INTERVIEWS & INTERROGATIONS

SUPPLEMENTAL READING
RECENT KENTUCKY CASE LAW AND OTHER MATERIAL

I. INTRODUCTION

There are certain legal considerations an officer should keep in mind when preparing to do an interrogation. Being knowledgable in this area greatly increases the likelihood that statements obtained will be admissible in court.

The U.S. Constitution (in the Bill of Rights) guarantees specific rights to persons being interrogated – the right to due process of law, Miranda rights, the right to confront one's accuser and the Sixth Amendment right to an attorney. Juvenile offenders also have certain specific rights under the Kentucky Revised Statutes.

A. Definitions

Interrogation – Questioning (or other conduct) done by law enforcement officers for the purpose of getting an incriminating response from a suspect.

Admission – A statement that helps to prove the guilt of the person making it. (For example: "I was there the night of the crime," or "The murder weapon belongs to me.")

Confession – A statement that acknowledges the guilt of the person making it (For example: "I killed Miss Scarlet in the Library.")

Admissions and confession may be oral, recorded or in writing.

B. Corroboration

When a confession is not made (or repeated) in open court, the prosecution must corroborate (back-up or support) the confession with some other evidence that a crime was committed as well. This rule does not apply to admissions, one or more admission may be used to help establish that a crime has been committed. (RCR 9.60)

C. Legal Consequences of a Rights Violation

If a statement is obtained by means of an interrogation that violates a constitutional right (due process, Miranda, right to counsel), the statement may be found inadmissible in Court pursuant to the Exclusionary Rule (KRE 613; KRE 801A)

D. Inevitable Discovery

In Nix. v. Williams, 467 U.S. 431 (1984), the Court held that information that would have been found independently of improperly gained information might be admissible under the "inevitable discovery" exception.

II. DUE PROCESS OF LAW

A. The Right to Due Process of Law

The right to due process of law ("due process") provided by the Fifth and Fourteenth Amendment to the U.S. Constitution is a very general right – the right of an individual to be treated fairly by the government. In the area of interrogation, due process of law requires that statements be obtained voluntarily. A statement is obtained involuntarily if it is the result of pressure (physical or psychological); that is, the person did not want to make the statement – it was made against his will.

It is a violation of due process even though the improper police conduct does not result in getting a statement, but the remedy will be something other than suppression.

B. How to Avoid Violating the Right to Due Process

In determining "voluntariness," courts look at all the circumstances of the situation. The two primary factors are 1) the actions of the interrogator and the 2) weakness of the suspect. Subtle psychological pressure may also be questionable.

III. MIRANDA

A. Miranda Rights

Miranda v. Arizona, 384 U.S. 436 (1966) requires law enforcement officers, prior to interrogation of a suspect in custody, to advise the suspect of the following:

- ★ You have the right to remain silent.
- ★ Anything you say can and will be used against you in court.

- ★ You have the right to consult with an attorney before making any statement and to have an attorney present during questioning.
- ★ If you want an attorney, but can't afford one, an attorney will be appointed for you free of charge.

★ You may stop the questioning at any time.

The Miranda rights are a combination of rights guaranteed by the Fifth and Sixth Amendments in the U.S. Bill of Rights. The key terms are "in custody" and "interrogation." If the suspect is not both "in custody" and being "interrogated," Miranda does not apply. (In Kentucky, the law is different if the suspect is a juvenile; KRS 610.200 requires that a juvenile be advised of their "constitutional rights" as soon as they are taken into custody, even if they are not being interrogated, and this has been interpreted to mean that they must be given their Miranda rights.)

B. "In Custody"

The Miranda Court limited the decision to situations in which the person has been "… taken into custody or otherwise deprived of freedom of action in any significant way." In recent cases, custody has been interpreted to include 1) arrests and 2) situations in which a reasonable person (not necessarily the person actually involved) would think his/her freedom of action was restrained to the degree associated with arrest. Whether a custodial situation exists is not always clear-cut. For example, if the restraint is at the police station, or is in a police vehicle, or under a "police-dominated atmosphere," it would be more likely to be considered custody. However, if the person is at their home or place of business, in their vehicle (in a traffic or Terry stop), on foot in a Terry stop, or at a crime scene, it would more likely to not be considered to be a custodial situation.

C. Interrogation

Interrogation is not brief, routine, "booking" questions, it is an officer authoritatively seeking answers to incriminating questions. Conduct may constitute interrogation, as well.

a) Volunteered Statements

If a statement is volunteered – not made in response to an attempt to get an incriminating response, it is not interrogation. Volunteered statements can occur at any time, even during an interrogation, if the suspect's statement is not responsive to the officer's question.

b) Clarifying Questions

Since most volunteered statements are not very detailed, an officer may try to clarify (make clear) what is being said. The questions, however,

must not be designed to expand upon what the person originally intended to say, but must be merely to clear up or explain the person's statement.

c) Questioning by Private Citizens

Miranda applies only to questioning conducted by law enforcement officers. Statements made by suspects in response to questioning by private citizens will be admissible in court despite a lack of any warning. However, it is universally held that law enforcement officers are forbidden from using private citizens as their agents in order to escape the Miranda rule.

If the suspect does not know that the interrogator is a law enforcement officer, there is no police-dominated atmosphere, and the situation is not considered interrogation for Miranda purposes. (Illinois v. Perkins, 495 U.S. 292 (1990))

D. How to Avoid Violating Miranda Rights

In a situation that is covered by Miranda, the Miranda procedure should always be followed – i.e. the officer should give the Miranda warning by reading from an appropriate card, and should then ask the person to waive (give up) his rights and answer questions.

a) When to give the warning

The warning should be given when the suspect is both "in custody" and is about to be "interrogated.," Some law enforcement agencies require their officers to give a Miranda warning any time they make an arrest, but the federal Miranda requirement does not make this mandatory. In such situations, however, if the person is eventually interrogated, and must time has passed since the arrest, the warning should be given again, just prior to the interrogation. In any event, if much time as passed, more than a short break, and the same, or another, officer wishes to start another interrogation session, it is still advisable to give another Miranda warning.

Miranda applies no matter the seriousness of the offense – whether the custody is for an arrestable violation, a misdemeanor or for a felony.

b) How to give the warning

1) READ IT!
2) Suspect must understand their rights

In order for the requirements of Miranda to be met, the suspect must be able to understand their rights. Possible barriers to understanding include: subnormal intelligence, insanity, extreme intoxication, hearing difficulty,

person in shock, great pain or extreme emotional disturbance, and language difficulties.

c) Waiver

To "waive" a right is to voluntarily and intentionally give it up.

1) Competency to Waive

The same circumstances that are possible barriers to communicating the warning may also affect the validity of the waiver. The law requires that the suspect, when waiving, be capable of making a competent decision. If the suspect is upset, etc., the officer should consider whether a waive will be held to be valid.

2) Conduct Constituting a Waiver

Remaining silent is not a waiver of rights. Body language might be sufficient, but an express (oral or written) waiver is strongly preferred. Ideally, a waiver should be written, signed and witnessed, but that is not always possible.

3) Interrogation following an invocation of the right to remain silent.

In Michigan v. Mosley, 423 U.S. 96 (1975), the Court held that following an invocation of a right to remain silent, an officer may re-initiate discussion, at lest to the extent of asking if a suspect is willing to continue an interrogation. In Mosley, the suspect had not requested an attorney and had been read Miranda warnings a second time.

IV. SPECIAL ISSUES

A. Interrogation under emergency circumstances

In certain circumstances, a failure to give Miranda warnings or a continuation of interrogation after Miranda had been given and rights invoked may be excused by a concern for public safety. This type of interrogation may be allowed if the law enforcement officers can show that the "paramount reason that the information is being sought [is] to save a life …." In New York v. Quarles, 467 U.S. 649 (1984), officers caught a suspected thief after a foot chase through a supermarket. When they frisked him, they discovered he was wearing an empty shoulder holster. The officer asked about the gun, and the suspect told the officers where it could be found. The Court agreed that the suspect's statement and the presence of the gun were admissible, although Miranda warnings had not been given at the time, as would otherwise have been required.

B. Interrogation under deceptive circumstances

In Springer v. Com., 998 S.W.2d 439 (1999), officers used an unrelated videotape of a suspect's residence to encourage a suspect to confess involvement in a murder. (Miranda warnings had actually been given, although the suspect was not in custody at the time.) The Court held that "the employment of a ruse. Or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion." Illinois v. Perkins, 496 U.S. 292 (1990). However, when the questioning is by a person who is not recognized as a law enforcement officer, such as an undercover officer posing as a fellow jail inmate, Miranda is not required.

V. RIGHT TO COUNSEL

A. What constitutes a "right to counsel?"

In Davis v. U.S., 512 U.S. 452 (1994), the Court held that a lawful interrogation need not stop simply because of an ambiguous request for an attorney. However, the line between ambiguous and unambiguous is very fine. For instance, a request for a probation officer (Fare v. Michael C., 442 U.S. 707 (1987)) was not held to be an invocation of the right to counsel, while the response "Oh yeah, I'd like to do that" to Miranda warnings was held to be so. (Smith v. Illinois, 469 U.S. 91 (1984)).

B. Re-initiation after invocation

In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that if a suspect has invoked the right to an attorney, an officer may not approach the suspect again before an attorney has been made available, to further interrogate, unless the suspect himself initiates further discussion with an officer. After an attorney has appeared in a case, the officer may not interrogate unless the attorney is present or unless the suspect specifically initiates discussion. Minnick v. Mississippi, 498 U.S. 146 (1990). Once a suspect has invoked the right to an attorney, police-initiated interrogation is not permissible even as to another, unrelated offense. Arizona v. Roberson, 486 U.S. 675 (1988).

C. Access to an attorney

While federal law does not require that a suspect be informed that an attorney has appeared (at the request of another) to represent the suspect. Kentucky law does so require, by the Kentucky Rules of Criminal Procedure (RCr 2.14).

D. How to Avoid Violating the Right to Counsel

a) Defendant's Attorney Present

The officer may interrogate if the defendant's attorney is present and the defendant is willing to make a statement.

b) Defendant's Attorney not Present

1) Defendant initiates contact and expressly requests to make statement.
2) Distinguish between conversation and interrogation
3) Non-LE informant – "listening post"

VI Vienna Convention Rights

Article 36 of the VCCR requires that foreign nationals who are arrested or detained be given notice "without delay" of their right to have their embassy or consulate notified of that arrest. The notice can be as simple as a fax, giving the person's name, the place of arrest, and, if possible, something about the reason for the arrest or detention. The police must fax that notice to the embassy or consulate, which can then provide counsel or other assistance to the foreign national.

In March of 2005, the United States pulled out of the Optional Protocol to the convention, which allows the International Court of Justice to intervene when detained foreign nationals are denied access to consular officials when imprisoned in a country that is a signatory to the convention. In June 2006, the Supreme Court ruled that foreign nationals who are deprived of the right to consular notification and access after an arrest may not use the treaty violation to suppress evidence obtained in police interrogation or belatedly raise legal challenges after trial. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) This does not mean, however, that a detained foreign national may not use the deprivation of the right at an earlier stage in the trial, as many defense attorneys are now aware of the right. It is also possible that individual officers and agency may be sued under 42 U.S.C. §1983 for failing to provide the notification as required by the treaty.

Appendix

Kentucky Rules of Criminal Procedure

RCr 2.14 Right to contact attorney

(1) A person in custody shall have the right to make communications as soon as practicable for the purpose of securing the services of an attorney.

(2) Any attorney at law entitled to practice in the courts of this Commonwealth shall be permitted, at the request of the person in custody or of some one acting in that person's behalf, to visit the person in custody.

RCr 9.60 Corroboration of confession

A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed.

Kentucky Rules of Evidence

KRE 613 Prior statements of witnesses

(a) Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

(b) This provision does not apply to admissions of a party-opponent as defined in KRE 801A.

KRE 801A Prior statements of witnesses and admissions

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
(1) Inconsistent with the declarant's testimony;
(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
(3) One of identification of a person made after perceiving the person.
(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
(1) The party's own statement, in either an individual or a representative capacity;
(2) A statement of which the party has manifested an adoption or belief in its truth;
(3) A statement by a person authorized by the party to make a statement concerning the subject;
(4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
(5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
(c) Admission by privity:
(1) Wrongful death. A statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased.

(2) Predecessors in interest. Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.
(3) Predecessors in litigation. Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.

Kentucky Revised Statutes

610.200 Duties of peace officer

(1) When a peace officer has taken or received a child into custody on a charge of committing an offense, the officer shall immediately inform the child of his constitutional rights and afford him the protections required thereunder, notify the parent, or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate, and if the parent is not available, then a relative, guardian, or person exercising custodial control or supervision of the child, that the child has been taken into custody, give an account of specific charges against the child, including the specific statute alleged to have been violated, and the reasons for taking the child into custody.

(2) Unless the child is subject to trial as an adult or unless the nature of the offense or other circumstances are such as to indicate the necessity of retaining the child in custody, the officer shall release the child to the custody of his parent or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate; or if the parent is not available, then a relative, guardian, or person exercising custodial control or supervision or other responsible person or agency approved by the court upon the written promise, signed by such person or agency, to bring the child to the court at a stated time or at such time as the court may order. The written promise, accompanied by a written report by the officer, shall be submitted forthwith to the court or court-designated worker and shall detail the reasons for having taken custody of the child, the release of the child, the person to whom the child was released, and the reasons for the release.

(3) If the person fails to produce the child as agreed or upon notice from the court, a summons, warrant, or custody order may be issued for the apprehension of the person or of the child, or both.

(4) The release of a child pursuant to this section shall not preclude a peace officer from proceeding with a complaint against a child or any other person.

(5) Unless the child is subject to trial as an adult, if the child is not released, the peace officer shall contact the court-designated worker who may:
(a) Release the child to his parents;
(b) Release the child to such other persons or organizations as are authorized by law;
(c) Release the child to either of the above subject to stated conditions; or
(d) Except as provided in subsection (6) of this section, authorize the peace officer to retain custody of the child for an additional period not to

exceed twelve (12) hours during which the peace officer may transport the child to a secure juvenile detention facility, a juvenile holding facility, or a nonsecure facility. If the child is retained in custody, the court-designated worker shall give notice to the child's parents or person exercising custodial control or supervision of the fact that the child is being retained in custody.

(6) (a) Except as provided in paragraph (b) of this subsection, no child ten (10) years of age or under shall be taken to or placed in a juvenile detention facility.
(b) Any child ten (10) years of age or under who has been charged with the commission of a capital offense or with an offense designated as a Class A or Class B felony may be taken to or placed in a secure juvenile detention facility or youth alternative center when there is no available less restrictive alternative.

U.S. Bill of Rights

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV (partial)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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NOTE : Because the following cases appear frequently in the text, they are not footnoted individually.

Miranda v. Arizona, 384 U.S. 436 (1966).

FOREIGN LANGUAGE

Com. v. Sanchez, 2003 WL 21242025 (Ky.App. 2003)

FACTS: Sanchez was arrested for an unspecified crime in Montgomery County. Police and the sheriff questioned him. At the subsequent suppression hearing, and after the court-appointed interpreter had reviewed the statement with Sanchez, he argued that the information learned during the initial custodial hearing was inaccurate and misleading.

During the hearing, the sheriff stated he believed Sanchez understood English because he was able to answer some questions asked in English; he had no other knowledge of Sanchez's English language abilities. The officers present noted that Sanchez did not "receive a translation of every question made," and that sometimes he did not wait for a translation and responded in English. The initial translator admitted that "she injected her own opinions into the translation and that she informed the officers that what Sanchez was saying did not always make sense to her."

The court-appointed translator "found that the volunteer custodial interpreter used by the police did not conform to the necessary standards." The prosecution argued that this was not relevant, because the Kentucky Supreme Court had not yet "imposed standards upon translation." The court-appointed translator noted numerous instances where the initial interpreter "either omitted information, added information, changed what was said or distorted the interrogation to some extent," and that "significant amounts" of information was left out of the translation. While the prosecution argued to the contrary, the court found that "Sanchez was clearly not provided with a reasonably competent interpreter" and suppressed the statement. The prosecution appealed.

On a side note, Sanchez claimed that his Vienna Convention rights were denied to him.

ISSUE: Is a foreign language speaker entitled to a competent translator?

HOLDING: Yes

DISCUSSION: The Court was not comfortable with whether Sanchez was made fully aware of his Miranda rights; the appellate court upheld the suppression. The transcript clearly indicated that "crucial portions of his Miranda rights were not fully explained."[1]
Because the suppression was upheld, it was unnecessary for the court to consider the Vienna Convention rights issue.

Rivera-Reyes v. Com.. 2006 WL 2986495 (Ky. 2006)

FACTS: On Oct. 7, 2003, Rivera-Reyes was arrested in Louisville on charges of raping his 10-year-old stepdaughter. Because he apparently spoke little to no English, Officer Simpson, Louisville Metro PD responded to a request for an officer that could speak some Spanish to assist. Along with other officers, Officer Simpson questioned Reyes, and provided to him a Spanish version of the Miranda rights waiver form, and Reyes indicated he understood his rights. He then made incriminating statements that were used against him.

Reyes moved for suppression of the statements, arguing that the Spanish version provided to him "did not contain a statement informing him that he could cease questioning at any time by refusing to answer questions or by requesting an attorney." Officer Simpson testified at the hearing that he "had limited

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[1]Quoting the opinion:
The English translation of the Miranda rights actually given to Sanchez shows its insufficiency clearly:
You have the right uh, to remain in silence, uh
Anything that you say can be (counted/told) against you and uh, against you also in the procedures.
You have the right to consult an attorney, uh, before to make any conversation or any um, uhh ... court that's going to involve it uh, or to question eh, any question.
You also have ummm ... right to have your lawyer whenever you want or to ask questions or when they are going to ask you questions.
Uh, number four says, uh, you can ask the court to assign you an attorney and you have the right to uh, to have one.
And number five says, um, you can stop asking questions in any (age in time/epoch) or um, refuse uh to respond to any type of question or uh, to ask for an appointment with your attorney before answering.
The custodial interpreter was asked by Sanchez to repeat # 2, and she stated, "all that you say can be used against you, and um, any other procedure in court." This version of a Miranda warning was insufficient to properly apprise Sanchez of his rights.

experience in reading constitutional rights to suspects in Spanish" but that Reyes seemed to understand him and was responsive to his questions. The trial court concluded that the version was sufficient and that the absence of the statement did not invalidate the waiver, because it did not "contain any additional rights." The Court found that his waiver was, in fact, "made voluntarily, knowingly and intelligently."

Reyes also argued that a violation of his Vienna Convention rights, as alleged and admitted by the prosecution, required that his statements be suppressed, which the trial court also denied.

Reyes took a conditional plea of guilty to one count of rape, and appealed.

ISSUE: May a Spanish version of Miranda be given, albeit imperfectly?

HOLDING: Yes

DISCUSSION: Rivera argued that the "Spanish version of the Miranda rights waiver form is constitutionally deficient because it contains only four enumerated rights, as opposed to the English version of the same form, which includes a fifth enumerated provision informing the individual that they can cease questioning at any time by saying so or by requesting the assistance of an attorney." He also pointed to Officer Simpson's "lack of proficiency in speaking and translating Spanish" as further invalidating his waiver.

The Court noted that Rivera initialed each provision on the waiver form, indicating that he understood, and further that "despite Officer Simpson's lackluster ability as a Spanish translator" other officers present testified that Rivera "responded appropriated to Officer Simpson's questions" and that he "appeared to understand his rights."

The Court found that the missing fifth provision did not, in fact, "contain any additional rights" and that it "conformed to the requirements of Miranda." In U.S. v. Davis, the Court had held that a warning consisting only of the "right to remain silent and that [the defendant] could invoke this right or request an attorney at any time were sufficient."[2]

The Court noted, however, that it was "true that any statement made, elicited or offered to law enforcement personnel in the absence of a qualified interpreter must be suppressed, the suspect still has the right to make a voluntary confession."[3]

Rivera also argued that "a violation of Article 36 of the Vienna Convention requires suppression of his statements as a remedy." It noted that it was "undisputed that the police never contacted anyone from the Mexican Consulate and never informed [Rivera] of his rights under Article 36 of the Vienna Convention" – as required by treaty agreement when a foreign national is arrested. However, the trial court found, and the appellate courts agreed, that the "multinational treaty does not confer individual rights such that suppression of statements is required when a violation of the provisions has occurred."[4] The Court affirmed the decision of the trial court not to suppress the evidence on this ground, as well.

Rivera's conviction was overturned.

Tellez v. Com., 2007 WL 625278 (Ky. App. 2007)

FACTS: On Sept. 21, 2004, Detective Welch, and other officers, went to the "Kentucky Horse Training Center in Lexington and asked Tellez to come with them to answer some questions concerning allegations of two counts of sexual abuse." Tellez was arrested and taken to the Lexington PD. Detective Welch gave Tellez his Miranda rights, in English, and initially, Tellez indicated that he did not understand. After being asked again "whether he understood that he had a right to an attorney, Tellez responded that he did."

Tellez was indicted, and moved for suppression, arguing that he did not understand his rights. At the hearing, Tellez stated that he was a Mexican citizen,

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[2] 459 F.2d 167 (6th Cir. 1972); see also California v. Prysock, 453 U.S. 355 (1981) and Duckworth v. Eagan, 492 U.S. 195 (1989).
[3] KRS 30A.400(2).
[4] The correct remedy is generally acknowledged to be an action by the complaining country through the International Court of Justice (the World Court) at The Hague, Switzerland.

but had been in the U.S. for close to twenty years, and that he spoke and wrote “a little” English. He testified, through an interpreter, that he did not understand that he had a right to an attorney. Detective Welch testified that he believed that Tellez understood his questions and that Tellez responded to his questions, in English. (Detective Welch did, apparently, have some Spanish language training as well.)

The trial court found that Tellez made a knowing, voluntary and intelligent waiver of his rights, and denied the suppression. Tellez took a conditional guilty plea, and appealed.

ISSUE: May a defendant’s claim that he lacked sufficient English to knowingly waive rights be refuted by evidence to the contrary?

HOLDING: Yes

DISCUSSION: The appellate court reviewed the trial court’s findings, and found that its decision was “supported by substantial evidence.” The court noted that “Tellez even wrote apology letters to the two victims in English and that Detective Welch could understand the letters.” The Court upheld the guilty plea.

SIXTH AMENDMENT RIGHT TO COUNSEL

U.S. v. Fellers, 540 U.S. 519 (2004)

FACTS: On Feb. 24, 2000, Sgt. Garnett (Lincoln P.D.) and Deputy Jeff Bliemester (Lancaster County S.O.) went to Fellers' home in Lincoln, Nebraska. When Fellers answered their knock, the two informed him that they had a federal warrant for him, as a result of an indictment for methamphetamine distribution. They explained that the indictment "referred to his involvement with certain individuals, four of whom they named." Fellers admitted to the officers that he knew the four and had used methamphetamine with them.

After about 15 minutes, Fellers was taken to the Lancaster County jail. There, he was advised of his Miranda rights. He signed a Miranda waiver form, and repeated the inculpatory statements he had made earlier, adding that he had loaned money to one of them, even though he suspected she was involved in dealing in drugs.

Before his trial, Fellers requested suppression of all of his inculpatory statements. The magistrate recommended that his home statements be suppressed, because they were made in response to the "officers' implicit questions" and that some of his jail statements also be suppressed, as "fruits of the prior failure to provide Miranda warnings." However the judge decided only to suppress the home statements but not the jail statements, which had been made after he received and waived his Miranda rights.

Fellers was convicted, and appealed. The Court of Appeals held that his Sixth Amendment rights had not been violated because he was not interrogated at his home, and that even had they been wrong, the jail statements were properly cured of any previous failures by his receipt and waiver of his Miranda warnings. (At least one judge, who filed a concurring opinion, did believe that the "post-indictment conduct outside the presence of counsel," at Fellers' home was interrogation, but concurred that the defect had been cured of any defect by the subsequent Miranda warnings given.)

Fellers appealed.

ISSUE: May an individual under arrest (pursuant to an arrest warrant) be questioned in any way without their attorney being present?

HOLDING: No

DISCUSSION: The Court discussed this case under the Right to Counsel Clause of the Sixth Amendment, noting that the right to counsel attaches "at or after the time that judicial proceedings have been initiated ... whether by way of formal charge, preliminary hearing, indictment, information or arraignment." This provision is separate and apart from the right to counsel cautions given under the Fifth Amendment.

The Court noted, in particular, that the "definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable," mentioning a case that held that a

postindictment lineup, although not interrogation, still entitles the individual to the assistance of counsel. The Court held that there was "no question that the officers in this case 'deliberately elicited' information from the petitioner." Since the Court of Appeals did not address the case from the Sixth Amendment perspective, focusing instead on the Fifth Amendment rights and subsequent waiver of those rights,. the "Court of Appeals "improperly conducted its 'fruits' analysis under the Fifth Amendment," and looked only as to whether the jail statements were "knowingly and voluntarily waived." Rather, the "Court of Appeals did not reach the question that they [the jail statements] were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard."

Because the Court had "not had occasion to decide whether the rationale of Elstad[5] applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards" and remanded the case back for consideration consistent with this opinion.

NOTE: In effect, this opinion requires that when an individual is under arrest as a result of an indictment (a judicial action), their counsel must be present during any questioning. The Court has left open whether a specific waiver of their right to have counsel present, above and beyond the standard Miranda warnings, will suffice.

Matthews v. Com., 168 S.W.3d 14 (Ky. 2005)

FACTS: "Matthews was arrested following a high speed car chase in Paducah." He was found to be driving a "rolling meth lab." He was questioned, and during that questioning, about one hour after his arrest, he invoked his right to counsel. He was told that his conversation was not being recorded and he "began speaking with the detective." He admitted smoking marijuana, but denied any responsibility for the lab. However, his comments were being both audio and video recorded.

Some four hours later, a second detective approached him and asked if he was willing to answer questions. He again denied any responsibility for the lab, but was informed that he was going to be charged with manufacturing anyway. That detective gave Matthews his Miranda rights, and he waived his rights and agreed to talk. He gave a confession to the effect that he knowingly transported the lab and attempted to flee from the police.

During this interrogation, Matthews was allowed to smoke and use the bathroom on demand, and was provided with food. He was eventually released on bond. As he was on federal parole at the time, his parole was revoked as a result of his arrest, and he was returned to the federal prison, outside of Kentucky. Eventually, he was brought back to Kentucky and stood trial on methamphetamine manufacturing (and related) charges, and sentenced according.

During a suppression hearing, the trial court suppressed Matthews' statements to the first detective, but permitted the admission of the statements to the second detective.

Matthews appealed on a number of issues.

ISSUE: May officer re-initiate questioning after an individual has invoked their right to an attorney?

HOLDING: Yes (but be careful!)

DISCUSSION: The Court relied upon Michigan v. Mosley, 423 U.S. 96 (1975), which permitted the police to "question a defendant after he has initially asserted his right to remain silent, provided they have not attempted to talk him out of asserting his privilege, and provided a time lapse occurs between his initial assertion of his privilege and a subsequent questioning." Here, some six hours elapsed between the two periods of interrogation.
The Court also agreed that his confession was proper. There was no evidence of any attempt to illegally influence the confession; instead, his confession was "his attempt to talk himself out of trouble."[6] While the police did not tell him that the statement was not being

[5] Oregon v. Elstad, 470 U.S. 298 (1985).

[6] See Oregon v. Elstad, 470 U.S. 298 (1985).

recorded, "[t]he mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion."[7]

With regards to his waiver of Miranda rights, the Court stated that two elements must be met.[8] First, the "relinquishment of the right" … "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Next, it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Only then can it be a valid waiver.[9] Nothing in the record indicated that the waiver was not freely and knowingly given.

The Court upheld the conviction.

U.S. v. Ware, 338 F.3d 476 (6th Cir. Ky., 2003)

FACTS: ***Most of the facts of this case are irrelevant to the issue and are excluded from this summary.***

On the day in question, Dets. Nunn and Napier, Louisville PD, among others, apprehended and arrested Ware and forced him to lie on the ground. He was frisked and handcuffed, and informed of his Miranda rights. They found the suspect package, which had been delivered to him, in the vehicle, inside the bag.

Relying on an anticipatory warrant, the officers returned Ware to his apartment and searched it. They found scales, baggies, weapons and personal papers. Nunn and Napier took the items to be booked, while Det. Pitcock took Ware for booking. Pitcock radioed Nunn and Napier to tell them that Ware wished to talk to them.

Ware was taken to an interrogation room. While being both video and audiotaped, Nunn read him his rights. Ware stated he was a little "hazy" on what they meant, and Nunn repeated them.

The Court recited from the discussion about the rights, the issue in this case. Nunn discussed Ware's getting an attorney, possibly a public defender. Pitcock explained that it was Ware's responsibility to find one, or ask for a public defender. They assisted him by providing a telephone book, and helping him locate a particular attorney that he had heard of in the past. The officers found the telephone number and Nunn left to try to reach the attorney's office. He was unable to do so, leaving a message and giving the attorney the detective's pager number.

Ware then decided to talk to the detectives, and Nunn cautioned him. Ware eventually challenged the admission of all of the evidence, including the statement. The magistrate recommended the entire statement be suppressed, but not the rest of the evidence.

ISSUE: May an interrogation continue after a suspect has requested counsel?

HOLDING: Yes, but be careful!

DISCUSSION: After Ware was arrested, he was taken to the police station for interrogation and booking. He was seated in an interview room and again advised of his Miranda rights. He concluded he would like to have an attorney present, and the officers assisted Ware in locating a particular attorney's name, ultimately deciding that he wanted attorney Stephen Miller. Det. Nunn left the room and tried to contact Miller, with no luck. While Nunn was out of the room, Ware and Det. Pitcock chatted about a variety of things. When Nunn returned, Ware decided he would talk to them, and their discussion (recorded) indicated he understood his right to stop the interrogation at any time.

The District Court originally suppressed the statements, "premised on the notion that the officer's interrogation of Ware did not cease when he requested counsel, that his statements were given in the same custodial interrogation as defendant's initial request for counsel, and that defendant did not sufficiently initiate discussion of the crime or waive his right to counsel."

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[7] Illinois v. Perkins, 496 U.S. 292 (1990).
[8] Moran v. Burbine, 475 U.s. 412 (1986).
[9] Fare v. Michael C. , 442 U.S. 707 (1979).

The appellate court, however, concluded that in fact, interrogation never began prior to Ware requesting counsel. The questions were related to the Miranda rights, or were routine booking questions. The questions asked were "not even tangentially related to criminal activity …." The Court held that Ware properly initiated a request to talk further with the detectives, and it was clear from the recorded conversation that he clearly understood he could stop the questioning at any time.

In addition, the Court ruled that the warrant, which was initially suppressed, while "technically deficient as an anticipatory warrant" was sufficient to apply the good faith exception. The Court referred back to U.S. v. Miggins as well, and is consistent with the holding in that case.

Jackson/Haydon v. Com., 187 S.W.3d 300 (Ky. 2006)

FACTS: On March 16, 2002, two men, each "armed with a gun, approached a truck that was sitting at a carwash in Louisville, Kentucky." One (allegedly Jackson) was masked, and the other (allegedly Haydon) was not. The "four male occupants were ordered to get out of the truck, to empty their pockets, and to get on the ground." One of the occupants, Nance, "pulled a gun and struggled with Haydon" and in the struggle, both men were shot.

During the ensuing investigation, both Jackson and Haydon "made incriminating statements to the police." Haydon's statements were made while he was hospitalized for his injury, and he was, apparently, considered to be in custody at the time. Jackson's name came up in the investigation, and learning that he was due in traffic court on March 19, investigators arranged to catch up with him there. They asked him to "accompany them back to the police station to talk about their investigation and Jackson agreed." When they arrived, Jackson was "placed in a small interrogation room and left alone for approximately 10-15 minutes," whereupon Det. Wheeler returned and spoke with him for "some time." As soon as he decided to arrest him, Wheeler gave Jackson his Miranda warnings, and Jackson repeated his statements, which were then recorded.

They later each moved to have their statements suppressed, or, in the alternative, to have their accomplice's statement suppressed. The Court denied both motions.

Eventually both men took conditional guilty pleas, and appealed.

ISSUE: Must a request for an attorney be unequivocal for law enforcement to be required to stop all questioning?

HOLDING: Yes

DISCUSSION: Haydon argued that the statements he made two days after the shooting, while he was still in the hospital, must be suppressed for several reasons. Although the "police administered Miranda warnings immediately before eliciting the taped statements at issue, Haydon claims they violated his Fifth Amendment rights because (1) they refused to stop the interview at the point when he asked for an attorney, (2) they questioned him during a time when he was unable to make free and rational choices, and (3) they utilized a "question-first" technique that has since been invalidated by Missouri v. Seibert."[10]

The Court stated that it was "compelled to note that the threshold issue in this case (and in any case involving a perceived violation of Miranda rights) is whether the defendant was subject to a custodial interrogation at the time he claims he was denied any of his Miranda rights." However, the Commonwealth had acknowledged that "Haydon was subject to custodial interrogation" at the time, so the Court moved on to determine "whether Haydon's rights were validly waived pursuant to Miranda."

