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CRIMINAL JUSTICE TRAINING



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CASE LAW UPDATES

Kentucky Court of Appeals 2013

Kentucky Supreme Court 2013

Sixth Circuit Court of Appeals 2013

U.S. Supreme Court 2013-14 Term

LEADERSHIP INSTITUTE BRANCH

LEGAL TRAINING SECTION

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NOTE:

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

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

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TWO CASES ARE NOT CITED IN THIS UPDATE, BECAUSE OF THE NUMBER OF TIMES THEY APPEAR.

FULL CITATIONS:

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

Terry v. Ohio, 392 U.S. 1 (1968)

KENTUCKY

PENAL CODE – KRS 506 – INCHOATE OFFENSES

Holbrook v. Com., 2013 WL 5888270 (Ky. App. 2013)

FACTS: On the day in question, in Pike County, the victim later testified that she was approached by Holbrook while she was pumping gas. He demanded the money in her wallet. When the victim glanced toward him, he “lifted up his shirt to reveal the handle of a gun sticking out of his waistband.” She told the robber she had no money; he said he’d just seen her at the bank (across the street, where she had made a deposit) and again demanded money. She again denied having any money. The man told her to finish pumping gas and she did so, and then “turned around and asked him what he wanted from her because she did not have any money.” She got into her car, he got into his, and he drove away. She tried to see his license plate, unsuccessfully, and then went to the clerk, who called police. Ultimately, the victim identified Holbrook in a lineup.

Holbrook was convicted of Robbery 1st, Receiving Stolen Property and Possession of a Firearm by a convicted felon. He appealed.

ISSUE: Is an actual taking of property required for a Robbery charge?

HOLDING: No

DISCUSSION: Holbrook argued that the jury should have been instructed on attempt under KRS 506.010, because there was no actual taking of property. The Court looked to Lamb v. Com., and agreed that no actual taking was necessary for the charge.¹ “Because the robbery was accomplished, there was no evidence of an ‘attempt.’”

Holbrook’s conviction was affirmed.

PENAL CODE – KRS 507 - MURDER

Kristoff v. Com., 2013 WL 2297125 (Ky. 2013)

FACTS: On January 13, 2010, Kristoff had just returned to Christian County on leave from the Army. He picked up his vehicle from his girlfriend’s father’s home, where it had been stored. He drank alcohol while there. It was dark when Kristoff left, driving his vehicle. “As he went through a sharp curve in the road, he crossed at least two feet over the double-yellow no-passing line and struck” a vehicle driven by Norma Cook. She was killed in the crash and her husband, the passenger, was injured.

The crash data recorder indicated Kristoff was doing 89 mph 2 seconds prior to the crash and 86 mph one-tenth of a second before it. He did not apply the brakes. Norma’s vehicle was going 43 mph. The upper limit on the road was 55 but the advisory speed in the curve was 40. Kristoff had two blood alcohol tests. The first, at the scene, presumably a PBT, indicated 0.1, the second, at the hospital, was 0.126.

¹ 599 S.W.2d 462 (Ky. App. 1979); See also Kirkland v. Com., 53 S.W.3d 71 (Ky. 2001).

Kristoff was indicted initially for Manslaughter 2nd. A second grand jury indicted him for Wanton Murder, Wanton Endangerment 1st, aggravated DUI, speeding and other traffic offenses. He was convicted and appealed.

ISSUE: May a collision that occurs as a result of driving in an extremely hazardous manner be considered Wanton Murder?

HOLDING: Yes

DISCUSSION: Kristoff argued that the Commonwealth did not prove all of the elements for KRS 507.020(1)(b) and that the circumstances of the accident did not rise to the level of “extreme indifference to human life.” Under Brown v. Com., the Court had ruled that the “characteristics of wanton murder, as opposed to second-degree manslaughter, are (1) homicidal risk that is exceptionally high; (2) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and “minimal or non-existent social utility in the conduct.”² The Court, however, stated that these are not a checklist but simply factors a trial court could consider.

In Kristoff’s case, the Court noted that it had previously made it clear that intoxication, along with other factors, can suffice to prove wanton murder.³ His conduct made the risk of a fatal accident extremely high. Kristoff’s argued that he’d been taught to drive in the center of the road while in the Army to avoid road-side explosives, but the Court noted that any social utility for driving that way in the Army “disappeared when he returned to Christian County, Kentucky.” Further, “the danger of roadside bombs approaches zero in the United States, but the danger of an oncoming car is extremely high.”

Kristoff’s conviction was affirmed.

PENAL CODE – KRS 508 – ASSAULT

Son v. Com., 2013 WL 5521871 (Ky. App. 2013)

FACTS: On the day in question, in Jefferson County, Son stabbed Duong in the back, using a 14-inch long knife. The knife went through Duong’s shoulder and exited under his armpit, near the rib case. Duong was stabbed a second time, in the abdomen. EMS responded and treated Duong, finding that his blood pressure was decreasing to a dangerous extent. EMS started IV fluids to keep his blood pressure sufficiently high. Duong was considered a Level 1 trauma case at the hospital, but fortunately, it was discovered that the knife had not struck any vital organs, such as his lungs. He was sent home after two days with medication but did not return for follow-up care due to concerns about the cost. He was “functionally normal” a month later.

Son was charged with Assault 1st and Attempted Murder. The Court agreed he could be convicted of both, but could be sentenced for only one offense “because it was a continuing course of conduct.” The jury recommended a sentence for Attempted Murder, but the Court elected to sentence him under the Assault conviction because it would require him to serve 85% of the sentence before he was eligible for parole. Son appealed.

ISSUE: Is proof of serious physical injury an element in Assault 1st?

HOLDING: Yes

² 975 S.W.2d 922 (Ky. 1998).

³ See Hamilton v. Com., 560 S.W.2d 539 (Ky. 1977).

DISCUSSION: Son argued that the Commonwealth failed to provide sufficient proof that Duong suffered a serious physical injury. The Court looked at the definition under KRS 500.080(15) and noted that although it turned out that none of the wounds pierced Duong’s chest or abdominal cavities, he did lose considerable blood due to the stab wounds. His blood pressure dropped dangerously low and serious consequences were averted only due to the prompt and expert treatment provided by EMS.⁴ “Simply because the victim did not die and was fortunate enough to recover from his injuries, does not erase the fact that he faced a ‘substantial risk of death.’”⁵

The Court upheld Son’s conviction.

PENAL CODE – KRS 508 – WANTON ENDANGERMENT

Coleman v. Com., 2013 WL 399132 (Ky. 2013)

FACTS: The night before Thanksgiving, Coleman and his wife went to a Louisville grocery store. They arrived in a Buick Century. Coleman tried to buy a money order from Rivers, at the service desk, but didn’t have enough cash. The couple left. A few hours later, Coleman came back, alone and apparently in the same vehicle, and went to the service desk. Rivers came over and recognized Coleman. Coleman pulled a gun and fired a single shot that grazed Rivers, and then ran away. Officer Clarkson (Louisville Metro) was working at the store and he immediately secured the scene, finding a .25 shell casing and a bullet fragment projectile in the area.

Coleman was identified by his wife’s use of her Kroger savings card during his earlier visit – it belonged to her daughter. The daughter identified her mother and Coleman from surveillance tapes although she later denied having identified Coleman. The officers got a search warrant for Coleman’s home, finding a .loaded 32 pistol and an almost full box of .25 ammunition.

Rivers later identified Coleman from a photopak and also identified him in Court. Coleman was convicted of Murder – Attempt and Wanton Endangerment 1st. (It is not clear why he was not charged with Robbery.) Coleman appealed.

ISSUE: Must there be some indication of potential victims in a Wanton Endangerment charge?

HOLDING: Yes

DISCUSSION: Coleman argued that he should have been acquitted of the Wanton Endangerment charge because no particular person was identified who was endangered when he fired the shot. (There was no one else in the immediate vicinity, apparently, at the time.) The Court, however, noted that by his own testimony, there were many other people in the store, several of whom entered with him. He fired the shot within seconds of entering and it was certainly reasonable for the jury to find the other customers might still be close to him at the time. The Court agreed that “shooting a gun in an occupied building is the classic example of conduct constituting wanton endangerment.”⁶ The Court found it sufficient that there was proof that there were other customers in the store at the time. That was further emphasized by the finding of a bullet fragment some distance from the target, Rivers.⁷

⁴ Brooks v. Com., 114 S.W.3d 818 (Ky. 2003).

⁵ Cooper v. Com., 569 S.W. 668 (Ky. 1978).

⁶ Port v. Com., 906 S.W.2d 327 (Ky. 1995).

⁷ Combs v. Com., 652 S.W.2d 859 (Ky. 1983); Swan v. Com., 384 S.W.3d 77 (Ky. 2012).

The Court excluded testimony by Officer Clarkson as to the possible trajectory of the bullet, as he was not qualified as an expert. Although the Court did sustain the objection, after Clarkson made a statement to that effect, it did not admonish the jury about the testimony already given. The Court agreed it was common knowledge that bullets ricochet and the exact trajectory wasn't critical anyway.

Coleman had requested suppression of the photopak identification, arguing that the other photos "were dissimilar in age, eye color, hair style, and facial hair." Using the process in Neil v. Biggers,⁸ the trial court had concluded that the photopak "was not unduly suggestive and correctly ended the analysis at that point." The Court noted that since the actual photos were not included in the record (only poor quality black and white photocopies were provided), it could only conclude that the trial court made the correct decision in admitting the photopak.

Coleman's conviction was affirmed.

Acosta v. Com., 391 S.W.3d 809 (Ky. 2013)

FACTS: Alvarado, six months old, died in 2005. Shortly before her death, her mother, Acosta moved in with Rankin in Kentucky. Rankin watched her children while she was at work. Alvarado's medical records prior to that time were normal. In mid-July, right after the move, mother and daughter were allegedly in a crash, although no police report was located under Acosta's name. (That was reportedly because Acosta lied about who was driving.) There was no record of a medical visit for the child as a result of the crash. Shortly before a scheduled six month doctor's visit, Rankin told Acosta the baby had fallen off the bed and a few days later, Acosta noticed a "soft spot" on the baby's head. Rankin's mother told the couple that the baby was acting as if she was hurting and also later testified that she had a fever. Acosta had told her about the "jelly spot," a "painful-looking soft knot on the back of the head." Goodlet, Rankin's sister, asked Acosta why she hadn't taken the baby to the doctor; Acosta said she was afraid a cigarette burn and another bruise would trigger a call to social services. Under pressure and a threat that Goodlet would call social services, Acosta finally took the child to the doctor. Another witness testified that the child appeared to be in pain and that he was reluctant to hold her. The witness indicated the child was kept in a car seat "twenty four seven" and could not hold a bottle.

At the appointment on August 18, a nurse practitioner noted several troubling issues but saw no evidence of bone fractures, although in fact, the child did have a fractured arm. She did not report the child to Social Services. On August 22, Rankin was watching the baby. He took M.A. (the 2-year-old) and Alvarado to his parents' home. He left briefly and allegedly returned to find that M.A. had pulled the baby out of the car seat and had his knees on the baby's neck. Rankin found her limp and he rushed out to his parents, outside; they called 911. She was pulseless and not breathing when EMS arrived. The ER doctor reported "evolving" bruising that "looked like handprints" on her neck. She was ultimately pronounced dead.

The autopsy revealed a fractured skull and multiple places of subdural and epidural bleeding. There were other bruises, contusions and facial injuries consistent from being thrown or swung against an object. The autopsy revealed pre-existing injuries as well, including multiple arm, leg and rib fractures, a dislocated shoulder and round burns on her legs. The injuries most likely occurred within the few months prior to her death.

As a result of the autopsy, her mother, Acosta, and Acosta's boyfriend, Rankin, were charged. Experts testified about the noticeable aspects of the injuries. Acosta's expert noted that if the medical practitioner, who did the exam five days before, didn't notice the injuries, it was unlikely a lay person, Acosta, would have. Rankin was convicted of Murder and Abuse, Acosta was convicted only of Abuse 1st; she appealed. The Court of Appeals affirmed, and she further appealed.

⁸ 409 U.S. 188 (1972).

ISSUE: May a Child Abuse charge be upheld even if the defendant cannot be shown to have directly caused the abuse?

HOLDING: Yes

DISCUSSION: The Court had presented the Criminal Abuse charge to the Acosta jury under two theories, the jury found Acosta to have intentionally abused the child, as opposed to having intentionally allowed Rankin to do so. The Court agreed that there was no real proof as to who committed the actual abuse, but that it was reasonable to infer that Acosta committed at least one abusive act. Upon appeal to the Kentucky Supreme Court, Acosta argued that there was insufficient proof that she committed any direct abuse. The Court looked to the statute and noted that the first element could be shown either with evidence of direct intentional abuse – or with evidence that the Acosta permitted another person of whom she had actual custody be abused.

The Court agreed that the proof that she permitted abuse was stronger than that she committed the abuse directly, but ruled that it was sufficient to support the conviction. The Court agreed that the instruction was flawed but noted that Acosta did not properly object to the giving of the instruction. But, the Court noted, there was no proof that Acosta was present or observed any abuse.

The Court reversed the conviction but ruled that she could be retried under the alternative theory of permitting the abuse.

PENAL CODE – KRS 509 – KIDNAPPING

Handle v. Com., 2013 WL 6729962 (Ky. 2013)

FACTS: On February 11, 2011, Handle was at home in Breckinridge County with his girlfriend, Hager, and their infant child. He became enraged over dirty dishes and began to verbally, and then physically, abuse Hager – tying her up, shooting her with a paintball gun and smacking her in the face with the flat side of a machete. This continued for three days, with Handle only untying Hager to care for the baby, and then threatening her (and her family) if she escaped. When Handle finally left the house, Hager called her family and eventually went to the Hardin County Attorney for help. Trooper Riley photographed her injuries.

Handle admitted to the trooper that he'd shot Hager with the paintball gun. He was indicted for Kidnapping, Assault 2nd and Wanton Endangerment 1st. Handle was eventually convicted of the first two charges, and appealed.

ISSUE: May Assault and Kidnapping both be charged?

HOLDING: Yes

DISCUSSION: Handle argued that he should have received a directed verdict on the charge of Kidnapping, claiming that it was too much when combined with respect to the Assault charge. The Court looked at the “Kidnapping Exemption” statute (KRS 509.050) and noted that:

In order for the exemption to apply: (1) "the criminal purpose must be the commission of an offense defined outside Chapter 509;" (2) "the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and" (3) "the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense."⁹

⁹ Murphy v. Com., 50 S.W.3d 173 (Ky. 2001); see also Hatfield v. Com., 250 S.W.3d 590 (Ky. 2009).

The Court agreed that the restraint in this case was not incidental to the crime of assault, and in fact, occurred over the course of several days. In short, the restraint was unnecessary to the assault, as Handle could have committed the assault without restraining Hager.

In an unrelated issue, Handle argued that he was denied the opportunity to present a defense when the court refused his motion to order Hager to reveal the user names and passwords for her Facebook and MySpace accounts. The assertion apparently related to possible use of social media during the time Hager claimed to have been restrained. The Court looked to RCr 7.24 and found nothing that would compel the discovery requested. (The opinion noted that there was no indication that such evidence even existed, only that Handle thought it might exist, and the Commonwealth argued that this was “the electronic version of searching [Hager’s] underwear drawer.”) The Court agreed that Handle’s “speculation that Hager’s Facebook or MySpace accounts may have indicated that she was not keeping her story straight” was not enough to justify compelling the production of the evidence. The Court agreed that Handle was free to question her about postings she’d made during cross-examination but chose not to do so.

The Court upheld his convictions.

PENAL CODE – KRS 510 – SEXUAL OFFENSES

Hillebrandt v. Com., 2013 WL 6212240 (Ky. App. 2013)

FACTS: Hillebrandt engaged in sexual intercourse with A.M., age 25. A.M. has an I.Q. of 48, in the lowest one percent. At trial, she testified that she understood what sexual intercourse was and that Hillebrandt forced her to have sex with him when she did not want to do so. She said she did not know how babies were made but did have a 3-year-old child.

Hillebrandt argued at trial that although A.M. was mentally disabled, she understood what sex was and thus could consent to it. He was convicted of Rape 3d and appealed.

ISSUE: Does understanding sex imply that the individual is mentally able to consent to it?

HOLDING: No

DISCUSSION: Hillebrandt argued that under Salsman v. Com. he could not be convicted of Rape, because his victim was not so mentally disabled as not to understand sexual intercourse.¹⁰ He argued that Salsman stood for the proposition that someone who understood sexual intercourse was capable of consenting to it. The Court, however, noted that the evidence did not demonstrate that A.M. was capable of consenting, only that she “understood” it. Further, it does not show she had any understanding of it prior to Hillebrandt engaging in sex with her.

The Court upheld his conviction.

PENAL CODE – KRS 510 – SEXUAL ABUSE

Stinson v. Com., 396 S.W. 3d 900 (Ky. 2013)

FACTS: During the summer of 2009, 17-year-old Betty¹¹ began living with Stinson, her uncle by marriage, in Madison County. Stinson subjected her to “sexual contact.” When her parents learned of it, Stinson was indicted for Sexual Abuse 1st. He argued that the law of the “lack of consent” was an element of

¹⁰ 565 S.W.2d 638 (Ky. App. 1978).

¹¹ A pseudonym.

the offense, and that it was vague and overbroad. He admitted to the sexual contact but argued that it was consensual. His motion was denied and he took a conditional guilty plea, he then appealed. The Court of Appeals ruled that “lack of consent” was not an element of the crime. He further appealed.

ISSUE: May a minor not yet 18 give legal consent to sexual contact with a person in the “special trust” category?

HOLDING: No

DISCUSSION: First, the Court ruled that lack of consent can be shown that incapacity to consent can be shown from “any [other] circumstances’ in which a victim does not expressly or impliedly consent.” Further, in 2008, a new category of “position of special trust” was created; it applies when the victim is under 18, not 16. Under KRS 532.045(1)(b), the position includes anyone who is “able to exercise undue influence over the minor.” The Court agreed that introduced a statutory ambiguity but resolved it using the “traditional tools of statutory construction” and agreed the legislature undoubtedly intended “to broaden first-degree sexual abuse to include abuse of a minor under the age of 18 by a person in a position of special authority or trust.” The language in KRS 510.110(1)(d) indicates that the focus should be on the conduct of the “trusted” person, not on whether the minor consented, and further, that the sexual contact must be related to the trusted position of the perpetrator. The Court agreed the intent was to protect minors in such situations, “regardless of whether their participation [would otherwise be deemed] voluntary.”

In addition, the Court disagreed that the phrase “position of authority” or “position of special trust” was vague. Clearly, in this case, Stinson’s position as the minor’s uncle, with the minor living in his household, qualified the victim as a household member.

The Court upheld his plea.

PENAL CODE – KRS 511 – BURGLARY

Lewis v. Com., 392 S.W.3d 917 (Ky. 2013)

FACTS: On January 3, 2006, Lewis entered a Louisville pharmacy. The staff became suspicious and the police were called. Lewis approached the pharmacy counter, requesting Oxycontin and another drug. He agreed he had no prescription but announced, instead, that he had a gun. The pharmacist proceeded to get the medications. Meanwhile the police arrived and arrested Lewis. They found a knife but no gun. Lewis was found to be “highly impaired” and claimed he thought he was filling a valid prescription.

Lewis was acquitted of Robbery but convicted of Burglary. Lewis appealed.

ISSUE: Must a burglary charge in a public building be shown to have involved an unwelcome act?

HOLDING: Yes

DISCUSSION: Lewis argued that the Commonwealth failed to prove that he remained unlawfully in the pharmacy for the purposes of burglary. The Court looked to KRS 511.090. The Court agreed that there is a presumption that “one who enters and remains in a building that is open to the public has a license or privilege to be there.” It is not burglary until the individual “knowingly defies a lawful order.” That order does not need to be verbal, however. The Court looked to Bowling v. Com.¹² that held the license to remain was “implicitly revoked ‘once the person commits an act inconsistent with the purposes of the business.’”

¹² 942 S.W.2d 293 (Ky. 1997).

However, the Court found that language to be obiter dictum (dicta), and that Lewis's license to be in the pharmacy was never "explicitly or implicitly revoked." In fact, the Court noted, the pharmacy staff "actually took steps to engage [Lewis] in business with the intention of keeping him there until police arrived."

The court reversed Lewis's conviction for Burglary.

PENAL CODE – KRS 515 – ROBBERY

Lewis v. Com., 399 S.W.3d 795 (Ky. App. 2013)

FACTS: On March 8, 2011, Thomas was working at a convenience store in Lexington. He was approached by Lewis who told him to "give me all the money." Lewis's hand was in his coat pocket. Thomas stepped away momentarily and returned, "at which time Lewis propped his hand, still inside his jacket pocket, up on the counter and again demanded money." Thomas testified he believed Lewis had a gun and he gave him the money. Lexington police arrived and viewed the surveillance footage. One of the officers recognized Lewis, whom they had encountered earlier in the evening.

The next night, Robinson was "shoved and robbed by Lewis." Robinson chased him down, demanding the return of the money. Robinson and Clark (his cousin) held Lewis for the police. Lewis was charged with Robbery 2nd and Alcohol Intoxication. Upon being questioned, he admitted to robbing the convenience store as well, but said he did not have a gun at that time. Lewis moved for a directed verdict, arguing there was no evidence he'd "used, or threatened to use, force during the Thornton's robbery." He was convicted and appealed.

ISSUE: May a threat of physical force be implied?

HOLDING: Yes

DISCUSSION: The Court agreed that while there was "no evidence that Lewis expressly threatened the use of physical force against Thomas." However, in Tunstall v. Com.¹³ and Birdsong v. Com.¹⁴ it had ruled that the threat of physical force "can be implied by a defendant's conduct. In this case, it was reasonable for a jury to find that Lewis was, in fact, threatening force.

Lewis's conviction was affirmed.

PENAL CODE - KRS 520 - FLEEING & EVADING

McCleery v. Com., 410 S.W.3d 597 (Ky. 2013)

FACTS: On November 28, 2011, Ball went to the trailer occupied by her son, Justin. A neighbor had told her there was a strange car parked there. She called her son and asked if he knew anyone with such a vehicle, which he denied. She honked her horn and a man emerged from behind the trailer. He told her he was "Thomas" and was "looking for guns." He got into the strange vehicle as Ball called 911. She later identified McCleery in a photo array as the man she'd seen.

Deputy Gilpin (Breckinridge County SO) arrived and located the vehicle. He tried to stop it, but the vehicle took off, speeding and ran several stop signs. It was a rainy morning and traffic was heavy. After a mile or so, the vehicle pulled into a circular drive and the passenger jumped out and ran. Gilpin continued following the vehicle and ultimately, it stopped. The driver Darcy, consented to a search of the vehicle and a shotgun, a

¹³ 337 S.W.3d 576 (Ky. 2011).

¹⁴ 347 S.W.3d 47 (Ky. 2011).

rifle, ammunition and a paint can (taken from the trailer) containing money was found. Darcy admitted he'd been at the trailer.

Deputy Henley got a call about a man who "had recently emerged from the woods near the caller's home." He had given the man a ride and told the deputy where he'd dropped him off. The deputy found McCleery at the location and placed him in custody as well. Both men were indicted. McCleery was convicted of Burglary, Theft, Fleeing and Evading 1st and PFO. He appealed.

ISSUE: Is proof that someone was actually at risk needed for a Fleeing and Evading charge?

HOLDING: No

DISCUSSION: McCleery argued that there was no proof that anyone had been injured or killed during the flight, or that anyone was even put at substantial risk – or more importantly, that he was complicit in Darcy's decision to flee the scene. Although the Court agreed that their actions did not rise to the same level as other cases of precedent, the pair did speed and run stop signs, Deputy Gilpin did testify that the traffic was heavy at the time and that a school and shopping center were nearby. That was enough to satisfy the risk element.¹⁵ The Court agreed there was no evidence that McCleery was driving the vehicle, but looked at the situation as whether he was complicit in Darcy's action. The Court noted that they were "acting in concert" in the burglary and he got into the vehicle voluntarily. As such, it was reasonable for the jury to infer that McCleery was working with Darcy and may have even counseled him, during the flight, as to what to do. Once he got out, McCleery fled rather than turning himself in immediately.

McCleery's conviction was affirmed.

PENAL CODE – KRS 530 – UNLAWFUL TRANSACTION

Hale v. Com., 396 S.W.3d 841 (Ky. 2013)

FACTS: Hale's stepson was married to the sister of a 14 year old girl – Hale became involved in a sexual encounter the girl. Prior to the encounter, Hale and his wife had stepped in to assist the girl's father, who was increasingly disabled with cancer. Hale and the girl became close and following her father's death, even closer. At some point, their conversations became sexual and intimate. On October 18, 2008, they had intercourse. In early December, Christian County CPS received an anonymous tip that "something might be amiss." Upon investigation, she admitted having had sex with Hale and the police became involved. Hale admitted the one incident and that it was a mistake. He was indicted for Unlawful Transaction with a Minor, but at trial, the jury was also instructed on Rape 3d. He was convicted of the Rape charge and appealed.

ISSUE: Is inducement of a minor to engage in unlawful sexual conduct an Unlawful Transaction?

HOLDING: Yes

DISCUSSION: Hale argued that it was only appropriate that he be charged with Unlawful Transaction if he induced his victim to commit a crime, not, as in this case, an unlawful sexual act. The Court looked to the history of KRS 530.064 and cases that flowed from it, regarding a defendant soliciting sex from an underage victim. In those cases, the Court "presumed that for UTM purposes a minor 'engages in illegal sexual activity' if he or she willingly participates in sexual activity that is illegal only because the minor is not old enough to consent to it." The Court agreed that the minor themselves did not have to be committing a crime for UTM to apply. The Court agreed with Hale that because of the overlap between the

¹⁵ See Lawson v. Com., 85 S.W.3d 571 (Ky. 2002).

Sexual Offenses (Rape, Sodomy, Sexual Abuse) and UTM, it is possible for conduct that constitutes a Rape 3d (as what the case here), a Class D felony, could also be prosecuted and sentenced as a Class B felony under UTM. The Court noted that the sexual offenses are very complex, and that such complexity was recognized by the General Assembly, which defined “several sex offenses broadly and allowing some degree of overlap among them.”

The Court upheld Hale’s conviction.

DRIVING UNDER THE INFLUENCE

Com. v. Ratliff, 2013 WL 4710330 (Ky. App. 2013)

FACTS: On May 8, 2011, Ratliff was arrested for DUI. Officer Fey (Louisville Metro PD) responded to a call of a man down and discovered Ratliff passed out in his vehicle at the Dairy Queen. The car was running and the headlights were on. Officer Fey opened the door, woke up Ratliff, and reached across to turn off the car and the lights. Ratliff was wearing his seat belt. The officer “detected a strong odor of alcohol coming from Ratliff,” who, however denied having been drinking. He did state he’d been at the track (some distance away) that day. He refused any FSTs or a PBT, stating “he was not driving.” The incident was recorded.

Ratliff moved prior to the trial for dismissal, arguing the officer did not have probable cause to arrest him for DUI. The District Court, relying on Wells v. Com.,¹⁶ granted the motion, finding that Ratliff had not been operating the vehicle. The Commonwealth appealed the dismissal to the Circuit Court, which was denied. It then appealed to the Kentucky Court of Appeals.

ISSUE: Does finding an impaired driver in a running vehicle in an empty, closed parking lot justify a DUI arrest?

HOLDING: Yes

DISCUSSION: The Court looked to Maryland v. Pringle to determine if probable cause existed, noting that “to determine whether an officer had probable cause to arrest an individual, [the Court must] examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.”¹⁷ Using White v. Com., the Court agreed that “probable cause to arrest someone for violating KRS 189A.010 must exist and must be known by the arresting officer at the time of the arrest.”¹⁸ Although White used the Wells factors to determine whether a subject’s “conduct constitutes ‘operating’ or being ‘in physical control’ of a motor vehicle,” the factors are not exclusive for the “resolving the issue of probable cause.” Instead, the Court must “consider the totality of the circumstances.” Further,

In the case, the Court noted that Ratliff was asleep, but that the vehicle was running and the lights were on. He had been at the location for only about 20 minutes, was “parked across several parking spots at a closed restaurant and he was wearing a seat belt. As such, “these facts address the intent of the driver, the location of the vehicle and circumstances as to how it arrived at it[sic] location.” The court found it “difficult to discern a reason for wearing a seat belt other than to guard against injury **while operating a motor vehicle.**” The court agreed that someone had to have driven the vehicle to the location, and that it was reasonable to believe that it was Ratliff who had done so.

¹⁶ 709 S.W.2d 847 (Ky. App. 1986).

¹⁷ 540 U.S. 366 (2003).

¹⁸ 132 S.W.3d 877 (Ky. App. 2003).

The Court agreed that the arrest was made with probable cause and reversed the District Court's decision. The case was remanded for further proceedings.

Com. v. Parrish, 2013 WL 6198351 (Ky. App. 2013)

FACTS: On November 18, 2010, Parrish was stopped for failing to make a complete stop at two stop signs. Officer Cobb (Nicholasville PD) gave him FSTs and although Parrish did not show any speech or balance issues, Cobb determined that Parrish showed signs of impairment. He administered a PBT and recorded the result by "showing it to his cruiser video." The citation noted that the PBT indicated the presence of alcohol, but not the numerical result. Cobb did not recall the specific number at trial, either. Parrish was charged with DUI. The officer conceded that the PBT may have been less than .080%. At the jail, Parrish's Intoxilyzer result was .086%.

Parrish requested, prior to trial, the cruiser video, but it was found not to exist. Since no formal discovery request was made, however, no hearing was held on the issue. It was conceded that the video was not "purposefully destroyed by Officer Cobb." The Commonwealth pursued the DUI under the "per se" provision of KRS 189A.010(1)(a). The trial court ruled that Parrish was guilty and he appealed to the Jessamine Circuit Court. He argued at that level that Brady v. Maryland was violated because Officer Cobb did not preserve the video, which may have been exculpatory. The Circuit Court agreed, finding a Brady violation, and reversed and remanded the case back to the trial court with instructions to conduct a Daubert¹⁹ hearing on the PBT results. The Commonwealth requested review by the Kentucky Court of Appeals.

ISSUE: May PBT results be admitted for exculpatory purposes?

HOLDING: Yes

DISCUSSION: The Court reviewed the Circuit Court's analysis, in which the Court noted that a PBT result of less than .08% is "exculpatory and is material if it is otherwise admissible." In Stump v. Com., the Court had ruled that a PBT may be admitted "to determine the defendant's blood alcohol level close in time to his operation of the car."²⁰ In Stump, it was held that the prohibition on using a PBT to prove guilt, KRS 189A.104, was inapplicable in such instances. Parrish argued that the missing PBT result should have resulted in his having received a "missing evidence instruction." Under Tinsley v. Jackson, such an instruction "requires that 'the evidence was intentionally destroyed by the Commonwealth or destroyed inadvertently outside normal practices.'"²¹ In this case, Officer Cobb failed to record the number on his citation and "somehow misplaced the cruiser video."

The Court summarized:

In order to prove that a Brady violation occurred, there must be a showing that: (1) exculpatory evidence existed, (2) that it was in the custody or control of the agents of the Commonwealth, (3) that it was not disclosed to the defense, and (4) that prejudice resulted from the failure to disclose.

Since the PBT result was arguable exculpatory, and not preserved, the Court agreed that the Circuit Court's decision was correct.

¹⁹Daubert v. Merrell Dow Pharmaceuticals, 509 U.S.579 (1993).

²⁰ 289 S.W.3d 213 (Ky. App. 2009).

²¹ 771 S.W.2d 331 (Ky. 1989); See also Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

CONTROLLED SUBSTANCES

Com. v. Hamilton / Cole, 411 S.W.3d 741 (Ky. 2013)

FACTS: In 2008, Hamilton and Cole were indicted for trafficking in Suboxone, a synthetic opiate. Suboxone contains two active ingredients, buprenorphine and naloxone. In 2002, buprenorphine was moved from Schedule V to Schedule III, under both Kentucky and federal law.

During a pretrial hearing, due to confusion over Suboxone’s rescheduling, it was stipulated that the Cabinet for Health and Family Services is able to “similarly control” any substance that is ‘designated, rescheduled, or deleted as a controlled substance under federal law” pursuant to KRS 218.020(3). The Court looked at 902 KAR 55:025(7), which had added buprenorphine itself to Schedule III, but Hamilton and Cole argued that the CHFS had not made “the statutorily required findings” detailing the effects of the drug and the reason for controlling it. (It appeared Kentucky simply followed DEA guidance on the drug, which was not available in the U.S. at the time it was added to the federal list.)

The trial court ruled that the delegation to CHFS, and its decision, were “proper and constitutional.” It agreed that it could not rule on the underlying procedures used by the DEA, however, as that was a federal agency. Hamilton and Cole took a conditional guilty plea and appealed. The Kentucky Court of Appeals reversed the trial court, remanding for a specific hearing on the constitutionality of KRS 218A.020(3) and required that the Attorney General and CHFS be added as necessary parties. The Commonwealth appealed.

ISSUE: Is changing the schedule classification of a drug in accordance with DEA recommendations proper?

HOLDING: Yes

DISCUSSION: The Court chose not to delve into the challenge to the constitutionality of the statute, finding instead that the trial court did have jurisdiction to “rule on Hamilton and Cole’s initial argument regarding the validity of the regulation.” (If constitutionality is raised at the trial court level, the Attorney General must be notified, but is not necessarily going to be involved.) The Court agreed that it was proper, however, for the trial court to have jurisdiction to hear the issue as to whether CHFS properly regulated buprenorphine under the statute, by moving it to Schedule III classification, as it was also so classified by the DEA.

The Court agreed that the statute “simply adopts the procedures used and findings made by the federal government” and are strikingly similar.²² The Court agreed that it is important that CHFS follow the statute, but noted that previously, it had not been held necessary to show that CHFS has made independent listed findings concerning a drug – instead, the federal findings could be viewed as the findings of CHFS. It was proper for the Court to take judicial notice of the federal regulation, although of course, it was free to challenge the methodology used by the DEA in its decision.

The Court reversed the Kentucky Court of Appeals and remanded the case to the trial court, during which time the parties could raise challenges to the process followed by CHFS.

²² See Com. v. Hollingsworth, 685 S.W.2d 546 (Ky. 1984).

ARREST

Goncalves v. Com., 404 S.W.3d 180 (Ky. 2013)

FACTS: On February 4, 2008, a Boston business was robbed by three men. They threatened the clerk, Hall, with a gun and forced him to open the safe. The robbers knocked Hall to the ground and emptied the safe. Det. Mattingly (Nelson County SO) reviewed the surveillance footage from the security cameras. The next day, in Hardin County, drug task force members stopped Jones’s vehicle, believing he was involved in manufacturing methamphetamine. They learned there was a warrant for Jones on an unrelated matter. Jones agreed to a search; liquor and other items from the robbery the day before were discovered in the trunk. Jones was given Miranda and questioned; he admitted to committing the robbery with Giguere and Goncalves. The information was relayed to Det. Mattingly, who got a warrant for Goncalves.

While executing the warrant, the officers spotted a pistol and a marijuana pipe in plain view. Another person at the house, Willoughby, stated that they had earlier sought Jones, while armed, as Goncalves thought Jones had stolen drugs and money from him. Det. Sgt. Cave, of the task force, obtained a search warrant for Goncalves’s home in Grayson County. They found a pistol and a number of other items there.

Goncalves was indicted. His first two trials were mistrials due to deadlock. During the third trial, both Jones and Giguere testified that Goncalves provided the weapons and knocked the clerk to the ground. Willoughby testified the Jones admitted to committing the robbery with Giguere and Goncalves.

Goncalves was convicted of Robbery 1st and appealed.

ISSUE: Must an officer have an arrest warrant “in hand” in order to execute it?

HOLDING: No

DISCUSSION: Goncalves argued that since there was no arrest warrant at the time he was arrested at his apartment, “the officers were illegally present in his residence when they observed incriminating items in plain view.” The trial court had ruled that in fact there was a warrant in existence. The evidence indicated that Sheriff Newton (Nelson) obtained the warrant and then faxed it from Nelson County to Det. Mattingly, who received it while at the Leitchfield PD in Grayson County. The Court agreed that a “peace officer need not have a warrant ‘in hand’” in order to execute it.²³ Goncalves challenged the time, noting that the timestamp on the fax indicated a time about 25 minutes after he was arrested. The Court, however, took judicial notice that the two counties were in different time zones and that the machine in Nelson County would have indicated a time an hour later than it was in Grayson County. There was also a question of whether one or both machines were time-calibrated. The Court agreed that the warrant existed prior to the arrest.

With respect to the search warrant, Goncalves complained that the affidavit was based on statements given by “unreliable accomplice snitches” and as such, was invalid. The Court, however, found that the two individuals were named and that other factual observations were shared with the detective who obtained the warrant. Goncalves argued that the warrant did not include the information that the informants were “drug-addicted accomplices” who were “known to be unreliable.” The Court did not agree that was enough to invalidate the warrant, however.²⁴

Goncalves also argued that the surveillance footage, preserved on DVD, was not admissible, because the source, the hard drive itself, had not been preserved. In fact, the Court gave the jury a “missing evidence”

²³ RCr 2.10.

²⁴ See Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).

instruction, apparently. The Court refused to reverse the conviction on Brady,²⁵ finding no indication that the Commonwealth destroyed the hard drive evidence in bad faith.²⁶ The technician testified as to his process in copying the footage, which resulted in gaps, explaining that the gaps were when the motion-detecting cameras did not actually record any images. He testified that he did not edit the footage in any way, but only copied the footage that was relevant to the robbery. Any possible error was cured by the instruction provided.

After resolving a number of other issues, the Court affirmed Goncalves' conviction

SEARCH & SEIZURE – SEARCH WARRANT

Johnson v. Com., 2013 WL 2359721 (Ky. App. 2013)

FACTS: On November 19, 2010, officers obtained a search warrant for Ballard's "suspected methamphetamine house" in Hardin County. The warrant was very specific, but also included "catch-all language to provide for a search 'on the person or persons of: any and all present found inside residence during the execution of the search warrant.'" Det. Strop's affidavit stated that video was taken by a CI doing controlled buys and showed other subjects using drugs inside the house. No identifying information for others who might be present was given. As they approached to serve it, "two men [Ballard and Johnson] ran out of the house, were ordered to the ground and immediately handcuffed." They recognized Johnson from the video. Trooper Payne "frisked Johnson and emptied his pockets, finding keys, a cigarette pack and a cell phone." Methamphetamine was found inside the pack. Until the drugs were discovered, Trooper Payne testified that "Johnson was only being frisked as a protective measure and was not under arrest."

Johnson was indicted with Possession of a Controlled Substance. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does "all persons present" in a warrant automatically justify a search of all individuals who are on the premises?

HOLDING: No

DISCUSSION: The Court looked to Com. v. Smith²⁷ and agreed that the "all persons present" clause was "invalid for lack of specificity in the description of the persons to be searched." It agreed that perhaps the trooper had "sufficient evidence to adequately identify Johnson with specificity in the affidavit and search warrant, either through a physical description or picture taken from the video, he failed to do so." Under the warrant, anyone on the premises, "no matter how innocent, could have been searched under the 'all persons present' clause." His "after-the-fact testimony" identifying Johnson with the video "cannot correct the facial invalidity of the search warrant." The Court found "no justification for allowing the search of Johnson's cigarette pack." Johnson was not under arrest and the drugs were not discovered as a result of "plain feel" during the course of a frisk.

The Court agreed the evidence should have been suppressed.

McIntosh v. Com., 2013 WL 6571801 (Ky. App. 2013)

FACTS: On May 27, 2011, Trooper Smith (KSP) was working in Booneville looking for a stolen vehicle and a suspect (Gabbard). He was accompanied by a local constable who told him that Gabbard and

²⁵ Brady v. Maryland, 373 U.S. 83 (1963).

²⁶ Brady v. U.S., 397 U.S. 742 (1970); Arizona v. Youngblood, 488 U.S. 51 (1988).

²⁷ 898 S.W.2d 266 (Ky. App. 1995).

McIntosh were friends and directed the trooper to McIntosh's home. At the house, the trooper noticed a burn pile near the house and the smell of ether coming from the house. He saw a "water bottle generator" on the front porch. Trooper Smith knocked but no one answered. He left to get a search warrant, leaving the constable and another trooper holding a perimeter.

In the affidavit, the trooper stated that "he had reasonable grounds to believe that "[i]llegal drugs, chemical agents or products used in the manufacture of illegal narcotics" would be found at the home. He received the warrant and it was immediately executed. During the search, he found a number of items, some "laced with methamphetamine residue." McIntosh was indicted and charged.

McIntosh moved for suppression, arguing that the "search warrant affidavit was overly broad and did not provide probable cause. The trial court denied the motion. McIntosh took a conditional guilty plea and appealed.

ISSUE: Should the address of a residence to be searched be incorporated into the narrative of the affidavit?

HOLDING: Yes

DISCUSSION: The Court noted that the trooper "cited the identifiable odor of ether" coming from the house, along with the burn pile and water bottle. As such, the Court agreed that was sufficient. The Trooper's affidavit properly included a street address and description, and the "address and description were incorporated into the warrant." McIntosh argued that since the warrant did not identify him specifically as a person to be searched or questioned, it was insufficient, to which the Court disagreed. Further, it noted that it was also not necessary to identify the precise room where the items would be found inside the house.

The Court upheld McIntosh's plea.

SEARCH & SEIZURE – CONSENT

Dukes v. Com., 2013 WL 5436261 (Ky. 2013)

FACTS: In September, 2011, Dukes was on parole and was under a deferred prosecution program. He was to report to Officer Newman, his parole officer. Officer Newman received several anonymous tips that Dukes was manufacturing methamphetamine. He corroborated the tips with fellow officers who knew Dukes. About the same time, Deputy McCoy (McLean County SO) received a tip from a gas station that Dukes had purchased a large amount of ether. Soon thereafter, he made a traffic stop on a relative of Dukes who also smelled strong of ammonia – the relative stated he was coming from Dukes' home. Officer Newman and Deputy McCoy exchanged information; Officer Newman decided to pay a visit to Dukes' mother's home, where Dukes was living. He, Deputy McCoy and another officer went there on October 27, 2011. Dukes was not there, but his mother "consented to a cursory search of the home to confirm" that. The officers then searched an out-building and found evidence of manufacturing methamphetamine.

Dukes was indicted and moved for suppression. At the hearing, the officers testified that they asked Dukes about the outbuilding and that his mother said that Dukes spent a lot of time there. They asked for consent to check it and she agreed. They testified that she smelled ether as they approached and that his mother "walked with them to the building and turned the door knob to allow them in the building." When they looked inside, they saw obvious evidence of manufacturing. At that point, they obtained a warrant for Dukes' arrest. Ms. Dukes testified, however, that she did not consent and that the door was locked – and the keys lost. The trial court ruled that consent was given. Dukes took a conditional guilty plea and appealed.

ISSUE: Is someone living in a common area of a residence able to overturn a consent from the owner?

HOLDING: No

DISCUSSION: The Court noted that the trial court heard testimony from two officers and Dukes's mother – and that the testimony was competing and inconsistent. In deciding that the officers were more credible, the Court “appropriately performed one of its’ essential functions in deciding between these competing stories” in a pretrial hearing.

Further, in this case, Dukes was not the actual owner of the property and “lived in a common living room while at the residence” rather than a private room. He apparently spent the bulk of his time living elsewhere, with a girlfriend. His mother “clearly had the authority and relationship to the home and out-building that she owned to consent.”

Dukes' plea was upheld.

SEARCH & SEIZURE – EXIGENT ENTRY

Gill v. Com., 2013 WL 5886234 (Ky. App. 2013)

FACTS: On February 4, 2010, Louisville Metro PD informed KSP that a suspicious package was being shipped through FedEx to Lexington. KSP intercepted it and a drug dog alerted on it. It obviously smelled of marijuana, even to the officers. The package was seized and a search warrant obtained. Inside they discovered about 6 pounds of marijuana. The package was reassembled and delivered to the Lexington address on the package, with the label indicating the recipient was Moore. It was delivered and accepted by Gill's girlfriend, which whom he had a child. Gill did not live at the residence, but did spend the night there on occasion and was there when the package was delivered. When she accepted the package, troopers (one disguised as a FedEx employee) rushed inside and did a safety sweep, handcuffing Gill. (They did not handcuff his girlfriend.)

They received consent to search but did not search. The troopers talked to Gill, after telling him he was not under arrest and could leave. He indicated he was expecting a shipment of clothing. During that time, KSP had searched his phone for Arizona numbers, as the package originated in Tempe. Gill then called a relative in Indiana as well as an individual in Arizona (whose number was in his phone), at the direction of the troopers. With the latter, he “made up a false story about the package arriving wet and damaged, in an effort to obtain more information.” Gill told Det. Addison that “he would try to figure out what was going on with the package and promised to contact him by the end of the week.” He did not, however, and was arrested a month later for trafficking in marijuana.

Gill moved to suppress the information obtained from his cell phone and his statements to the troopers. The motions were denied. He took a conditional guilty plea and appealed.

ISSUE: Are officers permitted to do a warrantless entry to a location where known contraband has been delivered?

HOLDING: Yes

DISCUSSION: First, Gill argued that the warrantless entry violated the Fourth Amendment, as the troopers did not have a warrant for the apartment.²⁸ Det. Addison had argued that they weren't sure if the

²⁸ The trial court had ruled that he did have standing as a regular, overnight guest.

package was going to the correct address, if someone would accept it, etc. In U.S. v. Singh, the Court had ruled that “the police had a limited right to enter the premises where the seized contraband had been delivered.”²⁹ Gill further argued that the protective sweep went beyond what was permitted and once inside, the sweep was justified to address any possible safety threat.³⁰ In addition, the primary resident, his girlfriend, did give consent for a full search, which in fact the police never performed.

Finally, Gill argued that his statements and phone conversations were the products of a custodial interrogation without the benefit of Miranda. The Court agreed that while Gill was handcuffed, he was in custody. However, his “incriminating statements were made only after the handcuffs had been removed, and he had agreed to cooperate with the police in the police in an effort to help himself by implicating others.”

The Court upheld the denial of the motion to suppress and affirmed his plea.

SEARCH & SEIZURE – PLAIN VIEW

Mayes v. Com., 2013 WL 557276 (Ky. App. 2013)

FACTS: On the day in question, Lexington PD received a complaint about drug trafficking at a specific house. They approached and found a woman (Regina Mayes) standing in the doorway of the residence. She agreed she lived there and consented to allow the three officers into the living room. As they spoke, Officer Thomas saw an open tin can on the coffee table; it contained marijuana. The officer later explained that he could see the marijuana and that gave them sufficient information to apply for a search warrant. Mayes was given her Miranda warnings and consented to a search. One of the officers later testified in the suppression hearing that he saw a blunt (a hollowed out cigar) on the table as well. Mayes was eventually cited, rather than arrested, because she had children in the house. Officer Thomas testified that the photos, which showed the tin with the lid on, was because it had already been prepared to be collected into evidence.

Mayes testified that the lid was on the can the entire time and that they could not have seen what it contained. The Court declined to suppress the evidence. Mayes took a conditional guilty plea to trafficking and possession and appealed.

ISSUE: Is it critical to prove all elements of plain view to uphold a search?

HOLDING: Yes

DISCUSSION: Mayes pointed out an unusual situation, that the Court made a misstatement in its ruling that went uncorrected. The Court’s written ruling indicated that there was “insufficient evidence” ... “to establish that the lid was off the tin.” The Court was forced to agree with Mayes that the “marijuana could not be identified in the closed tin without additional investigation on the part of the officers.” As such, the Court ruled that the Commonwealth had not met its burden to establish plain view as the “incriminating character of the tin was not immediately apparent because the lid hid its contents.”

The Court reversed the decision of the Fayette Circuit Court and remanded the case.

Jointer v. Com., 2013 WL 1701584 (Ky. App. 2013)

FACTS: On March 1, 2011, Officer Dellacamera (Lexington PD) pulled into a parking lot. He observed another vehicle “drive into the parking lot, stop briefly, and then immediately drive out of the

²⁹ 811 F.2d 758 (2d Cir. 1987); see also U.S. v. DeBerry, 487 F.2d 448 (2nd Cir. 1973).

³⁰ Maryland v. Buie, 494 U.S. 325 (1990).

parking lot.” He recognized Jointer, who he had arrested the week before for driving without an OL. He initiated a stop and Jointer pulled over. As the officer approached, Jointer began to get out. He was ordered back into the car but did not put his hands on the steering wheel, as he was told to do. Instead, he reached for an “unidentified black object” on the passenger seat. Officer Dellacamera pulled his weapon and ordered Jointer out. Jointer got out, “dropped the object, and went down on the ground as instructed.” He was handcuffed. Officer Dellacamera approached the open driver’s side door and “observed in plain view a small corner of a plastic baggie in an open compartment of the vehicle containing what he suspected was cocaine.” The baggy was “in an open compartment between the steering wheel and the driver’s side door.” The baggy was seized and the substance confirmed to be cocaine.

Jointer was indicted for possession of the cocaine and driving without an OL. He moved for suppression, which was denied. Jointer took a conditional guilty plea and appealed.

ISSUE: Is the location of the officer when they see contraband critical in the plain view analysis?

HOLDING: Yes

DISCUSSION: The Court agreed that it was “uncontroverted that the cocaine was plainly visible and the incriminating nature was immediately apparent from Officer Dellacamera’s visual perspective.” The question was whether the officer was “lawfully in a position to view” the baggy, however. The Court agreed that the officer was “simply standing between the open door and passenger compartment of the vehicle” when he spotted the item and he was in a “lawful position outside the vehicle when he viewed” it.

The Court affirmed the seizure of the cocaine.

SEARCH & SEIZURE – CURTILAGE

Com. v. Ousley, 393 S.W.3d 15 (Ky. 2013)

FACTS: Ousley lived in a townhouse in Lexington. The townhomes were close together, separated only by driveways. The homes were staggered to create some degree of privacy. A person approaching the front door would walk down the driveway to the short walk that led to the door. Ousley, specifically, had a small storage shed sitting on the driveway some distance back from the front of the house. The trash cans “were usually placed on the left side of the driveway almost touching the siding of the house on the left and somewhere between the storage shed and the front plane of Ousley’s house.” In 2009, Lexington police got a tip that Ousley was selling methamphetamine from his home. Det. Ford investigated and did surveillance on the residence. As a “last resort” he did a trash pull, in which in two instances, “he walked onto the property late at night and took trash bags from the closed outdoor trash cans.” He found incriminating evidence and obtained a search warrant. Upon executing it, the police found methamphetamine, marijuana, digital scales and other items.

Ousley was indicted for Trafficking 1st and additional charges. He moved for suppression of the trash pull evidence. The trial court concluded it was lawful, based on the location of the cans. Det. Ford indicated that the cans were between the car parked in the driveway and the storage shed and were “even” with the front of the house. The trash cans were city-issued items and were not placed in either instance where pickup would actually occur. Ousley testified that he kept the cans near the shed, as required by the homeowners’ association, but that at the time the pulls were done, apparently he had mulch sitting where the cans were normally be located. He disputed that they were between the car and the house next door, stating that the driveway was too narrow for that. The trial court apparently essentially adopted Det. Ford’s description as the truth.

The trial court assessed the question as to whether the cans were within the protected curtilage of the house. It looked to U.S. v. Dunn³¹ and noted that the cans were very close to the house, not in an enclosed area and were in an area open to and visible from the street. The Court ruled that they were not in the curtilage and denied the suppression. Ousley took a conditional guilty plea and appealed. The Court of Appeals ruled that under California v. Greenwood³² the cans were within the curtilage and reversed. Specifically, it noted that “given the configuration of the homes in Ousley’s neighborhood and the realities of modern urban living,” it could not be said that the general public would feel free to enter the area and rummage through the trash. The Commonwealth appealed.

ISSUE: Is the precise location of an item critical for a curtilage assessment?

HOLDING: Yes

DISCUSSION: The Court noted that the fact that “the trash was in a closed trash can is not the gravamen of this decision,” as everyone agreed the trash cans were closed. However, in Greenwood, the cans were out at the pickup location. In this case, however, the cans were still located on the protected curtilage. Even though the trial court and the appellate court differed on their decision as to where the cans were located, the court agreed that Greenwood is dispositive. Greenwood noted that cans put out for public access would be where it would be intended to be picked up and “established parameters defining where Fourth Amendment protection of the house or effects stops – the public domain.” The only relevant question, however, is whether the cans were on the curtilage, whether the trash is considered “abandoned” is not relevant. Also using the Dunn factors - (1) whether the area is included in an enclosure with the home, (2) whether the resident has taken steps to prevent observation from the people passing by, (3) how the area is used, and (4) the proximity of the area to the home – the Court agreed that homes in urban areas do not lend themselves to enclosures. Fencing is convenient but not necessary to show that an area is intimately tied to the house and few people completely barricade their homes and yards from sight. The trash cans were closed and opaque and as such, the trash was not open for observation. The area was used for personal activities, parking the car, home storage, yard work, etc. The Court found proximity to be the most definitive factor, noting that they were at most even with the front of the house and no farther from the house than the width of a narrow driveway.

The Court noted that in an urban setting “a larger percentage of private property is curtilage than in rural areas because there is generally a limited amount of land surrounding the house.” The Court agreed that curtilage is not “unassailable,” however, and that the general public may approach the front door. In Quintana, the Court coined the term “invadable” curtilage to describe where that would normally occur. Law enforcement may enter “only to the extent that the public may do so.” In this case, the officer’s actions clearly indicated he did not want to interact with the homeowner, a legitimate reason to “invade” the curtilage, but instead he was avoiding it by entering at night.

The Court summarized:

Law enforcement's right to invade the curtilage without a warrant must be related to actually engaging with the occupants of the residence, just as the public's right of access turns on the intent to engage in ordinary business with the occupants. Thus, the police do not violate the Fourth Amendment when they "utilize normal means of access to and egress from the house, for some legitimate purpose, such as to make inquiries of the occupant or to introduce an undercover agent into the activities occurring there."

³¹ 480 U.S. 294 (1987), see also Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

³² 486 U.S. 35 (1988).

And just as a private salesperson—absent no-solicitation signs, no trespass signs, etc.—has implicit permission to approach the house to conduct business with the inhabitants, so too do the police. But just as the salesperson must actually engage or attempt to engage the house, or else be seen as a trespasser, snoop, or peeping tom, so too must the officers actually try to contact the residents, whereupon they may "see or hear or smell from that vantage point."

The Court agreed that the time the invasion occurred is also important and "just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so."

Finally, although the Court agreed that the items in the can had been "disposed of" in a "very technical sense," that was not enough. Items remaining on the property retain some privacy aspects, even if characterized as trash. The Court emphasized that "the *location* of a closed container is always a factor that must be considered." Once the Court affirmed that the cans were in the curtilage, the analysis ended. The officers could simply have waited until the trash was set out for pickup.

The Court affirmed the reversal of his plea.

SEARCH & SEIZURE – TERRY STOP

Jones v. Com., 2013 WL 5436520 (Ky. App. 2013)

FACTS: On the day in question, Lexington police received a call stating that Robin Helton (the caller's stepdaughter) was in a hotel room with a man named Howard, and that they were both using and selling drugs. Officer Norris arrived. As he approached the building, he spotted a man walking to a vehicle. The officer asked the man if he was staying at the motel and the man provided the room number that the tipster had given. He agreed his name was Howard. Officer Norris frisked Howard. No weapons were found and Howard was cooperative.

During the frisk, the officer felt a pill bottle; Howard confirmed it was such. Officer Norris "retrieved the bottle from Jones's pocket, but did not open it, and told Jones he was not under arrest, but was merely being placed in handcuffs for the officer's safety while he awaited backup." When a second officer arrived, Jones was asked (still handcuffed) what was in the bottle and finally admitted it contained drugs. The pills inside were eventually identified as oxycodone by various manufacturers.

Jones denied trafficking and claimed they were for his personal use. He consented to a search of his vehicle – nothing was found. Two females (one being Helton) also consented to a search, and again, nothing was found. Jones consented to a search of his room, almost \$3,000 in cash was found along with various items. Jones agreed the cash was from drug sales, but identified other money (\$750) as being his "personal money." Two cell phones were found on his person "containing voice messages about drug sales." At the jail, almost \$6,000 was found in his wallet, he was "adamant this was his personal money and not the result of drug sales."

Jones was charged and moved for suppression. The trial court had no problem with the frisk but suppressed the pill bottle. However, since Jones gave consent (and under the inevitable discovery doctrine), everything from the motel room was admissible. When denied, he took a conditional guilty plea to trafficking and agreed to forfeiture of all of the cash. He then appealed.

ISSUE: Are items found improperly during a Terry frisk to be suppressed?

HOLDING: Yes

DISCUSSION: Jones argued that “*everything* seized as a result of the Terry frisk, which yielded no weapons, should have been suppressed.” The Court concurred, noting that “Terry permits a patdown search for the limited purpose of officer safety and finding weapons; searching for evidence of crime is not an acceptable purpose.”³³ The Court noted that until the pill bottle was removed and inspected, the officer had no way to know if it was contraband or not.

Further, the Court noted, “normally, items discovered through exploitation of unlawful police action must be suppressed as ‘fruit of the poisonous tree.’”³⁴ Although an intervening event can serve to overturn that assumption, in this case, Jones’s consent was not enough to remove the taint of the initial, unlawful search of his pocket. He was handcuffed and had not been given any rights, although he was under de facto custody, if not actual arrest. (The officer testified he considered Jones under arrest when he found the pill bottle, but had not told him so.) The Court couched Jones’s consent more as “acquiescence.”

The Court reversed the trial court’s decision and agreed that suppression of all evidence was proper.

Frazier v. Com., 406 S.W.3d 448 (Ky. 2013)

FACTS: On June 7, 2008, Deputies Moore and Boggs (Boone County SO) were in a fast food drive-through lane. They saw a passenger in another vehicle toss trash out of the car and decided to follow it. When that vehicle committed a minor traffic offense, they made a traffic stop. Frazier, the driver, appeared nervous and did not respond to a question about where they were going and who else was in the car. Deputy Moore had Frazier get out; he was frisked by Deputy Boggs. Deputy Boggs felt an item in Frazier’s front pocket that was “long, coarse and suspicious.” Frazier denied the item and Boggs finally extracted it, finding it to be marijuana. Frazier was secured in a cruiser and the deputies searched the car, finding a “tire thumper.” An onlooker reported that Frazier “appeared to be eating something.” The deputies found marijuana crumbs on his face and clothing and another bag of marijuana in his possession. (Two marijuana screens were found in in wallet during booking.)

Frazier was charged with a variety of charges, including Possession of Marijuana and CCDW. He moved for suppression and was denied, with the trial court finding the frisk justified. Frazier was convicted and appealed. The Court of Appeals upheld the conviction and Frazier further appealed.

ISSUE: May a person’s demeanor be used to justify a frisk?

HOLDING: Yes

DISCUSSION: First, Frazier argued that the frisk was improper. Deputy Moore argued that Frazier was nervous and initially uncooperative but that he did finally state the purpose of his travel. Frazier denied having anything on his person and refused to consent. Deputy Boggs justified the frisk on “Frazier’s nervous behavior and belligerent response.” Frazier objected adamantly to being frisked, as well. The Court reiterated the facts available at the time of the frisk: Frazier’s minor traffic offense, his shaking hands, that he would not make eye contact, his initial refusal to answer questions, his “verbal belligerence” and his refusal to consent to a search. Based on these points, the Court agreed a person’s demeanor could be a factor in deciding if a person was armed and dangerous, but that *alone* was not enough. None of the facts truly suggested that he had a weapon, the sole reason for a frisk. His refusal to answer questions or consent to a search “may have aggravated the officers,” but such refusal was not a satisfactory factor. He did, ultimately comply and he was not actively belligerent once he got out of the car. The failure of the deputies to articulate any reasonable facts that would have led to a belief that he was armed convinced the Court to agree that the frisk was improper.

³³ Com. v. Crowder, 884 S.W.2d 649 (Ky. 1994); Adams v. Williams, 407 U.S. 143 (1972).

³⁴ Wong Sun v. U.S., 371 U.S. 471 (1963).

Further, the intrusion into his pocket was “constitutionally invalid” as well. “Simply put, once an officer, without manipulating an object, identifies it by touch as a weapon or contraband,” they have probable cause to do a further search.³⁵ However, if manipulation is needed to identify the nature of an object, it is no longer “plain feel.” The deputy did not testify that he recognized the item specifically as a weapon or contraband, and in fact, stated that he opened the pocket to determine what the item actually was. Justification for a frisk cannot be developed during the frisk, it must exist before the frisk.

The Court also examined the vehicle search. Although the search might have been arguably valid under Arizona v. Gant, when drugs are found on the arrestee’s person, the Court noted that “clearly the arrest must be lawful in the first instance to justify the ensuing vehicle search.”³⁶ Since it was not, the evidence of the tire thumper could not be admitted, either, eliminating any possibility of a CCDW charge³⁷

Frazier’s conviction was reversed and the case remanded.

SEARCH & SEIZURE – SWEEP

McWilliams v. Com., 2013 WL 5436525 (Ky. App. 2013)

FACTS: On March 14, 2007, deputies from Bullitt County SO and members of the drug task force went to arrest McWilliams to serve an arrest warrant. He resisted but was eventually placed into custody. During a search of the premises, they saw evidence of manufacturing methamphetamine in the residence and an outbuilding, as well as a grenade with a trip wire. They called in the ATF and KSP’s Bomb Squad. With the warrant, a multitude of items were found, including firearms, drug paraphernalia and suspected explosives. McWilliams was indicted on a number of charges and moved to suppress the evidence. At the suppression hearing, Deputy Fowler testified that because McWilliams was considered armed and dangerous, he chose to take additional officers with him to serve the warrant. He agreed that McWilliams was outside when they arrived and that he was arrested and placed in the cruiser. He stated that McWilliams told him that other people might be in the area, so they “went into tactical mode and searched the area to ensure their safety.” They spotted the booby trap (the grenade) when they went into a garage. He agreed that no one was found in the area, to his knowledge. No one was found on the property.

Det. Hardin, director of the task force, also testified. He did not arrive until McWilliams had been removed but had been at the location previously. Det. Waters testified that he’d looked into the trailer, which was open, and was “checking to see if anyone was inside.” When told he might have “missed people,” he went back into the trailer to look again and observed the “pill soak.” McWilliams denied that he’d told the officers anyone else was there and said that the trailer door had been locked. His girlfriend testified that the day after the arrest, the door prop and the lock was broken on the front door.

The Court denied McWilliams his motion to suppress. He took an unconditional plea but later took a post-conviction motion, arguing his attorney did not represent him effectively.

ISSUE: May a suspect’s statement that he does not know if anyone is in a building justify a sweep?

HOLDING: Yes

³⁵ Minnesota v. Dickerson, 508 U.S. 366 (1993); See also Com. v. Crowder, 884 S.W.2d 649 (Ky. 1994).

³⁶ 556 U.S. 332 (2009).

³⁷ It is questionable that a tire thumper would be a “deadly weapon” under Kentucky law, although arguably, it could be called a club.

DISCUSSION: The Court reviewed the protective sweep under Maryland v. Buie.³⁸ In Com. v. Elliott, Kentucky had recognized that “this type of search had ‘been upheld in several courts in circumstances in which the police officers have reasonable grounds to believe that they may be in danger from areas not in the immediate vicinity of a defendant.’” The Court agreed that “there must be a ‘serious and demonstrable potentiality for danger.’”³⁹ In Calhoun, the Sixth Circuit had considered a warrantless search of the defendant’s apartment after she was arrested outside:

Because Calhoun was arrested outside her apartment, a warrantless search of the apartment could be justified only if the officers had a specific, reasonable basis for believing either that they were in danger from persons inside, as analyzed in Buie, or that evidence might be destroyed, as analyzed in Vale v. Louisiana.⁴⁰

In U.S. v. Colbert, the Court acknowledged that the location of the arrest, outside the home, is a factor in assessing “whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat.”⁴¹ Finally, in Guzman v. Com., Kentucky finally actually adopted Buie.⁴² The Court agreed, however, that an exigency (and need to sweep) “did not arise until McWilliams was being put into custody [and] mentioned that he did not know if anyone else was present.” At that point, the officers “had a reasonable and articulable reason to be concerned for their safety ... particularly based upon the remote location in a wooded area with several buildings where an individual might be hiding.” The Court agreed the sweep was appropriate under the circumstances and as such, that everything seen during the sweep was admissible.

Barrett v. Com., 2013 WL 5886509 (Ky. App. 2013)

FACTS: On March 12, 2012, Covington PD went to a home “to execute multiple arrest warrants upon Barrett based on an anonymous tip he was present at the residence.” (The location was listed in his name and the last contact they’d had with him had been at that location.) When they arrived, they swept the exterior and “heard voices and glasses clinking inside the house.”

Officer Edwards knocked and announced and the “voices ceased.” He knocked again, louder, using his flashlight, which caused the door to swing open. The officers identified themselves and announced they were coming in, getting no response. Officer Isaacs did a “safety sweep” downstairs and Edwards stayed at the foot of the steps to the second floor. Barrett’s stepmother, Deborah, came down. She said she was the owner and that Barrett was upstairs hiding in a closet. Officers Isaacs and Christian went up to find him. They found one closet and Officer Christian stayed there, while Officer Isaacs did another protective sweep. He spotted syringes and other paraphernalia suggesting heroin. Barrett was found in the closet by Officer Christian. Officer Isaacs stopped sweeping and assisted with the arrest. He secured the other evidence. Deborah Barrett told them the room where it was found was Barrett’s.

Barrett was indicated of Possession of a Controlled Substance. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May officers sweep a location when looking for a suspect for whom they have a warrant?

HOLDING: Yes

³⁸ 494 U.S. 325 (1990).

³⁹ Com. v. Elliott, 714 S.W.2d 494 (Ky. App. 1986); U.S. v. Morgan, 743 F.2d 1158 (6th Cir. 1984).

⁴⁰ 399 U.S. 30 (1970).

⁴¹ 76 F. 3d 773 (6th Cir. 1996).

⁴² 375 S.W.3d 805 (Ky. 2012).

DISCUSSION: Barrett first argued that the entry, without a separate search warrant, was unlawful. The Court noted that the officers “possessed multiple valid arrest warrants” for him, and had a tip that he was there. Further, to their knowledge, he owned the house – although later it was shown his father, with the same name, actually did so. Barrett did reside there. Under Payton v. New York, the entry was admissible.⁴³

With respect to the upstairs sweep, the Court agreed that “law enforcement officers may conduct a protective sweep for their own safety.”⁴⁴ When the officers learned that Barrett was upstairs hiding in a closet, but were not told which closet, it was proper for the officers to sweep to check out all possibilities. In fact, Officer Isaacs stayed “within eyesight of the hallway closet at all times during the protective sweep.” The evidence was found in “plain view on a dresser and television stand in Barrett’s bedroom adjoining the hallway.” As the officers were making a valid arrest, it was proper for them to do a sweep on the rooms near where Barrett was found.

Barrett’s plea was affirmed.

Brumley v. Com., 413 S.W.3d 280 (Ky. 2013)

FACTS: In spring, 2009, Sheriff Riddle (Clinton County SO) made several attempts to serve Brumley with an arrest warrant. On May 29, he got a tip as to where Brumley might be found, a mobile home which was not his primary residence. Brumley was renovating the trailer and stayed there on occasion to protect it. At about midnight, the Sheriff, along with other officers, went to the trailer. When he knocked, Brumley came outside. He was placed under arrest and searched some feet away from the trailer. He was not armed.

Officers heard a “rustling” or “shuffling” noise inside the trailer. They had prior information that there might be guns inside. They entered and did a protective sweep, finding that a “dog was the source of the noise.” They also found “several components” of a methamphetamine lab, as well.

Brumley was charged with manufacturing methamphetamine. He moved for suppression, which was denied. He was convicted and appealed.

ISSUE: Does the suspicion of guns justify a protective sweep search?

