Department of
Criminal Justice Training

Kentucky Justice and Public Safety Cabinet

2008

Case Law Updates

Kentucky Court of Appeals
Kentucky Supreme Court
Sixth Circuit Court of Appeals
2008-09 U.S. Supreme Court Term

John W. Bizzack, Ph.D.
Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

KENTUCKY
LEADERSHIP INSTITUTE
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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

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.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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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. 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.

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KENTUCKY

PENAL CODE - FLEEING & EVADING

Jones v. Com.
247 S.W.3d 539 (Ky. App. 2008)

FACTS: On the evening in question, a Lexington area officer stopped Jones's vehicle "because Jones failed to dim his high-beam headlights for oncoming traffic." When the vehicle stopped, "Jones gave his passenger a quantity of marijuana, exited the vehicle, and fled on foot all the while ignoring the peace officer's loud commands to stop." He was caught, charged and convicted of Possession of Marijuana and Fleeing or Evading the Police in the Second Degree. Jones appealed.

ISSUE: Is Fleeing and Evading the appropriate charge when the risk is as a result of a foot chase of a suspect into traffic?

HOLDING: Yes

DISCUSSION: Jones argued that his flight was not sufficient to charge fleeing and evading. However, "the Com. proved that Jones fled from the peace officer, at night, in the direction of a four-way traffic stop." The Court found that it was reasonable for the jury to conclude that Jones created a situation inherently fraught with danger to himself, to the peace officer, and to any vehicular traffic near the four-way stop.

Jones's conviction was upheld.

PENAL CODE - ASSAULT IN THE THIRD DEGREE

Israel v. Com.
2008 WL 2551403 (Ky. App. 2008)

FACTS: On Sept. 4, 2006, during a cookout, a neighbor noticed that Israel's vehicle was parked so close to a guest's vehicle that it was "actually resting above the bumper of the other vehicle." Police were called.

Officer Wright (Elsmere PD) responded to the call. He approached Israel and his wife, and "Israel became agitated." The neighbor "testified that she observed Israel push the officer and that Israel appeared to punch the officer in the face when the officer reached for his radio on his shoulder." She called 911 and returned, and saw "Israel continue to swing violently at the officer." She also admitted to being scared of Israel, which was why she called police in the first place. Other guests testified to similar fear. A different neighbor also testified that the officer used pepper spray when charged by Israel.

Officer Wright testified that when he'd asked Israel for the vehicle paperwork, Israel "became aggressive and struck his hand and note pad." The officer stated that "Israel kept moving toward him as he backed up, and that he'd used pepper spray" against Israel.

Israel was charged with, and eventually indicted, of Assault in the Third Degree. He was convicted, and appealed.

ISSUE: Is an attempted assault against a law enforcement officer sufficient to charge the suspect with Assault in the Third Degree?

HOLDING: Yes

DISCUSSION: Israel argued that the "only contact he made with the officer was with the officer's hand and note pad." He further argued that contact was accidental. Other witnesses indicated that Israel actually struck Officer Wright in the head, however, the Court noted that "even if Israel did not strike the officer in the head, there was testimony that he at least attempted to strike the officer." The Court found the evidence was sufficient to support the conviction.

PENAL CODE - ESCAPE

Brown v. Com.
2008 WL 2065225 (Ky. App. 2008)

FACTS: On the day in question, an Allen County officer spotted Brown in the back seat of a passing car. The officer knew of an outstanding warrant for Brown and made a traffic stop. As the vehicle stopped, both of the back doors were opened and another individual ran away. (It was later learned that person also had outstanding warrants.) Brown was told that he was under arrest. Brown got out and turned his back to the officer, so the officer placed "him in what could best be described as a bear hug." They struggled and the officer tried to handcuff Brown. As the officer dropped his cuffs and tried to retrieve them, Brown jumped up on the roof of the car. The officer pulled him down, "but Brown landed on top of the officer who was injured in the fall." They continued to struggle and Brown kicked the officer in the head multiple times. Finally, Brown got away from the officer. He was captured and arrested the following day. Brown was charged with Escape, as well as the original charges from the warrant. He was convicted and appealed.

ISSUE: Is it necessary for someone to have actually been placed in handcuffs for them to be considered in custody, for the purpose of an escape charge?

HOLDING: No

DISCUSSION: The Court reviewed the elements of First-Degree Escape. Brown argued that "he was never arrested or restrained because during the struggle, the officer never exercised control over him and therefore he could not have 'escaped.'" The Court noted, however, that the officer "told Brown several times he was under arrest." They struggled, and the "fact that the officer was never able to place Brown in handcuffs is of little consequence." The Court concluded that the evidence indicated that "Brown was in custody and his fleeing could amount to an escape."

Brown's conviction was affirmed.

PENAL CODE – ROBBERY

Nutter v. Com.
2008 WL 1850595 (Ky. 2008)

FACTS: On May 11, 2005, two Meijer (Lexington) loss prevention employees watched Nutter "take off his own shoes, put on a pair of new K-Swiss tennis shoes, and remove the tags." One checked the original box and found Nutter's "old shoes" there. The other followed Nutter as he walked from the store. Both employees confronted Nutter in the parking lot and told him to return to the store. Nutter ignored them and continued walking. When one grabbed him, Nutter "retracted his arm and spun around," breaking the grasp. They struggled, and Nutter lost a shoe in the process. Eventually, he broke free and fled. One of the employees saw Nutter pull out a small knife, and during a further struggle, one of the two employees was cut. The other chased Nutter while calling the police, but stopped chasing when a motorist said they would follow him. Nutter ran, losing the other shoe in the process, and was eventually found by police hiding in some bushes nearby.

Nutter was charged with First-Degree Robbery and PFO.

ISSUE: Is a use of force to escape apprehension, committed after the theft is completed, sufficient to charge robbery?

HOLDING: Yes

DISCUSSION: Nutter argued that the incidents should be considered separately, a theft and an assault, rather than a robbery, because the theft was already complete when the use of force (during the struggle with the guards) occurred. The Court quickly disagreed, however, finding that it is appropriate to consider that the "use or threat of force during escape from a completed or attempted theft [satisfies] the 'in the course of committing theft' requirement of the charge of robbery.[1]"

Nutter's conviction was affirmed.

Stewart v. Com.
2008 WL 1837318 (Ky. App. 2008)

FACTS: On April 3, 2005, Dustin and Jeffery Stewart, brothers, "undertook a purse snatching spree across Pike County." They would "drive up next to their intended victim" in their vehicle, and then "the passenger would lean out the window, grab ahold of the purse of the victim, and the resulting force would break the purse strap." Two of the victims testified at trial. The jury convicted Dustin Stewart of Robbery in the Second Degree for one of the thefts, and in the First Degree for the second.

Stewart appealed the First Degree Robbery conviction.

ISSUE: May a vehicle used in a robbery in a way which endangers an individual, be considered a dangerous instrument?

[1] See Mack v. Com., 136 S.W. 3d 424 (Ky. 2004).

HOLDING: Yes

DISCUSSION: Stewart argued that the use of the Jeep in the robbery did not constitute the use of a dangerous instrument, as it never touched the victims. The victim, however, testified that had the strap not broken, she "would have been either in the road or dragged by the vehicle." She did not seek medical treatment for injuries she claimed, however, because she lacked insurance.

The Court found that from the victim's testimony, there was ample evidence to consider the use of the vehicle to be consistent with it being characterized as a dangerous instrument. Further, the Court found that medical testimony is not required to prove an alleged injury.

Stewart's conviction was upheld.

Gamble v. Com.
2008 WL 3551174 (Ky. App. 2008)

FACTS: On Feb. 8, 2007, Lindgren and Dowdy were working as tellers at a Lexington bank. At about 11:30 a.m., Lindgren saw a man "with his head and face covered enter the bank and immediately pushed her silent alarm." He approached Lindgren and gave her a note and a plastic bag - the note read "This is a robbery. I have a gun. Quietly empty your drawer fast." He then repeated the demands verbally. She began to do so, giving him first "small bills from the front" but he demanded "bigger bills." She included a dye pack as well. The man told her "You just saved your life" and left the bank. Neither of the women ever saw a gun.

Gamble was apprehended. He was charged with First-Degree Robbery. Gamble admitted to having been the robber, but denied ever having had a gun. He was, however, ultimately convicted of First-Degree Robbery. Gamble appealed.

ISSUE: Does a deadly weapon (or dangerous instrument) have to be visible to justify the charge of First-Degree Robbery?

HOLDING: No

DISCUSSION: Gamble argued that he was entitled to a directed verdict on the charge of First-Degree Robbery because the prosecution failed to prove he had either a deadly weapon or dangerous instrument at the time of the robbery. The Court, however, noted that it had previously, in Mitchell v. Com., held that "a reference to a gun and a demand for money were sufficient" to support a conviction for First-Degree Robbery.[2]

Gamble's conviction was upheld.

[2] See 231 S.W.3d 809 (Ky. App. 2007).

DUI

Litteral v. Com.
2008 WL 5102145 (Ky. App. 2008)

FACTS: On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI. At the jail, he explained the testing and offered Litteral his right to attempt to contact an attorney during the 20 minute required observation period. Litteral did, in fact, try to contact his sister, an attorney, and "Officer Combs remained in close proximity to Litteral" during this time.

Litteral requested suppression of the BA test results, and was denied. Eventually, Litteral took a conditional guilty plea, and appealed.

ISSUE: May an officer stay close to a DUI suspect while they are attempting to contact an attorney, during the waiting period prior to a breath test?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the DUI and implied consent law. The Court noted that taking such samples are not "critical stages of a prosecution" and that as such, a suspect is not entitled to an attorney being present anyway.[3] In 2000, the Court noted that the Kentucky General Assembly "added a very limited right to attempt contact with an attorney." The Court found that "Litteral's only complaint is that he was unable to consult privately with his attorney." The Court found that the legislature crafted the language purposefully and that the "statute specifically avoids creating a right to have counsel present." Further, the Court stated, "[i]f … private consultation was intended, the Legislature could easily have granted that right."

The Court stated it believed:

> the Legislature was mindful of the requirement, which it previously incorporated into the legislation, that breathalyzer testing be permitted "only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes." KRS 189A.103(3)(a). The purpose of this observation period is to assure that the test "subject shall not have oral or nasal intake of substances which will affect the test." 500 KAR 8:030 Section 1(1). Considering that our Courts previously held the test subject was entitled to no contact with legal counsel, we believe the Legislature intended only to allow such right as would not infringe upon the Commonwealth's need to obtain accurate evidence regarding a violation of KRS 189A.010.

The Court noted that "Officer Combs' presence was mandated by KRS 189A.103(3)(a) to assure the accuracy of the test."

Litteral's plea was upheld.

[3] Newman v. Hacker, 530 S.W.2d 376 (Ky. 1975).

McCreary v. Com.
2008 WL 4601231 (Ky. App. 2008)

FACTS: On the night in question, Officer Toth (Franklin PD) spotted a car parked beside an empty building. Concerned, he pulled behind the vehicle and turned on his emergency lights. Officer Toth found McCreary, sitting behind the wheel. The engine was turned off and the keys were in McCreary's pocket. Officer Toth observed that McCreary had trouble getting the window rolled down and that there were two half-empty wine bottles in the back seat. McCreary refused any field sobriety tests.

Officer Toth arrested McCreary. He refused a breath test at the jail. Ultimately, McCreary was charged with DUI, third offense. After a second trial, since the first jury deadlocked. McCreary was convicted. He appealed.

ISSUE: Is a person found sleeping in a vehicle with the vehicle turned off in violation of DUI?

HOLDING: No

DISCUSSION: McCreary argued that the evidence was insufficient to charge him with having physical control of a motor vehicle, an element of DUI. The Court looked to the Wells' factors.[4] The Court noted that they could not be sure if McCreary was asleep (as he claimed). The Court agreed, however, that the evidence indicated that the vehicle was turned off and the keys pocketed, which weighed in McCreary's favor. Officer Toth agreed that McCreary was "bothering no one" where he was parked. McCreary claimed to be waiting to sell some CB radios, and that he'd been parked, when arrested, for about four hours. He also had alcoholic beverages in the car, another factor that weighed in McCreary's favor. Finally, McCreary indicated that it was his intent to stay where he was until he sobered up, although that was not his initial intention when he parked the car.

McCreary's conviction was reversed.

Greene v. Com.
244 S.W.3d 128 (Ky. App. 2008)

FACTS: On April 20, 2005, Officer Cox (Elizabethtown PD) made a traffic stop of Greene, as a result of a telephone tip from Greene's ex-wife, Deanna. Deanna reported that Greene "had been drinking and that his license was suspended." Arriving, Officer Cox found a truck, as described, at a local Dairy Queen. The officer confirmed that Greene's license was suspended and further observed Greene get in the car and leave the parking lot, driving somewhat erratically. Officers stopped the vehicle and confirmed that Greene both lacked a license and had been drinking. (He admitted to two beers.)

Officer Cox administered two field sobriety tests, which Greene failed. Officer Fegett administered a PBT and confirmed the presence of alcohol. Greene was arrested for DUI and driving on a suspended OL. At the jail, his BA was found to be .096 on the Intoxilyzer. He requested suppression, which was denied. Eventually, Greene was tried and convicted on both charges. He then appealed.

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[4] Wells v. Com., 709 S/W. 2d 847 (Ky. App. 1986); see also Harris v. Com., 709 S.W.2d 846 (Ky. App. 1986), White v. Com., 132 S.W.3d 877 (Ky. App. 2003), Blades v. Com., 957 S.W. 2d 246 (Ky. 1997). The Court noted that although Wells predated the current version of KRS 189A.010, its reasoning was still applicable.

ISSUE: May a court consider a PBT in making a probable cause arrest decision?

HOLDING: Yes

DISCUSSION: Greene argued that the tip was insufficient as reasonable suspicion to justify the stop. The Court found that the tip was a credible report and the officer confirmed information that further substantiated the tip, prior to making the stop. As such, the stop was valid.

Next, he argued that Officer Cox was not qualified to perform the FSTs, but in fact, the officer "testified he had been trained to perform the tests and he demonstrated the tests for the trial court." Although the Court noted there was some conflicting information, which it did not explain, it found that the trial court's decision was supported.

Next, Greene argued that the PBT results should not have been considered by the Court. The Court noted that prior to the changes in KRS 189A.104, in 2000, Kentucky permitted the PBT to be mentioned, but did not permit testimony as to its specific results. The Court noted, however, that "[c]ontrary to Greene's argument, the enactment of KRS 189A.104 does not clearly abrogate this rule." Instead the Court found that only the Intoxilyzer results could be used to enhance a penalty, and agreed that the "trial court may consider the pass/fail determination of the PBT to rule on the question of probable cause for arrest."

The Court noted, however, "that it is imperative the arrest officer demonstrate proficiency in utilizing the PBT as well as evidence the PBT be in proper working order" but that absent that, the Commonwealth had presented sufficient evidence of probable cause for the arrest in this case. (Note, the evidence was before the judge, not a jury.)

Next, Cox argued that his statements concerning his beer-drinking, made both before and after his arrest, should be suppressed. The Court found that his statements at the scene were admissible, as he was not in custody at the time. As such, Miranda was not required. However, the Court noted that "[a]fter administering the Intoxilyzer test, Officer Cox specifically asked Greene how much and where he had consumed the alcohol." The Court found this to be a custodial interrogation and that the statement should have been suppressed. Because it was simply cumulative, however, the Court found the error to be harmless in this case.

Finally, the Court addressed the admissibility of the Intoxilyzer results. Greene noted that the law requires a twenty minute personal observation before the test is administered. The Court noted the timeline and an error on the paperwork completed by Cox that confused the time of the observation period, but the Court found that the trial court was not in error to believe Officer Cox's testimony that he did the proper observation. The Intoxilyzer was properly calibrated and the test was properly administered.

After addressing several other procedural matters, the Court upheld his conviction.

ARREST

Doss v. Com.
2008 WL 746708 (Ky. App. 2008)

FACTS: On February 20, 2007, Officer Flener (Central City PD) held several warrants for Doss's arrest. He went to Doss's mother's home at about 11:15 p.m. and observed the back of the house. At about that time, he saw "Doss and an unknown male exit from the back of Doss's house." The unknown man left and Doss appeared to go back inside, although Flener "admitted that he could not see the backdoor" of the house. (Apparently he could see the back porch, but not the actual door.) He then contacted Officer Beadnell, who arrived within minutes, and who then stationed himself at the front door. Officer Flener went to the back door and knocked. Doss's mother answered and said that he was not at home - the officer later testified that Doss's mother "was very upset and aggravated with him." Flener "admitted he entered the house without her consent" and went to Doss's "bedroom door which was locked." He called Beadnell on the cell phone, and was told that Beadnell already had Doss in custody. Beadnell testified that when he heard a commotion inside, he knocked on the front door and it opened. He saw Doss and told him they had warrants for him, and Doss came out on the front porch. Beadnell stated he did not enter the house at any time. Officer Flener came around the house. As Beadnell tried to handcuff Doss, he ran, but was captured a block away. They found methamphetamine on his person.

Doss's mother testified that she did not give consent, but neither did she ask Officer Flener to leave. Doss testified that he had been in the house but that Beadnell had to have forced the front door open because it had been locked.

The trial court found there was "sufficient reason for Flener to have believed that Doss was inside his house" and denied the suppression motion that Doss had made. Doss took a conditional guilty plea, and appealed.

ISSUE: Is it appropriate to enter a residence if the officer has a reasonable belief that the subject of an arrest warrant is inside the address listed on that warrant?

HOLDING: Yes

DISCUSSION: The Court noted that:

> … turning to the applicable law, we find that, according to the United States Supreme Court, "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[5] In other words, if the police have a valid arrest warrant, that warrant grants the police the authority to enter a suspect's home if the police reasonably believe that the suspect is inside. "Reasonable belief is established by looking at common sense factors and evaluating the totality of the circumstances."[6]

[5] Payton v. New York, 445 U.S. 573 (1980).
[6] U.S. v. Pruitt, 458 F.3d 477, 482 (6th Cir. 2006).

> According to the record, Flener had several outstanding arrest warrants for Doss. At the evidentiary hearing, Flener testified that he was certain that Doss had reentered the home. Moreover, while Doss also testified at the hearing, he never contradicted any of Flener's testimony. Considering the totality of the circumstances and applying common sense, we find that it was more than reasonable for Flener to believe that Doss was inside his residence. Given the reasonableness of this belief, the trial court did not err when it denied Doss's motion to suppress.

Doss's conviction was upheld.

Case v. Com.
2008 WL 2779374 (Ky. App. 2008)

FACTS: On Oct. 24, 2006, Morris, of the McLean County Cabinet for Health and Family Services (CHFS) responded to a complaint involving drug usage in Case's home, that he shared with Daugherty. Deputy Wilkerson (McLean County SO) went along to assist in the home visit. Deputy Wilkerson also had a warrant for Daugherty. Morris contacted Newman, Case's parole officer, about their suspicions, and Newman also "had previously received several anonymous phone calls indicating there was drug activity" at the home. (Case's parole was related to drug charges.) Newman accompanied Morris and Deputy Wilkerson on the visit.

When they arrived, Henderson, Case's son, answered the door and told them he didn't believe his father was home. (Both of Case's vehicles were in the driveway.) Deputy Wilkerson asked about Daughterty, and Henderson stated "she was present, but that the officers could not come in without a search warrant." Deputy Wilkerson "responded that he could come in because he had an arrest warrant," and he and Newman entered.

As Daugherty was being arrested, the officers spotted a joint, a pipe and pills on the dresser. Newman also noticed a closed door with a light on behind it and a shadow under the door. Newman called out Case's name and he responded to "give him a minute." Newman opened the door and found Case sitting on the toilet and apparently trying to hide something in his hand. Newman saw a syringe and black bag, later found to contain methamphetamine. In searching the room, Newman and Wilkerson found more syringes and drug paraphernalia under the bed.

Case was charged and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is an entry justified when officers have an arrest warrant for one of the residents?

HOLDING: Yes

DISCUSSION: Case argued that the initial entry was unjustified, and that "the search of his residence was not authorized by the arrest warrant for Daugherty. The Court noted that the "United States Supreme Court has held that an arrest warrant founded on probable cause carries with it the limited authority to enter

a residence where the subject of the warrant lives when there is reason to believe the suspect is within."[7] When Henderson agreed that Daugherty was there, the entry was proper.

The Court found the denial of the motion to suppress was appropriate, and upheld Case's plea.

SEARCH & SEIZURE - SEARCH WARRANT

Davis v. Com.
2008 WL 344186 (Ky. App. 2008)

FACTS: On Jan 26, 2006, Det. Ford (Lexington PD) obtained a warrant to search a house occupied by Davis and Johnson, and to search a vehicle at that location as well. The affidavit read as follows:

> *On the 25 day of August 2004 at approximately 9:00 PM, affiant received from a qualified confidential informant [CI] that Damine Green, "Chops" was selling crack cocaine from residences on Alabama Avenue.*
> *On/about January 11, 2006 a different qualified confidential informant advised that subjects were selling crack cocaine from within 148 Alabama Avenue. The CI stated that the people who lived in the house w[e]re known as "Jesse" and "Linda." The CI advised that different subjects would utilize the residence to sell crack cocaine and that "Jesse" and "Linda" allowed the activity to occur.*
> *The CI advised that one of the subjects who is known to sell crack cocaine from within 148 Alabama Avenue is known as "Chops." The CI stated that he/she thought that "Chops'" real name was "Damien" but did not know his last name.*
> *However, the CI advised that "Chops" owned/operated a maroon Chevrolet Caprice Classic with no visible license plate. The CI stated that when the Caprice is parked near 148 Alabama Avenue, "Chops" is at the residence selling crack cocaine.*
> *Within the past 48 hours, affiant met with the second CI for the purpose of conducting a controlled purchase of crack cocaine from within 148 Alabama Avenue.*
> *The CI who provided the information contained in this affidavit has provided information to the narcotics unit on multiple occasions. The CI has also purchased narcotics on behalf of the police department on multiple occasions. The CI has demonstrated truthfulness and accuracy and the information has been verified via independent investigation.*

In the second block of the warrant, Det. Ford stated:

> *On/about August 2004, affiant received information from a different qualified confidential informant that "Chops" was selling crack cocaine around Alabama Avenue. Affiant inquired as to "Chops'" real identity and was advised by the CI that his name is really Damine Green.*
> *On/about January 16, 2006 detectives from the narcotics unit conducted surveillance at 148 Alabama Avenue to verify the information from the second CI. At approximately 1545 hours, detectives observed a vehicle drive to and park near the curb in front of 148 Alabama Avenue. The car was occupied by two people. The driver of the vehicle, Sidney*

[7] Payton, supra.

Maxberry, got out of the car and ran into the residence while the passenger, later identified as Kim E. Davis, Jr., stayed in the vehicle. After a few moments, Maxberry ran back out of 148 Alabama Avenue and assumed his role as the driver of the vehicle. Detectives noticed that the license plates on the vehicle were expired and called for assistance from Officers Marlin and Eckhardt who were in the area conducting patrol duties. The officers located the vehicle and conducted a traffic stop. Because detectives had observed suspicious activity occurring at an alleged drug house, the officers requested assistance from a narcotics detection canine (drug dog). The dog alerted to the presence of narcotics within the vehicle and the officers searched it. Officers were able to locate the following items of contraband: Approximately 6g of crack cocaine, approximately 1g of marijuana, $780 in US currency, and two (2) handguns. Davis claimed responsibility for all items and was subsequently arrested and criminally charged.
Within the past 48 hours detectives conducted surveillance at 148 Alabama Avenue and observed a maroon Chevrolet Caprice Classic sedan parked on the street near the residence. The CI advised that when that vehicle is parked near 148 Alabama Avenue, "Chops" is selling crack cocaine from within the residence.

Det. Ford further included an attachment in support of his request that the warrant be designated "no knock" - stating that:

> 1) he believed that the amount of crack cocaine inside 148 Alabama Avenue was of such a size that it could be easily discarded; 2) he suspected that Green had been an accessory to an incident of assault in the first degree; and 3) he had discovered that there was an active arrest warrant for Green." He also claimed that "48 hours before seeking the search warrant, he met with the second CI to conduct a controlled drug buy of crack cocaine from Green from within 148 Alabama Avenue. According to the affidavit, Detective Ford initially searched the CI for contraband and found none. After searching the CI's person, the police provided buy money to the CI and escorted the CI to the residence. In the affidavit, Detective Ford stated that he observed the CI enter and exit the residence. Afterwards, the police escorted the CI to a predetermined meeting place where the CI surrendered the alleged drugs. Additionally, Detective Ford stated in the affidavit that, during the controlled drug buy, the police observed a maroon Chevrolet Caprice Classic parked on the street near 148 Alabama Avenue."

A search warrant was signed, and the search was done the next day. The officers found Green outside the residence and arrested him, and then searched the house. Only at that time did they learn that Davis also lived there. Davis admitted ownership of items of drug paraphernalia and was arrested. He requested suppression, and Det. Ford testified concerning two CIs mentioned in the affidavit. Specifically:

> Detective Ford explained that the affidavit mentioned two confidential informants. One CI contacted the detective in August 2004, and the second contacted him on January 11, 2006. Regarding the second CI, whose information formed the basis of the affidavit, Detective Ford explained that he had not worked with the second CI before, but the detective claimed that the second CI had been previously involved in more than six controlled drug buys and had worked with other police officers. During the hearing, the detective revealed that the maroon Chevrolet Caprice Classic was in reality a maroon

> Chevrolet Impala. Regarding this vehicle, Davis specifically asked the detective if the second CI had told the detective that Green would be there selling drugs. Detective Ford responded yes.

Next, evidence was introduced by Davis that Green bought the car in question on January 21, 2006. As such, he averred that the CI had lied.

> In addition to questioning the accuracy of the second CI's information, Davis questioned the detective regarding the incident involving Sidney Maxberry on January 16, 2006. According to the affidavit, Detective Ford included that in the affidavit as an example of independent investigation which allegedly corroborated the second CI's information. At the hearing, Detective Ford confirmed the information in the affidavit that police observed a car driven by Maxberry, with Kim Davis as the passenger, stop in front of 148 Alabama Avenue. Furthermore, the police observed Maxberry exit the car, enter the residence, quickly leave the residence, re-enter the car and drive away.
> Detective Ford confirmed that the police subsequently stopped the car, searched it and found drugs, cash and handguns. The detective also confirmed that Maxberry, the individual who entered the house, was not charged because Kim Davis claimed responsibility for the contraband. Davis noted that, in the affidavit, Detective Ford had mentioned "suspicious activities" and asked the detective if he meant that Maxberry had been involved in a drug transaction while inside 148 Alabama Avenue. The detective responded that there was no proof of that. Davis then asked the detective to explain his reason for including this incident in the affidavit. Detective Ford explained that he included it to support the need for a "no knock" warrant because the incident demonstrated that the house was associated with guns and drugs.
>
> Davis questioned Detective Ford regarding the controlled drug buy mentioned in the affidavit. At the hearing, Detective Ford explained, during the controlled drug buy, the CI did not wear a wire nor did he record the transaction. In response to Davis's questioning, the detective admitted that he did not record the buy money's serial numbers. Moreover, he admitted that he did not field test the drugs obtained by the CI nor did he send them to the Kentucky State Police's forensic laboratory to be tested. However, despite those irregularities, Detective Ford explained that he searched the CI's person prior to the buy, and the CI had no contraband on his person. The detective attested that he personally observed the CI enter the residence at 148 Alabama Avenue, without stopping anywhere else. The detective then explained that he personally observed the CI leave the house and return to him, without stopping anywhere else. Detective Ford made it plain that, after exiting the house, the CI had drugs but no buy money.

Davis agreed that the warrant looked valid on its face, but argued that the faulty information invalidated the warrant. The trial court denied the suppression motion. Davis took a conditional guilty plea and appealed.

ISSUE: Must a warrant demonstrate a link between the address to be searched and criminal activity?

HOLDING: Yes

DISCUSSION: The Court noted that it was clear that "Detective Ford attested that on January 11, 2006, ten days prior to Green's purchase of the maroon Chevrolet, the CI told him about Green's maroon car." The Court found that the testimony "did not explain away the discrepancy between the information contained in the affidavit about Green's car and the testimony from Tim Griffin." The Court found that "Davis established that the affidavit contained intentionally or recklessly false statements regarding Green and his vehicle" and that the trial court should have purged any information received from the second CI from the affidavit and should have re-evaluated the remaining information to determine if it supported a finding of probable cause." Further, the Court found that the evidence presented in the affidavit "does not establish probable cause because 1) it does not demonstrate a specific connection between Green's illegal activity and 148 Alabama Avenue and 2) it was too remote in time, being over one year old at the time the detective sought the search warrant."

However, the Court found that the search was saved by the testimony considering the controlled buy and that alone was sufficient to support the search. Davis's plea was upheld.

<u>Jenkins v. Com.</u>
2008 WL 2484938 (Ky. 2008)

FACTS: In April, 2005, the Monroe County Sheriff's Department got a tip that "there was illegal drug activity occurring on a farm owned by [Jenkins's] father." Jenkins lived on the property, in a structure separate from the main house that was described as a "converted calf barn." Since this was not the first tip they received, Deputy Geralds "went to the property to determine if he could observe any suspicious behavior." Based upon his observations, the deputy submitted the following affidavit:

> *Affiant has been an officer in the aforementioned agency for a period of 3 years and 1 month … Affiant received information from a confidential informant that Lee Jenkins had methamphetamine, marijuana and the ingredients to manufacture methamphetamine. All of the items were for sale. Acting on the information received, Affiant conducted the following independent investigation: Completed a drive-by of the premises. The vehicles as described by the Confidential Informant were present and a high volume of traffic has been observed entering and exiting the premises. Affiant has reasonable and probable cause to believe, and believes, grounds exist for the issurance (sic) of a search warrant based on the aforementioned facts, information and circumstances[.]*

The warrant was signed. The officers searched the barn and found chemicals related to the manufacture of methamphetamine, marijuana and paraphernalia. Jenkins was indicted and convicted, and then appealed.

ISSUE: Must a search warrant affidavit indicate the source of credibility of an anonymous informant?

HOLDING: Yes

DISCUSSION: Jenkins argued that the "affidavit upon which probable cause was based did not describe the informant's reliability or basis of knowledge, and that the officers failed to adequately corroborate the tip." Deputy Murphy testified that the CI "was known to the officers and had provided credible information in the past." The information was conveyed in person by the CI to the deputies. Further, the deputy stated

that they had received prior complaints about the Jenkins' farm, specifically, that people were known to congregate there and party.

The Court noted, however, that the affidavit did not, itself, discuss the credibility of the informant. The Court found that the affidavit "is nearly identical to the 'bare bones' affidavits specifically condemned in" Illinois v. Gates.[8] The tip itself was "extremely general in its assertion of illegality; it did not reveal the informant's intimate knowledge of either [Jenkins] or the property; and it lacked any predictive information whatsoever."

The Court stated:

> A deficiency in the reliability of an informant's tip can be cured by independent police investigation and corroboration. Such did not occur in this case.

The deputies did only a brief surveillance, during which they observed a single vehicle leaving and one arriving. That was in conflict with the statement made by the affidavit, but it was unclear if the "high volume of traffic" referenced in the affidavit was information provided by the CI. The Court noted that "two vehicles in thirty minutes does not constitute 'traffic' even in rural Monroe County."

The Court found that the trial court should have suppressed the evidence. However, the government argued that good faith should have saved the evidence. The Court found that the affidavit "provided virtually no substantive detail concerning the particulars of the confidential tip or the tipster's reliability." As such, the Court found that "independent police corroboration of the tip became vital," and it had "little doubt that the issuing judge relied heavily on this element in determining that probable cause existed." Unfortunately, however, the only piece of corroborating evidence was shown to be a "misleading statement that did not accurately reflect what was actually observed."

The Court remanded the case back to Monroe Circuit Court to conduct a hearing to determine if the good faith exception should apply, in light of the deputy's conflicting testimony at trial.

Tidwell v. Com.
2008 WL 2152236 (Ky. App. 2008)

FACTS: On April 12, 2006, the Rays watched as a man walked down a street in Pike County, carrying several items from Mrs. Ray's sister's home (the Rivards) to a nearby trailer. The Rays went to the Rivards' home and found it had been broken into and ransacked, and that a number of items, including one they had seen the man carrying, were missing. They called the police, explained what they had seen, and stated that although they did not recognize the man they had seen, that the trailer in question was owned by Varney.

Trooper Leonard (KSP) went to investigate. No one was at the trailer, but he could "see a television and other items on the floor which the Rivards later identified as stolen." Trooper Leonard obtained a warrant and returned, still finding no one home. He searched the trailer and recovered a number of stolen items.

[8] 462 U.S. 213 (1983).

Varney was questioned. He testified that a former stepbrother, Tidwell, was living in the trailer in exchange for maintaining it. Varney also suggested the troopers check with a local unlicensed pawn broker, Tussey. Tussey told the police that Tidwell had brought jewelry to his home, and that one of the women with Tidwell claimed it had belonged to her grandmother. He had paid $200 for the jewelry, which was later identified by the Rivards. A search of his home, pursuant to a warrant, revealed more stolen goods.

Tidwell was arrested in West Virginia and agreed to return to Kentucky. During the ride back, he made statements to the transporting officers. As a result, more jewelry was recovered from two other pawn shops.

Tidwell was indicted on burglary and theft charges, as well as PFO. He was convicted of theft and PFO. He then appealed.

ISSUE: Is a missing search warrant affidavit fatal to a case?

HOLDING: No

DISCUSSON: Tidwell argued that the search warrant lacked a supporting affidavit. The affidavit was not included with the trial record, but during a suppression hearing, Trooper Leonard testified that he had sworn to an affidavit and was able to essentially reconstruct the affidavit. Eventually only the front page of the search warrant was actually entered into evidence. The Court, however, noted that the primary issue was whether Tidwell even had standing to raise the issue, since he denied that he "ever lived in or possessed any control over the trailer." As such, he had no expectation of privacy in the items found in the trailer.[9]

The Court found that the evidence indicated that the affidavit was properly completed and signed by a trial commissioner. The trooper testified that he sent it for filing, but did not keep a copy for himself. The search warrant was ruled valid.

Tidwell's conviction was upheld.

Charles v. Com.
2008 WL 2484958 (Ky. 2008)

FACTS: Sexton was working with Letcher County SO as an informant. On April 29, 2004, she set up a controlled buy from Charles and the deputy investigating the crime fitted her with a recording device. Sexton and Charles met for the transaction and money and an Oxycontin tablet were exchanged. Sexton then met with Deputy Clemons and handed over the pill and the recording device. On May 5, Deputy Clemons recorded a telephone conversation between Sexton and Charles concerning the sale of 60 Xanax pills. Again, the deputy provided the money, and they drove to a location where the deputy could observe the transaction. The exchange was made within 1,000 yards of an elementary school.

On May 11, the deputy obtained a search warrant for Charles's home and vehicle. During execution of the warrant, the deputies found only two pills, one each of Oxycontin and morphine. Charles was charged with Trafficking. She requested suppression but the trial court denied it without a hearing. She was convicted, and appealed.

[9] Rawlings v. Kentucky, 448 U.S. 98 (1980).

ISSUE: If information from an informant is corroborated, is it necessary to also indicate their record for reliability?

HOLDING: No (but still good practice)

DISCUSSION: The Court reviewed the affidavit, and found that although the requested hearing should have been held, that the trial court's error was harmless. The affidavit stated that:

> *On the 28th day of April 2004, at approximately 4:00 p.m., affiant received information from: a cooperating witness, whose information is known to be reliable, that Joetta Charles was selling Oxycontin 80 m.g . for $80.00 each[.]*
> *Acting on the information received, affiant conducted the following independent investigation : On 04-29-04 by means of a controlled purchase a cooperating witness purchased a quantity of Oxycontin from Joetta Charles. On 05-06-04 by means of a controlled purchase a cooperating witness purchased a quantity of Xanax from Joetta Charles within 1000 yds. of a school. During the purchase Joetta Charles stated that on Monday 05-10-04 that she would be filling her prescriptions and that she would have more Xanax and also some Lorcet 10 mg to sell. On both occasions Joetta was operating a gold 4DR Saturn passanger*
> *[sic] car.*

The Court noted that the affidavit indicated that Charles would have an additional source of pills when she got a new prescription. Although there was no information on the informant concerning their reliability the officer did properly corroborate the information provided. The Court found that a hearing would not have changed the result.

The Court further agreed that it was permissible for a witness to interpret what was being said on part of the recording made of the transaction. The witness interpreted certain comments (like "little footballs" for Xanax) that would otherwise have meant nothing to the jury. The Court noted that it is permissible to have a person with knowledge of drug matters assist the jury by explaining the meaning of drug language.

Charles's conviction was affirmed.

<u>Stith v. Com</u>
2008 WL 1920629 (Ky. App. 2008)

FACTS: On February 14, 2006, Stith and her estranged husband (who happened to be the county coroner) were "embroiled in a bitter divorce and custody battle" over two minor children. On that day, the older child found what was later determined to be cocaine in his mother's master bathroom. He called his father, who called Sgt. VonDerHaar (Boone County SO) to report what had been found. Det. Cochran submitted the following affidavit in support of a search warrant.

> *Affiant has been a law enforcement officer for a period of nine (9) years, and the information and observations contained herein were received and made in his capacity as an officer thereof.*

On Tuesday, February 14, 2006 at approximately 1545 hours, the Boone County Sheriff's Department received a phone call from Doug Stith, Boone County Coroner. Doug Stith stated to Sgt. Tony VonDerHaar that his seventeen (17) year old juvenile son, Brett Stith, had information that there was possible illegal narcotic substances located at 1107 Samuel Court, Union, KY 41091. Sgt. VonDerHaar thereafter contacted Affiant and assigned Affiant to the case.

Acting on the information received, Affiant conducted the following independent investigation:

Affiant contacted Brett Stith and spoke directly with him concerning what he observed in the residence of 1107 Samuel Court, Union, KY 41091. Affiant states that Brett Stith lives at the residence of 1107 Samuel Court, Union, KY 41091 with his brother and his mother, Barb Stith. Brett Stith told Affiant that at approximately 1530 hours on February 14, 2006 he was grooming in the master bathroom located at his residence at 1107 Samuel Court, Union, KY 41091. Brett Stith told Affiant that at that time, he opened the middle drawer of the vanity in the master bathroom and observed the corner of a small plastic baggie, with a small amount of a white powdery substance inside. Also located in the drawer was a glass dipping sauce container which appeared to have burn markings on the bottom. Brett Stith told Affiant that he immediately contacted his father, Doug Stith, and told him of the discovery, and that the time of that call was 1540 hours.

Affiant is aware from ongoing, active investigations concerning Barb Stith, that her family is concerned that she may be involved in substance abuse. Affiant is aware that Barb Stith does abuse alcohol on a regular basis.

Affiant states that the description of the observations made by Brett Stith is consistent with the manner of packaging and use of illegal controlled substance activity based upon Affiant's training and experience with said illegal controlled substances.

The affidavit was signed and executed. Officers found two bags of powder cocaine during the search. Stith was located at a nearby bar and arrested, and more cocaine was found during the search incident to arrest. She was indicted and moved for suppression. When that was denied, she went to trial and was convicted.

ISSUE: Must information from a known, named informant, that is rich in detail, be corroborated to be used in a search warrant?

HOLDING: No

DISCUSSION: Stith argued that the search warrant did not establish probable cause to search her home. Det. Cochran had acknowledged several misspellings and minor errors in the warrant. Stith, however, argued that the warrant indicated nothing to show that her son "had a basis of knowledge about illegal drugs," that the detective "did not corroborate the information he received," and that the "affidavit was based in large measure on hearsay."

Taking each in turn, the Court found that the "detail of [the son's] description combined with Det. Cochrans's training and experience in recognizing unique illegal drug packaging made it more likely evidence of a crime would be found in the Stith home." Because the information was received directly from a named (and to some degree known) informant, the need to corroborate the information was much less. The son's "firsthand observations" – given directly to Det. Cochran – were "inherently reliable because of their 'richness and detail.'" Nothing indicated that the son bore any "animosity toward his mother or favored his father such that he would fabricate a story alleging his mother was involved in criminal drug activity."

Further, the Court did not fault Det. Cochran for not taking further action to investigate before seeking a warrant, finding that the information he already had was more than sufficient to move forward. The issue of hearsay was simply discounted.

Stith's conviction was upheld.

<u>Cabbil v. Com.</u>
2008 WL 3875641 (Ky. App. 2008)

FACTS: On Dec. 20, 2004, Det. Doyle (Louisville Metro PD) received a CI tip that a described person named Junne was trafficking out of a specified apartment. The CI was considered reliable by that detective. The CI stated that he or she had been in the apartment in the previous 24 hours and "had seen illegal drugs packaged for sale."

Det. Doyle initiated surveillance. She watched a person enter the apartment and leave a short time later. That person was stopped for reckless driving and found to be in the possession of drug paraphernalia and heroin residue. He admitted to having gone to the apartment to buy drugs, had bought drugs from "Junne" and had bought from him before. He also stated he had seen a "quantity of heroin packets for sale."

Det. Doyle completed a search warrant, listing "Junne Crawford" as the subject of that warrant. She later testifed that she knew of another dealer by that name and that he and Cabbil were not the same person. She had mistakenly included "Crawford" on the affidavit. The warrant was issued and authorized the search of the apartment and a specific vehicle. Det. Doyle was unable to identify the signature of the judge on the warrant, but testified that she had, in fact, personally witnessed a district court judge sign that warrant.

After getting the warrant, they located the vehicle (and Cabbil). Cabbil was removed from the vehicle and it was searched; heroin was found.

Cabbil was indicted, took a conditional guilty plea, and appealed.

ISSUE: Does a search warrant for a car cover the occupants as well?

HOLDING: Yes

DISCUSSION: Cabbil first argued that the search warrant was invalid, as he was "not named as a subject of the search and because the listed age was incorrect." The trial court had found that Det. Doyle simply made a mistake by adding the Crawford name, and was accurate enough, even though the age provided was wrong. (Cabbil was 57, but the subject was described as "in his 40s.") He further argued that since he

was stopped some 3 miles from the house that the warrant did not cover him, but the Court noted that the warrant in this case also specifically covered the vehicle he was driving. Further, because Cabbil was in the car when it was stopped, the search warrant covered his person as well.

Finally, although it was unfortunate that Det. Doyle could not recall who had signed the warrant, the lengthy delay between the issuance of the warrant and the hearing mitigated her inability to remember such details.

Cabbil's plea was upheld.

SEARCH & SEIZURE - PROBATION & PAROLE SEARCHES

Lacey v. Com.
2008 WL 2468806 (Ky. App. 2008)

FACTS: On March 1, 2006, Probation and Parole Officer LaFollette was informed by Columbus, Ohio, officers that Lacey (one of his parolees) had been arrested for possession of methamphetamine and the chemicals used in manufacturing methamphetamine. Officer LaFollette had also received, about the same time, several anonymous tips indicating that Lacey was using and "possibly manufacturing the illegal substance."

LaFollette decided to search, pursuant to the parole agreement. He contacted Sheriff Hensley (Hart County) and enlisted his assistance. (Sheriff Hensley also had information linking Lacey to drug activity.) On June 12, along with other officers, they went to the Lacey home. Tracy Lacey (Lacey's wife) answered the door and was informed of the reason for LaFollette's visit, and Officer LaFollette further advised her that the Sheriff and deputies were there "for security purposes only."

LaFollette later testified that Tracy denied there were drugs in the house and gave verbal consent to search – this was corroborated by Sheriff Hensley. Officer LaFollette searched the bedroom and found "three bowls containing what he believed to be a controlled substance." Tracy claimed to have no knowledge of the bowls and was given her Miranda warnings. She called her husband, at LaFollette's request, and told him what was going on. Lacey returned, and he claimed responsibility for everything found at the house. He was arrested.

Lacey requested suppression, supported by Tracey's claim that she did not give consent to search the home. To complicate matters, however, a report written by one of the deputies "implies that permission to search the residence was not obtained from Tracey until after LaFollette found the bowls containing the suspected illegal substance." LaFollette acknowledged that "there were mistakes regarding the sequence of events." However, on cross-examination, "LaFollette made what appear to be several conflicting statements." First he testified that he had reasonable suspicion, based upon the information he had received, but then stated that he did not need reasonable suspicion to search. He "further testified that he obtained Tracy's consent because she was the only adult there and he could not have entered without her permission." Finally, he stated that "he needed consent to conduct a search, but subsequently testified that even if Tracy had not given consent, he would have still searched the residence anyway." (He clarified later that he would have gotten permission from his DOC supervisor to do the search, pursuant to agency policy.) The trial court concluded that LaFollete could conduct a home visit without consent if he had

reasonable suspicion, but found that Tracy did give consent. The suppression motion was denied. Lacey took a conditional guilty plea and appealed.

ISSUE: Must a Probation & Parole officer possess reasonable suspicion to do a home visit search without consent?

HOLDING: Yes

DISCUSSION: The Court reviewed the law on parole officers conducting home visits, and noted that "an officer must possess reasonable suspicion that a parolee is violating the term of his parole to conduct a home visit without consent."[10] However, the trial court based its decision on Tracy's consent, instead. Lacey argued that since she had not given a written consent, there was not substantial evidence that she'd actually given the consent.

The Court upheld Lacey's conviction.

SEARCH & SEIZURE – PLAIN VIEW

Ellis v. Com.
2008 WL 1837301 (Ky. App. 2008)

FACTS: On the day in question, Ellis and another man were in Ellis's apartment in Beecher Terrace, in Louisville. A shooting occurred in the area and a witness directed officers to Ellis's door. Officer Glauber (Louisville Metro PD) knocked, and Ellis answered. He gave consent to entry, and inside, the officers "smelled a strong odor of marijuana." Ellis's companion "opened his hand to show several buds of marijuana." Officer Judah swept the apartment, opening "a kitchen closet," where he found a "bag of cocaine sitting on a box." He picked up the bag and found another beneath. He showed it to Officer Glauber and they questioned Ellis, who further admitted to having a joint in the bedroom. Both Ellis and his companion were arrested.

At the station, Ellis demanded a phone call, and Officer Glauber loaned him a cell phone. Glauber "inadvertently heard part of the conversation and gleaned from it that Ellis had guns in his apartment." The officers got a search warrant and found two guns; one was inside the kitchen trashcan, under the plastic bag liner and near the drugs that had been found. Both men were indicted on a variety of charges.

Ellis requested suppression. His demand was denied after Officer Glauber's testimony. At trial, however, Officer Judah "seemed to contradict Officer Glauber's account." Because of that, Ellis again moved for suppression, and again, he was denied. Ellis was convicted, and appealed.

ISSUE: Are items found in plain view admissible?

HOLDING: Yes

DISCUSSION: The Court admitted the cocaine found by Officer Judah as being found in plain view. Ellis argued that the "contraband nature of the bags of cocaine" was not "readily apparent" and thus was not

[10] Coleman v. Com., 100 S.W.3d 745 (Ky. 2002).

admissible. The Court noted that only Officer Glauber had testified at the initial suppression hearing, and that his testimony indicated that the cocaine was sitting on top of the box when he was shown it by Officer Judah. At trial, however, Officer Judah indicated that he saw part of the bag sticking out of the box, initially, and investigated further, finding the additional bag. The Court, however, in studying Officer Judah's testimony closely, determined that Officer Judah testified that he "noticed a large bag of cocaine on top of the box when he opened the closet door" and that when he picked it up, he found another, beneath it. He was never asked, directly, whether "he could see the cocaine in the bag" before he picked it up. The Court found that the statements were not, actually, contradictory, and ruled that the cocaine was, in fact, in plain view. The Court found the cocaine was admissible.

The Court further found that Ellis could be held responsible for the weapons found in his apartment, and affirmed his conviction.

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

Com. v. Sies
2008 WL 1991696 (Ky App. 2008)

FACTS: On September 22, 2006, Sies was stopped by Dep. Walters (Boone County SO) for speeding. When Dep. Walters learned Sies had a suspended license, he arrested Sies. He searched her car pursuant to the arrest, but found nothing of interest. He then rolled up the car window, shut off the car and retrieved her purse and cell phone, returning with them to his car. Sies was taken to jail.

When they arrived, the deputy searched the purse and found a syringe. He advised Sies of her Miranda rights. He continued searching, cutting open her purse, and he (along with another deputy) found additional syringes, cotton swabs with residue and a metal spoon. The evidence processed by the lab indicated traces of heroin, morphine, cocaine and codeine. In addition to the original traffic offenses, Sies was further charged with various offenses related to the drugs and the paraphernalia. Sies demanded suppression, and the trial court agreed, finding the "search of Sies' purse was not performed incident to an arrest." The Commonwealth appealed.

ISSUE: May a purse (or other container) be searched some time after the arrest, and still be considered incident to the arrest?

HOLDING: Yes

DISCUSSION: The Court looked to Com. v. Ramsey[11] and New York v. Belton[12] for guidance, and concluded that "the passenger compartment of an automobile may be searched contemporaneous to a lawful arrest of the occupant of an automobile." The Court found that dispositive, and further noted that it was "unreasonable to expect an officer to leave a purse in an abandoned car, regardless of whether it was being towed or left on the side of the road" because '[p]urses typically contain personal and valuable objects which would be a target for a thief." Dep. Walters testified that he collected the purse as standard procedure. The Court noted that:

[11] 744 S.W.2d 418 (Ky. 1987).
[12] 453 U.S. 454 (1981).

> Because the purse would be subject to search within the confines of the vehicle we do not believe it to be any less subject to search once removed from the vehicle. An unsearched handbag can pose as great of a risk to a police officer as can an unsearched vehicle. The purse could have contained a handgun, knife, or other dangerous object. Furthermore, a purse, analogous to the jacket in Belton, supra, can contain evidence which the arrestee placed there in an attempt to hide it from an approaching police officer.

The Court further agreed that although it was not familiar with the "exact booking procedures" for the jail, that it felt "it safe to assume that the contents of Sies' purse would have been inventoried and the contraband discovered upon her booking, had it not been found earlier." As such, the Court ruled that even if the initial search was improper (although it found it was, in fact, alright), that it would have been "admissible under the inevitable discovery rule."[13]

The Court found the suppression of the evidence to have been an error, and reversed that decision, remanding the matter back to the trial court for further proceedings.

Centers v. Com.
2008 WL 109324 (Ky. App. 2008)

FACTS: On the day of his arrest, Centers had gone to meet his employer to pick up a payment. He got into a truck at the company to wait. Police responded to a call of a "male subject slumped over in a white truck." At the location, they found that "the only vehicle in the parking area was a white truck and Centers was inside." The truck was "parked sideways in the lot and the engine was running." The officer found Centers "sweating and clutching the steering wheel" and when Centers didn't respond as he knocked on the window, the officer feared "a possible medical emergency." When Centers "was unable to rationally respond to several simple questions, the officer checked his driver's license and had Centers perform a number of field sobriety tests" which Centers failed. Centers was arrested.

During the search incident to the arrest, the officer found a "duffel bag behind the passenger seat containing a handgun, syringes and spoons used to ingest drugs and a white powdery substance." More drugs were found in the console. Centers refused to submit to blood or urine tests. Centers was indicted, and eventually convicted, on charges relating to possession of the controlled substances, DUI and related charges. He appealed.

ISSUE: May a search incident to arrest precede the actual arrest?

HOLDING: Yes (but see discussion)

DISCUSSION: First, Centers argued that the "duffel bag and its contents were not in close proximity to him" and that the search was illegal. In the alternative, he argued that since the report indicated that a gun was found at 7:26 p.m. but the arrest was listed as occurring at 7:36 p.m., that the search could not have been incident to the arrest. The Court noted that what had occurred prior to the search would have indicated to any reasonable person that they were under arrest, and that it was clear that the officer was in the process of making an arrest when the search occurred.

[13] Richardson v. Com., 975 S.W.2d 932 (Ky. App. 1998).

In addition, a testifying officer blurted out, under questioning but not responsive to the question, that Centers had consulted with a lawyer before refusing the tests. The Court found that evidence of consultation with an attorney was not "probative of guilt or innocence" and that a mistrial, as Centers requested, was not appropriate.

Centers's conviction was upheld.

SEARCH & SEIZURE - ANONYMOUS TIPS

Henson v. Com.
245 S.W.3d 745 (Ky. 2008)

FACTS: On Feb. 27, 2003, an anonymous caller tipped the Jackson PD about two residents, Haddix and Henson. He stated that the pair had illegal drugs in their possession, and that they were in a vehicle that Officer Turner, of that department, knew belonged to Haddix. The officer found the vehicle, with Henson in the passenger seat, but Haddix was nowhere to be seen. Officer Turner asked Henson if he had any drugs or contraband, which Henson denied. When Turner told Henson to empty his pockets, Henson produced a small case and laid it on the hood. Turner told him to open the case, Henson did, and revealed a small plastic bag with white powder that Henson identified as cocaine. He also removed some used syringes. Henson was arrested and indicted for possession of the cocaine and the drug paraphernalia.

Henson requested suppression, and the trial court upheld the stop as justified based upon the tip. Henson took a conditional guilty plea and appealed. The Court of Appeals upheld the stop, and Henson further appealed.

ISSUE: Must a tip have a predictive component to justify an actual detention based upon the tip?

HOLDING: Yes (absent other evidence)

DISCUSSION: The Court first agreed that Officer Turner was free to approach the car and speak to Henson. However, the court noted that before "an investigating officer can rely on an anonymous tip as part of his basis for reasonable suspicion, that tip must have sufficient indicia of reliability. However, the Court did not agree that simply finding the vehicle, with Henson as an occupant, was sufficient to corroborate the tip, as it mirrored, in effect, the situation in Florida v. J.L.[14] The Court noted that "absence of any predictive components about where Henson would be going or what he would be doing" as well as "no details indicating how the caller knew about the alleged drugs."

Even though Henson voluntarily surrendered the case to Officer Turner, the seizure was tainted by the illegal detention. The Court reversed the earlier decision and remanded the case back for further proceedings.

[14] 529 U.S. 266 (2000).

Com. v. Morgan
248 S.W.3d 538 (Ky. 2008)

FACTS: On Dec. 17, 2002, Sheriff Staples (Hart County) received a tip that Morgan, Evans and Mansfield, known drug dealers, were cooking methamphetamine in Morgan's trailer. Sheriff Staples was aware of the prior reputation of the three, as well. Officers stopped Morgan and Evans as they were leaving Morgan's home and searched Evans, finding methamphetamine. Morgan consented to a search of the trailer, and more drugs and contraband were found. Both were arrested. Morgan moved for suppression, and the trial court concluded the officers had the "required particularized suspicion to conduct a stop" and denied the motion. Morgan took a conditional guilty plea and appealed. The Court of Appeals found the Sheriff lacked sufficient corroboration of the tip to support the stop, and the Commonwealth appealed.

ISSUE: Does prior knowledge by law enforcement officers of the reputations of specific individuals named in an anonymous tip add veracity to that tip?

HOLDING: Yes

DISCUSSION: The Supreme Court noted that the tip "Sheriff Staples received named three specific individuals, all of whom Staples knew had a history of committing drug-related offenses, and were said to be involved yet again in making and distributing methamphetamine." In addition, the Sheriff's "prior knowledge about the named suspects distinguished[d] this case from the typical anonymous tip cases, giving the tip corroboration." In addition, when the Sheriff arrived at the trailer, he spotted Evans, corroborating the information that Evans had been at Morgan's home all night, and that was immediately followed by Evans and Morgan leaving the trailer, precipitating the traffic stop. The Sheriff reasonably believed their leaving the trailer at that time was evidence that they were trying to elude him.

The Court held that the Sheriff has sufficient reasonable suspicion for the stop, and reinstated the plea.

Com. v. Marr
250 S.W.3d 624 (Ky. 2008)

FACTS: In August, 2001, Officer Bailey (Louisville PD) testified that police had received an anonymous tip about methamphetamine being sold from a body shop. LPD officers began surveillance, and noted a number of visitors arriving for short periods of time who "did not appear to be bringing in cars for body work." They pulled over a vehicle as it left the shop; it was found to contain two pounds of marijuana. The officers decided to enter the body shop. They told the owner that they were conducting a narcotics investigation. Despite noise from the back, the owner (who "seemed nervous") denied anyone else was present. Officer Bailey called for whoever was in the back to come out, and Marr (who matched the general description given by the tipster) emerged. Marr also appeared nervous. Officer Bailey did a frisk, and found "'hitters' used to ingest drugs, and two small, plastic bags of methamphetamine," along with a large amount of cash. The officers received both verbal and written consent to search Marr's residence, where they found weapons, methamphetamine and a lab.

Marr was arrested, and requested suppression. The trial court found that Officer Bailey lacked a "reasonable and articulable suspicion that Marr was engaged in criminal activity to justify the pat-down search." The Court further found that the consent for the residence search was vitiated by the initial

improper search, and suppressed all evidence. Upon appeal, the Court of Appeals affirmed the decision. The Commonwealth appealed.

ISSUE: May a frisk be done when the officer develops reasonable suspicion of a safety hazard?

HOLDING: Yes

DISCUSSION: The Court noted that this case was different from that usually found in anonymous tip cases - in that the officers had already determined that the traffic into the business was unusual and consistent with drug activity. In addition, they had already found one visitor to the business to be in possession of a large amount of drugs. As such, Officer Bailey was legitimately suspicious, and more so when the body shop owner lied about anyone else being present. In fact, the anonymous tip was "suitably corroborated" by the information learned later, pursuant to the investigation. The Court found that "[w]hether the tip provided basis to believe criminal activity was afoot or not, the additional factors listed above clearly allowed the officer the reasonable basis to do a pat-down search for his own safety at that point." Further, the "confluence of facts and the suspicion of drug activity in this building made the situation inherently dangerous."

The Court of Appeals decision was reversed.

SEARCH & SEIZURE - BOOKING/STRIP SEARCH

Hardy v. Com.
2008 WL 466135 (Ky.App. 2008)

FACTS: As a result of his arrest in Lexington, Hardy was taken go to Fayette County Jail. On the way there, the arresting officer "observed that Hardy was constantly moving and that he was manipulating the waistband of his pants with his hands, which were hand-cuffed behind him." The officer also noted other indications of extreme nervousness. The officer "was convinced that Hardy was hiding something…." When they arrived, the officer cautioned Hardy "of the consequences of promoting contraband [by taking it into the jail] and gave him the opportunity to reveal any items that he might have been concealing." Hardy denied having anything illegal on his person.

At the jail, the officer "submitted a request form for a strip search and verbally conferred with a booking officer concerning his reasons for the request." The jail officer agreed and when Hardy learned he was to be searched, "he became resistant and refused to cooperate." The process was videotaped and during the search, a bag containing nine grams of crack cocaine fell to the ground. Hardy was then further charged with promoting contraband. Hardy argued for suppression, but was denied. He was convicted, and appealed.

ISSUE: What is the standard for a strip search at the jail?

HOLDING: Particularized reasonable suspicion

DISCUSSION: The Court looked at the criteria promulgated by the Fayette County Detention Center for "unclothed searches." In addition, the Court looked to Masters v. Crouch, which founded that "a person

charged only with a traffic violation or nonviolent minor offense may not be subjected to a strip search *unless there are reasonable grounds for believing that the particular person might be carrying or concealing weapons or other contraband."*[15]

The Court then reviewed the evidence provided to the trial court, specifically:

> 1) the traffic stop was legitimately based on lack of illumination of the license plate;
> 2) Hardy was driving on a suspended license;
> 3) Hardy pulled his car over in an erratic manner, leaving part of his car in the roadway, thus causing Officer Arnold to expect him to flee;
> 4) Officer Arnold found a large amount of cash in Hardy's pocket;
> 5) Hardy's extreme and bizarre bodily movements during transport caused Officer Arnold to fear that Hardy had a weapon or that he was hiding drugs, prompting Officer Arnold to search the patrol wagon following transport;
> 6) the time of day and proximity to the suspicious individuals in the area with a reputation for drug activity aroused suspicion that criminal activity might be afoot.

Further, the Court noted that the search was a "visual strip search rather than the more invasive body-cavity search," and that it was "conducted in private."[16] In particular, the Court noted that "since corrections facilities have inherent risks of inmates' smuggling contraband and weapons in body cavities, the need for stringent security measures must be weighed in assessing the reasonableness of strip searches."

Hardy's search, and thus his conviction, were affirmed.

SEARCH & SEIZURE – TERRY

Richards v. Com.
2008 WL 4755238 (Ky. App. 2008)

FACTS: On July 12, 2006, Officer Miranda approached Richards and a companion - they were sitting in a car kissing. He asked them their purpose, and they stated they were waiting for someone. The passenger produced ID, but the driver (Richards) could not, and was further unable to give valid information as to his name and date of birth. (He gave a false name at the time.) After being warned, he gave his correct name, and admitted he was the subject of outstanding warrants. Richards was arrested, and asked if there was "anything in the vehicle that police should know about before it was searched." Richards did not respond. Officer Miranda searched and found 1.7 grams of crack cocaine in the driver's seat. When Officer Miranda began to handcuff the passenger, Richards admitted to possessing the cocaine.

Richards requested suppression, and was denied. He took a conditional guilty plea, and appealed.

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[15] 872 F.2d 1248 (6th Cir. 1989), emphasis in original.

[16] In Bell v. Wolfish, 441 U.S. 520 (1979), the Court held that that strip searches of prisoners and detainees do not violate the Fourth Amendment as long as they are reasonable. The Bell Court stated that: "The test of reasonableness under the Fourth Amendment is not capable of precise definition of mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

ISSUE: Does an approach on foot require reasonable suspicion?

HOLDING: No

DISCUSSION: Richards argued that Officer Miranda lacked even reasonable suspicion to approach the vehicle, and that as such, any evidence should be suppressed. The Court ruled that "the Fourth Amendment was not implicated when Officer Miranda approached Richards' vehicle, asked him general questions, and requested identification." Officer Miranda approached on foot and did not have his emergency lights activated, or his gun drawn. Further, the Court ruled that since Kentucky law requires that drivers provide their operator's licenses to officers upon request, when Richards failed to do so, further detention was appropriate. Once Richard told him that he had warrants, the officer had probable cause to arrest. The evidence was then discovered pursuant to the valid arrest.

Richards argued that Miranda was required to notify him immediately of his rights, and did not do so, but because Richards was in custody, but not under interrogation at the time, the Court ruled that the warnings weren't necessary.

Richards' conviction was affirmed.

Strange v. Com.
269 S.W.3d 847 (Ky.,2008)

FACTS: On April 11, 2005, Officers Hall and Olivares (Lexington PD) were patrolling an area known for prostitution and drug activity. Shortly after 11 p.m., they spotted a van and a payphone, with Strange nearby. "Both officers testified that they routinely stopped to question everyone out at that time of night in that neighborhood." After turning around, they found Strange talking to the van driver and separated the pair. Office Hall took Strange, and he reported that he "seemed nervous." Strange stated he was visiting a family friend who had been ill. Officer Hall spotted a bulge in Strange's pants pocket and did a frisk. Satisfied that the item wasn't a weapon, he asked Strange what the object was - and Strange said he didn't know. Strange let Hall remove the object, an unmarked medicine container with 12 Oxycontin and 5 Xanax. Strange was arrested.

Strange requested suppression, and was denied. He took a conditional guilty plea and appealed. The Court of Appeals affirmed the trial court's decision, and Strange further appealed.

ISSUE: Is routine stopping of individuals, without particularized suspicion, late at night, permitted?

HOLDING: No

DISCUSSION: The Court reviewed the trial record, and ruled that the actions of the officers constituted a seizure, in that Officer Hall stated that they "separated" the two men. His testimony "established beyond dispute that he took control of [Strange] and expected compliance."

Further:

> A reasonable person, in a high crime neighborhood late in the evening, would not and should not reasonably feel free to resist a police officer's order to move. Citizens are

> encouraged to comply with reasonable police directives, and the police should be permitted to expect reasonable compliance with reasonable demands. Appellant was directed to move over to the police cruiser, and he apparently did so promptly and peacefully . His passive compliance with the policeman's order cannot convert that order into a request which Appellant, or any citizen, should feel free to resist.

The Court then discussed whether the officers had sufficient reasonable suspicion to justify the seizure. The Court noted that the only facts presented were that Strange "was in a public area known for criminal activity, late at night, standing near a pay phone that has sometimes been used in drug transactions" and that he apparently approached a nearby van when the officers appeared. The remaining factors did not occur until after the initial seizure. Nothing indicated, however, that he approached the van because of the officers. "The officers gave no explanation of Appellant's movement to distinguish it from any other action he might have made, sinister or innocent," merely characterizing it as "evasive."

The Court stated:

> We recognize that police officers have training and experience that may enable them at times to see suspicious behavior that goes unnoticed to the untrained eye. That training and experience, however, should enable them to articulate the factors that aroused their suspicion . That has simply not been done here .

The Court did not question the officers talking to individuals who are "out at that time of night" and agreed that "[d]oing so may be a good police practice." But, the Court continued, "when the police take control over a citizen's person, and limit the movement of that citizen, as they did with [Strange], the Fourth Amendment is involved and they must be able to articulate the grounds for their suspicion."

The Court found the seizure unlawful, and ordered that the suppression should have been granted. The case was remanded for further proceedings.

<u>Com. v. Stephens</u>
2008 WL 2167980 (Ky. 2008)

FACTS: On Feb. 1, 2005, Officer Larrabee (Lexington PD) was patrolling in the Coolavin Park area, specifically, "two breezeways of the first building in this area, where people commonly gathered to buy and sell drugs." He spotted Stephens walk into the area and stay a few minutes. At the same time, a woman asked Officer Larrabee for directions, and he was still talking to the woman when Stephens emerged. Stephens glanced at him and appeared to be nervous. Stephens approached the woman who was asking for directions, and spoke to the woman's daughter, in the passenger seat. She then walked away. "Larrabee asked the women in the car what Stephens had said, and the woman stated that Stephens was looking for her sister and had inquired if they had seen her." The woman (and her daughter) left the scene.