With regards to a request for an attorney, the record indicated that "Hay With regards to a request for an attorney, the record indicated that "Haydon made mixed references to an attorney during his interrogation." The Court acknowledged that Smith v. Illinois "reiterated the bright line rule requiring police officers to cease all questioning at the moment a suspect reasonable appears to make a 'clear and

[10] 542 U.S. 600 (2004).

unequivocal' request for an attorney."[11] The Court reviewed the exchange between Haydon and the investigators and noted that he "twice appeared to make statements indicating that he wanted a lawyer." However, the exchange was confusing because Haydon was also involved in an unrelated domestic case, and his comments appeared to reference that case, not the assault. As such, the Court agreed that the statements, while "seemingly unequivocal," were actually regarding the other case, not the assault. As such, the Court declined to overturn the trial court's decision that "Haydon failed to invoke his right to have an attorney present."

Next, Haydon argued that he was "under the influence of painkillers, or in a lot of pain, at the time he was questioned in his bed at the hospital." However, the Court found the evidence in the record convincing and that his "statements were free and voluntary."

Finally, the court addressed the "question-first" technique allegation. The court concluded that a further evidentiary hearing would be needed to determine if that technique was, in fact, used, and agreed that upon withdrawal of Haydon's guilty plea, such a hearing should be conducted by the trial court.

Haydon further argued that his statements made some four days after the shooting were inadmissible because they followed upon the March 18 statements. The Court held that any decision on that issue would have to wait for the further evidentiary hearing.

With regards to Jackson, the Court noted that "Jackson was interrogated for approximately 30 minutes before being read his Miranda rights," and during that time, he "made incriminating statements." He was arrested, and then given his Miranda rights, which he waived, after the statements were made. He argued that this process violated his rights under Seibert. However, the trial court noted that "Jackson was not in custody at the time he made his initial statements to police." The appellate court noted that a "custody determination cannot be based on bright-line rules, but must be made only after considering the totality of the circumstances of each case." The "pivotal requirement triggering an officer's duty to administer Miranda warnings is whether the environment has become so coercive as to induce reasonable persons to believe that (1) they are under arrest; or (2) they have otherwise [been] deprived of [their] freedom of action in any significant way."

The trial court had noted that Jackson "had the equivalent of a high school diploma and was familiar enough with the criminal justice system to fully understand what the detectives were asking him to do" – as well as to understand the "possible consequences." He was "asked, not ordered" to talk and he voluntarily agreed to do so, and he also testified that he was "not threatened or physically coerced" while talking to Det. Wheeler. As such, the Court agreed he was not in custody at the time the incriminating statements were made.

The Court upheld the denial of the motions to suppress the statements.

Duncan v. Com., 2006 WL 2456353 (Ky. 2006)

FACTS: Duncan was in custody in Fayette County on an unrelated charge, along with Johnson. Duncan had an attorney on the other charge. Johnson was interviewed by the police, and he "implicated Duncan in the [current] matter." As a result, a detective went to speak to Duncan, and he was given his Miranda rights. Duncan claimed, at a suppression hearing, that "he immediately invoked his right to silence and did not want to talk to the detective." The detective testified that Duncan first stated that he wanted to talk to Johnson, "but that then he would talk to the detective about the robbery in question."

The detective set up a meeting between the two, but at the time, Duncan did not know that Johnson had implicated him. After he spoke to Johnson, Duncan stated that he asked to see his lawyer. The detective, however, stated that he re-advised Duncan of his Miranda rights and that Duncan did not ask for an attorney, but instead, discussed the robbery with the detective and admitted to the crime.

Just a few minutes after the interview started, coincidentally, Duncan's lawyer arrived to talk to Duncan about the first charge. He was told that Duncan was taken to police headquarters, and the

[11] 469 U.S. 91 (1984).

attorney contacted the police and told them they were not to speak to Duncan. By the time the message got to the detective, however, Duncan had already confessed.

Duncan moved for suppression, but the Court refused the motion. Duncan took a conditional guilty plea, and appealed.

ISSUE: If a suspect has an attorney on one charge, does that counsel attach to all other charges without a specific invocation of the right to counsel by the defendant?

HOLDING: No

DISCUSSION: Duncan argued that "because he was represented on other charges, his right to counsel attached to any new charges." However, the Court noted that he was not charged until after his confession, and that the "right to counsel cannot be invoked once and relied on for any and all future prosecutions."[12] Further, the right to counsel is "charge specific" and had not attached at the time he was questioned by the police.

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

Wilson v. Com., 199 S.W.3d 175 (Ky. 2006)

FACTS: On Aug. 8, 2003, Capt. McManus (Paducah PD) was on a traffic stop when he heard gunshots nearby. He called for backup and proceeded to investigate the sounds. Off. Melton arrived to assist, and they entered "The Set" - a downtown area. They saw a "large number of people … fleeing the area." Officers searched the area and found Reginald Knox, who had been shot but was still breathing. They found no weapon or ID at the scene. Knox later died from his injuries.

Upon investigation, Det. Krueger developed Demetrius Wilson as a suspect in the case, and he (and other officers) "put out word" that Wilson was wanted for questioning. Within a few days, Wilson's stepfather contacted Krueger and "made arrangements" for Wilson to "come in for an interview." Later that day, Wilson, his mother, his stepfather and an uncle arrived at the PD, and Wilson was questioned by Krueger and Det. Carroll.

In that first interview, Wilson told the detectives that he'd been at The Set and had gone behind a building to urinate. While he was doing so, someone put a gun to a head and tried to rob him. He struggled with the robber, Knox, and Knox fired two shots at Wilson. Wilson then stated he fired two shots at Knox, and Knox fired a final shot at Wilson, and apparently, Wilson then fled the scene. The group walked to the scene and Wilson explained his actions to the officers. The officers told Wilson that his information was not consistent with the physical evidence, and "further intimated that" … the area … " was equipped with video cameras" … "though no such video equipment existed." The group was sent off to lunch to "think things over" and were asked to return later in the afternoon.

When the group returned, Wilson's stepfather "informed Detective Krueger that the family had consulted with an attorney, who advised [Wilson] not to speak with police." Wilson gave that same statement to another officer. Wilson was then immediately arrested and taken into an interview room.

Wilson was given his Miranda warnings, and was asked if he wanted to make a statement. He did so, giving "a statement that was inconsistent with those made in his first interview." He stated that Knox approached him while he was urinating, and "struck him in the head with the gun" – knocking him to the ground. Knox hit him, took items from his pockets and fled. Wilson claimed he chased Knox and shot at him three times, Knox apparently then fired twice at him, Wilson fired back and Knox fell to the ground. Wilson claimed to have tossed his revolver into a grassy area and gone home.

Wilson was indicted for murder. He requested suppression of his statements, and was denied. Wilson was eventually convicted, and appealed.

ISSUE: May the right to counsel be invoked prior to an actual arrest?

[12] McNeil v. Wisconsin, 501 U.S. 171 (1991).

HOLDING: No

DISCUSSION: Wilson claimed that his statements to police "should have been suppressed because he had invoked his Fifth Amendment right to remain silent and right to counsel before his arrest and subsequent interview." The Commonwealth contended that his "Fifth Amendment rights had not attached when he attempted to invoke them, and that his alleged invocation represented a request for counsel that was ambiguous at best."

The appellate court agreed that if Wilson "had validly invoked his Miranda rights at the police station before his second statement was made, further interrogation by police would have been inappropriate" and suppression warranted.[13] However, the Court agreed that Wilson's "right to silence and counsel had not yet attached when he attempted to invoke them upon returning to the police station, because he was not in custody."

The court noted, however, that in McNeil v. Wisconsin, the Supreme Court had specifically stated that that Miranda rights may not be invoked in anticipation of an arrest, but that "[m]ost rights must be asserted when the government seeks to take the action they protect against."[14] In light of that case, and numerous cases from other jurisdictions, the court found it "clear that the Fifth Amendment rights protected by Miranda attach only after a defendant is taken into custody and subjected to interrogation" and that "[a]ny attempt to invoke those prior to custodial interrogation is premature and ineffective."

The "circumstances surrounding [Wilson's] attempted invocation of his Miranda rights indicate that he was not under formal arrest and that his freedom of movement was not restrained."[15] The Court agreed, as well, that even if the officers had already decided to make the arrest, an officer's "unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[16] Given that Wilson made his invocation "when he voluntarily returned to the police station after having been allowed to go to lunch with his family." Since he was not yet in custody, he could not invoke his Miranda right to counsel, and the "statements he made after being taken into custody were not obtained in violation of his Fifth Amendment rights." The Court upheld the denial of the suppression.

Wilson also objected to the introduction of evidence that he told Det. Krueger that Knox had "robbed him of 'money and weed'" which he claimed was "unduly prejudicial character evidence and should not have been admitted."[17] The Commonwealth, however, argued that the "marijuana evidence fits the motive exception to the general rule prohibiting the admission of such evidence." The Court found that since the "challenged evidence" was Wilson's "own admission" it was "clearly probative of the fact that [Wilson] did in fact possess marijuana" that night. The Court agreed that it served as sufficient motive to permit its introduction into evidence, and that the trial court's decision to admit the evidence was appropriate.

Wilson's conviction was affirmed.

Cummings v. Com., 226 S.W.3d 62 (Ky. 2007)

FACTS: Cummings was arrested by Louisville PD officers in September, 2002. "He waived his Miranda rights and detectives began questioning him." He then invoked his right to counsel, and the officers immediately stopped the questioning and turned off the tape recorder. Det. Arnold stayed with Cummings, while Det. Duncan left the room.

Det. Arnold later testified that Cummings "initiated conversation with him." Det. Arnold told Cummings that "he did not know if he could talk with him since [Cummings] had already asked for an attorney." When Cummings insisted he wanted to talk, Det. Arnold advised him again of his Miranda rights. "None of this exchange was tape-recorded." Dets. Duncan and Wilfong listened from outside the room, and Det.

[13] Edwards v. Arizona, 451 U.S. 477 (1981).
[14] 501 U.S. 171 (1991).
[15] Citing to Stansbury v. California, 511 U.S. 318 (1994); California v. Beheler, 463 U.S. 1121 (1983).
[16] Berkemer v. McCarty, 468 U.S. 420 (1984); Thompson v. Keohane, 516 U.S. 99 (1995).
[17] Known as "prior bad acts" evidence governed by KRE 404(b).

Duncan instructed Det. Wilfong to go back and question Cummings about other rapes in which he was a suspect. "The tape recorder was eventually turned back on and [Cummings] made incriminating statements."

Cummings requested suppression, eventually, and Dets. Duncan and Arnold testified as to the above. Cummings stated, however, that while the tape recorder was off, Det. Duncan "threatened him and his family."

The trial court denied the motion, finding no evidence of any "coercion, threat, or discomfort" in the transcript. Cummings took a conditional guilty plea, and appealed.

ISSUE: May a suspect re-initiate interrogation after asking for an attorney?

HOLDING: Yes

DISCUSSION: The Court started its review by noting that "[i]n order to use statements, whether exculpatory or inculpatory, made by a defendant subjected to custodial interrogation, the prosecution must demonstrate that [Cummings] was advised of his Fifth Amendment rights, including the right to remain silent and the right to an attorney." If the waiver "knowing, voluntary, and intelligent," the statement may then be admitted. Further, "[o]nce an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[18]

In this case, the Court found no indication that Cummings' wavier was coerced in any way, and the transcript supported the assertions by the detectives as to what occurred. Once the Court determines that the "inquiries or statements were intended to initiate a conversation with authorities" and that the defendant gave a "voluntary, knowing, and intelligent" waiver of his right to counsel, the information was admissible.[19]

[18] Edwards v. Arizona, 451 U.S. 477 (1981).
[19] Oregon v. Bradshaw, 462 U.S. 1039 (1983).

Cumming's plea was upheld, but it was remanded for sentencing errors.

Van Hook v. Anderson, 488 F.3d 411 (6th Cir. Ohio 2007)

FACTS: In 1985, Van Hook was arrested in Ft. Lauderdale, Florida on suspicion of a horrible murder that had occurred two months earlier, in Cincinnati. The Florida officers who arrested him gave him Miranda warnings. Van Hook initially agreed to talk, but then stated "[m]aybe I should have an attorney present." Believing that he was asking for a lawyer, the officers did not further question him.[20]

Cincinnati PD Det. Davis arrived in Ft. Lauderdale to transport Van Hook back to Ohio. At that time, Van Hook did not yet have an attorney. Det. Davis talked to him about the extradition and told Van Hook that they "had a lot to talk about" but that Van Hook would have to initiate any discussion. Van Hook stated that his mother had told him to tell the truth (something the detective already knew), and that he wanted to talk. He was given his Miranda rights, waived them and then gave a "full and graphic confession."

Van Hook was indicted on murder and robbery. He moved to suppress the confession, but the Court noted that although he had invoked his right to counsel, he had initiated the discussion with the police. The Ohio Court admitted the confession. He claimed temporary insanity in the homicide, but the jury both convicted him and recommended capital punishment.

[20] The Court noted that: "In 1985, the officers did not have the benefit of the Supreme Court's decision in Davis v. United States, 512 U.S. 452 (1994), when the Court made clear that a suspect in custody must "unambiguously request counsel," *id.* at 458, and that "maybe I should talk to a lawyer" is not an unequivocal request, *id.* at 462. In 2007, Van Hook's statement might well not have sufficed to require that questioning be stopped. The officers did, however, understand Van Hook to have asked for a lawyer, and stopped any further questioning of him based on his statement."

Van Hook appealed through the state courts and the federal courts, and through a lengthy process, and several changes in procedural law.

ISSUE: May a third party tell police that a suspect (who has invoked counsel) wishes to talk to them?

HOLDING: Yes

DISCUSSION: Van Hook argued that his confession should have been suppressed under Edwards v. Arizona.[21] The Court agreed that a "confession [must] be voluntary to be admitted into evidence."[22] Further, the Court stated that:

> The rule of Edwards embodies two independent inquiries: First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.).

The Court noted that the gravamen of Van Hook's claim is that he did not, under the law initiate "further discussions of the police." It stated that if the record had shown that "Det. Davis - unprompted - initiated the discussion, the confession would likely have to be suppressed." The Court framed the question - that the "facts in this case required [the Court] to resolve first the legal question whether a suspect can initiate discussions with police through a third party." He argued that only the suspect "himself" can "communicate a willingness and a desire to talk with the police."

The Court, however, found "no sound justification for reading the statement from Edwards that the suspect 'himself' must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk."

[21] 451 U.S. 477 (1981).
[22] Dickerson v. U.S., 530 U.S. 428 (2000)..

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

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

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

HOLDING: Yes

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

The relevant testimony is as follows:

> Detective Hester: . . . but we're talking about your son now and whatever happened with the others, I don't, you know, I wouldn't really expect much remorse or concern for their well being, but you're dealing with your own blood now and I'm offering you an opportunity to do right by your son, okay? So what went on? When did all this start with [T.B .]?
> Burnett: I don't know what to say. I don't know what to say. I was always told that I wasn't supposed to say nothing, not unless an attorney was present. I don't know. I ain't never been in an interrogation room. I don't know what to say. (emphasis added).
> Detective Hester: Understand this, based on . . .
> Burnett: I'm not really with the laws and stuff, I don't know. (emphasis added).
> Detective Hester: Well, like I told you before, and you've got, you know, those rights, okay, but here's what's gonna happen, okay. Based on what [T .B.]'s told me, the things he's described, I'm prepared to charge you today with the things that happened to [T.B.] And I can go to the Com. Attorney and I can

say, you know, obviously they're going to know about your record, and I can say you got another one here but he's repentant, he's sorry for this one, and he wants to help his son get through it, for the mistakes that he made . Or I can go back, you know, and we can work out for running stuff concurrent, you know, with whatever's happening in Indiana or things like that. I can somewhat advocate for you. Those decisions are made by them and by the judge, and not by me, but I can go in there and advocate for some sort of deal where you don't do fifteen (15) years and then, plus twenty-five (25) or thirty (30), after you get done with that you come back to Kentucky. I can work, you know, let's do fifteen (15) that runs concurrent with what he's gonna be facing up in Indiana and be done with it. Or I can say that, you know, I came in and I offered him an opportunity to show remorse, and show repentance, and he didn't take it. And we've gotta make sure that, you know, he's only thirty (30), what thirty-six (36), thirty-five (35)?
Detective Hester: Fifteen (15), only makes you fifty (50). I gotta make sure you get another twenty-five (25) on top of that so that you're at least seventy-five (75) before the time you get out. That's where we stand and . . . .
Burnett: I understand that. I'm just saying, I don't want to do anything without the law. (emphasis added) .

At this point, a few seconds elapse without Detective Hester saying anything, and then Burnett breaks down, begins crying and volunteers the following :
Burnett: I never meant to hurt my son. It just keeps coming back. It just keeps coming back.
Detective Hester: You got some . .
Burnett: I swear I try to fight it, I try . . .
Detective Hester: Uh huh.
Burnett: but it just keeps coming back. I pray to God just make it stop, but it just keeps happening.

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

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

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

> In determining whether the accused initiated the conversation pursuant to the two-part test in Smith v. Illinois, this Court has interpreted "initiated" in the ordinary sense of the word.[23] During the interrogation in Skinner v. Com.[24], the officer ceased questioning after the accused invoked his right to counsel, but shortly thereafter, the accused made incriminating statements about the crime not in response to questioning. This Court affirmed the denial of the suppression motion, adjudging that the accused initiated the conversation when he volunteered

[23] Smith, 920 S.W.2d at 518 (citing Oregon v. Bradshaw, 462 U.S . 1039, 1045 (1984)).
[24] 864 S.W.2d 290 (Ky. 1993).

> statements that were not in response to interrogation.[25] Similarly, in the present case, when Burnett became emotional and made the incriminating statements at issue - that he didn't mean to hurt his son and that it just keeps coming back - the statements were not in response to a question by Detective Hester. As stated above, as soon as Burnett stated he did not want to do anything without the law, Detective Hester said nothing more until after Burnett broke down and made the initial incriminating statements.

The decision of the Fayette Circuit Court was affirmed.

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

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

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

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

HOLDING: Yes

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

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

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

The Court noted that once Juarez invoked his right to an attorney, he could only be interrogated again if he "himself initiates further communication, exchanges or conversations with the police."[26] The videotape of the second session contained "no evidence of coercion or duress." The Court upheld the denial of his motion to suppress the statements.

Montejo v. Louisiana, 556 U.S. --- (2009)

[25] Id.; see also Cummings v. Com., 226 S.W.3d 62 (Ky. 2007).

[26] Oregon v. Bradshaw, 462 U.S. 1039 (1983).

FACTS: Montejo was arrested on murder and robbery charges in Louisiana. He was interrogated and changed his story several times. He was brought before a judge for his state-mandated 72-hour hearing, where he was appointed counsel as he appeared indigent, even though he apparently did not request counsel, or even speak, at that time.
Later that same day, two detectives visited Montejo, and after some discussion, he was given his Miranda warnings and agreed to go on an excursion to attempt to locate the murder weapon. During the trip, he "wrote an inculpatory letter of apology to the victim's widow." When they returned, Montejo's court appointed attorney "was quite upset that the detectives had interrogated his client in his absence."

Ultimately, Montejo was convicted and sentenced to death. His appeals through the Louisiana state court system were unsuccessful, with the Louisiana Supreme Court holding that the protections of Michigan v. Jackson[27] did not apply, as Montejo did not actually request an attorney or otherwise assert his Sixth Amendment right at the hearing or before. (The Louisiana court ruled that "if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.")

Montejo requested certiorari and the U.S. Supreme Court accepted review.

ISSUE: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

HOLDING: Yes

DISCUSSION: The Court initially noted that the issue was complicated by the fact that some states do not appoint counsel for an eligible defendant until that individual affirmatively requests counsel, while other states do so automatically. In Jackson, the defendant had properly requested counsel. The Court reviewed all of the questions that might arise ins determining whether Jackson is triggered, including, for example, the mysterious notion of how a defendant would "affirmatively accept" counsel that is automatically appointed by the court. The possible ways to do so would be, at best, impractical, and at worst, virtually impossible, according to the Court. It would also mean that "[d]efendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger Jackson, while those in other States, effectively instructed by the court to request counsel, would be lucky winners."

The court then addressed whether a Miranda[28] warning and waiver was sufficient to also waive the right to counsel, and agreed "that typically does the trick, even though the Miranda rights purportedly have their source in the Fifth Amendment." Under Edwards v. Arizona, the Court had "decided that once 'an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact."[29]

Further, the Court noted:

> The Edwards rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights."[30] It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."[31] This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence."[32]
>
> Jackson represented a "wholesale importation of the Edwards rule into the Sixth

[27] 475 U. S. 625 (1986).

[28] Miranda v. Arizona, 384 U.S. 436 (1966).
[29] 451 U. S. 477 (1981).
[30] Michigan v. Harvey, 494 U.S. 344 (1990).
[31] McNeil v. Wisconsin, 501 U. S. 171 (1991).
[32] Texas v. Cobb, 532 U. S. 162 (2001).

> Amendment."[33] The Jackson Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning," because doubts must be "resolved in favor of protecting the constitutional claim," Citing Edwards, the Court held that any subsequent waiver would thus be "insufficient to justify police initiated interrogation." In other words, we presume such waivers involuntary "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily" in subsequent interactions with police.[34]

The Court noted that "[w]hen a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary." The Court found:

> No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

As part of its decision, the Court was compelled to decide if Michigan v. Jackson was still valid law or if it should be overturned. The Court asked "What does the Jackson rule actually achieve by way of preventing unconstitutional conduct?" The Court noted that there were already three prophylactic rules in place to protect defendants: Miranda's protections against "compelled self-incrimination" and its right to have an attorney present during custodial interrogations if desired, Edwards, which holds that once a defendant invokes the right, all interrogation must stop, and finally Minnick v. Mississippi, which states that "no subsequent interrogation may take place [following invocation] until counsel is present, 'whether or not the accused has consulted with his attorney.'"[35]

The Court continued:

> These three layers of prophylaxis are sufficient. Under the Miranda-Edwards-Minnick line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment,[36] it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then Jackson is simply superfluous.

In particular, the Court noted it had "praised Edwards precisely because it provides 'clear and unequivocal' guidelines to the law enforcement profession.'"[37] The Court ruled that "when the marginal benefits of the Jackson rule are weighed against its substantial costs to the truth seeking process and the criminal justice system, we readily conclude that the rule does not "pay its way."[38] As such, the court overruled Michigan v. Jackson.

The Court concluded:

> This case is an exemplar of Justice Jackson's oft quoted warning that this Court

[33] Id.
[34] Harvey, supra.
[35] 498 U.S. 146 (1990).
[36] Cobb, supra.
[37] Arizona v. Roberson, 486 U.S. 675 (1988).
[38] U.S. v. Leon, 468 U. S. 897 (1984).

"is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."[39] We today remove Michigan v. Jackson's fourth story of prophylaxis.

Because certain issues were not fully addressed during Montejo's criminal case, the Court agreed that the case would be remanded for a further consideration, on the state level, as to whether Montejo did, in fact, affirmatively assert his right to counsel prior to agreeing to accompany law enforcement on the "excursion for the murder weapon," agreeing that had he done so, "no interrogation should have taken place unless Montejo initiated it."

Maryland v. Shatzer, 130 S.Ct. 1213 (2010)

NOTE: Please read this summary in detail. In short, Shatzer states that if a suspect being questioned invokes his right to counsel and is then released from custody, officers may re-approach the suspect after 14 days. Provided the suspect is again given Miranda warnings and does not re-invoke his right to counsel, he has effectively waived his rights. The suspect may again be questioned and his statements may be used against him in court.

FACTS: In August, 2003, a social worker for the Hagerstown Police Department learned of allegations that Shatzer has sexually abused his 3-year-old son. At the time, he was incarcerated for an unrelated child sexual abuse offense. Det. Blankenship interviewed Shatzer at the prison, after reviewing Shatzer's Miranda rights with him. Shatzer gave him a written waiver of those rights. However, when Blankenship explained why he was there, "Shatzer expressed confusion - he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated." At that time, Shatzer refused to talk to him without an attorney. Blankenship ended the session and returned Shatzer "back into the general prison population." Blankenship then closed the investigation.

Two and a half years later, the same social worker provided more specific allegations to the department. Det. Hoover was assigned, and they interviewed the victim, who was by that time eight years old. The victim provided more detailed information. They went to the prison where Shatzer had been transferred to interview him. Shatzer was again surprised, as "he thought the investigation had been closed, but Hoover explained they had opened a new file." He was again given Miranda. Once again, he gave a written waiver.

Hoover interrogated Shatzer for a half-hour, during which Shatzer admitted non-contact sexual actions in front of the child. He agreed to take a polygraph, and at no time did "Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one."

Shatzer took the polygraph five days later, after again giving a written waiver to his Miranda rights. When he was judged to have failed, he "became upset, started to cry and incriminated himself by saying ' I didn't force him. I didn't force him.'" He then requested an attorney. "Hoover promptly ended the interrogation."

Shatzer was charged with several offenses relating to the incident and he moved for suppression. The trial court denied the motion. Shatzer was tried and convicted. He appealed and the Maryland Court of Appeals reversed the conviction. Maryland appealed to the U.S. Supreme Court, which granted certiorari.

ISSUE: Is the Edwards v. Arizona[40] prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of both the decision in Miranda v. Arizona[41] and Edwards v. Arizona. Miranda had instructed that officers "must warn a suspect prior to questioning that he has a right

[39] Douglas v. City of Jeannette, 319 U. S. 157 (1943).

[40] 451 U.S. 477 (1981).

[41] 384 U.S. 436 (1966).

to remain silent, and a right to the presence of an attorney" in order to counteract the "coercive pressure" inherent in a custodial interrogation. If the suspect then indicates that he wishes to remain silent, or would like an attorney, the interrogation must then cease. "Critically, however, a suspect can waive these rights." A valid waiver request a showing that the "waiver was knowing, intelligent, and voluntary" under a high standard of proof laid out by Johnson v. Zerbst[42] for constitutional rights.

In the Edwards case, the Court had determined that "Zerbst's traditional standard for waiver was not sufficient to project a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel," concluding that instead, "'additional safeguards' were necessary." In McNeil v. Wisconsin, the Court had found it insufficient that the suspect had simply "responded to further police-initiated custodial interrogation."[43] Specifically, although a general waiver might be sufficient to an initial Miranda warning, it was "not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel." The Court had noted in other cases that there was a risk of increasing pressure to talk as the custody is prolonged.[44] In effect, earlier Courts were concerned about the possibility of a suspect being "badgered in submission" by repeated attempts at interrogation after invocation of the right to counsel.[45]

However, in this case, unlike the earlier cases on the issue, Shatzer was not held in continuous custody by the interrogating officers, but had instead been released back to serve his initial incarceration. There, he stayed for two and a half years before further interrogation was attempted.

The Court continued:

> When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer's asking the suspect whether he would like to waive his Miranda rights will any more "wear down the accused,"[46]) than did the first such request at the original attempted interrogation—which is of course not deemed coercive.

The Court noted that without some time limit, the disability caused by Edwards would be eternal. It would apply, under Roberson, "when the subsequent interrogation pertains to a different crime," under Minnick "when it is conducted by a different law enforcement officer" and even after the subject has met with an attorney. It would also "render invalid … confessions invited and obtained from suspect who (unbeknownst to the interrogators) have acquired Edwards immunity previously in connection with any offense in any jurisdiction." The Court noted that "[i]n a country that harbors a large number of repeat offenders, this consequence is disastrous."

The Court concluded that the protections offered by the Miranda warnings, which of course will be given at the second attempt at interrogation under custodial circumstances, will suffice when the subject "is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects."

The Court further agreed that although Shatzer was still incarcerated, that his return to the general prison population was, in fact, a break in custody. The issue remained, however, that if two and one half year was a sufficient break in custody, how much less would still meet that requirement. The Court found it "impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement

[42] 304 U.S. 458 (1938).
[43] 501 U.S. 171 (1991).
[44] See Minnick v. Mississippi, 498 U.S. 146 (1990).
[45] See Arizona v. Roberson, 486 U.S. 675 (1988).
[46] Smith v. Illinois, 469 U. S. 91 (1984).

officers need to know, with certainty and beforehand, when renewed interrogation is lawful." Although it was "certainly unusual" for at Court to "set forth precise time limits governing police action," there was precedent for doing so. The Court ruled that a period of fourteen days was "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."

The Court briefly addressed the concern that Shatzer remained incarcerated during that break in custody - by differentiating between "Miranda custody and incarceration pursuant to conviction." The Court noted that "'the inherently compelling pressures' of custodial interrogation ended when he returned to his normal life" albeit in prison.

The Court concluded that "because Shatzer experienced a break in Miranda custody lasting more than two weeks between the first and second attempts at interrogation, Edwards does not mandate suppression of his March 2006 statements. The Court reversed the Maryland Court of Appeals and remanded the case for further proceedings.

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."

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 then 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's case, the Court agreed that his right to counsel was violated and reversed his conviction in the murder case[47] 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

[47] 327 S.W.3d 512 (Ky. 2010).

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. They were tried together, and the defense for each was that the other actually fired the shots. Both were convicted, and appealed.[48]

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."[49] The Court summarized his statements:

> Was he asking for counsel or was he merely sking 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." It "may not even be admitted against the confessor, moreover, if on its face it implicates another defendant being jointly tried with the confessor."[50] The statement may be admitted, however, if the confession is "redacted so as to remove express and obvious inferential references to the defendant."[51] 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.

VOLUNTEERED STATEMENTS

Buttrey v. Com.
2007 WL 1789985 (Ky. 2007)

FACTS: On Jan. 9, 2003, Trooper Baxter (KSP) pulled over a vehicle with an expired registration. The driver, McNew got out and walked back to the trooper's cruiser, while McNew's son and Buttrey stayed in the car. Trooper Baxter then walked up to the car, opened the door and asked Buttrey, in the front passenger seat, for ID. The trooper

[48] Although two separate cases, the Court combined the two in its opinion.

[49] Berghuis v. Thompkins, 130 S.Ct. 2250 (2010).

[50] Richardson v. Marsh, 481 U.S . 200, 206 (1987) ; see also Crawford v. Washington, 541 U.S. 36 (2004).

[51] Bruton v. U.S. , 391 U.S . 123 (1968) ; Gray v. Maryland, 523 U.S .185 (1998).

immediately noted a "chemical odor in the car." Trooper Baxter put McNew through a sobriety test and asked him if there was anything illegal in the car. McNew admitted that there "might be a 'cook' in the car." The child and Buttrey both began to get out, and Trooper Baxter "got the child out of the car" and ordered Buttrey to put his hands on the roof. Buttrey, however, acted "restless" so Trooper Baxter tried to handcuff him. However, Buttrey ran away.

Trooper Baxter arrested McNew and took the child into protective custody. He searched Buttrey's jacket, which he'd left behind, and the passenger area of the car. The record indicated that "extensive evidence" of methamphetamine was found in the car, and the Buttrey's jacket contained two cell phones and other evidence of methamphetamine. The evidence regarding a lab was recovered, primarily, from the front seat. In particular, Trooper Baxter found a cooler that was being used actively to produce methamphetamine.

Buttrey was indicted, and fled to Indiana. When captured there, troopers went to Indiana and transported him back to Laurel County. During that five-hour trip, Buttrey "made several incriminating statements." At trial, Trooper Baxter indicated that although they did not give Buttrey his Miranda rights, neither did they attempt to take any statements from him. He stated that Buttrey was "talkative" and engaged in conversation with the troopers, including a discussion of how he had broken his leg, which was in a cast.

Buttrey "volunteered a statement identifying where he had hidden after escaping on the night of the traffic stop, and that he made "further incriminating statements involving methamphetamine." Specifically, he admitted that he was among the first people in the county to cook meth and that "current cooks did not know how to safety do it and would 'blow themselves up.'"

Prior to trial, Buttrey requested suppression, but was denied. He was convicted of multiple offenses and appealed.

ISSUE: Are volunteered statements admissible?

HOLDING: Yes

DISCUSSION: Buttrey argued that the statements made during the trip must be excluded because of their failure to give him Miranda warnings. However, the Court noted that the "duty to warn … does not attach absent custodial interrogation." As the prosecution conceded that he was in custody, interrogation remained the only issue.
The Court reviewed the facts, and found that there was no evidence that Buttrey made his "objectionable statements in reaction to questions or actions of the troopers." He did not assert that "the transporting state troopers attempted to question him, to bait him into talking, to appeal to his conscience or emotions, or to use any other method to elicit incriminating responses from him" Even though Trooper Baxter agreed that it was reasonable to think Buttrey might make incriminating statements during the long ride, the Court found that "[w]ithout more, the circumstances of the drive's duration cannot be characterized as anything other than normally attendant to a transportation for extradition."

The Court found that the "statements were voluntary" under Wells v. Com. and Rhode Island v. Innis.

Next, Buttrey argued that "Trooper Baxter's testimony about the statements [he] made during extradition should have been excluded" as evidence of prior bad acts (prohibited under KRE 404) as they referenced only his experience in manufacturing and knowledge of illegal acts. The trial court had concluded that the "statements were relevant to prove [Buttrey's] knowledge and intent – both of which [were] material elements" of the crime." The "fact that these statements were voluntarily given by [Buttrey] to law enforcement officers against his own interest len[t] significant trustworthiness to them since [Buttrey] clearly had expertise in manufacturing methamphetamine and had no apparent motive to fabricate the statements." The Court found it was appropriate to permit the statements.

