

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011



*Leadership is a behavior, not a position*

CASE LAW UPDATES  
THIRD QUARTER

KENTUCKY COURT OF APPEALS  
KENTUCKY SUPREME COURT  
SIXTH CIRCUIT COURT OF APPEALS



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





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

**[docjt.legal@ky.gov](mailto:docjt.legal@ky.gov)**

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

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### **NOTE:**

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to [docjt.legal@ky.gov](mailto:docjt.legal@ky.gov). The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

# KENTUCKY

## PENAL CODE – KRS 510 – SEXUAL ABUSE

### Turner v. Com., 345 S.W. 3d 844 (Ky. 2011)

**FACTS:** Turner was the stepfather of S.F. (the victim). They lived in Danville. S.F. alleged she was first “sexually approached” by Turner when she was 15 and that he attempted sex multiple times over a period of the next few years, in multiple counties. She could only recall a few instances of actual penetration and Turner later admitted to five. S.F. did not claim force, but did feel compelled to have sex with Turner fearing that otherwise, she and her mother would be “forced out of the house.”

Turner was charged with Rape and Incest. He was convicted of Incest and Sexual Abuse. He then appealed.

**ISSUE:** Is venue an issue in a sexual assault?

**HOLDING:** Yes

**DISCUSSION:** Turner argued that there was insufficient evidence presented that indicated the offenses occurred in Boyle County, and in fact, that the evidence indicated that some of the instances occurred in Garrard County (while on fishing trips). However, he did not request to have the prosecution moved and none of the offenses specifically required proof of venue as an element. (In fact, it noted that under venue, the prosecution is required to prove it but only after it is contested by the defense.)

Turner also argued that he was convicted under KRS 510.110, as a person of special authority forcing sexual contact upon a minor or unwilling victim. However, the addition of special authority as an element was not part of first-degree sexual abuse until 2008, leaving only a very short window of opportunity (effectively late July, 2008, given the time he was apparently arrested) for him to have committed the crime in question. As such, the Court found that the conviction for sexual abuse was erroneous and reversed it. (The Court further strongly criticized the trial court for the error, as well.)

## PENAL CODE – KRS 515 - ROBBERY

### McClain v. Com., 2011 WL 3370031 (Ky. App. 2011)

**FACTS:** On January 22, 2009, Perry was leaving the University of Louisville student center. He was approached by someone he later identified as McClain, who asked him for a ride and money. Ultimately, he took Perry’s cell phone. In a similar situation, on February 4, McClain also robbed Sharp and the next day, he robbed Peyton. On February 8, he robbed Watson and Dixon. Finally on February 9, he approached Gray, who knew about the recent robberies and told McClain he had no money. He immediately called U of L police and Sgt. Willoughby responded. He found McClain in the area and learned he’d been banned from the campus. McClain was arrested for Criminal Trespass 2<sup>nd</sup>. McClain was subsequently linked to the robberies and charged with two robberies and four counts of theft (because he apparently did not use force). He moved for a directed verdict, arguing that the Commonwealth had not met its burden on Watson’s robbery. In each of the situations, he had asked for a ride, money and the

use of a cell phone, often simply getting into a car which was stopped. The Court, however, directed a verdict as to the First Degree Robbery charge.

McClain was convicted of two counts of Robbery (2<sup>nd</sup> Degree), four counts of Theft and related charges.

**ISSUE:** Are menacing gestures enough to constitute force for a Robbery charge?

**HOLDING:** Yes

**DISCUSSION:** McClain contended that there was insufficient evidence that he used physical force against Watson. He argued that "Watson's subjective assumption McClain was armed is insufficient to constitute the threat of force." The Court noted that in Swain v. Com.<sup>1</sup> that "menacing gestures and a victim's assumptions that a perpetrator is armed" is not enough for a First Degree charge but that under facts very similar to the situation with Watson, that it was sufficient for a jury to find that force had been used to effect the theft.

McClain's convictions were upheld.

**Corbin v. Com., 2011 WL 3963486 (Ky. App. 2011)**

**FACTS:** On May 19, 2007, Hall, Robinson, Garrett and Garrett's 14-year-old daughter, A.E., were riding 4-wheelers in Harlan County. (Robinson and Garrett were riding together.) They were on property where David Corbin had a logging operation. When they reached a steep decline, Hall went ahead to check the terrain. When he didn't return as expected, the other three proceeded in the same direction. They found Hall talking with Tommy Corbin, David's brother, and Corbin was holding a shotgun. Hall's handgun was on the ground, holstered. As the trio approached, Corbin pointed the shotgun at them and told them to get off the vehicles. Corbin told them he was a U.S. Marshal and demanded proof of ownership of the ATVs. Only Hall had a document with him that proved ownership. Tommy took the other 2 4-wheelers, but eventually told Robinson he could have that one back, with Corbin only keeping the one A.E. had been riding. He also kept Hall's weapon. He told them they could retrieve the items at the Abington, Virginia police station the next day.

The individuals went to a nearby location and called for assistance. Deputy Sargent arrived. They contacted David Corbin, who arrived with his son, Jason. Jason went to the worksite and retrieved the items taken. Hall took out a complaint against Tommy Corbin for first-degree robbery, impersonating a peace officer and theft, and three counts of possession of a firearm for a convicted felon.

Tommy went to trial on the Robbery and Impersonating charges. He was acquitted on the impersonating charge but convicted on robbery. He appealed.

**ISSUE:** Is an intent to deprive someone of property permanently required for Robbery?

**HOLDING:** No

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<sup>1</sup> 887 S.W.2d 346 (Ky. 1994).

**DISCUSSION:** Tommy argued that the facts did not justify a First-Degree Robbery charge because there was no proof that he intended to deprive them of their property permanently. The Court noted however, that it is robbery even if nothing is actually taken. As such, the Court agreed that any intent to keep the property was not relevant to a robbery charge.

The Court upheld his conviction.

## **RESTITUTION**

### **Ellis v. Com., 2011 WL 3963478 (Ky. App. 2011)**

**FACTS:** While trying to destroy evidence in a theft case, Ellis was ultimately convicted of arson in the destruction of the Carlisle County Courthouse. He was ordered to pay restitution in the amount of 24 million dollars. The Court came to that amount by taking into consideration the relative sizes of the old and new buildings and insurance money that had been received toward the replacement. Ellis appealed the amount.

**ISSUE:** Does restitution require a factual basis?

**HOLDING:** Yes

**DISCUSSION:** The Court found the trial court's process flawed and noted that restitution should be based upon the value of the property. Apparently, the insurance company valued the original building as being worth 1.6 million. The Court noted there must be a factual basis for a restitution ordered and ordered a reconsideration.

### **Bowshier v. Com., 2011 WL 3628868 (Ky. App. 2011)**

**FACTS:** In May, 2009, several Radcliff homes were burglarized. Bowshier was ultimately indicted for receiving a firearm taken in one of the burglaries. Two others were indicted for the actual burglary. Bowshier took a plea in exchange for restitution, admitting he knew the gun was stolen. The others also took pleas. The gun was returned, lacking a magazine. The Court ordered all three jointly and severally liable for the entire amount of restitution owed on all of the stolen items – over \$34,000. Bowshier appealed, asking for apportionment relative to his guilt and was denied. He appealed.

**ISSUE:** May a subject be required to pay restitution in crimes for which he is not convicted?

**HOLDING:** No

**DISCUSSION:** The Court agreed that since Bowshier was only charged, and admitted, to the theft of a single firearm, it was not proper to order him to pay restitution for crimes for which he was "neither charged nor convicted."

The restitution was vacated and the case remanded.

## DOMESTIC VIOLENCE

### T.B. v. M.S., 2011 WL 3628868 (Ky. App. 2011)

**FACTS:** T.B. and M.S. lived together with a minor child from a previous relationship of M.S. For several years, she also cared for T.B.'s minor children, D.B. and A.B. On January 15, 2011, M.S. requested an EPO on the basis that her child had informed her that T.B. had sexual contact with her over the previous three years and that he'd also had such with A.B., his own child.

At a hearing on February 21, a DVO was entered against T.B. Temporary custody of A.B. and D.B. was awarded to CHFS. T.B. appealed.

**ISSUE:** May a DVO be based upon alleged sexual abuse of children?

**HOLDING:** Yes

**DISCUSSION:** Marcum (CHFS) testified that he had substantiated sexual abuse with respect to M.S. (child). Because of that, he had recommended that all of the children be removed, and in fact, evidence suggested he has also abused one of his own children.

The Court upheld the DVO.

### Barker v. Perkins, 2011 WL 3962655 (Ky. App. 2011)

**FACTS:** On October 20, 2010, Perkins filed for an EPO against Barker. She alleged he held a knife to her throat and threatened to kill her, had kicked her, threatened to damage her home and car and that he would "get her." At a hearing on November 22, the DVO was issued, after testimony from both parties.

Perkins stated that the couple lived together but effectively shared two houses, moving back and forth between them. Allegedly, both had keys to both houses. The trial court agreed that the "issue of cohabitation" was a "he said/she said" situation but found Perkins more reliable. The Court agreed they cohabitated and entered the DVO. Barker appealed.

**ISSUE:** May a couple share two houses for the purpose of living together?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Rivers v. Howell, which required that the petitioner would have to "share living quarters with the respondent."<sup>2</sup> The evidence indicated that they did so. The Court upheld the DVO.

### Rozier v. Moore, 2011 WL 3516930 (Ky. App. 2011)

**FACTS:** Moore and Rozier divorced in 2005 and were granted joint custody of their child. In 2006, after an altercation, Moore obtained a DVO against Rozier. In 2009 it expired and since things were going

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<sup>2</sup> 276 S.W. 3d 279 (Ky. App. 2008).

well, Moore did not take action to renew it. However, in 2010, she filed a petition on her own behalf and on behalf of her daughter and current husband. At the hearing, she testified Rowzier was harassing her with 15-20 calls a day and using derogatory terms toward her husband. At that time visitation exchange was being done at the police station, but during the exchange time, the "building was locked and occupied only by a single dispatcher." After issues during exchange, she had her husband participate, but testified that Rozier "became increasing aggressive toward" and threatened her husband. Rozier denied the above, stating that the communication was normal and on behalf of the child and that the Moore's husband instigated the problems between them.

The Court issued the DVO and Rozier appealed.

**ISSUE:** May a DVO be based upon evidence that the subject is in fear of injury?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that there was no indication that Moore "suffered physical injury or harm" from Rozier. However, The Court agreed that his behavior and a physical altercation with her adult daughter (who was not his daughter) caused her to fear for her own safety. The Court concluded that although "meager," the evidence supported the issuance of the DVO.

## DUI

### Com. v. Brewer, 2011 WL 2693574 (Ky. App. 2011)

**FACTS:** On August 27, 2008, Brewer was charged with DUI 1<sup>st</sup>. Before the first arrest had been adjudicated, he was arrested for DUI 2<sup>nd</sup>. Both offenses occurred in Christian County. On October 2<sup>nd</sup>, he pled guilty to the first charge. The second charge was then amended to a DUI 2<sup>nd</sup>. Brewer took a conditional guilty plea and appealed on the DUI 2<sup>nd</sup>.

**ISSUE:** Is it necessary to be convicted of the first DUI to be charged under the enhancement for a second DUI?

**HOLDING:** Yes

**DISCUSSION:** Upon initial appeal, the Circuit Court ordered the District Court to treat the later DUI as a DUI 1<sup>st</sup>, as a result of the decision in Com. v. Beard.<sup>3</sup> The Commonwealth then appealed, arguing that because he was actually convicted of the first offense before being convicted of the second, the second could stand as a 2<sup>nd</sup> offense for penalty enhancement. It argued that the General Assembly intended that the date of the first DUI offense – not the date of the conviction – should be used in deciding if a subsequent offense should be enhanced."

The Court upheld the Circuit Court's ruling that directed that the DUI 2<sup>nd</sup> guilty plea be vacated.

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<sup>3</sup> 275 S.W.3d 205 (Ky. App. 2008).

**Hadaway v. Com., 2011 WL 2937233 (Ky. App. 2011)**

**FACTS:** In February, 2008, Officers Gardner and Davis (unidentified Trigg County agency) stopped Hadaway for erratic driving. Given his appearance and other indicators, including his failure on FSTs, they arrested Hadaway for DUI. At the station, prior to the Intoxilyzer, Officer Grace observed Hadaway for 26 minutes. At trial, however, Hadaway argued that the officer was “in and out” of the room and did not have continuous control of him, pursuant to 500 KAR 8:030. He also stated he’d been allowed to use an inhaler and that the alcohol in the inhaler contaminated his breath sample. Officer Dill denied that, and Officer Grace testified he did not leave the room during the observation period.

Hadaway’s motion was denied and he was ultimately convicted of DUI and related offenses. The Trigg Circuit Court affirmed that conviction and he further appealed.

**ISSUE:** Is it necessary for an officer to watch a subject continuously during the observation period prior to the Intoxilyzer?

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

**DISCUSSION:** The Court noted that Officer Grace testified that he had been in the room the entire time and the Court noted that the observation period is not intended to be an “eyeball to eyeball requirement.” In Tipton v. Com., the Court had ruled that the operator was not required to “stare at the arrestee for 20 minutes.” Further, the Court noted that Officer Grace and Officer Dill both denied Hadaway had used an inhaler during the relevant period of time.

On a related note, Hadaway argued on appeal that the paperwork on the machine was not introduced as required.<sup>4</sup> However, because he failed to preserve the error, the Court noted that the evidence supported the conviction even without the breath test result, the error did not cause a “manifest injustice.”

The Court upheld the conviction.

## **CONTROLLED SUBSTANCES**

**Oakley v. Com., 2011 WL 3759486 (Ky. App. 2011)**

**FACTS:** KSP and London PD opened an investigation on a strong chemical odor at a London apartment complex. They tracked it to a specific apartment occupied by Elmer and Margie Oakley. When they knocked, Elmer answered. He consented to a search in which evidence of methamphetamine manufacturing was found, mostly in a duffel bag in a bedroom closet. Elmer stated the bag belonged to someone else but would not identify the owner at that time.

Elmer was convicted and appealed.

**ISSUE:** May a combination of items be proof that a drug lab had been used?

**HOLDING:** Yes

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<sup>4</sup> Com. v. Roberts, 122 S.W.3d 524 (Ky. 2003).

**DISCUSSION:** Elmer Oakley admitted that although he possessed the materials to make methamphetamine, that there was no evidence he actually intended to do so. The Court agreed that “intent can be surmised from the circumstances.” An expert testified as to the usage of the items found in the bag and elsewhere in the apartment and that “this combination of materials in the same home” led him to the belief that a meth lab had been operated on the premises.

Elmer also argued that he was entitled to a jury instruction on facilitation. The Court looked to the elements of that offense and the evidence presented in the case. The Court noted that Elmer did not provide Jason (the originally unidentified neighbor) with the opportunity to commit the crime, nor was he giving him a place to do so, as there was no evidence that methamphetamine had been made in the apartment.

The Court upheld the conviction.

## **SEARCH & SEIZURE – SEARCH WARRANT**

### **Sapp (Roger & Tonja) v. Com., 2011 WL 4430884 (Ky. 2011)**

**FACTS:** On February 18, 2010, Officer Coomes (Owensboro PD) arrested Carlisle. In questioning him, he learned that Carlisle had been en route to Sapp’s home to buy methamphetamine. He checked Carlisle’s cell phone and discovered a phone call to Sapp within the previous 30 minutes. Coomes called Sheriff Cox (McLean County) to report the conversation. Sheriff Cox was familiar with Sapp as a drug dealer and he communicated with Det. Conley (KSP) who also knew Sapp. Sheriff Cox submitted a search warrant affidavit as follows:

*On February 18, 2010, at about 5:30 p.m. I was contacted by Detective Coomes of the Owensboro Police Department. Coomes said that they had just taken Carlos Eugene Carlisle into custody. Carlisle told Coomes that he was on the way to buy methamphetamine from Roger O. Sapp at 235 School Street, Island, Kentucky. Sapp was currently holding meth at his home for sale to Carlisle: Coomes further told me that a check of Carlisle’s cell phone revealed that he had communicated with Roger Sapp’s known phone number within the last two hours. Carlisle stated that he owed Sapp \$150 for meth previously purchased. He said that Sapp would front him the drugs for payment after Carlisle had sold them to others. I knew that Sapp had a reputation among area police agencies as a major drug dealer. I spoke with Det. Matt Conley, a narcotic detective with Kentucky State police who informed me that Sapp had been implicated in several drug deals as the source of the drugs. Sapp has been convicted of multiple drug offenses.*

The warrant was issued and executed. The Sheriff’s Office found numerous items. Both Roger and Tonja Sapp were arrested, and both were charged with methamphetamine related charges. Both moved for suppression, arguing that the search warrant lacked probable cause. When that was denied, both took conditional guilty pleas and appealed.

**ISSUE:** Is a named informant inherently credible?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Carlisle was a named informant. The Sapps argue that there was no explanation of his reliability and that his tip “lacked any specificity” about what was occurring at the Sapp residence. Further, it was noted that his prior convictions had been for possession, not trafficking. The Court, however, noted that the general rule had long been that “information furnished by a named individual is ordinarily sufficient to support the warrant.”<sup>5</sup> Further, Carlisle stated that his basis of knowledge was his own personal experience and observations and that he had Sapp’s exact street address. The Court agreed that although the warrant did not specifically state that he’d bought methamphetamine at Sapp’s residence, it was a fair inference. The Court also took into consideration that Sheriff Cox and Det. Conley were familiar with the Sapps. The Court found that the search warrant was sufficient and upheld the pleas.

## SEARCH & SEIZURE – EXCLUSIONARY RULE

### McKenzie v. Com., 2011 WL 3207806 (Ky. App. 2011)

**FACTS:** McKenzie was detained by Newport PD when a search warrant was executed on a residence. McKenzie did not live there and was not the subject of the warrant, but was present at the time. Officer Carpenter found him standing in the kitchen, ordered him to the floor and handcuffed him. McKenzie was frisked, during which time the officer “spotted the tip of a plastic baggie” sticking out of a pocket. Believing it to be drugs, he removed the baggie and it was found to contain heroin. McKenzie was charged.

He moved for suppression, arguing that the officers did not knock and announce. The Court noted that exclusion was not the remedy and that the item was in plain view with its incriminating nature “readily apparent.” McKenzie took a conditional plea and appealed.

**ISSUE:** Is exclusion the remedy when officers fail to knock and announce?

**HOLDING:** No

**DISCUSSION:** The Court agreed that even if the officer failed to knock and announce and should have, that exclusion is not the proper remedy.<sup>6</sup> Next, he argued that the description of the homeowner, who was to be searched pursuant to the warrant, was inadequate – it described him only by name, gender and race – but the court noted that even if it was, that did not invalidate his detention. As an occupant at the time, it was appropriate to seize and detain McKenzie.<sup>7</sup> The Court looked to Johantgen v. Com., which specifically permitted a detention under such circumstances.<sup>8</sup> The Court agreed the frisk was proper because he was found in a house where the officers had probable cause to believe drug trafficking was occurring. Under U.S. v. Fountain, it was proper to handcuff and frisk McKenzie.<sup>9</sup> Finally, the Court agreed the baggie was in plain view but disagreed as to its being proof of contraband. It noted that baggies are carried for many lawful purposes. At most, it would lead to a suspicion. However, the Court held that it was justified under the “inevitable discovery” doctrine of Nix v. Williams.<sup>10</sup> Once he was detained, the officers learned

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<sup>5</sup> Embry v. Com., 492 S.W.2d 929 (Ky. 1973).

<sup>6</sup> Hudson v. Michigan, 547 U.S. 586 (2006).

<sup>7</sup> Michigan v. Summers, 452 U.S. 692 (1981).

<sup>8</sup> 571 S.W.2d 110 (Ky. 1978).

<sup>9</sup> 2 F.3d 656 (6th Cir.1993).

<sup>10</sup> 467 U.S. 431 (1984).

McKenzie was the subject of an active warrant and he would have been completely searched because of that warrant.

The Court upheld the denial of the motion to suppress.

## SEARCH & SEIZURE – CONSENT

### Walters v. Com., 2011 WL 4424311 (Ky. App. 2011)

**FACTS:** Walters was indicted on accusations from his minor daughter (age 16) that he had committed rape and incest. Walters was arrested at work and the detectives then searched his apartment with the consent of his girlfriend. (She denied having given consent.) He moved for suppression of the admissibility of statements he made to police and of his daughter’s psychotherapy records. When that was denied, he took a conditional plea and appealed.

**ISSUE:** May someone with common authority over a residence give consent?

**HOLDING:** Yes

**DISCUSSION:** The Court first looked to the search and noted that an exception to the usual prohibition exists “where the owner or third party possessing the premises validly consents to a warrantless search.”<sup>11</sup> Det. Anderkin (KSP) testified that Aguilar “affirmatively stated that she resided at the apartment” and gave consent. The Court agreed that “the detective could have reasonably believed that Aguilar possessed common authority over the apartment to authorize the search thereof.” The Court agreed the motion to suppress was properly denied.

Walters also wanted to admit records that indicated his daughter suffered from hallucinations and mental illness. The Court noted that psychotherapy records are “absolutely privileged and may not be disclosed absent a waiver of that privilege.”<sup>12</sup> However, in a criminal prosecution, the “compulsory process clause guarantees the accused the right to access exculpatory evidence regardless of that absolute privilege.”<sup>13</sup> Such records had previously been held in other jurisdictions to be “directly relevant to the issue of a witness’s credibility.” The Court reviewed the records in question and suggested that the daughter suffered from extremely vivid hallucinations that included family members involved in violent acts. The Court agreed that in this case, it was proper to admit the records.

Finally, Walters argued that a statement he made to the detective following his arrest should have been excluded. He had told the detective “to go to his apartment and talk with his girlfriend, Aguilar, because they were together when the alleged rapes occurred.” He argued that he had not yet been given Miranda at the time, but the Court agreed that he was not under interrogation at the time he’d made the statement. The Court found the statement to be voluntary and admissible.

The Whitley Circuit Court’s decision was reversed with respect to the exclusion of the medical records.

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<sup>11</sup> Colbert v. Com., 43 S.W.3d 777 (Ky. 2001); Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005); Illinois v. Rodriguez, 497 U.S. 177 (1990).

<sup>12</sup> KRE 507 (b).

<sup>13</sup> Com. v. Barroso, 122 S.W.3d 554 (Ky. 2003).

**Hack v. Com., 2011 WL 3759612 (Ky. App. 2011)**

**FACTS:** On December 9, 2008, Maeser (Cabinet for Health and Family Services) requested that an officer accompany her to the Hack home. She was working on an open case against Timothy Hack, who she knew had prior drug involvement. Det. Allaman, Greater Hardin County Narcotics Task Force, agreed to accompany her. He called Deputy Dover, Hardin County SO, to assist, and they, along with Officer Thompson (unidentified agency) went to the house. When they arrived, they sought entry at the front but realized it lacked a door knob suggesting it was not used. The group went to the back door where they were met by Racheal Hack. She explained the back door was blocked and redirected them to the front door.

She met Deputy Dover and Maeser there, after some delay. They explained their purpose and she admitted them to the living room. Det. Allaman and Officer Thompson returned to the front door and requested permission to enter, which Racheal gave. Dept. Allaham spotted a methamphetamine pipe in plain view. Deputy Duffey advised both Racheal and Timothy Hack of their rights and they gave written consent to search. Items necessary to make methamphetamine were found.

Racheal Hack was charged with a variety of offenses related to meth manufacturing. She moved for suppression, arguing the entry was under false pretenses. After a hearing, the Court denied the motion, finding her consent voluntary.

Racheal Hack took a conditional guilty plea and appealed.

**ISSUE:** Does a ruse to gain entry make a subsequent consent to search involuntary?

**HOLDING:** No

**DISCUSSION:** Hack argued that the ruse used to gain entry rendered her consent involuntary. The Court noted there was no evidence that the officers contacted Maeser and initiated the process. Hack did not dispute that she invited the officers inside. Hack's plea was upheld.

**SEARCH & SEIZURE – CARROLL**

**McPherson v. Com., 2011 WL 3793204 (Ky. 2011)**

**FACTS:** KSP executed a search warrant on a home owned by Powell. They found the components of a meth lab, including chemicals, but not the large quantity of methamphetamine they expected. Powell was not present and while they searched for them, McPherson arrived. He was told to leave and did so. However, a few hours later, he came back and was spotted by Deputy Thomas (Union County SO). Deputy Thomas followed and pulled in behind the vehicle when it stopped. He realized the driver was McPherson and knew he'd been told to leave the property earlier. McPherson stated he was there to pick up some truck wheels. (There were wheels visible in the yard but McPherson did not take them.) McPherson admitted he'd previously been convicted for manufacturing methamphetamine.

