

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2012  
EDITION



*Leadership is a behavior, not a position*

POLICE EXECUTIVE COMMAND  
COURSE

CASE LAW UPDATES

KENTUCKY COURT OF APPEALS – KENTUCKY SUPREME COURT  
SIXTH CIRCUIT COURT OF APPEALS  
U.S. SUPREME COURT 2011-12 TERM



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





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## Advanced Individual Training and Leadership Branch

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

[JamesR.Brown@ky.gov](mailto:JamesR.Brown@ky.gov)

### Legal Training Section

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

859-622-3801  
[docjt.legal@ky.gov](mailto:docjt.legal@ky.gov)

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

[Gerald.Ross@ky.gov](mailto:Gerald.Ross@ky.gov)

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

[Carissa.Brown@ky.gov](mailto:Carissa.Brown@ky.gov)

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

[Kelley.Calk@ky.gov](mailto:Kelley.Calk@ky.gov)

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

[Tom.Fitzgerald@ky.gov](mailto:Tom.Fitzgerald@ky.gov)

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

[Shawn.Herron@ky.gov](mailto:Shawn.Herron@ky.gov)

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

[Kevin.McBride@ky.gov](mailto:Kevin.McBride@ky.gov)

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

[Mike.Schwendeman@ky.gov](mailto:Mike.Schwendeman@ky.gov)

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**The case law summaries in this book have been edited from the summaries available on the Department of Criminal Justice website. For additional cases, and other useful links and documents, please go to the website at <http://docjt.ky.gov/legal/>.**

## TABLE OF CONTENTS BY TOPIC

|  |    |  |     |
|--|----|--|-----|
| <b>KENTUCKY</b>                                |    | CIVIL LITIGATION                           | 84  |
| PENAL CODE (in order<br>of statute referenced) | 1  | MISCELLANEOUS                              | 88  |
| <b>DOMESTIC VIOLENCE/<br/>FAMILY ISSUE</b>     |    | <b>SIXTH CIRCUIT</b>                       |     |
|  | 11 | ARREST                                     | 89  |
| ADULT ABUSE                                    | 14 | SEARCH & SEIZURE                           | 90  |
| DRIVING UNDER THE<br>INFLUENCE                 | 15 | 42 U.S.C. §1983                            | 115 |
| CONTROLLED<br>SUBSTANCES                       | 17 | INTERROGATION                              | 157 |
| ARREST<br>SEARCH & SEIZURE                     | 19 | TRIAL PROCEDURE/<br>EVIDENCE               | 159 |
| SUSPECT ID                                     | 47 | ADA  | 167 |
| INTERROGATION                                  | 49 | EMPLOYMENT                                 | 169 |
| TRIAL PROCEDURE /<br>EVIDENCE                  | 57 | FIRST AMENDMENT                            | 172 |
| EMPLOYMENT                                     | 82 | COMPUTER CRIME                             | 173 |
| OPEN RECORDS                                   | 83 | CHILD PORNOGRAPHY                          | 176 |
|  |    | <b>U.S. SUPREME COURT<br/>2010-11 TERM</b> | 179 |

# TABLE OF CASES

|                      |    |                                |    |
|----------------------|----|--------------------------------|----|
| <b>KENTUCKY</b>      |    | Casey v. Com.                  | 28 |
| Com. v. Bushart      | 1  | Hawkins v. Com.                | 29 |
| J.L. v. Com.         | 1  | Com. v. Snowden                | 30 |
| Gabbard v. Com.      | 2  | Randolph v. Com.               | 31 |
| Acosta v. Com.       | 3  | Ward v. Com.                   | 31 |
| Cox v. Com.          | 4  | Prewitt v. Com.                | 32 |
| Fields v. Com.       | 4  | Turner v. Com.                 | 33 |
| Turner v. Com.       | 5  | Bennett v. Com                 | 34 |
| Lewis v. Com.        | 6  | Com. v. Sanders                | 35 |
| Mason v. Com.        | 7  | Shelton v. Com.                | 36 |
| Mills v. Com.        | 7  | Smith v. Com.                  | 37 |
| Sparks v. Com.       | 8  | Jackson v. Com.                | 37 |
| McClain v. Com.      | 9  | Blades v. Com.                 | 38 |
| Corbin v. Com.       | 9  | Com. v. Dietz                  | 39 |
| Lawton v. Com.       | 10 | Com. v. Ali                    | 40 |
| C.H. v. CHFS         | 11 | Sullivan v. Com.               | 41 |
| Mays v. Calvert      | 11 | McPherson v. Com.              | 41 |
| Tuttle v. Shrout     | 12 | Com. v. Jamison                | 42 |
| Deckard v. Weston    | 12 | Greene v. Com.                 | 43 |
| Goodrich v. Goodrich | 12 | Armstrong v. Com.              | 44 |
| Barker v. Perkins    | 13 | Mucker v. Com.                 | 44 |
| Rozier v. Moore      | 13 | Robbins v. Com.                | 45 |
| Buchanan v. Com.     | 14 | Niceley v. Com.                | 46 |
| Com. v. Brewer       | 15 | Noffsinger v. Com.             | 46 |
| Hadaway v. Com.      | 15 | Whaley v. Com.                 | 47 |
| Com. v. Bilbrey      | 16 | Thornton v. Com.               | 48 |
| Hill v. Com.         | 17 | Barnes v. Com.                 | 49 |
| Masden v. Com.       | 17 | Stanton v. Com.                | 49 |
| Com. v. Adkins       | 18 | Qualls v. Com.                 | 51 |
| Oakley v. Com.       | 19 | Jackson v. Com.                | 51 |
| Dumas v. Com.        | 19 | Bradley v. Com                 | 52 |
| Beckham v. Com.      | 21 | Com. v. Quisenberry / Williams | 53 |
| Sapp v. Com.         | 21 | Martin v. Com.                 | 54 |
| Dodson v. Com.       | 22 | Witt v. Com.                   | 55 |
| McKenzie v. Com.     | 23 | Phifer v. Com.                 | 56 |
| Stevens v. Com.      | 24 | Huber v. Com.                  | 57 |
| Chavies v. Com.      | 25 | Mathews v. Com.                | 58 |
| Walters v. Com.      | 26 | Lewis v. Com.                  | 58 |
| Hack v. Com.         | 27 | Day v. Com.                    | 58 |
| Martinez v. Com.     | 27 | Tramble v. Com.                | 60 |

|                                |    |   |     |
|--------------------------------|----|---|-----|
| Matthews v. Com.               | 61 | U.S. v. Johnson                         | 100 |
| Long v. Com.                   | 62 | U.S. v. Spicer                          | 101 |
| Johnson v. Com.                | 62 | U.S. v. Jones                           | 102 |
| Williams v. Com.               | 63 | U.S. v. Stittiams                       | 103 |
| Pate / Woody v. Com.           | 64 | U.S. v. Dingess                         | 104 |
| Bell v. Com.                   | 64 | U.S. v. Galaviz                         | 104 |
| Johnson v. Com.                | 65 | U.S. v. Warfield                        | 106 |
| Jackson v. Com.                | 66 | U.S. v. Lilly                           | 107 |
| Feltner v. Com.                | 67 | U.S. v. Ballard                         | 107 |
| Edwards v. Lumbley             | 67 | U.S. v. Rhodes                          | 108 |
| Childers v. Com.               | 68 | U.S. v. Davis                           | 109 |
| Cornelius v. Com.              | 68 | U.S. v. McCaster                        | 110 |
| McClain v. Com.                | 69 | U.S. v. Cooper                          | 110 |
| Finch v. Com                   | 70 | U.S. v. Aguilera- Pena                  | 112 |
| Gulyard v. Com.                | 71 | U.S. v. Riley                           | 112 |
| Knee v. Com.                   | 71 | U.S. v. Sain                            | 113 |
| Mullikan v. Com                | 72 | U.S. v. Peoples/ Lopez/ Bennett         | 114 |
| Ruby v. Com.                   | 72 | U.S. v. Buford                          | 115 |
| Williams v. Com.               | 73 | Wheeler v. Nevell                       | 115 |
| Stigall v. Com.                | 74 | Everson v. Calhoun County               | 116 |
| Gatewood v. Com.               | 75 | Fowler v. Burns                         | 117 |
| Alford v. Com.                 | 75 | Nerwick v. CSX Transportation           | 118 |
| Fields/Cramer/Boyd v. Com.     | 76 | Coble v. City of White House            | 119 |
| Jackson v. Com.                | 78 | Schmalfedlt v. Roe                      | 120 |
| Shaffer v. Com.                | 78 | Meirthew v. Amore                       | 121 |
| Ramey v. Com.                  | 79 | Rodriguez v. Passinault                 | 122 |
| Rapone v. Com.                 | 80 | Howard v. Wayne County Sheriff's Office | 123 |
| Walker v. Com.                 | 81 | Pershell v. Cook                        | 124 |
| Artrip v. City of Hopkinsville | 82 | Walker v. Davis                         | 126 |
| Royalty v. Spalding            | 83 | Arnold v. Wilder                        | 126 |
| Eplion v. Burchett             | 83 | Williams v. Sandel                      | 128 |
| Davis v. City of Winchester    | 84 | Blosser v. Gilbert/Carpentier/Lloyd     | 130 |
| Stephens v. McCullough         | 85 | O'Malley v. City of Flint               | 131 |
| Brantley v. Bell/Coomes        | 86 | Bomar v. City of Pontiac                | 132 |
| Martin/Sapp/Motley v. O'Daniel | 87 | Lee v. Metropolitan Govt of Nashville   | 133 |
| Com. v. Peters                 | 88 | Marmelshtein v. City of Southfield      | 134 |
|                                |    | Jones v. Yancy                          | 136 |
| <b>SIXTH CIRCUIT</b>           |    | Bletz v. Gribble/Denny                  | 136 |
| Kennedy v. City of Villa Hills | 89 | Graves v. Bowles                        | 138 |
| U.S. v. Gross                  | 90 | Huckaby v. Priest                       | 139 |
| U.S. v. Ellison                | 92 | Sabo v. City of Mentor                  | 140 |
| Hammons v. U.S.                | 93 | Thompson v. Grida                       | 140 |
| U.S. v. Adkins                 | 95 | Kuslick v. Roszczewski                  | 141 |
| U.S. v. Carmack                | 96 | Thurmond v. Wayne County                | 142 |
| U.S. v. Lanier                 | 97 | Thornton v. Fray                        | 143 |
| U.S. v. Ammons                 | 98 | Harvey v. Campbell County               | 144 |
| U.S. v. Lucas                  | 98 | Bertovich v. City of Valley View        | 145 |

|                           |     |   |     |
|---------------------------|-----|---|-----|
| Tindle v. Enochs          | 145 | U.S. v. Bowling                         | 174 |
| Jacob v. Killian          | 146 | U.S. v. Sanchez                         | 174 |
| Cochran v. Gilliam        | 147 | U.S. v. Gillman                         | 175 |
| Bazzi v. City of Dearborn | 149 | U.S. v. Daniels                         | 176 |
| Siler v. Webber           | 150 | U.S. v. Bowling                         | 177 |
| Modrell v. Hayden/Carter  | 151 |   |     |
| Pritchard v. Hamilton Twp | 152 | <b>2010-11 U.S. Supreme Court</b>       |     |
| Skovgard v. Pedro/Mannix  | 155 |   |     |
| U.S. v. Peterson          | 156 | Bobby (Warden) v. Dixon                 | 179 |
| Otte v. Houk              | 157 | Greene v. Fisher                        | 181 |
| McKinney v. Ludwick       | 158 | Smith v. Cain (Warden)                  | 182 |
| U.S. v. Leary             | 159 | Perry v. New Hampshire                  | 183 |
| U.S. v. Bradford          | 160 | U.S. v. Jones                           | 185 |
| U.S. v. Boyd              | 160 | Ryburn v. Huff                          | 186 |
| U.S. v. Jackson           | 161 | Reynolds v. U.S.                        | 188 |
| U.S. v. Ramirez           | 162 | Howes (Warden) v. Fields                | 189 |
| U.S. v. Rodriguez         | 162 | Wetzel v. Lambert                       | 191 |
| U.S. v. Ham               | 163 | Messerschmidt v. Millender              | 193 |
| Smith v. Metrish          | 164 | Rehberg v. Paulk                        | 195 |
| Montgomery v. Bobby       | 165 | Florence v. Board of Chosen Freeholders | 196 |
| Jalowiec v. Bradshaw      | 166 | Filarsky v. Delia                       | 198 |
| U.S. v. Spalding          | 166 | Blueford v. Arkansas                    | 201 |
| Everson v. Leis           | 167 | Reichle v. Howards                      | 202 |
| Lee v. City of Columbus   | 168 | Parker v. Matthews                      | 204 |
| Asbury v. Teodosio        | 169 | Williams v. Illinois                    | 206 |
| Bryson v. Middlefield VFD | 170 | Miller v. Alabama                       | 208 |
| Kimble v. Wasylyshyn      | 171 | Arizona v. U.S.                         | 210 |
| Saieg v. City of Dearborn | 172 | U.S. v. Alvarez                         | 212 |
| Doe v. Boeland            | 173 |   |     |

# KENTUCKY

## PENAL CODE – KRS 503 - USE OF FORCE

### Com. v. Bushart, 337 S.W.3d 666 (Ky. App. 2011)

**FACTS:** On January 7, 2007, Bushart was staying with his girlfriend, Boyd, in Graves County. Clapp, who had previously dated Boyd and had recently assaulted her, showed up. (Evidence suggested she had sent him a text message that night indicating she still loved him, but she later testified she did so to “prevent any future violence from occurring.”)

Clapp told a friend that “Boyd had called him and told him she wanted him back.” Clapp entered through a garage door that was broken but he knew how to remove the item securing it. Boyd and Bushart heard someone entering the house and Bushart told Boyd to call for help. Bushart left the room and Boyd heard two gunshots. (Bushart claimed to have only fired one shot, but two wounds were found on Clapp’s body, one in the front and one in the back.) Clapp died. Bushart was found to be in possession of marijuana and had an unnamed controlled substance in his system.

Bushart was indicted for Reckless Homicide. Bushart claimed immunity under KRS 503.085 – for self-defense. The trial court analyzed the record and determined “Bushart had the right to use deadly force against Clapp and that the facts did not in any way rise to a showing of probable cause that Bushart was not entitled to the immunity provided” by state law.

The Commonwealth appealed.

**ISSUE:** May an affidavit be used to prove immunity under KRS 503?

**HOLDING:** No

**DISCUSSION:** The Commonwealth argued that the trial court should not have used Bushart’s affidavit in awarding him immunity. The Court agreed that “there was at least some evidence that the victim may have thought he was on the property lawfully and was not intending to break in to Boyd’s home.” By considering his affidavit without the opportunity for the Commonwealth to cross-examine him as to the reasons for his belief, the Court erred.

The Decision of the trial court was vacated and the case remanded for a “probable cause determination” in which the affidavit was not considered.

### J.L. (Mother) v. Com., 2011 WL 1434905 (Ky. App. 2011)

**FACTS:** During the summer, 2008<sup>1</sup>, Daughter, age 15, was dating a boy of which her mother did not approve. Daughter and Son (age 13) had been sneaking boyfriend into the house at night. On June

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<sup>1</sup> The opinion improperly gave the year as 1998.

9, Mother found boyfriend, covered with blankets, lying in Daughter's bed early one morning. Daughter, who had been in the shower, returned to room and found Mother with the phone in her hand – Mother asked “who was in the bed.” The Daughter replied, “A boy.” Mother told Daughter to leave the room, shut and locked the door behind her. Daughter tried to get back in but was unable to do so. Mother called Louisville Metro 911 and “reported that an intruder was in her home” and shot boyfriend in the leg. LMPD responded and arrested Mother.

Both Daughter and Son were eventually remanded to the custody of their father. At the removal hearing, the Court found the children to be abused or neglected. The Court “rejected Mother’s argument that she could reasonably believe[] that Boyfriend was an intruder.” The children were ordered removed and Mother appealed.

**ISSUE:** If a belief that a person is an intruder is unreasonable, is a use of force still justified under the “Castle Law?”

**HOLDING:** No

**DISCUSSION:** The record included testimony as to how the shooting traumatized Daughter and Son, but Mother argued that the shooting was self-defense under KRS 503.055 – the “Castle Doctrine.” The Family Court found that it was unreasonable for Mother to believe the boy was an uninvited intruder.

The Court agreed that removal was appropriate under the circumstances.

## **PENAL CODE - KRS 507 - MURDER**

### **Gabbard v. Com., 2011 WL 2112562 (Ky. 2011)**

**FACTS:** On June 8, 2009, Gabbard was operating his semi-cab on U.S. 27, near Butler. He lost control and collided with an oncoming vehicle, killing the driver, who happened to be the Commonwealth’s Attorney for that area. Witnesses at trial testified that Gabbard was speeding and weaving. Unopened cans of beer were found at the scene and in his truck and ultimately, testing indicated a blood alcohol of between .19 and .21. (He admitted to having had possibly as many as 16 beers that day, while driving.) Gabbard was charged with Wanton Murder and ultimately convicted. He appealed.

**ISSUE:** Is intoxication a defense to wanton murder?

**HOLDING:** No

**DISCUSSION:** The Court noted that Gabbard had driven his “massive semi-tractor at a high rate of speed in the on-coming lane of a two-lane highway.” They agreed that he could be deemed to “have disregarded that risk both consciously and presumptively.” Gabbard admitted that he realized he was intoxicated during the trip and continued to drive, having done so before without mishap. He “presumptively disregarded the grave risk of death he was creating when, by driving in excess of fifty-five miles-per-hour on the wrong side of the road, he created the imminent risk of killing someone and was unaware of that risk solely by reason of his voluntary intoxication.”

The Court agreed that the proof for a wanton murder case does not include evidence that the driver "was mean-spirited or that he in any way intended the death he caused." It is sufficient if it can be shown that the driver "consciously created a grave risk of death so devoid of justification that it may reasonably be thought to reflect an extreme indifference to the value of human life." Intoxication is not a defense and provides "no justification for risky behavior."

Gabbard's conviction was affirmed.

## **PENAL CODE - KRS 508 - CHILD ABUSE**

### **Acosta v. Com., 2011 WL 11251 (Ky. App. 2011)**

**FACTS:** Cecelia Alvarado was born in Florida in 2005, and shortly thereafter, moved with her mother, Monohan, to Tennessee. In July, 2005, Monohan began a relationship with Rankin and moved to Kentucky to live with him. She brought her 2-year-old son, M.A., and Cecelia. Rankin cared for both while Monohan was working. Cecelia's last doctor visit prior to the move, in June, 2005, showed nothing unusual. In August, 2005, Cecelia was seen at a Lexington clinic where the nurse noted a bruise on her forehead and scabbed areas on her legs, but nothing else. On August 22, 2005, Monohan was late for work due to a car problem. Rankin was watching the children. He later testified that he left Cecelia in her car seat and that when he returned to where she was (a bedroom) at 7 p.m., he found "the car seat knocked over, Cecelia on the floor, and M.A. on top of her, digging his knees into her neck." He took the baby to his parents and called for help. She had vivid bruising on her neck and was not breathing. Cecelia was declared dead after resuscitation efforts.

An autopsy indicated she had a fractured skull and expert testimony indicated that the injuries could not have been caused by M.A. In addition, the autopsy showed "Cecelia also had suffered multiple fractures to her arms, legs and ribs, round, cigarette-type burn marks to her legs, a tear to the frenulum inside the upper front of her mouth, and a dislocated shoulder joint." The injuries were in various stages of healing and had occurred between two and twelve weeks prior to her death.

Both were charged and convicted. Monohan (the subject of this summary) was convicted of Criminal Abuse 1<sup>st</sup>. She appealed.

**ISSUE:** May a person be prosecuted for Criminal Abuse who did not commit the actual abuse?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Criminal Abuse may be prosecuted under two different theories - either that the defendant intentionally abused another person, or intentionally permitted another person of whom they have actual custody to be abused. Under either theory, the actual or potential abuse must, of course, be proven. Monohan argued that she did not know Rankin was abusing Cecelia, but evidence was submitted that indicated she had reason to know that there was a problem. She had lied to the clinic by telling them the child had been in a car wreck, which was not the case. Although the evidence was not strong that she'd actually committed any of the abuse, there was at least some evidence that she might have done so. Both theories were submitted and instructed to the jury.

Monohan's conviction was affirmed.

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

### **Cox v. Com., 2011 WL 287321 (Ky. 2011)**

**FACTS:** Cox, drunk, broke into his ex-girlfriend's, Jackson's, home in Scott County. He talked to Jackson's teenage daughter and then went upstairs to Jackson's bedroom; Jackson was calling the police to report he had a gun. He threatened Jackson and then tried to rape her, and then took her downstairs. In the meantime, her daughter was outside with the police. Cox dragged Jackson back upstairs and again attempted rape. The police initiated conversation with Cox and he stated he "wanted 30 minutes more with Jackson." Eventually, Jackson broke free and ran downstairs. Cox fired at her, but "with the aid of police officers, she escaped out the door."

Cox was arrested and charged with Burglary, Attempted Murder, Attempted Rape, Wanton Endangerment and Kidnapping. He was eventually convicted on some of the charges, including Burglary and Kidnapping. Cox appealed.

**ISSUE:** May a suspect be charged with Kidnapping in addition to Sexual Assault, when they move the victim in more than an incidental way to facilitate the assault?

**HOLDING:** Yes

**DISCUSSION:** Cox argued that although his conduct may amount to kidnapping that prosecution was barred by the kidnapping exemption in KRS 509.050. The Court noted that the kidnapping exemption applies when the "criminal purpose is the commission of an offense defined outside this chapter and [the] interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the inference exceeds that which is ordinarily incident to commission of the offense which is the objective of [the] criminal purpose."

In Murphy v. Com., the Court devised a three-part test to determine if the exemption applies. First, the underlying criminal offense must be from outside KRS 509. Second, the "interference with the victim's liberty must occur immediately with and incidental to the commission" of that offense. Third, the interference must be more than what would normally be the case with the crime in question. The purpose of the statute is to prevent duplicative punishment for those offenses where some restraint is part of the underlying offense. In the facts of this particular case, the court agreed that Cox restrained Jackson "even beyond his final attempted rape, until she actually escaped." "Such restraint was excessive for purposes of the exemption."

The Court agreed that the kidnapping exemption did not apply.

### **Fields v. Com., 2011 WL 5881620 (Ky. 2011)**

**FACTS:** D.E., age 16, was a special education student at Hazard High School. In March, 2009, he was befriended by "Robert," who asked D.E. to meet him at the library. Eventually they met up with

“Eric” and went to a local apartment. There they found two undressed men drinking and watching a “porn video.” D.E. was sexually abused and was then told he was free to leave, but the men in the apartment also pointed a knife at him and threatened him if he told anyone.

Later that same month, D.E. was picked up by Robert again and taken to a different apartment, where he was forced inside and sodomized at knifepoint. He was again threatened if he told anyone, and further, that the men would “stab his aunt” who D.E. apparently lived with in Hazard.

“The allegations came to light during a discussion about students stealing [D.E.’s] lunch money.” As the discussion evolved, Capt. East “began to suspect that something had happened to D.E.” at the apartment complex. He recognized the description of “Robert” as possibly being Fields. Capt. East confirmed that Combs and Walker lived in the apartment identified by D.E. At that apartment, the police found a backpack owned by Fields, which contained a “distinctive knife” that D.E. later testified was the knife used against him. Although D.E. did not identify Fields in a photo array, he did identify the other two men. D.E. later identified Fields as “Robert” during the trial, however.

Combs eventually admitted that he was “involved in an incident with D.E.,” in which he claimed he was also forced by the others to participate. Ultimately Fields was convicted of Sexual Abuse by complicity as well as Rape and Sodomy, both as a principal and by complicity, along with Kidnapping. He appealed.

**ISSUE:** Does restraint during a sexual assault justify a kidnapping charge as well?

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

**DISCUSSION:** Fields argued that the Kidnapping conviction, based upon the second incident, should have been barred by KRS 509.050 – the “kidnapping exemption.” The Court agreed that in that instance, D.E.’s “restraint did not begin until almost immediately prior to the sexual assault.” The Court agreed that the force did not exceed that necessary to commit the Rape and Sodomy. The Court agreed that the charge should not have been presented to the jury.

The Kidnapping conviction was vacated and the case remanded for sentencing reconsideration.

## **PENAL CODE – KRS 510 – SEXUAL ABUSE**

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

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

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

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

**HOLDING:** Yes

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

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

## **PENAL CODE – KRS 511 - BURGLARY**

**Lewis v. Com., 2011 WL 2416598 (Ky. App. 2011)**

**FACTS:** On January 3, 2006, Lewis entered an open Walgreen's Pharmacy in Louisville. He had a hooded sweatshirt pulled up around his face and demanded OxyContin and another drug. Lewis claimed to have a gun. The store had been robbed in a similar fashion a few weeks prior. Apparently the police were summoned as they arrived while the robbery was ongoing. They found a knife with an open blade in Lewis's pocket.

Lewis was indicted on a variety of charges. He was acquitted of robbery but convicted of burglary. He requested a directed verdict on that charge, and was denied. He then appealed. As a result of the recent decision of Wilburn v. Com.,<sup>2</sup> which "related to burglaries committed in public places where the burglar had a license to enter, and what events would trigger the revocation of that license." In Wilburn, the Court "also expressly overruled Merritt v. Com., holding that the definition of a "deadly weapon" in the context of a robbery adopted in Merritt was irreconcilable with the language of the statutes now in effect."<sup>3</sup> Since one issue in this case related to Merritt, the Court agreed to review the earlier decision.

**ISSUE:** If one commits a crime in an open business, is that the functional equivalent of being told to leave?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that although Lewis "lawfully entered" an open premises, that once "he acted inconsistently with the business purposes of the pharmacy," his license to be there was automatically revoked. The Court agreed with the trial court that Wilburn did not require that he be

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<sup>2</sup> 312 S.W.3d 321 (Ky. 2010).

<sup>3</sup> 386 S.W.2d 727 (Ky. 1965).

“personally ordered to leave” – and in fact that the Wilburn court had agreed that when the manager shot at Wilburn, that was “the functional equivalent” of being told to leave. It specifically held that when a defendant perpetrated a crime, it served as “by obvious implication, the revocation of his license to remain in the dwelling or building.”

In addition, although the Court overruled Merritt, it permitted a jury instruction that “any object intended by its user to convince the victim that it is a pistol or other deadly weapon, and does so convince him, is one.” The Court found nothing to indicate that the decision was intended to be retroactive

### Mason v. Com., 2011 WL 5880945 (Ky. 2011)

**FACTS:** During 2008/09, Mason and Broadnax “had an on-again/off-again romantic relationship.” Broadnax lived in a townhome in Paducah that was solely in her name. Mason stayed there some nights and kept some belongings there. However, Broadnax stated Mason did not have a key and did not stay there when she was at work. Instead she would drop him off at his sister’s and pick him up on her way home. Mason did use the address for employment and other purposes. In November, 2009, they agreed to end their relationship and she packed up his belongings and took them to his sister’s home. On the evening on November 18, Mason “repeatedly called” her and threatened her. At about 3:30 a.m. the next morning, she heard glass breaking. She found Mason in her apartment and they struggled. He proceeded to choke her and punch her. Eventually he passed out and she called the police. She was found to have multiple facial injuries.

Officer Rowley interviewed Mason and he admitted he had restrained her but denied hitting her. He admitted he knew at that time, he had no right to be there. He was charged with Assault and Burglary. (However, his strategy at the subsequent trial was to show he lived there at the time and thus could not have committed burglary.) He conceded the assault. However, he was convicted of both charges and appealed.

**ISSUE:** Does an assault following immediately upon a break-in justify a charge of burglary?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that at the time Mason entered, “he did not have a key, and all of his belongings were at his sister’s house.” The evidence indicated he was angry and believed Broadnax was cheating on him. He had made threats and upon entering, he “rushed up the stairs and immediately attacked” her. The Court agreed it was reasonable to believe that he had “formed the intent to assault” prior to entering or “prior to remaining unlawfully.”

The Court affirmed his conviction.

### **PENAL CODE – KRS 514 - THEFT OF IDENTITY**

#### Mills v. Com., 2011 WL 1706545 (Ky. App. 2011)

**FACTS:** Mills was detained by Wal-Mart loss prevention for theft. Officer McConnell (Louisville Metro PD) responded and was told by Mills he had no ID. After being warned about providing false

information, he gave the officer ""personal information that belonged to the victim" – his brother, David. David was ultimately charged with the theft and ultimately told the officer that Mills had done it before.

Mills was charged with Theft of Identity by information. He took a conditional guilty plea and appealed.

**ISSUE:** If one gives a false identity to avoid detection, is that a Theft of Identity?

**HOLDING:** Yes

**DISCUSSION:** Mills argued that he should have been prosecuted on the offense of Giving a Peace Officer a False name (KRS 523.110) rather than Theft of Identity (KRS 514.160). The Court agreed he provided false information to "avoid detection." The Court noted that the prosecutor's decision to proceed on the felony charge was properly supported by Crouch v. Com.<sup>4</sup> The Court differentiated the two, noting that Mills agreed to be charged by information for the Theft of Identity.

The Court upheld the plea.

## **PENAL CODE - KRS 515 - ROBBERY**

### **Sparks v. Com., 2011 WL 1103239 (Ky. 2011)**

**FACTS:** On the day in question, Sparks allegedly robbed a Greenup County store. At trial, he admitted having been in the store, but stated he was actually getting repaid on a debt by one of the clerks. The prosecution played a recording made by 911, in which an "obviously shaken Shepherd" - the clerk who allegedly owed the debt - told the dispatcher that the robber said he had a gun, but that he did not believe that he did, in fact, have one. Shepherd testified that he initially believed the robber had a gun but came to believe "that probably there was not one."

Sparks was convicted of Robbery 1<sup>st</sup>. He appealed.

**ISSUE:** Does a statement by a robber that they have a gun, even then they do not, elevate the crime to Robbery 1<sup>st</sup>?

**HOLDING:** Yes

**DISCUSSION:** Sparks argued that because he was never shown to actually have a gun, that a threat that he had one was insufficient to convict him of Robbery 1<sup>st</sup>. The court looked to the recently decided Gamble v. Com., in which the robber specifically indicated he had a gun, although he did not, in fact, ever display one.<sup>5</sup> The Court noted that "Shepherd's doubts after the robbery" as to whether there was, in fact, a gun does "not compel a finding in Sparks's favor." The Court agreed the evidence would permit a juror to believe that "Sparks's gun reference together with his apparently pointing the gun at Shepherd, his keeping his hand in his pocket during the theft, and his warning to the co-worker not to anything stupid, were meant to convey the threat that Sparks would use a gun if the clerks resisted and succeeded in frightening them - as they both testified - and forestalling their resistance."

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<sup>4</sup> 323 S.W.3d 668 (Ky. 2010).

<sup>5</sup> 319 S.W.3d 375 (Ky. 2010).

The Court affirmed his conviction.

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** McClain contended that there was insufficient evidence that he used physical force against Watson. He argued that "Watson's subjective assumption McClain was armed is insufficient to constitute the threat of force." The Court noted that in Swain v. Com.<sup>6</sup> that "menacing gestures and a victim's assumptions that a perpetrator is armed" is not enough for a First Degree charge but that under facts very similar to the situation with Watson, that it was sufficient for a jury to find that force had been used to effect the theft.

McClain's convictions were upheld.

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

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

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<sup>6</sup> 887 S.W.2d 346 (Ky. 1994).

Corbin only keeping the one A.E. had been riding. He also kept Hall's weapon. He told them they could retrieve the items at the Abington, Virginia police station the next day.

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

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

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

**HOLDING:** No

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

The Court upheld his conviction.

## **PENAL CODE – KRS 520 – ESCAPE**

### **Lawton v. Com., 354 S.W.3d 565 (Ky. 2011)**

**FACTS:** In July, 2007, Lawton was released from jail in Fayette County into home incarceration (HIP) to care of his ill mother. He was to wear an ankle bracelet and could only leave his mother's home with permission and he was only permitted to take her to doctor's appointments. On August 21, his caseworker received a notification that the transmitter was "open." The caseworker went to the home the next day and retrieved the device, but did not find Lawton. He was finally located and arrested on October 2. Lawton claimed he'd been working during that time to pay his mother's medical bills and his own child support.

Lawton was convicted of Escape 2<sup>nd</sup>. Lawton appealed.

**ISSUE:** Is removing a HIP device an Escape 2<sup>nd</sup>?

**HOLDING:** Yes

**DISCUSSION:** Lawton argued that the proper charge should have been Escape 3<sup>rd</sup>. The Court reviewed the statutes in question and agreed that under the HIP agreement, Lawton's mother's home was a detention facility. The Court did not agree that previous rulings on the issue argued otherwise simply because the suspects in those cases were both convicted of felonies, while Lawton was only incarcerated originally for a misdemeanor.

However, due to an error in the jury instructions, the Court reversed the conviction and remanded the case for a new trial.

## **DOMESTIC VIOLENCE / FAMILY ISSUES**

### **C.H. v. Cabinet for Health and Family Services, 2011 WL 5419734 (Ky. App. 2011)**

**FACTS:** In April, 2010, a petition was taking alleged C.H. (Mother), with permitting N.H. to be absent and tardy for too many days. The principal had been in contact with Mother and had discussed the matter with her. Six of the absence days were due to head lice. At a hearing, the Court agreed that Mother had neglected the children's education. She appealed.

**ISSUE:** Does a failure to ensure a child regularly attends school constitute neglect?

**HOLDING:** Yes

**DISCUSSION:** Mother argued that the Commonwealth had failed to prove that N.H. suffered actual harm as a result of the Mother's conduct. The Court looked to an earlier decision and agreed that the child's absence from school was sufficient to threaten N.H.'s welfare and violated the child's "fundamental right to education instruction."<sup>7</sup> The Court agreed that it was reasonable to expect a parent to ensure the child's attendance at school and her inability to do so constituted neglect.

The Clark Circuit Court's decision was affirmed.

### **Mays v. Calvert, 2011 WL 6146878 (Ky. App. 2011)**

**FACTS:** Calvert filed for a DVO on behalf of her minor children alleging her stepfather (Mays) had sexually abused the minor children (age 3 and 10). The trial court ordered the DVO. Mays appealed.

**ISSUE:** Is testimony at a DVO hearing protected from use as a companion criminal proceeding?

**HOLDING:** Yes

**DISCUSSION:** May argued that he was told that "any testimony he provided (during the DVO hearing) could be used against him in a companion criminal proceeding" and as such, he did not testify. However, KRS 403.780 provides that such testimony (in a case involving the same parties) is not admissible in any such criminal proceedings. Although the objection was not properly preserved, the Court agreed that "under these unique circumstances," a "manifest injustice resulted from the" error and Mays was entitled to an evidentiary hearing on the issue.

The Court allowed the EPO to stand but vacated the DVO and remanded the case for further proceedings.

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<sup>7</sup> M.C. v. Com., 347 S.W.3d 471 (Ky. App. 2011).

**Tuttle v. Shrout, 2011 WL 4861878 (Ky. App. 2011)**

**FACTS:** On Jan. 3, 2011, Shrout filed for an EPO in Clark County against Tuttle. The family court denied the EPO, finding no indication of an immediate and present danger. However, the Court did summon Tuttle to a DVO hearing pursuant to KRS 403.745. Following the hearing, the Court issued a DVO for one year against Tuttle. He appealed.

**ISSUE:** Does a DVO require that an EPO be entered first?

**HOLDING:** No

**DISCUSSION:** Tuttle first argued that because the court did not enter an EPO, it could not issue a DVO. The Court noted the difference between an EPO and a DVO and agreed that even if the trial court does not issue an EPO, it must still hold a DVO hearing. Issuance of a DVO does not require the "presence of an immediate and present danger."

The Court affirmed the issuance of the DVO.

**Deckard v. Weston, 2011 WL 5419714 (Ky, App. 2011)**

**FACTS:** On June 3, 2010, Weston filed for a DVO against her half-brother, Deckard. The incident in question occurred at a local party where their mother was undergoing surgery, and the parties argued over who would hold a hospital-issued pager intended to keep them posted as to their mother's surgical status. Allegedly, Deckard physically threatened Weston over her holding the pager.

At the hearing, Deckard did not deny their disagreeable relationship and that he'd physically threatened Weston, but argued that a DVO was unwarranted as the two had "minimal contact" and "do not live in the same household." The Court issued the DVO and Deckard appealed.

**ISSUE:** Do half-siblings who do not reside together qualify as family members under KRS 403?

**HOLDING:** No

**DISCUSSION:** The Court noted that the two are "half-siblings who did not reside together." As such the Court agreed that they did not qualify as family members under KRS 403.720 and reversed the issuance of the DVO.

**Goodrich v. Goodrich, 2011 WL 1598781 (Ky. App. 2011)**

**FACTS:** On July 28, 2009, Pasqualina Goodrich was given a DVO by Hardin County. That DVO required Everett Goodrich to remain 500 feet away from her and her family/household. On April 9, 2010, she alleged that he had entered her residence (formerly the marital residence) and removed items when she was not home. Everett agreed that he had done so but argued he had not violated the order because no one was home. The trial court interpreted "household" to include the physical residence<sup>8</sup>

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<sup>8</sup> See Lynch v. Com., 74 S.W.3d 711 (Ky. 2002).

and noted Everett had previously sought permission from the court to enter the home to retrieve belongings. He was found to have willfully violated the DVO and held in contempt. Everett appealed.

**ISSUE:** If someone subject to a DVO enters the prohibited location when the other party isn't there, is that still a violation?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the DVO "specifically prohibited [Goodrich] from having 'any contact' with Pasqualina." It was clear Goodrich understood that to mean that he could not enter the home without the leave of the court. Such conduct "may be construed as intimidation and potentially disrupt[ive to] Pasqualina's life and sense of security."

The Court upheld the contempt order.

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Rivers v. Howell, which required that the petitioner would have to "share living quarters with the respondent."<sup>9</sup> The evidence indicated that they did so. The Court upheld the DVO.

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

**FACTS:** Moore and Rozier divorced in 2005 and were granted joint custody of their child. In 2006, after an altercation, Moore obtained a DVO against Rozier. In 2009 it expired and since things were going well, Moore did not take action to renew it. However, in 2010, she filed a petition on her own behalf and on behalf of her daughter and current husband. At the hearing, she testified Rowzier was harassing her with 15-20 calls a day and using derogatory terms toward her husband. At that time visitation exchange was being done at the police station, but during the exchange time, the "building was locked and occupied only by a single dispatcher." After issues during exchange, she had her husband participate, but testified that Rozier "became increasing aggressive toward" and threatened her

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<sup>9</sup> 276 S.W. 3d 279 (Ky. App. 2008).

husband. Rozier denied the above, stating that the communication was normal and on behalf of the child and that the Moore's husband instigated the problems between them.

The Court issued the DVO and Rozier appealed.

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

**HOLDING:** Yes

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

## **ADULT ABUSE**

### **Buchanan v. Com., 2011 WL 5105455 (Ky. App. 2011)**

**FACTS:** During a two month period in 2008, in McCracken County, Buchanan appropriated approximately \$20,000 of her mother's funds using a power of attorney. She "deceived and intimidated her mother in an effort to retain control of her mother's financial affairs." In January, 2009, Buchanan was indicted for violating KRS 209, the Adult Protection Act. She claimed it was unconstitutionally vague but was convicted. She appealed.

**ISSUE:** Is KRS 209 impermissibly vague?

**HOLDING:** No

**DISCUSSION:** The Court noted that "in order to survive a challenge of void for vagueness, a statute must define a criminal offense with such specificity and certainty that ordinary people can understand what particular conduct is prohibited in such a manner as to prevent arbitrary and discriminatory enforcement." Buchanan argued that there was no evidence "that her mother suffered mental or physical dysfunction sufficient to trigger the protections of the act." The Court noted that the charge applies when there are "limitations severe enough to prevent the vulnerable adult from managing her own affairs." In this case, Buchanan's mother clearly needed assistance to manage her affairs during her convalescence from brain surgery, as she was either hospitalized or receiving care at a nursing facility. The Court noted that witnesses stated that "Buchanan denied her mother any opportunity to collect and review her financial materials on her own" and told her mother she could sell the house and car. And ultimately, Buchanan confessed that "she had indeed misused her mother's resources." Although there were people to whom her mother could have complained, not doing so did not indicate acquiescence.

The Court upheld her conviction.

## DRIVING UNDER THE INFLUENCE

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

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

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

**HOLDING:** Yes

**DISCUSSION:** Upon initial appeal, the Circuit Court ordered the District Court to treat the later DUI as a DUI 1<sup>st</sup>, as a result of the decision in Com. v. Beard.<sup>10</sup> The Commonwealth then appealed, arguing that because he was actually convicted of the first offense before being convicted of the second, the second could stand as a 2<sup>nd</sup> offense for penalty enhancement. It argued that the General Assembly intended that the date of the first DUI offense – not the date of the conviction – should be used in deciding if a subsequent offense should be enhanced.”

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

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

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

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

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

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

**DISCUSSION:** The Court noted that Officer Grace testified that he had been in the room the entire time and the Court noted that the observation period is not intended to be an “eyeball to eyeball requirement.” In Tipton v. Com., the Court had ruled that the operator was not required to “stare at the

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<sup>10</sup> 275 S.W.3d 205 (Ky. App. 2008).

arrestee for 20 minutes.” Further, the Court noted that Officer Grace and Officer Dill both denied Hadaway had used an inhaler during the relevant period of time. On a related note, Hadaway argued on appeal that the paperwork on the machine was not introduced as required.<sup>11</sup> However, because he failed to preserve the error, the Court noted that the evidence supported the conviction even without the breath test result, the error did not cause a “manifest injustice.”

The Court upheld the conviction.

**Com. v. Bilbrey, 2011 WL 5105376 (Ky. App. 2011)**

**FACTS:** On June 13, 2008, Deputy Guffey (Clinton Co SO) testified that he responded to a complaint about a vehicle being driven down the center of the road that had “almost run at least two other vehicles off the road.” He was provided information about the truck and that it was trying to turn around at a specific location. The deputy located a vehicle matching the description some minutes later and found “Bilbrey slumped over in the driver’s seat with his head down.” He saw an open beer can and Bilbrey, apparently asleep. The engine was running and the parking lights were on. Deputy Guffey pounded on the truck’s window and Bilbrey finally responded, getting out and appearing unsteady and dazed. Deputy Guffey tried to do an HGN but Bilbrey said he was “too drunk” to do a balancing test. He was arrested and refused an Intoxilyzer.

Bilbrey moved for suppression, arguing he was not in control or operating the vehicle at the time of the arrest. The Court denied his motion and he was ultimately convicted. He was denied further motions and he appealed. The Court of Appeals reversed the conviction, finding that the Commonwealth had not proved that he was in control at the time. The Commonwealth moved for discretionary review.

**ISSUE:** Can a sleeping subject be found guilty of DUI?

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

**DISCUSSION:** The Court found the Deputy Guffey’s “testimony was clear, concise and thorough” and found no reason to doubt his veracity. The Court looked to previous cases, in particular Wells v. Com., in which courts had found that the defendant had not been proven to be in control.<sup>12</sup> Looking to the Wells factors, the Court noted that the first was “whether the defendant was asleep or awake.” Deputy Guffey had indicated he believed Bilbrey was asleep. However, the second factor, that the engine was running, suggested Bilbrey had operated the vehicle while intoxicated. The evidence indicated the vehicle had been driven just minutes before and the Court found it “improbable that in the nine minutes Bilbrey was parked at the Spring Creek Bridge he consumed so much alcohol that he was unable to perform or failed multiple standard field sobriety tests.” Logically, Bilbrey was intoxicated prior to arriving at the location where he was arrested. “Bilbrey was the only person in the vehicle and no other persons were in the vicinity.”

The Court agreed that “Deputy Guffey had a reasonable believe that Bilbrey had operated his truck while intoxicated.” The court reversed the Circuit Court’s decision and reinstated the District Court’s decision.

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<sup>11</sup> Com. v. Roberts, 122 S.W.3d 524 (Ky. 2003).

<sup>12</sup> 709 S.W.2d 847 (Ky. App. 1986).

**Hill v. Com., 2011 WL 4633351 (Ky. App. 2011)**

**FACTS:** On July 4, 2009, Sgt. Messer (Cold Springs PD) saw a vehicle “driving erratically.” He stopped the vehicle and asked the driver (Hill) for his OL; Hill responded that his license was suspended. Officer Love arrived and it was decided Love would do FSTs to determine if Hill was intoxicated. He did several “in-car” tests and then asked Hill to get out. Hill refused and took off in his vehicle. Following a short pursuit, he crashed and was quickly captured and arrested. He was given an Intoxilyzer test at the station and he was found to be .175.

Hill was indicted on charges of Wanton Endangerment 1<sup>st</sup>, Fleeing and Evading 1<sup>st</sup>, Operating on a suspended license and other charges.<sup>13</sup> At the trial, Officer Love was permitted to testify about the testing and maintenance of the Intoxilyzer 5000, to which Hill objected that Love should not have been permitted to read what someone else (the KSP technicians) had written. (Love had read this information from the log book kept with the instrument.) The Court disagreed and Hill was convicted. He appealed.

**ISSUE:** Is an Intoxilyzer log testimonial?

**HOLDING:** No

**DISCUSSION:** Hill argued that the “lab technician’s report was testimonial” and because he had not had the chance to cross-examine the technician, who was also not available at trial, that the evidence should have been excluded. That issue had previously been addressed in Com. v. Walther<sup>14</sup> and that Court had agreed that such records were not testimonial, and “thus their admissibility is not governed by Crawford.”<sup>15</sup>

The Court upheld the admission of the testimony as well as his conviction.

## **CONTROLLED SUBSTANCES**

**Masden v. Com., 2011 WL 1706754 (Ky. App. 2011)**

**FACTS:** Masden was arrested for selling pills to an informant working with KSP. KSP’s crime lab tested the pills and found them to be methadone and Masden was charged with Trafficking in the First Degree. He then appealed.

**ISSUE:** Is methadone a narcotic under the KRS?

**HOLDING:** Yes

**DISCUSSION:** Masden argued that methadone was a Schedule II non-narcotic drug and that the charge should have been a Second-Degree offense. At trial, a crime lab technician testified that it was

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<sup>13</sup> There was no indication in the record that he was charged or convicted of DUI, however.

<sup>14</sup> 189 S.W.3d 570 (Ky. 2006).

<sup>15</sup> Crawford v. Washington, 541 U.S. 36 (2004).

a narcotic, justifying the First-Degree. The Court noted that KRS 218A.010(23) defined narcotic and indicated any substance “chemically equivalent” to an opiate (as methadone is) is a narcotic. (The Court noted “if opiates are narcotics, and methadone is an opiate, then methadone is a narcotic by statutory definition.”) In addition, in Sanders v. Com., Kentucky had elected to find that even though “cocaine might not scientifically or technically be a narcotic, our legislature has nonetheless exercised its prerogative to treat” it so.<sup>16</sup> The Court also noted that federal law and other states’ laws treated methadone as a narcotic.

The Court found than an expert witness was unnecessary and upheld the conviction

**Com. v. Adkins, 331 S.W.3d 260 (Ky. 2011)**

**FACTS:** On March 16, 2007, Adkins was arrested by an Ohio County deputy sheriff on unrelated charges. He was arrested at his brother’s home, which occupies the same parcel of land as Adkins’ own home. The deputy found almost 17 grams of methamphetamine on Adkins, along with paraphernalia. He was then arrested for trafficking. Adkins testified at trial that he’d found the sock (in which the items were found) in the driveway and that he’d picked it up to keep it from his young son. He also stated he believed a friend of his brother, who was a drug dealer, had dropped it and that he’d seen that friend earlier in the day. He claimed to have tried to contact the sheriff but was unsuccessful, and that he intended to turn in the drugs to the sheriff’s office. He argued for an “innocent possessor” defense to be provided to the jury. The Court denied the request and provided a model instruction to the jury. He was convicted and appealed. The Court of Appeals ruled that he was entitled to “an affirmative instruction encapsulating that defense.” The Commonwealth appealed.

**ISSUE:** May a person be in lawful possession of illegal controlled substances?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to other states and noted that several have addressed the issue. The court noted a number of examples of situations where a “person might take possession of a controlled substance without any unlawful intent.” Further, those individuals may pass on the drugs to someone else, a teacher to a principal, for example, again without unlawful intent. The Court was “confident that the General Assembly did not intend to criminalize the possession or transfer of controlled substances in circumstances such as these.” Under such circumstances, an instruction to that effect should be given. The Court found that KRS 218A.1412, “by implicitly recognizing that in limited circumstances one might innocently and without unlawful intent possess controlled substances that belong to another person, creates such a defense.”

The Court noted that KRS 218A.220 is “meant to encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them.” The Court agreed he was entitled to the instruction, affirmed the decision of the Court of Appeals and remanded the case for further proceedings.

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<sup>16</sup> 663 S.W. 2d 216 (Ky. 1983).

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

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

Elmer was convicted and appealed.

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

**HOLDING:** Yes

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

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

The Court upheld the conviction.

**SEARCH & SEIZURE – SEARCH WARRANT**

**Dumas v. Com., 2011 WL 2112560 (Ky. 2011)**

**FACTS:** Dumas returned a work cell phone after he was fired. During the process of deleting contact information and other items on the telephone, the owner "discovered a disturbing picture electronically stored on it of a young girl posing suggestively and wearing adult-styled lingerie." The phone was given to the McCracken County Sheriff's Department, which turned the phone over to Marshall County because that was where Dumas lived. Marshall County obtained a search warrant for Dumas's residence. Computer, A/V equipment, compact discs, images and e-mail were seized. Ultimately Dumas was indicted on multiple counts of distributing matter portraying a sexual performance by a minor and possession of the same. Additional charges were placed in a superseding indictment. Dumas requested suppression

The affidavit stated:

*Affiant has been an officer in [the Marshall County Sheriff's Department] for a period of 7 years and 10 months . The made in [his] capacity as an officer hereof. On Wednesday, April 18, 2007, at approximately 3:16 PM, Affiant received information from/observed :*

*Affiant received information from Detective David Shepherd of the McCracken County Sheriff's Department . . . . Det. Shepherd sent an [e-mail] with an attached photo that was found on a camera phone that was once possessed by Dumas. The photo was of a young girl, who appeared to be between the ages of 6 & 8, wearing adult-type lingerie. Specifically, the girl had on a garter belt, panty hose, lace panties, and what appeared to be a [brassiere]. The [child's] upper thighs and midriff are exposed in the photo and she is posing in a provocative manner. Detective Shepherd showed Affiant the phone with the photo on April 23, 2007 .*

*Acting on the information received, Affiant conducted the following independent investigation : Affiant learned that this phone had been issued to Dumas as a part of his employment . . . . [Affiant learned that Dumas was fired on April 13, 2007, and turned the phone in to his employer who contacted law enforcement] . . . Affiant learned that Dumas was permitted to have the phone in question with him at all times . . . . Affiant has reasonable and [probable] cause to believe, and believes, grounds exist for issuance of a Search Warrant based on the aforementioned facts, information, and circumstances, and prays a Search Warrant be issued, that the property (or any part thereof) be seized and brought before the Court and/or retained subject to order of said Court.*

The deputy requested to seize the following:

*... any and all devices capable of taking and/or storing electronic photographs, including but not limited to, computers, web cams, hard drives, CD/storage disks, thumb drives, flash drives, VHS tapes, DVD's, magazines, photographs, PDA's, phones with digital cameras, film negatives, 35 mm films, photographs stored in [e-mail] and/or computer servers. Also any and all information which could identify minor child in photograph described in Affidavit on page 2 .*

Dumas argued that since the detective testified that he did not consider the photo to be pornographic and because he became known to McCracken, rather than Marshall County deputies, it made the affidavit untruthful. The trial court rejected the argument

**ISSUE:** If a search warrant affidavit contains a sufficient statement of facts to support probable cause, is it valid?

**HOLDING:** Yes

**DISCUSSION:** Dumas argued that the search warrant affidavit "contained intentionally or recklessly false statements and omitted facts." Essentially, an affidavit "must include a statement of facts sufficient to support a finding of probable cause." The affidavit included an "explicit description of the location to be searched" and a detailed list of items sought. The informants are not named but their identity is clearly indicated.

The Court agreed the warrant was sufficient and affirmed the trial court's decision. The Court also agreed that the two charges, while similar, did not violate double jeopardy and that the charge was not overbroad.

**Beckham v. Com., 2011 WL 2119337 (Ky. App. 2011)**

**FACTS:** On August 11, 2008, Deputy Kappes (Boone County SD / Northern Kentucky Drug Strike Force) got a warrant for Beckham's home, which also authorized the search of Beckham, Reynolds and a white Cadillac registered to Beckham. Deputy Kappes surveilled the property and saw two men at the back of the mobile home. Kappes approached, asked if Beckham was there and was told "he just left." He saw a pickup leave the scene and tried to get someone to stop it. One of the other officers recognized Beckham in the vehicle and got a deputy to stop the vehicle, about a mile away. Deputy Kappes immediately went to the scene. Beckham admitted to having marijuana, cash and other items on his person. He was arrested and returned to the home, where more contraband was found. Beckham was indicted on drug-related charged and requested suppression. It was denied, with the Court finding the warrant valid and Beckham's detention valid under Parks v. Com.<sup>17</sup> The Court agreed that the stop "was proper because Beckham was detained in close proximity to his home immediately after he left the residence."

Beckham took a conditional guilty plea and appealed.

**ISSUE:** May a subject whose home is being searched some distance away be seized?

**HOLDING:** No

**DISCUSSON:** The Court agreed that generally, a search warrant "does not authorize the off-premises detention of the owner or occupant of the premises to be searched."<sup>18</sup> However, Michigan v. Summers, created a limited exception to "detain the occupants of the premises while a proper search is conducted."<sup>19</sup> However, the Court agreed that none of the factors in Summers that justified the detention were present in the case as there was no indication that Beckham was fleeing (or even aware of the impending search), that he "posed a safety risk," or that he was "needed to assist in the search of the residence." (The Court noted that "Kappes may well have sought to detain Beckham for those reasons, but these facts were simply not elicited at the hearing."

The Court reversed his conviction with respect to the evidence seized as a result of the stop."

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

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

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<sup>17</sup> 192 S.W.3d 318 (Ky. 2006).

<sup>18</sup> Parks.

<sup>19</sup> 452 U.S. 692 (1981).

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Carlisle was a named informant. The Sapps argue that there was no explanation of his reliability and that his tip "lacked any specificity" about what was occurring at the Sapp residence. Further, it was noted that his prior convictions had been for possession, not trafficking. The Court, however, noted that the general rule had long been that "information furnished by a named individual is ordinarily sufficient to support the warrant."<sup>20</sup> Further, Carlisle stated that his basis of knowledge was his own personal experience and observations and that he had Sapp's exact street address. The Court agreed that although the warrant did not specifically state that he'd bought methamphetamine at Sapp's residence, it was a fair inference. The Court also took into consideration that Sheriff Cox and Det. Conley were familiar with the Sapps. The Court found that the search warrant was sufficient and upheld the pleas.

**Dodson v. Com., 2011 WL 1434667 (Ky. App. 2011)**

**FACTS:** On October 11, 2007, Louisville Metro officers sought and received a search warrant for Dodson's apartment. Drug trafficking was suspected and in fact, heroin, a firearm and other items were found. Dodson was indicted. On the morning of trial he moved for suppression but was denied. At trial, officers testified as to what was found, and in particular, a loaded handgun was on the windowsill behind the headboard of the bed. Sgt. Nunn testified as an expert that drug dealers often kept weapons near their bed in case of a drug-related robbery. Other witnesses testified that the heroin and the weapon belonged to a prior resident of the apartment.