Larrabee parked his car and approached Stephens on foot. He called to her, and she turned and approached him. He asked her purpose for being in the area, and she stated she was looking for her sister. He asked for ID, but she said she had none. He asked her for her name, social security number and date of birth, and she gave what was later determined to be a false name. She gave a date of birth and age that did not match, but corrected it when the discrepancy was pointed out. Larrabee ran the

information and found no criminal record, but he warned her that giving false information to an officer was a crime. Stephens insisted the information she gave was correct. She told him she had a Florida operator's license, but when he checked Florida records, he found no license under the information she gave him.

Larrabee asked her if she had any drugs or paraphernalia, which she denied. She agreed to a frisk. Officer Larrabee then found a crack pipe in her coat pocket and arrested her. A further search at the jail revealed a rock of crack cocaine.

Stephens was indicted on drug and other charges. She requested suppression. (It was only during that hearing that she admitted her true name, the false name she gave was one of her sisters. She stated she gave the false name because she though she had an outstanding warrant in Scott County.) The Court found that Larrabee had "reasonable, articulable suspicion to conduct the investigative stop of Stephens." Stephens took a conditional guilty plea, and appealed. The Court of Appeals reversed the trial court's decision, finding that the investigatory stop occurred when the officer "initially asked to speak with [Stephens], and that he did not have reasonable suspicion at that time to make the stop." The Commonwealth appealed.

ISSUE: Does asking for information and/or ID convert an encounter into a Terry stop?

HOLDING: No

DISCUSSION: The Court noted that the facts of the case were not in dispute. The Court agreed that "based on the facts and circumstances surrounding Stephens's interaction with Officer Larrabee, Stephens was not subject to an investigatory stop within the meaning of the Fourth Amendment when Officer Larrabee initially asked to speak with her." Simply approaching someone on the street is not a Terry stop; instead, the Court called it an "encounter." Further, the Court found that asking questions or requesting ID, in itself, does not bring the encounter up to the level of an investigatory stop, either. Nothing in the evidence presented indicated that "Officer Larrabee touched Stephens, used an intimidating tone of voice, or told her that she was not free to leave." As such, the Court found the encounter was still consensual.

However, once he found no criminal record, and continued questioning her, even after she reiterated that the information was correct, the Court found that the encounter had become an investigatory stop. At that point, the officer needed reasonable suspicion to prolong the stop.

The Court noted that at the time of the stop, Officer Larrabee knew that "Stephens had spent approximately three minutes in an area known to be high in drug trafficking, she appeared nervous, and she initially gave an age that did not match her date of birth." Larrabee noted at the suppression hearing that he found it odd that she approached the passenger in the other car rather than ask him about her sister. The Court found that it was a close call, but that it did not find that information sufficient to justify the stop.

The Court found that because the stop was "not supported by a particular, reasonable suspicion, the seizure of the crack pipe was improper and the evidence should have been suppressed." Even though she gave consent, the consent was tainted by the improper stop. The Court upheld the suppression and remanded the case back for further proceedings.

Ervin v. Com.
2008 WL 3165901 (Ky. App. 2008)

FACTS: In Nov., 2006, "Ervin was standing near a pay phone … in Lancaster … when she was approached by Garrard County Sheriff's Deputy Keith Addison." He asked if she needed help, and she replied that she was simply trying to get a ride. He parked nearby and watched her. Suspicious, the deputy pulled up to her again and asked her "if she was having any luck finding a ride." She said she was not. He asked her for ID, and asked her if she had any warrants, which she denied. He asked if she'd ever been arrested, and she admitted that she had. She gave him consent to search her person and he found nothing. She gave him permission to search her purse, admitting that there was a crack pipe inside. He found the pipe, along with other items suggestive of crack use, and confiscated them. Because Ervin agreed to work with the police, however, she was not arrested.

However, for reasons unexplained by the opinion, a warrant was later issued, and she was arrested three weeks later. She requested suppression, which the court denied. Ervin took a conditional guilty plea, and appealed.

ISSUE: Does asking for ID make an encounter a "seizure?"

HOLDING: No

DISCUSSION: Ervin argued that her "encounter with Addison constituted a seizure for Fourth Amendment purposes," particularly when he asked her for ID. The Court, however, disagreed, finding that officers "may pose questions, ask for identification, and request consent to search luggage - provided they do not induce cooperation by coercive means."[17] In this case, the Court found nothing to suggest that "Addison coercively obtained Ervin's consent to the searches." The Court agreed her consent to the search was voluntary, and upheld her plea.

Knight v. Com.
2008 WL 54784 (Ky. App. 2008)

FACTS: On Nov. 29, 2006, Troopers McWhorter and Ray (KSP) responded separately to Joseph Knight's residence on "a complaint of a possible drug overdose and shots being fired." They were told there was no problem, and to leave, but instead, they remained in the area, about a mile away down the road. A short time later, a vehicle left the residence and appeared "to be weaving in its lane down the road." Trooper McWhorter followed for about a mile until the driver made an unsignaled turn - the trooper then made a traffic stop. Trooper Ray joined him and they learned the driver was Herman Knight, and Joseph, his son, was the passenger.

Herman was instructed to get out, and Herman, angry, tried to conceal a pill bottle in his hand. He was arrested for having "prescription drugs not in a proper container."[18] Trooper Ray patted down Joseph, and as he did so, Trooper McWhorter "noticed a bulge in Joseph's pants in the groin area." When patted, the trooper "heard a noise which sounded similar to paper being crinkled and felt a hard object which he

[17] See Drayton v. Ohio, 536 U.S. 194 (2002).
[18] Presumably KRS 218A.210. In fact the charge refers to controlled substances, not prescription substances.

believed could possibly be a knife." In fact, it was "an envelope containing the hard object, a glass pipe, and methadone pills." Joseph was promptly arrested.

The two men objected to the traffic stop, producing witnesses that Herman had properly signaled the stop. They further noted that Herman was not cited for swerving, and Joseph argued that since he had already been searched by Ray, that McWhorter's search, which revealed the contraband, was improper.

When his motion for suppression was denied, Joseph took a conditional guilty plea, and appealed.

ISSUE: May contraband be seized during a Terry frisk?

HOLDING: Yes

DISCUSSION: The Court found that the trial court was "clearly within its discretion to accept Trooper McWhorter's testimony that Herman did not use his turn signal" nor was it required that Herman be charged with swerving to actually justify the stop. (In fact, Herman had pled guilty to the turn signal offense.)

As for the double frisk, Trooper McWhorter testified that he was busy with Herman when Trooper Ray allegedly frisked Joseph, and the Court found it was appropriate to do a second frisk. (The opinion noted that the only evidence that there had been a prior frisk was from Herman, however.) Finally, the Court found that although Terry frisks are intended to detect weapons, that "an officer is entitled to seize non-threatening contraband if its nature is immediately apparent from the sense of touch during an otherwise lawful pat-down."[19] The Court found that the "circumstances being that Joseph had a huge bulge in his pants that made the sound of crinkling paper with a hard object inside, it [was] reasonable that the officer could have believed it "immediately apparent' that the contents of the paper was illegal contraband."

Joseph Knight's plea was upheld.

SEARCH & SEIZURE - AUTOMATIC COMPANION RULE

Owens v. Com.
244 S.W.3d 83 (Ky. 2008)

FACTS: On the day in question, an officer "stopped a vehicle driven by Chris Thornton because he believed - correctly it turned out - that Thornton's driver's license had been suspended." He was arrested and searched. The officer found a crack pipe. Owens was the front-seat passenger in Thornton's vehicle.

The officer decided to search the vehicle and directed Owens to get out. He asked Owens if he had any weapons, which Owens denied. Owens began to empty his pockets, and a baggie fell out. That baggie contained a marijuana cigarette, some loose marijuana and several pills (methamphetamine and ecstasy.) The officer later testified that he had completed a pat-down when the baggie fell out, but also testified "seemingly contradictorily, that Owens began removing money from his pockets while the officer was conducting the pat-down." Nothing else was found.

[19] Minnesota v. Dickerson, 508 U.S. 366 (1993).

Owens moved for suppression, which was denied. He was tried and convicted, receiving a minor sentence for the original charge, but 20 years for a PFO conviction. He then appealed.

ISSUE: May an officer pat down a passenger when the driver of the vehicle is arrested?

HOLDING: Yes (but see note)

DISCUSSION: Owens argued that the "officer overstepped constitutional bounds when he frisked him for weapons." The Court agreed that the stop was appropriate, and that it was then appropriate to arrest and search Thornton, and to search the passenger compartment of the vehicle.[20] Further, the officer had "the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop." The question, the Court stated, was whether "an officer [may] conduct a pat-down search for weapons of a passenger of the vehicle when the driver has been arrested and the driver possessed illegal narcotics even if there is no independent suspicion that the passenger is guilty of criminal conduct."

The Court noted that

> Two schools of thought have emerged around this subject. One, known as the automatic companion rule, holds that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed. "Numerous state and federal courts have either expressly adopted the automatic companion rule or have issued decisions that seem to follow its contours. [16] The other school of thought, also used by several courts, is the totality of the circumstances rule in, which the propriety of the frisk is determined considering the totality of the circumstances." Some courts that have rejected the automatic companion rule appear to believe that it improperly creates a guilt-by-association scenario and obliterates the requirement that an officer have a particularized, reasonable, articulable suspicion that a person is engaging in criminal activity or is dangerous before subjecting that person to a frisk.

The Court found it illogical to reject the automatic companion rule, finding that "[l]imiting the right to make a protective search would increase the chances that an officer could be harmed by a passenger who had been carrying a concealed weapon." Further, the Court noted, "given the small space inside a vehicle and the general presumption that one voluntarily chooses one's traveling companions for the furtherance of a common goal or mission, it would be unreasonable and dangerous for an officer not to be concerned about his or her safety with regard to the passengers of a vehicle after the driver has been arrested."

The Court found that "adoption of the automatic companion rule provides needed bright line guidance to the bench, bar, law enforcement community, and citizens across the Commonwealth as to what is constitutionally permissible in cases such as the one at hand. The United States Supreme Court, along with commentators, has endorsed bright line rules in dealing with other Fourth Amendment concerns."

The Court concluded:

[20] The vehicle, surprisingly, belonged to Owens.

> We are not unmindful of the powerful protections afforded by the Fourth Amendment. In no sense should our holding in this case be taken as a license for law enforcement officers to believe that all frisks of all persons are always proper. We also reject any implication that our holding creates a "guilt by association" mentality . To the contrary, our holding is simply an avenue to protect the officer working at the point of contact and the public. Toward that end, our holding is a limited and narrow exception to the exclusionary rule, designed to apply only in situations in which the driver of a vehicle has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle . Only in those limited circumstances, which are fraught with danger for officers and bystanders alike, may an officer conduct a brief pat-down for weapons (not a full-blown search) of the vehicle's passengers, regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion .
>
> Applying our holding regarding the automatic companion rule to the case at hand leads to the conclusion that the trial court did not err when it denied Owens's motion to suppress.

The Court affirmed Owens's conviction and sentence.

NOTE: Although the stated intent of the Kentucky Supreme Court was to create a "bright-line rule" for Kentucky officers in such cases, it has created, instead, confusion. In late 2007, the Sixth Circuit ruled in U.S. v. Wilson, 506 F.3rd 488 (6th Cir. 2007) that it does not recognize the "automatic companion" rule. As such, although a Kentucky officer is now permitted under Kentucky state case law to perform such a search in Kentucky, should the case end up in the federal court, instead, the search may be ruled invalid and evidence found during that search will likely be suppressed.

SEARCH & SEIZURE - CARROLL

Crook v. Com.
2008 WL 746529 (Ky. App. 2008)

FACTS: On the day in question, when Officer Thurmond[21] (Louisville Metro PD) first spotted Cross's car, "it was traveling more than double the posted speed limit." The officer initiated a pursuit and "Crook initially began to weave erratically" and the officer thought the "driver was trying to throw something out of the car." The officer spotted something being thrown from the passenger side window. Immediately thereafter, Crook got the car under control and stopped. Officer Thurmond asked for his license and registration, and asked about the item that flew from the car: Crook told him it was a piece of toilet paper. When being asked again, he stated it was a "plastic clip." At that point, the officer saw that "Crook appeared very nervous, shaking uncontrollably and stumbling over his words," so the officer removed the car's passenger and took him back to the cruiser.

The passenger told the officer that Crook had tossed a crack pipe out of the window. After other officers arrived, Officer Thurmond again asked about the item, and again, was told it was a plastic clip. However, in search the area where he believed the item was tossed, the officer found a crack pipe.

[21] Note, the correct spelling of the officer's name is Thurman.

Crook was arrested on several charges, including tampering with physical evidence. The car was searched, including the trunk, and two guns were found, triggering further charges. Crook was indicted and moved to suppress the guns - that motion was denied. He then took a conditional guilty plea, and appealed.

ISSUE: Is the finding of a crack pipe that had apparently been thrown from a vehicle sufficient probable cause to justify a Carroll search of the entire vehicle?

HOLDING: Yes

DISCUSSION: The Court quickly concluded that "the facts known to the officer at the time he initiated the search created a fair probability that he would find drugs or other evidence of criminal activity." As such, the warrantless search of the vehicle was supported by probable cause.

Crook's plea was upheld.

SEARCH & SEIZURE - EXIGENT ENTRY

King v. Com.
2008 WL 697629 (Ky. App. 2008)

FACTS: On Oct. 13, 2005, Officer Cobb (Lexington PD) and others "were conducting an undercover 'buy-bust' operation at an apartment complex in the area of 1300 Centre Parkway." Officers were positioned around the area in order to respond quickly if a drug transaction occurred. At about 10 p.m., Officer Givens got a signal that a drug transaction had occurred and the officers hurried to the location. Officer Cobb heard a radio transmission from Givens describing the suspect and information as to where he had gone. After Cobb arrived at the location, Givens gave further specific information as to the apartment the suspect had entered, but Cobb later testified that he was too far from his car radio and did not hear it.

As the officers entered the breezeway, they heard a door "slammed shut in the vicinity of the two rear apartments." As they got closer to those doors, they "smelled a strong odor of marijuana" and realized it was coming from the "left rear apartment." They believed, from the odor, that door had been recently opened and closed, and thought that was where the fleeing suspect had gone. They knocked on the door and identified themselves, and "Cobb heard movement inside the apartment and feared that felony might be destroyed if immediate action was not taken."

Cobb "then kicked in the door and performed a protective sweep of the apartment." He saw drugs and cash in plain view. King and other occupants were arrested. Shortly afterward, the original suspect was found in the apartment across the hall.

King was indicted and moved for suppression. At that hearing, "King's counsel focused on the inconsistency between Cobb's written post-incident report and his suppression hearing testimony." Cobb had testified that he had not heard Givens' radio transmission that the suspect had entered the right, rear apartment. However, his postincident report indicated that he had heard the transmission. According to Cobb, he included Givens' transmission in his report because Givens had informed him that he (Givens)

had made the transmission during the pursuit of the suspect not because he himself had actually heard the transmission at the time of the incident."

The Court, however, found that Cobb's actions were appropriate and denied the suppression motion. King took a conditional guilty plea, and appealed.

ISSUE: May officers make an exigent entry to protect evidence?

HOLDING: Yes

DISCUSSION: The Court noted that Cobb was clearly unaware of which apartment the original suspect had entered. Further, the Court found that the trial court's decision was supported by substantial evidence. The entry into King's apartment was supported by exigent circumstances coupled with sufficient probable cause, and the entry was valid under the destruction of evidence exception. In Roaden v. Kentucky, the Court explained that "when a situation becomes imminent, … it is reasonable to permit police to secure the location without a warrant where police action literally must be "now or never" to preserve evidence of a crime."[22] Once the officers smelled marijuana and heard movement consistent with destruction of evidence inside, the officers had sufficient probable cause to enter the apartment and secure the evidence." Further, the Court found no evidence that the officers' actions were intended to circumvent the need for a search warrant - and that they were acting "based on the facts known to them at the time of the forced entry."

Finding the entry valid, the Court upheld the decision of the trial court.

SEARCH & SEIZURE - CLOSELY REGULATED BUSINESS

Meghoo v. Comm.
245 S.W.3d 752 (Ky. 2008)

FACTS: On July 27, 2000, Officer Chelf (KVE) "conducted a safety inspection of [Meghoo's] truck at a weigh station in Hardin County." Meghoo was traveling from Houston to New Jersey. Officer Chelf, pursuant to such investigations, "noted that the pages in [Meghoo's] logbook were misdated, contrary to vehicle regulations." He also found suspicious that the bills of lading were handwritten, rather than computer-generated. When Meghoo was given an opportunity to fix the logbook, "the dates still did not match up, and the changes actually made matters worse in that there were major discrepancies as to when [Meghoo] had been driving."

Officer Burke, along with his canine, arrived, and Meghoo was told the dog would "be taken around the exterior of the vehicle." According to Officer Chelf, Meghoo's "voice began to 'crackle' and his knees 'got weak' and the officer thought he might collapse." Officer Burke's dog "made a positive response for 'narcotic odor' at the trailer doors."

The officers broke the seal on the trailer and Meghoo provided the key to the lock. The officers found boxes inside the trailer, and "[u]pon being placed in the trailer, the dog went toward the boxes and immediately began biting and scratching upon one of them" - the alert the dog was trained to do. The dogs

[22] 413 U.S. 496 (1973).

was able to tear open a box before stopped, and the officers "detected a strong smell of fabric softener sheets." (Officer Chelf later testified that "those are commonly used to mask the odor of large quantities of narcotics.")

Officer Chelf arrested and handcuffed Meghoo. He cut into one of the packages in the box and found marijuana. They moved the truck and searched the interior, finding only the single box containing about 40 pounds of marijuana. Officer Chelf got consent to search, but only after the truck had been moved and the search completed.

Meghoo was indicted on trafficking in marijuana, as well as for violations of vehicle laws. Meghoo moved for suppression and the trial court ruled that the stop was legal, but that it wasn't clear that providing the key to the padlock upon request was consent. Further, held that the officers had grounds to do a warrantless search because of the dog's actions, but the Court was unclear that the officers had authority to arrest for the drug charge. However, the Court ruled that at the least, it was a valid citizen's arrest and upheld it. Meghoo took a conditional guilty plea, and appealed. The Court of Appeals ruled that the stop and the seizure was appropriate. The case was further appealed to the Kentucky Supreme Court to resolve "questions as to the permissible scope of safety inspections by vehicle enforcement officers, and the authority of those officers to investigate and arrest for offenses that are not within the immediate scope of motor vehicle carrier safety statutes and regulations." (The Commonwealth emphasized that there was "no need to rely on citizen's arrest authority" as the officers were authorized to do drug trafficking investigations.)

ISSUE: Are KVE officers entitled to make drug trafficking arrests?

HOLDING: Yes

DISCUSSION: The Court first addressed Meghoo's argument that the federal regulation concerning possession did not concern substances that are part of a shipment, as it concerned only driver safety. The Court noted, however, that KVE officers are fully empowered to investigate when they find violations of commercial vehicle law, and once they "established a reasonable suspicion based on the documents that other violations of law might be occurring," they were entitled to summon a drug detection canine provided there was no "unreasonable delay." In this case, they found the delay, if any, was reasonable. The entire encounter, ending with the arrest and including the inspection, lasted less than an hour. In addition, the discrepancies in the logbook authorized the officers to take the vehicle out of service for 24 hours, so Meghoo could not have driven away, anyway.

The Court found that the sniff was completely appropriate and that it was unnecessary to resort to the citizen's arrest provisions to authorize the officers taking action based upon the dog's sniff. The Court agreed that KVE officers are peace officers and once they had probable cause to believe a felony had occurred, "they were not required to look away just because their normal purview consists of traffic violations."

Meghoo's plea was affirmed.

SEARCH & SEIZURE – VEHICLE STOPS

Fischer v. Com.
2008 WL 1921319 (Ky. App. 2008)

FACTS: On Aug. 3, 2005. Det. Hagan (Louisville Metro PD) was observing Fischer's home as a result of complaints of drug trafficking. They followed Fischer from his home, and after observing several traffic violations, they watched him pull into a Kroger parking lot. He drove up and down several rows, passing empty spaces, and parked next to a van. He then spoke to the occupant. Both vehicles drove to a nearby McDonald's.

The officers followed and stopped in the driving lane. As Fischer got out, "Hagan activated the emergency lights to identify himself and the other officer as police officers." Hagan showed his badge and explained his purpose. He asked Fischer if he had marijuana, cocaine or crack on his person, which Fischer denied. When he asked about methamphetamine, however, "Fischer simply looked at the ground." When pressed, Fischer admitted to having methamphetamine, and produced it. "Hagan patted Fischer down to make sure he had no other drugs, weapons, or paraphernalia." Fischer further admitted that he had additional drugs at his home and gave the officers oral consent to a search there. When they arrived, Fischer gave them a written consent and unlocked the safe where he stored the drugs. They found methamphetamine both in the safe and elsewhere in the house, as well as $3,000 on his person.

At a later hearing, Hagan admitted he had not given Miranda warnings, and that Fischer's wife, who was present, did not refuse consent. She later testified, however, that Fischer had refused to sign the consent form. She stated that Hagan had then threatened her with being charged along with Fischer, and told her that her child would be taken from her. She claimed that Fischer had ultimately signed the form due to the threat.

Fischer was charged and took a conditional guilty plea. He then appealed.

ISSUE: Is approaching a vehicle already stopped a "vehicle stop?"

HOLDING: No

DISCUSSION: The Court agreed with the trial court's finding that the "officers did not seize Fischer when they first approached him in the parking lot." "Fischer had already parked and was getting out of his vehicle when Hagan turned on his emergency lights." Fischer was not blocked in by the police car, and Hagan "approached Fischer 'casually' and the tone of the conversation" was normal. Although the badge and lights "might turn some encounters with police into seizures, here these items were simply a way for Hagan, who was dressed in plain clothes and driving an unmarked vehicle, to identify himself as a police officer." Although Hagan agreed he was not going to let Fischer leave, "an officer's subjective intent is irrelevant except insofar as it may have been conveyed to the detainee."[23] Further, as soon as Fischer produced the drugs, Hagan had probable cause to arrest Fischer.

[23] U.S. v. Mendenhall, 446 U.S. 544 (1980).

With respect to the Miranda warnings, Hagan testified that he did not advise Fischer of Miranda because he never arrested him. (He gave Fischer a citation, instead.) The Court found that a consent to search is not "an incriminating statement … because the consent is not evidence of a testimonial or communicative nature."[24] As such, the evidence found was not subject to suppression because of a questioning concerning Miranda. Although the Court noted that Fischer had "a strong case in this regard with respect to any statements he made after he was taken into custody," that the specific statements he allegedly gave were not before the court to decide.

The Court upheld Fischer's conviction.

Stone v. Com.
2008 WL 351669 (Ky. App. 2008)

FACTS: On Aug. 8, 2004, Officers Green and Lankford (Louisville Metro PD) were patrolling a Louisville apartment complex known to have a high crime rate. At about 8:30 p.m., they spotted Stone "sitting in a legally parked motor vehicle in front of an apartment building." He continued to sit for several minutes. Although the engine was not on, the brake lights were lit.

Officer Green parked directly behind Stone's vehicle, and Lankford's car was behind Green's. Given the positioning of the vehicles, Stone was effectively blocked in. Stone tried to get out as Green approached, but complied when ordered to get back inside. Officer Lankford noted that the steering column was "popped," and both officers noticed a baggie of powder on top of the middle console. Officer Green ordered Stone out of the car, and Stone got out, but he then ran from the scene. He was captured, arrested and eventually indicted on trafficking, weapons and related charges.

Stone moved for suppression, which the trial court denied. He was convicted of Possession, but not Trafficking, and a few other charges. Stone appealed.

ISSUE: Is blocking in a subject's vehicle a seizure?

HOLDING: Yes

DISCUSSION: Stone argued that the officers lacked sufficient reasonable suspicion to "justify the investigatory stop." The Court agreed that the positioning of the police cruisers effectively blocked Stone into his parking place. He was not permitted to get out and walk away, but was ordered back into his car. These facts indicated he was actually seized and would not feel that he was free to leave. The Court found it "uncontroverted that [Stone] was seated in a legally parked vehicle in front of an apartment building" in the evening. He was violating no law and was approached by no one as he sat in his car. The Court found itself "simply unable to hold that an individual merely sitting in a legally parked vehicle in front of an apartment complex in a high crime area for a few minutes is sufficient to create reasonable suspicion of criminal activity."

The Court ruled that the trial court erred in not suppressing the evidence, and reversed the conviction.

[24] U.S. v. Cooney, 26 Fed Appx. 513 (6th Cir. 2002).

Duncan & Stephens v. Com.
2008 WL 4091038 (Ky App. 2008)

FACTS: On Sept. 13, 2006, the arresting officer (in Clark County) was on patrol "when he noticed a white Thunderbird in front of him at a stop sign." The officer testified later that the "occupants were 'all over the vehicle' so he decided to follow the car." (The Court noted "that the officer did not testify that the occupants' movement in the vehicle created a traffic hazard, i.e. occupants changing seating positions in a moving vehicle.") As the two vehicles entered I-64, the officer "pulled up alongside the vehicle and observed Stephens 'slumped over' against the passenger door frame." As it moved from I-64 to the Mountain Parkway, and after he spoke to his supervisor[25], the officer caught up with the Thunderbird and made a traffic stop.

The officer asked the driver (Duncan) for his license and learned that he was driving on a suspended OL. Duncan was arrested and secured. The officer then had Stephens get out and realized she was intoxicated. However, he did not arrest her until another officer arrived. The officer searched the car and found nothing. Over the next 50 minutes, "the officer repeatedly asked Stephens to hand over the drugs, threatened her with arrest, and even told her that he had 'four troopers on the way with a dog, and when they get here, they are going to give you a good enema.'"[26] Eventually, Stephens confessed that she had Oxycontin in her clothing. She was then given Miranda warnings.

At the hearing, the trial court reviewed the cruiser video and then found the officer had probable cause to make the stop. As such, the evidence found incident to the arrest was upheld. Duncan and Stephens appealed.

ISSUE: Is a sleeping passenger sufficient justification to make a traffic stop?

HOLDING: No

DISCUSSION: The Court noted that its "review of the record reveals that the officer never articulated any violation of law to provide grounds to stop the vehicle." The officer reasoned that he was concerned about the movement in the vehicle and that he "feared for Stephen's safety because she appeared to be 'passed out.'" The Court found this insufficient to justify the stop, even under reasonable suspicion.

The Commonwealth argued that the "stop was legal based on the community caretaking function articulated in Cady v. Dombrowski."[27] Our court addressed the applicability of the community caretaking function in Poe v. Commonwealth,[28] The Court did not agree that it was unusual for vehicles to "have a sleeping passenger." It stated that "[a]bsent some indication of distress from the passenger, allowing the officer to stop a vehicle with a sleeping passenger is questionably an infringement upon … Constitutional rights." "For the stop of the vehicle to have been proper, the officer must have had specific and reasonable facts leading to a reasonable belief that a citizen is in need of assistance."

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[25] The officer's statement to the supervisor was "I got behind a vehicle from Illinois, a white Thunderbird. It's a nice one, with two black guys in it and there's a girl slumped over in the passenger seat....there's a white girl slumped over in the passenger seat, I just don't like it. I think they're running drugs."
[26] The entire arrest, and these statements, were captured by the officer's video camera.
[27] 413 U.S. 433 (1973).
[28] 169 S.W.3d 54 (Ky.App.2005).

The case was vacated and remanded back to the trial court for further proceedings.

Com. v. McKinney & Prater
2008 WL 4091679 (Ky. App. 2008)

FACTS: On April 27, 2006, Det. Bradley (UK PD) received an anonymous tip "regarding possible drug activity at some apartments on campus." The caller contacted him again, several hours later, and arranged to talk to Det. Bradley in person. The caller, Wickstrom, and his girlfriend, Lea, told Det. Bradley that Lea lived with McKinney and that both McKinney and her boyfriend, Prater, were using drugs. Further they stated that the circumstances indicated the couple might be trafficking.

Lea gave consent to search her own bedroom and the apartment's common areas. Det. Bradley, along with Det. McPhearson, went to the complex, and Wickstrom directed them to a "blue car containing a man and a woman." Det. Bradley followed the car and later stated he believed the driver recognized him as police, because he "sped through the parking lot at a high rate of speed." Both officers chased the suspect vehicle and Bradley was able to get it stopped. Det. Bradley drew his weapon because he was concerned that the driver (Prater) was making suspect movements. Both occupants were ordered out of the car and patted down. Det. Bradley visually checked the car for weapons.

Det. McPhearson ran his drug dog, Gus, around the car, and Gus alerted. The officers found cocaine in McKinney's purse - but she claimed it was placed there by Prater. Marijuana was also found. McKinney was given her Miranda rights and she waived them, although she later claimed she hadn't been given those rights.

Both filed motions to suppress, and both were granted that suppression by the trial court. The Commonwealth appealed.

ISSUE: May information from an identified informant support a traffic stop?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that "there was reasonable suspicion to make an investigatory stop of the vehicle based upon the citizen informants' and the officer's observations." Further:

> The Commonwealth outlines multiple factors which it claims gave Bradley a reasonable and articulable suspicion that McKinney and Prater had committed or were about to commit a crime. Those factors are: Lea said she knew McKinney and Prater used cocaine; Bradley verified that Lea roomed with McKinney; Lea and Wickstrom stated that there was a high volume of people in and out of the apartment; Lea and Wickstrom stated that McKinney and Prater had exchanged duffel bags that morning; Lea and Wickstrom witnessed McKinney and Prater with plastic baggies the day of the arrest; Lea and Wickstrom had stated that McKinney and Prater drove a blue car before Bradley encountered McKinney and Prater; Wickstrom indicated to Bradley that the blue car leaving the apartment parking lot was that belonging to McKinney and Prater, and the driver of the car acted suspiciously, as if trying to avoid an encounter with the police, by leaving the apartment parking lot at a high rate of speed.

In addition, the informant was identified, and thus entitled to a "greater presumption of reliability" than an anonymous informant. The Court agreed that the officers had reasonable suspicion to make the stop.

Further, the Court agreed that the dog sniff was justified, given that the lapse of time between the stop and the utilization of the dog was "no more than two minutes." Once Gus detected drugs, the officers had "probable cause to search making a search warrant unnecessary."

However:

> The Commonwealth next argues that there were also grounds for a valid traffic stop and that it does not matter whether the stop was pretexual. In support of its finding that the traffic stop was not valid, the trial court cited several reasons: the speed bumps in the apartment parking lot would have precluded speeding; Bradley failed to initiate his vehicle's emergency equipment at the time he alleges that Prater sped away from him; the time of day and high volume of traffic most likely made speeding difficult if not impossible; McPherson was unable to get any closer to Bradley than five to six cars away due to the heavy traffic; Bradley failed to request personal identification, registration or insurance from Prater or McKinney; and Bradley failed to issue a citation for speeding, fleeing or evading, or excessive window tinting (McKinney acknowledged excessive window tinting). The trial court is vested with the discretion to determine the credibility of witnesses and draw reasonable inferences from their testimony.[29]. We hold that substantial evidence supports the trial court's findings that this was not a valid traffic stop.

Finally, the Court found that the issue of the Miranda warnings was not actually resolved by the trial court. Since the case was being remanded back, that issue was also returned to the trial court for additional findings. The Court vacated part of the judgment, but affirmed that the stop was valid as a Terry stop, and that the evidence found as a result of the stop should not have been suppressed.

FORFEITURE

Com. v. Coffey & Anderson
247 S.W.3d 908 (Ky. 2008)

FACTS: Coffey pled guilty to possession of a controlled substance - amending an earlier charge of trafficking. (The facts of the original case are immaterial to the summary.) As part of the plea agreement, the Court held a hearing to determine if the 1971 Malibu he was driving at the time he made an exchange with a CI would be forfeited to the Glasgow Police Department. At the time, the title holder of the vehicle was Coffey's sister, Anderson. Testimony during the hearing "developed that Geralean [Anderson] had stated that she did not know why the car was registered in her name, that Coffey always used the vehicle and that she was not responsible for any items in the car." Coffey apparently used the vehicle exclusively, "paid for the insurance, kept it in the garage at his house, and paid the taxes on it." Coffey argued that the possession charge did not sufficiently taint the vehicle and that "forfeiture would be disproportionate to that charge considering the value of that vehicle, and the Geralean was an 'innocent owner' under the forfeiture statute."

[29] Com. v. Whitmore 92 S.W.3d 76 (Ky. 2002) see also RCr 9.78.

The trial Court "concluded that Coffey had placed title in his sister's name solely to avoid forfeiture and that Anderson was a "straw man" owner, and found that the vehicle was subject to forfeiture. The Court of Appeals reversed that decision, finding that the meaning of owner was, as KRS 186.101 indicated, "the title holder or person who has possession of the vehicle due to a bona fide sale." Since that person was Anderson, the Court found that her status was as the vehicle owner. The Commonwealth appealed.

ISSUE: May a vehicle held in a name other than that of a suspect, but apparently solely controlled by the suspect, be seized and subject to forfeiture?

HOLDING: Yes

DISCUSSION: The Supreme Court noted that ownership and interest in a vehicle, for the purposes of KRS 218A forfeiture, is different than ownership under KRS 186. Although 218A forfeiture does permit an otherwise "innocent owner" to assert an interest in a vehicle being sought for forfeiture, that the "facts specific to each claim of ownership will determine who the owner is for purposes of forfeiture, and the statute does require an innocent owner to establish his or her status, not the Commonwealth." KRS 218A forfeiture is specifically intended to deter drug dealers "from titling vehicles or other property in someone else's name in order to use the property in illegal activity and yet escape forfeiture." In this case, it was clear that Anderson's putative ownership was, in fact, as a straw man, as she presented no evidence to indicate otherwise.

The Court found that Coffey was the actual owner of the Malibu and the trial court's original decision was reinstated.

Rickard v. Com.
2008 WL 2312609 (Ky. App. 2008)

FACTS: Rickard was arrested, indicted and eventually pled guilty to Trafficking in Controlled Substances (prescription painkillers), and as a result, the Hopkins Circuit Court ordered the forfeiture of vehicles, money and other items. During searches prior to his arrest, the items in questions were seized, and Rickard agreed to the forfeiture of certain of the items. Other items, however, he claimed were his son's property, and certain of the remaining items were agreed to be "personal in nature and not subject to forfeiture." Items remaining in dispute were two vehicles, cash, coins (foreign and collectible), stamps and store gift cards. The trial court had found all of the disputed items subject to forfeiture, and Rickard appealed.

ISSUE: May items purchased before a subject was proved to be involved in criminal activity be subject to forfeiture?

HOLDING: No

DISCUSSION: First, the Court discussed the two vehicles. The Court agreed that Rickard had used the vehicles to drive to and from the pharmacies where the medications were purchased. However, the Court noted that the statute only permits forfeiture "of vehicles used to transport controlled substances 'which have been manufactured, distributed, dispensed, possessed, being held, or acquired in violation of this chapter [KRS 218A]." Since there was no evidence that he bought the medications illegally, or that he

used the vehicles to transport the medications illegally, the Court agreed that the "use of the vehicles was too attenuated from the later criminal acts to warrant forfeiture."

With respect to the cash and coins (cash equivalents), the Court noted that Rickard had "large amounts of ordinary currency on or near [his] person" during each search - for a total of approximately $10,000 during three searches. The Court found it only necessary that "some portion of the currency [be] traceable to the exchange or intended violation." Since some of the money was found commingled with money exchanged during controlled drug buys, and the remainder found in close proximity to both Rickard and the drugs, the Court found that the evidence was sufficient. In addition, the Court agreed that the vast amount of assorted change, which was "not sufficiently unique to be distinguishable from the currency," was also subject to forfeiture. However, the Court did not agree that the collectible coins could be traced to the crime and most pre-dated the time during which Rickard was known to be trafficking, and were acquired during a time he was acknowledged to be collecting coins. To the extent that they were mixed with other coins, the Court concluded the Rickard had "presented clear and convincing evidence to rebut [the] presumption that the coins were purchased with illegal proceeds." The Court also found that two $1,000 bills were gifts from Rickard's sister, and dated from prior to 2001. There was no indication that the money was given in exchange for drugs. Finally, with respect to the gift cards, the Court found that although there was no direct evidence they had been exchanged for drugs, that one of the detectives had testified that such items (which included lottery tickets, EBT cards and specific store cards) were "commonly used in exchange for drugs." Although the connection was admittedly tenuous, the Court agreed that they were also subject to forfeiture.

The Court found that the vehicles, the collectible coins and the $1,000 bills were not subject to forfeiture, but that all other items were so subject.

<u>Estate of Duncan v. Com.</u>
2008 WL 5191507 (Ky. App. 2008)

FACTS: In 1991, the Duncans (Christopher and Rhonda) were indicted in Hancock County on drug charges. At the time of their arrest, the Hancock County SO seized 25 long guns. Christopher Duncan died in 2001, before the criminal charges were resolved. His estate moved to have the guns returned, but no ruling was made. In the meantime, Rhonda entered a pretrial diversion, in which she agreed to forfeit all seized property to the sheriff's office. In 2004, the Court ordered the guns to be so forfeited. The estate objected to the forfeiture.

In 2006, the Court of Appeals reversed the trial court's decision permitting the forfeiture. In subsequent proceedings, and upon a motion to actually return the weapons, the trial court denied the motion, arguing that Rhonda Duncan's agreement supported the forfeiture of the guns. (Rhonda and her two children were the actual heirs to the estate, and thus, she or her children would regain ownership of the guns.)

ISSUE: Is property owned by a deceased individual required to go through probate court?

HOLDING: Yes

DISCUSSION: The Court found that at the point Duncan died, the sheriff's office "lost all authority to retain the property." Further, only the District Court has the jurisdiction to handle estate issues. Finally, the Court noted, many of the guns had already been sold, and lacking any information as to the date of the

sale, the Court noted that the sheriff's office might have been in contempt of the appellate court's earlier ruling.

The Court found that the estate was entitled to the proceeds of the sale of the guns, and to the return of any guns still in the possession of the Commonwealth.

INTERROGATION - MIRANDA

Shouse v. Com.
2008 WL 466139 (Ky. 2008)

FACTS: Shouse was accused of shooting and killing his live-in girlfriend, Westwood, in Owsley County on December 31, 2004, and then calling 911 for help. KSP arrived shortly after the ambulance and found Shouse "sitting on a nearby tarp, visibly upset and shaking." He was placed in the front seat of a KSP cruiser and questioned. The statement was tape recorded and Shouse was not given Miranda warnings. Shouse claimed to have left Westwood briefly, to put on boots, and that during that time, she shot herself. Shouse got his brother, who lived nearby, to give him a ride up the hill. They found Westwood on the ground with Shouse's pistol near her hand. Along with another family member, they transported Westwood down the hill, because they feared an ambulance could not get up the steep, muddy hill. Shouse stated he tossed the gun about 18 inches away from her body so "it didn't get smashed down in the mud." He admitted the weapon was his and that he kept in on a shelf in the trailer he shared with Westwood. He also stated when he heard the gunshots, he thought there might be people hunting, and that he did not think about Westwood having the gun.

At that point, the officers were investigating the incident as a suicide. However, once they received information that "Westwood's wound was inconsistent with suicide because it was to the back of her head," which subsequently turned out to be incorrect, they arrested Shouse and charged him with shooting Westwood. They gave him Miranda warnings at that time.

At trial, a number of conflicting versions of statements given by Shouse and others were introduced. The Medical Examiner testified that the fatal wound, to the side of the head, lacked stippling, which indicated it had to have been fired from at least three feet away. Shouse also testified in his own defense.

Shouse was convicted of intentional murder, and appealed.

ISSUE: Does an interrogation, of a subject not in custody, require Miranda?

HOLDING: No

DISCUSSION: Shouse argued that he should have been given his Miranda warning prior to his initial statement. The Trooper testified that he did not consider Shouse in custody at the time, as he believed he was investigating a suicide. The Court agreed that the interview was, in fact, an interrogation. The Court looked to Com. v. Lucas, which stated that "[s]ome of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police ."[30] In this case, even

[30] 195 S.W.3d 403 (Ky. 2006).

Shouse agreed the trooper was "very cordial," and in particular, Shouse was not arrested at the time. The Court found no indication that he was subjected to anything more than the "standard taking of a witness's statement in the course of an investigation into an apparent suicide." The interview took place in the police car only because it was cold and raining.

Shouse's conviction was affirmed.

Prewitt (Sharon and Michael) v. Com.
2008 WL 399427 (Ky. App. 2008)

FACTS: On May 1, 2004, Sharon Prewitt was stopped at a checkpoint by Deputy Cranmer (Spencer Co. SO) and Trooper Harris (KSP). Dep. Cranmer had noticed her vehicle tags were expired and Trooper Harris detected the odor of marijuana in the car. Trooper Harris took charge of Sharon Prewitt's vehicle while Dep. Cranmer continued with the checkpoint.

Sharon admitted to Trooper Harris that she had smoked marijuana earlier in the day and the trooper conducted three field sobriety tests. Following those tests, she was arrested for DUI. On the way back to the trooper's vehicle, however, Dep. Cranmer "inquired whether he could ask Sharon some questions, Mirandized her, and proceeded to ask questions." He had been working with informants that had told him that there was marijuana being grown at the house she shared with her brother, Michael. She answered some questions but denied consent to search, stating that her brother also lived there. Dep. Cranmer then used her responses to get a search warrant.

The Court noted that:

> Unfortunately, the encounter between Sharon and the officers was not video-recorded from a police cruiser until Deputy Cranmer began the Miranda process with her. Thus, the initial conversation between Sharon and Trooper Harris was not recorded. However, we note that *immediately* after being Mirandized, Sharon asked the officers why they thought she had marijuana growing at her house, and one of the officers responded she had just told them she did. Thus, the conversation to which the officer was referring, *i.e.*, that there were multiple dead marijuana plants at Sharon's house, occurred before the tape recording began and before Sharon was Mirandized. Furthermore, one of the officers reminded Sharon that she had just told them that she had smoked a joint and driven her daughter somewhere, which also occurred before her Miranda rights were read to her.

In addition, the Court noted that at least one of the officers "repeatedly told Sharon during the stop that she was not under arrest" even though Trooper Harris had already made the decision to arrest her.

Both Sharon and Michael Prewitt were arrested based upon evidence found at the house, and both moved for suppression. The trial court reviewed the evidence and found no reason to suppress. Both Prewitts took conditional guilty pleas, and jointly appealed.

ISSUE: May statements obtained from a person in custody, taken prior to giving Miranda warnings, be admitted?

HOLDING: No

DISCUSSION: The crux of the Prewitts' appeal was that Sharon's statements should have been suppressed because her statements were obtained improperly. The Court noted that the Commonwealth had "acknowledged that Sharon was in custody at the time she was asked about the marijuana plants growing at her house." It was also apparent that she was asked "questions about the marijuana plants growing at her house before she was Mirandized." The fact that she repeated admissions after being given Miranda was not dispositive.

The Court concluded that it was necessary to remand the case back for an evidentiary hearing on whether the "officers deliberately employed the 'question-first' technique prohibited in Missouri v. Seibert.[31]"

Beckham v. Com.
248 S.W.3d 547 (Ky. 2008)

FACTS: On the date in question, a motel cleaning crew found a "badly beaten woman in a room at the motel" in Boone County. Beckham was targeted as a suspect "because he was the last person seen with the victim." Although they had not yet found Beckham, the investigating officers requested a warrant to obtain samples of "blood, saliva, body hair, head hair, and pubic hair from Beckham and to take nude photographs of him."[32] Later that day, officers went to Beckham's home and he agreed to speak to the officers - he was then transported to a local probation and parole office by the police. Detectives Pate and Lavender (Boone County SD) met Beckham there and questioned him for over two hours in a closed office. Beckham made a written statement in which he admitted to being with the victim and that he attempted sexual intercourse with her, but was unsuccessful, but stated that he did not assault her. He further gave permission for the officers to retrieve the clothing he was wearing at the time. He was not told until after that time that the officers had a warrant for him, and the opinion notes that Beckham apparently did not object to the collection of the evidence named in the warrant.

While at the hospital, Det. Pate "learned that another officer had found a bloodstained shirt in the trash where Beckham was staying." In addition, surveillance tape from a grocery store that Beckham visited after he left the victim indicated that he was wearing different clothing at that time. At about 11 p.m. that night, the officers "told Beckham that there had been a 'dramatic turn of events' or a 'dramatic discovery' and asked him if he had anything he needed to say to them." When Beckham stated that he might need help, he was given his Miranda rights. Beckham then "exercised his right to counsel, thereby ending the interrogation at 11:16 p.m., nearly seven hours after the police first encountered Beckham at his cousin's house."

The victim ultimately died and Beckham was indicted for murder. Beckham demanded suppression, which was denied, and he was ultimately convicted. He then appealed.

ISSUE: Does the existence of a body search warrant negate a finding that a subject is not in custody when an otherwise voluntary statement is given?

HOLDING: No

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[31] 542 U.S. 600 (2004).
[32] The Court refers to this as a "perk kit" - but the editor suspects that is a misspelling of "PERT."

DISCUSSION: The Court began its review by noting that "the crucial question to be determined in situations where a criminal defendant contends that the authorities failed to comply timely with the warnings required by Miranda is whether the defendant was 'in custody.'" To determine that, the Court must decide if the individual would have believed that they were free to leave during the time in question. (The Court cautioned that such a decision must be made from an objective viewpoint, not a subjective one.)

The court noted that the length of Beckham's interaction with the police, over six hours, was an important factor in determining custody, but further, that "it is not the only factor to be considered." The officers "testified that Beckham was told that he was free to go and, furthermore, that Beckham never gave an indication that his cooperation was anything other than voluntary." There was also no indication that he was touched or otherwise physically coerced during the interviews.

Further, the Court rejected Beckham's argument that "he had to have been in custody because the authorities already held a warrant for a perk [sic] kit and photographs at the time they questioned him, meaning that the officers likely would not have simply let him leave." The Court, however, noted that the "subjective intent of the officers is irrelevant in determining whether a person was in custody." Instead, the question was "whether a reasonable person in Beckham's situation would have believed that he was not free to leave," and found that the "existence of the warrant does not defeat a finding that Beckham was not in custody."

The Court concluded that the weight of the evidence tended "to show that Beckham was not in custody" and it upheld the trial court's decision to that effect.

Beckham's sentence was affirmed.

Monroe v. Com.
244 S.W.3d 69 (Ky. 2008)

FACTS: Vickie Monroe and her son Emerson were accused of murdering Vickie's husband, Gerald, on June 1, 2002. Prior to the homicide, Vickie Monroe had "confided in Emerson about how unhappy she was and how badly her husband treated her." The record indicated that a year before the murder they had discussed how much it would cost to "get rid of" Gerald. About that time, she gave Emerson $2,000 dollars and later, another $1,000. Both were charged with the robbery and murder of Gerald Monroe. Monroe moved for suppression of statements she made to the police, but was denied. During the trial, evidence was presented as to statements from three friends of Emerson's "about the statements made to them by Emerson." Emerson did not testify at trial.

Both were convicted and appealed.

ISSUE: Is a subject allowed free movement in a police station during a questioning "in custody?"

HOLDING: No

DISCUSSION: Monroe was initially interviewed at about midnight on June 12. She had been contacted at home and asked to come to the station for questioning, and agreed. She knew that Emerson was also being questioned. She was not given her Miranda warnings. Following "several small sessions," Monroe was "confronted with her son's accusations and made some incriminating statements." She was then

arrested. The Court noted, however, that until her arrest, she was not monitored and was allowed to "smoke, drink and eat" and was left alone. She was permitted to use the restroom and "returned to the office on her own." It would have been unreasonable for her to believe that she was in custody at that time and the Court concluded that Miranda warnings were unnecessary.

Vickie Monroe's conviction was reversed.

Alkabala-Sanchez v. Com
255 S.W.3d 916 (Ky. 2008)

FACTS: Trooper Devasher (KSP) developed Alkabala-Sanchez as a suspect in a multiple murder that occurred in Kentucky. With the assistance of local officers in New Jersey, he located Alkabala-Sanchez and asked him to come to the local police station to discuss the crime. Alkabala-Sanchez agreed, and was told he was free to leave at any time. He was permitted to move around the station, use the restroom, buy drinks and spend breaks as he wished. Prior to receiving Miranda warnings, he stated that another individual, Camacho, had killed the three men, but claimed he only learned of it after the fact. He also stated that Camacho "had told him to hide and not talk to the police."

It became obvious to the investigators that Alkabala-Sanchez was actually involved in the homicides. In the early morning hours he was given Miranda warnings, but he continued to talk to the officers for two hours. By the end of the interrogation, "he admitted to assisting with the planning of the murders and the disposal of the bodies." He was charged with murder and complicity and waived extradition to Kentucky. He requested suppression, and following a lengthy hearing, his request was denied. Although he argued that he was never given Miranda, that was apparently refuted by the translated transcript of the interrogation submitted as evidence. He noted that he "believed that the police had taken his sister in handcuffs to the police station," and that his uncle was also taken to the station; however, the evidence indicated that although she accompanied her brother, the sister was not in custody and was returned home. Also challenged were the abilities of the first translator, with another witness testifying as to the real meaning of Alkabala-Sanchez's words. Ultimately, the Court concluded that he was not in custody before Trooper Devasher gave him Miranda warnings and that the translation was "sufficiently reliable."

When his suppression was denied, he took a conditional guilty plea to complicity to commit murder. He then appealed.

ISSUE: Is stopping a non-custodial questioning to give Miranda, when it becomes incriminating, proper?

HOLDING: Yes

DISCUSSION: The Court noted that the main question in this case was whether Alkabala-Sanchez was in custody "when he made statements in an interview with a Kentucky State Police officer in New Jersey." The Court followed the trail outlined by Trooper Devasher, detailing how each bit of evidence led him closer to Alkabala-Sanchez. In particular, the Court noted that Alkabala-Sanchez agreed to meet with the officers during a phone call, and "[h]e obviously did not have to be there, and could have refused to meet with the officers." Alkabala-Sanchez agreed to accompany them to the station, rather than continuing a discussion by the side of the road, their designated meeting place. The trial court, which had the benefit of the statement, found that Trooper Devasher told him he was free to leave, and it was clear Alkabala-Sanchez

understood that. During the course of their lengthy discussion, Alkabala-Sanchez "began to talk too much, and to make statements not consistent with second-hand information." At that point, Trooper Devasher elected to give Miranda warnings and the Court found the next two hours were a "custodial interrogation."

The Court further noted this was not the "question-first" process described in Missouri v. Seibert.[33] In this case, Alkabala-Sanchez "had been telling a story as if it were told to him by Camacho's wife, but interspersed statements that indicated personal knowledge." The Court found no indication that the interview was done in bad faith, and that Trooper Devasher "began the interview under the assumption that Alkabala-Sanchez was simply a witness with knowledge of the crime." When it evolved further, he gave Alkabala-Sanchez Miranda warnings, which was proper.

Alkabala-Sanchez's conviction was affirmed.

Griggs v. Com.
2008 WL 1851080 (Ky. 2008)

FACTS: Griggs, who was married at the time, and the victim, Salyers, had a child together in 1989. They remained in contact, and although Griggs' marriage continued, he was still jealous of Salyers's relationships with other men. On June 12, 2005, the child, Nicole, was to go with Griggs for a month-long visit, but when he went to pick up Nicole, she and her mother were not there, having been delayed. A little later, Salyers dropped off Nicole at the Griggs's home. Later that night, however, Griggs went to Salyers's home, where they fought, and Griggs "killed her by shooting her twice in the head."

The next morning, Griggs took Nicole to summer school, then called his wife and asked her to pick up the child. When they arrived home, they found Griggs asleep. "When they tried to rouse him he was incoherent." Ambien (a prescription sleeping medication) was found nearby. When his incoherence persisted, his wife called for police and EMS. During the same time frame, a relative found Salyers's body. The relative called the Griggs's home, "apparently to accuse Griggs of the murder."

Griggs was taken to a Lexington ER. When he was roused by nurses, between 2 and 4 p.m., he was "responsive and coherent albeit lethargic and not aware of where he was." By about 3 p.m., uniformed officers were at the hospital, staying with him. The nurse asked Griggs what had happened, and he claimed to have taken Ambien and remembered nothing else.

At about 4:15, Det. Persley interviewed Griggs. At a later suppression hearing, he testified that he had originally been dispatched to look into a "possible suicide attempt, but that en route to the hospital he was informed of Salyers's murder and of Griggs and Salyers's relationship." He stated that Griggs had been lethargic, but oriented, and he had "understood who the detectives were, and had responded appropriately and deliberately to all of their questions." He was given, and waived, his Miranda rights. Eventually, Griggs confessed to Salyers's murder, and stated that he'd disposed of the gun near Paris. Some minutes later, Det. Persley returned to ask a few more questions and provided Miranda warnings again. Griggs requested an attorney. When Griggs was released from the hospital a few hours later, he was formally arrested. He later testified that he had no recollection of anything up until the point he received the second set of Miranda warnings.

[33] 542 U.S. 600 (2004).

Griggs moved for suppression, claiming that his overdose/intoxication rendered his confession involuntary. The trial court, however, denied the motion, given that both the nurse and the detective had found him "appropriately responsive and coherent."

Griggs appealed.

ISSUE: Is a suspect who is in the hospital, but not under arrest or under guard, "in custody" for purposes of Miranda?

HOLDING: No

DISCUSSON: The Court found that Griggs did not claim that the "detectives overbore his will by the use of coercive tactics" and did not "threaten Griggs, make promises, humiliate him, prolong the questioning unduly, or subject him to any sort of physical deprivation." The Court found the confession to be voluntary.

Griggs also claimed that the officers gave him Miranda, but that they did not tell him "that anything he said could be used against him." The audio recording supported his claim. However, the trial court found that since he wasn't in custody at the time, Miranda rights had not yet attached. The Court agreed, finding that "the restraint giving rise to 'custody' must be restraint instigated by the police…." "The Court noted that "hospital questioning, like questioning elsewhere, is not custodial unless the circumstances would lead a reasonable person to believe that were he capable of leaving the hospital, the police would not allow him to do so."

After resolving several other issues, the Court affirmed Griggs's conviction.

Fugett v. Com.
250 S.W.3d 604 (Ky. 2008)

FACTS: On Jan. 26, 2006, Ray and Robbins went to a downtown Louisville, planning to buy marijuana. Robbins met Fugett and they agreed upon a sale; and Fugett later called Robbins with a time and meeting place. Fields drove Fugett to the agreed-upon location, a hotel parking lot. When Ray and Robbins arrived, Fugett got into their SUV. A few minutes later, he returned to Fields' car with a shotgun, and stated that "he shot the boys when one pulled the shotgun on him." She drove him to his apartment as he cleaned blood from the shotgun. He gave her the shotgun and a handgun to hide. Fields later gave a statement to the police and the guns were recovered.

Ray and Robbins both suffered fatal wounds, consistent with having been shot in the back as they fled. A clerk at the hotel location identified the man they'd met with as Bosco - an alias for Fugett. A few days later, investigators learned Fugett was being released from jail on an unrelated charge and they approached him. He agreed to accompany them to police headquarters, nearby. (This release took place in the late evening.)

"During the initial portion of the interview, Fugett led the officers to believe he had information and would be willing to assist in the investigation." However, in the early morning hours the next day, while still at police headquarters, he approached a detective and indicated for the first time that he may have had a role in the incident. Thus, when the detectives returned at 5:50 a.m ., Fugett was given his Miranda warnings. After executing a waiver, Fugett informed the officers he had been present at the shootings. He denied pulling

the trigger, but he admitted he had hidden the guns, and he was then arrested. Around 10:30 a.m., he again approached the officers and said he had shot the victims in self-defense using a pistol he had taken from Ray's pocket.

Fugett was convicted of two counts of Manslaughter and one of Tampering with Physical Evidence. He was convicted, and appealed.

ISSUE: Is interrogation at a police station automatically custodial?

HOLDING: No

DISCUSSION: Fugett made a number of challenges related to trial procedure and jury selection. He also complained that "from the time he was taken from the jail to headquarters for questioning, he was in custody and entitled to his Miranda warnings." The Court noted, however, that when he was released, and met by the detectives, he was asked if he "would be willing to go to police headquarters and answer some questions." He was told "that he did not have to go and that he was free to leave." He chose to accompany the detectives and rode, unhandcuffed, in the back of their car. They entered through a non-public entrance and went to an interview room, where he was "often left alone, was never restrained, and was allowed free use of the restroom." He was allowed to have drinks and to smoke. Early in the discussion, he "led officers to believe he had information about the shooting and that he would assist in the investigation." He agreed he'd been at the service station across from the shooting location and that he knew one of the victims, and further that he stated he could identify witnesses and a vehicle involved. A few hours into the meeting they drove him through the suspect area, and provided food for him. Only after he admitted he may have had a role in the shootings was he given Miranda, and after that he told officers he had been at the shooting. He stated someone else had done the shooting, but he "admitted he had agreed to hide the guns." At that point, he was arrested. Fugett eventually claimed that the shooting was in self-defense.

Fugett argued that the approach was a "question first and then warn technique" prohibited by Missouri v. Seibert.[34] The Court noted the difference, however, in this case, in that Fugett was considered a witness, not a suspect, initially, and agreed, voluntarily, to be questioned. Before they began "systematic questioning, detectives properly provided him with his Miranda warnings." Further, the Court found that Fugett was not in custody prior to his actual arrest, so Miranda would not have been required. Fugett argued that the atmosphere was coercive, but the Court noted that was rejected in California v. Beheler.[35] In that case, "the Court recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." Further, "the definition of custodial interrogation" focuses on "words and actions on the part of police."[36] In this case, Fugett voluntarily left the interview room at approximately 5:25 a.m. and "approached a detective to inform him that he had not been fully honest."

The Court found the interrogation was appropriate, but reversed the conviction due to problems with the jury selection.

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[34] Seibert, supra.
[35] 463 U.S. 1121 (1983).
[36] Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).

INTERROGATION - RIGHT TO COUNSEL

Burnett v. Com.
2008 WL 746615 (Ky. 2008)

FACTS: Burnett was charged with various sexual offenses concerning his son. He took a conditional guilty plea, and appealed.

ISSUE: May unprompted statements made following an invocation of counsel be admitted?

HOLDING: Yes

DISCUSSION: Burnet argued on appeal that statements he made to Det. Hester (Lexington PD) should have been suppressed because he invoked his right to counsel, and that questioning continued past that point.

The relevant testimony is as follows:

> Detective Hester: . . . but we're talking about your son now and whatever happened with the others, I don't, you know, I wouldn't really expect much remorse or concern for their well being, but you're dealing with your own blood now and I'm offering you an opportunity to do right by your son, okay? So what went on? When did all this start with [T.B .]?
> Burnett: I don't know what to say. I don't know what to say. I was always told that I wasn't supposed to say nothing, not unless an attorney was present. I don't know. I ain't never been in an interrogation room. I don't know what to say. (emphasis added).
> Detective Hester: Understand this, based on . . .
> Burnett: I'm not really with the laws and stuff, I don't know. (emphasis added).
> Detective Hester: Well, like I told you before, and you've got, you know, those rights, okay, but here's what's gonna happen, okay. Based on what [T .B.]'s told me, the things he's described, I'm prepared to charge you today with the things that happened to [T.B.] And I can go to the Com. Attorney and I can say, you know, obviously they're going to know about your record, and I can say you got another one here but he's repentant, he's sorry for this one, and he wants to help his son get through it, for the mistakes that he made . Or I can go back, you know, and we can work out for running stuff concurrent, you know, with whatever's happening in Indiana or things like that. I can somewhat advocate for you. Those decisions are made by them and by the judge, and not by me, but I can go in there and advocate for some sort of deal where you don't do fifteen (15) years and then, plus twenty-five (25) or thirty (30), after you get done with that you come back to Kentucky. I can work, you know, let's do fifteen (15) that runs concurrent with what he's gonna be facing up in Indiana and be done with it. Or I can say that, you know, I came in and I offered him an opportunity to show remorse, and show repentance, and he didn't take it. And we've gotta make sure that, you know, he's only thirty (30), what thirty-six (36), thirty-five (35)?

> Detective Hester: Fifteen (15), only makes you fifty (50). I gotta make sure you get another twenty-five (25) on top of that so that you're at least seventy-five (75) before the time you get out. That's where we stand and . . . .
> Burnett: I understand that. I'm just saying, I don't want to do anything without the law. (emphasis added) .
>
> At this point, a few seconds elapse without Detective Hester saying anything, and then Burnett breaks down, begins crying and volunteers the following :
> Burnett: I never meant to hurt my son. It just keeps coming back. It just keeps coming back.
> Detective Hester: You got some . .
> Burnett: I swear I try to fight it, I try . . .
> Detective Hester: Uh huh.
> Burnett: but it just keeps coming back. I pray to God just make it stop, but it just keeps happening.

Ultimately, Burnett gave the detective a written statement, in the form of a letter to his son. The trial court reviewed the video of the interrogation and concluded that Burnett never unequivocally asked for counsel. Burnett claimed that two of his statements should be considered a request for counsel. The appellate court found that Burnett's first statement "was an expression of uncertainty about whether he wanted or needed an attorney, which would at best be ambiguous and equivocal." The Court found that his second statement:

> I don't want to do anything without the law," when coupled with his earlier reference to an attorney, was a sufficiently clear expression of Burnett's desire for an attorney, and a reasonable officer would have understood that the accused wanted to consult with an attorney before he said anything else . Although Burnett used the word "law" and not "attorney" or "lawyer", [the Court] nevertheless believe[d] a reasonable police officer would have known under the circumstances that Burnett wanted to consult with an attorney before giving a statement."

However, the Court further found the continued questioning was harmless error, because "Burnett subsequently waived his right to counsel when he immediately thereafter made a spontaneous confession to the crime."

> In determining whether the accused initiated the conversation pursuant to the two-part test in Smith v. Illinois, this Court has interpreted "initiated" in the ordinary sense of the word.[37] During the interrogation in Skinner v. Com.[38], the officer ceased questioning after the accused invoked his right to counsel, but shortly thereafter, the accused made incriminating statements about the crime not in response to questioning. This Court affirmed the denial of the suppression motion, adjudging that the accused initiated the conversation when he volunteered statements that were not in response to interrogation.[39] Similarly, in the present case, when Burnett became emotional and made the incriminating

[37] Smith, 920 S.W.2d at 518 (citing Oregon v. Bradshaw, 462 U.S . 1039, 1045 (1984)).
[38] 864 S.W.2d 290 (Ky. 1993).
[39] Id.. at 295; see also Cummings v. Com., 226 S.W.3d 62, 65-66 (Ky. 2007).

> statements at issue - that he didn't mean to hurt his son and that it just keeps coming back - the statements were not in response to a question by Detective Hester. As stated above, as soon as Burnett stated he did not want to do anything without the law, Detective Hester said nothing more until after Burnett broke down and made the initial incriminating statements.

The decision of the Fayette Circuit Court was affirmed.

Juarez v. Com.
2008 WL 2167887 (Ky. 2008)

FACTS: Juarez was arrested by Boone County officers for sexual offenses against three children. Juarez was a native Spanish speaker (Honduras) and his ability to speak English was disputed. He was interrogated and "made a number of highly incriminatory statements" – which resulted on multiple charges of Rape, Sodomy and Sexual Abuse, and related charges.

Juarez requested suppression and was denied. He was eventually convicted on some, but not all, of the offenses. He appealed.

ISSUE: Must all interrogation stop when a suspect requests an attorney?

HOLDING: Yes

DISCUSSION: The Court addressed the interrogation that occurred between Juarez and the investigating detective, McVey. Juarez indicated that "he understood English 'so-so.'" No translator was provided, and Juarez was provided his Miranda warnings in English. During the discussion "Juarez mentioned that one of the alleged victims had raped him and words to the effect that he wanted to talk to a lawyer or judge." The investigator did not acknowledge that mention but did provide Juarez with a waiver of rights form. Juarez said he was willing to talk and was instructed to sign the form. He later made an "ambiguous statement that his lawyer 'is no way coming.'" Again, the officer did not acknowledge the statement and continued the investigation. Juarez responses to the questioning were in "halting and broken English." Det. Watson then took over and Juarez "repeated his request for an attorney." Watson then stopped the interrogation and Juarez was placed in a holding cell.

McVey returned and asked Juarez if he had anything else to say, and Juarez said he did not. The Court noted that "[s]ince Juarez had already clearly invoked his right to counsel, McVey was not entitled to ask Juarez if he wanted to make any further statements." However, since Juarez made no statements, this was not an issue. As he was being taken to the jail, Juarez said he was sick, and McVey questioned him to clarify his complaint. Juarez was returned to the interview room and asked "if he wanted to talk further" and he agreed. He made "several incriminating statements" following questioning.

The Court reviewed the videotape of the interrogation, and found that despite Juarez's problems with English, his wavier was "knowing, voluntary and intelligent." The more difficult question, however, was "whether Juarez invoked his right to counsel early on during his interrogation by McVey." The Court found the initial "passing references to an attorney" were not an unequivocal evocation of his right to an attorney. Juarez "clearly had a sufficient grasp of English unambiguously to invoke his right to counsel, as evidenced

by his unambiguous requests for counsel during his questioning by Watson." When that occurred, questioning stopped.

The Court noted that once Juarez invoked his right to an attorney, he could only be interrogated again if he "himself initiates further communication, exchanges or conversations with the police."[40] The videotape of the second session contained "no evidence of coercion or duress." The Court upheld the denial of his motion to suppress the statements.

INTERROGATION - INTOXICATION

Casper v. Com.
2008 WL 681924 (Ky. App. 2008)

FACTS: On February 23, 2005, Deputy Robinson (Meade County SO[41]) attempted a stop of a truck Casper was driving. Casper fled, eventually ending up in the river. Casper swam from the truck but was "later found on a riverbank and transported to a hospital." Casper was suffering from hypothermia from the cold water and was under the influence of methamphetamine and alcohol.