Deputy Thomas asked for consent to search. McPherson consented (although he later denied doing so). Deputy Thomas found items that led to McPherson's arrest and subsequent guilty plea to manufacturing methamphetamine and related charges. McPherson then appealed.

**ISSUE:** May a vehicle be searched if there is probable cause to believe that contraband is contained within?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed with the trial court that it need not address the issue of consent. Instead, it justified the search under the "automobile exception" which permits an officer to search a legitimately stopped vehicle where probable cause exists that contraband or evidence of a crime may be in the vehicle.<sup>14</sup> The Court agreed that the facts, as known to the deputy, were sufficient to find probable cause and upheld the plea.

## **SEARCH & SEIZURE – ABANDONED PROPERTY**

### **Com. v. Snowden, 2011 WL 3208008 (Ky. App. 2011)**

**FACTS:** In October, 2009, Lexington PD, received a tip from an informant that he had delivered marijuana to "Rizzo" who lived on Wintergarden Dr. He did not know the exact address or Rizzo's real name but did identify Rizzo as having a green Pontiac. The detectives found a green Pontiac parked in front of Snowden's home; it was registered to Snowden. They did a knock and talk and found Snowden in an apartment there. He gave consent to search the car but denied consent to search the apartment. They found a "small amount of marijuana residue on the floorboard and a torn corner of a sandwich bag." The detectives searched his "trash toter" which was located behind the 4-plex where he lived and found additional evidence of marijuana. They used that information to get a search warrant for his apartment, which produced a "large quantity of marijuana."

Snowden was indicted on trafficking charges. He moved for suppression of the evidence found in the trash toter. The Circuit Court granted the motion to suppress, finding that the trash can was located within the curtilage and thus the search was improper. Excluding that evidence from consideration, the Court found very little evidence that narcotics trafficking was occurring at Snowden's home.

The Commonwealth appealed.

**ISSUE:** Is a trash container within the curtilage subject to search without a warrant?

**HOLDING:** No

**DISCUSSION:** The Commonwealth argued that the trash toter was not protected as it was not located in the curtilage. The Court noted that the trash toter was located in a parking lot immediately behind the apartment complex that was solely for the use of the tenants, with one toter, marked, for each of the units.

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<sup>14</sup> Moore v. Com., 159 S.W.3d 325 (Ky. 1980); Morton v. Com., 231 S.W.3d 566 (Ky. App. 2007); Carroll v. U.S., 267 U.S. 132 (1925)

When searched, it was in his normal location, in the grass behind the parking area, and not in front of the building where it would be placed for collection.

The Court looked to California v. Greenwood<sup>15</sup> and noted that it is a “more difficult issue” when trash that is not yet placed out for collection. The Court looked to the factors in determining curtilage is laid out in Quintana v. Com.<sup>16</sup> Those factors include the “proximity of area to the home,” “whether area is enclosed,” “how the area is used,” and “steps taken to prevent observation by passerbys.” Applying the factors to the situation in this case, the Court agreed that the dispositive issue was the reasonableness of any expectation of privacy in the trash. The Court concluded that the trash toter was within the curtilage of Snowden’s home and that a member of the public would recognize the area as private.

The Court upheld the motion to suppress the evidence found in the trash toter.

## SEARCH & SEIZURE – ANONYMOUS TIP

### Randolph v. Com., 2011 WL 3207791 (Ky. App. 2011)

**FACTS:** On April 21, 2009, Officer McGehee (Central City PD) was patrolling an apartment complex when a unidentified person told him that “three people had stolen a vacuum cleaner from an apartment porch and placed it in their trunk.” He pointed out the vehicle as it was leaving the parking lot. Officer McGehee stopped it and asked the name of the driver and two passengers. He realized immediately the driver was the subject of an outstanding warrant and arrested him. When Officer McGehee searched the driver he found illegal drugs. He had the passengers, one of whom as Randolph, get out of the vehicle. The officer asked Randolph if he could search her fanny pack, she refused. He then asked her if there was anything in the pack about which he should be concerned – she opened it and produced marijuana. She was arrested and the pack further searched, revealing methamphetamine and syringes. Ultimately, they learned that the owner of the vacuum cleaner had given the couple permission to take it.

Randolph moved for suppression, arguing that the initial stop was not lawful because it was not supported by reasonable suspicion. When the motion was denied, she took a conditional guilty plea and appealed.

**ISSUE:** Is a tip from a citizen informant directly (face-to-face) to an officer inherently reliable?

**HOLDING:** Yes

**DISCUSSION:** Randolph argued that the “stop of the vehicle in which she was a passenger” was unlawful. The Court differentiated between anonymous informants and citizen informants, noting that a truly anonymous tip must be supported by some independent verification to be considered reliable.<sup>17</sup> The Court equated this situation, however, to a citizen informant, in which there is “face to face contact between the citizen and an officer, who has the opportunity to determine the citizen’s credibility.”<sup>18</sup> In this case, although the officer did not know the name of the citizen, he could identify them if need be.

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<sup>15</sup> 486 U.S. 35 (1988); Smith v. Com., 323 S.W.3d 748 (Ky. 2009).

<sup>16</sup> 276 S.W.3d 753 (Ky. 2008).

<sup>17</sup> Hampton v. Com., 231 S.W.3d 740 (Ky. 2007).

<sup>18</sup> See Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

The Court concluded that even if it is determined that the information given by an informant is erroneous, "it does not vitiate an otherwise properly conducted Terry stop" because "the reasonableness of the officer's action is determined by the facts available at the time."<sup>19</sup> As such, the stop was proper and Randolph's plea was upheld.

## SEARCH & SEIZURE – K-9

### Ward v. Com., 345 S.W.3d 249 (Ky. App. 2011)

**FACTS:** On January 10, 2010, Deputy Mahan (Muhlenberg County SD) was patrolling in the late evening. He saw a vehicle run a stop sign. Deputy Mahan saw that the vehicle was occupied by two men, "one of whom kept turning back and looking nervously at Officer Mahan." When the deputy made the stop, he recognized both occupants as involved with drugs, Ward, the driver and Garner, the passenger. Both were "nervous and irritable."

Ward did not provide an OL, only giving Deputy Mahan his SSN. He told the occupants to keep their hands in view as he checked for warrants but Ward did not comply. Officer Mahan learned they had no outstanding warrants. He had not yet written a citation, but asked the two if there were any drugs in the car; both denied that to be the case. The deputy asked for consent to search. Ward stated he did not own the vehicle and did not know what was in it. Officer Mahan explained he could give consent, but Ward refused.

The deputy had a dog in his car, so he told the two men to "roll up their windows and turn off the car engine." The dog alerted on the passenger side door. He directed the men to get out and searched, he discovered methamphetamine inside a pack of cigarettes. About 15 minutes elapsed from the time he got the dog out and the dog alerted. He placed both men under arrest. While in separate cars, Ward told the deputy that the methamphetamine was his, and not Garner's and "pleaded for Garner not to go to jail."

Ward moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** Is a dog sniff done within a traffic stop permissible?

**HOLDING:** Yes

**DISCUSSION:** Ward argued that the traffic stop was "unreasonably extended" by the dog sniff. The Court reviewed the evidence and noted that the initial stop was justified. It was further proper to conduct a dog sniff at the scene. The deputy's "investigation was timely and reasonably related to the scope of the traffic stop." They were still within the typical time for a traffic stop (15-20 minutes). In this case, only 33 minutes elapsed between the stop and the arrest, and the time would have been shorter had Ward had an OL.

The Court upheld the dog sniff and the seizure of the evidence.

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<sup>19</sup> Dockstader v. Com., 802 S.W.2d 149 (Ky. App. 1991).

## SEARCH & SEIZURE – EXIGENCY

### Bennett v. Com., 2011 WL 4430862 (Ky. App. 2011)

**FACTS:** Trooper Ayers received a tip about a meth lab in operation at Bennett's home in Todd County. He and another trooper went to do a knock and talk. Several people were there, including King. While there, they "followed the smell of the chemicals to discover an active methamphetamine lab in a shed near the residence." Bennett and his wife consented to a search of the residence and they found various items associated with labs.

Bennett was indicted for manufacturing methamphetamine and related charges. King was also charged, but no one else. Bennett moved for suppression of the items found in the shed. At trial, King testified that Bennett was the one manufacturing in the shed, but Bennett argued that he had left for a time and that "King and others had, without his approval commenced to manufacture methamphetamine." He said he'd told them to leave the property.

Bennett was convicted and appealed.

**ISSUE:** Does the odor of contraband justify an exigent entry?

**HOLDING:** Yes

**DISCUSSION:** Bennett argued that the warrantless search and seizure of the items in the shed was improper. The Court noted that a "well established exception to the warrant requirement is the exigent circumstances exception."<sup>20</sup> The Court noted that "Kentucky courts have recognized a 'plain smell' analogue to the 'plain view' doctrine by which a police officer may infer probable cause to believe that an offense has been or is being committed based upon his sense of smell."<sup>21</sup> The Court agreed that an active lab "presents a significant danger to police and the public by its toxic fumes and the possibility of explosion." As such, seizure was appropriate.<sup>22</sup> The troopers did not create the exigency and responded appropriately when they encountered it by seizing the lab.

The Court upheld the denial of the motion and Bennett's conviction was affirmed.

## SEARCH & SEIZURE – VEHICLE

### Armstrong v. Com., 2011 WL 3242261 (Ky. App. 2011)

**FACTS:** On February 17, 2009, Armstrong was stopped on I-24 in Livingston County by Trooper Williams (KSP). He had out-of-state dealer tags, clothing in the car and a missing FTC sticker, suggesting it was being driven in violation of KRS 186.070 and 601 KAR 9:220(3). The dealership, however, confirmed during the stop that Armstrong had permission to drive the car.

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<sup>20</sup> Kirk v. Louisiana, 536 U.S. 635 (2002).

<sup>21</sup> Cooper v. Com., 577 S.W.2d 34 (Ky. App. 1979) overruled on other grounds by Mash v. Com., 769 S.W.2d 42 (Ky. 1989).

<sup>22</sup> See Bishop v. Com., 237 S.W.3d 567 (Ky. App. 2007)

Trooper Williams gave him a courtesy notice relating to the dealer vehicle tag violation and told him he was finished, but asked if he could “have a minute of your time.” He admitted upon questioning that he had a marijuana pipe in the car. A canine called to the scene alerted on the passenger door and the trunk. In a subsequent search, they found a pound of marijuana and an ounce of cocaine. He moved for suppression and was denied. Armstrong then took a conditional guilty plea and appealed.

**ISSUE:** Is asking unrelated questions during a traffic stop permitted?

**HOLDING:** Yes

**DISCUSSION:** Armstrong argued first that the traffic stop was improper. The Court agreed that the lack of the sticker was sufficient reason to stop the vehicle as the officer had an objective reason to believe there was a violation of the law. Further, the Court agreed that under Strange v. Com.<sup>23</sup> that officers are free to approach anyone and ask questions, so long as they do not legally seize that person. There was no indication Trooper Williams used any show of authority or physical force on Armstrong, he simply asked if he could ask a few questions.

The Court found it to be a consensual encounter and upheld the denial of the motion to suppress.

#### **Roberts v. Com., 2011 WL 3793442 (Ky. App. 2011)**

**FACTS:** Officer Love (Highland Heights Southgate Police Authority) spotted a vehicle passing an access road, then backing up and turning down the access road into an apartment complex. He stopped the vehicle for careless driving. He obtained the vehicle information and learned the driver was Roberts. Officer Love asked for consent and Roberts agreed. (Roberts denied having given consent.)

After Roberts got out, Love searched Roberts’ person with her consent. (She denied having given consent.) He found nothing on her person, but did find marijuana seeds in the side pocket. Roberts then withdrew consent. He found her purse and located pills (Adderall and hydrocodone) for which she admitted she lacked a prescription. She was arrested and searched at the jail, and marijuana was found.

Roberts was indicted on drug related charges. She requested suppression and was denied. She took a conditional plea and appealed.

**ISSUE:** Is a search done with consent permitted?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the stop was appropriate and that the search was done with Roberts’ consent. Her plea was upheld.

#### **Greene v. Com., 2011 WL 3360676 (Ky. App. 2011)**

**FACTS:** Officer McFarland (Winchester PD) made a traffic stop of a vehicle in which only one headlight was working. The driver was very upset and Greene, who was a passenger, appeared very

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<sup>23</sup> 269 S.W.3d 847 (Ky. 2008).

nervous. The driver was given a verbal warning but was asked for consent to search the car, which was provided. Greene, who was still in the car, was asked to get out. He was asked by both officers present to keep his hands out of his pockets but he failed to comply. He was frisked and nothing was found. He did admit, however, to having marijuana, upon which he was handcuffed. (The driver admitted she'd gotten marijuana in exchange for giving Greene a ride.)

Greene moved for suppression, arguing that the stop was unduly extended by the request to search. The motion was denied and Greene took a conditional guilty plea. He appealed.

**ISSUE:** Is an officer's well-articulated concern for safety a reason to justify a request to search?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the officer could ask the driver for consent and that it was then reasonable to have Greene step out. The officer explained that his training taught him to focus on the hands and that if someone kept their hands in their pockets, something dangerous could be found there. Greene voluntarily admitted that an item in his pocket was marijuana. The Court noted that the circuit court was "swayed by the officer's testimony" and found the officer's concern for his safety credible.

The Court found that Greene did not have an expectation of privacy in the vehicle, and thus lacked standing to object to the search.<sup>24</sup> The Court also upheld the stop as reasonable.

Greene's plea was upheld.

## SEARCH & SEIZURE – STANDING

### Turner v. Com., 2011 WL 3962521 (Ky. App. 2011)

**FACTS:** On April 5, 2009, London officers responded to a call from a Walgreen's pharmacy. The caller, Goodin, reported 3 men from the same car had taken turns purchasing pseudoephedrine. Officers Lawson and Shell responded. They found a car matching the description given in the parking lot and approached. Officer Lawson had the driver, Mark Turner, step out and frisked him. He found no weapons but did locate a silver pill bottle containing white residue. Turner was arrested and the other two occupants were asked to get out also. Joshua Turner, the back seat passenger got out. The officer searched the car and found methamphetamine in the front and boxes of pseudoephedrine open in the back seat. Both passengers were also arrested.

Joshua Turner was convicted of unlawful possession of a methamphetamine precursor. He appealed.

**ISSUE:** Is a search of a vehicle done prior to the Gant decision justified?

**HOLDING:** Yes

**DISCUSSION:** Turner argued that the search of the car should have been suppressed. The Court ruled that he lacked standing, as a passenger, to contest the search of Mark Turner, and what was found on him

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<sup>24</sup> Garcia v. Com., 185 S.W.3d 658 (Ky. App. 2006).

led to the proper search of the car. The Court agreed that a passenger did have the right to contest the propriety of a car search, pursuant to Brendlin v. California.<sup>25</sup> However, Turner based his argument on Arizona v. Gant, which was decided subsequent to the search in this case. But upon appeal, he abandoned that argument and based his objection on the “illegal pat-down of Mark.” The Court agreed he had no standing to challenge that search

Joshua Turner’s conviction was upheld.

## SEARCH & SEIZURE –VEHICLE – PRE-GANT

### Niceley v. Com., 2011 WL 4409155 (Ky. App. 2011)

**FACTS:** In Nicely, on February 15, 2009, Officer Schneble (Frankfort PD) stopped Niceley’s vehicle because it matched the description of a car involved in a burglary in the area. Officer Schneble learned that Niceley’s license was suspended and he was arrested. White powder was found during the search of the vehicle, it was later determined to be cocaine. During the pendency of the action, Arizona v. Gant<sup>26</sup> was decided. He moved for suppression based upon Gant, and the trial court denied the motion. Niceley took an Alford<sup>27</sup> plea and appealed.

**ISSUE:** Is a full search of the passenger compartment of a vehicle done prior to the Gant decision justified?

**HOLDING:** Yes

**DISCUSSION:** Niceley argued that Gant, decided following the trial, required the retroactive suppression of the evidence. Niceley’s plea was affirmed.

## TRIAL PROCEDURE / EVIDENCE – RULE 7.24

### Mathews v. Com., 2011 WL 4507962 (Ky. App. 2011)

**FACTS:** On October 25, 1995, in Warren County, Mathews and Morrow were involved in an argument. Mathews fired a gun at Morrow but missed him, hitting instead an innocent bystander. Mathews was convicted of intentional murder and appealed directly to the Kentucky Supreme Court, which ruled against him. Mathews then filed a separate action in the Kentucky Court of Appeals.

**ISSUE:** Is disclosure of oral inculpatory statements to the defense required?

**HOLDING:** Yes

**DISCUSSION:** Mathews argued that the prosecution failed to disclose evidence under RCr 7.24(1) to which he was entitled. Following his arrest, Mathews was questioned and admitted that he “waited outside as his wife burglarized homes,” and in his testimony, the detective mentioned this statement. The Court

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<sup>25</sup> 551 U.S. 249 (2007).

<sup>26</sup> 556 U.S. 332 (2009).

<sup>27</sup> Alford v. North Carolina, 400 U.S. 25 (1970).

noted that in prior decision, it had held that the first part of 7.24 applied only to written or recorded oral statements, but stated that it had begun to be “troubled by the result.” Mathews argued that the decision in Chestnut v. Com.<sup>28</sup> – which effectively overturned previous decisions and came later than the earlier decisions in Mathews’ cases required an overturning of his conviction.

The Court disagreed and affirmed his conviction.

### Lewis v. Com., 2011 WL 2713435 Ky. App. 2011

**FACTS:** On October 29, 2009, Lewis was arrested in Christian County. He had been identified in a videotape of a controlled buy between Howell, a CI and himself. Officer Spurlin (Hopkinsville PD) was permitted to testify that “he heard Lewis tell Howell to ‘step outside.’” He was convicted and appealed.

**ISSUE:** May a failure to disclose inculpatory statements (as required) be held to be harmless?

**HOLDING:** Yes

**DISCUSSION:** Lewis argued that it was error to permit the introduction, through Officer Spurlin, of the statement “because it was an incriminating statement which the Commonwealth did not disclose to the defense prior to trial.” The Court reviewed RCr 7.24 and noted that even if it was incriminating, that there was no reasonable probability that the outcome of the case would have been different had it been discovered. The Court upheld the conviction.

## **TRIAL PROCEDURE / EVIDENCE - PROXIMITY**

### Duggins v. Com., 2011 WL 4502061 (Ky. App. 2011)

**FACTS:** On June 2, 2009, officers arrived at a one-car wreck on the Western Kentucky Parkway in Grayson County. No one was around, however. The Sheriff at the scene found evidence of a mobile methamphetamine lab strewn around outside of the vehicle and traced the vehicle (which had an expired tag) to Duggins. Duggins was tracked down at a motel in Elizabethtown and was found to be banged up and bruised. He agreed he’d been in a wreck. His employer later stated that Duggins had walked to his home and reported he’d been injured in a wreck, but that he refused any help in retrieving the vehicle.

Duggins was charged and convicted of manufacturing methamphetamine. He appealed.

**ISSUE:** May debris found in close proximity to a wrecked vehicle be linked to that vehicle?

**HOLDING:** Yes

**DISCUSSION:** The Court ruled that there was sufficient evidence to link Duggins with the debris found in close proximity to the truck and upheld his conviction.

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<sup>28</sup> 250 S.W.3d 288 (Ky. 2008).

## TRIAL PROCEDURE / EVIDENCE – STATEMENTS

### Daugherty v. Com., 2011 WL 3962602 (Ky. App. 2011)

**FACTS:** Daugherty was charged (and ultimately convicted) of manslaughter in the shooting death of Adkins, in Madison County. He admitted to the shooting, but stated he only meant to wound him because Adkins had smashed his car window with a bat and had made a movement that made Daugherty believe he had a weapon. At trial, he was denied the right to introduce evidence that Adkins had been on methamphetamine and that reports and statements were read into the record.

He was convicted and appealed.

**ISSUE:** May evidence (a written document) be introduced by someone other than the preparer?

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

**DISCUSSION:** Although the medical examiner was asked about a toxicology report that indicated methamphetamine use, the Court disallowed the question as asked and the defense attorney did not re-ask the question in an appropriate way. As such, the Court dismissed the argument.

With respect to the statements, the Court noted that the first item complained of was a ballistics report. It was introduced by a detective, not the KSP examiner who had done the examination. The other was a statement from a witness who did not testify. (He was a prisoner in the Fayette County Jail and defense counsel filed for a writ of habeas corpus ad testificandum. The petition was granted but he did not testify.)

The Court noted that Daugherty failed to preserve that argument and did not meet the high burden necessary to get it reviewed without having done so. The Court noted that the fact that he had shot Adkins was not at issue, since he had admitted it, so the ballistics report was not critical.

His conviction was upheld.

## TRIAL PROCEDURE / EVIDENCE – IDENTITY OF INFORMER PRIVILEGE

### Johnson v. Com., 2011 WL 3759482 (Ky. App. 2011)

**FACTS:** On January, 2009, Lexington PD sought a search warrant for Johnson's home, seeking evidence of drug trafficking. Det. McBride drafted the affidavit, which noted:

- A CI informed police that Johnson was selling crack cocaine from his residence while children were present.
- Said CI had worked with Lexington police in the past, and had "demonstrated truthfulness and accuracy[.]"
- An independent investigation verified the information the CI provided regarding Johnson. More specifically, Detective McBride, accompanied by another detective of the Lexington Police Department, observed activity outside Johnson's home that was consistent with drug trafficking.

- The detectives, with the help of the CI, conducted a “controlled buy,” during which Johnson sold crack cocaine to the CI.

At no time was the CI identified by name. Crack cocaine and paraphernalia was found, along with an assault rifle and marijuana. Johnson, a convicted felon, was charged with offenses relating to the drugs and the weapon. He was not charged with any offenses relating specifically to the controlled buy, however.

During pretrial discovery, Johnson requested the identity of the CI, claiming the “CI possessed information necessary to Johnson’s defense.” He also argued that the warrant was inadequate and demanded that McBride produce the evidence logs from the buy. The trial court denied all motions and Johnson took a conditional guilty plea. He then appealed.

**ISSUE:** May the identity of an informant be held back from the defense?

**HOLDING:** Yes

**DISCUSSION:** With respect to the identity of the CI, the Court noted that KRE 508 controlled and there is a “delicate balance” to be maintained in such cases. In Johnson’s case, he was able to convince the court to take the matter to an in camera review, in which the Court concluded that disclosure was not proper – finding that the CI’s testimony was not part of the case and because revealing it would risk the safety of the CI. Johnson was unable to refute this decision with any facts, providing only “vague protests,” rather than the necessary explicit and detailed representations.

The Court declined to address the issue of the evidence logs, finding that he provided no support for it. The Court upheld his guilty plea.

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

**Bell v. Com.** , 2011 WL 4103028 (Ky. 2011)

**FACTS:** Bell was charged, and ultimately convicted, on Sodomy and related charges in Jefferson County. (He was not convicted on rape with the first victim.) He argued during trial that the only testimony that the sex was nonconsensual came from the complainant. Testimony at trial from a responding officer indicated that he found the victim nude, outside, with only a coat draped over her. She had been badly beaten and semi-conscious. Bell argued, however, that he should have been permitted to admit statements the victim had made to medical personnel concerning her use of drugs. (Apparently, his argument was that she traded sex for drugs.)

**ISSUE:** May evidence of the victim’s sexual activity be admitted if necessary to prove a possibility of consent?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that KRE 412 (the Rape Shield Law) did not apply in this case, because Bell did not seek to introduce the victim’s prior sexual conduct as indicating consent in and of itself. The Court agreed that the evidence of her prior drug use was relevant to his defense “for the purpose of

determining whether the complainant consented to the sexual relations with Bell in exchange for drugs.” The Court ruled he was entitled to a new trial on the Sodomy charge. (However, the ruling had no bearing on the assault charge, as that would be immaterial to whether she consented to the sex.)

