THIRD QUARTER
KENTUCKY

PENAL CODE – KRS 500 – DEFINITIONS

McGeorge v. Com., 2016 WL 4488159 (Ky. App. 2016)

FACTS: Over the course of a May, 2014 weekend, Scott McGeorge beat his wife Samantha and strangled her multiple times. The last time, she later stated, "he thought he had killed her." The weekend before, Samantha had stabbed Scott in the shoulder and he'd fractured three of her ribs. Once he realized how badly she was bruised up, he would not let her leave the house. McGeorge kept her bound for a period of time, then released her, but would not let her call for assistance. On Monday, he went to work and a friend stopped by, not having heard from Samantha. When she saw her, she called for police. When Deputy Quillen (Bell County SO) arrived, he found the house so dark he had to use his flashlight. He found Samantha "severely beaten, trembling, avoided eye contact with him, and she could barely walk." He saw bruising over Samantha's body and duct tape residue on her wrists, from where she'd been bound. Deputy Quillen had been to domestic calls there previously. At the ER, the doctor confirmed the prior rib breaks and detailed extensive bruising. She also reported a "stunning" or "seeing stars" sensation from being assaulted, but she did not report having lost consciousness or having any amnesia. The doctor later reported some minimal head trauma, at the least, that could cause problems in the future.

Scott was charged with Assault. He testified that Samantha had fought with him and he defended himself. He was convicted of Assault 2nd and appealed.

ISSUE: Is medical testimony required to prove a serious physical injury?

HOLDING: No

DISCUSSION: At issue was the severity of Samantha's injuries, whether serious or not. The Court looked at the definition of serious physical injury in KRS 500.080. In Com. v. Hocker, [m]edical testimony is not an absolute requisite to establish serious physical injury or even physical injury[,]" and a "victim [i]s competent to testify about [their] own injuries."[1] However, in this case, a doctor had provided detailed testimony, especially regarding the head injury. Samantha also described her injuries and how she was unable to work. The Court agreed that physical injury was unquestioned, at issue was whether an Assault 2nd occurred with a serious physical injury. The Court agreed the proof was sufficient and upheld his conviction.

PENAL CODE – KRS 515.. - ROBBERY

Searcy v. Com., 2016 WL 4487507 (Ky. 2016)

FACTS: On the day in question, Searcy drove to his friend Harrod, along with her children. to a doctor's appointment. On the way home, and due to, he alleged, "his active methamphetamine addiction," he went into a paranoid delusional episode. As Searcy drove past a mobile home park where he worked, "he became paranoid after seeing people there." He believed "people were out to get him, and his goal then became to not stop the car." When forced to stop because of traffic, Searcy "snapped." Believing the man on the moped behind him had a gun and was getting ready to shoot him, he accelerate and rammed the vehicle in front of him. Harrod, terrified, demanded he stop and he did so. He then jumped out, took off running and called for help. "An elderly man, later identified as Donald Cooke, stopped his car and Searcy got in." Cooke drove off, with Searcy "crouching in the passenger seat to avoid detection." Searcy's paranoia intensified and he fought Cooke for the wheel. "Searcy threw Cooke from the driver's side door, tossed Cooke's oxygen tank

[1] Com. v. Hocker, 865 S.W.2d 323 (Ky. 1993).

on top of him, and also threw his dog out the window. As a result of his injuries, he died a little over a week later. (The dog survived.)

Searcy was indicted on Capital Murder, Robbery and Unlawful Imprisonment (4 counts). He was convicted of Manslaughter 1st, Robbery 1st and Unlawful Imprisonment. He appealed the Robbery conviction.

ISSUE: Is underlying motive a factor in why someone commits a theft/robbery?

HOLDING: No

DISCUSSION: Searcy argued that his actions were triggered by a legitimate – albeit drug-induced – fear for his life and he didn't intend to deprive Cooke permanently of his car. He points to the fact that he actually took off on foot to his lack of intent to steal the car.

The Court looked to the elements of the charge, with Searcy only challenging the subjective intent to commit a theft. The Court found ample intent, however, including his own statements that he was trying to get into the driver seat to drive away. He had Cooke's keys in his possession when captured.

The Court noted:

> We are unprepared today to allow a defendant's drug-fueled paranoias to insulate him from the realities of his actions.

The Court noted it did not matter why Searcy thought he needed to take the car, only that he intentionally engaged in a course of physical actions that culminated in his forcible removal of Cooke, that ultimately killed him. Further, the Court agreed that an attempted robbery instruction was unnecessary, even though he did not succeed in actually taking it, as that isn't an element of Robbery

The Court upheld his conviction.

PENAL CODE – KRS - FLEEING & EVADING

Willis v. Com., 2016 WL 4487202 (Ky. 2016)

FACTS: At about 7:30 p.m. on January 9, 2014, Willis and Moran (his girlfriend) were sitting on a road in Leitchfield. Officer Townsend (Leitchfield) spotted them and stopped to make sure everything was alright. Willis drove off, apparently not responding to the deputy. In respond, Deputy Townsend went after him, lights and siren activated, although he'd not actually seen anything done that was improper.

> What some might consider a "low speed" (or at least non-high-speed) chase ensued. While being pursued, Willis drove through a stop sign and a red light. There were no other cars or pedestrians near those intersections when this occurred. Officer Townsend called for backup when it became apparent that Willis was not going to stop but eventually called off the chase to avoid endangering himself and the officer that had joined in pursuit.

When the deputy returned to where the chase had started, he found coffee filters with methamphetamine on the ground. He had not seen anything tossed but believed they came from the Willis vehicle. Five days later they found the car and traced it back to the Gearys. Sarah Geary stated she'd allowed Moran and Willis to borrow the car but it had not been returned. Geary consented to a search and items connected to methamphetamine manufacturing were found.

Willis and Moran were arrested, but Willis denied owning the drug items found. Both were indicted on a variety of drug charges. Moran testified against Willis, claiming she'd tossed the filters out at his direction. She stated Willis had the drugs before they met up and had brought items to make methamphetamine. They drove the borrowed vehicle until it ran out of gas, then called the Gearys to tell them where the vehicle was. Willis was convicted of some of the offenses, including Fleeing and Evading 1st, and appealed.

ISSUE: Does Fleeing and Evading 1st require proof of additional aggravating circumstances?

HOLDING: Yes

DISCUSSION: Willis argued that his conduct did not rise to the level of Fleeing and Evading 1st because it did not implicate one of the "four listed aggravating circumstances" – specifically, it did not create a "substantial risk, of serious physical injury or death to any person or property."[2] The Court looked to the dash cam video of the chase, which included Willis going through a red light and stop sign. "There was no evidence that any other motorists or pedestrians were near the intersections when this occurred." Travel was within the normal speed for the roads, although apparently a little over the speed limit. There was no erratic driving and only a small amount of ponded water on the road. Certainly, the Court agreed, there had been no one injured so they only legal question was whether there was any substantial risk of it. The Court looked to other cases and differentiated them, noting that in this case, there was little to no traffic and that running traffic control devices (when oncoming traffic could have been clearly seen due to headlights) was not risky behavior under the circumstances – and in fact, he braked and slowed as he approached. The Court declined to make such a chase a "strict liability" offense, in which it "would be essentially holding that anytime a person runs a stop sign or red light, no matter the circumstances, they have per se created a significant risk of death or serious physical injury." The court overturned his conviction, but noted he could be retried for the 2nd degree of the offense. Likewise, his Wanton Endangerment conviction must also fail.

Finally, the Court agreed that Willis could not be charged with having a precursor when the items for which he was charged, such as lithium battery strips, iodized salt and coffee filters, were not precursors under the statute. That charge, too, must fail.

Finally, the Court addressed his argument that his recorded statements to the police should not have been admitted. The Court looked at what was actually said and agreed that Willis never actually asked for an attorney when Townsend explained what was going to happen with him. Townsend simply mentioned that the Commonwealth's Attorney would be involved and agreed that Willis could have an attorney if he wished. "At no point during the police interview does Willis ask for a lawyer. He had been given Miranda and agreed to talk." Officer Townsend's "repeated questions, 'You wanna help yourself out and make it go away?" and similar statements to that effect" and discussion about various charges were not improperly coercive and at no time did the officer make any false assurances that his statements would not be used against him.

The Court looked to a possible additional problem, however:

> … namely, that Officer Townsend's statements may have amounted to "illusory promises" of leniency. "In this context, an illusory promise is a statement in the form of a promise, but lacking its substance in that it does not actually commit the police to undertake or refrain from any particular course of action."[3] Illusory promises of leniency deliberately used to induce inculpatory statements may be coercive and render the resulting inculpatory statements involuntary and inadmissible.[4] authority over the prisoner at the time, are not considered

[2] KRSs 520.095.

[3] U.S. v. Johnson, 351 F.3d 254, 262 n.1 (6th Cir. 2003); see also Stanton v. Com., 349 S.W.3d 914, 919 (Ky. 2011) ("One way in which investigators can overreach is to promise leniency in return for a confession .... Such promises ... are generally improper, as investigators are seldom in a position to honor them.").

[4] Com. v. Cooper, 899 S.W.2d 75, 79 (Ky. 1995) ("It is a general rule that confessions which are induced by hopes ... raised by the promise[s] ... of the prosecutor, or of any person having

> voluntary, having been made under mental duress, and therefore not competent."). Typically, a totality-of-the circumstances approach is used to determine whether such coercion was sufficient to overbear the will of the suspect so as to render the suspect's inculpatory statements involuntary and inadmissible.[5]

However, the Court agreed, because the error was not preserved, it could not address it further, given that in fact, he made no inculpatory statements during the interview, only exculpatory denials. The Court upheld only his possession of methamphetamine conviction.

Durbin v. Com., 2016 WL 4410089 (Ky. App. 2016)

FACTS: On April 14, 2013, KSP did a traffic safety checkpoint at the intersection of two highways in Edmonson County. At about 8:30 p.m., Durbin approached and proceeded through, ignoring Trooper Newkirk's order to stop. Trooper Newkirk then pursued him, with emergency equipment activated and using his PA to order him to stop. Durbin continued to drive, at one point , signaling the trooper "with a hand gesture outside the car." About a mile later, having been travelling at about 30 miles an hour, Durbin pulled into a friend's driveway. He further ignored the trooper's order not to pull down the long driveway close to the house.

When Trooper Newkirk approached Durbin, he smelled alcohol and found Durbin's eyes to be bloodshot. Durbin acknowledged he'd seen the trooper and failed three FSTs. He admitted he had smoked marijuana. Inside the vehicle, an open beer bottle and empty vodka bottle, along with marijuana, were found. He refused all testing and was charged with Fleeing and Evading and related drug charges. (He was not apparently, charged with DUI.)

At trial, there was testimony about the meaning of the hand gesture, which the trooper interpreted to mean "what do you want? What have I done? Why are you bothering me?" Durbin testified that it was intended to "inform the officer that he would pull over."

Durbin was convicted and appealed.

ISSUE: Is simply ignoring an order to stop fleeing and evading?

HOLDING: Yes

DISCUSSION: Durbin argued that he drove slowly throughout the "pursuit" and not erratically or dangerously. The court noted that the fleeing or evading statute did not mention such factors as necessarily to find guilt, but an intent to flee "can be inferred from the act itself and the surrounding circumstances."[6] In this case, Durbin admitted he heard and saw the trooper yet did not stop, and that is sufficient to infer an attempt to evade.

With respect to the hand gesture, Durbin argued it was improperly admitted as an opinion. The Court agreed that the Trooper could testify as to what he (as the recipient) thought the gesture meant, but of course, he could not testify as to what Durbin himself actually meant. He "merely recalled how he perceived the gesture at the time Durbin made it." It also emphasized that the gesture indicated that Durbin knew the trooper was there, despite what he may have meant by it. Despite his argument that it put him in an "unflattering light," the Court noted that "little evidence the Commonwealth bring in an effort to convict someone would not." The Court agreed it was properly admitted.

Finally, with respect to, apparently, an argument that he was forced to categorize the trooper as untruthful (when he apparently had testified there was sufficient space for Durbin to have stopped on the road), the Court agreed that was improper to attempt to get him to do so, but did not find the error to be so serious as to warrant reversal.

[5] *See* Smith v.Com., 722 S.W.2d 892 (Ky. 1987).
[6] Com. v. Suttles, 80 S.W.3d 424 (Ky. 2002).

The Court upheld his conviction.

JUVENILE

B.H., A Child Under Eighteen v. Com., 494 S.W.3d 467 **Ky. 2016**

FACTS: B.H., "Bill", a juvenile, was charged with multiple public offenses based on sexual conduct with his also-juvenile girlfriend, "Carol." He gave an "unconditional admission" to charges that were amended down and was adjudicated. Allegedly the couple, ages 15 and 13, had sex and they exchanged nude photos. One of Bill's charges was a felony, but it was amended down. Carol was not charged. Bill then appealed to the Circuit Court, which affirmed on the basis that he entered an unconditional admission to the offenses, and eventually, the case came to the Kentucky Supreme Court. (At issue was the fact that although the charge did not mandate sexual offender treatment, the Court had the discretion to require it, and did, and he was removed from his home and placed with DJJ.)

ISSUE: Is charging one juvenile with a sex offense involving another juvenile, when it is consensual, questionable?

HOLDING: Yes

DISCUSSION: The Court noted that the terminology in juvenile cases differs considerably from that in adult court. Juveniles lack certain rights, such as the right to a jury trial, and their proceedings are confidential. Juveniles cannot be classified as convicted felons. Juveniles do not enter guilty pleas, but do enter admissions, which amount to the same thing. Bill was subjected to the Boykin colloquy, just as adult defendants.[7]

The Court noted that :

> There are very real and important questions about whether prosecuting Bill and not prosecuting Carol, if the two juveniles are similarly situated, constitutes impermissible unconstitutional disparate treatment. There is the very real question of whether the two juveniles were actually similarly situated or not. Certainly this case raises questions of public debate about whether male and female sexual offenders face a double standard. There is also an interesting discussion about whether a child who is incapable of consenting to certain conduct can be guilty of committing that conduct on another child also incapable of consenting to the conduct. But none of these questions can be answered in this case because this is not a proper appeal of the district court's disposition of this juvenile case.

The Court agreed that since Bill took an unconditional plea, it could not reach the merits of the issue and dismissed the case. In a concurring opinion, however, the Court noted its concern over the selective prosecution, placing fault against "Romeo" rather than "Juliet." The Court noted the Bill was considered a "normal, male teenager" without any sex offender pathology, as assessed, and that in effect, there was a "race for absolution" by Carol's parents. Further, the Court noted, girls are considered to mature both mentally and physically faster than boys. Carol had "hosted these sexual encounters at her own home" and Bill's mother was also aware that they were having sex – but all of the blame settled on Bill. The Court noted there was a "very real question of whether the two juveniles were actually similarly situated or not," and whether what occurred constituted "impermissible unconstitutional disparate treatment" and a double standard between male and female offenders. The Court noted that the goal of a juvenile adjudication is to instill respect for the system,

[7] Boykin v. Alabama, 395 U.S. 238 (1969); The admonishments and advisements given by a judge to a criminal defendant prior to accepting a plea of guilty or nolo contendere. The plea colloquy is intended to ensure that the defendant is making the plea knowingly, intelligently and voluntarily.

but that Bill was taking all of the blame, and his "partner in crime totally disappear[ing] off the radar screen as soon as her parents showed up at the courthouse."

The Court upheld his plea.

CONTROLLED SUBSTANCES

Patterson v. Com., 2016 WL 3962282 (Ky. App. 2016)

FACTS: **"**In April 2014, Patterson was arrested in Henderson, Kentucky at a scene where several people were suspected of participating in drug use inside of a parked vehicle. Patterson was sitting in the passenger side seat. When officers approached the vehicle, Patterson was instructed to keep his hands visible. Officers stated that Patterson initially placed his hands on the dashboard but kept lowering them to his side. When ordered to do so by the officers, each time he placed his hands back on the dashboard. Patterson then jumped out of the vehicle and ran but was soon apprehended. The arresting officer noticed a syringe on the ground close to the area where Patterson was handcuffed and taken into custody. The syringe was later determined to contain methamphetamine residue. No drugs were found on Patterson during a search of his person incident to the arrest.

Patterson was charged with Possession of a Controlled Substance, Drug Paraphernalia and related offenses. At trial, none of the officers indicated they'd seen him put anything into his pockets or anything fall or be thrown from his pockets. Patterson stipulated that the syringe contained methamphetamine but argued that he did not possess it. Patterson was convicted of Possession and of Fleeting and Evading. He then appealed.

ISSUE: Can one be convicted for possessing a drug but not the container (syringe) it is in?

HOLDING: Yes

DISCUSSION: Patterson argued that he couldn't be convicted of possession of the drug, but not the syringe (the paraphernalia). The Court looked at whether the verdicts were inconsistent.[8] Even though they might be, arguably, "jurors are not required to weave an unbreakable thread of uniformity through them to build a neat and perfect story of criminal activity. Jurors are expected to analyze the evidence presented at trial against each charge individually and determine if such evidence is sufficient to support a guilty verdict. Unless the plain language of the relevant statute demands otherwise, each count in an indictment is an entity unto itself and must be weighed in that fashion by jurors. Criminal counts are not meant to be bound together. If the Commonwealth fails to present sufficient evidence to meet the elements of a specific count, then it is the duty of jurors to acquit on that specific count." In this case, the Court upheld the conviction for the possession.

DUI

Gooch v. Com., 2016 WL 3905620 (Ky. App. 2016)

FACTS: On October 13, 2013, Officer Agayev (Lexington PD) arrested Gooch on suspicion of DUI, after he ran his car into a ditch. Gooch failed FSTs and admitted to having had 5-6 bourbon drinks. His arrest narrative read as follows:

> *Listed vehicle was subject of ATL for reckless/drunk driving with comp [sic] following the vehicle. Listed vehicle was then observed by security staff at Link Belt driving recklessly on the property and then driving into the ditch. Upon arrival officers located the vehicle still running and driver inside. The driver was assisted out of the vheicle [sic] and out of the ditch.*

[8] Com. v. Harrell, 3 S.W.3d 349 (Ky. 1999):

The driver had strong odor of alcoholic beverege [sic] on his person, was confused, had slurred speech and was extrenly unstebale [sic] on his feet.

Gooch refused a breath test but agreed to a blood test, and blood was drawn. He moved to suppress that evidence, arguing that he was not offered the chance to have an independent blood test. The Court admitted a copy of the Implied Consent Agreement provided to Gooch, and that he signed. He did not, however, sign below the paragraph that indicated he wanted his own blood test afterwards. (The officer indicated he agreed to the blood test, after the refusal of the breath test, because Gooch had been cooperative.) The officer testified "that he did not allow Gooch to submit to an independent test because he was disqualified due to his failure to comply with the Implied Consent Agreement by refusing to take the breath test. He explained this to Gooch as well. Gooch said he understood that he did not have the option to take an independent blood test at his expense because he had not complied with the Implied Consent Warning."

Gooch argued at trial that there was a conflict between KRS 189A.105(4) and KRS 189A.103(7). The trial court "agreed with the Commonwealth's interpretation and held that Gooch did not have the right to an independent test because he had refused Officer Agayev's request that he submit to a breath test." When his motion to suppress was denied, Gooch took a conditional guilty plea and appealed.

The Circuit Court upheld the trial court's ruling, and Gooch was given a discretionary review to the Kentucky Court of Appeals on the issue.