Dodson was acquitted of trafficking but convicted of possession of the heroin, enhanced by the presence of the firearm. He appealed.

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<sup>20</sup> Embry v. Com., 492 S.W.2d 929 (Ky. 1973).

**ISSUE:** Does a CI also involved in criminal activity invalidate a search warrant?

**HOLDING:** No

**DISCUSSION:** Dodson argued that the warrant affidavit was unreliable, as it was based on the statement of an informant who was also involved in criminal activity. However, the Court noted “in cases involving identifiable informants who could be subject to criminal liability if it is discovered that the tip is unfounded or fabricated, such tips are entitled to a greater ‘presumption of reliability’ as opposed to the tips of unknown ‘anonymous’ informants who theoretically have ‘nothing to lose’.”<sup>21</sup> Further, “[s]tatements against the informant’s penal interest also increase the degree of veracity that a court may attribute to the statements.”<sup>22</sup> The Court discounted his assertion that the CI did not even actually exist and upheld the warrant.

The Court noted that KRS 218A.992 allows for an upgrade of an offense when a person is in possession of a firearm in *furtherance* of a drug offense. In Com. v. Montague, the Kentucky courts had ruled that “there must be a nexus between the underlying offense and the possession of the firearm.”<sup>23</sup> Dodson argued that it was not proven that the gun and the heroin were connected as they were in different parts of the apartment. The Court disagreed, however, ruling that even if Dodson was not convicted of trafficking, that the amount of heroin was shown to be substantial -worth approximately \$4,000, constituting over 200 doses and that the weapon could still be present in order to protect the drugs from being stolen. However, because the jury instructions did not include the proper language to require the jury to make the finding, the Court vacated the enhancement of the conviction and remanded the case.

## SEARCH & SEIZURE – EXCLUSIONARY RULE

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

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

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

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

**HOLDING:** No

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<sup>21</sup> Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

<sup>22</sup> Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).

<sup>23</sup> 23 S.W.3d 629 (Ky. 2000).

**DISCUSSION:** The Court agreed that even if the officer failed to knock and announce and should have, that exclusion is not the proper remedy.<sup>24</sup> Next, he argued that the description of the homeowner, who was to be searched pursuant to the warrant, was inadequate – it described him only by name, gender and race – but the court noted that even if it was, that did not invalidate his detention. As an occupant at the time, it was appropriate to seize and detain McKenzie.<sup>25</sup> The Court looked to Johantgen v. Com., which specifically permitted a detention under such circumstances.<sup>26</sup> The Court agreed the frisk was proper because he was found in a house where the officers had probable cause to believe drug trafficking was occurring. Under U.S. v. Fountain, it was proper to handcuff and frisk McKenzie.<sup>27</sup> Finally, the Court agreed the baggie was in plain view but disagreed as to its being proof of contraband. It noted that baggies are carried for many lawful purposes. At most, it would lead to a suspicion. However, the Court held that it was justified under the “inevitable discovery” doctrine of Nix v. Williams.<sup>28</sup> Once he was detained, the officers learned McKenzie was the subject of an active warrant and he would have been completely searched because of that warrant.

The Court upheld the denial of the motion to suppress.

## SEARCH & SEIZURE – PLAIN VIEW

### Stevens v. Com., 354 S.W.3d 586 (Ky. App. 2011)

**FACTS:** On June 28, 2007, Deputy Smith (McCreary County SO) got a call from Spradlin that “he had located a [motorcycle] that had been stolen from his grandfather” several days before. Spradlin had located it on Stevens’ property. Deputy Smith and Sheriff Skinner, along with two other deputies, went to Stevens’ property near the Kentucky-Tennessee state line. They entered the property through his driveway and spotted the motorcycle parked in an open shed. No one was home when they arrived. They later agreed that the motorcycle could not be seen from the road.

Deputy Smith entered the shed and confirmed that the serial number matched that of the stolen motorcycle. Stevens arrived a short time later and told the Sheriff he’d purchased it at a flea market. He and the Sheriff left the premises, and the deputies remained, subsequently getting permission from his wife to search the remainder of the property while waiting for the Kawasaki to be removed. At that time, a stolen four-wheeler was located and also removed. Stevens was ultimately charged with receiving stolen property for both items. He moved for suppression and the trial court agreed that the search was improper, holding that the viewing of the motorcycle was permitted under open fields, but that the subsequent search to identify it was not proper – considering the deputies agreed they could have sought a search warrant based upon the information they had. Although the Court suppressed the evidence found in that search, it did admit the admission of the four-wheeler, however. Stevens took a conditional guilty plea and appealed.

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<sup>24</sup> Hudson v. Michigan, 547 U.S. 586 (2006).

<sup>25</sup> Michigan v. Summers, 452 U.S. 692 (1981).

<sup>26</sup> 571 S.W.2d 110 (Ky. 1978).

<sup>27</sup> 2 F.3d 656 (6th Cir.1993).

<sup>28</sup> 467 U.S. 431 (1984).

**ISSUE:** Is a seizure valid when the contraband items is viewed from a place where the officers do not have the legal right to be?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the “officers were not where they had a right to be when they initially observed the Kawasaki [motorcycle].” The Court noted that it seemed to be located in the curtilage (in a shed) and not in the open fields and agreed that suppression was proper of that item. The Court recognized, however, that a “subsequent consent to search may dissipate the taint of a prior illegality.”<sup>29</sup> The Court found that the subsequent consent was voluntary and “not the product of coercion or duress.” The consent occurred some three hours after the motorcycle was found and given by someone who was not present when the first search was done. She “expressed a desire to cooperate with the officers.” In fact, she conferred with her husband by phone before signing the consent form. Further, although the Court agreed the deputies should have gotten a warrant, their “conduct was not abusive or flagrantly inappropriate,” and they arguably believed their actions were justified under plain view.

The Court upheld the second search and the plea.

**Chavies v. Com., 354 S.W.3d 103 (Ky. 2011)**

**FACTS:** A KSP trooper, driving through his neighborhood, “spotted a man standing in the garage of a for-sale house and an unfamiliar car pulling out of its driveway.” He stopped the car, driven by Chavies, for failure to wear a seatbelt and reckless driving. Because a warrant was discovered, Chavies was arrested. The trooper returned to the house, with a key provided by the realtor, and searched the house. Hurley was found hiding in a closet. He admitted that he was making and using methamphetamine in the house and that Chavies had stolen specific items. The troopers looked through the window of Chavies’ car and saw items matching what had been stolen. They searched the car and found more items and a mobile meth lab.

Chavies was indicted for Burglary, Manufacturing Methamphetamine, Receiving Stolen Property and related charges. Chavies moved for suppression and was denied. He was convicted of most of the charges and appealed.

**ISSUE:** Is inadvertent discovery required under the plain view doctrine?

**HOLDING:** No

**DISCUSSION:** Chavies first argued that the initial traffic stop was invalid because it was not based upon any reasonable suspicion of criminal activity. The trooper had testified that he followed Chavies and realized he wasn’t wearing a seat belt. When Chavies spotted the trooper, “he jerked back into the main road.” The Court agreed there was sufficient reason to make the stop. With respect to the search of the car without a warrant, the Court looked to the plain-view exception. The Court reviewed the usual three elements but noted there was “some confusion ... concerning a potential fourth element to the plain-view exception-inadvertent discovery by the police.” In Horton v. California, the Court had

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<sup>29</sup> Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).

noted that “even though inadvertence is a characteristic of most legitimate ‘plain-view’ seizures, it is not a necessary condition.”<sup>30</sup> However, in Hunt v. Com.,<sup>31</sup> the Court had “included the inadvertent discovery element in the plain-view exception analysis.” But the Court concluded that Hunt did “not signal a reversion in Kentucky law back to requiring” it. The items in question were in containers that were appropriate for the items (a laptop bag and the original box for the stolen lights). In addition, under the automobile exception, it was absolutely appropriate to search the vehicle for more stolen items, even though Chavies was in custody at the time, as they had sufficient probable cause to believe the car contained evidence of criminal activity. Further, the Court agreed that Hurley was not an unreliable anonymous tipster.

Chavies also challenged his conviction for Manufacturing Methamphetamine, but the Court quickly found that the trooper’s training and experience adequately supported his testimony that Chavies had a mobile meth lab in the vehicle.

Chavies’ convictions were affirmed.

## SEARCH & SEIZURE - CONSENT

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court first looked to the search and noted that an exception to the usual prohibition exists “where the owner or third party possessing the premises validly consents to a warrantless search.”<sup>32</sup> Det. Anderkin (KSP) testified that Aguilar “affirmatively stated that she resided at the apartment” and gave consent. The Court agreed that “the detective could have reasonably believed that Aguilar possessed common authority over the apartment to authorize the search thereof.” The Court agreed the motion to suppress was properly denied. Walters also wanted to admit records that indicated his daughter suffered from hallucinations and mental illness. The Court noted that psychotherapy records are “absolutely privileged and may not be disclosed absent a waiver of that privilege.”<sup>33</sup> However, in a criminal prosecution, the “compulsory process clause guarantees the accused the right to access exculpatory evidence regardless of that absolute privilege.”<sup>34</sup> Such records

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<sup>30</sup> 496 U.S. 128 (1990).

<sup>31</sup> 304 S.W.3d 15, 27 (Ky. 2009).

<sup>32</sup> Colbert v. Com., 43 S.W.3d 777 (Ky. 2001); Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005); Illinois v. Rodriguez, 497 U.S. 177 (1990).

<sup>33</sup> KRE 507 (b).

<sup>34</sup> Com. v. Barroso, 122 S.W.3d 554 (Ky. 2003).

had previously been held in other jurisdictions to be “directly relevant to the issue of a witness’s credibility.” The Court reviewed the records in question and suggested that the daughter suffered from extremely vivid hallucinations that included family members involved in violent acts. The Court agreed that in this case, it was proper to admit the records.

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

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

**FACTS:** On December 9, 2008, Maeser (Cabinet for Health and Family Services) requested that an officer accompany her to the Hack home. She was working on an open case against Timothy Hack, who she knew had prior drug involvement. Det. Allaman, Greater Hardin County Narcotics Task Force, agreed to accompany her. He called Deputy Dover, Hardin County SO, to assist, and they, along with Officer Thompson (unidentified agency) went to the house. When they arrived, they sought entry at the front but realized it lacked a door knob suggesting it was not used. The group went to the back door where they were met by Racheal Hack. She explained the back door was blocked and redirected them to the front door. She met Deputy Dover and Maeser there, after some delay. They explained their purpose and she admitted them to the living room. Det. Allaman and Officer Thompson returned to the front door and requested permission to enter, which Racheal gave. Dept. Allahan spotted a methamphetamine pipe in plain view. Deputy Duffey advised both Racheal and Timothy Hack of their rights and they gave written consent to search. Items necessary to make methamphetamine were found.

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

Racheal Hack took a conditional guilty plea and appealed.

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

**HOLDING:** No

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

**Martinez v. Com., 2011 WL 941583 (Ky. App. 2011)**

**FACTS:** On January 2, 2009, Martinez was walking to his van. Officers Thomas and Frazier (Lexington PD) spotted him swaying and stumbling. They approached Martinez as he got into his van and appeared ready to drive away. Upon questioning, he stated he was going to the store. Officer Thomas smelled alcohol and believed Martinez to be intoxicated. Officer Thomas had him step out and then saw some shell casings on the ground. Martinez denied having a gun and gave consent to search the van. They found no weapons but did learn that Martinez was a convicted felon. Officer Thomas asked Martinez for consent to search his home. Martinez agreed, led the police to the nearby apartment and allowed them inside. He explained a friend was there, sleeping, and the officers woke

him up before searching. In the only bedroom, they found two rifles. Both men were arrested and both denied owning the weapons. Martinez stated they belonged to a third party for whom he was keeping them - but could not give the friend's name. Ultimately, the officers also found various ammunition.

Martinez was indicted. He requested suppression, arguing the shell casings could not be directly linked to him. The Court, however, found that his consent was voluntary and that his "alcohol intoxication did not vitiate his consent and that he spoke English well enough to consent to the searches." The motion was denied and Martinez took a conditional guilty plea. He appealed.

**ISSUE:** Does an arguably illegal detention invalidate a voluntary consent?

**HOLDING:** No

**DISCUSSION:** Martinez argued that his consent was given during an illegal detention, but the court agreed that the "the dispositive inquiry for purposes of the Fourth Amendment was not whether the detention was supported by reasonable suspicion, but rather whether the consent was voluntary." Under Com. v. Erickson, the Court agreed that "the constitutionality of Martinez's detention has no bearing on whether the evidence obtained must be suppressed."<sup>35</sup> The only relevant inquiry was whether his consent was voluntary. Nothing indicated that Martinez was "confused or tricked."

The court upheld the consent and the plea.

### Casey v. Com., 2011 WL 1196704 (Ky. App. 2011)

**FACTS:** Casey was identified in a suspect in drug trafficking in Newport. Officers went to the apartment shared by Gillespie and Casey. The lease was in Gillespie's name and she paid the rent. Gillespie consented to a search, and in fact, asked that the officers search as she did not want anything illegal in the apartment. A ledger of drug transactions was found in a dresser, along with Casey's ID and men's clothing.

Casey was convicted and appealed, after having been denied suppression.

**FACTS:** May a lessee, who is a co-inhabitant of a residence, give consent to search the bedroom furnishings in a room they share with the suspect?

**HOLDING:** Yes

**DISCUSSION:** Casey argued that the search of the dresser was improper and that Gillespie "could not effectively give the police permission to search areas that were used or possessed only by Casey because they were exclusively within his control." The Court noted that it has repeatedly been held that the test for whether third party consent is valid is, "whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched."<sup>36</sup> The Court found it "entirely reasonable for the agents searching Gillespie

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<sup>35</sup> 132 S.W.3d 884 (Ky. App. 2004).

<sup>36</sup> Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005)

and Casey's apartment to assume that Gillespie could consent to the search of the dresser." It was in a shared bedroom and not locked or otherwise secured.

The Court upheld the search, although the conviction was reversed for other, unrelated, reasons.

## SEARCH & SEIZURE - OPEN FIELDS

### Hawkins v. Com., 2011 WL 556518 (Ky. App. 2011)

**FACTS:** On July 15, 2007, Deputy Moberly (Mercer County SO) received an anonymous tip about drug activity at a described location. The next day, while seeking the location, he and Trooper Rogers (KSP) found a red pickup truck parked along the road in Anderson County. The driver told them that his "girlfriend was inside of a trailer near the roadway and the driver was concerned for her safety." They went to check on her well-being. Trooper Rogers knocked on the front door, getting no answer, and Deputy Moberly did the same at the back. Deputy Moberly thought he heard voices inside the trailer, though. About that time, Trooper Rogers saw "two large dogs exit a nearby barn and decided to see what was in the barn." The trooper entered the barn and saw a "jar with clear liquid and lithium stripes and an altered aluminum kettle containing tubing." He realized it was a methamphetamine lab and obtained a search warrant. Upon execution of that warrant, officers found additional evidence of methamphetamine manufacturing.

Hawkins was charged and requested suppression. When that was denied, Hawkins was convicted of lesser offenses and appealed.

**ISSUE:** May an officer enter a barn under the Open Fields doctrine?

**HOLDING:** No

**DISCUSSION:** Hawkins contended that "police failed to establish that they had both probable cause and exigent circumstances to permit their entry into the barn." The Court noted that while the facts justified a search of the actual trailer "under the emergency exigent exception, their search of the barn went beyond the permissible scope of the emergency exigent exception permitting the trailer's search." In order to search a building, the "police must have an objectively reasonable basis for believing that a person within the building is in need of immediate aid."<sup>37</sup> The Court found no reason for the officers to believe that she was inside the barn, given what they knew. Seeing the dogs leaving the barn, a perfectly normal thing for dog to do "when strangers are in their yard," was not enough to justify their entry.

Further, the Court did not find it admissible under the Open Fields, as the trooper could not "observe the interior of the barn from the vantage point of the open field" - as he specifically testified that he did not see the evidence "until after he entered the barn." The Court concluded that the evidence in the barn should have been suppressed, as should the warrant, which was based on that evidence.

Hawkins conviction was reversed and the case remanded.

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<sup>37</sup> Michigan v. Fisher, 130 S.Ct. 546 (2009).

## SEARCH & SEIZURE – ABANDONED PROPERTY

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

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

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

The Commonwealth appealed.

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

**HOLDING:** No

**DISCUSSION:** The Commonwealth argued that the trash toter was not protected as it was not located in the curtilage. The Court noted that the trash toter was located in a parking lot immediately behind the apartment complex that was solely for the use of the tenants, with one toter, marked, for each of the units. When searched, it was in his normal location, in the grass behind the parking area, and not in front of the building where it would be placed for collection. The Court looked to California v. Greenwood<sup>38</sup> and noted that it is a “more difficult issue” when trash that is not yet placed out for collection. The Court looked to the factors in determining curtilage is laid out in Quintana v. Com.<sup>39</sup> Those factors include the “proximity of area to the home,” “whether area is enclosed,” “how the area is used,” and “steps taken to prevent observation by passerbys.” Applying the factors to the situation in this case, the Court agreed that the dispositive issue was the reasonableness of any expectation of privacy in the trash. The Court concluded that the trash toter was within the curtilage of Snowden’s home and that a member of the public would recognize the area as private.

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

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<sup>38</sup> 486 U.S. 35 (1988); Smith v. Com., 323 S.W.3d 748 (Ky. 2009).

<sup>39</sup> 276 S.W.3d 753 (Ky. 2008).

## SEARCH & SEIZURE – ANONYMOUS TIP

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** Randolph argued that the “stop of the vehicle in which she was a passenger” was unlawful. The Court differentiated between anonymous informants and citizen informants, noting that a truly anonymous tip must be supported by some independent verification to be considered reliable.<sup>40</sup> The Court equated this situation, however, to a citizen informant, in which there is “face to face contact between the citizen and an officer, who has the opportunity to determine the citizen’s credibility.”<sup>41</sup> In this case, although the officer did not know the name of the citizen, he could identify them if need be. The Court concluded that even if it is determined that the information given by an informant is erroneous, “it does not vitiate an otherwise properly conducted Terry stop” because “the reasonableness of the officer’s action is determined by the facts available at the time.”<sup>42</sup> As such, the stop was proper and Randolph’s plea was upheld.

## SEARCH & SEIZURE – K-9

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

**FACTS:** On January 10, 2010, Deputy Mahan (Muhlenberg County SD) was patrolling in the late evening. He saw a vehicle run a stop sign. Deputy Mahan saw that the vehicle was occupied by two men, “one of whom kept turning back and looking nervously at Officer Mahan.” When the deputy made

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<sup>40</sup> Hampton v. Com., 231 S.W.3d 740 (Ky. 2007).

<sup>41</sup> See Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

<sup>42</sup> Dockstader v. Com., 802 S.W.2d 149 (Ky. App. 1991).

the stop, he recognized both occupants as involved with drugs, Ward, the driver and Garner, the passenger. Both were "nervous and irritable."

Ward did not provide an OL, only giving Deputy Mahan his SSN. He told the occupants to keep their hands in view as he checked for warrants but Ward did not comply. Officer Mahan learned they had no outstanding warrants. He had not yet written a citation, but asked the two if there were any drugs in the car; both denied that to be the case. The deputy asked for consent to search. Ward stated he did not own the vehicle and did not know what was in it. Officer Mahan explained he could give consent, but Ward refused. The deputy had a dog in his car, so he told the two men to "roll up their windows and turn off the car engine." The dog alerted on the passenger side door. He directed the men to get out and searched, he discovered methamphetamine inside a pack of cigarettes. About 15 minutes elapsed from the time he got the dog out and the dog alerted. He placed both men under arrest. While in separate cars, Ward told the deputy that the methamphetamine was his, and not Garner's and "pleaded for Garner not to go to jail."

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

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

**HOLDING:** Yes

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

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

**Prewitt v. Com., 341 S.W.3d 604 (Ky. App. 2011)**

**FACTS:** On April 1, 2009, Officer Komara (Lexington PD) was working with Fed Ex when she spotted a suspicious package. It had handwritten labels, was sent from an individual to an individual, was from a Texas border city with the return address being a Mailbox Store, was sent overnight priority and had no signature required. It was destined for a Lexington location known for drug activity. The package was presented to a drug dog which alerted on the package. They obtained a search warrant and found 18 pounds of marijuana, packaged in six bundles. Officers went to the delivery address the next day and learned that the occupants claimed no knowledge of the recipient (Brizeuela). The occupant allowed a search of the home and found no indication of drug use.

During the same time, Fed Ex tried to deliver another package but learned that the address was incorrect. Noting its similarity to the first package, it too was presented to a drug dog, which alerted, and it was found to contain 18 pounds of marijuana. A person called to check about picking up the package, so it was resealed. At about 4:30 p.m., Prewitt arrived to pick it up and was promptly arrested. She told the officers she was picking it up for a friend, who was outside and lo and behold, they found Perez,

who had been at the first address they'd visited. Perez admitted knowing what the packages contained, but claimed Prewitt did, as well.

Prewitt was indicted. She requested suppression, which was denied. She then took a conditional plea to facilitation to trafficking, and appealed.

**ISSUE:** What is the standard for holding a package for a dog sniff?

**HOLDING:** Reasonable suspicion

**DISCUSSION:** Prewitt argued that Officer Komara had not reasonable suspicion to detain the first package and that detention tainted the seizure of the second package. The court agreed that both packages were seized, albeit for just a short time, to permit the drug sniff. The Court also agreed that sealed mail is protected by the Fourth Amendment, but held that only reasonable suspicion is required to briefly detain a package for further investigation.<sup>43</sup> Although the Sixth Circuit had not adopted the Postal Service's drug package profile, it had relied on many of the same factors to find a package suspicious.

The Postal Service's "drug package profile" targets packages based on: (1) the size and shape of mailing; (2) whether the package is taped to seal all openings; (3) whether the mailing labels are handwritten; (4) whether the return address is suspicious, e.g., the return addressee and the return address do not match, or the return address is fictitious; (5) unusual odors coming from the package; (6) whether the city of origin and/or city of destination of the package are common "drug source" locales; and (7) whether there have been repeated mailings involving the same sender and addressee.

The Court agreed Officer Komara had reasonable and articulable suspicion to detain the first package and detained it only so long as necessary to present it to the drug dog. Prewitt argued that the second warrant was fatally flawed because it was effectively a cut and paste from the first one and some errors were made during the process. The Court found that stripped of the inaccuracies, however, it still had sufficient information to establish probable cause for the search warrant.

Prewitt's plea was affirmed.

## **SEARCH & SEIZURE – STANDING**

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

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

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<sup>43</sup> U.S. v. Alexander, 540 F.3d 494 (6<sup>th</sup> Cir. 2008).

officer searched the car and found methamphetamine in the front and boxes of pseudoephedrine open in the back seat. Both passengers were also arrested.

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

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

**HOLDING:** Yes

**DISCUSSION:** Turner argued that the search of the car should have been suppressed. The Court ruled that he lacked standing, as a passenger, to contest the search of Mark Turner, and what was found on him led to the proper search of the car. The Court agreed that a passenger did have the right to contest the propriety of a car search, pursuant to Brendlin v. California.<sup>44</sup> However, Turner based his argument on Arizona v. Gant, which was decided subsequent to the search in this case. But upon appeal, he abandoned that argument and based his objection on the "illegal pat-down of Mark." The Court agreed he had no standing to challenge that search

Joshua Turner's conviction was upheld.

## SEARCH & SEIZURE – EXIGENCY

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

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

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

Bennett was convicted and appealed.

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

**HOLDING:** Yes

**DISCUSSION:** Bennett argued that the warrantless search and seizure of the items in the shed was improper. The Court noted that a "well established exception to the warrant requirement is the exigent circumstances exception."<sup>45</sup> The Court noted that "Kentucky courts have recognized a 'plain smell'

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<sup>44</sup> 551 U.S. 249 (2007).

<sup>45</sup> Kirk v. Louisiana, 536 U.S. 635 (2002).

analogue to the 'plain view' doctrine by which a police officer may infer probable cause to believe that an offense has been or is being committed based upon his sense of smell."<sup>46</sup> The Court agreed that an active lab "presents a significant danger to police and the public by its toxic fumes and the possibility of explosion." As such, seizure was appropriate.<sup>47</sup> The troopers did not create the exigency and responded appropriately when they encountered it by seizing the lab.

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

## SEARCH & SEIZURE - TERRY

### Com. v. Sanders, 332 S.W.3d 73 (Ky. App. 2011)

**FACTS:** On February 2, 2009, Officer Bradbury (Covington PD) saw "Sanders walking on Greenup Street." A man in front of her turned onto a cross street, as did she. About 2 hours later, Officer Bradbury saw her walking in the opposite direction. He then approached Sanders, "asked her name and why she was in the area." She explained that she'd been at the home of a family member. She gave what turned out to be a false name, but denied having any ID. When dispatch could not confirm that name, he asked for her Social Security number and ran that - but it came back to a "man who lived in Louisville." He advised her it was a crime to give a false name, but she continued to insist that information was correct. After he told her it was felony identity theft, however, she admitted to her real name and explained she had a warrant. Officer Bradbury confirmed the warrant and arrested her.

Sanders was indicted on Theft of Identity. She moved for suppression, which was granted. The Commonwealth appealed.

**ISSUE:** Does walking down the street at night, in a dangerous neighborhood, justify a Terry stop?

**HOLDING:** No

**DISCUSSION:** The Court agreed that Sanders was improperly seized, pursuant to Brown v. Texas.<sup>48</sup> The Court noted that several reasons were put forth to justify the detention, but the Court found that none, individually or collectively, rose to the level needed for reasonable suspicion as she was engaged in the "mere act of walking on a street." In fact, most of the factors cited occurred *after* her initial detention and noted that the Supreme Court had "clearly mandated that reasonable suspicion must be determined *before* the stop occurs and not be justified in a boot-strap fashion of rationalization by hindsight."<sup>49</sup> She was allegedly in a high crime area, which had previously not been held sufficient, and was understandably nervous by being in that area. The only sign of nervousness he articulated was that she picked up her pace, but the court noted it was cold. Sanders stated she was not following someone and the Court agreed that "[p]edestrians walk through the same places and spaces." It stated: "[m]ere suspicion could not be inferred from the act of walking on a street in conjunction with other passerby. To hold otherwise would truly raise the pernicious specter of a police state."

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<sup>46</sup> Cooper v. Com., 577 S.W.2d 34 (Ky. App. 1979) overruled on other grounds by Mash v. Com., 769 S.W.2d 42 (Ky. 1989).

<sup>47</sup> See Bishop v. Com., 237 S.W.3d 567 (Ky. App. 2007)

<sup>48</sup> 443 U.S. 47 (1979).

<sup>49</sup> Emphasis in original.

The motion to suppress was upheld.

**Shelton v. Com., 2011 WL 1515288 (Ky. App. 2011)**

**FACTS:** On July 8, 2008, Graves County deputy sheriffs, along with members of the Pennyrite Narcotics Task Force, executed a search warrant on a “suspect drug house” in Mayfield. Three suspects were named on the warrant, but not Shelton. In the affidavit, Deputy Workman stated that he had received information from a reliable CI that crack cocaine had been purchased from the three named subjects on several occasions. However, when they arrived Shelton was in the backyard. He was detained and frisked by Deputy Halsell, who “felt something in Shelton’s front pocket.” He removed a baggie of crack cocaine. Shelton was arrested for possession. Shelton moved for suppression. At the hearing, Deputy Halsell testified that “for routine safety reasons, every time he detains someone, he pats down that person” for a weapon. Deputy Halsell also stated that it was “common knowledge” that drug houses have weapons and that he had been told there might be a lookout at the residence. The Court recounted the testimony, during which the deputy admitted he did not know what the item was, but that anytime he feels something, he believes it might be a weapon. The Court denied the suppression.

Shelton took a conditional guilty plea, and appealed.

**ISSUE:** May an item that is arguably a weapon to be removed from a pocket during a Terry frisk?

**HOLDING:** Yes

**DISCUSSION:** First, the Court looked at the detention and frisk. The Court agreed that simple proximity to others “independently suspected of criminal activity” does not give sufficient cause to frisk the person.<sup>50</sup> The Court also looked to U.S. v. Vite-Espinoza, in which a subject found in the back yard of a home being searched pursuant to a search warrant were found.<sup>51</sup> The Court agreed the stop and the frisk were both appropriate under the circumstances, as Deputy Halsell “had a reasonable and particularized basis for conducting a pat-down of Shelton.”

However, the Court continued, when he reached into Shelton’s pocket, he exceeded the scope permitted by Terry. In Minnesota v. Dickerson, the Court stated, the frisk was “strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.”<sup>52</sup> This ruling was supported by the Kentucky courts in Com. v. Crowder.<sup>53</sup> The case turned on whether Deputy Halsell could reasonably believe the item was a weapon and the Court looked to U.S. v. Strahan.<sup>54</sup> In that case, one of the items felt was a money clip, which “provided rigidity to the bulge,” and that encouraged the Court in that case to accept that it *might* have been a weapon. In this situation, however, the Court found insufficient evidence to support the deputy’s contention that “the object he felt was a weapon” as he indicated he “had no idea what it was.” No testimony was elicited “regarding what

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<sup>50</sup> Ybarra v. Illinois, 444 U.S. 85 (1979).

<sup>51</sup> 342 F.3d 462 (6<sup>th</sup> Cir. 2003).

<sup>52</sup> 508 U.S. 366 (1993).

<sup>53</sup> 884 S.W.2d 649 (Ky. 1994).

<sup>54</sup> 984 F.2d 155 (6<sup>th</sup> Cir. 1993).

the object felt like in Shelton's pocket or why he had reason to believe that the object was possibly weapon [sic]."

The Court overturned the denial of the suppression motion and remanded the case for further proceedings.

**Smith v. Com., 2011 WL 2553945 (Ky. App. 2011)**

**FACTS:** On March 10, 2009, Buckner's vehicle was shot at by an unknown person in a red car. At about the same time, a person was reported to be entering the Hazard Wal-Mart, apparently angry and armed. Since the direction of travel was appropriate, Captain East and Officer Campbell (unknown agency) went to the Wal-Mart; they were met by Sgt. Napier and Officer Combs. They found a red vehicle and blocked it in – inside they could see a shell casing and a bottle of tequila. Captain East went into the store and found a man matching the description of the tip at the gun counter. He was told the man had already been frisked. When the officers left the store, a woman driving through the parking lot pointed at Smith, who had also exited. (Although the Court did not discuss this issue, it seems to have been presumed that she had some knowledge of what had occurred.) Captain East asked Smith to come to him and told him to raise his arms – Sgt. Napier immediately spotted a pistol. They searched the vehicle, upon consent, and found ammunition.

Smith was indicted for CCDW, wanton endangerment and related charges. He requested suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** May a Terry stop be based on credible information from an anonymous informant?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the encounter under the Terry standard. The Court agreed that although the witness was anonymous, that it was credible, and that others also pointed him out as possibly carrying a firearm. They also saw him headed toward the vehicle they had already identified as suspect. The Court agreed the officers "had a reasonable, articulable suspicion that Smith was involved in the shooting."

Smith's plea was upheld.

**Jackson v. Com., 2011 WL 6003887 (Ky. App. 2011)**

**FACTS:** On the day in question, Officer McMinoway (Lexington PD) was on patrol. Just before 1 a.m., he noticed a lone vehicle, a van, in a nightclub parking lot. Jackson was in the driver's seat and Henderson was standing outside the van with his hands near the window. The officer saw some type of contact. When Henderson saw the officer, he "quickly pulled his hands away from the window and abruptly walked away from the van."

The officer believed he'd just witnessed a "hand-to-hand drug transaction." He circled around and returned and noted that the van was leaving and that Henderson was now in the vehicle as well. The officer made a traffic stop and found Jackson to be "perspiring heavily, his hands were shaking, and he

was very hesitant when answering basic questions.” Jackson could not define his relationship with Henderson, nor did he identify him by name. When he reached for the glove box, the officer found his movements odd and ordered him from the car. Outside, Jackson “repeatedly put his hands into his pockets despite Officer McMinoway’s warnings to the contrary.” The officer frisked him and “felt a lump in [Jackson’s] pocket and heard the crumpling sound of a plastic baggy.” He immediately recognized it as contraband and in fact, it was 8.2 grams of cocaine in individual packages.

Jackson was indicted for Trafficking and related offenses. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is extreme nervousness and a lack of knowledge about one’s passenger sufficient for a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** The court reviewed the facts known to the officer at the time (as listed above) and agreed that the officer did possess a reasonable suspicion of criminal activity. As such, the initial interaction was proper. The Court also agreed it was appropriate to 1) get Jackson out of the vehicle and 2) frisk him, based upon a reasonable belief he was armed in dangerous. Finally, the Court found it proper to seize the contraband since the officer immediately recognized its character.<sup>55</sup>

The Court upheld Jackson’s plea.

## SEARCH & SEIZURE – HOTEL ROOM

Blades v. Com., 339 S.W.3d 450 (Ky. 2011)

**FACTS:** On March 23, 2009, Deputy Crabtree (McCracken County SO) stopped Brokaw’s vehicle. He learned it was uninsured and requested consent to search; she agreed. He found marijuana and methamphetamine paraphernalia in a bag. Blades, a passenger, admitted ownership of the items and was arrested. Deputy Vallelunga arrived and aided in the search; he found blister packs of pseudoephedrine and a hotel room key. Apparently, because of Blades’ arrest, he was unable to return to the hotel and check out. After “lunch-time,” the hotel manager allowed the officers to search the room without a warrant and a number of other drug-related items were found. Blades was convicted and appealed.

**ISSUE:** Does a hotel guest have an expectation of privacy after their rental period ends?

**HOLDING:** No

**DISCUSSION:** The Court began by agreeing that guests do “enjoy a reasonable expectation of privacy in hotel rooms.”<sup>56</sup> However, once their “rental period has expired or been lawfully terminated, the guest

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<sup>55</sup> Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010).

<sup>56</sup> Stoner v. California, 376 U.S. 483 (1964).

does not have a legitimate expectation of privacy in the hotel room or in any article therein of which the hotel lawfully takes possession.”<sup>57</sup>

Blades’ conviction was affirmed.

## SEARCH & SEIZURE - PASSENGER SEARCH

### Com. v. Dietz, 2011 WL 112895 (Ky. App. 2011)

**FACTS:** Dietz was the passenger in a vehicle driven by Jones. Officer Hoyle (Covington PD) noted that the tail lights were not on, as they should have been, and made a traffic stop. As he spoke to Jones, Dietz “repeatedly interrupted and appeared nervous.” Officer Hoyle had prior experience with Dietz and knew she had been a drug user, so he called for a drug dog. Officer Richardson arrived with his dog as Hoyle was working on the citation. Officer Richardson had both occupants step out, and both were frisked. Nothing was found. The dog alerted on the right rear passenger door. Officer Hoyle searched Jones and Dietz while Richardson searched the car. Nothing was found in the car, but methadone was located in Dietz’s pocket.

Upon motion, the trial court looked to Morton v. Com.<sup>58</sup> and Owens v. Com.<sup>59</sup> and concluded “that the original search of Jones and Dietz for weapons upon the exit of the vehicle was appropriate; however, the subsequent search of Dietz lacked the additional nexus which would support an in-depth search of her person.” The Court further noted that “had the officers searched Dietz *after* the completion of the search of the vehicle which produced no drugs, probable cause may well have been established.” The trial court suppressed the evidence. The Commonwealth appealed.

**ISSUE:** May a passenger be searched when there is evidence they were riding in a vehicle that contained drugs?

**HOLDING:** No

**DISCUSSION:** The Court stated that the “crux of the Commonwealth’s argument<sup>4</sup> is that the trial court erred in its determination that the contemporaneous search of Dietz and the vehicle did not provide the officers with probable cause as to the search of Dietz.” However, the Commonwealth depended upon the inevitable doctrine which the Court ruled inapplicable. The Court differentiated the facts from that of Dunn v. Com., in which there was only one occupant and the smell of burning marijuana<sup>60</sup> which provided “particularized suspicion of criminal activity” both as to the vehicle as well as the occupants. The dog, in this case, alerted on the car, and “Morton permits a search of the person in control of the vehicle as a result of particularized criminal suspicion arising from the canine alert on the vehicle.” Nothing in the facts provided an “independent showing of probable cause as to Dietz, a mere occupant of the vehicle.”

The suppression was upheld.

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<sup>57</sup> U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

<sup>58</sup> 232 S.W.3d 566 (Ky.App. 2007).

<sup>59</sup> 291 S.W.3d 704 (Ky. 2009).

<sup>60</sup> 199 S.W.3d 775 (Ky.App. 2006).

## SEARCH & SEIZURE - CARROLL

Com. v. Ali, 2011 WL 474809 (Ky. App. 2011)

**FACTS:** On May 5, 2009, Officer Mangus (Covington PD) spotted a car being driving with high beams and the occupants unsecured by seat belts. He suspected, because of prior reports, that the occupants might be involved in drug trafficking in the area. Officer Mangus stopped the car and called for a K-9; the dog and handler arrived while Officer Mangus was writing the citation for the traffic offenses, which apparently included a citation to the driver for driving on a learner's permit without a licensed driver in the car, since Ali (the passenger) showed a suspended license.

Both the driver and Ali were asked to get out while the dog sniffed the car. The dog alerted on several locations and the handler searched the car, finding marijuana residue. He searched Ali and found crack cocaine in his shoe. Ali was arrested. He challenged the search, arguing that "a passenger should not be searched unless there is probable cause, independent of that to search the car, to search him."<sup>61</sup> The Kenton County Circuit Court granted the suppression and the Commonwealth appealed.

**ISSUE:** Does Carroll authorize a search of all passengers?

**HOLDING:** No

**DISCUSSION:** The Court first noted that the initial traffic stop was proper. It was also appropriate to call for a drug dog, and the Court noted that a "dog's sniff does not per se constitute a search under the Fourth Amendment and does not require probable cause or reasonable suspicion."<sup>62</sup> However, an "otherwise lawful canine sweep that is ancillary to a legitimate traffic stop may constitute an unlawful search if the suspect is detained beyond the time necessary to complete the traffic stop."<sup>63</sup> However, Ali did not challenge the length of time it took for the dog to check the car. The Court stated, also, that the "dog's alert to the passenger car door justified the officer's warrantless search of the car." However, the Court agreed that "occupants of a car continue to have a heightened expectation of privacy, which protects against personal searches without a warrant." The Court agreed that "personal searches of vehicle occupants are not authorized under the automobile exception as a result of the occupant's mere presence within a vehicle, where there is probable cause to search."<sup>64</sup> However, in this case, "there was no testimony from either officer about why they thought [Ali] had drugs on his person," and as such, the search of Ali's person was not justified.

The Court agreed that since the officer's "did not articulate any reasons for this search other than Ali's mere presence in the vehicle," the trial court's ruling was correct and the evidence was properly suppressed.

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<sup>61</sup> U.S. v. Di Re, 332 U.S. 581 (1948).

<sup>62</sup> U.S. v. Place, 462 U.S. 696 (1983); See also Illinois v. Caballes, 543 U.S. 405 (2005).

<sup>63</sup> U.S. v. Jacobsen, 466 U.S. 109 (1984).

<sup>64</sup> However, in Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007), the Court agreed the dog's alert on the car gave the police probable cause to search Morton, the driver and sole occupant, but that "the probable cause to search would not extend to a passenger without some additional substantive nexus between the passenger and the criminal conduct."

**Sullivan v. Com., 2011 WL 1900289 (Ky. App. 2011)**

**FACTS:** On April 16, 2009, while patrolling an area in which there had been numerous complaints of drug activity, Detectives Page and Smoot (Lexington PD) saw a vehicle legally parked. Det. Page saw a man counting money, and also saw a digital scale and a green leafy substance. He drove up alongside the car and saw a bag of marijuana beside the driver's right leg. The detectives approached the car from opposite sides – with Det. Page seeing a passenger with money, marijuana and a digital scale. Both men were taken out of the car. Det. Smoot then also saw the suspect items. During a vehicle search, Det. Page found marijuana on the scale and 240 grams in the Ziploc bag, as well as 4.2 grams in a candy bag. Sullivan, the driver, was arrested.

Sullivan moved for suppression, arguing the officers lacked reasonable suspicion to do a Terry stop. The trial court ruled that Det. Page “was lawfully in a position where he could observe contraband in plain view.” Sullivan took a conditional guilty plea for trafficking and appealed.

**ISSUE:** Does probable cause justify the search of a vehicle for contraband without a warrant?

**HOLDING:** Yes

**DISCUSSION:** Sullivan argued that the information available to the detectives was “insufficient to establish reasonable suspicion to search his car.” Sullivan pointed to conflicting statements made by the detectives between the indictment and the suppression hearing. The Court agreed there “were some minor inconsistencies in the record,” but that the decision on the credibility of a witness was up to the Court. The Court further agreed that Dunn v. Com. “permits police to search a legally stopped automobile where probable cause exists that evidence of a crime will be found in the vehicle.”<sup>65</sup> In both areas from which Det. Page testified he saw the contraband, he was “legitimately in a position where he could and did observe evidence of a drug crime.”<sup>66</sup> Once he did so, he was “authorized to search the vehicle under the automobile exception pursuant to the plain view exception.”<sup>67</sup>

Sullivan's plea was affirmed.

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

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

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<sup>65</sup> 199 S.W.3d 775 (Ky. App.2006).

<sup>66</sup> Com. v. Banks, 68 S.W.3d 347 (Ky. 2001).

<sup>67</sup> Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court agreed with the trial court that it need not address the issue of consent. Instead, it justified the search under the "automobile exception" which permits an officer to search a legitimately stopped vehicle where probable cause exists that contraband or evidence of a crime may be in the vehicle.<sup>68</sup> The Court agreed that the facts, as known to the deputy, were sufficient to find probable cause and upheld the plea.

## SEARCH & SEIZURE - VEHICLE SEARCH

### Com. v. Jamison, 2011 WL 1085331 (Ky. App. 2011)

**FACTS:** On April 24, 2008, Det. Davis (Louisville Metro PD) was a housing authority liaison officer. He knew that an elementary school parking lot was used as a place for drug transactions. At about 10 p.m., he spotted a vehicle "parked in the lot near the break in the fence" and Det. Davis knew of no lawful reason for the vehicle to be parked there at that time." After a few minutes, a male got out of the rear of the van and the vehicle moved off. He ran the tags and learned it was a rental. The vehicle was stopped a few blocks away. Det. Davis later summarized his knowledge of the area and concluded by saying that "everything in my career tells me that ... the gentleman [driving the vehicle] had no legitimate reason to be there and that what he was there for was to purchase, either to purchase or sell narcotics."

Davis and his partner approached and Davis "smelled marijuana even before he reached the window." Jamison was in the front passenger seat, closest to Davis. Ultimately, illegal drugs were found and Jamison arrested. He appealed, and the trial court found the stop unlawful, suppressing the evidence found. The Commonwealth appealed.

**ISSUE:** Does reasonable suspicion justify a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the stop, and noted that in U.S. v. Cortez, the Supreme Court "explained the two elements in assessing evidence upon which an investigatory stop is made."<sup>69</sup> First, it must be based upon the totality of the circumstances, and noted that a "trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person." The consideration "must yield a particularized suspicion ... that the particular individual being stopped is

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<sup>68</sup> Moore v. Com., 159 S.W.3d 325 (Ky. 1980); Morton v. Com., 231 S.W.3d 566 (Ky. App. 2007); Carroll v. U.S., 267 U.S. 132 (1925)

<sup>69</sup> 449 U.S. 411 (1981).

engaged in wrongdoing.” The Court emphasized that “in every assessment, there is the ‘imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.” The court looked to the fact that the vehicle was parked for some minutes in a lot that prohibited trespassing and loitering. Even though Jamison argued that there was a possibility that the vehicle was doing something lawful, such as dropping off a resident at the adjacent apartment complex, the Court noted that even “wholly lawful conduct might justify the suspicion that criminal activity was afoot.”<sup>70</sup> The Court also referenced U.S. v. Arvizu, reiterating that the trial court should “take into account all relevant facts, including conduct that might appear to be entirely innocuous, in determining whether the police officer had a reasonable suspicion to believe that criminal activity recently occurred or was about to occur.”<sup>71</sup>

The Court found that the officer had sufficient reasonable suspicion that criminal activity was afoot thereby justifying the investigatory stop and further found that the officer was fully capable of articulating that suspicion during the suppression hearing.” The Court reversed the suppression and remanded the case.

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

**FACTS:** Officer McFarland (Winchester PD) made a traffic stop of a vehicle in which only one headlight was working. The driver was very upset and Greene, who was a passenger, appeared very nervous. The driver was given a verbal warning but was asked for consent to search the car, which was provided. Greene, who was still in the car, was asked to get out. He was asked by both officers present to keep his hands out of his pockets but he failed to comply. He was frisked and nothing was found. He did admit, however, to having marijuana, upon which he was handcuffed. (The driver admitted she'd gotten marijuana in exchange for giving Greene a ride.)

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the officer could ask the driver for consent and that it was then reasonable to have Greene step out. The officer explained that his training taught him to focus on the hands and that if someone kept their hands in their pockets, something dangerous could be found there. Greene voluntarily admitted that an item in his pocket was marijuana. The Court noted that the circuit court was “swayed by the officer's testimony” and found the officer's concern for his safety credible. The Court found that Greene did not have an expectation of privacy in the vehicle, and thus lacked standing to object to the search.<sup>72</sup> The Court also upheld the stop as reasonable.

Greene's plea was upheld.

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<sup>70</sup> Reid v. Georgia, 448 U.S. 438 (1980).

<sup>71</sup> 534 U.S. 266 (2002)

<sup>72</sup> Garcia v. Com., 185 S.W.3d 658 (Ky. App. 2006).

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** Armstrong argued first that the traffic stop was improper. The Court agreed that the lack of the sticker was sufficient reason to stop the vehicle as the officer had an objective reason to believe there was a violation of the law. Further, the Court agreed that under Strange v. Com.<sup>73</sup> that officers are free to approach anyone and ask questions, so long as they do not legally seize that person. There was no indication Trooper Williams used any show of authority or physical force on Armstrong, he simply asked if he could ask a few questions.

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

**SEARCH & SEIZURE - VEHICLE SEARCH - GANT**

**Mucker v. Com., 2011 WL 1103359 (Ky. 2011)**

**FACTS:** On October 14, 2007, Officer Martin (Shively PD) responded to a fight call. On the way, he was also told there was a man with a gun at the location. Upon his arrival, a witness told him a man, in a maroon SUV, was waving a handgun, but officer’s found only a female in the passenger seat. She explained the vehicle belonged to her boyfriend, Mucker. The witness then pointed out Mucker in the parking lot. As Mucker tried to get into the back seat of a different car, Martin seized him and patted him down, finding a loaded firearm. Mucker was arrested. When the license plate check of the SUV indicated that Mucker owned it, the officer asked for consent to search but was denied. The “officers nonetheless commenced a vehicle search, discovering a modified, sawed-off shotgun (with serial numbers filed off and the shoulder stock removed), in addition to a holster, shotgun shells, and a loaded magazine” that fit the weapon found on his person. Mucker was ultimately convicted of various weapons-related state offenses.

Mucker appealed.

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<sup>73</sup> 269 S.W.3d 847 (Ky. 2008).

**ISSUE:** Does finding a weapon on a convicted felon justify a search of the vehicle under Gant?

**HOLDING:** Yes

**DISCUSSION:** Mucker argued that the evidence found during the SUV search should be suppressed as the “fruits of an unconstitutional search.” The Court looked to Arizona v. Gant<sup>74</sup> for guidance. The trial court had upheld the search as relevant as it was for evidence of the crime of carrying a concealed deadly weapon, despite the fact a weapon had already been found on Mucker’s person. “The Commonwealth analogizes carrying a concealed deadly weapon to drug offenses and offers McCloud v. Commonwealth,<sup>75</sup> in which this Court affirmed the search of a vehicle as a search for evidence of the offense of possession or trafficking in drugs.” The Court agreed, finding that the “unlawful possession of a weapon more closely resembles narcotics-possession offenses than routine traffic violations” and that it was reasonable to believe “evidence relevant to the crime of carrying a concealed weapon might be found in the SUV.” The discovery of ammunition is relevant to show possession, as well. The Court reiterated, however, that the “*cart blanche* rule that a vehicle may be searched incident to arrest of a recent occupant is no more.”

Mucker’s conviction was affirmed.

**Robbins v. Com., 336 S.W.3d 60 (Ky. 2011)**

**FACTS:** In September, 2005, Robbins was eating dinner with two friends in Louisville. He had an outstanding bench warrant at the time for a drug trafficking case. Officer learned of his whereabouts from a CI and had followed him to the restaurant. They positively identified him through the window. Robbins left the restaurant and approached his vehicle, unlocking it with a remote key. His female friend opened the rear passenger door. The officer identified themselves and Robbins “ran to the passenger side of the vehicle, reached into his pocket, and threw something to the ground.” Robbins was seized and handcuffed. Robbins was searched and \$1,010 was found. Another officer found a small bindle under the vehicle that they believed contained cocaine. Robbins was then arrested. Other officers searched the vehicle and found more cocaine, totaling over three grams.

Robbins was indicted for trafficking and tampering with physical evidence. He took a conditional guilty plea and appealed both the charge and the forfeiture of the cash. The Court of appeals affirmed the search and the plea. Robbins further appealed.

**ISSUE:** May a vehicle be searched under Gant when a recent occupant is found to be in possession of drugs?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Arizona v. Gant<sup>76</sup> for guidance, and noted that a “vehicle search is permissible following a lawful arrest in two circumstances.” A search may be done when the occupant is arrested and still “unsecured and within reaching distance of the passenger compartment at the time

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<sup>74</sup> 129 S.Ct. 1710 (2009)

<sup>75</sup> 286 S.W.3d 780 (Ky. 2009).

<sup>76</sup> 129 S.Ct. 1710 (2009).

of the search," and is also appropriate "when it is reasonable to believe the vehicle contains evidence of the offense of arrest." In this case, the Court found the search valid under the second prong, and in fact, Robbins was arrested based upon drugs he tossed away outside the vehicle, and he had a significant amount of cash on his person. They also knew him to be a convicted drug trafficker and knew that drugs could be found in multiple places. The Court looked to Thornton v. U.S. for guidance on his status as a "recent occupant" of the vehicle and noted that while the relationship "may turn on ... temporary or spatial relationship to the car at the time of the arrest and search, ... it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him."<sup>77</sup> Robbins was certainly within arm's reach of the vehicle but had not physically occupied the vehicle once he arrived at the restaurant some time earlier. However, the officers knew that no one had been in the car during the time the car was parked there and that he'd unlocked the car with a remote key.

The Court upheld the denial of the motion to suppress. With respect to the forfeiture, the Court noted that Robbins had been previously convicted of drug trafficking, had no employment at the time of his arrest and also that three bindles of cocaine were found during the searches. The Court upheld the forfeiture as well.

## SEARCH & SEIZURE –VEHICLE – PRE-GANT

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

**FACTS:** In Niceley, on February 15, 2009, Officer Schneble (Frankfort PD) stopped Niceley's vehicle because it matched the description of a car involved in a burglary in the area. Officer Schneble learned that Niceley's license was suspended and he was arrested. White powder was found during the search of the vehicle, it was later determined to be cocaine. During the pendency of the action, Arizona v. Gant<sup>78</sup> was decided. He moved for suppression based upon Gant, and the trial court denied the motion. Niceley took an Alford<sup>79</sup> plea and appealed.

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

**HOLDING:** Yes

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

### Noffsinger v. Com., 2011 WL 1327415 (Ky. App. 2011)

**FACTS:** On August 8, 2009, Officer McGehee (Central City PD) spotted a non-illuminated license plate on a vehicle driven by Hornsby. Noffsinger was riding as a passenger. Hornsby received a citation for the offense. However, during the stop, the officer noticed that "Noffsinger seemed nervous and appeared to be impaired ...." He was "nervous and fidgety" and his "eyes appeared large and were wide open." Officer McGehee knew Noffsinger was a drug user and asked him to get out of

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<sup>77</sup> 541 U.S. 615 (2004).

<sup>78</sup> 556 U.S. 332 (2009).

<sup>79</sup> Alford v. North Carolina, 400 U.S. 25 (1970).

the car. As he did so, the officer “noticed a spoon inside a clear plastic bag, which was located between the door and the passenger seat” - Noffsinger picked it up. The spoon appeared to be scorched on the bottom. Officer McGehee asked if he’d used drugs and Noffsinger admitted to having done so the day before. He displayed a syringe mark on his arm upon request. He then took a syringe from his sock and something from his pocket and placed the item from his pocket into his mouth. Because possession of drug paraphernalia is an offense, the officer had probable cause for an arrest. (The item in his mouth turned out to be cotton.) Eventually, the officer found a dollar bill with white residue in his pocket. During a vehicle search, Officer McGehee found Xanax and a hydrocodone tablet and Noffsinger admitted all belonged to him.

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

**ISSUE:** Does the discovery of drug paraphernalia justify a further vehicle search under Gant?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed, first, that the traffic stop was properly justified by the minor traffic offense. Once the officer made the arrest for drug paraphernalia, properly seen in plain view, the Court agreed that the subsequent search was justified under Arizona v. Gant.<sup>80</sup> The Court detailed every step of the encounter and noted that the “facts demonstrate the reasonableness of Officer McGehee’s eventual arrest” and subsequent vehicle search.

The Court upheld the plea.

## **SUSPECT ID**

### **Whaley v. Com., 2011 WL 287322 (Ky. 2011)**

**FACTS:** In April, 2008, Whaley was accused in multiple armed robberies in Louisville. During one of the robberies, he shot the clerk in the leg. Det. Presley (Louisville Metro PD) created a photo-pack, in which he input identifiers in to a computer program, which then provided mug shots from which he could select. He showed the resulting photo-pack to three witnesses, separately and Whaley was identified. He was arrested in May and ultimately convicted. He appealed.

**ISSUE:** Is a photo pack valid if based on witness descriptions, even if the photos do not actually resemble each other?

**HOLDING:** Yes

**DISCUSSION:** Whaley argued that the photo-pack was unduly suggestive because he was the only one with a scar on his lip, he appeared slimmer and the witnesses all knew the photos were mug shots. The Court, however, stated that it was clear that all of the photos were mug shots and the police “expressly informed the victims that the suspect may or may not be in the photo-pack, and that it was okay if they could not make a proper identification.” The court agreed that the men do not closely

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<sup>80</sup> 129 S.Ct. 1710 (2009).

resemble one another, but “all loosely fit the description the victims gave the detective.” There was nothing that distinguished one from the other, and each victim had the opportunity to see the robber in a good light. The Court agreed the photo-pak identification was properly admitted.<sup>81</sup> On a side issue, the Court quickly concluded that the clerk who was shot in the leg suffered a serious physical injury, even though she was hospitalized for only 9 hours. She testified that the injury caused her pain and impaired the functioning of her leg for some time, although it did not “create a substantial risk of death.”

Whaley’s conviction was upheld.

**Thornton v. Com., 2011 WL 2436755 (Ky. App. 2011)**

**FACTS:** In Louisville, on December 8, 2008 Thornton and an accomplice robbed Hampton at gunpoint. The pair (and a third accomplice) were apprehended later, following a second robbery. After that robbery, the victim was taken to identify suspects (including Thornton) who had been stopped a short distance away in a vehicle that matched a description given by the victim. He identified all three occupants. Thornton was charged and requested suppression of the suspect identification and a statement made. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** Is a less than detailed description of a suspect still sufficient to support an identification?