The Laurel County decision was affirmed.

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

FACTS: On the date in question, a motel cleaning crew found a "badly beaten woman in a room at the motel" in Boone County. Beckham was targeted as a suspect "because he was the last person seen with the victim." Although they had not yet found Beckham, the investigating officers requested a warrant to obtain samples of "blood, saliva, body hair, head hair, and pubic hair from Beckham and to take nude photographs of him."[52] Later that day, officers went to Beckham's home and he agreed to speak to the officers - he was then transported to a local probation and parole office by the police. Detectives Pate and Lavender (Boone County SD) met Beckham there and questioned him for over two hours in a closed office. Beckham made a written statement in which he admitted to being with the victim and that he attempted sexual intercourse with her, but was unsuccessful, but stated that he did not assault her. He further gave permission for the officers to retrieve the clothing he was wearing at the time. He was not told until after that time that the officers had a warrant for him, and the opinion notes that Beckham apparently did not object to the collection of the evidence named in the warrant.

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

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

[52] The Court refers to this as a "perk kit" - but the editor suspects that is a misspelling of "PERT."

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

HOLDING: No

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

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

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

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

Beckham's sentence was affirmed.

MIRANDA - CUSTODY

Emerson v. Com., 230 S.W.3d 563 (Ky. 2007)

FACTS: Emerson's mother, Vickie Monroe "owned and operated a tavern," in Jefferson County, along with her husband, Emerson's stepfather. Emerson told his girlfriend, Decker, "that his mother wanted Monroe (her husband) murdered" … and "was putting pressure on him to do something about it." He told Decker that his mother had given him money to find someone to commit the murder, but that "he was thinking of doing it himself." He asked Crews (who was apparently connected to the girlfriend) to "obtain a gun to kill Monroe" - and a rifle was purchased from Wal-Mart by Hill.

Approximately a month later, Monroe was murdered in the early morning hours. Emerson picked up Crews and they rode around. At some point, Emerson stopped the car and Crews took a rifle from the trunk and threw it off the road. However, a witness was driving past and reported it to the police. The two men were stopped and after being questioned, were permitted to drive off.

At about 6 a.m., Emerson told Decker that he "had shot and killed Monroe and made it look like a robbery." Emerson became a suspect, but initially denied involvement when questioned by Det. Davis. He was interviewed, agreed to and took a polygraph, and was interviewed a second time. In the second interview, he admitted 'that he had hired a black man to kill Monroe, and buy and dispose of the gun." At that point, apparently, he was given his rights under Miranda.

Emerson was indicted for complicity in the murder and tampering with physical evidence. Prior to trial, he requested suppression, but was denied. He was convicted, and appealed.

ISSUE: Is a person who agrees to come to the police station for an interview in custody for Miranda purposes?

HOLDING: No

DISCUSSION: Among other issues, Emerson argued that his statements should have been suppressed. The Court noted, however, that the "evidence indicates that Detective Davis set up an interview with [Emerson] because he had been at the murder site in the early morning hours when the murder took place." The detective "had no information as to who had shot Gerald Monroe, and [Emerson] was not in custody." During the interview, Emerson "agreed to take a polygraph." He was told he could leave his cell phone in the interview room, and he claimed that "he no longer felt free to leave because his cell phone was in the other room." As a result of discrepancies in his statements to the examiner, Det. Davis questioned him further, and that was when he made his admission. After being given his Miranda rights, he signed a waiver and a confession. He showed police where the gun had been discarded and eventually gave another statement in which he admitted, specifically, shooting Monroe.

The trial court had ruled that he "was not in custody when the interviews began and could have left the police station at any time." The court looked to Stansbury v. California, to find that Miranda is only required when "there has been such a restriction on a person's freedom as to render him 'in custody.'"[53] Emerson argued that since he admitted he was "driving his mother's Lincoln, he was with Justin Crews, and they were in another county" that this information was incriminating, since he knew that a witness had reported the actions of the occupants of such a car. He also "thought the police knew about his disposal of the weapon." The Court, however, noted that "his 'knowledge' and suspicions are nothing more than the product of a guilty conscience." The Court further stated that Emerson "came to the detective's office voluntarily, was not monitored, was permitted to go to the restroom alone, and was told he was not in custody." He chose to leave the cell phone in the other room, and he could have retrieved it and left at any time prior to his admission.

The Court also quickly dismissed his argument under Missouri v. Seibert,[54] and that since he wasn't in

[53] 511 U.S. 318 (1994); Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).
[54] 542 U.S. 600 (2004).

custody, Miranda wasn't required, and thus, Seibert didn't apply.

The Court affirmed the finding of guilt, but remanded for further proceedings on sentencing, as it held that the jury instructions regarding mitigation were flawed.

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

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

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

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

Shouse was convicted of intentional murder, and appealed.

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

HOLDING: No

DISCUSSION: Shouse argued that he should have been given his Miranda warning prior to his initial statement. The Trooper testified that he did not consider Shouse in custody at the time, as he believed he was investigating a suicide. The Court agreed that the interview was, in fact, an interrogation. The Court looked to Com. v. Lucas, which stated that "[s]ome of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police ."[55] In this case, even Shouse agreed the trooper was "very cordial," and in particular, Shouse was not arrested at the time. The Court found no indication that he was subjected to anything more than the "standard taking of a witness's statement in the course of an investigation into an apparent suicide." The interview took place in the police car only because it was cold and raining.

Shouse's conviction was affirmed.

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

FACTS: Vickie Monroe and her son Emerson were accused of murdering Vickie's husband, Gerald, on June 1, 2002. Prior to the homicide, Vickie Monroe had "confided in Emerson about how unhappy she was and how badly her husband treated her." The record indicated that a year before the murder they had discussed how much it would cost to "get rid of" Gerald. About that time, she gave Emerson $2,000 dollars and later, another $1,000. Both were charged with the robbery and murder of Gerald Monroe. Monroe moved for suppression of statements she made to the police, but was denied. During the trial, evidence was presented as to statements from three

[55] 195 S.W.3d 403 (Ky. 2006).

friends of Emerson's "about the statements made to them by Emerson." Emerson did not testify at trial.

Both were convicted and appealed.

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

HOLDING: No

DISCUSSION: Monroe was initially interviewed at about midnight on June 12. She had been contacted at home and asked to come to the station for questioning, and agreed. She knew that Emerson was also being questioned. She was not given her Miranda warnings. Following "several small sessions," Monroe was "confronted with her son's accusations and made some incriminating statements." She was then arrested. The Court noted, however, that until her arrest, she was not monitored and was allowed to "smoke, drink and eat" and was left alone. She was permitted to use the restroom and "returned to the office on her own." It would have been unreasonable for her to believe that she was in custody at that time and the Court concluded that Miranda warnings were unnecessary.

Vickie Monroe's conviction was reversed.

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

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

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

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

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

HOLDING: Yes

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

clear Alkabala-Sanchez understood that. During the course of their lengthy discussion, Alkabala-Sanchez "began to talk too much, and to make statements not consistent with second-hand information." At that point, Trooper Devasher elected to give Miranda warnings and the Court found the next two hours were a "custodial interrogation."
The Court further noted this was not the "question-first" process described in Missouri v. Seibert.[56] In this case, Alkabala-Sanchez "had been telling a story as if it were told to him by Camacho's wife, but interspersed statements that indicated personal knowledge." The Court found no indication that the interview was done in bad faith, and that Trooper Devasher "began the interview under the assumption that Alkabala-Sanchez was simply a witness with knowledge of the crime." When it evolved further, he gave Alkabala-Sanchez Miranda warnings, which was proper.

Alkabala-Sanchez's conviction was affirmed.

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

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

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

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

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

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

Griggs appealed.

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

HOLDING: No

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

[56] 542 U.S. 600 (2004).

deprivation." The Court found the confession to be voluntary.

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

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

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

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

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

"During the initial portion of the interview, Fugett led the officers to believe he had information and would be willing to assist in the investigation." However, in the early morning hours the next day, while still at police headquarters, he approached a detective and indicated for the first time that he may have had a role in the incident. Thus, when the detectives returned at 5:50 a.m ., Fugett was given his Miranda warnings. After executing a waiver, Fugett informed the officers he had been present at the shootings. He denied pulling the trigger, but he admitted he had hidden the guns, and he was then arrested. Around 10:30 a.m., he again approached the officers and said he had shot the victims in self-defense using a pistol he had taken from Ray's pocket.

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

ISSUE: Is interrogation at a police station automatically custodial?

HOLDING: No

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

officers he had been at the shooting. He stated someone else had done the shooting, but he "admitted he had agreed to hide the guns." At that point, he was arrested. Fugett eventually claimed that the shooting was in self-defense.

Fugett argued that the approach was a "question first and then warn technique" prohibited by Missouri v. Seibert.[57] The Court noted the difference, however, in this case, in that Fugett was considered a witness, not a suspect, initially, and agreed, voluntarily, to be questioned. Before they began "systematic questioning, detectives properly provided him with his Miranda warnings." Further, the Court found that Fugett was not in custody prior to his actual arrest, so Miranda would not have been required. Fugett argued that the atmosphere was coercive, but the Court noted that was rejected in California v. Beheler.[58] In that case, "the Court recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." Further, "the definition of custodial interrogation" focuses on "words and actions on the part of police."[59] In this case, Fugett voluntarily left the interview room at approximately 5:25 a.m. and "approached a detective to inform him that he had not been fully honest."

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

Coomer v. Yukins, Warden, 533 F.3d 477 (6th Cir. 2008)

FACTS: On May 16, 1996, Coomer and Adams (together with their toddler) lived in Clawson, Michigan. On that day, finding that their rent and day-care payments were overdue, they decided to commit a robbery. Later that day, they encountered and strangled Iverson, and stole two checks, which were cashed later that day. On Dec. 30, the police learned that Coomer had called a friend and told him that Adams had beaten hear, and that she was at the home of another friend, Krawczyk. Dawson went to see her and she told him about the murder, and that she had not known that Adams was going to commit murder in addition to the robbery. She stated she hadn't reported it because Adams was holding her involvement in the crime over her. Krawcyzk had called the police about the assault, however, and when they arrived, Coomer explained that Adams "had beaten her and left in a stolen truck." On the way to the police station, Coomer told Krawcyzk about the murder and that she was worried about being arrested. She stated that Adams had told her he would take all the blame, however, so that she would be free to raise their child.

Adams was arrested for domestic assault that same day. In the meantime, apparently, Dawson had told his lawyer what he knew about Coomer and the lawyer contacted the police. That night, police went to Coomer's apartment, arriving at about 11:45 p.m. Later testimony indicated that 9-11 officers arrived, both uniformed and plainclothes, but there was conflicting testimony about the positioning of marked cars. Coomer later stated that she'd had no prior contact with police and that she'd used alcohol and marijuana that day, but not, apparently, to the extent that she appeared intoxicated. There was no indication that she'd been told she'd been arrested, but neither was she told that she was not. (Two officers stated they specifically told her that she was not under arrest and that they would leave if she asked.) Coomer was 20 years old, had graduated high school and had been an excellent student. There was also conflicting testimony about the degree of freedom she'd been given, but she did know that one of the officers was the lead officer in the homicide investigation.

Coomer later stated that she did not feel coerced, and there was indication that she was weeping while giving her statement, indicating remorse. She did ask that the officers remain quiet, because her son was sleeping, and offered refreshments. She confessed to her involvement in the murder, and the decision noted that "[f]ew questions were asked of her; most of her oral statements were offered in a continuous narrative over the next thirty minutes." She followed that up with a written statement, which was excluded by the

[57] Seibert, supra.
[58] 463 U.S. 1121 (1983).
[59] Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).

trial court. The lead investigator asked her to accompany them to the station and she was allowed to arrange for a sitter. She was transported by two officers and was provided with a soda and cigarettes. When they arrived, the lead investigator told her she "was now in custody" and he gave her Miranda warnings. She waived her rights and repeated her confession, adding details.

Ultimately, both Coomer and Adams were tried, and Coomer was convicted of murder and kidnapping. The state court dismissed the kidnapping charge. She appealed the murder conviction to the Michigan Supreme Court, and was denied. Coomer then filed a habeas corpus petition, arguing that her Miranda rights were violated. The District Court denied the petition, and she appealed.

ISSUE: Is a statement given in one's own apartment, in the presence of multiple officers, custodial?

HOLDING: No (but see discussion)

DISCUSSION: Coomer argued that the oral confession given at her apartment was unlawful. The trial court had found that since Coomer was in her own apartment, in the presence of at least one officer she knew, and that the questioning was "minimal and brief," that a reasonable person would not have believed they were in custody. The Sixth Circuit applied the Salvo[60] factors, and agreed that the trial court was correct. The statement made at the apartment was properly admitted and Miranda was not required.

The Court then looked to the oral confession made at the police station. Coomer had argued that the second confession was tainted by the unlawful first confession, which the Court had upheld. Again, the Court noted that the statement was not "obtained illegally or involuntarily" and in fact, she had been given, and waived, her Miranda rights. Even though the trial court had not admitted her written statement, the Court found that there was no indication, given the lapse of time, "the "absence of coercive police conduct; the change in location; the voluntary nature of her first oral statement that immediately preceded the unlawful written confession; and her waiver of rights at the police station." (The Court essentially ignored the trial court's decision to exclude the written statement, and the opinion is not clear on why Michigan actually did so.)

The denial of Coomer's writ was upheld.

MIRANDA RIGHTS

Yarborough, Warden v. Alvarado, 124 S.Ct. 2140 (2004)

FACTS: On the evening in question, Paul Soto decided to steal a truck in the parking lot at a mall in Santa Fe Springs, California. His friend, Alvarado, agreed to help. Soto produced a handgun and approached the driver of the truck, Castaneda, who was emptying some trash. Soto demanded the keys and money; Castaneda refused. At the time Alvarado, age 17, was on the passenger side of the truck. When Castaneda did not comply with Soto's demands, Soto shot and killed him. Alvarado assisted Soto in hiding the gun.

During the investigation, Det. Comstock (Los Angeles Sheriff's Office) became aware of Alvarado's involvement in the murder. She left word at his home that "she wished to speak with Alvarado," and she also contacted his mother at work. Around lunchtime, his parents brought him to the sheriff's station, and waited in the lobby while Comstock interviewed him. Alvarado "contend[ed] that his parents asked to be present during the interview but were rebuffed."

The interview lasted about two hours, and was recorded, with Alvarado's knowledge. Comstock did not give Alvarado his Miranda rights. During the interview, Alvarado originally denied that he knew

[60] In U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998), the Court considered the following factors in determining if an individual was in "custody": 1) the purpose of the questioning; 2) whether the place of the questioning was hostile or coercive; 3) the length of the questioning; and 4) other indicia of custody such as whether the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their request to answer some questions.

anything about the shooting, but after some discussion, began to change his story. He "acknowledged being present when the carjacking occurred" but denied any knowledge of what had happened. Comstock continued to press him, and he admitted helping the other man try to steal the truck. Finally he admitted that the other man was Soto, that he knew Soto was armed, and that he helped Soto hide the gun. He "explained that he had expected Soto to scare the driver with the gun, but that he did not expect Soto to kill anyone."

As the interview was winding down, Comstock asked Alvarado if he needed to take a break, but he declined. He was returned to the lobby, where his parents waited, and his father drove them home. A few months later, he was charged, along with Soto, with first-degree murder and attempted robbery.

Alvarado requested suppression of his statement because he did not receive Miranda warnings, but the trial court found that the interview was noncustodial. Alvarado testified, stating that he had just been standing nearby when the gun was fired, but the prosecution played part of the interview in rebuttal. Under cross-examination, Alvarado agreed that the interview with Det. Comstock "was a pretty friendly conversation," and that he "did not feel 'coerced or threatened in any way.'"

Both Soto and Alvarado were convicted, but the trial judge later reduced Alvarado's conviction to second-degree murder and sentenced him accordingly. Alvarado appealed.

The state appellate court found that the interview was noncustodial, emphasizing "the absence of any intense or aggressive tactics and noted that Comstock had not told Alvarado that he could not leave." The California Supreme Court declined to review the case. On federal appeal, the District Court also agreed that he was not in custody, but the Ninth Circuit reversed. The Court of Appeals "held that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave," noting that "this Court has considered a suspect's juvenile status when evaluating the voluntariness of confessions and the waiver of the privilege against self-incrimination."

The Ninth Circuit opined that the juvenile's age and experience had to be taken into consideration by the court, and found that in Alvarado's case, his "age and inexperience was so substantial that it turned the interview into a custodial interrogation." The Court found that it was "simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave."

ISSUE: May a court take a person's age and experience into consideration in deciding if a particular situation was custodial for Miranda purposes?

HOLDING: No

DISCUSSION: The Court weighed the facts to determine if it was reasonable for the trial court to find that Alvarado was not in custody at the time he gave the incriminating statement.

On one side, the Court noted that Alvarado was not transported by the police, but by his parents, that he was not required to appear at a specific time and his parents waited for him in the lobby, indicating that they believed he would be returning home with them. (In fact, they were told that the interview was "not going to be long.") Comstock focused on Soto's actions during the interview, and appealed to Alvarado's "interest in telling the truth and being helpful to a police officer." He was asked if he wanted to take a break, and at the end of the interview, he returned home.

On the other side, however, the interview did take place at the police station, and lasted a lengthy time, two hours. Comstock apparently never told him he was free to leave. He was brought to the station by others (his parents), rather than appearing of his own volition. Alvarado argued that his parents' request to sit with him during the interview was denied, but it is not clear from the record whether he was aware of that at the time.

The appellate court placed great weight on Alvarado's age and inexperience with the criminal justice system. However, the Court noted that it had "not stated that a

suspect's age or experience is relevant to the Miranda custody analysis." The Court concluded that the "Miranda custody test is an objective test." The Court noted that the Ninth Circuit "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics - including his age - could be viewed as creating a subjective inquiry." The Court concluded by stating that considering Alvarado's "prior history with law enforcement was improper" because, among other reasons, the officers will not necessarily even "know a suspect's interrogation history." The Court stated that "[w]e do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their Miranda rights."

The Court concluded that the trial court's determination that the interview was noncustodial was reasonable, and upheld the judgment.

A concurring opinion, by Justice O'Connor, noted that Alvarado was almost 18 years old at the time of an interview, and that many juveniles of that age "can be expected to behave as adults." The Justice noted that it would be difficult for the law enforcement officers to determine what bearing age has on the psychological ability of a individual to feel free to leave.
NOTE: This decision was 5-4, with a strong dissent.

Evans v. Com., 2005 WL 3078964 (Ky. App. 2005)

FACTS: On February 2, 2004, Dets. Holland, Lewis and Maynard (Lexington PD) were working an undercover drug buy. Holland and Lewis were in uniform, on patrol in marked cruiser, while Maynard was in plainclothes, working undercover. Maynard wore a radio transmitter so that the other officers could monitor him. They spotted Evans standing alone on a corner (Sixth Street and Elm Street) and they suspected he was dealing. Maynard approached him and was able to purchase a small amount of cocaine from Evans, but did not arrest him at the time.

After Maynard left, Holland and Lewis approached Evans and asked him for personal information (name, etc.) which he readily gave. They learned that he had an outstanding arrest warrant, and they immediately arrested him. They advised him of his Miranda rights.

He was indicted, and moved to suppress the evidence, arguing that "he was in custody when Detective Holland asked for his personal information." The trial court denied the motion, and he took a conditional guilty plea, and appealed.

ISSUE: May officers ask identifying information of a subject, not in custody, without providing Miranda warnings?

HOLDING: Yes

DISCUSSION: The appellate court stated that the detective's questions "did not subject Evans to a custodial interrogation since the detective's questions were not meant to elicit, nor did they elicit, any incriminating response from Evans." As such, the questioning was proper.

The decision of the Fayette Circuit Court was upheld.

U.S. v. Magana, 70 Fed.Appx 859 (6th Cir. TN 2003)

FACTS: On August 13, 2000, a man, who identified himself as "Andreas Mayer" entered the Franklin Post Office about a package he was expecting, and provided information about a delivery location. The next day, the government (the postal inspector) discovered the package contained over 600 counterfeit Social Security and alien registration cards (green cards). The officers arranged for a controlled delivery of the package to the designated location – the residence of Magana and other individuals. Those present at the apartment at the time of the delivery were arrested, and included a relative of Magana. On August 16, Secret Service Agent Biggers, Postal Inspector Wilson and INS Agent Kinghorn went to the location, and split up upon arrival. They found two Hispanic men and a Caucasion man standing in front of the apartment, one of the Hispanic men matched the description of "Mayer."

Biggers identified himself and asked if any of them lived in the designated apartment, and Magana said that he did. He also identified one of the other individuals present as staying there as well. He

produced identification, a driver's license. Magana asked the agent if he knew why one of his relatives had been arrested, and Biggers explained the reason. Magana volunteered that he had visited the relative in jail. He also stated, upon being asked, that he'd been in the post office "about a month before."

About that time, Wilson and Kinghorn arrived. Wilson asked if Magana would go to the post office, and Magana agreed, and asked the reason why. Biggers explained the reason why, and Magana said that it hadn't been him. He was told that if he went to the post office and the clerk didn't recognize him, he would be cleared. All three agents agreed that they told Magana the show-up was voluntary and that he wasn't under arrest.

Magana rode in the front seat of Biggers' car, with Kinghorn in the backseat. Wilson drove separately. Magana was not restrained in any way. Upon arrival, the clerk positively identified Magana as "Andreas Mayer." He was then arrested and given his Miranda rights; he waived those rights and confessed.

Magana is a Mexican national and illegally in the United States. The officers testified their entire conversation was in English, although Kinghorn spoke Spanish. He appeared fluent in English and spoke with little accent.

Magana requested a suppression of the statement. The trial court held that his waiver at the post office was given "voluntarily, knowingly and intelligently." However, the court suppressed the statements made from the time he was asked to accompany the officers to the post office until the Miranda rights were given at the post office, holding that "a reasonable person would not have believed that he was free to leave." The government asked the court to reconsider, and the court then suppressed all of the statements after he was "seized" at the apartment. The government further appealed.

ISSUE: Is both custody and interrogation required for Miranda to apply?

HOLDING: Yes

DISCUSSION: The court stated that "[a] "seizure" under the Fourth Amendment does not necessarily comprise the "custody" necessary to trigger the Miranda doctrine under the Fifth Amendment. The Court further reiterated that "*both*[61] custody and interrogation must exist" for Miranda to apply. The appellate court inferred that the trial court had used the term "seizure" to apply to what it found to be a constructive arrest.

Instead, however, the appellate court found the initial detention, outside the apartment, to be a reasonable detention under Terry. [62] Magana matched the specific physical description of the suspect and was outside the suspect apartment. The detention did not "mature into a constructive arrest as it entailed neither an unreasonable length of time nor unreasonable circumstances." Their questions were tailored to the offense they were investigating. The Court discounted the presence of three presumably armed law enforcement officers, one of whom was an INS agent, in judging whether the detention crossed the line into coercion.[63] The Court found that Magana voluntarily agreed to accompany the agents to the post office, and negated the assertion that because he was a Spanish-speaking alien and presumably unfamiliar with American police practice he was in some way coerced, because of his apparent ability to speak and understand English and his spoken consent.

The appellate court reversed the suppression.

Callihan v. Com., 142 S.W.3d 123 (Ky. 2004)

FACTS: Richard Callihan shared a home with his girlfriend, Danielle, and her three children, two boys and a girl. In May, 2001, the Dept. for Social Services opened an investigation of Callihan's alleged mistreatment of the children. When interviewed, the children related an incident where one of the boys was forced to "run up a steep bank carrying bricks on his shoulders," but nothing else at that time. Later,

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[61] Emphasis in original.

[62] Terry v. Ohio.

[63] The court mentioned the case of INS v. Delgado, 466 U.S. 210 (1984), which held, implicitly, that INS agents questioning illegal aliens about their citizenship is not sufficient to constitute a seizure.

however, they stated that Callihan had "punished them by making them stand naked." A few days later, Danielle reported that two of the children (boy and girl) reported that Callihan had sexually abused them.

At that point, KSP opened a police investigation. Trooper Virgin and DSS worker Ratcliff interviewed the three children. The girl reported to them that the abuse started some two years after he moved in with them, when she was about ten. Initially, Callihan asked for oral sodomy, which she refused to do. Later, as "punishment ... for her poor performance in school," he forced her to strip, and he raped her. He also instructed her to perform oral sodomy on one of her brothers, but her brother refused to allow it. Other allegations including forcing her to scrub the floor naked, while he watched pornography, followed by forcing her to bathe with him, followed by another rape. She alleged numerous other sexual encounters, and told them that Callihan had said he would harm her if she told her mother about it.

One of the boys corroborated his sister's claims, and outlined other instances of sexual abuse in which he was the victim, including anal sodomy.

After the interviews with the children, Virgin and Ratcliff contacted Callihan and asked him to come in to speak to them. They met at the DSS office. The first half hour of the discussion was not recorded in any way, and the only information about the content of that discussion was Virgin's report and testimony during the suppression hearing. Virgin stated that he told Callihan that he closed the door of the office for privacy (a custodian was outside) and that he told Callihan that he was not under arrest, that he (Callihan) was free to leave and that he had "no obligation to answer questions." He also told Callihan that he would not be arrested that day, in any event. Callihan then admitted the sexual abuse. Virgin gave Callihan his rights under Miranda v. Arizona[64], requested and received permission to record the rest of the interview. Callihan again admitted the abuse. Virgin allowed him to leave after the interview, but Callihan was arrested the next day.

[64] 384 U.S. 436 (1966).

Callihan requested suppression of the statement, claiming that it was defective because it was "obtained without the benefit of Miranda warnings after the police had focused a criminal investigation on him." The trial court refused to suppress the taped statement and eventually, he entered a conditional guilty plea. He then appealed the denial of suppression.

ISSUE: Must an individual who is not in custody, but is the focus of an investigation, be given their Miranda warning prior to questioning?

HOLDING: No

DISCUSSION: The Court noted that they could have decided "this case simply on the grounds that [Callihan] did, in fact, receive Miranda warnings immediately before he gave the taped statement, which rehashed the contents of his unrecorded confession. However, the recent decision in Missouri v. Seibert,[65] "preclude[d] such a simple solution." The Court described the process in Seibert as a "question-first" technique, and concluded that "absent an evidentiary hearing as to whether Virgin deliberately employed the ... technique to circumvent [Callihan's] Miranda rights," they could not dismiss the argument on those grounds.

However, the Court did reject Callihan's contention that the "mere fact that he was the focus of a criminal investigation entitled him to Miranda warnings prior to police questioning." The Court found it to be "well-settled" that Miranda is only required in custodial settings. Escobedo v. Illinois,[66] the Court stated, was decided before Miranda, and "has never been construed ... to require Miranda warnings simply because police have focused a criminal investigation on an individual who is subject to questioning." In fact, in Beckwith v. U.S.[67] the Court had held that "Miranda's safeguards, designed to prevent coercion from overcoming an individual's constitutional rights, did not apply" when the defendant was not in custody.

In addition, the Court states, Kentucky courts have held to the custodial interrogation requirement for

[65] 542 U.S. 600 (2004).
[66] 378 U.S. 478 (1964).
[67] 425 U.S. 341 (1976).

Miranda, citing a number of cases to that effect. In conclusion, the Court stated, that while "this Court has never explicitly rejected the 'focus of the investigation' test regarding the necessity of Miranda warnings, [it] does so now." (The Court noted that Callihan did not argue that he was in custody, and even had he done so, the Court noted the facts did not support such an allegation.)

The Court upheld the conviction.

U.S. v. Shaw, 464 F.3d 615 (6th Cir. Ky. 2006)

FACTS: In June, 2004, when he was arrested, Brendan Shaw was 18 and had an 11th-grade education. He lived with his cousin, Aaron Shaw, and Aaron's wife, Angie, and the couple's three children. Brendan Shaw served as a live-in babysitter for the children.

The couple apparently had ties to Fort Campbell, because on June 21, 2004, Angie brought the three year old child to the hospital, concerned because the child had reported what she interpreted to be sexual contact. An examination indicated no physical trauma, but the MPs were called to investigate.

The assigned investigator, Ford, contacted a special agent, Fagan, and Fagan asked Shaw to accompany her to the CID office. Shaw wanted to take the child to a neighbor's, and was concerned about seeing Brendan Shaw, so Fagan directed Ford to go to the Shaw quarters and get Brendan Shaw.

Ford and his trainee, both in an unmarked car, went to the Shaw home. By that time it was after midnight. Ford found Shaw outside with another teenager. Shaw was told that he was needed at CID to talk. Shaw was frisked and handcuffed, and then placed in the back of the cruiser. (Ford later testified that the MP SOP required the handcuffing.) He was not formally arrested, but neither was he told he was not under arrest. He was not permitted to go back inside and get shoes, and arrived at the CID office fully dressed except for shoes. (Another female teen, who was found inside the house intoxicated, was brought to CID as well, and eventually taken elsewhere.)

When he arrived, Shaw was placed in an interview room, his handcuffs removed, and left alone for some time. He was then moved to another room which had a two-way mirror. At the beginning of the interview, Wolfington read him the Army's version of Miranda, and the records indicate it was signed at 0310. Shaw was questioned for some four to five hours, but given breaks. During bathroom and cigarette breaks he was accompanied at all times. By 0745, Shaw had denied touching the child in a sexual manner intentionally, but admitted that he did assist him in bathing and dressing.

After that statement, Shaw was taken to another room, offered food (which he declined) and given a cot and "tarp-like cover" to sleep. He was under observation, and the Army witnesses claimed he slept for about six hours, but Shaw later denied having slept much of that time, as he'd been "too upset."

Shaw later learned that during the overnight hours, his uncle had driven down from Troy, Indiana, after receiving a call from Aaron Shaw, to pick him up. The uncle was not permitted to see or speak to Brendan Shaw, nor was the message from his uncle ever given to him.

Early that next afternoon, Shaw was taken to the hospital for a blood sample, allegedly by his consent. However, the consent form was lost. (The reason for the blood sample was never made clear in the opinion.) He was returned to the sleeping room, but shortly afterward was taken back to the interview room with the mirror for further interrogation, which started at about 1515. Originally, the interviewing agent, Joubert, planned to do a polygraph exam, but he was not permitted to do so. At no time during this process, apparently, did investigators speak directly to any of the children. Aaron Shaw reported that the five year old had said that Brendan Shaw took them on "love picnics" and hugged them, but denied any other sexual contact. (Wolfington stated he did not learn of this until later.)

Joubert started the second interview with Shaw, and he signed a second waiver. At about 1745, he confessed in detail to several instances of sexual abuse, including one instance of anal sodomy. He was given breaks during this process as well, and

apparently ate a "few French fries" and drank a coke. (This was apparently the first food he'd had since he was brought in.) By 2130, he'd also confessed (but with no detail) to having molested both the five-year-old and the one-year-old child.

The court noted that he'd been in custody for some twenty hours by that time, and had been questioned for some eleven of those hours. He was transferred to FBI custody and taken to a magistrate the next day.

After being indicted, Shaw requested suppression of his statements. The District Court denied the motion and Shaw took a conditional plea, and appealed.

ISSUE: Is being transported in handcuffs to a law enforcement station "custody?"

HOLDING: Yes

DISCUSSION: The Court addressed each issue in turn. First, with regards to Shaw's initial detention and putative arrest, the Court found the facts to be "basically indistinguishable" from Dunaway v. New York.[68] As such, the Court found that he was, in fact, arrested, when he was taken handcuffed to the CID office. Further, the Court found that the arrest was not adequately supported by probable cause. Specifically, the Court found that "the uncorroborated hearsay statement of a child as young as three, standing alone" was insufficient to provide probable cause. There was no independent interviews of any of the children, nor was there any attempt to otherwise corroborate the statements. The Court noted that its "determination that probable cause did not exist in this case is not based upon an assumption that the police could not believe or rely on the statements of a three-year-old child" but instead that "a large part of the problem here is that the police did not interview the child at all." "Instead, they relied solely upon the mother's allegation that the child had made a statement indicating possible abuse."

Next, the Court addressed "whether the statements Shaw made while in custody, notwithstanding the absence of probable cause to arrest him, were sufficiently voluntary to overcome the taint of illegality such that suppression of the statements is not required." The Court found the precedent to be clear, and that a "confession 'obtained by exploitation of an illegal arrest' may not be used against a criminal defendant."[69] The "threshold requirement" that must be met in order to admit the tainted confession is that it must be sufficiently voluntary. The appellate court found that since Shaw did voluntarily sign Miranda waivers twice, it must look further to determine if the statements were admissible.

First, the Court looked at how much time passed, and found that the "length of the detention in this case suggests that it likely had exploitive and coercive effects." The prosecution argued that the information gained from the father about possible sexual abuse of another child did not justify the initial arrest, and that "this type of post-arrest discovery of new evidence simply cannot … constitute an intervening circumstances that would break the causal connection between the illegal arrest and the subsequent confessions, particularly given that neither Shaw nor his interrogators knew about the alleged new evidence."

