

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2009



*Leadership is a behavior, not a position*

CASE LAW UPDATES  
THIRD QUARTER

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



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





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

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### **NOTE:**

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

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

# KENTUCKY

## PENAL CODE - ASSAULT

### Stiltz v. Com.

2009 WL 2706963 (Ky.,2009)

**FACTS:** During his arrest, Stiltz threw a bottle containing methamphetamine in a liquid state in such a way that it splashed Officer Smith, causing physical injury. As a result, and in addition to the other charges, he was charged with Assault in the Third Degree. Stiltz was convicted and appealed.

**ISSUE:** Is Third-Degree Assault a lesser included offense of Second-Degree Assault?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Stiltz had told Officer Smith what was in the bottle when he tossed it. The case was tried under the reckless provisions, and Stiltz argued that, if anything, his behavior was actually wanton. The Court agreed that could be the case, but found that the third degree offense was a lesser-included offense to the second degree offense.

Stiltz's conviction was affirmed.

## PENAL CODE – CHILD ABUSE

### Stone v. Com.

2009 WL 2837391 (Ky. App. 2009)

**FACTS:** On February 5, 2007, Stone and her son J.A. were at home. Allison, her live-in boyfriend, volunteered to babysit a nephew for his sister, while she was at school. Allison then left, leaving the two children with Stone. When the sister arrived to pick up her son, she later testified that Stone told her she'd been "busting [J.A.'s] ass all morning" and that she'd had Allison come home to "whoop him." The sister also stated that Allison came out of the bedroom with a broken paint stick.

The next day, Stone dropped off J.A. with his paternal grandmother. Stone explained that she'd spanked him with a hairbrush and his bottom was bruised, and not to "freak out." The grandmother immediately examined his bottom and was alarmed. She called the police and the child was taken to the ER. Photos were taken. The child stated that Allison had hit him with a stick.

Although Social Services was notified, no investigation was done. J.A. was placed with his mother and maternal grandmother, until Stone got her own place sometime later. The Christian County Sheriff's Office did investigate and Dep. Reed brought charges against both Allison and Stone.

Allison testified at trial as part of a plea agreement and testified in agreement with his sister. He stated that the child was not crying after the spanking, and with that, his sister agreed.

Stone was convicted of Criminal Abuse in the Third Degree and appealed.

**ISSUE:** Is *risk* of serious physical injury enough to charge with Criminal Abuse?

**HOLDING:** Yes

**DISCUSSION:** Stone argued that the prosecution failed to prove the required mental state (*mens rea*) for the crime – recklessness. The Court agreed that the evidence, that both Stone and Allison had beaten the child, was sufficient. Further, the Court agreed that there was no evidence on record as to whether J.A. suffered serious physical injury (and no evidence of any medical treatment at all). However, Criminal Abuse has as an element not just serious physical injury, but also the risk of it, and the Court found it not unreasonable for a jury to find that J.A. was at such risk. (The Court noted that the bruising covered his entire bottom, including the area between his buttocks.)

Stone's conviction was affirmed.

## **PENAL CODE - DISORDERLY CONDUCT**

### Windham v. Com.

2009 WL 1884366 (Ky. App. 2009)

**FACTS:** In Sept., 2003, Windham was convicted on charges of third-degree assault, resisting arrest and disorderly conduct. She appealed.

**ISSUE:** Is the doorway and front porch public places for Disorderly Conduct purposes?

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

**DISCUSSION:** Among other issues presented, Windham argued that the jury instructions which indicated her home was a "public place" for purposes of the disorderly conduct charge were incorrect. The Court noted, however, that the conduct which led to her arrest "occurred not only in her home, but also in the doorway, front porch, and front yard outside her residence ...." The Court agreed the doorway, as well as the front porch and yard, could all be considered public places under KRS 525.

After resolving a number of other issues, the Court upheld Windham's conviction.

## **FORFEITURE**

### Com. v. Maynard

2009 WL 2408418 (Ky. App. 2009)

**FACTS:** On January 4, 2007, police found approximately 24 pounds of marijuana on Maynard's property. It was seized, and he was indicted. But, before he could go to trial, Maynard died. The charges were then dismissed. Prior to his death, the Commonwealth had recorded a forfeiture lien against the real property. Upon Maynard's death, the Commonwealth sought to enforce the lien and sent a copy to

Maynard's former attorney. The attorney filed an objection, arguing that since Maynard had not been convicted, the property was not subject to forfeiture.

At the hearing, Maynard's attorney was understood to be representing the estate, and Maynard's heirs were also present. The trial court denied the forfeiture, finding that his heirs were innocent owners of the property. The Commonwealth appealed.

**ISSUE:** In a post-death forfeiture motion, is it necessary to name the heirs?

**HOLDING:** Yes

**DISCUSSION:** Maynard's heirs argued that the Commonwealth had failed to name them in the notice of appeal, and argued that the appeal must be dismissed for that reason. The Commonwealth countered by saying that it named Maynard and that his heirs simply "stepped into his shoes." The Court found little prejudice to the heirs by the Commonwealth's error in failing to name them as a proper party. Everyone involved had been actively involved in the litigation. However, the Court agreed that the Commonwealth's failure to name an indispensable party was fatal to the action.

The Court reminded the Commonwealth as to the proper process to designate such parties in a forfeiture action. Once the lien was dismissed by the trial court, the "heirs became the true and unencumbered owners of the real property," and they became indispensable parties to any further action. The Commonwealth's appeal was dismissed.

## **SEARCH & SEIZURE – VEHICLE STOP – CONSENT**

### **Gaines v. Com.**

**2009 WL 2475299 (Ky. App. 2009)**

**FACTS:** On June 17, 2007 Gaines and Raleigh visited a store in Lexington owned by Cassiano. Sanchez was working when Raleigh made a purchase with a \$50 bill. Gaines then came in and tried to make a purchase with another \$50 bill. Sanchez already suspected the first bill was fake and refused to make the sale. Cassiano arrived at the store and Sanchez showed him the bill. At about the same time, Gaines and Raleigh drove by. Sanchez and Cassiano followed them to a nearby stop and recorded the license plate number. They located several police officers nearby. Cassiano explained what they believed. Officer Slark found the suspect vehicle and stopped the car.

Gaines was driving but he denied having any ID. He provided a false name. Officer Slark noted that Gaines was nervous and did not make eye contact. He got out on request, but denied Slark consent to search the car, since the car belonged to Raleigh. He did consent to a search of his person, during which Slark found marijuana and Gaines' OL. Gaines was arrested.

Raleigh gave Officer Hawkins permission to search her car, and he (and Slark) found a backpack of counterfeit cash, along with items connected to Gaines. Only the cash was retained as evidence, and there was no documentation of the other items found in the backpack. Officers Kidd and Slark later testified that Gaines admitted the backpack was his.

Gaines was charged, indicted and eventually convicted on various charges, including Criminal Possession of a Forged Instrument. He appealed.

**ISSUE:** Is a consent to search a car considered to be unlimited, unless qualified?

**HOLDING:** Yes

**DISCUSSION:** Gaines argued that the original stop was unjustified “because he claims the police did not have enough reliable information to form a reasonable and articulable suspicion that [Gaines] had committed a crime at the time Officer Slark stopped the vehicle” – as he equated the information from Cassiano to “that of an anonymous informant.”

The Court reviewed the facts and agreed that Officer Slark had sufficient reason to stop the car, and that he knew Cassiano’s identity. (In fact, he stayed with the officers through the arrest.)

Further, the Court found the search and seizure of the backpack was appropriate, as it was searched pursuant to a valid consent by the owner of the car. Raleigh “gave unfettered consent to search the car” which included all containers inside the car. It was only after the backpack was opened that Raleigh stated it did not belong to her.

Gaines also argued that evidence that he always carried a backpack to be improper habit evidence under KRE 406, but in this case, the testimony (from a prior girlfriend) corroborated what was actually found in the backpack. The Court agreed that this was precisely the kind of habit evidence contemplated by the rule.

After resolving several other procedural issues, the Court upheld Gaines’ conviction.

## **SEARCH & SEIZURE – TERRY**

### Clay v. Com.

2009 WL 3047575 (Ky. App. 2009)

**FACTS:** On July 20, 2007, Officer Kornrumpf (Lexington PD) noticed a woman he believed to be loitering for the purpose of prostitution. He was tied up on another call at the time. A little later (actually early the next morning), he spotted a vehicle being approached by Clay and two women, one of whom was the person he’d seen earlier. As he passed, he saw one of the women being “helped into the back seat by Clay.” He saw the other female talking to another man, later determined to be the driver of the vehicle, at the rear of the vehicle. Kornrumpf stopped and turned on his emergency lights for safety. He asked all four to come to the rear of the vehicle, but one of the men (the driver) fled. Clay handed over his wallet, with ID, but would not make eye contact and kept looking back over his shoulder. Kornrumpf told Clay he was going to pat him down, but Clay refused to be searched “unless there were charges placed against him.” Kornrumpf called for backup and asked Clay to place his hands on his head. Clay did, but then fled, followed by the officer. “While Clay was running, he did not swing his arms at his sides, but rather he kept his hands in front of his waistband.” Kornrumpf observed him “making a throwing motion toward a residence.” Clay caught his hand on a fence and was apprehended.

Clay was arrested and searched . The officers found small amounts of crack cocaine and marijuana. A gun was found in the area where Clay was seen to be tossing something, but no physical evidence linked him to it. He was charged with a variety of offenses and moved for suppression. When that was denied, he stood trial and was ultimately only convicted of trafficking and several misdemeanor offenses. Clay appealed the felony conviction.

**ISSUE:** May the flight of another person in a group be used to justify a Terry detention?

**HOLDING:** Yes

**DISCUSSION:** Clay argued that Kornrumpf lacked sufficient cause to “stop” him, but the Court noted that another member of Clay’s party had abruptly fled the scene and refused to come back. “When considering the totality of the circumstances, the flight of other individuals is one of many factors that, when taken together, may give an officer reasonable suspicion for a brief detention.”<sup>1</sup> Further, the details provided to the Court, the nature of that area of town, the specific actions taken by the women, along with other small factors, were collectively sufficient to support the challenged interaction. Clay’s nervousness and baggy clothing were enough to justify a frisk, as well, and was to “allow an officer to pursue an investigation without fear of violence.”

The Court agreed that Kornrumpf had reasonable suspicion to frisk Clay and upheld his conviction.

## **SEARCH & SEIZURE - GANT**

Arnold v. Com.  
2009 WL 2475354 (Ky. App. 2009)

**FACTS:** On Sept. 28, 2006, Officer McChesney (Probation & Patrol) and Officer Helbig (Bowling Green PD) made a home visit to Elliott. They found a “large amount of cash and cocaine in the residence.” Elliott offered to make drug buys in exchange for going to jail. A recording device was attached to Elliott’s cell phone.

Elliott made a call to Arnold and arranged to buy cocaine. Arnold gave a vehicle description and they agreed to meet in Elliott’s apartment parking lot for the transaction. Further phone calls changed the location to a nearby lot. Arnold arrived; he was promptly stopped and handcuffed. A drug dog alerted to the car, cocaine was found and Arnold was formally arrested. He was subsequently indicted for trafficking. Arnold moved for suppression and was denied.

Arnold was convicted and appealed.

**ISSUE:** Is Gant implicated when a drug offense is the basis for an arrest?

**HOLDING:** No

**DISCUSSION:** Arnold first argued that Elliott was not a “sufficiently reliable informant” to support the search of the car. The Court, however, noted that the police did not rely totally on Elliott’s statement, but in

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<sup>1</sup> Fletcher v. Com., 182 S.W.3d 556 (Ky. App. 2005).

fact, relied upon Arnold's own statements over the phone. The Court agreed that there was sufficient information to support reasonable suspicion, which was all that was needed for the initial detention.

Further, the Court agreed that a "warrantless search of an automobile is justified if there is probable cause to believe criminal activity is afoot because an automobile is inherently mobile and there is a lessened expectation of privacy in an automobile."<sup>2</sup>

Of note, because Gant<sup>3</sup> was decided during the pendency of the appeal, the Court asked for supplemental briefs on that issue.<sup>4</sup> However, ultimately, the Court decided that Gant had no application to the case, noting that the "police were justified in searching Arnold's vehicle because it was reasonable for the police to believe the vehicle contained cocaine, 'evidence of the offense of arrest.'"

Arnold also argued it was improper to allow the recording of the telephone conversations to be played for the jury. Officer McChesney had properly identified the conversation, providing a foundation for it. Arnold further complained that the conversation contained hearsay, but the "Commonwealth did not offer the recording to establish that Arnold was a participant in the conversation, what the price of the cocaine was, or any of the other specific facts discussed by Arnold and Elliot." The Court agreed it was admissible.

Arnold's conviction was affirmed.

**Owens v. Com.**  
**291 S.W.3d 704 (Ky.,2009)**

*NOTE: This case was remanded back to Kentucky for consideration in light of the recent U.S. Supreme Court decision in Arizona v. Gant.<sup>5</sup>*

**FACTS:** Owens was the passenger in a vehicle lawfully stopped by police. The driver was arrested and Owens was frisked, although the officer had no "independent suspicion" that he was guilty of any criminal conduct. The initial decision had ruled that the "automatic companion rule" demanded, for both officer safety and public safety, that the officer had discretion to do a frisk under the circumstances presented. During the frisk, Owens apparently started removing items from his pockets and a baggie containing marijuana and some pills fell out. (Owens claimed the officer reached into his pocket to remove cash and that the baggie didn't belong to him.) Owens was charged and convicted. He had originally filed an unsuccessful appeal.

**ISSUE:** Does finding a crack pipe on an arrested subject's person permit the officer to search the vehicle in which that subject is arrested?

**HOLDING:** Yes

**DISCUSSION:** The Court was tasked with looking at the case from the point of view of Gant. The Court stated that:

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<sup>2</sup> California v. Carney, 471 U.S. 386 (1985).

<sup>3</sup>

<sup>4</sup>

<sup>5</sup> 129 S.Ct. 1710 (2009)

This narrowing of the automobile search requirement will undoubtedly affect the propriety of the automobile searches incident to arrest in a great number of cases, but this case is not one of them.

The driver was originally arrested for having a suspended OL. The search of his person incident to that arrest revealed a crack pipe, as such, it was reasonable to believe the vehicle might contain evidence of the offense which gave rise to the arrest. That made the search of the vehicle permissible under Gant.

The Court further noted that:

And an officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop. So it logically follows that an officer may order a passenger to exit a vehicle while that vehicle is searched incident to the lawful arrest of the driver. It appears that every important action taken up to the point where Owens was frisked was constitutionally permissible.

This made the crux of the case whether the passenger could be frisked when the driver was arrested for drug possession.

The Court continued:

Two schools of thought have emerged around this subject. One, known as the automatic companion rule, holds that "[a] 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."<sup>6</sup> Numerous state and federal courts have either expressly adopted the automatic companion rule or have issued decisions that seem to follow its contours.<sup>7</sup> 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.<sup>8</sup> Some courts that have rejected the automatic companion rule appear to believe that it

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<sup>6</sup> U.S. v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971) .

<sup>7</sup> See, e.g., U.S. v. Simmons, 567 F.2d 314, 319 (7th Cir. 1977) (holding that the automatic companion rule as expressed in Berryhill was insufficient to justify a full-blown search of an arrestee's companion, but the rationale "may be sufficient where a search is limited to a 'pat down. . . .") ; U.S. v. Poms, 484 F.2d 919, 922 (4th Cir. 1973) (voicing agreement with Berryhill) ; State v. Clevidence, 736 P.2d 379, 382 (Ariz.Ct.App. 1987) (citing Berryhill with approval for proposition that "[t]he right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest.") ; People v. Myers, 616 N.E.2d 633, 636 (Ill.App. Ct. 1993) (citing Berryhill with approval and holding that "[w]hile a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others.") ; State v. Moncrief, 431 N.E.2d 336, 342 (Ohio Ct.App. 1980) (citing Berryhill with approval) ; Lewis v. U.S., 399 A.2d 559, 562 (D.C. 1979) (citing Berryhill with approval) . Perry v. State, 927 P.2d 1158, 1163-64 (Wyo. 1996) (citing Berryhill with approval and adopting automatic companion rule) .

<sup>8</sup> See, e.g., U.S. v. Bell, 762 F.2d 495, 499 (6th Cir. 1985) (rejecting adoption of automatic companion rule) ; Eldridge v. State, 848 P.2d 834, 837-38 (Alaska Ct.App. 1993) (same) ; Commonwealth v. N, 649 N.E.2d 157, 158 (Mass. 1995) (same) ; State v. Eggersgluess, 483 N.W.2d 94, 98 (Minn.Ct.App. 1992) ; U.S. v. Flett, 806 F.2d 823, 827 (8th Cir. 1986) (same) . We appear to have utilized the totality of the circumstances test in regards to judging the propriety of Terry stops . See, e.g., Priddy v. Commonwealth, 184 S.W.3d 501, 511 (Ky. 2005), cert. denied, 549 U.S. 980 (2006) . However, we have not directly opined on the merits, or lack thereof, of the automatic companion rule.

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.<sup>9</sup> Legal scholars have also entered the debate.<sup>10</sup>

After much discussion, the Court concluded that in this case, it was appropriate for the officer to frisk Owens. It stated that the "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 Court upheld Owens' conviction.

**NOTE:** *Notably, although the Court quoted extensively from other jurisdictions on the matter, it did not address the decision made recently by the Sixth Circuit, which is the federal court of precedent for Kentucky. The Court ruled in U.S. v. Wilson, 506 F.3<sup>rd</sup> 488 (6<sup>th</sup> Cir. 2007) that it does not recognize the "automatic companion" rule. 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. 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.*

## INTERROGATION

**Jones v. Com.**  
**2009 WL 1974445 (Ky. App. 2009)**

**FACTS:** On January 5, 2006, Goeing (the pharmacist) and several other employees were working at the Family Drug in Wheelwright. Three armed persons, wearing dark clothing, entered at about 10 a.m. It was agreed by the employees that they sounded like young men.

Goeing was taken to the pharmacy and gave them about 5,200 hydrocodone tablets. They also took cash. During that time, a silent alarm had been triggered. One employee was able to slip out and alert workers at a neighborhood business. One of those employees saw the men leaving and later described the vehicle as a late-model Honda. Another witness, however, identified the vehicle as an Elantra (Hyundai), but agreed it was white with tinted windows. Yet another witness believed the vehicle was a Honda Accord. (Both of the later witnesses specifically stated they could read the model on the vehicle.)

KSP investigators arrived. They put out the vehicle description; Trooper Little pulled over Aaron Jones in response. He was questioned and released. The next day, a citizen found a number of items, including a toboggan, a glove, a hooded sweatshirt and pantyhose with the legs cut out, near a pumping station, and KSP collected them as evidence. The investigators came to believe Adam Jones (the defendant), his

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<sup>9</sup> See, e.g., Eldridge, 848 P.2d at 838 ; Ng, 649 N.E.2d at 157.

<sup>10</sup> See Kristi Michelle Bellamy, The "Automatic Companion" Rule and Its Unconstitutional Application to the Frisk of Car Passengers, 27 Am.J.Crim.L. 21 7 (2000) ; David E . Edwards, Suzette M. Nanovic, Francis M. O'Connell 8s Laura A. Yustak, Case Comment, Criminal Law- United States u. Bell: Rejecting Guilt By Association in Search and Seizure Cases, 61 Notre Dame L. Rev. 258 (1986) . John . J. O'Shea, The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion, 62 Notre Dame L. Rev. 751 (1987) .

brother Aaron and Chaffins were the suspects. That led them to question Fitzpatrick, Aaron's girlfriend, who provided information as to their movements on the day of the robbery – and stated that Jones told her that they were going to rob a pharmacy. That evening, they had pills and Aaron Jones had laughed about the misidentification of the car – in fact, they were driving a Honda Accord.

Another witness, who was jailed with Chaffins, reported that Chaffins had told him he'd robbed the pharmacy and that they'd worn disguises that had been discarded at a strip mine site. Det. Crum then took out warrants for Chaffins and Adam Jones; both were indicted. Eventually Jones was convicted of first-degree robbery and appealed.

**ISSUE:** Does the fact that an officer and suspect are related require more protection of the suspect's rights?

**HOLDING:** No

**DISCUSSION:** Jones argued that his statements, given to police prior to his arrest, should have been suppressed. In fact, when Jones realized he was a suspect, he contacted Det. Howard and "told him he wanted to talk to him." (The two men were related.) Jones came to the station the next day and he was escorted to an interview room. Det. Howard stated "it was his understanding that Jones had been advised of his Miranda rights by Detective Crum or someone else before being placed in the interview room" but he didn't witness it and could not be sure if that was the case. He told Jones 'he had been implicated in the pharmacy robbery.' He also told Jones that there was a warrant for his arrest and "that he would be arrested before he left the post." Det. Crum testified he had given Jones his Miranda warning in the hallway before the interview, because he knew it would be recorded. He apparently had him sign the waiver after the interview. The Court agreed that the officer's testimony was credible.

