houses used to compare electricity uses, one having been vacant for several months and the other having only two elderly residents - compared to Pride's home with five residents.) The trial court denied the motion and Pride took a conditional guilty plea. She appealed. The Court of Appeals reversed the trial court decision, finding that the CI's information was stale and the electricity comparison was flawed. The Commonwealth appealed.

**ISSUE:** May an electrical usage comparison be used to support a search warrant affidavit?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the standard for making this type of decision, the process outlined in Illinois v. Gates.<sup>39</sup> However, the Court of Appeals used the process in Ornelas v. U.S., which was more properly used for Terry and warrantless search cases.<sup>40</sup> Gates required the Court to look at the totality of the circumstances within the four corners of the affidavit, not look to extrinsic evidence. The Court noted that "suspicious electricity usage coupled with other information" can be enough for a warrant. The Court was unwilling to hold it "necessary for the police to undertake the kind of comprehensive investigation suggested by [Pride] before electricity records may be used." The process suggested, "forcing the police to interview the occupants of comparison houses, determine their lifestyle, and then determine in detail the appliance located in each house, could alert suspects to the investigation, and allow them time to destroy evidence." The Court agreed that the records indicated that the electricity usage overall at the Pride home was higher but also that there were spikes in the usage "which were indicative of a marijuana growing operation in Detective Weber's experience." Further, the affidavit apparently included specifics of the actual data. The Court found the warrant valid and reversed the decision of the Court of Appeals.

**Adams v. Com., 2010 WL 2025104 (Ky. 2010)**

**FACTS:** On February 17, 2008, Officer Parker (Madison County area agency) received a tip that Adams and Owens were manufacturing methamphetamine at a specific location. Owens owned the property but later claimed had not been staying there as he was evading an arrest warrant. Adams, however, was apparently residing there, although he denied it, claiming to have been living with his girlfriend elsewhere. Investigation revealed that Adams and Owens (and identified friends) had both been buying pseudophedrine in the area between August and October, 2007. Officers went to the house and found a number of people. Owens arrived in response to a call from one of the occupants. Adams was there and stated that he lived there. Officer Parker believed he smelled ether and found "on the cluttered porch" a "propane tank with a rubber hose attached and a jar containing a clear liquid." The officer knew both indicated the proximity of a lab. (The tank was later showed to be unrelated to any criminal activity.) Although Owens agreed to a search, the officers elected to get a search warrant. They found a number of items related to manufacturing and items containing residue. Both were charged. Adams moved for suppression, arguing that the warrant was flawed, but the trial court denied the motion. He appealed.

**ISSUE:** Will errors in a warrant invalidate it?

**HOLDING:** No (but see discussion)

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<sup>39</sup> 462 U.S. 213 (1983); See also Beemer v. Com., 665 S.W.2d 912 (Ky. 1984).

<sup>40</sup> 517 U.S. 690 (1996).

**DISCUSSION:** The Court reviewed the warrant, prepared by Officer Johnson. It read, in relevant part:

*... In plain view on the front porch Detective Parker observed a propane tank with a piece of hose sitting on the front porch and also detected an order [sic] that he believed to be ether, an item commonly used in the production of methamphetamine. At that time Detective Parker asked that [sic] occupants to exit the residence .*

*Your affiant responded to the residence after speaking with Detective Parker who stated that there were numerous persons at the residence. While at the residence your affiant observed a clear glass quart size jar with a clear unknown liquid sitting in plain view on the front porch. From training and experience your affiant knows that clear glass jars are frequently used in the production of methamphetamine. Also in plain view on the front porch your affiant observed the above described propane tank that is commonly uses [sic] with a gas grill. There was not a gas grill in the area of the propane tank and the gas grill was located on the opposite side of the porch. The propane tank had a plastic or rubber hose placed on the valve . Your affiant has also seen this used in the past in the process of manufacturing methamphetamine. The propane is used in the Birch Reduction process of manufacturing methamphetamine, and further used to make anhydrous ammonia which is an ingredient that is necessary for the illicit production of methamphetamine. Beside the propane tank, a piece of rubber or plastic hose was observed that had been fitted with a brass type fitting that appeared to be consistent with the valve on the propane tank on the porch.*

*From training and experience, your affiant knows that the above described items are commonly used by persons manufacturing methamphetamine using the Birch Reduction or "Nazi" method. The affiant has received Clandestine Laboratory Investigations Training from the Drug Enforcement Administration (DEA) and has been involved in the investigation of numerous Methamphetamine Labs and the arrest and prosecution of persons involved in manufacturing methamphetamine. From training and experience, the affiant knows that the above listed items are ingredients and items that are commonly utilized in the illicit manufacture of methamphetamine.*

The Court continued:

To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.<sup>41</sup> "Statements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken."<sup>42</sup> "After setting aside the affidavit's false material, if the remaining content of the affidavit is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search must be suppressed." "It is not enough for defendants to show that the affidavit contains false information; in order to obtain a Franks hearing, defendants must make a 'substantial preliminary showing' that the false statements originated with the government affiant, not with the informants, or that the government affiant repeated the stories of the [informant] with reckless indifference to the truth."<sup>43</sup> "[T]he fourth amendment does not require 'that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes may be garnered hastily.' "Under Franks, suppression is required only when the affiant deliberately lied or testified in reckless disregard of the truth."

The Court noted that although in this case, some of the items found were innocuous, "it does not follow that Officer Johnson intentionally or recklessly included false information in his affidavit." His observations were related truthfully, as were his corresponding statements linking the items to manufacturing. The issue of the ether smell was "more problematic," since no source for it was ever found. "While there [was] no readily apparent explanation

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<sup>41</sup> Com. v. Smith, 898 S.W.2d 496 (Ky. App. 1995) (citing Franks v. Delaware, 438 U.S 154 (1978)).

<sup>42</sup> U.S. v. Ayen, 997 F.2d 1150 (6th Cir. 1993) (citing Franks).

<sup>43</sup> U.S. v. Giacalone, 853 F.2d 470 (6th Cir. 1988).

for the absence of an apparent source of the smell," it was for the trial judge to decide upon his credibility. Even stricken from the warrant, however, there was still sufficient evidence to support it.

Adams also argued that it was improper to consider him in possession of the items found, but the Court agreed that for the purposes of KRS 218A, possession includes both constructive and actual possession. Although Adams denied at trial that he resided there, saying only that he "stayed there" on occasion, witnesses (including his friends and mother) testified to the contrary and evidence supported that he lived there. Adams's conviction was affirmed.

### **Hollan v. Com., 2010 WL 4025790 (Ky. App. 2010)**

**FACTS:** On September 20, 2004, Smith walked into the Breathitt County Sheriff's Office and told Deputy Turner "that he knew someone who was selling Oxycontin." Smith had not been an informant before. Turner gave Smith \$120 in marked bills and a tape recorder to make a buy. He searched Smith's person but not the car. Smith drove to Hollan's residence, with Turner following, and made a buy. After Smith left, they drove to a previously agreed upon location and Turner turned over two Oxycontin pills and the recorder. Turner did not search Smith or his car. Turner got a warrant, which stated that "(1) a confidential informant said Hollan was selling Oxycontin from his residence, and (2) Turner and the informant went to Hollan's residence where the informant bought two Oxycontin pills for \$120 as the deputy was watching said transaction." "A search of Hollan's home revealed a number of pills, a small bag of marijuana, a pill cutter, and two small insulin syringes." Hollan was indicted and moved to suppress. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** Is it necessary to substantiate information for a warrant provided by an unproven informant?

**HOLDING:** Yes

**DISCUSSION:** Hollan argued "that Smith's reliability as an informant was unknown and uncorroborated, and that accordingly, the warrant based upon the information he provided was defective." He asserted "that Turner failed to ensure credibility by failing to search Smith's car either before or after the transaction, and failing to search Smith himself after he came back from Hollan's house." In addition, the deputy did not actually witness the transaction, and if that was redacted, the warrant did not satisfy probable cause.

The Court noted that "that the test for sufficiency of an affidavit underlying a search warrant is a totality of the circumstances test, namely, whether given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>44</sup> It must also "establish a substantial basis for concluding that the contraband or evidence described will be found in the place to be searched."<sup>45</sup>

In this case, with an "informant whose reliability was unknown, and whose veracity had not been previously established," the "'controls' on the buy itself are of particular importance." Had the audiotape been usable, or the searches made, the situation might have been different. As such, "everything collected pursuant to the warrant should be suppressed." The Court found that the visual inspection and identification of pills not otherwise subjected to testing by the technician was sufficient and relevant. The Court, however, agreed that it was error to attempt to use an audiotape that was almost entirely inaudible and supported little of evidentiary value. Hollan's conviction was reversed.

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<sup>44</sup> Illinois v. Gates, 462 U.S. 213 (1983).

<sup>45</sup> Com. v. Hubble, 730 S.W.2d 532 (Ky. App. 1987).

**Sigler v. Com., 2010 WL 5018160 (Ky. App. 2010)**

**FACTS:** On October 13, 2008, Deputy Workins (Henderson County SO) was on his way home when he saw a “car swerve and drive into a ditch.” He followed the car and observed it pull into an apartment complex. Sigler got out of the car “with a black safe in his hands.” Deputy Workins identified himself and told Sigler to stop, but instead, Sigler ran into an apartment and tried to lock the screen door. He then ran through to the back and tried to unlock that door, with Workins right behind. When Workins unholstered his Taser, Sigler surrendered. (The residents of the apartment said they did not know Sigler.) Workins put Sigler in his cruiser, observing him to be “very nervous, sweating, rolling his eyes, grinding his teeth, and biting his lips.” He recognized these as being indications of drug use and Sigler actually told Workins “he had been awake for several days on methamphetamine.” He arrested Sigler for DUI. He asked about the safe, which Sigler claimed was not his - although he had a key to it in his possession. Deputy Workins got a warrant for the safe, which he described as a “case,” and found it to contain methamphetamine and paraphernalia. Because he did not know what it contained, he apparently checked off all of the possibilities on the warrant.<sup>46</sup> Sigler moved for suppression, which was denied. He took a conditional guilty plea, and appealed.

**ISSUE:** Is it necessary to be specific about the potential contents of a locked case for which probable cause indicates contains some type of contraband?

**HOLDING:** No

**DISCUSSION:** Sigler argued that the warrant was insufficient because it did not “describe the item to be seized with sufficient particularity.” Of course, the deputy did not know “what the locked safe contained” so “he listed multiple possibilities for its contents.” The Court agreed it was reasonable under the circumstances to believe the “safe was either stolen property or contained stolen property.” The Court found it unreasonable to expect the officer to list “any and all potential items” - or “every possible drug or weapon or criminal item.” The Court found the warrant sufficient and upheld the plea.

**SEARCH & SEIZURE – CONSENT**

**Piercy v. Com., 303 S.W.3d 492 (Ky. App. 2010)**

**FACTS:** On February 19, 2007, Detectives Russ and Coomer (Louisville Metro PD) were working on a narcotics investigation involving Piercy and his son. They had done surveillance on the home the men shared but no suspicious activity had been observed. On the date in question, however, they spotted Piercy leave his home and get into his van, which had an expired license plate and a cracked windshield. As Piercy pulled out, Det. Coomer stopped him. Det. Russ entered the alley from a side street and later testified that he saw Det. Coomer’s emergency lights. Piercy later stated that that he was not operating the vehicle, but simply unloading materials. The officers pulled in front of him and behind him and approached him on foot.

Piercy produced his license and registration upon request. The officers testified that they explained the complaints to Piercy and that they wanted to clear up the matter. Det. Coomer asked for consent to search the van and was denied. When Det. Russ determined there were no warrants, Det. Coomer told Piercy he was going to have his drug dog check the van. The dog alerted on Piercy and Det. Coomer found marijuana in Piercy’s pocket. The dog

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<sup>46</sup> The opinion said he listed five categories on the affidavit, as follows: stolen or embezzled property; property or things used as means of committing a crime; property or things in possession of a person who intends to use it as a means of committing a crime; property or things in possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime and property or things consisting of evidence which tends to show a crime has been committed or a particular person has committed a crime. However, since these are the categories that are actually pre-printed on the standard warrant affidavit and search warrant forms, it is more likely he simply checked them off. There is no indication that he actually listed other possibilities specifically.

also alerted on the van and marijuana was located inside the van. Det. Coomer asked if he could search the residence. Piercy stated he wanted to call his lawyer and walked toward the house, as the officers had taken his cell phone. The officers followed him inside. (Det. Cooper later stated that Piercy had given consent.) The officers smelled marijuana inside. The detectives sat at the table and filled out a consent to search form, which ultimately, Piercy declined to sign. He was finally allowed to call his attorney. While waiting for the attorney, Det. Coomer began to fill out a search warrant affidavit. Piercy's attorney arrived in about 15 minutes. She conversed with the officers but never asked them to leave. Other officers arrived; Coomer left and then returned with the search warrant. Drugs and related items were found during the search and Piercy was charged with Trafficking in marijuana and a controlled substance, and assorted other charges. He moved for suppression, which the trial court denied. Piercy took a conditional guilty plea and appealed.

**ISSUE:** May a subject's actions constitute consent?

**HOLDING:** Yes

**DISCUSSION:** First, Piercy argued that he was seized when the officers approached him and blocked in his vehicle. The Court, however, determined the "investigating officers had a reasonable, articulable suspicion that Piercy was about to drive a vehicle with expired tags." As such, the stop, if it was a seizure, was justified under Terry. The officer stated that Piercy did move the van and was inside the van when he was stopped. Piercy also told the officers that "he could not stay and had to leave because he was a hurry" – presumably in the vehicle. As such, although the Court disagreed the encounter was consensual, it still found it to be legal. Piercy did not challenge the search warrant itself, but instead argued that he did not consent to the officers' entry. The Court noted that the trial court had determined that the entry was with consent and the Piercy's "non-verbal conduct" – opening the door and allowing the officers to come inside and sit at his table - was acceptable.<sup>47</sup> Once the officers detected the marijuana, the officers had sufficient cause to obtain the warrant.<sup>48</sup> Once the Court agreed that the officers were properly in the home, the Court found that they had a right to be where they could smell the marijuana, and of course, they immediately recognized it as contraband. They properly obtained a warrant at that time. As such "all three requirements for the plain view/smell doctrine were met and Piercy did not have a privacy interest in the smell emanating from his residence."

The Court affirmed the denial of the suppression motion and Piercy's plea.

### **Stanfill v. Com., 2010 WL 1253223 (Ky. App. 2010)**

**FACTS:** On July 13, 2007, Officers Jackson and Garland (Pennyriple Narcotics Task Force), Officer Mighell (Calloway County SO) and Officer Hendricks (Probation and Parole), went to Stanfill's home. They were looking for two wanted fugitives. It was unclear who had initiated the search or provided the tip that the fugitives might be found at that location. When Jackson got out of his car, however, he saw several people and detected an "incredibly strong" odor he identified as ether. He thought it was coming from an outbuilding. He later testified that his training and experience indicated there was a methamphetamine lab in the area. Officer Jackson gathered everyone on the property. Stanfill stated he owned the property and lived in the main trailer with Keyes. He stated he did not own the outbuilding but did have some items there. He gave consent to search it. Officer Jackson opened a refrigerator sitting on the porch and found a drug generator and later stated that Stanfill "had a look of shock on his face when he saw the 'generator.'" Officer Jackson then arrested everyone.

Jackson had also noticed a "padlocked deep freezer behind the outbuilding and inquired as to its contents." Stanfill denied owning it but admitted that he had a key. He gave Officer Garland the keys and gave consent. They found "an illegally modified propane tank and a modified oxygen tank which tested positive for anhydrous ammonia."

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<sup>47</sup> U.S. v. Carter, 378 F.3d 584 (6<sup>th</sup> Cir. 2004).

<sup>48</sup> Cooper v. Com., 577 S.W.2d 34 (Ky. App. 1979).

Stanfill and Keyes were arrested. Pursuant to a search warrant, the officers searched and “found various items of drug paraphernalia, ingredients used to make methamphetamine, and some finished product.” Another man, Smith, was arrested for violating probation terms. At trial, the defense tried to implicate Smith in the crimes. Witnesses also testified that Smith was involved in methamphetamine and had cooked on Stanfill’s property, allegedly without Stanfill’s knowledge. (Smith supposedly “felt badly” about Stanfill’s arrest, but that he could not take responsibility because he faced a lengthy sentence for violating his probation.) Smith conceded at trial that he may have been on Stanfill’s property during the relevant time frame and had talked to Stanfill. He had skipped a meeting with Hendricks and was arrested for that violation. He agreed he’d been previously charged with methamphetamine trafficking. Thomas testified that she was on the property that day and that she and Keyes had smoked methamphetamine, but she stated that Stanfill was not around. Stanfill was convicted of various related charges and appealed.

**ISSUE:** Does common authority over an area permit a consent?

**HOLDING:** Yes

**DISCUSSION:** Stanfill first argued that the officers’ reasons for being on the property was pretextual because of the discrepancies in the testimony. The Court also failed to issue an order for the 911 and dispatch logs, although Stanfill was told he was entitled to them. However, Stanfill never formally asked for the material to be provided. The Court did not agree that the officers’ arrival “was improper or constituted a warrantless ‘search.’” There was no evidence that the officers “penetrated into those areas of Stanfill’s property where he had a reasonable expectation of privacy, or went beyond the ‘invadable’ curtilage.”<sup>49</sup> Once Jackson smelled ether, he was justified in questioning the individuals present at the scene. The Court noted that the officers did seize jars of a substance identified as ether but that they were destroyed before testing. The Court, however, agreed it was reasonable to accept that the officers had detected ether on the premises.

Stanfill also argued that the prosecution had failed to prove he could give a valid consent over the areas in question. The Court noted that “[t]he test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched.”<sup>50</sup> However, the Court stated, it was only necessary to explore whether Stanfill had common authority when he wasn’t the actual owner of the building, which he was. He also had a key to the locked freezer. Stanfill contested that he gave a voluntary consent of the freezer, since he was already in handcuffs by that time. The Court, however, gave credence to the testimony of the officers, all who stated that Stanfill gave consent - and further, had he refused, the officers stated they would have simply gotten a warrant. (They did not, however, share that intention with Stanfill.) The Court upheld the decision that the consent was voluntary.

Further:

Stanfill argued that the police testimony regarding the odor of ether was contradicted by certified weather reports which showed that wind patterns would have made it impossible for the officers to detect such an odor from the direction of the outbuilding. Stanfill submitted certified weather charts showing wind speeds, wind direction, and wind gusts for the date, time, and location in question, and asked the court to consider the charts as newly discovered evidence under CR 60.02(b). Stanfill also argued that 911 and police dispatch logs were never provided to him as he had requested. He contends that the logs were potentially exculpatory in nature because they could have contained information refuting the officers’ testimony that they were dispatched to Stanfill’s property to serve a warrant on a fugitive or fugitives.

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<sup>49</sup> Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

<sup>50</sup> Nourse v. Com., 177 S.W.3d 691 (Ky. 2005).

The Court, however, found that the charts were merely cumulative evidence and there was no indication that they would have changed the result. (The 911 and dispatch logs had already been addressed, as the Court noted that he never actually asked for an order for their production.) The Court upheld most of Stanfill's convictions, although it did find a minor error with one charge and dismissed that charge only.

**Cruces v. Com., 2010 WL 2788193 (Ky. App. 2010)**

**FACTS:** On October 18, 2008, Lexington police responded to a complaint that E.L., a 15 year old girl, had run away and was at the home of Cruces, her "adult boyfriend." Two officers, along with her mother, went to the apartment. They knocked and Cruces answered. Cruces spoke to E.L.'s mother in Spanish and also gave Officer McMinoway "verbal consent in Spanish for the police to enter the apartment, as well as consent in broken English and via body language." Officer Holland, however, stated that Castille opened the door and gave consent. When the officers entered, they found "four hispanic (sic) males in the living room." Officer Holland asked for consent from Castille to search the bedroom, which he gave. E.L. was found in the bedroom. Cruces was indicted for Rape and Sodomy 3rd. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** May a non-resident give a valid consent to enter a residence?

**HOLDING:** Yes

**DISCUSSION:** Cruces argued that "irrespective of whether Castille or Cruces allegedly gave consent to enter and search the apartment, the Commonwealth did not demonstrate that the individual giving consent had the apparent or actual authority to do so." The trial court had not given a specific ruling, but had "concluded that under the totality of the evidence, valid consent was given by one or both individuals." The Court noted that Castille supported Officer Holland's testimony, having given consent twice during the time the officers were present. The Court noted that Castille's two children were asleep in the bedroom where E.L. was found, "further bolstering the conclusion that he had actual or apparent authority to consent to the search of that area." The Court agreed that under either McMinoway's or Cruces' testimony, the consent was valid. Cruces' plea was upheld.

**Payton v. Com., 327 S.W.3d 468 (Ky. 2010)**

**FACTS:** On August 25, 2005, the Hardin County Cabinet for Families and Children received an anonymous tip about methamphetamine manufacturing in Grayson County at the Payton home. The social worker assigned asked Deputy Blanton (Grayson County SO) to assist. They went to the residence the next day, while the children were in school. Sharon Payton answered the knock and the social worker identified herself. Although there was some confusion as to the actual request, and whether they asked to come in, look around or search, it was undisputed that "Sharon threw her hands in the air, opened the door, and said, "Come on in." Nothing was found in plain view. The deputy went to the master bedroom, where he found Shawn Payton and Jody Mercer. Payton asked for a search warrant and the deputy replied that Sharon had given consent. Payton "responded "Fine" or "Well, okay." The deputy searched the room, lifting a mattress, and found foil containing methamphetamine. He patted down both men and found evidence on Mercer. He found additional pills (hydrocodone and oxycontin) in the living room. Mercer admitted the drugs all belonged to him, but "Shawn [Payton], in the spirit of cooperation, then directed the officers to his personal "stash" of marijuana."

Both Paytons were arrested. Shawn Payton moved for suppression, arguing the search was without consent but the trial court denied the motion. He took a conditional guilty plea and appealed.

**ISSUE:** Is an invitation to enter consent?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that “[p]recedent demands that courts consider whether a person consented to a search from the objective perspective of a reasonable officer, not from the subjective perception of the person searched.”<sup>51</sup> From similar fact scenarios, the Court believed “that an officer could reasonably believe that a suspect communicated consent to search by simply stating “come on in” in response to a request to enter and search, if that person did not expressly object to a search.” The Court found it sufficiently voluntary, and not coerced, as well. The Court agreed that Sharon was “apparently somewhat intoxicated and may have subjectively felt intimidated under the circumstances,” that there was no indication of “threats or promises or misrepresentations” made to her. The fact that she was “apparently not advised of her right to refuse consent to search” was “only one factor to be considered and is not in and of itself dispositive.”

Payton further argued “that implied consent by a party with an inferior interest in the residence is not effective where the suspect is present and refuses consent.” However, the court found no indication that Sharon’s interest in the residence was inferior, and there was no indication that Payton “clearly revoked his wife’s consent or objected to the search,” even though he initially asked about a warrant. The Court found that Georgia v. Randolph<sup>52</sup> did not apply in this situation and that the search was valid. The Court upheld the consent and Payton’s subsequent guilty plea.

## SEARCH & SEIZURE - CURTILAGE

### Johnson v. Com., 2010 WL 5018513 (Ky. App. 2010)

**FACTS:** On October 1, 2008, Officer King was dispatched to a residential burglary in Lexington. The victim described a person who had kicked in her back door and broke into a vehicle. In previous burglaries in the immediate area, the description of the suspect was the same but he had been riding a bicycle. The method of the break-ins was also similar. Later that day, the officer drove through the area, believing that the burglar must live nearby since he’d been on a bicycle previously. He spotted a car matching the general description and traced it to a nearby address. He followed the car to a shopping area but could not see who was driving it. Officer King went to the address and found a man, fitting the description of the suspect on the back porch. When they made eye contact, the man went inside. Officer King called for assistance to do a “knock and talk” at the address. Because guns had been stolen, he placed officers at the corners of the house as lookouts. When he knocked, no one answered. Another officer approached the back door and knocked, also. Officer King later “stated that in order for the other officer to get to the back door, the officer had to walk through a gate, which Officer King believed was open.” There was no sidewalk beside the house but a driveway led to the gate.

Johnson answered the back door. Officer King explained why they were there and asked for consent. Johnson agreed, explaining that he “lived in the basement of the home with his girlfriend, their two children, and the girlfriend’s mother.” The officers found items matching the proceeds of the burglary in the basement. The homeowner arrived and gave consent to a search of the entire house, during which more items from the burglaries were found. Officer King also later stated that “if Johnson had not opened the door, the officer planned to watch the house, wait for the owner, and obtain a search warrant.” After Johnson’s arrest, Officer May put together a photo pak that included Johnson’s photo. He used a computer program that used photos from Corrections to generate a lineup. One of the witnesses selected Johnson, one witness could make no ID and another narrowed it down to two, one of whom was Johnson. “Officer May told the court that the protocol was for the officer to read the directions for the lineup to the witnesses, have the witnesses read the directions themselves, have the witnesses sign that they had read the directions and, after doing so, view the lineup.” Johnson requested, and was denied, suppression. He then took a conditional guilty plea and appealed.

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<sup>51</sup> Florida v. Jimeno, 500 U.S. 248 (1991).

<sup>52</sup> 547 U.S. 103 (2006).

**ISSUE:** Under some circumstances, may officer approach the back door in a knock and talk?

**HOLDING:** Yes

**DISCUSSION:** The Court started with the issue of the “knock and talk” at the back door. The Court described it as follows: “knock and talk procedure is a proper police procedure and may be used to investigate the resident of the property, provided the officer goes only where he has a legal right to be.”<sup>53</sup> The usual procedure, however, “can be problematic when officers are not looking for assistance from the resident, but rather are using the procedure to look for evidence of wrongdoing by the resident and approach the home, as is the case here, to ask for consent to search.

The Court continued:

The concept of curtilage began in common law. It extends the same protection that a person has to the inside of the home to the area immediately surrounding the home.<sup>54</sup> Because police officers must walk onto the property and up to the house itself to reach the door to knock, as opposed to looking from the street or a public sidewalk, the part that is considered the residence’s curtilage becomes relevant. The United States Supreme Court recognized earlier that the Fourth Amendment protects the curtilage of a house, and the curtilage extends to the area that an individual would reasonably expect to be treated as the home itself.<sup>55</sup>

In Quintana, the Kentucky Supreme Court observed that Dunn established four analytical, non-exclusive factors which should be applied to solve curtilage questions. These factors are the proximity of the area to the home, whether the area is included in an enclosure with the home, how the area is used, and the steps the resident has taken to prevent observation from the people passing by. The Supreme Court then commented that “[b]ecause there is no expectation of privacy for anything that can be observed from outside the curtilage, either by sight or other senses, the focus of a knock and talk analysis must be on the right of access to private property within the curtilage.”

Applying the factors to the case at bar, the Court noted that the photos of the property indicated that “the property was located on a corner lot” and that “its location on the corner left the structure and its yard more exposed and accessible to the public.”

In fact, the back yard, back porch, and back door are in full view from the street and the sidewalk by the house. Although a lattice fence is found next to the side of the house by the back porch, the open design does not block a visual inspection of the back yard, back porch, or back door. The driveway on the side of the home leads up to the gate, back porch, and back door. In terms of the front door, the photographs depict no sidewalk and no worn path to the front door. Indeed, the closest path to the house when someone parks in the driveway is the back door. Finally, Officer King testified that at the time he used a “knock and talk” procedure, the back gate was open.

The Court noted, specifically, that “the back door was not enclosed, was used for access into the residence, was readily observable from the street and sidewalk because it was on a corner lot, and was not obscured by the lattice fence.” As such, the Court agreed the occupants could have had no expectation of privacy at the back door and that the “officers involved in the “knock and talk” procedure correctly interpreted the location of the back door as one in which they had the right of access to private property within the curtilage.”

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<sup>53</sup> Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

<sup>54</sup> U. S. v. Dunn, 480 U.S. 294 (1987).

<sup>55</sup> Oliver v. U. S. , 466 U.S. 170 (1984).

With respect to the photo ID, the court looked to King v. Com.,<sup>56</sup> which stated:

... [t]he determination of whether identification testimony violates a defendant's due process rights involves a two-step process.<sup>57</sup> "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive." If not, the analysis ends and the identification testimony is allowed. "If so, 'the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.'"<sup>58</sup>

The Court looked to the five factors in Neil v. Biggers: "1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and confrontation."<sup>59</sup> (These factors had been adopted in Kentucky in the case of Savage v. Com.<sup>60</sup>) The Court agreed that the witnesses properly met the Biggers factors and that the photopak was properly constructed. Johnson's pleas were affirmed.

### Parker v. Com., 2010 WL 5128662 (Ky. App. 2010)

**FACTS:** On August 4, 2008, Parker was visiting Padgett's home in Lexington. They were sitting on the porch (with a third man) when Officer Rothermund (Lexington PD) and a second officer approached the house to investigate drug activity. (They had been directed to the house by an identified woman who indicated she'd just bought crack cocaine from that house.) The officers searched Parker and found crack cocaine and marijuana; it was also learned he was the subject of an active bench warrant. Parker was arrested and indicted. At the suppression hearing, the testimony indicated that "Padgett's property was fenced-in, except for an opening in the fence (where a gate would be) facing the street." The Court also heard conflicting testimony on whether Parker consented to the search. The Court agreed (looking at what the officer reported) that Parker did not actually give consent, but agreed that the bench warrant would have ultimately been served, justifying the search under inevitable discovery. Parker was convicted and appealed.

**ISSUE:** May officer approach the front door on a knock and talk?

**HOLDING:** Yes

**DISCUSSION:** Parker argued that the "officers impermissibly entered the protected curtilage of the Padgett property." The Court looked to Quintana v. Com., which also concerned a knock and talk.<sup>61</sup> It recognized that certain areas of a property, including walkways, do not carry the same reasonable expectation of privacy because "they are open to plain view and are properly approachable by any member of the public," unless obvious steps are taken to prevent it. Since anyone could enter the front yard and approach the porch, police officers could also do so. The Quintana court called the area "invadable curtilage." The Court agreed the officer's entry was appropriate and Parker's conviction was upheld.

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<sup>56</sup> 142 S.W.3d 645 (Ky. 2004).

<sup>57</sup> Dillingham v. Com., 995 S.W.2d 377(Ky. 1999) quoting Thigpen v. Cory, 804 F.2d 893 (6th Cir.1986) Simmons v. U.S., 390 U.S. 377 (1968).

<sup>58</sup> Id. quoting Stewart v. Duckworth, 93 F.3d 262 (7th Cir. 1996).

<sup>59</sup> Supra.

<sup>60</sup> 920 S.W.2d 512 (Ky. 1995).

<sup>61</sup> 276 S.W.3d 753 (Ky. 2008).

## SEARCH & SEIZURE - PROTECTIVE SWEEP

### Guzman v. Com., 2010 WL 2010865 (Ky. 2010)

**FACTS:** On September 10, 2008, at about 1 a.m., Officer Krugler (Lexington PD) responded to a call from Wallace, Guzman's neighbor, who alleged Guzman was dealing in drugs and prostitution. The apartment was actually rented to Guzman's boyfriend, who was incarcerated. Officers interviewed Wallace, who claimed to have seen two men enter the apartment. As they were talking, one of the men, Demerit, left the Guzman apartment and the officers stopped him. He appeared to be high and told them he was just hanging out with a friend there. He gave consent and the officers searched his person and his vehicle, finding nothing.

The officers proceeded to the apartment to do a knock and talk. It took several minutes for Hendren, the other visitor, to answer the door. Officer Krugler later testified that "while she was waiting outside, she could hear moving inside the apartment and that she heard people walking around." When the door opened, Krugler "saw Guzman lying on a mattress on the floor that was directly in front of the door." Hendren admitted they had been having sex. Guzman gave consent for the officers to enter as she dressed under the covers. With the light on, Officer Krugler saw a blanket tacked over an interior door and asked if anyone else was there. Guzman replied that there wasn't, but Krugler did a "protective sweep of the apartment to ensure that there was no one who could harm the officers." In the kitchen she spotted a "large kitchen spoon" that was "burnt on the bottom," indicating narcotic use. She picked it up and saw white residue on it. Both Guzman and Hendren denied any knowledge of it. Krugler asked for consent to search for narcotics and Guzman asked "what would happen if she refused." Krugler responded that Officer McAllister would stay in the apartment while Krugler went to get a warrant – at which point Guzman gave consent. The officers searched, finding cocaine and paraphernalia. Guzman was charged and requested suppression. The Court denied the motion. Guzman took a conditional guilty plea and appealed.

**ISSUE:** Is a protective sweep proper when officers legitimately believe others might be present in a home where an investigation is taking place?

**HOLDING:** Yes

**DISCUSSION:** Guzman argued that the search was unlawful. The Court, however, noted that a "protective sweep is a recognized exception to the warrant requirement."<sup>62</sup> Such a sweep must be predicated by a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."<sup>63</sup> Looking at the combination of facts available and keeping in mind that "courts should use caution in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger," the Court agreed the sweep was proper. Guzman's plea was upheld.

## SEARCH & SEIZURE – ABANDONED PROPERTY

### Watkins v. Com., 307 S.W.3d 628 (Ky. 2010)

**FACTS:** On November 18, 2006, Officer Atkinson (Elkton PD) saw Watkins speeding through Todd County, in excess of 30 miles over the speed limit. He tried to stop the vehicle but Watkins sped away. "After what was apparently a relatively short, high-speed chase, [Watkins] spun out in the median of the highway and blew out a tire." He got out and tried to run away. Officer Atkinson called for backup and officers assisted in Watkins' capture. When he learned Watkins had been caught, Officer Atkins returned to Watkins's vehicle. Chief Marklin, who had stayed with the vehicle, learned that the "vehicle was owned by an unknown female in another town." Chief Marklin turned off the vehicle ignition.

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<sup>62</sup> Maryland v. Buie, 494 U.S. 325 (1990).

<sup>63</sup> See also U.S. v. Hatcher, 680 F.2d 438 (6<sup>th</sup> Cir. 1982).

Before having the vehicle towed, the officers conducted a search of both the interior of the car, as well as the trunk. In the trunk, they discovered marijuana and crack cocaine inside a red and white cooler. Therefore, the officers considered the search of the vehicle to be an inventory search prior to the arrival of the tow truck. Also, they were fulfilling a policy of the Elkton Police Department to tow all vehicles that are stranded on the 'travel portion' of the roadway.

Watkins moved for suppression, but the trial court concluded that he "lacked standing to challenge the search since he had abandoned the vehicle." It also found that the "search was properly conducted pursuant to an inventory exception to the warrant requirement." Watkins took a conditional guilty plea to numerous charges and appealed. The Court of Appeals affirmed and he further appealed.

**ISSUE:** Is a vehicle stranded (rather than parked) by a fleeing subject considered abandoned?

**HOLDING:** Yes

**DISCUSSION:** The Court chose to address the issue as one of an expectation of privacy with respect to abandoned property.<sup>64</sup> The Court found it clear that Watkins had abandoned the vehicle, because 1) it was owned by someone else, 2) he'd been in a high speed pursuit ending in damage to the car and he left the car running and with incriminating evidence in the trunk. It stretched "the imagination to the breaking point to believe that the fugitive [Watkins] would have returned to the disabled vehicle, changed the tire, and driven away."

Further:

Leaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property. When one or more persons are fleeing and evading law enforcement officers, who are in hot pursuit, and the car is stopped or becomes disabled and all occupants flee from the vehicle, that vehicle is considered abandoned and may be subject to a warrantless search.

Watkins's plea was upheld.

## **SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST**

### **Mash v. Com., 2010 WL 1005903 (Ky. 2010)**

**FACTS:** The investigation against Mash, in McCracken County, started with tips from two incarcerated informants. One of the two made a phone call to set up a sting and officers tracked the transaction. Det. Riddle approached when Mash arrived at the location of the transaction and identified himself. Mash appeared nervous and "stated he was there to see Dike." Upon being asked, Mash denied having weapons. Riddle attempted to pat him down and Mash pulled away. "Detective Riddle had to hold onto him to keep him still." The officer felt a large plastic baggie and a wad of currency, that he later testified he was 99% sure was cocaine - he was correct. Riddle arrested Mash, gave him Miranda rights and transported him. Det. Sgt. Carter (McCracken County SO) questioned him at the jail, gave him Miranda again and then took him to the sheriff's office. He testified that Mash admitted that he intended to exchange cocaine for sex. The deputies got a search warrant for Mash's home, and eventually, for his brother's home. They found a great deal of cocaine but Mash stated it was for personal use. Mash was convicted of Trafficking and related offenses and appealed.

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<sup>64</sup> California v. Greenwood, 486 U.S. 35 (1988).

**ISSUE:** Is a search incident to arrest made just prior to the actual arrest, but contemporaneous with it, permitted?

**HOLDING:** Yes

**DISCUSSION:** Mash argued that "Detective Riddle's warrantless pat down of [Mash], and his emptying [Mash's] pockets" violated the Fourth Amendment." The Commonwealth argued it was a legitimate search incident to arrest. The Court agreed that "the tips, coming as they did from known informants, contained 'sufficient objective indicia of reliability.'" The two tipsters came forward independently and demonstrated sufficient personal knowledge of the situation.

Further:

As Detective Riddle had the legal and constitutional authority to arrest [Mash], it follows that his search of [Mash's] pockets was a legitimate search incident to arrest. While [Mash] insists that a search incident to a lawful arrest must logically occur after the arrest, he admits his position is contrary to the rulings of both this Court and the United States Supreme Court.<sup>65</sup> It is immaterial whether police choose to search immediately after or prior to arresting a suspect. "A warrantless search preceding arrest is reasonable under the Fourth Amendment so long as probable cause to arrest existed before the search, and the arrest and the search were substantially contemporaneous."

Mash also argued that Sgt. Carter's testimony about how much cocaine would constitute trafficking was improper. The Court noted that:

Contrary to Detective Carter's testimony, possession with the intent to transfer does not fall within the definition of trafficking pronounced in KRS 218A.010(40) . "Traffic" is defined as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." "Noticeably absent from this statutory definition" is "[possess] with the intent to . . . transfer," the language used by Detective Carter.<sup>66</sup> Detective Carter announced an additional form of liability-possession with intent to transfer-on which the jury was not permitted to convict .

Unfortunately, the Court concluded that his testimony was inadmissible, but fortunately, concluded that his misstatement of the law did not unduly prejudice the jury. The Court deduced:

... that the jury agreed with the Commonwealth that Appellant intended to trade cocaine for sex. Such an exchange clearly falls within the meaning of "sell" as defined in the jury instructions: "to dispose of a controlled substance to another person for payment or other consideration." (Emphasis added) .<sup>4</sup> It also fits the substantially similar statutory language : "to dispose of a controlled substance to another person for consideration . . . . KRS 218A.010(36) . The jury likely found that Appellant intended to dispose of the cocaine to Olivia Dike in exchange for "other consideration."

Mash's conviction was affirmed.

### **Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010)**

**FACTS:** On January 2, 2007, Marshall was stopped by Officer Schwartz (Lexington PD). The officer believed that Marshall was the subject of an outstanding warrant. Because he knew from prior contact that

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<sup>65</sup> See Rawlings v. Kentucky, 448 U.S. 98 (1980).

<sup>66</sup> Com. v. Rodefer, 189 S.W.3d 550 (Ky. 2006).

Marshall was usually armed, he elected to wait for backup, but when it arrived, he had lost sight of Marshall. While searching for him:

... the officers encountered a frantic witness who informed them that [Marshall] was involved in a fracas inside a nearby apartment unit. As the officers approached the complex, Schwartz witnessed two women climbing out of the back window of the suspect apartment unit. The women stated that there was an altercation going on in the apartment and that they wanted to escape the situation. Schwartz and the other officers then proceeded to enter the apartment and could hear the confrontation upon arrival. As they proceeded through the apartment, Schwartz testified that he spotted [Marshall] toward the back of one of the rooms with his back-side partially turned toward Schwartz and with both hands down the front portion of his pants. All the while, another individual was yelling from inside the apartment "It's in his crotch-it's in his crotch!" Schwartz, fearing that he had just witnessed [Marshall] conceal a weapon in his groin area, placed [Marshall] in hand cuffs and performed a Terry frisk.

On direct examination, Schwartz testified that while performing the Terry frisk he felt a hard, rock-like substance in [Marshall]'s groin area, and, based on his five years' experience as a police officer, determined it "to be possibly crack cocaine.". In contrast, on cross-examination, Schwartz testified that upon feeling the golf ball sized object he "knew it to be crack cocaine based on all [his] experience with it." (emphasis added) . After hearing Schwartz's testimony, the trial court found that the officer immediately knew the item was contraband upon contact, that Schwartz did not manipulate the object when making his determination, or that there was insufficient evidence to show that the officer could have mistaken the object for a part of [Marshall's] anatomy.

Based upon evidence found, Marshall was convicted of trafficking in a controlled substance and bail jumping. He requested suppression and was denied. He took a conditional guilty plea and appealed. The Court of Appeals reversed the order "concentrating on the officer's testimony that the object could 'possibly' be crack cocaine." The Commonwealth appealed.

**ISSUE:** May an invasive search be done in a relatively public location?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The Court began:

Strip searches are not always appropriate and as noted above, even when "a person is validly arrested [or validly arrestable, that] does not mean that he is subject to any and all searches that the arresting officer may wish to conduct."<sup>67</sup> The rule is specifically applicable to strip searches, as they are extremely invasive and in fact will sometimes be totally improper, repugnant, and illegal.<sup>68</sup> Searches may not be conducted on the "mere chance that desired evidence might be obtained."<sup>69</sup> But there are situations where strip searches are necessary and particularly so where the officer has probable cause to specifically search such a private area to preserve or prevent the destruction of evidence or to discover a concealed weapon. Such were the facts surrounding our holding in Williams v. Com.<sup>70</sup>, a decision based on events resembling those here.

In this case, the officers knew that Marshall was "actively selling drugs" and "tended to carry a weapon." Further, the Court noted that since Marshall placed it "in a location that makes the contraband immediately apparent to the

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<sup>67</sup> U.S. v. Mills, 472 F.2d 1231, 1234 (D.C. Cir. 1972) (en banc).

<sup>68</sup> See Stewart v. Lubbock County, 767 F.2d 153 (5th Cir.1985); see also Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir.1983).

<sup>69</sup> Schmerber v. California, 384 U.S. 757 (1966)) ; see also LaFave 8v Israel, Criminal Procedure § 3.5(c), at 177 (2d ed. 1992).

<sup>70</sup> 147 S.W.3d 1 (Ky. 2004).

plain feel of an officer's open hand, [Marshall] essentially positioned the contraband in what can be analogized as in 'plain view' of the officers." Further, as soon as he identified the substance as crack cocaine, the officer had probable cause to arrest and do a full search. In effect, the Court stated that once he felt the cocaine, he could have made the arrest, and the fact that he did not actually make the arrest until he retrieved the cocaine was immaterial. Marshall argued that the search, which took place in his apartment in a way that other occupants could have observed, was inappropriate. The court looked to the case of Bell v. Wolfish - and detailed the four factors used to balance the need for a particular search versus the personal rights potentially invaded.

First, the court looked to the scope of the particular intrusion. A strip search is only less invasive than a physical exam, a chemical exam or a cavity search. However, simply because it was done in the field did not make it "per se prohibited." The Court did note that "officers should be cautious when performing these types of searches, outside of a sanitary and secure police station." In this case, the officers "faced a dangerous situation" and the circumstances warranted a visual search of Marshall's groin and buttocks. Next, the search was conducted by trained officers who had likely done it before, and there was probably embarrassment (mental pain) to Marshall. However, the Court repeated "simply because an individual chooses to hide contraband in an intimate location and does so making it immediately apparent to police, he may not then complain that the officers searched his person in an inappropriate manner absent other aggravating circumstances." (The Court noted in a footnote that it would have been better had the officers "simply closed the door completely.") The search involved "minimal trauma and pain." The Court did not "necessitate specialized training" - the only knowledge need is supplied by commons sense and decency. The officers testified that the no one was in the line of sight of the door. The Court found there was sufficient justification to initiate the more intrusive search. Finally, the Court looked to the last Bell factor and considered "the location in which the police conducted the search." The Court continued: "Of all the factors considered so far, we find this factor most troubling, yet ultimately conclude that it was reasonable under the circumstances." The Court, however, "recognize that strip searches are necessary for a plethora of reasons, and we understand that in order to preserve the safety of officers, of the public and of evidence, they must sometimes be employed . But we also take this opportunity, as did the United States Supreme Court, to issue a caveat: these interests "hardly justify disrobing an arrestee on the street."<sup>71</sup> The court refused to suppress evidence based upon the unsupported assertion that the search was conducted in a manner potentially exposing Appellate to prospective onlookers. Where a search is conducted unnecessarily exposing an arrestee's naked body to the public, we will suppress absent the most extraordinary and bizarre circumstances-but conjecture without evidence will not be considered .

After applying the Bell factors, the Court concluded that the "need for the search outweighed the privacy considerations in this case." The Court of Appeals decision was reversed and the case remanded.

## SEARCH & SEIZURE - INEVITABLE DISCOVERY

### Hunt v. Com., 304 S.W.3d 15 (Ky. 2010)

**FACTS:** Hunt was accused and convicted of the murder of his wife. More facts are in the discussion, as needed.

**ISSUE:** Is it appropriate to seize evidence in anticipation of it being lost or destroyed?

**HOLDING:** Yes

**DISCUSSION:** Hunt raised numerous allegations of error. First, following the murder, he drove his vehicle into a nearby creek, where it was recovered. Before pulling the vehicle from the creek, one of the officers retrieved a shell

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<sup>71</sup> Illinois v. Lafayette, 462 U.S. 640 (1983).

casing from a precarious location on the window edge. The Court agreed that it was appropriate for the officer to do a cursory search and take possession of an item that would have inevitably have been discovered when the vehicle was searched pursuant to a warrant the next day. The Court agreed it had been discovered pursuant to a valid plain view and the potential destruction of the evidence (during the tow) validated the need to move it.<sup>72</sup> Hunt also argued as to the chain of custody of his clothing, which were tested and confirmed to have traces of his wife's blood. The investigator had taken the items home to dry before packaging and the Court agreed that there was "no realistic possibility that someone could have broken into Detective Thompson's wood shop and planted Bettina's blood" on the items. (The detective had taken the items there to dry them so they could be packaged as evidence.) Hunt also objected to an officer's characterization of a homemade item as a possible "silencer." It was objected to in an untimely manner, but the Court agreed that although the officer was not a firearms expert, it was a legitimate observation by an experienced officers. The error, if any, was not relevant. The Court also addressed comments made by several people during the trial that Hunt refused to talk and concluded that the statements were not an impermissible comment on his right to silence. After discussing a litany of other alleged errors, the Court affirmed Hunt's conviction.

## SEARCH & SEIZURE - EXIGENT ENTRY

### Taylor (fka Noonan) v. Com., 2010 WL 204093 (Ky. App. 2010)

**FACTS:** In the early morning hours of July 21, 2007, Mayfield PD was contacted by a CI concerning crack cocaine trafficking at a specific address, 219 W. Walnut St. They arranged for the CI to make a controlled buy. The CI purchased crack from an unidentified person at the residence and delivered it to the police as required. Corporal Farmer then sought a search warrant for 210 W. Walnut.<sup>73</sup> While waiting for it, the county attorney advised that "they could go into the residence and secure the premises while waiting for the warrant." Officers did so. Officer Keller later stated they "secured the residence because there's a lot of people - some people outside and a lot of people inside." The officers required everyone to go outside while they waited for the warrant. Taylor was there at the time and was reportedly "extremely intoxicated." She asked for permission to use the bathroom and was denied. Eventually, though, after also stating she needed to get her purse, she was able to talk the officers into letting her use the bathroom. She then wanted to take her purse outside, but Officer Keller insisted he had to search it first, because they "were going to have a crowd of people outside" with "a very few, limited officers." He found a rock of crack cocaine in the purse and Taylor was arrested. A little while later, the warrant was issued and the residence was searched. No incriminating evidence was found. Taylor was indicted and moved for suppression. When that was suppressed, she took a conditional guilty plea and appealed.

**ISSUE:** Is simply waiting for a warrant sufficient exigent circumstances to justify an entry?

**HOLDING:** No

**DISCUSSION:** Taylor first argued that the evidence should have been suppressed because "police unlawfully entered the subject property without a warrant and without the authority to enter implicitly conferred by the warrant requirement." The Court, however, recognized the entry as lawful under exigent circumstances, the potential imminent destruction as evidence.<sup>74</sup> That burden is "a 'heavy' one that requires the demonstration of an 'urgent need.'<sup>75</sup> The Commonwealth argued that the "evidence of drugs 'might' have disappeared if anyone had discovered the police had the house under surveillance." However, the Court found this speculative since nothing suggested that "anyone had discovered - or was even on the verge of discovering - that police had the residence in

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<sup>72</sup> Segura v. U.S., 468 U.S. 796 (1984).

<sup>73</sup> Apparently a typographical error in the opinion.

<sup>74</sup> Posey v. Com., 185 S.W.3d 170 (Ky. 2006).

<sup>75</sup> Welsh v. Wisconsin, 466 U.S. 740 (1984).

question under surveillance or that the evidence was in imminent danger of being destroyed.” The Court did not find this satisfied the “urgent need” to enter the residence at that time.

The Court agreed that “the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence’ before entering a home on the basis of exigent circumstances.” Further, because the “evidence uncovered here as a direct result of that entry and subsequent search of Taylor must be suppressed as “fruit of the poisonous tree” because the “exclusionary rule” prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment.”<sup>76</sup> The Court further agreed that other doctrines, such as independent source or inevitable discovery, did not apply, as there was no indication that the evidence would have been found otherwise - since there was nothing in the record that indicated whether Taylor was an occupant or a visitor to the house. If the latter, it was “unclear whether the search warrant would have authorized a search of Taylor’s personal effects - particularly given that the warrant did not specifically name any individuals as suspects or subject them to a search.” The Court reversed the denial of the suppression motion and remanded the case.

## SEARCH & SEIZURE – TERRY

### Bates v. Com., 2010 WL 4296617 (Ky. App. 2010)

**FACTS:** In June, 2008, Officers Schnelle, McBride and Thomas were on patrol, on bicycles, in downtown Lexington. They were detailed there to discourage thefts from parked vehicles and were “told to make their presence known” in the area. At about 2330, they saw Bates’s car “parked in a deserted area of a public parking lot;”- Bates was inside. The officers knew that patrons of nearby businesses would “sometimes go out to their vehicles and smoke marijuana or consume other drugs.” They approached the car, with officers on either side and in front. “Officer Schnelle placed himself six to eight feet in front of Bates’ vehicle” – later testified that “he believed Bates could have navigated around him.” Officer Thomas was looking into the car with a flashlight and Bates was “focused” on him. Bates was asked why he was there – first replying he was waiting for a friend but later stated he was waiting for his girlfriend. He said he’d left his OL at home. Officer McBride detected the odor of alcohol but could not tell if it was coming from Bates or just from inside the vehicle. When they asked Bates to get out, he rolled up the car window and announced he was going to call his lawyer. However, when Officer McBride prepared to break the window with his baton, Bates complied. With Bates outside, Officer McBride looked into the vehicle and “saw what his experience and training led him to believe was a bag containing an illegal controlled substance partially sticking out from the map pocket on the back of the passenger front seat.” It and a set of scales were retrieved and Bates was arrested. Bates moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** May officers hold a suspicious individual for further investigation?

**HOLDING:** Yes (if the officer has reasonable suspicion or probable cause)

**DISCUSSION:** Bates first argued “that he was surrounded by the police from the initial contact with him and was, therefore, illegally seized or detained.” The Court agreed that “there was substantial evidence in the form of the police officer’s testimony that had Bates wished to leave in the early moments of the encounter, he was free to go.” He then argued the officers lacked probable cause to “further detain him” and again, the court disagreed, finding his actions, in sequence, justified it. Once they spotted the illegal drugs, the officers had probable cause and the “automobile exception” applied.<sup>77</sup> The Court also justified the seizure under “plain view” as well – as the item was

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<sup>76</sup> Wong Sun v. U.S., 371 U.S. 471 (1963).

<sup>77</sup> Chambers v. Maroney, 399 U.S. 42 (1970); Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).

found in a place to which the officers were permitted to be, they had a lawful right to access it and the “incriminating character of the cocaine was immediately apparent to them.”<sup>78</sup>

**Lloyd v. Com., 2010 WL 4137427 (Ky. App. 2010)**

**FACTS:** On July 25, 2007, Officer Miracle (Louisville Metro PD) was on patrol in an area where a robbery had been reported. He saw a man (Lloyd) riding a bicycle “circling the area near the intersection.” He relayed that information to another officer, Koofer, and Koofer subsequently also observed Lloyd’s actions. After watching for a few minutes, Officer Miracle got out of his car and called for Lloyd to stop. Lloyd, however “immediately raced off on his bicycle” and Officer Miracle pursued in his cruiser. “At some point during the chase, Lloyd abandoned the bicycle and threw a silver object.” Officer Miracle, on foot at that time, continued the pursuit, but returned to the area and found a loaded revolver. Lloyd was charged with Fleeing and Evading and Possession of a Handgun by a Convicted Felon. He moved for suppression which was denied. The charges were severed and he was convicted on the handgun charge. He then pled guilty to the Fleeing and Evading charge. He appealed.

**ISSUE:** Is simply approaching a subject and asking to speak to them a Terry stop?

**HOLDING:** No

**DISCUSSION:** Lloyd argued that the officer lacked “any reasonable suspicion for the initial stop.” However, by taking an unconditional guilty plea to Fleeing and Eevading, he waived most defenses. (The Court noted that the gun wasn’t found during the initial stop anyway, but during Lloyd’s flight after the stop.) However, even if that wasn’t the case, the Court noted that “not every encounter with police officers amounts to a restraint on a person’s liberty.” In this case, the officer “merely approached Lloyd and signaled that he wanted to speak with him.” Even assuming that was a restraint, though, Lloyd’s flight indicated that he was not yielding to the officer’s show of authority. He abandoned the weapon before the actual seizure. Lloyd’s conviction was affirmed.

**Johnson v. Com., 2010 WL 4683559 (Ky. 2010)**

**FACTS:** On June 27, 2007, at about 0230, Lt. Sutton and Officer Curtsinger (Frankfort PD) were dispatched to a disturbance call. The location is known for high crime and the call involved a “late-night party with excessively loud music playing.” The officers could hear the music, originating from the parking lot, from a block away. They approached on foot, finding 20-30 people “milling around and drinking alcohol.” When a party-goer spotted them and shouted, some of the partiers put down their beers and fled. Only one car in the lot was occupied, the one “playing the piercingly loud music.” The officers approached the vehicle, from which Officer Curtsinger smelled the odor of marijuana. Johnson (the passenger) and the driver were the only occupants. The driver consented to a search of the car and both were asked to get out for “officer safety purposes.” Sutton later testified that he “smelled the odor of alcohol” coming from Johnson’s breath. He asked if Johnson had any weapons or contraband, which Johnson denied, and he further consented to a search. However, before getting out, Johnson was spotted attempting to leave something next to the seat in the car. Sutton told him to remove his hands from his pocket; Johnson initially complied but then put his hand back in his pocket. Sutton frisked him and “felt a bulge, approximately the size of a ping-pong ball” in the pocket where Johnson was reaching. Johnson tried to “jump over the roof of the car.” The officers finally subdued Johnson, after a struggle, some two car lengths away from the vehicle. Once handcuffed, the bulge was gone, but “a white substance wrapped in plastic, approximately the size of a ping-pong ball, was found in plain view within arm’s length” where the struggle occurred. It was later confirmed to be cocaine.

Johnson was charged, and convicted with Possession of a Controlled Substance 1<sup>st</sup>, Tampering with Physical Evidence, Fleeing or Evading 2<sup>nd</sup> and Resisting Arrest. He appealed.

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<sup>78</sup> Coolidge v. New Hampshire, 403 U.S. 443 (1971); Hazel v. Com., 833 S.W.2d (Ky. 1992).

**ISSUE:** Does the odor of marijuana justify an investigative detention?

**HOLDING:** Yes

**DISCUSSION:** Johnson argued that the police had “no reasonable suspicion to stop and search him.” However, the Court agreed that the circumstances warranted “further police investigation” and that his “attempt to escape” justified his arrest and subsequent search incident to arrest. The Court, however, found “no difficulty concluding that objectively, Sutton and Curtsinger had ‘specific and articulable facts’ justifying the brief seizure.” The Court agreed that in King v. Com., “[t]he odor of marijuana alone can justify the warrantless search of an automobile.” Logically, then, “if the odor of marijuana alone can justify a search, it follows that the odor of marijuana, in addition to the other factors indicating the potential presence of illegal activity, enables the officer to make a brief stop to investigate.” With respect to the frisk, the Court noted that it “must consider the facts available to the officer at [the] time.” The officers found an “overtly hostile crowd,” Officer Curtsinger was actually later attacked from behind, and they were “vastly outnumbered.” Johnson’s actions caused Sutton to be concerned for his safety and he had to take “swift measures” to discover what was going on. As such, the frisk was appropriate.

Finally, the Court agreed the arrest for Fleeing and Evading was appropriate and thus justified the subsequent search incident to arrest. On a side note, the Court held that it was not double jeopardy to convict of Fleeing and Evading and Resisting Arrest, even though they are similar offenses. Johnson’s convictions were affirmed.

### Shockley v. Com., 2010 WL 5018165 (Ky. App. 2010)

**FACTS:** On about July 21, 2007, Officer King (Louisville Metro) was off-duty, driving through a residential neighborhood at 6:45 a.m. He spotted Shockley walking down the street, wearing a leather jacket, and with the “barrel of a shotgun ... protruding from beneath the jacket.” He also saw what appeared to be blood on Shockley’s shirt. Since King was in his personal vehicle and not in uniform, he approached showing his wallet badge and with his firearm in hand. He ordered Shockley to get down and put down the gun, eventually he complied. Officer King called for assistance on his cell phone but when Shockley started to move around, King tossed the phone down, spurring dispatch to issue an alarm. Ultimately over 10 officers responded. Shockley told the officer he was turkey hunting, but King noted that wasn’t in season. Shockley then said he was also deer hunting and that his father was in the woods with him, and “would be along shortly.” He explained the blood as a result of being cut by briars. Shockley was searched. Among other items, officers found a revolver, jewelry and prescription bottles with a nearby address (and presumably a different name). The address was found to have been burglarized.

Shockley was indicted on Burglary and related charges. He moved for suppression, which was denied, He took a conditional guilty plea and appealed.

**ISSUE:** Is it appropriate to frisk an individual in possession of a firearm that he is apparently trying to conceal?

**HOLDING:** Yes

**DISCUSSION:** Shockley argued that his initial interaction with King exceeded the bounds of a Terry stop and “instead amounted to an arrest.” The Court found the evidence to support King’s belief that Shockley was both armed and dangerous and his actions were “appropriate to neutralize the threat of harm.” The Court agreed that once he was frisked, it was “entirely likely that Officer King recognized [the revolver, bullets and knives] through feel alone and removed them” for safety reasons. Once the revolver was discovered, an arrest was justified and the

remaining items would have been found through search incident to arrest. As such, the discovery of the items was inevitable.<sup>79</sup> The Court upheld Shockley's conviction.

## SEARCH & SEIZURE - ANONYMOUS TIP

### Brown v. Com., 2010 WL 3928151 (Ky. App. 2010)

**FACTS:** On June 16, 2007, Officer Burkett (Lexington PD) received an anonymous tip that "cars had been coming and going from an empty house" at a specific address. The caller described several individuals and noted that a man was "hiding in the bushes in front of the house." When the officer arrived, he saw people matching the descriptions walking away from the house and he called to them to stop. They turned and walked back into the house, passing by some shrubbery which obscured his view of their hands. Officer Williams arrived and spotted the man (Brown) hiding in the bushes. They were all stopped and questioned and it was discovered that Brown and a female subject both had outstanding warrants. They were both taken to jail. After the female subject was processed, Burkett realized that Brown "had a white powdery substance around his mouth and appeared to be chewing on something." Fearing that he had ingested crack, Burkett insisted Brown spit it out. Although the record did not indicate how, Burkett was able to collect what was in Brown's mouth as well as what he had spit out. Burkett found more in the cell. It was all collected in one evidence bag and sent off for testing, all was confirmed to be crack.

Brown was indicted and moved for suppression. The trial court upheld the stop at the first hearing. At a second hearing he argued that the crack cocaine evidence was subject to spoliation because it was all mixed together, thereby making it impossible for him to prove that what was in his mouth was not cocaine. (He argued the female subject had dropped what was found on the floor.) Burkett testified that Brown was alone in the cell the entire time and that everything that was collected came from Brown. The Court denied the suppression motion and Brown appealed on both points.

**ISSUE:** Does the discovery of an outstanding warrant cure the illegality of an initial stop?

**HOLDING:** Yes

**DISCUSSION:** Brown argued that the "the anonymous tip did not have sufficient detail, was not corroborated, and did not create reasonable articulable suspicion of criminal activity." The Court reviewed the evidence and found that Burkett had sufficient suspicion to justify the initial stop. However, it further noted that even without that, the "discovery that [Brown] had an outstanding warrant was an intervening circumstance that cured any possible illegality in the initial stop."<sup>80</sup> The validity of the warrant was not disputed. With respect to the drug evidence, the Court noted that "before a motion concerning 'spoliation of evidence' can result in a due process violation, a criminal defendant must show bad faith on the part of the police."<sup>81</sup> Even if the Court were to find that Burkett was negligent in the collection of the evidence, that was insufficient to "rise to the level of bad faith" required. Brown's pleas were affirmed.

### Abdul-Jalil v. Com., 324 S.W.3d 433 (Ky. App. 2010)

**FACTS:** On May 24, 2006, Louisville Metro Police (LMPD) received an anonymous tip by phone from someone "who claimed to have information about the location of a handgun used in a recent homicide." The vehicle and driver were described and the location where they could be found given. The caller also stated the gun used in the homicide would be in the car, and another vehicle wanted in connection with the crime also would be

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<sup>79</sup> Nix v. Williams, 467 U.S. 431 (1984).

<sup>80</sup> Birch v. Com., 203 S.W.3d 156 (Ky. App. 2006).

<sup>81</sup> Arizona v. Youngblood, 488 U.S. 51 (1988).

located there. Officer Hamilton set up surveillance and observed the vehicle arrive some four hours after the tip was received. He observed Abdul-Jalil arrive and then depart a short time later. Officer Hamilton followed him and stopped the car for minor traffic offenses. He saw the driver make some movements that suggested he was trying to hide something under the front passenger seat. He obtained the required documents and asked for consent, which was denied. During the process, Officer Hamilton had two conversations by phone with Det. Huffman, who was investigating the homicide. Since Officer Hamilton could not arrest Abdul-Jalil for the traffic offenses, he eventually removed him from the car and told him the car was being impounded - as he was not the actual owner of the vehicle. Abdul-Jalil was allowed to leave on foot.

A warrant was obtained and the car searched. A handgun was found, as was Abdul-Jalil's birth certificate. However, the handgun was not the one involved in the crime. Abdul-Jalil was indicted - although the opinion never specifies the offense the context indicates that he may have been a convicted felon and charged with possession of the handgun. He took a conditional guilty plea and appealed.

**ISSUE:** Must an anonymous tip be corroborated?

**HOLDING:** Yes

**DISCUSSION:** Abdul-Jalil argued that "the initial stop lacked the exigency needed to justify the seizure of the car." The Court noted:

To serve as a basis for probable cause for search and seizure purposes, an anonymous tip must contain information which has at least moderate indicia of reliability, as well as predictive components which can be independently corroborated by police observations.<sup>82</sup> The information to be corroborated cannot merely be information readily observable by any member of the general public and must "show that the tipster has knowledge of concealed criminal activity."

The Court continued, noting that "an investigatory stop of an individual based solely upon police corroboration of details which were readily observable by any member of the public [is] unconstitutional." Without more, the Court found that the tip was insufficient to support the stop and Abdul-Jalil's movements "did not corroborate any aspect of the anonymous tip, and certainly did not give rise to suspicion that evidence of a crime would be found anywhere in the car other than the area within his immediate control."

The Court made particular note:

It is true that the anonymous tipster in this case predicted that the person named in the tip would be found at the St. Xavier Street address as opposed to a tip that stated a person was currently at a certain address. This fact is essentially a non-issue considering the registered owner of the car lived at the address given and the driver of the car was the car owner's paramour. It is safe to assume that the car and driver in this case would eventually end up at the address given under normal circumstances. This tip, viewed in light of what the officer knew at the time of the impoundment, lacked enough information to give the officer a "reasonable basis for suspecting . . . unlawful conduct" sufficient to warrant the immediate impoundment of Abdul-Jalil's car.

In White, the Court "considered the level of corroboration needed to establish the reliability of an anonymous tip." That decision "turned on the fact that "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted."

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<sup>82</sup> Henson v. Com., 245 S.W.3d 745 (Ky. App. 2008); Alabama v. White, 496 U.S. 325 (1990); Florida v. J.L., 529 U.S. 266,(2000).

In this case, the Court noted that

None of the information given by the tipster in this case shows that the tipster had special knowledge of Abdul-Jalil's future actions other than the fact that he would eventually bring the car he was driving back to the residence of the owner of the car. The tip did not specify any timeframe during which this event would occur. The phrase "future actions of third parties ordinarily *not easily predicted*" used by the Court is particularly pertinent to the case at bar. As was stated before, it would be difficult to determine how many people possessed the knowledge given by the anonymous tipster in this case considering the car was found at its registered owner's home, and was driven by the registered owner's paramour. The level of predictive information given in the tip falls short of demonstrating any particularized knowledge that would not be available to those simply living on or frequenting St. Xavier Street.

With respect to the warrantless seizure and impoundment of the car, the Court looked to Wagner v. Com.<sup>83</sup> The Commonwealth offered Chambers v. Maroney<sup>84</sup> in support, which the Court agreed was "good law but ... misapplied to the case" at bar. For Chambers to apply, "probable cause must exist" - which does not in this case. The Court found the seizure (which resulted in the finding of the weapon) to be unsupported and reversed the trial court's decision.

## SEARCH & SEIZURE - VEHICLE STOP

### Wood v. Com., 2010 WL 3927699 (Ky. App. 2010)

**FACTS:** Hill noticed an overturned motorcycle in a field in Graves County. He saw a man and an injured woman in the field, so he called 911. While waiting for emergency responders, Hill saw a truck arrive and the woman being placed in the vehicle. The other man got on the motorcycle and followed the truck. KSP arrived and while the troopers were talking to Hill, a motorcycle fitting the description went past. Trooper Pervine stopped the vehicle and frisked Wood, the driver. He found methamphetamine and Wood was arrested. He was also charged for leaving the scene of an accident and related traffic offenses. Wood moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

**ISSUE:** May officers investigate single-vehicle wrecks under the community caretaking provisions?

**HOLDING:** Yes

**DISCUSSION:** Wood argued that Trooper Pervine did not have a "reasonable articulable suspicion that he was involved in criminal activity" so he "manufactured a reason to stop him by alleging he had violated KRS 189.580(1)(a), leaving the scene of an accident." He claimed this only applied "if he had been operating a vehicle that was involved in an accident." The court, however, agreed with the trial court's decision that the community caretaking provisions applied, because police regularly responded to traffic accidents without any idea as to whether a crime had actually occurred.<sup>85</sup> The Court found this a legitimate reason to stop Wood. The Court also agreed that the Terry frisk was justified, and upheld the guilty plea.

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<sup>83</sup> 581 S.W.2d 352 (Ky. 1979).

<sup>84</sup> 399 U.S. 42 (1970).

<sup>85</sup> Cady v. Dombrowski, 413 U.S. 433 (1973); Poe v. Com., 169 S.W.3d 54 (Ky. App. 2005).

## SEARCH AND SEIZURE – VEHICLE STOP - GANT

### Rose v. Com., 322 S.W.3d 76 (Ky. 2010)

**FACTS:** On Nov. 19, 2003, Deputy Hardy (Estill County SO) went to Rose's home to arrest her on warrants for stolen checks. He passed a car driven by her ex-husband and recognized the passenger as Rose. He also saw her head "go down into the seat." Deputy Hardy stopped the vehicle and found Rose no longer in the car but noticed that the back seats had a gap between them and the trunk and surmised that she had managed to get into the trunk. Her ex-husband admitted that to Deputy Hardy. He extracted Rose from the trunk and arrested her. Mr. Rose consented to a search of the car and Hardy found a purse, a leather bag and a change purse. Inside Deputy Hardy found stolen checks. Rose was charged with Possession of Stolen Mail Matter and criminal Possession of a Forged Instrument. Rose moved for suppression, which was granted. The Commonwealth appealed. The Court reversed the decision, finding the search lawful under New York v. Belton.<sup>86</sup> Rose appealed.

**ISSUE:** May a vehicle be searched following an arrest, if one of the two Gant exceptions are not present?

**HOLDING:** No

**DISCUSSION:** During the pendency of the appeal, the U.S. Supreme Court granted certiorari in Arizona v. Gant. In addition, the Kentucky Supreme Court had ruled in Henry v. Com., in which it concluded that the grounds for a Belton search were not met.<sup>87</sup> Following that decision, Arizona v. Gant<sup>88</sup> was decided, which redefined "the constitutional analysis surrounding the search of a vehicle incident to the arrest of a recent occupant." The Court continued – "this approach ... directly contradicts our existing jurisprudence on the subject." Thus, we now find it necessary to bring the jurisprudence of this Commonwealth into compliance with that of our nation's highest court." The Court reviewed the history of Belton and Gant, and noted that the Gant decision did find it "pertinent to note that when considering the constitutionality of a vehicle search incident to the arrest of a recent occupant, a court may find the search constitutional even where the arrestee is secured if 'it is reasonable to believe *evidence relevant to the crime of arrest might be found in the vehicle.*'" In this situation, Rose was secured in the deputy's cruiser, so there was no possibility she could access the car to get a weapon or destroy evidence. As such, the search was unconstitutional and any case law that so conflicts was expressly overruled. With respect to the alternative justification, the Court was satisfied that Deputy Hardy did not have requisite suspicion that the vehicle harbored evidence related to the offense of arrest. He specifically testified "that he was *not* searching the vehicle in an attempt to locate evidence relating to the two warrants." As such, the search did not satisfy "constitutional muster under Gant's alternative analysis." The order suppressing the evidence was reinstated.

### Com. v. Elliott, 322 S.W.3d 106 (Ky. App. 2010)

**FACTS:** On March 15, 2009, Officer Lindsey (Russellville PD) "observed Elliott park his vehicle in an empty parking lot." He watched as "Elliott rummaged[d] through his vehicle" and then get out and "wander around the parking lot." Officer Lindsey made contact with Elliott and "detected a strong odor of alcohol." Upon learning that Elliott had Parkinson's disease and "conscious of [his] disability," Officer Lindsey took him through a "select series of field sobriety tests." Elliott failed. The officer asked for consent to search the vehicle, which was initially provided, but as Lindsey went to the car, "Elliott suddenly withdrew his consent." However, before the withdrawal, the officer saw "a white powder substance on the middle console, driver's seat, and gear shift of the vehicle" and a "couple of torn clear plastic baggie corners lying on the seat."

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<sup>86</sup> 453 U.S. 454 (1981).

<sup>87</sup> 275 S.W.3d 194 (Ky. 2008).

<sup>88</sup> 129 S.Ct. 1710 (2008).

Lindsey gave Elliott more field sobriety tests and Elliott failed every one. He was arrested for DUI. Lindsey then searched the vehicle and found cocaine in a cigarette pack and drug paraphernalia in the console. Elliott moved for suppression. Lindsey testified that he believed Elliott's impairment was due to more than just alcohol and that he believed the white powder was a controlled substance. Lab tests indicated Elliott had both alcohol and cocaine in his system.

The trial court rendered the following opinion:

Concerning the search of the interior of the automobile, the question is whether the search is justified as a search incident to arrest. The court cannot find that the observation of the plastic corners on the seat created probable cause that drugs would be found elsewhere in the interior of the car under the automobile exception to the warrant requirement. Analysis of the facts of this case involves the recent case of Arizona v. Gant, decided on April 21, 2009. In this case, the United States Supreme Court reversed (the majority did not characterize it as a reversal – but that is what it was) the longstanding rule established in New York v. Belton, which allowed officers to search, incident to arrest, the interior of a vehicle where a recent occupant had been subject to arrest. Gant concluded that the safety and evidentiary justifications underlying the “search incident to arrest” rationale apply only when there is a reasonable possibility that the person under arrest might still gain access to the vehicle.

The Gant Court recited that the purpose of the search-incident-to-arrest exception to the warrant requirement was 1) to protect officers from any weapons in the area, and 2) to safeguard any evidence of the offense of arrest. The Court reasoned that “if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, *both* justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” Despite this clear statement in the dicta of the opinion, the holding of Gant states that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest. This apparent conflict leaves open for legitimate argument whether the search-incident-to-arrest exception still applies where the arrestee no longer has access to the area to be searched but it is still “reasonable to believe” evidence might be found in the area. In interpreting Gant, this Court will presume that the holding was intended to be consistent with the stated reasoning of the opinion. The holding is thus interpreted to mean that where the arrestee no longer has access to the area to be searched, the search-incident-to-arrest exception no longer applies.

In this case the search took place after Elliott was arrested and handcuffed in the back of the police cruiser. Under Gant, the search-incident-to-arrest exception cannot apply. This warrantless search must be found unreasonable and the evidence must be suppressed. It is recognized that the rules of search and seizure were changed and that the officer in fact acted reasonably in following what appeared to be the law at the time.

Following that opinion, the Commonwealth asked for reconsideration, pointing out that Officer Lindsey observed the powder and other items that were in plain view and that gave him “probable cause to search the vehicle for cocaine under the plain view exception” and that it was “not required to defend the search as a search incident the arrest, and therefore Gant is not implicated.” The trial court then decided not to exclude the visible evidence, but did continue to suppress the cocaine found in the search. The Commonwealth appealed.

**ISSUE:** Is a vehicle exception (Carroll) search an exception to a Gant prohibition of a vehicle search?

**HOLDING:** Yes

**DISCUSSION:** The Court began:

In Gant, the United States Supreme Court determined the scope of the so-called “search-incident-to-arrest” rule. This rule is really an exception. It is an exception to the well-settled constitutional tenet that “all searches without a warrant are unreasonable . . . .”<sup>89</sup>

In applying Gant, the Kentucky Supreme Court has directed as follows:

The [United States] Supreme Court previously afforded officers virtual carte blanche to search an automobile incident to the arrest of a recent occupant of a vehicle, holding that “[o]nce an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.”<sup>90</sup> This carte blanche has been greatly reduced by Gant, however. According to the new, far more restrictive rule expressed in Gant, “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest.”

The Gant Court explained that permitting officers to search the vehicle of an arrestee occupant without a warrant in circumstances where it is reasonable to believe that the vehicle contains evidence of the offense of arrest is necessary and legitimate due to “circumstances unique to the vehicle context[.]” These circumstances include “the ready mobility of automobiles as well as the reduced expectation of privacy [one has] in an automobile, owing to its pervasive regulation.”<sup>91</sup> Accordingly, we agree with the Commonwealth that the trial court erred as a matter of law in ruling that the search-incident-to-arrest exception to the warrant requirement was not available unless the arrestee is within reaching distance of the passenger compartment of the automobile. A reasonable reading of Gant, as set forth by our Supreme Court in Owens, clearly holds that the exception is also available if it is reasonable to believe the vehicle contains evidence of the offense of arrest.

The Commonwealth also argued that the search was permitted under the “automobile” exception to the warrant requirement.<sup>92</sup> The Court agreed with the trial court that Officer Lindsey “acted reasonably” but went on to say that “this evidence compels a conclusion that Officer Lindsey had probable cause to believe that contraband was present in the vehicle.”<sup>93</sup> As such, the court found the trial court’s ultimate decision to be in error and reversed the order suppressing the additional cocaine and paraphernalia that was not in plain view at the time of the initial stop. Specifically, the court held that the search “was lawful under both the revised ‘search-incident-to-arrest’ exception set forth in Gant and the ‘automobile’ exception.”

### **Bledsoe v. Com., 2010 WL 4025901 (Ky. App. 2010)**

**FACTS:** On May 2, 2009, Officer Terry (Lexington PD) and another officer were on patrol, on bicycles. They observed a van parked in an area known for drug trafficking. They approached Bledsoe, the driver. No one else was in the area at the time. He told the officers he was waiting for his sister. Officer Terry later testified that Bledsoe had watery eyes, that his speech was slurred and that there was a smell of alcohol coming from the van. Bledsoe agreed that he’d been drinking earlier that day. Officer Terry arrested Bledsoe for alcohol intoxication. As the officer was doing paperwork, the other (unnamed) officer was searching the van; he found marijuana and a derringer. Bledsoe was also charged with possession of the marijuana and possession of a firearm by a convicted

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<sup>89</sup> Cook v. Com., 826 S.W.2d 329 (Ky. 1992)).

<sup>90</sup> Thornton v. U.S., 541 U.S. 615 (2004).

<sup>91</sup> Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006) (citing Pennsylvania v. Labron, 518 U.S. 938 (1996)).

<sup>92</sup> Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).

<sup>93</sup> McCloud v. Com., 279 S.W.3d 162 (Ky. App. 2007).

felon. Relying on New York v. Belton<sup>94</sup> and Com. v. Wood,<sup>95</sup> the Court ruled that the search of the passenger compartment was lawful. Bledsoe then took a conditional guilty plea and appealed.