Finally, the court noted that the "primary purpose of brining Shaw into the CID office was to question him for investigative purposes, precisely in hope that something might turn up." Although they did not physically abuse or threaten him, it "still does not dispel the taint of illegality in this case." The Court noted that the officers "apparently knew they did not have probable cause" because "[i]f they had, they likely would have formally arrested Shaw to begin with rather than merely bringing him in for investigative questioning." Instead, they "proceeded to conduct a series of custodial interrogations in what can only be described as flagrant disregard for Shaw's Fourth Amendment rights."

He court found that since "Shaw was arrested without probable cause, and the confessions Shaw made during his detention were not sufficiently voluntary to eliminate the taint of the illegality of his arrest" that it was required to reverse the trial court's decision (not to suppress the evidence) and remand the case back for further proceedings.

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[68] 442 U.S. 200 (1979).

[69] Brown v. Illinois, 422 U.S. 590 (1975).

Hughes v. Com., WL 1650692 (Ky. App. 2006)

FACTS: In January, 2003, Larry Fair arrived at West's duplex in Lexington. West and Hughes were at that location, and they had been drinking. Hughes "picked up a bag of clothes and threw them at [Fair's] feet." During the ensuing argument, Hughes "grabbed his shotgun" and killed Fair. West testified that Fair was not armed, and that following the shooting, Hughes "found a knife and 'hacked up' the inside of his arm and then placed the knife in the victim's lifeless hand." Another witness testified that Fair was not armed, but she fled the scene and did not see Hughes cut himself.

Hughes testified at trial that the shooting was in self-defense and in response to a knife attack. Officer Spears testified that when he arrived, he found Hughes "a little bit shaken" and that he stated that Fair owed him money, and that Fair cut him, and that he then shot Fair. On the way to the hospital, Hughes stated, in the presence of Officer Logeran and Dawson (a paramedic), that Hughes knew Fair was going to be at the apartment and that he took his shotgun because he expected trouble. (Only Dawson testified.)

He was convicted of Murder, and appealed.

ISSUE: Are statements that are volunteered in the presence of an officer admissible even though Miranda warnings have not been given?

HOLDING: Yes

DISCUSSION: The Court noted that it was undisputed that Hughes "was not advised of his Miranda rights" when he made the statements to Spears or in the ambulance. However, those warnings are only required when the individual is in custody and under interrogation.[70] When Spears first observed Hughes, he was undergoing medical treatment, and Spears believed that that need "outweighed any need to immediately interrogate him." Even though Logeran was in the ambulance, there was "absolutely no evidence to support a finding that [Hughes] was in police custody or under arrest." As such, the statements were not subject to suppression.

The judgment of the Fayette Circuit Court was affirmed.

Biros v. Bagley, 422 F.3d 379 (6th Cir. OH 2005)

FACTS: On February 9, 1991, officers left a message for Kenneth Biros asking him to come to the station for questioning concerning a recent murder of Tami Engstrom. (He had been the last person known to be in her company prior to her sexual assault and gruesome murder.) He went to Brookfield Township, Ohio, and spoke with officers of that jurisdiction, and with Sharon, Pennsylvania, officers, where the victim had last been seen. He repeated the story he'd told to others about what had happened that night – to the effect that she jumped out of his car and ran away.

Captain Klaric pressed Biros on several issues, and suggested that perhaps he'd made a sexual advance to Engstrom and been rejected. After much discussion, Biros admitted that he'd done something "very bad" and explained that he had made an advance, and that during a struggle, she had fallen out of the open car door and struck her head on the railroad tracks." He described where the incident had occurred.

At that point, Biros was advised of his Miranda rights. He later signed a waiver and repeated the story to Det. Fonce, and told police where her body could be located. When pressed for an exact location, he asked for an attorney, and after "consulting with an attorney, Biros agreed to show police the location of Engstrom's body."

As a result of that information, "several of Engstrom's severed body parts [were discovered] in a desolate wooded area of Butler County, Pennsylvania" the next day. Other body parts were found some 30 miles from that first site. Sexual and other pelvic organs had been removed from the eviscerated corpse and were never recovered." Bloodstains were found in the area where Biros indicated the initial attack occurred, and investigators there found part of her intestines nearby,

[70] Stansbury v. California, 511 U.S. 318 (1994); California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

as well as some of her clothing, scattered or buried just under the surface.

During a search of Biros' house, officers found bloodstained knives and other incriminating items, and the blood was confirmed to be Engstrom's. The autopsy on the remains found revealed 91 premortem stab injuries and 5 postmortem, and of course, the extreme dismemberment and evisceration of the body The coroner believed the immediate cause of death to be manual strangulation..

Biros was indicted for aggravated murder and sexual assault, and related charges. He requested suppression of the statements given to the police, but was denied. He was convicted and sentenced to death, and appealed.

ISSUE: Is a person who voluntarily submits to questioning, at a police station, in custody for Miranda purposes, if they are the primary suspect?

HOLDING: No

DISCUSSION: Biros argued that his statements were made while in custody. The trial court (and subsequent Ohio state appellate courts) had found that not to be the case, as did the federal District Court, to which he appealed on constitutional grounds.

The Sixth Circuit noted that "*Miranda* warnings are required where a suspect is 'in custody,' which occurs when 'there has been a 'formal arrest or restraint on freedom of movement.'" In this case, Biros was invited to come to the station, and did so, of his own accord. He was questioned in an interrogation room, but the door was left open. At no time did the officers indicate he was under arrest, nor was he told he could not leave, in fact, he was specifically told the opposite. Once he provided incriminating evidence, he was promptly given his Miranda warnings.

Biros raised several other issues, but ultimately, his conviction was upheld.

Taylor v. Com., 182 S.W.3d 521 (Ky. 2006)

FACTS: Lexington-Fayette County police "received information from a confidential source that Taylor was in possession of crack cocaine." That CI had proved reliable on "prior occasions." The CI gave a detailed description of the individual and the officers went to the location specified – where they found Taylor, who matched the description. As they approached, "Taylor moved in the opposite direction, occasionally making furtive glances at the officers." Finally, the "officers confronted Taylor next to a wall and handcuffed him." The area where this occurred was "known for drug trafficking" and the officers knew there were "multiple escape routes" from the area. They handcuffed Taylor because they feared he was a "flight risk." The officers told Taylor he was not under arrest, and that they'd "been told he possessed drugs." Taylor "voluntarily admitted … that he had cocaine and marijuana in his pockets." Less than 15 seconds elapsed between the handcuffing and the admission. He was then arrested and searched, and drugs were found on his person. Taylor "was read his Miranda rights after being formally arrested and he refused to answer any questions."

Taylor was indicted, and moved to suppress the admissions. The trial court held that there was sufficient reason to secure Taylor, and "that the officers were not interrogating Taylor" when he made the admission. Taylor took a conditional guilty plea, and appealed. The Kentucky Court of Appeals affirmed the judgment, and Taylor further appealed.

ISSUE: Is a spontaneous admission in response to an explanation for a reason for a stop admissible, even though Miranda warnings have not yet been given and the subject is in handcuffs?

HOLDING: Yes

DISCUSSION: Taylor argued that "he was not free to leave and the police did not have the right to make accusations in order to get an incriminating statement from him." Although he admitted that "no specific questions were asked of him," he argued that "the statements made by the police were designed to elicit an incriminating response." Taylor contended that "the term 'interrogation' under Miranda refers not only to express questioning but also to any words or actions on the part of the police that they should know

are reasonably likely to elicit an incriminating response."[71]

The Supreme Court, however, agreed that the handcuffs "were used only as a means of reducing the mobility of Taylor." The officer was telling Taylor "why he was being stopped" when Taylor spontaneously interrupted him stating that he had crack cocaine and marijuana in his pockets. The evidence indicated that "the statements made by Taylor were not in response to any police statement reasonably calculated to elicit an incriminating response." In addition, he was in a Terry detention, not a Miranda custody."

The Court concluded by stating that "[t]elling an individual of the reason he is being stopped by police is not an interrogation." To hold otherwise "would force the police to work in silence, detaining people without even informing them of what is going on."

The judgment was affirmed.

Gill v. Com., 2006 WL 435424 (Ky. 2006)

FACTS: On November 16, 2001, Jodi Toll (age 18) "was found shot to death at the Sportsman Motel in Fayette County." Gill became a suspect after Toll's boyfriend, Miller and Miller's uncle, Hawkins, were interviewed. Gill was questioned and gave a "detailed confession" to the murder. Gill stated that he had owed Miller and Hawkins money and that Hawkins had ordered him to murder Toll, and further told him where he could find Toll. He claimed that the motive was that Toll was pregnant by Hawkins.

Det. Marinaro testified that they had investigated the claim but found no evidence implicating Miller and Hawkins. She further stated that she had overheard a "monitored phone conversation at the jail in which [Gill] told someone that he had made up the entire story."

Gill was actually arrested both in connection with Toll's murder, as well as the "unrelated murder of Wilbert Adams." When he was taken to the station, he "was placed in an interview room, read his Miranda rights, and he signed a waiver of rights form." At some point during the discussion ensuing, he expressed his confusion over the plural "homicides." Det. Williams and Schoonover questioned him for up to an hour about Adams' murder. They took a break to smoke and the detectives left the room. Sgt. Carter, who knew Gill's family, came in to speak to Gill, telling him that she'd talked to Gill's father and asked him if he "needed anything." She also stated that "he wasn't a bad guy but had gotten where he was because of his involvement with drugs." She left when the detectives returned, and she "was adamant that she never discussed either murder with [Gill]."

The detectives took Gill outside to smoke, trying to maintain a "good rapport" with him. The detectives also agreed, however, that they wanted to keep him "unsure about what they did or did not know about the murders." When they returned him to the interview room, Gill was then questioned by "Schoonover and Marinaro about Toll's murder." He was not given his Miranda rights a second time. The "trial court ruled that the initial Miranda warnings were sufficient and that the cigarette break in between the two interviews did not dissolve [Gill's] waiver of rights." The trial court also found "that there is no requirement that a suspect be informed about the nature of the questioning before he is advised of his rights."

At the autopsy, Toll was found not to be pregnant, and further, that she had no drugs nor alcohol in her system. Semen found on the victim was identified to be Gill's.

Gill was convicted and then appealed.

ISSUE: Must a suspect receive a separate Miranda warning when the focus of an investigative questioning moves to a different crime?

HOLDING: No

DISCUSSION: The Court noted that "Kentucky has not squarely addressed whether Miranda warnings must be given prior to questioning a suspect about each crime for which he is being investigated." Looking to other circuits, however, the Court found "no merit in [Gill's] claim that the police were required to readvise him of his Miranda rights prior to questioning him about Toll's murder." That interview took place only one hour after he was initially advised of his

[71] Rhode Island v. Innis, 446 U.S. 291 (1980).

rights. He did not "claim that he had forgotten his rights or that he was unaware of them at the time he was questioned about Toll's murder." He made no request for an attorney nor did he ask to "cease the interview." The Court further noted that "[a]s [Gill] is a persistent felony offender, he is familiar with the legal system."

The Court also found "no merit in [his] argument that he was intentionally misled by police either when they failed to immediately tell him they were going to question him about the Toll murder, or when they told him they were not interested in the triggerman in the Toll murder." The tapes of the interview simply did not support his stated belief "that the police would let him go if he confessed."

The Court "has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of Miranda rights."[72] Further, the Court "has also held that the use of 'strategic deception' does not render a confession involuntary so long as the deception does not rise to the level of compulsion or coercion."[73]

Gill's conviction was upheld.

Com. v. Lucas, 195 S.W.3d 403 (Ky. 2006)

NOTE: This opinion is a modification of an earlier opinion rendered in June, 2006.

FACTS: On Feb. 26, 2002, "Lucas came to the police station voluntarily, was given Miranda warnings and was told that he was free to leave at any time, which he did after the questioning." He was questioned concerning an allegation of inappropriate touching of his stepdaughter. The next day, the police filed a complaint for sexual abuse and obtained a misdemeanor arrest warrant. During the investigation, the detective also learned of an allegation of the sexual abuse of a nephew some 20 years before.

Upon request, Lucas came to the station a second time, on March 1. He was not given Miranda warnings at that time but was also not told that he was free to leave. The detective told Lucas that she'd filed a misdemeanor complaint, but did not tell him that she already had a warrant. Lucas was questioned, and eventually confessed, to the abuse of the nephew, and he was arrested.

Lucas requested suppression of the confession, arguing that "he did not make a knowing and voluntary waiver of his rights." The trial court found he was not in custody at the time, and denied the motion. Lucas took a conditional guilty plea and appealed, and the Court of Appeals reversed the trial court's decision. An apparent misinterpretation indicated that the Court of Appeals believed that the trial court had found that Lucas in custody during the second interview, but the record indicated the opposite.

The Commonwealth appealed.

ISSUE: Is Miranda required when the individual is not in custody?

HOLDING: No

DISCUSSION: The Court discussed the issue of custody, and noted that none of the usual factors indicating that a situation is custodial were present. The Court found that the general circumstances of the two interviews were essentially identical, although the second interview did include a discussion of the allegations made by the nephew. (Apparently Lucas was a juvenile at the time, as the record indicates that he was served a juvenile summons for those offenses.)

The Court concluded that since he was not in custody, that the interrogation was not inappropriate, and it upheld the original conviction.

NOTE: *The issues involved in U.S. v. Fellers, 540 U.S. 519 (2004) were apparently not raised in the case, and it should be noted that once a warrant is issued, the right to counsel attaches and any statements made, even in a noncustodial setting, may be deemed inadmissible.*

Morrison v. Com., 2007 WL 1575305 (Ky. App. 2007)

[72] Colorado v. Spring, 479 U.S. 564 (1987).
[73] Springer v. Com., 998 S.W.2d 439 (Ky. 1999).

FACTS: Morrison was arrested on May 14, 2003, and taken to the Fayette County Detention Center. He was placed in a holding cell. When he became combative, Officer Blair, who had dealt with him before, responded. Blair later related that Morrison has asked him to get him in the back (presumably the regular cells) because he was tired, and volunteered that he's "robbed some places." Blair questioned him about the places he had robbed or "hit" and Morrison described two robberies in detail. A jail supervisor overheard the statements and contacted Lexington PD.

Several days later, Det. Sarrantonio brought Morrison in for questioning, and gave him his Miranda warnings. Morrison agreed to talk and confessed to both robberies, providing numerous details. He was later identified by a witness in a photo lineup.

Morrison was indicted, and moved for suppression, arguing that Blair had improperly questioned him. The trial court agreed to admit the first statement, but stated that "Blair should not have gone forward with his questioning of Morrison after this initial statement" and that those replies would be suppressed. It declined to suppress the confession made to Det. Sarrantonio, however. Morrison took a conditional guilty plea, and appealed.

ISSUE: May an unsolicited statement, prior to being given Miranda warnings, be admitted?

HOLDING: Yes

DISCUSSION: Morrison argued that his statement to Det. Sarrantonio should have been excluded as a 'fruit of the poisonous tree" of the original tainted questioning. The Court, however, found the "voluntary statement was sufficiently severable from the tainted and suppressed interchange that followed." Since he had been properly given his Miranda warning before he confessed, the Court found the confession to be properly admitted. The court noted that there was "no exchange between Morrison and Blair" but that, "[i]nstead, Morrison literally blurted out that he had 'robbed some places' in an unsolicited, unprompted statement -- perhaps because he had been drinking." However, "[r]egardless of the reason for his boasting or foolhardiness, whichever the case may be, he himself bodaciously made the statement." Blair was not interrogated in the usual meaning of the word, nor was there any coercion and at best, the comments occurred in the "course of casual conversation." The passage of time between the unwarned statement and the warned interrogation, six days, eliminated any possible taint, and in addition, the second statement took place in a different place and was with a different law enforcement officer.

The Fayette Circuit Court decision was affirmed.

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

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

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

The Court noted that:

> Unfortunately, the encounter between Sharon and the officers was not video-recorded from a police cruiser until Deputy Cranmer began the Miranda process with her. Thus, the initial conversation between Sharon and Trooper Harris was not recorded. However, we note that *immediately* after being Mirandized, Sharon asked the officers why they thought she had marijuana growing

> at her house, and one of the officers responded she had just told them she did. Thus, the conversation to which the officer was referring, *i.e.*, that there were multiple dead marijuana plants at Sharon's house, occurred before the tape recording began and before Sharon was Mirandized. Furthermore, one of the officers reminded Sharon that she had just told them that she had smoked a joint and driven her daughter somewhere, which also occurred before her Miranda rights were read to her.

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

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

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

HOLDING: No

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

The Court concluded that it was necessary to remand the case back for an evidentiary hearing on whether the "officers deliberately employed the 'question-first' technique prohibited in Missouri v. Seibert.[74]"

[74] 542 U.S. 600 (2004).

U.S. v. McConer, 530 F.3d 484 (6th Cir. 2008)

FACTS: On Jan. 19, 2005, Detroit officers executed a search warrant on a duplex. The first officer to enter, Officer Hughes, found Thompson in the living room with his hands raised, and spotted Arone McConer (the appellee), running through the home. He ordered him to stop, but Arone McConer did not. "Hughes followed him into the basement." He stopped Arone and checked him for weapons, and brought him back to first floor. Eventually, he and Thompson both were detained in a second floor apartment. Officer Penn, who followed Hughes into the apartment, found Brian McConer, running through the apartment in another direction and "throw[ing] cocaine packaged in nine Ziploc bags on the floor as he ran." Officer Penn located Brian hiding under a bed and arrested him.

Once the initial sweep was finished, Officer Hamilton arrested Arone and searched him, finding keys to the apartment. In the upper level apartment, he found a quantity of cocaine and marijuana, along with paraphernalia indicating trafficking. A loaded handgun was also found. The officers also found papers, including letters and receipts, containing Arone's name, but none were addressed to him at the residence itself. (The papers contained several other addresses.)

As the items from the search were collected and brought to where Arone could see them, "McConer signaled to Officer Hughes that he wished to speak with him privately." In a bedroom, "[w]ithout any prompting or questioning by Officer Hughes, McConer volunteered that he had just gotten out of prison and that he could not be around guns or dope." Hughes apparently then asked where he lived, and "McConer stated either that he used to live at the residence, or that he does not live there anymore." Hughes told him that they would get the information "all down on paper in a little while" and sent him "back to the living room to relax." The "exchange lasted less than a minute."

> After the search was completed, Officer Hughes interviewed McConer formally in the kitchen. This time, he gave McConer

Miranda warnings, and McConer signed a waiver form.

Hughes then produced a Detroit Police Department interrogation form, which also contained a statement of constitutional rights. Hughes read the rights to McConer again, and McConer signed the second form. McConer then agreed to give a statement. Hughes testified that while he was writing out the questions that he intended to ask McConer, McConer was panicky and kept asking questions, including "how much time could I get for this," and repeated that he "didn't live here anymore, . . . I can't be around any of this stuff, man. You just don't know." Officer Hughes received the following answers to the questions that he had written:

1. Do you understand your constitutional rights? "Yes."
2. How long did you live at this location? "For a few months."
3. How much cocaine was in the bedroom? "I don't even know."
4. How long has the pistol been in the bedroom? "I don't know."
5. Why was all of your IDs & paperwork in the front bedroom? "I left all my paperwork & the [toy] motorcycle here when I left."

JA 33. McConer initialed each answer and signed his name at the bottom of the interrogation form.

As they left, McConer indicated his coat to another officer. Unbeknownst to Arone, however, an earlier search of the coat had revealed over $6,000 in cash. Arone was charged with state offenses including trafficking and illegal gun possession. He was encouraged to plead guilty to avoid the case being referred to a federal court, but he decided instead to take the case to a state preliminary hearing. As a result, he was referred for federal prosecution and charges were filed. After a number of procedural matters, Arone requested suppression of the statements he made both to Hughes, and under the formal interrogation a short time later. The trial court denied the request. Arone was eventually convicted in federal court, and appealed.

ISSUE: Does a inadvertent failure to provide a timely Miranda warning, later remedied, invalidate an interrogation?

HOLDING: No

DISCUSSION: The Court quickly concluded the Arone's "unwarned statements" were admissible and did not violate Miranda, because they "were not obtained through interrogation." The only question asked in the bedroom that "could conceivably be construed as 'interrogation'" related to whether Arone lived in the house, and since no contemporaneous record was made of the discussion, even that wasn't clearly as the result of a question, or volunteered and then clarified by the officer. But since the evidence connecting him to the address was already so overwhelming, the Court found that error, if any, was harmless.

With respect to the questioning in the kitchen, the court ruled that "[a]ssuming that Officer Hughes's bedroom question about McConer's living situation was not interrogation, there is no Miranda problem with the admission of the statements" made there. Officer Hughes gave Miranda prior to starting the questioning. Even assuming it was interrogation, though, the Court still found no problem, because it was not analogous to the "question-first" technique condemned in Seibert. The situation was not one in which Miranda was '"inserted in the midst of coordinated and continuing interrogation." It was more similar to that situation in Oregon v. Elstad[75] in which the failure to warn was an unintentional oversight, not a plan. To be inadmissible under Seibert, the "two-step strategy must be 'deliberate' in order to violate Miranda" and that has not been shown to be so in the instant case.

The Court also examined Officer Hughes' testimony that Arone had stated he'd just gotten out of prison, which allegedly violated the court's order not to admit such information. Since they had already stipulated that he was a felon, the Court had ruled that any additional information concerning his criminal past was immaterial. However, even had it had preferred that there had been "no mention of prison at all," the court

[75] 470 U.S. 298 (1985).

did not indicate that it was improper to have a bare mention of his prior prison time nor did it warrant a mistrial.

The Court affirmed Arone McConer's conviction, but remanded his case for sentencing errors.

Jackson v. McKee, 525 F.3d 430 (6th Cir. 2008)

FACTS: On December 11, 2000, the Dollar Value store, in Detroit, Michigan, was robbed by a group of men. The store owner was killed. Jackson became a suspect, and he was asked to come to the police station and provide a statement. He did so, at about 8 a.m. on January 5, 2001.

At 10:30 a.m., Investigator Simon gave Jackson Miranda warnings, which he waived. He denied any involvement in the crime. Jackson was, however, arrested, and again questioned, at about 3 p.m. He was returned to a holding cell. Ross was interviewed the next day, and given a polygraph, and he implicated Jackson in the crime. Once again Jackson was questioned, after again being given Miranda. He was offered a polygraph about 9:55 p.m., and he agreed to take the test. The polygraph session ended shortly after midnight, with Jackson still denying any involvement in the crime. Following further interrogation, however, Jackson changed his story and confessed.

At about 2:15 a.m., Simon returned and again gave Jackson his Miranda warnings, and Jackson signed a written waiver. He confessed to shooting the store owner during the course of a robbery with Ross and another man, Dukes. He also expressed remorse for the crime.

Jackson and the two other men were tried jointly but before two separate juries (Jackson before one, Ross and Dukes before the other). Jackson was convicted, and appealed. After exhausting his state appeals, Jackson requested a habeas petition before the federal court.

ISSUE: What are the factors indicating a confession is voluntary?

HOLDING: See discussion.

DISCUSSION: Jackson first argued that the admission of his confession was improper because it was made involuntarily, through coercion. The Court noted that "[w]hether an interrogation rises to the level of coercion turns on a spectrum of factors: the age, education and intelligence of the suspect; whether the suspect was advised of his Miranda rights; the length of the questioning; and the use of physical punishment or the deprivation of food, sleep or other creature comforts."[76] The Court noted that Jackson appeared of his own accord and waived Miranda no fewer than four times. He expressed remorse when he confessed. He indicated he understood those rights. "He never said he was tired, confused or uncomfortable." He agreed in writing that he was not deprived of "food, water or the use of the restroom." He had prior experience with the criminal justice system. He was not under the influence of drugs or alcohol, or ill, or injured, and he never received any promises or threats. He never asked for an attorney or invoked his right to counsel. As such, the Court found his confession was voluntary.

In addition, the evidence indicated that he waived his rights in a knowing and/or intelligent manner. Despite his claim that he could communicate in a written form, he produced a written confession describing the crime, and further responded in writing to questions from the investigating officer. An expert witness agreed that his waiver was knowing and intelligent. Despite evidence that he had difficulty reading, he had average problem solving skills and intelligence. Even though he presented an expert[77] to the contrary, the trial court's decision was upheld.

Finally, Jackson argued that the admission of testimony from a non-defendant, concerning statements made by Ross and implicating both Ross and Jackson in the homicide, were a violation of his Confrontation Clause rights. Jackson conceded, however, that the statements were "non-testimonial." The Court discussed the evolution of that right,

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[76] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[77] His own expert indicated he may not have been making a full effort and may have exaggerated his deficiencies.

particularly since the ruling in Crawford v. Washington[78] which recognized that non-testimonial hearsay does not implicate the Confrontation Clause. (In other words, the law changed from when the appeals process on the issue began.)

The Court decided that Jackson's claim must fail because current law "does not prevent the admission of non-testimonial hearsay." (The Court also found it was unnecessary to decide the case the other way, because even under prior case law, the judge could decide, based upon certain factors, to admit the hearsay.)

Jackson's conviction was affirmed.

Florida v. Powell, 130 S.Ct. 1195 (2010)

FACTS: On August 10, 2004 Tampa, Florida, police officers were in search of Powell. They entered his girlfriend's apartment and found him coming from a bedroom. They searched the room and found a loaded handgun under the bed. Powell was arrested and transported. "Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form 310."

The form read as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell acknowledged the rights, agreed to talk and signed the form. He admitted he owned the gun and that he knew he was prohibited from gun possession, since he was a convicted felon. He was charged in Florida for the offense. At the trial court level, he moved for suppression of "his inculpatory statements," arguing that "the Miranda[79] warnings were deficient because they did not adequately convey his right to the presence of an attorney during question. The trial court denied the motion and he was subsequently convicted.

The Florida state appellate court, however, reversed the conviction, finding that the Miranda warnings were inadequate and that the statements should have been suppressed. The Florida Supreme Court agreed, finding that "advice Powell received was misleading because it suggested that Powell could 'only consult with an attorney before questioning; and did not convey Powell's entitlement to counsel's presence throughout the interrogation."

Florida requested certiorari, and the U.S. Supreme Court agreed to review the case.

ISSUE: Must a suspect be expressly advised of his right to counsel *during* custodial interrogation?

HOLDING: No (but see discussion)

DISCUSSION: The Court first addressed whether it had jurisdiction to hear the case, as Powell argued that it was based upon Florida law, not federal law. The Court, however, noted that "the "Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in Miranda."[80]

The Court moved to the certified question - "whether the advice Tampa police gave to Powell 'vitiate[d] Miranda.'" The Court reviewed the principles of Miranda, which established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[81]

The Court continued:

[78] 541 U.S. 36 (2004).

[79] Miranda v. Arizona, 384 U.S. 436 (1966).

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

[81] Duckworth v. Eagan, 492 U.S. 195 (1989).

> Miranda prescribed the following four now-familiar warnings:
>
> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

In this case, the third warning was the only one at issue. The Court agreed that although the "four warnings Miranda requires are invariable, .. the Court has not dictated the words in which the essential information must be conveyed."[82] The Court had agreed that "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement.' The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda."[83]

The Court looked to Duckworth and Prysock for guidance, and concluded that the warnings given in this case, in their totality, satisfied Miranda. Read in combination, the "first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway." As such, Powell's right to have an attorney present at all times was "reasonably conveyed." Powell argued that most jurisdictions, both in Florida and across the United States, did "expressly advise suspects of the right to have counsel present both before and during interrogation." The Court lauded the "standard warnings" used by the FBI, describing them as "exemplary," but declined "to declare its precise formulation necessary to meet Miranda's requirements."

The Court concluded:

> Different words were used in the advice Powell received, but they communicated the same essential message.

[82] California v. Prysock, 453 U.S. 355 (1981).
[83] Duckworth, supra.

The Florida Supreme Court decision was reversed, and the case remanded for further proceedings.

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. However, since it was "largely cumulative" anyway, the Court found no error at all. Witt's convictions were upheld.

MIRANDA/QUARLES

Henry v. Com., 2006 WL 2632575 (Ky. App. 2006)

FACTS: On Jan. 15, 2004, Louisville Metro PD officers went to Henry's last known address, an Economy Inn, "to question him regarding an assault that had occurred the day before." They found his car there, and asked at the office as to which room he occupied. The security guard at the motel told them "that he had just chased Henry off the premises and that, before Henry had driven away, he had tossed a handgun over the privacy fence between the motel and" the convenience store next door.

The officers went after Henry and found him in the parking lot of the convenience store. He was out of his vehicle and was walking back to where the security guard reported he'd tossed a gun. The officers "quickly apprehended Henry, handcuffed him, and placed him in the rear seat of their cruiser." They did not give him a Miranda warning, but immediately questioned him about the gun. He admitted ownership of two handguns, but did not admit to having thrown a gun over the fence. The officers found a gun in the location reported, and further found ammunition in Henry's car that matched that found in the handgun.

Henry moved for suppression, arguing that his statement should be suppressed and that the search of his vehicle (where they found the ammunition) was unlawful because the officers lacked a warrant. The trial court, however, based its decision on New York v. Quarles[84] and Thornton v. U.S.[85] Using Quarles, the Court found that there was a "public-safety exception to the requirement of Miranda warnings" when the police are questioning a "suspect about a handgun reasonably believed to have been recently abandoned by the suspect in a public place." Further, in Thornton, the court extended the Belton[86] rule "by authorizing a warrantless vehicle search that is incident to arrest even when the suspect has exited his vehicle on his own accord before the police arrive on the scene to arrest him."

ISSUE: May officers ask questions about an abandoned firearm without providing Miranda warnings?

HOLDING: Yes

DISCUSSION: The appellate court found that the officers "reasonably believed that he had abandoned the gun in a location known to be frequented by homeless men." Henry argued that the Kentucky Constitution provided "greater protection from searches and seizures and custodial interrogations that that provided by the Fourth Amendment, but the Court noted that it had "repeatedly held that Section 10 [of the Kentucky Constitution] is co-extensive to the Fourth Amendment jurisprudence."

The Court upheld the trial court's denial of suppression of the evidence.

U.S. v. Williams, 483 F.3d 425 (6th Cir. TN 2007)

FACTS: On the day in question, Officer Jackson and other Memphis (Tenn.) PD offices went to arrest Williams. When the officers arrived, they knocked on Williams' door but the man who responded did not look like the photo they had of Williams. (He was, in fact, Williams, however.) The man offered to retrieve his ID, which was in the pocket of his pants, on the floor. The officers then entered the room and asked if anyone else was there, and if "he had any weapon." The man stated that was "an old gun under his bed" - specifically, under the mattress. Jackson handcuffed Williams while another officer retrieved a sawed-off shotgun from that location. (Williams, however, stated that he was placed in a chair in the hallway, and that the officers searched his room. He claimed the officers never asked him for ID.)

[84] 467 U.S. 649 (1984).
[85] 541 U.S. 615 (2004).
[86] New York v. Belton, 453 U.S. 454 (1981).

The District Court opinion had internal inconsistencies and was "not wholly clear as to whose account it credited." However, it did grant Williams his request to suppress the gun, and the government appealed.

ISSUE: May the public safety exception (under New York v. Quarles) permit a subject in custody to be questioned about firearms before being given Miranda?

HOLDING: Yes

DISCUSSION: The Court noted that under the usual rule of Miranda, statements made during a custodial interrogation may not be used unless the Miranda warnings are given. "However, when officers ask 'questions necessary to secure their own safety or the safety of the public' as opposed to 'questions designed solely to elicit testimonial evidence from a suspect,' they do not need to provide the warnings required by Miranda." In this case, the government argued that the "statement [about the gun was] admissible under the public safety exception announced in [New York v.] Quarles."[87]

A Quarles evaluation:

> ... takes into consideration a number of factors, which may include the known history and characteristics of the suspect, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer when he undertakes the arrest. For an officer to have a reasonable belief that he is in danger, at minimum, he must have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it. The public safety exception applies if and only if both of those two conditions are satisfied and no other context-specific evidence rebuts the inference that the officer reasonably could have perceived a threat to public safety.

In this case, the Court could not determine whether the officers would have had reason to believe "that someone other than police could access the weapon and inflict harm with it." Because the facts had not been adequately developed in the prior proceedings, the Court was not able to determine if Williams was restrained or unrestrained. If he was restrained, the Court noted, there could be no objective concern that someone might access a weapon, but had he been unrestrained, the Court acknowledged, the Quarles exception might apply. The Court stated that "[a]n officer may rely on the public safety exception only if he has a objectively reasonable belief that he is in danger."

The case was remanded to the District Court to permit it to "make the factual finding necessary to determine whether the public safety exception applies."

MIRANDA – INTOXICATION

Hill v. Com., 2005 WL 3500776 (Ky. App. 2005)

FACTS: On the night in question, in Elizabethtown, Hill attended a gathering at Paula Skillman's apartment that included, also, Skillman's ex-husband, Carl, Jeffrey Gray and Norman Cheeseman. Each of these individuals related a different story to investigating officers of the events that transpired. However, the evidence indicated that the "partygoers consumed intoxicating substances … including, but not limited to, alcohol, cocaine and/or rock cocaine. Hill also stated he had "consumed up to twenty-eight beers, marijuana and cocaine" that day.