Jones argued, also, that Det. Howard "should have taken special pains to personally advise him of his constitutional rights because their 'blood relationship' made Jones more 'vulnerable due to the fact that he was talking to his cousin as his cousin and not so much as a Detective in the case.'" As such, his statements should have been considered confidential or off the record. The Court disagreed.

After resolving a number of other issues, the Court upheld Jones's conviction.

**Strauss v. Com.**  
**2009 WL 2633692 (Ky. App. 2009)**

**FACTS:** On July 15, 2007, Officer Williams (Lexington Metro) responded to assist Officer Slark with a DUI stop. He questioned Strauss, the driver, about how much he'd had to drink and his activities that day and performed field sobriety tests. Strauss failed all four tests and refused the PBT. Strauss was arrested, searched and given Miranda warnings. Specifically, Officer Williams later "testified that Strauss seemed to be paying attention while he was read his rights and that there was nothing in his statements or actions to indicate that Strauss did not understand his rights." Strauss was taken into custody.

Officer Slark searched the vehicle and found what appeared to be cocaine between the passenger seat and the center console. He also found a handgun. The passenger adamantly denied knowing about either item. Officer Slark, however, did not believe the passenger initially, so he handcuffed him and escorted

him toward another cruiser. Strauss began banging his head on the cruiser window to get the officer's attention, so they approached him and recorded his subsequent statement.

Officer Williams testified that Strauss made the first statement and was apparently anxious to absolve his passenger of any wrongdoing, stating, "He didn't have any idea of what was in the car, nothing. . . The Tech Nine [handgun] is mine. The dope is mine. I got a record of trafficking dope so y'all already know I'm a dope dealer with a nine." Strauss continued to ramble, stating that he was on probation and offering his probation officer's name. Strauss stated, "I'm a bad guy; I need to go to jail." Despite the contraband in the car, the front passenger was released.

Strauss was taken to jail and given the implied consent warning. Strauss denied having an attorney and began to ramble on about the need for the police to look for other criminals.

Strauss moved for suppression and was denied. He took a conditional guilty plea to various offenses and appealed.

**ISSUE:** Does intoxication invalidate a confession?

**HOLDING:** No

**DISCUSSION:** Strauss argued that his degree of intoxication invalidated his confession. The Court, however, noted that "[s]elf-induced 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."<sup>11</sup> Strauss, however, provided detailed information to the officers, and recognized that his passenger was being arrested - and took action to stop the arrest. He admitted to remembering most of the events of the evening.

The Court also gave no credence to his argument that Kentucky law required that he be provided with an attorney, and he was, in fact, given all the law requires, an opportunity to contact an attorney.

Strauss's plea was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - CRAWFORD**

### **Com. v. Stone**

**291 S.W.3d 696 (Ky. 2009)**

**FACTS:** On July 8, 2004, Griffin, Gray and two others became involved in a fight with Stone and four of his friends, including the Ursry brothers. "Aggressive words were exchanged, leading Eddie Ursry to physically attack Gray." Griffin's companions fled, leaving him alone with Stone and his four friends. "Griffin then picked up a large beer bottle" and struck Jeremy Ursry in the head. Ursry fell to the ground, the bottle broke, and Griffin was left holding the jagged remains. Stone later claimed that "Griffin then advanced toward him, wielding the shattered bottle as a weapon" and Stone pulled a knife in response. "Whether [Stone] thrust the knife towards Griffin, or Griffin lunged forward against the knife, is a matter of

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<sup>11</sup> Halverson v. Com., 730 S.W.2d 921 (Ky. 1986).

controversy." Griffin was fatally stabbed and Stone and his companions fled the scene. Stone cleaned the knife and gave it to Holbeck (another of the four companions) to hide.

Stone and his friends were quickly identified. All four were interviewed by Det. Duncan (Louisville Metro PD) and all but Eddie Ursry gave voluntary statements. Charges were filed and the court ruled that they would be tried together. Because it was anticipated that none of the defendants would testify at trial, the "out of court statement of each ... was carefully redacted to eliminate any references to the other defendants...."

However, at trial, the prosecution was permitted to get into evidence much of the redacted information through the testimony of Det. Duncan, who responded to questions on redirect that referenced the redacted information. Upon appeal, the Kentucky Court of Appeals ruled the "introduction into evidence of those portions of Holbeck's previously-redacted statements nullified the effect of the redaction and thereby violated [Stone's] Sixth Amendment right to confront the evidence ...."

The Commonwealth appealed.

**ISSUE:** Is a statement incriminating the defendant made by a non-testifying co-defendant admissible against the defendant?

**HOLDING:** No

**DISCUSSION:** Stone argued that "Crawford<sup>12</sup> has 'eclipsed' Bruton<sup>13</sup> and Richardson,<sup>14</sup> and now Crawford controls the admissibility of out-of-court statements in criminal cases." The Court looked to its recent decision in Rodgers v. Com.<sup>15</sup> to decide the matter. First, it reiterated that its "recent holding in Rodgers that Crawford does not overrule the Bruton and Richardson line of authority." Instead, they "simply each apply to different circumstances."

Bruton and Richardson, and the "cases descending from them, address the dilemma that arises when two or more defendants are jointly tried, and one (or more) of them has made a voluntary out-of-court statement which the prosecution wishes to present as evidence at trial."

The Bruton/Richardson line of cases resolves the dilemma, preserving the advantages of joint trials, by allowing the trial court to admit the statement into evidence after redacting from it any direct or implied reference to another defendant, and any section which, on its face, incriminates another defendant." Richardson holds that an out-of-court statement of a defendant which incriminates another defendant only through its 'linkage' to other evidence need not be redacted, if a limited instruction is given to admonish the jury not to consider the statement as evidence against any defendant other than the declarant. A defendant's out-of-court statement can only be used against a co-defendant if the defendant is subject to cross-examination.

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Continuing, the Court stated:

Crawford, on the other hand, applies when the out-of-court statement is offered as evidence against a defendant other than the declarant. Crawford holds that a defendant is denied his Sixth Amendment right to confront his accusers by the introduction into evidence of an out-of-court 'testimonial statement' made by a declarant who is unavailable for cross-examination.

The prosecution's argument was that the statement did not directly implicate Stone, "but does so only when linked to other evidence in the case, and thus under Bruton and Richardson, may be admitted into evidence with an appropriate limiting instruction to protect [Stone]." The Court found that argument to miss the point, because the statement was introduced not to implicate Holbeck (the speaker), but "solely to incriminate [Stone] by refuting his claim that the victim was" coming after him with a broken bottle."

The Court noted that "[a]ny incriminating effect of the statement on Holbeck was purely coincidental to its effect on [Stone] because Holbeck and the other defendants were charged only as accomplices to [Stone]."

The Court noted that:

The Bruton/Richardson analysis, which functions to *prevent* the out-of-court statement from incriminating the non-declarant defendant, cannot operate when, as in this case, the only purpose for admitting the statement was to incriminate the non-declarant. A vital element of Bruton/Richardson is the limiting instruction – the admonition that the jury may consider the statement as evidence against the declarant, but not against the defendant. Such an admonition becomes irrational when the sole purpose of the statement is to incriminate the defendant.

Since Bruton/Richardson did not apply, the Court looked to Crawford. The Court stated that:

Holbeck's statement that at the time of the stabbing, Griffin was 'backing up' and 'backing away' is exactly the sort of 'testimonial' evidence that, under Crawford, violates the Sixth Amendment. It is a statement taken by police officers in the course of an interrogation, made out-of-court, offered into evidence to prove the truth of the matter asserted, to establish the guilt of the accused. Holbeck was unavailable for cross-examination, and [Stone] had had not previous opportunity to confront him through cross-examination. The use of his testimonial statement at trial violated [Stone's] right under the Sixth Amendment, as enunciated in Crawford.

The Court also agreed that Stone did not open the door to admitting the statement "through his own cross-examination of Detective Duncant and thereby ... waived his right to object to it." The Court concluded that Stone was entitled to a new trial under Crawford.

## TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Hall v. Com.

2009 WL 2707225 (Ky. 2009)

**FACTS:** On May 5, 2006, Hall and Dylan (McIntosh), age 13, her son, had accepted an invitation to spend the night with Watson and Land, in Campton. Dylan, who suffered from ADHD, was hyperactive and because she was out of his prescribed medication, Depakote, Hall gave him one of her Klonopin, instead. She later learned that Watson had also given him a Klonopin.

The three adults “engaged in heavy drug use,” smoking and injecting methadone, for which Land had a prescription. Hall admitted that they had given Dylan a “line” of crushed methadone at some point in the evening. She also stated, later, that Dylan told her Watson had given him a “bunch” of methadone pills, but that she only told him to put them up, that he didn’t need them, she did not take the pills from him.

Hall stated that Dylan went to sleep about 11 p.m. and that she could not rouse him at about 6 a.m. for school because he was “snoring deeply.” At about 10 a.m., when she awoke again, she found that his “lips had turned blue.” Land’s mother arrived, for an unrelated reason, and she called for help. Dylan was taken to the hospital, where he died, and his death was attributed to acute methadone intoxication.

Hall, Land and Watson were all indicted for wanton murder in conjunction with Dylan’s death. Hall was convicted and appealed.

**ISSUE:** May the statements of other co-defendants be repeated when done so only to put the defendant’s statement into context?

**HOLDING:** Yes

**DISCUSSION:** The Court ruled that the evidence did not indicate that Hall engaged in wanton conduct, as there was no indication she actually perceived a risk (an overdose of methadone) and ignored it. As such, reckless homicide might have been the more appropriate charge. The Court ruled that since the jury was instructed on reckless homicide, along with manslaughter and wanton murder, that it was appropriate to reverse the wanton murder conviction and retry Hall on the lesser-included offense of reckless homicide, since there was sufficient evidence to prove that offense. (Had the jury not been so instructed, double jeopardy would attach and retrial would not have been possible.)

Hall also argued it was inappropriate for Det. Gibbs to repeat certain portions of her redacted statement, concerning what the other defendants had told him and her replies to his questions. The Court, however, ruled that the statements “provide[d] necessary context for Hall’s statements,” and that his attempts to challenge her statements with those made by the other defendants was a “valid interrogation technique.” The statements made by the other co-defendants were not introduced for the truth of the matter asserted, which would make them hearsay, but “only to show why and how Hall’s statement evolved as it did.” The Court agreed with Hall, however, that comments reflecting her recent time in jail should have been excluded.

The Court agreed that there was insufficient proof of wanton murder, and sent the case back to the trial court on remand.

**Martinez v. Com.**  
2009 WL 2706958 (Ky.,2009)

**FACTS:** Martinez was charged with involvement in an armed robbery in Owensboro that resulted in the death of one of the employees. Martinez apparently drove a vehicle (identified as the Latino Taxi) that picked up the suspects, which was caught on surveillance tape and he later denied having done so. Prior to the trial, the other three robbers pled guilty and agreed to testify against Martinez.

At trial, Det. Burns (Owensboro PD) testified that when Martinez asked for an attorney, the interview ended. He also testified that Martinez's reactions to the interrogation indicated guilt. (In a footnote, the Court noted that after Martinez requested an attorney, other officers improperly continued to question him and that information was properly suppressed.) Martinez was convicted and appealed.

**ISSUE:** Is it appropriate to comment on the reactions of a subject to an interrogation?

**HOLDING:** No

**DISCUSSION:** Martinez first complained that Det Krauwinkel (Owensboro PD) had several times denied that a disputed sign on his taxi was not on the vehicle and refused to agree that it was possible the sign didn't appear simply because the tape was of such poor quality. (He had finally conceded it was possible, but only after repeated representations that it could not be.) The Court agreed that Martinez had the opportunity to, and did, in fact, present evidence that the sign was on the vehicle.

With respect to Det. Burns's testimony, the Court agreed that it was not appropriate to state that Martinez acted guilty, because he lacked any personal knowledge about his guilt, but did not find that the error was not sufficient to warrant reversal.

Martinez's conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - PRIOR INCONSISTENT STATEMENTS**

Fairchild v. Com.  
2009 WL 2706989 (Ky. 2009)

**FACTS:** Fairchild was charged with complicity to murder, receiving stolen property and related charges. Baldrige was initially identified as the suspect in a Johnson County break-in that resulted in a death and he implicated Fairchild in the crime. Baldrige took a plea deal in which he agreed to testify against Fairchild. (Baldrige stated that Fairchild shot the victim and then instructed Baldrige to behead the victim, which he did not do.) Fairchild admitted to assisting with the stolen goods but claimed not to be present during the burglary.

Fairchild was convicted and appealed

**ISSUE:** May prior statements be introduced to refute contradictory statements?

**HOLDING:** Yes

**DISCUSSION:** Fairchild argued that prior consistent statements made by Baldrige were admitted at trial, but the evidence indicated that the information was introduced to rebut the assertion that Baldrige was

given false testimony to support his own deal. The Court agreed that the testimony was appropriate for that purpose.

Fairchild's conviction was affirmed.

**Tisdall v. Com.**  
**2009 WL 2901293 (Ky. 2009)**

**FACTS:** Tisdall was accused of sexual abusing his three-year old daughter while they sat in the family vehicle in Monroe County, at a gas station. (His wife had caught him and called the police.) The child was taken to the hospital, accompanied by Officer Hestand and another officer.

At about 6 a.m., Officer Hestand and Harlan, a social worker, arrived at the family home. Both officials testified that Officer Hestand gave him Miranda warnings, although Tisdall claimed he didn't remember. Officer Hestand later stated, however, that Tisdall "was not under arrest and was free to terminate the interview if he desired." Tisdall "initially denied any misconduct, but later acknowledged that he'd touched the child for the "thrill of the moment." Hestand arrested him. He later got a written statement from Tisdall's wife, who noted that she suspected other abuse as well, which she had not reported.

Hestand returned to the jail, where Tisdall signed a waiver form and admitted to having fondled his daughter over several months. He recanted at trial and stated that his wife accused him to get him out of the house.

Hestand was convicted and appealed.

**ISSUE:** Is a statement taken at a person's home (without Miranda) admissible?

**HOLDING:** Yes

**DISCUSSION:** Tisdall first complained that Hestand's mention, at trial, that Tisdall had been taken to KCPC (Kentucky Correctional Psychiatric Center) for evaluation was improper and required mistrial. The Court agreed, however, that the trial court handled it properly, and that further the "statement was in passing, was only said once, and was likely not entirely understood by the jury."

Tisdall also complained that the copy of his Miranda waiver had not been provided until the morning of trial. The Commonwealth stated that it had been "unintentionally left out of the discovery materials and that the mistake had only been realized that morning." The Court noted that the police report, which had been properly provided, had indicated the waiver had been executed. The Court agreed that although a discovery violation did occur, that "the late disclosure had little impact on the defense strategy."

Finally, Tisdall argued that "his oral statements to police made at his residence" should have been suppressed because they were "involuntarily given." He said he "felt intimidated" by the officer and did not feel free to leave because Hestand stood in front of the door. He also claimed that he'd had little sleep and was trying to cooperate with law enforcement. Officer Hestand agreed that he had refused Tisdall's request to go into the bedroom for safety concerns. The Court agreed, however, that the trial court's determination was appropriate, given that the trial court had the benefit of actually seeing and judging the credibility of the witnesses.

Tisdall's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - DOUBLE JEOPARDY

Johnson v. Com.  
292 S.W.3d 889 (Ky. 2009)

**FACTS:** Johnson was convicted of both rape and incest against his daughters, which involved multiple acts of sexual intercourse. He appealed.

**ISSUE:** Are multiple sexual acts of rape and incest a single continuing course of action, for double jeopardy purposes?

**HOLDING:** No

**DISCUSSION:** Johnson argued that charging him with both offenses, based upon a "single continuing offense," constituted double jeopardy. The Court, however, found that the offenses were not a single continuing offense, but instead, a series of individual acts that were each a separate offense. The Court also noted that the "crimes of rape and incest each require proof of a fact that the other does not," as "rape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not."<sup>16</sup>

After resolving several other issues, the Court upheld his conviction.

## MISCELLANEOUS

Com. v. Lopez  
292 S.W.3d 878 (Ky. 2009)

**FACTS:** Lopez was charged with violations of the Uniform Code of Military Justice (UCMJ) while in Iraq; he had been found guilty of viewing child pornography. He was, at the time, on probation in Kentucky for attempting to commit sexual abuse. In lieu of court-martial, he took a voluntary discharge. Once he returned to Kentucky, his probation was revoked and he appealed. He had admitted only to viewing adult pornography, which was also a violation of military rules. The Court of Appeals overturned the decision, and the Commonwealth appealed.

**ISSUE:** Nay violation of a serious military rule triggers a state probation revocation?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that "probation revocation is not dependent upon a probationer's conviction of a criminal offense." All that was required was evidence that he violated the terms of his probation, and found it of no consequence that he was discharged from the Army in lieu of

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<sup>16</sup> See Blockburger v. U.S., 284 U.S. 299 (1932)

conviction. The admission of violating a military rule was sufficient. (The Court did agree that certain military rules might not warrant revocation, but found that would be judged on a case by case basis.)

In this case, given the close connection to the offense for which he was on probation, the Court agreed his revocation was appropriate.

## **WORKER'S COMPENSATION**

### **Estes (Ricky & Donna) v. Thompson & Caudill** **2009 WL 3047600 (Ky. App. 2009)**

**FACTS:** On October 29, 2006, the Clark County Sheriff's Office got an emergency call from Powell County, alerting them to a vehicle on the Mountain Parkway. The occupants had been involved in an armed robbery in Powell County. Deputies Estes (a full-time deputy) and Thompson (an unpaid special deputy) responded in separate vehicles. The deputies met in the median of the Mountain Parkway and proceeded, running lights and siren, to try to locate the suspect vehicle. Estes spotted two vehicles on the side of the road, with emergency lights flashing, and he slowed, but he realized that wasn't the correct vehicle. However, Thompson, who was behind him, didn't realize that Estes was driving so slowly and struck him from the rear. Both men were badly injured.

Both men received worker's compensation benefits. Estes and his wife, however, sued Thompson, Sheriff Perdue and Caudill, the previous sheriff (who was sheriff at the time of the wreck), for negligence and related causes of action. The trial court dismissed all claims because of the exclusive remedy provisions of KRS 342.690 (worker's compensation). Both Ricky and Donna Estes appealed.

**ISSUE:** Is a special deputy an employee for worker's compensation purposes?

**HOLDING:** Yes

**DISCUSSION:** Estes argued that Thompson could not be considered an employee under worker's compensation and that even if special deputies could be so classified, that Thompson's appointment was invalid. The Court, however, quickly ruled that since the statute specifically includes "volunteer police," that it was correct to classify Thompson as an employee under the act. The Court noted that one of the tests was whether the employer had taken out insurance on the volunteers, and in fact, that had been done in this case. (KACo, the insurer, paid the benefits to Thompson without question.)

With respect to the validity of the appointment, Estes argued that Clark County exceeded the statutory maximum for such deputies and did not meet the Clark County requirements, either. However, the record indicated that there were no more than 14 special deputies on the books at the time and that was the number permitted based upon the population of the county. With respect to training, the sheriff had a draft proposal, and "[e]ven so, Estes cannot establish any requirement under KRS 70.045 that, in order to be a deputy sheriff, one must complete a certain amount of training."

Finally, the Court ruled that both men were within their scope of responsibility in looking for the suspect vehicle. In addition, since there was no assertion that Thompson intended to injure Estes, he was protected from liability, as negligence does not invalidate the exclusive remedy defense.

The Court upheld the dismissals.

# SIXTH CIRCUIT

## CONSTRUCTIVE POSSESSION

### U.S. v. Holycross

333 Fed.Appx. 81 (6<sup>th</sup> Cir. 2009)

**FACTS:** On August 3, 2005, a Columbus, Ohio, officer spotted Holycross driving fast and recklessly. He almost sideswiped an unmarked police car, which then requested a marked car to stop Holycross. When the officers in the marked car first spotted Holycross, they saw him “make a quick motion toward the floor behind the passenger seat.” He leaned toward the passenger side again before the officers got him stopped. When they learned Holycross did not have a valid OL, he was arrested. During an inventory search, the officers found a handgun under the passenger seat.

Holycross was a felon, so he was indicted, and eventually convicted, for possession of the gun. He then appealed.

**ISSUE:** Is a decision on constructive possession a case by case process?

**HOLDING:** Yes

**DISCUSSION:** Holycross argued that there was insufficient evidence to prove he was in possession of the gun. The Court agreed that “although a defendant’s proximity to a weapon does not by itself prove possession, proximity combined with ‘other incriminating evidence’ - including an attempt to conceal the weapon or forensic evidence - may support a finding of possession.”<sup>17</sup> The facts, as presented to the Court, clearly indicated that the officers reasonably believed he was aware of the gun, and that was confirmed by the presence of Holycross’s DNA on the weapon.