When Casper was released from the hospital, Deputy Garcia transported him to the jail. Deputy Garcia later stated that Casper was coherent and walked with assistance, although he "complained about being cold." Deputy Robinson returned to interview Casper, between 5-7 hours after he was apprehended, and later testified "that Casper spoke clearly and appeared to know what was going on." Casper was given his Miranda rights and Casper agreed he understood. His responses to Robinson were "coherent and consistent with facts known to the officer from his investigation." He admitted stealing the truck, and also confessed to "breaking into a barn and stealing a trailer and two ATVs."

Casper was indicted, and requested suppression. He argued that his "extensive drug use prior to his accident" and his hypothermia negated his confession. He stated that he did not recall signing the Miranda waiver. The Court denied the motion. Casper then took a conditional guilty plea, and appealed.

ISSUE: May an intoxicated subject give a valid statement?

HOLDING: Yes

DISCUSSION: The Court noted that "[a] confession's voluntariness is assessed based on the totality of the circumstances surrounding the making of the confession." "A confession [will be] considered voluntary unless, under the totality of the circumstances, a defendant's will has been overborne and his capacity for self-determination critically impaired."[42] The Court considered whether Casper's intoxication was sufficient to affect the "reliability and voluntariness of the statement" - "whether the accused was in sufficient possession of his faculties to give a reliable statement." The Court continued, stating that "[s]elf-induced

[40] Oregon v. Bradshaw, 462 U.S. 1039 (1983).
[41] Although the opinion stated Deputy Robinson was a member of the Meade County Police Department, he is, in fact, a member of the Sheriff's Office.
[42] Soto v. Com., 139 S.W.3d 827 (Ky. 2004), quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

intoxication is not enough to require exclusion without a showing that the defendant was intoxicated 'to the degree of mania' or of being unable to understand the meaning of his statements."[43]

In Casper's case, the Court found no indication that he was too impaired to have known what he was saying, since his statements were responsive, "coherent and elucidatory." Although the Court agreed that the "physical and emotional state of the accused can and should be taken into account when weighing the totality of the circumstances," there was no indication that Casper's not getting a blanket or a cigarette meant that he was not in "sufficient possession of his faculties." Finding no evidence of police coercion or duress, or that Casper was too intoxicated or exhausted, the Court upheld the judgment.

EVIDENCE / TRIAL PROCEDURE - MISSING EVIDENCE

Warren v. Com.
2008 WL 2941126 (Ky. App. 2008)

FACTS: Warren was involved in a fight with the victim, Smith - that fight proved fatal. Warren was interviewed by Det. Murrell (KSP) at the Cynthiana PD. Warren claimed he acted in self defense. Det. Jaskowiak did not find any injuries on Warren's head, as he had claimed. He took photos of Warren's body, but the lab returned the photo card indicating that the "film was blank due to a camera malfunction" - it apparently did not advance. Warren was not taken to the hospital for further examination.

Warren was indicted on First-Degree Manslaughter. He was eventually convicted of Reckless Homicide, and appealed.

ISSUE: Does all missing evidence require a missing evidence instruction?

HOLDING: No

DISCUSSION: Warren first argued that he had been entitled to a "missing evidence instruction" because of the photos. The Court noted that "a 'missing evidence' instruction is designed to cure any due process violation attributable to the absence of exculpatory evidence by a less onerous remedy than dismissing or suppressing relevant evidence.[44] Missing evidence instructions are only necessary when the Commonwealth's failure to preserve or collect evidence was intentional and "the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." Thus, absent the Commonwealth's engagement in some degree of "bad faith," a defendant is not entitled to a missing evidence instruction.

In this case, through no fault of the detective, no photos were available. Finding no bad faith, the court found no reason for the instruction to have been given.

Warren's conviction was affirmed.

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[43] Halvorsen v. Com., 730 S.W.2d 921 (Ky. 1986).
[44] Estep v.Com., 64 S.W.3d 805 (Ky. 2002).

EVIDENCE / TRIAL PROCEDURE - VIDEO

Morris v. Com.
2008 WL 2696889 (Ky. App. 2008)

FACTS: On June 6, 2006, Morris entered a Louisville convenience store and left without paying for items. An employee, Taylor, followed him outside. Morris turned toward him, lifted his shirt to display a gun, and Taylor returned to the store. He called Louisville Metro PD.

Det. Nauert obtained a copy of the surveillance video, on CD. He recognized Morris and prepared a photo pak to present to Taylor. On June 26, Taylor was unable to initially make an ID, but after watching the surveillance video, he identified Morris. Morris was arrested for First-Degree Robbery.

During trial testimony, Det. Nauert stated "as Mr. Taylor said, he turned, raised his shirt, showed him what he believed was a handgun. That's where he used the threat of physical force." Nauert was making that testimony as the video played, in effect, narrating it.

Morris was convicted, and appealed.

ISSUE: May officers narrate a video of which they have no personal knowledge, during testimony in court?

HOLDING: No

DISCUSSION: Morris argued that the "detective's testimony was improper because the trial court allowed him to narrate the video although he did not have first-hand, personal knowledge of its contents." The court, however, ruled that "[p]olice are permitted to give simultaneous commentary on crime scene surveillance footage."[45] That "testimony, however, is limited to video footage within their knowledge and experience." In this case, the detective had no personal knowledge and such narration was improper.

Morris also argued that the detective "gave improper expert testimony when he opined that Morris showed a "'threat of force,' which is an element of first-degree robbery." The Court agreed that although police are often permitted to testify as experts, that "Detective Nauert's testimony was outside the realm of permissible police expert testimony." Again, the testimony was ruled improper. The Court also agreed that his statement "improperly bolstered" Taylor's testimony, in that it "directly referenced and supported Taylor's testimony."

However, the Court concluded that the mistakes were not so egregious as to warrant a mistrial, given that the jury was able to actually watch the video and make their own conclusions - finding that "the video footage is such damaging evidence that it renders the detective's statement significantly less harmful."

Morris also objected to the introduction of Taylor's identification, because it was made after he was able to watch the surveillance footage. The trial court found it permissible, even though "Taylor's memory was only refreshed by the surveillance footage." The Court concluded it led to a "low risk of misidentification."

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[45] Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

Morris's conviction was affirmed

Turner v. Com.
248 S.W.3d 543 (Ky. 2008)

FACTS: During November/December, 2004, in Jackson, Turner sold "methadone wafers on three separate occasions to undercover police officers and to a confidential police informant." She also sold four Xanax pills on one of those occasions. She was indicted and tried. Two officers who participated stated that the "buys were arranged by the informant" and testified to their "efforts to procure audio recordings of what transpired." The Court admitted "recordings of two of the transactions," over Turner's objections. The informant, apparently, did not testify, and Turner objected that "she was given no opportunity to cross-examine the informant [and that] the admission of those comments violated the Confrontation Clause of the Sixth Amendment."[46] She was convicted, and appealed.

ISSUE: Should tapes of a criminal transaction be limited only to the transaction itself?

HOLDING: Yes

DISCUSSION: Turner argued that "the informant's comments on the audio recordings were testimonial hearsay, and thus that their admission into evidence" was a violation. The Court noted that two Circuit Courts of Appeal had found that "an informant's recorded statements may well be testimonial, as the Supreme Court ha[d] described, since the informant is aware that his or her statements are being recorded by government agents for the very purpose of criminal prosecution." In those specific cases, however, the Courts held that "the informant's statements are not hearsay and thus that their admission [did] not violate Crawford, when they are offered not for their truth, but 'to put [the defendant]'s" admissions on the tapes into context, making the admissions intelligible for the jury."[47] Turner, however, agued that several of the comments were, in fact, introduced for the "proof of the matter asserted and thus that Crawford still applies."

With respect to one of the statements, specifically, a conversation between the informant and the detective about the source of the methadone and the Xanax, the Court agreed that it was inadmissible under Crawford and should have been excluded[48] but ruled that the error was harmless, given that the overall evidence against her "was certainly compelling if not overwhelming." (The Court specifically noted that since it "appears likely that an informant's pre- or post-transaction accusatory statements will often raise the issue, … the Commonwealth would be well advised to limit its tape-recorded evidence to the transaction itself.")

The Court summarized:

> … to the extent that the non-testifying informant's statements and remarks on the audio recordings of Turner's drug sales provided context for Turner's portions of the conversations, the admission into evidence of the informant's portions did not run afoul of Turner's confrontation right. One of the informant's statements occurred before Turner was

[46] Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 547 U.S. 813 (2006)
[47] U.S. v. Nettles, 476 F.3d 508 (7th Cir. 2007); See also U.S. v. Hendricks, 395 F.3d 173 (3rd Cir. 2005).
[48] U.S. v. Cromer, 389 F.3d 662 (6th Cir. 2004).

> present and did not provide immediate context for anything Turner said. Even if the admission of that statement was erroneous, however, given the ample proof of Turner's guilt, the error was harmless beyond a reasonable doubt.

The Breathitt Circuit Court's decision was affirmed.

Manns v. Com.
2008 WL 3890350 (Ky. 2008)

FACTS: On Feb. 9, 2005, Det. Combs, an undercover officer, encountered Manns. They met in Salyersville, and Manns "agreed to help the detective obtain some oxycodone." The two, along with a CI, got into the detective's car and drove to Williams' residence. Manns was given money, met with Williams, and they entered the house together. When Manns emerged a few minutes later, he leaned in and showed two oxycodone pills and named a price. He also offered morphine. The detective had observed Williams hand the pills to Manns. Manns also offered marijuana. The entire transaction was audiotaped.

They met again some two weeks later, and again, a transaction was completed, involving morphine. Again, the transaction was recorded.

Subsequently, Manns was indicted for drug trafficking and related charges. When he was convicted, he appealed.

ISSUE: May tapes that include statements from a non-testifying CI be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, Manns argued that the admission of the recordings were improper. He argued that the first tape "contained hearsay from the non-testifying confidential informant, and that it included unrelated, inflammatory subject matter and an unidentified male voice." The trial court had found that the objected statements were "not hearsay since they were not being offered to prove the truth of the matter asserted." The Court found the situation to be analogous to that in Norton v. Com.,[49] and ruled that the tapes "were not entered into evidence for the purpose of proving the truth of any statement contained therein." The Court upheld the decision of the trial court. Finding no prejudice in the admission of the conversations, which included Manns, the Court upheld the admission of the tape.

Further, Mann argued that the prosecution provided the tapes in an "untimely" manner. (In fact, copies of the tapes had been provided to Mann's first lawyer, who apparently did not send them to Mann's second lawyer.) When new copies were provided, they were found to be of poor quality, and yet another set, of better quality, were sent. The Court found that there was no discovery violation.

Manns' conviction was affirmed.

[49] 890 S.W.2d 632 (Ky. 1994).

EVIDENCE / TRIAL PROCEDURE - DISCOVERY

Davis v. Com.
2008 WL 4531372 (Ky. App. 2008)

FACTS: On Nov. 13, 1998, at about 6:30 p.m., Cox was shot and killed in front of his residence in Jefferson County. Just before the murder, he was talking to his brother on a cell phone, and told his brother "that a vehicle was driving slowly up and down his street, and that he was going to see what the driver wanted." Cox was found dead shortly thereafter, shot seven times. His ex-wife, Levy, lived with him, but was out of state.

A neighbor, Rice, saw part of the event, and observed "a thin person entering a pickup truck in Cox's driveway." He then saw the person shoot Cox several times. Rice also believed that the shooter tried to load the vehicle into the truck, unsuccessfully.

Davis was developed as a suspect, as he had a relationship with Levy. He gave a taped statement to police that detailed his activities on the day of the murder. The investigation centered around Davis's rental of a truck on the day of the murder, which was returned later that evening.

Davis was indicted, and subsequently convicted, of murder and tampering with physical evidence. Following the trial, his attorney made an open records request, and "discovered various documents which were not included in the voluminous discovery disclosures provided to the defense prior to trial." He filed for post-conviction relief based upon alleged Brady violations. The trial court denied the motion after a hearing, and he appealed.

ISSUE: Is the production of all documents and records to the defense required?

HOLDING: Yes

DISCUSSION: Davis argued that "that the Commonwealth violated the exculpatory evidence disclosure requirements contained in Brady v. Maryland[50] by failing to give the defense (1) a handwritten statement prepared by Christina Levy; (2) notes prepared by Detective Sergeant Michael Doughty critiquing the Levy statement; (3) a letter from Christina to Detective Eddie Robinson; (4) a letter from Levy to Davis; and (5) police notes and memos concerning the investigation."

The "duty to disclose exculpatory evidence is applicable regardless of whether or not there has been a request by the accused." That duty "encompasses impeachment as well as other exculpatory evidence."[51]

The Court looked at each item of evidence. First, it discussed the handwritten chronology prepared by Levy, concerning her relationship with Davis. From that chronology, Det. Doughty made 19 pages of notes. Eventually Levy produced a second, shorter, typewritten version, which was provided to Davis and was

[50] 373 U.S. 83 (1963).
[51] U.S. v. Bagley, 473 U.S. 667 (1985).

admitted at trial. Davis argued that the original document, and the notes, would show the extent of Doughty's coaching of Levy's testimony. The Court found the Commonwealth's explanation persuasive, and noted that since Davis admitted most of the acts described, and because the material was "substantially, if not entirely, incorporated into the typewritten version," that the "impeachment value of the undisclosed material is highly questionable." Further, under RCr 7.24(2), the Court ruled that it was "questionable whether the Commonwealth had a duty to produce the Doughty notes."[52]

Next, the Court discussed the "five-page letter Levy wrote to lead detective Eddie Robinson during the course of the investigation," concerning a proposal that she try to meet with Davis, "presumably in an attempt to obtain incriminating admissions." In the letter, she referred to the detective by his first name. The Court concluded that it was not of such sufficient significance that it would have likely led to a different result. Evidence presented to the jury made it clear that Levy was a cooperating witness.

Another letter, from Levy to Davis, was also argued, with David stating that the letter was exculpatory in that it indicated that Levy was not afraid of Davis and that she wanted to see him. (Levy stated it was drafted as part of the plan to have her make contact with Davis, a plan that wasn't completed.) The Court concluded it was not exculpatory.

Next, the Court discussed the police notes and memos. One of the notes documented the finding of a bullet in the rental car the next day, although the notes called that date into question. (The notes indicated that the bullet was found in March, and that it was investigated in May, of the following year after the murder.) The memos were found to be immaterial to the ultimate outcome of the case.

After resolving several other issues, the Court affirmed Davis's conviction.

NOTE: Although all documents may not be admissible, or producible to the defense, officers should ensure that <u>all</u> documents are provided to the prosecution.

<u>Williams v. Com.</u>
2008 WL 4291603 (Ky. 2008)

FACTS: Williams was charged with First-Degree Trafficking and PFO 2. These charges arose after a CI, wearing a wire, taped a transaction in which Williams sold the CI crack cocaine. The tape was played at trial. Notably, "[n]ear the end of the nearly hour-long recording, the informant asked Williams if he "could get an `o' [ounce] on Sunday." Williams did not reply to this request on the tape, and he did not object to the statement at the time the audiotape was played for the jury.

Williams was eventually convicted, and appealed.

ISSUE: Is a defendant entitled to the entire tape of an encounter, in discovery?

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[52] (2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant). (Emphasis added).

HOLDING: Yes

DISCUSSION: Williams argued on appeal that "although the Commonwealth had provided him with a copy of the recording of the alleged drug sale during the discovery process, the copy he received did not contain the informant's last-minute request about a future transaction." As such, it was a surprise that he was unable to be prepared for at trial. (The trial court had ruled that he should have objected when it was presented, and that failure to do so waived any further objection to it.)

The Court ruled that although he had been entitled to the entire tape, the failure to receive that small portion at the end did not mean that the entire taped conversation was inadmissible. Williams' conviction was upheld.

NOTE: Officers who provide such recordings (audio/video) to prosecutors should ensure that what they are reproducing is, in fact, the entire recording.

Goodman v. Com.
2008 WL 2167538 (Ky. 2008)

FACTS: Gary and Paula Goodman were married in 1986, and in 2005, Paula Goodman moved out. Gary Goodman was "sad, depressed and confused about his wife's departure." Shortly after Paula moved out, Gary Goodman learned that she was having an affair and had moved in with Morgan. Encountering the pair one day, Goodman shot Paula Goodman four times, with one shot proving lethal. Gary Goodman returned to his own home and told his children that he'd just shot Paula and that the police were coming. (One of his daughters apparently told someone that her father had admitted the shooting, but the daughter later denied it.)

Responding Louisville Metro police officers who went to Goodman's house were told by Gary Goodman's son, Steven, that "his dad had killed his mom and was going to kill him too." Steven took cover behind the police car, where the officers were seeking cover as well. Both officers testified that rounds were fired from the house, nearly striking them. Gary Goodman yelled at them, admitting the shooting, and threatening to shoot the officers, as well. SWAT was called. Between 3 and 4 a.m. the next morning, one of the SWAT officers saw Goodman "running toward him from the house," and that Goodman "pointed his fingers at him in gun-like fashion and said, 'boom boom boom.'" Goodman was arrested.

Following a search, the officers found about 50 guns, ammunition, and a variety of related items. Goodman was hospitalized. He never denied either his wife's murder or his attempt to shoot the officers. His defense was that he had no memory of the details of the shooting, and that he was disturbed by seeing his wife with Morgan. The Court allowed the jury to be instructed on extreme emotional disturbance (EED) and First-Degree Manslaughter, with seeing his wife with Morgan as the triggering event, with respect to Paula Goodman's murder, but not with the attempted murder of the police officers. (The Court ruled that the lapse of some 10-15 minutes between the two incidents negated any EED in the shootings involving the officers at his home.)

Goodman was convicted of murder, attempted murder and related offenses. He appealed the trial courts' denial of his request to instruct the jury on EED with respect to the Attempted Murder charges involving the officers.

ISSUE: Must oral statements made by the suspect/defendant be recorded in some way, and provided to the defense during discovery?

HOLDING: Yes

DISCUSSION: Goodman challenged a statement he made in the presence of an officer. The officer was standing in the doorway of Goodman's hospital room when "he heard someone ask Goodman how he felt that day." Goodman had responded "she deserved what she got" and "I killed the fucking bitch." (The later statement had been provided in discovery, but not the former.) Kentucky Criminal Rules of Procedure required that "upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness."[53] The officer agreed, under cross, that he had not written down the statement and that he had given inconsistent information regarding the statement to the investigating detective.

The Court, however, ruled that the statement was similar to others that had been properly admitted. Although the statement should have been provided to the defense, the Court found that the error in not doing so did not have a reasonable possibility of affecting the ultimate verdict, given the cumulative evidence against Goodman.

Goodman's convictions were upheld.

Chestnut v. Com.
250 S.W.3d 288 (Ky. 2008)

FACTS: On Aug. 18, 2004, a "series of burglaries were committed on Mt. Rainier Drive in Jefferson County." Officers were dispatched on a burglary in progress. Officer Ebersol "noticed a gray Chevrolet parked outside of the residence from which the call had been made" – which then "sped away." Ebersol chased and caught the vehicle, which was driven by Chestnut.

Chestnut told the officer "that he was lost and had turned around in the subdivision." A show-up, however, with the resident and another officer resulted in the identification of Chestnut as the burglar. Both Chestnut and his estranged wife were ultimately charged with a number of burglaries in the area. Chestnut was convicted and appealed.

ISSUE: Must incriminating oral statements, made to officers, be disclosed during discovery?

HOLDING: Yes

DISCUSSION: Ebersol testified to the show-up, and how Chestnut was arrested as a result of the identification. (The Court had already agreed that the homeowner's actual statements were hearsay and would not be admitted.) The Court agreed that "investigative hearsay is still, fundamentally, hearsay and, thus, disallowed" – but noted that "not all testimony from a police officer concerning an investigation is hearsay." The rule in Sanborn v. Com. indicated that "a police officer may testify about information

[53] RCr 7.24.

furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." [54] Sanborn, however, "places a short leash on the extent to which investigative hearsay, or as more appropriately styled, investigative verbal acts, may be used." Such testimony is only admissible when "the taking of action by the police is an issue in the case and where it tends to explain the action that was taken as a result of the hearsay information." In this case, it was important to show how Chestnut was developed, and identified, as a suspect. Notably, the Court stated that the "testimony was not offered to prove the truth of what Boldrick told the officers," but instead "was offered to prove the officers' motive for arresting [Chestnut]." As such, the testimony was properly admitted.

Chestnut also argued that certain information presented during Det. Wright's testimony was never disclosed to him prior to trial, as required. Specifically, Det. Wright testified that, during an oral interview, Chestnut admitted "that he waited outside as his wife burglarized homes." This was never shared with defense counsel. The Court noted that, in the past, it had held that the first part of RCr 7.24(1)[55] only applied to written or recorded oral statements. However, after much consideration, the Court found that the rule "was intended to apply to both oral and written statements, which were incriminating at the time they were made."

The Court ruled that "nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules … since it was plainly incriminating at the time it was made." This created the "potential for the late introduction of evidence which is then destructive of the credibility of the entire defense." The Court found that the failure to disclose the statement in discovery gutted Chestnut's defense.

Chestnut's conviction was reversed, and the case remanded for a new trial.

<u>Henson v. Com.</u>
2008 WL 3890041 (Ky. 2008)

FACTS: On July 23, 2004, Deputy Kennedy[56] was the first on the scene to a serious crash. He found Henson "lying on the ground about two feet away from the driver's side of the blue Pontiac with his feet at the driver's side door." That door was open, but the passenger door, on the same side, was closed. Deputy Kennedy saw a number of beer cans, some full and some empty scattered about, and a cooler containing beer was found in the car. Four occupants in the car, including Henson, the driver, were seriously injured; Stephens was killed. Henson, the driver, was found to have a BA of .27.

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[54] 754 S.W.2d 534 (Ky. 1988).

[55] RCr 7.24 Discovery and inspection

(1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

[56] Although the opinion states that the deputy is a member of the "Shelbyville Sheriff's Department," the context indicates he is with the Shelby County Sheriff's Office.

Det. Rice, also of the Sheriff's Office, responded to the scene because it was a fatal accident. He was briefed about "what was known about the accident up to that point." As the accident reconstructionist for the agency, he prepared a "fatal summary" - which he was required to complete within a few hours of the wreck. In that summary, he indicated that Henson had been ejected through the driver side window and suffered severe injuries as a result.

Later, however, he concluded that Henson had gotten out of the vehicle on his own, and his actual final report reflected that conclusion. At trial, the issue of the initial report was brought up as being mistaken, because the driver-side window was not broken and was halfway down, leaving insufficient room for Henson's body to have been ejected. Det. Rice testified that he learned after the time he wrote the final report that there was a witness to the actual wreck, and that witness provided him information that was not incorporated by amendment in the final report. That testimony triggered an objection, because the witness statements were not provided to the defense during discovery, and thus came as a surprise. The Court denied the defense argument, saying that they had an opportunity to cross-examine Det. Rice about why he hadn't amended his initial report to reflect the change of opinion. Det. Rice stated that he didn't think Henson's position was significant to the actual cause of the wreck.

Henson was charged, and ultimately convicted, of Manslaughter (Second-Degree), Assault, DUI and related offenses. He appealed.

ISSUE: Is an officer required to disclose non-exculpatory oral statements?

HOLDING: No (but see note)

DISCUSSION: Henson argued "RCr 7.24(2) authorizes "pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)." In Lowe v. Com., the Court stated that the RCr 7.26(1) provides that:

> [T]he attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.[57]

The Court noted that the prosecution had no written or recorded statement from Baxter, the witness, but he was included in the witness list. The Court noted, however, that in Yates v. Com., it had held that the Commonwealth had no duty to advise the defendant of information from the officer not contained in his written report.[58] In that case, the omitted information was not exculpatory, and in fact, the information in the case at bar was not exculpatory, either.

Henson's conviction was affirmed.

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[57] See Lowe v. Com., 712 S.W.2d 944 (Ky. 1986).
[58] See 958 S.W.2d 306 (Ky. 1997).

NOTE: Officers should, however, ensure that the prosecutor is aware of any such statements made by witnesses.

Lynn v. Com.
2008 WL 4530901 (Ky. App. 2008)

FACTS: On Sept. 25, 2006, the Henderson PD got an anonymous tip that the tipster had spotted drugs at a specified residence. When they arrived, the officers found Lynn outside. He gave consent to search the residence and the officers found methamphetamine, marijuana and drug paraphernalia. During the search, the officers heard Lynn tell his wife to claim that the drugs were hers.

Lynn was charged, and eventually tried. He claimed that the tip did not provide sufficient probable cause to support the search. However, the Court disagreed and denied a motion to suppress. Lynn was convicted, and appealed.

ISSUE: Is the failure to provide a complete and inculpatory oral statement by the defendant to the defense fatal to the case?

HOLDING: No (but see discussion)

DISCUSSION: The Court quickly concluded that this was a "knock-and-talk" situation, and that such interactions were appropriate investigative tools. Further, Lynn argued that "the presence of two police cars and two uniformed officers at his home created a coercive and confrontational atmosphere whereby he did not voluntarily consent to the search of his home." The Court found that the presence of the officers did not "create a coercive environment."

Lynn also argued that the trial court erred in admitted his statement to his wife - "Tell them everything is yours. I can't take another charge." Specifically, he argued that the second portion of the statement was not provided to the defense until the day of trial, in violation of Brady v. Maryland.[59] The Court found that the statement was not a violation of Brady, since it was not exculpatory, but that the failure to provide the statement instead violated RCr 7.24 and RCr 7.26 which required that the Commonwealth has a duty to disclose all inculpatory statements it plans to introduce.[60] The prosecution stated that the officer who received the statement was not interviewed prior to that day, and as such, the prosecutor did not know the entire statement. The Court stated, however, that "[t]he Commonwealth cannot choose to wait until the day of trial to interview a witness and then disclose previously unknown evidence."

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[59] 373 U.S. 83 (1963)

[60] RCr 7.24 (1) provides: Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.
RCr 7.26 (1) provides: Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

The case was reversed because of the violation of the rule and remanded for a new trial.

NOTE: *This case emphasizes the need for all officers at the scene to document all oral statements, both inculpatory and exculpatory, and ensure that they are provided to the prosecutor.*

EVIDENCE/TRIAL PROCEDURE - HEARSAY

Langley v. Com.
2008 WL 746462 (Ky. 2008)

FACTS: On Oct. 5, 2005, Det. Duvall (Henderson PD) set up a drug buy from Langley, using a CI. While still on the phone with Duvall, the CI used 3-way dialing to call Langley, and set up the transaction with Duvall listening. Det. Duvall and Det. Adams met with the CI to search the CI and the car, and to equip the CI with a hidden video recording unit. Det. Adams gave the CI the money needed for the transaction.

What occurred next was partially recorded. No direct transaction was recorded, and "there was no discussion regarding drugs," but the recording indicated that, as the CI got out of Langley's car, "Langley can be seen gathering some money and placing the bills in the console between the front seats of the car." The CI then drove his own car back to where the officers were waiting and handed over the drugs. He identified that he got it from "Jermaine" and that the transaction occurred at "the corner of Vine and Adams."

The officers obtained an indictment for First-Degree Trafficking, and Langley was arrested. The CI, however, refused to testify at the trial. The prosecution "introduced evidence of the alleged drug transactions through the videotape and the testimony" of the two officers. Langley was convicted, and appealed.

ISSUE: Are non-emergency hearsay statements admissible?

HOLDING: No

DISCUSSION: Langley argued that admitting the videotape, without the CI, was a violation of Crawford v. Washington.[61] The Court noted that, in fact, the videotape "contain[ed] few statements made by the" CI. The Court elected to adopt the holding of a Third Circuit case, stating that it found "that the statements made by the informant during his conversation with Langley were not offered for their truth and did not violate Langley's rights under the Confrontation Clause." As such, the Court held that "the portion of the videotape that shows the confidential informant engaged in a transaction with Langley was admissible even though the informant did not testify at trial "

However, the Court did find that the CI's statement to Det. Adams (relating to Jermaine) "did constitute testimonial hearsay and should have been redacted from the video." The Court noted that the "U.S. Supreme Court has been clear that accusatory statements elicited by law enforcement officers in non-emergency situations are testimonial." However, the Court did conclude the error was harmless, since

[61] 541 U.S. 36 (2004).

even setting aside that portion of the videotape, "the evidence presented against Langley at trial was compelling to prove his guilt."

Further, the Court agreed that the videotape was properly authenticated by the two detectives, and that it was clear that the tape ran continuously without a break, and that the detectives were present when the video recording was started, and when it was stopped. The court also noted that even though the recording was played at trial on a DVD, yet provided to the defense on two CD-ROMs, the material was essentially identical. (There was confusion in that when copied for the defense, there was apparently two segments of the recording - each 5 minutes and 52 seconds, that were duplicated.)

Finally, Langley argued that the detective's listening in on the phone conversation was eavesdropping, but the Court quickly concluded that the CI had given implied consent by his actions in connecting the detective to the call, and there was no indication of duress or coercion. The Court also agreed that there was no Brady[62] violation in the defense not learning the details of the deal given to the CI until the morning of trial, since the defense was able to question the detectives about the deal.

Langley's conviction was upheld.

<u>LB, a Child under Eighteen v. Com.</u>
2008 WL 162891 (Ky. App. 2008)

FACTS: LB, a child of under 18, was accused of sexually abusing an adult female who was intoxicated, at the time, to the point of helplessness. Another party was convicted of rape in the same incident. (The actual facts of the crime are irrelevant to the summary.) During the juvenile proceeding, a police detective testified as to statements made by other individuals at the incident to the effect that a camera, used to take photos of the assault, was stolen, to statements made by a 4-year-old child present during the assault, and also testified as to the results of a rape kit. The child was convicted in juvenile court of sexual abuse in the first degree, and the child appealed.

ISSUE: Is hearsay generally admissible?

HOLDING: No

DISCUSSION: The Court agreed that the statements made by the officer were all inadmissible as hearsay. In fact, the "detective's testimony concerning the camera was so called 'double hearsay,'" in that the statements were made by others to the victim, who repeated the statements to the detective, who then repeated the statements in testimony. The purpose, the Court noted, of such testimony was to assert, as truth, that that camera was stolen and thus not available as evidence. As for the rape kit, the lab technician did not testify, and the detective was "improperly permitted to provide evidence" that another individual (LB's brother-in-law) had sexual intercourse with the victim. Finally, the detective repeated statements made by a 4-year-old who had actually already testified at the hearing, and thus the "child's prior statement should have been admitted only if it was: 1) inconsistent with her testimony; 2) consistent with her testimony, but offered to rebut an express or implied charge against her of recent fabrication or

[62] Brady v. Maryland, 373 U.S. 83 (1963)

improper influence or motive, or was 3) an identification of a person made after perceiving the person."[63] The Court noted that none of these factors appeared to apply to the child's statement.

Due to these, and other errors, LB's conviction was overturned.

EVIDENCE/TRIAL PROCEDURE - TRIAL TESTIMONY

McBeath v. Com.
244 S.W.3d 22 (Ky. 2007) (held over for finality)

FACTS: Ashley Lyons was murdered on the night of Jan. 7, 2004, and her body was found in Lyons' car that same night. She had been shot three times. She was also 21 weeks pregnant.

McBeath was, allegedly, the father of Lyons' baby. He was arrested, indicted, and tried. He moved to suppress on several issues, and was denied. He was convicted.

ISSUE: Is information solicited by a jailhouse informant admissible?

HOLDING: No

DISCUSSION: McBeath argued that the trial court erred in allowing a "jailhouse informant" to testify as to statements McBeath made while in jail, awaiting trial. He contended that although the informant "did not begin as an agent of the Commonwealth, he became one after he met with the officers and received instructions…." Det. Persley (Scott County SO) testified that he had gotten information from the informant initially, and two days later, had him sign a "memo of understanding" as follows:

> *I John Romano have been instructed by Det. Rodger Persley and Det. Jack Patrick that I am not allowed to ask Roger McBeath Jr. questions about the crime he has been charged with. I may have normal conversations with him about everyday events (Example: sports, movies, etc .,) but I may only listen when he speaks about the crime or his defense to the crime.*
> *I will do my best to remember the words he uses and not use other words to describe the statements. I will not sign this memo until the officers have answered all the questions I have .*

It was later agreed that the informant had, in fact, engaged in conversation with McBeath about the offense, and asked direct questions. The detectives involved testified that they had verbally told the informant not to ask questions but that statement was not part of the recording they had made.

The informant later testified at trial as to what he learned from McBeath during multiple conversations.

The Court noted that using a "statement 'deliberately elicited' from the accused after indictment and in the absence of counsel" was a violation of the Sixth Amendment.[64] Further, the Court noted that "a "knowing

[63] KRE 801A
[64] See U.S. v. Henry, 447 U.S. 264 (1980).

exploitation" of an opportunity to confront the accused without counsel is the same as intentional violation of it."[65]

Finally, the Court noted that "a jailhouse informant who acts only as a 'listening post' and reports incriminating statements has not interfered with the Sixth Amendment right to counsel, even if police purposefully place him in close proximity to the defendant in the jail or prison .[66]"

The Court found that not only did the informant ask questions, "he also attempted to use interrogation techniques 'designed to elicit incriminating remarks" - he waited until McBeath was upset after a phone conversation to approach him and initiate conversation. Next, the Court discussed whether the informant was a government agent, as defined in Massiah v. U.S.[67] The Court concluded that once the memo was signed, the agency relationship became undeniable. After that time, the informant's question was "not only tolerated," but encouraged, with the officers becoming his "handlers." The Court concluded that the "government was actively involved in inducing the informant to elicit the information from Appellant in violation of the Sixth Amendment and Section 10 of the Constitution of Kentucky."

In addition, the Court concluded that it could "not escape the conclusion that it is reasonably possible that Romano's testimony influenced the jury to conclude that Appellant committed the offenses" and as such, it could not consider the admission of the testimony to be harmless error. The Court reversed McBeath's conviction and remanded the case for a new trial.

Clark v. Com.
2008 WL 4692347 (Ky. 2008)

FACTS: Clark was charged with sexually abusing his daughter - the abuse starting when the child was about 9 years old. Det. Combs (KSP) investigated, and Clark was ultimately charged with a variety of offenses, including Rape, Sodomy and Incest. The case was tried in 2006, in Butler County, and Clark was convicted on many of the charges. (Some of the crimes had occurred in Ohio County, as well.)

Clark was convicted of multiple offenses, and appealed.

ISSUE: May a case be lost because an officer vouches for the veracity of another witness?

HOLDING: Yes

DISCUSSION: Clark objected to the introduction of an audiotape of his interrogation with Det. Combs, in which the "the jury not only heard Clark's responses to Officer Combs's questions, but also heard Officer Combs's interrogation technique, which involved disclosing his opinion to Clark about the truthfulness of L .C.'s allegations." He argued that "the introduction of Officer Combs's statements constituted reversible error because Officer Combs was permitted to vouch for the truthfulness of L.C., another witness at trial."

The Court agreed, ruling that the trial court should have redacted "Combs's statements regarding his belief in [the victim's] veracity and his ability to tell who is and who is not telling the truth."

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[65] Maine v. Moulton, 474 U.S. 159 (1985).
[66] Kuhlmann v. Wilson, 477 U.S. 436 (1986).
[67] 377 U.S. 201 (1964).

The Court reversed Clark's conviction.

Fain v. Com.
2008 WL 746813 (Ky. App. 2008)

FACTS: On August 8, 2006, Det. Goldie (Lexington PD) drove an undercover vehicle, outfitted with surveillance equipment, to a specific location where Det. Eckhart videotaped and observed Perry standing on a sidewalk. Perry approached his car and Eckhart asked for a "twenty." She went to Fain, sitting nearby, and returned to Det. Goldie's car with a rock of crack cocaine. Det. Goldie drove away. Other officers then moved in and approached the pair, and obtained identifications. Both Perry and Fain were later indicted for Trafficking. Perry testified against Fain, and officers also positively identified Fain. Fain was convicted, and appealed.

ISSUE: May officers testify as experts in street level drug trafficking?

HOLDING: Yes

DISCUSSION: Fain objected to the admission of testimony from Det. Ford (Lexington PD), who was permitted to testify as an expert concerning street-level drug trafficking, in particular, that Fain's actions fit the "'profile' of a drug dealer." The Court looked to Sargent v. Com., in which the Court "approved of an officer's expert opinion that the defendant possessed a large quantity of marijuana for sale, rather than personal use."[68] The Court applied the logic of Sargent and agreed that it was appropriate to permit Det. Ford to assist the jury "in understanding uncommon aspects of street-level drug culture."

The Fayette County Circuit Court was affirmed.

Shepherd v. Com.
251 S.W.3d 309 (Ky. 2008

FACTS: Shepherd (16), Miller (16) and Cook (17), were "hanging out" together in Lexington, "drinking and smoking marijuana." Miller and Shepherd decided to find someone to rob. Miller went to his apartment and got a revolver and Shepherd got a belt and strapped on the holster and gun. (Cook later testified that Shepherd had the gun.) The three walked around until they found Liebengood unloading groceries. "They sneaked up on Liebengood, and Shepherd ordered her to give him her money." She told him she had no money, and Shepherd took her purse from the car. He then ordered her to hand over her car keys and get into the trunk, and she refused. Shepherd struck her and she fell to the ground. (At this point, Cook later testified he started to walk away, fearing "things were getting out of hand.") Shepherd stood over Liebengood, asked if he should shoot her, and then shot her. Cook ran back toward his apartment, which he shared with Miller, and Shepherd and Miller also fled the scene.

Epps, who was Cook's cousin and the mother of Miller's child, was at the apartment when Miller returned. She testified the Miller was upset and told her that Shepherd was "crazy." Miller had the purse, and Epps tried to help get rid of it by throwing it across the fence. Shepherd also returned, wiping the holster, and "kept saying, 'I killed that white bitch.'"

[68] 813 S.W.2d 801 (Ky. 1991)

Shepherd was arrested the next day. He initially denied the crime and blamed it on someone else. He then confessed that he was involved, and that he and Cook tried to put the victim in her trunk but he claimed the Miller actually shot her. He stated that he threw the gun and the car keys into a dumpster.

Cook and Miller were arrested the next day. All three were indicted for murder and first-degree robbery. Cook pleaded guilty to robbery and agreed to testify, naming Shepherd as the actual shooter. "At trial, the Commonwealth introduced the statements Miller and Shepherd had given to the police shortly after the offense, each of which was redacted to eliminate any reference to the other defendant." However, in their "respective closing arguments, each defendant admitted to being present during the robbery, but contended that his co-defendant committed the murder."

Shepherd was convicted of murder, and Miller of complicity to the murder and robbery. Shepherd appealed.

ISSUE: May an officer's testimony regarding prior contacts with a defendant endanger the case?

HOLDING: Yes

DISCUSSON: Shepherd argued that he should have been given a separate trial, and that he was "unduly prejudiced by the joint trial because Miller's redacted statement expressly implicated him as the shooter." The Court looked to Bruton v. U.S. which found that "the use of a non-testifying co-defendant's confession that 'expressly implicated' the other defendant constitutes a violation of the Confrontation of the Sixth Amendment."[69] As an extension of the Bruton rule, the court had also found that "redacted confessions which merely delete the name of the other defendant or insert the phrase 'other party' or 'deleted' also constitute a Bruton violation because the statements still facially incriminate the co-defendant." [70] In this case, although what was admitted does not name Shepherd, it does, "however, link Shepherd to the murder when it is heard in light of the other evidence introduced against Shepherd at trial."

In this case, the Court stated that the U.S. Supreme Court had "addressed this type of redacted confession, and had held "that when the defendant is 'linked to the confession by evidence properly admitted against him at trial,' there is no Confrontation Clause violation if the confession is redacted to eliminate all references to the defendant's existence."[71] Because the redacted statement "never referred to Shepherd and only incriminated him when viewed in light of the other evidence," the Court found no Bruton violation.

Another claimed error involved the testimony of one of Shepherd's arresting officers. The officer, in response to a question by the prosecutor, gave a lengthy narrative which included "several prejudicial remarks, including that his unit was originally dispatched to Ashford Place Apartments for a narcotics complaint, in which one of the subjects of the complaint was Michael Shepherd; he recognized Shepherd through other contact he had had with him; and he thought Shepherd might be a flight risk because he had previous run from officers." He further described an instance in which Shepherd had run from an arrest. Following the testimony, Shepherd's counsel objected and moved for a mistrial, but instead, the judge offered to admonish the jury. Shepherd's counsel noted that an admonition would only spotlight the

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[69] 391 U.S. 123 (1968).
[70] Barth v. Com., 80 S.W.3d 390 (Ky. 2001).
[71] See Richardson v. Marsh, 481 U.S. 200 (1987).

statements, but did accept an admonishment of the witness outside the presence of the jury. Shepherd argued that he was entitled to a mistrial, but the Court agreed with the trial court that the evidence given by the officer "was not devastatingly prejudicial" and did not make the trial unfair, although it was improper.

Shepherd also argued that a technical violation of KRS 610.220(2) made his confession inadmissible. Although the facts differed, Shepherd may have arrived at the police station as early as 5:26 p.m., and the CDW was initially contacted at 8:06. The CDW granted an extension to Shepherd's time in custody, apparently of 2 hours, and the CDW was further contacted at 9:54 to extend that time for an additional half-hour to permit Shepherd to be photographed and fingerprinted. When the half-hour had passed, Shepherd's mother had arrived and spoken to her son, and Shepherd was eventually transported to the juvenile facility.

The Court agreed that although "police officers' failure to comply with these protective statutes is a serious infringement, the violation by itself does not necessarily justify suppressing the confession." In this case, "although the police officers may have been tardy in complying with the statute's two-hour requirement, they did not disregard the statute nor did they greatly exceed the statutory time limit." During that time, Shepherd had been given his Miranda warnings, and there was no indication he did not understand them. The Court found his statements to be voluntary and properly admitted.

Another issue involved a statement taken from McCann, Shepherd's cousin who lived with him. In that statement, he implicated Shepherd. However, "McCann's testimony at trial was either very different from this interview or he could not recall what he had told the police originally, prompting the trial court to make a finding that McCann was evasive and hostile." The prosecution was allowed "to play the portions of McCann's recorded police interview that were inconsistent with his trial testimony on direct examination," after it was authenticated by the detective that taped it. The Court found that since a proper foundation had been laid, and since there was ample opportunity to question McCann regarding the interview, its admission was appropriate.

Finally, after the trial, the defense learned of an interview between the police and another individual, Jones. Shepherd moved for a new trial, basing his claim on an assertion that the interview was exculpatory. However, the Court found that the interview was "rambling, inconsistent, confusing, and practically worthless for an substantial use in this case," and agreed it was not material to the case. In fact, upon review, the Court noted that much of it was actually very damaging to Shepherd, and the only helpful part was cumulative to evidence that had been submitted. As such, the Court upheld the trial court's decision not to reopen the case.

Shepherd's conviction was upheld.

Cleary v. Com.
2008 WL 4754833 (Ky. App. 2008)

FACTS: On February 18, 2002, Troopers Fugate and Miller (KSP) were patrolling Knott County. They drove past Cleary's house and saw her walk toward Mosley, who was sitting in a pickup truck in Cleary's driveway. Because the area was known for drug trafficking, they decided to investigate further, and "pulled into the driveway." They observed Cleary appear to drop something into the truck as they got out of their respective cruisers.

Trooper Miller talked to Mosley, who admitted she had two marijuana roaches in the ashtray. He seized them, along with a pill later identified as Oxycontin, found on the floorboard. Mosley admitted she'd come to buy that tablet, but Cleary later stated that Mosley already had the pill and was seeking more.

Trooper Fugate was inside, during this time, talking to Cleary and her husband about drug trafficking. They searched the house with Mr. Cleary's consent. They found no other contraband, but arrested Evelyn Cleary for trafficking.

Evelyn Cleary was arrested, tried and convicted. She then appealed.

ISSUE: Should an officer avoid mentioning "prior bad acts" of the defendant when testifying?

HOLDING: Yes

DISCUSSION: During the trial, Trooper Fugate testified:

> Prosecutor: I know it has been better than three years ago, but to the best of your recollection, can you tell the jury the substance of the conversation, or whatever you did, when you were inside the defendant's residence?
> Officer Fugate: Well, we basically had, um, I told her that we had received complaints on them for selling controlled substance pills.

The defense counsel objected and asked for a mistrial, arguing that they had not been given proper notice of the introduction of such "prior bad act" evidence.[72] The prosecutor had stated that he wasn't aware of the prior complaints, and was surprised by the trooper's mention of them at trial. The Court concluded that in this instance, the trial court's decision to admonish the jury to ignore the comment "concerning a single, isolated bit of improper testimony" cured the error, however. The Court distinguished the facts in this case from that in Gordon v. Com., during which an officer testified that Gordon was a "drug dealer" and that he was "suspected … of selling drugs at [a] particular location" - when those were not the crimes, specifically, for which he was on trial.[73]

On a related issue, the Court also disagreed that it was necessary for the trial court to have excluded two jurors for cause, when each of those potential jurors had specific ties to law enforcement. Each had indicated they could be fair and impartial.

Cleary's conviction was affirmed.

Byrd v. Com.
2008 WL 5051612 (Ky. 2008)

FACTS: On March 17, 2007, Reed left his car running when he stopped at a convenience store in Lexington. The car was promptly stolen, and Reed, with a friend who happened to be at the store, went in pursuit of it. He called 911. They lost the car, and returned to the gas station to meet with the police. An ATL was put out on the radio. Officer Cliffson quickly found the car, which was occupied by a single

[72] Under KRE 404(b) such evidence is admissible only under limited circumstances.
[73] 916 S.W.2d 176 (Ky. 1995)

person. When he turned on his lights and approached, the car was driven away, and a high-speed pursuit ensued.

The driver (Byrd) lost control and spun out. The officers ordered him out of the car, and Byrd "followed the orders and began yelling that the Devil was chasing him." He tried to get back in the car, but was seized, handcuffed and searched. He was "very intoxicated" and was eventually taken to the hospital for a blood test. Reed was never asked to identify the person who stole the car, and Byrd did not match the description initially given (Hispanic).

Byrd was convicted of Theft, DUI and related traffic charges. He was convicted, and appealed.

ISSUE: Is trial testimony concerning a defendant's choice to remain silent admissible?

HOLDING: No

DISCUSSION: During direct testimony, Officer Cliffson testified about the pursuit. Specifically, he stated, under questioning:

> Q: After you got him out of the car, he was unable to walk on his own and he had slurred speech . What did you do at that point?
> A: At this point we called EC--Emergency Care was already en route. And at this point he decided to become uncooperative and unresponsive to any questions or 'anything that was asked of him.
> Q: Emergency Care? Is that the ambulance?
> A: Yes, ma'am.
> Q: Okay. So the ambulance was called?
> A: Yes, ma'am.
> Q: And what do you mean he was uncooperative?
> A: He wouldn't answer any questions--

Byrd's counsel objected, arguing that he had a right not to speak, but the judge ruled that he did not have a right not to identify himself, and allowed the testimony to stand. Following the objection, the testimony continued:

> Q: At this point the defendant's out of the car?
> A: Yes, ma'am.
> A: Yes, ma'am.
> A: No, ma'am.
> Q: Okay. Did he make statements about the devil chasing hint?
> A: Yes, ma'am.
> A: Yes, ma'am.
> Q: Okay. And what happened once the ambulance arrived?
> A: We hadn't got any information out of him. Name, address, anything of that sort. EC, they need the information as well, so they'll attempt and a lot of times people will talk to EC and not the police for some reason .

Again, an objection was made, concerning the officer's testimony about his experience with such cases. Again, it was overruled.

More testimony:

Q. So sometimes they will answer the ambulance but not you all?
A: Yes, ma'am.
Q. Okay. And what happened at that point?
A. He still continued on if he would answer anything about Jesus and the devil chasing him.
Q: Okay. And where did you all go at that point?
A: To the EC buggy that was staged on the side of the highway itself
Q: Okay, so the ambulance on the side of the highway?
A: Yes, ma'am.
Q. And where did you all go once- Did you ride in the ambulance?
A: Yes, ma'am.
Q: And where did you all go?
A: We went to UK ER.
Q. Okay. And when you got to the University of Kentucky Emergency Room, did you request that the defendant's blood be taken?
A: Yes, ma'am.
Q: Okay. Tell us about that process .
A: It's standard implied consent form. We're to read it whether the person is cooperative or not. And then part of the implied consent is if they are unresponsive, acting unresponsive, the state of Kentucky implies consent, so therefore we can--in this situation we opted to take the blood test.
Q: Okay. And implied consent, that just, is that like a form that tells you have the right not to take the test?
A: Yes, ma'am.
Q: And the consequences of not taking the test?
A: Yes, ma'am.
Q: Okay. So you read that to the defendant?
A: Yes, ma'am.
Q. Okay. And after you read him the implied consent, what happened at that point?
A: He was still playing the unresponsive game.
Q: Okay. And is-

Again, the defense counsel objected, to the officer's statement that Byrd's behavior was a "game." After a lengthy bench conference, the judge again overruled the objection.

Byrd argued that this testimony improperly commented his failure to speak, which was his right. The Court agreed that "[w]hile the U.S. Supreme Court has never directly addressed whether that rule also extends to the use of a defendant's silence while he is in custody, this Court has so extended the privilege, ruling that

the prosecution "may not comment on post-arrest silence as evidence of guilt."[74] However, the Court has held that the Fifth Amendment is not ordinarily implicated by questions about a person's identity.[75]

In this case, however, the initial question and some of the officer's answers generically discussed Appellant's refusal to answer questions posed by the officer and medical personnel. To this extent, the testimony and questioning were improper comments on [Byrd's] Fifth Amendment right.

The Court concluded that it was improper to admit the testimony, but in this case, specifically, the Court found that the error was harmless because the evidence of Byrd's guilt was otherwise so overwhelming.

Sullivan v. Com.
2008 WL 4691944 (Ky. 2008)

FACTS: Sullivan (and accomplices) were charged with a series of break-ins that took place in Meade County. The investigation uncovered security footage that showed two men, one of whom was wearing a "hat depicting a marijuana leaf." Follow-up led police to Sullivan. Sullivan was eventually convicted, and appealed.

ISSUE: Are comments about a suspect's silence during questioning admissible?

HOLDING: No

DISCUSSION: At trial, Deputy Robinson (Meade Co. SO) stated that his questioning of Sullivan "did not last very long at all" and that Sullivan "didn't offer a whole lot of cooperation." When the testimony drew an objection, the trial court ruled that Robinson "could testify as to what [Sullivan] said, but he could not testify as to what {Sullivan] did not say, and that Robinson could not suggest that Sullivan was uncooperative due to his silence." The Court agreed that the testimony eventually given, however, was properly admitted.

Sullivan's conviction was affirmed.

Wilson v. Com.
2008 WL 2312731 (Ky. App. 2008)

FACTS: Wilson was convicted of second degree burglary at the home of Webb and Herron. The home had been "subjected to a forcible entry and the contents of a bedroom had been disturbed." There was no evidence of theft, however. A witness, Cook, testified that he saw a white Taurus, which turned out to belong to Wilson's mother, leaving the house. Upon checking, Cook found the front door locked and the side door forced open. Herron later testified that Wilson did not have a right to be at the house – although Wilson later claimed to have gone there with her mother to check on Webb, who'd had surgery the day before, and to have returned later, alone, at her mother's request, when they'd discovered Webb wasn't home. She indicated she'd run into Cook at the house and then left, and denied she'd ever entered the bedroom.

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[74] Green v. Com. , 815 S.W. 398 (Ky. 1991).
[75] Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 191 (2004).

There was evidence that "Wilson and Webb were family friends and that she had been over to his residence numerous times in the past." She claimed that she had permission to be in the house when Webb wasn't there, and "that no one had ever told her otherwise."

Wilson was convicted, and appealed.

ISSUE: Are prior consistent statements made by testifying witnesses admissible in court?

HOLDING: No (usually)

DISCUSSION: The Court noted that Olze (another witness) and Herron had given written statements that were consistent with what they said in court. Deputy Knight testified that Webb had dictated a statement to Herron, because he could not write – but this statement had been ruled hearsay and inadmissible. Wilson argued that the statement should have been admitted as it was favorable to her. Deputy Knight did read Wilson's statement to the jury.

The Court discussed the issue of "prior consistent statements." Deputy Knight had testified that Webb's and Herron's statements were "consistent with their testimony in court." The Court found that the "deputy's testimony that the prior statements were consistent with those given at trial was highly prejudicial in that it only served to bolster the Commonwealth's witnesses…." Further, the Court found that the "implication was that Webb's inadmissible statement also corroborated the statements of Herron" and another witness, Olze. The Court found that to be reversible error.

Wilson's case was reversed and remanded for further proceedings.

EVIDENCE / TRIAL PROCEDURE - EXPERT WITNESS

Ward v. Com.
2008 WL 2779531 (Ky. App. 2008)

FACTS: On Jan. 10, 2006, Ward was involved in a collision with Dixon. Dixon "suffered multiple traumatic injuries and died en route to the hospital." Ward failed a field sobriety test given by a KSP trooper and was arrested for DUI. He was given Miranda warnings and told the trooper that he thought he had the green light. (All other evidence indicated it was red.) He admitted to having had "two mixed alcoholic beverages at his office before he left work." Further evidence in the car indicated that Ward had a BA of .13, and had Valium, Darvocet, Ambien, Paxil, Inderal and hydrocodone in his system, and that, at the least, he'd probably taken 4 ½ Darvocet in the hours preceding the wreck.

Ward was indicted on wanton murder. He sought dismissal of that charge, and the lesser-included offense of second-degree manslaughter. That was denied, and he was convicted of the latter offense. Ward then appealed.

ISSUE: May officers testify as experts in matters within their experience?

HOLDING: Yes

DISCUSSION: Ward challenged the constitutionality of the homicide statutes, but that was denied. (Specifically, the Court found that the statutes are clear that "voluntary intoxication can lead to conduct that is considered 'wanton' under" the Kentucky Penal Code.")

Ward also argued against the testimony of Det. Crum, a 19-year veteran of KSP. The trooper testified that he had extensive training in traffic issues, and he was "asked about his experience with intoxicated drivers and how alcohol affects a person's ability to perceive and react while driving." Over Ward's objections, Crum was allowed to testify. Ward resumed his argument on appeal, that because Crum was not presented to the trial court as an expert witness pursuant to Kentucky Rules of Evidence (KRE) 702 and because the court failed to make any findings of fact concerning his qualifications to render the expert opinions to which he testified."

The Court noted that "[e]xpert opinions from police officers based upon their training and experience are frequently admitted almost as a matter of routine." Further, "[t]hese opinions are deemed to be distinguishable 'from the more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists.'"[76] The Court agreed that "where proffered testimony does not require applying "any theories, processes, or methods of novel or controversial origin," a witness's 'actual experience and long observation' are sufficient to qualify him as an expert in the relevant subject area."[77] As such, "[p]olice officers enjoy wide acceptance as expert witnesses based on their professional experience and training alone." In this case, Crum offered testimony as to the basis of his developed expert opinions on impaired driving.

In addition, the Kentucky "Supreme Court has recognized that police officers may render opinions regarding the general relationship between a blood-alcohol percentage and a person's level of intoxication -- even when an officer has not personally observed the defendant in question."[78] Ward's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE – CRAWFORD

Langley v. Com.
2008 WL 746462 (Ky. 2008)

FACTS: On Oct. 5, 2005, Det. Duvall (Henderson PD) met with a CI regarding a controlled drug buy from Langley. Det. Duvall, who knew Langley's voice, listened in as the CI set up the deal with Langley. Duvall "understood that the [CI] would need $100 to buy" methamphetamine from Langley. Detectives Duvall and Adams met with the CI, searched his person and car, and equipped the CI with a video recording unit. He was given the money and set out to do the buy.

The recording captured the entire time from the CI's departure until his return. The first 18 minutes were the informant driving through Henderson. He arrived, stopped the car, walked out and "got into the passenger side of a car while Langley got into the driver's side. After 30 seconds, the two got back out. Although there was "no discussion regarding drugs, as the informant was exiting the car, Langley can be seen gathering some money and placing the bills in the console between the front seats of the car." The

[76] Allgeier v. Com., 915 S.W.2d 745 (Ky. 1996).
[77] Kurtz v. Com., 172 S.W.3d 409 (Ky. 2005).
[78] Jewell v. Com., 549 S.W.2d 807 (Ky. 1977).

CI met up with Duvall and Adams and gave them a plastic bag of methamphetamine. Adams asked the CI "who gave him the drugs." The CI told him "Jermaine" [Langley]. In response to another question, he also told the officers the location of the buy.

Based on the video and an affidavit from Adams, Langley was arrested for first-degree trafficking. He was eventually indicted. The CI refused to testify, but the videotape was introduced through the testimony of the two detectives. Langley was convicted, and appealed.

ISSUE: Are incriminating statements made by a CI, who knows they are being recorded, potentially testimonial?

HOLDING: Yes

DISCUSSION: Langley argued that admitting the videotape, when he did not have the opportunity to cross-examine the CI, who voice is heard on the tape, was a violation of the Confrontation Clause.[79] The Court noted that the "videotape of which Langley complains contains few statements made by the confidential informant." The Court further agreed that other courts had "found that since a confidential informant is aware that his statements are being recorded in order to foster criminal prosecution, the informant's recorded statements may be 'testimonial' as the Supreme Court has employed that term." However, other courts have specified that "if the informant's statements are made as part of an 'integrated conversation' with the defendant and are introduced not to prove their truth but to place the defendant's statements into context, then the statements are not hearsay and their admission does not violate the Confrontation Clause." The Court concluded that the "portion of the videotape that shows the [CI] engaged in a transaction with Langley was admissible even though the informant did not testify at trial."

However, the CI's "statement to Detective Adams after the alleged drug transaction, however, did constitute testimonial hearsay and should have been redacted from the video." The case law "has been clear that accusatory statements elicited by law enforcement officers in non-emergency situations are testimonial."[80] However, the Court decided that, in the light of the other evidence against Langley, the admission of the final part of the tape was harmless error.

Further, the Court agreed that the videotape was properly authenticated by the two detectives, setting a proper foundation for its admission under KRE 901(a). Duvall testified that he retrieved it from the CI and immediately took the unit to the station and downloaded it. It was a "continuous feed with no stops or interruptions" of 32 minutes.

Finally, the Court addressed confusion related to the copy of the videotape used at trial. The material had originally been provided to Langley, in discovery, on two CDs. It was played at trial, however, from a DVD. The total length of the material on the two CDs was 37 minutes, but the video shown at trial was 32 minutes. The prosecution stated that when the unit was downloaded originally, it produced three segments, one lasting 27 minutes and 5 seconds, and two that were 5 minutes and 52 seconds, each. However, the two short segments were actually duplicates, so when the material was played for the jury, the prosecution did not play that segment twice. Langley had requested a spoliation instruction because of

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[79] See Crawford v. Washington, 541 U.S. 36 (2004).
[80] Davis v. Washington, 547 U.S. 813 (2006).

the discrepancy in the times, but the trial court refused it because he could not demonstrate that there was any difference in the two videos.

The Court noted that although "Langley's version is split between two CD-ROMs and the order of the segments is reversed on his second CD-ROM, the fact remains that all the segments are identical copies and portray the exact same sequence of events." Since the Court found "no indication that the video evidence was destroyed or missing," a spoliation (or missing evidence) instruction was not appropriate.

Langley has also argued that the phone call (which was set up as a three way call with the CI's knowledge) and the videotaping were both eavesdropping , but the Court found no indication that the CI, who was party to both, did not consent. As such, neither was unlawful.

Langley's conviction was affirmed.

EVIDENCE/TRIAL PROCEDURE - CONSTRUCTIVE POSSESSION

Okorley v. Com.
2008 WL 2468862 (Ky. App. 2008)

FACTS: On Nov. 23, 2005, Officer Rhea (Lexington PD) stopped a vehicle driven by Penman for running a stop sign. Okorley was the front seat passenger, and Richardson and Rogers were in the back seat. Officer Rhea noted that all "looked nervous and were all making movements." She discovered that Penman had an outstanding arrest warrant, removed everyone from the car, and searched it incident to arrest. The officer found a joint in the back ashtray and 4.8 grams of marijuana hidden under that ashtray. Okorley admitted ownership of the marijuana, even though he couldn't, apparently, state where the officer had actually found the marijuana. He then denied ownership, and Officer Rhea arrested all of the occupants because they all had "easy access to it based upon their respective locations in the car."

During the trip to the jail, Officer Rhea noticed Orkorley's movements in the car and thought he had something on his person. She requested a strip search, and prior to the search, Okorley stated he had illegal drugs on his person. A search revealed a quantity of crack cocaine and cash. He was indicted on Possession of marijuana and Trafficking in cocaine. He requested suppression, arguing that he "did not have easy access to the drugs," which were "located in the back of the center console, which was not accessible to him due to his location in the front seat and the large size of the driver." The trial court denied the motion. Okorley took a conditional guilty plea, and appealed.

ISSUE: May passengers be charged for drugs found in a vehicle they occupy?

HOLDING: Yes

DISCUSSION: Okorley argued that the "search conducted on him" lacked probable cause. The Court looked to Maryland v. Pringle and Burnett v. Com.[81], each of which involved passengers. The Court noted that "[t]o prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." In the more recent case of Com. v.

[81] 31 S.W.3d 878 (Ky. 2000).

Mobley,[82] the Court found a conviction for a passenger for accessible unclaimed drugs was appropriate. The drugs in the Penman's car were located in an area that was "centrally accessible to at least the three passengers, including Okorley." As such, all three passengers had constructive possession. Further, Okorley's movements in the vehicle justified the more detailed search at the jail.

Orkorley's conviction was upheld.

Parker v. Com.
2008 WL 1837321 (Ky. App. 2008)

FACTS: On June 29, 2004, Trooper Bowles (KSP) "was dispatched to a residential area shortly after midnight … to investigate a report of a strong chemical odor." He arrived and discovered the odor, which "he described as a combination of anhydrous ammonia and ether." The two sources of the odor were an outbuilding, some 75 feet from the Miller home, and a rolling trash can, in which he found a Coleman fuel container and several starter fluid can. The troopers approached the home, finding the lights on, but no one answered their knock. A note on the front door directed visitors to a side door.

A trooper certified in lab response confirmed that the odor indicated a methamphetamine lab. They entered the outbuilding and "discovered a recently active methamphetamine production lab." They secured the scene and requested a warrant for the residence. A vehicle "normally driven by Parker drove past the residence pulling a lawn mower on a trailer" but did not stop. Officers stopped the vehicle about a half mile away and found Parker driving and Miller as passenger. They returned the two to the residence and informed them of the search warrant. Miller produced a key to the house and when they entered, the officer discovered a video security system focused on the driveway, as well as methamphetamine and paraphernalia.

Miller also stated that the lights had been off when they left and also that the outbuilding contained various legal items.

Both were arrested, and Parker was convicted of Manufacturing Methamphetamine and related charges. She appealed.

ISSUE: Is possession of keys to a locked building sufficient to demonstrate constructive possession?

HOLDING: Yes

DISCUSSION: Among other issues, Parker argued that she was not in possession of the lab. The Court, however, quickly agreed that possession did not require "actual physical possession" but instead could be established by showing that the "contraband involved was subject to [her] dominion and control." In this case, given her possession of keys to the location where the lab was located, was sufficient to conclude that she had both "knowledge and construction possession of the lab…."

[82] 160 S.W. 3d 783 (Ky. 2005).

The Court also agreed that it was not double jeopardy to convict her of both manufacturing methamphetamine and possession of anhydrous ammonia in an improper container" as "[p]ossession of each of these items constituted a distinct violation of a statute."

Parker's conviction was upheld.

Sanders (Juan & Cecilia) v. Com.
2008 WL 2219789 (Ky. App. 2008)

FACTS: In the morning of Oct. 29, 2002, Juan Sanders was arrested leaving 3902 Vantage Place, in Louisville. Juan was out on bond pending his appeal for a manslaughter conviction and Vantage Place was his listed address. A few months earlier, however, his bond had been revoked, and warrants issued, but two other addresses were listed. He was also a suspect in a shooting that had occurred on Oct. 28. That morning, having been informed of a CI of his location, the police began surveillance of the Vantage Place address.

During the same time frame, however, another officer, investigating the shooting the day before, was working on a search warrant for the address. That officer received the warrant and the Vantage Place residence was searched, but no evidence was found concerning the shooting. However, they "discovered sixty-five marijuana plants and related paraphernalia." They obtained a second warrant (different judge) to continue to search for drug evidence in the house and the vehicle outside.

Both Juan and Cecilia Sanders were indicted on Trafficking marijuana and related charges. Juan requested suppression of the evidence found in the vehicle, while Cecilia requested suppression of all of the evidence. Both were denied, with the Court finding probable cause for both warrants.

The Sanders were tried together, and both were convicted. Both appealed.

ISSUE: Is one's presence, along with personal belongings, in a residence sufficient to prove constructive possession?

HOLDING: Yes

DISCUSSION: The Court reviewed what had been documented in prior hearings.

> Juan had a valid warrant issued for his arrest, which had been issued when his appeal bond was revoked after his manslaughter conviction was affirmed." A confidential informant informed the police that Juan could be located at the Vantage Place residence and the police corroborated this information with extensive surveillance. An officer acquired a valid search warrant based on the warrant relating to Juan's previous conviction, information from the confidential informant, police surveillance, and Juan's status as a suspect in a separate shooting incident." Juan contended, however, that the residence belonged to his estranged wife, and "thus he was not in constructive possession of the marijuana." Looking at each warrant in isolation, the Court found that there was sufficient probable cause to believe that Juan might be found at the Vantage Place address, even though it was based upon an anonymous tipster. In this case, "the confidential informant's tip was verified by lengthy police surveillance which confirmed that

Juan was at the residence." Since the second warrant was based upon legal observations made during the execution of the first warrant, it too was lawful.

With respect to Juan's argument concerning constructive possession, the Court noted that "Juan's clothes, various bills and correspondence addressed to him, and a 'grow lamp' displaying both Juan and Cecilia's names were found in the Vantage Place residence." During the surveillance, he appeared to be alone in the house, demonstrating that "he had control and dominion over the items in the house." As such, it was proper to find he had constructive possession of the marijuana.

Both convictions were affirmed.