**HOLDING:** Yes

**DISCUSSION:** Thornton argued that the show-up identification was inherently suggestive and that the trial court “improperly applied the five factors the Supreme Court specified in Neil v. Biggers.<sup>82</sup>” The trial court had noted that the victim did not adequately identify the three robbers because he did not provide a description of hair or other distinguishing factors (which were, in fact, present). He did immediately and positively identify the occupants upon being presented with them and the show-up was within an hour of the robbery. What identification he did provide, however, was completely accurate, with respect to clothing, in particular. Smith was slightly intoxicated but the Court did not find that to be an issue in that he was coherent. While a more detailed description might have made the identification more compelling, the lack did not present an insurmountable problem.

Hampton, the first victim, made an identification based upon two separate photo-paks. He picked out the robbers (Thornton and Page) quickly. Thornton complained that the detective did not specifically state that the suspect may not be in the photo-pak, but the Court found that to be unnecessary and upheld the identification. Thornton also complained that it was improper to admit a statement he made during custodial interrogation. However, the Court found no reason to believe he was not properly advised of his rights and there was no indication the statement was not given voluntarily. There was no recording made of the initial interrogation, and the detective admitted Thornton was “a bit tired.” The Court found that “simply saying that he was tired, without more, is not enough to negate the officer’s testimony that the statement was not coerced and was knowingly and intelligently made.”

The Court upheld the conditional plea.

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<sup>81</sup> See Neil v. Biggers, 409 U.S. 188 (1972)

<sup>82</sup> 409 U.S. 188 (1972).

**Barnes v. Com., 2011 WL 1900342 (Ky. App. 2011)**

**FACTS:** On May 24, 2009, Manning arrived at a Lexington home to water plants and feed the cat. She spotted a man inside the home who had broken in and when he saw her, the man retreated back into the house. She called 911. Manning did not see the man again but described him to responding officers, stating, among other things, that he wore black-rimmed glasses. The next day, she was shown a photo pak, in which none of the subjects wore glasses but was unable to make an ID. A few weeks later, officers in the area noticed a man who met the description Manning had given, and he obtained a name (Barnes) and information that Barnes lived in the area. Det. Wolff (Lexington PD) learned that Barnes had an outstanding warrant and arrested him. He presented a photo pak to Manning that included a photo of Barnes and she identified him "without hesitation."

Barnes was charged with Burglary and PFO. He moved for suppression of the identification, which the trial court denied. At trial, Manning testified about the photo-pak ID. She also identified a larger, color photo of Barnes, taken on the same day (by the detective) as the smaller photo used in the lineup. It was unclear when she saw the larger photo, however. She also made an in-court identification of Barnes. Barnes was convicted and appealed.

**ISSUE:** Are minor errors in a description fatal to a later identification?

**HOLDING:** No

**DISCUSSION:** The Court noted that even presuming that the showing of the larger photo was "unduly suggestive," that it did not constitute reversible error. The Court looked to the five factors in Neil v. Biggers<sup>83</sup> and noted that: she was able to get a good look at the intruder and that she "spent a few highly focused seconds" trying to recognize him. She explained discrepancies in her initial identification (as to height) – explaining that she was several steps below him and only perceived he was relatively short for a male. She also mistook his age, believing him to be younger than he actually was, and did not see his tattoos. She also thought his glasses were black when they were brown. She expressed some confusion about the presence of facial hair, with the Court noted that facial hair is an ever-modifiable feature. Her rapid identification in the second photo-pak, following an earlier viewing in which she made no identification, was reliable. Finally, her initial identification was within three weeks of the crime.

The Court concluded that the evidence did not "suggest a likelihood of misidentification." The Court affirmed Barnes' conviction.

## **INTERROGATION**

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

**FACTS:** In December, 2008, Stanton's stepson told his father that Stanton has sexually assaulted him. The child was interviewed by Monroe, a social worker, who was brought in by Officer Lancaster. The two then went to Stanton's home and Stanton and his family went to the Guthrie police

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<sup>83</sup> 409 U.S. 189 (1972).

station to be interviewed. Both Stanton and his wife were interviewed. After receiving Miranda, Stanton admitted to sexual contact with the boy. Stanton was arrested. The next day, he was interviewed again and again admitted to sexual contact in one instance, but stated that he had no memory of a second incident he'd admitted the day before.

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

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

**HOLDING:** No

**DISCUSSION:** Stanton argued that Monroe's statement that she would seek to remove his children unless he cooperated made his statements involuntary. The Court agreed that certain interrogation techniques were, in fact, "so offensive" that "they must be condemned."<sup>84</sup> However, Monroe testified that she was prepared to call a judge for a removal order, which she said was standard procedure when there were credible allegations of sexual abuse and the safety of other children was involved. There was discrepancy as to where the "threat" occurred. The Court noted that "it is not improper for investigators to urge a suspect's cooperation by threatening the arrest of an implicated friend or family member, provided that probable cause and good faith would support the arrest."<sup>85</sup> Court "have looked more critically at investigators' threats as to a suspect's children."<sup>86</sup>

The Court continued:

... when law enforcement personnel deliberately prey upon parental instincts by conjuring up dire scenarios in which a suspect's children are lost and by insinuating that the suspect's "cooperation" is the only way to prevent such consequences, the officers run a grave risk of overreaching. So powerful can parental emotions be that the deliberate manipulation of them clearly has the potential to "overbear" the suspect's will and to "critically impair" his or her capacity for "self-determination."<sup>87</sup>

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

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<sup>84</sup> Miller v. Fenton, 474 U.S. 104 (1985).

<sup>85</sup> Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008) Henson v. Com., 20 S.W.3d 466 (Ky. 1999), U.S. v. Finch, 998 F.2d 349 (6th Cir. 1993).

<sup>86</sup> Lynum v. Illinois, 372 U.S. 528 (1963).

<sup>87</sup> Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Stanton's conviction was upheld.

**Qualls v. Com., 2011 WL 5105150 (Ky. App. 2011)**

**FACTS:** In March, 2008, a 12-year-old girl was forcibly raped by Qualls in Hardin County. She did not report the rape for 17 days but when she did so, a warrant was issued. Qualls was arrested in Grayson County. Elizabethtown officers went to Grayson County to interview him, and they allegedly "insinuated that if Qualls would admit that he had engaged in consensual intercourse with the victim, he would receive a light sentence – possibly parole." He admitted that he had sex with her one time, but later stated that he had "only penetrated her digitally."

At trial, portions of the interview, including Qualls' admissions, was presented. He was convicted and appealed.

**ISSUE:** Are suggestive comments during an interrogation permitted?

**HOLDING:** Yes

**DISCUSSION:** Qualls argued that when he was not permitted to play the recording of the interview in its entirety, his right to present a complete defense was violated.<sup>88</sup> The Court, however, found that Qualls was given "ample opportunity to explain the circumstances of his confession to the jury." The Court noted that some of the recording was excluded because of KRE 412 (the Rape Shield Law), which "prohibits introducing evidence of the victim's past sexual behavior or inclinations." A recent case had ruled that a balancing act was necessary with KRE 403, "which provides that evidence is inadmissible if it is more prejudicial than probative."<sup>89</sup>

The Court further noted that "there was no evidence so support [the detectives'] suggestive comments" and implied that "their remarks were only utilized as an interrogation technique." The Court found no reason to believe that the remarks "were more prejudicial than probative." He had ample other opportunity to testify "that he felt pressured to confess." The victim testified in detail about what had occurred "while Quall's account of the events was vague and kept changing throughout his testimony. Further the victim contracted the same STD as had one of Quall's sexual partners. Qualls was permitted to enter his primary defense that sex would have been impossible due to the size of his penis and as such, his rights to present a complete defense were not violated.

Qualls' conviction was affirmed.

**Jackson v. Com., 2011 WL 11242 (Ky.. App. 2011)**

**FACTS:** Jackson was arrested and charged with the rape of a friend's 15-year-old daughter. Jackson was taken into custody and interrogated by Det. Ball (Lexington PD). At trial, the Court admitted "portions of the taped interview wherein the detective stated to Jackson that he was lying."

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<sup>88</sup> KRE 106, the "rule of completeness."

<sup>89</sup> Mayo v. Com., 322 S.W.3d 41 (Ky. 2010).

During the interrogation the detective made several statements, including “obviously you’re being deceitful with me,” “You sitting in that chair trying to bs me is not going to work today[,]” “What I don’t understand is somebody sitting in that chair telling me they didn’t do something when I know they did[,]” “So don’t lie to me and say that you don’t know [J.M.] and don’t lie to me and say you were not messing around with [J.M.’s] mom[,]” and “See how you were at first, you denied, lied. . .”

Jackson was convicted and appealed.

**ISSUE:** May an officer accuse a suspect of lying during an interrogation?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to the case of Lanham v. Com.<sup>90</sup>, in which the Court addressed “this very issue.” In that decision, the Court said:

We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect’s story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.

However, the Court agreed that the jury should have been given a “limited admonition that the statements were not to be considered by the jury as evidence of guilt but were only admissible to provide context for Jackson’s relevant responses.” The Court ruled that the error, however, was harmless, given that he changed his story and essentially admitted to the crime. On a related matter, the Court also agreed that it was improper to admit a statement by the detective that effectively vouched for the truthfulness of the witness<sup>91</sup> but since Jackson did not object at the time, the matter need not be considered.

The Court affirmed the conviction.

## INTERROGATION - RIGHT TO COUNSEL

### Bradley v. Com., 2011 WL 918746 (Ky. App. 2011)

**FACTS:** On Nov. 4, 2004, Det. Williamson (Louisville Metro PD) interviewed Bradley concerning a murder. He asked Bradley about his whereabouts and he “falsely informed Bradley that there was a police officer, outside of the interview room, who could identify him as running from the murder scene.” Bradley asked if he was going to jail and the detective agreed that “there would be consequences.” At a suppression hearing, counsel discussed whether the videotape should be shown, agreeing that the issue “was whether Bradley had invoked his right to counsel and his right to remain silent.” After reviewing the tape, the Court found the following to be the “most important portion.”

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<sup>90</sup> 171 S.W.3d 14 (Ky. 2005).

<sup>91</sup> Stringer v. Com., 956 S.W.2d 883 (Ky. 1997).

Williamson: Well here's the deal. Well you know what, you're right, but it can be a lot worse. You stand up and you tell the truth . Be a man and take what's coming. . . . You can either be a cold hearted son-of-a-bitch or you can be a man about it with some remorse. Tony [Bradley] only you can make that decision . I cannot do that for you.

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

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

Bradley: A lot of time .

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

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

Williamson: Do what?

Bradley: A lawyer.

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

Bradley: I did do it.

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

Bradley: Cause he was trying to get me.

Williamson: What was he doing?

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

Det. Williamson stated that he did not end the interview when Bradley asked about an attorney because he believed Bradley was “just talking aloud” and that he was “just experiencing normal hesitation to talk.” The trial court concluded that he “did not make a clear request for an attorney but simply asked if he needed one” and that his invocation of the right to remain silent was also ambiguous. Eventually Bradley took conditional guilty pleas on multiple charges. In Bradley v. Com., the Court agreed that his right to counsel was violated, and reversed his conviction in the murder case<sup>92</sup> but refused to consolidate his appeal for other offenses, including two counts of arson. Bradley further appealed his conviction for arson in this opinion.

**ISSUE:** May an inquiry about having an attorney invoke the right to counsel?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that its decision in the murder case, that “Bradley’s constitutional right to counsel was violated by police,” was controlling, and reversed his convictions on the arson charges as well.

**Com. v. Quisenberry and Williams, 336 S.W.3d 19 (Ky. 2011)**

**FACTS:** Quisenberry and Williams were charged with the robbery and murder of Harper, which occurred in Louisville on May 18, 2006. Her 2-year old daughter, Erica, was also shot, but survived.

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<sup>92</sup> 327 S.W.3d 512 (Ky. 2010).

They were tried together, and the defense for each was that the other actually fired the shots. Both were convicted, and appealed.<sup>93</sup>

**ISSUE:** Must a suspect be explicit about requesting an attorney?

**HOLDING:** Yes

**DISCUSSION:** Williams argued that his statement was taken in violation of Miranda and that he had invoked his right to silence and/or an attorney. The Court, however, determined that his specific words “did not amount to the unambiguous assertion of his rights.”<sup>94</sup>

The Court summarized his statements:

Was he asking for counsel or was he merely asking if counsel was an option? Was his interest in counsel for the sake of counsel's advice or merely in hopes that counsel could screen him from being perceived as a snitch? An officer in these circumstances would reasonably have entertained doubts about Williams's meaning, and thus it was not improper for the detective to continue the interrogation unless and until Williams made his desire for counsel clear, something he never did.

The court also agreed that the pretrial confession of one defendant may not be admitted against the other unless the confessing defendant takes the stand.<sup>95</sup> It “may not even be admitted against the confessor, moreover, if on its face it implicates another defendant being jointly tried with the confessor.”<sup>96</sup> The statement may be admitted, however, if the confession is “redacted so as to remove express and obvious inferential references to the defendant.” These redactions were done in this case, and a detective who testified “scrupulously avoided any mention either defendant made of the other, limiting his testimony to what each defendant said about his own actions, about the two victims, and about his having seen a gun and heard gunshots.” The Court found it immaterial that the confession might become incriminatory because of other evidence introduced in the trial. The Court agreed that “the admission of a paraphrased version of Quisenberry's redacted statement to police did not violate Williams's right to confrontation.” (The opinion detailed the conversation, and noted that while he mentioned the word, he never specifically asked for an attorney.)

Issues relating to Quisenberry are not relevant to this summary. The Court upheld the convictions of both.

### **Martin v. Com., 2011 WL 682639 (Ky. 2011)**

**FACTS:** On March 11, 2009, Martin was living with her children in Lexington. On that day, she went to the maintenance man, Wilburn (who lived across the hall) and asked him to fix her bathroom fixtures. Wilburn went to the apartment and Martin “shot and killed him.” She “gave several irrational explanations” to the police for the shooting. During one of the interviews, about 12 minutes into it, she

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<sup>93</sup> Although two separate cases, the Court combined the two in its opinion.

<sup>94</sup> Berghuis v. Thompkins, 130 S.Ct. 2250 (2010) .

<sup>95</sup> Richardson v. Marsh, 481 U.S . 200, 206 (1987) ; see also Crawford v. Washington, 541 U.S. 36 (2004).

<sup>96</sup> Bruton v. U.S., 391 U.S . 123 (1968) ; Gray v. Maryland, 523 U.S .185 (1998).

"indicated that she wanted an attorney." They stopped the interview after "attempting to determine where [Martin] wanted her children to be taken." She was then placed in a holding cell. A short time later, she knocked on the door and "asked Detective Iddings to come back and talk to her because she wanted to tell him the whole story." He did not, however, "continue the interview because [Martin] had invoked her right to an attorney." She was indicted for Murder and Wanton Endangerment. At trial, the defense suggested that the investigators "intentionally directed [Martin] away from irrational responses during the interview" so that the prosecution "could later argue that she had fabricated them." Det. Iddings was challenged by the defense with the question "You are aware that even if a suspect says they want an attorney, they can voluntarily reinstate on their own?" That statement was objected to and the objection upheld. She was convicted (but found mentally ill) and appealed.

**ISSUE:** Is it permitted to question a subject who reinstates after invoking Right to Counsel?

**HOLDING:** Yes

**DISCUSSION:** Martin argued that "her right to confrontation was unconstitutionally restricted by the trial court's ruling." The Court agreed that the restriction was improper as the "legal requirements of a proper investigation and interrogation of a criminal defendant are within the purview of an investigative detective." In this case, however, the Court agreed that a response to the question was unnecessary, as the question "contained, in itself, the fact that after a suspect requests an attorney, police may continue the interview if the suspect reinstates the questioning." The point also "came across through the questioning concerning the detectives' strategy for interviewing" Martin and even that the places where "steering was evident were read aloud during cross-examination." The Court agreed that the error was harmless since the defense was able to introduce their point.

On an unrelated note, Martin argued that permitting the jury to make cell phone calls during a break in the trial was improper, since it was during a "critical stage of the trial" and she should have been there. The Court noted that the jury had been properly admonished not to discuss the trial and there was no indication that any jury did so during their calls home. The "mere fact that jurors made cell phone calls does not create the presumption that they spoke about the case." Further, this was done during planning for dinner which was not a critical stage. Jurors had previously been admonished not to use their phones to access social media or watch the news and absent evidence to the contrary, they "are presumed to have followed the admonitions."

Martin's conviction was affirmed.

## **INTERROGATION - MIRANDA**

### **Witt v. Com., 2011 WL 1515414 (Ky. App. 2011)**

**FACTS:** On January 10, 2009, Durham's home in Jackson County was invaded and his house robbed while he was held at gunpoint. Fortunately, he was relatively unharmed. Sheriff Fee responded to the call for help. He detailed the items taken during the robbery and a previous burglary, including a weapon. Sheriff Fee developed information that indicated Witt may have been involved. Sheriff Fee found Witt at a friend's apartment on January 13; Witt confessed to the robbery and was taken to the station. Before they left the apartment, however, Witt produced several silver dollars taken in the

robbery. Sheriff Fee asked no more questions but did advise Witt of his Miranda rights. Witt had not been formally arrested when placed in the vehicle. Witt claimed he did not get Miranda warnings until he arrived and was shuttled between the jail and the sheriff's office several times, and that Det. Peters (KSP) was the first to give him Miranda warnings. Witt gave a statement to Det. Peters in which he agreed Sheriff Fee had given him Miranda warnings. He then gave a full confession to the robbery.

Witt was indicted. He requested suppression, which the Court denied, finding Witt's assertions to not be credible. He was convicted and appealed.

**ISSUE:** Is Miranda required when an adult subject is not in custody, but is being interrogated?

**HOLDING:** No

**DISCUSSION:** First, the Court noted that Miranda "is expressly limited to situations involving custodial interrogation." The Court agreed Witt was being interrogated but ruled Witt was not in custody while still at the apartment and on the trip to the station. The Court found "no threatening behavior or presence which would indicate to Witt that he was not free to leave at this time." Rather, he volunteered the information when asked a simple question – "would you like to tell me about it?" He was free to simply say nothing at that time. With respect to the recorded statement, Witt "clearly acknowledged" he'd received Miranda warnings and that he understood them. He attempted to raise a question-first Seibert issue, but since he'd not done so previously, the Court found it to be untimely.<sup>97</sup> However, since it was "largely cumulative" anyway, the Court found no error at all.

Witt's convictions were upheld.

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

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

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

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

**HOLDING:** No

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<sup>97</sup> Missouri v. Seibert, 542 U.S. 600 (2004).

**DISCUSSION:** Phifer argued that since Det. Johnson did not give him Phifer full Miranda warnings that statement was invalid and the ensuing ones were tainted. The Court, however, stated that in fact, Johnson did not have to give him Miranda at all given that only 45 minutes had passed.<sup>98</sup> Phifer did not argue that he forgot them or was unaware of them and in fact, he'd said he did understand them. With respect to coercion, Phifer argued that during his first interview with Det. Bell, Bell stated that no one would be going to jail. At the time, Phifer and Taylor were arguing about what had happened and Bell said he was trying to de-escalate the situation and that in fact, no one was going to jail at that time because the investigation was still ongoing. Phifer was not arrested for five more days. The Court noted that his story changed repeatedly during the investigation and that anything Det. Bell said (such as for Phifer not to use the word "drop" to describe what had happened) was not coercive. The Court found Ball's actions to be "proper interrogation techniques." Phifer had agreed that the officers "did not make him say anything he did not want to say."

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

## **TRIAL PROCEDURE / EVIDENCE – REDACTION OF CONFESSION**

### **Huber v. Com., 2011 WL 1900176 (Ky. App. 2011)**

**FACTS:** On November 1, 2008, Huckabee was awakened by his wife because she saw a strange vehicle near their cabin in Jackson County. Huckabee, retired KSP, went out and found Huber taking items from a metal storage building. (He also heard someone else running away.) He detained Huber and held him at gunpoint until daylight, and then took him to an area where Huckabee could get cell phone service. KSP Trooper Morris met them. Huber admitted to taking several items, which Huckabee valued at \$350. He later gave a recorded confession to the burglary, but not to another burglary under investigation. All of the property was recovered and the confession was played for the jury.

He was convicted and appealed.

**ISSUE:** Must admissions to unrelated crimes always be redacted from a confession?

**HOLDING:** No

**DISCUSSION:** With respect to the admission of his unredacted confession, which included statements about another theft, the Court agreed that it would be "nearly impossible" to redact the references to the other theft and would destroy the context. In addition, following the offense, but before Huber stood trial, Kentucky raised the threshold for felony theft from \$300 to \$500. Hubert argued he should have been sentenced for a misdemeanor rather than a felony, as a "mitigated punishment." However, Huber never asked that the new law be applied to his case, as required.

The Court upheld the conviction.

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<sup>98</sup> See Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

## TRIAL PROCEDURE / EVIDENCE – RULE 7.24

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

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

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

**HOLDING:** Yes

**DISCUSSION:** Mathews argued that the prosecution failed to disclose evidence under RCr 7.24(1) to which he was entitled. Following his arrest, Mathews was questioned and admitted that he “waited outside as his wife burglarized homes,” and in his testimony, the detective mentioned this statement. The Court noted that in prior decision, it had held that the first part of 7.24 applied only to written or recorded oral statements, but stated that it had begun to be “troubled by the result.” Mathews argued that the decision in Chestnut v. Com.<sup>99</sup> – which effectively overturned previous decisions and came later than the earlier decisions in Mathews’ cases required an overturning of his conviction.

The Court disagreed and affirmed his conviction.

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

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

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

**HOLDING:** Yes

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

### Day v. Com., 2011 WL 5865433 (Ky. 2011)

**FACTS:** Hargrove was killed, in Hopkins County, in June, 1991 – the actual day was in dispute because of a delay in the finding of the body. “Her body was found riddled with multiple stab wounds and dumped into a water-filled pit in an abandoned strip mine.” The murder remained unsolved for

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<sup>99</sup> 250 S.W.3d 288 (Ky. 2008).

many years, but ultimately, Day's ex-wife, Karen Campbell, admitted she'd given Day a false alibi for the day in question. Day had previously been linked by finger and palm prints to the scene. Day was indicted. At trial, it was revealed that Day and Hargrove had a relationship and Campbell had been absent from home for several evenings prior to the killing. When confronted, on the day of the apparent killing, Day admitted to Campbell he'd been with Hargrove but denied any relationship. That evening, Campbell called Hargrove and Hargrove also denied a relationship with Day. Campbell demanded Day stop seeing Hargrove, however, and threatened to leave him and take the house and business. She later admitted she went to bed and "could not account for Day's whereabouts from the time she went to bed until early the next morning." She knew Day left the house about 6 a.m. the next morning claiming he needed to check on Hargrove, as he feared she might have "done something to herself." He later reported he was at her house and that he'd found a lot of blood. Despite Day's denial about having touched the front door, his prints were found there. (The door had allegedly been cleaned the day before.)

Day objecting during the trial, bringing up a number of alleged trial errors. First, he argued that the case should have mistried because the prosecution failed to disclose a statement made by one of the witnesses, Forbes. She had "made three different statements to the police and prosecution during the investigation ... about a conversation she had with Hargrove the morning before the murder." The statements were inconsistent with respect to Hargrove's connection with Day. The defense was not given information about the third statement, made several days before the trial, in which Forbes claimed specifically that Day was "Hargrove's paramour" and that the "break-up was imminent." (Previously she had not provided Day's name.) The first time the defense heard this information was when Forbes testified. Forbes agreed that the written statement provided did not contain everything she had told the detective and that she signed it anyway.

The defense argued that the prosecutor had failed to comply with the discovery request for witness statements but declined to argue the issue on hearsay grounds. At conference, the trial court declined a mistrial but did voice "a concern with police sandbagging if police intentionally left out some information provided in their witness statements." (The detective who took the statement had died in the interim.)

Day was convicted and appealed.

**ISSUE:** Does Rule 7.24 cover statements made by the victim to a witness?

**HOLDING:** No

**DISCUSSION:** The Court looked at each argument in turn. The Court found that the prosecution did not violate RCr 7.24 because the incriminating statement in question was not made by the defendant to a witness, but by the victim to a witness. Subsection 2 of the rule covers written or recorded statements of witnesses, but did not cover notes and such in connection with the investigation involving other witnesses. Further, the statements are not covered by RCr 7.26, either, as it only requires pretrial disclosure (not less than 48 hours before) of documents and recordings. The Court did not believe the statement fell within the scope of the rule. However, the Court noted that the defense made discovery motions requesting "statements by any witness that were inconsistent with other statements made by the same witness." Day argued that Forbes's statement was inconsistent and as such, should have been disclosed. Although the Court agreed that the two statements were not inconsistent, the Court

noted “there is a fundamental difference between a statement that “Sheila was seeing a married man,” and a statement that “Sheila was seeing Dale Day and planned to break up with him that night.” The court agreed that the failure to disclose was fatally prejudicial because “Day went into trial with one theory of his case only be surprised by essential information that the Commonwealth had failed to disclose.”

The Court mistried the case and reversed it, also holding that because the jury did acquit Day of Murder, he could not be retried on that charge. He could, however, be retried for Manslaughter.

**Tramble v. Com., 2011 WL 6004369 (Ky. App. 2011)**

**FACTS:** In February, 2009, the Cincinnati postal inspector, O’Neill, was investigating marijuana transportation. She was focusing on Cottrell, and through him, she learned of Tramble. On August 31, 2009, Deputy Kappes (Boone County SO / Northern Kentucky Drug Strike Force) contacted her about a call from Arizona concerning a package coming via FedEx to a Crescent Springs address. Deputy Kappes learned that the address was a UPS store and that the box was in Tramble’s name. They obtained a warrant, collected and opened the package, finding it contained 5 pounds of marijuana. The package was returned to the UPS store and a local officer posed as the clerk. Tramble arrived, signed for and received two packages, the second was also discovered to also contain marijuana. She was apprehended leaving the store and admitted that she knew the packages contained marijuana. She also stated she was to deliver the packages to Cottrell, in Ohio.

Although Tramble was cooperative, the inspector “could not make arrangements with the Cincinnati Police Department for a ‘sting’ to incriminate Cottrell.” Tramble was charged with Trafficking and Conspiracy and was ultimately convicted only of Trafficking. She appealed.

**ISSUE:** Must oral statements be disclosed to the defense?

**HOLDING:** Yes

**DISCUSSION:** Tramble argued that evidence of an oral statement she made was not properly turned over to the defense in compliance with discovery demands and pursuant to RCr 7.24. The original trial date was postponed, but a few weeks before the new trial date, “the Commonwealth provided defense counsel with Inspector O’Neill’s report which contained an incriminating oral statement made by Tramble.” Over objection, the Inspector was allowed to testify as to the statement, in which Tramble acknowledged that she knew the packages contained marijuana. The Court agreed that the Commonwealth violated 7.24 and noted that it failed to see how the prosecution was not aware of the statement. The “disclosure was mandated by the rule” and a “plain reading” of the rule reveals “that disclosure is not limited to only those statements made to agents of the Commonwealth as asserted by the Commonwealth but encompasses all those statements made to any witness within the knowledge of the Commonwealth.” The Court agreed that the trial court erred in not addressing the violation, but did find the error was harmless because it was simply cumulative to the testimony of other witnesses.

Tramble also argued that it was improper to allow witnesses for the Commonwealth to “reference any mailings containing marijuana to Tramble’s residence in Ohio, for which the Commonwealth did not provide the required notice under KRE 404(c).” The Court reviewed the provisions of KRE 404 and agreed it was improper not to exclude references to “prior uncharged criminal activity.” However,

because Tramble did have the opportunity to challenge its admission, albeit unsuccessfully, prior to the trial, the Court upheld the trial court's decision.

However, due to comments made by the prosecutor during closing arguments, that referenced the uncharged crimes noted above, the Court agreed that Tramble was unfairly prejudiced and reversed her conviction.

**Matthews v. Com., 2011 WL 6004369 (Ky. App. 2011)**

**FACTS:** On June 6, 2008, Covington PD officers did a knock and talk at 4:30 at a local residence. Matthews answered the door and told the officers he did not live there but was simply watching the house. They asked for permission to search. He reiterated he did not live there but did consent to the search. They found marijuana and cash and "decided to conduct a protective sweep of the house." They then found several baggies of cocaine. The officers wanted to do a full search and conferred with the Commonwealth Attorney, who spoke to Matthews in person. He concluded that Matthews' consent was sufficient. During the subsequent search, the officers found a handgun and body armor. Matthews was charged for the drugs and for the weapon, since he was a convicted felon. The charges were bifurcated and he was convicted for possession of the drugs. He took a plea agreement on the weapons charge. Matthews then appealed.

**ISSUE:** Must the defense object to statements not previously disclosed in order to seek a mistrial on the issue?

**HOLDING:** Yes

**DISCUSSION:** Matthews argued that he should have been given a requested mistrial because the Commonwealth's Attorney (Sanders) "testified regarding statements Matthews made to him at the time of the search even though these statements were not provided during discovery as required by Kentucky Rules of Criminal Procedure (RCr) 7.24." Specifically, he admitted to Sanders that he could provide names of people selling from the residence but also that he was afraid to do so. Matthews claimed that his claim "to be afraid was not disclosed by the Commonwealth during discovery." However, Matthews did not object to the statement, nor did he ask that the jury be admonished about the statement and as such, a mistrial was not warranted. In addition, he argued that a statement by Officer Lusardi was improper, as it had been agreed "that officers could only testify in general terms that they were conducting an investigation." However, the officer testified that the knock and talk was part of "an investigation of narcotics use in the area." The Court found that Lusardi's statement did not unduly prejudice Matthews' case nor did it warrant a mistrial.

Finally, Matthews contended that the evidence seized should have been suppressed because he did not own the residence and "lacked the requisite authority to consent to a search of same." The Court noted that his argument was "legally self-refuting" – since if he did not own or control it, he did not have a reasonable expectation of privacy in the residence. However, the facts indicated that it was reasonable to believe that "Matthews possessed common authority over the residence, thus validating his consent to search the residence."

Matthews' conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – BUSINESS RECORDS

### Long v. Com., 2011 WL 6826377 (Ky. 2011)

**FACTS:** When K.M. was 14, her mother, Lisa, began to live with Long. Shortly thereafter, Long began to have “illegal sexual contact” with K.M. Long and Lisa married but the sexual activity continued with K.M. During that time, K.M. and Long exchanged a number of text messages of a sexual nature. Eventually K.M. ran away from home and revealed what was occurring. Long was indicted for incest, Rape 3<sup>rd</sup> and Sodomy 3d. At trial, K.M.’s father testified that he paid for her cell phone and had access to the customer account. When K.M. revealed the abuse, he accessed the account and discovered that approximately 1,500 cell phone messages had been exchanged. Over Long’s objection, he was permitted to testify about the number of messages. Long was ultimately convicted and appealed.

**ISSUE:** Must business records be introduced by a proper custodian of the records?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that “it is self-evident that cell phone account records are business records and, therefore, may be admitted only if the standards for the admission of business records are complied with.” These standards include the authentication required by KRE 901 as well as the hearsay rules. In Hunt v. Com.<sup>100</sup> the Court addressed those requirements, emphasizing the need to show that “they are what their proponents claim.” In this case, the Commonwealth sought to introduce the records not through the actual custodian of the records but through an unqualified witness who lacked any knowledge of how the records are prepared or kept. As such, the Court agreed it was improper to introduce the records. However, because evidence of the numerous text messages was well-established through other evidence, the error was harmless. Further, the court agreed it was appropriate for the victim to testify that she believed the messages were from Long since they came from his cell number. (This testimony actually violated a pre-trial order that indicated she could only testify that they came from his number.) The Court agreed that the testimony was proper opinion testimony under KRE 701 since it was “rationally based on K.M.’s perceptions.”

The Court upheld Long’s conviction.

## TRIAL PROCEDURE / EVIDENCE – IDENTITY OF INFORMER PRIVILEGE

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

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

- A CI informed police that Johnson was selling crack cocaine from his residence while children were present.

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<sup>100</sup> 304 S.W.3d 15 (Ky. 2009).

- Said CI had worked with Lexington police in the past, and had “demonstrated truthfulness and accuracy[.]”
- An independent investigation verified the information the CI provided regarding Johnson. More specifically, Detective McBride, accompanied by another detective of the Lexington Police Department, observed activity outside Johnson’s home that was consistent with drug trafficking.
- The detectives, with the help of the CI, conducted a “controlled buy,” during which Johnson sold crack cocaine to the CI.

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

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

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

**HOLDING:** Yes

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

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

## **TRIAL PROCEDURE / EVIDENCE - DOUBLE JEOPARDY**

**Williams v. Com., 336 S.W.3d 42 (Ky. 2011)**

**FACTS:** Williams was arrested for drug trafficking in Hardin County. 19 grams were found inside the vehicle. On the way to the jail, Williams attempted to swallow a plastic bag with 4.8 grams of cocaine. He was charged with a second count of trafficking, as well as tampering with physical evidence. He was indicted and took a conditional guilty plea, and appealed. The Court of Appeals upheld the conviction, and Williams further appealed.

**ISSUE:** Is multiple counts of drug trafficking necessarily double jeopardy?

**HOLDING:** No

**DISCUSSION:** Williams argued that the dual trafficking convictions were double jeopardy, as both arose from a single course of actions. However, the Court noted he “possessed two discrete quantities of cocaine” - even if originally part of the same stash. In addition, his intervening arrest interrupted the continuing possession of the cocaine. The Court upheld his conviction, finding no double jeopardy.

**Pate / Woody v. Com., 2011 WL 557298 (Ky. App. 2011)**

**FACTS:** On December 19, 2007, three people entered a Fulton County grocery, one armed, and stole about \$1300 from the safe. Several months later, five people were charged. Pate, specifically, was charged with subduing one of the clerks and was charged with Robbery 1<sup>st</sup> and Engaging in Organized Crime. She was also charged with Theft. Several of the other individuals took pleas in exchange for testifying against Pate and another individual, Woody. The pair was tried jointly and Pate was convicted of complicity to commit Robbery 1<sup>st</sup> and Theft. She moved to dismiss the Theft charge, arguing double jeopardy. That was denied and she appealed.

**ISSUE:** Is a conviction for Theft and Robbery double jeopardy?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the two crimes should have merged, as the “taking of the same cash (as charged as theft) represented the theft element in the robbery charge. The conviction for theft was reversed.

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that KRE 412 (the Rape Shield Law) did not apply in this case, because Bell did not seek to introduce the victim’s prior sexual conduct as indicating consent in and of itself. The Court agreed that the evidence of her prior drug use was relevant to his defense “for the purpose of determining whether the complainant consented to the sexual relations with Bell in exchange for drugs.” The Court ruled he was entitled to a new trial on the Sodomy charge. (However, the ruling

had no bearing on the assault charge, as that would be immaterial to whether she consented to the sex.)

Bell also raised an argument that it was improper for the trial court to exclude evidence that the victim had been charged with filing a false police report several years previous. KRE 608 permits the introduction of testimony concerning the "general truthfulness" of a complainant or witness. However, due to the specifics of the situation, without any specific proof she had lied or any information as to the resolution of the case, the Court found it improper to admit the evidence. (The officer had been deployed and was unable to explain the disposition of the charge.) Further, KRE 405 does not permit evidence of a "victim's specific instances of conduct" as proof of other behavior.<sup>101</sup>

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

## TRIAL PROCEDURE / EVIDENCE - 911 CALL

### Johnson v. Com., 2011 WL 1103346 (Ky. 2011)

**FACTS:** On September 18, 2008, Johnson forced his way in Kleinhenz's home in Jefferson County. He encountered an acquaintance, Elder, and tried to shoot her, but the weapon misfired. Johnson ended up stabbing her multiple times. He robbed Kleinhenz, who gave him cash. Johnson grabbed the money and ran. Elder called 911 and described her injuries. She "exclaimed she was dying from the wounds and wanted to talk to her mother and children." A recording of her call was played at trial.

Johnson was convicted of Robbery and Assault. He appealed.

**ISSUE:** Are statements made by a victim during a 911 call admissible?

**HOLDING:** Yes

**DISCUSSION:** Johnson argued that the admission of the 911 call was improper. He agreed that part of the call was relevant and admissible, the part concerning her statement that Johnson had stabbed her, but argued that the other portions were "irrelevant, unduly prejudicial and inadmissible hearsay." The Court, however, found that her statement that she thought she was dying "served to prove" that she had suffered a serious physical injury, an element of Assault 1<sup>st</sup> degree. Although her perception of the risk of death "is not perfect proof of a substantial risk thereof, it has some relevance to the severity of the injuries she sustained." Her desire to speak to loved ones was "simply circumstantial proof of the same point." The statements were not so prejudicial as to "substantially outweigh their probative value." (The Court noted that she did not die, and "can in fact see her children again" - which mitigated any prejudicial effect.)

With respect to the hearsay objection, the Court noted that they were offered as proof that she was seriously injured, and both conveyed her sense that was the case. They "fit squarely as present sense impressions under KRE 803(1)" which allowed for statements 'describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.'"

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<sup>101</sup> Dennis v. Com., 306 S.W.3d 466 (Ky. 2010).

Johnson's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – EXCITED UTTERANCE

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

**FACTS:** On September 22, 2008, S.N. was in Louisville “enjoying a social outing with some friends” and they ended up at a local bar. She left about 12:30 a.m. to go home. During the evening, she'd talked casually with Jackson. S.N. became confused in locating her vehicle and went back to the bar to get help. Jackson offered to help her find it. While they were walking down a side street, he asked her if she wanted any crack cocaine, which she declined. Ultimately, he struck her on the side of the head and she lost consciousness temporarily. She was raped and beaten but ultimately Jackson released her and she ran for help. At 3:50 a.m., Officer Johnson (Louisville Metro PD) responded to a 911 call. The officer found S.N. and testified later it looked like she'd been used as a “punching bag.” Officer Johnson investigated the area she described – he was familiar with it – and found a mattress and drug related items. He relayed his observations to Det. Grissom. Officer Drury went back to the area later and found Jackson sleeping on the mattress. He was arrested for possession of drug paraphernalia. S.N. was shown a photo-pak and immediately identified Jackson from the booking photo just taken. In addition, the officers obtained a DNA match.

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

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

**HOLDING:** Yes

**DISCUSSION:** Jackson argued that it was improper to admit Officer Johnson's testimony “recapping S.N.'s description of the incident.” The trial court had initially admitted it under KRE 803(1) – the present sense impression – but upon objection, had corrected itself and admitted it under KRE 803(2) – the excited utterance exception. The Court reviewed that rule, noting that Officer Johnson was the second person she had encountered, the first being a Good Samaritan who had assisted her. Under Young v. Com., he argued that too much time had passed between the crime and the statement.<sup>102</sup> The Commonwealth argued, however, under Noel v. Com., that the victim had fled the scene as soon as possible, contacted authorities and immediately gave her description of the rape. It contended “that her demeanor was very excited and upset, mirroring that of an excited utterance.”<sup>103</sup> She met the officer very close to where the assault occurred. The Court agreed it was properly admitted as an excited utterance.

Jackson's conviction was upheld.

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<sup>102</sup> 50 S.W.3d 148 (Ky. 2001).

<sup>103</sup> 76 S.W.3d 923 (Ky. 2002).

## TRIAL PROCEDURE / EVIDENCE – EXPERT TESTIMONY

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

**FACTS:** On August 31, 2007, Det. Wiseman (Hazard PD) pulled over a vehicle with an expired license plate. Two men were in the car and both were “acting suspicious.” Det. Wiseman put the driver in the back of his cruiser and the passenger (Feltner) “took this opportunity to then throw a syringe out his window.” Captain East, who had arrived, saw this and retrieved the item. Feltner admitted that had been shooting up “OC.” At trial, Captain East testified that OC means oxycodone or oxycontin and a crime lab technician testified that the syringe contained oxycodone. Feltner was convicted of possession of a controlled substance and he appealed.

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

**HOLDING:** Yes

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

Feltner’s conviction was affirmed.

### Edwards v. Lumbley, 2011 WL 2436752 (Ky. App. 2011)

**FACTS:** On December 29, 2008, Edwards and Lumbley were involved in a collision in Paducah. Edwards sued Lumbley, claiming he had caused the crash. Deputy Shaw (McCracken County SO) described the damage to both vehicles as minor and neither vehicle had to be towed. At the civil trial, “Deputy Shaw testified consistently with his report regarding the accident.” However, he did not recall how he came the conclusions in his report, nor did he know what information he received from either party prior to filing it. He agreed that he had no real recollection of the crash and that the day of the accident had been “particularly busy.”

The Jury found that Edwards had failed to prove Lumbley was negligent. Edwards appealed.

**ISSUE:** Are all officers qualified to testify as experts in motor vehicle accident causation?

**HOLDING:** No

**DISCUSSION:** During a pre-trial Daubert<sup>104</sup> hearing the Court had ruled the deputy “was not qualified as an expert capable of reconstructing motor vehicle accidents.” As such, he was not able to state his opinion that Lumbley was at fault. The deputy had testified that he had no training as an accident reconstructionist and that he had received no training beyond what he received in “basic.” The Court

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<sup>104</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

noted that Kentucky “holds that simply being a member of the police force does not qualify an individual to give opinion evidence as an expert.”<sup>105</sup> However, “a police officer must qualify as an expert by virtue of special training and/or experience.”<sup>106</sup> In this case, however, Deputy Shaw did not have any particular training or experience that qualified him to render an opinion on the cause of the collision.

The decision was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - VIDEO**

### **Childers v. Com., 332 S.W.3d 64 (Ky. 2011)**

**FACTS:** Childers was charged with drug trafficking in Lawrence County. The transaction had been videotaped and showed Childers handing something to someone else. She was charged with trafficking. During the trial, one of the detectives was asked to state what was heard on the tape, and did so.

Childers was convicted, and appealed.

**ISSUE:** May a witness interpret what is on a video?

**HOLDING:** No

**DISCUSSION:** The court agreed that with respect to the detective’s comments, “the law on this issue is quite clear.” A witness may “testify from recollection about events captured on tape, [but] he may not interpret what is on the tape.”<sup>107</sup> The detective did not hear firsthand what Childers said and his testimony was not from personal recollection. However, since the admission was not objected to at trial, the Court declined to overturn the conviction based upon the error. Her conviction was upheld.

## **TRIAL PROCEDURE / EVIDENCE - CORROBORATION RULE**

### **Cornelius v. Com., 2011 WL 112717 (Ky. App. 2011)**

**FACTS:** Deputy Riddle (McCracken Co. SO) received a tip from a CI, Hernandez, “who stated that he had made contact with an individual who might be able to sell him some cocaine.” A recording device was installed in his car and Deputy Riddle observed the transaction. At the meet, “one of the [three] men in the pickup got out and entered the passenger side of Hernandez’s car.” Hernandez used money given to him by the deputy to buy a “baggy of a white substance which resembled cocaine” - it was later tested to be cocaine. As the men left the scene, they were stopped. Cornelius, the driver, refused to get out and would not comply with orders. He was removed, handcuffed and searched. They found marijuana on his person. A passenger in the truck was Cornelius’s minor son. Det. Carter interviewed him and received conflicting information about the marijuana. Cornelius claimed he didn’t realize the marijuana was there until the last minute and that he was planning to give it up to the

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<sup>105</sup> Southwood v. Harrison, 638 S.W.2d 706 (Ky. App. 1982).

<sup>106</sup> Ryan v. Payne, 446 S.W.2d 273 (Ky. 1969).

<sup>107</sup> Gordon v. Com., 916 S.W.2d 176 (Ky. 1995).

officers. He was charged with Possession of Marijuana and Tampering with Physical Evidence (for hiding it in his pocket). He was convicted of Tampering and also PFO, for which he received an enhanced sentence. He appealed.

**ISSUE:** Is the presence of drugs in a pocket sufficient corroboration to a confession concerning the drugs?

**HOLDING:** Yes

**DISCUSSION:** Cornelius noted there was no “eyewitness testimony that he actually put the marijuana in his pocket when the police officers approached the pickup truck.” He did, however, confess to Det. Carter that he had put the marijuana in his pocket. Cornelius contended that was not enough to sustain the conviction under RCr 9.60 - the corroboration rule - and that its “mere presence ... in his pocket was insufficient corroboration to support his confession.” However, the Deputy testified that “when he ordered the occupants to show him their hands, Cornelius’s hands were out of sight, he was moving, and he refused to leave the truck.” The court found this sufficient corroboration that he “had placed the marijuana in his pocket during that interval in order to impairs its availability in an official proceeding.” Cornelius argued that “no one ‘in their right mind’ would think that he could successfully conceal drugs by placing them in his pocket when the police are approaching to apprehend him.” The Court, however, stated that in its view, “an individual in that highly stressful situation might react in exactly in such a manner.” The Court affirmed the conviction (but did reverse the PFO for unrelated reasons).

**McClain v. Com., 2011 WL 556197 (Ky. App. 2011)**

**FACTS:** McClain, who was eventually indicted on a variety of Burglary and Theft related offenses in Carlise, Kentucky, was contacted by Officer Weaver about a burglary of a local liquor store. Chief Denton advised McClain of his Miranda rights when he arrived at the station. He asked McClain about a particular individual and asked to talk about the burglary. McClain claimed he was “initially ... upset and hesitant” but that he then talked about the break-in, describing what they did with a handgun stolen during the crime. In a second recorded session with Deputy Sheriff Buckley, McClain acknowledged that he’d gotten his Miranda warnings. He moved for suppression of the statements, arguing they were involuntary, but the trial court denied the motion. McClain was convicted and appealed.

**ISSUE:** Does the Corroboration rule require proof that a particular suspect committed a crime?

**HOLDING:** No

**DISCUSSION:** McClain argued that “he was not found in possession of any fruits of the crime, that he was not clearly identifiable from the video surveillance except for his clothing, that he was too large at 320 pounds to fit through the wall’s opening, that police did not have his fingerprints at the crime scene, and that he gave inconsistent confessions.” He noted that RCR 9.60 “precludes a defendant’s conviction on the sole basis of his uncorroborated out-of-court confession.” However, in Slaughter v. Com., the Court had stated that “[t]he corroborative evidence required addresses itself as to whether the *crime* charged was committed and *not as to whether* the particular defendant committed it.”<sup>108</sup> Further,

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<sup>108</sup> 744 S.W.2d 407 (Ky. 1987). See also Dolan v. Com., 468 S.W.2d 277 (Ky. 1971).

"[s]uch proof, very simply, must be independent of any out-of-court confession, and must show that the charged crime was, in fact, committed. Once such evidence is present, guilt of the defendant may be proven by the evidence of the confession(s)." In this case, the Court found that the "corroboration of this crime was established by the video recording of the burglary." Other circumstantial evidence also supported the crime.

With respect to the voluntariness of his statements, the Court noted that "turns on the presence of absence of coercive police or otherwise state activity."<sup>109</sup> A prior Kentucky Supreme Court decision had held that the relevant inquiry to determine voluntariness is as follows: (1) whether the police's conduct was "objectively coercive;" (2) whether the coercion overbore the defendant's will; and (3) whether the defendant showed that the coercive police conduct was the "crucial motivating factor" behind his confession.<sup>110</sup> There was no evidence that any of these factors were present and no evidence that he was not properly read his Miranda warnings.

McClain's conviction was upheld.

## TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS

### Finch v. Com., 2011 WL 1104096 (Ky. 2011)

**FACTS:** Finch was convicted of two counts of murder, and one of assault, when he struck and killed two children and injured an adult while fleeing from police in Louisville. At trial, the prosecution had been allowed to introduce four earlier convictions and a pending charge to "show Finch's long history of fleeing from police. The Court did not allow three other instances, when he fled on foot rather than in a vehicle, to be introduced, but unfortunately, Sgt. Hensler "made reference during his testimony to an occasion in which he chased Finch on foot for two and a half city blocks." (He also mentioned a vehicle pursuit that evolved into a foot chase after a wreck.) Upon objection, the Court gave a curative admonition.

**ISSUE:** Is evidence of other instances of fleeing from police admissible?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the trial court properly allowed the introduction of the "prior bad acts" under KRE 404(b). Using the balancing test developed in Bell v. Com., the Court analyzed "the (1) relevance, (2) probativeness, and (3) prejudicial effect of the evidence at Issue."<sup>111</sup> The Court agreed that the evidence was admissible under the Bell test. With respect to Sgt. Hensler's testimony, the Court agreed that his testimony regarding the foot chases was improper. However, "based on the overwhelming amount of evidence against Finch, the slight amount of information Sergeant Hensler provided that exceeded the scope of the trial court's KRE 404(b) order did not" warrant a mistrial.

Finch's conviction was affirmed.

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<sup>109</sup> Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

<sup>110</sup> Bailey v. Com., 194 S.W.3d 296 (Ky. 2006).

<sup>111</sup> 875 S.W.2d 882 (Ky. 1994).

**Guilyard v. Com., 2011 WL 1515379 (Ky. App. 2011)**

**FACTS:** On July 23, 2007, O'Brien, a CI with the Northern Kentucky Drug Strike force, did a controlled drug buy with Guilyard. The agents fitted her with a recording device but did not search her because her clothing was too tight to conceal anything, but they did search her purse, shoes and car. During the transaction, Reese, O'Brien's ex-boyfriend showed up. She made the transaction (for cocaine) and she and Reese left together. She later met with the agents and turned over the cocaine.

Guilyard was indicted for trafficking, and subsequently convicted. He appealed.

**ISSUE:** Are statements regarding prior drug trafficking activities admissible?

**HOLDING:** No

**DISCUSSION:** At trial, Guilyard objected to the admission of comments by O'Brien as to his reputation for buying and selling drugs, claiming it to be a violation of KRE 404 and 405. The Court agreed that the evidence should not have been admitted. The Court agreed, as well, that the recorded conversation should not have been admitted in its entirety over Guilyard's objections – in the recording he bragged about his drug activities, which suggested "prior bad acts." The Court concurred that the majority of the recording was "irrelevant to the charged offense and was extremely prejudicial in that it served no purpose other than to imply that [Guilyard] was a bad person."

Guilyard's conviction was vacated and the case remanded.

**Knee v. Com., 2011 WL 1706612 (Ky. App. 2011)**

**FACTS:** On February 4, 2008, EMS responded to the home of Cotton's mother in Princeton. They found an infant, Ethan, who was eventually declared dead at the hospital. Knee and Cotton (the parents) were interviewed and Knee admitted he'd given Ethan a bottle to stop him from crying. The baby could not breathe through his nose due to congestion and Knee stated he pressed the bottle into the baby's mouth. He further admitted that when Ethan stopped crying, he "thought he might be dead, but that he could feel a faint heartbeat." He left the child and went outside; Cotton and her mother later found Ethan to be not breathing. The first EMS crew member on scene later testified that Ethan was not breathing when he arrived. Dr. Ross, at the ER, testified that "baby formula was aspirated from his lungs after Ethan was intubated." He believed the baby had been dead for several hours before his arrival at the hospital.

At trial, a tape of the interrogation was introduced which had been sanitized of any references to other "bad acts" by Knee. The Commonwealth, however, argued that his prior criminal history should have been introduced to rebut his defense of an accidental death. The Court found redaction to be a problem and left it to Knee to decide whether to play the entire tape or not use the tape at all. Knee objected but did use the tape and the jury was admonished about using the tape only for the purpose of the case at bar. He was convicted and appealed.

**ISSUE:** If statements concerning other criminal activities are not introduced to prove criminal disposition, might they be admissible?

**HOLDING:** Yes

**DISCUSSION:** Knee wanted to introduce, in defense, that he was “intimidated and coerced during the police interrogation” – and the Commonwealth argued that his position could not be “presented to the jury without the playing of the full interrogation tape” to refute the defense. The court agreed that the prior bad acts “were not being introduced by the Commonwealth to prove Knee’s criminal disposition” and as such, it was not error to admit the entire tape.

Knee’s conviction was affirmed.

**Mullikan v. Com., 41 S.W.3d 99 (Ky. 2011)**

**FACTS:** Mullikan lived with his parents in Maysville. After Fields moved in next door, Mullikan “became strangely paranoid that Fields was trying to harm him.” On September 18, 2008, a state trooper picked up a bottle of water from Mullikan which he “claimed tasted funny.” Later that day, Mullikan attacked Fields from behind. Mullikan got “the worse of it” after Fryman intervened. Mullikan believed Fryman was conspiring with Fields. Mullikan ran into Field’s home and grabbed a sword, and then ran from the house “swinging the sword at both Fields and Fryman.” As the police arrived, he ran to his parents’ home, where he was ultimately arrested. He fought with the officers, as well. Mullikan was indicted for Wanton Endangerment, Burglary, Assault (on the officer) and Terroristic Threatening. He was convicted and appealed.

**ISSUE:** Are passing comments about a defendant having served time in jail enough to invalidate a conviction?

**HOLDING:** No

**DISCUSSION:** In addition to a number of other issues, Mulliken argued that two officer witnesses commented on his “prior stints in jail” and another case. However, most of these references were elicited by Mullikan and not the prosecution. They “were brief and likely of little effect in light of the overwhelming evidence against” him. With respect to the Assault charge, in which he spit at an officer, the Court agreed that there was no proof of physical injury. But, the Court agreed that the Attempt was sufficient under that charge.<sup>112</sup>

The Court upheld the conviction but did reverse the penalty phase for unrelated errors.

**Ruby v. Com., 2011 WL 2553314 (Ky. App. 2011)**

**FACTS:** On Oct. 7, 2007, Officer Marzheuser (Kenton County PD) spotted a speeding vehicle and stopped it. The driver could not produce an OL so she had him step out. She observed that his speech was slurred, that he was sweating and that his demeanor “was not correct.” She called for a drug K-9, but in the meantime, he consented to a search of the car. Officers found a variety of items, including methamphetamine and two firearms. He was arrested and indicted for Trafficking and related charges. Following that arrest, he was arrested for DUI in Indiana. At trial, she testified that he denied

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<sup>112</sup> Although Assault in the Third Degree (KRS 508.025) limits application of spitting to when the victim is a jailer/corrections officers, in this case, the Court appeared willing to accept an Attempt charge.

that he owned the truck and that he failed all but one FST. Officer Inman, the K-9 handler, testified that his dog alerted on the methamphetamine and further about the actual search. Ultimately he was convicted and appealed.

**ISSUE:** Is a statement about a subject's involvement in a subsequent similar case admissible?

**HOLDING:** No

**DISCUSSION:** At trial, the prosecution introduced evidence of Ruby's "subsequent arrest for drug trafficking." The Court noted that under KRE 404(b) "evidence of other crimes, wrongs, or acts is inadmissible to establish the character of a defendant in order to show action in conformity therewith." However, it might be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In this case, an Indiana trooper testified about a traffic stop he made on Ruby for speeding. Ruby again denied ownership of the truck and again the trooper found drugs in the vehicle, in a bag Ruby agreed belonged to him. The trial court allowed its admission to be "used to determine Ruby's knowledge or absence of mistake or accident."

The Court agreed that Kentucky holds to a strict construction of the rule "because the admission of collateral criminal acts carries a significant degree of potential prejudice against a defendant."<sup>113</sup> Applying the "three critical factors, relevance, probativeness, and prejudice," the Court concluded that the trooper's testimony should have been excluded. The Court agreed it might be relevant, but given that there was no testimony that the substance found during the Indiana stop was, in fact, illegal drugs, the Court did not find it probative. At best, it was an "allegation of uncharged crimes."<sup>114</sup> With respect to the third factor, however, "there is universal agreement that other crimes evidence is inherently and highly prejudicial to a defendant."