HOLDING: No

DISCUSSION: The Court reviewed the matter in the context of the “protective sweep’ exception articulated in Maryland v. Buie,⁴⁵ only recently adopted in Kentucky by Guzman v. Com.⁴⁶ In Kerr v. Com., most recently, the Court “recognized that Buie permits “two types of protective sweeps incident to an arrest that are reasonable and lawful under the Fourth Amendment.”⁴⁷

The Court continued:

The first type of protective sweep allows officers “as a precautionary matter and without probable cause or reasonable suspicion, [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” The second type of protective sweep

⁴³ 445 U.S. 573 (1980).

⁴⁴ Guzman v. Com., 375 S.W.3d 805 (Ky. 2012); See also Kerry v. Com., 400 S.W.3d 250 (Ky. 2013); Maryland v. Buie, supra

⁴⁵ 494 U.S. 325 (1990).

⁴⁶ 375 S.W.3d 805 (Ky. 2012).

⁴⁷ 400 S.W.3d 250 (Ky. 2013).

"allows officers to undertake a broader search of places not adjacent to the place of arrest if there are articulable facts, which taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." This is the well-known reasonable suspicion standard. However, Kerr only applied the first category articulated in Buie. In contrast, the case currently before the Court requires that, for the first time, we apply the second Buie category.

The court agreed that Brumley was outside the trailer when arrested and that at no time did officers have to enter the trailer. As such, no "room or space whatsoever found inside the mobile home adjoined the place of arrest, as the arrest occurred entirely outside the residence."

With respect to the second category, the court noted that in cases prior to Guzman (when Buie was adopted by Kentucky), it had held that a higher standard, probable cause, was necessary.⁴⁸ As such, and to the extent that they conflict, those cases are now overruled. With Guzman principles in mind, the Court looked to whether the officers "harbored the requisite reasonable suspicion needed to give rise to a constitutional protective sweep." The court noted that "The justification for a protective sweep is the safety threat posed by unseen third parties in the house."

In this case, the arrest was at night, in a mobile home that lacked electricity and was "located in a remote area of a rural county." Although not ideal, "poor lighting" does not lead to a risk that there is someone dangerous at the scene.⁴⁹ The prosecution described the trailer as "broken down" and the Court noted that "that the unseemly appearance of Brumley's single-wide castle is of no consequence to our analysis. Even a 'ruined tenement' receives constitutional protection." The Court also gave no meaning to the fact that they were there to serve a felony arrest warrant, since to permit such would "render Buie meaningless." Even the defendant's own prior history is irrelevant with respect to whether the officers have a reasonable belief that someone else inside a residence might pose a danger.⁵⁰

The Court acknowledged that it has "reservations concerning the extent to which the officers were actually informed of the presence of guns in" the trailer. It recognized "that the transmission of collective knowledge between investigating and arresting officers is crucial to the success of law enforcement."⁵¹ In any event, the mere presence of guns does not automatically justify a protective sweep. The Court noted that "common sense suggests that an overwhelming amount of law abiding citizens in Kentucky have guns in their homes for lawful purposes. In other words, Brumley's rights under the Fourth Amendment cannot be diminished simply by exercising his rights under the Second Amendment." With respect to the assertion of noise, the Court agreed that:

A midnight knock at one's home and the arrest of a person living there could hardly go unnoticed by fellow residents. It strains credulity to think other persons who may be residing in the home—especially family members and loved ones—are not going to be stirring inside with at least some interest and most likely alarm. If noise inside the home of an arrestee provides reasonable suspicion for a protective sweep, then there would conceivably be reason to sweep almost every house where there is more than one member of the household. Buie requires something more. Many, if not most homes in Kentucky, harbor multiple occupants—including pets. Our analysis requires facts reasonably demonstrating that Brumley's home harbored not just an additional individual, but rather an "individual posing a danger to those on the arrest scene."

⁴⁸ See Southers v. Com, 210 S.W.3d 173 (Ky. App. 2003).

⁴⁹ U.S. v. Archibald, 589 F.3d 289 (6th Cir. 2009).

⁵⁰ U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996) (emphasis in original).

⁵¹ U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012); see also U.S. v. Hensley, 469 U.S. 221 (1985).

Further, it agreed that even the earlier cases required something more than just there was someone else present, but that the presence just be a threat. Further, the absence of evidence, that someone might be present, is not justification for a sweep. The Court looked at several cases for guidance, noting that in some, the officers had “reasonable suspicion that potentially dangerous criminal accomplices may have been present.” Brumley’s warrant for possession of controlled substances did not suggest accomplices.

Further, the Court questioned that “it hardly seems "reasonable" for them to be ordered into a darkened house where they could become easy targets for anyone wishing to do them harm from within the blackened confines” The court noted “an attentive departure from the premises with their prisoner would surely have been safer than an invasion of the home.”

The Court continued:

We certainly do not seek to diminish the legitimacy of law enforcement officers' concern for their personal safety. We have always endeavored to keep the safety concerns of officers foremost in our minds when engaging in this delicate balancing of constitutional proscriptions. But even prior to the U.S. Supreme Court's decision in Buie, this Court recognized that mere apprehension cannot serve as a pretext for breaching the search warrant requirement.⁵²

The Court noted that “reasonable suspicion is a very low threshold,” [but] “it is not a carte blanche for law enforcement officers to dispense with the search warrant requirement.” The Court reversed the decision denying suppression of the evidence located during the sweep, and remanded the case for further proceedings.

SEARCH & SEIZURE – VEHICLE STOP

Turley v. Com., 399 S.W.3d 412 (Ky. 2013)

FACTS: While on patrol in Muhlenberg County, Trooper Knight (KSP) saw Turley speeding. He followed, also noting the back license plate was not properly illuminated. He made a traffic stop. It was difficult to see into the cab of the large pickup, so the trooper asked Turley to get out, leaving two passengers inside. He gave Turley a FST, which he passed. After verifying his documentation, Trooper Knight told Turley to “have a good night.” Turley returned to the cab. Knight, however, returned with Turley to the cab and “undertook a detention of the two passengers pursuant to Terry v. Ohio, which permits a police officer to briefly detain a citizen if he has an individualized reasonable articulable suspicion that criminal activity is afoot.”⁵³ Knight stated he planned to do a warrant check on the two passengers, as that was his “customary practice.” He had no particular suspicion about them, however. He agreed he would have followed if Turley had driven off.

During the encounter, Turley had his arm on the center console, near a “small wooden box.” The trooper asked what was in it, and Turley said it wasn’t his, he didn’t know. “Knight then repeatedly demanded to be told what was in the box and ultimately demanded to "see what was in the box." Turley began to open it and Knight, thinking it might contain a weapon, seized it. A bag of marijuana fell out. Turley was arrested and placed in the cruiser. When one of the passengers refused to sit on the ground, awaiting a vehicle search, both passengers were arrested. A search of the vehicle revealed methamphetamine, two handguns and a large amount of cash. Turley was indicted for the drugs and being a PFO.⁵⁴ He moved for suppression and was denied. He was convicted and appealed.

⁵² Com. v. Johnson, 777 S.W.2d 876 (Ky. 1989).

⁵³ 392 U.S. 1 (1968),

⁵⁴ A charge for possession of the gun was done separately.

ISSUE: May occupants of a vehicle be held past the point that all reasonable actions have been completed?

HOLDING: No

DISCUSSION: The Court noted that the trial court considered that the encounter, once Turley returned to the vehicle, was consensual, and disregarded evidence that suggested the contrary. The Court noted the trooper's own statements indicated that he "objectively *did not* intend to terminate the encounter when he finished checking [Turley's] credentials and sobriety." Rather, he stated that he "*I had him* get back in [the truck] and sit down . . . behind the steering wheel." If the trooper "had" Turley do something, it is a "reasonable presumption that "he compelled the doing of the act, and that the subject's compliance was in response to the compulsion." He apparently admitted that the only reason why he took Turley back to the truck was to be able to maintain control of all three individuals. He "agreed that after the initial stop, [Turley] was never again free to leave," By continuing to investigate the passengers, Knight put Turley into the position of a "mere bystander," who had to simply patiently wait for the conclusion of the trooper's business with the passengers.

Further, the trooper demanded to see what was in the box, which precipitated Turley opening it. Turley "plainly did so in response to the trooper's emphatic demand to 'see what's in the box.'" The Court further agreed that Turley was in custody the entire time and would not have reasonably felt free to leave.

Further, the Court noted, the trooper stated specifically why he continued his control over Turley and the two passengers:

... it was his routine practice to detain passengers under these circumstances to see who they are, and determine if they are "wanted persons." However, Knight had no authority to detain either [Turley] or the passengers for that purpose. Historically, this has not been a country in which citizens are required to heel to the demand of a policeman to "show me your papers," nor will we indulge law enforcement conduct that leads us in that direction.

In response to the Commonwealth's argument that the trooper was free to approach the car, the Court noted "it would produce an absurd result" to apply that rule in this circumstance. Allowing a police officer "to routinely extend the stop at his own initiation by application of the consensual encounter rule would, in practice, eviscerate the constitutional principle that a stop may not be extended longer than is necessary to accomplish its purpose."

The Court concluded:

Moreover, in situations as we address here, many citizens do not perceive or understand a transition from a Terry-detention to a consensual encounter. Those who do must then make a decision that, as this case illustrates, can confound lawyers and judges: does the motorist risk being charged with the crime of resisting arrest or escape by assuming he is at liberty to leave and then doing so? Or, does he remain in place and create the appearance that he has consented to the continued intrusion upon his liberty? The stakes are too high for this Court to condone a police practice that fosters ambiguity about whether a suspect is "in custody." Our view in this regard is consistent with the legislative purpose of KRS 431.025, which requires an officer making an arrest to "inform the person about to be arrested of the intention to arrest him, and of the offense for which he is being arrested."

Finally, the Court refused to credit that there was an exigent circumstance when the box was opened. Looking to Kentucky v. King, the Court agreed that the Commonwealth may not rely upon the exigent circumstances exception to the warrant requirement under the circumstances presented because Trooper

Knight himself created the exigent circumstances which led to his seizure of the box by illegally extending the traffic stop, and by illegally insisting upon disclosure of the contents of the box.” His own conduct created the exigency.

The Court suppressed the evidence.

Com. v. Bucalo, 422 S.W.3d 253 (Ky. 2013)

FACTS: On April 2, 2009, Bucalo and her 6-year-old son checked into an Elizabethtown hotel. Duke and another male accompanied them. The four stayed in one room for 15 days, paying their bill every day, in cash, and declining maid service. At that point, hotel personnel terminated their stay and notified law enforcement. Dets. Gregory and Green, KSP, began surveillance and watched the group loading items into three different vehicles. Shortly after noon, Duke drove a white Dodge truck out of the parking lot, followed by Bucalo in a green Honda Accord. The troopers searched the room and found nothing illegal. Other law enforcement were ordered to follow the two vehicles. When both vehicles ran the same red light, Officer Bracket pulled over Duke and Sgt. Kelly (both of Elizabethtown PD) pulled over Bucalo. The stops were made in close proximity to each other.

Bucalo told Sgt. Kelly she was in a hurry because her son needed to use the restroom. Kelly refused her request to take the child to a restroom several times. About the same time, Officer Bracket received consent to search Duke’s vehicle and “narcotic residue located in a pipe” was found. Bucalo declined consent to search her vehicle. At some point, Det. Gregory arrived at the Bucalo stop, and he called for a drug dog. Sgt. Kelly left the scene, leaving Officer Young to write the traffic citation. Trooper Payne and Barry (his dog) arrived, and Barry failed to alert, initially. Upon being directed to search specific areas, Barry alerted on the driver’s side door. A search of the vehicle revealed ecstasy, marijuana, mushrooms, methamphetamine and items used to manufacture methamphetamine. Bucalo was arrested. The traffic stop, in toto, lasted about 1 hour and 35 minutes.

Bucalo was charged and moved for suppression. The trial court denied the motion. She took a conditional guilty plea and appealed. The Court of Appeals reversed the trial court, finding that Bucalo was detained for “an unreasonably prolonged amount of time” and that the officers lacked “reasonable suspicion to extend the duration of the stop.” The Commonwealth requested review.

ISSUE: May a traffic stop be extended as additional information is discovered?

HOLDING: Yes

DISCUSSION: The Court first addressed the duration of the traffic stop, Bucalo having acknowledged that the stop itself was, initially, lawful. The Court looked to the time frame – with Det. Gregory testifying that the dog occurred within about 20 minutes after the stop. Due to a “poor record,” the Court could not tell how long it took for the dog to do its task, other than the handler stating that it took “an hour or less.” The Court noted that pursuant to Epps v. Com.,⁵⁵ the stop was “unduly prolonged beyond the appropriate time necessary to complete the purpose of the stop.” The Court agreed that the detention could only be justified if the officers had at least reasonable suspicion to extend the stop. The Court agreed, however, that once contraband was found in Duke’s car, along with the information gleaned from the suspicious hotel stay, the officers had at least reasonable suspicion to continue to detain Bucalo. The Court noted that the vehicle hauling Bucalo’s belongings (the truck) was found to contain the contraband.

However, even with such suspicion, “there are still limits on the duration of the detention.” But since Det. Gregory promptly called for a drug dog, as well, which arrived within ten minutes of the call, the Court

⁵⁵ 295 S.W.3d 807 (Ky. 2009).

considered the time frame appropriate. The Court reversed the Kentucky Court of Appeals and affirmed the decision to deny the motion to suppress.

SEARCH & SEIZURE – VEHICLE STOP – COLLECTIVE KNOWLEDGE DOCTRINE

Jameson v. Com., 2013 WL 5436650 (Ky. App. 2013)

FACTS: On April 9, 2012, Jameson called 911 to report that his rental car had been stolen from a Lexington hotel parking lot. An ATL was broadcast several times. Later that night, the vehicle was recovered but the ATL was apparently never cancelled. Officer Burks had heard the ATL that evening. On April 13, he heard that officers had seen the vehicle. Officer Burks did a “felony stop” and removed the occupants, including Jameson. Once Jameson learned the reason for the stop, he “repeatedly asserted” that the vehicle was lawfully in his possession. Officer Burks did a frisk and a baggie, containing oxycodone was “seen hanging out of Jameson’s pocket.” Jameson “had slurred speech and glazed-over eyes” – he admitted he’d taken a pill some 30 minutes before. Officer Burks had confirmed the ATL was active when he made the stop, but learned that in fact, it should have been cancelled several days before.

Jameson was later indicted for possession of the drugs and related offenses; he sought suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Are officers imputed to have knowledge of what other officers know?

HOLDING: Yes

DISCUSSION: The trial court had concluded that the stop was, in fact, improper, pursuant to the “collective knowledge concept.” In Com. v. Vaughn, the court had applied this doctrine, which holds that “law enforcement officers can be held to the collective knowledge of other officers.”⁵⁶ The Court agreed that “an officer may conduct a stop based on information obtained by fellow officers.”⁵⁷ In this case, in contrast with Hensley, however, the “focus of the inquiry is not on what the arresting officer thought but instead what the issuing officer/department knew” – and in this case, the ATL was issued by Officer Burks’ own agency. The Court concluded, “in light of Vaughn, the knowledge that the ATL should have been removed is imparted to Officer Burkes as the collective knowledge concept applies prohibitively.” Without that, he lacked any reasonable suspicion to make the stop. The Court also faulted the police department for failing to update its records for four days.

The Court then discussed whether the Exclusionary Rule should apply. It looked to Herring v. U.S.⁵⁸ and agreed that this was a “singular mistake” and “not deliberate, reckless, grossly negligent, or a recurring of systemic negligence.” As such, exclusion would not serve to deter any improper conduct on the part of the officer. The Court upheld the denial of the motion to suppress and affirmed his plea. \

SUSPECT IDENTIFICATION

Com. v. Parker, 409 S.W.3d 350 (Ky. 2013)

FACTS: On February 5, 2009, Martin was in the parking lot at a Lexington Target when “Parker grabbed her purse and struck her in the face.” Parker and Masengale ran into the nearby neighborhood. Target called police and EMS. While waiting, Branham, the store manager, attended to Martin, who explained what had happened. She gave a description to Branham, the store manager, and a Target employee

⁵⁶ 117 S.W.3d 109 (Ky. App. 2003).

⁵⁷ U.S. v. Barnes, 910 F.2d 1342 (6th Cir.1990), U.S. v. Hensley, 469 U.S. 221 (1985).

⁵⁸ 555 U.S. 135 (2009).

who overheard heard Martin’s description stated she’d “seen the two men hanging around the store entrance.” She was instructed to look at the security video to see if she could identify them. When she did so, “Branham made several still photographs of the men from the video.” Martin “without hesitation” identified the two men.

Lt. Van Brackel arrived and broadcast the description out to officers in the area. Det. Iddings, who was in the store off-duty, assisted as well. Branham got a call from a witness, who stated he had not stopped because he had a child with him. However, he stated that he “had just seen the two men in his neighborhood.” Masengale was apprehended and returned to Target, where Martin identified him in a showup. During questioning, he identified Parker. Parker was arrested and found with Martin’s cell phone and iPod.

Masengale moved to suppress the showup, and Parker joined in, arguing that if the showup was tainted, “Masengale’s identification of him was likewise tainted.” At the subsequent hearing, the Commonwealth stated Martin would not be making an in-court identification. The trial court denied the motion to suppress, along with a related Brady⁵⁹ claim. The Court of Appeals reversed, holding that without Martin’s testimony, the trial court did not have sufficient cause to uphold the identification. The Commonwealth appealed.

ISSUE: Are showup identifications admissible?

HOLDING: Yes (but see discussion for details)

DISCUSSION: The Commonwealth argued that Parker did not have standing to challenge Martin’s identification of Masengale, which led to Parker being identified. The Court agreed that showups are “inherently suggestive,” but still a necessary tool.⁶⁰ In such cases, the Court would rely on the Biggers factors.⁶¹ The trial court agreed that the circumstances were suggestive, as Martin was told that she would be seeing someone in custody “who matched the description she had given.” Masengale was also in the custody of a police officer. However, the trial court had ruled it was reliable, as she had adequate opportunity to see the attacker and gave a “fairly detailed” description prior to the identification. She “did not hesitate” when she made the identification. The time lapse was only 15-20 minutes from the time it occurred.

The Court agreed that the Court of Appeals ruling was in error and that there was no case law that required a witness to appear at a hearing on the identification. Instead, the judge was permitted to make reasonable inferences based upon the information presented. Further, the Court knew when the crime occurred and when the arrest and questioning occurred and could extrapolate the time lapse.

The ruling of the Court of Appeals was overturned and the ruling of the trial court reinstated.

Barnes v. Com., 410 S.W.3d 584 (Ky. 2013) (modified from February, 2013 ruling)

FACTS: On May 24, 2009, Manning went to tend to a friend’s home – as they were out of town. She was to water the plants and feed the cats, and had been going there twice a day. As she was tending to outside plants, she walked up the back deck steps. Through the sliding glass door, she “saw a person inside bending over removing the pole from the base of the door which secured it.” She yelled at the person. They stared at each other and he then disappeared. She went around and discovered the front door was unlocked so she retreated to her car, nearby, calling a friend and her father, as well as 911. She waited up the street for the police. Officers discovered that entry to the house had been made through a pet door and that a glass

⁵⁹ Brady v. Maryland, 373 U.S. 83 (1963).

⁶⁰ Savage v. Com., 920 S.W.2d 512 (Ky. 1995).

⁶¹ Neil v. Biggers, *supra*.

panel on the back door was damaged. That door, too, was unlocked. The owners returned and found jewelry missing. A partial print was recovered from the jewelry box.

Manning gave a description of the subject. She was showing a photo array the next day but did not identify anyone. A couple of weeks later, detectives spotted a man in the area that fit the description, Barnes. He was questioned and a photo was taken; he denied any involvement. His explanation for being in the area, however, was “peculiarly suspicious.” The next day, a photo of Barnes, along with similar photos, was presented to Manning. His photo was the one taken by the officers, the others were mug shots. Manning picked him out and said she was “100% positive.” She was given a larger photo to view and again agreed Barnes was the subject.

At trial, she once again identified Barnes. However, he was considerably older than she originally stated and “there was some disparity in her previous description of his height and facial hair.” Barnes was convicted and appealed; his conviction was affirmed. He further appealed.

ISSUE: Is an identification made from a valid photopak admissible?

HOLDING: Yes

DISCUSSION: Barnes did not initially object to the identification made, which required the court to look at his later appeal on the issue in a different light. The Court reviewed the pretrial identification process under the lens of Neil v. Biggers.⁶² The Court noted that the photo array used by the police, in which Manning identified Barnes, was a “good lineup” and not “impermissibly suggestive.” She had a good view of the suspect for some seconds. She was not even initially frightened, as she had encountered someone unexpectedly at the house before. Showing her the larger photo to confirm her identification was also permissible.

The Court also addressed an issue with the partial fingerprint that was lifted. The technician testified that he could only identify four points (not the 10 required) so he did not in fact even compare it to Barnes’s prints. The Court noted that there was apparently some confusion during argument as to whether the comparison was made, but in fact, the trial record was clear that it was not.

Barnes’ conviction was affirmed.

Crews v. Com., 2013 WL 6730041 (Ky. 2013)

FACTS: On September 26, 2010, Crews attacked Cutter in a grocery store parking lot in Lexington. He grabbed her purse and they struggled, with Cutter eventually being knocked to the ground. “Refusing to relinquish her purse without a fight, Ms. Cutter and Crews engaged in a tug-of-war, each desperately grasping separate handles of the purse.” Eventually, the zipper gave way, the purse opened, and Crews grabbed Cutter’s wallet and fled. Cutter suffered minor injuries which were treated at the scene. A witness later identified the robber as Crews. When credit card charges started appearing, Cutter contacted Det. Sharp, the lead investigator. Surveillance video from the store where the purchases were made showed a man and woman involved. Still photos from the video were broadcast on Crime Stoppers. Citizen callers identified the suspects as Harris (the female) and Crews. Harris admitted she was on the video, and identified her confederate as Crews. (She claimed to not know that the cards she used were stolen.)

Crews was subsequently convicted of Robbery, Complicity to Fraudulent Use of Credit Cards and PFO. Crews was convicted and appealed.

⁶² 409 U.S. 188 (1972).

ISSUE: May an improper suspect identification cause the identification to be suppressed?

HOLDING: Yes

DISCUSSION: Crews argued that Cutter’s identification of him was tainted “by her exposure to a photo” on the Crime Stoppers segment. She was later given a photo lineup, but she was unable to identify Crews from it. She did identify him from a solo photo, after she was told that the man had been seen “following her around inside the store prior to the robbery.” She recognized him from his clothing, apparently. The trial judge sustained the motion, finding the method used to be “unduly suggestive.”

At the trial, however, Crews’ attorney told the judge he wanted to question her about the photo lineup. The Court warned him that by doing so, he “opened the door for admission of the whole pre-trial identification process.” The Court then reversed its ruling and allowed Cutter to identify Crews, which she did by “stating only that she recognized his eyes.” Oddly, Crews’ attorney did not question Cutter. With respect to the other witness, he had never been shown a photo lineup but had been shown a single photo of Crews prior to trial. The Court ruled that in neither case did the trial court “conduct the appropriate Biggers analysis.” However, the Court ruled any error to be harmless, in the face of all of the other evidence submitted to the jury.

Crews also argued that he had asserted his right to counsel after receiving Miranda. Following the reading of the rights, Crews asked the detective “do you think I need an attorney?” The detective said no and proceeded to interview him. The recording was not played for the jury, the detective instead providing a summary, stating that Crews “admitted some knowledge” of the credit card issues. Crews provided no incriminating statements about the actual robbery. The Court stated that “it is obvious beyond question that Crews indeed needed a lawyer,” and that it “would defy common sense to believe that” the detective did not know that. The Court noted that in Leger v. Com., it had held that “lying to persons being interrogated in order to induce them to waive their rights under Miranda is not permitted.”⁶³ The Court agreed that any confession would have to be suppressed. But, since none were made with respect to the robbery, there was nothing to suppress. The Court did reverse, however, Crews’ conviction on the credit card usage.

In addition, Det. Sharp was permitted testify that the interview was brief and that when he asked about the robbery, “the interview ‘turned south.’” When asked what that meant, he said that Crews “just wasn’t cooperative and indicated that he didn’t want to talk anymore. And when they say that, it’s over.” Over objection, the statement was allowed to stand, and during the subsequent testimony, the detective “again stated that the interview with Crews became confrontational and that Crews indicated he no longer wanted to talk.” The Court agreed that the Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant’s silence once that defendant has been informed of his rights and taken into custody.” The Court, finding that the comment was not impermissible, however, allowed the statement.

The Court also agreed that Crews’ mug shot was properly introduced under the factors outlined in Redd v. Com.⁶⁴

- (1) the prosecution must have a demonstrable need to introduce the photographs;
- (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and
- (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

The Court agreed that because of questions related to Crews’ appearance at the time of the crime, and as such, it was proper to admit the photo. The Court also noted that the jury was allowed to view the videos in

⁶³ 400 S.W.3d 745 (Ky. 2013).

⁶⁴ 591 S.W. 2d 704 (Ky. App. 1979); Williams v. Com., 810 S.W.2d 511 (Ky. 1991).

the jury room on the prosecutor's laptop, which was described as "unclean" as it presumably included other information. The jury was admonished not to navigate outside the permitted files. The Court noted that "in a perfect world, all DVDs intended to be introduced into evidence will be converted into a format playable in a clean and regular DVD player available to the jury. But we do not live in a perfect world." The Court agreed that the Court employed proper measures and the jury was correctly admonished.

Finally, the Court noted that robbery does not require an intent to harm, only evidence that physical injury was caused as a result of the theft (or attempted theft). The Court upheld the robbery conviction.

INTERROGATION

Smith v. Com., 410 S.W.3d 160 (Ky. 2013)

FACTS: On September 18, 2009, at about 11 p.m., Smith rode his horse to the Rigney's home in Wayne County. There he found Samantha Rigney, holding her young child, Jazzlyn, and Jonathan holding their son, Gabe. A cousin of Samantha, Conn, and Conn's son, Austin were also present. Samantha asked, as he approached, "why he was out so late." Smith drew a weapon and began to shoot, causing his horse to start bucking. The residents sought cover inside the house; Samantha was killed.

Wayne County deputy sheriffs went to the Smith's home, and his wife gave them permission to look for him. They found the horse, which had been recently ridden, and two beers in a saddlebag. They were unable to locate Smith and told his wife to have him call when he returned. He called about an hour later. They returned to Smith's home and told him why they were there; Smith stated "that if he had shot somebody he could not remember doing so." Smith was taken to the Sheriff's Office and questioned. He was given Miranda and admitted he'd been at the Rigney home, suggesting "that he had gone there to confront Jonathan because he believed that Jonathan had stolen property from his brother." First he said he had set off a large firecracker, and then, that Jonathan had gotten a rifle and pointed it had him. In an "alternate version," he said he'd set off the firecracker in response to Jonathan's threat. In a third version, he said he'd set off the firecracker but did not mention Jonathan's use of the rifle. He maintained throughout that he had shot no one.

Smith was convicted of Murder and related charges. He appealed.

ISSUE: Is an interview from a drunk subject admissible?

HOLDING: Yes

DISCUSSION: Smith argued that "the interview should have been suppressed because he was so intoxicated at the time of the interview that his statements were not knowingly, willingly, and voluntarily made." The Court noted that "generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes." The Court agreed "[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."⁶⁵ However, it noted that intoxication may be a factor if it is enough to make the subject more vulnerable to police coercion, and thus involuntary, or so much that that the subject is hallucinating, functionally insane or the like, making it unreliable. However, neither was the case with Smith. Everything indicated that he "freely and knowingly accompanied the police ... for the express purpose of submitting to questioning about his alleged participation in the shooting." There was no indication that he was so intoxicated as to make his statements unreliable. Further, the Court agreed that Wanton Endangerment 1st was an appropriate charge for his shooting under the circumstances and that everyone present was at risk.

⁶⁵ Britt v. Com., 512 S.W.2d 496 (Ky. 1974).

The Court upheld his conviction.

Buster v. Com., 406 S.W.3d 437 (Ky. 2013)

FACTS: On October 1, 2009, CHFS was informed of an allegation of sexual abuse. Bell, a social worker, interviewed the victim, who claimed Buster sodomized her. Patricia Buster, the wife of the suspect, was also named and provided Bell with the names of other children her husband had sexually assaulted, agreeing that she'd been involved in the crimes. Bell interviewed Buster (who was at that time incarcerated for an unrelated offense) and he confessed to the sexual assault of multiple victims. He was ultimately charged with hundreds of sexual crimes.

Prior to trial, Buster argued that he was not given Miranda warnings before being questioned by Bell. The Court overruled his motion, finding that “the fact that someone is incarcerated on an unrelated charge does not mean that the prisoner is ‘in custody’ for Miranda purposes.” He took a conditional guilty plea and appealed.

ISSUE: Is an interview of a jailed subject custodial for Miranda purposes?

HOLDING: It depends (see discussion)

DISCUSSION: First, the Court agreed that Bell was a “state actor” – although not law enforcement – for Miranda purposes.⁶⁶ (This had been previously decided in Patricia Buster’s related case.) His role was as an investigator that was to work in cooperation with law enforcement and he was turning over information to officers regularly. In Buster’s case, the interrogation took place in a small room inside the prison, with only Buster, Bell and a guard present. The Court weighed the facts available, noting that Buster was not told he was free to return to his cell initially. However, the interrogation was brief, he was not restrained in any way and had been given a drink. Bell did not speak in an aggressive or hostile manner and Bell stated that everything he’d said was of his own free will. The Court agreed that, under Fields v. Howe,⁶⁷ he was not in Miranda custody and as such, affirmed the denial of the motion to suppress.

Buster’s plea was affirmed.

Peacher v. Com., 391 S.W.3d 821 (Ky. 2013)

FACTS: On August 25, 2008, Janet and Jeannette Allen (sisters) were ordered to clean up their Louisville home, which was in “deplorable condition.” They were ordered to provide alternative housing for their two toddler children, who were also half-brothers - Wyatt and Chris. Nereida Allen, another sister, agreed to take the two children and her and her boyfriend picked them up that day. On August 27, EMS responded to the couple’s home, finding Chris unconscious and in full cardiac arrest. He was transported to the hospital and found to have suffered severe head injuries that left him brain dead, along with severe abdominal injuries, with almost all abdominal organs showing extensive injury. He was removed from life support the next day and died. The child also had extensive bruising, “literally from head to foot.” The forensic child abuse pediatrician testified that such bruising usually indicated the child had been “violently shaken.” Although it was difficult to tell when the injuries were sustained, she thought it likely that some of them had been inflicted in the 18 hours before his death. The medical examiner and neuro-pathologist indicated that all of the serious injuries occurred in the 48 hour prior to his death, with the brain injuries, specifically, having occurred within a few hours of his arrival at the hospital.

⁶⁶ Welch v. Com., 149 S.W.3d 407 (Ky. 2004).

⁶⁷ 565 U.S. --- (2012).

Peacher and Allen were questioned by the police at the hospital, who arrived because of the reports of abuse. Multiple interviews were done, separately, of each, and in both, “the detectives became more accusatory as the interviews progressed, and in both cases the defendants' stories evolved from essentially blanket denials of any wrongdoing to admissions of having been rough with Christopher in the course of trying to discipline him.” Initially, Peacher stated that the child had the injuries when he arrived, but when confronted, he could provide no explanation for the time frame. He claimed the child had been lethargic and nauseous earlier that day and gradually admitted to more physical contact. Allen also stated that he was “heavily bruised” when he arrived and described him as a discipline problem. Both stated he refused food and had vomited. Eventually, she called 911 when he collapsed. When Allen was told she was under arrest, she became tearful and admitted that he had fallen and she had “jerked him up” multiple times.

The child-abuse pediatrician also examined Wyatt as well, finding him to also be somewhat bruised, but not nearly so badly. He also had round “cigarette” burns on his legs and unusual bruising on the ears. Eventually, both Peacher and Allen blamed the other.

Peacher and Allen were charged and tried jointly. Both were convicted of murder, Assault 1st and Criminal Abuse 1st. They were also convicted of abuse of the other, surviving child. Peacher appealed. (Allen’s appeal was separate.)

ISSUE: May statements made while not in custody be admitted?

HOLDING: Yes

DISCUSSION: Peacher raised a number of arguments in his appeal. First, Peacher argued that his motion to suppress the statements he made to the detectives should have been suppressed. Peacher argued that he should have been advised of his Miranda rights but the trial court ruled he was not in custody during the first three segments. By the fourth interview, he was in custody and was given Miranda, which he duly waived. The Court looked to Howes v. Fields and noted that to determine custody, the Court must look at “the place, time, and duration of the questioning; the questioning's tenor, whether cordial and neutral or harsh and accusatory; the individual's statements; the presence or absence of physical restraints; whether there was a threatening presence of several officers and a display of weapons or physical force; and the extent to which the questioner sought the individual's cooperation or otherwise informed him that he was not under arrest and was free to leave.” Peacher argued that he was not free to leave since he was taken from the hospital to the police station, in a police vehicle, “he was kept there for nearly four hours and was questioned three times before he was Mirandized; the interviews were recorded; he was told that his house and his car would be searched and that his phone records would be subpoenaed. During the second interview the detective took his cell phones and read the text messages recorded on them; during the third interview the questioning became more accusatory, and the detective asked him what he had in his pockets, searched his wallet, and had him photographed.” The detectives stated that both agreed to go to the station and that Peacher rode as a passenger in the front seat.

The Court agreed Peacher was clearly interrogated, but noted, that wasn’t the question. “Custody does not materialize, moreover, merely because an interviewee admits to something potentially incriminating.”⁶⁸ He was interviewed in an open office area and was free to move about and allowed to watch television in another room. He was told several times he was not under arrest.

The Court also agreed that in a joint trial, “the Confrontation Clause ban applies even to hearsay statements offered as evidence against the co-defendant declarant himself, if the declarant does not testify and if the statement either expressly or by immediate implication tends to incriminate another defendant.”⁶⁹ However, in Richardson v. Marsh, the Court had “explained that the Confrontation Clause does not rule out joint trials

⁶⁸ Emerson v. Com, 230 S.W.3d 563 (Ky.2007).

⁶⁹ Bruton v. U.S., 391 U.S. 123 (1968); Gray v. Maryland, 523 U.S. 185 (1998).

or the use at joint trials of non-testifying defendants' out-of-court statements or confessions, provided that the statements are redacted so as to remove express or immediately obvious inferential references to defendants other than the confessor, and provided that the jury is admonished to consider the statements as evidence against the confessor alone.”⁷⁰ In this case, the Court noted that the prosecution “redacted Allen’s and Peacher’s recorded statements so as to eliminate any reference either one made to the other” – “in such a way that the redactions were not at all apparent.” Allen’s redacted statement implicated her in the child’s condition, alone, although coupled with medical testimony, Peacher was also potentially implicated. The Court noted that even if it was possible that the other party might be “inferentially incriminated,” the other defendant’s properly redacted statement could be admitted with proper jury admonition.

The Court agreed that a complicity charge was also appropriate, as there was evidence of a joint undertaking that resulted in the abuse.

Peacher and Allen’s convictions were affirmed.

INTERROGATION - SCHOOL

N.C., a Child Under Eighteen v. Com., 396 S.W.3d 852 (Ky. 2013)

FACTS: A teacher at Nelson County High School found an empty pill bottle on the floor in the boy’s bathroom. The bottle indicated it was for N.C. and had contained hydrocodone. The school investigated the matter and determined that N.C. had given away some pills. N.C. was removed from class and brought to the office by Deputy Sheriff Campbell (the School Resource Officer) and the Assistant Principal, Glass. N.C. was questioned in the closed office with the SRO and Glass the only other persons present. Although initially denying he knew why he was there, N.C. finally admitted that he “did something stupid.” He stated he had the pills with him because of recent dental surgery; he took one and gave two away to a fellow student. Glass told him that he was “subject to school discipline” and N.C. was ultimately expelled. After Glass left the room, Campbell told N.C. that “he would be charged with a crime and explained the criminal consequences.” N.C. was ultimately charged as a Youthful Offender because of prior criminal acts.

N.C. was charged in juvenile court and requested suppression. At the hearing, Deputy Campbell testified that he had been in clothing that identified himself as a member of the Sheriff’s Office and was armed. He had been the SRO for four years. The deputy did not tell N.C. he was free to leave the office during the questioning or give him Miranda⁷¹ warnings. The Court denied N.C.’s motion and he took a conditional guilty plea. N.C. then appealed and ultimately, the Kentucky Supreme Court granted review.

ISSUE: If a student is being questioned at school, by or in the presence of a law enforcement officer, must they be given Miranda warnings?

HOLDING: Yes

DISCUSSION: The Court framed the question as whether “a student is entitled to the benefit of the Miranda warnings before being questioned by a school official in conjunction with a law enforcement officer” when criminal charges, rather than just school discipline, is possible. The Court began by reviewing Miranda, noting that the threshold inquiry is whether the subject is both being questioned by law enforcement and is in custody. But since that initial rule was established, the Court has held that in some situations, interrogation by non-law enforcement state actors may also be subject to the Miranda⁷² rule. The Court also looked to a case from another state, in which the court ruled that when law enforcement isn’t

⁷⁰ 481 U.S. 200 (1987).

⁷¹ Miranda v. Arizona, 384 U.S. 436 (1966)

⁷² See Mathis v. U.S., 391 U.S. 1 (1968) (IRS agent); Buster v. Com., 364 S.W.3d 157 (Ky. 2012) (social worker); Harsfield v. Com., 277 S.W.3d 239 (Ky. 2009).

present, and the child is not subjected to criminal charges, Miranda is not implicated. The Court concluded that the “law enforcement’ requirement in Miranda may be contextual, or more related to function than to title.”

The question as to whether a person is in custody is objective, and at “its most basic,” custody “requires a formal arrest or restraint.”⁷³ The trial court must “determine the circumstances surrounding the interrogation and, given those circumstances, to decide whether a reasonable person would believe he could terminate the interrogation and leave.”⁷⁴ The second step is whether the statement was “voluntarily given,” and absent Miranda warnings, when they are required, statements will be considered inadmissible as involuntary. This question was initially addressed in a pre-Miranda case, Fikes v. Alabama.⁷⁵ Following Miranda, warned statements will lean it toward the statements being given voluntarily, but that is “not the end of the inquiry.” In Schneckloth v. Bustamonte, the Court laid out the “totality of the circumstances” test which views “knowledge of the right to refuse consent as a factor.”⁷⁶

With respect to juveniles, the Court looked to In re Gault.⁷⁷ In Gault, the Court reviewed the “development of juvenile legal issues to that point in time,” and noted that when a juvenile is adjudicated for a public offense, the child’s liberty can be restrained for many years. As such, the Court agreed that juveniles are entitled to due process, just as adults. The Court noted that “admissions and confessions of juveniles require special caution because a juvenile cannot be judged by the more exacting standards of mature adults.” The Gault Court ruled that the “constitutional privilege against self-incrimination is applicable to the case of juveniles as it is with respect to adults.”

The Court looked to J.D.B., in which the Court “did not even question whether Miranda applied, but looked directly at the question of whether the juvenile was in custody.” J.D.B. was 13 when interrogated at school, threatened with juvenile detention and never given Miranda warnings. The J.D.B. Court noted that juveniles are particularly susceptible to the “influence of authority figures and the naturally constraining effect of being in the controlled setting of a school with its attendant rules.” The Court framed the custody question as: “what were the circumstances surrounding the interrogation, and given those circumstances, would a reasonable person believe he could terminate the interrogation and leave?” The Court agreed that for juveniles, age was also a factor to be given some weight.

The Court then looked to Kentucky’s Unified Juvenile Code and the due process requirements contained therein. The Court agreed that N.C. was in custody under the facts given. Under Kentucky law, KRS 610.200, when a peace officer takes a child into custody for an offense, the officer “shall immediately inform the child of his constitutional rights and afford him the protections required thereunder...” As such, once the Court determined that N.C. was in the custody of the SRO, he was entitled to have been informed of his rights, including those under Miranda.

The Court noted that “on its face,” this was a school discipline matter and N.C. had “no reason to believe that he was facing criminal charges.” The pills were his legal prescription. Although under Kentucky law, he did commit a crime by “transferring” the pills, “there is nothing to indicate that he knew this.” Only discipline/expulsion was discussed with the assistant principal. Only after he confessed was N.C. told that he had committed a crime. The Court noted that the assistant principal had admitted to having a “loose routine” with the SRO and that they had done such questioning “in tandem” before. The Court stated also that “no reasonable student . . . would have believed that he was at liberty to remain silent, or to leave, or that he was even admitting to criminal responsibility under these circumstances.” The Court acknowledged that

⁷³ Thompson v. Keohane, 516 U.S. 99 (1995).

⁷⁴ J.D.B. v. North Carolina, 131 S.Ct. 2402 (2011); see also Stansbury v. California, 511 U.S. 318 (1994).

⁷⁵ 352 U.S. 191 (1957).

⁷⁶ 412 U.S. 218 (1973).

⁷⁷ 387 U.S. 1 (1967).

had N.C. been over 18, the statements would not have been admissible. The Court observed that Glass was “acting in concert with the SRO,” which made this situation “state action by law enforcement.”

The Court agreed that “safeguarding children in our schools and maintaining appropriate discipline is an issue of paramount public importance.” However, when a student is “questioned with more than school discipline in mind, there was a confluence of the student’s rights and the needs of the school.” The shift from “traditional in-school discipline toward greater reliance on juvenile justice interventions,” even for “common school misbehavior,” has led to students being put in contact with juveniles who have committed more serious offenses. “Such policies, which emphasize criminal charges, can serve to change the nature of questioning a student for purposes of school discipline into a criminal interrogation.”

The Court stated that “to the extent that school safety is involved, school officials must be able to question students to avoid potential harm to that student and other students and school personnel.” However, “when that questioning is done in the presence of law enforcement, for the additional purposes of obtaining evidence against the student to use in placing a criminal charge, the student’s personal rights must be recognized.” The Court agreed it was not reasonable to expect school officials “to understand all the ramifications” of such questioning, but “trained law enforcement is another matter.” The Court noted that the “only viable reason to have law enforcement in the schools is to be able to assert peacekeeping and custodial authority over anyone who behaves in such a way that disorder ensues or a law is broken.”

In short, the Court stated:

Administering school discipline does not require the participation of law enforcement.
Administering the law does.

The Court summed up the balancing act, noting that “school officials may question freely for school discipline and safety purposes, but any statement obtained may not be used against a student as a basis for a criminal charge when law enforcement is involved or if the principal is working in concert with law enforcement in obtaining incriminating statements, unless the student is given the Miranda warnings and makes a knowing, voluntary statement after the warnings have been given.” The Court agreed that in some cases, the presence of the SRO or other law enforcement officer “will maintain order and create a safer environment for the administrator and the student.” However, it continued, “statements obtained without giving Miranda warnings are subject to suppression if a criminal charge is brought.”

The Court ruled that the statements must be suppressed and reversed the conditional plea.

NOTE: *Although not binding in this matter, this opinion included a concurring opinion that addressed the “public safety exception” recognized in New York v. Quarles.⁷⁸ Under Quarles, certain statements made prior to Miranda might be admitted when limited to the need to resolve an immediate safety issue, such as the location of a weapon. In addition, in a lengthy dissent, one of the justices discussed the SRO program and the interaction between the school, the SRO and the law enforcement agency for which the officer works, if different from the school system. The Court characterized the situations as a “school official working with another school official who is required by law to be a law enforcement officer.” The justice noted that if Miranda warnings are given, it must be assumed “those rights will be invoked” and if this occurs, the safety of the school might be jeopardized.*

⁷⁸ 467 U.S. 649 (1984); See also Henry v. Com., 275 S.W.3d 194 (Ky. 2008).

INTERROGATION - RIGHT TO SILENCE

Baltimore v. Com., 2013 WL 6730040 (Ky. 2013)

FACTS: Jackson and Cole went to a Louisville apartment complex. There Jackson “got into a prolonged fight in the parking lot” with Baltimore. A large crowd watched. Initially “Jackson seemed to be getting the best of [Jackson].” Then, someone gave Baltimore a gun, which he used to shoot and kill Jackson.

Baltimore was charged with Murder. At trial, six witnesses testified they saw the shooting. Baltimore presented no witnesses but denied the murder. He was convicted of Murder and appealed.

ISSUE: Must an invocation of the right to remain silent be respected?

HOLDING: Yes

DISCUSSION: Baltimore argued that the witnesses were all connected to the victim and that their testimony was inconsistent and not credible. The Court agreed that bias might be drawn from their relationship to the deceased, but the “[c]redibility and weight of the evidence are matters within the exclusive province of the jury.”⁷⁹

With respect to the investigation, Baltimore had turned himself in once an arrest warrant was issued. He was given Miranda but refused to sign the form. He told the detective that he “had *nothing to say*” about the shooting. He later said he had nothing to do with it and wasn’t present. The interview continued and several times he said he had “nothing to say.” The trial court had admitted this colloquy. The Court noted that the ruling that he “did not invoke his Miranda right to remain silent with his statement that ‘he had nothing to say’ conflict with the essential holding of the Miranda decision.” The Court agreed that his statement was sufficient to invoke the right to silence. When the error is “of a constitutional magnitude, reversal of the conviction is required unless it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”⁸⁰ In this case, the Court noted that since six witnesses all said he did it and there was no alternative perpetrator evidence put forth, the error was, in this case harmless.

Baltimore’s conviction was affirmed.

Baumia v. Com., 402 S.W.3d 530 (Ky. 2013)

FACTS: On June 26, 2010, Baumia and Thompson (her boyfriend) attended a party in Louisville. She admitted that she began drinking about 5-5:30 p.m. At about 8 p.m., she got into her car, with an open beer bottle. Thompson got into the passenger seat. Thompson was angry at being made to leave the party and began to assault her. Witnesses saw this altercation but did not see an actual assault. They both believed, however, that the “conflict was physical.” One witness pulled in behind them and called 911, while the other approached on foot. Seeing that witness, Baumia turned back toward the party. She later said she was going to tell her father about Thompson’s actions, but when he promised to stop, she again turned around and headed home. Three witnesses saw her run a stop sign while speeding through the subdivision. One said that it sounded like she gave it “all the gas she could.” Three children were riding bikes in the neighborhood and one child was struck by her car and thrown almost 70 feet. Baumia then crashed into a home, damaging two vehicles and the garage.

Sgt Howell (Louisville Metro PD) tried to question Baumia, but found her “unresponsive, unsteady on her feet, smelled of alcohol, and that her eyes were glassy.” He believed her to be intoxicated. EMTs who

⁷⁹ Com. v. Smith, 5 S.W.3d 126 (Ky. 1999).

⁸⁰ McGuire v. Com., 368 S.W.3d 100 (Ky. 2012); Chapman v. California, 386 U.W. 18 (1967).

transported her said she was “belligerent and smelled of alcohol” and admitted to having had a “couple of drinks.” She admitted the same to a nurse and a doctor.

Officer Van Cleave, who met Baumia at the hospital asked her to take a PBT. She refused and he immediately got a search warrant. After the samples of her blood were taken, she was released. Dr. Smock later testified that he believed her blood alcohol was between .23 and .26 when she struck the child, and that she would have had to drink almost 8 beers to get to that level. She later admitted to having had six and that she was under the influence.

The child died the next day. Baumia was eventually convicted of murder, Wanton Endangerment 1st, Criminal Mischief and DUI. She appealed.

ISSUE: Should *any* mention of someone invoking a right of silence be avoided, no matter how worded?

HOLDING: Yes

DISCUSSION: Prior to the trial, Baumia had sought exclusion of Officer Van Cleave’s testimony concerning her invocation of her right to remain silent. (Specifically she said “My father told me not to talk to the f---n’ police, see my attorney.) The trial court ruled that she was not in custody at that time and denied the motion. The Court also denied a trial motion to Sgt. Howell’s comment on her “silence when explaining her demeanor after the collision.” The court reviewed each, in term.

With respect to Officer Van Cleave’s statement, the Court ruled that it was improper to permit the testimony regarding her “pre-custody, pre-Miranda invocation of her right to remain silent.” The Court agreed that although her statement wasn’t ideal, it “was effective.” The Court looked to the pre-Miranda case of Griffin v. State of California, which stated “that the Fifth Amendment ... forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”⁸¹ However, since that time, “the admissibility of a suspect’s silence has been discussed with reference to Miranda.” However, in Jenkins v. California, the Court had held that the “pre-arrest, pre-Miranda silence may be used for impeachment and not run afoul of the Fifth Amendment or due process.”⁸² Post-arrest, pre-Miranda silence might also be used in impeachment.⁸³ However, in Doyle v. Ohio, the court had held “that impeachment through the use of post-arrest, post-Miranda silence does indeed violate due process.” The issue in this case, however, whether a subject’s “pre-arrest, pre-Miranda silence may be utilized in the Commonwealth’s case-in-chief.”

Looking to the Kentucky Constitution, the Court noted that in Green v. Com.,⁸⁴ the “giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right.” It “exists whether or not the warning has been or is ever given.” The court noted, however, that both Kentucky’s Constitution and the Fifth Amendment “state that an individual cannot be ‘compelled’ to incriminate herself.” As such, some form of “official compulsion must be present in order for the privilege against self-incrimination to attach.” The Court then moved on, asking “whether an individual may be officially compelled outside of a custodial setting.”

The Court concluded that although the fact that she refused to submit to the test is admissible, the “phrasing and language employed ... was not indicative of guilty and was both irrelevant and unduly prejudicial.” As such, the statement should not have been introduced. However, the Court agreed that in the face of the

⁸¹ 380 U.S. 609 (1965).

⁸² 447 U.S. 231 (1980).

⁸³ Fletcher v. Weir, 455 U.S. 603 (1982).

⁸⁴ 815 S.W.2d 398 (Ky. 1991).

entire case, especially the overwhelming evidence of her guilt, it was harmless error. With respect to Howell's comment, that "Baumia didn't want to talk," again, the Court agreed it was error. However, "the prejudicial effect of Howell's testimony concerning [Baumia's] desire not to speak with him shortly after the accident [was] minimal." As such, the error did not warrant exclusion.

The Court also looked at the introduction of a video taken from a police vehicle. Officer Bassler, who responded, was running his video as he approached the scene, following essentially the same route as Baumia from her father's house, where the party was, to the crime scene. The video was relevant, the Court agreed, because he "offered a more accurate description of the crime scene than what could be depicted by the witnesses' testimony." It also "showed the residential nature of the neighborhood, including the presence of several stop signs located in the area," as well as the "weather conditions on the day of the collision – illustrating it occurred on an evening in which there would have been no issue with [Baumia's] visibility." Although certainly prejudicial, as all crime scene photography would be, it did not substantially outweigh the probative value.⁸⁵

The Court then looked at the admission of the 911 call, made by one of the witnesses. It was admitted and played to the jury over the defense's objection. The Court agreed, however, that it provided a timeline, and also "gave the jury a more accurate description of what actually happened rather than just the recollections provided from those who were present that day." Finally, the Court reviewed the admission of witness testimony as to Baumia's consistent use of profane language after the crash. Even if it was error, however, the Court ruled it to be harmless.

Baumia's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

McAtee v. Com., 413 S.W.3d 608 (Ky. 2013)

FACTS: On July 9, 2009, Haskins was murdered in front of Beals's Louisville home. Beals was interviewed by Det. Trees (Louisville Metro PD) four days later and she related everything she'd seen. She identified the shooter as YG, who she knew from the neighborhood. Kilgore, Beals's neighbor, who had been with Beals at the time, was interviewed as well; he also identified the person involved in the altercation as YG, although he did not witness the actual shooting. He identified McAtee as YG in a photopak. McAtee was indicted for Murder and Tampering with Physical Evidence (for leaving the scene with the gun). At trial, both Beals and Kilgore claimed to have no memory of the events. Beals denied even having spoken to Det. Trees. Kilgore, at least, remembered Det. Trees, but recalled nothing of the interview or of having made the identification. Det. Trees was allowed to impeach both witnesses using the statements they'd provided to him, including a recording of Kilgore's interview.

McAtee was convicted and appealed.

ISSUE: May prior statements be introduced when the subject claims no memory of them?

HOLDING: Yes

DISCUSSION: With respect to the statements introduced by Det. Trees, Under KRE 801A(a)(1), "a statement is inconsistent ... whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."⁸⁶ Such "prior inconsistent statements may be introduced as

⁸⁵ See KRE 403.

⁸⁶ Brock v. Com., 947 S.W.2d 24 (Ky. 1997).

an impeachment device and as substantive evidence.”⁸⁷ The Court agreed that both statements qualified as “testimonial” pursuant to Crawford v. Washington⁸⁸ because there was no “ongoing emergency” and the “primary purposes of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” The Court stated the question is “whether despite his memory loss, an amnesic witness ‘appears at trial’ to the satisfaction of the Confrontation Clause.”⁸⁹ It noted that the Confrontation Clause only guaranteed an *opportunity* for cross-examination. The Court agreed that Crawford did not overrule Owens, which held that a witness appears when they “willingly take the stand, answers questions in whatever manner”⁹⁰ The Court agreed it was proper to allow Det. Trees to testify as to what Beals and Kilgore said to him.

The Court also addressed the tampering charge and noted there was no evidence that McAtee had done anything to deliberately conceal the gun by placing it in an unconventional location. (The Court noted that the police had only searched for the gun at the scene of the crime, some months later.) The Court agreed that under Mullins v. Com., simply leaving with a gun is not enough to trigger a Tampering charge.⁹¹ The Court reversed that conviction.

In addition, Dets. Willett and Leshar testified about their interrogation of McAtee. He had argued that since they admitted some of the recording of the questioning – the “rule of completeness”⁹² required that the entire recorded statement (three hours) be played for the jury. However, the Court concluded that in this case, McAtee was trying to get his entire statement (in which he maintained his innocence) before the jury without being subjected to cross-examination. The Court ruled, however, that defense counsel was “quite successful in exposing police interrogation techniques for their confession-inducing qualities” even without the entire recording being provided to the jury.

On an unrelated note, during deliberations, the jury asked to review Kilgore’s recorded statement and were provided with the DVD and a standard DVD player. However, the DVD player would not read the disc. At that point, the judge asked the prosecutor to “provide a ‘clean’ computer” to use. The prosecutor did so and also notified defense counsel that the request had been made. The Court agreed this process was in error, but held it to be harmless, because sending back the DVD was “akin to sending a witness back to the jury room.”⁹³ (An alternative proper way to do this would be to call all parties back to the courtroom and allow the jury to view it in that setting, instead.) The defendant’s actual confession, however, is always admissible.

The Court reversed the Tampering conviction but affirmed the Murder conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Johnson v. Com., 405 S.W.3d 439 (Ky. 2013)

FACTS: During her trial for child abuse and murder, Johnson argued it was improper to allow the prosecution to play recordings of three interrogations by Det. Allen over the course of the two days following the child’s death. The recordings included statements by the detective to the effect that she was lying and suggestions that he believed the story of another party more than hers. Johnson was convicted and appealed

⁸⁷ Jett v. Com., 436 S.W.2d 788 (Ky. 1969).

⁸⁸ Crawford v. Washington, 541 U.S. 36 (2004).

⁸⁹ McIntosh v. Com., (2008)

⁹⁰ U.S. v. Owens, 484 U.S. 554 (1988)

⁹¹ 350 S.W.3d 434 (Ky. 2011).

⁹² KRE 106

⁹³ See Berrier v. Bizet, 57 S.W.3d 271 (Ky. 2001).

ISSUE: Is it proper for one witness to be asked to give an opinion about the truth of another's testimony?

HOLDING: No

DISCUSSION: The Court agreed that it “has long been the law of this Commonwealth that a “witness's opinion about the truth of the testimony of another witness is not permitted That determination is within the exclusive province of the jury.”⁹⁴ However, it agreed that “[t]echnically speaking, however, when an officer makes statements during an interview accusing a person of lying, neither the officer nor the person is a witness at that time.” The Court looked to Lanham v. Com., in which it had previously “held that such statements are admissible.”⁹⁵ When a recording is played, however, the proper action to take is “for the trial court to supply an admonition, in order “to inform the jury that the officer's comments or statements are offered solely to provide context to the defendant's relevant responses.” Following the recording, the detective was asked to give his opinion as to the meaning of several of Johnson's statements, The Court agreed that his opinions were not relevant but did not find that it was unjust for it to have been given to the jury.

With respect to comments the officer made that arguably bolstered the testimony of another witness, the Court agreed that “[t]he law in the Commonwealth is clear that “a witness may not vouch for the truthfulness of another witness.”⁹⁶ The Court, however, noted that his statement “merely indicated that only one of the two stories [Johnson] told was consistent with Will Callahan's testimony.”

The court affirmed her convictions.

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESS

Oliver v. Com., 406 S.W.3d 437 (Ky. 2013)

FACTS: On September 16, 2010, Boggess (a cab driver) took Oliver from Lexington to Nicholasville. Upon arrival, Oliver “without warning and seemingly unprovoked, stabbed Boggess repeatedly through the driver's-side window and attempted to take cash from him before fleeing the scene on foot.” Officers arrived and quickly apprehended him.

Oliver was charged with Assault 1st and Robbery 1st. Oliver claimed that he stabbed Boggess in self-defense during a drug transaction. At trial, Det. Elder (Nicholasville PD) testified “about his involvement in the case, which included photographing and investigating the scene.” Elder explained that he observed blood on the interior of the driver's side door and the driver's seatbelt. When that was challenged as beyond the detective's knowledge, Elder was permitted to testify about his 19 years of training and experience, which included “the investigation of bloody crime scenes.” He was able to “identify distinct blood patterns, such as smears, droplets, and spatters.” The Court found that sufficient to allow Oliver to testify about it. The next day, when Elder was asked about his opinion as to what had happened. The defense asked for a Daubert⁹⁷ hearing during which Elder testified that he'd had “eighty hours of formal crime scene investigation training wherein he learned how to classify blood patterns based on the effect of various physical forces on the blood.” He had also been trained in homicide investigation. As a result, he was permitted to testify as an expert and stated that “he believed that Boggess was attacked inside the van.

Oliver was convicted and appealed.

⁹⁴ Moss v. Com., 949 S.W.2d 579 (Ky. 1997).

⁹⁵ 171 S.W.3d 14 (Ky. 2005),

⁹⁶ Stringer v. Com., 956 S.W.2d 883 (Ky. 1997).

⁹⁷ 509 U.S. 579 (1993).

ISSUE: May an officer qualify as an expert?

HOLDING: Yes

DISCUSSION: Oliver argued that it was improper to allow Elder to testify as an expert. The Court looked to KRE 702 and agreed that Elder was properly qualified as an expert by his “knowledge, skill, experience, training, or education.” As such, he was permitted to testify in the form of an opinion. The Court noted that “crime scene reconstruction analysis requires a more specialized level of knowledge than simply offering a lay opinion or an observation based on common sense.” However, in this case, “Elder possessed the requisite expertise to offer his opinion as to *where* the crime occurred.” Although Elder admitted he was not overly familiar with the “advanced calculations used to determine the velocity and angle the blood evidence traveled,” that was not critical in this case. The Court agreed his “formal crime scene investigation training as well as his nineteen years of investigative experience” was sufficient to qualify him to “offer his opinion concerning the location of the attack on Boggess.”

The Court also agreed that admitting evidence, though his own testimony, that Oliver owed substantial child support was proper, for the purpose of showing that he had a motive to commit a robbery.⁹⁸

Finally, Oliver argued that convicting him of both Assault 1st (KRS 508.010) and Robbery 1st (KRS 515.020) constituted Double Jeopardy. Oliver argued that serious physical injury, which is an element of the Assault charge, is a “natural consequence” of Robbery 1st, and that the “elements of the crime of assault are swallowed by the elements of the crime of robbery.” The Court compared the two charges and applied the Blockburger⁹⁹ test. It concluded that each charge includes elements that the other does not. Certainly, serious physical injury could result from the use of a deadly weapon or dangerous instrument during a robbery, but it is not an element of the crime of robbery.¹⁰⁰

The Court upheld Oliver’s convictions.

NOTE: Det. Elder completed the Basic Investigator Course and the Homicide Investigation course given by DOCJT.

TRIAL PROCEDURE / EVIDENCE – RIGHT TO SILENCE

Thomas v. Com., 2013 WL 1188030 (Ky. App. 2013)

FACTS: On March 10, 2010, Dublin answered a knock on his door. A masked man entered the home, looked around and left. Dublin tried to lock the door, but three more masked men entered, knocking him to the floor. They told him to sit in a chair and not move. He was threatened with a knife and when he grabbed for it, cut his finger. Finally they took \$110 from his wallet and left. Dublin called for help and Deputy Wyant (Hickman County SO) arrived.

Dublin identified one of the intruders as possibly being Smith, who he knew from work he’d done previously at Dublin’s house. Det. Miller, KSP, arrived and took over the investigation. He found Smith and interviewed him, and eventually, Smith implicated Crumble and Thomas. Crumble also implicated Thomas.

⁹⁸ KRE 404(b).

⁹⁹ Blockburger v. U.S., 284 U.S. 299 (1932).

¹⁰⁰ Robbery 1st has three distinct possibilities that elevate a Robbery to the first degree – and simply the presence of a deadly weapon or threat of the use of a dangerous instrument is sufficient.

Thomas was indicted for Complicity to commit Burglary, Robbery and Assault.¹⁰¹ He was convicted and appealed.

ISSUE: Is it improper to mention a person's not speaking to law enforcement at trial?

HOLDING: Yes

DISCUSSION: During the trial, Det. Miller was asked about his investigation. He related that once Thomas was identified as being involved, he tried to interview him, but Thomas refused to talk. Thomas requested a mistrial, arguing that Miller improperly referred to Thomas exercising his right to remain silent, which had also apparently been the subject of a motion in limine. The Court agreed that it is "well settled that the Commonwealth may not comment "in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody."¹⁰² However, apparently an admonition to the jury was not requested, and had it been, it presumably would have cured the issue. In addition, the testimony was not "devastating" to the defense, particularly in the context to which it was given, a summary of the investigation.

The Court upheld Thomas's convictions.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Ordway v. Com., 2013 WL 2257673 (Ky. 2013)

FACTS: Ordway was riding with two friends: Turner, who was driving, and Lewis, who was in the back seat behind Ordway. Both Turner and Lewis were armed; Ordway had drugs. Ordway later testified that Lewis put a gun to his head and threatened him to "give it up." Turner also had a gun out. Ordway said he gave them all his drugs but they were not satisfied. He smacked the gun from Lewis's hand and grabbed Turner's gun. He shot both of them and the vehicle crashed. Ordway got out and then saw that Lewis was also getting out, with a gun. Ordway grabbed the gun and shot Lewis with it, twice. The crash drew many witnesses, who testified as to what they saw. Many reported that Ordway reach back into the vehicle and shoot the other two. Two testified that Ordway approached their cars and tried to take them. (Ordway agreed he'd done so, but that he was only seeking help.) Emergency responders found Ordway "stumbling around in the middle of the road, talking to himself." Both shooting victims "were found buckled into their seat belts." During transport, Orway alternated 'between periods of screaming agitation and periods of non-responsiveness." He was restrained at the hospital.

Det. Wilson, Lexington PD, interviewed Ordway briefly. Ordway said he's shot the two men in self-defense and that they were his friends, but "somewhat inconsistently, that he did not really know them." Det. Wilson later testified that Ordway's "behavior in the aftermath of the shooting was not consistent with the behavior of the typical person who had acted in self-defense." Lewis was found to have fake crack cocaine ("fleece") in his pocket, but it was lost before testing. The police found ecstasy and marijuana in the vehicle. An audio recorder was also located in the vehicle and initially, Ordway's attorney was told there was nothing on it. Later, however, it was learned that there were comments captured on it that might be exculpatory. (He moved for a mistrial but was denied.)

Ultimately, Ordway was convicted and sentenced to death. He appealed.

ISSUE: May an officer testify as to how people typically behave?

¹⁰¹ A charge of participating in a criminal syndicate was dismissed prior to trial.

¹⁰² Hunt v. Com., 304 S.W.3d 15 (Ky. 2009); see also Doyle v. Ohio, 426 U.S. 610 (1976); Romans v. Com., 547 S.W.2d 128 (Ky. 1977).

HOLDING: No

DISCUSSION: Ordway argued that permitting Det. Wilson to testify how people might respond to a self-defense situation was improper. In his testimony, Det. Wilson “implied that he had unique expertise in how those who have lawfully engaged in self-protection act, and then authoritatively testified through opinion testimony that [Ordway], by the way he acted following the shootings, did not fit that profile.” The Court agreed that “the testimony was incompetent because it permitted the police detective “to authoritatively suggest how innocent persons behave after they lawfully engage in an act of self-defense, and to then, with some measure of certainty, exclude Appellant from that class of persons based upon his conduct following the shooting.”¹⁰³ The Court noted that it was improper to “introduce evidence of the habit of a class of individuals either to prove that another member of the class acted in the same way under similar circumstances or to prove that the person was a member of that class because he acted the same way under similar circumstances.”¹⁰⁴ It was permissible for a prosecutor to argue it, but the final decision must be left to the jury and not swayed by a witness urging the jury “to depend upon his apparent expertise as a police officer and his perception and opinion about matters outside the realm of common knowledge.” The Court does “not recognize as legitimate subjects of expert opinion, ‘how guilty people typically behave’ or ‘how innocent people do not act.’”¹⁰⁵ The Court concluded that “the opinion of an experienced and respected police detective that [Ordway’s] conduct did not match the stereo-typical conduct of an innocent person acting in self-defense authoritatively portrayed [Ordway’s] defense as a fabrication.” Finding that the testimony was “clearly devastating,” the Court agreed that it justified reversal.

The Court also looked at several other issues that arose. Ordway argued that Det. Wilson’s testimony that Ordway invoked his right to silence (rather profanely) was improper. The Court agreed that “the Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant’s silence once that defendant has been informed of his rights and taken into custody.”¹⁰⁶ The Court considers it “fundamentally unfair if the price of exercising the right to remain silence was the prejudicial effect of appearing to be uncooperative with police.” However, in this case, Ordway preempted the detective even reading the Miranda warnings (after which the “statement would indisputably have been inadmissible”) by blurting out his refusal to talk before he was given those warnings. Nevertheless, the Court agreed the evidence was irrelevant and should have been excluded.¹⁰⁷

The Court reversed Ordway’s conviction, but did rule on a number of other disputed issues in anticipation of retrial.

Stephenson v. Com., 2013 WL 3897421 (Ky. App. 2013)

FACTS: In March, 2009, McKee was an information making controlled buys for the KSP. McKee contacted Det. Clark, telling him he had a deal to buy 10 Oxycontin pills from Stephenson, who he knew as Castle. Det. Clark met with McKee, searched him, equipped him with a recording device and gave him cash. McKee entered to make the deal, but was unsuccessful. Stephenson contacted Perry to set up the transaction, and McKee rode with Stephenson to go to Perry’s home. Det. Clark followed.

When Stephenson went inside Perry’s home, McKee provided information to Clark about vehicles in Perry’s driveway. He also found information in the car that provided Stephenson’s real name, which corroborated

¹⁰³ See Johnson v. Com., 885 S.W.2d 951 (Ky. 1994).

¹⁰⁴ Miller v. Com., 77 S.W.3d 566 (Ky. 2002); KRE 406.

¹⁰⁵ Newkirk v. Com., 937 S.W.2d 690 (Ky. 1996).

¹⁰⁶ Doyle v. Ohio, 426 U.S. 610 (1976); Romans v. Com., 547 S.W.2d 128 (Ky. 1977); see also Miranda v. Arizona, 384 U.S. 436 (1966).

¹⁰⁷ The court discounted the argument that his refusal to talk exhibited guilt.

Clark's information as to who owned the vehicle. Stephenson emerged. He provided 10 pills to McKee, but also suggested that he had many more in his possession. The pills were confirmed to be Oxycontin.

Stephenson was indicted and went to trial. He was convicted and appealed.