Hill testified that "he was having a nice evening with the other partygoers when all of a sudden things went bad." He stated he'd won a great deal of cash at a casino riverboat that day, and that the other tried to rob him of the money, and cocaine. He grabbed a gun from the table and fired into the air, and he and Carl Skillman ran from the apartment. Outside, they struggled for the gun, and it went off. Skillman was shot in the stomach.

However, Skillman stated that Hill had started to fire the gun in the apartment for no reason, and that he

[87] 467 U.S. 649 (1984).

even attempted to shoot Paula Skillman in the back. Everyone else fled the apartment, and that Hill told him "that he could run or he could get his head blown off" but that he (Skillman) refused to run. They struggled, and Skillman was shot in the stomach. (It is not clear as to whether this occurred inside the apartment or outside.)

After the shooting, Hill encountered a bystander, Glendora Finley, as she drove down the road. She avoided hitting him, but he then "fired a shot into the passenger-side door of her vehicle." She reported the incident to the KSP. Within a short time, Hill "encountered Detective Pete Chytla of the Elizabethtown Police Department" who saw Hill running down the street. Chytla approached him, and Hill pointed the gun at the car, but he discarded it immediately when Chytla activated his blue lights. Hill yelled that "They are trying to kill me. Please put me in the car!"

Hill was tried on a variety of charges, including First Degree Assault (Skillman), First Degree Attempt Assault (Finley), Trafficking and Wanton Endangerment (Chytla). He was convicted of most of the charges, and appealed.

ISSUE: May an intoxicated individual voluntarily waive Miranda and provide an admissible statement?

HOLDING: Yes

DISCUSSION: The Court quickly found that Hill and Skillman, and other witnesses, all presented testimony in front of the jury, and it was the proper province of the jury to decide whom to believe.

Hill next argued that it was too impaired to have been able to voluntarily waive his *Miranda* rights or to voluntarily give "any statements to police during his custodial interrogation." As noted, he'd consumed possibly as many as 28 beers during the day and "might have smoked marijuana and snorted cocaine that day." However, the officers had testified that during his interview, he was "consistently responsive to the questions asked" and that they did not note "any behavior which they would describe as expected from an intoxicated person." The evidence was sufficient for the jury to find that he was in sufficient command of his faculties to have made a voluntary confession.

The judgment of the Hardin Circuit Court was affirmed.

Conway v. Com., 2005 WL 2899697 (Ky. App. 2005)

FACTS: On May 3, 2003, Officers Iddings and Mooney, among others, (Lexington PD) "were having dinner at the Tally-Ho Restaurant." They were approached by two women, who told the officers they had been harassed outside. They pointed out Conway, and Iddings and Mooney approached him. They found him "unsteady on his feet," with "bloodshot eyes," and he "smelled of alcohol and had slurred speech." He also made "threatening moves while being questioned." Conway was arrested for alcohol intoxication, and Mooney gave him his Miranda rights, which Conway indicated he understood. Mooney and Faulkner took him to jail, and prior to booking, they searched him and found marijuana, pills, scales, cash and rolling papers. He stated that he'd been selling drugs, and that he would "obtain more drugs" and "was willing to work with the police as an informant against other drug dealers." He repeated the statements after he was again advised of his Miranda rights. (Later, he was involved in a fight with jail personnel, during which his arm was broken.)

At the suppression hearing, he testified that "he had been drinking heavily prior to arrest, and that he had also smoked marijuana and had taken a large amount of Xanax. " As such, he was confused, and "did not remember making the incriminating statements to the police."

ISSUE: Are confessions made while intoxicated admissible?

HOLDING: Yes

DISCUSSION: Conway argued that his statements "should have been suppressed because he was too intoxicated at the time to make a knowing and voluntary waiver of his right to remain silent." The Court noted that "[t]he traditional rule is that a confession otherwise voluntary is not to be excluded by reason of self-induced intoxication unless 'the accused was intoxicated to the degree of mania, or of

being unable to understand the meaning of his statements.'"[88] The Court reiterated the statement in that case that "[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."

The Court found that "while Conway was clearly intoxicated," the officer's statements made it clear that "Conway was able to make a knowing and voluntary waiver of his right to remain silent."

The Court upheld Conway's conviction.

Soto v. Com., 139 S.W.3d 827 (Ky. 2004)

NOTE: Many of the issues in dispute in this case relate to trial procedures and the written opinion is lengthy. Only those issues of relevance to law enforcement will be discussed in this summary.

FACTS: Miguel Soto married Armotta Porter in August, 1995. They separated in May, 1996, and divorced following the birth of their daughter, Brianna. Armotta moved in with her parents, Edna and Armott Porter, who lived in Crestwood, during that time.

Soto attempted to see Armotta in July, 1996, and was rebuffed by her father. In August, 1996, the Porter home was burglarized, and Soto was the suspect. Charges were filed, but dismissed, following an agreement of no contact and an agreement that Soto re-join the U.S. Army and leave Oldham County. He did so. However, Soto was assigned to Fort Knox in April, 1999.

In June, 1999, Soto was asked to leave his girlfriend's home, where he had been living. He discarded all of his personal belongings, with the exception of the contents of a black duffel, explaining that he did not need the items "where he was going." Later that day, he drove to Crestwood, left his car in a parking lot, and walked to the Porter home. He hid in a shed, and when Armott Porter entered the shed to store garden tools, Soto murdered Porter and hid his body in the shed. He then entered the house and killed Edna Porter, wrapped her body in a comforter, and left her body on her bed.

A short time later, Armotta and Brianna returned home; Armotta parked her car in the attached garage. She entered the kitchen and was confronted by Soto, who told her he was going to kill her. Armotta "convinced [Soto] not to kill her in the presence of her daughter but to take her someplace away from the residence." As the two entered the garage, Armotta turned and fled back into the kitchen, and Soto shot her in the back. She managed to get the door closed and locked, protecting Brianna with her body. Soto fired through the door, further injuring her, but Porter was able to call 911 for help. At that point, Soto apparently fled the premises.

A short time later, Soto appeared on foot at the home of Mitch Nobles, a retired Louisville police detective who had attended the Soto's wedding. Soto confessed to Nobles that he had committed the murders.

Soto was tried and convicted, and sentenced to death. He appealed on a number of issues.

First, he appealed the introduction of "various incriminating statements he made both before and after his arrest, claiming the statements were involuntary due to his intoxication and police coercion." The statements were made to Mitch and Gary (Mitch's brother) Nobles, and consisted of a series of admissions connecting Soto to the crime. Soto also complained of statements made in the presence of Deputy Sheriff (Oldham County) Hoskins, who responded to the call from Nobles. Hoskins advised Soto of his Miranda rights, which Soto indicated he understood. Hoskins later stated that did not believe he was intoxicated. Hoskins transported Soto back to the Porter home. Nobles volunteered his assistance, because he knew Soto, and questioned Soto in the back seat of Hoskins' car, with Veech (Oldham County S.O.) listening from the front seat through the partially opened window (presumably the shield). Soto told Nobles that Armott Porter was in the shed and that he'd buried the missing gun in the creek. Both Veech and Nobles stated that Soto did not appear to be intoxicated.

Soto was taken to a substation for a recorded statement. Soto was wet and shirtless and

[88] Quoting Britt v. Com., 512 S.W.2d 496 (Ky. 1974).

complained of the cold, and was given a garment to wear. Veech twice gave Soto his Miranda rights, and Soto signed a waiver form. During the interrogation, which lasted approximately 25 minutes, Soto admitted to the murders and the assault and that he'd hidden the missing gun. He was handcuffed during this time, but did not complain of any discomfort.

Soto was then taken to the hospital for blood and urine, which eventually came back positive for PCP, cocaine, amphetamines and a high level of diphenhydramine.[89] At the hospital, he volunteered that everything they needed was on the clothes dryer in the Porter home, and that was where the .38 revolver and ammunition for both handguns was found, folded into some clothing.

Another issue related to the admission of statements made by Armotta Porter to the 911 operator. An "unidentified female" told the operator that "she had been shot in the back and knee by Miguel Soto" and gave the Porter address. The operator terminated the call and sent emergency responders to the scene. The operator called back the number and got the same woman, who identified herself at that time as Armotta Porter. Both recordings were played at the trial, and Soto objected, claiming they were "inadmissible hearsay." The trial court found the statements admissible under the "excited utterance" exception to the hearsay rule. In addition, Porter made statements to the first responding officer, Speigel, to the same effect, and those statements were admitted. On a side note, the Court also held that the 911 call was properly authenticated because the 911 operator could trace the incoming call as being from the Porter home, and by recognizing Armotta Porter as the original caller, when the 911 operator called her back.

Soto was convicted.

ISSUES: 1) May an intoxicated individual give a valid confession?

2) Are statements made to a 911 operator inadmissible hearsay?

HOLDINGS: 1) Yes
2) Yes

DISCUSSION: With regards to the first argument, the trial court found that since he was not in custody, and the Nobles were not law enforcement officers at the time, that the statements were admissible. The Nobles also reported their observation that Soto was not noticeably intoxicated at the time.

With regard to the second issue, the court found that Soto had properly been advised of his Miranda rights, and waived them. Hoskins was asked to recite Miranda at the suppression hearing, and misstated them, leaving out the right to counsel, but the Court found that there was no indication that he failed to give them correctly at the time.

Next, the Court considered whether Soto actually invoked his right to silence during the interrogation. At one point, in response to a question as to whether he had said anything to Armotta, Soto stated "I trust myself not to say anything" but continued to answer questions readily. The Court affirmed the trial court's decision that he had invoked his right to remain silent. In addition, Soto had already confessed fully, and nothing of significance was stated after his equivocal statement, so any error was harmless.

The Court readily dismissed Soto's claim of police coercion, noting there was nothing in the record that indicated either "coercive measures or promises of leniency."

The Court also noted that the criterion is not whether someone is intoxicated, but whether they are in "sufficient possession of [their] faculties" so as to give a "reliable statement." The information Soto provided was accurate, and although he vomited several times, he had explained that often happened when he was nervous.

The Court upheld the trial court's decision regarding the admissibility of the 911 recordings. The Court upheld his conviction.

[89] A non-prescription antihistamine most commonly known as Benadryl. Trial testimony indicated that while it would cause drowsiness, and possibly impairment, it is not considered intoxicating.

Nichols v. Com., 142 S.W.3d 683 (Ky., 2004)

FACTS: On August 18, 2000, in Lebanon, a group of individuals gathered at a friend's apartment, to play cards. David Nichols arrived at the apartment, and was soon asked to leave. (There was disputed testimony as to why he was asked to leave, but there was some evidence that it was because of erratic behavior and because he was carrying a "large kitchen knife.") Some time later, Nichols returned and was again told to leave, and became combative - standing outside and "taunting the occupants of the apartment, shouting threats and waving the knife around." Eventually, the occupants of the apartment called the police.

Pittman heard the dispatch over a police scanner and went to the apartment. When he arrived, Nichols was at the foot of the stairs. Pittman passed him, went to the apartment and then came back down and asked Nichols to leave. Nichols struck Pittman, knocked him down and then began to stab him. Several people from the apartment rushed to assist Pittman, including Joshua Wright, who was stabbed by Nichols during the altercation. Nichols then ran away, screaming. Pittman and Wright were rushed to the hospital; Wright died but Pittman, although seriously injured, survived.

At trial, Dr. Caruso (a forensic psychiatrist) testified that Nichols "suffered severe mood swings and paranoid beliefs, but he was not delusional." Nichols did not deny having stabbed the two men, but claimed "he acted in self-protection or under the influence of an extreme emotional disturbance." He also stated that he was voluntarily intoxicated at the time.[90]

The jury was instructed on a variety of possibilities, including all degrees of homicide, assault and on the defense of extreme emotional disturbance. The Court did not instruct on the voluntary intoxication defense. Nichols was convicted of Wanton Murder and Assault under EED, and was also found to be a Persistent Felony Offender (PFO).

Nichols appealed on several issues.

[90] The evidence indicated he might have drunk as much as 1 1/2 pints of vodka and six or seven beers. Several witnesses testified that he was apparently intoxicated.

ISSUE: May an intoxicated person give an admissible statement?

HOLDING: Yes

DISCUSSION: Nichols argued that the trial court should have suppressed his inculpatory statements to police because they were given while he was under the influence of alcohol. However, the court disagreed, stating "the basic question is whether the confessor was in sufficient possession of his faculties to give a reliable statement." The Court went on to statement that it is only when the individual begins to hallucinate or "begins to confabulate to compensate for his loss of memory for recent events" that the statement becomes unreliable. "Loss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it. 'In vino veritas' is an expression that did not originate in fancy. If we accept the confessions of the stupid, there is not good reason not to accept those of the drunk.[91]"

The officer testified that Nichols told him how much he'd had to drink, and refused to take a breath test for alcohol. He signed an acknowledgement of his Miranda rights and refused to give a taped statement. Although the court disagreed, the officer also stated he did not believe Nichols was under the influence at the time. However, the Court also believed that Nichols was "in sufficient possession of his faculties to give a reliable statement."

The Court upheld the conviction for Wanton Murder, but reversed the conviction for Assault because of the failure to give the instruction.

Evans v. Com., 2006 WL 2986480 (Ky. 2006)

FACTS: On the day in question, Evans and his girlfriend, Amanda Maynard, arrived at a party in Martin County; they'd spent the day "partying" together. Earlier that day Evans had taken a Soma and a Lorcet, both prescription medications. The couple joined up with Jaime Slone on the way.

[91] Britt v. Com., 512 S.W.2d 496 (Ky., 1974).

After some time at the party, Evans stated he saw Maynard "nodding off" or "passing out." They put her in the back seat of the car, which actually belonged to her father. Evans drove to Top Cat Liquors and bought a soft drink and two candy bars, using the drink to take five Soma and five Xanax pills. He later testified that he thought "he had just enough time to get home before the pills would "hit [him] real good."

On the way home, one of the car's tires blew out. Evans walked to a nearby mining office and asked for help, and eventually, he and the guard went to another station to use the telephone, where he requested a tow truck. However, none was available, so Evans decided to try to get the car home on the rim.

The guard later testified that he saw Amanda asleep in the back seat, and that while Evans "did not smell of alcohol" that he "did appear 'high.'" Evans testified that the last thing he remembered was leaving the guard station.

The damaged wheel left a groove in the roadway that later assisted an accident reconstructionist to find that it went some 7 miles before "it left the roadway and struck the right shoulder guardrail" but that prior to that, the vehicle's path of travel was "very chaotic," indicating that Evans did not have control of it. When it hit the guardrail, the vehicle stopped suddenly and "Amanda was flung from the backseat of the car through the rear passenger window." Evans, however, drove on, and the evidence indicated the car continued to follow an "extremely erratic" path, ending, finally, at Evan's "driveway, where police later found [the car] parked."

Shortly after 2 a.m., the police received a call about a woman lying in the middle of the road. The body was identified and the officers followed the groove in the roadway to the house, and the house was secured until additional officers and investigators could be summoned. At 6 a.m., Evans was "summoned to the front door, read his Miranda rights, and questioned about the prior evening." Evans "did not smell of alcohol but did appear slightly intoxicated," but officers testified that he "was coherent and able to carry on a conversation, providing cogent and appropriate responses to their questions." His statement was recorded, and later played at his trial. He was arrested for murder.

At trial, Evans admitted that he took the medication, and provided no evidence that he was legally prescribed the medication in question. He claimed not to realize that Amanda was not at the house with him, and "thought he remembered carrying Amanda into his house." He also claimed he didn't realize she was dead until he was told at the jail that he was charged with murder. He was eventually convicted of wanton murder and appealed.

ISSUE: Is intoxication sufficient to make a waiver of Miranda rights involuntary?

HOLDING: No (usually)

DISCUSSION: Among other issues, Evans claimed that the trial court erred by "failing to suppress the statements he made to police officers who arrived at his home the morning after the accident." He objected to its admission on the grounds that he "was too intoxicated when he gave the statement to voluntarily waive his Miranda rights." (The objection came after two other officers had testified regarding the statement, and the trial court concluded it would be futile at that point to suppress the information.) In addition, in the statement, Evans had denied having taken any medication, and at trial, in fact, he fully admitted it.

Evans' conviction was affirmed.

Parrent v. Com., 2007 WL 2405085 (Ky. App. 2007)

FACTS: On May 16, 2005, Officer Wilkins (Lexington PD) responded to a burglary in progress. As he arrived, he found Parrent and a woman, Napier, in the custody of a civilian. Officer Wilkins learned from the victim, Sutherland, that he had found his front door damaged when he arrived home, and spotted the couple "walking down the street carrying items that Sutherland recognized as belonging to him." Sutherland chased the pair, caught up with them and held them for police. Eventually, the pair was arrested. Parrent was found to have two prescription bottles belonging to Sutherland in his possession,

while Napier had a watch that Sutherland identified as belonging to him.

Parrent was transported to jail and given his Miranda warnings. He confessed that he had burglarized Sutherland's home. He was indicted, and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May an intoxicated subject waive Miranda rights?

HOLDING: Yes

DISCUSSION: Parrent argued that he was "too intoxicated to understand his Miranda rights." Officer Wilkins, however, had testified that Parrent "was coherent during the questioning and that he observed absolutely nothing to indicate that [Parrent] had been drinking." Parrent stated that he and Napier had shared a twelve-pack of beer prior to the burglary. He recalled being given his rights, but argued that he did not understand them, and that he confessed only to protect Napier.

Parrent argued under Hill v. Anderson that "[w]hen a suspect suffers from some mental incapacity, such as intoxication … and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession in question."[92] The Court, however, agreed that the officer "had no indication that [Parrent] was intoxicated at the time of his confession." The Court stated, with acerbity, that Parrent's argument that he did not understand his rights "somewhat disingenuous in light of the fact that he was also charged with being a first-degree persistent felony offender" and as such "[c]learly, [Parrent] had knowledge of the criminal justice system and his rights thereunder."

The denial of the motion to suppress was upheld.

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

FACTS: On February 23, 2005, Deputy Robinson (Meade County SO[93]) attempted a stop of a truck Casper was driving. Casper fled, eventually ending up in the river. Casper swam from the truck but was "later found on a riverbank and transported to a hospital." Casper was suffering from hypothermia from the cold water and was under the influence of methamphetamine and alcohol.

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

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

ISSUE: May an intoxicated subject give a valid statement?

HOLDING: Yes

DISCUSSION: The Court noted that "[a] confession's voluntariness is assessed based on the totality of the circumstances surrounding the making of the confession." "A confession [will be] considered voluntary unless, under the totality of the circumstances, a defendant's will has been overborne and his capacity for self-determination critically impaired."[94] The Court considered whether Casper's

[92] 300 F.3d 679 (6th Cir. 2002).

[93] Although the opinion stated Deputy Robinson was a member of the Meade County Police Department, he is, in fact, a member of the Sheriff's Office.

[94] Soto v. Com., 139 S.W.3d 827 (Ky. 2004), quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

intoxication was sufficient to affect the "reliability and voluntariness of the statement" - "whether the accused was in sufficient possession of his faculties to give a reliable statement." The Court continued, stating that "[s]elf-induced intoxication is not enough to require exclusion without a showing that the defendant was intoxicated 'to the degree of mania' or of being unable to understand the meaning of his statements."[95]

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

INTERROGATION TECHNIQUES

Missouri v. Seibert, 124 S.Ct. 2601 (2004)

FACTS: At the age of 12, Jonathan Seibert died in his sleep. He suffered from cerebral palsy, and at the time of his death, had bedsores on his body. Fearing charges of neglect for the bedsores, Seibert and two of her other teenaged sons, and two of their friends, "devised a plan to conceal the facts surrounding Jonathan's death by incinerating his body in the course of burning the family's mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family, to avoid any appearance that Jonathan had been unattended." In the fire, set by Darian Seibert and a friend, Rector died.

Darian, however, suffered burns in the attempt, and was hospitalized. Officer Clinton went to the hospital five days later and awakened Patrice Seibert, who was with her son. Following specific instructions given by Officer Hanrahan (Rolla, P.D.), Clinton took her to the police station and left her alone in an interrogation room for approximately 20 minutes. Hanrahan then questioned her for up to 40 minutes, without giving her Miranda warnings. He repeatedly squeezed her arm during the interrogation and stated several times that "Donald was also to die in his sleep." Finally, after she admitted that Donald was "meant to die in the fire," she was given coffee and cigarette break.

Officer Hanrahan "then turned on a tape recorder, gave Seibert the Miranda warnings, and obtained a signed waiver of rights from her." In the second, recorded statement, Hanrahan paraphrased the previous discussion back to her and Seibert essentially repeated her previous admissions.

Seibert was charged with first-degree murder. She requested suppression of both statements. Hanrahan admitted he had made a "conscious decision" to not provide Miranda warnings, "resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'"

The trial court suppressed the unwarned statement but admitted the statement given after the Miranda warning. Seibert was convicted of second-degree murder. The Missouri Supreme Court reversed the conviction, stating that "[i]n the circumstances here, where the interrogation was nearly continuous, the second statement, clearly the product of the invalid first statement, should have been suppressed."

The Court granted cert to resolve a split in the Courts of Appeals on the issue, as some circuits had held that in situations where the failure to give Miranda was deliberate, suppression might be warranted, and others had not.

ISSUE: Are statements given as a result of an unwarned interrogation, which is then followed by Miranda warnings and an immediate repeat of the interrogation in which the statements are repeated, admissible?

HOLDING: No

DISCUSSION: The Court stated that "[t]he technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda." The Court noted that the practice was "promoted not only by his

[95] Halvorsen v. Com., 730 S.W.2d 921 (Ky. 1986).

[Hanrahan's] department, but by a national police training organization[96] and other departments in which he had worked."

The Court first avowed that "it would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance."

The Court went on to say that:
The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?: Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with Miranda, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

The Court continued, saying that "[b]y any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after the interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." By using this method, the "interrogator can count on getting its [the confession's] duplicate, with trifling additional trouble."

The Court added that:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly thing he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[97]

The Petitioner (the prosecution) argued that the confession was admissible by equating it to the case of Oregon v. Elstad.[98] However, the Court noted that Elstad did not suggest that an intentional failure to give the warning, when clearly required, was permissible, it simply exonerated the police in a case where they possibly mischaracterized a "living room conversation" as a "good-faith Miranda mistake."

Finally, the Court illustrated the difference between Elstad and the current case.

> The contrast between Elstad and this case reveals a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In Elstad, it was not unreasonable to see the occasion for questioning at the station house as

[96] In another part of the opinion, this organization was identified as the Police Law Institute, located on the University of Iowa campus.

[97] Quoting from Moran v. Burbine, supra.

[98] 470 U.S. 298 (1985)

> presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.
>
> At the opposite extreme are the facts here, which by an objective measure reveal a police strategy adapted to undermine the Miranda warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of 15 to 20 minutes, in the same place as the unwarned statement. When the same officer who had conducted the first phase recited the Miranda warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise her that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way

Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."

The Court concluded by stating that "[s]trategists dedicated to draining the substance out of Miranda cannot accomplish by training instructions what Dickerson[99] held Congress could not do by statute...." The Court upheld the judgment of the Missouri Supreme Court.

U.S. v. Johnson, 351 F.3d 254 (6th Cir., TN 2003)

FACTS: In January, 2001, the Monroe County (Tennessee) police department began surveillance of Tracy's residence; the target was her half brother, Maurice Johnson. Johnson had no permanent address, but stayed with friends and family members. He was suspected of dealing in drugs.

During the surveillance, officers saw "numerous short-term visitors, parking up to six or eight cars at a time." Some of these individuals were known to have criminal records relating to drugs, and one was a regular police CI. A few days later, that CI provided information that he had witnessed cocaine sales at the Tracy house. They sought and received a search warrant shortly after midnight on January 10, 2001.

Officers immediately proceeded to execute the warrant. At 1:30 a.m., they searched, but they did not find Johnson. They did find more than nine grams of crack, hidden in Tracy's bed. He claimed Johnson owned the drugs. The police offered him a chance to get Johnson to take the blame for the drugs, otherwise, he would be arrested. Tracy was able to track down Johnson, who finally returned to the residence at 4 a.m. He spoke to the investigating officer and confessed to owning the drugs. He was given his Miranda rights, repeated the confession and was arrested. Another gram of crack was found on him following the arrest.

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[99] Dickerson v. U.S., 530 U.S. 428 (2000)

After conviction, Johnson challenged the admissibility of his confession, stating it was not made voluntarily.

ISSUE: May promises or threats made against a third party (potential criminal suspect) be considered coercive so as to invalidate an interrogation?

HOLDING: No (but see discussion)

DISCUSSION: The Court examined two lines of cases - those "concerning threats and promises with respect to the defendant and [those] concerning threats and promises with respect to third parties." The court found that promises of leniency may be coercive, particularly if they are "so attractive." These cases generally involved promises that the defendant would be released. As a result, the Court concluded that such promises "may be coercive if they are broken or illusory." In this case, the promise was not illusory because the police in fact kept their promise not to prosecute Tracy.

The second line of cases involved threats to arrest or prosecute third parties, particularly family members. In situations where the threat was invalid because there was no valid basis on which to arrest the third parties, the court found such situations coercive. However, in this situation, the officers did have probable cause to arrest Tracy, based upon the finding of the drugs in her bed.

The Court affirmed the conviction.

England v. Com., 2005 WL1185204

FACTS: On or about July 7, 2000, England killed Lisa Halvorson. She died from "blunt-force trauma to the neck" that resulted in asphyxia and her body was "bloodied and bruised from being strangled and run over by a car, among other things." Her body was found lying in the gravel driveway on July 10.

Police first searched Lisa's boyfriend's home, and collected evidence, but nothing was found that indicated his involvement. They then focused on Pat Halvorson, her ex-husband, as a suspect. While the investigation was ongoing, Karl Woodfork contacted KSP (the investigating agency) and told them he had information on the murder. He was "wired for sound" and sent to England's home "with instructions to record discussions about the murder." England made comments "that were sufficient to warrant further questioning." He was brought in on March 30, 2001.

"During the interrogation England asked whether he should be talking and asked whether he should talk to his lawyer." However, no attorney was called, and eventually, "England gave an inculpatory statement about the incident." England stated that "he and McCary went to Lisa's house at dusk where McCary repeatedly choked, beat and ran over Lisa with a car." He admitted having struck Lisa, but "insists that he did not participate in the murder, and that he even tried to persuade McCary to stop." Both England and McCary were eventually charged, and England was convicted of complicity to murder. He appealed.

ISSUE: Is the use of a "false-friend" during interrogation permitted?

HOLDING: Yes

DISCUSSION: First, England argued that his right to counsel was violated. However, the Court noted that it could not be his right to counsel under the Sixth Amendment, because no proceeding had commenced when he was interrogated, but that even if he claimed it was his Fifth Amendment right, "he still would not prevail." (The Court noted that "[t]his is not a pedantic distinction," and that "[t]hough both the Fifth and Sixth amendments contain a right to counsel, the effect of those rights is very different.")

However, the Court concluded, "[i]n any event, England had not unambiguously invoked his Fifth Amendment right to counsel." In Davis v. U.S.[100], the Court had found that "maybe I should talk to a lawyer" was insufficient "to invoke the right to counsel because the statement in equivocal." In addition, the mere hint, by stating that he had a lawyer, was also insufficient to constitute a request for counsel. As such, the statements were properly admitted at trial.

Next, England argued that his statements were coerced. England alleged that "the use of a false-friend during the interrogation constituted coercion,"

[100] 512 U.S. 452 (1994).

and that the investigators promised him that the "death penalty would be taken off the table" and that he "might see his kids and sick father again." Nothing the officers told him was "illegal or untrue" and as such, could not be objectively coercive. In addition, the use of one of the investigators as a "false friend" – they apparently attended high school together and played on the same sports teams – was "more akin to a good cop, bad cop routine." There was nothing that suggested that relationship was "objectively coercive." The Court found that England made a "reasoned determination to cooperate with the police after being presented with the evidence already compiled against him."

Next, England argued that the admission of information included in an affidavit in support of an EPO against his co-conspirator (McCary) should have been excluded. In two previous cases, the court had held that "affidavits for restraining orders were inadmissible hearsay because they were offered to prove the truth of the matter asserted."[101]

Rhodes v. Com., 2005 WL 387125

FACTS: In December, 2002, and January, 2003, Nellie Millard's home was burglarized, with antiques and a dollhouse taken. On May 19, 2003, while in jail on Muhlenberg County on unrelated charges, Det. Smith (Central City PD) questioned Robert Rhodes about the crime. He was given his Miranda rights, signed a waiver, and then gave Smith a confession about the burglary. He was then charged, and indicted, for second-degree burglary.

Rhodes requested suppression of the confession, arguing that Smith "represented to him that the case would remain in district court as a misdemeanor if Rhodes would give a statement to police and return the dollhouse." Smith testified at the hearing that he told Rhodes "that he would talk to the County Attorney about keeping the charges in district court if Rhodes would cooperate with the police" but that he did not make any promises about it. Smith did, in fact, talk to the County Attorney, who ultimately decided against keeping the case in district court..

ISSUE: Do promises made (and kept) during an interrogation make the confession inadmissible?

HOLDING: No

DISCUSSION: The Court looked to Hutto v. Ross, to find that "a confession is involuntary if it is 'extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the extension of any improper influence.'"[102] The Kentucky Supreme Court has "identified three factors to be considered in assessing the voluntariness of a confession: '1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant demonstrated that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession.'"[103] In Skaggs v. Com., the Court agreed that "[t]he representation to an accused who is a cooperative confessor that the fact of his confession would be made known to the prosecuting authorities is not sufficient to render a confession involuntary."

In this situation, the trial court apparently agreed that Smith had kept the only promise he made, that he would talk to the County Attorney, which he did. It did not "constitute an implied or express promise to Rhodes" that the case would stay in District Court.

Rhodes also argued that he should not have been questioned without his attorney, despite the fact that Smith did not know he was being represented by counsel (presumably on the charges for which he was in jail), nor did Rhodes ever indicate that he wished to speak to his attorney.

The Court upheld the denial of the suppression motion.

U.S. v. Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008)

FACTS: On March 13, 2006, undercover officers in Louisville made an arrest during a controlled buy of a large quantity of cocaine. They received a search warrant on the address where one of the

[101] Bray v. Com., 68 S.W.3d 375 (Ky. 2002); Barnes v. Com., 794 S.W.2d 165 (Ky. 1990).

[102] 429 U.S. 28 (1976).

[103] Henson v. Com., 20 S.W.3d 466 (Ky. 2000).

vehicles involved in the arrest was registered. There, they found Pacheco-Lopez and another man. At the time, the officers knew nothing about those two men.

During a later suppression hearing, the Court noted that the "exact sequence of events" that occurred involving the two men is unclear, "because each of the three officers who testified at the July 10, 2006, suppression hearing recalled the events in a slightly different manner." The Court chose to rely on the testimony of Agent Slaughter (DEA). Trooper Lagrange (KSP) provided language assistance, since Lopez spoke no English. He was given his Miranda warnings in Spanish by Trooper Lagrange. He admitted, upon further questioning, that he had transported the cocaine, and then declined to speak further. (It was later found that the truck that Lopez had admitted driving to Louisville had been modified to transport drugs in a hidden location.") The trial judge ruled that the pre-Miranda questioning was not an interrogation and that it was "only important with the benefit of '20/20 hindsight.'"

Lopez took a conditional guilty plea and appealed.

ISSUE: May a midstream Miranda be provided?

HOLDING: Yes, under appropriate circumstances.

DISCUSSION: Lopez argued that the initial questions did constitute an interrogation. (The prosecution admitted that he was in custody at the time.) The government, however argued that the questions were, in effect, booking questions and thus permitted. The Court noted that "[t]his case requires further delineation of the line between questions relating to the processing of an arrest that are biographical and questions of an investigatory nature." In this case, the Court found that "Lopez's pre-Miranda statements cannot be described as merely biographical, but instead resulted from an interrogation subject to the protections of Miranda. Some of the initial questions would not – in isolation – implicate Miranda; at the very least, asking the defendant his name is the type of biographical question permitted under the booking exception." However, "asking Lopez where he was from, how he had arrived at the house, and when he had arrived are questions 'reasonably likely to elicit an incriminating response,' thus mandating a Miranda warning." The Court made note of the fact that the officers did not "take notes or document [Lopez's] identity at the time." The Court also mentioned that the questioning was not done at a police location, and that undermined the assertion that this questioning was for booking purposes.

The Court found that the booking information was admissible.

Further, the Court noted "[m]idway through the interrogation, the police officers read Lopez his Miranda rights in Spanish."[104] The trial court had permitted the responses that followed this warning, finding that the earlier statements were not interrogation, but because the appellate court found otherwise, it found it necessary to decide "whether Lopez's later, post-Miranda statement should similarly be suppressed or whether it is admissible." Looking to Missouri v. Seibert[105] and Oregon v. Elstad,[106] the Court identified the "relevant factors for determining whether a midstream Miranda warning could be effective are: (1) the completeness and detail involved in the first round of questioning; (2) the overlapping content of the statements made before and after the warning; (3) the timing and setting of the interrogation; (4) the continuity of police personnel during the interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." The Court found that an "analysis of the sequence of events surrounding Lopez's interrogation compel [its] conclusion that the warning was ineffective, and that his statements were thus the result of a single, unwarned sequence of questioning." In particular, the sequence of questions was logical, and there was no break in the questioning at all. There was "no break in the questioning or any effort by the police to ensure that Lopez understood that his prior statements could not be used against him."