Holycross’s conviction was affirmed.

## SEARCH & SEIZURE - SEARCH WARRANT

### U.S. v. Quinney

583 F.3d 891 (6<sup>th</sup> Cir. 2009)

**FACTS:** Quinney was under investigation for creating and passing counterfeit currency. Two Secret Service agents visited his home and received consent to look in his bedroom. They saw a printer. Quinney admitted that “he had passed bogus bills, but denied printing them.” After further questioning of two witnesses, who claimed he had printed the bills, the agents returned. “During the second visit, the agents seized the printer without obtaining either consent or a search warrant.” Quinney’s stepfather later “testified that the agents simply announced that they were seizing the printer without seeking even the stepfather’s permission.”

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<sup>17</sup> U.S. v. Arnold, 486 F.3d 177 (6<sup>th</sup> Cir. 2007); U.S. v. Bailey, 553 F.3d 940 (6<sup>th</sup> Cir. 2009).

They found Quinney and interviewed him, in their car. He was not arrested or given Miranda warnings. They told him that they had the printer and it was being examined, and also that witnesses had stated he created the bills. At some point, he confessed, in writing, and that was followed up by a supplemental confession the next week. (There was some question as to whether he received Miranda at that time.)

Quinney was charged with counterfeiting. He requested suppression of the evidence and the statements, but was denied. He then appealed. The case was reviewed and sent back to the trial court, because the trial court has "applied an incorrect standard of review in analyzing the motion to suppress." The trial court again upheld the suppression and Quinney again appealed.

**ISSUE:** Should a search warrant be obtained prior to items being taken from a house, when there is no exigency?

**HOLDING:** Yes

**DISCUSSION:** Quinney challenged the seizure and the admissibility of the statements, "alleging that the district court misapplied the inevitable-discovery doctrine."<sup>18</sup> The government argued that "the agents had probable cause to obtain a search warrant at the time the printer was seized." The Court distinguished the case the government presented in support of that argument, U.S. v. Kennedy<sup>19</sup>, from U.S. v. Haddix.<sup>20</sup> The Court agreed with Quinney that the agents should have gotten a search warrant and that the motion to suppress that item should have been granted.

Because the admission of the statements depended upon the validity of the printer being admissible, the Court remanded the case to "reevaluate whether these post-seizure statements should also be suppressed as 'fruit of the poisonous tree.'"

Quinney's plea was vacated and the case remanded.

### **U.S. v. Smith** **2009 WL 2031866 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Officer Uselton, a Special Agent with the West Tennessee Violent Crime and Drug Task Force and a member of the Crockett County Sheriff's Dept., obtained search warrants for two locations, a residence and a business, based upon the same search warrant affidavit. Drugs and handguns were seized from the residence, and Smith was indicted.

Smith moved for suppression. At the hearing, Officer Uselton stated that "he had received information from a confidential informant that drug sales were occurring at 34 Williams Circle and 544 West Church Street in Alamo, Tennessee." Controlled buys were made at both locations, two buys at the business, (one within 5 days, one within 72 hours of the search, but the latter wasn't mentioned in the affidavit) and one at the residence was made within 72 hours and referenced in the affidavit.

The trial court denied the motion, and Smith took a conditional guilty plea. He then appealed.

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<sup>18</sup> U.S. v. Alexander, 540 F.3d 494 (6<sup>th</sup> Cir. 2008); Nix v. Williams, 467 U.S. 431 (1984).

<sup>19</sup> 61 F.3d 494 (6<sup>th</sup> Cir. 1995)

<sup>20</sup> 239 F.3d 766 (6<sup>th</sup> Cir. 2001)

**ISSUE:** May controlled buys be used to corroborate an unproven informant?

**HOLDING:** Yes

**DISCUSSION:** Smith argued "that the affidavit failed to indicate any reason why the officers considered the confidential informant to be reliable and that the officers did not observe any drug transactions taking place inside of 544 West Church Street." However, the Court agreed that the corroboration required for an informant not specifically shown to be reliable may be "established by a police-monitored controlled purchase."<sup>21</sup> The Court agreed that looking at the four corners of the affidavit, it was clear that "proper measures were taken in this case to ensure the reliability of the controlled purchases, including thoroughly searching the informant and the vehicle used before the purchase and maintaining a visual on the confidential informant going to and coming from the residence."

The Court found probable cause to issue the search warrants, and affirmed Smith's plea.

## **SEARCH & SEIZURE – TERRY**

### **U.S. v. Johnson**

**2009 WL 2105547 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On October 16, 2006, Terry Johnson, along with his brother, Steve, were driving in Steve's pickup truck in Mansfield, Ohio. They stopped to talk to friends standing on the sidewalk. Deputies Coughenbaugh and Snay (Richland County Sheriff's Office) passed by in the opposite direction. They checked the license plate and discovered a possible arrest warrant for Steve, so they turned around and headed back. They found it at an auto parts store and went inside. When they asked about the owner, Steve identified himself. They confirmed his identity and took him outside; Terry followed. Steve handed Terry his personal belongings and Terry went back inside.

Deputy Coughenbaugh pointed out to Deputy Snay that Terry had been driving, so Snay went back inside and asked Terry for his OL. Terry replied he didn't have it with him, and provided his Social Security number. Snay discovered Terry's license was suspended and decided to arrest him. He noticed that Terry was nervous and bladed his body. Snay handcuffed Terry, whereupon Terry stated he had a handgun. Snay found the gun and cocaine.

Terry Johnson was indicated on drug possession with the intent to distribute and being in possession of the firearm, as he was a felon. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

**ISSUE:** Is asking for ID a Fourth Amendment Seizure?

**HOLDING:** No

**DISCUSSION:** Johnson argued that the deputy "lacked reasonable suspicion to ask him for his driver's license." The Court noted, however, that simply asking for ID does not make an encounter a Fourth

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<sup>21</sup> U.S. v. Coffee, 434 F.3d 887 (6<sup>th</sup> Cir. 2006)

Amendment seizure.<sup>22</sup> The Court noted that just because his brother was arrested, Terry Johnson should not have felt constrained by the officer. The officers did not issue any orders to him. Nothing indicated that the deputy "raised his voice, displayed a weapon, restricted Terry's movement, accused Terry of a crime, or otherwise made a display of authority that would have indicated that Terry was not free to end the encounter." Once the deputy learned Johnson's license was suspended, he had probable cause to make the arrest and the search was then a valid search incident to arrest.

The Court upheld the denial of the motion to suppress and Johnson's plea.

### U.S. v. Flores

571 F.3d 541 (6<sup>th</sup> Cir. 2009)

**FACTS:** Organized crime task force officers in Akron, Ohio were investigating Spragling. They monitored several of his communications with associates and identified a location as a "stash house." The traced one transaction back to an individual and they determined that a transaction was going to occur at the house. There, they found a unfamiliar vehicle, which was registered to Flores, "who was also unfamiliar to the agents." They monitored the residence and followed the vehicle when it left. When the vehicle pulled onto the highway, the officers decided to stop it. Sgt. Malick, "who initiated the traffic stop, admitted that neither the driver nor the Jeep was in violation of any traffic laws."

Flores, the driver, gave consent, and the officers found more than \$20,000 in cash, wrapped in plastic, in a duffel bag on the backseat. A drug dog alerted on the bag but no drugs "beyond trace amounts" were found. The officers confiscated the cash but allowed him to leave. Three days later, another officer found his vehicle at the airport and put a tracking device on it, thereby uncovering more incriminating evidence.

Flores was arrested and charged. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

**ISSUE:** May a combination of clues be used to satisfy reasonable suspicion for a stop?

**HOLDING:** Yes

**DISCUSSION:** Flores argued that the officers "lacked reasonable suspicion to stop his vehicle because the only fact upon which they relied to conduct their search was that he 'exited from a house which they believed to be used for stashing drugs.'" The Court noted that there had "been a lengthy investigation into the illegal activities of Spragling, who was believed to be the leader of a major drug-trafficking ring" and which led back to the residence as being a drug house. The Court agreed that "contrary to what Flores claims, the agents did not rely solely on the fact that he had emerged from the residence," but instead were suspicious because of the "intercepted conversations indicating that a drug delivery was about to take place, their reasonable belief that 'The Spot' was a location where Spragling and his associates stashed drugs and money, and the unfamiliar Jeep in the driveway of the house at the time of the scheduled delivery." Although they had no description of the person believed to be making the transaction, they certainly had enough to satisfy the reasonable suspicion standard.

The Court upheld the denial of the motion to suppression.

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<sup>22</sup> I.N.S. v. Delgado, 466 U.S. 210 (1984).

**U.S. v. See**  
**2009 WL 2610816 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On April 22, 2007, See and two men were sitting in See's car, at about 4:30 a.m. They were parked in a Cleveland public housing complex. Officer Williams (Cleveland Metro Housing Authority) parked his patrol car in such a way that See could not drive away. Williams later stated that he noticed the vehicle because he "saw three men sitting in an unlit car that was backed into a parking space in a dimly lit part of the parking lot farther from the building than other vacant spots." At some point, he noticed the vehicle lacked a required front license plate – but upon checking, he saw it had valid temporary tags.

As a result of a search, Williams found a firearm, for which he arrested See, a convicted felon. See moved for suppression and was denied. See then appealed.

**ISSUE:** Is simply a presence in a high crime area sufficient to make a Terry stop?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the blocking in of See's car was a Terry stop. The Court also agreed that "[g]iven the fact that Williams blocked See's car with his marked patrol car" that " a reasonable person in See's position would not have felt free to leave."

The Court concluded, however, that the stop "was not supported by reasonable suspicion." See's presence in a high crime area was not enough to justify reasonable suspicion, nor was the time of day, alone, enough. The Court noted that Williams could certainly have "pursued a consensual encounter." Since the stop was improper, the fruit of the stop must be suppressed, as it was the "direct result of the initial, unlawful Terry stop.

The Court reversed the decision not to suppress the gun.

## **SEARCH & SEIZURE – PRETEXT STOPS**

**U.S. v. Wickersham**  
**2009 WL 2610816 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On January 30, 2007, Trooper Johnson (Ohio State Highway Patrol) received a tip about a pending drug transaction from an informant. The informant gave specific information concerning Wickerham's vehicle. Trooper Johnson and Snoopy, his drug K-9, went to a place along the route and waited. However, when Wickersham passed, the trooper was occupied with another stop and he asked Trooper Jordan to "see if he could get the vehicle stopped." "Jordan caught up with Wickersham and radioed Johnson asking whether there was already probable cause to stop the car. After receiving no answer from Johnson, Jordan told himself, "okay ... if you're not going to answer me, I'm not going to just stop this car. I'll find a reason to stop it."<sup>23</sup>

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<sup>23</sup> There is no indication in the record as to how this comment was captured.

When Jordan saw Wickersham cross the center line twice, he made a traffic stop. Wickersham claimed to have been watching Jordan, who had a white Pontiac pulled over, and he "figured [Jordan was] looking for white Pontiacs." Trooper Johnson and Snoopy arrived; the dog alerted on the trunk. "Johnson took Wickersham and a passenger, Elizabeth Saber, out of the car, patted them down, advised them of their Miranda rights and locked them in the back of Jordan's cruiser." Johnson found a flashlight and a locked suitcase in the trunk, and a small, home-made, compartment in the engine compartment. He could not open the compartment, either. Saber said "she and Wickersham had been out to dinner, but she could not remember in what restaurant or in which city." The vehicle and the pair were taken to the station, and the vehicle more thoroughly searched. The officers found crack and powder cocaine hidden in the flashlight. Wickersham was arrested and indicted for trafficking.

Wickersham moved to suppress the evidence "as the fruit of an unlawful stop and search." The trial court denied the motion. Wickersham took a conditional guilty plea and appealed.

**ISSUE:** May officers make pretextual stops?

**HOLDING:** Yes

**DISCUSSION:** Wickersham argued that "he never crossed the lane line" and that the trooper "made up the story as a pretext for pulling him over." The trooper "shut off his camera shortly before seeing the violations, which made it harder to challenge his testimony, and that the odds are slim that, within one minute of pulling up behind Wickersham, Jordan would catch him violating the law." The Court, however, noted that just because there was "a potential motive to fabricate does not make Trooper Jordan's testimony a fabrication." The trial court had found Jordan credible. The Court agreed that "[n]o doubt, Jordan would have been well advised to keep his video camera on during the whole pursuit." However, he was in compliance with state law and agency policy, even though he failed to record the actual violations.

The Court also discounted Wickersham's assertion that Jordan's action, coming up fast behind him, caused him to swerve. Finally, the Court discounted the assertion that Snoopy only signaled because she was directed to do so, noting that the video does not support that theory. The Court noted that "adding weight to the probable cause determination is the tip Trooper Johnson received from the confidential informant." The Court further upheld the logic of taking the car to a warm, lighted location to search, since the night was cold and windy and it was dark at the location of the actual stop. Trooper Johnson had also "discovered some suspicious modifications in the front of the car, and witnessed Saber's suspicious inability to remember their supposed dinner destination."

The Court affirmed the plea.

## **SEARCH & SEIZURE – PLAIN VIEW**

U.S. v. Estes  
2009 WL 2568097 (6<sup>th</sup> Cir. 2009)

**FACTS:** On June 7, 2007, Crowder contacted the Jackson, TN, PD to report that she had been assaulted at Estes's home. She told Officer Anderson that she went there to get high, but that Estes

“attempted to rape her” and that she’d kicked out the window to escape. Crowder and Anderson went to Estes’s home, with other officers.

Crowder pointed out her car, which she’d left in the driveway in her hurry to escape. Anderson saw a broken window, as well. He knocked. Estes answered and reported that his son had argued with his girlfriend and the window had gotten broken, before they left. Crowder, however, identified Estes as her assailant.

Anderson arrested Estes and secured him in the patrol car. The officers did a “protective sweep” of the residence; one noted a “little Derringer” on a nightstand. Crowder also went inside in search of her keys and cell phone, which she claimed Estes had taken, but they were later found in her car.

Although the testimony was confusing, Officers Anderson and Falacho “entered the yard of the house to look around.” Falacho took photos, and he noticed a tray, which was found to contain drug-related items, “on the ground behind a wheel of the defendant’s car, which was parked in the driveway and visible from the alley.” Det. Stilwell arrived and prepared an affidavit for a search warrant, which stated:

*When JPD officers arrived on the scene to make contact and detain Estes, officers observed in plain view a small Derringer type handgun in Estes’ bedroom during a security check [of] the residence after Estes stated that his son had been at the residence. Officers also found marijuana, cocaine packaged in multiple separate baggies, oxycontin, drug paraphernalia and a State of Tennessee cosmetology license issued to James Estes with the illegal drugs that was [sic] concealed outside the residence under Mr. Estes’ vehicle. Mr. Estes, by his own voluntary admission served a 12 year sentence for drug crimes and was released in 2000.*

The warrant was signed and executed. During the search the officers seized the Derringer, as well as other guns, marijuana and prescription medication.

Estes moved for suppression. At the hearing, the trial court concluded that there was insufficient evidence to “justify a conclusion that the officers thought someone else was in the house.” As such, they “could not rely on the ‘public safety’ exception to the warrant requirement for their protective sweep” or the community caretaker exception. However, the Court denied the motion, finding that even if the reference to the gun (which was sighted in the house) was eliminated from the affidavit, the officers still had sufficient probable cause because the items outside were also in plain view.

Estes took a conditional guilty plea and appealed.

**ISSUE:** May the physical location of a suspect item suggest its incriminating nature?

**HOLDING:** Yes

**DISCUSSION:** Estes argued that the “officers could only have observed the tray containing drug-related items by violating the ‘curtilage’ of his property.” The Court agreed that the Fourth Amendment extended its protections to the curtilage.<sup>24</sup> He noted that his backyard was surrounded by a fence. The

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<sup>24</sup> *U.S. v. Jenkins*, 124 F.3d 768 (6th Cir. 1997); *U.S. v. Dunn*, 480 U.S. 294 (1987).

Court agreed that “it is an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”<sup>25</sup> It is critical, also, that the “incriminating character of the evidence must be immediately apparent and the officer must have a lawful ‘right of access’ to it.”

In this case, the officer simply stated that he saw a tray, in an unusual location. However, the Court noted that at least three of the Dunn factors were not present and that indicated the driveway did not constitute a curtilage. First, the “area was not enclosed,” the “defendant had not taken any steps ‘to protect the area from observation by people passing by,’” and “it was used as a point of entry into the residence, accessible from the adjacent alley.” The Court noted that “while the testimony of Officer Falacho is equivocal concerning precisely when he saw the tray, he stated unequivocally that it was in plain view.” Further, the Court noted that “while a tray in the abstract may not be ‘inherently incriminating,’ a tray placed behind the wheel of a car at a residence where officers had been told that drug trafficking occurred earlier in the evening is inherently worthy of a closer look.” One of the officers had stated that the witness told them Estes used a tray. In U.S. v. McLevain, the Court had found that an “item is inherently incriminating” when “the executing officers can *at the time* of discovery of the object on the facts then available to them determine probable cause of the object’s incriminating nature.”<sup>26</sup>

Estes’ plea was affirmed.

## SEARCH & SEIZURE - APPARENT AUTHORITY

### U.S. v. Penney

576 F.3d 297 (6<sup>th</sup> Cir. 2009)

**FACTS:** Penney lived in Soddy-Daisy, Tennessee, and ran a local bar. He had a “tempestuous relationship” with Bowman and she lived with him “off and on.” “Soddy-Daisy police officers were no strangers to Penney’s residence, where they were called on the ‘numerous occasions’ when the relationship ... turned violent.” On August 19, 2003, after a quarrel, “a barefoot Bowman hitch-hiked to the Soddy-Daisy police station to file a complaint for assault against Penney.” Penney arrived and insisted that the police remove Bowman from his residence. Penney was arrested. As they processed the complaint, Bowman “offered information about narcotics in Penney’s house.” She gave Det. Sneed written consent to search.

Bowman accompanied the officers to the house. She did not have a key to the front door so she went to the back door, which she was able to open without a key. (Sneed later learned that there was a special trick to open that door.) She led them around the house, pointing out contraband as she collected her own belongings. They found guns, cash, scales and illegal narcotics, some from containers. They searched outside and found a rifle in a truck and a shotgun in the chicken house.

After Penney’s release the next day, he returned to the station to ask about his guns. He was told they were confiscated during the search. He told the officers that Bowman had no authority to consent as she did not live at the house.

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<sup>25</sup> Horton v. California, 496 U.S. 128 (1990).

<sup>26</sup> 310 F.3d 434 (6<sup>th</sup> Cir. 2002).

As a result of the interaction, the local police and the ATF opened an investigation, and connected Penney with drug trafficking. As a result of an intercepted conversation with a CI, Det. Sneed obtained an anticipatory search warrant to be executed after Penney met with the CI to make a transaction. When the CI gave the signal, the officers all moved in to execute the warrant. Although the arrest became violent, Penney was taken into custody. Several officers were injured during the apprehension. Guns and money were found in the house, but no drugs.

Penney was indicted on a variety of charges. He was convicted of drug charges and an attempt to kill a federal officer (during the arrest). Penney appealed.

**ISSUE:** May an apparent live-in girlfriend give consent to a search?

**HOLDING:** Yes

**DISCUSSION:** Among a variety of other issues, Penney argued that since Bowman lacked authority to give consent, the fruits of that search must be suppressed. The Court noted, however, that a "co-occupant's 'common authority' depends not on property rights, but 'on mutual use of the property by persons generally having joint access or control for most purposes.'"<sup>27</sup> But even if the individual does not have authority, the search will be valid if the police "reasonably believed" that they did. Penney argued that at most, Bowman was an overnight guest who had been stripped of that status prior to the search, and that "she did not own or have control over the chicken house or the closed containers that were opened during the search." Further, the officers had "actual notice" that Bowman did not live with Penney and her co-occupancy had been terminated, because she did not have a key.

The Court reviewed what was known to the Soddy-Daisy police:

Bowman and Penney had been involved in an off-and-on relationship for approximately six years. When the relationship was on, Bowman lived with Penney, which the police officers knew from their numerous visits to the Dayton Pike residence on domestic violence calls. When the relationship was off, Bowman would leave Penney's place. During these periods she resided with her mother, whose address she listed on her August 19, 2003 complaint against Penney. The officers' most recent visit to Penney's residence connected to the couple's turbulent relations occurred on August 2, 2003, as a result of which Penney had kicked Bowman out. Detective Sneed testified that he did not think Bowman was staying at Penney's at the conclusion of the August 2, 2003 incident.

On August 19, however, when Bowman arrived at the Soddy-Daisy police station, Bowman told Sneed that although the couple has broken up six months ago, they had now reconciled and that she had moved back in the day before. That morning, in the heat of argument, Penney kicked Bowman out without giving her a chance to collect shoes or her car keys. Bowman then hitched a ride with a passing motorist to the police station.