ISSUE: Must a subject consent to all officer-requested DUI tests before they are entitled to an independent test?

HOLDING: Yes

DISCUSSION: The Court looked to:

> … Com. v. Duncan,[9] [in which] the Supreme Court explained Kentucky's Implied Consent law:
>
> The General Assembly enacted Kentucky's Implied Consent law, found in KRS 189A.103(1), which provides that by virtue of driving on Kentucky's roadways, a motor vehicle operator implicitly consents to the testing of his or her breath, blood, and urine for the purpose of determining the individual's BAC. Of course, Kentucky's Implied Consent law is not absolute. The driver has the freedom to refuse to submit to any form of testing.[10] However, refusal to submit to testing can result in the immediate suspension of the driver's license and a double minimum jail sentence.[11] Moreover, such refusal can be used in court as proof of the driver's guilt.

The Court noted that KRS 189A.103 provides for the consent to test for alcohol or other substances in blood, breath or urine, and allows a defendant to have independent testing after they submit to all of the officer's testing, while KRS 189A.105 addresses the ramifications of refusing. In Duncan, the Court addressed the order and timing of tests, and the Court agreed,

> "Once the suspected impaired driver has met the requirements set forth in KRS 189A.103 and submitted to all of the testing the police officer may request, the person's right to request an independent blood test will be triggered by KRS 189A.105(4). Only after a person "has submitted to all alcohol concentration tests and substance tests requested by the officer" will that person be permitted to request such a test. KRS 189A.105(2)(a)3 is clear in that a

[9] 483 S.W.3d 353 (Ky. 2015).
[10] See KRS 189A.104.
[11] See KRS 189A.105(1) and (2)(a)(1).

> person's right to request an independent blood test arises only after he or she has submitted to all of the tests the officer requests: "[I]f the person first submits to the requested alcohol and substance tests, the person has the right to have a test or tests of his blood performed . . . ." KRS 189A.105(4) then provides that once the final test the officer requested is administered, the officer must immediately inform the person again of his or her right to request the test or tests, but this subsection presumes that the person has submitted to all of the tests the officer requested.

In this case, since Gooch did refuse the breath test, he was not entitled to an independent blood test. The Court upheld the denial of the motion to suppress, and affirmed his plea.

Com. v. Hon. Judge Burke (Jefferson District Court), 2016 WL 5320368 **Ky. App. 2016**

FACTS: On February 11, 2014, Judge Burke (Jefferson District Court) issued an order which denied the County Attorney's motion to "require the defense in a DUI case to submit all motions to suppress no later than thirty days before trial." Her order was based on RCr 9.78, which ostensibly prohibited any restriction of when evidentiary / suppression hearings could be held in a criminal case.

The Commonwealth filed in the Circuit Court for a writ of prohibition and/or mandamus. The Commonwealth argued that such orders had been issued in other courts and that denying the order meant that prosecutors faced suppression hearings in the middle of trials, when jeopardy had already attached. The Circuit Court denied the motion. The Commonwealth appealed. However, before the case moved forward, the rule in question was revoked and replaced with RCr 8.27, which required that such motions be filed before trial. Judge Burke moved to dismiss the underlying case, but the Commonwealth appealed that, asking that the appeal be heard, as part of her order had indicated that making such motions would trigger potential sanctions against county attorneys.

ISSUE: Are prosecutors entitled to demand suppression hearings occur before a trial?

HOLDING: Yes

DISCUSSION: The Court dismissed the petition as moot due to the change in the rule.

RESTITUTION

Bentley v. Com., 2016 WL 4056411 (Ky. App.. 2016)

FACTS: Bentley was involved in a theft that involved stolen firearms. Bentley was offered a plea that required him to pay the victim, directly, $1,000 and the victim's insurance company $11,000. He accepted the plea conditioned on the right to appeal the payment to the insurance company, and appealed. Bentley argued that restitution could only be to the victim, for their out of pocket expenses, and that the insurance company should be required to sue him.

ISSUE: Is restitution limited to out of pocket costs?

HOLDING: Yes

DISCUSSION: Bentley argued that Clayborn v. Com., and KRS 533.030(3) "limits restitution to the victim's actual out-of-pocket expenses."[12] He specifically referenced an opinion by the Attorney General, as well, although acknowledging such opinions are not binding. The Commonwealth argued that in fact, insurance companies can be considered victims under Com. v. Morseman.[13]

[12] 701 S.W.2d 413 (Ky. App. 1985).
[13] 379 S.W.3d 144 (Ky. 2012).

The Court acknowledged that the law on the issue is both conflicting and confusing. The Court also looked at Blevins v. Com., in which Blevins was ordered to pay money to the ASPCA, which had given money to Rowan County on Blevins' animal cruelty case, with the Court in the case finding that the ASPCA was not a victim under KRS 532.020(3).[14] In this case, the Court agreed, the insurance company did not suffer direct expenses as a result of Bentley's crime, but "instead paid damages under a contract of insurance."

The Court upheld the payment to the Meades and reversed the payment to the insurance company.

FAMILY / DOMESTIC VIOLENCE

Tapscott v. Ordway, 2016 WL 5497072 (Ky. App. 2016)

FACTS: Ordway and Tapscott were romantic partners and roommates in Jefferson County. On February 9, 2015, Ordway requested a DVO, claiming that Tapscott had yelled at her, threatened to attack her and tried to punch her, but missed. Tapscott also tried to contact her at work and on social media. Ordway listed several other incidents as well, of actions that were not specifically violent. Tapscott did not appear at the scheduled hearing.

Later, however Tapscott tried to set it aside, claiming to have been laid up with a broken knee. Her counsel had tried to get a continuance but had contacted the wrong court. The Court set it aside and rescheduled a hearing. At that hearing Ordway contradicted herself, denying that Tapscott had ever physically swung at her. Tapscott claimed that Ordway had been the aggressor in an incident. The trial court again ruled against Tapscott.

Tapscott moved to set it aside, noting she'd not entered any evidence at trial and the Ordway had perjured herself. Denied, she appealed.

ISSUE: Is a credible threat all that is needed for a DVO?

HOLDING: Yes

DISCUSSION: The Court looked at the standard for entry of a DVO. The Court agreed that even removing the disputed testimony, the evidence supported Ordway's claim she'd been threatened. The court upheld the DVO, despite the conflicting evidence.

Malone v. Brown, 2016 WL 5485217 (Ky. App. 2016)

FACTS: On September 11, 2015, Brown requested a DVO in Jefferson County. She claimed she'd lived with Malone for a few weeks and was pregnant with his child. On September 5, they gotten into an argument in which she'd slapped him and he strangled her. Later that day, he threw her to the ground and dragged her out of the house. Brown claimed that Malone then began posting false information about her on social media.

Malone filed a sworn cross-petition, claiming that Brown had slapped and punched him. A hearing was held on the matter and concluded that each party would get a no-contact DVO against the other. Malone appealed.

ISSUE: Is sharing a bedroom for several weeks enough to be considered living together?

HOLDING: Yes

DISCUSISON: Malone argued that the court lacked jurisdiction and that he and Brown were not living together at the time, as required. As such, she lacked standing for the DVO. Under Barnett v.

[14] 435 S.W.3d 637 (Ky. App. 2014).

Wiley, the Court considered what "living together" meant.[15] Malone argued that Brown had been a guest in his home, that she did not pay any expenses and that they did not represent themselves as a couple. The Court noted that given lifestyles today, it would be impossible to fully define cohabitation. In this case, Brown had moved to Louisville because she was pregnant and she shared a bedroom with Malone. They were also looking for an apartment together when the trouble arose. The Court agreed that Brown had standing to bring the case.

The Court upheld the mutual DVOs.

NOTE: *With the changes in Kentucky law, this issue has become, to some extent, moot.*

A.F. v. Cabinet for Health and Family Services, 2016 WL 4410081 (Ky. App. 2016)

FACTS: Dep. Starkey (Webster County SO) provided security at an apartment complex where A.F. and her six year old daughter lived. Since he lived on the premises, he was known to the residents. He received a call from Richmond, who lived next door to A.F. She indicated she heard a "thump" about 10 p.m. on May 14, 2015, and the deputy went to investigate. He found all the doors and windows locked. Richmond (and her husband) indicated they thought the daughter was alone and that A.F. had left to drive her boyfriend to Madisonville.

Dep. Starkey called A.F. and she agreed the daughter was alone. He received consent to go in and check on the daughter, and found her asleep. Starkey stayed near the apartment until A.F. returned, having been gone about 45 minutes. The deputy reported the situation to a social worker, who proceeded in a neglect case against A.F. At the subsequent hearing, A.F. claimed that Richmond had agreed to watch the daughter while she was gone, but the neighbor indicated that she'd not specifically agreed to the time in question, and that, after all, the apartment door was locked. (She apparently stated to the deputy that "she had not thought about how anyone could check on the child if the door was locked," although she was adamant at the hearing she'd left the door unlocked.)

The Court found her guilty of neglect, but did not remove the daughter from the home. A. F. appealed.

ISSUE: Is leaving a child under seven unsupervised neglect?

HOLDING: Yes

DISCUSSION: A.F. argued that the facts did not support a decision that she'd neglected her daughter. The Court looked to KRS 600.020 and the social worker testified that they considered leaving a child under seven alone/unsupervised was considered a "high risk factor." The Court agreed that A.F. driving away that night, knowing her daughter was alone, constituted neglect. The Court upheld the conviction.

McKinney v. Petterson / A.W., 2016 WL 5318778 (Ky. App. 2016)

FACTS: McKinney is the girlfriend of Wissinger, who is also the father of the minor child in question, A.W. Wissinger and Petterson, the mother, were involved in a divorce. When the child was returned to Petterson following a multi-week visitation with her father, Petterson noticed a burn and took her for treatment. She requested a DVO, based on the child telling her that she'd been burned with a cigarette by McKinney. (McKinney acknowledged the burn, but stated it was an accident.) Testimony was introduced that indicated it was a deliberate, rather than accidental burn, with medical evidence being introduced through the investigator.

An EPO and then a DVO was issued against McKinney, who then appealed.

[15] 103 S.W.3d 17 (Ky. 2003).

ISSUE: Should medical evidence be introduced by an investigator?

HOLDING: No

DISCUSSION: Although the testimony was subject to challenge, McKinney, unrepresented in the hearing which is not uncommon in such proceedings, did not object to the way the evidence was introduced. The Court agreed it was improper to introduce the evidence that way. However, the Court noted, the Court had the opportunity to judge the credibility of McKinney and elected to believe that the wound was intentional. The Court upheld the DVO.

DeAngelo v. DeAngelo, 2016 WL 5318618 (Ky. App. 2016)

FACTS: The DeAngelos were married for 13 years and shared four children. Their divorce was fraught with animosity. Michelle sought a DVO, alleging her husband threatened to kill her and that he had a gun. He also, according to a witness, had thrown a diaper bag at Michelle. The Court issued the DVO and William appealed.

ISSUE: Is the Family Court vested with the ability to make credibility decisions?

HOLDING: Yes

DISCUSSION: The Court looked at KRS 403.740 which vests the Family Court with the ability to make such decisions, and the court found a preponderance of the evidence that concluded that William's conduct met the necessary standard. The Court upheld the DVO.

Revell v. Hernandez, 2016 WL 4410084 (Ky. App. 2016)

On July 25, 2015, Revell obtained an EPO against her live in boyfriend, Hernandez, in Jefferson County. He did not appear at the scheduled hearing and the DVO was issued. At that hearing, Revell testified that they fought physically and that he choked her after he told him to leave her home. The trial court, however, ruled that domestic violence had not occurred and declined to issue the DVO. Revell appealed.

ISSUE: Is choking sufficient for a DVO?

HOLDING: Yes

DISCUSSON: Revell argued that her testimony, uncontested, was sufficient to prove that domestic violence had occurred, under KRS 403.752. Under Caudill v. Caudill, the domestic violence statutes "should be construed liberally in favor of protecting victims from domestic violence and prevent future acts of domestic violence."[16] The trial judge apparently relied on the testimony that they were "mutually fighting" and that Revell was attempting to keep Hernandez from leaving in her vehicle. However, the Court agreed that in fact, domestic violence was shown, and reversed the denial of the DVO.

Cosby v. Springfield, 2016 WL 3962280 (Ky. App. 2016)

FACTS: Springfield and Cosby had a child together, K.C. Cosby was convicted of sexually assaulting Springfield's older child, A.B. During his incarceration, Springfield and Cosby corresponded by mail. In September, 2014, Cosby sent several letters in which he "threatened to do anything possible to see his child, K.C., and made numerous other sexually explicit and harassing statements." He stated he wasn't afraid of an EPO or DVO because he was already incarcerated. Spring requested a DVO for herself and her children, citing the letters and a contact through social media from one of Cosby's friends.

[16] 318 S.W. 3d 112 (Ky. 2003).

Cosby testified by phone and noted that Springfield had been communicating with him and sent him money. Springfield agreed that she had done so, but that when the letters became threatening, she was worried about A.B. Oliver, Cosby's mother, also testified. Springfield stated she wanted no contact with Cosby. The trial court referred the visitation matter to a paternity ruling and awarded the DVO.

Cosby filed a motion, arguing that at the time, Springfield was living in Illinois. Springfield had testified that at the time she filed, she was living in McCracken County. She claimed to move back and forth between the states.

ISSUE: May an individual from out of state get an EPO in Kentucky?

HOLDING: Yes

DISCUSSION: The Court noted that Springfield lived in McCracken County at the time of the sexual abuse and when she received the letters, and even when she filed the DVO. The Court upheld the DVO.

SEARCH & SEIZURE – SEARCH WARRANT

Malone v. Com., 2016 WL 4056413 (Ky. App. 2016)

FACTS: On July 22, 2011, Louisville Metro PD officers executed a search warrant at a residence. The warrant provided for a search of the home, certain vehicles and Malone himself, and the narrative stated:

> Affiant received information from Confidential Informant (CI) who pursuant to the Kentucky Rules of Evidence 508 is knowledgeable of the ways drugs are packaged and sold due to his/her involvement in the illicit world of drug trafficking. This informant is versed in the ways drugs are packaged, possessed, sold, and distributed. This informant stated that a B/M by the name of "Darnell" is selling drugs from a house on the corner of Third Street and Amherst. CI further stated that the house sits across from the Speedway and there is an unknown vehicle covered by a gray cover sitting near the garage. CI stated that "Darnell" has a blue/gray Chevy and a red mustang that CI has seen drugs in before. CI also stated that "Darnell" has a twin brother named "Darryl" who also sells drugs and was recently released from incarceration. After receiving this information, affiant was able to get possible last name of "Malone" as well as a photo and verify that the subject of this warrant is "Darnell Malone".

When they arrived, a male (Malone) "ran out of the front door and through the front yard where he was apprehended by one of the detectives. As he was running, Malone threw a set of keys, which police officers recovered and determined opened the front door to the residence." Malone was brought back inside and held during the search, during which a large amount of cocaine was found. Mail, medication and a social security card, bearing Malone's name, and four vehicles registered to him were also located there.

Malone was indicated on Trafficking and he moved to suppress, arguing the search warrant was insufficient. That was denied and during the trial, he testified he did not live at the suspect residence, but instead, with his mother. He stated the mother of his child and his child lived at the suspect address. (He stated he was only at the house because he was looking for his brother, Daryl, as he listed that address as his home.) Malone was convicted and appealed.

ISSUE: May corroborated tips be used to support a warrant?

HOLDING: Yes

DISCUSSION: Malone argued that the warrant was barebones and that the CI was not adequately corroborated. The Court noted that "pursuant to Gates, a trial court should "make a practical, commonsense decision whether, given all circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place."[17] With respect to anonymous tips, the Court "should continue to consider an anonymous or confidential informant's "veracity" and "basis of knowledge," just not as "two largely independent channels" but as elements of the totality of the circumstances, and "examples of strong showings of reliability include: unquestionably honest citizens who come forth with information that if fabricated might subject them to criminal liability; highly explicit and detailed information along with a statement that the event was observed first-hand; and corroboration of details of an informant's tip by independent police work."[18]

In this case, the Court found that there was a "substantial basis" to agree that probable cause existed. The tip was well corroborated by the detective, and within 48 hours of getting the warrant, the detective had "conducted and observed a controlled buy from someone who came in and out of the residence, was enough for the trial judge to conclude that the confidential informant was reliable and that there was probable cause to search the residence. The informant told police that a person matching Malone's description sold drugs out of the residence and that turned out to be true.[19] He was distinguished from his twin by his name. (Nor did that matter, as no contraband was found on his person.)

Further, the Court agreed, he was in constructive possession of the cocaine and the evidence closely tied him to the home, even though he claimed not to live there.[20] He was alone at the house when police arrived, had keys and had personal belongings and vehicles there. His flight indicated he was aware of the drugs.

Malone's conviction was affirmed.

SEARCH & SEIZURE – PLAIN VIEW

Schmuck v. Com., 2016 WL 5247755 (Ky. 2016)

FACTS: Leitchfield police received complaints about possible drug activity at Hicks' home. A CI had reported sales of hydrocodone and morphine, and that Hicks had also used and made methamphetamine. Using a pharmacy log, the officers learned that five people had used Hicks' address to purchase Sudafed.

They sought a search warrant, using the names of the five people who had purchased Sudafed. At the house, however, they found Schmuck at the home. He later asserted he'd been staying there for several weeks. He was in the carport when they arrived and he was searched. His room and personal items in the room were also searched. Based upon what they'd found, he was arrested. He was convicted of manufacturing methamphetamine, possession of synthetic drugs and possess of paraphernalia. He then appealed.

ISSUE: Does a regular overnight guest have some expectation of privacy?

HOLDING: Yes

DISCUSSION: Schmuck argued that he had a reasonable expectation of privacy in his room and his belongings. The court agreed that he did have standing to raise the issue under Minnesota v.

[17] Illinois v. Gates, 462 U.S. 213 (1983).
[18] Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).
[19] *See* Taylor v. Com., 987 S.W.2d 302 (Ky. 1998).
[20] Houston v. Com., 975 S.W.2d 925 (Ky. 1998); Pate v. Com., 134 S.W.3d 593 (Ky. 2004).

Carter.[21] The Court then outlined what was needed to determine if he did, in fact, have it, and whether the warrant was enough to allow the search of the space in which he claimed privacy.

In addition, Schmuck argued it was improper to show a photo of him handcuffed outside the residence. The Court agreed that although not universally prohibited, such an admission must be very carefully balanced and should be reviewed.

The Court reversed his conviction on unrelated issues and addressed the above issues as guidance to the trial court in a retrial.

SEARCH & SEIZURE – PLAIN VIEW

Jones v. Com., 2016 WL 4488158 (Ky. App. 2016)

FACTS: On February 28, 2014, Cynthiana officers had information about Jones's whereabouts – they had an arrest warrant for him. Assistant Chief Denton and Officers Kiskaden, Raims and Batte when to the location. As the officers approached, the apartment door opened and Tucker emerged. He was pulled out and put on the ground. Jones claimed that he began to exit and Officer Kiskaden pushed him back inside – this was corroborated by Tucker and Wornall, another visitor. The officers, however, said that Jones had not emerged, but instead backed inside when he saw them. Eventually, Officer Kiskaden scuffled with Jones and arrested him in the living room. At that point, Officer Kiskaden and Asst. Chief Denton spotted drugs and paraphernalia in the living room and Officer Kiskaden spotted a shotgun behind the front door. They secured the scene and got a search warrant.