**ISSUE:** May officers search a vehicle incident to arrest for alcohol intoxication?

**HOLDING:** No

**DISCUSSION:** During the pendency of the appeal, the case of Arizona v. Gant was decided, which altered the long-standing Belton rule. Reviewing the facts, the Court found that Bledsoe's arrest was insufficient to justify the warrantless search of his vehicle in this case. The Commonwealth argued that the fruits of the search should be preserved under the good faith exception of U.S. v. Leon.<sup>96</sup> However, the Court elected to follow the ruling in King v. Com., which held that Leon is limited to warrant cases.<sup>97</sup> The Court ordered the trial court to allow Bledsoe to withdraw his guilty plea.

### Torrez v. Com., 2010 WL 4860357 (Ky. App. 2010)

**FACTS:** On May 28, 2008, Torrez was stopped while driving by Trooper Boyles (KSP). Torrez, who indicated that he did not speak English and did not have an operator's license, was arrested for a number of traffic related offenses. Trooper Boyle placed Torrez into the cruiser and searched Torrez's car for identification. He did not find ID but did find packages of marijuana. Torrez moved for suppression, which the trial court denied. He took a conditional guilty plea and was sentenced. He then appealed.

**ISSUE:** May officers look for identification in a vehicle when the driver has been arrested?

**HOLDING:** Yes

**DISCUSSION:** The Court looked at the case of Arizona v. Gant. The Court agreed that under Gant, Trooper Boyles "had reason to believe the vehicle contained evidence of the offense of arrest, i.e., identification for Torrez, and properly searched the passenger compartment of Torrez's vehicle for such identification." The Court affirmed Torrez's conviction.

## SUSPECT ID - SHOWUPS

### Gist v. Com., 2010 WL 2326542 (Ky. App. 2010)

**FACTS:** On April 1, 2008, a cash advance store in Louisville was robbed. Marshall, the clerk, recognized the robber as a prior customer named Gist, even though he was partially masked. She was able to locate a receipt with his information and gave it to the police. One of the responding officers, who had not yet been given that information, independently found a witness who directed him to Gist's apartment – as the location where the robber had fled. Officer Manning knocked. Gist answered and provided ID. When the officers realized his connection to the crime, he was taken outside, not in handcuffs, so that Marshall could view him. Even though he'd changed clothes, she immediately identified him, from 20-30 feet away, as the robber. Gist was transported, given Miranda warnings and confessed. He was indicted. Gist moved for suppression, which was denied. Gist took a conditional guilty plea and appealed.

**ISSUE:** Is a show-up identification permitted?

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<sup>94</sup> 453 U.S. 454 (1981).

<sup>95</sup> 14 S.W.3d 557 (Ky. App. 1999).

<sup>96</sup> 468 U.S. 897 (1984).

<sup>97</sup> 302 S.W.3d 659 (Ky. 2010).

**HOLDING:** Yes

**DISCUSSION:** The Court looked the process of the identification, using the two step process developed by Dillingham v. Com.<sup>98</sup> First, the Court analyzed whether the process was unduly suggestive. If it was not, the analysis ends and the ID is accepted. If it is suggestive, as showups are, inherently, the ID may still be admitted if the totality of the circumstances overall made it reliable.<sup>99</sup> The Court applied the five Biggers factors, and noted that first, Marshall had ample opportunity to see the robber, especially given that she'd seen him multiple times in the two weeks previous to the crime. He was wearing the same clothing each time, the same clothing he wore in the robbery. She recognized his voice and facial features and was able to quickly match him to a customer file. The show up occurred immediately following the robbery. She positively identified him during the showup. The Court found the identification to be reliable and upheld his conviction.

**Petro v. Com., 2010 WL 3292949 (Ky. App. 2010)**

**FACTS:** On February 4, 2008, Wilson was working at a job site close to Neal's home. He noticed someone hooking up a trailer at Neal's home, to a red Ford Ranger pickup truck. He yelled at the individual and the individual looked back at him. Wilson watched for a few moments, from about 30-35 feet away. The individual drove away. About an hour later, Bridgeman, Wilson's employer, returned to the site. Wilson described the individual and Bridgeman called Neal. Neal stated he'd given no one permission to take the trailer. Neal filed a police report with Clinton County Sheriff Riddle. Riddle spoke to Bridgeman but did not speak to Wilson or otherwise document the conversation. Bridgeman's description of the truck was apparently inaccurate, as he reportedly stated it was white with a blue stripe. There was no indication that Sheriff Riddle was given the physical description of the suspect. Four days later, coincidentally, an accident occurred nearby involving a white truck with a blue stripe. Sheriff Riddle called Wilson to the scene, who, for unknown reasons, agreed it was the suspect vehicle. Sheriff Riddle took Wilson to the hospital to identify the injured driver, Petro. Petro was identified by Wilson. He was charged and indicted for theft. Petro moved to suppress the ID, but that was denied. He was convicted and appealed.

**ISSUE:** Must a show up be done close in time to the actual crime?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that "show ups are inherently suspect and 'should be accepted with caution.'"<sup>100</sup> However, they are "helpful when used immediately after the crime to establish probable cause or to clear a suspect."<sup>101</sup> The Court agreed that in this situation, since no other description was recorded, there was no accuracy of the prior description to compare to Petro. Further, the Court noted, and "most importantly, four days had passed before the show up identification took place." There was no other evidence connecting Petro to the crime and "the record offers no explanation for why a regular lineup of suspects was not used in this case." Petro's conviction was reversed.

**Grady v. Com., 325 S.W.3d 333 (Ky. 2010)**

**FACTS:** Grady was arrested for several armed robberies in Louisville. He was taken to the Louisville Metro PD where Detective Colebank questioned him. The detective later testified that he gave Grady his Miranda warnings and obtained an oral waiver, but that Grady refused to sign a waiver form or be recorded. He admitted the robbery but denied having a handgun. (Grady later claimed that he asked for an attorney and told Colebank he

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<sup>98</sup> 995 S.W.2d 377 (Ky. 1999).

<sup>99</sup> Neil v. Biggers, 409 U.S. 188 (1972); Savage v. Com., 920 S.W.2d 512 (Ky. 1995).

<sup>100</sup> Myers v. Com., 499 S.W.2d 277 (Ky. 1973).

<sup>101</sup> Savage v. Com., 920 S.W.2d 512 (Ky. 1996).

did not want to answer questions and that Colebank's testimony was false.) At trial, one of the victims (Criswell) was permitted to make an in-court identification, after he had allegedly made a pre-trial ID (from a photopak) of Grady. At trial, however, the prosecution was unable to produce the photopak. Grady was convicted on multiple charges and appealed.

**ISSUE:** May the fact that a photopak is lost prior to trial be used against the prosecution?

**HOLDING:** Yes, the lineup will be presumed to be overly suggestive

**DISCUSION:** Among multiple other issues, Grady argued that his confession was involuntary. He had not been allowed to testify at the hearing but argued that he would have testified that: (1) the officer lied when he impugned certain statements onto Grady; (2) that he did not waive his Miranda rights; (3) that he specifically invoked his right to an attorney; (4) that he was kept at the robbery office for eight hours; and (5) that he told Colebank that he did not want to answer any questions. In this case, the Court found several factors "particularly pertinent," including: "the length of the interrogation, whether the defendant has been advised of his Miranda rights, whether the defendant has waived his Miranda rights, and whether he has invoked Miranda rights." In this case, however, the Court "must first determine whether that confession was made at all." However, Grady was not permitted to testify on that issue and the Court found it to be reversible error not to do so.

With respect to the identification, the Court began:

Suggestive identifications deprive defendants of due process because they increase the likelihood of misidentification.<sup>102</sup> And ultimately, the admissibility of identification testimony spins on its reliability.<sup>103</sup> A conundrum presents itself, however, when a defendant asserts that an out-of court identification is made under unduly suggestive circumstances, and the materials used in that identification are lost. Such a circumstance, as we have here, makes the question of whether the unduly suggestive identification has tainted a subsequent in-court identification particularly difficult to resolve.

To decide, the Court "court must answer two questions: (1) was the first, pre-trial identification unduly suggestive; (2) if the pre-trial identification was unduly suggestive, does there exist an independent basis to support the reliability of the in-court identification so that the unduly suggestiveness of the pre-trial identification becomes moot."<sup>104</sup> The Court looked to Shegog and noted "that when a defendant asserts that a pre-trial line up has tainted a subsequent identification he carries the burden to show the unduly suggestiveness of the first pre-trial line up materials."<sup>105</sup> The Court ultimately decided to remand the issue back to the trial court to consider, reiterating, however, "that simply because lost line-up materials merit a rebuttable presumption that they are unduly suggestive does not necessitate a finding that the factors in the second prong of the Savage<sup>106</sup> analysis, which provide an independent basis for the identification, have not been satisfied in this case."

The convictions were reversed and the case remanded, pursuant to the opinion.

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<sup>102</sup> Neil v. Biggers, 409 U.S. 188 (1972).

<sup>103</sup> Manson v. Braithwaite, 432 U.S. 98 (1977).

<sup>104</sup> Savage v. Com., 920 S.W.2d 512 (Ky. 1995).

<sup>105</sup> Shegog v. Com., 142 S.W.3d 101 (Ky. 2004).

<sup>106</sup> Savage, *supra*.

## INTERROGATION - QUARLES

### Smith v. Com., 312 S.W.3d 353 (Ky. 2010)

**FACTS:** On April 24, 2003, Louisville police executed a search warrant at the Smith home. "In executing the warrant police used what was characterized as a "dynamic entry," which involved ramming the door open to gain entry into the residence." Smith was at home with her two pre-teen children. Upon entering the bedroom where Smith was located, Sgt. Gentry "immediately handcuffed her and, without advising her of her rights pursuant to Miranda v. Arizona, asked her if she had any drugs or weapons on her." Smith replied that there was something in her pocket and Gentry found crack cocaine there. She was eventually charged with Trafficking, but ultimately convicted of Possession.

After recovering the cocaine, Gentry arrested Smith and escorted her into the living room where she was met by Detective Scott Gootee. Gootee testified that pursuant to normal routine, he then gave Smith the Miranda warnings; however, no other witness recalled this and the trial court concluded he had not. The record is unclear about what prompted Smith to make her next comments, though there was testimony that one of the officers may have said something about the children being present and whether they could be moved elsewhere. In any event, Smith made statements to the effect "well, I knew this was going to happen one day so that's why I've told my kids this may happen one of these days", and that she "was not a big drug dealer but just did it to get by." In effect, the statements amounted to an admission of drug dealing.

The statements were initially suppressed by the trial court but it reversed its decision upon a motion to reconsider. The Court held that "the statement made in the bedroom, implying she had drugs in her pocket, was held to be admissible on the basis that Smith was not in custody at the time she made it." The living room statements were held to be admissible on the basis that those statements were not made in response to any police inquiry designed to elicit an incriminating statement and thus it was irrelevant whether or not she had been Mirandized." Smith appealed her conviction.

**ISSUE:** Does the Quarles exception to Miranda require a quantifiable public safety threat?

**HOLDING:** Yes

**DISCUSSION:** With respect to the first statement, the Court agreed that it "was the product of an un-Mirandized custodial interrogation." In reaching that decision, the Court asked "three questions: whether Smith was placed in custody for Miranda purposes as a result of being handcuffed; whether Gentry's questioning was interrogation; and if she was in custody for Miranda purposes and was interrogated, whether the public safety, or any other, exception applies to allow the admission of her statement."

With respect to the first question the Court looked at all the factors that have been used to determine custody:

... the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled .<sup>107</sup>

Other factors which have been used to determine ...

... custody for Miranda purposes include : (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive ; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the

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<sup>107</sup> U.S. v. Mendenhall, 446 U.S. 544 (1980)).

suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions .<sup>108</sup>

The Court agreed she was in custody as the time she made the bedroom statement. Further, the Court agreed that the question was interrogation. The Commonwealth argued that “even if Smith's statement was a product of custodial interrogation, the statement was nevertheless admissible pursuant to the public safety exception identified in New York v. Quarles,<sup>109</sup> which we recently adopted in Henry v. Commonwealth.<sup>110</sup>” However, the Court agreed that the “interrogation of Smith was not made in relation to any quantifiable public safety threat.”

Moving to the living room statements, the Court noted it was uncontested that she was in custody at that time.

There was conflicting testimony at trial regarding the circumstances which caused Smith to make the incriminating statements. Some testimony indicated that Smith's statements were made spontaneously and were not in response to anything said by the police. If the statements were made spontaneously, there is obviously no bar to the admission of the statements in trial and the trial court correctly denied the motion to suppress. However, Smith contends that she made the statements in response to an officer's comment to the effect that the children were present and could they be removed elsewhere. Even if we were to accept Smith's version of events as true, we are persuaded that the officer's comment cannot fairly be characterized as police interrogation, and thus the trial court correctly denied the motion to suppress.

As these statements were not the product of a custodial interrogation, they were properly admitted. The Court reversed Smith's conviction as a result of the admission of the first statement.

### **Carver v. Com., 303 S.W.3d 110 (Ky. 2010)**

**FACTS:** Carver was arrested following a burglary in Scottsville - he had been captured and beaten by the homeowner prior to the arrival of police. He was handcuffed and secured in the cruiser, but because he was out of control and combative, he was not immediately frisked. While officers were questioning the witnesses, Carver kicked out the cruiser window. He was taken to the hospital to be checked. The handcuffs were removed for x-rays, and he promptly “knocked over a table and raised a knife, which he flourished.” Sgt. Cooke asked him “what he was doing with the knife” and Carver responded to the effect that he should have been better checked before being put in the car. The steak knife was later identified as having come from the burglarized home, although Carver stated he grabbed it at the hospital. Carver was convicted of Burglary and related charges and appealed.

**ISSUE:** Is there a public safety exception to the Miranda requirement?

**HOLDING:** Yes

**DISCUSSION:** Carver argued that his statements at the hospital were inadmissible because he had not yet been given Miranda warnings. The Court, however, stated that Carver's “possession of the steak knife at the hospital created a safety risk to hospital staff, patients, police officers, and himself. An exception to the Miranda warning requirement exists when public safety is at risk.”<sup>111</sup> Once he flashed the knife, the officer “had a duty to quickly disarm him and ascertain how he obtained it, lest he acquire another.” The question was “was not intended to

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<sup>108</sup> U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).

<sup>109</sup> 467 U.S. 649 (1984).

<sup>110</sup> 275 S.W.3d 194 (Ky. 2008).

<sup>111</sup> U.S. v. Quarles, 467 U.S. 649 (1984).

prompt a confession or provide incriminating evidence but was simply the officer's attempt immediately to diffuse a dangerous situation." Further, "while it may have been preferable for the police officers to provide the Miranda warnings prior to taking [Carver] to the hospital, his belligerent and combative nature made such warnings difficult, if not impossible, to provide."

In addition, although he was "technically in police custody in the hospital x-ray room; ... he was not in an inherently oppressive interrogation atmosphere." In fact, he was temporarily *in* control of the situation. His nonresponsive answer to the officer's question shows that he "was not succumbing to the inherent pressure of police custody" but instead was "in open defiance of it." The Court agreed that "requiring police officers to issue a Miranda warning to the suspect holding them at knifepoint or gunpoint does nothing to further the Miranda decision's goal of protecting and preserving Fifth Amendment Rights." There was adequate additional proof that he obtained the knife at the house, rather than at the hospital, as well. Carver's conviction was affirmed but he was ordered to be resentenced due to a procedural error in his prior conviction status.

## INTERROGATION – CUSTODY

### Overholt v. Com., 2010 WL 2471843 (Ky. 2010)

**FACTS:** On January 29, 2008, the parents of a young child went to Overholt's home in Logan County to accuse him of sexually abusing the child. Overholt and his wife ran an informal daycare. They confronted Overholt and then took the child for an exam – Trooper Bowles (KSP) met them there. Trooper Bowles went to Overholt's home; Overholt followed him back to the Logan County Sheriff's Office to discuss the situation. Trooper Bowles interviewed him for over an hour and Overholt confessed to several instances of sexual abuse with various children. He was indicted on 149 counts involving 10 victims, with allegations of various sexual acts. Overholt moved to suppress the confession, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is an interview/interrogation at a police station inherently custodial?

**HOLDING:** No

**DISCUSSION:** Overholt argued that the interview was custodial and since he was not given Miranda warnings, it must be suppressed.<sup>112</sup> The Court noted that "the test for determining whether a person was in custody is whether a reasonable person would have believed that he or she was free to leave, considering the surrounding circumstances."<sup>113</sup> Overholt argued that when he was told to come to the sheriff's office, he believed he "was under arrest and had no choice but to follow Trooper Bowles to that office." However, at the beginning of the interview, the trooper specifically told him he was not and confirmed he'd come to the office voluntarily. He acknowledged at the end of the interview that he'd come there voluntarily and in fact, had driven himself there. He was never handcuffed or otherwise restrained. The room was small, the Court agreed, but the interview lasted only a little more than an hour. Overholt was seated near the door. The court stated that such determinations do not depend upon the individual's subjective belief, but "rather by whether a reasonable person would have felt that he or she was not free to leave." The court agreed that simply because it took place at the sheriff's office did not make it custody.<sup>114</sup> Overholt also argued that the trooper's questioning tactics were coercive and consisted of "veiled threats." The Court reviewed the taped interview and characterized it as "firm urging to simply tell the truth." The Court found nothing to indicate, "either by tone of voice or language used, that compliance was compelled." No other coercive factors were present, either, "such as the presence of several officers, the display of a weapon by an officer, or physically touching the suspect." The Court agreed he was not in custody and upheld the denial of the motion to suppress.

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<sup>112</sup> See Callihan v. Com., 142 S.W.3d 123 (Ky. 2004).

<sup>113</sup> Baker v. Com., 5 S.W.3d 142 (Ky. 1999); U.S. v. Mendenhall, 446 U.S. 544 (1980).

<sup>114</sup> Oregon v. Mathiason, 429 U.S. 492 (1977).

## INTERROGATION - RIGHT TO SILENCE

### Carlisle v. Com., 316 S.W.3d 892 (Ky. App. 2010)

**FACTS:** On November 6, 2007, Det. Trimborn (unidentified Henderson County area officer) “confronted Carlisle at his grandmother’s home regarding allegations he had raped his stepdaughter.” He was taken to the station by Det. Trimborn and there was provided with a written copy of Miranda. Trimborn questioned Carlisle regarding the allegations. “For approximately an hour and a half, Carlisle wholly denied the rape and maintained his innocence despite Detective Trimborn’s insistence that he admit to raping his stepdaughter so he could ‘help [him]self.’”

Since this case turned on how the law was applied to the circumstances, the opinion included the following transcript:

Carlisle: Well, Brian, I don't want to say no more, okay?

Det. Trimborn: Let me talk to my sergeant for a second.

Hang tight. I don't want you to mess yourself up. Just think about it for a few minutes, okay? I'm going to let you sit here and think for a few minutes. I don't know what to tell you, other than you need to help yourself. You really need to help yourself.

Carlisle: Am I under arrest?

Det. Trimborn: I said no. It's as clear as I can be, I said no. Sit here for a few minutes[;] let me talk to my sergeant[.] I'll be right back. Just think about it.

Carlisle: Can I walk outside and smoke a cigarette?

Det. Trimborn: No, you can't smoke a cigarette. Just hang on tight.

Detective Trimborn then left the room.

Carlisle was alone for approximately six-and-one-half minutes when Officer Bradley Newman entered. Carlisle was apparently acquainted with Officer Newman. He did not give new *Miranda* warnings to Carlisle at any point in the conversation during which the following exchange occurred:

Off. Newman: What's up, [Carlisle]?

Carlisle: What ya say, Bradley?

Off. Newman: What are you doing, man?

Carlisle: Oh, I don't know, man.

Off. Newman: What the hell's going on?

Carlisle: You a sergeant now?

Off. Newman: No. No. What the hell's going on, brother?

Carlisle: Well . . . I'd rather not say. Of course, you probably already know.

Off. Newman: Know a little bit about it.

Carlisle: Bad situation, [Newman]. Real bad situation.

Off. Newman: Well, what, what, tell me what, what happened, I mean . . . or what it's really about[.] I'm just hearing hallway talk right now.

Carlisle: My, my daughter said that I raped her.

Off. Newman: How did you supposedly rape her?

Carlisle: I don't know, I don't know what she's saying. That's just all I know. This detective, [Trimborn], come in here and told me a bunch of stuff, I mean –

Off. Newman: What'd he tell you?

Carlisle: Just told me about what, about hit and miss what, what she said. Now, I don't, I can't really remember right now because I'm in a sto-, uh, state of confusion.

Off. Newman: You work today?

Carlisle: No.

Off. Newman: No?

Carlisle: But I'm supposed to go in tomorrow.

Off. Newman: When'd all this sh\*\* supposedly happen?

Carlisle: Not last, not last night, night before last. The night that I was supposed to have went to work, Sunday night.

Off. Newman: Now, how would, how would you have raped her? I mean, I don't, I mean, did you hold her down and do something?

Carlisle: Didn't do nothing.

Off. Newman: Well, they sure got you in a pickle right now. You're looking at a long time. And you know I ain't going to bullsh\*\* you. I mean, you're looking at a long time, L.D. [Carlisle]. Now, I don't know what I can do to help you.

Carlisle: Am I under arrest, Brad?

Off. Newman: Not yet. No. I'm not saying they're not going to, I'm not going to say that they're not going to lock you up, because I don't know. This ain't got nothing to do with me. I work street crimes, not this. I'm back here, but I don't work stuff like this. But I just come back here to see if there was anything I could do to help you. Because I know, brother, that you don't want to be gone a long time.

At this point, Carlisle asserted his right to consult with an attorney.

Carlisle: I'd rather talk to a lawyer.

Off. Newman: You want to talk to a lawyer?

Carlisle: Yeah.

Off. Newman: So you don't want to answer any more of his questions or anything?

Carlisle: I'd rather not.

Off. Newman: Well, that's your right, man. That's your right. I'll go get with him and see what he wants to do with you, okay? But if there's anything you wanted to tell me, I could see what I could do to help you. But if you just want to talk to an attorney, I'll go ahead and . . . have at it. I'm not going to be able to help you now.

Carlisle: Huh?

Off. Newman: I'm not going to be able to help you in any way now, man. I mean, I've got a good, you know, I work with these guys.

Carlisle: Just, just, just on somebody's word they can – . . . ?

Off. Newman: Every day, every day, man. Every day. That's what we do. I mean, that's where we go[.] [Y]ou've got somebody that says, so and so said they was going to kill me. Well, guess, what, we gotta do a report on it.

Carlisle: I don't understand that.

Off. Newman: I don't understand it half the damn time, but . . .

Carlisle: Am I free to go?

Off. Newman: Not until he comes back in here. Like I said, I don't know what their intentions are, but I might have been able to help you a little bit, but if you're just, if you don't want to talk to me, I can't, I can't make you talk to me . . . [Pause] . . . you want me to just go get him? You don't want me to try to help you?

Carlisle: I really appreciate it, man, but –

Off. Newman: I tried, man.

Carlisle: What can I say?

Off. Newman: All right.

Officer Newman then left the room.

Soon thereafter, Detective Trimborn and Officer Newman re-entered with paperwork and informed Carlisle he was under arrest. The interrogation continued as follows:

Det. Trimborn: Okay, Lann [Carlisle], I just got off the phone with the prosecutor. You're under arrest. We're going to charge you with rape.

Detective Trimborn then addressed Officer Newman, still in Carlisle's presence.

Det. Trimborn: The prosecutor told me, Brad [Officer Newman], that when I get done with this paperwork, if he ain't said a word to try to help himself, then there will be no deals cut whatsoever. He will give him the maximum sentence in prison as a rapist. Basically, he's calling Lann's [Carlisle's] bluff.

Carlisle: What? So I will be under arrest, right?

Det. Trimborn: You are under arrest. What's your middle initial?

Carlisle: D, for Darrell.

[Trimborn then proceeds to fill out paperwork.]

Det. Trimborn: What is rape, third?

Carlisle: Can we step outside for a few minutes?

Det. Trimborn: Who's that?

Carlisle: Can me and you step outside for a few minutes?

Detective Trimborn agreed to Carlisle's request and the two left the room. The conversation that next took place was not recorded; however, the circuit court concluded Carlisle confessed to committing the rape and that Trimborn neither questioned nor threatened the suspect. Upon reentering the police station, Carlisle Detective Trimborn testified at the suppression hearing that he asked Carlisle no questions outside; instead, he claims Carlisle simply stated, "Brian, you're right. I did it." Subsequently, the detective says he advised Carlisle that while Carlisle was free to make a statement, Trimborn could not ask questions because Carlisle had invoked his right to have an attorney present. Trimborn did not claim to restate the full Miranda warning. The detective testified Carlisle then proceeded to give a detailed account of the rape. confessed to raping his stepdaughter and gave a fairly detailed description of the offense.

Carlisle was indicted on charges of Rape 1<sup>st</sup>. He moved for suppression of the evidence. The Court denied the motion. Carlisle took an Alford<sup>115</sup> conditional plea and appealed.

**ISSUE:** Must an invocation to a right to silence be scrupulously honored?

**HOLDING:** Yes

**DISCUSSION:** The Court began: "Once a suspect in custody has invoked his right to remain silent, the interrogation must cease."<sup>116</sup> Statements made after "invocation are admissible provided the authorities have 'scrupulously honored' the defendant's right to remain silent."<sup>117</sup>

The factors identified in Michigan v. Mosley which determine whether interrogating officers have, in fact, scrupulously honored a suspect's rights are: (1) whether the defendant was advised of his Miranda rights prior to the initial interrogation; (2) whether the detective conducting the interrogation "immediately ceased questioning [the suspect] after he invoked his right to remain silent and did not resume questioning or try to persuade [him] to reconsider his decision"; (3) the differences between the circumstances of the original and any subsequent interrogation, *e.g.*, whether the later questioning was about a different offense, after significant time had passed, in a different location, and/or conducted by a different officer; and (4) whether the suspect was re-read the Miranda warnings prior to the subsequent interrogation.<sup>118</sup> Application of these factors to the case *sub judice* reveals that Carlisle's right to remain silent was not scrupulously honored.

The Court continued:

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<sup>115</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>116</sup> Edwards v. Arizona, 451 U.S. 477 (1981).

<sup>117</sup> Michigan v. Mosley, 423 U.S. 96 (1975).

<sup>118</sup> Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

The officers' questioning of Carlisle can be viewed as three separate interrogations or three phases of the same interrogation. The first occurred when Detective Trimborn escorted Carlisle to the police station and initiated the questioning. The detective properly issued Miranda warnings prior to asking the suspect any questions and ensured he understood them. However, although Detective Trimborn asked no further questions after Carlisle invoked his right to remain silent (*i.e.*, when he said, "I don't want to say no more[.]"), the detective continued his attempts at persuading Carlisle to confess. By telling Carlisle, "I don't want you to mess yourself up[.]" and encouraging him to "think about" his decision to remain silent because he needed to "help [him]self," Detective Trimborn was continuing his effort to have Carlisle waive the right to remain silent, or to confess in spite of it. This was improper.

The second interview also raised concern because Carlisle was questioned only a few minutes later, about six minutes, "again about the same offense in the same location, without re-informing him of his Miranda rights." The second officer also "tried to convince Carlisle to waive his right to remain silent, suggesting Newman could offer help only if Carlisle did so."

A third contact was made while the officers were completing arrest paperwork. "The conversation between the police officers conveyed the prosecutor's position that if Carlisle "ain't said a word to try to help himself, then there will be no deals cut whatsoever." It was certainly meant for Carlisle's hearing and clearly designed to put pressure on the suspect to relinquish his right to remain silent. The detective's comment was effectively an ultimatum: either Carlisle would confess before Detective Trimborn finished the paperwork, or the prosecutor would "give him the maximum sentence in prison as a rapist." Additionally, and again, Detective Trimborn did not remind Carlisle of his right to remain silent upon re-entering the interrogation room, when stepping outside to permit Carlisle to smoke a cigarette, or when later recording Carlisle's confession following the smoke break."

The Court concluded that "given the officers' repeated failure to comply with the requirements of Miranda and Mosley, it is clear they engaged in a pattern of behavior designed to deprive Carlisle of his right to remain silent." The Court reversed the denial of the motion to suppression and remanded the case for further proceedings.

### Helm v. Com., 2010 WL 4683562 (Ky. 2010)

**FACTS:** Helm was charged with the continuing sexual assault of two pre-teen girls in Hardin County. Upon being interviewed, he "admitted to having a sexual relationship with both girls, but denied using force. He later objected to the admission of this interview and confession. Although he was charged with Rape 1<sup>st</sup> and Sodomy 1<sup>st</sup>, the jury apparently accepted his claim that he'd waited until each girl turned 12 before having sex and he was convicted on numerous 2<sup>nd</sup> degree offenses of the same crimes. He appealed.

**ISSUE:** Does telling a subject in custody that he must answer questions violate their right to silence?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that at the time he was interviewed, he was not under arrest. However, the detective provided him with Miranda warnings and Helm waived the rights. The Court noted that although he was not in custody at the outset, he did admit to numerous crimes during the interview. Once the detective told him that "he had to answer her question," the Court concluded he would have been in effective custody as he would not have felt free to leave.

Further, although the Court noted that he never unequivocally invoked his right to remain silent, he was told that he "had" to answer the detective's questions when he asked "Do I really have to tell you?" That "incorrect response to Helm's question rendered Helm's subsequent waiver of his right to remain silent involuntary." A suspect's waiver of his right to remain silent "must be `voluntary in the sense that it was the product of a free and deliberate choice

rather than intimidation, coercion, or deception.”<sup>119</sup> The Court agreed that any statements made following this question - which related only to one of the victims, should have been suppressed. However, since Helm testified freely, against advice of counsel, concerning the same matters, the error was harmless.

Helm’s convictions were affirmed, but the case was remanded for resentencing due to unrelated errors.

## INTERROGATION - RIGHT TO COUNSEL

### Bradley v. Com., 327 S.W.3d 512 (Ky. 2010)

**FACTS:** Bradley was accused of a murder and attempted arson In Louisville. He was taken in for questioning by Det. Williamson and given his Miranda rights, which he waived. “During the interrogation, Detective Williamson misrepresented to Bradley the state of their investigation when he told him that there was a police officer waiting in the hall who could identify Bradley as having run away from the scene of the shooting.”

The opinion detailed the relevant part of the discussion, as follows:

Williamson: Well here's the deal. Well you know what, you're right, but it can be a lot worse. You stand up and you tell the truth . Be a man and take what's coming.

. . . You can either be a cold hearted son-of-a-bitch or you can be a man about it with some remorse. Tony [Bradley] only you can make that decision . I cannot do that for you.

Bradley: So I'm going to [be] sitting behind bars now?

Williamson: Well you know what, it's your choice. You're going to do some time. I'm not going to sit here and lie to you. Okay.

Bradley: A lot of time.

Williamson: Well I don't know. I don't know the story. Why don't you run it by me and we'll look at it.

Bradley: Well, you know, I need a lawyer or something.

Williamson : Do what?

Bradley: A lawyer.

Williamson: That's your right. We read you your rights when you come [sic] in here . But I, I'm totally convinced you do what is the right thing and you'll be better off. You see where I'm at? You feel what I'm saying? Do you want to tell us? Just tell us what happened. It's nothing we can't get through, I mean there may be circumstances here that change this whole thing. Only you can tell us. It's a big step .

Bradley: I did do it.

Williamson: You did what. You shot him? Why?

Bradley: Cause he was trying to get me.

Williamson : What was he doing?

Bradley: If I didn't get him he was going to get me.

He was convicted and appealed.

**ISSUE:** Is a subject who says he needs a lawyer invoking their right to counsel?

**HOLDING:** Yes

**DISCUSSION:** Bradley argued on appeal that his comment about a lawyer was sufficient to have invoked his right to counsel. The Court agreed that “not every use of the word lawyer or attorney by a suspect is an invocation of the right to counsel.” The police must cease interrogation “if the suspect clearly and unambiguously asserts his or

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<sup>119</sup> Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (U.S. 2010) (quoting Moran v. Burbine, 475 U.S. 412 (1986)) (emphasis added) . See also Colorado v. Connelly, 479 U.S. 157 (1986) and Fare v. Michael C., 442 U.S. 707 ( 1979 ).

her right to counsel.”<sup>120</sup> In this case, the Court concluded that when Det. Williamson asked for clarification of the request, Bradley’s response erased all doubts about Bradley’s desire. Instead, “Bradley’s comments bear none of the commonly encountered signs of equivocation that would support a conclusion that the suspect has not unequivocally invoked his right to counsel.” Once a subject invokes, “only the suspect may re-initiate dialogue with the authorities; the authorities cannot continue to cajole or otherwise induce the suspect to continue to speak without first affording the suspect an attorney.” The confession, as such, “was the result of Williamson improperly continuing to question Bradley once Bradley had invoked his right to counsel.” In addition, a valid waiver of the right to counsel cannot be supported only by the simple fact that Bradley confessed.

The Court vacated the convictions and the case was remanded, with direction to suppress the confession.

## INTERROGATION - MIRANDA

### Delacruz v. Com., 324 S.W.3d 418 (Ky. App. 2010)

**FACTS:** On August 24, 2007, Det. Williams (unidentified Graves County area officer) learned that a box containing marijuana was en route, through FedEx, to a residence in Mayfield. He intercepted the package and a drug dog alerted on it. He opened it, pursuant to a warrant, and found 14 pounds of marijuana. The box was resealed and Det. Williams prepared to do a controlled delivery.

Det. Williams donned a Fed Ex uniform and delivered the package to Ladd. She was immediately arrested. She explained she’d been paid to accept the package by Lopez and had been told to call Delacruz (who owned the residence) when it arrived. Delacruz, when questioned, initially denied knowing about the package but later stated he thought it contained car parts. All three were indicted. Delacruz was convicted of Trafficking and appealed.

**ISSUE:** Must an interrogator determine if a subject understands all of their Miranda rights?

**HOLDING:** Yes

**DISCUSSION:** Delacruz argued that he did not understand his Miranda rights. The Court included a transcript of the audio recording that was made during the process. The Court noted that the “recording demonstrate[d] that Detective Williams attempted to assure that Delacruz understood that he had the right to remain silent.” Delacruz stated he did not understand, but “rather than rereading the rights, describing each individual right, or providing Delacruz with rights written in Spanish, Detective Williams only asked if he understood that he did not have to answer questions.” The Court found this insufficient since the detective did not ascertain whether Delacruz understood all of his Miranda rights.

The Court reversed the conviction and remanded the case back for a new trial, with direction to suppress the statements unless the Commonwealth could show that Delacruz did understand all of his rights.

## INTERROGATION – HEARSAY

### Banks v. Com., 2010 WL 4156758 (Ky. 2010)

**FACTS:** In July, 2007, Banks’s home in Montgomery County was searched. The officers found his two young children at the house as well as a number of items relating to the manufacture of methamphetamine in the garage. However, no heat source was found in the garage, so the officers believed the kitchen stove was used as well. Banks initially claimed he knew nothing of the manufacturing, even when faced “with incriminating statements

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<sup>120</sup> Ragland v. Com., 191 S.W.3d 569, 586 (Ky. 2006); Edwards v. Arizona, 451 U.S. 477 (1981); Davis v. U.S., 512 U.S. 452 (1994).

purportedly coming from the co-Defendants.” He finally admitted he’d rented the garage to Mullis for that purpose, however. He was charged with Manufacturing and related charges and ultimately convicted. He appealed.

**ISSUE:** May hearsay be admitted to prove the context of an interrogation?

**HOLDING:** Yes

**DISCUSSION:** Banks argued that the “police fabricated statements, purportedly from the co-defendants, that incriminated” him, in an effort to get him to confess. The Court noted that:

The Commonwealth did not seek to introduce the fabricated statements of co-defendants for their truth, but instead to provide the context of the interrogation. In context, they serve to demonstrate how police caught Appellant in a lie—that he didn’t know anything about the methamphetamine. This helped prove Appellant’s manufacturing of methamphetamine by illustrating how he attempted to cover it up. A cover-up is highly relevant, “constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself.”<sup>121</sup>. To the extent these statements were offered for this purpose, they were constitutionally permissible “

It would have been appropriate, had Banks asked, for the judge to admonish the jury about the appropriate use of the information, although he did not do so.

Banks also argued that the charge of Controlled Substance Endangerment to a child was inappropriate, since the lab was in an apparently detached garage. The Court, however, noted that since there was no heat source in the garage, and because a CI testified that he witnessed him with a chemical mask and ingredients in the house, with the children in the next room, there was sufficient evidence they were exposed to the manufacturing.

The Court upheld both convictions.

## **TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD LAW**

### **Mayo v. Com., 322 S.W.3d 41 (Ky. 2010)**

**FACTS:** The victim, Mayo’s estranged wife, claimed that Mayo raped and orally sodomized her after an argument. She alleged he threatened her with anal sex and assault if she did not comply. (He claimed that they had consensual sex.) On the morning of the trial, the Court heard arguments on the admission of the victim’s sexual history and concluded the KRE 412 (the rape shield law) prevented testimony about it because Mayo had not provided proper notice. The Court did allow some question concerning their prior sexual relationship, but not specifics. He was convicted and appealed.

**ISSUE:** Does consent to a particular sex act at a prior time indicate consent at the time of an alleged sexual assault?

**HOLDING:** No

**DISCUSSION:** Mayo argued it was improper to exclude evidence of prior anal intercourse, as he argued it was proof that it wasn’t really a “threat.” The Court reviewed KRE 412 and agreed some sexual history evidence could be introduced to prove consent. The Court agreed that current law could criminalize sexual conduct between spouses, so it is possible to rape or sodomize a spouse. “Having cleared away the procedural underbrush,” the Court focused on the argument and noted that evidence of prior sexual conduct did not mean the victim consented

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<sup>121</sup> Woodard v. Com., 147 S.W.3d 63 (Ky. 2004) (cover-up by false identification).

to any type of sex on the day in question. The Court agreed the particular sex act could carry an embarrassing stigma but the court also agreed it had a low probative value. Excluding that evidence did not prejudice Mayo.

The Court upheld Mayo's conviction.

## TRIAL PROCEDURE / EVIDENCE - DOUBLE JEOPARDY

### Lloyd v. Com., 324 S.W.3d 384 (Ky. 2010)

**FACTS:** On the day in question, in Whitley County, a "man walked into drugstore, pointed a handgun at a store employee, announced that this was a hold-up, and demanded OxyContin." As the employee unlocked the drug safe and the man took drugs, a customer entered the store, realized what was going on and called 911 from outside. He also watched as the man fled the store.

A description was put out to officers that the vehicle was a "small foreign car, possibly a Toyota or Nissan." Officer Taylor responded to the scene of a vehicle stop "made by another officer of a car fitting the description." He later testified that the driver "appeared nervous and gave officers consent to search the vehicle." They found "Lloyd in the trunk and carrying a handgun" with stolen drugs also in the trunk. Lloyd was later identified by the employee as the robber.

Lloyd was indicted on Robbery, Theft and related charges. He moved for suppression. The Robbery and Theft charges proceeded to trial and he was convicted. He then appealed.

**ISSUE:** Is it double jeopardy to charge both Theft and Robbery?

**HOLDING:** Yes

**DISCUSSION:** First, Lloyd argued that he was subjected to double jeopardy when he was tried and convicted for both Robbery and Theft, when both charges were based upon the theft of the drugs.

The Court noted:

In order to determine whether a person may properly be subjected to prosecution for multiple offenses based upon one act, courts use two main guideposts – the Blockburger<sup>122</sup> test and the expressed intent of the legislature.

First, the Court considered the case under Blockburger, summarizing it with the question - "is one offense included within another."<sup>123</sup> The Court reviewed the elements of Theft and Robbery. While acknowledging the two offenses are similar, each contains elements that are different from the other.

The Court looked to Terry v. Com.<sup>124</sup> which inextricably, neither party cited. From Terry, the Court found a "general principle that a 'monetary damage threshold is a distinct element' of a criminal offense."

However, the Court noted that "the General Assembly has shown its intent to prevent prosecutions for both theft by unlawful taking and robbery based upon the same underlying theft." The Court continued:

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<sup>122</sup> 284 U.S. 299 (1932).

<sup>123</sup> Com. v. Burge, 947 S.W.2d 805 (Ky. 1996).

<sup>124</sup> 253 S.W.3d 466 (Ky. 2008).

The Blockburger test, although highly useful, is simply 'a rule of statutory interpretation' since 'neither the United States nor the Kentucky Constitution proscribes the imposition of multiple punishments for separate offenses committed during the course of a single criminal episode.'<sup>125</sup> Accordingly, "[t]he rule against double jeopardy in this situation [multiple criminal charges based upon one underlying act] presume[s] that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense."

The Court agreed that the "Blockburger test must yield to a contrary expression of legislative intent." The Court noted that in KRS 515.020, the applicable robbery statute, the General Assembly used the term theft, and they did not find "the use of the same term in both statutes" to be coincidental. Further, legislative commentary provided that "all of the elements of the crime of theft as set forth in KRS 514.030 are incorporated into this offense." The Court found there to be an "unmistakable expression of intent for theft by unlawful taking to be subsumed into robbery."

The Court found that Lloyd's "double jeopardy argument is meritorious." The Court dismissed the theft conviction and remanded the case.

Lloyd also argued that the "stop and seizure of the vehicle in which Lloyd was found hidden" was improper. The officer that actually made the traffic stop was unavailable, only Officer Taylor, who responded to assist, testified. Officer Taylor did testify that the driver gave consent to search and there was no evidence that the "driver lacked authority to consent to the search of the vehicle." The Court identified that "the issue is the antecedent question of whether the initial stop of the vehicle was proper." The Court agreed that "hearsay testimony (Taylor's description of what the other officer said) is generally permissible at a suppression hearing." The Court found the denial of the motion to suppress the evidence to be proper.

The Court remanded the case to the trial court with instructions to dismiss the Theft conviction. (In a concurring note, the justice noted that a person may lawfully be charged with both, but simply not convicted of both.)

## **TRIAL PROCEDURE / EVIDENCE – SPOUSAL PRIVILEGE**

### **Winstead v. Com., 327 S.W.3d 386 (Ky. 2010)**

**FACTS:** On the night Branson was stabbed to death in Hopkins County, "a witness reported seeing her nephew, Russell Winstead, at or near Branson's driveway." He was a suspect because "he was known to have recently borrowed substantial sums of money from Branson to cover his gambling debts." No direct physical evidence was immediately found but later investigation "sharpened the focus on Winstead." "First, police found hidden under Winstead's mattress at home a knife consistent with that used to stab Branson. Second, Winstead's wife contacted police and changed her initial statement to them concerning a critical piece of the investigation : the time Winstead arrived home on the night of Branson's murder."

Winstead was charged with Murder and Robbery. He fled overseas but was eventually extradited back to Kentucky. He was convicted and appealed.

**ISSUE:** Does a spouse's testimony about an alibi violate the marital privilege rule?

**HOLDING:** No

**DISCUSSION:** First, Winstead argued that the trial court erred in allowing his ex-wife, Rainwater, to testify. They were married when the murder occurred, but had divorced prior to the trial. She had contacted police to tell them

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<sup>125</sup>Beaty v. Com., 125 S.W.3d 196 (Ky. 2003).

she'd not been truthful when initially interviewed and that she'd lied because Winstead had told her to do so. This information was critical because it left Winstead's whereabouts unknown at the time of the murder. The trial court had admitted her statement, ruling that "communications between spouses about establishing an alibi were not privileged because an alibi, by its very nature, was intended for disclosure."

The Court noted:

KRE 504 contains two separate evidentiary privileges . The first, contained in section (a), is the testimonial privilege "by which a spouse may refuse to testify, or may prevent the other spouse from testifying against him or her, as to events occurring after the date of their marriage . . . ."126 Since Rainwater was no longer Winstead's wife at the time of trial, the testimonial privilege of KRE 504(a) was inapplicable ; and the trial court did not err in allowing Rainwater to testify against Winstead about events occurring during their marriage . Although in a published case we did not explicitly hold - but strongly hinted --- that the spousal testimony privilege survives only as long as the marriage, we have explicitly held in an unpublished case that the spousal testimony privilege does not extend to a former spouse . We now, again, definitively hold that the spousal testimony privilege ends when the marriage is dissolved.

However, this left the question of "whether the challenged portion of Rainwater's testimony was a confidential communication that should have been barred under the marital communication privilege of KRE 504(b)." The Commonwealth noted that "because Rainwater testified to Winstead's telling her that he discussed this concocted alibi with others, his communications with her were meant for disclosure, rendering the privilege nonexistent or waived."

Winstead also argued that Rainwater should not have been allowed to testify about the actual time he arrived home that night "because her observation of his arrival time would itself be considered a confidential communication under the broad definition of communication used in cases like Slaven v. Com."127

The Court continued:

Here, however, the only type of alleged non-verbal communication at issue is Rainwater's observation of the time that Winstead arrived home. We note that Winstead does not allege that others would not have been able to observe the time he arrived home ; for instance, Rainwater's children, who were also home at the time, any persons walking or driving by their home at the time, or any neighbors within sight of his home could have also observed what time Winstead arrived home. Because the time of Winstead's arrival at home could have also been observed by others outside the marriage, we cannot say that Rainwater's observation of her husband's arrival time was a confidential communication between the two spouses even if it might be construed as a communication under the broad definition used in our precedent.

The Court concluded that the privilege does not apply "if the evidence shows that the request to convey a false alibi was not made privately between the spouses - at least one other person was present when the request was made - or if the evidence shows that the requesting spouse intended to disclose to others the particular request that spouse made to the other." The Court agreed that the error, if any, was harmless and allowed the admission to stand.

Winstead also argued against the use of two "jailhouse informants." The Court stated that three things must be shown to support a violation of the Sixth Amendment in such cases: "(1) the right to counsel has attached, (2) the informant was acting as a government agent, and (3) the informant deliberately elicited incriminating statements." In addition, the evidence must indicate "the informant performed some action beyond merely listening that was

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<sup>126</sup> Thurman v. Com., 975 S.W.2d 888 (Ky. 1998), construing KRE 504.

<sup>127</sup> 962 S.W.2d 845 (Ky. 1998).

designed deliberately to elicit incriminating remarks."<sup>128</sup> The evidence indicated that the informant provided the information without any promises of leniency and there was no evidence that they "ever questioned Winstead in any manner or used other techniques deliberately to elicit incriminating information."

Specifically, the Court stated:

As we recognized in McBeath, a defendant must show that police and their informant did more than merely listen but, instead, took some action deliberately designed to elicit incriminating remarks. There is no evidence that the most damaging incriminating remarks by Winstead --- asking Roulette to confess --- was in response to any action by Roulette or law enforcement authorities; rather, it appears that Winstead himself set that ball in motion.

The Court affirmed the convictions, but did remand for resentencing due to unrelated errors.

## TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY

### Brown v. Com., 2010 WL 5018447 (Ky. App. 2010)

**FACTS:** On January 12, 2009, Officer Buemi (Newport PD) was on patrol "when he saw a man jogging across the road carrying a bag." When the man spotted the officer, he ran away. People nearby indicated that the "man had just robbed them at gunpoint, so the officer pursued him in his cruiser." He saw the man toss a handgun under a vehicle. The pursuit continued. Another officer in the chase saw the man throw a purse over a fence. The officers caught him [Brown] and found he had \$10 in his hand - which one of the victims claimed to have had (in the same denominations). They retrieved the purse and gun (a BB gun) - the purse was given back to the victim and the gun was retained as evidence. Brown was indicted on Burglary and Fleeing and Evading.

Brown moved to exclude the purse and money since it had not been retained, arguing that he did not have the opportunity to test it for prints "and that the integrity of the evidence was compromised by a violation of the chain of custody when the items were returned to their original owners." The trial court denied the motion, finding that any gap in the chain of custody "would go to the weight of the evidence rather than its admissibility."

Brown took a conditional guilty plea and appealed.

**ISSUE:** Must a chain of custody be perfect?

**HOLDING:** No

**DISCUSSION:** The Court noted that "a 'perfect' chain of custody need not be established, nor is it necessary to preclude all possibility of tampering or misidentification."<sup>129</sup> The Court agreed that "gaps ... typically go toward the weight of the evidence rather than admissibility." It was clear that the "money and purse went from the victims, to the robber, to the ground where police retrieved them, and then back to the victims." They were not tested by the police but "simply referenced as items in themselves." The Court agreed "with items of physical evidence which are clearly identifiable and distinguishable, there is no requirement of proof of chain of custody."<sup>130</sup> Further, the Court agreed that while the defendant had a right to test the items, that denial of that right "is not always a ground for reversal." It is not "warranted unless a defendant can show bad faith on the part of the police in failing to

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<sup>128</sup> McBeath v. Com., 244 S.W.3d 22 (Ky. 2007), citing, e.g., U.S. v. Henry, 447 U.S. 264 (1980); Kuhlmann v. Wilson, 477 U.S. 436 (1986) .citing Moore v. U.S., 178 F.3d 994 (8th Cir. 1994).

<sup>129</sup> Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998).

<sup>130</sup> Hunt v. Com., 304 S.W.3d 15 (Ky. 2010).

preserve evidence.”<sup>131</sup> The Court found it reasonable to return the items to their owners and noted that the “evidence was not even exculpatory in nature.”

Brown’s plea was affirmed.

## TRIAL PROCEDURE / EVIDENCE - DISCLOSURE OF STATEMENTS

### Clutter v. Com., 322 S.W.3d 59 (Ky 2010)

**FACTS:** In 1998, Clutter was indicted for a sexual assault committed in 1990. Although the crime was reported soon after it occurred, the victim recanted. She later stated she recanted at the request of her mother, who was Clutter’s girlfriend and business partner. The victim came forward again later because she was concerned about her own child being in Clutter’s presence. He was not tried until 2008, as he had been taken into federal custody and convicted for an unrelated offense. Upon his release, he was returned to Kentucky, tried and convicted. He then appealed.

**ISSUE:** May late disclosure of inculpatory statements compromise a trial?

**HOLDING:** Yes

**DISCUSSION:** Clutter argued that his belated trial was in violation of the Interstate Agreement on Detainers (IAD). However, the Court agreed that Clutter, acting pro se, did not properly make the request, by completing and submitting the appropriate forms to invoke the speedy trial rights under the IAD. (Clutter had been advised on several occasions that he needed to do so.) The Court found no error. Clutter also argued against the admission of an oral statement made by a witness in 1990, to the effect that he had had sex with the victim. The Commonwealth agreed that the disclosure of the statement on the day before trial was untimely under RCr 7.24, and agreed it would not use the statement in its case-in-chief. The Court agreed over objection that it could be used in rebuttal, if needed. Although it was never actually introduced, Clutter argued “that his right to testify in his own defense was compromised by the potential for the admission of the incriminating statement and reversal is thus warranted.” Although the Court agreed the delay was improper, the Court found no prejudice was caused by the untimely disclosure.

Clutter’s conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - KASPER

### Commonwealth of Kentucky, Cabinet for Health and Family Services v. Hon. Gregory M. Bartlett (Kenton Circuit Court) and Cole, Cox and Young (real parties), 316 S.W.3d 279 (Ky. 2010)

**FACTS:** Cole and Young shared a home in Kenton County. After being flagged by KASPER,<sup>132</sup> police obtained a search warrant and searched the home. As a result, Cole was indicted for drug trafficking. He requested his own report, as well as that produced on Cole and another defendant, Cox. He moved for suppression of the warrant affidavit, claiming it contained false and misleading information about Cole’s report. The trial court granted the request for discovery but the Cabinet (which maintains KASPER) moved to vacate the order, arguing that KRS 218A.202<sup>133</sup> prohibits the trial court from ordering discovery. Following a hearing, the trial court refused to vacate its order. In addition, the Court noted that “Cole made a sufficient showing that the records he sought ‘may contain information which is relevant or exculpatory to the Defense.’” It ordered the document

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<sup>131</sup> St. Clair v. Com., 140 S.W.3d 510 (Ky. 2004); Allen v. Com., 817 S.W.2d 458 (Ky. App. 1991).

<sup>132</sup> Kentucky All-Schedule Prescription Electronic Reporting.

<sup>133</sup> This statute provides a list of those who are permitted to receive the report.

produced for in camera review. The Cabinet filed for writs of prohibition and mandamus to prevent enforcement of the court order. The Kentucky Court of Appeals denied the writ and the Cabinet further appealed.

**ISSUE:** Must KASPER reports used to support search warrants or arrests be disclosed to the defendant?

**HOLDING:** Yes

**DISCUSSION:** The Cabinet continued its argument that the statute prevented the court from ordering the disclosure of the KASPER report. Relevant to this case, the statute does not permit the disclosure of the reports to “criminal defendants, their counsel, or to the trial court” – by its language listing the only parties permitted to receive the reports. The Court stated, however, that:

... this argument overlooks the unique constitutional considerations that arise in criminal cases. Criminal cases are simply different because of the unique constitutional rights enjoyed by criminal defendants.

The Court continued:

Whatever prohibition against disclosure KRS 218A.202 makes, it cannot infringe on a criminal defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution or Section 11 of the Kentucky Constitution. Under the Cabinet's view, a criminal defendant could not discover any report, even his own. It would not matter if the report contained exculpatory information, or even if it was exonerating. The trial court would be unable to compel disclosure, even by a court order, and even if the court first screened the documents in camera to protect the confidentiality of any information that was not actually exculpatory. This cannot be the case.

It is well established that a criminal defendant has a constitutional right to discover exculpatory documents, even if those documents are confidential or if their disclosure is prohibited by rule or statute.<sup>134</sup> The U.S. Supreme Court has held that a criminal defendant's Sixth Amendment right to confront witnesses prevails over the government's interest in keeping juvenile records confidential.<sup>135</sup> It has also held that a defendant's due process right to present a defense prevails over evidentiary rules and privileges.<sup>136</sup>

In addition, the U.S. Supreme Court has held that a defendant's right to discovery exculpatory evidence in the government's possession prevails over a qualified privilege.<sup>137</sup>

In Barroso, this Court extended the logic of Ritchie, unanimously holding that a defendant's constitutional right to discover exculpatory evidence prevails over absolute privileges, too.

The common and necessary thread of these cases is that a criminal defendant's constitutional rights to exculpatory information prevail over rules and statutes that prohibit the defendant from receiving the information. This is true even if those rules or statutes purport to absolutely prohibit disclosure. To put it simply, “constitutional rights prevail over conflicting statutes and rules.”

The Court agreed, however, that in order to invoke the right to view such otherwise confidential documents, it was required to follow the two-step process set out in Barroso. First, “the defendant must produce ‘evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.’” Next, “the trial court must conduct an

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<sup>134</sup> Com. v. Barroso, 122 S.W.3d 554 (Ky. 2003).

<sup>135</sup> Davis v. Alaska, 415 U.S. 308 (1974).

<sup>136</sup> Chambers v. Mississippi, 410 U.S. 284 (1973); Roviano v. U.S., 353 U.S. 53 (1957).

<sup>137</sup> Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

in camera review to determine whether or not the records sought actually do contain such evidence.” The process provides the appropriate balance between the defendant’s rights and the “government’s interest in keeping certain records confidential.” In the case at bar, the trial court properly applied the Barroso procedure. The Court discounted the Cabinet’s argument that the reports contained only raw data and agreed with Cole that instead, the data was “detailed and specific,” as well as being “readily understandable and concrete, requiring little if any further analysis before its impeachment becomes apparent.”

The Court concluded:

... the Cabinet’s only argument is that the statute prohibits disclosure and “[c]ourts may not add or subtract from statutes.” No court has added or subtracted anything from any statute; the Kentucky and U.S. Constitutions have already done all the work.

The Court upheld the denial of the Cabinet’s writ.

In a footnote, the Court also commented upon the record, which indicated that the prosecutor had a copy of at least two of the three reports, finding it noteworthy because according to the statute, the prosecutor is not authorized to receive the reports either. It stated that it appeared that the Cabinet thought it could “rely on a statute to deny the criminal defendant access to potentially exculpatory reports, even though the prosecution has a copy of those same reports in violation of the same statute.”

### Oakes v. Com., 320 S.W.3d 50 (Ky. 2010)

**FACTS:** On the night in question, Kustes and a co-worker went to a Bullitt County White Castle to eat. A man (Oakes) approached them and “began flirting.” When they left, Oakes approached them and warned her that he’d heard two officers saying they would pull her over and offered her a ride home. She declined the offer. On the way home, Kustes had to stop at train tracks. According to a witness, Oakes got out of his car and approached Kustes’s car -“Kustes heard a ‘thump’ on her driver-side window.” She saw Oakes, left the scene and later discovered that her door handle had been broken.

Kustes continued on to drop off her friend. When she arrived in her own driveway and turned off the car, her driver’s side door was “immediately opened.” Oakes leaned into her car and said, “What’s up, girl?” Kustes grabbed her purse and tried to run, but Oakes grabbed the purse and struck Kustes in the neck and side. Kustes dropped the purse; Oakes took it and ran. Kustes called police and Det. McGaha arrived. She gave him a description of the assailant and the officer also obtained surveillance video as well. Oakes was identified by a Louisville officer who had previously arrested him. McGaha constructed a photo pak and Kustes immediately identified Oakes.

Oakes was ultimately convicted of Robbery 2<sup>nd</sup> and PFO 2<sup>nd</sup>; he appealed.

**ISSUE:** May KASPER reports be used in impeachment?

**HOLDING:** No (but see discussion)

**DISCUSSION:** First, Oakes argued that he was improperly denied the opportunity to introduce a KASPER record to impeach Kustes. The Court agreed that Oakes could “invade the KASPER privilege to receive exculpatory information or to use such information in his defense,” but the Court noted that it could “still be excluded under [the] rules of evidence, such as for lack of relevance, just like anything else.” The Court found that evidence that the victim may have misused a prescription painkiller was extrinsic evidence and not relevant. (Oakes was suggesting that she was actually selling the medication.) The Court noted that the only entries that suggested this came after the date of the indictment. As such, the Court denied this argument.

Oakes also argued that the failure of Kustes to show up at a pre-trial suppression hearing concerning the admissibility of the identification violated his right to confrontation. The Court, however, agree that the right is a trial right, not a pretrial right.<sup>138</sup> The Court agreed that her presence was not required. The Court then reviewed the identification procedures and concluded it was not impermissibly suggestive. The Court agreed that Oakes's photo "stands out to some extent" because of his attire and because the photo was taken at a higher resolution, but otherwise was sufficiently similar. Finally, the Court noted Kustes's description corroborated and supported her later identification of the photo.

Oakes's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - WITNESS TESTIMONY

### McClendon v. Com., 2010 WL 3722788 (Ky. 2010)

**FACTS:** On September 28, 2007, Deaton and her friend, Aistok, were drinking beer at her home in Kenton County. They decided to walk several blocks to get some food. On the way back, they were approached by McClendon who was "carrying an open beer and the remains of a twelve pack and appeared to be highly intoxicated." He asked about buying more liquor and Deaton suggested a location. McClendon asked if she'd drive him there, in his truck, parked nearby - Deaton agreed to do so. Aistok, however, went her separate way. Deaton became frightened when she did not see a vehicle where he'd said he'd parked and McClendon forced her into a yard and sexually assaulted her. During that time, the resident heard noises and called the police and witnessed part of the assault. Officer Steffen arrived and saw McClendon flee and jump over a fence. He did not comply with commands but was eventually was apprehended. He told the officer that "Deaton had performed oral sex on him in exchange for crack cocaine."

McClendon was indicted and stood trial. He testified that Deaton had performed oral sex in exchange for drugs at least twice before and that their encounters were consensual. During the testimony, a SANE nurse testified as to Deaton's statements during the exam. McClendon was convicted and appealed.

**ISSUE:** May a witness (a forensic nurse) read statements from the victim, recording in their report, verbatim?

**HOLDING:** No

**DISCUSSION:** McClendon first objected to the testimony of Mertens, a SANE nurse. She "effectively read Deaton's history statement verbatim" which McClendon argued impermissibly bolstered Deaton's statement.

The Court began:

Kentucky law has long been clear that "a witness cannot be corroborated by proof that on previous occasions [she] has made the same statements as those made in [her] testimony."

The Court agreed it was improper to have allowed the testimony, which "merely showed prior consistent statements from Deaton." However, the report did not identify McClendon as the assailant. Her testimony was also "clearly within the bounds of the medical treatment or diagnosis exception to the hearsay rule" – KRE 803(4). However, because Deaton's testimony alone was sufficient for the jury to find guilt, the Court found the error, if any, was harmless, since McClendon's act of fleeing suggested guilt. The Court agreed, however, that allowing her to read directly from the report was also error.

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<sup>138</sup> Pennsylvania v. Ritchie, 480 U.S. 39 (1987); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

McClendon's conviction was reversed.

**Pence v. Com., 2010 WL 2867834 (Ky. App. 2010)**

**FACTS:** Pence stood trial for Trafficking in Perry County. Three detectives testified at the trial. Pence was convicted and appealed.

**ISSUE:** May a witness bolster the testimony of another witness?

**HOLDING:** No

**DISCUSSION:** Pence argued that Detective Napier was permitted to "introduce improper character evidence" that Turner, the CI, did a "good job." The Court noted that generally, "a witness's credibility may not be bolstered until it has been attacked."<sup>139</sup> The issue is covered by KRE 608 on character evidence. In this case, Det. Napier testified before Turner, therefore his character could not yet have been at issue. The Court noted that "when rehabilitation evidence is admitted before credibility is attacked, any error is harmless as long as credibility is, in fact, later impeached."<sup>140</sup> The Court agreed that statements made by Det. Napier reflected favorably on the CI's truthfulness, with respect to never having had money come up short or transactions not "matching up." The Court differentiated this from testimony concerning the CI's reliability. The Court also concluded that the video of the transaction was not hearsay, but was "evidence of the event itself, introduced for a non-hearsay purpose." The Court noted the recording was shown only twice.

Pence's conviction was upheld.

**Howard v. Com., 2010 WL 3604126 (Ky. App. 2010)**

**FACTS:** On August 31, 2008, Howard (Elliott County Jailer) was transporting Senters from Elliott County to Boyd County. When she was being booked, she told a female guard that Howard had raped her. KSP responded and Senters was taken to the hospital. Sexual contact was confirmed. Testimony later indicated she was "very upset and crying." Det. Kouns was assigned and he obtained a search warrant for Howard's cruiser, where physical evidence was found. He interviewed Howard twice. In the first statement, Howard denied having had sex with Senters but he admitted it in the second interview – claiming it was consensual. During Det. Kouns' testimony at trial, he was permitted to "essentially read from the transcript of his interview with Senters." Senters also testified, apparently consistently. When the defense counsel objected to this as impermissible hearsay and improper bolstering by the repeating of "prior consistent statements," the Court admitted the recording instead. Howard was indicted and convicted. He then appealed.

**ISSUE:** May a witness read from a transcript of an interview with a victim?

**HOLDING:** No

**DISCUSSION:** Howard objected to Kouns being permitted to read from his report, bolstering Senters. The prosecution argued that the statements were being offered not for the truthfulness of the statement, but "rather to demonstrate why Det. Kouns took the actions that he did." The Court reviewed KRE 802 and concluded that it could not "agree that reciting and/or playing Senters' taped statement was admissible for the purpose of explaining Det. Kouns' investigative actions."<sup>141</sup> The Court agreed that the multiple hearing of Senters' statement

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<sup>139</sup> Harp v. Com., 266 S.W.3d 813 (Ky. 2008).

<sup>140</sup> Reed v. Com., 738 S.W.2d 818 (Ky. 1987).

<sup>141</sup> Sanborn v. Com., 754 S.W.2d 534 (Ky. 1988); Eubank v. Com., 275 S.W. 630 (1925); Winstead v. Com., 283 S.W.3d 678 (Ky. 2009).

impermissibly bolstered her initial statement, perhaps giving her more credibility – and since Howard admitted to sex, Senters' credibility was pivotal to the case.

Howard's conviction was reversed and the case remanded.

**Jackson v. Com., 2010 WL 252244 (Ky. 2010)**

**FACTS:** Jackson was charged with the fatal shooting of Washington, in May of 2006, in the Iroquois Homes housing project in Louisville. Jackson agreed he had shot Washington but argued that he did so unintentionally during a struggle. Jackson was convicted of Murder and Tampering with Physical Evidence, and appealed.

**ISSUE:** May an officer give a lay opinion?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, a testifying officer was asked about photos that showed Washington's body. The prosecutor asked the officer if "in his opinion and experience, the body appeared to have been in a struggle." Upon objection, the officer expanded, stating that when he "first observed the body at the scene," the clothing was intact and that he saw no evidence consistent with a struggle. A detective testified as to his visual examination of the body, stating that he'd found small drops of blood and the shirt was slightly soiled. He also stated that "his jacket was still on his shoulders and that his hat was still on his head." The Court agreed "that both witnesses' opinions were clearly admissible as lay opinion and thus find no abuse of discretion in this regard."

Jackson's conviction was affirmed.

**Patterson v. Com., 2010 WL 1005976 (Ky. 2010)**

**FACTS:** Patterson was involved with a woman who had three children, one of whom was a 13-year-old female. The two other children were several years younger. Patterson was ultimately charged with the rape of the 13-year-old girl, which allegedly occurred in February, 2005, although she did not speak to an officer about it until March, 2006, after a "considerable amount of counseling" and removal to foster care. He was convicted and appealed.

**ISSUE:** May a witness "bolster" another witness's testimony?

**HOLDING:** No

**DISCUSSION:** During testimony, an officer who interviewed the girl was allowed to "testify that in his experience child sex-abuse victims were almost always initially reluctant to 'give up information,' and that commonly they provided additional details as time went on." Patterson argued that this constituted improperly bolstering of the victim and the Court agreed.

The Court continued:

In Sanderson v. Com., we recently reiterated the rule against this sort of class habit testimony and explained that a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he/ she acted the same way under similar circumstances.<sup>142</sup> This

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<sup>142</sup> 291 S.W.3d 610 (Ky. 2009), (citing Kurtz v. Com., 172 S.W.3d 409 (Ky. 2005)).

rule applies to investigators,<sup>143</sup> as well as to exports, Sanderson, and it applies whether the testimony is offered on direct examination of a witness during the Commonwealth's case in chief or, as it was here, on redirect examination for the purpose of rebuttal or rehabilitation.<sup>144</sup>

Because the Court agreed that the case turned on the jury's assessment of the victim's credibility, the error was not harmless. For this, and other reasons, Patterson's conviction was reversed.

**Janes v. Com., 2010 WL 252249 (Ky. 2010)**

**FACTS:** Janes and Lawless shared a home in Jefferson County, along with Lawless's two sons. After a number of arguments, Lawless threatened to leave Janes. When Lawless arrived home, she found Janes drunk and he attempted to shoot her. Lawless fled to the neighbor's home and called police. The officers found both of Lawless's sons had been shot, as well as Janes. All three survived. Janes was charged with Assault and Wanton Endangerment (for shooting at Lawless). At trial, the investigating officer "testified that he had interviewed Janes while Janes was hospitalized" and had given him Miranda warnings. When he started to "relate Janes's response," defense counsel objected, but the trial court permitted the officer to answer - to the effect that Janes told him that "something bad happened that should not have happened, but [Janes] would only talk about it with his attorney present." At that point, he stopped the questioning. The trial court did admonish the jury that "it could not hold against Janes his invocation of his rights to remain silent and to have counsel."

Janes was convicted and appealed.

**ISSUE:** Is the introduction of a party's own statement hearsay?

**HOLDING:** No

**DISCUSSION:** Janes raised the issue of the officer's testimony about his statement.

The Court noted that:

Obviously, Janes had the rights to silence and to the services of counsel. But we agree with the Commonwealth that Janes did not invoke those rights until after he had already made a statement. In other words, once informed of his rights, Janes did not immediately invoke his rights to silence and to counsel. Instead, he blurted out that something bad had happened but that he would not talk about it. Only after making those comments did Janes arguably invoke his rights to silence and counsel by saying he would not speak further without an attorney.

Since the prohibition against hearsay does not prohibit the admissibility of statements of a party, such as Janes, there was no prohibition on the Commonwealth's placing into evidence, by way of the officer to whom Janes made the statement, Janes's statement that something bad had happened that should not have happened. As the United States Supreme Court has recognized, "a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." The Court agreed that although the officer's statement about the invocation of the right to silence may have been impermissible, that the admonition was sufficient to cure the error.

Janes's conviction was affirmed.

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<sup>143</sup> Miller v. Com., 77 S.W.3d 566 (Ky. 2002).

<sup>144</sup> Newkirk v. Com., 937 S.W.2d 690 (Ky. 1996).

### Martin v. Com., 2010 WL 2471866 (Ky. 2010)

**FACTS:** On February 20, 2008, in Paducah, Daniels saw a white pickup pull up in front of a social club. Martin got out and he and Daniels spoke. It escalated into an argument and Martin pulled out a gun. Daniels ran but was shot. Martin approached him where he fell and shot him multiple times in the leg. Daniels survived. Martin fled the scene and went to Chicago, where he was located by the Illinois authorities. He was eventually extradited to Kentucky and charged with Assault and PFO. He was convicted and appealed.

**ISSUE:** Is some investigative hearsay permitted?

**HOLDING:** Yes

**DISCUSSION:** During Daniels's testimony, he testified that when he was first questioned by police, he denied knowing the name of the person who shot him. When the officer asked him if it was Martin, he agreed that it was. (Daniels's girlfriend told the officer that Daniels had told her that Martin was the shooter.)

The Commonwealth argued that the testimony "was allowed as an 'investigative verbal act' pursuant to Chestnut v. Com.<sup>145</sup>"

In Chestnut, this Court recognized that, while investigative hearsay is disallowed, there are limited circumstances where a police officer may testify to statements made to him: "The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case."<sup>146</sup> Such testimony is then admissible not for proving the truth of the matter asserted, but to explain why a police officer took certain actions.<sup>147</sup>

The Court agreed that Martin's implication that the officer "suggested" the name "opened the door for allowing the Commonwealth to present what would otherwise be inadmissible hearsay testimony." "The testimony about what Lola Wilkes told Detective Smith was admitted, not for the purpose of proving the truth of the statement (the identity of the shooter), but to explain how Detective Smith knew to ask Daniels if the shooter was Dawan Martin."

Martin's conviction was affirmed.

### Burchett v. Com., 2010 WL 2218630 (Ky. App. 2010)

**FACTS:** On November 22, 2006, Deputy Bradshaw (Adair County SO) was serving papers when he learned of a reckless driver in the area. He found Burchett and witnessed the reckless driving. He tried to stop her but she drove away quickly. Dep. Bradshaw pursued, assisted by Deputies Burton and Greer. When Burchett came around a curve, she almost struck Burton and then lost control, leaving the roadway and hitting several trees.

Burton found Burchett in the car, "lying on the floor and talking incoherently." Later blood tests confirmed the presence of cocaine. At her DUI trial, Dep. Bradshaw reported that he "kept getting reckless driving complaints on a gray car." Burchett objected that statement was hearsay and the prosecution explained "that it was offering the testimony to explain Dep. Bradshaw's actions." The Court agreed and admitted the testimony.

Ultimately Burchett was convicted and appealed.

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<sup>145</sup> 250 S.W.3d 288, (Ky. 2008).

<sup>146</sup> Sanborn v. Com., 754 S.W.2d 534 (1988).

<sup>147</sup> Young v. Com., 50 S.W.3d 148 (Ky.2001) .

**ISSUE:** Is investigative hearsay admissible?

**HOLDING:** It depends – see discussion.

**DISCUSSION:** The Court reviewed KRE 801(c), and noted that the “analysis is one of relevance.” The statements in question can only be admitted if relevant to the case, and “they are only relevant if used to explain why the officer acted as he or she did and the officer’s actions are at issue.” In this case, the Court did not conclude that the deputy’s actions were, in fact, at issue, therefore, the Court should have excluded his “testimony regarding the reckless driving complaints.”

However, upon further review, the Court concluded that the error was harmless. Burchett’s conviction was affirmed.

**Roach v. Com., 313 S.W.3d 101 (Ky. 2010)**

**FACTS:** The family of Eba Wilson, age 90, realized that “several accounts written on her account had been forged.” Although she was mentally alert until her death, her “eyesight had deteriorated to the point that she often had family members or her caretaker, Roach, fill in her checks, which she then signed.” She also had a number of other physical infirmities but tried to be as independent as possible. Her son, or her daughter-in-law, would read her bank statements to her every month and she remained very aware of her financial situation. However, due to their own medical problems, the family did not review the statements for several months. Wilson went to the hospital shortly after that, and never returned home, so Roach’s employment ceased at that time. Wilson’s checking accounts statements were redirected to her son’s home and when he reviewed the material, he found that several large checks, totaling \$6,000, had been written to Roach and her daughter.

Her son initiated an investigation. Eventually Roach was charged with Adult Exploitation and multiple charges of Criminal Possession of a Forged Instrument. Roach asserted, however, that Wilson had simply loaned her the money. She was convicted and appealed.

**ISSUE:** May a lay witness testify concerning handwriting?

**HOLDING:** Yes

**DISCUSSION:** Roach argued that since Wilson was arguably able to manage her own affairs, that the charge of Adult Exploitation (KRS 209.990(5)) was improper. The court, however, did show that her “physical limitations forced her to seek assistance in managing her affairs.” As such, the alleged actions fell under the purview of that statute. Roach also contended that the testimony that the signatures were forged by the lead detective was improper, as he was not an expert. The Court, however, noted that Kentucky had “previously recognized the propriety of admitting such lay witness testimony when the lay witness is very familiar with the signatory’s handwriting, and the testimony would be helpful to the jury.” The Court noted that the detective himself stated he was not an expert and the Court admitted his statement as lay witness opinion testimony under KRE 701. He never specifically stated the signatures were, in fact, forged. The Court concluded that the error, if any, did not unduly sway the jury.

Finally, Roach argued that hearsay was presented to the jury. The Court examined the record and concluded that “most, if not all, of the challenged hearsay appears to have been volunteered by witnesses rather than intentionally elicited by the Commonwealth and that the trial court sustained all hearsay objections lodged by Roach.” Several of Wilson’s statements came before the jury through other witnesses, as she had died prior to the trial and her deposition had never been taken. The Court had, in fact, sustained all objections to the introduction of the testimony and had admonished the jury to disregard the improper statements. She objected to the lead detective

being “allowed to bolster” the testimony of other witnesses. The detective was the law enforcement representative and was permitted to sit through the trial at the prosecution’s table. He thus saw all witnesses before he testified as the final witness. The Court, however, found the admission of his testimony, which was consistent with the testimony of the earlier witnesses, to be of little concern, even if possibly error.

Roach’s conviction was affirmed.

**St. Clair v. Com., 2010 WL 4683561 (Ky. 2010)**

**FACTS:** St. Clair was charged with several sexual offenses with respect to her forcing her two daughters (ages 5 and 6) to perform oral sex on her and her boyfriends. At trial, she testified, of her own volition, that she believed her daughters were lying. During cross, the prosecutor pressed her on the point, asking her specifically why she thought her daughters would lie about the issue. Upon objection, the trial court admonished him “not to invite the witness to speculate.” Ultimately, after rewording the question, St. Clair indicated that she thought the paternal grandparents (who had custody at the time) induced the children to lie. She was convicted of Sodomy, and appealed.

**ISSUE:** May a witness be asked to call another witness a liar?

**HOLDING:** No

**DISCUSSION:** St. Clair argued that under Moss v. Com., it was improper to ask a witness to characterize the testimony of another witness as a lie.<sup>148</sup> However, the Court noted, in this case, St. Clair had “readily volunteered her opinion that the girls had lied” and her counsel did not timely object. Nor was it improper for the prosecutor to follow up on the statement and ask her for the basis for that opinion. (The Court noted that even the permitted question, however, as worded, should have been excluded as it had already been “asked and answered” and also possibly violated Moss, but found the error “clearly harmless.”)

**TRIAL PROCEDURE / EVIDENCE - CHILD WITNESS**

**Howard v. Com., 318 S.W. 3d 607 (Ky. App. 2010)**

**FACTS:** Howard was accused of sexual abuse of a 5-year-old female family member. At the time of the trial, she was 7 years old and testified. The nurse at the hospital where the child was initially examined also testified as to what the child had told her at the time. He was convicted of Sexual Abuse 1<sup>st</sup> and appealed.

**ISSUE:** May a child be held competent to testify?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Howard argued that the child was not competent to testify because she was “not able to give particular examples of statements that were lies and statements that were truth.” The Court stated that:

The threshold question of witness competency in Kentucky is controlled by KRE 601. Under that rule, all persons are qualified to testify as a witness unless the trial court determines that they:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

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<sup>148</sup> 949 S.W.2d 579 (Ky. 1997).

(4) Lacks the capacity to understand the obligation of a witness to tell the truth.

A witness is presumed to be competent, therefore the burden of proving that they are not falls to the person asserting the incompetence. The decision on a child witness falls to the discretion of the trial court. In this case, the court had an adequate competency hearing. Howard pointed to inconsistent statements, but the Court stated that Howard was confusing credibility with competency, "which are two different issues entirely."

Howard also argued that the nurse was allowed to testify as to statements the child made that indicated Howard was the perpetrator. The Court agreed that normally such statements would be inadmissible hearsay, but that "statements made for the purpose of medical treatment or diagnosis may be admitted as an exception to the general exclusion of hearsay."<sup>149</sup> Under the rule, "hearsay statements may be admissible if they are important to an effective diagnosis or treatment." The statements must describe medical history, past or present symptoms, pain, sensations, or the "inception or general character of the cause or external source" of the injuries. The Court agreed that normally the identity of the perpetrator would not qualify but noted there was a special exception for when the perpetrator of child sexual abuse lived with the child, as there was an interest in stopping the abuse as well. Further, that information was needed for emotional treatment and support. Finally, Howard argued that he was not permitted to introduce evidence that the child "could have been exposed to sex toys and pornography" which would have a bearing on her "sexualized behavior" that he raised as a defense. The Court agreed that KRE 412(b)(2) - the "rape shield" law - was in place for exactly such situations. The Court noted that it was not a defense for Howard that the child may have "initiated sexual contact because she was incapable of consent." The fact that she may have seen pornography did not excuse Howard's behavior.