The Court rules that Lopez's statements both pre- and post-Miranda must be suppressed.

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[104] The Court called this "Miranda-in-the-middle."
[105] 542 U.S. 600 (2004).
[106] 470 U.S. 298 (1985).

HEARSAY/CRAWFORD

Crawford v. Washington, 124 S.Ct. 1354 (2004)

FACTS: On August 5, 1999, Kenneth Lee was stabbed at his apartment. That same night, police arrested Michael Crawford for the assault. Crawford and his wife Sylvia were given Miranda warnings, and each was interrogated twice. Crawford finally confessed that he and Sylvia had gone in search of Lee because Lee had attempted to rape Sylvia. When they found Lee at his apartment, a fight ensued. Lee was stabbed and Crawford's hand was cut.

During her interrogation, Sylvia "generally corroborated" her husband's account, but her version of the fight was somewhat different. Crawford had stated that Lee had pulled a weapon of some type, but Sylvia did not make that statement. Crawford was charged with assault and attempted murder. At trial, Michael Crawford claimed self defense and Sylvia Crawford claimed the marital privilege against testifying against her husband.

Washington does not extend the marital privilege concerning testimony against a spouse to "a spouse's out-of-court statements admissible under a hearsay exception."[107] The prosecution was permitted to introduce her tape-recorded statement that indicated the assault was not self-defense. Because the statement implicated her, as well, the prosecution "invoked the hearsay exception for statements against penal interest."

Crawford argued that admitting such evidence would "violate his federal constitutional right to be 'confronted with the witnesses against him.'" (This is called the Confrontation Clause of the Fifth Amendment.) The Court had found in Ohio v. Roberts[108] "that the statement of an unavailable witness could be used if the statement bears an "adequate indicia of reliability." The Court admitted the statement, and Crawford was convicted of assault.

[107] Kentucky Rule of Evidence, Rule 504 covers this privilege, but differs somewhat in language.
[108] 448 U.S. 56 (1980).

The appellate court reversed, finding that Sylvia's statement was not trustworthy, and detailed a number of factors that that guided the court in coming to that conclusion. The state Supreme Court reinstated the conviction, finding that the statement did bear "guarantees of trustworthiness" because it "interlock[ed]" with Michael Crawford's statement. Michael Crawford appealed.

ISSUE: May a trial court allow the introduction of an out of court, testimonial statement, to be used when the witness is legally unavailable to appear as a witness, when the statement was not taken under circumstances that would allow the individual on trial to cross-examine the witness?

HOLDING: No

DISCUSSION: The Court recognized that its opinion in this case was to some degree in conflict with White v. Illinois[109], which allowed certain statements to be admitted under the hearsay exception for "excited utterances" or "statements made in contemplation of medical treatment." Because the court did not define what it considered to be a "testimonial statement," however, appellate courts have wrestled with cases since this opinion was entered. As an example, many courts have admitted the information conveyed in 911 or emergency calls for help under the excited utterance exception, but that application may now be questionable, if the caller isn't brought in as a witness in court.

The Court found that the wife's statement could not be used against her husband, because the use violated the Confrontation Clause, and "where testimonial statements are at issue, the only indicium of reliability to satisfy constitutional demands is confrontation."

The Court reviewed the long history of the Confrontation Clause, going back into English history prior to the Constitution, and noted that the "primary object" of the clause "is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class." The Court noted that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England. The

[109] 502 U.S. 346 (1992).

statements are not *sworn* testimony, but the absence of oath was not dispositive."[110] The "Framers [of the Constitution] would not have allowed testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." The Clause "commands that reliability [of a particular statement] be assessed in a particular manner: by testing in the crucible of cross-examination."

The Court has overturned Ohio v. Roberts by this decision.

NOTE: Kentucky extends the "spousal privilege" in the Kentucky Rules of Evidence, Rule 504. Kentucky's rule is somewhat different from Washington's, and it appears unlikely that Kentucky would even allow the introduction of such a statement in court, pursuant to Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1998).

Davis v. Washington, 126 S.Ct. 2266 (2006)

NOTE: The cases of Davis v. Washington and Hammon v. Indiana were consolidated and argued before the U.S. Supreme Court in the same proceeding.

FACTS: In the first case, Davis, on February 1, 2001, Michelle McCottry made an emergency call to a local 911 operator. (In fact, she disconnected the call before she spoke, but the 911 operator was able to reverse the call and reach her.) McCottry related that she "was involved in a domestic disturbance with her former boyfriend Adrian Davis" – the defendant. Before the officers arrived, Davis fled. The officers talked to McCottry within minutes of the call and "observed [her] shaken state, the 'fresh injuries on her forearm and her face,' and her 'frantic efforts to gather her belongings and her children so that they could leave the residence.'" Eventually, Davis was charged with a "felony violation of a domestic no-contact order." McCottry, however, for reasons not explained in the opinion, did not appear at trial, and the only witnesses were the two responding police officers. Over Davis's objection, the trial court admitted the recording of the 911 call, in which McCottry identified Davis as her attacker, and eventually, Davis was convicted. The Washington Court of Appeals and the Washington Supreme Court each affirmed the decision of the trial court, agreeing that the "portion of the 911 conversation in which McCottry identified Davis was not testimonial," and thus not prohibited under Crawford v. Washington.[111]

In the second case, Hammon, "police responded late on the night of February 26, 2003, to a 'reported domestic disturbance' at the home of Hershel and Amy Hammon." When they officers arrived, they "found Amy alone on the front porch." She appeared "somewhat frightened," but told the officers that "nothing was the matter." She allowed them into the house, and they found a "gas heating unit" with the front glass broken, and pieces of glass on the floor in front of the unit. (Flame was coming through the broken panel, as well.) Hershel was in the kitchen, and he told the officers that the two had been in an argument but that it "never became physical." The officers tried to talk to the two separately, but Hershel kept trying to "participate in Amy's conversations with the police," and "became angry" when the officer kept them separated. Eventually, the officer had Amy "fill out and sign a battery affidavit." She handwrote the following:

Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

Hershel was charged with domestic battery and violating his probation. Amy did not appear (as ordered) at the trial. (Apparently, she invoked the marital privilege and could not be required to testify against her husband.) The officer who took the affidavit was "asked … to recount what Amy told him and to authenticate the affidavit." (The prosecutor

[110] Nothing prevents a statement given to police from being given under an oath, but note that such statements must be signed or acknowledged in front of an official authorized by KRS 62.020, such as a notary public or a judge.

[111] 541 U.S. 36 (2004).

defended the affidavit as being made "under oath[112]," but the defense counsel vigorously objected to the introduction of the affidavit, because it did not give him the opportunity to cross examine the affiant.)

The trial court admitted the document as a "present sense impression" and Amy's statements (apparently to the officer) as "'excited utterances' that 'are expressly permitted in these kinds of cases even if the declarant is not available to testify.'" (The officer related what Amy had told him as to the reason for the argument, and what she told him of Hershel's actions in the assault.)

Hershel Hammon was found guilty by the trial court. Upon appeal, the Indiana appellate courts both affirmed, finding that Amy's statement was admissible as an excited utterance, and not testimonial, as it was not "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings" and in a situation where "the motivations of the questioner and declarant are the central concerns." The appellate courts further agreed that the affidavit was, in fact, "testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench."[113]

In both cases, the convictions were appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: 1) Is an alleged victim's statement to a 911 operator, naming an assailant, a "testimonial statement" within the meaning of Crawford?

2) Is an oral accusation made to an investigating officer at the scene of an alleged crime, but after the fact, a testimonial statement within the meaning of Crawford?

HOLDING: 1) No

2) Yes

DISCUSSION: In 2004, the U.S. Supreme Court handed down the opinion of Crawford v. Washington.[114] Since that time, numerous cases in the lower state and federal courts have argued the meaning and ramifications of the definition of a prohibited "testimonial statement." The Court noted that "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."

The Court began its opinion by the following:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purposes of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Court noted that "the facts of [the Crawford case spared us the need to define what we meant by 'interrogations," but the "Davis case today does not permit us this luxury of indecision."

The Court reviewed the litigation invoking the Confrontation Clause over the years. It noted that most of the previous cases "involved testimonial statements of the most formal sort – sworn testimony in prior judicial proceedings or formal depositions under oath" but that earlier, English, cases "did not limit the exclusionary rule to prior court testimony and formal depositions." The Court did not "think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

The Court found that an interrogation "solely directed at establishing the facts of a past crime" … "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." "A 911 call, on the other hand, and at least the initial interrogation

[112] It should be noted that as a rule, a statement given to law enforcement at the scene will not be considered to be "under oath" – subjecting the individual to perjury – as Kentucky law does not automatically grant to law enforcement officers the ability to place someone under oath. In Kentucky, the ability to take an oath from an individual is governed by KRS 62.020.

[113] A bench trial, as opposed to a jury trial.

[114] Id.

conducted on connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."

In Davis, the Court looked at three points. First, "McCottry was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,'" that occurred hours before. Second, "McCottry's call was plainly a call for help against bona fide physical threat" and "any reasonable listener would recognize that McCottry … was facing an ongoing emergency." Third, "the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had happened in the past," even though the 911 operator was attempting "to establish the identify of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." Finally, "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe," rather than in a calm environment, as that in the Crawford case.

The Court concluded that "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency," and that "[s]he simply was not acting as a *witness*; she was not *testifying*."

However, the Court agreed with the Indiana Supreme Court that "a conversation which begins as an interrogation to determine the need for emergency assistance" may "evolve into testimonial statements." In Davis, once Davis drove away, the call-taker "proceeded to pose a battery of questions," and the Court concurred that "[i]t could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the 'structured police questioning' that occurred in Crawford." The Court found that the trial courts could readily deal with such statements, through pretrial proceedings, and if necessary, redact the inadmissible portions of such statements.

In Hammon, the Court found it to be "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." The Court noted that "[t]here was no emergency in progress" and "the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything." When the officer pressed Amy "for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.'" Looking at the situation objectively, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer *should* have done." Like Crawford, Amy's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." Both took place in rooms where the parties were separated both from the occurrence and from other parties and "both took place some time after the events described were over." As such, both were "inherently testimonial."

The Court acknowledged that a number of amici curiae[115] parties have "contend[ed] that the nature of the offenses charged in these two cases – domestic violence – requires greater flexibility in the use of testimonial evidence," because "[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." The Court agreed that "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." However, the Court concluded that it could "not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." The Court found that when defendants attempt to coerce "silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce," and that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."

The Court "determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment" required the exclusion of Amy Hammon's affidavit.

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[115] Friend of the Court – a brief filed by a non-party who has a strong interest in or views on the subject matter of the action.

The Supreme Court affirmed the ruling of the Washington Supreme Court and upheld Davis's conviction, but reversed the ruling of the Indiana Supreme Court and remanded the Hammon case for further proceedings.

Fulcher v. Motley, 444 F.3d 791 (6th Cir. Ky. 2006)

FACTS: On Dec. 22, 1991, "Bramer was found beaten and stabbed in his home in Jefferson County." Several years later, Fulcher was convicted of burglary, robbery and Bramer's murder. At trial, the prosecution's case was based upon the testimony of Fulcher's friend and accomplice, Terry Wright, as well as an interview with a inmate who shred a cell and to whom Fulcher allegedly confessed. (Another inmate testified that he was offered money to provide Fulcher with an alibi.)

Wright testified that he and Fulcher were together, drinking, when they decided to steal money from Bramer's home. Bramer was asleep on the couch when they arrived, but during their search for items to steal, the burglars accidentally awakened Bramer. Wright and Fulcher ran out, and Bramer followed them to the car, "reached inside, and smacked Fulcher on the head." Fulcher asked Bramer if they could talk, and they went back into the house. Wright followed in a few moments and he found "Fulcher hitting Bramer in the head with a hammer." Wright ran outside, wiping his fingerprints off the door, and got back in the car. Within minutes, Fulcher came out, covered in blood. He admitted that he killed Bramer to keep him from identifying them.

A few weeks after the robbery, Pamela Ash (Fulcher's girlfriend) was pulled over while driving Fulcher's car. She was questioned, and admitted that just before Christmas, Fulcher had asked her to wash a pair of bloody sweat pants, claiming that he and Wright had been in a fight. Wright later asked her to "dispose of a key" that she didn't believe belonged to him, and she threw it into a sewer, where it was later "recovered by the police." Ash, however, did not testify at the trial, as she and Fulcher had married in the interim, and she invoked the marital privilege, meaning that she could not be required to testify against him.

Fulcher was convicted, and appealed, and after being denied relief in the Kentucky courts, he continued his appeal in the federal courts. The District Court denied his request, and he appealed his case to the Sixth Circuit.

ISSUE: Is the use of a recorded statement by a witness who does not appear to be cross-examined permitted?

HOLDING: No

DISCUSSION: Fulcher argued that his Sixth Amendment rights were violated when the Court admitted Ash's tape-recorded statement to the police, and cited numerous cases to that effect.[116] His appeal, however, was focused "squarely on the inconsistency of the proceedings below with Sixth Amendment Clause jurisprudence" under the case of Crawford v. Washington[117] and its progeny.

The Court reviewed the complex history of the Confrontation Clause and related issues. In Lilly v. Virginia, the Court held that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."[118] In Lee v. Illinois, the Court "guided courts to question the reliability of confessions elicited by custodial police interrogation," finding them lacking a "particularized guarantee of trustworthiness" and "presumptively unreliable."[119]

The Court that previous Kentucky decisions were inconsistent with clearly established federal law in the area, even at the time of the alleged crime. The Court found that even prior to Crawford v. Washington, the state of the law clearly indicated that admission of Ash's statements, without giving Fulcher an opportunity to challenge her recorded statements, was inappropriate.

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[116] Ohio v. Roberts, 448 U.S. 56 (1980); Lee v. Illinois, 476 U.S. 530 (1986); Idaho v. Wright, 497 U.S. 805 (1990); Taylor v. Com., 821 S.W.2d 72 (Ky. 1990).
[117] Id.
[118] 527 U.S. 116 (1999).
[119] 476 U.S. 530 (1986).

The Court concluded that the court had erred in allowing the admission of Ash's statement, reversed Fulcher's conviction, and remanded the case back to the District Court for entry of the request writ.

Stallings v. Bobby, 464 F.3d 576 (6th Cir. OH 2006)

FACTS: Stallings, the driver, and Quarterman and Penson, passengers, were stopped by Officer Simcox on a traffic matter. Fake cocaine and counterfeit money were found in Quarterman's pockets and a firearm was found in the backseat. Quarterman, however, made a deal with the officer as he didn't want the weapons charge, and "offered to implicate Stallings as the owner of the gun." Simcox agreed to talk to the prosecutor if he cooperated. Quarterman told the officer that Stallings had additional weapons and drugs at a particular house, and a search warrant was obtained for the home of Angela Roberts. There, they found guns, crack cocaine and other items. Roberts was detained when she returned to the home during the search.

Roberts first told police the items found belonged to Quarterman, and apparently confirmed that a second time. However, after being taken into police custody, she told the offices that "she had lied and the contraband actually belonged to Stallings." Stallings was subsequently charged, and tried to the bench.

Roberts testified that the items found belonged to Stallings, who stayed at her house on occasion. The prosecution attempted to call Quarterman, but he invoked his right not to incriminate himself and refused to testify. The prosecution then called Officer Simcox who repeated statements given to him by Quarterman that incriminated Stallings. The Court eventually found Stallings guilty only of possession of cocaine, and Stallings appealed. The Ohio appellate courts remanded the case for consideration of a possible violation of the Confrontation Clause, and affirmed the conviction. Eventually, Stallings appealed to the federal courts, arguing that his right to confront adverse witnesses had been violated. During the interim, the case of Crawford v. Washington[120] had been handed down, and the parties further briefed on that issue as well. The U.S. District Court agreed that the Confrontation Clause had been violated, but found it to be harmless error and dismissed the petition.

Stallings appealed.

ISSUE: Is the confession of an accomplice, that incriminates the suspect, admissible?

HOLDING: No (usually)

DISCUSSION: The Court reviewed the admissibility of the statement under the law as it was at the time of the conviction. It noted that prior to the Crawford decision, "a hearsay statement was considered admissible for purposes of the Confrontation Clause if the statement bore "adequate indicia of reliability' which could be inferred if the evidence fell 'within a firmly rooted hearsay exception.'"[121] As a result of Lilly v. Virginia, the Court agreed that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule".[122]

The Court further concluded that "in determining whether a Confrontation Clause violation is harmless, courts must consider such factors as 'the importance of the witness'[s] testimony in the prosecution case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, … and, of course, the overall strength of the prosecution's case."[123] The Court noted that Quarterman's statement was clearly important to the prosecution's case, because "nearly half of the … closing argument was focused" on it. In addition, Quarterman's statement served to corroborate the otherwise weak testimony given by Roberts.

Stallings' conviction was reversed, and the case remanded for further proceedings.

U.S. v. Cromer, 389 F.3d 662 (6th Cir. 2005)

FACTS: On March 8, 2001, officers executed a search warrant that netted a substantial amount of drug related materials, as well as cash and a firearm.

[120] 541 U.S. 36 (2004).

[121] Ohio v. Roberts, 448 U.S. 56 (1980).

[122] 527 U.S. 116 (1999).

[123] Delaware v. Van Arsdall, 475 U.s. 673 (1986).

Cromer was arrested as a result of, among other evidence, the presence of his fingerprints on some of the contraband items.

At trial, the lead officer, O'Brien, testified as to the circumstances that led to the issuance of the warrant. During her direct examination, the detective did not mention that an informant provided some of the information for the warrant, but it was brought out on cross-examination. During much of the witness's testimony, Cromer conducted the cross-examination on his own, rather than letting his counsel do the questioning. Det. O'Brien testified to what the CI said, in response, essentially, to Cromer's questions.

Cromer was convicted, and appealed.

ISSUE: Are statements taken during a law enforcement interrogation considered testimony, for the purposes of the Confrontation Clause?

HOLDING: Yes

DISCUSSION: The Court reviewed the appeal in light of the recently decided case of Crawford v. Washington.[124] In that case, the Court "introduced a fundamental re-conception of the Confrontation Clause" and made "a distinction between testimonial and nontestimonial statements" for the purposes of the clause. While the Crawford Court did not define testimonia, it "did provide some guidance in the matter." The Court offered as a definition, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Since that time, circuits have begun to further develop a useful definition. The Courts have agreed that police interrogations (even if not taken under oath) are testimonial in nature. In addition, the Court accepted that:

A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certain is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.[125]

In U.S. v. Saget,[126] the Court noted that "Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."

The Court found Friedman's definition "to be both well-reasoned and wholly consistent with the purpose behind the Confrontation Clause," finding that statements " 'made to the authorities who will use them in investigating and prosecuting a crime, … made with the full understanding that they will be so used,' are precisely the sort of accusatory statements the Confrontation Clause was designed to address."

The Court noted that "[t]ips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial." In addition, "[t]he very fact that the informant is confidential – i.e., that not even his identity is disclosed to the defendant – heightens the dangers involved in allowing a declarant to bear testimony without confrontation," and "[t]he allowance of anonymous accusations of crime without any opportunity for cross examination would make a mocker of the Confrontation Clause."[127]

In this case, while certain of the officer's statements were classified as background, "O'Brien's testimony about [Cromer], by contrast, explicitly, albeit not directly, informed the jury that someone had implicated [Cromer] in illegal activities."

Finally, the court noted that "[i]f there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that

[124] 541 U.S. 36 (2004).

[125] Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1042-43 (1998).

[126] 377 F.3d 223 (2d Cir. 2004).

[127] U.S. v. Silva, 380 F.3d 1018 (7th Cir. 2004).

is no longer subsumed by the evidentiary rules governing the admission of hearsay statements." In light of these determinations, the court reversed the lower court and remanded the case for a new trial.

Winn v. Renico, 175 Fed.Appx. 728 (6th Cir. Mich. 2006)

FACTS: On January 10, 1998, Winn was living at a residence in Detroit with a number of his relatives. That evening, an altercation ensued between Winn and his cousin's boyfriend, Groves. Winn shot Groves several times, but Groves survived. Winn attempted to flee, and was stopped by West, his sister's boyfriend.[128] During a struggle over the gun, Winn shot and killed West. Winn then fled to the home of another cousin. The next day, he surrendered to Detroit authorities.

Winn was interrogated about the events of that night by Sgt. Wilson. He admitted to shooting both men, claiming that the West shooting was accidental and the Groves shooting was in self-defense. He was charged with intentional murder of West, however, and intentional assault for Groves.

He was convicted by a jury of second-degree murder and assault with intent to commit murder, along with possession of a firearm by a convicted felon. The Michigan appellate courts upheld his conviction, and he filed a writ of habeas corpus with the federal courts. The U.S. District Court denied the petition, and he further appealed to the Sixth Circuit.

ISSUE: Is the failure of a subpoenaed witness to appear fatal to a trial?

HOLDING: No

DISCUSSION: On appeal, Winn limited his argument to whether his Sixth Amendment Confrontation Clause right "was violated when the trial court admitted the preliminary examination testimony of two witnesses who were not produced at trial." One of the two witnesses who did not appear at trial was Groves, the surviving victim. Groves had been extensively examined, and cross-examined, at the preliminary hearing, and since the prosecution claimed he was unavailable for trial, was permitted to introduce his testimony from that proceeding at the trial. Sgt. Wilson was apparently tasked with serving the witnesses with subpoenas, and he detailed, at a "due diligence" hearing held for that purpose, the efforts he made to locate the witnesses, including surveillance on an identified property. (Wilson received the subpoenas approximately two weeks before the start of the trial.) The Court compared the efforts made by Sgt. Wilson to efforts made by officers in the case of U.S. v. Quinn,[129] which Winn referenced. It stated "[f]irst and foremost, Sgt. Wilson undertook precisely those efforts that the officers in Quinn neglected" – by following up leads, making personal visits and contacting a variety of agencies for information. The agency also spent quite a bit of time surveilling properties where the witnesses might be found. There was no indication that more time would have led to a better result. In addition, the witnesses in question were not considered key witnesses; there were sufficient other witnesses to the events.

The Court concluded that the prosecution had made a good faith effort sufficient to prove that the witnesses were, in fact, unavailable for trial, and upheld the denial of the writ.

U.S. v. Grooms, 194 Fed. Appx. 355 (6th Cir. MI) 2006

FACTS: On the day in question, Customs agents determined that a passenger on a flight from Columbia to Miami was transporting approximately 4 kilos of heroin. She was arrested. They learned she was scheduled to travel to Detroit with Davila, who was also arrested. Davila agreed to cooperate.

The next day, Davila and an agent attempted a "controlled delivery of the heroin." They took hotel rooms, and Davila called her contact to arrange for the drug pickup. Her contact, who was Columbian, told her that she'd be picked up later.

Grooms was, in fact, arranging the pickup. He contacted Clark and "asked him if he was interested in

[128] All of these individuals apparently resided in the house.

[129] 901 F.2d 522 (6th Cir. 1990).

picking someone up at the airport the next day. Clark was very familiar with Grooms, and expected to "be paid after the pickup." The next morning, Clark was told by Grooms to "go to a particular road near the airport, and then instructed him to drive to a hotel to pick up a woman." That same morning, "cell phone records showed Davila again called the Colombian number" and later that day, she got a call explaining that they couldn't do the deal the day before, but that someone (Clark) would "come for her shortly." He used slang terms to indicate that they would check the shipment.

When Clark arrived, Davila asked him about her money and plane ticket, and Clark told her that Grooms would have them. When he went to pick up the suitcase, agents entered and made the arrest.

During that time, Clark's phone rang numerous times, and Clark told the agents that the calls were from Grooms. The instructed Clark to call Grooms back, and Grooms ordered Clark to go back home. An hour later, when Clark called him again, he was again told to go home, and Grooms called Clark later to see if he was home. The agents took Clark home and sent his wife, Rhonda, away, "in preparation for the expected meeting between Clark and Grooms."

Some hours later, Rhonda returned – Clark and the agents had left – and she called Grooms. "Grooms did not respond to her questioning about what was going on, he hung up." A few days later, they talked, and Grooms "told her not to mention his name, asked her to keep Clark's business going, and assured her that he would take care of her and her son." He met with her and he gave her cash for Clark's legal fees.

Grooms was arrested at his girlfriend's home, and the girlfriend told her that she paid all the living expenses, that Grooms had no job but that he had two cell phones. Later, she denied those statements at trial, and the prosecutor, in his closing argument, "commented on this financial arrangement."

Grooms was convicted of conspiracy in drug trafficking, and he appealed.

ISSUE: May hearsay be admitted if it provides an investigatory background explaining the actions of the officers involved?

HOLDING: Yes

DISCUSSION: First, Grooms challenged his conviction on the government's use of "Davila's post – arrest statements" – citing Crawford v. Washington.[130] He argued that "Davila's alleged testimonial statements violated his Sixth Amendment right to confront the witnesses against him," and also that admitting a tape recording of her statement was error. The prosecution argued that it was "back ground evidence that merely described why law enforcement acted."

The court agreed that the statements and the tape were introduced "as background evidence detailing the events leading up the drug transaction and explaining why government agents acted as they did." The statements did not refer to Grooms or connect him to any criminal activity." The trial court considered the recorded statements as both coconspirator statements as well as nonhearsay investigatory background evidence. As such, the statements did not "offend Crawford or the Sixth Amendment."

Further, the court found that "Clark's post-arrest recorded conversations with Grooms were," in fact, conspirator statements, and thus admissible, even though Clark was cooperating with the government at the time. The prosecution need only show that a conspiracy existed, the defendant against whom the statement is offered was a member of the conspiracy and that the statement was made in the course of and in furtherance of the conspiracy.

After consideration of numerous other issues, Grooms' conviction was upheld.

Com. v. Hartsfield, 2007 WL 29385 (Ky. App. 2007)

FACTS: On April 22, 2003, a Fayette County Grand Jury indicted Hartsfield on three counts each of first-degree rape and sodomy, and of PFO. One of the victims, Buford, however, died before trial.

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[130] 541 U.S. 36 (2004).

Following Buford's death, Hartsfield requested that the counts involving her be dismissed, alleging that admitting Buford's statements to third parties would be hearsay. The Court denied that motion, and the Commonwealth sought clarification "as to the admissibility of these statements." One statement involved "a statement made to a 'sexual assault nurse examiner' (a SANE nurse)" … "during the course of Buford's examination and treatment for rape at the University of Kentucky Medical Center." The other statement in question were made by Buford "immediately after the alleged rape" when she told two witnesses, one her daughter, that "he raped me."

The trial court ruled that all of the statements would be inadmissible, because "Hartsfield's right to cross-examine Buford would be violated by their admission." As a result, the two counts involved Buford were dismissed, and Hartsfield pled guilty to sexual misconduct against the other two victims.

The Commonwealth appealed.

ISSUE: Are statements made to a SANE nurse during the course of treatment nontestimonial, and therefore admissible?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that the statements made to the SANE nurse were "admissible under the KRE 803(4) 'medical treatment or diagnosis' exception to the hearsay rule." It further argued that the statements are not "testimonial" and thus are not prohibited under Crawford v. Washington.[131] The Court agreed that the statements "fall squarely within the … exception," are not "testimonial, and are thus admissible.[132]

With regards to the other statements, made immediately after the alleged rape, the Court agreed that such statements qualified as "excited utterances under KRE 803(2) and therefore are not subject to the prohibition against hearsay." In Ernst v. Com., the Court had developed the "criteria to determine whether a statement is an excited utterance …."[133] "The factors to be considered include the lapse of time involved, the likelihood of and inducement for fabrication, the actual excitement of the declarant, the place of declaration, and so forth."[134] In this case, the Court concluded that Buford's exclamation to the passerby witness and to her daughter both satisfied the Ernst criteria.

The Court reversed the suppression order and remanded the matter for further proceedings.

Heard v. Com., 217 S.W.3d 240 (Ky. 2007)

FACTS: On the day in question, Heard got into a fight with Angel Saunders, the mother of Heard's infant daughter. Heard had attempted to visit Angel at her grandmother's home, but the grandmother, Sara Saunders, would not admit him. Later, after the grandmother left the house, Heard kicked in the door, assaulted Angel and took the child with him.

When Sara Saunders returned home, she called the Lexington-Fayette PD, and Officer Gilbert responded. Angel Saunders had already admitted to her grandmother that Heard was her assailant, and further admitted it to Officer Gilbert. At some point, Heard called his own cell phone, which he had left behind, and spoke to an officer and a paramedic. Heard hung up and called back on the house phone, and the officers listened in as he spoke to Sara Saunders and to a paramedic. Heard admitted that he had struck Angel with his fists, but denied having struck her with a gun, as was alleged.

Angel was taken to the hospital, and the child was located with Heard's mother.

At trial, however, Angel Saunders refused to testify and did not respond to a subpoena. She "recanted her previous incriminating statements in an affidavit." Heard was convicted of criminal trespass and assault. He requested a judgment of acquittal or a new trial based upon Angel's recantation, but the trial court denied it. He then appealed.

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[131] 541 U.S. 36 (2004).

[132] See also Meadows v. Com., 178 S.W.3d 527 (Ky. App. 2005).

[133] 160 S.W.3d 744 (Ky. 2005).

[134] Id.

ISSUE: May statements of a witness who does not testify be admitted through third-parties?

HOLDING: No

DISCUSSION: Heard argued to the Court of Appeals that his "Sixth Amendment right to confront his accuser" was violated by the court's admission "into evidence the victim's out-of-court statements made through Officer Gilbert and Dr. Wicker…." The Court of Appeals agreed that "portions of Officer Gilbert's testimony were improperly admitted in light of" … Crawford v. Washington,[135] but found that the improper testimony was simply cumulative and thus not reversible error. The Supreme Court reviewed the issues raised by the Crawford challenge.

"Officer Gilbert was permitted to repeat what Angel had told him about the attack [Heard] made on her, events that had already occurred" During that discussion, she related no "information bearing upon the safety or whereabouts of her child" nor was there an "ongoing emergency." Angel was "safely in the presence of one or more police officers and the statements concerned violations of law." As such, the statements "were clearly testimonial and they should not have been allowed into evidence." However, the court then had to decide if the erroneous admission was harmless or not.

Heard argued that the following statements were improperly admitted and not harmless:

1) [Heard] had called and asked [Angel] if her grandmother was gone;
2) [Heard] showed up a few minutes after the call and threatened to kick in the door;
3) [Heard] did kick in the door;
4) [Heard] hit Angel in the head with a gun;
5) Angel refused to let go of the child;
6) when Angel did let go, [Heard] grabbed the child; and
7) {Heard] pointed a gun at Angel and said he would have shot her if the gun were not broken.

The Court concluded that while parts of the testimony was cumulative to that given by Sara Saunders, the Court could not "in good conscience declare that this erroneously admitted testimony was harmless beyond a reasonable doubt."

The Court reversed the conviction for Second-Degree Assault and remanded the case for a new trial. The Court further noted that, however, Dr. Wicker's testimony was properly admitted pursuant to the "medical treatment exception to the hearsay rule and that it was possible that Sara Saunder's testimony might be admissible as an excited utterance," but that would be for the trial court to determine.

Cross v. Com., 2007 WL 121823 (Ky. App. 2007)

FACTS: On April 9, 2001, at about 2 a.m., Cross returned to Clarkson's apartment, where he had been the day before. Later that day, about at 4:45 p.m., he called for a cab. At 6:12 p.m. a neighbor of Clarkson called police to report that a "large black man whom she did not know had broken down her back door," choked her until she became unconscious, taken prescription medications and money and left in Yellow Cab #786.

Meanwhile, in the cab, "Cross began rustling through a black fanny pack bag." He asked the cab driver if he was familiar with drug names found on prescription bottles in the fanny pack. As a result of the police report, Yellow Cab dispatch asked the cab driver, via the radio, for his destination. Cross became nervous, told the cabdriver to stop, paid his fare and got out. The cabdriver later turned over to police a cell phone he found in the cab.

Officer Schmidt responded to the victim, and interviewed neighbors. The description of the intruder was provided to possible witnesses, and "Clarkson knew from the description that it was Cross." During that time, the recovered cell phone, now in the possession of the police, "rang constantly" - and one of the "saved numbers matched the number of … Clarkson's apartment." The next day, "ten bottles of the victim's medications" were recovered "near the original cab destination." The medication was documented and returned to the victim. Clarkson and Stovall (her roommate) were given the nickname of the

[135] 541 U.S. 36 (2004).

suspect; they identified the nickname as belonging to Cross, and "provided a physical description of him which matched the description given by the victim."

Cross was arrested. He gave a statement that he purchased the medications from Stovall's teen-age son, but admitted that the intruder was "probably him."

Cross was indicted on charges of robbery and burglary, and other related charges. Prior to trial, the victim died, from unrelated causes. Cross was convicted on some of the charges. However, prior to the resolution of his appeals, the Court decided the case of Davis v. Washington, and Cross renewed his appeal based upon issues resolved in that case.

ISSUE: Are statements made during a 911 call admissible under Crawford v. Washington?