CIVIL LITIGATION

Louisville-Jefferson County Metro Government v. Stoke
2008 WL 2468757 (Ky. App. 2008)

FACTS: On May 14, 2003, Stoke arrived at his part-time job at a local gun store. Since the owner had not yet arrived, Stoke went to a nearby restaurant. A short time later, he returned to the gun shop and pulled into an alley intending to park in the lot for the shop. He "noticed a police cruiser behind him with its emergency lights flashing," so he drove into the lot and stopped.

Several more cruisers pulled in as well, and as Stoke got out of his car, "two officers approached him on foot with their service weapons drawn." The two "officers gave contradictory commands – one ordering him to get on the ground and another ordering him to get back into his jeep." However, "[t]orn between these conflicting commands from police officers with drawn weapons, Stoke stood upright near his vehicle." One of the officers seized "Stoke's unconcealed sidearm from his person." The owner of the gun shop came outside and identified Stoke as an employee, and further said "be gentle, he's disabled, he got [sic] bone crisis, bone disease." "Despite this caution and despite the fact that Stoke's weapon had been secured, one of the officers forced Stoke to the ground, face down on the asphalt parking lot." Stoke later testified that he was handcuffed behind his back, and that the officer, "in so doing, either placed his elbow or knee on his back." Stoke alleged that action "caused him intense physical pain."

During this time, the officers confirmed that: "Stoke (1) worked for the owner of the gun shop; (2) had a proper concealed carry permit for his weapon, and (3) had no outstanding arrest warrants." When Stoke complained and asked to get up, "one of the officers yanked on the handcuffs behind Stoke's back and pulled him up, thereby causing a cut on his left wrist." They then removed the cuffs and returned his weapon.

Stoke filed suit for false arrest and battery. The officers, and the Metro Louisville government, asserted the defenses of sovereign immunity and official immunity. The trial court denied their demands and both the government, and the officers appealed.

ISSUE: 1) Is Louisville Metro entitled to sovereign immunity?
2) May officers automatically put a person who is armed with a handgun on the ground and handcuff them?

HOLDING: 1) Yes
2) No

DISCUSSION: First, the court quickly concluded that the Louisville-Jefferson County Metro Government was entitled to governmental sovereign immunity, finding the newly-merged government to be more akin to a county.

Next, the Court examined the claims of the officers for official immunity. Looking to Yanero v. Davis, the court noted that official immunity turns upon "whether the offending actions were 'discretionary' or 'ministerial.'"[83] Further, "official immunity from damages for a civil-rights violation actually only applies 'for good faith judgment calls made in a legally uncertain environment.'" In other words, "whether official immunity applies in any given case turns on the official's 'good faith,' or, in other words, upon the 'objective reasonableness' of his action under the circumstances."

Regarding the false arrest claim, Stoke did "not dispute that the officers responded to a call from a concerned citizens who had seen Stoke in downtown Louisville carrying a sidearm at his waist." Further, the Court stated, although it knew "of no law prohibiting a private citizen from carrying an unconcealed firearm, [it] acknowledge[d] that the frequency of such behavior in major metropolitan areas is sufficiently rare that [it could not] say that the officer's decision to make an investigatory stop was" improper. As such, the Court found the officers entitled to official immunity on that claim.

However, the Court did not extend that immunity to "their purported treatment of Stoke after the stop was made." The Court noted that:

> … if Stoke is able to prove at trial to the fact finder's satisfaction that the officers (1) issued conflicting commands; (2) forced him at gunpoint to the ground and handcuffed him in a rough manner despite warnings about his frailness; and (3) otherwise treated him roughly without any legitimate cause, then Stoke may prevail on his battery or excessive force claim.

Further, it stated that if his allegations are proved, they are an indication "that the officer's treatment of him went well beyond that which was necessary to conduct a reasonable investigatory stop," and that under Stokes version of the facts, "the officers had no plausible justification for handcuffing Stoke, forcing him to the ground, or otherwise treating him in the rough manner he alleges."

As such, the Court denied the officers official immunity on the battery or excessive force claim.

NOTE: Although this indicates that the Louisville Metro government itself is not subject to state lawsuit, as the prior City of Louisville was, it does not prevent individual officers or other employees from being sued.

[83] 65 S.W.3d 510 (Ky. 2001).

POLICE OFFICER BILL OF RIGHTS

Fournier v. City of Lawrenceburg
2008 WL 1103930 (Ky. App. 2008)

FACTS: Fournier, a Lawrenceburg police officer, was involved in two incidents in 2005. First, he allegedly threatened an individual by suggesting that if the individual, who had been arrested for DUI, "start[ed] giving {Fournier} a hard time in court" about the DUI charge, that he would further raise a marijuana charge. (He had seized a small amount of marijuana during the arrest.) The subject's father complained and the Mayor suspended Fournier without pay, citing "a number of violations of the SOPs related to the … arrest." The second incident occurred a few months later, when Fournier refused to take a high school student into custody that had been found in possession of marijuana, a pill and cash. The school officials present complained of Fournier's conduct during the incident, that he had been "curt," "brusque," "condescending" and had treated them as if they were "stupid people." Again, Fournier was subjected to discipline.

On August 2, he was given a disciplinary hearing, and some of the charges related to the high school incident were upheld, including "discourtesy to the public." After conflicting testimony was taken from the chief, there was testimony from five officers that "it is not appropriate for an officer to arrest someone who has committed a misdemeanor outside of the officer's presence."[84] Fournier stated that the school officials did not cooperate with his investigation and that he could not "arrest" the student under the circumstances with which he was presented. With respect to the first incident, Fournier testified that the subject had stated he would bring charges of excessive force.

The Council found that the appropriate penalty for the high school incident was a six month suspension without pay, and for the DUI incident, dismissal.

Fournier filed an original action (a lawsuit) against the city and numerous other defendants. The Circuit Court dismissed most of the defendants, leaving only the City Council in the action. Fournier appealed the dismissal.

ISSUE: Is an appeal under KRS 15.520 to the Circuit Court a new trial, or simply a quasi-new trial that includes a review of the hearing transcript?

HOLDING: A quasi-new trial

DISCUSSION: The first issue concerns procedural matters, as Fournier named only the City of Lawrenceburg in his appeal, and that entity had already been dismissed from the case. He did not appeal the dismissal of the City, as he could have done, he simply named the City as a party in the appeal. He did not, however, name the City Council, which was the only party still officially in the case. Since KRS 15.520 requires the appeal be brought to contest the action of the hearing authority – in this case, the City Council. Because the essential party was not named in the appeal, the Court agreed the appeal was fatally flawed, and dismissed the action.

[84] Note that barring specific exceptions, this is correct.

However, the Court further elected to address the substantive issues, as well, to settle the matter. The Court noted:

> Fournier notes that KRS 15.520(2) provides that an officer dissatisfied with the result from a hearing authority may bring an action in circuit court and that action 'shall be tried as an original action by the court.'" According to Fournier, in order to comport with due process, that statutory provision requires the circuit court to conduct a *de novo* proceeding and to review the evidence without regard to the findings of the hearing body.

The Court, however, relying on Brady v. Pettit[85], had "previously determined that KRS 15.520 entitles a discharged police officer to a quasi trial de novo before the circuit court," in which the circuit court may review the transcript of the initial hearing, and permit the officer to "call such additional witnesses as he may desire." The Court, then, was limited to making a "determination of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department.[86] The Court affirmed its earlier decision that a quasi trial de novo was sufficient.

The Court further found that the testimony presented in the hearing was sufficient to support the City's contention that Fournier acted improperly in both incidents, and upheld the dismissal on the merits, as well.

OPEN RECORDS

Com. of Kentucky, Dept. of Corrections v. Chestnut
2005 WL 3544299 (Ky. 2008)

FACTS: Chestnut was a prisoner at the Western Kentucky Correctional Center (WKCC). He made an open records request for his inmate file – asking for "[a]n entire copy of my inmate file excluding any documents that would be considered cofidential [sic]." The request was rejected by WKCC as being "too broad and overly vague" – the custodian "stated that Chestnut 'must describe the record (forms) with reasonable particularity, so that the records can be identified.'" Chestnut appealed the denial to the Attorney General, and also amended his request. He included a "list of several types of documents he wanted to see," as well as making "a demand for 'any and every document contained within my file from the front cover to the back." Chestnut also argued to the Attorney General that he "believed his initial description 'was clear enough for a laymen [sic] to have understood.'"

The WKCC produced 138 pages, but refused to comply with "Chestnut's blanket request for all other nonconfidential documents in his file because the WKCC continued to insist that the request was still 'vague' and 'overly broad….'"

The Attorney General upheld Chestnut's position, finding that the current line of opinions upheld the validity of requests for "complete personnel records" and that they AG found no reason to find differently for an individual inmate's records.

[85] 586 S.W.2d 29 (Ky. 1979).
[86] Stallins v. City of Madisonville, 707 S.W.2d 349 (Ky. App. 1986).

WKCC and the Dept. of Corrections appealed the matter to the Franklin Circuit Court. After some months, the trial court found in Chestnut's favor. Again the DOC appealed, and again, the Kentucky Court of Appeals upheld Chestnut's decision. Once more, the DOC appealed, to the Kentucky Supreme Court.

ISSUE: Must an Open Records request specify the precise documents desired?

HOLDING: No

DISCUSSION: The Court reviewed the Kentucky Open Records Act, KRS 61.870. The Court noted that the statute permitted "any person" to seek review of the records, and noted that no class of person is held to a "more stringent standard when submitting open records requests." The presumption was "even stronger when a person, like Chestnut, seeks access to public records pertaining to himself."[87] The Court noted that the statute only required that records be described, not that they be "particularly described." The Court found that it "appears obvious to [the Court] that Chestnut's request was adequate for a reasonable person to ascertain the nature and scope of Chestnut's open records request." The Court stated that Chestnut "was required to do nothing more and, indeed, likely could not have done anything more because he could not reasonable be expected to request blindly, yet with particularity, documents from a file he had never seen." (Further, a footnote to the opinion notes that he would not be permitted to enter the offender records office to physically inspect the file.) Even though the DOC's policy required a "reasonably particular description of the records being requested," that regulation could not be upheld because it required more than the statute. The Court found that the "Attorney General's decision to extend its treatment of school employees' personnel files to an inmate's request to see his own inmate file was logical, and it was not arbitrary."

Finally, the Court found that complying with the request (and presumably with those of other inmates) would not be an unreasonable burden on the DOC, even if it was "tedious and time-consuming work." The Court noted that the DOC had indicated that each inmate had more than one file, in more than one location. The Court pointed out, however, that Chestnut only asked for his files from WKCC (although he may not have even realized the files were held in multiple locations) and further, that DOC could "reorganize its materials in such a manner as to more easily facilitate open records review by inmates, the general public, and DOC personnel" and that Kentucky law strongly suggested that records management be done in such a way as to expedite records recovery.

The Court agreed that a few of the documents in the file could be held back, but that the "prospect of a public agency's potentially negligent disclosure of protected items is simply an insufficient reason to thwart the openness the General Assembly sought to achieve when it enacted the Open Records Act."

The Court concluded by quoting Justice Brandeis - "[s]unlight is said to be the best of disinfectants[.]"[88] The Court upheld the lower courts' decisions in Chestnut's favor.

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[87] KRS 61.884.

[88] Buckley v. Valeo, 424 U.S. 1 (1976).

SHERIFFS

Jones v. Cross & Spradlin
260 S.W.3d 343 (Ky. 2008)

FACTS: On Sept. 3, 2000, Deputy Cox (Barren County SO) "went to execute an arrest warrant on an evasive David Price." He requested help from Troopers Cross and Spradlin (KSP). As the three proceeded north on Hwy 740, they learned that Price was "approaching from the opposite direction." Apparently, the road had been blocked because Price "abandoned his vehicle and fled on foot into a grassy field." The troopers pursued him on foot, while the deputy pursued him into the field in his cruiser. "As Trooper Cross caught Price, Deputy Cox ran his cruiser over Trooper Cross, leaving tire tracks on his uniform." He also struck Trooper Spradlin, who was injured, but not Price.

Troopers Spradlin and Cross (along with Cross's wife) sued both Deputy Cox and Sheriff Jones, in their individual and official capacities, for negligence. (Deputy Cox, however, is not part of this opinion, nor is the issue of Sheriff Jones's individual liability.) The trial court ruled that Sheriff Jones had official immunity for the tortious acts of his deputy, and that KRS 70.040[89] does not serve to legally waive that immunity. The case was appealed, and the Kentucky Court of Appeals "agreed that a sheriff is entitled to immunity when sued in his official capacity unless said immunity is waived." However, it found that the statute in question did serve to waive that immunity, although it declined to "address the constitutionality of said statute." Sheriff Jones appealed that ruling.

ISSUE: Does a sheriff in his official capacity (the office of sheriff), have immunity for tortious acts of his deputy, and if so, does KRS 70.040 waive that immunity?

HOLDING: Yes and Yes

DISCUSSION: The Court agreed that since the county is a political subdivision of the state, it is "'cloaked' with sovereign or governmental immunity." As the "chief law enforcement officer of the county," the sheriff "has absolute official immunity at common law for torts (by him or his deputies) when sued in his official capacity."[90] The Court, however, noted that "the next question is whether KRS 70.040 waives that immunity." The plain meaning of the statute "clearly imposes liability on the sheriff in his official capacity for acts committed by his deputies." Finding that the "plain language of KRS 70.040 leaves no room for any other reasonable construction than a waiver of the sheriff's official immunity (the office of sheriff) for the tortious acts or omissions of [deputy sheriffs]," the Court affirmed the decision of the Court of Appeals.

(A concurring opinion found that, unlike other county officials, that the sheriff had always been liable for the acts and omissions of deputy sheriffs, even absent said statute. The concurring opinion noted that historically, in a line of cases back to Britain, the sheriff had always been legally responsible for those he employs)

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[89] 70.040 Deputy's acts and omissions -- Liability for.
The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.
[90] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

SIXTH CIRCUIT COURT OF APPEALS

ARREST

U.S. v. Hardin
539 F.3d 404(6th Cir. TN 2008)

FACTS: In June, 2008, Hardin's "federal supervised release" was revoked, and a federal arrest warrant was issued for him. On Aug. 29, 2005, Officer Kingsbury (Knoxville PD) got a tip that "Hardin might be staying with a girlfriend at her apartment," but the CI didn't know the exact apartment number, only its approximate location in the building. The CI also described the car Hardin was driving.

Officers Kingsbury and Tarwater went to the building and decided that Apartment 48 was the correct apartment. They talked to the manager, who stated that Hardin had not leased an apartment and that he had never seen him on the property. The tenant of that apartment was a woman named Reynolds. (It was later stipulated that Hardin did stay there overnight, on occasion.)

When the officers explained Hardin's criminal background, the manager became "worried about Hardin's potential presence" in the complex. Kingsbury told the manager to use the ruse of checking for a water leak to confirm if Hardin was there. They watched on CCTV as the manager went to the apartment, opened the door with a key, called out "Maintenance" and entered. Hardin was there, and on the phone with Reynolds at the time. At Reynolds' direction, Hardin allowed the manager in to check the bathroom for the purported leak. The manager then left the apartment and told the officers that Hardin was there.

Officers then entered the apartment and took Hardin into custody. They found a firearm under the couch cushion where he was sitting. Officer Turner, doing a sweep of the apartment, also found two more guns under the couch. Finally, they found cocaine, marijuana and $2,000 in cash on Hardin's person.

Hardin was indicted on drug and firearms charges, and requested suppression. He contended that the "officers lacked probable cause to believe that he was present in the apartment where he was staying as a guest." After a hearing, the magistrate judge recommended that the motion to suppress be denied, in that the manager was not acting as an agent of the police at the time. The trial judge agreed, and also noted that the apartment manager had an "independent business duty to enter the apartment" - a legal concern for the welfare of the other tenants.

Hardin was convicted, and appealed.

ISSUE: May a civilian be asked, as the agent of the police, to determine if someone is inside before serving an arrest warrant?

HOLDING: No

DISCUSSION: The Court discussed whether the "proper standard for evaluating the quantum of proof required for police officers to enter a residence to execute an arrest warrant" was reasonable suspicion or

probable cause. In Payton, which involved a warrantless arrest, the Court used both the phrases "reason to believe"[91] and probable cause to describe the standard. The government argued that the Pruitt standard should prevail; in that case the Court held that "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant."[92] Hardin, however, contended that Pruitt had overlooked U.S. v. Jones, in which the court found that "government officials cannot invade the privacy of one's home without probable cause for the entry."[93] Instead, the Court concluded that neither case actually answers the question involved in the case at bar. In this case, the Court focused not on the standard, but on whether the apartment manager was acting as an agent of the officers. The Court concluded that it was clear that the manager was, in fact, acting directly as the agent of the officers, even the officers involved that the decision for the manager to enter the apartment "was 'without a doubt' the officers' idea." (Kingsbury stated that they "sent" the manager to check.) Because of that, the information gained by the manager's unlawful entry could not be used in deciding if the officers had sufficient cause to believe Hardin was present.

Stripping the case of the manager's information, the Court then had to consider whether the information from the "CI alone established sufficient reason to believe that Hardin was inside" the apartment. The Court found that the information did not even meet the lesser standard of reasonable cause, let alone probable cause, in that the CI provided "relatively limited information" about Hardin's location. The fact that the apartment manager did not recognize Hardin as even a guest was in contrast with the CI's vague information. Even if the officers had sufficient belief that he was an occasional visitor, they had "essentially no evidence to indicate that Hardin was then inside the apartment."

The government also argued that the "manager's search of [the apartment] was legal due to consent obtained through the use of the 'ruse.'" The Court found that the purported investigation of a water leak, something a tenant would be hard-pressed to deny entry for, "invalidated any possible consent." In fact, the Court noted, the manager "simply used his own key and entered the unit."

The Court concluded:

> In sum, we conclude that whether Payton involves a probable-cause standard or a lesser reasonable-belief standard remains an open question in our circuit, to be settled in an appropriate case. Further, we hold that the apartment manager in this case was acting as an agent of the government and that the officers' remaining information failed to establish even a reasonable belief that Hardin was inside Apartment 48.

The Court concluded that the search was unlawful, and that the additional charges for the guns and the drugs must be reversed.

U.S. v. Smith
549 F.3d 355 (6th Cir. 2008)

FACTS: On March 22, 2005 KSP did a controlled buy of crack cocaine from Smith, in Lexington. About a month later, an informant told KSP that Smith was traveling to Hazard with more crack in his

[91] Payton v. New York, 445 U.S. 573 (1980).
[92] U.S. v. Pruitt, 458 F.3d 477 (6th Cir. 2006).
[93] 641 F2d 425 (6th Cir. 1981).

possession. They enlisted the aid of a second informant to wait with a trooper and to identify Smith's vehicle, if he arrived in Hazard. (The sources were an unmarried couple, and the first source as considered a highly reliable informant.) The second source identified the vehicle, driven by Smith, and the troopers made a traffic stop on that vehicle for a minor infraction.

Trooper Miller approached the car. He spoke to the pair, and noticed that the zipper of Smith's pants was down, and that Smith was "tugging and pulling" at his crotch. Trooper Miller got consent to search, and walked his K-9, Balco around the exterior of the vehicle. Campbell, the passenger, told Miller that the drugs were on Smith's body, something Campbell later denied.

Miller walked Balco near Smith, and the dog's demeanor indicated that he had found drugs. Smith did not consent to a search of his person, however.

Both men were transported to the post. Det. Fugate sought a search warrant. The affidavit stated:

> *Affiant has been an officer in the aforementioned agency for a period of 10 years and the information and observations contained herein were received and made in his capacity as an officer thereof.*
> *On the 25 day of April, 2005, at approximately 0800 a.m., affiant received information from: A KSP cooperating witness who state they received information that Terrence T. Smith was traveling to Hazard Kentucky on the same with [sic] at least one ounce of "Crack" Cocaine.*
> *Acting on the information received, affiant conducted following independent investigation: On 03-22-05, units from the Hazard HIDTA Drug Task Force, purchased two ounces of "Crack" Cocaine From Terrence T. Smith using a No. 07-5377 United States v. Smith cooperating witness. Terrence T. Smith has (2) two drug related arrest [sic].*

The warrant was issued and a quantity of crack cocaine was found hidden inside Smith's underwear.

Smith was indicted on federal trafficking charges, and moved for suppression. The trial court agreed that the warrant did not establish probable cause, but stated that the "Leon good faith exception saved the evidence from suppression."[94] The Court upheld the arrest and found that he was properly searched under the search incident to arrest.

Smith took a conditional guilty plea, and appealed.

ISSUE: Is a lengthy handcuffing, and removal to another location, an arrest?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed the facts available to Trooper Miller when he made the arrest.

> 1. A controlled buy of crack cocaine from Smith took place on March 22, 2005, involving Source A.
> 2. On the day of the traffic stop, according to Source A, Smith was supposed to be on the way to Hazard, transporting drugs.

[94] U.S. v. Leon, 468 U.S. 897 (1984)

3. Smith's vehicle was identified upon entry into Hazard by Source B.
4. Source A and B had a long track record of reliability.
5. After the stop, Smith's pants were unzipped and he was "tugging and pulling" at his crotch; on the basis of his experience, Miller knew that drug traffickers commonly hide contraband in the crotch area.
6. Passenger Campbell informed Miller that Smith had drugs hidden in his crotch area.
7. Miller's search of the vehicle based on Smith's consent yielded no drugs, but Balco changed "demeanor" when sniffing Smith's crotch, and a similar demeanor change when sniffing Smith's seat in the car.

The Court agreed, also, that despite Trooper Miller's assertion to the contrary, "handcuffing Smith and transporting him to a police post, where he remained handcuffed for at least an hour and a half," was an arrest. However, the court found there was sufficient probable cause to justify that arrest, and that the fact that the trooper chose not to thoroughly search him at the time was immaterial. Further, the "fact that KSP officers made an effort to obtain a search warrant [did] not compromise the lawfulness of the search."

The denial of the suppression motion, and the subsequent plea, was affirmed.

U.S. v. Boyett
295 Fed.Appx. 781, 2008 WL 4488803 (6th Cir. 2008)

FACTS: On May 29, 2006, officers took an armed robbery report from Jones and Brown. They stated that a man known to them only by a nickname (Juvenile) and a first name (Larry) had robbed them at gunpoint, They identified his vehicle in detail and immediately reported it. A few days later, Lt. Massey, who had reviewed the report, spotted a vehicle matching the description and recognized the driver as Larry Boyett. He knew that Boyett had been involved in a road rage incident and that he had felony charges pending.

Lt Massey called for backup and followed Boyett into a parking lot. He did a high risk stop and secured Boyett and his passenger, holding them at gunpoint until back-up arrived. Both subjects were frisked and secured in separate cars. The officers searched the vehicle, finding a handgun, and Boyett, a felon, was indicted on that charge.

Boyett moved for suppression, arguing that the initial robbery report was unreliable. The trial court, however, found that it was, and further, that the scope of the search, which revealed the weapon, was also reasonable. Boyett took a conditional guilty plea, and appealed.

ISSUE: Does approaching a car at gunpoint, handcuffing occupants and securing them in a cruiser automatically convert a stop into an arrest?

HOLDING: No

DISCUSSION: The Court agreed with the trial court that the report was properly issued and based upon articulable and detailed facts. Lt. Massey's stop, therefore, was reasonable. The Court also justified the search, which revealed the weapon, as being within the scope of a vehicle frisk.[95]

[95] Michigan v. Long, 463 U.S. 1032 (1983).

Finally, the Court disagreed with Boyett's assertion that the stop was an "arrest." The Court found that "[a] approaching the car at gunpoint, handcuffing Boyett and his passenger, and then placing them in squad cars during the search was reasonably related to the situation at hand."

Boyett's plea was affirmed.

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Williams
544 F.3d 683 (6th Cir. 2008)

FACTS: On July 23, 2004, Officer Stewart (Detroit PD) sought a search warrant. In it, he alleged that "(i) Williams [the suspect] resided in the upper level apartment at 4900 Tarnow Street; (ii) Williams possessed two firearms, a .25 caliber handgun and a .45 caliber handgun; (iii) one month prior to the warrant application, Williams used a .45 caliber handgun to rob five pounds of marijuana from a drug trafficker; (iv) Williams was arrested for carrying a concealed weapon on June 26, 2004; and (v) Williams was recently arrested for possession of a stolen vehicle where a gun was found in the vehicle."

The warrant was executed later that day, and the officers found Williams in an upstairs apartment with his door open. They saw him "cutting crack cocaine on a table." The officers entered, made the arrest and searched, finding a "short-barreled shotgun and cocaine base."

Williams was indicated on drug and weapons charges, and moved to suppress. When that was denied, Williams took a conditional guilty plea and appealed.

ISSUE: May a judge infer a nexus between a drug dealer's home and his possession of weapons, when they have been observed in possession of firearms?

HOLDING: Yes

DISCUSSION: Williams argued that the "warrant application did not establish a nexus between the targeted handguns and the residence [to be searched]." The Court agreed with the trial court, however, stating that Williams overlooked "the Government's logical, and indeed legally correct, assertion that 'it is reasonable to suppose that some criminals store evidence of their crimes in their homes, even though no criminal activity or contraband is observed there.'" The Court found that the demonstrated firearms activity supported the search warrant for the suspect's home. The Court agree it was appropriate for a judge to "infer a nexus between a suspect and his residence" - depending upon the nature of the crime and the suspect items. The fact that the assertion was that Williams "possessed multiple guns" made it reasonable that he might keep at least one handgun at his home. The informants indicated only two reasonable locations where he might store guns, his home and his car, and since he was arrested in his car, without both guns, it was reasonable that one of the guns was at his home.

The Court further agreed the officer's testimony was consistent with the information provided in the warrant, and that the informants' information both supported the warrant and was corroborated by the officers.

U.S. v. Slaughter
274 Fed. Appx. 460 (6th Cir. Mich. 2008)

FACTS: On Aug. 2, 2002, Detroit officers executed a search warrant on Slaughter's home. They recovered a firearm and a "bag containing narcotics." The search warrant read as follows:

> *1.) The Affiant is a sworn member of the Detroit Police Department, currently assigned to the Narcotics Division working in conjunction with a credible and reliable SOI[96] #2073 regarding the sale of illegal narcotics from [19675 Buffalo Street]. Information from SOI #2073 has led to the seizure of narcotics, narcotics proceeds, narcotics paraphernalia and firearms. SOI #2073 has been used by the Affiant and other members of the Detroit Police Narcotics Division on over 3 occasions resulting in over 5 arrest[s] for Violation of Controlled Substance Act and other offenses, and over 2 conviction's [sic] in 3rd Circuit Court and 36th District Courts, with cases still pending in 36th District Court and 3rd Circuit Court.*
> *2.) On 08/24/02, Affiant met with SOI #2073 to formulate a plan to attempt to make a controlled purchase of Narcotics from the above-described location. The SOI was searched for money and drugs with none being found and issued a sum of Secret Service Funds with which to attempt to make the purchase. The Affiant then observed the SOI enter the target location, stay a short time, and then return directly to the Affiant. The SOI turned over a quantity of suspected cocaine, which the SOI stated (s)he purchased at the above-described location and from the above-described sellers with the issued Secret Service Funds provided. The SOI was again searched for money and drugs with none being found.*
> *3.) The suspected cocaine was then conveyed to the Narcotics Section where a preliminary analysis was performed by P.O. Gerald Parker, where the test indicated positive for the presence of cocaine. The cocaine was then placed into LSF #508923.*
> *4.) Affiant has been in numerous narcotic raids in the City of Detroit. In the overwhelming majority of these raids, firearms and/or weapons were found used to protect illegal narcotic activity and seek to remove the same.*
> *5.) Therefore, Affiant has probable cause to believe that the above listed items will be found on the premises of the above-described location.*

Although originally charged under state law, Slaughter's case was transferred to federal court. There, Slaughter moved for suppression of the warrant, arguing it lacked probable cause, but the trial court disagreed. After a lengthy delay in the case, because Slaughter, who was free pending trial, disappeared, Slaughter made a second motion to suppress, claiming that the SOI did not come to his house on the date of the alleged controlled buy. This was supported by affidavits from Slaughter's friends. The Court ordered a Franks[97] hearing. The prosecution provided considerable evidence supporting the warrant. Slaughter offered information from the witnesses, as well as documents that were allegedly "left behind in Slaughter's house by the officers executing the search." He claimed the documents "showed that Detroit police officers manufactured informants and controlled buys on the fly when executing unlawful searches."

[96] Source of Information.
[97] Franks v. Delaware, 438 U.S. 154 (1978).

The Court ordered the prosecution to produce the SOI for an *in camera*[98] hearing. The prosecution was unable to do so, however, because the Detroit PD had not continued to use the SOI in the intervening years and had lost track of him. The Court denied Slaughter's suppression motion. He took a conditional guilty plea and then appealed.

ISSUE: May a tip from a CI be corroborated by a controlled buy?

HOLDING: Yes

DISCUSSION: Slaughter argued that the warrant lacked probable cause "because it contains no assertion that [the] SOI … observed narcotics in the home or that officers observed narcotics traffic in and around the house." The Court noted, however, that in this case, "the affidavit was not based on an informant's tip, but on the controlled purchase of cocaine at a residence by a reliable source with whom the affiant had previously worked, which purchase was independently corroborated by the affiant." In addition, when "a complete stranger goes to a residence to purchase cocaine and actually gets it, no matter the quantity, it is reasonable to infer that more drugs may be stored there." Further, the Court found that the Franks claim also failed, in that there was no evidence that any false statements were included in the affidavit, either intentionally or recklessly. The Court noted that nothing required an informant be produced at a suppression hearing, and only requires it at trial under specific circumstances. (Not to mention that Slaughter himself caused the lengthy delay, and that had he not jumped bond, the situation may have been different.)

The Court affirmed the denial of his suppression motions.

U.S. v. West
2008 WL 782463 C.A.6 (Ky.), 2008

FACTS: Sonya Bradley was last seen, at her apartment in Eddyville, on Oct. 10, 2002. She was reported missing and KSP began an investigation. She had reportedly disappeared without informing her mother or her three children, and she left behind "all her personal belongings, including her purse and her medication." Bradley has never been found.

West, Bradley's "one-time boyfriend" was investigated as a suspect, as he was the last to see Bradley. On Nov. 28, KSP learned West had an outstanding Indiana arrest warrant, and they went to arrest him. West refused to come out, and eventually, they cut off the power and pleaded with him, by phone, to surrender. When they feared he had taken some action to harm himself, they broke in, and found he'd attempted to cut his wrist and had "ingested a large quantity of either Xanax or Valium."

KSP got a search warrant, and the affidavit, handwritten by Det. Pelphrey, was as follows:

> *[A]ffiant received information . . . [t]hat a felony warrant for the arrest of William David West from Evansville, [Indiana] charging him with assault. An attempt to arrest West was made by KSP officers resulting in West getting into his home and then barricading himself in the residence. Suspect later surrendered to KSP stating that he had taken an overdose of drugs, resulting in him being taken to the hospital for possible treatment.*

[98] In chambers.

> *Acting on the information received, affiant conducted the following independent investigation: KSP officers are currently investigating the disappearance of Sonya Bradley in Eddyville, [Kentucky]. Bradley was the girlfriend of William David West with information obtained during the investigation places West as the last person to have contact with the victim. Also West has served time in the correctional system for murder, and attempted murder. West is currently on parole at this time. Also received information that he is currently dealing in marijuana and prescription medicine.*

The information in the warrant was "second-hand knowledge given to Pelphrey by others, namely, the local county sheriff." The warrant was signed and West's apartment was searched, but nothing was found. (They also seized his van but did not search it, although a search was authorized by the warrant.)

The next day, the troopers received information that "West had made a drunken confession indicating that he had accidentally killed Bradley and disposed of her body in a well near Fredonia, Kentucky." Troopers tried to corroborate the tale and searched the area. They were able to get the witness temporarily released from federal custody to assist, but "they were unable to discover Bradley's body or even a well." They also interviewed another individual who was supposedly a witness to the confession.

On Dec. 2, Det. Steger got a second search warrant for the van, as follows:

> *Affiant has been an officer in the aforementioned agency for a period of 5 years and the information and observations contained herein were received and made in his capacity as an officer thereof.*
> *During the investigation of the disappearance of Sonya Bradley, Det. Sam Steger, Kentucky State Police, received information from James Towery that on November 9, 2002, David West came to Mary Moody's residence in Lyon County, Kentucky, and spoke to James Towery. James Towery stated that David West was very upset and crying and appeared to be under the influence. West stated that he had accidentally killed Sonya Bradley. West further stated that he transported her body to the Fredonia, Kentucky area, and disposed of the body in a well. Based upon the Affiant's investigation it was determined that Sonya Bradley was last seen on October 10, 2002 in the company of David West. The Affiant also determined that West owns a motorcycle and the above stated Chevrolet van.*

Notably, the warrant did not detail the unsuccessful attempts to corroborate the statement or the fruitless searches. The Assistant County Attorney reviewed the warrant, but was also not apprised of the other actions taken by the troopers that were to no avail.

The warrant was obtained and during a search, they found 15 rounds of .38 ammunition. West argued that he found ammunition when he cleaned apartments. Since West was a convicted felon, he was turned over to the ATF for further prosecution relating to the ammunition.

West moved to suppress the ammunition, arguing that the affidavits "contained various falsehoods that were known to the police officers." The trial court denied the suppression and eventually, West was convicted. He then appealed.

ISSUE: Is a bare-bones search warrant affidavit sufficient to support the issuance of a warrant?

HOLDING: No

DISCUSSION: With respect to the first affidavit, the Court found that the affidavit was 'bare bones," and did "not establish probable cause to believe that evidence of any crime was likely to be found at either West's residence or in his van."

> The affidavit provides no factual circumstances that would allow an issuing magistrate to make a reasoned determination regarding the veracity, reliability, or basis of knowledge of Pelphrey's handwritten statements. The affidavit states that Kentucky State Police officers are investigating the disappearance of Bradley, and that West was the last person to have contact with her. The affidavit states that West had been convicted and served time for murder and attempted murder. The affidavit also states that unknown sources indicate that West deals marijuana. None of these averments is supported by any facts, and with regard to the conviction for murder and attempted murder, are patently false. All of these statements made by Pelphrey in the affidavit are hearsay, yet no information is included regarding the source of the hearsay information or the source's veracity, reliability and basis of knowledge.[99] Taken on its face, the affidavit is bereft of any facts that suggest any connection between Bradley's disappearance and any evidence likely to be found at the residence or in the van. Instead, the affidavit is based on unsubstantiated conclusions and unreliable hearsay, and accordingly, is constitutionally deficient.

Because the warrant was considered "bare bones," the "good-faith exception could not be applied to rescue it."[100] The only connection between Bradley, West and the residence was "hearsay information that West was the last person to be seen with Bradley" and that does "not establish that any criminal conduct has occurred, let alone that any evidence of such conduct will be found in Bradley's residence or van" - but was instead, a "bald conclusion unsupported by facts which would allow an independent magistrate to analyze the veracity and reliability of hearsay information." As such, any evidence found during that search must be suppressed.

With respect to the second warrant, the Court also found it to be "constitutionally deficient," and that it indicated a "clear reckless disregard for the truth." The Court noted that the affidavit:

> … contained one paragraph describing Towery's story that West had drunkenly confessed to murdering Bradley and disposing of the body in a well near Fredonia, Kentucky. This drunken conversation allegedly occurred in Mary Moody's driveway. This information is obviously weak and sparse, but we have held that such information may be enough to establish probable cause if the "authorities undertook probative efforts to corroborate an informant's claims through independent investigations."[101] Detective Steger, prior to seeking a search warrant, attempted to do just that. Unfortunately his independent investigation did not corroborate Towery's story, but rather undermined it. Officer Steger did not relay to the issuing magistrate that Towery was in federal custody awaiting sentencing when he told his story to investigators. Steger also failed to inform the

[99] Illinois v. Gates, 462 U.S. 213 (1983).
[100] See U.S. v. McPhearson, 469 F. 3d 518 (6th Cir. 2006).
[101] U.S. v. Weaver, 99 F.3d 1372 (6th Cir. 1996).

> magistrate that Mary Moody was unable to corroborate Towery's claim that the conversation took place in her driveway. Steger left out of his affidavit the fact that he was unable to locate Bradley's body, the well, or any other evidence related to her disappearance despite the fact that Towery's description of the area was so detailed that Officer Bryan testified that he instantly knew the exact location of which Towery spoke.

The Court noted that

> The fact that the affidavit prepared by Steger did not accurately reflect the facts known to him at the time the affidavit was sworn evinces a reckless disregard for the truth. In such circumstances we are required to analyze the affidavit "including the omitted portions and determine whether probable cause still exists."[102]
> When the affidavit is viewed as a whole, taking in the totality of the circumstances and the omitted information, it is not probable cause that is depicted, but rather it is a picture of unreliable and uncorroborated hearsay statements of a federal prisoner hoping to garner favor with the government before being sentenced. Accordingly, we find that the affidavit is insufficient to support a finding of probable cause. Just as the Leon[103] good faith exception does not apply to save a "bare bones" affidavit, it also cannot save an affidavit that contains knowing or reckless falsities.[104] Detective Steger purposely withheld information when he prepared his affidavit. Steger knew that his affidavit was incomplete and misleading to the issuing magistrate, and as such, he cannot be held to have reasonably relied on the search warrant. Accordingly, the Leon good faith exception does not apply to save the December 2 affidavit.

The Court found that any evidence found pursuant to the second warrant must also be suppressed, as well as "any statements given by West after the two searches related to the evidence found." West's case was remanded for further proceedings.

U.S. v. Hawkins
2008 WL 2178104 (6th Cir. Ohio 2008)

FACTS: In June, 2006, Canton (Ohio) officers received information on a large quantity of crack being sold by "Hulk" at his residence. They located the residence as described by an informant and the two vehicles associated with the house, also described by the informant.

Det. Miller contacted the CI to get further information. That CI confirmed the residence and the other information given by the first informant, and also identified Eve Ramsey as living at the residence and owning one of the suspect vehicles. The officers then had the CI do a controlled buy, and he made a buy, under the direction of supervision of the officers. He identified Hawkins from a photo array as the person he knew as Hulk. A few days later, he made a second buy.

On July 19, the officers got a no-knock search warrant, using additional information they had gleaned about Hawkins, specifically concerning his violent criminal history. On July 21, they did a search, finding

[102] U.S. v. Atkin, 107 F.3d 1213, 1217 (6th Cir. 1997).
[103] U.S. v. Leon, 468 U.S. 897 (1984).
[104] McPhearson, supra.

substantial drugs, cash, and various paraphernalia. Hawkins was charged with trafficking and requested suppression. After that was denied, Hawkins took a conditional guilty plea, and appealed.

ISSUE: May corroboration substitute for a statement of CI reliability?

HOLDING: Yes

DISCUSSION: Hawkins argued that the CI "was not a proven, reliable, or credible source." He also argued that "several statements in the warrant affidavit were false, and therefore, he was entitled to a [Franks] hearing."[105] The trial court had determined that Hawkins' argument for mistaken identify did not meet the standard of reckless disregard, and that it is insufficient for a defendant to simply argue that statements in a warrant are false. The trial court refused to look beyond the four corners of the warrant, although it had permitted Hawkins to call the officers to testify. The Court had then denied the motion.

Hawkins argued that the statements made by Det. Miller showed that he had made false statements - as an example, that he testified that he drove around the block after dropping off the CI, in contravention to his statement in the warrant that he watched the CI enter the house. The Court, however, noted that Hawkins had mischaracterized the warrant. The warrant stated that:

> *Det. Miller "followed [CI#403] to the residence of 2319 3rd St. NW and had [CI#403] observed enter and exit the residence by members of the Vice/Criminal Intelligence Unit. [CI#403] was never out of visual contact during the transaction other than when [CI#403] was inside the residence." Nowhere in the warrant affidavit does Det. Miller state that he personally observed Hawkins entering the residence; rather, he states that other officers in the Vice/Criminal Intelligence Unit observed CI#403 enter and exit the residence. Therefore, Hawkins' suggestions to the contrary are simply wrong and without support.*

The court agreed that when a CI is not verified as reliable by the affiant, it is essential that the police corroborate the information provided. As such, in this case, although there were no statements in the warrant affidavit about the reliability of the confidential informant, based on the controlled buy the court concluded that the informant's information was sufficiently corroborated and, thus, the warrant affidavit provided sufficient probable cause.[106] In this case, the Court found that the totality of the circumstances "created a fair probability that drugs or other evidence would be found at Hawkins' residence."

Hawkins's plea was upheld.

U.S. v. Fowler
535 F.3d 408 (6th Circ. KY 2008)

FACTS: Fowler was a member of the Louisville Outlaw Motorcycle Club. On Nov. 5, 2002, BATF officers in Louisville got a search warrant for Fowler's residence. They decided it would be safer to initiate the search when the Fowlers (husband and wife) were not home, so they waited until they were observed leaving, on Nov. 7. Officers made a traffic stop on the vehicle, and Jason Fowler was "taken out of the car." He was told about the search warrant and asked if he'd like to be present. He said that he would, so he

[105] See Franks v. Delaware, 438 U.S. 154 (1978).
[106] See U.S. v. Coffee, 434 F.3d 887 (6th Cir. 2006).

was transported back to the house in the squad car. He agreed to be handcuffed for the trip. He was left in the car during the search, which "turned up various firearms and a small quantity of methamphetamine." At some point he was brought into the house and interviewed by Agent McMahan. He was given his rights, and he stated that he didn't know if he needed his attorney. The Agent told Fowler that was his decision to make. Ultimately, Fowler waived his rights and spoke to the agents about what they had found. He got a phone call during that time, from someone who wanted to deliver methamphetamine. Fowler arranged for the delivery later that day, and the two men delivered 1484 grams (approximately 53 ounces).

Fowler was indicted, and eventually convicted on RICO, firearms and drug charges. He appealed.

ISSUE: Does an assertion in a warrant that an officer has used a CI for some time indicate that person is credible?

HOLDING: Yes

DISCUSSION: Fowler argued that the "warrant was not supported by probable cause because it was issued on the basis of information provided by a [CI] of unknown reliability." The Court, however, while noting that "the affidavit does not explicitly vouch for the {CI's] credibility," it did state that the agent had worked with the CI for some time. From that, "[o]ne can logically infer … that the confidential informant was credible and reliable." In addition, the affidavit indicated that the agent "had independently verified much of the information provided by the {CI]." He argued that the omission that the CI was involved in "ongoing criminal activity" damaged the CI's veracity, but the Court noted that the affidavit did indicate that the CI "had sold methamphetamine to Fowler." Further, the Court noted that "it is no surprise that most confidential informants are engaged in some sort of criminal activity," and it "would unduly hamper law enforcement if information from such persons were considered to be incredible simply because of their criminal status."

The Court also addressed Fowler's assertions that his post-arrest statements should have been excluded. The court found neither a Sixth Amendment nor a Fifth Amendment violation. There was no Sixth Amendment violation because at the time he was questioned, there had been "no adversarial judicial proceedings … initiated against Fowler at the time he was questioned …" Further, when he was given Miranda, he waived his rights, and there was no indication that his statements, or his waiver, were coerced or involuntary. He claimed that the government had promised leniency, but he produced "nothing other than his own assertions to prove the existence of such false promises." Officers involved in the case, from both Kentucky and Indiana, testified that no promises of leniency were made. Since at this stage of the proceeding, the presumption must be with the government's position, the trial court's findings "can only be reversed if they are clearly erroneous."

The Court upheld Fowler's conviction, but remanded the case back for resentencing because of errors in that process.

U.S. v. Taylor
2008 WL 49974986th Cir. 2008

FACTS: On August 31, 2006, Grand Rapids (MI) officers obtained a search warrant on Taylor's home. In her affidavit, Officer O'Brien, who had 13 years of experience, 11 in the Vice Unit, related the following:

In this regard your affiant met with a reliable and credible informant 1523 who indicated from personal knowledge that cocaine could be purchased at the above described premises. This informant from personal knowledge is familiar with the characteristics of cocaine, [and] the manner in which cocaine is used and sold in the community. When your affiant met with the informant, the informant directed your affiant to the above described premise[s]. The informant had been at the above described premises within the last 48 hours and observed a quantity of cocaine being sold there. The cocaine as described by the informant is being sold for various amounts of US currency.

The cocaine is easily concealed on or about the person. When the informant left the premise[s], there were additional amounts of cocaine on the premises being offered for sale. The person(s) selling the cocaine is/are described as: B/M, Marious Taylor, 5'9"/165, 4-25-78. Your affiant has known the informant one month. The informant has made 4 controlled purchases of controlled substances. All of these controlled purchases tested positive for the controlled substance that was purchased. The informant has supplied information on 5 drug traffickers in the community said information having been verified by your affiant through police records, personal
observations, other police officers, and other reliable informants.

Officers found crack cocaine, a scale, cash and a firearm, and Taylor was indicted on federal weapons and drug trafficking charges. Taylor requested suppression and was denied. He then took a conditional guilty plea, and appealed.

ISSUE: Is simply stating that a CI has proved reliable in the past sufficient?

HOLDING: Yes (but see discussion)

DISCUSSION: Taylor argued that the information supporting the affidavit was not corroborated and that the informant was not shown to be reliable. Although the Court agreed that "[c]orroboration of an informant's tip through the officer's independent investigative work can be a critical factor in some cases in determining whether an affidavit based on a confidential informant's tip provides a substantial basis for finding probable cause, such as where the affidavit is merely a boilerplate form." However, it was not critical that every statement be corroborated for the affidavit to be upheld. The Court noted that "Sixth Circuit precedent "clearly establishes that the affiant need only specify that the confidential informant has given accurate information in the past to qualify as reliable."[107]

Further, the Court noted that the "informant was not an anonymous source whose statements required independent corroboration, but rather was a person known to the affiant officer." The Court agreed that the informant's short, but successful, career also gave it an indicia of reliability.

He also argued that the affidavit failed to establish that drugs would be found in the residence, but the Court noted that the affidavit stated that "the informant stated from personal knowledge that cocaine could

[107] U.S. v. Greene, 250 F.3d 471, 480 (6th Cir. 2001); see U.S. v. Allen, 211 F.3d 970, 976 (6 Cir. 2000)(en banc)(noting that affiant could attest "with some detail" that the informant provided reliable information in the past).

be purchased at the residence" and that he was quite familiar with cocaine. The informant identified that he'd been at the residence in the previous 48 hours and had observed cocaine being sold.

The Court found that the "affidavit in the instant case was not a 'bare bones' affidavit." The affidavit did more than simply state suspicions, or conclusions; it provided some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." Further, it "included information that an informant who had personal knowledge about the characteristics of cocaine and the manner in which it is used and sold, and who had participated in controlled purchases of controlled substances which tested positive for the substances purchased, had personally observed cocaine being sold at the defendant's residence within the forty-eight hours preceding the issuance of the warrant." The Court found a "clear nexus between the illegal activity and the premises to be searched."

The Court upheld Taylor's plea.

U.S. v. Franklin
2008 WL 2611337 (6th Cir. 2008)

FACTS: On Oct. 19, 2005, Officer Dyer (Jackson, TN, PD) was seeking a search warrant for Franklin's home. He could not find a judge in Madison County (where Jackson is located), because of a judge's conference, but he was able to find a Henderson County judge. That judge agreed to sign the warrant, and it was clearly indicated that he was a General Sessions judge from Henderson, signing under "interchange" - which apparently indicated a form of mutual aid between judges. However, it was later argued at a suppression hearing that the judge did not properly sign the warrant, as he wasn't sitting by interchange nor was he in the county at the time he signed. The trial court found that the Henderson judge had the authority to sign the warrant. Franklin was charged with weapons offenses as a result of the subsequent search.

Franklin took a conditional guilty plea, and appealed.

ISSUE: Is a warrant that is invalid under state law, but which meets the minimum requirements under federal law, valid for federal purposes?

HOLDING: Yes

DISCUSSION: The Court noted that the actual legality, or illegality, of the warrant was immaterial, since the case was being tried in federal court. The Court found that "the warrant … was granted in compliance with the requirements of the Fourth Amendment," and as such, "the warrant was valid." The Court found that the only Constitutional requirement of a warrant is that it be issued by a "neutral and detached magistrate." Nothing suggests that the Henderson judge was not such.

The Court found the warrant was valid under federal law, and its possible invalidity under state law was immaterial.

U.S. v. Wagner
2008 WL 3271461 (6th Cir. 2008)

FACTS: Around Sept. 3, 2006, the BATF, with the help of a CI, "arranged for a controlled buy of crack cocaine from Wagner." The CI also stated that he had seen Wagner with guns, identified him in a photo, and gave them his address and vehicle information. The agents independently corroborated the information, as well.

Around Sept. 6, the CI made another, recorded, buy from Wagner of crack cocaine.

On Sept. 8, BATF requested a warrant, and on Sept. 13, they went to Wagner's apartment to execute it. They "encountered Wagner in the parking lot, stopped him, and ordered him back into the apartment." They "handcuffed Wagner and detained him for the duration of the search, which turned up a .38-caliber revolver, ammunition, a 16-gauge sawed-off shotgun, and miscellaneous drugs and drug trafficking paraphernalia."

Wagner, a convicted felon, was indicted on various weapons offenses. Wagner requested suppression, and when that was denied, he took a conditional guilty plea. He then appealed.

ISSUE: May a resident be detained during the execution of a search warrant?

HOLDING: Yes

DISCUSSION: Wagner argued that his detention, during the execution of the search warrant, was unconstitutional. (He claimed he was "arrested" … "in the parking lot of his apartment complex without probable cause.") The Court stated that "[w]hen officers execute a search warrant at a suspect's home, they enjoy an implicit, limited authority to detain the occupants at the premises – even with handcuffs – without making an arrest."[108] Further, "[a]n officer's right to detain a suspect who is in the process of leaving his home when the officer arrives to execute a valid search warrant is not limited by the suspect's geographic proximity to the house; rather, police may detain a suspect as soon as is practicable under the circumstances."[109] In Wagner's case, the Court found the situation was a detention, not an arrest, and that there was "no violation of the Fourth Amendment arising out of these events."

Wagner's plea was upheld.

SEARCH & SEIZURE - PLAIN VIEW

U.S. v. Williams
2008 WL 3271251 (6th Cir. 2008)

FACTS: On Sept. 28, 2003, Sgt. Gibbons (Dyer County, TN, SO) responded to a domestic call at Williams' mobile home. As he arrived, he saw Taylor, Williams' girlfriend leaving. (He recognized her from prior calls.) Taylor told him that she and Williams had fought over his infidelity, and that "Williams threw her over a counter in the kitchen." She stated she'd escaped from the house and that Williams had followed

[108] Muehler v. Mena, 544 U.S. 93 (2005).
[109] U.S. v. Cochran, 939 F.2d 337 (6th Cir. 1991).

her with a knife, and that she'd "then tried to run over Williams with her car," but was unsuccessful, instead striking his car.

Gibbons arrested Taylor for "aggravated domestic assault" and placed her in the cruiser. She stated that if she was going to jail, so was Williams, and told Sgt. Gibbons that there were drugs in the house. He summoned a sheriff's office investigator, who proceeded to the scene, joining two other officers who were already there, talking to Williams. Williams stated that Taylor shouldn't be going to jail, as he was the one that hit her. So, Williams was arrested.

Sgt. Gibbons told Taylor that he needed to enter the house to take pictures, and she handed over the keys. Inside, he saw, in plain view, marijuana and cocaine. Investigator McCreight got a search warrant, but he did not include Gibbons' observations, only Taylor's assertions that there were drugs in the house. In the ensuing search, they found more cocaine and marijuana, and a firearm.

Williams, a convicted felon, was indicted on weapons and drug charges, under both state and federal law. He requested suppression and was denied. Williams was convicted, and appealed.

ISSUE: May a search be based upon consent from someone with "apparent authority?"

HOLDING: Yes

DISCUSSION: The trial court had ruled that Taylor had apparent authority to give consent for the officers to enter the house, and that the officers acted in good faith on her representation that she had the ability to give consent. The trial court had also upheld the warrant. On appeal, Williams abandoned the issue of the authority, and focused on his assertion that the search warrant did not provide sufficient probable cause. The Court agreed that "probable cause existed within the four corners of the affidavit to support issuance of the search warrant for the drugs" - even excluding "extraneous statements made by officers (apparently to the judge) regarding their observation of drugs in plain view."

The Court noted that it had held in the past that "[w]hen a witness has seen evidence in a specific location in the immediate past, and is willing to be named in the affidavit, the totality of the circumstances presents a substantial basis for conducting a search for that evidence."[110] In addition, the seizure of the gun was appropriate, since the officers knew Williams was a convicted felon. (Thus, the nature of the contraband, the gun, was immediately incriminating.)

The Court upheld the denial of the suppression.

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

U.S. v. Nichols
512 F.3d 789 (6th Cir. 2008)

FACTS: On Sept. 9, 2004, Officers Wigginton and Deslauriers (Metro Nashville PD) were patrolling. Officer Wigginton spotted a vehicle that "kind of grabbed [his] attention" and he radioed Officer Deslauriers,

[110] U.S. v. Pelham, 801 F.2d 875 (6th Cir. 1986)

and gave him the tag. The NCIC check indicated nothing unusual and the officers continued patrolling. Officer Deslauriers passed by the suspect vehicle and "saw the men trying to avoid him as well." (Officer Wiggington later testified that the "people were kind of standing around it and didn't want to hang around, they avoided me.") The state vehicle check finally returned and they learned that the vehicle was registered to "Elbert Nichols." A further check on that name indicated Nichols had a robbery warrant outstanding. Since they had seen a man fitting the very general description (race and gender) of Nichols near the car, the officers "positioned themselves to watch the vehicle." When it drove away, they made a traffic stop. As they approached on foot, the "could see that the passenger was quite agitated and kept yelling at the driver to 'stomp it' or 'punch it.'" Officer Deslauriers recognized the passenger as Nichols "from the mug shot that had come up on his computer system." The driver was compliant, and Nichols was arrested. He was given his Miranda rights and informed of the warrant, but he denied that he was Nichols.

Officer Deslauriers found a loaded handgun in a locked glovebox. Nichols was further confronted with the weapon, and continued to deny his identity. However, as the officer was working on the arrest paperwork, Nichols finally admitted his identity, but still "insisted that the robbery warrants were a mistake." He refused any further interviews.

Nichols was charged with the weapon, as he was a felon.[111] He requested suppression, but was denied. He then took a conditional guilty plea, and appealed.

ISSUE: May a locked glovebox be searched incident to arrest of an occupant of the vehicle, when the suspect is in custody and already secured in a separate vehicle?

HOLDING: Yes

DISCUSSION: Nichols first argued that "Officer Deslaurier's decision to run a warrant check on the name 'Elbert Nichols' was motivated by race, claiming that Officer Deslauriers presumed Nichols to be black." The Court, while agreeing with court precedent that "selective enforcement of the law based on a suspect's race may violate the Fourteenth Amendment," did not agree that suppression was necessarily appropriate. The Court looked to Whren v. U.S.[112] and Hudson v. Michigan[113] and stated that if anything, a claim under 42 U.S.C. § *might* be the appropriate remedy, rather than a suppression motion. However, the Court noted, "there was no intrusion at all on Nichols's personal liberties by the initial actions of the officer" - "no search, no seizure, and only the use of the officer's powers of observation from a place where he had a right to be, and his obtaining of information lawfully in the possession of the state." Further, the Court noted that "Nichols cites no direct evidence of discrimination in his case and only the barest of circumstantial evidence." (The Court noted that the officer was never "specifically asked why he decided to check for outstanding warrants..." during the suppression hearing, but the Court noted that his reason for doing so was "reasonably clear" - the suspicious behavior of the men near the vehicle.) Although Nichols argued that the behavior did not rise to the level of "reasonable suspicion," they found that unnecessary - that "indeed, it did not require any suspicion at all" to run the computer check. The Court upheld the computer check.

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[111] The robbery charges are not part of this summary.
[112] 517 U.S. 806 (1996).
[113] 126 S.Ct. 2159 (2006).

Nichols next argued that the search of the locked glovebox went beyond the permissible scope of a search incident to arrest. The Court looked to New York v. Belton[114] for guidance, and noted that "[a]lthough it certainly seems impossible that Nichols could have, in a Houdini-like fashion, extricated himself from his handcuffs and escaped the patrol car to retrieve a weapon from a locked glove box," that current case law indicates that the search-incident extends even to items inside the vehicle when the suspect is still in custody. The Court upheld the search of the glove box, even though it was locked.

Finally, Nichols argued that the "inculpatory statements he made to Officer Deslauriers shortly after his arrest" should have been suppressed. Even though Nichols never expressly waived his rights, he did so by implication.

Nichols plea was upheld.

SEARCH & SEIZURE - SWEEP SEARCH

U.S. v. Lanier (Walter)
2008 WL 2744601 (6th Cir. 2008)

FACTS: On July 12, 2005, members of Cleveland's (Ohio) SWAT team, along with Det. Ezzo, went to Agnes Lanier's residence to execute an arrest warrant for Keith Lanier, Walter Lanier's uncle. Agnes told them that Keith was not present but allowed them to enter. Pursuant to the stated procedures, the officers handcuffed those present in the house and brought them together. Once the house was secured, the detective with the warrant was to come inside to identify the named individual.

Following that process, Officer Richardson found Walter Lanier asleep, woke him and handcuffed him. He saw a gun "protruding from [Lanier's] pillow" and body armor in the corner. After Lanier was taken from the room, the officer found ammunition under the mattress, which was, in this case, sitting directly on the floor, without a frame. (The officer later stated that it was "'common practice' to always search under mattresses to ensure that no one is hiding underneath" and that someone could hide in a set of box springs.)

Walter was charged with possession of the firearm, he was a convicted felon, and the body armor, both under federal law.[115] He requested suppression, and the Court agreed to suppression of a confession (not discussed in the body of the opinion) but denied suppression of the seized evidence, the gun and the ammunition. Lanier took a conditional guilty plea, and appealed.

ISSUE: May officers sweep a residence while serving an arrest warrant?

HOLDING: Yes

DISCUSSION: The Court noted that, although "an arrest warrant is not a search warrant,"[116] that when executing arrest warrants, "officers may 'as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which

[114] 453 U.S. 454 (1981).
[115] 18 U.S.C. §931.
[116] U.S. v. Jones, 641 F.2d 425 (6th Cir. 1981).

an attack could be immediately launched.'"[117] The Court limited that search "only to a cursory inspection of those spaces where a person may be found."[118]

The Court agreed that the weapon, and the body armor, were both in plain view, despite Walter Lanier's contention that they were not. Further, the Court noted that the trial court had "credited Officer Richardson's testimony about looking underneath the mattress and box springs as part of his protective sweep." That Court further stated that:

> While it is logical to question whether or not there is a substantial probability that one would be hiding under a box spring lying on the floor, Officer Richardson testified that such a procedure is "common practice," and that there is "plenty of room" for someone to hide under a box spring.

In addition, the Court found at least one other federal court had found looking under a mattress sitting directly on the floor was reasonable.

The Court affirmed the decision of the trial court.

SEARCH & SEIZURE – CIVILIAN SEARCH

U.S. v. Richards
2008 WL 4935965 (6th Cir. 2008)

FACTS: Richards was the lessee of a storage unit in Clarksville, Tennessee. On February 21, 2000, an employee, Berg discovered the lock had been cut on the unit, so he entered (as permitted by the lease) to determine what had happened. He opened a suitcase inside the unit and found child pornography. The owner was notified. He told Berg to put another lock on it and that he (the owner) would investigate further when he returned to town. When Weir, the owner, arrived, he inspected the unit and confirmed what Berg had found. He called his attorney, who instructed him to call the police.

On March 2, the police were called, and Officer Outlaw responded. Weir escorted the officer to the unit and unlocked the door, Outlaw looked inside and "Weir lifted the lid of the suitcase," showing Outlaw what he'd found. Weir left the unit unlocked and other officers also inspected the unit, but did not exceed the scope of the search originally made by Berg and Weir.

Det. Crabbe, who had viewed the material, got a search warrant that evening, and the officers searched the unit completely. More child pornography was found, so they further obtained a warrant for Richards's apartment. More illegal pornography was found there. The FBI took over the case, and charged Richards.

Richards requested suppression, which was denied. Richards took a conditional guilty plea, and appealed.

ISSUE: May officers search in the same areas that a civilian search has already revealed contraband?

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[117] Maryland v. Buie, 494 U.S. 325(1990).
[118] Id.

HOLDING: Yes

DISCUSSION: Richards argued that he was not in constructive possession of the material because Berg replaced the cut-off lock with one to which Richards lacked a key. The Court, however, found that Berg was simply following standard protocol when he did so.

Richards also argued that the officers committed an impermissible search, but the Court found that the lawful private search, "may be followed by a government search under certain circumstances."[119] In this case, the Court found that the initial search by the storage unit owner/employee was permitted, and that Outlaw, and the other officers, "merely confirmed what was found by the private searchers and, therefore, did not violate any Fourth Amendment protections." With those observations, the officers properly obtained a warrant to search further.

Richards' plea was affirmed.

SEARCH & SEIZURE - SEIZURE

U.S. v. McCauley
548 F.3d 440 (6th Cir. 2008)

FACTS: On June 19, 2006, Dep. Phillips (Montgomery County SO, Ohio) was dispatched to recover a stolen vehicle in Dayton. While he was there, a vehicle pulled up behind him, with a couple inside. Mitchell was hysterial and crying and told the deputy that a "man she knew had just chased her with a gun." She identified his car and that he lived on a nearby street. Dep. Phillips put out a dispatch with the information he had been given.

Officer Helthinstine (Five Rivers Metro Parks ranger) heard the broadcast, and being nearby, stopped on the street where the suspect was believed to live. A few seconds later, a vehicle matching the description drove by, and the officer chased the vehicle until it pulled into a driveway and into a garage. Before the door closed behind the vehicle, the officer spotted a black male (McCauley) get out. The man ignored the officer's demands to stop and went into the house.

The garage door opened a few seconds later, and Denise McCauley got out on the driver's side. She identified the man who'd gone inside as her husband, Thomas. McCauley emerged from the house and approached the officer, yelling and cursing. Officer Helthinstine held him at gunpoint until back-up arrived and arrested McCauley.

Det. Snyder arrived and got consent from Denise McCauley to search the house. He and Officer Helthinstine entered, and immediately saw narcotics sitting in plain view on top of a bar. She also gave consent for another officer to search the vehicle, stating that she owned the car, and they found a firearm on the back seat.

McCauley admitted, under questioning, to possessing the gun, and was indicted, as he was a felon. He requested suppression, and was denied. He took a conditional guilty plea, and appealed.

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[119] See U.S. v. Jacobsen, 466 U.S. 109 (1984); U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

ISSUE: Is a person seized when a gun is pointed at them?

HOLDING: Only if they submit

DISCUSSION: First, the Court discussed the initial seizure, and noted that it did not occur until McCauley submitted to a show of authority. Officer Helthinstine had, at the time of the actual seizure, more than adequate reasonable suspicion to support that seizure. The Court specifically noted that the original sketchy information was enhanced by McCauley's actions in fleeing the scene.

Further the Court agreed that Denise McCauley gave valid consent, as it was both voluntary and by someone with authority over the house and vehicle. (She was described by the officers as cooperative.)

McCauley's plea was upheld.

SEARCH & SEIZURE - COMPUTER CRIME

U.S. v. Hodson
2008 WL 4273085 (6th Cir KY 2008)

FACTS: On Oct. 7, 2005, Det. Passano (Passaic County, NJ, SD) was online under a false persona, searching for sexual predators. He represented himself as a 12-year -old boy. He was contacted by an individual and they traded instant messages (IMs) for almost an hour. The individual provided personal information, which included that he was an adult male who lived in Kentucky, and also that "he was a homosexual who favored young boys" and that he liked looking at his own two boys (8 and 11) naked. He also claimed to have had sex with a 7 year old nephew. He "expressed his desire to perform oral sex on the presumptive" 12 year old (Passano) and "his willingness to travel to New Jersey to do so."

Det. Passano subpoenaed AOL and got back information that led to Hodson, who lived in Middlesboro, Kentucky. He contacted Det. Pickrell of KSP, who verified some of the information, including that Hodson had only one child and no known nephews. On Jan 19, 2006, she prepared an affidavit "based entirely on the AOL information, the internet conversation and her partial substantiation thereof" for a search warrant for Hodson's residence. The warrant specifically requested:

> *Any and all computers, hard drives, zip drives, data bases, software, diskettes, floppy disks, CDs, printers and/or any other electronic devices and/or their components of any kind capable of printing, recording, storing, transferring and/or disseminating documents, notes, calculations, schedules, spread sheets and/or any other information and/or data of any kind including any and all books or manuals that may contain sexually explicit reproductions of a child's image, voice, or handwriting. Including sexually explicit photographs, negatives, slides, magazines, movies, videotapes, audiotapes, and picture or computer generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct or visual depiction of a child including undeveloped film or videotape and data stored on computer disk of by electronic means which is capable of conversion into a visual image or material relating to children that serves a sexual purpose for a given individual. Including toys, games, drawings,*

fantasy writings, diaries, souvenirs, sexual aids, manuals, letters, books about children, psychological books on pedophilia and ordinary photographs of children.

Visually explicit images, whether on paper or its equivalent stored in electronic, magnetic or other computer formats including such images as stored within computer storage devices and other computer media depicting any child known or reasonably believed to be under the age of 18 years of age, in which the child is actually or by simulation engaged in any act of sexual intercourse with any person or animal; Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus and sex organs of the child and the sex organs of another person or animal; Actually or by simulation engaged in any act of masturbation; Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal; Actually or by simulation engaged in any act of excretion or urination within a sexual context; Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person female, a fully or partially developed breast of a child.

Computer Systems, including, but not limited to system components, input devices, output devices, data storage devices, data transmission devices and network devices; and Computer media; and Other material relating to computer systems and the internet including, but not limited to, documentation, operating system software, application or access program disks, manuals, books, brochures, or notes; and Computer access codes, usernames, log files, configuration files, and passwords; and any and all evidence related to ownership, control or use of the safe deposit box, files, logs, and accounts.