Howard's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - EXPERT WITNESS

### Hayes v. Com., 2010 WL 2629561 (Ky App. 2010)

**FACTS:** On June 28, 2007, Officer Kelton (unidentified Shelby County area agency) did an undercover buy of crack cocaine. He had parked in an area known for trafficking and been approached by a female, who ultimately summoned Hayes to the van. Hayes then left the van and the officer could see him hand a rock of crack to a female. She exchanged the rock with Kelton for a fifty dollar bill, the serial number of which he had previously recorded on his "digital audio recorder." The transaction was also recorded on audio but Hayes never spoke. After he drove away, Kelton described Hayes and the two women involved. Kelton had a uniformed trooper film the area so he could identify from whom he made the buy. Trooper Martin did so and Kelton identified Hayes. Hayes was arrested and searched; the bill he'd gotten from Kelton was found on his person.

At trial, Det. Warman (Shelbyville PD), a long time narcotics investigator, testified that "it was not unusual to use another person as a go-between in order to limit exposure and to avoid the police." The trial court allowed the testimony and Hayes was convicted. He appealed.

**ISSUE:** May an expert witness testify as their opinion of how a subject's actions fall into the category of drug dealers?

**HOLDING:** No

**DISCUSSION:** Hayes argued that it was inappropriate to allow a detective to explain that the lack of illegal narcotics on his person indicated he was a dealer. The Court agreed that the Commonwealth was correct that "courts have routinely admitted expert testimony to explain evidence in regard to the drug trade," but that this case

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<sup>149</sup> KRE 803(4).

could be distinguished. In this case, the Court agreed that “the opinion as expressed by the expert of the habit of a class of individuals, i.e., drug dealers, was an attempt to prove that Hayes was a member of the class and acted in accordance.” The Court found that the “trial court exceeded its discretion in allowing expert testimony regarding the habits of drug dealers in an attempt to prove that Hayes was a drug dealer and guilty of trafficking.”

In addition, Hayes argued that it was error to admit “a digital audio recordings which was only a copy of a copy of the original when the police had destroyed the original.” Kelton had “downloaded the recording onto his computer and then transferred the audio file to a CD that was played in court.” The Court found that the evidence was authenticated and that there was “no legitimate good faith belief that the recording was not an accurate duplicate.” While the potential for tampering always exist, there was no evidence to that effect in this case. There was no evidence of bad faith in the destruction of the original recording and the jury was properly instructed that the “recording was only a copy and not the original.”

The conviction, however, was reversed on the first issue and remanded for further proceedings.

## TRIAL PROCEDURE / EVIDENCE - IMPEACHMENT

### Snorton v. Com., 2010 WL 1005916 (Ky. 2010)

**FACTS:** Snorton was accused of the murder of McKinney, following a day of ingesting drugs with McKinney and others at Brown’s home in Princeton. The murder took place after McKinney attempted to sell a gun to Snorton and when Snorton refused, McKinney suggested to a companion that they simply rob Snorton. They did so and fled Snorton’s home with money and crack cocaine. Snorton allegedly followed them to the apartment and fatally shot McKinney numerous times. (Various witnesses scattered during the shooting.) No guns were found. Snorton was also shot during the altercation and appeared later at the hospital with an arm wound, which he claimed occurred was when two unidentified men jumped him. Snorton was interviewed several days later and eventually confessed to shooting McKinney, which he alleged was in self defense. He claimed to have gone to the apartment to recover his property.

Snorton was convicted and appealed.

**ISSUE:** May a prior inconsistent statement be used to impeach a witness?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Snorton argued that he was not given the opportunity to impeach the testimony of other witnesses (who were in the apartment at the time of the shooting) “with their prior inconsistent statements given during videotaped interviews with Detective Sholar.” Since the witnesses did not deny that they made the statements, but only that they could not recall whether they had made the statements, the trial court denied Snorton the opportunity to introduce the videotapes.

The Court followed:

In Kentucky, it is well-settled that a prior inconsistent statement may be used to assail the credibility of a witness and may also be received as substantive evidence.<sup>150</sup> In order to sustain their admission, the statements must be “material and relevant to the issues of the case” and a proper foundation must be established so that “the witness whose testimony is to be contradicted, supplemented, or otherwise

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<sup>150</sup> Jett v. Com., 436 S.W.2d 788 (Ky. 1969); KRE 801A(a)(1) ; see also Askew v. Com. , 768 S.W.2d 51 (1989).

affected by the out-of-court statement may have a proper and timely opportunity to give his version or explanation of it."<sup>151</sup>.

The Court must determine if "[a] statement is inconsistent . . . whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."<sup>152</sup> Underlying our policy in this respect is the belief that "[n]o person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" <sup>153</sup> The Court concluded that the statements were "highly material and relevant" to Snorton's defense. However, since Det. Sholar was permitted to testify about the videotaped statements, the Court agreed that the error was not harmless because Snorton was denied the opportunity to present "crucial evidence going to his self-defense claim at a highly important time in trial."

The Court reversed the conviction.

## TRIAL PROCEDURE / EVIDENCE - CRAWFORD

### Laymon v. Com., 2010 WL 668656 (Ky. App. 2010)

**FACTS:** On the morning of July 8, 2006, McCracken County deputies found J.A. sleeping in her mother's car. She stated that Laymon had "entered her bed and touched her inappropriately." She was not taken for any testing. She was present but did not testify at trial, instead, three other persons testified about what she had said. Laymon was convicted of Sexual Abuse and appealed. The case was appealed to the circuit court and affirmed. Laymon further appealed.

**ISSUE:** May statements given by a victim some hours after the crime be introduced by another witness?

**HOLDING:** No

**DISCUSSION:** The Court noted that the lower courts had failed to give enough consideration of Davis v. Washington, Heard v. Com., and Rankins v. Com.<sup>154</sup> Under that line of cases, the statements made by J.A. to her family and the deputies, several hours after the abuse, were testimonial. "There was no ongoing emergency," but instead, "she was questioned in an effort to facilitate criminal prosecution." Laymon's conviction was vacated.

### Stanley v. Com., 2010 WL 323123 (Ky. App. 2010)

**FACTS:** Stanley was accused of an armed robbery that occurred on February 23, 2007, in Henderson County. Detective Herndon later testified that he brought her into the station, gave Stanley her Miranda rights and questioned her. She confessed and handed over a knife. Det. Herndon testified at length about her confession. Stanley testified that although she had been present, that she had given the knife to another subject, Turner, who committed the actual robbery. She was unaware that he was going to commit the robbery when she handed him the knife to cut the cocaine.

Stanley was convicted of complicity to commit robbery and she appealed.

**ISSUE:** May witnesses testify as to what another witness said as to what occurred?

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<sup>151</sup> Jett, supra. see also KRE 613.

<sup>152</sup> Brock v. Com., 947 S.W.2d 24 (Ky. 1997) (emphasis added) (citing Wise v. Com., 600 S.W.2d 470 (Ky. App. 1978)); see also Young v. Com., 50 S.W.3d 148 (Ky. 2001).

<sup>153</sup> Wise, supra; see also Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001).

<sup>154</sup> 547 U.S. 813 (2006); 217 S.W.3d 240 (Ky. 2007); 237 S.W.3d 128 (Ky. 2007)

**HOLDING:** No

**DISCUSSION:** The Court quickly concluded that the evidence provided by Det. Herndon, the only prosecution witness, was testimonial and was admitted in violation of Crawford v. Washington.<sup>155</sup> The Court noted that “the jury was given the statements of the victim as to ‘what happened’ with the primary purpose to establish criminal liability without Stanley having the opportunity to cross-examine the witness accusing her.” Stanley’s conviction was reversed.

## **TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS**

### **Willis v. Com., 304 S.W.3d 707 (Ky. App. 2010)**

**FACTS:** In April, 2007, Ruby Willis initiated divorce proceedings against her husband Larry. On June 19, following Larry’s request for a meeting, law enforcement officers arrived at the meeting site, a BP station, and found that he had a gun, rope, a knife and binoculars. Ruby then sought an EPO. In an incident several months later, Larry allegedly tried to drown her in a swimming pool. A week later, Ruby arrived with friends to move her belongings. Larry and Ruby stepped outside and Larry shot Ruby. Ruby suffered life threatening injuries and suffered brain damage from lack of oxygen.

Larry was charged with Assault 1<sup>st</sup> and Attempt-Murder. The Assault charge was reduced and he was convicted. Larry Willis appealed.

**ISSUE:** Is evidence of prior bad acts ever admissible?

**HOLDING:** Yes (but it depends)

**DISCUSSION:** Willis argued that the admission of the other acts of violence were in violation of KRE 404(b), which prohibited the “admission of evidence of bad acts other than those charged unless they serve to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” The Court agreed that the evidence was, however, admissible.

Willis’s conviction was affirmed.

### **Brinegar v. Com., 2010 WL 3360695 (Ky. App. 2010)**

**FACTS:** On April 4, 2005, an Estill County church was destroyed by arson. During the investigation, Wilson and Brinegar “each made formal statements indicating the other’s involvement in a total of five fires.” However, they were charged only in this church fire. Wilson took a plea deal and testified against Brinegar, stating specifically that Brinegar “repeatedly manipulated her into starting a number of fires in Estill County, including the fire that burned down the church.” Brinegar objected at trial but the information was admitted. Ultimately Brinegar was convicted and appealed.

**ISSUE:** Is evidence of prior bad acts that demonstrate a common scheme or plan admissible?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”<sup>156</sup> However, such evidence of “prior bad

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<sup>155</sup> Crawford, supra.

<sup>156</sup> KRE 404(b).

acts" may be admitted if it is offered to prove a common scheme or plan; such evidence is relevant to serve a purpose other than provide a defendant's criminal disposition; and the probative worth and need for the evidence outweighs potential prejudice to the accused."<sup>157</sup> Looking to the "common scheme or plan exception," the Court noted that if "the method of the commission of the other uncharged crimes is so similar as to indicate a reasonable probability that all of the crimes were committed by the same person, evidence that the defendant committed the other uncharged crimes is admissible to show a common scheme or plan."<sup>158</sup> "Common facts rather than common criminality are the keystone of such an examination."<sup>159</sup> In this case, the Court noted that the "evidence not only indicates that Brinegar committed similar crimes within the previous three weeks, but that he committed them in the same geographic vicinity, that in each case he directed a fire to be started in a particular way, sometimes reporting the fire himself, and was on site to put out each fire in question." That constituted a "signature of sorts" under the provisions of Adcock v. Com.<sup>160</sup> The Court found it was relevant under KRE 401 and helped clarify Brinegar's course of conduct over the time leading up to the fire in question.

The Court found the evidence admissible and affirmed the conviction.

## TRIAL PROCEDURE / EVIDENCE - PHOTOS/VIDEOS

### Phillips v. Com., 2010 WL 2471669 (Ky. 2010)

**FACTS:** During Phillips's trial for murder, photos of the shotgun blast wound on the back of the victim's head were shown to the jury. Phillips was convicted and appealed.

**ISSUE:** May gruesome photos be shown as evidence?

**HOLDING:** Yes

**DISCUSSION:** Although the photos were gruesome, the Court agreed that the photos were relevant to demonstrate that the victim was, in fact, killed by gunshot wounds. Further, the position of the wound, in the back of the head, was "relevant to refute Phillips's claim of self defense." In addition, "as a general rule, photographs do not become inadmissible simply because they are gruesome."<sup>161</sup> The evidence "loses its admissibility when the photographs depict a body that has been 'materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer."<sup>162</sup> That threshold is very high.

Phillips's conviction was affirmed.

### Mullins v. Com., 2010 WL 4156766 (Ky. 2010)

**FACTS:** In September / October, 2008, Humphrey (acting with Operation UNITE) went to Mullins' home to make a controlled drug buy. Mullins was indicted in Breathitt County and ultimately convicted. He then appealed.

**ISSUE:** Are video recordings of a drug buy admissible, even if they don't document the entire transaction?

**HOLDING:** Yes

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<sup>157</sup> O'Bryan v. Com., 634 S.W.2d 153 (Ky. 1982).

<sup>158</sup> Com. v. English, 993 S.W.2d 941 (Ky. 1999); Billings v. Com., 843 S.W.2d 890 (Ky. 1992).

<sup>159</sup> Lear v. Com., 884 S.W.2d 657 (Ky. 1994).

<sup>160</sup> 843 S.W.2d 890 (Ky. 1992).

<sup>161</sup> Foley v. Com., 953 S.W.2d 924 (Ky. 1997).

<sup>162</sup> Clark v. Com., 833 S.W.2d 793 (Ky. 1991).

**DISCUSSION:** Mullins argued that video recordings of the buys should not have been introduced “because the Commonwealth did not prove to the jury that the officers searched the cooperating witness before and after the “buy”; the officers searched the cooperating witness’s vehicle before and after the “buy”; and, finally, that the officers kept the cooperating witness under observation and monitored the entrances and exits of the location of the “buy.” The Court, however, found that nothing in Kentucky law required that, although certainly, it might create an issue of credibility.

Mullins’ conviction was affirmed.

## **EMPLOYMENT – KRS 15.520**

### **Moore v. City of New Haven, 2010 WL 4295588 (Ky. App. 2010)**

**FACTS:** In 2005, Moore entered into an employment agreement with the City of New Haven to serve as police chief. In 2008, he was terminated for several reasons, including insubordination. He filed an action claiming the termination violated KRS 15.520. The trial court granted summary judgment on behalf of the city, finding it had the authority to terminate Moore as an at-will employee, pursuant to the agreement. Moore appealed.

**ISSUE:** Does KRS 15.520 apply when there is no outside complaint?

**HOLDING:** No

**DISCUSSION:** Moore first argued that the process used to terminate him violated KRS 83A.080 and that only the mayor (and not the city council, as was actually done) had the authority to terminate him. The Court agreed that the mayor was a member of the council, and as such, the termination was lawful under that statute. Furthermore, it ruled that Moore’s contact made him specifically an at-will employee and subject to termination at any time. Moore also argued that he should have been afforded a hearing pursuant to KRS 15.520. However, the Court noted that in the case he cited, City of Munfordville v. Sheldon, the termination was as a result of a citizen complaint, which did not seem to be the case for Moore.<sup>163</sup> Instead, the Court looked to McCloud v. Whitt, in which 15.520 had been found not to apply in a discretionary termination.<sup>164</sup>

The Court upheld the summary judgment.

## **OPEN RECORDS**

### **Valentine v. Personnel Cabinet, 322 S.W.3d 505 (Ky. App. 2010)**

**FACTS:** Valentine made an Open Records request for the personnel file of the prosecuting attorney in his criminal case. Upon appeal, the Attorney General’s Decision indicated Valentine was entitled to the records, but the Circuit Court, upon an appeal of that decision, reversed it. Valentine appealed.

**ISSUE:** Is the personnel file of a government employee completely available through Open Records?

**HOLDING:** No

**DISCUSSION:** The Attorney General’s Decision determined that once the file was stripped of private information, it was “otherwise subject to inspection.” The trial court had held that “Valentine’s request would serve no valid public

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<sup>163</sup> 977 S.W.2d 497 (Ky. 1998).

<sup>164</sup> 639 S.W.2d 375 (Ky. App. 1982).

interest and appeared to be motivated only by personal curiosity.” In fact, he had made several requests, trying to discover personal information of everyone involved in his case. The Court agreed that “when balanced against the invasion of privacy sought by Valentine’s request to obtain personnel records of his prosecuting attorney, the balance must tip in favor of privacy.” The Court was unaware, nor had it been enlightened, as to “how such request would advance the public’s interest in assuring that the agency in question was properly performing its function.”

The Court upheld the decision of the trial court to deny the request.

**Central Kentucky News-Journal v. Hon. Douglas M. George (Judge, Taylor Circuit Court), 306 S.W.3d 41 (Ky. 2010)**

**FACTS:** The Kentucky News-Journal was seeking copies of documents related to a confidential settlement entered into between the Campbellsville Independent School District, the Board of Education and related parties, and an employee alleging sexual harassment. After mediation, the parties reached two separate settlements in which both agreed the terms would remain confidential and the Taylor Circuit Court agreed to seal the records. The News-Journal requested the documents from the involved school districts under the Kentucky Open Records Act and was denied. The News-Journal appealed to the Kentucky Attorney General. In its Decision, 07-ORD-110, the Attorney General concluded that the settlement agreements were public documents and subject to disclosure, but that because of the court order, “its authority was limited and the issue of public access to the agreements was one to be resolved by the court.” As such, the News-Journal intervened in the actions to request the trial court unseal the agreements. The trial court denied the motion and the newspaper appealed to the Kentucky Court of Appeals for a writ of mandamus. The Kentucky Court of Appeals ruled that pursuant to Courier-Journal and Louisville Times Co. v. Peers<sup>165</sup> that the news media “was entitled to intervene and participate in a hearing on the underlying merits of its claims.” It ordered the trial court to allow the intervention but ruled that neither the Open Records Act’s privacy exemptions, nor the First Amendment, required the court to unseal the agreements.

The News-Journal returned to the Court of Appeals, which denied its motion. The News-Journal further appealed.

**ISSUE:** Are settlements of lawsuits against public entities confidential?

**HOLDING:** No

**DISCUSSION:** The Court concluded that “because ... settlement agreements involved the expenditure of public funds, the public’s interest in the outcome of the settlement was ... strong.” The interest of a plaintiff in keeping the amount secret was of little weight. The Court agreed that a “confidentiality clause” does not “create an inherent right to privacy superior to and exempt from the statutory mandate for disclosure” under Open Records.

The Court reversed the decision and ordered the records released.

**NOTE:** *A few days later, the Central Kentucky News-Journal reported that the two settlements in question involved a payment of \$100,000 to the plaintiff.*

## **CIVIL LITIGATION**

**Pullen v. Conder, 2010 WL 4295582 (Ky. App. 2010)**

**FACTS:** On May 26, 2007, Conder was riding his bike on the sidewalk along Browns Lane. He hit an uneven place, fell and was injured. He filed suit against Pullen (the director of Louisville Metro Public Works),

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<sup>165</sup> 747 S.W.2d 125 (Ky. 1988).

arguing that Pullen had breached a legal duty to maintain the sidewalk. Pullen asserted the defense of qualified immunity. He also argued that Conder “violated an ordinance by riding his bicycle on the sidewalk and that Conder’s violation of that ordinance was the proximate cause of his injury” and moved for summary judgment. The Court denied the motion.

Pullen then argued for summary judgment on qualified immunity. He explained that he did not know about the condition of the sidewalk, or even Conder’s accident, until long after it occurred. He also noted that he could find nothing that indicated that anyone had complained about the condition of the sidewalk. Conder argued that “Pullen’s duties were ministerial,” so he was not entitled to immunity. The summary judgment was denied and Pullen appealed.

**ISSUE:** Is a public official entitled to immunity for ministerial acts?

**HOLDING:** No

**DISCUSSION:** The Court first addressed the confusion of Pullen arguing a defense to the negligence claim in the context of an immunity claim and noted that lack of knowledge of a defense did not relate to it. The Court agreed that the type of immunity at issue in this case was “qualified official immunity.”

The Court continued:

While performing discretionary acts or functions, public officers or employees are shielded from liability for negligence by the doctrine of qualified immunity.<sup>166</sup> Discretionary acts involve the exercise of judgment by an official acting within the scope of his office. Qualified immunity does not extend to negligent performance of ministerial duties which consist of routine acts or functions.

The Court agreed that repairing sidewalks is a ministerial function of the Public Works Department. However, “how to make repairs and, possibly, when to make those repairs, would be discretionary functions” of the office. Because of that, the Court agreed that the denial of summary judgment was appropriate. (The Court also noted that Pullen may be able to later prove he is entitled to qualified immunity, but had simply “not done so to date.”) The Court did not rule on the possibility of liability under negligence.

The Court affirmed the denial of summary judgment.

**Flynn v. Blavatt, 2010 WL 4137478 (Ky. App. 2010)**

**FACTS:** On October 14, 2004, Flynn, a student at Connor High School (Hebron), was struck in the face by Bass. His jaw was broken. In 2007, he filed suit against a number of defendants, including personnel with the school. Specifically, he alleged that Berger and Wilson, P.E. teachers, were “liable under the theory of negligent supervision and that the other defendants were vicariously liable.” The trial court awarded summary judgment, on the doctrine of immunity, to the school system defendants. Flynn appealed that decision with request to Berger and Wilson.

**ISSUE:** Is enforcement of a rule a discretionary function?

**HOLDING:** Yes

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<sup>166</sup> Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

**DISCUSSION:** The Court noted, first, that the complaint did not indicate whether the two were sued in their individual or official capacities. The court noted that in a similar situation, the Court had concluded that when it fails to specify, the defendant “shall be deemed as amenable to suit only in his individual capacity.”<sup>167</sup>

The Court noted that school officials are not entitled to sovereign immunity but are “cloaked with governmental immunity.”<sup>168</sup> This applies whether they are sued in their official or individual capacities. This protection prevents such employees from being held liable for actions related to alleged negligence in the performance of duties that involve “discretionary acts or functions,” taken in good faith within the scope of their authority. Such employees are not protected, however, for the negligent performance of a ministerial act, when the “duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.”<sup>169</sup> Flynn argued that the “duty to supervise [students] is ministerial.”

The Court found that the “enactment of the rules and enforcement of them are discretionary in nature.”<sup>170</sup> As such, the teachers are protected by “qualified official immunity.” The Court also noted that the assault occurred while students were changing clothes and that both teachers were in the office. “Logically, the teachers could not be in all the locations [gym, locker room and hallway] at the same time.”

The Court upheld the decision of qualified official immunity.

### **Brown v. Preston, 2010 WL 5018558 (Ky. App. 2010)**

**FACTS:** On the day in question, Deputy Sheriff Preston (Johnson County SO) was dispatched to a wreck. The road was slippery with snow and sleet. He parked behind an ambulance which had parked behind the wrecked vehicle (owned by Brown). He checked his rear view to determine whether traffic could see him. His emergency lights were on as were the lights for the ambulance. Two crew members were working with Brown, extricating her - Burchett and Moore. Preston began to check the plate and got out to approach Brown, Burchett and Moore, who were walking to the ambulance. Preston heard a “jake brake” and yelled for everyone to run. The oncoming coal truck left the road and killed Brown and Burchett. (This all occurred within three minutes.)

The estates of both Brown and Burchett filed suit against Preston, Sheriff Witten and the Sheriff’s Office. They contended that Sheriff Witten was “vicariously liable for the alleged negligence of Preston” because of his status as a deputy. Preston, the Sheriff and the Sheriff’s Office moved for summary judgment, arguing that they were immune. The Estates appealed.

**ISSUE:** Are an officer’s decisions at a traffic scene discretionary?

**HOLDING:** Yes

**DISCUSSION:** Deputy Preston argued that his actions in responding to the crash “were discretionary and consequently, that he was entitled to qualified official immunity.” Such immunity applies when the employee’s actions involve, the exercise of discretion and judgment, or personal deliberation, decision, and judgment.”<sup>171</sup> Ministerial acts, on the other hand, “are those that require only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” The Court noted, however, that the distinction was rarely as simple as it might seem and that it must determine the “dominant nature of the act.”<sup>172</sup> The Estates pointed to KRS 70.150, which required deputy

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<sup>167</sup> Bolin v. Davis, 283 S.W.3d 752 (Ky. App. 2008).

<sup>168</sup> James v. Wilson, 95 S.W.3d 875 (Ky. App. 2002).

<sup>169</sup> Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

<sup>170</sup> S.S. v. Eastern Kentucky University, 431 F.Supp.2d 718 (E.D. Ky. 2006).

<sup>171</sup> Yanero, supra.

<sup>172</sup> Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010).

sheriffs “to direct, regulate and control traffic to maintain a maximum degree of safety.” The Court noted that his actions at the time, checking the plate, were in accordance with another part of the same statute, which required the deputy to determine the owner, etc. of the vehicle involved in the accident.

Despite an expert’s testimony as to actions the deputy could have taken to make the scene safer, the Court found that Preston’s actions at the scene were discretionary. Since there was certainly no contention that his actions were made in bad faith, the Court assumed them to be in good faith. The court found Deputy Preston immune. With respect to the Sheriff, the Court noted that Preston was properly skilled in his job and as such, the agency was not vicariously liable for his actions. The Court upheld the dismissal of both parties.

**Pugh v. Randolph, 2010 WL 5018184 (Ky. App. 2010)**

**FACTS:** Pugh (Louisville Metro PD) was on duty when he received a dispatch of a purse snatching. The victim was describing her assailant when she spotted a car drive by and indicated the robber had gotten into that specific car. The driver was later found to be Jones. Pugh did a traffic stop and got out to talk to the driver, when the car “took off.” Pugh pursued it, and eventually, it ran a traffic signal and crashed into another vehicle. Demetra Boyd, a child, was killed in the crash, other children and the adult driver were injured. Boyd (Demetra’s father and the driver of the car) filed suit against Pugh, the police agency and Metro Louisville, arguing negligence. Pugh moved for dismissal and/or summary judgment. The trial court, relying on Jones v. Lathram, found Pugh’s act of driving to be ministerial and not discretionary and thus he was not entitled to qualified immunity and dismissal.<sup>173</sup> Pugh appealed.

**ISSUE:** Is the decision to engage in a pursuit discretionary?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the Jones’ case was “highly distinguishable from the present case” and involved the “act of safely driving a police cruiser in responding to an emergency call from a fellow officer.” In this case, at issue was Pugh’s adherence to policies for police pursuits and asked whether his actions were “purely ministerial, discretionary, or a combination of the two.” Pugh was actively in pursuit of a perpetrator and Pugh, himself, was not involved in the crash. The accident was not a direct result of Pugh’s driving.

The Court noted that the policy dictated that “whether a pursuit should be initiated depends, in part, on the seriousness of the ... offense” - in this case, a robbery. The Court reversed the denial of the motion and directed that further discovery and proceedings on the claim be held.

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<sup>173</sup> 150 S.W.3d (Ky. 2004).

# SIXTH CIRCUIT

## ARREST

### U.S. v. Collins, 359 Fed.Appx. 639 (6th Cir. 2010)

**FACTS:** On August 30, 2007, Deputy Craycraft (Clark Co. SO, Ky) received a contempt bench warrant for Collins, who had failed to respond to an order to have a mental health evaluation. The warrant included a notation that “this person is mental and could be possible trouble - when attempting to serve take 3 deputies.” Craycraft and three other deputies went to Morefield’s home, which he shared with his girlfriend. Morefield at first denied Collins was there, but then admitted he was sleeping in another room. Morefield offered to get him, but Craycraft refused, stating “we’ll get him.” There was dispute as to whether Morefield actually gave consent for the deputies to enter. The deputies entered, found Collins and arrested him. They spotted two rifles in a gun rack in the same room and seized them. (Morefield later delivered another firearm that belonged to Collins.)

Collins was charged with possession of firearms by a felon. (Other charges were dismissed.) Collins moved for suppression, which the judge denied. Collins took a conditional guilty plea and appealed.

**ISSUE:** May officers enter a home on a misdemeanor arrest warrant when they have probable cause the subject is inside?

**HOLDING:** Yes

**DISCUSSION:** Collins first argued that a misdemeanor bench warrant for contempt of court was somehow different from other arrest warrants, or that officers could not enter a residence to serve such warrants. The Court disagreed and found the warrant valid. The Court also found that it was appropriate for officers to enter a home when they have probable cause to believe that a suspect is inside.<sup>174</sup> Further it held that it was “well-established that law enforcement officials have authority to enter a residence in order to execute an arrest warrant if there is probable cause to believe the person named in the warrant is inside.”

The Court affirmed the lower court’s decision.

### U.S. v. Edmundson, 2010 WL 5423742 (6<sup>th</sup> Cir. 2010)

**FACTS:** On March 24, 2006, Frankfort police responded to an emergency call from an individual who called himself Tony Smith and “claimed that armed individuals in his home were trying to kill him.” The responding officer arrived at a “multi-unit apartment complex” and found a “man screaming at the top of his lungs out of a window, while striking the drawn window blinds.” He yelled that “they are going to kill me” and that “they have got a gun.” The door was locked, so the officer, believing the situation was exigent, kicked open the door. [Note: although it is never specifically stated in the opinion, this appeared to actually be the door of the individual two-story unit, and not a door into a common foyer.] He found a “shirtless man [Edmundson] charging down the stairs of the apartment towards him.” The man screamed that the alleged assailants were trying to get out the back door. The officer ordered him to get down and ultimately pushed him to the floor, where he continued to scream. Edmundson’s girlfriend, Reffert, came into view and told the officer that she and Edmundson were alone. At that point, the officer handcuffed Edmundson and pulled him out to the front steps. The officer saw that neighbors were watching. The officer arrested Edmundson (who was later found to be under the influence of narcotics and in the grip of a paranoid delusion) for disorderly conduct. Upon searching him incident to the arrest, the officer found a gun magazine, cash,

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<sup>174</sup> U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008); Payton v. New York, 445 U.S. 573 (1980).

crack and powder cocaine. As a result of what was found, Edmundson was charged with federal offenses for Trafficking and having a firearm as a convicted felon. He moved for suppression, which was denied. He appealed.

**ISSUE:** May a disorderly conduct arrest be based upon actions that occurred within a home?

**HOLDING:** Yes

**DISCUSSION:** Edmundson argued that the arrest for disorderly conduct was unlawful because it occurred inside his own home. The trial court had found that the arrest was lawful because he was “engaging in tumultuous behavior and making unreasonable noise in a public place which wantonly created a risk of public annoyance or alarm.” The Court agreed that despite Edmundson’s argument to the contrary, “Kentucky’s proscription of disorderly conduct encompasses acts that occur in a private location so long as it “produces its offensive or proscribed consequences in a public place.” The officer’s testified that he heard the screams from the parking lot, which was a public place.<sup>175</sup> The Court also found to be of particular significance, “the timing of Edmundson’s arrest, and of the officer’s observation that Edmundson’s neighbors emerged from their apartments to witness the commotion from the parking lot.” The record did not clearly indicate when the officer noticed that an audience had been attracted, but the Court found that probable cause did “not turn on *when* the officer noticed the neighbors or even whether the neighbors emerged from their apartments at all.” All that was required was the “probability of substantial chance” that others would be alarmed.<sup>176</sup> Their emergence only proved that the officer’s belief was reasonable – as it was proved to be accurate.

The Court affirmed the denial of the motion to suppress.

**U.S. v. Reagan, 2010 WL 4386809 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Reagan was arrested in 2007. At about 4 a.m., Deputy Faulkner (unidentified Tennessee sheriff’s office) had just completed his shift and was sitting in an unmarked vehicle at a gas station, reading a newspaper. He saw a black car parked about 30 feet behind his vehicle and heard two people arguing. The female passenger got out and went inside, while the male driver remained in the car and turned up the radio. Faulkner, who was not in uniform, put on his badge and gun and approached the car, asking about the problem. “Reagan replied that there was no disturbance.” Faulkner spotted two clear containers of alcohol and “smelled alcohol coming from the car.” He asked Reagan to get out of the car, but before Reagan did so, Faulkner saw him place a firearm in the door pocket. Faulkner handcuffed and frisked Reagan and then gave him Miranda warnings. He asked Reagan if there were any other weapons in the car and Reagan admitted there was another gun in the center console. Faulkner found a revolver there. He retrieved and unloaded both firearms and placed them on the hood of the car.

Faulkner arrested both parties and called for a vehicle tow. He did an inventory search, finding scales and both crack and powder cocaine. He also found liquor. Reagan requested suppression and was denied. At trial, Faulkner testified that he initially detained Reagan for “officer safety.” He only arrested him after he learned that Reagan was a convicted felon. The magistrate judge recommended denial of the suppression motion and the trial court agreed. Reagan took a conditional guilty plea and appealed.

**ISSUE:** Is an arrest for a concealed weapon appropriate before checking to see if the subject has a permit?

**HOLDING:** Yes (although it can be raised as an affirmative defense).

**DISCUSSION:** Reagan’s primary argument was that “Faulkner lacked probable cause to arrest him and, thus, the subsequent inventory search of his vehicle was unconstitutional.” The Court, however, ruled that the deputy made

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<sup>175</sup> KRS 525.010(3); Woosley v. City of Paris, 591 F. Supp. (E.D. Ky. 2008).

<sup>176</sup> U.S. v. McClain, 444 F.3d 556 (6<sup>th</sup> Cir. 2005).

a valid arrest, whether it was a misdemeanor arrest under Tennessee law for the concealed weapon or a felony arrest for having the weapon as a convicted felon. Reagan argued that the arrest was made before Faulkner checked to see if he had a weapon permit, but the Court noted that was an affirmative defense. (Nor did he actually allege he had a valid permit, anyway.)

The Court also noted that Reagan put forth no real argument as to “why Faulkner lacked any reasonable suspicion” and thus found the argument effectively abandoned. The Court agreed that the search was a proper inventory search and affirmed the denial of the motion to suppress.

*NOTE: The arrest was justified under Tennessee law. Kentucky state courts may find the arrest under the circumstances invalid.*

## SEARCH & SEIZURE - SEARCH WARRANT

### U.S. v. Sprague, 370 Fed.Appx. 638 (6th Cir. 2010)

**FACTS:** On Aug. 19, 2005, Kingsport (TN) PD officers got a search warrant for Sprague's apartment, based upon an affidavit by Det. Adkins. The warrant asserted that Sprague was not in compliance with sex offender registration and that he had committed perjury. Specifically, Sprague was barred from associating with children but was playing the role of Santa Claus. He was also seen to be driving multiple vehicles, although he swore he had only one, and he claimed responsibility for two daughters who lived with him, although he was prohibited from living with minors. Officers searched his home and found pornographic material and a large amount of cash, as well as computer equipment. When leaving the apartment, Det. Adkins spotted Sprague and stopped him on an active FTA warrant. He was told of the search of his home and consented to a search of his storage unit. He stated he was living with a woman, and upon confirmation, a search warrant was obtained for her home. The computer was searched based upon a separate search warrant.

Sprague was indicted and moved for suppression, arguing, apparently, that he didn't live in the first apartment. When that was denied, he took a conditional guilty plea to possessing child pornography and appealed.

**ISSUE:** Does an allegation of a false statement in an affidavit invalidate the warrant?

**HOLDING:** No

**DISCUSSION:** Sprague argued first, that the apartment was not his primary residence and that the affidavit was materially false in that respect. He also argued that the “the purpose of the search was to uncover child pornography, not to investigate the alleged violations of Defendant's obligations to register as a sex offender.”

The Court continued:

The question of whether the apartment was Defendant's primary address is easily resolved. As a preliminary matter, Detective Adkins never swore in the affidavit that it was his primary residence. The affidavit stated that the Prospect Drive apartment was “resided in or occupied and possessed by” Defendant, not that it was his primary residence. The apartment was undoubtedly still possessed by Defendant, and even if he were usually staying at Conley's place, he still had a large number of possessions at the Prospect Drive apartment, including an outdoor cat. Additionally, Defendant received a Section 8 voucher, which is only available for a primary residence, for the apartment. He stated that the apartment was his address on all of his registration forms to register as a sex offender as well as other sworn legal documents.

One of the witnesses testified that the apartment was such a mess that no one could live there, but there was no indication that she told that to the affiant officer. Further, the fact that an indictment was issued does not end the investigation and evidence of his contact with children (the Santa Claus suit) was sought in the search.

The Court agreed:

It is possible that the officers were hoping to find child pornography on the computers, but we are unaware of any principle of law that a search warrant issued based on credible allegations of illegal activity is invalid where the officers hope to find information of additional criminal activity.<sup>177</sup>

The Court discounted a suggestion by one of the witnesses that one of the detectives had been seen at the apartment prior to the warrant being issued, finding that witness essentially incredible.

Sprague's plea was affirmed.

### **U.S. v. Khami, 362 Fed.Appx. (6<sup>th</sup> Cir. 2010)**

**FACTS:** Khami's home in Detroit became the focus of two separate drug trafficking investigations. The investigation led by ICE did not result in a search warrant for that agency but did contribute to a search done by a task force, CHIEF. Khami was mistakenly linked to the investigation as he was believed to be the "Arab male" described by a witness as being involved in the trafficking. The transactions took place near Khami's home, "but not at that location." The description given of the location where the drug transaction took place was not the same as Khami's home.

Officers obtained a search warrant for Khami's home. During the search, officers found a gun. Khami argued, however, that:

Willis [the witness] describes the house as South of 7 Mile Road; Mr. Khami's house is North of 7 Mile Road. Willis describes the house as a "two-family flat"; Mr. Khami's home is a single-family dwelling. Willis describes the house as being "beige brick"; Mr. Khami's house has white aluminum siding on it. Willis describes the house as being located "near the corner"; Mr. Khami's house is in the middle of his block

Khami was indicted for being a Felon in Possession of a Firearm. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does an allegation of a false statement in a search warrant automatically require a Franks hearing?

**HOLDING:** No

**DISCUSSION:** The Court noted that the search warrant affidavit consisted of the following:

First, the CHIEF investigator alleged that in his lengthy experience in law enforcement and in drug investigations, the articles sought in the search warrant are the kind of evidence usually recovered from homes of people who are suspected of involvement in drug trafficking. The affidavit then details the CHIEF surveillance of three vehicles believed to be involved in narcotics trafficking which led to the recovery of 9,500 ecstasy pills in a traffic stop of two of the vehicles. The affidavit then discusses using the license plate number of vehicle #3 to determine the registered address, and law enforcement officers then going to that address and observing the black male previously seen participating in the three-vehicle

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<sup>177</sup> See Whren v. U.S., 517 U.S. 806 (1996).

transaction. That male was followed to 19168 Havana Street where he met with an Arab male who had come from inside the home. Then the affidavit discusses information obtained from Willis, one of the defendants arrested in the traffic stop of the first two vehicles which describes the drug transaction that occurred at an unknown house, and then alleges that Willis identified Defendant as the Arab male involved in that transaction and identified 19168 Havana Street from photographs as near the location of the drug transaction. The affidavit concludes with allegations that Defendant lists 19168 Havana Street as his address on his driver's license and that Defendant has two prior drug convictions.

Specifically, there was a nexus to the house because officers saw the driver of a vehicle involved in the transaction go to Khami's home. Standing alone, that would not have been sufficient but it did "lend credibility" to the identification given by the witness of Khami. Khami argued that the affidavit was "intentionally misleading" because it left out "material facts that would have defeated probable cause" As such, he argued, he was entitled to a Franks hearing.<sup>178</sup> The Court noted that the "standard for obtaining a Franks hearing is higher for a claim of material omission than for an allegedly false affirmative statement," because "criminal investigations are usually fast-paced and have many sources of information that may not all be recognized as equally important to the officers involved."<sup>179</sup> In this case, there were two investigations working in tandem and facts known to one may not have been known to officers involved in the other. Khami also argued that it was unconstitutional to prohibit a firearm from having a weapon but that argument was quickly overridden by the court.

Khami's conviction was affirmed.

### U.S. v. Lazar, 604 F.3d 230 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 9, 2002, a federal magistrate judge signed a search warrant for two offices in Memphis, Tennessee. The suspect in the case was Dr. Lazar, who was under investigation for health care fraud and deceit. The documents were duplicates except for the address. The attachment describing the items to be seized is as follows:

1. *"Any and all documents and records . . . including but not limited to patient charts, files, medical records . . . concerning the treatment of any of the below listed patients, claim forms, billing statements, records of payments received . . . for the following patients:"*
2. *"Any and all information and data, pertaining to the billing of services . . . .";*
3. *"Any and all computer hardware . . . .";*
4. *"Any and all computer software . . . .";*
5. *"Any computer related documentation . . . .";*
6. *"Any computer passwords . . . .";*
7. *"If a determination is made during the search, by the Special Agent assigned to the computer aspect of this search, . . . that imaging or recreation of the computer hard drives will damage the seized information, you are authorized to seize the computers . . . ."; and*
8. *"All other records or property that constitutes evidence of the commission of the offenses outlined in the search warrant . . . ."*

Lazar sought suppression.

The packet also included a list of patient's names for whom records were sought - there was later testimony that the list was not attached to the warrant and affidavit due to privacy concerns for the children involved. The lack of the list was noted by the Magistrate Judge that reviewed the packet of materials at a later date. There was confusion at

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<sup>178</sup> Franks v. Delaware, 438 U.S. 154 (U.S. 1978).

<sup>179</sup> U. S. v. Fowler, 535 F.3d 408 (6<sup>th</sup> Cir. 2008) (citing U.S. v. Graham, 275 F.3d 490 (6<sup>th</sup> Cir. 2001), U. S. v. Sawyers, 127 F. App'x 174 (6<sup>th</sup> Cir. 2005)).

the suppression hearing as to which of the lists entered into evidence during the hearing was the original list submitted the judge. The original reviewing magistrate avoided the issue entirely, and simply held that the warrants lacked probable cause and that the judge viewing a patient list did not save the warrants from “facial invalidity.”

The reviewing magistrate recommended, and the District Judge agreed, that the warrant should be suppressed. The government appealed.

**ISSUE:** Is a warrant which does not list with particularity the items to be seized facially invalid?

**HOLDING:** Yes

**DISCUSSION:** First, the court discussed whether the language of the warrant sufficed to “incorporate a patient list into the affidavit and warrants.” The District Court had ruled that it did not, but the Court agreed that no special language was needed to incorporate by reference a separate document into a warrant.

The court looked to Groh v. Ramirez<sup>180</sup> for guidance. In that case, the Court noted that “[b]ecause [the officer] did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly unreasonable under the Fourth Amendment.” The Court found that this case, like Groh, “deals with particularization of search warrants and whether they are facially deficient.” The Court agreed that the list was in front of the issuing judge and ruled the suppressing the files that were on the list was in error. (However, it was appropriate to suppress files that were not on the list before the judge.) Because the District Court, however, “did not make a finding as to which patient list came before the issuing Magistrate Judge” it could not “yet determine which patient records should have been suppressed.”

The government argued that the inevitable discovery doctrine prevented suppression of the files which were not on the original list. It claimed “that it would have obtained the files suppressed by the District Court through use of a Department of Justice or grand jury subpoena. It points out that it had already used a subpoena to inspect some of the defendant’s records. It asserts that it resorted to search warrants to diminish the risk that, if it subpoenaed the files, the defendant might either decline to produce or alter the subpoenaed files.” The court, however, noted that “complications can readily arise from use of a subpoena.” The Court agreed that “the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or *other compelling facts* establishing that the disputed evidence inevitably would have been discovered.”<sup>181</sup> Further, the Court found no evidence that the government “likely would have sought to acquire Dr. Lazar’s records by subpoena, much less procured them in the same condition and as promptly as by seizing them with a warrant.”

The case was remanded back for further proceeding on that issue. The Court noted that even if the government need not show that it would likely have obtained the records as quickly and completely with a subpoena, it must at least show that it was ready to obtain them in that manner if, for any reason, it could not have done so—or would have chosen not to do so—with a search warrant.<sup>182</sup> The court, however, did rule that there was sufficient probable cause and that a sufficient foundation had been laid “for a common sense determination that there was a fair probability that evidence of health care fraud—namely, the defendant’s patient files and records—would be found at the defendant treating physician’s offices.”

The Court affirmed in part and vacated the prior decision in part, and remanded the case for further proceedings.

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<sup>180</sup> 540 U.S. 551 (2004).

<sup>181</sup> U.S. v. Kennedy, 61 F.3d 494 (6<sup>th</sup> Cir. 1995).

<sup>182</sup> U.S. v. Roberts, 852 F.2d 671 (2d Cir. 1988).

**U.S. v. Howard, 621 F.3d 433 (6<sup>th</sup> Cir. 2010)**

**FACTS:** As a result of a traffic stop on December 12, 2005, in Bradley County, Tennessee, Bautista-Benitez's vehicle was searched. Over 5 kilos of drugs were found, along with two cell phones. Howard was drawn into the case and a drug dog was summoned and alerted on Howard's vehicle. The investigation led to a residence in Crittenden, Kentucky, which encompassed two trailers with a common driveway, a locked gate and single mailbox bearing the address 15712.

Agent Hardcorn (Northern Kentucky Drug Task Force, prepared a warrant with the following description.

***On or in the premises numbered:***

*15712 Carlisle Road  
Crittenden, KY 41030  
Kenton County*

***More particularly described as:*** *A singlewide trailer, which is white in color with brown trim. The trailer has two entrances, both facing toward Carlisle Road. The front door is facing a brown barn. A brown metal pole barn is attached to the white trailer with several additional wooden structures by the pole barn. A mailbox with the numbers "15712" clearly posted on it is located across the street from the described property. Additionally, there is another single family trailer located approximately 100 yards to the right of the above described pole barn. This trailer is white in color with the front door facing toward Carlisle Road. The roof is dark in color with wooden steps going to the front door. All of the buildings described here are located on the property of 15712 Carlisle Road.*

Digital scales and an electronic money counter were found in one of the two mobile homes. However, it was then discovered that the address provided was, in fact, incorrect.

Bautista-Benitez and Howard were both indicted. Howard was convicted and appealed.

**ISSUE:** Does a minor error of address on a search warrant invalidate the warrant?

**HOLDING:** No

**DISCUSSION:** With respect to the search warrant, the Court found the facts detailed to be sufficient to prove probable cause. Although Howard argued that the two mobile homes in fact had separate addresses, the court found the "minor, technical inaccuracy" to be insufficient to overturn the warrant.<sup>183</sup> Howard also argued that he was entitled to federal funds to allow him to hire an expert to challenge the drug dog's alert. The Court agreed it was "venturing into relatively uncharged waters because the caselaw" on the issue was sparse. The Court noted that the "ability of dogs to detect the odor of narcotics is uncontroverted." As such, an expert was not needed for that purpose. But the Court agreed, "at least four other aspects of a drug-dog's alert that could present circumstances where expert assistance is 'necessary to mount a plausible defense.'"

The Court noted that, first, the dog's health might be challenged, but that did not seem at issue in this case. Second, the dog's certification might be challenged, but again, no such showing was made in this case that the dog's certification was questionable. Third, the adequacy of the dog's training or performance, specifically, might be at issue, but, the Court agreed that "it viewed expert testimony offered to disprove the reliability of drug dogs *generally* as having little value when determining the reliability of a *particular* drug dog."<sup>184</sup> The credibility of a drug dog "rests almost entirely" on the credibility of the dog handler's testimony "[b]ecause the handler is the only

<sup>183</sup> U.S. v. Pelayo-Landero, 285 F.3d 491 (6th Cir. 2002); U.S. v. Durk, 149 F.3d 464 (6th Cir. 1998).

<sup>184</sup> U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994) U.S. v. Torres-Ramos, 536 F.3d 542 (6th Cir. 2008).

witness who can speak to the subjective interaction during a particular dog alert.”<sup>185</sup> Ultimately, the Court agreed that his criticism of the dog’s records were not such that Howard needed expert assistance to challenge the dog’s credibility. Finally, the Court agreed an expert might be needed “if the drug-dog alert at issue was ambiguous or the product of abnormal circumstances.” Since drugs were found, the dog’s alert was obviously accurate. The Court agreed a drug dog expert was not needed in this case.

With respect to suppression of the evidence found in the mobile home, Howard based his demand on the exclusionary rule. The Court explained in Murray v. U.S.<sup>186</sup> that:

... [t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint.

There are, however, expectations to the general rule. The first is the independent source doctrine, which “rests on the proper balance to be struck between the ‘interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime.’” Second, the Court addressed the inevitable-discovery doctrine. In Nix v. Williams<sup>187</sup>, the Court ruled that “[s]ince the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.” If “the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.” Since Howard’s “purported consent to search the Suburban was ... tainted by his unlawful arrest,” evidence found there should be suppressed unless an expectation applies.

The prosecution argued that the dog’s alert constituted an independent source for the search, because the officer’s had reasonable suspicion to justify the use of the dog. In this case, the officers had reasonable suspicion of Howard’s involvement. The duration of the detention was reasonable and the wait for the dog was appropriate. The Court looked to U.S. v. Garcia<sup>188</sup> and agreed that even if the manner he was detained rose to the level of an arrest, “the officers’ display of authority and use of force to detain him did not create the circumstances that led to Titan [the dog] sniffing the Suburban.” The dog’s deployment was entirely independent. The Court agreed that the alert of a properly trained drug dog was sufficient probable cause, in itself, to support the search of the Suburban. The handler had testified extensively as to the dog’s training, which the court found adequate.

Howard’s conviction was affirmed.

### **U.S. v. Tatman, 2010 WL 3724593 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In February, 2006, Tatman and his wife, Taresa, were separated. She had moved all her belongings from their residence in Chillicothe, Ohio, except for a single disputed item. She returned to the house on Feb. 4 and threatened to turn Tatman over to the authorities for illegal weapons unless he gave her the house. He agreed to do so, but eventually, they got into an altercation and Tatman removed her from the house and ripped the phone from the wall. “Taresa then went to a local general store and called the police alleging domestic

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<sup>185</sup> U.S. v. Howard, 448 F. Supp. 2d 889 (E.D. Tenn. 2006).

<sup>186</sup> 487 U.S. 533 (1988).

<sup>187</sup> 467 U.S.431 (1984).

<sup>188</sup> 496 F.3d 495 (6<sup>th</sup> Cir. 2007).

violence.” Deputy Clark (Ross County SO) met her in the parking lot with her cousin, Fletcher, with whom she had been living.

The officers decided to go to the house and arrest Tatman. He did not answer the door, however. They fetched Taresa and she agreed to unlock the door, and as soon as she did so, the deputy encountered Tatman inside. Taresa consented to the entry, but Tatman “immediately objected to Taresa’s and Clark’s entry and told Clark that Taresa did not live there and had no right to be there.” After a discussion, Tatman agreed to leave and went upstairs to get some belongings. Taresa told Deputy Clark about the weapons (which were fully automatic) and the deputy went upstairs, finding “finding three such weapons on a blanket on the floor.” Tatman was arrested for domestic violence and secured in a cruiser. Taresa signed a written consent for the home and even showed Clark where weapons might be hidden. Eleven weapons were found. A third search was done two days later, pursuant to a warrant, and yet more fully automatic weapons, suppressors, silencers and related items were found. Tatman was arrested some time later on federal weapons charges, and the agent requested consent to search for additional items and a fugitive believed to be on the property. Tatman gave written consent. More items were seized. Tatman was indicted on federal weapons charges and requested suppression. The Court granted the suppression and the government appealed.

**ISSUE:** May evidence found in an unlawful entry be used to support a later search warrant?

**HOLDING:** No

**DISCUSSION:** The Court looked to the first search under the doctrine of Georgia v. Randolph<sup>189</sup> and ruled that “Tatman’s objection to Clark’s entry trumped Taresa’s consent.” The Court noted that “Tatman’s version of events was corroborated by sworn affidavits from Taresa and Fletcher and was consistent with the undisputed story of what had taken place earlier that night—Tatman had physically removed Taresa from the house after she threatened to report his possession of illegal guns to the police.” The question remained, however, as to “whether Tatman’s objections to Clark’s entry invalidated Taresa’s consent for the police to enter Tatman’s home and arrest him.” The Court found that Tatman “clearly and unequivocally objected to the police officer’s presence before the search began.” Further, a “person who consents to a warrantless search has the right to restrict the scope of the search.”<sup>190</sup>

The Government tried to argue that “the search was legal because it was a search incident to a lawful arrest.” This argument fails because the arrest was not legal; although Clark may have had probable cause to arrest Tatman for domestic violence, Clark was not permitted to enter Tatman’s home to arrest him without a warrant or exigent circumstances.<sup>191</sup> The next argument was that since Tatman was arrested at the time he went upstairs, that the arresting officer could stay with him, but the Court agreed “Clark’s entry into the house to arrest Tatman violated the Fourth Amendment” and “as both Clark and Tatman testified, Clark did not place Tatman under arrest until after they both were upstairs.” Finally, the government argued that the search was justified by exigent circumstances, but the Court noted, Clark did not know about the weapons until he entered the house illegally. Further, “[e]vidence that firearms are within a residence, by itself, is not sufficient to create an exigency.”<sup>192</sup> Tatman was cooperative so there was no exigency concerning the weapons. The Court uphold the suppression of the items found in the first search.

With respect to the second search, Tatman argued that “Taresa’s consent was not voluntary and, even if her consent had been voluntary, she no longer had apparent authority to consent to the search.” The court agreed that under the circumstances, “Taresa signed the consent form in the middle of the night, after the domestic dispute with

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<sup>189</sup> 547 U.S. 103 (2006).

<sup>190</sup> Florida v. Jimeno, 500 U.S. 248 (1991).

<sup>191</sup> See Kirk v. Louisiana, 536 U.S. 635 (2002); Payton v. New York, 445 U.S. 573 (1980).

<sup>192</sup> U.S. v. Bates, 84 F.3d 790 (6th Cir. 1996).

Tatman, and just after Tatman was taken in handcuffs into the back of a police cruiser. Under these circumstances, it seems quite likely that Taresa did not even read this statement contained in the consent form, let alone intelligently consider its meaning.” The government failed to meet its burden that her consent “was given intelligently and voluntarily.” Taresa invoked the Fifth Amendment and did not testify, but did submit an affidavit as follows: “[T]he young deputy presented me with a paper and told me it would be in my best interest to sign it because it would allow them to enter the residence and search it and would protect me from being involved and losing my home.” Fletcher submitted a similar affidavit. The Court agreed her consent was not voluntary and further, “the circumstances surrounding the second search created ambiguity such that Clark had a duty to further inquire into Taresa’s authority to consent to the search of the house before conducting a search in reliance on her consent.” “When police are conducting a search pursuant to a person’s consent and circumstances arise that create ambiguity as to whether the person who consented actually had authority to consent to the search, the police have a duty to take affirmative steps to confirm that the person who consented actually had such authority.”<sup>193</sup> The Court agreed that “therefore, even if Taresa had consented to the second search voluntarily, this consent could not provide the basis for a valid warrantless search because Tatman’s statements sufficiently undermined Taresa’s apparent authority to consent to a search of the house, such that Clark was required to make further inquiry into the issue.

With respect to the search pursuant to the warrant, the Court reviewed the warrant, which read:

- 1. The Affiant [sic] is a ten-year veteran of law enforcement and is currently assigned as a Detective within the Ross County Sheriff’s Office Detective Division. The Affiant received initial training through the Ohio University Southern Ohio Police Officer Training Academy and has received advanced training through the Ohio Police Officer’s Training Academy.*
- 2. On February 4, 2005, the Ross County Sheriff’s Office was summoned to 401 Tabernacle Rd. reference [sic] a complaint of Domestic Violence. The responding Deputy obtained information from the victim and an arrest was made stemming from the complaint.*
- 3. While at the scene, the Deputy was advised by the victim that the suspect was in possession of fully automatic firearms. The victim gave consent and a search was conducted for the alleged firearms.*
- 4. During this search a number of non-registered fully automatic weapons were discovered, these weapons were [sic] concealed in the attic of this residence. Also a number of other weapons were located throughout this residence.*
- 5. While checking the non-modified weapons it was discovered and confirmed that one weapon had been reported stolen from Clark County Ill [sic] in 1996 This weapon is described as being a Diawa .12 gauge shotgun. Confirmation of this stolen weapon was obtained from law enforcement from Ill.*
- 6. Affiant [sic] additionally discovered technical drawings and instructions to assist in the conversion [sic] of semi automatic weapons to fully automatic weapons.*
- 7. Affiant [sic] later learned that a workshop had been used to manufacture and alter parts and weapons to convert them into fully automatic weapons.*

The Court agreed that the majority of the information in the affidavit was tainted “because it was obtained during the previous illegal searches.” As such, the “[t]he critical question to be determined is whether the affidavit, apart from the tainted information that is either inaccurate or illegally obtained, provides the requisite probable cause to sustain a search warrant.”<sup>194</sup>

After removing the tainted portions from the warrant, the Court was left with insufficient information to support the warrant. Taresa’s representations about the weapons, and she was unnamed in the warrant, is as “an informant and no independent corroboration of the information she provided was available.”<sup>195</sup> In addition, an assertion that

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<sup>193</sup> Illinois v. Rodriguez, 497 U.S. 177 (1990); U.S. v. Waller, 426 F.3d 838 (6th Cir. 2005).

<sup>194</sup> U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003) (citing U.S. v. Charles, 138 F.3d 257 (6th Cir. 1998)).

<sup>195</sup> U.S. v. Allen, 211 F.3d 970 (6th Cir. 2000) (en banc); U.S.v. Higgins, 557 F.3d 381 (6th Cir. 2009).

Tatman owned such weapons did not necessarily mean the weapons were located at the house. The Court agreed that the untainted facts were “were too vague, generalized, and insubstantial to establish probable cause.”<sup>196</sup> The Court upheld the suppression of the warrant and further agreed that the fruits of the search were not admissible under the inevitable-discovery doctrine.” Finally, with respect to Tatman’s later consent, which resulted in the seizure of a single item, a gun parts kit, the Court agreed that it was properly suppressed “because [the item] was not immediately incriminating and, therefore, its seizure was not permitted under the plain view doctrine.” Specifically, the agent who seized the item admitted that “that he was not able to determine whether or not they were illegal before doing so.” He took photos and sent them to the firearms technology branch for identification. “These firearms experts determined that, among the items seized, the CZ-26 parts kit was considered an illegal machine gun because “it was readily convertible to be made into a machine gun.” The Court agreed the agents did not exceed the scope of Tatman’s consent, but that did not necessarily permit the seizure of the gun parts. “The Fourth Amendment “protects two types of expectations, one involving ‘searches,’ the other ‘seizures.’”<sup>197</sup>

Specifically:

Tatman’s consent permitted the ATF agents to look in the box where they discovered the gun parts and obviated any concerns about the officers interfering with Tatman’s expectations of privacy in doing so. However, in order for the gun parts to have been *seized* lawfully, the requirements of the plain view doctrine must be satisfied.<sup>198</sup> Under this doctrine, law enforcement officers are permitted to seize evidence without a warrant if the evidence is “(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from where the object can be seen; and (4) seized by an officer who had a lawful right of access.”<sup>199</sup> The parts were not immediately incriminating.

Further, “although O’Brien admitted to never asking Tatman for consent to take the gun parts for testing, he apparently was under the impression that Tatman’s signing of the form meant that ‘[he] could take any property.’” He was mistaken. The consent form simply stated that Tatman “underst[ood] that any contraband or evidence of a crime found during the search can be seized.” The Court upheld the suppression of the gun parts.

### **U.S. v. Sneed, 385 Fed.Appx. 551, 2010 WL 2836334 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On May 3, 2007, a bank robbery occurred in Pickerington, Ohio. A vehicle and license plate were obtained by witnesses. The FBI found the vehicle to belong to Castro, and upon questioning, she indicated her brother, Sneed, had borrowed it that day and returned it. She changed that story later, however, but eventually agreed he had the vehicle on May 3. A similar bank robbery had occurred about a week earlier and Castro also confirmed Sneed had the car that day. The agents obtained a search warrant for the car and found evidence linking the vehicle to the robbery. Upon further investigation, the agents learned that Sneed lacked a real, permanent residence, although he listed his sister and his mother’s home with his employer. They sought to interview Sneed at work and found a vehicle they had discovered was registered to him in the parking lot. However, he apparently fled his workplace and never returned to clock out or retrieve his vehicle. (Evidence later indicated he owned a second car.) That vehicle was towed and a warrant was sought to search it.

Continuing:

The affidavit stated that witnesses to the Sky Bank robbery observed two black males exit the bank and enter a Honda Accord, driven by a third black male, with Ohio plate number DWN 2893. The affidavit

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<sup>196</sup> U.S. v. Carpenter, 360 F.3d 591 (6<sup>th</sup> Cir. 2004) (en banc).

<sup>197</sup> U.S. v. Jacobsen, 466 U.S. 109 (1984)

<sup>198</sup> See Soldal v. Cook County, Ill., 506 U.S. 56 (1992); U.S. v. Flores, 193 F. App’x 597 (6<sup>th</sup> Cir. 2006).

<sup>199</sup> Shamaeizadeh v. Cunigan, 338 F.3d 535 (6<sup>th</sup> Cir. 2003) (citing U.S. v. Roark, 36 F.3d 14 (6<sup>th</sup> Cir. 1994)).

also stated that the vehicle was registered to Virginia Castro and that an interview with Castro revealed that Castro's brother, Dante Sneed, had access to the Honda Accord. In addition, [a witness's] affidavit noted that a suspicious-looking male entered Sky Bank in the hours leading up to the robbery, identified himself as "Dante," and asked questions about money orders. Surveillance video revealed the suspicious-looking male to be Dante Sneed. Specifically in regards to Sneed's Cadillac, the affidavit stated that the vehicle in question was registered to Dante Sneed, per Ohio motor vehicle records. The affidavit then went on to state the following:

*13. On 5/4/2007, Castro, Sneed's sister, stated that Sneed did not live at 2259 New Village Road, but instead lived in many different places. Castro did not know the exact address where Sneed stays, because it changes nightly.*

*14. On 5/16/2007, at approximately 10:15 pm, agents went to the Greyhound terminal to interview Sneed. Upon arrival Sneed's vehicle, Ohio Registration EBT- 6523, a four door, black in color, Cadillac, was seen in the Greyhound parking lot. Agents parked their vehicles next to Sneed. Greyhound management advised that Sneed had clocked in at 9:56 pm. Greyhound management attempted to find Sneed, even paging him over the loud speaker. Sneed did not respond. Agents and Columbus Police Department officers searched the entire terminal for Sneed but he had fled the premises. A CPD officer saw a black male, matching the height of Sneed and having similar clothing to what Sneed was wearing, walking on 4th Street away from the Greyhound terminal. Agents and CPD officer's [sic] surrounded Sneed's vehicle. It is believed that Sneed did not return to the vehicle in hopes of disassociating himself from the car and its contents.*

*15. On 5/17/2007, Greyhound management confirmed that Sneed never returned to work to clock out.*

*16. Due to Sneed having abandoned his job and his vehicle agents seized the vehicle for safe keeping. Furthermore, as Sneed does not have a full time residence it is the belief that evidence of the Sky Bank robbery may be in Sneed's vehicle.*

*17. Your affiant believes there is sufficient probable cause to search the 1996 Cadillac, four door Vin#: 1G6KD52Y4TU214423, with Ohio registration EBT-6523.*

The warrant was issued and a gun and other items that linked Sneed to the robberies were found in the car. He was indicted and moved for suppression. "He argued that the warrantless seizure of his Cadillac was not supported by exigent circumstances and that the search warrant affidavit did not establish probable cause to believe that evidence from the robberies would be located in the vehicle." The Court, however, "determined that a warrant was not necessary to seize the Cadillac, so long as the agents had probable cause to believe that it contained contraband" while agreeing that the affidavit did, in fact, provide sufficient probable cause.

Sneed was convicted and appealed.

**ISSUE:** May probable cause support the search of a vehicle for fruits of a crime when the owner lacks a fixed address?

**HOLDING:** Yes

**DISCUSSION:** "Sneed challenges the search warrant affidavit for failing to establish the required nexus between his Cadillac and evidence of the bank robbery. He does not contend that probable cause was lacking to establish his involvement in the bank robbery. Nor does he challenge the veracity of the information contained in the affidavit." The Court looked to whether the affidavit established a "sufficient 'nexus between the place to be searched the evidence to be sought.'"<sup>200</sup> "It is not enough that the owner of the property is suspected of a crime; rather, the affidavit must show reasonable cause to believe that contraband sought will be found in the property to be searched. The Sixth Circuit, along with numerous other Circuits, has consistently held that a nexus can be

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<sup>200</sup> 594 F.3d 488 (6th Cir. 2010).

inferred based on the nature of the evidence sought and the type of offense that the defendant is suspected of having committed.”<sup>201</sup> The Court found it a close call, but that there were sufficient facts to meet the nexus requirement. Since the evidence indicated that Sneed’s address changed nightly, it was certainly reasonable to infer that anything of value might be kept in his vehicle.

Even if the warrant was not sufficient, the Court did find it would uphold the search under the Leon good faith exception.<sup>202</sup> In such cases, the “objectively reasonable reliance standard requires less than the showing required for probable cause.” Leon does not apply only when (1) when the affidavit contains a known or reckless falsity; (2) when the magistrate who issued the warrant wholly abandoned his or her role; (3) when the affidavit lacks an indicia of probable cause such that reliance on it is objectively unreasonable; and (4) when the warrant is facially invalid such that it cannot reasonably be presumed valid.” In this case, the Court found the affidavit to be far more than “bare bones.”

Sneed’s conviction was affirmed.

### U.S. v. Ferguson, 385 Fed.Appx. 518, 2010 WL 2776834 (6<sup>th</sup> Cir. 2010)

**FACTS:** Ferguson was arrested for drug trafficking on a state search warrant, on his property in Bowling Green. He moved for suppression and was denied. He was ultimately convicted and appealed.

**ISSUE:** Must a warrant prove a nexus with the location to be searched?

**HOLDING:** Yes

**DISCUSSION:** The Court began:

Detective Craig Sutter, an officer who was assigned to the drug task force involved in the investigation, stated in his affidavit in support of the application for the search warrant of the Mt. Lebanon Church Road residence that he and several officers arrived at 2946 Mt. Lebanon Church Road, Bowling Green, Kentucky, at approximately 8:30 a.m., on May 15, 2006, to execute a federal arrest warrant for Ferguson. Sutter knocked on the front door, but no one answered. Sutter heard music coming from the residence and saw someone peer through the blinds of a front window.

Sutter also observed two pieces of mail bearing Ferguson’s name in plain view inside a black Ford Explorer associated with Ferguson that was parked in the driveway. The officers waited approximately forty-five minutes before leaving.

The affidavit further stated that at about 10:10 a.m., dispatch received a phone call from Corey Ferguson’s neighbor at 3013 Mt. Lebanon Road, and that “[t]his neighbor *advised that she saw Corey Ferguson* leave 2946 Mt. Lebanon Road in a red Dodge pickup truck that was towing a trailer.” (*Emphasis added.*) Sutter attested that at 10:17 a.m. another trooper stopped the red pickup and that Corey Ferguson was in this vehicle. The trooper placed Ferguson under arrest, and during a search incident to arrest, the trooper found a 12 gauge shotgun shell in Ferguson’s pants pocket. The affidavit noted that Ferguson was a convicted felon, and that the affiant knew Ferguson to be engaged in drug trafficking. Lastly, Sutter stated that based on his experience and training, he knew that drug traffickers are frequently armed and often maintain firearms in their homes.

A search warrant was signed that authorized seizure of firearms and ammunition. While executing it, the officers also found over \$5,000 in cash and related items. The trial court ruled the warrant was supported by the discovery of Ferguson in illegal possession of ammunition just minutes after leaving the premises listed in the warrant. The

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<sup>201</sup> See U.S. v. Gunter, 551 F.3d 472 (6<sup>th</sup> Cir. 2009); U.S. v. Williams, 544 F.3d 685 (6<sup>th</sup> Cir. 2008).

<sup>202</sup> U.S. v. Leon, 468 U.S. 897 (1984); U.S. v. Carpenter, 360 F.3d 591 (6<sup>th</sup> Cir. 2004) (en banc).

Court, however, noted that it is not unlawful for a felon to possess ammunition. Further, the neighbor indicated only that an unidentified black male entered the truck, they did not identify Ferguson. "This inaccuracy is material because it was the key fact connecting Ferguson to the residence during the relevant time period, and therefore linking the shotgun shell to the suspected possession of firearms in the residence."

The court found "the facts connecting criminal activity to the Mt. Lebanon Road residence are scant." However, the Court found the error, if any, to be harmless, in the face of the other overwhelming evidence against Ferguson. With respect to the items seized, the Court agreed that "the cash, the safe deposit key, the four surveillance cameras, and the JVC television were outside the scope of the search warrant." The Court, however, found that the incriminating nature of the items was not apparent, so it was improper to seize the items on plain view. The Court did permit the initial seizure of the cash, since it agreed it was in close proximity to the drug trafficking actions. However, the court noted that the alternate explanation Ferguson posed, the nature of the money and its location (in a piggy bank of some kind) was feasible and overturned the forfeiture.

### **U.S. v. Whisnant, 2010 WL 3199689 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In February, 2007, Johnson, Whisnant's ex-wife, disappeared. Because of their tumultuous relationship, Whisnant was identified as a suspect. Officers obtained a search warrant for the body on his property, as well as for other items. Capt. Jeffers (Scott County TN SO) noticed drywalling material on the porch and a newly touched up area of a wall inside. Realizing the picture was hanging over the area might have been hung to conceal evidence, he removed it, finding a recently patched wall. He poked a small hole and saw "rolls of cloth." They enlarged the hole and found numerous soft gun cases. Because Whisnant had a history of bomb-making, they enlisted the aid of the bomb squad. The items inside the wall were removed and found to be guns, ammunition and bomb-making materials. More components of a Sten machine gun were also found in the house.

Whisnant was indicted for being a Felon in Possession. He was indicted and requested suppression, which was denied. Shortly thereafter, Det. Anderson, who had worked on the case, was found to have "engaged in professional misconduct unrelated to this case." A second hearing was held, excluding Deputy Anderson. The trial judge agreed that the "officers reasonably made access into the wall" and the motion was again denied. Whisnant was convicted and appealed.

**ISSUE:** May a residence be lawfully damaged during a valid search?

**HOLDING:** Yes

**DISCUSSION:** Whisnant argued that "cutting holes in the interior walls of his house" exceeded the scope of the warrant. The Court agreed, however, that "[o]fficers executing search warrants on occasion must damage property in order to perform their duty."<sup>203</sup> Any damage would, of course, be subject to later judicial review if warranted. The warrant gave the officers the entire premises and the evidence of recent patching made the actions of the police appropriate under the circumstances. The Court upheld the denial of the motion to suppress

Whisnant's conviction was affirmed.

### **U.S. v. Silvey, 2010 WL 3398837 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In March, 2008, the Buffalo Trace Regional Narcotics Task Force (BTRNTF) got an anonymous tip that "a Vietnam veteran living somewhere in Fleming County, Kentucky was cultivating marijuana inside his house." They were told he had automatic weapons. The officers were not given his name, but were told he lived "in a newly built home protected by a locked gate" which was "probably monitored by video cameras." In October, they

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<sup>203</sup> Dalia v. U.S., 441 U.S. 238 (1979).

received a second tip that provided Silvey's name and they learned his specific address. Neighbors stated that he "terrorized" them by firing what they thought were automatic weapons.

Officers collected a pair of garbage bags left outside the entrance to his home and found fresh green marijuana clippings that had been pruned from live plants, along with a receipt that had his wife's name. They sought a search warrant and listed the search location as the "only dwelling" at the address. The warrant, specifically, did not list that Silvey resided at his address. The warrant was issued and executed. Silvey was at the house and he was taken into detention. They found an active growing operation and a "veritable armory's worth of firearms." He was handcuffed and questioned. He admitted that he grew the marijuana (for his own use) and that the guns were his. He was released on bond. The next day, agents arrived for a second interview at his home. They confirmed that he had been given Miranda the previous day and he repeated his admission from the day before, including that he was a convicted felon. Silvey was indicted on gun and drug related offenses. He moved for suppression of the evidence and the statements, arguing that the search warrant was insufficient. He further argued that his statements were thus tainted and inadmissible. The trial court denied the motion and he took a conditional guilty plea. He then appealed.

**ISSUE:** Is good faith an available defense for an otherwise invalid warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court began with the assumption that the warrant was, in fact invalid, and proceeded to the issue of good-faith reliance. The Court looked to U.S. v. Laughton, which held that good faith in a "subsequently invalidated warrant is impossible in four situations."

(1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; and (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid.<sup>204</sup>

Silvey argued that the third provision applied in this case. As such, the question was whether the officers had a reasonable basis to believe the information supported the warrant.<sup>205</sup> The court agreed that it did, in that the information in the warrant – that the trash bag came from the suspect residence – could be inferred from the fact that the suspect residence was the only one on the lane. A reasonable officer could conclude that the affidavit established probable cause. Certainly it was possible that the bag "could have been flung out the window of a passing car, or it could have fallen off the back of a garbage truck." But "when it comes to probable cause, the name says it all; certainty is never required, only a fair probability."<sup>206</sup>

The Court affirmed the denial of the suppression motion.

### U.S. v. Pirtle, 2010 WL 1253812 (6<sup>th</sup> Cir. 2010)

**FACTS:** Around June 4, 2007, Det. Freeman began an investigation of drug selling around a specific address in Memphis (TN). He observed drug sales and also received a tip that "Red" was selling drugs out of a particular apartment. He made several attempts at corroboration, including observation of "walk up and drive up traffic." He obtained a warrant that read, in relevant part, as follows:

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<sup>204</sup> U.S. v. Laughton, 409 F.3d 744 (6<sup>th</sup> Cir. 2005).

<sup>205</sup> U.S. v. Carpenter, 360 F.3d 591 (6<sup>th</sup> Cir. 2004).

<sup>206</sup> Leon, *supra*.

*[Affiant Detective E. Freeman has been in the Memphis Police Department's Organized Crime Unit's Narcotics Section for the past three (3) years, and has participated in numerous narcotics investigations, arrest[s] and seizures. The affiant has attended several narcotics investigative school[s] including some sponsored by DEA.*

*The affiant spoke to a reliable confidential informant whose information in the past has been found to be true and correct. The informant advised the affiant that a male known as "Red" was selling and storing cocaine at this location (4837 Tulane #3). The affiant conducted surveillance on this location (4837 Tulane #3) and observed walk up and drive up traffic that is consistent with that of illegal narcotics activity. The informant, who has been at this location (4837 Tulane #3) within the past five (5) days of this warrant advised the affiant that this illegal narcotics activity is continuing. This occurred in Memphis, Shelby County, Tennessee.*

*He/she therefore asks that a warrant issue to search the person and premises of the sale a Male Black, approx. 6'1" tall, Short Hair, Light Complexion, Early 20's, approx. 140 lbs. and known as "RED" as above described in said County, where he/she believes said Crack Cocaine, Drug Records, and Proceeds is/are now possessed, contrary to the Laws Of the State of Tennessee.*

The search ended with the seizure of drugs and a rifle. Pirtle was detained and later admitted to ownership of the items found. Later discovery noted that "Freeman did not specify in his affidavit that he had never worked with the confidential informant until the days prior to the search warrant was issued." He also neither mentioned details of his surveillance of the area nor provided additional photographs that he had taken to document the traffic indicating drug sales were ongoing although one photograph was included with the affidavit. Freeman indicated that he limited the information in the affidavit in order to protect the identity of his confidential informant."

Pirtle was indicted in federal court for possession of the rifle. He moved for suppression. The federal magistrate judge ruled that the warrant was supported by probable cause and even if not, it was done in good faith under U.S. v. Leon.<sup>207</sup> The District Court, after a hearing, found that "although there was an insufficient showing for the establishment of probable cause," that the good faith exception did apply. Pirtle was convicted and appealed.

**ISSUE:** Is a search under a warrant that does not demonstrate probable cause still valid under good faith?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the "evidence was properly admitted under the good faith exception because there is nothing in the record to show that Det. Freeman did not act in good faith or was unreasonable in relying on the search warrant." In fact, the information that Det. Freeman did not include tended "to bolster the statement in the affidavit, rather than discredit it." (He had held back some detail to protect the informant.) The Court concluded the "warrant contained indicia of reliability sufficient for an objectively reasonable officer to rely on its validity." There was "no falsity in the affidavit, implicating Franks v. Delaware."<sup>208</sup>

The Court upheld the warrant and the conviction.

### U.S. v. Thomas, 605 F.3d 300 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 25, 2005, TBI agents requested a warrant for a Nashville address. The warrant, by Agent Mabry, recited information he received from DEA Agent Hardcastle.

The relevant portion of the affidavit read as follows:

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<sup>207</sup> 468 U.S. 897 (1984).

<sup>208</sup> 438 U.S. 154 (1978).