HOLDING: Yes

DISCUSSION: The Court noted that in this case, the victim called 911 and reported what had occurred, and that this call "was made in the immediate wake of [Heard's] intrusion into the victim's home. The Court quoted extensively from Davis, and concluded that "when the 911 call is made to seek emergency assistance - it is nontestimonial and the confrontation clause is not implicated." The call in question "was without any aforethought of giving a statement for later use against Cross in a court proceeding." As such, the content of the 911 call was properly admitted and Cross's conviction was affirmed.

U.S. v. Hearn, 500 F.3d 479 (6th Cir. 2007)

FACTS: In early, 2004, Jackson-Madison County (Tennessee) officers "learned from confidential informants that Hearn possessed large amounts of illegal drugs that he intended to sell at an upcoming rave party in Nashville." The officers set up surveillance and, on March 18, followed Hearn, who was in his vehicle, and tried to stop it. As they did so, "an unidentified white object, which appeared to be the top of a pill bottle," hit the police car. Hearn stopped, and consented to a search of the car. The officers found a semi-automatic weapon and a guitar case which contained documents belonging to Hearn, marijuana and pill bottles containing over 300 pills, some of which were identified as Ecstasy. With that, they were able to get a search warrant for his home, where they found ammunition for the weapon.

Hearn was indicted on federal drug trafficking charges. Hearn moved to suppress "statements by confidential informants because the introduction of the informants' statements would violate Hearn's constitutional rights to confront witnesses against him."[136] The government agreed not to use any statements to prove specific elements of the charged offenses, intending only to "use the informants' statements to show why authorities initiated the stop that led to the discovery of the contraband." The trial court permitted the use of the CI statements in a limited way.

However, at trial, two witnesses "provided more expansive explanations, which implicated Hearn in a manner unlike that of any other evidence." One of the officers "testified that he stopped Hearn because he learned" from a [CI] "that Mr. Hearn had large amounts of ecstasy and marijuana [and] was going to be leaving to take the narcotics to a rave party in Nashville." Another officer testified that Hearn was investigated because an informant told him that Hearn was going to sell a large quantity of MDMA[137] pills at a rave party. He also linked the drugs to Hearn's residence and car.

Hearn was convicted, and appealed.

ISSUE: May officers broadly testify as to statements made by a non-testifying CI?

HOLDING: No

DISCUSSION: The Court started by noting that "the government's conduct in this case makes clear that it introduced the confidential informants' statements, at least in part, to establish possession with intent to distribute and firearms-possession in furtherance of drug trafficking." The prosecution asked "broad, open-ended questions" and made no attempt to ensure "through narrow questioning or otherwise, that

[136] Crawford v. Washington, 541 U.S. 36 (2004).
[137] Ecstasy.

the officers did not testify as to the details of the confidential informants' allegations."

The Court agreed that "[a]dmission of the confidential-informant statements, therefore, violated Hearn's right to confront witnesses against him." The Court found "no conceivable reason, besides implicating Hearn, for the officers to testify that a confidential informant told them that Hearn placed the drugs in his car and was driving to Nashville to sell them." The CI's statements went to the "heart of the government's case" and that meant that the admissions were not harmless.

Hearn's convictions were reversed and the case remanded.

RIGHT TO SILENCE

Adams v. Com., 2005 WL387281 (Ky. 2005)

FACTS: Adams met and then married the victim while both were hospitalized for psychiatric treatment for suicidal thoughts. The victim had attempted suicide, following his divorce.

On January 15, 2001, Adams called 911 and reported that her husband had shot himself, in the back or in his legs. The deputy who responded "had to bang on the door for a significant amount of time before Adams allowed him in." The deputy found the victim on the floor, with a weak pulse. Adams again stated that he had shot himself.
Upon arriving, EMS found the victim "motionless and without a pulse," and "with an obvious gunshot wound in his lower abdomen." They attempted resuscitation and transported, but the victim was pronounced dead at the hospital.

Another deputy that arrived later stated that he found Adams "sitting on a couch with a semiautomatic handgun lying on the floor in front of her with the muzzle pointed towards the husband's body and the handle towards Adams." An empty casing was found behind Adams and to her right. He described Adams as "very calm and apparently more concerned about her cigarettes" than her husband.

During the investigation, Adams made several contradictory statements. First, she said that they argued because victim "had been talking to another woman over the computer, and, after the argument, he shot himself." Later, she told the detective that "he first asked her to shoot him" but that she had refused and he then shot himself. However, at the station, while writing out a statement she mentioned, "I should have blown my brains out like I did his." The police chief, who was present, asked her to repeat what she said, and she did so. She originally told the investigating officer that she didn't know "from where the handgun had come," but then admitted that she had gotten it out "intending to shoot herself." Upon being further questioned, she stated that the victim had "got the gun and that he placed the muzzle against his right side and pulled the trigger with his right hand." When the detective, however, mentioned that gun residue tests could be used to detect the presence of gunpowder on her hands, "she exclaimed '[j]ust put me in prison,' and broke into tears."

Adams was arrested for murder, and she invoked her right to silence. However, when she was reviewing the file, which she asked for, she said, " I must have done it. I don't remember. But after seeing this, I must have done it."

Adams was indicted and convicted of murder. She appealed on several points.

ISSUE: May comments indicating culpability, made voluntarily after a suspect invokes their right to silence, admissible against that suspect at trial?

HOLDING: Yes

DISCUSSION: First, Adams argued that her statement concerning her culpability for her husband's death was "impermissibly admitted at trial because she invoked her right to silence." The testimony indicated that the statements were made spontaneously and were "not the result of any questioning." As such, there was no error in admitting the statement.

Next, Adams argued that RCr 9.60 "prohibits a conviction based on a confession unless accompanied by other proof that such offense was committed," and that, in this situation, there was no proof that a homicide had been committed. Under Kentucky law, a homicide charge requires that the "Commonwealth prove a death and the cause of the death by the criminal agency of another." There was no question but that the death of the victim was proven, of course, but Adams claimed that there was insufficient evidence to "support proving criminal activity."

The evidence at trial indicated that the wound was fired from a distance of six to twelve inches away, and at an angle inconsistent with a self-inflicted wound. The appellate court considered that sufficient and upheld the conviction.

Edmonds v. Com., 2007 WL 29400 (Ky. App. 2007)

FACTS: On Nov. 27, 2004, the Super Dollar Store in Lexington was robbed by a man (allegedly Edmonds) who "demanded money from the clerk and threatened him with a pocket knife." Officers Brand and Noel responded and promptly arrested Edmonds "who matched the description of the robber" nearby. They took Edmonds back to the store "where the clerk identified him as the perpetrator." (Prior to the show-up, Edmonds had been given his Miranda warnings.) Edmonds was taken to the police department and interviewed by Detective Cain, but he denied the crime. The next day, Officers Brand and Noel, however, interviewed him again, and Edmonds confessed.

Just before the trial, Edmonds requested suppression of the statement he gave to the two officers, arguing that the statement was taken in violation of his Fifth Amendment right against self-incrimination. During the hearing, the court noted that the interview between Edmonds and Detective Cain resulted in a loud argument, although the two arresting officers, who were outside the room, were not aware of the details of that argument. At the second interview, the next day, the two arresting officers once again gave Edmonds his Miranda warnings, and he indicated that he understood them. During that discussion, which Brand was taping, unbeknownst to Edmonds, Brand apologized for Detective Cain's behavior – which Brand admitted was a subterfuge to gain rapport with Edmonds. During the discussion, Edmonds did state that he wanted to speak to an attorney, for the purposes of making a complaint against Cain, who he alleged assaulted him in the interview room, but not for the purposes of the robbery charge.

The trial court concluded that the officers had, in fact, "scrupulously honored Edmonds' rights and had not coerced his confession." Edmonds took a conditional guilty pleas to second-degree robbery, and appealed.

ISSUE: Does a statement from a suspect that they have "nothing to say" constitute an invocation of a suspect's right to silence?

HOLDING: Not necessarily

DISCUSSION: First, Edmonds argued that he had invoked his right to remain silent during the interrogation by Detective Cain, and that Noel and Brand had failed to honor that invocation when they reinitiated the interrogation the next day. For the purposes of ruling, the Court accepted that he had invoked the right. (However, the Court noted that in Furnish v. Com., it had ruled that the statement allegedly made by Edmonds, that he had "nothing else to say" was not an invocation, but instead, a denial of any knowledge of the crime.[138])

The Court looked to Mills v. Com. [139] to decide the matter. In Mills, the Court identified factor that the Mosley Court "relied upon in determining that police officers had scrupulously honored the defendant's right to cut off questioning. These factors included:

> (1) Mosley was carefully advised of his rights prior to his initial interrogation, he orally acknowledged those rights, and signed a printed notification-of-rights form;
> (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning or try to persuade Mosley to reconsider his decision;

[138] 95 S.W.3d 34 (Ky. 2002)
[139] 996 S.W.2d 473 (Ky. 1999); see also Michigan v. Mosley, 423 U.S. 96 (1975)

(3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and
(4) Mosley was given a fresh set of Miranda warnings prior to the second interrogation.

The Court did not, however, make these factors "exclusive or exhaustive," nor did they elevate any factor as being more important than the others. The "Mosley analysis is to be approached on a "case-by-case basis,' examining all the relevant factors." In applying those factors to the case it bar, the Court noted that Edmonds was given, and understood, his Miranda rights, that Detective Cain did not continue to question him after he stated he had nothing to say, and that "the second interrogation took place about twenty-four hours later at a different location and by different officers." Unlike Mosley, however, the "second interrogation was in relation to the same crime." The Court found nothing indicating that the officers sought to "undermine [Edmond's] resolve to remain silent" and found no error in the trial court's ruling upholding the admission of his statements.

Next, the Court addressed whether "his confession during the second interrogation was involuntary" as the "result of police coercion." Edmonds argued that Cain's actions the day before had made him more susceptible to "confessing the following day." He stated that he was afraid, if he didn't confess, that he'd be locked up with Cain again, and that Cain would hurt him. In Henson v. Com., the Court discussed police coercion.[140] The trial court had not addressed the allegations made against Cain, other than stating that "if true," Cain's conduct "was inexcusable" and found that the factors surrounding Edmond's confession removed any taint that was possible from that first interrogation. However, the Court of Appeals noted that if the events did occur as alleged by Edmonds, which included a statement that Edmonds would be sent to prison where he would be sexually assaulted, as well as alleged physical contact made by Cain, could constitute impermissible coercion.[141]

As such, the Court concluded that it was "necessary to remand to the trial court for findings of fact as to what occurred during the interrogation to Detective Cain on November 27, 2004" and did so.

Franklin v. Bradshaw, 545 F.3d 409 (6th Cir. 2008)

FACTS: Franklin, 16, was identified and questioned as a participant in a murder. He was given his rights and signed the form. He denied he was in the area and offered an alibi. However, further investigation placed him at the scene and he was identified by a witness as the shooter. Franklin was questioned again, two days later. The state appellate court summarized his statement at that time as follows:

> The videotaped interrogation begins at 12:32 p.m. [Franklin] is informed of the charges lodged against him. [Franklin] is then asked if he remembers his rights as they were explained to him when the officers questioned [Franklin] the day before when he signed a *Miranda* card. Appellant is again advised that he has the right to remain silent, to end the questioning at any time, and to have counsel present. [Franklin] never invokes any of his rights. At 12:34 p.m., the officers ask [Franklin], "do you understand your rights," and he answers "yes, sir." The officers ask [Franklin], do you want to tell us your side of the story." [Franklin] answers "no." [Franklin] never states during the questioning that he wishes to remain silent, however he does put his head down and avoid eye contact with the officers. The officers inform [Franklin] that they know he was at the scene because a number of witnesses place him there. [Franklin] denies being at the scene and states "how you going' to tell me where I was, I know where I was." The officers ask [Franklin] "did you fire any shots?" [Franklin] answers, "I didn't kill nobody." The officers ask [Franklin] "was it your gun?" [Franklin] answers, "I never had no gun," and states "I'm not lying to you." The officers ask [Franklin] "is that your response, i[s] that what you're going with," and [Franklin] responds, "I ain't did nothing."

[140] 20 S.W.3d 466 (Ky. 1999).
[141] See also Arizona v. Fulminante, 499 U.S. 279 (1991) and Hager v. Com., 189 S.W.2d 867 (1945).

The trial court had admitted the statement, over objection. Following his conviction, and unsuccessful state appeals, Franklin filed for habeas in the federal courts.

ISSUE: Is a single negative response enough to unambiguously invoke the right to remain silent?

HOLDING: No

DISCUSSION: The Court noted that the critical question was whether Franklin invoked his right to remain silent during the interview. The Court noted that the right must be asserted unambiguously, otherwise, "questioning need not cease." (The same standard applies to invocation of the right to counsel.) In this case, the Court found that Franklin's single negative response to being asked if he wanted to "tell his side of the story" was not sufficient to unequivocally assert his right to remain silent, nor was his failing to raise his head or look at the officers significant.

Franklin's conviction was affirmed.

Davie v. Mitchell (Warden), 547 F.3d 297 (6th Cir. 2008)

FACTS: Davie was charged, and eventually convicted, of "a bloody and gruesome series of crimes [which occurred] on the morning of June 27, 1991," and which resulted in the beating and shooting deaths of two people and the attempted murder of a third. He was arrested promptly, given his Miranda warnings and transported to the police station. At 9:05 a.m., upon arrival at the station, he was given his rights again, initialed the form but refused to sign the waiver. He was not interrogated. He was given the rights again about an hour later, made a few comments, but refused to speak to the officers. Again, the interview ended. At about 12:15 p.m., he was questioned a third time and provided some information, but he did not confess. He stopped talked at 12:35 p.m. At about 2 p.m., he asked to speak to Det. Vingle, and Vingle arrived and gave him Miranda warnings once more. At that time Davie confessed. At no time did Davie asked for an attorney.

Davie was convicted, and sentenced to die. He appealed under a habeas writ, arguing that his Miranda rights had been violated.

ISSUE: Does a defendant effectively waive a previously invoked right to remain silent by asked to speak to a particular officer about the crime?

HOLDING: Yes

DISCUSSION: The Court reviewed the actions of the Ohio courts, which equated the situation to that considered in Oregon v. Bradshaw. In that case, the Court "concluded that authorities could speak to a defendant, without depriving him of his rights, when the defendant asked 'Well, what is going to happen to me now?' even though the defendant had previously invoked his right to counsel."[142] As in that case, Davie "evinced a willingness to discuss the investigation without influence by authorities" – asking, specifically, to speak to a particular officer about the matter. In the interim, he'd had contacts with various officers, and exchanged comments, but the Court did not find these contacts to be improper attempts to reinitiate an interrogation.

Further, the Court found there to be no violation even though Davie refused to sign the waiver form, since he verbally expressed a willingness to talk, nor did the Court require that officers go further to explain that such statements could be used against the defendant, even though they did not sign the form.

In addition, the Court did not find the situation violated Michigan v. Mosley.[143] In that case, the Court upheld "a confession that followed a cutoff of questioning" (invoking the right to silence), finding that "police are not indefinitely prohibited from further interrogation so long as the suspect's right to cut off questioning was 'scrupulously honored.'"

The Court examined the specific facts of the case. The Court found three separate attempts by officers to speak to Davie, over five and a half hours. At each interaction, he was again given Miranda warnings, and when he refused to talk, the Court found "no evidence

[142] 462 U.S. 1039 (1983).
[143] 423 U.S. 96 (1975).

… that the officers engaged in any other conduct to persuade Davie to change his mind." Davie unquestionably initiated the discussion with Vingle that led to the conviction.

The Court upheld the admission of the confession.

Berghuis (Warden) v. Thompkins, 130 S.Ct. 2250 (2010)

FACTS: A shooting occurred in Southfield (Michigan) on January 10, 2000. Morris died from multiple gunshot wounds; France survived and later testified. Thompkins, the suspect, fled, but was apprehended a year later in Ohio.

Southfield officers traveled to Ohio to question Thompkins, who was "awaiting transfer to Michigan." At the beginning of the interrogation, Officer Helgert provided Thompkins with his Miranda[144] rights in writing. The officer had Thompkins read the last provision of the warnings out loud to ensure that Thompkins could read and presumably understand English. Helgert read the other four warnings to Thompkins and he signed the form. There was conflict in the record as to whether Thompkins was asked, or verbally confirmed, that he understood his rights.

During the ensuing 3 hour interrogation, "at no point … did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." He was "largely silent," but did occasionally give a limited verbal response, such as yes, no or a comment such as "I don't know." He also refused a peppermint and mentioned that the chair he was sitting on was hard. Toward the end of the interrogation, one of the officers asked Thompkins if he believed in God and Thompkins's eyes "welled up with tears." Thompkins agreed he prayed to God. Officer Helgert then asked him, "Do you pray to God to forgive you for shooting that boy down?" Thompkins responded "yes" and looked away. He refused to give a written confession and the interrogation ended some 15 minutes later.

Thompkins was charged with murder, assault and related firearms offenses. He moved for suppression of his statements, arguing that he had invoked his Fifth Amendment rights and that interrogation should have then ended.[145] The trial court denied the motion.

Thompkins was convicted and appealed. The Michigan appellate courts denied his argument that the statements should have been suppressed, holding that he had "not invoked his right to remain silent." Thompkins filed a petition for habeas corpus in the U.S. District Court, which also rejected his claim, stating that the state court's decision was not "contrary to, or involved an unreasonable application of clearly established federal law."[146] "The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation."

Thompkins appealed to the U.S. Court of Appeals for the Sixth Circuit, which reversed. The Sixth Circuit "acknowledged that a waiver of the right to remain silent need not be express, as it can be 'inferred from the actions and words of the person interrogated.'"[147] However, it's recitation of the facts indicated that it believed that "Thompkins was silent for two hours and forty-five minutes" and that silence offered a "clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." (The Court also ruled in his favor on an unrelated assistance-of-counsel issue.) The Warden (as the respondent in a habeas petition) requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Must a subject unambiguously and unequivocally invoke the right to silence?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the Miranda ruling and noted that all of the parties conceded "that the warning given in this case was in full compliance with these requirements." Instead, the dispute in this case "centers on the response – or nonresponse – from the suspect" following the warnings being given. Thompkins argued that he remained silent "for a sufficient period of time so the

[144] Miranda v. Arizona, 384 U.S. 436 (1966).

[145] Michigan v. Mosley, 423 U.S. 96 (1975).

[146] 28 U.S.C. §2254(d)(1).

[147] North Carolina v. Butler, 441 U.S. 369 (1979).

interrogation should have 'ceas[d]' before he made his inculpatory statement."[148] However, the Court noted, in Davis v. U.S., it had "held that a suspect must do so 'unambiguously.'"[149]

The Court continued:

> The court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis.

Further, it ruled that "there is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." Such a requirement avoids forcing law enforcement officers "to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'"[150]

The Court then considered whether, in fact, Thompkins waived his right to remain silent.

The Court continued:

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the produce of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[151]

Decisions since Miranda demonstrate "that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." The prosecution, as such, "does not need to show that a waiver of Miranda rights was express." Instead, an "implicit waiver" is "sufficient to admit a suspect's statement into evidence."[152] It is to the prosecution to make an adequate showing that the accused understood Miranda rights, as given. Once that is done, however, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent."

Further:

> Although Miranda imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a Miranda warning, it does not impose a formalistic wavier procedure that a suspect must follow to relinquish those rights.

Miranda rights can be waived through more informal means than a "typical waiver on the record," which generally requires a verbal invocation. The Court found no "contention" on the record that Thompkins did not understand his rights, but instead, found "more than enough evidence in the record" that he did. His response to the officer's final question was a "course of conduct indicating waiver" of the right to remain silent – he could have remained silent or invoked his Miranda rights at that time, or any time earlier, ending the interrogation. The fact that would have been three hours after the warning was given was immaterial and "police are not required to rewarn suspects from time to time." This is further confirmed in that he gave "sporadic answers to questions throughout the interrogation." The Court found no evidence of coercion or threat, as neither, the length of time nor the conditions of the interrogation were not such as would put him in physical or mental distress. Appealing to his religious beliefs (moral and psychological pressures) did not make the interrogation improper.[153]

Thompkins also contended that the police could not question him until they obtained a waiver, but again, the Court noted that Butler foreclosed this line of argument.

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[148] Mosley, supra.
[149] 512 U.S. 452 (1994).
[150] See Moran v. Burbine, 475 U.S. 412 (1986).
[151] Id.
[152] Butler, supra.
[153] Oregon v. Elstad, 470 U.S. 298 (1985).

The Court stated:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

The Court affirmed that in order for a statement (under interrogation) to be admissible, the accused must have been properly given, and understood, the Miranda warnings. The Court would then look for an express or implied waiver but the Court agreed that officers need not obtain a waiver before commencing an interrogation.

The Court agreed that the statements were admissible and reversed the decision of the Sixth Circuit on the issue. The Court also ruled on an unrelated question with respect to jury instructions, and found no prejudice to Thompkins. The Court remanded the case to the lower court to deny the habeas petition.

COERCION

Trotter v. Com., 2005 WL924179 (Ky. App. 2005).

FACTS: Dewayne Parker and Tanya Mitchell had a lengthy, and stormy, relationship, during which time they had two children. They broke up in 2000, and Parker did not take it well, but he eventually "started getting used to it."

Mitchell began dating Eddie Trotter after the breakup. Trotter and Parker met in October of 2000, at a party. Parker was asked to leave, because he was not supposed to be near Mitchell, but Parker refused.[154] Parker confronted Trotter and told him to stay away from Mitchell. Finally, he left.

In December, Parker went to Mitchell's apartment and forced his way inside. He yelled that he didn't want Trotter near his children, and threatened to kill him. Trotter appeared during the argument, and Parker threatened him again. Mitchell went to call the police, and Parker left.

A few days later, Parker picked up his son (with Mitchell) at school, and took him to his (Parker's) home. Although he shared custody with Mitchell, she had not given him permission to pick up the boy. On December 12, Mitchell requested a criminal complaint, concerning two incidents in that same month, during which time Parker threatened to kill Trotter.

In April, 2001, Parker approached Trotter, displayed a firearm, and said he would kill him but for the witnesses. Trotter did not report this to the police, but another witness confirmed the threat. In May, Parker entered Mitchell's apartment, while she and Trotter were asleep, and left a threatening note on Trotter's chest. Later that month, Parker jumped in front of the car in which Trotter and Mitchell were traveling. Parker argued with Mitchell and gave her a watch that belonged to Trotter, which had last been seen in Mitchell's bedroom. Trotter later testified that he was very concerned about these incidents, and that he had gotten a gun "from his grandfather for protection."

On June 24, Trotter and a friend Adams went to a restaurant. When he came back to Mitchell's home, Trotter "saw a man coming out of her house and phoned her to find out who it was." She told him that it was Parker, and that he had violated the protective order. Trotter denied having made such a call, however, Adams testified that Trotter had made a call, but he did not know anything about the conversation.

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[154] The Court was unclear on what, if any, formal court orders were in existence at this time.

Later that same day, Trotter and Adams drove to another location to buy marijuana. Trotter claimed when he left that location, "Parker struck him on the head three times with a bottle and shoved him to the ground." He further stated that "he saw a flash of chrome" and that he then drew his gun, shot and killed Parker. "Adams contradicted much of this testimony." Adams said that Trotter was "looking for a guy in a green shirt" and that he was "gonna do something nasty." At the location, they spotted the man (Parker) and Trotter got out of the car and "squar[ed] off" with him. Parker reached for Trotter, and Trotter pulled a gun and shot Parker. Trotter got back into the car and they drove off, eventually disposing of the gun in the Ohio River.

Parker was taken to a hospital, and died shortly afterward. At the crime scene, police found a lighter and a short piece of chrome. The lighter was the type with a "trigger ignition mechanism" and the chrome appeared to be the broken off "nose" of the lighter. There were no bottles at the scene. A witness placed Trotter leaving the area, and another witness identified the license number of Trotter's vehicle.

Trotter was arrested two days later. Human blood was found on the door handle of the car. Trotter first denied killing Parker, but confessed later. Trotter's head was examined, and no injuries were found; Adams later testified that Trotter was uninjured when they left the scene. Mitchell testified that Trotter "told her that he shot Parker."

Trotter and Adams were indicted for Murder and Tampering with Physical Evidence. Adams pled guilty to Facilitation to Murder and agreed to testify against Trotter. Trotter was convicted, and appealed.

ISSUES: Is a statement taken from a suspect in a law enforcement vehicle automatically coercive?

HOLDING: No

DISCUSSION: Trotter first appealed on the issue of the prosecution presenting testimony regarding "prior bad acts" that he claimed unfairly prejudiced the jury against him. The first time, a detective mentioned that in addition to the charges for which he stood trial, he had been arrested on "some other miscellaneous charges." When Trotter objected, the judge admonished the jury to disregard the statement and reminded them to only consider the two charges before them. Such a statement, the Court agreed, violated KRE 404(b), but held that the judge's admonishment was sufficient to correct the problem. (The Court also noted that the remedy "was the one his own attorney requested.")

Trotter next complained, "the prosecutor attempted to elicit testimony as to how [Trotter] obtained the gun." Trotter had given a statement to the effect that he bought the gun, but the prosecutor asked the detective about the source of the gun, and the Court noted that Trotter had stolen the gun.[155] However, the question was objected to, and was not answered. In fact, apparently, Trotter himself made reference to the stolen gun in his own testimony.

Trotter also objected to the admission of his taped statement to the police. When Trotter was stopped on the day of his arrest, he was in a vehicle with his pregnant girlfriend, Elizabeth Swain. Det. Nieves had Trotter get into the front seat of the cruiser, and he was not handcuffed. Another detective sat in the back. Nieves did not arrest Trotter at the time, deciding instead to talk to him in the car. Nieves read Trotter his Miranda rights, and Trotter signed a written waiver, and then Nieves interrogated Trotter. After Trotter finished, Nieves told him that he did not believe his story, and began to complete the arrest citation. Trotter began to talk again. The tape had a pause between the two statements, but Nieves testified that he did not make any threats or promises. Trotter complained, "Nieves did not record exactly what rights were read to him and that he was not asked if he had read the waiver form that he admitted to signing." He also argued that "questioning a suspect in a police car is inherently coercive...."

The Court, however, noted that Trotter had agreed that he had been read his rights, and that he had signed the waiver, and dismissed the allegations regarding the reading of Miranda.

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[155] Note that the facts of the case stated that he had "gotten" the gun from his grandfather, but the opinion does not explain the discrepancy.

The Court then turned to the issue of whether the statement was voluntary. The Court outlined three criteria to determine voluntariness: "whether the police activity was 'objectively coercive,'" "whether the coercion overbore the will of the defendant," and "whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession."

In U.S. v. Brown,[156] the Court held that the backseat of a police car (presumably locked in and behind a shield) is inherently coercive, but the Court noted that even in Brown, that was not the only, nor necessarily the determining factor, in whether a confession was voluntary; the Brown case included other factors such as police hostility, age, physical condition, emotional state and the violence of the custody. In Trotter's situation, however, the court noted that he was in the front seat and that Nieves properly gave him Miranda rights and received a waiver. Although a second officer was in the car, there was no indication that officer took any action. Trotter was advised that he was being recorded. Trotter claimed that he only confessed when Nieves began writing the arrest citation, and that Nieves had implied, by his action, that he would not be arrested if he confessed. The Court, however, stated that Trotter's "subjective interpretation of this behavior" did not make the behavior coercive. Trotter's alleged emotional state, he claimed he was "agitated," "afraid," and "dazed," was, if anything, more likely the result of having killed a man, rather than the police actions. He was of average intelligence, was not "excessively young, old, or infirm." He was not threatened, rushed, made any promises, confined, lied to, or deprived of sleep or food. The Court concluded that his statements were, in fact, voluntary.

The Court affirmed Trotter's conviction.

Hudson v. Com., 2007 WL 858809 (Ky. 2007)

FACTS: On the day in question, police and EMTs in Fayette County were called to an "unresponsive child." CPR was performed. However, the child died. According to the medical examiner the child died from a liver laceration that resulted in internal bleeding and had suffered "blunt impacts to the head, trunk and extremities." A responding officer, however, "noticed that Hudson, who remained at the residence, was nervously repeating, 'I didn't do anything wrong, I wouldn't hurt a kid.'" The officer gave Hudson his Miranda warnings. Upon questioning, Hudson appeared remorseful and told the officer that he had given the child some medication earlier in the day, let her lie down and later found her unresponsive.

Hudson was taken in for further questioning. He was arrested on an unrelated warrant. The next day, detectives interviewed him again, and during that time, he made incriminating statements. He was charged in the child's murder.

Hudson moved to suppress the statements made during the second interview, arguing that he was coerced into making statements. Following a hearing, the trial court denied the motion.

Hudson took a conditional plea to homicide, and appealed.

ISSUE: Is physical and emotional vulnerability sufficient to make a confession involuntary?

HOLDING: Depends upon circumstances

DISCUSSON: The Court reviewed the circumstances under which the confession was made. Hudson argued that the officers "implied promises of leniency," which the officers denied. Hudson's allegations were vague and Hudson "point[ed] to no explicit promises of lenient treatment for his confession." The Court found those vague suggestions of promises unconvincing and that they did not make his statement involuntary.

Hudson also claimed that he was physically and emotionally vulnerable as a result of personal circumstances. However, "Hudson ha[d] not demonstrated a level of physical and emotional stress that would render him unable to make a voluntary decision." (He claimed to having been in pain from a recent surgery, and having been emotionally upset due to family deaths.) However, the Court found nothing to indicate that Hudson was in such a state as to render his statements involuntary.

[156] 557 F.2d 541 (6th Cir. 1977).

Hudson's conviction was affirmed.

MENTAL INCAPACITY

Cook v. Com., 2005 WL924326 (Ky. App. 2005).

FACTS: Eric Cook has an IQ of 58, is classified as mildly mentally retarded, and was, in his adolescence, treated for mental illness. At the time of the events of this case, he was "receiving Social Security for his disability."
On May 20, 2002, in Clinton County, Cook's cousin, T.A., age 4, stated overnight with Cook's family. Her mother, Adkins, picked her up the next morning, and Cook walked to the car with T.A., and asked Adkins for cigarettes. After they left the Cook home, T.A., who was upset, told her mother that Cook had licked her genital area and made her raw. Adkins drove to her aunt's home to try to contact her husband, and examined her daughter, finding that she was indeed "red and raw." Adkins returned and confronted Cook, who denied having done anything. Cook left the house. Adkins took T.A. to the doctor, who examined the child and referred Adkins to Social Services. Social Services and Trooper Wilson (KSP) began an investigation.

Wilson was unable to continue the investigation for some two months, as Cook had been hospitalized. On June 27, he went to Cook's home and found him outside. Cook agreed to talk to Wilson, but he wanted to go someplace else to do so. Wilson agreed, and Cook got into the car. Wilson asked Cook to "pick a radio station that he liked and that they would listen to music." He drove a short distance and pulled to the sign of the road. He read Cook his Miranda rights and told Cook of the investigation. Cook signed a waiver.

Cook denied having done anything to T.A., and Wilson told him that they had a saliva sample. (This was untrue.) He suggested, perhaps, that Cook had committed the act in his sleep, which Cook originally resisted. Later, however, he agreed that perhaps he'd done the action in his sleep, but that he certainly hadn't done it when he was awake. Parts of the interview were recorded, as Wilson had turned off the recorder more than once, when Cook would become upset. Cook agreed, however, to having the recorder turned back on. The interview lasted approximately half an hour.

Cook was indicted and arrested, for first-degree sodomy. Numerous witnesses testified, but T.A. was found incompetent as a witness, probably because of her age. The jury was instructed on both sodomy and sexual abuse. The jury convicted Cook on the sodomy charge. Cook appealed.

ISSUE: Does mental retardation automatically make a confession inadmissible?

HOLDING: No

DISCUSSION: Cook argued first that his confession was inadmissible, because it was the product of coercion. The Court acknowledged that there was evidence of Cook's mental retardation, and that Wilson both lied about the evidence and that he "led [Cook] to an unlikely conclusion, namely that [Cook] committed the crime while he was asleep." However, mental retardation is only a factor, not a determining factor, and it "certainly does not automatically render a confession involuntary." There was also evidence that Wilson took great pains to make Cook comfortable. Wilson did lie, but "such practices are not forbidden to the police."[157] Cook did not raise the issue at trial, and the Court declined to overturn the conviction based upon the late allegation.

On a side note, the Court also refused to consider Cook's assertion that the Court should have also instructed on the second-degree offenses of sodomy and sexual abuse. The Court quickly disposed of that argument, noting that the "reason [Cook] was charged with these specific crimes is the age of the victim." The "second-degree sexual offenses are not lesser-included offenses of the first-degree offenses."

The Court upheld the conviction.

Bailey v. Com., 194 S.W.3d 296 (Ky. 2006)

FACTS: "Bailey, who was nineteen at the time of the alleged incident, is classified as moderately mentally retarded" with an IQ of 50 – the equivalent of a six-

[157] Frazier v. Cupp, 394 U.S. 731 (1969).

year-old. On the dates of the incident in question, Bailey had been asked to babysit L.J. (age 6) and her two sisters (ages 3 and 10), by his uncle, who was dating the girls' mother. Following the date, the childrens' mother learned that he had apparently sexual assaulted L.J.