I am further requesting authorization to remove the computer system(s), and related computer peripherals, storage devices, software and media to an off-site controlled environment to perform the search for the items described above.

The Court later found it significant that "that this depiction of the "places to be searched and things to be seized" describes and directs a search for evidence of child *pornography*, with nary a hint of child *molestation*."

The affidavit also included Det. Pickrell's probable cause for the affidavit. Again the Court noted that "the statement of probable cause contains no information whatsoever with regard to Hodson's engaging in any aspect of child pornography, or any basis for believing that individuals who engage in child molestation are likely also to possess child pornography."

Det. Pickrell's request was granted, and the search resulted in the seizure of "two computers, a web cam, a DVD, a CD, a floppy disk, four VHS tapes, and an envelope containing miscellaneous papers." Upon later investigation, "forensic experts searched the hard drives of the two computers and discovered, buried in the hard drives, between ten and 50 pictures of child pornography that had been downloaded on December 6, 2002, but which had later been deleted and were, as of that time, inaccessible to Hodson. None of the images were of Hodson's son and no evidence was seized or subsequently discovered that would support any charge against Hodson of child molestation." Hodson was, however, charged for the possession of

the child pornography. He moved for suppression. That was denied upon recommendation of the magistrate judge. Hodson took a conditional guilty plea, and appealed.

ISSUE: Is a warrant solely for child pornography valid when the suspect is believed to be engaged only in child sexual abuse, with no indication of child pornography being involved?

HOLDING: No

DISCUSSION: Hodson argued that the information in the affidavit was stale, that there was no nexus between the probable cause and the place to be searched, and between the evidence and any connection to child pornography. The trial court had found that the inference between an individual's interest in children as sexual partners and that individual's possession of child pornography was reasonable.

The magistrate judge had agreed that "on the whole, the warrant was defective because there was neither probable cause to search for child pornography nor a molestation-pornography nexus, but that the officer's good faith excused this defect." The Sixth Circuit panel agreed that it was "beyond dispute that the warrant was defective for lack of probable cause - Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography)." As such, the Court discussed whether the Leon[120] good faith exception applied in this case "whether the faceless, nameless "reasonably well trained officer" in the field, upon looking at this warrant, would have realized that the search described (for evidence of the crime of child pornography) did not match the probable cause described (that evidence would be found of a different crime, namely, child molestation) and therefore the search was illegal, despite the magistrate's decision to the contrary."

The Court concluded that such an officer would have realized that the warrant was invalid - and that "it was unreasonable for the officer executing the warrant in this case to believe that probable cause existed to search Hodson's computers for child pornography based solely on a suspicion — albeit a suspicion triggered by Hodson's computer use — that Hodson had engaged in child molestation." Even though Det. Pickrell had "specialized, subjective knowledge about these kinds of criminal offenses," such subjective good faith was not sufficient.

The Court reversed the denial of the motion to suppress, and remanded the case to the trial court for further proceedings consistent with the decision.

U.S. v. Terry
522 F.3d 645 (6th Cir. 2008)

FACTS: On October 14, 2004, AOL "intercepted two e-mail messages containing a known child pornography image." AOL transmitted the messages and all related information to the National Center for Missing and Exploited Children (NCMEC), and they, in turn, contacted the Immigration and Customs Enforcement (ICE). ICE them issued a subpoena to AOL for information concerning the individual behind the screen name listed in the messages, and AOL identified the individual as Roy Terry, who lived in Cincinnati, Ohio. ICE confirmed Terry's address with the Post Office.

[120] U.S. v. Leon, 468 U.S. 897 (1984)

ICE obtained a warrant for that address and it was executed on March 21, 2005. The Court noted that ICE was interested not in Roy Terry, but in Brent Terry, Roy's adult son, "because the e-mail account used to send the image was registered specifically to the younger Terry." During the search, Roy Terry indicated that his son lived at a separate address, which he rented from his father, and confirmed his son's email address name. ICE then got a warrant for that address, and collected a laptop computer, three hard drives and "various external media." They found 123 images and eight videos of minors engaged in sexually explicit conduct.

Brent Terry was charged with possession of the images. He requested suppression, which was denied, and then took a conditional guilty plea. He appealed.

ISSUE: Should detailed information (such as IP addresses) be included in computer search warrants?

HOLDING: Yes

DISCUSSION: Terry argued that "there was an insufficient nexus to connect the intercepted child pornography image to his home computer, arguing that the AOL e-mail account used to send the illicit image could have been access from any computer with an Internet connection." Given what they described in the search warrant, however, that two emails were sent from a specific screen name, that the name was registered to Brent Terry, that Brent Terry lived at a specific address and was known to have a computer at that address, the Court found it "require[d] no great leap of logic to conclude that the computer in Terry's home was probably used to send the intercepted messages." Although the court admitted there might be other possibilities, such as a hacker, it noted that "probable cause does not require 'near certainty,' only a 'fair probability.'"

The Court noted that Terry argued that "there was no IP information either to tie his computer to the e-mail messages, or even to limit the possible number of computers that could have been used to send the message." Although the court noted that "any IP or other information that could have more specifically tied Terry's home computer to the e-mail messages would certainly have been welcome," it was satisfied that the information provided was sufficient to support the likelihood that the images would be found on Terry's home computer.

The Court, however, was "somewhat troubled by the fact that the *content* of the incriminating e-mail messages was apparently not preserved." (Apparently, the image itself was, but not the message that accompanied it.) Terry argued that without that, he could not successfully argue that his message might have been simply a reply to an unsolicited child pornography message. The Court, however, noted that "absent any evidence that innocent persons frequently receive and reply to unsolicited child pornography spam (and in a way that would produce the computer traces in this case)," it could not say that the search warrant was issued inappropriately.

Terry's plea was affirmed.

SEARCH & SEIZURE - TERRY

U.S. v. Pearce & Johnson
531 F.3d 374 (6th Circ. 2008)

FACTS: On Jan. 14, 2005, Cleveland PD and Cleveland Metro Housing Authority "were conducting a special detail in the area surrounding … housing projects in northeast Cleveland." The investigation focused on the Mount Carmel Deli because of increased drug trafficking and a shooting in that area.

At about 8:15 p.m., Johnson (driving) and Pearce (the passenger) parked across the street from the Deli. Officer Shaughnessy, of the CMHA, arrived to do a "planned police sweep" of the street, and parked just behind the Johnson car. He saw Pearce "leaning slightly forward" as Johnson was getting out. Johnson, spotting Shaughnessy, "kind of hunched over a little bit, and he stuck his right hand into the small of his back at his waistline" – as he backed away from the officer and toward the front of the car. Thinking he was reaching for a gun, "Officer Shaughnessy immediately drew his own gun and ordered Johnson to show his hands and walk toward the police cruiser."

Other officers arrived, including CPD Officer Svoboda. When Johnson did not comply with Shaughnessy's orders to "show his hands," Officer Svoboda "also drew his gun and advanced toward Johnson." Johnson continued to keep his hands at his back, out of sight. Eventually, with the addition of the second officer, however, "Johnson complied … and moved toward Officer Shaughnessy who began to frisk Johnson in search of weapons." During the frisk, he "recovered nine small plastic bags containing marijuana."

Officer Svoboda walked toward the car, which was not occupied. (At some point, Pearce had also gotten out.) Glancing inside, he saw "a magazine or clip from a gun laying on the passenger floorboard." Svoboda shouted "gun" and Shaughnessy immediately handcuffed Johnson. (Pearce was being detained by other officers at the time.) They searched the car and found two handguns, one each under both the driver's and passenger seats. Ammunition and cocaine were also found in the car.

Johnson admitted he owned one of the guns, the one found under the driver's seat, both to Officer Shaughnessy and later to Agent Arone (BATF). Pearce did not admit to owning either gun. Both men were charged for the guns, as both were convicted felons. Both men filed for suppression, and were denied. Both were convicted of being felons in possession. Both then appealed.

ISSUE: May an individual be searched when they exhibit behaviors that suggest they may be carrying a weapon?

HOLDING: Yes

DISCUSSION: Johnson (and Pearce) argued that the original contact was an unlawful seizure. The Court reviewed the history of the issue and applied it to the admitted facts in the case. The Court found the "brief investigatory detention of Johnson" was permitted, as "Officer Shaughnessy's observations provided a sufficient basis for temporarily detaining Johnson to determine whether or not he was actually engaged in wrongdoing." Officer Shaughnessy did not stop Johnson because of his appearance in the suspect area, in fact, he didn't stop him at all. He did respond to Johnson's own behaviors that "reasonably suggested that he might be carrying a weapon." (The government did not argue that Officer Shaughnessy's drawing

his weapon constituted a seizure.) The Court found that the officer has reasonable suspicion to both stop Johnson and to "conduct a protective pat-down to ensure that Johnson was not carrying any weapons." The Court did not address (as Johnson did not, apparently raise the issue) as to whether it was reasonable for the officer to immediately recognize the marijuana as contraband. The Court noted that any evidence uncovered during the encounter was properly admitted, as well.

Both convictions were affirmed.

U.S. v. Young
2008 WL 2001729 (6th Cir. 2008)

FACTS: On the day in question, Officers Gray and Smith later testified that "Young made a 'flagging' gesture toward the officers," and that he "asked the officers [apparently in plainclothes] if they were looking for marijuana.," This took place in a complex known as a drug hot spot. When he realized the two were police officers, however, Young walked away. As a result, the officers stopped and frisked Young, and a gun and marijuana were found.

Young, a felon, was charged, and ultimately convicted. He appealed.

ISSUE: May a person who is suspected of carrying drugs be frisked?

HOLDING: Yes (but see discussion note)

DISCUSSION: The Court ruled that "[o]fficers who stop a person who is "reasonably suspected of carrying drugs" are "entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions."[121] The initial stop, based upon a combination of factors, was also upheld.

Young's conviction was affirmed.

NOTE: This is a federal case, and Kentucky state courts may not rule in exactly the same way, however.

U.S. v. Davis
514 F.3d 596 C.A.6 (Tenn.), 2008

FACTS: On March 9, 2005, Investigator Gilreath and Lt. Fortner (Knoxville, TN, PD) received a call from a CI, to the effect that "Davis was 'posted up[122]'" at a nearby location. The officers were very familiar with the location as a high-crime area. They found Davis where indicated and began surveillance. They observed him drive to a location some three blocks away. Gilreath checked with his unit to discover if Davis had a driver's license, but since he knew Davis as "Melvin Tate" from previous dealings - that was the name and birthdate that he checked. An individual named Tate did come up on the computer search, and that individual was found not to have a valid OL.

The officers moved to intercept Davis, but he was able to drive off before a marked unit could arrive. (The plainclothes officers did not have a vehicle with lights or siren.) Davis stopped at another location,

[121] U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).
[122] The term refers to a "street-level crack dealer stand[ing] in a particular area so that he or she can be approached by buyers."

however, and Gilreath got out and approached him. He asked Davis if he had an OL, and Davis told Gilreath that he did not. Gilreath also spotted "bits of what appeared to be marijuana stuck to the thighs and abdomen area of Davis's pants." Davis was arrested, and during the subsequent search, he was found to have crack cocaine in his sock. After receiving Miranda, Davis decided to become a CI for the FBI and Knoxville PD. He also revealed his legal name to be Davis, at that time, and was found to have a suspended OL in that name.

Between his arrest and August 24, the officers were in contact with each other and with Davis. They talked to Davis about his OL and he indicated that he was trying to get enough money together to get his OL reinstated. Around the middle of August, Gilreath learned that Davis was "starting to get back into the business." On August 24, he received a call from a reliable CI that Davis was in the area where he'd been arrested in March, with two "young girls" in his car. They found him there and saw girls that appeared to be juveniles in the vehicle with him. Again, they called for a marked car to make a stop. They caught up with him in the high school student drop-off lane and approached him. He confirmed he still did not have a license (they had not checked to be sure) and they smelled marijuana smoke in the vehicle. The also saw marijuana on the console. One of the young women in the car stated that Davis "had given her something to hold onto" and produced a baggie of crack cocaine. Davis was arrested. He was eventually charged with drug trafficking and related offenses and requested suppression. When that was denied, he went to trial, was convicted, and then appealed.

ISSUE: Does a reasonable mistake invalidate reasonable suspicion?

HOLDING: No

DISCUSSION: With respect to the first encounter, in March, the Court found that the officers had "specific and articulable facts that gave rise to a reasonable suspicion." Even though the license check was made under Tate rather than Davis, the Court found it reasonable given Investigator Gilbreath's prior knowledge of Davis, including the fact that his mother's name was apparently Tate and earlier booking photos identified him as Tate. As soon as Davis admitted that he did not have a license, the situation changed to a valid detention for an admitted offense.

With respect to the second stop, the Court found it valid even though the officers did not check his OL status. The Court found that the officers had, at the least, reasonable suspicion that Davis was continuing to drive without his license, and that, based upon the tip, that he was using an illegal substance with two juvenile girls. In addition, they had observed some sort of exchange between Davis and one of the girls. Once they approached and spotted the marijuana, the officers had probable cause for an immediate arrest.

The Court upheld the denial of the motion to suppress.

U.S. v. Blair
524 F.3d 740 (6th Cir. 2008)

FACTS: On March 25, 2004, Officer Munday and Holmes (Knoxville, TN, PD) were on surveillance of a residence, which was suspected to be the source of drug trafficking. Officer Munday, undercover, observed subjects making "hand-to-hand drug purchases." During the surveillance, he had a clear view of the house from four doors away.

At about 10:35 p.m., he spotted a man, later identified as Blair, get out of a car at the residence and talk to the owner. Although Munday was familiar with Blair, "he could not recognize Blair from his vantage point." He saw them make what he believed to be a drug transaction. He did not believe he had enough for probable cause, however, so he watched until Blair left the house. Officer Munday observed Blair "roll through a stop sign" and he contacted Holmes (via Nextel walkie-talkie) as to what had occurred, but he did not, specifically, instruct Holmes to make a stop.

Because Holmes could not see the suspect house, he did not know what car Blair was actually driving. However, when he "saw Blair's car approach from the direction of the suspect house," he fell in behind and stopped him for what he told Blair was a "tag-light" violation. He determined that Blair had a valid license and no warrants, but noted that Blair was fidgety and kept reaching under his seat.

Officer Holmes later testified that he was told by Munday immediately upon learning that Blair's license was valid that he (Munday) had observed him in a drug transaction and that he'd committed a traffic offense. However, video evidence suggested he did not learn this for some four minutes after the license check came back valid. Officer Munday had, however, heard Holmes mention Blair's name on the radio, and told him that he'd encountered Blair before, with an assault rifle, and that he'd attempted to flee. Officer Holmes asked his partner to come to the scene of the stop and identify Blair.

During that time, Officer Holmes asked Blair for permission to search the car, and was refused. Officer Holmes told Blair that if he didn't agree, he would call for canine, and was still refused. He returned to his car, called for a canine unit, and then went back to talk to Blair further. Blair questioned Holmes repeatedly as to why he'd been stopped, and during that time, he continued to reach under the seat and toward his ankles. Holmes told him to stop doing that, retreated and called for backup. Blair got out and asked if he could check his tag light, and Holmes thought Blair was preparing to flee. Later evidence indicated the light was working, but Holmes testified it was too dim to reach the license plate.

Officer Munday arrived during that time, as did two other backup officers. Holmes explained to Blair that a dog was on the way, and if the dog did not alert, he was free to go. However, he also said that if the dog did alert, they would have probable cause for a search. When the dog arrived, Blair was instructed to get out. When he reached in a pocket, he was ordered to submit to a patdown, and Holmes felt a lump that he believed, and which was found to be, packages of crack cocaine. Blair was arrested.

Blair was indicted on federal narcotics charges, and moved to suppress. Blair then took a conditional guilty plea, and appealed.

ISSUE: Is a subject's presence in a high crime area late at night sufficient to justify a Terry stop?

HOLDING: No

DISCUSSION: Blair argued that the stop was initially improper, but the Court credited the trial judge's decision to the contrary. The trial court chose to believe Officer Holmes's statement that the light was, if functioning at all, not functioning correctly. (The Court, however, "entertain[ed] serious doubt as to Officer Holmes's justification for the stop, primary because the video evidence shows that the tag-light was fully operational.") However, the trial actually found the stop also valid under Terry v. Ohio, and the appellate court elected to analyze the case based upon the trial court's reasoning.

First, the Court looked at the validity of a Terry stop based upon the officer's knowledge that Blair had just "left a known drug house in a high-crime drug-trafficking area at night." The Court noted, however, that Officer Holmes could not even be certain that Blair was the person that Munday saw leave the house, and he had to have Officer Munday come to the scene of the stop, some six minutes later, to confirm it. The Court considered whether the late hour, and the high-crime reputation of an area, justifies a Terry stop, and found it does not, although it might certainly be combined with other factors to find probable cause. The trial court had also looked to Munday's assertion that he had witnessed a drug transaction. However, because Holmes stated he did not know of that allegation until the stop was made, the Court found that it could not have been a factor in his decision to stop.

The Court also looked at the government's theory that the collective knowledge of the two officers could be congregated. Unlike the case cited in by the prosecution, in this case, however, Officer Holmes did not receive the information Munday had concerning the drug transaction, and as such, could not rely upon the knowledge of his fellow officer to support the stop.

The Court found that Officer Holmes lacked sufficient reasonable suspicion to support the lengthy stop, and as a result, all evidence found as a result of that detention must be suppressed.

SEARCH & SEIZURE - VEHICLE FRISK

U.S. v. Shank
2008 WL 4273129 (6th Circ. 2008)

FACTS: On May 2, 2003, in the late afternoon, Officers Mullins and Barrett (Dayton, OH, PD) were patrolling near a housing complex known for high crime and drug activity. They spotted a Cadillac with windows so darkly tinted as to be illegal. They could tell that the driver was the sole occupant, and apparently male, but that was all. The officers did a traffic stop, and the vehicle stopped in the roadway, rather than pulling to the curb. The officers approached. The driver stated he did not own the car, and that he had no identification, but identified himself as Shank.

Shank was asked to get out, and was frisked, the officers finding only a "wad of cash." They had him sit in the patrol car while they confirmed his identity, and he became "argumentative and nervous." He complied, however. As Barrett operated the in-car computer, Mullins was checking the tint in the window. Barrett confirmed that Shanks had a valid OL and began writing citations for the window tint and other minor offenses. A resident approached and asked that the cars be moved, as they were blocking access. Mullins got into Shanks' car to move it, and he checked the "lunge area" - the places a driver could easily reach. He found a firearm in the glove box and a small amount of crack cocaine in the console. They also realized that Shanks had been associated with a drug distribution network in the past. Shanks was placed under arrest.

Shanks sought suppress, and was denied. He took a conditional guilty plea, and appealed.

ISSUE: May officers frisk a car when they have reasonable suspicion there may be weapons inside?

HOLDING: Yes

DISCUSSION: Shanks first argued that the presumed tint violation was insufficient to support the stop, but the Court quickly dismissed that contention. The Court also agreed that Barrett was still writing the citations when Mullins went to move the car. The Court, however, noted that the most substantial argument was whether Mullins had cause to search the car. The Court examined the situation as a Long frisk, making the analogy that since Shanks was not under arrest, and "would presumably have approached the Cadillac to leave only moments after their traffic violation tickets had been completed and issued to him."

The Court observed that the record showed that the officers had reasonable, articulable suspicion based upon the following:

> (1) a man was observed driving a car with windows tinted so as to make it extremely difficult to detect movement of any occupants within, a violation of Ohio law; (2) the immediate area, notably the housing development the car was entering, was well-known for violent crime including shootings and considerable drug distribution activity; (3) the driver, when approached, was found not wearing a seatbelt, a second violation of Ohio law; (4) the car the man was driving did not belong to him; (5) the man had no driver's license nor any other form of personal identification or vehicle registration, a third violation of Ohio law; (6) the man verbally identified himself with a name that was soon recognized as belonging to a person having past association with cocaine dealing activities; (7) the officers knew that the distribution of drugs often involves weapons possession and use; and (8) the man appeared increasingly nervous, agitated and uncooperative upon being frisked and asked to sit briefly in the police vehicle.

The Court found that "[t]here is … no known numerosity of facts, a minimum of which must be gleaned in sifting the circumstances in order to 'total up' and justify … that the officer had reasonable suspicion to frisk or search pursuant to Terry." In this case, the Court found that the "combined circumstances here permitted the officers to reasonably suspect that Shank presented a danger and might have gained immediate control of a weapon if he approached the car."

The Court found the frisk (and the admission of the subsequent evidence) to be justified, and affirmed the plea.

SEARCH & SEIZURE - CARROLL

U.S. v. Crumb
2008 WL 2906770 (6th Cir. 2008)

FACTS: In the early morning hours of Jan. 27, 2007, Officer Duffy (Lindale, Ohio, PD) saw a vehicle on I-71 speeding and "weaving on and off the shoulder." Officer Duffy (along with Auxiliary Officer Mahon) made a traffic stop. Officer Duffy approached and spoke to Scott, the driver, and noticed the "odor of marijuana emanating from the vehicle." He spotted a "partially smoked marijuana cigarette in an ashtray in the vehicle's center console." Duffy asked both men in the vehicle (Scott and Crumb, the passenger) for ID and also asked for the joint. Both complied and they handed over the joint.

Crumb was found to have two outstanding arrest warrants, so Duffy got him out of the vehicle and patted him down.[123] He found a small bag of marijuana and a small electronic scale. Duffy was handcuffed and secured in the cruiser. Duffy had Scott get out, and realized he had "alcohol on [his] breath." He patted Scott down and found a bag containing smaller bags of marijuana and a speed loader. Scott was secured in the cruiser as well.[124] The officers searched the car and found a loaded revolver on the driver's side of the vehicle. Scott was formally arrested and given Miranda warnings, and he refused to make any statement.

Duffy continued to search the car and found crack cocaine between the console and the driver's seat; Officer Mahon found Ecstasy scattered on the passenger side. They also found, in the trunk, another large bag of marijuana and a pistol. Crumb admitted ownership of the firearm in the trunk.

Both men were charged with possession of the firearms and the drugs, both being convicted felons. They moved for suppression, which the trial court denied. Crumb appealed.

ISSUE: May a marijuana cigarette found inside a car support a Carroll search?

HOLDING: Yes

DISCUSSION: Crumb argued that once the visible joint was seized, that no further search of the vehicle was supported by probable cause. (Although the court didn't say, specifically, Crumb was presumably most interested in suppressing the firearm found in the trunk, for which probable cause would have been needed.)

The Court summarized his argument as having two prongs - whether the initial stop was properly supported by reasonable suspicion, and whether the "subsequent search of the vehicle was supported by probable cause." As Crumb did not raise the first issue, the Court did not address it.

The Court first looked as to whether "Officer Duffy's detection of marijuana in the vehicle, by itself, provided the necessary probable cause to conduct a lawful search of the vehicle." Like the trial court, the Court looked to U.S. v. Garza for direction.[125] The Court emphasized that Garza affirmatively stated that "marijuana odor - and only the marijuana odor - … provid[ed] probable cause to search the interior of the truck" in that case. Subsequent Sixth Circuit cases have followed that precedent.[126] This is also consistent with the line of cases that have held that a trained drug-detection dog will provide the requisite probable cause for a Carroll search.

The Court stated that "[i]t is clear that upon smelling the marijuana odor and seeing the marijuana cigarette, the police officers had reasonable grounds to believe that further evidence of a crime may be found inside the vehicle." The Court upheld Crumb's plea.

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[123] Although the opinion called it a pat-down search, it was apparently a full search incident to arrest.
[124] The opinion suggests that Duffy and Mahon may have been in separate vehicles.
[125] See 10 F.3d 1241 (6th Cir. 1993).
[126] U.S. v. Puckett, 422 F.3d 340 (6th Cir. 2005); U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004); U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002).

U.S. v. Richardson
2008 WL 2967811 (6th Cir. TN, 2008)

FACTS: At about noon, March 30, 2004, Det. Forrester (Collierville, TN, PD) was told by a CI that a "man possessing approximately nine ounces of crack cocaine would arrive" at a specified local motel that evening. With the approval of the detective, the CI made arrangements to make a buy. The CI had worked with the detective before and had proved reliable. He also provided a detailed description of both the man and his vehicle.

At about 5 p.m. that evening, officers began surveillance at the motel. The CI (with Det. Forrester) made several calls to the subject. At about 7:30 p.m., a vehicle matching the CI's description pulled into the motel, drove to the back and parked. By chance, it was only a few spaces from one of the officers doing surveillance. The officers pulled to that car and approached, with weapons drawn. Richardson (the driver) opened the door, and the officers immediately detected a "very strong odor of marijuana."

Det. Cardelli, whose car was parked only a few spaces away, later testified that Richardson's car was not completely blocked in; it could have driven away but it would have been a "tight fit." He stated that they intended only to talk to Richardson and detain him for investigation. Richardson did not immediately exit, when ordered, but did, eventually. Det. Cardelli "grabbed [Richardson's] arm as he was getting out of the car. Richardson fit the description provided by the CI. Noticing "large bulges" in several of Richardson's pockets, Cardelli patted him down and, in both pockets, felt "hard objects." He found a quantity of crack cocaine, marijuana and a wad of cash.

Richardson was placed on the ground and handcuffed. Inside the car, they found scales and a box of plastic sandwich bags. He was indicted for the drugs, and requested suppression. Richardson took a conditional guilty plea, and appealed.

ISSUE: Does the odor of marijuana justify a Carroll search?

HOLDING: Yes

DISCUSSION: Richardson argued that he was seized without probable cause, and that the scope of the search "exceeded the scope of a Terry stop and pat-down without proper justification." The Court, however, found that the CI's tip was sufficient, particularly its prediction as to when and how Richardson would arrive at the motel, to support a Terry detention. Once the officers detected the odor of marijuana, they had sufficient probable cause to search the entire car. The Court also found that Det. Cardelli's representation of the situation, particularly that Richardson "was handcuffed only after the drugs were found in his front pants pocket, was credible." By the time that occurred, Cardelli had already properly frisked and located items that could be weapons, particularly since the CI had stated that he believed the subject might be armed. (The Court placed emphasis on the fact that "[e]very other detail provided by the CI occurred just as the CI had predicted.") Further, Det. Cardelli's seizure of the drugs "before he concluded that [Richardson] was not armed, did not violate the Fourth Amendment for him to seize the drugs discovered during the pat-down."

Richardson's plea was upheld.

SEARCH & SEIZURE – K-9

U.S. v. Torres - Ramos
536 F.3d 542 (6th Cir. 2008)

FACTS: On May 26, 2004, at about 11 a.m., Trooper Coverstone (Ohio State Police) stopped a van for speeding in Shelby County. It bore Washington plates. The trooper asked the driver, Reynaga, to get out. She produced the van's registration, but stated she did not have her OL on her person. Trooper Coverstone asked her about the van's owner, her travel companions and her travel plans. She was nervous and failed to answer basic questions fully. (Specifically, she claimed her Aunt Paula owned the van, but she did not know her last name, claiming she had recently married.)

She went back to the van to get her license as the trooper was checking the van's ownership. Reynaga returned and handed over her California license, along with the license of one of her passengers, Servin. The trooper took Reynaga back to his car and placed her inside. He also asked for a drug dog to be dispatched.

Coverstone began to question Servin, the passenger. His responses differed materially from Reynaga's. As they spoke, the trooper noticed the "strong odor of an air freshener," leading him to believe they were trying to cover up the smell of a narcotic. He learned from dispatch that Servin had a criminal history. He also contacted the DEA[127] and learned that the owner of the van (Paula Demechor) was the subject of a current wiretap.

Some 35 minutes into the stop, Trooper Gilman and Emir (his drug dog) arrived. Emir alerted on the van. The troopers removed everyone, including another defendant, Torres-Ramos, from the van and secured them. They found 9 kilos of cocaine hidden in the vehicle. Trooper Coverstone gave Servin his Miranda warnings, and asked if he would help with a controlled delivery. Servin agreed and the plan was devised.

The delivery was made, and as the recipients left the scene, Trooper Coverstone made a traffic stop and arrested the occupants, "based upon his supervisor's determination that probable cause existed for their arrests."

Reynagos, Servin and Torres-Ramos were all arrested, and demanded suppression of the drugs found in the van. The trial court determined that none of the three had an expectation of privacy in the van, and also concluded that "Coverstone had reasonable suspicion that criminal activity was afoot, thereby permitting him to extend the scope of the initial traffic stop." Servin and Torres-Ramos took conditional guilty pleas; while other defendants in the case went to trial and were convicted. They all appealed.

ISSUE: Is the reliability of a drug dog's training and performance a matter for the jury to decide?

HOLDING: Yes

DISCUSSION: The Court agreed that passengers do not have a reasonable expectation of privacy in a vehicle,[128] but also noted that passengers "may still challenge the stop and detention and argue that the

[127] From the context, he apparently contacted EPIC – the El Paso Intelligence Center.
[128] Illinois v. Rakas, 439 U.S. 128 (1978).

evidence should be suppressed as fruits of illegal activity."[129] As such, the court found that the passengers had standing to contest the stop, but further found that Trooper Coverstone had sufficient reasonable suspicion both for the initial stop, and to extend the stop. The Court evaluated the stop in detail, however, noting that the "issue of when the traffic stop ended is complicated by the fact that Coverstone never began writing a speeding ticket" – he later testified that he intended only to warn the driver. Torres-Ramos and Servin argued that the traffic stop was over when Coverstone called for K-9, but the trial court disagreed. The trial court had reasoned that it was appropriate for Coverstone to continue to investigate the ownership and lawful possession of the van. Once he detected the inconsistencies between the stories, it was appropriate to further extend the stop.

The Sixth Circuit, however, found that the traffic stop ended when "Coverstone put Reynaga in his patrol car, which occurred immediately after he called for the canine unit." The Court carefully analyzed everything Coverstone knew at that time, and agreed that the trooper had reasonable suspicion that the possession of the van might be unlawful, since it was 1,000 miles from "home," and the driver could not recall how she'd gotten the van initially, which was less than a week before. The Court agreed there was sufficient reasonable suspicion to extend the stop. The details that developed justified the extension of the stop.

The defendants also argued that the dog, Emir, was "insufficiently reliable to establish probable cause to search the car." They argued that "Ohio's canine certification process is fundamentally flawed." The Court reviewed the information that was put before the trial court on the issue, included the testimony of the handler as to Emir's training and record, as well as testimony from an expert witness that questioned the training protocol under which Emir was certified. The Court concluded that although the expert witness might have a better protocol, that Emir's training indicated he was sufficiently reliable to justify the search.

The convictions of Torres-Ramos and Servin were affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Horne
2008 WL 4949133 (6th Cir. 2008)

FACTS: On October 2, 2005, Officers Weigand and Schaible (Cincinnati PD) approached a building known to them as a high crime location. The building was posted against trespassing and the officers were authorized by the owner to enforce the law. They spotted a group of people in the breezeway and Weigand called to them to leave if they didn't live there. Horne, one of the group, ducked behind of the girls standing there. Weigand approached him and asked him if he lived there, and Horne said he did not. Weigand asked if he had "anything" on his person: Horne denied it and told him he could check. Weigand patted him down, but when he got to Horne's waist, "Horne suddenly collapsed to the ground." Weigand got him up and continued, finding a "hard metal object in Horne's waistband." Thinking it was a gun, Weigand handcuffed Horne, he then found a revolver in the suspect location. Horne was given Miranda rights and transported, and he was questioned inside the car about the gun. He admitted having bought it for protection. He was searched at the jail, and cocaine base was found in two locations on his person.

[129] U.S. v. Ellis, 497 F.3d 606 (6th Circ. 2007).

Horne later testified that he lived in the apartment building, but the evidence indicated otherwise. Horne, a felon, was charged with a variety of weapons and drug offenses, and requested suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Does an officer need reasonable suspicion to ask for consent?

HOLDING: No

DISCUSSION: Horne argued that the officers lacked reasonable suspicion for a Terry stop. The Court initially found that the consent to search was valid, negating even the need for reasonable suspicion for a Terry, but also found that the officers did have reasonable suspicion. The Court pointed to "several 'specific and articulable facts,'" - that the area was a hot spot for drug and gun activity, it was late at night, and Horne acted strangely.

Further, the Court stated:

Under the totality of the circumstances standard, "[e]ven if each specific fact relied upon by the authorities to make a Terry stop would not be a basis for suspicion when considered in isolation, the reasonable suspicion necessary to support an investigatory stop can still be found when it is based upon an assessment of *all* circumstances surrounding the actions of a suspected wrongdoer . . . ."[130]

Further, the Court noted that Weigand's frisk was appropriate and justified.

Horne's plea was upheld.

U.S. v. Gross & Wilkins
550 F.3d 578 (6th Cir. 2008)

FACTS: On May 8, 2006, Gross and Wilkins were pulled over by Deputy Ritter (Hamilton County, TN, SO). Deputy Ritter was on "interdiction duties" at the time. He later related that "his attention was drawn to [the vehicle they were occupying) because the occupants had leaned back, or were 'slouching' in their seats, so that their heads were positioned behind the center post of the vehicle." He followed, and noted a minor traffic infraction - a straddling of lanes. Deputy Ritter stopped the vehicle.

Ritter and two other deputies searched the vehicle, finding a kilo of cocaine. Gross and Wilkins were both arrested. They argued for suppression, but the trial court found that the traffic stop was supported by probable cause. Both took a guilty plea, and appealed.

ISSUE: Is a slow lane change sufficient to support a traffic stop?

HOLDING: No

DISCUSSION: The Court found that what the deputy "described is essentially a slow lane change: the vehicle straddled two lanes for a few seconds while changing from one lane to the other, in an area where the highway began a steep incline and changed from two to three lanes." The Court reviewed another

[130] U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993).

tape, put into evidence, which showed an unrelated vehicle doing the same thing, and ruled that the lane change did not amount to a violation of the statute.

Because the Court found that the traffic stop was improper, all evidence found as a result of the stop should have been suppressed. The convictions were reversed, and the case remanded.

42 U.S.C. §1983 - USE OF FORCE

Ryan v. City of Hazel Park (Michigan)
2008 WL 2130370 (6th Circ. Mich. 2008)

FACTS: On March 23, 2004, Ryan awoke, not feeling well. She had two seizures that morning and returned to bed until about noon. When she awakened again, she still felt unwell, but decided to visit her daughter (Middleditch) at the home of her ex-husband, a drive of less than three miles. Upon arrival she had another seizure, and her daughter gave her some medicine and had her lie on the couch. She napped, and her daughter awakened her and told her "she needed to leave." The daughter walked Ryan to her car, and concerned, "asked if she would be able to drive home." Ryan said she could and "Middleditch rolled down Ryan's window a few inches and turned on the radio to help keep Ryan alert." Ryan then left. As she drove, however, she "felt a seizure coming on and thought about stopping but decided she could complete the drive." Shortly thereafter, "her condition worsened," and she had no recollection of what occurred next.

During that time, Officer Weimer "saw Ryan's car swerve suddenly from one lane to another …." He pursued her, but Ryan continued to drive several blocks. Finally she stopped in a turn lane and the officer approached the car. Ryan drove off again, with Weimer behind. Ryan "continued for several blocks, stopping at a traffic light and running a stop sign in the process." She did not, apparently, speed. Two more officers joined the chase and they were finally able to box her in and stop the car.

Officers Clark and Gielniak approached with guns draw. Ryan would not "show her hands or exit the vehicle," so Clark sprayed her with OC through the partially open window. When she still refused to open the door, Weimer broke the window with his baton and pulled her from the car. He used an arm bar takedown to get her on the ground. Officer Clark handcuffed her.

Ryan later testified that the first thing she remembered was "being outside of her vehicle and looking at Weimer just prior to being thrown to the ground." She suffered cuts to her right eye. She claimed that she now suffers from panic every time she sees an officer and that she suffers from nightmares and low self-esteem.

Ryan was convicted of fleeing and evading, and resisting arrest. She filed suit against the officers for excessive force, and the trial court granted the defendant officers, and the city, summary judgment on both the federal and pendant state claims. Ryan appealed.

ISSUE: Is the need for a particular use of force judged from the viewpoint of the subject or the officer?

HOLDING: The officer

DISCUSSION: The Court noted that a use of force must be judged from the point of view of the officers, not the individual. "Thus, even if the force used was unreasonable from Ryan's perspective because she was not in full control of her actions at the time, we do not judge the use of force from her perspective."

> In this case, Ryan was fleeing, resisting, and obstructing police officers. She led three police cruisers on a chase that lasted almost eight minutes. As Ryan points out, this was not a high-speed chase, and the testimony and police reports from the defendants indicate that Ryan was driving at or below the speed limit during the chase. However, a chase need not be high-speed to be dangerous, and the record indicates that Ryan disobeyed traffic signals and stop signs. The chase concluded only because the officers forced Ryan's vehicle to a halt. Once the chase did end, Ryan refused to follow the officers' directions to display her hands and exit the vehicle. Weimer had to forcibly remove Ryan from the vehicle, and Ryan resisted his efforts. Once he had Ryan out of the vehicle, Weimer used the straight-arm bar takedown to force Ryan to the ground. In doing this, he caused Ryan's head to hit the pavement, which resulted in a cut, a bruise, and swelling. Weimer testified he forced Ryan to the ground because he could feel her arm muscles tensing, and he believed she was going to resist being handcuffed.

Further:

> The three factors highlighted by the Supreme Court in Graham[131] weigh in favor of the reasonableness of the officers' use of force. First, although Ryan's initial crime was merely a traffic violation – swerving abruptly from one lane to another – Ryan ultimately committed the felony offenses of fleeing and eluding and assaulting, resisting, or obstructing an officer. This Court has held that officials are entitled to qualified immunity in the face of excessive force allegations even when the plaintiff "was suspected of relatively minor crimes" if the plaintiff resisted and the officials responded with force.[132] Second, Ryan posed an immediate threat to herself and the officers. She refused to place her vehicle in park, and it continued to push against Clark's cruiser even after the chase ended. Once she exited the vehicle, she was on a busy street and the officers wished to quickly place her in custody. Third, Ryan actively resisted arrest and attempted to evade arrest. If a reasonable officer would have recognized Ryan's condition and understood that her nonresponsiveness was beyond her control, this analysis might be different. However, under the circumstances, the officers could not be expected know that Ryan's non-responsiveness might be due to a seizure. Thus we find that, under the totality of the circumstances, the officers' actions were objectively reasonable.

The Court affirmed the grant of summary judgment.

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[131] Graham v. Connor, 490 U.S. 386 (1989).
[132] See Wysong v. City of Heath, 2008 WL 185798 (6th Cir. Jan. 22, 2008).

Reed v. City of Cleveland
2008 WL 2743748 6th Cir. (OH) 2008

FACTS: On Jan 18, 2004, "Mays (driver) and Robinson (passenger) picked up food at a Burger King restaurant." They parked to eat their food.

Officers Clark and Rose were dispatched on a report of drug activity, with a specific address and vehicle description provided. They parked behind the identified car, which was Mays' car, and saw the two men inside. Further, Mays matched the description of a person supposedly involved in drug trafficking.

Officer Clark requested that dispatch check the plate. The officers saw "furtive movements" - further described as "people turning back, looking at you, then reaching down in a downward motion continuously." Both officers got out of the car and approached with guns drawn.

Mays was ordered out and was handcuffed by Rose. Clark ordered Robinson out, but Robinson then "took off running down the street." Clark chased him, tackled him and a struggle ensued.

Four witnesses later testified as to the struggle- Mays, Clark, Rose and Mathis, the resident of the house where it occurred.

> Officer Clark, for his part, stated that Robinson managed to get on top of him and punched him in the face. He also testified that, during the struggle, Robinson reached for the gun in Clark's holster. As they wrestled over the gun, Clark acknowledged that he fired a single gunshot at Robinson. The latter was killed by a single bullet to the chest. Clark claimed that he shot Robinson because he feared for his life and the lives of others.
>
> On the other hand, Mathis testified that she saw "every bit" of the struggle between Officer Clark and Robinson and the eventual shooting of Robinson. She claimed that Robinson was never on top of Clark and that she did not see Robinson punch Clark. Furthermore, she stated that Robinson neither wrestled with Clark, tried to get away, nor reached for Clark's gun. Mathis instead said that she saw Robinson put his hands up in the air when Clark tackled him onto his back, and that Clark had his knee on Robinson. In contrast to Clark's own admission and Officer Rose's testimony, Mathis said that Rose (who ran over to the two men after ensuring that Mays's handcuffs were secure), and not Clark, actually shot Robinson. Mathis explained that her basis for saying that Rose fired the fatal shot is the way Rose handled his gun immediately after she saw Robinson slump to the ground.

Reed (the representative of Robinson's estate) sued the officers and the City of Cleveland, in state court, and the City immediately removed the case to federal court. All three defendants moved for summary judgment - the officers, specifically, requesting qualified immunity.

The trial court dismissed the City as a defendant, but refused qualified immunity for the two officers, finding that there were "genuine issues of material fact existed as to (1) which officer shot Robinson, and (2) whether the officer who shot Robinson reasonably believed that the latter posed a threat to the officer or to the public." Clark, however, had already conceded that he actually shot Robinson. The officers appealed.

ISSUE: May factual disputes be resolved in an interlocutory appeal of a denial of qualified immunity?

HOLDING: No

DISCUSSION: The court reviewed the law on qualified immunity. Reed argued that the trial court did not "have jurisdiction over Officer Clark's appeal because Clark is disputing the district court's factual findings rather than its legal conclusions." With that, the Court agreed, and further stated that "[d]espite Clark's repeated attempts to characterize the qualified-immunity claim before [it] as a purely legal question, his arguments 'in fact rely on [his] own disputed version of the facts, not the facts as alleged by [Reed].'"

Specifically:

> Clark's claim (broken down into several different arguments) is essentially that Mathis's testimony must be discredited in its entirety because it conflicts with other evidence and is therefore totally unreliable. In particular, he contends that (1) Mathis's belief that Officer Rose fired the fatal shot is refuted by the coroner's report showing that the shot was fired within a quarter inch of Robinson's chest, and (2) Mathis's testimony that she did not see Robinson grab Clark's gun "does not mean that it did not, in fact, happen.

Further:

> Officer Clark's reading of Mathis's testimony (i.e., that she simply did not see what happened) ignores Mathis's own repeated statements that she watched "every bit" of the incident and that Robinson immediately raised his hands in the air after being tackled by Clark. This conflicting interpretation of the record constitutes precisely the type of impermissible resolution of a disputed fact that is inappropriate in evaluating a claim of qualified immunity, and that, in the context of a denial of such a claim, deprives [the Court] of jurisdiction to review Clark's claim in the first instance.

The Court found that "Mathis's eyewitness testimony calls into question not only who shot Robinson but, more importantly, whether the force used was reasonable under the circumstances." To find in Clark's favor, the Court would have to "ignore or discount the testimony in the record that contradicts [Clark's] own factual account." That, the Court is not permitted to do at the current stage of litigation.

The Court dismissed the interlocutory appeal.

<u>Slusher v. Carson & Terry</u>
540 F.3d 449 (6th Circ. 2008)

FACTS: On May 13, 2004, Deputies Carson and Terry (Shiawassee, Mich, SO) were dispatched to the home of Dr. Waite to assist him in recovering personal property allegedly hidden by his wife, in defiance of a divorce decree and property order. The order permitted Waite to enter property owned by Linda and Benjamin Slusher, with the assistance of peace officers, to reclaim two tractors. The deputies met Waite at his home and they accompanied him to the Slusher property, nearby. Ben Slusher reviewed the order

and went to get the two tractors, followed by Carson. Linda Slusher emerged from the house and Ben asked that they let her look at the order as well.

Waite asked Terry to accompany him to search for other items of property, but Linda objected, stating that the order did not permit Waite to search the barns. Slusher and Waite argued. Carson asked Linda Slusher to hand back the court order, which she was still holding, and she said she hadn't finished reading it. Carson told her that she'd had sufficient time and asked for it back. Slusher "retracted her hand" when Carson reached for it. She asked if she could make a copy, and Carson refused. "At this point, Carson made another attempt to retrieve the order, and in the process pulled her arm down with one hand and used his other hand to grab her right hand, which was holding the order." She claimed he twisted her fingers, and she "yelled out that Carson was gripping her 'bad hand.'" She claimed to have a medical condition in that hand and that Carson's actions caused her to lose the use of that hand for several months.

Ben Slusher drove the tractors to Waite's property and the deputies left. Slusher called 911 and reported that she'd been "assaulted by an officer and wanted to file a report." The two deputies returned, and allegedly, "began laughing and … told Slusher that they could arrest her for assaulting them." Slusher went to the ER.

The next day, she went to the Sheriff's Office and spoke to the Sheriff. She claimed that he also "laughed at her, refused to take pictures of her injuries, threatened her with arrest, and would not allow her to make a report." She was contacted several days later by Internal Affairs, and was asked to make a statement. However, she told IA that "she was concerned that criminal charges might be filed against her, and that she would only meet with IA with an attorney. She alleged he refused that condition, so they did not meet. IA's report indicated that the deputies "acted well within the use of force continuum guidelines."

Slusher filed suit under 42 U.S.C. §1983, alleging excessive force under federal law, and stated claims of assault and battery. She further sued the Sheriff's Office for failure to supervise and train the deputies, and that they "failed to investigate complaints and discipline officers, and had an 'unwritten policy or custom of discouraging citizen's complaints, or threatening to arrest citizens [sic] who state their intention to file a complaint." (She later tried to amend her complaint to add allegations concerning the search, but that was denied.)

The defendants moved for summary judgment, which was granted. Slusher appealed.

ISSUE: Does an alleged medical condition make a use of force unreasonable, after the fact?

HOLDING: No

DISCUSSION: First, the Court reviewed the use of force allegations. The Court noted that "at a minimum, Slusher's liberty was restrained when Deputy Carson grabbed her right hand…." She was not free to go at that moment. However, the Court then evaluated whether the seizure was reasonable, and looked at "Carson's decision to use force from the perspective of an objective officer."[133] The Court noted that:

[133] Dunigan v. Noble, 390 F.3d 486 (6th Cir. 2004).

> The offices were aware that Waite believed he needed their help in reclaiming his tractors, as this could readily be inferred by Waite's decision to obtain a court order that provided for officer assistance. Thus, once Slusher became agitated and pulled the order away from Carson, it was reasonable for the officers to conclude that a brief show of force might be necessary to ensure she complied with their orders.

In a footnote, the Court also noted that her assertions of a medical condition affecting her hands was immaterial, as there was no indication that the deputies were aware of this. The Court found no indication that the "officers used more force than was necessary." As such, there was no constitutional violation and it was unnecessary to go further.

In addition, the Court found Slusher had "presented no evidence that the county maintained policies or customs that would have caused her injury."

The Court affirmed the summary judgment.

Whitehead v. Bowen
2008 WL 4935970 (6th Cir. 2008)

FACTS: On March 17, 2005, at about 8:40 a.m., a Pioneer Valley PD (Kentucky)[134] made a traffic stop of a vehicle in which Whitehead was a passenger. The officer arrested Whitehead when he learned that there were outstanding warrants for him. During the arrest, Whitehead suffered a broken wrist.

One year later, Whitehead sued Officer Bowen under 42 U.S.C. §1983. Officer Bowen denied having had any contact with Whitehead on that date and stated that he was not involved in any way with the arrest. (He had been in court on an unrelated matter only a few minutes after the alleged arrest.) Instead, Officer Bowen indicated that Chief Elliott was the arresting officer.

The trial court granted summary judgment on Bowen's behalf. Whitehead replied that he had not had sufficient time to conduct discovery to refute Bowen's assertion. The Court, however, stood by its original decision, and Whitehead appealed.

ISSUE: May claims made changing the theory of a case be made after summary judgment is initially granted?

HOLDING: No

DISCUSSION: On appeal, Whitehead argued that although Elliott may have been the arresting officer (as was indicated on the citation), Bowen "assisted the Chief in making the arrest and injured Whitehead while doing so." The Court, however, ruled that the time to raise such assertions was long past, and affirmed the decision of the trial court.

[134] Note, there is no such agency in Kentucky, this is presumed to be from other evidence to be the Pioneer Village PD.

Schreiber v. Moe and City of Grand Rapids
2008 WL 4791359,6th Cir. 2008

FACTS: The following is taken from the trial court's recitation of the facts:

> On November 1, 2002 at approximately 3:39 p.m., the Grand Rapids Police Department emergency communications center received a 911 call from an anonymous caller reporting a domestic dispute between Schreiber and his 15-year-old daughter, Sarah. . . . The dispatch operator labeled the incident a "Priority 2." The Grand Rapids Police Department Manual of Procedures provides that a Priority 2 call involves the potential for physical harm against a person present at the scene. At approximately 3:46 p.m., Officer Moe was dispatched to the Schreiber's home to check on the situation. While enroute he received a message from the dispatch operator explaining that it was a Priority 2 call involving the welfare of a 15-year-old girl and that an anonymous caller "thinks she is getting beat."
> Schreiber does not dispute that, prior to Officer Moe's arrival, he and his daughter were involved in a "heated" discussion. The argument was the culmination of Sarah's recent rebellious behavior. Schreiber acknowledges that during the argument, he took the phone away from Sarah and "threw it on the floor because she wouldn't hang up." It is not clear from the record, but at some point prior to Officer Moe's arrival, Sarah telephoned a social worker at Catholic Social Services, Cindy Musto. Musto explained that she spoke with Schreiber in an effort to calm him down, however, during their conversation, he continued to yell and threaten his daughter. Schreiber left the phone after hearing a knock at the door.
>
> The knock on the Schreiber's door was Officer Moe. Officer Moe arrived at Schreiber's residence shortly after being dispatched to the location. Upon his arrival, Officer Moe heard screaming coming from the residence: "I could hear a male voice inside screaming profanities at an unknown person." When Officer Moe knocked on the apartment door, a young boy, James Schreiber Jr., opened the door. When the door opened, Officer Moe could see Schreiber screaming at someone but could not see the target of his invective. Officer Moe was also not able to see Sarah. According to Officer Moe, he asked Schreiber's son if Sarah was okay, however, before the boy could answer, Schreiber came to the door, yelling profanities, and demanding to know why Officer Moe was there. Schreiber then profanely told Officer Moe that he was not permitted in the apartment. Officer Moe informed him that he was going to check on Sarah's welfare. Despite Schreiber's repeated, belligerent objection to the entry, Officer Moe entered the apartment because he "was deeply concerned that his (Schreiber's) daughter was not okay and she may be injured and he may have assaulted her." Officer Moe conceded that Schreiber did not invite him into the home.
>
> After entering the residence, Officer Moe located Sarah in the living room and observed that she was crying and upset. Despite Officer Moe's arrival, both Schreiber and his daughter continued to argue and curse at each other. Officer Moe described the situation as "chaos" and "basically a barrage of profanities" and threats between Schreiber and his daughter. Schreiber also continued to yell at Officer Moe, calling him a "Neo Nazi" and "pig." He also continued to demand that Officer Moe leave his home or obtain a search

warrant. In light of the situation, Officer Moe requested immediate back up from an additional officer.

At some point during the early stages of the situation, Officer Moe talked to Musto on the telephone. Officer Moe claims that Schreiber's wife handed him the phone and indicated that Musto would explain the situation. Schreiber does not dispute that Officer Moe spoke with Musto on the telephone. Musto identified herself and explained that she was concerned for Sarah's safety. After suggesting that Sarah be taken to a teen shelter, Musto ended the phone call with Officer Moe. Upon the arrival of Officer Matthew Veldman on the scene, Officer Moe attempted to run a file check on Schreiber and asked Schreiber's wife if she had a personal protection order against him. During this time, Schreiber continued to yell at Officer Moe and demand that he leave. Schreiber also asked if he could leave the living room to use the bathroom. Officer Moe refused to allow Schreiber to leave the living room. According to Schreiber, Officer Moe said that he would not allow Schreiber to leave because he might have a gun in another room. Schreiber also asserts that Officer Moe pushed him back onto the couch when he attempted to stand up and leave.

Although Officer Moe would not allow Schreiber to go to another room in the apartment, Schreiber did go outside on a second-story balcony to relieve himself. When Schreiber exited the apartment onto the balcony, Officer Moe closed the sliding glass door behind him. Schreiber maintains that Officer Moe locked the door and was laughing at him from inside the apartment. Schreiber, however, concedes that he did not see Officer Moe lock the door. Nevertheless, Schreiber became incensed, used more profanity, and demanded that Officer Moe open the door. When Officer Moe did not open the door, Schreiber ripped off the screen door, grabbed a lawn chair and struck the glass door three times, causing the door to completely shatter into the apartment.

The parties tell slightly different versions of the ensuing events. Schreiber acknowledges that he was “out of control” when he broke the sliding glass door, however, he contends that he walked into the apartment and was immediately grabbed by Officer Moe and thrown to the glass-covered floor. Schreiber could not recall if he said anything as he walked through the door.. Schreiber also denies that he tried to strike Officer Moe during the incident. He also claims that when he landed face down on the floor, Officer Moe was on top of him, rubbed his face in the glass and punched him in the face and side, at least twenty times. Although Schreiber denies that he attempted to strike Officer Moe, he concedes that while the two men were on the ground he continued to use profanity and insult Officer Moe.

Officer Moe asserts that when Schreiber broke through the door he immediately charged at Officer Moe. Officer Moe maintains that Schreiber struck him at least seven or eight times and that, during the struggle, he brought Schreiber to the ground amidst the glass. Although Officer Moe denies that he pushed Schreiber's face into the glass, he does concede that he hit Schreiber at least six times. He maintains that these punches were necessary to defend himself from Schreiber's attack. While the two men were struggling on the ground, Officer Veldman prevented two of Schreiber's children from jumping on Officer

> Moe's back. Officer Moe also claims that he struggled with Schreiber on the ground for about two minutes before he was able to control him and apply handcuffs.
>
> After Schreiber was handcuffed, Officer Moe escorted him to his police car. While en route, Schreiber cursed at Officer Moe and spit blood in his direction. Schreiber claims that when Officer Moe placed him in the police car, he kicked Schreiber five times in the ribs. Officer Moe denies this accusation. While in the police car, Schreiber continued to scream and spit blood. He also told Officer Moe that he had AIDS. Schreiber did not have AIDS, but, by his own admission, lied to Officer Moe to "piss him off."
>
> Schreiber was taken to a local hospital where he was treated for three facial lacerations as well as bruises and swelling around each eye. Although he complained of rib pain, medical personnel did not discover a fracture. According to Officer Moe, while he was transporting Schreiber to the hospital, Schreiber threatened to kill him, have someone else injure him, or sue him. On December 16, 2003, Schreiber plead no contest in state court to a misdemeanor offense of attempting to assault, wound, resist, obstruct, oppose, or endanger a police officer in violation of MICH. COMP. LAWS §§ 750.81d(1), 750.92.

Thereafter, Schreiber filed suit against Officer Moe and the City of Grand Rapids under 42 U.S.C. §1983 seeking damages for alleged constitutional violations. The trial court granted summary judgment to Officer Moe and the City on Schreiber's allegations concerning warrantless entry, false arrest, illegal imprisonment and excessive force, finding that they were barred by Heck v. Humphrey.[135] They allowed the case to go forward on Schreiber's assertion that Officer Moe had kicked him when he was in custody, however.

The remaining claim was set for pretrial conference, but Schreiber's counsel failed to attend, and also failed to submit mandated pretrial orders. The Court considered the case abandoned and dismissed the remaining claim.

Schreiber appealed.

ISSUE: May a case be dismissed simply because plaintiff's counsel misses a schedule pretrial conference?

HOLDING: No

DISCUSSION: The Sixth Circuit criticized the trial trial's decision to dismiss the case, as it did not investigate why counsel had failed to submit the order or missed the date. (Schreiber's attorney claimed it was a calendaring error.) The Court found that the dismissal was an abuse of discretion on the part of the trial court, and reversed the dismissal of Schreiber's remaining claim of excessive force.

Vance v. Wade
546 F.3d 774 (6th Cir. 2008)

FACTS: On June 10, 1999, at about 6 p.m., "the Bristol (TN) Police Department simultaneously executed seven search warrants for gambling machines at various locations in the city." Captain Wade

[135] Supra.

was in charge. Det. Breurer was the team leader for a search at Tootie's Restaurant, in which Vance had an interest.

When Vance arrived, he found people standing outside, along with several police cars. He entered and found Det. Breuer, who told him "we're closed." Vance identified himself and asked about a search warrant, and Det. Breuer directed another officer to show a copy to Vance.

Vance later claimed that Breuer "was screaming at him to sit down" and that he replied that the document wasn't a search warrant. When a phone began to ring, Breuer prevented Vance or anyone else from answering it - Breuer later explained that it wasn't common practice to permit that. Vance claimed he demanded to use the restaurant phone to call a lawyer, but that he was not permitted to do so, because he wasn't under arrest. (He then asked to be arrested so that he could do so.) Breuer and Vance then faced off.

Breuer and another officer, Perrin, conferred, and decided to call Captain Wade back to the location because Vance was interfering with them. (Vance agreed he'd been told to sit down several times and that he did not do so.)

When Wade returned, he immediately handcuffed Vance and walked him out of the restaurant. (Vance claimed that was done roughly.) He was seated in a police car with the door open. After further discussion with Breuer, Wade returned and "crammed" Vance into the vehicle.

> Specifically, at deposition, Vance stated that Vance claims that when Wade returned to the vehicle, he said "[g]et in there," and pushed Vance into the car, "cramm[ing] my head down on my shoulder." Vance testified that Wade "took his hand and put [it] on my shoulder and he twisted the upper trunk all the way around. Then he ran out of reach so he swapped hands and put his hand there to give him more leverage. And then he took this hand and he crammed my head down on my shoulder." Vance stated that "at that time I was hung. My hips were hung in the vehicle. I couldn't break loose. Finally they broke loose, thank the Lord. My hips broke loose and I fell face forward into the floorboard, laying in the floorboard. My knees were right on the running frame of the car" Vance then testified that Wade "just took the door and shut it up like that and pushed my body in there" and that while the door did not close on his legs, instead "[t]he door pushed them in, crammed me in there."

Vance was left in the car for some 10 to 15 minutes, in the heat, and was ignored by another officer sitting in the car. After he was able to "right himself" in the back seat, he told the officer in the car that the cuffs had cut off feeling in his hands, and that he was in pain from recent back surgery. The officer spoke to Breuer and Wade, and Breuer returned and removed the handcuffs.

Vance later claimed injuries to his back and neck, but he did not seek medical aid from the officers at the time. A family member photographed his hands, but the photos showed only a small bruise and no lacerations or blood. The only medical evidence was an unsworn report from late, 2001.

Vance filed suit under 42 U.S.C. §1983 against the city and the two officers, but because his criminal charges were pending, the suit was stayed. Once he was convicted, and appeals related to his criminal case were exhausted, the lawsuit was allowed to proceed.

Bristol, Wade and Breuer moved for summary judgment. The magistrate judge agreed that there was a constitutional violation, similar to the case of Lyons v. City of Xenia,[136] but found Wade to be entitled to qualified immunity. Vance appealed.

ISSUE: Is force used at some time after the arrest arguably reasonable, when the suspect is handcuffed and not resisting?

HOLDING: No

DISCUSSION: The Court looked at each of Vance's assertions. With respect to the claim that he was excessively handcuffed and mishandled, the Court noted that "Wade took prompt corrective action upon learning of Vance's complaints." (The Court noted that Vance did not sue the auxiliary officer who initially ignored his struggles and complaints in the back seat.)

The Court moved on to Vance's claims regarding the time he was escorted to the car and allegedly crammed into the cruiser. The Court agreed that, as alleged, Wade's actions were a constitutional violation. Applying the analysis in Saucier v. Katz, the Court found that Wade was not entitled to qualified immunity. Specifically, because the assertion was the "Wade escorted [Vance] to a police vehicle, left that scene for several minutes, and then returned to Vance in forcibly crammed him into the floorboard," the Court noted that there was no urgency that might possibly excuse Wade's actions. The Court found that "time delay" to be the "decisive factor that render this case substantially different than Saucier." Although the Court agreed it was reasonable to handcuff Vance and remove him from the scene, the force used against him was "well after" Vance was secured and removed, and after the scene was defused, since Wade was "cooperatively sitting handcuffed in the back of a police vehicle for several minutes …."

The Court reversed the grant of summary judgement and remanded the case regarding Wade back for further proceedings.

Dunn v. Matatall and Porter
549 F.3d 348 (6th Cir. 2008)

FACTS: On May 5, 3006, Dunn was arrested by Officer Matatall and Sgt. Porter (Southfield, MI, PD). The Sixth Circuit looked to the recitation of the facts given by the trial court, which used Officer Matatall's in-car video as timestamps:

> The recording, which is about fifteen and a half minutes long, begins at 2:30:53. At about 2:31:29, Matatall turned on his flashing lights along with a few siren bursts to initiate the traffic stop while Plaintiff was making a right turn onto a residential street. (2:31:29-47.) Matatall reported over the radio that "the vehicle is not stopping." (2:31:58.) He then sounded the siren until Plaintiff eventually stopped almost two minutes later. (2:32:04-2:33:48.) Plaintiff failed to stop at the first stop sign he encountered. (2:32:06-10.) Plaintiff then crossed to the other side of the street to pass another vehicle as Matatall announced his speed at fifty miles per hour. (2:32:10-18.) Plaintiff at that point ran through a second stop sign at [what appears to be around the same speed], and then accelerated

[136] 417 F.3d 565 (6th Cir. 2005).

> noticeably[.] (2:32:20-23.) Plaintiff continued, passing another vehicle driving in the opposite direction and executing a number of turns while Matatall verbally recorded his speed at forty-five miles per hour. (2:32:24-33:15.) Plaintiff ran a third stop sign and encountered a more commercial area that Matatall announced as eastbound on 7 Mile Road. (2:33:16-22.)
>
> On 7 Mile, Plaintiff began to slow somewhat in the left lane and slowly pulled over to the right and stopped driving. (2:33:35-55.) Matatall instructed Plaintiff to place the car keys outside of the car and to drop the keys, which Plaintiff did onto the roof of the car through his open window. (2:33:55-34:15.) Matatall then exited his car and approached the rear passenger side of Plaintiff's car with a flashlight in one hand and his gun in the other. (2:34:16-21.) Using the flashlight, Matatall took a few seconds to briefly examine Plaintiff's vehicle from the passenger side and re-holster his gun. He then walked up to the driver's side window, telling Plaintiff not to move his hands. (2:34:21-26.) Matatall attempted to open the driver's door, instructed Plaintiff to unlock the door and grabbed one of Plaintiff's hands. (2:34:26-29.) Plaintiff unlocked the door, Matatall opened it and began to attempt to remove Plaintiff from the car. (2:34:29-31.) At that moment, Porter pulled up and came to an abrupt stop in his police car, parking at an angle in front of Plaintiff's car. (2:34:31-36.) As Porter parked, Matatall struggled with Plaintiff, ordering him with a raised voice to get out of the car. (*Id*.) Plaintiff yelled that his seatbelt was preventing him from exiting ("my seatbelt; my seatbelt"). (2:34:36-39.) Matatall told Plaintiff to get his hands in the air. (2:34:39-40.) In the meantime, Porter stepped out of his car and rapidly approached Plaintiff's door from the front of the car, leaving the door between Porter and Matatall. (2:34:40-44.) Porter briefly—for about one second—pointed his firearm in Plaintiff's direction and then put the gun away and walked around the open door to assist Matatall, who at this point was grabbing Plaintiff's hands or wrists; Porter stood now on the other side of Matatall, between Matatall and the camera. (2:34:44-46.) Plaintiff said "okay" and "I'm coming, I'm coming" as his belt was apparently now unfastened and together Defendants pulled Plaintiff out of his car. (2:34:46-49.) Plaintiff was somewhat bent over at the waist as Defendants pulled him out, clutching his wrists or forearms as they forced him between them out and onto the street. (*Id*.) As he was being pulled from both sides while still bent over, Defendant Matatall [seems to have] lost his grip on Plaintiff's right wrist while Defendant Porter maintained his grip on the other side. Plaintiff then twisted or spun slightly around on his left foot, [apparently] lost balance and fell hard on his right side, landing with his back to the camera. (2:34:47-50.) Plaintiff remained on the ground as Defendants handcuffed him. (2:34:50-[35:]13.) Plaintiff exclaimed a few times, saying he was a "sick man," "you broke my hip" and asking the officers to feel where the bone was "sticking out." (2:34:55-35:30.)1 Within a few seconds, Matatall assessed Plaintiff's injury and called for medical help over the radio. (2:35:31-34.) The remaining several minutes of the video show additional officers on the scene who, along with Defendants, search Plaintiff's pockets, ask him why he ran and announce that medical help is on the way.

Dunn's suffered a fractured femur during the arrest, and claims to have a permanent disability as a result of the injury.

Dunn sued the officers and Southfield under 42 U.S.C. §1983 for excessive force. The officers moved for qualified immunity and summary judgment, and the trial court agreed, finding that the officers' actions were

objectively reasonable under the circumstances. Because the trial court concluded that they did not violate Dunn's rights, it did not move on the decide whether the officers were still entitled to qualified immunity.

Dunn appealed.

ISSUE: Is the initial decision concerning whether force is reasonable the decision of the judge?

HOLDING: Yes

DISCUSSION: Dunn conceded that the video was an "accurate account of the events surrounding the arrest," but argued that the decision as to whether it depicted excessive force "should be answered by a jury." The Court noted that at this state, it was required to look at the facts and to draw "all inferences in favor of the nonmoving party to the extent supportable by the record," and then to make the decision as a "pure question of law." The Court noted that Scott v. Harris " instructs [the Court] to determine as a matter of law whether the events depicted on the video, taken in the light most favorable to Dunn, show[s] that the Officers' conduct was objectively reasonable."

Using that standard, the Court concluded that the officers "acted reasonable in attempting to neutralize a perceived threat by physically removing Dunn from his vehicle after he led Officer Matatall on a car chase and then appeared to refuse the Officers' commands to exit the car." Neither officer could be expected to know "what threat Dunn may have posed." The Court agreed that Dunn's statement that he was "coming" might have "indicate[d] that he had decided to exit the vehicle on his own, only seconds elapsed between the time the seatbelt was unfastened and when Dunn was pulled out of the car, giving the Officers little opportunity to fully comprehend whether Dunn had finally decided to become compliant." The Court quoted Sgt. Porter, who stated "at what point do we then trust this resistant person to suddenly say, okay, I give up."