Bell also raised an argument that it was improper for the trial court to exclude evidence that the victim had been charged with filing a false police report several years previous. KRE 608 permits the introduction of testimony concerning the “general truthfulness” of a complainant or witness. However, due to the specifics of the situation, without any specific proof she had lied or any information as to the resolution of the case, the Court found it improper to admit the evidence. (The officer had been deployed and was unable to explain the disposition of the charge.)

Further, KRE 405 does not permit evidence of a “victim’s specific instances of conduct” as proof of other behavior.<sup>29</sup>

Bell’s conviction on Sodomy was reversed and the remaining convictions upheld.

## **TRIAL PROCEDURE / EVIDENCE – EXCITED UTTERANCE**

### **Jackson v. Com., 343 S.W.3d 647 (Ky. App. 2011)**

**FACTS:** On September 22, 2008, S.N. was in Louisville “enjoying a social outing with some friends” and they ended up at a local bar. She left about 12:30 a.m. to go home. During the evening, she’d talked casually with Jackson. S.N. became confused in locating her vehicle and went back to the bar to get help. Jackson offered to help her find it. While they were walking down a side street, he asked her if she wanted any crack cocaine, which she declined. Ultimately, he struck her on the side of the head and she lost consciousness temporarily. She was raped and beaten but ultimately Jackson released her and she ran for help.

At 3:50 a.m., Officer Johnson (Louisville Metro PD) responded to a 911 call. The officer found S.N. and testified later it looked like she’d been used as a “punching bag.” Officer Johnson investigated the area she described – he was familiar with it – and found a mattress and drug related items. He relayed his observations to Det. Grissom. Officer Drury went back to the area later and found Jackson sleeping on the mattress. He was arrested for possession of drug paraphernalia. S.N. was shown a photo-pak and immediately identified Jackson from the booking photo just taken. In addition, the officers obtained a DNA match.

Jackson was convicted of Rape. He took a conditional plea and appealed.

**ISSUE:** May a victim’s statements be admitted under the excited utterance exception to the hearsay rule?

**HOLDING:** Yes

**DISCUSSION:** Jackson argued that it was improper to admit Officer Johnson’s testimony “recapping S.N.’s description of the incident.” The trial court had initially admitted it under KRE 803(1) – the present

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<sup>29</sup> Dennis v. Com., 306 S.W.3d 466 (Ky. 2010).

sense impression – but upon objection, had corrected itself and admitted it under KRE 803(2) – the excited utterance exception. The Court reviewed that rule, noting that Officer Johnson was the second person she had encountered, the first being a Good Samaritan who had assisted her. Under Young v. Com., he argued that too much time had passed between the crime and the statement.<sup>30</sup> The Commonwealth argued, however, under Noel v. Com., that the victim had fled the scene as soon as possible, contacted authorities and immediately gave her description of the rape. It contended “that her demeanor was very excited and upset, mirroring that of an excited utterance.”<sup>31</sup> She met the officer very close to where the assault occurred. The Court agreed it was properly admitted as an excited utterance.

Jackson’s conviction was upheld.

## TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

### Fields/Cramer/Boyd v. Com., 2011 WL 3793149 (Ky. 2011)

**FACTS:** On October 2, 1987, a Central City street worker found a vehicle abandoned near the city garage. Inside, police found Mullen’s body – she had been beaten and stabbed to death. At the time, she was Springer’s girlfriend but was also in a relationship with Fields (who was on the Central City PD). She had claimed to be pregnant and that Fields was the father. She had also told Officer Scott (Central City PD) that Boyd, Springer and Duncan were involved in drugs and stolen property. Scott told Fields about the tip.

Springer was tried and acquitted of the murder in 1988 and that “case languished until 2005.” That year, Detective Silfies got a tip about the murder and passed it on to Det. Fleming, who was doing a cold case investigation of the Mullen murder. The witness, Robinson, told Fleming she was an eyewitness to the murder and that information led to the indictment of Fields, Cramer and Boyd. Springer and his girlfriend, Smith, were also indicted.<sup>32</sup>

Robinson related the circumstances surrounding the murder at trial and all were convicted. They appealed.

**ISSUE:** May a confession that does not specifically name the other defendant be admitted?

**HOLDING:** Yes

**DISCUSSION:** First, the defendants argued their trials should have been severed (tried separately) because “incriminating out-of-court statements made by Cramer” to a jail informant were introduced. In it Cramer indicated “we” did it, but because he did not testify, his co-defendants could not cross-examine him. The Court noted that this situation often arises with joint trials and is resolved “by compliance with principles established under Crawford v. Washington<sup>33</sup> and Bruton v. U.S.<sup>34</sup>”

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<sup>30</sup> 50 S.W.3d 148 (Ky. 2001).

<sup>31</sup> 76 S.W.3d 923 (Ky. 2002).

<sup>32</sup> It is unclear how Double Jeopardy factored into this case.

<sup>33</sup> 541 U.S. 36 (2004).

<sup>34</sup> 391 U.S. 123 (1968).

The Court addressed whether the statement by the informant was “inherently untrustworthy.” The Court looked to Crawley v. Com.,<sup>35</sup> which identified four factors by which the trustworthiness, and hence the admissibility, of a statement against penal interest is to be assessed: 1) the time of the declaration and the party to whom it was made; 2) the existence of corroborating evidence in the case; 3) the extent to which the statement is against the declarant's interest; and 4) the availability of the declarant as a witness.”

Cramer was legally unavailable because he elected not to testify and the statement was a “strong admission of responsibility for the crime.” The Court noted that the elements to admit the inculpatory statement under KRE 804(b)(3) were properly satisfied and the judge concluded the informant was sufficiently trustworthy.

Further, the Court looked at the admission of the statement with respect to Fields and Boyd. The Court noted that the “we” referenced in the statement was not made clear, but Boyd and Fields contended that “their association with Cramer as codefendants undoubtedly suggested to the jury that Cramer's remark included them, and thereby inferentially linked them to the crimes depicted in the photographs.” They argued that Crawford “barred the introduction of the statement.”<sup>36</sup> However, the Court noted that Crawford “does distinguish testimonial statements from casual remarks made to friends.” The court held that this spontaneous statement to a fellow inmate was not testimony. With respect to Bruton<sup>37</sup>, which ruled that the “Confrontation Clause forbids “the use of a non-testifying codefendant's confession that ‘expressly implicate[s]’ the other defendant,” the Court noted that “when a codefendant's confession does not expressly implicate the other defendant, but rather inferentially “links” him to the crime, the Confrontation Clause is not offended so long as the evidence itself is otherwise “properly admitted” and “the confession is redacted to eliminate all references to the defendant's existence.” Bruton states that the appropriate way to deal with such statements is to redact all references to the other defendant and a jury admonition that it can only be used against the person that made the statement. However, neither Fields nor Boyd requested a redaction and as such, it was properly admitted.

The convictions of Fields, Cramer and Boyd were upheld.

### **Bussell v. Com., 2011 WL 3793151 (Ky. 2011)**

**FACTS:** On December 2, 1990, Sue Lail went missing in Christian County. Bussell, her handyman, was identified as a suspect when items missing from her home were linked to him. On February 23, 1991, Lail's body was found – she had been beaten and strangled. Bussell was convicted but his conviction was overturned in 2007. He was retried in 2008, resulting in mistrial, and again in 2009, when he was convicted of Robbery and Murder. He again appealed.

**ISSUE:** May videotapes of testimony from a previous trial be shown in a retrial?

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

**DISCUSSION:** Bussell contended that using the videotaped testimony from two witnesses (who had subsequently died) violated his rights because “no adequate cross-examination had occurred.” (One of his

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<sup>35</sup> 568 S.W.2d 927 (Ky. 1978); Harrison v. Com., 858 S.W.2d 172 (Ky. 1993).

<sup>36</sup> 541 U.S. 36 (2004); see also Stone v Com., 291 S.W.3d 696 (Ky. 2009)

<sup>37</sup> 391 U.S. 123 (1968)

appeals centered on the ineffectiveness of his trial counsel in the earlier trial.) The Court permitted their testimony both from the trial and a subsequent hearing, finding that they effectively balanced out. At the subsequent hearing related to the effectiveness of his former trial counsel, several critical issues regarding the witnesses were discovered, particularly the fact that one of the witnesses was mentally retarded and had a reputation for untruthfulness.

Since no proper objection had been made, the Court concluded that no palpable error had occurred. The use of the hearing testimony offset the unchallenged statements made by the witnesses at the first trial. At the 2009 trial, defense counsel was able to introduce significant testimony challenging the two questionable witnesses.

Bussell's conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE – RELEVANCY**

### **Mullins v. Com., 350 S.W.3d 434 (Ky. 2011)**

**FACTS:** On the day of Faulkner's death, he and Cayson were dropped off in Lexington by Faulkner's girlfriend so they could buy marijuana. They got a ride from an unknown man and were taken to a local address. There, Mullins, Waide, Clark, Wade and Porter were standing in the yard. Porter later testified that he was talking to Faulkner when he was shot and Porter fled. Mullins jumped in the car with him and said "I'm sorry. Drive." Porter saw a "shiny object" in Mullins' hand but was not certain it was a gun. Mullins jumped out at a nearby corner and fled. Cayson testified that he saw Mullins shoot Faulkner and then leave with Porter. White, who was nearby, later testified she saw Mullins shoot Faulkner and that he'd admitted same to her two days later. He stated Faulkner had stolen a large amount of money from him.

At trial, the medical examiner stated Faulkner had died from multiple gunshot wounds from a medium caliber weapon. Piltcher, a forensic analyst, stated that all three bullets recovered were fired from the same gun and all were .44 caliber hollow-points. No gun was ever found and no shell casings were located at the scene. A taped interview of Mullins was played at trial, in which he admitted having been at the scene but denied any involvement. He claimed Faulkner was shot from a vehicle by unknown persons.

Mullins was convicted of Murder and appealed.

**ISSUE:** Is evidence of "bad blood" between the defendant and the victim admissible in a homicide trial?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that testimony about the prior "bad blood" and "words" between the two in the days prior to the shooting was proper. In addition, the fact that no shell casings were found at the scene, suggesting a revolver, and the testimony that Mullins had a revolver of the appropriate caliber in his possession just days prior, was also admissible. As such, the handgun evidence was relevant under KRE 401 and 403.

The Court, however, questioned a Tampering charge, based on the “missing” gun. The Court held there was no indication that Mullins did anything more than simply flee with the gun and noted that there was no indication that the police actually even looked for it anywhere but at the scene of the crime and further, that search took place five months after the murder. The Court found it improper to charge with tampering “simply because a woefully inadequate effort to locate the evidence was made by the police.” Simply failing to find evidence does not warrant a tampering charge.

The Tampering charge was reversed but the Murder charge was upheld.

**Conner v. Com., 2011 WL 3793150 (Ky. 2011)**

**FACTS:** The Connors (Jesse and Mary) had been married for nine years but separated prior to the events in question. There was dispute as to whether they maintained a sexual relationship after the separation, however. On October 30, Mary alleged that Jesse had been at her house when she returned from work and that he forced her to have sex. She went to the hospital and reported the rape. After an interview, Deputy Sturgill (Madison County SO) went to locate Jesse. He spotted Jesse and a pursuit ensued. Jesse then “stopped his truck and threatened to shoot himself if law enforcement approached him any further.” He was persuaded to get out, arrested and transported. “En route, Conner made potentially incriminating statements to the law enforcement officers transporting him and made more statements after his arrival at headquarters.” Jesse Conner was charged with a number of offenses and the court severed off certain of them, including fleeing/evading, violation of the EPO/DVO and tampering with a witness charges.

He was tried initially on the more serious charges. During the trial, Deputy Sturgill and Sgt. Anderson testified as to “Conner’s behavior when they tried to apprehend him.” Conner objected but the testimony was admitted and he was convicted of Assault, Burglary, Rape and Sodomy. He appealed.

**ISSUE:** Is proof of flight evidence of guilt?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that it had long recognized “that proof of flight has long been accepted as admissible because flight suggests a sense of guilt.” Under KRE 403, relevant evidence, may, however be excluded if unduly prejudicial. Conner argued that he did not dispute the assault, so that “introduction of testimony that he attempted to avoid apprehension was excessive information about a bad act.” The Court, however, held that the prosecution “did not use the flight testimony to suggest to the jury that Conner committed a separate offense and precedent holds that proof of flight can be evidence of guilt.” The Court also admitted a statement made by Conner to Sgt. Anderson, to the effect that “I guess she’s going to say I raped her with a gun, huh?” The Court found this statement to corroborate his sense of guilt.

The Court admitted a recorded statement Conner made, in which he mentioned a previous EPO (one that was not the subject of the present charges). The court noted that he did not object to the recorded statement and the general objection was insufficient to preserve the issue. Finally, Conner objected to the treating physician’s statement about the source of Mary’s injuries was inadmissible hearsay and “not reasonably pertinent to treatment or diagnosis.” The Court agreed the admission of his statement was

improper but held it to be harmless error in the light of other evidence against Conner.<sup>38</sup> (It noted that the fact she was beaten and raped was relevant, but not the name of her attacker.)

Conner's conviction was affirmed.

**Jackson v. Com., 2011 WL 3793153 (Ky. 2011)**

**FACTS:** On May 4, 2007, Jackson was operating a "bootleg" taxi, in Louisville. (He had a suspended taxicab license but had fitted his personal car as a cab.) He picked up two highly intoxicated women but the trip back took far longer than it should have because Jackson did not know the area. At the house, one woman (Angela) got out but he ended up speeding off with the other woman (Tana) in the back seat because he thought the police were behind him and would stop him. He drove to a nearby location, removed the taxi identifiers and ended up driving the car back to his own apartment complex. Tana woke up in the parking lot and found Jackson "blocking the car door and pulling at her clothes." She fled but he caught her and dragged her back, threatening to kill her. He choked her and she passed out. She awakened in an ambulance.

Later testimony indicated that Louisville Police called her phone, when they responded to Angela's call about the abduction.

Sergeant Joe Dennis of the Louisville Metro Police testified that he heard Tana screaming, "No! No! No! Get off me," while a male shouted, "Shut up! Stop yelling!" Tana's screams gradually became muffled, indicating her mouth being covered. Sergeant Dennis then heard gurgling sounds before the phone finally went dead.

Jackson admitted that he had covered her mouth to keep her from alerting police about his bootleg taxi. Officers found Jackson as he left the parking lot, having been alerted by Jackson's screams, and they chased him until he "spun out." They found Tana and she was immediately transported to the hospital. Following his arrest, the police seized a number of items from his home and admitted them into evidence. These items included a camera, video camera, a reflexology chart and women's pantyhose. Jackson was charged with Kidnapping, Assault and Attempted Rape and related offenses. He was acquitted of the Attempted Rape but convicted of the remaining crimes. He appealed.

**ISSUE:** Is irrelevant evidence admissible?

**HOLDING:** No

**DISCUSSION:** Jackson argued and the Court agreed that it "was completely improper to admit these items into evidence." The seized items were totally irrelevant to the crime of which he was accused. The Court agreed that much of the evidence was not prejudicial but balked at the pantyhose. However, since he was acquitted of the attempted rape, the Court found that the jury was not tainted by its introduction.

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<sup>38</sup> Colvard v. Com., 9 S.W.3d 239 (Ky. 2010).

Jackson argued that there was insufficient proof that he caused Tana a serious physical injury. The Court agreed that being choked into unconsciousness was enough to be serious physical injury.<sup>39</sup> The weak pulse she exhibited when found by officers corroborated this injury.

Jackson's conviction was affirmed.

## TRIAL PROCEDURE/ EVIDENCE - SUSPECT ID

### Houston v. Com., 2011 WL 3962511 (Ky. App. 2011)

**FACTS:** On March 20, 2007, Bell was shot (with a shotgun) and wounded. He was at Smith's home in Fayette County at the time, along with Morton. Morton could not identify the person that shot him because his face was covered partially with a scarf. He had been in Houston's car earlier, however, and knew that Houston had a shotgun at that time. Bell asserted he recognized Houston by his eyes and exposed facial features. He said he'd had an altercation with Houston's brother previously and that the shooter had told him to "leave his brother alone."

He identified photos of Houston while he was in the hospital, and later again identified Houston from a photo. Houston was convicted of first-degree assault and appealed.

**ISSUE:** May an expert witness be prohibited from discussing other cases during testimony (to illustrate a point)?

**HOLDING:** Yes

**DISCUSSION:** Houston argued that he was misidentified. He was to introduce Dr. Fulero as an expert witness in eyewitness identification, he had testified in other courts on the issue. Dr. Fulero underwent a Daubert<sup>40</sup> hearing, and was allowed to testify as an expert. However, the trial court ruled he could not talk about any other cases but only discuss the specifics of Houston's case. The Court agreed that any evidence of other cases, in which suspects had been exonerated, was irrelevant to Houston's case and upheld the denial of his testimony, permitting only his testimony about the difficulties and limitations of eyewitness testimony.

The Court upheld Houston's conviction.

## TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESS

### Feltner v. Com., 2011 WL 2731847 (Ky. App. 2011)

**FACTS:** On August 31, 2007, Det. Wiseman (Hazard PD) pulled over a vehicle with an expired license plate. Two men were in the car and both were "acting suspicious." Det. Wiseman put the driver in the back of his cruiser and the passenger (Feltner) "took this opportunity to then throw a syringe out his

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<sup>39</sup> See also Cooper v. Com., 569 S.W.2d 668 (Ky. 1978).

<sup>40</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 597 (1993).

window." Captain East, who had arrived, saw this and retrieved the item. Feltner admitted that had been shooting up "OC."

At trial, Captain East testified that OC means oxycodone or oxycontin and a crime lab technician testified that the syringe contained oxycodone. Feltner was convicted of possession of a controlled substance and he appealed.

**ISSUE:** May an officer testify as to knowledge obtained through experience, without being qualified as an expert?

**HOLDING:** Yes

**DISCUSSION:** Feltner argued that East should have been qualified as an expert before being allowed to testify as to what "OC" meant. The Court noted that officers are allowed to testify as experts when properly qualified to do so. However, in this case, Captain East was not specifically qualified, but the Court held that his experience as a commanding officer in the police force and the knowledge he'd gained about drugs was sufficient to qualify him to testify as to the meaning of the term.

Feltner's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – JURY

### Abnee v. Com., 2011 WL 3207779 (Ky. App. 2011)

**FACTS:** Following Abnee's conviction in Nicholas County, he purportedly received a letter from a member of his jury panel. (Although it was written to the judge, it ended up with Abnee's attorney.) The letter indicated that the juror (and others) doubted Abnee's guilt and that they believed his "reputation convicted him." The letter writer indicated that Abnee's criminal record was in the jury room when they went in and that other members of the jury went through it.

The trial court held a hearing. Abnee's attorney indicated he'd not spoken to the letter writer but that he believed her testimony was critical. The prosecution argued that it had contacted the bailiff that had worked the trial, "who told him that there was nothing on the table when he took the jury back to deliberate." The bailiff did not testify at the hearing, however. Abnee's motion for a new trial was denied and Abnee appealed.

**ISSUE:** May information left in a jury room taint the decision?

**HOLDING:** Yes

**DISCUSSION:** Abnee argued that "extrinsic influences tainted the jury's deliberations." The Court agreed that the "right to an unbiased decision by an impartial jury is essential to due process."<sup>41</sup> Although RCr 10.04 states that a jury may not be examined to "establish a ground for a new trial, except to establish that the verdict was made by lot," the Court noted that the rule could be not be used to "deny the accused his

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<sup>41</sup> Hodge v. Com., 68 S.W.3d 338 (Ky. 2002).

constitutional right to confront the witnesses and the evidence against him.” The Court noted, in Com. v. Wood, that the Sixth Circuit had held a similar rule in another state unconstitutional.<sup>42</sup>

The Court ruled that the case must be remanded to the trial court “for an evidentiary hearing in which testimony is taken from all witnesses involved, including the bailiff and the jury panel.”

## TRIAL PROCEDURE / EVIDENCE – STATEMENT

### Walker v. Com., 349 S.W.3d 307 (Ky. 2011)

**FACTS:** Walker and Thomas had lived together in Louisville in the 1990s and had children together. In 2002, the couple became estranged and Walker moved with the children to Georgia. Thomas regained custody of the children in 2006, brought them to Louisville and began seeing Scott in 2007. Walker returned from Georgia and during that time, saw his children on occasion and tried to reestablish a relationship with Thomas.

On September 14, 2007, friction occurred between the pair and Thomas dropped him off at the home of a relative. At about 5 a.m. the next morning, Walker went to Thomas’s apartment and entered, finding Scott asleep in the master bedroom with the children. (Two were in the bed and the third on a pallet on the floor.) Walker “lost it” and attacked Scott. He dragged Scott to the basement. When Thomas returned about 6 a.m., Walker took her to the basement, where she saw Scott’s body and blood spattered everywhere. Walker insisted, however, Scott was not dead but he would not let Thomas call for help. When he fell asleep, however, Thomas fled with the children.

When the police arrived, Walker was still asleep. He gave a lengthy interview and eventually, the detective “confronted him with what the detective maintained was inconsistent evidence.” Gradually he admitted that the children had not “accused Scott of sexual contact: as he’d originally claimed and that he’d beaten and choked” him, but insisted that he believed Scott was alive at the time. He denied any intent to kill him. Prior to the trial, he sought to have the entire interview excluded. The Court admitted it, however.

Scott was determined to have died from blunt force trauma and strangulation. Walker was convicted of Intentional Murder and appealed.

**ISSUE:** May a statement that consists of an officer’s attempt to “bond” with a suspect be introduced before a jury?

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

**DISCUSSION:** Walker argued that most of the statement “consisted not of his statements but those of the detective, statements, as noted, accusing Walker of lying, statements commenting on other evidence, and statements relating to the detective’s personal life.” (The detective at one point told Walker he understood how painful it was to see another man in Thomas’s life, serving as the parent to his children. as the detective had a similar experience with an ex-spouse.) The Court ruled that those statements were not legally hearsay, but instead “were meant to elicit and did elicit responses from Walker.”

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<sup>42</sup> 230 S.W.3d 331 (Ky. App. 2007).

The Court agreed, however, that he would have been entitled to a jury admonishment as to how to regard that information. Since he failed to ask for it, the issue was waived.

Walker's conviction was affirmed.

## INTERROGATION

### Stanton v. Com., 349 S.W.3d 914 (Ky. 2011)

**FACTS:** In December, 2008, Stanton's stepson told his father that Stanton has sexually assaulted him. The child was interviewed by Monroe, a social worker, who was brought in by Officer Lancaster. The two then went to Stanton's home and Stanton and his family went to the Guthrie police station to be interviewed. Both Stanton and his wife were interviewed. After receiving Miranda, Stanton admitted to sexual contact with the boy. Stanton was arrested. The next day, he was interviewed again and again admitted to sexual contact in one instance, but stated that he had no memory of a second incident he'd admitted the day before.

Stanton was indicted on charges of Rape and Sodomy, ultimately 34 counts of various types of sexual assault. Eventually he was evaluated and KCPC and found to be borderline mentally retarded. He moved for suppression, which the court denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does a "threat" to remove children make a statement involuntary?

**HOLDING:** No

**DISCUSSION:** Stanton argued that Monroe's statement that she would seek to remove his children unless he cooperated made his statements involuntary. The Court agreed that certain interrogation techniques were, in fact, "so offensive" that "they must be condemned."<sup>43</sup> However, Monroe testified that she was prepared to call a judge for a removal order, which she said was standard procedure when there were credible allegations of sexual abuse and the safety of other children was involved. There was discrepancy as to where the "threat" occurred.

The Court noted that "it is not improper for investigators to urge a suspect's cooperation by threatening the arrest of an implicated friend or family member, provided that probable cause and good faith would support the arrest."<sup>44</sup> Court "have looked more critically at investigators' threats as to a suspect's children."<sup>45</sup>

The Court continued:

... when law enforcement personnel deliberately prey upon parental instincts by conjuring up dire scenarios in which a suspect's children are lost and by insinuating that the suspect's "cooperation" is the only way to prevent such consequences, the officers run a grave risk of overreaching. So powerful can parental emotions be that the deliberate manipulation of them clearly has the

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<sup>43</sup> Miller v. Fenton, 474 U.S. 104 (1985).

<sup>44</sup> Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008) Henson v. Com., 20 S.W.3d 466 (Ky. 1999), U.S. v. Finch, 998 F.2d 349 (6th Cir. 1993).