Once at the residence with Bowman, officers observed further evidence that she was not a mere overnight guest at Penney's house. Bowman's car was parked outside the residence, consistent with her account of that morning's events. She led officers through the

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<sup>27</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

residence and picked up her belongings from drawers, a laundry basket, and the washing machine, which she gathered into "several bags." She showed police officers firearms, most of which were in plain view, and identified particular unlocked, unlabelled containers that she knew held narcotics. Bowman told the police that she fed and took care of the chickens when Penney was not there, that she took care of "things around the house," and that she wrote Penney's checks.

The trial court found it was reasonable for the officers to believe that Bowman had authority, and noted, in particular that it was "reasonable for the police not to investigate 'whether Bowman's name was on the lease 'as it is a reality in today's world that consenting adults often co-habitat [sic] together without benefit of legal formalities – including those formalities relating to the establishment of property interests.'"

The Court noted that it had "confirmed a number of times that a live-in girlfriend has common authority over the premises wherein she cohabits with a boyfriend."<sup>28</sup> Such "cohabitation need not be uninterrupted to support a reasonable belief in common authority." In some cases, the court had accepted that an individual could reside at more than one location. The Court paid little heed that "Bowman listed her mother's address on her complaint form" since the "absence of formalized property rights does not automatically translate in the absence of common authority."<sup>29</sup>

The Court did examine Penney's "demand that Bowman be removed from his residence" but agreed that the "particular facts" the officers had about this situation was important. "The officers knew of numerous occasions when the couple has quarreled violently and reconciled, and had no reason to think that the quarrel of August 19 was any different. Lovers' quarrels and reconciliations are as much of a 'reality in today's world' as is cohabitation without 'legal formalities,' and the police cannot be faulted for not presuming that a particular quarrel put an end to the couple's relationship and living arrangements."

With respect to her lack of having a key, the Court agreed this was "hardly surprising in view of the circumstances: Bowman did not have a chance to even collect her shoes, let alone pick up a key." Finally the Court noted that since Penney wasn't present (because he was in jail), he simply "lost out" of the opportunity to object to the consent given by Bowman. The Court agreed that Bowman had authority and access to the closed containers and thus could give consent. (The trial court had excluded the weapon found in the truck, finding that she did not have authority to consent to that search, however.)

Penney also argued that the proceeds from the anticipatory warrant should be suppressed because first, the triggering event never actually occurred and second, there was an "insufficient nexus between Penney's residence and the contraband to support probable cause." While it was true the actual triggering event did not occur, the Court found that what did occur was sufficient to justify the search. The Court noted that:

... anticipatory search warrants are typically sought to conduct searches triggered by a police-controlled delivery of contraband when there is little or no evidence connecting the place to be searched with evidence of a crime.<sup>30</sup> That a magistrate may rely on information

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<sup>28</sup> See, e.g., U.S. v. Grayer, 232 F. App'x 446, 449 (6th Cir. 2007); U.S. v. Hudson, 405 F.3d 425, 442 (6th Cir. 2005); U.S. v. Gillis, 358 F.3d 386, 391 (6th Cir. 2004); U.S. v. Moore, 917 F.2d 215, 223 (6th Cir. 1990).

<sup>29</sup> Matlock.

<sup>30</sup> U.S. v. Penney,

in the affidavit other than the facts regarding the anticipated event in the context of an anticipatory search warrant is undisputed. Federal courts, including ours, have relied on such information to uphold a broader scope for the search than would be justified on the basis of the “triggering” controlled delivery alone.<sup>31</sup> This warrant was not a typical anticipatory warrant, however, and the Court found that there was more than sufficient cause to connect Penney and his home to drug trafficking

On a separate issue, the Court had disallowed a statement made by Penney some 15 minutes into his arrest and after he realized he’d shot an officer. The Court found that the statement did not qualify as an excited utterance, because sufficient time had passed for Penney to have realized the seriousness of what he had done, and to have reason to try to develop a story that would mitigate it.

Penney’s conviction and sentence were affirmed.

## **SEARCH & SEIZURE - K-9**

### **U.S. v. Scott**

**2009 WL 2251306 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On November, 29, 2007, Officer Jared (Lexington PD) saw a “blue Dodge sedan matching the description of a vehicle implicated in a narcotics investigation.” The vehicle was speeding and “made an illegal turn.” He make a traffic stop and did a “warrants check.” A K-9 unit arrived, and the officer had Scott get out allowing the dog to work. The dog alerted. The officers found crack and powder cocaine, along with marijuana.

Scott was indicted for possession with the intent to distribute. He moved for suppression, and was denied. Scott took a conditional guilty plea and appealed.

**ISSUE:** Does an officer need probable cause to allow a dog sniff of a vehicle otherwise legitimately stopped?

**HOLDING:** Yes

**DISCUSSION:** Scott first argued that “Jared lacked probable cause to conduct a warrantless traffic stop.” The Court noted that Kentucky case law “has specifically held, that excessive speed or driving erratically constitutes reckless driving...” Scott was driving at “nearly double the speed limit, and made an improper turn signal.” That gave the officer probable cause for the stop. Scott then argued that the officer had no right to allow the dog to sniff his vehicle, but the Court noted that the “canine team arrived before Jared even began to run the warrants check” and as such, he was not detained for that purpose.

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<sup>31</sup> See, e.g., U.S. v. Rey, 923 F.2d 1217, 1220 (6th Cir. 1991) (holding that “indications of prior illicit activity,” besides the controlled delivery, justified a search beyond “the seizure of the controlled delivery package”); U.S. v. Garcia, 882 F.2d 699, 704 (2d Cir. 1989) (holding that “additional facts in the supporting affidavit gave rise to probable cause to believe that the apartment was being used as a storage and distribution center for drugs,” authorizing a broader search than may have been justified by the delivery of contraband alone).other than the contraband to be delivered.”

The Court upheld his plea.

## SEARCH & SEIZURE

### U.S. v. Washington

573 F.3d 279 (6<sup>th</sup> Cir. 2009)

**FACTS:** Washington lived with his uncle, Young, in Cincinnati. On December 18, 2006, Officer Rock recognized Young as someone who had dropped a crack pipe previously, so he arrested him. "As Officer Rock was ushering Young into a police car, Young shouted up to Washington, who was watching from the window of the apartment, instructing him to secure the apartment and keep people out."

A few days later, the landlord, Moore, told the officer that "he had observed a number of non-residents loitering in the halls." Moore stated, specifically, that he had been told there was a "great deal of foot traffic" in the Young apartment and that a man had entered with a gun. He told the officer that in light of Young's arrest, no one was permitted to be in the apartment. Rock took no immediate action but continued patrolling.

A few days later, Officer Rock saw two women arguing near the building. One of the women (Wilson) said she was Young's girlfriend and that she was looking after the apartment. She told the officer there were two people in the unit, but "did not request his help or say they were trespassing." The officer, however, assumed that they were. Wilson gave him consent to search, but Rock later "testified that he did not believe Wilson had authority to consent to the search." (He admitted he got her consent to "cover all his bases.")

An unknown person answered the knock and opened the door. "Washington was among those who were immediately visible, and he became belligerent and told Rock that he was not allowed in the apartment." Once Rock entered, he immediately saw drug paraphernalia, but nothing indicated it could be seen from the doorway. Washington initially said the officer could not search him, but when told he would be frisked, he admitted to having a weapon. A crack pipe was also found.

Washington was a convicted felon, so he was charged. Upon motion, however, the trial court suppressed the evidence, finding that he "had an expectation of privacy in the unit and the search violated the Fourth Amendment." In response, the government argued that probable cause and exigent circumstances justified the warrantless entry and search. When denied, the government appealed.

**ISSUE:** Does a minor criminal justify sufficient to justify an exigent entry?

**HOLDING:** No

**DISCUSSION:** The Sixth Circuit has, in the past, "generously construed the Fourth Amendment as protecting nearly all overnight guests, even when the guest occupies a common area in the apartment that is not private from other residents."<sup>32</sup> Washington had been lawfully residing in the apartment for several months, but the government argued that since Young's lease prohibited multiple occupants (and using the apartment for illegal purposes) that Washington was a trespasser. Even though Young was, in fact,

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<sup>32</sup> U.S. v. Pollard, 215 F.3d (6<sup>th</sup> Cir. )

delinquent on his rent, the Court found Young was still a lawful resident and thus could invite others to lawfully be in his apartment. The Court noted that simply being behind on the rent, or having someone else live on the premises, was not sufficient to divest a tenant of an expectation of privacy.

The Court moved on the discussion of a possible exigency - which it framed as "Officer Rock's belief that an ongoing criminal trespass was taking place." The Court reviewed the possibilities for raising that exigency exception and found that none applied. The Court stated, specifically, that "an ongoing criminal trespass, on its own," does not create an exigency, as nothing Washington was doing was immediately dangerous. The Court noted that, in Welsh v. Wisconsin, it had been held that "an important factor to be considered when determining whether an exigency exists is the gravity of the underlying offense for which the arrest [or search] is being made."<sup>33</sup> In this case, the offense was a minor misdemeanor.

The Court upheld the suppression of the evidence.

## SEARCH & SEIZURE – GANT

### U.S. v. Bell

2009 WL 2526161 (6<sup>th</sup> Cir. 2009)

**FACTS:** Bell was arrested after a CI made a call to his "drug source." After the transaction, Bell left and was stopped by the police. After drugs were found, and he was charged, he took a conditional plea. He then appealed.

**ISSUE:** May officers search a vehicle incident to arrest if they can reasonably believe that evidence of the offense is in the car?

**HOLDING:**

**DISCUSSION:** Bell argued that the police search of his car violated Arizona v. Gant.<sup>34</sup> The Court agreed, however, that the "police could reasonably believe that evidence of Bell's drug offense was in the car," since he "had apparently sold the drugs inside the car, and had driven the car to and from the sale site."

Bell's plea was upheld.

## SEARCH & SEIZURE – FEDERAL AUTHORITY

### U.S. v. Evans

6<sup>th</sup> Cir. 2009

**FACTS:** On February 13, 2006, Cartwright and Pasha were in the Social Security building in Detroit. Pasha was using her cell phone and was asked by a guard to end her call because such use was prohibited in the building. He waited a few minutes but she continued to talk. When he asked her a second time, she put her phone on speaker so that everyone could hear the call. The guard (Cleveland)

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left the lobby and contacted the Federal Protective Services (FPS) for help. When he came back to the lobby, Pasha "had got into it with somebody else...."

FPS officers Smith and King responded to the call of a disturbance. Cleveland directed them to the two women and the officers escorted them outside and told them to leave. The FPS officers later stated they were "very disorderly," were "loud and belligerent" and cursing. Cleveland came outside to check on the situation and observed one of the women dancing to music coming from her cell phone. The two FPS officers later stated that they took no further official action at the time because they were young girls just trying to show off, and they knew someone was coming to pick them up.

Evans arrived to pick up the girls. She almost struck one car and blocked in the driveway. The girls got into the car but Evans got out and walked into the SSA building. She made "vociferous statements" that Officer Smith took as threats against the guard for making Pasha stop talking on the phone. Smith made a note of her license plate as she drove away and ran it through dispatch.

Officers Smith and King followed Evans, while waiting for the response from dispatch. They received a negative report and at that point, they passed Evans's car and "basically considered the incident 'over.'" Evans, however, then fell in behind them and began to tailgate them, and "the women inside the car were reaching underneath their seats and making visible hand gestures in the direction of the FPS vehicle, their thumbs and index fingers raised, ' as if they were pointing a gun.'" Both men took the gesture as a threat. They made a vehicle stop. Evans "made various obscene remarks and refused to lower her car window or produce her driver's license or registration." She stated that she would not comply because they were not "real" police.

Officer King called Detroit PD for assistance and officers promptly arrived. They assured Evans that the two men were federal law enforcement officers. When they ran her license and vehicle information, they learned that she had an outstanding warrant. The FPS officers arrested her. On the way to booking, they also learned there was an unserved personal protection order and they asked Evans about it. She indicated (profanely) that she was going to kill the individual (another police officer) who took out the order, and that she would do the same to Smith and her mother. After being processed for federal crimes, concerning the threats, Evans was turned over to Detroit PD.

Evans was charged with threatening to assault a federal law enforcement officer and related charges. The federal court ultimately convicted her for the threat, but acquitted her for failing to comply with the FPS officers' orders because their "ticket" was "limited to federal property." Evans appealed.

**ISSUE:** May federal officers make a vehicle stop for investigation of a federal offense?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the legal mandate of the Federal Protective Service and quickly concluded that they "reasonably exercised their investigative and protective authority pursuant to [federal law] when they left federal property to surveil Evans's vehicle." Since their authority extended to the protection of persons on federal property, it was appropriate for them to follow her because of her threats toward the security guard. When they received a negative report from dispatch, they considered it over and abandoned their investigation.

The Court found the stop appropriate as well, as they had probable cause to arrest her at the time of the assault for threatening to assault them. The Court noted that it was immaterial that they were not on federal property at the time.

Finally, the Court ruled that Evans' response to Smith's question about the order was not as a result of interrogation, but was, instead "spontaneously volunteered and unresponsive to his question."

The Court affirmed the decision of the trial court.

## **SEARCH & SEIZURE - COMPUTER**

### **U.S. v. Lapsins**

570 F.3d 758 (6<sup>th</sup> Cir. 2009)

**FACTS:** Lapsins was suspected of involvement in child pornography, through his computer interaction with another suspect in the same offense. The investigator located a photo that had been exchanged and matched the photo to a known victim with the National Center for Missing and Exploited Children. Using a court order, he requested subscriber and billing information for the email account in question. AOL did so, also providing all other email accounts listed with that account, as well as the same telephone number provided to the suspect in the other case. The investigator also discovered that the Yahoo account that matched what he had listed Lapsin's email address as an alternate address.

The investigator also requested and received "CyberTipline Reports" concerning that same email/Yahoo screen name. He received one tip and matched the information and IP address to Lapsins' listed home address. He also confirmed that the IP address was connected to a cable modem.

The investigator, Klain, got a search warrant. The police seized a computer, computer equipment and numerous CDs and other storage media. About 1400 images of child pornography and about 69 videos were seized. Lapsins admitted to sending images to the other suspect and creating a Yahoo! group to share child pornography.

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

**ISSUE:** Is it necessary to connect computer activity to a physical location for a search warrant?

**HOLDING:** Yes

**DISCUSSION:** Lapsins argued that the warrant did not satisfy probable cause and that the investigator's supporting affidavit did not provide reason to believe that the pornographic images at issue were photographs of real children, as opposed to computer-generated images, or that the evidence related to the suspected crime would be located at Lapsin's house. He also argued that the information "was stale because one of the major events described in the affidavit, the Yahoo! chat and emailing the image to the Greensburg Suspect, occurred nine months before the warrant was issued."

The Court found that his first argument failed because the totality of the circumstances “provided probable cause to believe that the pornographic images at issue included images of real children.” Specifically, the image emailed by Lapsins was a “known victim” who had been identified for the National Center for Missing and Exploited Children by an identified Belgian police officer. The NCMEC had told the officer that it was a photograph of a real child, and it could be assumed, as such that the image was not a virtual, computer generated image. Jones reasonably believed, as did the magistrate judge, that the image “likely depicted a real child.” Further, Yahoo! reported to the investigator that “Lapsins uploaded 132 images of child pornography” to the site on a specific date. The opinion found it sufficient, but noted that the “better practice would be to include a plain statement of the affiant’s belief that the image depicted a real child, together with a recitation of the facts that support such belief.”

The Court noted that Lapsins had put forth no information that would have suggested “that the images were not of real children.” As such, at the probable cause stage needed for a warrant, the Court found it reasonable to believe at least some of the images depicted real children.

With respect to his second argument, the Court noted that there was ample evidence to connect Lapsins to both the computer identifiers and to the address on the search warrant, his residence. At least some of the uploads came through a “residential cable modem in the Cincinnati area.” Further, such criminal activity would be “much more tied to a place of privacy, seclusion, and high-speed Internet connectivity....” It is a “matter of plain common sense” that if such matter involves a home email address, it would be likely to find evidence on a home computer.

As for the staleness issue, the Court noted that the old information had been “freshened” by new information that was sufficient to remedy any “potential staleness defect.” The Court also noted that “pornographic images can often be recovered from computers by forensic examiners such that the passage of time does not greatly effect the probable cause calculus.”

After a lengthy discussion on sentencing issues, the Court affirmed Lapsins’ conviction and sentencing.

## **SEARCH & SEIZURE -**

### **U.S. v. Dyer**

**570 F.3d 758 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Glance was renting a cabin at Pigeon Forge, TN, in December, 2006. State officers received a tip that Dyer and Glance were selling drugs from the cabin, so they initiated surveillance. On Dec. 7, Officer Seals did a search warrant affidavit.

The warrant read:

*On December 4, 2006, I was contacted by Jackson County, NC, Sheriff's Department Lieutenant Kim Hooper regarding information he had received from a confidential source, hereinafter referred to as CS1. The Jackson County Sheriff's Department has charged CS1 with various felony drug charges and the disposition of those charges are [sic] pending. On December 1, 2006, CS1 voluntarily gave a statement against his penal interest to Jackson County Sheriff's Department Detective Rick Buchanan. CS1 stated that*

*CS1 and another individual, within the past seven days, went to meet with Kenny Dyer at a rental cabin in Pigeon Forge, TN. CS1 [s]tated that while they were at the rental cabin, the individual CS1 was with purchased one ounce of methamphetamine from Kenneth James Dyer II for \$1,400.00. During the transaction, CS1 observed a large quantity of Methamphetamine remaining in the possession of Kenny Dyer. CS1 stated that the transaction, which took place in CS1's presence, transpired in the basement of the rental cabin where a pool table is located. CS1 stated that Stacie Lee Glance was also present at the rental cabin during the transaction. CS1 further stated that a blue Dodge Neon and a gray Ford Ranger with North Carolina registration were parked outside the cabin at the time.*

*On December 6, 2006, I met with Lieutenant Hooper, Detective Buchanan, and CS1 in Pigeon Forge, TN. CS1 took us to a 316 Silver Stone Way and showed us where the drug transaction had taken place. A blue Dodge Neon bearing NC registration . . . and a gray Ford Ranger bearing NC registration . . . were parked in front of the cabin.*

*On December 6, 2006, I conducted surveillance at 316 Silver Stone Way. I observed Kenneth James Dyer II, and a white female, fitting the description of Stacie Lee Glance, exit the rental cabin and leave in a blue Dodge Neon. I was able to identify Kenneth James Dyer II from a photograph provided to me by Lieutenant Hooper.*

*On December 6, 2006, I received information from Lieutenant Hooper that Kenneth James Dyer II and Stacie Lee Glance are both wanted in North Carolina. Lieutenant Hooper faxed me copies of warrants from Swain County, NC, and Buncombe County, NC. Dyer is wanted in Swain County for felony possession of schedule II controlled substance, felony violation of probation, and misdemeanor violation of probation. He is wanted in Buncombe County for feloniously possessing, manufacturing, and transporting methamphetamine in excess of 200 grams but less than 400 grams.*

The search warrant was signed. When they arrived to execute the warrant, Dyer and Glance were leaving. Dyer, driving, rammed his vehicle into one of the police cars and fled the scene. The officer pursued in the remaining car but lost the pair.

During the search, the officers found almost \$5,000 in cash, 51 grams of methamphetamine and assorted paraphernalia. Glance returned later the same day but was unable to get into the cabin, as the rental company had changed the door code. When she called the rental company to get in, the rental company called the police. Glance was arrested at the cabin and Dyer was also later apprehended in another state.

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

**ISSUE:**

**HOLDING:**

**DISCUSSION:** The trial court had ruled that Dyer had a privacy interest, even though he wasn't listed on the rental agreement, because he was Glance's overnight guest. However, the Court agreed that even though both had privacy interests, that a valid search warrant overrules that interest.

The Court agreed that a judge might rely on hearsay, but "when the majority of the information in the affidavit comes from confidential sources, as it does in this case, courts 'must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of circumstances.'"<sup>35</sup> Dyer corrected noted that the affidavit at hand lacked "any information about the confidential informant's previous tips, the length or nature of the relationship between the informant and Seals, and any indication that the magistrate judge learned of the informant's identity." However this warrant does aver that the CI did witness a drug deal at the premises. The Court noted that U.S. v. Higgins, "reaffirmed the importance of the 'necessary nexus between the place to be searched and the evidence sought,' finding no probable cause based, in part, on the absence of facts indicating that "the informant had been inside [the place to be searched] or that the informant had seen drugs or other evidence in or around [the defendant's] apartment."<sup>36</sup> In addition, the officers knew the identity of the informant, although it was not disclosed in the affidavit.

Even though the affidavit lacked sufficient corroborating detail, the Court found that unnecessary in this case. The officers did perform some independent corroboration, doing surveillance and background checks on Glance and Dyer.