The Court decided that "given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly removing Dunn from the car to contain those potential threats was objectively reasonable." The fact that Dunn was seriously injured as a result is irrelevant to the determination that the force used was, in fact, justified.

The grant of summary judgement in favor of the officers was affirmed.

Kelley & Allen v. McCafferty & Steubenville Police Dept. (Ohio)
2008 WL 2604328 (6th Cir. 2008)

FACTS: On Dec. 23, 2004, Officer Hanlin (Steubenville PD) requested a search warrant for Kelley's residence. The affidavit stated:

> *On 12-22-04, Steubenville Police Narcotics Detectives met with a reliable police confidential informant in regards to purchasing crack cocaine from Dawn Kelly. The informant has a history of providing reliable information and has participated in numerous controlled purchases.*
> *On 12-22-2004, Officers provided the informant with forty dollars in marked currency and searched the informant prior to any activity finding no contraband. The informant was fitted with an electronic transmitter for audio surveillance. Officers were able to view the*

informant enter 112 McDowell Avenue and were able to hear the informant make contact with Dawn Kelly. The informant exchanged forty dollars for crack cocaine. The informant was also able to view Ms. Kelly's crack cocaine supplier deliver further crack cocaine to the residence. Following the controlled purchase the informant provided officer with the narcotic which tested presumptive positive for cocaine base.

With the above information and transactions, Officers believe there is further crack cocaine within 112 McDowell Avenue. The affiant request [sic] a no-knock and/or day/night warrant due to the fact that he believes there to be a risk of serious [sic] to officers. Officers are not aware of the number of subjects inside the residence nor the identity of the subjects inside. The affiant's experience shows that drug traffickers often possess firearms to protect their currency and/or narcotics.

That same evening, Officers Hanlin and others executed the warrant, "without knocking and with weapons drawn." Kelley and Allen (her minor daughter) alleged the officers pointed their weapons at them, which officers denied.

They secured the two women and searched, finding crack cocaine and paraphernalia. Kelley was charged with trafficking and related charges.

At the time, Steubenville was under a consent decree, which "required the City to develop and implement a training policy for its officers, develop an internal affairs policy wherein there exists no discretion over whether to investigate a complaint, and track all uses of force and warrantless searches and seizures." That decree was terminated, because Steubenville was essentially in compliance for the mandated period of time, in 2005.

Kelley (acting on her own behalf and that of her daughter) sued based upon allegations of an invalid search and seizure. The defendant officers and the city sought, and received, summary judgment, Kelley and Allen appealed.

ISSUE: Does a search warrant entry, with guns, amount to an illegal use of force?

HOLDING: No

DISCUSSION: Kelley argued that the search warrant lacked probable cause. The Court noted that a "warrant is valid when the supporting affidavit provides a 'substantial basis' for the issuing magistrate" to believe "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[137] The evidence indicated that a CI, who was reliable, had provided information, and that they made a successful controlled buy in that residence. In addition, the Court found that even if the officers aimed their weapons at the two women, that did not make the entry and subsequent search unlawful. The Court stated that "[b]ecause the police believed themselves to be entering an active drug house where weapons may be present, and with an unknown number of individuals inside, it was not unreasonable for them to have their weapons drawn upon entry." Kelley agreed that once she submitted, the officers no longer pointed their weapons at her. The officers had requested, and received, a no-knock warrant, so

[137] Illinois v. Gates, supra.

entering without knocking was not a violation.[138] The requirements for such are not, the Court noted, high, and "are less demanding than that of probable cause." The Court upheld the officers' actions.

Finally, since the Court found no liability on the officers, the case against the city also failed. The judgment of the trial court, dismissing the defendants, was affirmed.

Parsons v. City of Pontiac
533 F.3d 492 (6th Cir. 2008)

FACTS: On April 7, 2004, sometime prior to 6:50 a.m., Frantz, a firefighter, was shot at a fire station in Pontiac. He was discovered by an arriving firefighter. Frantz was unable to talk to police, however, as he was immediately sent into surgery. Later that day, investigating officers, however, learned that Parsons might be a suspect from Parsons's girlfriend. Parsons had been a probationary firefighter, and had expressed his displeasure with the fire department to his girlfriend. He had been fired just prior to the shooting. The detectives questioned other firefighters about Parsons. Many indicated having had no concerns about Parsons, and in fact, Frantz had apparently nothing to do with his firing, having served as only an intermittent supervisor. Others expressed their opinions that he was a possible suspect. One called Parsons and set up a meeting for lunch with him to discuss what had happened to Frantz. Officers met the pair at the restaurant. They found Parsons in his car, pulled him from the car and to the ground. He was taken to the station and was given Miranda warnings. He refused to waive his rights and was ultimately charged with attempted murder.

Officers searched Parsons's home, pursuant to a warrant. They found four guns, none of which was connected to the shooting. Parson's attorney provided a possible alibi, and police were able to document that Parsons was with a friend as late as 5:25 a.m., at the Auburn Hills police station some distance away, and the friend agreed that Parsons had actually been with her until around noon on April 7.

On April 8, officers were finally able to talk to Frantz. He was unable to identify the shooter, except to say that the shooter was taller that he was. He did not believe the shooter was Parsons. (Note, many of the documents in this case were misdated by one day, which confused matters.) He stated that the shooter knocked on the kitchen window to gain access, a common practice among the firefighters who did not have keys to the door. (Note, this information showed up in a supplemental report dated April 7, although it was agreed that they did not learn of this until April 8, from Frantz.)

On April 9, Parsons was released, although it was noted that he was still under investigation. He was, however, transferred to a psychiatric facility by the sheriff's department, from which he was released later in the same afternoon. After being held approximately 28 hours, Parsons was never officially charged.

Parsons filed suit against the officers and the City of Pontiac. The defendants filed for summary judgment, and following a hearing, that motion was granted. Parsons appealed.

ISSUE: Is probable cause (judged upon the officer's knowledge at the time) required for an arrest?

HOLDING: Yes

[138] Richards v. Wisconsin, 520 U.S. 385 (2007).

DISCUSSION: Parsons first argued that his arrest was unlawful, as it was not based upon probable cause.[139] A lawful arrest must be based upon "reasonably reliable information that the suspect committed a crime."[140]

> Furthermore, "in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest." *Id.* This court stated in Gardenhire that a bare allegation of criminal wrongdoing, although possibly justifying a brief investigatory detention, was insufficient by itself to establish probable cause that the suspect had committed a crime. Police officers may not "make hasty, unsubstantiated arrests with impunity," nor "simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone."[141]

However, only the information available to the officers at the time must be considered.[142] Looking at the information in the possession of the arresting officers, the Court found a lack of clear probable cause supporting that arrest. They certainly had enough to consider Parsons a "potential suspect," but not enough for an arrest. The Court found that the arrest was not objectively reasonable. As such, the officers were not entitled to qualified immunity.

The decision of the trial court to grant summary judgment was reversed, and the case remanded for further proceedings.

Zantello v. Shelby Township (Michigan)
2008 WL 1986702 (6th Cir. 2008)

FACTS: On July 23, 2004, Zantello delivered a large water cooler to a business. During the moving of the heavy item, Zantello and the business owners (the Almansours) began to argue, and someone reported "an assault and battery" to the police. Officers Phelps and Underwood found a half-dozen people yelling at each other, and identified Zantello and one of the Almansours and the "central figures in the altercation." When a physical fight broke out, they arrested both men. Zantello was charged with felony assault, but Almansour refused to testify against him and the charge was dismissed. Zantello then filed suit against the officers and the township under 42 U.S.C. §1983, claiming excessive force, along with related Michigan state claims.

The defendant officers requested summary judgment, and the trial court denied that motion. The officers filed an interlocutory appeal.

ISSUE: May an excessive force lawsuit be decided by the judge in favor of officers, prior to trial, when there are disputed facts?

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[139] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002).
[140] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[141] Ahlers v. Schebil, 188 F.3d 365, 371-72 (6th Cir. 1999).
[142] Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir. 2008).

HOLDING: No

DISCUSSION: The Court noted that the officers clearly had probable cause to arrest Zantello for physical assault, based upon their own observation. The Court agreed that "[n]othing required the officers to wait until the individuals came to blows before arresting the would-be combatants…." Even accepting Zantello's claim that at the moment of the arrest, he did not have a bar in his hands, the court noted that more than one of the bars was readily accessible to him. The Court found the officers to be entitled to qualified immunity on this claim.

With respect to the excessive force claim, Zantello claimed the officers variously slammed him into a refrigerator, grabbed him and threw him around, pushed and manhandled him, twisted his arm, and slammed his head into the cruiser. Eventually, he claimed, he had to have surgery on his shoulder. The Court agreed that the evidence was not one-sided, but noted that the problem for the officers is that, according to Zantello, they continued to use force even after they had full control of the scene and even after he cooperated with them." The Court continued, stating that:

> … [m]ore fully developed facts might well reveal that the officers' use of force was reasonable—if, for example, the arm twisting was only slight and incidental to the officers' effort to restrain Zantello rather than a gratuitous post-arrest exercise of force. But because at this stage in the proceeding [the Court] must view the evidence in Zantello's favor, we agree with the district court that these allegations—supported by the record—create a triable issue of fact over whether the officers used excessive force.

Finding that such a right, to be free of excessive force, was already clearly established, the Court declined to give the officer summary judgment with respect to this claim.

<u>Carpenter v. Bowling (City of Franklin, Ohio)</u>
276 Fed.Appx. 423 (.6th Cir, 2008)

FACTS: Prior to the date of the incident, Kirby and her former boyfriend, Combs, had an agreement that custodial transfers of their son, Tyler, would take place at the Franklin police station. On at least two occasions, Combs had failed to do so in a timely manner, and Kirby had filed a motion for contempt of court. On Aug. 16, 2002, Combs again missed the transfer, and upon representations that Kirby had a warrant for Combs, the officers went to his apartment.

There, the officers arrested Combs. Carpenter, Combs's sister, and Combs's mother were also present. Carpenter told the officers she had papers at her home that "would exonerate her brother" and the officers instructed her to get the paperwork. Carpenter, however, returned without them. She then called Combs's attorney to find out if they could make the arrest without a warrant. Officer Whitman spoke to Combs's attorney on the phone, who told the officer that the original agreement was unchanged. The officer also spoke to a children's services employee who told him that Kirby had a right to take Tyler. Officer Whitman gave Tyler to Kirby, who was in the parking lot.

During that time, Carpenter "was screaming profanities" and "throwing objects around in the apartment." She followed them into the parking lot, whereupon they arrested her for disorderly conduct. (Charges against Combs were dismissed.)

Combs, Tyler and Carpenter filed suit under 42 U.S.C. §1983, under false arrest and excessive force. The defendants requested summary judgment based upon qualified immunity. The trial court found that although they had a right to arrest Combs, they did not have a right to make the exigent entry into the apartment to do so. It also refused to grant the motions regarding excessive force, finding that there were "disputes of material fact" regarding "Carpenter's conduct and the officers' explanations for using force." The defendant officers took an interlocutory appeal.

ISSUE: May an officer's concerns that a situation might escalate be sufficient cause to use an elevated degree of force against an individual?

HOLDING: No

DISCUSSION: First, the Court addressed the issue of the entry into the apartment. Although the officers stated that they had consent, Carpenter and Combs stated that the officers forced their way inside. Because of his dispute, the Court declined to grant summary judgment on the issue.

With respect to the use of force, the court noted that Combs admitted following the officers (with the child) out to the parking lot, and that she shouted at Kirby to remember her obligation to return the child at the appointed time. She denied cursing or threatening anyone. At that point, she was grabbed by Officer Bowling, and, she claimed, she was shoved to the sidewalk and "body slammed" into a vehicle. She also claimed that Officer Dickman put his knee into her back and grabbed her shoulder and that the two officers crushed her against a vehicle. She claimed that she wasn't fighting or resisting, and verbally told that them that she would permit them to arrest her. She suffered injuries to her hands and arms, and had medical treatment and physical therapy for those injuries. The Court noted that the crime at issue was disorderly conduct, and that its less serious nature weighed against the need for much force. Also, nothing suggested that she did more than speak loudly and nothing indicated she moved toward Kirby or threatened her. "In view of the non-threatening nature of Carpenter's offense, the absence of any resistance by Carpenter and the absence of any threat to anyone, a jury crediting these fact-supported allegations could find that the officers used constitutionally excessive force."

Further, the Court noted:

> The officers' complain that this conclusion fails to appreciate the risk of escalation they faced—as Carpenter was visibly upset about the situation with her brother, had voiced her frustrations to the officers and had previously been accused of harassing Kirby (several months earlier). Yet virtually any arrest of an individual by the police poses a risk of resistance and escalation. The question is whether that risk was real at the time the officers used force and, more pertinently, whether a triable issue of fact exists over that risk. Carpenter was 30 or 40 feet from Kirby and claims not to have done anything more than remind Kirby to return Tyler on Sunday. A jury could thus reasonably conclude, if it credited these factual allegations, that the police had no basis for immediately grabbing, shoving, body slamming and repeatedly crushing Carpenter against a van to prevent the situation from escalating. Even if we were to grant the officers' premise that they had a reasonable basis for fearing that the situation might escalate, moreover, that would not necessarily justify repeatedly crushing Carpenter against a van while jerking back hard on her arms—all in the context of arresting her for a relatively minor and non-threatening

> crime, one for which she "[a]t all times" did not resist the officers (save for raising her head to ask them to stop).

Finally, the Court stated that:

> The resolution of Carpenter's excessive-force claim in the end turns on several genuine issues of material fact, including at a minimum these: Was Carpenter walking toward, cursing at or otherwise threatening Kirby at the time of her arrest? Did the officers repeatedly body slam or crush Carpenter against the van and jerk back unreasonably hard on her arms? And did Carpenter resist the arrest or the officers' attempt to handcuff her? "[W]hen the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity." [143]

The Court affirmed the denial of summary judgment.

Kirby v. St. Clair County Sheriff's Department (Michigan)
530 F.3d 475 (6th Cir. 2008)

FACTS: At the time of the incident in this case, Deputies Duva and Carrier, along with Sgt. Buckley, were members of the St. Clair County Sheriff's Department, as well as members of a county drug task force. In 2003, the task force had received information that Kirby was selling methamphetamine and crack cocaine from his home in the rural area of the county. After two successful controlled buys, they got a search warrant for the house. On Nov. 4, 2003, they met to discuss the service of the warrant, having been "told by informants that Kirby was a violent, paranoid individual who was often high, kept numerous weapons around his home, and had outfitted his residence with surveillance equipment." One source told them that Kirby always answered the door with a gun, made visitors undress to prove they weren't wired, and "stated constantly that the police were watching him." They decided to arrest Kirby when he was not at home.

Later that day, they found Kirby driving in the area. Deputy Carrier and Sgt. Buckley made a stop, and Kirby pulled to the shoulder of the road in obedience to their lights and siren. Deputy Duva pulled in front of the two vehicles, angling his vehicle, positioned so that Kirby "could not easily flee." For reasons unexplained, two motorists, Moore and Kornieck pulled over as well, some feet behind the cruiser. They could see Kirby's truck and the deputies, but not Kirby.

Deputy Carrier approached Kirby and ordered him to turn off the engine and raise his hands. Kirby did not comply, but it was unclear if Kirby could even hear the orders, given that the windows were up and the siren was still sounding. Sgt. Buckley was also approaching, as was Deputy Duva.

> The parties' accounts of the events that next unfolded, and that led to the fatal shooting, diverge significantly. According to Buckley, as he was walking on the shoulder of the road, the Ranger began to "back[] up towards [him]." He states that he heard the Ranger's engine revving, observed the truck's backup lights come on, and saw gravel flying from its tires. There was a distance of less than two feet between himself and the Ranger, Buckley

[143] Bouggess v. Mattingly, 482 F.3d 886, 888 (6th Cir. 2007).

> estimates, as it came at him in reverse, traveling seven to eight miles per hour. Buckley testified that he tried to get to the Ranger's side by stepping backwards and sideways, but could not avoid the vehicle, which backed up approximately twelve feet. Buckley claims that as he was pushed backward by the Ranger, he was forced to hang on to its tailgate. Buckley states that he then began to lose his balance and slipped down a muddy embankment towards the ditch. Fearing for his life, Buckley fired his gun into the Ranger four to five times. Buckley aimed at Kirby's head with each shot, "shooting to kill him."
>
> Seeing the Ranger move towards Buckley and hearing gunshots, Carrier and Duva also opened fire on Kirby. Both officers testified that they had seen Buckley slip behind the Ranger and feared that he would be run over as that vehicle reversed. At this time, Carrier was standing a few feet to the side of the Ranger, near its driver-side door. Carrier admits that he was not in danger. Duva claims to have been standing at the Silverado's rear passenger-side wheel well, and was similarly not then at risk.
>
> [The officers] claim[ed] that the Ranger briefly came to a stop after this first round of shots. They state that the Ranger then, however, lurched forwards towards Duva, its engine again revving. By one of the defendant's estimates, the truck drove forward at seven to eight miles per hour, and moved perhaps five feet. Fearing that he would be crushed between the Silverado and the Ranger, Duva again opened fire on Kirby. Carrier and Buckley followed suit. Buckley admits that he could see Carrier and knew that Carrier was neither in front nor back of the vehicle, and that Buckley could not actually see Duva to know whether he was in the Ranger's path.

Kirby was fatally injured. These events all occurred in a span of less than a minute. Kornieck's testimony essentially supported that of the officers, differing only in non-relevant details. Moore, however, testified that "the Ranger was moving in a non-threatening manner around the vehicles and officers." He stated the truck rolled backwards but that its backup lights were not on. He placed Buckley out of harm's way, near the cruiser's passenger-side tire, some 6-7 feet behind the Ranger. He claims the truck would have hit the cruiser rather than Buckley. Moore stated that Buckley left his "position of safety" and approached the moving truck, and that he stepped out of its way as it continued to move backwards. The only time he made contact with the Ranger was when he was using it for balance. He also claimed that Duva was not in the path of the Ranger as it moved forward, trying, Moore thought, to drive around Duva's vehicle. Moore further stated that the vehicle was not moving when shooting broke out, and that Kirby had apparently realized he couldn't drive around the vehicles boxing him in.

Kirby's estate representatives compiled expert testimony that the Ranger was stationary when the shooting erupted, and that "it had not posed a risk to anyone in the first place." Thirteen shots were fired, in total. Buckley fired eight shots, of which six struck Kirby. Carrier fired three shots, all of which struck Kirby. Duva fired two shots, both of which missed. Kirby was unarmed, but weapons and drugs were found at his home, later.

Kirby's widow and estate representative filed suit under 42 U.S.C. §1983 and a number of state claims. The trial court dismissed all of the claims except those made under §1983, finding that there were factual disputes that precluded a grant of qualified immunity. The evidence was sufficient for a jury to find that the officers used excessive force in repeatedly shooting him.

The officers filed an interlocutory appeal of that decision.

ISSUE: If an officer unreasonably places themselves in harm's way, may a subsequent use of force, in self-protection, be considered excessive?

HOLDING: Yes

DISCUSSION: In challenging the denial of qualified immunity, the officers argued that "there was no violation of a clearly established constitutional right even under Kirby's factual accounts because reasonable police officers in defendants' positions would have feared for their safety." The officers alleged that the trial court, "in denying summary judgment, improperly relied on the legal conclusions of Moore and failed to review the record from the perspective of a reasonable police officer." The Court, however, noted that to succeed in qualified immunity at this point, it is necessarily for the officers to accept Kirby's assertions as fact, and to only argue the law. (Certainly, however, the credibility of Moore's assertions as to what occurred may be challenged at trial.) The Court noted that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."[144]

The Court concluded:

> Finally, and critically, defendants had sufficient time under plaintiffs' account to assess the situation before firing several rounds at Kirby. Moore estimates that the Ranger had been moving slowly, that the Ranger had been stationary for a few seconds before Buckley began shooting, and that another five to six seconds passed between when Buckley stopped shooting and when Duva began Moore also stated that the incident may have taken up to two minutes to play out. Under these facts, this was not, as defendants allege, a situation that required a "split-second" decision,[145] nor one where "a [possibly] dangerous situation evolved quickly to a safe one before the police officer[s] had a chance to realize the change."[146] Even if defendants were in close proximity to the Ranger and were thus unable to determine initially that Kirby did not pose a risk, each had an adequate opportunity to realize before shooting that the Ranger had stopped moving and that no one was in its path. We are mindful that "police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving. . . ."[147] However, the fact that a situation unfolds relatively quickly "does not, by itself, permit [officers] to use deadly force."[148] Here, even without "the 20/20 vision of hindsight,"[149], a jury could conclude that reasonable officers would not have perceived an immediate threat.

Further, the Court noted, the right to be free of unlawful force has been clearly established for some years. "Garner[150] made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone." The Court affirmed the denial of summary judgment.

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[144] Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006).
[145] see Graham v. Connor, 490 U.S. 386, 397 (1989).
[146] see Smith v. Cupp, 430 F.3d 766, 774-75 (6th Cir. 2005).
[147] Graham, supra.
[148] Smith, supra.
[149] Graham, supra.
[150] 471 U.S. 1 (1985).

Floyd v. City of Detroit
518 F.3d 398 (6th Cir. 2008)

FACTS: On April 18, 2004, Floyd and his girlfriend, Hargrove, along with her son, lived in a duplex in Detroit. On that date, they went to a family party. Floyd returned home between 6:30 and 7 p.m. to pick up additional food for the party. He found a neighbor's car parked in his driveway, and called upstairs to complain. Wilmer, the neighbor, picked up a metal lawn chair and threatened to toss it down at Floyd. "Not to be outdone, Floyd armed himself with what he described as a three-foot silver fence pole and warned that he intended to lob the pole at Wilmer if Wilmer threw the chair."

The argument "fizzled out without an exchange of projectiles." Another neighbor, however, Grant, witnessed the argument, and thought that Floyd had brandished a gun. Apparently Wilmer did also, because he called the police and complained about a "person with a weapon." Officer Quaine and Reynoso responded, and were told by Wilmer that "Floyd had threatened him with a shotgun in the course of their parking dispute" and that he had left, "brandishing the weapon."

During this time, Hargrove returned and was interviewed by the officers. Floyd returned shortly thereafter, at about 8 p.m. Floyd later testified that he parked in the rear, between two trucks, and walked toward the house, empty-handed. He came between two parked trucks, and as he "neared the end of the passage in between the parked trucks, he noticed the officers running toward him because their flashlight beams could be seen in the dusk." Floyd claimed that a "split-second" later, "they allegedly began shooting at him without warning." Officer Quaine fired first and missed; Officer Reynoso fired next and that shot struck Floyd in the chest.

The officers denied that they had their flashlights out, and "emphasized that they had credited Wilmer's warning that Floyd was armed with a shotgun and had threatened Wilmer with the weapon just hours earlier." Both officers stated that Officer Quaine had identified themselves as "Detroit police" and ordered him to "show me your hands."

Officer Quaine later testified that Floyd had fired at him first, and that he thought Floyd was armed with a handgun. Officer Reynoso testified that "he fired at Floyd because, after hearing the initial shot and seeing Quaine fall to take cover, he mistakenly believed that Floyd had shot Quaine." Floyd was also down at that time. The officers approached and asked about the gun and Floyd denied having a gun. (He also claimed that one of the officers tried to plant a weapon in the area.) No guns were recovered from the area.

Grant agreed with Floyd that neither officer gave a verbal warning before shooting, that Floyd was unarmed, and that the officers asked about a gun after the shooting. Grant believed, however, that three shots were fired, and also stated that Floyd had car keys in one hand and that his hands were down, below waist level. Grant also heard one of the two officer's radio that there was an "officer down."

EMS responded and transported Floyd, where he was discovered to have a serious, but ultimately non-fatal wound. The bullet was not removed.

Floyd filed suit against the officers, and the City of Detroit, under 42 U.S.C. §1983, and also filed state claims. The defendants claimed summary judgment and were denied. (One minor claim was dismissed, however.) The City and the officers appealed.

ISSUE: Is an officer who shoots at a subject, and misses, absolved from liability when that shot causes another officer to fire and strike that same subject?

HOLDING: No

DISCUSSION: The Court reviewed the standard for summary judgement under qualified immunity, and applied the facts. Officer Quaine, the Court concluded, did seize Floyd by shooting at him, even though he missed[151] because Floyd never fled from Quaine's "show of authority." The evidence was undisputed that Floyd stopped immediately when the officers appeared, and that shot "actually had the intended effect of contributing to Floyd's immediate restraint." Certainly, Officer Reynoso's shot was a seizure. In fact, "Quaine's own use of deadly force escalated the situation by unambiguously signaling that such force was called for." Quaine "also participated in the tactical decision that he and Reynoso would confront Floyd in the latter's backyard at dusk by approaching Floyd with their guns drawn, without any verbal warning and, according to Floyd, running." Just because his shot had the "fortuity" of missing did not, the Court concluded, absolve him of responsibility.

The ultimate question was, the Court decided, whether "the officer's actions in connection with Floyd's seizure in fact violated his Fourth Amendment rights." To decide that, the Court reviewed whether the officers' actions, as admitted, were "objectively reasonable."

The Court stated that:

> Officers Quaine and Reynoso emphasize that they learned from Floyd's neighbor Wilmer that Floyd had brandished a shotgun in a threatening manner several hours earlier. But according to Floyd, he was never armed, the officers were using flashlights due to the impending darkness, he had his empty hands extended in front of him, and the officers ran around the corner and shot him in his own backyard without warning. The officers' contrary assertion that Floyd was in fact armed and fired first is simply irrelevant to our determination of "whether a constitutional right would have been violated on the facts alleged" by Floyd.[152] As a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers.[153] Furthermore, we conclude that, under the facts as viewed in the light most favorable to Floyd, the officers' use of deadly force to effect Floyd's seizure violated his Fourth Amendment right to be free from such excessive force.

Having found a constitutional violation, the Court then reviewed whether the right was clearly established at the time.

> The defendants properly concede that a suspect's right to be free from the use of excessive force is clearly established.[154] No further argument on this point is made by

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[151] The Court distinguished this case from situations where it had held that shooting at a fleeing felon was not a seizure. See Adams v. City of Auburn Hills, 336 F.3d 515 (6th Cir. 2003)

[152] See Saucier v. Katz, 533 U.S. 194 (2001).

[153] Sample v. Bailey, 409 F.3d 689 (6th Cir. 2005).

[154] See Graham v. Connor, 490 U.S. 386 (1989) (recognizing that the use of excessive force violates a suspect's Fourth Amendment rights).

> Officer Quaine. Officer Reynoso, however, asserts that he is entitled to qualified immunity because he reasonably but mistakenly believed that Floyd had shot Officer Quaine.
> Reynoso contends that, because he made a purportedly honest mistake of fact, his actions were reasonable as a matter of law. This contention, however, fails to address the true issue regarding Reynoso's actions; namely, whether his mistaken perception and response were themselves reasonable. Plainly, not all mistakes—even honest ones—are objectively reasonable.[155] The bare assertion that Reynoso allegedly formed an honest but mistaken belief thus does little to resolve the key issue of whether his belief and subsequent actions were nonetheless objectively unreasonable.

The Court noted that Reynoso's believe that Quaine had been shot "rested solely on Reynoso's observation of Quaine taking cover." He admitted that he never even looked at Floyd's hands. The Court specifically reviewed Reynoso's deposition testimony:

> Q. Now, when you shot Mr. Floyd, I should say before you shot Mr. Floyd, at that time, likewise, you did not give him any verbal instructions?
> A. No.
> Q. In fact, you were unaware whether your partner shot at him or he shot at your partner, you didn't know either way, did you?
> A. No.
> Q. In fact, at that time, you didn't even know it was Mr. Floyd, did you?
> A. No.
> Q. It could have been anybody?
> A. Right.
> Q. And when you shot him, you never saw him being armed in any way, did you?
> A. I didn't have a chance to look at his hands.
> Q. Right. You shot before you looked at his hands, didn't you?
> A. Yes.
> Q. So at that particular time, you didn't know who this person was and whether they were armed or not, true?
> A. True.
> Q. You shot because you heard a previous shot and you were afraid that this person might be armed?
> A. Yes.
> Q. And yet you didn't see that person take any threatening action toward you or your partner, did you?
> A. No.

At this stage of the proceeding, the Court was unwilling to find that the officer's actions were reasonable, and found that neither officer was entitled to qualified immunity. Because the case was still active against the officers, liability for the City "turn[ed] on the separate issues of its training practices and policies." The Court declined to consider the City's appeal.

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[155] See Dawkins v. Graham, 50 F.3d 532, 534 (8th Cir. 1995) ("[T]he Fourth Amendment's allowance for officers' honest mistakes is limited to mistakes that are objectively reasonable." (citing Maryland v. Garrison, 480 U.S. 79 (1987)).

Simon v. Cook
261 Fed.Appx. 873 (6th Cir. 2008)

FACTS: On Oct. 31, 2003, Simon called Lexington PD to "report that government officials had been harassing him." He told the responding officers (which included Officer Cook) that "the police and county coroner had been harassing him and that many agencies and government officials were implicated in the alleged harassment." The officers were aware, before arrival, that the address had been flagged as a "signal 10" - and there was potential risk. When Simon put his finger in Officer Cook's face, which Cook characterized as an aggressive act, Cook handcuffed him. After further questioning, the officers found his comments to be irrational. They detained Simon and took him to Eastern State Hospital for a mental evaluation. There, he was diagnosed with a "psychotic disorder - not otherwise specified" and put on a 72-hour hold. (In fact, he was held for five days.)

Simon sued Officer Cook and Lexington, under 42 U.S.C. §1983. The District Court denied all of his claims and rejected his challenge to applicable Kentucky statutes. He then appealed.

ISSUE: May a subject be detained upon evidence that they are mentally ill and a danger to themselves or others?

HOLDING: Yes

DISCUSSION: The Court reviewed the Kentucky statute (KRS 202A) and relevant Lexington PD policies, which mirrored the statute. The Court noted that Officer Cook followed the statute and policy. A psychiatrist discussed Simon's mental condition, which was paranoid and delusional at times. The Court discussed the case of Monday v. Oullette, and agreed that the "Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."[156] Using that case as guidance, the Court agreed that the "undisputed facts indicate that Cook had probable cause to believe that Simon was a danger to himself or others." Although the situation did not initially appear dangerous to the officers, "even Simon admits that the situation escalated during his conversation with Cook." The Court stated that "[t]aken together, the undisputed facts indicate that Simon demonstrated a high level of irrationality and a relatively low level of dangerousness." At one point, the Court noted, Simon stated that he would "follow the police and get to the bottom of the alleged attacks against him indicated a substantial chance of irrational and dangerous behavior in the near future."

The Court found that Officer's Cook's decision to detain Simon for psychiatric evaluation was reasonable under the circumstances. Because the claim could not be upheld against Cook, the case also failed with respect to Lexington.

In a further opinion, the Court opined that the statute in question was sufficiently clear. In addition, the Court found that the fact that the hospital did not retain the documentation submitted by the officers, pursuant to KRS 202A.041(1) was not a violation of due process, because the facility was required to do its own, independent, evaluation as well.

[156] 118 F.3d 1099 (6th Cir. 1997).

Finally, the Court agreed that when Simon filed suit against Officer Cook and Lexington, he, by that action, waived his otherwise privileged communications with the psychiatrist.

The summary judgement was affirmed in favor of Officer Cook and Lexington.

Wysong v. City of Heath
260 Fed.Appx. 848 (6th Cir. 2008)

FACTS: John Wysong suffers from diabetes, and on occasion, his blood sugar plunges down unexpectedly. This causes "Wysong to act aggressively and later not remember what happened." When that occurs he resists help. On July 13, 2002, in the evening, he began to experience an attack and pulled into a grocery store to get something to balance his blood sugar. His next memory was "waking up handcuffed in a police car."

That same evening. Officer Ramage (Heath PD) was leaving that parking lot when two young women "met him and complained that a man in a white truck was making obscene gestures and comments towards them and was kicking the window in his truck." Officer Ramage called for assistance and approached the man who was outside the truck, staggering. When he spoke to the man, the man ran away. Ramage chased him down, and with the assistance of Officer Coulter, took him to the ground and handcuffed him.

The officers later testified that the man "violently resisted their attempts to handcuff him" and kicked them. During that time a third officer arrived, and they were finally able to handcuff the man and secure him in the car. The two women were witnesses and agreed that the man was "out of control." As he came around, he told the officers he was a diabetic. (He was wearing a medic alert on a chain around his neck, but that was not immediately visible.) They called EMS, and transported him to the station. The paramedics gave Wysong emergency treatment and took him to the hospital, and the hospital later stated that "Wysong's actions were caused by an uncontrollable medical condition, and opined that he should not be charged or arrested for that reason." He was, however, charged with a misdemeanor count of disorderly conduct, but it was quickly dropped.

Wysong then filed suit against the officers, and the city, for excessive force, under 42 U.S.C. §1983. The officers requested summary judgement based upon qualified immunity, and were denied, twice. They appealed to the 6th Circuit.

ISSUE: May officers be given qualified immunity against an allegation of excessive force when the complaining plaintiff has no memory of what occurred, and no evidence otherwise that the officers' use of force was excessive?

HOLDING: Yes

DISCUSSION: The court noted that although Wysong claimed that the officers' account of his resistance was untrue, he offered no witnesses or other explanation as to "how he knows the police are lying when he himself cannot speak to what happened." He specifically stated that he had "no conscious memory" of what had occurred. His only reported injury was a "bruised left knee."

The Court noted that the trial court apparently interpreted unconscious as being motionless but mentally aware of what was going on, although a further examination of the deposition indicated that was not the

meaning that Wysong intended. Wysong's own statements indicate that he was not mentally aware of what was going on, although other evidence indicated that he was not motionless.

Even though, in such motions, the Court must consider the "facts in the light most favorable to the plaintiff," it was clear, given that Wysong could offer "no external evidence, identifies no support witnesses, and cannot remember the underlying events," that the defendant officers were entitled to qualified immunity. The officers were entitled to use appropriate force when faced with a resisting subject. The officers had no way to know the reason for his actions, and once they realized Wysong had a medical condition, they promptly sought appropriate medical care.

The Court concluded that the "undisputed facts in this case show that no constitutional violation occurred." The District Court's decision was reversed and the officers granted summary judgment.

Ziegler v. Aukerman
512 F.3d 777 (6th Cir. 2008)

FACTS: On June 16, 2004, Ziegler was brought to the Foote Memorial Hospital by her husband "because she was depressed and became suicidal." Within a half hour of her arrival, Ziegler was reported to have stated that she "planned to drive her car into a tree." In another half hour, Ziegler asked to go outside with her husband and subsequently disappeared. Police were dispatched to her home, but Ziegler then came back, having supposedly gone outside to smoke. The police were notified about her return.

Ziegler was evaluated and judged to be a threat to herself. Nurse Aukerman, who examined her, "filed a mental health petition" which was signed off on by Dr. Brown. Ziegler "stated that the law did not allow the hospital to hold her and she announced her intention to leave" - and did so at about 2:45 a.m. Again, police were called, and told that Ziegler needed to be brought back to the hospital because she was suicidal. Officer Jonoshies (Springport Township PD) was dispatched; he found Ziegler at her home and took her into custody. She was back at the hospital by 3:45 p.m.

Ziegler filed suit under 42 U.S.C. §1983 against the hospital, the nurse and doctor, the officers and the dispatcher, alleging a variety of claims. All defendants requested summary judgment. The Court ruled in favor of the officers and the dispatcher, and Ziegler appealed the order for Officer Jonoshies.

ISSUE: Must an officer detain an individual on a mental health petition, when they observe no actions that could be considered to indicate the individual is a threat to themselves or to anyone else?

HOLDING: Yes

DISCUSSION: The Court agreed that the law did not permit a detention solely for the purpose of assessing mental health, but that officers must have "probable cause to believe the person seized poses a danger to himself or others."[157] However, the Court found that in this case, the officer did have probable cause, based upon a call from a credible source that a mental health order existed, even though the officer did not find her behaving dangerously. The Court found her seizure and transport reasonable and justified, and upheld the decision of the trial court.

[157] Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997).

Lawler v. City of Taylor and Toro
2008 WL 624770 (6th Cir. 2008)

FACTS: On Feb. 27, 2004, Lawler dropped off his girlfriend and then proceeded to another location, where "he drank eight to ten beers." He then drove to yet another location to visit a second girlfriend. Sgt. Witherspoon (Taylor, MI, PD) stopped Lawler, and Lawler admitted he had been drinking. Lawler failed two FSTs, and was found to have a BA of .20. (He had two previous "Operating While Intoxicated" convictions on his record.)

Although his mood varied on his way to jail, between "accepting the inevitable and trying to evade it," by the time they arrived at the jail "he apparently was not happy to be there."

Toro took Lawler in to be booked, and Lawler objected to being told what to do. "A videotape captures what happened next; Lawler raised his left arm slightly and Toro tackled him to the floor face-down, struggled with him for a few moments and struck him forcefully three times - twice slamming his knee into Lawler's back (once with Lawler's arm pulled back at an awkward angle) and once hitting him with his elbow." Lawler was never out of Toro's control, and several other officers finally entered and assisted Toro in handcuffing Lawler. When Lawler complained about pain in his arm, he was taken to the hospital and found to have a broken arm.

Lawler eventually pled guilty to OWI, and charges relating to his alleged assault on the officer were dismissed. Toro was eventually fired by the PD. Lawler then sued Taylor, Toro and a variety of other city officials under 42 U.S.C. §1983, and all except Toro were eventually dismissed.

Toro appealed, arguing that he was entitled to qualified immunity, and Lawler appealed the dismissal of all of the other parties.

ISSUE: Must an officer's use of force be in proportion to the threat posed by an individual?

HOLDING: Yes

DISCUSSION: The Court first noted that to decide Toro's motion, it must decide, "in the light most favorable to Lawler" whether "Toro violated Lawler's Fourth Amendment rights when he seized him" and whether those rights were clearly established."[158]

The Court agreed with the District Court that there was a "triable issue of fact" over whether Toro's use of force was "objectively reasonable." The court noted that "[w]hen the altercation occurred, Toro and Lawler were in the booking room of a police station, where Lawler refused to comply with Toro's orders and called Toro an offensive name." The Court agreed that some force was warranted to allow Toro to control Lawler, but also found that the videotape might permit a jury to decide that Toro's use of force was "disproportionate to any threat he faced from Lawler." It further found that a jury could conclude that "it was gratuitous [for Toro] to knee [Lawler] in the back twice and to hit him once with his elbow." The Court stated that "even if a situation is 'tense, uncertain, and rapidly evolving,'[159] that does not innoculate [sic] an

[158] See Saucier v. Katz, supra.
[159] See Graham v. Connor, supra.

officer from a charge that he crossed the line from subduing an individual to assaulting him." The Court agreed that a jury could find that Toro's actions were excessive.

Further, because case law "clearly established Lawler's right to be free from gratuitous force during booking," it was appropriate to deny Toro qualified immunity at this stage of the proceedings.

The Court, however, further agreed that the dismissal of all other defendants, including the city, was appropriate, as Lawler's pleadings provided nothing on which to find liability against them.

42 U.S.C. §1983 - SCHOOL

S.E. (Next friend of A.E.) v. Grant County Board of Education
544 F.3d 633 (6th Cir. 2008)

FACTS: On the last day of the school year, May 26, 2005, A.E. received her medication (Adderall) at lunch, as usual, from the school nurse. She had four pills left at that time and the nurse gave them to her in the original container to take home.[160] A.E. did not want to take them at that time, but was required to do so. She was cautioned not to share them with anyone else. During an end of the school day movie, another student asked her about the container and pressured A.E. to give her one. Finally, A.E. did so.

The school administration learned of this after school was out for the year, from the parent of the other child, and contacted A.E.'s mother about it. (A.E. had already told her mother what had occurred that day.) They were told A.E. would be interviewed by a deputy sheriff, but that did not occur over the summer break because the deputy was apparently ill. When school resumed, the Assistant Principal (Lacey) discovered that there had been no investigation. He had A.E. come in and write a statement, but she later claimed she was unaware it would be given to law enforcement. (It was given to the SRO, Deputy Osborne, who ultimately charged A.E. with trafficking.) A week later, the Assistant Principal brought in both students and asked them what occurred, A.E. did not speak. He gave both girls a one-day suspension and told them that they would be "subject to a six-month probation through the juvenile justice system." A.E. was summoned to a juvenile court proceeding and given a choice of diversion or formal proceedings. She chose diversion.

A.E. filed suit against the Board of Education, and other various parties, under 42 U.S.C. §1983, claiming a variety of issues. The trial court rendered summary judgment in favor of all defendants. The plaintiff appealed.

ISSUE: May a school official turn over an incriminating student statement, not taken at the request of an officer, to law enforcement?

HOLDING: Yes

DISCUSSION: The Court first looked to whether the acceptance by A.E. of a diversion program triggered the Heck[161] bar regarding claims under the Fourth and Fifth Amendments. The Court noted that Spencer v.

[160] A.E. is bi-polar and has Attention Deficit Hyperactivity Disorder (ADHD). Adderall is a Schedule II non-narcotic medication.
[161] Heck v. Humphrey, 512 U.S. 477 (1994)

Kemna meant that "where the plaintiff was neither convicted nor sentenced" and was not eligible for habeas corpus, the Heck bar did not apply.[162]

With respect to the Fourth Amendment issue, A.E. argued that Lacey seized her at the "behest of police" and that as such, he was "acting in conjunction with law enforcement." They emphasized that the statement was never placed in her school file, but was taken solely for the purpose of being shared with law enforcement. Lacey, however, testified that he had not spoken to Deputy Osbourne about it prior to his taking of the statements, and pointed to numerous decisions "holding that the sharing of the results of rule violation investigations with law enforcement did not make the school officials agents of law enforcement." The Court found, however, that Lacey was not acting at the behest of Deputy Osbourne, and further, did not violate A.E.'s Miranda rights for that reason, also.

The Court upheld the summary judgment in favor of the defendants.

42 U.S.C. §1983 - MEDICAL CARE

Cain v. Irvin
2008 WL 2776863 (6th Cir. 2008)

FACTS: On June 17, 2005, Cain's boyfriend at the time, Wilson, was at a Russell Springs shopping center that was a "popular gathering place for young people." Cain joined him later that evening, and arrived intoxicated. Another of Wilson's former girlfriends arrived, Harris, and the two women got into a verbal argument. Wilson then struck Cain with a variant of brass knuckles (called a "fist pack") after she "screamed at Wilson and twice slapped him in the face." Wilson left the scene.

Cain was assisted to a friend's car by two male friends, Hardin and Sigward. Hardin wanted to take her to the hospital, but she refused, she was, instead, "preoccupied with finding somebody to 'beat up' Wilson." She went looking for an old boyfriend to "go after" Wilson. (Cain stated that she only wanted to find the old boyfriend, McGowan, "so that he could drive her to the hospital.")

Police were dispatched regarding the fight. Officer West, and then Chief Irvin, arrived. Officer West was directed to the hospital to find Cain, but he reported, at about 10 p.m., that she had not arrived. The officers finally found her at the Pizza Hut where McGowan worked. All of the witnesses agreed that Cain's "speech was slurred and that she had trouble maintaining her balance." Cain later stated that "Irvin mocked her demeanor during" this meeting. Cain told them that she'd taken Lortab and Xanax earlier that day, as prescribed. Irvin found her eyes to be "non-reactive" to light, which he believed was an indication that she was impaired on some controlled substance. She began to stumble, and Irvin grabbed her by the shirt. Witnesses later supported that Irvin asked her if she needed medical treatment, and she refused. (Cain stated that Irvin refused her request for medical treatment, but witnesses support Irvin's claim.) Cain agreed that although she characterized "Irvin's maneuver [to be] aggressive," she admitted he "did not in any way strike or touch her, beyond preventing her from falling down."

Irvin noticed a plastic bag "hanging out of" Cain's pockets. When asked about it, she turned it over, and they found it to contain "prescription pills outside of their original prescription container." She was arrested

[162] 523 U.S. 1 (1998); see also Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)

for public intoxication and possession of the medication (Lortab, Schedule III and Xanax, Schedule IV) outside their proper containers.

Officer Taylor took Cain to the Russell County jail, but she was eventually transferred to Adair County as the local jail did not house women. Cain listed only her back, for which she took the medication, as a medical problem, and the Jailer testified that she did not "appear to need medical attention." (The Uniform Citation, conversely, did indicate that she had visible swelling of her left eye.) She was permitted to make a phone call before they left Russell County. During the transport, the transport officer noticed the injury and when she was refused at the Adair jail because of the injury, took her to the hospital in Columbia. From there, she was sent to Louisville, but was ultimately found to have a non-serious injury and given eye drops. She was released to her father.

Cain sued Irvin and Russell Springs, arguing both federal and state claims. The trial court awarded summary judgment to the defendants, and Cain appealed.

ISSUE: Does a brief delay in medical care, that does not worsen the injury, constitute excessive force?

HOLDING: No

DISCUSSION: The Court quickly agreed that Irvin had probable cause to arrest Cain. Although she suggested that her "behavior was the result of head trauma" - the Court noted that "this explanation would not account for why witnesses observed [Cain] unable to stand and walking" irregularly at the shopping center. However, even accepting Cain's explanation for her "apparent disorientation," the Court found that it was unnecessary to decide if she was "*actually* intoxicated, but rather whether Irvin had probable cause *to believe* that Cain was intoxicated." The Court found that Irvin did, in fact, have that probable cause and was justified in making the arrest. In addition, she had "voluntarily handed [pills] over to police, and was unable to produce a prescription." As such, he had cause to arrest her for the possession charge, as well.

The Court, forced at this stage of the proceeding to accept Cain's version as true, next had to decide if her claim to having been refused medical care was, in fact, justified. The Court, although finding that she may have met the subjective prong of the Farmer[163] test, when she allegedly told Chief Irvin that she was in pain and needed medical care, concluded that she did not satisfy the objective prong, which was that a reasonable officer would have perceived her need for such care. In Napier[164], the Court found that "when a plaintiff complains of an unreasonable delay in receiving medical care, she must present medical evidence to establish the detrimental effect of the delay" by "plac[ing[verifying medical evidence in the record…."

The Court found that her injury "was not one that obviously necessitated a doctor's care," even if it was apparent to the officers. The Court stated that the "obviousness test is whether a layperson would perceive the need for immediate medical assistance." She suffered only a delay of two hours before she received care, and that brief delay proved to make no difference in her medical care.

The Court found in favor of Irvin and the City on the federal claims, and dismissed the state claims, as well.

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[163] Farmer v. Brennan, 511 U.S. 825 (1994).
[164] Napier v. Madison County, Ky, 238 F.3d 739 (6th Cir. 2001).

42 U.S.C. §1983 - HANDCUFFING

Dixon v. Donald
2008 WL 4148515 (6th Cir. 2008)

FACTS: Prior to 2005, Dixon had maintained certain private roads near his home. He had stopped maintaining them because of health issues for some time, as he was "severely disabled" and receiving disability benefits from the VA. By 2005, the roads had fallen into serious disrepair, so he resumed working on them in April of that year. Edwards, another property owner who possessed easement rights to the road, demanded that Dixon (and others) stop work because "she owned the road and [Dixon] was trespassing." He "explained to her that there was an easement and right-of-way jointly owned by all residents." In response, she "became irate and began cursing and threatening Dixon and others…." She called the Blount County Sheriff's Department, and a deputy was sent in response. The deputy "stated that he could not settle the dispute" and advised Dixon to get an attorney. Dixon did so, and that attorney "advised him that his maintenance of the roads was legal and he could continue the road maintenance."

Two days later, on April 19, two members of the Edwards family came out "onto the road" and demanded that he stop the work. They blocked his tractor by standing in the road, and stated they had called the sheriff's office again. Dixon managed to drive around them.

Officer Donald arrived. He spoke to the Edwards, who reasserted their claim. He approached Dixon and Dixon showed him the deed. "Donald looked at the deed and asked if it was 'signed by a judge.'"[165] Both Edwards (Donna and Helen) claimed that Dixon tried to run them over with the tractor and that she was "in fear of her life." Officer Donald arrested Dixon for aggravated assault. Dixon argued that he had not assaulted or threatened them, and that he had witnesses, but "[a]lledgedly, Donald refused to talk to any of the witnesses or pay any attention to [Dixon's] story."

When Donald began to handcuff Dixon, Dixon explained his injury and asked that he be handcuffed in front. Again, [a]llegedly, Donald took a cursory look at his visible injuries and sarcastically said that Dixon "looked fine sitting on the farm tractor." He handcuffed Dixon in back, and Dixon later claimed this caused an injury to his shoulder. Dixon was placed in the cruiser with the windows up and the air conditioning off for about 20 minutes. He ended up being charged with Disorderly Conduct, but that charge was eventually dismissed by the court.

Dixon sued Officer Donald, Sheriff Berrong and the Edwards. Donald and Berrong requested summary judgment. The trial court awarded Berrong summary judgment, but denied Donald's request for summary judgment. Donald appealed.

ISSUE: May an officer ignore an obvious injury when making a decision as to how to handcuff a subject?

HOLDING: No

[165] Deeds would not be expected to be signed by a judge, as they are not court orders.

DISCUSSION: Using the standard two part test, the Court first looked to whether Dixon had properly claimed a violation of a constitutional right - in this case, specifically, if Donald lacked probable cause for the arrest and if he committed excessive force by handcuffing Dixon behind his back, despite his injury.

Addressing the handcuffing issue first, the Court agreed that "an officer does not have to credit everything that an arrestee tells him during the course of a handcuffing," and that he didn't have to handcuff Dixon in front just because Dixon asked for that. However, in this case, "Dixon has significant and obvious injuries to his torso." (The Court was apparently provided with photographs of these injuries, which involved extensive scarring.) The Court concluded this was a fact question, and as such, must be put before a jury.

However, since Dixon did not put forward any evidence regarding the second claim, regarding the probable cause issue, the Court declined to address it.

The Court agreed that the right to be free from excessive force, relating to a handcuffing, was clearly established, and allowed the case to go forward on that claim.

42 U.S.C. §1983 - INJURED NON-SUSPECTS

Schneider v. Franklin County, Ohio
2008 WL 2967645 (6th Cir. 2008)

FACTS: On Nov. 14, 2003, Schneider and her boyfriend, Jones, had been at a Hilliard, Ohio, bar since late the previous afternoon. Earlier that same evening, the Franklin County Sheriff's Office "had received a complaint of a suspect driving a Cadillac who was dealing drugs in the vicinity of the bar" – and the couple had arrived in a Cadillac that was parked in the bar's lot. Two officers, Burns and Strayer, of the "Special Investigations Unit" went to stake out the lot, and two uniformed deputies, Meister and Wetzer, were on patrol in the area as well.

After 1 a.m., the couple left the bar. "Schneider was noticeably intoxicated and slipped and fell on her way to the car, injuring her right ankle." Her friends helped her to the car, and she removed her shoes and socks to check her ankle. Jones drove out of the parking lot and down a service road – he was then pulled over by the two uniformed deputies, at the request of the detectives. Specifically, Burns asked that they "stop the car and identify the occupants" by "find[ing] a violation." The stop was purportedly made for speeding.

The deputies approached the vehicle, asked for ID, and administered a field sobriety test to Jones, which he passed. He was placed in the cruiser while Deputy Meister checked his information, and he told the deputy that Schneider was injured. Deputy Wetzel obtained Schneider's ID, and told her to get out of the car – she "told him that she could not get out because of her hurt ankle." Deputy Meister later testified that Schneider's ankle was "very dislocated," "pretty gruesome" and had a "deformity." Deputy Wetzel yelled at her to get out of the car, and Schneider later testified that she "felt compelled" to do so. As she did so, "she immediately fell to the ground and broke her ankle."

Schneider sued the deputies and Franklin County under 42 U.S.C. §1983. The officers requested summary judgment based upon qualified immunity, and were denied. They took an interlocutory appeal of the denial.

ISSUE: May an officer order an obviously injured non-suspect out of a vehicle, when doing so will likely worsen the injury?

HOLDING: No

DISCUSSION: The Court began – "in order to prevail on a civil rights claim under 42 U.S.C. §1983, a plaintiff must establish that a person acting under the color of state law deprived her of a right secured by the Constitution or laws of the United States." Defendants (in this case, the officers) may raise the "defense of qualified immunity, which shields government officials from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[166] To determine qualified immunity, the Court uses the two pronged test outlined in Saucier v. Katz – 1) whether, considering the allegations in a light most favorable to the part injured, a constitutional right has been violated, and 2) whether that right was clearly established." [167]

First, the Court looked at Deputy Meister's traffic stop. The Court concluded, from the facts presented, that it was impossible for the Cadillac to have actually been speeding in excess of 60 mph on the service road. Since speeding was the purported reason for the stop, the Court agreed that "the violations did not occur and Schneider's constitutional rights were violated."[168] The Court further noted that "Meister's reliance on Burns" direction was inappropriate, and that "a seizure conducted in reliance on a dispatch is proper only if the law enforcement officer who issued the information possessed the necessary reasonable suspicion."[169] The Court found the denial of qualified immunity for Meister to be correct.

With respect to Wetzel, the Court agreed that officers "may order passengers out of the car pending completion of the stop."[170] However, Schneider's claim did not concern the "legality of the order, but the officers' alleged unreasonableness in forcing her to exit her car despite clear medical injuries" and a claim that they "should have realized that ordering her out of her car would have caused her to further injure herself." The Court agreed that although she was not, apparently, under arrest, that "[s]ince the officers had taken the driver of her car into custody and began to issue verbal commands, Schneider would not have felt free to leave the scene and thus was in [de facto] custody." "This custody created a 'special relationship,' and thus the officers owed a duty of care to Schneider"[171] once she was in their custody. Further, it agreed, that "the police officers affirmatively acted in a way that exposed her to harm," although it noted that it was unclear on Meister's role, if any, on ordering her out. The Court also found that the violation qualified under the "state-created danger" exception, in that the deputies (the "state') required her to do something that "placed her specifically at risk."

Moving to the second prong, the Court found that although it is generally appropriate to order a passenger from the car, that the deputies "should have known this did not give them the power to order a non-violent, non-threatening woman with a serious injury out of a car where the exit threatened to further compound the injury." The Court agreed that qualified immunity was inappropriate for this claim, as well.

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[166] Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006); Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[167] 533 U.S. 194 (2001).
[168] U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993).
[169] Smoak, supra.
[170] See Maryland v. Wilson, 519 U.S. 408 (1997).
[171] See Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

The Court upheld the denial of qualified immunity.

42 U.S.C. §1983 - HECK BAR

Harper v. Jackson
2008 WL 3315058 (6th Cir. 2008)

FACTS: On July 31, 2003, Officer Jackson (Paducah PD) responded to a call from a Wal-Mart security officer, "who reported that Harper had purchased methamphetamine precursors." Harper was detained for four hours while Jackson sought a search warrant. Officers Jackson and Young eventually searched the Harper home, and ultimately charged Harper with the possession of methamphetamine precursors, trafficking in marijuana and use/possession of drug paraphernalia. Harper further argued that he was handcuffed and denied the right to speak to an attorney.

Harper pled guilty to reduced drug charges. He then filed suit under 42 U.S.C. §1983, arguing that the officers violated his Fourth Amendment rights by detaining him and searching his home. The trial court granted summary judgment for the officers, "concluding that a judgment in Harper's favor would necessarily impugn the validity of Harper's outstanding guilty-plea convictions because the defendants discovered the marijuana and drug paraphernalia during the contested search."[172]

ISSUE: Does a conviction always require a lawsuit related to the arrest be dismissed?

HOLDING: No

DISCUSSION: The Court discussed the "Heck bar" - which "precludes a [plaintiff's] use of §1983 to collaterally attack an outstanding conviction." As such, the Court had to consider "the question of whether success on Harper's claim would necessarily imply the invalidity of his convictions…." The Court concluded that in this case, the "fact that a Wal-Mart security employee notified the police of Harper's purchase establishes that even if [the court] were to conclude that the officers illegally detained Harper, success on the §1983 claim would not necessarily impugn his conviction because the resulting discovery of the marijuana and drug paraphernalia would have inevitably occurred regardless of the detention." Since the court concluded that "even if the warrant were unlawfully obtained, the police acted in good faith reliance on the warrant issued by a neutral magistrate, and thus the evidence could have been admitted to secure Harper's conviction."[173]

The Court reversed the trial court's dismissal and allowed the case to go forward.

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[172] See Heck v. Humphrey, 512 U.S. 477 (1994).
[173] See U.S. v. Leon, 468 U.S. 897 (1984)

42 U.S.C. §1983 - AGENCY POLICY

Mann v. Helmig
2008 WL 2744570 (6th Cir. 2008)

FACTS: Prior to May 16, 2005, Mann and his former girlfriend were involved in a domestic situation - during which time the Kenton County District Court had issued (and re-issued) a Domestic Violence Order. Mann had argued that he and the petitioner, Wagner (his sister), were not "intimate partners" under 18 U.S.C. §922(g), and as such, the assumption that someone against whom a DVO has been entered has a federal prohibition against possessing firearms was inaccurate in cases such as his. As a result of this argument, the Court had amended the order against him to read that he "may" be prohibited from possessing weapons.

On May 16, 2005, with the DVO still in effect, "the Boone County Sheriff's Department received a call reporting gunshots at [Mann's] residence." Deputy Combs responded, and met Mann at the door. Mann explained he had been target shooting in his backyard. He showed the weapons to Combs, and Combs left. When he returned to his car, he was told that the complainant, Mark Mann, Mann's brother, wanted to talk to him. He went next door and explained to Mark Mann, his wife and another woman that it was legal for Mann to be firing a weapon, and was only then told about the DVO.

Deputy Combs returned to Mann's home, and found that Mann had continued to shoot at targets. Mann complied when told to unload the weapon and put it down. They discussed the DVO and Mann showed him the Amended DVO with the non-mandatory language.

Deputy Combs, unsure what to do, tried to contact the county attorney's office, to no avail. He reached an Assistant Commonwealth's Attorney, and was told that Mann "was not permitted to possess firearms if he was subject to an active DVO." Mann turned over six guns and ammunition, and Deputy Combs placed them into the property room. ("Sometime thereafter, the Boone County Sheriff's office informed [Mann] that he could come retrieve the guns," but he did not do so.)

Mann filed suit under 42 U.S.C. §1983 against the Sheriff, arguing violations of the Second, Fourth, Fifth and Fourteenth Amendments, and also sued under Kentucky law for conversion." (The court noted that Mann intentionally sued Helmig only in his official capacity.) The trial court ruled in favor of the Sheriff, finding that Mann did not show that "this single, isolated incident was part of any pattern of unconstitutional conduct by Boone County, or that it was otherwise taken pursuant to any County policy or custom." (The Court also dismissed the Kentucky claim.)

Mann appealed.

ISSUE: Is a policy of consulting a prosecutor, and depending upon their advice in a questionable situation, constitutional?

HOLDING: Yes

DISCUSSION: The essence of Mann's argument was that Deputy Combs confiscated the weapons "pursuant to a policy of the Boone County Sheriff's Department." The Court noted that the legal definition

of the term "policy" is that it is a "word [that] generally implies a course of action consciously chosen from among various alternatives."[174] The policy, as identified by Mann, was that deputies would "follow the advice of the County or Commonwealth Attorney when a deputy was unsure" about how to "deal with a certain situation." (The Court noted some confusion as to Mann's actual argument - in certain points of the brief, he seemed to be arguing that the policy of seizing the firearms was actually at issue.)

The Court agreed with Tuttle that if one goes back far enough into any given situation, a policy could likely be found that "caused the alleged constitutional violation." The Court found there to be "simply … too tenuous a connection between the policy of contacting and following the advice of the County or Commonwealth Attorney and the injuries sustained by Mann." The Court found no "affirmative link between the 'policy' and the confiscation of Mann's firearms and ammunition."

The Court found instead that the "proximate cause of Mann's alleged constitutional injuries was either the ambiguity of his DVO, the erroneous advice of the Commonwealth Attorney, or, less directly, the inability of Deputy Combs to contact Mann's attorney." The Court concluded that the "policy of consulting with the Commonwealth Attorney is clearly not itself unconstitutional," even though it led, in this case, to a mistake. The Court found that "Mann cannot simply rely on one incident to satisfy his burden."

The Court addressed Mann's second argument, briefly, and found that since Mann did not sue the prosecutor that issued the opinion, "their decisions cannot be challenged" in this case.

The trial court's summary judgment was affirmed.

42 U.S.C. §1983 – COLOR OF LAW

<u>McGuire & Ryan v. City of Royal Oak (Michigan)</u>
2008 WL 4428841 (6th Cir. 2008)

FACTS: On August 9, 2003, McGuire and Ryan were traveling by bus from Canada to Clarkston, Michigan to attend a concert. At the end of the concert, Threlfell was assaulted by members of the group with McGuire and Ryan. McGuire got off the bus to break up the fight, but Ryan was asleep on the bus. (McGuire later denied knowing exactly who had assaulted Threlfell.)

Royal Oak officers Warner and Gale, off-duty, were also in attendance. They claimed "to have seen the assault occur and the perpetrators board the bus." They told the bus driver not to leave and waited for the Oakland County Sheriff to arrive. When the deputies arrived, they identified themselves and assisted in the investigation. They ordered McGuire off the bus and told him that "if he did not identify the men who assaulted Threlfall, they would pin the crime on him and 'throw the book at him.'" Gale escorted Ryan off the bus and identified him as one of the attackers. Based upon their claim, later reiterated in written statements, McGuire and Ryan were arrested for assault. The charges were subsequently dropped when evidence indicated clearly that they had not committed the crime.

McGuire and Ryan sued the officers and the City of Royal Oak, under 42 U.S.C. §1983, claiming Fourth Amendment violations, along with state claims of false arrest, gross negligence and related assertions. The defendants moved for summary judgment based upon qualified immunity and Michigan's

[174] <u>Oklahoma City v. Tuttle</u>, 471 U.S. 808 (1985).

intergovernmental immunity law. The trial court refused the summary judgment, and the two officers appealed.

ISSUE: May officers who take action off-duty be working "under color of law?"

HOLDING: Yes

DISCUSSION: The officers argued for immunity, stating that they were not acting under color of law when they took the actions. The Court noted that there was "abundant evidence" that they "acted under color of state law" because they "purport[ed] to exercise official authority."[175] They "repeatedly identified themselves as police officers, and they leveraged this authority to disperse the crowd around Threlfall and to detain the bus they believed to contain his assailants." This is inconsistent with the actions of private citizens, and "consistent with the duty imposed upon them by the Royal Oak Police Department standards of conduct."

The Court stated that in a malicious prosecution claim, an allegation that a prosecution was based "upon an officer's having 'fabricated evidence and manufactured probable cause'' is sufficient to state a claim.[176] Since the information provided by the two officers, later proved to be false (although not necessarily malicious) was the basis for the prosecution, the Court agreed it was inappropriate to dismiss the case at this stage. The Court found ample evidence that the two "acted with gross negligence in singling out McGuire and Ryan and [actively] furthering their prosecution. The evidence indicated that they did not, in fact, "know the identity of the assailants and yet repeatedly testified against McGuire and Ryan in spite of this." As such, the Court agreed that the state claim of gross negligence could also go forward.

42 U.S.C. §1983 - SEARCH

Jacob v. Township of West Bloomfield
531 F.3d 385 (6th Cir. 2008)

FACTS: On the day in question, Killian, a housing inspector for West Bloomfield, Michigan, responded to complaints at Jacob's property. Specifically, he was responding to inoperable vehicles and other items that had been sitting in the yard for so long that grass had grown up around them, which was a violation of local land use ordinances.

Pursuant to the established process, Jacob was sent a number of notices. When he did not respond, criminal charges were filed. Jacob pled guilty and agreed to 14 days to clean up the property. (By agreement, if he did not take action, he would be sentenced to thirty days in jail.)

Three weeks later, Killian "entered the curtilage of [Jacob's] property without a warrant" and concluded that Jacob had not yet complied. While Jacob was serving time, Killian entered again, and again concluded he was not in compliance, and continued to do so after Jacob was released.

[175] See Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005).
[176] Spurlock v. Satterfield, 167 F.3d 995 (6th Cir. 1999); Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).

Jacobs filed suit under 42 U.S. C. §1983, arguing that Killian "violated the Fourth Amendment when he entered the property to inspect it without a warrant." Killian requested qualified immunity, but the trial court found that he was "not entitled to qualified immunity with respect to [Jacob's] Fourth Amendment claims."

In a prior appeal, the Sixth Circuit had ruled that claims for "searches occurring prior to [Jacobs's] guilty plea and incarceration were precluded by Heck v. Humphrey.[177]" The case had been returned to the trial court to decide whether Killian's "intrusion upon the property constituted a Fourth Amendment search under Widgren v. Maple Grove Township.[178]" Killian appealed on the issue of whether the trial court "properly held that Widgren does not preclude [Jacobs's] claim."

ISSUE: Do criminal investigations on private property, done by government inspectors, rather than officers, require a search warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the Fourth Amendment provides a "strong shield against [criminal] investigations" that intrude upon one's private property." However, since administrative or regulatory searches are "generally less intrusive than one which could potentially lead to criminal sanctions," such investigations that intrude upon property are "accordingly more likely to be tolerated under the Fourth Amendment." The Widgren case "considered this distinction between criminal and merely administrative investigations." In this case, the Court found the situation distinguishable, because Killian "did not enter [Jacob's] property for a purely administrative purpose." Instead, there was a very real threat that the intrusion would result in incarceration, and was done at the specific direction of a local prosecutor.

Killian argued that the search was not intrusive - he did not, for example, search inside the house. However, the Court noted that Killian "specifically targeted his investigation of [Jacob] after receiving a complaint about the conditions on {Jacob's] property, and he continued to single-out [Jacob] for continuing intrustions as [Jacob] failed to comply with the land use ordinance." Further, the Court found that even though the search was brief and not overly intrusive, that did not mean that the search did not violate the Fourth Amendment.