ISSUE: Is testimony on prior crimes committed by the defendant admissible?

HOLDING: No (as a general rule)

DISCUSSION: Stephenson argued that the prosecutor impermissibly introduced evidence that indicated that he was under investigation for other drug crimes and had in fact been indicted on two other cases. The Court agreed this was improper and warranted reversal.

The Court also discussed the admission of the audio recording. It noted that this tape did not just include conversation between McKee and Stephenson but also narration of what McKee was observing. The Court stated that the "narrative statements made on the tape are clearly a description of past events, even though very recently past. They were not made in the context of an ongoing emergency and they were not made during the actual course of the drug buy as it was occurring."¹⁰⁸ The Court concluded however, that his would not, in itself, have warranted reversal.

The Court reversed Stephenson's conviction based on the first issue.

Morton v. Com., 2013 WL 2660364 (Ky. App. 2013)

FACTS: On December 16, 2010, a Super 8 hotel was robbed in Whitesburg. A man walked in and wandered around the lobby, receiving permission to use the restroom. Eventually he walked behind the desk and put a knife to the clerk's neck. Not happy with what was in the register, the robber forced the clerk into the office for more money. When he left, he told the clerk that if he called the police, he'd come back. The robber tried to force the clerk into a laundry room, but he refused. The clerk was able to run upstairs and the robber fled. The police arrived and the clerk provided a detailed description of the robber's clothing and that he had a "bushy goatee." The police searched the area and a nearby convenience store employee told them that Morton had been in a little earlier, wearing the same clothing. The money stolen was about \$500 in small bills. A photo from the store's surveillance camera was shown to the clerk, who identified him as the robber.

Later that night, the police stopped a vehicle pulling out of Morton's driveway. Morton was in the back, trying to "conceal a large number of \$1 and \$5 bills, as well as rubber bands, between the vehicle's seat cushions." He had taken off the identified toboggan and jacket, but was wearing the same shirt as described by the clerk. When taken back to the store, the clerk identified him. Without the toboggan, the clerk also recognized him as the son of a former manager/desk clerk, explaining his knowledge of how the hotel worked.

Morton was indicted for Robbery and Retaliating against a Participant.¹⁰⁹ He was convicted and appealed.

ISSUE: May officers give specific testimony as to an "ultimate issue" in a trial?

HOLDING: No

DISCUSSION: Morton argued that testimony given by officers entitled him to a mistrial. Officer Slone testified that Morton's clothing matched the description of the clerk. The defense objected, arguing

¹⁰⁸ See Baker v. Com., 234 S.W.3d 389 (Ky. App. 2007).

¹⁰⁹ A Theft charge was dismissed.

that was a question for the jury. The next witness, Chief Fields, testified that he had concluded, based upon investigation, that Morton was the robber, based on the clothing description . Again, the defense objected on the “ultimate issue” and the judge admonished the jury to disregard that testimony. The Court agreed that “in general, a witness’s opinion that a defendant is guilty is not admissible at trial.”¹¹⁰ The Court agreed, however, that Officer Slone’s comments were simply cumulative, as the clerk testified to the same thing. Further, the Court assumed that the jury would follow the admonition.¹¹¹ The Court agreed the error, if any, was harmless.

The Court did agree, however, that he should have received a directed verdict on the Retaliating charge, as the facts clearly did not apply to that offense.

TRIAL PROCEDURE / EVIDENCE – AUTHENTICATION

Simmons v. Com., 2013 WL 674721 (Ky. 2013)

FACTS: Simmons’s recently departed girlfriend, Tiffany, accessed his Facebook account and “discovered sexually suggestive messages between Simmons and E.J. “ She told her father and brother, and they discovered that E.J. was a middle school student (presumably under 16). They printed out the Facebook messages and contacted CPS. Det. Knoll (McCracken County agency) contacted Facebook with a search warrant and received official records of the messages sent. He interviewed E.J. who explained that she had met Simmons during a weekend family visit and that they eventually had sex during that weekend. She had deleted additional text messages from her phone but had recorded them in her diary.

Simmons was indicted for Sexual Abuse, Sodomy 3d and Rape 3d. The messages were introduced against him and he was ultimately convicted. Simmons appealed.

ISSUE: Must writings be authenticated to be admitted at trial?

HOLDING: Yes

DISCUSSION: Simmons argued that the admission of the “unauthenticated communications” violated KRE 901 and 1002. With respect to the text messages, the Court noted that E.J. read them into the record but her diary was not introduced into evidence. As such, they were used to refresh her recollection as to the exact text of the messages, a proper exception to the hearsay rule (KRE 803). With respect to the Facebook messages, Simmons argued they were not authenticated. The Court noted that since they were admitted, a proper foundation would have been needed. The Court noted that the initial printout and the information received by search warrant “contained essentially the same information.” E.J. testified that those were the messages she received, the girlfriend’s father agreed they were the messages he accessed and printed out and Det. Knoll testified that the printouts were the ones he received pursuant to the search warrant. The Court agreed that ‘a writing’s content, taken in conjunction with the circumstances, can be relied upon in determining authentication.’ Once the judge, as gatekeeper admits it, it falls to the jury to determine the credibility of the writing. The Court agreed the messages were properly admitted.

Simmons’ convictions were affirmed.

¹¹⁰ Nugent v. Com., 639 S.W.2d 763 (Ky. 1982).

¹¹¹ Johnson v. Com., 105 S.W.3d 430 (Ky. 2006).

TRIAL PROCEDURE/ EVIDENCE – ESCAPE

Mapel v. Com., 2013 WL 132573 (Ky. App. 2013)

FACTS: On October 16, 2008, Mapel, an inmate at the Montgomery County Regional Jail, was helping unload a delivery. He disappeared but was apprehended the next day by KSP. At trial, Deputy Jailer Daniels and Jailer Myers were asked if Mapel had escaped. Over objection that word suggested a legal conclusion, Daniels was allowed to state that Mapel escaped. Jailer Myers also testified he'd been told that Mapel had escaped.

Mapel was convicted and appealed.

ISSUE: Is the use of the term “escape” permitted to describe a prisoner’s action?

HOLDING: Yes

DISCUSSION: Mapel argued that both gave “inadmissible opinion testimony regarding the ultimate issue of fact” – that he “escaped.” The Court noted that under KRE 701, a non-expert witness may testify to those things that rationally based on their own perception” and within their personal knowledge. In this case, neither made express conclusions “as to how Mapel’s conduct conformed to the legal definition of escape,” they simply used the term as non-experts would do so.

Mapel’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Cornelius v. Com., 2013 WL 45265 (Ky. App. 2013)

FACTS: On October 9, 2010, Officer Creason (unidentified Bullitt County agency) spotted Cornelius’s vehicle cross the center line. He observed additional erratic driving and attempted a traffic stop, but Cornelius continued driving onto I-65, reaching speeds of 100 miles per hour. Eventually, they entered Louisville and got onto the Watterson Expressway. Finally, the vehicle stopped and the passenger fled. The officers apprehended Cornelius, the driver, who claimed the passenger “had hit him in the face with a gun and had forced him to keep driving.” The passenger was never identified.

Cornelius was indicted on Fleeing and Evading and related charges. He was convicted and appealed.

ISSUE: Must all law enforcement reports be provided to the prosecution prior to trial?

HOLDING: Yes

DISCUSSION: Cornelius argued that he was entitled to a dismissal because at trial, it became clear that Officer Creason had prepared a report that had not been provided to Cornelius prior to trial. The Commonwealth had informed the Court, when the matter arose, that it was unaware of the report. It was subsequently provided. At that point, the Court had offered a mistrial, which Cornelius did not want, and the Court stated that if he wanted to continue, he would have to waive objections to the report. The Court agreed that his decision to go forward did, in fact, waive any objections to the report, particularly since the Court had agreed that there was a discovery violation. (In fact, the denial to accept a mistrial was a strategic defense decision.)

Cornelius also argued that the elements were not proven for Fleeing and Evading 1st, as no substantial risk of injury was proven. The Court disagreed, noting that the officers testified there were other cars on the road and that at one point, Cornelius had veered into Creason's lane.

The Court upheld his conviction.

TRIAL PROCEDURE/ EVIDENCE – RULE 7.24

Price v. Com., 2013 WL 191189 (Ky. App. 2013)

FACTS: On May 3, 2010, a teacher for Price's minor child, in Boone County, saw bruises on the child. The teacher contacted CHFS, which responded, along with Det. Stahl (Boone County SO). Both Price and the child were taken to the station that evening and interviewed separately. Price admitting to spanking the child, but the child said that Sanders, her mother's boyfriend, did it.¹¹²

Price was indicted on Criminal Abuse 1st. The teacher testified to an earlier injury, a black eye, that she'd also reported. The child testified that both Price and Sanders had beaten her. Sanders testified that both he and Price had beaten the child. Price admitted spanking but denied everything else. Price was convicted and appealed.

ISSUE: Must oral incriminating statements be provided in discovery?

HOLDING: Yes

DISCUSSION: Price argued that the teacher should not have been permitted to testify because the prosecution "disclosed the substance of her testimony only five days prior to the trial." The prosecution had been ordered to provide discovery under RCr 7.24, which requires that any oral incriminating statements be provided. However, the teacher's statement did not include any such statements and 7.26, which requires all statements no later than 48 hours prior to trial, controlled instead. The information was provided five days before the trial and thus was timely.

Price's conviction was affirmed.

Curtis v. Com., 2013 WL 4508006 (Ky. App. 2013)

FACTS: Curtis was convicted on one charge count of Trafficking and acquitted on a second. Prior to the trial, however, the Court had ordered the Commonwealth to "disclose incriminating statements pursuant to" RCr 7.24. The prosecutor filed two discovery responses, each over 15 pages, and a CD. However, the material did not explain how Curtis's true identify was obtained, as he was only identified by aliases in the material. At trial, an officer explained how he'd gone to a location where Curtis's vehicle was parked and obtained his information under the pretense that the vehicle had been involved in a hit and run. This information was only produced at trial. The defense argued against its admission, but it was admitted.

Curtis appealed.

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

HOLDING: Yes

¹¹² Sanders pled guilty to Criminal Abuse 1st.

DISCUSSION: The Court looked to RCr 7.24 and Chestnut v. Com.¹¹³ which required the disclosure of “the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness.” During the trial, the defense had used the strategy of mistaken identity, which it likely would not have pursued had they known about the identification. However, defense counsel was aware of the identification issue and it is unlikely the result of the trial would have been different.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – LAB REPORTS

Stambaugh v. Com., 2013 WL 645746 (Ky. App. 2013)

FACTS: On January 13, 2010, Stambaugh found her grandson, Draven, 5 months, dead in his crib. Her daughter, Heather, and Draven, lived with her. She called EMS, telling the EMTs that she’d given Draven “some children’s medicine for allergy relief.” Draven was later found to have toxic levels of diphenhydramine (Benadryl) and carisprodol (Soma, a prescription pain reliever). Both Stambaugh and Heather were charged with Manslaughter, 2nd. Stambaugh was convicted and appealed.

ISSUE: Are toxicology tests done during a routine autopsy admissible when introduced by someone other than the actual technician?

HOLDING: Yes

DISCUSSION: Stambaugh argued it was improper to introduce the toxicology report regarding the Soma. The test was done at AIT Laboratories (in Indianapolis) at the behest of the Kentucky Medical Examiner. Neither toxicologist that testified had “personally identified the Soma in the tests.” The Court noted that the test was not done for the purpose of proving a fact at trial, but was done as part of a routine autopsy. There was no indication of a crime until the tests came back. Although the witness did not perform the test, he did review the report, which was based completely on computer printouts.

Further, the Court agreed the diphenhydramine, which Stambaugh admitted to having given Draven, was fatal on its own. Other witnesses testified that Stambaugh had talked about giving the baby Benadryl and that her daughter had hidden it on occasion, trying to prevent her from doing so.

The Court agreed the admission of the testimony was proper.

TRIAL PROCEDURE / EVIDENCE - BRADY

Browning v. Com., 2013 WL 4680486 (Ky. 2013)

FACTS: Browning, his wife Nicole, their four children and Nicole’s parents shared a trailer in Bullitt County. At some point, in 2010, Nicole became suspicious that Browning was engaging in an inappropriate relationship with their pre-teen daughter, G.B. She placed a digital recorder under the bed before she left the house with the other three children. When she returned and checked the recorder, she heard suspicious activity on the recording. She took G.B. to the Bullitt County Sheriff’s Office where she was interviewed. G.B. admitted having had oral sex with her father and that he’d attempted intercourse.

Browning was charged with Sexual Abuse, Unlawful Transaction with a Minor, Incest and PFO (on the basis of a prior child support conviction). Over the course of the pretrial, Browning requested dismissal based

¹¹³ 250 S.W.3d 288 (Ky. 2008).

upon the alleged failure of the prosecution to produce requested discovery. A few weeks before trial, the discovery material was reviewed by the Court and then passed on to Browning. The Court denied his request to delay the trial. The Commonwealth continued to provide discovery right up into the week before trial, and again, Browning requested and was denied a delay. During the trial, Browning learned that G.B. had been undergoing counseling (which allegedly the prosecution knew nothing about), and that he'd gotten no records of it. The trial court denied the motion, stating that he hadn't asked for them. During the testimony of a CHFS investigator, Browning further learned that they also had documents which had not been provided to him. The Court recessed the trial to allow Browning time to review them. When the Court reconvened a few days later, Browning again demanded a dismissal or a retrial. Finding that some records had, in fact, not been provided as required, the Court declared a mistrial.

Browning's case was retried a few months later. He was convicted and appealed.

ISSUE: Does a failure to get requested records require reversal?

HOLDING: Not always

DISCUSSION: Browning objected to the use of his statement following his arrest. He alleged that one of the deputies choked him to the point of unconsciousness and that he confessed to "stop this abuse." He stated he was coached by the deputies as to what to say. He did not report this to the jail (and signed a form that indicated he had no injuries) – but he said he didn't read the document before he signed it. (The deputy jailer who did the intake stated he reviewed the forms with Browning and did not notice any injuries.) Sheriff Tinnell testified that he was present at the first, brief, interview and that he explained Browning's rights. The waiver was signed in the Sheriff's office. Deputy Fowler testified that he made the arrest and that Browning was never placed in a holding cell (as he alleged). Det. Cook testified that he interviewed Browning and took a video statement, but that he did not choke (or observe anyone choking) Browning. He also stated that he did not tell Browning what to say. The Court agreed that Browning's statement was voluntary and not as the result of any coercion.

The Court further determined that although he did not get all of the records to which he was entitled, it was not due to the bad faith of the prosecution. (Partially, in fact, it was the Court's error, as it failed to review and pass on the records in a timely manner.) Browning also objected to the Deputy Jailer introducing the intake form about which he was testifying. The Court agreed that it was proper to allow him to do so, even though he was not the "official custodian" of the record. He prepared the form, "had knowledge that the form was what it purported to be and he was qualified to authenticate it."¹¹⁴

The Court affirmed the decision.

Tramble v. Com., 409 S.W. 3d 333 (Ky. 2013)

FACTS: In February, 2009, Postal Inspector O'Neill was investigating marijuana being transported through the Cincinnati post office. She was focusing on Cottrell and through that investigation, learned about Tramble. In August, she got a call from Deputy Kappes (Boone County SO) about a package being mailed to a PO box in Crescent Springs, in Tramble's name. A warrant was obtained; the package was intercepted and opened. It contained over two pounds of marijuana. The package was rewrapped and eventually handed over the Tramble by a deputy posing as a clerk. Tramble was stopped as she left the post office and admitted she knew the package, and a second one that she picked up, contained marijuana. She was supposed to deliver both – totaling 17 pounds - to Cottrell. She offered to cooperate but it could not be set up with Cincinnati, so she was charged with Trafficking. At trial, she argued that she did not know the packages contained marijuana.

¹¹⁴ KRE 901(b)(1). See also KRE 801A(b) and 803(6).

Tramble was convicted and appealed. The Court of Appeals overturned her conviction and the Commonwealth appealed.

ISSUE: Are prior bad acts admissible?

HOLDING: Yes

DISCUSSION: The Court of Appeals had ruled it was improper to admit evidence that “other than the one charged” there had been other occasions where marijuana had been mailed to Tramble. The Supreme Court noted that her argument at trial was that she did not know the packages contained marijuana and it was proper to refute that with evidence that she’d previously accepted marijuana. As such, such “prior bad act” evidence was admissible to prove the mental state in the charged offense – knowingly.¹¹⁵ Further, the Court agreed that evidence of the Cottrell investigation was also admissible, as his “prior scheme to traffic in drugs” fit within the exception as well.

Tramble’s conviction was reinstated.

TRIAL PROCEDURE / EVIDENCE – AGE

Rodriguez v. Com., 396 S.W.3d 916 (Ky. 2013)

FACTS: Rodriguez was indicted for Incest with respect to his daughter, which began when the girl was 8 (in 2005) and continued until his arrest in 2010. At trial, the question of her age was not actually addressed – and is a factor in determining sentencing since Incest is a Class A felony when committed on a victim under 12.

Rodriguez was convicted and appealed.

ISSUE: Is proof of age important in an Incest case?

HOLDING: Yes

DISCUSSION: The Court agreed that the evidence, when considered in toto, indicated that the child testified that the sex began when she was 8, a fact to which Rodriguez had admitted in a taped interview as well.

With respect to his sentencing, however, the Court noted that the indictment charged him only with a single class of incest. Because the victim passed the age of 12 during the five years in question, the jury was not given the opportunity to indicate at what point they believed that single charged act occurred. As such, although convicted, it was not clear that the jury verdict was unanimous that the act of incest occurred before the child turned 12.

Rodriguez’s conviction was reversed and the case remanded.

¹¹⁵ KRE 404(b).

TRIAL PROCEDURE / EVIDENCE – JURY

McGaha v. Com., 414 S.W.3d 1 (Ky. 2013)

FACTS: McGaha and Cowan were neighbors in Adair County, and engaged in a “series of disputes.” Most recently, Cowan objected to a light on McGaha’s storage building that “annoyed him.” When police arrived in response to a complaint, “Cowan and his wife became belligerent” and were arrested. The next day, Cowan was out riding on his ATV when he encountered McGaha. McGaha “steered directly into [Cowan’s] ATV without braking,” knocking Cowan off the vehicle and causing a serious, likely fatal, injury. Moments later, McGaha then shot Cowan in the head with a shotgun.

McGaha was charged with Murder. He admitted he killed Cowan, but claimed self-defense. He presented evidence “of Cowan’s threats, harassment, and intimidation toward” McGaha and his family. He also testified that Cowan had pointed a gun at his on a previous occasion, that he knew Cowan had a gun with him on the ATV and that he pointed it at McGaha that day. McGaha claimed that he rammed the ATV because of that. Further, he stated that he demanded Cowan show his hands, as he lay on the ground, and that Cowan made verbal threats. He shot him in response to a perceived threat.

McGaha was convicted, and appealed.

ISSUE: Does being a Facebook friend require someone to be excluded from a jury?

HOLDING: No (but should be disclosed)

DISCUSSION: McGaha argued that one of the jurors failed to disclose that “she was a Facebook ‘friend’ of the victim’s wife.” The juror had admitted that she casually knew some of the Cowan family, but that they weren’t close. No question was asked about “any social media relationship[s].” (The juror had 629 Facebook friends.) The court agreed, however, that her disclosure was responsive to the question asked and was truthful. McGaha could have asked additional questions of the juror but chose not to do so.

The Court agreed that “it is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonable be presumed.”¹¹⁶ Further, “[F]riendships’ on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire.”

The Court affirmed McGaha’s conviction.

Mayse v. Com., 422 S.W.3d 223 (Ky. 2013)

FACTS: In January, 2009, Mayse used a phone chat line to lure Davis to her home, under the “guise of a sexual encounter” in Kenton County. Instead, however, she was conspiring with Hartbarger and Parker to rob Davis. Davis was attacked and a “fierce melee ensued.” Davis tried to escape by jumping out of an upstairs window but was unsuccessful. Cooke entered and assisted the others in holding Davis down while he was beaten to death. At some point, \$20 was taken from Davis’s wallet by Parker. The body was transported to an isolated location and set on fire.

Mayse was charged with Complicity to Murder and Robbery. She was convicted and appealed.

ISSUE: Should items not admitted as evidence be provided to the jury?

¹¹⁶ Sluss v. Com., 381 S.W.3d 215 (Ky. 2012).

HOLDING: No

DISCUSSION: Among a myriad of issues, Mayse argued that several proffered defense exhibits that were never properly admitted were given with the evidence that was provided to the jury for review. The jury, realizing that they had evidence had not been given to them at trial, asked the judge for direction. They were brought back into the courtroom and strongly admonished to disregard the items. The Court noted that the jury's time with the items was brief and that they agreed that hadn't even looked at one of the items. (Ironically, both were exhibits the defense itself was trying to get before the jury.)

The Court agreed it was proper not to give a mistrial based on the error, but cautioned that "with the disappearance of court reporters in this state," the vigilance to ensure that the proper exhibits go into the jury room falls squarely on the trial judge.

The Court affirmed Mayse's convictions.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

Minter v. Com., 415 S.W.3d 614 (Ky. 2013)

FACTS: Minter attended a party at a Madison County apartment. Griffin and his girlfriend, Beth, also attended. They all became intoxicated. Beth asked Minter to help her get Griffin back to their next door apartment. Beth then returned to the party. Griffin later testified that Minter sodomized him. Afterwards, Griffin called police and went to the hospital, where a rape kit was performed. The results were a positive match for Minter.

Minter was indicted 17 months later for Sodomy, Burglary and Assault, and just prior to trial, the charge of PFO was added. At trial, Minter argued that the sexual encounter was consensual. Minter was convicted and appealed.

ISSUE: Does the Rape Shield law prevent introduction of most prior sexual conduct by the victim?

HOLDING: Yes

DISCUSSION: First, Minter argued that the burglary conviction was invalid, because it failed to establish that he had the intent to commit a crime necessary for the charge. The court disagreed, ruling that even if he was permitted in by Beth, that it was proper for the jury to credit Griffin's testimony that he told Minter to leave. In addition, Minter had argued that he was kept from presenting a complete defense, by showing that Griffin "had on other occasions engaged in homosexual activity." He attempted to do so using another witness testifying as to what Beth had told the witness, that she had caught Griffin in sexual acts with men. The Court agreed that to admit the testimony was generally prohibited under KRE 412, the "Rape Shield Law." Although there are exceptions, none applied in this case. The Court agreed that evidence that would indicate "prior sexual behaviors that have no relevance to the offense on trial except to case a negative light upon the alleged victim" was generally inadmissible. Whether he had, or not, engaged in prior consensual homosexual activity was not a factor in the case. The Court agreed that KRE 412 was properly applied.

Minter's convictions were upheld.

TRIAL PROCEDURE / EVIDENCE – INVESTIGATIVE HEARSAY

McDaniel v. Com., 415 S.W.3d 643 (Ky. 2013)

FACTS: On the night in question, McDaniel was accused of shooting Washington and Henderson. He was charged with Assault 1st for both victims. During the trial, two witnesses testified in explanation of prior inconsistent statements made by one, Washington, in the context of viewing a photo array. During that process, Washington was equivocal in his identification of McDaniel as the shooter, in contrast to his “more assured” identification at trial. Det. Warner also testified as to the circumstances of the identification and that he believed the Washington feared retaliation for making identification. He was convicted and appealed.

ISSUE: Is “investigative hearsay” admissible?

HOLDING: No (but see discussion)

DISCUSSION: McDaniel argued that he was entitled to a limiting instruction to the jury, cautioning them to use the testimony of the two witnesses only for the purpose of the explanation of the prior inconsistent statement. He also argued that Warner’s comments, in which he also discussed Washington’s fear, was inadmissible investigative hearsay.

The Court noted that “investigative hearsay” is a “misnomer . . . derived from an attempt to create a hearsay exception permitting *law enforcement officers* to testify to the results of their investigations.”¹¹⁷ The Court had rejected the concept in a line of cases started with *Sanborn v. Com.*¹¹⁸ The Court noted that it applies under the “verbal acts doctrine,” which provides that testimony is nonhearsay when it is “not admitted for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place.” The Court, however, admitted Warner’s description under the “hearsay exception for then-existing state of mind (Washington’s fear).”¹¹⁹

The Court did, however, find “especially troubling” Warner’s statement that he knew Washington “was pretty sure he knew who the person was.” Although not specifically vouching, or “bolstering,” Washington’s identification, it was “still improper because he gave lay opinion testimony as to what another witness meant by what he said out of court.”¹²⁰ However, the Court did not find it so erroneous as to warrant reversal, as Washington’s fear of retaliation appeared more general in nature, and not directed specifically toward McDaniel.

McDaniel argued, as well, that he was improperly charged with respect to the injuries Henderson sustained – a through and through gunshot wound to the wrist. No medical testimony was presented but the injury was apparently treated in the emergency room and she was sent home, and she told others that the pain lasted only a few days. She testified at trial that she did not lose the use of her hand for any length of time, although she did use a “stress ball” to get her strength back. The Court agreed that the injury did not appear, from the evidence presented, to be a “serious physical injury” nor did she suffer a serious and prolonged disfigurement or prolonged impairment of health – she ended up with only a small scar. As such, Assault 1st was not appropriate and that conviction was reversed.

¹¹⁷ *Nall v. Com.*, No. 2007-SC-000189-MR (Ky. 2008).

¹¹⁸ 754 S.W.2d 534 (Ky. 1998).

¹¹⁹ KRE 803(3).

¹²⁰ *Tamme v. Com.* 973 S.W.2d 13, 34-35 (Ky. 1988); *see also Thacker v. Com.*, No. 2004-SC-000517-MR, 2005 WL 2675001 (Ky. 2005)

Wise v. Com., 422 S.W.3d 262 (Ky. 2013)

FACTS: On June 8, 2011, Wise found her husband dead in their bed in Taylor County. The Coroner initially believed the man had died of a heart attack, but a lab test indicated a morphine overdose. The Coroner communicated this to the Sheriff's Office and Deputy Pickard interviewed Wise about it. He also learned that Wise was a nurse and had the responsibility for destroying unneeded narcotics at her place of employment. He interviewed her again, after giving her Miranda warnings. She signed a waiver. She repeated her story (that her husband had been ill but refused to go to the hospital, and that she'd given him a nitro pill) and agreed to take a polygraph in Louisville.

At the exam, she signed a waiver. The examiner told her that she'd "reacted" to the exam and told her "This is your opportunity to tell the truth." She admitted that she'd taken morphine home and given it to her husband in his drinking glass. None of these statements were recorded, as was required by policy. Pursuant to policy, the questioning was turned by over to Taylor County deputies, who were watching from another room. That interaction was recorded and she acknowledged the prior Miranda warning. She said she'd given him the morphine but didn't intend to kill him, only to "get some peace" that night from arguing with him.

Wise was arrested and charged with Murder. She moved for suppression, which was denied. She was convicted of intentional murder and appealed.

ISSUE: Does an initial waiver for polygraph testing extend to post-polygraph questioning?

HOLDING: Yes

DISCUSSION: The Court divided the interactions into three parts. First, the Court looked at the pre-polygraph Miranda warnings and waiver, in which she signed a form acknowledging that she'd received the warnings. Although the form was not read to her, she'd admitted that she was literate and college-educated. She'd had an opportunity to read it and ask questions. Her signature "amounted to an *implied* waiver." Further, the Court agreed that she had to be aware that "she was making incriminating statements." "The nature of an implied waiver – depending as it does on the defendant's knowledge of her rights and action inconsistent with an exercise of those rights – necessarily makes it a knowing waiver." There was no evidence that she was "intimidated, coerced or deceived into making her initial waiver."

With respect to her post-polygraph questioning, Wise argued that the form she signed was restricted to the polygraph only. She was actually interviewed after the polygraph twice, the first, briefly, by the examiner and later, by the Taylor County deputies. The Court noted that her waiver "came from her deliberate and continuing choice to act in a manner inconsistent with her rights once she had been advised of them."

In Wyrick v. Fields, the Court noted that an initial waiver extends to post polygraph questioning.¹²¹ Consistent with that opinion, Wise was questioned by the examiner in the same room as where she'd taken the exam. With respect to the second interview, the Court noted she'd been reminded of the form and asked if she'd signed it. The Court agreed the deputy could have been more direct, but the interview was part of a continuous process. The Court agreed her confession was properly admitted

Wise's conviction was upheld.

¹²¹ 459 U.S. 42 (1982).

TRIAL PROCEDURE – PRIVILEGED MATERIAL

Brown v. Com., 416 S.W. 3d 302 (Ky. 2013)

FACTS: On August 17, 2010, Brown agreed to sell Curd a large quantity of marijuana, something he'd done before. They agreed to meet at a location in Louisville. Brown asked for a ride from Grice. When they arrived, he got into Curd's vehicle, and was "immediately surprised" to see another man in the car, Talbert. Talbert expressed concern about Grice, who was in the vehicle next to them. In response, Curd drove off. At some point during this "surprise excursion," Talbert pulled a gun and pointed it at Brown. Curd stopped the car and Brown jumped out, leaving the marijuana behind. He did stop to try to get his cell phone, which he'd dropped.

At this point, the situation was in dispute. Brown maintained that Talbert ordered him back to the car and that he drew his own gun and began shooting at the vehicle. Curd drove off, and Brown continued to shoot. He hit Talbert, and Talbert subsequently died, and he also hit a nearby house.

Brown was indicted for murder, possession of the firearm, wanton endangerment and tampering. He was later charged with trafficking in marijuana over five pounds, and the firearms case dismissed. During the trial process, Brown sent several letters to local media outlets, claiming to be "unjustly imprisoned." He also made numerous admissions in the letters. The Commonwealth was unable to get the original letters by a subpoena to the media outlets and elected to seek a search warrant for his cell. Louisville Metro Corrections officers searched his cell and seized 42 documents, which were given to the detective in the case. She emailed scans of the documents seized to the prosecutor and the defense counsel. Brown requested an in camera review by the judge, who subsequently sealed 24 of the documents as being protected by attorney-client privilege. The detective was prohibited from discussing the contents of the material with anyone. Brown moved to dismiss the indictments and was denied. He was convicted and appealed.

ISSUE May items be seized from a jail cell, even if potentially privileged?

HOLDING: Yes

DISCUSSION: The Court looked to the case of Weatherford v. Bursey¹²², for guidance on the issue of seizing potentially privileged material from a jail cell, and whether it violates that individual's right to counsel. In U.S. v. Steel, the Court detailed the four factors to consider:

- 1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was the result of other inadvertent occurrences; 2) whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant's intrusion; 3) whether any information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and 4) whether the details about trial preparations were learned by the government.¹²³

The Court agreed the detective's motive was proper, although the court doubted that the originals were, in fact, needed. The warrant specifically excluded privileged documents, but the "officer who conducted the search testified that he had no training to distinguish between legal documents and other documents" – he simply collected everything. There was no prejudice shown by the seizure of the documents.

In addition, Brown argued that he was questioned after he requested an attorney. They Court reviewed the recording and agreed that while Brown mentioned an attorney, his request was ambiguous, couched in terms

¹²² 429 U.S. 545 (1977),

¹²³ 727 F.2d 580 (6th Cir. 1984).

of “if” he wanted an attorney, asking how long it would take. From context, the Court garnered that Brown “only desired an attorney if the attorney could appear without delay.”

Another issue arose with respect to the Commonwealth’s use of an expert witness. The prosecution called a detective to testify with respect to a ballistics issue. No notice had been given to the defense and the Court agreed to delay the testimony until the next morning. It was argued that RCr 7.24 was violated by the Commonwealth failing to disclose the “identity of its expert witness along with the expert’s anticipated testimony.” However, the Court agreed, the defense did not request that information in writing, as required. The Court also ruled that the detective was testifying “based solely on their training and experience, not on scientific data.” As such, the Court agreed that the detective’s testimony was properly admitted as expert.

Finally, the court addressed the admission of a portion of “The First 48” being admitted. In the clip, Brown “looked at the cameras with an at-ease demeanor and said “Hello America,’ and expressed that he was a fan of the show.” The Court agreed this was relevant to rebut Brown’s prior testimony that he was nervous was arrested and was “afraid he had left his girlfriend and child in danger.” The Court agreed that the error, if any, was harmless.

In addition, Brown argued that the Commonwealth failed to redact portions of his recorded interview, although when given the final transcript to review, the defense council did not inform the trial court that requested redactions had not been made. As such, the interview that was played for the jury included a statement by one of the interviewing detectives as to what she thought Brown should have done (in effect, not go after the car and continue shooting). The Court agreed that it was “likely improper,” but ruled that it did not believe it was critical to the resolution of the trial.

The Court affirmed Brown’s conviction.

TRIAL PROCEDURE / EVIDENCE – GRAND JURY

Com. v. Royse, 2013 WL 5436523 (Ky. App. 2013)

FACTS: Royse was indicated for neglect in a case involved a resident of a nursing facility in which she worked. Ultimately, however, the case was dismissed because the inspector made false and misleading statements to the Grand Jury. The case was originally dismissed with prejudice but was later changed to without prejudice. The Commonwealth appealed the dismissal.

ISSUE: Does an incomplete presentation of the facts to the Grand Jury lead to an invalidation of the indictment?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that there was no demonstration that the investigator did “knowingly or intentionally presented false, misleading, or perjured testimony to the grand jury.” The Court looked to the specific facts available to the trial court and agreed that there were material facts not provided to the Grand Jury. The Court agreed that the jury was misled and that “simple mistakes and misunderstandings” were “made to appear to be conduct constituting a felony charge.”

The Court agreed that a dismissal was proper under the circumstances.

WORKERS' COMPENSATION

KSP v. McCray, 2013 WL 5864401 (Ky. App. 2013)

FACTS: In April, 2012, Trooper McCray (KSP) filed a report of injury form indicating that he suffered psychological trauma and severe PTSD as a result of an officer-involved shooting in which he was involved in 2009, and in which he'd killed a man. He was not physically injured during the incident. The administrative board ruled that whether he'd suffered a compensable issue was the contested issue. McCray testified as to the distress he'd suffered following the shooting. He agreed he has suffered no physical injury, but stated he stopped working in 2010 because of rage and anger issues related to the event. His psychologists testified as to his total disability. The ALJ looked to KRS 342 and ruled that a compensable injury required some physical trauma and a "harmful change in the human organism that is evidenced by objective medical findings." Psychological harm must result from physical trauma. McCray appealed the ruling to the Workers' Compensation Board, which vacated and remanded the matter, with the Board ruling that an "injury" under KRS 342.0011(1) does not require physical contact.

The KSP appealed.

ISSUE: Is PTSD a compensable injury in Kentucky?

HOLDING: No

DISCUSSION: The Court looked to the statute and agreed that it was "clear from the plain and unambiguous language that an 'injury' for purposes of KRS Chapter 342" requires an actual physical injury, and a claim for any psychological trauma must be as a "direct result of a physical injury." As McCray "candidly acknowledged" that he suffered no physical injury. As such, his psychological trauma could not be compensated under KRS 342. The decision of the WCB was reversed.

NOTE: In a strong concurring opinion, the Court noted that this situation is a "patent disgrace" and "cries out for a statutory revision."

OPEN RECORDS

City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013)

FACTS: In 2007, McCafferty was accused of shooting her husband in Fort Thomas, and ultimately, was convicted of Manslaughter. She agreed to waive any appeal in exchange for a promise of the possibility of parole after serving twenty percent of an 18 year sentence. Two recordings were made during the investigation by law enforcement. Following her conviction, but prior to sentencing, a local TV station obtained the two recordings, with portions redacted containing footage of the interior of the house – the City claimed that was an unwarranted invasion of the family's privacy. Three weeks later, the Enquirer requested the same records and was denied completely, with the City invoking the law enforcement exemption. The City claimed that since McCafferty could still take a collateral attack on her conviction, the case was not yet over.

In proceedings before the Attorney General, the Campbell Circuit Court and the Kentucky Court of Appeals, the newspaper argued that the enforcement proceeding against McCafferty was, in fact, complete due to her sentencing agreement. And, even if by chance she could raise an issue, the "law enforcement exemption applies only to disclosures that would 'harm' the agency in such a proceeding," and no such harm had been demonstrated. This was "especially and patently so with respect" to what had been released in discovery and shown in trial, and that which had already been released to the TV station. Although agreeing that the newspaper was entitled to what had been given to the TV station, the Court sided with the City on everything

else, finding that there was a possibility (however low) of a collateral challenge. The Court of Appeals agreed that, pursuant to Skaggs v. Redford,¹²⁴ Kentucky’s interest in prosecuting McCafferty “is not terminated until [her] sentence has been carried out.” However, the Court of Appeals ruled that the “harm” element required “a definite and substantial showing by the agency that release of the requested records would interfere with a prospective enforcement proceedings, i.e., a showing more definite and substantial than the generalized and purely speculative harms the City had so far adduced.” It remanded the case back for a “more particularized consideration” and the release of any records that did not meet that standard.

The City appealed.

ISSUE: Must a law enforcement agency justify holding back investigative files specifically?

HOLDING: Yes

DISCUSSION: The Court noted that both parties agreed that the Fort Thomas Police Department had compiled and maintained an investigative file on the case and that McCafferty’s “conviction remained subject to collateral challenge.” The Court agreed that the law enforcement exemption had been part of the Open Records Act since it became law in 1976 and that certainly the files were compiled for law enforcement purposes. The newspaper conceded that a RCr 11.42 motion was a possibility.

However, the Court agreed with the Court of Appeals, finding that the City’s reading of the statute does not comport with the clearly expressed intent of the General Assembly. The City’s position, that harm could be presumed by release, “would turn on its head the Act’s basic presumption of openness.” By “creating a blanket exemption for police files regardless of their contents,” the Court agreed, it would “run totally counter to the General Assembly’s directive that the exemptions from disclosure be ‘strictly construed.’” That violates KRS 61.871 and 61.878(4), the latter which requires that any non-excepted material must be separated from that excepted and made available.

The Court held, instead, that “the law enforcement exemption is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when, because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action.” The Court did not mean that the justification must be “line by-line or document-by-document,” but instead, the agency must identify the “particular kinds of records it holds and explain[] how the release of each assertedly exempt category would harm the agency in a prospective enforcement agency.” It noted that the holding meant that “even if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories.”

The Court further noted that Open Records cases are unique in that in most disputes, both sides have access to the facts, but in these cases, “only the agency knows what is in its records.” Although in some situations, the Court can review the records *in camera*, in cases where the records are voluminous (in this case, as many as thirty boxes), that was possible “only to a limited extent.” The Court noted that it appeared that the City had “not yet made an attempt to identify non-exempt records in its files,” and without that, the law enforcement exemption could not be invoked. The Court affirmed the Court of Appeals ruling and remanded the case with instructions to give the City the opportunity to make that “required showing.” (The Court agreed that prosecutor’s files are, however, completely exempt.)

The City objected to the suggestion (by the Court of Appeals) that it might be required to pay attorney’s fees and fines. The Court noted, however, that a “good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act” – triggering fees and

¹²⁴ 844 S.W. 2d 389 (Ky. 1992).

files. The initial withholding of the tapes (which were released early in the proceeding) was at most, a minor violation.

The Court ruled that the City must produce “an outline or index of its responsive records indicating meaningful classes into which they have been or might be sorted and then may explain through a custodian’s affidavit or testimony how disclosure of particular records or the records in a particular class would harm a prospective enforcement action.” The trial court could then, if necessary, inspect allegedly exempt records. At this point, however, the Court did not hold that sanctions were appropriate.

City of Owensboro v. Mayse, 2013 WL 4508006 (Ky. App. 2013)

FACTS: On November 21, 2011, Mayse, a reporter for the Owensboro newspaper, made a series of requests for records related to a former Owensboro PD officer (Cosgrove). Chief Skeens responded that the City had no records concerning any complaints and alleged suspension. Mayse followed up on December 1, asking for all documents related to Cosgrove’s employment status from August 1 through November 18, 2011 as well as a copy of his personnel file. The City provided a copy of his letter of resignation and agreed to make available a partially redacted file (absent medical records). A week later, Mayse submitted a third request, specifically highlighting that he “was requesting any documents related to any grievance or internal process that involved Cosgrove’s employment and eventual resignation.” The response indicated that any internal investigation documents were exempt and that they had nothing else responsive. Mayse appealed the denial and the Attorney General requested the files to review in camera.

Following its review, the Attorney General asked Owensboro “for an explanation for the reason that certain forms could not properly be classified as ‘complaints’ or for a methodology to distinguish them from a complaint.” The City’s explanation for withholding two documents, entitled “Professional Standards Complaint Forms,” was as follows:

The documents you reference are not “complaints” filed against an officer. In each instance the document is the initiating document of an internal investigation that was initiated by the police department. Each bears the notation “Internal” and is signed not by a complainant, but by the officer conducting the PSU internal investigation. There was no written complaint (document) about Officer Cosgrove received by the department.”

The Attorney General rejected the City’s argument that the two forms were not subject to release under the ORA.¹²⁵ The City appealed the decision in Mayse’s favor. The Daviess Circuit Court affirmed the Attorney General’s decision, ordering the City to release the documents. It also awarded Mayse attorneys’ fees and costs. Upon reconsideration, it found that the City’s denial of the records, initially, was “willfully defiant” and “done in ‘bad faith,’” The City appealed but did provide Mayse with the two disputed forms.

The City moved to strike the documents, which Mayse had attached to his civil forms filed with the court, from the record – they had not been made part of the record in Daviess County.

ISSUE: Does a willful denial that records exist justify the awarding of attorneys’ fees in an Open Records case?

HOLDING: Yes

DISCUSSION: The City argued that the records, prepared by a police officer rather than a third-party complainant, were exempt from public inspection under KRS 61.878(1)(i) and (j). It also argued as to

¹²⁵ 12-ORD-055, dated March 12, 2012.

whether Cosgrove’s resignation was a final action and finally, whether the City acted in “bad faith” by denying the existence of the two documents.

The City argued that although they had produced the records, the matter was not moot and they still had the authority to appeal the issue as to whether the records are exempt from disclosure. The Court agreed it was proper to strike the documents and that Mayse could not refer to the content of the records for the purposes of the appeal. The Court agreed that since the City had turned over the documents, there was no “case in controversy” and the issue was moot with respect to this case.

The Court further agreed that the “City’s response, on three separate occasions, that no record responsive to Mayse’s request for complaints is problematic given the eegis of the Open Records Act.” The City further denied the records to the Attorney General. The City agreed that such action was willful. The Court upheld the award of attorneys’ fees and further, remanded the matter back for additional attorneys’ fees expended during the appeal.

Kentucky New Era v. City of Hopkinsville, 415 S.W. 3d 76 (Ky. 2013)

FACTS: A writer for the Kentucky New Era, Inc. requested copies of arrest citations and police incident reports for a 7 month period in 2009, involving stalking harassment or terroristic threatening, from the Hopkinsville PD. The City Clerk “withheld some records, including those involving juveniles and open cases, and redacted person data from other reports, including not only names in some instances, “the social security numbers, driver’s license numbers, telephone numbers, and complete home addresses of victims, witnesses, and suspects.” Eventually, the New Era received redacted copies of all of the requested records. The New Era noted that it was trying to analyze differences in how Hopkinsville police “treated stalking, harassment, and terroristic threatening complaints” and ... why the police ‘made arrests and pursued charges in some situations but not in others.’” In its redactions of the records that were released, the City also removed “such demographic data as birth date, marital status, gender, race and ethnicity.” In its initial appeal to the withholdings and redactions, the Attorney General agreed “that an entire record was not rendered exempt merely because it mentioned, in some capacity, a juvenile, and he also agreed with the newspaper that the City’s privacy redactions did not comport with the Act’s requirement that exemptions be applied narrowly.” The City initiated an action in the Christian Circuit Court, which held that the redactions of social security and driver’s license numbers, home addresses and telephone numbers was proper, but that wholesale redaction of demographic data was not. (That ruling was not appealed by the City.) Further, it ruled that information on juveniles was not totally exempt under KRS 610.320, which called of the “nondisclosure of a juvenile’s court records.”

Both sides appealed, and the Kentucky Court of Appeals upheld the City’s redactions of personal identification data. It also ruled that under the “privacy exemption the names of juveniles, as well as any other information individually identifying them, could be redacted from the requested records.” New Era then sought discretionary review, arguing that in upholding the redactions, the Kentucky Court of Appeals misapplied the Open Records Act, in particularly the redaction of information which “would constitute a clearly unwarranted invasion of personal privacy” under KRS 61.878(1)(1).

ISSUE: May most personal information be redacted from law enforcement records produced in an Open Records request?

HOLDING: Yes

DISCUSSION: The Court noted that the current Open Records Act (ORA) excludes 14 types of records from disclosure. To preserve the ORA’s “presumption in favor of open examination,” the Court agreed that it must be strictly construed and that the agency seeking exemption must detail “by affidavit or otherwise, the record or information withheld, the exemption or exemptions claimed, and the reasons why

the withheld information falls within the claimed exemption.” The Court agreed that it “must balance the interest in personal privacy the General Assembly meant to protect, on the one hand, against, on the other, the public interest in disclosure.”

The Court agreed that an individual has a strong interest in “controlling the dissemination of personal information” – especially when it is compelled by the government to disclose that information initially and then “turns around and disseminates that information to a third party.” The Court agreed that an “individual’s interest becomes strong with regard to personal information the dissemination of which could subject him or her to adverse repercussions” that could “include embarrassment, stigma, reprisal, all the way to threats of physical harm.”¹²⁶ Further, the Court noted that “as a categorical manner ... a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy.”¹²⁷ In National Archives and Records Administration v. Favish,¹²⁸ the Court agreed that private citizens might appear in law enforcement records as the “result of mere happenstance,” as a witness, etc. and as such, the “privacy interest ... is at its apex.” As such, federal courts and the FOIA have generally held that such information is “generally exempt from disclosure” unless critical to “confirm or refute substantial evidence that the agency is engaged in improper conduct or is necessary otherwise to reveal ‘matters of substantive law enforcement policy.’”¹²⁹

The Court ruled, that it had “no hesitation in recognizing as the federal courts have, that, absent a statute to the contrary, Kentucky’s private citizens retain a more than de minimis interest in the confidentiality of the personally identifiable information collect from them by the state.” The Court agreed that “witnesses, victims, and uncharged suspects referred to in the ... arrest and incident reports, adults and juveniles alike, have privacy interests in their addresses, phone numbers, social security numbers, and driver’s license that implicates KRS 61.878(1)(a) of the ORA.” The Court also noted that juveniles have long had privacy protections as perpetrators, and found “no rational basis for recognizing that heightened privacy interest for a juvenile perpetrator but denying it to juvenile victims and witnesses, particularly in the context of records pertaining to stalking, harassment, or terroristic threatening, all typically intensely personal crimes.” Turning to the public interest in such disclosure, the Court agreed that disclosure is not warranted when it “would not serve the public interest and was not required merely ‘to satisfy the public’s curiosity.’”

As it stands, the newspaper would be entitled to the names of those involved except in the case of juveniles, for their stated purpose of “monitoring” the Hopkinsville police department’s “performance of its investigatory and law enforcement duties.” Although the Court agreed that the public is entitled to know that the PD is “providing equal protection to all parts of the community,” it did not agree “that interest can only be vindicated by sacrificing the privacy interests of all those with whom the police come in contact.” Home addresses, for example, often have no relation to an incident, and even when it does, a street name may be sufficient to “show where in the city the police have, or have not, been active.” With the names, the newspaper could follow up by routine methods to find the individuals. The newspaper’s speculation that some of these individual “might be able to shed light on police misconduct” is not enough to override the privacy exemption. The Court agreed the redactions were proper.

Further, the Court agreed, the City’s “categorical” redaction, not a blanket denial, is appropriate, and that the agency “need not undertake an ad hoc analysis of the exemption’s application to such information in each instance, but may apply a categorical rule.”

The Court summed up:

¹²⁶ Dept. of State v. Ray, 502 U.S. 164 (1991).

¹²⁷ U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

¹²⁸ 541 U.S. 157 (2004).

¹²⁹ American Civil Liberties Union v. U.S. Dept. of Justice, 655 F.3d 1 (D.C. Cir. 2011).

The Open Records Act is meant to open the state's public agencies to meaningful public oversight, to enable Kentuckians to know 'what their government is up to.'" It is not meant to turn the state's agencies into clearing houses of personal information about private citizens readily available to anyone upon request."

The Court agreed that the redactions were proper and upheld the decision of the Kentucky Court of Appeals.

CIVIL LIABILITY

Robinson / Dickinson v. Officer Meece / Louisville Metro PD, 2013 WL 1352073 (Ky. App. 2013)

FACTS: Robinson and Dickinson were arrested on August 28, 2006, on a variety of charges. They pled guilty to possession of a firearm by a convicted felon and tampering with physical evidence. About 3 ½ years later, they sued Officer Meece and the LMPD on claims of excessive force, false imprisonment and related issues. Meece filed a motion to dismiss based upon a statute of limitations and a bar due to their convictions. Metro Louisville also claimed sovereign immunity. All claims were dismissed and they appealed.

ISSUE: Is one-year the statute for most common law torts?

HOLDING: Yes

DISCUSSION: Robinson and Dickinson argued that their claims were set forth under KRS Chapter 344 (The Kentucky Civil Rights Act) and the tort of outrageous conduct, both of which have a five-year statute of limitations under KRS 413.120. The Court agreed that five years was correct for such claims, but that neither was the correct cause of action based upon the alleged facts. The facts pled only supported such common law torts as assault, false imprisonment and malicious prosecution, all of which were covered by the one-year statute of limitations. The Court agreed that the complaint was time-barred and upheld the dismissal.

Cummins v. City of Augusta, 2013 WL 5436657 (Ky. App. 2013)

FACTS: In December, 2010, a local resident told Cummins (Chief of Police) that an officer was "engaging in unethical, borderline-criminal, behavior." Cummins investigated and recommended the matter to the Bracken County Commonwealth Attorney, that the officer was "compromising criminal investigations and possibly engaging in official misconduct." The mayor refused to further investigate and ordered him to stop his investigation and the Commonwealth's Attorney refused to prosecute. Undeterred, Cummins requested a grand jury investigation and also that the Attorney General intervene, both apparently declined. On December 7, 2011, Cummins was terminated but given no details beyond "just cause."

Cummins filed suit under, among other causes of action, the Kentucky Whistleblower Act. The trial court dismissed and Cummins further appealed.

ISSUE: Absent an express contract, do officers work "at will?"

HOLDING: Yes

DISCUSSION: The Court noted that a police chief is normally an "at will" employee. City ordinance stated that employees may only be dismissed for "just cause," but other language indicated that was not intended to provide any contract rights.

The Court upheld the termination.

Oakley v. Ballard County Sheriff (and others), 2013 WL 275641 (Ky. App. 2013)

FACTS: On December 12, 2009, Deputy Grief responded to a domestic disturbance at the Oakley home. Oakley left prior to the deputy's arrival. Finding Amie (Oakley's wife) with visible injuries, the deputy obtained an arrest warrant for Assault 4th and Fleeing and Evading 1st against Oakley. Amie filed for an EPO/DVO and Oakley requested the same. Ultimately, both were dismissed.

Oakley was arrested on December 14 for the criminal charges and the charges were dismissed at arraignment at Amie's request. Oakley sued for malicious prosecution. The Sheriff's Office (and its defendants) filed for a motion for summary judgment. The court ruled in the Sheriff's Office favor and Oakley appealed.

ISSUE: Does an improper charge automatically prove a malicious prosecution claim?

HOLDING: No

DISCUSSION: Oakley argued that the Fleeing and Evading charge was inappropriate and that since it was dismissed at arraignment, the proceedings were resolved in his favor. (This is an element for malicious prosecution.) The Court looked to the statute itself, noting that KRS 520.095 requires that a law enforcement officer command him to stop – which did not occur. As such, he did not violate the statute when he left the location. However, the Court found no evidence of actual malice on the part of the Sheriff's Office. The Court agreed that malice could be inferred from a lack of probable cause, but “that fact alone does not conclusively establish the intent of the alleged wrongdoer.”¹³⁰

Further, the Court found no indication that Oakley made any effort to discover any facts to establish malice. The Court upheld the summary judgment for the Sheriff's Office.

CIVIL LIABILITY – IMMUNITY

Robinson & Sexton v. Kenton County Detention Center, 2013 WL 560699 (Ky. App. 2013)

FACTS: In 2006, Sexton (an inmate) reported to a deputy jailer and an investigator that she'd been sexually assaulted by Stokes (a deputy jailer) a few days before. Within an hour of the report making it up the chain of command, the jailer's office began an internal investigation. The Kenton County PD was asked to do a criminal investigation. Stokes was immediately placed on leave. Two days later, Robinson (another inmate) also reported sexual assaults that had happened less than a month before. Ultimately Stokes was charged with multiple counts of Rape and Sodomy and immediately fired. Eventually, Stokes pled guilty to Sexual Abuse and related charges.

Robinson and Sexton filed suit against the Jail, the Jailer and other parties under both state and federal law, under 42 U.S.C. §1983. The District Court dismissed all claims under summary judgment and declined to exercise jurisdiction over the state law claims.

Robinson and Sexton filed an action against the detention center and the jail (and related parties) alleging negligent hiring, supervision and retention (of Stokes), and negligent operation of the jail. All defending parties requested summary judgment on sovereign immunity. The Jailer and deputy jailer (who investigated) requested qualified official immunity in their individual capacities, as well. Again, the Court found in favor of the defendants. Robinson and Sexton appealed.

ISSUE: Is the hiring of a law enforcement officer a discretionary act?

¹³⁰ Mosier v. McFarland, 106 S.W.2d 641 (1937).

HOLDING: Yes

DISCUSSION: The Court reviewed the status of the law on immunity for governmental employees. In Yanero, the Court recognized the doctrine of sovereign immunity as it applies to the Commonwealth and political subdivisions of the state, such as counties.¹³¹ As such, Kenton County, the Fiscal Court and the Detention Center are all entities of the county and sovereign immunity applies. That sovereign/absolute immunity extends to public officials facing suit in their official capacities.

With respect to suit in their individual capacities, the Court again looked to Yanero, noting that public employees/officers are “entitled to ‘qualified official immunity’ for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, i.e., those that involve the ‘exercise of discretion and judgment, or personal deliberation, decision and judgment,’ (2) that were made in good faith and (2) were within the scope of the employee’s authority.” There is no immunity for the “negligent performance or omissions of a ministerial¹³² act, or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.” Robinson and Sexton argue that hiring Stokes was a ministerial function in that they “should have been aware of Stokes’s propensity to commit sexual assault from his criminal history, his poor performance on the police academy training test, and his repetitive tardiness and absenteeism.” In contrast, though, the Court found that the hiring was “based upon an evaluation of numerous factors, all of which underscore the discretionary nature of the hiring decision.” The question, instead, was “whether they acted in good faith.” Just because someone was harmed “by a bad or even negligent decision by a public employee will not convert the action into ‘bad faith’ and defeat” qualified immunity. The court found no reason to believe that the jail staff had any reason to believe Stokes would commit sexual assault from his history, there was simply no correlation between his history and the crime.

The Court upheld the award of qualified immunity.

Louisville-Jefferson County Metro Government / Bishop v. Brooks / Martin, 2013 WL 645955 (Ky. 2013)

FACTS: In 1998, Brooks and Martin filed suit against Metro and Bishop (Corrections chief), claiming to have been subjected to racial discrimination and retaliation, in violation of the Kentucky Civil Rights Act (KCRA). Metro won at trial. Brooks and Martin appealed. During the retrial, a hearing was held concerning possible apportionment of any fault, between Metro and Bishop, and Metro indicated that Metro would be fully indemnifying Bishop and that they did not distinguish between a lawsuit in Bishop’s individual capacity or his official capacity. At the second trial, Brooks and Martin won, with Martin receiving a judgment over \$700,000. (Attorneys’ fees were also awarded of approximately \$243,000.) Upon appeal by Metro, most of the judgment was affirmed.

Metro tendered a check for \$949,910, which they claimed satisfied the judgment and fees. However, Brooks and Martin refused, arguing they were also entitled to post-judgment interest, pursuant to KRS 360.040. Metro objected, but the Circuit Court awarded interest at the statutory 12%. Metro appealed.

ISSUE: May a government entity be required to pay post-judgment interest?

HOLDING: Yes

¹³¹ 65 S.W.3d 510 (2001).

¹³² A ministerial act is “one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” Yanero, *supra*.

DISCUSSION: Metro argued that the KCRA does not allow for post-interest judgment against a governmental entity. Brooks and Martin countered that Bishop, as an individual, was not immune from interest, and that Metro’s agreement to indemnify Bishop was a waiver of their immunity against such interest.

The Court agreed that although the possibility of interest on the judgment had not been raised before, the two were entitled to it by law. And, although Metro was correct that it is entitled to immunity, such immunity was not appropriate for awards of post-judgment interest.¹³³ Because Metro agreed to indemnify Bishop and waived the right to have liability apportioned between the parties, that constituted a waiver of its immunity to the interest of a KCRA claim. The Court noted that Bishop was found liable for discriminatory and retaliatory behavior, his behavior could not have been characterized as a “good faith judgment call made in a legally uncertain environment.”¹³⁴ Metro also argued that the judgment was not against Bishop in his individual capacity, but only in his official capacity – but the Court noted that the judgment was considered “joint and several” and did not distinguish between the defendants or their respective capacities. As such, Metro, by indemnifying, is liable for the full amount, including interest. Specifically, “by agreeing to indemnify an individual who was not immune to post-judgment interest, Metro waived its own immunity.”

The decision ordering the payment of post-judgment interest was affirmed.

CIVIL LIABILITY - SHERIFFS

Harlan County / Duff / Hall v. Browning, 2013 WL 657880 (Ky. App. 2013)

FACTS: Former Sheriff Browning (Harlan County) was murdered in March, 2002. He had served as Sheriff previously and at the time of his death, was a candidate for the office against the incumbent, Duff. Former Deputy Sheriff Hall eventually pled guilty to Facilitation to commit the murder. In 2010, Browning’s widow filed suit against Duff, alleging that he was negligent in hiring, training and supervising Hall and that he wantonly, recklessly or even intentionally directed Hall to “cause the wrongful death of Browning.” She also sued Hall for committing the crime.

Duff, Hall and Harlan County argued for immunity in the lawsuit. The trial court ruled that KRS 70.040 waived any sovereign immunity for the Sheriff and his deputy at the time, Hall. They appealed.

ISSUE: May a sheriff (otherwise immune) be held liable for the acts of their deputies?

HOLDING: Yes

DISCUSSION: To start, the Court noted that it was only ruling on the issue of official immunity, not on individual immunity for Duff and Hall. The Court noted that the Sheriff is a Constitutional officer¹³⁵ who serves as the Chief Law Enforcement officer of each county. The Sheriff is also a county official and as such, is normally cloaked with sovereign immunity when sued in their official capacity.¹³⁶ As such, the elected sheriff is entitled to sovereign immunity when sued in their official capacity.

The Court looked to the statute, KRS 70.040, which reads:

The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits

¹³³ Kentucky Dept. of Corrections v. McCullough, 123 S.W.3d 130 (Ky. 2003).

¹³⁴ Yanero, supra.

¹³⁵ Ky. Constitution §99; Shipp v. Rodes, 245 S.W. 157 (1922).

¹³⁶ Com. Bd. Of Claims v. Harris, 59 S.W.3d 896 (Ky. 2001).

to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.

Previous cases, including Jones v. Cross, had interpreted this provision as putting “liability on the sheriff in his official capacity for acts committed by his deputies.”¹³⁷ As a result, the Court agreed, this constituted a “negative waiver of the sovereign immunity traditionally enjoyed by a sheriff at common law” and makes the sheriff liable for the acts of omissions of deputy sheriffs. As such, Sheriff Duff remains liable for the acts of omissions of Hall, in his official capacity, but does retain official immunity for his own intentional or unintentional (negligent) torts.

Deputy Sheriff Hall, “unlike the sheriff, is not a constitutional officer named and designated in the Constitution” but is, instead, an employee of the sheriff and as such, “acts in an official capacity for that office.”¹³⁸

The Court continued:

An action against an official in his official capacity is in reality an action against the pertinent governmental entity, and an official sued in his official capacity is shielded by the same immunity enjoyed by such governmental entity.¹³⁹

However, in a complicated twist, although Hall would normally have shared the immunity of the Sheriff, because the legislature waived that immunity, specifically, Deputy Sheriff Hall retained liability for his own actions.

Finally, the Court agreed that Harlan County, itself, was entitled to sovereign immunity. To sum up, the Court held that Sheriff Duff was entitled to sovereign immunity for his own acts, but not for the acts of Deputy Sheriff Hall. Deputy Sheriff Hall was likewise, not entitled to sovereign immunity. The Court allowed the case to go forward.

EMPLOYMENT

Sparks v. City of Oak Grove, 2013 WL 53985 (Ky. App. 2013)

FACTS: On January 16, 2009, at about 2:30 a.m., Captain Sparks (Oak Grove PD) was involved in a high-speed chase. The vehicle entered Tennessee with Sparks and other officers, in pursuit, and stopped. Eventually, they broke out the windows. Sparks pepper-sprayed and handcuffed the subject, who began begging to be shot. Sparks decided to take him to the hospital in Fort Campbell as the driver was a veteran. Captain Sparks left a memorandum about the incident for Major Langdon, as he was not scheduled to work for the subsequent four days. Langdon, finding some of Sparks’ actions improper, suspended Sparks with pay and initiated an investigation. Langdon then recommended termination and on February 9th, the suspension was converted to unpaid. The gist of the concern “revolved around the commission of numerous felonies and misdemeanors by the criminal suspect during the high speed pursuit without any criminal charges being filed by Sparks” and he presented criminal charges for official misconduct against Sparks. The Special Judge assigned dismissed those charges.

¹³⁷ 260 S.W.3d 343 (Ky. 2008).

¹³⁸ KRS 70.030.

¹³⁹ Yanero v. Davis, *supra*.

On December 9, 2009, Sparks was given an administrative hearing. Chief Perry and Major Langdon both testified that “they believed Sparks had no intention of ever filing charges against the suspect, only that he intended to dump the suspect at the military hospital and ‘be done with it.’”

Mayor Potter, who sat as the hearing officer, terminated Sparks. Sparks appealed.

ISSUE: Is an employment hearing before the mayor sufficient under KRS 83A?

HOLDING: Yes

DISCUSSION: Sparks argued that he was entitled to a hearing before the Council, not just the Mayor, under KRS 15.520(1)(h). However, since under KRS 83A.130(9), the mayor serves as the appointing authority, the Court agreed that the hearing before the mayor was appropriate authority to lead the hearing required. Sparks looked to KRS 95.765, which required that the hearing be before the legislative body, but that statute only applies when the city has adopted a civil service system. As there was no evidence that Oak Grove had, in fact, done so, the statute does not apply.

Sparks also argued that he was never given the charges in a “clear and specific writing” as required by KRS 15.520(1)(3). The Court agreed, however, that the letters, along with a supplemental form, from the Mayor sufficed to meet the requirement.”

The Court upheld the termination.

Murphy v. City of Richmond, 2013 WL 1163802 (Ky. App. 2013)

FACTS: Shortly before October 26, 2009, Sgt. Rogers responded to a domestic violence call at McQueen’s home. They began a sexual relationship following that incident. On October 26, Rogers, Murphy and another officer went to McQueen’s home to have group sex, during which McQueen suffered several injuries, including a split lip and bruises. She went to get ice from a neighbor, who encouraged her to report it. McQueen refused, but the neighbor and others reported it on their own. She was “coerced” to go to the hospital and get treatment, but refused a rape kit, as she believed she had not been raped. During the subsequent interview, she made statements that made the investigators believe that crimes had occurred. Richmond suspended the officers and they were also indicted. The criminal charges were dismissed after a jury absolved the officers of any crime.

At the subsequent hearing, the IA investigator stated that he believed criminal charges should not have been placed. The chief admitted that once the case became publicized, and the bad press ensued, other officers became concerned about working with the officers. But, he agreed, had the criminal charges not been filed, no administrative charges were likely to have been placed against the officers either.

Murphy and Rogers were terminated by the Commission. They appealed.

ISSUE: May legal private conduct that becomes public be a cause for termination?

HOLDING: Yes

DISCUSSION: Murphy argued that the Commission did not make a sufficient findings of fact and that his actions did not cause any negative impact on the department. The Court agreed that they did, in fact, do so, but did not “cite to the evidence it relied on in making those findings of fact.” The Court agreed that it was sufficient.

Murphy argued that his “discipline was based, not on his conduct, but on the negative impact of publicity over which he had no control.” The Court agreed that completely private behavior does not reflect on the department, but unfortunately, in this case, it did become public. He “took the risk that his conduct would become public.” The Court agreed the termination was properly based upon Conduct Unbecoming and Conduct Impairing the Police Department.

JURISDICTION

McGlennen v. Com., 2013 WL 3238036 (Ky. App. 2013)

FACTS: On May 2, 2011, Deputy Osborne (Owen County SO) was contacted by Sheriff Kinman and Deputy Shaw (Carroll County SO) concerning warrants they had on McGlennen and others. He was initially to meet the Carroll County peace officers to execute the warrants in Owen County but was called away to another emergency. Because there was no one else available to assist, he contacted Sheriff Kinman and Deputy Shawn and “requested they execute the warrants.” McGlennen was located but in the course of the arrest, he escaped. He was subsequently charged with Escape 2nd. During a hearing, it was agreed that there was no interlocal agreement between the counties under KRS 65.255. As such, the question was whether the Carroll County authorities were authorized to assist under KRS 431.007(1). The trial court agreed that they were and as such, it was an escape. McGlennen took a conditional guilty plea and appealed.

ISSUE: May a local officer request the help from an out-of-county local officer?

HOLDING: Yes

DISCUSSION: The Court agreed that the request by Deputy Osborne was a valid and lawful request for assistance from the Carroll County peace officers, and was sufficient to provide them with the same powers of arrest in Owen County as they had in Carroll County. Deputy Osborne was a lawful agent of the Owen County Sheriff’s Office at the time he made the request, and there was no requirement under the law that such a request be in writing. Further, because such requests are generally in “emergency circumstances, such a requirement would render the statute meaningless.”

McGlennen’s plea was upheld.

SIXTH CIRCUIT

FELON IN POSSESSION

U.S. v. Tapplin, 2013 WL 5604670 (6th Cir. 2013)

FACTS: Police were searching for Tapplin to question him concerning an unrelated matter. They found him and discovered he had five bullets in his pocket. He “explained that he had found the bullets on the ground just moments before and had picked them up as a precaution to protect innocent children playing nearby.”

Tapplin, a felon, was charged with possession of the ammunition. He sought to present the affirmative defense of justification. The district court denied it. Tapplin took a conditional guilty plea and appealed.

ISSUE: May a felon in possession of a firearm/ammunition raise the affirmative defense of necessity?

HOLDING: Yes

DISCUSSION: The Court looked to the five elements that must be met for a convicted felon to raise the affirmative defense:

1. That the defendant, or a third party, was under a ‘present, imminent, and impending,’ threat of death or serious bodily injury;
2. That the defendant had not recklessly or negligently placed himself in the situation;
3. That the defendant had no reasonable, legal alternative to violating the law;
4. That a direct causal relationship existed between the criminal action taken and the avoidance of the threatened harm; and
5. That the defendant did not maintain possession any longer than necessary.

The Court agreed that the children were not actually at a present, serious risk due to the bullets, as there was no indication that the children were even aware of the bullets or able to make use of them. The Court agreed that the defense of justification was not available to Tapplin and upheld his plea.