1. SA John Hardcastle with the Drug Enforcement Administration (DEA) recently met with a Confidential Informant (CI) who works for DEA. This CI provided information regarding [sic] illegal indoor marijuana grow operation located at 3971 Taz Hyde Road, Nashville, TN. This CI has worked with SA Hardcastle, and has given him reliable information within the past year. Information provided by this CI has led to the successful arrests and prosecution of three subjects who were arrested. Two were charged and convicted in Federal Court.
2. The CI has informed SA Hardcastle that James I. THOMAS has had a reputation within the marijuana community of Nashville for the past two to three years as being a successful producer of just not [sic] leaf marijuana, but the more sought after "bud" of the plant, which is more expensive and produces a greater high for the user. Typically one ounce of the "hydroponically" produced bud will sell as for a high [sic] as \$250.00 per ounce.
3. The CI informed SA Hardcastle where James I. THOMAS lived. SA Hardcastle was able to confirm by [sic] THOMAS'S driver's license has the address of 3971 Taz Hyde Road. SA Hardcastle discovered that THOMAS has an active gun permit with the address listed as 3971 Taz Hyde Road. On 10-18-2005 at approximately 10:15 am, SA Hardcastle drove by the residence of 3971 Taz Hyde Road and observed THOMAS standing in the driveway smoking a cigarette.
4. According to the reliable CI, he/she has been to the residence on at least three occasions and observed THOMAS conduct narcotic transactions. The CI has observed THOMAS exit the residence with marijuana and sell the marijuana to customers on at least three occasions.
5. According to Nashville Electric Service, the subscriber to this residence is Sandra G. Brumit the girlfriend of James I. THOMAS. According to Metro Nashville Property records, Brumit is the owner of the property. The house has a finished area of 1059 square footage. SA Hardcastle pulled electricity records for that address from March 2005 through September 2005. The research conducted by SA Hardcastle revealed usage which SA Hardcastle and I believe to be high usage. The following information was provided by Nashville Electric Service (NES) to the [sic] SA Hardcastle for the electrical usage at 3971 Taz Hyde Road:  
March 2005 - \$345.24  
April 2005 - \$371.22  
May 2005 - \$337.51  
June 2005 - \$436.28  
July 2005 - \$513.90  
August 2005 - \$499.63  
Sept. 2005 - \$530.46
6. The following information was provided by the Nashville Electric Service (NES) to SA Hardcastle for the electric usage for the neighbor of THOMAS located at address of 3986 Taz Hyde Road. The square footage of the residence according to the Davidson County is 1568 square footage of finished area.  
May 2005 - \$125.00  
June 2005 - \$181.64  
July 2005 - \$202.78  
Aug 2005 - \$221.89  
Sept 2005 - \$233.21
7. According to the NES records, THOMAS'S residence regularly uses more electricity than the neighbor. THOMAS pays twice as much a month on a regular basis which you [sic] affiant knows is something that is very common with indoor marijuana grow operations.
8. Indoor marijuana cultivation operations typically use large volumes of electricity to operate the advanced lighting systems used in such operations. An indoor grow operation can generate marijuana year round if the growing operation is managed properly. An indoor grower of marijuana will use a technique that is referred to as an "up cycle" to increase the lighting given to the marijuana simulate [sic] the coming of fall to make the marijuana plants to [sic] produce more "buds" on the plants.
9. NES disclosed to the Affiant that the January 2005 bill was for \$745.00. Given the recorded square footage of the 3971 Taz Hyde Road location and the utility usage, it strongly appears that James I.

*THOMAS is "cycling up" on his utility usage which indicates that THOMAS is running a marijuana cultivation operation on the 3971 Taz Hyde Road location.*

*10. Davidson County property records reveal that there are at least two "out buildings" located on the property out of sight from the front of the property. Property records do not indicate that there are any other structures on the property that would legitimately use such a high volume of electricity such as a heated pool or air conditioned buildings other than [sic] the residence.*

During the subsequent search, they found 128 marijuana plants and a large quantity of processed marijuana, handguns, cash and motorcycles. This was all found in a freestanding trailer behind the main house, where Thomas, his girlfriend and their two children lived. Thomas was charged and moved for suppression. At the hearing, Agent Hardcastle "essentially reiterated all of the information" in the warrant and denied making any intentional or reckless misrepresentations. He did admit that the CI's statement about marijuana sales at the address concerned events that had taken place 8 months before, but stated that he considered the CI reliable. Thomas's mother, Brumit, who actually owned the property (not his girlfriend) stated that there were three buildings and a pool that all depended upon electricity. The motion was denied because the Court found no indication that the officers "knowingly, intentionally, or recklessly made any false statements necessary to the finding of probable cause." It found the information not to be stale because it involved a "marijuana grow operation, which is entrenched activity and thus less subject to time constraints."

Thomas took a conditional plea and appealed.

**ISSUE:** May a warrant be read in its totality (rather than as a sum of its parts) to determine if it satisfies probable cause?

**HOLDING:** Yes

**DISCUSSION:** Although the court found the affidavit to be "a relatively thin justification for probable cause," the Court found that it did, in fact, support probable cause. The affidavit sufficiently detailed the CI's "positive prior record of giving accurate information to the police." The officers made an attempt to corroborate as much of the information as possible. Viewed individually and in a vacuum, each element was unpersuasive, but "viewed together and in totality, as required," the Court agreed it was sufficient. Thomas focused on what the affidavit lacked, but the Court agreed that the electric usage records refreshed the arguably stale tip and properly compared the bills to a neighboring property. The officers viewed the property from the road and saw only two outbuildings, neither of which should account for much electricity usage. (The trailer was apparently hidden from the road.)

The Court also agreed that even if there were flaws, the officers acted in good faith under Leon.<sup>209</sup> Thomas's plea was upheld.

### **U.S. v. Castro, 364 Fed.Appx. 229 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In May, 2007, Det. Matos (Cleveland PD) was watching Castro's neighborhood as it was known to be a hot spot for drug activity. On May 22, she saw Castro and another man commit a traffic offense and then saw Castro get out of the car, enter the residence and return. She broadcast its location so that a marked car could make the stop. Sgt. Kelly and Det. Fallon made the stop, with the assistance of a marked car. Sgt. Kelly asked the driver for a license, which he did not have. Sgt. Kelly saw a small piece of folded paper with what appeared to be narcotics spilling out. Det. Fallon was removing Castro from the car and found a similar piece of paper. He frisked Castro and found a bag of heroin. Castro was arrested.

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<sup>209</sup> U.S. v. Leon, 468 U.S. 897 (1984).

Sgt. Kelly contacted Det. Matos, who decided to seek a warrant for Castro's home. Other officers secured Castro's home, finding Castro's mother present. She allowed the officers to enter and Sgt. Kelly spotted a scale. The officers made a protective sweep and Sgt. Kelly found a rifle in the closet. Det. Matos called when the warrant was signed and an additional search was done at that time, during which weapons, ammunition, scales and more heroin were found. Castro challenged the warrant. It was later determined that Det. Matos's affidavit incorrectly indicates that Castro was identified through a CI, in fact, "an anonymous source provided the tip." When challenged, the trial court "struck the reference to a confidential informant from the affidavit, and examined the affidavit as though the tip had come from an anonymous source. It concluded that there was still sufficient evidence to support the warrant and the warrant was upheld. Castro took a conditional plea and appealed.

**ISSUE:** If incorrect information is in a warrant, is it appropriate to consider the warrant without that information to determine if it is still valid?

**HOLDING:** Yes

**DISCUSSION:** Castro "argued that the district court erred by inserting the correct information into the warrant affidavit rather than simply striking the recklessly false information." The Court looked to Elkins<sup>210</sup> for guidance, and concluded that "having struck the false reference to a confidential informant from the affidavit, the district court properly read the remainder of the affidavit as though the tip had come from an anonymous source." The Court agreed that the remaining portions of the search warrant were enough to find probable cause.

The Court upheld the denial of the motion to suppress.

### **U.S. v. Brooks, 594 F.3d 488 (6<sup>th</sup> Cir. OH 2010)**

**FACTS:** On October 10, 2006, Lt Rhoades and Officer Kilgore were executing search warrants during a drug task force operation in Ohio. When they went to Brooks' home and knocked, he answered. He was arrested and placed in custody. At that time, the officers detected a strong odor of marijuana "wafting from the residence." (Apparently they did not have a warrant for Brooks' home.) Brooks said he needed shoes so Lt. Rhoades accompanied him to the bedroom. There, he saw an ashtray that contained marijuana seeds. During the search incident to his arrest, the officers found \$1,000 in cash.

At this point, most readers will assume they know what comes next—the officers immediately search the parts of the bedroom not in plain view, find more contraband, and then go get a search warrant. Surprisingly, and encouragingly, this is not the case.

Instead, the officers took Brooks out of the residence and froze the scene. They then met with other METRICH officers and prepared an application for a warrant to search the residence. The key aspect of a search warrant application is the affidavit submitted to the magistrate to establish probable cause. The officers prepared the affidavit with the assistance of other members of the METRICH team, and Lieutenant Rhoades ultimately executed the affidavit. This is where Brooks says the problem arose.

The affidavit cannot be praised for its technical perfection. It is clearly a cut and-paste job. There is a second paragraph 9 *after* paragraphs 10 and 11, and paragraphs 10 and 11 are relics from an affidavit used for a completely different case. Although sloppiness may raise flags, it is not in any way fatal because search warrant affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation."<sup>211</sup> What matters is the information contained in the affidavit. In this case, the material paragraphs are as follows:

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<sup>210</sup> U.S. v. Elkins, 300 F.3d 638 (6<sup>th</sup> Cir. 2002).

<sup>211</sup> U.S. v. Ventresca, 380 U.S. 102, 108 (1965).

1. *The affiant has been a police officer for over thirty four years with the Richland County Sheriff's Office and is presently assigned as a shift supervisor with road patrol*
2. *On December 21, 2001, XXXXXXXX contacted members of the METRICH Enforcement Unit and stated that Lyna Brooks, D.O.B. 05/30/76, S.S.N. xxx-xx-xxxx of 135 Vale Avenue, Mansfield, Richland County, Ohio, was trafficking in drugs. RM47928.*
3. *On March 25, 2002, XXXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks of 135 Vale Avenue, Mansfield, Richland County, Ohio was trafficking in cocaine and crack cocaine.*
4. *On March 30, 2001, XXXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks was trafficking in crack cocaine.*
5. *On July 8, 2005, XXXXXXXX contacted the METRICH Enforcement Unit and stated that Lyna Brooks of 135 Vale Avenue, Mansfield, Richland County, Ohio is trafficking in crack cocaine.*
6. *On February 8, 2005, XXXXXXXX contacted the METRICH Enforcement Unit and stated that drugs were being sold from the residence located at 135 Vale Avenue, Mansfield, Richland County, Ohio*
7. *On February 20, 2006, XXXXXXXX made a controlled drug buy of crack cocaine for the METRICH Enforcement Unit from Lyna Brooks. The evidence was submitted to the Mansfield Police Department Crime Laboratory and tested positive for cocaine base.*
8. *On February 21, 2006, XXXXXXXX made a controlled drug buy of crack cocaine for the METRICH Enforcement Unit from Lyna Brooks. The evidence was submitted to the Mansfield Police Department Crime Laboratory and tested positive for cocaine base.*
9. *On October 10, 2006, the affiant, made contact with Lyna Brooks at his residence located at 135 Vale Avenue, Mansfield, Richland County, Ohio in reference to an Indictment for Aggravated Trafficking in Crack Cocaine. Brooks was placed under arrest. The odor of marihuana was strong in the residence. When the affiant took Brooks into his bedroom to get shoes there were marihuana seeds located in the ashtray in plain view Brooks stated this bedroom belonged to him and was on the first floor, south side of the house. In Brooks rear hip pocket was \$ 1,000 in United States currency. Brooks refused a consent to search. [paragraphs 10 and 11 are omitted]*
9. *[should be paragraph number 12] In the past C.I. 00-28 has provided valuable information to the METRICH Enforcement Unit which has been independently corroborated and proven reliable. C.I. 00-28 has also made controlled purchases for the METRICH Enforcement Unit which has resulted in the arrest and conviction of individuals on a variety of violations of the Ohio Revised Code.*

In summary, the affidavit sets up the affiant's qualifications in paragraph 1. Then, in paragraphs 2 through 8, the affidavit describes a series of drug-related interactions with confidential informants that range from five years to six months before the date of the affidavit. In the first paragraph 9, the affidavit discusses what the officers observed that same day when they executed the arrest warrant on Brooks. Paragraphs 10 and 11 are irrelevant because they were left over from a different case. Finally, in the second paragraph 9, the affidavit attempts to establish the credibility of at least one of the confidential informants.

Upon Brooks's motion to suppress, the District Court concluded that the evidence in the affidavit was stale and insufficient to support probable cause, suppressing the evidence. The government appealed.

**ISSUE:** Must an affidavit establish a connection (nexus) between the location named in the warrant and the items sought?

**HOLDING:** Yes

**DISCUSSION:** At issue is whether the affidavit supported the probable cause needed to issue the affidavit. The Court reviewed the standards, noting, for example that "when a warrant applicant seeks to search a specific

location," the affidavit must establish "a nexus between the place to be searched and the evidence to be sought."<sup>212</sup> Further, "[t]he critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought."<sup>213</sup> Finally, "in seeking to establish probable cause to obtain a search warrant, the affidavit may not employ 'stale' information, and whether information is stale depends on the "inherent nature of the crime."<sup>214</sup> "Whether information is stale in the context of a search warrant turns on several factors, such as 'the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and] the place to be searched (mere criminal forum of convenience or secure operational base?).'"<sup>215</sup> "In the context of drug crimes, information goes stale very quickly 'because drugs are usually sold and consumed in a prompt fashion.'"<sup>216</sup>

The Court ruled that it believed the analysis starts and ends with the information in the first paragraph, as that information easily satisfies all of the requirements of a proper search warrant affidavit. It recounts Lieutenant Rhoades's first-hand observations of things in the residence the same day as the affidavit was executed. Thus, the information clearly establishes the requisite nexus between the place to be searched and the evidence sought, and the information is unquestionably fresh. This leaves only the question of whether the information in the first paragraph gives rise to a fair probability that a search will uncover contraband or evidence of a crime.

The Court agreed that "it is fairly probable under these facts that where there is smoke, there may be more there to smoke." The court emphasized the likelihood that more contraband might be found in the house. The Court concluded that the information in the first paragraph, alone, was sufficient to provide the necessary probable cause.

The trial court's decision was reversed and the case remanded.

## SEARCH & SEIZURE – CONSENT

### U.S. v. Burcham, 2010 WL 3058389 (6<sup>th</sup> Cir. 2010)

**FACTS:** On January 19, 2002, Officers Brown and Kellum (Memphis, TN, PD) were patrolling when they were alerted that "other officers were searching for Burcham as a suspect in an aggravated assault involving a baseball bat." They had already heard that Burcham had stolen firearms in his possession. The officers looked for him, finding him sitting in his vehicle at a gas station with his girlfriend, Kinsella. The officers detained Burcham and found a bat; they arrested him for the assault. He was transported by other officers. Officers Brown and Kellum stayed at the scene talking to Kinsella about the stolen weapons. Eventually they ended up at a storage unit Burcham rented and discovered stolen weapons.

Burcham was charged with the weapons and sought suppression. When that was denied, he was convicted and appealed.

**ISSUE:** May a person with common authority over an area give consent to search that area?

**HOLDING:** Yes

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<sup>212</sup> U.S. v. Carpenter, 360 F.3d 591 (6<sup>th</sup> Cir. 2004).

<sup>213</sup> Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

<sup>214</sup> U.S. v. Spikes, 158 F.3d 913 (6<sup>th</sup> Cir. 1998) (quoting U.S. v. Henson, 848 F.2d 1374 (6<sup>th</sup> Cir. 1988)).

<sup>215</sup> U.S. v. Hammond, 351 F.3d 765 (6<sup>th</sup> Cir. 2006) (quoting U.S. v. Greene, 250 F.3d 471 (6<sup>th</sup> Cir. 2001)).

<sup>216</sup> U.S. v. Frechette, 583 F.3d 374, 378 (6<sup>th</sup> Cir. 2009).

**DISCUSSION:** The officers testified that they had heard Burcham had stolen guns and had them in a storage unit, and they even had been told where the unit was located. Kinsella agreed that she knew about the guns at the unit. She provided the access code and the keys and gave them written consent to search the unit. (She also gave a written statement about the guns.) Burcham, however, testified that Kinsella did not have the code or keys and that the officers must have gotten from his property at the jail. He argued that Kinsella lacked the authority to consent. The Court agreed that “police may obtain consent to search a location from anyone having ‘common authority over or other sufficient relationship to the premises.’”<sup>217</sup> Such consent may be by “apparent authority,” as well.<sup>218</sup> The Court had no trouble finding that the officers had sufficient reasonable belief that Kinsella had authority to consent and noted that the manager made no effort to stop them (even though Kinsella was not on the lease) once he learned she had the key and the code.

The Court affirmed the denial to suppress and Burcham’s conviction, as well.

### **U.S. v. Montgomery, 621 F.3d 568 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On July 14, 2007, in the early morning hours, “someone hiding in the trees shot Montgomery in the back with birdshot or buckshot.” He woke up his girlfriend, Ewing, who had passed out on the couch. She retrieved his rifle and he returned fire, while Ewing called 911. Officer Malone arrived and found Montgomery injured. He summoned EMS. “Malone noticed that Montgomery had no trouble communicating, as did Officer Anthony Crawford, who arrived shortly after Malone.”

Montgomery left for the hospital. Det. Blaine arrived and the officers “surmised that the attacker had tried to break into the shed.” He communicated this to Captain Murphy, who was at the hospital, and he asked Montgomery for consent to search the home and outbuildings. At the hospital, a nurse who cared for Montgomery noted in the record that he was not actively bleeding and that he was alert, oriented and answered questions appropriately. He complained of extreme pain and was given morphine. He responded to the request to search with the statement - “That’s fine’ without question or hesitation.” The officers did not obtain a written consent nor did they tell him he could refuse. Ewing also signed a consent form at the house. The officers discovered a marijuana growing operation. “The officers had other reasons to search the area. They noticed marijuana paraphernalia in the kitchen, a humming noise coming from the shed, a pressurized garden hose leading into the shed and the smell of marijuana near the shed, leading them to think that the shed housed a marijuana-growing operation.”

Montgomery was indicted. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

**ISSUE:** Does medication automatically negate a consent?

**HOLDING:** No

**DISCUSSION:** The Court agreed that “medication or intoxication may diminish the capacity to consent to the extent it undermines an individual’s grasp on the reality of what he is doing.” As such, “when officers seek and obtain consent from a medicated or intoxicated individual, as is sometimes appropriate, they can expect a dispute about the voluntariness of any consent given and what often comes with it: attendance and testimony at a suppression hearing.” Yet, the Court noted, “Montgomery apparently wants more. He wants what amounts to a per se rule that medication (or intoxication) necessarily defeats and individual’s capacity to consent, given that the only cognizable evidence on which he relies relates to the morphine injection.” The Court found that a “bridge too far,” as “per se rules are anathema to the Fourth Amendment.” Further, “drug-induced impairment, moreover, is a matter of degree, making it appropriate to gauge the impact of drugs on a case-by-case basis and in view of other

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<sup>217</sup> U.S. v. McCauley, 548 F.3d 440 (6<sup>th</sup> Cir. 2008).

<sup>218</sup> Illinois v. Rodriguez, 497 U.S. 177 (1990).

circumstances at play.” The Court reviewed related case law with respect to Miranda waivers, noting that the “knowing and intelligent prong of the Miranda waiver inquiry is more protective of individual liberty than the consent-to-search doctrine.” In Montgomery’s case, the doctor noted that the doctor obviously believed that Montgomery was capable of making medical decisions. Everyone who observed him indicated he was alert and oriented.

The denial of the motion to suppress was affirmed.

### U.S. v. Allen, 619 F.3d 518 (6<sup>th</sup> Cir. 2010)

**FACTS:** On August 29, 2006, (Michigan) Officer Goodine attempted to stop a vehicle in which Allen was a passenger. That precipitated a high speed chase. When the vehicle was finally stopped, Allen and the driver got out. Allen did not comply with the officer’s order and was tased. He fell to the ground and was handcuffed. Officer Goodine found a bag of crack cocaine and a weapon that he believed came from the passenger’s side of the vehicle. Allen was indicted for trafficking and possession of the weapon. He initially took a plea but was allowed to retract that plea when “Officer Goodine was indicted on multiple charges relating to theft and official misconduct.” Allen was convicted and appealed.

**ISSUE:** If a subject flees from an improper stop, is that a new and distinct crime?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Allen argued that the evidence seized should have been suppressed because the stop itself was improper. The Court however, noted that “[i]f a suspect’s response to an illegal stop ‘is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.’”<sup>219</sup> In this case, the “act of fleeing from police officers constituted a new, distinct crime that rendered evidence subsequently seized admissible.” Allen’s conviction was affirmed.

### U.S. v. Miser, 2010 WL 5158539 (6<sup>th</sup> Cir. 2010)

**FACTS:** On January 18, 2008, Officers Carson and Cribley (Hamblen County TN PD) received a tip that Miser and Crum (who were wanted) were living at a specific location and that the trailer “contained a sizable quantity of illegal drugs.” They saw Miser on the porch when they arrived and asked him for ID. They learned that he had an outstanding Florida warrant. He denied that Crum was there and invited the officers inside.

They immediately smelled marijuana and saw a roach lying in the ashtray. Miser agreed he’d just finished smoking it. Officer Carson walked towards the bedroom but was stopped by Miser. Miser was then arrested for possession and a bag of marijuana was found in his pocket. He was given Miranda and consented to a search of the trailer. However, the officers elected to get a search warrant and returned some time later, finding about 170 pounds of marijuana, cocaine, a firearm and oxycodone. (Miser, however, denied he gave them consent to enter.)

Miser admitted he’d slept at the trailer on occasion and that he knew about the marijuana. The Court denied his motion to suppress, adopting the officers’ version of the facts and rejecting Miser’s. The Court also noted that even if he believed Miser, “exigent circumstances justified the officers’ entry into the trailer, because the officers had detected the odor of marijuana wafting through the trailer’s open front door.” At trial, more evidence was presented linking Miser to the contraband, with a witness stating that Miser had been the sole occupant for some time and that only his vehicle was regularly there. Miser also paid the monthly rent even though it was leased to another.

Miser was convicted and appealed.

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<sup>219</sup> U.S. v. Castillo, 2000 WL 1800481 (6<sup>th</sup> Cir. 2000).

**ISSUE:** Is it credible that a person who knows contraband is hidden in a location would give consent to search that area?

**HOLDING:** Yes

**DISCUSSION:** Miser argued that it was incredible that he would have admitted the officers under the circumstances, but the Court found it “not difficult to imagine why a suspect might consent” as he “may have believed that the officers were looking only for Frankie Crum - not drugs - and that consenting to entry for purposes of verifying the absence of Crum would not expose him to a thorough search of the trailer.” The Court noted that the “vast majority of criminal defendants voluntarily consent to be searched - even when they are carrying drugs.” Determinations of the credibility of a witness were for the fact finder, the jury. The Court found that there was adequate proof that “Miser actually or constructively possessed the drugs and firearm” as there was adequate evidence linking him to the trailer itself. When he stopped Officer Carson from going into the bedroom, he exhibited knowledge that contraband was stored there.

The Court upheld the denial of the motion to suppress and ultimately, his conviction.

**U.S. v. Block, 2010 WL 2025582 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In July, 2006, Ohio State police were seeking Block on outstanding warrants. The FBI brought in a fugitive task force to locate him and Agent Domonkos tracked Block to the home of Pleasure (his girlfriend). She answered their knock and told them that Block was not there. (They later learned he'd jumped out the window as the FBI had arrived.) They received another tip, some months later, that he was staying at another home and driving a particular car, registered to Minnie Brown. On December 19, they set up surveillance on the address and vehicle. They learned that Pleasure was the tenant and she later said it was actually her sister who held the lease, but that she shared the residence with her. They set up a perimeter and then knocked, and heard “someone moving, running inside.” They saw someone they believed to be Block looking out the window from upstairs and forced entry, finding Pleasure initially. They searched the premises and found Block. “In the course of searching the apartment for officer safety, the agents saw a large amount of cash sitting on a shelf in an upstairs walk-in closet.” Block was arrested. Pleasure signed a consent to search although she later indicated she did not believe she had a choice and that the “police had already conducted a full search of the apartment.” Following the consent, however, the agents searched and found the cash and a large quantity of crack cocaine. Block admitted ownership.

Block was indicted and requested suppression. The Court upheld the initial and the second search and held he had no standing to object because he had no expectation of privacy at the apartment. Block took a conditional plea and appealed.

**ISSUE:** Does a valid consent negate other issues in a search?

**HOLDING:** Yes

**DISCUSSION:** Block argued that the agents lacked reason to believe he was present and that in order to search, they needed more. The Court noted that “when law enforcement must enter a third party’s house to execute an arrest warrant, it is ‘an open question in our circuit’ whether the officers need a reasonable belief or probable cause to believe the suspect is present in the house before entry.”<sup>220</sup> The court however, found they did not need to address that issue, as it agreed the agent reasonably believed he saw Block looking out the window.

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<sup>220</sup> U.S. v. Hardin, 539 F.3d 404 (6<sup>th</sup> Cir. 2008).

The Court also upheld that Pleasure's consent to search was voluntary. Pleasure was an adult with a high school education and presumably understood the ramifications of signing a consent.

The Court upheld the conviction.

**U.S. v. Taylor, 600 F.3d 678 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In March, 2008, Ohio task force members learned that Taylor was at an Elyria, Ohio, apartment. Although they had an arrest warrant for Taylor, they did not have a search warrant for the apartment, which was apparently not his home. They went to the apartment and found Arnett, the female resident, who gave them permission to search for Taylor. Although she originally said he was not inside, she admitted it finally. They found Taylor hiding and brought him to the first floor. They asked Arnett for permission to search the apartment for "any other stuff," because of a suspicion of weapons in his background. They did not ask for permission to search Taylor's belongings, but having already seen men's clothes in a spare bedroom during the initial search, they returned to that bedroom and searched a closet. They found a shoebox (men's shoes) and inside found a handgun, ammunition and Taylor's jail ID band. They questioned Arnett, who said Taylor did not live at the apartment but had been storing items in that closet.

Taylor, a felon, was indicted for possession of the gun. He moved for suppression, which was granted, with the trial court finding that "Arnett did not have actual or common authority to consent to a search of Taylor's belongings because Taylor had not granted Arnett access to his property." Nor did she have apparent authority over the shoebox. The Government appealed.

**ISSUE:** Does a container that obviously belongs to someone other than the person giving consent be searched pursuant to that consent?

**HOLDING:** No (but see discussion)

**DISCUSSION:** On appeal, the government dropped the argument of actual or common authority and relied solely on "apparent authority." The Court noted that the "apparent-authority doctrine excuses otherwise impermissible searches where the officers conducting the search 'reasonably (though erroneously) believe that the person who has consent' to the search had the authority to do so."<sup>221</sup> The burden to prove that belief falls to the prosecution. The government argued that a shoebox isn't the type of container that "commands a high degree of privacy" and noted that other items (toys, children's clothes) were also in the closet. Taylor argued that the ownership of the box was at least ambiguous. The Court agreed that "the officers began the search with the reasonable belief that most items within the apartment were subject to Arnett's mutual use, given that she was the sole tenant of the apartment." The men's clothes were an argument, however, that someone else was using the room, and the shoebox lay under men's clothes. The trial court had ruled that the officers opened the shoebox specifically because they believed it belonged to Taylor. The Court noted that storing an item at the home of a third party did not reduce the expectation of privacy in the container. In *Waller*, the Court had listed "several factors that it took into consideration: (1) the type of container and whether that type 'historically command[ed] a high degree of privacy,' (2) whether the container's owner took any precautions to protect his privacy, (3) whether the resident at the premises initiated the police involvement, and (4) whether the consenting party disclaimed ownership of the container.

Applying these factors, the Court agreed that shoeboxes aren't normally private, they are "often used to store private items, such as letters and photographs." Taylor also had it closed and hidden under his own clothing. The Court compared the facts to other cases in which it had ruled that the search was proper, but found that "there was

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<sup>221</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990). *United States v. Waller*, 426 F.3d 838 (6<sup>th</sup> Cir. 2005),

ambiguity over whether Arnett had mutual use or control of the shoebox.” Given that both Arnett and Taylor were available to clarify the ambiguity in Taylor’s favor, the Court agreed the search was improper.

The suppression of the evidence was upheld.

**U.S. v. Ward, 2010 WL 4861738 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On June 2, 2007, Det. Winters (Middletown, OH, PD) responded to a local business on a “disturbance between a male passenger in a green car and a woman standing next to the car.” When he arrived, he witnessed an altercation between Clemons and the occupants of the car. Davis, and his passenger, Thomas, drove off and Winters followed, pulling them over in a motel parking lot. “When Detective Winters observed Thomas making frantic movements to and from the car’s console area, he ordered him to step out of the car and conducted a pat-down search of Thomas’s outer clothing, during which he found 2.8 grams of crack cocaine.” The detective also found ammunition and two guns. Thomas was arrested.

Office Birch was called to the scene to pick up Clemons and bring her to the motel. The officer questioned her and learned that she, Thomas and Davis had stayed at the motel the night before but had checked out. The motel room clerk, however, stated that they had merely changed rooms. Based upon what was found on Thomas and in the car, Officer Birch asked the staff to check their previous room. However, the person who did so led him to their new room. Birch knocked and Ward opened the door. “Officer Birch asked if he knew Davis” – which he denied – and Ward shut the door. Realizing that he was in the new room, Birch told Winters that there was another man in the room. Clemons told Winters that there might be another gun in that room. Officer Birch waited outside the room until Ward emerged, a few minutes later. He “detained a cuffed Ward at gunpoint.” He was not given Miranda. Birch advised Ward that they had found drugs and guns and that they had information that another gun might be in the room. They asked for permission to search, which Ward gave in writing after being told that he did not have to do so. Birch searched, finding 792 grams of crack cocaine but no gun.

Ward was indicted on several federal charges relating to drug trafficking. He requested suppression and was denied. He was convicted and appealed.

**ISSUE:** Is Miranda required before a consent to search is requested?

**HOLDING:** No

**DISCUSSION:** Ward first argued that he did not voluntarily consent to the search of the hotel room, citing, in particular, that he was not given Miranda prior to being asked to sign the consent form. The Court noted that Miranda involves the Self-Incrimination Clause, which is “not implicated by the introduction at trial of physical evidence resulting from voluntary statements.” The Court found his consent to be valid. Ward also argued that he was not lawfully seized and that the officer “should not have relied on Clemons’ statements that there was another gun in Ward’s hotel room” because she was later found to be “not credible.” (In fact, what the court had found not credible about Clemons was that she had later denied that she had told officers about a possible third gun in the room.) The Court found it was perfectly reasonable for Officer Birch to believe that Ward might be armed and therefore the frisk was appropriate.

Ward’s conviction was affirmed.

## SEARCH & SEIZURE - TIPS

### U.S. v. Tillman, 2010 WL 5135615 (6<sup>th</sup> Cir. 2010)

**FACTS:** On May 8, 2007, Detective Waichum (Grand Rapids, MI, PD) got a tip from a CI about a possible drug sale. The informant had been registered with the PD for 2 years, had passed a background check and had undergone at least three “reliability buys.” Waichum had worked with the informant regularly for two years and was his “main handler,” after developing him as an informant. The CI had an “extremely strong” track record and had made over 100 controlled buys. He worked for the police for money, “not for leniency from a conviction, and he had never provided any false information.”

On the day in question, he tipped Waichum to a deal at a local tavern which had become a favorite spot for such activities. Because Waichum was undercover, he called for other officers to make the arrest. He was on the phone with the informant when Tillman stepped out of the bar - the informant identified Tillman as the dealer. Officer Arsenault spotted Tillman, who matched the description of the suspect. The officer saw him “put his hands down toward his waistband.” Suspecting Tillman might be armed, the officer immediately arrested him, finding a loaded gun in his waistband along with five bags of crack cocaine. Tillman was charged with possession of cocaine with intent to distribute and firearms related offenses. He moved for suppression. When it was denied, Tillman took a conditional guilty plea and appealed.

**ISSUE:** Is a necessary to corroborate and support, to the extent possible, even a known tipster?

**HOLDING:** Yes

**DISCUSSION:** Tillman argued that the police lacked sufficient probable cause to make the arrest. The Court looked to the informant’s tip and noted three elements to consider - “the reliability of the informant,” “the basis of the informant’s knowledge,” and “any police corroboration of the informant’s tip.” Each “cut against Tillman.” The Court also noted that Waichum knew the CI’s identity and the CI knew first-hand that Tillman possessed the drugs. The officers’ verified what they could of the tip, finding he matched the physical description given, “adding one more data point to the probable cause calculation.” Tillman tried to argue statistics against the CI, noting that out of about two hundred “engagements,” only about 30 search warrants were issued. The Court noted that “good detective work often involves many interactions with a suspect before an arrest occurs.”

Tillman also argued that 30 grams did not constitute the “ton of dope” the CI claimed, but the Court noted that “no one took the informant to be speaking literally.” Finally, the Court stated that officers do “not need a warrant to arrest a felony suspect in a public place.” They found the location to be public and noted that establishments that are “heavily regulated,” as are places that serve alcohol, have diminished expectations of privacy anyway.<sup>222</sup>

Tillman’s plea was upheld.

### U.S. v. Hairston, 2010 WL 4537979 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 8, 2008, at 2:55 a.m., Cleveland police dispatch received a call from a woman named Alice. She stated that a described black male offered her male friend marijuana in exchange for sex with her. She stated the man had a firearm and that she felt threatened. Alice provided her phone number and address and provided specific details concerning the suspect’s movements.

Officer Stanard and his partner were dispatched to the address. They later testified that the area was high crime and that a lot of drug and prostitution activity occurred. The description was provided and they were told that the

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<sup>222</sup> U.S. v. Biswell, 406 U.S. 311 (1972).

"vehicle was still on the victim's street in front of her home." It was dispatched as high priority. Officer Stanard found a vehicle matching the description in front of Alice's home. As the patrol car approached, the vehicle "sped away" and made a high speed turn. The officers followed, never losing sight of the vehicle. Officer Stanard activated his lights and siren and made a traffic stop. Both officers got out and approached the suspect vehicle "cautiously." Hairston, the driver, eventually complied with their commands to put his hands out. He was removed from the car and handcuffed. He was frisked and placed in the back of the car, the officers advised Hairston that he "was not under arrest but that his vehicle matched the description of the one they had been looking for based on the dispatcher's alert." They searched, finding "clumps" of marijuana sitting in the console in the front seat. They also found a loaded weapon under the driver's seat.

As other officers arrived, Officer Stanard and his partner left to find the complaining victims. They found the victims and interviewed them; they gave a statement that essentially matched the emergency call. Hairston, a convicted felon, was charged for the gun and moved for suppression. The trial court found the officers had reasonable suspicion to stop Hairston's vehicle and denied the motion. He took a conditional guilty plea and appealed.

**ISSUE:** Is the knowledge of a dispatcher imputed to officers?

**HOLDING:** Yes

**DISCUSSION:** The Court assessed the validity of the original stop. Hairston argued under Florida v. J.L.<sup>223</sup> and Feathers v. Aey<sup>224</sup> that the tip was anonymous and uncorroborated. However, the Court noted that the cases upon which Hairston relied "actually support[ed] [its] conclusion that reasonable suspicion existed to justify the stop." The Court agreed that an "informant's tip is sufficient to establish reasonable suspicion" and that it "need not be based exclusively on an officer's personal observations."<sup>225</sup> In Feathers, the Court imputed "to the individual officers the dispatcher's knowledge" and noted that in this case, there was sufficient information to determine that a Terry stop was appropriate. Even though all the information about the caller was not passed on to Officer Stanard, the information was later verified when he made contact with the victims. Alice did not refuse to identify herself and could be found responsible if the information was fabricated. The detail she provided could easily be corroborated by the officer – and when Hairston fled the scene, the officers' suspicions were verified. The Court also noted the "contextual considerations" that supported reasonable suspicions.

Hairston's conviction was affirmed.

## SEARCH & SEIZURE - PLAIN VIEW

### U.S. v. Dixon, 2010 WL 5135570 (6<sup>th</sup> Cir. 2010)

**FACTS:** On November 16, 2008, Officer Frisby (Dayton, OH, PD) made a traffic stop on a vehicle with only one headlight. He saw two occupants, Rose (driver) and Dixon (passenger). He requested ID from both and returned to his car to check their histories. He learned that Dixon had been arrested recently several times for carrying concealed weapons and drug trafficking. He did not call for backup, however, as he was aware all of his fellow officers were tied up. He could see the pair engaged in a "lot of movements" in the car although he did not mention this in the subsequent report. He returned on the passenger side and asked Dixon to get out - Dixon did so. Frisby frisked Dixon. He spotted a "pistol protruding from under the floor mat on the passenger's side of the vehicle" and recognized it as a Glock. He put Dixon in cuffs and retrieved the firearm. Dixon, a felon, was charged with possession. When his motion to suppress was denied, he took a conditional guilty plea and appealed.

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<sup>223</sup> 529 U.S. 266 (2000).

<sup>224</sup> 319 F.3d 843 (6<sup>th</sup> Cir. 2003).

<sup>225</sup> U.S. v. Hardnett, 804 F.2d 353 (6<sup>th</sup> Cir. 1986).

**ISSUE:** Is a weapon partially hidden under a floor mat (in violation of state law) in plain view?

**HOLDING:** Yes

**DISCUSSION:** The Court found the initial stop to be lawful under Ohio law. He asked Dixon out of the car in connection with that lawful stop - he did not improperly prolong it. Having Dixon get out was within the officer's discretion. He could see the Glock while he was outside the car with Dixon and that "is quintessentially what the plain-view doctrine permits." Plain view is proper when the "officer is lawfully positioned in a place from which the object can be plainly viewed; the incriminating character of the object is immediately apparent; and the officer has a lawful right of access to the object itself."<sup>226</sup> The officer met all three elements, as he was outside the car, the location of the weapon was specifically unlawful under Ohio law and the law "does not bar the seizure of evidence in a parked car."

The Court upheld the denial of Dixon's motion to suppress.

## SEARCH & SEIZURE - TERRY

### U.S. v. Noble, 364 Fed.Appx. 961 (6<sup>th</sup> Cir. 2010)

**FACTS:** On November 23, 2006, Officer Budny and Kitko (Cleveland OH PD) saw Noble sitting in a car under a no stopping sign. The car was running. They pulled behind him and activated their emergency equipment - "Noble reacted by putting his hands in the air." Officer Budny obtained Noble's OL and returned to the car to run checks. He told Officer Kitko he thought he smelled marijuana but wasn't sure (he was congested) so they both walked to the car, with Kitko on the driver's side. Kitko confirmed the odor and asked Noble to get out. He asked about a weapon but Noble did not respond. Kitko patted Noble down, and felt a bag which Noble agreed was marijuana. Kitko also felt objects in his other pocket which he believed to be cocaine and money. He lifted Noble's coat and saw a gun. Kitko placed him under arrest. Noble was indicted in Ohio for the gun (he was a felon), drug trafficking and related offenses, as well as the illegal parking. However, once he was indicted by the federal courts for the weapon and the cocaine, Ohio dismissed the state charges.

In January, 2007, ATF agents went to Noble's home to interview him. They knew he had already been indicted by Ohio, that he had a lawyer, and that he also had a pending federal indictment. Noble asked if "he should have his attorney present." They told him "they could not give him legal advice, and they read him his Miranda rights and a waiver." Noble signed the waiver and eventually admitted to the crimes. He said he "did not want to make a written or recorded statement without his attorney being present." Noble later moved for suppression of the evidence found during the pat-down, and from his interview, that was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is a frisk during a traffic stop permitted, if the officer has reasonable suspicion the individual is in possession of marijuana?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The court quickly discarded Noble's argument that the no-stopping sign was not in effect on the day he was arrested, because it was Thanksgiving. The Court agreed that although no-parking regulations were not in effect on holidays, that no-stopping rules were still in effect. It did not matter that the stop was pretextual. The belief that he was under the influence of marijuana justified a longer detention than a simple traffic citation would have warranted, as well. With respect to the frisk, the Court agreed "although an officer does not have the authority to automatically perform a pat down of a person stopped for a vehicular violation, we have found, in comparable situations, that a pat down during a traffic stop is reasonable when additional facts are present which

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<sup>226</sup> U.S. v. Bishop, 338 F.3d 623 (6<sup>th</sup> Cir. 2003).

indicate that the person may be armed.”<sup>227</sup> Although belief that Noble had marijuana was not enough for an officer to be certain that he was armed, it was certainly enough to satisfy the reasonable suspicion standard, particularly when combined with the officer’s experience and Noble’s lack of response to the question. The Court found the weapon was admissible.

With respect to the statements, Noble argued that invoking his right to counsel on state charges invoked those rights on the federal charges, as well. Apparently, at the time he was questioned, however, the state charges had been dismissed. The Court concluded that “the state charges did not invoke his Fifth Amendment rights, but only invoked his Sixth Amendment rights with respect to those charges.”<sup>228</sup> Further the Court ruled that “Noble’s Sixth Amendment right to counsel on the state charges was extinguished by the state’s dismissal of those charges.”<sup>229</sup> He had no “active” Sixth Amendment right to counsel at the time of the interview. (Apparently the federal authorities had requested an indictment but it had not yet been returned at the time of the interview.)

Noble’s plea was upheld.

### **U.S. v. McDaniel, 2010 WL 1253811 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On January 29, 2006, at about 8 p.m., Officer Putnick and Grisby (Cincinnati PD) were patrolling when they came across a vehicle illegally parked. Officer Putnick pulled up alongside to “tell the driver to move the car closer to the curb.” He saw the driver, who was McDaniel, “make a startled expression.” All “four occupants stared with blank expressions as if surprised by the officers’ presence.” He saw McDaniel “turn away very quickly and make a furtive movements as if he was putting something into his waistband.” He believed that indicated McDaniel was trying to conceal a gun. Officer Grisby interpreted it to mean he “might get out of the car and run,” however. Officer Putnick ordered the men to keep their hands in sight. They obtained ID and explained what was going on. The officers waited for backup before asking McDaniel to get out for the car. He was handcuffed and frisked. Officer Putnick “felt a gravel-like substance in McDaniel’s right sleeve which, based on experience, he believed to be crack cocaine.” He continued the frisk, going over the waist area again, and “felt a gun, which slid down McDaniel’s pant leg onto the ground.” He also discovered a scale and cash.

McDaniel was indicted on multiple counts. Suppression was granted upon motion and the government appealed.

**ISSUE:** Is a frisk valid when based upon articulable suspicion that an individual is armed?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the standard of a Terry stop and frisk and noted that it is “constitutionally permissible if two requirements are met.” “First, there must be a proper basis for the stop.” “Second, to proceed from a stop to a frisk, the police officers must have reasonable suspicion that the person stopped is armed and dangerous.”<sup>230</sup> Looking to the facts, the Court agreed that the stop was valid and that McDaniel’s actions supported Officer Putnick’s reasonable suspicion that “McDaniel was armed and dangerous.” The suppression was reversed and the case remanded.

### **U.S. v. McKnight, 2010 WL 2836319 9 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On December 31, 2006, Sgt. Towers (Nashville PD) received a call of a “man with a gun at 151 University Court.” He was not surprised, as the area, a public housing complex, was “regularly plagued” with

<sup>227</sup> U.S. v. Campbell, 549 F.3d 364 (6<sup>th</sup> Cir. 2008).

<sup>228</sup> McNeil v. Wisconsin, 501 U.S. 171 (1991).

<sup>229</sup> Cato-Riggs v. Yukins, 46 F. App’x 821 (6<sup>th</sup> Cir. 2002); U.S. v. Montgomery, 262 F.3d 233 (4<sup>th</sup> Cir. 2001). See also U.S. v. Toepfer, 317 F. App’x 857 (11<sup>th</sup> Cir. 2008), U.S. v. Martinez, 972 F.2d 1100 (9<sup>th</sup> Cir. 1992).

<sup>230</sup> Arizona v. Johnson, 129 S.Ct. 781 (2009).

violent crime. And of course, since it was New Year's Eve, he expected to hear and report to sounds of gunfire throughout the night. He arrived about midnight at the address and received more information. "The initial call arose from a domestic dispute, during which a man with a shotgun threatened the caller." The caller identified herself as the suspect's girlfriend, although it was unclear if she provided her name. She did identify the shooter as McKnight and explained she's fled to a nearby residence, from where she made the call. She also gave a physical description of McKnight.

Towers was waiting for backup when he spotted a man fitting the description; he called out, "Barry." The man walked to him and agreed he was Barry McKnight. Towers arrested McKnight and provided Miranda warnings. McKnight agreed he owned a shotgun and took them to the apartment to show it to them. McKnight was eventually indicted for being a Felon in Possession. He requested suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is a crime victim's statement sufficient support an investigatory stop, even if the victim is not known at the time?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Sgt. Towers' recitation of the facts of the events were credible and found no reason to disturb that finding. It noted that a "crime victim's statement generally will suffice to establish probable cause, to say nothing of proof beyond a reasonable doubt in some settings."<sup>231</sup> All of the circumstances, including Towers' own observations, "amounted to reasonable reliable information that McKnight had committed a crime." McKnight equated the information to that in Florida v. J.L., an uncorroborated tip of a crime.<sup>232</sup> The "risk presented by an anonymous tip is that the police have no recourse when the tip is false and few grounds for verifying it." But "these cautionary considerations are just that: considerations. They do not establish an unbending requirement that the police may never rely on anonymous phone calls."<sup>233</sup> The Court noted that the tip in this case "concerned a report of criminal activity against *her*" – the caller. She gave her location. "Nothing in the record, moreover, suggests that Smith [the girlfriend] refused to give her name, only that at most an administrative error occurred because no one asked for her name and she never volunteered it."

McKnight also challenged the report because "it arose from a domestic dispute." The Court agreed that "officers are under no obligation to take a victim's statement's *less* seriously when the victim knows her assailant."<sup>234</sup> The information arose "credibly from (and in the midst of) an alleged physical confrontation, as opposed to (less credibly) an out-of-the-blue report invoking an estranged partner's past wrongs." McKnight also argued that his cooperative attitude diminished the probable cause that he had committed an offense, but the Court found that "cooperating with an officer does not necessarily diminish other evidence of wrongdoing."

The Court upheld the denial of the motion to suppress and affirmed McKnight's conviction.

### U.S. v. Sutton, 2010 WL 3119532 (6<sup>th</sup> Cir. 2010)

**FACTS:** On February 8, 2006, Deputy Miller (Lincoln County TN SO/17<sup>th</sup> Judicial Drug Task Force) received a call from Det. Crews (Shelbyville TN PD) that a man named Rashad was selling crack from a specific location. He was driving a gold Mitsubishi. Det. Crews drove by and found the vehicle; following it until it stopped near the location specified. It left a few minutes later and Miller followed. As it left the park, the driver of the Mitsubishi "drove through a stop sign without stopping." It did stop at the next intersection. Crews checked the plate during

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<sup>231</sup> U.S. v. Shaw, 464 F.3d 615 (6<sup>th</sup> Cir. 2006); U.S. v. Arnold, 486 F.3d 177 (6<sup>th</sup> Cir. 2007).

<sup>232</sup> 529 U.S. 266 (2000); See also U.S. v. May, 399 F.3d 817 (6<sup>th</sup> Cir. 2005).

<sup>233</sup> Illinois v. Gates, 462 U.S. 213 (1983).

<sup>234</sup> U.S. v. Harness, 453 F.3d 752 (6<sup>th</sup> Cir. 2006); Ahlers v. Schebil, 188 F.3d 365 (6<sup>th</sup> Cir. 1999).

this time. The vehicle then sped off at double the speed limit, again running through traffic control devices. Miller activated his emergency equipment. The vehicle stopped at a residence and the driver got out, walking through the car. Miller ordered him back to the car, but the driver responded that his ID was in the house. It took several more orders before the driver complied and returned to the car. The driver “appeared very nervous” and identified himself as Sutton but Miller quickly realized that Sutton was actually Rashad. Another officer arrived as backup. Miller asked Sutton if he was on probation or parole, he agreed he was on parole. He did not respond to a question about weapons. Miller frisked Sutton and “heard and felt a crunch of a cellophane wrapper” at his ankle. He pulled up the pant leg and found the wrapper sticking out of the sock, finding it to be crack cocaine. Sutton was arrested.

Miller asked the passenger, Bowman, who was also the registered owner of the car, “whether the officers could search the vehicle for hidden contraband.” Bowman consented. The officers found powder and crack cocaine under the seat. Bowman also owned the trailer in question, identified in the original tip, and again, she gave consent. The officers searched, finding scales and marijuana. Sutton also had about \$1,300 in his possession. Sutton was given Miranda, waived his rights and admitted the cocaine was his.

Sutton requested suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is it reasonable to believe a suspected drug dealer is armed?

**HOLDING:** Yes

**DISCUSSION:** The Court began, identifying the “crux of Sutton’s argument is that Miller fabricated the traffic violations in order to stop Sutton in the hopes of finding contraband” – especially since Sutton did not charge Miller with any traffic offenses. The Court noted that a “credibility determination” made by the trial court, “will only be set aside if it is clearly erroneous.” In this case, the Court agreed Miller’s recitation of the facts was credible. Sutton also argued that the frisk was improper because “Miller did not have reasonable suspicion to believe that Sutton was dangerous.” Although he did not raise the issue in a timely manner, and thus the Court was not required to consider it, it chose to do so. The court found that it was reasonable for Miller to believe Sutton might be armed, but the Court had held previously “that officers who stop a person reasonably suspected of carrying drugs ‘are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions’ and to take reasonable measures to protect themselves.”<sup>235</sup> The additional circumstances, including Sutton’s behavior when stopped, made it doubly reasonable that he may be armed.

The Court upheld the denial of the suppression motion.

### **U.S. v. Walker**, 615 F.3d 728 (6<sup>th</sup> Cir. 2010)

**FACTS:** On December 5, 2005, Agent Kelly (FBI) responded to a bank robbery call in Sciotoville, Ohio. He was given a description of the perpetrator and a vehicle description with license plate. Local authorities issued a BOLO. Officer Bower (Portsmouth PD) located a vehicle matching the description some 27 minutes after the robbery, in a parking lot. He observed as Burke walked towards the car. As Officer Bower approached Burke and the car, he saw Walker, who owned the business, approach with a black duffel bag. Officer Bower asked Walker “whether he was the one driving the van” and he agreed he was. When the officer asked him for ID Walker walked to the other side of the vehicle. When the officer told him to stop, Walker partially unzipped the bag. “Officer Bower grabbed the bag, placed it on the ground and escorted Walker about eight feet away to the front of the police cruiser,” away from Burke, where he was frisked. Officer Timberlake arrived and was directed to frisk Burke, who was still standing near the car. Burke provided ID, but Walker insisted that his ID was in his wallet, in the bag which had been left near the car. The officers offered to get the wallet, but Walker responded “I’d rather not let you get in the bag” and “I have some personal things in there.” Officer Timberlake, however, unzipped the bag further and

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<sup>235</sup> U.S. v. Jacob, 377 F.3d 573 (6<sup>th</sup> Cir. 2004); U.S. v. Heath, 259 F.3d 522 (6<sup>th</sup> Cir. 2001).

spotted a “skeleton mask” that matched the description of one used in the robbery. Both men were handcuffed and given Miranda. Officer Bower asked about the gun and money, Walker told him the gun was in the bag but did not respond about the money. The officers obtained a warrant and searched the bag, finding the money and a firearm.

Walker was indicted for the robbery (and others) and sought suppression. The trial court denied the suppression. Eventually Walker took a conditional plea relating to robberies in Ohio and Kentucky and appealed.

**ISSUE:** Is it reasonable to further open a partially opened duffel bag to determine if a weapon is accessible?

**HOLDING:** Yes

**DISCUSSION:** The parties agreed that the officers believed they were dealing with an “armed and dangerous individual,” based on a BOLO and Walker’s statements. The parties agreed the officers could do a limited search of the bag. Walker, however, argued that at most, the officers should have done a frisk of the bag, rather than unzipping it further. The Court, however, agreed that “[u]nzippping the bag more than it was already unzipped was ‘an efficient and expedient way’ to determine whether a gun lay on the top of the bag, ready for use.” The Court noted that the officers were not obligated to use the least intrusive ways to achieve their objective, only a reasonable method. The Court found it “fair to say that the search was reasonably designed to discover weapons that might pose a threat to the officers’ safety, namely weapons lying on the top of the already partially unzipped duffel bag.” The court found the “modest search” to be quite reasonable.<sup>236</sup> Further, the Court noted that its “job is to ask what was reasonable under the circumstances, not to poke and prod for lesser-included options that might not occur to even the most reasonable and seasoned officer in the immediacy of a dangerous encounter.” The Court also agreed that although Walker was located some eight feet from the bag, Burke was only three feet from it, and both men were as yet unrestrained.

The Court continued:

... according to Walker’s own telling, the officers did not have probable cause to arrest either suspect when the search was made. If true, that left the officers with a difficult set of options. They could make a limited search of the bag to ensure their own safety. Or they could arrest the suspects and take them into custody, even though it might not yet have been clear that probable cause existed that they had robbed the bank. Or they could let the men go and return the un-searched bag to Walker. Faced with these kinds of split-second judgments, police officers, it is clear, have a much more difficult job than we judges, who may take several weeks (if not months) to resolve these kinds of issues. That is why we do not “require that police officers take unnecessary risks in the performance of their duties.”<sup>237</sup> Where, as here, the only alternative is to give a suspect access to a potential weapon (in an un-searched bag), a Terry search for weapons is justified—and reasonable.

Walker’s conviction was affirmed.

### U.S. v. Johnson, 620 F.3d 685 (6<sup>th</sup> Cir. 2010)

**FACTS:** On April 14, 2007, at about 4 a.m., a resident of a housing authority apartment called 911. The conversation was as follows:

OPERATOR: 911 Where is your emergency?

CALLER: [XYZ] Whitson Drive.

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<sup>236</sup> U.S. v. Williams, 962 F.2d 1218 (6<sup>th</sup> Cir. 1992).

<sup>237</sup> Terry v. Ohio, 392 U.S. 1 (1969); Michigan v. Long, 463 U.S.1032 (1983).

OPERATOR: What's the problem there?

CALLER: Um. They've finally had to come over here a couple of times before because I had some people coming by my house and they're back.

OPERATOR: What kind of vehicle are they in?

CALLER: They've got it parked now. They're outside their vehicle walking around my house.

OPERATOR: And what kind of vehicle is it?

CALLER: A Cadillac. Uh a blue Cadillac.

Sgt. Lamb and Officer Parton (Newport PD) responded. They did not hear the call, of course, but "were told by the dispatcher that the caller reported suspicious activity around a blue Cadillac." The officers later testified that they'd responded to calls from the same caller earlier that same day and on the previous day.

Although Lamb stated that the earlier calls involved "some subjects that had been coming to her residence bothering her," and agreed with defense counsel that the caller stated "that those people had been there looking for somebody, At some point, the basis for these characterizations was never brought out, and the district court found that "the nature of the prior complaints is not known"<sup>238</sup>

The officers arrived in minutes at the duplex. They were aware it was a high drug trafficking area. They saw a blue Cadillac with a shredded, flat tire and parked behind the vehicle. They got out, looking around, and saw Johnson "walking from a grassy area to the side of the duplex toward Buda Road, where a white car with a female driver was waiting." He was not close to the Cadillac and they saw no one else in the immediate area. Johnson was carrying a "bag" - which Sgt. Lamb found suspicious. They called to Johnson to stop and identified themselves as police, but he continued to walk toward the other car. He eventually opened the passenger-side door and tossed the bag inside. The officers ordered him to put up his hands - Johnson did not do so. Only after demands at gunpoint were made did he finally do so.

On the officers' orders, Johnson then stepped out from the side of the vehicle, whereupon Lamb noticed a sagging bulge in the hand-warmer of the hooded sweatshirt that Johnson was wearing. Around this time, Lamb observed Johnson "sort of bending over . . . , he bent over and actually put his hands towards his middle region of his, of his body, and was sorta slumped over and bending." Lamb approached Johnson, patted him down, and discovered a loaded gun inside a sock in the hand warmer. The officers handcuffed Johnson and recovered from his person 3.8 grams of cocaine base, assorted pills, and a glass pipe. A third officer arrived during the arrest to back up Lamb and Parton.

Johnson was charged for drug trafficking and having a firearm while involved in drug trafficking. He requested suppression and was denied - the trial court concluding that "although the 911 call "lacked even moderate indicia of reliability," the officers' initial attempt to speak to Johnson was permissible and Johnson's "actions after this initial request, when viewed in the totality of the circumstances, ... provide[d] the officers with a particularized and objective basis for stopping the defendant."

Johnson took a conditional guilty plea and appealed.

**ISSUE:** Is a subject seized when they stop in response to an officer's demand that they do so?

**HOLDING:** Yes

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<sup>238</sup> Lamb ran the license plate for the blue Cadillac and discovered that it was registered to Johnson. The record does not specify whether he learned this information before the encounter with Johnson or after arresting Johnson. Lamb also testified that he had pulled over Johnson for running a stop sign in a blue Cadillac a month before the incident at Whitson Drive. However, Lamb did not indicate when he realized that he had previously encountered Johnson or when he remembered that Johnson had been driving a blue Cadillac. Lamb gave no indication that he recognized Johnson or associated him with the Cadillac at any point during the sequence of events on April 14, 2007.

**DISCUSSION:** Johnson argued that the “officers lacked a constitutional basis to detain him” initially. As such, the dispositive issue in this case is whether Sgt. Lamb and Officer Parton had reasonable suspicion that Johnson had committed, was committing, or was about to commit a crime when they stopped him.” The Court agreed that “[a] reasonable person in Johnson’s position would not have felt free to leave when the officers ordered him to stop. There were two officers, they had arrived in marked police cars, they announced themselves as police several times, and they yelled at Johnson to “‘stop’ and ‘stay right there where he was’ as they advanced toward him in the dead of night.” When he reached the car and stood waiting, he yielded to the officers’ demands that he stop. The Court continued:

It would be an unnatural reading of the case law to hold that a defendant who is ordered to stop is not seized until he stops *and* complies with a subsequent order to raise his hands. If a subject is seized only if (1) “a reasonable person would have believed that he was not free to leave,”<sup>239</sup> and (2) the subject actually “yield[s]” to the message that he is not free to leave, then for a person who is moving, to “yield” most sensibly means to stop. To “yield” cannot mean to comply with each subsequent order made by an officer after the subject’s initial compliance. Indeed, if a person stopped and raised his hands at an officer’s command but failed to obey a further command to spread his legs or to lie on the ground, we would not say that he had not been seized initially. It is enough to submit to an officer’s initial command to stop and to remain stopped.

It might be argued that Johnson had not truly yielded when he stood at the passenger-side door because he *looked* like he might flee. Such an argument would be unconvincing. First, Johnson had in fact stopped. There is no dispute that he stood still at the passenger door. Second, the government cites no case suggesting that a person who has actually stopped in response to officers’ commands but who looks like he *might* run has not submitted to an order to stop. Third, even if some such case exists, Sergeant Lamb offered precious little objective basis for his belief that Johnson “was either thinking I’m going to jump in the car or I’m going to run, one [or] the other.” The only testimony that Lamb provided in support of this belief is that Johnson “was sort of bracing himself in the door frame and on the top of the door.” But bracing much more strongly suggests holding one’s position than preparing to flee.

Moreover, both of Johnson’s hands were on the car, apparently within Lamb’s view, and it is unclear whether the car’s engine was even running. Without something more—perhaps moving into the car or signaling to the driver—there are inadequate grounds to conclude that Johnson considered fleeing.

The Court concluded that once he stopped and stood by the car, he was, in fact, seized. The Court detailed the information available to the officers at that moment.

(1) Johnson was in a high drug-trafficking area; (2) it was 4:00 a.m.; (3) the officers were responding to a 911 call; (4) two or three minutes after the 911 call, the officers observed Johnson twenty to thirty yards from the blue Cadillac referenced in the call and near the residence from which the call was made; (5) the officers did not notice anyone else in the area, besides the driver of the white car to which Johnson was headed; (6) Johnson did not stop when called to by the officers and instead continued walking toward the white car; and (7) he was carrying a bag, which he threw into the white car.

The Court looked at each factor, finding the first two should not be given undue weight. The next three turn “on the content and reliability of the call.” The Court agreed that the “the 911 call ‘was too vague and ‘provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility,’ and it lacked even ‘moderate indicia of reliability.’” The caller did not identify the suspects beyond calling them “some people,” and thus the police had no descriptive information or anticipated behavior by which to identify a particular suspect on the scene. Moreover, the 911 caller provided insufficient reason to believe that Johnson, even

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<sup>239</sup> California v. Hodari D., 499 U.S. 621 (1991).

if he was one of the “people” she had called about, had committed, was committing, or was about to commit a crime. The caller stated only that “some people” who had been near her home earlier were “back” and were “outside their vehicle walking around my house.” The caller did not specify “any incriminating behavior or indicate that she suspected them of any criminal conduct in particular.”

The Court then addressed “the facts that might cast suspicion on Johnson in particular, as opposed to anyone who happened to be in the area—the sixth and seventh facts.” The Court found it “undisputed that the officers lacked reasonable suspicion to seize Johnson when they called for him to stop and that Johnson was entitled to keep walking.” Despite the governments argue that “ignoring an unconstitutional order contributes to reasonable suspicion.” The Court doubted “the wisdom of labeling reasonably suspicious the proper exercise of one’s constitutional rights.” The Court concluded that despite ongoing debate, “*this case* ... does not present even a close question.” Johnson did not “change course or otherwise react suspiciously to the police” - in fact, he did not react at all but simply continued about his business. Because the Court found the officers lacked reasonable suspicion for the initial seizure, the Court held everything found after the stop to be subject to exclusion. The denial of his motion to suppress was reversed.

### U.S. v. Johnson, 2010 WL 4457410 (6<sup>th</sup> Cir. 2010)

**FACTS:** On April 2, 2006, at about 10 p.m., Johnson, his girlfriend and another friend when to a Columbia (TN) club. It was notable because it was “Mule Day, an annual festival in Columbia known for drinking and revelry.” Violence, including gun-related violence, was also associated with that day. They arrived, parked in the parking lot and entered the club. During that time, the Columbia PD SWAT team investigated the lot, looking in car windows for visible firearms. Det. Alsup looked into Johnson’s Expedition; he saw an open gym bag on the floor of the front passenger side and spotted a box of ammunition but could not tell the caliber or even if the box actually contained ammunition. He told the other officers, and eventually, Det. Duncan learned of it. SWAT officers spotted the three companions leave the club and walk toward the car. Johnson opened the front passenger side. The officers confronted the three and ordered them to raise their hands, which they did. Det. Duncan frisked Johnson, finding a firearm in his belt. Johnson was arrested. When discovered to be a convicted felon, Johnson was prosecuted for that offense. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is the presence of ammunition enough to suspect a firearm is involved?

**HOLDING:** Yes

**DISCUSSION:** Johnson argued that the initial stop was unlawful. The Court noted that the “only question is whether the police had reasonable suspicion to believe Johnson possessed a firearm in Club Karma” – in violation of Tennessee law. Looking at the evidence known to the officers, the Court agreed that “while a time of day or dangerous location cannot alone provide reasonable suspicion, ‘police officers are not required to ignore the relevant characteristics of a location [or time] in determining whether the circumstances are sufficiently suspicious to warrant further investigation.’”<sup>240</sup> The Court “noted that the presence of a box of ammunition in an automobile – albeit confirmed through inquiry – is adequate to provide reasonable suspicion that the owner possesses a firearm.”<sup>241</sup> The Court agreed that the “factors combined needed only provide the officers with reasonable suspicion that Johnson violated the prohibition on carrying a firearm into an establishment serving alcohol.” The Court next looked at the “officers’ intrusion ‘was reasonably related in scope to the situation at hand.’”<sup>242</sup> The Court did this “by examining the reasonableness of the officials’ conduct given their suspicions and the surrounding circumstances.” A frisk must be justified by the officer’s reasonable belief that the subject is armed and dangerous – but the officer need not be “absolutely certain that the individual is armed.” The Court agreed that previous case

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<sup>240</sup> U.S. v. Pearce, 531 F.3d 374 (6<sup>th</sup> Cir. 2008).

<sup>241</sup> U.S. v. Isham, 501 F.2d 989 (6<sup>th</sup> Cir. 1974).

<sup>242</sup> Caruthers, 458 F.3d 464

law indicated that the “believed presence of a firearm [is] central in permitting a protective search of a suspect due to a reasonable officer’s fear of danger.”<sup>243</sup> In Michigan v. Long, the Court agreed that “danger may arise from the possible presence of weapons in the area surrounding a suspect.”<sup>244</sup>

The Court agreed that a frisk, without asking questions first, was reasonable. The Court upheld the denial of the suppression motion.

**U.S. v. Smith, 594 F.3d 530 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On November 21, 2006, at about 3 a.m., Cincinnati officers responded to a 911 call at an apartment complex. Officer Putnick and Rock arrived first and waited for backup, Officers Hill and Weyda. They could not immediately enter because the exterior door was locked. They tried various ways to get in – “ringing the door buzzers, knocking on windows, making noise (in particular, through the horn attached to their vehicle), using searchlights, and having dispatch try to contact the residence from which they had received the 911 call.” Officer Putnick even climbed up the fire escape to bang on second floor windows. Finally, they saw Smith come through the lobby, rolling his bike, and he allowed the officers to enter. However, some type of altercation arose and the officers took up a “tactical position” around Smith - he tried to push out as they were coming in. They questioned Smith, who was evasive and kept trying to leave. The officers asked him to “slow down.” Smith answered some questions and kept trying to roll his bike past the officers. Officer Weyda indicated he could hear Officer Rock asking questions but could not hear Smith’s responses. At some point, one of the officers apparently grabbed a firearm from Smith’s waistband and handed it off to another officer.

Smith, a convicted felon, was charged in federal court for possession of the firearm. Smith moved for suppression and was denied, he then appealed.

**ISSUE:** Is a brief seizure of someone leaving a building where a 911 call has been generated appropriate?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the standards for deciding if a seizure actually occurs - “the encounter must not be consensual and the officers must use physical force or the individual must submit to the officers’ show of authority.”<sup>245</sup> “[a] consensual encounter becomes a seizure when ‘in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’”<sup>246</sup> In the past, the Court had “noted that, “[c]ircumstances indicative of a seizure include ‘the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.’”

Further:

However, absent the intentional application of physical force, even if there is a show of authority and a reasonable person would not feel free to leave, in order for a seizure to occur there must also be submission to the show of authority: “there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.” Concerning submission, the Court noted that: “what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.”

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<sup>243</sup> U.S. v. Paulino, 935 F.2d 739 (6<sup>th</sup> Cir. 1991).

<sup>244</sup> 463 U.S. 1032 (1983).

<sup>245</sup> Brendlin v. California, 551 U.S. 249 (2007); California v. Hodari D., 499 U.S. 621 (1991).

<sup>246</sup> U.S. v. Jones, 562 F.3d 768 (6<sup>th</sup> Cir. 2009) (quoting U.S. v. Mendenhall, 446 U.S. 544 (1980)).

The Court agreed that an “investigatory stop of an individual by a law enforcement officer is proper so long as there is a reasonable basis for the stop.”: An officer can stop and briefly detain a person when the “officer has reasonable, articulable suspicion that [a] person *has been*, is, or is about to be engaged in criminal activity.”<sup>247</sup> However, to justify a Terry stop, an “inchoate and unparticularized suspicion or ‘hunch’” is not sufficient. Instead, the officer must be “able to articulate some minimal level of objective justification for making the stop,” based upon “specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”<sup>248</sup> This determination balanced the individual’s personal interest in security with the government’s interest in addressing crime. The Court concluded that Smith was not seized before he was ordered by one of the officers to stop. Officers are permitted to ask questions absent any reasonable suspicion.<sup>249</sup> They can “position themselves immediately beside and in front of a suspect and even reach across a suspect, provided they leave a way out.

Further:

Thus, the fact that uniformed police officers here were asking Smith questions while surrounding him on both sides, in close physical proximity, with another officer at some distance in front of him, did not make the encounter non-consensual. Indeed, the fact that three officers rushed into the building as Smith opened the door may have given Smith some cause for alarm. However, it is more significant that the officers did not initially seek to arrest or stop Smith as they entered the building. They did not block Smith in; instead, they merely tried to move around and past him. This would have indicated to a reasonable person that the officers were not trying stop him and that, unless he engaged in activity that generated a reasonable, articulable suspicion, he was free to leave. Certainly, the officers were not required to allow Smith out of the building before attempting to respond to an emergency 911 call; however, their need to enter the building quickly did not mean that a reasonable person would feel that he could not leave or that their initial encounter was non-consensual.

In addition:

... the officers did not use physical force to restrain Smith until they grabbed him when he reached into his jacket (after Officer Putnick told Smith to stop). Prior to that point, there is no evidence of any physical contact, and any physical contact would have been unintentional and a byproduct of the hallway’s small parameters and the officers’ efforts to enter quickly in response to the 911 emergency call (the officers did not physically block Smith in). Furthermore, even assuming that the officers made a show of authority when they surrounded Smith in the hallway in close physical proximity as they attempted to enter the building, Smith did not passively acquiesce or submit to their show of authority but, instead, tried throughout the encounter to push past the officers. Continuing efforts to push past the officers do not constitute submission to a show of authority. Consequently, there was no seizure at this point.

Once Officer Putnick told Smith to stop, the interaction turned into a seizure and a Terry stop. That stop was justified “because the officers had a reasonable suspicion of criminal activity under the totality of the circumstances, which included: (1) the emergency 911 call; (2) Smith’s efforts, with his head down, to push past the officers and exit the building as the officers entered; (3) that these events took place in a high-crime area in (4) the very early hours of the morning; and (5) Smith’s vague responses to the officers’ questions.”

Smith contended:

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<sup>247</sup> U.S. v. Atchley, 474 F.3d 840 (6th Cir. 2007) (quoting U.S. v. Hensley, 469 U.S. 221 (1985)) (emphasis in original); see also U.S. v. Sokolow, 490 U.S. 1, (1989).

<sup>248</sup> U.S. v. Foster, 376 F.3d 577, (6th Cir. 2004).

<sup>249</sup> U.S. v. Drayton, 536 U.S. 194 (2002).

... that the 911 call is not a significant factor in considering the totality of the circumstances. Smith argues and the district court appears to have assumed that the emergency 911 call was a silent or hang-up 911 call.<sup>250</sup> In examining the 911 call, this court has found that a 911 hang-up call “standing alone without follow-up calls by a dispatcher or other information, is most analogous to an anonymous tip.” *Cohen* noted that a “silent 911 hang-up call could be said to have suggested the possibility of, among other things, a limited ‘assertion of illegality’ but, absent any observed suspicious activity or other corroboration that criminal activity was afoot,” even that limited assertion could not be accepted. The police officer who testified in that case stated that a person had called 911, but that the person had hung up “right after they dialed 911” without providing any additional information. Thus, *Cohen* indicates that a silent 911 call can provide some support for a reasonable suspicion of criminal activity but, by itself, cannot support a finding that the law enforcement officers had a reasonable suspicion of criminal activity.

Therefore, even if we found that this was a silent 911 call, it offered a limited “assertion of illegality” which, in conjunction with other factors, could provide the officers with reasonable suspicion. However, in this case, Officer Hill testified that some additional information was communicated with the 911 call: “I recall the dispatcher saying it sounded like it was a struggle inside of the apartment building because the line was still open.” This information narrowed the inferences as to what caused the emergency 911 call, suggested criminal activity and, given the small number of apartments in the residential complex (*i.e.*, there were 12 buzzer buttons or 12 listings for names) and the time of night, significantly increased the probability that Smith might have been involved in criminal activity. Furthermore, Smith’s refusal to move out of the way of the officers and his efforts to push through them as they tried to enter the building and as they moved around him, also supported a finding of reasonable suspicion. The Supreme Court has found that flight from law enforcement officers in a high crime area can justify a reasonable suspicion of criminal activity.<sup>251</sup> Furthermore, this court has found that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”<sup>252</sup> Moreover, “flight is not the only type of ‘nervous, evasive behavior.’ Furtive movements made in response to a police presence may also properly contribute to an officer’s suspicions.”<sup>253</sup>

Here, the officers described Smith throughout the encounter as very agitated and unsettled. More importantly, Smith did not merely run from the officers; instead, he stood in their way, with his head down, and attempted to push through them and past them. When they sought to enter the building, the police were not trying to investigate or intimidate Smith, they were not purposefully seeking to slow him down or to inhibit his movements; rather, they were seeking to respond as quickly as possible to a 911 emergency. In response, Smith did not get out of their way, or simply stand still; instead, and without any explanation, he attempted, with his head down, to push his way through and past the officers. Smith’s aggressive behavior, which inhibited the officers’ efforts to respond to a 911 emergency call, distinguishes this case from other *Terry* stop situations and contributes significantly to our finding that the officers had a reasonable suspicion of criminal activity.

Several other contextual considerations were also present, including that it was “late at night” and “a high-crime area.”. Even though “these factors may not, without more, give rise to reasonable suspicion . . . they are relevant to the reasonable suspicion calculus.” (the incident in *Caruthers* took place at 1:20 a.m.). It was reasonable to conclude, based on Officer Putnick’s prior testimony regarding his extensive experience in this area (and with this apartment complex, in particular) that this was a high-crime area. Furthermore, 3:00 a.m., like 1:20 a.m. is, as *Caruthers* described it, “late at night.” While activity at such hours and in such an area, by itself, certainly could have an innocent explanation, in conjunction with the other factors, it supported a finding of reasonable suspicion.

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<sup>250</sup> *U.S. v. Cohen*, 481 F.3d 896 (6th Cir. 2007).

<sup>251</sup> *Illinois v. Wardlow*, 528 U.S. 119 (2000).

<sup>252</sup> *Caruthers*, 458 F.3d at 466 (citing *Wardlow, Id.*).

<sup>253</sup> *Id.*

Finally, Smith's evasive, non-responsive, and vague answers to the officers' questions, which (in part) prompted Officer Putnick's instruction to stop, also provided some additional basis for the officers' reasonable suspicion. This court has noted that a suspect, "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, *without more*, furnish those grounds."<sup>254</sup> Thus, while a suspect's refusal to answer or listen does not, by itself, justify a reasonable suspicion of criminal activity, it can be a factor that, together with other factors, supports a finding of reasonable suspicion.

Here, Officer Weyda could not remember any of Smith's responses to the questions he was asked. But Officer Hill testified that Smith, "was kind of evasive in his answers" and that he thought that Smith's responses were "vague." Officer Putnick testified that he asked Smith, "How you [sic] doing, sir? Do you live here?" and that Smith "didn't acknowledge me. He just kind of kept his head down and tried to keep walking. At that point when he didn't acknowledge me, my suspicion raised a little bit and I asked him to stop." Smith's refusal to answer some of the questions posed to him, and his vague and evasive answers to other questions, provided further support for the officers' reasonable suspicion that he was engaged in criminal activity.

Finally, when Smith reached abruptly inside his clothing, the officers were justified in reacting and grabbing him. At that point, they saw the weapon and were further justified in seizing it.

The denial of the motion to suppress was affirmed.

## SEARCH & SEIZURE - STANDING

### U.S. v. Domenech, 623 F.3d 325 (6<sup>th</sup> Cir. 2010)

**FACTS:** A man calling himself Rogelio rented two rooms at the Green Acres motel in an unnamed Michigan city. He filled out a registration card that was "full of nonsense." Local sheriff's deputies noted suspicious activity at the hotel and with the Michigan State Police, they approached one of the two rooms. Two deputies knocked at the door while a trooper waited outside the bathroom window. When the occupant heard the knock, the trooper observed him "enter the room and lean over" but due to window frosting, he could not see much. "Expecting (correctly) that the person in the bathroom was about to flush away evidence, [Trooper Burchell] opened the window and swung his flashlight at Alejandro [Domenech]." The deputies burst through the door and found Alejandro and William Domenech, with two women, and also found drugs, guns and counterfeit currency.

Both men were charged with drug trafficking, possession of firearms and related federal charges. They moved for suppression and were denied. They were convicted and appealed.

**ISSUE:** Does a subject have an expectation of privacy in a third-party's motel room?

**HOLDING:** Yes (in some cases)

**DISCUSSION:** The Court agreed that the constitutional right to reasonable privacy does apply to hotel rooms.<sup>255</sup> However, the court also notes that the moving party (in this case the Domenech brothers) also has to establish that he has standing to establish that expectation of privacy in a location. Although the rooms were rented through an

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<sup>254</sup> U.S. v. Campbell, 486 F.3d 949 (6<sup>th</sup> Cir. 2007) (quoting Florida v. Royer, 460 U.S. 491 (1983)) (emphasis added). We also note that all of these factors were present before the officers had initially positioned themselves around Smith.

<sup>255</sup> U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

agent, Rogelio, who actually used an alias, and that the rooms were being used for criminal activity, the Court found those circumstances did not “individually or cumulatively – defeat the reasonableness of the privacy expectation” in this case.

With respect to the criminal activity, the Court specifically rejected the idea that criminal activity undermined privacy expectations in U.S. v. Washington.<sup>256</sup> The Court agreed that the use of an agent to rent the rooms complicated the analysis, but did cite to case law that suggested the involvement of a third party in the registration process did not defeat an expectation of privacy – even though the individual might lack “a legally enforceable contract or property right in the room.” Even the use of an alias by the agent (the opinion suggested that Rogelio and Ward were the same person) did not defeat that expectation, nor did the arguable “invalid registration” – which the Court noted was only a legal concern to the motel itself. The Court also addressed Alejandro’s “social guest status” in the room occupied by his brother – the room approached by Officer Birch. The Court concluded that “because William demonstrated a reasonable expectation of privacy – showing that he legitimately regarded Room 22 as his temporary residence – Alejandro’s meaningful connection validates his own expectation.” Finally, the Court addresses the prosecutions’ exigent circumstances entry into the bathroom of the first room they entered. The trial court had concluded that because the trooper could not actually see anything, that he did not have probable cause to enter the room.

The Court reversed the conviction of both brothers.

### **U.S. v. Ocampo, 2010 WL 4721079 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Ocampo, with others, made a number of trips in 2005/06 between Michigan and other states, including Texas and California. Evidence, particularly specific purchases made, linked these trips to drug trafficking. Ocampo’s financial records indicated he was spending far more money than he earned during that time. During a lengthy surveillance, officers heard Ocampo make highly incriminating statements, and at one point, he met with Sandoval. After they left the meeting, “Sandoval transferred a box from the trunk of his vehicle to the trunk of the car [Ocampo] was driving.” (Cash was later found at Ocampo’s residence bearing Sandoval’s prints.) The next day, Ocampo went to his storage unit and retrieved a suitcase, which he provided to Sandoval at a meeting. Sandoval was stopped for a traffic offense. His vehicle was searched and the suitcase was found to contain 60 pounds of marijuana, wrapped in one-pound bricks.