Jones was indicted on possession of the drugs and the weapon. Jones moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does plain view require the officers to be in a place where they were lawfully permitted to be when they viewed the contraband?

HOLDING: Yes

DISCUSSION: Jones argued that the officers "were not lawfully in the spot from which they observed the contraband because they unlawfully dragged Jones into the living room. " The Court agreed it came down to credibility and that the officers lawfully entered, pursuant to an arrest warrant. "An arrest warrant authorizes a limited invasion of the arrestee's privacy interest in order to execute the warrant. A valid arrest warrant also permits the police to enter the home of the arrestee to serve the warrant."[22] Once he was secured, two officers spotted the paraphernalia which was in plain view, and knew it to be incriminating. [23]

The Court upheld his plea.

SEARCH & SEIZURE – TERRY

Boyd v. Com., 2016 WL 3886525 (Ky. 2016)

FACTS: On August 19, 2013, Det. Wolff (Lexington PD) and others "went to Green Acres Park" to find Boyd, to gain his assistance in a homicide investigation. The officers knew Boyd had a previous homicide conviction in which a firearm was used. At about 11 p.m. they drove past the park and saw a number of people loitering there, although the park was closed. They entered the park on

[21] 525 U.S. 83 (1998)
[22] McCloud v. Com., 279 S.W.3d 162 (Ky. App. 2007).
[23] Chavies v. Com., 354 S.W.3d 103 (Ky. 2011).

foot, wearing street clothes and marked vests. The officers approached 10 people standing in the parking lot, not knowing if Boyd was in the group.

Det. Wolff spoke to the person closest to him, who remained silent and handed him ID. At that point, Det. Wolff realized he was speaking to Boyd, so Wolff took his hands and had him sit on the pavement. When Wolff asked him about weapons, Boyd pulled his arm away and dumped narcotics onto the pavement. Boyd then tried to get up and other officers rushed to assist. They gained control of him, handcuffed and frisked him, and a loaded firearm was found in his pocket. (Boyd's testimony differed somewhat, with him arguing that Wolff searched his pockets at the outset.) He testified that he did not have any drugs in his possession. The trial court elected to believe the officer's testimony and agreed the officers had a right to stop the men in the park to investigate, including Boyd. The search that revealed the firearm was incident to the arrest for the narcotics.

Boyd was convicted of possession of the firearm, as he was a convicted felon, along with possession of the drugs and CCDW. He appealed the firearms conviction.

ISSUE: Does a Terry stop necessarily carry some authority to use physical force?

HOLDING: Yes

DISCUSSION: The Court first looked at whether the officers' actions were justified at the outset, whether they had "reasonable, articulable suspicion" to justify an investigatory stop.[24] The Court agreed that "trespassing and loitering alone provide sufficient reasonable suspicion for an officer to stop and question a subject."[25] The Court noted that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it."[26] In addition, officers are authorized to take action to protect themselves and "maintain the status quo."[27] Although a Terry stop (and frisk) must be limited to what is necessary, in this case, the Court found that the stop and the frisk was appropriate, as the officer knew the Boyd had previously committed a homicide with a firearm and that the suspicion was that Boyd was trafficking in narcotics and would likely be armed for that reason, as well. The officer was justified in maintaining control over Boyd during the interaction.

The Court upheld the conviction.

SEARCH & SEIZURE – VEHICLE STOP

Com. v. Smith, 2016 WL 4934498 (Ky. App. 2016)

FACTS: Det. Qualls (Franklin County SO) was conducting surveillance on Smith, having received tips that he was trafficking in cocaine. (Smith was on parole for the same crime.) He and Captain Wyatt were doing so, with Deputy Eaton on standby with a K-9. Smith later testified that he saw Qualls and knew he was under surveillance. Smith went home, entered his apartment and then left to buy gas, with the officers trailing behind. Det. Qualls, parked nearby, saw Smith meet with another individual that lived in the same apartment complex. They met briefly at the vehicle. Smith went home for a few minutes and then left again. Qualls, following behind, saw that Smith failed to use his turn signal and contacted Deputy Eaton to make the stop, because his own unmarked car lacked lights and siren.

Deputy Eaton made the stop and had the "standard conversation" with him about the stop. Smith denied having drugs in the vehicle. Deputy Eaton had his dog do a sniff and the dog alerted on the

[24] Frazier v. Com., 406 S.W.3d 448 (Ky. 2013); U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).
[25] Simpson v. Com., 834 S.W.2d 686 (Ky. App. 1992).
[26] Williams v. Com., 147 S.W.3d 1 (Ky. 2004). The court also cited to an Illinois case that stated that "it would be paradoxical to give police the authority to detain pursuant to an investigatory stop yet deny them the use of force that may be necessary to effectuate the detention." People v. Starks, 546 N.E.2d 71 (1989).
[27] U.S. v. Hensley, 469 U.S. 221 (1985).

driver's side door. Deputy Eaton had Smith get out and in a subsequent search, 7 grams of cocaine were found in the front seat. Smith had $4,299 in cash as well.

Smith was charged with Trafficking. He moved to suppress and that was granted. The Commonwealth appealed.

ISSUE: May officers rely on tips from other officers to take actions?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that as a parolee, Smith was not entitled to deny the search. However, that issue was not raised before the trial court and the Court refused to consider that claim. The Commonwealth argued as well that Qualls' observation of the traffic violation was enough to justify the stop by Eaton. The trial court had ruled that the officer that made the stop must have witnessed the offense themselves, which did not occur.

The Court noted that "officers are permitted to, and regularly do, rely on hearsay in the form of tips from informants, some of whom are anonymous, to justify traffic stops.[28] In this case, since the information came directly from another officer, there was no need for Eaton to verify the information. In addition, it could be justified under the "collective knowledge" rule, in which what Qualls knew could be imputed to Eaton.[29]

However, the Court agreed, the drug sniff was outside the bounds of a traffic stop and that he immediately did the sniff upon initiating the stop. He made no attempt to even write a citation until after the drugs were found. In this case, the Court agreed, the "drug sniff unreasonably prolonged the stop because it was performed before the citation was even written."

The Court upheld the suppression of the evidence.

Moberly v. Com., 2016 WL 3886314 (Ky. App. 2016)

FACTS: In the wee hours of a December morning, Officer Sorrell (Lexington PD) ran the tags on Moberly's vehicle. Although the tag appeared current, in fact, the registration has been cancelled because of a lack of insurance. Moberly made a stop at 3:35 a.m.

Moberly produced a valid OL but lacked other documents. He stated he did not own the car. Officer Sorrell testified later that Moberly was extremely nervous and sweating (on a cold day) and kept blowing the smoke for his cigarette and looking to the right. The officer completed the paperwork and ran Sorrells through several databases, learning that Moberly had been charged the prior year for trafficking in marijuana and CCDW, but he could not tell the disposition of the cases. He returned to the car and asked Moberly if he had drugs or weapons in the car, which Moberly denied. He refused consent.

Moberly returned to his vehicle to complete the paperwork and called for a K-9. Officer Jones arrived at 3:59 a.m. and walked the car around the vehicle, while Moberly was outside the vehicle. The dog alerted on the driver's side. The officers searched, finding cocaine and methylone (originally thought to be heroin) in the glove compartment, along with a stolen handgun under the driver's seat. Moberly was arrested. The entire time frame was approximately 45 minutes. Moberly was charged with what was found.

[28] Navarette v. California, 134 S.Ct. 1683 (2014); Adams v. Williams, 407 U.S. 143 (1972).
[29] Com. v. Vaughn, 117 S.W.3d 109 (Ky. App. 2003).

Moberly argued that the stop was "unreasonably prolonged" because Sorrells did not have reasonable suspicion to detain him beyond the time needed to issue the citations. The trial court disagreed. Moberly took a conditional plea and appealed.

ISSUE: May a traffic stop be extended if suspicious facts are developed?

HOLDING: Yes

DISCUSSION: The Court agreed that under the Fourth Amendment, the "duration and scope of a traffic stop are limited."[30] It is improper to hold beyond the completion of the initial traffic stop unless something has occurred to give the officer reasonable suspicion. Moberly argued that checking the databases was not warranted and that holding him for the dog was improper. The Court noted that based upon the officer's observations, the officer's further investigation was justified, even though each of the elements along did not create reasonable suspicion.[31] The Court agreed that the case was easily distinguished from Rodriguez v. U.S., which held that a "routine traffic stop may not be extended to include a dog sniff in the absence of reasonable suspicion"[32] – since in fact, the officer had enough to "justify the officer expanding the scope of the stop to include the minimal intrusion of running his name through the database." Once he learned of the possibly pending charges, that allowed a brief detention, which led to the arrest.

The Court upheld his plea.

INTERROGATION

Martin v. Com., 2016 WL 4575672 (Ky. App. 2016)

FACTS: In 2009, Martin was charged with Sodomy, Sexual Abuse and Incest over events with his 4-year-old step-granddaughter in Hardin County. He took a guilty plea, but moved to withdraw that plea at sentencing. That was denied. He made a post-conviction appeal arguing ineffective assistance of counsel. When that was denied, he further appealed.

ISSUE: Does intoxication necessarily make an interrogation invalid?

HOLDING: No

DISCUSSION: Martin claimed, among other issues, that his attorney was deficient when they did not move to suppress the statements he made to the police, "on the ground that he was heavily intoxicated" at the time. The Court looked at the situation and agreed that "the fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference."[33] The Court must look at potential coercion, sufficient to overbear the individual's will.[34] Or, it continued, it must suppress if the individual was "intoxicated to the degree of mania," was hallucinating, functionally insane from intoxication or otherwise unable to understand what was going on, which would make it unreliable.

The Court found no evidence of coercion. Although it took place in the middle of the night and Martin was tired, he was easily able to answer questions. He admitted he'd taken two Percocet but denied that he needed medical attention. When the detective left the room, he laid his head on the table to rest. He was not able to provide a written statement, however, he had signed a waiver of his Miranda rights. The Court noted that even apparent subsequent amnesia did make the statement inadmissible.[35] Nothing indicated his confession was not voluntary and informed.

[30] U.S. v. Davis. 430 F.3d 345 (6th Cir. 2005); Turley v. Com., 399 S.W.3d 412 (Ky. 2013).
[31] Simpson v. Com., 834 S.W.2d 686 (Ky. App. 1992).
[32] 575 U.S. --- (2015).
[33] Peters v. Com., 403 S.W.2d 686 (Ky. 1966).
[34] Smith v. Com., 410 S.W.3d 160 (Ky. 2013).
[35] Britt v. Com., 512 S.W.2d 496 (Ky. 1974).

As such, the Court agreed, a motion would have been futile and concluded his counsel had not been ineffective. The court upheld his plea.

French v. Com., 2016 WL 5320048 (Ky. App. 2016)

FACTS: While in custody, French confessed to a robbery in Shelby County and "volunteered a confession relating to another, similar robbery which took place in Henry County." He later repeated that confession to the Henry County authorities. French later argued that he was intoxicated on drugs, having ingested four doses, when he confessed. He was charged in the Henry County case.

French later took a plea to both robberies, with the sentences being served together. He brought a post-conviction motion that his counsel was deficient for failing to move to get the confession suppressed. The trial court denied that motion and he appealed.

ISSUE: Is self-reported intoxication sufficient to claim a high level of intoxication for interrogation purposes?

HOLDING: No

DISCUSSION; The Court noted that "French offered scarcely more than allegations that he was intoxicated" at the time of his confession. He filed medical records in which he "self-reported" he'd taken controlled substances that day, The Court found no indication that he'd met the requirements of Hill v. Anderson[36] or Halvorsen v. Com.[37] The Court agreed there was no evidence that he was "either coerced or extraordinarily intoxicated." Further, he seemed quite content to enter his plea and that he clearly understood his options. The Court upheld his plea and sentence.

SUSPECT IDENTIFICATION

Mwendapeke v. Com., 2016 WL 4709141 (Ky. App. 2016)

FACT: On January 8, 2013, Burns was robbed at gunpoint in the parking lot of her Louisville apartment building. She was able to get a license plate and note a vehicle description. Her cell phone was taken, but her son's father arrived moments later and she used his phone to call 911. Officer Jones arrived and she gave him a detailed description, further noting that she knew the robber "from somewhere, but could not place him." Officers used the plate information to connect it to a vehicle; Det. Bruce spotted the vehicle and seized Mwendapeke, the driver.

Although the stolen items or a gun were not found in the vehicle, a movie rented with Burns' debit car was found. Burns was brought to the scene and immediately identified Mwendapeke. He was arrested and charged.

Mwendapeke moved for suppression of the show-up identification. Following a hearing, the court upheld the identification. He was convicted at trial and appealed.

ISSUE: Are all identification processes suggestive to some extent?

HOLDING: Yes

DISCUSSION: The Court looked at the law on identification, which included Moore v. Illinois and Neil v. Biggers.[38] The Court agreed that all identification proceedings are suggestive to some extent, but

[36] 300 F.3d 679 (6th Cir. 2002).
[37] 730 S.W.2d 921 (1986).
[38] 434 U.S. 220 (1977); 409 U.S. 188 (1972).

that it was permitted if under the totality of the circumstances, the identification was reliable. There was some discussion as to who first brought up Mwendapeke's name but the Court agreed that it accepted that Burns' in fact recollected the name on her own. The Court found the issue to be immaterial, however. Although the process was suggestive, using the Biggers factors, the Court agreed that the process was reliable.

The Court upheld his conviction.

Jackson v. Com., 2016 WL 3962611 (Ky. App. 2016)

FACTS: Jackson was charged with 19 counts of Burglary 2nd and related offenses. He had been identified by the resident of one of the homes. Before trial, the Court held a suppression hearing on the issue of the identification. Det. Horn (Louisville Metro PD) testified that he did two different identification sessions with the witness. In the first, he showed the witness a photopak in which the witness did not identify Jackson (or anyone else, although he indicated another photo closely resembled the suspect). He was provided a second photopak that included Jackson, with a new booking photo taken when Jackson was arrested for another offense and it excluded the other individual who "resembled" the suspect. In that one, he identified Jackson.

At the hearing, an eyewitness identification expert testified. He stated that a brief encounter was not enough to "establish a 'robust' face memory." Further, the expert stated that when trying to identify someone after the fact, the brain will register familiarity, but will not tell a person the source of that familiarity. This can lead to what Dr. Lyle identified as "source confusion." In this case, the witness may have been confused because he'd seen Jackson in the previous photopak. The Court denied the motion, finding the identification reliable. Jackson appealed.

ISSUE: May two different photos of a suspect, in two different photopaks, be used?

HOLDING: Yes

DISCUSSION: The Court began:

> The Due Process Clause forbids the admission of identification testimony where there exists a "very substantial likelihood of irreparable misidentification."[39] A suggestive pre-trial identification can impermissibly taint later in-court identifications by the same witness.[40]

In Kentucky, to evaluate the admissibility of an in-court identification by a witness following an allegedly suggestive pre-trial identification by the same witness, we follow the two-step approach outlined by the U.S. Supreme Court in Biggers.[41] In Grady, the Kentucky Supreme Court explained the analysis as follows:

> … when a defendant alleges that an in-court identification has been tainted by a pre-trial identification, a court must answer two questions: (1) was the first, pre-trial identification unduly suggestive; (2) if the pre-trial identification was unduly suggestive, does there exist an independent basis to support the reliability of the in-court identification so that the unduly suggestiveness of there-trial identification becomes moot. To determine whether an independent basis of reliability exists, the court must consider, under the totality of the circumstances, the five Biggers' factors: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of his prior description of the criminal;4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and confrontation.[42]

[39] Neil v. Biggers, supra.; Oakes v. Com., 320 S.W.3d 50 (Ky. 2010); Dillingham v. Com., 995 S.W.2d 377 (Ky. 1999).
[40] Moore v. Com., 569 S.W.2d 150 (Ky. 1978).
[41] See Grady v. Com., 325 S.W.3d 333 (Ky. 2010).
[42] King, 142 S.W.3d at 649; Savage v.Com., 920 S.W.2d 512 (Ky. 1995).

The Court held a Biggers hearing and the Court did not "believe the fact that Mr. Johannes was shown two photograph packs, both depicting Jackson, is enough to render his identification so unreliable as to make it inadmissible." In Duncan v. Com., the Kentucky Supreme Court explicitly rejected the notion that successive photograph arrays displaying the defendant are always unduly suggestive, particularly where at least a few days have elapsed between the two identifications and different photographs of the defendant are utilized.[43] In Duncan, the Court determined that a gap of three days was "substantial." In this case, it was a gap of six days. Based on Duncan, the Court stated, "we cannot conclude that the temporal proximity between the two arrays was unduly suggestive. Additionally, just as in Duncan, two different pictures of Jackson were used in the arrays. As observed by the trial court, Jackson looks different in each photograph. The second photograph, which was taken closer in time to the crime at issue, shows Jackson with a fuller face, more facial hair, and a different hairstyle than the first photograph. Given the differences between the two photographs, we cannot conclude that Mr. Johannes was shown what amounted to a mere repetition of the first photo. [T]hat fact plus the amount of time between the two viewings convince us that the photo identification process was not unduly suggestive."

The Court affirmed Jackson's conviction.

TRIAL PROCEDURE / EVIDENCE – VIDEO

Merriman v. Com., 2016 WL 4710184 (Ky. App. 2016)

FACTS: On September 5, 2013, a number of car batteries were stolen from a fenced-in business. At the time, the gate was open but the location was posted for authorized personnel only. Security video caught the theft. Merriman was identified and charged. At trial, the Commonwealth sought to introduce a "compilation video" that took video from multiple cameras and wove the incident together into a single narrative, rather than the individual camera footage.

Ultimately, he was convicted and appealed.

ISSUE: May a compilation of security videos be used, rather than the individual recordings?

HOLDING: Yes

DISCUSSION: Merriman argued that under the best evidence rule, the original videos, and not the compilation, should have been introduced. The Court looked the KRE 1001 and noted that duplicates (as the compilation was considered) could be introduced. Testimony indicated that the "compilation merely placed the relevant events in chronological order in a concise manner."

The court agreed the video was properly introduced. After resolving other issues, the Court upheld Merriman's conviction.

TRIAL PROCEDURE / EVIDENCE –

Whittaker v. Com., 2016 WL 5497111 (Ky. App. 2016)

FACTS: Tackett and Leachman shared a home in Daviess County. On September 1, 2013, Tackett was at home alone when someone came knocking, asking for Leachman. She explained he wasn't at home. The man asked if she recognized him and she replied that she did not. At that point, two men came in, with covered faces, brandishing a gun. They demanded the location of the safe, which she gave, and they took the safe, which weighed 150 pounds. As they rolled it away, one man's face covering fell off. Tackett began screaming she'd been robbed and the Wallaces heard her. They approached the man, who threatened them with a gun. The Wallaces retreated. The man wedged the safe between a house and a tree and fled before the police arrived.

[43] 322 S.W.3d 81 (Ky. 2010).

Before the police took the safe into evidence, Leachman was allowed to retrieve some items from it. Officer Isbell lifted a palm print, and ultimately, Whittaker was identified as a suspect. Tackett selected him from a photo array. Using a warrant, the officer obtained new prints and DNA and the identification was confirmed.

Whittaker was indicted for Robbery, Burglary and Wanton Endangerment; he was convicted. He appealed.

ISSUE: Should property be returned to victims whenever possible?