CONSTRUCTIVE POSSESSION

U.S. v. Walker, 734 F.3d 451 (6th Cir. 2013)

FACTS: On November 11, 2010, Cincinnati undercover officers spotted a vehicle with heavily tinted windows, playing very loud music. They called for a marked car to pull it over. When that occurred, the four undercover officers also got out and approached it. The occupants did not roll down a window so they knocked on the car windows. Finally, Evans (driver) and Walker (passenger) rolled down the window and spoke to the officers. The officers smelled marijuana. They saw that Walker was “agitated,” and that his heart could be seen beating under his t-shirt. Evans got out without incident. When Officer Peponis asked Walker to get out, giving him specific directions as to how to do so, he saw that Walker’s hands began to move out of sight, against those directions. He ignored warnings and finally the officer reached in and secured his hands. Other officers moved to help and Officer Lowry, who had opened the car’s back door, behind Walker, saw a “gun on the floor of the car between the passenger’s seat and the door, near the floor mounting for the front passenger’s seat belt.” The gun was loaded with a round in the chamber.

Since Walker was a convicted felon, he was indicted under federal law for possession of the weapon. Since the gun was manufactured in Ohio, it was critical (under the federal charge) to prove that the ammunition in the weapon came from elsewhere. An expert testified that the ammunition came from Russia.

Walker was convicted and appealed.

ISSUE: May a subject be in “constructive” possession of a weapon?

HOLDING: Yes

DISCUSSION: Walker argued that he never possessed the weapon in question. The Court agreed that the gun was not found in his actual possession, but noted that a “weapon is ‘constructively’ possessed if the government can show [Walker] ‘knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.’”¹⁴⁰ The prosecution argued that his behavior indicated he “knew the gun was in the car and was trying to grab it.” Walker contended that he did not know the gun was there.¹⁴¹ The Court, however, agreed that the “quantum of evidence necessary to overcome Bailey” and prove that someone is in constructive possession of a weapon is “minimal in both the actual and constructive possession contexts.”¹⁴² The Court noted that the “line of demarcation between ‘actual’ and ‘constructive’ possession is not analytically crisp.” However, in this case, the Court agreed that the evidence established “possession, whether actual or constructive.” Walker’s incriminating actions, coupled with his proximity to the weapon, was enough to prove possession.

Walker’s conviction was affirmed.

ARREST

U.S. v. Mohammed, 2013 WL 331570 (6th Cir. 2013)

FACTS: On July 26, 2010, Officers Frith, Bauer, Boone and Young (Nashville PD) set out to execute an arrest warrant for Howard at his residence. As they approached, they found two men, motionless, slumped in chairs in the front yard, both generally fitting the description of Howard. (One, in fact, was Mohammed.) The officers were unable to rouse them with flashlights and announcements. Seeing large beer cans, realized the two men were drunk. Officer Bauer spotted a firearm in Mohammed’s lap and alerted the others. Moving in closer, Officer Frith snatched the gun. Both men were proned out and cuffed. Mohammed roused, but was sluggish, confused and disoriented. Howard was identified and arrested; Mohammed was frisked. Mohammed initially denied having had a gun, but later admitted to it. Officer Young found marijuana, a holster and Mohammed’s ID.

Howard’s mother, upset, emerged from the house, and the officers moved both men down the street. Officer Young discovered that Mohammed was a convicted felon, so he was arrested for possession of the firearm. Mohammed was given his Miranda rights, and he agreed to answer questions. He stated he’d gotten the gun from Howard about thirty minutes earlier. The gun was, in fact, stolen.

Mohammed was indicted. He moved for suppression of the search of his person, which was denied. Mohammed appealed.

ISSUE: May otherwise possibly unlawfully gotten evidence be admitted because an arrest warrant is discovered?

¹⁴⁰ U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).

¹⁴¹ U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).

¹⁴² U.S. v. Morrison, 594 F.3d 543 (6th Cir. 2010); U.S. v. Montague, 438 F. App’x 478 (6th Cir. 2011).

HOLDING: Yes

DISCUSSION: The trial court had ruled that it was inevitable that Mohammed would have been arrested, even absent the discovery of the evidence in his pockets, because he was a convicted felon. The Court agreed that “the inevitable discovery doctrine is an exception to the exclusionary rule” which “prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment, as well as derivative evidence acquired as a result of an unlawful search.”¹⁴³ Further, the inevitable discovery doctrine “allows unlawfully obtained evidence to be admitted at trial if the government can prove by a preponderance that the evidence inevitably would have been acquired through lawful means.”¹⁴⁴ To summarize, “if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.”

The District Court agreed that the “search of Mohammed’s person exceeded the scope of a valid pat-down.” Mohammed argued that if had they not seized his wallet, they would not have learned his true identity, which is what triggered his arrest. (He claimed he would have been able to credibly represent himself as someone else and “could have denied possession of an ID.”)

The Court noted, however, that the officers had lawful possession of the weapon, which was stolen, and as such, they could (and would) have arrested Mohammed for its possession. Officers confirmed that they would have almost certainly run the gun’s serial number to determine its ownership. The Court agreed it was “mere happenstance that they determined he was a convicted felon and arrested him on that basis before learning that the gun was stolen.” The Court agreed that the items found on Mohammed’s person were properly admitted.

Mohammed also argued that his statements should have also been suppressed, but the Court agreed that the officers would have asked him the same questions (as to where he’d gotten the gun) in either event, and it is “highly likely he would have made materially similar answers.” The Court agreed his statements were also properly admitted.

U.S. v. McWhorter, 2013 WL 628417 (6th Cir. 2013)

FACTS: In 2006, the Sparta (TN) PD “began investigating a series of counterfeit checks being passed at local businesses.” Officer Selby got a description of one of the passers and eventually identified McWhorter as the person who had given businesses the counterfeit checks. Selby obtained an arrest warrant, withholding the name of the witness because the witness was a juvenile. The issuing official typed up the affidavit, which Selby reviewed – unfortunately missing an error as to who actually made the identification.

McWhorter was arrested and interviewed, after having received his Miranda warnings. In the initial stages of the questioning, McWhorter asked about assurances for his wife, who was also under arrest. He was put in contact with the prosecutor, requesting “favorable treatment for his wife in consideration for his cooperation with the investigation.” The prosecutor (Crawford) gave no guarantees but indicated they were not interested in his wife if, in fact, he committed the crimes. Crawford put nothing in writing, but McWhorter later insisted the promises were, in fact, made. He was permitted to speak to his wife (in person) and finally made inculpatory statements. He consented to a search of his house and computers. A tremendous amount of incriminating evidence was located there. Officer Selby attempted to talk to McWhorter further the next day, but he refused, having learned that his wife was still in jail. He “declared that he would not talk” until she was released.

¹⁴³ U.S. v. Kennedy, 61 F.3d 494 (6th Cir. 1995) (citing Wong Sun v. U.S., 371 U.S. 471(1963)).

¹⁴⁴ Nix v. Williams, 467 U.S. 431 (1984).

The following year, prior to his criminal trial and after counsel had been assigned, another officer from a different department went to the state prison where he was being held for parole violations. McWhorter waived Miranda in writing and denied any involvement with the counterfeiting case she was investigating. A few months later, he was questioned about yet another counterfeiting case. The Secret Service officer on that case, Agent Landkammer, “became aware that McWhorter was currently facing state charges.” He was concerned about discussing the state charges without McWhorter’s attorney present and emphasized to McWhorter that he was only interested in the federal charges he was currently investigating. McWhorter again gave inculpatory statements.

McWhorter was indicted on federal charges. He moved to suppress on several issues and was denied. He was convicted and appealed.

ISSUE: Do errors on an arrest necessarily invalidate it?

HOLDING: No

DISCUSSION: McWhorter first argued that the arrest warrant was not valid, because there was a material misrepresentation that was “at a minimum reckless disregard and perhaps intentional.” The Court concluded, however, that “regardless of any defects in the arrest warrant, the arrest was valid because it was supported by probable cause.” Nor did he make a “substantial preliminary showing under” Franks v. Delaware.¹⁴⁵ Although there was a defect in the warrant, it was relied upon in good faith by the arresting officers under U.S. v. Leon.¹⁴⁶ Further, McWhorter was unable to prove that the misstatement was “made knowingly, intentionally, or with reckless disregard.”

McWhorter also argued that he invoked his right to silence in 2006 and that “his right to silence was not scrupulously enforced.” He also argued that his right to counsel was violated when he was interviewed on two separate occasions in 2007. Taking each instance in turn, McWhorter told a federal agent that he did not want to talk to him anymore. At the time he was angry but he quickly became calm and cooperative again. Within minutes, he agreed to talk to two other officers and made inculpatory statements. The Court agreed that his statement to the first officer “was ambiguous when placed in context and that it was not an unequivocal assertion of his right to remain silent.”¹⁴⁷ in that he “specifically directed his statement only to” a particular officer.

McWhorter next argued that some of his statements were made as a result of an agreement about leniency for his wife, and that because the “state authorities did not follow through with their part of the agreement, his statements were coerced and not voluntary.” To find a statement involuntary due to coercion, three requirements must be met: (1) the police activity must be objectively coercive; (2) the coercion must be sufficient to overbear the defendant’s will; and (3) the alleged police misconduct must be the crucial motivating factor in the defendant’s decision to offer the statement.¹⁴⁸ The Court agreed that he was “most likely promised something regarding his wife,” to be reduced to writing, but it was unclear what, exactly, what that promise actually was. However, the Court agreed that it was appropriate for the trial court to find only that if he cooperated, that would be shared with the prosecutor.

Finally, the Court looked at his right to counsel claim under Edwards v. Arizona.¹⁴⁹

¹⁴⁵ 438 U.S. 154 (1978).

¹⁴⁶ 468 U.S. 897 (1984).

¹⁴⁷ Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

¹⁴⁸ U.S. v. Mahan, 190 F.3d 416 (6th Cir. 1999).

¹⁴⁹ 451 U.S. 477 (1981).

The Court summarized the law, as follows:

An accused who has “expressed his desire to deal with the police only through counsel, 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.”¹⁵⁰ Moreover, police may not question a defendant about any unrelated crimes after invocation of the right to counsel, even if such crimes are the subject of a separate investigation.¹⁵¹ Further, where a defendant has requested and been provided counsel, police may not reinitiate an interrogation without the presence of counsel.¹⁵²

However, in Maryland v. Shatzer, the Court held that after a 14-day break in custody the police may ask an accused to waive his Miranda right to counsel even though he has previously invoked his Miranda right to counsel while in custody.¹⁵³ Additionally, lawful imprisonment imposed upon the conviction of a crime does not create the coercive pressures identified in Miranda, and therefore it does not constitute custody for Miranda purposes.

The Court noted that the Edwards rule was to “prevent police from badgering a defendant into waving [sic] his previously asserted Miranda rights.”¹⁵⁴ McWhorter’s situation was more similar to Shatzer, as he was questioned more than four months after he invoked his right to counsel. Although he was in actual custody, it was for a totally separate offense. He was given and waived Miranda in each of the interviews, and as such, both were admissible.

After addressing a number of other procedural issues, McWhorter’s convictions were affirmed.

U.S. v. Shaw, 707 F.3d 666 (6th Cir. 2013)

FACTS: Officers Cheirs and Robinson (Memphis PD) tried serve an arrest warrant on Brown. They had the address 3171, but could not find the house.

They eventually found two houses on opposite sides of the street with a 3170 address, at which point, you might say, they were getting warmer. One of the houses presumably was mislabeled, and the officers had several options at their fingertips to figure out which house was 3171 Hendricks and which was not. They could have determined which side of the street contained odd-numbered addresses and served the warrant on the “3170” address on that side of the street. They could have checked city records or for that matter Google Maps to identify which house was the right one. Or they could have gone up to one of the houses and asked an occupant which house was 3171 Hendricks and which one was 3170 Hendricks.

They chose the last option. They saw that one house was occupied, so they started with that one. “Now they were getting colder.” The woman that answered the door “promptly shut the door.” With Officer Robinson in the rear of the house, Officer Cheirs continued to knock and after some minutes, the woman finally reopened the door. “Instead of asking the woman what the address of the house was, whether Phyllis Brown lived there or whether this was the odd-numbered side of the street, Officer Cheirs represented to the woman that he had a warrant ‘for this address.’ False. He had a warrant for 3171 Hendricks, and this was 3170 Hendricks.”

¹⁵⁰ Id.

¹⁵¹ Arizona v. Roberson, 486 U.S. 675 (1988).

¹⁵² Minnick v. Mississippi, 498 U.S. 146 (1990).

¹⁵³ 130 S. Ct. 1213 (2010).

¹⁵⁴ McNeil v. Wisconsin, 501 U.S. 171 (1991) (quoting Michigan v. Harvey, 494 U.S. 344, (1990)).

“Having no reason to know that this representation was false,” and failing to actually look at the warrant, the woman admitted them to the home of Brown’s “hapless neighbor,” Shaw. The officers did a protective sweep and found “a lot of cocaine.” Shaw was arrested and charged with a battery of offenses. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: May officers lie to justify their presence at a location?

HOLDING: No

DISCUSSION: First, the Court looked to whether the officers’ belief that they were at the correct house and whether it was reasonable. The Court noted they had a “fifty-fifty likelihood of being false and when readily available alternatives could have confirmed” the correct location.

The Court detailed their reasons:

The officers offer five potential reasons for entering Shaw’s house to serve this arrest warrant, and none is reasonable—singly or cumulatively.

Reason one: this house was occupied, and the other was not. But the occupation of a house at a given point in the day says nothing about its address or whether the object of an arrest warrant lives there. It is quite possible, indeed, that the opposite is true—that fugitives generally do not spend a lot of time at home. Reason two: a woman answered the door, and Phyllis Brown is a woman. Yet there were many people in the house, and the reality that one of them was a woman proves nothing. Of course, if the officers had looked at a picture of Phyllis Brown before serving this warrant, that could have confirmed or, as here, alleviated their suspicions when they met someone other than Phyllis Brown. As with other obvious options in this case—checking for the odd-numbered side of the street, checking city records, checking Google Maps—the apparent choice not to learn what Phyllis Brown looked like before serving this arrest warrant amounts to one more self-imposed shroud of ignorance that made other potential clues look more salient than they were.

Reason three: the woman closed the door upon first seeing them. Perhaps the officers could think that this reaction showed the woman was up to no good, but it does not make her Phyllis Brown (particularly when the same woman returned to the door), it does not make the house 3171 Hendricks, and it does not by itself justify entry into the house. That is all the more so here. The officers had an arrest warrant for criminal trespassing, not drug dealing or something else that an occupant might wish to hide from the officer’s view. The most law-abiding place for criminal trespassers to be is at home, on *their* property. The only people apparently trespassing that day were the officers.

Reason four: the officers saw scales in the house. Ditto. This might be helpful if the officers could connect this observation to Phyllis Brown and the reason for her arrest. Yet this criminal-trespassing arrest warrant had nothing to do with drug dealing, and the officers do not claim that the observation of the scale gave them exigent circumstances to enter the house.

Reason five: the officers had a fifty-fifty chance of being right, and that alone allowed them to take this approach. Yes, yes, and no. Yes, the officers had even odds of being right—at least as long as they refused to determine which side of the street contained odd-numbered houses. Yes, there was nothing wrong with going up to the house. But, no, officers may not say something is true—that they have an arrest warrant “for this house”—as a basis for obtaining entry into the house when there is a fifty-fifty probability that the statement is false. That is all the more true when there are readily available means for alleviating most, if not all, doubt about the point, and when no officer-safety concerns justify the deception.¹⁵⁵

¹⁵⁵ See U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).

The Court agreed that on occasion, “ruses and lies” are essential to law enforcement. But that does not permit “offices to tell an occupant that they have a warrant to make an arrest at a given address when they do not.” They rolled the dice, and were wrong, “leaving them with having obtained entry into the wrong house based on a false pretense.” The Court looked to Bumper v. North Carolina¹⁵⁶ in which it ruled that a search is not justified “as lawful on the basis of consent when that ‘consent’ has been given only after the official conducting the search has asserted that he possesses a warrant’ when he does not.” The Court found no doubt they would have been denied entry had they told the woman who opened the door the truth.

The Court continued:

This is not the only problem with the encounter. Just as the officers entered the house based on a hollow representation, they overstayed their stay based on one. After the officers falsely said they had a warrant for this address, the woman trustingly let them in. The officers saw five people in the front room, and one officer asked who lived there and who owned the property. The still-unidentified woman at the front door said she lived there, and so did one of the men. One of the occupants then asked, “[W]hat address y’all looking for?” An officer responded, “3170 Hendricks.” False again. The apparent justification for this answer was the risk that, if the officers told them the truth—they had an arrest warrant for 3171 Hendricks—the occupants would “lie” and say that *this* was 3170 Hendricks. The officers were right about one thing—the proclivity for lying that day—as the occupants answered, falsely, that “this is 3171 Hendricks.” Seizing on the answer, the officers claim that it gave them a definitive right to stay in the house. But the officers misjudged the impact of a false response to a false statement, what you might say was being too deceptive by half. The two falsities still left the officers with a false premise—that this was 3171 Hendricks. It was not.

The Court offered alternative wording that would have left “no one, truthful and deceptive alike, any room to maneuver.” The Court found no custom in law enforcement training nor in Fourth Amendment law which allows officers to give a false answer when asked what right they have to be at a location. The Court stated “the officers, in short and in truth, had no right to enter the house based on a falsity and no right to stay there based on a falsity.” The Court further noted “there may be good candidates for taking a stand on the exclusionary rule, but this is not one of them.”

The plea was reversed and the case remanded.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Kinison, 710 F.3d 678 (6th Cir. 2013)

FACTS: On August 8, 2011, Omstott told Lexington officers that she believed Kinison, her boyfriend, “was potentially involved in criminal sexual activity with children.” Det. Flannery enlisted help from Agent Kidd (FBI). She interviewed Omstott, who told her about disturbing text messages expressing a desire to engage in sex with children, and as a result, used forensics to “extract ... text messages from her phone.” Det. Barter, with Omstott’s consent, downloaded over 1600 text messages which were ultimately included in the subsequent search warrant. Omstott claimed that Kinison was viewing photos and video clips on his home computer.

On August 31, Det. Flannery got a warrant to search Kinison’s home and electronics. While executing it, Kinison arrived. The officers saw his cell phone lying on the console of Kinison’s vehicle and immediately obtained a second search warrant for the car. They seized a computer and cell phone from the house and the second cell phone from the car. All told, they found over 300 child pornography images and 40 videos.

¹⁵⁶ 391 U.S. 543 (1968).

Kinison was arrested and charged under federal law for possession of the material, under 18 U.S.C. §2252. He moved for suppression, which was granted. The Government appealed.

ISSUE: Is a known informant considered credible?

HOLDING: Yes

DISCUSSION: Kinison had argued that the warrant affidavit was insufficient to prove probable cause. The trial court “concluded that Omstott’s statement to police was insufficient and that police should have corroborated several additional details in order for her statement to be credible and the affidavit to be sufficient.” The Court noted, however, that it had previously “clearly held that a known informant’s statement can support probable cause even though the affidavit fails to provide any additional basis for the known informant’s credibility and the informant has never provided information to the police in the past.”¹⁵⁷ In this case, the informant was possible a target for criminal prosecution as well.

The Court found the trial court to have erred in concluding that the police were required to do further investigation or corroborate her statements. Further, the Court agreed there was sufficient nexus between the evidence and the place to be searched, as it was reasonable to believe that the home and Kinison’s personal electronics were where the evidence would be found. The Court noted that in previous child pornography cases, there had been a “piece of data (for example an IP address or a link between an email address and a provider) linking the individual to a computer, *none* of the aforementioned cases involved, as this case does, a credible known informant who was also the suspect’s girlfriend, and who turned over evidence to police that inculpated both of them in a serious crime.” This type of crime is generally carried out in the privacy of the home, and the evidence made a clear connection between the crime and the home.¹⁵⁸ The Court agreed the evidence should have been admitted.

The Court reversed the trial court’s decision to suppress the evidence.

U.S. v. Carter, 2013 WL 1316390 (6th Cir. 2013)

FACTS: Between January and April, 2009, using a CI, Det. Wolff arranged for a cocaine base buy at a particular Chattanooga (TN) residence. Only two of the purchases were directly from Carter but he was involved indirectly in others. The officer got a warrant for the address, referencing a John Doe as he was unaware of the true identify of one of the other individuals present. They were required to force entry to execute it and found another individual (Smith) trying to flush the drugs. Carter was present and was immediately secured. The officers found marijuana close to Carter and arrested him, then finding the keys to the residence and to a vehicle parked outside. When cocaine was found in the residence, he was charged with that as well.

Carter moved for suppression and was denied. He also moved for the identity of the CI and was again, denied.

Carter was eventually convicted (after his first trial mistried) and appealed.

ISSUE: Is a John Doe warrant to permit searches of all persons on a property valid?

HOLDING: Yes

¹⁵⁷ U.S. v. Miller, 314 F.3d 265 (6th Cir. 2002).

¹⁵⁸ U.S. v. Paull, 551 F.3d 516 (6th Cir. 2009).

DISCUSSION: Carter argued that that “his person should not have been searched by police unless he was committing a crime at the time of the search or he was named specifically in the warrant as a person to be searched.” He maintained that Det. Wolff knew who he was and could have named him in the warrant. The Court ruled that simply listing a John Doe does “not render improper the search of any other individuals found in the apartment at the time of the execution of the warrant.” The Court noted that the verbiage in the warrant authorized a search of “all persons ... found within the curtilage” for cocaine.

In addition, the search of Carter’s person did not occur until after marijuana was found in close proximity to him. Coupled with the officer’s knowledge that he had made drug sales from the location, that arrest was proper. Once arrested, a full search was authorized.

With respect to the CI’s identify, the Court agreed that protecting the CI was justified, when necessary to further to aims of law enforcement. “The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.”¹⁵⁹ The privilege is limited, however, when the disclosure of the CI’s identify is “relevant and helpful to the defense.” As such, the decision to order disclosure is a case by case one. In this situation, the Court noted the CI was still actively involved in cases and was not a necessary witness in Carter’s case, as he was charged only based on what was found on the day of the search, not on earlier transactions involving the CI. Nor did he need the CI to identify the unknown individual (“Kip”) as it was apparent that he already knew Kip’s true name. Kip was also unnecessary to the case.

Carter’s conviction was upheld.

U.S. v. Rose, 714 F.3d 362 (6th Cir. 2013)

FACTS: In November, 2008, Rose came under investigation by Cincinnati PD for sexual abuse of three minors. The minors reported that Rose had “molested and/or raped them and that he had shown them pornographic images on a computer in his bedroom.” The officers obtained a search warrant for his home and computer. Although the front page of the warrant indicated the address to be searched, including a description and photo, nowhere in the actual affidavit was the address repeated. The warrant was signed and executed. They seized a laptop that had numerous images of child pornography, some depicting Rose himself.

Rose was indicted for possession of child pornography. He was denied all suppression motions, took a conditional guilty plea and appealed.

ISSUE: Must a search warrant make a direct link between the address on the warrant and the crime being investigated?

HOLDING: Yes

DISCUSSION: The Court noted that “although the search warrant provided a description of the property that tenuously linked the property to Rose by explaining that the name ‘Rose’ appeared over the doorbell of apartment number one, the affidavit did not provide a link between the property and Rose.” It simply stated that the “victims testified that criminal activity took place in Rose’s bedroom and nothing more.” It noted that although it “undoubtedly links Rose, and Rose’s bedroom, to evidence of criminal activity, it failed to link Rose to 709 Elberon Ave., and as such, it does nothing to establish the required nexus between the place to be searched and the evidence sought.” Being “bound by the four corners of the affidavit,” the Court could “not consider what the officer executing the warrant knew or believed.” However, the Court did agree that under U.S. v. Leon, the officers did obtain and execute the warrant in

¹⁵⁹ Roviaro v. U.S., 353 U.S. 53 (1957).

good faith. The “facts in this case do not raise fears of police misconduct,” but instead, only “concerns about sloppiness in drafting affidavits within the Cincinnati Police Department.”

Although ruling that the warrant was legally insufficient, it upheld the plea under Leon.

U.S. v. Hodge, 714 F.3d 380 (6th Cir. 2013)

FACTS: On October 18, 2010, Deputy Gault (Calhoun County, MI, SO) received word from Banks of “illegal activity occurring in Hodge’s Battle Creek residence.” Banks explained he’d seen “methamphetamine manufacturing, several firearms and a bomb” two days before. He relayed the tip to Det. Gandy who “immediately set to work corroborating Banks’s story.” He learned that Hodge had been buying pseudoephedrine locally and confirmed Hodge’s identity and residence. He learned that the SO and Battle Creek PD both had been investigating Hodge and Freeze for manufacturing methamphetamine and found two anonymous tips to that effect as well.

Det. Gandy obtained a warrant for the lab and weapons, but did not mention the bomb. He admitted he thought he had stronger evidence for the lab and also thought the description of “any and all firearms, ammunition and weapons” covered a pipe bomb. Because of the guns, they determined that Battle Creek’s Emergency Response Team would do the initial entry and that the Sheriff’s Office would then do the actual search. They arrived, knocked and then breached the door with a ram. Hodge appeared, brandishing a screwdriver, which he subsequently dropped. However, he screamed and balled his fists as he was subdued and secured.¹⁶⁰

Before the ERT teams reentered, “Gandy asked Hodge, without first giving Miranda warnings, ‘if there is anything in the house that could get anyone there hurt, any active meth labs, meth waste, bombs, anything like [that] at all.’” Hodge said no. He denied a second specific question about a bomb. The ERT began a sweep for methamphetamine gases. A minute or two later, Hodge blurted out that there was a bomb in the house. Upon being pressed, he explained where it would be found. Robinson, with the ERT, asked additional detailed questions about the bomb and then entered and located it. Det. Pierce, a bomb expert, arrived and neutralized it. During the subsequent search, Gandy found no methamphetamine lab, but did find marijuana, prescription drugs, drug paraphernalia and a rifle.

Hodge was charged with the bomb, as well as possessing a firearm while being an unlawful user of a controlled substance.¹⁶¹ Hodge moved for suppression, arguing the information about the bomb was obtained as an unwarned statement. The court denied the motion and he took a conditional plea. He then appealed.

ISSUE: Is corroboration required when an informant is named/known?

HOLDING: No

DISCUSSION: Hodge argued first that the search warrant was insufficient. The Court noted that “statements from a source named in a warrant application, such as Banks, are generally sufficient to establish probable cause without further corroboration because the legal consequences of lying to law enforcement officials tend to ensure reliability.”¹⁶² In such situations, independent corroboration is not required, however.¹⁶³ Even so, Gandy did a great deal of investigation and the Court agreed the warrant was sufficient.

¹⁶⁰ No easy task, as he was 6’6 and weighed 320.

¹⁶¹ 26 U.S.C. §5861; 18 U.S.C. §922(g).

¹⁶² U.S. v. Miller, 314 F.3d 265 (6th Cir. 2002).

¹⁶³ U.S. v. McCraven, 401 F.3d 693 (6th Cir. 2005).

With respect to the bomb, the Court agreed that the statement was proper under Miranda (although the facts do not indicate he was actually given the warnings) or more importantly, under New York v. Quarles¹⁶⁴, the public safety exception. Although previous Quarles cases focused on guns, the Court noted that the “critical inquiry” is whether officers “have a reasonable belief based on articulable facts that they are in danger.” Bombs are, of course, “potentially unstable and may cause damage if ignored or improperly handled by the police,” making them more, not less, dangerous than guns. The questions asked about the bomb were focused on the construction and stability of the bomb. The Court upheld the statements under Quarles. Further, the Court agreed that even absent the questions, the bomb would have inevitably been discovered while executing the warrant. The bomb “sat in a visually prominent area of [the] home and was conspicuously covered in a towel.” The officers were looking for small items and could justifiably have searched where the items was located.

Hodge’s plea was upheld.

U.S. v. Buffer, 2013 WL 3185585 (6th Cir. 2013)

FACTS: Prior to September 24, 2009, Memphis PD received a complaint, possibly an anonymous tip, about drugs being sold from a specific address. On that day, Officer Edwards did surveillance on the location and observed several short visits. Butler was apparently inside at the time. Edwards, an experienced drug investigator, believed that the short visits “were consistent with drug transactions.” He stopped one vehicle that was leaving for a traffic violation and recovered marijuana from an individual he’d observed making a buy.

Edwards sought a search warrant, which was signed. It was executed on September 28 and three loaded handguns, a sawed-off shotgun, marijuana, packaging materials and over \$5,000 in cash was seized. Butler was charged with being a felon in possession of a firearm, along with a separate charge for the shotgun, along with drug charges. He admitted to possessing one of the guns, but moved to suppress the rest of the evidence. He took a conditional guilty plea and appealed.

ISSUE: Must an anonymous tip be adequately corroborated?

HOLDING: Yes

DISCUSSION: In this case, the initial tip was assumed to be anonymous, and so “no information exists as to the informant’s reliability,” but the Court agreed that probable cause could still exist with corroboration.¹⁶⁵ The Court agreed that Edwards’ surveillance of the home was some corroboration. However, the Court agreed that “the discovery of the marijuana, even when taken together with the short visits and anonymous tip, did not create a substantial basis for determining that probable cause existed to search” Butler’s home. The Court found “no clear nexus” between the two, noting that the individual may have possessed the marijuana before arriving at the location. (The subject did not admit to having purchased it that day.)

However, even if the warrant was “insufficiently corroborated,” it might still be upheld under U.S. v. Leon.¹⁶⁶ However, in this case, the “only definite connection [the warrant] draws between an illegal activity – drug trafficking – and the place to be searched – the Residence – is an anonymous tipster’s allegation that ‘drugs were being sold’ there.” As such, more corroboration was required to bolster that “inchoate connection.” Here, the details failed to do so. “Taken with only an unadorned tip, the requisite connection never materialized.”

¹⁶⁴ 467 U.S. 649 (1984).

¹⁶⁵ U.S. v. Brooks, 594 F.3d 488 (6th Cir. 2010).

¹⁶⁶ 468 U.S. 897 (1984).

The court reversed the order that denied the motion to suppress and remanded the case.

U.S. v. Brown, 715 F.3d 985 (6th Cir. 2013)

FACTS: A CI told police that “he had seen cocaine and what he considered to be drug dealing” at Brown’s Michigan home. An officer drafted a search warrant affidavit with that information, and it was signed. During the search, officers found cocaine, a pistol and \$4,700 in cash.

He was charged with trafficking and possession of the weapon in the commission of a crime. He moved for suppression and was denied. He was subsequently convicted and appealed.

ISSUE: Must a CI be shown to be reliable in a warrant?

HOLDING: Yes

DISCUSSION: Brown argued that the submitted affidavit did not provide probable cause for the search. Specifically, he stated that the affidavit “did not establish probable cause because it did not describe sufficiently the basis for the conclusion that the [CI] was reliable.” In the affidavit, the officer detailed that the CI had been used by the narcotics enforcement team in “numerous other investigations” and had provided reliable information in drug cases. The Court agreed the officer might have provided more specifics about what type of information he had provided but found that “level of specificity is not necessary.” The same objection was made to the officer’s identification of two cases he’d been involved with the CI, and the Court returned with the same decision. All that is required is that the CI be identified as having “given accurate information in the past to qualify as reliable.” Although he did not include all of the details he corroborated, the court did not require that – that it was enough when the officer personally knew the informant to simply state that to be the case.

Brown also argued he was entitled to a Franks hearing, because the officer made an error in typing up the affidavit. (He indicated someone was present that was not.) However, as there was no indication that the allegedly false statement made any difference in the determination, nor was it done “knowingly and intentionally or with reckless disregard for the truth.”

The Court affirmed is conviction.

U.S. v. Saffell, 2013 WL 1777146 (6th Cir. 2013)

FACTS: In October, 2005, McGarry, a regular informant, told the police that Saffell had told him he had met a 12-year-old girl on the Internet and that he had recorded himself having sex with the girl. (Saffell contended he was gay, however.) He began to record conversations with Saffell, in which they discussed “the arrangement of an underage sexual partner for Saffell.” Saffell, however, later contended that McGarry “initiated an aggressive and persistent crusade to entrap Saffell ...” During the conversations, Saffell indicated an interest in McGarry. “Once McGarry came to terms with Saffell’s being more interested in men,” they discussed a meeting with the fictitious “Tad.” Saffell was told Tad was 18 and agreed to a meeting. However, there, he was arrested by Det. Allar. The detective then prepared a search warrant, as follows, for Saffell’s home.

On 10/25/05 at around 4:30 P.M. I was contacted by . . . McGarry . . . regarding Matthew Saffell. [McGarry] has given me information in the past of various criminal acts that have always proven to be truthful and reliable. McGarry advised me that he was offered a ride home by . . . Saffell. McGarry stated that Saffell offered him money to engage in sexual acts with McGarry’s girlfriend if Saffell could watch. Saffell advised McGarry that he was a sexual pervert and had met a 12 year old girl. I supplied McGarry with a digital recorder .

I have listened to these recording[s] and the recording[s include] Saffell [talking to] McGarry about purchasing a young girl to pull a train on. "To pull a train" is slang for having sexual intercourse with several partners in a line one after another. Another recorded conversation has Saffell telling McGarry about the girl he had sex with a couple days ago. Saffell also asks McGarry to engage in sexual activity for twenty dollars. McGarry eventually agrees to tell Saffell about his past sexual encounters as Saffell masturbated in front of McGarry. McGarry stated that Saffell had a bag of sex toys and removed a bottle of lubricant and applied it to his penis while he masturbated. Saffell advised McGarry that he has in his resident [sic] pornographic materials that would blow a normal person[']s mind. This statement enforces McGarry[']s statement to me that Saffell had advised McGarry that he makes pornographic movies with minors.

McGarry has been in constant contact with me since 10/25/2005. . . Saffell wants McGarry to find a young boy and girl he could have sex with. Saffell offers to pay McGarry and the young boy for the sex. McGarry advised Saffell that he knew a 13 year old boy and a 12 year old girl who [were] interested. Saffell stated that he would pay fifty dollars for a sexual encounter. The encounter was set up and Saffell was arrested at the meeting place on this date, 11/21/2005. Due to the above statements I believe that Matthew [Saffell's] residence contains pornographic materials depicting children engaged in sexual acts.

It further noted that the detective:

"believes and has good cause to believe that said property . . . is concealed in 105 Morristown Street . . . being the residence of Matthew Saffell, being a [g]rayish colored single story house with white trim, and a white door facing Morristown Street."

A number of tapes were found, containing legal pornography. However, on the computer hard drive, they found suspected child pornography. Saffell was charged, but the case was dismissed, under state law. Some five years later, he was indicted under federal law.¹⁶⁷ Safeell moved for suppression, and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a clear connection be made between an address and the crime in a warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court agreed that the affidavit was "sufficient to establish a connection between Saffell and the premises to be searched." The Court noted that the informant had identified that he and Saffell had discussed pornography that he had at his home. Further, it was specifically discussed that he'd made a recording of a sexual encounter with an underage female and it was logical to believe he had additional child pornography as well. The lack of a time frame mentioned as to when this occurred was not dispositive and did not render it stale.¹⁶⁸

Further, although some information known to Saffell was not included in the affidavit, the Court did not find the omission to be deliberate or reckless.

Saffell's plea was affirmed.

¹⁶⁷ 18 U.S.C. §2252 (1)(4)(B).

¹⁶⁸ U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009); U.S. v. Brooks, 594 F.3d 488 (6th Cir. 2010).

U.S. v. Ugochukwu, 2013 WL 5227050 (6th Cir. 2013)

FACTS: Initially, at the start of the investigation in 2009, officers “focused on the drug trafficking activities of” Sapp, who was distributing heroin in the Cleveland area.” When his initial supplier dried up, he turned to two men who obtained their drugs from Ugochukwu.

During the lengthy investigation, Ugochukwu discussed with his intermediaries the quality of the heroin and other details of the trafficking. On May 24, 2010, the officers intercepted calls that discussed a meeting the next day. Ugochukwu was recorded entering a residence and leaving shortly with \$300,000 in drug proceeds. Another intercepted call further involved Ugochukwu in the trafficking. Finally, in July, 2012, in a series of searches and arrests, the officers began to round up the conspirators. They went to serve an arrest warrant at Ugochukwu’s home, but no one answered. Hearing someone inside, they broke down the door and found him. A sweep confirmed he was alone. During the sweep, they saw a blender, a food sealer and packaging materials and used that information to get a search warrant.

During the search, they found heroin that had recently arrived by “body courier,” money and a variety of other incriminating items. He was indicted and moved for suppression, which was denied. He was convicted and appealed.

ISSUE: Must a warrant establish a nexus between the crime and a location?

HOLDING: Yes

DISCUSSION: Ugochukwu argued that the search warrant affidavit was insufficient because it did not “contain sufficient information to establish the required nexus between his apartment and drug trafficking.” He claimed that the earlier searches (of the homes of his confederates) did not link him to the conspiracy and that the items seen in plain view during his arrest were commonly found in households. The Court disagreed, finding that it was more than sufficient, as it provided great detail of the investigation, including the substance of the wiretaps. The officers related “the substance of an intercepted telephone conversation” between Ugochukwu and other defendants discussing heroin distribution. It incorporated by reference the criminal complaint and supporting documents, as well, the same document that supported his arrest warrant.

The Court upheld the denial of the motion to suppress.

U.S. v. Rodgers, 2013 WL 5311271 (6th Cir. 2013)

FACTS: Rodgers came under investigation by the DEA in November, 2010, after being identified by a CI as a “major drug trafficker in the Detroit area.” A GPS tracking device on his vehicle indicated he frequented the area around a specific house and that his vehicle could be seen to be parked there as well.

In December, Rodgers told the CI that he was storing cocaine at that house. A warrant was used to search it while he was not present and 24 kilos of cocaine, marijuana and a gun was found. Rodgers was detained and brought to the house; he was found to be in possession of the keys to the house. He was given Miranda and admitted to where more marijuana was found. He also provided the alarm code. A search of his workplace also revealed more cocaine, in an office to which he held the only key.

Rodgers was convicted for the drugs, and appealed.

ISSUE: Does proof of a CI’s reliability validate a search warrant?

HOLDING: Yes

DISCUSSION: Rodgers first argued that the search warrant used to search the home lacked sufficient probable cause. The Court noted that the CI had provided accurate information on five earlier occasions. The information was corroborated by the tracking device and actual surveillance, and his repeated visits to the home, which was not where he apparently lived. Further, Rodgers' admission to having additional marijuana and his ability to tell the officers where it was hidden, provided constructive possession of those drugs, as well.

The Court upheld his conviction.

U.S. v. Vanderweele, 2013 WL 5992131 (6th Cir. 2013)

FACTS: On July 28, 2010, an informant told Agent Petschke (ATF) that he'd seen Vanderweele with a pistol and silencer some 4-5 months earlier, at a Michigan motorcycle club. The agent learned that Vanderweele had three .22 pistols, but no silencer, in his name. He sought a search warrant for Vanderweele's home. During the subsequent search, the team found four silencers, three handguns and related items. Some of the items, including one silencer, were found under Vanderweele's bed.

Vanderweele was eventually indicted for possession of unregistered silencers under 26 U.S.C. §5861(d). His motion to suppress denied, he took a conditional guilty plea and appealed.

ISSUE: Is it presumed that weapons or ancillary items purchased some time before will remain in a suspect's possession?

HOLDING: Yes

DISCUSSION: Vanderweele argued that the search warrant did not provide probable cause for the search because it relied upon a statement that the silencer was in his possession as many as 7 months before the search and because it did not show a nexus to his home. The issuing magistrate had reviewed the warrant for staleness under the factors outlined in U.S. v. Abboud: that the home was his permanent home for the entire duration of the time in question, that possession of a silencer was much like a gun and an item someone would be likely to continue to possess once purchased, and was well within the time frame other courts had approved.¹⁶⁹ Further, the Court agreed that nexus was satisfied, because "firearms, ammunition, and related items are commonly stored within the owner or possessor's dwelling."¹⁷⁰

The Court agreed that the magistrate's analysis was sufficient and upheld the warrant.

SEARCH & SEIZURE – CONSENT

U.S. v. Perry, 703 F.3d 906 (6th Cir. 2013)

FACTS: In January, 2009, Tibbs returned home to his boarding house about 5:30 a.m. During the next few hours, Perry, another boarder, knocked on his door four times, the last time she brought a firearm and pointed it at him. Tibbs shut the door and called the police - Perry left the house. She returned that evening about 9 p.m. and was confronted by her landlord. She denied having pointed a gun, but "threatened to do just that as she walked upstairs." She pointed a gun at another resident, Dancy, thinking he'd called the police. By this time, police were on the way.

¹⁶⁹ 438 F.3d 554 (6th Cir. 2006).

¹⁷⁰ See U.S. v. Smith, 182 F.3d 473 (6th Cir. 1999).

Officers Hendree and Parker arrived and talked to the residences. Both were armed, Hendree with a shotgun and Parker with a handgun. She complied with their orders and was handcuffed. She said she had no gun but admitted to having been drinking. Her door stood open nearby and they asked for consent to search. (This was witnessed by occupants.) Parker went in and called for Hendree, who spotted a revolver “sticking out from under a pillow.” Hendree’s report later indicated that he found the gun during a protective sweep – not mentioning the consent.

Perry, a felon, was charged with the gun. She argued that it was located during an unlawful search. The trial court ruled that it was a consent search or a protective sweep, and that either supported the search.

Perry took a conditional guilty plea to possession of the firearm and appealed.

ISSUE: May a drunk, handcuffed subject give a valid consent?

HOLDING: Yes

DISCUSSION: Perty argued that she did not consent. The Court agreed that one witness was ambiguous in his statement but that three others testified that she did give consent. She then argued that the consent was not voluntary and the Court agreed that there were facts suggesting that was the case – as she was handcuffed, drunk and never told that she could refuse. However, the Court then noted that “she was no stranger to the police or the criminal justice system” and had been arrested (and presumably handcuffed) 57 times before. The “encounter with the officers in the hallway was brief, without any repeated questioning or physical abuse.” The Court agreed that her consent was voluntary and upheld her plea.

U.S. v. McCormick, 2013 WL 979132 (6th Cir. 2013)

FACTS: On October 1, 2010, Smith (McCormick’s girlfriend) called police to report a domestic assault. She reported he had several guns in his home even though he was a convicted felon. Officers went to the home and knocked. McCormick answered, appearing drunk, but had no trouble talking to the officers. McCormick asked to go back inside and was instructed to stay on the porch. At that point, McCormick said “let’s go in and talk about it” and walked back inside. The officers followed. He walked “through the living room, through the kitchen, and into a hallway by a bedroom.” Officer Steward ordered him to stop and was ignored. Steward grabbed McCormick; he was handcuffed and taken outside. Officer Moore spotted “what appeared to be a rifle at the end of the hallway,” but when he looked closer, he realized it was a BB gun. However, he then noticed three guns poking out from under a bed. Officer Moore extracted the guns, then saw a fourth long gun.¹⁷¹

McCormick was indicted for being a felon in possession. He moved for suppression and was denied. He then appealed.

ISSUE: Does an invitation to come inside and talk constitute a consent to an entry?

HOLDING: Yes

DISCUSSION: The Court agreed that McCormick’s actions constituted a consent to the officers entering his home. McCormick argued that Steward tased him, but the Court noted he had not a single piece of evidence corroborating that claim. The Court also agreed that his consent was voluntary. McCormick also argued that under Kentucky law, he was permitted to own the long guns, because when he was released (1996) he was only told he could not possess handguns. The Court noted that he could not rely on the representation of a state officer with respect to federal law.¹⁷²

¹⁷¹ He found two shotguns, a rifle and a combination rifle/shotgun.

¹⁷² Called entrapment-by-estoppel.

McCormick then argued that the evidence was insufficient to support the charge. To satisfy the elements of 18 U.S.C. §922(g)(1), the prosecution needed to prove that McCormick had a prior felony conviction (he had at least two) and that he knowingly possessed the guns and that the guns had been made outside Kentucky (in interstate commerce). The Court agreed that the requirements were satisfied.

McCormick's conviction was upheld.

U.S. v. Frost, 2013 WL 1490102 (6th Cir. 2013)

FACTS: Memphis officers responded to a location close to Frost's home as a result of an emergency call. There they found Donnell Frost, Jr. (DJ), age 16, who told them that he and his father had physically fought when he left the house with his mother's cell phone. As he got away, he heard his father go into, and then come out of the house, and when he looked back, he saw his father coming after him with a gun. He fired one toward DJ. (Frost later said he was just trying to scare him.)

Officers went to Frost's home and immediately arrested him. They asked for consent to search first from DJ's mother, who denied it, saying the house belonged to Frost. They asked Frost for permission. He refused to sign a form but told them they could "search all that [they] want because he didn't have any firearms and he had fired no shots at anybody." Inside they found a 2-shot Derringer pistol which had been fired once, hidden in a bed.

Frost, a convicted felon, was indicted for possession of the weapon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May a subject in custody still give a voluntary consent?

HOLDING: Yes

DISCUSSION: Frost argued that his consent was not freely and voluntarily given, since "he was handcuffed and sitting in the back of a patrol car, after having been arrested." The trial court noted that he'd only been detained a brief time when asked and that the officers had re-holstered their weapons. The Court noted that several factors were involved in determining if a consent was voluntary – such as "the characteristics of the accused, including the age, intelligence, and education of the individual, whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights." In addition, it must look at the "details of the detention, including the length and nature of detention; the use of coercive and punishing conduct by the police; and indications of 'more subtle forms of coercion that might flaw [an individual's] judgment.'"¹⁷³

The Court reviewed factors with respect to Frost, finding that the only possible error was that the officers did not inform Frost that he could refuse consent. Although the Court had "recognized that police officers are not constitutionally obligated to inform suspects of their right to refuse consent, we have also indicated that failure to do so should be considered when analyzing the voluntariness of a defendant's consent."¹⁷⁴ However, his refusal to sign a consent form suggested that he knew he had the right to refuse and "moreover, was unafraid to exercise this right." His oral consent was different than the one given in Worley, in which the subject, when asked for consent, responded "You've got the badge, I guess you can."¹⁷⁵ Instead, he seemed to be trying to mislead the officers about what they might find.

¹⁷³ U.S. v. Watson, 423 U.S. 411 (1976).

¹⁷⁴ U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011).

¹⁷⁵ U.S. v. Worley, 193 F.3d 380 (1999).

Frost's plea was affirmed.

U.S. v. Hinojosa, 2013 WL 4483523 (6th Cir. 2013)

FACTS: On January 18, 2012, Officer Wonders and Shaffer (Kalamazoo PD) were on patrol in a “high-crime, high-drug area.” They observed Hinojosa, in a vehicle, parked next door to a house that “had been the site of past drug activity and neighborhood complaints.” They watched him get out and walk around, move the car, and then get out and walk around again. Finally, he “walked into the house through the front door.” After a minute, he came out and drove off. They followed him to another house that had several apartments and the officers knew that there had been reports of drug manufacturing in that building.

Officer Wonders approached Hinojosa's vehicle on foot, as Officer Shaffer parked nearby and got out. Officer Wonders knocked on Hinojosa's driver's side window and asked to talk to him “real quick.” Hinojosa did not roll down the window but asked what he wanted. Officer Wonders stated they were investigating tips regarding suspicious activity. Upon request, Hinojosa produced an OL. Upon checking, the officer learned it was suspended and that he was on parole. Officer Wonders arrested Hinojosa. Hinojosa told the officer he had a pistol.

As Hinojosa was a felon, he was indicted for having the weapon. He moved for suppression, which was denied. The trial court found the interaction to be consensual, as the officers did leave him “a way of exiting the driveway, although the way may not have been his preferred means of exiting.”

Hinojosa took a conditional guilty plea and appealed.

ISSUE: Is approaching a subject on foot generally a consensual encounter?

HOLDING: Yes

DISCUSSION: The Court agreed that “none of the officers' actions during the encounter with Hinojosa prior to the arrest, either individually or collectively, amounted to a seizure, and Hinojosa's arrest instead was the result of a consensual encounter.”¹⁷⁶ He was left with a “reasonable means of egress.” The Court believed that Officer Wonders' resting of his hand on his gun was also reasonable. Hinojosa agreed to talk to him. Hinojosa “may have subjectively felt impelled – for instance by custom, courtesy, respect, or even eagerness to please” – to give his ID to Officer Wonders, but that was a request, not a command.¹⁷⁷

The Court upheld Hinojosa's plea.

U.S. v. Isom, 2013 WL 5288973 (6th Cir. 2013)

FACTS: In June, 2010, Memphis PD received a complaint that Isom was selling marijuana from a home he shared with his girlfriend, Gilkey. Under surveillance, a number of people were seen to be coming and going - Isom later left. When he was caught speeding, he was stopped. Det. McDonald approached, and as he did so, “he saw Isom throw something out of the window and shove a plastic bag under the seat.” He saw marijuana on Isom's clothes. Isom told him he'd been “rolling a blunt” and that he'd tossed it out. Marijuana was found under the seat.

He was taken back to his house. There, Det. Graves knocked and finally, a young girl opened the door, saying only she and her siblings were there. However, as he walked away, he spotted an adult (Gilkey) peeping through the blinds. He returned and she came to the door. He sought entry and told her they were

¹⁷⁶ Michigan v. Chesternut, 486 U.S. 567 (1988).

¹⁷⁷ U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).

about to tow a vehicle registered to her, that contained drugs. She agreed to him entering and signed a consent to search. They found a large amount of marijuana and elected to stop the search to obtain a warrant. With the warrant, they found a loaded handgun and more drugs.

Isom was indicted on the firearm and drug charges. He appealed.

ISSUE: Does approaching a person in the evening, at home, invalidate a consent?

HOLDING: No

DISCUSSION: The Court looked to whether Gilkey voluntarily signed the consent form. Gilkey testified that she was employed and could read. Further, the Court agreed that the facts, that she was alone, with small children, at night, when the police arrived, was not enough to show coercion and that, the officers used “no threats, intimidation, or promises in exchange for consent.”

The Court upheld Isom’s conviction.

SEARCH & SEIZURE – EXIGENT ENTRY

U.S. v. Daws, 711 F.3d 725 (6th Cir. 2013)

FACTS: Deputy Sheriffs (Henderson, TN) responded to an armed home invasion in 2010. The victim recounted that Daws had taken money at gunpoint and warned that if the victim called the police, he would be killed. As that interview ended, the deputies got another call about Daws, the caller claimed that Daws and a second person had arrived “with a bundle of money” and wanted to hide a shotgun (the weapon used in the first crime.) The deputies were very familiar with Daws and “resolved to do two things: promptly apprehend Daws and be careful, the last of which prompted them to don body armor, call for backup and approach Daws’s rural house quietly.” They found a friend of Daws outside, crying and they heard him confess to someone on the phone that he and Daws had “done something bad” and would be going to jail. The friend was apprehended. The deputies entered and found Daws inside the house. During a protective sweep, they found a shotgun.

Daws, a felon, was charged with possession of the gun. He took a conditional guilty plea and appealed.

ISSUE: Does a person making threats justify an exigent entry?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers had ample reason to justify a warrantless entry: “the gravity of the crime being investigated, the likelihood that the suspect is armed and the suspect’s willingness to use a weapon.”¹⁷⁸ The Court agreed that given what they knew, “even the most reticent officer could be forgiven for taking matters into his own hands – and for halting an escalating set of risks.” The delay inherent in getting a warrant “would have heightened the risk that Daws would act on the threats” he was making. The Court agreed that Daws’s actions “gave officers ... reasons to believe they faced an immediate risk.” The Court agreed that the deputies faced a real risk that Daws would open fire on them.

The Court agreed their entry was justified and upheld the plea

¹⁷⁸ Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555 (6th Cir. 2006).

SEARCH & SEIZURE - CONSENT

U.S. v. Evans / Dunn, 2013 WL 6620469 (6th Cir. 2013)

FACTS: In the fall of 2008, the FBI investigated several similar armed robberies in Memphis. Investigator Bartlett (Shelby County, TN, SO) worked with the FBI on the case. He had local TV stations broadcast some of the surveillance footage. One tip led them to Dunn and Jones; Jones was identified from a photo array. Another tip specific to Dunn identified where he was living with Nelson and Jones. A database search “suggested a connection between those three and Evans.” The officers went to the apartment and encountered Nelson and Thompson, who said that Dunn and Jones would be found in another specific apartment. The officers noticed a store card in their car with the name of one of the robbery victims. Upon further questioning, Thompson said there were probably weapons in the apartment. Realizing what was up, she also said her infant child was in the apartment as well.

The officers went to the apartment and asked for the child. They were refused entry. They heard a voice yell not to open the door and lots of noises. They found an apartment complex manager but still couldn't get the door open with the key he had. They finally kicked in the door and entered with drawn weapons. Dunn and Evans tried to run, but all three adults in the apartment were secured and searched. The third adult, Kirby (Evans) the homeowner, and two children were removed; Kirby consented to a search of the apartment.

In the subsequent search, they found a pistol in the toilet tank and clothing matching that in the surveillance video. Evans and Dunn were arrested. Dunn confessed to all 7 robberies, Evans refused to make a statement. Thompson admitted that she knew that Evans, Jones and Dunn had been involved in the robberies. Kirby admitted that Jones and Evans shared the apartment with her and the Dunn was Jones' boyfriend and often stayed as well. All three helped with expenses.

Dunn and Evans were indicted. Both moved for suppression, with Evans also moving to suppress the photo identification. When their motions were denied, both took conditional guilty pleas and appealed.

ISSUE: May the current leaseholder have priority when consent is requested by law enforcement to search their residence?

HOLDING: Yes

DISCUSSION: Dunn argued that the officers lacked probable cause or exigent circumstances to enter and that Kirby's “consent to a search could not override the refusal of consent as a presently objecting co-tenant.” The Court agreed the officers lacked a warrant but agreed that their reasonable belief that the child was at risk was sufficient to justify their entry. They had an objectively reasonable belief that the occupants were armed and that at least one small child was present. They also reasonably believed there was an attempt to get rid of evidence, as evidenced by the sound of moving items after they announced. At the time, they did not know that Evans was the child's father.

Once they lawfully entered, they obtained consent, freely and voluntarily, from the leaseholder (Kirby), who was the sole name on the lease and apparently held the only key. Once they searched and found the evidence, they had more than sufficient evidence to arrest both Evans and Dunn. With respect to Dunn's confession, the Court noted that since the search was lawful, his subsequent confession could not be held to be the fruit of the poisonous tree of an unlawful search.

Both pleas were upheld.

SEARCH & SEIZURE – CUSTODY

U.S. v. Vaughan, 2013 WL 174219 (6th Cir. 2013)

FACTS: Vaughan was arrested in Tennessee when Agent Richardson (TBI) told Trooper Kilpatrick that Vaughan would be delivering marijuana to a restaurant parking lot and that the trooper was to “develop probable cause” for a stop. When the trooper saw that Vaughan was not wearing a seatbelt, he made the stop. He found Vaughan with bloodshot eyes and smelling of burnt marijuana. Trooper Dunkleman arrived with his drug dog. As Trooper Kilpatrick wrote the citation, Vaughan denied consent to search. However, the dog alerted and the vehicle was searched anyway. Vaughan was not arrested, but was secured in the back of the trooper’s vehicle. They found \$19,000 in cash and other suspicious items. Agent Richardson arrived and gave Vaughan Miranda rights. He was arrested, convicted and appealed.

ISSUE: Is someone held locked in a patrol car under arrest?

HOLDING: Yes

DISCUSSION: The District Court had agreed that at the time he was placed in the car, Vaughan was under arrest, as his cell phone had been confiscated, he was secured in a patrol car next to a caged dog and he was told he was detained and not free to leave. He was held for approximately 1½ hours. However, the Court agreed that his detention at that time was supported by sufficient probable cause for an arrest.

Vaughan’s conviction was affirmed.

U.S. v. Young, 707 F.3d 598 (6th Cir. 2013)

FACTS: On December 15, 2006, at about 1:15 a.m., Young was reclining in the passenger seat of a vehicle parked outside a Grand Rapids, MI, restaurant. It was parked in a city-owned lot regularly used by the restaurant patrons. The area “had a recent history of violent crime.” Since the restaurant patted down patrons, officers considered people waiting outside to be more likely to have a weapon, and in addition, they were on the lookout for loitering in violation of city ordinance.

Officers Fannon and Johnson pulled into the lot and parked behind the vehicle. They watched Young and then approached, along with Officer Loeb. After a pause, Young rolled down the window. He answered the questions asked about what he was doing, stating that his friend had gone inside to ask about a table or take-out. The friend, Eric, was approaching the vehicle and was instructed to go back inside. Young was told to “sit tight.” Officer Johnson proceeded to run a records check on Young. Young was told that he was not allowed to just sit in the car in the parking lot. Due to Young’s suspicious movements, Officer Fannon told him to keep his hands visible. When Young didn’t comply, he was told to get out. Young did so, but “disclosed that he had a gun in his pocket.” He was secured, frisked, and the gun seized. Young was then discovered to have an outstanding arrest warrant.

Young, a felon, was charged with possession of the firearm. He moved for suppression and was denied. Young took a conditional guilty plea and appealed.

ISSUE: Does the discovery of an arrest warrant remove the taint of an otherwise unlawful detention?

HOLDING: Yes

DISCUSSION: Young argued that “he was seized when the officers parked behind him, or, at least, when the officers told him to ‘sit tight.’” At the time, he was at most possibly merely trespassing, and that

was not enough reasonable suspicion to support the seizure. Once he explained his purpose for being there, seizure was not appropriate.

The Court noted that the record was unclear as to whether Young's vehicle was actually blocked in by the police but the Court assumed it was. "The presence of three officers shining flashlights into the car and authoritative instructions from Officer Fannon also suggest that a reasonable person would not have felt free to leave anytime thereafter." The Court looked for sufficient indicators to support a Terry stop and noted that the "high-crime history of the parking lot" and their knowledge that the restaurant patted down patrons were "contextual factors, not specific to Young." Such factors are not to be given much weight "because they raise concerns of racial, ethnic, and socioeconomic profiling." However, the Court noted that trespassing is, in itself, a crime. Young's position in the car, reclined and possible asleep, indicated he was "going nowhere." Initially, the officers lacked Young's explanation for being there. The Court agreed the initial contact was supported by reasonable suspicion.

The Court moved on to whether the scope was reasonable. The Court noted that once they obtained his ID, it was inevitable, no matter what else occurred, that they would have discovered the outstanding warrant. The Court agreed that "running a warrant check is not the quickest way to 'confirm or dispel suspicion' of trespass, nor is it the 'least intrusive means' of investigation."¹⁷⁹ Other circuits have noted that running a warrant check is not necessarily improper as it "may help clear the person's name or may give the officers important information about the suspect." Because the check is reasonable, the "inevitable product of that check, the gun, is the fruit of a legal seizure."

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE – TERRY

U.S. v. Tillman, 2013 WL 6038230 (6th Cir. 2013)

FACTS: On February 27, 2012, Deputy Delaney (Boyd County SO) stopped Tillman for not wearing a seat belt. In fact, Tillman was behind Delaney at a stop light and Delaney was already suspicious of the vehicle (which belonged to Tillman's girlfriend) as it had factored into other stops in the jurisdiction.

As he pulled over the vehicle, Delaney saw Tillman reach over into the front passenger side of the vehicle. He was concerned that Tillman, who leaned over a second time, was reaching for a weapon. Delaney drew his weapon as he got out of his vehicle but kept it out of Tillman's view. He saw that Tillman did not have any documents in his hands (another possible reason for his reach toward the passenger side) so Delaney had Tillman place his hands on the steering wheel. Tillman complied but then reached into his left pants pocket. Delaney asked about drugs or weapons in the car and saw that Tillman was sweating heavily, despite the temperature being 55 degrees. Tillman again moved his left hand out of sight.

Delaney ordered Tillman out and frisked him. He found a number of items, including 4 oxycodone pills, brass knuckles, a large amount of cash and a cell phone that included incriminating text messages. Tillman was arrested for the drugs and the concealed weapon. A search warrant was used to further search the car; cocaine, a loaded firearm and a large amount of money were found.

Tillman moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is the refusal to obey an order to keep one's hands in sight important in determining whether a frisk is appropriate?

¹⁷⁹ U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

HOLDING: Yes

DISCUSSION: The Court agreed that the traffic stop was legitimate and based on a valid traffic offense. Even if it was a pretext, the officer's subjective intentions were irrelevant.¹⁸⁰ With respect to the frisk, the Court agreed that "to proceed from a stop to a frisk, an officer must have a reasonable suspicion that the person to be searched is armed and dangerous."¹⁸¹ The Court agreed that Deputy Delaney had sufficient cause to support a frisk, given his observations and interpretations for Tillman's behavior. The Court gave "significant weight" to Tillman's refusal to "heed Delaney's instruction to keep his hands on the steering wheel."¹⁸² His nervousness was also a factor.¹⁸³ Deputy Delaney articulated well that he was concerned about the possibility, even likelihood, that Tillman had a weapon. Further, furtive motions to reach under a seat can also create reasonable suspicion for a Terry frisk.¹⁸⁴ Although a certain amount of nervousness is to be expected, an officer may use their training and experience to judge how much is too much.¹⁸⁵ Finally, Tillman was driving a vehicle that belonged to a known drug dealer.

The Court agreed it was proper to deny the motion to suppress.

U.S. v. Williams, 2013 WL 1831773 (6th Cir. 2013)

FACTS; On May 23, 2009, Sgt. Johnson (Memphis PD) was on patrol in a nightclub parking lot, as there had been a number of break-ins reported. Officer Amato was also in the area. Sgt. Johnson saw a vehicle backed into a space some 300 feet from the club's entrance, headlights on and engine running. Two occupants, Chalmers (driver) and Williams (passenger) were inside. Finding the location unusual, he pulled nearby, although later testimony differed as to whether the vehicle was blocked in. His alley lights were illuminating the vehicle. He approached the car with a flashlight.

Sgt. Johnson noticed that the occupants were "shuffling around" and "moving stuff" on the floorboard. He saw that both were "unkempt," unlike most of the club patrons. He asked what they were doing and shone his light inside. He saw DVD monitors and stereo equipment, with no boxes, at Williams' feet. He learned Chalmers had a suspended OL, expired plates that belonged to another vehicle and burglary tools in plain view.

Officer Amato arrived as backup and both men were secured in separate vehicle while the officers searched the lot for evidence of recent car break ins. Officer Amato returned to find Williams moving in the back seat, and subsequently found a handgun on the floorboard. Ammunition fitting the weapon was found on Williams' person.

Williams, a convicted felon, was indicted for possession of the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May officers detain someone briefly with reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court looked to whether the encounter, initially, was a seizure. It concluded this case fell "somewhere in the middle." On one hand, Sgt. Johnson's car did apparently leave room for

¹⁸⁰ U.S. v. Shank, 543 F.3d 309 (6th Cir. 2008).

¹⁸¹ See Joshua v. DeWitt, 341 F.3d 430 (6th Cir. 2003).

¹⁸² See Adams v. Williams, 407 U.S. 143 (1972).

¹⁸³ U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000).

¹⁸⁴ U.S. v. Graham, 483 F.3d 431 (6th Cir. 2007); U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

¹⁸⁵ See U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995).

Williams to drive past. But, “maneuvering around Sergeant Johnson’s close-in squad car was the only way to leave the scene.” They noted the ultimate question was whether Williams felt free to leave. The Court was convinced that the “encounter was more akin to an investigative detention than a run-of-the-mill conversation on a public street,” citing the lights pointed at the pair, Sgt. Johnson’s walking directly in front of the car, the use of a flashlight. “At this point, [the Court thought that] a reasonable person in the defendant’s shoes, already hemmed into a parking space with a single narrow egress, would no longer feel free to terminate such an encounter.” The Court concluded that Sgt. Johnson “seized Williams by a ‘show of authority’ when he began asking questions of the occupants in an already-coercive environment.”

However, Sgt. Johnson had “ample reason for suspicion based on a number of converging factors.” As such, the scope of the investigation “was reasonably related to the circumstances that justified the detention.” The officers took prompt action to address their suspicions by “surveying the lot and talking to affected patrons.” Nothing suggested that the detention “was improper or drawn-out beyond reason.”

The Court upheld the denial of the motion to suppress and his plea.

U.S. v. Royal, 2013 WL 1777255 (6th Cir. 2013)

FACTS: In September 2009, weapons and ammunition were stolen from a Tennessee clinic. Before the burglary was reported, however, Morristown officer encountered Royal and Kelley. At about 5 a.m., Officer Sexton reported that he saw two men near car wash bays. He called for backup and Officer Campbell arrived quickly. Both officers were experienced.

The officers later testified that both men were wearing clothing “with what appeared to be insulation stuck to the outside, and with their hoods pulled over their heads.” Neither had a vehicle at the car wash, both were “sweating profusely and were visibly nervous.” They said they were just “walking around” but would not state where they’d been. Only Royal had ID. No warrants were found for either man. They asked if the men would consent to a pat-down search for weapons; both did. Officer Campbell found, on Royal, marijuana, a pocketknife, a screwdriver and a speed loader. The officers saw a vehicle parked in a church parking lot across the street, which was otherwise empty. Both men denied any connection to the car, which in fact belonged to Royal’s mother. The men were detained in the back of a cruiser until Corporal Shockley arrived, moments later. They were not handcuffed nor under arrest. The Corporal gave each man Miranda warnings and spoke them briefly, separately. He noted that it was a warm night, but both were wearing long-sleeved clothing and were “sweating profusely.” He also noted the unusual presence of the car where normally only church busses were placed overnight. Upon approach, they saw that the windows were down and the keys in the ignition. The back seat was full of items, including mail, a guitar and a computer printer box. A shipping label on the box identified the clinic, some four miles away. They also saw mail addressed to Royal. Upon investigation, they found the clinic had been burglarized.

Royal and Kelley were arrested, and the vehicle towed to the police station. The contents were inventoried and the handgun was also found. Royal was charged and moved for and convicted, for possession of the gun, in federal court, because he was a convicted felon. He appealed.

ISSUE: May officers do a brief detention based on reasonable suspicion?

HOLDING: Yes

DISCUSSION: The District Court had concluded that the initial stop and frisk, and then the subsequent detention, was justified based upon what the officers knew and then located on the frisk. The Court agreed the items in the vehicle were in plain view, and the sighting of a box, with a shipping address of the clinic, was highly suspicious. The vehicle was properly towed and inventoried. The Court noted that the two men “disavowed any connection to the vehicle.” Royal argued that the encounter was “an investigative

detention from the moment the officers first pulled into the car wash and approached them.” The Court noted that an individual is seized when an officer “by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied.”¹⁸⁶ Simply approaching someone in a public place and asking questions isn’t enough¹⁸⁷ although the right words could make a reasonable person feel they weren’t free to leave.¹⁸⁸ Although factors have been detailed in various cases, the “officer’s subjective intent in detaining an individual is irrelevant unless that intent is conveyed to the individual in such a way as to cause him to believe he is not free to leave.”¹⁸⁹ Nothing in the encounter seemed to lead to anything other than a voluntary encounter. The two men consented for the frisk for weapons, which even without consent, the Court agreed was justified under the facts.

The Court also addressed Royal’s argument that Sgt. Herrera, who wasn’t involved in the arrest, prepared documents that indicated the frisk was a “search incident to arrest.” He did not testify, but the Court did chastise the preparation “as ‘careless’ and ‘without due consideration of the legal phraseology he employed.’” Royal’s conviction was affirmed.

U.S. v. Logan, 2013 WL 1924997 (6th Cir. 2013)

FACTS; On October 13, 2010, at about 10:30 p.m., Officer Boutell (Kalamazoo, Michigan) was patrolling. He spotted a vehicle with headlights off, but dome light on, and saw 4-5 people inside. He believed the vehicle was trespassing as it was parked in a vacant lot. He drove by without stopping and called for two other officers to back him up. All three officers believed the city owned the lot. In fact, the vehicle was parked on private property. They pulled in without lights to “gain a tactical advantage” and then shined their spotlights on the car to momentarily blind the occupants. They parked some distance away and were not blocking the vehicle in.

As they emerged, the officers saw Logan get out on the front passenger side. He was ordered back in at gunpoint and “Logan hesitated, unsure about what he wanted to do, and he ‘stutter stepped’ back and forth.” Officer Weldon believed “he was likely trying to distance himself from contraband in the car.” Logan gave a false name. He gave consent to search his person and a bullet was found, causing him to be handcuffed. A warrant was discovered under his real name. Officer Boutell was dealing with Jones, who was “not fully cooperative.” In light of Jones’s behavior, Officer Boutell frisked him. An open bottle of gin was found in the console. Officer Boutell believed he could search the entire car, and did so, finding a loaded handgun which matched the ammunition Logan had.