<sup>45</sup> Lynumn v. Illinois, 372 U.S. 528 (1963).

potential to "overbear" the suspect's will and to "critically impair" his or her capacity for "self-determination."<sup>46</sup>

However, in this case, the Court noted that the "information was not delivered in a threatening manner but was simply an accurate statement as to the usual next step when a suspect in a child sexual abuse case declined to cooperate and children were deemed to be at risk." Nothing indicated they "sought to exploit" his mental limitations or that he failed to understand the situation. The Court emphasized however "that when circumstances justify informing the suspect of the officers' intended next step, the information should be conveyed in a professional manner, without threatening words or tone, because if not handled appropriately a trial court may well find that resulting statements are the product of coercion."

Stanton's conviction was upheld.

### **Phifer v. Com., 2011 WL 3360908 (Ky. App. 2011)**

**FACTS:** On October 19, 2007, Taylor, Phifer's girlfriend, took JT, her two month old female child to the UK emergency room. The nursing staff saw signs of abuse and called Lexington PD. That night, Taylor gave LPD consent to search her apartment. There, Officer Geis found Phifer outside and Phifer agreed to go to the station to talk. Officer Geis gave Phifer Miranda warnings there and he was handcuffed and transported. Some 45 minutes later, Det. Johnson tried to give him Miranda again but Phifer stopped him, indicating Geis had already done so. He was apparently released, as he agreed to be interviewed again on October 24 and 25. Det. Ball gave him Miranda before each interview as well. After an investigation, both Phifer and Taylor were charged.

Phifer moved to suppress statements he made about how the baby was injured; the court denied that motion. The pair were tried together. The evidence indicated the baby would likely never be able to walk, talk or fully function on her own. Phifer was convicted of First-Degree Assault and Taylor of Second-Degree Criminal Abuse and Endangering the Welfare of a Minor. Phifer appealed.

**ISSUE:** Does a break of 45 minutes require the reading of Miranda a second time?

**HOLDING:** No

**DISCUSSION:** Phifer argued that since Det. Johnson did not give him Phifer full Miranda warnings that statement was invalid and the ensuing ones were tainted. The Court, however, stated that in fact, Johnson did not have to give him Miranda at all given that only 45 minutes had passed.<sup>47</sup> Phifer did not argue that he forgot them or was unaware of them and in fact, he'd said he did understand them.

With respect to coercion, Phifer argued that during his first interview with Det. Bell, Bell stated that no one would be going to jail. At the time, Phifer and Taylor were arguing about what had happened and Bell said he was trying to de-escalate the situation and that in fact, no one was going to jail at that time because the investigation was still ongoing. Phifer was not arrested for five more days. The Court noted that his story changed repeatedly during the investigation and that anything Det. Bell said (such as for Phifer not to use

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<sup>46</sup> Schneekloth v. Bustamonte, 412 U.S. 218 (1973).

<sup>47</sup> See Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

the word “drop” to describe what had happened) was not coercive. The Court found Ball’s actions to be “proper interrogation techniques.” Phifer had agreed that the officers “did not make him say anything he did not want to say.”

The Court agreed that the motion to suppress was properly denied and Phifer’s conviction was upheld.

## **EMPLOYMENT**

### **Royalty v. Spalding (Mayor of Bardstown), 2011 WL 2693565 (Ky. App. 2011)**

**FACTS:** On May 24, 1998, Royalty (Bardstown PD) was involved in an incident in which he fired a shot at a suspect that was dragging him in a vehicle. He fired at the car again, twice, but stated he did not know if the vehicle was coming at him or what the intentions were of the driver.

On June 16, he was placed on suspension and ultimately was removed from his position as a police officer, for violation of city policy. The hearing indicated that there was no indication the vehicle in question did anything but back away from Officer Royalty. Royalty appealed the decision to the Nelson Circuit Court, which upheld the Mayor’s action. Royalty further appealed.

**ISSUE:** Does the KRS 503 defense of self-defense matter in an administrative hearing?

**HOLDING:** No

**DISCUSSION:** Royalty argued that the decision was “based on conjecture and speculation and not on probative evidence.” However, he had not raised that issue before, instead, arguing at the Circuit Court level, that the nature of the proceeding was improper. Further, the Court noted that it did not find that Royalty fired the shots as the “ultimate measure of self-defense.” The Court agreed with the Mayor that the criminal statute on self-defense was not relevant to Bardstown’s policy.

Royalty’s termination was upheld.

## **SIXTH CIRCUIT**

### **SEARCH & SEIZURE - SEIZURE**

#### **U.S. v. Ali, 2011 WL 3890310 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Officer Hill (Greater Cleveland Regional Transit Authority PD) was on foot patrol when he was approached by Emrich. She told him her cell phone had just been stolen. She explained that only three people had been within reach when it disappeared, one of whom was Ali. Hill used his own phone to dial Emrich’s number but did not hear it ring anywhere. Emrich told Hill she thought Ali had the phone. Hill approached Ali and although the exact words were disputed, Hill explained what was going on. Both Ali and his girlfriend, Dozier, denied having the phone. Dozier later stated that Hill told both to take everything out of their pockets, and ultimately Ali began removing items from his jacket to show to Hill. At some point, his jacket rode up and a revolver became visible. Hill and Ali struggled and Ali fled, only to be apprehended later.

Because Ali was a convicted felon, he was charged for possession of the weapon. He challenged the arrest as the product of an unreasonable search and seizure. The trial court concluded it was, at worst, a Terry stop and that Hill had justification for that detention. Ali took a conditional guilty plea and appealed.

**ISSUE:** Does a promise to hold a method of transportation make an encounter a seizure?

**HOLDING:** No

**DISCUSSION:** The Court looked at the original stop as consensual under U.S. v. Drayton<sup>48</sup> and Florida v. Bostick.<sup>49</sup> The Court discounted the offer Hill made to hold the bus during the encounter, finding that offer simply “made it possible for Ali to agree to Hill’s request without missing his bus.” The request to empty Hill’s pockets was reasonable and in addition, the Court agreed that Hill may not have even made the request as he indicated that tactic was dangerous. Once Hill saw the revolver, it was appropriate for Hill to seize Ali forcefully, noting that “consensual encounters sometimes turn into seizures based on the information uncovered or believed to be withheld.”<sup>50</sup> A further frisk was supported by particularized suspicion once he saw the weapon.

The Court upheld the denial of the motion to suppress.

## SEARCH & SEIZURE – SEIZURE

U.S. v. Johnson, 428 Fed.Appx. 616, 2011 WL 2637000 (6<sup>th</sup> Cir. 2011)

**FACTS:** On January 6, 2009, Officers Morton and Layne (Nashville, TN, PD) were dispatched to an address to investigate drug trafficking allegations made by a CI. As they arrived at the housing project, the officers spotted a man walking toward the building where they were headed. Morton called out to the man (Johnson) to stop. Instead, Johnson knocked on the suspect door, demanded entry and was admitted before Morton could catch up. However, within seconds, Johnson came back out.

Johnson stated he lived next door. He fumbled for ID but produced none. He denied having anything illegal and agreed to be searched and even “started to search himself.” Morton intervened and began to search and noted that Johnson “was trying to ‘blade’” so that Morton could not see his right side. Morton saw that Johnson’s jacket “was severely sagging from the outer pocket on the right side.” Morton felt a handgun and retrieved it.

Johnson, a convicted felon, was charged under federal law with possession of the firearm. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does a hurried entrance and exit from a suspect building justify a Terry stop?

**HOLDING:** Yes

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<sup>48</sup> 536 U.S. 194 (2002).

<sup>49</sup> 501 U.S. 429 (1991).

<sup>50</sup> Florida v. Royer, 460 U.S. 491 (1983).

**DISCUSSION:** Johnson argued that he was first “accosted” by the officer when he was coming out and that he never gave permission for the frisk, nor did he feel free to leave. The Court looked to the facts, as developed by the trial court, to determine if the officers had reasonable suspicion to detain Johnson. The Court detailed the facts and agreed the officers “had a reasonable, particularized suspicion to conduct a Terry stop followed by a pat-down.” The Court noted the critical factor to be his “hurried entrance into the very building that the officers planned to target followed by a remarkably quick exit.”

The Court upheld his plea.

**U.S. v. Campbell, 436 Fed.Appx. 518, 2011 WL 3792374 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On February, 2005, after a lengthy investigation, local and federal law enforcement executed a search warrant on Max’s Lounge, in Knoxville. They were seeking evidence of illegal gambling. Officer Gilreath briefed the officers involved in the warrant raid, including the likelihood that the persons inside would be armed. The team was split into a perimeter and an inside operation with a total of 17 officers involved. When the officers pulled up, they spotted an individual (Campbell) standing outside and he “rapidly came off the front porch.” Officers ordered Campbell to the ground. He told them he had a gun, which they retrieved, and they also found crack cocaine in his pocket. He was arrested and once transported to the station, given Miranda. He was charged with drug and firearms offenses.

Campbell moved for suppression arguing they had no reasonable suspicion to stop or frisk him. The Court concluded that his actions, coupled with his proximity to the suspect location and his presence in a high-crime area, was sufficient to believe he was the “lookout.” His motion to suppress was denied. He was ultimately convicted and appealed.

**ISSUE:** Does a suspect moving rapidly away from a suspect scene justify a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** Campbell argued that he was seized without reasonable suspicion. However, the Court noted that within seconds of being ordered to the ground, Campbell announced he had a gun. Once the officers knew about the gun, the officer was justified in handcuffing Campbell. The Court looked to the factors that arguably supported the Terry stop and agreed that “factors that are innocent when considered in isolation may provide the basis for reasonable suspicion when viewed together by an experienced officer.”<sup>51</sup> Further, unprovoked flight is also a relevant factor.<sup>52</sup> While walking away does not equate to reasonable suspicion, “the speed of the suspect’s movements may be relevant in the totality of the circumstances.”<sup>53</sup> The officers’ experience about such gambling operations was critical, as well.

The court held the stop valid and upheld Campbell’s conviction.

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<sup>51</sup> U.S. v. Arvizu, 534 U.S. 266, 273 (2002).

<sup>52</sup> Illinois v. Wardlow, 528 U.S. 119 (2000).

<sup>53</sup> U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

**U.S. v. Clariot, 655 F.3d 550 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On January 29, 2008, Guzman and Toledo, with Clariot as a passenger, flew a small plane to a rural Tennessee landing field near Jackson. They landed at about 9 p.m. The Dept. of Homeland Security had been tracking the plane and asked Lt. Carneal, of the local sheriff's office, to investigate. Since the plane landed at a landing field without the benefit of airport staff (who went home at night), Lt. Carneal asked for backup.

The deputies entered the airport and inquired if the pilot needed help. They also asked for ID. The deputies provided the information on identities to DHS, which determined there were no warrants. Carneal returned the ID and they discussed the options of finding lodging in Jackson and if they could leave the plane unattended. While waiting for the airport to respond to the inquiry, Lt. Carneal asked about searching the plane. Both Guzman and Toledo became nervous and decided they would just leave. Ultimately they flew to Nashville.

Federal officers told Nashville authorities that they men had "taken an irregular flight pattern." Nashville authorities then had the plane checked by a narcotics dog. Pretending to be airport personnel, they called Guzman (who had checked into a local hotel with the other men) and told him that the police would be arriving soon to search the plane. Guzman left his room and was immediately stopped by a Nashville detective, who requested consent to search the plane. He agreed and 70 kilos of cocaine were found.

Guzman, Toleo and Clariot were indicted for trafficking. They requested suppression of Lt. Carneal's observations in Jackson and the Court agreed, finding further that the evidence found later was tainted by the brief detention in Jackson. The government appealed that decision.

**ISSUE:** Does a detention at one point taint evidence seized at another point in time?

**HOLDING:** No

**DISCUSSION:** The Court noted that "any causative link between the seizure and the defendants' later behavior is a stretch." Even assuming it was improper, it "was brief and stemmed from an understandable request for identification after a moonlit landing at a small unstaffed airport." The men were, in fact, free to leave at that time, having been cleared. Guzman even admitted, knowing he was "clean," that he felt "at ease" during the detention. (In fact, the officers had offered to drive them to a hotel if necessary.) The Court noted that "temporal proximity is the only arrow in the defendant's quiver, and it pierces nothing." The Court agreed that the "exclusionary rule forbids the government from using evidence *caused* by an illegal seizure, not evidence found around the time of a seizure." Nothing was gained during the brief detention in Jackson, and as such, nothing could be lost.

Further, the Court noted that even if the observations were excluded, that the cocaine located would not be excluded. The Court reversed the suppression.

## SEARCH & SEIZURE – CONSENT

### U.S. v. Johnson, 656 F.3d 375 (6<sup>th</sup> Cir. 2011)

**FACTS:** On October 30, 2007, Smyrna, Tennessee law enforcement officers did a knock-and-talk at a residence. They had a tip that residents there had marijuana and a gun. Rawls, Johnson's mother-in-law, owned the home. Rawls shared the home with her mother, Conerly, and her daughter, Karen, Johnson's wife, along with children. Johnson and his wife were separated but he stayed at the house intermittently.

Conerly answered the knock and the officers explained why they were there. Conerly identified that Karen Johnson was in the bedroom with Johnson and that Rawls was sick in bed. The Johnsons emerged and both Karen Johnson and Conerly agreed they lived in the house. (It is disputed whether Johnson also claimed to live there, he claimed that he did so, but the officers claimed he said he "came and went" to visit the children.) In any event, the officers claimed he did not object to a search. (Johnson claims he did object to the search.) Conerly and Karen signed formal consent forms.

Karen turned over some marijuana voluntarily and Det. Weaver began to search her bedroom. He found a handgun, counterfeit money, marijuana, computer equipment and related items. Johnson was indicted and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** May a subordinate tenant's refusal to permit a search override a dominant tenant's consent?

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

**DISCUSSION:** The District Court agreed that Johnson had objected to the search, but further held that his objection was invalid because he was not a full-time resident. As such, his interest was inferior to that of his wife and Conerly, who did live there full-time. The District Court had looked to U.S. v. Ayoub.<sup>54</sup> The Court looked to Georgia v. Randolph, noting that there was no precedent as to whether an objection by someone with a lesser possessory interest could be superseded by a consent from someone with a superior interest.<sup>55</sup> The Court noted that Johnson had a reasonable expectation of privacy in the bedroom he shared, albeit occasionally, with his wife, and that he stored personal possessions there. The Court found that Randolph did not "distinguish among the 'multiplicity of living arrangements'" and that the "particular arrangement of adult co-occupants" in this case did "not fall within any 'recognized hierarchy.'"

The Court upheld Johnson's express objection and reversed the trial court's decision denying the suppression of the evidence.

### U.S. v. Hernandez, 2011 WL 3676865 (6<sup>th</sup> Cir. 2011)

**FACTS:** On October 9, 2008, at about 0530, Deputy Rhodes (Washington County TN SD) stopped a black pickup truck weaving between lanes. Chavez, the driver, failed the FSTs and was arrested. Heatherly was a passenger. They searched the car, finding \$20,000. Officer Walters, a local officer who

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<sup>54</sup> 498 F.3d 532 (6<sup>th</sup> Cir. 2007).

<sup>55</sup> 547 U.S. 103 (2006).

was working with the DEA, went to the storage unit facility which had been their destination. There, he found an SUV surrounded by a group of men, including Hernandez. He searched the SUV with consent, finding a kilo of cocaine and \$69,000. He used Rodriguez, one of the men present, to translate Miranda for Hernandez and Lopez. All were arrested and transported.

Various officers tried to get consent to search their trailer residence, using a Spanish-speaking deputy. Hernandez refused, but Lopez agreed in writing. The Deputy had translated the consent form and also reviewed it orally with Lopez. (She had a degree in Spanish and grew up speaking a Guatemalan dialect.) Hernandez later argued that “the language the form used was, at best, exceedingly formal and at worst, incorrect.” He further argued that Lopez was illiterate and had “limited verbal Spanish ability.”

At the trailer, \$8,900 in cash was found hidden. Everyone was indicted. Hernandez and Lopez moved for suppression of the money found at the trailer, disputing that the deputy “had used the proper Spanish term for search.” A Spanish interpreter criticized the language as too formal “to the point that it may have confused some Spanish speakers.” The Court denied the suppression, finding that the language in the form was made moot since she also told Lopez what they intended. (And of course, since Lopez was illiterate, he could not have read it in any event.)

Both were convicted and appealed.

**ISSUE:** Does a form written/explained in a different dialect from the recipient negate the consent given?

**HOLDING:** No

**DISCUSSION:** The Court discussed the consent and noted that “whether Lopez voluntarily consented is largely dependant upon the sufficiency of the oral explanation that [the deputy] provided to Lopez.” The Court noted that speculating as to whether a different dialect might have confused a person does not rise to error. In context, it should have been clear what the officers intended to do at the trailer.

The denial of the motion to suppress was affirmed.

**U.S. v. Bond**, 433 Fed.Appx. 441, 2011 WL 3557422 (6<sup>th</sup> Cir. 2011)

**FACTS:** In early 2009, Troopers Slinker and Young (KSP) were canvassing hotels in support of a drug investigation. They noticed a car behind them driving erratically. They did not want to jeopardize their investigation so they pulled into a gas station to let the car go past. The vehicle, however, pulled in behind them and the driver (Bond) got out and tried to peer inside their tinted windows. He got into the car and “sped off, again weaving between lanes.” The troopers requested leave from the detail and went after him, stopping the car. Young smelled marijuana and had Bond step out. Bond was frisked and produced ID in the name of Mays. Mays, however, “lacked driving privileges.” Trooper Denny arrived with a dog and swept the vehicle; the dog alerted. The troopers found fragments of marijuana. The troopers told Bond repeatedly that they did not plan to arrest him – because they were actually focused on another investigation. However, they offered to drive him home and he accepted the offer, directing them to a nearby hotel.

Once there, Trooper Denny accompanied him in. Bond's key card, which he obtained from the desk, did not work on the room so they returned to the desk. The clerk checked and said that the holder of the ID was actually in the room next door, but "Bond immediately balked that 102 was *not* his room." The Trooper noted that he would simply get a search warrant and Bond grabbed the card and opened the door. A large amount of marijuana and firearms were found in the room; Bond was arrested.

Bond moved for suppression, arguing that he had not given consent for the search. The trial court concluded that "by unlocking his hotel door," Bond had given consent. Bond took a conditional guilty plea and appealed.

**ISSUE:** Is a reluctant consent valid?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that a number of factors were involving in deciding if a consent was valid. In particular, the voluntariness "must be examined within the overall context and psychological impact of the entire sequence of events."<sup>56</sup> The Court agreed that "Bond's diversionary tactics did at first evidence an unequivocal *lack* of consent." However, he changed his position when he snatched the key and unlocked the door – and that decision was "the product of some rational thought." The Court found that although he was not warned that he could refuse, that his prior criminal history indicated that he was aware of his rights. The Court found the "threat" to get a warrant to be grounded on an investigation that would have supported a warrant, and as such, it did not taint the consent.

Bond's guilty plea was upheld.

**U.S. v. Ruff, 437 Fed.Appx. 448, 2011 WL 4000852 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On November 21, 2007, Officers Edwards, Radigan and Grubbs (Cincinnati, OH, PD) were in plainclothes but wearing vests emblazed with their agency name. They had badges around their necks, visible. They were conducting an investigation into narcotics in a high-crime area. Officer Edwards got a tip about an individual carrying a large amount of crack cocaine and a gun. They found an individual meeting that description, standing with two other people and approached separately. Officer Edwards made contact and identified himself - all three "jumped up and fled, throwing the open beer cans, one of which struck Officer Edwards in the shoulder." Edwards and Radigan chased one of the men (Ruff). As he ran, Ruff pulled a gun and tossed it down. Edwards fired a Taser and Ruff fell, but apparently, he actually tripped. Edwards searched Ruff, finding crack cocaine and ammunition.

Ruff was charged with drug trafficking and possessing the gun in connection with drug trafficking. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does an officer simply approaching an individual require reasonable suspicion?

**HOLDING:** No

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<sup>56</sup> U.S. v. Jones, 846 F.2d 358 (6<sup>th</sup> Cir. 1988).

**DISCUSSION:** Ruff argued that the initial approach was, in fact, an “arrest requiring probable cause.” (He also argued that if not, it was a Terry stop that lacked reasonable suspicion.) The Court, however, found that the “initial approach by the police officers does not even constitute a Terry stop – much less an arrest – because no seizure occurred.” Ruff fled and did not yield to any show of authority. Further, the officer did not deploy the Taser until the gun was tossed away and that immediately confirmed the tip. The officer “had both a reliable tip and a highly corroborating circumstances at the time that he deployed the taser.” As such, he had probable cause for the arrest.

Ruff’s plea was upheld.

## SEARCH & SEIZURE – PRIVATE SEARCH

U.S. v. Spicer, 432 Fed.Appx. 522, 2011 WL 3288986 (6<sup>th</sup> Cir. 2011)

**FACTS:** On July 26, 2007, Spicer left his hotel room to smoke. While he was out, the housekeeper came in and noticed the smell of marijuana and the presence of residue. She “showed the room to her supervisor” and notified the front desk that the occupant had violated the no-smoking policy.

The supervisors went to the room to document the infraction. Believing that the room had been vacated, they opened a duffel bag and “found what appeared to be drugs.” The General Manager thought that the room had been re-keyed. Police were called to the hotel. The General Manager took them to the room, but much to their surprise, “the alleged re-keying apparently failed, because Spicer had re-entered the room.” They told Spicer to wait in the hallway. Two detectives arrived, ensured the room was empty and “observed the unzipped, drug-filled backpack in plain view.” They arrested Spicer and got a search warrant. They ultimately found 3 kilos of cocaine.

Spicer was indicted and moved for suppression. The Court held that under U.S. v. Jacobsen “the police could retrace the private search without a warrant.”<sup>57</sup> Spicer took a conditional guilty plea and appealed.

**ISSUE:** Does the “private search” doctrine apply to a hotel room?

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

**DISCUSSION:** The Court agreed that a hotel-room guest does have a reasonable expectation of privacy in the room, absent under circumstances.<sup>58</sup> The Court found this to be a “cut-and-dried application” of Jacobsen, “noting that the private hotel employees discovered Spicer’s drugs, and that the police properly retraced their search without uncovering anything new.” However, the Court had previously been unwilling to extend Jacobsen to “private searches of residences.”<sup>59</sup> The Court thus declined to “stretch the private-search doctrine to residential searches, including police searches of hotel rooms premised on private employees’ discoveries.”

The Court found that Jacobsen did not apply at all. The Court agreed that other circumstances may have in fact justified the search, for example, “that the General Manager had divested Spicer of his status as an

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<sup>57</sup> 466 U.S. 109 (1984).

<sup>58</sup> U.S. v. Caldwell, 518 F.3d 426 (6<sup>th</sup> Cir. 2008).

<sup>59</sup> U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

occupant of the room, entitling the General Manager to consent to a police search" or that it was found during a protective sweep under Maryland v. Buie.<sup>60</sup> However, they did not make such arguments and the Court declined to raise them sua sponte.

The denial was vacated and the case remanded.

## SEARCH & SEIZURE - INVENTORY

### U.S. v. Lilly, 438 Fed.Appx. 439, 2011 WL 3873843 (6<sup>th</sup> Cir. 2011)

**FACTS:** On March 4, 2009, Officer Veach (Mt. Morris Township, MI, PD) saw Lilly driving. He noted Lilly was not wearing a seatbelt and that his windshield was cracked. He followed and stopped Lilly's vehicle. The stop occurred on a road without a shoulder. He learned the vehicle was registered to someone who lived some distance away. Officer Veach also learned that Lilly lived with the registered owner, who was his mother. A check revealed outstanding warrants and Lilly was arrested. The officers determined the vehicle should be towed and pursuant to agency policy, Officer Veach searched the vehicle. He smelled marijuana and found a considerable quantity of marijuana and cash in duffel bags.

Lilly was indicted for Trafficking and moved for suppression. At a hearing, Officer Veach testified that it was routine policy and that they never allowed vehicles to stay on the side of the road or in parking lots because of liability and theft concerns. Specifically, he testified that Lilly's vehicle was a road hazard because there was no shoulder or parking lane. Lilly testified that he was wearing a seatbelt and alleged that officers had admitted that was the case.

The Court denied the motion to suppress. Lilly was convicted and appealed.

**ISSUE:** May a vehicle that poses a traffic hazard be impounded and inventoried?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the inventory policy pursuant to Colorado v. Bertine<sup>61</sup> and South Dakota v. Opperman.<sup>62</sup> Lilly argued that Officer Veach "failed to state the reasons for" the impound in his report, as the policy requires. He also misstated the policy by saying that it was routine to impound cars "any time the only occupant has been arrested."