HOLDING: Yes

DISCUSSION; Whittaker argued that the safe and print evidence must be suppressed, because the print lift destroyed any potential DNA which could have proved exculpatory. The Commonwealth argued that the motion was properly denied because the officers had a good faith basis to return the evidence to the victim under KRS 421.500 (7). Further, under St. Clair v. Com., the Court had ruled it was proper to return a vehicle to the owner after it had been processed for prints.[44] The Court also looked to California v. Trombetta[45] and Arizona v. Youngblood[46] that an action involving the preservation of evidence only applies when the evidence is clearly exculpatory and when the defendant can't obtain the evidence by other means. When the exculpatory value is indeterminate, bad faith must be show.[47] The court found no bad faith at all and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Hightower v. Com., 2016 WL 4487190 (Ky. 2016)

FACTS: On February 18, 2013, Officer Meredith (Russellville PD) was on patrol when it spotted a car with headlights and interior lights on, in the driveway of an abandoned building. He could see two people; the driver was Pulley and the passenger was Hightower. He approached on foot and smelled marijuana. He ordered both to put their hands in front of them (steering wheel and dashboard) but he saw Hightower chewing. He continued to chew over orders to stop. Officer Meredith went around and ordered him out, and Hightower claimed it was "just weed." Officer Meredith recovered a small amount from Hightower's mouth.

Hightower was charged with Possession of Marijuana and Tampering, along with PFO.[48] Hightower appealed.

ISSUE: Is Tampering and Possession of a drug Double Jeopardy?

HOLDING: No

DISCUSSION: Hightower claimed that the two charges constituted Double Jeopardy and part of the same course of conduct. The Court disagreed and found them not to be in violation of the Double Jeopardy protections. It was also not part of the same course of conduct, as Hightower both possessed it and then separately tried to destroy it

The Court upheld his conviction but did vacate the fine as Hightower was indigent.

[44] 140 S.W.3d 510 (Ky. 2004),
[45] 467 U.S. 479 (1984)
[46] 488 U.S. 51 (1988),
[47] See also U.S. v. Spalding, 438 F. App'x 464 (6th Cir. 2011).
[48] Although the underlying charge was minor, Hightower got 20 years for the PFO 1st.

TRIAL PROCEDURE / EVIDENCE – CONTEMPT OF COURT

Saxton v. Com., 2016 WL 3661744 (Ky. App. 2016)

FACTS: Saxton was indicated on several felony counts in 2014, in Graves County, and was appointed a public defender. He appeared in court on May 18, 2015, during a motion and ended up involved in a "prolonged, contentious, and unorthodox exchange" with his attorney over a motion. The Court finally ordered that the proceedings were "done" and told Saxton to address any issues with his attorney outside the courtroom. Saxton was told finally to "be quiet." As he was led back out of the courtroom, he told the judge "good day, sir" – and was promptly held in contempt to serve 14 days. When he stated "thank you, sir," another 14 days were tacked on. Ultimately, the Court ordered him to serve 7 and to hold the remaining 21 in abeyance pending his good behavior in court. Saxton appealed.

ISSUE: Does a trial court have a great deal of discretion in contempt?

HOLDING: Yes

DISCUSSION: The Court noted that "a trial court possesses 'nearly unlimited discretion' when wielding its contempt powers."[49]

> Contempt is defined as "the willful disobedience toward, or open disrespect for, the rules or orders of a court."[50] Criminal contempt, imposed as measure of punishment on an individual, includes conduct or acts which "obstruct the court's process, degrade its authority, or contaminate its purity."[51] Direct contempt – that which is committed in the presence of the court – is "an affront to the dignity of the court. It may be punished summarily by the court, and requires no fact-finding function, as all the elements of the offense are matters within the personal knowledge of the court."

The Court noted"

> Saxton's conduct during the hearing was, by definition, contempt. The trial court instructed him three times to direct questions concerning his case and pending or necessary motions to his attorney outside of court. Saxton nevertheless continued asking his attorney questions on the record, in front of the court, even after the trial court announced that the hearing was "done." Polite and inquisitive as he was for most of the hearing, Saxton repeatedly spoke out of turn, over his counsel, over the court, and eventually in direct and intentional contravention of a clear order from the court to be silent. This is sufficient for this Court to conclude that a finding of contempt fell within the discretion of the trial court.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Hester v. Com., 2016 WL 5246033 (Ky. 2016)

FACTS: On November 10, 2011, Hester and his girlfriend, Womack, gathered with other "drug-using acquaintances of Seabolt, at Seabolt's Warren County home. Womack and Hester argued violently and Hester beat Womack and also pointed at gun at Womack and Seabolt. Hester later denied he'd done so. Seabolt called 911. Having warrants, Hester called Webb to pick him up, and she arrived with Estlack. The three left the home and Webb picked up Havens, also wanted on outstanding warrants.

[49] Meyers v. Petrie, 233 S.W.3d 212 (Ky. App. 2007) (citing Smith v. City of Loyall, 702 S.W.2d 838 (Ky. 1986))
[50] Com. v. Burge, 947 S.W.2d 805 (Ky. 1996).
[51], A.W. v. Com.,163 S.W.3d 4 (Ky. 2005).

The four now hatched a plan to manufacture methamphetamine. They went to an isolated area, and Hester and Havens fought. Havens ended up shot in the leg. They fought over the gun and the gun went off again, Havens was then shot in the head. He was left dying on the side of the road. Estlack went to the police and explained what had happened. Det. Phillips talked to Webb, who finally admitted that Havens had been shot, but said it was Estlack, not Hester, who shot him. When apprehended several days later, Hester gave a version that largely matched Webb's. He was indicted on Murder and Wanton Endangerment charges.

Hester offered the altperp (alternative perpetrator) defense, arguing that Estlack did the shooting. A number of witnesses, including a playing of Hester's interview blaming Estlack, was presented. Hester was ultimately convicted of Manslaughter 1st and Wanton Endangerment 1st, and appealed.

ISSUE: Is it proper to admit a confession through hearsay?

HOLDING: No

DISCUSSION: First, Hester argued it was improper to allow two witnesses to testify as to what Womack had said, out of court. The statements were offered as "prior statements inconsistent with her trial testimony, and therefore, admissible under KRE 801A(a)(1): (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is: (1) Inconsistent with the declarant's testimony[.]" However, it was argued that the prosecution did not lay the "proper evidentiary foundation" first. First, "KRE 613 requires that before evidence can be admitted to show that a witness, other than a party opponent, made at another time a different statement" he must be asked about that statement "with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it." In Noel v. Com. and as defined in KRE 801A, the Court "explained that modern cases have consistently required strict compliance with the foundation requirements of . . . KRE 613(a)."[52] The Commonwealth argued the error was harmless.

Looking at the first statement, the court agreed that the testify "forced the jury to ponder an alleged confession in an otherwise less-than-overwhelming case." Womack was never given a chance to explain the apparent discrepancy.

The Court stated that "it is hard to conceive of anything more damning than a guilt-ridden confession. As noted by the U.S. Supreme Court, "[a] confession is like no other evidence" because it "is probably the most probative and damaging evidence that can be admitted against [a defendant]."[53] However, the Commonwealth argued that the forensic testimony, which indicated the fatal gunshot could have only originated with the person in the position where Hester was sitting, made the admission harmless. The Court, however, disagreed, finding the forensic evidence, which could, in fact, be questioned, "does little to overshadow the devastating effect of an improperly admitted confession." The Court reversed the manslaughter conviction.

The Court also agreed the criminal charges were improperly joined for trial with the murder charge. The events happened several hours apparent, with different victims and in the presence of different witnesses. The only common thread was a handgun that was never proved to be the same gun.

After resolving several other issues, the Court vacated the manslaughter conviction and remanded the case for further proceedings.

[52] 76 S.W.3d 923 (Ky. 2002).
[53] Arizona v. Fulminante, 499 U.S. 279 (1991)

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Thompson v. Com., 2016 WL 5239680 (Ky. 2016)

FACTS: Thompson was involved in a high speed chase with Trooper Martin, in Hardin County. He ended up colliding with another vehicle, driven by Berry, while going the wrong way. Berry was killed in the collision; three children were injured. Thompson was convicted of murder, assault and related charges. He was convicted and appealed.

ISSUE: Is evidence of an outstanding warrant admissible in a fleeing and evading case, even if the officers were unaware of it at the time?

HOLDING: Yes

DISCUSSION: Thompson argued that Trooper Cook's testimony was improper, when he talked about the effect of responding to a call involving children and related matters. Thompson argued that this was more in the nature of victim testimony, rather than factual witness testimony. The Court agreed that the disputed testimony was a violation of KRE 403 – and was more prejudicial than probative – but noted that it was simply isolated testimony and almost certainly didn't influence the verdict.

Thompson also argued that mention of his outstanding warrant at the time was improperly under KRE 404(b). The Court agreed that although the two troopers were unaware of it at the time, it was certain a factor in motive or intent for Thompson's flight. It was sufficiently probative as to be admissible.

The Court upheld his convictions.

Smith v. Com., 2016 WL 4151895 (Ky. App. 2016)

FACTS: In the wee hours of May 23, 2012, Sheriff Beard (Green County SO) responded to a residence. He found Lobb lying in the front yard, with Brian Smith "pacing around him." Lobb lived next door to the place he was found and was "covered in blood, and had multiple injuries including lacerations, a broken leg and a traumatic brain injury." Smith had a serious abdominal stab wound. Frank Smith was present, but stated he'd seen nothing.

The investigation indicated that Smith's mother and Lobb's wife had fought the day before, and that Frank and Brian Smith had come to Lobb's house and attacked him with a steel pipe. Lobb defended himself by stabbing Brian. Lobb later claimed that he'd been beaten for 40 minutes and then dragged over to the Smith house, where he was found. Sheriff Beard and Constable Patterson found the knife and a place at the Lobb home where it appeared a fight had occurred. (Blood and human flesh made a trail to the Smith home.) Using a search warrant, they also found bloody footwear (boots and sneakers), a bloody axe handle, steel pipe and tee-shirt.

Frank and Brian Smith were both indicted for Assault and related offenses. Frank Smith was convicted and appealed.

ISSUE: Is it proper to restrict some testimony about a victim?

HOLDING: Yes (but see discussion)

DISCUSSION: Smith argued that he was improperly denied the right to present evidence that Lobb was on probation at the time, having assaulted his wife and a police officer. (Lobb had a motive to lie, Smith argued, as he faced revocation.)

The Court noted:

> Kentucky Rule of Evidence ("KRE") 611(b) states in part that a "witness may be cross-examined on any matter relevant to any issue on the case, including credibility." "Witness credibility is always at issue, and relevant evidence which affects credibility should not be excluded."[54] The corollary to this maxim, however, is that a trial court retains broad discretion over cross-examination.

In this case, the Court knew that Lobb was a convicted felon and that his wife had apparently been arrested in a situation that involved the Smiths. The Court also knew he had a firearm (illegally) and admitted stabbing Brian Smith. As such, the Court agreed the restriction on the testimony was proper.

Smith's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – MISSING EVIDENCE

Lawrence v. Com., 2016 WL 4410710 (Ky. App. 2016)

FACTS: On July 8, 2011, just before 1 a.m., Officer Allen (Bowling Green PD) spotted Lawrence make a sudden, unsignaled turn into an apartment complex. He did a traffic stop and approached the driver, Lawrence. The officer detected the odor or marijuana and Lawrence agreed to be searched. The officer found small bag of marijuana and asked for his information for a citation. He advised Lawrence that giving false information was an offense.

Lawrence gave a false name and social security number, but that information did not come back on file. Lawrence explained he had an Indiana OL, but of course, it was still not on file. At this point, Lawrence was searched and handcuffed. Officer Perry arrived. A woman at the complex where the stop occurred was observed and identified herself as a Facebook friend of Lawrence's, and that he was there to visit her. However, she only knew his Facebook alias, not his real name. After some investigation, and using his address, which he provided, and birth date, officers were able to identify his real name. This took approximately an hour and a half. During that time, a K-9 officer was summoned and arrived, and his dog alerted on the vehicle. Marijuana, rolling papers and scales were found.

Lawrence was charged with possession of the items found and providing a false name. At the jail, he was cautioned that if he had any additional drugs, it was a felony to take them into the jail. He denied having any. At the booking area, however, he pulled a plastic bag from his pants, tried to swallow it and refused to spit it out when ordered. He was tased to stop him from continuing to chew and taken to the floor. He continued to chew, however, when the effect of the Taser wore off. He resisted being handcuffed. The Taser was applied to his jaw to try to get him to open his mouth so the item could be retrieved. (The deputy jailer who wielded the Taser did not want him to overdose or choke.) He spit it out but continued to resist, and the Taser was used one more time, at which time he complied. When EMS arrived, Lawrence admitted to having swallowed some pills, so he was transported. Eventually, the substance in the bag was discovered to be cocaine, for which he was charged.

During the discovery, the Commonwealth was ordered to produce all videos of the stop and at the jail, or explain why videos were non-existent. The Court agreed they were relevant and did allow Lawrence to argue the point to the jury, giving his version as to what had occurred. Ultimately, he was convicted and appealed.

ISSUE: Is failing to preserve video evidence a violation of Brady v. Maryland?

HOLDING: No

[54] Com. v.Maddox, 955 S.W.2d 718 (Ky. 1997).

DISCUSSION: In his appeal, Lawrence questioned "the lack of videotapes from the in-car video of the original stop, the surveillance records from the jail, and the administration of a taser" at the jail.

With respect to the in-car video, the original stop was tagged by the officer as a misdemeanor. Although Lawrence was later charged with felonies, that original designation on the recording did not change, which meant that it was removed from the system more quickly than the video record of a felony would be. As such, it was unavailable. With respect to the jail videos, the chief Deputy jailer explained the videos are on a nine-day loop and since it was not requested during that time frame, it was automatically deleted. The Taser itself did not have a camera attachment.

Lawrence argued that the failure to maintain evidence was a violation of Brady v. Maryland.[55] The Court, however, found no indication that the evidence was destroyed, but only deleted according to the usual protocol. As such, absent bad faith, Lawrence's argument failed. In Estep v. Com., the Court agreed that due process is "implicated only when the failure to preserve the missing evidence was intentional and the potentially exculpatory nature of the evidence was known when it was lost or destroyed."

Lawrence's convictions were affirmed.

NOTE: *Although not mentioned in the case, failing to maintain video records the length of time required by the Records Retention Schedule could in fact, present a separate legal issue.*

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Mayes v. Com., 2016 WL 4488308 (Ky. 2016)

FACTS: In 2010, Mayes moved in with Tonya, her two sons and her daughter, and they lived in various locations in Whitley and Laurel Counties. As a result of actions taken in Whitley County, Mayes was charged with sexual crimes involving the minor daughter – including Rape and Sexual Abuse. He was convicted and appealed, claiming trial issues related to the girl's testimony.

ISSUE: May prior bad acts be admitted to prove motive, opportunity, etc.?

HOLDING: Yes

DISCUSSION: The Court looked at the testimony of the victim, in which she described where and how many times various acts had occurred. Although the victim never specifically claimed penetration, nor was she apparently directly asked, the Court agreed that it was not unreasonable for a jury to find it had occurred. With respect to the sexual abuse, the Court noted the victim couched her answers on direct in what Mayes had "tried" to do, rather than actually did, during cross-examination, in fact, she did testify to sexual touching.

Mayes also argued that certain instances of alleged "prior bad acts" were improperly admitted. The Court noted that such evidence may be admitted, however, "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]"[56]The victim testified about pornography she'd witnessed on a computer, apparently at the behest of Mayes. This was enough, the Court agreed, to be admitted "to prove Mayes's intent, preparation, scheme, or plan for the sexual abuse alleged by Katie.[57] As such, it was properly admitted.

[55] 373 U.S. 83 (1963).
[56] KRE 404(b)(1).
[57] *See* KRE 404(b); Gilbert v. Com., 838 S.W.2d 376 (Ky. 1991) (holding that evidence of defendant forcing victims to watch pornographic videos indicated a part of the overall scheme to aid defendant in engaging in sexual intercourse with victims).

The Court also looked at evidence presented to prove child abuse committed against the two boys, in which he'd assaulted the boys by striking their genitals, placed his hands in their pants, scared them so badly one of the boys had urinated on the floor (and then "whooped him" for it) and forced them to stand in the corner for hours at a time. The Court agreed such evidence was probative and relevant.

The Case was reversed due to an issue with the jury instructions, but the above issues were addressed as likely to come up on retrial.

Jump v. Com., 2016 WL 3752122 (Ky. App. 2016)

FACTS: On December 16, 2011, Parker found that his tractor was missing from his Gallatin County farm. Jump was identified as the thief, with Mullins was an accomplice. Their plan was to drive the tractor to a family member's home, at "tractor speed," which would take 2-3 hours. Deputy Burcham spotted the pair, at the time, Mullins was driving the tractor. Jump was following in a vehicle, but was not immediately recognized as involved until Mullins implicated him, as he drove away when the stop occurred. Jump abandoned the car and sought help from another family member. He was later arrested, but denied being involved, claiming to have been splitting wood with a third party, who denied it.

Jump was charged with the theft. During his trial, the deputy read from notes he took concerning the dispatch and the subsequent response. Jump was convicted and appealed.

ISSUE: Is reading from notes, when the notes are the individual's own notes and are available for review, permissible?

HOLDING: Yes

DISCUSSION: Jump argued that the deputy's notes should not have been allowed into evidence, as an indication as to why he pulled over Mullins in the first place. The Court agreed that since the deputy was reading from his own notes, and available for cross examination, the admission was proper.

The Court upheld his convictions.

NOTE: *Although the decision says the deputy was "reading" from his own notes, in fact, he was more likely refreshing his recollection under KRE 612. In either event, however, any notes used on the stand are subject to review.*

Castle v. Com., 2016 WL 4410098 (Ky. App. 2016)

FACTS: Castle was involved in a fatal vehicular crash in Johnson County, in which she turned into her friend's driveway and was struck by a speeding motorcycle which crashed into her SUV. Castle, however, was under the influence of alcohol and drugs and she went into her friend's house. She asked her friend for a mint, but settled for alcohol free mouthwash. Several first responders who interacted with her at the scene smelled alcohol on her breath and body. She failed the HGN test, denied having had any alcohol and gave conflicting accounts of what had happened. She never expressed concern about the motorcyclist or her car. She was transported and again failed the HGN. She finally admitted she'd been drinking vodka that day. She claimed she took several prescriptions but that she hadn't been warned about drinking while taking them. Det. Dials, KSP, who questioned her later testified that she giggled and that her demeanor was consistent with being intoxicated. A blood test came back at 0.200 and she was positive for Valium and a medication for depression. She had pill bottles, mostly empty, in her purse.

Castle was charged with Manslaughter 2nd and DUI. Dr. Davis testified that her degree of intoxication indicated she had alcohol prior to the crash and that she would have a decreased ability to judge distances and time, and that would be made worse by the addition of prescription drugs. However,

an accident reconstructionist noted that but for the motorcycle's speed, Castle could have safely made the turn into the driveway. During the trial, the jury was taken to the scene – where a small memorial still stood for the victim. (The court denied a motion to remove it.)

Castle was convicted. Following the trial, Castle learned that one of the jurors had a connection of sorts with the victim, her son had attended the funeral and several social media postings linked her to the victim as well. The Court denied her motions and she appealed.

ISSUE: Is simply being friends on Facebook a sufficient relationship to remove a juror?