Following a further investigation, Ocampo was arrested. Drugs, the cash mentioned above, and other incriminating items were found in the residence and storage unit. After suppression motions were denied, Ocampo was convicted on numerous drug trafficking charges. He then appealed.

**ISSUE:** Does a subject have an expectation of privacy in luggage given to someone else?

**HOLDING:** No

**DISCUSSION:** Among other issues, Ocampo claimed that the search of the suitcase violated his Fourth Amendment rights. The Court discussed whether he had a reasonable expectation of privacy in the suitcase, which he had given into the keeping of someone else. The Court agreed that even if he allegedly owned the suitcase, he did not apparently intend to use Sandoval’s car as a “secure storage space” -especially given he had his own home and storage unit. There was no evidence that he ever expected to get it back or that he could get into the trunk to retrieve it<sup>257</sup> nor that he took any “steps to preserve his privacy with respect to the suitcase.”

The Court upheld the denial of the motion to suppress and ultimately, his convictions.

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<sup>256</sup> 573 F.3d 279 (6th Cir. 2009).

<sup>257</sup> U.S. Robinson, 390 F.3d 853 (6th Cir. 2004).

## SEARCH & SEIZURE – VEHICLE STOP

### U.S. v. Guarjardo, 2010 WL 3069605 (6<sup>th</sup> Cir. 2010)

**FACTS:** On August 29, 2007, Officer Hoppe (Tennessee Highway Patrol) was patrolling on I-75. He was in the median when he saw a vehicle travelling well below the speed limit and observed it cross the fog line. The vehicle slowed even more when the driver apparently noticed the marked car in the median. Officer Hoppe knew there was a nearby methadone clinic and that drivers were often impaired in the area. He estimated the vehicle was going about 48 mph initially, but it speeded up to 55. He made the stop at 8:32 a.m. The driver (Guarjardo) admitted he had no OL. He was brought out of the vehicle and denied being intoxicated - Hoppe was also “quickly satisfied” that he was not impaired. Hoppe questioned the occupants’ travel plans and intentions and Guardjardo become increasingly nervous - “swinging his arms, looking distressed, and having his voice crack.” Due to traffic, Hoppe decided to get the vehicle off the expressway and while he followed the vehicle to the next exit, he was able to verify some information, but not enough to confirm the driver’s name at that time. Eventually, at the second location, some 25 minutes later, Guarjardo gave consent to search. After a detailed search, Hoppe found suspicious containers of cat litter and ID hidden in the engine compartment. He found the litter bags suspicious in that the sealing strip of one appeared to have been tampered with and one was heavier than the other. He had the passenger (Lara) open the heavier bag and ultimately 10 kilos of cocaine and three of heroin were found in the bag.

Both men were charged and indicted for drug trafficking. Guarjardo moved for suppression and that was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is reasonable suspicion sufficient for an officer to investigate an ongoing traffic offense?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that “[a]lthough ‘virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic violation,’ this circuit has required probable cause to justify an investigatory stop for *completed* misdemeanor traffic violations.<sup>258</sup>” This court has also held, however, that when the stop is for an *ongoing* violation—no matter how minor—reasonable suspicion will be sufficient to justify an investigatory stop.”

Guarjardo argued that there was nothing posted as to a minimum speed limit and nothing on the record that he was somehow impeding traffic. He also noted that although he did not have his lights on, as required by Tennessee law when it was raining, the in-car video indicated that Hoppe’s wipers were on, at best, only intermittently, apparently suggesting that the rain was also intermittent. The government argued that Hoppe had probable cause, from his own observation, that Guarjardo had failed to stay in his lane of travel. The trial court had justified the stop on Hoppe’s reasonable suspicion that Guarjardo was “engaged in the ongoing offense of driving while intoxicated.” The Court agreed that “[b]ecause Hoppe had reasonable suspicion to believe that the defendant was driving while impaired, the initial investigatory stop was proper under the Fourth Amendment.” Further, the court found that Hoppe did not impermissibly extend the duration of the stop and that it was perfectly appropriate for Hoppe to consider the matter still unresolved. As such, the duration of the stop was appropriate. With respect to the scope, the court agreed that Hoppe’s request and the consent that did not expressly limit the scope was proper and did extend to the closed containers of cat litter. The court agreed that “although one may delimit the scope of a search to which he consents, no explicit authorization is required to search a particular container “if his consent would reasonably be understood to extend to a particular container.” The Court also agreed that “at the time the first cat litter container was opened, Hoppe had probable cause to believe that contraband would be found inside.”<sup>259</sup>

<sup>258</sup> U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008); see also U.S. v. Sanford, 476 F.3d 391 (6th Cir. 2007).

<sup>259</sup> California v. Acevedo, 500 U.S. 565 (1991).

Guarjardo's plea was upheld.

**U.S. v. Street, 614 F.3d 228 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On January 23, 2008, Washington County (TN) officers got a very specific tip about a methamphetamine sale that would take place later that day. Sgt. Gregg spotted the tipped vehicle and noticed that neither occupant was wearing a seat belt. Lt. Remine learned about the traffic violation and stopped the vehicle. He had the driver, Sam Street, get out. As Street walked toward the back of the car, he was observed putting his hand in his pocket and grabbing something. "Concerned that Street was reaching for a weapon, one of the officers grabbed his arm and asked if he had something in his pocket." Street admitted to have a pistol - the officer "removed Street's hand from his pocket, reached in and retrieved" the pistol. Street did not have a permit to carry it. The passenger, Randall Street, was asked to get out and was frisked, on the reasoning that, if the driver was armed, the passenger might also be. He was frisked and three bulges were found - Randall admitted they were drugs. They turned out to be three balloons of crystal methamphetamine. Scales were later found on his person at the jail.

Both men were indicted. Randall moved for suppression, but the trial court found the search appropriate. Randall was convicted and appealed.

**ISSUE:** Must an officer take the least intrusive measures possible during a traffic stop?

**HOLDING:** No

**DISCUSSION:** The Court found that "the police had a legitimate basis for their actions at each stage of the encounter." The initial stop was appropriate, even if pretextual.<sup>260</sup> Both men were legitimately asked to get out of the car.<sup>261</sup> It was further appropriate to grab Street's arm as it was only a "minor infringement on his physical liberty, one proportionate to the risk created by a suspect's reaching into his pockets during a traffic stop and commensurate to other common (and commonly accepted) exercises of physical control during a stop prompted by probable cause to suspect a violation of law, including: removing a driver or passenger from a car; directing the suspects where to stand; directing them where to place their arms during the encounter; and for that matter holding their arms as officers escort them to a specific location." Street argued that the "officer could have done less" and offered alternatives. "But the Fourth Amendment demands reasonableness, not unforgiving scrutiny; it demands that the officer take sensible steps given the circumstances of the encounter, not that he take the least intrusive steps imaginable." The Court agreed that retrieving the gun was proper as well.

Street's conviction was affirmed.

**U.S. v. Freeman / Russell, 2010 WL 4244268 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On January 17, 2007, Freeman (driver) and Russell (passenger) were stopped for speeding while driving a rental car. Freeman argued that the trooper who made the stop detained them for longer than necessary, and that eventually, drugs were found in the car's headliner. The trooper testified that he detected the odor of marijuana during the stop and that he called for a drug dog while working on the paperwork for the stop. The dog arrived within 10 minutes and alerted on the vehicle. The officers found \$1800 in cash inside the car, and eventually, the drugs.

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<sup>260</sup> Whren v. U.S., 517 U.S. 896 (1996).

<sup>261</sup> Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997).

Freeman noted that Lunceford had never said anything about the marijuana initially, on the radio on in any report, but was instead focused on concerns about the rental car paperwork. He later stated that he called the dog because of the odor, however. Both were charged with trafficking. Freeman moved for suppression on the issues, and was denied. He was convicted and appealed.

**ISSUE:** May a stop be extended when the officer detects the odor of marijuana?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the initial stop was justified for speeding. The Court found the extension of the stop justified under the credible allegation of the odor of marijuana. The Court noted that “[e]ven though he did not mention the odor in his initial communications with dispatch, he did call for a drug dog soon after returning to his car, which suggests that he had smelled something.” The Court upheld the length of the stop and the admission of the evidence.

**U.S. v. Sweeney, 2010 WL 4536901 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Sweeney was allegedly among a group of men involved in a drug transaction in Cleveland. He had driven away from the scene and was then stopped for a minor traffic offense. He was frisked and a large amount of cash found, for which Sweeney offered an alternate explanation. During an inventory search<sup>262</sup> of the car, crack cocaine was found; he was charged. The trial court found the stop, and search, proper. Sweeney appealed.

**ISSUE:** May officers draw on experience to make inferences?

**HOLDING:** Yes

**DISCUSSION:** Sweeney argued that there was insufficient cause to support the initial stop and that “the fact that he was present in a neighborhood known for drugs and other illegal activity cannot alone give rise to reasonable suspicion.” He also contended “that the officers’ testimony concerning the men on the street corner and what they were doing is too inconsistent to add sufficient additional support.” The Court noted that the officers had “considerable relevant experience”<sup>263</sup> and that “officers may draw on their experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” The Court explained the discrepancies between the testimony of the officers, expressing “confidence in the officers’ testimony, noting that such discrepancies indicate that the officers were not engaging in a “conspiracy or fabrication because if there was some sort of fabrication, the testimony would have been more consistent than it was.”<sup>264</sup> It also noted that “at least some of the differences in the officers’ accounts (e.g., the more detailed information Officer Goines provided about the possible drug transaction) could reasonably be due to the fact that Officer Goines was the passenger in the patrol vehicle and could freely observe the activities on the corner, while Officer Weaver had driving duties dividing his attention.”

The Court found the stop to be lawful and affirmed his conviction.

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<sup>262</sup> Inexplicably, he did not challenge this, apparently.

<sup>263</sup> U.S. v. Flores, 571 F.3d 541 (6<sup>th</sup> Cir. 2009)

<sup>264</sup> U.S. v. Bradshaw, 102 F.3d 204 (6<sup>th</sup> Cir. 1996)

## SEARCH & SEIZURE - VEHICLE STOP - GANT

### U.S. v. Johnson, 627 F.3d 578 (6<sup>th</sup> Cir. 2010)

**FACTS:** On April 2, 2008, Officer Bolte (Cincinnati PD) was doing surveillance when he observed a hand-to-hand drug transaction. He relayed the information to other officers to make the stop. Officer Vogelpohl did so. Johnson attempted to flee from the stop but was eventually subdued. As he went to the ground, a gun was revealed in his waistband. Officers searched the car after he was secured and drugs were found. He was subsequently charged under federal law with firearm and drug offenses. He moved for suppression, which was denied, and he was convicted on possession of the drug and powder cocaine. Johnson appealed.

**ISSUE:** Is a search for weapons in the passenger compartment of the car, when reasonably suspected, permitted under Gant?

**HOLDING:** Yes

**DISCUSSION:** Johnson argued that Officer Vogelpohl lacked sufficient cause to make the stop. The Court, however, stated that Officer Bolte had reasonable suspicion, based upon his own observation, and that "Officer Vogelpohl did as well because Officer Bolte relayed sufficient information to him."

Further, once Johnson had been arrested for possession of a firearm and secured outside of the car, police safety was no longer a valid reason to search the Camry, but the search of the passenger area where Johnson had been sitting was still permissible because "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"<sup>265</sup> Indeed, in some cases, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." Police could have reasonably believed that ammunition or additional firearms were in the car or in containers in the car, especially in the passenger area searched by police that was formerly occupied by Johnson.

The Court upheld the denial of the suppression motion, and ultimately, his conviction.

## SEARCH & SEIZURE - EXCLUSIONARY RULE

### U.S. v. Gross, 624 F.3d 309 (6<sup>th</sup> Cir. 2010)

**FACTS:** While on patrol on November 15, 2007, Officer Williams (Cuyahoga Metropolitan Housing Authority Police) found a legally parked vehicle, running but without a driver. He did find a "barely-visible passenger who was slumped down" in the front seat, however. When Williams turned on his spotlight, the passenger reacted, first sitting up and then slumping further. Williams approached the window and asked the passenger [Gross] why he was there. He said he'd been at his girlfriend's house. Williams spotted an open bottle on cognac on the center console. He asked for ID, but Gross said he would have to go into the house. He did provide identifying information upon request. Williams ran a check, finding an outstanding warrant. He had Gross get out, frisked him but did not search him at the time. He was taken to the jail, where Gross went through a metal detector. It went off, but despite several attempts, the officers were unable to determine what was setting it off. Gross asked to use the restroom and was permitted to do so. Almost immediately thereafter, a gun was found in the area of the toilet. "An investigation into how the firearm entered the jail revealed the Gross was the only inmate from the street to have access that day to the [restroom] pod where the gun was located." The officers informed Gross, a convicted felon, of their investigation. He denied having had the gun but stated that he knew who did. He denied permission for a DNA swab, so it was obtained the next day under a warrant. His DNA was found on the firearm

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<sup>265</sup> Arizona v. Gant, 129 S. Ct. 1710 (2009) (quoting Thornton v. United States, 541 U.S. 615 (2004)).

and its ammunition. Some time later, Gross contacted the ATF on his own, talked to an agent and ultimately, after receiving Miranda warnings, admitted to having brought the firearm into the jail.

Gross was charged for possession of the firearm and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** Does an illegal seizure automatically require suppression of all evidence ultimately found?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the legality of the initial encounter, stating:

"This Court has explained that there are three types of permissible encounters between the police and citizens: '(1) the consensual encounter, which may be initiated without any objective level of suspicion; (2) the investigative detention, which, if nonconsensual, must be supported by a reasonable, articulable suspicion of criminal activity; and (3) the arrest, valid only if supported by probable cause.'"<sup>266</sup> Although "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures" by approaching individuals in public places and asking questions, a consensual encounter becomes a seizure when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"<sup>267</sup> "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their request is required."<sup>268</sup>

Gross argued "it was improper for Williams to approach the parked vehicle in which Gross was sitting without some reasonable suspicion." The Court agreed that by effectively blocking in the car, Williams "began an investigatory Terry stop."<sup>269</sup> The Government however, did not argue that "Williams had a reasonable suspicion to block or to approach the car." Rather, it justified the encounter under the "community-caretaking" function.<sup>270</sup> The Court, however, noted that "any purported community-caretaking function in this instance could have been accomplished through a consensual encounter rather than an investigative stop." The Court agreed that since he did not have a reasonable articulable suspicion, Gross was improperly seized.

However, that does not end the matter, as there was a long period of time between the seizure and his "subsequent voluntary confession" to the ATF agent. "The significant length of time between the unlawful seizure of Gross and his voluntary confession while in lawful police custody on an outstanding arrest warrant counsels a finding of attenuation in this case as to the confession."<sup>271</sup>

The Court continued:

As to the second factor – the presence of intervening circumstances – there were intervening circumstances that served to sever the chain linking the unlawful detention and the DNA swab, further

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<sup>266</sup> Waldon, 206 F.3d at 602 (quoting U.S. v. Avery, 137 F.3d 343 (6th Cir. 1997)).

<sup>267</sup> U.S. v. Drayton, 536 U.S. 194 (2002); U.S. v. Mendenhall, 446 U.S. 544 (1980). See also Florida v. Bostick, 501 U.S. 429 (1991).

<sup>268</sup> U.S. v. Peters, 194 F.3d 692 (6th Cir. 1999) ("Absent coercive or intimidating behavior which negates the reasonable belief that compliance is not compelled, the [officer's] request for additional identification and voluntarily given information from the defendant does not constitute a seizure under the Fourth Amendment."). Factors that, if present, indicate that a seizure occurred include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

<sup>269</sup> See also U.S. v. See, 574 F.3d 309 (6th Cir. 2009).

<sup>270</sup> See U.S. v. Koger, 152 F. App'x 429 (6th Cir. 2005); U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003) Cady v. Dombrowski, 413 U.S. 433 (1973)); Taylor v. Mich. Dep't of Natural Res., 502 F.3d 452 (6th Cir. 2007).

<sup>271</sup> U.S. v. Akridge, 346 F.3d 618 (6th Cir. 2003)

dissipating any taint. The DNA swab was only taken after a valid search warrant was taken in order to swab Gross. The remaining piece of evidence is the firearm. Central to the determination of whether the firearm was purged of the taint of the illegal stop is whether the discovery of the warrant constituted an intervening circumstance. We hold that it did not.

The Court also noted that it had “not previously considered whether the discovery of a valid arrest warrant may serve to dissipate the taint of an unlawful detention.”<sup>272</sup> The Court looked to U.S. v. Hudson<sup>273</sup> and cases from other circuits. The Court concluded that “where there is a stop with no legal purpose, the discovery of a warrant during that stop will not constitute an intervening circumstance.”

Further, it stated:

To hold otherwise would result in a rule that creates a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a “police hunch” that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion. Despite a lack of reasonable suspicion, a well-established constitutional requirement, the officer may then seize those individuals, ask for their identifying information (which the individuals will feel coerced into giving as they will have been seized and will not feel free to leave or end the encounter), run their names through a warrant database, and then proceed to arrest and search those individuals for who a warrant appears. Under this scenario, an officer need no longer have reasonable suspicion on probable cause, the very crux of our Fourth Amendment jurisprudence.<sup>274</sup>

The Court concluded, “where an officer engages in an illegal stop and then discovers through his own investigation or prompting that the individual or individuals he has illegally stopped have outstanding warrants, the evidentiary fruits of the subsequent arrest is tainted as fruit of the poisonous tree and must be suppressed.” However, weighing the factors, the Court could not “conclude that the DNA swab and confession against Gross retain any taint from the initial unlawful seizure.” The gun, “however, was found only a short time after Gross entered the jail bullpen, and was not separated from the taint by any intervening circumstances.”

The Court agreed that the firearm itself should have been suppressed, but not the DNA test or the confession. The case was remanded to the trial court.

## **SEARCH & SEIZURE - CUSTODY**

### **U.S. v. West, 371 Fed.Appx. 625 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In 2006, King received a package at her place of employment. She opened it and found “two brick-shaped packages covered in plastic wrap and a white-powder residue.” West called her shortly thereafter and told her that the package would be arriving and not to open it. He said “Rocky” would pick it up. She rewrapped the package and left it with someone else at the workplace, as she had to attend an appointment. When she returned it had been picked up. King then told her supervisor about the package. They contacted Det. Teeter (unnamed Tennessee agency). He set up surveillance and found the vehicle Rocky had been driving. Det. Price followed it when it left the house. (West was driving.) She called for a marked unit to stop the vehicle. Officer Mohny responded and made the stop. When Officer Mohny approached the car, “West turned toward him quickly, yelling.” Since he could not see West’s right hand, he ordered West out of the car and secured him in his cruiser. Det. Price arrived, although her version differed slightly from Mohny’s. Price detected the smell of unburnt marijuana and called for a dog sniff of the car. While they were running computer checks on the two men and the

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<sup>272</sup> U.S.v. Williams, 615 F.3d 657 (6th Cir. 2010).

<sup>273</sup> 405 F.3d 425 (6th Cir. 2005).

<sup>274</sup> Terry v. Ohio, 392 U.S. 1 (1968).

car, Sgt. Perry and Xena, the drug dog, Xena, arrived. Xena alerted to several areas in the vehicle. Perkins, the passenger, was secured after they found marijuana and a gun. Both were arrested. More marijuana was found in the trunk during an inventory search.

West moved for suppression and was denied. Both stood trial and both testified, giving different versions as to what had occurred. West was convicted of trafficking and related charges, and appealed.

**ISSUE:** Is being placed in the back of a cruiser automatically an arrest?

**HOLDING:** No (but it may be custodial)

**DISCUSSION:** West argued that “Mohney’s actions exceeded the legitimate scope of the stop when he detained West in the back of his patrol car.” The Court noted that “because Mohney never wrote a speeding ticket” it was “more difficult to determine when the purpose of the initial stop ended.” However, the Court noted that since he had not yet obtained West’s license and registration when he placed West in the car, he was still “pursuing the purpose of the original stop.” The Court noted that the trial court did not make a finding with respect to whether West was handcuffed at that time, a matter which was in dispute, and which the Court noted was a “critical factor to [its] analysis.” However, West did not raise an affirmative factual dispute on the issue. The Court noted that it had established in U.S. v. Jacob that simply being placed in the back of a patrol car does not constitute an arrest.<sup>275</sup> The Court found that “the fact that Mohney was the only officer actively on the scene” and was dealing with two persons, one of whom was behaving aggressively, made it reasonable for Mohney to secure the pair in his cruiser. He also used the “least intrusive means reasonable available to verify or dispel [her] suspicion” - “calling for a canine unit.”

West’s conviction was affirmed.

## INTERROGATION

U.S. v. Everett, 601 F.3d 484 (6<sup>th</sup> Cir. 2010)

**FACTS:** From the opinion:

Even before he was arrested, April 15, 2008 was shaping up to be a bad day for Mr. Everett. That evening, he had helped his estranged wife (with whom he was in the process of obtaining a divorce) move into a new house. At her insistence, Everett had retrieved some of the possessions that he had been storing with her, including a shotgun.

By the time he had finished, it was approximately 8:30 p.m. This being tax day, however, Everett needed to get to the office of Advance Financial, a tax-preparation company, before closing time – which he believed to be 9:00 p.m. – in order to seek help filing for an extension.

A few minutes before 9:00, Detective Morgan Ford, sitting in her patrol car on a Nashville thoroughfare, saw Everett drive by at a high rate of speed. Ford was a member of the Nashville Police Department’s “Flex Team,” which she described as “an aggressive patrol unit designed to make traffic stops and *Terry* stops in high-crime areas to reduce crime.” In other words, as Everett characterizes it, Ford was planning to make “pretext[ual]” traffic stops “with the real purpose of trying to ferret out other types of crime.”

Ford followed Everett to the Advance Financial office. As Everett parked, she pulled up next to him with her lights on and approached his vehicle. At that point, if not before, Ford would have seen that Everett

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<sup>275</sup> 377 F.3d 573 (6<sup>th</sup> Cir. 2004).

was a middle-aged African-American male. She asked Everett (who was still in his car) for his license, registration, and proof of insurance. Everett admitted that his license was suspended, but produced alternate identification and proof that he was in the process of paying off the required fines to get his license back. At that point, Ford “started smelling . . . alcohol” on Everett’s breath. Rather than engaging in what Ford called a standard traffic stop procedure, she asked Everett if he had any contraband or weapons. Everett responded he had an open beer and a shotgun. (He was a convicted felon.) He denied any other weapons. Ford patted him down and found marijuana.

Ford handcuffed Everett, Mirandized him, and placed him in her squad car. She then searched Everett’s vehicle, where she found the .410 shotgun, which was unloaded and wrapped in a black trash bag, on the floorboard of the back seat. She also found the open forty-ounce beer, as well as a set of digital scales with white powder residue, which field-tested positive for crack cocaine. Because Everett had been so cooperative, Ford decided to “cut [him] a break” on the firearm charge and issued him misdemeanor citations for simple possession of marijuana, possession of drug paraphernalia, and driving on a revoked license. She also issued a traffic citation for careless driving. At that point, Ford released Everett from custody.

However, federal charges were brought for Everett’s possession of the weapon. He moved for suppression, which the District Court originally granted. After further motions, however, the District Court vacated that order and denied the suppression motion. Everett took a conditional guilty plea and appealed.

**ISSUE:** May a subject be questioned about unrelated matters during a Terry traffic stop?

**HOLDING:** Yes

**DISCUSSION:** Everett did not argue “nor could he - that the traffic stop was invalid at its outset.” The Court noted that pretext stops were legal and his admission to speeding was sufficient to render the stop lawful. Prior 6<sup>th</sup> Circuit cases had upheld officer’s off-topic questions during traffic stops, although other circuits had ruled differently. “This circuit split was resolved in Muehler v. Mena, in which the Supreme Court gave its imprimatur to wide-ranging questioning during a police detention.”<sup>276</sup> In Arizona v. Johnson, the “Court removed all doubt that Muehler’s reasoning applies to traffic stops.” In both cases, the questioning had no effect on the overall duration of the seizure. The Court agreed the questioning in this case may have prolonged the detention for a few minutes, at most. In Johnson, the Court stated “that unrelated questions are permissible “so long as those inquiries do not *measurably* extend the duration of the stop.” Circuits that had confronted the issue since Muehler had “refused to adopt a bright-line ‘no prolongation’ rule.” A “police officer intent on asking extraneous questions could easily evade Everett’s proposed rule – by delegating the standard traffic-stop routine to a backup officer, leaving himself free to conduct unrelated questioning all the while, or simply by learning to write and ask questions at the same time.” The Court declined to construe precedent “as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop.” The Court stated that each case must be evaluated on its own, with Sharpe<sup>277</sup> as guidance. Sharpe stated that it was “appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . .” The Court found the officer’s question about weapons to be completely proper, given that he suspected Everett might be intoxicated. The additional delay caused by the insertion of “extra words” relating to drugs and other illegal items was minimal.

The Court cautioned that “the rule of Muehler and Johnson – i.e., that extraneous questions are a Fourth Amendment nullity in the absence of prolongation – is premised upon the assumption that the motorist’s responses are voluntary and not coerced.”

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<sup>276</sup> 544 U.S. 93 (2005).

<sup>277</sup> U.S. v. Sharpe, 470 U.S. 675 (1985).

The denial of the suppression motion was affirmed.

## INTERROGATION - CUSTODY

### U.S. v. Brooks / Lovelace, 2010 WL 2161809 (6<sup>th</sup> Cir. 2010)

**FACTS:** On September 11, 2007, Burke and Comer were murdered in Rineyville. Sgt. Burke (the husband of one of the victims) was developed as a suspect. Det. Walker, KSP, went to Fort Campbell to question him about the homicides. Sgt. Burke (the husband of the murdered subject) gave the names of Brooks and Lovelace as alibi witnesses, stating he'd been with them during the time the murders were committed. Agents with the Defense Criminal Investigative Service (DCIS) were asked to assist since the case involved military suspects. Agents spoke to both and noted some inconsistencies. Further inconsistencies arose when Lovelace gave a written statement and she admitted that Burke asked that they say the three were talking at the time of the murders. When challenged, Brooks vacillated on the time she'd been with Burke. Eventually, both women were indicted, tried and convicted of misleading the DCIS agents. Both appealed.

**ISSUE:** Is an interview at a workplace in custody?

**HOLDING:** No

**DISCUSSION:** Among other issues specific to federal law and not therefore summarized, Brooks argued that her statements were made under custodial circumstances and without Miranda warnings. The Court noted that the interviews were taken in a side room of the workplace of the two women (the dispatch center.) Brooks consented to being questioned. Several breaks were taken but she was never told she could leave. The agent stated he did not give her Miranda warnings because he did not consider it a custodial interview. The Court compared the circumstances to that in U.S. v. Mahan, and noted that "[f]or an individual to be "in custody," there must be "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."<sup>278</sup> In determining whether a suspect is "in custody" for purposes of applying the Miranda doctrine, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."<sup>279</sup> As in Mahan, Brooks was "interviewed at work, he was never told that he was not free to go, the door of the interview room was unlocked, arrest was never threatened, and no show of force was made, such as the use of handcuffs or the brandishing of a firearm."

The Court agreed the interview was not custodial and affirmed the convictions.

### U.S. v. Hinojosa, 606 F.3d 875 (6<sup>th</sup> Cir. 2010)

**FACTS:** Hinojosa came under investigation as involved in international transmission of child pornography - U.S. to Canada. Canadian officials referred it to ICE, which further investigated and tracked the transmissions to Hinojosa's home. Using both NCIC and LEIN (the Michigan state database), they learned there was a possible warrant for Hinojosa, although the two systems were inconsistent in several ways. (In fact, it was later determined the warrant was for someone else.)

Agents went to Hinojosa's home and spoke to his wife. They did not tell her they had a warrant, only that they needed to speak with Hinojosa. She allowed them to enter, telling them he was ill and lying down. They went to the bedroom; she later contended that she did not give them consent to follow her nor did she realize they were behind her until they entered the bedroom. As they walked to the bedroom, they spotted several distinctive elements in the house that matched what they'd seen on video of Hinojosa in sexual situations with his daughter.

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<sup>278</sup> Thompson v. Keohane, 516 U.S. 99 (1995).

<sup>279</sup> Berkemer v. McCarty, 468 U.S. 420 (1984). See also Thompson, (stating that the custody determination hinges upon whether, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.")

Agent George spoke to Hinojosa and requested consent to search the residence and the computer, both were denied. He was arrested and questioned; he confessed to having a sexual relationship with his daughter and that he'd produced pornography with her. Agent Smith prepared an affidavit, summarizing what they'd learned. Hinojosa was indicted and moved for suppression. He was ultimately convicted and appealed.

**ISSUE:** Is an interrogation that takes place at a residence custodial?

**HOLDING:** No

**DISCUSSION:** Hinojosa first argued that the discrepancies between NCIC and LEIN should have "put the officers on notice that they were dealing with two unique individuals." The government did not dispute that "the relied-upon warrant" was for someone else. The Court, however, concluded that the officers entered under consent and as such, "an arrest warrant was not a prerequisite for such entry." The Court reviewed the facts, and concluded that the "interaction between the officers and [the wife] was devoid of coercion or intimidation." His wife said they were polite and not "intimidating or aggressive in anyway." Agent George testified that he requested consent to follow her to the bedroom for "officer safety" and that the wife did not object. The Court noted that Hinojosa's wife did not contradict the officer, "rather, she simply could not recall whether she was asked for permission to further enter the residence." The Court further noted that a verbal consent was not required and that her "non-verbal actions constituted valid consent." Hinojosa also complained that his statements were improperly included in a subsequent search warrant affidavit. Hinojosa was questioned in his bedroom and the court found it "significant to [its] inquiry that the questioning occurred at [the] home." Such venues are generally not considered coercive. The interview consisted of only a few brief questions, no weapons were drawn nor threats made. He was not handcuffed or restrained. Notably, he "refused to consent to the further search of the residence, which suggests that the environment was not coercive."

Although he was not told he was not under arrest, that "failure to do so does not automatically render the encounter custodial." The Court agreed that simply because they fully intended to arrest him from the outset did not make the situation custodial.<sup>280</sup> The Court agreed the questioning was not under custodial circumstances and that Miranda was not required. Finally, the Court found that the arrest, while without a valid warrant, was still appropriate, since the officers had probable cause that he'd committed felonies. Their plain view observations could properly be considered in making that decision, as well. (In fact, the Court agreed the arrest was appropriate even without those observations.) Specifically, the Court ruled that an IP address registered to him, at that address, was sufficient probable cause in itself.

Hinojosa's conviction was affirmed.

### **U.S. v. Ivy, 2010 WL 3398905 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On January 11, 2007, Memphis (TN) officers went to a residence investigating "internet child pornography." They had Ivy's name but did not know if he lived there. They were met at the door by Ivy, who invited them in and told them he lived there with Blalock. He was told what they were investigating and he "told them there were no children in the house, and that he had never touched a child." But he refused to talk about child pornography without an attorney. They left the house after given him contact information. He was not given Miranda at that time as "nothing even remotely resembling a custodial investigation occurred at this first meeting."

Later that day, Blalock executed a consent to search on the address, but in an abundance of caution, the officers also obtained a search warrant. When they arrived the next day, however, no one was home. They contact Blalock who had Ivy go to the house. Before he did so, however, he "asked if he was going to be arrested." They assured

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<sup>280</sup> Berkemer v. McCarty, 468 U.S. 420 (1984).

him he would not be, but that “they did need a key to make a non-forceful entry into the house.” Ivy provided the key and “volunteered that he was going to cooperate with the officers.” Because he had indicated he wanted an attorney before, the agent “contacted an AUSA<sup>281</sup> who told him it was permissible to proceed.” Ivy gave a signed statement. Although not in custody, he was given his Miranda warnings and signed a waiver.

“At this point [Ivy] told the officers he had destroyed the hard drive on his computer, which was the principal item the officers had sought to secure with the search warrant.” He took the officers to where he had disposed of it, “but the hard drive was too damaged to have any evidentiary value.” Back at the house, Blalock had arrived and showed officers “some secret hiding places.” They found a marijuana growing operation but no federal charges were placed. Ivy agreed to come to the station and drove himself there. There, Ivy “admitted to growing the marijuana and made a number of incriminating statements relative to his internet pornography activities.” It was reduced to writing and he signed a statement. He was then allowed to leave. A month later, on February 8, he returned “unescorted and in his own automobile.” He was again giving Miranda warnings and signed a waiver. He gave the agents “some of his internet contacts.” He was there “less than an hour, was not arrested, and again left on his own.” He was indicted in August and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** Is the scene of the execution of a search warrant custody for Miranda purposes?

**HOLDING:** No

**DISCUSSION:** Ivy argued that he was in custody during the execution of the search warrant and that he should have received Miranda at the time. He argued that his later Mirandized statements were the fruit of the poisonous tree from that unwarned interaction. He stated he was told that “he was best served by not having an attorney and that he would be better off cooperating.” He also “indicated that he felt intimidated by the agents in reaching some of his decisions.” The court, however, found that Ivy was “not in custody when he made the challenged statements” and affirmed his plea.

### Fields v. Howes, 617 F.3d 813 (6<sup>th</sup> Cir. 2010)

**FACTS:** Fields was incarcerated at the Lenawee County Sheriff’s Dept on December 23, 2001 for disorderly conduct. He was taken from his cell to a locked conference room but was not told where he was being taken or for what purpose. He was not handcuffed but was in a jail jumpsuit. There he was questioned about his relationship with Bice, a minor, by Deputy Sheriffs Batterson and Sharp. The questioning started between 7 and 9 p.m. and lasted for about 7 hours. Fields was not given his Miranda warnings and was told if he did not want to cooperate he was free to leave, but that it would have taken about 20 minutes to actually leave as a corrections officer would be needed to return him to jail. At one point Fields became angry and was told if he “continued to yell the interview would be terminated.” He did not ask for an attorney or to go back to his cell, but did say more than once that he “did not want to speak to them anymore.” During the interview he finally admitted to sexual contact with Bice. These statements were introduced against him at trial. He was convicted and appealed. The Michigan state courts upheld the conviction and Fields filed for a habeas petition. The District Court permitted the petition, finding that the “state court unreasonably applied Mathis v. U.S.”<sup>282</sup>

**ISSUE:** Is a subject in custody for unrelated purposes in custody for Miranda purposes?

**HOLDING:** Yes

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<sup>281</sup> Assistant United States Attorney.

<sup>282</sup> 391 U.S. 1 (1963).

**DISCUSSION:** The Court noted that Miranda “only applies if the suspect was (1) interrogated while (2) in custody.”<sup>283</sup> The Government agreed that Fields had been subjected to an interrogation, the only question which remained was whether he was in Miranda custody. “Miranda warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’”<sup>284</sup> Further, “although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”<sup>285</sup> In Mathis, the Court had held that “nothing in the Miranda opinion ... calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.” That court also “found that requiring Miranda warnings only where questioning occurs in connection with the case for which a suspect is being held in custody ‘goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights.’” Finally, the “central holding of Mathis is that a Miranda warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e. questioned in a manner likely to lead to self-incrimination, about conduct occurring outside of the prison.”

The Court looked to the recently decided case of Maryland v. Shatzer<sup>286</sup>, which held that “an incarcerated prisoner subjected to questioning on an unrelated crime to be in custody for Miranda purposes.” The Court affirmed the writ of habeas corpus.

**Hoffner v. Bradshaw (Warden), 622 F.3d 487 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On September 22, 1993, Hoffner and Dixon kidnapped and robbed Hammer, who was then buried alive and left to die. Hoffner became a suspect and was questioned, he denied involvement but made statements incriminating Dixon. He agreed to go downtown and on the way, volunteered that Dixon had told him where the body was buried. He led police to the gravesite. At the station, he was given Miranda. He waived rights and gave a statement implicating Dixon. After the body was found, Dixon confessed and implicated Hoffner. Hoffner was given his rights, again, waived them, and confessed.

Ultimately Hoffner was convicted. He appealed.

**ISSUE:** Does a coercive atmosphere (a police station) automatically make a location custody for Miranda purposes?

**HOLDING:** No

**DISCUSSION:** Addressing Hoffner’s claim, the Ohio Supreme Court began by explaining that:

Miranda warnings are not required simply because the questioning takes place in a coercive atmosphere.<sup>287</sup> Rather, the court undertook analysis under Thompson v. Keohane<sup>288</sup> and California v. Beheler<sup>289</sup> to determine whether Hoffner would have felt that he was not at liberty to terminate the interview and leave. The court found that the police’s initial questioning regarding Hammer’s whereabouts consisted of “[g]eneral on-the-scene questioning” not subject to the Miranda warning requirement. Further the court found “no evidence that police officers coerced Hoffner into making any statements”; rather, Hoffner “voluntarily offered information that Dixon had killed Hammer.” The court held that the police’s

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<sup>283</sup> Rhode Island v. Innis, 446 U.S. 291 (1980).

<sup>284</sup> Oregon v. Mathiason, 429 U.S. 492 (1977).

<sup>285</sup> California v. Beheler, 463 U.S. 1121 (1983).

<sup>286</sup> 130 S.Ct. 1213 (2010).

<sup>287</sup> Oregon v. Mathiason, 429 U.S. 492 (1977).

<sup>288</sup> 516 U.S. 99 (1995).

<sup>289</sup> 463 U.S. 1121 (1983),

initial instructions to Hoffner to stay in a specific location were reasonably necessary to secure the scene and did not place Hoffner in custody. The court also found that events after Hoffner left the Wilkerson house in the police vehicle did not constitute custodial interrogation. According to the Ohio Supreme Court, "Hoffner voluntarily agreed to go to police headquarters to give a taped statement. On the way to the station, Hoffner offered to direct police to the location of Hammer's body." The court reasoned that "[b]ecause Hoffner was not under arrest or in custody . . . , police were not required to issue Miranda warnings." As to the interrogations at the police station occurring both before and after his arrest, the court found that, in both instances, Hoffner voluntarily waived his Miranda rights in writing. Therefore, the court concluded that "[a]ll of Hoffner's statements regarding Hammer's disappearance and murder were voluntarily made and properly admitted at trial." The district court found that "the Ohio Supreme Court correctly identified and reasonably applied federal precedent to this case's facts" and therefore denied *habeas* relief on this claim. Hoffner argues that this was an unreasonable application of Supreme Court precedent. He claims that the initial questioning at the Wilkerson house was custodial because he was not free to leave after ten officers entered Wilkerson's house, and at least one officer pointed a gun at him and ordered him to stay in one place. He maintains that the questions he was asked at that point regarding Hammer's disappearance constituted interrogation. Hoffner argues that, because he gave incriminating statements to the police shortly thereafter and because his custody with the police was continuous until the time he gave his first statement, he could not have reasonably perceived the later questioning to be "new and distinct," which would have dissolved the taint of the earlier Miranda violation. Finally, he claims that the officers failed to ensure that, at the time he gave his confession, his earlier pre-Miranda statements could not be used against him, thus violating United States v. Pacheco-Lopez.<sup>290</sup>

The procedural safeguards outlined in Miranda apply only to suspects subject to "custodial interrogation." This term was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." "[T]he only relevant inquiry" for determining whether an individual is in custody "is how a reasonable man in the suspect's position would have understood his situation."<sup>291</sup>

The Court continued:

This requires that resolve two questions: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [Miranda]."

The Court agreed that "circumstances surrounding the beginning of Hoffner's interaction with the police do not reflect any form of coercion or custody." The "police did not need to give Hoffner Miranda warnings upon entering the house in order to ask basic investigatory questions." His responses were made voluntarily and were not in response to questioning.

The Court upheld Hoffner's conviction.

### U.S. v. Williams, 615 F.3d 657 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 12, 2004, Officers Vass and Pappas (Columbus, OH, PD) pulled up to a group of subjects "standing outside an affordable-housing complex." They recognized one individual, Williams, and told him that he was trespassing. Williams acknowledged that there might be a warrant for him and that he was armed.

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<sup>290</sup> 531 F.3d 420 (6<sup>th</sup> Cir. 2008).

<sup>291</sup> Berkermer v. McCarty, 468 U.S. 420 (1984).

He was arrested. He moved for suppression of the evidence (a gun was found on him) and his statements. The trial court suppressed and the government appealed.

**ISSUE:** Is a subject seized when questioned by officers at the scene of a crime?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The Court agreed that:

Williams was seized: a reasonable person would not have felt free to leave upon being approached by two uniformed officers in a marked car, singled out of a group, and immediately accused of a crime. The seizure was unlawful: Williams was not trespassing or committing any other crime when the officers approached, and the fact that others in his group were drinking publicly and *might* have been trespassing did not constitute reasonable suspicion that Williams himself had recently committed a crime or was about to commit one.” His statement about the warrant was not the product of “free will”<sup>292</sup> The Court focused on the fact that “Vass immediately accused Williams of a crime” and his approach was not nonthreatening.<sup>293</sup>

The Court noted that although Williams was not trespassing, others in his group were. (Apparently he may have been on a sidewalk.) Some of the group were drinking, but not Williams. In the previous situation where he was accused of trespassing, he was not cited or written up, and simple loitering was not actually a crime in Ohio. The Court agreed the seizure was unreasonable.

The government argued that the taint was attenuated<sup>294</sup> because of the warrant. “The test for attenuation is whether the evidence sought to be introduced—here, the gun, the ammunition, and Williams’s inculpatory statements—“has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” The Supreme Court has set forth three factors to guide this inquiry: “[t]he temporal proximity of the [unlawful detention] and the [emergence of the incriminating evidence at issue], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” The Court rejected the argument, holding that although other circuits had “treated the discovery of a warrant as an intervening circumstance sufficient to render incriminating evidence admissible, we have never adopted its approach as the law of this circuit.”<sup>295</sup> Moreover, allowing information obtained from a suspect about an outstanding warrant to purge the taint of an unconstitutional search or seizure would have deleterious effects. It would encourage officers to seize individuals without reasonable suspicion—not merely engage them in consensual encounters—and ask them about outstanding warrants.

The Court noted that the “purpose of stopping Williams was to seek evidence against him, and toward that end Vass immediately asked several questions related to criminal activity other than trespassing.” Finding that this case called for a “straightforward application of the exclusionary rule and the related fruit-of-the-poisonous-tree doctrine,” the Court found the evidence had been correctly suppressed.

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<sup>292</sup> Brown v. Illinois, 422 U.S. 590 (1975).

<sup>293</sup> The Court does not elaborate on this, but apparently focused on the context of the approach and the fact that two uniformed officers were involved.

<sup>294</sup> Weakened

<sup>295</sup> U.S. v. Hudson, 405 F.3d 425 (6<sup>th</sup> Cir. 2005).

## INTERROGATION - MIRANDA

### Treesh v. Bagley, 612 F.3d 424 (6<sup>th</sup> Cir. 2010)

**FACTS:** On August 28, 1994, Officer Januszczak (Cleveland PD) arrested Treesh. He recited Miranda and asked if Treesh understood them. He didn't initially respond but finally said "yeah, yeah, I know." He was transferred to the custody of another PD, and then another, and finally was taken into booking. Lt. Doyle gave the following version of Miranda at that point.

You understand you're under arrest? You've been arrested before. Do you understand your Miranda rights? I'm going to ask you some questions over the next hour or so, two hours or three hours. You have a right to answer the questions that I ask, or you can stop me at any time. If you can't afford an attorney, one will be appointed. Do you understand me? Okay.

Treesh agreed to talk and was interrogated for about an hour and forty five minutes. At some point, Doyle reminded Treesh of his rights again. He was jailed, but brought back a few hours later and again interrogated, after another reminder about rights. Less than an hour later, an FBI agent gave him the warnings again and Treesh signed a waiver form. He did so again a few hours later. At about 2 p.m., during yet another interrogation, he invoked his right to counsel. He was ultimately found guilty in the Ohio courts and appealed. The Ohio Court found that "Doyle's incomplete warning were sufficient" to apprise him of his rights. Treesh filed for habeas relief and was denied, but allowed the appeal that denial.

**ISSUE:** Must a subject be readvised of their Miranda rights if the situation has not changed?

**HOLDING:** No

**DISCUSSION:** The Court noted that, under Wyrick v. Fields, a suspect need not be readvised unless the situation has changed by the passage of time or other circumstances.<sup>296</sup> Although the first recitation of the rights was deficient, Treesh admitted he understood and agreed to talk.

The Court affirmed the denial of Treesh's petition.

### Daoud v. Davis (Warden), 618 F.3d 525 (6<sup>th</sup> Cir. 2010)

**FACTS:** The body of Teriza Daoud was found in a dumpster in Toledo, OH, in 1985. Her son, Daoud was identified as a suspect, but never arrested. In 1994, he "spontaneously confessed to the murder to a 911 operator and to two Detroit police officers after jumping in front of their marked vehicle." He was given and waived Miranda and gave a detailed account of the murder, which he repeated at the station. Two officers from Toledo went to interview him. He refused to speak to one of the officers, but did give a "detailed, tape-recorded account of the murder, including details about the disposal of the body and his attempts to clean up the evidence" to the other.

Daoud was charged with murder and found incompetent. A separate hearing was held to determine if he was competent when he gave the actual confession. The trial court excluded the confessions, finding that he did not knowingly and intelligently waive his Miranda rights but apparently found him to be competent. The Michigan Court of Appeals reversed, finding that the statements prior to his transport to the station were not the result of a custodial interrogation. The Michigan Supreme Court reversed the entire decision and found all of the statements admissible. Daoud was convicted and appealed. He appealed his conviction under a writ of habeas corpus.

**ISSUE:** Does mental illness impact the voluntariness prong of Miranda?

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<sup>296</sup> 459 U.S. 42 (1982).

**HOLDING:** No

**DISCUSSION:** Daoud contended that he did not knowingly and intelligently waive his Miranda rights. The Court noted:

In Miranda v. Arizona, the Supreme Court established “certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.”<sup>297</sup> However, a suspect may waive his Miranda rights “provided the waiver is made voluntarily, knowingly, and intelligently.” This inquiry “has two distinct dimensions.”<sup>298</sup>

The Court noted that it was not free to substitute its own judgment unless the trial court did not clearly follow established law. The Court found no reason to find that was the case. The Court agreed the “mental illness does not affect the voluntariness prong under Miranda.”<sup>299</sup> However, it had not decided the extent to which “mental illness can impact the knowing or intelligent prong.”<sup>300</sup> The experts disagreed on whether Daoud’s waiver was competent and ultimately the trial court found that it was. The Court upheld that decision.

Daoud’s conviction was affirmed.

## INTERROGATION - MIRANDA - SEIBERT

Dixon v. Houk, 627 F.3d 553 (6<sup>th</sup> Cir. 2010)

**FACTS:** On November 4, 1993, Dixon was interrogated by Toledo (OH) officers. He expressly invoked his right to remain silent, although he was not under arrest at the time. After his formal arrest five days later he was interrogated twice more. The officer elected not to give him Miranda warnings to “forestall an invocation of counsel.” The strategy succeeded because Dixon confessed to a closely related crime. He capitulated in the second session a few hours later and confessed to the initial crime. Dixon was advised of his Miranda rights at that point. The state trial court suppressed the statements because “they were obtained as a result of a deliberate, bad faith plan on the part of the police to violate his rights” under Miranda, including an “ultimately false” statement by the interrogator in the form of a “promise of possible benefits” if Dixon confessed. The appellate court, however, found the confession admissible. He was ultimately convicted. After state appeals, he requested habeas corpus. The District Court found the confession admissible and he further appealed.

**ISSUE:** Does an attempt to persuade a subject to confess (under custodial interrogation) violate Miranda?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Oregon v. Elstad<sup>301</sup> and Missouri v. Seibert<sup>302</sup> and noted that the “Supreme Court has consistently maintained that the bright-line rule of Miranda against further interrogation by police remains in effect.”<sup>303</sup> The Court found the “cut-a-deal” dialogue was another step in the effort to get a confession by persuading Dixon that he had no right to silence or a lawyer but rather a duty to incriminate himself — the very

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<sup>297</sup> Duckworth v. Eagan, 492 U.S. 195 (1989).

<sup>298</sup> Colorado v. Spring, 479 U.S. 564 (1987) (quoting Moran v. Burbine, 475 U.S. 412 (1986)).

<sup>299</sup> Colorado v. Connelly, 479 U.S. 157 (1986).

<sup>300</sup> Moran, *supra*.

<sup>301</sup> 470 U.S. 298 (1985).

<sup>302</sup> 542 U.S. 600 (2004).

<sup>303</sup> Edwards v. Arizona, 451 U.S. 477 (1981).

opposite of his Miranda rights and his right to due process." A confession given to a deal to avoid the death penalty is "not voluntary."<sup>304</sup>

The Court found the confession was "eventually obtained" but only after the police wore Dixon out with admittedly illegal interrogation, the purpose of which was to get him to confess against his will. The police used both illegal questioning and, as the Ohio trial judge found, false enticement "to cut a deal." The Court granted the writ and gave Ohio 180 days to retry him without the confession.

## INTERROGATION - DIMINISHED CAPACITY

### Adams v. Haeberlin, 2010 WL 4906799 (6<sup>th</sup> Cir. 2010)

**FACTS:** In 1998, Taylor's body was found in a vacant lot in Louisville. She had been sexually assaulted and murdered. When it was discovered that Adams was the last person seen with the victim, he was detained and taken to the police station. He was given Miranda and took a consensual polygraph. When that was completed, he was told he failed and "was not being truthful." He was also "falsely told" ... "that his fingerprints had been found on a brick used to kill the victim." He then agreed to tell the truth and "made inculpatory statements to the police." He was stopped and given Miranda a second time. He agreed to waive the rights and signed a waiver form. He stated he had hit Taylor in the head with a brick and had sex with her. He agreed to a videotaped statement and once again, was given his Miranda warnings and waived them.

Adams was indicted and moved for dismissal, arguing incompetency. However, after evaluation, he was judged competent. He moved for suppression of the inculpatory statements. At the hearing, Det. Eastham testified that he was given Miranda warnings three times and that Adams stated he understood those rights. He testified that "[Adams] appeared lucid, appeared to be aware of where he was and was not rambling." He further stated that Adams appeared normal and was speaking coherently. The trial court denied the motion to suppress.

Adams was convicted of Murder and Rape. He then took a habeas appeal.

**ISSUE:** May a mentally handicapped individual validly waive Miranda?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that there "is no meaningful distinction between Kentucky's standard for competence to stand trial and the federal standard articulated" in Dusky v. U.S.<sup>305</sup> Although the Court agreed that Adams was mentally retarded that does not mean he might not be found competent to stand trial.<sup>306</sup> The Court found that it was appropriate to rely upon the Kentucky Supreme Court's decision upholding the decision that he was competent. Adams further argued that he was incompetent to waive his Miranda rights. The Court noted that what was important was whether Adams understood that he could "choose not to talk to law enforcement officers, to talk only with counsel present, or [could] discontinue talking at any time."<sup>307</sup> The Court found "no reason to believe that the competency standard for waiving Miranda rights is higher than the competency standard for standing trial." Further, "diminished mental capacity alone does not prevent a defendant from validly waiving his or her Miranda rights."

The Court upheld the decision of the Kentucky Supreme Court that Adams' waiver was knowing and intelligent and affirmed the judgment.

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<sup>304</sup> Mincey v. Arizona, 437 U.S. 385 (1978).

<sup>305</sup> 362 U.S. 402 (1960).

<sup>306</sup> Adkins v. Virginia, 536 U.S. 304 (2002).

<sup>307</sup> Garner v. Mitchell, 557 F.3d 257 (6<sup>th</sup> Cir. 2009).

## INTERROGATION - RIGHT TO COUNSEL

### Ayers v. Hudson, 623 F.3d 301 (6<sup>th</sup> Cir. 2010)

**FACTS:** Ayers was arrested in 2000 for Brown's murder in Cleveland. While in jail before the trial, he became acquainted with Hutchinson. "According to Hutchinson, Ayers spoke about his case from the very beginning of their association, and continued to speak with him about it frequently thereafter." At some point just prior to the trial, he claimed, Ayers "broke down" and admitted to the murder. Hutchinson communicated that to the Cleveland PD and thereupon they met and discussed the matter.

The detectives' report of the meeting specifically references Hutchinson's failure to include important details regarding the murder weapon and the amount of money taken from Brown's apartment. However, "within an hour or so" of speaking with the detectives and returning to the jail pod, Hutchinson directly questioned Ayers regarding both the murder weapon and the sum of money stolen. During this questioning that occurred after Hutchinson met with the police, Ayers allegedly confessed to using a small, black iron to kill the victim and stealing \$700 from her. The next day, Hutchinson telephoned his wife and asked her to contact the police on his behalf. On Monday morning, November 27, the police placed Hutchinson in protective custody.

The prosecution also introduced evidence that Smith claimed to have spoken to Ayers about the murder. However, at trial, he recanted portions of his written statement, claiming that he had been pressured into giving the statement. (Phone records contradicted one of his written statements - indicating that although Smith stated Ayers called him on a given day, in fact, the reverse was true.)

Ayers moved for suppression of the testimony and was denied. Ayers was convicted and appealed.

**ISSUE:** Can the use of a jailhouse informant violate a subject's right to counsel?

**HOLDING:** Yes

**DISCUSSION:** With respect to the jailhouse informant, the Court noted that "[a] defendant is 'denied the basic protections' of the Sixth Amendment' when there [is] used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."<sup>308</sup> This applies not only to direct confrontations by known government officers, but also to "*indirect and surreptitious interrogations*" by covert government agents and informants." Finally, in Maine v. Moulton, the Court stated:

... [o]nce the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. *The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.* We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, *at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.*<sup>309</sup>

The Court noted that there was no dispute but that Ayers's right to counsel had attached. The Court agreed that there was a conflict in the circuits about when an informant actually becomes a government agent but ultimately

<sup>308</sup> Massiah v. U.S., 377 U.S. 201 (1964); U.S. v. Henry, 447 U.S. 264 (1980).

<sup>309</sup> 474 U.S. 159 (1985).

agreed “with those courts that do not limit agency in the Massiah context to cases where the State gave the informant instructions to obtain evidence from a defendant.” It stated that “[t]o hold otherwise would allow the State to accomplish ‘with a wink and a nod’ what it cannot do overtly.” The Court found that a review of the statements strongly suggested “at a minimum, that the police shared information with Hutchinson.” The Court found it “remarkable that after meeting with [the investigators], Hutchinson knew exactly what questions to ask Ayers regarding the details of the murder.”

The denial of Ayer’s motion was overturned as was his conviction.

**Cornelison v. Motley (Warden), 2010 WL 3521951 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Cornelison was arrested for the November 4, 1997, “beating death of Ricky Noland in Richmond.” He gave a videotaped statement in which he was given and waived Miranda and “proceeded to make self-incriminating statements.” He moved for suppression and the trial court reviewed the tape. The trial court made the following factual ruling:

In this case, the detective commences reading the requisite Miranda rights to the defendant. The defendant inquires, “What if I want my lawyer present first?” The detective responds[,] “that’s up to you.” Detective Pedigo repeated for the defendant that he had the right to stop the questioning at any time in order to have a lawyer present. After some conversation, the defendant commences writing on the waiver form and then says, “I would like to have a lawyer, though, I want that on the record” and writes on the waiver form. . . . [At the suppression hearing,] Detective Pedigo testified that he was unsure and wanted to clarify the defendant’s intent when he next asked, “Do you want your lawyer present or do you want to talk to us . . . whichever you want to do.” Then the defendant completed the form and laid down the pen. Detective Pedigo responded with, “Does that mean that you want to talk to us?”; and the defendant nods his head. The detective says, “Is that a yes?”, and the defendant answers, “Yes.”

Cornelison then stated that he “got his kicks in” when two others beat Noland. The trial court refused to suppress, finding his statements “merely a clarification of his rights and not an invocation of his right to counsel.” The Court found that “a reasonable officer would not have understood Cornelison to have invoked his Sixth Amendment right to counsel.” Cornelison was convicted of murder and appealed. Ultimately, the Kentucky Supreme Court affirmed the conviction. After further proceedings, Cornelison filed for habeas, arguing that the confession should have been suppressed. The District Court denied the motion and he was given leave to appeal.

**ISSUE:** Must an invocation of the right to counsel be unequivocal?

**HOLDING:** Yes

**DISCUSSION:** “Cornelison argues that his request for counsel was unambiguous when he stated, according to the transcript of the confession tape made by his lawyer that was provided to the *habeas* court, “Uh, you know what I’m saying I want my lawyers to be here to know what I’m talking about first of all, you know what I’m saying,” and “I would like to have a lawyer, I would like to have that on record, I would like to have my lawyer here so.” He contends that Kentucky’s finding to the contrary was in improper application of clearly established federal law. Because Cornelison did not provide the tape to the court, for unexplained reasons, the Court could not evaluate it. It noted that the “essence of Cornelison’s claim is that the police continued to interrogate him in violation of federal law after he invoked his right to counsel.”

The Court agreed that:

Under Edwards v. Arizona, once a custodial suspect invokes his right to counsel, the police may not further interrogate him until counsel has been made available unless the suspect initiates further

communication.<sup>310</sup> Furthermore, in Davis v. U.S., the Supreme Court held that the immediate cessation of interrogation is triggered by a clear and unambiguous request for counsel.<sup>311</sup> If a suspect makes an ambiguous or equivocal assertion of his right to counsel, questioning may continue.<sup>312</sup> Thus, a suspect must assert his right to counsel “with sufficient clarity that a reasonable officer would perceive it as such under the circumstances.”<sup>313</sup> The inquiry is objective. Significantly, the suspect must “make some affirmative ‘statement’ or ‘request’ whose ordinary meaning shows his desire to deal with the police through counsel.”<sup>314</sup> For example, we have held that a statement such as “maybe I should talk to an attorney by the name of William Evans” triggers the Edwards prohibition on further custodial interrogation.<sup>315</sup> However, “an accused’s *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.”<sup>316</sup>

The Court found that the “sequence of events also undermines Cornelison’s contention that his conversation with the police, after he requested counsel, should not render his request ambiguous and equivocal.” The Court agreed that “that Cornelison failed to make a statement that a reasonable officer would have understood to be an unambiguous or unequivocal request for counsel.” As such “the decision of the Kentucky Supreme Court was neither contrary to nor involved an unreasonable application of clearly established federal law.” The District Court’s decision was affirmed.

### Tolliver v. Sheets, 594 F.3d 900 (6<sup>th</sup> Cir. 2010)

**ISSUE:** On December 29, 2001, at about 1 a.m., Schneider was shot in her apartment in Columbus (OH) apartment. She shared her home with her boyfriend, Tolliver. Tolliver called a number of people, including his ex-wife, who eventually made the call to 911. Police responded and found Tolliver covered in blood, although he had washed his hands. While sitting in one of the cruisers outside, Tolliver made several unprompted comments. He was taken to the station and gave an interview and “made a number of statements that the prosecution later used at trial to cast doubt on his credibility.” In addition, the deputy coroner found a number of bruises and abrasions on Schneider’s body. (Her manner of death was listed as undetermined.) Tolliver was ultimately convicted of murder and appealed.

**ISSUE:** Must law enforcement cease questioning after a suspect invokes the right to counsel?

**HOLDING:** Yes

**DISCUSSION:** Tolliver first argued that his statements to the police were inadmissible. The trial court had found them mostly admissible, with the one statement that was inadmissible harmless. The Court found that “while many of Tolliver’s statements were voluntary, the police eventually began interrogating Tolliver within the meaning of Miranda, and continued the interview and interrogation even after Tolliver invoked his right to counsel.”

In this case, the government concedes both that Tolliver was in custody and that the police did not successfully administer a Miranda warning. The questions for us, then, are whether: (1) the police interrogated Tolliver; (2) Tolliver ever invoked his right to remain silent; or (3) Tolliver ever invoked his

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<sup>310</sup> 451 U.S. 477 (1981).

<sup>311</sup> 512 U.S. 452 (1994).

<sup>312</sup> *Id.*; see also Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (“An ‘implicit waiver’ of the ‘right to remain silent’ is sufficient to admit a suspect’s statement into evidence.” (quoting North Carolina v. Butler, 441 U.S. 369 (1979))).

<sup>313</sup> Franklin v. Bradshaw, 545 F.3d 409 (6<sup>th</sup> Cir. 2008) (citations omitted); see also U.S. v. Hurst, 228 F.3d 751 (6<sup>th</sup> Cir. 2000) (applying Davis to the invocation of both the right to counsel and the right to remain silent).

<sup>314</sup> U.S. v. Suarez, 263 F.3d 468 (6<sup>th</sup> Cir. 2001) (citations omitted); see also Edwards, *supra*, (indicating that the request must show the suspect’s “desire to deal with the police only through counsel”).

<sup>315</sup> Abela v. Martin, 380 F.3d 915 (6<sup>th</sup> Cir. 2004).

<sup>316</sup> Smith v. Illinois, 469 U.S. 91 (1984).

right to counsel. While Tolliver interrupted police attempts to administer the Miranda warning, volunteered numerous statements, and was unclear as to whether he was invoking his right to remain silent, we find that at times the police crossed the line into “express questioning or its functional equivalent” and that, prior to the end of the interview, Tolliver unambiguously invoked his right to counsel. In other words, the statements police obtained from Tolliver following the initiation of interrogation and Tolliver’s invocation of the right to counsel were obtained in violation of Tolliver’s Fifth Amendment rights; the trial court thus erred in admitting those statements at trial.

The Court also agreed that suspects have a right to remain silent but that “even if a suspect has invoked his right to remain silent, any information he then *volunteers* is admissible, provided it did not result from further interrogation.” The Court stated Tolliver “cannot have it both ways: if he wanted to invoke his *right* to remain silent, he then needed to *remain* silent.”

Further.

Tolliver’s third statement, that he was not going to exercise his right to remain silent until he was informed that he had that right, simply cannot stand as an invocation of the right to remain silent. To the contrary, Tolliver was clearly stating that he had *not* invoked his right to remain silent, but that he *would*. Tolliver apparently believed that he could volunteer information to the police while retaining his right to remain silent, because he had prevented Viduya from administering the Miranda warning. Tolliver was, of course, incorrect. Moreover, we share the state trial court’s “definite impression” that Tolliver wanted “to assert his position and argue his perception of evidence to the detective, without being questioned.”

Finally:

The line between impermissible interrogation and permissible follow-up questions to volunteered statements is a fine one. Police may listen to volunteered statements, and need not interrupt a suspect who is volunteering information in order to deliver a Miranda warning. Police may even interrupt a volunteered statement to ask clarifying or follow-up questions.<sup>317</sup>

That said, when asking a suspect about volunteered information, police may at times cross the line from asking clarifying or follow-up questions into the “express questioning or its functional equivalent.”<sup>318</sup> The Supreme Court, while not explicitly clarifying the distinction between permissible follow-up questions and impermissible interrogation, has stated in a different context that, even at meetings with the police initiated by a suspect, “[i]f, as frequently would occur . . . the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be ‘interrogation.’”<sup>319</sup> Again, as the Supreme Court has made clear repeatedly, “[w]ithout obtaining a waiver of the suspect’s Miranda rights, the police may not ask questions . . . that are designed to elicit incriminatory admissions.”<sup>320</sup> The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police are seeking to expand the interview.

The Court agreed that the trial court was correct in considering Viduya’s statement a “follow-up question and thus [it] did not constitute interrogation.” The Court did find improper Viduya’s question about the wound. When they

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<sup>317</sup> See U.S. v. Rommy, 506 F.3d 108 (2d Cir. 2007) (collecting cases); Andersen v. Thieret, 903 F.2d 526 (7th Cir. 1990) (rejecting custodial interrogation challenge when, in response to suspect’s volunteered statement, “I stabbed her,” police asked, “Who?”).

<sup>318</sup> Innis, 446 U.S. at 300-01, barred by Miranda. See, e.g., U.S. v. Crowder, 62 F.3d 782 (6th Cir. 1995) (holding that police officer interrogated suspect when, after suspect stated that shotgun was “in the wood,” officer asked clarifying question about location).

<sup>319</sup> Edwards v. Arizona, 451 U.S. 477 (1981) (addressing whether police questioning of a suspect constitutes interrogation where the suspect first invoked his Fifth Amendment right to counsel but then arranged a meeting with investigators and volunteered information).

<sup>320</sup> Muniz, 496 U.S. at 602 n.14.

began discussing how Tolliver could obtain an attorney without money, the Court found that all statements from that point on were in violation of the Fifth Amendment. The Court concluded that “any reasonable police officer would have immediately understood that Tolliver was asking to see an attorney” and that his request was “an unambiguous invocation of his Fifth Amendment right to counsel.” However, the Court summarized: “[i]f all of the statements the prosecution used at trial to argue that Tolliver had lied when speaking to the police had been improperly admitted, this would be a closer case. In fact, however, many of the statements were properly admitted. The prosecution’s infrequent references to Tolliver’s improperly-admitted statements thus “were, in effect, cumulative.” The Court found the admission of the statements to be harmless and affirmed the denial of Tolliver’s petition.

## INTERROGATION - RIGHT TO SILENCE

### Simpson v. Jackson, 615 F.3d 421 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 27, 1997, a home in Columbus, Ohio, was firebombed. One child died in the fire and another was seriously injured. Simpson was charged as an accessory to the crime. While incarcerated for an unrelated crime, he was questioned. No Miranda warnings were given prior to the statements. Two other statements were made two months later, at police headquarters, and he was given Miranda and waived prior to the statements. All of the statements were recorded. During the first statements, Simpson implicated two other individuals. The investigators arranged for Simpson’s release on probation to encourage him to cooperate. He “failed to cooperate, leading the officers to believe that [he] had more to do with the fire than he was admitting.” He was arrested again when he failed to abide by the terms of his release and taken to the police station, where the second two statements were given. At that time, he admitted his involvement in setting the fire. All of the statements were admitted, over objection.

Simpson was convicted and appealed. He filed for habeas relief.

**ISSUE:** Does the subject asking questions after invoking a right to silence negate that invocation?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The Court looked at each statement, but considered the June statements first. On June 16<sup>th</sup>, Simpson was ostensibly arrested for violating his release - and the Court noted, “[t]his presented a situation in which Kallay and Ozbolt could exert significant pressure through the potential consequences of his release violations in order to get Simpson to cooperate in the arson investigation.” The officer began to read him his rights, although Simpson begged him not to do so. The officer finished the rights and gave him a copy, which Simpson indicated he understood. When the officer asked if he wanted to waive the rights, however, Simpson responded in negative ways, shaking his head and making statements like “nah” and “I messed up last time I did that.”

Following four to five seconds of silence, the officer said, “Well that’s up to you, whether you want to talk to us or not, we’re not going to twist your arm or anything like that.” Simpson *immediately* responded, “what y’all wanna talk about?” and the officer stated, “just basically what we’re talking about now.” We will refer to the colloquy up to this point as the “first Miranda interaction.” Everything that follows will be referred to as the “second Miranda interaction.”

Simpson then questioned the officer in detail about his current situation. “Critically, the officer did not ask Simpson any substantive questions, instead only responding to Simpson’s questions and explaining that he was arrested for violating the terms of his release.” When another officer returned, he asked if Simpson wanted to talk and again proceeded to give Miranda warnings. Simpson told him that the other officer had already done so. He was again given a waiver of rights form.

At this point in the interview, it is apparent that Simpson was still struggling with the fact that, while he has been arrested for violations of his release conditions, the interview is more about the arson. He indicated the waiver of rights form and said, "this thing right here, I mean, talking about 'may be used against me.' For what?" The second officer responded, "Well what would happen if you came out and said that, you know, 'I killed one of the people with [inaudible].'" Then, you know, if you tell us that, and we didn't advise you of your right, we'd lose that statement in court." Simpson then executed the waiver of rights form.

Simpson argued that he had invoked his right to silence during the first interaction, but the warden argued that at that point, "Simpson's inclinations remained unclear." The Court agreed that if it had ended at that point, "the warden would likely be incorrect that Simpson's desire to remain silent was in doubt." However, the "analysis does not end there." The Court found that "viewed in its entirety, we conclude that the officer honored Simpson's initial inclination to remain silent because the officer did not ask any material questions and, instead, only responded to Simpson's inquiries. Once the other officer returned, they returned to the issue of Miranda and Simpson executed the waiver of rights form."

The Court concluded that the officers' actions were appropriate - since they did not ask him any substantive questions about his apparent invocation until they were able to clarify (by his consent) that he did not wish to invoke the rights.<sup>321</sup> "Though Simpson's is not a case of unsolicited statements, the Edwards line of cases is relevant for what it assumes—that it is permissible for the officers still to be in the same room with the interviewee for at least some period of time after he invokes his right to remain silent. The officers need not immediately leave the room; they simply may not continue questioning or badgering the suspect." Simpson also argued that the officers "used a combination of threats and promises, which had the cumulative effect of overbearing his will." The Court considered the voluntary nature of a confession.<sup>322</sup> and noted that "it is clear that a defendant faces an uphill climb when, as here, he argues that a confession was involuntary even though he properly received and waived his Miranda rights." The Court found that more recent cases (than Lynumn) teach that it is "much more difficult to argue the involuntariness of a confession" when Miranda warning have been given and waived.

With respect to the June 20<sup>th</sup> statement, he again argued that although he waived his rights, he was discouraged from seeking an attorney. The Court found the facts "not materially distinguishable from the facts in Kyger v. Carlton."<sup>323</sup> The Court also looked to Williams v. Withrow, in which an officer made a deal that if the suspect told them everything and it was confirmed on a polygraph, they would let him "walk."<sup>324</sup> In Simpson's case, however, he was never told he would not be charged in the arson, only that they would let him bond out on the violation of the earlier agreement. The Court agreed that everything the officers told him was "the truth about his predicament" and they were "merely informing Simpson of the options before him." The Court agreed that it did not render a confession involuntary if a suspect is told the truth "or that officers may inform an interviewee of reality only when that reality is bright and cheery."<sup>325</sup> The Court agreed the June 20<sup>th</sup> statements were not inadmissible under the circumstances. However, Simpson also argued there was a right to counsel issue, since he was essentially given to understand that if he wanted an attorney, he would not be able to take the polygraph on the scheduled day and would be immediately charged with murder. This statement was materially identically to the statements made in Kyger. His request was equivocal and the officer properly asked for clarification. The warden's preferred attempt to distinguish the case from Kyger "would be to accept a rule that police *may not* discourage interviewees from persisting with their request for counsel *after* they have already requested counsel, but *may* preemptively discourage them from seeking the advice of counsel after informing them of the right to counsel but before they actually request counsel." The officer's statement that he only needed an attorney if he was planning to lie "crossed

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<sup>321</sup> Davis v. U.S., *supra*.

<sup>322</sup> Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Lynumn v. Illinois, 372 U.S. 528 (1963); see also Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994).

<sup>323</sup> 146 F.3d 374 (6th Cir. 1998).

<sup>324</sup> 944 F.2d. 284 (6th Cir. 1991).

<sup>325</sup> McCalvin v. Yukins, 444 F.3d 713 (6th Cir. 2006).

the line from stating the truth to distorting the truth and, arguably, to giving legal advice.” The Court agreed that under this argument, the June 20<sup>th</sup> statement was inadmissible.

With respect to the April statements, the Court noted that the trial courts had held that he was not in Miranda custody at the time, although he was in prison. The Court agreed that although there was a string of state cases to the effect that “simply being incarcerated does not, by itself, constitute custody for Miranda purposes,” that was “contrary to factually indistinguishable Supreme Court case law.”<sup>326</sup> The Court agreed that “restricting Miranda protections to those that are in custody for the case under investigation would go ‘against the whole purpose of the Miranda decision’ and that there was ‘nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.’” Since the “statements were, by far, the most damning evidence against him,” as there “was no physical evidence or eyewitness linking him to the arson,” they were certainly material evidence.

Although his responses in the April statements were not inculpatory, they were incriminating in that they were responses that the prosecution sought to use at trial.<sup>327</sup> As a result, the Court found that his convictions for aggravated murder, murder and attempted murder must be voided but he could still be convicted of aggravated arson and assault based upon the one statement held to be admissible.

## 42 U.S.C. §1983 – EXIGENT ENTRY

### Johnson v. City of Memphis, 617 F.3d 864 (6<sup>th</sup> Cir. 2010)

**FACTS:** On April 22, 2004, Officers Adams and Rice (Memphis PD) were dispatched to a 911 hang[up] call. Rice arrived and found the “front door wide open.” He announced his presence and “entered with his weapon drawn.” Adams pulled up and followed Rice, also with his weapon drawn. “At some point after the officers entered, a second call came in to dispatch with sufficient information to classify the call as a ‘mental consumer.’” The officers agreed that “they should sweep the building to make sure that no one was hurt or in need of assistance.” As they went around a corner, Johnson appeared and Rice (who is now deceased) asked him why he “did not respond to the officers’ calls.” “Johnson did not answer, but instead jumped on Rice and a fight ensued.” Johnson grabbed Rice’s gun hand and Rice yelled that fact to Adams. “Adams shouted repeatedly at Johnson to get down, then fired twice at Johnson.” After Adams fired, Johnson threw Rice into a wall and charged at Adams. Adams retreated, yelled at Johnson to get down, and continued to fire, but “Johnson reached him and hit him with enough force to throw Adams against a wall and knock him out briefly.” “When Adams came to his senses, Johnson was dead at his feet.”

They later learned that “Johnson was not ordinarily dangerous, but was bipolar and off his medication.” The 911 caller was Monica Johnson, the decedent’s widow, who had left the house as soon as she called. She called back from another location and was apparently the individual who provided the medical information concerning Johnson, but this information was either not received, or not relayed, in a timely manner to the officers at the scene. Monica Johnson filed suit against the officers and the City of Memphis. The District Court dismissed all claims. She later tried to reinstate the claim against the dispatcher for negligence in not relaying the information quickly enough to prevent the shooting. Johnson appealed.

**ISSUE:** Is a 911 hang-up call sufficient exigent circumstances to justify an exigent entry?

**HOLDING:** Yes

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<sup>326</sup> Mathis v. U.S., 391 U.S. 1 (1968).

<sup>327</sup> Kyger, supra.

**DISCUSSION:** The Court began, noting that “exigent circumstances arise when an emergency situation demands immediate police action that excuses the need for a warrant.” In Welsh v. Wisconsin, the Court had recognized “four situations that may rise to the level of exigency: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect’s escape, and (4) a risk of danger to the police or others.”<sup>328</sup> More recently, the Supreme Court recognized another “exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.”<sup>329</sup> That was reiterated in Michigan v. Fisher, in which the court held that officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>330</sup>

The court agreed that officers do not need “ironclad proof” nor do they “need to wait for a potentially dangerous situation to escalate into public violence in order to intervene.” The Court noted that a “911 hang call with an unanswered return call from the dispatcher has been found to be sufficient to justify an officer’s objectively reasonable belief that someone inside the residence is in immediate need of assistance.” Combined with the open door, the Court found that the trial court was “correct in finding that the police were justified in entering the home to sweep for a person in need of immediate assistance under the emergency aid exception.” In fact, the “whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it,” and misusing the system is a crime in most jurisdictions. The Court agreed that “911 hang-up calls *do* convey information” – “that someone physically dialed 9-1-1, the dedicated emergency number, and either hung up or was disconnected before he or she could speak to the operator.” When a return call goes unanswered, it points “to a probability, perhaps a high probability, that after the initial call was placed the caller or the phone has somehow been incapacitated.” This leads to a reasonable belief that someone needs assistance.

The court found it “objectively reasonable for the police in this situation given the information they had, to enter the house.” The Court rested this decision on the specific facts and declined to make a per se rule for all 911 hang calls, however. The court upheld the dismissal of the dispatch negligence claim due to the city’s immunity under Tennessee law. The summary judgment in favor of the officers and the city was affirmed.

## 42 U.S.C. §1983 – BRADY

### Elkins v. Summit County, Ohio, 615 F.3d 671 (6<sup>th</sup> Cir. 2010)

**FACTS:** Elkins was convicted of the 1998 rape and murder of Johnson and the rape and assault of her 6-year-old daughter, Brooke in Barterton, Ohio. Because Brooke stated the “rapist looked like her uncle, Elkins, the Barberton police arrested Elkins.” While the investigation was ongoing, Mann was arrested for robbery. He was drunk and asked Officer Antenucci, “Why don’t you charge me with the Judy Johnson murder?” In compliance with training and policy, the officer wrote and sent a memo to the department investigating the murder. Procedure dictated that such memo would be reviewed and disseminated to the appropriate detectives. “However, the Mann memorandum was not disclosed to Elkins or the prosecution and was never produced.”

At trial, Brooke identified Elkins but he produced substantial evidence that he was elsewhere at the time. Most significantly, hairs found on both victims did not match Elkins. He was, however, convicted. In 2002, Brooke recanted her testimony. “The same year, through a series of breathtaking improbable coincidences, Elkins began to suspect that Mann was Johnson’s murderer” and was able to obtain a DNA sample from him. (The two were incarcerated in the same facility at the time.) Testing proved that Mann was the perpetrator and he eventually pled guilty. Elkins was released and he was found to have been wrongfully imprisoned and won a settlement in his claim to that effect.

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<sup>328</sup> 466 U.S. 740 (1984); U.S. v. Radka, 904 F.2d 357 (6<sup>th</sup> Cir. 1990); U.S. v. Johnson, 22 F.3d 674 (6<sup>th</sup> Cir. 1994).

<sup>329</sup> Brigham City v. Stuart, 547 U.S. 398 (2006).

<sup>330</sup> 130 S.Ct. 546 (2009).