The Court agreed the admission of the Indiana offense was improper and reversed his conviction.

## **TRIAL PROCEDURE / EVIDENCE - BRADY**

### **Williams v. Com., 2011 WL 1327133 (Ky. App. 2011)**

**FACTS:** Williams worked as a physician at a pain management clinic in Lewis County. He worked about 2 ½ days a week and a witness said Williams saw about 200 patients a day (which he disputed). In 2001, the Lewis County SO began receiving complaints about the clinic, related to traffic and improper prescribing. A joint investigation, along with CHFS and the Attorney General, was begun. Several CI's, including Brothers, posed as patients.

On May 2, 2001, Brothers went to the clinic, was briefly assessed and completed a report that stated she "was in pain, had difficulty sleeping, and had been in a motor vehicle accident a few years prior." She brought no medical records with her. During her brief office visit with Williams, he asked her a few questions but did no physical examination. (He did touch her back "which caused her to flinch.") He gave her Vicodin and Anaprox and ordered a MRI and blood work. At her next visit, on July 9, she

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<sup>113</sup> Bell v. Com., 875 S.W.2d 882 (Ky. 1994).

<sup>114</sup> The Indiana case was not yet concluded.

brought fake records to the clinic, none of which indicated she'd had any sort of injury. Williams saw her briefly and gave her Vicodin, Anaprox and Valium. On a third visit, on August 7, 2001, Williams asked her about the MRI and Brothers' stated she did not know what an MRI was. He renewed the prescriptions and again wrote her an order for an MRI. On her last visit, on September 5, she stated she felt "real good" and Williams renewed the prescriptions for Vicodin and Valium.

Williams was charged with unlawfully prescribing the controlled substances and was ultimately only convicted for the Vicodin prescription written on September 5. During the trial, Journey, one of the clinic owners, testified. The defense learned that the day before he testified he had pled guilty in connection to a related federal prosecution. The Commonwealth was aware of the plea deal but had not disclosed it, because, the prosecutor stated, he was unaware there was anything in it related to testifying in Williams's case - and in fact, Journey stated he did not agree to testify as part of the plea deal.<sup>115</sup> Williams appealed.

**ISSUE:** Does Brady apply to evidence the Commonwealth does not have?

**HOLDING:** No

**DISCUSSION:** Williams argued that allowing Journey to testify violated Brady<sup>116</sup> and that refusing to give him access to the plea agreement for cross-examination violated Crawford.<sup>117</sup> With respect to Brady, the Court ruled that the outcome of the case would not have been different even if Journey had not testified. The court noted that "the Commonwealth cannot be expected to turn over information which it simply does not have." With respect to Crawford, the Court noted this was not a case involving testimonial hearsay, but a Confrontation Clause issue instead. The Court noted that the "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."<sup>118</sup> The Court noted that he was told what was in the agreement by the trial judge, who had viewed it. Any failure in not having the actual document was harmless.<sup>119</sup>

Williams' conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE – HEARSAY

### Stigall v. Com., 2011 WL 2438377 (Ky. 2011)

**FACTS:** On April 4, 2007, Stigall, age 16, was "hanging out" at his mother's house in Louisville. He was accused of raping L.E., the 5-year-old daughter of a family friend that day. The victim was examined and shown to have genital injuries consistent with a sexual assault. She admitted in an interview that Stigall was her assailant. Stigall was indicted on Rape and Sexual Abuse charges and

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<sup>115</sup> Neither the prosecution or the defense were given the plea deal paperwork as it was sealed. The judge was only able to obtain it upon an agreement to maintain its confidentiality, although a sealed copy was preserved for appellate review.

<sup>116</sup> 373 U.S. 83 (1963).

<sup>117</sup> 541 U.S. 36 (2004).

<sup>118</sup> Delaware v. Fensterer, 474 U.S. 15 (1985).

<sup>119</sup> Chapman v. California, 386 U.S. 18 (1967).

ultimately convicted. At the trial, the detective indicated that the victim testified consistently throughout the investigation. Stigall appealed.

**ISSUE:** Is a comment that a victim's statement was consistent improper?

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

**DISCUSSION:** Among other issues, Stigall argued that a portion of the investigator's testimony "improperly bolstered L.E.'s testimony." However, the Court noted that the detective "did not repeat any of L.E.'s out-of-court statements" but "rather, she merely stated her opinion that there were no striking inconsistencies" in L.E.'s claims. However, at best, the Court concluded it was only indirect bolstering and of minimal impact in light of the other evidence of guilt.

The Court affirmed his conviction.

**Gatewood v. Com., 2011 WL 2112566 (Ky. 2011)**

**FACTS:** On March 17, 2006, Jackson later testified, she heard two shots and saw Gatewood fire the second shot, killing Vargas. She saw Gatewood later that day and he told her that he'd shot Vargas. Gatewood was charged with murder, robbery and related charges. He was convicted of murder and appealed.

**ISSUE:** Is a statement made four hours after the fact admissible as a "present sense impression?"

**HOLDING:** No

**DISCUSSION:** Among other issues, Gatewood contested the trial court's refusal to admit a statement given by McPherson (a witness) through a detective witness. McPherson was interviewed four hours after the shooting, and as such, the Court agreed it could not be admitted as a "present sense impression." In prior cases, the Court had declined to accept a statement given 7 minutes after an incident as such, and neither qualified as the "immediately thereafter" required under KRE 803(1). An inconsistent statement by one witness could not be used to impeach the testimony of another witness, which is what the prosecution was trying to do. The trial court correctly recognized it as hearsay and denied its admission, finding it "nothing more than a pretext for violating the hearsay rule."

The Court affirmed Gatewood's conviction.

**Alford v. Com., 338 S.W.3d 240 (Ky. 2011)**

**FACTS:** S.A. accused Alford, her mother's boyfriend, of sexual abuse spanning years. S.A. was age 3 when Alford entered the household. Alford and S.A.'s mother ultimately had 2 children together. S.A. and another sibling, W.A., shared a biological father and had visitation with him. In 2001, when S.A. was 13, she told a stepsister and her stepmother that Alford was sexually abusing her. She was taken for an exam and no evidence was found. She was interviewed by Det. Slack (KSP), as was W.A. She stayed with her father and did not return to her mother's home. She was re-examined 2 months later and found to have evidence of sexual contact. Alford was charged with Rape and Sodomy. At

trial, S.A. detailed numerous acts of sexual assault. She stated she told no one about the abuse because she was afraid of what Alford would do to her or her family. Her mother testified that she never heard or saw anything indicating sexual abuse or assault and noted that they lived in a small trailer with thin walls. She agreed, however, that she was not always at the trailer. W.A., however, testified that the story was the result of a plan by their father so that S.A. could come to live with him. Det. Slack testified as to his interview with the victim.

Alford was convicted of Sodomy and Sexual Abuse, but not Rape. He appealed.

**ISSUE:** May a detective repeat a victim's statement in testimony?

**HOLDING:** No

**DISCUSSION:** Alford argued that the both Det. Slack and Dr. Hayden (who examined S.A.) repeated inadmissible hearsay. The Court agreed that "there is no hearsay exception for statements made by an alleged victim of sexual abuse to a police detective."<sup>120</sup> The Court agreed that the case turned on S.A.'s credibility and that the extensive use of hearsay unfairly bolstered S.A.'s credibility. When combined with the inadmissible hearsay of Dr. Hayden, who "read extensively from his interview" with her, it rose to the level of error. The Court noted that the "identity of the perpetrator is rarely, if ever, pertinent to medical diagnosis or treatment."<sup>121</sup> However, statements about what was done to her is admissible under KRE 803(4). During his testimony, Dr. Hayden "basically repeat[ed] the allegations to which S.A. had already testified, including statements that had no relevance to medical diagnosis and treatment." The extensive, inadmissible hearsay testimony by Dr. Hayden was highly prejudicial and unfairly bolstered the credibility of S.A."

The case was reversed and remanded for further proceedings.

## **TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE**

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

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

Springer was tried and acquitted of the murder in 1988 and that "case languished until 2005." That year, Detective Silfies got a tip about the murder and passed it on to Det. Fleming, who was doing a cold case investigation of the Mullen murder. The witness, Robinson, told Fleming she was an eyewitness to the murder and that information led to the indictment of Fields, Cramer and Boyd. Springer and his girlfriend, Smith, were also indicted.<sup>122</sup>

<sup>120</sup> Smith v. Com., 920 S.W.2d 514 (Ky. 1995).

<sup>121</sup> Garrett v. Com., 48 S.W. 3d 6 (Ky. 2001).

<sup>122</sup> It is unclear how Double Jeopardy factored into this case.

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

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

**HOLDING:** Yes

**DISCUSSION:** First, the defendants argued their trials should have been severed (tried separately) because “incriminating out-of-court statements made by Cramer” to a jail informant were introduced. In it Cramer indicated “we” did it, but because he did not testify, his co-defendants could not cross-examine him. The Court noted that this situation often arises with joint trials and is resolved “by compliance with principles established under Crawford v. Washington<sup>123</sup> and Bruton v. U.S.<sup>124</sup>” The Court addressed whether the statement by the informant was “inherently untrustworthy.” The Court looked to Crawley v. Com.,<sup>125</sup> which identified four factors by which the trustworthiness, and hence the admissibility, of a statement against penal interest is to be assessed: 1) the time of the declaration and the party to whom it was made; 2) the existence of corroborating evidence in the case; 3) the extent to which the statement is against the declarant's interest; and 4) the availability of the declarant as a witness.”

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

Further, the Court looked at the admission of the statement with respect to Fields and Boyd. The Court noted that the “we” referenced in the statement was not made clear, but Boyd and Fields contended that “their association with Cramer as codefendants undoubtedly suggested to the jury that Cramer's remark included them, and thereby inferentially linked them to the crimes depicted in the photographs.” They argued that Crawford “barred the introduction of the statement.”<sup>126</sup> However, the Court noted that Crawford “does distinguish testimonial statements from casual remarks made to friends.” The court held that this spontaneous statement to a fellow inmate was not testimony. With respect to Bruton<sup>127</sup>, which ruled that the “Confrontation Clause forbids “the use of a non-testifying codefendant's confession that ‘expressly implicate[s]’ the other defendant,” the Court noted that “when a codefendant's confession does not expressly implicate the other defendant, but rather inferentially “links” him to the crime, the Confrontation Clause is not offended so long as the evidence itself is otherwise “properly admitted” and “the confession is redacted to eliminate all references to the defendant's existence.” Bruton states that the appropriate way to deal with such statements is to redact all references to the other defendant and a jury admonition that it can only be used against the person that made the statement. However, neither Fields nor Boyd requested a redaction and as such, it was properly admitted.

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<sup>123</sup> 541 U.S. 36 (2004).

<sup>124</sup> 391 U.S. 123 (1968).

<sup>125</sup> 568 S.W.2d 927 (Ky. 1978); Harrison v. Com., 858 S.W.2d 172 (Ky. 1993).

<sup>126</sup> 541 U.S. 36 (2004); see also Stone v Com., 291 S.W.3d 696 (Ky. 2009)

<sup>127</sup> 391 U.S. 123 (1968)

The convictions of Fields, Cramer and Boyd were upheld.

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

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

**FACTS:** On May 4, 2007, Jackson was operating a “bootleg” taxi, in Louisville. He picked up his victim and Following his arrest, the police seized a number of items from his home and admitted them into evidence. These items included a camera, video camera, a reflexology chart and women’s pantyhose.

Jackson was charged with Kidnapping, Assault and Attempted Rape and related offenses. He was acquitted of the Attempted Rape but convicted of the remaining crimes. He appealed.

**ISSUE:** Is irrelevant evidence admissible?

**HOLDING:** No

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

Jackson’s conviction was affirmed.

### **Shaffer v. Com., 2011 WL 5316738 (Ky. 2011)**

**FACTS:** C.C., age 7, accused Shaffer (her uncle) of sodomy during a July 2005 visit to her grandmother’s (Kathy’s) home in Adair County. Every summer, C.C. and J.C. (her brother) would visit their grandmother for several weeks. When C.C. told her grandmother that Shaffer had touched her while she was taking a bath, Kathy Shaffer notified the police. C.C. later alleged that Shaffer had sodomized her during a time when they’d been alone in the home. He was indicted. At trial, Devon (Shaffer’s younger brother) testified that he’d been sent by Shaffer to a nearby convenience store on that date. At the time he left, Shaffer had been wearing only boxers and had an erection. A few days later, Kathy Shaffer had Shaffer removed from the house after an apparently unrelated argument.

At some point, Devon and C.C. went Shaffer’s new home (a trailer across the street) to take a shower, and Devon witnessed some suspicious activity between the two. C.C. told him at the time that Shaffer had “touched her.”

A “cursory exam” was done shortly after the incident and some physical symptoms were discovered. Shaffer was charged with sodomy because of an allegation of apparent anal intercourse but an exam to confirm that had occurred had not occurred because C.C. was “crying and resistant” to an examination. (The nurse indicated that C.C. did not report any bleeding, however.) Originally, C.C. was brought to

the health center “complaining of frequent and difficult urination.” When asked, she reported that Shaffer had “touched her in her ‘privates’ and stuck something hard in her ‘butt.’” (The nurse was not a SANE, but had testified as to extensive coursework in pediatrics which had also covered sexual abuse.) At trial, the nurse “speculated that it was possible” that the child had “confused her ‘butt’ and vagina” and admitted she could not be sure her symptoms were “caused by sexual trauma.”

Shaffer was convicted and appealed.

**ISSUE:** Is irrelevant testimony inadmissible?

**HOLDING:** Yes

**DISCUSSION:** On appeal, Shaffer argued that the symptoms the nurse discussed were irrelevant and inadmissible because the alleged crime was sodomy. The Court reviewed a number of evidentiary rulings and noted that it was not proper to limit the defense cross-examination of the nurse-witness in questioning whether the symptoms were consistent with the allegations. Given the specifics, however, the Court ruled the error to be harmless.

Shaffer also argued against a recording of his interview with Det. Atwood, along with a transcript, being provided to the jury. The defense agreed the transcript was accurate (after certain portions had been redacted). The Court agreed it was proper for the jury to be provided the transcript, which was not admitted into evidence nor were they allowed to have it in the jury room.

Shaffer’s conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY**

### **Ramey v. Com., 2011 WL 6826204 (Ky. 2011)**

**FACTS:** Ramey was charged with the murder of Jerry Eldridge at his home in Alma (Calloway County). A number of other charges were placed as well, as the murder occurred in the context of a home invasion. Part of the evidence against Ramey was a pair of gloves. One of the pair was found near Eldridge’s body and was linked by DNA to Ramey. The other glove, however, was found by one of the victims, lying in the road. Since she believed “it might be evidence, [she] stopped and, using a hair brush, picked it up.” She immediately handed it over to a state trooper stationed at the home, nearby. Blood on the glove matched to Eldridge.

At trial, Ramey objected to the introduction of the glove, arguing it was not adequately authenticated. Since the “gloves themselves are readily identifiable and impervious to change” and because there was an adequate foundation placed supporting their admission, the trial court admitted the gloves, even though the witness that found the second glove apparently did not identify it at trial.

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

**HOLDING:** No

**DISCUSSION:** The court noted that the chain of custody was “nearly complete” and that there sufficient evidence presented to provide a “reasonable assurance of both identity and integrity – that they were the same gloves found and that their condition “had not materially changed subsequent to the crime.” The gloves “were handled with care and soon after being found were packaged separately and secured.”

The Court also addressed an issue of a witness mentioning that Ramey might have been involved in a burglary in the area just prior to the murder. He argued that it was improper evidence under KRE 404(b) and the Court agreed it was improperly admitted, as it did not meet any of the exceptions for this kind of evidence.<sup>128</sup> However, the Court found the error to be harmless and not serious enough to have affected the outcome of the trial.

The Court upheld the conviction.

## **TRIAL PROCEDURE / EVIDENCE – RULE OF COMPLETENESS**

### **Rapone v. Com., 2011 WL 588091 (Ky. 2011)**

**FACTS:** On April 27, 2008, M.M.’s mother left M.M. (age 4) and her brother in Rapone’s care. At about noon, M.M.’s cousin came back and found the door locked and the brother playing outside. She found this unusual and knocked repeatedly. Rapone unlocked the door and admitted her, he was wearing only pajama pants. M.M. was wearing panties and a jacket. When told to get dressed, M.M. went to get her clothes, which were in her mother’s room. Again, this was unusual. M.M. went with her aunt to her grandmother’s apartment and M.M. complained of painful urination. Upon inspection, her genitals were found to be red and swollen.

M.M. was taken by her mother to the ER and the child was subsequently interviewed by Cox, a Marshall County social worker and Det. Hilbrecht (Marshall County SO). Although the child’s language was “coarse,” they determined that Rapone had in fact raped the child. Forensic examination confirmed injuries.

M.M.’s apartment was searched and evidence was found. However, Rapone had fled and was eventually extradited back to Kentucky from Pennsylvania. He confessed to sexual contact but denied intercourse. However, he was indicted for Rape and ultimately convicted. He appealed.

**ISSUE:** Is a party entitled to have an entire recording entered into evidence?

**HOLDING:** Not necessarily

**DISCUSSION:** Among other issues, Rapone objected to the redaction of certain parts of his recorded statements, while introducing the remainder of it. He argued that such redactions violated the “rule of

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<sup>128</sup> KRE 404(b) does recognize two exceptions, one when the prior bad act evidence is “offered for some other purpose, such as proof of motive . . . ,” and the other if the prior bad act evidence is “so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.”

completeness" in KRE 106. The Court, however, agreed that the redacted statements were simply an attempt to introduce the possibility of alternative perpetrators without having to face cross-examination. The Court ruled the redaction proper.

Rapone also objected to the admission of the statement given by the doctor witness with respect to what M.M. told him, because it was "not given for medical diagnosis or treatment." However, because the defense did not properly object to the statement being admitted, the Court declined to rule on it, beyond agreeing that it was improper to permit the doctor to identify Rapone. The Court agreed that the testimony was harmless.

Rapone's conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE – STATEMENT**

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

**FACTS:** Walker and Thomas had lived together in Louisville in the 1990s and had children together. In 2002, the couple became estranged and Walker moved with the children to Georgia. Thomas regained custody of the children in 2006, brought them to Louisville and began seeing Scott in 2007. Walker returned from Georgia and during that time, saw his children on occasion and tried to reestablish a relationship with Thomas. On September 14, 2007, friction occurred between the pair and Thomas dropped him off at the home of a relative. At about 5 a.m. the next morning, Walker went to Thomas's apartment and entered, finding Scott asleep in the master bedroom with the children. (Two were in the bed and the third on a pallet on the floor.) Walker "lost it" and attacked Scott. He dragged Scott to the basement. When Thomas returned about 6 a.m., Walker took her to the basement, where she saw Scott's body and blood spattered everywhere. Walker insisted, however, Scott was not dead but he would not let Thomas call for help. When he fell asleep, however, Thomas fled with the children.

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

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

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

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

statements were not legally hearsay, but instead “were meant to elicit and did elicit responses from Walker.” The Court agreed, however, that he would have been entitled to a jury admonishment as to how to regard that information. Since he failed to ask for it, the issue was waived.

Walker’s conviction was affirmed.

## EMPLOYMENT

### Artrip v. City of Hopkinsville, 2011 WL 336643 (Ky. App. 2011)

**FACTS:** Artrip started as a Hopkinsville police officer in 2004. A year later, he was charged with DUI and related charges, in Tennessee. He was immediately suspended without pay until the charges were resolved.<sup>129</sup>

Artrip filed suit under federal law against the city, arguing he was wrongfully suspended in violation of KRS 95.450 and KRS 15.520. The Court agreed that it was improper to indefinitely suspend Artrip and noted that:

As of January 4, 2008, however, “Mr. Artrip has not been reinstated to active duty, *no administrative charges have been filed against him*, no hearing has been conducted regarding his suspension, and the criminal charges filed against him in Tennessee are still pending.”

Eventually, in light of the court’s order that he be reinstated and receive back pay, the city entered into a confidential settlement with Artrip, restoring the status quo. On April 15, 2008, just after his reinstatement, the City formally preferred charges against him and suspended his employment.” After a hearing, he was fired. He appealed the decision and the Circuit Court upheld the firing. He further appealed.

**ISSUE:** Should charges promptly follow a police officer’s suspension?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that it was not “bound by a federal court’s interpretation of Kentucky law” and that the statute says the hearing should be provided within 60 days of charges being filed (which was not done until 2008). The Court mentioned an apparent conflict between the two statutes, but stated that since it did not have to resolve the conflict, that it would not do so. The Court agreed that under appropriate circumstances, suspension can precede the preferment of charges, but that such charges should be made within a reasonable period of time.

The Court upheld the firing decision, although it set aside one of the counts on procedural reasons.

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<sup>129</sup> Ultimately, he pled guilty to reckless driving and violation of the implied consent law.

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

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

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

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

**HOLDING:** No

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

Royalty's termination was upheld.

## **OPEN RECORDS**

**Eplion v. Burchett, 354 S.W.3d 598 (Ky. App. 2011)**

**FACTS:** Eplion was in the Boyd County Jail for over a year and was then transferred to the Little Sandy Correctional Complex. In 2006, he filed an open records case with the jail. Eplion did not get a response in the legal time frame so he appealed to the OAG. The response of the jail to that appeal indicated that the records in question were generated during the administration of a prior jailer and that they could not locate any records from that time frame. The response indicated confusion as to who the proper custodian of such records would be.

The OAG informed the current jail administration that the records "belonged not to the past or present jailers as individuals, but to the agency, and that they had an obligation to maintain the records amassed by their predecessors." The KDLA completed training with the officials with respect to their responsibilities. Eplion appealed to the Boyd Circuit Court requesting the records and payment of penalties for the delay. In a hearing, the jail "represented that they had made efforts to locate the records but were unable to do so." They offered to contact the former jailer about it. The Court ruled that they could not produce the records but that a fine was not appropriate under the circumstances. Eplion appealed.

**ISSUE:** Does the reason for an Open Records request apply with respect to penalties when the government entity fails to produce records?

**HOLDING:** No

**DISCUSSION:** The Court noted that when the denial of records is in “willful disregard” of the ORA, penalties are within the trial court’s discretion. Despite procedural issues with the record, the Court agreed that apparently, the records in question simply didn’t exist, despite diligent searches by the current administration. The Court agreed the Eplion was correct “that many of these records should exist, or at least should have existed at one time, and perhaps were improperly destroyed.”

However, the Court noted that once that was determined, it was incorrect to find no relief for Eplion at all. The Court noted that Eplion wanted the records to attack his conviction (on an assertion of his counsel being ineffective) and the trial court apparently assumed that attempt would be unsuccessful. However, the Court noted, “nothing in the Act conditions an individual’s right to obtain public records on his purpose in seeking those records.” Further, simply finding that the records do not exist does not end the jail’s obligation to Eplion. The Court agreed he was entitled to a “written explanation for their nonexistence.”<sup>130</sup> Given that the jail offered to undertake further investigation, it was improper for the Court not to include that as part of the final order, since it was unclear that the “officials ever actually did what they offered to do, and in the absence of a court order, they could not be forced to do so.” Eplion was entitled to a judgment ordering a written explanation at the least.

The Court further noted that the “only basis upon which penalties may be awarded is a finding that the officials’ noncompliance with the Open Records Act was willful.” However, because Eplion did not raise that issue, the Court declined to address it on appeal.

The Court ordered the trial court to render a judgment as indicated.

## CIVIL

### Davis v. City of Winchester, 2011 WL 5105441 (Ky. App. 2011)

**FACTS:** On October 5, 1996, Officers Craycraft and Stone (Winchester PD) were patrolling downtown in plainclothes. (They were responding to complaints of unruly behavior that would stop when an officer arrived in a marked car.) Davis was visiting the “Fishin’ Hole,” a bar owned by his wife. Following a pool tournament there, during which he drank 1-2 beers, he walked to another location, Barn’s Bar, where he drank several more beers. He and Salyers decided to walk back to the first bar via an alley. During that time, the officers “heard loud, boisterous voices laced with profanity coming from Wall Alley” and saw “Davis and Salyers staggering towards them.” Officer Craycraft asked their identity and Davis explained he was the co-owner of the Fishin’ Hole. The officers later testified that Davis’s speech was slurred and that he appeared “manifestly intoxicated.” When the radio crackled in Craycraft’s pocket, Davis asked if the two were officers, they agreed and showed badges. Salyers then “smiled and walked into the bar.” Davis challenged them, asking how he was to know that they were “real” officers, and Officer Craycraft then called for a prisoner transport, having already decided to arrest Davis. Davis “used profanity to express his view of their circumstances” and walked to his bar entrance. The officers, who had actually not arrested the pair as yet, followed Davis, waiting for the marked unit to respond. As they went into the door, “Davis swung his arm around, striking Officer

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<sup>130</sup> 10-ORD-078.

Craycraft in the chest with a closed fist, knocking him off balance.” All three began to struggle and eventually Davis was secured.

Davis claimed that he was not swinging at the officer, however, but simply pointing to a sign that required officers to provide identification before entering the bar. The struggle attracted a crowd and the officers called for additional help. Officer Vaught arrived and took custody of Davis. The police ordered the bar shut down for the night. At the jail, Davis complained about an injured thumb and threatened to kill the officers who had injured him. He was ultimately charged with Alcohol Intoxication, Disorderly Conduct, Resisting Arrest, Terroristic Threatening, Assault 3<sup>rd</sup> and operating a disorderly retail establishment. All of the charges were dismissed and Davis filed a civil lawsuit against the City of Winchester and the officers, claiming malicious prosecution, excessive force and unlawful arrest. A jury found in favor of the defendants and Davis appealed. Ultimately, the Kentucky Supreme Court reversed the ruling on the malicious prosecution charge and remanded it back for a new trial.

Eventually, the case reached a second trial and again, the jury found in favor of the defendants. Davis appealed.

**ISSUE:** Are officers liable for false arrest if they can support any criminal charge based upon the evidence?

**HOLDING:** No

**DISCUSSION:** Davis argued that a jury instruction provided that he could prevail only if the officers “did not have reasonable grounds to believe the Plaintiff committed *any* one of the crimes.” He sought a different charge to the jury, but the Court found the issue to be moot, as the jury clearly found that the officers did not act with malice at all. The Court found it to be “self-evident that malice is a necessary element of the offense of malicious prosecution.”

The Court upheld the jury verdict.

**Stephens v. McCullough**,<sup>131</sup> 2011 WL 1515235 (Ky. App. 2011)

**FACTS:** Richard McCullough, age 14, lived with his mother and her boyfriend. He also stayed with his grandmother and she took him to many appointments and events. Dewayne, the boyfriend, “did not participate in child rearing activities” but did tell Richard not touch his firearms. He did, however, obtain a handgun for Richard. Richard hunted with Dewayne and went to the range with him.

On July 25, 2006, Richard’s mother told his grandmother that he was staying with a friend, but the grandmother found Richard and friends at his mother’s home. She ordered them all to leave the house. Erin Stephens was not with the group at that time, but joined them later and they all returned to the home. Richard obtained Dewayne’s loaded firearm from a nightstand. Ultimately, Richard shot Erin in the hand, apparently unintentionally.

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<sup>131</sup> The correct spelling is McCullouch, but was incorrectly listed by the Court.

Erin Stephens, through her mother sued Richard and Dewayne, as well as Richard's mother and grandmother." The grandmother was dismissed from the action initially, and subsequently, both Richard's mother and Dewayne were also dismissed. Stephens appealed the dismissals.

**ISSUE:** Is dismissal of a civil case appropriate when there are many issues of material fact left unanswered?

**HOLDING:** No

**DISCUSSION:** The Court agreed the dismissals were improperly granted, as there remained "too many issues of material facts" to grant summary judgment at this time. The Court agreed that a jury could find Richard's mother and mother's boyfriend negligent in his supervision and further noted that since "Dewayne was instrumental in teaching Richard how to properly use firearms, he assumed the duty to suitably instruct and supervise Richard."

The Court reversed the summary judgment in favor of the mother and boyfriend.

**Brantley v. Bell & Coomes, 2011 WL 1598723 (Ky. App. 2011)**

**FACTS:** On February 5, 2005, in the early morning hours, KSP received a 911 call from the Buschkoetter home in Daviess County. Trooper Bell, along with a local deputy arrived first. They spotted Gerald Buschkoetter in the garage, clad only in underwear. When he spotted the two, he ran into the house and down the steps into the basement. Jamie Brantley (aka Buschkoetter, Gerald's wife) was also present; she advised the officers that Gerald had two loaded handguns and had fired shots inside the building. She told the two that he was bipolar and that he'd attacked her the year before, had tried to suffocate her and had gotten out of his car on the highway and laid down in the lane of travel.

Trooper Bell began to communicate with Gerald, backed up by Trooper Coomes. Trooper Bell finally convinced Gerald to come out of the bathroom where he was barricaded. He emerged violently, however, and was armed with both guns and waved them in their general direction. The troopers did not believe he was aiming at them and did not use force against them. He then started flinging shoes in their direction. They exchanged a pair of pants for his putting down the guns, but he was still close by them. After an hour of discussion, however, they saw him pick up one of the handguns and point it at them and at that time, both troopers fired. They went to him and retrieved a revolver from under his body. He died from two gunshot wounds.

Brantley filed suit against the troopers and other parties, on both her behalf and the behalf of their child, claiming wrongful death and loss of consortium. The Court dismissed all claims except the claims against the two in their individual capacities. She also filed an action under the state Board of Claims. The Board denied that claim, however, and that was not appealed. With respect to the lawsuit, the trial court dismissed the action against the troopers, ruling that their actions were "discretionary and within the scope of their authority, they had acted in good faith in their dealings with Gerald, and they were thus entitled to qualified immunity." Brantley appealed.

**ISSUE:** Must evidence be in the record to be considered in refuting a summary judgment motion?

**HOLDING:** Yes

**DISCUSSION:** Brantley argued that there were, in fact, genuine issues of material fact, but had made no attempt to add affidavits or other information to the official record. Bell and Coomes alleged that while there were disputed issues of fact, they were not relevant to the ultimate issue, whether their use of deadly force was reasonable. The Court agreed that Brantley had sufficient time, during the pendency of the action, to put additional evidence on the record, and chose not to do so.

The summary judgment was affirmed.

**Martin, Sapp and Motley v. O'Daniel, 2011 WL 1900165 (Ky. App. 2011)**

**FACTS:** In March, 2006, O'Daniel (retired KSP) purchased a vehicle from Godsey. Shortly after the sale, he took it for an oil change and learned the engine was not original to the vehicle. He began an investigation, believing he'd been defrauded, and with the help of a KSP detective, Riley, learned that the VIN plate had also been replaced. Det. Riley then impounded the car on the presumption that it was stolen. In fact, it had been stolen in 1981 and as a result, "Det. Riley believed that State Farm [which had paid out on the claim in 1981] was the titular owner of the 1975 Corvette." O'Daniel, who was also insured by State Farm, communicated with the company about the car. One State Farm representative stated the insurance company wasn't interested in pursuing its claim, but another representative stated that they were.

O'Daniel continued to explore how he could get a proper title to the car and hired an attorney. He spoke to Det. Riley who stated, perhaps in jest, that he would crush the car before returning it to O'Daniel. Ultimately, O'Daniel sought to get the car titled through Jessamine County but when the local County Clerk sent the paperwork to the DOT, the DOT contacted KSP. KSP opened a criminal investigation and Sgt. Motley and Det. Martin were assigned, under the supervision of Lt. Col. Sapp.

Since, at the time, O'Daniel was working for the Justice Cabinet, the Cabinet asked KSP to "transfer the investigation ... to another police department." Only after some additional discussion did the matter get transferred to the Jessamine County Sheriff's Office. However, ultimately, KSP presented the evidence to the Franklin County Commonwealth's Attorney, who declined to prosecute. However, a special prosecutor did present the matter to a grand jury, which indicted O'Daniel. He was acquitted and brought suit against the 4 KSP troopers for malicious prosecution. Riley was dismissed, but the Circuit Court denied a motion for qualified immunity in favor of the other three. Motley, Sapp and Martin appealed.

**ISSUE:** Does qualified immunity apply to an intentional tort?

**HOLDING:** No

**DISCUSSION:** O'Daniel put forth various allegations against the three defendants. The Court noted that the allegation of malicious prosecution includes by its key element, malice, and that alone "negates a public employee's claim to qualified immunity." The trial court determined that he had produced sufficient evidence to go forward with the claim, and the appellate court agreed. Since Yanero stated

that qualified immunity only applies to negligence claims and since malicious prosecution is an intentional tort, qualified immunity did not apply.

The Court agreed that that the three defendants were not entitled to qualified immunity.

## MISCELLANEOUS

### Com. v. Peters, 353 S.W. 3d 592 (Ky. 2011)

**FACTS:** In February, 2008, Peters was charged with DUI. At arraignment, her counsel requested a pretrial conference and specifically, the presence of the arresting officer. The Commonwealth objected to requiring the presence of the officer. The trial court subsequently entered an order that required the production of the witness, noting that having the prosecuting witness present at pretrial conferences expedites the disposition of such cases. The Commonwealth requested a writ of prohibition from the Shelby Circuit Court to prevent the enforcement of that order, and the Circuit Court agreed that the "Commonwealth's prosecution would suffer irreparable harm under" that requirement. Upon appeal, the Court of Appeals overturned the writ, finding no evidence of irreparable harm and the Commonwealth appealed.

**ISSUE:** May the court order a witness to attend a pretrial conference?

**HOLDING:** Yes

**DISCUSSION:** The Kentucky Supreme Court equated the order to one which permitted requested discovery and reviewed the criminal pretrial procedure cited by both sides. Under RCr 7.14, the defense is entitled to a number of items under discovery and both RCr 7.10 and RCr 7.20 permit the taking of criminal depositions prior to trial, particularly when a witness may be unavailable for trial. However, this is tempered by the right of the witness to refuse to be interviewed once compelled to attend. Because the initial order required the presence of the witness to be interviewed, it exceeded what the rules permitted, but, nothing, it continued, prohibited an order to require the witness to simply be physically present. In this case, because many prosecutors will not agree to a plea bargain without the presence of the arresting officer, it might be necessary to facilitate the process.

The reversal of the writ was itself reversed, but the court noted it was entirely proper to order the officer to be present, it was simply improper to order the officer (or other witness) to be present for the purpose of being interviewed.

# SIXTH CIRCUIT

## ARREST

### Kennedy v. City of Villa Hills, 635 F.3d 210 (6<sup>th</sup> Cir. 2011)

**FACTS:** In May, 2005, Kennedy was “embroiled in a zoning dispute about the expansion of a strip mall next to his home.” He approached Schutzman, a police officer and building inspector for Villa Hills, about the dispute. Schutzman refused to speak to him, and Kennedy, when leaving, told other city workers in the building that Schutzman “broke all the zoning laws.” Schutzman approached Kennedy and asked him what he has said, and Kennedy made a derogatory personal comment about Schutzman. Schutzman arrested Kennedy for disorderly conduct. Kennedy was acquitted in the criminal case and then sued several parties, including Schutzman, for wrongful and retaliatory arrest. The trial court granted summary judgment to everyone but Schutzman, who had claimed qualified immunity. Schutzman appealed the denial.

**ISSUE:** If an arrest is clearly unreasonable, is the officer entitled to qualified immunity?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the requirements for a qualified immunity defense. The Court noted that an “arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.”<sup>132</sup> Looking at Kentucky law, the court concluded that Schutzman “could not reasonably believe that he had probable cause to arrest Kennedy” as there was no indication of “public alarm” put forward. Although it was agreed that Kennedy was agitated, the evidence was mixed as to how loud he actually was and it might have actually been a reasonable volume. The court noted that “Kentucky law does not criminalize arguments and noise that disturb only police officers because such conduct does not risk *public* alarm.”<sup>133</sup> In fact, “because the First Amendment requires that police officers tolerate coarse criticism, the Constitution prohibits states from criminalizing conduct that disturbs solely police officers.”<sup>134</sup> In deed, “the freedom of individuals verbally to oppose or challenge police actions without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>135</sup> Finally, “a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.”<sup>136</sup> The Court reviewed a number of Kentucky cases concerning disorderly cases as well.

The Court then looked to the claim of retaliatory arrest, and noted that “motive *is* relevant to Kennedy’s claim that Schutzman arrested Kennedy in retaliation for Kennedy’s exercise of his First Amendment rights.”

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<sup>132</sup> Harris v. Bornhorst, 513 F.3d 503 (6<sup>th</sup> Cir. 2008).

<sup>133</sup> This language comes from the statutory commentary.

<sup>134</sup> City of Houston v. Hill, 482 U.S. 451 (1987).

<sup>135</sup> Lewis v. City of New Orleans, 415 U.S. 130 (1974.)

<sup>136</sup> Arnett v. Myers, 281 F.3d 552 (6<sup>th</sup> Cir. 2002).

The Court summarized:

A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.<sup>137</sup>

Although agreeing that proof of motive is difficult, the Court found sufficient evidence by Schutzman's actions that the "content of Kennedy's speech may have been a motivating factor for Schutzman to arrest Kennedy." The right to be free of such arrests was clearly established, however.<sup>138</sup>

The Court affirmed the denial of summary judgment on the grounds of qualified immunity.

## SEARCH & SEIZURE - SEIZURE

### U.S. v. Gross, 624 F.3d 309 (6<sup>th</sup> Cir. 2011)

**FACTS:** On November 15, 2007, Officer Williams (Cuyahoga Metro Housing Authority PD) was patrolling a public housing project known for high crime. He spotted a vehicle legally parked, with the engine running, with no driver. He saw a "barely-visible passenger who was slumped down" in the passenger seat. He found no outstanding warrants or issues against the registered owner. The passenger reacted to the spotlights of the police vehicle by "sitting up abruptly and then slumping down further in his seat." Williams approached the passenger side on foot. The officer spotted the passenger (Gross) through the closed window and Gross "then cracked the door." Williams asked why Gross was there and he said he had been "over [at] his girlfriend's house." The officer noted an open bottle of cognac on the console. Gross said he had no ID but could go into the house for it. He gave the officer his name, DOB and SSN. When Officer Williams ran the information, he learned Gross had an outstanding warrant for a CCDW charge. He arrested Gross, frisked him, but did not do a thorough search. He transported him to the jail, where Gross was searched and sent through a metal detector. It went off, but despite repeated passes through the machine, they could not find the source. He was taken into a holding area where he asked to use the restroom and was permitted to do so.

A short time later, officers discovered a firearm near the toilet. He was the only inmate from the street that had access to that area that day. While still incarcerated, he was advised of the investigation and given Miranda. He waived his rights and said that he knew who brought it in but that he did not own it. The officers requested his consent for a DNA test, but he refused. They got a search warrant and collected the sample via an oral swab. Evidence from the gun proved to be a match.

Gross was charged with being a felon in possession and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

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<sup>137</sup> Thaddeus-X v. Blatter, 175 F.3d 378 (6<sup>th</sup> Cir. 1999); See also Hartman v. Moore, 547 U.S. 250 (2006) and Barnes v. Wright, 449 F.3d 709 (6<sup>th</sup> Cir. 2006).

<sup>138</sup> Greene v. Barber, 310 F.3d 889 (6<sup>th</sup> Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

**ISSUE:** Does an officer approaching someone in a public place and asking questions constitute a stop?

**HOLDING:** No

**DISCUSSION:** The Court first discussed the “stop” – but noted that in fact, he was not stopped. In U.S. v. Drayton, the Court held that law enforcement officers do not violate the Fourth Amendment “by approaching individuals in public places and asking questions.”<sup>139</sup> They may ask for consent so “long as the police do not convey a message that compliance with their request is required.”<sup>140</sup> Gross argued that by parking behind the car, he was blocked in by the officer’s vehicle and not free to leave. The Court agreed.<sup>141</sup> The prosecution argued that Officer Williams was fulfilling his duty under the community caretaking doctrine.<sup>142</sup> The Court noted that “any purported community-caretaking function in this instance could have been accomplished through a consensual encounter rather than an investigative stop.” The Court agreed the stop evolved into an unlawful seizure.

However, the Court noted that the “significant length of time between the unlawful seizure of Gross and his voluntary confession while in lawful police custody on an outstanding arrest warrant counsels a finding of attenuation in this case as to the confession.” In other words, even if he was unlawfully seized, enough time passed between the stop and his voluntary confession that he did, in fact, bring in the gun, that the confession was not fatally tainted.

The Court further noted that it had “not previously considered whether the discovery of a valid arrest warrant may serve to dissipate the taint of an unlawful detention.” The Court was highly reluctant to rule that the discovery of the warrant cured the taint of the stop, since to do so would suggest that an officer could randomly stop people in hopes of finding a warrant.

The Court concluded:

Finally, we consider the purpose and flagrancy of the official misconduct. As to flagrancy, while it is disheartening that Williams had once before blocked in a car in a similar manner, it was not until our recent decision in See,<sup>143</sup> decided after the events in this case, that it would have been clear to Williams that his methods were decidedly an investigatory stop and not a consensual encounter. As to purpose, Williams did not have a lawful purpose for his stop, nor was he, as the officers were in Green,<sup>144</sup> seeking evidence against a third-party. He also did not, as in Williams,<sup>145</sup> “immediately [ask] several questions related to criminal activity other than trespassing.”. While Williams’s actions could be interpreted to have been “in the hope that something might turn up,” unlike in Shaw<sup>146</sup> or Brown,<sup>147</sup> there is not sufficient evidence in the

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<sup>139</sup> U.S. v. Drayton, 536 U.S. 194 (2002),

<sup>140</sup> U.S. v. Peters, 194 F.3d 692 (6th Cir. 1999).

<sup>141</sup> The same officer was the subject of a similar case previously, U.S. v. See, 574 F.3d 309 (6th Cir. 2009).

<sup>142</sup> See U.S. v. Koger, 152 F. App’x 429 (6th Cir. 2005); U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

<sup>143</sup> U.S. v. See, 574 F.3d 309(6th Cir.2009).

<sup>144</sup> U.S. v. Green, 111 F.3d 515 (7th Cir. 1997).

<sup>145</sup> U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

<sup>146</sup> U.S. v. Shaw, 464 F.3d 615 (6th Cir. 2006).

<sup>147</sup> Brown v. Illinois, 422 U.S. 590 (1975).

record to show that Officer Williams “knew [he] did not have probable cause.”<sup>148</sup>. Accordingly, the purpose and flagrancy of Williams’s actions do not weigh heavily in the attenuation determination.

However, the Court found that the possession of the weapon was not sufficiently attenuated, although the DNA swab and confession were, and reversed the suppression motion with respect to the firearm.

## SEARCH & SEIZURE – SEARCH WARRANT

### U.S. v. Ellison, 632 F.3d 347 (6<sup>th</sup> Cir. 2011)

**FACTS:** On September 8, 2007, Det. Melzoni<sup>149</sup> applied for a search warrant, “relying in part on a tip from a confidential informant.” The CI’s reliability was not challenged, and he advised the officer that he had observed “within the past seventy-two hours, two males known to the informant as ‘Red’ and ‘Short’ meet outside of a residence on Cedar Circle in Nashville, Tennessee, and complete a drug transaction.”

The affidavit stated:

*The [CI] observed “Short” exit a side door of the residence and meet with “Red”. While standing outside, “Short” did give “Red” a large quantity of cocaine in a plastic bag. After the deal was completed “Short” went backing [sic] into the residence and “Red” left the property.*

Det. Melzoni explained in the affidavit that his experience indicated that persons at a location where drugs were being sold might have drugs on their person and thus requested authorization to search the home and any persons present. The warrant was issued and executed. Ellison was found outside. A large quantity of drugs, pills, a gun, cash and other items were found. On Ellison’s person, they found a “handwritten ledger, which documented money paid and owed for controlled substances that he had distributed and which showed multiple \$50 to \$200 drug sales.” While they were executing the warrant, Ellison got a call for a drug delivery. Ellison owned the property authorized by the search warrant and was charged with a variety of drug and firearms charges. He moved for suppression, arguing that the search warrant affidavit did not prove a sufficient nexus between the evidence sought and the place to be searched. The trial court noted that the affidavit was sufficient, even though it did not “name the person selling the drugs or the owner of the property.” Ellison took a conditional guilty plea and appealed.

**ISSUE:** Does a suspect’s walking into a house provide a sufficient nexus between the house and drug trafficking?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the search warrant was properly supported by probable cause. “Commission of a drug transaction outside of a house and one participant’s walking back into the house, as observed in this case, plainly demonstrated a sufficient nexus with the house.” Such “incriminating

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<sup>148</sup> U.S. v. Shaw, *supra*.

<sup>149</sup> Presumably Nashville PD, but unidentified in the opinion.

actions are inextricably connected to the residence for which the search warrant was sought" and certainly gave a "fair probability" that drugs were stored there and that a search would lead to the discovery of contraband. The fact that Ellison was not mentioned by name was irrelevant.<sup>150</sup> The Court noted that while the probable cause for an arrest required proof that a particular person committed a crime, "a search warrant may be issued on a complaint which does not identify any particular person as the likely offender."

The Court affirmed the conviction.

**Hammons v. U.S., 411 Fed. Appx. 837 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On September 11, 2008, Hammons, his wife (Mary Ruth) and his neighbor (Bowling) were arrested in London for Trafficking in Marijuana. Prior to the arrest, a search warrant execution at his home revealed a large quantity of marijuana (58 lbs) and firearms.

The search warrant affidavit was offered by Detective Mitchell (Laurel County SD). It relayed statements by an informant to authorities after being arrested that same morning on unrelated drug charges. He identified Hammons as a dealer and made specific allegations as to amounts and prices that the informant had purchased at Hammons' home. The authorities verified the residence by checking the registration of vehicles parked in the driveway. The informant made a drug buy call which suggested they had an ongoing relationship.

The warrant stated:

*On the 11th day of September, 2008, at approximately 8:30 a.m./p.m. affiant received information from/observed: \_\_\_\_\_ who advised that in the past 3 or 4 months he has purchased 12 to 15 lbs of marijuana from Scott Hammons who resides at the residence referenced in this affidavit. \_\_\_\_\_ further stated that he purchased the marijuana a (sic) 1 lb. quantities for which \_\_\_\_\_ paid \$1200 U.S. Currency. \_\_\_\_\_ also advised that he met Hammons at the residence mentioned in this affidavit on at least one occasion and received marijuana. \_\_\_\_\_ also advised that Hammons fronted the marijuana to \_\_\_\_\_ and allowed \_\_\_\_\_ to pay for the marijuana when he received the next pound. \_\_\_\_\_ advised that it had been approximately 2 weeks since he last purchased marijuana from Hammons. \_\_\_\_\_ also advised that he usually contacted Hammons via telephone and that he and Hammons would arrange a meet and time. \_\_\_\_\_ accompanied law enforcement and showed your affiant the residence referred in this affidavit stating that it was the Hammons residence.*

*On the morning of 09-11-2008 the Laurel County Sheriff's Office executed a search warrant at the \_\_\_\_\_ residence. During that search approximately 1/2 pound of marijuana was recovered. \_\_\_\_\_ advised that this was the remainder of the most recent purchase made from Hammons. Acting on the information received, affiant conducted the following independent investigation: Your affiant secured the cooperation of \_\_\_\_\_ to place a controlled call to Hammons in the presence of law enforcement. \_\_\_\_\_ called Hammons at XXX-XXX-XXXX, the number \_\_\_\_\_ advised belonged to Hammons. \_\_\_\_\_ inquired with Hammons if \_\_\_\_\_ could meet Hammons later this date and Hammons advised that he could. Hammons also told \_\_\_\_\_ that Hammons had something that was a lot better. On a second call, also on in the presence of law*

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<sup>150</sup> U.S. v. Pinson, 321 F.3d 558 (6<sup>th</sup> Cir. 2003); see also Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

*enforcement, Hammons told \_\_\_\_\_ that “we” are loaded heavy and that it was “good stuff.” Law Enforcement established surveillance on the residence mentioned in this affidavit and ran computer checks on registration checks on vehicles in the driveway and other computer databases. The vehicles are registered to Timmy Scott Hammons at XXXX XXXXX, London.*

During the search, Mary Ruth described her husband’s actions, and after being advised of Miranda, Hammons confessed. He was ultimately indicted on federal marijuana trafficking charges and related offenses. He moved for suppression and requested the identify of the informant. When that motion was denied, Hammons took a conditional guilty plea and appealed.

**ISSUE:** Must an unproven CI’s information be corroborated?

**HOLDING:** Yes

**DISCUSSION:** Hammons argued that the affidavit did not provide a nexus between the crime and his residence. The Court agreed that “[t]here must ... in other words, be a nexus between the place to be searched and the evidence sought.”<sup>151</sup> The Court agreed that warrants can be based on hearsay, but that “the source of information is highly relevant to the probable cause determination.”<sup>152</sup> When it is based upon an informant “without indicia of reliability,” “courts insist that the affidavit contain substantial independent police corroboration.”<sup>153</sup> The identity of the informant had been given to the magistrate, but the only indication that he was reliable was that Hammons was allegedly source of the marijuana the informant had in his possession. The court had held that such “penal statements do not establish reliability.”<sup>154</sup> However, under Woosley, the Court could also look to the totality of the circumstances, if the affidavit includes sufficient corroboration.<sup>155</sup> The Court, however, agreed that the phone calls, made in the presence of the law enforcement officers, where Hammons “spoke both to the quantity and quality of marijuana in his possession,” was sufficient corroboration.

With respect to the nexus, the Court agreed that since the supposed sales had occurred over several months, there might be an issue of staleness. However, it “clearly linked [Hammons] drug trafficking activities to his home and established a fair probability that evidence would be found there.”<sup>156</sup> A nexus might be inferred “between a suspect and his residence, depending upon the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.”<sup>157</sup>

Finally, the court agreed that “[a]lthough the government is privileged to withhold the identity of police informants, “[w]here the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the

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<sup>151</sup> U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006).

<sup>152</sup> U.S. v. Gunter, 551 F.3d 472 (6th Cir. 2009).

<sup>153</sup> U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

<sup>154</sup> U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003) See U.S. v. Higgins, 557 F.3d 381 (6th Cir. 2009) (citing Armour v. Salisbury, 492 F.2d 1032 (6th Cir. 1974)).

<sup>155</sup> U.S. v. Woosley, 361 F.3d 924 (6th Cir. 2004).

<sup>156</sup> U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006) (citing Zurcher v. Stanford Daily, 436 U.S. 547 (1978)); see also U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (en banc).

<sup>157</sup> U.S. v. Williams, 544 F.3d 683, 687 (6th Cir. 2008) see also Gunter, 551 F.3d at 478; U.S. v. Gunter, 266 F. App’x 415 (6th Cir. 2008); U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002); U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).

privilege must give way.”<sup>158</sup> “Mere conjecture or supposition about the possible relevancy of the informant’s testimony is insufficient to warrant disclosure.”<sup>159</sup> Instead, a defendant bears the burden of showing how disclosure of an informant’s identity will materially aid his defense.<sup>160</sup>

Hammons argued that since the informant did not request to remain anonymous, he should be provided the information, but the court noted that the privilege in question “is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law.”<sup>161</sup> The Court agreed Hammons had failed to make a showing as to why he needed the information to support his defense and that despite his assertion he needed the information to determine if the affidavit “exaggerated or omitted information,” he had not made a sufficient case.

Hammons’ conviction was affirmed

### U.S. v. Adkins, 429 Fed.Appx. 471 (6<sup>th</sup> Cir. 2011)

**FACTS:** In early July, 2007, Following the corroboration of a controlled substance by a CI, Agent McNamara (Tennessee Bureau of Investigation) prepared an affidavit for a search warrant for Adkins’ home.

The relevant portion of the affidavit is as follows:

*[Your affiant] met with [the informant] . . . on July 6, 2007, and that [the informant] provided information regarding illegal activity, to wit: Gary Adkins was selling methamphetamine in Hamelin County.*

*The [informant] state[d] that Gary Adkins routinely distributes methamphetamine from 5957 Old White Pine Road[,] Morristown, Tennessee. On July 6, 2007, [the phone call was to arrange the purchase of ½ ounce of methamphetamine from Gary Adkins for the price of \$1,000.00. Once [the informant] made contact with Gary Adkins, Adkins instructed [the informant] to call back in fifteen minutes.*

*The [ informant] called back in fifteen minutes and was informed by Gary Adkins that he would not be able to meet [the informant], but he would send someone else to meet [the informant] at the Hardee’s on highway 25E Morristown, Tennessee. Shortly after [the informant] contacted Gary Adkins, surveillance . . . TBI [Agent] Jim Williams, observed a green Dodge pick[-]up truck . . . registered to Gary Adkins travel from 5957 Old White Pine Road to the parking lot of Hardee’s on highway 25E Morristown, Tennessee. Your affiant placed a digital recording device on the [informant’s] person. Your affiant and [the informant] drove from the Hamblen County jail parking lot to the Hardee’s on Highway 25E Morristown, Tennessee. During the travel to the Hardee’s the [informant] placed a call to Gary Adkins stating [the informant] was going to be late arriving at the Hardee’s and to confirm the description of the vehicle the [informant] was to meet with. [The informant] was informed the person the [informant] was to meet with was at the Hardee’s parking lot and driving a green pick[-]up truck.*

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<sup>158</sup> Roviaro v. U.S., 353 U.S. 53 (1957).

<sup>159</sup> U.S. v. Sharp, 778 F.2d 1182 (6th Cir. 1985).

<sup>160</sup> See U.S. v. Moore, 954 F.2d 379 (6th Cir. 1992).

<sup>161</sup> Roviaro, supra.

*Upon arrival at the Hardee's on 25E Morristown, Tennessee, the [informant] got into the green pick[-]up truck with an unknown white male. After a short meeting with the unknown male, the [informant] returned to your affiant's vehicle and turned over to your affiant a red shop cloth containing a small plastic baggie that contained a crystal like substance, which field tested positive as methamphetamine. Your affiant and [the informant] returned to the Hamblen County Jail. Once the green Dodge pick[-]up truck left the parking lot of the Hardee's it was observed by surveillance . . . returning to 5957 Old White Pine Road[,] Morristown, Tennessee.*

Adkins arrived during the search and was given his Miranda warnings. He proceeded to tell the agents where additional methamphetamine would be found on the property, along with a large amount of cash and two firearms. He was indicted on drug charges, as well as weapons charges for having the guns in furtherance of drug trafficking. He moved for suppression, arguing that the search warrant affidavit did not establish probable cause.

The District Court found the warrant affidavit to be adequate and Adkins proceeded to trial. He was convicted and appealed.

**ISSUE:** Is corroboration required of a CI previously found to be reliable?

**HOLDING:** No

**DISCUSSION:** Adkins argued that the search warrant affidavit was "was based only on a general statement by an unidentified confidential informant with no indicia of reliability and contained insufficient corroborating evidence." The Court agreed that "independent corroboration of a confidential informant's story is not a *sine qua non* to a finding of probable cause." The Court required only "substantial independent police corroboration" when a CI was not yet known to be sufficiently reliable. In this case, the details of the controlled substance purchase and its connection to the residence, were adequately spelled out in the affidavit, even though it did not discuss the reliability of the informant. It did, however, detail the officer's "first-hand observations of contraband" linked to Adkins' home and the Court found that sufficient.

Adkins further argued that statements he made to police following the search and his arrest should be suppressed, because they were made close in time to an illegal search. The Court quickly dismissed that argument as well. The District Court's decision was affirmed.