HOLDING: No (but see discussion)

DISCUSSION: First, Castle argued that she did not *cause* the victim's death, but in fact, his own speed did, as he travelled on the "undulating, rural road." If not for his recklessness, she noted, he would not have died. The Court, however, agreed that the victim was in his own lane and had Castle not been drinking, she may have perceived him in enough time not to have struck him. As such, the Court upheld the verdict. Next, the Court looked into the juror allegations and noted that the juror did not respond accurately to questions directly about their connection to victim. When questioned, the juror stated that she shares a Facebook account with her husband and had no recollection of "liking" any photos of the funeral. She was "friends" with her son and saw photos of him on her newsfeed. She had no knowledge of any relationship between her son and the victim.

The Court noted 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 reasonably be presumed."[58] '[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 *override*." Therefore, no presumption arises about the nature of the relationship between a juror and another person with an interest in the litigation simply from their statuses Facebook friends. "As with every other instance where a juror knows or is acquainted with someone closely tied to a case, it is the extent of the interaction and the scope of the relationship that is the relevant inquiry."[59]

The Court agreed that the juror did not appear to know the victim in any way, nor did she have any preexisting knowledge of his death. "The extent and nature of Juror X's connection to CJ is virtually non-existent."

With respect to the viewing of the crime scene, the Court looked to "KRS 29A.310(3) which 'permits a jury to view the place where the charged offense was committed when deemed necessary by the trial court. The decision lies within the sound discretion of the lower court.'"[60] In this case, the scene had been "altered" by the addition of the small memorial, but the Court noted that it added nothing to what the jury already knew about the case. The memorial was simple and neither overstated nor inflammatory."

The Court upheld her convictions.

TRIAL PROCEDURE / EVIDENCE – PRIVILEGE

Sheets v. Com., 495 S.W.3d 654 (Ky. 2016)

FACTS: Sheets stood trial for the alleged Sodomy and Sexual Abuse of his 9 year old daughter. He was convicted and appealed.

[58] McGaha v. Com., 414S.W.3d 1 (Ky. 2013)."
[59] Id. (quoting Sluss v. Com., 381 S.W.3d 215 (Ky. 2012)).
[60] Debruler v. Com., 231 S.W.3d 752 (Ky. 2007).

ISSUE: Must some indication that psychotherapy records might prove useful to the case to warrant the trial court doing an in camera review of those records?

HOLDING: Yes

DISCUSSION: Sheets raised a myriad of issues, including his motion to compel discovery of his daughter's treatment records with the Children's Advocacy Center. Her guardian had objected, "arguing that Sheets was not entitled to outright discovery of the privileged records or to an *in camera* review of the records by the trial court as he had failed to make the threshold showing of a reasonable belief that the records contain exculpatory evidence as required under Com. v. Barroso.*"*[61] Sheets filed a reply to the guardian ad litem's objections, characterizing his position as a "catch-22" and contending that "proof is in the pudding" that the records might contain either exculpatory evidence or evidence relevant to the issue of the alleged victim's competency. He also specified that the reason for the request was to see whether Michelle may have recanted or varied her allegations during therapy." The Court had ruled his argument insufficient and disallowed discovery of the records.

The Court noted that:

> The psychotherapy records at issue are covered by the psychotherapist patient privilege provided in KRE 507. The general rule is that "[al patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition." KRE 507(b). Subsection (c) lays out several narrow exceptions to the general rule of privilege not relevant here, and other than those exceptions, the psychotherapist-patient privilege is an "absolute" privilege and thus not subject to avoidance based on a need for the evidence.[62]
>
> But this Court has also recognized that the privilege must give way to a criminal defendant's right to obtain exculpatory evidence under Brady v.Maryland*,* and right to confront the witnesses against him under the Fourth Amendment and Section Eleven of the Kentucky Constitution.[63] This effectively makes for a qualified privilege in the criminal litigation context.[64] Thus, in Barroso*,* this Court created a process by which a defendant may obtain an *in camera* review of the records sought, conducted by the trial court alone, which protects both the defendant's constitutional right to a fair trial and the witness's interest in the confidentiality of the privileged information from unnecessary over-disclosure. That *"in camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." This preliminary showing is required to prevent defendants from engaging in purely speculative fishing expeditions and "unrestrained forays into confidential records in the hope that the unearthing of some unspecified information would enable the defendant to impeach the witness."

In this case, however, the Court agreed there was insufficient initial proof that the records might prove useful in Sheets' case, and in fact, were merely speculation.

The Court reversed one of the charges for evidentiary reasons and upheld the remainder of his convictions.

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[61] 122 S.W.3d 554 (Ky. 2003).

[62] Barroso, 122 S.W.3d at 558; cf. KRE 506(d)(2) (providing interest-weighing, need-based exception to the "qualified" counselor-client privilege under KRE 506).

[63] 373 U.S. 83 (1963).

[64] Hodge v. Com., 17 S.W.3d 824 (Ky. 2000);see also Barroso, ("[W]e conclude that the Compulsory Process Clause affords a criminal defendant the right to obtain and present exculpatory evidence, including impeachment evidence, in the possession of a third party that would otherwise be subject to the psychotherapist-patient privilege.").

Jenkins v. Com., 496 S.W.3d 435 (Ky. 2016)

FACTS: Jenkins was accused of rape and sodomy of his 17-year-old step-granddaughter, in Ohio County. At the time she made the accusation, the victim was living in a residential group in Graves, County, so a KSP detective arranged for a detective in that post, Det. Kent, to interview her. That information was shared with Ohio County social services investigators. In May, 2006, Jenkins and his wife were interviewed. In July, 2006, Jenkins agreed to take a polygraph and he was interviewed again, shortly thereafter, he was charged and indicted. By the time it went to trial, however, in 2014, the victim was 25.

At the trial, no mention was made of the polygraph, but "two brief excerpts, 'snippets; as the Commonwealth referred to them, from the audio portion of Jenkins's post polygraph interview" were admitted. Jenkins was convicted and appealed.

ISSUE: May small portions of a post-polygraph interview be admitted?

HOLDING: Yes

DISCUSSION: Jenkins argued that the snippets of post-polygraph testimony, redacted of any reference to the polygraph, should not have been admitted. The Court had allowed it to be admitted, but "subject to the rule of completeness in its present guise as KRE 106 ("Remainder of or related writings or recorded statements").

The Court noted that in Rogers v. Com., the "Court recognized an exception to the general rule against polygraph evidence for such evidence introduced by a defendant trying to show that his or her confession had been coerced."[65] The Court agreed that:

> Undoubtedly, a defendant who confesses or who otherwise makes inculpating admissions during a post-polygraph interview faces a hard choice when it comes to deciding how best to confront that evidence, whether by revealing the polygraph, as he may under Rogers, or by some other means. But since, under Wyrick,[66] there is nothing inherently improper about post polygraph interrogations, and since the confessing defendant who proceeds under Rogers would likely be entitled to an admonition limiting how the polygraph evidence could be used, the confessing defendant's supposed "dilemma" strikes us as one of those tough but constitutionally permissible choices acknowledged in Jenkins v. Anderson,[67] rather than a constitutionally "intolerable" one such as confronted the suppression-seeking defendant in Simmons.[68]

In other words, under Rogers, if a defendant wishes to challenge an interrogation, they are free to introduce polygraph evidence, and request an admonition on the use of the otherwise prohibited evidence.

With respect to the Rule of Completeness, the Court noted that the information presented "accurately reflected Jenkins's limited admission that under the influence of medications, such as those he was taking at the time of the alleged incident, a person could possibly engage in sex without realizing it. The excerpt included Jenkins's denial of any memory suggesting that that had happened to him."

Jenkins argued that his actions did not constitute force and that the victim acquiesced to the sexual acts. The court note that "forcible compulsion" does not require violence or duress or resistance by the victim.[69]"

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[65] 86 S.W.3d 29 (Ky. 2002).
[66] Wyrick v. Fields, 459 U.S. 42 (1982).
[67] 447 U.S. 231 (1980) (quoting Chaffin v. Stynchcombe, 412 U.S. 17 (1973)
[68] Simmons v. U.S., 390 U.S. 377 (1968).
[69] Gibbs v. Com., 208 S.W.3d 848 (Ky. 2006) (discussing statutory amendments in 1988 and 1996 eliminating any requirement that the victim resist her attacker); See also Gordon v. Com., 214 S.W.3d 921 (Ky. App. 2006) (holding that testimony to the

The Court also agreed that with the Sexual Misconduct statute, the Court was asked to construe the apparent overlap of KRS 510.140 with other statutes outlawing non-consensual intercourse and non-consensual deviant intercourse, the Rape and Sodomy statutes. The Court held that the sexual misconduct statute, with its misdemeanor penalty, was intended to apply only in cases where the victim's non-consent was premised on her age, and the perpetrator's young age, likewise—under eighteen if the victim was under sixteen but not under twelve, and under twenty-one if the victim was fourteen or fifteen—could be considered a mitigating factor.[70]

The Court upheld his convictions.

Turnage v. Com., 2016 WL 3751996 (Ky. App. 2016)

FACTS: On September 4, 2014, Travis's vehicle was parked in her Muhlenberg County driveway. The vehicle had been "rummaged through," but nothing was taken. She saw a person walking away and called 911. Det. Ward arrived and Travis described a "man wearing a blue shirt, blue jeans and a hat, and that the man staggered as if drunk." Det. Ward left and shortly thereafter spotted Turnage, who was dressed as the description indicated. He did not respond when Det. Ward activated his lights. When Det. Ward spotlighted Turnage, he saw Turnage 'throw a bag into a ditch on the side of the road." He stopped on command and Det. Ward later stated that Turnage appeared to be drunk.

The bag turned out to contain a laptop belonging to Pendley. When he went to that home, only then did the Pendleys realize that the family car, in the garage, had been burglarized. Turnage was charged At trial, Travis testified about the man who had walked away from her car, even though Turnage wasn't convicted of any offenses in that situation. The jury was admonished to consider the evidence only to the extent that it indicated guilt in the charged crime. Turnage was convicted of Burglary 2nd and related offenses.

ISSUE: Is prior bad acts evidence sometimes admissible?

HOLDING: Yes

DISCUSSION: Turnage argued that Travis's testimony was inadmissible prior bad acts evidence. It was admitted under the exception that allowed it to be used as establishing a plan to steal from vehicles.

The Court noted:

> The Kentucky Supreme Court has stated that even when "evidence that establishes *modus operandi* is offered for a purpose other than to prove identity, the evidence is treated 'as if offered to prove identity by similarity, and ... the details of the charged and uncharged acts [must] be sufficiently similar as to demonstrate a *modus operandi*[.]'"[71] Furthermore, our Supreme Court "require[s] the proponent of the evidence to 'demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.'"[72]

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effect that the defendant pushed and held apart the twelve-year-old victim's legs in the course of sodomizing her satisfied, for directed verdict purposes, the "forcible compulsion" requirement).

[70] Cooper v. Com., 550 S.W.2d 478 (Ky. 1977).

[71] Newcomb v. Com., 410 S.W.3d 63 (Ky. 2013) (quoting Billings v. Com., 843 S.W.2d 890 (Ky. 1992)).

[72] Clark v. Com., 223 S.W.3d 90 (Ky. 2007) (quoting Com. v. Buford, 197 S.W.3d 66 (Ky. 2006).

The Court agreed that the length of time between two offenses is a relevant factor.[73] Turnage was in about the same location, at the same time, wearing the same outfit, and "staggering as if intoxicated" in both instances. This showed "a reasonable probability that the two crimes were committed by the same individual."[74] The Court agreed it was properly admitted.

Further, the two were "inextricably intertwined" with the charged offense, and put the charged offense and the discovery of Turnage into context. In this case, it explained why the deputy was talking to Turnage, which led directly to the discovery of the laptop, and he did that using Travis's description. It was also clearly relative to present a complete picture.

Turnage's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – JURY INSTRUCTIONS

Pritchett v. Com., 2016 WL 4575665 (Ky. App. 2016)

FACTS: On May 18, 2012, Pritchett arrived at her cousin's Covington home to babysit. She spent the night at the home, sleeping on the couch. While she was asleep, Dukes came in and went upstairs. She knew he was there, but not what he was doing. The next morning, she went upstairs to take a shower. Later, Officer Malone was on patrol in that area and spotted Hall, on a cell phone, pacing in the alley next to the Fisk Street home. Officer Cramer arrived and also observed Hall. Both officers heard the door of the Fisk Street home open, and two women, Pritchett and Cuthbertson, approached Hall at the fence. They handed something to Hall and he left, and the officers believed they'd witnessed a hand-to-hand transaction. They approached Hall and tried to grab the item Hall was clutching – he threw it away. The officers detained and searched him, finding heroin paraphernalia, and a crack pipe was at his feet. They never found the item he threw. The two women were also detained.

> Officer Malone then secured the residence, and upon execution of a search warrant, the officers searched 1226 Fisk Street. Officers found a total of 3.8 grams of heroin in various places throughout the residence, including on the living room mantel, in the upstairs bathroom on the tank of the toilet, and next to the bed in the front bedroom. Officers also found multiple sets of digital scales in the kitchen, some of which had a white powdery substance on them. Additionally, officers found several cell phones and multiple syringes throughout the residence. In one of the bedrooms, officers discovered a "packaging center" for heroin which included bits of plastic, packaging bags, and an iron to seal the bags. Pritchett's ID card was found in a pile of clothes in the packaging center bedroom along with two syringes.

Pritchett was indicted for trafficking, but was ultimately convicted of possession. Pritchett appealed.

ISSUE: Is a jury instruction defining possession permitted?

HOLDING: Yes

DISCUSSION: Pritchett argued that the jury instruction did not properly define possession, it was defined as ""hav[ing] actual physical possession of, or otherwise to exercise actual dominion or control over, a tangible object." Pritchett maintains that there was no proof that she ever had actual physical possession of any heroin or that any heroin found in the home belonged to her." The Court, however, noted that under Kentucky law, "possession does not necessarily need to be actual physical possession as Kentucky courts utilize the concept of constructive possession to connect defendants

[73] Funk v. Com., 842 S.W.2d 476 (Ky. 1992). See also Violett v. Com., 907 S.W.2d 773 (Ky. 1995) ("The pattern of behavior and conduct was strikingly similar and it was sufficiently close in time.")

[74] Clark, 223 S.W.3d at 97. See also Southworth v. Com., 435 S.W.3d 32 (Ky.2014) ("If the proof in this case is to be considered modus operandi, then there must be such similarity between the proof offered and the facts at trial that the identity of the defendant can be determined from the similarities.").

to illegal drugs and contraband.[75] Constructive possession is established by demonstrating that the contraband was subject to the defendant's dominion or control.[76] The definition provided in the jury instructions plainly provides for this theory of possession, and it is also supported by the evidence of record." The circumstances were such that Pritchett had, at least, constructive possession of the heroin, having stayed overnight and occupied rooms where the heroin was clearly visible and accessible. She was in control of the household while her cousin was away. Further, the "open and widespread dispersal of drug paraphernalia and heroin itself throughout the residence where she spent the night was probative of her knowledge that the substance was heroin," and she was with another individual when the transaction took place outside. She was complicit in the possession of the heroin by others, as well.

The Court upheld her conviction.

CIVIL LITIGATION

Jones (Matt and Lori) v. Bennett (Russell County Sheriff), 2016 WL 4487189 (Ky. 2016)

FACTS: Russell County 911 received a call that a described vehicle had passed the caller at a high rate of speed and pulled into a sparsely populated residential area. Deputy Bertram went in search, ending up on a dead end road. He did not find the suspect vehicle, initially. At some point, however, he contacted dispatch and said he understood that the vehicle was at a particular residence, with Lawless driving, and that he was going to wait on him to come back out of the subdivision. He waited in a gravel parking lot of a church, and within moments, he saw the vehicle "blow past him" and turn onto the main road. Within second, Lawless crashed in the Jones's vehicle. Matt and Lori Jones were injured.

The Joneses filed suit claiming that Deputy Bertram was negligent in failing to take action before the crash occurred. The trial court gave the deputy and the sheriff's office immunity. Upon appeal, the Court of Appeals upheld that decision. The Joneses appealed.

ISSUE: Is a negligent investigation claim viable?

HOLDING: No (but see discussion)

DISCUSSION: The Court began:

> Qualified official immunity is simply "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions."[77] This type of immunity protects government officials from liability for the negligent performance of discretionary acts—those acts "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." [78]

The Court agreed:

> Decisions about how to investigate and apprehend a criminal suspect are an example of discretionary conduct warranting qualified immunity.il This case does not require a determination of whether Deputy Bertram was negligent in deciding to arrest the driver of the black Camaro or even whether he was negligent in his conduct after deciding to arrest the driver. There is no evidence Deputy Bertram ever reached the point of making a decision to arrest. According to the record, Deputy Bertram did not see the black Camaro until a few

[75] Rupard v. Com., 475 S.W.2d 473 (Ky. App. 1971); Hargrave v. Com., 724 S.W.2d 202 (Ky.1986); Houston v.Com., 975 S.W.2d 925 (Ky. 1998); Leavell v. Com., 737S.W.2d 695 (Ky. 1987), Clay v. Com., 867 S.W.2d 200 (Ky. App.1993).
[76] Clay, supra.
[77] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[78] Knott Cnty. Bd. of Educ. v. Patton, 415 S.W.3d 51 (Ky. 2013) (alterations omitted) (quoting Yanero, 65 S.W.3d at 522).

> seconds before it collided with Jones. And Deputy Bertram did not illuminate his blue lights until the Camaro sped past him, mere seconds before the crash with Jones. Any argument that Deputy Bertram was negligent in pursuing or arresting Lawless is entirely unsupported by the facts of record. Instead, the crux of this case is whether Deputy Bertram was somehow negligent in his investigation of the facts reported by the 911 caller, *i.e.,* looking for the Camaro; and, more directly, whether the investigation of possible criminal activity under the circumstances of this case is a discretionary act cloaked with qualified immunity.

The Court acknowledged it had yet to deal with a "negligent investigation" claim, but in similar cases, had noted that there was no guidance as to how a particular investigation was to be done. Certainly, the duty to respond, as dispatched, was ministerial, but a "police investigation requires many "good faith judgment calls made in a legally uncertain environment"—the very definition of a discretionary act.[79]

The Court concluded:

> Deputy Bertram was free to exercise his own judgment as to the most effective way to investigate the 911 caller's claims regarding the black Camaro. The present record contains no evidence that Deputy Bertram was trained in how to locate a speeding driver who might be intoxicated. Much like Rowan Cnty v. Sloas[80] or Haney v. Monsky,[81] Deputy Bertram had little other than his personal discretion to guide his search for the Camaro. Deputy Bertram, accordingly, was entitled to official immunity, and the grant of summary judgment was appropriate.

MISCELLANEOUS – FORCIBLE DETAINER

Shinkle v. Turner, 496 S.W.3d 418 (Ky. 2016)

FACTS: On February 10, 2014, Turner gave notice to Shinkle, to vacate her tenancy. On February 18, he filed a forcible detainer complaint against her On February 27, at the court proceeding, Shinkle moved to dismiss as she'd not gotten the required one month notice. The Court agreed and delayed the proceeding until March 13. Shinkle filed a motion to dismiss in the meaning, on the same reasoning. On March 13, the Court ruled against her, finding that 30 days had by then passed.

Shinkle appealed to the Circuit Court, and then to the Court of Appeals, unsuccessfully. She further appealed.

ISSUE: Is the 30 day rule in forcible detainer action inviolate?