Logan, a convicted felon, was charged with possession of the gun. He moved for suppression. The Court agreed that he encounter was a seizure and that Logan was seized when he began to cooperate with the officers. The Court agreed that although they were mistaken about the ownership of the lot, it was reasonable under the circumstances, and justified even without that belief, as it was in close proximity to a cut through used as a “means of flight by people committing criminal acts in the adjoining neighborhood.” The Court agreed that the bullet provided probable cause to search.

Logan took a conditional guilty plea and appealed.

ISSUE: Is flight sufficient for reasonable suspicion?

HOLDING: Yes

¹⁸⁶ Brendlin v. California, 551 U.S. 249 (2007).

¹⁸⁷ U.S. v. Drayton, 536 U.S. 194 (2002).

¹⁸⁸ U.S. v. Richardson, 385 F.3d 625 (6th Cir. 2004).

¹⁸⁹ U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).

DISCUSSION: The Court noted that Logan was not immediately seized, because he did not immediately yield. Ultimately he was seized, however, when he complied with the order to get into the vehicle. The Court agreed that the brief seizure was appropriate based upon the facts as known by the officers at the time, and was supported by his brief flight, even though only a few steps, away from the vehicle. The Court agreed that the small amount of weight given to the fact that the area experienced high crime was proper, as it was, in fact, limited. The Court agreed that although fleeing a scene is not “always an accurate predictor of guilt,” it was enough to create reasonable suspicion of criminal activity.

The court upheld the stop and his conviction.

U.S. v. Figueredo-Diaz, 718 F.3d 568 (6th Cir. 2013)

FACTS: In November, 2009, Hoing, a Tennessee officer on special assignment with the DEA task force, received a tip from a CI. He was told that Rivas had purchased a one way ticket from Texas to Memphis. Other facts indicated that Rivas might be involved in drug trafficking. He went to the airport and called Rivas’ number; he then observed a man answer a phone. He hung up and began to follow Rivas, now that he’d been identified. He tracked Rivas to a restaurant and then approaching a tractor-trailer. Rivas climbed into the vehicle; Figueredo-Diaz was waiting in the passenger’s seat. The truck was registered to Rivas. Rivas got out and waiting, another vehicle drove up, driving by Morales-Loya. Rivas got in and they drove away, followed by Figueredo-Diaz driving the truck. The officers followed, splitting up when the two vehicles split up, with the truck parking in a truck stop lot. Eventually they reconnected at a warehouse.

As the four men (the three identified and another who had joined them) “huddled around the rear of the trailer with its doors wide open,” officers approached. Rivas and the unidentified men fled, while the other two were “detained without incident.” A narcotics detection dog alerted but no drugs were found. Hoing then deployed his own dog which gave a positive alert on the trailer. Remembering that Rivas inspected the underside of the truck earlier, he checked that area, finding 2,100 pounds of marijuana underneath. (Cash and other items were found inside the cab.)

Figueredo-Diaz and Morales-Loya (as well as Rivas) were charged with conspiracy to distribute. They moved for suppression, arguing that they were unlawfully detained. The Court suppressed the evidence for the two men. The Government appealed.

ISSUE: Is evidence found as a result of a legal search admissible against third parties?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers had reasonable suspicion to detail Rivas. As such, the government argued, even if the detention of the other two men was unlawful, “the suppression of the evidence was not warranted because it would have been discovered in the course of the agents’ lawful detention of Rivas.” The Court agreed that the “defendants’ detention was entirely superfluous so far as the discover of evidence is concerned.” The dog sniff “was going to happen regardless” of whether the two men were present. The officers had the authority to detain the trailer and were justified in not allowing it to drive way.

The order to suppress was reversed.

U.S. v. Davis, 2013 WL 4054919 (6th Cir. 2013)

FACTS: On April 15, 2011, Van Buren County (MI) officers “learned of a violent home invasion that left the home residents robbed and beaten by armed assailants.” They took weapons and a large amount of

cash. A CI provided information about suspects. Officer Ferguson (Kalamazoo PD) received a call about the whereabouts of one of the suspects, Crawford, and that he “was staying at numerous local hotels, having others use their names to rent rooms on his behalf.” He reached out to the Sheriff’s Office, learning they’d been able to track him to a local Red Roof Inn. Officer Ferguson met deputies there, then left to follow up on a lead at another hotel. He was called back to the Red Roof Inn, as Crawford had just been dropped off by another person, Davis. Davis appeared to be waiting for Crawford and then left that parking lot to wait in a nearby lot with a view of the hotel.

During that time, the officers were obtaining a search warrant for Crawford’s room. Because they believed Crawford was dangerous, they intended to wait to execute it until he was not present. Crawford did, in fact, leave the room. Davis “flashed his lights twice in an apparent effort to signal his location to Crawford.” The officers approached and Crawford ran towards Davis’s vehicle. “Crawford apparently resisted arrest and caused quite a scene in the parking lot.” Officer Ferguson approached Davis’s vehicle, on the passenger side, with a drawn weapon. Sgt. Kelly approached on the driver’s side and ordered Davis “to keep his hands visible and reached in to physically remove him from the vehicle.” Davis continued to reach for his waistband and was handcuffed. Sgt. Kelly asked about weapons and Davis stated that he had a firearm in his waistband. The weapon was located, along with ten individual packages of crack cocaine and a razor blade. He consented to a vehicle search and a digital scale, a holster and gloves were found.

Davis, a convicted felon, was charged with possession of the firearm, along with the drugs and other related charges. Davis moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does approaching a suspected robber with drawn guns, and handcuffing him, exceed the bounds of a Terry stop?

HOLDING: Not necessarily

DISCUSSION: Davis argued that his initial detention was improper because the officers approached with drawn weapons and handcuffed him. The Court, however, agreed that “officers may take such precautions without exceeding the bounds of a Terry stop so long as those precautions are warranted by the facts.¹⁹⁰ The Court agreed that the facts “fully support[ed]” the officers’ actions.” Further, it was clear there was a connection between Crawford (tied to the robbery) and Davis. As such, the Court agreed that although they did not have substantial information linking Davis to the home invasion, they did link him to Crawford. Officer Ferguson, in fact, gave a detailed recitation of what he knew, and it clearly added up to reasonable suspicion that the driver of the vehicle was involved in the home invasion.

The Court affirmed Davis’s plea.

U.S. v. Jeter, 721 F.3d 746 (6th Cir. 2013)

FACTS: On May 10, 2011, Toledo officers on patrol went to a local shopping center, relatively empty, which had been the source of many complaints of crimes occurring there. They observed a number of people gathering at the center, who were not shopping but “apparently, remaining together without any visible purpose except to be in each other’s company.” They observed one individual on a bicycle who “was seen on several occasions traversing back and forth across the parking lot.” Officers Toth and Niles decided to address what they believed to be a “loitering problem” since they saw that no one was shopping or had any bags. Jeter was on a bicycle, but was apparently not a member of the group nor was he the person they saw earlier.

¹⁹⁰ U.S. v. Marxen, 410 F.3d 326 (6th Cir. 2005).

When Jeter arrived, he went into a store and purchased a snack and a bottle of water. He consumed the snack outside, placed the water on his bike and began to leave. At that same time, Officers Toth and Niles had called for additional officers to the parking lot to “saturate” the area. The officers assembled a block away to discuss strategy, to allow them to “bum rush” those who were loitering. A helicopter and ground units were positioned to round up stragglers.

During the approach, Officers Toth and Niles spotted a man on a bicycle (Jeter) and believed him to be the same person they’d seen earlier. They approached and Officer Niles rolled his window down and asked to speak to him. Instead, Jeter started “wandering away on his bike.” They moved to prevent him from pedaling out into the street. When Officer Niles got out of the car, Jeter dropped his bike and ran. The officers gave chase, observing him “clutching the right front pocket of his shorts.” He was caught and searched, and the officers found a handgun in his pocket. As he was a convicted felon, he was arrested for possession of the gun.

Jeter moved to suppress, and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a subject who flees the scene of a consensual encounter be followed and seized?

HOLDING: Yes

DISCUSSION: Jeter argued that he was improperly stopped and thus, the gun should have been suppressed.

First, the Court agreed that under the facts, and particularly since Jeter was not the man earlier observed and had done business at the location, that “there was no probable cause or reasonable suspicion to detain” him. The facts indicated that “no laws were being broken or were about to be broken at the time officers converged upon him.” However, his first encounter, while he was still on his bike, was not a seizure because he at most, paused briefly when the officers spoke to him. His brief pause was not a submission to authority, nor did he attempt to even talk to the officers. Instead, he “intentionally ignored the officers and their request” and did not submit.¹⁹¹

Once he ran, and was tackled, he was, of course, seized. The Court disagreed that the officers provoked his flight. The Court agreed that the facts of what “constitutes a provoked flight” is “far from developed.” In Illinois v. Wardlow, the Court mentioned the term unprovoked, but did not define it, or its corollary, provoked flight.¹⁹² The court agreed that, for example, wrongdoing on the part of the officers would “make a finding of provocation more likely.” In this case, the court found no evidence of fraud, or that Jeter feared imminent harm by the officers. Although the convergence of officers and vehicles might have been intimidating, “Jeter fled in a manner suggesting an attempt to escape from law enforcement.” He was not just getting out of the way, he ran down an alley. There was no indication that they expected him to flee and in fact, their approach and tactics were intended to keep that from happening. In fact, no one else fled and only two officers, in one vehicle, approached Jeter specifically. Finally, he admitted he ran because he had the weapon.

The court noted: “Terry provides the framework for Jeter’s seizure and Wardlow provides the justification.” Flight suggests wrongdoing, although it is not dispositive of it, and Jeter’s grabbing and holding his pocket gave further evidence of his possible possession of contraband.

The Court agreed the seizure was reasonable and upheld the conviction.

¹⁹¹ California v. Hodari D., 499 U.S. 621 (1991)

¹⁹² 528 U.S. 119 (2000).

U.S. v. Falls, 2013 WL 3801580 (6th Cir. 2013)

FACTS: Nashville officers were dispatched to a call of “several individuals at the end of Charlie Place, a cul-de-sac in a high crime area” who were “clicking’ weapons.” They found Falls there and “engaged him in conversation.” He said they told him to “stop” and “come here.” Officer Kahn testified that he said something like “Hey, how you doing”? “Do you live around here?” Falls said he stated that he lived there and pointed to his home. The officers explained the call and asked if they could frisk him, to which he agreed. They found a loaded weapon in his waistband.

Because Falls was a convicted felon, he was charged with possession of the weapon. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is an officer’s request for a subject to do something necessarily an order?

HOLDING: No

DISCUSSION: The Court looked to whether the officer’s request was an order. The officer testified that he asked Falls to stop, and that his tone of voice was normal. The officers did not show their weapons or touch Falls prior to the frisk. The Court noted that although Falls argued he felt “blocked in,” that “there was no evidence that he was physically unable to leave.” Under the circumstances, the Court agreed that even if the officer did use the words claimed by Falls, “without any other evidence of coercion,” that “did not convert the consensual encounter into a seizure.”¹⁹³

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – HOTEL ROOM

U.S. v. Spicer, 2013 WL 6486800 (6th Cir. 2013)

FACTS: On July 25, 2007, Spicer checked into the Marriott Courtyard hotel in Columbus, OH. He paid with cash, including an additional deposit. While he was out, the next day, the maid entered to clean because the room had been listed as “vacant and dirty.” She smelled marijuana smoke and saw marijuana on the floor so she contacted her supervisor. Two other hotel employees, including the assistant manager, responded to the room. They saw several personal items, including a backpack, and checked it for identification. Inside, they found “blocks of drugs wrapped in cellophane.” The room was rekeyed and the police contacted.

Responding officers were taken to the room. The general manager knocked and tried to enter with his key, but “to the surprise of the general manager, Spicer was in the room, pushing on the door from the inside.” Spicer came out into the hallway. Narcotics detectives arrived and entered to confirm the room was empty. They “saw the unzipped backpack in plain view ... with what appeared to be three kilograms of cocaine inside.” With a search warrant, the drugs were seized.

Spicer was indicted for possession with intent to distribute. He moved for suppression and was denied. He took a conditional guilty plea and appealed. A prior panel of the Sixth Circuit Court of Appeals vacated the District Court’s denial. The District Court again denied the motion and again, he appealed.

ISSUE: May a hotel terminate a guest’s residency by trying to lock them out of the room?

¹⁹³ U.S. v. Davis, 514 F.3d 596 (6th Cir. 2008).

HOLDING: Yes

DISCUSSION: The Court agreed that a “hotel may lawfully terminate a guest’s occupancy for unauthorized activity, including possession of illegal drugs.”¹⁹⁴ Occupancy is terminated when the hotel takes “justifiable affirmative steps to repossess [a] room ... and to assert dominion and control over it.”¹⁹⁵ Once the tenancy is terminated (even if unsuccessful, as was the case in this situation), a hotel employee may give consent to enter.¹⁹⁶

The District Court’s denial was upheld.

SEARCH & SEIZURE – SWEEP

U.S. v. Holland / Persa, 2013 WL 2302380 (6th Cir. 2013)

FACTS: In January, 2011, a single person held up a Cleveland Subway restaurant. The robber was tracked to a nearby apartment, but no one answered there. The officers left. Investigation indicated the Holland and Persa lived at the apartment and two different officers returned later. They knocked loudly and threatened to get a warrant if the occupants didn’t answer. Holland opened the door. They knew he was not the man on the surveillance tape, so they asked if anyone else was there. He denied it, but the officers “heard rustling in a nearby bedroom.” They found Persa hiding there. Upon investigation, they learned that Persa was involved in a number of unsolved bank robberies. Both were arrested. Holland gave consent to search the apartment. Both men were indicted for bank robbery.

Both men moved for suppression, arguing that the warrantless arrests violated the Fourth Amendment. The District Court ruled that under U.S. v. Talley the “officers were entitled to enter the bedroom by virtue of the “public-safety exception.”¹⁹⁷

When the motion was denied, both took a conditional guilty plea and appealed.

ISSUE: Is a sweep permitted when officers know there should be more than one occupant, and hear evidence of the presence of another person?

HOLDING: Yes

DISCUSSION: The Court noted that although there was no evidence Holland gave explicit consent, it was not coercive to threaten a warrant. Such a threat “does not necessarily invalidate consent,” when there was sufficient probable cause to get a warrant. The Court agreed that it was not error to find “that Holland gave the officers consent to enter without a warrant.”

With respect to the sweep, the Court noted that the officers knew that two men lived there prior to their arrival, and when they heard noises from another room, after being told no one was there, it was appropriate to do a “limited protective sweep for officer safety.” (The Court also noted that the alleged robber was armed.) The Court agreed that the sweep was proper under Maryland v. Buie.¹⁹⁸ The officer “articulated specific facts from which a reasonably prudent officer would have believed that the bedroom harbored an

¹⁹⁴ U.S. v. Lanier, 636 F.3d 228 (6th Cir. 2011).

¹⁹⁵ U.S. v. Cunag, 386 F.3d 888 (9th Cir. 2004).

¹⁹⁶ U.S. v. Allen, 106 F.3d 695 (6th Cir. 1997).

¹⁹⁷ 275 F.3d 560 (6th Cir. 2001).

¹⁹⁸ 494 U.S. 325 (1990), See also U.S. v. Taylor, 248 F.3d 506 (6th Cir. 2001).

individual who might pose a danger to the officers on the scene.” The Court agreed that the sweep was proper.

The Court upheld both arrests.

SEARCH & SEIZURE – VEHICLE EXCEPTION (CARROLL)

U.S. v. Crawley / Allen, 2013 WL 1978007 (6th Cir. 2013)

FACTS: On January 4, 2010, Trooper Lilly (Virginia State Police) observed a vehicle pass him with an expired Virginia inspection sticker and no front plate. He followed and saw it bore a Maryland rear plate; he knew that state also required front plates. He saw the vehicle exit at the last moment, at a location with no gas stations or easy reentry. The vehicle pulled into a pizza place, without signaling. The trooper pulled up and activated his lights. Allen opened the driver’s side door and the trooper saw that the “ car’s electronic gauges appeared not to be working and that there was a screwdriver on the floor.” Allen said they’d pulled off for gas and that the front plate was lost in a snowstorm. The trooper learned that Crawley was wanted in Georgia on a non-extradition warrant and had other arrests on record. So did Allen. Trooper Edwards arrived as backup. Trooper Lilly questioned them about their travel and they said they’d been fishing. Although there were poles in the car, the trooper “found this answer odd because it had been very cold and all of the lakes and most of the streams were frozen over. Moreover, neither defendant could produce a fishing license.” When separated, their stories were similar but not quite consistent.

Crawley gave consent to search the inside of the car. Another trooper ran a dog around the vehicle but the dog did not alert. Other items found inside were also suspicious, including a hand-rolled marijuana cigarette, which Crawley said belonged to his father, who had glaucoma. They searched the trunk, finding \$70,000 in cash and several firearms.

Both were arrested and moved for suppression. It was denied after the magistrate concluded the stop, and the detention, was justified. It further concluded that the evidence supported probable cause to search the vehicle. Both took a conditional guilty plea and appealed.

ISSUE: Does the presence of a joint, especially when coupled with other drug evidence, provide probable cause for a vehicle exception search?

HOLDING: Yes

DISCUSSION: The Court ruled that the initial stop was justified by the observed traffic violation. The Court agreed that “It is not inappropriate for an officer to check for valid identification and outstanding warrants while conducting a traffic stop.¹⁹⁹ After learning of the warrant, it was proper to call for, and wait for, backup. With the suspicious answers, it was proper to continuing the questioning. The Court agreed the time, 30 minutes, was long for a traffic stop, but was justified under the facts as given.²⁰⁰ He also argued that the time on the citation indicated it was issued five minutes after the stop, but the Court noted that was not really an issue. With respect to the trunk search, the Court noted that the cigarette alone didn’t create probable cause, but that “a marijuana cigarette when coupled with other evidence of drug activity provides probable cause.”²⁰¹

The Court upheld the searches and the pleas.

¹⁹⁹ See U.S. v. Smith, 601 F.3d 530 (6th Cir. 2010).

²⁰⁰ See U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

²⁰¹ U.S. v. Crumb, 287 F. App’x 511 (6th Cir. 2008).

U.S. v. Johnson, 707 F.3d 655 (6th Cir. 2013)

FACTS: On January 11, 2010, Officer Parks stopped Johnson for a seat belt violation. He smelled marijuana from inside and spotted a license plate on the back seat. The female passenger admitted to having just smoked marijuana. She provided false information initially. Johnson asked to speak to Officer Parks and told him he knew he would be arrested because he was under a condition of release to stay away from the passenger. He also admitted to being a convicted felon and that there was a gun under the passenger seat. The officer confirmed the passenger's true identify and also that Johnson had an active arrest warrant.

Johnson was indicted for being in possession of the weapon. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Does the odor of marijuana justify a Carroll search?

HOLDING: Yes

DISCUSSION: Among other issues, Johnson argued that the search of his vehicle was not valid to a lawful arrest. The Court noted that he did not challenge the actual stop, and that “an officer’s detection of the smell of marijuana in an automobile can by itself establish probable cause for an arrest.”²⁰² In addition, he volunteered that he was a convicted felon and that there was a gun in the car. The Court held the search was valid.

In addition, the Court agreed that his prior conviction, for Stalking 1st degree, was a violent felony and as such, could be used against him to satisfy the requirements of the Armed Career Criminal Act, enhancing his sentence.

U.S. v. Colbert, 2013 WL 1908902 (6th Cir. 2013)

FACTS: On October 25, 2010, Agent Wamsley (ATF) and Louisville Metro police officers did surveillance of Victory Park. Det. Nichols, of LMPD’s street narcotics team, supervised. He regularly worked in that area, characterizing it as an “open-air drug market.” Officers saw Colbert at the park around 5:00 p.m. He was approaching individuals and vehicles there and would quickly return each time to his vehicle or a nearby picnic table. He approached 15 people within 30 minutes. They saw no actual transactions but believed his behavior was consistent with hand-to-hand trafficking.

They then followed him as he drove to a nearby residence a few blocks away. He entered and came out just a few minutes later. He was not carrying anything, but they believed he was using the house as a storage location. He returned to the park and engaged with another 10-15 persons. He repeated the pattern a third time. At about 6:30 p.m., Nichols made a traffic stop of Colbert, for failing to use a turn signal. He tried to get out but was ordered back inside by Dets. Nichols and King. He was asked “if he had anything on him, anything in the vehicle.” He said he did not. Det. Loudon called for a drug dog. Nichols had Colbert get out and frisked him, finding neither weapons or contraband. He had no warrants. Colbert denied a request for consent to search the vehicle. About 10-15 minutes later the dog arrived, but did not alert, as Colbert watched. Afterward, Nichols questioned Colbert as follows:

Are you sure there’s nothing in your vehicle? You just saw the K-9 drug dog run around your car. Do you have anything in your vehicle that you need to tell me about? [Colbert then] replied that there was a marijuana blunt in the backseat

²⁰² U.S. v. Bailey, 407 F. App’x 27 (6th Cir. 2011) (quoting U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002)). See also Carroll v. U.S., 267 U.S. 132 (1925).

Nichols searched the car, finding a baggie of marijuana on the back seat. The dog was directed to search inside and alerted on the pocket of a jacket that was in the open cargo compartment of the station wagon. The K-9 officer then saw a handgun under the jacket and seized it. Between 7:15 and 7:30, Colbert was arrested. Colbert admitted to ATF agents that he owned the weapon, for which he was subsequently charged because he was a convicted felon. The officer obtained a search warrant for the residence he'd visited twice.

Colbert was charged and requested suppression. He was convicted for the firearm²⁰³ and appealed.

ISSUE: Does an admission of drugs inside a vehicle justify a Carroll search?

HOLDING: Yes

DISCUSSION: Colbert argued that the scope and duration of his detention after the initial traffic stop was too long. The Court noted that to continue to hold an individual, “the officer must have reasonable suspicion of additional criminal activity.”²⁰⁴ Colbert argued that even if they had reasonable suspicion at the outset, that suspicion was dispelled when the dog failed to alert, but the Court agreed that the suspicion originated, and continued, because of Colbert’s own actions. Det. Nichols’ actions toward Colbert were part of a continuous act over a limited period of time.

Colbert’s conviction was affirmed.

SEARCH & SEIZURE – DOG SNIFF

U.S. v. Patton, 2013 WL 949481 (6th Cir. 2013)

FACTS: On November 28, 2009, officers responded to a break in in a Knoxville home. The 911 caller reported that the intruder was her ex-boyfriend, Patton, and described his vehicle. As an officer arrived, he spotted the described vehicle and stopped it. Patton got out, locking the car behind him. He was handcuffed.

Additional officers arrived, as well as a drug dog. The dog alerted to the vehicle. An officer asked Patton for the keys, which he eventually produced. He then stated that there was a gun in the car. The officer found a handgun and ammunition. Patton, a convicted felon, was charged with the possession of the gun. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is a dog alert enough for probable cause for a search?

HOLDING: Yes

DISCUSSION: Patton argued that the search was unlawful. The Court agreed that the initial stop was justified under Terry v. Ohio.²⁰⁵ Patton argued that since he was in custody at the time of the search, and that there were no exigent circumstances present, it was unlawful as a search incident to the arrest. The Court noted, however, that was not the nature of the search, which was instead justified by the drug dog’s alert.²⁰⁶ In its most recent review of a dog sniff case, Florida v. Harris, the Supreme Court “reaffirmed that the long-standing ‘totality-of-the-circumstances’ approach is all that is required to support a narcotics dog’s

²⁰³ No drug charges are mentioned, but they may have been the subject of a separate state prosecution.

²⁰⁴ See U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010).

²⁰⁵ 392 U.S. 1 (1968).

²⁰⁶ Illinois v. Caballes, 543 U.S. 405 (2005); U.S. v. Reed, 141 F.3d 644 (6th Cir. 1998); U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994).

reliability to detect drugs during a search.” In this case, the record “amply supports” the Court’s conclusion that the dog’s alert provided probable cause to search the car.

Patton’s conviction was affirmed.

U.S. v. Morris, 2013 WL 4017130 (6th Cir. 2013)

FACTS: In March, 2011, Morris was stopped by Michigan State Police for speeding. He consented to a search and a loaded handgun was found. In April, he sold cocaine to Dix, an informant, through VanHoose. In May, he was arrested as the passenger in a van which had been stopped for traffic offenses, his son, Corey, was the driver. In that stop, a “large brick of rubber-banded currency” was spotted in the console. That discovery led to a K-9 search of the car, which revealed cocaine, cash and a firearm. A few days later, while on bail, he was arrested again and found to be driving on a suspended OL. A vehicle search led to yet more drugs.

Morris was convicted on multiple charges, from the series of events, and appealed.

ISSUE: May information developed during a traffic stop move it into a Terry stop, to allow a delay for a drug dog to arrive?

HOLDING: Yes

DISCUSSION: Morris argued that during the traffic stop in which his son was the driver, the officer “lacked reasonable suspicion to prolong the stop long enough to conduct the canine sniff.” The Court agreed that in fact, the stop moved from a traffic stop, to a consensual encounter, to a Terry stop – with the last being based on the currency, Morris’s prior convictions and Morris’s son lying about the presence of the currency. The five minute delay in waiting for the dog was also reasonable. The Court agreed that the situation was analogous to U.S. v. Erwin.²⁰⁷ Further, the Court noted, the son lacked proof of insurance and the car did not belong to either of them, which further supported the delay.

The Court upheld the conviction.

SEARCH & SEIZURE – MEDICAL SEARCH

U.S. v. Booker, 728 F.3d 535 (6th Cir. 2013)

FACTS: Booker was arrested by Officer Steakley, Oak Ridge (TN) PD, during a traffic stop. (He had previously been arrested by the same officer and found to be hiding 13 bags of marijuana.) The police K-9 alerted near where Booker, the passenger, had been sitting. The officer patted Booker down and noted that he’d “clenched his butt[ocks] together” but felt no drugs. He did find two large wads of currency in Booker’s pockets and a small amount of marijuana in the vehicle.

Booker was arrested for felony possession of marijuana, although the amount found did not warrant that arrest under Tennessee law. He was transported by another officer. As they talked at the scene, the officers noticed that Booker was trying to put his hand down the back of his pants, so they moved his handcuffed hands to the front. He tried to barricade himself in the interview room when left there alone, briefly. The officers searched the room, patted Booker down and shook his pants, trying to dislodge anything hidden. On the way to jail, Booker continued to fidget. Deputy Shelton, at the jail, agreed to strip search Booker to see if he was hiding anything, although that was not normally done. Booker was stripped and told to bend over, a small string protruded. When Shelton asked about it, Booker tried to cover the area and push the

²⁰⁷ 155 F.3d 818 (6th Cir. 1998).

string up out of site. After another altercation, Booker was taken to the hospital covered only in a blanket, and he continued to be “squirmish.” Dr. LaPaglia, at the ER, was told that it was “strongly suspected that Booker had drugs in his rectum.” This was the third time that doctor had been asked over the years to do that type of search.

Upon arrival, Booker denied having hidden anything and he had no symptoms. Dr. LaPaglia later testified that drugs hidden in the rectum presented a serious concern because that area absorbs drugs very readily. He explained that concern to Booker, who still refused consent. LaPaglia, later testified that he decided on his own, without direction, that it was his duty to remove any drugs. He stated that Booker gave consent, although no other witnesses heard that consent. However, Booker tightened his muscles so that LaPaglia could not examine him. LaPaglia ordered a nurse to administer muscle relaxants, but Booker was still uncooperative. Finally, the nurse was directed to “administer a sedative and a paralytic agent” via IV, and intubated him. While he was paralyzed, a large rock of crack cocaine was removed and turned over for evidence.

Booker was denied suppression and was ultimately convicted. He appealed.

ISSUE: Is a forced medical recovery of drugs hidden in the body unlawful?

HOLDING: Yes

DISCUSSION: The Court agreed that LaPaglia’s conduct could be attributed to the police officers who brought Booker to him.²⁰⁸ Even if he consented to a digital exam, which the Court questioned, there was no evidence he consented to intubation and paralyzing drugs. Further, even if the doctor “was motivated by benevolent medical ideas, his actions ... constitute medical battery.”

The Court looked to the cases of Rochin v. California²⁰⁹ and Winston v. Lee.²¹⁰ Under both, the Court agreed that the exam done on Booker was in violation of his Fourth Amendment rights as it was clearly an unreasonable search. In particular, Winston v. Lee indicated that the following questions must be asked to determine if a particular search was appropriate: (1) “the extent to which the procedure may threaten the safety or health of the individual,” (2) “the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity,” and (3) “the community’s interest in fairly and accurately determining guilt or innocence.” Being subjected to unnecessary paralysis and intubation, while not extremely risky, carries at least some risk and clearly Booker’s dignity was affronted when this was done without his consent. There were other methods to determine if he was hiding anything, such as an X-ray or medical monitoring.

Further, the officers and the doctor were culpable, even if acting in subjective good faith, because a reasonable officer should have recognized the search was unlawful. The Court disregarded an argument under inevitable discovery and vacated Booker’s conviction.

SEARCH & SEIZURE – SCHOOLS

G.C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013)

FACTS: In 2008, G.C. was enrolled as an “out of district” student in Owensboro. (Normally, he would have been expected to attend a school in Daviess County.) G.C. had been subjected to discipline for misbehavior several times prior to the final incident. In spring, 2009, G.C. left the school without permission and was found with tobacco, Assistant Principal Smith brought him in and told him she was

²⁰⁸ Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602 (1989) (quoting Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

²⁰⁹ 342 U.S. 165 (1952)

²¹⁰ 470 U.S. 753 (1985)

concerned that he was thinking about suicide again. He entered a treatment center later that day. Ultimately, he was suspended and at the end of the school year, a meeting was held to discuss whether he could continue at the school. He was registered for the next school year using his grandparents' Owensboro address, but his parents agreed at the same time that he still lived outside the city.

On September 2, 2009, G.C. violated school policy by texting. His phone was seized and brought to Assistant Principal Brown, who read the text messages – she later said she was concerned that he might be planning to harm himself. The Principal, Vick, agreed that his out of district privilege should be revoked and it was. G.C. filed suit, arguing that his rights to an education, and under the First and Fourth Amendment, were violated. The District Court ruled in favor of the school and G.C. appealed.

ISSUE: May a student's cell phone be searched without probable cause?

HOLDING: No

DISCUSSION: G.C. argued that the search of his cell phone in September, 2009 “was not supported by a reasonable suspicion that would justify school officials in reading his text messages.” (He conceded a similar search in March, 2009, was justified based upon a concern that he might harm himself.) The Court looked to New Jersey v. T.L.O., in which the Court had “implemented a relaxed standard for searches in the school setting.”²¹¹

The Court noted that ““a student search is justified in its *inception* when there are reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises.”²¹² Such searches must be “reasonably related to the objectives of the search and not excessively intrusive” The Court noted that it had yet to address a school cell phone search and looked to District Court rulings on the issue. The Court noted that broad language in some of those cases did not “comport with [its] precedent.”

The Court continued:

Such broad language, however, does not comport with our precedent. A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications. Moreover, even assuming that a search of the phone were justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search. Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction. Because the crux of the T.L.O. standard is reasonableness, as evaluated by the circumstances of each case, we decline to adopt the broad standard set forth by DeSoto and the district court

The Court looked specifically to the case of Klump v. Nazareth Area School District,²¹³ in which a seized phone was searched for text messages and voice mail. The phone was also used to call other students and to text the student's brother. The District Court had found that seizing the phone was proper, as it was being used in violation of the school rules, but that it was not proper to go beyond that. Even though incriminating text messages were found, there was “no justification for the school officials to search [the] phone for evidence of drug activity.”

²¹¹ 469 U.S. 325 (1985)

²¹² Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489 (6th Cir. 2008).

²¹³ 425 F. Supp. 2d 622 (E.D. Pa. 2006).

The Court disagreed that a “general background knowledge of drug abuse or depressive tendencies, without more, enables a school official to search a student’s cell phone when a search would otherwise be unwarranted.” They had no reason to believe at the time of the September search that he was engaging in any unlawful activity or contemplating suicide or injury. The Court agreed the search of the phone was unreasonable. Further, although there was no proof of any damages to G.C. as a result of the search, the Court agreed that the possibility remained he might be entitled to nominal damages, at the least.

The Court reversed the case with respect to the cell phone search.

SEARCH & SEIZURE – COLLECTIVE KNOWLEDGE DOCTRINE

U.S. v. Alexander, 2013 WL 2500587 (6th Cir. 2013)

FACTS: On October 8, 2010, Officers Saidler, Rice and Butler (Cincinnati PD) were investigating drug activity at a gas station. Saidler and Rice, in plainclothes, were parked close enough to observe any activity. They were in communication with Officer Butler, a block away, in uniform. On that day, they observed a vehicle parked at a gas pump but not buying fuel. The occupant engaged in what they believed to be two hand-to-hand transactions. They did not actually see any weapons, drugs or cash, however.

The driver, Alexander, drove off. Officer Saidler saw that the license plate light was out and that was communicated to Officer Butler. Officer Butler made the stop and Officers Rice and Saidler were right behind him. Officer Rice called for a drug dog immediately. About 18 minutes later, Officer Fromhold arrived with a dog and within a few minutes, the dog alerted on the driver-side door. When the door was opened, the dog alerted on the center of the console. Crack cocaine was found during the search. Officer Saidler also searched the trunk, finding a digital scale and a loaded handgun. Alexander was arrested.

Alexander moved for suppression, arguing that the initial stop was unlawful. After two hearing, the court denied the motion. Alexander pled guilty to being a felon in possession and appealed.

ISSUE: Will knowledge known to one officer be imputed to other officers on the same team?

HOLDING: Yes

DISCUSSION: The Court agreed it was proper to impute any knowledge held by Officers Saidler and Rice to Officer Butler, as they were working as a team.²¹⁴ Further, there was no evidence that the two officers at the scene did not fully communicate the situation to Officer Butler and share their reasonable suspicion. Alexander also argued that his mother’s testimony during the hearing, in which she indicated the light was working properly, showed that there was contradiction over the reason for the stop. However, the Court ruled that she could not say whether it was working that night because she was not present. (Others who allegedly could testify as to the light’s status were not present at the hearing.) The Court agreed it was reasonable to give more credence to Officer Butler.

With respect to the wait on the drug dog, the Court agreed that the duration of the stop was “within the bounds of the Fourth Amendment.” The dog’s alert provided probable cause to search the entire vehicle, and that resulted in the discovery of the gun.

The Court upheld Alexander’s plea.

²¹⁴ U.S. v. Woods, 544 F.2d 242 (6th Cir. 1976).

SUSPECT IDENTIFICATION

U.S. v. Watson / Lewis, 2013 WL 5508874 (6th Cir. 2013)

FACTS: In April, 2007, three armed men (Watson, Lewis and another) broke into a home in Dayton, Ohio. Six adults occupied the home. Lewis confronted Burg, Sr. and his two adult sons (Dwayne and Torrance) in a back bedroom. The third accomplice guarded the bedroom door and Watson remained at the front door.

The robbery “was unquestionably drug related.” The three men were members of a street gang and they wanted drugs and cash from a drug operation run by Dwayne Burg, Jr. The Burgs initially denied possessing drugs or cash and eventually, Lewis shot and killed Burg, Sr. During that time, Watson was watching Burg’s daughter, Hurston and Powers, a friend. Hurston got a “very long, steady look” at Watson, who was not masked. Powers did, as well. He finally ordered Hurston to stop looking at him. Eventually, the other two gunmen emerged with cash and all three fled the scene. None of the witnesses made an identification despite being shown several photo arrays. The case went cold.

More than two years later, Dwayne Burg saw mugshots of Lewis and Watson on the news in connection with an unrelated crime. Both Dwayne and Torrance immediately recognized Lewis. Hurston, advised by her brothers, also watched the news and identified Watson as they man she’d seen. A family member contacted the police and Det. Galbraith interviewed the witnesses. Lewis was identified by his gang name. He put together a photo array with Lewis’s photo, with the help of another detective, which, he did not realize, was the same photo as used in the news report. Both of the Burgs identified Lewis. In January, 2010, six months later, Det. Gaier took over the homicide investigation. He approached Hurston, showing a photo array that included Watson, and she identified him. Powers was unable to make a positive ID, wavering between the photo of Watson and another man. Since the photo he used of Lewis was a 2009 mugshot, the detective obtained an earlier photo, taken around the time of the crime, and Powers immediately identified him.

Both men were indicted in federal court, charged with firearms law violations and the Hobbs Act. They both moved to suppress the identifications, arguing that Hurston’s was not blind or sequential, and thus tainted. With respect to Powers, they argued that the detective failed “to include in the second array a photograph of the other man noted earlier by Powers as a potential match.” Lewis also argued that the use of the same photo as already seen by the witnesses in the news report prejudiced the identification.

The District Court refused the motion and both took conditional guilty pleas. They appealed.

ISSUE: Does showing a suspect’s photo on the news always taint an identification later?

HOLDING: No

DISCUSSION: The Court agreed that “due process forbids police officers from using identification procedures that are “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”²¹⁵ Since the purpose for this, however, “is not to ensure the reliability of identification evidence, but to deter malfeasance by investigating officers,” suppression is not warranted “unless there is improper behavior by state officials giving rise to the suggestiveness.”²¹⁶

Looking at each identification in turn, the Court first addressed the non-blind, non-sequential lineup of Hurston of Watson and agreed it was not unduly suggestive. With respect to the criticism of Powers’ identification, in which the second photo was not included, the Court agreed that it was, at best, barely

²¹⁵ Simmons v. U.S., 390 U.S. 377 (1968).

²¹⁶ Perry v. New Hampshire, 132 S.Ct. 716 (2012).

suggestive. However, that is “not a constitutional problem,” only undue suggestiveness is.²¹⁷ The Court noted that “Detective Gaier was quite careful and undoubtedly fair in administering both photo arrays.” He provided instructions that indicated that the photo arrays may not contain a suspect’s photo and nothing indicated that he “attempted to influence” the witness. The five fillers were proper. Further, the two photos were “quite distinct” from each other – and each was similar to the filler photos. The failure to include the other individual’s photo did not create suggestiveness, and in fact, including that person’s photo “may well have created undue suggestiveness towards” him. The Court upheld that identification.

With respect to the identification of Lewis, the Court noted that was no indication that the officers caused the photo to be used by the news and that such photos are public record and readily accessible on the internet. At most, it was “bad luck, not police malfeasance,” which “led to any suggestiveness that there may have been in the identification procedure.”

The Court affirmed the pleas of both men.

INTERROGATION

Norris v. Lester (Warden), 2013 WL 4516081 (6th Cir. 2013)

FACTS: On March 10, 1997, Milem was murdered in Memphis. Norris was arrested the next day, as a result of a witness identifying him as the killer. Officers “came to Norris’s mother’s home and took Norris, handcuffed and in the back of a squad car, to the Memphis Police Department Homicide Office to be interviewed.” They did not have a warrant. He initially denied any involvement. He was booked into the jail at approximately 8:45 p.m. He was held until March 13, when he was given his Miranda warnings. He asked to speak to his mother and was allowed to call her. He then confessed and signed a written statement to that effect.

He moved for suppression, but the confession was admitted against him at trial. He appealed.

ISSUE: Is time important in determining if lengthy detention taints a subsequent confession?

HOLDING: Yes

DISCUSSION: Norris argued that his prior attorney was deficient because he failed to explore the issue of precisely how long he was held prior to giving the confession. At a state post-conviction hearing, the Court held that he’d been in custody for less than 48 hours.²¹⁸ The Court noted that “inculpatory statements that result from an illegal arrest in violation of the Fourth Amendment should be analyzed under the ‘fruit of the poisonous tree’ doctrine and explained the factors to be considered in deciding whether to suppress the statements.” Factors to be considered are the “temporal proximity of the arrest and the [statements], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” This would serve to shift the burden of admissibility of a statement back to the prosecution.

The Court agreed that although the Sixth Circuit requires that law enforcement “listen to exculpatory witness accounts,”²¹⁹ that the “facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed ... a crime.”²²⁰ The Court agreed as

²¹⁷ U.S. v. Beverly, 369 F.3d 516 (6th Cir. 2004).

²¹⁸ See Brown v. Illinois, 422 U.S. 590 (1975) – held that a confession obtained by exploitation of an illegal arrest is not admissible.

²¹⁹ Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).

²²⁰ Devenpeck v. Alford, 543 U.S. 146 (2004).

well, that an individual's "mere presence at a crime scene, even when combined with vague indications of motive, is not enough to establish probable cause."²²¹ However, the Court noted that the statement given by a witness, that placed Norris at the scene with a gun, was sufficient to justify his arrest.

Norris also argued that he was entitled to a "prompt probable-cause determination" pursuant to McLaughlin.²²² The earlier court proceeding held that using the time when he was booked as the arrest time "was contrary to clearly established federal law." Even though he was not formally arrested, the Court held that a "person is considered seized for Fourth Amendment purposes when, under the circumstances, a reasonable person would not believe himself free to leave."²²³ The fact that Norris was transported handcuffed was sufficient to show he was taken into custody for some period of time prior to his booking. Although there were disputes as to what time that occurred, it was undisputed that he was already at the police station by no later than 7:30 p.m., which would have placed him in custody at longer than 48 hours before he confessed. The evidence suggested that he was being held to allow the police to collect more evidence, and the "record contains no alternative explanation for Norris's prolonged detention." The Court agreed that there was a "reasonable probability that the confession would have been suppressed" if the McLaughlin issue had been raised in a timely manner. The Court allowed the direct appeal to proceed on that issue.

U.S. v. Tummins, 710 F.3d 608 (6th Cir. 2013)

FACTS: Deputy sheriffs went to the Tummins' home in Tennessee to execute a search warrant on his home computers, looking for child pornography. The officers asked him if they could talk to him and inquired as to how he connected to the Internet. He took them upstairs to look at his cable modem. They told him that his IP address had been connected to "some shared child-pornography files." Tummins agreed that he had downloaded child pornography. "At the end of the encounter, Tummins signed an inculpatory statement."

Tummins was indicted and moved for suppression. The trial court granted the motion and the government appealed.

ISSUE: Does telling a subject they are not under arrest usually make the situation non-custodial?

HOLDING: Yes

DISCUSSION: The Court looked to whether Tummins was in custody for the purposes of Miranda.²²⁴ The Court found no indication that the two deputies "forced Tummins to remain with them such that Tummins was in custody to the extent associated with a formal arrest." The Court found significant that the "entire encounter took place in Tummins' home."²²⁵ In addition, "when an officer tells a suspect that he or she is not under arrest, [the Court has] tended to find that the suspect was not in custody." The two deputies had emphasized that Tummins was not under arrest and that all they wanted was the computer.

The Court reversed the lower court's decision.

²²¹ Harris v. Bornhorst, 513 F.3d 503 (6th Cir. 2008).

²²² County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

²²³ Michigan v. Chesternut, 486 U.S. 567 (1988).

²²⁴ Stansbury v. California, 511 U.S. 318 (1994); California v. Behler, 463 U.S. 1121 (1983).

²²⁵ U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009).

U.S. v. Simon, 2013 WL 195485 (6th Cir. 2013)

FACTS: While in custody in Ohio on a federal conviction, Simon was released on furlough to a Detroit halfway house. He initially tried to get the provided bus voucher to Detroit changed to Buffalo, NY, but was unsuccessful. He then travelled to Detroit and tried, unsuccessfully, to get the Canadian embassy to give him asylum. His brother finally picked him up, at their mother's home, and deposited him at the halfway house, where he was arrested for escape by two U.S. Marshals. He was taken to the federal courthouse for questioning. He was given Miranda warnings prior to the questioning and he waived his rights, confessing to having announced his imminent defection to Canada and his refusal to go to the halfway house.

Simon was charged with Escape and moved for suppression of his confession. He was ultimately convicted, of escape. He appealed.

ISSUE: Is a promise of leniency necessarily coercive?

HOLDING: No

DISCUSSION: Simon argued that the marshals “promised him leniency and that their promises prevent his waiver from being knowing, intelligent, and voluntary.” The standard is whether Simon knew he could “choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.” Simon has testified he did, in fact, understand the rights. To find a confession involuntary due to coercion, it must be “objectively coercive, the coercion in questions must have been sufficient to overbear Simon’s will, and the coercion must have been the crucial motivator in Simon’s decision to confess.”²²⁶ The Court had ruled that in some cases ““a *promise* of lenient treatment or of immediate release may be so attractive as to render a confession involuntary.”²²⁷ The Court found the deputy marshals to be more credible, with them testifying that they denied promising that he would not be prosecuted for the escape.

Simon’s conviction was affirmed.

U. S. v. Woods, 711 F.3d 737 (6th Cir. 2013)

FACTS: On June 15, 2010, Officer Mardigian (Lansing, MI, PD) spotted a speeding vehicle. He followed to car into a parking lot, where it stopped on its own. As Woods was getting out, the officer ordered him back into the car and to place his hands on the steering wheel. He did not comply, but instead kept reaching down into the passenger side. Officer Mardigian drew his weapon, and Woods finally complied. Upon demand, he produced a false name and denied having ID. He was arrested for driving without a license.

Because of Woods’s actions, Officer Mardigian waited for backup before proceeding. When Officer Rasdale arrived, they approached to take him into custody. When he again reached into the passenger side, he was then seized, extracted and ordered to the ground. Woods was handcuffed and righted, at which point Officer Mardigian felt a “hard lump” in his pocket. Woods volunteered it was bogue (a street term for something illegal). He also said he had a gun, but that it was in the car. (The lump turned out to be keys.) After he was searched, the officers approached the vehicle, seeing a handgun on the floorboard. The gun was retrieved and crack cocaine was found as well.

Woods was indicted for the gun and the drugs, and argued for suppression. When that was denied, he took a conditional guilty plea and appealed.

²²⁶ U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002).

²²⁷ U.S. v. Wrice, 954 F.2d 406 (6th Cir. 1992) (emphasis added).

ISSUE: Is a non-responsive statement (that indicates possession of contraband) a product of interrogation?

HOLDING: No (but see discussion)

DISCUSSION: Woods argued that “his initial incriminating statement, as well as the discovery of a gun and drugs in his car, were the products of a custodial interrogation conducted in violation of his Fifth Amendment rights as articulated in Miranda v. Arizona,”²²⁸ The Government argued several alternative grounds for admission of the statement. It argued that the officer’s question was not an interrogation, that the question, if interrogation, was justified due to public safety, that physical evidence found as a result of a unwarned statement is admissible and finally, that its discovery was inevitable.

The Court chose the first argument as dispositive. The Court agreed that that the statement was not interrogation under Rhode Island v. Innis.²²⁹ It was, instead, a “natural and automatic response to the unfolding events during the normal course of an arrest.” The items was “legitimately within the officer’s power to examine as part of a search incident to arrest.” The answer could have been either “innocuous or incriminating” - “to say that Officer Mardigian had the right to physically go through Woods’s pockets but could not simply ask him, “What is in your pocket?” would be illogical.” This was unusual in that the suspect divulged “incriminating information that ha[d] nothing to do with the question asked.” It was a “simple, nontrick question.” That he responded by volunteering that he had a gun in the car was not likely and his “unexpected and unresponsive reply cannot retroactively turn a non-interrogation inquiry into an interrogation.”²³⁰ Simply because an officer was asking the question did not make the questioning “interrogation.”

Woods’s plea was affirmed.

Padgett v. Sexton (Warden), 529 Fed.Appx. 590 (6th Cir. 2013)

FACTS: In March, 2001, Smith’s body was found in Putnam County, Tennessee. Padgett became a suspect and was interviewed twice. He had been given Miranda warnings and had waived them before each interview. Padgett had been initially arrested for theft and told the officers that he was sober, although he’d been drinking earlier in the day. He told the officers he was bipolar but “denied needing treatment.” They later testified that he appeared normal. Padgett was charged with murder. He moved to suppress, claiming that he was incapable of having waived his Miranda rights for various reasons. His first interview lasted approximately 3 hours. He was interviewed again, three days later, and he confessed, claiming that Smith was having an affair with his (Padgett’s) wife. He told one of the investigators that he had was not taking prescribed medication but that “this did not affect his understanding of their conversation.” That interview lasted about 2 hours, then a break of an hour, and then another interview of an hour, at which point he confessed. With questioning, a statement was crafted, and Padgett signed it.

At the hearing, a doctor testified that Padgett was bipolar and had a history of alcohol and polysubstance abuse. His interview and confession, he asserted, was affected by withdrawal from alcohol and sleep deprivation, the interview took place during the overnight hours. Padgett claimed he didn’t remember the first interview and during the second interview, he was hallucinating and thought that one of the investigators was going to throw him down a stairway.

²²⁸ 384 U.S. 436 (1966).

²²⁹ 446 U.S. 291 (1980).

²³⁰ See Tolliver v. Sheets, 594 F.3d 900 (6th Cir. 2009).

The Court denied the motion, finding that even with his claimed mental illness, Padgett still understood what he was doing. At trial, witnesses testified that he'd told them weeks before that he planned to kill Smith. On the first day of the trial, jurors were able to see Padgett being transported to the courthouse holding cell; they had been allowed to see the cell by a courthouse employee – it was empty at that time. The two jurors admitted later they'd discussed it with other jurors. Upon request for a mistrial, the Court offered a curative admonition, which Padgett's attorney objected to, arguing that would draw more attention to the fact that Padgett was incarcerated. It was given, however.

Padgett was convicted and appealed. When his conviction was affirmed in the Tennessee state courts, he requested a habeas corpus review.

ISSUE: Does mental illness automatically invalidate a confession?

HOLDING: No

DISCUSSION: The Court first looked at his confession, noting that “only if the ‘totality of the circumstances surround the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.”²³¹ The Court noted that the list of factors provided by that case are not exclusive, but that it “must examine all relevant circumstances surround an interrogation to determine whether a Miranda waiver is valid.” Looking at the evidence provided by both sides, the Court agreed that Padgett validly waived his Miranda rights. The Court noted that under Colorado v. Spring, a defendant need only understand “that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.”²³² Mental capacity is one factor, but not the only factor, to be considered. The testimony of the officers as to what they observed was enough to offset the expert's testimony and upheld his waiver.

With respect to the viewing, the Court agreed that a chance, inadvertent viewing by a juror of a defendant is not so prejudicial that the defendant is denied a fair trial. The instruction was enough to “cure” the error.

The Court upheld Padgett's conviction.

U.S. v. Conder, 529 Fed.Appx. 618 (6th Cir. 2013)

FACTS: On August 10, 2010, Agent Obermiller (DHS-ICE) went to Conder's Memphis home to execute a warrant, looking for evidence of child pornography. The search warrant indicated that a particular cellular phone, linked to Conder, was being used. The agents parked and went to the back door, as it appeared that was the door normally used. No one answered and they turned to return to their vehicle. About that time, Conder arrived. Agents Obermiller and Pannell asked to speak to him and they then walked back to the mobile home, where there was a porch. Other agents pulled in behind Conder's vehicle. They asked if they could speak to him inside. He agreed, upon being asked, that he was inviting all of the agents to come inside. Four agents entered.

Conder stated he did not have any computers or internet access at the home and offered to let them search. He denied having any pornography at all, and specifically, that he had any child pornography. Conder provided his cell phone number, which matched that in the search warrant. He admitted he'd gotten images on the phone but that he had been deleting them as he received that, but also that he “had not finished deleting all of them.” He refused consent to search the truck, where the phone was located, but again offered to let them search the mobile home. They produced the search warrant. One agent went to fetch the phone, while other officers searched the home. They told Conder he was not under arrest and would not be

²³¹ Fare v. Michael C., 442 U.S. 707 (1979).

²³² 479 U.S. 564 (1987).

arrested that day, they were only collecting information. He was given Miranda and admitted that he had been receiving and sending child pornography on the phone. He provided a signed statement to that effect.

Conder was charged with knowingly possessing child pornography. He moved to suppress the statements and was denied. Conder took a conditional guilty plea and appealed.

ISSUE: Are in-home custodial situations presumptively non-coercive?

HOLDING: Yes

DISCUSSION: Conder argued that the self-incriminating statements he made initially, prior to Miranda, “were the product of a custodial interrogation.” The Court looked to the circumstances, and noted that “with the ultimate inquiry turning on whether a formal arrest occurred or whether there was a restraint on freedom of movement of the degree associated with a formal arrest.”²³³ The Court looked to other factors, such as:

- (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 informed at the time that the questioning was voluntary or that 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 requests to answer some questions.²³⁴

Conder argued that he was confronted by multiple officers, one had a weapon visible (although all were armed), his truck was blocked in, one of the law enforcement vehicles had a prisoner cage, he was not told he was free to go, and the agents already had a search warrant. The Court found only a few of the issues relevant, since the analysis has to be done from Conder’s viewpoint and he was unaware of the warrant or, apparently, where the agents had parked their vehicles outside. For those that were relevant, the Court noted that encounters in the home are presumed to be non-custodial.²³⁵ In Miranda, the Court had noted that “the potentially coercive police tactic of isolating suspects in unfamiliar environments solely to ‘subjugate the individual to the will of his examiner.’” Even when the individual is the focus on an investigation, an in-home questioning is usually non-coercive, although certainly specific circumstances could cause it to become so. Conder’s situation, specifically, fell on the side of it being non-coercive, as he admitted the agents, and that he felt free to refuse consent for them to search his truck. That indicated he understood he had freedom of action. Their failure to tell them he could refuse was a factor, but not a deciding one. The Court agreed that he was not in custody when he made the initial statements.

Further, since his argument to suppress the statements made following Miranda depends upon the statements made prior to that being held to be custodial interrogation, that argument necessarily fails.

The Court affirmed Conder’s plea.

42 U.S.C. §1983 – STATE CREATED DANGER

Salyers v. City of Portsmouth, 2013 WL 4436536 (6th Cir. 2013)

FACTS: In June, 2008, Salyers, Sr. (father) gave Salyers, Jr. (son) his prescribed Methadone dose. (Salyers, Jr. was not permitted to manage his own dosage because he had previously self-medicated and had

²³³ U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009).

²³⁴ U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).

²³⁵ U.S. v. Hinojosa, 606 F.3d 875 (6th Cir. 2010).

two DUIs on his record.) Some time later, Jr. left his home in Ohio, collided with another vehicle, and continued toward Portsmouth. He eventually crashed into a second vehicle. Officer Nichols (Portsmouth PD) arrived and located Jr., and matched him to the earlier hit and run report. The officer realized something was wrong with his mental state, although the officers detected no alcohol. Jr. was lucid and cooperative, however. Jr. was cited for reckless driving and handed over to another officer, from the jurisdiction where the first crash occurred. That officer also cited him and then released him. Because his vehicle had been towed, Jr. “began wandering the streets of downtown Portsmouth on foot.” A few hours later, police were summoned to a man, apparently Jr., “pounding on car windows and attempting to enter a car stopped at a red light” but they could not locate him. At about 8:45 p.m., they responded to another complaint of a man throwing bricks at a parked car. Again, officers arrived too late, but soon spotted Jr. walking across a bridge between Kentucky and Ohio. The officer blocked traffic and took Jr. into custody and again, after questioning, determined him to be unimpaired.

Under Ohio law, Jr. could not be arrested for a misdemeanor as the officers had not witnessed him do anything illegal. Officer Davis was instructed by his commanding officer to release him, just not on the bridge. He offered to drop him off someplace where he could get a ride, but Jr. stated his father was already on the way to pick him up. He was eventually dropped off on the Kentucky side of the bridge, in a large grassy area on the far side of a guardrail. He was warned to stay off the highway. He then advised dispatch to inform South Shore (Ky.) police of Jr.’s presence.

About 15 minutes later, Jr. walked out into traffic and was fatally struck. Sr. filed a §1983 action against Portsmouth and named officers. (He also sued the driver who struck Jr.) The Court ruled in favor of all of the defendant officers (and the driver) and Sr. appealed.

ISSUE: Is a subject given a ride to a location they agree to, and left there, in “state custody?”

HOLDING: No

DISCUSSION: Sr. argued that the officer’s action violated Jr.’s Fourteenth Amendment Due Process rights by leaving him near the highway. The Court agreed that normally, state actors (such as law enforcement officers) do not have a duty to protect individuals against “private violence.”²³⁶ The only exceptions are when the individual is in custody, or whether the actions of the officer “make the individual more vulnerable to private violence” – a “state-created danger.”²³⁷

In this case, Sr. disavowed the state-created danger argument, basing his case on the custody requirement. The Court noted that unlike Stemler, there was no indication that Jr. “resisted [the] proposed drop-off point.”²³⁸ He specifically rejected an offer by the officer to be dropped off somewhere else. He was free to choose where he wanted to go and the officers’ call to alert Kentucky authorities did not suggest any wrongdoing. At best, it suggested the officer might have been concerned Jr. would disregard his instructions to stay off the highway or that Jr. lied about a ride. The Court found this case to be most similar to Cartwright v. City of Marine City and that the custody exception didn’t apply because he was never restrained in any way.²³⁹ And, in fact, even if the officers had a custodial duty, there was no indication that the officers breached it by showing deliberate indifference to his safety.

As such, the Court agreed that the officers were entitled to qualified immunity as they did not violate Jr.’s constitutional rights.

²³⁶ DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189 (1989).

²³⁷ Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997); Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).

²³⁸ Id.

²³⁹ 336 F.3d 487 (6th Cir. 2003).

42 U.S.C. §1983 – GIGLIO

Dawson v. Dorman, 2013 WL 2397410 (6th Cir. 2013)

FACTS: Dawson was a suspect in a robbery at gunpoint in Ludlow. He was charged with Robbery 1st. On the eve of trial, the indictment was dismissed after the prosecutor concluded “that the case was in trouble due to witness credibility issues.” Dawson sued Dorman (the lead investigator), claiming false or misleading information that led to the arrest.

The District Court awarded summary judgment to the defendants and Dawson appealed.

ISSUE: May an officer’s history of untruthfulness be used to determine their credibility?

HOLDING: Yes

DISCUSSION: Dawson claimed that Dorman “committed the constitutional tort of malicious prosecution by deliberately fabricating evidence to support the robbery charge.”²⁴⁰ Dorman testified incorrectly about where a fingerprint (that matched Dawson) was located in the crime scene. (It was on a soda can taken from his brother’s home, not on the shoebox taken in the crime.) Dorman claimed to have mistakenly believed all the prints examined were taken from that one item, because he never personally looked at the fingerprint cards before they were sent to the lab. Dorman argued it was mere negligence that caused his false testimony. The District Court believed Dorman was more credible and awarded him summary judgment.

Although normally, the Court noted, evidence as to mental state is almost impossible to discover, the Court noted that his history of dishonesty as an officer was long and other cases had been affected because of that history. The Court agreed there was some evidence supporting Dawson, but it was not enough, as Dorman’s error was not critical to the determination of probable cause.

The Court upheld the summary judgment motion.

42 U.S.C. §1983 – ARREST

Autrey v. Stair / Kennedy (Detroit PD) 2013 WL 331560 (6th Cir. 2013)

FACTS: At about 2 a.m. on April 28, 2007, Officer Chuney (Detroit PD) responded to an vehicle accident. He learned one of the vehicles was an unmarked car registered to the PD. He learned that a commander, Bettison, had been driving it, and knew that Bettison was a close friend and fundraiser for the Mayor. Officer Chuney surveyed the car, finding an empty wine cooler bottle inside and three outside the car. He did not fill out the report, instead telling the other police officials who responded to the scene what had happened. He did discuss with three officers the bottles, however. Sgt. Hayes, his supervisor, did not find it necessary to separately secure the bottles as evidence since the entire scene was taped off. Sgt. Hayes reported this to the lieutenant, who ordered him to go to the hospital with Bettison. Messages went “up and down the relevant chains of command” as to what had happened. Eventually command staff, including Stair and Kennedy, convened at the hospital and were told that alcohol may have been involved.

Deputy Chief Logan directed Commander Serda “to evaluate the situation at the site of the accident.” Commander Serda responded to the scene and noted that there was no tape around the bottles specifically, but felt that the crime scene perimeter at the nearby intersection was sufficient. Logan and Autrey tried to talk to Bettison but were thwarted because he was sedated and unconscious. They learned that Bettison had

²⁴⁰ Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010)

been drinking and was “obviously over the legal limit.” Autrey later claimed that Logan had said the accident site was no longer a crime scene and that IA was not coming out. He decided to go check on the car for personal items. He observed two police cars still there, blocking the road, but no crime scene tape present. He removed a car seat and a flashlight, as well as the empty wine cooler bottles. He ultimately threw away the bottles.

Sgt. Kennedy, however, of IA, did arrive at the site, responding to a call from Commander Stair, a short time later. He also saw no tape but observed that the car was being prepared to be moved by the tow truck. He found the top of an alcoholic beverage container bottle (apparently a screw top from one of the coolers) and with that, served an investigative subpoena for the blood alcohol results at the hospital. It proved to be at .22, and Bettinson later admitted to having had several alcoholic beverages that night. As a result of later discussion, Sgt. Kennedy and Commander Stair decided that Commander Autrey did remove the bottles, necessitating a report to that effect. An amended report was drafted, with a recommendation that Autrey be charged with criminal offenses related to tampering with the evidence and related crimes. The prosecutor specifically did not want to know what Autrey’s statement about what had occurred said, as he didn’t want to involve Garrity issues.²⁴¹ Following a preliminary hearing, Autrey was bound over for trial.

At trial, Autrey was acquitted. He then filed a lawsuit under 42 U.S.C. §1983 against a number of police defendants. The Detroit defendants moved for summary judgment following extensive discovery, which was granted. During the process, Autrey dropped all claims against everyone but Sgt. Kennedy and Commander Stair. Autrey appealed only the dismissal of his claims against those two.

ISSUE: Does a malicious prosecution lawsuit require proof of lack of probable cause?

HOLDING: Yes

DISCUSSION: The Court noted that since the Michigan trial court had ruled that probable cause existed to bind Autrey over for trial, the “principles of collateral estoppel precluded [Autrey] from pushing a second time an identical challenge to the quantum of evidence necessary to initiate a criminal prosecution.” Further, the Court noted, there was no evidence that the pair “provided false information or failed to provide material exculpatory information” to the prosecutor. Each of Autrey’s claims, malicious prosecution and wrongful arrest, require, as an element, a “lack of probable cause to pursue the particular action.” Collateral estoppel applies when “a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment,” the “same parties ... had a full [and fair] opportunity to litigate the issue,” and there is “mutuality of estoppel.” The last element is not necessary when the defense is being “asserted defensively to prevent a party from relitigating an issue” that has previously been litigated to its conclusion.

The Court agreed that even though Autrey was acquitted at trial, the trial court had concluded that there was probable cause to bring the case. The court agreed that a cause of action might proceed if there was evidence of deliberate falsehoods or the omissions of crucial information before the trial court, but that requires more than mere allegations. The omitted information did not contradict any of the information that indicated Autrey improperly removed items from the scene. Parsing the language in the reports, the Court noted that although certain terminology might not be precise, it does not equate to a falsehood or misstatement. Further, even though the bottles were not essential to the case against Bettison, they “would’ve been nice to have,” according to Sgt. Kennedy.

The court agreed that collateral estoppel precluded the §1983 case. The District Court’s decision was upheld.

²⁴¹ Garrity v. New Jersey, 385 U.S. 493 (1967).

Garcia v. Thorne, 2013 WL 1136552 (6th Circ. 2013)

Facts. On March 17, 2008, Mason (MI) police responded to a break in at a home. Smith, Garcia’s 15 year old son, became a suspect. Officer Thorne obtained an arrest warrant for Smith, which was authorized a few days later. Thorne called Garcia’s phone numbers attempting to contact her – she later claimed that he called at “inappropriate hours” – in the middle of the night. He was apparently trying to get a current address for her. At some pointed, however, he learned she’d moved to Lansing. Thorne had a previous history with Garcia and characterized her as “anti-police.”

A short time later, Garcia visited Smith’s high school to talk about his absence. She explained that there was a warrant for his arrest so she saw no reason for him to attend school. A few days later, Thorne talked to Smith, who agreed to turn himself in the next day, but Garcia called the department and told them that Smith would not be doing so and again complained that Thorne had been calling. During the next night, Garcia claimed Thorne called her and threatened her with criminal charges. The next morning, Thorne requested a warrant for Garcia for harboring a felon but instead, the prosecutor issued a truancy warrant for her. Lansing PD executed the warrant and transferred her to Mason, Smith was arrested the following day.

The prosecutor filed a nolle prosequi and dismissed the truancy charges. Garcia filed suit against Thorne under 42 U.S.C. §1983, arguing false arrest, malicious prosecution and related claims. Thorne moved for summary judgment, which was granted, and Garcia appealed.

ISSUE: Do minor errors invalidate an arrest warrant?

FACTS: No

DISCUSSION: With respect to the false arrest claim, the court noted that Garcia “must show that [Thorne] lacked probable cause to arrest her.”²⁴² Garcia did not dispute that she was harboring her son, but argued that Thorne should have known that as a juvenile, Smith would not be charged with a felony. The Court noted, however, that under state law, Smith could have been waived to an adult court for his particular offense. Further, even though Thorne knew that Garcia (and Smith) lived in Lansing, and that his use of a Mason address on the warrant was incorrect, it was not material to the probable cause finding. The Court agreed that the mistakes were not material and that the arrest was valid.

With respect to his alleged calls during unreasonable hours, the Court noted that Garcia had produced no evidence substantiating the calls. However, the Court agreed that even if made, the calls “do not shock the conscience,” which is a very high standard. At worst, they showed poor judgment. Neither does submitting a warrant with an arrest in his jurisdiction, as the warrant was validly served by Lansing police.

Finally, the Court agreed that Thorne’s request for charges against Garcia were not causally linked to her complaint about his phone calls, as he could show “he would have taken the same action in the absence of the protected activity [free speech].” In Hartman v. Moore,²⁴³ the Court had held “that the lack of probable cause is highly probative, if not dispositive, of the existence of a retaliatory motive.” The converse is also true, in that the “existence of probable cause indicates a lack of retaliatory motive.”

The Court affirmed the dismissal of Garcia’s claims.

²⁴² Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010) (citing Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669 (6th Cir. 2005)).

²⁴³ 547 U.S. 250 (2006).

Alman/Barnes/ Triangle Foundation v. Reed (and others), 703 F.3d 887 (6th Cir. 2013)

FACTS: At about 1 p.m., on October 12, 2007, Alman went to Hix Park, in Westland, Michigan. He parked his car, listening to the radio. He moved to a picnic table eventually. Deputy Sheriff Reed (Wayne County, MI, SO) approached Alman and “struck up a conversation.” Deputy Reed was part of a multi-jurisdictional task force doing ongoing surveillance on the park, investigating “complaints of lewd conduct and possible sexual activity.” Deputy Reed was the decoy in the detail on that day. At some point, Alman told Reed that he and his partner had just moved to the area, which led Reed to assume Alman was gay. Although there was dispute, at some point, “Alman began walking down a trail and Deputy Reed followed him.” They ended up in a clearing and Alman later stated that “he believed that Reed was flirting with him.” Alman went down on one knee after allegedly touching or brushing Reed’s crotch. Reed then arrested Alman and he was taken back to the detail area. He was transported to jail and his vehicle towed.

The vehicle in question, however, belonged to Alman’s partner, Barnes. Barnes travelled to Indiana and decided to pay a redemption fee (\$900) in order to retrieve the vehicle. He signed a release that effectively negated any potential civil litigation regarding the car. When he went to retrieve the vehicle, however, the only person that could release it was not available, and would not be there for another four hours. Barnes contacted the Triangle Foundation, a LGBT advocacy organization. Finally, at about 6 p.m., he was able to retrieve his vehicle.

Ultimately, the charges against Alman were dismissed, but he was given an “appearance ticket” for violating two local ordinances. One charge was subsequently dismissed and when officers did not appear on the second one, at trial, it too was dismissed.