The Court, however, agreed that it was proper for Officer Veach to determine the vehicle was a traffic hazard and impound it. Officer Veach properly articulated reasons to impound the vehicle. Finally, Lilly failed to raise the issue of the error in the report and as such, waived it.

The Court upheld his conviction.

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<sup>60</sup> 494 U.S. 325 (1990).

<sup>61</sup> 479 U.S. 367 (1987).

<sup>62</sup> 428 U.S. 364 (1976).

**U.S. v. Ballard, 432 Fed.Appx. 553, 2011 WL 3319431 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On July 19, 2009, Officers Dendinger and Bays were patrolling in Canton, Ohio. At about 1:30 a.m., they spotted Ballard driving at a high rate of speed. As they fell in behind him, Ballard slowed to an appropriate speed and began signaling his turns but eventually “pulled his vehicle to the curb and parked without signaling.” The officers made a traffic stop.

They checked Ballard for the required documents and discovered his license was suspended for failing to maintain insurance. Pursuant to agency policy, that required that his vehicle be towed and impounded and further, that it be inventoried. During the inventory, they found a firearm and asked him why he had not told them of the gun. (At that point, he had not been given Miranda warnings and none of his statements would have been used.) Ballard, who was a felon, later asked what would have been different had he told them, and they agreed that nothing would have been different. He acknowledged possession of the gun.

He was indicted for possession of the firearm and ammunition. He moved for suppression but the Court held that the inventory search was proper. He took a conditional guilty plea and appealed.

**ISSUE:** May a vehicle be towed and inventoried when done so pursuant to a written policy?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Colorado v. Bertine<sup>63</sup> and South Dakota v. Opperman<sup>64</sup> and held that the inventory was permissible “because it was conducted in conformity with established policy and procedures.” Once the officer discovered his license suspension, he were properly within the policy to seize and inventory the vehicle. The Court agreed that the policy actually gave the officers discretion, but noted that under a insurance suspension, state law stated the no person could have legally driven the vehicle. The Court stated that although it was legally parked, the vehicle could not have been removed by anyone because of the state law. Further, there was no evidence that the officers impounded the vehicle in order to do the inventory.

The Court upheld the denial of the motion to suppress.

## **SEARCH & SEIZURE – CARROLL – ODOR**

**U.S. v. McCaster, 2011 WL 3664206 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On December 16, 2008, Officers Mazur and Yasenchack (Cleveland PD) made a traffic stop. They discovered a loaded handgun, crack and powder cocaine in a space under the center console of McCaster’s car. He was indicted for the firearm, as he was a convicted felon, and for the drugs. He moved for suppression.

Officer Mazur testified he stopped the vehicle for window tinting and a lack of license plate illumination. When McCaster rolled down the window, Officer Mazur smelled burned marijuana. Officer Yasenchack concurred. Both McCaster and his passenger were removed and the vehicle searched. First, the

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<sup>63</sup> 479 U.S. 367 (1987).

<sup>64</sup> 438 U.S. 364 (1976).

remnants of a marijuana cigar was found, then the space under the console. McCaster agreed the drugs and gun were his. The Court denied the suppression motion and McCaster was convicted. He then appealed.

**ISSUE:** Does the odor of marijuana provide probable cause to search a vehicle?

**HOLDING:** Yes

**DISCUSSION:** McCaster agreed that U.S. v. Garza<sup>65</sup> gave law enforcement probable cause to search the entire vehicle. He argued, however, that there was no proof the two officers “had any experience or training in the detection of the odor of marijuana.” However, he did not initially raise this challenge and waived the issue. But the Court noted McCaster offered nothing to suggest that the officers’ testimony was false and that the circuit had never before required “an officer claiming to have smelled burnt marijuana – a common and distinctive odor – to show he had any particular training and experience in detecting marijuana.” The officer’s ten years of service and work in a unit that dealt with a great deal of drug activity was sufficient.

With the odor, the officers had probable cause to search the entire vehicle. The Court upheld the denial of the suppression motion.

## SEARCH & SEIZURE – VEHICLE

### U.S. v. McCall, 433 Fed.Appx. 432, 2011 WL 3555422 (6<sup>th</sup> Cir. 2011)

**FACTS:** On May 15, 2008, Officer Hollis (Johnson City TN PD), pulled over a vehicle that was following another too closely. McCall, the driver, said he was returning to Wytheville, Virginia from North Carolina. The vehicle, he said, belonged to a friend who had gotten it after it was seized from a tow company. Hollis noted two rifles in the back seat and McCall said he was free to “run them.” Another officer arrived as backup and the two approached so that Hollis could give McCall his citation. Hollis had McCall step out for a frisk, and McCall agreed. Hollis took the guns back to his cruiser. Although there was dispute about the actual words, McCall agreed he had given consent for a search of the car. (There were issues with microphones worn by the officers.)

Hollis searched the car and found methamphetamine hidden in the console. McCall was arrested. More methamphetamine was found on his person. He was charged and moved for suppression. That was denied. McCall was convicted at trial and appealed.

**ISSUE:** May a traffic stop be extended on consent?

**HOLDING:** Yes

**DISCUSSION:** McCall argued that the traffic stop was unduly extended “without reasonable suspicion of criminal activity.” The Court agreed that it was proper to approach a person and ask for consent. The Court noted that “the totality of the evidence indicates McCall was not illegally seized and that a reasonable person in McCall’s position would feel free to leave under the circumstances.” Most importantly, it noted,

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<sup>65</sup> U.S. v. Garza, 10 F.3d 1241 (6<sup>th</sup> Cir. 1993).

"McCall initiated the idea of running the guns." The officers had returned McCall's paperwork and were standing in a way that did not impede him leaving, and they "did not coerce, threaten force, or show hostility." The Court did not question the moving of the guns to the cruiser to be checked as "guns are uniquely dangerous, particularly in the context of a traffic stop." Further, "during the incident, McCall was unrestrained and uncoerced and could have withdrawn his consent at any time, asked for his rifles back, and been on his way."

Finally, the Court agreed that Hollis did not "dismantle" the vehicle when he lifted a loose plastic cover on the console covering the gear box and found the drugs and that it did not exceed the scope of the consent.

McCall's conviction was upheld.

**U.S. v. Rhodes, 436 Fed.Appx. 513, 2011 WL 3792373 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On February 19, 2009, Officer Velez (Dayton, OH, PD) was working in a special enforcement unit focused on guns and drugs. On that day, he and Det. Riegel noticed a vehicle jutting out of an alley that presented a risk to oncoming traffic. They found Rhodes sitting in the car as they passed. The officers saw him "making a stuffing motion towards like the center console" and put his hands over his face. They turned around but just as they approached, the officers "heard tires squeal and observed Rhodes driving quickly towards the back of the alley." When they pulled in after it, they saw Rhodes get out, leaving the door open – he fled into his girlfriend's apartment nearby.

Officer Velez knocked on the door and ordered it to be opened. Rhodes peeked out through the blinds. Velez continued knocking and identified himself. Rhodes finally opened the door, after some discussion, and Taylor gave consent to search. Rhodes was arrested. The officers decided to tow the vehicle. They checked the ownership and discovered Rhodes was not the owner. They inventoried the vehicle pursuant to policy and found handguns, a scale and crack cocaine hidden inside a secret compartment.

Rhodes, a convicted felon, was indicted on drug and weapons offenses; he moved for suppression. After a hearing, the Court agreed that the officers had cause to stop him, arrest him and search the vehicle. When the suppression motion was denied, he took a conditional plea and appealed.

**ISSUE:** May an abandoned vehicle be inventoried?

**HOLDING:** Yes

**DISCUSSION:** The Court credited the testimony of the officers over that of Rhodes, although it agreed their testimony was a bit ambiguous. The Court noted that despite Rhodes's assertions that he had gotten out of the car ten minutes before the police arrived, "it was difficult to comprehend how police could have located Rhodes if he had not fled from the police."

The Court affirmed the inventory search and upheld Rhodes's plea.

**U.S. v. Chandler / Ciers, 437 Fed.Appx. 420, 2011 WL 3796330 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On January 26, 2010, Sgt. Birkenhauer (unnamed Kentucky agency) got a call from Hamilton regarding drug activity by his roommate, Chandler. Hamilton initially tried to be anonymous but

finally identified himself. The matter was referred to Agent Benton, who met in person with Hamilton, and who provided numerous details about Chandler's trafficking in Oxycontin. On February 4, Hamilton told Agent Benton that Chandler was going on a buying trip. Officers set up surveillance and observed a truck go to the residence, leave, and then return to the residence. Hamilton was told by Chandler about the trip and was told that he was having trouble finding a driver. Ultimately, the driver of the truck, Proffitt, agreed to drive Chandler. Sgt. Birkenhauer communicated with the Ohio State Patrol about the trip and they agreed to do surveillance at the designated meeting place. The meeting took place as described by Hamilton and officers followed as it returned to Kentucky. Once in Kentucky, Officer Caldwell (Kenton County PD) made a traffic stop upon request, although no traffic violations were observed.

The two men were frisked and a drug dog was brought to the scene. An agent took Chandler's arm and "felt an unusual bulge." They ultimately found 140 Oxycontin tablets taped to his bicep. Both men were arrested and both made admissions at the nearby police station. Chandler gave written consent to search the residence, where additional items were found.

During the same time frame, Ciers was stopped by the Ohio State Patrol for traffic violations, upon leaving the Ohio meeting place. He made "furtive movements" toward the center console. Ciers stated he lived in Detroit and appeared very nervous. Sgt. Schultz noted Ciers blading his body and she was concerned he was hiding something. She frisked him, finding a large bundle of money. Ciers was handcuffed. No weapon was found but Sgt. Schultz did read him Miranda and secured him. A drug dog alerted but no drugs were found. They cash was found to be just under \$10,000. The cash was seized but Ciers was not immediately charged. He was held for one hour and 20 minutes and then released.

Both men were charged and both requested suppression. When their motions to suppress were denied, both took conditional guilty pleas and appealed.

**ISSUE:** May a traffic stop be extended upon reasonable suspicion?

**HOLDING:** Yes

**DISCUSSION:** Chandler argued the initial traffic stop was improper and went on too long. The Court agreed that the initial stop was 'well within the acceptable parameters of a lawful Terry stop based upon a reasonable suspicion of criminal activity." The Court found Hamilton to be a reliable informant, given that he was identified. A "large portion of the information provided by Hamilton accurately predicted Chandler's future behavior."<sup>66</sup> The Court further found the officers to be "diligent in conducting their investigative detention." No more than 15 minutes had passed before the drugs were found. The denial of Chandler's motion to suppress was upheld.

With respect to Ciers, he conceded the traffic stop was proper and that the frisk was as well. However, he argued that the trooper did not have the right to seize the currency. Although he failed to raise the issue at the trial court level, the Court examined it and found the seizure to fall within the plain-view doctrine. The Court agreed that although currency is not necessarily immediately apparent to be incriminating, that there was a "strong nexus between the purpose of the investigatory stop and the currency." The officers had reasonable suspicion, at least, that he'd just been involved in a drug transaction. Finally, the large amount

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<sup>66</sup> U.S. v. Cohen, 481 F.3d 896 (6<sup>th</sup> Cir. 2007).

of the currency was unusual. No additional investigation was needed to “establish the likely connection between the currency and the suspected narcotics transaction.”

The denial of the motion to suppress was also upheld.

## SEARCH & SEIZURE – VEHICLE – GANT

U.S. v. Peoples, 432 Fed.Appx. 463, 2011 WL 2899363 (Ky. App. 2011)

U.S. v. Lopez, 2011 WL 3477009 (Ky. App. 2011)

U.S. v. Bennett, 439 Fed.Appx. 501, 2011 WL 4469745 (Ky. App. 2011)

**FACTS:** On February 8, 2009, Officer Dozeman (Holland, Michigan, PD) conducted a traffic stop of a vehicle driven by Peoples. He discovered Peoples’ OL was suspended and arrested him. Upon searching the vehicle, officers found cash and marijuana in the passenger compartment. A drug dog alerted on the trunk and officers located a handgun there. As Peoples was a felon, he was charged with its possession. He requested suppression because of the Gant precedent, which was granted, despite the fact the search was lawful at the time it was done. It was granted and the Commonwealth appealed.

On September 27, 2006, Trooper Cromer (KSP) stopped Lopez for speeding (over 100 mph). He was arrested and his vehicle searched. Trooper Cromer found crack cocaine, paraphernalia and a handgun. Lopez was charged with both and he requested suppression, because of the intervening precedent in Gant. (The case was still under appeal for other issues at the time.) The Court suppressed the evidence and the Commonwealth appealed.

In July, 2007, Bennett was arrested out of his car (where a tip had indicated he was selling drugs) and the car searched. Evidence was found that supported his arrest for drug trafficking. He moved for suppression but was denied. He was subsequently was convicted. He appealed based upon Gant.

**ISSUE:** May a vehicle search done before Gant be decided under Belton?

**HOLDING:** Yes

**DISCUSSION:** In all three cases, the Court reversed the granting of the suppression motions because of the intervening decision in U.S. v. Davis.<sup>67</sup> The Court noted that precedent at the time permitted the search, and excluding the evidence served no deterrence effect. Specifically, in Bennett, the Court noted that even under Gant, the search would have been justified, as evidence relevant to the crime of arrest could logically be found in the vehicle. The decisions in Peoples and Lopez were vacated and remanded to the trial courts and the decision in Bennett was upheld.

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<sup>67</sup> --- U.S. --- (2011).

## INTERROGATION

### Otte v. Houk (Warden), 654 F.3d 594 (6<sup>th</sup> Cir. 2011)

**FACTS:** On February 11, 1992, Otte stole his grandfather's truck and gun, along with credit cards belonging to other relatives and left Indiana for Ohio. Ultimately he shot and killed Wasikowski during a robbery. A witness stated Carroll might know the suspect and Carroll did, in fact, identify Otte. Carroll was actually with Otte when he was apprehended several hours later. During that time, however, he'd committed another robbery and shot another victim, who died some days later. The vehicle was searched and incriminating items were found. He confessed, ultimately.

Otte was indicted on murder. He requested suppression of his confession and was denied. He was convicted, sentenced to death and appealed.

**ISSUE:** Does withdrawal from drugs and alcohol invalidate a Miranda waiver?

**HOLDING:** No

**DISCUSSION:** Prior to his confession, Otte argued, he "was suffering from the effects of drug and alcohol withdrawal" and that made his Miranda waiver invalid. The Court noted that the inquiry on his ability to waive his rights "should be *primarily* on how the police officers perceived the defendant." One of the detectives testified that "Otte seemed composed and showed no physical symptoms of drug effects," and that he "indicated he understood [his rights] and waived them."

Otte's conviction was affirmed.

### U.S. v. Cromer, 436 Fed.Appx. 490, 2011 WL 3715110 (6<sup>th</sup> Cir. 2011)

**FACTS:** On November 1, 2006, Cromer and Watkins were stopped because the vehicle (owned by Watkins but driven by Cromer) lacked a registration plate. When the two gave conflicting information about their travel plans, the officer called for a drug dog. However, before the dog arrived, Watkins admitted there was methamphetamine inside the car. Both were arrested.

Kentucky DEA officers got a search warrant for Cromer's Kentucky home. They found, among another things, a 1971 Plymouth Duster, and seized it, although the warrant did not specifically authorize that seizure. When Georgia dismissed the case against Cromer, he returned to Kentucky. He went to the DEA office seeking the return of the car. At some point he was told they would not release the car at that time and explained the process for retrieving the car. They asked him about what had occurred in Georgia, "prefacing their questions with assurances that Cromer was free to leave at any time and did not have to answer them." He told them he'd been given methamphetamine by Watkins. (Watkins later stated he and Cromer were in a partnership involving drug trafficking.)

Cromer was charged, convicted and appealed.

**ISSUE:** Does holding an item belonging to a subject invalidate a statement given when they come in to retrieve that item?

**HOLDING:** No

**DISCUSSION:** Cromer argued that by seizing his vehicle, the DEA coerced him to come into the office and they “overbore his will.” The Court, however, agreed that his statements were voluntary. Even if the vehicle was improperly seized, enough time had passed that the statements “were sufficiently removed from the seizure of his Duster to dissipate any taint.”

The Court upheld the denial of the suppression motion, and upheld his conviction.

**McKinney v. Ludwick, 649 F.3d 484 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On August 3, 2004, firefighters responded to a fire at a gun shop in Inkster, Michigan. It took several hours to suppress the fire. Once they were able to search the premises, the firefighters found Alexander’s body. He was one of the owners of the business. His body was found with flex-cuffs attached to one wrist. He died from smoke inhalation and burns, but had also been beaten and was possibly unconscious prior to the start of the fire. Approximately 90 guns were missing and an accelerant had been used.

McKinney was linked to the fire and was given a polygraph while in custody for another reason. He obtained counsel at that time, on August 17. He was arrested again, on November 20, on unrelated charges and the detective “used the opportunity to interrogate McKinney about his possible involvement in the Alexander case.” He was given Miranda and waived his rights. Eventually, McKinney admitted to having “planned it.” He immediately asked for his lawyer and the interrogation was stopped. As he was taken back to his cell, the detective told him that his case “might be prosecuted by the federal government” and as such, he could face the death penalty.

The next morning, Det. Delgreco was in the cellblock for another reason and McKinney asked to talk to him (and the ATF) about what was going to happen. “Delgreco reminded McKinney that they could not speak due to McKinney’s prior request for his attorney, but McKinney persisted and agreed to talk without his attorney.” Eventually, McKinney “gave a written statement and affidavit admitting he had both planned the robbery and served as a lookout during it.” He insisted that the fire and the homicide “had not been part of his plan.”

McKinney was convicted in Michigan for his role, with the only evidence presented being his confession. He had moved for suppression and been denied. When the Michigan courts denied his appeals, he filed for habeas corpus. The District Court refused to enter the petition, and McKinney appealed.

**ISSUE:** May an invocation of counsel be revoked by the subject even after an attorney has been retained?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Miranda v. Arizona and Edwards v. Arizona<sup>68</sup> for guidance. In Edwards, the Court noted that “a valid waiver of [the] right cannot be established by showing only that he

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<sup>68</sup> 451 U.S. 477 (1981); 498 U.S. 146 (1990).

responded to further police-initiated custodial interrogation even if he has been advised of his rights.” In Minnick v. Mississippi, the Court ruled that “after an individual asks for counsel during interrogation, the government cannot demonstrate a valid waiver of this right absent the ‘necessary fact that the accused, not the police, reopened the dialogue with the authorities.’” The Court noted that although Delgreco did engage in an “impermissible interrogation” by his comment, that the “coercive effect of this interrogation had subsided by the time McKinney asked to speak with Delgreco the next morning.”<sup>69</sup> He “validly waived his right to counsel before giving his statements.” In Hill v. Brigano,<sup>70</sup> the Court held that “even when police impermissibly interrogate an individual after he invokes his right to counsel, that individual can still initiate communication with police and waive his previously asserted right when ‘enough time ... elapse[s] between the impermissible further interrogation and the initiation [such] that the coercive effects of the interrogation ... subside[s].’”

The Court affirmed the denial of McKinney’s petition for a writ of habeas corpus.

## 42 U.S.C §1983 – SEARCH & SEIZURE

### O’Malley v. City of Flint, 652 F.3d 662 (6<sup>th</sup> Cir. 2011).

**FACTS:** Chief Hagler, Acting Chief of the Flint, Michigan, PD, spotted what he believed to be an unmarked police vehicle. He thought it to be a Michigan State Police SUV as it included a roof antenna, a vehicle push-bar, Call 911 decals and emergency lights. The number 47 was stenciled on the back. He believed, however, that the driver was attempting to impersonate an officer and contacted MSP to determine if they had a vehicle in the area. They did not.

When the vehicle pulled into a residential driveway, Hagler parked behind it and approached O’Malley, who had gotten out. O’Malley stated he was a security guard and had a CCDW permit and that a gun was on the front seat under a t-shirt. Hagler requested backup and told O’Malley to keep his hands in view and come to him. O’Malley became upset and Hagler handcuffed him.

Within minutes additional officers arrived and took custody of O’Malley. Officer Johnson secured O’Malley in her cruiser while the other officers investigated. They learned that O’Malley was the subject of an outstanding warrant by another agency and Officer Johnson held him, still at the scene, to await pickup. Two hours later, however, the other agency advised Hagler that “it had mistaken O’Malley for another individual” and they had no warrant on him. Hagler, who had left the scene, contacted Johnson and told her to release him and return his property.

O’Malley alleges that he told Johnson the handcuffs were too tight during his custody but she refused to loosen them.

O’Malley filed suit under 42 U.S.C. §1983. The defendant officers and the city filed for summary judgment. The Court concluded that Hagler was not entitled to qualified immunity and Hagler appealed.

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<sup>69</sup> The Court of Appeals actually found it to be “no means clear” that Delgreco’s comment “qualified as the functional equivalent of interrogation, as opposed to a type of ‘subtle compulsion’ to cooperate that is not foreclosed by Miranda and Edwards.” Other circuits had, in fact, held death-penalty comments to not be the case.

<sup>70</sup> 199 F.3d 833 (6<sup>th</sup> Cir. 1999).

**ISSUE:** May an officer handcuff a subject because of their conduct to detain them?

**HOLDING:** Yes

**DISCUSSION:** First the Court reviewed the initial encounter. O'Malley stated he was unreasonably seized when Hagler parked behind him and "unlawfully asked him questions." The Court noted that "the Fourth Amendment does not apply to consensual encounters with the police" but only when the subject does not feel free to leave. Although he was blocked in, O'Malley was "out of his vehicle and walking toward the house." He obviously felt free to leave at the time. The Court found he was not seized at that time.

When Hagler approached and asked questions, that was also lawful. He "did not use language or a tone compelling compliance. He stopped, but that did not indicate he was seized. However, even if he did, Hagler had, at the least reasonable suspicion sufficient to have supported a Terry stop. The Court held that Hagler was entitled to qualified immunity on these points.

With respect to the handcuffing and detention, and subsequent vehicle search, the Court also agreed qualified immunity was warranted. The Court held that O'Malley became agitated and "Hagler was faced with a threatening situation." Hagler could not see into the vehicle due to its tinted window. At some point the situation ripened into an arrest, but "this occurred after the police learned of and properly detained O'Malley on the arrest warrant issued by the City of Warren." The Court agreed Hagler was also entitled to qualified immunity on this claim.

Finally, the Court looked at O'Malley's claim of excessive force related to handcuffing. Hagler was responsible for O'Malley for only two minutes following his handcuffing, at which point he was handed over to Johnson. The Court held that his failure to immediately loosen the cuffs was not a constitutional violation, given that O'Malley actually never asked that they be loosened, only commenting that they were too tight.

The Court reversed the trial court and granted summary judgment to Hagler.

**Rodriguez and Palmer v. City of Cleveland, 439 Fed. Appx. 433, 2011 WL 3792371 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Throughout 2004 -2006, Rodriguez entered into agreements with Palmer, who served as the fiduciary for a family member's estate. Palmer was to gradually transfer estate business assets to Rodriguez. In 2006, acting on a tip, Cleveland PD arrested Rodriguez for receiving stolen property (a vehicle) and possessing criminal tools. The officers went to do a business inspection of his property and Rodriguez permitted them entry; they began to run VIN numbers of the vehicles on sight. He was released and then arrested a second time, for additional stolen items, this time with media present. His tow trucks were confiscated which "spelled disaster" for the business. Rodriguez, who was also employed elsewhere, was fired as a result of the criminal charges.

Ultimately, most of the charges were dismissed or never, in fact, even filed. He was only cited for some minor business related permit issues. Vehicles that were confiscated were not returned until sometime in 2007. Eventually, the agreements between Rodriguez and Palmer were cancelled because he would be unable to satisfy the contract.

Rodriguez and Palmer filed suit against Cleveland, named officers and other entities under 42 U.S.C. §1983 and state law. The case was removed to federal court. Rodriguez moved for summary judgment on a claim of unreasonable seizure of his property, noting that the dismissal of the felony counts indicated that the officers lacked probable cause to seize the items. The defendants countered with a summary judgment demand of their own. The District Court found in Rodriguez's favor, finding that they lacked probable and legal cause to seize the tow trucks when there was no reason to believe there was any criminal issues with them. (A tip suggested one might be stolen, but not all 9 of them.) Further, the Court noted there was no justification for holding them for 7 months and for nearly a month after the dismissal of all charges against him.