## **SEARCH & SEIZURE – PLAIN VIEW**

### **U.S. v. Carmack, 426 Fed.Appx. 378 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 23, 2005, Kentucky officers got a search warrant on Carmack's residence, as a result of a counterfeit money used to place an order in other state. They seized several items not listed on the warrant, including more than 25 credit cards issued to Carmack and members of his family. They also seized a sawed-off shotgun in the back seat of a car some 20-25 feet from the residence and which they had to walk by to approach the residence. (Carmack's wife said the vehicle, which was inoperable, was parked on the street some distance away and had been so parked for around a year.)

Carmack was charged with possession of the weapon, among other charges not at issue in this opinion. He requested suppression of the weapon, which was denied. Carmack took a conditional guilty plea and appealed.

**ISSUE:** May a unlawful weapon be removed from a vehicle, when the police have a search warrant for the residence to which it is connected?

**HOLDING:** Yes

**DISCUSSION:** The Court first agreed that the officer that saw the weapon was clearly under the province of plain view and readily recognized it as illegal. With respect to lawful access, to remove it from the vehicle, the Court agreed that they “were executing a valid search warrant on the property where the weapon was observed” – as the Court chose to believe the officers as to where the vehicle was physically located.

The trial court decision was affirmed.

## SEARCH & SEIZURE – REASONABLE EXPECTATION OF PRIVACY

U.S. v. Lanier, 636 F.3d 228 (6<sup>th</sup> Cir. 2011)

**FACTS:** Lanier rented a hotel room in Benton Harbor, Michigan. A few minutes after the check-out time, a maid entered and saw a large quantity of drugs (cocaine and a scale). The manager called police and allowed them access about a half-hour after the check-out time, which was actually before the usual grace period which would have deactivated the keycard.

When Lanier returned, he was arrested. He requested suppression and was denied. He took a conditional plea and appealed.

**ISSUE:** Does a hotel guest have an expectation of privacy when they have left items in a room after the check-out time?

**HOLDING:** No

**DISCUSSION:** The Court noted that while he may have had a subjective expectation of privacy in the room, he did not have an objective one. The Court noted that a hotel guest has only an expectation of privacy during the time they are lawfully in possession of the room, a “predetermined period of occupancy.” The Court agreed, however, that a regular practice of allowing guests to stay past check out might modify that expectation, but that did not apply in this case as Lanier had made no practice of delaying his departure from that hotel.<sup>162</sup> Further, once being discovered to be using the room for unlawful purposes, it was appropriate for any privacy interest to immediately end.

Lanier’s plea was upheld.

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<sup>162</sup> See U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

## SEARCH & SEIZURE - CONSENT

### U.S. v. Ammons, 2011 WL 1130447 (6<sup>th</sup> Cir. 2011)

**FACTS:** Deputy Walker was investigating a residential theft one morning in Newbern, Tennessee. Robert and Billy Shanklin told the deputy that their mother, Judy, owned the house, but that she actually lived with her former boyfriend, Ammons, in a camper in the driveway. (The house was being remodeled.) They had found some of their mother's belongings in the house and believed Ammons had stolen them and hidden them there. Judy Shanklin arrived and asked the deputy to search the house - he did so, finding other items. Ammons was arrested for Theft. Billy Shanklin found pawn shop receipts, indicating that Ammons, who was a convicted felon, had also pawned three guns.

Ammons, out on bond a week later, was arrested towing a stolen tractor. Two more guns were seized from his vehicle during that arrest. He was ultimately indicted on five counts of possession of firearms as a convicted felon. He moved for suppression, which was denied. He then appealed.

**ISSUE:** May officers rely on apparent authority in a consent?

**HOLDING:** Yes

**DISCUSSION:** Ammons argued that each of the searches was improper. With respect to the house, the Court found that the officers had, "at the very least ... good faith reliance on Judy Shanklin's apparent authority to consent."<sup>163</sup> In fact, there was some question about the relationship between the two parties, and the house, and that in some situations, the actual property owner might lack the authority to give consent to search a home occupied by another. However, faced with her assertion that she owned the house, supported by her sons' statements that no one actually lived in it, it was appropriate for the deputy to believe Shanklin could give consent.

With respect to the truck, the Court noted that a CI's tip gave the officers reasonable suspicion to stop Ammons. That informant was known to the officers and had provided reliable information in the past.<sup>164</sup> The informant provided "detailed, not general, information, as he spoke specifically about Ammons, the truck, and when and where Ammons would be the next day." The officer personally verified everything prior to the stop, except for the fact that the tractor was, in fact stolen. The Court upheld the stop, and the subsequent arrest and search.

Ammons' conviction was affirmed.

### U.S. v. Lucas, 640 F.3d 168 (6<sup>th</sup> Cir. 2011)

**FACTS:** On December 18, 2007, Det. Burbrink (Louisville Metro PD) received information from another officer that a reliable CI had told the officer that Lucas was growing marijuana at his home. Dets. Burbrink and Lainhart did a knock and talk at the back door. They were invited inside and immediately smelled burned marijuana. Det. Burbrink explained the purpose of his visit and stated he

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<sup>163</sup> Illinois v. Rodriguez, 497 U.S. 177 (1990).

<sup>164</sup> Florida v. J.L., 529 U.S. 266 (2000); U.S. v. Allen, 211 F.3d 970 (6<sup>th</sup> Cir. 2000).

would only give Lucas a citation if Lucas had drug paraphernalia or a small amount of personal use of marijuana. Burbrink saw a marijuana pipe in plain view and asked about other similar items; Lucas produced rolling papers, pipes and marijuana residue ("shake") but stated there was nothing else in the house. The tone of the exchange was described as "conversational." Three more detectives arrived during the discussion.

Burbrink asked Lucas to sign a consent to search form, but Lucas hesitated. Burbrink explained they had probable cause to get a search warrant. Sgt. Lainhart began a protective sweep in anticipation of getting the warrant. Lucas gestured and asked Burbrink "what do I have to sign?" Burbrink verbally reviewed the form with Lucas and advised him he could stop the search at any time. Lucas signed the consent form about 10 minutes after the officers first arrived.

The officers searched the bedroom first, since they were told by the CI that was where the growing operation was located. They found a number of marijuana plants in the closet, "individually potted and named." They also found a camera sitting nearby and Lainhart knew that growers often take "bragging" photos. He reviewed the photos in the camera and found several to show marijuana use. They did not search a computer located in the bedroom. In the living room, they found a laptop computer that had a chart documenting the growth of the marijuana in the closet and other notes that suggested a grow operation. Lainhart asked Lucas if the laptop was password protected and was told it was not. "Lucas did not object to a search of his laptop, or claim that a search would exceed the scope of his consent to search, or try to withdraw his consent to search."

Lucas admitted to learning about marijuana growing on the Internet, that he shared tips with others and that he cloned plants to re-sell. Lainhart did not find anything incriminating on the hard drive, but noticed a thumb drive inserted into the USB port. He accessed that drive and found child pornography. He stopped searching after reviewing a few images and told Burbrink that Lucas was under arrest. He contacted Crimes Against Children Unit (CACU) for assistance. Burbrink handcuffed Lucas and Lucas told him "I have a problem." Burbrink told him to hush and wait for CACU, giving him chips, a drink and allowed him to smoke. Dets. McNamara and Wampler arrived and were told what had occurred. McNamara detected the faint odor of marijuana but did not believe Lucas was intoxicated, finding him very cooperative.

Det. McNamara secured a second consent, getting permission to "seize and examine the computer, computer media, and peripheral equipment." After collecting the evidence, Lucas was taken to the station. He was given Miranda and waived his rights. He admitted during the subsequent questioning that he gave consent. Two days later, Det. McNamara got a search warrant for the computers already seized, to permit a forensic examination even if Lucas thought to withdraw his consent. More than 900 images and 300 minutes of video were recovered, including a number of videos depicting child rape.

Lucas was charged and eventually took an conditional guilty plea on the pornography charges. He then appealed.

**ISSUE:** Does a general consent to search cover a laptop computer?

**HOLDING:** Yes

**DISCUSSION:** The Court first noted that a knock and talk is a “legitimate investigative technique aimed at achieving a suspect’s consent to search.”<sup>165</sup> The Court pointed out that Lucas was a college educated man who invited the officers in and conversed with them. The officers, very early on, had sufficient probable cause to search and Burbrink’s statement that they would seek a warrant “was a proper statement that did not taint the subsequent search.”<sup>166</sup>

Lucas argued he was coerced by the presence of five officers, Burbrink’s promise he would write a citation when in fact they were looking for a grow operation, and other reasons. The Court did not find that his initial hesitation, and later acquiescence, indicated coercion. Instead, the Court found his agreement to be an indication that he understood the gravity of his situation and that he decided to cooperate.

With respect to the scope of the search and whether the laptop was within the scope of the consent. The Court agreed it was not necessary to get a separate consent for every closed container within the covered area.<sup>167</sup> Although this line of cases had not been previously applied to the search of a personal computer located in a private residence, but noted that a “general consent to search reasonably includes permission to search any container that might hold illegal objects.”<sup>168</sup> Sgt. Lainhart reasonably believed he would find further narcotics related evidence in the computer. Lucas was only a few feet away and did not object to the search. The trial court made an analogy between the “search of Lucas’s non-secure laptop to the search of a closed, unlocked container.” However, the Court noted that its decision in this case “should not be read as a grant of broad authority to the police to open a suspect’s non-secured computer and examine at will all of the electronic files stored there.” It had cautioned in another case that the authority to search a residence does not necessarily extend to consent to search all closed containers stored in a specific area. The Court shared a concern that computers were “not an exact fit” to other containers because computer contained so much highly sensitive items. The Court had recently held that individuals to have “a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider.”<sup>169</sup> Sgt. Lainhart properly stopped the search once he confirmed the presence of child pornography while searching for drug-related evidence.

Lucas’s plea was affirmed.

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

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

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<sup>165</sup> U.S. v. Thomas, 430 F.3d 274 (6<sup>th</sup> Cir. 2005).

<sup>166</sup> U.S. v. Salvo, 133 F.3d 843 (6<sup>th</sup> Cir. 1998).

<sup>167</sup> Florida v. Jimeno, 500 U.S. 248 (1991); U.S. v. Garrido-Santana, 360 F.3d 565 (6<sup>th</sup> Cir. 2004).

<sup>168</sup> Canipe.

<sup>169</sup> U.S. v. Warshak, 631 F.3d 266 (6<sup>th</sup> Cir. 2010).

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

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

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

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

**DISCUSSION:** The District Court agreed that Johnson had objected to the search, but further held that his objection was invalid because he was not a full-time resident. As such, his interest was inferior to that of his wife and Conerly, who did live there full-time. The District Court had looked to U.S. v. Ayoub.<sup>170</sup> The Court looked to Georgia v. Randolph, noting that there was no precedent as to whether an objection by someone with a lesser possessory interest could be superseded by a consent from someone with a superior interest.<sup>171</sup> The Court noted that Johnson had a reasonable expectation of privacy in the bedroom he shared, albeit occasionally, with his wife, and that he stored personal possessions there. The Court found that Randolph did not “distinguish among the ‘multiplicity of living arrangements’” and that the “particular arrangement of adult co-occupants” in this case did “not fall within any ‘recognized hierarchy.’”

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

## SEARCH & SEIZURE – PRIVATE SEARCH

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

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

The supervisors went to the room to document the infraction. Believing that the room had been vacated, they opened a duffel bag and “found what appeared to be drugs.” The General Manager thought that the room had been re-keyed. Police were called to the hotel. The General Manager took them to the room, but much to their surprise, “the alleged re-keying apparently failed, because Spicer had re-entered the room.” They told Spicer to wait in the hallway. Two detectives arrived, ensured the

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<sup>170</sup> 498 F.3d 532 (6<sup>th</sup> Cir. 2007).

<sup>171</sup> 547 U.S. 103 (2006).

room was empty and “observed the unzipped, drug-filled backpack in plain view.” They arrested Spicer and got a search warrant. They ultimately found 3 kilos of cocaine.

Spicer was indicted and moved for suppression. The Court held that under U.S. v. Jacobsen “the police could retrace the private search without a warrant.”<sup>172</sup> Spicer took a conditional guilty plea and appealed.

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

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

**DISCUSSION:** The Court agreed that a hotel-room guest does have a reasonable expectation of privacy in the room, absent under circumstances.<sup>173</sup> The Court found this to be a “cut-and-dried application” of Jacobsen, “noting that the private hotel employees discovered Spicer’s drugs, and that the police properly retraced their search without uncovering anything new.” However, the Court had previously been unwilling to extend Jacobsen to “private searches of residences.”<sup>174</sup> The Court thus declined to “stretch the private-search doctrine to residential searches, including police searches of hotel rooms premised on private employees’ discoveries.”

The Court found that Jacobsen did not apply at all. The Court agreed that other circumstances may have in fact justified the search, for example, “that the General Manager had divested Spicer of his status as an occupant of the room, entitling the General Manager to consent to a police search” or that it was found during a protective sweep under Maryland v. Buie.<sup>175</sup> However, they did not make such arguments and the Court declined to raise them sua sponte.

The denial was vacated and the case remanded.

## SEARCH & SEIZURE - ABANDONED PROPERTY

### U.S. v. Jones, 406 Fed.Appx. 953 (6<sup>th</sup> Cir. 2011)

**FACTS:** Ohio officers made a traffic stop of a vehicle identified as transporting drugs. The driver “ran from the vehicle and the officers gave chase.” He tossed a gun and cocaine and ran into a bar – the First Note Café. The first officer entered and ordered everyone to the floor, other officers arrived and began patting down the patrons. Jones was near the front door and was noted, during the pat-down, to be wearing a bullet-resistant vest. The officers located a jacket, matching the one worn by the fleeing subject, near the rear of the bar. Inside they found a Kenton County inmate bracelet that included information about Jones, as well as an “inmate personal property inventory list” that described the jacket and a bullet-resistant vest.

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

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<sup>172</sup> 466 U.S. 109 (1984).

<sup>173</sup> U.S. v. Caldwell, 518 F.3d 426 (6<sup>th</sup> Cir. 2008).

<sup>174</sup> U.S. v. Allen, 106 F.3d 695 (6<sup>th</sup> Cir. 1997).

<sup>175</sup> 494 U.S. 325 (1990).

**ISSUE:** May abandoned property be seized and used as evidence against a suspect?

**HOLDING:** Yes

**DISCUSSION:** Jones conceded that the jacket had been abandoned before found and that “search and seizure of abandoned property does not violate the Fourth Amendment.”<sup>176</sup> As such, all evidence introduced relating to the jacket was proper. His drug trafficking conviction was affirmed.

## SEARCH & SEIZURE – TERRY

### U.S. v. Stittiams, 417 Fed. Appx. 530 (6<sup>th</sup> Circ. 2011)

**FACTS:** On October 9, 2007, Stittiams went to a friend’s home, in Millington, TN, to have his hair cut. Ten others had gathered near the residence, some to get their hair cut, others to play cards. Some of the individuals began fighting and police were summoned.

Officers arrived. Stittiams walked away, supposedly to take possession of some clippers so they did not disappear. Officer Gonzalez called to him and told him to stop, Stittiams ignored him initially. Eventually, however, he raised his hands and walked toward the officers. He admitted, upon being asked, that he had a gun in his waistband. Officer Gonzalez walked him to his cruiser and cuffed him, apparently arresting him. Eventually, because Stittiams was a convicted felon, he was charged for the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** May a subject walking away from the scene of a reported “armed disturbance” be lawfully detained?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the only issue before it was “whether Gonzalez lawfully stopped Stittiams.” The Court agreed that a stop did not occur until Stittiams acceded to the demand to stop and as such the only facts that could be considered would be those known to the officer at that time. The Court agreed, however, that Officer Gonzalez had sufficient cause to seek to detain Stittiams for investigation – as he knew the nature of the area (high crime and a location where multiple calls had occurred), a call about an “armed disturbance” at the location, and Stittiams was the only one who walked away and that he did not stop when initially asked to do so. The Court equated the case to Illinois v. Wardlow, which justified detained a fleeing subject.<sup>177</sup> The Court noted that the actions could only be viewed from the officer’s standpoint, not what Stittiams may have actually been intending to do. The Court agreed that simply walking away was not enough to justify the stop, but that coupled with the other underlying circumstances, in this case, it was appropriate.

Stittiam’s plea was upheld.

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<sup>176</sup> Abel v. U.S., 362 U.S.217 (1960).

<sup>177</sup> 528 U.S. 119 (2000).

**U.S. v. Dingess, 411 Fed.Appx. 853 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Columbus (OH) officers spotted two men in a vehicle in “the common driveway of a duplex.” They received reports that a person was selling drugs from a vehicle matching that description, so they checked the license plate. They learned Dingess owned the vehicle and upon pulling up his photo of record, learned he had a lengthy criminal history. (He was later discovered to be staying with his girlfriend who lived in the duplex.)

The officer spent some time on an unrelated traffic stop and returned to investigate further. They parked on the street. Officer Phalen approached the driver’s side and Officer Narewski the passenger side. Both car windows were down and they smelled burning marijuana. Officer Phalen saw that Dingess was “holding a marijuana blunt.” Spotting them, Dingess “said that he was not doing anything wrong and demanded that the officers move away.” He allegedly tossed the blunt into his brother, Drew’s, lap and Drew raised his hands in surrender. Officer Phalen opened the car door and told Dingess he was under arrest. During an ensuing struggle, Dingess was tasered twice. As he fell, Officer Narewski saw a gun and alerted Phalen.

Dingess was charged with possession of the firearm as he was a convicted felon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does a consensual encounter require reasonable suspicion?

**HOLDING:** No

**DISCUSSION:** Dingess argued that “the officers engaged in a Terry stop without a reasonable, articulable suspicion.” The Court, however, agreed that the “officer initiated a consensual encounter rather than a Terry stop, and the officers had probable cause before the encounter ripened into a Terry stop or an arrest.” The Court noted such factors as – the “officers parked their car without blocking Dingess’s egress and then approached Dingess and Drew to initiate conversation.” Dingess noted a number of factors, including the number of officers, but the Court found them to be irrelevant to the situation. Once they smelled the marijuana, they had probable cause to make the arrest. Dingess did not brief the issue of the officers entrance “uninvited onto private property,” but the Court agreed that it would have lacked merit “in light of the open access to the common driveway and the officers’ unobstructed view of Dingess’s activities.”<sup>178</sup>

The Court upheld the denial of the motion to suppress.

**U.S. v. Galaviz, 645 F.3d 34 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On December 27, 2006, at about 2:45 a.m., a woman in Bridgeport, Michigan called 911 to report she’d just been robbed at gunpoint. She and her sister were upset and could not describe the vehicle beyond it being a “white car.” Dispatch put out the information to officers as a “white vehicle.” Over the next few minutes, officers called out that they were investigating various white cars in the area.

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<sup>178</sup> U.S. v. Smith, 783 F.2d 648 (6<sup>th</sup> Cir. 1986).

Deputy Webber (Saginaw County SO) was monitoring the radio and was in the area. He spotted a white Lincoln Town Car stopped at a traffic light. Thinking it might be the correct vehicle, he came in behind the vehicle, which then “accelerated away from” him. He believed it to be speeding. It made several turns and then parked in a residential driveway. Deputy Webber followed and blocked it in. When the deputy got out of his car, the driver, Galaviz, “was already out of his car and walking toward the front door of the house.” The deputy realized that the man looked Hispanic, rather than black, as was put out in the radio transmission. He ordered Galaviz to return to the car but he continued toward the house. When he reached the door, he began kicking and yelling for admission. Galaviz refused to get on the ground and Webber drew his Taser. Someone opened the door and Galaviz began to enter – the deputy later indicated he wasn’t sure if someone inside actually opened the door. He fired the Taser. At this point, Galaviz screamed but was apparently already in the house, as Webber entered with the consent of the residents after him. He was told Galaviz fled out the back door but eventually he was found hiding in the basement.

Officers outside spotted “part of a handgun sticking out from under the front seat.” Once it was unlocked, they retrieved a revolver. Because Galaviz was a convicted felon, he was indicted for having possession of the weapon. He requested suppression, which was denied. Galaviz took a conditional guilty plea and appealed.

**ISSUE:** Is evidence that a subject was involved in a robbery sufficient to do a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** The Court focused on whether the initial Terry stop of the vehicle was lawful and properly supported by specific and articulable facts that Galaviz might have been involved in the robbery. The Court agreed that he had reasonable suspicion to stop Galaviz’s vehicle and investigate whether it was involved. However, it noted that once he realized that Galaviz did not meet the description of the robbers, the “reasonableness of the suspicion was undermined.” However, the Court noted it did not need to reach the question, which was close, as to whether the reasonable suspicion was revived by Galaviz’s actions because the discovery of the gun was not the “fruit of the poisonous tree.”<sup>179</sup> The gun was discovered by backup officers before Webber even located Galaviz and not as a result of his detention. Certainly it was found as a result of the initial pursuit, but that did not taint the seizure of the gun. The Court justified their finding the gun under the plain view doctrine, noting that a “motorist has ‘no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.’”<sup>180</sup> Looking at photos, the Court agreed that the car was close enough to the house to be possibly considered within the protected curtilage.<sup>181</sup> However, “given the characteristics of the driveway, it found it was not the case because it was not enclosed by a fence and the car was “parked directly abutting the public sidewalk.” Nothing separated the driveway from that public area. The Court ruled that the officers did not need a warrant to enter the driveway where the car was parked.

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<sup>179</sup> Wong Sun v. U.S., 371 U.S. 471 (1963).

<sup>180</sup> U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

<sup>181</sup> U.S. v. Jenkins, 124 F.3d 768(6th Cir. 1997).

In addition, because it is illegal in Michigan to carry a firearm in a car without a license, which made it immediately apparent to be contraband. The Court justified the entry into the car to seize the weapon under the Carroll (vehicle) exception

The Court affirmed the denial of the motion to suppress, and upheld the plea.

## SEARCH & SEIZURE - JAIL SEARCH

### U.S. v. Warfield, 404 Fed.Appx. 994 (6<sup>th</sup> Cir. 2011)

**FACTS:** On February 14 and 28, 2006 Detective Harper (KSP) worked with a CI to make two 3-oz. cocaine buys from Warfield. On March 16, the same CI made arrangements to buy 8 oz. of crack. He informed his KSP handler that Warfield would be driving a specific vehicle. Det. Harper knew that Warfield had a suspended OL. He was following the Warfield vehicle prior to the buy and spotted him swerving. Troopers in a marked vehicle stopped Warfield and eventually arrested him for operating on the suspended OL. A drug dog alerted on the vehicle but no drugs were found during the subsequent search.

Warfield was taken to the Warren County Regional Jail. Detective Harper told the jailers that the dog had alerted. "Based on this information, a nine-year-old drug conviction, and Warfield's refusal to submit to a search without his lawyer present, the police at the jail suspected Warfield of possessing drugs on his person and took him into a room for an unclothed pat-down search." Before he was searched, however, he "dropped a small baggie that he had concealed in his crotch area." The baggie contained eight oz. of cocaine.

Warfield was indicted on trafficking and distribution of cocaine. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does a strip search at the jail require reasonable suspicion?

**HOLDING:** Yes

**DISCUSSION:** Warfield objected to the "threatened strip-search at the jail, the anticipation of which led him to drop the baggie containing the crack cocaine." The Court agreed that the KSP "could properly arrest him for driving on a suspended license." A full "strip-search" under such circumstances is appropriate if the "circumstances demonstrate that it was 'reasonable.'"<sup>182</sup> The decision requires a balancing between the invasion of the personal privacy rights and the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Kentucky's jail policies allow such searches "only a reasonable suspicion that is based upon the existence of objective information that may predict the likelihood of the presence of" drugs.<sup>183</sup> Warfield's criminal history, his refusal to submit and the drug dog alert together justified the search, providing an "adequate reason under Bell<sup>184</sup> for the jail officers' strip-search of Warfield."

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<sup>182</sup> Bell v. Wolfish, 441 U.S. 520 (1979).

<sup>183</sup> Reynolds v. City of Anchorage, 379 F. 3d 358 (6<sup>th</sup> Cir. 2004); 501 KAR 3:120, Sec. 3(1)(b).

<sup>184</sup> Bell, *supra*.

Finding so, the Court found it unnecessary to address the issue as presented by the Commonwealth, which was that Warfield abandoned the crack cocaine. Warfield's conviction was affirmed.

## SEARCH & SEIZURE - INVENTORY

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

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the inventory policy pursuant to Colorado v. Bertine<sup>185</sup> and South Dakota v. Opperman.<sup>186</sup> Lilly argued that Officer Veach "failed to state the reasons for" the impound in his report, as the policy requires. He also misstated the policy by saying that it was routine to impound cars "any time the only occupant has been arrested."

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

The Court upheld his conviction.

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

**FACTS:** On July 19, 2009, Officers Dendinger and Bays were patrolling in Canton, Ohio. At about 1:30 a.m., they spotted Ballard driving at a high rate of speed. As they fell in behind him, Ballard

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<sup>185</sup> 479 U.S. 367 (1987).

<sup>186</sup> 428 U.S. 364 (1976).

slowed to an appropriate speed and began signaling his turns but eventually “pulled his vehicle to the curb and parked without signaling.” The officers made a traffic stop.

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Colorado v. Bertine<sup>187</sup> and South Dakota v. Opperman<sup>188</sup> and held that the inventory was permissible “because it was conducted in conformity with established policy and procedures.” Once the officer discovered his license suspension, he were properly within the policy to seize and inventory the vehicle. The Court agreed that the policy actually gave the officers discretion, but noted that under a insurance suspension, state law stated the no person could have legally driven the vehicle. The Court stated that although it was legally parked, the vehicle could not have been removed by anyone because of the state law. Further, there was no evidence that the officers impounded the vehicle in order to do the inventory.

The Court upheld the denial of the motion to suppress.

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

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

Officer Velez knocked on the door and ordered it to be opened. Rhodes peeked out through the blinds. Velez continued knocking and identified himself. Rhodes finally opened the door, after some discussion, and Taylor gave consent to search. Rhodes was arrested. The officers decided to tow the vehicle. They checked the ownership and discovered Rhodes was not the owner. They inventoried the

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<sup>187</sup> 479 U.S. 367 (1987).

<sup>188</sup> 438 U.S. 364 (1976).

vehicle pursuant to policy and found handguns, a scale and crack cocaine hidden inside a secret compartment.

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

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

**HOLDING:** Yes

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

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

## **SEARCH & SEIZURE – PAROLE**

### **U.S. v. Davis, 2011 WL 944376 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Davis was on parole in Ohio in January, 2007, at an approved residence in Akron. On January 8, Sgt. Dittmore (Canton PD) learned Davis was living in Canton and possibly involved in trafficking. The source gave specific information, which Sgt. Dittmore verified. He contacted Officer Beebe, of the Parole Authority, who joined the investigation along with an ATF agent. As they were surveilling the property, Davis arrived in a vehicle they'd previously linked to him. They stopped him, searched the vehicle and searched the residence, finding a firearm. Davis was arrested, given Miranda and confessed in writing to possession of the gun. At a suppression hearing, the Court found that conditions for a warrantless search were met and denied the motion. At trial Davis claimed he was coerced and did not know about the gun, and that he heard the officers talking about charging his girlfriend (who lived there with her children) with child endangerment and that motivated him to cooperate.

Davis was convicted and appealed.

**ISSUE:** Is a parole search privilege limited only to the parolee's assigned officer?

**HOLDING:** No

**DISCUSSION:** Davis argued that the warrantless search violated his Fourth Amendment rights. The Court examined the Ohio statute relevant to parole searches, which had already "passed constitutional muster." It also looked at the "facts of the search itself" and found adequate reasonable suspicion to

believe Davis was violating his conditions.<sup>189</sup> Even though a different parole officer conducted the investigation, other than his assigned officer, the Court found it to be adequate.

Davis's conviction was affirmed.

## SEARCH & SEIZURE – CARROLL – ODOR

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

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

Officer Mazur testified he stopped the vehicle for window tinting and a lack of license plate illumination. When McCaster rolled down the window, Officer Mazur smelled burned marijuana. Officer Yasenchack concurred. Both McCaster and his passenger were removed and the vehicle searched. First, the remnants of a marijuana cigar was found, then the space under the console. McCaster agreed the drugs and gun were his. The Court denied the suppression motion and McCaster was convicted. He then appealed.

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

**HOLDING:** Yes

**DISCUSSION:** McCaster agreed that U.S. v. Garza<sup>190</sup> gave law enforcement probable cause to search the entire vehicle. He argued, however, that there was no proof the two officers "had any experience or training in the detection of the odor of marijuana." However, he did not initially raise this challenge and waived the issue. But the Court noted McCaster offered nothing to suggest that the officers' testimony was false and that the circuit had never before required "an officer claiming to have smelled burnt marijuana – a common and distinctive odor – to show he had any particular training and experience in detecting marijuana." The officer's ten years of service and work in a unit that dealt with a great deal of drug activity was sufficient.

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

## SEARCH & SEIZURE – VEHICLE STOP

### U.S. v. Cooper, 431 Fed. Appx. 399 (6<sup>th</sup> Cir. 2011)

**FACTS:** "Cooper's troubles began with a traffic stop." Officers Sauterer and Taylor<sup>191</sup> drove past several people sitting in a silver Toyota. When they ran the plate, they discovered the vehicle was

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<sup>189</sup> U.S. v. Loney, 331 F.3d 516 (6<sup>th</sup> Cir. 2003).

<sup>190</sup> U.S. v. Garza, 10 F.3d 1241 (6<sup>th</sup> Cir. 1993).

<sup>191</sup> Unidentified Ohio agency.

listed as red and the officers later testified that such a discrepancy suggested a stolen vehicle. They approached to investigate. As Taylor approached the passenger side, he later testified, Cooper “appeared agitated, looked around nervously, and hid his hands.” Cooper admitted to having marijuana. He was told to get out and Taylor “retrieved the marijuana from Cooper’s pocket.” As Taylor began a patdown, Cooper admitted he had a gun. Cooper was handcuffed and the gun fell to the ground.

Cooper was charged with possession of the firearm, as he was a felon. He moved for suppression, arguing that the officer’s knowledge about the area and the other facts were not sufficient to support the stop. The District Court agreed the “officers lacked reasonable suspicion to initiate the seizure.” The evidence was suppressed and the Government appealed.

**ISSUE:** Is an officer’s training and experience a factor in the reasonable suspicion for a stop?

**HOLDING:** Yes

**DISCUSSION:** First, the Court look to whether “there was a proper basis for the stop” by “examining the totality of the circumstances.” It looked to “whether the law enforcement officials were aware of specific and articulable facts which gave rise to reasonable suspicion.” It also looked to “whether the degree of intrusion ... was reasonable related in scope to the situation at hand.” The Court noted that neither party challenged the second part of the assessment, it would focus on the first part - whether they had reasonable suspicion at the outset.

The Court noted:

The district court began its Terry-stop analysis on the right track. First, as the district court found, the officers’ testimony established that the stop occurred in a high-crime area. The officers described a specific, circumscribed location—a particular intersection—and noted the frequency of car thefts and other crimes in that area.<sup>192</sup> This factor properly fits into the officers’ reasonable-suspicion calculus.<sup>193</sup> And, second, along with the high-crime-area feature, the district court acknowledged that the officers observed a discrepancy between the color of the vehicle and its registration information.<sup>194</sup>

However, the Court “ended its analysis too soon.” The Court found it necessary to give “due weight” to the officers’ experience, as “an officer’s specialized training and experience may permit him to make inferences from and deductions about from the cumulative information available to him that ‘might well elude an untrained person.’”<sup>195</sup> The Court concluded that the officers did have sufficient reasonable suspicion to uphold the initial seizure and reversed the suppression.

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<sup>192</sup> U.S. v. Caruthers, 458 F.3d 459 (6<sup>th</sup> Cir. 2006).

<sup>193</sup> U.S. v. Johnson, 620 F.3d 685 (6<sup>th</sup> Cir. 2010).

<sup>194</sup> U.S. v. Caro, 248 F.3d 1240 (10<sup>th</sup> Cir. 2001).

<sup>195</sup> U.S. v. Arvizu, 534 U.S. 266 (2002).

**U.S. v. Aguilera-Pena, 426 Fed. Appx. 368 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In November, 2007, Corp. Smith (Romulus, MI, PD) stopped Pena for “improper lane use.” Federal agents had asked him to make the stop as they were investigating Pena for drug trafficking. Smith asked him several questions about drugs and money in the car, Pena denied any contraband or money but failed to maintain eye contact with Smith. He gave consent to search the car. Corp. Smith had Pena get out, frisked him and then searched the trunk and passenger compartment. Agent McCanna arrived and secured Pena. During questioning, Pena admitted there was contraband in the car and that he’d been paid to drive the car from Oregon to Detroit and back. At this point, about six minutes had passed.

Agent McCanna knew that was a common transport practice and believed he had probable cause to search. The vehicle was taken to a nearby public works garage for further search, and Pena was taken along as well. A drug dog alerted to the console and they found \$410,000, 175 grams of heroin and a handgun. Pena was arrested. He requested suppression, which was denied. He took a conditional plea and appealed.

**ISSUE:** Is questioning during a traffic stop permitted when it does not appreciably extend the length of the stop?

**HOLDING:** Yes

**DISCUSSION:** Pena argued that the traffic stop was unreasonably extended and that the questioning during the stop was improper. The Court, however, stated that asking “extraneous questions” is not improper so long as the questioning does “not unnecessarily prolong the detention, and the detainee’s responses are voluntary and not coerced.”<sup>196</sup> Asking for consent is not improper either, even if the subject is detained.<sup>197</sup> The Court found the questioning was minimal and did not extend the traffic stop unduly. His admission, only minutes into the stop, that he was hauling contraband “gave the officers probable cause to further detain Pena.” The Court affirmed the denial of the motion to suppress.

**SEARCH & SEIZURE – VEHICLE STOP - PRETEXT**

**U.S. v. Riley, 410 Fed.Appx. 96 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In October, 2005, Riley was arrested as a result of a search at a friend’s home, in which cocaine was found. On March 9, 2007, Riley was the passenger in a vehicle stopped by Columbus (OH) officers. Becoming suspicious, the officers called for a drug dog and Andor arrived promptly. Andor alerted on the two front doors. The driver was arrested and a firearm was found on his person during the search incident to the arrest. The driver claimed the gun was Riley’s (and in fact, later evidence suggested that was the case.) Riley was directed out of the car, handcuffed and frisked, and a “cookie of crack” was found in his pocket. He was arrested. On April 10, Riley’s mother’s home was searched, pursuant to a warrant, as a result of a controlled drug buy at the home the day before. Crack cocaine and related drug paraphernalia were found, the drug-buy money, and “two loaded AK-47 rifles placed in tactical positions within the home.”

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<sup>196</sup> U.S. v. Everett, 601 F.3d 484 (6<sup>th</sup> Cir. 2010).

<sup>197</sup> Ohio v. Robinette, 519 U.S. 33 (1996).

Riley was charged in federal court for multiple drug and firearms crimes. He was convicted and appealed.

**ISSUE:** May a vehicle be stopped on a pretext?

**HOLDING:** Yes

**DISCUSSION:** Riley argued that the circumstances of the March traffic stop were questionable, as it was based, in part on the officer's statement that the license plate light was out, when they later stated they ran a license plate check - which he claimed would have not been possible if the light was, in fact, out. The Court found that even if the stop was a pretext to search for drugs, that was "not relevant in a Fourth Amendment analysis, so long as the police had probable cause to believe that a traffic violation occurred before they stopped the vehicle."<sup>198</sup>

Riley also argued that they had insufficient probable cause for an arrest and search. The Court looked to the specific facts known to the officers - the nervousness of the driver, the drug dog's alert on both sides of the car, and the cocaine and gun found on the driver, which he claimed belonged to Riley. The Court agreed the search and arrest were proper and affirmed his conviction.

## SEARCH AND SEIZURE – PRE- GANT VEHICLE STOP

**U.S. v. Sain**, 421 Fed. Appx. 591 (6<sup>th</sup> Cir. 2011)

**FACTS:** On January 15, 2009, Sgt. Beaver (Jackson, TN, PD), received a BOLO for Sain. He was wanted for a domestic assault. He was reportedly driving a red Ford Mustang and the plate was provided, along with the information that he was possibly armed with a handgun.

Sgt. Beaver spotted the car and called for backup. He approached Sain at a gas pump. After his identity was confirmed, Sain was arrested. Officers searched the vehicle while Sain was detained nearby. The hatchback was opened by Beaver, using keys provided by Sain. He found a backpack, with a handgun and ammunition, in that area.

Sain was indicted for possession of the weapon, as he was a convicted felon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is a hatchback considered accessible to the driver during a vehicle search?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the case under the precepts of Arizona v. Gant. However, it also noted that under New York v. Belton, that a hatchback or wagon was accessible to the driver and thus subject to search. In U.S. v. Pino, the court held that Belton covered all areas "reachable without exiting the vehicle" as the hatchback was.<sup>199</sup>

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<sup>198</sup> U.S. v. Hill, 195 F.3d 258 (6<sup>th</sup> Cir. 1999); U.S. v. Blair, 524 F.3d 740 (6<sup>th</sup> Cir. 2008); Whren v. U.S., 517 U.S. 806 (1996).

<sup>199</sup> 855 F.2d 357 (6<sup>th</sup> Cir. 1988).

Further, recently, the court had held in U.S. v. Buford that suppression of the evidence “is not warranted so long as, at the time of search,” the officer was working under valid precedent at the time.<sup>200</sup> The Court agreed that pre-Gant case law should have been applied and the suppression was not warranted, even though the officer chose to unlock the hatchback rather than crawl into it from the passenger compartment.

The Court upheld the denial of the motion to suppress.

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

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

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

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** In all three cases, the Court reversed the granting of the suppression motions because of the intervening decision in U.S. v. Davis.<sup>201</sup> The Court noted that precedent at the time permitted the search, and excluding the evidence served no deterrence effect. Specifically, in Bennett, the Court noted that even under Gant, the search would have been justified, as evidence relevant to the crime of arrest could logically be found in the vehicle. The decisions in Peoples and Lopez were vacated and remanded to the trial courts and the decision in Bennett was upheld.

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<sup>200</sup> 632 F. 3d 264 (6<sup>th</sup> Cir. 2011).

<sup>201</sup> --- U.S. --- (2011).

## SEARCH & SEIZURE - VEHICLE STOP - GANT

### U.S. v. Buford, 632 F.3d 264 (6<sup>th</sup> Cir. 2011)

**FACTS:** On May 18, 2008, Nashville officers stopped a car driven by Buford and learned that Buford had an outstanding warrant for a probation violation. He was arrested and the vehicle searched. Officer Chisolm found a loaded handgun under the seat. On the way to jail, Buford volunteered that he had the gun because he feared being robbed for the truck. He was charged with the unlawful possession of the weapon.

Buford argued that since he was secured at the time, the search of the vehicle was improper and the evidence should be suppressed. Although Gant was not decided until the next year, the Court agreed that under the retroactivity principle, Gant must be applied. The trial court suppressed the evidence and the prosecution appealed.

**ISSUE:** Is Gant retroactive to pending cases?

**HOLDING:** No

**DISCUSSION:** The Court agreed that "It is firmly established that a decision of the Supreme Court declaring a new constitutional rule applies "to all similar cases pending on direct review." And, it was clear that the search violated Gant. However, that was not the end of the analysis. The Court decided it must look to "whether the exclusionary-rule remedy requires that we suppress the fruits of the unconstitutional search of Buford's vehicle notwithstanding the police's reliance on 'a different kind of authority, namely' this circuit's well-settled case law."

The Court reviewed the opinions of other circuits that had addressed the issue, noting that the "Supreme Court had not yet directly addressed the question." The Court noted that in Leon, the Court declined to require suppression when an officer reasonably relied on an invalid warrant to conduct the search because "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."<sup>202</sup>

The Court ruled that "exclusion is not the appropriate remedy when an officer reasonably relies on a United States Court of Appeals' well-settled precedent prior to a change of that law." The Court reversed the suppression and remanded the case for further proceedings.

## 42 U.S.C. §1983 - ARREST

### Wheeler v. Newell, 407 Fed.Appx. 889 (6<sup>th</sup> Cir. 2011)

**FACTS:** On August 10, 2007, Elizee, mother of K.G., arrived at the Sandusky PD to get help in retrieving K.G. from the home of her paternal grandparents (Wheeler and husband). She'd had permission to visit them, but Elizee learned that K.G.'s father, Griffith, had travelled from Massachusetts and was also at the home. Elizee feared for K.G. and drove from Florida to pick him up.

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<sup>202</sup> U.S. v. Leon, 468 U.S. 897 (1984).

Officer Newell went with Elizee, they arrived at about 1 a.m. Wheeler, her husband and Griffith were watching a movie, K.G. was asleep. Officer Newell rang the doorbell and discussed the matter with Wheeler, who showed him an email indicating that K.G. could visit until August 16. Officer Newell explained that under Ohio law, Elizee was entitled to full custody unless there was a court order to the contrary and requested the boy be returned. "Griffith began yelling at Elizee [who was outside] and made his first of three attempts to run past Officer Newell and confront Elizee outside the house." Other officers arrived and eventually, Griffith was arrested for disorderly conduct and resisting arrest. Wheeler headed out to confront Elizee and her husband grabbed at her hand. She shouted at Elizee across the street, and "was very upset throughout these events and refused to obey the officers' commands to calm down."

Eventually, she too was arrested. The opinion does not indicate the disposition of that arrest, but she filed suit against Sandusky and the officers for false arrest - the case was removed to federal court under federal question jurisdiction. The District Court awarded summary judgment to the officer and Wheeler appealed.

**ISSUE:** May a false arrest claim be made when officers had probable cause to make the arrest?

**HOLDING:** No

**DISCUSSION:** First, the Court looked to whether she had "made out the violation of a constitutional right."<sup>203</sup> The Court reviewed the elements of a disorderly conduct charge in Ohio and agreed that "based on the undisputed facts," the arrest was appropriate. Because unlawful actions took place in the presence of the officers, they had probable cause and did not violate her rights. The dismissal was upheld.

**Everson v. Calhoun County, 407 Fed.Appx. 885 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In September, 2005, Everson informed the Calhoun County (Michigan) Sheriff's Office that on December 16, 2004, her then-boyfriend, Officer Graham (Battle Creek PD) had "forcibly sodomized her during an otherwise-consensual sexual encounter." She had broken up with him but had been unsure what to do next, and had confided in various people before deciding to make the report. Detective Picketts investigated and confirmed she had, in fact, discussed the matter with several individuals. Graham denied the action, however, and claimed she filed the report in spite when she learned he was getting married. Everson, the complaining victim and eventually plaintiff, later claimed, however, that the detective did not interview several critical witnesses.

Eventually, a report was submitted and the prosecution declined the case. Upset by the decision, Everson "criticized Picketts loudly and repeatedly, accusing him of not doing his job and being 'just part of the good ole boy system.'" She made a formal complaint to the Sheriff and to the Calhoun County prosecutor.

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<sup>203</sup> Thacker v. Lawrence Cnty., 182 F.App'x 464 (6<sup>th</sup> Cir. 2006),

Picketts then began an investigation of Everson, and eventually filed an arrest complaint against her for filing a false police report - having witnesses that she admitted having lied about the claim. She was charged, and ultimately, she was bound over for trial. The trial court, however, quashed the case for lack of evidence. She was rearrested and the case submitted in another county, but again, the case was dismissed.

Everson filed suit against Picketts and Calhoun County, under 42 U.S.C. §1983, alleging retaliation for her exercise of her First Amendment rights. Most of the case was dismissed, but Picketts remained in the action and appealed the denial of his motion for summary judgment.

**ISSUE:** Is a retaliatory arrest actionable?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that this type of case employed a “two-step test, considering (1) whether, viewing the allegations in the light most favorable to the injured party, a constitutional right had been violated; and (2) whether that right was clearly established.”<sup>204</sup> The Court agreed that it had already been clearly established that “the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”<sup>205</sup> To make a retaliation claim, she would be required to show “(1) protected speech; (2) injury as a result of defendant’s actions; and (3) causation.”<sup>206</sup> Picketts argued that he had probable cause for the arrest. The Court, however, found there remained “genuine disputes of material facts” about the second investigation and thus, it was necessary to allow the case to go forward.

The Court affirmed the denial of qualified immunity.

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

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

Officer Huffine responded to the Fowler home. They did not answer the door so the officers went looking for them in the outbuildings. In an open shed, he spotted a tarp over an item that resembled a lawn mower. He could only see the bottom of the item but it “looked new and was ‘Toro red’ in color.” They waited for the Fowlers to return and Huffine then interviewed the Fowlers. Fowler said he’d seen the mower that morning and had placed a call to Sheriff Harris (Unicoi County) about it. He denied having bought it or even knowing about it until that morning. (They later learned the Sheriff was out of town that day.) Det. Fincher learned from Det. Hagey (Washington County SO) that the Fowlers had “purchased a new farm tractor and trailer [stolen] from Williams” for a substantial amount of cash.” The

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<sup>204</sup> Dorsey v. Barber, 517 F.3d 389 (6<sup>th</sup> Cir. 2008); Pearson v. Callahan, 129 S.Ct. 808 (2009).

<sup>205</sup> Hartman v. Moore, 547 U.S. 250 (2006).

<sup>206</sup> Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

detectives decided they had enough for an arrest and went to bring in the Fowlers. When they arrived at the house, they found Fowler heading to a doctor's appointment so they told him to report to the station when finished. They entered without a warrant or consent and arrested Linda Fowler, however. Upon being questioned, the Fowlers continued to deny any involvement. Williams refused to give a statement as he was facing charges for the theft. They were subsequently released and no further criminal action taken against them.

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

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

**HOLDING:** Yes

**DISCUSSION:** The officers argued that it was inevitable that sometimes they would make mistakes but that they had probable cause to make the arrest on the theft. The Court agreed that an officer "is entitled to rely on eyewitness accounts for purposes of determining probable cause."<sup>207</sup> The facts, as known to them at the time, supported that belief. The Court agreed that an officer "is not required to believe a criminal suspect's story."<sup>208</sup> Their claim to know nothing of the mower located on their property was suspicious and found the discrepancy supported probable cause. The Court noted that it must "evaluate probable cause based on what the officers knew at the time of the Fowlers' arrest."<sup>209</sup>

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** Nerswick argued that he was arrested without probable cause. Normally, an arrest

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<sup>207</sup> Crockett v. Cumberland College, 316 F.3d 571 (6<sup>th</sup> Cir. 2003).

<sup>208</sup> Ahlers v. Schebil, 188 F.3d 365 (6<sup>th</sup> Cir. 1999).

<sup>209</sup> Anderson v. Creighton, 483 U.S. 635 (1987).

pursuant to a facially valid warrant is a complete defense, unless the defendant officers misled the court or “omitted material information” in getting the warrant. The only discrepancy to which Nerswick pointed was the officer’s oath that they had “videotapes” – when in fact, they only had one, a tape of him making the sale at the center. He also challenged the lack of written statements – the statements were not taken until after the arrest. However, the Court found that the information they had at the time they requested the warrant was sufficient to support probable cause.

The summary judgement decision was affirmed.

## 42 U.S.C. §1983 – FORCE

### Coble v. City of White House (Tennessee), 634 F.3d 865 (6<sup>th</sup> Cir. 2011)

**FACTS:** On April 6, 2007, at about 2240, Officer Carney (White House, TN, PD) was patrolling. He saw a vehicle pull out of a parking lot. It crossed the fog line and Officer Carney turned on his in-car video and his emergency lights. Coble (the driver) continued on until he turned into his own driveway. Officer Carney followed the car into the driveway. Coble refused to obey any commands or answer questions, and instead, argued with the officer, “told him to get off his property, and began walking toward his house.” Carney sprayed Coble with OC and took him to the ground, during which time Coble’s ankle was badly broken. With the help of Officer Bilbrey, he was subdued. What happened next was not caught on the camera but audio was captured by the microphone worn by Officer Carney. Coble claimed that the officer pulled him up by the cuffs and forced him to walk 7 or 8 steps on his obviously broken ankle, and eventually he was dropped face-first to the ground. Officer Carney testified that they did get him up, but after Coble said his leg was broken and he saw that it was, he “immediately sat him down on the driveway.” Coble was taken by helicopter to the hospital and found to have a BA of .16. He was charged, and pled guilty, to DUI and resisting. He then filed suit for excessive force, false arrest and related claims under 42 U.S.C. §1983. The District Court ruled that force before he was cuffed was barred by Heck v. Humphrey.<sup>210</sup> Further, it found that the claims of excessive force were also to be dismissed “in light of the audio recording,” pursuant to Scott v. Harris.<sup>211</sup> The Court noted that the videotape indicated that Coble said nothing until he cried out that his leg was broken and that he was immediately directed to sit down at that point. The testimony of the officers was “square with the audiotape” and Coble’s was not. Coble appealed.

**ISSUE:** May there still be a genuine issue of fact even when an event is recorded?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that usually, “construing the facts on summary judgment in the light most favorable to the non-moving party usually means adopting the plaintiff’s version of the facts.” However, Scott indicates that is only the case if there is a genuine dispute as to those facts. Appellate courts are not required to “accept ‘visible fiction’ that is ‘so utterly discredited by the record that no reasonable jury could have believed it.’”<sup>212</sup> The Court found no reason to hold that Scott could not be extended to an audio recording. However, the Court agreed that Coble’s claims were not “blatantly

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<sup>210</sup> 512 U.S. 477 (1994).

<sup>211</sup> 550 U.S. 373 (2007).

<sup>212</sup> U.S. v. Hughes, 606 F.3d 311 (6<sup>th</sup> Cir. 2010).

contradicted" by the audio recording and that a lack of sound did not necessarily mean that the sound did not occur. Further, even if part of his testimony was discredited, "that does not permit the district court to discredit the entire version of the events."

For that reason, the Court found there remained a genuine issue of material fact and reversed the summary judgment on behalf of the officer. The case was remanded for further proceedings.

### **Schmalfeldt v. Roe, 412 Fed.Appx. 826 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Officer Roe (Coloma Township, Michigan, PD) responded along with other officers to Schmalfeldt's home, in response to a call that he and his girlfriend (Gross) had been arguing. Schmalfeldt had apparently made the call, asking that Gross be removed from the house for violent behavior. Both were physically injured and Schmalfeldt was "highly intoxicated." He was seated at a table when Officer Roe decided to arrest him. Schmalfeldt stated that Officer Roe, "without any warning, deployed the Taser against him." He fell to the floor and was ordered to roll over, which he was unable to do, and was shocked again. He was "forcibly pulled up from the floor, handcuffed, and removed from the house" and sustained a detached muscle in his arm as a result.

Schmalfeldt was charged with resisting and obstructing an officer and domestic violence. He pled guilty to lesser charges and filed suit, claiming that he was "unarmed, offered no resistance, and was cornered by four police officers so that he obviously had no means of escape" and that the use of the Taser was "objectively reasonable and constituted excessive force."

Roe however, contended that Schmalfeldt physically resisted when an officer grabbed his arm and then became physically aggressive and threatening towards the officers, thus requiring the use of the Taser." The District Court, because of this dispute in the stories, determined that qualified immunity was not appropriate. Roe appealed.

**ISSUE:** Is using a Taser against a non-resisting suspect excessive force?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the "existence of disputed fact in this case works to deprive [the court] of authority to hear [the] appeal, based on the Supreme Court's ruling on Johnson v. Jones.<sup>213</sup>" In that case, it was held that "a defendant entitled to raise qualified immunity as a defense may not appeal a district court's summary judgment order denying qualified immunity if the pretrial record is "sufficient to show a genuine issue of fact for trial." Jurisdiction to review the denial of qualified immunity is available only "to the extent it turns on an issue of law."<sup>214</sup>

The Court noted that it had "precedents stretching back at least to 1994, indicating that spraying a suspect with mace - then the equivalent of later-developed pepper sprays and electroshock devices - can amount to excessive force if used unreasonably against a non-resisting suspect."<sup>215</sup> Since this case

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<sup>213</sup> 515 U.S. 305 (1995).

<sup>214</sup> Mitchell v. Forsyth, 472 U.S. 511 (1985).

<sup>215</sup> See Adams v. Metiva, 31 F.3d 375 (6<sup>th</sup> Cir. 1994).

turns on a credibility determination as to whether the force was necessary, the question “is one for a jury and not for the district court.”

The Court upheld the decision.

**Meirthew v. Amore, 2011 WL 1195944 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 19, 2007, Officer Amore (Wayne, Michigan, PD) was patrolling Meirthew's neighborhood. He saw, through her windows, that several minors were consuming alcohol. He obtained a search warrant and returned. The officers found that several minors had been drinking and that “Meirthew herself was highly intoxicated, having consumed six to ten beers.” She was told to sit down but instead walked away. The officers took her to the floor and handcuffed her. At some point, she “allegedly kicked a reserve officer in the groin.” She was arrested for a variety of charges, including furnishing the alcohol to the minors, felony assault, resisting arrest and disorderly conduct. Two of the juveniles, including her daughter, were also arrested. They were all taken to the booking room, where, according to video, Meirthew appeared “intoxicated and belligerent.” They concluded they should forgo booking and prior to putting her in a cell, she was to be searched by a female officer. The officer, Amore, led her “to a wall and instructed her to spread her feet.” He was “holding her by her handcuffs or wrists” The video showed “some level of resistance” but it was not clear. Officers testified that she was kicking, swinging her elbows and would not cooperate. One of the juveniles stated that she “refused to spread her feet, continually moving them together after Amore would kick them apart” but that she was not otherwise violent and did not attempt to actually kick the officers.

Officer Amore used a “pain-compliance technique” - lifting her arms “such that her elbows were above her head.” When she still did not cooperate, he used an “arm-bar takedown” to “thrust Meirthew to the floor face first.” She fell, “unbraced and uncontrolled, to the floor, hitting her face with the full force of her body.” As she was bleeding profusely, she was taken for treatment, and found to have “six facial fractures, head lacerations, and a nosebleed.” As a result, she claimed to have numbness in part of her face and arm and wrist pain. Eventually, the assault charges were dismissed and she pled guilty to the alcohol and disorderly conduct charges. She then filed suit under 42 U.S.C. §1983 for excessive force.

**ISSUE:** May a use of force against a non-compliant subject still be found to be excessive?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the facts and agreed that she “set forth sufficient admissible evidence to establish a genuine issue of material fact regarding the reasonableness of Amore’s use of force.” When Amore used the takedown, Meirthew was “unarmed, handcuffed, surrounded by police officers, physically restrained, and located in the secure confines of a police station.” Although she was non-compliant, the Court agreed a jury “could find that Merthew posed no danger and the use of the arm-bar takedown was unreasonable under the circumstances.”

The Court looked to Graham v. Connor,<sup>216</sup> noting that all the “factors favor a finding of excessive force.”

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<sup>216</sup> 490 U.S. 386 (1989).