HOLDING: Yes

DISCUSSION: The Court noted that in the pendency of the action, Shinkle did in fact vacate. The Court noted it could have declared the issue moot, but it decided that the public interest in the issue encouraged it to resolve the matter in order to guide further decisions.

The Court noted that Forcible Entry and Detainer was a very old body of law, couched around a landlord recovering use of their own property. The Court noted that since the statute provided for a 30 day period past the demand, Turner had no right to start the action until 30 days had passed. The Court agreed that "a landlord cannot accurately or honestly state a claim for forcible detainer before the expiration of the tenant's right of possession at the end of that month."

[79] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[80] 201 S.W.3d 469 (Ky. 2006).
[81] 311 S.W.3d 235 (Ky. 2010).

The Court agreed that the trial court should have simply dismissed the action and required Turner to follow the statutory scheme. The Court reversed the trial court's decision.

MISCELLANEOUS – IAD

Jefferson v. Com., 2016 WL 4255018 (Ky App. 2016)

FACTS: In August, 2009, Jefferson robbed a Kenton County store at gunpoint. The following month, he stole a car, using a BB gun. Warrants were issued. Investigating officers found him in 2013, in an Ohio prison and lodged a detainer with Ohio pending his release from that incarceration. Jefferson requested a final disposition of the Kentucky charges. He mailed that request, by certified mail, and it was received on May 6, 2013, which started the clock running for the Interstate Agreement on Detainers (IAD). (The IAD is a compact between the federal government and most states, including Kentucky, which provides a mechanism for a uniform process to resolve situations when a prisoner in one state has pending charges in another state.[82])

Jefferson was returned to Kentucky and arraigned in August, 2013, he was subsequently indicted and arraigned a second time, in October, 2013. A status hearing was scheduled for November, at which time his counsel argued that since he was not brought to trial with 180 days of his request, as the IAD requires, that his indictment must be dismissed. The Court noted that due to the lack of paperwork on the actual IAD request, it was hampered in reviewing the case, and the prosecutor indicated that it was unaware of the IAD demand and even defense counsel admitted he was unaware of it until he was researching the case.

The Court concluded that by agreeing to a status hearing after the 180 days had passed, that Jefferson had waived it. He declined an offer of an immediate trial date, took a conditional plea, and appealed.

ISSUE: May a defendant acquiesce to a proceeding outside the IAD limits?

HOLDING: Yes

DISCUSSION: The Court looked to the 180 day time provisions of the IAD, and commenced when a "a detainee's request for final disposition of the charges against him has actually been delivered to the appropriate court and to the prosecuting officer that lodged the detainer against him."[83] However, that can be waived when the defendant makes a request (or agrees to one) that is inconsistent with the IAD's time limits, in this case, agreeing to a status hearing after the expiration of the 180 days.[84] At no time during his four appearances in a Kentucky court in between did he raise a speedy-trial or IAD concern. Despite the fact that his own attorney was unaware of the IAD, Jefferson initiated it and clearly understood his rights under the IAD, as he initiated it.

The Court affirmed his plea.

MISCELLANEOUS – SEX OFFENDER REGISTRATION

Com. v. Maupin, 2016 WL 3962297 (Ky. App. 2016)

FACTS: Maupin is a sex offender required to register under the Kentucky Sex Offender Registry. He was required to report his current residence/s to the Fayette County Office of Probation and Parole. In September/October, 2013, he was listed as having two residence, a day shelter and a night shelter. On October 16, Deputy Palmer (Fayette County SO) went to the night shelter to try to

[82] Article III of the IAD is codified in KRS 440.450.
[83] Fex v. Michigan, 507 U.S. 43 (1993).
[84] New York v. Hill, 528 U.S. 110 (2000).

locate Maupin, who was not signed in for the night. A warrant was sought and issued, and Maupin was arrested.

At trial, the shelter director (who managed both) testified that clients could line up and sign in at a designated hour, to secure a bed, but could come and go as they pleased. During the time in question, a month, Maupin's name appeared only twice, but he testified that he'd signed in under initials for his Islamic name (MAW) and that the two times his full name appeared, he'd likely had someone else sign him in to secure a place because he wasn't there in time. (However, those initials showed up on days when he was actually in jail, as well, and he'd not provided that alternative name to Probation and Parole, either.)

Maupin was convicted and appealed. He was awarded a JNOV (a new trial),with the Court noted it had reservations on the case overall. The Commonwealth appealed and the trial court changed its ruling to a judgement of acquittal, holding that a directed verdict, in effect, should have been given to Maupin. The Commonwealth appealed.

ISSUE: Is a sex offender required to sleep at their registered address every night?

HOLDING: No

DISCUSSION: The Commonwealth argued that the trial court improperly weighed the evidence and judged the credibility of the witnesses, which was the role of the jury. The Court started by analyzing the statute in question with the fact of Maupin's homeless status. The Court noted that the "General Assembly may have taken for granted that a sex offender would have a home or established residence when it drafted KRS 17.500, et seq." However, a homeless person may sleep someplace different every night. It looked to Tobar v. Com., in which the Court had "addressed the challenge that compliance with the statute poses for homeless sex offenders given the fluid and unpredictable reality of homelessness. In response to that reality, the Court stressed that "the focus of KRS 17.510(10)(a) is not that the sex offender have an address, but that any *change* in address be reported to the proper authorities."[85]

The Court noted that if it was presumed that Maupin only slept at the shelter two nights, he violated the law. The Deputy's single visit, in which he did not find Maupin, was insufficient to prove he'd changed his residence, as he wasn't required to be there all the time. The Court agreed that the evidence about the sign in sheets was equivocal at best, as they were clearly not an accurate reflection of who was present at a given time. Given that uncertainty, it was for the jury to decide.

The Court reversed the acquittal.

[85] Tobar v. Com., 284 S.W.3d 133 (Ky. 2009)

SIXTH CIRCUIT

POSSESSION OF A FIREARM BY A CONVICTED FELON

U.S. v. Johnson, 2016 WL 4088739 (6th Cir. 2016)

FACTS: During an investigation of a strong-arm robbery in which Johnson was a suspect, Officer Murphy discovered Johnson's address and went to interview him. His ID listed that as his home address. When Cooper, his girlfriend, was told she needed to go to the police station for an interview, she said she needed to get shoes. Officer Szklarski accompanied her upstairs to get them. He saw three bedrooms. They came downstairs and left the house, locking it up. The next day, officers executed a search warrant at the house.

During the search of the bedroom from which Cooper had retrieved her shoes, they found male clothing strewn about. The officers also found a loaded pistol in a dresser drawer, on top of clothing. Knowing Johnson was a convicted felon, they recovered the weapon and he was charged with it. Cooper later testified that she lived at the house with Johnson and others, but that the bedroom in question was occupied by one of the others, not Johnson.

Johnson was convicted and appealed.

ISSUE: May constructive possession be shown by proximity?

HOLDING: Yes

DISCUSSION: The Court noted that constructive possession can be "established in the absence of physical possession if the defendant 'knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others."[86] The Court noted that it had previously found it satisfied that when the defendant has dominion over the premises. Although it was argued that the bedroom belonged to someone else, the gun was found in the room where Cooper retrieved her shoes, and she "shared a bedroom with Johnson." There was also a picture of Johnson and mail addressed to Johnson and Cooper in the room. Further, even though the other occupant also had access, even after Johnson was arrested, the "law does not require evidence demonstrating that Johnson was the only person with access to the drawer."[87]

The Court affirmed Johnson's conviction.

FIRST AMENDMENT – MEDIA

Detroit Free Press, Inc. v. U.S. Dept. of Justice, 829 F.3d 478 (6th Cir. 2016)

FACTS: Following a decision known as Free Press I, the U.S. Marshal's Service, which maintains booking photos for those it takes into custody, "adopted a 'bifurcated policy' for releasing booking photos." In Free Press I, in 1996, the Sixth Circuit had ruled that the "Freedom of Information Act (FOIA), 5 U.S.C. § 552, required the release of booking photos of criminal defendants who have appeared in court during ongoing proceedings, finding that criminal defendants lack any privacy interest in the photos In the ensuing years, two other circuits had ruled differently and as a result, in some jurisdictions, the media could get the photos, but in other jurisdictions could not. (In fact, "straw man requestors" who were in the Sixth Circuit would make the request for the USMS offices in the Sixth Circuit, and then provide them to media outlets and others in circuits that denied access.) Ultimately, as a result of the circuits that denied access, the "USMS abandoned the bifurcated policy in 2012 and refused—nationwide—to honor FOIA requests for booking photos."

[86] U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008); U.S. v. Grubbs, 506 F.3d 434 (6th Cir. 2007).
[87] U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).

Accordingly, when Detroit Free Press (DFP) requested the booking photos of four Michigan police officers charged with bribery and drug conspiracy, the Deputy U.S. Marshal for the Eastern District of Michigan denied the request. In the lawsuit that followed, both the district court and the panel, constrained by Free Press I, ordered disclosure. We granted rehearing en banc to reconsider whether there is a personal-privacy interest in booking photos.

ISSUE: May federal authorities deny access to booking photos?

HOLDING: Yes

DISCUSSION: The court looked at Exemption 7(C) under FOIA, which "prevents disclosure when: (1) the information was compiled for law enforcement purposes and (2) the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[88] Neither party disputes that booking photos meet the first requirement. The second requires that we "balance the public interest in disclosure against the [privacy] interest Congress intended [Exemption 7(C)] to protect."[89] The government shoulders the burden of showing that Exemption 7(C) shields the requested information from disclosure.[90]"

The Court agreed that the exemption provides for denial when disclosure involves embarrassing or humiliating facts that connect a person to criminality, and certainly, it noted "Booking photos—snapped "in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties"—fit squarely within this realm of embarrassing and humiliating information.[91] Further, booking photos "convey guilt to the viewer" and as such, are usually disfavored when it comes to showing them to juries.[92]

The Court also noted that "in 1996, when we decided Free Press I, booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection." Websites display booking photos from arrests from many, many years ago. The Detroit Free Press, however, argued that "closely intertwined with public trials, booking photos form part of the public record, and the common law recognizes no invasion-of-privacy tort remedy for publicizing facts in the public record." It also highlighted the point that some states mandate the release of booking photos (but some do the reverse, and prohibit it). The Court agreed that there is a "non-trivial privacy interest" in booking photos.

Having addressed the first point, the Court balanced the interest in releasing with the public's interest in disclosure. The Court agreed that the USMS desire to look at such cases on a case-by-case basis, as opposed to the newspapers advancing a "categorical approach with the public interest always outweighing the privacy interest.[93]." The Court agreed that the case-by-case approach is more appropriate.

The Court noted that in 1996, it "court could not have known or expected that a booking photo could haunt the depicted individual for decades." The Court overruled Free Press I and remanded the case.

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[88] 5 U.S.C. § 552(b)(7)(C).
[89] Reporters Comm., 489 U.S. 749 (1989).
[90] 5 U.S.C. § 552(a)(4)(B).
[91] Detroit Free Press, Inc. v. Dep't of Justice (Free Press I), 73 F.3d 93 (6th Cir. 1996)."
[91] Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497 (11th Cir. 2011)
[92] See U.S. v. Irorere, 69 F. App'x 231 (6th Cir. 2003) ("[T]he Sixth Circuit has condemned the practice of showing 'mug shot' evidence to a jury 'as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality.'" (quoting Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979))); see also U.S. v. McCoy, 848 F.2d 743 (6th Cir. 1988) (finding the district court erred in overruling an objection to lineup photos, which "suggest that [the defendant] is a 'bad guy' who belongs in jail").
[93] See Reporters Comm., supra.

SEARCH & SEIZURE – ANONYMOUS TIP

U.S. v. Noel, 2016 WL 4446083 (6th Cir. 2016)

FACTS: In November, 2013, Noel's parole officer got a tip that Noel had a firearm in his home. In a search, a gun was found hidden in the ceiling. Under the federal rules, a search of a parolee's property was authorized if there was "reasonable cause to believe" that a violation was occurring. Earlier in the year, Noel had testified positive for marijuana four times, and each instance also justified a search, but apparently none were conducted. The tip and search in question occurred a week after his most recent positive test. The context of the anonymous call indicated the Noel was known to the caller, who also knew that he lived with his uncle and allegedly had been "assaultive" towards him. The parole officer and a Detroit officer went to do the search, finding Noel arriving at the house. After the gun was found, Noel was arrested and confessed to having possessed the gun for several months.

Noel was charged with the gun, and moved for suppression. He argued that the anonymous tip was not enough to justify reasonable suspicion. The trial court ruled that the call, combined with the positive marijuana tests, was enough to justify the search, even if it was precipitated by the call alone. (The trial court also mistakenly thought he had consented.) Noel appealed.

ISSUE: Is a phone tip with sufficient detail enough to support reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court agreed that the phone tip was sufficient reasonable cause, and that the term was analogous to reasonable suspicion under Terry v. Ohio. Although the call was anonymous, the caller had been able to parse out the caller's relationship to Noel and their location, and had identified that the relationship was a "close one" given the type of information the caller had about Noel. The fact that the caller's identity was ascertainable "makes a world of difference" as it increased the ability that they caller could be tracked down and held accountable for false information. Further, the caller actually made two calls, lessening the idea that they were simply making up the story. A more detailed tip would have been better, but the Court agreed, what was provided is sufficient.

The denial of his motion was affirmed.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Calvetti, 2016 WL 4698277 (6th Cir. 2016)

FACTS: On March 26, 2014, Trooper Ziecina (Michigan State Police) observed a vehicle (driving by Calvetti) make several erratic moves. He could see that the driver's "arms were locked in a rigid, unnatural position on the steering wheel and that she had a frozen, cold expression on her face." When she continued to drive more slowly than the speed limit, he made a traffic stop.

The passenger, Cortez, produced his license, but Calvetti could not find hers. The officer directed her to come back to his car so he could run the plate, and asked her about the travel plans. He then talked to Cortez. He noticed that despite the assertion that she was "moving Cortez from Texas to Michigan" that there were few personal items in the car, and that the vehicle was not registered to Calvetti. (She claimed she was buying it.) "Calvetti stated that she was responsible for all of the vehicle's contents, denied there was anything illegal in the van, and authorized the police to search it. At that point, the traffic stop had lasted approximately fifteen minutes."

A drug canine called to the scene showed "some interest" in the floor of the minivan, but did not alert. As questioning went on, Calvetti made certain admissions and "acted very nervously throughout their

conversation, did not make eye contact, was sweating and shaking, touched her face, and "search[ed] for answers" to simple questions."

> Approximately thirty-five minutes into the traffic stop, the officers moved Cortez to the patrol car with Calvetti while the officers searched the minivan. Neither defendant was restrained. The car's audio recording system recorded a conversation between Calvetti and Cortez. They conferred as to whether their independent answers to Ziecina's questions matched and made observations about the drug-sniffing dog's behavior. As the search continued, Calvetti said that she was "not doing this anymore," wondered whether the patrol car contained a recording device, and told Cortez that he would have to take the blame. Calvetti also talked to a co-conspirator on Cortez's cell phone, alerting the co-conspirator that the police were searching the minivan using a drug-sniffing dog. Calvetti then erased the co-conspirator's number from the cell phone.

Trooper Ziecina had noted "discrepancies" in the way to minivan was constructed, and ultimately discovered contraband under the floor using an optical scope. Five, 1-kilo sized packages were spotted, 16 packages were eventually discovered. The entire process took about an hour and 13 minutes. Cortez cooperated and agreed to help with a controlled delivery, but he "subsequently tipped off the buyer."

> As they interviewed Cortez, the agents sometimes left the room to talk to Calvetti, a technique known as "whipsawing." After the agents advised Calvetti of her rights, she signed a Miranda form indicating that she understood her rights but did *not* want to answer questions. Nevertheless, the agents questioned Calvetti, explaining that they wanted her help with the investigation. The agents asked her about her travel plans, ownership of the minivan, and her residence in Dearborn Heights. Thereafter, the agents asked and obtained Calvetti's permission to use her Dearborn Heights residence to stage a controlled delivery. Calvetti then signed a consent for the search of her house. The written consent stated that she "freely consent[ed]" to a search of her Dearborn Heights residence and she had "not been threatened, nor forced in any way."

That residence, in fact, was nearly empty, serving apparently as a "stash" house.

Both were charged with intent to distribute. Calvetti moved to suppress her statements and the fruits of the search of the house. The Court ruled that "Calvetti had implicitly waived her right to remain silent by answering Agent Moore's questions after receiving Miranda warnings." Both moved to suppress the evidence found in the van, with Cortez arguing "that the arresting officers had unconstitutionally prolonged the traffic stop without reasonable suspicion of criminal activity. Calvetti maintained that there was no probable cause to initiate the traffic stop because she was driving in compliance with Michigan law." Both were denied, and both parties were convicted. Both appealed.

ISSUE: If questioning goes on after invocation of right to remain silent, but nothing is used at trial, is there any remedy?

HOLDING: No

DISCUSSION: With respect to the statement, the Court noted that:

> If a defendant invokes the right to remain silent at any time, prior to or during the interrogation, questioning must cease.[94] A defendant's invocation of her right to remain silent must be clear and unambiguous.[95] Here, Calvetti clearly and unambiguously invoked her right to remain silent by signing her full name on the "no" signature line below the question "Are

[94] Miranda v. Arizona, 384 U.S. 436 (1966).
[95] Berghuis v. Thompkins, 560 U.S. 370 (2010).

you willing to answer some questions?"[96] Agent Moore noticed Calvetti's "no" signature on the waiver form, but immediately began asking her questions regardless.

The Court agreed that the questioning was improper under Michigan v. Mosley, but that it is a "fundamental trial right."[97] In this case, none of her statements were used at trial and as such, she suffered no Fifth Amendment injury. "By its terms, the Fifth Amendment does not prohibit the act of compelling a self-incriminating statement other than for use in a criminal case."[98]

With respect to the search, Calvetti argued that the violation "tainted her consent to search it." The Court noted that:

> Miranda warnings are not independent rights; rather, they are prophylactic rules stemming from the Fifth Amendment privilege against self-incrimination.[99] The privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[100] "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."
>
> In U.S. v. Cooney, we ruled that the Cooney defendant's signing of a consent to search form after invoking her right to remain silent did not violate the Fifth Amendment because "the consent is not evidence of a testimonial or communicative nature."[101] Giving consent to search is not in itself a testimonial statement because it does not "relate a factual assertion or disclose information."[102] While the Cooney defendant's consent to search led to the disclosure of incriminating documents, that evidence was physical, not testimonial.[103] Consenting to a search is therefore not the type of statement that falls within the protections of the Fifth Amendment.[104]

With respect to the stop, the Court agreed that a vehicle stop is a seizure, but that reasonable suspicion developed during the stop can be used to extend the stop. "In forming reasonable suspicion, officers may draw on their "experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[105] While a "mere hunch" is not enough, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard."