The Court also noted that the defendants could not "seek shelter under the administrative inspection exception to the Fourth Amendment's warrant requirement," according to the district court, because an "administrative inspection may not be used to gather evidence as part of what is, in actuality, a criminal investigation."<sup>71</sup> The Court agreed that the requirement for a search warrant "before making an unwelcome intrusion onto private property has been clearly established for over 20 years." The Court denied qualified immunity to the defendants on other issues, which included a claim that exculpatory information was withheld to secure his indictment.

The defendants appealed.

**ISSUE:** May vehicles be seized pursuant to administrative law?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that even they suspected the Rodriguez possessed a stolen dump trunk, that did not "render their warrantless administrative search ... invalid."<sup>72</sup> The Court found them entitled to qualified immunity on that part of the claim. With respect to the trucks, which were not properly licensed pursuant to local ordinances, the Court agreed the initial seizure was appropriate, even if in retrospect, the interpretation may have been incorrect. (The underlying issue involved whether it was proper for Cleveland to have ordinances that overlapped state laws on the same matter.) The Court agreed the defendants were entitled to qualified immunity for impounding the trucks. The Court detailed the back-and-forth actions with respect to the trucks over some months, and ultimately the cancellation of the contract re-vested Palmer with possessory interest in the vehicles. Rodriguez failed to exercise any of the options provided under the law to retrieve the vehicles, as he misunderstood the reason they were being held in the first place. The Court agreed that the defendants were entitled to qualified immunity on this issue as well.

With respect to his arrest, the Court agreed Rodriguez was properly arrested on probable cause for his "unexplained possession of stolen goods." Even proving that he had paid for the item, did "not make the property any less stolen." The Court awarded them qualified immunity on this case as well.

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<sup>71</sup> Although an administrative inspection may uncover evidence of a crime, it cannot be done for that purpose. However, if such evidence is located during a legitimate administrative inspection, it can be used in a prosecution.

<sup>72</sup> See U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983).

With respect to the alleged withholding of exculpatory information, the Court noted that the case depended upon testimony given by one of the officers in court, and agreed that witnesses are granted absolute immunity for their testimony. As such, that claim also failed.

Finally, with respect to claims of retaliation and harassment, the Court found no indication that the named defendants took part in any such activity. All further claims against the defendants were also dismissed.

**Jacob v. Killian, 437 Fed.Appx. 460, 2011 WL 4036078 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Killian originally inspected Jacob's property in West Bloomfield Township in 1999. He found inoperable vehicles, castoff materials and general disarray. He issued a notice of violation after learning of a series of complaints over the prior years. Eventually misdemeanor charges were placed on the charge of blight. Killian agreed to clean up the property pursuant to an agreement but the violations continued. He served a jail sentence. The dispute continued. Jacob filed suit and won a partial judgment relating to Killian's entry into the curtilage of his property. He appealed the portions where he was unsuccessful.

During the pendency of his first appeal, the Court ruled on Widgren v. Maple Grove Twp. "which held that a "purely administrative" warrantless entrance by a tax assessor onto the curtilage of a house "does not violate the Fourth Amendment by observing the exterior of a house for a purely "tax purpose."<sup>73</sup> The case was remanded to consider the impact of the case on Killian.

**ISSUE:** Is the backyard of a home inside the curtilage?

**HOLDING:** Yes

**DISCUSSION:** The central issue in this appeal "is whether Killian did or did not enter the protected curtilage of Jacob's house." The Court agreed that the facts indicated that Killian entered the backyard but argued that it was not part of the curtilage. Experts studied photographs taken by Killian to determine where he was standing when he took them. The Court considered Killian's argument that Jacob consented by virtue of an agreement but found it "reaching." Further, Jacob argued that Killian entered his property uninvited so many times he could not provide dates. Killian even admitted he inspected Jacob's property following Killian's serving his sentence, which corroborated Jacob's assertion that he'd done so.

Killian argued that he was ordered to do so, by the Court or a prosecutor. However, the Court noted, the argument, even if factually correct, does not entitle him to qualified immunity because, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence."<sup>74</sup> Public "officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." (Nor did he actually point to any such orders.)

The Court noted that in fact, Jacob never served probation, he served jail time instead. As part of a plea agreement initially, he'd agreed to two years of probation but that case was closed when he served his 30 days. There was no language that suggested he waived any Fourth Amendment rights at all.

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<sup>73</sup> 429 F.3d 575 (6<sup>th</sup> Cir. 2005).

<sup>74</sup> Kennedy v. City of Cincinnati, 595 F.3d 327 (6<sup>th</sup> Cir. 2010)

The Court affirmed the denial of qualified immunity.

**Modrell v. Hayden & Carter, 436 Fed.Appx. 568, 2011 WL 3836454 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 30, 2005, the McCracken County SO received a tip that Richard Modrell was delivering methamphetamine to a local convenience store while working as a pizza delivery person. A week later, Det. Hayden got a tip from a CHFS worker of drug activity at the address Modrell shared with his mother. Deputy Riddle was dispatched to go with her to investigate the complaint, specially that Michelle Lindsay and her 15-year-old daughter used marijuana there.

When they knocked at their basement apartment door, Richard Modrell answered and told them that Lindsay and the daughter were in the basement with him. He gave the officers consent to search the area and they found evidence of methamphetamine use. He also stated there was a gun in the basement and more guns upstairs. Deputy Riddle noted the basement was fitted out as an apartment and that the door at the top of the steps (leading into the rest of the house) had a lock but he did not determine if it was, in fact, locked. Modrell was arrested and Lindsey was, at least, detained. Riddle went outside and around to the back porch and informed Phillip Modrell (Richard's father) that everyone in the house was being detained until they could get a search warrant. He entered, over Phillip's objections. Riddle "told him he was coming in anyway" and made a gesture that Phillip believed indicated he was reaching for a gun. Riddle ordered everyone inside to come to the carport and was told that Modrell's "mother-in-law was not physically capable of doing so" and that a child was asleep upstairs. At some point, allegedly, Riddle saw Lindsay's daughter enter the upstairs residence through the connecting door to the basement.

Ultimately, Phillip Modrell sued Riddle, Hayden and Deputy Carter for various constitutional claims. The trial court granted summary judgment to Hayden but denied qualified immunity to Riddle on the warrantless entry and related state law claims. The Court found it unclear where the daughter was located and that "depending upon the daughter's whereabouts, Riddle's warrantless entry may have been justified to prevent her from destroying evidence."

Riddle appealed the denial of qualified immunity.

**ISSUE:** Is the entry into a home without exigent circumstances (or a warrant) improper?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that warrantless intrusions into private property are presumptively unreasonable, but could be justified under exigent circumstances. Riddle argued that exigent circumstances, specifically "officer safety and the prevention of the evidence destruction" justified his entry. Specifically, he argued that they had information about guns in the house and a tip that adults answered the door with guns in their hands. Modrell admitted that there were guns in the house, as well. The Court noted, however, that the suspects were already detained and a gun secured, and that while the "Modrells may not have been outright friendly, they remained courteous throughout the incident." The Court found no officer safety issues apparent.

With respect to the evidence, Riddle urged the court to look to Illinois v. McArthur.<sup>75</sup> McArthur includes four elements to assist in deciding whether an individual's privacy interest outweighs the concerns of law enforcement: "(1) whether there was "probable cause to believe that [the defendant's residence] contained evidence" of a crime or contraband; (2) whether "the police had good reason to fear that, unless restrained," the defendant would destroy the evidence before they could return with a warrant; (3) whether officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy"; and (4) whether the restraint in question lasted "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."

In this case, the Court focused on whether the house was a single-family home or a duplex, since if the latter, probable cause was needed for each unit.<sup>76</sup> If a single house, it was not.<sup>77</sup> Riddle was told that Modrell was renting the basement from his father and could see that it had a separate entrance and facilities. Riddle even treated it as a separate unit by going around the outside to get to the back porch.

Finally, the Court noted that the information to which they were responding came from two separate anonymous tips. The Court agreed that Riddle lacked probable cause concerning the upstairs residence. As such, the case turned on the location of the daughter, who might have a reason to destroy evidence to protect her mother. However, when he entered the house without a warrant, and without any particular reason to believe evidence would be destroyed, "any benefit to law enforcement from Riddle's action was marginal at best, but it came at great cost to the privacy rights of the residents upstairs."

The Court noted that much of the interaction was captured by Riddle's recorder, which indicated that he ordered Modrell to remain in one place and threatened to handcuff him.

The Court upheld the District Court's ruling denying qualified immunity.

## **42 U.S.C §1983 - SHERIFF**

### **Cochran v. Gilliam (Dan and Don), 656 F.3d 300 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In 2008, Cochran leased a home in Stanford. He fell behind in rent and the landlords sought to evict him. A standard eviction notice was handed down. On September 8, the eviction notice was executed. Deputy Sheriffs Dan and Don Gilliam, along with Deputy Schnitzler and the landlords, went to the home with the Warrant for Possession. The landlords were told to secure the personal property inside but the Landlord told the deputies that he had been informed by the Lincoln County Attorney that he could take the property and sell it, Don Gilliam verified that with the County Attorney as well. The property was removed from the residence by the landlord.

Cochran was at work when he got a call from a neighbor as to the eviction; he immediately went to the house. The deputies threatened to restrain or arrest anyone who attempted to interfere with the landlord taking the property. Various calls were made seeking help to prevent the landlord from taking the property, to no avail. Ultimately one of the deputies even bought a television taken from the property from the

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<sup>75</sup> 531 U.S. 326 (2001)

<sup>76</sup> U.S. v. Whitney, 633 F.2d 902, 907 (9<sup>th</sup> Cir. 1980).

<sup>77</sup> Shamaeizadeh v. Cunigan, 338 F.3d 535, 553 (6<sup>th</sup> Cir. 2003)

landlord. To date, none of the property was returned to Cochran and ultimately, the landlords declared bankruptcy, thwarting any ability to get reimbursed for the property.

Cochran filed suit against the Gilliams under 42 U.S.C. §1983. They requested summary judgment and were denied. They appealed.

**ISSUE:** During an eviction, is the duty of the deputies at the scene simply to keep the peace?

**HOLDING:** Yes

**DISCUSSION:** Cochran argued that when the deputies actively assisted in the removal and loading of the property and specifically permitted the landlords to transport it away, they carried out the eviction in an unreasonable manner. He agreed it was lawful to remove the property, however, and place it out on the sidewalk. The Court found no question that Cochran had a constitutional right to his personal property. In Soldal v. Cook County, the Court held that when a deputy “not only stood by to keep the peace during the repossession of a trailer home but played an active role in facilitating the wrongful repossession of the trailer.”<sup>78</sup> The Court agreed, in Revis v. Meldrum, that “an officer’s mere presence at the scene to keep the peace while parties carry out their private repossession remedies does not render the repossession action that of the state.”<sup>79</sup> Once the officers take an active role, however, they are no long “mere passive observers.” The deputies engaged in affirmative actions (confirmed by photos and testimony) and further, “interposed themselves between Cochran and the Landlords to allow the Landlord to take Cochran’s property” – threatening to arrest them if they interfered. They sent away the KSP trooper called to the scene, as well. The Court ruled that their actions crossed over in “meaningful interference” with Cochran’s possessions.

The Gilliams argued that since they sought legal advice, their actions were reasonable. The Court, however, noted that a call for “general advice” does not make unreasonable actions reasonable. Reliance on legal advice is a defense only under extraordinary circumstances.<sup>80</sup> The Court agreed that a landlord may take a lien on property to secure rent but that does not allow the property to be taken without the proper judicial process.

Further, the Court was satisfied the Soldal set the standard for the constitutional right in question. It noted that “while the Gilliams’ involvement may have begun as a civil standby to serve the eviction notice and simply keep the peace, their actions quickly turned into active participation in the seizure of Cochran’s property” – which was directly against the holding of Soldal.

The denial of summary judgment was upheld.

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<sup>78</sup> 506 U.S. 56 (1992).

<sup>79</sup> 489 F.3d 273 (6<sup>th</sup> Cir. 2007); U.S. v. Coleman, 628 F.2d 961 (6<sup>th</sup> Cir. 1980).

<sup>80</sup> Silberstein v. City of Dayton, 440 F.3d 306 (6<sup>th</sup> Cir. 2006).

## 42 U.S.C §1983 – CONSPIRACY

### Bazzi v. City of Dearborn, 658 F.3d 598 (6<sup>th</sup> Cir. 2011)

**FACTS:** Bazzi and Haidar were acquaintances in Dearborn, Michigan. Haidar had been indicted on federal wire fraud and Bazzi sent a copy of the document to Haidar's girlfriend. Bazzi had been convicted in 1994 and remained, at the time, on federal supervised probation. Haidar spoke to Saab, a Dearborn police officer about it. Saab suggested that "they fabricate a police report alleging that Bazzi broke the window of Haidar's car" and that he would have Thompson, another officer, take the report. However, Thompson refused. So, Saab and Haidar decided to go ahead themselves.

Late that evening, Thompson got a call from Saab that someone would be calling him. Haidar called Thompson shortly thereafter and in fact, called him a total of 10 times. Haidar told Thompson that "Bazzi was carrying guns and drugs in his car and that his cousin saw Bazzi with a gun." He described Bazzi's car and gave Thompson his address. Thompson and Officer Cox went to the location. They saw Bazzi speeding and run a stop sign, so they pulled him over. Bazzi gave consent to search but nothing was found. They allowed him to leave without citations. Cox later did an internal report in which "she falsely reported that Bazzi was stopped on suspicion of driving a stolen vehicle."

Bazzi was arrested for violating his release because of the fabricated report. The charge was dismissed, however. Saab was forced to resign after an investigation but he was not convicted on federal charges brought as a result. Bazzi filed suit under 42 U.S.C. §1983. Most of the claims were resolved in Bazzi's favor, leaving only Thompson and the City of Dearborn. They were granted summary judgement and Bazzi appealed.

**ISSUE:** May an officer be sued for involvement in a civil conspiracy to have someone arrested?

**HOLDING:** Yes

**DISCUSSION:** Bazzi argued that Thompson conspired with the others to violate his constitutional rights. However, the Court noted, there was no evidence "from which to infer that Thompson shared a conspiratorial objective of such broad scope." Thompson actually opted out of the conspiracy by refusing to generate the false report. The Court found although Thompson was involved in the stop that there was no indication he shared in the conspiratorial motive to have Bazzi arrested. The Court agreed that the alleged traffic violations were "subject to dispute" - especially since Bazzi was not even cited. Cox's false report threw doubt on the actual motives for the stop. Thompson argued that the tip provided at least reasonable suspicion, but the Court found that the tip fell short of any indicia of reliability. Rather, Thompson knew that the informant was of "highly questionable veracity and possessed personal animosity" against Bazzi. The Court agreed there was sufficient evidence to infer a conspiracy with respect to the traffic stop.

The Court agreed that there was sufficient indication that Thompson was involved in a conspiracy so as to allow the case to go to a jury. The summary judgement on Thompson's behalf was reversed.

**Siler v. Webber, 2011 WL 3677965 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On July 8, 2004, Deputies Webber, Franklin, Monday, Green and Carroll (Campbell County TN SO) went to Lester Siler's home to investigate drug complaints. When they arrived, they "took Siler's wife and son outside, handcuffed Siler to a chair, and gave him an ultimatum: either he sign a form allowing them to search his home, or they would obtain his consent by force." They threatened to do a variety of things, including electrocuting him, breaking his fingers and killing him. He refused, so they "proceed to inflict pain," slapping, punching and beating him with objects. Unknown to them, however, his wife "recorded part of it on tape."

All five officers were convicted and sent to prison. Siler brought §1983 charges against them and the county. The Sheriff (McClellan) and Chief Deputy (Scott) (collectively, the Supervisors) were also sued in state court, but apparently not under §1983. The County and the Supervisors claimed the responsibility fell solely on the five deputies. After various procedural efforts, the County received summary judgment. The Silers appealed.

**ISSUE:** Is the government entity liable for misconduct of employees, absent a showing of deliberate indifference?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the County did not bear any vicarious liability for the actions of the deputies since the County had done nothing that caused the deputies to commit the assault.

The Court continued:

Municipalities face policy-based liability under § 1983 only if a plaintiff demonstrates "that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."<sup>81</sup> Where, as here, a plaintiff points to a municipal policy of *inaction* as the municipality's "deliberate conduct," the plaintiff must show that the municipality's failure to act constitutes "deliberate indifference" to the plaintiff's constitutional rights, and "directly caused" the plaintiff's injury, *see id.* at 415. With limited exceptions, deliberate indifference must be established with evidence that the municipality ignored a pattern of similar constitutional violations.

The Court found no indication that the County had a policy of tolerating excessive force or abuse. The Court did not agree that the 45 lawsuits involving excessive force, over 8 years, constituted a "clear and persistent" pattern of abuse in the absence of data showing what the "normal" number would be for a jurisdiction of equivalent size. The Silers also argued that three of the deputies, at the time of the case, "had not yet attended the academy for training or achieved academy certification." However, they failed to show a pattern of conduct of constitutional violations by untrained employees, necessary to meet the deliberate indifference standard. They also complained that the deputies were inadequately screened and that two of them had troubling criminal issues. Although the Court agreed that one's domestic violence history "may well have made him an extremely poor candidate for ... deputy," the Silers had not shown that he was highly likely to do what he was convicted of doing.

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<sup>81</sup> Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997).

The decision of the trial court was affirmed.

## 42 U.S.C §1983 – USE OF FORCE

Pershell v. Cook, 430 Fed.Appx. 410, 2011 WL 2728137 (6<sup>th</sup> Cir. 2011)

**FACTS:** On February 5, 2007, Pershell called 911 after getting into a fight with someone who refused to leave his home. Officers responded, but before they arrived, the other person left. Pershell tried to cancel the response, but was told that the officers would need to continue on to the house. Pershell was unaware that the police had an outstanding warrant from an incident that had occurred two months before. Officer Martin (Baroda – Lake Township PD) was accompanied by Officer Jones (Bridgman PD) and three members of the Michigan State Police.

Officers Martin and Jones were admitted and Martin told Pershell he was under arrest. Pershell ordered them out of the house and the three troopers then entered as well. Pershell allegedly asked why he was under arrest and was told by one of the troopers it was for “resisting arrest.” (In fact, it was for an unrelated misdemeanor.) One of the troopers took Pershell to the ground and he landed face first. Pershell could not identify the troopers by name. He allegedly was struck several times and became unconscious, he was then “dragged or carried” to at cruiser. (Brief video from one of the in-car cameras supported this assertion.) He was removed to a wheelchair at the jail, having suffered an ankle injury during the incident. He was bailed out and went immediately to the hospital, where he was eventually determined to have a pelvic fracture that required several years of treatment.

Pershell filed suit under 42 U.S.C. §1983, alleging excessive force. At a deposition, he could not identify which officer did what, precisely, but was able in some cases to identify that a particular officer did not do something. The officers denied having injured him intentionally or taking many of the actions claimed by Pershell. They agreed, however, that the “only physically aggressive action taken by Pershell” involved a combative stance when he was first confronted, conceding he never struck at them or swung at them.

The defendant officers (and their employing agencies) requested summary judgment. Some were granted, some were not. The Court did deny qualified immunity to most of the officers (except for Jones, who allegedly took no physical action) and they appealed.

**ISSUE:** Is striking a handcuffed, immobilized subject unreasonable?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that, looking at it from Pershell’s viewpoint (as required at this point in the litigation), the use of force against him was objectively unreasonable. It was clearly established “that striking a handcuffed and immobilized arrestee is unreasonable conduct.”<sup>82</sup> The Court also held the leg sweep to be unreasonable when the officers were faced with simple verbal resistance and a combative stance, as Pershell did not resist arrest or pose an immediate danger. He was unarmed and there were “five armed officers at the scene, one of them pointing a taser at Pershell and another carrying a rifle.”

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<sup>82</sup> Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6<sup>th</sup> Cir. 2004).

The defendants argue that since Pershell could not pinpoint which officer took specific actions against him, the action could not proceed, but the Court noted that although he could not see the officers who were striking him, he had “provided significant information about the location and conduct of the officers based on his own sensory observations” and the officers themselves were able to place themselves during the incident. The officers at the scene were all known by name but simply were not known to Pershell at the time.

With respect to state law claims of assault and battery, the Court agreed that striking Pershell with enough force to fracture his pelvis supported an inference of malice and bad faith against him. The Court agreed the state-law claim could also move forward. The Court upheld the denial of summary judgment against the four officers.

**Walker v. Davis, 649 F.3d 502, (6<sup>th</sup> Circ. 2011)**

**FACTS:** On the night in question, Germany was clocked riding his motorcycle at 70 mph in a 55 mph zone. The officer tried to stop him but he refused. Deputy Davis (Allen County SO) heard about the pursuit and blocked the road, but Germany maneuvered around him. Deputy Davis chased after him. Germany did not exceed 60 mph during the chase and ran only one light. He eventually turned off the road and drove through a muddy field, with Davis behind. At some point, David “unintentionally rammed German’s motorcycle” – and Germany died as a result.

Walker filed suit against Davis and Sheriff Carter on behalf of Germany’s estate, under 42 U.S.C. §1983. Both Defendants moved for summary judgement and was denied. Davis and Carter appealed.

**ISSUE:** Is striking a fleeing motorcyclist, absent a pressing need to stop the pursuit, justifiable?

**HOLDING:** No

**DISCUSSION:** The Court agreed that “Germany posed no immediate threat to anyone as he rode his motorcycle across an empty field in the middle of the night in rural Kentucky.” This facts set this case apart from the situation in Scott v. Harris<sup>83</sup> and the court noted that the “chase here was a sleeper by comparison.” The Court noted that despite the paucity of cases on the issue, that “intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force.” Whether the collision here was actually intentional was a matter for the jury to decide.

The Court affirmed the denial of summary judgement.

**Arnold v. Wilder and City of Strathmoor Village, 657 F.3d 353 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On October 25, 2003, Arnold lived with her three children in Kingsley.<sup>84</sup> Arnold went outside to call her son, Jacob, and his friends inside and saw Officer Wilder (Strathmoor Village PD) parking his police car in Breuer’s driveway. (Breuer was the mayor.) Jacob and his friends “met up with Arnold” in the driveway. Officer Wilder “crossed the street and stopped two of the boys in front of Arnold’s house.” Arnold apparently suspected the purpose of the visit as Breuer had complained before about the

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<sup>83</sup> 550 U.S. 372 (2007).

<sup>84</sup> Strathmoor Village PD contracts with Kingsley to provide police services.

neighborhood children, including Jacob, running through yards and jumping over fences. Chief Reynolds had visited the Arnolds before about the complaints. On the day in question, Breuer called Reynolds, who was off-duty, so he sent Wilder to investigate.

Wilder spoke to Arnold, who explained she was the parent of only one of the boys. She sent the other two inside to call their moms. Wilder became angry and told her that he was not finished with the boys. Arnold later claimed that “Wilder began to get very angry with her for no apparent reason.” He blocked her from going inside so she told Jacob to go inside and call her father. Arnold claimed Wilder knocked her to the ground, put her into a chokehold and dragged her towards the car. At no point did Wilder actually arrest her. Wilder shoved her into the car and pepper-sprayed her, then locked her inside. However, one of the boys opened the door and Arnold ran inside her home with the children. The boys called 911, Arnold’s father and their own mothers. Arnold, who was covered with OC, tried to wash it off her daughter, Caroline, who’d come in contact with it as well.

Louisville Metro officers arrived. Sgt. Brown asked Wilder what had happened and he stated that a prisoner had escaped and was inside the house. Brown tried to talk Arnold out, to no avail. Arnold refused to open it under her brother, a local defense attorney, arrived. Armacost, a witness, testified that Wilder insisted he was going to lock Arnold up. Eventually, Brown was admitted and called EMS for the OC spray. She suggested Wilder write Arnold a citation, which Wilder refused to do. Brown told Arnold there was nothing she could do and that Arnold would have to submit to the arrest. She was placed in Wilder’s car despite Brown’s continued attempt to dissuade him from making the arrest.<sup>85</sup> Reynolds arrived and spoke briefly to Wilder and then drove to the station where he asked another officer how he could “make this a felony.” Arnold was released from jail a few hours later. The children were traumatized by the incident.