The Court upheld the denial of the motion to suppress.

## SEARCH & SEIZURE - CONSENT

### U.S. v. Canipe

569 F.3d 597 (6<sup>th</sup> Cir. 2009)

**FACTS:** On June 25, 2007, Deputy Hagie (Washington Co., TN, SD) was told by a supervisor that Canipe, a convicted felon, "might be in possession of a firearm." Dep. Hagie knew that Canipe had been convicted of arson and that he had attempted to stab another officer in the past. Dep. Hagie learned he was due to check in with his probation officer, so he decided to intercept him there. He found Hagie there, called for backup, and followed him. Seeing that Canipe was not wearing a seat belt, Dep. Hagie made a traffic stop. (He later conceded that the stop was really to determine if Canipe had a weapon.) It took him at least 15 minutes to write the citation, which Hagie claimed was normal for that time of day. Within a short time, a total of four officers were at the scene of the traffic stop.

When Canipe signed the citation, Hagie returned all his documents. He then asked if Canipe had anything unlawful in the vehicle, which Canipe denied. Hagie asked for consent and Canipe agreed to both a frisk and a search of the car.

While an officer stood with Canipe between the rear of the truck and the front of Hagie's cruiser – a "short distance" of about ten feet between the two vehicles – Hagie and Officer Bevins searched the truck. Hagie found a closed metal box resembling a tackle box on the

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<sup>35</sup> U.S. v. Helton, 314 F.3d 812 (6<sup>th</sup> Cir. 2003), see also Frazier and Illinois v. Gates, 462 U.S. 213 (1983).

<sup>36</sup> 557 F.3d 381 (6<sup>th</sup> Cir. 2009).

front floor of the passenger seat and observed the corner of a second plastic box protruding from beneath the seat. When he moved the seat forward, Hagie discovered that the top of the second box was inscribed with the word "Ruger," which he knew was a company that manufactured firearms. Hagie opened the Ruger box, observed a handgun inside of it, and placed Canipe under arrest. (It was unclear whether the ammunition in the metal tackle box was found before or after the firearm.)

Canipe was given Miranda warnings, signed a waiver and "gave an incriminating statement." He requested suppression, and was denied. Canipe appealed.

**ISSUE:** Does asking consent to search require reasonable suspicion?

**HOLDING:** No

**DISCUSSION:** First, Canipe argued that "Hagie's conduct, unaccompanied by evidence of any other criminal act, exceeded what was reasonably related to the circumstances justifying a typical stop for failure to wear a seatbelt." The Court noted that Canipe did not question the lawful nature of the initial stop and that Hagie's underlying motivation "did not undermine its constitutionality."<sup>37</sup> However, it continued, stating that "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."<sup>38</sup> As an example, "[a] lawful traffic stop may become an impermissible seizure if it occurs over an unreasonable period of time or under unreasonable circumstances."<sup>39</sup>

The Court looked to the case of U.S. v. Erwin, which noted that "the Constitution does not mandate that a driver, after being lawfully detained, must be released and sent on his way without further questioning," just because the officer has "concluded the original purpose of the stop."<sup>40</sup> The Court addressed the "well-established precedent" that "[a] law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions."<sup>41</sup> That rationale extends to a request to search a vehicle, as well.<sup>42</sup> It does not matter that the officer have a "valid suspicion of wrongdoing."

However, absent reasonable suspicion of criminal activity, a law enforcement officer must allow an individual to leave if he so requests and any consent obtained by the officer's refusal to permit him to do so is invalid.<sup>43</sup>

Fourth Amendment scrutiny is only triggered when an encounter "loses its consensual nature." In this case, the Court agreed that "Hagie's continued detention and questioning of Canipe" was reasonable, based upon the reliable information he'd received from a close relative of Canipe. The stop was of a reasonable duration and Hagie's request for consent was simple and straightforward. The Court agreed the stop and the continued detention was reasonable.

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<sup>37</sup> Whren v. U.S., 517 U.S. 806 (1996).

<sup>38</sup> Illinois v. Caballes, 543 U.S. 405 (2005).

<sup>39</sup> See Ellis.

<sup>40</sup> 155 F.3d 818 (6th Cir. 1998)

<sup>41</sup> Erwin; Florida v. Royer, 460 U.S. 491 (1983)

<sup>42</sup> U.S. v. Dunson, 940 F.2d 989 (6th Cir. 1991).

<sup>43</sup> Florida v. Bostick, 501 U.S. 429 (1991).

Canipe also argued that his “purported consent to search was invalid,” characterizing it as a “mere expression of approval” or an “acquiescence,” rather than an “unequivocal, specific, and intelligent consent.” The Court noted that the trial court had “astutely observed” that Canipe had a criminal history and was “no stranger to the police or the criminal justice system.” As such, he could be presumed to know what he was doing.

Finally, Canipe argued that the scope of the search was exceeded, and that he’d only agreed to the officers “looking” in his truck, not “to move seats or open containers.” However, the officers did not break into or pry open locked containers. He complained he could not see the search, but the Court noted that he was standing only about ten feet from the truck. The Court agreed that stating that an officer might look into a vehicle conveys a general consent to search, when the individual does not specifically limit that search. The Court found it significant that the firearms box was “inscribed, in plain view, with the name of a familiar firearms manufacturer, thereby rendering its incriminating contents immediately apparent ... and further justifying Hagie’s decision to open the box.”<sup>44</sup> Canipe could have stopped or limited the search at any time, but made no effort to do so.

Canipe’s conviction was affirmed.

## SUSPECT IDENTIFICATION

**Mills v. Cason (Warden)**  
572 F.3d 246 (6<sup>th</sup> Cir. 2009)

**FACTS:** Mills (along with two other men) were accused of attacking four women during a robbery. When they were unable to get any money in the robbery, the men “went on a rampage, repeatedly beating and kicking the women and striking them with guns.” They also “cut up” the women and one of the men committed rape. They then set the building on fire. Two of the women got out but the remaining two died of smoke inhalation and multiple traumatic injuries.

When interviewed, neither of the survivors could provide a description. One was shown six photos and eliminated three, but could not select a suspect from the remaining three. (Mills’s photo was one of those three.) At trial, however, she did identify Mills, over his objections.

Mills was convicted and appealed. After exhausting his appeals in the state courts, he filed for habeas relief. The U.S. District Court ruled in the state’s favor and Mills further appealed.

**ISSUE:** May a pretrial identification be introduced at trial?

**HOLDING:** Yes

**DISCUSSION:** Mills argued that the “introduction at trial of a pretrial identification [was] so “impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>45</sup> To determine if the later identification was tainted, the court followed a two step evaluation. First, the Court had to

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<sup>44</sup> U.S. v. Campbell, 549 F.3d 364 (6<sup>th</sup> Cir. 2008).

<sup>45</sup> Thigpen v. Cory, 804 F.2d 893 (6<sup>th</sup> Cir. 1986)

determine if the procedure was unduly suggestive. If so, the Court looked to Neil v. Biggers<sup>46</sup> to decide it was, nonetheless, reliable.<sup>47</sup> This process was followed by the trial court, with further weight given to the totality of the circumstances to decide the matter.<sup>48</sup>

The Court agreed that the trial court's decision was properly substantiated, and affirmed Mills' conviction.

## TRIAL PROCEDURE / EVIDENCE – CRAWFORD/BRUTON

**U.S. v. Johnson**  
6<sup>th</sup> Cir. 2009

**FACTS** Several years after a 2001 bank robbery that resulted in the death of a guard, the FBI received a tip that O'Reilly had been bragging about being involved. The tipster, Nix-Bey agreed to take notes on further conversations, and was told to be a "good, active listener." He agreed some time later to use a recording device, and it was arranged that the two be in the same cell. The listening device was disguised in a radio. O'Reilly provided extensive information, including the names of others involved. The FBI agent engaged the cooperation of those individuals, as well, and they named another party, Johnson, and stated he had recruited them into the conspiracy. Johnson was arrested in 2004.

At trial, the two informants, who had pled guilty, testified as to Johnson's involvement. The tape recording from Nix-Bey, who did testify as well, was also admitted. Johnson was convicted, and appealed.

**ISSUE:** Is evidence told to a third-party informant admissible?

**HOLDING:** Yes

**DISCUSSION:** First, the court addressed the admissibility of the tape recording. The Court agreed that O'Reilly's statements on the tape were not testimonial, because, of course, he did not know the statements would be used in a criminal proceeding against a third party. As such, Crawford<sup>49</sup> did not apply. The Court agreed that even if Bruton<sup>50</sup> would normally apply, that the Bruton rule is to guard against the risks of a joint trial, and the two men were not tried together. Further, it was admissible under the Federal Rules of Evidence, as a "statement against penal interest," as set forth in Rule 804(b)(3). The context of the statement was such that they were considered to be trustworthy.

After resolving several other issues, Johnson's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – BRADY

**Montgomery v. Bagley**  
581 F.3d 440 (6<sup>th</sup> Cir. 2009)

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<sup>46</sup> 409 U.S. 188 (1972)

<sup>47</sup> Ledbetter v. Edwards, 35 F.3d 1062 (6<sup>th</sup> Cir. 1994).

<sup>48</sup> Manson v. Braithwaite, 432 U.S. 98 (1977)

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**FACTS:** Montgomery was charged in Lucas County, Ohio, with the murders of Ogle and Tincher during the course of an armed robbery. He was convicted, and ultimately went through a lengthy post-trial appeal in the state court. He then petitioned for habeas through the federal court. The District Court denied all of his claims except for an allegation under Brady, in that the State had withheld a police report indicated that Ogle was seen four days subsequent to her apparent murder. (Ogle was considered missing for some days prior to her body being found.) The District Court had found there was no doubt that the State had refused to disclose the report, which was discovered some six years after Montgomery's trial. It also agreed that there was a reasonable probability that it was exculpatory and that its disclosure would have affected the outcome of the trial. It then issued a writ in favor of Montgomery.

However, following a newspaper story about the issuance of the writ, several people who were involved in the initial report contacted the police to state they'd been mistaken, and that they'd seen Ogle's younger sister, instead. The District Court refused to consider that evidence, however. The prosecution appealed.

**ISSUE:** Must reports of other witnesses be turned over to the defense under Brady?

**HOLDING:** Yes

**DISCUSSION:** First, the Court discussed the state's initial argument that the report was not evidence because it was inadmissible hearsay. The disclosure of the report "would have led to witnesses who would have cast serious doubt on the State's case." As such, the Court determined it was exculpatory evidence.

Further, the Court noted the report "strikes at the heart of the State's case" in that it directly contradicted a primary witness. Further, that witness's testimony led to the imposition of the death penalty and even if he'd been found guilty of murder, it might have led to a different punishment.

The Court stated that "[u]nder Brady, it is incumbent upon the State to turn over all favorable exculpatory evidence. It is not the sole arbiter of what must be turned over."<sup>51</sup> The Court found it immaterial that 23 years later, the witnesses filed retractions.

The Court affirmed the issuance of the habeas writ based upon the Brady violation.

## **TRIAL PROCEDURE / EVIDENCE – PRESENT SENSE IMPRESSIONS**

### **U.S. v. Davis 6<sup>th</sup> Cir. 2009**

**FACTS:** In July, 2007, Davis "decided to go joyriding in a rented car accompanied by his friend, Senecca McElwee, and a gun." The car was rented for him by a friend. On July 10, McIntosh, 17, was walking with a relative and 2 children when they recognized Davis, and could see he was holding a gun. She believed he'd been involved in a murder a week earlier in Grand Rapids. She picked up the pace, concerned about the children, and tried to call 911. The first call was dropped but she reconnected and gave them the plate number. (She was mistaken as to the make and model, but the two vehicles are

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<sup>51</sup> Kyles,

very similar.) Although she'd only seen one weapon, she told dispatch she saw two, thinking this would cause a quicker response. She was also mistaken in how long it had been since she'd seen the car, in fact, it was less than a minute.

On July 11, 2007 Officer LaFave (Grand Rapids) was flagged down by a woman and given the same information. He put it out on the radio. Douglas, who was an occupant in the car at the time, later stated that they learned immediately that the police had been called. The men drove to a house and went inside to discuss the matter and smoke marijuana. They decided to switch the car for another, through the person that had originally rented it.

When the PD ran the plate and discovered it was a rental, they quickly learned of the planned switch. They placed the new car, still on the rental lot, under surveillance. When it was picked up, they immediately made a traffic stop. Davis, in the front passenger seat, did not immediately comply but moved to place something under the seat. The officers searched the car and found a firearm under the passenger seat, along with a small baggie of marijuana. The officer later stated the weapon could not have been just thrown under the seat, but that its placement was consistent with the "stuffing" motion they'd observed. Davis was taken into custody and waived his Miranda rights. He initially denied everything, but later admitted to the marijuana. He continued to deny the gun, however, and the other occupants also denied knowledge of the firearm.

Davis was indicted for being a felon in possession, and objected to the admission of the two statements. The Court denied his motion. Eventually, Davis was convicted and appealed.

**ISSUE:** Are present sense impression statements admissible?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the statements made by an unidentified woman to Officer LaFave. The trial court had admitted the statement, holding that it was not hearsay, because it was "being offered not to prove the truth of the matter asserted, but to aid in understanding the officers' subsequent actions." <sup>52</sup> His testimony, "read in context, fairly precisely provides an explanation of what [Davis] subsequently did and said in the afternoon...." The jury had been "properly invited to focus on [Davis's] reaction to the statement, not the 'truth' of the substance." The Court agreed that it was not hearsay.

With respect to the 911 call, the trial court had ruled it was admissible "as both an excited utterance and a present sense impression" under the Federal Rules of Evidence 803. The call was made within a minute of McIntosh spotting Davis in the car and was essentially contemporaneous with that event. The Court agreed that the excited utterance exception was weaker, since "there were certain acknowledged 'exaggerations' in McIntosh's 911 call." However, the Court agreed that the exaggerations went on the weight and not the admissibility of the evidence.

The Court also disagreed that the admission of the unknown woman's statement violated the Confrontation Clause, since again, the statements were not admitted to prove the truth of the matter contained.

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<sup>52</sup> U.S. v. Gibbs, 506 F.3d 479 (6th Cir. 2007).

Finally, the Court agreed there was sufficient evidence for the jury to find that he had been in constructive possession of the firearm. The Court found his theories about the gun “inventive or interesting,” they were unavailing. Finding the evidence of Davis’s guilty abundant, the Court upheld his conviction.

## TRIAL PROCEDURE / EVIDENCE – CRAWFORD

### U.S. v. Pike

2009 WL 2514070 (6<sup>th</sup> Cir. 2009)

**FACTS:** In December, 2006, Officer Gabrielson (Ohio Organized Crime Investigations Commission) met Pike and Pennington. He saw them again two months later. During that time frame, Gabrielson had engaged in many telephone conversations with Pennington, about criminal activities, and spoke to Pike some three times. The police began surveillance of Pike’s home as a result. On March 5, 2007, Pennington told Gabrielson that Pike had one or two guns that he could sell, and promised to talk to Pike about it. Late that night, he called the officer back to see if he was interested in a .22 revolver and mentioned that Pike had recently sold a .357 pistol. Pike, who was present, offered Gabrielson the weapon, and they agreed, after negotiation, to the sale, which was to be made in about an hour.

Gabrielson proceeded to the location and met Pennington, who had the gun. Pennington then returned to Pike’s home with the money. Pike, a felon, was indicted, and requested suppression of Pennington’s statement that incriminated him. That was denied and the recordings were introduced. Pike was convicted and appealed.

**ISSUE:** Are statements made to an undercover officer testimonial?

**HOLDING:** No

**DISCUSSION:** The trial court had found that the statements were properly admitted under FRE 801(d)(2)(E) as a “statement by a coconspirator of a party during the course and in furtherance of the conspiracy” - and were not hearsay. Such statements must be corroborated by independent evidence. In this situation, there was no doubt the two were conspirators, and the officer provided corroboration.

As to Pike’s assertion that the statement was testimonial, under Crawford v. Washington, the Court agreed “statements made in furtherance of a conspiracy are inherently testimonial in nature.”<sup>53</sup> The statements were clearly not made in anticipating of a prosecution, but during the commission of a crime. Because neither party knew that Gabrielson was an officer, the statements “were not the product of interrogation and were not testimonial in nature.”<sup>54</sup>

Pike also argued that because he was never seen in actual possession of the firearm, that there was insufficient evidence to show he was in control of it. The Court, however, quickly disagreed and upheld his conviction.

The Court agreed that the introduction of the statements was not improper and upheld Pike’s conviction.

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<sup>53</sup> 541 U.S. 36 (2004).

<sup>54</sup> See U.S. v. Mooneyham, 473 F.3d 280 (6<sup>th</sup> Cir. 2007).

## TRIAL PROCEDURE / EVIDENCE – CONSTRUCTIVE POSSESSION

### U.S. v. Mosley

2009 WL 2391949 (6<sup>th</sup> Cir. 2009)

**FACTS:** On November 1, 2007, at about 12:30 a.m., Detroit police saw a vehicle make an illegal turn. They made a traffic stop; Mosley was the sole occupant. Two officers approached; one saw the driver's hand momentarily hidden between the seats. The other officer asked for and received Mosley's documents. As the officers returned to their car, one officer told the other about what he had observed. Both returned to the car and Officer Woodcum asked Mosley to get out. The officer received consent to search. In the area between the seats, the officer observed "an upside down handgun." Mosley, a convicted felon, was arrested. No further evidence was found in the car.

No evidence was recovered from the handgun that linked it to Mosley. He was tried, convicted, and then appealed.

**ISSUE:** Is a subject's proximity to a weapon an indication they are in constructive possession of that weapon?

**HOLDING:** Yes

**DISCUSSION:** Mosley argued that he was not in sufficient possession of the weapon to support the charge. "In this case, [Mosley] was the sole occupant of the vehicle containing the gun" and made suspicious motions in the "precise area" where the gun was later found.

The Court upheld his conviction.

### U.S. v. King

2009 WL 2407684 (6<sup>th</sup> Cir. 2009)

**FACTS:** On January 24, 2006, Toledo officer executed a warrant on a local residence. After SWAT had secured the location, Det. Scoble found King and Richardson secured on the floor. Det. Rider searched both men and gave them Miranda. During the search, an officer found a rock of crack cocaine in one of the bedrooms and upon asking, learned it was King's bedroom. They also found other evidence that linked King to the residence, including mail and medicine bottles, along with a gun. King denied that any more guns were in the house, which was the case. He also stated that there was marijuana in his jacket, in the bedroom. More crack cocaine was also found. He made incriminating comments to Det. Scoble and indicated as he left that it was "his house."

The property was actually owned by King's niece, and in fact, later evidence indicated that although he was there daily, he did not actually live there. The current tenant of the house was in jail. King was indicted, tried, and convicted. He appealed.

**ISSUE:** May a subject possess items in a home he doesn't own?

**HOLDING:** Yes

**DISCUSSION:** King argued that since he did not live in the house, there was insufficient evidence that he possessed either the drugs or the gun for which he was charged. He contended that he was at the house simply to walk dogs that were left there and that he “never exercised dominion or control over the residence.” The Court noted, however, that King stated that the bedroom was his and there was no one else living in the house. Items were found in the house clearly linked to King. He also knew the “contents of the bedroom and the residence” and his statements to that effect were proved to be true. Finally, he admitted to one of the detectives that he’d “been selling drugs before the detective had even been in training.”

After resolving other issues, including an objection to Det. Coble’s testimony that King possessed the items, which the Court agreed was actually in response to one of King’s own questions, the Court affirmed his conviction.

## **TRIAL PROCEDURE / EVIDENCE – TAINTED EVIDENCE**

### **U.S. v. Britton**

**2009 WL 1884468 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On Aug. 27, 2005, Officers Hulseley and Davis (Memphis PD) were patrolling a high drug trafficking area. They were in special black uniforms and driving a black unmarked van. They got a report of a drug transaction and proceeded to the location. Near the reported location, the officers found three young black men (including Britton). The officers reported that they were “standing on the sidewalk in front of the house so as to impede pedestrian travel,” although there were no pedestrians in the area. Other witnesses stated that they were standing in the yard or the driveway, at a house owned by a relative of one of the men. Officer Hulseley, “apparently casting about for a reason to detain the men,” drove toward them to arrest them for obstructing the walkway. Officer Davis got out and ordered them to show their hands. They were apprehended and searched by Hulseley while pruned out. Britton, however, moved toward the house. He took off and Davis chased him. As Britton scaled a fence, a silver object fell from his waistband, which turned out to be a handgun. He was apprehended and charged with the obstruction offense, evading arrest and unlawful possession of the weapon.

The prosecution dismissed all state charges, however, but a federal charge was placed against Britton, a felon, for the weapon possession. Britton moved for suppression of the gun. The trial court concluded that the “officers lacked probable cause to arrest the three individuals for obstructing the sidewalk.” However, once Britton ran, Officer Davis had reason to chase him. The Court denied the suppression. Britton took a conditional guilty plea and appealed.