In 2006, he sued a number of officers and the City of Barberton. Some of the claims were dismissed, but the Court denied a motion for summary judgment with respect to the §1983 due process claim. The trial court noted that at the stage of the proceeding, "it must infer that the detectives both received and failed to disclose the memorandum, and that the failure to disclose the memorandum violated Elkins' right to due process." The Court also found sufficient evidence to support a claim of malicious prosecution under Ohio law. Cross-appeals followed.

**ISSUE:** May the failure to disclose exculpatory evidence trigger federal civil liability?

**HOLDING:** Yes

**DISCUSSION:** Elkins claimed that the failure of the officers to disclose the memorandum deprived him of a fair trial. The officers either denied "having seen the memorandum or did not testify at trial," but "did not contest that Antenucci created and dispatched the memorandum to the Detective Bureau in accordance with department policies." No other relevant document in the case seemed to be missing and the actual incident report on Mann's involvement with the robberies was received and preserved. The Court assumed the officers received the memorandum and agreed that the prosecution (and by extension the police) is required to disclose exculpatory evidence.<sup>331</sup> That right was already clearly established in 1999. The Court further agreed that the "exculpatory value of the Mann memorandum would have been apparent to the detectives given the state of the case at that time." Specifically, the Court noted that the case against Elkins was flimsy and detailed suspicious actions taken by Mann and his wife. (The couple lived next to Johnson at the time.)

The Court affirmed the District Court's denial of summary judgment.

## 42 U.S.C. §1983 –ARREST

### Fettes v. Hendershot, 375 Fed.Appx. 528 (6<sup>th</sup> Cir. 2010)

**FACTS:** In 2004, an Ohio investigator opened an investigation of a local pizza restaurant for its failure to pay workers' compensation premiums. The owners of the store were listed as "Robert D. Fettes, Jr." and Nancy L. Fettes but the contact information just showed Robert Fettes. The address was Fettes's home. Bunting, the investigator, went to the home to issue the appropriate warning letter. Fettes, Jr. answered the door, stated that his father (Fettes, Sr.) was the owner and accepted the letter. When the premiums were not paid, Bunting took out a warrant, some seven months later, indicating that Robert Fettes was the defendant. He later stated that he didn't know there were actually two men with the same name. On May 6, 2005, Officer Hendershot (Caldwell OH PD) stopped Fettes, Sr. for running a stop sign. Hendershot ran the license and provided the dispatcher two social security numbers. (Michael Fettes was also in the vehicle and warrants came back for both, both originating with the Cambridge PD. Starr, the dispatcher, checked with Cambridge and confirmed both warrants. Hendershot arrested both men. Fettes, Sr. stated he told Hendershot there must be an error. Hendershot himself called Cambridge dispatch, Schick (also a defendant in the case), and provided him with Fettes, Sr.'s SSN. Schick later testified he had little memory of the call, but stated that he thought he verified it and that he wrote an SSN on the back of one of the warrants.

Hendershot turned them over to Cambridge officers. Officer Milburn took charge of Fettes, Sr., and substituted his cuffs for Hendershot's. Sr. immediately complained the cuffs were too tight, but he was driven to the jail, some ten minutes away. When presented with the actual warrant, which had his son, Jr.'s SSN written on it, he told the jailer of the error. Upon request he told the jailer about the tight cuffs and after searching him, she removed them. Jail Officer Fitch compared the SSNs available and realized the mistake. Fettes was released without about two hours of the initial arrest. He went to the hospital ER and claims to suffer from "handcuff neuropathy," permanent damage

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<sup>331</sup> Brady, supra.

to the wrist nerves. Fettes filed suit under 42 U.S.C. §1983, against all involved. The District Court dismissed some of the counts but allowed others to proceed. Everyone appealed.

**ISSUE:** Is an arrest warrant presumed valid until proven otherwise?

**HOLDING:** Yes

**DISCUSSION:** First, the Court discussed the application of qualified immunity to the various defendants. With respect to the actual arrest, the Court noted that the validity of an arrest warrant depends upon the existence of probable cause.<sup>332</sup> "Arrest warrants in the hands of a police officer, unless facially invalid, are presumed valid." If the officer "reasonably mistake[s] a second person as being the individual named in the warrant and arrest[s] him, the arrest of the second person does not offend the Constitution."<sup>333</sup>

Further:

In Masters v. Crouch, this court held that "police and correction employees may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistake identity or otherwise."<sup>334</sup>

The Court agreed that although it might be arguable "that Schick was negligent in failing to verify Fettes's address, as that information was readily verifiable, ... negligence does not equate to a constitutional violation." With respect to the handcuffing, the Court noted that "unduly tight on excessively forceful handcuffing" is prohibited but that "not all allegations of tight handcuffing" rise to the level of excessive force.<sup>335</sup> The Court agreed that its "precedents fail to notify officers that any response to a complaint of tight handcuffing other than an immediate one constitutes excessive force." Given the short duration of the trip, the officer's "adherence to police handcuff protocol, and absence of any egregious, abusive, or malicious conduct supports the reasonableness of the officers' conduct. The officers' actions were found to be in the 'hazy border between excessive and acceptable force" and thus the officers should have been granted qualified immunity.

The Court reversed the decision against the two Cambridge officers and Schick.

### **Miller v. Sanilac County, 606 F.3d 240 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On February 19, 2006, Miller and friends attended a demolition derby. The temperature that night was at zero, there was significant wind-chill and there was ice on the roads. Miller dropped off his friends and then went to assist a friend who had driven off the road. Around midnight, he approached a stop sign but was unable to stop because of ice. Deputy Wagester, in the area on an unrelated call, saw Miller run the stop sign and made a traffic stop. He asked for Miller's required documents; Miller produced the document he was using as a license (which was permitted under state law) and was searching for the other documents when the deputy walked away. Because he believed he detected a slight odor of alcohol on Miller's breath, the deputy had him go through field sobriety tests - and later stated he failed all but one. Miller refused a PBT.

Miller was arrested for reckless driving. He gave consent for a blood alcohol. At the hospital, the "individual who drew Miller's blood observed that Miller was shaking and was cold to the touch, which Miller claims to be the result of being subjected to the cold during the arrest." He was given a number of tickets, including one for having a .02% blood alcohol.<sup>336</sup> However, the actual blood tests, which were returned a week later, indicated his blood alcohol was at zero. All charges were dismissed at that point. (A later test for controlled substances also came

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<sup>332</sup> Baker v. McCollan, 443 U.S. 137 (1979).

<sup>333</sup> Hill v. California, 401 U.S. 797 (1971).

<sup>334</sup> 872 F.2d 1248 (6<sup>th</sup> Cir. 1989).

<sup>335</sup> Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394 (6<sup>th</sup> Cir. 2009)

<sup>336</sup> This was apparently a state law issue relating to a prior DUI conviction.

back negative.) Miller filed suit against Deputy Wagester and Sanilac County, under 42 U.S.C. §1983, arguing excessive force, search and seizure and malicious prosecution. The trial court granted summary judgment in favor of the defendants and Miller appealed.

**ISSUE:** May pursuing unproven charges be consider malicious prosecution?

**HOLDING:** Yes

**DISCUSSION:** With respect to the DUI (OWI under state law) claim, “the fact that Miller’s blood alcohol was found to be 0.00% casts doubt on Deputy Wagester’s claims that Miller smelled of alcohol and failed the field sobriety tests.” The Court noted that it was “unclear how Miller could more specifically challenge Wagester’s perceptions of Miller’s odor, appearance, and performance on field sobriety tests, especially because he would have no way of knowing how the test is evaluated and claims he was not told whether he had failed and why.” The Court agreed that a jury could conclude that Wagester was being untruthful and that he didn’t have probable cause for the arrest. Further, because Deputy Wagester knew of the icy road conditions, “which could certainly have caused Miller to inadvertently drive through the stop sign,” the Court found there was an issue of fact as to whether Wagester had probable cause to cite for this offense. The Court found absolutely no facts to support another charge, a minor in possession of alcohol.

With respect to the malicious prosecution allegation, the Court noted since it found there was a genuine issue as to whether probable cause existed for the 3 criminal charges (the other offenses being non-arrestable), the court agreed that there was at least some evidence that the officer was behaving maliciously in pursuing the criminal charges. The Court also agreed that same evidence supported allowing the false arrest claim to go forward. With respect to the force claim, “Miller specifically complains about his exposure to cold weather during the stop, Deputy Wagester’s conduct in effecting the arrest, and the tightness of the handcuffs.” The Court agreed that “[u]nnecessary detention in extreme temperatures . . . violates the Fourth Amendment’s prohibitions on unreasonable searches and seizures.”<sup>337</sup> However, the Court found no facts to support that he’d been kept outside in the cold any longer than reasonable necessarily to achieve the aim of the stop. With respect to the handcuffing allegation, the court noted that the claim must indicate that “(1) he or she complained that the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced “some physical injury” resulting from the handcuffing.”<sup>338</sup> However, there was no indication that he complained of the cuffs until they arrived at the hospital nor do the medical records support that he suffered any lasting injury to his hands. With respect to Miller’s assertion that he was slammed against the vehicle during the arrest, although he claimed he was not injured by the action, the Court ruled that it believed” that a jury could reasonably find that slamming an arrestee into a vehicle constitutes excessive force when the offense is non-violent, the arrestee posed no immediate safety threat, and the arrestee had not attempted to escape and was not actively resisting.” The Court found this set of facts not to be one of the “hazy cases” and that “a jury could reasonably find that the officer’s alleged conduct violated Miller’s rights.”

The Court reversed the grant of summary judgment for the allegations discussed.

### **Wysong v. City of Heath, 2010 WL 1923657 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On July 13, 2010, Officer Ramage (Heath, OH, PD) was at a grocery store on an unrelated matter “when he was approached by two women who complained that a man in a white truck had been kicking the window of his truck and making lewd gestures and obscene comments to them.” Officer Ramage observed the man (Wysong) going back toward the grocery. The officer called for backup and approached Wysong, “who appeared to be staggering, and asked to speak to him.” He asked if the truck belonged to Wysong, “and Wysong answered,

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<sup>337</sup> Burchett v. Kiefer, 310 F.3d 937 (6<sup>th</sup> Cir. 2002).

<sup>338</sup> Morrison v. Bd. of Tr. of Green Twp., 583 F.3d 394 (6<sup>th</sup> Cir. 2009); Lyons v. City of Xenia, 417 F.3d 565 (6<sup>th</sup> Cir. 2005)).

‘What truck?’” After a few more comments, Wysong fled toward the road. Ramage yelled at him to stop and told him he was under arrest, while chasing after him. Ramage caught up with Wysong and “forced him to the ground by striking him in the shoulder.” With Officer Coulter’s assistance, Ramage tried to handcuff Wysong, but he continued to struggle and kick at the officers. With the assistance of two more officers, they were finally able to subdue him, although he continued to struggle as he was being taken to the car.

Wysong later claimed he had no memory of what had occurred until he was inside the police car. There, he began to calm and told the officers that he was diabetic. They called for EMS to meet them at the police station, a short distance away. He was cooperative until they reached the station, where he again became combative. He was treated with oral glucose at the station but the paramedic recommended he go to the hospital. Ramage accompanied him to the hospital and eventually released him there on a personal recognizance bond. Ramage completed an incident report stating that Wysong had been charged with disorderly conduct, obstructing official business and resisting arrest. It also indicated that the paramedic told him that Wysong’s blood sugar was low. (His blood sugar was apparently 48 when first checked, which is critically low, but the paramedic was confused about his apparent period of lucidity prior to having been treated with the glucose.) Coulter completed a consistent report. He also picked up Ramage at the hospital and heard Ramage tell Wysong that the decision on the charges being dismissed would be up to the prosecutor. Although there was confusion as to the prosecutor’s action, the prosecutor did authorize charges of disorderly conduct. Ultimately, apparently after receiving further information about Wysong’s medical condition, he dismissed that charge as well.

Heath filed suit for unlawful arrest and excessive force under 42 U.S.C. §1983, along with related state court actions. The District Court granted summary judgment for the defendants for the false arrest and malicious prosecution claims, and Wysong appealed. (The excessive force case was resolved in 2008 in favor of the defendants.)

**ISSUE:** Is an arrest false when the subject’s actions are due to a medical condition?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that the officers were entitled to summary judgment on the false arrest claim because “there existed a probability of criminal activity when Ramage arrested Wysong....” That they learned later of his low blood sugar “does not negate the earlier finding of probable cause.”<sup>339</sup> With respect to the malicious prosecution claim, the Court noted that it was the prosecutor’s decision to continue the case and there was “no evidence in the record that the officers misled [the prosecutor] in any way.” The police are not liable for the prosecutor’s decision so long as the officers were truthful.<sup>340</sup> The Court found that the evidence did not support Wysong’s assertions that the officers’ information was misleading, noting, for example, that the ER report was not complete until two days after Ramage placed the charges. The Court also noted that Wysong claimed to have no memory of what occurred, therefore he could not speak to any threats the officers allegedly made.

The Court ruled in favor of the officers in both the state and federal claims.

**McCumons v. Marougi, 385 Fed.Appx. 504, 2010 WL 2777270 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On August 10, 2007, Officer Marougi (Pontiac, MI, PD) went in plainclothes to a park to investigate “open sexual activity.” McCumons saw him drive past; the two nodded at each other. The officer then parked nearby. McCumons drove around the park and parked, and again, the officer drove past and they made eye contact. Officer Marougi continued past and parked near the front of the park. McCumons drove in that direction

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<sup>339</sup> Peet v. City of Detroit, 502 F.3d 557 (6<sup>th</sup> Cir. 2007); Reynolds v. Jamison, 488 F.3d 756 (7<sup>th</sup> Cir. 2007).

<sup>340</sup> Thacker v. City of Columbus, 328 F.3d 244 (6<sup>th</sup> Cir. 2004); Kinkus v. Village of Yorkville, Ohio, 289 Fed. App’x 86 (6<sup>th</sup> Cir. 2008); Skousen v. Brighton High School, 305 F.3d 420 (6<sup>th</sup> Cir. 2002).

and spotted the officer's car, so he stopped to say hello. They "exchanged pleasantries" and allegedly the officer "asked McCumons what would make it a 'better day.'" They continued "flirting" and started discussing what they liked and were "looking for." Allegedly the officer said he did "oral." After several more minutes the officer moved his car into some tall grass and McCumons pulled up nearby. He "rolled down the passenger window and told Marougi that he had seen a police officer nearby (little did he know) and was going to leave, which he did."

Officer Marougi followed McCumons to a nearby flea market. He "arrested McCumons, impounded his car and released him from custody after fifteen minutes." Ultimately McCumons was charged with soliciting. He paid \$785 to redeem his car (with was seized under the Michigan statute). Eventually the criminal charges were dropped. McCumons filed suit against Officer Marougi under 42 U.S.C. §1983. Marougi invoked qualified immunity, which was denied. Marougi appealed.

**ISSUE:** Does failure to demonstrate probable cause for an arrest trigger federal civil liability against the arresting officer?

**HOLDING:** Yes

**DISCUSSION:** The Court began:

When a government official invokes qualified immunity to a 1983 action, the claimant must make two showings to overcome the defense: He must show that the officer's conduct violated a constitutional right, and he must show that the constitutional right in question was "clearly established."<sup>341</sup> McCumons plainly satisfies the first requirement: Officer Marougi concedes that, in retrospect, he did not have probable cause to arrest McCumons. At first blush, it might appear that McCumons just as plainly satisfies the second requirement: No one doubts that "it is clearly established that arrest without probable cause violates the Fourth Amendment."<sup>342</sup> But it is not that simple. The second question turns not just on whether the legal right is "clearly established" in the abstract but on whether the officer's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken," was "objective[ly] ... reasonable."<sup>343</sup> "[R]easonable mistakes," the Supreme Court reminds us, "can be made as to legal constraints" on police officers and when that is the case, "the officer is entitled to the immunity defense."<sup>344</sup> The key question, then, is: did Officer Marougi make a "reasonable mistake" in concluding that he had probable cause to arrest McCumons?"

The Court concluded that he did not have probable cause under the facts put forth by McCumons. The Court looked at the statute and McCumons' statement, and noted that, according to the statement, "it was Officer Marougi who 'invited' McCumons to engage in sexual behavior, not the other way around." The Court stated that "it was Officer Marougi who did the soliciting," noting that "[p]erhaps McCumons was amenable to the invitation, but even then he ultimately rejected it." "A reasonable officer could not think that McCumons made an invitation when he was the one invited and he was the one who declined."

The officer argued that the Court "should consider not just the words exchanged but the non-verbal setting in which they were uttered." He continued, arguing "gestures, facial expressions, tone of voice and other contextual clues ... might cast a different light on the conversation." The Court agreed that the statute does include those "other means." However, "Marougi has only himself to blame for [the Court's] inability to take him up on this invitation," because the record "does not contain any such facts, and we may not assume their existence to the detriment of the moving party." Had he filed an affidavit to these details, "that might be a different matter." However, the Court

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<sup>341</sup> Silberstein v. City of Dayton 440 F.3d 306 (6<sup>th</sup> Cir. 2006).

<sup>342</sup> Leonard v. Robinson, 477 F.3d 347 (6<sup>th</sup> Cir. 2007).

<sup>343</sup> Anderson v. Creighton, 483 U.S. 635 (1987).

<sup>344</sup> Saucier v. Katz, 533 U.S. 194 (2001).

“cannot credit factual allegations never made and ... cannot draw inferences in favor of the officer and *against* the moving party.”

The Court concluded that this was not a close call, since if McCumons' account is true, no reasonable officer could have believed he'd been invited to have sex - “when the officer made the sexual advances and when McCumons was merely receptive to them.” The Court noted that, “consistent with its duty at this phase of the litigation, the court gave McCumons the benefit of all inferences in determining whether, as a matter of law, Officer Marougi merely made a ‘reasonable mistake’ in arresting him.” The Court noted that the jury would be free to resolve the conflicting accounts. The court upheld the rejection of the qualified immunity claim at this stage of the proceedings.

## 42 U.S.C. §1983 - PROPERTY SEIZURE

### Kennedy v. City of Cincinnati, 595 F.3d 327 (6<sup>th</sup> Cir. 2010)

**FACTS:** Kennedy possessed a pool token, allowing him to swim in Cincinnati public pools. The token cost \$10. Kennedy was accused of staring at children at the pool during a field day and left the area when questioned. Pool staff began to keep a log of Kennedy's actions, which included standing around and watching children. Lifeguards and other staff noted his interactions with children and multiple parents complained of his actions. On June 21, the pool manager contacted the police and asked that Kennedy be investigated. Officers Smith and Zucker arrived; they were told that Kennedy was violating the pool rules and had been banned by the elementary school for activities that had taken place there. Officer Zucker talked to Kennedy at length and it was determined he was not a sex offender nor did he have warrants. They concluded that they could take no action against Kennedy. Hudepohl, the manager, told the officers that Kennedy would be banned and asked them to retrieve his pool token. Kennedy surrendered it and left without incident.

In February, 2008, Kennedy filed a complaint, arguing that Officer Zucker (who actually took the pass), Hudepohl and Cincinnati violated his rights by confiscating the token and restricting his access to the pool without due process. He also argued that Hudepohl had defamed him by “falsely implying that he had engaged in serious sexual misconduct.” The defendants requested summary judgment. The District Court dismissed the City, but permitted the action against Zucker and Hudepohl to go forward. Zucker and Hudepohl appealed.

**ISSUE:** Is “following orders” a valid defense for an officer?

**HOLDING:** No

**DISCUSSION:** The Court first concluded that Kennedy did not have a property interest in his pool pass. However, the Court agreed that under Kennedy's version of the facts, he was banned from the entirety of Cincinnati's recreational system, far more than just the single pool. As Hudepohl's case was ruled upon for separate procedural reasons, the Court limited its discussion to Zucker.

Zucker avers that he should be immune from suit because he was following the orders of Hudepohl, an agent of the municipal pool. However, “since World War II, the ‘just following orders’ defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order.”<sup>345</sup> Regardless of the authority Hudepohl possessed, Zucker was not “relieve[d] . . . of his responsibility to decide for himself whether to violate clearly established constitutional rights[.]” “[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a

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<sup>345</sup> O'Rourke v. Hayes, 378 F.3d 1201 (11th Cir. 2004) (internal quotations marks and citation No. 09-3089 Kennedy v. City of Cincinnati, et al. omitted).

superior or in a policy.”<sup>346</sup> Thus, viewing the facts alleged in the light most favorable to Kennedy, we conclude that Zucker violated Kennedy’s constitutional rights by banning him from all City recreational property without due process of law.

The Court further ruled that Kennedy had a clearly established right to remain on public property, based upon Williams v. Fears.<sup>347</sup> As such, the Court ruled that Kennedy possessed a constitutionally protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without procedural due process, constituted a violation of a clearly established constitutional right.”

Zucker’s appeal was denied.

## 42 U.S.C. §1983 – USE OF FORCE

### Miller v. Village of Pinckney, 365 Fed.Appx. 652 (6<sup>th</sup> Cir. 2010)

**FACTS:** On November 8, 2006, after a night of drinking, Darlene Miller decided to visit her ex-husband, hoping to see her children. When her ex-husband discovered she was there, she was ordered to leave. When Miller threatened to kill herself, he called 911 - she then left. Officer Garbacik (Pinckney PD) was dispatched, with Officer Shepard as back up. They were given a description of Miller’s vehicle.

Shepard arrived first and spotted the described van. He attempted to stop it but Miller sped up. Garbacik elected to follow it; Shepard stayed where he was in case that wasn’t the correct vehicle. Garbacik stopped the van. Miller, realizing from the plate that it belonged to Miller, set off in search of Garbacik. Radio difficulties complicated matters and Shepard became more concerned since his partner had called for assistance by hitting her emergency button. He was able to figure out where she was and proceeded to assist. Garbacik, in the meantime, was trying to control Miller, who threw two bottles of Mike’s Hard Limeade out the window toward Garbacik. When Shepard arrived, he saw the two standing close to each other, but he did not realize that Garbacik had already managed to get handcuffs on Miller. A video of the scene showed Shepard dashing toward the pair, raising his arm and striking Miller in the face and throat with his forearm. “He forcefully moved Miller to the van and pushed her body up against it.” Miller claimed that on the way to the van, Shepard “knead her to the ground,” but the video contradicted this account. She was placed in Garbacik’s cruiser. Eventually Miller pleaded no contest to two counts of resisting and obstructing an officer. She sued Shepard and the Village of Pinckney, alleged excessive force. The District Court gave summary judgment and dismissed the case against Shepard and the village. Miller appealed.

**ISSUE:** Is a use of force unjustified when only determined to be so after the fact?

**HOLDING:** No

**DISCUSSION:** The 6<sup>th</sup> Circuit looked to the trial court’s opinion, agreeing that while objectively, the force Shepard used was greater than was necessary, that he had only “a few seconds at best” to decide upon a course of action, and “in light of the circumstances, his use of force was not unreasonable.” It added only two points. First, it noted that her conviction did not bar her claim, since it would not have invalidated her underlying conviction.<sup>348</sup> At least theoretically, she could both admit to resisting arrest and still successfully claim that Shepard had used excessive force against her. Second, her best possible claim, Shepard’s initial strike, does not state a constitutional claim, given what Shepard knew and saw at the moment he took that action. This was affirmed by the lack of any

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<sup>346</sup> N.N. ex rel. S.S. v. Madison Metro. Sch. Dist., — F. Supp. 2d —, 2009 WL 4067779 (W.D. Wis. Nov. 24, 2009). See, e.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (officer that was following police chief’s order was not immune from suit).

<sup>347</sup> 179 U.S. 270 (1900).

<sup>348</sup> Heck v. Humphrey, 512 U.S. 477 (1994)

“objectively serious injuries from the impact.” The Court agreed that Shepard could have taken other actions, but noted that an “officer’s use of force does not become constitutionally unreasonable just because, after the dust has settled, we can imagine a more reasonable way for responding to an officer in need.”<sup>349</sup>

The summary judgment and dismissal were affirmed.

### **Schreiber v. Moe and City of Grand Rapids, 596 F.3d 323 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On November 1, 2002, Officer Moe (Grand Rapids, MI, PD) was patrolling. At 3:45 a.m., he was dispatched to Schreiber’s apartment on a priority level that indicated there was some risk of harm to someone at that location. Specifically, there was a belief by the caller that Schreiber’s teenage daughter, Sarah, was “getting beat.”<sup>350</sup> When Officer Moe arrived, he “could hear an angry male voice yelling profanities.” Schreiber later agreed he was in a “heated discussion” with his daughter. Moe knocked and a 10-year-old boy answered. Officer Moe could see Schreiber “yelling at someone within the house” – although there was dispute as to whether Sarah was visible. Schreiber came to the door and profanely asked why Moe was there. Although there was dispute as to the actual conversation, Schreiber agreed he asked for a warrant and “explicitly told Moe that Sarah was fine.” Moe however, entered, and later claimed that Schreiber’s wife, Emily, “invited him to come in further.” Moe saw Sarah, who was crying and upset, but apparently uninjured. The house, however, was in “chaos.” Schreiber and Sarah continued yelling and Schreiber began “shouting various insults at Moe” – using such terms as “neo-Nazi” and pig. He also did not deny stating he would have the “Michigan Militia” kill Moe. Moe called for backup.

At some point, Emily gave Moe a telephone and explained a local social worker was on the phone – who proposed that Sarah come to the youth shelter to get away from her father temporarily. Officer Veldman arrived and Moe began to check the computer for anything on Schreiber. Schreiber became even more agitated and asked to go to his room. Moe however, refused, fearing he might be going to get a gun. He was also denied when he asked to go to the bathroom. (He later alleged that he has a bowel condition that caused an urgent need to go to the bathroom, but there was little indication that Officer Moe was aware of this.) Schreiber eventually ran to a balcony and tried to find a way down – some ten feet. The balcony door became locked, although there was dispute as to how it became so. Schreiber used a chair to break the door and re-enter the apartment. At that point, Schreiber, who claimed to be calm and in control, alleged Officer Moe threw him to the ground, punched him multiple times and squeezed his groin. (He agreed he was calling Moe names throughout the incident, as well.) Moe claimed that Schreiber attacked him and that he defended himself. Officer Veldman was busy trying to keep other family members out of the fray.

Schreiber was arrested and removed to Moe’s patrol car. He was eventually taken to the hospital and found to have head lacerations and a swollen eye. He pled no contest to an assault on a police officer. He filed suit against Moe (and the City) under 42 U.S.C. §1983, claiming false arrest, illegal imprisonment, entering without a warrant, unlawful seizure and excessive force. Moe and the City requested summary judgment, which was granted in part by the trial court. Moe’s entry was justified under exigent circumstances, and Heck v. Humphrey<sup>351</sup> “barred Schreiber’s false-arrest and illegal-imprisonment claims” because he pled guilty to the underlying offenses. The trial court divided the force claim into two segments, that force used during the actual arrest and the force allegedly used against Schreiber once he was in the patrol car. The Court agreed Heck disallowed the claims that took place pre-custody but allowed the claim concerning force in the police car to continue. The City, itself, was dismissed.

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<sup>349</sup> Illinois v. Lafayette, 462 U.S. 640 (1983); Scott v. Clay County, 205 F.3d 867 (6<sup>th</sup> Cir. 2000)

<sup>350</sup> Although the record reflected that there was additional information available to dispatch, because there was no indication that information was shared with Officer Moe, the Court found it irrelevant to this discussion.

<sup>351</sup> 512 U.S. 477 (1994).

Schreiber, however, failed to move forward on his one remaining claim and the Court dismissed that claim eventually. However, he was able to get the claim reinstated upon appeal. Schreiber then agreed to dismiss that claim but reserved the right to appeal the previous dismissal of the other claims. This appeal followed.

**ISSUE:** Does a conviction or guilty plea to an underlying charge invalidate a use of force claim?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court reviewed each of the claims. First, with respect to the warrantless entry, the Court agreed that “exigency exists ‘where there are real immediate and serious consequences that would certainly occur were a police officer to postpone action to get a warrant.’”<sup>352</sup> In Michigan v. Fisher, the Court agreed, “officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>353</sup> The Court quickly agreed that the risk of harm to Sarah was an exigent circumstance, given what Officer Moe was told by dispatch. However, since it was, in effect, an anonymous call, the Court had to evaluate whether that was enough. But, the court concluded he had to evaluate whether “any evidence [was] observed by the police in the course of investigating the call” that corroborated the tip.<sup>354</sup> The Court agreed that Officer Moe “made several observations that corroborated the 911 caller’s conclusion that Sarah was at risk of physical danger.” Both versions of the facts provided would have justified Moe’s entry to ensure that Sarah was safe, even though the Court agreed there “were no signs of blood.” (The Court noted that there was no need to show a likelihood of a “serious, life-threatening injury to invoke the emergency aid exception.”<sup>355</sup>) With respect to Moe remaining in the apartment after he assured himself that Sarah was uninjured, the Court noted that the “situation continued to deteriorate.” As such, Moe could have reasonably believed that “Schreiber was on the brink of violence and that, even if Moe had determined that Sarah was at that point unharmed, a continued police presence was required for a time to prevent further harm.”

Moving on to the force used after Schreiber “shattered the balcony door and re-entered the apartment,” the Court noted that the versions of the facts differed dramatically. At this state of the proceeding, the Court is required to construe all disputed facts in favor of the plaintiff. Had Moe used force in the face of a compliant subject, as Schreiber claimed to have been, it would have been legally excessive. His claims also extended to force he claimed was used after he was handcuffed, as well. As such, Officer Moe could not be awarded dismissal under qualified immunity at this stage – as the right to be clearly free from being “punched in the face twenty times as he lay on the floor,” as Schreiber claimed, was sufficiently established. The Court continued, however, acknowledging that “Schreiber’s deposition testimony is at times inconsistent both with itself and with his prior statements.” But at this stage, such analysis was not permitted. The Court further did not find that Heck barred this part of the action, because any force against him was immaterial to his underlying conviction. (A decision in favor of Schreiber would not invalidate the arrest.)

The Court affirmed the dismissal in the issue of the entry and reversed the dismissal with respect to the excessive force claims. That claim was permitted to move forward.

### **Karttunen v. Clark, 369 Fed.Appx. 705 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Clark, a Michigan state trooper, was dispatched to Karttunen’s home on November 10, 2004, to investigate a hit and run accident. He also knew that Karttunen had an outstanding arrest warrant. He knocked and got no response. He looked in a window and saw Karttunen asleep. Clark was able to awaken him by knocking on the window; Karttunen came to the window. Clark asked him to come outside to get a message but

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<sup>352</sup> Ewolski v. City of Brunswick, 287 F.3d 492 (6<sup>th</sup> Cir. 2002).

<sup>353</sup> 130 S.Ct. 546 (2009).

<sup>354</sup> Thacker v. City of Columbus, 328 F.3d 244 (6<sup>th</sup> Cir. 2003)

<sup>355</sup> Fisher, *supra*.

Karttunen refused. Clark told him he would impound his truck if he didn't come outside. Clark grabbed Karttunen when he opened the door and allegedly tackled him and took him to the ground, injuring him. Clark put him into a patrol car. Clark described it as a controlled takedown. He did agree he had not told Karttunen he was under arrest until he was handcuffed. Karttunen eventually pled no contest to a resisting arrest charge. He then filed suit under 42 U.S.C. §1983, alleging excessive force. Clark requested summary judgment, which was denied, with the trial court finding that the no contest plea did not bar the action and that Karttunen's version of the fact showed no indication at all of resisting and therefore, no force at all was justified. Just prior to trial, Clark raised a defense under Heck v. Humphrey. The District Court ruled in Clark's favor and dismissed the case. Karttunen appealed.

**ISSUE:** Does a conviction or guilty plea to an underlying charge invalidate a use of force claim?

**HOLDING:** No

**DISCUSSION:** The Court noted that the "salient question is whether the 1983 claim 'necessarily' implies the invalidity of the state-court conviction."<sup>356</sup> The Court looked to its decision in Schreiber v. Moe, and stated that "the mere fact that the conviction and the 1983 claim arise from the same set of facts is irrelevant if the two are consistent with one another." Since Michigan law did not provide for an affirmative defense of excessive force in a resisting arrest case, the court found that excessive force could still have occurred in the context of Karttunen's arrest.

The judgment in Clark's favor was reversed.

**Jefferson v. Lewis, 594 F.3d 454 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On December 31, 2006, Officer Lewis (Flint, MI, PD) responded to a shots fired call. At 10:30 p.m., when the call came he'd, he'd been on duty about 11 hours due to a shortage of officers. At the scene, witnesses reported that the shots had been fired, and that bullets had struck near them. He heard six shots from a "long gun" of heavy caliber. He called for backup and went to the location, but several more gunshots appeared to be more faint. He got out of his car, with shotgun, and proceeded on foot. He heard more shots and took cover behind a parked car. He heard male voices and moved to determine their location, and spotted two men, one of whom had a long gun. He told the men to freeze, drop the gun and put their hands up. Adams and Manning, the two men, testified that they complied, but Lewis contended Manning ducked behind a column and "Adams continued reaching into the trunk of [a] car." Both men eventually complied. A third man, Stewart, emerged and he was also ordered to freeze. Officer Lewis testified, however, that the "men continued to duck up and down and to move their hands toward their waists." He only saw Manning with a gun, however.

Officer Lewis heard another "loud metal sounding" noise to his left and saw another individual coming from the house. He saw it was an unarmed woman and told her to go back into the house. He spotted more movement from the side door of the house. A person was "standing in the doorway." "He perceived a hand with something metallic in it extended in his direction beyond the door frame and, at the same time, a flash of light." He thought the person was firing at him, and he returned fire with the shotgun. However, did not chamber another round into his shotgun after firing the first shot and did not take cover to protect himself from future gunfire." It turned out to be Jefferson, who testified that she did not have a weapon or anything shiny in her hand, except possibly the doorknob. She was injured by the shots, although the opinion did not detail the extent of her injuries.

Jefferson sued for excessive force under 42 U.S.C. §1983. Officer Lewis requested summary judgment, which the District Court denied. Officer Lewis appealed.

**ISSUE:** Are unarmed and nondangerous subjects subject to deadly force?

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<sup>356</sup> Swiecicki v. Delgado, 463 F.3d 489 (6<sup>th</sup> Cir. 2006).

**HOLDING:** No (but see discussion)

**DISCUSSION:** First, the Court ruled that it was proper to entertain the interlocutory appeal, since Lewis was willing to concede Jefferson's version of the facts for the purposes of the appeal. The Court started with a quote from Graham v. Connor - "All claims that law enforcement officers have used excessive force—deadly or not . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard."<sup>357</sup>

Further:

We apply "the objective reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Further, we conduct the reasonableness inquiry objectively, based on the "information possessed" by the officer, without regard to the officer's subjective beliefs and without regard to facts not known by the officer at the time of the incident.<sup>358</sup> In an excessive force claim involving an officer's use of deadly force, the Supreme Court has instructed that the test is whether the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."<sup>359</sup>

With respect to the first inquiry under Saucier v. Katz, the Court agreed that Jefferson's version of the facts showed a clear indication that her constitutional rights were violated. The Court noted that "[o]nly in rare instances may an officer seize a suspect by use of deadly force."<sup>360</sup> However, while it is true that "[a]s a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers," whether a suspect is "nondangerous" is based on the facts known to the officer at the time of the incident, not on hindsight. The Court concluded that "whether Officer Lewis had probable cause to believe that he was in danger of serious harm turns, in large part, on the resolution of [the] factual dispute": as to the mysterious flash he observed. Since Jefferson had a right to be free of unlawful seizure, it must be left to a jury to decide whether her Fourth Amendment rights were violated.

The second prong of the Katz inquiry:

... is whether the right was clearly established and whether Officer Lewis's actions were objectively unreasonable in light of that clearly established right. In other words, in light of the undisputed facts and viewing any factual disputes in the light most favorable to Jefferson, was Officer Lewis's decision to fire at the individual standing in the doorway objectively unreasonable in light of a clearly established right to be free from deadly force? In this case, this turns on whether (a) Officer Lewis actually did see a flash in the doorway that he believed to be a muzzle flash from a gun and, (b) if so, whether that belief and his response were reasonable. If the answer to those two questions is an unequivocal "yes" even under Jefferson's version of events, then Officer Lewis is entitled to qualified immunity regardless of whether there was a constitutional violation. However, absent an unequivocal affirmative, the question of qualified immunity must be submitted to the jury.

Further:

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<sup>357</sup> 490 U.S. 386 (1989).

<sup>358</sup> Dunn v. Matatal, 549 F.3d 348 (6th Cir.2008) (citing Graham).

<sup>359</sup> Tennessee v. Garner, 471 U.S. 1 (1985).

<sup>360</sup> Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005) (quoting Whitlow v. City of Louisville, 39 F. App'x 297 (6th Cir. 2002)).

The second question is whether (1) Officer Lewis's belief that the flash of light was a muzzle flash coming from the individual in the doorway shooting at him and (2) his reaction to that stimulus were objectively reasonable. The fact that most strongly cuts against the reasonableness of Officer Lewis's decision to "return" fire is that, even accepting Officer Lewis's testimony on its face, Officer Lewis only saw a flash; he heard no corresponding gunshot before he "returned" fire. Additionally, Officer Lewis did not chamber another round in his shotgun or seek cover, which one might expect an officer to do if he reasonably believed that he was being fired upon. But, on the other hand, it is uncontested that Officer Lewis immediately began checking his bullet-proof vest to see if he had been shot, a fact which certainly cuts strongly in Officer Lewis's direction.

In light of the competing inferences one might draw from these facts and their effect on the question of whether Officer Lewis's actions were objectively unreasonable, we agree with the district court that the jury should find the facts that determine whether Officer Lewis is entitled to qualified immunity.

The Court concluded that it was not improper to deny Officer Lewis qualified immunity at this stage and affirmed the decision.

### **Wilson v. Wilkins, 362 Fed.Appx. 440 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On December 24, 2006, Wilson called Nashville (TN) PD concerning a domestic dispute with her husband, but they did not intervene. On December 28, she called again, alleging assault. Officers Wade and Smith responded. Wilson told them she wanted her husband to leave to give her "space." Officer Wilkins arrived and urged Wilson to have her husband arrested. Under pressure, she finally agreed. Officer Smith told Wilson her husband would have to appear in court downtown, and Officer Wilkins insisted she ride with him. She agreed and rode in the front seat. On the way downtown, and after Wilkins passed the usual routes to downtown, Wilson became concerned. Officer Wilkins caressed her hand, which Wilson considered offensive under the circumstances. When the vehicle slowed, Wilson unhooked her seatbelt and jumped from the car, screaming for help from passers-by. Wilkins called for backup and specifically asked for a female officer. Wilson told the officer who responded, Officer Booker, who she actually knew, that she thought Officer Wilkins was trying to rape her.

Wilson filed suit under 42 U.S.C. §1983, claiming injury to a vocal cord that required surgery. Wilkins moved for summary judgment, arguing that she wasn't seized, and further that there was no clearly established constitutional right that he had violated. The District Court denied the motion, finding that she was captive in a moving vehicle. Wilkins and the City appealed.

**ISSUE:** Might an attempted restraint by an officer (for a presumed sexual assault) be considered a "show of authority" for §1983 purposes?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the claims had to be analyzed under the Fourth Amendment, and further, that Wilkins's action constituted a "show of authority." The Court also agreed that physical touching could constitute a seizure. The Court agreed that Wilson's right not to have her liberty impinged by a state actor exercising authority over her was clearly established at the time of the incident. Finally, the Court ruled that what Wilkins did was objectively unreasonable. The denial of summary judgment was affirmed.

### **McKenna v. Edgell, 617 F.3d 432 (6<sup>th</sup> Cir. 2010)**

**FACTS:** The court drew on the District's Court denial of summary judgment for the "operative facts."

In the early morning of March 18, 2004, Scott McKenna was suffering from a seizure in his home in Royal Oak, Michigan. At that time, McKenna was a single father living with his three daughters, Alexandra, Samantha, and Jessica. Alexandra, his then fourteen-year-old daughter, called 911 and told the dispatcher that she thought her father may be having a seizure or choking. Officers Edgell and Honsowetz were dispatched to assist a man having trouble breathing. The officers arrived before any other emergency personnel. Alexandra directed the officers to McKenna's bedroom, where they found McKenna lying in bed.

The course of events after the officers entered McKenna's bedroom is disputed. Alexandra testified that she "couldn't see exactly what was going on" for some period, because she was talking to one of the officers. However, she also testified that this period was "for about a minute . . . . So I was standing there watching it all." According to Alexandra, the officers instructed Scott McKenna to get out of bed and to get dressed. McKenna got up and started to pick up his pants, but then sat back down on the bed and began to lie back down. Alexandra testified that the officers then "picked him up by his hands, and they like pulled him up from the ground and told him to put his pants on." McKenna then sat back down and, according to Alexandra, "was telling them to stop."

According to Alexandra, the officers continued to try to get McKenna out of bed while McKenna "just laid back down." Finally, Alexandra testified, the officers handcuffed McKenna's wrists and ankles, and only then did McKenna begin struggling with them.

Contradicting the testimony offered by McKenna's daughter, the officers said that after they found McKenna unresponsive to verbal questioning, Officer Edgell placed his hand on McKenna's upper arm or shoulder to try to rouse him. Officer Edgell testified that when McKenna did rouse he immediately became aggressive and violent, pushing them and causing Officer Honsowetz to fall backwards. The officers asserted that it was necessary to handcuff McKenna because of his violent behavior. Firefighters arrived as the officers were already restraining McKenna. Scott McKenna has no recollection of the events that took place during his seizure.

His daughter also stated that "when the officers arrived, one of them asked her whether McKenna was on drugs and whether he had assaulted her." She denied both. After he was taken from the premises by EMS, the "two officers searched through McKenna's bathroom medicine cabinet and the top drawer of his dresser." Items were knocked around and thrown away during the search, including some memorabilia. The officers testified they were looking for prescription or illegal drugs. One of the officers "admitted that even in responding to medical emergencies, he is always aware that criminal activity may be involved and he is 'always looking to investigate it.'"

The Court noted conflicting evidence as to the proper medical protocol for such calls. "McKenna's witnesses stated that the appropriate response to a medical seizure is not to restrain the subject but rather to clear the area and let the episode run its course. A firefighter testified, '[w]e don't handcuff patients.' Firefighters and paramedics testifying for the defendants stated that they are trained to initiate physical contact to rouse a nonresponsive subject, to restrain the subject for safety if necessary, and to look for indications in the environment that might explain the subject's condition."

McKenna filed suit, claiming a deprivation of rights under the Fourth Amendment and 42 U.S.C. §1983. The court dismissed the city on a failure to train allegation, but refused to dismiss Edgell and Honsowetz under qualified immunity. "The officers moved for summary judgment a second time, arguing that because they had acted in response to a medical emergency, they were qualifiedly immune from suit under Peete v. Metropolitan Government of Nashville and Davidson County<sup>361</sup>." The Court found that "the facts did not make clear "that the police officers

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<sup>361</sup> 486 F.3d 217 (6th Cir. 2007).

were attempting to provide medical assistance.” The case proceeded to trial and McKenna won, but his jury award for pain and suffering was later reduced substantially. Both parties appealed.

**ISSUE:** May an officer who commits excessive force during a medical response be subject to federal civil liability?

**HOLDING:** Yes

**DISCUSSION:** First, the Court reviewed the issue of qualified immunity. The Court began:

Whether government officials performing discretionary functions are entitled to qualified immunity involves two questions: “(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established.”<sup>362</sup> In accordance with this framework, the officers advance two independent reasons why qualified immunity applies to them:

First, as responders<sup>363</sup> to a medical emergency, they assert that they are immune from suit under Peete, which held that liability under the Fourth Amendment for torts committed by firefighters, paramedics, and emergency medical technicians (“EMTs”) in the process of responding to a medical emergency is not clearly established. Second, the officers argue that McKenna was incapable of submitting to any show of authority, such that he could not have been “seized” within the meaning of the Fourth Amendment.

In Peete, the plaintiff died because of what would arguably be medical malpractice by unqualified providers.

The Court continued:

There are two ways to think about whether Peete applies to the facts of the instant case. First, as argued by McKenna, the fact that the defendants here are police rather than medical-care personnel may render Peete inapplicable.<sup>364</sup> As a general matter, exposure to liability does not depend merely on the profession of the government actors. It would not be coherent, for example, to say that paramedics who strap a patient to a gurney without medical need, search his home for evidence of a crime, and forward what they discover to the police do not violate the Fourth Amendment, simply because they are paramedics. On the other hand, the fact that a government agent is a police officer clearly matters in some cases—for example, when it bears on the question of whether a person is “seized” under the Fourth Amendment.<sup>365</sup> The officers urge us to follow the lead of two district courts that have applied qualified immunity to police based on Peete.<sup>366</sup> We note that these unpublished lower-court cases are not binding upon us. The instant case, however, does not require us to resolve the question. Instead, we will assume without deciding that Peete’s holding could extend to defendant police officers.

A second way to think about Peete is that its applicability depends on a defendant’s objective function or purpose. Peete may stand for the proposition that when a government agent acting in the role of a

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<sup>362</sup> Everson v. Leis, 556 F.3d 484, 494 (6<sup>th</sup> Cir. 2009).

<sup>363</sup> The Court stated: “The defendants here refer to such persons as “first responders.” We eschew that term, as it unduly emphasizes the fact that these individuals get to a scene first rather than the fact that they go there to provide medical support—the critical element of their engagement for the purposes of Peete’s applicability.

<sup>364</sup> The Court stated: “We are mindful of the challenges police officers face when acting as medical-emergency responders. Often, they are the first and only people on the scene. We acknowledge, as the district court did, the harm to the public that could result from officers’ overexposure to liability for civil-rights violations. Qualified immunity is itself one way of negotiating the need to allow plaintiffs to seek relief.”

<sup>365</sup> See U.S.v. Mendenhall, 446 U.S. 544 (1980)

<sup>366</sup> See Daniels v. Bowerman, No. 08-10278, 2008 WL 2743918 (E.D. Mich. July 14, 2008); Mills v. Hall, No. 06-15689, 2008 WL 2397652 (E.D. Mich. June 10, 2008).

paramedic - any medical emergency responders - commits an unreasonable search or seizure, it is not yet clearly established that the conduct violates the Fourth Amendment. There is support for this interpretation in the Peete panel's opinion. It stated that qualified immunity turns on "the specific purpose and the particular nature of the conduct alleged in the complaint."

The panel held that the defendants in Peete were protected because they intended only to provide medical aid: "[t]he paramedics did not unreasonably seize [the patient] for the purpose of interfering with his liberty. They responded to [his] grandmother's call that he was experiencing an epileptic seizure and needed medical attention. They were not acting to enforce the law, deter or incarcerate." On this logic, when officers do act to "enforce the law, deter or incarcerate," qualified immunity might not apply. So reasoned the district court in denying the officers' second summary-judgment motion in the instant case: "[t]he police officers here were not necessarily offering medical assistance. Although the police officers were first on the scene and 'first responders,' it is not clear that trying to get someone out of bed and get him dressed constitutes medical assistance."

The court concluded that their qualified immunity claim depended upon "whether they acted in a law-enforcement capacity or in an emergency medical-response capacity when engaging in the conduct that McKenna claimed violated the Fourth Amendment. If the officers acted as medical-emergency responders, then McKenna's claim would amount to a complaint that he received dangerously negligent and invasive medical care. Under a function-dependent view of Peete, if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established. If the defendants acted in a law-enforcement (e.g., investigative or prosecutorial) capacity, however, McKenna's claim does not "look[] like a medical malpractice claim," rather, his claim is that he was subject to an unreasonable seizure and search. It is certainly clearly established that police violate the Fourth Amendment when they handcuff people whom they neither suspect of criminal wrongdoing nor believe to be a danger to themselves or others."<sup>367</sup>

Ultimately, the Court concluded that the "objective determination of the role that the officers played at McKenna's home" is for the jury, not the judge. The Court agreed, however, that "the reasonableness of officer conduct in excessive-force cases is a question for the court." In this case, the "objective question in this case involves a highly factual characterization, not a legal concept at the center of Fourth Amendment law like reasonableness in the use of force, exigent circumstances, or probable cause." In this case, the jury "clearly found that the officers had acted in a law-enforcement capacity."

The Court concluded:

The jury easily could have found the following: The officers arrived at the McKenna residence in response to a 911 call reporting that McKenna might be having a seizure or choking. One of the officers asked Alexandra whether her father was using drugs, whether he had assaulted her, and whether anything like this had ever happened before. The appropriate response to a medical seizure was not to restrain the subject but rather to clear the area and let the episode run its course. Instead of following that procedure, the officers handled McKenna, repeatedly attempted to get him to put on his pants, and tried to force him to rise in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned him on his stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby teeth collection. One of the officers also ran a check on McKenna's license plate.

This "view of the facts" supported the jury's finding that the officers acted in a law enforcement capacity. The Court agreed that:

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<sup>367</sup> U.S. v. Davis, 514 F.3d 596 (6<sup>th</sup> Cir. 2008); Monday v. Oullette, 118 F.3d 1099 (6<sup>th</sup> Cir. 1997).

Like the district court, we fail to see how it serves any medical-emergency responder purpose to persist in insisting that a medically seizing individual put on his pants. Questioning Alexandra about McKenna's possible drug use, meanwhile, is equally suggestive of an inquiry into the cause of McKenna's medical condition and of an investigation into wrongdoing. It looks more like the latter, however, given that the officer also asked Alexandra about domestic violence. Even so, alone, these questions would make for a very close case. They are more consistent with law-enforcement behavior, however, when viewed against what happened next: the officers handled, subdued, and handcuffed McKenna at the hands and feet without any sign of violence on his part. All together, their treatment of him was consistent with their treatment of a criminal suspect believed to have abused illegal drugs. This objective characterization of the officers' conduct provides a law-enforcement purpose for handcuffing McKenna: if an individual is on drugs or otherwise given to unpredictable behavior, restraining him gives the investigating officers greater control over the situation, protects the officers, and minimizes the individual's ability to interfere with their search.<sup>368</sup>

Further:

The search conduct is consistent with this law-enforcement posture. Under ordinary circumstances, the officers' search reasonably would be consistent with a quest for clues about McKenna's medical condition, information that would be valuable to his treatment. But coming immediately after the officers handcuffed McKenna without cause instead of letting the medical seizure run its course, the search looks investigatory. Indeed, Alexandra's testimony that the officers knocked down all the items on top of the dresser and threw away the baby-teeth collection is consistent with a rummage for contraband and the indifference of a raid. Their jettisoning of McKenna's personal effects does not convincingly reflect an urgency for time-sensitive medical information: McKenna had been stabilized by medical personnel and taken to the hospital.

Finally, the Court stated:

We could hold as a matter of law that police officers who are dispatched to a location by a 911 call for medical attention—a fact emphasized by the dissent—always act in a medical-response capacity, regardless of the other facts in the record. This proposal would be an illogical and dangerous rule. It cannot be that an officer receives Peete protection simply because he was invited to the scene of a medical emergency. This proposition overlooks the possibility that an encounter that begins as medical in nature may evolve into one that is investigatory. More importantly, such a rule would give officers who respond to 911 calls free rein to rifle through callers' homes in search of incriminating evidence and to physically abuse callers in ways unrelated to anyone's safety. We decline to immunize misconduct of this sort; instead, we allow this case to stand on the judgment of the jury, in whose hands qualified immunity cases that turn on disputed facts have traditionally rested.<sup>369</sup>

However, this was not the end of the assessment. The officers argued that in fact, "McKenna was not seized because he was not conscious during the incident at his home." The Court did not agree that his "complete lack of memory about the incident" was critical as it is "possible for a person to be conscious during an experience and yet not remember it." Moreover, Alexandra testified that at one point, her father told the officers to "stop." Finally, the Court concluded that "[t]he officers do not contend that McKenna's home was never 'searched' under the Fourth Amendment." The record contained ample evidence to support the determination that the officers unreasonably

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<sup>368</sup> See U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004) (holding that it was reasonable for an officer conducting a Terry stop and frisk of an individual he believed to be on PCP to handcuff that individual based on the officer's experience that "people on PCP can become extremely violent").

<sup>369</sup> See Brandenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989).

searched the home and seized McKenna. As described above, both actions violated clearly established constitutional rights and the denial of qualified immunity was appropriate.

The Court upheld the plaintiff's award, including the reduced remittitur which he had appealed.

**Steele v. City of Cleveland, 2010 WL 1687729 (6<sup>th</sup> Cir. 2010)**

**FACTS:** On May 8, 2007, Steele was "driving on a Cleveland thoroughfare in a vehicle with expired license plates, playing music loudly." Six officers (three named, three unnamed) made a traffic stop. Steele showed a valid OL. As he was ordered out, however, he broke away, was shot 16 times and died. His estate filed suit against Cleveland and a number of officers, under 42 U.S.C. §1983. The defendant officers requested summary judgment, but beyond agreeing Steele was stopped for expired plates, the "officers' story diverges from the complaint's version of events."

The officers claim that, as VanVerth and Staimpel approached the car, Steele "started sliding his hand down his right side," disobeying their repeated orders to "keep his hands in plain sight." At that point, Miles, who had been alerted to the impending traffic stop via police radio, arrived on the scene. He shouted to the other officers that, according to police records, Steele "had previous weapons charges." VanVerth then drew his service weapon and ordered Steele "numerous times" to exit the vehicle. Steele initially refused to comply, but "finally stood up in the doorway of the driver's side of the vehicle." The three officers ordered Steele to get down on the ground "50 or 60 times," but Steele did not comply. Steele then "dove back into the vehicle," apparently "reaching for something." At that point, VanVerth saw Steele "grab [a] gun." Staimpel "dove into the vehicle after [Steele]" and wrestled with Steele for control of the gun, during which time the gun was at least briefly pointed "directly at" VanVerth. According to Staimpel, "Steele had more control of the gun" during this time than Staimpel did. "[I]n fear of imminent danger" and "believing Steele intended to fire his weapon," each of the three officers fired at Steele, who then fell out of the car and into the street. After Steele was incapacitated, Miles radioed for an ambulance." VanVerth, "concerned about [Steele's] movements," ordered him out of the car. Steele refused. VanVerth attempted to "escort [him] from the vehicle," at which point Steele "broke away from [VanVerth's] grasp" and again attempted to "move his hand down his right side."

Following a number of motions and the unresponsiveness of the plaintiff to an order that permitted further discovery, the Court granted summary judgment to the defendants. The estate plaintiff appealed.

**ISSUE:** Must facts be placed on the record to be considered in a summary judgment motion?

**HOLDING:** Yes

**DISCUSSION:** The estate representative argued that a "genuine issue of material fact preclude[d] summary judgment because unnamed eyewitnesses claim that Steele was unarmed and forensic evidence outside the record (the coroner's report) show[ed] that Steele was shot primarily in the back." These assertions were not supported by evidence placed in the record, although, of course, it could have been. The court noted that deadly force is objectively reasonable when an officer fears for their own life, or that of another.<sup>370</sup> The facts put forth by the officers was compelling and unrefuted by the plaintiff. In a footnote, the Court noted that it did not reach any decision about "whether an officer 'lawfully entitled to shoot to kill may nonetheless violate the Fourth Amendment by pulling the trigger too many times,'" since the plaintiff's assertion of 16 rounds was not actually in the record.

The summary judgment was affirmed.

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<sup>370</sup> Tennessee v. Garner, 471 U.S. 1 (1985); Williams v. City of Grosse Pointe Park, 496 F.3d. 482 (6<sup>th</sup> Cir. 2007); Graham v. Connor, 490 U.S. 386 (1989).

### Griffin v. Hardrick, 604 F.3d 949 (6<sup>th</sup> Cir. 2010)

**FACTS:** On August 20, 2005, Griffin was arrested for disorderly conduct and resisting arrest. She was taken to the jail and during booking, asked to see a nurse. She wanted to be taken to the local hospital to have bruises on her back and arms treated. The nurse refused and “Griffin refused to take ‘no’ for an answer and began raising her voice with the nurse.” Hardrick, a Corrections officer, responded. Hardrick “took hold of one of Griffin’s arms, but Griffin attempted to pull away.” She cautioned the officer that her arms were sore. Another officer, Rutledge, also responded and took her other arm; they led her down the hall. Griffin alleged she was not resisting in any way, but that “Hardrick nevertheless suddenly tripped her, causing her to fall to the floor.” In turn, Rutledge fell on top of her, breaking her leg. (Hardrick contended that she was trying to get away from him and he did a “leg-sweep maneuver” to take her to the ground.) Griffin was taken to the hospital and had surgery to repair the break.

Much of the situation described was caught on videotape. Griffin filed suit against Hardrick in state court - the case was subsequently removed to federal court under 42 U.S.C. §1983. Hardrick requested, and was granted, summary judgment. Griffin appealed.

**ISSUE:** Is a use of force that results in an unintended injury always excessive?

**HOLDING:** No

**DISCUSSION:** Although Griffin initially argued that the force was used under the Fourth Amendment, the District Court analyzed the claim under the Fourteenth Amendment. The Court began by noting that “prisoners are protected from the use of excessive force by the Eighth Amendment.”<sup>371</sup> Griffin, however, as a pretrial detainee, was protected by the Fourteenth Amendment, instead. The Court noted that “the law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same.” Since Hardrick did not contest that he did the act that caused Griffin’s injury, the Court was left to determine whether the maneuver was “applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Griffin argued it was inappropriate for the Court to use the videotape at the summary judgment stage. The court however, looked to Scott v. Harris and determined it was permitted.<sup>372</sup>

Turning to the substance of the decision, the Court noted that the “issue is ... not whether the use of force was absolutely necessary in hindsight,” but whether it “plausibly could have been thought necessary.” The Court noted that initially, Hardrick was “calm and nonaggressive” and that he spoke to her for about 30 seconds “before ever touching her.” The Court found that the “fact that Griffin had been engaged in a loud, lengthy, and animated conversation with the nurse” gave Hardrick valid reason to believe that “force would be necessary.” She continued to struggle as they walked away, further reinforcing that belief. The Court found no reason to believe that Hardrick intended to use such force as would break her leg. The Court agreed that no reasonable jury could find that Hardrick “evinced such wantonness ... as is tantamount to a knowing willingness’ that Griffin’s injury occur.”

The Court upheld the decision of summary judgment for Hardrick.

### Williams v. Ingham, 2010 WL 1489712 (6<sup>th</sup> Cir. 2010)

**FACTS:** On September 1, 2005, Officers Ingham, Bodnar and Hutchinson (Akron, Ohio, PD) were on patrol. At roll call that day, they’d received a hot sheet of stolen cars. At about 12:40 a.m., Officers Ingham and Bodnar spotted a vehicle on the list and called for backup. They observed the driver commit a traffic offense, so they

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<sup>371</sup> Whitley v. Albers, 475 U.S. 312 (1986).

<sup>372</sup> 550 U.S. 372 (2007).

“attempted to initiate a felony stop.” Williams, the driver, “drove off at a high rate of speed through a residential neighborhood.” During the chase, at speeds at least double the speed limit for the area, Williams “ran 18 stop signs and nearly hit a police cruiser.” The chase ended and officers bailed out to apprehend the driver. Officer Hutchinson recognized Williams as someone who had a “tendency to flee from the police.” Officers approached from both sides and Williams was instructed to place his hands out the window and to get out of the car. When he did not comply, one of the officers opened the door, seized him and took him to the ground. Ingham, specifically, had no physical contact with Williams. Williams suffered a small cut on his face. Sgt. Dorn responded to fill out a supervisor’s report and to talk to Williams. Williams admitted he’d been driving and to other offenses and was eventually indicted on multiple counts.

On November 27, while out on bond for the first arrest, Williams was spotted leaving a known drug house. Again a chase ensued, reaching speeds of up to 70 mph. Williams ran stop signs and lights. The chase ended - with Williams claiming he stopped voluntarily and officers claiming he struck an officer’s cruiser. Again, three officers approached -Hutchinson, Van Nostran and Diydk. They handcuffed the female passenger and ordered Williams to get out. He did not comply. In the ensuing struggle, Officer Hutchinson broke his finger. Officer Van Nostran used an expandable baton to jab and strike Williams. He was pulled from the car and taken to the ground. They struggled and Officer Diydk used his Taser in drive-stun mode. They were finally able to handcuff Williams. Again, a sergeant, this time Sgt. Lesser, did a scene investigation of the use of force and ruled it justified. A small amount (crumbs) of crack cocaine and a marijuana blunt were found in the car. Williams was evaluated at the hospital and released to the officers, who took him to jail. At some point during the process, an officer witnessed him dropping a baggie of crack cocaine. Williams was charged and convicted. Williams filed suit against the officers for excessive force in the two arrests, seeking \$100 million in compensation.

The officer moved for summary judgment. The trial court found the officers’ actions reasonable and dismissed the case. The Court also found that some parts of his claim were barred by Heck v. Humphrey “because a conviction for resisting arrest requires a finding that the arrest was lawful, which in turn requires that the arresting officers did not use excessive force.” Williams appealed.

**ISSUE:** Is a use of force that results in an injury always excessive?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the undisputed facts. With respect to the first arrest, the Court found the “officers used minimal force to quickly bring Williams under control and to neutralize a potential safety threat to the officers.” With respect to the second arrest, the Court detailed the actions of the officers, which included one officer delivering two blows with his fist to the middle of Williams’ back. Again, the Court agreed that the actions taken by the officers were objectively reasonable. Williams failed to prove that his constitutional rights were violated, so the Court agreed the trial court did not err in rendering summary judgment.

**Solovy v. City of Utica, 2010 WL 1687722 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Solovy, a Type-1 diabetic, relies on an insulin pump to manage his blood sugar. On June 29, 2006, at about 8 p.m., his blood sugar fell to a dangerously low level. He drove to a convenience store to get food, but before he could do so, “he succumbed to confusion caused by his low blood sugar.” He had no recollection of the next events, but he apparently drove his car from that location into the intersection, where he was found by Sgt. Carroll. Sgt. Carroll and Officer Morabito found him confused and apparently intoxicated. Solovy later testified that Carroll tapped on the window and told him to unlock the door, which he did. He says he told the officer he needed food. He claims the officer handcuffed one hand and pulled him out and to the ground and then completed handcuffing him behind his back. He complained of a “bad locked shoulder” and that the cuffs were too tight, but the officer ignored him. He also claimed the officer picked him up by the handcuffs and that caused extreme pain. The handcuffs were removed at some point before the arrival of the ambulance.

The officers “provide starkly different accounts of the encounter.” They maintained they never handcuffed him and that Officer Morabito had immediately recognized that Solovy had an insulin pump. Sgt. Carroll asserted that Solovy was combative before he was placed in the ambulance. The EMS report indicated Solovy had consumed alcohol, but it was unclear where that information was obtained. The paramedic did not note that Solovy was combative and that he would “absolutely” have done so if that was the case. An IV raised his blood sugar to an acceptable level and he declined further EMS care. Solovy’s mother was contacted and picked him up at the scene. Later that evening, Solovy “began to experience progressive numbness and weakness in his right hand and wrist.” He went to the ER and later had nerve tests which diagnosed his problem as “right radial neuropathy from a handcuff injury.”

Solovy filed suit under 42 U.S.C. §1983 against the two officers. Upon motion, the trial court granted them summary judgment on all claims. Solovy appealed only the claims against Sgt. Carroll.

**ISSUE:** Is a use of gratuitous (unnecessary) force justified?

**HOLDING:** No

**DISCUSSION:** The Court looked to the facts at hand, and found that Solovy “presented sufficient evidence to create a genuine issue of material fact as to whether Sergeant Carroll used unreasonable force.” The Court agreed that the hospital report - abrasions to wrists and bruises on knees - supported his claim that he’d been handcuffed and forced to the ground. The Court noted a reasonable jury could “disbelieve the officers and believe Solovy.” The Court found nothing in the facts before it to indicate the Solovy posed an “apparent safety risk to the public or to the police.” As such, any force used to remove him from the vehicle was “gratuitous and therefore unreasonable.”<sup>373</sup> The Court also found that the handcuffing may have been unreasonable, in that Solovy claimed to have twice told the officers that the handcuffs were too tight. The injury supported the claim that he may have been subjected to excessive force in the use of the handcuffs. Next, the assertion that he was lifted by the cuffs, an action “almost guaranteed to cause substantial pain, especially to a person with a shoulder injury,” described a cognizable claim as well. The Court further agreed that a reasonable officer would have known such actions to constitute excessive force. The Court agreed these assertions were enough, at this stage, to defeat summary judgment in favor of Sgt. Carroll and remanded the case for further proceedings.

**Aldini v. Johnson / Bodine / Kaczmarek / Leopold, 609 F.3d 858 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In the early morning hours of May 13, 2006, Aldini, celebrating his birthday, was asked to leave a Dayton bar. He kicked out the door on his way out and the bouncers “took him to the ground.” He was arrested by nearby Dayton officers. Officer Jones later testified that Aldini was “screaming and fighting during the arrest.”

He was taken to the Montgomery County Jail for booking. He was waiting in the booking area to be photographed when he “repeatedly asked for a phone call so he could ask his friends to post bond.” There was no indication that Aldini “yelled, swore, or became abusive.” However, he was told to go into one of the cells lining the area and he complied. As Officer Johnson walked away from the cell, he again “demanded to make a call.” A scuffle ensued and Sgt. Bodine, Officer Kaczmarek and Officer Leopold arrived. Aldini later testified he was “spun around, taken to the ground, and ‘viciously beat[en]’ and kicked.” He claimed the “officers held his body – face down and elevated above the floor – with a person holding each leg and arm in a crucifix or Vitruvian man position.” He claimed he was punched, kicked and twice tased. Aldini was bleeding profusely. He was taken to another cell and restrained. At one point the officer who had arrested him was waiting to get his cuffs back and “heard Aldini yelling and screaming in the booking room and saw many corrections officers there with him.”

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<sup>373</sup> Solomon v. Auburn Hills Police Dep’t, 389 F.3d 167 (6<sup>th</sup> Cir. 2004).

He was removed from the restraint chair to sign papers and then returned to it. He remained in that chair for some two hours. Photos taken at the time show his facial injuries and video indicated he was “calm and submissive.” Friends arrived to post bond and Aldini was released from the chair at 6 a.m.. He was ordered to clean his face for the booking photo. Upon release he immediately went to the hospital where he was treated for facial lacerations. He had “at least six twin taser marks on his back.” He also had head trauma - multiple areas of swelling and bruising, bruising on his back, and skin irritation of his wrists. He was in a great deal of pain on the “side of his head, his nose, neck, and back.” He admitted he had been drinking but denied drug use – this was confirmed by blood tests. The Dayton police took photos and a statement but “although Dayton Police have searched for them, the statement and photographs have disappeared.”

Aldini filed suit against the named jail officers, under 42 U.S.C. §1983. The District Court granted qualified immunity for Officers Leopold and Kaczmarek based upon the Fourteenth Amendment. Officer Johnson and Sgt. Bodine (who wielded the taser) were denied qualified immunity. They appealed the denial while Aldini appealed the grant of summary judgment to the other two.

**ISSUE:** What is the appropriate standard for judging a use of force against a pretrial detainee?

**HOLDING:** Fourth Amendment

**DISCUSSION:** The Court stated the question to be “under what Amendment should Aldini’s claim be analyzed?” The Court noted that “Section 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the United States.” In this case, the “two primary sources of constitutional protection against physically abusive governmental conduct” are the 4<sup>th</sup> and the 8<sup>th</sup> Amendments. The 4<sup>th</sup> Amendment is implicated in claims that “arise in the context of an arrest or investigatory stop of a free citizen.”<sup>374</sup> The 8<sup>th</sup> Amendment applies to “excessive force claims brought by convicted criminals serving their sentences.”<sup>375</sup> When neither clearly applies, “courts have applied the 14<sup>th</sup> Amendment.”<sup>376</sup>

The time “beyond the point at which arrest ends and pretrial detention begins” has become a “legal ‘twilight zone.’”<sup>377</sup> Under the 4<sup>th</sup> Amendment, the standard must be whether the “use of force is objectively reasonable.” In Phelps, the court “acknowledged that Fourth Amendment protections do not vanish at the moment of arrest.”<sup>378</sup> In that case, the Fourth Amendment applied when the force was applied by arresting officers, but during the booking process. It left an “open question as to how far the Fourth Amendment’s protection extended beyond the transfer of custody from the arrested officers[sic] – although [the Court] had already found that such protection applies at least through the completion of the booking procedure, which is typically handled by jailers.”

The Court continued:

There is no principled basis in the text of the Constitution, the precedents of the Supreme Court, or our prior cases for placing a dividing line between protection by the Fourth and the fourteenth Amendment at the end of custody of the arresting officer, at the completion of booking, or at the initial placement of the arrestee in a jail cell.” The Court did, however, finding precedent for “placing the dividing line at the probable-cause hearing for those arrested without a warrant, since Bell v. Wolfish<sup>379</sup> did hold, in dicta, “that individuals who have not had a probable-cause hearing are not yet pretrial detainees for constitutional purposes.” That hearing “is a judicial proceeding that affects the ‘legal status’ of the

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<sup>374</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>375</sup> Whitney v. Albers, 475 U.S. 312 (1986).

<sup>376</sup> Lanman v. Hinson, 529 F.3d 673 (6<sup>th</sup> Cir. 2008).

<sup>377</sup> Wilson v. Spain, 209 F.3d 713 (8<sup>th</sup> Cir. 2000).

<sup>378</sup> Phelps v. Coy, 286 F. 3<sup>rd</sup> 295 (6<sup>th</sup> Cir. 2002).

<sup>379</sup> 441 U.S. 520 (1979).

arrestee,” just like a guilty verdict or plea “affects his ‘legal status’ by authorizing his detention for the duration of his sentence.”

The Court concluded that the trial court erred when it applied the Fourteenth Amendment to the facts. The Court also noted that “actions that do not violate the Fourteenth Amendment’s shock-the-conscience standard may nevertheless violate the Fourth Amendment’s reasonableness standard for excessive force.” Since the Court was applying the higher standard in making its decision in three of the four officers, the decision to use the Fourteenth Amendment rather than the Fourth was not harmless. The Court affirmed the decision with respect to Officer Johnson (who had been denied summary judgment) but vacated the decisions with respect to the other officer.

## 42 U.S.C. §1983 - USE OF FORCE - TASER

### Kijowski v. City of Niles / Aurilio, 2010 WL 1378601 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 28, 2006, a wedding reception was going on at the Aulizio’s Banquet Center in Warren, Ohio. Kijowski was a guest. “What should have been a wholly joyous occasion soured after Reuben Shaw, an off-duty police officer hired by the Banquet Center to provide security, observed the groom urinating in the parking lot.” The matter became confused but a scuffle ensued among several parties and “wisely, Officer Shaw radioed for backup.” In response, “the entire shift of the Warren Police Department, as well as members of other nearby departments, arrived at the Banquet Center,” including Officer Aurilio (Niles PD). He arrived as police were attempting to arrest a number of “actively resisting” subjects. Officer Aurilio assisted by using his Taser in drive stun mode against a subject he later learned was Kijowski. Kijowski gave a different version of the facts. He claimed he called dispatch to report that officers were beating people in the parking lot and that dispatch then directed police to him, on the telephone. (A dispatch recording corroborated his statement.) He claimed he was dragged from the truck and tased. He was arrested for assault but never indicted. The record indicates that he was not found guilty of any crimes.

Kijowski filed suit against Aurilio and other defendants, which was eventually removed to federal court under 42 U.S.C. §1983. The court granted qualified immunity and Kijowski appealed.

**ISSUE:** Is the use of a TASER appropriate when an officer is not faced with active resistance to an arrest?

**HOLDING:** No

**DISCUSSION:** The Court noted that it “must first examine a critical factual issue – whether Kijowski was resisting arrest – as [it could not] undertake the reasonableness analysis without assessing the circumstances confronting Officer Aurilio.” It “slosh[ed] ... though the factbound morass of reasonableness”<sup>380</sup> The Court noted that under Kijowski’s account, he did not resist arrest. The language of his complaint gave a reasonable inference “that no resistance was offered prior to Officer Aurilio’s initial use of his Taser. There was simply no time.” The second Taser shock followed on the heels of the first, the facts indicated that the “only tenable conclusion is that it would have been impossible for Kijowski to muster any fight.”

If that was, in fact the case, the Court could not say that Officer Aurilio’s “conduct was objectively reasonable as a matter of law.” The Court looked to other circuits and noted that the Tenth Circuit had ruled the use of a Taser to be appropriate when officers are faced with active resistance.<sup>381</sup> However, “without active resistance, the equation is different.” Absent a compelling justification, the use of a Taser is unreasonable. The Court did note that the Sixth Circuit precedent “potentially requires [the Court] to evaluate the Taser shocks independently.” However, since the analysis in this case applied to both shocks, it considered the two collectively. The Court further “found little difficulty

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<sup>380</sup> Davenport v. Causey, 521 F.3d 544 (6<sup>th</sup> Cir. 2008).

<sup>381</sup> Casey v. City of Federal Heights, 509 F.3d 1278 (9<sup>th</sup> Cir. 2007).

in concluding that the right Officer Aurilio allegedly violated was clearly established.” “Against the backdrop of existing law, Officer Aurilio could not reasonably have believed that use of a Taser on a non-resistant subject was lawful.”

The Court reversed the grant of summary judgment and remanded the case for further proceedings.

## 42 U.S.C. §1983 - STATE-CREATED DANGER

### Willis v. Charter Township of Emmett, 360 Fed.Appx. 596 (6<sup>th</sup> Cir. 2010)

**FACTS:** At about 6:30 a.m., on July 18, 2003, Willis was involved in a terrible crash with another vehicle. Willis’s pickup had the cab partially ripped from the frame - it landed upside down. A bystander (Reed) who stopped to help tried to take Willis’s pulse, his arm was dangling through the window, but found nothing. However, he did crawl partways inside and found Willis to be breathing. Bishop, a local police officer/firefighter, who responded, was told that Willis had no pulse. (Reed claims he told Bishop that Willis was breathing, but Bishop denied that.) Bishop focused on the other victims and told yet another officer, Barbre, that Willis was dead. Barbre radioed that information to other responders. “When paramedics arrived, Barbre specifically instructed them not to go to [Willis’s] pickup because the driver was dead and instead told them to treat the other victims.” Counts, a local firefighter, also tried to get a pulse with no success. He did note that Willis’s “lower body was badly mangled.” He denied telling the paramedics that Willis was dead and noting that he was never told that Willis was breathing.

Willis was pronounced dead by an ER physician, who did so via phone. Willis was left in the truck, which was covered by a sheet, for several hours, while the wreck was being investigated. At about 8:45 a.m., the sheet was removed and the cab secured so that firefighters could extricate the body - but “someone from the medical examiner’s office who was able to enter the cab discovered that [Willis] was still breathing.” He was immediately taken by helicopter to the hospital but died before 10 a.m.

His estate filed sued against all responders, under 42 U.S.C. §1983. The federal claims were dismissed under summary judgment and the estate appealed. (The negligence claims were remanded to the state court.)

**ISSUE:** Is a failure to take action always actionable?

**HOLDING:** No (unless there is a specific duty to do so)

**DISCUSSION:** The initial question is whether Bishop and Counts (the firefighter) violated Willis’s rights under the 14<sup>th</sup> Amendment by failing to provide Willis “with medical care and spreading the false information that he was dead, causing the other emergency responders not to treat him.” Normally, there is no affirmative duty on the state to protect or aid individuals.<sup>382</sup> There are two exceptions to this rule: “the ‘custody’ or ‘special relationship’ exception” and the “state-created danger exception.”<sup>383</sup> The Court first looked to the “custody” exception and determined that it did not apply because no affirmative action by a state actor restrained Willis from acting in his own behalf. He was, instead, “restrained by the unfortunate circumstances of the car accident.” There was no indication Bishop and Counts knew of Willis’s situation; they simply “erroneously assumed he was dead.”

With respect to the state-created danger exception, the Court looked to the three factors that might apply: “if the state actor affirmatively acted to create or increase the risk of injury,” “if the victim, or a small class including the victim, was especially endangered” and “if the state actor had the requisite degree of culpability.”<sup>384</sup> The Court

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<sup>382</sup> DeShaney v. Winnegago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).

<sup>383</sup> Kallstrom v. City of Columbus, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998).

<sup>384</sup> Hunt v. Sycamore Cmt. Sch. Dist. Bd. of Educ., 542 F.3d 529 (6<sup>th</sup> Cir. 2008); McQueen v. Beecher Cmty. Sch., 433 F.3d 460 (6<sup>th</sup> Cir. 2006); Ewolski V. City of Brunswick, 287 F.3d 492 (6<sup>th</sup> Cir. 2002).

agreed that the two men did not “affirmatively act” to deny Willis care, but noted the “difficulty of distinguishing between an affirmative act and a failure to act.” However, it agreed that they did not make Willis somehow less safe nor did they expose him to other private acts of violence. Certainly his condition likely deteriorated while he was left untreated, but that did not impute liability to Bishop and Counts. Even under the lesser standard of deliberate indifference, neither had sufficient culpability, nor was his situation so obvious to responders. In hindsight, they should have more thoroughly evaluated Willis, but they did not “act with deliberate indifference in failing to do so.” In addition, they had other duties at the scene that drew their attention. The Court also looked at the allegation that their actions somehow “arbitrarily thwarted potential attempts by private parties to rescue” Willis.<sup>385</sup> However, they put forth no evidence that any other private individual did attempt to assist him since everyone assumed he was deceased.

The grant of summary judgment was affirmed.