Wilder claimed that Arnold fought him and that he had to spray her to make her stop kicking him and the car. Arnold was arraigned on Disorderly Conduct, Assault, Resisting Arrest and Escape. She refused a plea deal and went to trial. Purcell and Lutes, Jacob’s friends, Jacob and Caroline testified consistent with Arnold. She was acquitted of all charges.

Arnold filed suit on her own behalf and on behalf of her children against Wilder, Kingsley and Strathmoor and several other individuals. Arnold’s claims against Wilder for false arrest and related claims and against Strathmoor for hiring, survived summary judgement. Ultimately, only the claim on behalf of Arnold went to trial and a judgment of over one million dollars was entered against Wilder. (Strathmoor had agreed that it would be responsible for any damages entered against Wilder.) The damages were reduced to approximately a quarter-million dollars and both sides appealed.

**ISSUE:** Is pursuing a criminal case in the face of no evidence malicious prosecution?

**HOLDING:** Yes (see discussion for factors)

**DISCUSSION:** The Court noted that a false arrest claim rested, or failed, based upon probable cause for the initial arrest. The Court noted that a person can only be charged with escape if they flee a lawful arrest. The Court agreed a jury could find that “Wilder arrested Arnold without authority and therefore she was

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<sup>85</sup> The opinion includes a number of obscenities uttered by Wilder.

justified in fleeing from the police car.” The Court found Arnold’s actions to not be resisting arrest. The Court agreed the false arrest verdict was proper.

With respect to malicious prosecution, the Court also agreed that Arnold met all six necessary elements for such claims. The Court noted that the charges were initiated by Wilder’s making the arrest and filling out the citation form.

With respect to the judgement, the Court changed the punitive damages awarded to \$550,000

**Williams v. Sandel, 433 Fed.Appx. 353, 2011 WL 2790474 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On July 7, 2007, Williams planned to go from Covington to Lexington with a cousin. Before leaving, he bought some vodka and a blue pill (believed to be ecstasy). On the way south, he took the pill with the vodka. He began to “feel extremely hot” and had his cousin pull to the side of the expressway; Williams got out and walked north. He “began to remove his clothing ‘little by little’ until he was completely naked.” He then jogged north on I-75.

At about 11:54, a motorist called 911 and Sgt. Sandel (Kenton County PD) responded. He found Williams jogging in the median strip. There were no lights in that area. Sandel turned around and approached him from behind. Williams turned to face the officer and from this point, the interaction was recorded. In addition, the “video recorded sound audible inside the unattended cruiser including communication from the police radio, a satellite radio comedy program playing on the cruiser’s radio, and occasional, muffled yelling from the officers and Williams. Some recorded portions of the satellite radio program had racial overtones.”

Sandel had his Taser<sup>86</sup> in his hand. Williams raised his hands and initially got to his knees. Traffic passed continuously. Officer Fultz arrived and as he scaled the concrete median, Williams stood up and then kneeled down again and eventually went prone. After a brief struggle, Fultz was able to get a handcuff on Williams’ left hand. Officer Wilkins (KVE) arrived and joined the group. Fultz knelt across Williams’ back “in an apparent attempt to finish securing him.” Williams, who was very fit, “used his free right arm to push himself up from a prone position into a seated position” and Fultz lost his grip on Williams’ left arm. Sandel then Tased him. Upon being directed to do so, Williams became prone again but did the same thing when they tried to cuff him. Sandel tased him again. An off-duty officer who was with Wilkins also approached the scene.

They continued to struggle, trying to get Williams to stay in a prone position, but he ended up on his back. Fultz appeared to strike him with his baton and Williams turned over, but still refused to let himself be handcuffed. Fultz again used his Taser and his baton. Williams eventually began to scoot himself toward the travel lanes of I-75. He was right on the yellow line when tased again and fell with his head in the oncoming travel. Fultz pulled him back into the emergency lane, where once again, Williams “resumed his seated position” and then stood up. Williams ran into traffic and fell when he was tased, with Wilkins and the off-duty officer trying to get traffic stopped. Williams got up and ran and three of the four officers ran after him, out of the view of the camera.

An eyewitness reported the following:

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<sup>86</sup> The opinion called it an ECD device.

[The officers] were all following [Williams] or chasing after him more or less, and he just, he was running across I-75, running back and forth, zigzagging, trying to dodge the cops . . . . And they actually, they finally got a hold of him I believe one of them tackled him or something and then they did hit him with their billy club to try and get his arms locked like this, backwards, like holding himself up. And one of them was hitting him in the elbow, but it wasn't, it wasn't phasing him at all. So, then after that, I believe he got up and they tased him and that didn't stop him. He just ripped the taser right out of himself, and then kept running down the road. And I believe they caught him down the road again, but I could, I could barely see that far. That was probably another eighth of a mile to a quarter mile down the road that he ran from them, all in the same side of the median though on I-75.

Apparently at some point, Fultz and Wilkins also used OC spray. Ultimately Williams was cornered against the median and the officers continued to use their batons. Williams suffered a head injury of some time. He "ultimately collapsed from exhaustion" and was secured. Deputy Hill (Boone County SO) arrived at the end, finding Williams and the officers several hundred yards down the highway. He stated:

The officers were giving [Williams] verbal commands to get on the ground. The officers would pause and give him an opportunity to comply with their verbal command. When he refused to comply, he was struck in the thigh with an expandable baton. I heard and observed this sequence several times.

I also noticed that taser probes were still in the male subject but the leads were gone. In my experience, it is not unusual for subjects who have been tased to try and pull the probes out and disconnect the leads. Once this occurs, the probes are disconnected from the taser device and it will no longer be effective to subdue an individual.

I also noticed that the officers who were around him were exhausted from the physical confrontation. Since the subject was noncompliant with the officers' efforts to arrest him, I discharged my taser into his back. I squeezed and released the taser trigger and it cycled for five (5) seconds. The subject fell face down on the ground while the taser cycled for the five (5) seconds. After the first five (5) second cycle ended, the subject started to push up from the ground, so I squeezed and released the trigger again while the probes and leads still had a good connection. The taser cycled for another five (5) seconds. After the second taser cycle ended, one of the officers was able to secure the second handcuff on the subject.

There was no dispute that once Williams was secured, no additional force was used against him. EMS was called. Williams was "combative and screaming" and had "'chewed-up' two non-rebreather masks." He was secured to the stretcher and taken to the hospital, where he was found to have various injuries. He had elevated creatinine and developed a condition that developed from a muscle injury. He eventually had to have several dialysis treatments. He also suffered from PTSD. His toxicology screens were clean, however.

He was charged and convicted with Disorderly Conduct, other offenses were initially mistried. He eventually took a plea on Wanton Endangerment and Resisting Arrest. Williams filed suit in state court, which was removed to federal court, and the officers argued that the "force used was not objectively unreasonable and that they were entitled to qualified immunity." Wilkins further argued that Williams' state convictions estopped him from claiming excessive force.

The District Court denied the officers' motions and they appealed. The officers moved for reconsideration on the basis of the video, which the court denied, stating that "the disputed nature of the conduct depicted in the video, coupled with the video's lack of audio, rendered segmentation impractical and inappropriate."

**ISSUE:** Is bizarre conduct enough to justify a forcible seizure?

**HOLDING:** Yes

**DISCUSSION:** The officers argued that given the situation they faced – "a naked man on the interstate in the middle of the night, who was unwilling to allow himself to be secured" – the force used was reasonable. The Court agreed that he was entitled to be free of excessive force, but ruled that the right to be free of this type of force in such circumstances was not. His "bizarre conduct" provided sufficient reason for the officers to seize him. He "posed an immediate threat to the safety of himself and the officers, as well as passing motorists." It was clear, since Williams was nude, that he was unarmed, but his location and actions made him dangerous. (The Court noted that 11 vehicles passed him during the initial seconds of his interaction with Sandel.) Even though they were mostly in the emergency lane, "there is some risk inherent in standing alongside traffic moving at such high speeds, especially when there is an individual involved who has been engaging in bizarre and highly erratic behavior." The Court noted the number of vehicles passing at different points of the encounter and stated that "risk of serious bodily injury or death is great when encountering the high-speed traffic present on an interstate." Even when the traffic was stopped on the southbound side of the road, his proximity to a scalable median also posed a risk to traffic that flowed by on the other side. The video indicated he "actively resisted the officers' efforts to secure him." The Court agreed that his "offenses were arguably not of extreme severity" but that "law enforcement surely has an interest in efficiently securing a suspect." "Taken alone and out of context," the baton strikes, 37 uses of the Taser and OC, "makes the officers' conduct seem somewhat unreasonable." But, the Court noted, despite this, he "remained unsecured and unwilling to comply." His injury "does not dictate a finding of excessive force."

Finally, Williams alleged that one of the officers used a racially charged comment – he said one of them said to "get a rope." The Court, however said that such comments do not make an otherwise appropriate use of force excessive. The Court concluded that the officers' use of force was not objectively unreasonable under the facts as presented. The Court gave qualified immunity to the officers on both the federal and state claims.

**Lee v. Metropolitan Government of Nashville and Davidson County, 432 Fed. Appx. 435, 2011 WL 2882227 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On September 22, 2005, Lee attended a concert at a Nashville lounge. After getting too close to the stage, he was escorted outside, but he refused to leave and "persisted in what can only be described as strange behavior." Metro Nashville PD responded. Officer Brooks was approached by Lee as he arrived and he got out to talk to Lee. "Lee's responses to Brooks's questions were incoherent: Lee said that his name was "Blue" and he would point to the sky when he was asked what was going on." Brooks said that Lee got very close to him and eventually "kind of lunged" toward him. When Brooks tried to take Lee's hands, "Lee then jerked away, ripped his shirt off, spun around, and lunged at Brooks again." Brooks used OC and Lee took off running with Brooks following. Lee stopped when ordered, but then took off again. Lee, who was stripping off clothes and eventually became nude, finally fell down. Brooks tried to subdue him but Lee took off again. Other officers, include May, arrived as backup. Mays tased Lee and it

"had the intended effect." Lee fell to the ground. However, six more activations had "little to no effect on Lee." "Because many of the taser activations did not incapacitate Lee, it is unclear how many of the activations actually resulted in the taser delivering electricity to Lee." Brooks and Officer Scott were attempting to control him at the same time and Brooks got tangled in the Taser wires. They had trouble because Lee "was struggling while naked and sweaty, and Lee also partially moved underneath a car." The struggle continued, with one handcuff being placed on Lee's wrist. More officers arrived. Officer Scruggs later noted that he heard a specific sound that he associated with a Taser being activated that "did not have a connection with the target." Officer Scruggs tased Lee three times, but Lee still ran away from him. After multiple activations, with Lee falling but getting right back up, he finally fell, "hitting his head on an SUV's step bar." The officers moved in, with Scruggs drive-stunning Lee twice. Finally, they got handcuffs on Lee after three officers worked to pull his hands together. Officer Cregan placed both knees across Lee's back to keep him down and he remained that way for about 10 minutes. As the ambulance arrived, the officer said it "seemed like Lee passed out." They rolled him over and found his lips were blue.

Paramedic Hitchcox arrived and found Lee not breathing. She administered treatment but he died the next day. At the time of his death, Lee had LSD and marijuana in his system and his death was attributed to "excited delirium" and a "severely acidic blood level" (Lee's medical experts suggested he died from metabolic acidosis, caused by "taser-induced muscle contractions coupled with a deprivation of oxygen due to Cregan's weight on Lee's chest cavity.")

Lee's parents brought suit under 42 U.S.C. §1983 and also made state law claims. (Taser was also sued.) The case was moved to federal court, which remanded several of the claims back to state court. The federal court dismissed Taser, finding that there was no evidence it was faulty or that Taser "had failed to warn about the dangers of excessive taser use." It dismissed all of the officers but May, Scruggs, and Cregan as well, both on excessive force and failure to intervene claims. The remaining officers and Nashville proceeded to trial. The jury found in their favor, finding the force used was not excessive, and the failure to train against Nashville failed as a matter of law.

The Lees appealed.

**ISSUE:** Do multiple Taser application automatically mean excessive force was used?

**HOLDING:** No

**DISCUSSION:** With respect to the officers dismissed prior to trial, the Court agreed that "it is indeed possible to hold a police officer liable under § 1983 for failing to act to prevent the use of force when certain circumstances are met."<sup>87</sup> But, that requires that at least one officer actually be found liable for excessive force.

With respect to Taser, sued under products liability, the Court agreed the warnings it had provided were adequate. At trial, Lee's estate argued against the admission of evidence that indicated that Lee had a criminal history and a past history of drug use, both of which were relevant to put an economic value on his future life. He was also apparently under the influence of hallucinogenic mushrooms, as noticed by one of the ER doctors and confirmed by toxicology testing.

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<sup>87</sup> Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006).

The Court affirmed the decision in favor of the three officers at trial.

**Sabo v. City of Mentor (Ohio), 657 F.3d 332 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On February 5, 2009, Dian Sabo noticed her elderly husband Richard acting strangely. Believing he was having a stroke, her granddaughter called 911. He refused to cooperate with EMS and told them he'd get a gun if they didn't leave. They withdrew and asked Dian to come outside with them. Mentor PD officers responded to a call for assistance and set up a perimeter around the house.

Officer Tkach was positioned on the second floor of a home behind the Sabo house. Dian called her husband on the phone and told him to come out with his hands raised. He "acted confused on the first call and did not answer the second," but he did emerge with his hands up, holding a shotgun aloft. He was ordered to drop the gun but did not do so. Officer Tkach shot him once in the back, killing him.

Dian Sabo filed suit under 42 U.S.C. §1983. The officers and the city moved for qualified immunity. The Court dismissed the City of Mentor but denied qualified immunity to the officers. The officers appealed.

**ISSUE:** When there is a dispute in material facts, is summary judgment permitted?

**HOLDING:** No

**DISCUSSION:** The Court noted that although Tkach maintains that Sabo pointed his guns at the officers, Dian Sabo argued differently. "Tkach's only argument rests on a version of the facts that differs" from that of Sabo's. The Court agreed it lacked jurisdiction to review the case with the dispute in facts.

The Court affirmed the denial of summary judgement.

**Bomar v. City of Pontiac, 657 F.3d 332, (6<sup>th</sup> Cir. 2011)**

**FACTS:** On September 11, 2007, Pontiac (Michigan) officers "conducted an evening drug raid on a house. During the raid, they learned that a vehicle, containing drugs and weapons, was due to arrive shortly. About 15 minutes later a vehicle arrived, but sped away when officers attempted to secure it. Officer Main and two other officers drove to intercept the vehicle, which "fled down a street that had only one forward path of egress" – which happened to be the street Bomar lived on. They drove into the street from the other direction, hoping to intercept it. The vehicle was "nowhere to be found" however, and Officer Main drove slowly down the street, checking driveways. They stopped to observe a similar vehicle and a young black male (Bomar's 12-year-old son) "stood up from behind the car, as though he had been crouching." In fact, he was simply taking their dog out for a nighttime break. Officers jumped out of the car and pulled weapons, ordering him to stay put, but he did not do so, instead running into the house, followed by Officer Main. Officer Main grabbed the boy, who had just told his mother, Bomar, "that he was being chased." "Chaos ensued" and Bomar began to strike Main, not realizing he was an officer. Both Bomar and his son were ultimately handcuffed and removed from the house, restrained on the ground. Officer-witnesses later stated that "Main handcuffed Bomar without any problems, and that she remained only verbally combative after that point." Bomar later testified that Main pepper-sprayed and punched her, after she was handcuffed, with her son corroborating that statement. Another child, a 10-year-old girl, testified that her mother was on the ground handcuffed when sprayed, but stated her mother was punched

prior to being handcuffed. Officer Main conceded he'd pepper-sprayed and punched Bomar after she was handcuffed, arguing that she "continued to pose a threat, even after being handcuffed."

The officer realized that the boy "was not the assault-rifle-toting suspect they had been pursuing and released both him and his mother from handcuffs." The boy complained of injuries and both went to the hospital. Bomar displayed facial injuries and was later diagnosed with TMJ and PTSD.

Bomar filed suit, on behalf of herself and the two children, under 42 U.S.C. §1983 and related state claims. Officer Main, and others demanded qualified immunity and most claims were dismissed, except for the excessive force claim against Officer Main and a related state-law claim of battery. Officer Main appealed.

**ISSUE:** Does verbal combativeness justify excessive force?

**HOLDING:** No

**DISCUSSION:** The trial court denied summary judgement, finding a "genuine issue of material fact" as to whether the use of force subsequent to handcuffing was excessive, given that there was the "deposition testimony of Main and other officers at the scene, which suggested that, once Bomar was handcuffed, the situation was under control." Main argued that the court could only review the depositions of Bomar and the children, which he interpreted "to reveal that Bomar continued to struggle after being handcuffed." The Court disagreed, finding that the "facts as alleged by the plaintiff" could include "the facts in the entire record, interpreted in the light most favorable to the plaintiff."

Main's appeal was dismissed and the case allowed to go forward.

## **42 U.S.C §1983 – FAILURE TO INVESTIGATE**

**Bertovich v. Village of Valley View, Ohio, 431 Fed.Appx. 455, 2011 WL 2711088 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In July, 2005, Bertovich and his father were at a restaurant in Valley View. After Bertovich hugged his father, another patron (Bartolozzi) called the pair by a derogative term suggesting homosexuality. Bertovich then "gestured and spoke offensively" to the patron. The Bertoviches moved to another location in the restaurant and they were followed by Bartolozzi and another man. A fight ensued. A bartender grabbed his father and Cooke, an auxiliary Euclid police officer, jumped Bertovich from behind. He suffered a compound fracture of his left leg and alleges permanent injuries.

Valley View officers responded but, he alleged, once they learned Cooke was involved, they failed to do a proper investigation. (He also alleged animus toward his father and himself, as his father had served on the city council.) No criminal action was taken against Cooke.

Bertovich initially sued in state court, and ultimately in federal court. He argued Valley View deliberately failed to properly investigate. He added claims against Cooke and the restaurant. Ultimately it went to trial, only against Cooke, and Bertovich won. He appealed the dismissal of his claims against Valley View.

**ISSUE:** Is there a legal right to have someone prosecuted?

**HOLDING:** No

**DISCUSSION:** The Court discussed his argument under the “class of one” equal protection claim. In such claims, the plaintiff “alleges that he or she has been ‘intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.’”<sup>88</sup> The Court noted that he was unsuccessful in pointing out that any other victim would have received a different response. The Court noted that his pleading lacked sufficient detail to state a cognizable claim against the officers, instead, it made only “conclusory allegations” without any “further factual allegations.”

Bertovich also argued that he was not given due process as no investigation was undertaken to prove how his leg was broken. The Court noted, though that there is no legal right to have another prosecuted.<sup>89</sup>

The Court upheld the dismissal of the action against the City and the officers.

## 42 U.S.C §1983 – FALSE ARREST

### Thompson v. Grida (and others), 656 F.3d 365 (6<sup>th</sup> Cir. 2011)

**FACTS:** In February, 2007, in Cuyahoga County, Ohio, Thompson and his wife learned there was a problem at the school bus stop with their 10-year-old daughter, Maya. Then went to the scene and saw police cars and their older son, “being held against a police car.” They identified themselves as the parents of the “girl involved in the altercation” and asked about her. They were ordered to “get back” and they did so.

Officer Shuburt then approached Mrs. Thompson. Thompson heard her yell to the officer not to hit her or put his hand on her and Thompson stepped between the two. Officer Shuburt admitted to “shoving” her. Thompson told his wife to go to the car and the officer then grabbed him and began to kick him. Other officers “joined in” and Thompson was sprayed with OC. Thompson later argued he did not resist and complied with all orders. The officers, however, stated that the pair “yelled racial expletives at the offices and disregarded their orders at the scene.” They stated that Thompson was “physically aggressive” and attempted to punch Officer Shubart and that he resisted their efforts to subdue him.

Thompson was charged with assaulting the officer but was not convicted. He filed suit for false arrest under 42 U.S.C. §1983. The officers moved for summary judgement, which was denied. The officers appealed.

**ISSUE:** Must the Court look to the plaintiff’s version of the facts in an initial motion for summary judgment in a civil rights lawsuit?

**HOLDING:** Yes

**DISCUSSION:** The officers contended that even construing the facts in the Thompson’s favor, as required at this state of the case, that there were no “disputed issues of material fact.” They argued that the “right

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<sup>88</sup> Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

<sup>89</sup> See Diamond v. Charles, 476 U.S. 54 (1986); Mitchell v. McNeil, 487 F.3d 374 (6<sup>th</sup> Cir. 2007).

not to be arrested in the circumstances presented in this case [are] not clearly established.” However, the cases presented “only support this assertion if the Court accepts the version of the facts proposed by the officers.” The fact that Thompson was successful in his criminal case suggested at least one jury believed Thompson’s version of the facts.

The Court upheld the denial of the qualified immunity argument.

**Fowler (William and Linda) v. Burns, 2011 WL 3416729 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On January 7, 2007, a Greene County (TN) business reported the theft of five expensive, red Toro lawn mowers. When interviewed, a local resident reported a pickup pulling several mowers in a direction leading to the home of the Fowlers. About a month later, an inmate who was a suspect in the mower heist, reported that he and Williams had worked at the Fowler home and that Williams had sold one of the mowers to the Fowlers. Other tips had already led to the recovery of the other four mowers.

Officer Huffine responded to the Fowler home. They did not answer the door so the officers went looking for them in the outbuildings. In an open shed, he spotted a tarp over an item that resembled a lawn mower. He could only see the bottom of the item but it “looked new and was ‘Toro red’ in color.” They waited for the Fowlers to return and Huffine then interviewed the Fowlers. Fowler said he’d seen the mower that morning and had placed a call to Sheriff Harris (Unicoi County) about it. He denied having bought it or even knowing about it until that morning. (They later learned the Sheriff was out of town that day.) Det. Fincher learned from Det. Hagey (Washington County SO) that the Fowlers had “purchased a new farm tractor and trailer [stolen] from Williams” for a substantial amount of cash.” The detectives decided they had enough for an arrest and went to bring in the Fowlers. When they arrived at the house, they found Fowler heading to a doctor’s appointment so they told him to report to the station when finished. They entered without a warrant or consent and arrested Linda Fowler, however. Upon being questioned, the Fowlers continued to deny any involvement. Williams refused to give a statement as he was facing charges for the theft. They were subsequently released and no further criminal action taken against them.

The Fowlers filed suit, claiming false arrest and related claims under 42 U.S.C. §1983. The officers were granted summary judgement on some of the claims, but not all. They appealed for summary judgement on the remainder of the claims.

**ISSUE:** May an officer depend upon an eyewitness in decided probable cause for an arrest?

**HOLDING:** Yes

**DISCUSSION:** The officers argued that it was inevitable that sometimes they would make mistakes but that they had probable cause to make the arrest on the theft. The Court agreed that an officer “is entitled to rely on eyewitness accounts for purposes of determining probable cause.”<sup>90</sup> The facts, as known to them at the time, supported that belief. The Court agreed that an officer “is not required to believe a criminal suspect’s story.”<sup>91</sup> Their claim to know nothing of the mower located on their property was

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<sup>90</sup> Crockett v. Cumberland College, 316 F.3d 571 (6<sup>th</sup> Cir. 2003).

<sup>91</sup> Ahlers v. Schebil, 188 F.3d 365 (6<sup>th</sup> Cir. 1999).

suspicious and found the discrepancy supported probable cause. The Court noted that it must “evaluate probable cause based on what the officers knew at the time of the Fowlers’ arrest.”<sup>92</sup>

The Court agreed the officers had sufficient probable cause to support the arrest and dismissed the action against them.

**Nerswick v. CSX Transportation, Inc., 2011 WL 4119153 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On June 9, 2006, Nerswick allegedly found that two large pieces of metal had fallen from a truck outside his business in Ohio. He took them to a nearby recycling location and sold them. The recycling center recognized that the items belonged to CSX railroad and contacted them. Officers Dugger and Minges (CSX police) responded. They sought an arrest warrant and he was taken into custody the next day. He was questioned for more than two hours at the CSX facility and then taken to the Hamilton County Justice Center. He was bound over to the grand jury but the grand jury declined to indict. He then filed suit against Officers Dugger and Minges (and CSX) under 42 U.S.C. §1983. The trial court awarded summary judgement to the officers and Nerswick appealed.