Alman and Barnes filed suit under several claims. The District Court dismissed the claims and Alman and Barnes appealed.

ISSUE: Must an arrest be based upon probable cause?

HOLDING: Yes

DISCUSSION: First, the Court discussed the existence of probable cause for the offenses charged. Under Michigan v. DeFillippo, the Court equated probable cause for an arrest with the “facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances show, that the suspect has committed, is committing, or is about to commit an offense.”²⁴⁴ The Court reviewed the elements of each offense and concluded that in none of them do the facts support probable cause for the arrest. As such, the Court reversed the dismissal on that claim.

Officers involved claimed qualified immunity, but because the District Court had concluded probable cause was present it had not ruled on that issue. Alman and Barnes only alleged constitutional violations against Sgt. Swope, who made the initial decision to charge Alman. Sgt. Swope admitted that he acted solely upon what he was told by Reed with respect to the allegation of touching. The Court agreed that “without more facts at his disposal, [Swope] had no reasonable basis to believe that any of the offenses that Alman was charged with had occurred or were about to occur.” As such, the Court agreed qualified immunity was not appropriate.

With respect to a failure to train cause of action, the Court noted that the bar is high on such cases. It requires that the plaintiff prove that ““that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city’s deliberate indifference; and that the inadequacy is

²⁴⁴ 443 U.S. 31 (1979); Devenpeck v. Alford, 543 U.S. 146 (2004).

‘closely related to’ or ‘actually caused’ the plaintiff’s injury.”²⁴⁵ Finding nothing to suggest that either employer (Wayne County for Reed, Westland PD for Swope) had any reason to be aware of a potential for constitutional violations due to inadequate training on enforcement of such charges. The court affirmed the dismissal of the case against the government employers.

Finally, the court looked at Barnes’s claims regarding the seizure of his vehicle. The Court agreed that the “seizure of a vehicle in connection with an arrest not supported by probable cause violates the Fourth Amendment in the same manner that the arrest itself violates the Fourth Amendment.”²⁴⁶ Although there are exceptions, particularly with respect to temporary seizures, “the subsequent seizure of property based on the invalid arrest violates it as well.” As it held that the arrest was invalid, the Court reversed the decision dismissing the claim regarding the vehicle. Barnes also claimed that the process used to seize the vehicle effectively extorted money from him but the Court did not agree.

The Court remanded the case for further proceedings on the reversed claims

42 U.S.C. §1983 – SEARCH & SEIZURE – MEDICAL EMERGENCY

Russell v. Davis, 2013 WL 1442518 (6th Cir. 2013)

FACTS: On September 5, 2008, Jason Miller was arrested for shoplifting. He identified himself as his brother Chris. Of course, no one showed up at the court appearance and a warrant was issued for Chris Miller. Chris was able to get that corrected but also told Officer Mick that he believed his brother would commit “suicide by cop.” Officer Mick later stated he shared that information with others, including Officer Davis and Sgt. Brophrey. Jason Miller, accompanied by his mother, Russell, tried to turn himself in but was for some reason unable to do so. Trisha (Chris’s wife) called Officer Mick and told him where Miller could be found. Officer David and Sgt. Brophrey went to the Russell home and found Miller walking on the street. He was arrested.

At that time, Miller was carrying a .357-magnum Ruger revolver, which measured roughly one foot in length and weighed nearly three pounds. Officer Davis claimed he did a thorough search but was not discovered. Miller was handcuffed and placed in Davis’s car, and then the two officers searched the jacket he’d been carrying. In the meantime, Miller extracted the firearm and managed, through some contortions, to shoot himself in the mouth, fatally.

Russell filed suit against the officers and the agency under 42 U.S.C. §1983. The officers requested summary judgment, which was granted. Russell appealed.

ISSUE: Must officers take precautions to ensure a subject does not commit suicide?

HOLDING: Yes (if they have reason to know they may do so)

DISCUSSION: Russell argued that “because they had been informed that Miller was likely to commit suicide,” the officers “had a duty to take precautions to prevent an in-custody suicide.” The Court noted that although the Eighth Amendment does not apply to pre-trial detainees in custody, the Fourteenth Amendment “does provide them with a right to adequate medical treatment.”²⁴⁷ Under either, the plaintiff

²⁴⁵ Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) (citing City of Canton v. Harris, 489 U.S. 378 (1989)).

²⁴⁶ See U.S. v. Place, 462 U.S. 696 (1983).

²⁴⁷ Gray v. City of Detroit, 399 F.3d 612 (6th Cir. 2005).

must show that there was a “deliberate indifference to serious medical needs.”²⁴⁸ Certainly, the Court agreed, “suicidal tendencies are a sufficiently serious medical need.”²⁴⁹

With respect to an in-custody suicide, the Court stated, in Barber v. City of Salem:

The proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section §1983 for a jail detainee’s suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent’s serious medical needs.²⁵⁰

However, the Court noted, the officers did apprehend him, handcuff him and place him in a police car. They stood immediately outside while searching his jacket, during which brief time he managed to extract the weapon and commit suicide. As such, although their “conduct was far from ideal,” performing “at best ... a cursory search,” the officers did not act with deliberate indifference.

The court upheld the dismissal on the basis that no constitutional violation occurred.

Stricker v. Twp. of Cambridge, 710 F.3d 350 (6th Cir. 2013)

FACTS: On December 22, 2008, Susan Stricker called local (Cambridge) and state officers “requesting help for her son, Andrew, who was suffering from an apparent drug overdose.” Consistent with policy, the officers were sent to secure the premises for EMS. (In fact, officers were familiar with Andrew and his brother William, both were known to be heroin addicts.) Susan and Kevin (her husband) refused to allow the officers to enter without a warrant. Stricker told them that she no longer wanted medical help for Andrew and she ultimately called the Michigan State Police to try to get the local officers off the property. However, she refused to answer the door to the state trooper who responded, either. At that point, deputy sheriffs arrived. Andrew was presented to the officers, through a window and the trooper later testified that Andrew was pale and did not appear to be alert or focused. After further discussion and consultation with the local prosecutor, the officers forced their way in, “conducted a search of the house, and placed Andrew’s parents in handcuffs while EMS administered care to Andrew.” He was transported and ultimately arrested for using narcotics. The Strickers were arrested for various state charges.

The Strickers, along with additional members of the family, sued a number of law enforcement officials from Cambridge Township, Lenawee County Sheriff’s Office and the Michigan State Police for the entry and detention. The District Court denied all claims, finding exigent circumstances justified all of the actions taken at the scene. The Strickers appealed.

ISSUE: Is an exigent entry permitted based upon a probable medical emergency?

HOLDING: Yes

DISCUSSION: The Court noted that one “well-recognized exception applies when the ‘exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’”²⁵¹ “Circumstances in which it is objectively reasonable to believe a medical emergency exists fit within the exigent circumstances exception.”²⁵² The Court looked to several

²⁴⁸ Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001).

²⁴⁹ Horn v. Madison Cnty Fiscal Court, 22 F.3d 653 (6th Cir. 1994).

²⁵⁰ 953 F.2d 232 (1992).

²⁵¹ Kentucky v. King, 131 S. Ct. 1849 (2011) (quoting Mincey v. Arizona, 437 U.S. 385 (1978)).

²⁵² Brigham City v. Stuart, 547 U.S. 398 (2006),

cases for guidance in “what constitutes a medical emergency.”²⁵³ The Court agreed that “the combination of [a] 911 call, the uncertain nature of the emergency, and the need to safeguard EMS while tending to the [victim] made for exigent circumstances.”

The Court continued:

Viewed in the light most favorable to the Strickers, the combination of the 911 call soliciting help for a drug overdose, the police’s independent knowledge and observations confirming the reported overdose, and the Strickers’ attempts to prohibit access to Andrew despite their initial call for help made it objectively reasonable for the officers to believe that Andrew was overdosing on drugs and was in need of immediate medical evaluation and attention.

The Court found it to be “clear that it was objectively reasonable for the officers to believe a medical exigency existed when they had affirmative evidence that someone in the home needed immediate aid.” The court found it significant that the Strickers also “barred all access to Andrew by refusing requests for him to leave the house to be treated.”²⁵⁴ With respect to the duration and scope of their actions once the officers entered, the Court agreed that Andrew was not immediately within view when the officers entered. As such, they were justified in looking for him. Further, they were justified to sweep the location in order to protect themselves and the EMS crew, particularly given that they had “repeatedly inhibited” access to Andrew by EMS.

Finally, the Court found the issue of the more extensive search of the was a close call but because it was reasonable for the officers to believe Andrew was in a drug overdose, it was reasonable to search for what he may have ingested in order to aid in treatment.²⁵⁵ With respect to the arrest, the Court agreed that the officers had probable cause to believe that the Strickers had “resisted and obstructed officers,” violating Michigan statute. They argued the commands were unlawful but the Court disagreed. Nor did the Court agree that the force used, holding them at gunpoint, having them lie on the floor and handcuffing, was excessive under the circumstances.

The Court affirmed the District’s Court’s dismissal of the action.

42 U.S.C. §1983 – FAILURE TO TRAIN

Essex (and others) v. County of Livingston, (MI) 2013 WL 1196894 (6th Cir. 2013)

FACTS: In early 2008, Deputy Boos (Livingston County SO) sexually assaulted five women “while transporting them from the Livingston County Jail to the county courthouse.” He was ultimately charged with sexual crimes and pled guilty. During the subsequent lawsuit against the County and Sheriff Bezotte, Boos argued that “he did not know his acts were criminal because he believed [them to be] consensual.” He claimed to be unaware that Michigan law was that no “inmate or detainee could ... provide valid consent” and that he “never received training on sexual assault or the proper conduct in transporting detainees.” He acknowledged that he was generally aware it was wrong, however. Sheriff Bezotte had not implemented any special training for his deputies as “he believed it was common sense.”

The five women filed suit under 42 U.S.C. §1983 against the Sheriff and the jail administrator, arguing that the Sheriff was deliberately indifferent in failing to train deputies about sexual assault. Both moved for summary judgment and qualified immunity, but the District Court only gave summary judgment to the jail

²⁵³ See Michigan v. Fisher, 558 U.S. 45 (2009); Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003); Johnson v. City of Memphis, 617 F.3d 864 (6th Cir. 2010).

²⁵⁴ Brooks v. Rothe, 577 F.3d 701 (6th Cir. 2009).

²⁵⁵ McKenna v. Edgell, 617 F.3d 432 (6th Cir. 2010).

administrator. The Court denied it as to the Sheriff and Livingston County. Following extensive litigation, Bezotte appealed for qualified immunity.

ISSUE: Is a neglect to train adequately actionable?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that in this case, the §1983 claim against Sheriff Bezotte was “against him in his individual capacity” and thus is distinct from a claim against him in his official capacity.²⁵⁶ A claim in the sheriff’s official capacity is “merely another claim for a claim against the municipality.” Claims against the government entity are not subject to the qualified immunity defense, which can only be asserted by the individual.²⁵⁷

The Court continued:

In a case such as this, where the supervisor is also the policymaker, an individual-capacity claim may appear indistinguishable from an official-capacity or municipal claim, but these failure-to train claims turn on two different legal principles. For individual liability on a failure-to-train or supervise theory, the defendant supervisor must be found to have “encouraged the specific incident of misconduct or in some other way directly participated in it.”²⁵⁸ A plaintiff must demonstrate that the defendant supervisor “at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.” A mere failure to act will not suffice to establish supervisory liability.²⁵⁹

The Court contrasted this to a failure to train and supervise claim against a government entity, noting “such claims do not require direct participation in or encouragement of the specific acts; rather, these claims may be premised on a failure to act.”²⁶⁰ “

A plaintiff must establish that the municipality, through its policymakers, failed to train or supervise employees despite: 1) having actual or constructive knowledge of a pattern of similar constitutional violations by untrained employees,²⁶¹ or 2) the fact that the constitutional violation alleged was a patently obvious and “highly predictable consequence” of inadequate training.

The Court continued:

We highlight this crucial distinction between individual-capacity and official-capacity failure to-train-or-supervise claims because, in the instant case, whether sexual assault was an obvious consequence of inadequate training or whether a pattern of sexual misconduct in other counties sufficed for proving actual or constructive knowledge speaks to the County’s liability for Bezotte’s conduct in his official capacity. These questions do not bear on the qualified-immunity inquiry of whether Bezotte exhibited the much higher culpability standard of personal involvement.²⁶²

²⁵⁶ Kentucky v. Graham, 473 U.S. 159 (1985).

²⁵⁷ Brennan v. Twp. of Northville, 78 F.3d 1152 (6th Cir. 1996); Myers v. Potter, 422 F.3d 347 (6th Cir. 2005).

²⁵⁸ Phillips v. Roane Cnty., 534 F.3d 531 (6th Cir. 2008) (quoting Sheehee v. Luttrell, 199 F.3d 295 (6th Cir. 1999)).

²⁵⁹ Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006).

²⁶⁰ Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978); Heyerman v. Cnty. of Calhoun, 680 F.3d 642 (6th Cir. 2012).

²⁶¹ See Bd. of Comm’rs of Bryan Cnty. v. Brown, 520 U.S. 397 (1997).

²⁶² See Miller v. Calhoun Cnty., 408 F.3d 803 (6th Cir. 2005) (noting that the grant of qualified immunity was proper where there was no evidence of personal involvement, but the official-capacity claims were separate actions against the County analyzed under a deliberate-indifference inquiry)

Using this analysis, the Court found that the Sheriff was entitled to qualified immunity. Public officials who violate a plaintiff's constitutional rights while acting under the color of law may be liable under 42 U.S.C. §1983. However, the qualified immunity defense bars individual liability where "a reasonable official in the defendant's position would not have understood his or her actions to violate a person's constitutional rights." Immunity "gives ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law."²⁶³ Plaintiffs bear the burden of showing that a clearly established right has been violated and that the official's conduct caused that violation." In this case, although certainly sexual assault constituted a clearly established violation of the constitutional rights of the women, there was no assertion that any of the Sheriff's "personal actions violated those rights." To succeed, it would need to be proved that the Sheriff "took deliberate action or was otherwise involved in Boos' illegal acts." At best, they only proved that "that Bezotte inadequately trained road patrol deputies and failed to supervise Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions."

The Court agreed that Sheriff Bezotte was entitled to qualified immunity in his individual capacity, and that "that Bezotte inadequately trained road patrol deputies and failed to supervise Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions." The Court declined to exercise jurisdiction over the County's appeal, however, leaving the question of the County's potential liability unresolved.

42 U.S.C. §1983 – USE OF FORCE

Smith (Donnetta, Charles and Logan) v. Stoneburner / Knapp, 716 F.3d 926 (6th Cir. 2013)

FACTS: After Charles Smith shoplifted a phone charger (\$14.99), he was stopped by the manager. He admitted his crime but refused to stay at the store while the manager called the police. Instead, he walked home, within sight of the store. Officers Stoneburner and Knapp (Sturgis, MI, PD) responded. After talking to the store employees, they decided to talk to Charles.

The found Logan (Charles's brother, age 19) outside. He told the officers that Charles was inside but when asked about the officers entering, he told the officers "that he would ask his mother and that they could wait on the back deck of the house while he checked." They followed him into the back door. Logan entered and Stoneburner went inside with him. Knapp stayed outside. Logan "retrieved Charles from his bedroom upstairs and brought his mother, Donnetta, down too." Charles agreed to step outside.

There, Charles denied having stolen the phone charger and allowed a frisk. Stoneburner found only a lighter. "Undeterred, Stoneburner asked Charles if he could look inside the house," to which Charles returned only a mumble. He moved to go back inside and pulled the door behind him, whereupon, "Stoneburner held the door open, told Charles to stop and crossed the threshold of the doorway to grab Charles by the wrist." He pulled him back outside. At some point, Donnetta told him not to touch Charles, and moved between them; Stoneburner then "collided with Donnetta, causing her to hit the side of the house."

Charles stiffened his body as he was bent over a deck railing, so each officer grabbed an arm, "pressed his head against the wall" and handcuffed him. Charles was charged with a misdemeanor theft and convicted.

All three of the Smiths filed suit under 42 U.S.C. §1983, claiming that Stoneburner illegally entered the home, twice, and used excessive force against Charles and Donnetta. The District Court denied the officers qualified immunity and granted summary judgment in Charles's favor on the issue of the second entry and arrest. The officers appealed.

ISSUE: Is a warrantless entry for a minor crime permitted, without an exigency?

²⁶³ Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009) (quoting Hunter v. Bryant, 502 U.S. 224 (1991)).

HOLDING: No

DISCUSSION: The Court reviewed each of the incidents under the qualified immunity standard.

“First up is whether Officer Stoneburner violated the Smiths’ Fourth Amendment rights when he followed Logan into the house to look for Charles. Police officers, it has long been true, may not enter a private home without a warrant absent an exigency or consent.”²⁶⁴ Stoneburner does not claim that he had a warrant when he entered the home, and he does not claim any exigency justified the entry. He instead leans on the consent exception. The Court asked – “did Logan invite Stoneburner into the house?” “Maybe yes, maybe no.” As there was dispute on the issue, the Court continued “that is the epitome of a triable issue of fact” which had to go to a jury. The Court indicated that the “testimony shows two competing versions of what happened, only one of which can be true.”

Second was whether Stoneburner violated the Fourth Amendment when he entered the second time to arrest Charles. There was no issue of consent in this situation.²⁶⁵ Officer Stoneburner certainly had probable cause that Charles committed the crime, but there was no exigency requiring him to get inside immediately or to make a “warrantless entry to arrest Charles for this \$14.99 crime.” His entry was not “hot” in any sense of the word, nor was it a pursuit. He made no attempt to arrest Charles while he was outside and it was not illegal for a citizen not in custody to simply end a conversation and walk away. Had Stoneburner remained outside, Charles “would have remained inside the house, a non-violent person alone with a non-violent phone charger.” Stoneburner could have simply sought a warrant. Certainly Charles could have destroyed the charger, “but to call this a public-safety exigency gives public safety a bad name.” There was more than enough evidence even without the charger and had he tried to destroy it, he would have simply added evidence tampering to his list. After all, “how does one make a phone charger disappear without leaving the house?”

The Court continued:

A sledgehammer would leave plenty of shards for the police to discover. Hiding the charger in the house was a possibility but hardly a sure thing. Tossing the charger out the window would have accomplished little. This was not Venice. It was canal-free Sturgis, Michigan. And flushing a charger down a toilet – or more precisely trying to flush a charger down a toilet – would be more likely to create new problems than eliminate the one at hand.”

Once Charles decided not to cooperate, Stoneburner’s investigation hit the point at which a warrant was required.

As to whether the rights were well established, the Court noted:

By 2010, Payton and Welsh had been on the books for more than 25 years, making it clear that a double presumption guarded against warrantless entries into a home to arrest a misdemeanor suspect.

“Third up is whether Officers Stoneburner and Knapp used excessive force in arresting Charles and shoving Donnetta.” The Court noted that “standard is easy to state and even easy to apply in this instance.” It continued: “A police officer uses excessive force in arresting a suspect if his actions are objectively unreasonable given the nature of the crime and the risks posed by the suspect’s actions.”²⁶⁶ Charles argued his head was banged against the wall several times and the Court agreed that “shoplifting of this sort offers

²⁶⁴ Payton v. New York, 445 U.S. 573 (1980).

²⁶⁵ See also Welsh v. Wisconsin, 466 U.S. 740 (1984).

²⁶⁶ Graham v. Connor, 490 U.S. 386 (1989).

no reason by itself for banging a suspect's head against a wall." There was some evidence that Charles was physically resisting, but he argued that he was trying to straighten his back so he could breathe. In any event, as a factual argument, the officers were not eligible for qualified immunity. Same for the issue of whether allegedly tight handcuffs caused an injury, since the officers claimed they loosened the cuffs when he complained. As for Donnetta's claim, she claimed the officer intentionally shoved her, he claimed he "inadvertently bumped her." The Court noted that "it makes no difference if it was a "gratuitous shove" or an "inadvertent bump" – either way, it "falls within the bailiwick of the jury."

The Court affirmed the District's Court's decisions.

Burdine v. Sandusky County, 2013 WL 1606906 (6th Cir. 2013)

FACTS: On August 11, 2007, at about 3:30 a.m., Fremont (OH) officers arrived at a fight call. Officer Daniels arrived first and saw Burdine, bearing injuries. He approached and Burdine (possibly intoxicated) "lunged and possibly swung at" him. Burdine was pepper sprayed and subdued. He passively resisted by not standing up to go to the car, so he was picked up. Officer Emrich arrived, recognized Burdine, and ordered that he be taken directly to the jail because he believed "Burdine would not cooperate with standard booking procedures." There, he refused to get out and was "forcibly removed and carried into the jail." He was taken to the shower room to be rinsed off, but when the handcuffs were removed, he "began making martial arts moves and appeared ready to punch the officers." He began to "violently swing his arms, kick and bite at the officers." Several officers moved in and tried to control him. Deputy Sgt. Myers drive-stunned him in the back of the leg, which appeared to have no effect. He did it again, on the lower back, after Burdine kicked another deputy. Burdine was stunned a third time and still showed no effect. Sgt. Myers asked for EMS to be called because he was not going to be accepted at the jail and they held him face down while waiting; he was finally successfully handcuffed. Burdine vomited, causing Deputy Kaiser, holding him, to back off. However, Burdine grabbed one of Kaiser's fingers, almost dislocating it.

The first EMTs²⁶⁷ present testified that Burdine was breathing and "mumbling something incoherent, but might not have been using actual words." By the time he was moved, however, he had ceased breathing. Officers did CPR but he was pronounced dead upon arrival.

At autopsy, alcohol, methamphetamine and marijuana was found. He also had an heart condition that put him at increased risk for sudden cardiac arrest. The ME concluded the death was accidental, caused by excited delirium. Later, the family's expert put the cause of death as "traumatic asphyxia due to compression of his neck and back" while being restrained and called it a homicide. (He noted that drugs were "within recreational ranges.")

Burdine's estate filed suit. All of the defendant officers were dismissed by summary judgment, with the court finding that their actions were all reasonable under the Fourth Amendment. The Estate appealed.

ISSUE: Must a triable issue of fact be shown by more than just an expert's opinion?

HOLDING: Yes

DISCUSSION: The Court agreed that the only evidence of the strangulation was the Estate's own expert, noting that his interpretation required that he find that Burdine was unconscious when first viewed by the EMTs. However, no other evidence supports that assumption and several witnesses testified that he was conscious, although incoherent, and was breathing. The Court agreed that no one testified that anyone "manually compressed" his throat, and noted that "there is remarkable consistency in their accounts – despite

²⁶⁷ From other facts, it appeared they may have worked for the jail, as Burdine was transported via backboard in a squad car.

the involvement of two separate police forces, comprising over a half-dozen officers, and an independent two-person EMT squad.”

The Court agreed that a “single expert report that relies on the expert’s contrary interpretation of all other evidence does not create a genuine issue of material fact.”²⁶⁸

The court upheld the decision to award summary judgment to the officers.

Martin v. City of Broadview Heights 712 F.3d 951 (6th Cir. 2013)

FACTS: Parker, age 19, died in the early morning hours of August 16, 2007, just minutes after he was arrested and restrained by Officers Tieber, Zimmerman and Semanco (Broadview Heights, OH, PD). They responded to a call about a man, wearing only jeans, yelling for help. On their way there, a nearby resident reported that a “naked male entered a nearby apartment.” When Officer Tieber arrived, he encountered Martin “running towards his patrol car, speaking quickly and nonsensically.” He calmed down momentarily and asked to be taken to jail but when Tieber tried to handcuff him, he “jogged away.” Tieber ran after him and fell on top of Martin. Officer Semanco fell on top of both of them and delivered “compliance body shots” to Martin’s side with a knee. Martin bit Tieber’s knuckle and Tieber struck Martin twice in the face. “Semanco used all of his force to strike Martin’s face, back, and ribs at least five times.” Tieber folded himself around Martin and there was evidence to suggest he had his arm around Martin’s neck. Officer Zimmerman arrived and assisted with handcuffing. Officer Novotney arrived. Martin was held down, although there was dispute as to how much force was used and for how long. Martin made a “gurgling sound.” When they rolled him over, he was unresponsive and showed “no signs of life.” Help was called but he was declared dead.

Martin’s cause of death was disputed. The Coroner ruled he died from excited delirium due to LSD, but the forensic pathologist ruled his death was due to asphyxiation and that the officers’ actions were “compressive events.” He and a second pathologists pointed to injuries that suggested he was pulled backwards by the neck.

Martin’s mother (his estate administrator) filed suit under 42 U.S.C. §1983. The officers asserted qualified immunity, which was denied. The officers appealed.

ISSUE: Is tackling a naked subject (by multiple officers) reasonable?

HOLDING: No (in most cases)

DISCUSSION: Looking at the Graham factors, the Court agreed that the officers were justified in “deploying some force” – but the degree would be the issue. With respect to the second factor, the Court had to take into account that they had reason to believe that he was “either on drugs or mentally unstable and they knew he was unarmed.” The Court found the Tieber’s response, to tackle Martin and fall on top of him, was unreasonable. A police expert testified that he should have tried to de-escalate the situation. Instead, Tieber “used severe force that did not match the threat Martin presented.”

With respect to the third factor, Martin did initially jog away from Tieber. But even so, what the officers did was not a “reasonable response to Martin’s attempted escape.” Further, his movement when he was on the ground, described as an “active struggle” by the officers, suggested that his “movements were an attempt to gasp for air and escape the compressive weight of the officers on top of him, not an effort to fight with the

²⁶⁸ Lewis v. Adams County, 244 F. App’x 1 (6th Cir. 2007).

officers or get away.”²⁶⁹ Their actions “were not justified by Martin’s possible crime, the threat he posed to anyone’s safety, or his resistance.” The Court looked to case law and agreed that the line in Champion v. Outlook Nashville Inc. was crossed when they placed weight on him after he was handcuffed.²⁷⁰ Although the officers argued otherwise, the Court ruled that Champion did not apply to just after the handcuffing, however, but that it “forbids creating asphyxiating conditions by putting substantial pressure” to “restrain a subject who does not pose a material danger to the officers or others.”²⁷¹ Champion “required the officers to de-escalate the situation and adjust the application of force downward.”

The Court agreed that the officers were not entitled to qualified immunity.

Edgerson v. Matatall 2013 WL 3185723 (6th Cir. 2013)

FACTS: On December 19, 2007, Officer Matatall and Sgt. Porter, were on patrol with Southfield (MI) PD. They spotted a vehicle matching a description of a previous incident with police. Matatall attempted to make a traffic stop and a pursuit ensued. He ended the chase by intentionally colliding with the vehicle. Edgerson and Williams fled from the vehicle. Sgt. Porter fired at Williams but he was not hit. Williams was apprehended and a gun found nearby – he admitted he had it during the chase.

Edgerson, in the meantime, later stated that as he ran, he slipped and fell and was shot by Officer Matatall five times while he was “down in a surrender position.” All five bullets entered in the back of his lower right leg, from the knee down. Officer Matatall claimed that “Edgerson repeatedly looked back and appeared to be aiming a weapon at him.” He claimed he shot Edgerson while he was still standing. He only realized after the fact that the object he’d been holding was a cell phone. A witness corroborated that “Edgerson had taken a ‘shooting stance,’ with ‘one arm up, looking parallel.” (The witness was previously a Marine and his father had been a police officer.) No charges were apparently ever placed against Edgerson.

Edgerson filed suit under 42 U.S.C. §1983. The officers moved for summary judgment but the Court denied it as to Officer Matatall. He appealed.

ISSUE: Must issues be raised in the initial brief supporting a motion to be considered?

HOLDING: Yes

DISCUSSION: The Court looked to the objective reasonableness of Matatall’s conduct. The Court noted that the only evidence that “Officer Matatall offers is the portion of the testimony of the ‘independent’ witness that Matatall finds corroborating.” It discounts Edgerson’s questions about the credibility of that witness, and that type of inquiry is for the jury to decide.

Notably, from the opinion, it appeared that Officer Matatall did not raise the argument that medical records would show that Edgerson was standing when shot until the reply brief – this information must properly be brought in the initial brief supporting the motion. By not doing so, he forfeited it. The Court also noted that it did “not have jurisdiction to consider arguments that rely entirely on a defendant’s disputed version of the facts.”

The Court upheld the denial of Matatall’s motion.

²⁶⁹ Graham v. Connor, 490 U.S. 386 (1989).

²⁷⁰ 380 F.3d 893 (6th Cir. 2004).

²⁷¹ See also Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007).

Correa v. Simone, 2013 WL 2500603 (6th Cir. 2013)

FACTS: On May 15, 2010, Officer Simone (Cleveland, OH, PD) was dispatched to a disturbance at a local bar. The suspect was described, and was indicated to have a gun. Simone went to the area and found Correa, who matched the description. He turned on his dash cam but failed to turn on the sound. The officer stopped Correa at gunpoint and told him to prone out. He went to his knees but would not lie down. Simone tased him. Two additional officers arrived and Correa was searched. He did not have a gun. Eventually, he was charged with the assault at the bar (he spat on a woman), obstruction and disorderly conduct.

Correa stated that when the officer stopped him, he did not know what was going on. He stated that he followed the officers' orders and did what he was told to do, which did not include lying prone. He filed suit against Officer Simone for excessive force. The District Court, viewing the video, indicated there were questions of fact about whether Correa was complying with the orders or not. The Court allowed some of the claims to go forward, including excessive force under §1983. Simone appealed.

ISSUE: May a Taser be used on someone who is not actively resisting?

HOLDING: No

DISCUSSION: The Court reviewed the situation, looking at three factors, “the severity of the crime at issue,” “whether the suspect poses an immediate threat to the safety of the officers or others,” and “whether he is actively resisting arrest or attempting to evade arrest by flight.”²⁷² In this case, the Court agreed that the first weighed in Simone’s favor and the third in Correa’s favor. With respect to the second, the Court agreed that in the past, it had held that when a subject has their hands up, they are not actively resisting.²⁷³

The Court agreed that “using a taser on a potentially armed suspect who is complying with all officer commands and not resisting violated clearly established law” at the time of the incident.

The Court upheld the denial of summary judgment.

Norton v. Stille, 2013 WL 1955889 (6th Cir. 2013)

FACTS; On October 12, 2010, Norton was a 58 year old woman, 5’4, 130 lbs., using a scooter for mobility due to recent foot surgery. Deputy Sheriff Stille was 5’2, 105 lbs. Norton was booked into jail for a minor offense and “unnerved, she began to devolve into a panic attack when placed into custody.” At the booking area, she asked for a minute to try to get control of herself. She removed her jewelry when asked to do so. She said she needed to blow her nose and picked up a roll of toilet tissue. Stille took it away from her. Norton then grabbed a paper towel to do so, as well as a plastic soda bottle, stating she needed a drink. Stille grabbed Norton’s arm and they struggled. The bottle finally dropped to the floor. (All of this was caught on video, with no audio.) “After the bottle had fallen to the floor, and any conceivable threat to Stille had dissipated, Stille pulled Norton’s left arm behind her back, swinging Norton off her scooter, pushing the scooter against the wall and breaking Norton’s arm.” Norton was unstable due to her injury and ended up face down on the floor. Her arm was broken a second time and Norton passed out. Eventually it was found to have been broken three times and Norton remains permanently disabled.

²⁷² See Wysong v. City of Heath, 260 F. App’x 848 (6th Cir. 2008).

²⁷³ Thomas v. Plummer, 489 F. App’x 116 (6th Cir. 2012); Landis v. Baker, 297 Fed App’x 453 (6th Cir. 2008).

Norton sued Stille under 42 U.S.C. §1983. Stille moved for summary judgment under the Heck bar, which was denied.²⁷⁴ Stille was denied qualified immunity and appealed.

ISSUE: Does passive resistance warrant actions that cause serious physical injury?

HOLDING: No

DISCUSSION: The Court looked to the Graham²⁷⁵ factors – “severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether she is actively resisting arrest or attempting to evade arrest by flight—favor a finding of excessive force.” The Court noted that the offense was minor, failing to pay a fine for a non-appearance in court – and “never posed a real threat to Stille.” Further, the bottle “was never placed in a position that Stille could have reasonably interpreted as threatening.” At best, Norton’s resistance was passive. The first break didn’t occur until after the bottle was dropped. At best, she “defied” Stille by grabbing for items, but she was not “actively resisting or trying to flee.” She was only contained in a secure area, with other officers around, but she was limited in movement by the scooter and boot on one foot. It is hardly plausible that she would be fleeing anywhere quickly.

The Court concluded that the use of force was excessive and that the right to be free of such force was long established.

The Court affirmed the denial of summary judgment based on qualified immunity.

Jones v. Sandusky County, OH, 2013 WL 5992087 (6th Cir. 2013)

FACTS: On July 11, 2010, Tracy Jones was preparing to go to work when he got into an argument with his son, Bryan, who lived with him. The son threatened to kill his mother, Kim. Tracy ordered him out of the house but Bryan refused, saying he had a gun. Tracy left and called 911 from the home of another son, Brandon, who lived nearby. He told dispatch that the Sheriff’s office had been there earlier to remove the son, but that he came back, making the threats. He also told dispatch that Bryan had been drinking for two days, was acting crazy, was in a house with loaded guns and would fight. Dispatch mistakenly told the responding deputies that Jones “was going to kill everybody and himself.”

Deputies arrived shortly after 10 p.m. They looked in the window and saw Jones sitting on the couch, with a shotgun across his lap. His eyes were closed but he moved on occasion and “half-opened his eyes.” They tried to call but Jones had unplugged the landline phone and had no cell phone. Sheriff Overmyer, having been notified, made his way to the house, confirming along the way that Jones had been involved previously in a drive-by shooting. Sheriff Overmyer requested assistance from other agencies and put EMS on standby. He activated his tactical unit and four members of the team were summoned. As this was going on, Jones was under constant visual surveillance and moved little.

The team was authorized to make a forcible tactical entry, as the Sheriff was unsure of the level of Jones’s level of consciousness. Tracy provided information as to the layout and that the kitchen door was unlocked, but wanted to go inside and get Jones himself. The team refused that request. They implemented a plan using the unlocked door and set up the stack. When they reached the door of the living room, one deputy tossed in a flash bang and they all rushed in and shouted at Jones. He did not put down the weapon, but moved it, instead, “to a position where it was pointed at” the team.” Two deputies fired on him, killing him. This all occurred in short succession.

Tracy and Kim Jones filed suit under 42 U.S.C. §1983 against the involved officers. Defendants moved for summary judgment, which was denied. They appealed.

²⁷⁴ See Heck v. Humphrey, 512 U.S. 477 (1994).

²⁷⁵ Graham v. Connor, 490 U.S. 386 (1989).

ISSUE: Will a use of force incident be “carved up” into segments for analysis?

HOLDING: Yes

DISCUSSION: Both deputies requested qualified immunity in the deployment of the flash bang and the subsequent shooting. The Court noted that in this circuit, “when there are multiple instances of force used, the usual procedure in this circuit is to ‘carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage.’”²⁷⁶ In this situation, the trial court defined three segments for analysis: “1) the defendants’ entry into the Jones’s home without a warrant; 2) the defendants’ use of a flash-bang device when entering the home; and 3) the defendants’ use of deadly force against Jones.”

With respect to the use of the flash bang, the Court agreed that under prior case law, the use of a flash bang is a use of force.²⁷⁷ However, the trial court did not “address whether Jones’s right to not endure a flash-bang device was clearly established” in the first place. The Court reversed the denial of summary judgment on that issue and remanded it back for further opportunity to address its use.

With respect to the shooting itself, the Court also agreed that the summary judgment was inappropriate. There was factual dispute on several points, “including whether Jones had time to comply with the orders of the TRT or heard the orders in the first place, given the impact of the flash-bang device and whether, when he raised his gun, Jones was doing so solely because he was startled and awoken by the flash-bang device.” A use of deadly force is assessed under “objective reasonableness,” the standard is whether “‘is whether a reasonable officer in [defendants]’ shoes would have feared for his life, not what was in the mind of [the decedent] when he turned around with the gun in his hand.’”²⁷⁸ “Independent of how much time [the deputies] may have given Jones to comply with their commands, there is evidence from three officers that they had time to observe [Jones] move his weapon and point it in the direction of the” team. His actual motivation is, the Court agreed, irrelevant. They confronted him only seconds after the flash bang was detonated. There was a question “as to what Jones was able to see or hear,” as well as what the deputies “were able to see and hear and they approached” Jones. With the smoke, they could not clearly see what Jones was doing with the weapon. This created a “genuine issue of material fact as to what threat the police perceived before they fired at Jones, and more importantly, whether the threat was reasonable.” The Court affirmed the denial of qualified immunity.

The Court further agreed that the proceeding must continue with respect to Sheriff Overmyer, as well, as the ultimate supervisor of the team.

In sum, the Court allowed for the possibility of summary judgment on the claim involving the flash bang, but affirmed the decision to deny summary judgment with respect to the shooting itself.

Hocker v. Pikeville City Police Department, 738 F.3d 150 (6th Cir. 2013)

FACTS: On August 13, 2010, Hocker got off work, drank a six pack of beer and at approximately 10:30 p.m., went to Batten’s home. She was his occasional girlfriend, but at the time, had a protective order keeping him from the house. She called 911, reporting that he was “highly intoxicated” and “suicidal.” He left the house in an identified vehicle. Officers Baisden and Branham (Pikeville PD) spotted the vehicle speeding past them, headlights off, on a winding, narrow road. The officers “gave chase” for seven miles, although Hocker later stated that he did not see or hear them. Hocker finally pulled off the main road onto a gravel drive and then he stopped.

²⁷⁶ Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996)

²⁷⁷ Ramage v. Louisville/Jefferson Cnty. Metro Gov’t, No. 11-5934, 2013 WL 1235652, (6th Cir. Mar. 28, 2013) and other cases.

²⁷⁸ Bell v. City of East Cleveland, 125 F.3d 855, No. 96-3801, 1997 WL 6401166th Cir. 1997) (table); see Jones v. City of Cincinnati, 507 F. App’x 463, 468-69 (6th Cir. 2012)

Hocker later claimed that he was just stopping to insert a CD and then intended to back out of the drive and continue on his way. Due to an alleged engine defect, when he backed up the vehicle revved up, shooting it backwards, It possibly spun gravel and “most definitely”, ran into Baisden’s cruiser. He later said he thought he’d hit a telephone pole. The last thing he remember was “hearing shots (and possibly feeling one round hit his left side) before blacking out.”

The officers added “a few undisputed facts and another perspective on these 25 seconds.” Both turned off their sirens and got out of their vehicles. Baisden posted up on the driver’s side door, taking cover “between the cruiser’s body and his open driver’s side door.” He ordered Hocker to “show his hands and step out of his vehicle.” Branham left his cruiser and moved to join Baisden. When Hocker’s vehicle collided with Baisden’s, the door swung shut and temporarily trapped Baisden’s arm. Baisden had to backpedal as his cruiser was pushed 30 feet toward a ditch. Branham was also backpedaling and he moved left to avoid Baisden’s moving vehicle. He opened fire on Hocker’s car. Baisden freed himself and also fired on the car. From the spent casings, it appeared both officered fired from positions to the left of the vehicles. At least 20 shots were fired; 9 struck Hocker. He blacked out, allegedly. The officers ordered him out of the car but he did not move. They removed him forcibly from the car and handcuffed him. He was taken for treatment.

Hocker was indicted on a variety of charges, including attempted murder. He took a guilty plea to Wanton Endangerment 1st, Fleeing and Evading 1st and DUI. Hocker then filed a lawsuit against the officers and Pikeville, under 42 U.S.C. §1983, claiming violations of the Fourth and Fourteenth Amendments. The District Court dismissed the lawsuit and Hocker further appealed.

ISSUE: Is proof of a Constitutional violation the initial element in a use of force analysis under 42 U.S.C. §1983?

HOLDING: Yes

DISCUSSION: The Court noted that the “facts of his chase, seizure and use of force provides a partial explanation” for the dismissal, while the “legal test for piercing the qualified immunity of officers protecting the public safety provides a complete one.” The first test, the Court agreed, was not met – as Hocker did not “show a constitutional violation” on the part of the officers. The Court noted that “no doubt the use of deadly force by police officers is a serious matter and ought to be avoided - but not at all costs and not in all situations.” The question remains - “why and to what end the police deployed the force.” The Court looked specifically to Tennessee v. Garner²⁷⁹ and Scott v. Harris.²⁸⁰

Using that guidance, the Court found that the “officers did not use excessive force” against Hocker. In fact, he specifically pled guilty to a crime, Wanton Endangerment, which included the element of conduct that created a “substantial danger of death or serious physical injury to another person.”²⁸¹ Only when that immediate risk became evident did the two officers fire their weapons. Their response was “precisely the kinds of ‘split-second judgments – in circumstances that are tense, uncertain and rapidly evolving,’ – that they may, sometimes must, take in the line of duty.”²⁸²

The Court continued:

... it makes no difference that Hocker may not have intended to hurt the officers, that he may not have known the officers were trailing him, and that he may not have heard the officers insist he exit

²⁷⁹ 471 U.S. 1 (1985).

²⁸⁰ 550 U.S. 372 (2007).

²⁸¹ KRS 508.060.

²⁸² Graham v. Connor, *supra*.

the car. The question is not Hocker's state of mind. It is whether a reasonable officer could perceive Hocker's actions as so dangerous as to warrant the force used. Hocker's un-communicated intent in driving the way he did in short has nothing to do with it.

Hocker's contention, also, that at the moment they fired, neither officer was in harm's way. The Court noted that "particularly in the context of the lightning-quick evolution of this encounter," it was not that simple. At the moment they started firing, neither officer clearly knew where their partner was located and the knowledge that they, themselves may be safe from immediate harm, did not mean that their partner was also safe. "This reality by itself justified the officers' conduct." At the time they fired, the "night's peril" had not ended. His previous course of conduct, over the previous minutes, "had put others, including most recently the officers, in harm's way." In fact, he remained in the car and the engine was still on, leaving the car operable. "From the officers' reasonable perspective, the peril remained."

Hocker argued that firing at the "driver's side of a *moving* (and potentially departing) vehicle" was unreasonable. The Court looked to other cases and found nothing to so indicate, and in fact, "acknowledged that there are many factors at play when deciding the reasonableness of an officer's use of deadly force" – such as the immediate threat to the officer or others, the severity of the crime at issue and "whether the suspect is actively resisting arrest or attempting to evade by flight."²⁸³ The Court also included, as a factor, "whether the officers 'had sufficient time ... to assess the situation before 'using deadly force.'"²⁸⁴

Hocker submitted an affidavit from an expert witness. Since the District Court had discussed it, the Sixth Circuit panel decided to do the same. The Court noted that the expert had stated that Hocker had committed nothing more serious than a Class A misdemeanor; the Court disagreed. Instead, the Court noted that he had committed several felony offenses, in particular the Wanton Endangerment 1st during both the chase and the ramming. Even if the use of force might have violated some policy, "such a premise is wrong as "deadly force from time to time violates standard police training" and that didn't lead necessarily to liability. The Court noted that the expert assumed, wrongly, that the officers were safe once they moved out from behind [Hocker's] car. It was reasonable for them to assume that they were not.

The Court also agreed that the officers did not use excessive force when they removed him forcibly from the car. Using the same analysis as before, "Hocker comes up short – for many of the same reasons." When the officers got his door open, they "found a wounded man screaming profanities and grasping the steering wheel." The dangerous nature of his driving justified the officers' belief that he "posed a continuing, immediate threat to their safety and the safety of others."²⁸⁵ A witness to the end of the chase confirmed that she saw the officers pulling, grabbing and hitting Hocker as he was inside and in fact, she never saw him outside the car. Hocker argued that bruising he had around his neck suggested he'd been dragged from the car that way, but the Court noted that the photo only shows faint bruising that could have occurred at any time. The Court agreed that "no jury could reasonably find a Fourth Amendment violation based on this self-serving *interpretation* of the evidence by someone who did not remember what had happened."

The Court also discussed the use of a video recording taken by a bystander. After the incident, a witness took videos of the scene. The KSP officer gave him a choice, to delete the video or he would take the device into evidence. The video was deleted. The Court found no reason under these facts to issue a spoliation instruction as he noted that recordings of the "post-chase, post-collision, post-shooting, post-apprehension, post-everything crime scene" could not cast any light on Hocker's claims.

The Sixth Circuit agreed that no constitutional violation occurred and affirmed the dismissal of the case.

²⁸³ Smith v. Cupp, 430 F.3d 766 (6th Cir. 2006).

²⁸⁴ Estate of Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008).

²⁸⁵ See Dunn v. Matatall, 549 F.3d 348 (6th Cir. 2008).

Saad v. Keller (and others), 2013 WL 6171341 (6th Cir. 2013)

FACTS: On July 10, 2010, Officer Keller (Dearborn Heights, MI, PD) was dispatched on a call of a harassing phone call. Solak, who received the call, said that Joseph Saad, who lived down the street, “had left a threatening message on her answering machine and had a history of leaving such messages.” Officer Keller went to the house, knocked, and Saad answered. He agreed that he’d left the message. Saad later claimed that when he opened the door, Officer Keller placed his foot inside. Officer Keller agreed he’d done so, but only when Saad “became irate when asked for identification, shoved him backwards and told him to get off the property.” Saad called to his mother, Sihra, and she came to the door and “began arguing with Officer Keller, who asked to see her identification.”

Additional officers were arriving, in response to a call for backup. Officer Cates, Officer Gondek and Reserve Officer Nason arrived. Sgt. Skelton later arrived. Officer Cates, who’d gone to her car, returned, and was told that “they were entering the home to arrest Saad.” Sgt. Skelton testified that Officer Keller gave a “non-verbal communication” to enter the home and make the arrest and that he “assumed that Officer Keller had a lawful basis to enter the Saad home and arrest Saad.”

Saad later maintained he did not resist arrest but that Officer Keller immediately Tased him, and that he was “tased ... a second time, gratuitously, when he was already incapacitated.” He also claimed that the officer “needlessly beat him and Officer Gondek punched him several times,” and continued to do so while he was on the floor. Keller’s version differed, saying that Saad did resist arrest and continued to do so after being warned he would be Tased. He only stopped resisting and allowed himself to be handcuffed after being Tased twice. Officer Cates stated that Saad’s mother “became irate, screamed at Cates, grabbed her shirt collar, pushed her, and scratched at her neck in order to get to Saad” after he was Tased. When the officer stated her intent to arrest her as well, Mrs. Saad “turned away and cross her arms across her chest.” Mrs. Saad stated she was handcuffed before she knew what was happened, complained that the handcuffs were too tight and bruised her wrists. (A recording indicated she was saying “my hands, my hands” during the incident, and a booking video shows her “rubbing her wrists.”) She also claimed to have been thrown to the ground on the way to the vehicle but Cates said she dropped to the ground “to resist being placed in the police car.” Both Saads complained of chest pain at the jail and were taken for medical evaluation. Mrs. Saad, who had a pre-existing heart condition, was admitted. Officer Keller was treated for foot and ankle injuries.

Charges of resisting and obstructing were dismissed against Mrs. Saad. Saad went to trial on similar charges but received a directed verdict, with the Court concluding that due to inconsistencies in testimony, the jury could not possibly convict him.

Both filed suit against the officers under 42 U.S.C. §1983, claiming unlawful entry, unlawful arrest, and excessive force claims. The officers moved for summary judgment and were denied. The officers appealed.

ISSUE: Does a finding of probable cause bar a claim for malicious prosecution?

HOLDING: No

DISCUSSION: The Court first addressed the issue of whether Saad being bound over for trial precluded his bringing a claim related to probable cause (collateral estoppel). The Court looked to Darrah v. City of Oak Park²⁸⁶ and agreed that “a finding of probable cause in a prior criminal proceeding” does not bar a claim for malicious prosecution in which it is argued that the police provided false information. In this case, the Court agreed the question as to whether Saad shoved or otherwise assaulted Officer Keller was at issue. The Court noted that did not bar a claim of unlawful entry and arrest.

²⁸⁶ 255 F.3d 301 (6th Cir. 2001); see also Hinchman v. Moore, 312 F.3d 198 (6th Cir. 2002).

Further, since such facts were in dispute, it was not proper to resolve the issue at this state of the proceedings. In short, the only reason Officer Keller (and the other officers) could enter would be to arrest Saad for a felony (assaulting the officer), which Saad denied. Since the information provided by each was blatantly contradicted by the other, summary judgment was not possible. With respect to the remaining officers, however, it was not clear to the other officers that Saad's arrest was unlawful or to have any reason to question Keller's decision, and as such, the officers were entitled to qualified immunity on the issue of unlawful entry.

With respect to the excessive force claims, it was proper to deny Officer Gondek qualified immunity on the claim that he punched Saad after he was already on the floor, as the facts were in contradiction. The Court affirmed the denial on the excessive force claims against the officers, affirmed the denial to Keller on the unlawful entry and arrest claims, but reversed that decision with respect to the remaining officers.

Toner v. Village of Elkton (MI), 2013 WL 6183005 (6th Cir. 2013)

FACTS: On October 19, 2008, Toner was arrested for DUI, having been initially stopped for speeding and other traffic offenses. Video captured most of the initial exchange and the ensuing FSTs, as well. A PBT indicated his BA was .166. Toner cooperated in the arrest, but claimed at one point that one of the cuffs was too tight; Jobs loosened them slightly. The audio captured Jobs placing Toner into the back seat and several comments back and forth, as well as Jobs "chewing gum." Toner claimed several things happened during the process, including his head being smacked on the doorframe and his shoulder being "popped" by Jobs lifting up on the chain. Nothing in the intake records indicated any injury. A blood draw was done, pursuant to a search warrant. He was eventually released and pled guilty to DUI. He went to a doctor a few days after the arrest, complaining of shoulder pain, and a small tear in his rotator cuff was diagnosed. On March 1, 2011, he sued under 42 U.S.C. §1983, claiming excessive force against Officer Jobs and the Village of Elkton in making the arrest. The District Court dismissed the claim against the village and gave summary judgment to the claims against Jobs. Toner appealed the decision dismissing the claim against Jobs only, finding that Toner's version was "blatantly contradicted by [the] video and audio [recordings] associated with his arrest, along with the other information from the record."

ISSUE: May a Court give more credence to a recorded interaction?

HOLDING: Yes

DISCUSSION: Toner argued that it was error to disregard all of his factual allegations, "even though the incident forming the core of [his] complaint occurred out of view of the video camera." The Court agreed with that, but nevertheless, held that his "allegations, even if proven, would not make out an excessive-force claim..." The Court agreed that when testimony is "only partially contradicted by audio and video recordings, that does not permit the district court to discredit his entire version of the events." The absence of something on a recording is not evidence, necessarily, that it did not occur. However, the Court agreed, it was "not simply the lack of sound recorded on the audio, but also what was recorded, that blatantly contradicted [Toner's] allegations." Instead, it was the lack of any corroborating evidence, and a great deal of evidence that the conduct, if any, was less extreme than claimed. If anything, his claims point, at most, to carelessness, not wanton or intentional abuse. The Court did agree, however, that his assertion that there was no point in complaining at the jail since, he claimed, they were all "in cahoots" and bowled together lacked credence. The Court agreed that the trial court should not have summarily rejected his claims, however.

Nonetheless, the Court agreed that his allegations "suffer from a shortcoming that is equally fatal" – he simply didn't make a claim that violated his constitutional rights. Even had Jobs done as indicated, his behavior would still not have been excessive force, which much be assessed on the "objective

reasonableness” standard. There was no indication Toner was subjected to “gratuitous violence.” At most, he was given unneeded assistance in getting into the car. The Court agreed that Jobs’ behavior did not add up to a Fourth Amendment violation.

The Court affirmed the dismissal of the action.

Burgess v. Sheriff Gene Fischer (Greene County, OH), 735 F.3d 462 (6th Cir. 2013)

FACTS: On January 23, 2009, Burgess was stopped for speeding and found to also be under the influence of Paxil. He failed FSTs and was arrested for DUI. He admitted not cooperating with Trooper Griffith (Ohio State Highway Patrol) and he was subjected to a “takedown.” He did not suffer any apparent injuries at that time. He was disruptive on the way to the jail, belligerent and shouting expletives. The trooper warned the jail of Burgess’s behavior, and several officers were waiting when they arrived, deputy sheriffs, corrections officers and a nurse. Deputies Barrett and McKinney tried to search him upon arrival and also had to do a takedown. Although there was dispute about injuries sustained at that time, Burgess claimed he had “excruciating pain” and a broken tooth. The nurse gave him ibuprofen and told him he could have additional medical attention if he desired. The deputies stated he was not compliant and resisted. They admitted he was taken to the ground but denied he was unconscious at any time. The nurse assessed him and found a small laceration and some bruising in his hands and wrists. Although the booking took a long time, it was mainly due to Burgess being “combative and intoxicated.”

Shortly after 3 a.m., Burgess did a medical screening form in which he indicated no issues. Upon being released, he went to the hospital and had a CT scan, where he was found to have sustained several skull fractures which required surgery. He did not contact either the OSP or Greene County, but they learned of it through a routine follow-up to the use of force. The investigator determined that the officers had acted appropriately. Video of the incident was destroyed pursuant to the document retention policy.

Burgess filed suit, under 42 U.S.C. §1983, making a variety of claims against the parties. The defendants moved for summary judgment, which was granted. Burgess (and his wife, who filed her own claims) appealed.

ISSUE: Are the Fourth Amendment and Fourteenth Amendment standards different?

HOLDING: Yes

DISCUSSION: The Court assessed each of the claims.

The Court began:

There is a long-standing principle that government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁸⁷ Once raised, it is the plaintiff’s burden to show that the defendants are not entitled to qualified immunity.²⁸⁸ To determine whether qualified immunity applies in a given case, we use a two-step analysis: (1) viewing the facts in the light most favorable to the plaintiff, we determine whether the allegations give rise to a constitutional violation; and (2) we assess whether the right was clearly established at the time of the incident.²⁸⁹ We can consider these steps in any order.²⁹⁰

²⁸⁷ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

²⁸⁸ No. 12-4191 Burgess, et al. v. Fischer, et al. Page 7 Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009).

²⁸⁹ Campbell v. City of Springboro, Ohio, 700 F.3d 779, 786 (6th Cir. 2012); *see also* Saucier v. Katz, 533 U.S. 194, 201 (2001).

²⁹⁰ Pearson v. Callahan, 555 U.S. 223, 236 (2009).

The first step is to determine “under which constitutional amendment the right asserted was clearly established,” since §1983 “does not confer substantive rights; rather, it is only a means to vindicate rights clearly conferred by the Constitution or laws of the United States.”²⁹¹ Since an excessive force claim can be brought under the Fourth, the Eighth or the Fourteenth Amendment, “which amendment should be applied depends on the status of the plaintiff at the time of the incident; that is, whether the plaintiff was a free citizen, convicted prisoners, or fit in some gray area in between the two.”²⁹² The Fourth Amendment applies to free citizens, the Eighth to convicted persons²⁹³ and the Fourteenth applies to those in between – pretrial detainees.

A showing under the Fourteenth Amendment must meet a “substantially higher hurdle” than under the Fourth Amendment.²⁹⁴ Under the Fourth, the “objective reasonableness” standard is applied. Three factors are used to guide the analysis: ²⁹⁵ “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.”²⁹⁶ Further, these factors are assessed from the perspective of a reasonable officer on the scene making a split-second judgment under tense, uncertain, and rapidly evolving circumstances without the advantage of 20/20 hindsight.”

In contrast, with the Fourteenth Amendment, the Court must “consider whether the defendant’s conduct ‘shocks the conscience’ so as to amount to an arbitrary exercise of governmental power.” A critical factor will be whether the defendant law enforcement officers have an opportunity to deliberate on their actions, or whether it was a “rapidly evolving, fluid and dangerous predicament.” In short, the Court must decide if the officers acted “‘maliciously and sadistically for the very purpose of causing harm’ rather than ‘in a good faith effort to maintain or restore discipline.’”²⁹⁷

Further:

Notwithstanding the Due Process Clause’s broader applicability, we remain cognizant of the fact that “if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”²⁹⁸

In this case, the trial court elected to apply the Fourteenth Amendment standard, finding that there was no indication the deputies acted maliciously or sadistically. The Court, however, concluded that under Aldini v. Johnson²⁹⁹, decided after Burgess’s arrest, the Fourth Amendment standard should have been applied to the situation, in which a prisoner was in the booking room and had been surrendered to jail officials. Aldini established that the “dividing line between the Fourth and Fourteenth Amendment zones of protection was the probable cause hearing for warrantless arrests.”

Finally, because there are disagreements as to the facts as to whether Burgess posed an immediate threat to the officers, the Court could not resolve it in the officers’ favor at this point. He was handcuffed, surrounded and to some degree compliant. He did make an offensive comment, but, the Court agreed the “case law

²⁹¹ Graham v. Connor, 490 U.S. 386 (1989).

²⁹² Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008); Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002).

²⁹³ Whitley v. Albers, 475 U.S. 312 (1986).

²⁹⁴ Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).

²⁹⁵ Martin v. City of Broadview Heights, 712 F.3d 951 (6th Cir. 2013).

²⁹⁶ Martin, *supra*.

²⁹⁷ See Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000).

²⁹⁸ U.S. v. Lanier, 520 U.S. 259 (1997).

²⁹⁹ 609 F.3d 858 (6th Cir. 2010).

overwhelmingly compels a finding that the takedown resulting in several fractures ... was unreasonable and clearly established as being so.”³⁰⁰

The Court reversed the summary judgment in favor of Barrett and McKinney.

With respect to failure to intervene claims, the Court agreed that mere presence during an altercation is not enough to place liability. The Court agreed that even if the two parties named (another officer and the nurse) believed the takedown was excessive, it simply didn't last long enough for them to have the “opportunity and means” to intercede. The Court upheld their dismissal.

Finally, the Court addressed the destruction of the videotape. The Court agreed the county policy did not require the destruction, only permitted it, and in fact, the tapes, under the policy, should have been retained for a full five days. Since the agency had already looked into the incident by that time, the Court agreed the issue of spoliation should be put before a jury.

Lyttle v. Redford Police Officer Riley, 2013 WL 1798983 (6th Cir. 2013)

FACTS: On May 19, 2009, shortly after midnight, Redford police were dispatched to the home of Lyttle and his “then-girlfriend, Sarah Thomas.” They had received a hang-up 911 that a female was “fighting with her boyfriend.” (Thomas had made the call.) When they arrived both were standing in an enclosed front porch. The officers later said they could see Lyttle “pulling Thomas against her will towards the inside of the house from the porch.” Lyttle later disputed that, arguing that the blinds were drawn. (Thomas later testified that she was not being forced against her will.) Wanting to talk to her to ensure her safety, the police had Thomas come outside. Thomas told them no one else was inside with Lyttle, but the police apparently tried to force open the front door. Lyttle fled out the back. Officer Riley, at the rear, said that Lyttle “came out the back of the house with his hands in his pockets and ignored Riley’s command to remove his hands from his pockets and lay down.” Riley tased Lyttle. Lyttle later testified that he was actually trying to unlock the door when it became jammed by the officers kicking it and that he told them that he would come out through the back. He claims he was shirtless and with his hands up when he was tased three times, the last time causing him to fall to the ground and injure his back.

Lyttle was charged with domestic assault and battery, resisting and obstructing police. He was acquitted, and filed suit under 42 U.S.C. §1983 for excessive force, false arrest, false imprisonment and related claims under state law as well against Riley and the City. Riley requested summary judgment and qualified immunity; it was denied. Riley appealed.

ISSUE: If material facts are in dispute, is qualified immunity appropriate?

HOLDING: No

DISCUSSION: The Court began its opinion by noting that “the facts of this case are clearly in dispute, and the appeal is frivolous.” On each major issue, the Court noted that the parties vastly disputed what had occurred. As such, the Court agreed that immunity was not appropriate and affirmed the dismissal of the appeal.

McCaig v. Raber (Bangor City, MI, PD) 2013 WL 628420 (6th Cir. 2013)

FACTS: On January 1, 2008, Officer Raber and his partner responded to a fight call. As Officer Raber arrived, he saw McCaig strike someone in the face. He told McCaig he was under arrest and McCaig raised his hands in a “surrender motion.” He then held his hands out to be handcuffed. He alleged that Officer Raber “smacked” the cuff on his wrist. He gave a detailed statement as to what occurred, with Raber

³⁰⁰ Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010).

ending up slamming McCaig to the ground, breaking his arm. Officer Raber claimed that McCaig tried to pull away, causing him to leg sweep him to the ground.

McCaig filed suit under §1983, arguing excessive force. Raber moved for summary judgement under qualified immunity, which was denied. Raber appealed.

ISSUE: Must a defendant concede all facts before raising a qualified immunity defense?

HOLDING: Yes

DISCUSSION: The Court noted that when “appealing a denial of qualified immunity, a defendant must be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.” Raber did not do this, instead asserting that “McCaig was resistant, or, at the very least, did not communicate an intent to comply with Officer Raber’s commands.”

Further, the Court agreed that qualified immunity requires a two tiered assessment. First, it must decide if a constitutional right would have been violated based on the facts, and second, whether that right was clearly established at the time.³⁰¹ The Court agreed that the right to be free from excessive force had long been clearly established.³⁰² “Reviewing the facts in the light most favorable to McCaig, a reasonable jury could find that Officer Raber’s use of a takedown maneuver was not objectively reasonable” and a violation of the Fourth Amendment. The Court agreed whether the unreasonableness of using a takedown maneuver under the circumstances was clearly established at the time, and the Court agreed that it was, as it was, under McCaig’s assertions, a “use of force on a non-resistant or passively-resistant individual.” The Court affirmed the denial of qualified immunity.

Jackson v. Wilkins, 2013 WL 827725 (6th Cir. 2013)

FACTS: On May 29, 2007, Jackson assaulted his girlfriend, Wade, in Benton Harbor, MI. Wade fled to a nearby house and called the police. Officers Blaskie and Wilkins arrived and spotted Jackson leaving the house in a vehicle. Wade yelled that he was “stealing her car,” Wilkins tried to block him in but was unsuccessful; Jackson sped off.

Jackson’ crashed after a brief chase, ending up in a field. Jackson did not comply with orders to get on the ground, instead walking toward Wilkins with his hands up. Wilkins “stiff-armed” Jackson, who stumbled back and then fled on foot. He ran into an alley and Blaskie tased him, the shock slamming him into the “metal arm of a nearby dumpster.” Blaskie stated that “Jackson did a ‘backflip’ around it.” He tried to continue to run but was captured. The three struggled, with the officers punching, kicking and tasing Jackson. He finally stopped resisting and he was handcuffed. Officer Alsup arrived as backup. Jackson was ordered to get up from the ground but he said he could not do so; he pleaded repeatedly (on the video) for help. He was finally picked up and laid across the back seat of Alsup’s car. The officers saw a bruise forming on his exposed chest. They drove back to the scene of the initial crash and searched the area, with Jackson remaining in the car. Officer Blaskie left. The other two officers stayed at the scene and at some point, Jackson was moved to Wilkins’ car. The discussed whether he should go to the hospital. Apparently Wilkins did not tell Alsup about Jackson’s collision with the dumpster, however. Alsup decided he could go to the jail and Wilkins did the transport.

Wilkins told jail staff that Jackson “had been tased and that he had some injuries” but did not specifically mentioned the dumpster collision. When the Berrien County deputies told Jackson to get out of the car, again he said he could not on his own. He was pulled out and carried to a cell and during that time, Wilkins

³⁰¹ Saucier v. Katz, 533 U.S. 194 (2001).

³⁰² Graham v. Connor, 490 U.S. 386 (1989).

saw Jackson had defecated on himself. Jackson was monitored in his cell, mostly remaining on the floor except for managing to pull himself onto the toilet three times. He vomited and continued to defecate on himself. Finally a nurse evaluated him and called an ambulance. Jackson died from a lacerated liver suffered when he collided with the dumpster.

Jackson's estate "sued everyone involved" under 42 U.S.C. §1983, claiming both excessive force (Blaskie and Wilkins) and deliberate indifference to Jackson's medical needs (everyone). The Estate also sued the City, the police chief, the County and the Sheriff. The trial court granted summary judgment based on qualified immunity to all defendants. The Estate appealed.

ISSUE: Is medical attention required for a subject who suffered a possibly serious injury?

HOLDING: Yes

DISCUSSION: First, the Court addressed the excessive force claims against Blaskie and Wilkins. To consider if force is reasonable, the Court looks at three factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."³⁰³ In this case, the factors supported the force used by the officers. Although apparently the agency prohibited tasing a running subject, there is no established law on that issue.³⁰⁴ Although arguing too much force was used to subdue Jackson, the Estate conceded that he was the "strongest" and "most physical" subject the officers had fought. As such, a significant amount of force was warranted. The court upheld the summary judgment in favor of Blaskie and Wilkins on the excessive force claim.

With respect to the deliberate indifference claim, the Court looked to Harris v. City of Circleville.³⁰⁵ The Court first applied the test, whether a defendant knew of a substantial risk to the prisoner, to Officer Wilkins. He knew of the collision with the dumpster and the subsequent fight, and he knew that Jackson said he could not get up and was moaning for help. He saw the bruising and Jackson's "rapid physical deterioration." The Court agreed that the evidence indicated a serious internal injury, despite few outward physical marks. Wilkins' argument that he thought Jackson was intoxicated "rings hollow" – as he knew that he'd been able to be very physical just moments before. The Court disagreed with Wilkins' assertion that Jackson refused to go to the hospital, given what could be seen and heard on the video.

With respect to the delay in attention, for which there was no explanation, the Court noted that Wilkins' actions violated Benton Harbor policy that immediate medical treatment be made available after force was used and the subject is complaining of pain. Nor was he monitored as policy required, or taken to the hospital when he showed "unusual distress." Wilkins failed to share an important fact, the collision with the dumpster, with his supervisor.

He "repeated this mistake" at the jail when he did not tell them about the collision with the dumpster. The nurse later testified that had he known about it, he would have "sent Jackson directly to the emergency room." The Court agreed that the Estate had made sufficient proof of deliberate indifference on Wilkins' part. Blaskie, however, spent much less time with Jackson and left him in the hands of other officers. As such, he did not have the same obligation to pass on such facts about the potential injury. Alsup, as well, was an even easier case, as he did not know about the collision or the rapid change in behavior. Both Blaskie and Wilkins were entitled to qualified immunity on the deliberate indifference claim.

³⁰³ Hayden v. Green, 640 F.3d 150 (6th Cir. 2011).

³⁰⁴ Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505 (6th Cir. 2012).

³⁰⁵ 583 F.3d 356 (6th Cir. 2009).

Likewise, the Court found that the four Berrien County officers had “little reason to believe that Jackson might be seriously injured” as they weren’t told about the collision. What they did observe supported a belief, however, that he was extremely intoxicated instead and as such, qualified immunity was supported for them as well. With respect to the nurse, a confusion as to the time he entered the cell suggested a lengthy delay before calling for an ambulance, but other evidence supported that the delay was instead, very short. As such, the nurse was also entitled to qualified immunity.

Moving on to municipal liability, along with the Chief and the Sheriff, the Estate argued that Benton Harbor did not properly train its officers on its policies and orders. (In fact, the order being argued had not been issued at the time of the incident.) Officer Wilkins’ one time failure does not indicate that he was not properly trained

The court affirmed the summary judgment on the part of all parties, with the exception of Officer Wilkins on the deliberate indifference claim.

Lee v. City of Norwalk (OH), 529 Fed.Appx. 778 (6th Cir. 2013)

FACTS: On May 7, 2009, Officer Montana (Norwalk PD) responded to a call of a woman urinating in a hospital parking lot. He was told the woman was driving out of the parking lot in a pickup. He found the individual (Mimi Lee) in a nearly fast food place and did a traffic stop. Officer Hipp arrived. Lee explained that she was on medication that made it difficult to control her bladder. Officer Montana, seeing that her eyes were “glassy and bloodshot” and that she smelled of an alcoholic beverage, had her perform an FST. A PBT indicated her BA was 0.185, more than twice the legal limit, and she was arrested. The officers saw beer cans, open and unopened, in the truck bed. She was handcuffed and allegedly complained that they were too tight. (She subsequently alleged an injury from the cuffs.)