## 42 U.S.C. §1983 – SPECIAL RELATIONSHIP

### Estate of Smithers (by Norris) v. City of Flint, 602 F.3d 758 (6<sup>th</sup> Cir. 2010)

**FACTS:** On October 26, 2002, Smithers was at home, in Flint, Michigan, with Sharp, Bonner, Shirley and Booker Washington. They were watching TV and playing cards. Smithers and Shirley Washington, his girlfriend, got into an argument and Smithers asked her to leave; she refused. Smithers called the Flint PD to ask that “someone” be removed. The dispatcher pressed for more information and he said Smithers “was not going to say anything further.” Officers Murphree and Walker were dispatched under the code TWM - “trouble with a man.”

Bonner later testified that “the intoxicated [Shirley] Washington threatened to kill Smithers, Sharp, and Bonner, and stated that she intended go home and “retrieve her nine millimeter handgun” and that this “would be the last time that [Smithers] would ever call the police on her.” After discussion with the parties at the house, which included Washington making statements that “if you take me to jail, I’m going to come back and kill ‘em,” the police took her into custody. The men went back in the house but did not lock the door. “Meanwhile, Washington was taken to the Flint police station, booked, issued an appearance ticket for trespassing, and released.” She returned some hours later, fatally shot Smithers and wounded Sharp and Booker Washington. She was later convicted of murder.

Smithers’s estate, along with Sharp and Bonner, filed suit against Flint and the officers, under 42 U.S.C. §1983 and state law. After limited discovery, the District Court entered summary judgment and the plaintiffs appealed. (The Court remanded the state law claims back to Michigan.)

**ISSUE:** Is an officer required to make an arrest in a domestic assault, if the statute makes it mandatory?

**HOLDING:** No

**DISCUSSION:** The plaintiffs alleged that since “Washington made death threats in the presence of the officers and that the officers were therefore required to detain her for at least 20 hours for domestic violence, pursuant to [Michigan state law], rather than arresting her for trespassing and releasing her on an interim bond.” The Court noted that the U.S. Supreme Court “has held that a state statute written in purportedly mandatory terms providing that ‘a peace officer shall arrest’ a person whom he has probable cause to believe has violated a domestic restraining order does not give rise to a protected property interest under the Due Process Clause.”<sup>386</sup> Further, the Court “found that police have the “discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance.” The trial court had also ruled that the statute in

<sup>385</sup> Beck v. Haik, 234 F.3d 1267 (6<sup>th</sup> Cir. 2000).

<sup>386</sup> Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).

question was permissive and discretionary, not mandatory. The court noted that although “officers do not have the discretion to release an individual pursuant to MCL § 780.582a should she be arrested for domestic violence, the Supreme Court has held that police officers have discretion to determine whether to arrest someone for domestic violence in the first place, even if the relevant statute seems to make such an arrest mandatory.”

Further, the plaintiffs argued, “the officers created a danger to them when the officers chose to ticket Washington for trespassing and to release her, rather than to detain her for 20 hours on charges of domestic violence.” They also argued that the officers’ arrest of Washington for trespassing “created an illusion of safety because plaintiffs believed that Washington would be held for 20 hours pursuant to a domestic violence arrest.” The court looked to DeShaney v. Winnebago County Dep’t of Social Services<sup>387</sup> and Bukowski v. City of Akron<sup>388</sup> and agreed that the state is not required “to protect the life, liberty and property of its citizens against invasion by private actors.” The Court looked to the elements of a “state created danger claim, stating:

(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.<sup>389</sup>

The Court further stated that “as it is difficult to determine whether an officer’s “behavior amounts to affirmative conduct or not, we have focused on ‘whether [the victim] was safer before the state action than he was after it.’”<sup>390</sup>

The Court continued:

However, while this action may have been ill-advised, the officers’ failure to hold Washington did not constitute an affirmative act. The officers exercised their discretion in arresting Washington for trespassing, rather than for domestic violence, for which they are protected under Castle Rock. Thus, the officers’ first affirmative act had the effect of protecting Washington’s eventual victims, at least for a short period of time. Their second affirmative act, releasing Washington from custody, did not “create” or “increase” the danger to plaintiffs. The officers did not require or encourage plaintiffs to remain in the unlocked house or suggest that Washington would be held for 20 hours so as to imply that plaintiffs would be safe. Their actions did not constitute an approval of Washington’s threats any more than the return of the children in DeShaney or Bukowski encouraged that those children should be further harmed. As in those cases, these events were tragic; however, the officers’ actions could not have been interpreted by a reasonable juror to have created or increased the danger to plaintiffs.

The plaintiffs also raised an Equal Protection claim - arguing that the officers “treated their situation differently from other domestic violence situations because the aggressor in this incident was female, rather than male, and the event took place in a poor neighborhood.” To make such a claim under §1985(3), “a claimant must prove both membership in a protected class and discrimination on account of it.”<sup>391</sup> The plaintiffs placed in the record documentation of the number of women versus men who were arrested but it was not broken out by domestic violence cases. The Court found that evidence unconvincing.

The Court upheld the grant of summary judgment.

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<sup>387</sup> 489 U.S. 189 (1989).

<sup>388</sup> 326 F.3d 702 (6<sup>th</sup> Cir. 2003).

<sup>389</sup> See Kallstrom v. City of Columbus, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998); Jones v. Reynolds, 438 F.3d 685 (6<sup>th</sup> Cir. 2006) (citing Cartwright v. City of Marine City, 336 F.3d 487 (6<sup>th</sup> Cir. 2003)); see Ewolski v. City of Brunswick, 287 F.3d 492 (6<sup>th</sup> Cir. 2002).

<sup>390</sup> Koulta v. Merciez, 477 F.3d 442, 446 (6<sup>th</sup> Cir. 2007) (quoting Cartwright, supra).

<sup>391</sup> Bartell v. Lohiser, 215 F.3d 550 (6<sup>th</sup> Cir. 2000).

## 42 U.S.C. §1983 - AGENCY LIABILITY

### Mize v. Tedford and City of Flint, 2010 WL 1655835 (6<sup>th</sup> Cir. 2010)

**FACTS:** On September 2, 2007, Officer Tedford (Flint PD) stopped Mize for swerving. She later claimed he took her to an empty sub-station and raped her. He apparently released her, as she went to the hospital. The hospital called the police and Mize was able to identify Tedford from photos. Upon questioning, "Tedford painted a somewhat more consensual picture of the encounter but did not deny that he inappropriately had sex with Maze." Tedford was placed on leave. He later resigned and pled guilty to "willful neglect of duty." Mize filed suit against Tedford and the City of Flint, alleging the rape violated her civil rights and that the "city's policies caused the rape." Tedford was served but did not respond and judgment was entered against him in default but the Court dismissed the City from the action. Mize appealed the summary judgment in favor of the city.

**ISSUE:** Is an agency liable when an employee/officer commits a sexual assault on duty?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Mize argued that the city's policy or custom led to her injury. The Court, however, found that the city's policies "forbade such conduct." Further, the agency did a review and found him in violation of "no fewer than fourteen departmental policies." He was promptly removed from duty, forced to resign and signed a "commitment ... that he would never serve in law enforcement again." Mize argued that a lack of supervision allowed the incident to occur.

The Court continued:

This "failure to supervise" theory of municipal liability is a rare one. Most agree that it exists and some allege they have seen it, but few actual specimens have been proved. It appears to relate to two more common theories of municipal liability: An inadequate-training theory or an "acquiesce[nce]" theory.<sup>392</sup>

The Court, however, found that Flint's policies were facially lawful and that the city did not act with "deliberate indifference" to the risk of sexual assault by its employees. "Tedford had no history of misconduct that gave the department notice of the risks of putting him on patrol duty." He was an 18 year veteran. The Department "did not have a pattern of sexual assaults by its officers," and only a handful had occurred in "the preceding two decades." The department had a record of investigating every allegation. Simply leaving Tedford the opportunity to commit an assault did not lead to deliberate indifference that he would take advantage of it. Although Tedford did not have a stellar work record and may have been a lazy employee, nothing in the record suggests "the danger of rape" much less that the agency ratified such "egregious conduct."

The Court affirmed the summary judgment in favor of the City of Flint.

### Meier v. County of Presque Isle, 2010 WL 1849228 (6<sup>th</sup> Cir. 2010)

**FACTS:** On September 17, 2006, Meier drove his car into a ditch and through a fence. Deputy Flewelling responded to the scene. A witness identified Meier (who had left the scene) as the driver. Meier was located at a nearby residence. The deputy questioned him and "detected a strong odor of alcohol and observed that Meier's eyes were glassy." Meier admitted to having several beers and other alcoholic beverages that day. He admitted he was intoxicated. He was arrested for DUI and driving on a suspended OL. At the jail, Meier was given a breath-analysis which returned a reading of .31. He refused a second test. Although intoxicated, he responded

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<sup>392</sup> Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.; 455 F.3d 690 (6<sup>th</sup> Cir. 2006); Leach v. Shelby County Sheriff, 891 F.2d 1241 (6<sup>th</sup> Cir. 1989).

appropriately to the booking officer's questions. The booking officer concluded he did not need any immediate medical attention but because his BAC was over .30, she contacted the on-call doctor pursuant to policy. She summarized what she had observed and the doctor instructed her to keep an eye on him.

The jail kept a log on his activities. Meier was given another breath test a few hours later, it was down to .217. He slept most of the evening except when he was aroused to eat or engage in some other activity. At shift change, the ongoing and offgoing Corrections officers checked all the cells together; the same thing happened at the next shift change. At approximately 11 a.m., the officer noted that Meier was "starting to feel real bad, thought it was from coming down off of the alcohol." About 1:30 p.m., when other male inmates had gone outside, the officer on duty investigated and found "Meier lying face down on the floor in a pool of blood." He was breathing but unconscious, but was apparently at least semi-conscious when the Undersheriff arrived. An ambulance was summoned and he was transported. He was comatose for about six months but eventually died.

Meier's estate filed suit under 42 U.S.C. §1983, arguing that he was denied medical care. The trial court agreed that he needed medical care, but that there was insufficient evidence that the named defendant officers "recklessly disregarded an appreciated and serious medical risk." Meier's estate appealed.

**ISSUE:** Does a violation of a policy automatically result in liability?

**HOLDING:** No

**DISCUSSION:** The Court reviewed two departmental policies that were considered relevant to the case. The first indicated that if a subject had an BAC of over .30, the arresting officer was to take them to a medical facility for evaluation. The second outlined what the Corrections officers should do during a medical screening and that if the officer feels the subject is too intoxicated, they should be rejected. They are also to summon medical help under certain, specific circumstances and if the subject is very intoxicated, they should be observed closely.

The Court noted that normally a prisoner's claims are brought under the Fourth or Eighth Amendment, that since Meier was a pre-trial detainee, his claims started under the Fourteenth Amendment. Under either, however, "the test for deliberate indifference include both an objective and subjective component, which the plaintiff bears the burden of demonstrating."<sup>393</sup> The objective component required that there was a "sufficiently serious medical need," and the subjective required that the defendant being sued "subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk."<sup>394</sup> More than negligence was needed. Further, "because culpability under the test is personal, the subjective component must be addressed for each officer individually."<sup>395</sup> The Court reviewed each of the defendant officers individually and concluded that could not be satisfied for any of the defendants. Even if the policy was, in fact, violated, there was no indication that the officer was even aware of the policy or that the violation contributed to his death. One officer complied with the "unwritten custom of calling a doctor for a consultation." The officers who responded to the call for assistance, when Meier was found unresponsive, did not perform CPR, but, the Court noted, they "had reason not to move him" as he was lying in a pool of blood. While "rolling Meier onto his back might have been the better choice, ... that is not what the Constitution requires."

Further, the Court found no violation on the part of the supervisors or the county since no violation was found on the part of the actual actors.

The decision to dismiss was affirmed.

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<sup>393</sup> See Phillips v. Roane County, 534 F.3d 531 (6th Cir. 2008); Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001).

<sup>394</sup> Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

<sup>395</sup> Garretson v. City of Madison Heights, 407 F.3d 789 (6th Cir. 2005).

## 42 U.S.C. §1983 - HANDCUFFING

### Binay v. Bettendorf/Pongracz, 601 F.3d 640 (6<sup>th</sup> Cir. 2010)

**FACTS:** Marion and Joselito Binay, along with their minor son, Sean, were living in an apartment in Southgate, Michigan. Officer Pongracz, a member of DRANO (a drug task force) received an anonymous tip that drug trafficking was occurring at the apartment. A K-9 officer went to the apartment on two occasions - the dog twice gave a positive alert on the door. (The dog did not alert elsewhere in the apartment building.) Officer Pongracz decided he had probable cause and sought a warrant, which was granted. The warrant was executed on January 10, 2007 but no evidence was found.

Issues arose concerning the execution.

Mr. Binay testified that at approximately 8:20 p.m. he heard a knock at the door of Plaintiffs' apartment and was walking the seven to ten steps to answer the door when six masked men knocked down the door. Defendants brandished weapons as they entered the apartment and forced Mr. and Mrs. Binay to the floor. Defendants pointed their guns at Mr. and Mrs. Binay, instructed them not to look at the officers, and handcuffed them. Because the officers were wearing masks, Plaintiffs were unable to see the faces of the officers who handcuffed them. Defendants secured the kitchen, bathroom, and two bedrooms within moments, during which time the officers found Mr. and Mrs. Binay's son in a bedroom and forced him into the living room. Then the drug sniffing dog went through the premises and found no scent or presence of narcotics anywhere in the apartment. The dog was out of the apartment within 15 minutes.

The defendant officers then ransacked each room for the next few minutes but found nothing. The officers who conducted the search reported the results to Lt. Menna and Officer Pongracz. At that point, after completing the search, officers interrogated the Binays, who continued to be handcuffed and held at gunpoint. The Binays submitted to the officers and cooperated throughout the entire ordeal. The officers left after approximately an hour without finding narcotics.

The Binays filed suit in state court, but it was removed to federal court. Pongracz and Bettendorf requested summary judgment, which was partially granted. The motions were denied with respect to the excessive force claim, with the trial court concluding they were not entitled to qualified immunity on that allegation at this point. Both officers appealed.

**ISSUE:** Is the use of handcuffs during a search warrant execution always permitted?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the facts under the standard of Saucier v. Katz, which it found to be appropriate in this situation. The question in the case was whether the Binays "have alleged sufficient facts to show that [the officers] violated [their] Fourth Amendment rights by using excessive force in the execution of a valid search warrant at [the Binays] apartment."

The Court looked to Michigan v. Summers, quoting:

... the Supreme Court held that "for Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."<sup>396</sup> The Court described the rationale for this limited authority as follows: In assessing the justification for the detention of an occupant of premises being

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<sup>396</sup> 452 U.S. 692 (1981).

searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the “articulable facts” supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

This was clarified by Muehler v. Mena, which noted that “[i]nherent in Summers’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.”<sup>397</sup> The Binays alleged that the officers “completely ransacked their apartment and did not complete the search and interrogation until approximately an hour after arriving.” The officers’ own plan, made prior to the raid, indicated they did not anticipate firearms. The Binays “immediately submitted to and cooperated with the officers” but were held at gunpoint and handcuffed for an hour. The Court looked to Hill v. McIntyre, which was also a case in which a valid search warrant supported the search but no evidence of illegal activity was found.<sup>398</sup> The Court noted that certain critical facts remained disputed, specifically, whether the interrogation continued after the search was essentially completed and after no evidence was found.

With respect to the handcuffs, the Court agreed that there are a number of cases “in which the courts have found the use of handcuffs and guns in detaining suspects not to constitute excessive force.” But, the Court continued, “the fact that it is *sometimes* reasonable to use handcuffs and guns when detaining suspects does not support Defendants’ argument that the amount of force used *in this case* was objectively reasonable. Whether an exercise of force is excessive will vary depending on the facts and circumstances of the specific case.” The proper question—“is whether the amount of force that the officers used to secure and detain [the Binays] was objectively reasonable given the circumstances of this search.” In this case, [the Binays] had no criminal record, cooperated throughout the ordeal, posed no immediate threat to the officers, and did not resist arrest or attempt to flee, all of which are factors that tend to weigh against the officers’ contentions regarding the amount of force that was appropriate.” In addition, “questions remain as to whether the officers’ wearing of masks during the entry and search, which [the Binays] claim violates DRANO policy, added to an environment of intimidation and terror such that it contributed to a use of excessive force.” With respect to the individually named officers, the court noted that the liability for each “must be assessed individually based on his own actions.”<sup>399</sup>

Further:

To hold an officer liable for the use of excessive force, a plaintiff must prove that the officer “(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force.”<sup>400</sup> As a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability.”<sup>401</sup>

With respect to Pongracz: he argued “that he did not personally participate in the alleged use of excessive force based on the handcuffing, ... because he did not personally handcuff [the Binays] or have the opportunity or means to prevent the handcuffing of [the Binays.]” He also stated that “ he did not have control over the decision concerning whether [the Binays] were to be held at gunpoint during the duration of the search.” (He stated that a lieutenant on scene made those decisions.) He was, however, the “leader of the raid” and had ordered Binay to the

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<sup>397</sup> 544 U.S. 93 (2005).

<sup>398</sup> 884 F.2d 271 (6<sup>th</sup> Cir. 1989).

<sup>399</sup> Dorsey v. Barber, 517 F.3d 389 (6<sup>th</sup> Cir. 2008); Ghandi v. Police Dep’t of the City of Detroit, 747 F.2d 338 (6<sup>th</sup> Cir. 1984).

<sup>400</sup> Turner v. Scott, 119 F.3d 425 (6<sup>th</sup> Cir. 1997).

<sup>401</sup> See Ghandi, supra.

ground at the barrel of a shotgun. Binay also argued that the officer with the shotgun, and Pongracz was the only officer who carried a shotgun, pointed the weapon at them during the interrogation. As such, there is sufficient evidence that Pongracz did hold them at gunpoint at some point during the raid. Bettendorf argued that he was merely present at the scene and took no specific actions, the same as two other officers who had been dismissed pursuant to qualified immunity. The Court noted that Bettendorf agreed to being armed with a pistol, and to taking certain specific actions during the raid. As such, "there is a question of fact as to whether he was one of the officers pointing a gun at or securing [the Binays] during some part of the raid." The court noted that "the fact that [the officers] wore masks during the raid made it exceedingly difficult for [the Binays] to identify with precision which officers engaged in which conduct." The Court found sufficient reason to find that he was "personally involved in the conduct that violated the Fourth Amendment."

As to whether it was clearly established law, the court found that "the authority of police officers to detain the occupants of the premises during a proper search for contraband is 'limited' and that officers are only entitled to use 'reasonable force' to effectuate such a detention." The Court had "long recognized "that the Fourth Amendment permits detention using only 'the least intrusive means reasonably available.'"<sup>402</sup> Based on the case law in effect at the time of the warrant execution, the officers "were on notice that their detention of Plaintiffs during the search using means that were more forceful than necessary would constitute a Fourth Amendment violation."

The Court upheld the denial of summary judgment with respect to the two officers under federal law, as well as under state law.

## 42 U.S.C. §1983 - EMPLOYMENT

### Hebron v. Shelby County Government, 2010 WL 5376869 (6<sup>th</sup> Cir. 2010)

**FACTS:** In 2003, Shelby County eliminated 33 deputy sheriff sergeant's positions. They were given the choice of discharge or temporary demotion; the plaintiffs accepted the demotions. Several months later, five were reinstated and the plaintiffs continued to wait. In 2006, the county announced a promotions process for several sergeant's positions but did not offer to reinstate any of the previously demoted deputies. In 2008, 11 were promoted but none of the previously demoted deputies received a promotion.

The demoted deputies filed suit under a county ordinance, which required that temporarily demoted deputies were to be given priority over other applicants for promotion. They claimed a deprivation of property under 42 U.S.C. §1983 and that they were deprived of due process. The County moved to dismiss, arguing that the statute of limitations barred the lawsuit and that there was no private right of action under the statute. The trial court dismissed and the deputies appealed.

**ISSUE:** Does the beginning of the statute of limitations differ based upon the nature of the claim?

**HOLDING:** Yes

**DISCUSSION:** The Court first looked to when the statute of limitations would have begun under an "automatic reinstatement" theory - and held that when "the county announced it would use new procedures to fill the sergeant openings rather than reinstating the demoted deputies," the deputies should have been "first alerted of the need to protect their alleged property interest." As such, the lawsuit was not filed in a timely manner and the statute of limitations had passed under that theory. The Court noted that they had already suffered a compensable injury, demotion, loss of pay and seniority rights. Under the priority theory, however, which the Court noted was not fleshed out, it was "also quite possible that this theory of recovery is not time-barred." They "may not have known, and may not have had any reason to know, that the county would deprive them of 'priority' until the county

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<sup>402</sup> Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002) (quoting U.S. v. Sanders, 719 F.2d 882 (6th Cir. 1983)).

announced the results of the promotions process.” The Court found it “appropriate to give the claimants a shot at the theory.”

The dismissal was reversed and remanded.

## 42 U.S.C. §1983 - SEARCH WARRANT

### Ellison v. Balinski and City of Detroit, 625 F.3d 953 (6<sup>th</sup> Cir. 2010)

**FACT:** The case arose as a result of a rent dispute involving individuals not involved in the lawsuit. Ultimately, Balinski, a Detroit PD investigator, was assigned to it as a fraud case as it was alleged that the individual who claimed ownership of the rented property did not, in fact, own it but instead had illegally rented it out. Her investigation revealed that the property had been conveyed twice by a company connected to Ellison, to two different individuals. (Another property showed the same unusual property conveyance.) She contacted Ellison, seeking further information, but he told her he’d sold the property and ignored further calls from Balinski. Balkinski sought a search warrant for Ellison’s residence; it also served as the address for the company that had owned the properties. She specifically sought access to his computer and other records looking for information about the two named properties. The search took a long time, and ultimately, Balkinski emptied out a plastic tub at the house and just “started gathering things up.” She seized the desktop computer and after Ellison arrived and his car was searched, pursuant to the warrant, she also seized a laptop. Apparently no criminal proceedings were ever initiated.

Ellison filed suit against Balkinski under 42 U.S.C. 1983, claiming a violation of his Fourth Amendment rights. He also filed a state court action for defamation. The jury found in favor of Ellison and awarded him \$100,000. They found for Balinski on the state law claim. The Court also awarded Ellison’s attorney \$102,000 in attorneys’ fees pursuant to 42 U.S.C. §1988. Balinski appealed.

**ISSUE:** May an officer be sued for an invalid search warrant?

**HOLDING:** Yes

**DISCUSSION:** Balinski argued that the warrant provided for probable cause, but the court noted that it was “unclear from the face of the affidavit prepared ... exactly what crime was being investigated, much less what crime she had probable cause to suspect had occurred.” The only suggestion was a reference to a “fraud complaint” by the initial renters who had brought the matter to the attention of the police. Balinski stated, in deposition testimony, that she suspected mortgage fraud, but there was no indication that she actually had access to any mortgage or loan documents at all. On appeal, she retreated from that claim and argued that she didn’t know what type of fraud might have occurred because she lacked evidence. The Court stated that she appeared “to be making the startling suggestion that the mere suspicion that *some* vaguely specified crime has occurred makes constitutional a search of an unsuspecting citizen’s entire *home*.” The court found that the warrant “failed entirely to establish a nexus between the material to be seized and the place to be searched” as it failed to indicate how she came to know that the company worked from that residence or why any documentation of fraud might be found there.

Further, with respect to qualified immunity, the Court found the warrant affidavit to be “so lacking in indicia of probable cause as to render official belief in its existence unreasonable.”<sup>403</sup> As such, the Court agreed that the lack of mention of a specific crime “thought probably committed” and the failure to make a link between the residence and the crime was enough to defeat qualified immunity. The Court upheld the judgment and further upheld the attorneys’ fees, finding it had been correctly calculated under the lodestar process.

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<sup>403</sup> Malley v. Briggs, 475 U.S. 3345 (1986); Mills v. City of Barboursville, 389 F.3d 568 (6<sup>th</sup> Cir. 2004).

## 42 U.S.C. §1983 - PROSECUTION

### Sykes v. Anderson, 2010 WL 5292287 (6<sup>th</sup> Cir. 2010)

**FACTS:** On March 7, 2002, Sykes, Urquhart and Holmes arrived at their place of business to open up. As they entered, two men forced themselves inside at gunpoint. They took Urquhart to the safe and left the other two locked up in another room. The robbers obtained money (about \$27,000) and left the store. Sykes and Homes left the room to find Urquhart. They called the police and barricaded themselves in the “safe room” to wait.<sup>404</sup> When officers arrived, they began to interview the women. Urquhart, who was pregnant, “became increasingly agitated and extremely emotional” when one of the officers, Sgt. Nichols, “attempted to interview her in the room where the robbery had just occurred and with the door closed.” (She had also been a victim in a home invasion shortly before, which the investigator knew.) Sgt. Nichols found her “agitation suspicious” - although Urquhart ultimately required medical treatment at the scene. “Both Sykes and Holmes also provided statements to the police at the scene, and, as with Urquhart, Sgt. Nichols found Sykes’s statement suspicious, albeit for ever-changing reasons.”

Sgt. Nichols suspected the robbery was an “inside job.” She discovered Holmes was a frequent gambler and found records that suggested (but were not definitive) that Holmes had gambled a large amount of money shortly after the robbery. The records actually went to Sgt. Anderson, who had taken over the investigation. He also obtained videotape of the robbery, although it did not cover several important areas inside the store. Sgt. Anderson obtained arrest warrants for the three - the opinion noted that he did not have them reviewed by anyone and that allowed “to go undetected several flagrant misrepresentations, exaggerations, and omissions of evidence that were key to determining whether probable cause existed to believe that the [three women] had committed any crime.” At a preliminary hearing, Sgt. Nichols testified and “her testimony contained at least two false statements that bore upon whether there was sufficient evidence to prosecute.” At trial, the case depended heavily on Holmes’s gambling habit, but “troublingly Sgt. Anderson had failed to turn over the gaming records” to the defense. He also “never revealed—to either the prosecution or the defense—that the gaming records had been accompanied by a disclaimer letter that noted the records may be inaccurate and in direct conflict with that letter, Sgt. Anderson testified that the records established conclusively that Holmes had gambled approximately the same amount of money taken in the robbery in the three days following the robbery.”

Sykes and Urquhart were convicted. A year later, Holmes pled no contest. The convictions of Sykes and Urquhart were overturned, the state appellate court finding them based upon meager evidence and speculation. Sykes and Urquhart filed suit against the officers in state court, it was subsequently removed to federal court. They made a number of claims, including that Sgt. Anderson withheld exculpatory evidence<sup>405</sup> and that the city failed “to train, monitor, direct, discipline and supervise its officers, specifically referring to the City’s policy of having the same individual write and approve an application for a warrant and its failure to respond adequately to citizen complaints against its police officers.” After a number of procedural motions, the City was dismissed and the case went to trial on some of the issues. The jury found against Sgt. Anderson and Sgt. Nichols and awarded Sykes and Urquhart over \$2 million in damages. Appeals followed.

**ISSUE:** Will material false representations in affidavits subject officers to civil liability?

**HOLDING:** Yes

**DISCUSSION:** In addition to procedural arguments, Sgt. Anderson claimed that the jury verdict was improper because “no reasonable juror could have concluded that probable cause to arrest Sykes was lacking.” Although Anderson procured a warrant, the Court agreed that “if the affidavit contains false statements or material

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<sup>404</sup> This reference was apparently to the room where the safe was held, not a protected room.

<sup>405</sup> Brady v. Maryland, 373 U.S. 83 (1963).

omissions,” the Court was required to set aside the improper information and decide if the remaining information was sufficient.<sup>406</sup> The Court agreed that Anderson “deliberately made false or misleading statements and omitted material information from his warrant application in order to manufacture probable cause.” Further, some of the claims he made were “simply false.” He “explicitly omitted” the evidence of the two armed man, stating instead that “no robbery took place.” The Court found those “conclusions are simply not supported by any of the information available to Sgt. Anderson at the time he submitted his warrant application.” The Court found that the evidence could not support that Sykes and Urquhart were involved in the crime, as there was nothing connecting them except “mere presence at the scene of the crime.” The Court upheld the verdict against Sgt. Anderson.

With respect to the claim of malicious prosecution against Sgt. Nichols, the court summarized the elements:

To succeed on a malicious-prosecution claim under §1983 when the claim is premised on a violation of the Fourth Amendment, a plaintiff must prove the following: First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant “ma[d]e, influence[d], or participate[d] in the decision to prosecute.”<sup>407</sup> Second, because a §1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, “as a consequence of a legal proceeding,” the plaintiff suffered a “deprivation of liberty,” as understood in our Fourth Amendment jurisprudence, apart from the initial seizure.<sup>408</sup>

The Court did not require actual malice for the claim, however, and agreed that a reasonable jury could have found the two officers liable for malicious prosecution. There was a lack of probable cause and their actions were sufficient to influence the decision to prosecute. The Court found “very little case law in this circuit discussing precisely what role an investigating officer must play in initiating a prosecution such that liability for malicious prosecution is warranted, but existing cases do indicate that an officer may be responsible for commencing a criminal proceedings against a plaintiff, where the officer “ma[d]e, influence[d], or participate[d] in the decision to prosecute.” Sgt. Nichols’s allegedly made two misrepresentations during her preliminary hearing testimony, and the court agreed that “[p]olice officers cannot, in good faith, rely on a judicial determination of probable cause [to absolve them of liability] when that determination was premised on an officer’s own material misrepresentations to the court.”<sup>409</sup> The Court agreed that a jury could find her statements to be “material to the state court’s finding of probable cause.”<sup>410</sup> “In fact, the materiality of Sgt. Nichols’s false testimony in determining whether there was probable cause to prosecute is highlighted by the prosecutor’s reliance on the alleged discrepancy between Urquhart’s statement and the video evidence when the prosecutor argued at the preliminary hearing that probable cause existed to believe that the Plaintiffs were involved in the robbery.”

Sgt. Anderson’s liability “is not premised on his disclosure of truthful investigatory materials.” Although a number of intervening decisions were made regarding the prosecution, the Court asked whether it was appropriate to hold “Sgt. Anderson liable for all reasonably foreseeable consequences of his initial misdeeds.”<sup>411</sup> The Court concluded

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<sup>406</sup> Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) Franks v. Delaware, 438 U.S. 154 (1978)); Burleigh v. City of Detroit, 80 F. App’x 454 (6th Cir. 2003); U.S. v. Campbell, 878 F.2d 170 (6th Cir. 1989).

<sup>407</sup> Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007); see also McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005); Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001); Skousen v. Brighton High Sch., 305 F.3d 520 (6th Cir. 2002).

<sup>408</sup> Johnson v. Knorr, 477 F.3d 75 (3d Cir. 2007); see Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) (discussing the scope of “Fourth Amendment protections . . . beyond an initial seizure,” including “continued detention without probable cause”); cf. Heck v. Humphrey, 512 U.S. 477 (1994) (“[U]nlike the related cause of action for false arrest or imprisonment, [an action for malicious prosecution] permits damages for confinement imposed pursuant to legal process.”). Fourth, the criminal proceeding must have been resolved in the plaintiff’s favor. Heck, 512 U.S. at 484 (“One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.”).

<sup>409</sup> Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006).

<sup>410</sup> Specifically, she stated “that the video-surveillance evidence contradicted Urquhart’s witness statement and account of the robbery when, in fact, Urquhart’s statement was entirely consistent with that evidence.”

<sup>411</sup> Malley v. Briggs, 475 U.S. 335 (1986).

that the plaintiffs “were required to present some evidence that the impact of Sgt. Anderson’s misstatements and falsehoods in his investigatory materials extended beyond the Plaintiffs’ initial arrest and ultimately influenced the Plaintiffs’ continued detention.”

The Court continued:

Employing this standard in the instant case, a reasonable jury could have found that Sgt. Anderson participated in or influenced the decision to prosecute the Plaintiffs such that liability for malicious prosecution is proper. Perhaps the most telling evidence of Sgt. Anderson’s influence over the decision to commence criminal proceedings against the Plaintiffs resides in his investigatory materials, which were clearly in the prosecution’s possession. Not only did these materials contain knowing misstatements, as outlined previously, but also it is apparent from the record that the prosecution actually relied on many of Sgt. Anderson’s falsehoods in proceeding against the Plaintiffs by reproducing many of the very same material misrepresentations of the evidence that Sgt. Anderson had made. For example, Lewis stated in her notes that the surveillance “video tape does not show an [armed robbery]” because “nothing [was] taken from the safe until the [defendants were] alone in the room,” and that the Plaintiffs “appear[ed] to be counting money.” This is plainly not the case, and a reasonable jury could have concluded from the striking similarities between Prosecutor Lewis’s unsupported conclusions and Sgt. Anderson’s falsehoods that the prosecution relied on Sgt. Anderson’s misstatements in filing criminal charges.

Sgt. Anderson’s influence can likewise be seen in the prosecution’s reference to the Holmes gaming records. Notwithstanding the fact that the prosecution had not seen any documentation from the Casino, Lewis noted that Holmes had “spent almost the exact amount stolen [at] a casino” and that Sgt. Anderson, the officer in charge, “ha[d] the records” to prove it.

The Court agreed that the claim for malicious prosecution against Sgt. Anderson was appropriate.

Finally, with respect to the Brady claim, the Court noted that the officer never revealed the gambling records at all to the defense, nor did he tell even the prosecution that more was sent other than the one page actually introduced (out of a total of 9 pages, including a disclaimer concerning the accuracy of the information.) In fact, the one page introduced had been cropped in a manner that disguised that it was part of a longer fax. Sgt. Anderson argued that a Brady claim was not cognizable in an action under §1983. However, in Moldowan v. City of Warren<sup>412</sup>, the Court had found otherwise. Further, the record did not support Sgt. Anderson’s assertion that the plaintiffs even possessed any information at all that Holmes’s gambling record was an issue. Even the prosecutor noted that had he known of the additional information, he would have asked different questions and he certainly would have disclosed it under Brady. The Court upheld the due process claim against Sgt. Anderson.

The Court affirmed the decision but did send the case back for further information concerning the actual award amount.

## **42 U.S.C. §1983 – DAMAGE TO PROPERTY**

### **Spangler v. Wenninger, 2010 WL 3069600 (6<sup>th</sup> Cir. 2010)**

**FACTS:** In 1997, Doan was convicted of the kidnapping and murder of Culberson, in Clinton County, OH, but her body was never found. In 2004, the Clermont County OH SO received a reliable tip that the body could be found “near or under the garage on Spangler’s property, in Brown County.” Messer, Spangler’s son, lived on the property and ran a business there until he was jailed in 2003; vehicles and materials for his business were stored in the garage. Spangler had since rented the property to tenants, although apparently, Messer’s belongings remained in the garage. On April 27, 2004, the sheriff’s offices in Clermont and Brown Counties collaborated on a search

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<sup>412</sup> 578 F.3d 351 (6<sup>th</sup> Cir. 2009).

warrant and a search warrant was obtained to search for the body. The FBI also assisted with the search, which began that same day. It was accepted that Sheriff Wenninger (Brown County) was generally in charge, but others stepped in when he was not available, including Sheriff Rodenberg (Clermont County).

The search began with drilling holes in the concrete floor of the garage and cadaver dogs were brought in to check the holes. If the dogs indicated on cadaver scent, deputies would dig in those areas. On April 29, items were moved from the garage to facilitate the search, including several vehicles. On May 1, the remaining contents of the garage were removed and placed outside. The dirt removed was searched and then piled outside. By May 3, there was a large hole in the garage, which filled with water. As the search went on, Spangler "became concerned about the structural integrity of the garage." Wenninger, apparently knowledgeable about construction, reinforced the structure. They ran out of space and began piling dirt on top of the items places outside, including the vehicles, (Two of the defendants later testified they considered the items to be junk.) "Dunn [Brown County deputy] testified that the officers knew that they were damaging the property by piling dirt on it." Spangler argued that there was plenty of space to move the property to safety or, in the alternative, pile the extracted dirt where it would do no damage. On May 11, the search ended, with no body having been found. They did not fill in the hole, which was, by that time, 15 feet deep. Sheriff Wenninger agreed that he knew the hole would fill with water, but "he advised the law enforcement personnel that they were not required to fill it." During this same time, the tenant's vacated the property, because the septic system became damaged by the search as well.

The Spanglers (husband and wife) filed suit against Brown and Clermont county defendants, including both sheriffs. The trial court dismissed most of the defendants, but denied summary judgment to Sheriffs Rodenberg and Wenninger. They appealed.

**ISSUE:** Does a search warrant permit intentional, unnecessary destruction of property?

**HOLDING:** No

**DISCUSSION:** The Court looked to the standard for qualified immunity. "Qualified immunity shields government officials performing discretionary functions from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"<sup>413</sup>

Further:

A defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established.<sup>414</sup> A right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable officer would understand that what he is doing violates that right."<sup>415</sup>

The Court looked to the first question, and noted that the claims are premised on the "seizure of [the Spanglers'] personal property and garage, which affected their possessory interests in said property." The Court identified that a "seizure occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'"<sup>416</sup> The Court agreed that destruction is certainly a "meaningful interference." As such, the Court had to determine if the damage was sufficient to present the case to the jury.<sup>417</sup> The Court noted that photos show that "the property was left in complete disarray with piles of dirt placed all over [the Spanglers'] vehicles and property." Further, it noted that there was plenty of other space on which to pile the dirt and that they could have sought to

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<sup>413</sup> Feathers v. Aey, 319 F.3d 843 (6<sup>th</sup> Cir. 2003); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

<sup>414</sup> Jones v. City of Cincinnati, 521 F.3d 555 (6<sup>th</sup> Cir. 2008); Saucier v. Katz, 533 U.S. 194 (2001).

<sup>415</sup> Anderson v. Creighton, 483 U.S. 635 (1987).

<sup>416</sup> Soldal v. Cook County, 506 U.S. 56 (1992); U.S. v. Jacobsen, 466 U.S. 109 (1984).

<sup>417</sup> Hill v. McIntyre, 884 F.2d 271 (6<sup>th</sup> Cir. 1989).

expand the search warrant for that purpose. "The totality of the circumstances did not warrant the knowing destruction of [the Spanglers] personal property by unnecessarily piling dirt on it, and failing to fill the large hole that remained in the garage." In addition, the Court agreed that the "Supreme Court established that the unreasonable destruction of property may be a meaningful interference with personal property constituting an unconstitutional seizure under the Fourth Amendment."<sup>418</sup> The two sheriffs both supervised and even directly participated, in Wenninger's case, in the actual search – as 1983 liability can't be premised simply on the basis of their status as supervisors/employers. The Court agreed that denial of qualified immunity was appropriate.

The Court affirmed the denial of qualified immunity for Sheriff Wenninger and Rodenberg.

## TRIAL PROCEDURE / EVIDENCE - CHAIN OF CUSTODY

### U.S. v. Logan, 2010 WL 1461452 (6<sup>th</sup> Cir. 2010)

**FACTS:** On February 3, 2005, the Warrick County (Indiana) Sheriff's Department did a controlled buy during a drug trafficking investigation. Yancy and Rice, the sellers, later stated that they had accompanied White (a convicted drug dealer) to Logan's home in Madisonville. White made a purchase of cocaine and then gave it to Rice and Yancy to deliver to Gamble in Indiana. Instead, Yancy and Rice passed on the information to the Madisonville police. The police did surveillance as the transaction was made and the drugs were turned over the Det. Lantrip. He processed the evidence and turned it over to McKinney, the evidence technician.

Officers obtained a search warrant and found a number of items, powder and crack cocaine, marijuana, scales, a large amount of cash and a handgun. McKinney and Officer Carter processed the evidence and eventually, the drug evidence was forwarded to KSP. The case was transferred to the ATF, but only \$3,000 in cash (rather than the \$5139 seized) was initially given to the agent. The agent realized it later and returned, receiving the remainder of the cash. However, he realized that "the bills in his possession" were not the same ones seized. He did verify that the gun was the proper one, however. At trial, the defense was permitted to introduce evidence that McKinney had "mishandled the money and that the evidence room was in 'disarray.'" The agent testified that the room was disorganized and that things were not labeled. He agreed the McKinney had misappropriated money and that he was the subject of an ongoing investigation, led by himself. The defense was not allowed to introduce an audit report that substantiated this, however.

Logan was eventually convicted, and appealed.

**ISSUE:** Is a flaw in the chain of custody always fatal?

**HOLDING:** No

**DISCUSSION:** The Court noted:

To admit physical evidence, the government must show "that the exhibit offered is in substantially the same condition as it was when the crime was committed."<sup>419</sup> "Absent a clear abuse of discretion, 'challenges to the chain of custody go to the weight of the evidence, not its admissibility.'"<sup>420</sup> "[A] missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect." The government need not eliminate the possibility of misidentification or alteration entirely, "but as a matter of reasonable probability."

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<sup>418</sup> Jacobsen, *supra*; Soldal, *supra*; Thomas v. Cohen, 304 F.3d 563 (6<sup>th</sup> Cir. 2002).

<sup>419</sup> U.S. v. Robinson, 104 F.3d 361 (6<sup>th</sup> Cir. 1996) (citing U.S. v. Aviles, 623 F.2d 1192 (7<sup>th</sup> Cir. 1980)).

<sup>420</sup> U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

The Court found that because McKinney mishandled money and was under investigation, he “necessarily tampered with the gun and drug evidence.” The Court stated that it had “never held that evidence of the mishandling of one piece of evidence requires that separate pieces of evidence in the same case be necessarily excluded.” In the case of the cash, the “actual physical evidence ... was not the only means by which the prosecution could show that money was found on the scene” - the agent’s testimony to that effect was sufficient. There was no evidence suggesting that the gun and the drug evidence was misidentified - the gun was identified by its serial number and the drug evidence “was sealed and contained the Madisonville evidence label”

The Court did not err in admitting the evidence although Logan’s conviction was partially overturned for other reasons.

## TRIAL PROCEDURE / EVIDENCE - SPOUSAL PRIVILEGE

### Sandoval v. Toledo Correctional Institution, 2010 WL 4908260 (6<sup>th</sup> Cir. 2010)

**FACTS:** On January 27, 1996, Fremont, OH, authorities discovered the body of Perez. His murder was unsolved for several years until evidence surfaced against Sandoval. In 2000, he was indicted, tried and eventually convicted of murder.

During that trial, Heather Sandoval (his ex-wife) agreed to testify against him. They were married at the time of the murder, but divorced later. Sandoval objected to the admission of her testimony. He was convicted and appealed through the state courts, and his conviction was affirmed. He then applied for habeas under the federal courts. The district court denied the petition and he appealed.

**ISSUE:** Does violating the spousal privilege interfere with federal due process rights?

**HOLDING:** No

**DISCUSSION:** The Court agreed that there was no question but that Heather Sandoval’s “testimony was barred by the Ohio marital privilege statute” and that admission of it was in error.<sup>421</sup> The Court surveyed the history of the marital privilege, finding that it “does not have a grounding in the concepts that underpin the constitutional guarantee of due process.”<sup>422</sup> Instead the privilege was intended to preserve the “marriage relationship.” As such, the bar to her testimony was under Ohio law, which was intended to preserve “marital peace,” but that her “decision to jeopardize that peace by providing testimony did not contribute to a fundamentally unfair trial for Sandoval.”

Because the error, if any, was connected to a privilege granted by state law only, and because it did not rise to the level of fundamental unfairness prohibited by due process, the Court found that the petition for habeas corpus was properly denied.

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<sup>421</sup> Ohio Rev. Code Ann Sec. 2945.42 In relevant part:

Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness .... The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.

<sup>422</sup> Trammel v. U.S. , 445 U.S. 40 (1980).

## TRIAL PROCEDURE / EVIDENCE - RECORDINGS

### U.S. v. Knowles, 623 F.3d 381 (6<sup>th</sup> Cir. 2010)

**FACTS.** Mosley was living with Knowles, who was both her boyfriend and her half-brother, along with Mosley's four children. On Easter Sunday, 2007, Mosley found a camcorder in the glove compartment of a pickup truck she shared with Knowles. She watched the video and recognized a nude female in the video as Melinda Yates. She continued watching and saw her own daughter (T.M.) – age approximately 11 at the time – being touched by a Knowles – who she identified by his hand and voice. She also recognized the video had been shot in their residence. She talked to T.M. about it, and the daughter confirmed what had happened. Mosley had a videotape and DVD copy made and kept the items for several days, until she confronted Knowles. He threatened her and choked her. He took her purse, with the original tape, and fled. She called the police but they were unable to play the copy it due to damage on the DVD. She was able to obtain a second copy, it was apparently still on the digital memory in the actual camcorder. During that same time frame, the police were able to stop Knowles and recovered a handgun but not the original videotape.

Knowles was charged with child pornography. At trial, the government used yet another copy, made by the FBI, of the recording. It was not actually admitted into evidence, but was used in questioning witnesses. During deliberations, the jury asked to view it and neither side objected. The jury initially stated it was hung, but upon being further charged, convicted Knowles of sexual exploitation of a minor and related charges.

Knowles appealed.

**ISSUE:** Is a duplicate recording admissible?

**HOLDING:** Yes

**DISCUSSION:** Knowles first objected to the second copy that was made by a commercial camera shop, because of chain of custody issues. However, Knowles did not raise that objection and trial. The Court reviewed it under plain error, and noted that a “party must do more than merely raise the possibility of tampering or misidentification to render the evidence inadmissible.”<sup>423</sup> The Court found that the evidence and witness testimony supported that the second recording was essentially identical to the missing videotape. The FBI agent also testified that he had both DVDs and that he could not view all of the first one because of the damage. The Court found the error, if any, was harmless and that it was appropriate to use the videotape at trial. The Court also agreed that playing the FBI-created copy was appropriate.

Knowles also argued that a piece of evidence (a receipt), was not made available to him prior to trial, and that it was potentially favorable to him.<sup>424</sup> The Court, however, ruled that the item was not exculpatory but was, in fact, inculpatory. It also did not “fall into the category of impeachment evidence.” And finally, even if “a Brady violation occurred, the failure to disclose the receipt to Knowles was not a material violation because disclosure would not have resulted in a different verdict.”<sup>425</sup>

The Court affirmed Knowles's conviction.

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<sup>423</sup> U.S. v. Combs, 369 F.3d 925 (6<sup>th</sup> Cir. 2004).

<sup>424</sup> See Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Bagley, 473 U.S. 667 (1985).

<sup>425</sup> See Coe v. Bell, 161 F.3d 320 (6<sup>th</sup> Cir. 1998).

**FACTS:** Officers Gootjes and Wojczynski (Grand Rapids, Michigan, PD) were patrolling in their area. They went by the Wealthy Street Market, which had a “no-trespass letter” on file that indicated that “the owner of the store had authorized the police to detain, question, and arrest people who were loitering on the store’s property.” They spotted Maze standing near an occupied vehicle parked at the lot. When Maze saw the police, he “began walking away from” the car. The officers approached him and asked if he’d done business at the store, Maze stated he had not. When Officer Gootjes stepped out of the car, “Maze took off running, ignoring the officer’s command to stop.” He “held the waistband of his pants with his right hand” as he ran. “Officer Gootjes was concerned by this action because he thought that Maze might have a gun.” He was unable to keep Maze in sight “at every moment of the chase” - two blocks - but he “remained about 15 to 20 feet behind Maze at all times.” The officer saw a “clear plastic bag fall to the ground at Maze’s feet” and made a “mental note of where the bag landed” although he did not stop. The other officer remained at the car to radio dispatch and call for assistance, and then drove after Maze to try to intercept him. He was able to catch up with Maze and force him down. The two officers struggled to handcuff Maze. Officer Wojczynski retraced the chase, “backtracking the route that Maze had run.” He found the bag and confirmed that was where Gootjes has seen it fall. The bag contained five individually-wrapped crack pieces. They did not find a gun on Maze, but did find a cell phone and a “wad of cash,” \$460.

Maze was placed in another officer’s car and transported. During part of the time he was in the car, the in-car video was turned off, for about six minutes, but it was recording when Gootjes gave Maze his Miranda warnings. Maze was charged under federal law with trafficking. Prior to trial, there was a dispute about what portions of the recording should be admitted. Specifically, neither the prosecutor or defense counsel wanted the first part of the recording admitted. That “part reveals that Maze refused to make a statement to the officers about his actions that day once he was given a Miranda warning.” It also shows that Maze was uncooperative and hostile to the officers, kicking at the car’s side window and telling Officer Huffman, “Shut up, bitch.” In addition, during this exchange, “Maze demonstrated his familiarity with Officer Wojczynski by calling him Chip, the officer’s nickname in the neighborhood.” Maze, however, wanted that to be admitted. The Court agreed it was problematical but did allow the officers to be questioned about the gap in the recording.

In the portions of the recording introduced at trial, Maze told Officer Huffman that “I got somethin’ for you,” and asked the officer to come back to the neighborhood at night by himself. Officer Huffman perceived this to be a threat. Maze also indicated that “they didn’t find what I was runnin’ for” and that “there’s somethin’ better out there that I ran for.” He reiterated that they had not yet found what he dropped, “[b]ut if they find it, hey that’s what I, that’s what I’ll get charged with. That’s what I’m pleading guilty to.”

The officers testified as to his actions that day and that they knew Maze from previous contacts. There was discussion concerning the admission of the dispatch tape, which was of poor quality. Maze argued that it was fake. The prosecution verified it was authentic, but noted that it was unlikely the jury would be able to “get anything out of it.” Officer Wojczynski verified it was his transmission. The Court excluded it, however, because the little that was audible was cumulative, most was unintelligible, but noted there was no indication it wasn’t the real tape. The Court also allowed an officer to testify as an expert as to the “typical habits of a drug dealer as distinguished from those of a drug user.”

Maze was convicted and appealed.

**ISSUE:** May a judge exclude a recording of a transaction?

**HOLDING:** Yes

**DISCUSSION:** First, Maze objected to the exclusion of certain evidence. The Court admitted to being “frankly puzzled as to why Maze believes that [the] excluded evidence would have aided his defense.” The officers could

have been questioned about their relationships. The Court agreed the “danger was high that the jury would draw an unfairly prejudicial inference about Maze’s guilt based on his generally unpleasant nature and his invocation of the right to remain silent.” The Court disagreed that some of the recordings would have proved the officers lied, in fact finding that the recording supported certain points made by the officers. Finally, the Court did not abuse its discretion in excluding the largely inaudible recording. With respect to the expert testimony by the officer, Maze argued that she went outside the province of an expert and testified as to facts that were the province of only the jury to decide. However, the court did not find that her “testimony so obviously exceeded the bounds of permissible expert testimony that its admission” was error.

Maze’s conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - IMPEACHMENT

### Brooks v. Tennessee, 626 F.3d 878 (6<sup>th</sup> Cir. 2010)

**FACTS:** Brooks (and others) were involved in the 1994 murder of Wisniewski and the burning of his car in Clarksville (TN). One of the other men [Lunceford] involved eventually contacted Clarksville PD and offered information, upon a promise of immunity. Immunity was offered and he related the details of the crime. They were unable to get any physical evidence, however, so Lunceford agreed to wear a wire and ‘initiate conversation with Brooks” about the crime. Brooks supposedly confessed but the recording was inaudible. He never directly repeated the confession in subsequent discussions. Brooks became suspicious and challenged Lunceford but did not find the wire. Brooks was arrested.

At trial, Lunceford testified, as did another individual, Nelson, who had been jailed with Brooks. The prosecution, however, failed to disclose information it had on Nelson that called his credibility into question, including the fact that he suffered from a severe mental illness. Brooks was convicted, and appealed.

**ISSUE:** Is it necessary to reveal significant impeaching material against a witness?

**HOLDING:** Yes

**DISCUSSION:** Brooks argued that the prosecution did not disclose “significant impeaching materials concerning Nelson,” particularly with respect to his truthfulness in other cases.<sup>426</sup> The Court noted

The standard for Brady materiality was set forth by the Supreme Court in Kyles v. Whitley.<sup>427</sup> As the Court there held, suppressed evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” The reasonable-probability standard “does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).”

The documents revealed during post-conviction investigation revealed that Nelson suffered from a severe mental illness. The Court agreed it was a “serious professional failing” for the prosecutor not to discover and reveal this information. However, the standard in Brady required that the court “look to the undisclosed evidence as a whole to determine whether there is a reasonable probability that, had this evidence been disclosed to the defense, the result of the proceeding would have been different.” In this case, the defense did, in fact, have a wealth of impeachment material regarding Nelson and used it at trial. Although the Court affirmed the conviction, it

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<sup>426</sup> Brady

<sup>427</sup> 514 U.S. 419 (1995)

emphasized that the state's investigation was seriously flawed in that it depended, in large part, on a discredited witness.

## TRIAL PROCEDURE / EVIDENCE - CRAWFORD

### Miller v. Stovall (Warden), 608 F.3d 913 (6<sup>th</sup> Cir. 2010)

**FACTS:** Miller was married to Bruce (Miller) for several months when she began an affair with Cassaday. She "told him tall tales" about her husband, even claiming that she'd become pregnant twice by Cassady and that Miller had "forced miscarriages." On November 7, 1999, Bruce was murdered. Within a month, "Miller had stopped seeing Cassaday, rebuffed his proposals of marriage, and started dating someone else." Cassady became more and more depressed and in February, 2000, he committed suicide. Following his death, his brother found a briefcase, which he'd previously been told existed. Inside the briefcase was evidence that Cassady and Miller had planned and executed the murder. It also included a "suicide note" to his parents, explaining what had happened. Investigation recovered substantiating emails from Cassaday's computer, but did not find an electronic copy of IMs – instant messages - the hard copy of which was in the briefcase.

Miller was charged but she pointed to an alternative suspect, Bruce's business partner. She was convicted of second-degree murder and conspiracy to commit first-degree murder. Michigan affirmed the conviction. Miller filed for habeas and the District Court "conditionally granted the writ. Michigan appealed.

**ISSUE:** Is a suicide note left for police to find, that implicates another subject, testimonial?

**HOLDING:** Yes

**DISCUSSION:** The crux of the appeal in this case was the admission of the suicide note, and whether it was prohibited testimonial hearsay. The Court reviewed the Confrontation Clause of the Sixth Amendment, noting that

For over twenty years, courts analyzed confrontation challenges using Ohio v. Roberts, under which hearsay statements were admissible so long as they bore sufficient "indicia of reliability," that is, if they fell into a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."<sup>428</sup> In Crawford v. Washington, the Supreme Court revised its understanding of the confrontation right.<sup>429</sup> The Court held that if a hearsay statement is testimonial, it can be admitted against a criminal defendant only if the declarant is unavailable for trial and the defendant had a prior opportunity to cross examine the declarant. Although the Court left unanswered whether Roberts still governed nontestimonial hearsay, it later held that the Confrontation Clause did not apply at all to such statements, abrogating Roberts in full.<sup>430</sup>

At the time Crawford was decided, Miller was awaiting leave to appeal from the Michigan Supreme Court. That was subsequently denied. Although in Whorton v. Bockting,<sup>431</sup> the Court had held that Crawford was not retroactive on collateral review; however, Crawford governs here because a new rule applies to cases that are still on direct review when it is announced.

In this case, "Michigan resolved Miller's Confrontation Clause claim on the merits, but it did so under Roberts, then good law, rather than Crawford, which replaced Roberts as the governing standard while Miller's direct appeal was still pending before the Michigan Supreme Court. We must determine, then,

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<sup>428</sup> 448 U.S. 56 (1980).

<sup>429</sup> 541 U.S. 36 (2004).

<sup>430</sup> See Davis v. Washington, 547 U.S. 813 (2006).

<sup>431</sup> 549 U.S. 406 (2007).

whether to review Miller's claim under the law prevailing at the time of the state appellate decision or the law prevailing at the time Miller's conviction became final."

The Court noted that case law on the specific issue was mixed. When, as in this case, "the law changes after a state court rules on a petitioner's claim but before her conviction becomes final, it may be critical." The Court concluded that "when the governing law changes between a state court's ruling and the date on which a petitioner's conviction became final, a federal habeas court reviewing the state-court judgment must apply the law that controlled "at the time his state-court conviction became final."<sup>432</sup> The Court engaged in a lengthy procedural discussion, attempting to reconcile a number of federal cases that revolved around the issue. The court also looked at the mandates under Teague v. Lane.<sup>433</sup>

The Court concluded that "Miller's claim is governed by Crawford, not Roberts." The Court agreed that there was "no dispute that Cassaday was unavailable at trial or that Miller never had the opportunity to cross-examine him." The only issue to be determined was whether the suicide note was testimonial. The court reviewed the available case law on the issue. The magistrate judge's reasoning that it was testimonial was based upon the fact that the note was a confession and made under circumstances where an objective witness would expect to see it used at a trial. The note in question was "written by a former police officer (Cassaday), typed, signed, and placed in a sealed envelope made it formalized enough" to be considered a testimonial statement. The Court stated that "the question of how formal a confession must be to be testimonial turns on what level of formality would lead a reasonable person to expect the confession to be used in investigation or prosecution." The content and context of the note made it clear that Cassaday intended his brother to find it and deliver it to the authorities. The contents of the briefcase were clearly his attempt to make the case against Miller. The Court agreed that there were multiple scenarios that were possible, but it was clear that "any reasonable person, particularly one with Cassaday's training, ... would anticipate the prosecutorial importance of" the letter in question, as it made direct accusations against his co-conspirator."

The Court concluded it was testimonial and affirmed the conditional grant of the writ of habeas corpus.

### U.S. v. Sutton, 2010 WL 2842745 (6<sup>th</sup> Cir. 2010)

**FACTS:** Sutton and Turner were involved in an elaborate tobacco selling scheme. They were indicted, along with others, under federal law in Tennessee. Most pled guilty but Sutton stood trial. He was convicted and appealed.

**ISSUE:** Are recorded statements of a government informant always testimonial?

**HOLDING:** No

**DISCUSSION:** Among other issues, Sutton argued that his Confrontation Clause rights were violated when tape recordings, the testimony of government agents and rough notes were admitted as evidence. The tape recordings, which were captured by secret tape recordings made with the cooperation of one of the other defendants, included incriminating statements made by Sutton. Sutton argued that the statements were testimonial because the subject wearing the wire was cooperating with the government. The Court, however, has consistently rejected the contention that the presence or participation of a government informant or agent makes all recorded comments testimonial.<sup>434</sup> The Court agreed that the statements by any of the co-conspirators, other than Bowen [wearing the wire], are non-testimonial because the co-conspirators did not know they were being taped and no Crawford error arose from their admission. Furthermore, despite Sutton's arguments otherwise, because non-testimonial out-of-

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<sup>432</sup> Williams v. Taylor, 529 U.S. 362 (2000).

<sup>433</sup> 489 U.S. 288 (1989).

<sup>434</sup> U.S. v. Mooneyham, 473 F.3d 280 (6<sup>th</sup> Cir. 2007), U.S. v. Johnson, 581 F.3d 320 (6<sup>th</sup> Cir. 2009).

court statements do not implicate the Confrontation Clause, this court does not need to determine whether the statements of the co-conspirators (other than Bowen's) comport with Ohio v. Roberts<sup>435</sup> or Bruton v. U.S.<sup>436</sup>

Thus, only Bowens' statements were at issue, and the "government conceded that Ron Bowen's statements were testimonial, which was correct since Ron Bowen would have reasonably believed that his statements would be used against Sutton and other co-defendants (including Bowen himself)." The trial court had admitted his statements because they were offered to "provide context, not to establish the truth of the matter asserted." It gave a limiting instruction to the jury each time the information was admitted. The Court agreed that "no Confrontation Clause violation occurs when statements by a government informant are admitted to provide context, not to establish the truth of the matter asserted."<sup>437</sup> Without his part of the conversation the statements would have made no sense. Sutton also argued that testimony about an interview of one of the other subjects was improperly admitted. The Court agreed that "[i]t is beyond dispute that a defendant has the right to cross-examine a co-defendant when the co-defendant's testimony incriminates him, as it did here." However, Sutton never sought to cross-examine the subject.

Sutton's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - EXPERT / LAY TESTIMONY

### U.S. v. Smith / Garrett, 601 F.3d 530 (6<sup>th</sup> Cir. 2010)

**FACTS:** During testimony in Smith's and Garrett's trial for involvement in a "large drug conspiracy," officers testified as to both the facts and their expert opinions about certain evidence. Both men were convicted and appealed.

**ISSUE:** May an officer testify both as a lay witness and an expert?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed the difference between fact and opinion/expert testimony. The Court noted that "it is an error to permit a witness to testify both as a fact witness and as an expert witness" unless there is a "cautionary jury instruction regarding the [witness's] dual witness roles" or "a clear demarcation between [the witness's] fact testimony and expert opinion testimony."<sup>438</sup> The investigator testified, for example, as to the property ownership, a fact, and also about "typical money laundering practices," arguably expert testimony. The Court agreed that the jury should have been instructed as to the investigator's dual role and how to properly weigh fact and opinion testimony from the same witness. However, the Court also noted that the defense did not object to the offered instructions, either. The Court concluded that although it was error, the error was not so prejudicial as to require reversal.

The convictions for both were affirmed.

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<sup>435</sup> 448 U.S. 56 (1980).

<sup>436</sup> 391 U.S. 123 (1968).

<sup>437</sup> U.S. v. Jones, 205 F. App'x 327 (6<sup>th</sup> Cir. 2006); See generally U.S. v. Hendricks, 395 F.3d 173 (3<sup>d</sup> Cir. 2005).

<sup>438</sup> U.S. v. Lopez-Medina, 461 F.3d 724 (6<sup>th</sup> Cir. 2006).

## TRIAL PROCEDURE / EVIDENCE - FRANKS HEARING

### U.S. v. Purifoy, 2010 WL 3687036 (6<sup>th</sup> Cir. 2010)

**FACTS:** On April 24, 2008, DEA agents executed a search warrant at a condo associated with Purifoy, in Commerce Township, Michigan. Cocaine and weapons, including a “assault rifle with a one-hundred-round drum,” were found. Purifoy moved to suppress the evidence, argued that the warrant was insufficient and even recklessly false. In the warrant affidavit, Agent DeBottis detailed information he received from three CIs, to the effect that they “observed consistent, short-term vehicular activity at the condominium late at night.” He interpreted that to indicate drug trafficking. All three CIs identified Purifoy from a photo and Purifoy had been previously arrested for the offense. In another paragraph, DeBottis identified four vehicles Purifoy utilized. Finally, DeBottis detailed information that Purifoy owned the condo and one of the vehicles under an alias. (Another vehicle was owned by a “nominee.”) Finally, the affidavit detailed a search of a trash container that included plastic bags and other indicia of drug trafficking.

Purifoy was indicted and moved for suppression of the search warrant. (Although he characterized it as a Franks<sup>439</sup> hearing, the Court did not do so, and the Court indicated that it was in fact more of a pre-Franks hearing.) The court agreed that there were errors in the warrant, including a misidentification of another individual. He took a conditional guilty plea and appealed.

**ISSUE:** Does a reasonable mistake in a warrant trigger a Franks hearing?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the information, noting that “Purifoy has produced no evidence that statements in the affidavit were recklessly or knowingly false.” Although the agent was mistaken in the identification of an individual, it was a reasonable mistake. “A reasonable misidentification cannot be made ‘recklessly’ and a mistake cannot be made ‘knowingly.’” The mistakes were “of relatively little consequence to the overall portrait painted by the affidavit.” Finally, “Purifoy contends that the information provided by the confidential sources should be disregarded in this case because this information was not sufficiently corroborated by the DEA agents.” “When confronted with hearsay information from a confidential informant or an anonymous tipster, a court must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of the circumstances for evaluating the impact of that information.”<sup>440</sup> “While independent corroboration of a confidential informant’s story is not a *sine qua non* to a finding of probable cause, in the absence of any indicia of the informants’ reliability, courts insist that the affidavit contain substantial independent police corroboration.”<sup>441</sup>

The denial of the motion to suppress was affirmed.

## TRIAL PROCEDURE / EVIDENCE – CORROBORATION RULE

### U.S. v. Brown, 617 F.3d 857 (6<sup>th</sup> Cir. 2010)

**FACTS:** In April, 2006, Helms reported that a pistol and necklace had been stolen from his Cleveland, TN, home. He suspected Brown was the thief and reported this to Det. Harbison. The detective found Brown sleeping on a couch at his cousin’s home. Upon request, Brown agreed to go outside, where Helms stood waiting. The two explained that Helms just wanted his gun back and that if he handed it over, Brown could go back to what he was

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<sup>439</sup> Franks v. Delaware, *supra*.

<sup>440</sup> U.S. v. Helton, 314 F.3d 812 (6<sup>th</sup> Cir. 2003).

<sup>441</sup> U.S. v. Frazier, 423 F.3d 526 (6<sup>th</sup> Cir. 2005).

doing. Brown said he'd traded the gun for methamphetamine and that he could get it back, but would not say where it was. He was taken to the police station and given Miranda rights, which he waived. He gave a recorded confession. He reiterated that he would get the gun back. A few days later, his mother called with the same offer. The gun was never recovered.

Brown was indicted for being a Felon in Possession of a Firearm on the basis of his confession "that he had taken - and therefore possessed - Helms' gun." When reinterviewed, he changed his story, saying that the gun he had traded was not Helms' gun. He revised his story further a few minutes later, saying his friend had broken into the house and subsequently gave him the gun. He again offered to help find the gun. At trial, he recanted his confession, saying he could not remember speaking with the officers or admitting that he'd ever possessed any guns. He was convicted and moved for acquittal. Brown argued that "the only thing linking him to the crime was his uncorroborated confession", which under the Federal Rules of Evidence could not sustain his conviction. The trial court agreed and reversed his conviction; the government appealed.

**ISSUE:** Does a confession require some corroboration?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that a "dusty doctrine of criminal law—the "corroboration rule"—lies at the heart of this appeal." In Opper v. U.S., the Supreme Court adopted the English common law that "says that no one may be convicted of a crime based solely on his uncorroborated confession."<sup>442</sup> The rule requires "prosecutors to demonstrate through independent evidence that the crime occurred before they could use an accused's own statements to establish guilt."<sup>443</sup> The current version embraces a variation on the rule, requiring instead that the government show "substantial independent evidence which would tend to establish the trustworthiness of the statement." The Court also held that even a voluntary inculpatory confession might be unreliable.

The Court continued:

Developments in interrogation law provide one source of uncertainty about the modern role of the rule. Another source is the development of modern sufficiency of the evidence rules. Years after adopting the corroboration rule, the Supreme Court recognized that criminal defendants have a due process right to have their convictions supported by evidence that leaves no reasonable doubt about their guilt.<sup>444</sup>

The Court agreed, however, that there was sufficient independent evidence to corroborate Brown's confession - the items were indeed stolen. "Independent corroboration of one part of the statement may corroborate the entire statement, including the part in which Brown admits possessing a firearm." Brown offered no explanation how he could steal something yet never "possess" it.

The Court reversed Brown's acquittal and remanded the case for further proceedings.

### **Warlick v. Romanowski (Warden), 367 Fed.Appx. 634 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Warlick was charged with the murder of Fortune, in a nightclub in Detroit, after being found hiding near the scene in close proximity to the murder weapon. The next morning, after an hour of interrogation, Warlick agreed to provide a signed statement to the effect that another man, Spoon, actually shot Fortune during the course of a robbery. He stated he did not know what Spoon did with the gun or the identity of the other person. Warlick

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<sup>442</sup> 348 U.S. 84 (1954).

<sup>443</sup> Smith v. U.S., 348 U.S. 147 (1954); U.S. v. Calderon, 348 U.S. 160 (1954).

<sup>444</sup> Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970).

was charged with "felony murder" - as he admitted to being involved with the commission of a felony that resulted in the murder, even if he didn't shoot Fortune himself.<sup>445</sup> He moved for suppression of the statement but was denied. At trial, gunshot residue tests, taken during the same interrogation, were also admitted, and an expert stated that Warlick either fired a gun or was in close proximity to one when fired. A defense witness (an officer) testified that he examined a vehicle and that that witnesses had testified to someone fleeing the seen in a similar vehicle.

Warlick was convicted and appealed.

**ISSUE:** Must a defendant claiming a Brady violation indicate which evidence was potentially exculpatory and how?

**HOLDING:** Yes

**DISCUSSION:** Warlick argued that his statements were coerced. "To make this determination, this court must look at the totality of the circumstances to ascertain whether Warlick made an uncoerced choice and whether he possessed the required level of comprehension."<sup>446</sup> "Factors to consider in this analysis include "the age, education and intelligence of the suspect; whether the suspect was advised of his Miranda rights; the length of the questioning; and the use of physical punishment or the deprivation of food, sleep or other creature comforts."<sup>447</sup> The Court looked at the circumstances of the statements and the officers' testimony that Warlick was "promised that the police would mention his help to the prosecutor if he cooperated." One of the officers testified that "no threats, coercion or promises were made" otherwise. Warlick was given his rights; his demeanor and education level indicated that he could understand those rights. The Court agreed the statement was admissible.

Warlick argued that the state suppressed evidence in violation of Brady v. Maryland.<sup>448</sup> To be successful, "Warlick must demonstrate that (1) the evidence in question is favorable, (2) the State suppressed the relevant evidence, and (3) the State's actions resulted in prejudice."<sup>449</sup> Warlick contended that a "delay in turning over material encompassed by a discovery order" affected his ability to mount a defense - but he did not explain which pieces of evidence caused the problem or that that evidence was exculpatory. He also failed to note how the proceedings might have been different had the evidence been disclosed. He also argued that the late inclusion of a witness (a lab technician) on a witness list was prejudicial, since he was permitted to testify. The Court agreed that it was alright, however, because "Warlick should have reasonably anticipated that someone would present testimony about administering the gunshot residue test." He also had ample opportunity to cross-examine the witness. Finally, Warlick also claimed that it was inappropriate to admit the 911 call to the police by a witness. The witness testified, and authenticated the tape as a recording of her call. In addition, the contents were not a factor in the conviction.

Warlick's conviction was affirmed.

## EMPLOYMENT

### Kindle, Silveria and Adkins v. City of Jeffersontown, 374 Fed.Appx. 562 (6<sup>th</sup> Cir. 2010)

**FACTS:** Kindle, Silveria and Adkins (nka Handy) worked for the Jeffersontown PD. They were fired in 2007 following their making of allegations of misconduct by Lt. Col. Emington - they had circulated the report to the

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<sup>445</sup> Felony murder is the common term used to charge an individual who did not actually kill a victim, but who acted on concert with someone who did. For example, if a bank employee is murdered during the course of a bank robbery, all of the robbers may be charged with felony murder for their death.

<sup>446</sup> Moran v. Burbine, 475 U.S. 412 (1986) (quoting Fare v. Michael C., 442 U.S. 707 (1979)).

<sup>447</sup> Jackson v. McKee, 525 F.3d 430 (6<sup>th</sup> Cir. 2008) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

<sup>448</sup> 373 U.S. 83 (1963).

<sup>449</sup> Strickler v. Greene, 527 U.S. 263 (1999).

Mayor and other city officials as part of a letter to the city's ethics commission. They had previously informed the police chief that Emington had created a hostile work environment that had forced them into medical leave, but the chief denied that he could do anything about Emington's actions. While Silveria and Adkins were off, other officers also reported misconduct to the Chief, who told Foreman (the mayor) about the problem. A short time later, they reported the problem directly to Foreman and told him they were considering filing for protection under the Kentucky Whistleblower Act (KWA). Foreman asked the to hold off until after the election, a month away. The three, however, tendered the report under KRS 61.102 on October 27 - specifically alleging that Emington:

(1) violated federal and state wage and hour laws by requiring dispatchers to report for duty fifteen minutes early and not paying them overtime; (2) generated unnecessary overtime by forcing some dispatchers to work overtime so that others could attend social events with Emington; (3) violated staffing policy by leaving only one dispatcher on duty so that others could accompany Emington on Secretary's Day; (4) failed to contribute to the retirement account of a part-time employee and then reduced that employee's work schedule when she complained to the administration; (5) improperly used an online database to check on employees' controlled substance prescriptions; (6) failed to qualify with her firearm; and (7) committed miscellaneous acts of mismanagement and/or abuse of authority.

The Chief reported to the mayor that he was obligated to investigate the allegations, but the Mayor noted that the matter had been referred to the ethics commission. On Nov. 20, the three withdrew the complaint, citing retaliation, and did not appear at the ethics hearing. The complaint was dismissed with prejudice. On Nov. 28, Emington filed a complaint against the three and a hearing was ultimately scheduled. The three appeared by counsel and stated that they would be filing legal action, and as such would present no case before the council. All three were fired.

The three filed an action in state court, which was ultimately removed to federal court. The District Court dismissed the action. The three appealed.

**ISSUE:** Are statements made about a law enforcement commander's misconduct of "public concern" for purposes of the First Amendment?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the argument whether Jeffersontown, a municipality, is a political subdivision under the KWA. The "This Court acknowledges that Kentucky courts have recognized a distinction between municipalities and counties and agencies of the state for purposes of sovereign immunity." However, "whether an entity receives sovereign immunity in Kentucky does not appear to be dispositive of whether that entity is a political subdivision for purposes of the Kentucky Whistleblower Act." "Because Plaintiffs engaged in precisely the type of behavior that the Whistleblower Act is designed to protect, and the Kentucky Supreme Court indicated in Allen that the statute is enforceable against municipal corporations, Plaintiffs may proceed with their claim under the Kentucky Whistleblower Act against the City of Jeffersontown."

With respect to First Amendment claims, the Court noted that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."<sup>450</sup> A three step inquiry assists in that determination. First the Court "must determine whether the relevant speech addressed a matter of public concern." If yes, the next step is balancing "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." And finally, the Court must decide if "the employee's speech was a substantial or motivating factor in the employer's decision to

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<sup>450</sup> Pickering v. Bd. of Educ. of Township High Sch. Dist., 391 U.S. 563 (1968) (citing Garrison v. State of Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375, (1962)).

take the adverse employment action against the employee.”<sup>451</sup> On the first element, the Court agreed that the allegations against Emington were matters of public concern.<sup>452</sup> The information provided by the three was bolstered by information provided by other employees, as well. The District Court did not address the second element, so the Court elected to remand the matter back to that court for further findings necessary to decide if the speech was protected. Jeffersontown bears the burden “of proving that they had legitimate efficiency interests that outweigh Plaintiffs’ speech interests and that they would have reached the same decision even in the absence of the protected conduct.”

The District Court’s decision was vacated and the case remanded.

### **Eckerman v. Tennessee Department of Safety, 2010 WL 5140625 (6<sup>th</sup> Cir. 2010)**

**FACTS:** Eckerman, a member of the Tennessee Highway Patrol, claimed he was demoted from lieutenant to sergeant in 2006 because of his connections with the Republican Party. Following a hearing, his demotion was reversed by the civil service commission, with a finding that there was “no reasonable basis for the disciplinary action.” At the same time, he filed a federal lawsuit and the court gave summary judgment to Tennessee, finding adequate justification for the adverse employment action.

Eckerman appealed.

**ISSUE:** Is demotion an adverse employment action?

**HOLDING:** Yes

**DISCUSSION:** Eckerman claimed “he was retaliated against by defendants for exercising two constitutionally-protected rights: the right of political association and the right to file a federal lawsuit.” To establish an unconstitutional retaliation claim, plaintiff has the burden to prove: (1) that there was constitutionally-protected conduct; (2) an adverse action by defendants sufficient to deter a person of ordinary firmness from continuing to engage in that conduct; and (3) a causal connection between the first and second elements—that is, the adverse action was motivated at least in part by plaintiff’s protected conduct.”<sup>453</sup> A plaintiff successfully demonstrates a causal connection between the adverse action and the protected conduct by offering direct or circumstantial evidence indicating that the protected conduct was a substantial or motivating factor behind the adverse action against plaintiff.<sup>454</sup> If the plaintiff meets his burden of establishing retaliation, the burden shifts to defendants “to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct.” Once this shift occurs, summary judgment is warranted if, in light of the evidence viewed in the light most favorable to the plaintiff, no reasonable juror could fail to return a verdict for the defendant.<sup>455</sup>

The Court agreed that “political affiliation generally is not a constitutionally permissible ground for state employment decisions” except for certain positions,<sup>456</sup> In addition filing a lawsuit concerning discrimination, prior to the demotion, was also a protected activity. The Court agreed that a demotion, alone, was enough to constitute an adverse action.

The Court noted that although the department put forth “evidence of a legitimate, nonpolitical reason’ for the demotion, that the opinion of the administrative law judge on the issue was precedent that must be followed.

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<sup>451</sup> Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, (1977).

<sup>452</sup> See v. City of Elyria, 502 F.3d 484, (6<sup>th</sup> Cir. 2007); Graham v. City of Mentor, 118 F. App’x 27 (6<sup>th</sup> Cir. 2004); Chapel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564 (6<sup>th</sup> Cir. 1997)

<sup>453</sup> Sowards v. Loudon Cnty., 203 F.3d 426 (6<sup>th</sup> Cir. 2000); see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

<sup>454</sup> Kreuzer v. Brown, 128 F.3d 359 (6<sup>th</sup> Cir. 1997).

<sup>455</sup> Garvey v. Montgomery, 128 F. App’x 453 (6<sup>th</sup> Cir. 2005).

<sup>456</sup> Rutan v. Repub. Party of Ill., 497 U.S. 62 (1990).

The summary judgment was reversed.

## EMPLOYMENT - USERRA

### Escher v. BWXT Y-12, LCC, 2010 WL 4024951 (6<sup>th</sup> Cir. 2010)

**FACTS:** In 2005, BWXT received an anonymous complaint about Escher, an employee. The complaint indicated that Escher “was doing personal, Naval Reserve business while at BWXT.” A review of his email indicated he was doing substantial correspondence during his work day and a review of the phone system at a later date indicated he made a great number of local and long-distance calls related to the Naval Reserves as well.