Some four months later, Det. Woods (Allen County SO) contacted Bailey, who denied any wrongdoing and declined a polygraph. Woods told him that he would probably be arrested if he didn't take the polygraph, and Bailey changed his mind and agreed to do so. He changed his mind again, however, when Woods attempted to schedule the test. When reminded he would probably be arrested, Bailey again agreed to the test.

On March 1, Bailey was taken to the Allen County SO, and Sheriff Foster then drove Bailey to the Madisonville KSP post, some two hours away, for the test. The civilian examiner advised Bailey of his rights – but he "had substantial difficulty understanding these rights" and mischaracterized what he was being told. (He also asked what "an atturnity" is.) The examiner learned during his background questioning that he was illiterate, having left school in the ninth grade, had taken special education classes and was unemployed. Bailey had "significant difficulty" in following the examiner's directions during the giving of the test. Some two hours in the process, the examiner began changing his tone concerning Bailey's denials that he had sexually abused the girl, and told him that the machine told him that Bailey was lying. The examiner offered him "possible scenarios by which Bailey might have touched L.J. inappropriately, while continuously reminding Bailey that he 'knew' that something bad had happened." Bailey continuously denied, however, that anything had happened, beyond that he had perhaps touched her when he helped her change her clothes that night. After some 30 denials, over several hours, Bailey admitted that perhaps he'd rubbed himself "on top of her panties."

Bailey was returned to Allen County, where he was met by Det. Woods. Bailey gave a "very brief confession" – "again largely by answering 'yes' or 'no' to questions posed by" the detective. Bailey was arrested.

Bailey requested suppression, and after a lengthy hearing, the court granted the motion. The prosecution appealed, and the Court of Appeals reversed. Bailey appealed.

ISSUE: Is it necessary to consider a suspect's mental capacity when determining if an interrogation is impermissibly coercive?

HOLDING: Yes

DISCUSSION: The Court noted that involuntary confessions are inadmissible – and that the "threshold question to a voluntariness analysis is the presence or absence of coercive police activity."[158] Courts are also required to look at the "characteristics of the accused" – including age, education, intelligence, and linguistic ability. – as well as the characteristics of the interrogation – such as "length of detention, the lack of any advice to the accused concerning his constitutional rights, the repeated or prolonged nature of the questioning, and the use of overtly coercive techniques such as the deprivation of food or sleep, or the use of humiliating tactics." In Henson v. Com., the Court "has succinctly summarize the relevant inquiry to determine voluntariness as follows: '(1) whether the policy activity was 'objectively coercive': (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession.'"[159]

At the suppression hearing the defense presented uncontroverted testimony as to Bailey's "very serious mental deficiency." On tests of comprehension and vocabulary, he "received the lowest possible score," as he did on tests to evaluate his "ability to make predictions based on information presented to him." The psychologist noted that Bailey had "excellent social skills" and could "maintain eye contact and hold a conversation with an adult" but that did not indicate his "level of understanding." He had "developed the ability to hold congruent conversations by repeating back what the speaker ha[d] said, and by reading body

[158] Colorado v Connelly, 479 U.S. 157 (1986); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[159] 20 S.W.3d 466 (Ky. 1999).

language and tone of voice" and that he desired to "be compliant and to act appropriately, particularly with authority figures, even though he likely does not understand the substance of what is being told to him." He was "very prone to agree with whatever is suggested" to him because "he has learned that being nice helps and works."

The Court found it to be "simply impossible to evaluate the police action outside the lens of Bailey's very serious mental deficiency, which necessarily calls into question his ability to give a reliable confession." It further found that it agreed with the trial court's "conclusion that an examination of the totality of the circumstances indicates that Bailey's will was overborne and the tactics used by the police officers critically impaired his capacity for self-determination." He was unable to realize that agreeing with suggestions would be against his self-interest – and that his confession could have been a way to "satisfy" the examiner.

The Court noted that both the examiner and Det. Woods were aware of Bailey's mental deficiencies to some extent – because of his lack of knowledge about certain words, his inability to follow simple directions such as writing a number upon request, his uncertainty concerning his year of birth and his inability to write his name in cursive. The examiner had explained the test is "extremely simplistic tones" and he "spoke with Bailey in a tone of voice characteristic of a person communicating with a very small child." Further, the Court noted that Bailey "was alone in the company of law enforcement for nearly seven hours before giving his confession." He did not drive, and was taken to a city some two hours away. He also evidenced a "complete inability to understand his Miranda rights" – something that should have been apparent, from the evidence, to the examiner and the investigating officers.

The Court of Appeals decision was reversed and the order of the Allen Circuit Court, suppressing the confession, was reinstated.

EXCLUSIONARY RULE

<u>Chavez v. Martinez</u>, 123 S.Ct. 1994 (2003)

FACTS: On November 28, 1997, Officers Peã and Salinas, Oxnard, California, Police Department, were investigating narcotics activity. While questioning a man, they heard a bicycle approached on a dark path nearby. They ordered the rider, who was Martinez, to get off the bike, spread his legs and place his hands behind his head, which he did. Salinas patted him down, found a knife, and a fight began.

The trial court heard conflicting statements about what actually occurred next. The officers stated that Martinez took Salinas' gun from his holster and pointed it towards them – Martinez denied this. However, they both agreed that Salinas did yell, "He's got my gun." Peã then shot Martinez several times, "causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down." He was arrested and EMS was notified.

Patrol Supervisor Chavez arrived with EMS and accompanied Martinez to the hospital. He questioned Martinez while he was being treated – the interview "lasted a total of about 10 minutes, over a 45 minute period…." Martinez initially made statements that he didn't know (the answers), that he was choking and that he was dying. Eventually, he admitted that he took Salinas' gun and pointed it, and that he used heroin. At one point, he stated he would not continue to talk unless he was treated, although there is no evidence that Chavez prevented his treatment. At no time was he given Miranda warnings.

Martinez was never charged with any crime, and as such, his statements were never used against him. However, he sued under 42 U.S.C. §1983, claiming that his Fifth Amendment rights were violated, the right not to be "compelled in any criminal case to be a witness against himself," as well as his Fourteenth Amendment to be free from "coercive questioning."

Chavez claimed qualified immunity, but the District Court found in favor of Martinez. Chavez took an interlocutory appeal to the Ninth Circuit, which upheld the District Court, finding that the right to be free from such questioning was clearly established at the time.

Chavez appealed and was granted certiorari.

ISSUE: Is a law enforcement officer subject to liability under 42 U.S.C. §1983 for a coercive interrogation that does not result in a statement being used in a criminal prosecution?

HOLDING: No (under the facts of this case)

DISCUSSION: The Court found that "police questioning" did not constitute a "criminal case," holding that a "'criminal case' at the very least requires the initiation of legal proceedings." The Court stated that "[t]he text of the Self-Incrimination Clause simply cannot support the Ninth Circuit's view that the mere use of compulsive questioning without more, violates the Constitution."

The Court noted that it has long been the case that the government has been permitted to compel persons to given incriminating testimony, so long as that evidence was not used against them in a criminal case. The Court found little difference between Martinez and a witness who might be forced to testify on pain of contempt. The Court agreed that they had already concluded "those subjected to coercive police interrogations have an *automatic*[160] protection from the use of their involuntary statements … in any subsequent criminal trial." As such, the Court found there to be no Fifth Amendment violation.

With regards to the Fourteenth Amendment claim, the Court stated that previously, the Court had overturned convictions based upon evidence obtained by methods that are brutal and conscience-shocking. The Court left open the possibility that such "conscience-shocking" methods on the part of the police may result in §1983 liability.[161]

However, the Court was "satisfied that Chavez's questioning did not violate Martinez's due process rights. In Lewis, the court held that official behavior that will be held to be conscience-shocking is "the conduct intended to injury in some way unjustifiable by any government interest." The Court noted that Chavez did not interfere with Martinez's medical treatment and that he ceased his interview to allow medical procedures and tests to be performed. The Court stated that "the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story." As such, the Court found that no Fourteenth Amendment violation occurred.

The Ninth Circuit's decision was overturned and the case remanded for further proceedings.

U.S. v. Patane, 124 S.Ct. 2620 (2004)

FACTS: On June 3, 2001, Patane was arrested for harassing his former girlfriend. He was released on bond and prohibited from contacting her. However, Patane "apparently violated the restraining order by attempting to telephone" her. On June 6, after a call from Patane's ex-girlfriend, Officer Fox (Colorado Springs P.D.) began an investigation. The same day, a probation officer notified the ATF that Patane, a convicted felon, owned a handgun, and the ATF relayed that information to Det. Benner, who regularly worked cases with the ATF. Benner and Fox teamed up to go to Patane's house.

When they arrived, Fox questioned Patane about his contact with his former girlfriend, and then arrested him for violating the order. Benner started to give Miranda warnings, but Patane interrupted him and said he knew his rights, and Benner did not continue with the warning. Benner asked him about the handgun, and Patane said "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." Benner pressed him, and finally Patane told him where the pistol could be found, and gave Benner permission to get it, which Benner did.

Patane was indicted on a federal firearms charge and he requested suppression of the firearm as evidence. The District Court granted the motion, on the premise that the officers "lacked probable cause to arrest respondent for violating the restraining order." (Therefore, it never reached the issue as to whether "the gun should be suppressed as the fruit of an unwarned statement.")

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[160] Emphasis in original.

[161] City of Sacramento v. Lewis, 523 U.S. 833 (1998).

The appellate court reversed the lower court ruling as it related to the probable cause, but permitted suppression based upon Patane's alternative theory, that the statement was unwarned.

ISSUE: May physical evidence discovered as the result of a statement given without Miranda warnings be used at trial?

HOLDING: Yes

DISCUSSION: The Court described the Miranda rule as a "prophylactic employed to protect against violations of the Self-Incrimination Clause of the Fifth Amendment," but continued to say that the clause was "not implicated by the admission into evidence of the physical fruit of a voluntary statement." As such, the Court stated, Miranda "is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn." As such, the Court refused to apply the Exclusionary Rule in such cases.

The Court stated that the "core protection" afforded by the Self-Incrimination clause "is a prohibition on compelling a criminal defendant to testify against himself at trial." The Clause does not apply to "the introduction of nontestimonial evidence (the gun) obtained as a result of voluntary statements." The Court noted that the Self-Incrimination Clause, was, in effect, "self-executing" in that it "contain[s] its own exclusionary rule." The Court reiterated that "[i]t follows that police do not violate a suspect's constitutional rights (or the Miranda rule) by negligent or even deliberate failures to provide the suspect with the panoply of warnings prescribed by Miranda." Only when the actual statements may be used in court does the "complete and sufficient remedy" of exclusion of the statement apply.

The Court noted that the fruit of a "actually coerced statements" must be suppressed, that "statements taken without sufficient Miranda warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination." In this particular case, the Court concluded that this situation was not one in which the evidence must be suppressed, holding that the word witness "in the constitutional text limits the scope of the Self-Incrimination Clause to testimonial evidence."

The Court reversed the lower court's opinion that suppressed the fruit of the unwarned statement, the gun, and remanded the case back to the lower court for further proceedings consistent with this opinion.

NOTE: While the Supreme Court's opinion is not clear on the matter, the lower court's opinion clarifies the point that the prosecution sought to introduce only the gun itself, not any statements made by Patane concerning the gun or its whereabouts. In addition, the Court did not address the issue of the woman who, according to the Circuit Court of Appeals, answered the door at Patane's residence. It is possible that another alternative theory for the prosecution was that they could have obtained permission from the woman to search the residence, or even secured the residence and sought a search warrant for the gun that they believed was in the house.

Corley v. U.S., --- U.S. --- (2009)

FACTS: On September 17, 2003, in Norristown, Pennsylvania, Corley was arrested by federal and state officers on a state warrant. The arrest occurred at about 8 a.m. Corley was held initially at a local police station. At about 11:45, he was taken to a local hospital for treatment of a minor injury, and from there, at about 3:30 p.m., he was taken to the local FBI office. There he was informed he was a suspect in a bank robbery. He was not taken before the local magistrate (who was located in the same building), but instead was questioned "in the hopes of getting a confession." At 5:27, "sold … on the benefits of cooperating," Corley signed a Miranda waiver and gave an oral confession. About an hour later, he was asked to put it in writing but he told them he was tired and they "decided to hold him overnight and take the written statement the next morning." He repeated his confession the next day, it was reduced to writing, and he signed it. He was taken to a magistrate at 1:30 p.m., 29.5 hours after his arrest.

Corley was charged with armed bank robbery and related offenses and moved to suppress both his oral

and written confession, based upon §3501. The U.S. District Court denied the motion, finding that the initial oral confession, subtracting the treatment time, was within the six-hour window mandated by §3501(c). Further, the District Court ruled that the written confession, given the next day, after a break requested by Corley, was admissible because that does not violate Rule 5(a).

Corley was convicted of conspiracy and armed robbery, and appealed. The Third Circuit affirmed the conviction, under a different rationale from the District Court. Corley appealed.

ISSUE: Is a confession made more than six hours after an arrest (by federal authorities) presumptively inadmissible?

HOLDING: Yes

DISCUSSION: The Court noted that the Government's argument focused on 18 U.S.C. §3501(a), "which provides that any confession 'shall be admissible in evidence' in federal court 'if it is voluntarily given.'" The Government essentially ignored, however, the rulings in McNabb v. U.S.[162] and Mallory v. U.S.[163] McNabb had provided that confessions obtained after an "unreasonable presentment delay" will be inadmissible. Rule 5(a) was enacted shortly thereafter, which codified the rule that individuals under arrest must be taken before a magistrate without undue delay. The Court noted that the "fundamental problem with the Government's reading of §3501 is that it renders §3501(c) nonsensical and superfluous." The Court noted that a basic rule of construction is that a statute must be read to include all sections, including the section that requires that a confession be made within six hours of arrest unless the suspect is taken before a magistrate. A few years latter, Mallory applied Rule 5(a) and held that a confession given seven hours after arrest, when the suspect was held "within the vicinity of numerous committing magistrates" constituted unnecessary delay and was thus inadmissible. (Specifically, the Court noted that "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'") In 1968, Congress enacted 18 U.S.C. §3501, which codified McNabb-Mallory to some extent, and which held that a pre-presentment confession made within six hours of arrest, that is otherwise found to be voluntary, will be admissible. (Those made after the six hours may also be admitted, if, for example, the Court agrees that transportation causes the delay.)

The Court concluded that "§3501 modified McNabb-Mallory without supplanting it." The Court ruled that a District Court faced with a "suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]')". A confession made during those six hours that is voluntary will be admissible, so long as it meets other applicable evidentiary rules. "If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed."

The Court vacated the Third Circuit's decision, and remanded it back for a determination as to whether the delay was justifiable.

Kansas v. Ventris, --- U.S. --- (2009)

FACTS: On January 7, 2004, Ventris and Theel conspired to shoot and kill Hicks. They were promptly arrested. Prior to Ventris's trial, "officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements." Ventris allegedly then confessed his involvement in the crime to the informant.

Ventris testified at trial and "blamed the robbery and shooting entirely on Theel." The prosecution sought to introduce his prior contradictory the statement via the informant; Ventris objected. The prosecution admitted that there might have been a violation of Ventris's Sixth Amendment right to counsel, " but nonetheless argued that the statement was admissible for impeachment purposes…"

[162] 318 U.S. 332 (1943).
[163] 354 U.S. 449 (1957).

The trial court allowed the statement to be introduced, but it cautioned the jury to carefully consider "all testimony given in exchange for benefits from the State." The jury ultimately convicted Ventris of burglary and robbery, but not murder. Ventris appealed, and the Kansas Supreme Court reversed his conviction, finding that his "statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony."

Kansas applied for certiorari, which the U.S. Supreme Court granted.

ISSUE: May a defendant's voluntary statement, obtained in violation of their right to counsel, be admitted for impeachment purposes?

HOLDING: Yes

DISCUSSION: After a discussion on the admissibility of evidence excluded in the case in chief, the Court considered the deterrent effect on admitting, or not admitting, such evidence. The Court stated:

> Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of Massiah[164] would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment. Not likely to happen—or at least not likely enough to risk squandering the opportunity of using a properly obtained statement for the prosecution's case in chief.

The Court concluded that the statement "was admissible to challenge Ventris's inconsistent testimony at trial," and reversed the decision of the Kansas Supreme Court. The case was remanded to Kansas for further proceedings.

BRADY/EXCULPATORY EVIDENCE

Rothfuss v. Com., 2005 WL735556 (Ky. 2005)

FACTS: On March 19, 2002, Officer Honaker (Kenton Co. P.D.) went to Coppage's home in response to a burglary report. The residential burglary had apparently occurred during the overnight hours, and Coppage slept through it. Several credit cards and cash had been taken, and a number of drawers had been pulled open and items scattered around. The apparent point of entry was a basement window. No physical evidence was found.

Det. Capps was assigned to investigate, and he quickly learned that one of the credit cards had been used that morning at a Wal-Mart in Madison, Indiana. Over $1,000 had been charged. Later than morning, Capps learned, an attempt was made to purchase more items on the card, at a Wal-Mart in Louisville, but that transaction was refused.

A loss prevention officer, Phillips, witnessed the second transaction. She followed them out of the store after the card was rejected and was able to get a license number on the vehicle. Capps learned that the vehicle was registered to Rothfuss. He showed Phillips a photo array that included Rothfuss, and she quickly identified him as one of the men in her store involved with the transaction.

"Capps subsequently conducted a non-custodial interview with Rothfuss." He first denied being at the Wal-Mart, but on further question, agreed he'd been with a couple during the time of the burglary and the visit to the Wal-Mart. However, he refused to identify the couple. The "investigation then went stagnant" and because Capps didn't feel he had enough to arrest Rothfuss. During that time, he also question Donald Coppage, the victim's oldest son, on the chance that the burglary was an inside job. Coppage vigorously denied it, and Capps enlisted his aid in catching the perpetrators.

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[164] Massiah v. U.S., 377 U.S. 201 (1964).

A few weeks later, Donald Coppage contacted Capps and met up with him, and then gave Capps the names of two people, Peggy Lovitt and Billy Ray Carroll. However, he did not give Capps any further information about the men. Capps found Lovitt, in jail, and he admitted her involvement in the crimes, along with Rothfuss and Billy Ray Caroll. Capps got warrants for all three, and eventually, they were indicted.

At trial, Lovitt testified in detail about their activities that evening. Eventually, Caroll and Rothfuss were convicted for their part in the burglary. Rothfuss appealed.

ISSUE: Must an officer's notes concerning an interrogation be disclosed when a Brady request is made?

HOLDING: No (but see note)

DISCUSSION: Rothfuss was charged with "complicity to commit second-degree burglary" under KRS 502.020 (1). The evidence indicated that Rothfuss drove Carroll to a location near the residence burglarized, and that he was then contacted by Carroll to pick him up at a previously specified location. The Court found that was sufficient evidence, combined with a few other facts, to indicate that he had been involved in the burglary.

Rothfuss also argued that no evidence should be introduced as to the use of the credit cards, which the trial court had permitted into evidence based on KRE 404(b), since he was only seen with Carroll and Lovitt in close proximity to the stores and that he did not attempt to actually use the cards himself. However, since the use of the cards was "so inextricably intertwined with other evidence essential to the case," as required by the rule, the appellate court found that it was properly admitted.

Finally, Rothfuss argued that he had not been provided information about the apparent initial suspicion that Donald Coppage was involved in some way with the burglary, and only learned of it when it was mentioned by Capps during his testimony. Capps "testified about his questioning of Coppage while referring to a page of notes that he had taken during the questioning." Since the only "record" of the interrogation of Coppage was the page of notes taken by Capps, the court agreed that the Rules of Criminal Procedure, Rule 7.24(2) did not require disclosure of "memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)." Only official reports were required to be disclosed. However, Rothfuss alleged that the information was exculpatory and thus should have been given to him, pursuant to Brady v. Maryland,[165] but the court agreed that such disclosure is only required when there is a "reasonable probability" that the evidence would prove useful. In this case, the court found nothing in the Coppage interview that would have proved useful "as his statements did not tend to exonerate Rothfuss or establish his innocence. (In fact, since it tied Rothfuss to Carroll and Lovitt, it was actually inculpatory.

The Court affirmed Rothfuss's conviction.

NOTE: *While the Court found that the notes did not need to be disclosed in this instance, officers should ensure that the prosecutor is aware of all material, including notes, relevant to a case.*

Wright v. Com., 2007 WL 79061 (Ky. App. 2007)

FACTS: On June 8, 2004, Wright and Hurt allegedly were involved in a drive-by shooting in Covington in which Heard was seriously injured. Hurt and Allen were feuding, and allegedly, Hurt drove near where Heard and Allen were standing and his passenger fired in Allen's direction, striking Heard.

Hurt and Wright were tried together, and several witnesses identified the vehicle as Hurt's. However, none of the witnesses knew Wright and they could not identify him positively as the passenger. There was also "conflicting testimony concerning the passenger's race and appearance." Hurt, however, identified Wright as his passenger, and stated that they went to Covington only to "fist-fight" with Allen and that when "he saw how many people were present he decided to

[165] 373 U.S. 83 (1963).

postpone the fight." At that point, he stated, "Wright produced a handgun and started shooting."

Wright, however, stated that he'd been in Cincinnati playing basketball, and that Hurt was just trying to pin the crime on him because he was a juvenile.

Officer Manson, Cincinnati PD, testified that Wright had admitted to him that he'd been in Covington that evening. Manson had arrested Wright and given him his Miranda warnings, and at that point, Wright "denied any involvement in the shooting." Manson "counseled him to be truthful" and Wright then said he had been in Covington, but had not been involved in the crime. Manson told the investigating Commonwealth's Detective, but the information had been "inadvertently omitted from the detective's file and from the materials produced during discovery." During trial, the detective recalled Manson's statement.

Wright argued that it was a violation of his Miranda rights and the discovery rule, and demanded suppression of "any further reference to it." The trial court denied it, however, and Manson was eventually called as a rebuttal witness by Hurt.

Eventually, the jury convicted Wright of First-Degree Assault and Hurt of complicity. Wright appealed.

ISSUE: Are potentially exculpatory statements absolutely required to be documented and provided to the defense?

HOLDING: Yes

DISCUSSION: Wright argued that the failure of the Commonwealth to produce Officer Manson's report was a violation of such a magnitude that a new trial was required. The statement, although innocuous and not incriminating in itself, clearly contradicted Wright's "trial strategy" – that he was in Cincinnati that night. The Court agreed that the Commonwealth's failure to disclose the statement, and then introducing it at trial, "misled defense counsel with respect to critical evidence and induced Wright to rely upon a defense he might not otherwise have asserted or asserted in the same way." The Court concluded that the "fairness of Wright's trial was undermined and its outcome thrown into reasonable doubt by the Commonwealth's failure to timely disclose Wright's potentially incriminating statement to his arresting officer.

Wright's conviction was reversed.

JUVENILE INTERROGATION

Myers v. Potter, 422 F.3d 347 (6th Cir. TN 2005)

FACTS: Some time before April, 1999, Raymond Myers, Jr. lived with his father Raymond Myers, Sr., in a home in Warren County, Tennessee, with Dianne Watts and her daughter Jessica. Watts was the older Myers' girlfriend. In 1999, the younger Myers (Jr) was 14, and they had shared a house for five years at that point. In 1998, Watts had become Jr's temporary legal custodian in order to provide him with health insurance, but early in 1999, Jr had moved with his mother to another location.

On July 30, 1999, the local fire department responded to a fire at the house. Inside, they found the bodies of Dianne and Jessica Watts, along with a friend of Jessica's, Chelsea Smith. They determined the fire was arson, and in addition, that each of the women had suffered "blunt-force trauma to the head."
Investigating officers immediately suspected that Myers, Sr had committed the crimes. Over several days, they interviewed both Jr and Sr, along with Teresa Myers, Jr's mother, at her home in Winchester, Tennessee. On August 4, officers went to the house and took Sr. into custody, and shortly thereafter, 3 officers (Rowland, District Attorney Investigator; Gentry, Tenn. Arson and Bomb Squad; Hutchins, McMinnville PD) arrived and began to interrogate Jr, who (according to the record) signed a *Miranda* waiver a 1:05 p.m. Some time later, Hutchings and Gentry asked permission of Ms. Myers to take Jr to the "local Franklin County District Attorney's Office for additional questioning." After some discussion, she agreed, upon the promise that he be returned in an hour. She initially asked to go with them, but Gentry promised that they would "have him right back" to which the other officers nodded agreement. (Hutchins later stated she did not participate in the discussion nor did she make any promises.)

Jr was placed in Hutchins car and taken, instead, to the Warren County District Attorney's Office, an hour away. There he was interrogated for some 4 hours by Agent Elrod (Tenn. Bureau of Investigation), and he signed a second Miranda waiver and a polygraph consent. Jr later claimed that Elrod threatened him with life imprisonment, showed him photos of the bodies and called him names. He also claimed that he asked to go home and asked for an attorney, and was denied. He then claims that Hutchins began to interrogate him (separately) and again, he told her wanted to go home, and he was crying. (Hutchins later denied doing any questioning during this time.)

When her son did not return home as expected, Ms. Myers became frantic. Finally, about 10:30 p.m., she received a phone call from DA Potter (also a defendant in this case), who told her son would not be brought home and that she would need a court order to have him released. Myers claimed Potter did not reveal where Jr was being held, nor why.

That same evening, Potter (or his office) contacted children's services (TDCS) and asked for a placement for Jr, and at about 2:30 a.m., he was taken to a foster home in Grundy County. Later that morning, the juvenile court was told that his legal custodian had been killed, and if Jr was not taken into custody, he would be "removed from the jurisdiction of the court," at which point it was placed in the custody of the TDCS. He was held for several weeks, and interrogated several times by Hutchins and others. Finally, on August 31, his mother received a court order to bring him home.

Shortly thereafter, Sr. was indicted for the triple murder. Jr testified during his father's criminal proceedings about the "details of his detention and interrogation" and eventually, the court suppressed Jr's statements, determining that the statements had been coerced by Elrod.[166] Eventually, Sr was convicted.

On October 10, 2003, Jr filed a lawsuit under 42 U.S.C. §1983 against all of the officers, DA Potter and McMinnville Police Chief Melton, for violations of his rights under the Fourth and Fourteenth Amendments. Melton was alleged to have failed to train Hutchins, specifically, in the "proper method to reasonably seize and/or obtain custody of a minor for interrogation or other purposes." (Jr also made claims under Tennessee state law.) Eventually, through several procedural motions, all defendants were dismissed through summary judgment.

Jr appealed, specifically, the dismissal of Hutchins and Melton. (The other defendants were involved at this point under a different legal procedure.)

ISSUE: Must a valid consent (by a parent) for a juvenile to be interrogated include specific information as to where the juvenile will be taken, and for how long?

HOLDING: Yes

DISCUSSION: Myers first argument was that by removing him from his home, Hutchins and the other officers violated his Fourth Amendment rights. Hutchins claimed that she has probable cause to "arrest" Myers as a "material witness" – not as a suspect – because he was helping to "create an alibi defense for his father" but nothing in the record substantiated that assertion. The Court noted that neither Myers (or his mother) were informed of his status as a material witness, and since he was not handcuffed, he did not appear to be "under arrest" either. The Court noted that he was originally taken from the house with his mother's consent. Such detentions are reasonable if done with the voluntary consent of the individual. However, the Court further noted that the two *Miranda* waivers signed by Jr do not authorize his seizure and removal to another location.

The Court further noted that his mother's consent was obtained only after a false representation as to where Jr would be taken, and for how long. A valid consent must be "unequivocally, specifically, and intelligently given."[167] Myers and Jr both stated that they would not have consented had they known what the officers were planning to do. Given that Jr was transported some distance away, without the knowledge of his mother, it was reasonable to find that even had the

[166] The court did not discuss the content of Jr's statements, although presumably they incriminated his father in the crime.

[167] U.S. v. Worley, 193 F.3d 380 (6th Cir. 1999); U.S. v. Jones, 641 F.2d 425 (6th Cir. 1981).

encounter been consensual initially, it was transformed into a non-consensual seizure by removing him to a location where he would reasonably believe he was not free to leave. During that time, Jr alleged, he specifically asked Hutchins to let him leave, and with that, she was on notice that he did not consent to staying. With this, Myers has met the first prong of showing a constitutional violation.

Next, the Court moved to a determination of whether Hutchins violated a well established right, and again, the Court found that to be the case. Under Dunaway v. New York,[168] the Court had clearly established that "an investigative detention … must be supported by probable cause …." As the Court found no indication in the record that there existed probable cause to arrest Jr, either as a suspect or material witness, and because the officers found it necessary to resort to false representations to take Jr from his mother's home, the Court found it "indisputable that a reasonable officer would have known that it was unlawful to take Myers into custody by using false representations … to obtain his consent and that of his mother." As such, the Court found that Hutchins was not entitled to qualified immunity and a dismissal.
With regards to the claim against Melton, the Court agreed that further discovery was appropriate, before deciding the claim, and permitted that such discovery be taken.

JDB v. North Carolina, 131 S.Ct. 2394 (2011)

FACTS: J.D.B., a 13 year old, 7th grade student in Chapel Hill, North Carolina, was "removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour." This was the second time he'd been questioned with respect to two recent residential burglaries. Police also spoke to his legal guardian, his grandmother, and his aunt after the first interrogation. When they learned that one of the stolen items had been seen in J.D.B.'s possession, Investigator DiCostanzo went to the school again, talked to the school resource officer and school staff, and explained he was there to question J.D.B. He was not given Miranda warnings, given the opportunity to contact his guardian or told he was free to leave the room.

After initially denying his involvement, J.D.B. asked if he would still be in trouble if he returned the stolen items. The investigator explained it would still be going to court, but that it would be helpful if he did so. He also warned J.D.B. that he would seek a secure custody order (juvenile detention) if necessary. With that prospect, J.D.B. confessed that he and a friend did the break-ins. Only then was he told that he could refuse to answer questions and that he was free to leave. He gave a statement and the location of the stolen items. At the end of the school day, the questioning ceased and he was allowed to take the school bus home.

Juvenile petitions were filed. His public defender moved for suppression, arguing that he was interrogated in a custodial setting by law enforcement without being provided Miranda warnings. The trial court determined he was not in custody and that his statements were voluntary. He was adjudicated delinquent. North Carolina's appellate courts affirmed the decision. J.D.B. requested certiorari and was granted review.

ISSUE: Is a child's age a factor in the custody analysis required under Miranda v. Arizona?

HOLDING: Yes

DISCUSSION: The Court discussed the ackground of Miranda and its progeny cases. The court emphasized, pursuant to Stansbury v. California[169] and Oregon v. Mathiason,[170] that "whether a subject is 'in custody' is an objective inquiry." Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogations and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest

[168] 442 U.S. 200 (1979).

[169] 511 U.S. 318 (1994).

[170] 429 U.S. 492 (1977).

or restraint on freedom of movement of the degree associated with formal arrest.[171]

The test, "involves no consideration of the 'actual mindset' of the particular suspect," but does include an examination of "all the circumstances surround the interrogation." North Carolina argued that "a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning." The Court did not agree, noting that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go ."

The Court continued:

> A child's age is far "more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

The Court stated that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparently to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." The Court did not, however, "say that a child's age will be a determinative, or even a significant, factor in every case," particularly in cases where the juvenile is near the age of 18. The Court, however, said that "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."

The Court concluded:

> To hold … that a child's age is never relevant to whether a suspect has been taken into custody - and thus to ignore the very real differences between children and adults – would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults.

Since the trial court did not address the question of the importance of the child's age in the custody analysis, the Court reversed the North Carolina decision and remanded the case back for further proceedings.

NOTE: *This case specifically does not address whether removing a child to another room within a school satisfies the custody prong of Miranda. Instead, it focused only on whether the age of a child was a consideration in determining the voluntariness of a statement. Law enforcement officers are strongly advised to discuss the issue with local prosecutors as to whether a child being questioned at the school would trigger Miranda.*

MISCELLANEOUS

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

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

Clark was convicted of multiple offenses, and appealed.

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

HOLDING: Yes

DISCUSSION: Clark objected to the introduction of an audiotape of his interrogation with Det. Combs, in which the "the jury not only heard Clark's responses to Officer Combs's questions, but also heard Officer

[171] Thompson v. Keohane, 516 U.S. 99 (1995). Also see Yarborough v. Alvarado, 541 U.S. 652 (2004).

Combs's interrogation technique, which involved disclosing his opinion to Clark about the truthfulness of L .C.'s allegations." He argued that "the introduction of Officer Combs's statements constituted reversible error because Officer Combs was permitted to vouch for the truthfulness of L.C., another witness at trial."

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

The Court reversed Clark's conviction.

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." 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.,[172] 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[36] but since Jackson did not object at the time, the matter need not be considered.

The Court affirmed the conviction.

[172] 171 S.W.3d 14 (Ky. 2005).

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NOTES

While many of these cases involves multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)

Terry v. Ohio, 392 U.S. 1 (1968)

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) citation.

Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat: *Not Recommended For Full--Text Publication*

KENTUCKY CASES:

Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as "Unpublished" carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

UNPUBLISHED CASES
Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).