First, the underlying crimes allegedly committed by Meirthew were not severe. While Meirthew was charged with kicking an officer in the groin, the charge was dismissed pursuant to a plea bargain in which she pleaded no contest to three counts of furnishing alcohol to a minor and disturbing the peace. Second, Meirthew did not pose an immediate threat at the police station. Indeed, she was unarmed, handcuffed, and surrounded by police officers.). Moreover, Meirthew made no verbal or physical threats, is five feet, four inches in height, and 123 pounds in weight. Amore, on the other hand, is five feet, ten inches in height, and 230 pounds in weight.<sup>217</sup> Moreover, the situation confronting Amore in the booking room was not a “tense, uncertain, and rapidly evolving” situation requiring him to make “split-second judgments.” Finally, Meirthew was not attempting to resist or evade arrest by flight. Indeed, she was already arrested, handcuffed, and present in the City of Wayne police station. While Meirthew refused to spread her feet to be searched, such resistance was minimal.<sup>218</sup> Moreover, while Meirthew’s non-compliance may have justified *some* physical response by Amore, the *amount* of force utilized may have been unreasonable.<sup>219</sup>

The Court noted that the maneuver, which “forcefully thrust her to the booking room floor” was performed, “despite the fact that [Meirthew] was handcuffed, leaving her with no means with which to protect her face.” The Court agreed, as well, that the right had been clearly established, as prior decisions had clearly stated “that it is unreasonable to use significant force on a restrained subject, even if some level of passive resistance is presented.”<sup>220</sup>

The Court agreed qualified immunity was not warranted and allowed the case to go forward.

### **Rodriguez v. Passinault, 637 F.3d 675 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On Sept. 5, 2003, Murray and Rodriguez attended a party and were then dropped off at Murray’s truck. Murray was intending to drive Rodriguez home. As they left the parking area, Murray spotted a police car. Because he was on parole and prohibited from drinking alcohol, Murray “attempted to elude the cruiser by maneuvering his vehicle through alleys and driveways before pulling into an alley and shutting off his engine and lights.” He ducked down and told Rodriguez to do the same.

Deputy Sheriffs Passinault and Jenkins (Shiawassee County SO), suspicious, began to search the area on foot. Murray started the engine and tried to drive away. Passinault, “allegedly fearing for his and his partner’s safety, fired several shots at the vehicle. Murray was fatally struck, and his truck subsequently crashed into a ditch.” Rodriguez was injured by flying glass caused by the gunshots. Further details were stated in a previous decision on the same case.<sup>221</sup>

Rodriguez filed suit against Passinault and others under 42 U.S.C. §1983. This case was suspended while the previous case (involving Murray’s estate) was litigated. When the court in that case finally

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<sup>217</sup> See Grawey v. Drury, 567 F.3d 302 (6<sup>th</sup> Cir. 2009); Harris v. City of Circleville, 583 F.3d 356 (6<sup>th</sup> Cir. 2009); Solomon v. Auburn Hills Police Dep’t, 389 F.3d 167 (6<sup>th</sup> Cir. 2004).

<sup>218</sup> Rohrbough v. Hall, 586 F.3d 582 (8<sup>th</sup> Cir. 2009); Shreve v. Jessamine Cnty. Fiscal Court, 453 F.3d 681 (6<sup>th</sup> Cir. 2006).

<sup>219</sup> Santos v. Gates, 287 F.3d 846 (9<sup>th</sup> Cir. 2002).

<sup>220</sup> Griffith v. Coburn, 473 F.3d 650 (6<sup>th</sup> Cir. 2007).

<sup>221</sup> Murray-Ruhl v. Passinault, 246 Fed. Appx. 338 (6<sup>th</sup> Cir. 2007) - summary included in the 2007 compiled Case Law Update.

affirmed the dismissal of Jenkins but reversed the dismissal of Passinault. Rodriguez then re-filed her complaint naming only Passinault. The court granted Passinault summary judgment, "concluding that Rodriguez was not seized within the meaning of the Fourth Amendment because Passinault did not know that she was a passenger in Murray's truck, because she was not actually shot, and, in any event, because Passinault was entitled to qualified immunity." Rodriguez appealed.

**ISSUE:** Is a passenger in a vehicle seized when the vehicle is seized?

**HOLDING:** Yes

**DISCUSSION:** To make a claim of "excessive force under the Fourth Amendment requires that a plaintiff demonstrate that a seizure occurred, and that the force used in effecting the seizure was objectively unreasonable."<sup>222</sup> The Court reviewed the cases of Fisher v. City of Memphis<sup>223</sup> and Troupe v. Sarasota Cnty., Fla.,<sup>224</sup> both of which relied on Brower v. Cnty. of Inyo.<sup>225</sup> The court also looked to Scott v. Clay Cnty., Tenn.<sup>226</sup> The court noted that "an officer's intentionally applied exertion of force directed at a vehicle to stop it effectuates a seizure of all occupants therein." Murray's injuries resulted in the car stopping, eventually, as he lost control.

Because, like Murray-Ruhl in the previous case, Passinault's entitlement to qualified immunity depends on which party's version of the facts a jury accepts, the Court reversed the summary judgment and allowed the case to go forward.

#### **Howard v. Wayne County Sheriff's Office, 2011 WL 1130395 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Howard was arrested by Deputy Wood (Wayne County SO) because he "elbowed Wood in the stomach as he proceeded through the employee entrance security checkpoint" at the Young Municipal Center. Wood ordered him to stop, but Howard responded in a profane way that "Wood needed to get out of his way." He proceeded to walk toward the elevators over Wood's telling him he was under arrest. Wood and Deputy Hardie went after him and took him into custody. Howard's version was different, asserting that he may have accidentally bumped Wood and was never profane.

Wood sprayed Howard with OC, took him to the ground and handcuffed him. Howard claimed he momentarily blacked out. He was ultimately acquitted of any charges. Howard filed a pro se complaint against the deputies. The trial court granted the deputies summary judgment, even though it agreed there were genuine issues of material fact ... regarding the necessity of using the degree of force employed by Wood and, derivatively, by Hardie: because "[t]he precise contours of the right to be free from the use of excessive force remain unclear where an individual offers some form of resistance to an arresting officer."

Howard appealed.

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<sup>222</sup> Graham, supra.

<sup>223</sup> 234 F.3d 312 (6<sup>th</sup> Cir. 2000).

<sup>224</sup> 419 F.3d 1160 (11<sup>th</sup> Cir. 2005),

<sup>225</sup> 489 U.S. 593 (1989).

<sup>226</sup> 205 F.3d 867 (6<sup>th</sup> Cir. 2000).

**ISSUE:** If OC is used unreasonably, is it excessive force?

**HOLDING:** Yes

**DISCUSSION:** Howard first argued that he was improperly arrested without probable cause. The Court looked to the Michigan law and found that Michigan had equated resistance to obstruction, even though the statute explicitly differentiated the two. The Court agreed that “Howard was required to comply with Wood’s request to place his hands behind his back regardless of whether the defendant deputy sheriff had probable cause to voice such an order.” The Court upheld the summary judgment on that issue.

With respect to the force claim, and looking to Graham, the Court agreed that it must pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>227</sup> Examining the issue from Howard’s viewpoint, the court assessed whether qualified immunity was appropriate. Under Harlow v. Fitzgerald, “[q]ualified immunity from liability is available to government officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>228</sup> The trial court had looked to three other OC cases “in an attempt to elucidate the purported lack of uniformity in such decisions occasioned by an arrestee’s varying levels of resistance to authority.”<sup>229</sup> Unlike those cases, however, Howard “denied engaging in any actions that would justify arresting officers using pepper spray to subdue him.” The Court agreed that using a chemical weapon is not per se unreasonable, but agreed that using such weapons unreasonably, “may constitute excessive force.”<sup>230</sup> As such, at the time of the arrest, the law was “was already clearly established that use of pepper spray on an arrestee who was not accused of a serious crime, was not posing an immediate threat to the safety of the officer or others, and was not actively resisting arrest or seeking to flee is constitutionally unreasonable.”

The Court reversed the summary judgment regarding the excessive force claim and remanded the case for further proceedings.

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

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

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<sup>227</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>228</sup> 457 U.S. 800 (1982).

<sup>229</sup> Greene v. Barber, 310 F.3d 889, 898 (6th Cir. 2002); Abdul-Khaliq v. City of Newark, 275 F. App’x 517 (6th Cir. 2008); Vaughn v. City of Lebanon, 18 F. App’x 252 (6th Cir. 2001).

<sup>230</sup> Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court noted that, looking at it from Pershell’s viewpoint (as required at this point in the litigation), the use of force against him was objectively unreasonable. It was clearly established “that striking a handcuffed and immobilized arrestee is unreasonable conduct.”<sup>231</sup> The Court also held the leg sweep to be unreasonable when the officers were faced with simple verbal resistance and a combative stance, as Pershell did not resist arrest or pose an immediate danger. He was unarmed and there were “five armed officers at the scene, one of them pointing a taser at Pershell and another carrying a rifle.”

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

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

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<sup>231</sup> Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6<sup>th</sup> Cir. 2004).

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

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

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

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

**HOLDING:** No

**DISCUSSION:** The Court agreed that “Germany posed no immediate threat to anyone as he rode his motorcycle across an empty field in the middle of the night in rural Kentucky.” This facts set this case apart from the situation in Scott v. Harris<sup>232</sup> and the court noted that the “chase here was a sleeper by comparison.” The Court noted that despite the paucity of cases on the issue, that “intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force.” Whether the collision here was actually intentional was a matter for the jury to decide.

The Court affirmed the denial of summary judgement.

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

**FACTS:** On October 25, 2003, Arnold lived with her three children in Kingsley.<sup>233</sup> Arnold went outside to call her son, Jacob, and his friends inside and saw Officer Wilder (Strathmoor Village PD) parking his police car in Breuer’s driveway. (Breuer was the mayor.) Jacob and his friends “met up with Arnold” in the driveway. Officer Wilder “crossed the street and stopped two of the boys in front of Arnold’s house.” Arnold apparently suspected the purpose of the visit as Breuer had complained before about the neighborhood children, including Jacob, running through yards and jumping over fences. Chief Reynolds had visited the Arnolds before about the complaints. On the day in question, Breuer called Reynolds, who was off-duty, so he sent Wilder to investigate.

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

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<sup>232</sup> 550 U.S. 372 (2007).

<sup>233</sup> Strathmoor Village PD contracts with Kingsley to provide police services.

called 911, Arnold's father and their own mothers. Arnold, who was covered with OC, tried to wash it off her daughter, Caroline, who'd come in contact with it as well.

Louisville Metro officers arrived. Sgt. Brown asked Wilder what had happened and he stated that a prisoner had escaped and was inside the house. Brown tried to talk Arnold out, to no avail. Arnold refused to open it under her brother, a local defense attorney, arrived. Armacost, a witness, testified that Wilder insisted he was going to lock Arnold up. Eventually, Brown was admitted and called EMS for the OC spray. She suggested Wilder write Arnold a citation, which Wilder refused to do. Brown told Arnold there was nothing she could do and that Arnold would have to submit to the arrest. She was placed in Wilder's car despite Brown's continued attempt to dissuade him from making the arrest.<sup>234</sup> Reynolds arrived and spoke briefly to Wilder and then drove to the station where he asked another officer how he could "make this a felony." Arnold was released from jail a few hours later. The children were traumatized by the incident.

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

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

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

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

**DISCUSSION:** The Court noted that a false arrest claim rested, or failed, based upon probable cause for the initial arrest. The Court noted that a person can only be charged with escape if they flee a lawful arrest. The Court agreed a jury could find that "Wilder arrested Arnold without authority and therefore she was justified in fleeing from the police car." The Court found Arnold's actions to not be resisting arrest. The Court agreed the false arrest verdict was proper.

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

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

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<sup>234</sup> The opinion includes a number of obscenities uttered by Wilder.

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

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

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

Sandel had his Taser<sup>235</sup> in his hand. Williams raised his hands and initially got to his knees. Traffic passed continuously. Officer Fultz arrived and as he scaled the concrete median, Williams stood up and then kneeled down again and eventually went prone. After a brief struggle, Fultz was able to get a handcuff on Williams’ left hand. Officer Wilkins (KVE) arrived and joined the group. Fultz knelt across Williams’ back “in an apparent attempt to finish securing him.” Williams, who was very fit, “used his free right arm to push himself up from a prone position into a seated position” and Fultz lost his grip on Williams’ left arm. Sandel then Tased him. Upon being directed to do so, Williams became prone again but did the same thing when they tried to cuff him. Sandel tased him again. An off-duty officer who was with Wilkins also approached the scene.

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

An eyewitness reported the following:

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

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<sup>235</sup> The opinion called it an ECD device.

another eighth of a mile to a quarter mile down the road that he ran from them, all in the same side of the median though on I-75.

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

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

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

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

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

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

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

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

**HOLDING:** Yes

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

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

**Blosser v. Gilbert, Carpentier and Lloyd, 422 Fed. Appx. 453 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On December 27, 2005, Blosser found the keys to a pickup truck outside a veterinary clinic. He took the truck without the owner’s permission, but quickly realized it had OnStar. He then abandoned the vehicle, returned to where he had left his own vehicle and drove away. A short distance away an officer attempted to pull him over, but Blosser sped away, failed to stop at several stop signs and went the wrong way down a street. He struck two emergency response vehicles, finally spinning out when he hit a police cruiser. Officers Gilbert and Capentier approached with guns drawn and gave “conflicting commands.” Ultimately, Gilbert “grabbed his arm and pulled it through the window.” At some point he complained of pain in his left arm and was taken for evaluation, where it was discovered a tendon was torn. (There was a related claim against the jail for failure to obtain the appropriate follow-up treatment for the injury.)

Blosser argued that the two officers used excessive force, with Gilbert and Carpentier arguing for qualified immunity. The District Court found in favor of the officers and Blosser appealed.

**ISSUE:** Is it lawful to forcibly remove someone through a window following a high speed chase?

**HOLDING:** Yes

**DISCUSSION:** In looking at the situation under objective reasonableness, the Court agreed that the officers acted to “neutralize a perceived threat by physically removing [Blosser] from his vehicle” following a car chase. Although the stop began with a traffic offense, it changed when Blosser initiated a high speed chase involving evasion and reckless driving. His actions made it reasonable for the officers to be concerned about the possibility of a weapon, or even that he would use the car against them. (The Court agreed that the problem with removing from the car likely was because of the steering wheel, but noted that the “officers could reasonably have perceived [it] as purposeful resistance.”) Further, even though it was later understood that Blosser had an arm injury, handcuffing him at the time was reasonable since it was likely not obvious to the officers at the time.

The Court upheld the qualified immunity.

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

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

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

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

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

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

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

**HOLDING:** Yes

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

toward the house.” He obviously felt free to leave at the time. The Court found he was not seized at that time.

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

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

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

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

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

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

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

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

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

**HOLDING:** No

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

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

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

**FACTS:** On September 22, 2005, Lee attended a concert at a Nashville lounge. After getting too close to the stage, he was escorted outside, but he refused to leave and “persisted in what can only be described as strange behavior.” Metro Nashville PD responded. Officer Brooks was approached by Lee as he arrived and he got out to talk to Lee. “Lee’s responses to Brooks’s questions were incoherent: Lee said that his name was “Blue” and he would point to the sky when he was asked what was going on.” Brooks said that Lee got very close to him and eventually “kind of lunged” toward him. When Brooks tried to take Lee’s hands, “Lee then jerked away, ripped his shirt off, spun around, and lunged at Brooks again.” Brooks used OC and Lee took off running with Brooks following. Lee stopped when ordered, but then took off again. Lee, who was stripping off clothes and eventually became nude, finally fell down. Brooks tried to subdue him but Lee took off again. Other officers, include May, arrived as backup. Mays tased Lee and it “had the intended effect.” Lee fell to the ground. However, six more activations had “little to no effect on Lee.” “Because many of the taser activations did not incapacitate Lee, it is unclear how many of the activations actually resulted in the taser delivering electricity to Lee.” Brooks and Officer Scott were attempting to control him at the same time and Brooks got tangled in the Taser wires. They had trouble because Lee “was struggling while naked and sweaty, and Lee also partially moved underneath a car.” The struggle continued, with one handcuff being placed on Lee’s wrist. More officers arrived. Officer Scruggs later noted that he heard a specific sound that he associated with a Taser being activated that “did not have a connection with the target.” Officer Scruggs tased Lee three time, but Lee still ran away from him. After multiple activations, with Lee falling but getting right back up, he finally fell, “hitting his head on an SUV’s step bar.” The officers moved in, with Scruggs drive-stunning Lee twice. Finally, they got handcuffs on Lee after three officers

worked to pull his hands together. Officer Cregan placed both knees across Lee's back to keep him down and he remained that way for about 10 minutes. As the ambulance arrived, the officer said it "seemed like Lee passed out." They rolled him over and found his lips were blue.

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

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

The Lees appealed.

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

**HOLDING:** No

**DISCUSSION:** With respect to the officers dismissed prior to trial, the Court agreed that "it is indeed possible to hold a police officer liable under § 1983 for failing to act to prevent the use of force when certain circumstances are met."<sup>236</sup> But, that requires that at least one officer actually be found liable for excessive force.

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

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

### **Marmelshtein v. City of Southfield, 421 Fed. Appx. 596 (6<sup>th</sup> Circuit, 2011)**

**FACTS:** On or around December 13, 2004, Southfield (Michigan) PD received an anonymous complaint that there was drug activity at or near Marmelshtein's home. Detective Bauman drove by and checked the license plate of the only vehicle there, discovering it belonged to the oldest son of the family and that he'd had a previous misdemeanor marijuana possession charge. Detectives Bauman and Simerly did a trash pull and located marijuana "residue." Bauman obtained a search warrant for the home.

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<sup>236</sup> Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006).

Late on the afternoon of December 13, they went to execute the warrant. The officers and the Marmelshteins differed on what happened next, with the Marmelshtein's contending the officers broke down the front door without announcing. Officer Jagielski stated he knocked, waited ten seconds and then used the ram. Officer Swart tossed in a flash-bang. The team was "dressed completely in black helmets and hoods covering their faces, goggles covering their eyes, and tactical vests covering their bodies."

As they entered, Jagielski saw Leonid Marmelshtein, age 69, run at them, yelling and screaming. Officer Jagielski ordered Marmelshtein to get down but he did not comply, so he and Sgt. Lask forced him to the floor and handcuffed him. (Marmelshtein stated he went toward the "masked men" not aware they were law enforcement, and that they threatened to kill him and "drove him to the ground.") Photos corroborated head and facial bruising. Arlene (his wife) fled out the back door and another team member tossed a "second flash-bang grenade through a side window into her general vicinity." She was stopped outside, handcuffed and brought back inside the house. Officers found .16 grams of marijuana on Marc, the oldest son's, dresser. Leonid was charged with a variety of minor offenses and ultimately pled no-contest only to disorderly conduct. The remaining charges were dismissed. Marc Marmelshtein took a guilty plea to misdemeanor possession of marijuana.

The Marmelshtein's filed suit under 42 U.S.C. §1983 for excessive force, false arrest and malicious prosecution (for Leonid only), unreasonable execution of a search warrant, and a claim against the city based upon training. The defendants moved for summary judgment, arguing that Leonid's plea undermined his claim for false arrest and malicious prosecution, and the Court agreed. The Court, however, allowed the excessive force claims and search warrant claims to go forward, noting that "no reasonable law enforcement officer would have considered a confused and elderly couple to be capable of producing the kind of tense and rapidly evolving uncertain situation which would require ten police officers to make split-second decisions including the use of two 'flash-bang' grenades." The defendant officers appealed that decision.

**ISSUE:** Does a plea (or conviction) under one charge serve to defeat an excessive force claim related to the arrest?

**HOLDING:** No

**DISCUSSION:** The Marmelshteins maintained "that they neither resisted nor refused to follow the defendant officers' directives once it became readily apparent to them that these individuals were police officer and detectives ...." The Court agreed that Leonid's plea to one charge was not dispositive of the use of force or search warrant issue and that his failure to immediately follow orders did "not give the officers license to use disproportionate force to subdue him."<sup>237</sup> The Court agreed, further, however, that the District Court should have assessed the action of each officer individually, since, specifically, only two officers took direct action about Leonid.

With respect to the warrant, the Court agreed that a "search of seizure may be invalid if carried out in an unreasonable fashion," even if the warrant itself is valid.<sup>238</sup> The Court noted there was a issue as to

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<sup>237</sup> Accord Cabrera v. City of Huntington Park, 159 F.3d 374 (9th Cir. 1998).

<sup>238</sup> Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

whether the officers properly knocked and announced and whether it was reasonable to use flash-bangs.<sup>239</sup> However, because that latter right, to be free of flash-bangs, had not been clearly established at that time, the Court agreed the officers were entitled to summary judgement and reversed that ruling.

The Court allowed the two issues discussed above to go forward.

**Jones v. Yancy, 420 Fed. Appx. 554 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On April 8, 2006, Jones was in a one-vehicle wreck in Memphis, Tennessee. Jones left the scene with a bystander so that he could call his brother. He did not report the crash, but by the time he returned, a police service technician (presumably a tow truck) had arrived. Jones was unable to produce his OL. Officers Yancy and Walker arrived and also requested his OL, and again, he was unable to find it in the car. He was handcuffed. He was also, allegedly, pepper-sprayed, beaten and taken to the ground, although he told them he could not “get down on his knees due to a preexisting injury.” He claimed to have multiple injuries from the encounter. A witness supported Jones’s assertions.

Jones filed suit under 42 U.S.C. §1983 against the two officers, claiming excessive force. The Court concluded that under Jones’s assertions, he “was the victim of an unprovoked attack that resulted in his being pepper sprayed and slammed into the patrol car well after he was in handcuffs.” Because of the factual dispute between the parties, the Court found the officers not entitled to summary judgment.

**ISSUE:** Does the submission of facts indicating a violation of a constitutional right defeat a qualified immunity motion?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that there was no legal issue submitted to review, and that the facts “as alleged by Jones” indicated the possibility, even the likelihood, of the violation of a clearly established right. The presence of an unrelated and presumably unbiased witness indicated he was not disorderly.

The Court permitted the case to go forward.

**Bletz v. Gribble and Denny, 641 F.3d 743 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 3, 2005, Deputy Denny (Ionia County Michigan, SO) looked over a list of outstanding warrants for Saranac residents. Deputy Denny saw a bench warrant for Zachary Bletz, who lived with his parents in that town. He verified the warrant and set out, with Deputy Gribble, to execute the warrant. They arrived about 11:40 p.m. and parked near the house. They saw only a light or TV in a second floor bedroom, the rest of the house was dark. They approached and knocked. The residents did not hear the knocking, but the dog inside started to bark. Zachary came to investigate and saw the officers in the back yard. When told he was under arrest, he was apparently cooperative. However, since he was wearing slippers, they discussed the need to get shoes for him. Zachary wanted to go

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<sup>239</sup> See Hudson v. Michigan, 547 U.S. 586 (2006).

inside to get shoes, but was told the officers would have to go with him. He walked inside and tried to close the door, but Officer Denny forced the door open. As they entered, Officer Denny saw a “long-haired man” standing inside and pointing a gun. Denny and Gribble both took cover and yelled at him to put the gun down. There was dispute as to whether they identified themselves as officers. The man, homeowner Fred Bletz, had poor vision and hearing, and was without glasses or hearing aid. Bletz repeatedly asked – who are you – to the officers. When he did not drop his weapon, Officer Gribble shot Bletz four times and he died as a result. Bletz did not fire. Gribble claimed that Bletz was pointing the weapon at him, which Zachary denied – Denny did not see anything. The officers went into the house, secured Zachary and kicked the unloaded gun from Bletz’s hand. Kitti, Zachary’s mother came in and was also placed on the floor and secured. Zachary was arrested. Kitti was not arrested but was held in a police vehicle for some time. Both were released later that night.

The Bletzs filed suit, based upon their own claims as well as a claim on behalf of Fred Bletz. The Court determined the officers were not entitled to summary judgment under the Fourth Amendment claims, and they appealed.

**ISSUE:** Is entering a darkened home without announcing unreasonable?

**HOLDING:** Yes

**DISCUSSION:** The Court looked at the situation in the light most favorable to the plaintiffs, who argued that the entry by the officers into a “darkened residence without announcing themselves in the middle of the night” was unreasonable. In addition, the Court considered whether the “events leading up to a shooting are legitimate factors.” In cases “where the events preceding the shooting occurred in close temporal proximity to the shooting, those events have been considered in analyzing whether excessive force was used.”<sup>240</sup> The Court chose to look “only at the facts alleged by [the Bletzes] in the moment immediately preceding the shooting.” The Court noted that Zachary said his father was lowering the weapon at the time of the shooting. Further, the officers were some distance from Bletz and near a breezeway, and could have retreated to relative safety. The Court agreed that it was appropriate to deny qualified immunity to Gribble at this stage of the proceeding.

However, the Court found that Deputy Denny, who did not fire his weapon or was otherwise in a position to supervise Deputy Gribble, was entitled to qualified immunity.<sup>241</sup>

With respect to the actions taken against Kitti Bletz, the Court agreed she was seized. The officers argued that they “needed to secure the scene of the shooting and conduct an investigation.” The officers failed “to adequately explain why it was necessary to keep her both handcuffed and locked in the back of a police car for three hours when there was no evidence to suspect her of a crime or that she would present a continued safety risk.” The Court further agreed that “law enforcement officers were fairly on notice regarding the constitutional violations inherent in subjecting an innocent bystander to a detention that was excessive both in duration and in the manner it was carried out.”

The Court allowed the case to go forward on these issues.

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<sup>240</sup> Claybrook v. Birchewell, 274 F.3d 1098 (6<sup>th</sup> Cir. 2001); Dickerson v. McClellan, 101 F.3d 1151 (6<sup>th</sup> Cir. 1996); Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397 (6<sup>th</sup> Cir. 2007).

<sup>241</sup> See Bruner v. Dunaway, 684 F.2d 422 (6<sup>th</sup> Cir. 1982).

**Graves v. Bowles, 419 Fed. Appx. 640 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Graves was arrested by KSP on August 15, 2007 on a warrant by the Glasgow police, for a robbery in Glasgow a few days earlier. The next day, however, they learned he was not the robber, as the same robber had just committed a robbery in Paducah. Graves was released and filed suit against Glasgow, 6 Glasgow Officers and 11 KSP troopers, claiming excessive force and wrongful arrest under 42 U.S.C. §1983. He also sued bank employees. The District Court gave summary judgment to all defendants and Graves appealed.

**ISSUE:** Is a high degree of force justified to serve a warrant?

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

**DISCUSSION:** The Court reviewed the claims. First, the Court reviewed the claim of wrongful arrest and determined that Glasgow PD and KSP both had probable cause to believe Graves was the robber when they obtained the warrant. He was identified by multiple people, including a relative and a former landlord, from surveillance photos from the bank. He was identified in photo paks by bank employees.<sup>242</sup> Graves found fault with the investigation, but the Court noted that it “must ask what the police actually knew [at the time of the arrest] and Graves cannot refute the identifications.” The Court found the wrongful arrest claim must fail.

With respect to the force claim, he argued that KSP “unreasonably used excessive force when they deployed a ‘flash-bang’ device that broke the rear windshield of his car, surrounded his car with weapons drawn, broke two of his car windows, forcibly removed him from his car, and handcuffed him.” He also argued that Glasgow was at fault for using KSP’s Special Response Team to serve the warrant, which both groups should have known was unnecessary since he had complied earlier with a request to come in for questioning. The court agreed that police had the right to use “some degree of physical coercion or threat” to make an arrest, and how much was reasonable would depend upon “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>243</sup>

The Court noted, however, that the original robbery suspect was armed and that Graves had “brandished a gun in a recent domestic disturbance, and had been involved in prior assaults.” He had previously been unwilling to surrender in other matters, and knew he used drugs and could thus be unpredictable.<sup>244</sup> When KSP surrounded the car, he did not comply with the orders of the team, which justified the breaking of the car windows. “His refusal to comply with orders and unexpected motion toward his console” gave the SRT reason to believe he might be reaching for a gun.

The Court recognized “that his event was in no way pleasant or cordial,” but found the use of force reasonable based upon what the KSP knew at the time. Finally, because the case against the Glasgow officers was dismissed, the case against the City of Glasgow must also be dismissed. The Court upheld the dismissal of all law enforcement defendants.

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<sup>242</sup> Ahlers v. Schebil, 188 F.3d 365 (6<sup>th</sup> Cir. 1999).

<sup>243</sup> citing Tennessee v. Garner, 471 U.S. 1 (1985)).

<sup>244</sup> Dudley v. Eden, 260 F.3d 722 (6<sup>th</sup> Cir. 2001)

## 42 U.S.C. §1983 – QUALIFIED IMMUNITY

### Huckaby v. Priest (and others), 636 F.3d 211 (6<sup>th</sup> Cir. 2011)

**FACTS:** Barton and Pierce (married) lived in Southgate, Michigan. In August, 2003, they entertained a visitor, Huckaby for a few weeks. She packed up her car on September 2, intending to return home. A neighbor, Johnson, called the Southgate police, believing she was witnessing a breaking and entering. Officers Priest and Fobar responded. They found Huckaby standing just inside the house and gestured to her to come to them; she met them on the front porch. They asked her who owned the house. (They differed on her response to the question.) She was placed in Fobar's car while the officers went to investigate, entering through the door left open by Huckaby. There, they encountered Barton, who was dressed, and Pierce, in pajamas. The police told them why they were there, and Barton identified themselves as the owners and asked the officers to leave. The police asked for ID to prove their ownership, and both pointed to family pictures hanging nearby. They insisted on more ID and Barton asked to go upstairs to get it.

Pierce asked the officers not to go to her bedroom. As she turned to say something to Barton, Officer Fobar "grabbed her leg and pushed her down the steps, allowing Priest to slip by her and follow Barton up the stairs." (The officers contested this statement.) Additional officers arrived, and one was instructed to watch Pierce, who was then in the living room. Priest and Fobar came downstairs with Barton in cuffs, stating he'd "pulled a gun." All three were taken to the local station, with the two women booked for possible burglary. They were released later that day. (The opinion does not state the disposition of any case against Barton.) All three filed suit under 42 U.S.C. §1983. Ultimately, the Court agreed the officers were not entitled to qualified immunity with respect to Pierce's claims but that they were with respect to Huckaby's claims. Appeals followed.

**ISSUE:** In a qualified immunity case, must the facts be analyzed in the light most favorable to the plaintiff?

**HOLDING:** Yes

**DISCUSSION:** With respect to Pierce, the Court "identified a number of disputed material facts which made qualified immunity inappropriate." The Court stated that the officers "refuse to concede the facts in the light most favorable to Pierce," which is the required standard in such cases. Huckaby argued that the officers lacked probable cause to hold her for five hours, and the Court agreed, in her case, that the District Court's dismissal of her action was premature and not construed in the light most favorable to her. Specifically, the Court alerted "the district court that there is a distinction between the reasonable suspicion required to detain a suspect under Terry v. Ohio and the showing of probable cause required to support a warrantless arrest."

The Court ruled the case would go forward and qualified immunity was not granted.

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

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

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

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

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

**HOLDING:** No

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

The Court affirmed the denial of summary judgement.

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

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The officers contended that even construing the facts in the Thompson's favor, as required at this state of the case, that there were no "disputed issues of material fact." They argued that the "right not to be arrested in the circumstances presented in this case [are] not clearly established." However, the cases presented "only support this assertion if the Court accepts the version of the facts proposed by the officers." The fact that Thompson was successful in his criminal case suggested at least one jury believed Thompson's version of the facts.

The Court upheld the denial of the qualified immunity argument.

**Kuslick v. Roszczewski, 419 Fed. Appx. 589 (6<sup>th</sup> Cir. 2011)**

**FACTS:** In March, 2008, someone wrote a threat on a high school bathroom wall in Hale, Michigan. Det. Roszczewski (Michigan State Police), investigated and ultimately began looking at Sarah Kuslick as a suspect. He obtained a search warrant for handwriting samples. Sarah and her parents appeared at the Post to comply. (Although an adult, Sarah was developmentally disabled.) Kuslick did not want to leave Sarah, her daughter, alone as she produced the samples but was told she had to remain in the hallway. Initially she was close enough to hear and see what was going on, but was then instructed to go around the corner; she refused. Lt. Lesneski ordered her to leave the building and again, she refused. At the same time, Sarah was producing the 30-plus samples requested. She finished and as they left, Kuslick and Lesneski continued to argue, with Lesneski pulling and /or pushing her toward the door.

Roszczewski obtained a criminal complaint against Kuslick, accusing her of obstructing him in his duties. The charge was dropped when the Michigan court determined she'd done nothing to obstruct the execution of the warrant. Kuslick filed suit under 42 U.S.C. §1983 claiming wrongful arrest and malicious prosecution. The District Court denied Roszczewski's motion for summary judgment and he appealed.

**ISSUE:** Is the question of a statement being materially false for the Court to decide in a qualified immunity determination?

**HOLDING:** Yes

**DISCUSSION:** Roszczewski argued that even if his allegedly false statement was removed from his statement supporting the arrest warrant – that she frustrated the service of his warrant – that probable cause still existed for his arrest. The Court noted, however, that the warrant "accused Kuslick of obstructing Roszczewski, not the other troopers, and the allegedly falsified statement constitutes the one factual allegation actually linking Kuslick to any obstruction of Roszczewski's execution of the warrant." (Although they were initially told about 30 samples were needed and Sarah actually produced more than that, he put in his statement that he actually needed 100.) The Court noted that the case "turns on materiality" – and whether a false statement is material is a question for the court,

initially, in a qualified immunity analysis.<sup>245</sup> He argued that her refusal to comply with the orders given was obstruction under Michigan law. However, since he argued he was obstructed, not the other troopers, and because he was able to complete the execution of his warrant by collecting the needed samples, that was immaterial. The Court concluded - "telling lies to a magistrate in order to concoct probable cause is no technical violation of the law, and qualified immunity surely does not require us to countenance such behavior, if indeed a jury concludes that is what occurred here."

The denial of summary judgment was affirmed.

## 42 U.S.C. §1983 – SEARCH WARRANT

### Thurmond v. Wayne County (Michigan), 2011 WL 2270901 (6<sup>th</sup> Cir. 2011)

**FACTS:** On April 15, 2004 Troopers Bunk and Seibt (Michigan SP) tried to pull over a speeding vehicle. The suspect was injured in the process and captured. He did not have ID but identified himself as Shomarie Thurmond. He provided other identifiers that matched that identity. Thurmond also had an outstanding warrant from Wayne County so he was turned over to that agency, while the troopers got warrants for crimes related to the initial chase. Thurmond did not appear in court and a bench warrant was issued. However, as was later learned, in fact, the suspect was Labaron Thurmond, Shomarie's cousin.

Almost a year later, the real Shomarie Thurmond was arrested and taken to the MSP Detroit post. He was arraigned the next day. He made no "protestations of mistaken identity" at that time, but apparently told transporting troopers that he was not the person they wanted. He provided information that his cousin was the guilty party. Trooper Bunk, however, identified Thurmond as the person who had committed the crime. Ultimately, however, the case against Thurmond was dismissed.

Thurmond filed suit under 42 U.S.C. 1983 against various parties, claiming issues in the discovery process. After much procedural and discovery issues, the Court granted summary judgment in favor of most of the defendant officers and Thurmond appealed.

**ISSUE:** Is a warrant facially valid until shown to be otherwise?

**HOLDING:** Yes

**SCUSSION:** The Court noted that the arrest warrant was facially valid and that "mere detention ... in the face of repeated protests of innocence" was not necessarily unconstitutional. Over time, of course, it might be, but not initially. In fact, with respect to the deputy sheriffs who were named, Thurmond never protested his innocence and most had only passing contact with him. The Court, however, ordered the federal court to either exercise jurisdiction over his state law claims or return it to the state court system.

The Court did not, however, agree that the troopers who were aware of his protestations were, at this stage of the proceedings, entitled to immunity and allowed the case to go forward.

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<sup>245</sup> Vakilian

**Thornton v. Fray (and others), 429 Fed. Appx. 504 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On February 14, 2007, a number of Flint, Michigan police officers went to execute a warrant to arrest Pugh and search his residence, which he shared with Thornton. A few hours before, officers spotted KT (Thornton's 15 year old son) leave the residence and they seized him briefly. They released him after questioning. At about 7 p.m., they executed the warrants. There was dispute as to whether the officers knocked and announced, but in any event, when they entered, Thornton was seized, handcuffed and forced to remain seated on the floor until the search was complete. However, since at the time she was dressed only in a nightgown and without underwear, she was forced to remain in a position where the "lower part of her body [was] fully exposed" to everyone, including her children. The three younger children, ages 12, 11 and 9, were brought downstairs, including the female child who was escorted out of the bathroom by a male officer. The oldest boy returned during the search and was also secured. (The 3 younger children were not handcuffed, but the oldest boy was.) They were detained for approximately two hours and then released.

Thornton sued on her own behalf and behalf of her minor children under 42 U.S.C. §1983 and the Fourth Amendment. The defendant officers requested summary judgment and were denied. They appealed that denial.

**ISSUE:** Is it reasonable to hold occupants of a house being searched pursuant to a warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court addressed the claims individually. The Court agreed that it was reasonable, with a search warrant, to "detain the occupants of the premises for the duration of the search."<sup>246</sup> During such a detention, under Muehler v. Mena, "officers may use reasonable force – including handcuffs – for the duration of the search."<sup>247</sup> The Court agreed that in this situation, with an arrest expected for a murder suspect, the use of force and display of weapons was reasonable. All claims related to those actions should be properly dismissed.

However, the Court noted that the seizure of KT, hours before the search, by Officers Villereal and Lash, and forcing him into a van at gunpoint, "could not reasonable be deemed to fall within the rule." The two officers involved in that incident were not entitled to qualified immunity.

With respect to the alleged failure to knock before entering, the Court agreed that the officers lacked any exigent circumstances to justify entering without knocking. Those officers involved in the entry were thus not entitled to qualified immunity on that claim. (The officers, however, disputed, claiming they did knock, but with such a disputed claim, summary judgment cannot be granted.) Finally, with respect to Thornton's claim about not being allowed to dress or cover up, was also improper and that all officers involved in that matter were not entitled to qualified immunity on that claim.

As noted above, some claims were permitted to go forward and the remainder dismissed.

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<sup>246</sup> Michigan v. Summers, 452 U.S. 692 (1981); U.S. v. Fountain, 2 F.3d 656 (6<sup>th</sup> Cir. 1993); U.S. v. Bohannon, 225 F.3d 615 (6<sup>th</sup> Cir. 2000).

<sup>247</sup> 544 U.S. 93 (2005).

## 42 U.S.C. §1983 – TRAINING

Harvey v. Campbell County, Tennessee, Sheriff McClellan and Deputy Scott, 2011 WL 1789955 (6<sup>th</sup> Cir. 2011)

**FACTS:** On December 23, 2005, Deputy Lowe began a vehicle pursuit of Harvey. Within minutes, Lowe shot and killed Harvey. Lowe stated that Harvey had a knife and refused to stop or put it down, and that he shot Harvey in self-defense. That proved to be untrue, however. Lowe ultimately admitted that he planted the knife and was fired for tampering. He was later convicted of three felony charges. Harvey (the victim's wife) filed suit on her own behalf, and that of her minor son, against Lowe, the former Sheriff and Chief Deputy, and the County. Lowe was unable to be served and the court dismissed him. It ultimately gave summary judgment to the remaining defendants by finding that they had adequately screened him. However, it allowed the case to go forward on the issue of training and ruled against McClellan and Scott's demand for qualified immunity.

All parties appealed.

**ISSUE:** Is the plaintiff responsible for identifying training inadequacies in a case based upon a training deficiency?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the plaintiffs' claim relied solely on the allegations within the complaint "without any supporting factual evidence." The Court noted that the "plaintiffs must show three elements: (1) that Lowe's training was inadequate to prepare him for the tasks that officers in his position must perform; (2) that the inadequacy persisted due to the County's deliberate indifference; and (3) that the inadequacy is closely related to or actually caused the plaintiffs' injury."<sup>248</sup> The Court discussed "deliberate indifference" – finding it to be a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."<sup>249</sup> However, "mere allegations that an officer was improperly trained or that an injury could have been avoided with better training are insufficient to make out deliberate indifference." No evidence was presented that support a finding that either McClellan or Scott were involved in the shooting or that they showed any indifference to training needs, and even if they did, the finding would be against them in their official, not personal, capacities.

The Court reviewed Lowe's personnel record, which indicated he was certified in 2004 as a law enforcement officer and was given the sheriff's office use of force policy. The Court noted that "it was manifestly *not* the defendants' duty to show that Deputy Lowe's training was adequate; it was plaintiffs' burden to show that such training was *inadequate*." There was no evidence on the record of "prior misuses of deadly force that could be deemed to have put McClellan and Scott on notice of any deficiency in training."

The Court ruled McClellan and Scott were entitled to summary judgment on the issue of training.

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<sup>248</sup> Plinton v. County of Summit, 540 F.3d 459 (6th Cir. 2008).

<sup>249</sup> Connick v. Thompson, 131 S.Ct. 1350 (2011) (quoting Bryan County, 520 U.S. at 410).

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

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

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

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

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

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

**HOLDING:** No

**DISCUSSION:** The Court discussed his argument under the “class of one” equal protection claim. In such claims, the plaintiff “alleges that he or she has been ‘intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.’”<sup>250</sup> The Court noted that he was unsuccessful in pointing out that any other victim would have received a different response. The Court noted that his pleading lacked sufficient detail to state a cognizable claim against the officers, instead, it made only “conclusory allegations” without any “further factual allegations.”

Bertovich also argued that he was not given due process as no investigation was undertaken to prove how his leg was broken. The Court noted, though that there is no legal right to have another prosecuted.<sup>251</sup>

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

### Tindle v. Enochs, 420 Fed. Appx. 561 (6<sup>th</sup> Cir. 2011)

**FACTS:** In 2006, Deputy Tindle (Wayne County, MI) was in charge of the execution of a search warrant on 20075 Fenmore and the house next door. Two undercover officers approached the house to attempt to make a drug buy. They were turned away and notified Deputy Enochs by radio of such. They reported that a “blue car had pulled into the driveway” and that three men were probably leaving in

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<sup>250</sup> Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

<sup>251</sup> See Diamond v. Charles, 476 U.S. 54 (1986); Mitchell v. McNeil, 487 F.3d 374 (6<sup>th</sup> Cir. 2007).

that car. Tindle, apparently, was leaving from a house that shared a common driveway with 20075. The vehicle in which he left was stopped and he was pruned out and handcuffed, and eventually taken back to 20075 with the others in the other. He was detained for 2-3 hours and then released with a misdemeanor loitering charge.

Tindle filed suit against Enochs under 42 U.S.C. §1983, along with state law claims, in Michigan state court. Deputy Enochs removed it to federal court and claimed qualified immunity. The District Court granted it in part and denied it in part and both appealed from adverse decisions.

**ISSUE:** Is a mistake in judgment defensible under 42 U.S.C. §1983?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Tindle bore the burden of proving “both that, viewing the evidence in the light most favorable to [Tindle], a constitutional right was violated and the right was clearly established at the time of the violation.”<sup>252</sup> In this case, the Court agreed that Tindle did not prove that any constitutional right was, in fact, violated. The Court found the detention reasonable under Michigan v. Summers,<sup>253</sup> noting that the “exception has since been extended to include residents and non-residents of a house subject to a search warrant that leave or arrive at or near the time of the search warrant’s execution.” The Court agreed it was reasonable for Deputy Enochs to believe that “her pre-arrest detention of Tindle was constitutional” and that he’d “left a house targeted by a search warrant.” He even conceded he’d left a house with a common driveway to the target house. Tindle could not prove his case based on “grounds for speculation” that Enochs misread the situation. The immunity standard provides “ample room for mistaken judgments.” Even though he protested, initially, that he was not inside the suspect house, the Court agreed that an officer “is under no obligation to give any credence to a suspect’s story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation.”<sup>254</sup>

The Court concluded Tindle could not prove the Enochs violated his constitutional right and agreed that Enochs was entitled to qualified immunity.

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

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

During the pendency of his first appeal, the Court ruled on Widgren v. Maple Grove Twp. “which held that a “purely administrative” warrantless entrance by a tax assessor onto the curtilage of a house “does

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<sup>252</sup> Chappell v. City of Cleveland, 585 F.3d 901 (6<sup>th</sup> Cir. 2009).

<sup>253</sup> 452 U.S. 692 (1981).

<sup>254</sup> Criss v. Kent, 867 F.2d 259 (6<sup>th</sup> Cir. 1988).

not violate the Fourth Amendment by observing the exterior of a house for a purely 'tax purpose.'"<sup>255</sup> The case was remanded to consider the impact of the case on Killian.

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

**HOLDING:** Yes

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

Killian argued that he was ordered to do so, by the Court or a prosecutor. However, the Court noted, the argument, even if factually correct, does not entitle him to qualified immunity because, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence."<sup>256</sup> Public "officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." (Nor did he actually point to any such orders.)

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

The Court affirmed the denial of qualified immunity.

## 42 U.S.C §1983 - SHERIFF

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

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

Cochran was at work when he got a call from a neighbor as to the eviction; he immediately went to the house. The deputies threatened to restrain or arrest anyone who attempted to interfere with the landlord taking the property. Various calls were made seeking help to prevent the landlord from taking

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<sup>255</sup> 429 F.3d 575 (6<sup>th</sup> Cir. 2005).

<sup>256</sup> Kennedy v. City of Cincinnati, 595 F.3d 327 (6<sup>th</sup> Cir. 2010)

the property, to no avail. Ultimately one of the deputies even bought a television taken from the property from the landlord. To date, none of the property was returned to Cochran and ultimately, the landlords declared bankruptcy, thwarting any ability to get reimbursed for the property.

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

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

**HOLDING:** Yes

**DISCUSSION:** Cochran argued that when the deputies actively assisted in the removal and loading of the property and specifically permitted the landlords to transport it away, they carried out the eviction in an unreasonable manner. He agreed it was lawful to remove the property, however, and place it out on the sidewalk. The Court found no question that Cochran had a constitutional right to his personal property. In Soldal v. Cook County, the Court held that when a deputy “not only stood by to keep the peace during the repossession of a trailer home but played an active role in facilitating the wrongful repossession of the trailer.”<sup>257</sup> The Court agreed, in Revis v. Meldrum, that “an officer’s mere presence at the scene to keep the peace while parties carry out their private repossession remedies does not render the repossession action that of the state.”<sup>258</sup> Once the officers take an active role, however, they are no long “mere passive observers.” The deputies engaged in affirmative actions (confirmed by photos and testimony) and further, “interposed themselves between Cochran and the Landlords to allow the Landlord to take Cochran’s property” – threatening to arrest them if they interfered. They sent away the KSP trooper called to the scene, as well. The Court ruled that their actions crossed over in “meaningful interference” with Cochran’s possessions.

The Gilliams argued that since they sought legal advice, their actions were reasonable. The Court, however, noted that a call for “general advice” does not make unreasonable actions reasonable. Reliance on legal advice is a defense only under extraordinary circumstances.<sup>259</sup> The Court agreed that a landlord may take a lien on property to secure rent but that does not allow the property to be taken without the proper judicial process.

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

The denial of summary judgment was upheld.

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<sup>257</sup> 506 U.S. 56 (1992).

<sup>258</sup> 489 F.3d 273 (6<sup>th</sup> Cir. 2007); U.S. v. Coleman, 628 F.2d 961 (6<sup>th</sup> Cir. 1980).

<sup>259</sup> Silberstein v. City of Dayton, 440 F.3d 306 (6<sup>th</sup> Cir. 2006).

## 42 U.S.C §1983 – CONSPIRACY

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

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

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

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

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

**HOLDING:** Yes

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

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

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

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

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

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

**HOLDING:** No

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

The Court continued:

Municipalities face policy-based liability under § 1983 only if a plaintiff demonstrates "that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."<sup>260</sup> Where, as here, a plaintiff points to a municipal policy of *inaction* as the municipality's "deliberate conduct," the plaintiff must show that the municipality's failure to act constitutes "deliberate indifference" to the plaintiff's constitutional rights, and "directly caused" the plaintiff's injury, *see id.* at 415. With limited exceptions, deliberate indifference must be established with evidence that the municipality ignored a pattern of similar constitutional violations.

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

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<sup>260</sup> Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997).

The decision of the trial court was affirmed.

## 42 U.S.C. §1983 – UNLAWFUL ENTRY

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

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

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

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

Riddle appealed the denial of qualified immunity.

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

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that warrantless intrusions into private property are presumptively unreasonable, but could be justified under exigent circumstances. Riddle argued that exigent circumstances, specifically "officer safety and the prevention of the evidence destruction" justified his entry. Specifically, he argued that they had information about guns in the house and a tip that adults answered the door with guns in their hands. Modrell admitted that there were guns in the house, as well. The Court noted, however, that the suspects were already detained and a gun secured, and that

while the “Modrells may not have been outright friendly, they remained courteous throughout the incident.” The Court found no officer safety issues apparent.

With respect to the evidence, Riddle urged the court to look to Illinois v. McArthur.<sup>261</sup> McArthur includes four elements to assist in deciding whether an individual’s privacy interest outweighs the concerns of law enforcement: “(1) whether there was “probable cause to believe that [the defendant’s residence] contained evidence” of a crime or contraband; (2) whether “the police had good reason to fear that, unless restrained,” the defendant would destroy the evidence before they could return with a warrant; (3) whether officers “made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy”; and (4) whether the restraint in question lasted “no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.”

In this case, the Court focused on whether the house was a single-family home or a duplex, since if the latter, probable cause was needed for each unit.<sup>262</sup> If a single house, it was not.<sup>263</sup> Riddle was told that Modrell was renting the basement from his father and could see that it had a separate entrance and facilities. Riddle even treated it as a separate unit by going around the outside to get to the back porch.

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

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

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

**Pritchard (and others) v. Hamilton Township Board v. Trustees, 424 Fed. Appx. 492 (6<sup>th</sup> Circ. 2011)**

**FACTS:** On August 8, 2007, Lt. Braley (Hamilton Township PD) held a public meeting to discuss underage drinking and a specific alcohol-involved crash. The parents of that juvenile believed their son had alcohol at the Prichard’s’ home on the night of the accident. They also stated they had seen “kids laying in the front yard” previously. They told Lt. Braley that the Pritchards were planning another party, on August 10, and that they suspected “there would be underage drinking at the party.” Lt. Braley met with Chief Richardson and Lt. Johnson the next day to discuss the issue and they developed a plan to monitor the event. Lt. Johnson also ensured that Ohio Liquor Control agents would be available.

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<sup>261</sup> 531 U.S. 326 (2001)

<sup>262</sup> U.S. v. Whitney, 633 F.2d 902, 907 (9<sup>th</sup> Cir. 1980).

<sup>263</sup> Shamaeizadeh v. Cunigan, 338 F.3d 535, 553 (6<sup>th</sup> Cir. 2003)

For most of the evening, the officers monitored the party, seeing nothing unusual. On his last pass at 11:45 p.m., they planned to stop at midnight, Lt. Braley saw “four individuals in the side yard,” one of whom “appeared to be intoxicated and was yelling very loudly.” As it was very dark, he could not describe them beyond saying that the voice was male. He reported the information to Lt. Johnson but took no further action as he was not in uniform. Allegedly, later that night, Lt. Johnson, Chief Richardson and Officer Gilbert discussed the party, having had no complaints at all. Lt. Johnson instructed Officer Gilbert to have his wife make an “anonymous noise complaint” – even though they lived some distance away. He did so, and ultimately, Officer Gilbert and another officer were dispatched to the party.

What happened next was in dispute. Mary Pritchard stated she met Officer Gilbert at the front door and that he “brushed past her and went immediately to her backyard, at which point a few people in the backyard took off running. Gilbert pursued them, and by her count, 22 officers “stormed” around both sides of the house. Christman, the man Gilbert elected to chase, recalled seeing about 10 officers “swarm” onto the property. Christman ran for about 30 seconds, fell and was apprehended and was held for about 40 minutes. Christman was underage and admitted to drinking alcohol – he was cited for underage drinking and disorderly conduct and released to his father, who was also at the party. (Because Ohio, like Kentucky, permits an underage juvenile to drink with the parent’s permission, the charges were dismissed.<sup>264</sup>)

Lt. Braley allegedly threatened Pritchard, saying he could take her house and would tell her son’s football coach – witnesses described a “‘chaotic’ scene with officers yelling, acting aggressively, and threatening to use their tasters on people.” Clark, also at the party, began to use his cell phone to record the party. He was told, after a few minutes, to stop recording, and he did. However, he opened his phone a few minutes later and was arrested for disorderly conduct. (Lt. Johnson later maintained they were concerned the recording “might reveal the identity of undercover liquor control agents if it was disseminated online.”) Those charges were ultimately dismissed as well.

A few days later, Pritchard received information anonymously that indicated the noise complaint originated with an officer’s wife and that the officers conspired to raid the party. Pritchard, Christman and others filed suit under 42 U.S.C. §1983. The Court denied summary judgment under federal and state law to the defendant officers on allegations under the Fourth Amendment (unlawful search of the property and unlawful arrest), civil conspiracy, false arrest, malicious prosecution and emotional distress. The defendant officers appealed.

**ISSUE:** Is entry into a backyard (curtilage) permitted without an exigency?

**HOLDING:** No

**DISCUSSION:** Taking each claim individually, the Court noted that under the Fourth Amendment has “reach beyond the walls of the home.” The Court noted that under U.S. v. Dunn, it decided whether an area is within the curtilage, the Supreme Court had provided four factors: “[1] the proximity of the area claimed to be curtilage to the home, [2] whether an area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to

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<sup>264</sup> Kentucky has a similar provision in Unlawful Transaction with a Minor in the Third Degree, KRS 530.070.

protect the area from observation by people passing by.”<sup>265</sup> Even if unfenced, the backyard is part of the curtilage.<sup>266</sup> Even if Officer Gilbert’s version was taken as truth, that he entered to do a knock and talk, the Court agreed that such a technique was permitted “so long as the encounter does not evolve into a constructive entry.” The Court found no exigent circumstance to justify going into the backyard – he claimed it was justified by Christman running, but Pritchard and Christman argued that he entered the backyard and precipitated the chase. Lt. Johnson further argued that he arrived because of Gilbert’s call for help, yet the facts suggest that Johnson was present apparently as Christman was apprehended after only a brief chase.

Lt. Braley was apparently not present in the backyard, only the side yard, which may have not been in a private area. However, the Pritchards argued that he was involved in the planning of the raid and was responsible for Officer Gilbert under the doctrine of supervisory liability. Absent Lt. Braley’s actions, “no police officers would have ever entered their property.” The Court agreed a jury could find that “Lt. Braley not only encouraged or condoned the actions of Officer Gilbert, but that Officer Gilbert’s actions were a direct result of Lt. Braley’s planning and acts.” Finally, it was not disputed that Chief Richardson did not enter the property, but noted there was a showing that he failed to action, and thus condoned, the unlawful plan, and thus made him potentially liable.

With respect to the arrests, the Court agreed that “an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence”<sup>267</sup> nor make “hasty, unsubstantiated arrests with impunity.” The Court found nothing in Ohio law that explained why it was reasonable to arrest Clark, even if he was intoxicated, as there was no reason to believe his recording of the indicated presented an immediate risk of physical harm to anyone. With respect to Christman, the Court found nothing to indicate why running from the police constituted disorderly conduct. They knew he was drinking but also knew that his father was present at the party with him, and they could not “simply turn a blind eye toward potentially exculpatory evidence known to them.”<sup>268</sup> The officers argued they were unaware that the law made an exception in this case, The Court agreed that “knowledge of [a] statute is imputed to the police officers” and the Court found “no reason to hold that it would be reasonable for an officer to be ignorant of the very statute that he is enforcing.”