**ISSUE:** Is a gun dropped as a result of an unlawful action by police admissible?

**HOLDING:** Yes

**DISCUSSION:** First, the government argued that Britton lacked standing, because he had “discarded the gun before he was apprehended.” The court noted that “a finding of abandonment must be based on some evidence that the defendant intended to renounce ownership of property.” The evidence indicated

that he simply dropped the gun, not that he threw it down. However, the Court noted that although Britton's arrest was, arguably, illegal, he was not under arrest when he dropped the gun, he was simply being chased. The "gun was not discovered as the result of a 'search' –but "[r]ather, ... was publicly exposed through [Britton's] action, albeit inadvertently."

Britton makes the point that he would never have dropped the gun if the police did not provoke the chase by trying to detain him, which they had no legal right to do. It is true that Officers Hulse's and Davis's action in rousting Britton and his friends from their lawful gathering was unlawful police conduct that ought to be deterred. But the Supreme Court has never held that invocation of the exclusionary rule is justified by the use of unlawful police action by itself. In order to exclude evidence under constitutional doctrines of the exclusionary rule on the fruit of the poisonous tree, the defendant must show more than "the mere fact that a constitutional violation was a 'but-for' cause of [the police] obtaining [the] evidence."<sup>55</sup>

The Court continued:

It is plainly apparent that Britton's dropping the gun was inadvertent, a mere happenstance. There is no evidence that the police intended to provoke flight or a chase or otherwise exploited the circumstances to cause Britton to shed his possessions. Nor has Britton shown that he had a reasonable expectation of privacy in the area of the yard where the gun was exposed.

The Court concluded that the exclusionary rule did not demand the suppression of the evidence in the case and affirmed the decision not to do so.

## TRIAL PROCEDURE / EVIDENCE – WITNESS DEAL

### Akrawi v. Booker

572 F.3d 252 (6<sup>th</sup> Cir. 2009)

**FACTS:** Akrawi was tried along with eight co-defendants in a large drug trafficking operation. Much of the prosecution's case centered on the testimony of Abood, who had been in jail in a similar case, he was released on a lowered bond to assist in the Akrawi case. (The investigating officer, Pappas, was to "advise the prosecutor of the extent of Abood's cooperation while released on bond.")

Abood testified as to several transactions in which he purchased cocaine from Akrawi - he later stated that "no one promised him anything for his testimony and no one had threatened him." He admitted that he hoped that the cooperation would help him in his own case and that he was concerned about being deported, as he was not a U.S. citizen. He had testified before the grand jury that he wanted to "help rid the streets of drugs." The investigator testified that he did not request anything for Abood, but that he knew the prosecutors were considering a reduction in Abood's charges because of his cooperation.

Akrawi was convicted, and appealed, but he was denied leave to appeal. Following Akrawi's conviction, however, "Abood's situation had improved dramatically." Eventually Abood pled guilty and received lifetime probation, because his testimony had proved "crucial" in the Akrawi case. Following the discovery of more

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<sup>55</sup> Hudson v. Michigan, 547 U.S. 586 (2006).

information concerning the deal, Akrawi appealed to the trial court, contending that the prosecution failed to disclose information regarding the cooperation agreement.

At further proceedings, Pappas stated that he made no promises to Abood, and that he had no authority to make any promises. One of the prosecutors agreed that the “possibility of a charge-reduction was the benefit that Abood hoped or expected to gain by his cooperation.” The trial court agreed that Akrawi was entitled to a new trial. Before the trial was conducted, however, the Michigan courts found that no firm agreement was reached until after Abood testified, and that all of the communications that occurred before were only a “future possibility of leniency.”

Akrawi moved of habeas in the federal court and the U.S. District Court agreed that the prosecution had wrongfully suppressed evidence of the deal in Akrawi’s favor. However, it also ruled that the nondisclosure did not result in such actual prejudice that he was entitled to review. Akrawi further appealed.

**ISSUE:** Is the defense entitled to know about informal deals with witnesses?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the extent to which the “rule of Brady requires disclosure not just of evidence of formal cooperation agreements, but also evidence of informal communications between the prosecution and a witness, has received significant attention in recent Sixth Circuit case law.” Further, in Bell v. Bell, “the court noted that ‘[i]t is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under Brady.’”<sup>56</sup> In addition, it stated that “[t]he existence of a less formal, unwritten or tacit agreement is also subject to Brady’s disclosure mandate.” And to further confirm “‘Brady is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to ‘less formal, unwritten, or tacit agreement[s],’ so long as the prosecution offers the witness a benefit in exchange for his cooperation, . . . so long in other words as the evidence is ‘favorable to the accused.’”<sup>58</sup>

But, the Court continued:

Yet, the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*. Further, the mere fact of favorable treatment received by a witness following cooperation is also insufficient to substantiate the existence of an agreement. “[I]t is not the case that, if the government chooses to provide assistance to a witness following trial, a court must necessarily infer a preexisting deal subject to disclosure under Brady.” “The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witness prior to the testimony.”

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<sup>56</sup> Brady v. Maryland, 373 U.S. 83 (1963).

<sup>57</sup> 512 F.3d

<sup>58</sup> Harris v. Lafler, 553 F.3d 1028 (6<sup>th</sup> Cir. 2009)

As such, the Court found that the question is “whether the prosecution made assurances or representations to Abood suggesting the existence of a mutual understanding or tacit agreement - evidence favorable to Akrawi because of its impeachment value.” The Court found that the Michigan courts’ decisions were based on fundamental errors of law. The Court found that there was an informal agreement or mutual understanding that Abood would receive leniency for his cooperation. But that isn’t the end of the story. The Court noted that it was necessary to also find prejudice by the error. The Court noted that although no direct evidence was presented, that the jury did hear substantial evidence about the potential for a reduction in the charges. There was highly incriminating evidence from another source and Abood’s testimony was not the centerpiece of the prosecution’s case. But Akrawi argued that the testimony giving by several of the parties was in fact false, in that they testified that there was no promise of leniency. The Court found that that the testimony was misleading, but not indisputably false and was “technically accurate.” It found “scant evidence of an actual meeting of the minds.”

The Court found the alleged perjury to be of “relatively minor significance.”

The Court ruled that although the prosecution did violate Brady, it did not demonstrate sufficient proof that the nondisclosure resulted in actual prejudice. Akrawi’s conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE – CHILD WITNESS**

### **Evans v. Mitchell (Warden)**

**2009 WL 2707379 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On March 25, 1987, Richards and Williams were stabbed to death in their Cleveland apartment. Speights (Williams’ son) was injured, but survived. Richards’ son Albert, age 7, and an infant were also present. A robbery also took place.

Evans and the Fraziers were charged with murder. Evans was convicted of both murders and received the death penalty. His appeals were denied and he took a collateral appeal. The District Court denied the claim but permitted the appeal.

**ISSUE:** May a 7 year old witness be considered to be competent?

**HOLDING:** Yes

**DISCUSSION:** First , the Court agreed that Albert Richards was a competent witness and that he understood the oath and his duty to testify truthfully. Evans also argued that the “government withheld a supplemental police report ...” and that he was not told that one of the Fraziers “was testifying pursuant to a plea agreement.” The Court concluded, however, that the information in the supplemental report was not material, nor was it exculpatory.

With respect to the plea agreement, the Court found that it occurred after the trial, and Frazier’s “motive to testify against Evans was discussed in open court, and Evans could have impeached Frazier on those grounds.” The Court upheld Evans’ conviction.

## **42 U.S.C. §1983 - BRADY**

**Moldowan v. City of Warren**  
578 F.3d 351 (6<sup>th</sup> Cir. 2009)

**FACTS:** Moldowan was originally convicted in the 1990 abduction and sexual assault of Fournier, but his conviction was reversed in 2002 after new evidence came to light. He was acquitted on retrial and then filed suit against numerous parties, including the Warren Police Department and several officers. He alleged the parties, both acting together and separately, violated his rights by fabricating evidence and failing to disclose exculpatory evidence.

Some of the relevant facts of the underlying investigation include the following.

Following her abduction and brutal assault, Fournier reported that she had been taken by four males that she knew, including Moldowan, her ex-boyfriend. Eventually, all four were arrested, but charges against one were dropped when he had a solid alibi. Fournier testified at a preliminary hearing, as did her sister Corcoran. Two of the three remaining men, Moldowan and Michael Cristini, were bound over for trial. At trial, the two offered essentially the same testimony. Another witness, Dr. Warnick, a forensic odontologist, testified that bite marks on her body were consistent with the two men, as well. Both men offered alibi witnesses and competing expert testimony. Both men were convicted, however.

After the conviction, a private investigator uncovered a witness that suggested other individuals committed the crime. Further, a dentist-witness that had supported the prosecution came forward to state that she'd been deceived and had actually been unsure of her findings. As a result of this evidence, Moldowan was granted a new trial, at which time he was acquitted.

Following a complex procedural history, the trial granted summary judgment in favor of one officer, but denied it to all of the other parties. Multiple appeals (on behalf of the various defendants) ensued.

**ISSUE:** Does law enforcement have a responsibility under Brady to disclose exculpatory material?

**HOLDING:** Yes

**DISCUSSION:** The Court first declined to grant qualified immunity to the officer-defendants, finding factual disputes that could not be resolved at this point. However, Det. Ingles (and two other non-officer parties) also requested "absolute testimonial or witness immunity." Although the Court agreed that normally that claim would not be reviewed in an interlocutory proceeding, that because these claims, in this case, are similar to those raised by public official qualified immunity, it would do so. The Court noted: "exposing police officers and forensic investigators to suit based on testimony they deliver as part of their official duties and on behalf of the state undoubtedly implicates their ability to exercise their discretion and potentially inhibits them from performing their duties."

With respect to Det. Ingles, Moldowan contended that "Ingles was required to disclose exculpatory statements" from a witness that suggested that others had committed the crime.<sup>59</sup> The Court agreed that the responsibility to reveal such evidence "falls squarely on the prosecutor, not the police."<sup>60</sup> However, it

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<sup>59</sup> Brady v. Maryland, 373 U.S. 83 (1963); see also California v. Trombetta, 467 U.S. 479 (1984).

<sup>60</sup> Giglio v. U.S., 405 U.S. 150 (1972); Lindsay v. Bogle, 92 F.App'x 165 (6<sup>th</sup> Cir. 2004); Kyles v. Whitley, 514 U.S. 419 (1995).

continued, this “well-established rule ... does not resolve whether the police have a concomitant or derivative duty under the constitution to turn potentially exculpatory material over to the prosecutor.” Moldowan argued that if that was not the case, “then the state could sidestep its constitutionally-mandated disclosure obligations by maintaining an unstated, but nevertheless pervasive, wall of separation between the prosecutor’s office and the police with regard to the existence of potentially exculpatory evidence.”

The Court noted that it has recognized that the police have an active role in any prosecution, and are “treated as an arm of the prosecution for Brady purposes.” As such, “the police inflict the same constitutional injury when they hide, conceal, destroy, withhold, or even fail to disclose material exculpatory information.” In Arizona v. Youngblood, the Court had confirmed that the police have at least a limited obligation to preserve evidence that might exonerate the defendant.<sup>61</sup> Although the Court agreed that police cannot necessarily know if particular evidence was material, in the legal sense, the Court agreed that “there is no doubt that the police are just as capable of depriving criminal defendants of a fundamentally fair trial by suppressing exculpatory evidence.”

The Court agreed that the right to disclose such evidence was clearly established such that Det. Ingles should have been well aware of it. The Court then considered whether, in this instance, the character of the evidence was such that the parties should have recognized its potential exculpatory nature. (The Court noted that even an “inadvertent nondisclosure” has a critical impact on the case, so that the mental state of the actor was no the determining factor.)

In Illinois v. Fisher, the Court explained that the “applicability of the bad-faith requirement in Youngblood depended ... upon the distinction between ‘materially exculpatory’ evidence and ‘potentially useful’ evidence.”<sup>62</sup> The Court stated that “simply put, where the evidence withheld or destroyed by the police falls into that more serious category [materially exculpatory], the defendant is not required to make any further showing regarding the mental state of the police.”<sup>63</sup>

The Court stated:

Where the exculpatory value of a piece of evidence is “apparent,” the police have an unwavering constitutional duty to preserve and ultimately disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of the [sic] whether a criminal defendant or a §1983 plaintiff can show that the evidence was destroyed or concealed in “bad faith.”

The Court found no direct evidence that Det. Ingles “acted intentionally in withholding these exculpatory statements,” but noted that it was certainly enough to survive summary judgment at this stage.

In another issue, Moldowan alleged that Office Schultz destroyed evidence introduced at the first trial, in contravention of the trial court’s order that all evidence be preserved. The officer was fulfilling an “entirely ministerial task of sending out annual inquiries to the detectives in charge of each case, asking whether the detective wanted the evidence being held in the property room, ‘held, destroyed or released.’” Apparently

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<sup>61</sup> 488 U.S. 51 (1988)

<sup>62</sup> Illinois v. Fisher, 540 U.S. 544 (2004).

<sup>63</sup> Wright, 260 F.3d

Ingles authorized its destruction. The Court found no bad faith on the part of Schultz and granted him summary judgment.

The Court affirmed the denial of summary judgment in favor of Det. Ingles with respect to the Brady claims.

## **42 U.S.C. §1983 - STATE-CREATED DANGER**

### **Culp v. Rutledge**

**2009 WL 2590856 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On February 1, 2006, at about 7:30 p.m. Collins confronted Jamika when she was attending Bible study in Detroit. They had been involved in a long-distance relationship and had a child, but Jamika broke up with Collins when he became abusive. Witnesses saw Collins grab Jamika and the child and throw them to the ground. Security guards intervened but Collins was able to break free and escape. The police were called and Officers Rutledge and Mason responded. They interviewed witnesses, but were unable to make an arrest because of the minor nature of Jamika's injuries. She made a report of the assault, and later that day, she went to the police station to file a formal complaint at Collins for the assault and battery. She was instructed to file her report at another location, because it involved domestic violence.

Jamika and her parents went to the second building and Jamika made a detailed report. The officer also took photos. Sgt. Cooper, the DVU shift supervisor, later stated she recalled getting a phone call from the initial responding officers about the incident, and that they told her that they would be forwarding the report on the incident. She denied, however, that she took a statement from Jamika, but the evidence indicated otherwise. Jamika (and her father) "assert[ed] that the female officer [allegedly Cooper, who fit the description] explicitly told them that Collins would be arrested," and that since they did not see him around the neighborhood after that, they assumed he had, in fact, been arrested. Sgt. Cooper did testify as to the usual process in such cases.

As a result of the initial officer's report, an investigator, Lewis, was assigned, and was tasked with contacting Jamika to discuss formal charges. However, because Jamika allegedly never came to the unit, and Lewis was unable to contact her by phone, no formal charges were made and Collins was not arrested.

On Feb. 26, Collins returned to the church "armed with a sawed-off shotgun" and sat in the balcony. However Jamika and her father were not present. Her mother, Rosetta, got into a "heated exchange" with Collins, however, and Collins shot and killed her. He later committed suicide.

Jamika later testified that Collins's brother had threatened her and her family, and that she had told him she'd filed the report. She stated that her family was concerned, but that they "mistakenly thought that Collins was in jail."

Jamika and her father filed suit against the officers, the Detroit police, and the City claiming under 42 U.S.C. §1983. Eventually everyone was dismissed except Sgt. Cooper, who argued that the Jamika and her father, Culp, could not bring a due process claim on Rosetta's behalf, and that in the alternative, there was insufficient evidence that Cooper "had engaged in actionable affirmative conduct that had placed

Plaintiffs at risk to an attack by Collins ....” The trial court granted summary judgment to Sgt. Cooper and Jamika and Culp appealed.

## ISSUE:

## HOLDING:

**DISCUSSION:** The Court reviewed the “state-created danger exception” to the Due Process Clause, which “generally does not provide individuals with an affirmative right to state protection.”<sup>64</sup> Following DeShaney, however, the Court had identified two exceptions “whereby state actors have an affirmative duty of care and protection: (1) the ‘special relationship’ exception, and (2) the state-created danger exception.”<sup>65</sup> The latter applies “when the state either plays a role in creating a danger to an individual or renders an individual more vulnerable to a pre-existing danger.”<sup>66</sup>

Further, the Court continued:

Under the state-created danger theory, a governmental actor can be held responsible for an injury committed by a private person if:

- (1) an affirmative act by the governmental actor either created or increased the risk that the plaintiff would be exposed to the injurious conduct of the private person;
- (2) The governmental actor’s act especially endangered the plaintiff or a small class of which the plaintiff was a member; and
- (3) The governmental actor had the requisite degree of culpability.<sup>67</sup>

Jamika and Culp argued that Sgt. Cooper is liable “created a dangerous situation when she told the Williams family that the police would arrest Collins but did not follow through with the arrest.” The danger was increased because Jamika told Collins’ brother about the complaint, increasing Collins’s anger at Jamika and her family, and that they only returned to the church because they believed Collins was in jail.

The trial court, however, found that there was no evidence that the “alleged inaction” increased the danger, since Sgt. Cooper did not encourage them to return to the church, and that the “causal link to the attack [was] attenuated because Collins could have attacked [them] at any time.” Further, since he was employed, he would likely have been able to post bond and be out of jail.

Further, “any failure by Sergeant Cooper to follow up on Jamika’s domestic violence claim constitutes *inaction* which does not qualify as an affirmative act under a state-created danger theory.”

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<sup>64</sup> DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989)

<sup>65</sup> Kallstrom v. City of Columbus, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998).

<sup>66</sup> Jones v. Union County, Tennessee, 296 F.3d 417 (6<sup>th</sup> Cir. 2002)

<sup>67</sup> Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Ed., 542 F.3d 529 (6<sup>th</sup> Cir. 2008); McQueen v. Beecher Cmty Schs., 433 F.3d 460 (6<sup>th</sup> Cir. 2006); Ewolski v. City of Brunswick, 287 F.3d 492 (6<sup>h</sup> Cir. 2002).

Finding that the action was unsupported because it failed under the first prong, the Court did not have to go further, but did also state that the action failed under the second and third prongs, as well. There was no evidence that Cooper should have realized that a failure to arrest Collins would post a specific risk to Rosetta, or that she should have "forseen that the entire Williams family could be injured by her failure to effectuate an arrest warrant for Collins ...."

The trial court's decision was affirmed.

## **42 U.S.C. §1983 - FALSE ARREST**

### **Brooks v. Rothe**

**577 F.3d 701 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Brooks was a shift supervisor at a SafePlace facility for victims of domestic violence. The policy manual for the facility "stressed the importance of resident confidentiality" and emphasized that they should contact a higher-level supervisor if law enforcement wanted access and that all searches required a search warrant.

On May 8, 2006, Brooks noted that a resident, MR, became increasing uncoordinated and had trouble walking and standing, over the course of several hours. She asked if she needed medical help, which she declined, but "when she tried to stand up, she staggered and could not walk." Eventually, she agreed to medical treatment and he called 911.

However, the first responder to arrive was Lt. Rothe (Bad Axe, MI, PD) Brooks refused to let him in or give him any information and Brooks later stated he was "uncomfortable giving Rothe any information because he was not with the ambulance." She was concerned that he might be a resident's husband and not a police officer. "Rothe, growing frustrated, explained to Brooks that he was a first responder and needed to come into the building," but when she continued to deny him, he left.

The ambulance arrived and the paramedics entered. Brooks called her supervisor again to get permission to copy MR's file for the paramedics. She also told him about refusing Rothe entry, and Kain told her that he was "fine" and could be admitted." Brooks later denied that she was told it was alright to admit him.

Brooks then received a call from Weisenbach, a local prosecutor and SafePlace board member, who "demanded information about the events at the shelter and yelled at Brooks for not let Rothe enter the building."

During this time, the paramedics became suspicious that MR had overdosed on drugs, possible Soma and Ativan. She was transported to the hospital. The resident's roommate reported to Brooks that she had seen MR take several pills and gave her an empty plastic bag that had contained the pills, which Brooks locked up. Brooks was concerned that there might be more drugs in the room, because a child shared MR's room.

Lt. Rothe had contacted Chief Bodis, as well as Weisenbach. Bodis also received a call from his wife, a 911 supervisor, and learned that the call was a drug overdose. Bodis contacted the chief prosecuting attorney, Gaertner, who instructed that the "SafePlace needed to be secured and investigated." Bodis

called the SafePlace president to express his displeasure about Brooks' refusal to admit Rothe. He called Gaertner back to ask about getting a warrant, and was instructed that exigent circumstances (potential destruction of evidence and the safety of the residents) meant that a warrant was unnecessary.