At the station, the cuffs were removed. She complained about the swelling and marks on her wrists, then became agitated and threw a piece of paper on the floor. She was denied permission to go to the bathroom and when she moved to do so anyway, she was grabbed by officers. She claimed, specifically, that Officer Montana choked her “for about thirteen seconds.” She further claimed that he pulled her up from the floor and threw her down, while ordering another officer to OC her. (She was not, however, sprayed.) She was handcuffed again and sat in her chair, and the booking proceeded.

Following her release, she went to seek medical treatment for her wrists, receiving a splint and medication. Ultimately she had surgery for carpal tunnel problems. Lee (and her husband) filed suit, claiming excessive force and related state claims. The officers were granted qualified immunity and the cases dismissed. The Lees appealed.

ISSUE: Is a brief handcuffing excessive force?

HOLDING: No

DISCUSSION: The Court noted that she could not prove that the handcuffing caused her issue, nor that the brief delay (following her alleged complaint and the complete removal of the cuffs) constituted excessive force. The drive from the arrest site to the station was only a few minutes, as it was only 1.5 miles apart. In Fettes v. Hendershot, the Court agreed that there was no “constitutional requirement obligating officers to stop and investigate each and every utterance of discomfort.”³⁰⁶

With respect to the station encounter, the Court agreed that “the video recording of the booking process contradicted Lee’s allegations and showed that each officer acted reasonably under the circumstances.”

³⁰⁶ 375 F.App’x 528 (6th Cir. 2010).

Officer Montana's actions, for example, "were instead reasonable police procedures for handling a belligerent and aggressively resistant arrestee." The Court agreed that "although ordinarily the plaintiffs' version of the facts must be accepted as true when deciding the defendant's motion for summary judgment, a video that contradicts a nonmovant's version of the facts can support a grant of summary judgment."³⁰⁷ The video clearly showed that the "Lees' characterization of the officers' actions as a 'vicious assault' [was] not accurate." Although Officer Montana maintained some kind of a neck hold, "Lee was kicking and struggling during that time, she was not 'limp' and compliant as she claims." The video also showed that as soon as Lee was subdued and handcuffed, all force against her stopped. Although the officer "may not have used the minimum amount of force necessary to subdue Lee, the video shows that the force Officer Montana used was not constitutionally excessive."

The Court upheld the decision in favor of all of the officers.

Jones v. City of Cincinnati, 507 Fed.Appx. 463 (6th Cir. 2013)

FACTS: On November 30, 2003, Cincinnati police and firefighters responded to a disorderly person in a restaurant parking lot. Officers Pike and Osterman found Jones "marching, squatting, and shouting profanities outside." Jones weighed 348 pounds and was 5'11. Pike called dispatch, stating that Jones might be violent and requesting a mental health response team. He also turned on the video in his vehicle, but part of the subsequent encounter was obstructed by the car's hood. As described by the Court:

At some point, Jones lunges at Pike and throws a punch. Officer Osterman tackles Jones and all three go to the ground. They shout at him to put his hands behind his back but he does not comply, instead "struggles aggressively." The officers jab and strike Jones with batons. At some point Jones grabbed Osterman's neck and reached for his waist area, and also held onto Pike's baton for some seconds. The struggle continues and Officer Slade arrives – he uses OC. More officers arrive and they try to get him handcuffed. Jones can be heard moaning. After another loud moan, he falls silent. Some ten seconds later, one officer asks about rolling him. They finally get him cuffed and some seconds later, the same officer again asks about rolling him. They call for the firefighters and start rolling him over. Officer Pike checks his breathing and again calls for the firefighters, only then noticing that they had left. They call for dispatch to get them back to the scene.

They continue to check on him, but get no response. One officer notes that he has a pulse but they don't see him breathing. One officer does a sternum rub and he is turned to his side. The firefighters arrive and begin CPR. He was pronounced dead 35 minutes later. His death was attributed to "abnormal cardiac rhythms resulting from a violent struggle and positional asphyxia."

The Court denied immunity, finding in part that because the officers struck him so quickly, with barely a pause between strikes, that Jones was not given a chance to comply. Further, it noted at least one officer understood that his position was a problem. The officers appealed.

ISSUE: Is using force against an aggressive subject reasonable?

HOLDING: Yes

DISCUSSION: The officers argued that "under the rapidly evolving circumstances of that morning, they did not act unreasonably in using their batons to strike and jab Jones." The Court agreed, finding Jones to be the primary aggressor, refusing to comply with orders. The strikes, the Court agreed, were all to non-critical areas of the body. Even assuming Jones began to struggle to breathe during the fight, the Court

³⁰⁷ Scott v. Harris, 550 U.S. 372 (2007); Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007).

agreed that the officers “could not have discerned whether Jones resisted in an attempt to breathe or in defiance of commands.”

A secondary issue was the officers’ refusal to unhandcuff Jones when requested to do so by the firefighters. The officer testified that he did not do so “because putting them on was difficult, and he did not know if Jones was feigning injury.” The officer’s subjective motivations were useful to the Court to understand “what an objectively reasonable officers would have done under the circumstances.” There was no indication the officers understood that CPR would be difficult or less effective with the handcuffs on, and apparently they did, in fact, do CPR. Finally, the 64 second delay in rolling him did not show a deliberate indifference to his medical needs. When they realized he was in distress, they immediately sought help for him.

The Court reversed the denial of summary judgment.

Eldridge v. City of Warren, 2013 WL 3968761 (6th Cir. 2013)

FACTS: On June 18, 2009, Warren (MI) PD got a call about erratic, possibly drunk, driving. Officers Moore and Horlocker responded and found the “truck parked behind the barricades it had knocked over” with the motor running. Eldridge, the driver, “muttered something inaudible” to the officers’ questioning. Officer Moore was able to get the car door open, turn off the ignition and remove the key. The officers continued shouting, trying to get him to get out, but he was unresponsive to their commands - instead, he kept saying “I’m fine.” Officer Horlocker got the passenger door open as they continued to try to get Eldridge to get out.

The officer’s commands had “little effect.” Finally, “stymied by the seemingly uncooperative Eldridge” Moore began to tug at his arm and threatened to use a Taser. Both officers began pulling on him as the commands got louder. Two minutes and 9 seconds into the situation, Officer Moore tased Eldridge, causing him “to thrash about erratically.” He was finally extracted, grabbed and “pinned ... to the side of his car.” He was still slow to comply with commands to get on the ground and was finally pushed by the officers into a prone position. “Moore placed his knee at Eldridge’s neck, causing Eldridge to hit his head on the pavement. They searched him after handcuffing and discovered that he was wearing an insulin pump.

“Eldridge was a diabetic. He was suffering from a hypoglycemic episode.”

Eldridge sued under 42 U.S.C. §1983, claiming excessive force. Moore and Horlocker requested summary judgment. The trial court granted it on a claim of deliberate indifference to medical needs but not on the excessive force claim. The officers appealed.

ISSUE: Is using a Taser against an impaired subject, who is not actively resisting, lawful?

HOLDING: No

DISCUSSION: The Court looked at the situations under the lens of Ciminillo v. Streicher, which provided “three guideposts:” “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”³⁰⁸ In this case, although DUI is certainly serious, it was not so under the current context. Since Moore had the keys, clearly, “Eldridge was going nowhere.” Once the vehicle was turned off, he posed little risk to anyone, the public nor the officers. His polite responses indicated he could not get out of the vehicle. He was apparently of approximately equal size to the two officers.

³⁰⁸ See also Graham v. Connor, 490 U.S. 386 (1989).

The Court noted that the “true flashpoint of this controversy” was whether he was actively resisting. To the officers, he appeared “noncompliant and therefore actively resisting.” However, the Court noted, the “facts demonstrate that Eldridge was not actively resisting, and under our precedent it is unreasonable to tase a nonresisting suspect.”³⁰⁹ It was disputed whether Eldridge was, in fact, holding onto the steering wheel as the officers tried to extract him. The Court noted that in other cases of precedent, the subject was involved in “some outward manifestation – either verbal or physical” of active resistance. The Court looked in particular to Foos v. City of Delaware, in which the vehicle was still running and being revved, and reacted violently to a vehicle’s window being broken by the officers.³¹⁰ Eldridge, instead, was “without reaction, exhibiting neither hostility nor belligerence.”

Finding a common thread in the case law to date, the Court noted that “noncompliance alone does not indicate active resistance, there must be something more.” It can be verbal or physical. In this case, the interaction did “not follow the typical course of active resistance.” The vehicle was disabled without incident, and the only persons “conveying any sense of aggression were the two officers.” This did not justify the use of a Taser.

The Court agreed that the law was clearly established. It further ruled that Moore’s use of his knee to keep Eldridge pinned was unwarranted, because the video demonstrated “that he was attempting to comply with the officers’ request” and simply could not, for medical reasons.

The Court affirmed the denial of summary judgment.

Wells v. City of Dearborn Heights (MI) 2013 WL 4504759 (6th Cir. 2013)

FACTS: On February 12, 2008, Dearborn Heights officer served a search warrant on Wells’s home. Officers Mueller, Ciochon and Pellerito “took Wells to the ground, handcuffed him, and tased him.” During that time, Wells’ dog was also shot. There was dispute with respect to the order of the events, however, with Officer Mueller stating that he tased Wells before he was handcuffed. Wells claimed that a physical disability prevented him from immediately going to the ground as ordered. Wells admitted that he was trying to turn around to see what had happened when the dog was shot, thinking that in fact, his father, who was also present, had been shot instead. Marijuana and methadone were found during the search and Wells later pled guilty to possession of marijuana.

Wells then filed suit for excessive force against a number of parties, after further court action, only the three officers directly involved and the City remained as parties. They were granted summary judgment and Wells appealed.

ISSUE: Is using a Taser against a handcuffed subject unlawful?

HOLDING: Yes

DISCUSSION: The Court looked at each assertion by Wells, against Mueller. The court agreed that “kneeing Wells to the ground” as Wells agreed was done, was objectively reasonable under the need to detain the occupants, even if Wells’s slow response was due, in hindsight, to a physical disability.

However, the Court agreed that, taking Wells’s story as true (as required at this stage of the litigation) meant that Mueller did use excessive force by tasing him. Even if he was cursing and struggling, the Court agreed

³⁰⁹ Hagans v. Franklin Cnty. Sheriff’s Office, 695 F.3d 505 (6th Cir. 2012).

³¹⁰ 492 F. App’x 582 (6th Cir. 2012).

that using such force was inappropriate in the face of passive resistance.³¹¹ It is “especially true when the suspect is already handcuffed.”³¹² There was no indication Wells “posed a safety threat or a flight risk.”³¹³

The court agreed the Mueller was not entitled to summary judgment on the Taser claim. The Court also looked at claims against Ciochon and Pellerito for failing to stop Mueller from tasing Wells. The Court noted that the events “occurred rapidly” and that they could have nothing to intervene.³¹⁴

Further, because the Court reversed the summary judgment related to the tasing, it also reversed the trial court’s decision that Mueller’s actions did not violate Michigan law, either. In addition, claims against the city were also reinstated and the case remanded for further proceedings.

McAdam v. Warmuskerken, 2013 WL 1092729 (6th Cir. 2013)

FACTS: In July 2009, McAdam was riding as a passenger with his mother when the vehicle was stopped for defective taillights. His mother was asked to do FSTs. He got out of the car, twice, and then said “he could just walk home.” He was “advised to go home or risk going to jail.” As he walked away, however, he “began taping the officers,” using his phone. Officers Warmuskeken, Wilson and Davila (Ludington, MI, PD) followed him, and at some point, told him he was under arrest for disorderly conduct.” He was taken to the ground with a leg sweep and subdued. Despite that, however, he claimed he was tased at least four times. He was taken to the hospital, where he refused treatment until they returned his phone. (At this time he was handcuffed to the bed and the wheels had been locked.) He claimed he was then tased 3 more times.

McAdam eventually pled guilty to assault and battery on the officers, but complained of excessive force. The officers argued for qualified immunity under Heck v. Humphrey.³¹⁵ Their motions were denied and they sought interlocutory review.

ISSUE: Is tasing a verbally non-compliant subject excessive?

HOLDING: Yes

DISCUSSION: The Court noted that McAdam must prove first, that the officers violated a constitutional right, and then, that the “right was ‘clearly established’ at the time the officer acted.”³¹⁶ However, the officers cannot use the appeal “merely to quibble over the district court’s assessment of the factual record and remain[] unwilling to accept the claimant’s fact-supported version of events.”

The Court broke the issues down. First, the Court agreed that an officer may not tase an individual “who is subdued on the ground and is not resisting arrest, even if the officer does so only once.”³¹⁷ Next the Court stated that tasing was unlawful if done while an individual is “handcuffed to a hospital bed and is verbally resisting medical treatment, but does not pose a safety risk to hospital staff or police officers.”

The Court then looked to the Heck argument, noting that if a claim successfully brought under 42 U.S.C. §1983 would invalidate an underlying criminal conviction, it is barred. However, in this case, McAdam’s

³¹¹ Meirthew v. Amore, 417 F. App’x 494 (6th Cir. 2011).

³¹² Michaels v. City of Vermillion, 539 F. Supp. 2d. 975 (N.D. Ohio 2008).

³¹³ See Austin v. Redford Twp. Police Dep’t, 690 F.3d 490 (6th Cir. 2012).

³¹⁴ See Floyd v. City of Detroit, 518 F.3d 398 (6th Cir. 2008) Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982), Ontha v. Rutherford Cnty., Tenn., 222 F. App’x 498 (6th Cir. 2007).

³¹⁵ 512 U.S. 477 (1994).

³¹⁶ Saucier v. Katz, 533 U.S. 194 (2001).

³¹⁷ Hagens v. Franklin Cnty. Sheriff’s Office, 695 F.3d 505 (6th Cir. 2012); Austin v. Redford Twp. Police Dep’t, 690 F.3d 490 (6th Cir. 2012).

allegations concerned being tased after he was secured, and officers do not have license to tase “after the underlying events had already occurred and after McAdam was under control.”

42 U.S.C. §1983 – STATUTE OF LIMITATIONS

Hornback v. Lexington-Fayette Urban County Government, 2013 WL 5544580 (6th Cir. 2013)

FACTS: On August 31, 2010, Officers Graham and Dillingham (Kentucky Probation and Parole) arrived at Hornback’s Lexington home to do a home visit on Bell, Hornback’s roommate. As they entered they smelled marijuana. The officers requested help from other Probation and Parole officers as well as Officers Wilson and Rhea (Lexington PD). They did a warrantless search of Hornback’s room and found marijuana. He was arrested and charged, initially, with felonies, but they were ultimately reduced to misdemeanors. Hornback moved for suppression and the trial court granted the motion. Ultimately, the charges against him were dismissed. Hornback then filed suit against the involved officers, claiming illegal search and seizure. The District Court concluded the statute of limitations had expired and dismissed the claims. Hornback appealed.

ISSUE: When does the cause of action in an alleged unlawful search occur?

HOLDING: When the search actually happens.

DISCUSSION: Hornback argued that his cause of action did not accrue until the trial court ruled that the search of his bedroom, without a warrant, was illegal. The defendants, however, argued that his cause of action accrued on the day the search occurred, as he “knew or should have known of his injury at the time.” The Court noted that state law determined the appropriate statute of limitation for a suit claimed under 42 U.S.C. §1983, and in Kentucky, that is one year.³¹⁸ However, federal law governs when the statute begins to run, and it ordinarily does not begin until the plaintiff “has a complete and present cause of action.” The Court agreed that in this situation, Hornback’s cause of action accrued on the day of the search, since he should have known that since he was not under supervision, the search was unlawful. The Court noted that under Wallace v. Kato, some claims are redressable under §1983 even before the criminal case proceeds, and “claims of illegal search are analogous to claims of false arrest.” The Court upheld the dismissal.

42 U.S.C. §1983 – DISCRIMINATION

Hidden Village, LLC v. City of Lakewood, 734 F.3d 519 (6th Cir. 2013)

FACTS Hidden Village, an apartment complex in Lakewood, Ohio, was populated by young people released from foster care or juvenile detention. Most of the youth were black. There was dispute, initially, as to whether the location and use violated local zoning laws. Following that dispute, the police department, in 2006, circulated a memo to officers noted that citations and arrests were preferred in that area and subsequently, the residents began complaining about “police harassment.” The Mayor wrote the sponsoring agency (Lutheran Metropolitan Ministries) expressing his intent to “seek to have the program removed from Lakewood...” In May, 2007, Lakewood officials visited the complex to do a “joint inspection” which left the residents fearful. Hidden Village sued under §1983 and the Fair Housing Act and the defendants sought summary judgment. The District Court rejected their demand and Lakewood (and individual defendants) appealed.

ISSUE: Is evidence that a concerted public safety effort is race-motivated admissible?

³¹⁸ Roberson v. Tennessee, 399 F.3d 792 (6th Cir. 2005).

HOLDING: Yes

DISCUSSION: Hidden Village filed suit, claiming that Lakewood discriminated against its tenants on account of race. Although Lakewood, as a city, is not eligible for qualified immunity, “liability against the city arises only if it violated a constitutional or statutory right through a custom or practice of doing so.”

The Court agreed that there was “considerable evidence [which] shows a concerted effort to displace the program.” Individual defendants, including the police chief and the Mayor, were implicated in this action as a result of communications with the sponsoring agency. A jury could conclude that race was a factor in the decision to target the complex, as the record indicated that the “Youth Re-Entry Program” was targeted for “unfavorable treatment” and that the police began citing the residents for rules “that the City never before enforced with such vigor.” With respect to the inspection, which include a number of different city officials including a SWAT team, the fire department and the health department, the fire inspector noted that he was not given a “specific reason” for the inspection, which before had only been done after complaints or specific concerns. Only the buildings in the complex occupied by program participants were searched, and “to top it all off, the inspectors, contrary to protocol, asked residents to leave the building while the inspection took place.” Finally, none of the white program participants, of which there were a few, ever complained of police harassment. In the context of other evidence, the race of the program participants was brought up in discussions. The Court agreed that the evidence supported a claim that the participants’ race was a factor in the city’s actions.

The Court upheld the denial of summary judgment and allowed most of the claims in the case to proceed.

42 U.S.C. 1983 – ARREST

Wilson v. Martin, 2013 WL 5567729 (6th Cir. 2013)

FACTS: In January, 2008, Lima (OH) stormed Wilson’s home in search of a criminal suspect. Wilson huddled with her five children, including T.W. – Wilson and a toddler child were shot in the crossfire. Wilson died as a result.

About three years later, Officer Garlock responded to a street fight. A group of youths were in the street, but not fighting. T.W., now age 11, was in the group. T.W. broke away from the group, heading home. She “extended both of her middle fingers toward Officer Garlock’s car.” He yelled at her to come to him immediately, threatening her with being handcuffed. She told him that “her grandmother had forbidden her to speak to the police.” She continued to walk toward home and Garlock went after her, ordering her to stop. He grabbed her “from behind, pulled her hands behind her, and pushed her forward to place her under arrest.” Officer Woodworth arrived and helped Garlock handcuff her, and the two (much larger) officers pulled her to the cruiser. She was transported. There, Officer Boettiger told the other officers who she was (Wilson’s daughter) and she was charged with “persistent disorderly conduct.”

T.W. sued. The officers claimed qualified immunity, which was partially granted, but denied with respect to claims of false arrest, false imprisonment, unlawful seizure and detention, along with retaliation. The officers appealed.

ISSUE: Does profanity justify an arrest?

HOLDING: No

DISCUSSION: The Court first looked at T.W.’s claims under the Fourth Amendment. She alleged that the officers violated her rights by arresting her without probable cause to do so. The officers argued that when she refused to stop and continued to walk away, that was enough to justify her arrest for disorderly

conduct. However, the officer conceded that profanity alone is not enough. The Court disagreed that a young juvenile raising her middle finger to an adult male officer was insufficient to cause a situation where violence was likely to occur. The Court agreed that her gesture, while crude, was not criminal, and “the officers were patently without probable cause to arrest her.”

The officers also argued that they could arrest her for obstructing official business for failing to stop as ordered. However, the Court noted, the officers had no legal basis to order her to stop in the first place. Finally, the officers argued they did not arrest her in retaliation for a wrongful death lawsuit against the agency with respect to her mother’s death. The Court agreed that the facts, including the officer’s identification of her as Wilson’s daughter, argued otherwise.

The Court agreed that the officers were not entitled to summary judgment at this stage of the litigation.

Wynn v. Estes, 2013 WL 5912242 (6th Cir. 2013)

FACTS: On May 5, 2010, Wynn, an OB/GYN working for a Pulaski, TN, hospital, was alerted to the need to return to the hospital to deliver a baby. At about 8:50 p.m., Officer Estes (Pulaski PD) spotted Wynn speeding and made a traffic stop. There was dispute as to “the degree to which Wynn effectively communicated to Estes” as to what was going on, but it was undisputed that she was in scrubs and had a lab coat lying on the seat. Wynn apparently provided an OL and other ID, but then left the scene, heading to the hospital. Estes “tailed her to the hospital, and he immediately arrested her [for evading arrest] in the physician’s parking lot.”

Wynne filed suit under 42 U.S.C. §1983, claiming an unlawful arrest and excessive force. Officer Estes requested qualified immunity, which the District Court denied, finding that a reasonable jury could conclude that “Estes gave her permission to continue driving to the hospital” after concluding that she was, in fact, a doctor. Estes appealed.

ISSUE: If there are genuine issues of material fact, may a case be dismissed by the court?

HOLDING: No

DISCUSSION: The Court agreed that there was dispute over whether Estes made a statement that could be construed as permission to continue on to the hospital. The Court agreed that because there were “genuine issues of material fact” surrounding the case, it was necessary to deny summary judgment.³¹⁹

42 U.S.C. §1983 – BRADY

Provience v. City of Detroit, 529 Fed.Appx. 661 (6th Cir. 2013)

FACTS: On March 24, 2000, Hunter was murdered in Detroit. Witnesses described what had occurred. A month later, Irving was murdered, apparently for planning to tell the police that Sorrell and Antrimone Mosley had killed Hunter. Sgt. Moore (Detroit PD) was in charge of the investigation, a progress note indicated that the two murders were connected and identifying Sutherland as another witness. Two weeks later, Sutherland was murdered.

A few months later, Wiley was arrested for several burglaries. He told police that Provience was the shooter and that his brothers drove the getaway car. Much of his information, however, contradicted what other witnesses had said about the vehicle used and what had occurred. Provience was arrested, along with his

³¹⁹ The police chief, upon being directly contacted by the family of Dr. Wynn’s patient, intervened and had the doctor released before booking. She delivered the baby a short time afterward.

brother. The progress note was not turned over in discovery. Provience's brother was acquitted, but Provience was convicted of murder 2nd. Wiley testified, but Provience was not told that he'd been given a plea deal.

In 2002, Woods confessed to Irving's murder and implicated the Mosleys in Hunter's murder. Woods' confession was not provided to Provience, who was appealing his case at the time. As a result of an investigation by the Innocence Project, however, Provience's conviction was vacated.

Provience filed sued under 42 U.S.C. §1983 against Moore, arguing that he'd violated Brady by not sharing the progress note. Moore's motion for qualified immunity was denied, with the court finding genuine issues of material fact, and specifically, whether the information Moore provided to get the arrest warrant was false. Moore appealed.

ISSUE: May withholding material evidence subject a law enforcement officer to lawsuit?

HOLDING: Yes

DISCUSSION: Under Brady, the Court held that withholding material exculpatory evidence could result in liability on the part of law enforcement.³²⁰ Provience demonstrated that "the evidence at issue is favorable to him as exculpatory or impeaching, that the evidence was suppressed, and that he was prejudiced by the suppression." The progress note supported a "viable alternative theory of the crime," and showed a connection between the three homicides. (This cast doubt on the prosecution's theory, that Provience's murder of Hunter was "over an isolated drug territory dispute.") It was less clear that some of the other disputed evidence would be Brady material, however.

The Court agreed, however, that Moore was entitled to qualified immunity for his decision to arrest, based on Wiley's testimony. At most, he was negligent in relying on Wiley's statement. An officer does not have to investigate every claim of innocence but only "consider the totality of the circumstances."³²¹

The Court agreed that summary judgment in favor of Moore was properly denied on the Brady claim, alone.

Romo v. Largen, 723 F.3d 670 (6th Cir. 2013)

FACTS: On November 6, 2010, Romo met relatives at a bar. One was designated as the driver and they visited several bars through the evening. Romo was dropped back off at his truck, with the intention being to sleep in it. To ensure Romo would not drive, his brother took the keys. Romo was awakened some time later by Officer Largen. Largen asked him a number of questions, including asking if Romo knew why he'd been pulled over. Romo responded that "the officer did not pull him over because he was not driving." (The officer had apparently seen a similar vehicle a few minutes earlier, pass a semi on railroad tracks.) Romo failed FSTs and was arrested. He repeatedly denied having been driving or that he even had the keys.

At trial, the officer's report varied somewhat from his testimony. Although never specifically stated, presumable Romo was not convicted. He filed suit under §1983 for false arrest and related claims. Largen claimed qualified immunity and was denied. He then appealed.

ISSUE: Does a reasonable explanation negate probable cause for an arrest?

HOLDING: Yes

³²⁰ Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009).

³²¹ Gardenhire v. Schubert, 205 F.3d 303(6th Cir. 2000).

DISCUSSION: The District Court explored several possibilities, ranging from a complete fabrication by the officer to a scenario in which he told the truth, but was mistaken about the truck. The Court, however, agreed that since there was a “genuine dispute of material fact,” summary judgment in favor of the officer was improper. The Court agreed that “no reasonable officer would believe that he could constitutionally arrest a person found sleeping in a truck and take that person to jail for drunk driving, particularly after the person offers a cogent explanation for sleeping in the truck and shows that he does not even have the truck’s keys.” It was certainly appropriate for the officer to investigate the situation, but his explanation “should have dispelled those suspicions.” The Court agreed that drunk driving is a serious danger, but “they need more than presence in the driver’s seat of a vehicle for probable cause.”

The Court reversed the denial of qualified immunity with respect to the federal malicious prosecution claim – but otherwise affirmed the decision.

42 U.S.C. §1983 – SEARCH & SEIZURE

Lucaj (Victor and Megann) v. Taylor, 2013 WL 4729576 (6th Cir. 2013)

FACTS: In April 2009, Victor Lucaj discovered three potted marijuana plants on his property. He contacted the Taylor police and ask that they remove the plants. Officer Shewchuk was dispatched to handle it. He was asked to park a few houses down as Victor feared retaliation. Officer Starzec spotted the call on her computer and “improperly categorized it as a narcotics investigation.” She called Officer Kantz and left her a voice mail, indicating incorrectly that the Lucaj’s neighbor was the complaining party. No officers ever responded to the Lucaj house, however, apparently Shewchuck was cancelled on the call.

The next day, Megann Lucaj told her brother, Banks, about the plants. He contacted a friend at the PD, who passed on the information to Sgt. Neal. That same day, Officer Kantz went to the neighborhood to do surveillance. Seeing the plants, she got a search warrant. However, she “failed to follow established department procedures which likely would have revealed that it was the Lucajs themselves that reported the marijuana plants.” It incorrectly stated that the investigation was based on an anonymous tip from a neighbor. While Kantz was getting the warrant, Sgts. Neal and Martin went to the Lucaj home and removed the plants. Shortly after that, Kantz sent a “deconfliction form” to other agencies to alert them that Kantz would be serving the warrant, but specifically did not notify other members of her own department (including the Special Operations Department of which Sgt. Neal was a part).

The Downriver Area Narcotics Organization (DRANO) arrived at the Lucaj house and saw that the plants were no longer in the backyard. A neighbor reported that “men dressed in plain clothes” had taken the plants. They knocked and announced, but Megann was in the bathroom and did not respond immediately. The team forced entry. Megann was taken to the floor and frisked. She told the team what had occurred and that her husband had the business card of the officers who had just left. They got the card, talked to Neal and confirmed that he’d taken the plants. At some point, Officers Corne and Starzec had conducted a K-9 sweep of the property, although there was dispute as to when, precisely, that occurred.

The Lucajs sued the City of Taylor and several officers. The District Court denied the motion for summary judgment on the basis of qualified immunity for Starzec and Corne, and they appealed.

ISSUE: Is timing of events during a search critical in determining possible misconduct?

HOLDING: Yes

DISCUSSION: The case against Starzec and Corne focused on when the K-9 sweep occurred, whether it was before or after they “knew or should have known that the search was in error or had been called off.” The Lucajs argued that “Kantz relayed the information from Neal ‘to the other officers in her

presence' and that 'the search was called off at that point.'" However, she did not contend, specifically, "that Starzec and Corne were in Kantz's presence when the information was relayed." Megann was not able to recall if Lt. Pizana, who was also present, actually "told all of the officers to end the search and leave" prior to the search. She did recall Corne asking her if she had a cat, however.

The Court agreed that "no reasonable jury could find that Starzec and Corne knew or should have known that the search was erroneous prior to conducting the K-9 sweep," and as such, the officers were entitled to summary judgment. The Court reversed the denial.

42 U.S.C. §1983 - HECK

Gottage v. Rood, Latour, Notorlano and Periate, 2013 WL 4034417 (6th Cir. 2013)

FACTS: On June 4, 2008, Gottage, having spent several days drinking and taking Vicodin, fired a shotgun into the ground beside his father's home. He then entered the house and pointed the weapon at Muysenberg, his nephew; Muysenberg called the police. He later provided two written statements.

The first responding officers talked to Gottage through a bathroom window, while Gottage was showering. He refused to let them in, stating they would need a warrant. He later stated that he passed out. Emergency response team officers arrived and tried to make contact with Gottage, to no avail. A neighbor, Labeau, told him that when he passed out, Gottage could not be awakened. He offered to go inside and get Gottage, as he had a key. However, instead, the officers fired tear gas inside, which awakened Gottage, who came out with his hands up. He was ordered to get down, but there wasn't enough room on the porch to do so, so he moved toward the porch step. He was tackled by Officers Rood, LaTour and Notorlano and taken face first into the concrete. Labeau also testified that the officers "mashed" Gottage's face into the cement and that a large bloodstain remained in the driveway. Gottage had a broken nose, injuries to his arm and shoulder, two black eyes and various cuts and bruises. The officers testified that Gottage refused directives and that "tackling him was thus necessary and appropriate," with Gottage contending that "he was not given time to comply." Labeau supported Gottage's claim that he said nothing and did not resist.

Gottage filed suit against the officers, under 42 U.S.C. §1983, claiming excessive force. The officers claimed immunity and were denied. They appealed.

ISSUE: Is a claim for excessive force necessarily negated by a resisting arrest conviction?

HOLDING: No

DISCUSSION: The District Court ruled that it only had jurisdiction over the issue of "whether Gottage's plea of no contest to resisting and obstructing arrest forecloses his excessive-force claim." (The officers' refusal to concede to Gottage's recitation of the facts precluded consideration of any other assertions in the appeal.)

The officers, however, asserted that since Gottage pled no-contest to resisting arrest, he could not file suit for excessive force. The Court agreed that under Schreiber v. Moe³²² and Karttunen v. Clark³²³ a claim for excessive force was not necessarily negated by a resisting arrest conviction under Heck v. Humphrey.³²⁴ The Court agreed that Gottage could bring the lawsuit even though he took a plea essentially admitting guilt to resisting arrest.

³²² 596 F.3d 323 (2010).

³²³ 369 F. App'x 705 (6th Cir.2010).

³²⁴ 512 U.S. 477 (1994).

The Court affirmed the denial of summary judgment on the officers' behalf.

42 U.S.C. §1983 – PROOF

Burley v. Gagacki (and others), 729 F.3d 610 (6th Cir. 2013)

FACTS: On June 13, 2007, “masked law enforcement agents, dressed in black, with guns drawn, broke into a home” in Detroit. They allegedly “assaulted and terrorized” Geraldine and Caroline Burley. They refused to identify themselves by name, only giving the women the identifier of “Team 11.”

The women filed suit for excessive force and violations of the Fourth Amendment. The identities of the officers became the “central focus of the litigation” – as they “intentionally concealed their identities and the raid was part of a vast multi-law enforcement operation involving Wayne County, and federal, state, and municipal law enforcement agents.” The trial judge dismissed Wayne County and any state and local officers, but allowed the case to go to trial against federal agents. The judge then granted judgment at the close of the plaintiff's case, essentially directing a verdict in favor of the defendants, also awarding them costs. The plaintiffs were required to post bond and they appealed.

ISSUE: Does concealment of identity during a raid shift the burden to officers to show who was, in fact, present?

HOLDING: Yes

DISCUSSION: The Court held that the judgment was error “because genuine issues of material fact exist” with respect to who was actually present at the scene. It directed the trial court specifically to “consider whether the circumstances of this case, which include an intentional concealment of identity, coupled with an ‘I wasn’t there’ defense, warrants shifting the burden of production onto the federal agents to establish their lack of involvement.” The plaintiffs had requested the names of the officers and had, after two years, received a report identifying six federal and two local officers; they promptly amended their complaint when they received it. (There was some confusion because another report indicated the same team executed a warrant on another property, at the same time, but the federal defendants named never affirmatively asserted that they were not involved in the Burley raid until their depositions, after the statute of limitations had run.) Each of the plaintiffs, individually, had testified that they recognized certain of the agents’ voices.

The women argued that by failing to respond completely to interrogatories as to whether they denied the allegations, that the defendants defaulted on using the defense that they were not present. (However, the plaintiffs did not file a motion to compel discovery, either.) The Court agreed that in a Bivens’ action, it was necessary to “identify with particularity the federal officer who engaged in the alleged misconduct because a federal officer ‘is only liable for his or her own misconduct.’”³²⁵ The Court agreed that the record contained sufficient evidence that the federal defendant officers, collectively, “were the individuals who entered [the] home and engaged in the use of excessive force” in light of the voice recognition testimony. The Court agreed that “although there may be reasons to discount Geraldine Burley’s voice-recognition testimony, the decision should have been left to the jury.” If it could be shown that Gagnacki was part of the entry team, then a jury could infer that the other federal agents were also present and involved.

The Court concluded:

[W]e are not inclined to shield the federal defendants from liability as a reward for their unethical refusal to identify themselves by name and badge number. There is no dispute that the raid of plaintiffs’ residence occurred. Moreover, plaintiffs’ inability to identify the officers who entered their

³²⁵ Ashcroft v. Iqbal, 556 U.S. 662 (2009).

home is the consequence of the agents' conduct – the officers wore black clothing and face masks, with the intent to conceal their identities, and refused to provide their names when asked. Significantly, the federal defendants' names are listed on the report of investigation as the parties who executed the search warrant at their residence. Although an officer's mere presence at the scene of a search is insufficient to establish individual liability under 1983, here the agents' intent to conceal contributed to plaintiffs' impaired ability to identify them.

The Court agreed that shifting the burden to the defendants, in this type of situation, was appropriate and “prevent[s] this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire.” It vacated the judgment in favor of the federal defendants (as well as the order to pay costs and the bond).

The Court also reviewed the summary judgment in favor of Wayne County. The Court agreed that “a municipality can be liable under 42 U.S.C. §1983 only if the plaintiff can demonstrate that his civil rights have been violated as a direct result of that municipality's polity or custom” or “failure to train amounts to deliberate indifference' to such rights.”³²⁶ In this case, Wayne County had allowed one of its officers to be deputized as a federal drug enforcement agent and referred all inquiries about the raid to the DEA. However, because the one identified local officer (Gagacki) was working for the DEA at the time, the liability, if any, fell to the DEA, as they would also be responsible for training and supervising that officer. Further, the evidence indicated that the DEA had their own entry team and any local or state officers at the scene served only as perimeter security. As “mere presence at the scene” is not enough to place liability on an officer, without something more, the Court agreed that the proof was insufficient to place any responsibility on local officers.³²⁷ The Court further agreed that “failure to intervene” was also not a viable argument in this case, because there was no proof that the local officers were involved in the use of force. It affirmed the decision in favor of Wayne County.

TRIAL PROCEDURE / EVIDENCE – CRAWFORD

Poole v. MacLaren, 2013 WL 6284355 (6th Cir. 2013)

FACTS: On December 12, 2001, Covington was murdered at a home in Michigan he shared with his fiancée, Lester. Lester had purchased the home from Poole's uncle, Varner. A dispute arose between Lester and Varner. On that day, Coddington, who had a child with Varner, drove Poole to a location near the home. She waited and heard four gunshots; Poole then returned to the car. He told her that he'd shot Covington. Shortly thereafter, Varner told Coddington that he'd paid Poole to kill someone, and that “having Covington murdered made it easier for him to deal with Lester.”

Coddington testified at the preliminary hearing but recanted what she in that proceeding said at trial. She claimed she'd been threatened by a police officer and told what to say. In addition to Coddington's testimony, the case relied on a jail informant, Higginbotham, who stated that Varner said he'd paid Poole to kill Covington. In addition, Sgt. Gardner testified that Varner had offered to trade information about the murder for information in a separate murder, in exchange for leniency.

Poole was convicted of Murder and Possession of a Firearm by a Convicted Felon. The Michigan appellate courts upheld his conviction and he requested habeas corpus.

ISSUE: May a witness's statement be introduced by a third party?

HOLDING: No

³²⁶ Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004).

³²⁷ Ghandi v. Police Dep't of Detroit, 747 F.2d 338 (6th Cir. 1984).

DISCUSSION: Poole argued that the “admission of Varner’s statement through the testimony of ... Gardner violated the Confrontation Clause.” The Court agreed that although it was error, that his testimony “was not a significant focus” in the case against Poole. In fact, his statement may have been more helpful to Poole than harmful, as it put a possible self-defense argument before the jury – as he said that Poole shot Covington because Covington had reached for a gun. While possible error, it was harmless error.

After resolving several other issues, the Court upheld Covington’s convictions.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

U.S. v. Nelson, 725 F.3d 615 (6th Cir. 2013)

FACTS: On June 15, 2009, Officers Meredith and Massey (Murfreesboro, TN) were dispatched to an anonymous 911 call about a “black man wearing a blue shirt, with a ‘poofy’ afro, riding a bicycle, was armed with a pistol.” Officer Meredith, arriving first, found Nelson, who “precisely matched this description.” As the officer started to get out of the car, Nelson rode away. Officer Meredith shouted at him but he continued on. Officer Massey, still in his vehicle, followed and saw as Nelson tossed a “large, heavy object” into nearby bushes. Nelson abandoned his bike and fled on foot, but he was quickly apprehended. (The above sequence took place in approximately one minute.)

Nelson was arrested and two bullets were found during a search. A loaded handgun was found where Officer Massey saw him toss and object. As Nelson was a felon, he was charged with possession of the weapon. Prior to the trial, he moved to have “any testimony regarding the 911 caller’s description” suppressed on the grounds that it was “inadmissible hearsay.” The motion was denied and he was convicted at trial. He appealed.

ISSUE: Is hearsay usually inadmissible?

HOLDING: Yes

DISCUSSION: Although the Court agreed that the officer had sufficient reason to believe Nelson was in possession of the weapon, the Court noted that the testimony of five officers, total, “based on an anonymous, out-of-court declarant’s observations,” was not necessary to provide the jury with the reason for the officers’ actions. The “hearsay evidence should not have been admitted.” Since none of the officers saw him with the gun before he tossed it, the testimony was “effectively offered to prove the truth of the statements made, rather than to show background,” making it hearsay. Instead, a “less-detailed statement indicating that the police received a 911 calls,” would have avoided the problem. The court noted that the details were not needed to explain that it was a lawful stop to the jury.

The Court agreed that the information was not harmless and likely materially affected the ultimate verdict. Further, the hearsay evidence “went to the very heart of the sole disputed issue for the jury’s resolution, namely, whether Nelson possessed a gun.”

The Court reversed his conviction.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

U.S. v. Perales, 2013 WL 4529509 (6th Cir. 2013)

FACTS: On October 3, 2011, Beasley entered a Wooster, Ohio, bank and handed the teller a note requested \$5,000 in large bills. Beasley was given \$2500 and fled. A similar robbery occurred a week later in

Toledo, but that time, the robber fled without getting any money. 36 minutes later, she robbed a bank in Millbury, 8 miles away, getting \$3350. A vehicle was spotted picking her up and information was relayed to local law enforcement.

Perales, driving a vehicle fitting the description, was stopped, and Beasley was found hiding in the back seat. Clothing matching what was worn during the robberies was found, along with money and a hold-up note. Perales was carrying a motel key.

Beasley pled guilty to two bank robberies, Perales went to trial for aiding and abetting and was convicted. He appealed.

ISSUE: Is an out of court identification admissible if the witness is present?

HOLDING: Yes

DISCUSSION: Among other issues, Perales challenged the admission of an FBI agent's testimony about a motel employee who made an out-of-court identification of Perales as the man staying at the motel. The clerk did not identify Perales in the courtroom but the agent confirmed that when he showed the clerk a photo of Perales, the clerk identified him, just a week before the trial. The Court agreed it was admissible non-hearsay because the clerk was available at trial for cross-examination.

The Court upheld Perales's conviction.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

U.S. v. Clingman, 2013 WL 1316061 (6th Cir. 2013)

FACTS: In 2008, the FBI received information that a website, Radar.net, was being used to store and distribute child pornography. The site was based in California; it required users to provide an email address and phone number and then choose a screen name and password. To upload an image, the user would email it to an email address provided by the website and only a person with a password could post photos to the user's account. Photos so uploaded were time-stamped. The photos could be shared by the user with others by providing them with a "join code." All of this information was tracked by time, date and IP address. Special Agent Lies (FBI) identified a user page with the screen name "xcon28" contained child pornography. He connected that user name with an email address, a mobile email address and a cell phone number. Records linked all three to Clingman. (Clingman was a former convict, age 28, at the time.) In an email from the provided email address, the sender identified himself as "xcon28 from Radar."

IP addressed showed that user "had logged in repeatedly from several IP addresses." Two connected with locations where Clingman volunteered or studied, and where he had Internet access. Further, during times he was incarcerated, the account was inactive, with the exception of one apparent hacking attempt.

Clingman admitted he used computers at the two locations, and to his cell phone account. He admitted he'd uploaded adult pornography but not child pornography. He admitted to owning the account in question. He claimed to have sold the phone to a friend, Craun, a few months before. Craun stated he'd had the phone about three months and had a new number assigned to it when he bought it. Craun denied using it to access the Internet, but the browser history suggested otherwise, and further suggested that Clingman may have used the phone at that time to upload images.

During testimony, an agent testified that he saw one image of child pornography on the phone. Clingman objected, because that had not been disclosed prior to the trial. However, the judge allowed the testimony to stand.

Clingman was ultimately charged and convicted of transporting child pornography, he appealed.

ISSUE: May child pornographic images be produced by law enforcement for the defense?

HOLDING: No

DISCUSSION: The Court noted that there was disagreement as to whether the agent was ever asked if there was child pornography on the phone. Under the Adam Walsh Child Protection and Safety Act, Clingman (and his attorney) would not be allowed to have a copy of it.³²⁸ They would be entitled to access to the phone, so long as it remained under the control of law enforcement, and that was, in fact, done. In fact, the prosecution did not intend to bring up the issue in the case-in-chief, at most, it was expected to be used in rebuttal, if at all.

The Court upheld Clingman's conviction.

TRIAL PROCEDURE / EVIDENCE – BRADY

U.S. v. Howard, 2013 WL 656780 (6th Cir. 2013)

FACTS: Chattanooga police responded to a stolen vehicle report – along with information as to where the car could be found. (It turned out to be a payment dispute between Howard and a friend who had sold him a car.) The officers, assuming that it was truly a stolen car, went to the location where the car sat, which was Howard's girlfriend's home. Howard came out and told them that the keys were inside the house but that they could not go inside without the girlfriend's permission. When she came back, she gave them permission to search for the keys but that was not all they found. They also located a sawed-off shotgun, ammunition and a driver's license application and mail with Howard's name, showing that as his address.

Howard, a convicted felon, but charged for the weapon and ammunition. He was convicted and appealed.

ISSUE: Is non-crucial evidence required to be released under Brady?

HOLDING: No

DISCUSSION: Howard claimed that a miscommunication between forensic technicians and prosecutors that resulted in the non-disclosure of a fingerprint report. The Court agreed it was improperly withheld, but ruled that it was not "crucial" as Howard claimed. Although the prosecution said that no fingerprint tests were done, at trial, during cross, "one of the investigating officers said that the gun and bullets had been fingerprinted and that crime-scene technicians had a report." In fact, the report indicated they had only found unidentifiable smudges. For that reason, the trial court had ruled that the late disclosure was not prejudicial.

The Court agreed that a "successful Brady claim has three components: favorable evidence, suppression and prejudice."³²⁹ Prejudice occurs when "there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." In this case, the Court agreed there was no prejudice because there was sufficient evidence that Howard possessed the gun and the ammunition. The lack of identifiable prints could not exonerate Howard, it was at best neutral. Although Howard argued he could have had an expert look at the report, he was unable to show that an earlier disclosure would have changed the outcome.

³²⁸ 18 U.S.C. §3509(m)(2)(A).

³²⁹ Strickler v. Greene, 527 U.S. 263 (1999).

The Court upheld Howard's conviction.

U.S. v. Macias-Farias, 706 F.3d 775 (6th Cir. 2013)

FACTS: Macias-Farias was charged with conspiracy to distribute marijuana, as a result of a delivery of 1600 pounds of marijuana. The truck driver told the DEA that he thought he was delivering produce to a location near Louisville and agreed to cooperate in making a controlled buy. He was directed to make the delivery in Shepherdsville, where vehicles registered to Macias-Farias and another individual entered and exited. Although the agents "claimed to have maintained visual surveillance of the truck all night, they learned that the load had been "surreptitiously off-loaded from the truck." Lacefield, who had been observed with the other men near the parked truck, agreed to cooperate. He set up a meeting and arranged for a transfer of about 100 pounds of marijuana. The DEA agents missed the buy but used Lacefield's information to "put out an alert" on a vehicle involved, driven by Babor. The vehicle was located and the driver arrested, the marijuana having been found in the vehicle.

Lacefield alerted the DEA that another large load was arriving on February 25, and they tracked Macias-Farias and another man until they made contact with the truck. (The load consisted of 3,766 pounds of marijuana.)

Macias-Farias was charged and convicted. He appealed.

ISSUE: Must a document be material to be required under Brady?

HOLDING: Yes

DISCUSSION: During the trial, Agent Moore (DEA) testified about a report he'd made concerning the Babor stop. The defense had objected as it had not been provided with that report. They later asked that Agent Moore's testimony be stricken or that they receive a mistrial, since the report was "3500"³³⁰ material that should have been produced under Giglio and Brady. Since Babor was not available to be questioned, the Court agreed that it was improper but found it harmless error. (The jury was instructed to ignore the references to what Babor said.)

The Court agreed that to be Brady material, it must be favorable to the accused.³³¹ In this case, the Court ruled that the evidence was not shown to be "either exculpatory or suitable for impeachment purposes." The Court noted that the prosecution simply apparently "considered it irrelevant to the government's case." Further, the Court found insufficient proof that it was material to the case.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Robertson v. Kerns (Warden), 2013 WL 979124 (6th Cir. 2013)

FACTS: Robertson was indicted in 2006 in Hamilton County OH on a variety of charges relating to the shooting of Willis. (He was also implicated for the shooting death of Cox.) He was convicted and appealed.

ISSUE: May an officer testify about what a witness told them?

³³⁰ 18 U.S.C. 3500 – the Jencks Act.

³³¹ U.S. v. Douglas, 634 F.3d 852 (6th Cir. 2011); Strickler v. Greene, 527 U.S. 263 (1999).

DISCUSSION: No

HOLDING: During Robertson’s trial, Det. Upchurch testified about statements from Willis, identifying Robertson as the shooter. Willis did not testify. The Court agreed that the introduction of the statements were error but ruled it to be harmless error. The Court noted that two witnesses to the shooting testified and identified Robertson. Since the testimony was essentially identical to what Det. Upchurch said, it could “take the place of” the inadmissible testimony

The Court upheld the conviction.

Mitchell v. Kelly (Warden), 2013 WL 1197004 (6th Cir. 2013)

FACTS: At Mitchell’s 2005 trial for murder, robbery and related charges in Columbiana County (OH), Dr. Graham, the Coroner, testified concerning an autopsy report prepared by Dr. Seligman. It was admitted over Mitchell’s objections. The trial court ruled that the report was a business record and thus not hearsay. Mitchell was convicted and appealed.

ISSUE: Is it now permitted for someone other than the technician who prepared a report to testify about it?

HOLDING: No

DISCUSSION: Mitchell argued that the report was testimonial, and thus it was not permitted for anyone other than Dr. Seligman, who prepared it, to testify. The Court agreed that, at the time, such reports were not considered testimonial. Since that time, however, in Bullcoming v. New Mexico and Melendez-Diaz v. Massachusetts³³², the Court had ruled that such forensic laboratory reports are testimonial. The Court agreed the lower court’s decision was correct at the time, although it would no longer be so.

Peterson v. Smith, 2013 WL 49565 (6th Cir. 2013)

FACTS: On December 1, 1999, Al-Rifai was killed while leaving his Detroit workplace. A co-worker, Obed, witnessed the shooting from 10 feet away and identified Peterson as the shooter. He observed an argument between Al-Rifai and Peterson some time prior to the shooting, but did not “have a good command of the English language” and did not know what the argument was about. Peterson returned several times during the evening and confronted Al-Rifai as he left the store. At the time Obed did not know Peterson’s name, but knew him as a regular customer. When Peterson’s home was searched, they found shotgun shells matching those left at the scene. He was finally apprehended on December 12.

Peterson was convicted. He appealed through the Michigan state court system, unsuccessfully. He took a habeas corpus petition which was denied, and appealed.

ISSUE: Do inconsistencies in description invalidate a suspect ID?

HOLDING: No

DISCUSSION: Peterson attempted to impeach Obed on the argument that his trial testimony did not match his earlier witness statements on several points. He described the jacket to the officer as “dark” and in court as “green” – for example, and there were discrepancies in how the argument was described. The Court, however, found the discrepancies to be minor.

³³² 131 S.Ct. 2705 (2011); 557 U.S. 305 (2009).

Peterson also argued that his trial counsel should have tried to suppress Obed eyewitness visual and voice identification. The court noted that the Court had adopted a two-step approach for determining whether to exclude eyewitness identification testimony as a violation of due process in Neil v. Biggers³³³ and Manson v. Brathwaite.³³⁴ First, it must “assess whether the identification was unnecessarily suggestive and then assess whether “under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.”³³⁵ In Manson, the court identified five factors to consider “whether a suggestive identification was nonetheless reliable: (1) the opportunity to view the suspect at the time of the crime; (2) the degree of attention at the time of observation; (3) the accuracy of the prior description of the suspect; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification.” Obed was only ten feet away, with a clear view and was paying attention, yet he was not the intended victim or in any apparent danger himself. His description was consistent and “he did not waver or indicate uncertainty about the identity of the shooter.” The Court agreed that the identification was properly admitted.

Peterson also objected to the admission of evidence found at his home. The search was without a warrant but done with the “undisputed written consent of Peterson’s mother, Janie Peterson, who owned that house and the house next door.” The Court agreed that consent was a “well-recognized exception” to the search warrant requirement and that consent might be obtained “from one who has actual or apparent authority over the premises.”³³⁶ Although a later affidavit was introduced in which she said that there was an agreement that her son would be the only occupant of the address in question, in the initial report, she told the officer that Peterson was an “infrequent resident” there. The ammunition was found in plain view in the kitchen, where apparently Janie Peterson met and spoke to the officers.

The court denied Peterson’s motion for habeas corpus.

CHILD PORNOGRAPHY

U.S. v. Vanderwal, 2013 WL 3746103 (6th Cir. 2013)

FACTS: Postal inspectors identified Vanderwal’s address in records seized during a raid of an Ohio company involved in child pornography. They contacted Vanderwal and “offered him the opportunity to purchase child pornography.” He agreed and requested four DVDs by name. The Postal Inspection Service obtained a search warrant and executed it on December 7, 2010. The search revealed 914 videos and over 5,000 still images of child pornography. They specifically located a VHS tape of two pre-pubescent girls, naked in his bathroom, clearly made by a camera placed in the bathroom. The girls were the daughters of a family friend and he was a frequent babysitter. They found additional items of evidence, as well.

Vanderwal was charged with a variety of offenses under federal law, involving child exploitation and pornography. He was convicted and appealed.

ISSUE: Is the intent to create sexual explicit videos of children unlawful, even if not completed?

HOLDING: Yes

³³³ 409 U.S. 188 (1972).

³³⁴ 432 U.S. 98 (1977).

³³⁵ See Howard v. Bouchard, 405 F.3d 459 (6th Cir. 2005).

³³⁶ Illinois v. Rodriguez, 497 U.S. 177 (1990).

DISCUSSION: The Court looked at whether the visual depiction of the two girls in the video qualified as “sexually explicit conduct.”³³⁷ The Court noted that he was charged with *attempted* sexual exploitation of a minor, not the completed offense. As such, the Court agreed that it was “not necessary for the Government to prove that the videos Vanderwal created were lascivious, only that he had the specific intent to create a lascivious video.” He argued that there was no evidence he attempted to have the girls engage in any sexually explicit behavior, but the Court looked to other items he had in his possession, and the fact that the camera position was intended to focus on the genital area of someone standing at the sink. He also had a clear plastic shower curtain in the bathtub, suggesting that the children could be viewed naked through the plastic.

The Court affirmed his conviction.

FIRST AMENDMENT

Speet/Sims v. Schuette, 726 F.3d 867 (6th Cir. 2013)

FACTS: From 2008-2011, Grand Rapids MI had an anti-begging ordinance. Both Speet and Sims were charged under the ordinance, both having been ticketed for holding up a sign soliciting assistance. Speet spent four days in jail as a result of a guilty plea, charges against Sims were dismissed. A month later, Sims asked a passerby for change and again, was cited. He pled guilty. The records indicated that in fact, 399 people had been arrested or cited under the ordinance.

Speet and Sims sued Schuette (the Michigan Attorney General), Grand Rapids and several officers, arguing that the statute violated the Constitution. The District Court granted them a partial summary judgment and Schuette appealed.

ISSUE: Does the First Amendment protect charitable soliciting (begging)?

HOLDING: Yes

DISCUSSION: The Court agreed that the Supreme Court has “held – repeatedly – that the First Amendment protects charitable solicitation performed by organizations” under the First Amendment.³³⁸ The Court further agreed that “solicitation is a recognized form of speech protected by the First Amendment.”³³⁹ Sister circuits had consistently ruled that individual panhandling is protected speech, as well, and there was no “legally justiciable distinction’ between ‘begging for one’s self and solicitation by organized charities.” The Court noted that a number of the individuals cited under the law were simply holding up signs, the remainder were verbally soliciting alms.

The Court affirmed the decision that indicated that the law violated the First Amendment in that it banned a “substantial amount of activity that the First Amendment protects.”

WIRETAP

U.S. v. Williams, 2013 WL 1759941 (6th Cir. 2013)

FACTS: On December 31, 2008, Officer Pride (Cleveland, TN, PD) stopped Williams’ car for having a nonfunctional brake light. He tried to flee and was tased. He possessed a bottle with 3.9 grams of crack

³³⁷ 18 U.S.C. 2256(2)(A).

³³⁸ City of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

³³⁹ U.S. v Kokinda, 497 U.S. 720 (1990).

cocaine. Shortly thereafter, he was identified by an individual, who became an informant, as a drug dealer, and the CI began to make controlled buys from Williams.

On December 23, 2009, Agent Ledford (DEA) prepared the following affidavit for a wiretap order.

This affidavit is based primarily on my review of materials provided by agents and officers as well as discussions with CPD officers and Sammy McNelley, who has been a Task Force Officer with the DEA in Chattanooga, Tennessee. I have also personally participated in some phases of the investigation, although I was not personally present for the majority of drug purchases and other activity discussed herein. I rely extensively on analysis of reports written by other federal, state, and local law enforcement officers and employees assigned to this case; the review of telephone toll records and pen register data; review of text messages received from the execution of a federal search warrant for such content; and review of debriefings of controlled sources of information and other cooperating witnesses.

One source was McNelly, a former agent, who'd been terminated from the drug task force for reasons unrelated to his honesty. Agent Ledford detailed why the wiretap was needed and why "alternative investigative techniques were ineffective." For example, he noted that physical surveillance was difficult because Williams was dealing in areas populated by his friends who could alert him. Subpoenas against potential witnesses would likely cause them to be subject to intimidation, as would less formal interviews. Search warrants required that locations be first identified. The CI could not identify all of the members of the group or the source of the drugs.

Eventually he was indicted and moved for suppression, argued that the affidavit was insufficient to meet the requirements of 18 U.S.C. §2518. He was convicted and appealed.

ISSUE: Does a wiretap order require an indication that other methods are or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: The Court noted that federal law requires that a wiretap order "must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." In U.S. v. Landmesser, the Court had noted that "the "necessity" requirement is designed "to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime" and to prevent wiretapping from being "routinely employed as the initial step in criminal investigation."³⁴⁰ The Court agreed, however, that the need was evident and proven by the extensive affidavit which carefully detailed what had been done.

The Court also noted that the reliance on the work of Agent McNelly was also proper and that there was no proof that McNelly was dishonest. Agent Ledford documented that the information had come from a fired officer, but also corroborated the information through other independent sources. The court noted that as explained in Alfano, "[t]he basic standards for a wiretap are similar to those for a search warrant, but there also must be strict compliance with Title III."

The Court upheld the warrant and his plea.

³⁴⁰ 553 F.2d 17 (6th Cir.1977)

U.S. v. Wren, 2013 WL 2477168 (6th Cir. 2013)

FACTS: During an investigation into another individual, Wren was identified as a heroin supplier. During intercepted phone calls, Wren’s involvement was confirmed. The DEA executed a search warrant on a home owned by Wren and found considerable evidence and cash, along with a rifle and 100-round drum magazine. A “drug ledger” was also found, along with a pistol and a vehicle registered to a company owned by Wren.

Wren was charged for trafficking and for the gun, as he was a convicted felon. He was convicted and appealed.

ISSUE: Does a wiretap order require an indication that other methods are or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: Although Wren argued the warrant lacked probable cause, the Court bypassed that inquiry, concluding that the officers “relied in good faith on a facially-valid warrant issued by a ‘neutral and detached’ magistrate.”³⁴¹ The court agreed that the facts, as presented in the warrant, were sufficient to support the agents’ reliance on it.

With respect to his challenge on the wiretaps, the Court agreed that “a law-enforcement official’s application for wiretap authority requires ‘a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.’”³⁴² This ensures that a wiretap is not used as the initial step in an investigation or when more traditional investigative techniques could suffice.³⁴³ Law enforcement officials must give serious consideration to non-wiretap techniques prior to applying for wiretap authority and explain why, under the particular circumstances, such techniques would be, or are, inadequate.³⁴⁴ The government is not required to show the impossibility of other means of obtaining information and the mere fact that some investigative techniques produced evidence does not foreclose the need for a wiretap. Wren argued that the language in the affidavit was “simply boilerplate language and mere opinion,” the same as applied in most narcotics investigations. The Court however, agreed that it properly demonstrated “that the government seriously considered non-wiretap techniques and it explained why such techniques would be inadequate under the circumstances.” It provided a “detailed summary of the investigative techniques used prior to seeking the wiretap.” The lengthy affidavit included a reference to prior investigation efforts and why they would not provide a clear picture of the drug organization. The Court agreed the wiretap was appropriate.

With respect to his constructive possession of the weapons, the Court noted that was sufficient, as “constructive possession exists when a defendant ‘knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.’” However, “where the defendant shares possession of the premises where contraband is found, additional incriminating evidence must show the defendant knew of and controlled the contraband.”³⁴⁵ A connection or nexus must still be shown between the weapon and the defendant. In this case, Wren owned the house and was sleeping there when the warrant was executed. The ammunition was located in an unlocked safe in his bedroom, and a photo of a weapon, with a drum attached, was on his telephone. The pistol was found in a vehicle he

³⁴¹ See U.S. v. Leon, 468 U.S. 897 (1984)

³⁴² 18 U.S.C. § 2518(1)(c).

³⁴³ U.S. v. Rice, 478 F.3d 704 (6th Cir. 2007).

³⁴⁴ U.S. v. Stewart, 306 F.3d 295 (6th Cir. 2002).

³⁴⁵ U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).

apparently owned, or at least drove. The jury apparently discounted testimony from his girlfriend that the weapons were hers.

After resolving other issues, the Court upheld Wren's convictions.

U.S. v. Nagi, 2013 WL 5433464 (6th Cir. 2013)

FACTS: Nagi (and others) was arrested on a variety of drug trafficking related offenses. During the investigation, agents used wiretapping to intercept calls for some months and used the information in the prosecution of the case. Nagi and his fellow defendants were convicted and appealed.

ISSUE: Must wiretap requests prove that other methods would be ineffective?

HOLDING: No

DISCUSSION: Nagi argued that the wiretaps "did not meet the necessity requirements of 18 U.S.C. §2518(1)(c)" because they "did not establish that less intrusive techniques were insufficient to meet law enforcement needs." However, the Court agreed, "law enforcement officials are required only to 'give serious consideration to the non-wiretap techniques prior to applying for wiretap authority' and inform the court of the reasons for their belief that non-wiretap techniques 'have been or will likely be inadequate.'"³⁴⁶ The Court noted that the initial affidavit detailed the reasons why the officers believed a wiretap was needed, in particular because "traditional surveillance techniques were hampered by counter-surveillance techniques employed by" the defendants.

The Court upheld the admission of the wiretapped evidence and affirmed the convictions of all defendants.

CIVIL LITIGATION

Mott v. Mayer, 2013 WL 1663219 (6th Cir. 2013)

FACTS: In 2005, Mott became a target of a joint operation between the DEA and the Richland County Sheriff's Office (RCSO) to combat drug trafficking (specifically crack cocaine." After his arrest, Mott had admitted having done a small transport of drugs but denied everything else, including involvement in a large scale operation. Mott pled guilty, but it was learned two years later that Bray, the CI, "had engaged in illegal conduct throughout the investigation." Bray, the CI who had identified Mott, later pled guilty to perjury and deprivation of civil rights as a result of his actions. The federal government requested the court to overturn the convictions/pleas of all of the defendants arrested as a result of the operation, noting that "Bray's illegal conduct was so pervasive and his credibility so tainted by his guilty plea" that the defendants were entitled to the dismissals. At that time, the charges against Mott were dismissed.

Mott filed suit against a number of state and federal officials, including Captain Faith, Sgt. Mayer and Det. Metcalf (RCSO).³⁴⁷ The RCSO officers moved for summary judgment and were denied on the issues of fabrication of evidence and false arrest, but were granted it with respect to the other claims Mott raised. Both cross-appealed their denials.

ISSUE: May the use of an unreliable informant lead to civil liability against the officers?

HOLDING: Yes

³⁴⁶ U.S. v. Stewart, 306 F.3d 295 (6th Cir. 2002).

³⁴⁷ The federal defendants settled with Mott.

DISCUSSION: Mott argued that several events occurred that demonstrated that Bray was not a reliable informant and argued that the officers repeatedly failed to corroborate Bray's statements as well. Examples pointed to by the Court included that Bray, who was on parole, was acting as a CI without the consent of his parole officer. Officers expressed concern about a buy, including that they did not know where he went during the transaction, nor did they follow him afterward, "even though they were responsible for monitoring him in order to ensure both the safety of the parties involved and the integrity of the evidence." In another situation, Bray claimed to have made a controlled buy from a subject who was wearing a GPS monitor, yet the officers never verified the location of the subject – which would have shown that the subject could not have made the sale to Bray. Bray was also caught with crack cocaine himself, a violation of his agreement with the RCSO. Det. Metcalf apparently helped him get the matter dismissed. Bray allegedly made several transactions with "Mott" – only apparently identified by Bray as such. Bray was proven to have lied to the investigators about the money, having hidden \$780 of what he was supposed to use for the buy in his car. However, they continued to use Bray as a CI.

With respect to the malicious prosecution claim, the court noted that it was distinct from false arrest, as the first involves the "wrongful institution of legal process." To succeed in a malicious prosecution claim, the following elements must be met:

First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a §1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

Mott's grand jury indictment was based entirely on Lucas repeating "unreliable, uncorroborated information from Bray." Some of the testimony was "misleading or false." However, the trial court had ruled that Mott's later statement provided sufficient probable cause to support the continued prosecution. The appellate court, however, noted that "authorities made the decision to charge Mott and the grand jury indicted him before he spoke with investigators." In fact, although he admitted some involvement with drug trafficking, he explicitly denied any involvement in the specific transactions with which he was charged.

The Court reversed the grant of summary judgment to the defendant RCSO officers on the issue of malicious prosecution. The court also affirmed the denial of summary judgment on other claims.

MISCELLANEOUS – STATEMENTS BY A LAW ENFORCEMENT OFFICER

Wood v. Cocke County (TN) , 2013 WL 5452160 (6th Cir. 2013)

FACTS: The Woods and the Blasks owned homes in Valley View Estates. The developer, Bryant, was to maintain the roads until they were accepted by the county, which has never occurred. (Bryant was imprisoned in 2010.) The county refused to accept the roads due to concerns about their current condition and the need to bring them up to standards. In 2010 a "handful of logging trucks" used the roads, rutting and degrading them. At one point, a resident complained to a deputy sheriff that the trucks were trespassing. The deputy "responded – incorrectly – that the roads were public and therefore open to the loggers." The roads continued to degrade and the residents could not afford to improve them to the needed standard. Instead they filed suit against the county, arguing it had "implicitly accepted the roads." The trial court ruled in favor of the county and the residents appealed.

ISSUE: May an officer's statements in an unrelated matter be possibly used as evidence in a case?

HOLDING: Yes

DISCUSSION: The Court looked to whether the use of the roads by emergency responders and the truckers made them public. The Court noted that on one occasion, when the deputy refused to exclude the trucks, he was mistaken in his belief, but indicated that “nobody from the subdivision ever disputed the deputy’s assertion or otherwise followed up with other county officials.” In any event, that mistake “did not give rise to ‘a general and long-continued’ public use” of the roads.

The Court upheld the trial court’s decision.

SUPREME COURT OF THE UNITED STATES

2013-2014 TERM

42 U.S.C. §1983 – EXIGENT ENTRY

Stanton v. Sims, 134 S.Ct. 3 (2013), Decided November 4, 2013

FACTS: On May 27, 2008, Officer Stanton and his partner (La Mesa, CA, PD) responded to an “unknown disturbance” involving a subject with a baseball bat. Officer Stanton was familiar with the gang violence associated with the area. The two officers, uniformed and in a marked vehicle, approached the location and spotted three men walking in the street. When the men saw the officers, two of them “turned into a nearby apartment complex.” The third, Patrick, crossed the street 75 feet in front of the cruiser and “ran or quickly walked toward a residence.” That residence belonged to Sims.

Officer Stanton considered Patrick’s actions suspicious and got out to detain him. He called out “police” and “ordered Patrick to stop in a voice loud enough for all in the area to hear.” Patrick looked toward the officer “ignored his lawful orders,” and went into the front yard, through a gate. When the gate closed, the six-foot-high privacy fence, blocked Officer Stanton’s view. The officer believed Patrick had committed a misdemeanor under California law, by failing to stop, and he also feared for his own safety.³⁴⁸ He “made the ‘split-second decision’ to kick open the gate in pursuit of Patrick.” Unfortunately, Sims was, herself, standing behind the gate when he did so, and she was struck by the “swinging gate,” suffering a head and shoulder injury.

Sims filed suit against Officer Patrick under 42 U.S.C. §1983, for his entry into her property. The District Court ruled in Stanton’s favor, finding the entry to be justified “by the potentially dangerous situation.” (The court also agreed that even if a constitutional violation did occur, the officer was entitled to qualified immunity “because no clearly established law put him on notice that his conduct was unconstitutional.” Sims appealed, and the Ninth Circuit Court of Appeals reversed, ruling that Sims was “entitled to the same expectation of privacy in her curtilage as in her home itself, because there was no immediate danger, and because Patrick had committed only the minor offense of disobeying a police officer.” Further, the appellate court agreed that was clearly established and as such, the officer was not entitled to qualified immunity.