Having determined that the search did violate the Fourth Amendment, the Court moved to the second prong – "whether or not this rule was 'clearly established' at the time of the violation."[179] The Court found that the search in this case was to "search for evidence of a crime for which [Jacob] had already faced criminal sanctions." It certainly was for a law enforcement purpose, and there seemed to be no justification for the warrantless entry. That Killian was not a law enforcement officer "matter[ed] little, as it is clearly established that a government official does not have to carry a badge and gun to be subject to the restrictions of the Fourth Amendment."

The Court agreed that qualified immunity was not appropriate in this case, and permitted the case to go forward.

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[177] 512 U.S. 477 (1994).
[178] 429 F.3d 575 (6th Cir. 2005).
[179] See Saucier v. Katz, 533 U.S. 194 (2001).

Lawrence v. Bloomfield Township
2008 WL 647163 (6th Cir. 2008)

FACTS: Bloomfield Township officers received a 911 domestic violence report on the evening of August 19, 2000. Officers Godlewski and Kelley responded. As they approached, they spotted "Christian Lawrence, a young child, through a screen door and beckoned him outside." The child had a swollen eye and a "sizeable cut" and he told the officers his father, who was Frank Lawrence Sr., had struck him. When Lawrence, Sr. appeared at the door, he was placed under arrest.

Officer Monkonen arrived, and he and Godlewski spotted Frank Lawrence, Jr. inside the house. They asked him to come outside and he responded with an obscenity. They talked back and forth, trying to convince Lawrence, Jr. to come outside, to no avail. He screamed that the officers were not to come in the house without a warrant. He blocked the entrance physically. Eventually, "the officers reached into the house, pulled Lawrence out, took him to the ground and told him to sit down on a bench." Officer Monkonen did a protective sweep of the house, and another officer, McAtee, "entered the house with Christian to find the board with which his father hit him."

Lawrence, Jr., was charged with interfering with an officer, but prior to the trial, he filed a number of actions. He went to trial and was convicted. He then filed suit against the officers, various supervisory officers and the township, claiming that the use of force was unlawful. The District Court granted the defendants summary judgment, and Lawrence appealed.

ISSUE: Is a brief, protective sweep of a residence justified upon reasonable belief that an act of domestic assault has occurred?

HOLDING: Yes

DISCUSSION: The Court quickly found that the township's policy, in effect, that they would treat all domestic violence allegations seriously and should attempt to find and secure any weapons involved, to be facility constitutional, nor was there any evidence that it had been applied by officers in an unconstitutional manner. The Court further found that "[e]xigent circumstances … may justify a warrantless entry into a house" and pointed to two possible exigencies. First, the Court found a "risk of injury posed to the officers or others that required swift action," and second, that "the officers had a 'reasonable belief that the destruction of [evidence] was imminent." In hindsight, it was now known that "no other victim or assailant remained in the house," but a "reasonable officer could fairly determine that he needed to conduct a brief search to ensure that was so." Lawrence's "aggressive, aberrant behavior" only further supported the need for officers to ensure that they had accounted for everyone at the scene. The Court found their use of force "was proportionate to the nature of the impediment and the erratic behavior of Lawrence." Although Lawrence claimed that the officers "grabbed onto [his] hair, dragged [him] out, stomped on [his] leg and threw [him] up on a bench," the officers found that the "officers [had] no reasonable option but to grab him as best they could and drag him to the bench" and accepted that possibly an officer had stepped on his leg in the process. The Court noted that Lawrence had provided no evidence of any injury to his leg. The Court found no indication that Lawrence had been treated improperly once he was out of the house and secured.

Finally, Lawrence argued that his statements were protected by the First Amendment, but the Court found that "Lawrence was not arrested merely for his utterances." The Court found that he was arrested for

interfering with the officers' justified search of his home, "not for the content of his speech or his assertion of rights."

The District Court's decision was affirmed.

42 U.S.C. §1983 - COURT PROCEDURE

Abdul-Khaliq v. City of Newark
275 Fed.Appx. 517 (6th Cir. 2008)

FACTS: In March, 2003, Abdul-Khaliq returned home to his girlfriend to find "four armed men demanding money" from her. He called 911 and reported the event, which was misinterpreted as a child abduction attempt. Officers Gross, Minton and Cook (Newark PD) were dispatched. In the meantime, Abdul Khaliq pursued the invaders.

When they arrived, the officers questioned a neighbor who was standing in the street, and the girlfriend, who explained what had occurred. She agreed that she had tried to get Abdul-Khaliq to take a "toy gun" with him when he left, but that he did not do so. Abdul-Khaliq returned to the house and later admitted that "he was angry and frustrated" when he approached the officers, and that he "asked the officers why they were not 'chasing after the criminals.'" The officers claimed that they tried to get Khaliq to let them pat him down, and that they told him to put his hands on the car. He claimed that when the officer demanded to know about a gun, that he cursed at them, that he didn't have a "f**king gun." "After debating with the officers about whether or not he was carrying a gun, Khaliq reached for his jacket." He claimed it "opened his coat as a non-threatening gesture to show the officers that he was not carrying a gun," but one of the officers "interpreted [the action] as an aggressive gesture." They then "sprayed Khaliq with pepper spray, shoved him to the ground, and handcuffed him." He was arrested for disorderly conduct.

Khaliq filed suit under 42 U.S.C. §1983, making a number of claims under both state and federal law. The defendants requested summary judgment. The trial court granted the motion on all claims, noting, however, that it was not clear that Khaliq had, in fact, alleged excessive force - a claim about which there was some confusion. The Court found the officers had probable cause to arrest Khaliq because of his admitted "yelling and cursing" at the officers.

Khaliq appealed.

ISSUE: May a judge decide a case in favor of officers, when the facts themselves are not disputed?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers involved had sufficient probable cause to arrest Khaliq, who admitted at deposition that he was "being argumentative and uncooperative inasmuch as he admits to angry yelling and cursing at the officers while carrying on a prolonged debate about whether or not he had a gun." Further, the Court did not find that the force used, even under Khaliq's version of the event, was excessive, as it consisted of a "brief dose of pepper spray," being knocked to the ground and being handcuffed. The Court upheld the summary judgement in favor of the officers.

Cook v. McPherson
273 Fed.Appx. 421 (6th Cir. 2008)

FACTS: On October 26, 2002, Cook and his family visited a Chattanooga restaurant for dinner. He was confronted by another individual outside. Cook sent his family inside, and then followed them. "During that time, the other party called the Chattanooga Police Department and claimed that Cook had flashed a knife and was threatening to use it." Officers McPherson and Bender arrived, and found Cook at the restaurant. Cook admitting, upon questioning, that he had a knife, so the officers "grabbed Cook's hands and put them behind his head." The officers "pushed him head-first through the restaurant's door, then drove him toward the ground, with his face to the pavement." As he was being handcuffed, one of the officers put his knee in Cook's back.

Cook was charged in the initial assault[180] on the individual outside, and for assaulting one of the officers, resisting arrest and carrying a weapon. He was convicted of all counts but the assault against the officer.

Cook timely filed a complaint against the officers, under 42 U.S.C. §1983, for false arrest, false imprisonment, malicious prosecution and excessive force. The officers requested summary judgment, and the trial court granted it, under the provisions of Heck v. Humphrey.[181] Cook appealed on the malicious prosecution claim.

ISSUE: Does an acquittal prove that officers lacked probable cause for an arrest?

HOLDING: No

DISCUSSION: The Court noted that a malicious prosecution claim requires proof that the prosecution "was initiated without probable cause." The trial court had reasoned that although Cook was ultimately acquitted on the charge of assaulting the officer, the fact that the grand jury indicted him indicated sufficient probable cause for the charge. Cook contended, however, that the two officers "may have testified untruthfully before the grand jury," which would serve, if true, to be an exception to the usual rule. The Court noted, however, that Cook offered "absolutely no evidence - other than his eventual acquittal on the assault charge - to support that assertion."

The Court upheld the summary judgment against Cook and in favor of the defendant officers.

42 U.S.C. §1983 - QUALIFIED IMMUNITY

Eubanks v. Baylis & City of Grand Rapids, MI
2008 WL 744255 (6th Cir. 2008)

FACTS: On Sept. 16, 2002, Eubanks (a Kent County LE officer) left his car blocking a driveway while he visited Assenco's home. (Assenco was a retired deputy sheriff.) At about 9:30 p.m., he left Assenco's home and found a police officer shining his light on several homes - the officer than "pulled up and boxed his car in position." Eubanks later asserted that the officer "exited his vehicle with his gun drawn

[180] The opinion doesn't explain if he allegedly had physical contact with the individual, or if he merely threatened him.
[181] 512 U.S. 477 (1994).

and pointed it at him." He recognized the officer as Baylis, whom he had encountered at the jail when Baylis had brought in prisoners. Baylis demanded identification and registration, and Eubanks identified himself as a deputy sheriff. Baylis then, allegedly, "held the gun close to his head and demanded that he retrieve identification from his car." Eubanks showed Baylis his badge, which he retrieved from his wallet which was in the car. Baylis "told Eubanks never to block a driveway again, holstered his gun, and drove away."

Eubanks complained to the Grand Rivers' police department. An investigation showed that "Baylis was not on duty" and further, "that the record of radio traffic did not show any parking calls for the relevant time and place."

Eubanks filed suit under 42 U.S.C. §1983, against Baylis and Grand Rapids, asserting violations of his Fourth, Fifth and Fourteenth Amendment. The trial court awarded summary judgement to all defendants, and Eubanks' appealed.

ISSUE: Must an agency provide solid proof against a plaintiff's assertions to successfully raise a defense of qualified immunity?

HOLDING: Yes

DISCUSSION: First, the 6th Circuit found that:

> … police time sheets showed that Baylis was not working on the night of Monday, September 16, because there was an X next to his name on the time sheet. Additionally, evidence in the record showed that Baylis normally did not work on Mondays. However, he worked on Monday, September 23, a week after the alleged incident, as indicated by overtime sheets, and there was an X next to his name on the time sheet for that night. Therefore, the fact that he normally did not work on Mondays and the X entry on the time sheet are not conclusive proof that he was off duty on September 16." Next, the Court noted that the IA investigator reviewed tapes from 10 p.m. until midnight, although Eubanks clearly asserted that the encounter took place at about 9:30 p.m. There was, in fact, a call in that area at about 9:46 p.m.

The Court concluded that it was possible that Baylis was working that night, and that was sufficient to preclude summary judgement. The Court reversed the summary judgement in favor of Baylis and Grand Rapids, and remanded the case for further proceedings.

NOTE: Agencies are advised to ensure that timekeeping paperwork clearly reflects if an officer is working or not working during specific hours.

INTERROGATION - RIGHT TO SILENCE

Thompkins v. Berghuis (Warden)
547 F.3d 572 (6th Cir. 2008)

FACTS: On February 22, 2001, Thompkins was interrogated by Det. Helgert on suspicion of involvement in a shooting that had occurred over a year before. (He had been identified as a suspect, but not located until then.) Helgert later testified that Thompkins was given his Miranda warnings but that refused to sign the form. Thompkins was described as not communicative, and it was noted that he remained substantially silent during the almost three hour interrogation, responding only with occasional nods and "I don't knows." Thompkins showed a little more emotion when Helgert took a "spiritual tac[k]" – and he responded to a question as to whether he'd asked God for forgiveness in the shooting in the affirmative. Thompkins refused, however, to put anything in writing.

Thompkins later requested suppression, which the trial court denied, and was convicted. He sought habeas relief.

ISSUE: Is remaining silent under questioning an implied invocation of the right to remain silent?

HOLDING: Yes

DISCUSSION: Thompkins argued that "he had effectively invoked his right to remain silent by" being so uncommunicative. (In fact, Helgert had agreed to a question by the defense that Thompkins "had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes.")

The Court reviewed the evolution of the law on the invocation of the right to remain silent. The Court also reviewed the state record, and noted that the few responses Thompkins gave demonstrated that the interrogation was "very, very one-sided" as described by Officer Helgert. "Most revealing, three times Thompkins's counsel asked Helgert variations of a question regarding whether Thompkins remained silent during the first two-plus hours of the interrogation, and each time Helgert confirmed that Thompkins had done so." The Court found no "course of conduct indicating waiver."

The Court agreed that Thompkins had not waived his right to remain silent "by in fact remaining substantively silent for nearly three hours."

The Court upheld the habeas writ and ordered Michigan to release him unless the state court commended a new trial within 180 days.

Franklin v. Bradshaw
545 F.3d 409 (6th Cir. 2008)

FACTS: Franklin, 16, was identified and questioned as a participant in a murder. He was given his rights and signed the form. He denied he was in the area and offered an alibi. However, further investigation placed him at the scene and he was identified by a witness as the shooter. Franklin was

questioned again, two days later. The state appellate court summarized his statement at that time as follows:

> The videotaped interrogation begins at 12:32 p.m. [Franklin] is informed of the charges lodged against him. [Franklin] is then asked if he remembers his rights as they were explained to him when the officers questioned [Franklin] the day before when he signed a *Miranda* card. Appellant is again advised that he has the right to remain silent, to end the questioning at any time, and to have counsel present. [Franklin] never invokes any of his rights. At 12:34 p.m., the officers ask [Franklin], "do you understand your rights," and he answers "yes, sir." The officers ask [Franklin], do you want to tell us your side of the story." [Franklin] answers "no." [Franklin] never states during the questioning that he wishes to remain silent, however he does put his head down and avoid eye contact with the officers. The officers inform [Franklin] that they know he was at the scene because a number of witnesses place him there. [Franklin] denies being at the scene and states "how you going' to tell me where I was, I know where I was." The officers ask [Franklin] "did you fire any shots?" [Franklin] answers, "I didn't kill nobody." The officers ask [Franklin] "was it your gun?" [Franklin] answers, "I never had no gun," and states "I'm not lying to you." The officers ask [Franklin] "is that your response, i[s] that what you're going with," and [Franklin] responds, "I ain't did nothing."

The trial court had admitted the statement, over objection. Following his conviction, and unsuccessful state appeals, Franklin filed for habeas in the federal courts.

ISSUE: Is a single negative response enough to unambiguously invoke the right to remain silent?

HOLDING: No

DISCUSSION: The Court noted that the critical question was whether Franklin invoked his right to remain silent during the interview. The Court noted that the right must be asserted unambiguously, otherwise, "questioning need not cease." (The same standard applies to invocation of the right to counsel.) In this case, the Court found that Franklin's single negative response to being asked if he wanted to "tell his side of the story" was not sufficient to unequivocally assert his right to remain silent, nor was his failing to raise his head or look at the officers significant.

Franklin's conviction was affirmed.

<u>Davie v. Mitchell (Warden)</u>
547 F.3d 297 (6th Cir. 2008)

FACTS: Davie was charged, and eventually convicted, of "a bloody and gruesome series of crimes [which occurred] on the morning of June 27, 1991," and which resulted in the beating and shooting deaths of two people and the attempted murder of a third. He was arrested promptly, given his <u>Miranda</u> warnings and transported to the police station. At 9:05 a.m., upon arrival at the station, he was given his rights again, initialed the form but refused to sign the waiver. He was not interrogated. He was given the rights again about an hour later, made a few comments, but refused to speak to the officers. Again, the interview ended. At about 12:15 p.m., he was questioned a third time and provided some information, but he did not confess. He stopped talked at 12:35 p.m. At about 2 p.m., he asked to speak to Det. Vingle, and Vingle

arrived and gave him Miranda warnings once more. At that time Davie confessed. At no time did Davie asked for an attorney.

Davie was convicted, and sentenced to die. He appealed under a habeas writ, arguing that his Miranda rights had been violated.

ISSUE: Does a defendant effectively waive a previously invoked right to remain silent by asked to speak to a particular officer about the crime?

HOLDING: Yes

DISCUSSION: The Court reviewed the actions of the Ohio courts, which equated the situation to that considered in Oregon v. Bradshaw. In that case, the Court "concluded that authorities could speak to a defendant, without depriving him of his rights, when the defendant asked 'Well, what is going to happen to me now?' even though the defendant had previously invoked his right to counsel."[182] As in that case, Davie "evinced a willingness to discuss the investigation without influence by authorities" – asking, specifically, to speak to a particular officer about the matter. In the interim, he'd had contacts with various officers, and exchanged comments, but the Court did not find these contacts to be improper attempts to reinitiate an interrogation.

Further, the Court found there to be no violation even though Davie refused to sign the waiver form, since he verbally expressed a willingness to talk, nor did the Court require that officers go further to explain that such statements could be used against the defendant, even though they did not sign the form.

In addition, the Court did not find the situation violated Michigan v. Mosley.[183] In that case, the Court upheld "a confession that followed a cutoff of questioning" (invoking the right to silence), finding that "police are not indefinitely prohibited from further interrogation so long as the suspect's right to cut off questioning was 'scrupulously honored.'"

The Court examined the specific facts of the case. The Court found three separate attempts by officers to speak to Davie, over five and a half hours. At each interaction, he was again given Miranda warnings, and when he refused to talk, the Court found "no evidence … that the officers engaged in any other conduct to persuade Davie to change his mind." Davie unquestionably initiated the discussion with Vingle that led to the conviction.

The Court upheld the admission of the confession.

INTERROGATION - MIRANDA

U.S. v. McConer
530 F.3d 484 (6th Cir. 2008)

FACTS: On Jan. 19, 2005, Detroit officers executed a search warrant on a duplex. The first officer to enter, Officer Hughes, found Thompson in the living room with his hands raised, and spotted Arone

[182] 462 U.S. 1039 (1983).
[183] 423 U.S. 96 (1975).

McConer (the appellee), running through the home. He ordered him to stop, but Arone McConer did not. "Hughes followed him into the basement." He stopped Arone and checked him for weapons, and brought him back to first floor. Eventually, he and Thompson both were detained in a second floor apartment. Officer Penn, who followed Hughes into the apartment, found Brian McConer, running through the apartment in another direction and "throw[ing] cocaine packaged in nine Ziploc bags on the floor as he ran." Officer Penn located Brian hiding under a bed and arrested him.

Once the initial sweep was finished, Officer Hamilton arrested Arone and searched him, finding keys to the apartment. In the upper level apartment, he found a quantity of cocaine and marijuana, along with paraphernalia indicating trafficking. A loaded handgun was also found. The officers also found papers, including letters and receipts, containing Arone's name, but none were addressed to him at the residence itself. (The papers contained several other addresses.)

As the items from the search were collected and brought to where Arone could see them, "McConer signaled to Officer Hughes that he wished to speak with him privately." In a bedroom, "[w]ithout any prompting or questioning by Officer Hughes, McConer volunteered that he had just gotten out of prison and that he could not be around guns or dope." Hughes apparently then asked where he lived, and "McConer stated either that he used to live at the residence, or that he does not live there anymore." Hughes told him that they would get the information "all down on paper in a little while" and sent him "back to the living room to relax." The "exchange lasted less than a minute."

> After the search was completed, Officer Hughes interviewed McConer formally in the kitchen. This time, he gave McConer Miranda warnings, and McConer signed a waiver form.
>
> Hughes then produced a Detroit Police Department interrogation form, which also contained a statement of constitutional rights. Hughes read the rights to McConer again, and McConer signed the second form. McConer then agreed to give a statement. Hughes testified that while he was writing out the questions that he intended to ask McConer, McConer was panicky and kept asking questions, including "how much time could I get for this," and repeated that he "didn't live here anymore, . . . I can't be around any of this stuff, man. You just don't know." Officer Hughes received the following answers to the questions that he had written:
>
> 1. Do you understand your constitutional rights? "Yes."
> 2. How long did you live at this location? "For a few months."
> 3. How much cocaine was in the bedroom? "I don't even know."
> 4. How long has the pistol been in the bedroom? "I don't know."
> 5. Why was all of your IDs & paperwork in the front bedroom? "I left all my paperwork & the [toy] motorcycle here when I left."
>
> JA 33. McConer initialed each answer and signed his name at the bottom of the interrogation form.

As they left, McConer indicated his coat to another officer. Unbeknownst to Arone, however, an earlier search of the coat had revealed over $6,000 in cash. Arone was charged with state offenses including trafficking and illegal gun possession. He was encouraged to plead guilty to avoid the case being referred to a federal court, but he decided instead to take the case to a state preliminary hearing. As a result, he was referred for federal prosecution and charges were filed. After a number of procedural matters, Arone requested suppression of the statements he made both to Hughes, and under the formal interrogation a

short time later. The trial court denied the request. Arone was eventually convicted in federal court, and appealed.

ISSUE: Does a inadvertent failure to provide a timely Miranda warning, later remedied, invalidate an interrogation?

HOLDING: No

DISCUSSION: The Court quickly concluded the Arone's "unwarned statements" were admissible and did not violate Miranda, because they "were not obtained through interrogation." The only question asked in the bedroom that "could conceivably be construed as 'interrogation"" related to whether Arone lived in the house, and since no contemporaneous record was made of the discussion, even that wasn't clearly as the result of a question, or volunteered and then clarified by the officer. But since the evidence connecting him to the address was already so overwhelming, the Court found that error, if any, was harmless.

With respect to the questioning in the kitchen, the court ruled that "[a]ssuming that Officer Hughes's bedroom question about McConer's living situation was not interrogation, there is no Miranda problem with the admission of the statements" made there. Officer Hughes gave Miranda prior to starting the questioning. Even assuming it was interrogation, though, the Court still found no problem, because it was not analogous to the "question-first" technique condemned in Seibert. The situation was not one in which Miranda was '"inserted in the midst of coordinated and continuing interrogation." It was more similar to that situation in Oregon v. Elstad[184] in which the failure to warn was an unintentional oversight, not a plan. To be inadmissible under Seibert, the "two-step strategy must be 'deliberate' in order to violate Miranda" and that has not been shown to be so in the instant case.

The Court also examined Officer Hughes' testimony that Arone had stated he'd just gotten out of prison, which allegedly violated the court's order not to admit such information. Since they had already stipulated that he was a felon, the Court had ruled that any additional information concerning his criminal past was immaterial. However, even had it had preferred that there had been "no mention of prison at all," the court did not indicate that it was improper to have a bare mention of his prior prison time nor did it warrant a mistrial.

The Court affirmed Arone McConer's conviction, but remanded his case for sentencing errors.

Jackson v. McKee
525 F.3d 430 (6th Cir. 2008)

FACTS: On December 11, 2000, the Dollar Value store, in Detroit, Michigan, was robbed by a group of men. The store owner was killed. Jackson became a suspect, and he was asked to come to the police station and provide a statement. He did so, at about 8 a.m. on January 5, 2001.

At 10:30 a.m., Investigator Simon gave Jackson Miranda warnings, which he waived. He denied any involvement in the crime. Jackson was, however, arrested, and again questioned, at about 3 p.m. He was returned to a holding cell. Ross was interviewed the next day, and given a polygraph, and he implicated Jackson in the crime. Once again Jackson was questioned, after again being given Miranda. He was

[184] 470 U.S. 298 (1985).

offered a polygraph about 9:55 p.m., and he agreed to take the test. The polygraph session ended shortly after midnight, with Jackson still denying any involvement in the crime. Following further interrogation, however, Jackson changed his story and confessed.

At about 2:15 a.m., Simon returned and again gave Jackson his Miranda warnings, and Jackson signed a written waiver. He confessed to shooting the store owner during the course of a robbery with Ross and another man, Dukes. He also expressed remorse for the crime.

Jackson and the two other men were tried jointly but before two separate juries (Jackson before one, Ross and Dukes before the other). Jackson was convicted, and appealed. After exhausting his state appeals, Jackson requested a habeas petition before the federal court.

ISSUE: What are the factors indicating a confession is voluntary?

HOLDING: See discussion.

DISCUSSION: Jackson first argued that the admission of his confession was improper because it was made involuntarily, through coercion. The Court noted that "[w]hether an interrogation rises to the level of coercion turns on a spectrum of factors: the age, education and intelligence of the suspect; whether the suspect was advised of his Miranda rights; the length of the questioning; and the use of physical punishment or the deprivation of food, sleep or other creature comforts."[185] The Court noted that Jackson appeared of his own accord and waived Miranda no fewer than four times. He expressed remorse when he confessed. He indicated he understood those rights. "He never said he was tired, confused or uncomfortable." He agreed in writing that he was not deprived of "food, water or the use of the restroom." He had prior experience with the criminal justice system. He was not under the influence of drugs or alcohol, or ill, or injured, and he never received any promises or threats. He never asked for an attorney or invoked his right to counsel. As such, the Court found his confession was voluntary.

In addition, the evidence indicated that he waived his rights in a knowing and/or intelligent manner. Despite his claim that he could communicate in a written form, he produced a written confession describing the crime, and further responded in writing to questions from the investigating officer. An expert witness agreed that his waiver was knowing and intelligent. Despite evidence that he had difficulty reading, he had average problem solving skills and intelligence. Even though he presented an expert[186] to the contrary, the trial court's decision was upheld.

Finally, Jackson argued that the admission of testimony from a non-defendant, concerning statements made by Ross and implicating both Ross and Jackson in the homicide, were a violation of his Confrontation Clause rights. Jackson conceded, however, that the statements were "non-testimonial." The Court discussed the evolution of that right, particularly since the ruling in Crawford v. Washington[187] which recognized that non-testimonial hearsay does not implicate the Confrontation Clause. (In other words, the law changed from when the appeals process on the issue began.)

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[185] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[186] His own expert indicated he may not have been making a full effort and may have exaggerated his deficiencies.
[187] 541 U.S. 36 (2004).

The Court decided that Jackson's claim must fail because current law "does not prevent the admission of non-testimonial hearsay." (The Court also found it was unnecessary to decide the case the other way, because even under prior case law, the judge could decide, based upon certain factors, to admit the hearsay.)

Jackson's conviction was affirmed.

U.S. v. Pacheco-Lopez
531 F.3d 420 (6th Cir. 2008)

FACTS: On March 13, 2006, undercover officers in Louisville made an arrest during a controlled buy of a large quantity of cocaine. They received a search warrant on the address where one of the vehicles involved in the arrest was registered. There, they found Pacheco-Lopez and another man. At the time, the officers knew nothing about those two men.

During a later suppression hearing, the Court noted that the "exact sequence of events" that occurred involving the two men is unclear, "because each of the three officers who testified at the July 10, 2006, suppression hearing recalled the events in a slightly different manner." The Court chose to rely on the testimony of Agent Slaughter (DEA). Trooper Lagrange (KSP) provided language assistance, since Lopez spoke no English. He was given his Miranda warnings in Spanish by Trooper Lagrange. He admitted, upon further questioning, that he had transported the cocaine, and then declined to speak further. (It was later found that the truck that Lopez had admitted driving to Louisville had been modified to transport drugs in a hidden location.") The trial judge ruled that the pre-Miranda questioning was not an interrogation and that it was "only important with the benefit of '20/20 hindsight.'"

Lopez took a conditional guilty plea and appealed.

ISSUE: May a midstream Miranda be provided?

HOLDING: Yes, under appropriate circumstances.

DISCUSSION: Lopez argued that the initial questions did constitute an interrogation. (The prosecution admitted that he was in custody at the time.) The government, however argued that the questions were, in effect, booking questions and thus permitted. The Court noted that "[t]his case requires further delineation of the line between questions relating to the processing of an arrest that are biographical and questions of an investigatory nature." In this case, the Court found that "Lopez's pre-Miranda statements cannot be described as merely biographical, but instead resulted from an interrogation subject to the protections of Miranda. Some of the initial questions would not – in isolation – implicate Miranda; at the very least, asking the defendant his name is the type of biographical question permitted under the booking exception." However, "asking Lopez where he was from, how he had arrived at the house, and when he had arrived are questions 'reasonably likely to elicit an incriminating response,' thus mandating a Miranda warning." The Court made note of the fact that the officers did not "take notes or document [Lopez's] identity at the time." The Court also mentioned that the questioning was not done at a police location, and that undermined the assertion that this questioning was for booking purposes.

The Court found that the booking information was admissible.

Further, the Court noted "[m]idway through the interrogation, the police officers read Lopez his Miranda rights in Spanish."[188] The trial court had permitted the responses that followed this warning, finding that the earlier statements were not interrogation, but because the appellate court found otherwise, it found it necessary to decide "whether Lopez's later, post-Miranda statement should similarly be suppressed or whether it is admissible." Looking to Missouri v. Seibert[189] and Oregon v. Elstad,[190] the Court identified the "relevant factors for determining whether a midstream Miranda warning could be effective are: (1) the completeness and detail involved in the first round of questioning; (2) the overlapping content of the statements made before and after the warning; (3) the timing and setting of the interrogation; (4) the continuity of police personnel during the interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." The Court found that an "analysis of the sequence of events surrounding Lopez's interrogation compel [its] conclusion that the warning was ineffective, and that his statements were thus the result of a single, unwarned sequence of questioning." In particular, the sequence of questions was logical, and there was no break in the questioning at all. There was "no break in the questioning or any effort by the police to ensure that Lopez understood that his prior statements could not be used against him."

The Court rules that Lopez's statements both pre- and post-Miranda must be suppressed.

Coomer v. Yukins, Warden
533 F.3d 477 (6th Cir. 2008)

FACTS: On May 16, 1996, Coomer and Adams (together with their toddler) lived in Clawson, Michigan. On that day, finding that their rent and day-care payments were overdue, they decided to commit a robbery. Later that day, they encountered and strangled Iverson, and stole two checks, which were cashed later that day. On Dec. 30, the police learned that Coomer had called a friend and told him that Adams had beaten hear, and that she was at the home of another friend, Krawczyk. Dawson went to see her and she told him about the murder, and that she had not known that Adams was going to commit murder in addition to the robbery. She stated she hadn't reported it because Adams was holding her involvement in the crime over her. Krawcyzk had called the police about the assault, however, and when they arrived, Coomer explained that Adams "had beaten her and left in a stolen truck." On the way to the police station, Coomer told Krawcyzk about the murder and that she was worried about being arrested. She stated that Adams had told her he would take all the blame, however, so that she would be free to raise their child.

Adams was arrested for domestic assault that same day. In the meantime, apparently, Dawson had told his lawyer what he knew about Coomer and the lawyer contacted the police. That night, police went to Coomer's apartment, arriving at about 11:45 p.m. Later testimony indicated that 9-11 officers arrived, both uniformed and plainclothes, but there was conflicting testimony about the positioning of marked cars. Coomer later stated that she'd had no prior contact with police and that she'd used alcohol and marijuana that day, but not, apparently, to the extent that she appeared intoxicated. There was no indication that she'd been told she'd been arrested, but neither was she told that she was not. (Two officers stated they specifically told her that she was not under arrest and that they would leave if she asked.) Coomer was 20

[188] The Court called this "Miranda-in-the-middle."
[189] 542 U.S. 600 (2004).
[190] 470 U.S. 298 (1985).

years old, had graduated high school and had been an excellent student. There was also conflicting testimony about the degree of freedom she'd been given, but she did know that one of the officers was the lead officer in the homicide investigation.

Coomer later stated that she did not feel coerced, and there was indication that she was weeping while giving her statement, indicating remorse. She did ask that the officers remain quiet, because her son was sleeping, and offered refreshments. She confessed to her involvement in the murder, and the decision noted that "[f]ew questions were asked of her; most of her oral statements were offered in a continuous narrative over the next thirty minutes." She followed that up with a written statement, which was excluded by the trial court. The lead investigator asked her to accompany them to the station and she was allowed to arrange for a sitter. She was transported by two officers and was provided with a soda and cigarettes. When they arrived, the lead investigator told her she "was now in custody" and he gave her Miranda warnings. She waived her rights and repeated her confession, adding details.

Ultimately, both Coomer and Adams were tried, and Coomer was convicted of murder and kidnapping. The state court dismissed the kidnapping charge. She appealed the murder conviction to the Michigan Supreme Court, and was denied. Coomer then filed a habeas corpus petition, arguing that her Miranda rights were violated. The District Court denied the petition, and she appealed.

ISSUE: Is a statement given in one's own apartment, in the presence of multiple officers, custodial?

HOLDING: No (but see discussion)

DISCUSSION: Coomer argued that the oral confession given at her apartment was unlawful. The trial court had found that since Coomer was in her own apartment, in the presence of at least one officer she knew, and that the questioning was "minimal and brief," that a reasonable person would not have believed they were in custody. The Sixth Circuit applied the Salvo[191] factors, and agreed that the trial court was correct. The statement made at the apartment was properly admitted and Miranda was not required.

The Court then looked to the oral confession made at the police station. Coomer had argued that the second confession was tainted by the unlawful first confession, which the Court had upheld. Again, the Court noted that the statement was not "obtained illegally or involuntarily" and in fact, she had been given, and waived, her Miranda rights. Even though the trial court had not admitted her written statement, the Court found that there was no indication, given the lapse of time, "the "absence of coercive police conduct; the change in location; the voluntary nature of her first oral statement that immediately preceded the unlawful written confession; and her waiver of rights at the police station." (The Court essentially ignored the trial court's decision to exclude the written statement, and the opinion is not clear on why Michigan actually did so.)

The denial of Coomer's writ was upheld.

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[191] In U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998), the Court considered the following factors in determining if an individual was in "custody": 1) the purpose of the questioning; 2) whether the place of the questioning was hostile or coercive; 3) the length of the questioning; and 4) other indicia of custody such as whether the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their request to answer some questions.

EVIDENCE / TRIAL PROCEDURE – SPOLIATION

U.S. v. Branch
537 F.3d 582 (6th Cir. 2008)

FACTS: On March 5, 2003, Officer Colston (Oldham County PD) encountered Branch and Patterson, while Colston was taking a break at a local convenience store. His suspicions were aroused when the pair "seemed to actively avoid him." He followed the pair when they drove north on I-71, finally stopping them for speeding. Colston requested the vehicle documents from Branch, the driver. Branch gave him the rental agreement, which was "overdue by several weeks." He also got Patterson's license. Colston noted that although both claimed to be from New York, their licenses were from Florida (Patterson) and Tennessee (Branch). Colston returned to his car, wrote up a warning citation, ran checks on both and called for backup. He then went back to the stopped vehicle and asked Branch to get out, whereupon, he later testified, "Branch's level of nervousness 'just shot through the ceiling all of a sudden.'" Colston returned Branch's documents along with the warning citation.

Colston told Branch he was free to leave, but asked him if "he would mind staying to answer a few more questions." Branch agreed and related a story as to why he and Patterson were together. He got consent from Patterson to search, since Patterson had rented the car. Colston's narcotics dog "became excited and signaled its alert to the scent of narcotics at several places on the car." Colston searched, finding a bag containing just shy of $10,000 in cash.

Officers Colston and Campbell patted down the two men, and Colston found a "large unusual hard object" at Branch's waist. Branch told him that the item was cocaine. Colston handcuffed Branch and found that the item was a kilo brick of cocaine. Branch was given Miranda, and admitted that he was transporting the cocaine to sell.

The entire encounter was captured on Colston's patrol video recorder, but when he reviewed the recording, he discovered that there was no audio track. He believed that the tape had no evidentiary value and turned it in for reuse.

Branch was indicted for possession with intent to distribute, and requested suppression based upon the destruction of the videotape. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is the failure to preserve potentially exculpatory evidence always "bad faith?"

HOLDING: No

DISCUSSION: The Court addressed several issues. First, the Court concluded that the factors upon which Colston depended to make the stop were adequate to support that stop. (The Court stated, specifically, that while none of the factors were dispositive, individually, that "viewed in their totality, they create a reasonable suspicion that illegal activity was afoot.") The Court further supported the frisk, but did not elaborate. The Court found that Colston's seizure of the cocaine was also appropriate, even if it was not, arguably a weapon, since when asked about it, Branch replied "Man, it's cocaine, just take it." At that point, Colston had probable cause to seize the contraband.

Branch also argued that Colston's failure to preserve the tape violated his right to have "material exculpatory evidence" so preserved. If the tape was, in fact, materially exculpatory, such destruction would violate the right to due process "regardless of whether the government acted in bad faith."[192] "Constitutional materiality means that the evidence possesses both "an exculpatory value that was apparent before the evidence was destroyed and … [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[193] Just because an officer is negligent, or even grossly negligent, does not constitute bad faith.[194] Since Branch argued only that the tape might be "potentially useful" exculpatory – he did not argue that it was materially exculpatory evidence. Therefore, the standard to decide the due process issue is whether Colston destroyed the tape in bad faith, and since the trial court decided that, at most, the destruction was negligent, the Court found the destruction was not in bad faith.

Branch's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - RECORDINGS

U.S. v. Rose
522 F.3d 710 (6th Circ. Mich. 2008)

FACTS: During Rose's trial, the jury was presented with evidence in the form of "audio files on a laptop computer" that were played during an identified informant's testimony. When the jury asked to listen to the recording again, during deliberations, they were brought back into the courtroom to listen to the recording on the laptop. When they requested that they be allowed to take the recordings back into the jury room, the recordings were transferred to CDs and were able to be played on a stereo. (They were never actually physically admitted into evidence during the trial, since at that time, they resided solely on the laptop computer.) The recordings concerned a conversation between the informant and Rose about Rose's sale of a gun, a silencer and a magazine of ammunition. He was eventually convicted of charges relating to the sale, and appealed.

ISSUE: May evidence held on a laptop be copied to a CD, for use in evidence?

HOLDING: Yes (but see discussion)

DISCUSSION: Rose argued that it was inappropriate to change the medium of the recordings and permit them to be taken back into jury room. The Court noted that the "use of CDs was simply a practical solution to the technical challenge of enabling the jury to play the digital recordings."

Further, the Court noted that the "recordings sent into the jury room may be understood to constitute 'original' recordings within the meaning of Rule 1001(3) of the Federal Rules of Evidence or 'duplicate' recordings within the meaning of Rule 1001 (4) of the Federal Rules of Evidence." In both the Federal Rules of Evidence and Kentucky Rules of Evidence, a "duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it

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[192] California v. Trombetta, 467 U.S. 479 (1984); Youngblood v. Arizona, 488 U.S. 51 (1988); U.S. v. Wright, 260 F.3d 568 (6th Cir. 2001) ; U.S. v. Jobson, 102 F.3d 214 (6th Cir. 1996).
[193] Youngblood, supra.
[194] Wright, supra.

would be unfair to admit the duplicate in lieu of the original." In this case, prior to being taken back into the jury room, the CDs were played for defense counsel, and defense counsel did not disagree that they were exact copies.

The Court found that it was appropriate to permit the material to be transferred to CD, and further, that it was appropriate to permit the jury to take the CDs into the jury room for additional listening.

After resolving other issues, the Court upheld Rose's conviction.

EVIDENCE / TRIAL PROCEDURE - DISCOVERY/BRADY

Johnson v. Bell[195]
525 F.3d 466 (6th Cir. 2008)

FACTS: On July 5, 1980, an armed robbery took place at a market in Nashville, TN. After securing the cash, the robber began shooting and the owner's son was killed. The owner (Bell) and another customer (Smith) were injured. The robber then shot a cab driver and the cab passenger as he fled the scene. The owner was able to give information, however, that led the police to arrest Johnson the next day. Both Bell and Smith identified Johnson at trial, as did another customer who entered during the crime.

During the investigation, Davis provided an alibi for Johnson, but he recanted just prior to trial and instead, incriminated Johnson by placing him near the scene of the crime. Johnson was convicted of three counts of murder, and related charges, and was sentenced to death. He then appealed through the state courts, unsuccessfully. Eventually, he appealed to the federal court, under habeas corpus. The case was returned to the Tennessee state courts, but eventually returned to the federal court. The District Court ruled for the prosecution on all issues, and Johnson appealed.

ISSUE: May the failure to disclose records, pursuant to discovery, jeopardize a case?

HOLDING: Yes (but see discussion)

DISCUSSION: Johnson argued, first, that the prosecution failed to produce material evidence during his trial, material that he only learned about because of an Open Records request he made some years later. As a result of that request, he "received several police and medical reports" that he argued "undermine[d] the credibility of certain witnesses."

Looking at the evidence under Brady v. Maryland[196], the Court noted that to be successful, Johnson "must show that (1) evidence favorable to the petitioner, (2) was suppressed by the government, and (3) the petitioner suffered prejudice."[197] The Court accepted that the first two elements were satisfied and "proceed[ed] directly to the issue of prejudice or materiality." Johnson argued that the material could have been used to impugn the reliability of the witnesses, particularly Smith, because he could not remember

[195] Note, the Bell in the case citation is not the same person who was the victim in this case, but is, instead, the Warden of the facility where Johnson was being held.
[196] 373 U.S. 83 (1963).
[197] Banks v. Dretke, 540 U.S. 668, 691 (2004).

little details about the other customers in the store at the time of the robbery. Smith had failed to pick Johnson from a lineup, but the Court noted that even though he was not certain of his identification, he had verbally identified Johnson, "noting that the curled hair differed from that of the robber." (Johnson had apparently curled his hair for the lineup.) Other documents were also in the package, and Johnson objected to having been provided with none of them.

The Court noted, however, that although Smith's memory lacked detail, that "[a]ll of them [the interviews] were taken at a time when Smith could hardly have been expected to describe the events with … clarity" as he was suffering from gunshot wounds to the back and hand. However, given that Smith was admittedly unsure about many of the details of the crime, even at trial, the Court concluded that the "overall impeachment value of these reports, viewed collectively, is fairly minimal."

With respect to the two documents related to the owner, Bell, the Court noted that Bell stated the robber had no facial hair. A photo taken the next day indicated Johnson had a faint mustache and goatee. However, given that Bell knew Johnson as a customer of some long standing, the Court concluded that the documents would have provided little with which to prejudice the case.

Finally, the Court addressed a document related to the third witness. However, the Court noted that witness, whose testimony was already weak and contradictory, was unlikely to have been further impeached had Johnson had the documents in question.

The Court found that the failure to disclose the documents, although arguably improper, was insufficient to overturn the conviction. After addressing a number of other allegations, the Court upheld the conviction.

Owens v. Guida, Warden
549 F.3d 399 (6th Cir. 2008)

FACTS: Owens was charged with hiring a third party to kill her husband, which he did. She was arrested, and convicted. Following unsuccessful state appeals, she requested habeas corpus on a number of issues, including that the prosecution failed to turn over evidence that indicated her deceased husband had a paramour.

ISSUE: Does Brady apply to evidence held by the law enforcement agency but which is never provided to the prosecutor?

HOLDING: Yes

DISCUSSION: Among other claims, Owens argued that the stated failed to turn over "sexually suggestive cards and love notes between Ronald (her husband)" and another woman, and "police reports that discussed these notes and summarized an interview with [the woman] in which she admitted the affair." The prosecution had denied the claim because it found that the notes were not exculpatory and that she could have put on other evidence about the affair.

The Court noted that the notes were taken to the police station, and that eventually, upon the woman's request, were turned back over to the woman. The police had "checked with an unknown city attorney, who said that the letters were irrelevant…."

The Court noted that:

> When Owens filed her request, the prosecution told the court that it had turned over "everything we have in the way of any kind of physical evidence." While this may have been technically true because the prosecutors never handled the letters, it was not true for purposes of Brady. Brady's disclosure requirement includes not just information in the prosecutor's files, but "information in the possession of the law enforcement agency investigating the offense."[198]. These letters were at one time in police possession, but whether by accident or on purpose, those letters were never shown to Owens.

The Court, however, found that there was a "longstanding, commonsense belief in our culture that people who kill their spouses because of infidelity are not as morally culpable as other murderers." As such, the Court agreed that mitigation might have kept her from the death penalty. However, the Court agreed, such cases all occurred in the heat of passion," killing took place immediately, in person, and upon discovery of the infidelity instead of weeks later, in cold blood, and second hand through a hired killer."

Balancing the information available, the Court found that the state court followed a reasonable interpretation of Brady, and upheld Owens' conviction and sentence.

EVIDENCE / TRIAL PROCEDURE - DISCOVERY

Smith v. U.S.

2008 WL 2622657 (6th Circ. 2008)

FACTS: On Dec. 10, 2003, Detroit officers executed a search warrant on a home. Sgt. Spencer, in charge, announced their presence, and saw, through a window, that Smith was running. The officers then forced the door and entered.

Officer Salazar found Smith in the bathroom. He brought her back to the front room and handed her off to other officers to secure. He then continued to search. Officer Bradford found cocaine, packaged for distribution, in the area from which Smith ran. Another officer, Carson, found a loaded weapon under the couch. Sgt. Spencer found a large amount of cash on Smith's person. When the gun was found, Smith stated that the "gun was there because she had gotten robbed a couple of days ago at the house" and that she had gotten it from her "supplier." Sgt. Spencer repeated this statement in court, but agreed he had not included this statement in his initial written report.

Smith later argued that the statement was made as a result of an interrogation, but the prosecution characterized it as an "excited utterance." Smith also argued that the prosecution should have disclosed this statement during discovery, because it was inculpatory.

The trial court found the statement was an excited utterance, and not discoverable under the federal rules. Smith was convicted of weapons and drug charges, and appealed.

ISSUE: Must an oral statement made by a suspect be provided in discovery?

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[198] Jamison v. Collins, 291 F.3d 380, 385 (6th Cir. 2002).

HOLDING: No (in federal court)

DISCUSSION: The Court noted that, according to the Federal Rules of Criminal Procedure, Rule 16(1)(1)(A):

> "[u]pon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial."

Noting that this rule only applied to statements made in response to an interrogation, the Court found that Smith's statement was not made as a result of interrogation but was, instead, a spontaneous statement, and ruled that the statement need not have been disclosed.

After resolving several other issues, the Court upheld the convictions.

NOTE: It is critical, however, to note that Kentucky's Rules of Criminal Procedure on the issue is somewhat different. Kentucky specifically requires that ALL incriminating oral statements made by the defendant (or other witnesses) be documented and provided to the defense.

EVIDENCE / TRIAL PROCEDURE - INVESTIGATIVE HEARSAY

U.S. v. Pugh
273 Fed.Appx. 449 (6th Cir. 2008)

FACTS: During Walter and Tyreese Pugh's joint trial for bank robbery, a police detective testified that he "was given the name of Walter Pugh as a possible suspect." In addition, Tyreese argued that one of the witnesses also attributed the statement "we hit a lick" - committed a robbery - to Walter Pugh. Because Walter did not testify, he could not be cross-examined. The Pughs appealed based upon these statements.

ISSUE: Is background information, albeit hearsay, admissible?

HOLDING: Yes (depending upon circumstances)

DISCUSSION: With respect to the statement by the detective that he received Walter's Pugh's name as a suspect, the Court found that it was not hearsay, as it was not "offered for the truth of the matter asserted (that Walter was guilty) but instead to explain why the detective pursued the investigation in the way that he did." The Court noted that admitting such a potentially testimonial statement "in and of itself is not enough to trigger a violation of the Confrontation Clause" but instead, it must be being introduced as true hearsay - "in other words, it must be offered for the truth of the matter asserted." In this case, it was simply being offered as background information and to explain how the detective conducted his inquiry.

The Court concluded that the statement about "hitting a lick" was non-testimonial, and thus does not implicate the Confrontation Clause - the right to confront witnesses against one. The Court concluded that,

under Crawford v. Washington[199], that only testimonial statements implicate the Confrontation Clause, so nontestimonial statements can only be barred by the rules of evidence. Because the witness was not a "police officer or government agent seeking to elicit statements to further prosecutions," but instead, was a friend, there was no anticipation that the statement would be used to investigate or prosecute the crime. Under state hearsay rules, the statement could be used against Walter "as an admission of a party opponent." (The Court provided a limiting instruction explaining to the jury that it could not be used against Tyreese.)

Both convictions were affirmed.

EVIDENCE / TRIAL PROCEDURE - EXPERT WITNESS

U.S. v. Brown
272 Fed.Appx. 465 (6th Cir. 2008)

FACTS: Brown (and five others) were indicted for engaging in drug trafficking in Kenton County, in May, 2006. Brown possessed 6.5 grams of crack cocaine, which he had admitted he had "cooked for sale" - he also had "several small scales." He agreed to become a CI, but after signing the agreement, he "sold drugs for provision to an undercover officer and cooked additional crack … without police permission and contrary to the agreement."

Brown was convicted, and appealed.

ISSUE: May an officer testify as both an expert and a fact witness?

HOLDING: Yes

DISCUSSION: Brown argued that one of the police officers and one of the forensic specialists testified as both a fact witness and as an expert witness. The officer was part of the arrest team, and also testified as to his opinion that the quantity of drug seized "was consistent with distribution, not personal use." The forensic specialist testified as to her procedures with respect to the sample at issue in this case, and well as her opinion on certain matters.

The Court noted that the "qualifications of both witnesses were made a matter of record, and neither testified outside the limits of those qualifications." Even though the Court did not caution the jury as to the dual roles of these witnesses, the Court found that the error, if any, was harmless. The Court did mention, however, that although it might be a "better practice" to provide such an instruction, it was not reversible error to fail to do so.

Brown's conviction was upheld.

[199] 541 U.S. 36 (2004).

U.S. v. Webber
259 Fed.Appx. 796 (6th Cir. 2008)

FACTS: Webber was accused of drug trafficking - the precise nature of the criminal investigation is immaterial to this summary. At trial, Special Agent Riolo (FBI) testified as to the "coded language used by Webber and Hines (a co-defendant) in their wiretapped telephone conversations," but Webber argued that the agent "had insufficient expertise to translate the specific slang words or jargon used during the conversations." The conversations "were all in Jamaican patois, which Webber claim[ed] [was] impossible for non-Jamaican speaking listeners to understand." Although the Agent was not explicitly qualified as an expert, he was allowed to testify as to his opinion, and the jury was instructed that he was an expert.

Webber was convicted, and appealed.

ISSUE: May officers testify as experts in areas in which they demonstrate adequate experience and knowledge?

HOLDING: Yes

DISCUSSION: The government argued that Agent Riolo "was qualified as an expert on the basis of his extensive training and experience in narcotics investigations" - some of which "involved Jamaican nationals." The government further contended "that the words or phrases used by [the defendants] would not mean anything to a juror, unless the codes used were explained by an expert in drug investigations with knowledge of the specific case."[200] The Court concluded, however, that the Agent was well qualified to explain the language being used and that his testimony was properly admitted.

After resolving several other issues, the Court affirmed the majority of the plea, reversing only on one minor issue.

U.S. v. Martin
2008 WL 834019 (6th Cir. 2008)

FACTS: Martin was a crack dealer living in Louisville. During the relevant time period, Louisville police set up two controlled buys, in which a CI purchased crack. They got a warrant for Martin's residence, which was actually leased by Susan Tyson, and found a substantial amount of crack, a weapon with ammunition, and a phone bill for Martin. When they tried to arrest him, he fled on foot but was quickly captured, and had crack on his person at that time.

Martin was indicted and eventually convicted of most of the charges. He appealed.

ISSUE: May officers testify both as fact and expert witnesses, in the same proceeding?

HOLDING: Yes

DISCUSSION: Martin argued that the trial court erred in "allowing a police officer to testify as both an expert in drug trafficking and as a fact witness, because the court did not draw a clear line of demarcation

[200] See U.S. v. Garcia, 72 F.3d 130 (6th Cir. 1995).

between the two types of testimony or issue a cautionary instruction to the jury about the difference between expert and fact testimony." Although the Court noted that no objections were made at the time, they agreed to review it under "plain error."

In this case, officer testified both to what actually happened during the search, as well as explaining the "significance in the drug trade of some of those items of evidence, such as digital scales, baggies, razor blades, and firearms, and opined that the quantities of crack found in the apartment were consistent with distribution and exceeded the amounts typically possessed for personal use." The Court concluded that there was no indication that the "duality of the officer's testimony had an undue effect on the outcome in this case." As such, the Court did not "commit plain error by allowing the police officer to testify as both expert and fact witness without a cautionary instruction."

Martin's conviction was affirmed.

EVIDENCE/TRIAL PROCEDURE - CRAWFORD

U.S. v. McGee
529 F.3d 691 (6th Cir. 2008)

FACTS: McGee was indicted on charges of possession with intent to distribute cocaine base. During his trial, one of the officers "testified to statements made by the confidential informant that related to McGee's identity" but "McGee was not afforded the opportunity to confront, or cross-examine, the informant."

Specifically, in an interchange between the prosecutor and the officer:

> Q: Now, what else did you do to confirm that the person your CPI [confidential police informant] was speaking to was Mr. McGee and not Mr. Rimpson?
> A: I called the CPI back the next day and said, Hey, I know we called a few people.
> Who was the one that we finally got that we talked to?
> Mr. Karafa (McGee's attorney): I object, Your Honor. The question's objectionable in the first place, but prior to the answer there's a lack of foundation. It's incompetence [sic] hearsay.
> The Court: No, he's just saying what he did, I think. Overruled. Next question.
> Mr. Lennon (for the government)
> Q: You called the CPI; is that correct?
> A: Right.
> Q: *And confirmed who you were speaking - who he was speaking to that day?*
> A: *Yeah, and he advised Zookie [McGee].*[201]

Eventually, McGee was convicted, and appealed.

ISSUE: Is a statement by a CI as to the identify of a suspect, by their nickname, potentially testimonial?

[201] Emphasis in original.

HOLDING: Yes

DISCUSSION: The Court noted that

> The confidential informant's statement that he was talking to "Zookie" is testimonial because a reasonable person in the CI's position would anticipate his statements being used against the accused in investigating and prosecuting a crime. The purpose of the informant's statement is also used for the truth of the matter asserted; that is, to identify McGee as the person the CPI talked to on the phone, and with whom he arranged the drug buy. The admission of this evidence therefore violated the confrontation clause.

However, the Court found that since the prosecution introduced sufficient other evidence to support the conviction, that the error was harmless. In particular, the officer had personal contact with McGee in the past and knew him, and his nickname, and that he was the one that showed up at the drug buy.

McGee's conviction was affirmed.

U.S. v. Halter
259 Fed.Appx. 738 (6th Cir. 2008)

FACTS: In 1999, Officers in Westerville, Ohio, "executed a search warrant for Halter's office and seized a computer and related materials.' The computer was found to contain "50 images and two movies containing sexual depictions of minors." Witnesses identified the children, and further, testified that the original photos were taken outside of Ohio. Halter was convicted, and appealed.

ISSUE: May evidence that an individual was engaged in a computer chat when unlawful images were exchanged be admitted to prove that they were involved in the exchange?

HOLDING: Yes

DISCUSSION: Halter first argued that his actions were protected under the First Amendment, but the Court quickly dismissed that allegation. Halter next argued that he was somehow not responsible for the images, the but evidence "recovered from the computer showed that he was sending and receiving emails from his work account at the same time he was participant in an internet chat room devoted to exchanging sexually explicit images of children." Since the photos were of very young children, that had been actually identified at trial by witnesses who had met some of them, and because the chat room was intended for individuals who wanted to exchange sexually-explicit photos of real children, the Court dismissed any assertion that the photos were not properly authenticated by the witnesses.

Halter also argued that the "testimony by the four identification witnesses at trial violated his rights under the Confrontation clause." The Court first noted that most of the "alleged Crawford-violating statements" were elicited by Halter's own attorney during cross-examination. The Court found only one statement was the responsibility of the prosecution, and that its admission was in error, but harmless.

Halter's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - CONSTRUCTIVE POSSESSION

U.S. v. Gravely
2008 WL 2497696 (6th Cir. 2008)

FACTS: On Feb. 4, 2006, Officer Gauthney (Columbus PD) was working a extra duty detail at a local hotel. He received a noise complaint at about 1:20 a.m., and found Evans coming out of the room. He told Evans to go back inside and tell his friends to hold down the noise. When Evans opened the door to do so, he saw "several people and drugs in the room" Gravely was sitting on the far bed, next to the night stand, along with five other people sitting variously around the room. Gauthney saw Gravely with a "bag of crack cocaine on his lap." He was also "kicking something on the floor" and further saw him "fidget and appear to reach for something underneath him." He drew his gun, trained it on Gravely and called for backup.

When Officer Sagle arrived, Gauthney approached and handcuffed Gravely. As he stood up, the officer spotted a gun lying on the bedspread. Gravely claimed the gun belonged to someone else, and that he never touched the gun nor did he know if it was loaded. He denied sitting on the gun, but agreed it was next to him. The officers also found a scale and drugs on the nightstand, and drugs were what he had been attempting to conceal.

Gravely was indicted for trafficking and for possession of the gun, as he was a convicted felon. He pled guilty to trafficking and went to a bench trial on the weapons charge, for which the judge further found him guilty. He appealed.

ISSUE: Is an individual sitting in close proximity to a gun, and that is aware of the gun, in constructive possession of the gun?

HOLDING: Yes

DISCUSSION: Gravely argued that he was never in possession of the firearm - either actually or constructively.

> In order to establish unlawful possession of a firearm, the government may show either actual or constructive possession. "Actual possession exists when [the firearm] is in the immediate possession or control of the party."[202] "[T]o establish constructive possession, the government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which the contraband is concealed."[203]

However, in U.S. v. Arnold, the Court had ruled that "mere proximity to a gun is not enough to establish constructive possession, let alone actual possession."[204] In many case, a "more direct link to the gun is needed." In Gravely's situation, the court argued that he "was sitting in close proximity to the gun, and was aware the gun was there." He was "the only person sitting on the bed, and he was either sitting on top of

[202] U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).
[203] Id. (quoting U.S. v. Ferg, 504 F.2d 914 (5th Cir.1974).
[204] 486 F.3d 177 (6th Cir. 2007).

the gun or right next to the gun." The officer observed "Gravely moving his arms as if he was placing something underneath him." The gun was within his reach.

Gravely's conviction was affirmed.

U.S. v. Brooks
2008 WL 744729 (6th Cir. 2008)

FACTS: On Oct. 8, 2002, Officer Beavers (Dayton PD) and other members of the Metropolitan Housing Authority, "responded to a report of drug and weapons activity" at an apartment complex. When they arrived, Beavers spoke to the manager, Haden, who had placed the call. Beavers had received reliable information in the past from Haden. Haden told Beavers that the boyfriend of a tenant at a particular address was engaging in drug and weapons activity, and provided the name of "Snake." They went to the apartment and spoke to the tenant, Winn, and also saw a man fitting the description given sitting on the floor inside the apartment. Winn gave the officers consent to search. Winn and Brooks (Snake) followed Beavers into the bedroom. Beavers then spotted a banana clip and ammunition in plain view, and asked about the weapon he assumed was nearby. Both Winn and Brooks "simultaneously sat down on the mattress" - which made Beavers suspect that the gun was located there. When they left the room, "Beavers flipped the mattress and found a loaded AK-47 assault rifle." Brooks was arrested and secured. After being given his Miranda rights, he confessed to owning the gun.

Brooks was originally charged under Ohio law, but his case was taken over by the United States as a felon in possession of a firearm. He moved to suppress on the grounds that his statements were the fruit of an unlawful arrest. The trial court upheld the arrest and Brooks was eventually convicted. He appealed.

ISSUE: May an individual be found in constructive possession of a weapon found under the mattress of a bed where he is sleeping, even if he is not the actual tenant of the residence?

HOLDING: Yes

DISCUSSION: The Court found that "[w]hen Beavers discovered the AK-47 under the mattress he already had the following information: (1) a report from the site manager—who had been a reliable source of information in the past—that a man matching Defendant's description was engaging in drug and weapons activity at 128 South Alder where he lived with his girlfriend; (2) Defendant was the sole male inside the 128 South Alder address at the time of the search; (3) a banana clip and other ammunition was found on a bedroom table; (4) when asked where the gun to which the ammunition went to was located, Defendant and his girlfriend immediately, and rather suspiciously, sat down on the mattress under which the AK-47 was subsequently found."

Brooks further argued that the apartment, and the bedroom, belonged to his girlfriend, and that there was no evidence he was aware of the gun. The Court, however, looked to Pringle v. Maryland and found it was reasonable for the officer to "infer - based on other information available - that [Beavers] possessed the firearm."

Brooks' conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - CHAIN OF CUSTODY

U.S. v. Drake
2008 WL 2224811 (6th Cir. 2008)

FACTS: On March 2, 2005, Nashville park rangers spotted Drake at a basketball game, and he "turned and took off running." They pursued him, and Ranger Avant later testified that his hand was cupped and that there "was stuff flying out the back of [Drake's] coat - like feathers or something like that." Ranger Ellington had gone a different route and approached Drake from a different angle, and "he testified that he saw what he thought was the pistol grip of a gun." He yelled "gun" and both rangers drew their weapons. Drake escaped however. Notably, he was "wearing a dark-colored hat." The rangers continued their search and finally found him, patted him down and found no gun. He denied having a gun, finally admitting to having been carrying a curtain rod.

A third ranger "pointed out [to Avant] a black hat - that appeared to be the same one Drake had been wearing minutes before - next to a shotgun along the fenceline." Both were clean, which the rangers interpreted to mean that they had not been there long.

Later investigation indicated that Drake's prints were not on the gun, but an expert stated that was not determinative. The hat was never marked or identified as evidence, and did not appear in a clothing inventory when Drake was arrested. The hat reappeared, however, during Drake's transfer from state to federal custody, when he was recorded as wearing it. The agent who picked him up, "[h]aving been alerted by an Assistant United States Attorney that a black hat relevant to the case was missing," took the hat from Drake. The hat was eventually entered into evidence against him.

Drake was indicted as being a felon in possession, and eventually convicted. He appealed.

ISSUE: Is an item that is not recognized as evidence until some time after the arrest, still admissible, even though the chain of custody is questionable?

HOLDING: Yes

DISCUSSION: Drake argued that the trial court erred in admitting the black hat. Physical evidence, like the hat, "is admissible when the possibilities of misidentification or alteration are 'eliminated, not absolutely, but as a matter of reasonable probability.'"[205] Further, "physical evidence may be admitted even if there is a missing link in the chain of custody, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect.[206] - 'challenges to the chain of custody go to the weight of the evidence, not its admissibility.'"[207]

The Court noted that officers testified as the presence of the hat, and that he could not have gotten the hat from an outside source between the time he was arrested and the time he was transferred. Although there were questions about the chain of custody, the court found that there was no evidence of tampering. As such, the admission was not improper.

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[205] U.S. v. Allen, 106 F.3d 695, 700 (6th Cir. 1997) (quoting U.S. v. McFadden, 458 F.2d 440, 441 (6th Cir. 1972)).
[206] U.S. v. Robinson, No. 95-6225, 1996 WL 732297, at *2 (6th Cir. Dec. 19, 1996) (unpublished).
[207] Allen, supra, (quoting U.S. v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990)).

Drake's conviction was affirmed.

FIRST AMENDMENT

Gilles v. Garland
2008 WL 2468149 (.6th Cir. 2008)

FACTS: On Oct. 14, 2002, Gilles, a Christian evangelist, considered it a duty to "proclaim his faith to students at colleges and universities throughout the United States and beyond." He was:

> … engaged in fulfilling this duty for about 45 minutes at the "Academic Quad" on the campus of Miami University in Oxford, Ohio when he was interrupted by a campus security officer, Donald Delph." Officer Delph told him he needed permission to "conduct a speech on campus; otherwise he would be arrested." Gilles got a copy of the policy on the matter - which stated:
>
> "Every person with legitimate business at the University has the privilege of free access to the public areas of the buildings and grounds during those hours when they are open, such hours to be determined by the President or designated University official."

When he asked about where he could speak, he was told by Lt. Powers that that "although some areas on campus were designated as free speech areas and some were not, plaintiff's speech was not considered "legitimate business" and would not be permitted anywhere on campus."

Gilles got a lawyer and began correspondence with university counsel. His letter contended "that public grounds on public university campus property represent a "traditional public forum" and that any limitation of expressive activities in these areas is unconstitutional unless "severely restricted." Asserting that religious discussion is protected speech under the First Amendment, the letter demanded rescission of the university policy that classified Gilles's religious speech as not being "legitimate business."

The university general counsel argued that campus property was not a public forum and that Gilles was merely allowed to walk through campus, at best. He could speak if invited by a legitimate university organization, however. Gilles attempted to find a sponsor, unsuccessfully. Eventually, after two years of trying other means to achieve his aim, he filed suit against the university of the campus police, including Lt. Powers.

Following two years of procedural wrangling, the trial court dismissed all of the defendants. Gilles appealed the dismissal of his free speech and due process claims.

ISSUE: Is an unwritten policy enforceable?

HOLDING: Yes (but see discussion)

DISCUSSION: After teasing out the actual claim, the Court focused in on the unwritten policy that Gilles needed a sponsor to speak. Specifically

> He complains that the policy's standards guiding officials' discretion can hardly be found to be sufficiently clear where the policy has not even been reduced to writing. Indeed, the existence of the "speech policy" did not even emerge until over a month after Gilles was denied permission to speak on campus, in Parker's November 27, 2002 letter response to Gilles's attorney. In fact, despite the fact that Gilles sought clarification on October 14 from Officer Delph, from the university administration at the student union, and from Lt. Powers, he was never advised that the reason he lacked permission was that he had failed to obtain an invitation from a student group. These undisputed facts alone support a reasonable inference that the speech policy was not as clear and well-established as defendants now contend.
>
> Even in the Parker letter, which affords the only inkling of the policy's parameters, the "policy and consistent practice" is described simply as not allowing visitors to "make formal speeches and presentations, erect displays, or conduct similar activities unless invited to do so by the University or by a recognized student organization."

The Court noted, however, that there was no information as to whether the "policy has been consistently and uniformly applied. The Court noted that it seriously doubted that the only criteria for speaking on campus was an invitation, asking that "Can it really be that the university has abdicated all responsibility for approving or disapproving on-campus speeches and presentations by visitors?"

The Court noted that it found:

> …no basis for concluding that the student-sponsorship requirement is well-understood. To the extent the pleadings afford any insight into the operation of the unwritten policy, we can conclude only that it was *not* well understood by university officials charged with most immediate responsibility for enforcing it. The allegations of the complaint are devoid of any suggestion that Officer Delph or Lt. Powers even asked Gilles if he had been invited to speak by any student organization. Further, the complaint also affords absolutely no basis for determining that the "consistent practice" has been and is uniformly applied." The Court found that the unwritten policy "appears to be devoid of standards."