Weisenbach and Rothe proceeded to the SafePlace to gain entry, and again, they were denied entry. What occurred when they arrived was somewhat in dispute, with some assertions that Brooks physically denied Weisenbach entry. Rothe again contacted Bodis, who was also in contact with Gaertner, and all agreed that Brooks should be arrested. Brooks was arrested for resisting and obstructing a police officer. Later, the charges were dismissed at the volition of the prosecutor.

Brooks filed suit against all named parties above, as well as the City of Bad Axe, under 42 U.S.C. §1983, on a variety of assertions including assault and battery, false arrest and false imprisonment.

The trial court granted summary judgment to the defendant officers on the federal claims, and also dismissed the state claims without prejudice. Brooks appealed.

**ISSUE:** Is arrest appropriate when an officer is denied entry during an emergency situation?

**HOLDING:** Yes

**DISCUSSION:** The Court concluded that Brooks' claim "hinges on the legality of her arrest for resisting or obstructing Lieutenant [sic] Rothe" and as such, would be considered under the Fourth Amendment. The Court reviewed the matter under the elements of the original charge against Brooks and concluded that it was appropriate to charge her with the offense. Further, the Court agreed that the entry by Lt. Rothe was justified under exigent circumstances and Brooks was actively preventing him from making the entry.

The Court upheld the summary judgment.

## **INTERROGATION**

### **Beach v. Moore**

**2009 WL 2487357 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Beach was charged in the death of Buck, whose body was discovered hidden on December 26, 1999, in Toledo. Following the murder, the police talked to Beach four times, "each time [Beach was] making statements that increasingly showed his involvement in the events surrounding the murder." Two interviews were held with his attorney present, but with specific statements that Beach was not under arrest and was speaking voluntarily. Prior to a third interview, his attorney had arranged for a deal that depended upon Beach being successful in a polygraph, but he was not. As a result, he was offered a deal if he pled guilty to involuntary manslaughter.

Beach tried to enforce the earlier anticipated deal, but the court refused. He was tried and the statements made at the two earlier interviews was admitted. He was convicted of aggravated murder. He appealed through the Ohio courts and was denied. He sought habeas from the federal courts and was denied. He was permitted to appeal.

**ISSUE:** Is a statement in response to a plea deal offer voluntary?

**HOLDING:** Yes

**DISCUSSION:** After ruling on several procedural issues, the Court addressed Beach's argument that his statements were involuntary. The Court reviewed the circumstances, and his assertion that he was promised a plea deal. However, there was no indication that his "will was overborne," and in fact, his own attorney admitted the plea negotiations were not opened until after the two statements were made.

The Court upheld the admission of the two statements and affirmed the conviction.

**Young v. Renico**  
**2009 WL 2707379 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On February 8, 1997, Detroit police responded to a possible shooting in a city park. They found a vehicle with a flat tire and various tools arranged to change the tire. They found the driver, Young and her 15 year old son, Michael, with gunshot wounds to the head. Young was dead and Michael unconscious. A purse in the car contained \$300 in cash.

The investigation led Det. Lovier to the victim's husband, Ardra. He came to the homicide office on his own, and signed a Miranda form, acknowledged his rights. Young and Det. Smith sat in the open squad room, with other detectives working nearby. Young first gave an exculpatory statement that indicated he'd been elsewhere in the state. He acknowledged having handguns, and stated he was presently carrying one. He handed the weapon to Lovier upon request, who secured it in a desk drawer.

Smith and Lovier conferred. Smith called the hospital, and learned that Michael had been taken off life support at the request of his father and had died.

When confronted, Young confessed in detail. He provided information as to where the murder weapon had been hidden in the house, and later forensic testing confirmed that it was, in fact, the murder weapon.

Young was convicted and appealed. The Michigan state courts denied his appeal, and he took a federal habeas corpus petition. The U.S. District Court denied the petition, and Young further appealed.

**ISSUE:** Is a person who arrives voluntarily to give a statement seized?

**HOLDING:** No

**DISCUSSION:** Young argued that "his confession was the fruit of an illegal seizure." He contended "that the officers kept him in the homicide section squad room without probable cause and that they exploited this unconstitutional detention to gather more evidence against him, which prompted his confession."

The Court countered:

Young contends that he was in the custody of the homicide detectives once he reported to the office and was advised of his Miranda rights. While we have held that an officer's recitation of Miranda warnings provides some "evidence that the nature of the detention

has grown more serious," we have been careful to note that the giving of such warnings does not automatically signal the beginning of a custodial arrest.<sup>68</sup> This is so because the fundamental inquiry remains whether a reasonable person would have felt free to end the encounter with the police and go on his way. In conducting this inquiry, we should consider the fact that Detective Smith issued Miranda warnings to Young as soon as he entered the station, but we should also analyze the other circumstances surrounding the interrogation.

The Court noted that Young had spoken to an officer at about 4:30 a.m. and agreed to come to the homicide office and that he chose the time of his arrival (about noon). He was not threatened in any way. Although he was given Miranda warnings, he was not handcuffed or restrained, and was questioned in the middle of an open office area. The Court agreed that the reading of Miranda "did not transform his voluntary arrival at the police station into a custodial arrest."

Young also argued that he was seized when the officers "confiscated his handgun, which he possessed under a valid concealed-carry permit." The Court noted, however, that he was not told that the officers were going to keep the gun as evidence or not return it to him when he left. Even though Det. Smith later testified that he planned to keep the gun and test it, and that it was not the usual policy to seize a lawfully-owned weapon, that was not the issue. All that mattered was Young's perception, "not what the officers' subjective intentions were."<sup>69</sup>

"Finally, Young contends (and we agree) that he was in custody once Detective Smith told him that he "would not walk out of there" because his initial statement was "bullshit." But, the Court agreed, at that point the officers had sufficient probable cause to detain Young, anyway.

The Court affirmed Young's conviction.

## **42 U.S.C. §1983 - MEDICAL NEED**

**Harris v. City of Circleville**  
583 F.3d 356 (6<sup>th</sup> Cir. 2009)

**FACTS:** On April 3, 2004, Trooper McManes (Ohio State Highway Patrol) stopped Harris for speeding. Harris's fiancée was following. McManes believed that Harris might be intoxicated, but after testing, decided that she was not going to charge him with DUI. Harris sat in his fiancée's car while waiting for the ticket.

Another trooper arrived, Cooper, and told Harris that he was going to be arrested for DUI, and further, that there was a warrant out for him. Harris later admitted to being upset and cursing. Trooper McManes handcuffed Harris and took him to the Circleville City Jail. There, officers Williams, Roar and Gaines were on duty. They started the booking process and one of the officers yanked at Harris's neck chain. He was taken to the ground, lifted and walked backward into the booking area again. (Some of the events were caught on surveillance tape.) He was told by one officer to kneel, but he could not do so because he was handcuffed and one of the officers "was pulling his arms up behind him." The officers then "used a

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<sup>68</sup> Obasa, 15 F.3d at 608; see also State v. Damon, 570 A.2d 700, 705-06 (Conn. 1990) ("[T]he issuance of Miranda warnings as a cautionary measure does not mean that the defendant had been arrested.").

<sup>69</sup> U.S. v. Mendenhall, 446 U.S. 544 (1980)

'takedown' maneuver," with one officer striking him in the back of the knee and another apparently using a baton to the side of his leg. (The opinion noted that Harris did not appear to be resisting on the tape.) Harris later stated he heard popping sounds and started screaming that they broke his neck. He also told them to quit shocking him, but the officers told him he wasn't being shocked. He did not respond to their commands to get up and they eventually stripped him to his underwear and dragged him into the cell. He was still yelling that he could not move and was in pain. At some point, Trooper McManes stopped by the cell and read a form to him.

One of the civilian employees later testified that Harris's screams could be heard as far as the communication center. Finally, another officer checked on him, contacted the sergeant and EMS was called, over an hour after Harris was booked. Harris was discovered to have a spinal cord injury, aggravated by a congenital defect of his spine. Harris filed suit, alleged that the city and the officers used excessive force and were deliberately indifferent to his medical needs. The defendants requested summary judgment, which the trial court denied, finding first that the force could be found, by a jury, to be "not objectively reasonable," and further that a layperson would have realized Harris needed medical care. The judge did give summary judgment to the City of Circleville, however.

The officers filed an interlocutory appeal.

**ISSUE:** Is an officer expected to recognize and act upon a serious medical need of a prisoner?

**HOLDING:** Yes

**DISCUSSION:** First, with respect to the excessive force claim, the Court found that the officers were "not entitled to qualified immunity because [it] conclude[d] that the facts taken in a light most favorable to Harris are sufficient to establish a violation of Harris's constitutional rights under either standard."

The Court continued:

Applying a Fourth Amendment analysis to Harris's excessive force claims, it is clear that the facts, taken in a light most favorable to Harris, are sufficient to establish a violation of his constitutional rights. The "objective reasonableness standard" depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene.<sup>70</sup>). Relevant considerations in determining the reasonableness of force used are: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of the police officers or others; and 3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.<sup>71</sup>

In assessing the reasonableness of the Officers' actions, we analyze the events in segments. There are three segments: 1) the initial incident in Cell No. 3; 2) the takedown maneuver in the booking area; and 3) the kicking incident in Cell No. 3. Considering the relevant factors, with respect to each of these three segments, Harris's version of the events supports a holding that Defendants violated Harris's Fourth Amendment right to be free from excessive force.

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<sup>70</sup> Dunn v. Matatall, 549 F.3d 348, 353 (6th Cir. 2008)

<sup>71</sup> Id. (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

Under Harris's version of the facts, in the first segment, the Officers began the booking process by attempting to take Harris's jewelry and belt from him. When one of the Officers yanked at a necklace he was wearing using a ball point pen, Harris said, "Man, you don't even have to do that" and stepped back. The Officer then kicked Harris's leg out from under him and pushed him in the back, causing him to fall and hit his head. The Officers said nothing to Harris before taking him to the ground.

In the second segment, as the three Officers were walking Harris back into the booking area he was still handcuffed and one of the Officers was lifting up on his hands behind his back. There was an officer on each side of Harris when Officer Williams instructed Harris to "kneel down." Harris could not comply with the instruction, however, because he was handcuffed and one of the officers was pulling his arms up behind him. When Harris did not comply with the instructions to kneel, the Officers used a "takedown" maneuver to get Harris down on the floor. Officer Gaines, who was behind Harris at the time, struck Harris in the back of the knee, in an attempt to get his knee to buckle. Officer Roar administered two peroneal strikes to the left side of Harris's leg. Harris testified that the strikes by the officers caused all three of them to go down on the ground, that he felt knees striking his back, that his arms were being pushed up by both officers over his head.

In the third and final segment, after the Officers had ignored Harris's cries for help and left him on the floor of Cell No. 3, one of the Officers entered the cell. Rather than respond to Harris's cries for help, that Officer told Harris to get up. When Harris responded that he could not move, that Officer kicked Harris in the ribs and said "Looks like we got us a broke nigger here."

We conclude that the Graham factors weigh against the Officers. Harris was accused of "speeding, DUI and failing to appear in mayor's court." Relatively speaking, these are not particularly serious crimes and none of them involve violence. In addition, Harris did not pose an immediate threat to the Officers or anyone else at the Circleville City Jail.

It is undisputed that Harris was handcuffed during each of the incidents in question. During the first segment he was surrounded by the three Officers and during the second segment he was surrounded by the Officers *and* Troopers McManes and Cooper. Indeed, the Officers testified that they did not feel threatened by Harris or that they were in any imminent danger from him. Finally, under Harris's version of the facts, he did not actively resist at any time.

The Court agreed that a constitutional violation did, apparently occur, and further, that a "clearly established legal norm precluding the use of violent physical force against a criminal suspect who has already been subdued and does not present a danger to himself or others" was clearly prohibited.

The Court upheld the denial with respect to the excessive force claims.

With respect to the medical issue, The Court noted that a "medical need is objectively serious where a plaintiff's claims arise from an injury or illness 'so obvious that even a layperson would easily recognize the

necessity for a doctor's attention."<sup>72</sup> The Court agreed that was clearly the case in this situation, and specifically, that his statements about being shocked warranted further investigation. At least two of the officers admitted realizing that there Harris was claiming symptoms consistent with a serious injury, and at least one stated that he assumed another officer was arranging for it. As such, the officers "were aware of facts from which the inference could be drawn that a sufficiently serious medical need existed, and that they drew that inference." The right to medical treatment was clearly established.<sup>73</sup>

The Court upheld the denial of summary judgment with respect to the medical needs claim, as well.

Finally, Harris argued that the actions were taken out of racial animus, and given the evidence presented (including specific statements regarding his African-American race), the Court agreed that claim could also move forward.

## 42 U.S.C. §1983 - FAILURE TO TRAIN

Howard v. City of Girard, Ohio and John Does 1-4  
2009 WL 2998216 (6<sup>th</sup> Cir. 2009)

**FACTS:** Howard, then 17, called 911 because he could not contact his father for several days. He shared an apartment with his father but could not gain access and had slept in the hallway. Emergency personnel forced entry into the apartment, but did not keep Howard out. His father was found lying naked, with a self-inflicted gunshot wound. An emergency crew transported his father who died at the hospital.

Howard sued the city and the emergency responders (for whom he did not have names) under 42 U.S.C. §1983 "for failing to limit Howard's access to the apartment until the crew first surveyed the interior of the apartment." He claimed that their actions caused his "severe psychic injury." He also claimed the city failed to train its employees properly. The Court dismissed the federal action and refused to exercise jurisdiction over the state claims of negligence.

Howard appealed.

**ISSUE:** Is permitting a relative to view the body of a subject improper?

**HOLDING:** No

**DISCUSSION:** First, the Court noted:

To prevail on a claim against the city under §1983, plaintiff must establish both: (1) the deprivation of a constitutional right, and (2) the city's responsibility for that violation. Or, in the words of the district court, "[f]or a municipality to be held liable for a constitutional violation, a plaintiff must show an actual constitutional violation for which the municipality is responsible.

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<sup>72</sup> Blackmore v. Kalamazoo County, 390 F.3d 890 (6<sup>th</sup> Cir. 2004).

<sup>73</sup> Fitzke v. Shappell, 468 F.2d 1072 (6<sup>th</sup> Cir. 1972).

The Court noted that the Due Process Clause of the Fourteenth Amendment “does not generally require a municipality to protect an individual from harm by third parties.”<sup>74</sup>

However:

There is an exception, however, for “state-created danger.” We have held that the “state-created-danger theory of due process liability” has three requirements: (1) an affirmative act by the state that creates or increases the risk that an individual will be exposed to private acts of violence, (2) a special danger to the victim as opposed to the public at large, and (3) the requisite degree of state culpability.<sup>75</sup> Although they raised several arguments below, plaintiff’s sole argument on appeal relates to the district court’s analysis of the third McQueen prong.<sup>3</sup> The district court held that defendants could not be held liable unless they acted with “deliberate indifference,” meaning in this context that “[t]he state must have known or clearly should have known that its actions specifically endangered an individual.”<sup>76</sup> The district court concluded that plaintiff failed to allege sufficient facts to support his amended complaint because he did not allege that Girard, or its employees, acted with anything but recklessness.

The Court found that Howard did not meet the standard for a federal case and affirmed the federal court’s decision. (This leaves open the possibility of further state action for negligence, however.)

## **42 U.S.C. §1983 - SHERIFF**

### **Dever v. Kelley**

**2009 WL 2998216 (6<sup>th</sup> Circ. 2009)**

**FACTS:** After several years of negotiation and sharing control of a company (APC) with Clark, the owners (the Devers) “decided to take control of APC away from Clark.” “Fred (Clark) called the sheriff’s office for assistance in removing Clark, but the deputies declined to intervene absent a court order.” Dever then changed the locks, which kept Clark out. When Clark persisted in returning, an employee called the Sheriff’s office. The deputies excluded him from the premises. Litigation between the Devers and Clark ensued.

The Court issued a preliminary order, finding a reasonable probability that Clark would be successful in forcing the sale in further litigation. Clark was required to post a bond, but was given control over the company.

The next morning, on December 13, at 5:30 a.m., “Clark called the ... Sheriff’s Office for assistance enforcing the preliminary injunction.” Deputies met Clark and they proceeded to APC. Dever was already present. The deputies knocked and Dever unlocked and opened the door. Dep. Reed “‘threw’ a copy of the preliminary injunction on Fred’s desk and stated that it gave possession of APC to Clark.” Dever replied that he (and his wife) had “filed a motion for a stay and an appeal, both of which were pending.” The deputies refused to look at the paperwork to that effect, and refused to speak to Dever’s attorney on

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<sup>74</sup> See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).

<sup>75</sup> McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 464 (6th Cir. 2006).

<sup>76</sup> Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

the phone. One the deputies later admitted he probably told Dever to get his belongings and get out (in slightly less polite terms). Clark disputed that some of the items did, in fact, belong to Dever, and Dever was ordered to leave the items. Dever left under escort.

A stay was ordered on December 22, and Dever sought the assistance of the sheriff to enforce the order, but the sheriff's office refused to become involved. Clark filed for bankruptcy on the part of APC, and that "stayed the stay." After further litigation, the Dever's finally regained control some six weeks later but by that time, little remained of the business.

On Dec. 12, 2006, the Devers filed suit against Clark and Sheriff Kelly (along with the deputies directly involved). The Sheriff moved for summary judgment, which was granted. The Devers appealed.

**ISSUE:** May law enforcement officers refuse to uphold a valid order?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that the Devers had to prove that the Sheriff and his deputies acted under color of law and that their conduct "deprived them of rights secured by federal law." The parties stipulated to the first, leaving only the second prong for discussion.

The Court stated that although the issues were "hotly contested," that on the date in question, the preliminary injunction was still in effect. Dever's presence on the property was unlawful on that date. If they believed the order was improper, their recourse was to appeal it, not disobey it. As such, Dever had no expectation of privacy to be violated that morning, so "no search" occurred within the meaning of the Fourth Amendment and the Devers have not presented evidence from which a rational trier of fact could find a violation of their right to be free from an unreasonable search."

The Court upheld the summary judgment in favor of the Sheriff.

## **42 U.S.C. §1983 - FALSE ARREST**

**Noy, Estes, Rhodes v. Travis**  
6<sup>th</sup> Cir. 2009

**FACTS:** On June 10, 2001, Noy noticed a change in her 2-year old daughter's behavior. She took her to her doctor, who noted that he did not believe the child had been abused but could not "conclusively rule" it out. Several days later she took her to another doctor and then to an emergency room. The ER doctor told her too much time had passed for any physical evidence to be found. During that time frame, Noy and her mother, Estes, made a videotape of the child's genitalia to document the suspected abuse. She did the same to her other daughter, who would have been an infant at the time of the suspected abuse. Prior to going to the ER, she took the tapes to the Pike County (Ohio) Sheriff's Office as she suspected the child had been sexually abused by her father, Rhodes.

On Jun 15, 2001, Noy was interviewed by a deputy sheriff, and on June 27, Dep. Travis took out a criminal complaint against Noy and Estes charging them with endangering the child. Both were indicted about two

months later, and promptly went to trial. Noy was acquitted at trial and the charges against Estes were dropped.

Noy and Estes filed suit against all parties, including a claim on behalf of the two children for being deprived of their mother and grandmother for a period of time. The trial court gave the defendants summary judgment and Noy and Estes appealed.

**ISSUE:** Does an acquittal in a criminal charge mean there was no probable cause?

**HOLDING:** No

**DISCUSSION:** First, the Court noted, the "right to be free from an arrest lacking in probable cause is clearly established."<sup>77</sup> However, "the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest."<sup>78</sup> The Court agreed that the "graphic videotape of [Noy] examining her naked children," was enough to satisfy the standard of objective reasonableness for the arrest.

The summary judgment was affirmed.

## 42 U.S.C. §1983 - USE OF FORCE

### Smoak v. Hall and Bush

2009 WL 2778101 (6<sup>th</sup> Cir. 2009)

**FACTS:** On January 1, 2003, the Smoaks (Pamela and James) and Pamela's teenage son, Brandon were traveling home to North Carolina from a holiday visit to Nashville. At a stop, James accidentally left his wallet on the roof of the car and drove off.

Within moments, a caller reported that a car drove past her at a high rate of speed and there "there was money flying all over the interstate." Tennessee Highway Patrol officers met the caller to recover the money, which was later discovered to be \$445 in currency. Troopers were dispatched to the Cookeville area to look for the vehicle. Dispatch originally believed a robbery had occurred, but the dispatcher (Pickard) agreed that some time later, after they confirmed the amount of the cash and the discovery of the wallet, that he no longer believed that to be the case. However, "Pickard did not relay this information to the other dispatchers until after the Smoak's station wagon had been stopped."

Several BOLOs were put out, some stating that the vehicle "was possibly involved in a robbery." Trooper Bush (THP) spotted the vehicle and followed it for 8 miles, during which time it committed no traffic infractions. He confirmed that the vehicle registration matched the ID found with the cash. He was told to stop the car, although there was confusion about who called for back-up for the stop. (In fact, back-up was requested, both from THP and from nearby Cookeville officers. Specifically, one dispatcher stated that "we're fixing to have a *felony stop* on a vehicle . . . possible *armed* robbery out of Nashville."