Escher was placed on leave and investigated. Johnson, his supervisor, reviewed the emails and made a rough estimate of the time expended on the emails. She found it was not incidental and there was no evidence to support his assertion that he was making up the time. “Johnson, a former military officer, hesitated to fire Escher for his Naval Reserve work.” After conferring with the President and General Manager, however, she decided to fire him. Escher later complained that his military leave was being charged incorrectly. Escher filed suit alleging a violation of USERRA, state law and for retaliation of his complaints. The District Court found in favor of the employer and Escher appealed.

**ISSUE:** For USERRA, must the military service be proven to be the motivating factor in an adverse action?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the retaliation provisions of USERRA, 38 U.S.C. §4311(b). In such claims, the employee “bears the initial burden of showing, by a preponderance of the evidence, that his protected status was a motivating factor in his adverse employment action. To establish “actionable retaliation, the relevant decision maker, not merely some agent of the defendant, must possess knowledge of the plaintiff’s protected activity.”<sup>457</sup> The Court agreed that the evidence that the investigation occurred less than a month after his complaint, and the fact that some members of the company knew of the complaint did “not form a basis for an inference of discriminatory motive.” His actions “hit a threshold” that the company had already terminated one employee for doing what Escher has been doing and there was no indication that his military service was a motivating factor in terminating Escher. Despite his assertion that he had management approval for his actions, there was no indication that the management “knew the extent of Escher’s e-mail use and condoned that use.” The Court found no evidence that “his protected status was a motivating factor in the adverse employment action.” In addition, “even if he could, BWXT can show that it would have taken the adverse action anyway, for a valid reason.” The Court affirmed the dismissal of the lawsuit.

## EMPLOYMENT – FIRST AMENDMENT

### Kelly v. Warren County Board of Commissioners, 2010 WL 3724599 (6<sup>th</sup> Cir. 2010)

**FACTS:** Kelly worked as a 911 operator in the 1980s, and then moved on to be a police officer in Hamilton County, Ohio. In 1995, Sheriff Ariss (Warren County, Ohio, Sheriff’s Office) reviewed his application “to be a full-time deputy and determined that Kelly’s background left him unsuited for the job.” Following this, Kelly continued as a police officer. He clashed with his employer and filed suit against the Chief and the department in 2000 alleging that he was threatened with firing for exposing the Department’s shortcomings. He was hired by Lynchburg PD in 2001, but terminated when he “accused the police chief of destroying evidence and assaulting a juvenile.” He then moved on to CSX railroad, where he was terminated after threatening a hearing officer. He

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<sup>457</sup> Mulhall v. Ashcroft, 287 F.3d 543 (6<sup>th</sup> Cir. 2002); Fenton v. HiSAN, Inc., 174 F.3d 827 (6<sup>th</sup> Cir. 1999).

contacted Young and asked to return to work as a 911 dispatcher. He revealed two misdemeanor convictions and explained that Sheriff Ariss might object. He was conditionally hired, subject to a background check. The Board of Commissioners was contacted by several parties, including Sheriff Ariss and Prosecutor Hutzel, about the hiring. Eventually the Board rescinded the provisional employment offer.

Kelly sued the Board, Sheriff Ariss and Hutzel under 41 U.S.C. §1983, alleging that he was suffering discrimination because of protected First Amendment activities. The Board's response was that "Kelly's checkered background, not his protected speech, persuaded it of Kelly's unfitness to serve as a dispatcher." Although the Court found that Kelly's actions constituted protected conduct and that the Board perpetrated an adverse employment action when it refused to hire him, it concluded that Kelly did not present sufficient evidence to support the contention that his protected conduct motivated the Board's decision.<sup>458</sup> Ariss and Hutzel received summary judgment based upon qualified immunity, and "Kelly failed to provide sufficient evidence of retaliation to hold them liable in their official capacities." Kelly appealed.

**ISSUE:** Must the exercise of a First Amendment right be proven to be the motivating factor in a retaliation case?

**HOLDING:** Yes

**DISCUSSION:** First, "[t]o establish a prima facie case of First Amendment retaliation against the Board under 1983, Kelly must establish that: (1) he engaged in protected conduct; (2) he suffered an adverse action likely to chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) his protected conduct was a substantial or motivating factor in the adverse action."<sup>459</sup> When a potential public employee seeks to demonstrate protected conduct in the First Amendment retaliation context, he must show that the speech touched on a matter of public concern.<sup>460</sup> If Kelly makes the prima facie showing, the burden shifts to the Board.<sup>461</sup> The Court stated that the Board may defeat Kelly's claim by showing either that, under the balancing test established by Pickering v. Board of Education<sup>462</sup>, the Board's legitimate interest in regulating employee speech to maintain an efficient workplace outweighed Kelly's First Amendment rights, or that under the mixed-motive analysis established by Mt. Healthy, it would have rescinded Kelly's offer even absent his protected conduct."

Kelly failed to "establish that his protected conduct motivated the Board's decision to rescind its offer [which] dooms his retaliation claim." Instead, "direct evidence reveals that neither of Kelly's two protected activities—campaigning for Ariss's opponent and suing Duvelius—prompted the Board to rescind its offer." Kelly argued that nether employee was rehired under questionable circumstances and the Court agreed, "though disparate treatment can give rise to an inference of unlawful motives,<sup>463</sup> Kelly's attempted comparison misses the mark." The Court agreed that his checkered history "prompted the Board to believe that he could not establish the required trust with the law enforcement personnel who would rely on him for their safety."

The Court continued:

The provisional-hire policy afforded the Board a safety valve, allowing it to reject candidates whom, though recommended and conditionally hired at the urging of a supervisor, the background check disqualified. Even if the Board confirmed all previous individuals' provisional employment offers after

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<sup>458</sup> The Court stated: "Because Kelly's claim against the Board fails on the merits, we proceed as if Kelly presented sufficient evidence of a county policy or custom underlying the Board's refusal to hire him to satisfy the Monell policy or custom requirement." See Monell v. New York Dept. of Soc. Servs., 436 U.S. 658 (1978).

<sup>459</sup> Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).

<sup>460</sup> Connick v. Myers, 461 U.S. 138 (1983).

<sup>461</sup> Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

<sup>462</sup> 391 U.S. 563 (1968).

<sup>463</sup> Arnett v. Myers, 281 F.3d 552 (6th Cir. 2002).

looking into their background, its failure to do so here does not evidence a departure from normal procedure unless Kelly demonstrates that background checks of other candidates revealed similarly disconcerting information, a showing he fails to make.

The Court held the retaliation claim against the Board failed.

Further, the Court agreed that he was unable to show a valid claim against Ariss and Hutzel. "The only adverse action Kelly complains of is the Board's refusal to hire him. Ariss and Hutzel counter that "they cannot be liable for the Board's decision because the Board possessed final hiring authority." The Court looked to Fritz v. Charter Twp. of Comstock<sup>464</sup>, but noted that "even if Ariss and Hutzel expressly encouraged South to vote against Kelly's hire because of his protected conduct, and the Board did just that, Kelly fails to present evidence that either individual held sufficient influence over the Board to deter a person of ordinary firmness from exercising his free expression rights."

The Court upheld the summary judgment in favor of Ariss and Hutzel.

## FIRST AMENDMENT

### Briner v City of Ontario (OH), 370 Fed.Appx. 682 (6<sup>th</sup> Cir. 2010)

**FACTS:** The opinion provides a lengthy discussion of the facts of the case (23 pages) but in summary, the Briners claimed that the police department and the city violated their First Amendment rights and destroyed their towing business, and took out unwarranted criminal charges against them, as a result of actions taken by the police chief and others. The Briners had complained repeatedly in public concerning the police department and that resulted in a "sustained pattern of retaliation" against them. The District Court granted summary judgment to the defendants and the Briners appealed.

**ISSUE:** Does the First Amendment provide protection when a citizen publicly criticizes law enforcement?

**HOLDING:** Yes

**DISCUSSION:** First, the Court noted that the trial court had "suggested that the Briners's complaints about the police might not even constitute the type of speech that is protected by the First Amendment." The trial court did not address the holding of Houston v. Hill, however, which held that the "First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."<sup>465</sup> With respect to the retaliation allegations, the Court noted that the police refused to investigate a crime against the Briners and removed them from the tow rotation, and that they allegedly brought criminal charges because of the Briners' support of a police review commission. The Court agreed their speech, as discussed, was constitutionally protected. The injury they asserted would be of the type likely to "chill further criticism." Several items of deposition testimony supported the Briners' allegations that certain actions were taken specifically because they had been filing complaints against the department. With respect to the malicious prosecution claim, the Court noted that the Briners would be required to show that there was no probable cause to justify the arrest and prosecution. The Court looked to Ohio law, as malicious prosecution is a state claim, and noted that since the chief and other officers had agreed they were annoyed by the Briners' complaints, that a jury could conclude the "intense focus" on finding Ms. Briner guilty of a crime illustrated "a desire to find some way to punish her for her and her husband's complaints." The dismissals of misdemeanor charges that were filed resolved the prosecution in her favor, as required under Ohio law. Because there were material facts in dispute the case must go to the jury. With respect to the question as to whether posting yard signs was a form of political speech, the Briners indicated they were threatened and harassed about the signs.

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<sup>464</sup> 592 F.3d 718 (6th Cir. 2010).

<sup>465</sup> 482 U.S. 451 (1987).

"Although the Briners did not surrender and take down the signs, they were subjected to efforts at intimidation by members of the Department and have alleged that they suffered some amount of anxiety, fear, and intimidation." However, since the case was being brought as a retaliation claim, the assertion that their speech was not actually abridged was immaterial, only the fact that they were intimidated, albeit unsuccessfully, by the department's actions.

The Court reversed most of the summary judgment and returned the case for further proceedings.

## COMPUTER CRIME

### U.S. v. Warshak, 2010 WL 5071766 (6<sup>th</sup> Cir. 2010)

**FACTS:** Warshak was involved in major scam, the details of which are irrelevant to the summary. As part of the investigation, over 27,000 of his private emails were seized, using the Stored Communications Act<sup>466</sup> (SCA) which "allows the government obtain certain electronic communications without procuring a warrant" first. He was ultimately convicted and appealed.

**ISSUE:** Is there some expectation of privacy in emails?

**HOLDING:** Yes

**DISCUSSION:** Warshak argued that the disclosure violated the SCA. The Court noted that:

The compelled-disclosure provisions give different levels of privacy protection based on whether the e-mail is held with an electronic communication service or a remote computing service and based on how long the e-mail has been in electronic storage. The government may obtain the contents of e-mails that are "in electronic storage" with an electronic communication service for 180 days or less "only pursuant to a warrant." 18 U.S.C. § 2703(a). The government has three options for obtaining communications stored with a remote computing service and communications that have been in electronic storage with an electronic service provider for more than 180 days: (1) obtain a warrant; (2) use an administrative subpoena; or (3) obtain a court order under § 2703(d). § 2703(a), (b).

Warshak apparently had a number of email accounts with various ISPs. The government had made a request of NuVox Communications that they "prospectively preserve the contents of any emails to or from Warshak's email account." It did so, therefore preserving material that otherwise would not have been saved. Pursuant to the request of the government, Warshak was not notified of this. The government got a subpoena some time later to have NuVox turn over the material and did so again several months later (for the emails produced in the interim). The Court agreed that "Warshak plainly manifested an expectation that his emails would be shielded from outside scrutiny." As he notes in his brief, his "entire business and personal life was contained within the . . . emails seized." Given the often sensitive and sometimes damning substance of his emails, we think it highly unlikely that Warshak expected them to be made public, for people seldom unfurl their dirty laundry in plain view." The Court then asked "whether society is prepared to recognize that expectation as reasonable."

Further:

This question is one of grave import and enduring consequence, given the prominent role that email has assumed in modern communication.<sup>467</sup> Since the advent of email, the telephone call and the letter

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<sup>466</sup> 18 U.S.C. §2701 et seq.

<sup>467</sup> Katz, 389 U.S. 347 (1967) (suggesting that the Constitution must be read to account for "the vital role that the public telephone has come to play in private communication").

have waned in importance, and an explosion of Internet-based communication has taken place. People are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away. Lovers exchange sweet nothings, and businessmen swap ambitious plans, all with the click of a mouse button. Commerce has also taken hold in email. Online purchases are often documented in email accounts, and email is frequently used to remind patients and clients of imminent appointments. In short, “account” is an apt word for the conglomeration of stored messages that comprises an email account, as it provides an account of its owner’s life. By obtaining access to someone’s email, government agents gain the ability to peer deeply into his activities. Much hinges, therefore, on whether the government is permitted to request that a commercial ISP turn over the contents of a subscriber’s emails without triggering the machinery of the Fourth Amendment.

In confronting this question, we take note of two bedrock principles. First, the very fact that information is being passed through a communications network is a paramount Fourth Amendment consideration.<sup>468</sup> Second, the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish.<sup>469</sup>

The Court looked back to telephone conversations<sup>470</sup> and letters<sup>471</sup>, both of which are protected. The Court found that “given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection.” The Court found email to be the “technological scion of tangible mail, and it plays an indispensable part in the Information Age.” It follows that email requires “strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve.”

As such:

If we accept that an email is analogous to a letter or a phone call, it is manifest that agents of the government cannot compel a commercial ISP to turn over the contents of an email without triggering the Fourth Amendment. An ISP is the intermediary that makes email communication possible. Emails must pass through an ISP’s servers to reach their intended recipient. Thus, the ISP is the functional equivalent of a post office or a telephone company. As we have discussed above, the police may not storm the post office and intercept a letter, and they are likewise forbidden from using the phone system to make a clandestine recording of a telephone call—unless they get a warrant, that is. It only stands to reason that, if government agents compel an ISP to surrender the contents of a subscriber’s emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception.

The Court agreed that the “mere *ability* of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy.” Even though NuVox stated, in its subscriber notification, that it could and might access email if need be, under certain circumstances, that does not diminish the expectation of general privacy. NuVox served as an intermediary of the information.

The Court agreed that:

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<sup>468</sup> U. S. Dist. Court, 407 U.S. 297 (1972) (“[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.”).

<sup>469</sup> See Kyllo v. U.S., 533 U.S. 27 (2001) (noting that evolving technology must not be permitted to “erode the privacy guaranteed by the Fourth Amendment”); see also Orin S. Kerr, Applying the Fourth Amendment to the Internet: A General Approach, 62 Stan. L. Rev. 1005, 1007 (2010) (arguing that “the differences between the facts of physical space and the facts of the Internet require courts to identify new Fourth Amendment distinctions to maintain the function of Fourth Amendment rules in an online environment”).

<sup>470</sup> Katz, *supra*.

<sup>471</sup> Ex Parte Jackson, 96 U.S. 727 (1877).

... a subscriber enjoys a reasonable expectation of privacy in the contents of emails "that are stored with, or sent or received through, a commercial ISP." As such, the "government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of Warshak's emails. Moreover, to the extent that the SCA purports to permit the government to obtain such emails warrantless, the SCA is unconstitutional."

However, the Court noted that the SCA is not so "conspicuously unconstitutional as to preclude good-faith reliance." The Court found that despite some mistakes, the government agencies reasonably relied on the SCA to obtain the contents of Warshak's emails. After a lengthy discussion on the meaning of the disputed term "electronic storage," the Court agreed that good faith reliance was appropriate in this issue.

Warshak also raised a Brady claim, concerning the gargantuan amount of material provided to the defense - some 17 million documents. Despite his claim, however, that the material was disorganized and difficult to search, the Court noted that it was from the computers owned by Warshak's own company.

The Court affirmed Warshak's convictions.

### U.S. v. Humphrey, 608 F.3d 955 (6<sup>th</sup> Cir. 2010)

**FACTS:** Humphrey was charged as a result of "befriending a minor female and surreptitiously videotaping her as she engaged in sexual acts with him." He first met the girl when she was 15, when he was paying her to clean his house. He exchanged prescription medications and cigarettes for sex. A few months later, the girl told her school counselor. The case was under investigation when the girl was sent to a drug rehabilitation center, where Humphrey visited her numerous times. The police obtained a search warrant and searched his home and vehicles. They found pills and tapes that showed the girl and Humphrey having sex. The girl stated she did not know he was videotaping their sexual encounters.

Among other charges, Humphrey was indicted for production of child pornography. The prosecution moved to have Humphrey's "knowledge of the victim's age" excluded as evidence, arguing that such knowledge (scienter) is not required for conviction under 18 U.S.C. §2251. The trial court agreed. Humphrey was convicted and appealed.

**ISSUE:** Is knowledge of the victim's age required for a child pornography prosecution?

**HOLDING:** No

**DISCUSSION:** Humphrey argued that he should have been permitted to "raise a mistake-of-age defense" to the charge, and that it was "constitutionally mandated under the First Amendment." The Court found the issue to be a "matter of first impression" and looked to other jurisdictions for guidance. Only one circuit had held that a mistake-of-age defense could be raised. The Court found "the reasoning of the majority of our sister circuits to be persuasive and adopt[ed] it as [its] own." Nothing in the legislative history indicated that knowledge of a victim's age is required or available as an affirmative defense.

The Court upheld the lower court's decision to exclude his knowledge (or lack of knowledge) as to the victim's age.

Humphrey's conviction was affirmed.

**UNITED STATES SUPREME COURT OPINIONS**  
**2010-2011 TERM**

**42 U.S.C. §1983 - INJUNCTIVE RELIEF**

**Los Angeles County v. Humphries, 131 S.Ct. 447 (2010)**  
Decided November 30, 2010

**FACTS:** Craig and Wendy Humphries were reported to Los Angeles authorities for child abuse and subsequently investigated. Both were exonerated. However, under California law, their names were included in the Child Abuse Central Index, to remain for 10 years. Although a statute indicated that an unfounded report could be removed, there was no procedure to review whether a “previously filed report is unfounded, or for allowing individuals to challenge their inclusion in the Index.”

The Humphries filed suit against various parties, including the Los Angeles County Sheriff’s Office (apparently responsible in part for the index) under 42 U.S.C. §1983, seeking damages, an injunction and a “declaration that the defendants had deprived them of their constitutional rights by failing to create a procedural mechanism through which one could contest inclusion on the Index.” The trial court granted summary judgment to California, but upon appeal, the Ninth Circuit Court of Appeals disagreed, ruling that the 14<sup>th</sup> Amendment required notice and some form of hearing to give the subjects the opportunity to be removed from the Index. It also held that the Humphries were the “prevailing parties” and were thus entitled to attorney’s fees under 42 U.S.C. §1988. It partitioned the fees between the various government defendants.

Los Angeles County denied any liability and argued that “in respect to the county, the plaintiffs were not prevailing parties.” It noted that under Monell, a municipal entity could only be liable under §1983 “if a municipal ‘*policy or custom*’ caused the plaintiff to be deprived of a federal right.”<sup>472</sup> The Ninth Circuit found that it wasn’t clear on the record if the county’s failure to create its own process to allow individuals to challenge the listing was enough to trigger liability. It also found it unnecessary to review the decision, finding that Monell was not implicated when the claim is for prospective relief - the declaratory judgment.

**ISSUE:** Does Monell’s policy or custom requirement apply to claims for prospective (injunctive) relief?

**HOLDING:** Yes

**ISSUE:** In Monell, the court concluded that a “municipality could not be held liable under §1983 solely because it employed a tortfeasor.” It focused on the language in §1983 that addresses how a “person” might face liability, finding that it could not easily read the statute to allow for vicarious liability simply on the basis of an “employer-employee relationship.” The Court ruled that a “municipality could only be held liable under §1983 for its own violations of federal law” - noting that might include the unconstitutional implementation or execution of a “policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers” or “deprivations visited pursuant to government ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.” Monell, in other words, did permit a municipality to be held liable “when execution of a government’s *policy or custom* ... inflicts the injury.”

The Court found nothing in §1983 that would suggest that the “causation requirement contained in the statute should change with the form of relief sought.” In fact, Monell specifically states that “local governing bodies” can be sued for “monetary, *declaratory, or injunctive relief*” when appropriate. The Court found that to hold otherwise “would undermine Monell’s logic.”

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<sup>472</sup> Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

The Court concluded that "Monell's 'policy or custom' requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective." It reversed the Ninth Circuit's decision and remanded the case for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-350.pdf>

## TRIAL PROCEDURE / EVIDENCE - EXPERT TESTIMONY

Harrington (Warden) v. Richter, 131 S.Ct. 770 (2011)

Decided January 19, 2011

**FACTS:** Richter was charged in California for Johnson's murder, as well as burglary, attempted murder and robbery. In opening statements, the defense attorney "stressed deficiencies in the investigation, including the absence of forensic support for the prosecution's version of events." As a result, the "prosecution took steps to adjust to the counterattack now disclosed" by having a detective testify as "an expert in blood pattern evidence." A serologist also testified about the source of a particular blood pool. Defense counsel cross-examined the witnesses, making several points but did not introduce any forensic evidence on its own.

Richter was convicted. His conviction was affirmed through the state court system and he then took a federal habeas petition. Specific to this summary, he argued that "his counsel was deficient for failing to present expert testimony" on the blood forensics. The District Court denied his petition but the Ninth Circuit Court of Appeals reversed that decision and granted it, finding that his trial counsel was deficient. The Government petitioned the U.S. Supreme Court, which granted certiorari.

**ISSUE:** Is the failure to present certain forensic evidence of ineffective assistance of counsel?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court reviewed the standard for an ineffective assistance of counsel claim under Strickland v. Washington.<sup>473</sup> To be sufficiently deficient, the attorney's representation "must have fallen 'below an objective standard of reasonableness" - but there is also a strong presumption that the counsel was adequate. "The question is whether counsel made errors so fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." The standard is whether "but for the counsel's unprofessional errors, the results of the proceeding would have been different." The standard was not "whether it deviated from best practices or most common custom."

The Court concluded that "a competent attorney could elect a strategy that did not require using blood evidence experts" since "counsel is entitled to balance limited resources in accord with effective trial tactics and strategies." The Court noted that "it was far from evident at the time of trial that the blood source was central to Richter's case." Although their strategy did not work out as hoped, it was not an unreasonable or unprofessional strategy, viewed objectively.

The decision of the Ninth Circuit Court of Appeals was reversed.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-587.pdf>

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<sup>473</sup> 466 U.S. 668 (1984).

## EMPLOYMENT - BACKGROUND CHECK

NASA v. Nelson, 131 S.Ct. 746 (2011)

Decided January 19, 2011

**FACTS:** The petitioners (28) are all employees of the California Institute of Technology (Cal Tech) but working under contract for the Jet Propulsion Laboratory (owned by NASA). Many had worked for JPL for years and had undergone the customary employee background check through the university when hired, but as a result of changes in federal law (HSPD-12) were required in 2004 to undergo the same background check as federal employees in equivalent level positions. (The requirement was made part of the contract between NASA and Cal Tech.) Shortly before the deadline to have the employee paperwork submitted, the petitioners filed suit. They focused on two parts of the questionnaire, a group of questions which asks the employee about use of illegal drugs and requires disclosure of drug treatment or counseling and another section, which is sent to references, asking open-ended question about the employee's suitability for the position.

The District Court refused to enter an injunction stopping the use of the questions, but the Ninth Circuit Court of Appeals reversed that decision, finding both to be "not narrowly tailored to meet the Government's interests in verifying contractors' identities and ensuring JPL's security." NASA petitioned the U.S. Supreme Court for review and it granted certiorari.

**ISSUE:** Are questions concerning illegal drug use and open-ended questions concerning suitability valid on employment background checks?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to earlier claims concerning violations of "informational privacy." In Whalen v. Roe<sup>474</sup>, the Court had noted that the disclosure of "private information" to the government "was an 'unpleasant invasion of privacy'" but pointed out that the statute did carry with it some security provisions to protect against release of the information to uninvolved parties. The Court stated that when the government asks such questions, it does so as an employer, and that earlier cases had recognized that in that capacity, the government "has a much freer hand than it does when it brings its sovereign power to bear on citizens at large." The Court did not find their attempt to make their status as contractors, rather than employees, persuasive, as there were no practical differences between their duties and those of actual federal employees and that they had the same access to NASA facilities.

The Court found that the challenged portions of the two questionnaires to be "reasonable, employment-related inquiries that further the Government's interests in managing its internal operations." The questions about drug use were a useful way to determine if the employees are "reliable, law-abiding persons" who will properly discharge their duties. The question about treatment was a way to separate out those users who are "taking steps to address and overcome their problems" - and the process specifically protects the applicants from being reported to criminal authorities providing they answer truthfully. With respect to the open-ended question, the Court found it to be "reasonably aimed at identifying capable employees who will faithfully conduct the Government's business." The use of such questions was, it noted, pervasive in both the public and private sectors.

The Court concluded that the collection of the data, along with the protections in the process, made the process valid and that the "Government's inquiries do not violate a constitutional right to informational privacy."

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-530.pdf>

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<sup>474</sup> 429 U.S. 589 (1977).

## EMPLOYMENT - RETALIATION

Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011)

Decided January 24, 2011

**FACTS:** Thompson and his fiancée, Regalado, worked for North American Stainless (NAS) in Kentucky. In 2003, Regalado filed against NAS on a claim of sex discrimination, through the EEOC. Three weeks later, NAS fired Thompson. He filed through the EEOC and eventually sued the NAS, claiming that he was fired in retaliation for Regalado's charge. The District Court granted summary judgment to NAS, finding that Title VII of the Civil Rights Act of 1964 does not allow for third-party retaliation claims. The Sixth Circuit Court of Appeals ultimately affirmed that decision. Thompson appealed.

**ISSUE:** May a third party have protection against retaliation in a Title VII case?

**HOLDING:** Yes

**DISCUSSION:** The Court found "little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII."<sup>475</sup> The Court had construed the antiretaliation provision "to cover a broad range of employer conduct." The statute prohibits an employer from any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court found the possible firing of a fiancé to qualify as such.

The Court declined to "identify a fixed class of relationships for which third-party reprisals are unlawful." The Court anticipated that close family members would likely always meet the standard, and that "a milder reprisal on a mere acquaintance will almost never do so, but beyond that [it] was reluctant to generalize."

The Court then looked to whether Thompson was entitled to sue NAS, as NAS argued he lacked standing to do so. The Court applied to "zone of interests" tests which it crafted in Lujan v. National Wildlife Federation.<sup>476</sup> This test permitted suit for a plaintiff with an interest "arguably [sought] to be protected by the statutes," but excluded those "who might technically be injured ... but whose interests are unrelated to the statutory prohibitions in Title VII." The Court found that Thompson was not an "accidental victim" or "collateral damage" in the case, but "to the contrary, injuring him was the employer's intended means of harming Regalado."

The decision of the Sixth Circuit Court of Appeals was reversed and the case remanded for further proceedings.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-291.pdf>

## 42 U.S.C. §1983 - QUALIFIED IMMUNITY

Ortiz v. Jordan, 131 S.Ct. 864 (2011)

Decided January 24, 2011

**FACTS:** Jordan (a case manager) and Bright (a prison investigator), both at the Ohio Reformatory for Women, were sued by Ortiz, an inmate, under 42 U.S.C. §1983. She alleged violations of her rights under the Eighth and Fourteenth Amendments. She alleged that she was sexually assaulted twice by a corrections officer and that Jordan and Bright failed to respond and protect her. (She also alleged that she suffered retaliation by prison officials

<sup>475</sup> Burlington N. & S.F.R. Co. v. White, 548 U.S. 53 (2006).

<sup>476</sup> 497 U.S. 871 (1990).

for her reporting of the incidents.) Bright and Jordan requested qualified immunity and summary judgment. This defense shields public officials if their conduct “d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>477</sup> The Court, finding that material facts were in dispute, denied the motion. The case went to trial and the jury found in favor of Ortiz against both defendants. Upon appeal, however, the Sixth Circuit Court of Appeals overturned the judgment, choosing to review the denial of the motion of summary judgment and finding that the motion should have been granted.

Ortiz appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May a party appeal an order denying summary judgment (under qualified immunity) after a full trial on the merits?

**HOLDING:** No

**DISCUSSION:** The Court agreed to review the case “to decide a threshold question on which the Circuits are split....” The Court noted that “once a case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.” The defense, of course, does not actually vanish, but “must be evaluated in light of the character and quality of the evidence received in court.” Although normally a summary judgment denial is nonappealable, when pleaded under qualified immunity the Court recognizes an exception, because qualified immunity “finally and conclusively [disposes of] the defendant’s claim of right not to stand trial.”<sup>478</sup> In Johnson v. Jones, the court had held that “immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a “purely legal issue,” illustratively, the determination of “what law was ‘clearly established’” at the time the defendant acted.”<sup>479</sup> However, they did not seek an immediate appeal when it was denied, nor did they move to overturn the verdict under a different procedural vehicle, Rule 50(b).

The decision of the Sixth Circuit was reversed and the case remanded.

The Court further noted that Jordan and Bright’s appeal was fatally flawed because they failed to renew their motion for judgment as a matter of law.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-737.pdf>

## TRIAL PROCEDURE / EVIDENCE - CRAWFORD

Michigan v. Bryant, 131 S.Ct. 1143 (2011)  
Decided February 28, 2011

**FACTS:** On April 29, 2001, at about 3:25 a.m., Detroit (MI) officers responded to a call that a man had been shot. They found Covington, “lying on the ground next to his car in a gas station parking lot.” He had a serious gunshot wound to his abdomen, “appeared to be in great pain” and he “spoke with difficulty.” Officers questioned him about what had occurred and he stated that “Rick” [Bryant] had shot him about a half hour earlier. EMS arrived. Covington was transported to the hospital but subsequently died. The officers went to Bryant’s house, where the shooting had allegedly occurred. They did not find Bryant but “did find blood and a bullet on the back porch and an apparent bullet hole in the back door.” They also found Covington’s wallet nearby.

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<sup>477</sup> Harlow v. Fitzgerald, 457 U. S. 800 (1982).

<sup>478</sup> Mitchell v. Forsyth, 472 U. S. 511 (1985).

<sup>479</sup> 515 U.S. 304 (1995).

Bryant was arrested and tried. At the trial, officers testified as to what Covington had told them (that Bryant shot him) prior to his death. Bryant was convicted of second-degree murder and related charges. He appealed through the Michigan state court system. The case was remanded back for reconsideration following the case of U.S. v. Davis, but ultimately, the conviction was affirmed. The Michigan Court of Appeals concluded that the “statements were properly admitted because they were not testimonial.” The Michigan Supreme Court, however, reversed his conviction, holding that it was clear that “the ‘primary purpose’ of the questioning was to establish the facts of an event that had *already* occurred; the ‘primary purpose’ was not to enable police assistance to meet an ongoing emergency.”<sup>480</sup> (The prosecution argued for their admission, initially, as an excited utterance, as this case predated the decision in Crawford v. Washington.<sup>481</sup>)

Michigan requested certiorari, which was granted by the U.S. Supreme Court.

**ISSUE:** Is a statement by a wounded citizen concerning the identity of the perpetrator and circumstances of the shooting testimonial?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the history of the Confrontation Clause and how it led up to the reversal of Ohio v. Roberts<sup>482</sup> by Crawford v. Washington. Davis and Hammon took further steps to “determine more precisely which police interrogations produce testimony.” Davis made it clear that not all those questioned by the police are witnesses and not all “interrogations by law enforcement officers,” are subject to the Confrontation Clause.” In those cases, they reviewed the meaning of the term testimonial and the “concept of an ongoing emergency.” The Court noted that the standard rules of hearsay, under the state and federal rules of evidence, to determine if a statement was reliable, “will be relevant.” Unlike responses to domestic violence situations, this case required the court to “confront for the first time - when a potential threat extended beyond the initial victim to “the responding police and the public at large.”

The Court continued: “An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The Court agreed that the “existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than “prov[ing] past events potentially relevant to later criminal prosecution.” The Court equated the logic to that “justifying the excited utterance exception in hearsay law.” The Court continued, noting that “statements “relating to startling event or condition made while the declarant was under the stress of excitement caused by the event or condition are considered reliable because the declarant, in the exciting, presumably cannot form a falsehood.”<sup>483</sup> The Court concluded that Michigan “employed an unduly narrow understanding of ‘ongoing emergency’ that Davis does not require.” The Court disagreed that Davis “defined the outer bounds” of the phrase, and that the Michigan courts “failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry.” Davis and Hammon, both domestic violence cases, “have a narrower zone of potential victims than cases involving threats to public safety.” Further, “an assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.” In addition, the duration and scope of an emergency may depend in part on the type of weapon employed.” In this case, the serious injuries incurred by the victim provided “important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.”

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<sup>480</sup> Davis v. Washington, Hammon v. Indiana, 547 U.S. 813 (2006).

<sup>481</sup> 541 U. S. 36, (2004).

<sup>482</sup> 448 U.S. 56 (1965).

<sup>483</sup> Idaho v. Wright, 497 U. S. 805 (1990).

The Court also noted that an interrogation to determine the need for emergency aid can “evolve into testimonial statements.” It is the responsibility of the trial court to determine when that occurs and prevent the testimonial statements from being admitted. The Court noted that “whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.” The formality or informality of the encounter is also a factor, but again, not a definitive one. In this case, the questioning “occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.” The Court stated that “Davis requires a combined inquiry that accounts for both the declarant and the interrogator.”<sup>11</sup> In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.”

The Court continued:

The combined approach also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession.

Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim’s injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.<sup>12</sup> Taking into account a victim’s injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim’s physical state. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

The Court then looked to the facts of the case at bar. Because the case was tried prior to the Crawford decision, the record, as developed, did not necessarily answer certain questions. However, the Court noted that the officers agreed on the information they learned, but “not on the order in which they learned it or on whether Covington’s statements were in response to general or detailed questions.” “The police did not know, and Covington did not tell them, whether the threat was limited to him.” The Court agreed that “an emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim.” The Court noted that neither Covington nor the police knew where Bryant was, and stated that “at bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington. The Court found it unnecessary to determine when the emergency ended because all of Covington’s statements were made at the outset of the interaction. “the ultimate inquiry is whether the “primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.” The questions asked were what were needed to assess what was going on to the address the potential risk. - in other words, “they solicited the information necessary to enable them ‘to meet an ongoing emergency.’”

The Court concluded that Covington’s statements were not testimonial hearsay and that the Confrontation Clause did not bar their admission at trial. The Michigan Supreme Court decision was vacated and the matter remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-150.pdf>

## FIRST AMENDMENT

Snyder v. Phelps, 131 S.Ct.1207 (2011)

Decided March 2, 2011

**FACTS:** On March 10, 2006, members of the Westboro Baptist Church (WBC) picketed near the site of the funeral of Lance Corporal Matthew Snyder, in Westminster Maryland. They had “notified the authorities in advance”... and “complied with police instructions in staging their demonstration.” “The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence.” They did not enter the church property nor did they go to the cemetery. “They did not yell or use profanity, and there was no violence associated with the picketing,” although the signs contained a number of offensive statements.<sup>484</sup> Although the funeral procession passed close by (within 200-300 feet), Snyder’s father (the plaintiff) testified that he could see only the tops of the sign and did not know “what was written on the signs until later that night, while watching a news broadcast covering the event.”

Snyder sued Phelps (the pastor of the WBC), the WBC and Phelps’ daughters in federal court (under diversity jurisdiction) on Maryland state tort law claims, including defamation and intentional infliction of emotional distress. WBC requested summary judgment, arguing that the “church’s speech was insulated from liability by the First Amendment.” The WBC was granted summary judgment on two of the five claims but the case went to trial on the remaining three claims. A jury found in favor of Snyder and returned a judgment totaling \$10.9 million in damages. Phelps and the WBC appealed and the District Court reduced the judgment to \$2.1 million, but left the verdict intact otherwise.

Phelps / WBC appealed to the Fourth Circuit, continuing to argue that the First Amendment insulated them from judgment. The Fourth Circuit concluded that the WBC’s “statements were entitled to First Amendment protection, because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.” Snyder requested certiorari from the U.S. Supreme Court, which was granted.

**ISSUE:** Does the First Amendment allow peaceful picketing at a funeral, when the picketing does not directly interfere with the funeral?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that “whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.”<sup>485</sup> The First Amendment is based upon the “principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>486</sup> Speech that concerns “public affairs is more than self-expression; it is the essence of self-government.”<sup>487</sup> It “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>488</sup> That protection does not extend to “matters of purely private significance.”<sup>489</sup> Although the “boundaries of the public concern test are not well defined”<sup>490</sup> in recent years, the Court has “articulated some guiding principles, principles that accord broad protection to speech to ensure that

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<sup>484</sup> They stated, for instance: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.”

<sup>485</sup> Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U. S. 749 (1985) (quoting First Nat. Bank of Boston v. Bellotti, 435 U. S. 765 (1978)).

<sup>486</sup> New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

<sup>487</sup> Garrison v. Louisiana, 379 U. S. 64 (1964).

<sup>488</sup> Connick v. Myers, 461 U. S. 138 (1983).

<sup>489</sup> Hustler Magazine, Inc. v. Falwell, 485 U. S. 46 (1988).

<sup>490</sup> San Diego v. Roe, 543 U. S. 77 (2004).

courts themselves do not become inadvertent censors.” Speech is public when it can be “fairly considered as relating to any matter of political, social, or other concern to the community.”<sup>491</sup> The “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”<sup>492</sup> The Court discussed the issue at length, noting that the decision as to “whether speech is of public or private concern” requires it look at the “content, form and context” of the speech. Under a First Amendment analysis, the Court is obliged to “make an independent examination of the whole record” in order to make sure “the judgment does not constitute a forbidden intrusion on the field of free expression.”<sup>493</sup>

The Court agreed that the “content” of the signs related to “broad issues of interest to society at large” although it agreed that the “messages may fall short of refined social or political commentary.” With respect to the context, at a funeral, the court agreed that the location “cannot by itself transform the nature” of the WBC’s speech, as the signs were “displayed on public land next to a public street.” The Court found nothing to lead it to believe that WBC was contriving to mount a personal attack on the Snyders as it had been engaging in similar actions long before “it became aware of Matthew Snyder,” and appeared to represent the WBC’s honest beliefs. Despite the hurtful result, the WBC “conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street.” The Court noted that such places are the “archetype of a traditional public forum” - for “[t]ime out of mind” as places “used for public assembly and debate.”<sup>494</sup> However, the Court agreed that the choice of where and when such speech is allowed is “subject to reasonable time, place, or manner restrictions.”<sup>495</sup> Prior cases had “identified a few limited situations where the location of targeted picketing can be regulated.”

The Court continued - “simply put, the church members had the right to be where they were.” They were in compliance with the regulations set by local authorities. Any “distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.” The issue arose because of the content of the signs and the Court noted that the “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>496</sup> “Indeed,” the Court stated, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>497</sup>

The Court quickly dismissed the argument that the funeral made Snyder a member of a captive audience, as it had applied that concept “only sparingly to protect unwilling listeners from protected speech.”

The Court concluded that:

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that

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<sup>491</sup> Connick, supra.

<sup>492</sup> Rankin v. McPherson, 483 U.S. 378 (1987)

<sup>493</sup> Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485 (1984)

<sup>494</sup> Frisby v. Schultz, 487 U. S. 474 (1988).

<sup>495</sup> Clark v. Community for Creative Non-Violence, 468 U. S. 288 (1984).

<sup>496</sup> Texas v. Johnson, 491 U. S. 397 (1989).

<sup>497</sup> Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557 (1995)

we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The decision of the U.S. Court of Appeals for the Fourth Circuit was affirmed, dismissing the action.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-751.pdf>

*NOTE: Unlike many of the situations concerning the Westboro Baptist Church around the country, in this case the WBC protestors were silent and stayed on public land. This decision does not necessarily apply to situations where the protestors might be more vocal and disturb a funeral service and might attempt, for example, to enter a cemetery.*

## TRIAL PROCEDURE / EVIDENCE - BRADY

Connick v. Thompson, 131 S.Ct. 1350 (2011)

Decided March 28, 2011

**FACTS:** Thompson was tried for attempted armed robbery and later for murder, and ultimately convicted of both. He spent 18 years in a Louisiana prison and 14 on death row for the crimes. A month before his execution, it was discovered that in the initial armed robbery trial, prosecutors had evidence that was clearly exculpatory but failed to turn it over to the defense as required under Brady v. Maryland.<sup>498</sup> (As part of the investigation, technicians had collected a section of the victim's clothing that was stained with the robber's blood, which was shown to be Type B. At the time the prosecutors believed they did not have to turn it over because they did not know Thompson's blood type, which was type O.) When this was discovered, the prosecution agreed to vacate the conviction. Upon retrial, Thompson was acquitted.

Thompson then filed suit against the District Attorney, Connick, as well as the District Attorney's Office and other parties, "alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed." He argued that their violation to disclose the evidence under Brady was a cause of action under 42 U.S.C. §1983, was caused by an "unconstitutional policy" of the office and that Connick showed "deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations."

Even prior to trial, "Connick conceded that the failure to produce the crime lab report constituted a Brady violation," leaving the only issue to be "whether the nondisclosure was caused by either a policy, practice or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors." No prosecutor could recall "any specific training session regarding Brady" before the date of the case, but it was not disputed that all the prosecutors were familiar with its general requirements. When in fact the crime lab report was discovered, having not been disclosed, there was specific disagreement in the office as to whether it should be disclosed.

The jury found no unconstitutional policy but did find a failure to train. It awarded Thompson 1.4 million dollars, plus attorney's fees. Connick appealed, arguing that there had been no pattern of similar violations that would put him on notice of the need for such training. The District Court had found that a "pattern of violations is not necessary to prove deliberate indifference when the need for training is 'so obvious.'" The Court continued, noting that the DA "knew to a moral certainty" that prosecutors would have Brady evidence in their possession and that it was "not always obvious what Brady requires, and that withholding Brady material will virtually always lead to a substantial violation of constitutional rights." The Fifth Circuit Court of Appeals affirmed the decision, holding that Thompson did not need to prove a pattern of violations to be successful. The decision noted that "attorneys, often fresh out of law school, would undoubtedly be required to confront Brady issues ...." Connick petitioned the U.S. Supreme Court for review and it granted certiorari.

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<sup>498</sup> 373 U.S. 83 (1963).

**ISSUE:** Does imposing failure-to-train liability on a district attorney's office for a single Brady violation contravene the rigorous culpability and causation standards of Canton and Bryan County<sup>499</sup>?

**HOLDING:** Yes

**DISCUSSION:** Under the failure to train theory, Thompson “bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their Brady disclosure obligation, with respect to evidence of this type and (2) that the lack of training actually caused the Brady violation in this case.” The Court noted that a plaintiff who seeks liability on a municipal government must prove that an official municipal policy caused the injury. Such policy is created by “decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” In some cases, the decision not to “train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of §1983.” However, it “must amount to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’” Deliberate indifference is a “stringent standard of fault, requiring proof that the government disregarded an obvious need that carried with it an obvious consequence. It must become, in effect, the “functional equivalent of a decision by the city itself to violate the Constitution.”

A pattern of similar violations is “ordinarily necessary” to prove failure to train.<sup>500</sup> Thompson had shown that in the years prior to his conviction, the office had cases overturned four times for Brady violations. However, the Court noted that none of the cases had a fact pattern similar to that at bar, and did not deal with physical or scientific evidence. Thompson, however, was not relying on that, but instead on the “single-incident” liability hypothesized in Canton v. Harris.<sup>501</sup> Although the Canton Court did not find liability in its case, it “left open the possibility” that “in a narrow range of circumstances,” a single incident might prove actionable. The Court, however, found that “failure to train prosecutors in their Brady obligations does not fall within the narrow range of Canton's hypothesized single-incident liability.” Rejecting comparisons with the police action in Canton, the Court noted that “attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.” Unlike law enforcement officers who must go through training, usually after the fact, to learn their responsibilities, an attorney hired as a prosecutor has already received years of training, passed a licensing exam, and in most states, must continue to obtain training as well. Prosecutors also train on the job, in the Orleans Parish District Attorney's Office new prosecutors were paired with and mentored by more experience prosecutors. As such, the court found that “formal in-house training about how to obey the law” was not necessary, noting that “prosecutors are not only equipped with but are also ethically bound to know what Brady entails and to perform legal research when they are uncertain.” Absent a specific reason to suspect a deficiency, Connick was entitled to rely on the attorneys' legal training and ethical obligations to prevent violations. The Court acknowledged that a failure to train on a “nuance” of Brady law did not equate to a total absence of training on the issue. The Court did not “assume that prosecutors will always make correct Brady decisions or that guidance regarding specific Brady questions would not assist prosecutors.” Simply “showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.”

The Court concluded that “the role of a prosecutor is to see that justice is done.” The Court agreed “by their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility.” However, the issue was not that an error was made but whether Connick “was deliberately indifferent to the need to train the attorneys under his authority.” The Court agreed that he was not, and the verdict was reversed.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-571.pdf>

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<sup>499</sup> Board of Comm'rs of Bryan Cty. v. Brown, 520 U. S. 397 (1997).

<sup>500</sup> Id.

<sup>501</sup> 489 U. S. 378 (1989).

## SEARCH & SEIZURE - EXIGENT CIRCUMSTANCES

Kentucky v. King, 131 S.Ct. 1849 (2011)

Decided May 16, 2011

**FACTS:** On October 13, 2005, Lexington PD officers set up a controlled buy of crack cocaine outside an apartment building. Officer Gibbons watched the transaction from a nearby unmarked car and radioed uniformed officers to detain the suspect. He described the suspect as “moving quickly toward the breezeway of an apartment, and he urged them to ‘hurry up and get there’ before the suspect entered an apartment.”

The officers proceeded to the area and ran into the breezeway. As they entered they heard a door close and “detected a very strong odor of burnt marijuana.” At the end of the breezeway corridor, the officers found two apartment doors and they did not know which one the suspect had entered. (In fact, Officer Gibbons had radioed that the suspect was entering the apartment on the right, but the officers were already outside their cars and did not hear the transmission.) The marijuana odor appeared to be coming from the apartment on the left, so they banged on the door loudly and announced “police.” As soon as they started banging, they heard people moving around and thought that other things were being moved as well. They believed drug-related evidence “was about to be destroyed.” They announced that they “were going to make entry inside the apartment.” Officer Cobb kicked in the door and the officers found King, King’s girlfriend and a guest, all smoking marijuana. (The girlfriend was the lessor, but King essentially lived there with her and their child and Kentucky conceded that he had standing to challenge the search.) The officers did a protective sweep and saw marijuana and powder cocaine in plain view. During a subsequent search, they found “crack cocaine, cash, and drug paraphernalia.” Eventually, they discovered the original suspect in the apartment on the right.

King was charged with trafficking in marijuana. He moved for suppression, but the trial court denied the motion, finding the officers’ actions to be appropriate. The court noted that “exigent circumstances justified the warrantless entry,” because the occupants did not respond to the knocking. The trial court also addressed what the officer heard, and his reasonable belief that evidence was being destroyed. King took a conditional guilty plea and appealed. The Kentucky Court of Appeals affirmed his conviction but the Kentucky Supreme Court reversed, finding that there was a question as to whether simply hearing people moving inside was sufficient to presume that evidence was being destroyed. The Court found no evidence of bad faith, but held that “exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence.”

The Commonwealth appealed<sup>502</sup> and the U.S. Supreme Court granted certiorari.

**ISSUE:** Does lawful police action impermissibly “create” exigent circumstances which precludes warrantless entry?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that the Fourth Amendment “expressly imposes two requirements.” The first is that all searches and seizures must be reasonable. The second is that warrants may only issue when “probable cause is properly established and the scope of the authority search is set out with particularity.”<sup>503</sup>

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<sup>502</sup> King argued that the case was moot, and that the Supreme Court should not address it, because Kentucky had actually already dismissed the charges against him. However, the Court noted that a reversal of the Kentucky Supreme Court’s decision “would reinstate the judgment of conviction and the sentence entered” by the trial court.

<sup>503</sup> Payton v. New York, 445 U.S. 573 (1980).

The Court had, however, also recognized that the presumption for a search warrant “may be overcome in some circumstances” and that the “warrant requirement is subject to certain reasonable exceptions.”<sup>504</sup> The exigent circumstances exception has been “well-recognized” when the “exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”<sup>505</sup> The Court detailed the various situations that justified such searches and noted that “what is relevant here – the need ‘to prevent the imminent destruction of evidence’ has long been recognized as a sufficient justification for a warrantless search.”

However, over the years, “lower courts have developed an exception to the exigent circumstances rule, the so-called ‘police-created exigency’ doctrine.” In such situations, “police may not rely on the need to prevent destruction of evidence when that exigency was ‘created’ or ‘manufactured’ by the conduct of the police.” Using that exception, however, requires “something more than mere proof that fear of detection by the police caused the destruction of evidence.” The Court agreed that “in some sense the police always create the exigent circumstances.” In “the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement.” In most cases, the evidence in question is drugs, since drugs “may be easily destroyed by flushing them down a toilet or rinsing them down a drain.” The lower courts that have addressed the issue have “not agreed on the test to be applied” in such cases, however, and noted that at least five different “tests” were in use around the country.

The Court found that the answer was “whether the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.” The Court continued:

Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

The Court detailed similar cases, noting that in Horton v. California, it has stated that the “essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”<sup>506</sup> The Court specifically rejected the “bad faith” test adopted by several courts, including Kentucky, finding it “fundamentally inconsistent with [prior] Fourth Amendment jurisprudence.” The Court had rejected a subjective approach, requiring instead only an objective analysis, because legal tests concerning reasonableness are “generally objective.” The Court also rejected the “reasonable foreseeability” test, also used by Kentucky and other jurisdictions, which held that “police may not rely on an exigency if ‘it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.’” The Court found that test “would ... introduce an unacceptable degree of unpredictability.” The Court noted that “whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.” The Court found that approach to be simply unfeasible and “would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time.”

The Court also rejected the calculus that included a decision as to whether the officers had sufficient time to get a warrant, finding that “approach [would] unjustifiably interfere[] with legitimate law enforcement strategies.” The Court detailed a number of reasons why this approach was also inappropriate. King argued that officers “impermissibly create an exigency when they ‘engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable’” and should turn on the “officers’ tone of voice and the forcefulness of their

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<sup>504</sup> Brigham City v. Stuart, 547 U.S. 398 (2006).

<sup>505</sup> Mincey v. Arizona, 437 U.S. 385 (1978).

<sup>506</sup> 496 U.S. 128 (1990).

knocks.” The Court found that officers might “have a very good reason to announce their presence loudly and to knock on the door with some force.”<sup>507</sup> The Court noted that “officers are permitted – indeed, encouraged – to identify themselves to citizens, and ‘in many circumstances this is cause for assurance, not discomfort.’”<sup>508</sup>

The Court concluded that “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” The Court stated that “when law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.” And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupants has no obligation to open the door or to speak.”<sup>509</sup> However, “when the police knock on a door but the occupants choose not to respond or to speak, ‘the investigation will have reached a conspicuously low point,’ and the occupants ‘will have the kind of warning that even the most elaborate security system cannot provide.’” Indeed, “if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at that time.” So, an occupant who chooses “not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”

In this case, the court did not need to decide if exigent circumstances existed, since “any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency.” The Court assumed, for purposes of reaching the crux of the argument, that it did and framed the question as – “under what circumstances do police impermissibly create an exigency?”

Finally, the Court stated, “in this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment.” Officer Cobb simply banged loudly on the door and announced their presence. The evidence was contradictory that indicated that they threatened to, for example, break down the door unless it was opened. The officers did not state that they were going to come inside until the “exigency arose” – at the point that they knew that there was a strong possibility that evidence might be destroyed.

The Court held that the exigency justified the warrantless search of the apartment, reversed the decision of the Kentucky Supreme Court and remanded the case for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-1272.pdf>

## 42 U.S.C. §1983 - PROCEDURAL

Camreta v. Greene, Alford v. Greene, 131 S.Ct. 2020 (2011)

Decided May 26, 2011

**FACTS:** In February 2003, Nimrod Greene was arrested for the suspected sexual abuse of a young boy. The parents told investigators that they also believed Greene had molested his own 9-year-old daughter, S.G. This was reported to Camreta, of the Oregon Department of Human Services. Camreta and Deputy Alford (Deschutes County Sheriff’s Office) went to S.G.’s school and interviewed her. They did not have a warrant nor did they seek parental consent. She initially denied any abuse, but subsequently stated that she had, in fact, been abused. Greene was indicted and stood trial, but was not convicted.

Sarah Greene (S.G.’s mother) filed suit against Camreta and Alford on behalf of S.G., under 42 U.S.C. §1983. The District Court granted summary judgment in favor of Camreta and Alford. The 9<sup>th</sup> Circuit Court of Appeals affirmed,

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<sup>507</sup> U.S. v. Banks, 540 U.S. 31 (2003).

<sup>508</sup> U.S. v. Drayton, 536 U.S. 194 (2002).

<sup>509</sup> Florida v. Royer, 460 U.S. 491 (1983).

although it agreed that the interview violated S.G.'s right not to be seized and interrogated, absent a warrant, a court order or exigent circumstances. However, at that time, there was no clearly established law that would warn them of the illegality of their actions. The 9<sup>th</sup> Circuit explained that it chose to rule on the constitutional claim, in order to provide future guidance to those involved in child welfare cases. Camreta and Alford requested certiorari for a review of that portion of the 9<sup>th</sup> Circuit's decision. (S.G.'s mother did not appeal the issue of immunity.)

**ISSUE:** May the Court review a decision on petition of the prevailing party, when the underlying unlitigated issue (legally resolved by the decision) may have a continuing negative effect on any party of the case?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed its ability to accept a petition for certiorari under such circumstances, noting that no matter its decision, S.G.'s mother had abandoned any right to collect money from Camreta and Alford. The Court stated that to have a case remain justiciable, the party requesting the petition must show they have "suffered an injury in fact," "caused by the conduct complained of, and "have an ongoing interest in the dispute, and have a stake not only at the outset of the litigation but throughout its course."

In this case, the court agreed that the judgment, while not accompanied by any personal liability, "may have prospective effect" on Camreta and Alford, as well as any others who might take the same action, because they will now be on notice of the illegality of that action. "Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." However, in practice, the Court had generally declined to accept cases in which the prevailing party made the petition.

But the Court found such qualified immunity cases to be in a "special category" when "brought by winners." They involved "rulings that have a significant future effect on the conduct of public officials - both the prevailing parties and their co-workers - and the policies of the government units to which they belong." In addition, and perhaps more important, "they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases."

The Court had long recognized that its "regular policy of avoidance [by not ruling in matters unless forced to do so] sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." In other words, if the court does not resolve the underlying claim, the public official can "persist in the challenged practice" because the law remains not clearly established.

Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with the legal requirements. Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.<sup>510</sup>

In this case, the 9<sup>th</sup> Circuit followed the two-step process that in some cases is appropriate (although not required). In fact, it did so specifically to provide guidance to child welfare workers. Oregon responded by providing legal advice to agencies consistent with the 9<sup>th</sup> Circuit's decision, to cease interviewing children in school with a warrant or otherwise authorized method. This left the public officials in an awkward situation, following a ruling in which no opportunity was given to contest, or not do so and invite litigation. However, because S.G., who is almost 18 at this point, has moved outside the 9<sup>th</sup> Circuit's jurisdiction, the matter is moot with respect to her. The Court noted that the remedy sought, vacatur, is designed to "prevent an unreviewable decision 'from spawning any legal

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<sup>510</sup> See Pearson v. Callahan, 555 U.S. 223 (2009).

consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." Vacatur "strips the decision below of its binding effect" and "clears the part for further re litigation."<sup>511</sup>

Finally, the Court stated:

In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school. We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue, and remand for further proceedings consistent with this opinion.

The Court acknowledged, in a footnote, that this was a unique disposition to a case, but emphasized that this case had a "unique posture." The Court did not touch the qualified immunity ruling but vacated the 9<sup>th</sup> Circuit's ruling on the merits of the Fourth Amendment issue, because that part of the decision is moot, preventing the Court from ruling, but it does have prospective effects on Camreta.

FULL TEXT OF DECISION: <http://www.supremecourt.gov/opinions/10pdf/09-1454.pdf>

## TRIAL PROCEDURE / EVIDENCE - DNA TESTING

Skinner v. Switzer, 131 S.Ct. 1269 (2011)

Decided March 7, 2011

**FACTS:** Skinner was convicted in 1995, in Texas, for the murder of his girlfriend and her two sons. He did not deny being present in the house but claimed he was incapacitated on cocaine and alcohol, and that rendered him "physically unable to commit the brutal murders." He identified another possible suspect. During the investigation, a number of items were collected as evidence, some of the items implicated Skinner, but fingerprints suggested another person was present. A number of the items were left untested. Skinner was convicted and "unsuccessfully sought state and federal postconviction relief." He also attempted to get access to untested pieces of evidence. In 2001, Texas passed a law "allowing prisoners to gain postconviction DNA testing in limited circumstances;" it required the prisoner to "meet one of two threshold criteria." The prisoner could show that the testing was either "not available" or "available, but not technologically capable of providing probative results" at the time of the trial. Or, in the alternative, the prisoner could show that the material was not previously tested "through no fault" of his and that "the interests of justice" required the opportunity for testing. On motion, the court would be required to find that the prisoner "would not have been convicted if exculpatory results had been obtained through DNA testing."

Skinner filed for injunctive relief under 42 U.S.C. §1983, which was denied. The 5<sup>th</sup> Circuit Court of Appeals affirmed that decision, ruling that such an action must be brought a petition for a writ of habeas corpus and not an action under §1983. Skinner requested certiorari, which was granted.

**ISSUE:** May a prisoner use the due process clause to request testing of previously untested evidence?

**HOLDING:** Yes

**DISCUSSION:** Skinner brought his action under the 14<sup>th</sup> Amendment, arguing that the failure to release the material deprived him of his right to due process to use available state methods to challenge his conviction. The Court looked only at whether it had federal jurisdiction over Skinner's claim and if so, whether he could bring that claim under 42 U.S.C. §1983.

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<sup>511</sup> Deakins v. Monaghan, 484 U.S. 193 (1988).

The Court reviewed previous cases under both types of claim, civil rights and habeas corpus. Central to that analysis is the case of Heck v. Humphrey.<sup>512</sup> Pursuant to Heck, a case cannot be brought if any award under the decision would “necessarily imply the invalidity of” the underlying criminal conviction. In Skinner’s case, the court agreed that even if he succeeds in what he wants, DNA testing, that would not necessarily invalidate his conviction, and in fact, may simply further incriminate him. Certainly, however, his ultimate aim is to attack his conviction. Switzer (the District Attorney) argued that allowing this type of suit would result in vastly more cases, but the court found that concern unwarranted, holding that in the circuits that currently do allow such cases, that “no evidence tendered by Switzer shows any litigation flood or even rainfall.”

The decision of the 5th Circuit was reversed and the case remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-9000.pdf>

*NOTE: Although this case is primarily procedural, law enforcement agencies should realize that such cases may be revived many years after the conviction. Evidence and documentation should be retained until there is no further possibility of litigation.*

## EMPLOYMENT - USERRA

Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011)

Decided March 1, 2011

**FACTS:** Staub was an employee of Proctor Hospital until he was fired in 2004. Staub was an Army reservist, required to attend drill monthly and to train full-time for several weeks a years. Mulally, his immediate supervisor, and Korenchuk, her supervisor, “were hostile to Staub’s military obligations.” Mulally scheduled him for additional shifts without notice to force him to “pay back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.” She asked a co-worker to “help her get rid of him.” Korenchuk made derogatory comments concerning the Reserves, as, among other things, a “waste of taxpayer’s money.” He knew Mulally was “out to get” Staub.

In January, 2004, Mulally gave Staub a disciplinary warning, invoking a company rule, but it was later shown that “the company rule invoked by Mulally did not exist” and “even if it did, Staub did not violate it.” A few months later, Korenchuk accused Staub of doing something he was told not to do, and Buck, Korenchuk’s supervisor, reviewed the file and fired Staub, based upon Staub’s alleged failing to follow the corrective action outlined in the previous discipline plan. Staub challenged his firing internally, claiming that the allegations in the discipline plan were fabricated and that he did not take the actions of which he was accused. Buck did not investigate but upheld the firing.

Staub sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), “claiming that his discharge was motivated by hostility to his obligations as a military reservist.” He did not accuse Buck of hostility, but only Mulally and Korenchuk, claiming that “their actions influenced Buck’s ultimate employment decision.” At trial, a jury found in Staub’s favor, holding that his “military status was a motivating factor” in his firing.

Proctor appealed, and the 7<sup>th</sup> Circuit Court of Appeals reversed, finding this to be a cat’s paw case, and that Staub was seeking “to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision.” Since the “undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally,” the Court found in favor of Proctor. Staub requested certiorari and the U.S. Supreme Court granted review.

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<sup>512</sup> 512 U.S. 477 (1994).

**ISSUE:** May an employer be held liable when adverse decisions under USERRA are made by a supervisor without animus, if based primarily upon recommendations of supervisors found to have animus?

**HOLDING:** Yes

**DISCUSSION:** USERRA provides for extensive protection for active duty military and reservists. The Court noted that “when the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee’s membership in or obligation to a uniformed service, a motivating factor obviously exists.” However, as in this case, confusion occurs when the actual termination is done by an “official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else.”

The Court noted that “so long as the agent [the supervisor] intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA.” An “exercise of judgment by the decisionmaker does not prevent the earlier agent’s action (and hence the earlier agent’s discriminatory animus) from being the proximate cause of the harm.” Proximate cause requires only a finding of “some direct relation between the injury asserted and the injurious conduct alleged.” Simply because there was an intervening decision by another party does not “automatically render the link to the supervisor’s bias ‘remote’ or ‘purely contingent.’” The Court noted that it was “common for injuries to have multiple proximate causes”<sup>513</sup> and that an “employer’s authority to reward, punish, or dismiss is often allocated among multiple agents.”

The Court addressed the incongruity of Proctor’s position - stating that if a file is based upon recommendations based upon animus, but is reviewed by a supervisor without animus, it would effectively shield the employer from what was “*designed and intended* to produce the adverse action.” The Court noted that if after an investigation, the adverse action occurs “for reasons unrelated to the supervisor’s original biased action, ... then the employer will not be liable.” But if the biased report is a causal factor and is used without a true investigation into its underlying truth, the decision will be fatally tainted. In this case, the “biased supervisor and the ultimate decisionmaker ... acted as agents of the entity that [Staub] seeks to hold liable; each of them possessed supervisory authority delegated by their employer and exercised in the interest of their employer.” The Court concluded that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”

The decision of the 7<sup>th</sup> Circuit Court of Appeals was reversed.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-400.pdf>

## SENTENCING - ARMED CAREER CRIMINAL ACT

**Sykes v. U.S.**, 131 U.S. 2267 (2011)

Decided June 9, 2011

**FACTS:** Indiana officers attempted to make a traffic stop of Sykes, but he did not stop. “A chase ensued,” in which “Sykes wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house.” He then fled on foot and was eventually apprehended with the use of a police dog. Sykes was charged with being a felon in having a firearm since he had, on two previous occasions, used a firearm in robberies. He was also charged with a violation of Indiana’s “resisting law enforcement” law, by “vehicle flight,” a Class D felony. Sykes did not dispute that offense was a felony, but argued that “it was not violent.” As a result of this conviction, he received an enhancement on his federal sentence for possession of the

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<sup>513</sup> Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

firearm, to a minimum of 15 years, because of his third conviction for a violent felony, under the Armed Career Criminal Act.

Sykes appealed and the 7<sup>th</sup> Circuit Court of Appeals affirmed his sentence. Sykes requested certiorari, and was granted review.

**ISSUE:** May a conviction for a vehicle flight from law enforcement be considered a violent felony under federal law?

**HOLDING:** Yes

**DISCUSSION:** In such decisions, the Court looks “only to the fact of conviction and the statutory definition of the prior offense, and [does] not generally consider the particular facts disclosed by the record of conviction.” The Court looked to “whether the elements of the offense are of the type that would justify” using it to enhance the offense, “without inquiring into the specific conduct of the particular offender.”<sup>514</sup> Under 18 U.S.C. §924(e)(2)(B), an offense is a violent felony if it both has, as an element, “the use, attempted use, or threatened use of physical force against the person of another,” or it “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The Indiana offense in question does not meet the first element, nor does it meet the specific offenses named in the second element, therefore it would only apply if it fit within the “residual provision” involving a true risk of physical injury to another.

The Court noted:

When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator’s indifference to these collateral consequences has violent - even lethal - potential for others.

The Court went on to compare the risk of vehicle flight to burglary and arson, noting that about 4% of vehicle pursuits resulted in injuries to nonsuspects. Burglaries result in about 3.2% of individuals being injured, and arson in about 3.3% of nonsuspects being injured.

The Court stated:

Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more certain risk as a categorical matter than burglary. It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.

The Court noted that unlike burglaries, which is specifically named as an enhancing offense, “vehicle flights from an officer by definitional necessity occur when police are present, are flights in defiance of their instructions, and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another.”

The Court agreed that Indiana’s vehicle flight law was appropriately used as a violent felony to enhance Syke’s federal sentence.

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<sup>514</sup> James v. U.S., 550 U.S. 192 (2007).

*NOTE: Kentucky has a statute that is very similar, in effect, to the Indiana law in question - KRS 520.095, Fleeing or evading police in the first degree. Under the court's analysis, a conviction for this offense could also be applied to a federal sentence under similar circumstances. For that reason, peace officers should be cautious about allowing this charge to be dismissed or reduced in plea bargaining, as it can only be used as an enhancement if the subject is, in fact, convicted of the offense.*

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-11311.pdf>

## INTERROGATION

J.D.B v. North Carolina, 131 S.Ct. 2394, 2011  
Decided June 16, 2011

**FACTS:** J.D.B., a 13 year old, 7<sup>th</sup> grade student in Chapel Hill, North Carolina, was "removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour." This was the second time he'd been questioned with respect to two recent residential burglaries. Police also spoke to his legal guardian, his grandmother, and his aunt after the first interrogation. When they learned that one of the stolen items had been seen in J.D.B.'s possession, Investigator DiCostanzo went to the school again, talked to the school resource officer and school staff, and explained he was there to question J.D.B. He was not given Miranda warnings, given the opportunity to contact his guardian or told he was free to leave the room. After initially denying his involvement, J.D.B. asked if he would still be in trouble if he returned the stolen items. The investigator explained it would still be going to court, but that it would be helpful if he did so. He also warned J.D.B. that he would seek a secure custody order (juvenile detention) if necessary. With that prospect, J.D.B. confessed that he and a friend did the break-ins. Only then was he told that he could refuse to answer questions and that he was free to leave. He gave a statement and the location of the stolen items. At the end of the school day, the questioning ceased and he was allowed to take the school bus home.

Juvenile petitions were filed. His public defender moved for suppression, arguing that he was interrogated in a custodial setting by law enforcement without being provided Miranda warnings. The trial court determined he was not in custody and that his statements were voluntary. He was adjudicated delinquent. North Carolina's appellate courts affirmed the decision. J.D.B. requested certiorari and was granted review.

**ISSUE:** Is a child's age a factor in the custody analysis required under Miranda v. Arizona?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed the background of Miranda v. Arizona<sup>515</sup> and its progeny cases. The court emphasized, pursuant to Stansbury v. California<sup>516</sup> and Oregon v. Mathiason<sup>517</sup>, that "whether a subject is 'in custody' is an objective inquiry."

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogations and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.<sup>518</sup>

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<sup>515</sup> 384 U.S. 436 (1966).

<sup>516</sup> 511 U.S. 318 (1994).

<sup>517</sup> 429 U.S. 492 (1977).

<sup>518</sup> Thompson v. Keohane, 516 U.S. 99 (1995). Also see Yarborough v. Alvarado, 541 U.S. 652 (2004).

The test, "involves no consideration of the 'actual mindset' of the particular suspect," but does include an examination of "all the circumstances surround the interrogation."

North Carolina argued that "a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning." The Court did not agree, noting that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." The Court continued:

A child's age is far "more than a chronological fact." It is a fact that "generates common-sense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

The Court stated that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." The Court did not, however, "say that a child's age will be a determinative, or even a significant, factor in every case," particularly in cases where the juvenile is near the age of 18. The Court, however, said that "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."

The Court concluded:

To hold ... that a child's age is never relevant to whether a suspect has been taken into custody - and thus to ignore the very real differences between children and adults - would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults.

Since the trial court did not address the question of the importance of the child's age in the custody analysis, the Court reversed the North Carolina decision and remanded the case back for further proceedings.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-11121.pdf>

*NOTE: This case specifically does not address whether removing a child to another room within a school satisfies the custody prong of Miranda. Instead, it focused only on whether the age of a child was a consideration in determining the voluntariness of a statement. Law enforcement officers are strongly advised to discuss the issue with local prosecutors as to whether a child being questioned at the school would trigger Miranda.*

## VEHICLE SEARCH

Davis v. U.S., 131 S.Ct. 2419 (2011)

Decided June 16, 2011

**FACTS;** In April, 2007, Greenville, Alabama officers made a traffic stop that resulted in the arrest of the driver (Owens) for DUI and the passenger (Davis) for giving them a false name. The two were secured in separate cruisers and the officers searched the passenger compartment of the vehicle, finding a revolver in Davis's jacket pocket. As he was a convicted felon, he was indicted under federal law for its possession. He moved for suppression, although acknowledging that under New York v. Belton<sup>519</sup>, the search was permitted. (The issue was raised to preserve it on appeal.) He was ultimately convicted. However, during the pendency of his appeal,

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<sup>519</sup> 453 U.S. 454 (1981).

Arizona v. Gant<sup>520</sup> was decided. The 11th Circuit Court of Appeals agreed that under Gant, the vehicle search was a violation of Davis's constitutional rights. However, in deciding whether the violation warranted suppression, it viewed that as a separate issue "that turned on 'the potential of exclusion to deter wrongful police conduct.'"<sup>521</sup> Finding that penalizing the arresting officer for following what was binding precedent at the time would do nothing to deter improper conduct, the Court declined to apply the Exclusionary Rule and affirmed the conviction.

Davis requested certiorari and was granted review.

**ISSUE:** Does the Exclusionary Rule apply to vehicle searches performed before Arizona v. Gant was decided?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the history of the Exclusionary Rule and its deterrent effect on unconstitutional conduct. It noted that beginning with U.S. v. Leon<sup>522</sup> it had changed its analysis in such cases to "focus the inquiry on the 'flagrancy of the police misconduct' at issue." When the police act in a good-faith and reasonable manner, the deterrence effect is minimal. At the time the search was conducted, it was done pursuant to binding judicial precedent. The Court noted that "police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful' deterrence, and culpable enough to be 'worth the price paid by the justice system.'"

The Court continued:

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorize a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than 'act as a reasonable officer would and should act' under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from 'doing his duty.'

The Court concluded:

It is one thing for the criminal "to go free because the constable has blundered." It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.

The Court affirmed the decision of the 11<sup>th</sup> Circuit Court of Appeals.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-11328.pdf>

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<sup>520</sup> 129 S.Ct. 1710 (2009).

<sup>521</sup> See Herring v. U.S., 556 U.S. 135 (2009).

<sup>522</sup> 468 U.S. 897 (1984).

## FIRST AMENDMENT

Borough of Duryea, Pennsylvania v. Guarnieri, 131 S.Ct. --- (2011)

Decided June 20, 2011

**FACTS:** Guarnieri was terminated as the police chief of Duryea, Pennsylvania. He grieved the termination pursuant to the agency's collective bargaining agreement. The arbitrator found fault on both sides and ordered the chief reinstated following a disciplinary suspension. Upon his return, Guarnieri was given 11 specific directives from the council concerning the performance of his duties. He grieved those as well and the arbitrator "instructed the council to modify or withdraw some of the directives" on various grounds. Guarnieri sued the Borough, the council and individual members of the council under 42 U.S.C. §1983, arguing that his first grievance was protected by the "Petition Clause of the First Amendment" and that the directives were retaliation for his taking advantage of that right. During the pendency of the action, they also denied him overtime pay, which the Labor Cabinet ordered to be paid. He then argued that the lawsuit was also a petition and that the initial denial of his overtime was retaliation for having filed the lawsuit.

Ultimately the jury found in Guarnieri's favor and the Borough appealed, arguing that the grievances and the lawsuit "did not address matters of public concern." Although all circuits but the 3<sup>rd</sup> (where Pennsylvania is located) had held that such actions are not actionable unless they do concern matters of public concern, the 3<sup>rd</sup> Circuit Court of Appeals had held otherwise and upheld the jury's decision. The Borough requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a government employee's grievance actionable under the First Amendment?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that "when a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern."<sup>523</sup> If it is not, then the speech is not automatically protected. The Court must "balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"<sup>524</sup> The Court continued, noting that this analysis "reconciles the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission."<sup>525</sup>

The Court concluded that simply because this case was brought under the Petition Clause, there was no reason to find differently than had it been brought under the Speech Clause. Had he done so, the case would have been subjected to the "public concern test." However, in the 3<sup>rd</sup> Circuit, a "more generous rule" was applied to Petition Clause cases, in which he was protected from retaliation "so long as his petition was not a 'sham.'"

The Court continued:

Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. Every government action in response could present a potential federal constitutional issue.

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<sup>523</sup> Connick v. Myers, 461 U.S. 138 (1983).

<sup>524</sup> Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968).

<sup>525</sup> San Diego v. Roe, 543 U.S. 77 (2004).

The Court agreed this would “raise serious federalism and separation-of-powers concerns.” The Court noted that a “different rule for each First Amendment claims would require employers to separate petitions from other speech in order to afford them different treatment; and that, in turn, would add to the complexity and expense of compliance with the Constitution.” The Court concluded that “a petition that ‘involves nothing more than a complaint about a change in the employee’s own duties’ does not relate to a matter of public concern and accordingly ‘may give rise to discipline without imposing any special burden of justification on the government employer.’”<sup>526</sup> The Court stated that “the right of a public employee under the Petition Clause is a right to participate as a citizen through petitioning activity, in the democratic process” – “not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.”

The Court vacated the decision of the 3rd Circuit Court of Appeals and remanded it for further consideration.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-1476.pdf>

## TRIAL PROCEDURE / EVIDENCE

**Bullcoming v. New Mexico, 131 S.Ct. --- (2011)**

Decided June 23, 2011

**FACTS:** In August, 2005, Bullcoming “rear-ended a pick-up truck at an intersection in Farmington, New Mexico.” Ultimately he was arrested for DUI. Bullcoming refused a breath test, so the police got a warrant for a blood test. The blood was then sent to the New Mexico lab for testing and a forensic analyst, Caylor, determined the blood sample to be .21.

At trial, Caylor was not used as a witness because he was on unpaid leave for an undisclosed reason. The defense objected, but the Court permitted the introduction of test report under the business record exemption to the hearsay rule, through a lab technician who “neither observed nor reviewed Caylor’s analysis.” Bullcoming was convicted. The New Mexico appellate court upheld the conviction, finding the report was non-testimonial and “prepared routinely with guarantees of trustworthiness.” He appealed to the New Mexico Supreme Court. During the pendency of the appeal, the case of Melendez-Diaz v. Massachusetts<sup>527</sup> was decided. In Melendez-Diaz, the Court had agreed that such forensic analysis reports were testimonial and invoked the Confrontation Clause right. The New Mexico Supreme Court ruled that the evidence was testimonial and that such reports were “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” However, it upheld the admission of the report, finding first that Caylor was a “mere scrivener” who simply copied the test results from the lab equipment readout, and second, that the person who did testify was qualified as an expert on that piece of lab equipment and was “able to serve as a surrogate for Caylor.”

Bullcoming requested review by the U.S. Supreme Court, which granted certiorari.

**ISSUE:** Is a lab report testimonial?

**HOLDING:** Yes

**DISCUSSION:** The Court began with a discussion of the Confrontation Clause of the Fifth Amendment. It noted that the case of Crawford v. Washington permitted the admission of “testimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>528</sup>

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<sup>526</sup> U.S. v. Treasury Employees, 513 U.S. 454 (1995).

<sup>527</sup> 129 S.Ct. 2527 (2009).

<sup>528</sup> Michigan v. Bryant, 131 S.Ct. 45 (2011).

In this case, there was nothing on the record that indicated that Caylor was actually unavailable and Bullcoming certainly did not have an opportunity to cross-examine him. The Court agreed that the analyst who did testify was not an “adequate substitute for Caylor.”

With respect to the state’s argument that Caylor simply transcribed the information from the machine, which was the “true accuser,” the Court listed all of the ways that Caylor interacted with the machine during the process. The Court stated that the “human actions not revealed in raw, machine-produced data, are meet for cross-examination.” The Court agreed that most witnesses “testify to their observations of factual conditions or events.” In Crawford, the Court had noted that the “‘obvious[s] reliab[bility]’ of a testimonial statement does not dispense with the Confrontation Clause.” The substitute analyst could not “convey what Caylor knew or observed about the events his certification concerned.” Nor “could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.” No opportunity was given for the defense counsel to question anyone about why Caylor was on leave, and whether it was related to “incompetence, evasiveness, or dishonesty....”

And, certainly, Melendez-Diaz left no room for argument that such reports are, in fact, testimonial. However, it also noted that since the lab was required to preserve samples, that retesting of the samples by another analyst was, in fact, an option. New Mexico, however, requires that the defendant initiate the request for retesting, which it called a “notice-and-demand procedure.” New Mexico asserted that in most cases, the test results are admitted by stipulation and rarely does defense counsel even insist on live testimony. However, the Court noted that in places where it is the regular duty of analysts to testify, “the sky has not fallen” and that “operations and staffing decisions” are made to allow the analysts to appear as needed. And, ultimately, the samples could have been retested by a different analyst, which New Mexico chose not to do. (The defense counsel learned only when trial was about to commence that Caylor would not be available, which limited their ability to request retesting of the sample.)

Bullcoming’s conviction was reversed and the case remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-10876.pdf>