The Court continued:

At first blush it might seem unduly harsh to have an expectation that law enforcement officers should know the intricacies of criminal statutes, but this position finds support in other areas of the qualified immunity doctrine that regularly impute knowledge of statutes and case law to officers. Indeed, it is a touchstone of qualified immunity doctrine that “a reasonably competent public official should know the law governing his conduct.”<sup>269</sup> For instance, we impute knowledge of state-law definitions and state-court interpretations of a statute to police officers

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<sup>265</sup> U.S. v. Dunn, 480 U.S. 294 (1987); Oliver v. U.S., 466 U.S. 170 (1984) (quoting Boyd v. United States, 116 U.S. 616 (1886))

<sup>266</sup> Jacob v. Twp. of West Bloomfield, 531 F.3d 385 (6th Cir. 2008); Widgren v. Maple Grove Twp., 429 F.3d 575 (6th Cir. 2005).

<sup>267</sup> Everson v. Leis, 556 F.3d 484 (6th Cir. 2009).

<sup>268</sup> Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

<sup>269</sup> Harlow v. Fitzgerald, 457 U.S. 800 (1982).

when we decide whether an officer could reasonably conclude that probable cause exists under a given set of circumstances.<sup>270</sup> Likewise, we impute knowledge of clearly established constitutional case law to police officers when we state that the “binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point,” places a law enforcement official “on notice that [his] conduct violates established law.”<sup>271</sup>

In a footnote, the Court noted that:

Indeed, an ignorance of the law defense—especially when the law is clear— in the qualified immunity context “might foster ignorance of the law or, at least, encourage feigned ignorance of the law.”<sup>272</sup> Permitting an officer to be ignorant of the law would also draw a stark contrast with our long tradition of imputing knowledge of criminal statutes to the general public.<sup>273</sup>

The Court also agreed that there was sufficient evidence at this state to permit the Prichards and other parties to go forward with the conspiracy claim. The Court also agreed that under Ohio law, the jury could find malice or bad faith in the officers’ actions

The Court upheld the denial of summary judgment and permitted the case to move forward.

## 42 U.S.C §1983 – FIRST AMENDMENT

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

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

Kaminski was hired to be a security guard at the center. On March 2, 2007, he called police (Pedro and Mannix) to report that Skovgard and Gros were trespassing. (Kaminski was given no training on the issue and assumed that the property line went to the street.) However, they were determined to have been on the public right of way and the charges dismissed. Skovgard and Gros filed suit under 42 U.S.C. §1983. The trial court granted summary judgement to the officers and the City of Kettering and

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<sup>270</sup> Kennedy, 635 F.3d at 215–16; Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

<sup>271</sup> Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010) (quoting Hope v. Pelzer, 536 U.S. 730 (2002)); see also Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007) (imputing knowledge of First Amendment principles to an officer, and holding that probable cause did not exist because the officer should have known that the defendant’s conduct was protected by the Constitution, even though it was probably prohibited by the statute); Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988) (noting that we expect a reasonably competent officer to know the law governing his conduct but suggesting that it might be unfair to impute knowledge of a case to an officer only four days after the case is decided).

<sup>272</sup> Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975).

<sup>273</sup> See e.g., Bryan v. U.S., 524 U.S. 184 (1998) (noting that the traditional rule is that “ignorance of the law is no excuse” for a defendant’s criminal conduct).

Skovgard and Gros voluntarily dismissed the charges against the other defendants. They appealed the summary judgement.

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

**HOLDING:** Yes

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

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

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

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

## **SUSPECT ID**

**U.S. v. Peterson, 411 Fed.Appx. 857 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Peterson was involved in a Springboro, Ohio, bank robbery. Bowman, a bank manager, identified Peterson from a photo array of 6 images. He was convicted and appealed.

**ISSUE:** Must all of the photo pak subjects be wearing the same clothing and be of the same age?

**HOLDING:** No

**DISCUSSION:** In addition to various procedural claims, Peterson argued that the photo identification procedures was unduly suggestive because "his photo was the only one in dark clothing, which was part of the description of the robber, there was an apparent difference in age between his photo and that of the other individuals; and the officers asked Bowman whether she could identify the robber from the photo array, thereby suggesting that the robber was found in one of the six photos." The Court

however, found the inquiry to be appropriate, and also discounted “Bowman’s two possible viewings of photographs of the robber before the identification.” (The news media had apparently shown still images from the surveillance video.)

Further, even if suggestive, the Court found that “an analysis of the totality of the circumstances under the *Biggers* test still assures us that there was no substantial likelihood of misidentification in this case. In assessing the reliability of the identification, we consider five factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the witness’s degree of attention at the time of observation;
- (3) the accuracy of the witness’s prior description of the criminal;
- (4) the level of certainty demonstrated by the witness when confronting the defendant;
- and (5) the length of time between the crime and the confrontation.

The manager had ample opportunity to view the robber and had accurately described his appearance. She expressed adequate certainty of her identification and although the delay between the crime and the confrontation (over a year and a half) was substantial, that did not outweigh the other factors. The Court upheld the identification, and Peterson’s conviction.

## INTERROGATION

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

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

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

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

**HOLDING:** No

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

Otte’s conviction was affirmed.

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

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

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Miranda v. Arizona and Edwards v. Arizona<sup>274</sup> for guidance. In Edwards, the Court noted that "a valid waiver of [the] right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." In Minnick v. Mississippi, the Court ruled that "after an individual asks for counsel during interrogation, the government cannot demonstrate a valid waiver of this right absent the 'necessary fact that the accused, not the police, reopened the dialogue with the authorities.'" The Court noted that although Delgreco did engage in an "impermissible interrogation" by his comment, that the "coercive effect of this interrogation had subsided by the time McKinney asked to speak with Delgreco the next morning."<sup>275</sup>

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<sup>274</sup> 451 U.S. 477 (1981); 498 U.S. 146 (1990).

<sup>275</sup> The Court of Appeals actually found it to be "no means clear" that Delgreco's comment "qualified as the functional equivalent of interrogation, as opposed to a type of 'subtle compulsion' to cooperate that is not foreclosed by Miranda and Edwards." Other circuits had, in fact, held death-penalty comments to not be the case.

He “validly waived his right to counsel before giving his statements.” In Hill v. Brigano,<sup>276</sup> the Court held that “even when police impermissibly interrogate an individual after he invokes his right to counsel, that individual can still initiate communication with police and waive his previously asserted right when ‘enough time ... elapse[s] between the impermissible further interrogation and the initiation [such] that the coercive effects of the interrogation ... subside[s].”

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

## **TRIAL PROCEDURE / EVIDENCE - CONSTRUCTIVE POSSESSION**

### **U.S. v. Leary, 422 Fed. Appx. 502 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 15, 2008, Leary was arrested after police found three guns and a substantial amount of cocaine in an apartment he shared with Luhman. Leary argued that although he shared the apartment and the bedroom with Luhman, that two others frequently stayed at the apartment. However, Lughman testified that she had seen Leary with weapons at the apartment and that on the day in question, she had sought help from the police to get the guns out of the apartment. They ultimately sought consent to search the apartment from Leary, who agreed, and the guns and drugs were found.

He argued at trial there was insufficient evidence to find he “constructively possessed the drugs and that he constructively possessed the guns in furtherance of a drug trafficking crime.” His motions were denied and he was convicted. He then appealed.

**ISSUE:** Must there be a connection between drugs and guns to charge for the presence of the guns?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the evidence was sufficient that the guns were being used to further a drug trafficking scheme. Witnesses testified that the quantity of the drug and the way they were presented was more than usually seen in personal use. It was located on his side of the closet, under his hats. The cash in his possession upon arrest was mostly 20 dollar bills, the usual sale amount, and he did not have a legitimate job. In addition, no paraphernalia was found at the apartment. The Court agreed that guns and drugs found in close proximity could be used to support the assertion that the guns were used to further the drug trafficking, but that in this case, mere proximity was not sufficient, since they were in a storage place, in a duffel bag, not readily accessible. In addition, the amount of drugs was not so substantial as to indicate major trafficking. The guns were not in a “strategic location” in the apartment and two were not loaded, nor was there a “specific nexus” between the guns and the drugs. The guns were not on his person nor could they readily be seen.

The Court affirmed the drug trafficking conviction, but not the gun possession charges.

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<sup>276</sup> 199 F.3d 833 (6<sup>th</sup> Cir. 1999).

**U.S. v. Bradford, 418 Fed. Appx. 390 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On May 18, 2006, Bradford and his girlfriend were asleep in her home on Flint, Michigan. The police awakened them serving a drug-trafficking search warrant. Under the mattress, they found a loaded handgun and drug-dealing paraphernalia. Bradford, a convicted felon, was indicted for the possession of the weapon. He was convicted and appealed.

**ISSUE:** Is a gun under a mattress logically connected to someone who slept in the bed?

**HOLDING:** Yes

**DISCUSSION:** Bradford challenged his connection to the weapon, since it was found under the mattress of his girlfriend's bed, in her apartment. However, the prosecution proved he stayed at the house many times over the previous months and he jointly owned a car with the girlfriend. He also kept many personal items in the bedroom. The gun was found next to items used in drug distribution and he was proven to be connected to drug trafficking. (Bradford was supposed to be living at another address, by the terms of his probation, but his aunt testified he did not live with her.)

The Court upheld his conviction.

**TRIAL PROCEDURE / EVIDENCE - CRAWFORD**

**U.S. v. Boyd, 640 F.3d 657 (6<sup>th</sup> Cir. 2011)**

**FACTS:** On January 6, 2007, in Knoxville Tennessee, Newsom and Christian were carjacked, Christian was raped and both were murdered. Newsom's body was initially found, but not Christian's. Christian's abandoned vehicle was found and inside, police found Davidson's fingerprint. He lived a short distance from where the car was located. Officers executed a search warrant on his home and found Christian's body in the trash can in the kitchen. Semen on the body eventually linked Davidson to the crime as well.

Police initiated a manhunt for Davidson. Through investigation, they discovered Davidson and Boyd had made a number of phone calls. They found Boyd and stopped his car, but he denied, initially, knowing Davidson. He then said he wasn't going to do time in jail for Davidson and told them where he was hiding. He admitted Davidson was in a house they had broken into. The house was vacant, and inside, the police found and arrested Davidson and seized clothing, a cell phone and other evidence. Boyd returned to the Knoxville police voluntarily and recounted what Davidson had told him of the crimes and admitted to having assisted Davidson even though he knew of the crimes.

Boyd was charged with being an accessory after the fact and misprision, because he had assisted Davidson in his actions after the crime. At trial, he moved to exclude portions of his recorded interview in which he described what he'd been told by Davidson, arguing they were inadmissible hearsay and violated the Confrontation Clause, but the trial court ruled that they were "non-hearsay offered to prove Boyd's knowledge rather than the truth of the matter asserted." Boyd was ultimately convicted and appealed.

**ISSUE:** Is it appropriate to use an incriminating statement made to a third party when not being used to prove that he had, in fact, committed the crime?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the statements were admissible because the charges required that Boyd “had knowledge of a crime.” The jury was instructed to use the information “only for the purpose of determining Boyd’s notice and knowledge of Davidson’s involvement in the carjacking” - not to determine that he had, in fact, committed the crime. The Court noted it did not violate Crawford, either, because “to constitute a Confrontation Clause violation, the statement must be used as hearsay - in other words, it must be offered for the truth of the matter asserted.”<sup>277</sup> In addition, in the context in which they were offered, to a companion, a “reasonable person in Davidson’s position would not have anticipated the use of the statements in a criminal proceeding.”<sup>278</sup>

Boyd’s conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - CONFRONTATION CLAUSE

### U.S. v. Jackson, 425 Fed. Appx. 476 (6<sup>th</sup> Cir. 2011)

**FACTS:** Jackson was the target of a drug investigation in Hamilton County (Chattanooga), Tennessee. Deputy Sheriff Langford had arranged for a controlled buy from Jackson at a hotel room. Following the buy Jackson was apprehended and was found to have the “buy money” as well as a quantity of powder cocaine. Several months later, the cooperating witness in the buy was accused of murdering another person. The prosecution moved to have any mention of that later crime excluded from the trial and stated they would not be using the witness at trial. Only a video of the transaction would be used along with the deputy’s testimony and lab evidence.

Following the deputy’s testimony, the Court agreed that cross-examination about the witness would be excluded. The deputy was questioned about the source’s motivation, which was initially for help with legal problems but eventually the source was simply paid.

Jackson was convicted and appealed.

**ISSUE:** Is it a violation of the Confrontation Clause for a source not to appear at trial?

**HOLDING:** No

**DISCUSSION:** Jackson argued that his right to confront the witness was violated because he was not permitted the cross-examination and because the source did not appear at trial. The Court agreed that simply limiting cross-examination was not inappropriate. The fact that the source was charged with a crime months after the event did not factor into the deputy’s use of the informant. Although the source appeared in the video, which was presented without sound, the source was not a witness because they did not testify.

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<sup>277</sup> U.S.v. Davis, 577 F.3d 660 (6<sup>th</sup> Cir. 2009).

<sup>278</sup> Crawford v. Washington, 541 U.S. 36 (2004).

Jackson's conviction was affirmed.

## TRIAL PROCEDURE / EVIDENCE - CORROBORATION RULE

### U.S. v. Ramirez, 635 F.3d 249 (6<sup>th</sup> Cir. 2011)

**FACTS:** During an unrelated investigation, Ramirez admitted to two separate investigators that she was aware that the company for which she worked hired illegal aliens. At a grand jury proceeding, Ramirez denied knowing that a person had submitted false documents and stated that "she had no reason to believe that any of Durrett Cheese's employees were illegal aliens." She was indicted, however. One of the investigator's testified as to the statements she had made and a number of documents were introduced that suggested Ramirez had helped prepare employment documents for alleged illegal aliens.

Ramirez was convicted and appealed.

**ISSUE:** Must a confession be corroborated by other evidence?

**HOLDING:** Yes

**DISCUSSION:** Ramirez argued that "the government did not substantially corroborate her extra-judicial statements, resulting in her conviction being based on ... statements alone." The Court agreed that a "defendant cannot be convicted based solely on her uncorroborated statements or confessions."<sup>279</sup> "The purpose of this rule is to avoid errors in convictions based upon untrue confessions and to promote sound law enforcement by requiring police investigations to extend their efforts beyond the words of the accused."<sup>280</sup> It "ensures that an appropriate investigation is done prior to prosecution." The Court continued, stating that "[a]n out-of-court admission is adequately corroborated if the corroborating evidence 'supports the essential facts admitted sufficiently to justify a jury inference of their truth.'"<sup>281</sup> However, "corroborative evidence need not establish each element of the evidence." Instead, "corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty." The Court found that a "confession is adequately corroborated where '[e]xtrinsic proof ... fortifies the truth of the confession, without independently establishing the crime charged.'"<sup>282</sup> Instead, "[s]o long as portions of the defendant's statement are corroborated by "substantial independent evidence" that "tend[s] to establish the trustworthiness of the statement," then the elements of the crime may be established by the defendant's statements." The Government argued that "it is not required to corroborate every fact contained in Ramirez's statements to the investigators, but is only required to corroborate some of the important facts."<sup>283</sup> It contended that the documentary evidence indicated that she was aware of the illegal status of the applicants and that she conspired to hire them.

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<sup>279</sup> Smith v. U.S., 348 U.S. 147 (1954).

<sup>280</sup> Wong Sun v. U.S., 371 U.S. 471 (1963);

<sup>281</sup> U.S.v. Pennell, 737 F.2d 521 (6<sup>th</sup> Cir. 1984) (quoting Opper v. U.S., 348 U.S. 84 (1954)).

<sup>282</sup> U.S. v. Ybarra, 70 F.3d 362 (5<sup>th</sup> Cir. 1995).

<sup>283</sup> Dalhouse

The Court agreed the evidence was sufficient to corroborate her statement to the investigators. Her conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - CHAIN OF CUSTODY**

### **U.S. v. Rodriguez, 409 Fed.Appx. 866 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Rodriguez was allegedly involved in two robberies in Tennessee, the first on February 14, 2006 and the second on March 23, 2006. Rodriguez was arrested less than two month later and was questioned in English by the investigating officer, Wilder. Rodriguez responded in Spanish. The resulting confession was transcribed and signed. Reed, the clerk at the second robbery, identified Rodriguez in a preliminary court appearance. Rodriguez had planned to question Wilder about a prior misdemeanor theft arrest (from over 10 years before) but the court agreed it could not be admitted under the federal court rules as it was not, under case law, a crime of dishonesty.<sup>284</sup> A number of witnesses linked Rodriguez to the robberies, and in the first one, one detective testified that he took fingerprints from a CD that had been touched by one of the robbers (as seen on the surveillance video). The fingerprints were linked to Rodriguez. Rodriguez was convicted and appealed.

**ISSUE:** Must the item on which a fingerprint is taken be preserved for actual evidence in the trial?

**HOLDING:** No

**DISCUSSION:** Rodriguez argued that since the “government failed to produce the original source of the fingerprints, a CD” that the admission of the print card ID was improper. However, “direct testimony reasonably established that one of the robbers touched a CD and that the fingerprints lifted from a CD matched Rodriguez’s fingerprints.” The Court found an adequate chain of custody supported the admission of the evidence.

The Court further agreed that the trial court was correct in not admitting the testimony concerning the misdemeanor offense.

Rodriguez’s conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - EXPERT WITNESS**

### **U.S. v. Ham, 628 F.3d 801 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Ham was arrested as a result of a drug search warrant in Knoxville, TN. At trial, various agents testified as to the characteristics of crack cocaine as well as distribution methods. The same agent testified as to the amounts of crack cocaine consistent with personal use and to the use by dealers of throw-away cell phones (he had three). Another agent, who was present at the scene, testified as to what certain items are used for - plastic bags, etc. Ham was convicted and appealed.

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<sup>284</sup> Fed. R. Evid. 609; U.S. v. Rattigan, 1993 WL 190910 (6<sup>th</sup> Cir. 1993).

**ISSUE:** When a witness testifies in a dual role (lay and expert), must the jury be instructed on that issue?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that when a witness testifies both as to fact and expert opinion, the court must give a jury instruction regarding the “dual witness roles” and there must be a “clear demarcation” between the two. However, even though the court failed to do so in this case, the Court did not find that it “seriously affected” the court proceedings

Ham’s conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE – EXCULPATORY / BRADY**

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court addressed the appeal as one based on Brady. The Court ruled that “[o]ne does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Further, the test for materiality is “not whether it [is] likely that [the defendant’s] conviction would be overturned in light of newly discovered evidence.”<sup>285</sup> Brady has not generally be applied to “delayed disclosure,” but only a “complete failure to disclose.”<sup>286</sup>

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<sup>285</sup> Jamison v. Collins, 291 F.3d 380 (6<sup>th</sup> Cir. 2002).

<sup>286</sup> U.S. v. Kuehne, 547 F.3d 667 (6<sup>th</sup> Cir. 2008).

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

Smith's petition was denied.

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

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

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

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

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

**HOLDING:** No

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

Ohio claimed that the report was not material and /or not Brady evidence. The Court noted that the "law in Brady applies regardless of whether the defendant has expressly requested such evidence and encompasses both exculpatory and impeachment evidence."<sup>287</sup> However, it continued, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." The Court agreed that determining materiality was very difficult.

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<sup>287</sup> Maryland v. Brady, 373 U.S. 83 (1963).

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

The Court upheld his conviction.

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

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

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

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

**HOLDING:** No

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

Jalowiec's convictions were upheld.

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

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

He was charged in state court, that was dismissed and he was then charged in federal court. The police impounded the vehicle, which was stolen, and searched it. Evidence, including fingerprints, were taken, but the evidence technician destroyed the actual box from which she'd lifted prints. During the pendency of the case, Det. Loudon received an inquiry from the property room concerning some of the other items, listing the name of the stolen vehicle's owner but did not reference Spalding, nor did it indicate that the evidence came from the vehicle. The detective, finding no open case under the victim's name, authorized the disposal "without realizing their connection to Spalding's case." Only the fingerprint evidence remained.

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

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

**HOLDING:** No

**DISCUSSION:** The Court looked to two cases: California v. Trombetta<sup>288</sup> and Arizona v. Youngblood.<sup>289</sup> The Court agreed that "The government violates a defendant's due process rights when it does not preserve material exculpatory evidence" and that "the government violates a defendant's due process rights when it does not preserve material exculpatory evidence."

Spaulding, however, made no claim that any of the material would have been exculpatory, only "potentially useful." At best, the court said, the destruction was negligent and /or reckless. The Court agreed that he was not entitled to dismissal or even a spoliation instruction.<sup>290</sup> The Court "defined intentional destruction not as a knowing and willful removal of evidence, but as removal with the purpose of rendering it inaccessible or useless to the defendant in preparing [his] case; that is, spoiling it."

Spaulding's convictions were affirmed.

## ADA

### Everson v. Leis, 412 Fed.Appx. 771 (6<sup>th</sup> Cir. 2011)

**FACTS:** On April 19, 2003, Everson had a seizure while at a Cincinnati-area mall. Deputy Wittich (Hamilton County SO) arrived in response to the call; EMS was already on scene. Later testimony indicated that Everson was trying to swing and kick at mall security and EMS, he also kicked the deputy. He was taken to the ground while EMS tried to get a blood sugar reading. Wittich, "putting an end to this ruckus," restrained Everson and he was placed on the cot. Wittich arrested Everson and eventually charged Everson with Assault and Disorderly Conduct. The charges were dismissed when Everson provided documentation of his medical condition.

Everson subsequently sued various parties, include Wittich and Sheriff Leis, under 42 U.S.C. §1983. Everson eventually agreed to dismiss some of the claim, proceeding only with his Title II claims under the ADA. The District Court gave summary judgment to the defendants, finding that "Everson's actions were involuntary and caused by his epilepsy, but nonetheless concluded that any discrimination was unintentional and thus not actionable under the ADA." Everson appealed.

**ISSUE:** Is the arrest of a person with a medical disability a violation of the ADA?

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

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<sup>288</sup> 467 U.S. 479 (1984).

<sup>289</sup> 488 U.S. 51 (1988).

<sup>290</sup> U.S. v. Boxley, 373 F.3d 759 (6<sup>th</sup> Cir. 2004).

**DISCUSSION:** The Court noted that Wittich had testified that he asked an EMS crew member if Everson's actions were due to his medical condition, and that the EMT had stated that it was not. The Court noted that "Wittich received no training on accommodating people with epilepsy." However, the Court found no evidence that indicates that "Wittich intentionally discriminated against him based on his disability by approaching and restraining him." Everson was presenting a threat to those around him and "Wittich was justified in using reasonable force to secure the scene." The arrest was not motivated by any discrimination and in fact, there was evidence supporting Wittich's belief that his conduct was purposeful, as he "was not randomly thrashing about, but was engaging in what appeared to be targeted physical and verbal attacks."

The summary judgment was affirmed.

**Lee v. City of Columbus, 636 F.3d 245 (6<sup>th</sup> Cir. 2011)**

**FACTS:** Members of the Columbus Division of Police filed suit that "as employees, they were subject to certain impermissible city Division Directives that mandate the procedures governing their return to regular duty following sick leave, injury leave, or restricted duty." They claimed that the "the mandatory disclosure and funneling of confidential medical information through immediate supervisors" violated the Rehabilitation Act <sup>291</sup> as well as privacy considerations. The District Court awarded summary judgment and an injunction against Columbus, and the government appealed.

**ISSUE:** Is requiring a sick leave note (to an immediate supervisor) a violation of the ADA?

**HOLDING:** No

**DISCUSSION:** The Court looked to the Americans with Disabilities Act<sup>292</sup>, as well as the Rehabilitation Act, and noted that while both prohibit discrimination against the disabled, only the Rehab act "expressly prohibits discrimination *solely* on the basis of disability." To recover under the Rehab Act, "an employee must establish that: "1) he is an individual with a disability; 2) he is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and 3) he [suffered an adverse employment action] solely by reason of his handicap."<sup>293</sup> The trial court had found that the policy "was overly intrusive and improperly provided supervisors with confidential medical information even when they had no reason to possess such knowledge, particularly in light of the fact that the City had a human resources department which presumably could be used to create a "confidentiality barrier between these personnel, whose jobs consist of handling medical information, and supervisors."

The Court agreed that the "ADA's limitations on the disclosure of medical information set forth in 42 U.S.C. § 12112(d) are incorporated by reference into the Rehabilitation Act." The Court, however, found that "the requirement that an employee provide a general diagnosis – or in this case, an even less specific statement regarding the "nature" of an employee's illness" is not "tantamount to an inquiry "as to whether such employee is an individual with a disability or as to the nature or severity of the disability"

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<sup>291</sup> 29 U.S.C. § 791 *et seq.*

<sup>292</sup> 42 U.S.C. § 12111 *et seq.*; 29 U.S.C. § 794(d); *see also* Doe v. Salvation Army in the U.S., 531 F.3d 355 (6th Cir. 2008).

<sup>293</sup> Jones v. Potter, 488 F.3d 397 (6th Cir. 2007).

under § 12112(d)(4)(A).” The Court found “the analysis in the present circumstances should focus on whether a medical inquiry is intended to reveal or necessitates revealing a disability, rather than whether the inquiry may merely *tend to* reveal a disability.”

The Court determined that the policy did not trigger the protections of the Rehab Act or the ADA. The decision was overturned and the injunction vacated.

## EMPLOYMENT - FIRST AMENDMENT

### Asbury v. Teodosio, 412 Fed.Appx. 786 (6<sup>th</sup> Cir. 2011)

**FACTS:** Asbury, a detention supervisor in Summitt County, was terminated because of prohibited contacts with juveniles whom she had supervised, following their release. The trial court granted summary judgment to the employer. She appealed, arguing that a prohibition on further contact with the juveniles violated her First Amendment rights to free speech and free association.

**ISSUE:** Does a government employee have a lesser right under the First Amendment than other citizens?

**HOLDING:** Yes

**DISCUSSION:** Although the Court noted that a “government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment,”<sup>294</sup> that the government employee does have a greater ability to regulate employee speech that it does with respect to the speech of citizens in general.<sup>295</sup> The government may put limits on an employee’s speech “that would be unconstitutional if applied to the public generally.”

The Court continued:

To successfully make out a prima facie case for retaliation, “the employee must demonstrate that: (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two . . . .”<sup>296</sup> This same framework also applies to First Amendment freedom of association claims.<sup>297</sup> Demonstrating constitutionally protected speech requires the plaintiff to make two threshold showings: first, that the speech involves a matter of public concern and second, that the speech occurred outside the duties of his or her employment.<sup>298</sup> Matters of public concern relate to political, social, or other concerns of the community.<sup>299</sup> As a result they are distinguishable from internal office politics where an individual speaks as an employee about matters of only

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<sup>294</sup> City of San Diego v. Roe, 543 U.S. 77 (2004).

<sup>295</sup> Connick v. Myers, 461 U.S. 138 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

<sup>296</sup> Scarborough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) (citing Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc)).

<sup>297</sup> This same framework also applies to First Amendment freedom of association claims.

<sup>298</sup> Hughes v. Region VII Area Agency on Aging, 542 F.3d 169 (6th Cir. 2008); Miller v. City of Canton, 319 F. App’x 411 (6th Cir. 2009).

<sup>299</sup> Connick, *supra*.

personal interest.<sup>300</sup> We determine whether speech involves a matter of public concern by looking “to the content, form, and context of the statements in light of the record as a whole.”

If the Court determines the plaintiff meets the threshold showings, it then applied the “Pickering balancing test.” If the speech is private, however, and “does not touch on matters of public opinion,” it “need only satisfy rational basis review.”<sup>301</sup>

Asbury asserted that her “association and speech with released juveniles are a matter of societal concern because she encouraged and supported the juveniles in an effort to help them become and remain law-abiding and productive members of society,” but following precedent, the Court found that it was a private matter and did not “rise to the level of a matter of public concern” - taking it out of constitutional protection. The policy had a rational basis to prevent an appearance of conflict of interest and appearance of propriety. The Court refused to “constitutionalize Asbury’s self-serving criticisms” and affirmed the summary judgment in the employer’s favor.

Further, none of her statements (her “protests”) were “directed at informing the public about improper conduct at the Detention Center” but instead were always in response to disciplinary actions caused by her own misconduct.

## EMPLOYMENT

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

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

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

**ISSUE:** Are volunteers employees?

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

**DISCUSSION:** The Department argued that during the time in question, the department had no more than 4 or 5 actual paid employees along with 4 trustees during part of the time. (Federal law requires

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<sup>300</sup> Akers, 352 F.3d at 1037 (quoting Jackson v. Leighton, 168 F.3d 903 (6<sup>th</sup> Cir. 1999)).

<sup>301</sup> Waters v. Churchill, 511 U.S. 661 (1994); U.S.v. Nat’l Treasury Emps. Union, 513 U.S. 454 (1995)

15.) They argued the firefighter-members were not employees. The Court reviewed case law concerning employee status. Although some circuits had "included remuneration as a factor," that was not universal. The EEOC notes that although volunteers are not usually employees, they may become so if they receive benefits such as a pension, insurance, worker's compensation and access to professional certification. Bryson demonstrated that the firefighter-members, although volunteers, received worker's compensation, insurance, gift cards, access to the facilities of the department, training and access to an emergency fund. Some of the members, during part of the time, received a retirement payment and an hourly wage. The Court noted that "although remuneration is a factor to be considered, it must be weighed with all other incidents of the relationship." The Court agreed that the firefighter-members might be considered employees and remanded the case back for further consideration of all of the factors.

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

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

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

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

**HOLDING:** Yes

**DISCUSSION:** The Court agreed he'd made a prima facie case but that he failed to show the Sheriff's "proffered reasons were pretextual." The Court looked to the circumstantial reasons put forward by Kimble, suggesting he was "pre-rejected" for the position and that the sheriff ignored the recommendations of Kimble's supervisors and encouraged two white deputies to apply, "notwithstanding their professed inability to meet posted job requirements." The Court noted that the "more subjective" the "hiring decision," the "more closely" it would "scrutinize [the employer's] proffered rationales." The Court noted that the Human Resources Manager had assisted several white applicants who did not meet the stated requirements, but not Kimble. Finally, the Court noted that only Kimble met all the requirements and that the Sheriff offered to waive one of the requirements for the person he ultimately selected. Finally, the Court noted that the primary reason the Sheriff stated he did not select Kimble (enforcement rates) was never listed in the requirements or the description. (And, in fact, earlier promotion decisions had ignored activity levels.)

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

## FIRST AMENDMENT

### Saieg v. City of Dearborn, 641 F.3d 727 (6<sup>th</sup> Cir. 2011)

**FACTS:** Every year, a number of people attended the Arab International Festival in Dearborn, Michigan. The police department was in overall charge of the festival. Businesses in the event area were permitted, with special permits, to sell goods on the sidewalks, businesses outside the area were permitted to purchase an information table. Businesses who wished to distribute material were required to do so from a “fixed location” – rather than walking around. Anyone leafleting was subject to arrest after being warned. The intent of this policy was to keep the sidewalks clear and traffic flowing. The immediate festival area was surrounded by an outer perimeter which served to provide for crowd control and parking. The restriction on leafleting applied in that area as well. Saieg, of the Arabic Christian Perspective, planned for members of the organization to distribute leaflets and talk one on one with attendees. The Police Chief told him he could not do so and provided the organization with a table, instead, at no cost. Saig, however, believed that his evangelism would be less successful if he could not approach Muslim attendees directly.

Saieg and the organization filed suit prior to the 2009 festival, against the City and the police chief, under the First Amendment. They were unable to get an injunction, however, and distributed leaflets from a fixed location that year. The trial court ultimately held that the restriction “was a valid time, place, and manner restriction” and that Saieg had “alternative channels of communication, even though they are not his preferred channels.” The process is content neutral and “serves a substantial government interest” of maintaining foot traffic flow. Upon appeal, the Sixth Circuit permitted Saieg to distribute materials in the outer perimeter. That order was only in effect for the 2010 festival. Saieg requested a permanent injunction.

**ISSUE:** May a content-neutral regulation still be unlawful?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed whether the streets and sidewalks in the outer perimeter “were functioning as traditional public for a or limited public for a during the Festival.” The Court noted that if a particular rule is “content-neutral,” the test is intermediate scrutiny. The Court agreed that the restriction in this case was content-neutral. The Court agreed that it was appropriate for businesses to have use of the sidewalk space in front of their location.

The next test is whether the restriction serves a substantial government interest. The City argued that the restriction was to enhance traffic flow in the area and minimize disorder. However, the Court noted that other activities that were permitted on the sidewalk which eroded the government’s purported interest. The City admitted that leafleteers had never posed any problems before, and the Court noted that the tables were actually “more obstructive.” Further, the Court found “concerns about crowd control ... to be exclusively conjectural.” Finally, the Court found the restriction on leafleting in the outer perimeter to not be “narrowly tailored” to further the objective of the government. The Court noted that

"mere speculation about danger" is "not an adequate basis on which to justify a restriction of speech. At most, he might attract a few listeners on the sidewalk.

The Court concluded that the "restriction on *pedestrian* leafleting is substantially broader than necessary to further the interest in *vehicular* traffic control and parking." The Court agreed, however, that it did provide an alternative means of communication. The Court found that the methods did not provide for a substantial governmental interest and granted the permanent injunction.

## COMPUTER CRIME

### Doe v. Boland, 630 F.3d 491 (6<sup>th</sup> Cir. 2011)

**FACTS:** Boland is an Ohio attorney. As part of a project to use in testifying in two child pornography cases, Boland "downloaded innocent-looking images" of two female children. He then "digitally manipulated the pictures to make it look like the children were engaging in sexually explicit acts." During his testimony, Boland "displayed a series of 'before-and-after' images that he had digitally altered" to illustrate how it would not be possible for a person who did not actually participate in creating the images to know that the child depicted is an actual minor engaged in unlawful acts.

The prosecutor raised the idea that Boland himself "may have violated federal law by creating and possessing some of these images." The judge noted they were done at the express order of the court, but told Boland to purge the images. He did not, instead using them in two more criminal cases. In 2004, the FBI searched his home and seized files. He entered into an agreement, admitting that he violated §2252A(a)(5)(B) - possessing images that had "been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."<sup>302</sup> Following this admission, the children (through their guardians) filed suit under federal law - which permitted civil remedies to anyone aggrieved by a violation of the above statute.

The District Court dismissed the case, given that Boland had been acting as an expert witness under court order to develop the evidence. The plaintiffs appealed.

**ISSUE:** May an expert witness create pornographic images involving children has an example in court?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the federal statutes in question do not provide an exemption for expert testimony. Further, the Court noted that the Adam Walsh Child Protection and Safety Act of 2006<sup>303</sup> requires that child pornography "shall remain in the care, custody, and control of either the Government or the court" - although the defendant shall have ample opportunity to examine it. Boland argued that without an exemption for "this kind of expert testimony," a "defendant's right to put on an effective defense under the Sixth Amendment would be hindered, requiring a narrowing of the civil-remedy provisions under the constitutional avoidance doctrine." The Court noted, however, that federal law "does not allow for the creation and possession of new contraband."

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<sup>302</sup> See also 18 U.S.C. §2256(8)(C).

<sup>303</sup> Pub. L. No. 109-248, § 504 (codified at 18 U.S.C. § 3509(m)).

The Court noted that establishing the knowledge of the defendant “that he possessed child pornography because digital-imaging technology makes it difficult to know if an image represents an actual, as opposed to a virtual, child” did not authorize or require the creation of child pornography. “Once Boland modified the images of the minors, he crossed the line between possessing lawful images and violating the statute.” The court order did not expressly authorize the creation of child pornography, but only permitted the creation of images to illustrate “the ease of creating digital images that are indistinguishable from actual images ... without creating images that depict minors in sexually explicit situations.”

The Court overturned the dismissal and remanded the case for further proceedings.

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

**FACTS:** In May, 2007, Bowling took approximately 82 photos of himself with his girlfriend’s 7-year-old daughter. They depicted Bowling in sexual contact with the girl and the girl “engaged in lascivious exhibition of herself.” He contended all the photos were taken on one occasion. He admitted sexual contact with her, including oral sex. Det. Peters testified about the photos at the sentencing hearing, noting that the girl was wearing different clothing in some of the photos. He testified “that the images were stored electronically on a computer disc seized” at the house and that the “images were organized in separate folders, which indicated the photos were taken on “separate dates, ranging from May 9, 2007, to May 17, 2007.” Each individual folder of images depicted the girl in the same clothing. Photos of Bowling with a 16-year-old who also lived in the house were found in the computer files as well.

Bowling was convicted and his sentence reflected the above situation. Bowling appealed his sentence.

**ISSUE:** May time-stamped photos be used to prove a pattern of conduct?

**HOLDING:** Yes

**DISCUSSION:** Bowling argued there was insufficient proof that he “engaged in a pattern of activity” with the girl “on more than one occasion.” The Court agreed, however, that the evidence indicated that he’d been engaged in prohibited sexual contact with the girl on multiple occasions. Further, although he claimed that he downloaded the photos all at one time, the time stamps indicated the folders were created over the time range discussed.

The court upheld the penalty enhancement based upon the multiple contacts.

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

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

before the allegations came up, “which means that the hard drive had been wiped.” The half-brother also accused Sanchez of sexual assault.

Sanchez was charged and convicted under federal law.<sup>304</sup> He then appealed.

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

**HOLDING:** No

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

Sanchez’s conviction was affirmed.

## COMPUTER CRIME – WARRANT

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

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

Kniss asked for consent to search and was denied. He then produced the search warrant. He told Gillman he could leave (having told him earlier he would not be arrested that day) but Gillman remained and continued to talk to Kniss. Marijuana was found during the search; Gillman was immediately arrested and given his Miranda warnings. A number of incriminating items were found and Gillman was charged under federal law.<sup>305</sup> He moved for suppression and was denied. He took a conditional guilty plea and appealed.

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

**HOLDING:** Yes

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<sup>304</sup> 18 USC §2251.

<sup>305</sup> 18 USC §2252.

**DISCUSSION:** Gillman argued that “the IP address was not itself a sufficient nexus between the sharing of child pornography and his residence because it was possible he used a wireless internet router – something that would have allowed anyone nearby to access the internet and share child pornography through his IP address.” The Court, however, noted that all that was needed was probable cause. The Court looked to U.S. v. Hinojosa,<sup>306</sup> which held that a specific IP address, registered to a specific residence, along with proof that the defendant lived at that address, was sufficient for a search warrant.<sup>307</sup>

Gillman also argued that the information was stale, in that 5 months elapsed between the time they observed the transaction and the time they sought the warrant. The Court noted that “stale information cannot be used in a probable cause determination.”<sup>308</sup> Staleness depend in large part “on the inherent nature of the crime.” The Court agreed that child pornography “is not a fleeting crime” and is carried out, as a rule, “in the secrecy of the home and over a large period.” In addition, it can have an “infinite life span” because the material “can be easily duplicated and kept indefinitely even if they are sold or traded.” It can be discovered on a hard drive even after being deleted. As such, the Court agreed that the information was not stale despite the long time period.

In addition, Gillman’s incriminating statements were given prior to being taken in custody for the marijuana. In general, an “in-home encounter between police and a citizen” is considered “non-custodial.”<sup>309</sup> The court upheld the admission of his statements.

## CHILD PORNOGRAPHY

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

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

Daniels was convicted and appealed.

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

**HOLDING:** No

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

- 1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area;

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<sup>306</sup> 606 F.3d 875 (6<sup>th</sup> Cir. 2010).

<sup>307</sup> See also U.S. v. Lapsins, 579 F.3d 758 (6<sup>th</sup> Cir. 2009); U.S. v. Wagers, 452 F.3d 534 (6<sup>th</sup> Cir. 2006).

<sup>308</sup> U.S. v. Frechette, 583 F.3d 374 (6<sup>th</sup> Cir. 2009).

<sup>309</sup> U.S. v. Panak, 552 F.3d 462 (6<sup>th</sup> Cir. 2009).

- 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.<sup>310</sup>

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

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

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

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

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

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

**HOLDING:** Yes

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

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<sup>310</sup> U.S. v. Brown, 579 F.3d 672 (6th Cir. 2009).

Bowling's sentence was affirmed.

## UNITED STATES SUPREME COURT OPINIONS 2011-2012 TERM

**Bobby (Warden) v. Dixon, 128 S.Ct. 26 (2011)**  
**Decided November 7, 2011**

**FACTS:** Dixon and Hoffner murdered Hammer, in Ohio, “in order to steal his car.” They two men “beat Hammer, tied him up, and buried him alive, pushing the struggling Hammer down into his grave while they shoveled dirt on top of him.” They used his identification to obtain an ID card in Hammer’s name and used that identification to sell the stolen vehicle for cash. During that same time frame, Hammer was reported missing. Dixon became a target of the subsequent investigation. On November 4, 1993, “a police detective spoke with Dixon at a local police station.” It was a chance encounter but the detective gave Dixon Miranda warnings and “then asked to talk to him about Hammer’s disappearance.” Dixon refused to answer without his lawyer. (He was not in custody at the time, but simply visiting the station for another purpose.)

Upon further investigation, it was determined the Dixon had sold the car using forged paperwork. He was arrested for forgery on November 9. He was interrogated, intermittently, over several hours, for a total of about 45 minutes but he was not given Miranda during this time. Dixon admitted to selling the car and signing Hammer’s name but stated that Hammer had given him permission to do so. He claimed not to know Hammer’s whereabouts, stating that he “thought Hammer might have left for Tennessee” The officers told him that Hoffner “was providing them more useful information” and that the first one of the pair to cut a deal would be the only one to get a deal. Dixon continued to deny knowing anything about the disappearance and was booked for forgery.

That same afternoon, Hoffner led the police to Hammer’s grave. He claimed that Dixon “had told him that Hammer was buried there.” Dixon was brought back to the police station and he asked if it was correct that the police had found Hammer’s body and that Hoffner was in custody. They agreed that they had found the body but denied that Hoffner was in custody. Dixon stated that he had spoken to his attorney and that he wanted to talk to them about what had happened. He was given Miranda again and gave a detailed confession, but tried to pin the “lion’s share of the blame on Hoffner.”

Both confessions were excluded at his state trial for murder. The prosecution did not dispute that the initial confession should have been excluded but argued that the second “was admissible because Dixon had received Miranda warnings prior to that confession.” The Ohio Court of Appeals agreed and allowed the second to be admitted, whereupon Dixon was convicted of murder, kidnapping, robbery and forgery. He was sentenced to death. The Ohio Supreme Court affirmed the convictions. Dixon filed for habeas corpus in the U.S. District Court and was denied.

However, the Sixth Circuit Court of Appeals reversed that denial, noting, however, that it had authority to do so if the Ohio Courts was either contrary to the law or “involved an unreasonable application no clearly established Federal law.” The Sixth Circuit identified three errors that it believed occurred in the trial. First, the Court said it was clearly established that “police could not speak to Dixon on November 9, because he had invoked his right to counsel on November 4.” Next, the Sixth Circuit held that his rights were violated by the police urging him to make a deal (and confess) before Hoffner did so. Finally, the Court held that the later confession was technically in violation of Miranda and that under Elstad, was inadmissible because it was “the product of a ‘deliberate question-first, warn-later strategy.’”<sup>311</sup> Ohio appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May a subject invoke the right to counsel before being taken into custody?

**HOLDING:** No

**DISCUSSION:** With respect to the first alleged error in the trial, the Supreme Court noted that it was “undisputed that Dixon was not in custody during his chance encounter with police on November 4.” The Court noted that it had never held before that a person can invoke “Miranda rights anticipatorily in a context other than ‘custodial interrogation.’”<sup>312</sup> He was certainly not in custody when he gave that initial confession. With respect to the second alleged error, the Court noted no court had held that “this common police tactic is unconstitutional” or to hold that a “defendant who confesses after being falsely told that his codefendant has turned State’s evidence does so involuntarily.”

With respect to the third alleged error, the Court found that unlike in Seibert, “there is no concern here that police gave Dixon Miranda warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat.” In fact, his later confession actually *contradicted* his prior unwarned statements” in which he claimed no knowledge of what had happened to Hammer. Dixon declared that he wanted to talk to the police before the interrogation session even began. The Court found no nexus between the previous unwarned admission and his “later, warned confession to murder.” In addition, a significant break in time (over four hours) had occurred and he had been taken to another location as well.

The Court ruled that because the Ohio court’s reasoned judgment was in accord with precedent, the judgment of the Sixth Circuit was reversed and the case remanded.

**Full Text of Opinion:** <http://www.supremecourt.gov/opinions/11pdf/10-1540.pdf>.

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<sup>311</sup> Oregon v. Elstad, 470 U.S. 298 (1985); Missouri v. Seibert, 542 U.S. 600 (2004).

<sup>312</sup> McNeil v. Wisconsin, 501 U.S. 171 (1991); Montejo v. Louisiana, 556 U.S. 778 (2009).

**Greene v. Fisher, 132 S.Ct. 573 (2011)**  
**Decided November 8, 2011**

**FACTS:** On December, 1993, Greene and four other men robbed a North Philadelphia (PA) grocery store. One of the men shot and killed the store owner. All five were arrested and two confessed, implicating the other three as well. Greene did not confess. At trial, Greene argued for severance of the trials, asserting that “the confessions of his nontestifying codefendants should not be introduced at his trial.” The trial court agreed to require that the confessions be redacted to remove names but did not sever the trials.

Greene was convicted of second-degree murder, robbery and conspiracy. He appealed, arguing that Bruton<sup>313</sup> required that his trial be severed. The conviction was upheld, with the Pennsylvania Superior Court holding that the redaction of the names from the confessions cured any error. Greene appealed to the Pennsylvania Supreme Court. During the pendency of that appeal, however, the Court had ruled in Gray v. Maryland,<sup>314</sup> which “considered as a class, redactions that replace a proper name with an obvious blank ... notify the jury that a name has been deleted [and] are similar enough to Bruton’s unredacted confessions as to warrant the same legal results.” The Pennsylvania Supreme Court granted the petition for appeal but later dismissed the action for procedural reasons.

Greene filed for federal habeas corpus, which the U.S. District Court denied. The Third Circuit Court of Appeals affirmed the conviction, holding that when an issue becomes “clearly established” is at the time the state court case is adjudicated on its merits. Greene petitioned for certiorari to the U.S. Supreme Court and was granted review.

**ISSUE:** For purposes of adjudicating a state prisoner’s petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d).

**HOLDING:** When the last state-court decision on the merits (the facts) is decided.

**DISCUSSION:** The Court ruled that appeals of this nature fall under 28 U.S.C. §2254(d)(1). In such cases, the federal courts must “focus on what a state court knew and did” and whether they applied precedent as of the time the state court rendered the decision. The Court agreed that its decision does not contradict its ruling in Teague v. Lane, which ruled that under Teague, a state-court decision would merit adjudication when a decision becomes “contrary to, or an unreasonable application of, clearly established Federal law, before the conviction became final.”<sup>315</sup>

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<sup>313</sup> Bruton v. U.S., 391 U.S. 123 (1968).

<sup>314</sup> 523 U.S. 185 (1998).

<sup>315</sup> 489 U.S. 288 (1989).

The Court agreed that the “last state-court adjudication on the merits of Greene’s Confrontation Clause claim occurred on direct appeal to the Pennsylvania Superior Court.” The decision by that court predated Gray by three months. As such, his writ of habeas corpus was prohibited under the statute. (The Court noted that he was in an unusual predicament “of his own creation.” He did not file an petition in a timely manner that would have allowed him to proceed under Gray or assert it as a petition for state postconviction relief.”)

The Court affirmed Greene’s conviction.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-637.pdf>.

**Smith v. Cain (Warden), 132 S.Ct. 975 (2012)**  
**Decided January 10, 2012**

**FACTS:** Smith was charged with the murder of five people during an armed robbery at a residence. A single witness, Boatner, “linked Smith to the crime.” Boatner was at the scene when Smith and two others entered, demanded money and drugs and started shooting. Boatner identified Smith as the first person through the door, and claimed “he had been face to face with Smith during the initial moments of the robbery.” No other witnesses or evidence implicated Smith. Smith was convicted and appealed. During his appeal efforts, he “obtained files from the police investigation of the case.” The lead investigator’s notes indicated that Boatner had made conflicting statements when he identified Smith as the one of the robbers in that he could not supply any description on the night of the crime other than they were black males. Five days later, Boatner claimed he could not make an ID because he had not seen any faces. The investigator’s formal report stated that Boatner had said he could not identify the perpetrators.

Smith argued for his conviction to be vacated because the failure to disclose the notes violated Brady.<sup>316</sup> The trial court denied his motion and the Louisiana appellate courts agreed. Smith requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** If there is a reasonable probability that undisclosed material would have affected the outcome of a trial, must the conviction be reversed under Brady?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the prosecution agreed that it withheld information that was favorable to Smith. The Court noted the sole question to be “whether Boatner’s statements were material to the determination of Smith’s guilt.” Materiality, under Brady, is “when there is a reasonable probability that, had the

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<sup>316</sup> Brady v. Maryland, 373 U.S. 83 (1963).

evidence been disclosed, the result of the proceeding would have been different.”<sup>317</sup> The Court noted that it would only need to be enough to undermine the confidence in the result of the trial.<sup>318</sup> In previous cases, the Court had “observed that evidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict.”<sup>319</sup> In this case, however, “Boatner’s testimony was the *only* evidence linking Smith to the crime.” His “undisclosed statements directly contradict his testimony” and were “plainly material” in the ultimate conviction.

The Court agreed that a jury might have discounted his undisclosed statements, recognizing his inability to identify a suspect as a fear of retaliation, for example. However, the “police files that Smith obtained” ... “contain other evidence that Smith contends is both favorable to him and material to the verdict.” The Court held that Boatner’s undisclosed statement alone was sufficient to undermine the trial and elected not to review the additional material.

The U.S. Supreme Court overturned the verdict in the Orleans Parish Criminal District Court and remanded the case for further proceedings.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8145.pdf>.

**Perry v. New Hampshire 132 S.Ct. 716 (2012)**  
**Decided January 11, 2012**

**FACTS:** On August 15, 2008, at about 3 a.m., Ullon called the Nashua (NH) police to report an African-American male trying to break into cars in the apartment parking lot. When Officer Clay arrived, she found Perry near a car with a broken-out back window, holding two amplifiers. A metal bat lay on the ground. He stated he’d found the items on the ground. Ullon’s wife, Blandon, had awakened a neighbor, Clavijo, to tell him she’d just seen someone break into his car. (She’d apparently been watching while her husband called the police.) While another officer was detaining Perry in the parking lot, Officer Clay met with Clavijo and then went to talk to Blandon. She explained she’d watched a man break into the car and when “asked for a more specific description,” pointed out her window to Perry and identified him as the thief. However, a month later, she was unable to pick Perry out of a photo array.

Perry was charged with theft and criminal mischief. He moved for suppression of the initial identification, which was a showup. The trial court denied the motion, finding that she pointed to Perry “spontaneously” and not as the result of an “unnecessarily suggestive procedure” of the officers at the scene. Both Blandon and Clay testified about the identification.

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<sup>317</sup> Cone v. Bell, 556 U.S. 449 (2009).

<sup>318</sup> See Kyles v. Whitley, 514 U.S. 419 (1995).

<sup>319</sup> U.S. v. Agurs, 427 U.S. 97 (1976).

Perry was convicted and appealed, with Perry arguing that the trial court was incorrect in “requiring an initial showing that the police arranged the suggestive identification procedure.” The appellate court affirmed his conviction. Perry requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a preliminary judicial review necessary in contested eyewitness testimony?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the history of its cases “involved police-arranged identification procedures.” The Court synthesized the prior cases into Neil v. Biggers<sup>320</sup> and Manson v. Brathwaite<sup>321</sup> which are “used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized that “due process concerns arise only when law enforcement officers use an identification process that is both suggestive and unnecessary.” However, even when that does occur, suppression is not the “inevitable consequence.” As such, on a case-by-case basis, it was necessary to determine “whether improper police conduct created a ‘substantial likelihood of misidentification.’” If the identification is reliable, it will still be admissible.

In this case, the Court agreed that the “police engaged in no improper conduct.” Perry’s proposed rule “would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications.” Certainly, the Court noted, “external suggestion” was not the only factor that “cast[] doubt on the trustworthiness of an eyewitness’ testimony” and further, almost all identifications carry at element of suggestiveness.

The Court concluded that the “fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” The Court noted that it is the responsibility of the jury, not the judge, traditionally, to make determinations on the reliability of evidence. Further, there are “other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.” These include the “right to confront the eyewitness” and the right to an attorney “who can expose the flaws in the eyewitness’s testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony.” And, in fact, these safeguards were “at work at Perry’s trial” and the attorney constantly exploited the weaknesses in Blandon’s identification.

The Court held that the “Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was

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<sup>320</sup> 409 U.S. 188 (1972).

<sup>321</sup> 432 U.S. 98 (1977).

not procured under unnecessarily suggestive circumstances arranged by law enforcement.” Perry’s conviction was affirmed.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8974.pdf>.

**U.S. v. Jones, 132 S.Ct. 945 (2012)**  
**Decided January 23, 2012**

**FACTS:** In 2004, Jones, a nightclub owner, became a suspect in a trafficking case. As part of the information gathered from other sources, the Government got a warrant for the use of an electronic tracking device on his vehicle. The Court issued a warrant and the device was to be installed within 10 days and within the District of Columbia. The device was installed on the 11<sup>th</sup> day, however, and while the vehicle was in a public parking lot in Maryland. They tracked him for 28 days, and in fact, had to replace the battery at one point, again, while it was in a public lot. They collected for than 2,000 pages of data over the four weeks.

Jones was indicted on a variety of drug trafficking charges. He moved to suppress the evidence gained through the device, and the court agreed to suppressed the data while the vehicle was parked in his own garage. It concluded the remaining data could be admitted, because “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>322</sup> The jury hung in his first trial, and he was retried. He was convicted. Jones appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which reversed his conviction because of the admission of the GPS evidence. The Government appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** Is attaching a tracking device physically to a vehicle a trespass that required a warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search.” The Court emphasized that the officers “physically occupied private property for the purpose of obtaining information.” The Court noted that in *Knotts*, the tracking device was on a container before it came into *Knotts*’ possession, and was placed there with the consent of the owner at the time. In the “second ‘beeper’ case,” *U.S. v. Karo*<sup>323</sup> the circumstances were much the same – the device was placed on item before it came into the possession of the suspect.

In this case, however, Jones “possessed the Jeep at the time the Government trespassorily inserted the information-gathering device,” which placed it “on much

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<sup>322</sup> *U.S. v. Knotts*, 460 U.S. 276 (1983).

<sup>323</sup> 468 U.S. 705 (1984).

different footing.” The officers did more than just observe the vehicle, the “encroached on a protected area.”

The Court noted that “situations involving merely the transmission of electronic signals without trespass,” however, would remain subject to the analysis in Katz.<sup>324</sup> The Court found it unnecessary to consider whether Jones had a reasonable expectation of privacy, as discussed in Katz, because the officers clearly invaded his vehicle for the purpose of attaching the device.

The Court upheld the reversal of Jones’s conviction.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>.

**Ryburn v. Huff, 132 S.Ct. 987 (2012)**  
**Decided January 23, 2012**

**FACTS:** Officers Ryburn and Zepeda (Burbank PD) were called to a local high school because a student, Huff, was “rumored to have written a letter threatening to ‘shoot up’ the school. During their investigation, they learned Huff had been absent for two days and was frequently bullied. One of his classmates “believed that [Huff] was capable of carrying out the alleged threat.” Because they had received training on the subject, the officers recognized “these characteristics are common among perpetrators of school shootings.” They proceeded to his home to question him, but received no answer to their knocks or their call to the home phone. However, when they called Huff’s mother on her cell phone, she answered and said she was actually at home and that Huff was with her.