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<sup>77</sup> Estate of Dietrich v. Burrows, 167 F3d 1007 (6<sup>th</sup> Cir. 1999).

<sup>78</sup> Michigan v. Defillippo, 443 U.S. 31 (1979).

Two THP troopers and two Cookeville officers made the stop. Most of the ensuing events were recorded by Bush's video camera.

Once the station wagon pulled over, neither the THP troopers nor the Cookeville officers approached the car. Instead, Bush called to the "driver" over the loudspeaker, and instructed him to exit the vehicle, place his hands in the air, walk backwards around the car, and finally, to get on his knees with his hands laced behind his back. Trooper Bush did the same for the two passengers — first Pamela Smoak and then her son Brandon. Only after the Smoaks were kneeling on the ground did the troopers approach and, somewhat frantically, apply handcuffs, while the obviously confused and increasingly agitated Smoaks demanded to know why they had been stopped.

As the Smoaks knelt on the pavement and troopers applied the handcuffs, the two Cookeville officers — one wielding an assault rifle and the other a shotgun — prowled a few feet away, their raised guns tight against their shoulders and trained on the Smoaks. Although this gesture was superficially menacing and surely intended as an intimidating show of force, the way these two officers paced and shuffled behind the troopers, wavering guns gripped white-knuckled in their hands, exhibits such nervousness and fear that, even on video, the tension is palpable and the ensuing events are almost predictable. It is also worth noting that, prior to trial, the troopers testified that pointing a gun at a suspect, absent the justification for deadly force, is a significant departure from customary professional police practices, and that the correct position of an officer's gun is in the "down ready" position until deadly force is warranted. Nothing in this record provides a justification for deadly force, and this was *not* the "down ready" position.

Meanwhile, handcuffed on the side of the highway and still wholly uninformed about why they had been stopped, the Smoaks asked the troopers several times to "please shut the door[s]" of the station wagon so that their dogs would not escape from the car onto the highway. The troopers ignored these requests. When Mrs. Smoak's son, Brandon, asked Trooper Phann if he could close the passenger-side door, Phann ordered him not to move. Lieutenant Andrews approached the driver's side of the car, determined that there were no other passengers, and closed the driver-side door. At this point, Mrs. Smoak can be heard clearly, saying: "My dog is not mean, he will not hurt you."

While Phann was handcuffing Brandon, the Smoak's one-year-old bulldog/bull terrier mix, General Patton, jumped from the still-open passenger-side door and — with ears up and tail wagging — bounded through the tall grass alongside the highway. According to the Smoaks, the dog was headed toward James Smoak, but Eric Hall, the Cookeville police officer with the shotgun, moved to intercept; according to Hall, however, the dog was pursuing him and he was retreating in fear. Either way, Hall back-peddled in a slight semi-circle, toward the handcuffed, prone, and now shouting Smoaks, with the excited dog following (tail wagging vigorously). Then, directly in front of the camera, when the dog had almost reached Hall, Hall stopped, leaned down with the shotgun and — with the gun's muzzle almost touching the dog's face — fired. The dog's head exploded in a mist of blood, bone, and brain, and its lifeless body dropped from the camera's view.

James and Pamela Smoak both jumped to their feet, James wailing "You shot my dog, you shot my dog," and Pamela screaming and crying "Why did you do that?" Trooper Phann still had hold of Brandon and had not allowed him to his feet. While Pamela stood screaming, Lt. Andrews and Trooper Bush grabbed the still-handcuffed and now grief-stricken and sobbing James Smoak and drove him to the ground, the weight of all three men landing on James's left knee. With James face-down on the ground, the two troopers knelt over him and Lt. Andrews knelt on his head, pinning it to the ground. James ultimately needed surgery to repair the damage to his knee.

Meanwhile, the Cookeville officers turned their guns on Pamela Smoak and ordered her to get back down on her knees, which she did without further violence on the part of the officers. The troopers put the Smoaks into separate patrol cars, after which Bush and Hall can be seen on the videotape grinning and laughing. At 5:23 p.m., Bush advised dispatcher Brock that the Smoaks were in custody and Brock should "ask Nashville the charges." Brock replied that no robberies had been reported and that James Smoak was not wanted for any crimes. At that point, Andrews and Bush determined that a mistake had been made, but the last of the handcuffs was not taken off for another 10 minutes.

The entire incident lasted 29 minutes, even though the THP troopers knew within the first 20 minutes that the Smoaks were innocent of any wrongdoing. After the Smoaks drove off, the videotape records Bush lamenting that "I wish I had never stopped that f...ing car." It is perhaps telling, however, that far from showing remorse, Bush later testified that he would have conducted the same stop even without the information concerning a possible robbery because a report of a speeding car with a wallet and money coming out of it might indicate a car-jacking. Andrews and Phann, on the other hand, testified that they would not have conducted a felony stop had they had all the facts known to the dispatchers at the time. Pickard had actually joked with another dispatcher that someone had probably lost all his money, which reminded him of something his kids would do.

The Smoaks sued all parties involved, and also sued under Tennessee law. They settled with all of the Cookeville defendants, including the officer who actually shot the dog. The THP defendants moved for summary judgment. The trial court denied their qualified immunity motion, and the THP defendants appealed. When their interlocutory appeal was denied, the case was sent back for trial.

At a jury trial, on only claims against Lt. Andrews and Trooper Bush, the jury "concluded that Andrews had not used excessive force on James Smoak and had not injured him, but that Bush had." Smoak was awarded a little over \$200,000 in damages. Bush appealed.

**ISSUE:** Is an officer who uses clearly excessive force entitled to qualified immunity?

**HOLDING:** No

**DISCUSSION:** Bush argued that the District Court erred by not giving him qualified immunity. The Court stated that Bush's argument was "that he could not have known that it would be improper to take hold of a man whose hands are bound behind his back and, using the full weight of his body, drive that defenseless man to the pavement." The Court, however, noted that:

"The law is . . . clear that force can easily be excessive if the suspect is compliant."<sup>79</sup>  
"There is no government interest in striking someone who is neither resisting nor trying to flee."<sup>80</sup> We do not hesitate to say that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation [Bush] confronted."<sup>81</sup> Hence, it was clearly established that the force Bush used was excessive.

The Court agreed, however, that if the officers were reasonably mistaken, that the force could have been excused and continued:

Bush contends that he deemed this level of violence necessary at the time because Smoak was "noncompliant," though he concedes that Smoak's only "noncompliant act" was his visceral reaction to Officer Hall's horrifying shotgun blast to the dog's head — Smoak stood up when he had been ordered to kneel. But, in the totality of the encounter, Smoak had been fully compliant. Bush signaled Smoak to pull over, which Smoak did. Rather than approach the driver's side window to speak with Smoak — as every driver knows is customary in a traffic stop — Bush shouted to Smoak over the loudspeaker, ordering him first to throw his keys out the window onto the highway; then to exit the car with his hands over his head and walk backwards to the rear of the car; and then to kneel down on the pavement. Smoak complied promptly with every instruction. As ordered, Smoak knelt there with his hands behind his back while Bush ordered Smoak's wife and step-son to exit the car and kneel on the pavement, hands up. Bush never explained to these hapless travelers why he had stopped them or why they were being thus treated, but Smoak nonetheless complied with every instruction. As the family knelt on the side of the highway — the Cookeville officers' guns trained on them — Smoak complied while the troopers secured his hands behind his back, handcuffed his wife and step-son, and looked in his car. Up to this point, Smoak was remarkably compliant — in fact, commendably so.

When Hall shot the dog, Smoak stood up, crying out, "You shot my dog, you shot my dog!" Despite the fact that both Bush and Andrews had hold of the handcuffed Smoak, that Trooper Phann had hold of Smoak's step-son, Brandon, and that the two Cookeville officers had guns at the ready, Bush contends that he thought it was necessary to slam Smoak to the ground, i.e., that this use of force was, at most, a reasonable mistake. We disagree. Having reviewed the evidence, including the video, we find this use of force clearly unreasonable. Bush has not established that he was entitled to qualified immunity.

The Court affirmed the denial of qualified immunity and allowed the case to proceed.

*NOTE: The in-car video for this case is available through the Internet, contact the Legal Section for details.*

**Jones v. Garcia & Miller**  
**2009 WL 3109826 (6<sup>th</sup> Cir. 2009)**

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<sup>79</sup> Wysong v. City of Heath, 260 F. App'x 848, 855 (6th Cir. 2008) (citing Champion v. Outlook Nashville, Inc. 380 F.3d 893 (6th Cir. 2004)).

<sup>80</sup> *Id.* (citing Smoak I, 460 F.3d at 784, and McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988)).

<sup>81</sup> Saucier v. Katz, 533 U.S. 194, 202 (2001).

**FACTS:** On April 14, 2004, Pontiac (Michigan) police saw Jones breaking into parked cars. Jones fled, but “eventually stopped” and when ordered “agreed to lay face down on the ground.” He told Officer Miller “that he had previously injured his right shoulder and asked to be picked up by the left arm.” However, he claimed, “Officer Miller ‘snatched’ him up by the right arm,” causing his shoulder to dislocate. Officer Miller stated that he “rolled [Jones] to the side and helped him get to one knee,” and to get up. Both Officers denied that Jones cried out in pain or that there was an audible “pop” as Jones claimed.

Jones spend the night in jail. He complained the next morning to the officer on duty of pain. He was taken to the hospital and treated for a dislocated shoulder. He had surgery the next year on the shoulder. (He did plead guilty to the crime for which he was originally stopped.)

Jones filed suit against the officers under 42 U.S.C. §1983. The claims of excessive force on the part of Garcia was withdrawn. (He attempted to amend his claim to add another against Garcia, but that was denied.) The U.S. District Court gave summary judgment, and Jones appealed.

**ISSUE:** Is an officer entitled to qualified immunity when a subject alleges (and proves injury) for an excessive use of force?

**HOLDING:** No

**DISCUSSION:** The Court began:

The Fourth Amendment prevents law enforcement from using objectively unreasonable applications of force in the course of making an arrest.<sup>82</sup> The question here is not whether that right is clearly established; all agree that it is. The question is whether Officer Miller violated the prohibition—or at least whether there is a material issue of fact that he did. Viewed in the light most favorable to Jones, the evidence supports a plausible theory of excessive force to present to the jury.

The Court summarized:

Before Officer Miller’s alleged use of excessive force, according to Jones, he had stopped running from the police, had complied with their orders by laying face down on the ground, was handcuffed behind his back and had warned the police of his pre-existing shoulder injury. At that point, Officer Miller had no justification for “snatch[ing]” Jones and hauling him from prone to standing by his injured arm.<sup>83</sup> If allegations of “excessively forceful handcuffing,”<sup>84</sup> create triable issues of fact over excessive force, so does “snatch[ing]” a

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<sup>82</sup> See Graham v. Connor, 490 U.S. 386, 388 (1989).

<sup>83</sup> ROA 62; see McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988) (need for force is “nonexistent” when suspect is handcuffed and “not trying to escape or hurt anyone”).

<sup>84</sup> Kostrzewa v. City of Troy, 247 F.3d 633, 641 (6th Cir. 2001) (quotation marks omitted), and twisting a suspect’s limb to turn him over, Grawey v. Drury, 567 F.3d 302, 315 (6th Cir. 2009),

suspect by his injured arm (and shoulder) and taking him from a prone to standing position in one motion.<sup>85</sup>

The Court noted that this was not a case “where the suspect merely registered subjective complaints of pain.”<sup>86</sup> “After the incident, Jones had a dislocated shoulder, which could show that the injury arose from more than the inevitable force needed to make an arrest.” The officers countered that a single officer could not have lifted Jones (who weighted 220 pounds) by just the one hand, as only a “superhuman” officer could do so. The Sixth Circuit, however, noted that it would not require the officer to, in effect, dead lift Jones to his feet, but instead, would require Miller to maneuver Jones’s “torso and upper body, not his whole body.”

The officers also claimed that Jones contradicted himself in the original description of the incident, stating:

I told him I had a bad shoulder; I had an accident a couple of years ago. And besides, you know, rolling me over, you know, in the sitting position and then standing me up, he just snatched me up while I was laying on my stomach, and that’s when the injury occurred.

The Court agreed that his first statement was not the “picture of clarity” but that it did not actually contradict his claim. It was, at best, ambiguous.

The Court found sufficient cause to allow the case to go forward for further discovery and reversed the decision of the trial court. The Court did, however, affirm the dismissal of Officer Garcia from the case, as the primary allegation, of excessive force, was only against Miller. Jones’s tardy attempt to add Garcia under claim was denied.

## **EMPLOYMENT – FMLA**

### **Mitchell v. County of Wayne (Michigan)** 2009 WL 2192283 (6<sup>th</sup> Cir. 2009)

**FACTS:** During the time in question, Mitchell worked for the Wayne County Sheriff, on the day shift. On February 22, 2005, Mitchell was told he must take a “random drug test” the following day. (He had taken several such tests during his time with the sheriff’s office.) Later that night, Mitchell fell and injured his back. He called the sheriff’s office the next morning, at about 520 a.m., and he alleged, told that person who answered that he had a test scheduled for that day and would not be able to be there. (It was unclear whether he stated, specifically, that it was a drug test.) Mitchell did not go to a medical doctor or the ER for his injury, but did visit a chiropractor. He took no prescription medication.

While at the chiropractor, Mitchell filled out FMLA paperwork and it was faxed to the Sheriff’s Office. He requested three weeks of leave, at the direction of the chiropractor. He later confirmed they had received the paperwork, but did not mention to the personnel officer that he had missed the drug test. (He had taken two other periods of FMLA leave while working for the Sheriff’s Office.)

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<sup>85</sup>Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993) (“An excessive use of force claim could be premised on [the officer’s] handcuffing [the suspect] if he knew that she had an injured arm and if he believed that she posed no threat to him.”) superseded by statute on other grounds as recognized in Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007).

<sup>86</sup> Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005); Neague v. Cynkar, 258 F.3d 504 (6th Cir. 2001).

Over the next week, he called the Sheriff's Office every morning, to "advise that he was still on leave." On March 1, he called again, and asked Sgt. Boisvert if he needed to keep doing so, and also mentioned the missed drug test. He was told that he didn't need to keep calling in. On March 7, Commander Kreyger called him, revoked his police powers and wrote him up for missing the test. On March 14, he submitted paperwork for additional FMLA leave, until March 23.

On March 24, he went to personnel to provide notice that he was ready to return to work. He was told he was not approved to do so, and the next day, was summoned to Commander Kreyger's office. He was suspended for failure to appear for the test. He had 24 hours to respond, and he wrote a short memo explaining what had occurred.

At the subsequent hearing, he was told that "it just looks suspicious." He was told that he could return to work with an agreement that he was subject to random testing for the next year, to which he agreed. He was also told that "if he returned to work, [they] could place him on any shift ... regardless of his seniority rights." He refused to agree and was fired.

Mitchell filed suit. At trial, the two commanding officers denied that they told Mitchell that his schedule was subject to change. Two witnesses testified that the county "did not have a written policy instructing what to do in the event that they had to miss a drug test," that "he would not have believed that the failure to appear for a drug test due to injury would have constituted 'a refusal' to take the test." Both did state, however, that if the person could physically notify that he could not appear for a test, but did not do so, that the failure could be a refusal.

The jury found in favor of the county, and Mitchell appealed.

**ISSUE:** May a jury accept another, legitimate reason for a termination in a FMLA case?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the provisions of FMLA. The Court agreed that it was reasonable for the jury to find Mitchell's claim that he had told "someone" that he missed a test incredible, and that he also ignored several opportunities to specifically tell supervisors that he had missed a drug test. It was also reasonable for the jury to believe Commander Kreyger's claim that the reason for the termination was the failure to follow the order, rather than his use of FMLA.

The Court upheld the jury verdict.

## **EMPLOYMENT - SHERIFFS**

**Harris v. Butler County, Ohio (and Sheriff Jones)**  
**2009 WL 2628501 (6<sup>th</sup> Cir. 2009)**

**FACTS;** Harris was initially hired as a Butler County deputy sheriff in 1999. Apart from a brief 4-month absence, he worked for the sheriff's office through January, 2006.

Sheriff Jones took office in January, 2005. Harris was sworn in but did not received a special commission that would have permitted him to carry a gun and work off-duty jobs.<sup>87</sup> When he was able to ask Jones about it, he allegedly was told that it was because he campaigned for another candidate. Harris denied it, but agreed that he had held one fundraiser for another candidate that was held at his church. Harris did received the commission several days later. During that same time frame, Harris allegedly associated with a female ex-prisoner, in violation of agency policy. Harris was called in and told that he could either resign or be terminated. Harris chose to resign.

Harris filed suit for unlawful termination, and the trial court gave summary judgment to the Sheriff's office. Harris then appealed.

**ISSUE:** May a deputy be terminated for an action in violation of a sheriff's office policy (when it is alleged that the termination is also for their political activity against the sheriff)?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that:

A plaintiff must establish three elements for a claim of employment-based retaliation: first, that the employee 'engaged in protected conduct'; second, that 'an adverse action was taken against the [employee] that would deter a person of ordinary firmness from continuing to engage in the conduct'; and third, that 'the adverse action was motivated at least in part of the [employee's] protected conduct'<sup>88</sup> Only if the plaintiff makes meets all three prongs will the burden shift to the employer to show that he would have made the same decision in the absence of the protected conduct to be entitled to prevail on summary judgment.

The Court agreed that the "right of political association is well established as falling within the core of activities protected by the First Amendment."<sup>89</sup> The evidence before the court suggested that Harris had engaged in political activity adverse to Jones and thus satisfied the first prong of the analysis. Second, the Court reviewed whether Harris was materially affected by Jones - and the Court concluded that the brief delay (10 days) in getting the special commission did not materially affect Harris. With respect to the "effective termination," a forced resignation, the Court found that it was unnecessary to explore that issue because Harris failed to meet the third prong. The Court found there was insufficient causal connection between the resignation and his "lack of political support for Sheriff Jones." Harris admitted "violating the associations policy and knew that a violation of the associations policy would result in termination."

The Court upheld the summary judgment in favor of the Sheriff.

## **EMPLOYMENT - USERRA**

### **Hance v. Norfolk Southern**

**6<sup>th</sup> Cir. 2009**

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<sup>87</sup> In Ohio, some deputies work only the jail, and do not necessarily have permission to carry a firearm.

<sup>88</sup> Thaddeus-X v. Blatter, 175 F.3d 378 (6<sup>th</sup> Cir. 1999).

<sup>89</sup> Sowards v. Loudon County, 203 F.3d 426 (6<sup>th</sup> Cir. 2000).

**FACTS:** Hance was an employee of the Norfolk Southern. He was terminated by the railroad and asserted it was because of his responsibilities to the Tennessee National Guard (TNG). During his time with the railroad, he was transferred. He was eventually released for having an “unacceptable work record,” although he had never been disciplined. During the appeal process, he was told that one of the supervisors (who were named in the lawsuit) “was upset with Hance because Hance was off too much time from work with military service.” Hance was brought back to the railroad. When he reported, he brought with him a member of the TNG, who explained that Hance was due to report for summer drill two days later. The meeting was hostile, and eventually, the TNG Master Sergeant was forced to leave. The supervisor ordered Hance to report to another location (in another state) the day following his scheduled return for possible work, but he was not guaranteed work there. Hance reported the situation to a railroad executive and was told he didn’t have to follow that order. As a result, he did not report. Hance also stated that he was actually ineligible to work at that time, as he had not yet had a required medical examination. (The railroad disputes this, stating that he was still required to report.)

Hance was charged with insubordination and terminated. Hance appealed to the U.S. District Court, which found that although his termination was not based on his military service or status alone, it was a motivating factor and that he thus made a prima facie case of discrimination under USERRA. He was ordered to be reinstated and awarded damages of approximately \$350,000. The railroad appealed.

**ISSUE:** Is adverse employment action prohibited if the employee’s military status is a motivating factor in the decision, albeit not the only factor?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the provisions of USERRA and noted that “adverse employment actions are prohibited” if a subject’s military service is a motivating factor, unless the employer can prove that the action would have been taken anyway.<sup>90</sup> The railroad argued that Webster lacked the authority to investigate or terminate Hance, and thus his “anti-military animus cannot be imputed to the company.” The Court noted, however, that Webster was not the only NS supervisor that indicated concern about Hance’s deployments, and one of those individuals did make the decision to terminate Hance. The Court agreed it was proper to attribute the animus to the company.

The Court agreed that the railroad had “failed to demonstrate a valid nondiscriminatory basis for Hance’s dismissal,” and upheld the decision.

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<sup>90</sup> 38 U.S.C. §4311(c)(1).