> Here, the government maintains that the following factors collectively give rise to reasonable suspicion:
> (1) Driving behavior: Calvetti's abrupt lane change, reduction of speed, and rigid, unnatural posture were "suggestive of a person trying not to be stopped";
> (2) Luggage: The minivan contained very few belongings for someone who was relocating to a new state;
> (3) Minivan Ownership: Calvetti first claimed to own the minivan, but when confronted with the fact that it was registered to someone else, she back peddled, stating that she was still in the process of buying the van;
> (4) Hard travel: Unlike any driver that Trooper Ziecina had pulled over in ten years, Calvetti was the first to state that she had been driving for 24 hours straight;

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[96] See U.S. v. Scott, 693 F.3d 715 (6th Cir. 2012) (writing "no" in response to the written question "Having these rights in mind, do you wish to talk to us now?" invokes the right to counsel).
[97] 423 U.S. 96 (1975)
[98] Lingler v. Fechko, 312 F.3d 237 (6th Cir. 2002).
[99] See Maryland v. Shatzer, 559 U.S. 98 (2010).
[100] Pennsylvania v. Muniz, 496 U.S. 582 (1990) (internal quotation marks omitted).
[101] 26 F. App'x 513 (6th Cir. 2002).
[102] See Muniz, 496 U.S. at 594.
[103] Cooney, 26 F. App'x at 518–19.
[104] See Elstad, 470 U.S. at 304 ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence.").
[105] U.S. v. Arvizu, 534 U.S. 266 (2002) (quoting U.S. v. Cortez, 499 U.S. 411 (1981)).

(5) Nervousness: Calvetti appeared unusually nervous, searching for answers to simple questions, not making eye contact, sweating, shaking, and deflecting the question of whether she was always this nervous by volunteering that she had already been stopped and searched on the trip; and
(6) Criminal history: Calvetti admitted that she had a prior misdemeanor drug conviction and Cortez had more than one prior drug conviction, smoked marijuana, and spent 18 years in prison for a drug offense.

In U.S. v. Stepp, the Court had "affirmed the district court's denial of the defendants' motions to suppress on the basis that the officers had reasonable suspicion to prolong a factually similar traffic stop.[106] In that case, the government relied on five factors to support a finding of reasonable suspicion: (1) nervousness, (2) the passenger pretending to be asleep but tightly gripping his cell phone, (3) the defendants' inability to produce a car rental agreement, (4) the defendants' travel plans were to train at a boxing gym, yet neither defendant could name the gym or its location, and (5) criminal history checks for both defendants revealed involvement in narcotics."

> Analyzing these considerations, we reiterated that nervousness was a relevant but "unreliable indicator, especially in the context of a traffic stop." Similarly, we explained that feigning sleep and the defendants' inability to produce their rental car agreement were weak indicators of criminal activity. What remained were two stronger indicators: (1) "vague" or "dubious" travel plans, and (2) relevant criminal history.
>
> Regarding travel plans, we explained that our court has "placed weight on implausible travel plans in considering whether reasonable suspicion has arisen," such as when inconsistent explanations are offered. In Stepp, the proffered travel plans were dubious because the occupants lacked knowledge of their final destination in a city that was less than an hour away, and demonstrated an inability to answer "relatively basic follow-up questions" about their plans. Here, Calvetti's and Cortez's travel plans were also dubious; they had almost no luggage, despite claiming that they were relocating from one state to another, and that they had driven straight through from Texas to Michigan.

The Court continued:

> Regarding a suspect's criminal history, we cautioned in Stepp that "an officer's knowledge that a defendant has a criminal history is not enough to create a reasonable suspicion," even when combined with other weaker indicators, but we also distinguished the circumstances in that case. In Stepp, like the instant case, "the criminal history reports . . . were specific and related to the same suspicions that the officer was developing—that the occupants of the vehicle might be involved in drug trafficking." We thus concluded that "the specific nature of [the defendants'] criminal histories—involvement in narcotics—casts a suspicious light on the otherwise weak indicators, particularly when combined with the dubious travel plans."

In light of Stepp, the enumerated factors in this case, when viewed in the light most favorable to the government, constitute reasonable suspicion of criminal activity. Although the government relies on several weak indicators of criminal behavior, it also relies on two strong indicators—Calvetti's and Cortez's dubious travel plans (driving twenty-four straight hours from Texas to Michigan with a small amount of luggage inconsistent with moving to a new state) and criminal histories (drug-related offenses). Taken together with Calvetti's nervousness, driving behavior, and her inconsistent statements as to whether she owned the minivan, these factors establish that the officers had reasonable suspicion necessary to justify expanding the initial stop in order to question Calvetti and Cortez further and to accommodate the minivan search.

Finally, the Court agreed that the conversation in the vehicle was sufficient to support a conspiracy conviction as well, along with the evidence found at the residence. The convictions were affirmed.

[106] 680 F.3d 651 (6th Cir. 2012).

SEARCH & SEIZURE – PERSONAL SEARCH

U.S. v. Doxey, 833 F.3d 692 (6th Cir. 2016)

FACTS: Doxey became a suspect in a drug and firearms trafficking ring. He was located at a Michigan gas station, where ATF agents watched him do a hand-to-hand transaction. He drove away, and the officers, knowing he was on parole and had a suspended OL, planned to stop him. However, he pulled to the side of the road before they could do so. Officers pulled over behind him and he cooperated, coming back to the rear of his vehicle with Trooper Marshall. He was searched with his consent, and $1,560 in cash was found. He claimed some was from his girlfriend and the rest was gambling proceeds. During a search of the car, a burnt roach and digital scales were found. His two female passengers were also questioned.

They proceeded with Doxey to his girlfriend's house, where he was living. Todd, the girlfriend consented. Heroin residue was found but Doxey denied ownership, claiming that the drugs likely belong to Todd's ex-boyfriend. While still inside Todd's house, the officers asked Doxey if he would consent to another search of his person; Doxey agreed. Because the officers suspected that Doxey was hiding drugs in his genital area, they asked him to remove his underwear and squat so that his genitals and his rectum could be examined. Trooper Marshall explained that "it [i]s quite common for people that are trafficking narcotics or trying to [hide] any type of narcotics for people to try and hide them on their person so police officers can't find them."

Doxey initially complied by pulling his pants and underwear down. But when the officers asked him to squat down, Doxey was "reluctant to do that." Instead, Doxey "would squat just a little bit, like it was quite evident he was clenching his butt cheeks together in order to hide something, to prevent something to fall out." Because it was obvious to the officers that Doxey was hiding drugs in his rectum, they decided to take him to the Muskegon Police Department for another search.

As a condition of his parole, he was required to allow complete body searches. Doxey became combative during another search and eventually, they retrieved a baggie containing heroin from between the buttocks. The case was turned over for federal prosecution. He moved for suppression which was denied. He was conviction of possession with an intent to distribute and appealed.

ISSUE: Is retrieving a contraband item from the exterior of a suspect's body invasive?

HOLDING: No

DISCUSSION: The Court noted that the search of Doxey was not an invasive cavity search but instead, was a simply retrieval of an item in plain view and outside the body, although partially hidden initially. The officers had reasonable grounds/ suspicion to believe Doxey was violating his parole.

The Court agreed:

> Searches that intrude into the body implicate greater constitutional concerns.[107] A warrantless search of a person's body implicates the "most personal and deep-rooted expectations of privacy,"[108] and is reasonable only if it falls within one of the Fourth Amendment's exceptions,[109] However, "[t]he fact that an intrusion is negligible is of central relevance to determining reasonableness."

In this case, the Court noted that "

[107] *See* Schmerber v. California, 384 U.S. 757 (1966) ("Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.").
[108] Winston v. Lee, 470 U.S. 753 (1985),
[109] Missouri v. McNeely, 133 S.Ct. 1552 (2013).

There is no question in this case that Trooper Marshall's flicking a baggie from in-between Doxey's buttocks invaded Doxey's privacy interests beyond that of a visual search. Trooper Marshall's removal, however, did not require any further touching, intrusion, or probing into Doxey's body. Unlike the cases Doxey cites, namely, U.S. v. Booker, this is not a case where the officers probed inside Doxey's anal cavity based on the belief that he might be hiding something inside.[110] For example, in Booker, the defendant was injected with muscle relaxants, a sedative, and a paralytic agent before being paralyzed and intubated. When the defendant was paralyzed with a tube in his throat, a doctor removed a five-gram rock of crack cocaine from his rectum. *Id.* This case is hardly analogous. Unlike in Booker, the officers here did not subject Doxey to an extremely intrusive medical procedure before removing something secreted in his anal cavity. What happened here was a far more limited intrusion upon Doxey's privacy interest and was based on the presence of a baggie in plain sight.

Additionally, unlike in Booker, there is nothing in the record related to the danger of flicking the protruding baggie from in-between Doxey's buttocks, nor did Doxey argue that he was at risk for injury or that he was injured by the removal. Instead, the record shows that the baggie was protruding far enough out of Doxey's buttocks so that Trooper Marshall could flick it with his finger, and there is no indication that this process was difficult or prolonged.

Finally, the fact of Doxey's status as a parolee diminished his reasonable expectation of privacy and provided a strong justification for the search. Just as the Supreme Court held in Samson, the government "has an overwhelming interest in supervising parolees because they are more likely to commit future criminal offenses."[111] And the government's interests in reducing recidivism and promoting rehabilitation "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."

Doxey of course was a parolee who consented to a body search and even voluntarily pulled his pants and underwear down so that the officers could examine his genitals and rectum. Doxey only went "out of his way . . . not to relax his butt cheeks" once it became obvious to the officers that he was hiding something in his rectum. Although removing the baggie protruding from Doxey's buttocks was an invasion of privacy beyond that caused by a visual search, what occurred here was a constitutionally permissible search that was reasonable under the totality of the circumstances. The bottom line is that the baggie was removed from in between Doxey's buttocks without any intrusion into his anal cavity, without any injury, harm, or pain to Doxey, and in a private environment. We therefore find that the manner of removal was permissible under the Fourth Amendment and the district court's denial of Doxey's suppression motion was not plain error.

Doxey also argued that he should have been provided with the identity of a CI. The Court noted that "the government has a limited privilege to withhold the identity of a confidential informant from a criminal defendant.[112] This privilege is limited, however, by "the fundamental requirements of fairness." When "disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." To determine whether the government is required to disclose the identity of the informant, we balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." This depends "on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[113] In this case, the Court agreed, the information was properly denied, with a further note that the "the CI's statements were clearly contextual and

[110] 728 F.3d 535 (6th Cir. 2013),
[111] 547 U.S. at 844
[112] Roviaro v. U.S., 353 U.S. 53, 59-60 (1957).
[113] Id.; see also U.S. v. Sales, 247 F. App'x. 730 (6th Cir. 2007) ("[T]o invoke this privilege[,] the public interest in protecting the flow of information to the government must outweigh the defendant's need for disclosure of information in the preparation of a defense.")

provided to the jury only as background to the events leading up to Doxey's arrest, and not as evidence of his guilt."

Doxey's conviction was upheld.

SEARCH & SEIZURE – INDEPENDENT SOURCE DOCTRINE

U.S. v. Williams, 2016 WL 3648260 (6th Cir. 2016)

FACTS: Williams and Gulley were suspects in an interstate heroin trafficking case. Officers obtained warrants for Williams' Kentucky home (and Gulley's Cincinnati home) and executed them on June 11, 2014. Significant amounts of heroin, cash and firearms were found. They turned their attention to a Cincinnati area house they believed the pair were using as a stash house, that had been under surveillance. Williams and Gulley both visited the house regularly and these visits mirrored visits made to other stash houses in "frequency, length, and duration." Both Williams and Gulley were found to have keys to the house, no one lived there, and a vehicle they were suspected of using to transport drugs was there regularly.

Officers went to the house following the search of Gulley's home, in anticipation of a warrant being issued. (Officer Waters was in the process of preparing the warrant at the time.) They did not wait, however, but instead, tested a set of keys they retrieved from Gulley on the front door. It "knocked it ajar." And within moments, they heard footsteps and an alarm went off. They went in and did a protective sweep, finding 3 large dogs in the basement and Richardson and his girlfriend upstairs. Richardson told them that Williams owned the house and provided him a key. That information was shared with Waters, who put it in the affidavit.

A search warrant was issued for the house and heroin, a kilo press and firearms were retrieved. Williams and others were charged. Williams asked for suppression of the evidence from the stash house and the trial court agreed, finding the warrant tainted by the illegal search, noting that without the information found when they went in, a warrant would not have been supported. The Government appealed.

ISSUE: In the independent search doctrine, is the question whether the evidence would have still been discovered without the improper evidence?

HOLDING: Yes

DISCUSSION: The Court looked at the issue from the point of the government's invocation of the independent search doctrine.[114] In that, a search that is improper should only put the officers in the same position they would have been in without it, not a worse position.[115]

To apply the doctrine, the government must show that "the initial illegal search did not prompt officers to seek a warrant for a second search."[116] Next, it must be shown that the judge would have issued the warrant even absent the information from the illegal search, if after stripping out the illegally obtained information, whether sufficient probable cause remains. In this case, the Court noted, the lead officer argued that a warrant was already in process, but the court found the information to be less than credible, given that they were apparently testing the key to shore up the warrant. The officer's statement was clear that they used the key (searching the house) to gather probable cause for the warrant and "presumably, if the key did not fit the door, there would not have been a later search." The Court found it more plausible that had they not had the match, they would not have immediately sought a warrant for the stash house.

[114] U.S. v. Leake, 95 F.3d 409 (6th Cir. 1996); Nix v. Williams, 467 U.S. 431 (1984).
[115] U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005).
[116] Murray v. U.S., 487 U.S. 533 (1988).

The Court upheld the suppression of the evidence.

INTERROGATION

Dobbins v. Com., 650 Fed.Appx. 257 (Ky. 2016)

FACTS: In April, 2012, Dobbins and Gray, his girlfriend, traveled from WV to Caldwell County for a funeral. The next day, they went to Jane's house, age 11. While there. Gray and Jane went for a walk, meeting Dobbins along the way. The next week, Jane began to talk of suicide and after a couple of weeks, stated that Dobbins had raped her. She had injuries consistent with a rape. By this time, the couple had returned to WV.

Someone from the Caldwell County SO requested WV State Police interview Dobbins. Trooper Huff did so and Dobbins admitted the rape. During the trial, he moved to suppress the statement, arguing he'd not been properly Mirandized while in custody. That was suppressed; he was ultimately convicted, and appealed.

ISSUE: Is being given a ride by law enforcement to an interview custody?

HOLDING: No

DISCUSSION: The Court ruled that in fact, Dobbins had been properly Mirandized, but chose to discuss the issue of custody as well, even though it was moot.

Trooper Huff asked Dobbins to speak to him, and offered him a ride to the station, which Dobbins accepted. The Court noted that "in his patrol car, while on the way to the police station, Trooper Huff read Dobbins his Miranda rights and emphasized that Dobbins was not under arrest. After having heard his rights, Dobbins continued making statements to Trooper Huff. At no point in the interview did Dobbins indicate he did not want to speak to Trooper Huff; therefore, based on our review of the record, Trooper Huff's Miranda warnings were appropriate" Even though Dobbins claimed he was drunk at the time, the trooper found no indication that Dobbins was so impaired as to have not made his own decision. Only two troopers were present, and Dobbins was interviewed in the open area of the office, not an interrogation room. Even though choosing to leave might have been awkward, it was still doable. The interview was short, an hour and a half, and he was never restrained or faced with aggression or intimidation.

Further:

> Miranda warnings are only required when the suspect being questioned is "in custody."[117] The U.S. Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." This inquiry turns on "whether the person was under formal arrest[,] . . . there was a restraint of his freedom[,] or . . . there was a restraint on freedom of movement to the degree associated with formal arrest."[118] Custody, to be sure, does not occur until the police restrain the liberty of an individual, either by some form of physical force or show of authority.
>
> Indicia that someone is in custody include: "the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the suspect, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[119] It must be judged by "the objective circumstances of the interrogation, not on

[117] Thompson v. Keohane, 516 U.S. 99 (1995)
[118] Com.. v. Lucas, 195 S.W.3d 403 (Ky. 2006), as modified (Aug. 2, 2006);
[119] U.S. v. Mendenhall, 446 U.S. 544 (1980).

> the subjective views harbored by either the interrogating officers or the person being questioned."[120]

The court agreed the situation was not custody, and upheld his conviction.

McKinney v. Hoffner, 830 F.3d 363 (6th Cir. 2016)

FACTS: In 2007, Harper (age 70) allowed McKinney to move into his Hillsdale County, Michigan, home, in exchange for doing chores. Wilkinson, Harper's caretaker, also lived there. Occasionally, arguments would break out. On October 22, 2009, Wilkinson left, leaving the two men alone. "After Wilkinson left, McKinney shot Harper in the face at pointblank range while Harper slept, killing him. McKinney fled in Harper's van, and police soon arrested him in Illinois following a traffic stop during which McKinney claimed to be Harper. The officers searched the van and discovered two handguns—including the one used to kill Harper—a handgun magazine, and Harper's wallet."

Detectives from the Hillsdale County Sheriff's Department went to Illinois to investigate the homicide. Det. Hodshire questioned McKinney prior to him being extradited back to Michigan. At some point, McKinney said he wanted to wait until he got a public defender, but subsequently, in the same interchange, did confess. (This after the detective said, following, "well that's fine, but like I said ….") After appeals, the confession was admitted, and the "prosecution relied heavily on McKinney's confession at trial, playing it almost in full and mentioning it often in opening and closing arguments." McKinney was convicted and appealed. The Michigan courts upheld the conviction and he filed a habeas petition in federal District Court. The District Court awarded the writ unless the state retried McKinney within 90 days, without the confession. Michigan appealed.

ISSUE: Is a contradictory invocation of a right to counsel valid?

HOLDING: No

DISCUSSION; The Court discussed whether his statement was, or was not, an unequivocal invocation of his right to counsel. Michigan summarized his "statement that he would "just as soon wait" until he had an attorney before talking to the police [Statement 1], followed immediately by his statement that he was willing to discuss the "circumstances" [Statement 2], was not an unequivocal assertion of the right to counsel or a statement declaring an intention to remain silent."

The Court looked first to the definition of interrogation.

> In Miranda v. Arizona[121] and Edwards v. Arizona,[122] require police officers to cease questioning a suspect who unequivocally invokes his right to counsel. Police cannot use statements made after the suspect requests counsel if those subsequent statements are the result of further police initiated interrogation.[123]
>
> The Supreme Court defined "interrogation" in Rhode Island v. Innis.[124] In Innis, police officers placed the defendant under arrest for kidnapping, robbery, and murder, advised him of his Miranda rights, and took him to the police station. The defendant stated that he understood his Miranda rights and wanted to speak with an attorney. On the way to the station, however, the officers spoke to each other about the murder weapon in front of the defendant. One officer testified that they were "talking back and forth" and commented "that I frequent this area while on patrol and there's a lot of handicapped children running around [because a school for handicapped children was nearby], and God forbid one of them might

[120] Stansbury v. California, 511 U.S. 318 (1994).
[121] 384 U.S. 436 (1966).
[122] 451 U.S. 477 (1981).
[123] Smith v. Illinois, 469 U.S. 91 (1984).
[124] 446 U.S. 291

find a weapon with shells and they might hurt themselves." The second officer "more or less concurred" with the sentiment, and at some point the defendant "interrupted the conversation" and showed the officers where he had hidden the gun.

The Supreme Court held that the officers' statements regarding the shotgun were not interrogation. The Court defined interrogation to refer "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." That definition includes "either express questioning or its functional equivalent." The Supreme Court noted that interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." The concern in Miranda was that the "interrogation environment" created by interrogation and custody would "subjugate the individual to the will of his examiner" and thereby "undermine the privilege against compulsory self-incrimination."

The Supreme Court acknowledged the "subtle compulsion" inherent in the officers' conversation, but held that no interrogation occurred. "Given the fact that the entire conversation . . . consisted of no more than a few off hand remarks," the Court could not say that it was "reasonably likely that Innis would so respond." The police did not carry on a "lengthy harangue" in the presence of the suspect, and the officers' comments were not particularly "evocative." As such, the defendant "was not subjected by the police to words or actions that the police should have known were likely to elicit an incriminating response."