Stanton appealed and the U.S. Supreme Court granted certiorari.

ISSUE: If the law is not settled on a particular issue and the officer act in a manner not “plainly incompetent,” is the officer entitled to qualified immunity?

HOLDING: Yes

DISCUSSION: The Court noted, initially, that the law was clearly not settled on the issue of when a pursuit into a curtilage might be warranted when the underlying offense is relatively minor at the time. The Court noted that under Ashcroft v. al-Kidd, qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and ‘protects all but the plainly incompetent or those who knowingly violate the law.’³⁴⁹ In this case, the Court agreed that there was no suggestion that Officer Stanton “knowingly violated the Constitution,” the question being whether he was “plainly incompetent” in his decisionmaking. The Court noted that the Ninth Circuit concluded that he was, “despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.”

³⁴⁸ Kentucky does not have a clearly equivalent statute.

³⁴⁹ 563 U.S. --- (2011); see also Malley v. Briggs, 475 U.S. 335 (1986).

The Ninth Circuit had looked to two cases, Welsh v. Wisconsin³⁵⁰ and U.S. v. Johnson.³⁵¹ In Welsh, however, the Court agreed that no “hot pursuit” had actually occurred, the officers had gone to his home at some time later, entered without a warrant or consent, and made an arrest for a nonjailable traffic offense. The Court had agreed that “application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned,” but agreed that it “did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is ‘usually’ required.” Johnson, also, did not involve a hot pursuit, as the subject had escaped some 30 minutes earlier. The Court agreed that the Ninth Circuit read both cases “too broadly,” in that neither case involved a hot pursuit. Curiously, the Court noted, the Ninth Circuit cited U.S. v. Santana³⁵² with approval, a case in which the officer made a warrantless entry while in hot pursuit. (Although Santana involved a felony, the Court expressly did not limit its holding on that fact.)

The Court emphasized, it “held not that warrantless entry to arrest a misdemeanor is never justified, but only that such entry should be rare.” In fact, the Court cited to two California state court cases that held “where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant.”³⁵³ The Court found it “especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent – and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where he acted.” The Court concluded that it did not “express any view on whether Officer Stanton’s entry into Sims’ yard in pursuit of Patrick was constitutional.” It ruled, instead, that the officer *may* have been mistaken in his belief, but he was not “plainly incompetent.” As such, he was entitled to qualified immunity.

The U.S. Supreme Court reversed the decision of the Ninth Circuit and remanded the case for further proceedings.

TRIAL PROCEDURE

Kansas v. Cheever, 134 S.Ct. 596 (2013), Decided December 11, 2013

FACTS: On January 19, 2005, Cheever shot and killed Sheriff Matthew Samuels (Greenwood County, Kansas). In the hours before the shooting, he and friends had cooked and smoked methamphetamine. When they were alerted that law enforcement was on the way to arrest him on an unrelated matter, he tried to flee, but found that his car had a flat tire. Instead, he and a friend hid upstairs, with a loaded pistol. When he heard footsteps coming up the stairs, he stepped out and shot Sheriff Samuels. He stepped back into the bedroom and then, “walked back to the staircase and shot Samuels again.) Although he fired at other officers, only Samuels was hit.

Kansas charged Cheever with capital murder. Shortly thereafter, the Kansas Supreme Court had found the death penalty scheme unconstitutional, so the prosecution dismissed their own charges and allowed the federal authorities to prosecute Cheever under the Federal Death Penalty Act of 1994.³⁵⁴ In that proceeding, he gave notice that he intended to raise the defense that he was intoxicated on methamphetamine at the time of the shooting, so much so that he could not have formed the specific intent needed under the charge. He was ordered to undergo a psychiatric examination. During a postponement in the proceedings, the Kansas Supreme Court ruled that the death penalty was, indeed, constitutional in Kansas and Kansas brought a second prosecution against Cheever. (He was never tried under federal law.) There he also “presented a voluntary-intoxication defense,” arguing his methamphetamine use had made him “incapable of premeditation.” Testimony was presented that he has suffered brain damage due to long term methamphetamine abuse. Kansas attempted to rebut this testimony using the psychiatrist who had examined him while the case was in federal court. Cheever

³⁵⁰ 466 U.S. 740 (1984).

³⁵¹ 256 F.3d 895 (2001).

³⁵² 427 U.S. 38 (1976).

³⁵³ People v. Lloyd, 265 Cal. Rptr. 422 (1989); also cited In re Lavoyne M., 270 Cal. Rptr. 394 (1990).

³⁵⁴ 18 U.S.C. §3591 et seq.

objected, arguing that this violated the Fifth Amendment's Self-Incrimination Clause, as he'd not agreed to the examination. The trial court permitted it, however, noting that even the defense expert had used the report in coming to his conclusion. Cheever was convicted of murder and attempted murder, and sentenced to death. He appealed first to the Kansas Supreme Court, which ruled in his favor, agreeing that using the information from the court-ordered examination violated his rights.

Kansas appealed and the U.S. Supreme Court granted review.

ISSUE: May the prosecution use a court-ordered psychiatric examination to rebut evidence of the mental status of the defendant?

HOLDING: Yes

DISCUSSION: The Court, as did the Kansas courts, first looked to Estelle v. Smith, in which a prior U.S. Supreme Court had ruled that "a court-ordered psychiatric examination violated the defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute at trial."³⁵⁵ However, in Buchanan v. Kentucky, a later Court had agreed that "a State may introduce the results of a court-ordered mental examination for the limited purpose of rebutting a mental-status defense."³⁵⁶

In this case, the Court agreed, "where a defense expert who has examined the defendant testifies that a defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal." In this case, the "State permissibly followed where the defense led." Further, the Court noted that although voluntary intoxication is not a "mental disease or defect," as narrowly defined in Kansas, that the Court had a broader view of the term and felt it appropriate to allow a "mental status" defense – as Cheever was in this case. (Kansas had declined to apply Buchanan because it ruled that Cheever's intoxication was a temporary state, not a permanent one.) The Court agreed that "Cheever's psychiatric evidence concerned his mental status because he used it to argue that he lacked the requisite mental capacity to premeditate." The Court agreed that such testimony is limited, however. Since Kansas did not address the issue as to whether the expert exceeded the scope of rebuttal, the Court declined to address it either.

The Court vacated the decision of the Kansas Supreme Court (which overturned Cheever's conviction) and remanded the case for further proceedings.

TRIAL PROCEDURE – SENTENCING

Burrage v. U.S., 134 S.Ct. 881 (2014), Decided January 27, 2014

FACTS: On April 15, 2010, a long time drug user, died following an extended drug binge. Starting the day before, he had started with marijuana, moved on to injecting crushed oxycodone, and then met Burrage and purchased heroin. Banks' wife found him dead the next morning. A search of the couple's home revealed a variety of drugs, including heroin.

Burrage was charged with distributing heroin, and specifically with causing a death resulting from the use of the heroin. At trial, medical experts testified that multiple drugs were present in Banks' system, but only morphine (metabolized from the heroin) was above the therapeutic range. Both doctors testified that the heroin was a factor that contributed to the overall effect that led to Banks' death. Specifically, his death was attributed to "mixed drug intoxication."

Burrage argued at trial that there was no evidence "that heroin was a but-for cause of death." The Court declined to offer requested instructions to the jury which would have required the prosecution to offer proof that the heroin was the proximate cause of his death. Instead the court allowed the jury to consider the heroin to be a

³⁵⁵ 451 U.S. 454 (1981).

³⁵⁶ 488 U.S. 402 (1987).

“contributing cause.” Burrage was convicted. Burrage appealed to the Eighth Circuit, which affirmed his convictions. Burrage requested certiorari from the U.S. Supreme Court.

ISSUE: To support an enhanced penalty under federal law, is it necessary to prove that a drug distributed by the defendant is the proximate cause of another’s death?

HOLDING: Yes

DISCUSSION: Proof that an individual died – the “death result enhancement” – as a result of drug trafficking is used under federal law to increase a sentence for distribution. The Court noted that the “but-for requirement is part of the common understanding of cause” under federal jurisprudence. It agreed that “it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter.” When nothing says otherwise, the courts have “regular read phrases like ‘results from’ to require but-for causality.” The Court agreed that “ a phrase such as ‘results from’ imposes a requirement of but-for causation.” Despite the prosecution’s argument that “distinctive problems associated with drug overdoses counsel in favor of dispensing with the usual but-for causation requirement,” since “addicts often take drugs in combination.”³⁵⁷

The Court concluded that “where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury,” the defendant cannot be subjected to the penalty enhancement. The Court reversed Burrage’s sentence and remanded the case for further proceedings.

SEARCH & SEIZURE – CONSENT

Fernandez v. California, 134 S.Ct. 1126 (2014), Decided February 25, 2014

FACTS: In October 2009, in Los Angeles, Fernandez approached Lopez and told him that he was in the territory of the Drifters gang. He pulled out a knife and Lopez ended up cut on the wrist. He fled the scene and called 911 for help, but he was attacked by four men and robbed of his cell phone and wallet, and \$400 cash. Two LAPD officers responded and drove down an alley frequented by the Drifters. A man “who appeared scared” walked past them and said “[t]he guy is in the apartment.” The officers spotted a man run into the building indicated. A minute later, they “heard sounds of screaming and fighting coming from that building.”

With backup’s arrival, the officers knocked on the door. Roxanne Rojas answered the door; she was “holding a baby and appeared to be crying.” She had blood on her shirt and an apparently injured hand. Her face was reddened and had a “large bump on her nose.” She said she’d been in a fight. Officer Cirrito asked if anyone else was inside, and she said her son (age 4) was there. He asked her to step outside so he could do a protective sweep. Fernandez appeared, wearing only boxers. He was agitated and said “You don’t have any right to come in here. I know my rights.” Suspecting he’d assaulted Rojas, he was removed and arrested. Lopez then identified him as one of his attackers as well. He was then taken to jail. About an hour later, Det. Clark returned and told Rojas what had happened. He received oral and written consent to search. They found gang paraphernalia, a butterfly knife, clothing identified by Lopez and ammunition. Rojas’ son showed them a sawed off shotgun.

Fernandez was charged with robbery, possession of a firearm by a felon and related federal firearms charges. He moved to suppress, but was denied. He pled nolo contendere (no contest) to the firearms charges. He was convicted at trial of the robbery and another related charge. The California appellate courts affirmed. He requested certiorari from the U.S. Supreme Court, which granted review.

ISSUE: Does the refusal to consent to a search extend past the point at which the objecting party is removed, if another co-inhabitant gives consent later?

HOLDING: No

³⁵⁷ Statistics gathered from one federal agency suggest approximately 46% of drug overdose deaths involve combinations of more than one drug.

DISCUSSION: The Court agreed that a warrant is generally required for a home search, but that there are reasonable exceptions to that rule. One of those exceptions is consent. The Court noted that “it would be unreasonable – indeed, absurd – to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search.” Requiring a warrant under such circumstances “would needlessly inconvenience everyone involved – not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed.” The Court then questioned what should be done “when there are two or more occupants? Must they all consent? Must they all be asked? Is consent by one occupant enough?”

Initially, the Court faced that issue in U.S. v. Matlock,³⁵⁸ holding that “the consent of one who possesses common authority against the absent, nonconsenting person with whom the authority is shared.” In Illinois v. Rodriguez, the earlier holding was reaffirmed and extended, when the consent was given by a person who officers reasonable believed was a resident, but in fact, was not.³⁵⁹ Although consent by “one resident of jointly owned premises” is usually enough, the court had “recognized a narrow exception to this rule in Georgia v. Randolph.³⁶⁰ In that case, the Court upheld that a “physically present inhabitant’s express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant.” However, the Randolph Court ‘went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present.’”

In the case at bar, Fernandez argued that the only reason he was not present was because he was arrested, and that his objection should have remained in effect. However, the Court noted that the dictum in Randolph did not mean that removing an occupant under a valid arrest would necessarily invalidate the search. Following the rule proposed by Fernandez would require officers to decide how long an objection should reasonably last. The Court concluded that it would take Randolph on its face, and that denying someone in the position of Rojas “the right to allow the police to enter *her* home would also show disrespect for her independence,” especially when she would have reason to have all dangerous items removed from the premises. The Court agreed that “the Fourth Amendment does not give [Fernandez]” the power to control Rojas in that manner. The Court upheld the decision of the California court.

FEDERAL ASSET FORFEITURE

Kaley v. U.S., -134 U.S. 1090 (2014), Decided February 25, 2014

FACTS; The Kaleys (Kerri and Brian) were charged with transporting stolen medical devices across state lines and laundering the money made by this crime. Immediately following their indictment, the government sought a restraining order (under 21 U.S.C. 853(e)(1)) to prevent them from “transferring any asset traceable to or involved in the alleged offenses.” That included \$500,000 they intended to use for legal fees. The District Court granted the request, later modifying that to except \$63,000 it found was not connected to the crime. The Kaleys took an interlocutory appeal and the Eleventh Circuit reversed and remanded as to what type of evidentiary hearing was required in such cases. After a further proceeding and appeal, the Eleventh Circuit ruled that they were not entitled to a hearing on the frozen assets “to challenge the factual foundation” of the grand jury indictment.

The Kaleys requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does a federal grand jury indictment also support the seizure of assets connected to the crime?

HOLDING: Yes

³⁵⁸ 415 U.S. 164 (1974).

³⁵⁹ 497 U.S. 177 (1990).

³⁶⁰ 547 U.S. 103 (2006).

DISCUSSION: The Court began by noting that it had twice considered similar claims, in Caplin & Drysdale Chartered³⁶¹ and U.S. v. Monsanto.³⁶² In both, it had concluded that it was permissible to seize, for example, robbery proceeds and refuse to allow them to be used to hire an attorney, even prior to conviction (or trial). The Court found that it was, after all, alright for the Government to restrain persons with only probable cause, and as such, it would be permissible to restrain property, as well. In this case, a Court had already found probable cause, and there was no contention that the funds in question were mostly derived from the crime of which they stand accused.

The Court agreed that until the standard set by Caplin and Monsanto is changed by Congress, the “Kaleys cannot challenge the grand jury’s conclusion that probable cause supports the charges against them. The grand jury gets the final word.”

The Court affirmed the decision of the Eleventh Circuit, upholding the freezing of the assets.

MILITARY JURISDICTION

U.S. v. Apel, 134 S.Ct. 1144 (2014), Decided February 26, 2014

FACTS: Two California highways run through Vandenberg Air Force Base. Although both are open to the traveling public, the roads are actually located on land owned by the military, through an easement with the state. At one intersection, a location has been designated “for peaceful protests” – the base houses missile and space launch facilities. A public advisory detailed the rules for using that space, and that such protests must be scheduled in advance. Further, it notifies the public that only peaceful, authorized protests are allowed and that two weeks’ notice must be given. Failure to comply with the rules might lead to ejection and barring from the property.

Apel was an antiwar activist. In March 2003, he “trespassed beyond the designated protest area and threw blood on a sign for the Base.” He was convicted and barred from the base for three years, under 18 U.S.C. §1382. In May, 2007, he returned and again was barred, this time permanently, unless he followed specified procedures. The only expectation was that he could use the road to traverse the Base. He ignored the order, however, and entered the prohibited area during 2008 and 2009, and was again barred from the location. In 2010, he again trespassed three times, and was cited each time under federal law and escorted off the property.

He was convicted. He appealed, and the Ninth Circuit reversed, holding that the federal statute does not apply to the designated protest area, and that the Government does not have “exclusive right of possession” over that area. The United States requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a public roadway through a military base still under the command of the military?

HOLDING: Possibly (see discussion)

DISCUSSION: The Court noted that §1382 “is written broadly to apply to many different kinds of military places,” including a “reservation, post, fort, arsenal, yard, station, or installation.” The Court agreed that historically, many military places “provided services to civilians, and were open for access by them.” In old west times, such bases “were often bustling communities” that attracted businesses of all types. The common feature of all is “that they have defined boundaries and are subject to the command authority of a military officer.” Further, the ownership status of military sites around the world varies significantly, and many have roads running through them that are used by the public. In several ways, the Base Commander had consistently maintained authority over the designated protest area, including occasional patrols. The easement given to the state was for the purposes of right-of-way and on occasion, the Base Commander had closed the roadway for limited times.

³⁶¹ 491 U.S. 617 (1989)

³⁶² 491 U.S. 600 (1989).

The Court agreed that the best reading of the statute in question “is that it reaches all property within the defined boundaries of a military place that is under the command of a military officer.” The Court vacated the decision of the Ninth Circuit and remanded the case.

FEDERAL FIREARMS LAW

Rosemond v. U.S., 134 S.Ct. 1240 (2014), Decided March 5, 2014

FACTS: During a “drug deal gone bad,” Perez had arranged to sell marijuana to Gonzales and Painter. Perez was accompanied by Joseph and Rosemond. During the transaction, Painter got into the backseat to inspect the marijuana. However, instead of a transaction, he punched the back seat occupant (it was unclear whether it was Joseph or Rosemond) and fled with the marijuana. At that point, “one of the male passengers – but again, which one is contested – exited the car and fired several shots.” All three then gave chase, but before the “could catch their quarry,” they were stopped by a responding officer.

Rosemond was charged with, among other things, a violation of 18 U.S.C. §924(c), “using a gun in connection with a drug trafficking crime, or aiding and abetting that offense.” Federal law further stated that anyone who assists in such crimes may be punished in the same manner as the principal. In its prosecution, the Government proceeded on two alternative theories: that he himself fired the handgun or that he aided and abetted Joseph in doing so. Arguments were made and the jury instructed on both. Rosemond was convicted, but the jury forms did not indicate under which theory the government acted. Rosemond appealed. The Tenth Circuit Court of Appeals upheld his conviction. Rosemond requested review and the U.S. Supreme Court granted certiorari.

ISSUE: To convict of aiding or abetting in a crime involving a firearm under federal law, must the defendant be found to have been aware of the presence of the weapon by a cohort?

HOLDING: Yes

DISCUSSION: The Court looked to the statute and the line of cases that flowed from it. The Court agreed that under 18 U.S.C. §2 “those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.”³⁶³ The Court agreed that required that the person both “take an affirmative act in furtherance of that offense” and that be done, with the “intent to facilitating the offense’s commission.”

The court noted that he Rosemond admitted that he actively participated in a drug transaction. However, he argued he had nothing to do with the firearm or the shooting. In other words, he admitted to “one element (the drug element) of a two-element crime.” The court noted that the common law crime of aiding and abetting applied to someone who “facilitated any part – even though not every part – of a criminal venture. Under the logic of the common law, “every little bit helps – and a contribution to some part of a crime aids the whole.” The Courts of Appeal across the U.S. had generally agreed to that, noting that the “division of labor between two (or more) confederates thus has no significance.”

In the past, the Court had “found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense.” By doing so, the subject “becomes responsible, in the typical way of aiders and abettors, for the conduct of others.” However, the question is, the subject must know that an accomplice will, such as in this case, be carrying a gun – making a drug deal an armed crime. Without that prior knowledge, he would not have the opportunity to make a decision about participation. “But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime.”

³⁶³ Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

The Court noted that “what matters for purposes of gauging intent ... is that the defendant has chosen, with full knowledge, to participate in the illegal scheme....” It does not matter whether “he participates with a happy heart of a sense of foreboding.” The Court used an analogy:

By virtue of §924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

As such, the Court agreed that the jury instructions should have reflected the need for the jury to find that Rosemond “needed advance knowledge of a firearm’s presence.” The case was remanded back to the Tenth Circuit with the requirement that the Court look to whether the error was sufficient to overturn the conviction.

FEDERAL LAW – CRIME OF VIOLENCE

U.S. v. Castleman, 134 S.Ct. 1405 (2014), Decided March 26, 2014

FACTS: Congress enacted 18 U.S.C. §922(g)(9) to close a “dangerous loophole” in federal gun laws. “While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors.” Section 922(g)(9) provided that an individual who has been convicted of a “misdemeanor crime of domestic violence” may not possess any firearm or ammunition. A “misdemeanor crime of domestic violence” was further defined as “an offense that ... (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”³⁶⁴ In 2001, Castleman was charged under Tennessee law with “intentionally or knowingly caus[ing] bodily injury to” the mother of his child, to which he pled guilty. In 2008, federal authorities learned he was selling firearms on the black market. He was charged with violating §922(g)(9) and other unrelated offenses.

Castleman moved to dismiss the charge, arguing that his Tennessee conviction did not include the necessary element of “physical force” – the District Court agreed that to qualify, the crime “must entail ‘violent contact with the victim.’” Upon appeal, the Sixth Circuit affirmed, “by different reasoning – finding that the degree of force is that same as required under a different statute, which defines “violent felony.” The Court noted that he could have been convicted for a “slight, nonserious physical injury” from force that could not be described as violent. This decision “deepened the split of authority among the Courts of Appeal on the issue. The U.S. Supreme Court granted certiorari to resolve the split.

ISSUE: Does a minor assault that includes any degree of force qualify as a misdemeanor crime of domestic violence for federal law purposes?

HOLDING: Yes

DISCUSSION: The Court noted that under common law, the element of force is satisfied “by even the slightest offenses touching.” In this case, that “common-law meaning of ‘force’ fits perfectly.” Since the perpetrators of domestic violence are prosecuted under applicable state assault/battery statutes, “it makes sense “to use the “type of conduct that supports a common-law battery conviction.” Further, while “violent” or “violence” does connote a “substantial degree of force,” ... “that is not true of ‘domestic violence.’” Instead, that term is “a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.” The Court emphasized that most domestic assaults “are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting.” These “minor uses of force” are not usually considered “violent,” but

³⁶⁴18 U.S.C. §921(a)(33)(A).

these situations involve “the accumulation of such acts over time” that “can subject one intimate partner to the other’s control.” The Court stated that the statute groups those convicted of misdemeanor crimes of domestic violence “with others whose conduct does not warrant such a designation.” In addition, to read the statute otherwise would render the federal law “inoperative in many States” – as the laws under which such situations are prosecuted fall into two categories – “those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter.” Certainly, offensive touching does not generally entail violent force.

The Court concluded that the degree of force necessary for the crime was the same as that required to support a “common-law battery conviction.” Under the Tennessee statute, not even act alleged under the law would be a use of physical force, but in this case, he pled guilty, according to the indictment, of causing bodily injury (which must have resulted from physical force.) The Sixth Circuit decision was reversed and the case remanded.

SEARCH & SEIZURE – TRAFFIC STOP

Navarrette v. California, 134 S.Ct. 1683 (2014), Decided April 22, 2014

FACTS: On August 23, 2008, 911 dispatch for the California Highway Patrol (CHP) in Mendocino County, CA, received a call from the CHP dispatcher in adjacent Humboldt County. Humboldt County relayed a tip from a 911 caller, which was broadcast to CHP officers at 3:47 p.m., as follows:

Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David- 94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.

At 4 p.m., a CHP officer heading northbound toward the area passed the truck; he made a U-turn and made the stop at 4:05 p.m. A second officer arrived on scene and the two officers approached the truck; they immediately smelled marijuana. A search of the truck revealed 40 pounds of marijuana. Navarrette was driving; his passenger bore the same last name. Both were arrested.

Both moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment as it lacked reasonable suspicion. The California trial courts disagreed and upheld the stop. Both Navarettes took a conditional guilty to transporting marijuana and appealed. The California Court of Appeal affirmed the plea; the California Supreme Court denied review. The Navarettes sought certiorari to the U.S. Supreme Court, which accepted review.

ISSUE: Might an anonymous 911 caller provide sufficient information to support a traffic stop?

HOLDING: Yes

DISCUSSION: The Court began by noting that the “Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’”³⁶⁵ Reasonable suspicion depends upon “both the content of information possessed by police and its degree of reliability.”³⁶⁶ Although a “mere hunch” is not enough, it requires “considerably less” than probable cause.³⁶⁷

With respect to anonymous tips, the Court noted that it had already rejected “the argument ‘that reasonable cause for a[n] investigative stop] can only be based on the officer’s personal observation, rather than on information supplied by another person.’”³⁶⁸ A true anonymous tip, standing alone, rarely provides any information as to the “Informant’s basis of knowledge or veracity” because an ordinary caller does “not provide extensive recitations of

³⁶⁵ U.S. v. Cortez, 449 U. S. 411 (1981); see also Terry v. Ohio, 392 U. S. 1 (1968). T

³⁶⁶ Alabama v. White, 496 U. S. 325 (1990).

³⁶⁷ U.S. v. Sokolow, 490 U. S. 1 (1989).

³⁶⁸ Adams v. Williams, 407 U. S. 143 (1972).

the basis of their every observations.” But, under some circumstances, “an anonymous tip can demonstrate ‘sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.’” The Court contrasted its holdings in Alabama v. White³⁶⁹ and Florida v. J.L.³⁷⁰. In the first, it had agreed that “the officers’ corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity.” In the latter, however, the bare-bones tip, which essentially just placed a described suspect (allegedly with a gun) at a location, a bus stop, where people would, of course, be likely to stand. The tip provided no basis for the informant’s knowledge of “concealed criminal behavior” – the gun – or any prediction of the suspect’s future behavior that might be corroborated to “assess the tipster’s credibility.” In the latter, the Court concluded the tip was “insufficiently reliable.”

In the current case, the first question is “whether the 911 call was sufficiently reliable to credit the allegation that” the Navarettes ran the caller off the road. Even “assuming for present purposes” that the call was truly anonymous, the Court found “adequate indicia of reliability” to support the stop.

By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip’s reliability.³⁷¹

Unlike cases where the tip concerns something hidden, like drugs or firearms, this claim involved personal and direct knowledge of the subject’s wrongdoing. Further, the Court continued:

There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck’s location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because “substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.” A similar rationale applies to a “statement relating to a startling event”—such as getting run off the road—“made while the declarant was under the stress of excitement that it caused.” Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds. There was no indication that the tip in J. L. (or even in White) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller’s veracity here.³⁷²

In addition, the caller used the 911 system, and most, if not all, such emergency systems include “some features that allow for identifying and tracking callers, and thus provide some safeguards against making false reports with immunity.” They “can be recorded, which allows victims with an opportunity to identify the false tipster’s voice and subject him to prosecution.” Federal FCC mandates require cell phones to relay the phone number to 911 and most now identify the caller’s “geographic location with increasing specificity.” Although not perfect, it would be reasonable for an officer to “conclude that a false tipster would think twice before using such a system.” The use of 911 was one of the relevant circumstances that supported the reliance of the officers.

The Court agreed, however, that “even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that ‘criminal activity may be afoot.’” The Court agreed that the reported behavior supported a reasonable suspicion of impaired/drunken driving. A number of cases supported the idea that “the accumulated experience of thousands of officers suggest that these sorts of erratic behaviors are strongly correlated with drunk driving.” Not all traffic infractions do, of course, such as minor speeding or failure to use a seatbelt, but “a reliable tip alleging the dangerous behaviors” reported in this case, certainly do. “Running another vehicle off the

³⁶⁹ Supra.

³⁷⁰ 529 U. S. 266 (2000)

³⁷¹ Illinois v. Gates, 462 U. S. 213 (1983); Spinnelli v. U.S., 393 U. S. 410 (1969).

³⁷² Internal citations removed for brevity.

road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.³⁷³ Further, “the experience of many officers suggests that a driver who almost strikes a vehicle or another object – the exact scenario that ordinary causes ‘running off the roadway’ is likely intoxicated.” Although it is certainly true that it might have been caused by a momentary distraction, a finding of reasonable suspicion does not have to “rule out the possibility of innocent conduct.”³⁷⁴

Finally:

Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time. Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly sufficed in that regard. Of course, an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. Once reasonable suspicion of drunk driving arises, “[t]he reasonableness of the officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.” This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.

The Court acknowledged this situation was a “close call,” but agreed that “under the totality of the circumstances,” the “indicia of reliability” was enough to find reasonable suspicion to justify the investigative stop.

The Supreme Court upheld California’s ruling.

42 U.S.C. §1983 – USE OF FORCE

Tolan v. Cotton, 134 S.Ct. 1861 (2014), Decided May 5, 2014

FACTS: On December 31, 2008, Officer Edwards (Bellaire, TX) was on patrol. At around 2 p.m., he noticed a black SUV turn onto a residential street and park; two men, Tolan and Cooper, who were actually cousins, got out. Edwards keyed in the license number on his MDT but keyed it in incorrectly (one number different). Coincidentally, that incorrect plate was registered to a vehicle of the same make and color, and it was, in fact, listed as stolen. Immediately, the computer system notified other officers that Edwards was with a stolen vehicle.

Edwards got out and ordered both men to the ground. He accused them of stealing the car, to which Tolan said it was his car. Apparently Tolan complied with Officer Edwards’ order to lie on the ground, but Cooper did not. Tolan’s parents emerged, who lived at the house; his father attempted “to keep the misunderstanding from escalating into something more” and told Cooper to lie down and both to “say nothing.” Edwards told the Tolans what he suspected and Tolan’s father identified his son and his nephew. His mother told them that the vehicle belonged to the family. Eventually Sgt. Cotton arrived – he also had his firearm out. Tolan’s mother, still objecting to the situation, was ordered to stand against the garage door, to which she further complained.

At this point, it was alleged, Cotton “grabbed her arm and slammed her against the garage door with such force that she fell to the ground,” leaving bruises that lasted for days. (Cotton testified that he escorted her to the garage and that she “flipped her arm up and told her to get his hands off her.”) Tolan, allegedly, seeing his mother pushed, rose up to either his knees or his feet. He told the officer to “get his f***ing hands off my mom.” Sgt. Cotton then turned and fired three shots at Tolan, striking him once in the chest, “collapsing his

³⁷³ The Court cited to several training manuals and documents for law enforcement.

³⁷⁴ U.S. v. Arvizu, 534 U.S. 266 (2002)

right lung and piercing his liver.” Although Tolan survived, the injury ended his “budding professional baseball career and causes him to experience pain on a daily basis.”³⁷⁵

Cotton was charged with, but acquitted, of aggravated assault in the shooting. Cooper, Tolan and Tolan’s parents filed suit against Stg. Cotton for excessive force. Upon motion, the District Court granted summary judgment in Cotton’s favor, finding the force not unreasonable. Upon appeal, the Fifth Circuit Court of Appeals affirmed, holding that even if it did violate the Fourth Amendment, he was entitled to qualified immunity because Cotton “did not violate a clearly established right.”

The Tolans and Cooper requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a court required to analyze the evidence in a summary judgment case in the light most favorable to the plaintiff?

HOLDING: Yes

DISCUSSION: The Court that such questions of qualified immunity require a “two-pronged inquiry.” First, the Court must, using facts most favorable to the plaintiff, decide whether the “officer’s conduct violated a federal right”³⁷⁶ – in this case, the Fourth Amendment.

The second prong is “whether the right in question was ‘clearly established’ at the time of the violation.”³⁷⁷ Although the Court may decide these two prongs in any order, it “may not resolve genuine issues of fact in favor of the party seeking summary judgment.”³⁷⁸ This is the role of a judge in a summary judgment motion, which is only appropriate if “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.”

In use of force cases, courts are instructed to “define the ‘clearly established’ right at issue on the basis of the ‘specific context of the case.’” In this case, however, the Fifth Circuit did not analyze the evidence “in the light most favorable to Tolan with respect to the central facts of this case.” The Court looked to several points in which there was material conflict, such as the amount of light at the scene, Tolan’s mother’s demeanor, and the nature of Tolan’s statement and whether it was threatening. Critically, too, was the characterization of Tolan’s movements just prior to the shooting – and whether he was on his knees or his feet – as Tolan emphasized he was not getting up or approaching.

The Court came to the “inescapable conclusion” that the lower courts did not properly consider key evidence. The Court continued:

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial reasons.

Applying that principle, the trial court was obligated to acknowledge and credit Tolan’s evidence that was in conflict with that provided by Cotton. The Court did not express any view at this point “as to whether Cotton’s actions violated clearly established law.” The Court vacated the Fifth Circuit’s judgment and remanded it back, so that Tolan’s evidence could be properly credited and weighted.

³⁷⁵ Tolan’s father, Bobby, had a long career in Major League Baseball, playing for a number of teams.

³⁷⁶ Saucier v. Katz, 533 U.S. 194 (2001).

³⁷⁷ Hope v. Pelzer, 536 U.S. 730 (2002).

³⁷⁸ Pearson v. Callahan, 555 U.S. 223 (2009); Brousseau v. Haugen, 543 U.S. 194 (2004).

TRIAL PROCEDURE – DOUBLE JEOPARDY

Martinez v. Illinois, 135 S.Ct. 2070 (2014), Decided May 27, 2014

FACTS: In August, 2006, Martinez was indicted on charges of aggravated battery and mob action against Binion and Scott. For some four years, however, the case stalled, mostly due to delays caused by Martinez. Finally, on July 20, 2009, in the face of a pending trial date on August 3, the State moved for a continuance because it could not locate Binion and Scott. Subpoenas for the pair were issued and the case continued to September 28. Still unable to find the two men, another continuance and then another was requested by the State and given by the trial court. Finally, on March 29, another continuance was granted, apparently Binion and Scott were present, and the two men were ordered to appear on May 10, with a trial date set for May 17.

On May 17, “Binion and Scott were again nowhere to be found.” The State asked for a brief continuance and the trial court offered to delay swearing in the jurors until the entire panel was present. At that point, the State would have the choice of having the jury sworn or dismissing the case. Binion and Scott still not arriving, the trial court offered to call the other cases on the docket and delay swearing in the jury for a bit longer. When all delays had run out, and Binion and Scott still not being present, the State moved for yet another continuance. The trial court denied the motion, noting that the case had been ongoing for five years and that the two witnesses “are well known in Elgin, both are convicted felons.” Further, it stated that “one would believe that the Elgin Police Department would know their whereabouts.” The trial court offered to issue “body writs³⁷⁹” for the pair and that the state “might want to send the police out to find these two gentlemen.” The trial court noted that there were a total of 12 witnesses on the state’s list and that it could proceed with the witnesses present in anticipation of the missing pair being located and brought to court. The trial court brought in the jury and gave it the oath. Upon directing the prosecution to proceed, the prosecutor stated that “the State is not participating in this case.” After several other back and forth discussions, the defense moved for acquittal, which the trial court granted. The State then appealed, arguing that it should have been granted a continuance. The Illinois appellate court agreed that jeopardy had not attached and that the continuance should have been granted. The Illinois Supreme Court affirmed.

Martinez requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the swearing in of the jury signal the start of a trial, triggering the Double Jeopardy Clause?

HOLDING: Yes

DISCUSSION: The Court began by noting that “there are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn.”³⁸⁰ In Downum v. U.S., the Court had held that case “pinpointed the state in a jury trial when jeopardy attaches, and [it] has since been understood as explicitly authority for the proposition that jeopardy attaches when the jury is empaneled and sworn.”³⁸¹ Jeopardy attaches when a defendant is “put to trial” and that occurs when the jury is “empaneled and sworn.”³⁸²

Although the Court agreed that Martinez was subjected to jeopardy, that was not the end of the matter. The Court then looked to whether the case “ended in such a manner that the defendant may not be retried.” In this case, the Court found no doubt that was the case – as he was acquitted of the charged offenses. “Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal ... could not be reviewed ... without putting [a defendant] twice in jeopardy, and thereby violating the

³⁷⁹ In Kentucky, such writs might take the form of a “Forthwith Order of Arrest” or a “Capias Warrant.”

³⁸⁰ Crist v. Bretz, 437 U. S. 28 (1978).

³⁸¹ 372 U. S. 734 [(1963)],

³⁸² Serfass v. U.S., 420 U. S. 377 (1975).

Constitution.”³⁸³ In this case, the Court ruled that the prosecution had failed to prove its case, acquitting Martinez. The Court had tried to delay the process as long as possible but in the end, when the prosecutor refused to dismiss the case, the Court was forced to do so in the only way possible to it, by acquitting Martinez.³⁸⁴

The Court reversed the decision of the Supreme Court of Illinois and remanded the case.

42 U.S.C. §1983 – USE OF FORCE

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014), Decided May 27, 2014

FACTS: On July 18, 2004, near midnight, Lt. Forthman (West Memphis, AR, PD) pulled over a vehicle that had only one headlight. Rickard was driving; Allen was the passenger. The officer noticed that there was a large (basketball or head-sized) indentation in the windshield of Rickard’s car. He asked Rickard if he’d been drinking, which Rickard denied. Rickard did not produce an OL so the officer asked him to step out of the vehicle. Instead, Rickard “sped away.” Lt. Forthman gave chase, joined by Sgt. Plumhoff and Officers Evans, Ellis, Galtelli and Gardner. They tried a “rolling roadblock” to stop him, but were unsuccessful. The vehicles sped toward Memphis, TN, swerving through traffic at speeds in excess of 100 mph. They passed a number of vehicles during the chase.

Rickard exited the expressway in Memphis and shortly afterward, executed a sharp turn that caused him to impact Evans’ cruiser. As a result, Rickard’s car spun out and struck Plumhoff’s cruiser. “Now in danger of being cornered, Rickard put his car into reverse ‘in an attempt to escape.’” Evans and Plumhoff approached on foot, and “Evans, gun in hand, pounded on the passenger-side window.” At some point, Rickard struck yet another cruiser. Even though he was flush against that cruiser’s bumper, he was accelerating and the car was rocking back and forth. Plumhoff fired three shots into Rickard’s car; all the while Rickard was reversing in an arc and fleeing down the street. During the turn, Rickard’s actions forced Ellis to jump out of the way. Gardner and Galtelli also fired at Rickard’s car, a total of 12 shots. “Rickard then lost control of the car and crashed into a building.” Both occupants, Rickard and Allen, “died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase.”

Rickard’s daughter, Whitne, filed suit under 42 U.S.C. §1983 against the officers, the West Memphis mayor and the police chief, alleging excessive force. The officers moved for summary judgment under qualified immunity but were denied by the Sixth Circuit Court of Appeals. An appellate panel ruled that the officers’ actions violated the Fourth Amendment and upheld the denial. The officers requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is using deadly force to end a dangerous, high speed pursuit, Constitutional?

HOLDING: Yes

DISCUSSION: The Court noted that in this case, the officers acknowledged that they shot Rickard but contended that “their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law.” Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; decided legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

The officers argued two separate points – that “they did not violate Rickard’s Fourth Amendment rights and that, in any event, their conduct did not violate any Fourth Amendment rule that was clearly established at the time of the events in question.” Under Saucier v. Katz, the Court had ruled that “the first inquiry must be whether a constitutional right would have been violated on the facts alleged,” that that was modified somewhat

³⁸³ U.S. v. Martin Linen Supply Co., 430 U. S. 564 (1977);

³⁸⁴ In a footnote, the Court acknowledged that jeopardy may still have attached, however, and a retrial barred.

in Pearson.³⁸⁵ In Pearson, the Court noted that the Saucier procedure was beneficial, but need not be followed rigidly. In the case at bar, the Court began its evaluation “with the question whether the officers’ conduct violated the Fourth Amendment, finding that to be “beneficial” in “develop[ing] constitutional precedent” in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense.”

The Court began:

A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment’s “reasonableness” standard.³⁸⁶ In Graham, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” The inquiry requires analyzing the totality of the circumstances.

Using the usual precepts of Graham, the Court noted that it must analyze this situation “from the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” This allows “for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”

The estate executor made two arguments - that the Fourth Amendment did not allow the officers to use deadly force to end the chase and that even if they could fire their weapons at the fleeing vehicle, they “went too far when they fired as many rounds as they did.” The Court looked to Scott v. Harris, first, which held that ““police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”³⁸⁷ The Court found “no basis for reaching a different conclusion here.” The record disproved the claim that the chase was over at the time the shooting ended, when in fact, given that Rickard was still actively trying to escape the scene, it was not. The Court agreed that “all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.” Further, “Rickard’s conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path— underscores the point.” The Court held that it was “beyond serious dispute that Rickard’s flight posed a grave public safety risk, and here, as in Scott, the police acted reasonably in using deadly force to end that risk.”

With respect to the number of rounds fired, the Court noted that “It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.” During the ten seconds encompassing the time the shots were fired, “Rickard never abandoned his attempt to flee.” He managed to drive away and only stopped when he crashed. This was not a situation where the officers “had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.”

Even though Allen, as his passenger, was put at risk, the Court noted this case was not intended to address that concern. Her “presence in the car cannot enhance Rickard’s Fourth Amendment rights” and “after all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen’s safety worked to his benefit.”

Although the ruling in that case precluded the denial of summary judgment, the Court also noted that its decision on Brosseau v. Haugen³⁸⁸ demonstrated “that no clearly established law precluded [the officers’] conduct at the time in question.” Such cases depend “very much on the facts of each case.” Between the time the events

³⁸⁵ 533 U.S. 194 (2001); Pearson v. Callahan, 555 U.S. 223 (2009).

³⁸⁶ See Graham v. Connor, 490 U. S. 386 (1989); Tennessee v. Garner, 471 U. S. 1 (1985).

³⁸⁷ 550 U.S. 372 (2007)

³⁸⁸ 543 U.S. 194 (2004)

occurred in Brosseau and the events in this case, approximately five years, there was no showing that there had been any groundswell of case law that would have given the officers warning that their conduct, using deadly force to end a high-speed car chase, was unreasonable

The Court held that the officers were entitled to summary judgment and reversed the decision of the Sixth Circuit Court of Appeals, remanding the case for further proceedings.

FEDERAL FIREARMS LAW

Abramski v. U.S., 134 S.Ct. 2258 (2014), Decided June 16, 2014

FACTS: Abramski offered to buy a handgun for his uncle, Alvarez from a licensed dealer.³⁸⁹ Alvarez sent him a check for the purchase, noting, in the memo line, that it was for a “Glock 19 handgun.” Abramski went to Town Police Supply, where he filled out a Form 4473. He falsely checked that he was the “actual transferee/buyer” although “according to the form’s clear definition, he was not.” He also signed the certification in which he acknowledged that falsely answering the question was a federal crime. When his named cleared the background check, he purchased the weapon. Abramski deposited the check, gave the gun to Alvarez and received a receipt. Unfortunately, however, “federal agents found that receipt while executing a search warrant at Abramski’s home after he became a suspect in a different crime.” He was charged with violating 18 U.S.C. §§922(a)(6) and 924(a)(1)(A) by falsely affirming that he was the actual buyer of the handgun. Abramski argued for dismissal on the basis that his misrepresentation was not material because in fact, Alvarez could have lawfully bought it himself. The District Court denied his motion. Abramski took a conditional guilty plea and appealed. The Fourth Circuit Court of Appeals affirmed the convictions, finding that the identity of the actual purchaser was always material under federal law.

Abramski requested certiorari and the U.S. Supreme Court granted review.

ISSUE: May a weapon be purchased, under federal law, by a “straw” purchaser?

HOLDING: No

DISCUSSION: Abramski’s primary argument was that federal gun law “simply does not care about arrangements involving straw purchasers” so long as that person, standing at the counter, is legally eligible to own a gun. The Court agreed that the language of the statute did not specifically address the concept of a straw purchaser. To answer that question, the Court looked to “interpret the relevant words not in a vacuum, but with reference to the statutory context, ‘structure, history and purpose.’”³⁹⁰

The Court agreed that:

All those tools of divining meaning – not to mention common sense, which is a fortunate (though not inevitable) side-benefit of construing statutory terms fairly – demonstrate that 922, in regulating licensed dealers’ gun sales, look through the straw to the actual buyer.

The Court noted that the whole purpose of the core provisions of the law was to “verify a would-be gun purchaser’s identity and check on his background” and that the relevant information be kept in the dealer’s records. No part of that works if the statute ignores straw purchases, which would make the process simply an empty formality. Without the ability to check the information for the “actual” purchases, the provisions of the law “would be utterly ineffectual, because the identification and background check would be of the wrong person.” Further, by storing the name of the purchases, law enforcement officers might be able to find a gun at a crime scene and “they can trace it to the buyer and consider him as a suspect.” It also allows dealers to spot

³⁸⁹Because Abramski had previously been a police officer, and retained an ID card even though he’d been fired, he thought he could get a deal.

³⁹⁰ Maricich v. Spears, 570 U.S. – (2013).

suspicious purchasing practices. The Court noted that “those provisions can serve their objective only if the records point to the person who took actual control of the gun(s). At most, they may find only an intermediary, if those provisions are ignored.

Further, it noted that “Abramski’s view would thus render the required records close to useless for aiding law enforcement; Putting true numbskulls to one side, anyone purchasing a gun for criminal purposes would avoid leaving a paper trail by the simple expedient of hiring a straw.” Abramski argued that to find otherwise, a later resale of a weapon to a private party, or the purchase of a firearm intended to be a gift for another, would also not be permitted. However, the Court agreed that the “secondary market for guns” was left “largely untouched” by Congress. That “choice (like pretty much everything Congress does) was surely a result of compromise.” The court noted that “the individual who sends a straw to a gun store to buy a firearm is transacting with the dealer, in every way but the most formal; and that distinguishes such a person from one who buys a gun, or receives a gun as a gift, from a private party.” Even though there is little control in the secondary firearms market, the Court found “no reason to gut the robust measures Congress enacted at the point of sale.”

The Court concluded:

No piece of information is more important under federal firearms law than the identity of a gun’s purchaser – the person who acquires a gun as a result of a transaction with a licensed dealer. Had Abramski admitted that he was not that purchaser, but merely a straw – that he was asking the dealer to verify the identity of, and run a background check on, the wrong individual – the sale here could not have gone forward. That makes Abramski’s misrepresentation on Question 11.a. material under §922(a)(6). And because that statement pertained to information that a dealer must keep in its permanent records under the firearms law. Abramski’s answer to Question 11.a. also violated §924(a)(1)(A).

The decision of the U.S. Fourth Circuit was affirmed

FIRST AMENDMENT

Lane v. Franks, --- U.S. --- (2014), Decided June 19, 2014

FACTS: In 2006, Lane was hired to oversee a program (CITY) operated by the Central Alabama Community College (CACC). At the time, the program faced serious financial concerns and Lane did a comprehensive audit. He learned that one employee, Schmitz, who was also a state legislator, was not reporting to her office at the program to perform her duties. He was not successful in changing her conduct, so he went to the CACC president and attorney, who warned him against the political ramifications of firing Schmitz. He went back to Schmitz and admonished her to “show up to the ... office to serve as a counselor.” She refused and was promptly fired. Schmitz then told another employee that she would get back at Lane for firing her. Schmitz’s termination drew a great deal of attention, especially from the FBI.³⁹¹ Lane testified before a federal grand jury and Schmitz was indicted for theft and mail fraud. Lane again testified at two subsequent trials and, ultimately, Schmitz was convicted.

During that time, CITY experienced budget shortfalls. Franks, the new president of CACC, decided to lay off 29 program employees, including Lane, but ultimately rescinded all but two of those firings – one of the two being Lane. (Franks later stated he considered Lane to be in a different category than the rest of the employees, as he was the director.) Lane sued Franks³⁹² under 42 U.S.C. §1983, arguing that “Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz.” The U.S. District Court ruled in favor of Franks, finding that although there were questions as to Franks’ “true motivation” for the termination, that Franks would not have had reason to know that Lane’s speech was protected. The District Court ruled that because the substance of Lane’s testimony involved information he’d learned as part of his work, his speech might be considered “part of his official job duties and not made as a citizen on a matter of public concern.”

³⁹¹ The program had federal funding.

³⁹² Franks resigned during the lawsuit, and Burrow, the new president, was substituted as the official defendant.

Lane appealed. The Eleventh Circuit Court of Appeals affirmed, relying, as did the trial court, on Garcetti v. Ceballos.³⁹³ Lane filed for certiorari and the U.S. Supreme Court granted review.

ISSUE: Is testifying truthfully as to matters learned in the course of one’s employment protected speech?

HOLDING: Yes

DISCUSSION: The Court began, noting that “speech by citizens on matters of public concern lies at the heart of the First Amendment, which ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”³⁹⁴

Further:

This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights.”³⁹⁵ There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For [g]overnment employees are often in the best position to know what ails the agencies for which they work.³⁹⁶ The interest at state is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.³⁹⁷

In Pickering v. Board of Education, however, the Court had given government employers some ability to control the speech and actions of its employees. It created a balancing test to analyze “whether the employee’s interest or the government’s interest should prevail in cases where the government seeks to curtail the speech of its employees.” If the speech involves a matter of public, rather than private, concern, the speech must be permitted. However, under Garcetti, the Court developed an additional two-step inquiry:

The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. In short, in Garcetti, the Court ruled that when a public employee speaks as to their official duties, they “are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.”

The Court then moved on to the question raised by Lane, “whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.” Clearly his testimony concerned a matter of public concern and “truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.” This remains the case “even when the testimony relates to his public employment or concerns information learned during that employment.” The Court noted that “sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.” Apart from any employer obligations, the Court agreed, the employee has a clear obligation “to speak the truth.”

³⁹³ 547 U.S. 410 (2006).

³⁹⁴ Roth v. U.S., 354 U.S. 476 (1957).

³⁹⁵ Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U. S. 589 (1967); Pickering v. Board of Education, 391 U. S. 563 (1968); Connick v. Myers, 461 U. S. 138 (1983).

³⁹⁶ Waters v. Churchill, 511 U.S. 661 (1994).

³⁹⁷ San Diego v. Roe, 543 U.S. 77 (2004).

Court precedent has “recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.” In Roe, the court observed that Government employees “are uniquely qualified to comment” on “matters concerning government policies that are of interest to the public at large.” It is even more critical in the context of this case, public corruption, which often require fellow public employees to testify.

The Court continued:

It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials – speech by public employees regarding information learned through their employment – may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

The Court agreed that Lane’s speech was “speech as a citizen.” Further, it also clearly involved a matter of public concern, as defined as speech that can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”³⁹⁸ The analysis turns on the “content, form, and context” of the speech. The speech in this case, which was sworn testimony, was fortified by being made “under oath” and under circumstances that had “the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others.”³⁹⁹

The final inquiry was whether CACC had “an adequate justification for treating the employee differently from any other member of the public” based on its internal needs. Here, however, the CACC’s “side of the Pickering scale is entirely empty,” there was simply no “government interest that tips the balance in their favor.” Lane’s testimony was not false or erroneous, and it did not disclose any “sensitive, confidential, or privileged information.” The Court ruled that he was entitled to First Amendment protection. The Court did, however, agree that Lane’s claims against Franks, as an individual, must be dismissed under qualified immunity, as the matter had not been clearly established at the time Franks terminated Lane. This did not, however, resolve the claim against the new president of CACC, who represented the position (president) in her official capacity.

The U.S. Supreme Court affirmed the decision of the Eleventh Circuit with respect to the individual claim against Franks, but reversed the dismissal of the remaining claims. The court remanded the case for further proceedings.

FEDERAL LAW – BANK FRAUD

Loughrin v. U.S., --- U.S. --- (2014), Decided June 23, 2014

FACTS: Pretending to be a missionary, Loughrin went door-to-door in a Salt Lake City neighborhood. He “rifled through residential mailboxes and stole any checks he found.” In some cases, he was able to alter the checks to remove existing writing and filled them out “as he wanted,” in other cases, he “did nothing more than cross out the name of the original payee and add another.” On at least one occasion, he was “lucky enough to stumble upon and blank check,” whereupon he filled it out and forced the account holder’s name. As many as six were cashed through Target, and he would buy merchandise, then return and exchange the goods for cash. Each of the checks cashed at Target when through a federally insured bank. In three instances, Target recognized the checks as frauds and did not submit them for payment, three others were cashed. In at least one instance, the bank declined payment, the evidence was unclear as to what happened with the other two.

³⁹⁸ Snyder v. Phelps, 562 U.S. – (2011).

³⁹⁹ U.S. v. Alvarez, 567 U.S. --- (2012).

Eventually Loughrin was apprehended and charged with six counts of bank fraud, under 18 U.S.C. §1344. He was convicted and appealed. The Tenth Circuit Court of Appeals affirmed. Loughrin requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is the presentation of a fraudulent bank check to a merchant bank fraud?

HOLDING: Yes

DISCUSSION: The question before the Court was “whether the Government must prove yet another element; that the defendant intended to defraud a bank.” In other words, more than just intending to get money, that it was necessary to specifically intend to deceive a bank. Loughrin argued that he only intended to deceive Target, not the bank.

The Court, however, disagreed, finding, that Loughrin’s crime occurred by his making of false statements, “in the form of forged and altered checks, that a merchant would, in the ordinary course of business, forward to a bank for payment.” As such, the Court agreed, his conviction was proper.

SEARCH & SEIZURE – CELL PHONE

Riley v. California / U.S. v. Wurie, --- U.S. --- (2014), Decided June 25, 2014

FACTS: In the first case, Riley was stopped in Los Angeles police for expired registration tags, it was then learned that his license was also suspended. His car was impounded and searched pursuant to the agency’s inventory policy. Two handguns were found, and Riley was then arrested for the concealed weapons. Riley was searched and items associated with gang activity were found. The officer seized Riley’s smart phone from his pocket, “accessed information on the phone and noticed that some words (presumably in text messages or a contacts list)” also suggested involvement in gang activity.

Two hours later, a detective specializing in gangs “further examined the contents of the phone,” looking for potential evidence such as photos or videos. He found, in particular, a photo of Riley standing in front of a vehicle suspected of being involved in a recent shooting. Riley was charged in that shooting, with enhancements for committing the crimes to benefit a criminal gang. Riley moved to suppress the evidence obtained from the phone, which was denied. Riley was convicted and the California appellate courts affirmed his conviction.

In the second case, Wurie was observed by Boston police during routine surveillance making an “apparent drug sale from a car.” He was arrested, taken to the station and two phones were seized. One, a “flip phone,” was “repeatedly receiving calls” from a number identified on the phone’s external screen as “my home.” They opened it and saw, as the phone’s wallpaper, a woman and a baby. They were able to track the number to an apartment building. There, they saw that Wurie’s name was on the mailbox and through a window, saw a woman who appeared to be the one in the photo. They secured the apartment, obtained a search warrant and eventually found drugs, weapons and cash. Wurie, a felon, was charged with distribution of drugs and possession of the firearms. He moved for suppression and was denied. He was convicted but upon appeal, the First Circuit Court of Appeals reversed his conviction.

In both cases certiorari was requested and the U.S. Supreme Court granted review.

ISSUE: May a cell phone be routinely searched incident to arrest?

HOLDING: No

DISCUSSION: The Court noted that both cases “concern the reasonableness of a warrantless search incident to a lawful arrest.” In Weeks v. U.S., the Court had ruled that it had long been recognized that it was permissible to “search the person of the accused when legally arrested to discover the seize the fruits or evidences

of crime.”⁴⁰⁰ Although usually called an exception, in fact, the Court agreed, that was “something of a misnomer,” since “warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.” Since that time, the scope of such searches has been debated, with three specific cases illustrating the parameters of the argument.

In Chimel v. California, the Court “laid the groundwork for most of the existing search incident to arrest doctrine.”⁴⁰¹ In Chimel, the Court agreed it was reasonable to search the person to remove any weapons or items that might be used to aid in an escape. It further noted it was “entirely reasonable for the arresting officer to search for and seize any evidence ... to prevent its concealment or destruction.” In U.S. v. Robinson, the court applied the rule to the contents of a cigarette package found on the person of an arrested subject and ruled that a “custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”⁴⁰² That was clarified in U.S. v. Chadwick, however, which ruled that a locked footlocker in the possession of the arrested subject could not be searched incident to arrest.⁴⁰³ Finally, in Arizona v. Gant, the Court emphasized that “concerns for officer safety and evidence preservation underlie the search incident to arrest exception.”⁴⁰⁴

Moving to the specific issue of “how the search incident to arrest doctrine applies to modern cell phones,” the Court noted that they “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” Although such phones were unknown just ten years ago, now, it noted “a significant majority of American adults now own such phones.” Even though Wurie’s was a “less sophisticated” phone than Riley’s, that model had only “been around for less than 15 years.” Both were based on technology that was “nearly inconceivable” when Chimel and Robinson were decided.

The Court noted that balancing tests created in earlier cases simply did not apply ‘with respect to digital content on cell phones’ and found little to no risk of harm or destruction of evidence “when the search is of digital data.” Although an arrested subject loses a great deal of privacy rights, “cell phones ... place vast quantities of personal information literally in the hands of individuals.”

Further, the Court agreed:

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Although the Government in both cases suggested that there might be indirect ways that searching the phone might protect officers, the Court found that there had been no proof in either case that such “concerns are based on actual experience.’ To the extent that a particular case might have such an issue arise, the Court found it to be “better addressed” by treating it as a specifically articulated exigency based upon specific facts.

In both cases, the Government focused primarily, however, on the destruction of evidence prong. In both cases, it was argued that:

... that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone,

⁴⁰⁰ 232 U.S. 383 (1914)

⁴⁰¹ 395 U. S. 752 (1969)

⁴⁰² 414 U. S. 218 (1973)

⁴⁰³ 433 U. S. 1 (1977)

⁴⁰⁴ 556 U.S.332 (2009); A further exception allowed under Gant, searching for evidence related to the crime of arrest, stemmed from “circumstances unique to the vehicle context.”

connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called “geofencing”).

In addition, it argued that encryption is a security feature in some phones, used along with passwords/codes. When locked, the information is inaccessible unless the password is known. In the case of remote wiping, the primary concern is not with the arrested subject, who cannot access the phone, but with third parties. However, the Court noted that it had been given no evidence that “either problem is prevalent” – as it had been provided with “only a couple of anecdotal examples of remote wiping triggered by an arrest.” With respect to searching a phone before the password triggers the phone to lock down, the Court noted that law enforcement officers are “very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity.” Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

The Court noted that remote wiping can be prevented by disconnecting the phone from the network, by turning it off, removing the battery or placing the phone in a Faraday bag to isolate it from signals. While this is not necessarily a “complete answer to the problem,” it is, at least a reasonable response, already in use by some law enforcement agencies. The Court agreed, however that if there truly is an exigent circumstances, especially one with life-or-death consequences, “they may be able to rely on exigent circumstances to search the phone immediately.”⁴⁰⁵ Or, if the phone is unlocked, secure it so that it does not automatically lock.⁴⁰⁶ The theoretical threat of a remote wipe of the data, alone, is not sufficient, however, to be considered an exigent circumstances, particularly since it can be, as a rule, prevented by alternative means.

The Court agreed that although an arrested subject has “diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” Despite the assertion that a search of a cell phone, in the context of an arrest, is “materially indistinguishable” from the search of other items in their possession.

The Court continued:

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term “cell phone” is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in Chadwick, rather than a container the size of the cigarette package in Robinson.

In addition, a cell phone can contain “many distinct types of information” that together can be used to reconstruct “the sum of an individual’s life.” The Court contrasted a note with a person’s phone number to a “record of all ... communications” – and in some cases, the content of that communications, with that same individual, as might be found on a cell phone. Normally, a person would not carry about “sensitive personal

⁴⁰⁵ Missouri v. McNeely, 133 S.Ct. 1552 (2013)

⁴⁰⁶ See Illinois v. McArthur. 531 U.S. 326 (2001).

information” every day, but now, that is done routinely. The Court noted that the vast majority of adults “keep on their person a digital record” of their lives, from the “mundane to the intimate.” Not only in quantity is it different, but also in quality – for example, an Internet browsing history, historic location data, various apps that might suggest a person’s private life.

In U.S. v. Kirschenblatt, it was observed that : it is “a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.”⁴⁰⁷ However, “If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”

To further complicate matters, a cell phone may be used to access a wealth of data located elsewhere, in what is called “cloud computing.” In fact, it may not even be readily known whether a particular piece of data is one the phone itself ... or located elsewhere and simply being access through the phone. Arguing that such data would be access with would be analogous to “finding a key in a suspect’s pocket and arguing that it allowed law enforcement to unlock and search a house.”

The Court noted that agencies should, of course have protocols, but that “the Founders did not fight a Revolution to gain the right to government agency protocols.” All of the options argued before the court were found to be unfeasible and unacceptable, The Court emphasized. However, that it was not holding that a cell phone is immune from search, only that a warrant will generally be required prior to a search, unless another recognized exigent circumstance applies.

The Court concluded:

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

...

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

The Court reversed the judgment in Riley and affirmed the judgment in Wurie.

FIRST AMENDMENT

McCullen v. Coakley, --- U.S. --- (2014), Decided June 26, 2014

FACTS: In 2000, Massachusetts enacted a state law “designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed.” That law established a buffer zone of an 18 foot radius around entrances and driveways. Anyone could come inside that area, but they could not approach another within six feet without consent to give them a leaflet or handbill, or to counsel or educate them. A separate provision prohibited blocking access to the location. In 2007, the statute was being considered inadequate to address problems that were occurring, in particular, that protestors were violating the buffer zone regularly and congregating in the area. Boston police had made only a

⁴⁰⁷ 16 F.2d 202 (2nd Cir. 1926).

few arrests, however, and that when prosecutions did occur, they were unsuccessful, because deciding whether a person had approached another intentionally was virtually impossible in the crowded space. In response, Massachusetts amended the statute, creating instead a 35 foot fixed buffer zone “from which individuals are categorically excluded.” (Only those working at the clinic, patients, public responders and utility workers and those using the sidewalks to reach other destinations were permitted inside the zone.)

The individuals who stand outside such clinics include actual protestors as well as those who engage in “sidewalk counseling,” offering alternatives to abortion and assistance. McCullen, the primary petitioner in this case, falls into the latter category. As a result of the 2007 statute, McCullen was no longer able to stand on a 56-foot length of public sidewalk in front of the clinic. Other petitioners, at two other clinics, were prohibited from the one area of the public sidewalk where they might, in fact, be able to influence those coming to the clinic. (In those cases, those coming to the clinics would enter through a private driveway and parking in a private lot, areas they could not enter.) All argue that since the 2007 law took effect, they “have had many fewer conversations and distributed many fewer leaflets.” In a related issue, it was noted that the clinics were permitted to hire escorts, and that the escorts would thwart their attempts to talk to the patients by blocking access physically and verbally.

In 2008, McCullen (and the others) sought an injunction; The District Court denied it and the First Circuit Court of Appeals affirmed. After additional legal proceedings, McCullen petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: May a fixed buffer zone around an abortion clinic (or other facility) prohibit activity on a public sidewalk or other traditional public fora?

HOLDING: No

DISCUSSION: The Court noted that the very language of the statute limited access to the public sidewalks, areas that occupy a “special position in terms of First Amendment protection.”⁴⁰⁸ These public areas, labeled “traditional public fora” – have since time immemorial “been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” The Court noted that such areas “remain one of the few places where a speaker can be confident that he is not simply preaching to the choir.” In all other means of communication, the hearer can turn away and tune out the message – but not so on the public streets and sidewalk. Historically, the court had held that any attempt to restrict speech in that area must be very, very limited, although the government is permitted to “impose reasonable restrictions on the time, place or manner of the speech, so long as the restriction is narrowly drawn and content-neutral.

In this case, McCullen argued that virtually all of the speech that is affected by the law relates to abortion, to which the Court disagreed, as it did not mention the content of speech on its face, and in fact, its primary purpose was public safety to avoid unsafe interactions between the two sides of the issue. The court noted that “obstructed access and congested sidewalks are problems no matter what caused them,” and “compromise public safety.” The statute was limited to such locations because there was only a regular problem at such locations.

McCullen also argued that the exemptions to the statute serve to favor one side of the debate over the other. With respect to the speech of the escorts, the Court agreed that if it went beyond the scope of their employment, it would violate the express language of the statute, it might constitute selective enforcement, but that claim was not before the Court.

Finding the case to not be either content nor viewpoint based, it moved on to analyze it under the strict scrutiny standard. The court agreed that although it was legitimate to be concerned about public safety, that the “buffer zones impose serious burdens” on speech by carving out and designating as prohibited significant portions of public sidewalks. McCullen noted that she was forced to raise her voice to be heard by those within that area, which was at odds to the message she wanted to convey. McCullen and the others were forced to stay so far back

⁴⁰⁸ U.S. v. Grace, 461 U. S. 171(1983).

that by the time they realized an individual was a patient, it was too late to engage in face to face conversation or pass on a leaflet before that individual entered the prohibited zone. The Court specifically noted that the alternatives offered by the Government, chanting and showing signs, missed the point, as McCullen and the others are not protestors. They believe that their objective can only be met by “personal, caring, consensual conversations.” In all three locations, they are not seeking a right to enter private property, but only to stand on the public sidewalks.

The Court agreed that the “buffer zones burden substantially more speech than necessary” to achieve the state’s interests. The state already has a law that criminalizes harassment and related conduct. Specific obstructions, too, can be addressed through existing local ordinances that prohibit impeding free travel on public rights-of-way. Injunctive relief against a particular, offending individual is also a valid option, as it “focuses on the precise individuals and the precise conduct causing a particular problem.” Further, since it was acknowledged that there were only a few locations, and that the areas and the parties were well known to local law enforcement, the Court found no reason that they could not take specific action against individuals flouting the law, if necessary. Further, although it agreed that a fixed zone makes it easier for law enforcement, the Court noted “that is not enough to satisfy the First Amendment” and the need to narrowly tailor such restrictions. Also, the Court noted it did not “think that showing intentional obstruction is nearly so difficult in this context as [the state] suggest[s]. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.” Since a significant police presence has routinely been in place at these locations, detecting lawbreakers should not be difficult.

The Court concluded that sidewalks and other traditional public fora “have hosted discussions about the issues of the day throughout history.” Taking the “extreme step of closing a substantial portion of a traditional public forum to all speakers,” “without seriously addressing the problem through alternatives,” is not consistent with the First Amendment.

The First Circuit’s decision is reversed and the case remanded.

Department of Criminal Justice Training Research & Learning Resources

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Students attending courses at the Department of Criminal Justice Training may use the Kentucky Virtual Library (KVL), as well as, other online scholarly research sites for any class research assignments. The steps to obtain research materials from KVL are listed within this document.

Along with these sites instructors may have specific research requirements within their class. In such cases, instructors will advise you of any specific research locations prior to the assignment. If no specific research requirements are identified you may wish to use other online search engines to obtain valid resources such as Google Scholar © (<http://scholar.google.com/>) or Academic Index © (<http://www.academicindex.net/>).



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Accessing Kentucky Virtual Library Resources

Because KYVL databases are limited to Kentucky citizens, KYVL must have some way to confirm your residency.

The easiest way to do this is to ask users to access KYVL through their local public library.

There are three methods for obtaining access to KYVL this way:

Accessing Through the Library's Web Site

Many large public libraries provide access to KYVL databases, as well as additional resources, to anyone with a library card. To find out if your library provides this type of access, follow these instructions:

1. Go to your public library's web site.*
2. Look the section of the site labeled research, online databases or virtual resources. (This will vary from library to library.)
3. Click through to the list of resources or a specific databases (for example: EBSCOhost).
4. Enter your library card number.

Requesting a Username/Password via Phone

While the instructions above will work with many public libraries in Kentucky, there are still several libraries that will simply link to the KYVL website, where you will be required to enter a specific KYVL-created login. In this case, you will need to contact the library directly to obtain a username and password.*

Helpful hint: All KYVL logins have the same format, a 10-character username and 8-character password. Double check the username and password your library gives you to make sure it follows these guidelines.

Request a Username/Password Directly from KYVL

If you are unable to obtain a login via the above methods, you can request this information directly from KYVL by filling out the form located [HERE](https://kyvl.custhelp.com/app/ask) (<https://kyvl.custhelp.com/app/ask>) Please note that KYVL staff will only be available to provide logins during regular business hours. Any request submitted after 4:30 PM Monday - Friday will not be fulfilled until the next business day.

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docjt.legal@ky.gov

Please remember to include your name, rank, agency and a contact number should we need further information regarding your inquiry.

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

Please allow two to three business days for us to review and respond to your inquiry.