Mrs. Huff refused to come outside and speak with the officers, and hung up on him. A few minutes later, though, both came out of the house and stood on the steps. “Officer Zepeda advised [Huff] that he and the other officers were there to discuss the threats.” Mrs. Huff refused to allow them into the house to discuss the matter and Sgt. Ryburn, who was also present, found it “‘extremely unusual’ for a parent to decline an officer’s request to interview a juvenile inside” and that she herself never asked why the officers were there.

Sgt. Ryburn asked about guns in the house and Mrs. Huff immediately turned and ran back inside. Sgt. Ryburn, concerned went in behind her. Huff followed the officer and was, in turn, followed by Officer Zepeda, who did not want Sgt. Ryburn inside alone. The remaining two officers, who had been out of earshot also entered, believing that they had been given consent by Mrs. Huff to enter.

They all remained inside for some 5-10 minutes, until Mr. Huff emerged and challenged their right to be there. The officers “ultimately concluded that the rumor about [Huff] was false. They did not search anyone or any place while inside the house.

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<sup>324</sup> Katz v. U.S., 389 U.S. 347 (1967).

The Huffs brought suit under 42 U.S.C. §1983, claiming that their Fourth Amendment rights were violated by the officers' entry. The District Court found in favor of the officers at a bench trial, concluding that the officers were entitled to qualified immunity "because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led" the officers to believe there were weapons inside the house. The Court noted that in such a "rapidly evolving incident," the "courts should be especially reluctant ' to fault the police for not obtaining a warrant."

The Ninth Circuit, on appeal, upheld qualified immunity for the last two officers who entered, but reversed it as to the remaining officers. The Court of Appeals found no reason to believe the officers (or others inside the home) were in any danger, finding instead Mrs. Huff had "merely asserted her right to end her conversation with the officers and returned to her home."

The Government appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May officer enter a home without a warrant if they reasonable believe that is necessarily to prevent harm to themselves or others?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed with the lone dissenting judge in the Ninth Circuit. That judge noted that "the discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house." She "faulted the majority for "recit[ing] a sanitized account of this event,' that differed markedly from the District Court's findings of fact." Instead, she looked to "cases that specifically address the scenario where officer safety concerns prompted the entry" and concluded that the officers "could have reasonably believed that [they were] justified in making a warrantless entry to ensure that no one inside" would post a risk to them.

The Court agreed that "no decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." The Court found that "on the contrary, some of our opinions may be read as pointing in the opposition direction."

The Court looked primarily to Brigham City v. Stuart<sup>325</sup> which found that "officers may enter a residence without a warrant when they have 'an objectively reasonable basis for believing that an occupant is ... imminently threatened with [serious injury].'" The need to preserve and protect life "is justification for what would be otherwise illegal absent an exigency or emergency."

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<sup>325</sup> 547 U.S. 398 (2006).

The Court noted that the Ninth Circuit majority - “far removed from the scene and with the opportunity to dissect the elements of the situation – confidently concluded that the officers really had no reason to fear for their safety or that of anyone else.” They ignored the fact that the Huffs did not respond to the officers knocking on the door and did not answer their home telephone, that Mrs. Huff hung up on the officers and that she ran back into the house when asked about guns. The Court noted that the Ninth Circuit apparently believed “that conduct cannot be regarded as a matter of concern so long as it is lawful.” Their “method of analyzing the string of events ... was entirely unreasonable.” The Court noted that “It is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture.”

The Court agreed that “reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” and that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving.”<sup>326</sup>

The Court summed up the case, stating “reasonable police officers in [this] position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent” and that the facts as described in this case, could have given the officers that reasonable belief.

The Court reversed the decision with respect to the officers remaining in the case and remanded the case for judgment in their favor.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-208.pdf>.

**Reynolds v. U.S., 132 S.Ct. 975 (2012)**  
**Decided January 23, 2012**

**FACTS:** Reynolds was convicted of a sex offense in Missouri in October, 2001. He was released from prison in July, 2005 and registered, as required, as a sex offender in Missouri. In September, 2007, he moved to Pennsylvania, but did not update his Missouri registration and did not register in Pennsylvania. He was indicted under federal law for failing to register as required by the federal Sex Offender Registration and Notification Act (SORNA)<sup>327</sup> which became law in July, 2006.

Reynolds argued that in the fall of 2007, the Act “had not yet become applicable to pre-Act offenders” despite the fact the Attorney General had enacted an interim rule that specified that was the case.

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<sup>326</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>327</sup> 18 U.S.C. §2250(a).

The District Court rejected Reynolds' claim, as did the Third Circuit Court of Appeals. However, the Third Circuit's ruling reflected its belief that he was obligated to follow the registration requirements even absent any specific rulemaking on the matter.

Because the Circuit Courts of Appeal had reached various conclusions on that issue, the U.S. Supreme Court accepted certiorari with respect to Reynolds' case.

**ISSUE:** Did federal SORNA's registration requirements immediately apply to pre-SORNA offenders?

**HOLDING:** No

**DISCUSSION:** The Court looked to the "natural reading of the textual language" of the Act. The Act specified that the Attorney General was delegated the authority to "specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment" of the law. The Court noted that Congress likely recognized the practical issues inherent in requiring pre-Act offenders to register, as it would prove expensive and possibly not yet immediately feasible. The Act gave the States three years to "bring their systems into compliance" and even allowed the Attorney General to extend that grace period to five years. The Court noted that the language of the statute contained "potential lacunae"<sup>328</sup> and that it failed to answer important questions about how the Act should be applied against pre-Act offenders, who could "on their own, reach different conclusions about whether, or how, the new registration requirements applied to them."

The Court agreed that its reading of the Act "involves implementation delay." The Court agreed that the Act's registration requirements did "not apply to pre-Act offenders until the Attorney General so specifies." The Court did not rule, however, on whether the Interim Rule was a valid specification of that fact, because that was not yet argued. The Court reversed the Third Circuit's decision and remanded the case for further proceedings.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-6549.pdf>.

**Howes (Warden) v. Fields, 132 S.Ct. 1181 (2012)**  
**Decided February 21, 2012**

**FACTS:** While incarcerated for an unrelated crime, Fields was taken to a conference room in the prison to be interrogated for a child sexual offense. He was taken there in the early evening and interrogated for some 5-7 hours. He was told initially, and during the questioning, that he was "free to leave and return to his cell." During the questioning, Fields was free of any restraints but the two deputies doing the questioning were armed. The door to the room was open during part of the time as well.

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<sup>328</sup> Gaps.

About halfway through the questioning, he was “confronted with the allegations of abuse” and “he became agitated and began to yell.” He was told that if he did not want to cooperate he could leave. Eventually, he confessed. He later claimed that he said “several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell prior to the end of the interview.” At that time, he had to wait until a corrections officer returned to escort him, and was returned to his cell far later than his “normal bedtime.” He was never given Miranda warning or otherwise told he did not have to speak to the deputies.

Fields was charged with criminal sexual conduct. He moved for suppression and was denied by the trial court. He was convicted and took appeals through the Michigan appellate system. The Michigan Court of Appeals ruled he was not in custody during the interrogation and the Michigan Supreme Court declined to review the case. Fields took a habeas corpus petition in the U.S. District Court federal court and it was granted. Upon appeal, the Sixth Circuit held that the interview was a “custodial interrogation and that Miranda<sup>329</sup> is required when a prisoner is brought from general population to talk to a law enforcement officer about any criminal conduct.” The Sixth Circuit “reasoned” that the right was clearly established by Mathis v. U.S.<sup>330</sup>

Michigan requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is being questioned while incarcerated for an unrelated crime automatically custodial for Miranda purposes?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the meaning of the word “custody” and defined it as “term of art that specifies circumstances that are thought generally to present a serious danger of coercion.” Relevant factors include the “location of the questioning,”<sup>331</sup> “statements made during the interview,”<sup>332</sup> “the presence or absence of physical restraints,”<sup>333</sup> “and the release of the interviewee at the end.”<sup>334</sup> The Court stated that “not all restraints on freedom of movement amount to” Miranda custody. Looking to Maryland v. Shatzer,<sup>335</sup> the Court noted that a “break in custody may occur while a prisoner is serving a term in prison,” and as such, it follows “that imprisonment alone” is not enough to create Miranda custody.

The Court continued:

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<sup>329</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>330</sup> 391 U.S. 1 (1968).

<sup>331</sup> Maryland v. Shatzer, --- U.S. --- (2010).

<sup>332</sup> Berkemer v. McCarty, 468 U.S. 420 (1984).

<sup>333</sup> New York v. Quarles, 467 U.S. 649 (1984).

<sup>334</sup> California v. Beheler, 463 U.S. 1121 (1983).

<sup>335</sup> Shatzer, supra.

There are at least three strong grounds for this conclusion. First, questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.

...

Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for a prompt release.

...

Third, a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.

The Court concluded:

In short, standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation. The Court noted “when a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation,” including “the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.”

In Fields’ case, although the questioning was lengthy and he did not consent to it, he was told repeatedly he could be returned to his cell if he so desired. He was not restrained and was questioned in comfortable surroundings. Even though he could not leave on his own, that would have been no different had he been taken to the room for other reasons.

The Court concluded that “taking into account all of the circumstances of the questioning – including especially the undisputed fact that [Fields] was told that he was free to end the questioning and return to his cell – we hold that [Fields] was not in custody within the meaning of Miranda.”

The U.S. Supreme Court reversed the decision of the Sixth Circuit.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-680.pdf>.

**Wetzel v. Lambert, 132 S.Ct. 1195 (2012)**  
**Decided February 21, 2012**

**FACTS:** During Lambert’s trial for robbery-murder in Philadelphia in 1984, one of the prosecution witnesses, Jackson, admitted to being involved, and named Reese and Lambert as accomplices. 20 years later, Lambert requested postconviction

relief, arguing that the prosecution had “failed to disclose ... a ‘police activity sheet’ in violation of Brady v. Maryland.<sup>336</sup> The document “noted that a photo display containing a picture of an individual named Lawrence Woodlock was shown to two witnesses” in the robbery and that they made an ID. Further, the document noted that Woodlock had been implicated by Jackson as being involved with him in multiple armed robberies, but did not specify the robbery in question in this case. The document “bore the names of the law enforcement officers involved in the investigation of the ... robbery” and the “names of the robbery’s murder victims, as well as the police case numbers for those murders.” There was no indication, however, that Woodlock was every investigated.

Lambert argued that the activity sheet was exculpatory, because it suggested another robber was involved and that he could have used it to impeach Jackson. The Commonwealth, on the other hand, stated that it was “nothing more than an ‘ambiguously worded notation.’” In addition, since Jackson was already “extensively impeached” at the trial, it “would not have discredited Jackson any further.”

The Pennsylvania Supreme Court agreed and rejected the claim, holding the document was not material. Lambert filed for review in the U.S. District Court, which denied the writ of habeas corpus. Lambert appealed and the Third Circuit Court of Appeals reversed and granted the writ, ordering that Lambert be released unless retried within 120 days. Pennsylvania requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Must evidence that is not clearly material be revealed under Brady?

**HOLDING:** No

**DISCUSSION:** The Court noted that the Third Circuit “overlooked the [state court’s decision] that the notations were ... ‘not exculpatory or impeaching’ but instead ‘entirely ambiguous.’” The Third Circuit had “focused solely on the alternative ground that any impeachment value that might have been obtained from the notations would have been cumulative.”

The Court agreed that it was incorrect for the Court of Appeals not to consider the trial court’s ruling about the document. The Court agreed that ruling could be reasonable, but did not find it necessary to agree or disagree with it. Instead, the Court noted that “any retrial here would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution.” The Court held that it was not appropriate to reverse the conviction unless the “state court decision is examined and found to be unreasonable” under federal law.<sup>337</sup> The decision of the Third Circuit Court of Appeals was vacated and the case remanded.

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<sup>336</sup> 373 U.S. 83 (1963).

<sup>337</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-38.pdf>.

**Messerschmidt v. Millender, 132 S.Ct. 1235 (2012)**  
**Decided February 22, 2012**

**FACTS:** Kelly decided to break out of her relationship with Bowen. She moved out of her apartment, to which Bowen had a key, because she feared an attack – he had assaulted her before and had been convicted of “multiple violent felonies.” She requested assistance from the LA County Sheriff’s Department to gather her belongings. They arrived, but “were called away to respond to an emergency before the move was complete.” “As soon as the officers left, an enraged Bowen appeared at the bottom of the stairs to the apartment.” He screamed at her for calling them, grabbed her and tried to throw her over the railing. He then tried to drag her inside the apartment by her hair but she got away and ran to her car. He grabbed a sawed off shotgun and ran to the front of her car, threatening to kill her if she tried to leave. She sped away and he fired 5 times, blowing out one of the tires. She was, however, able to escape. She immediately went to law enforcement and told them what happened, identified Bowen as a member of a local gang and provided photos.

Detective Messerschmidt was assigned to the case. Kelly gave him details about Bowen and told him that she believed he was staying at his foster mother’s home. Messerschmidt did a background check and confirmed that he was an active gang member with a long criminal background, encompassing 17 pages. He prepared warrants for Bowen’s arrest and for a search of the home where he was believed to be living. The warrant sought firearms and evidence of gang membership (in a detailed list). The supporting affidavits (one detailing Messerschmidt’s training and experience and the other focused on the crimes against Kelly) requested “night service” for safety’s sake.<sup>338</sup> Ultimately, a magistrate approved the warrants, which were served two days later for a team. There, they found Millender, a woman in her 70s, and her daughter and grandson. They went outside initially but were then allowed to wait in the living room. Bowen was not found in the residence, but a shotgun (which belonged to Millender), ammunition and a piece of mail addressed to Bowen were seized. Bowen was found and arrested two weeks later in a motel.

The Millenders filed suit under 42 U.S.C. §1983, against Messerschmidt and others, arguing that the search warrant was invalid. The District Court found the warrant deficient in two respects, holding that the authorization to search for firearms was improperly broad because the crime was committed with a weapon that could be specifically described which negated the need to “search for all firearms.” Further, the search for gang-related information was irrelevant as there “was no evidence that the crime at issue was gang-related.” The District Court granted summary judgment to the Millenders and rejected the officers’ claim for qualified immunity. Messerschmidt and Lawrence (another deputy) appealed and the Ninth Circuit Court of Appeals panel found in their favor, granting them qualified immunity because they were operating under a judicially authorized warrant. The full Ninth Circuit, however,

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<sup>338</sup> These dual affidavits appear to be a California-specific process.

on rehearing, affirmed the denial of qualified immunity, agreeing that the warrant was overbroad by failing to establish probable cause that the broad categories of evidence were contraband or evidence. The deputies had probable cause to search for a single, identifiable weapon only and a reasonable deputy would have realized that the warrant was too broad.

The deputies requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** If a signed warrant is not obviously defective, may an officer rely upon it?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the validity of the actual warrant was not at issue, but whether Messerschmidt and Lawrence were entitled to qualified immunity, “even assuming that the warrant should not have been served.” The Court reviewed the precepts of qualified immunity and noted that “the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in ‘objective good faith.’”<sup>339</sup> However, that fact does not end the “inquiry into objective reasonableness” and that an exception exists when “it is obvious that no reasonably competent officer would have concluded that a warrant should issue.”<sup>340</sup> The “shield of immunity” is lost when the warrant is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”<sup>341</sup> But that “threshold is a high one, and it should be.”

The Court agreed that the specific facts suggested that it was likely that Bowen owned additional firearms and that seizing all of them was “necessary to prevent further assaults on Kelly.” California law specifically permitted a court to order the seizure of items that a person intends to use to commit an offense. Further, the Court agreed it was reasonable for an officer to believe that there was probable cause to search for all firearms and related items. With respect to the authorization to search for gang-related material, the Millenders argued that the case was clearly a domestic assault and not connected to his gang membership. However, the Court noted that the “effort to characterize the case solely as a domestic dispute ... is misleading.” The Court noted that Bowen’s motives in attempting to kill Kelly might be related to “his desire to prevent her from disclosing details of his gang activity to the police.” (And in fact, she had given information already.) As such, the Court agreed an officer might reasonably believe that evidence of his gang affiliation might facilitate his prosecution by proving motivation and could also add related charges under state law. (It would also tie him to the residence that was searched.) In any event, it would not be unreasonable for an officer to believe that searching for such items was proper.

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<sup>339</sup> U.S. v. Leon, 468 U.S. 897 (1984).

<sup>340</sup> Malley v. Briggs, 475 U.S. 335 (1986).

<sup>341</sup> Leon, *supra*.

Messerschmidt's warrant was detailed and "truthfully laid out the pertinent facts." The only facts that were not included (Bowen's record) would have only made it stronger. Lawrence, a district attorney and a judge, all approved the warrant without any obvious concerns. Although the Ninth Circuit did not factor this into their decision, the Court noted that such intermediate review of the warrant was very important. The Court concluded that "any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant." A "simple glance" would not have revealed any error.

The U.S. Supreme Court reversed the decision of the Ninth Circuit and ordered that the denial of qualified immunity be reversed.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-704.pdf>.

**Rehberg v. Paulk, 132 S.Ct. 1497 (2012)**  
**Decided April 2, 2012**

**FACTS:** Rehberg, a CPA, was investigated by Paulk, an investigator for a Georgia district attorney, for his alleged sending of several anonymous faxes, including one to a hospital. The investigation was launched, apparently, "as a favor to the hospital's leadership." Paulk testified before the grand jury, and Rehberg was ultimately indicted on several felony charges, including an alleged assault on a hospital physician and the burglary of his home. The charges were soon dismissed. A few months later, Paulk returned to the grand jury, and again Rehberg was indicted. But, once again, the indictment was dismissed. While the second indictment was pending, Paulk obtained yet a third indictment, which was also dismissed in due course.

Rehberg filed suit against Paulk under 42 U.S.C. §1983, alleging that Paulk had presented false testimony to the grand jury. Paulk argued he was entitled to absolute immunity for his testimony. The District Court denied Paulk's motion to dismiss the case, but ultimately, the Eleventh Circuit Court of Appeals reversed, finding that Paulk was entitled to absolute immunity.

Rehberg requested review and the U.S. Supreme Court granted certiorari.

**ISSUE:** Is a grand jury witness entitled to absolute immunity for their testimony in that proceeding?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the history of the government “functions that merit the protection of absolute immunity.” In Imbler v. Pachtman<sup>342</sup>, the Court agreed that public prosecutors were entitled to broad and absolute immunity for their actions as prosecutors. Further, under common law, “trial witnesses enjoyed a limited form of absolute immunity for statements made in the course of a judicial proceeding. They could not be sued for defamation, even if the statements were maliciously false, although they could, however, certainly be criminally charged for perjury if the statements were materially false and given under oath. This was extended to “any claim” under Briscoe v. LaHue<sup>343</sup> with the Court concluding that without such immunity, the “truth-seeking process at trial would be impaired.”

The Court agreed that the reasons to apply absolute immunity to trial testimony applied in equal force to testimony given before the grand jury. In both cases, witnesses (whether lay or law enforcement) would face potential perjury charges, a powerful deterrent.

The Court affirmed the decision of the Eleventh Circuit Court of Appeals.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-788.pdf>.

**Florence v. Board of Chosen Freeholders, 132 S.Ct. 1510 (2012)  
Decided April 2, 2012**

**FACTS:** In 1998, Florence was arrested in Essex County, NJ. He was sentenced to pay a fine in monthly installments. In 2003, after he fell behind in his payments, a bench warrant was issued. He caught up his payments but “for some unexplained reason, the warrant remained in a statewide computer database.” When he was stopped for a traffic offense two years later, he was arrested for the (presumably) outstanding warrant and taken to the Burlington County Detention Center.

At the jail, he was subjected to a delousing shower and was examined for “scars, marks gang tattoos, and contraband” pursuant to the jail’s procedures. He also claimed he was instructed to “open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals” although there was some question as to whether the last was actually part of the normal practice. Florence did share a cell with other inmates following his admission. He was transferred to the Essex County Correctional Facility six days later and was further examined by officers there, a process that “applied regardless of the circumstances of the arrest, the suspected offense, or the detainee’s behavior, demeanor, or criminal history.” He was released the next day when the charges against him were dismissed.

Florence sued the jails and related other parties under 42 U.S.C. §1983, claiming violations of his Fourth and Fourteenth Amendment rights. He claimed that “persons

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<sup>342</sup> 424 U. S. 409 (1976).

<sup>343</sup> 460 U. S. 325 (1983).

arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process.” He argued instead that such searches could only be done “if they had a reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband.” The District Court certified the case as a class-action, with the class being identified as “individuals who were charged with a nonindictable offense under New Jersey law” processed at the facilities named in the lawsuit, and who were “directed to strip naked even though an officer had not articulated any reasonable suspicion they were concealing contraband.”

Ultimately the District Court granted summary judgment in Florence’s favor, finding such searches unreasonable. Upon appeal, however, the Third Circuit Court of Appeals reversed, finding that the jail procedures “struck a reasonable balance between inmate privacy and the security needs of the two jails.” Florence requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May jails do a thorough search, including requiring inmates to disrobe, during initial intake?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that the term “strip search” is imprecise.

It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer. There are no allegations that the detainees here were touched in any way as part of the searches.

The Court continued, stated that “the difficulties of operating a detention center must not be underestimated by the courts.”<sup>344</sup> The Court had maintained the “importance of deference to correctional officers” in such matters. In *Bell v. Wolfish*<sup>345</sup>, the Court had held that searching inmates after “contact visits” was appropriate since that served to deter the smuggling of contraband inside the facility. Subsequent cases had consistently upheld the right of detention facilities, and the Court noted that “these cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their

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<sup>344</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>345</sup> 441 U. S. 520 (1979).

facilities.” The Court agreed that “some type of strip search of everyone who is to be detained” is common practice in facilities across the country.

With respect to individuals arrested for minor offenses, the Court noted that some of the lower courts “have held that corrections officials may not conduct a strip search of these detainees, even if no touching is involved, absent reasonable suspicion of concealed contraband.” The Court agreed, however, that jails “have a significant interest in conducting a thorough search as a standard part of the intake process.” Such reasons include the need to detect lice or contagious diseases, wounds and injuries. The Court also noted the need to determine gang affiliations because such “rivalries spawn a climate of tension, violence, and coercion.” Finally, “detecting contraband concealed by new detainees ... is a most serious responsibility.” Such contraband, including weapons, drugs and alcohol, as well as more common items, such as cigarettes and lighters, “disrupt the safe operation of a jail.” Scarce and desirable items “have value in a jail’s culture and underground economy.”

Despite Florence’s assertion that it was unreasonable to search individuals arrested for minor offenses, the Court noted that the “record provides evidence that the seriousness of an offense is a poor predictor of who has contraband ....” Further, “it would be difficult in practice to determine whether individual detainees fall within the proposed exemption.” In fact, the Court noted that “people detained for minor offenses can turn out to be the most devious and dangerous criminals,” and provided a list of such incidents over recent years. Further, someone being arrested for a minor offense has reason to hide contraband, fearing a more serious charge should the contraband be found and further could be coerced by other inmates to hide such items upon intake.

Finally, the Court noted the difficulties of classifying inmates by their “current and prior offenses before the intake search.” In addition, “jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset,” they often do not even have access to the inmate’s criminal history at the beginning and what they do have might be inaccurate. Trying to determine, in a few minutes, whether an inmate should or should not be searched presents practical problems for jail officials, and “to avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population.”

The Court upheld the decision of the Third Circuit Court of Appeals.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-945.pdf>.

**Filarsky v. Delia, 132 S.Ct. 1657 (2012)**  
**Decided April 17, 2012**

**FACTS:** Delia (a Rialto, California, firefighter) was accused of doing construction work at his home while off on an injury leave. Filarsky, a local employment attorney, was hired by the city to investigate the matter. During an interview with Peel and

Bekker (fire department officials, along with Filarsky, Delia admitted having purchased building materials, but denied that he'd actually done any work. At a break, Filarsky suggested resolving the matter by having Delia produce the purchased materials (several rolls of insulation) and the Fire Chief, Wells, agreed. When they reconvened, however, Delia refused the request to allow Peel to enter the home to see the materials and also to bring the requested items outside where they could be viewed. Filarsky then ordered him to produce the materials.

Delia argued, through counsel, that to do so would violate the Fourth Amendment. When they failed to sway Filarsky, his attorney "threatened to sue the City and everyone involved, including Filarsky. Filarsky signed the order and Peel and Bekker followed Delia to the house. The rolls of insulation were brought outside and Peel and Bekker thanked him and left.

Delia filed suit against all parties under 42 U.S.C. §1983, claiming the order violated his Fourth and Fourteenth Amendment rights. The District Court granted qualified immunity and summary judgment to all defendants, holding that Delia had not "demonstrated a violation of a clearly established constitutional right." Delia appealed, and the Ninth Circuit Court of Appeals affirmed that decision, with respect to all defendants but Filarsky. (The Court of Appeals agreed that the order did violate the Fourth Amendment, but agreed that it was not clearly established at the time the order was given.) However, the Court concluded that since Filarsky was a private attorney, not a city employee, he could not claim the protections of qualified immunity. The Court did note, however, this conflicted with the decision in Cullinan v. Abramson<sup>346</sup> but felt it was bound by Circuit precedent.

Filarsky requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a private individual performing a government function entitled to the protections of qualified immunity?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the historical basis behind the defense of qualified immunity, especially with respect to 42 U.S.C. §1983. The logic behind common law immunity was that "government actors were afforded certain protections from liability, based on the reasoning that 'the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions.'"<sup>347</sup>

The Court went on to explore what existed in 1871, at the time §1983 was enacted. It noted that at that time, government was "smaller in both size and reach" and in fact, there were far fewer employees at all, let alone full-time employees who did nothing but government work. It was common, even expected, that a public servant did not

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<sup>346</sup> 128 F.3d 301 (6<sup>th</sup> Cir. 1997).

<sup>347</sup> Wasson v. Mitchell, 18 Iowa 153 (1864).

devote all of their efforts to public duties, but would often carry on other regular business. It was common in the 1800s, or even the 1900s, for a private attorney to “conduct criminal prosecutions on behalf of the State,” in fact, Abraham Lincoln served in that role on several occasions.

“Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.” Case law had ruled that judicial immunity applied to judges who worked “on a part-time or episodic basis” as well as those employed so full-time.<sup>348</sup> The Court noted that some officials (naming specifically justices of the peace) did not even draw a salary, but collected fees, a concept that would apply in modern day to, for example, Kentucky constables. In addition, “private detectives and privately employed patrol personnel often were publicly appointed as special policemen, and the means and objects of detective work, in particular, made it difficult to distinguish between those on the public payroll and private detectives.”<sup>349</sup> The Court addressed in particular, the law that “Sheriffs executing a warrant were empowered by the common law to enlist the aid of the able-bodied men of the community in doing so.”<sup>350</sup> When so serving, the private individual “had the same authority as the sheriff, and was protected to the same extent.”<sup>351</sup>

The Court concluded that nothing in modern times “counsels against carrying forward the common law rule” because “such immunity ‘protect[s] government’s ability to perform its traditional functions.’”<sup>352</sup> Allowing those who are performing a governmental function to claim the protections of such helps to ensure that the most talented are not deterred from “entering public service.” In fact, “it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals, which is precisely what happened in the case at bar.

The Court continued:

Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

In addition, if the lawsuit against the private individual, working in conjunction with government officials, moves forward, the government officials will of necessity still be

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<sup>348</sup> Bradley v. Fisher, 80 U.S. 335 (13 Wall. 335) (1872).

<sup>349</sup> Sklansky, The Private Police, 46 UCLA L. Rev. 1165.

<sup>350</sup> In Kentucky, this concept is codified in KRS 70.060, Sheriff may command power of county.

<sup>351</sup> Robinson v. State, 93 Ga. 77, 18 S. E. 1018 (1893).

<sup>352</sup> Wyatt v. Cole, 504 U. S. 158 (1992).

drawn into the case, which “substantially undermine[s] an important reason immunity is accorded public employees in the first place.” It would also prove difficult, if not impossible, to distinguish between those that would be entitled to such protections, given the myriad ways an individual could be employed by a government agency (as a part-time employee, on a limited project, etc.)

The Court concluded:

New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto’s internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.

The Court reversed the Ninth Circuit holding denying qualified immunity to Filarsky.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-1018.pdf>.

**Blueford v. Arkansas, 132 U.S. 2044 (2012)  
Decided May 24, 2012**

**FACTS:** Blueford stood trial in Arkansas for capital murder but the prosecution waived the possibility of the death penalty.<sup>353</sup> The jury was instructed on the possible charges that the jury might consider and specifically instructed that they were to start their deliberations by looking at the charge of capital murder, and only if the jury concluded that charge was inappropriate, were they to move to first-degree murder, manslaughter and then negligent homicide.

A few hours into deliberations, the jury sent a question asking what would happen if they could not agree on a charge at all. The Court brought the jury back into the courtroom and “issued a so –called ‘Allen instruction,’ emphasizing the importance of reaching a verdict.”<sup>354</sup> The Court deliberated another half hour and reported that it was “hopelessly” deadlocked. The Court inquired into the votes for each of the possible charges and the jury foreman stated that they were unanimous that it was not capital or first-degree murder, but that they disagreed on manslaughter and never reached negligent homicide. They were given another Allen instruction and went back to deliberate, but finally returned that they had not, and could not, reach a verdict. The Court declared a mistrial.

Blueford was retried. He moved to dismiss the capital and first degree murder charges, arguing that since the jurors had unanimously decided he was not guilty of those offenses it was a violation of Double Jeopardy to retry him on those charges.

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<sup>353</sup> The crime would have been classified as Wanton Murder, KRS 507.020(1)(b) in Kentucky.

<sup>354</sup> Allen v. U.S., 164 U.S. 492 (1896).

The trial court, and the appellate courts of Arkansas, disagreed, stating that the foreperson's report to the court was not a "formal announcement of acquittal" when she disclosed the vote.

Blueford requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Does the Double Jeopardy Clause bar a retrial on a greater offense if the jury announces (during an Allen charge) that it has voted against guilt on that greater offense?

**HOLDING:** No

**DISCUSSION:** Blueford continued to argue "that he cannot be retried for capital and first-degree murder because the jury actually acquitted him of those offenses."<sup>355</sup> The Court, however, agreed that the "foreperson's report was not a final resolution of anything." Even though the jury had been instructed to deliberate each charge separately, from the most serious on down, it was possible for the jury to revisit the higher charges, "notwithstanding its earlier votes." As such, the "foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered."

Blueford further argued that it was improper for the trial court to declare a mistrial and that instead it should have explored other options to allow the jury to give effect to its decision not to convict on the two highest charges. The Court disagreed, noting that it had never before required a trial court "to consider any particular means of breaking the impasse – let alone to consider giving the jury new options for a verdict."<sup>356</sup>

The Court concluded that the "jury in this case did not convict Blueford of any offense, but it did not acquit him of any either." The Court ruled that "the Double Jeopardy Clause does not stand in the way of a second trial on the same offense" and upheld the judgment by the Arkansas Supreme Court.

**Reichle v. Howards, 132 S.Ct. 2088 (2012)**

**Decided June 4, 2012**

**FACTS:** On June 16, 2006, Vice President Cheney was visiting Beaver Creek, Colorado. The Secret Service, including Reichle and Doyle, were members of his protective detail. Howards, also at the mall, was overheard by Agent Doyle while speaking on the cell phone, and heard to say "I'm going to ask [Cheney] how many kids he's killed today." Agent Doyle shared that with the detail and he and Reichle (and a third agent) began to monitor Howards more closely. Howards entered the

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<sup>355</sup> Green v. U.S., 355 U.S. 184 (1957).

<sup>356</sup> See Renico v. Lett, 559 U.S. – (2010).

line to speak to the president, and when he approached him, he told Cheney that his “policies in Iraq are disgusting.” At some point Howards also touched Cheney’s shoulder.<sup>357</sup> Cheney thanked Howards and moved along.

It was determined that Agent Reichle would question Howards. He had not heard Howards’ initial statement nor observed his interaction with the Vice President, but had been briefed as to both. He approached Howards and asked to speak to him, but Howards refused and attempted to leave. Agent Reichle stepped in front of Howards and asked him if he’d assaulted the Vice President. Howards denied having done so. He then “falsely denied” having touched the president. Reichle confirmed that Agent Doyle had seen the touch, and then arrested Howards.

Howards was handed over to the local sheriff’s office, where he was charged with Harassment under Colorado law. Eventually, that was dismissed.

Howards brought suit against a number of parties under 42 U.S.C. 1983 and under Bivens v. Six Unknown Fed. Narcotics Agents.<sup>358</sup> He alleged that he was arrested and searched in violation of the Fourth Amendment and in retaliation for the criticism, in violation of the First Amendment. (Only Reichle and Doyle remained defendants, however, the others having been given summary judgment at the lower court levels and not successfully appealed.) Both moved for qualified immunity and summary judgment. The District Court in Colorado had denied that claim. The Tenth Circuit Court of Appeals agreed that the two agents were entitled to summary judgment on the Fourth Amendment arrest claim, as he had made a “materially false statement to a federal official.”<sup>359</sup> However, the Court denied qualified immunity on the First Amendment claim, as it ruled that Howards had established a “material factual dispute regarding” their motivation in making the arrest. The Court looked to precedent in finding that Hartman v. Moore did not prevent such a claim when it involved a allegation of a retaliatory arrest, even if the arrest was supported by probable cause.<sup>360</sup>

The agents requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is an officer protected under qualified immunity for making an arrest (supported by probable cause) that is allegedly in violation of the First Amendment because it is retaliation for a criticism made by the subject?

**HOLDING:** Yes

**DISCUSSION:** The Court initially agreed to review two questions: “whether a First Amendment retaliatory arrest claim may lie despite the presence of probable

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<sup>357</sup> There was dispute about whether it was a simple pat or something more, but that distinction was not critical to the Court’s decision.

<sup>358</sup> 403 U.S. 388 (1971).

<sup>359</sup> 18 U.S.C. §1001.

<sup>360</sup> 547 U.S. 250 (2006).

cause to support the arrest, and whether clearly established law at the time of Howards' arrest so held." The Court concluded it would review only the second question, however. The Court noted that for such claims to be successful, "the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official."<sup>361</sup> The Court stated the issue to be whether "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." The Court further ruled that the existing Tenth Circuit precedent would further not have a "dispositive source of clearly established law in the circumstances of this case." Hartman involved a retaliatory prosecution, not a retaliatory arrest, but a "reasonable official" could have interpreted Hartman to apply to both, particularly since the prosecutor is, in effect, a third-party to the actual case.

The Court continued:

An officer might bear animus toward the content of a suspect's speech. But the officer may also decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat.<sup>362</sup>

The Court concluded that "Hartman injected uncertainty into the law governing retaliatory arrests, particularly in light of Hartman's rationale and the close relationship between retaliatory arrest and prosecution claims." However, it agreed that "when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation."

The Court reversed the decision of the Tenth Circuit and remanded the case back for an award of qualified immunity for both agents.

**Parker v. Matthews, --- U.S. --- (2012)  
Decided June 11, 2012**

**FACTS:** On June 29, 1981, Matthews burglarized and murdered his estranged wife, Marlene, as well as his mother-in-law, Cruse, at their Louisville home. He was arrested that same morning at his mother's house, where he'd fled to clean up. The murder weapon was found on the property. Matthews denied responsibility for the crimes.

He was indicted. Matthews did not contest that he killed the two women, but argued that he acted under "extreme emotional disturbance" Making a successful claim under that defense would have reduced the murder charge to first-degree manslaughter. At trial, he laid out the troubled history of the marriage, as well as the testimony of a psychiatrist who diagnosed him as having an "adjustment disorder" as a result of stress in his life. Matthews also admitted to drinking and having taken

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<sup>361</sup> Brousseau v. Haugen, 543 U.S. 194 (2004); Anderson v. Creighton, 483 U.S. 635 (1987).

<sup>362</sup> Wayte v. U.S., 470 U.S. 598 (1985).

drugs that night. He rendered the opinion that Matthews was acting under EED at the time.

Matthews was convicted, however, of murder and sentenced to death. He appealed through the Kentucky appellate courts, which upheld the conviction. Matthews then took a writ of habeas corpus, arguing that the Kentucky Supreme Court had improperly rejected his claim that “the evidence was insufficient to prove that he had not acted under the influence of” EED. The District Court dismissed the writ, but the Sixth Circuit Court of Appeals reversed that decision. The Warden requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Does the burden of disproving a defense of EED fall to the prosecution, once it has been initially introduced by the defendant?

**HOLDING:** Yes

**DISCUSSION:** The Sixth Circuit ruled that the Kentucky Supreme Court had “impermissibly shifted to Matthews the burden of proving extreme emotional disturbance, and that the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt.” At the time of the murder, the allocation of proof in such cases was governed by Gall v. Com., “which placed the burden of producing evidence on the defendant, but left the burden of proving the absence of extreme emotional disturbance with the Commonwealth in those cases in which the defendant had introduced evidence sufficient to raise a reasonable doubt on the issue.”<sup>363</sup> In Matthews’ case, however, the Kentucky courts placed the burden completely on Matthews. Kentucky had also looked to Wellman v. Com., in which it had ruled that “absence of extreme emotional disturbance is not an element of the crime of murder which the Commonwealth must affirmatively prove.”<sup>364</sup>

The Court looked to the jury instructions, which required the jury to find that Matthews had not acted under EED at the time of the murder, beyond a reasonable doubt, in effect, assigning that burden to the Commonwealth. The Court agreed that was proper for the jury to make that decision, and noted that the EED claim “was belied ‘by the circumstances of the crime.’” The Court emphasized that “expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that *the jurors* were entitled to consider the tension between [the expert’s] testimony and their own common-sense understanding of emotional disturbance.” In trying to resolve the conflict, the Sixth Circuit overstepped its authority.

The Court resolved, as well, an issue of prosecutorial misconduct in the Commonwealth’s favor, and reinstated Matthew’s conviction and sentence.

**Full Text of Opinion:** <http://www.supremecourt.gov/opinions/11pdf/11-845.pdf>.

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<sup>363</sup> 607 S.W.2d 97 (1980).

<sup>364</sup> 694 S.W. 2d696 (Ky. 1985).

**Williams v. Illinois, --- U.S. --- (2012)**  
**Decided June 18, 2012**

**FACTS:** On February 10, 2000, a woman (L.J.) was abducted, robbed and raped, and then released. She was taken to the hospital and a blood sample and vaginal swabs were collected. Those samples were sealed and sent to the Illinois State Police lab. At ISP, a forensic scientist confirmed the presence of semen on the vaginal swab and then replaced it in the evidence locker. Evidence indicated those swabs were then sent to Cellmark, in Maryland, for DNA testing. Cellmark returned a report that included the male DNA profile developed from the sample. At the time, Williams was not a suspect in the rape case.

Lambatos, an ISP specialist, used the computer database to compare the profile to others in the system. At some point, she got a match from a sample taken from Williams when he was arrested on unrelated charges in August, 2000. Williams was placed in a lineup in April, 2001 and he was immediately identified by L.J. He was indicted for the rape and elected for a bench trial in 2006.<sup>365</sup> At trial, three different forensic experts testified. Hapack testified that he extracted the sample from the swabs. Abbinanti developed the DNA profile of Williams from the blood sample that was taken when he was incarcerated. Finally, Lambatos testified as to the comparison she did between the profile provided by Cellmark and the profile developed on Williams. She also testified about the general process used to extract DNA, although of course, she did not do the actual extraction on either sample. Lambatos testified concerning the protocol for packaging and shipping samples and identified the shipping manifests in evidence as indicating that the samples were properly sent to Cellmark and returned with a profile.

Williams objected, arguing that it was not proper for Lambatos to testify as to what had been done in the Cellmark lab. However, the prosecutor noted that Lambatos was only being asked about what she had done with the information provided by Cellmark. The trial court allowed the testimony to continue, ultimately Lambatos testified that it was a match. The Cellmark report itself was not entered into evidence and Lambatos did not identify it as the source of any information directly. Upon directly questioning, she testified that she would have been able to tell if the sample was degraded by the report data. Williams objected, based upon the Confrontation Clause, because the expert that did the report (at Cellmark) was not available for cross-examination. The prosecution referred to the Illinois Rules of Evidence regarding expert testimony and argued that any deficiency in the underlying information went to the weight, not the admissibility, of the evidence.

Williams was convicted, and upon appeal, the higher courts upheld the conviction, concluding that Lambato's testimony did not violate the Confrontation Clause

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<sup>365</sup> There was no explanation for the delay, although it might possibly have been because he was in custody for other offenses. Further, it is important to note that this was a bench, rather than jury trial, as the judge is presumed to be able to ignore improperly introduced evidence in coming to a decision without the need for an objection.

because “the Cellmark report was not offered into evidence to prove the truth of the matter it asserted.” It agreed that her reference to the report was done for the “limited purpose of explaining the basis for [her expert opinion],” not for proving that the information was truthful.

Williams requested review and the U.S. Supreme Court granted certiorari.

**ISSUE:** May an expert testify, without violating the Confrontation Clause, about an opinion derived from evidence that might otherwise be inadmissible?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed a series of recent decisions, starting with Crawford v. Washington.<sup>366</sup> Two of the reports, Melendez-Diaz v. Massachusetts<sup>367</sup> and Bullcoming v. New Mexico<sup>368</sup>, specifically discussed forensic reports. In the former, the Court agreed that admitting sworn certificates as to the contents through a different analyst was improper, as the certificates were clearly prepared for the purpose of the particular case and as such, were testimonial. In the latter, reports attesting to an analysis of alcohol content were admitted, and the Court agreed such admission violated the Confrontation Clause, because the defendant did not have the opportunity to question the person who did the test. (The reports were admitted through another analyst.)

In this case, the Court agreed that it has long been agreed that an “expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts.” Further, “modern rules of evidence continue to permit experts to express opinions based on facts about which they lack person knowledge, but these rules dispense with the need for hypothetical questions” – as earlier common law had required.<sup>369</sup>

The Court reviewed precisely what Lambatos said on the stand. She specifically “did not testify to the truth of any other matter concerning Cellmark,” other than that the lab was accredited, that ISP used them on occasion and that from the manifests, swabs were sent and a DNA based on those swabs were returned. The closest she got to a problem was when she testified that the DNA profile was based upon the swabs, but even the defense admitted that the same information, in response to a question posed a slightly different way, would have been proper. The Court agreed that the question may have been problematical with a jury, although it agreed that the match was “striking confirmation that the sample that Cellmark tested was the sample taken from the victim’s vaginal swabs.” The Court noted that “conventional chain-

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<sup>366</sup> 541 U.S. 36 (2004).

<sup>367</sup> 557 U.S. 305 (2009).

<sup>368</sup> 131 S.Ct. 62 (2010).

<sup>369</sup> Kentucky’s equivalent of the Rules of Evidence at issue are KRE 702 and 703. Although worded differently, they are essentially the same, although Kentucky does indicate that facts or data relied upon by the expert may be introduced even if not otherwise admissible, if trustworthy and necessary to illuminate testimony. This rule has not yet been tested, however, since Crawford v. Washington.

of-custody evidence” was properly introduced concerning the swabs and agreed that it could not conceive of how even sloppy lab work could have made the extracted DNA match Williams. The match to which Lambatos testified “was not in any way dependent on the origin of the samples from which the profiles were derived.”

The Court upheld the introduction of evidence that might otherwise be admissible to support an expert’s testimony and to “illuminat[e] the expert’s thought process.”

The Court agreed that William’s Confrontation rights were not violated and upheld his conviction.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-8505.pdf>.

**Miller v. Alabama, --- U.S. --- (2012)**  
**Decided June 25, 2012**

**FACTS:** In November, 1999, Jackson, age 14, and two other juveniles decided to rob a video store. En route, Jackson learned that Shields, one of the boys, was carrying a sawed-off shotgun. Jackson stayed outside while the other two entered. The clerk, Troup, refused their demand for money. Jackson entered at some point. Troup threatened to call the police and Shields fatally shot her. The boys fled.

All three were charged with capital felony murder and aggravated robbery. Despite appeals, Jackson’s case remained in the adult court where he was convicted. Under Alabama law, he was sentenced to life without possibility of parole. He did not appeal his sentence at that time.

Following the Court’s decision in Roper v. Simmons, however, he filed for habeas corpus.<sup>370</sup> Jackson argued that life imprisonment for a 14-year-old offender violates the Eighth Amendment prohibition on cruel and unusual punishment. While on appeal, the Court ruled on Graham v. Florida.<sup>371</sup>

Miller was also 14 when he beat a man badly, and then set his trailer on fire with the man still inside. The victim died from his injuries and smoke inhalation. His case was also tried in adult court in Alabama with “murder in the course of arson.” Miller’s conviction under that crime also carried no possibility of parole. His state court appeals were denied.

Both cases were consolidated upon appeal and the U.S. Supreme Court granted review.

**ISSUE:** May a juvenile homicide offender be sentenced to life without parole?

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<sup>370</sup> 543 U.S. 551 (2005). This case invalidated the death penalty for all juvenile offenders.

<sup>371</sup> 560 U.S. --- (2010). This case invalidates life without parole on juvenile nonhomicide offenders.

**HOLDING:** No

**DISCUSSION:** The Court began by noting that these cases “implicate two strands of precedent reflecting [its] concern with proportionate punishment.” The Court concluded that the “confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.” Both Roper and Graham “establish that children are constitutionally different from adults for purposes of sentencing” because they have “diminished culpability and greater prospects for reform.” The Court pointed to a “lack of maturity and an underdeveloped sense of responsibility,” vulnerability to “negative influences and outside pressures,” along with limited ability to control their environment and finally, that their personality traits are less fixed and subject to change.

Although the Court noted that Graham was specific to nonhomicide crimes, the Court noted that nothing in the science of how children develop is “crime-specific.” Fundamentally, Graham “insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” However, the mandatory penalty schemes in both cases “prevent the sentencer from taking account of these central considerations.” Doing so contravenes Graham and Roper, which have as a “foundational principle” the concept that “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” The Court equated life-without-parole to the death penalty, especially to juveniles, who will naturally spend more years imprisoned under such penalties.

Overall, the Court discussed, it noted that even adult capital cases, such as Woodson v. North Carolina<sup>372</sup>, it had held that “mandating a death sentence ... violated the Eighth Amendment” because it case no consideration to the “character and record of the individual offender or the circumstances” of the crime itself. The Court agreed that “youth is more than a chronological fact,” but is a time when the subject is “most susceptible to influence and the psychological damage.”

The Court noted that juveniles will, in effect, be given “a *greater* sentence than those adults will serve,” when they look at the number of years they will actually serve. “In imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” Looking at each case, in Jackson’s situation, he “he did not fire the bullet that killed” the clerk, nor did he intend her death. In addition, both his mother and grandmother “had previously shot other individuals.” With respect to Miller, who was high on drugs and alcohol he had consumed with his adult victim, the Court stated that “if ever a pathological background might have committed to a 14-year-old’s commission of a crime, it is here.” Miller was physically abused, neglected and in and out of foster care his entire young life. He had tried to commit suicide four times, once when he was of kindergarten age. His prior criminal history was,

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<sup>372</sup> 428 U.S. 280 (1976).

surprisingly, limited. Certainly he deserved a severe punishment, but the Court disagreed that life imprisonment without the possibility of parole was appropriate.

The Court reversed the sentencing in both cases.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf>.

**Arizona v. U.S., --- U.S. --- (2012)**  
**Decided June 25, 2012**

**FACTS:** In 2012, Arizona enacted a statute “called the Support Our Law Enforcement and Safe Neighborhoods Act,” also referred to as S.B. 1070. The United States filed suit, seeking to enjoin the statute, arguing that provisions of the law preempted federal law. Of particular interest to law enforcement, the statute provided “specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers” and also required officers “who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status....”

The U.S. District Court enjoined provisions from taking effect, and the Ninth Circuit Court of Appeals affirmed that decision. Arizona requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May a state pass a law that requires law enforcement officers to check on the immigration status of subjects lawfully detained for other reasons?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “federal power to determine immigration policy is well settled.” The States are “precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”<sup>373</sup> State laws are also “preempted when they conflict with federal law.”

Looking at each of the four challenged provisions in turn, the court first invalidated a provision that created a misdemeanor offense of failing to carry an “alien registration document,” thus adding a state penalty for “conduct proscribed by federal law.” The Court agreed the area of alien registration was exclusive to the federal government.

The Court then moved to the next provision, which provide a criminal penalty for an offense for which there is no federal equivalent, making it a state misdemeanor when an unauthorized alien applies or solicits for work in a public place, or performs work as an employee or an independent contractor. The Court agreed that despite earlier decisions, federal law does now generally occupy the field of penalizing employers for hiring unauthorized workers, although it does not put any specific criminal

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<sup>373</sup> Gade v. National Solid Wastes Management Assn., 505 U.S. 88 (1992).

sanctions on the worker. Instead, federal law places civil and other penalties, such as removing eligibility to become a lawful permanent resident, upon the unauthorized alien who takes employment. As such, placing criminal sanctions on such individuals would be contrary to the federal purpose.

The next provision permits local law enforcement to detain an unauthorized alien who they have probable cause to believe has committed a public offense that would make them removable (subject to deportation) from the United States. The Court described the federal process for removable, noting that such warrants are generally served by federal officers who have training in the intricacies of immigration law. The Court agreed that allowing local and state officers to do so “creates an obstacle to the full purposes and objectives of Congress” and invalidated that provision.

Finally, the Court addressed the provision that requires state and local officers to make “reasonable attempt ... to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.’” An arrested subject shall not be released until their status is determined. To determine status, the usual method is to contact ICE. The statute presumes someone with a valid Arizona OL or similar ID is lawfully in the country. Officers are not permitted to consider race, color or national origin improperly and finally, officers are required to act in a manner consistent with state and federal law.

The Court noted that “consultation between federal and state officials is an important feature of the immigration system.” ICE is obligated to respond to request from law enforcement related to a person’s immigration or citizenship status, via the Law Enforcement Support Center. The Court agreed that the federal scheme “leaves room for a policy requiring state officials to contact ICE as a routine matter.” The Court agreed, however, that holding someone in detention solely until their status is verified does cause constitutional concern. The Court noted that depending upon the interpretation of the statute, if it is determined that a state officers must “conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption.” At this point, the court found no need to address “whether reasonable suspicion of illegal entry would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law.” The Court stated that “at this state, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the provision] will be construed in a way that creates a conflict with federal law.”

The Court overturned three of the four challenged provisions, but declined to rule upon the fourth “without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.”

**Full Text of Opinion:** <http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>.

**U.S. v. Alvarez, --- U.S. --- (2012)**  
**Decided June 28, 2012**

**FACTS:** The Court began by noting that “lying was his habit.” Alvarez had lied about several things before he announced that he “held the Congressional Medal of Honor”<sup>374</sup> while attending a meeting as a board member of a California local water district board. The Court noted his “statements were but a pathetic attempt to gain respect that eluded him.” The statements did not appear to have been made to get employment or reap any particular benefits.

Alvarez was charged under the federal Stolen Valor Act, for lying about having received the Medal.<sup>375</sup> (The Act applies to all honors, but with an enhanced penalty with respect to the Medal.) The U.S. District Court denied his claim that the statute violated the First Amendment. He appealed, and the Ninth Circuit Court of Appeals ruled it invalid for that reason. The government requested certiorari. While that request was pending, the Tenth Circuit found the act constitutional.<sup>376</sup> As such, that set up a conflict between the Circuits as to the Act’s validity and the U.S. Supreme Court accepted review.

**ISSUE:** Is the Stolen Valor Act of 2008 a violation of the First Amendment?

**HOLDING:** Yes

**DISCUSSION:** The Court began by acknowledging the extraordinary honor conveyed by the Medal. However, the Court noted that “fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.” The Court noted that “when content-based speech regulation is in question ... exacting scrutiny is required” and agreed that the First Amendment is “sometimes inconvenient.” The Court conceded that there was no question but that Alvarez lied about the Medal. However, the Court noted that content-based restrictions on speech have traditionally been restricted only to those situations that are “intended, and likely, to incite imminent lawless action,” defamation, “fighting words,” child pornography, fraud, true threats and “speech presenting some grave an imminent threat the government has the power to prevent.” Missing from that list is “any general exception to the First Amendment for false statements.” The Court declared this comports with the “common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.” The Court disagreed with the Government’s arguments that false statements fall outside of First Amendment protections, noting that cases cited by the Government for that assertion all involve

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<sup>374</sup> The editor recognizes that the phrase is technically incorrect and it should simply be called the Medal of Honor.

<sup>375</sup> [Pub.L. 109-437](#).

<sup>376</sup> [U.S. v. Strandlof](#), 667 F.3d 1146 (2012)

“defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.” The Court also declined to equate the issue at bar to those situations where a subject lies to a Government official, commits perjury or speaks as if one is a Government official.

The Court pointed out that a plain reading of the statute indicates it applies “to a false statement made at any time, in any place, to any person.” In this case, the “lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home.” The statute applies “entirely without regard to whether the lie was made for the purpose of material gain.” The Court continued, noting that “our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”<sup>377</sup> If this statute was upheld, “there could be an endless list of subjects the National Government or the States could single out.”

The Court emphasized, however, that “where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>378</sup>

Further:

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

The Court discussed the long history of military honors, and specifically, the meaning of the Medal. The Medal of Honor is “reserved for those who have distinguished themselves ‘conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty,’” and related several instances that resulted in the award of the Medal. It agreed that the Government had a very strong interest in “protecting the integrity of the Medal of Honor.” But that did not end the matter, as the First Amendment further requires that the speech restriction must be “actually necessary” and that there must be a “direct causal link between the restriction imposed and the injury to be prevented.” That link, in this case, has not been shown, with no evidence presented that a false claim dilutes the general impression of the military honor. Even if actual Medal holders “might experience anger and frustration,” the Government acknowledged, in an amici brief, that “there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners’] honor.”

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<sup>377</sup> A reference from George Orwell’s book, *Nineteen Eighty-Four*.

<sup>378</sup> Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Further, the Government has not shown “why counterspeech would not suffice to achieve its interest” in protecting the Medal’s integrity. In fact, the facts in this case “indicates that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.” Even before the FBI became involved, Alvarez’s statements were known to be false and he suffered tremendous public ridicule. The “outrage and contempt” shown for the lies “can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”

The Court affirmed:

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; the straight-out lie, the simple truth.”

The Court continued: “The First Amendment itself ensures the right to respond to speech we do not like, and for good reason.” The suppression of speech by the federal government “can make exposure of falsity more difficult, not less so.” Open discussion is “not well served when the government seeks to orchestrate public discussion through content-based mandates.” The Court offered several ways the Government could protect the integrity of the Medal, including simply publicizing a list of those who had received it, and decried the Government’s insistence that it was not feasible to do so.<sup>379</sup> The Court emphasized that “truth needs neither handcuffs nor a badge for its vindication” and agreed that “only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth.”

In holding that the Stolen Valor Act impermissibly infringed upon protected speech, the Court concluded:

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression.

The Court affirmed the decision of the Ninth Circuit Court of Appeals.

Full Text of Opinion: <http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf>.

**EDITOR’S NOTE:** *Because this Opinion emphasized that Alvarez did not receive, or even apparently attempt to receive, any material benefit from his claim, this decision does not appear to call into question KRS 434.444, which criminalizes a misrepresentation of military status when it is done with the intent to defraud, obtain employment, or to be elected or appointed to a public office. The Opinion specifically left open that doing so might subject one to criminal penalties.*

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<sup>379</sup> In fact, at least one private website purports to do so. As an editorial note, the Opinion indicated that the Medal of Honor has been awarded just 3,476 times since 1861.