**ISSUE:** Is an arrest based upon a warrant that demonstrates probable cause sufficient for an arrest?

**HOLDING:** Yes

**DISCUSSION:** Nerswick argued that he was arrested without probable cause. Normally, an arrest pursuant to a facially valid warrant is a complete defense, unless the defendant officers misled the court or “omitted material information” in getting the warrant. The only discrepancy to which Nerswick pointed was the officer’s oath that they had “videotapes” – when in fact, they only had one, a tape of him making the sale at the center. He also challenged the lack of written statements – the statements were not taken until after the arrest. However, the Court found that the information they had at the time they requested the warrant was sufficient to support probable cause.

The summary judgement decision was affirmed.

**42 U.S.C §1983 – FIRST AMENDMENT**

**Skovgard & Gros v. Pedro, Mannix and City of Kettering, 2011 WL 3849469 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Skovgard prayed, protested and attempted to counsel women entering an abortion clinic 4 days a week since 1989. She was arrested numerous times over the years, for criminal trespass, and was occasionally convicted, doing the same activity, across the country. She had only been confronted once at the Kettering Center, however. Gros did the same. Both regularly walked in the grass along a public street adjacent to the center as well as on sidewalks on other borders.

Kaminski was hired to be a security guard at the center. On March 2, 2007, he called police (Pedro and Mannix) to report that Skovgard and Gros were trespassing. (Kaminski was given no training on the issue and assumed that the property line went to the street.) However, they were determined to have been on

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<sup>92</sup> Anderson v. Creighton, 483 U.S. 635 (1987).

the public right of way and the charges dismissed. Skovgard and Gros filed suit under 42 U.S.C. §1983. The trial court granted summary judgement to the officers and the City of Kettering and Skovgard and Gros voluntarily dismissed the charges against the other defendants. They appealed the summary judgement.

**ISSUE:** Even with an error on the part of the law, may an arrest be justified?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to discovery that indicated that prior to this incident, Kettering officers were given no training or guidance as to how to respond to trespassers, despite numerous issues that had arisen there over the years. Pedro testified that he had gotten no training or instruction on property lines or public right-of-way around the building. Both officers were certified under state law, however. Following the incident, specific procedures and maps were provided to officers.

The Court stated that “Pedro and Mannix would have had probable cause to arrest plaintiffs if, on the basis of the facts known to them, they could have reasonably concluded that plaintiffs knowingly entered or remained on the Center’s property without privilege.” At the time they were in a grassy area rather than a paved sidewalk, but that area was, it was discovered, within the public right of way.

The Court noted that the law did not “clearly require” that the officers determine the right-of-way before they made arrests and awarded the officers qualified immunity on the basis of the arrests. With respect to their First Amendment claims, the Court noted that the officers tried to steer the pair from an area they believed constituted trespassing to a nearby sidewalk and secured their signs and belongings before arresting them. As such, there was no evidence they were motivated by the content of the protest.

The Court found no indication of deliberate indifference to training on the part of the City of Kettering. The Court upheld the qualified immunity and summary judgment in favor of the defendants.

## **TRIAL PROCEDURE / EVIDENCE – TESTIMONY**

### **U.S. v. Bevelle and Rendon, 2011 WL 3795692 (6<sup>th</sup> Cir. 2011)**

**FACTS:** During Bevelle’s trial for drug trafficking, a DEA agent made a “gratuitous comment” concerning Bevelle (when he should have said Rendon) that implicated Bevelle in an investigation. His counsel objected out of hearing of the jury and requested a mistrial. He declined an admonition as he did not want to draw attention to the comment further. Also, during the trial, the same agent, Agent Wozniak, testified as both a fact and an expert witness. The jury was not specifically instructed as to his dual role.

Bevelle was convicted and appealed.

**ISSUE:** Should the jury be instructed when a witness is testifying both as an expert and a lay witness?

**HOLDING:** Yes

**DISCUSSION:** With respect to the lay/expert testimony, the Court agreed 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>93</sup> However, he did not object and the Court ruled that it was not plain error in the absence of any objection.

The government conceded the remark was improper but argued it was not flagrant. The Court agreed it was isolated and not done deliberately. The evidence against Bevelle was strong and the comment did not warrant reversal.

The Court further disregarded a Miranda objection that had not been properly raised, noting only that he was interviewed at his own home and was not under arrest, and that "the home environment in itself is obviously not hostile or coercive."<sup>94</sup>

Bevelle's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – EXCULPATORY / BRADY

Smith v. Metrish, (Warden), 436 Fed.Appx. 554, 2011 WL 3805640 (6<sup>th</sup> Cir. 2011)

**FACTS:** Smith was a suspect in a murder case that occurred on January 1, 2000. Smith became a suspect and was arrested for the murder at his grandmother's home, where he lived, in Michigan. He gave consent to search the home and during the search, the police seized sneakers that matched prints at the scene. Smith was indicted. He waived his rights and gave a total of ten different versions of what happened that night.

Smith was tried. It was discovered, during the course of the trial, that Long, who had been indicted as an accessory, committed perjury during a preliminary hearing. (He later pled guilty to it.) A motion was made for a mistrial on the basis of the prosecution's failure to disclose Long's perjury. Long had already testified in the trial before it was discovered and the defense was permitted to recall him to impeach him. Smith was convicted. He appealed the case through the state courts unsuccessfully and sought habeas corpus relief.

**ISSUE:** Must a Brady error be material to justify vacating a conviction?

**HOLDING:** Yes

**DISCUSSION:** The Court addressed the appeal as one based on Brady. The Court ruled that "[o]ne does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Further, the test for materiality is "not whether it [is] likely that [the defendant's] conviction would be overturned in light of newly discovered

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<sup>93</sup> U.S. v. Smith, 601 F.3d 530 (6th Cir. 2010) (quoting U.S. v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006)).

<sup>94</sup> U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).

evidence.”<sup>95</sup> Brady has not generally be applied to “delayed disclosure,” but only a “complete failure to disclose.”<sup>96</sup>

The Court concluded that the claimed failed because Smith should have already known about the problem and in fact, his counsel alerted the prosecutor to it. The Court also agreed that the delay (24 hours) did not cause any material harm.

Smith’s petition was denied.

Montgomery v. Bobby (Warden), 654 F.3d 668 (6<sup>th</sup> Cir. 2011)

**FACTS:** On March 8, 1986, Toledo, OH, police found Tincher’s body in her vehicle. She had been shot once in the head. Tincher’s roommate, Ogle, was subsequently reported missing when she failed to report to work. They located her abandoned car the next day. On March 11, they received a jailhouse tip that Heard was involved. They brought him to the station and he gave a statement naming Ellis as an alibi witness. Ellis provided Montgomery’s name.

The next day, with Ogle still missing, police located Montgomery at his uncle’s home. He said that he knew police were looking for him. He was arrested pursuant to an outstanding warrant, brought to the station and questioned about the homicide and disappearance. He admitted his gun was the murder weapon, but that he gave it to Heard, who later returned it empty. He stated he was told by Heard that he’d shot the two women but that he did not know where Ogle’s body was located. He later admitted that he’d been with the two women at the time but maintained that Heard had been the killer.

He was permitted to try to make some calls to locate the weapon, which was eventually given to the police by his mother. Montgomery was charged with Tincher’s murder, at which point he stated he could help them locate Ogle’s body and did so. He was also charged with her murder. (Heard eventually pled guilty to complicity to the murders and testified against Montgomery.) He was convicted and appealed through habeas corpus.

**ISSUE:** Is all nondisclosed evidence material?

**HOLDING:** No

**DISCUSSION:** Montgomery argued that the prosecution “withheld an exculpatory pretrial police report concerning Ogle, taken at a time when Ogle was still considered missing.” Witnesses indicated they saw her after the time she was considered to have gone missing. The report surfaced six years after the trial and only as the result of a FOIA request by the defense counsel. The District Court considered the report exculpatory as it suggested she was not murdered when Heard testified she was and as such could have been used to impeach his testimony. It thus permitted the habeas petition to go forward. (Apparently the woman was actually Ogle’s younger sister.)

Ohio claimed that the report was not material and /or not Brady evidence. The Court noted that the “law in Brady applies regardless of whether the defendant has expressly requested such evidence and

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<sup>95</sup> Jamison v. Collins, 291 F.3d 380 (6<sup>th</sup> Cir. 2002).

<sup>96</sup> U.S. v. Kuehne, 547 F.3d 667 (6<sup>th</sup> Cir. 2008).

encompasses both exculpatory and impeachment evidence.”<sup>97</sup> However, it continued, the evidence “must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” The Court agreed that determining materiality was very difficult.

The Court looked at the totality of the evidence and concluded that the report was not material under Brady. It emphasized that Montgomery had confessed on the same day as the alleged siting, within hours, in fact. A wealth of evidence connected Montgomery and Heard to the murders.

The Court upheld his conviction.

### **Jalowiec v. Bradshaw (Warden), 657 F.3d 293 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Lally’s body was found in a cemetery in Cleveland OH on January 19, 1994. He had been shot and beaten. Lally had been expected to testify in a criminal trial set to begin that same day, against Raymond and Danny Smith. Jalowiec was eventually charged with the murder. (Raymond Smith was ultimately convicted as well as a co-conspirator.)

The prosecution’s case against Jalowiec was based on the testimony of Michael Smith, Raymond’s other son. Jalowiec admitted he’d been at the scene but did not participate in the murder. Jalowiec was convicted and ultimately sought habeas relief in the federal court.

**ISSUE:** Do all Brady violations require that a conviction be overturned?

**HOLDING:** No

**DISCUSSION:** Among other issues. Jalowiec contended that the prosecution unlawfully held back exculpatory evidence – specifically, “prior inconsistent statements made to the police” by other witnesses during the course of plea agreements and immunity deals. The Court concluded however, that while the information should have been disclosed, it was “arguably as incriminating as it is exculpatory.” Jalowiec failed to show how he would have been able to have used it in undermining the evidence against him. The Court reviewed each statement and concluded that although a Brady violation, the information contained within would not have affected the ultimate outcome in the case.

Jalowiec’s convictions were upheld.

### **U.S. v. Spalding, 438 Fed.Appx. 464, 2011 WL 4435541 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On March 1, 2006, Louisville Metro officers stopped Spalding’s car for a traffic violation. He “abandoned the vehicle and fled on foot.” They saw him toss a loaded weapon and a baggie of crack cocaine. They apprehended him and ultimately found another baggie of crack cocaine on the floorboard in the back of the vehicle in which he was transported.

He was charged in state court, that was dismissed and he was then charged in federal court. The police impounded the vehicle, which was stolen, and searched it. Evidence, including fingerprints, were taken,

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<sup>97</sup> Maryland v. Brady, 373 U.S. 83 (1963).

but the evidence technician destroyed the actual box from which she'd lifted prints. During the pendency of the case, Det. Louden received an inquiry from the property room concerning some of the other items, listing the name of the stolen vehicle's owner but did not reference Spalding, nor did it indicate that the evidence came from the vehicle. The detective, finding no open case under the victim's name, authorized the disposal "without realizing their connection to Spalding's case." Only the fingerprint evidence remained.

Spalding moved to dismiss the case because of the destroyed evidence. Since there was no evidence of bad faith, the Court denied his motion. He was convicted and appealed.

**ISSUE:** Does the destruction of evidence in a case require a spoliation instruction?

**HOLDING:** No

**DISCUSSION:** The Court looked to two cases: California v. Trombetta<sup>98</sup> and Arizona v. Youngblood.<sup>99</sup> The Court agreed that "The government violates a defendant's due process rights when it does not preserve material exculpatory evidence" and that "the government violates a defendant's due process rights when it does not preserve material exculpatory evidence."

Spalding, however, made no claim that any of the material would have been exculpatory, only "potentially useful." At best, the court said, the destruction was negligent and /or reckless. The Court agreed that he was not entitled to dismissal or even a spoliation instruction.<sup>100</sup> The Court "defined intentional destruction not as a knowing and willful removal of evidence, but as removal with the purpose of rendering it inaccessible or useless to the defendant in preparing [his] case; that is, spoiling it."

Spalding's convictions were affirmed.

## EMPLOYMENT

### Bryson v. Middlefield Volunteer Fire Department, 656 F.3d 348 (6<sup>th</sup> Cir. 2011)

**FACTS:** The Middlefield Volunteer Fire Department is made up of members that are both paid and volunteer. Bryson was a firefighter member and also a paid administrative assistant working for the Fire Chief, Anderson. She alleged that Anderson had "subjected her to unwanted sexual advances, requests for sexual favors, and other verbal and physical contact." She filed for discrimination under Ohio and federal law. She also claimed for retaliation, alleging she was terminated or constructively discharged as well.

The EEOC determined that the firefighter members, although volunteers, were also employees, as they were compensated for their services. The EEOC gave Bryson a right to sue letter as a result. The department argued that they were not subject to suit as they did not have 15 employees during the relevant time period [for a federal Title VII lawsuit] and that the firefighter-members "received only de minimus benefits for their services." The Court ordered further discovery and eventually concluded that the benefits

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<sup>98</sup> 467 U.S. 479 (1984).

<sup>99</sup> 488 U.S. 51 (1988).

<sup>100</sup> U.S. v. Boxley, 373 F.3d 759 (6<sup>th</sup> Cir. 2004).

provided were not enough to qualify them as employees and dismissed Bryson's federal claims. Bryson appealed.

**ISSUE:** Are volunteers employees?

**HOLDING:** It depends (see discussion)

**DISCUSSION:** The Department argued that during the time in question, the department had no more than 4 or 5 actual paid employees along with 4 trustees during part of the time. (Federal law requires 15.) They argued the firefighter-members were not employees. The Court reviewed case law concerning employee status. Although some circuits had "included remuneration as a factor," that was not universal. The EEOC notes that although volunteers are not usually employees, they may become so if they receive benefits such as a pension, insurance, worker's compensation and access to professional certification. Bryson demonstrated that the firefighter-members, although volunteers, received worker's compensation, insurance, gift cards, access to the facilities of the department, training and access to an emergency fund. Some of the members, during part of the time, received a retirement payment and an hourly wage. The Court noted that "although remuneration is a factor to be considered, it must be weighed with all other incidents of the relationship." The Court agreed that the firefighter-members might be considered employees and remanded the case back for further consideration of all of the factors.

**NOTE:** *Although the significance may not be immediately obvious for law enforcement agencies, sheriff's offices are permitted to have special deputies who serve as volunteers.*

**Kimble v. Wasylyshyn (Sheriff, Wood County, Ohio), 439 Fed.Appx. 492, 2011 WL 4469612 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Kimble alleged that his employer, the Wood County Sheriff's Office, discriminated against him with a racial motivation with respect to an internal promotion. When the position of "Environmental Sergeant" opened up, Kimble was recommended by the individual currently in the position. When it was posted, however, it was originally opened only to existing sergeants, which did not include Kimble. Several employees were approached by the sheriff and asked to apply, but they declined. When the posting period ended with no applicants, it was reopened to deputies with specific requirements. Kimble had the stated qualifications and applied. Only one other deputy applied, but he lacked one of the stated requirements. The sheriff agreed to waive the requirement and ultimately, the other deputy was selected. Kimble filed suit and the Sheriff's Office was granted summary judgment. Kimble appealed.

**ISSUE:** May evidence that an government employer had a racial motive for rejecting an applicant for a promotion be admitted?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed he'd made a prima facie case but that he failed to show the Sheriff's "proffered reasons were pretextual." The Court looked to the circumstantial reasons put forward by Kimble, suggesting he was "pre-rejected" for the position and that the sheriff ignored the recommendations of Kimble's supervisors and encouraged two white deputies to apply, "notwithstanding their professed inability to meet posted job requirements." The Court noted that the "more subjective" the "hiring decision," the "more closely" it would "scrutinize [the employer's] proffered rationales." The Court noted that the Human

Resources Manager had assisted several white applicants who did not meet the stated requirements, but not Kimble. Finally, the Court noted that only Kimble met all the requirements and that the Sheriff offered to waive one of the requirements for the person he ultimately selected. Finally, the Court noted that the primary reason the Sheriff stated he did not select Kimble (enforcement rates) was never listed in the requirements or the description. (And, in fact, earlier promotion decisions had ignored activity levels.)

The Court overturned the summary judgment and remanded the case for trial.

**Kuivala v. City of Conneaut, 430 Fed.Appx. 402, 2011 WL 2745964 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Kuivila was hired as a Deputy Police Chief for the City of Conneaut. This was intended to be temporary, as it was anticipated that Chief Arcaro would retire in year and Kuivila would become the Chief. However, several months before the anticipated retirement date, Kuivila came to believe that the chief did not intend to retire and he knew that the city could not afford his position indefinitely. Meetings ensued on a compromise but nothing was resolved. During May and June of 2008, "various job performance issues arose with" Kuivila. His attorney sent a letter concerning the matter to the city. On July 1, he was terminated, while still under his original one year probation. Kuivila filed an action, arguing that he was terminated for discussing his situation with an attorney. The trial court gave the summary judgment to the employer and Kuivila appealed.

**ISSUE:** Is contacting an attorney seeking advice grounds to terminate a public employee?

**HOLDING:** No

**DISCUSSION:** The Court first agreed that it was against public policy to discharge an employee because he sought legal advice or retained a lawyer to discuss their employment. However, in this situation, the Court agreed that the he was not able to prove that the City did not have "an overriding legitimate business justification to fire him."

As such, the Court upheld the termination.

**CHILD PORNOGRAPHY**

**U.S. v. Daniels, 653 F.3d 399 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Daniels was charged with multiple federal counts involving production and distribution of child pornography, child exploitation and related offenses. He worked with a female accomplice to set up "dates" for prostitutes and to create Internet ads for the service. They traveled together through several states and at one point, engaged one juvenile in the "escort service," taking nude pictures of her and posting them on the Internet. At trial, it was stipulated that Craigslist and social-networking sites operated through the Internet and that "any image uploaded to them travels in interstate commerce."

Daniels was convicted and appealed.

**ISSUE:** Is knowledge of the age of a child in a pornographic photo required for prosecution?

**HOLDING:** No

**DISCUSSION:** Daniels argued first that there was insufficient evidence that the photos were pornographic. The Court looked to the six factors developed in U.S. v. Brown:

- 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.<sup>101</sup>

The Court agreed that the photos in question were, in fact, pornographic. Daniels next argued that he didn't actually take the photos, Head did, but the Court agreed that Daniels induced her to do so and was equally responsible for the taking of the photos and their distribution through Craigslist.

The Court also agreed that knowledge of the age of the victim is not required in a transporting case under 18 USC 2423(a). Further, the evidence indicated that at some point, Daniels did become aware that some of the girls were minors.

Most of the convictions were upheld, although several were reversed due to specific elements in the charged statutes that were held not to have been met.

**U.S. v. Bowling, 427 Fed.Appx. 461, 2011 WL 2935844 (6<sup>th</sup> Circ. 2011)**

**FACTS:** In May, 2007, Bowling took 82 photos of himself with his girlfriend's 7-year-old daughter, I.G. The photos show Bowling in sexual conduct with I.G. and "I.G. engaged in lascivious exhibition of herself." The photos were stored in a computer. Det. Peters (KSP) questioned him and he admitted having taken the photos, but argued they were all taken at the same time. At the sentencing hearing, Det. Peters described the photos, testifying that they showed I.G. wearing different clothing, including different underwear, suggesting that they were taken at different times. In addition, the images were stored in multiple folders and each folder had been created on a different day, ranging over a week. (In each set of photos in a folder, the child was wearing the same clothing.) Photos of Bowling with a 16-year-old girl were also found, in sexual situations, investigation revealed she had been living with Bowling and his girlfriend at the time. Bowling was charged and eventually pled guilty, but appealed his sentencing.

**ISSUE:** Does proof of sexual conduct on more than occasion justify an enhanced federal sentence?

**HOLDING:** Yes

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<sup>101</sup> U.S. v. Brown, 579 F.3d 672 (6<sup>th</sup> Cir. 2009).

**DISCUSSION:** The Court agreed that he qualified for an enhanced sentence because the proof indicated that he engaged in “prohibited sexual conduct” on at least two separate occasions. The Court emphasized that the time stamps and related evidence were sufficient and his sentence was properly calculated.

Bowling’s sentence was affirmed.

## **COMPUTER CRIME**

**U.S. v. Sanchez**, 440 Fed.Appx. 436, 2011 WL 3677935 (6<sup>th</sup> Cir. 2011)

**FACTS:** Sanchez was charged with using his 12-year-old daughter to produce child pornography. The girl testified that he had been “sexually molesting her since she was in kindergarten.” On the day in question, her father forced to her to have sexual intercourse and used the computer and a webcam to record it. Her family became suspicious when Sanchez ordered the girl to take a pregnancy test. The computer in question was owned by the girl’s half-brother and was “substantially modified” before the allegations came up, “which means that the hard drive had been wiped.” The half-brother also accused Sanchez of sexual assault.

Sanchez was charged and convicted under federal law.<sup>102</sup> He then appealed.

**ISSUE:** Must a computer be hooked to the Internet at the time to prove that a video depiction captured on that computer might be used in interstate commerce?

**HOLDING:** No

**DISCUSSION:** Sanchez argued that the prosecution did not prove that a sexual act was committed in order to produce the “visual depiction.” He noted that there was no proof that the computer was hooked to the Internet at the time. The Court found his argument unavailing and that the girl’s testimony was sufficient to prove that the sexual act was recorded. The key point was whether he “used means of producing the visual depiction that were transported in interstate commerce.” The Court agreed that a nexus with interstate nexus had been proven.

Sanchez’s conviction was affirmed.

## **COMPUTER CRIME – WARRANT**

**U.S. v. Gillman**, 432 Fed.Appx. 513, 2011 WL 3288417 (6<sup>th</sup> Cir. 2011)

**FACTS:** On December 16, 2006, police accessed a file-sharing network and observed an individual with a specific IP address share a video “depicting the sexual exploitation of a minor.” The Internet provider confirmed the IP address was assigned to Gillman, in Smyrna, Tennessee. On June 7, 2007, Detective Kniss obtained a search warrant to search Gillman’s home and computer for child pornography. The next day, Det. Kniss went to the house and talked to Gillman for 30 minutes, not mentioning the search

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<sup>102</sup> 18 USC §2251.

warrant. Gillman admitted to viewing and sharing child pornography and agreed there was material on his computer's hard drive.

Kniss asked for consent to search and was denied. He then produced the search warrant. He told Gillman he could leave (having told him earlier he would not be arrested that day) but Gillman remained and continued to talk to Kniss. Marijuana was found during the search; Gillman was immediately arrested and given his Miranda warnings. A number of incriminating items were found and Gillman was charged under federal law.<sup>103</sup> He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is the IP address sufficient to support a search warrant for the location to which the IP address is registered?

**HOLDING:** Yes

**DISCUSSION:** Gillman argued that "the IP address was not itself a sufficient nexus between the sharing of child pornography and his residence because it was possible he used a wireless internet router – something that would have allowed anyone nearby to access the internet and share child pornography through his IP address." The Court, however, noted that all that was needed was probable cause. The Court looked to U.S. v. Hinojosa,<sup>104</sup> which held that a specific IP address, registered to a specific residence, along with proof that the defendant lived at that address, was sufficient for a search warrant.<sup>105</sup>

Gillman also argued that the information was stale, in that 5 months elapsed between the time they observed the transaction and the time they sought the warrant. The Court noted that "stale information cannot be used in a probable cause determination."<sup>106</sup> Staleness depend in large part "on the inherent nature of the crime." The Court agreed that child pornography "is not a fleeting crime" and is carried out, as a rule, "in the secrecy of the home and over a large period." In addition, it can have an "infinite life span" because the material "can be easily duplicated and kept indefinitely even if they are sold or traded." It can be discovered on a hard drive even after being deleted. As such, the Court agreed that the information was not stale despite the long time period.

In addition, Gillman's incriminating statements were given prior to being taken in custody for the marijuana. In general, an "in-home encounter between police and a citizen" is considered "non-custodial."<sup>107</sup> The court upheld the admission of his statements.

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<sup>103</sup> 18 USC §2252.

<sup>104</sup> 606 F.3d 875 (6<sup>th</sup> Cir. 2010).

<sup>105</sup> See also U.S. v. Lapsins, 579 F.3d 758 (6<sup>th</sup> Cir. 2009); U.S. v. Wagers, 452 F.3d 534 (6<sup>th</sup> Cir. 2006).

<sup>106</sup> U.S. v. Frechette, 583 F.3d 374 (6<sup>th</sup> Cir. 2009).

<sup>107</sup> U.S. v. Panak, 552 F.3d 462 (6<sup>th</sup> Cir. 2009).