The Court then evaluated the claim regarding the nature of the actual forum - whether the campus area in question was a traditional public forum, a limited/designated public forum or a nonpublic forum. The trial court had determined that the area was a limited public forum, and that speech could be restricted if the restriction is content-neutral and reasonable - and further held that the need for student organization sponsorship helped satisfy that restriction. The Court agreed that the space in question in this case was also a limited public forum.

The Court also agreed that the policy seems facially valid, but noted that "further proceedings are warranted to define the contours of the unwritten speech policy and its operation." The case was remanded for such further proceedings. (The Court also deferred Lt. Powers' request for qualified immunity, until the case could be further developed.)

Phelps-Roper v. Strickland
539 F.3d 356 (6th Cir. 2008)

FACTS: Since 1957, Ohio has had a statute regulating the picketing of funerals and funeral processions. It was amended in 2006 to cover the time from one hour before, to one hour after, the service, for a distance of 300 feet, including the procession.

Phelps-Roper, a member of the Kansas-based, Westboro Baptist Church, along with fellow church members, have engaged in picketing at the funerals of American soldiers. Their picketing included signs containing offensive messages. Phelps-Roper sued, challenging the validity of the statute, claiming that she wished to continue to protest in Ohio but feared prosecution under the statute.

The trial court found the provision regarding the actual procession to be "unconstitutionally overbroad" in that it created a "floating buffer zone" that moved with the procession. It upheld the remainder of the statute, however, finding it to be a constitutional limitation on freedom of speech. Phelps-Roper further appealed.

ISSUE: Is a protest-prohibition valid when it is content-neutral?

HOLDING: Yes (but see note)

DISCUSSION: The Court discussed whether the statute was a "content-neutral regulation of the time, place and manner of speech" of the plaintiff. The Court found that the restriction applies "equally to all demonstrators, regardless of viewpoint" - as it makes "no reference to the content of the speech." As it is content-neutral, the "appropriate test is intermediate scrutiny." Under that standard, "the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions: (1) 'serve a significant government interest;' (2) are 'narrowly tailored;' and (3) 'leave open ample alternative channels for communication of the information.'"[208]

The Court agreed that the funeral protest provision served an important governmental interest, because the funeral attendees are "'captive' to the message" which was an "unwanted communication." The Court equated the "individuals mourning the loss of a loved one" to those cases in which it held that individuals had a right to privacy in their home, and upon entering medical facilities. Despite Phelps-Roper's argument to the contrary, the Court found that although funeral attendance is voluntary, it is a "deep tradition and social obligation" that compels attendance at such funerals. It is not so simple to simply "avert …eyes" from an unwanted and offensive communication. The court found the statute to be narrowly tailored to 300 feet - and "restricts picketing or other protest activities that are directed at a funeral or burial service." The Court noted that "Phelps-Roper is not silenced during a funeral or burial service, but must merely stay 300 feet away within a brief window of time, outside of which she may say what she wants, wherever she wants, and when she wants, with no limitation on the number of speakers or the noise level, including the use of amplification equipment, and no limitations on the number, size, text, images or placards."

The Court also agreed that the size of a funeral necessitates a larger buffer zone than would be reasonably expected for protection of a single residence, and that Ohio's other, existing, laws were insufficient to

[208] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

protect funeral attendees not just "from physical acts, but from the harmful psychology effects of unwanted communication when they are most captive and vulnerable." The Court agreed that Phelps-Roper had sufficient alternative channels of communication, even if it was not "her best means of communication."

The prohibition relating to funeral protests was upheld.

NOTE: Kentucky has a similar statute that is still under challenge.

COMPUTER CRIME

Warshak v. U.S.
532 F.3d 521 (6th Cir. 2008)

FACTS: Warshak was the "president and sole owner of Berkeley Premium Nutraceuticals, Inc." That company became the target of a federal investigation focusing on money laundering and related offenses. Investigators requested a search warrant for his "internet service providers - NuVox Communications and Yahoo! - to turn over Warshak's account information," including email. This request was pursuant to the Stored Communications Act (SCA), 18 U.S.C. §2791 et seq. The provision of that law (the "compelled-disclosure") gives "different levels of privacy protection based upon whether the e-mail is held with an electronic communication service or a remote computing servicing and based on how long the e-mail has been in electronic storage." E-mails that have been stored for less than 180 days require a warrant. Those being held in a "remote computing service" or those that are 181 days or more old may be obtained with a warrant, an administrative subpoena or a court order. Under §2703, a court with jurisdiction may give such an order if "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation" is provided. In addition, under the SCA, the government may request (in the order) a "delay notice in 90-day increments" if good reason is shown for the delay - otherwise, the government must notify the subject of the court order.

In Warshak's case, the Court granted the court order and also granted the delay. It further permitted several additional delays of notification. Approximately a year after the order was granted, the government gave Warshak notice. He then sued, arguing that the original order "violated the Fourth Amendment on its face and as applied because the searches were based on a showing of less than probable cause and were not supported by a warrant." The District Court granted an injunction, further ordering that the government not use such orders to search email accounts within the area covered by the court, until a hearing could be held.

A few months later, Warshak was indicted, and in February, 2008, he was convicted. The government appealed the issuance of the injunction.

ISSUE: Is the SCA constitutional?

HOLDING: Yes

DISCUSSION: The Court addressed the issue as to whether this particular issue was ripe for adjudication. The Court noted that it was unlikely that Warshak, himself, would be the subject of further searches, since

he was convicted. It noted that the issue in this case was whether "permitting the government to search e-mails based on 'reasonable grounds' … is consistent with the Fourth Amendment, which generally requires 'probable cause' and a warrant in the context of searches of individuals, homes, and perhaps most analogously, posted mail?" The Court found that the "answer to that question will turn in part on the expectations of privacy that computer users have in their e-mails - an inquiry that may well shift over time, that assuredly shifts from internet-service agreement to internet-service agreement and that requires considerable knowledge about ever-evolving technologies." In this case, the Yahoo! Account agreement indicated that the government could receive the information in the account upon request. (Other agreements, with different providers, however, may make different promises to users.) The Court stated that the "Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly, it generally should be applied after those circumstances unfold, not before." Further, "[l]itigation by hypothetical becomes particularly risky in the face of ever-evolving and ever-more-complicated technology."

The Court noted that:

> The Stored Communications Act has been in existence since 1986 and to our knowledge has not been the subject of any successful Fourth Amendment challenges, in any context, whether to §2703(d) or to any other provision."

The Court directed the dismissal of Warshak's claim.

EMPLOYMENT - USERRA

<u>Petty v. Metropolitan Government of Nashville - Davidson County</u>
538 F.3d 431 (6th Cir. 2008)

FACTS: In 1991, Petty was hired as a Nashville police officer. He was also, and had been for some time, a member of the Army Reserve. By 2002, Petty was a police sergeant. He had also been approved to work off-duty.

In 2003, Petty's unit was mobilized to go to Iraq. He properly notified his agency, and he stopped working on Nov. 30, 2003, preparatory to deployment. While he was in Iraq, in June or July, 2004, during an inspection of quarters, Petty was found to have a still, which was being used to make wine. (There was a dispute as to why he had the still, but that is immaterial to the summary.) Petty (a military officer) was charged under the UCMJ[209], where he was accused of having the still and having provided alcohol to enlisted personnel. Petty elected to resign rather than face court martial, and the charges were ultimately dismissed. His discharge was listed, on his DD-214 as "under honorable conditions (general)."

Upon his return, in February, 2005, Petty requested reinstatement with the Nashville PD. The PD had a "return-to-work process" for officers that had been away for an extended period of time, "regardless of the reason for their separation." For those returning from military service, a authorization to obtain military records was required. In addition, in a required questionnaire, Petty explained that he had faced military charges while in Kuwait, but did not detail what had occurred. He was, notably, not paid for the

[209] Uniform Code of Military Justice.

approximately 3 weeks between February 28, the date of his request, and March 21, his first day back at work. He was not returned to his previous position as a patrol sergeant, but was given a desk job.

The Department (through OPA) began an investigation as to whether Petty was truthful in his return to work paperwork. The OPA determined that any charges against him on that respect were unfounded. However, Metro informed him that POST (the state training agency) "did not accept his discharge." The agency continued its investigation, "troubled by the disconnect between [Petty's] description of the events leading to his discharge and the severity of his punishment." It was then that they discovered that the copy of the DD-214 he submitted was, allegedly, altered, in that it was missing a "a few boxes at the bottom" - which listed the reason for his separation as "in lieu of trial by court martial." Petty admitted that he enlarged the form, and that by doing so, he inadvertently eliminated the boxes. During that same time frame, Petty had filed suit, and he alleged that the follow-up investigation was in retaliation for that suit. From Oct. 10, 2005, on, Petty was assigned to a desk job answering calls from the public, a position traditionally staffed by officers "facing discipline or who are otherwise 'disempowered.'" In addition, he was denied the opportunity to return to his off-duty job.

Petty complained that Metro violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), by delaying his return to work, subjecting him to the process, not returning him to his previous position, and denying him the ability to work off-duty. Eventually, the trial court found in favor of Metro on all issues, and Petty appealed.

ISSUE: May an agency place additional requirements on an officer seeking reemployment after returning from military leave?

HOLDING: No

DISCUSSION: The Court reviewed the principles of USERRA and noted that it was intended to be "broadly construed in favor of its military beneficiaries." Various sections of the statute specifically cover the issues presented by Petty's case. With respect to the "delay in rehiring," the Court found that Petty satisfied his requirements by properly notifying his employer of his military deployment, and that it lasted less than five years. In addition, he properly requested reinstatement, and he was separated from the service under honorable conditions. Metro argued that by submitting the allegedly "altered" DD-214, he did not submit the required documentation, and that the document was thus void.

The Court found that the document he provided was sufficient, and further, that his authorization permitted Nashville to have "unfettered access" to all of his military records. (The Court noted that it was not, necessarily, agreeing that such a waiver could be required.) As such, Nashville was not permitted to delay his return to work

Specifically, the Court noted that:

> It is of no consequence here that Metro believes it is obligated to "ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officers is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department." In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns.

The Court noted that Petty's separation from the service was honorable, which qualifies him for rehiring. USERRA does permit a "for cause" termination, after rehiring, if appropriate. Further, the Court found that Metro's return to work practices, although neutral, and not discriminatory toward veterans, in that they apply to all officers returning, are in violation of USERRA in that they add additional prerequisites to such officers.

Next, the Court addressed the position to which Petty was assigned. The Court quickly concluded that once he qualified for reemployment, "Metro had no basis on which to question his qualifications." The Court noted that "[a]bsent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." Metro took three weeks to rehire Petty, and did not return him to an equivalent position. The Court stated that "Metro cannot defeat the 'prompt reemployment' guarantee .. by engaging in never-ending investigations into Petty's qualifications." The Court noted that, in fact, Metro never proved Petty was disqualified, in that it apparently never actually finished the investigation. (Apparently Petty left the police department of his own accord.)

The Court did not, however, elect to discuss the issue relating to the off-duty work, under USERRA, citing the fact that the request wasn't made until 10 months following his return and that it was not part of normal employment benefits. However, it did address it as potential discrimination. The Court questioned Metro's assertion that because Petty was under investigation, he fell under their policy of denying off-duty work privileges to officers under investigation. The trial court had found that a legitimate reason. However, the Court noted that "failure to consider Metro's motivations for launching the investigation had triggered the policy's application to Petty in the first place."

The Court found that because the second investigation was triggered by a continuing concern about Petty's "conduct in service," it was inappropriate to use that investigation to deny him benefits.

The Court reversed the earlier decisions and found in favor of Petty.

EMPLOYMENT - DISCRIMINATION - ADA

<u>Tucker v. State of Tennessee</u>
539 F.3d 526 (6th Cir. 2008)

FACTS: Lauren and Blake Tucker, a married couple, are deaf mute. On Feb. 29, 2004, Savannah (TN) police "received a call regarding a domestic dispute at the home of Donna Spears, Lauren's mother." Blake had arrived from Alabama to pick up Lauren and their small child from Spears' home, and a disagreement had arisen. A neighbor called the police.

Officers realized they had a communication problem, and they used a pen and paper to get information from Lauren. After a written discussion, Lauren apparently agreed to leave with Blake. However, as they were leaving, Blake got into a fight with a neighbor, Judy Crotts. Officer Pope saw Blake both strike and push her. Officer Pope struggled with, and then arrested, Blake, for resisting arrest, disorderly conduct, and assault - both on the neighbor and on the officer himself. Odis Tucker, Blake's uncle, also deaf mute, tried to interfere and was also arrested.

Both men were taken to jail, and they requested a TDD/TTY telephone. That was not available, so instead, they relayed information through an operator, who then apparently typed it into a TDD/TTY, so that they could communicate with Blake's mother, Vonnie. They were released the next day. Communication was also an issue at their initial appearance, because there was no sign language interpreter immediately available. They were given a card to read, with their rights, and they each pled not guilty, in writing. Both eventually took plea agreements, and later argued that they believed they had no choice because the court was unable to provide sign language interpretation.

The Tuckers filed a civil rights action, arguing that the "City Police discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation during their arrest" following the domestic disturbance call. They complained of the lack of the accommodation at the jail and in court, as well. The police, and the other defendants, sought and received summary judgment dismissal of the action, and appealed. Specifically, with respect to the city police, the Court found that they were not performing an activity covered by the ADA. The Tuckers appealed.

ISSUE: Does the ADA require an interpreter when a deaf-mute is being arrested?

HOLDING: No

DISCUSSION: The Court reviewed the provisions of the ADA, and concluded that the exigent circumstances of an arrest precludes the necessity to have an interpreter. The actual arrest of the two took place as a result of a situation that the police observed, and for which it was appropriate to arrest, disability or not. In fact, the Tuckers conceded that the police were able to effectively communicate with them, by means of a pen and paper. Further, the Court found no evidence that the presence of any auxiliary aids, such as an interpreter, would have changed the situation. The Court concluded that "even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against Blake or Odis Tucker because of their disabilities in violation of the ADA."

After resolving the issues against the remaining defendants (the county and the jail), the Court affirmed the dismissal of the case against all parties.

EMPLOYMENT - OFF DUTY CONDUCT

<u>Pennington v. Metro Government of Nashville</u>
511 F.3d 647 (6th Cir. 2008)

FACTS: On December 25, 2004, Officer Pennington (off-duty) and his date met friends at a local bar. One of his friends got into an altercation and Pennington intervened, thinking that the security guards were being too rough with his friend. The guards grabbed Pennington, who finally said that he was a police officer. The "fight immediately stopped and Pennington and his friends were escorted out of the bar." Outside, the manager explained that police were on the way and that they could not leave. Pennington produced his badge and ID card.

Sgt. Rogers arrived, followed by Capt. Hagar. Hagar later stated that Pennington was "red-faced" and that Pennington had admitted pushing the security guards, but that he was cooperative with Hagar. (The opinion noted that there were "two simultaneous investigations going on, one a criminal investigation

handled by Sergeant Rogers and the other an administrative investigation handled by Hagar.") Pennington's supervisor, Capt. Parris was contacted, and Parris directed them to contact Assistant Chief Bishop. Hagar asked Bishop about doing a breathalyzer, and further stated that if Pennington did not take the test voluntarily, he was to be ordered to do so.

(It was later explained that there was no policy prohibiting an intoxicated officer from identifying himself as such, but that when officers invoke their authority, they are subject to the policies and procedure of the department.)

Hagar claimed that Pennington agreed to the test, but Pennington argued that he did not do so, but that he submitted to a direct order which threatened discipline and termination. Pennington was taken to a nearby police station in a patrol car but was not considered under arrest. The test was given in the back seat of a "DUI police car in the parking lot." Pennington registered a .121 on the test.[210] Hagar ordered that Pennington be taken home and agreed he could delay writing a statement until the start of his shift, the next day.

Following an investigation, the department concluded that "Pennington had not violated any department policies or regulations" and he received only "informal verbal counseling." Pennington then sued the department and the involved command officers, for forcing him to take the test, under the Fourth, Fifth, Sixth and Fourteenth Amendments. The trial court granted summary judgement to all defendants and found that the compelled breath test was not an unconstitutional seizure. Pennington appealed the decisions in favor of Bishop and Hagar, but not the decision of summary judgment in favor of Metro Nashville.

ISSUE: Is the ordering of a breath test for an intoxicated off-duty officer permissible?

HOLDING: Yes

DISCUSSION: The Court noted that the case was one of first impression, and looked to other circuits as a guide. Specifically, the Court looked to the case of Driebel v. City of Milwaukee, which stated that there is a need to "distinguish between a police department's actions in its capacity as an employer and its actions as the law enforcement arm of the state." The Driebel court noted that the Fourth Amendment is not a protection against termination or discipline, but instead, that it must look at whether a seizure or detention would have occurred if the officer did not obey the order.

In this case, the Court noted that Pennington had asserted that he feared job loss if he did not obey the order - but that he was not handcuffed, rode to the station in the front seat, was not given Miranda warnings, and went home without filing a report.

The Court affirmed the decision of the trial court to dismiss all defendants.

[210] Presumably this was a PBT.

EMPLOYMENT - FIRST AMENDMENT

Habel v. Township of Macomb
258 Fed.Appx. 854 (6th Cir. 2007)

FACTS: Four members of the Macomb Fire Department filed a lawsuit against the Fire Department and Macomb Township, as well as the officials in charge of each. One firefighter, Meerschaert, claimed that he was disciplined as a result of "voicing public concerns to township officials and the media." Shortly after the discipline was imposed, Meerschaert and the other three firefighters distributed a flyer to citizens of the township addressing their concerns. At some point after that, Meerschaert received a 45-day suspension, and he resigned rather than accept that discipline. Habel was also suspended, but he appealed his suspension and was reinstated. Herczeg was terminated, allegedly for speaking out about the need for more personnel and training. Finally, Smith, who was active in voicing those same concerns, was also disciplined throughout several years and was restricted on making runs. (As a part-time firefighter, his income was dependent upon his runs.) After Smith was passed over for a full time position, he resigned and took another firefighting position.

The township defendants requested summary judgment and qualified immunity. The trial court ruled that they were not entitled to such, because a jury could "reasonably conclude that the defendants had retaliated against the plaintiffs in violation of the First Amendment" because the firefighters were speaking on a "matter of public concern." The defendants appealed.

ISSUE: Are public employees protected by the First Amendment when their speech addresses a matter of public concern?

HOLDING: Yes

DISCUSSION: The Court noted that public employees are protected by the First Amendment when their speech addresses a matter of public concern.[211] The Sixth Circuit agreed, noting that their speech directly related to their public employment and matters of public health and safety. Further, the Court stated that there was sufficient evidence for the case to go forward (to trial or settlement) concerning the issue of unlawful retaliation against the four firefighters.

Although the court noted that the plaintiffs may not ultimately prevail, the Court did not have jurisdiction to decided "essentially factual disputes."

The case was remanded back to the trial court for further action.

Greenwell v. Parsley
541 F.3d 401 (6th Cir. 2008)

FACTS: In September, 2005, there was an article in the Louisville newspaper indicated that Greenwell was running for Sheriff in Bullitt County. At the time, Greenwell was a deputy sheriff. The current Sheriff, Parsley, brought Greenwell to the office and stated, "See in the paper here where you're trying to take my job." Parsley sent Greenwell out while he conferred with his attorney, and subsequently

[211] See Connick v. Myers, 461 U.S. 138 (1983).

fired Greenwell. Greenwell later maintained that he was fired not just for running for the office, but because he "had spoken out on a matter of public concern, namely, the operation of the sheriff's department." (Greenwell had indicated in the article the changes he'd like to make in the department.)

"In the end, neither man was elected sheriff – as Parsley lost in the primary, and Greenwell lost in the general election."

Greenwell sued, arguing that Parsley had violated his First Amendment rights. The trial court granted summary judgment to Parsley. Greenwell appealed.

ISSUE: May an elected official fire someone who files to run against them?

HOLDING: Yes

DISCUSSION: The Court reviewed the issue under the precepts of Carver v. Dennis, in which a County Clerk had fired a deputy who had announced an intention to run for the office. [212] In that case, the court noted that the "First Amendment protects the right of public employees to speak out on matters of public concern," but that does not extend "to candidacy alone."[213] The Court noted that "[t]he First Amendment does not require that an official in [an employer's] situation nourish a viper in the nest." In this case, Greenwell was terminated as soon as Parsley learned of his candidacy, and the fact that Parsley "highlighted certain implied criticisms of the department in the newspaper account does not transform this case into one of political speech."

The Court found nothing to "belie the conclusion that the termination was because of the candidacy."

The dismissal was affirmed.

[212] 104 F.3d 847 (6th Cir. 1997)
[213] See Connick v. Myers, 461 U.S. 138 (1983)

2008-2009
United States Supreme Court

SEARCH & SEIZURE - ARREST WARRANT

Herring v. U.S.
--- U.S. --- (2009)
Decided January 14, 2009

FACTS: On July 7, 2004, Investigator Anderson (Coffee County, Alabama, Sheriff's Department) learned that Herring was at the office to retrieve something from an impounded vehicle. Knowing that Herring was "no stranger to law enforcement," Anderson checked for warrants. There were none in Coffee County, so Pope, the clerk, checked with her counterpart in Dale County, the neighboring county. Morgan, the Dale clerk, reported an active FTA warrant. Pope relayed the information to Anderson, at the same time asking for a faxed copy of the warrant. Anderson and another deputy stopped Herring as he was leaving the lot and arrested him. Incident to the arrest, they searched and found methamphetamine and a pistol - Herring was a convicted felon, and he was charged for the weapon and the drugs.

However, it turned out that the warrant had been recalled some months previously and had simply not been removed from the computer system. But, by the time that was discovered, the incriminating evidence had already been located. Herring was indicted in federal court and moved for suppression. The trial court, and ultimately the Eleventh Circuit, concluded that the Coffee County deputies were "entirely innocent of any wrongdoing or carelessness" so suppression was not appropriate.

Herring requested certiorari from the U.S. Supreme Court, which accepted the case.

ISSUE: Does the Fourth Amendment require evidence found during a search incident to arrest be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

HOLDING: No

DISCUSSION: The Court began its opinion by noting that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." In this case, the "Coffee County officers did nothing improper," and in fact, "the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant." Even though the error was likely negligence on the part of another government agency, Dale County, the Court did not find it reckless or

deliberate. The Coffee County deputies acted in "good faith" reliance on the representations of another government official. [214]

The Court stated that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." The rule is intended to "deter deliberate, reckless, or grossly negligent conduct, or in some instances recurring or systemic negligence."

The Court found no indication that the error that occurred was anything more than a simply mistake on the part of an unidentified Dale County clerk. Even if agreed to be negligence, that negligence was not so egregious as to trigger the exclusionary rule.

Herring's conviction was upheld.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-513.pdf

42 U.S.C.§1983 - QUALIFIED IMMUNITY

Pearson v. Callahan
--- U.S. --- (2009)
Decided January 21, 2009

FACTS: In 2002, Bartholomew, a narcotics task force informant, told Officer Whatcott (Central Utah Narcotics Task Force) that Callahan "had arranged to sell Bartholomew methamphetamine later that day." He went to Callahan's home at about 8 p.m. on the night in question, and confirmed that the methamphetamine was available and for sale. He then told Callahan he needed to go get money for the purchase, and left to meet the task force members. Bartholomew was searched and given money for the buy, along with a transmitter.

Officers drove Bartholomew to Callahan's home and he was admitted by Callahan's daughter. Callahan parceled out a gram of methamphetamine and made the transaction. Bartholomew gave the agreed-upon signal and officers entered through the porch. The officers saw Callahan drop what was later determined to be methamphetamine. They arrested Callahan and did a protective sweep of the home. At some point they found syringes in the home, as well. Callahan was charged.

The trial court admitted the evidence, finding that "the warrantless arrest and search were supported by exigent circumstances." Upon appeal, the "Utah attorney general conceded the absence of exigent circumstances, but urged that the inevitable discovery doctrine justified introduction of the fruits of the warrantless search." However, the Utah Court of Appeals disagreed and vacated Callahan's conviction. Callahan then filed suit under 42 U.S.C. §1983, "alleging that the officers had violated the Fourth Amendment by entering his home without a warrant."

The officers moved for summary judgment, which the U.S. District Court granted, "noting that other courts had adopted the 'consent-once-removed" doctrine." That "permits a warrantless entry by

[214] See U.S. v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984)

police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view." Although the District Court stated that it believed that the principle would change in the future, given that it was "in tension" with the decision in Georgia v. Randolph,[215] the Court agreed that the "officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine authorized their conduct."

The Tenth Circuit Court of Appeals disagreed, holding that the officers' actions violated Callahan's Fourth Amendment rights. The panel "took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that 'broade[n] this doctrine to grant informants the same capabilities as undercover officers." Further, the Court ruled that the right was clearly established in the Tenth Circuit, given that the officers knew they did not have a warrant, that Callahan "had not consented to their entry," and that "consent to the entry of an informant could not reasonably be interpreted to extend to them."

The Court noted that the Tenth Circuit followed the analysis laid out in Saucier v. Katz[216]. However, the Court acknowledged that Saucier "has been criticized by courts at all levels," and that "lower court judges … have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages."

Callahan requested certiorari, which the U.S. Supreme Court granted.

ISSUE: Are the courts required to use the two-pronged Saucier analysis in deciding qualified-immunity cases?

HOLDING: No

DISCUSSION: The Court reviewed the doctrine of qualified immunity, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[217]

The Court continued:

> Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.

The protections afforded by qualified immunity "applies regardless of whether the government official's error is a 'mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Further, the Court emphasized, it had "made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against

[215] 547 U.S. 103 (2006).
[216] 533 U.S. 194 (2001).
[217] See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

government officials [will] be resolved prior to discovery."[218] It stated that "[b]ecause qualified immunity is 'an immunity from suit rather than a mere defense to liability' … it is effectively lost if a case is erroneously permitted to go to trial." As such, the Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[219]

In Saucier, the "Court mandated a two-step sequence for resolving government officials' qualified immunity claims."

> First a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Prior to Saucier, court had held that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."[220] Saucier "made that suggestion a mandate," requiring that the question of the constitutionality of the officer's actions "must be the initial inquiry."

In the case at bar, the Court discussed "whether the Saucier procedure should be modified or abandoned." First, the Court addressed the doctrine of stare decisis and noted that reconsideration of prior decisions must be approached with "utmost caution," but stopped short of making it "an inexorable command."

The Court noted that:

> Because of the basis and the nature of the Saucier two-step protocol, it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory two-step rule for resolving all qualified immunity claims should not be retained.

The Court concluded that "while the sequence set forth [in Saucier] is often appropriate, it should no longer be regarded as mandatory." Instead, the lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

The Court" continue[d] to recognize that it is often beneficial" to use the Saucier analysis. "At the same time, however, the rigid Saucier procedure comes with a price." It "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." Some cases are "so fact-bound that the decision provides little guidance for future cases." In addition, a "constitutional decision resting on an uncertain interpretation of state

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[218] See Anderson v. Creighton, 483 U.S. 635 (1987).
[219] Hunter v. Bryant, 502 U.S. 224 (1991).
[220] County of Sacramento v. Lewis, 523 U.S. 833 (1998).

law is also of doubtful precedential importance," leading some courts to skip that first step in the analysis.

The Court concluded that its decision "does not prevent the lower courts from following the Saucier procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."

With respect to the case at bar, the Court concluded that the conduct of the officers did not violate clearly established law. As such, the officers were entitled to qualified immunity. In 2002, the "'consent-once-removed' doctrine had gained acceptance in the lower courts." Although the Tenth Circuit had not ruled upon the issue, "no court of appeals had issued a contrary decision." As such, the "officers … were entitled to rely on those cases."

The decision of the Tenth Circuit Court of Appeals was reversed, and the officers granted qualified immunity.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-751.pdf

EMPLOYMENT - SEXUAL HARASSMENT INVESTIGATION

Crawford v. Nashville and Davidson Cty., TN
--- U.S. --- (2009)
Decided January 26, 2009

FACTS: In 2002, the Metro government of Nashville and Davidson County, TN, were investigating rumors of sexual harassment by a school district supervisor (Hughes). Crawford, a long-time employee, was asked by a human resources investigator if she had ever "witnessed 'inappropriate behavior'" by that employee. She replied with several instances of when she had been sexually harassed by that employee, in the form of sexual comments and overt behavior. Despite the fact that two others had accused him, as well, Metro took no action against Hughes. They did, however, fire both Crawford and the two accusers shortly after ending the investigation. (With respect to Crawford, they claimed it was for embezzlement.)

Crawford filed a complaint with the EEOC and followed that with a lawsuit in the U.S. District Court. The trial court granted summary judgment for Metro and the U.S. Court of Appeals, Sixth Circuit, affirmed that decision. Crawford requested certiorari and the U.S. Supreme Court accepted the case.

ISSUE: Does Title VII of the 1964 Civil Rights act protect a worker from being dismissed because they cooperate (by answering questions) with an employer's internal investigation of sexual harassment?

HOLDING: Yes

DISCUSSION: The Court began:

> The Title VII antiretaliation provision has two clauses, making it "an unlawful employment practice for an employer to discriminate against any of his employees … [1] because he has opposed any practice made an unlawful employment practice …, or [2] because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing ….[221]

The first clause is known as the "opposition clause," the second is called the "participation clause." Crawford accused Metro of violating both. Both the District Court and the Court of Appeals ruled that the opposition clause did not apply because "she had not 'instigated or initiated any complaint,' but had 'merely answered questions by investigators in an already-pending internal investigation initiated by someone else.'" Both courts agreed it failed under the second because the participation clause confines such protections to instances where "an employee's participation in an employer's internal investigation ... occurs pursuant to a pending EEOC charge." (The investigation was internal but there was no EEOC action pending at the time.)

The Court, however, found that Crawford's statement is "covered by the opposition clause," because her response was certainly "resistant or antagonistic" towards Hughes' behavior. The Court found it odd to protect "an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

Further, in response to the assertion that this would reduce the incentive for employers to not investigate allegations of discrimination; the Court noted that under both Burlington Industries, Inc. v. Ellerth[222] and Faragher v. Boca Raton[223], employers have a "strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability."

The Court stated:

> The appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the inquiries the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it "exercised reasonable care to prevent and correct [any discrimination] promptly" but "the plaintiff employee unreasonably failed to take advantage of … preventative or corrective opportunities provided by the employer." Nothing in the statute's text or our precedent supports this catch-22.

Because the Court ruled that Crawford was protected under the opposition clause, it did not explore her argument under the participation clause. The Court reversed the earlier decision and remanded the case for further proceedings.

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[221] 42 U.S.C.§2000e-2(a).
[222] 524 U.S. 742 (1998).
[223] 524 U.S. 775 (1998).

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/06-1595.pdf

SEARCH & SEIZURE - PASSENGER FRISK

Arizona v. Johnson
--- U.S. --- (2009)
Decided January 26, 2009

FACTS: On April 19, 2002, Officer Trevizo and Detectives Machado and Gittings, members of a gang task force, were patrolling in Tucson "near a neighborhood associated with the Crips gang." They pulled over a vehicle when a check showed that the vehicle's registration had been suspended for a violation related to insurance. (The violation justified a citation.) The car had three occupants, the driver, a front-seat passenger and a back-seat passenger (Johnson). At the time of the stop, the officers had no suspicion of criminal activity.

When asked by Det. Machado, the occupants denied having any weapons. He had the driver get out. Gittings "dealt with the front-seat passenger, who stayed in the vehicle throughout the stop." Officer Trevizo "attended to Johnson." She had noticed that as they approached, "Johnson looked back and kept his eyes on the officers," and wore clothing "consistent with Crips membership." She also spotted a scanner in Johnson's pocket. He produced no identification, but when requested, he provided his name and date of birth. He volunteered his hometown as one known for a Crips gang, and told her that he'd served time for burglary.

Wanting intelligence about his gang membership, she had him get out of the car. Suspecting (based upon the above observations) that he might have a weapon, she "patted him down for officer safety." During that frisk, she found a gun. He struggled and was handcuffed. He was ultimately charged for possession of the gun, since he was a convicted felon, in state court.

Johnson requested suppression, but the trial court denied his motion. He was ultimately convicted. Johnson appealed to the Arizona Court of Appeals, which reversed his conviction, concluding that Officer Trevizo had no right to frisk Johnson. Arizona appealed, but the Arizona Supreme Court denied review. Arizona requested certiorari to the U.S. Supreme Court, which agreed to hear the case.

ISSUE: If a vehicle is stopped for a minor traffic violation, may a passenger be frisked when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

HOLDING: Yes

DISCUSSION: The Court quickly reviewed the precepts set forth in a line of cases beginning with Terry v. Ohio[224] and focusing specifically on three cases related to traffic stops: Pennsylvania v. Mimms[225], Maryland v. Wilson[226], and Brendlin v. California.[227] In Mimms, the Court noted, it was

[224] 392 U.S. 1 (1968).
[225] 434 U.S. 106 (1977).

appropriate to have a driver get out of a vehicle, and further, to frisk that driver "if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'" In Wilson, the Court extended that rationale to passengers. However, the Wilson Court acknowledge that there might be no reason to stop or detain passengers if the driver has committed a minor vehicular offense, but it emphasized "the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" Finally, in Brendlin, the Court agreed that since a vehicle stop necessarily also stops the passenger, that a passenger "has standing to challenge a stop's constitutionality." Further, in an intervening case, in dictum, the Court had ruled that officers may frisk drivers and passengers upon "reasonable suspicion that they may be armed and dangerous."[228]

The Court concluded:

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.[229]

The Court agreed that a traffic stop "communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will." The Court, however, ruled that the officer "was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."

The judgment of the Arizona Court of Appeals was reversed, and the case remanded for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-1122.pdf

42 U.S.C.§1983 - ABSOLUTE IMMUNITY

Van de Kamp v. Goldstein
--- U.S. --- (2009)
Decided January 26, 2009

FACTS: In 1998, Goldstein, a state felon, filed a habeas corpus petition in a California federal court. He alleged that his 1980 murder conviction was flawed because it "depended in

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[226] 519 U.S. 408 (1997).
[227] 551 U.S. 249 (2007).
[228] Knowles v. Iowa, 525 U.S. 113 (1998).
[229] Muehler v. Mena, 544 U.S. 93 (2005).

critical part upon the testimony of" Fink, a "jailhouse informant," which he claimed was "unreliable, indeed false," and that Fink had "received reduced sentences for providing prosecutors with favorable testimony in other cases." He further alleged that LA District Attorneys knew about this and that they had not shared this "potential impeachment information" (as required) with Goldstein's attorney.

The Court agreed, after a hearing, that the information may have made a difference at the trial had Goldstein's attorney been made aware of it in a timely manner. The state was ordered to either retry Goldstein (who had already served 24 years) or release him, they chose the latter.

Goldstein then filed an action under 42 U.S.C. §1983 against individual district attorneys, the elected district attorney and others, complaining that the "prosecution's failure to communicate … "violated the prosecution's constitutional duty to 'insure communication of all relevant information on each case [including agreements made with informants] to every lawyer who deals with it.'"[230] He further alleged that "this failure resulted from the failure of petitioners (the office's chief supervisory attorneys) adequately to train and to supervise the prosecutors who worked for them as well as their failure to establish an information system about informants."

The LA County District Attorney petitioners claimed absolute immunity from suit. The trial court denied the claim, finding that "conduct asserted amounted to 'administrative,' not 'prosecutorial' conduct," making immunity inappropriate. The Ninth Circuit agreed. Goldstein requested certiorari, and the U.S. Supreme Court granted it.

ISSUE: Does a prosecutor enjoy absolute immunity for failing to disclose informant information in violation of Brady[231] and Giglio[232]?

HOLDING: Yes

DISCUSSION: The Court analyzed the difference between prosecutorial functions and administrative functions and made it "clear that absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." To determine the nature of a particular task, the court "must take account of the 'functional' considerations" of that task. In the years since Imbler[233], the court had decided that, for example, "absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation,"[234] but that it does apply when a prosecutor "appears in court to present evidence in support of a search warrant application."[235]

The court agreed that Goldstein was attacking the "office's administrative procedures." The Court also agreed "purely for argument's sake, that Giglio imposes certain obligations as to training, supervision, or information-system management." However, the Court concluded that prosecutors enjoyed absolute immunity for such claims, because they are "directly connected with the conduct

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[230] Giglio v. U.S., 405 U.S. 150 (1972).
[231] Brady v. Maryland, 373 U.S. 83 (1963).
[232] Supra.
[233] Imbler v. Pachtman, 424 U.S. 409 (1976).
[234] Burns v. Reed, 500 U.S. 118 (1997).
[235] Kalina v. Fletcher, 522 U.S. 118 (1997).

of a trial," and that an "individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." The Court noted that it "will often prove difficult to draw a line between *general* officer supervision or officer training (say, related to Giglio) and *specific* supervision or training related to a particular case."

Although the Court acknowledge that "sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits," but that such immunity was essential for the functioning of the prosecutor's office.

The Court reversed the decision of the Ninth Circuit Court of Appeals, and remanded the case for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-854.pdf

NOTE: This decision does not affect the ability of law enforcement officers to be sued for withholding evidence under Brady.

FEDERAL LAW - DOMESTIC VIOLENCE/WEAPONS

U.S. v. Hayes
--- U.S. --- (2008)
Decided February 24, 2009

FACTS: In 2004, Marion County (WV) officers responded to Hayes' home on "a 911 call reporting domestic violence." Hayes gave consent for a search of his home during the call, and officers found a rifle. Further investigation indicated he owned several other guns. Based upon that evidence, Hayes was charged the following year under 18 U.S.C. §§922(g)(9) and 924(a)(2) with three counts (for apparently three guns) "of possessing firearms after having been convicted of a misdemeanor crime of domestic violence." The charges were based upon a 1994 battery conviction in West Virginia, with the victim being Hayes's wife at the time, with whom he also had a child in common.[236]

Hayes argued that the 1994 conviction did not qualify as a "predicate offense" under §922, maintaining that it "applies only to persons previously convicted of an offense that has as an element a domestic relationship between aggressor and victim." The statute under which he was convicted was a "generic battery proscription, not a law designating a domestic relationship between offender and victim as an element of the offense."

Hayes argument was rejected, and he then took a conditional guilty plea. He appealed. The Fourth Circuit Court of Appeals reversed his plea, holding that the predicate offense must "have as an element a domestic relationship between the offender and the victim." This created a split in the circuits, as nine circuits had already ruled in the opposite manner. The United States appealed the case, and the U.S. Supreme Court granted certiorari.

[236] The case suggested that the law at the time required more than just that the victim and abuser be married, it also appeared to require that the couple have a child in common and that the victim be cohabiting with the abuser as a spouse.

ISSUE: Must a federal charge under §922(g)(9) be based upon a state charge that includes, specifically, as part of the statute, that the victim be in a domestic relationship with the perpetrator?

HOLDING: No

DISCUSSION: The Court engaged in a lengthy statutory and linguistic construction debate on §922(g)(9), and all agreed that the definition "imposes two requirements." First, the crime must include "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." Second, it must be committed by a "person who has a specified domestic relationship with the victim." It found the question to be - does the charge requires that the relationship be a "discrete element" of the charged offense. The Court ruled that "in a §922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for "'an offense … committed by" the defendant against a spouse or other domestic victim."

The decision of the Fourth Circuit Court of Appeals was reversed, and the case remanded for further proceedings consistent with the opinion.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-608.pdf

INTERROGATION - CONFESSION

Corley v. U.S.
--- U.S. --- (2009)
Decided April 6, 2009

FACTS: On September 17, 2003, in Norristown, Pennsylvania, Corley was arrested by federal and state officers on a state warrant. The arrest occurred at about 8 a.m. Corley was held initially at a local police station. At about 11:45, he was taken to a local hospital for treatment of a minor injury, and from there, at about 3:30 p.m., he was taken to the local FBI office. There he was informed he was a suspect in a bank robbery. He was not taken before the local magistrate (who was located in the same building), but instead was questioned "in the hopes of getting a confession." At 5:27, "sold … on the benefits of cooperating," Corley signed a Miranda waiver and gave an oral confession. About an hour later, he was asked to put it in writing but he told them he was tired and they "decided to hold him overnight and take the written statement the next morning." He repeated his confession the next day, it was reduced to writing, and he signed it. He was taken to a magistrate at 1:30 p.m., 29.5 hours after his arrest.

Corley was charged with armed bank robbery and related offenses and moved to suppress both his oral and written confession, based upon §3501. The U.S. District Court denied the motion, finding that the initial oral confession, subtracting the treatment time, was within the six-hour window mandated by §3501(c). Further, the District Court ruled that the written confession, given the next day, after a break requested by Corley, was admissible because that does not violate Rule 5(a).

Corley was convicted of conspiracy and armed robbery, and appealed. The Third Circuit affirmed the conviction, under a different rationale from the District Court. Corley appealed.

ISSUE: Is a confession made more than six hours after an arrest (by federal authorities) presumptively inadmissible?

HOLDING: Yes

DISCUSSION: The Court noted that the Government's argument focused on 18 U.S.C. §3501(a), "which provides that any confession 'shall be admissible in evidence' in federal court 'if it is voluntarily given.'" The Government essentially ignored, however, the rulings in McNabb v. U.S.[237] and Mallory v. U.S.[238] McNabb had provided that confessions obtained after an "unreasonable presentment delay" will be inadmissible. Rule 5(a) was enacted shortly thereafter, which codified the rule that individuals under arrest must be taken before a magistrate without undue delay. The Court noted that the "fundamental problem with the Government's reading of §3501 is that it renders §3501(c) nonsensical and superfluous." The Court noted that a basic rule of construction is that a statute must be read to include all sections, including the section that requires that a confession be made within six hours of arrest unless the suspect is taken before a magistrate. A few years latter, Mallory applied Rule 5(a) and held that a confession given seven hours after arrest, when the suspect was held "within the vicinity of numerous committing magistrates" constituted unnecessary delay and was thus inadmissible. (Specifically, the Court noted that "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'") In 1968, Congress enacted 18 U.S.C. §3501, which codified McNabb-Mallory to some extent, and which held that a pre-presentment confession made within six hours of arrest, that is otherwise found to be voluntary, will be admissible. (Those made after the six hours may also be admitted, if, for example, the Court agrees that transportation causes the delay.)

The Court concluded that "§3501 modified McNabb-Mallory without supplanting it." The Court ruled that a District Court faced with a "suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]')". A confession made during those six hours that is voluntary will be admissible, so long as it meets other applicable evidentiary rules. "If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed."

The Court vacated the Third Circuit's decision, and remanded it back for a determination as to whether the delay was justifiable.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-10441.pdf

[237] 318 U.S. 332 (1943).
[238] 354 U.S. 449 (1957).

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

Arizona v. Gant
--- U.S. --- (2009)
Decided April 21, 2009

FACTS: On Aug. 25, 1999, Tucson (AZ) officers received a tip that drugs were being sold from a particular address. Officers did a knock and talk, and spoke to Gant, who identified himself and stated he expected the owner to return later. The officers left and checked Gant's record, and learned that he had an outstanding warrant for driving on a suspended OL, and that his license was still suspended.

Officers returned later, and arrested several occupants. Gant then arrived, driving, and got out of the car. The officers arrested and handcuffed Gant, first contacting him when he was 10-12 feet from his car. When additional officers arrived, Gant was secured in the back of a patrol car, handcuffed. The officers searched the car, finding a gun and cocaine in a jacket on the backseat of the car. Gant was charged with possession of the cocaine and possession of drug paraphernalia (the plastic bag). He moved for suppression, arguing that Belton[239] "did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle."

The trial court denied his motion, but ultimately, the Arizona Supreme Court "concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment." Arizona sought certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to the arrest conducted after the vehicle's recent occupants have been arrested and secured?

HOLDING: Yes

DISCUSSION: The Court reviewed, at length, the precepts of Belton and Chimel v. California.[240] The Court acknowledged that the Belton opinion "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search" including situations where the arrested subject has left the scene. Further, the Court noted, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." In the case at bar, the Court stated that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case." The Court specifically noted that in this case, there were five officers present, with three arrested subjects who were already secured in vehicles.

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[239] New York v. Belton, 453 U.S. 454 (1981); See also Thornton v. U.S., 541 U.S. 615 (2004).
[240] 395 U.S. 752 (1969)

The Court ruled that Belton and Thornton "permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.[241]" In addition, searches are permitted "when safety or evidentiary concerns demand."

The Court concluded, "officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search" and "[c]onstruing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." The Court stated:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

The Court upheld the decision of the Arizona Supreme Court.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-542.pdf

SPECIAL NOTES:

A. Although this case limits the application of Belton and Thornton, it does not affect a Carroll[242] search, a consent search, or a frisk of the vehicle for weapons pursuant to Michigan v. Long[243].
B. Inventory of vehicles may be performed when the agency has a ***proper inventory policy, and only when there is a legitimate need to actually tow the vehicle.***[244] Under City of Danville v. Dawson, the Court agreed that a vehicle should only be towed when it is actually necessary to do so, and that an owner or operator should be given the option to find an alternative way to secure the vehicles. Specifically, the Court stated that the "practice of impounding vehicles following arrests for mere traffic violations is utterly unnecessary and indeed, is of questionable legality."[245] In addition, Wagner v. Commonwealth [246] controls in Kentucky, and states that:

   "A vehicle may be impounded without a warrant in only four situations:
   1. The owner or permissive user consents to the impoundment;

[241] The term - offense of arrest - means the offense for which the individual is initially being arrested. In Gant's case, that would be the warrant for driving on a suspended OL, not the drug offenses for which he was ultimately charged.
[242] Carroll v. U.S., 267 U.S. 132 (1925).
[243] 463 U.S. 1032 (1983).
[244] See South Dakota v. Opperman, 428 U.S. 364 (1976).
[245] 528 S.W.2d 687 (Ky. 1975). Both Wagner and Dawson, are no longer valid on another point of law, as indicated by Estep v. Com. , 663 S.W.2d 213 (Ky. 1983).
[246] 581 S.W.2d 352 (Ky., 1979).

2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or permissive user cannot reasonably arrange for alternate means of removal;
3 The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party; or
4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed."

The Wagner court further stated: "[i]f the only potential danger that might ensue from non-impoundment is danger to the safety of the vehicle and its contents no public interest exists to justify impoundment of the vehicle without the consent of its owner or permissive user. Because the vehicle is legally in his custody the driver, even though in police custody, is competent to decide whether to park the vehicle in a "bad" neighborhood and risk damage through vandalism or allow the police to take custody. Only when the vehicle if not removed poses a danger to other persons, property or the public safety does there exist a public interest to justify impoundment if the owner or permissive user is unable to reasonably arrange for a third party to provide for the vehicle's removal."

FEDERAL TRIAL PROCEDURE - HABEAS CORPUS

Cone v. Bell
--- U.S. --- (2009)
Decided April 28, 2009

FACTS: Cone was convicted in Tennessee for a 1980 double murder. He pursued direct appeal, raising numerous challenges. Eventually, Tennessee rejected his claims and Cone sought post-conviction relief, arguing ineffective counsel. Ultimately, in 1987, that was also denied. In 1989, he filed yet another petition, claiming that the "State had failed to disclose evidence in violation of his rights under the United States Constitution." That was again denied. Cone went through several other petitions over a number of years.

During this time, however, Tennessee ruled that criminal defendant was permitted to "review the prosecutor's file in [their] case." Cone requested his file and learned that "evidence had indeed been withheld from him at trial," included "statements from witnesses who had seen him several days before and several days after the murders," in which they described him as "wild eyed," "real weird" and "drunk or high." (Cone's defense was drug addiction, which had been discounted at trial.) The file also "contained a police report describing Cone's arrest in Florida following the murders," in which he was described as "looking around 'in a frenzied manner,' and 'walking in [an] agitated manner.'" Police bulletins describing him as a "drug user" and a "heavy drug user" were also in the file.

With that evidence, Cone amended his pending petition, claiming that the "State had withheld exculpatory evidence demonstrating that he 'did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past.'" He argued that there was a "reasonable probability that, had the evidence not been withheld, the jurors would not have

convicted [him] and would not have sentenced him to death." He explained he had not raised the Brady claim at an earlier time because he had not had access to the material which proved the claim.

The postconviction court denied relief, stated that either he had waived the claim by not raising them at an earlier time, or that they were "re-statements of previous grounds" already litigated and decided. Cone ultimately requested certiorari from the U.S. Supreme Court, which accepted the case.[247]

ISSUE: Is a claim under federal law (habeas corpus) "procedurally defaulted" because it has been presented twice to the state courts?

HOLDING: No

DISCUSSION: During the lengthy proceeding, the "State of Tennessee offered two different justifications for denying review of the merits of Cone's Brady[248] claim." First, the Court addressed the claim that the "repeated presentation of a claim in state court bars later federal review." The Court quickly concluded that it does not create a "bar to federal habeas review." The Court stated that a "claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration – not when the claim has been presented more than once."

The Court also agreed that Cone's claim had not been waived by his alleged failure to raise the issue in a timely manner. The Court stated that "when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment."

The Court further stated:

> The documents suppressed by the State vary in kind, but they share a common feature: Each strengthens the inference that Cone was impaired by his use of drugs around the time his crimes were committed.

The evidence also included information that would have aided Cone's attorney in impeaching witnesses that cast doubt on his drug addiction. The Court defined the "federal question that must be decided is whether the suppression of that probative evidence deprived Cone of his right to a fair trial." The lower courts did not "distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment – an omission [it found] significant." The Court agreed that "the materiality of the suppressed evidence with respect to guilt and punishment is significant in this case," since the evidence of his guilt was overwhelming and that nothing indicated he was insane. The evidence, however, might prove critical in the sentencing phase of his case, with its "far lesser standard" necessary to "qualify evidence as mitigating in a penalty hearing in a capital case."

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[247] The recitation of the case's procedural history is lengthy and complex, and immaterial to the ultimate issue of the case.

[248] Brady v. Maryland, 373 U.S. 83 (1963).

The Court noted that the lower courts had not "fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone's drug addiction … was sufficiently serious" to have caused a jury to change its sentencing decision.

The Court remanded the case back to Tennessee to determine if the suppressed evidence may have made a difference in his sentencing, "with instructions to give full consideration to the merits of Cone's Brady claim."

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-1114.pdf

TRIAL PROCEDURE / EVIDENCE - SIXTH AMENDMENT

Kansas v. Ventris
--- U.S. --- (2009)
Decided April 29, 2009

FACTS: On January 7, 2004, Ventris and Theel conspired to shoot and kill Hicks. They were promptly arrested. Prior to Ventris's trial, "officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements." Ventris allegedly then confessed his involvement in the crime to the informant.

Ventris testified at trial and "blamed the robbery and shooting entirely on Theel." The prosecution sought to introduce his prior contradictory the statement via the informant; Ventris objected. The prosecution admitted that there might have been a violation of Ventris's Sixth Amendment right to counsel, " but nonetheless argued that the statement was admissible for impeachment purposes…"

The trial court allowed the statement to be introduced, but it cautioned the jury to carefully consider "all testimony given in exchange for benefits from the State." The jury ultimately convicted Ventris of burglary and robbery, but not murder. Ventris appealed, and the Kansas Supreme Court reversed his conviction, finding that his "statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony."

Kansas applied for certiorari, which the U.S. Supreme Court granted.

ISSUE: May a defendant's voluntary statement, obtained in violation of their right to counsel, be admitted for impeachment purposes?

HOLDING: Yes

DISCUSSION: After a discussion on the admissibility of evidence excluded in the case in chief, the Court considered the deterrent effect on admitting, or not admitting, such evidence. The Court stated:

> Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for

> all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of Massiah[249] would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment. Not likely to happen—or at least not likely enough to risk squandering the opportunity of using a properly obtained statement for the prosecution's case in chief.

The Court concluded that the statement "was admissible to challenge Ventris's inconsistent testimony at trial," and reversed the decision of the Kansas Supreme Court. The case was remanded to Kansas for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-1356.pdf

FEDERAL LAW - IDENTITY THEFT

Flores-Figueroa v. U.S.
--- U.S. --- (2009)
Decided May 4, 2009

FACTS: In 2000, Flores-Figueroa, a Mexican citizen, sought work in the United States. Initially, he gave his employer a "false name, birth date, and Social Security number, along with a counterfeit alien registration card." The numbers of the cards "were not those of a real person." In 2006, he provided different counterfeit cards, with his real name, but "numbers on both cards [that] were in fact numbers assigned to other people."

His employer forwarded the information the U.S. Immigration and Customs Enforcement, which discovered that the numbers belonged to real people. They charged him with, among other offenses, aggravated identify theft under 18 U.S.C. §1028(a)(a).

Flores moved for acquittal on that charge, arguing that the "Government could not prove that he *knew* that the numbers on the counterfeit documents were numbers assigned to other people." The Government claimed that was unnecessary, and the District Court agreed. He was convicted, and the Court of Appeals agreed.

Flores-Figueroa requested certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does the federal crime of identity theft require that a subject know that a Social Security number they are using actually belongs to another individual?

HOLDING: Yes

DISCUSSION: After a lengthy discussion on English grammar, the Court concluded that it was the intent of Congress to require "the Government to show that the defendant knew that the means of

[249] Massiah v. U.S., 377 U.S. 201 (1964)

identification at issue belonged to another person." (The Court distinguished this case from those where the defendant used the identification to commit overt fraud or theft on the person whose identity the cards or number portray.) The decisions of the lowers courts were reversed and the case remanded for further proceedings.

NOTE: This case involves federal identity theft, rather than state identity theft. Kentucky may rule differently in a similar situation, based upon state law.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/08-108.pdf

FEDERAL LAW - DRUG TRAFFICKING

Abuelhawa v. U.S.
--- U.S. --- (2009)
Decided May 26, 2009

FACTS: Said was believed to be trafficking in cocaine and the FBI got a warrant to tap his cell telephone. They captured six calls between Said and Abuelhawa, during which time two transactions were arranged. The amount transacted, however, were so small as to be federal misdemeanors under 21 U.S.C §844 for Abuelhawa, although the charges against Said, the seller, were felonies under 21 U.S.C. §841. The FBI, however, charged Abuelhawa with six felony charges, "on the theory that each of the phone calls, whether placed by Abuelhawa or by Said, had been made 'in causing or facilitating' Said's felonies," in violation of another federal law.

Abuelhawa moved for acquittal, arguing that his efforts to buy the cocaine, by telephone, could not be so charged, but the District Court disagreed. He was convicted at trial. "Abuelhawa argued the same point to the Court of Appeals for the Fourth Circuit, with as much success." He requested, and the Supreme Court granted, certiorari.

ISSUE: Does the use of a telephone in a federal drug misdemeanor cause it to become a felony offense?

HOLDING: No

DISCUSSION: The Government argued that the use of a cell phone facilitates the drug transaction, and the Court noted, "on the literal plane, the phone calls could be described as 'facilitating' drug distribution" and made such distribution easier. However, it continued, "the Government's literal sweep of 'facilitate' sits uncomfortably with common usage." The Court found it "odd to speak of one party as facilitating the conduct of the other," when in fact, without a buyer, a sale is simply not possible. The Court did not agree with the Government's argument that somehow using a telephone to communicate "is different from borrowing the money or merely handing over the sale price for cocaine." The Court agreed, however that "[b]ecause cell phones, say, really do make it easier for dealer to break the law, Congress probably meant to ratchet up the culpability of the buyer who calls ahead."

Further, the Court stated, when the original "statue was enacted, the use of land lines in drug transactions was common, and in these days when everyone over the age of three seems to carry a cell phone, the Government's interpretation would skew the calibration of penalties very substantially."

The Court reviewed the history of the statutes in question and noted that "history drives home what is already clear in the current statutory text: Congress meant to treat purchasing drugs for personal use more leniently than the felony of distributing drugs, and to narrow the scope of the communications provision to cover only those who facilitate a drug felony." Under the Government's interpretation, "in a substantial number of cases Congress would for all practical purposes simultaneously have graded back up to felony status with the left hand the same offense it had dropped to a misdemeanor with the right." The Court found it "impossible to believe that Congress intended 'facilitating' to cause [the] twelve-fold quantum leap in punishment for simple drug possessors."

The Court reversed the conviction and remanded the case back to the trial court for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/08-192.pdf

INTERROGATION - SIXTH AMENDMENT

Montejo v. Louisiana
--- U.S. --- (2009)
Decided May 29, 2009

FACTS: Montejo was arrested on murder and robbery charges in Louisiana. He was interrogated and changed his story several times. He was brought before a judge for his state-mandated 72-hour hearing, where he was appointed counsel as he appeared indigent, even though he apparently did not request counsel, or even speak, at that time.

Later that same day, two detectives visited Montejo, and after some discussion, he was given his Miranda warnings and agreed to go on an excursion to attempt to locate the murder weapon. During the trip, he "wrote an inculpatory letter of apology to the victim's widow." When they returned, Montejo's court appointed attorney "was quite upset that the detectives had interrogated his client in his absence."

Ultimately, Montejo was convicted and sentenced to death. His appeals through the Louisiana state court system were unsuccessful, with the Louisiana Supreme Court holding that the protections of Michigan v. Jackson[250] did not apply, as Montejo did not actually request an attorney or otherwise assert his Sixth Amendment right at the hearing or before. (The Louisiana court ruled that "if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.")

[250] 475 U. S. 625 (1986).

Montejo requested certiorari and the U.S. Supreme Court accepted review.

ISSUE: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

HOLDING: Yes

DISCUSSION: The Court initially noted that the issue was complicated by the fact that some states do not appoint counsel for an eligible defendant until that individual affirmatively requests counsel, while other states do so automatically. In Jackson, the defendant had properly requested counsel. The Court reviewed all of the questions that might arise ins determining whether Jackson is triggered, including, for example, the mysterious notion of how a defendant would "affirmatively accept" counsel that is automatically appointed by the court. The possible ways to do so would be, at best, impractical, and at worst, virtually impossible, according to the Court. It would also mean that "[d]efendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger Jackson, while those in other States, effectively instructed by the court to request counsel, would be lucky winners."

The court then addressed whether a Miranda[251] warning and waiver was sufficient to also waive the right to counsel, and agreed "that typically does the trick, even though the Miranda rights purportedly have their source in the Fifth Amendment." Under Edwards v. Arizona, the Court had "decided that once 'an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact."[252]

Further, the Court noted:

> The Edwards rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights."[253] It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."[254] This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence."[255]
>
> Jackson represented a "wholesale importation of the Edwards rule into the Sixth Amendment."[256] The Jackson Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," despite doubt that defendants

[251] Miranda v. Arizona, 384 U.S. 436 (1966).
[252] 451 U. S. 477 (1981).
[253] Michigan v. Harvey, 494 U.S. 344 (1990).
[254] McNeil v. Wisconsin, 501 U. S. 171 (1991).
[255] Texas v. Cobb, 532 U. S. 162 (2001)
[256] Id.

> "actually inten[d] their request for counsel to encompass representation during any further questioning," because doubts must be "resolved in favor of protecting the constitutional claim," Citing Edwards, the Court held that any subsequent waiver would thus be "insufficient to justify police initiated interrogation." In other words, we presume such waivers involuntary "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily" in subsequent interactions with police.[257]

The Court noted that "[w]hen a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary." The Court found:

> No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

As part of its decision, the Court was compelled to decide if Michigan v. Jackson was still valid law or if it should be overturned. The Court asked "What does the Jackson rule actually achieve by way of preventing unconstitutional conduct?" The Court noted that there were already three prophylactic rules in place to protect defendants: Miranda's protections against "compelled self-incrimination" and its right to have an attorney present during custodial interrogations if desired, Edwards, which holds that once a defendant invokes the right, all interrogation must stop, and finally Minnick v. Mississippi, which states that "no subsequent interrogation may take place [following invocation] until counsel is present, 'whether or not the accused has consulted with his attorney.'"[258]

The Court continued:

> These three layers of prophylaxis are sufficient. Under the Miranda-Edwards-Minnick line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment,[259] it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then Jackson is simply superfluous.

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[257] Harvey, supra.
[258] 498 U.S. 146 (1990).
[259] Cobb, supra.

In particular, the Court noted it had "praised Edwards precisely because it provides 'clear and unequivocal' guidelines to the law enforcement profession.'"[260] The Court ruled that "when the marginal benefits of the Jackson rule are weighed against its substantial costs to the truth seeking process and the criminal justice system, we readily conclude that the rule does not "pay its way."[261] As such, the court overruled Michigan v. Jackson.

The Court concluded:

> This case is an exemplar of Justice Jackson's oft quoted warning that this Court "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."[262] We today remove Michigan v. Jackson's fourth story of prophylaxis.

Because certain issues were not fully addressed during Montejo's criminal case, the Court agreed that the case would be remanded for a further consideration, on the state level, as to whether Montejo did, in fact, affirmatively assert his right to counsel prior to agreeing to accompany law enforcement on the "excursion for the murder weapon," agreeing that had he done so, "no interrogation should have taken place unless Montejo initiated it."

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-1529.pdf

EMPLOYMENT – DISCRIMINATION

Ricci v. DeStefano
--- U.S. --- (2009)
Decided June 29, 2009

FACTS: In 2003, 118 firefighters in New Haven, Connecticut, took the lieutenant and captain promotional exam. The results of the exam would determine which firefighters would be eligible for promotion over the next two years, and the "order in which they would be considered." When the test results came back, indicating that "white candidates had outperformed minority candidates," a rancorous public debate ensued. Some minority firefighters threatened a lawsuit arguing that the test was discriminatory, while others argued the tests were "neutral and fair." The City, "relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well."

"Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials" under both Title Vii of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

The U.S. District Court granted summary judgment to the City, and the Second Circuit Court of Appeals affirmed. The firefighters requested certiorari from the U.S. Supreme Court, which was granted.

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[260] Arizona v. Roberson, 486 U.S. 675 (1988).
[261] U.S. v. Leon, 468 U. S. 897 (1984).
[262] Douglas v. City of Jeannette, 319 U. S. 157 (1943).

ISSUE: Do Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results?

HOLDING: No

DISCUSSION: The Court first reviewed the detailed process whereby the contractor for the City had developed the test in question, and noted, among other things, that the contractor "oversampled minority firefighters" to ensure that the test "would not unintentionally favor white candidates." The contractor, with the approval of the City and pursuant to union rules, developed a 100-question written test and an oral assessment board with the results weighted 60/40 to reach the final score for each candidate.

After the tests were administered, by the rules of their civil service board, the top 10 candidates were eligible for an immediate promotion to fill three existing lieutenant vacancies. All 10 were white. 9 candidates were eligible for promotion to captain, 7 were white and 2 were Hispanic.

Following the examinations, the "City expressed concern that the tests had discriminated against minority candidates." The contractor defended the tests. The City's counsel claimed that such a "statistical demonstration of disparate impact" was sufficient to serve as a "predicate for employer-initiated, voluntary[y] remedies- even … race-conscious remedies." The Human Resources director agreed and the City raised the issue of possibly refusing to certify the results.

Even before they learned their actual score, several firefighter-candidates spoke in favor of certifying the test, believing that it was a fair test based upon accepted standards for firefighting and the department's own rules. Others, however, criticized the test as based upon practices not relevant to New Haven.

Over the next month, several meetings were held, with various parties arguing for and against certifying the test. The contractor explained the process and stated that all of the questions were "drawn from the source material and that the oral test accurately reflected real-world situations" relevant to the two positions. (Further, each oral examination panel included one white, one black and one Hispanic firefighter.) An expert from a business that actual competes with the contractor that prepared the test argued that the test was defective in several ways and the "scores indicated a 'relatively high adverse impact.'" He recommended the use of assessment centers. (That competitor eventually got a contract with the city to develop an assessment center process.)

On March 18, the city's attorney argued against certifying the test, stating that promotions under the list would be subject to challenge. Mayor DeStefano and other city officials involved in the process agreed. Firefighters, including Ricci, argued for certification of the test, but did not express a problem with changing the process in the future. The Civil Service Board voted, ultimately, not to certify the results, and a lawsuit ensued.

The plaintiffs are 17 white firefighters and 1 Hispanic firefighter, all of who passed the test but were denied a chance to be promoted. They sued under Title VII, which prohibits both intentional discrimination (disparate treatment) as well as "practices that are not intended to discriminate but in

fact have a disproportionately adverse effect on minorities" (disparate impact). Although Title VII originally covered only the first, subsequent court decisions had included the second, and eventually, it too became codified in law.

The firefighter-plaintiffs argued that the City's decision constituted a violation under disparate treatment, while the City countered that "its decision was permissible" because the tests may have violated disparate impact.

The Court noted that the City's reasons, "[w]ithout some other justification, … violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." The Court noted:

Whatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race.

The Court then looked to whether the "City had a lawful justification for its race-based action." The Court noted that its decision "must be consistent with the important purposes of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity." The Court found itself "searching for a standard that strikes a more appropriate balance," between the concerns of the parties. The Court noted that prior court decisions had "held that certain government actions to remedy past racial discrimination – actions that are themselves based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions [are] necessary."[263] That "standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination."

The Court continued:

> Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.

Yet, they found "their efforts invalidated by the City in sole reliance upon race-based statistics." The Court noted that "once [a]process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race." To do so "amounts to the sort of racial preference that Congress has disclaimed."

In this case, the Court found that there is "no support for the conclusion that [the City] had an objective, strong basis in evidence to find the tests inadequate…." The court agreed that the "racial adverse impact here was significant," given the numbers. However, the Court noted that the statistical disparity with nothing more, "is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." The City would have been liable "only if the examinations were not job related and consistent with business necessity, or if there existed an

[263] Richmond v. J.A. Croson Co. , 488 U.S. 469 (1989).

equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."

The Court concluded:

> … there is no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The Court found that the firefighters were entitled to summary judgment on their claim under Title VII, and thus it did not address the "underlying constitutional question" under the Fourteenth Amendment. The lower court's decision was reversed, and the case remanded for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf

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NOTES

While many of these cases involve multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

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

Nost language in italics in the body of the summary is directly from an search warrant affidavit, and all errors are from the original.

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) citation.

Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat:

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KENTUCKY CASES:

Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as "Unpublished" carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

UNPUBLISHED CASES
Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).