Innis clearly establishes that interrogation includes express questioning or its functional equivalent—any words or actions that police should know are reasonably likely to elicit an incriminating response. The Supreme Court has provided little additional guidance on what constitutes the functional equivalent of express questioning, although it has suggested that interrogation may be limited to "compelling influences, psychological ploys, or direct questioning."[125] Innis thus provides a very general rule, and the Supreme Court has repeatedly emphasized that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[126]

Looking at the detective's statement, in effect, an "uncompleted sentence fragment," the Court agreed that the Michigan Court's conclusion that it was not interrogation was proper.

The Court looked to Davis v. U.S., in which the court said that a "suspect "must unambiguously request counsel."[127] In this case, "McKinney's two statements came in quick succession—the video of the confession confirms that only two seconds elapsed between the statements. When McKinney said he wanted to wait for an attorney but followed by saying he wanted to talk, a "reasonable officer" could easily have "understood only that [McKinney] *might* be invoking the right to counsel" – not that he actually was doing so.

The Court denied the habeas petition.

42 U.S.C. 1983 – FALSE ARREST

Sinclair v. Lauderdale County, TN, 2016 WL 3402594 (6th Cir. 2016)

FACTS: Sinclair's son was sentenced to a rehab program in Tennessee. It was agreed that if he received a temporary furlough, his mother, Cheryl, would be his only form of transportation. If he left the facility without leave, he would be considered to have escaped. The following month, he received an overnight furlough to attend a family function. He did not return on Sunday, as required,

[125] Arizona v. Mauro, 481 U.S. 520 (1987) (holding that allowing suspect to speak with his wife in the presence of a police officer was not interrogation, as it did not fall into any of these categories).
[126] Yarborough, 541 U.S. 652 (2004); *see also* Parker v. Matthews, 132 S. Ct. 2148 (2012).
[127] 512 U.S. 452(1994).

but spent the night with his girlfriend and she drove him back on Monday. Believing he would be kicked out, he then left the facility. A few days later, his probation officer was notified, but they mistakenly though his mother had brought him back, rather than his girlfriend. A warrant was issued on the son for a probation violation.

As a result, an assistant DA requested charges against Cheryl Sinclair for accessory to escape after the fact. The Sheriff's Investigator, after doing his own investigation, did the appropriate paperwork to initiate the charges. Cheryl Sinclair was arrested. After spending 37 days in jail, and the discovery that in fact his girlfriend brought him back, rather than his mother, the charges were dismissed.

Cheryl Sinclair brought a claim under 42 U.S.C. §1983, claiming false arrest. The trial court awarded them qualified immunity, and she appealed.

ISSUE: Does a mistake in law necessarily support a lawsuit?

HOLDING: No

DISCUSSION: First, the court noted that the criminal charge of escape, in Tennessee, specifically did not include someone who violated probation/parole. The Court, however, noted that under "Heien v. North Carolina, they were still entitled to qualified immunity. The mistake, as it were, was reasonable, particularly since the judge's order specifically mentioned potential charges of escape.[128]

She was also misidentified as the person who brought him back, which triggered the charge. The Court noted that based upon the information they had, it would be reasonable for an officer to believe she knew where her son was and risked punishment for failing to return him within the window given by the furlough.

The Court upheld the dismissal. f

Davis v. Butler County, OH., 2016 WL 4036390 (6th Cir. 2016)

FACTS: On March 8, 2014, Davis's daughter called her to report that Butler County deputies were at her home. (Davis owned it, but three adult children resided there.) Upon her arrival, she found Deputy Hollingsworth and asked what was going on. He showed her a search warrant, which she pronounced to be bulls**t. The deputy was angered and instructed a female officer to search her, then she was handcuffed and secured in a cruiser for over an hour. She was transported after drugs were found in the house. There, she was given Miranda and questioned. She was apparently charged, but posted bond and was released. Her car was searched and her cell phone seized and never returned. Her charges were reduced and ultimately dismissed as the deputy did not proceed with the case. She had her charge expunged, but her photo was posted to a website and to the newspaper website as well.

Davis filed suit that fall but it was dismissed due to procedural matters. Eventually, another attempt was also dismissed. Davis appealed.

ISSUE: Is it improper to search someone who was validly arrested?

HOLDING: No

DISCUSSION: The Court looked at the merits of each of her claims. In the first, claiming she was improperly seized, the Court noted that the subsequent indictment indicated that there was, in fact, sufficient probably cause for the initial arrest. With respect to the search of her vehicle, Davis never actually stated who searched her vehicle and for that reason, her claim was denied. False

[128] 135 S. Ct. 530 (2014) ("The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—*whether of fact or of law*—must be objectively reasonable.")

imprisonment and false arrest claims were properly denied for statute of limitations reasons. Retaliatory prosecution was properly denied for the same reason as the seizure claim. The Court dismissed all of the claims.

Galinis v. County of Branch, City of Coldwater, and others, 2016 WL 4434511 (6th Cir 2016)

FACTS: On August 1, 2011, Peter Galinis visited the clerk's office at the Branch County Courthouse to return a DVD of a 2009 trial that he had purchased from the office earlier that day. He was distressed because the DVD was not functional and he was of the opinion that the DVD had deliberately been made defective. After recording his interaction with the clerk on his cell phone, police officers told him to stop recording and to leave the courthouse. When Galinis refused to leave, the officers arrested him and removed him from the building. Three video clips from Galinis's cell phone recording were made publicly available on YouTube, and although they contain low-quality video, they do have some audio.[129] The events of that afternoon were also recorded by the video surveillance system at the courthouse, but those recordings did not have sound.

After several back and forth discussions, and a judge's opinion that if he was being disorderly, he could be arrested, he was, in fact ultimately arrested, after a momentary struggle. Although on video, it does not appear to be violent, he claimed his glasses were broken and that he suffered several other injuries. He was charged with several minor offenses. At a preliminary hearing, Deputy Pollack "testified that Galinis was disorderly only because he refused to leave the courthouse when asked to do so, and that Galinis did not swear, yell, scream, kick, throw a tantrum, or batter or wound the officers in any way."

Ultimately, the case was dismissed because "Galinis had a right to refuse to leave the courthouse because there were no rules against the use of cell phones." He then filed suit against all parties. Upon application, the court granted summary judgement on some claims, but denied qualified immunity on others. Officer Pollack and Coldwater officers who responded appealed.

ISSUE: Is violating a non-existent policy illegal?

HOLDING: No

DISCUSSION: The Court began:

> Whether a defendant receives qualified immunity in a §1983 action turns on two questions: did the defendant violate a constitutionally protected right, and if so, was the right clearly established at the time the act was committed?[130] These questions may be addressed in any order that will facilitate a fair and efficient disposition of the case. Galinis's Fourth Amendment claims for wrongful arrest and wrongful imprisonment turn on whether the defendants had probable cause to arrest him.[131] Probable cause exists when there is "reasonably trustworthy information" that is "sufficient to warrant a prudent man" in believing that the person being arrested had committed or was committing an offense.[132]

The Court looked at the specific charges, and whether they had probable cause to believe that he was committing the offenses of physical interfering or resisting a lawful command. At the time, the issue was controlled by a case that indicated that resisting even an unlawful arrest was prohibited. In this case, Galinis used no force at all to resist the arrest, at most, he was passively noncompliant.

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[129] Those videos can be found at: Branch County 1 of 3 Cop Caught Breaking the Law, YouTube (Aug. 21, 2011), https://www.youtube.com/watch?v=PWb9g8S_CmI; Branch County 2 of 3 Cop Caught Breaking the Law, YouTube (Aug. 21, 2011), https://www.youtube.com/watch?v=vJynaZJcoUQ; Branch County 3 of 3 Cop Caught Breaking the Law, YouTube (Aug. 21, 2011), https://www.youtube.com/ watch?v=cLHQSCkQXXY.

[130] See Pearson v. Callahan, 555 U.S. 223 (2009).

[131] See Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002); see also Wallace v. Kato, 549 U.S. 384 (2007) ("False arrest and false imprisonment overlap; the former is a species of the latter.").

[132] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000) (quoting Beck v. Ohio, 379 U.S. 89 (1964)).

The Court noted that a number of arguments were brought up in the appeal in which were not raised initially. Affirmative defenses must be raised in the first responsive pleading in most states, or they are deemed abandoned, as a rule.

The Court noted that:

> Refusing to allow video recordings in a courthouse may be a sensible policy. Indeed, it is the policy of this federal appellate court and the policy of the Branch County Courthouse today. But for whatever reason, no such policy existed when Galinis made his recording, and he had a lawful right to be in the courthouse. Galinis has presented a credible case that the officers acted unlawfully, and he is therefore entitled to a trial.

The lower court's decision was affirmed.

Dodd v. Simmons / Pierce, 2016 WL 3613389 (6th Cir. 2016)

FACTS: Dodd and Simmons had a child together, and "custody disputes plagued their families' relationship thereafter." When Dodd showed up at a local fast food restaurant and found the Simmons family already there, he elected to eat in his car, but they noticed him. "A heated argument ensued." The police were called, and Dodd called his father, Earl. "Before he arrived, Earl placed his handgun, which he customarily wears on his side in a holster, in his car's center console." He joined the argument. Officers Witherspoon and Roberts, Centerville PD, arrived and interviewed him. "Deeming the incident a family dispute, the officers made no arrests, charged no one with a crime, recommended no further investigation, and wrote no reports."

Simmons sought an order of protection against Earl, claiming he'd had his hand on his gun the entire time, and that he'd threatened her and her family. She obtained that order and then sought an arrest warrant for Earl. When she arrived there, however, her father was the only police officer on duty. He called Officer Pierce to speak to the family. "Officer Pierce then asked two members of the Simmons family—Pam Simmons and Cory Chandler—to write statements describing the McDonald's fight." Their statements agreed: "with one hand on his holstered gun and the other on his crotch, Earl threatened to 'take care' of Cory." Officer Pierce also talked to Officers Roberts and Witherspoon about what they observed at McDonald's days earlier. Both opined that "nothing happened"—no crime occurred. Officer Pierce asked Officer Roberts to write a statement, and Officer Roberts complied, noting that the Simmonses "did state that Mr. Dodd did not threaten them with [his] gun but did have his hand resting on this weapon during the exchange of words."

Officer Pierce consulted with the prosecutor and was instructed to seek an aggravated assault warrant. He included some of the statements, but excluded a statement indicated that Earl did not threaten anyone with the gun. After Earl's wife complained, the two witnesses admitted they'd lied and the charges were dropped.

Earl filed suit, arguing false arrest and related claims. At a jury trial, Pierce was found liable for false arrest. Pierce appealed.

ISSUE: Is an arrest based upon a valid warrant (although parts of it were later disproved) lawful?

HOLDING: Yes

DISCUSSION: The Court noted that:

> Because arrests based on facially valid warrants approved by a magistrate judge supply a complete defense, Earl had to prove that "in order to procure the warrant," Officer Pierce "'knowingly and deliberately, or with a reckless disregard for the truth, made false statements

> or omissions that create[d] a falsehood' and 'such statements or omissions [we]re material, or necessary to the finding of probable cause.'"[133] Unearthing falsities or omissions in an otherwise-valid warrant will not suffice—a constitutional violation occurs only when a truthful and complete affidavit lacks probable cause. Officer Pierce's liability therefore hinges on the strength of Earl's argument that the information omitted would have altered the probable-cause calculus if included. In hindsight, we know that Earl's holster was empty. But Earl offered no proof at trial that Officer Pierce knowingly omitted that information from the warrant affidavit. Pam and Cory both assured Officer Pierce that Earl's gun was in his holster. Officer Roberts's statement, too, contributed to Officer Pierce's believing that Earl's holster contained a gun.
>
> In fact, the officers' statements from the scene "set forth each element of aggravated assault and *supported* Officer Pierce's belief in probable cause. And Officer Roberts's and Witherspoon's opinions did not provide information that negated any element of the offense, leaving the probable-cause calculus unchanged." The Court noted that there was "no right, clearly established or otherwise, to "a reasonable inquiry for inculpatory and exculpatory evidence." In fact, our cases hold just the opposite—a police officer has no duty to search for exculpatory facts if the facts within the officer's knowledge establish probable cause.[134] The court should not have considered Officer Pierce's failure to interview Earl in its qualified-immunity analysis.

The Court reversed the trial court and ordered the granting of his motion for qualified immunity.

Bickerstaff v. Lucarelli and others, 830 F.3d 388 (6th Cir. 2016)

FACTS: Bickerstaff worked as a PI for several criminal defense firms. She called a victim in one of the crimes (Harris) and Harris agreed to be interviewed. Shortly thereafter, she got a call from Det. Lucarelli who told her not to contact Harris as she was his "client." (Harris stated she'd agreed to be interviewed but felt harassed by Bickerstaff's repeated calls and an unannounced visit to Harris's home, and she filed a formal complaint. Lucarelli was assigned to the matter and ultimately, the prosecutor submitted the case to the grand jury. She was indicted for intimidating a crime victim and telecommunications harassment. The charges were dismissed the following month.

Bickerstaff filed suit under 42 U.S.C. §1983 and alleged that Lucarelli had sexual relationships with Harris and other female victims, and that his agency knew and took no action. She also alleged that McDuffie, who presented the case to the grand jury, omitted exculpatory information. The Court ultimately dismissed most of the claims and Bickerstaff appealed.

ISSUE: If the grand jury finds probable cause, is there a valid false arrest lawsuit?

HOLDING: No

DISCUSSION: Despite Bickerstaff's allegation, the Court agreed that she still failed to present a plausible legal theory that would justify her lawsuit. The Court looked at malicious prosecution under both state and federal law, and agreed that in neither case, did she make her case. In particular, once a grand jury finds probable cause, there is no cause of action, unless the defendants present false testimony or "testify with a reckless disregard for the truth."[135]

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[133] Sykes, 625 F.3d at 305 (alterations in original) (quoting Wilson v. Russo, 212 F.3d 781 (3d Cir. 2000)).

[134] See, e.g., Stahl v. Czernik, 496 F. App'x 621 (6th Cir. 2012) (holding that there is "no continuing duty to investigate" once the officer establishes probable cause); Manley v. Paramount's Kings Island, 299 F. App'x 524 (6th Cir. 2008) ("While the police may not ignore known exculpatory evidence in judging probable cause, they are 'under no obligation to give any credence to a suspect's story' and need not halt the investigation just because the suspect gives a 'plausible explanation' for her conduct." (quoting Criss v. City of Kent, 867 F.2d 259 (6th Cir. 1988))); U.S. v. Harness, 453 F.3d 752 (6th Cir. Case No. 15-6145, Dodd v. Simmons, et al. 2006) (finding that a police officer need not speak to the suspect before arresting him because "once a police officer has sufficient probable cause to arrest, he need not investigate further" (quoting Klein v. Long, 275 F.3d 544 (6th Cir. 2001))).

[135] Robertson v. Lucas, 753 F.3d 606 (6th Cir. 2014).

The Court looked at all of what Bickerstaff presented, which it described as "conclusory statements," rather than facts. The Court upheld the dismissal of most of the claims.

42 U.S.C. 1983 – FORCE

Eldridge v. City of Warrant, 2016 WL 3626822 (6th Cir. 2016)

FACTS: On June 18, 2009, Warren (MI) PD was advised of a man who had "erratically driven his truck over a curb and stopped in a construction area." Officers Moore and Horlocker responded, finding Eldridge in the truck. He did not step out as directed, and resisted when they tried to remove him. He was tased and handcuffed. Once secured, they found he had a diabetic insulin pump and learned he was having a hypoglycemic episode. EMS was called and he was ultimately returned home by the officers.

Eldridge filed suit under 42 U.S.C. §1983, claiming excessive force under the Fourth Amendment. The officer requested summary judgement and were denied, and the case was set for trial. After ongoing discovery and motions, the Court allowed Eldridge to attempt to introduce a video depicting Taser use by Warren officer, and specifically one of Moore tasing an individual sitting in a chair. At trial, the judge, however, excluded the evidence. The jury found in favor of the officers, and the claim against the city was not considered, as there was no fault found on the part of the officers. Eldridge appealed.

ISSUE: May evidence not admissible under one rule be admitted under another rule?

HOLDING: Yes

DISCUSSION: The Court looked at the admission of the video under KRE 404(b) – and noted such evidence was not admissible as character evidence. It might, however, be admitted for proving motive, opportunity, or other reasons. The Court noted that the officer admitted he intentionally used his Taser against Eldridge, there was no mistake or accident. The Court noted there was not even any evidence that the individual in the video had a medical condition, as did Moore, all that was depicted was a non-compliant individual being tased.

The Court upheld the jury verdict in favor of the officers.

Presnall v. Huey / Easlick, Richard, 2016 WL 5340266 (6th Cir. 2016)

FACTS: Troopers Huey and Easlick were part of the Flint Area Narcotics Group (FANG), under the supervision of Lt. Richard. On June 4, 2013, they were patrolling a high crime area of Flint, including the apartment complex where Presnall lived. They arrived about 9:50 p.m. Early on, Huey spotted three men who walked away when they spotted the marked vehicles. Presnall was one of them, and grabbed at his belt line as he walked away. Huey was engaged in something else at the moment, but when finished, he went in search of the man.

As Huey was walking between buildings, Huey heard someone yell, "stop, police." He saw another officer running after a male suspect and Huey took off as well. He saw it was the same man he'd been looking for. Despite orders to stop, the man ignored Huey and continued to run towards two other officers, who were wearing clearly marked clothing.

Presnall slowed, and reached toward his waistband, pulling out something that caused "his shirt to stretch out." Huey slowed to draw his weapon from an ankle holster. He saw Presnall aim a handgun with an extended magazine toward the two officers and heard the clicks of a misfiring weapon. Both Huey and Easlick fired multiple rounds, about ten each, at Presnall. They could see Presnall attempt to reload with a second magazine. After another volley, Presnall dropped the gun. Huey stopped firing, but did reload, just in case. Agents Miller and McAfee, the other two officers,

gave a similar account, although they did not see the weapon because of their position and the lighting. In fact, Miller was planning to tackle Presnall, not realizing he was armed. Other officers confirmed pieces of the sequence of events.

Presnall was hit 8 times, and grazed twice more. The investigation indicated that the officers acted reasonably, "and indeed may have saved two other officers' lives."

Presnall's mother, acting as his estate, filed suit, claiming excessive force and related issues, under 42 U.S.C. §1983. The trial court ruled in favor of the officers and the Estate appealed.

ISSUE: Are discrepancies in what officers report seeing in a use of force incident fatal to the case?

HOLDING: No (and in fact, expected)

DISCUSSION: The Court noted that the Estate did not contest any of the relevant facts. The fact that some officers did not see or hear what officers did does not refute the fact those things occurred. Some of that certainly had to do with lighting and positioning, for example. As to why they were "pursuing" him in the first place, the Court noted that to be immaterial, in fact, Presnall's own actions precipitated it and that all that was important was "the shooting itself and the few moments directly preceding it."[136]

The Court agreed that the shooting was reasonable and affirmed the dismissal.

Stamm v. Miller, 2016 WL 4932025 (6th Cir. 2016)

FACTS: On May 16, 201, Stamm went to King's home, in Brighton, MI. There, he became intoxicated. On his way home, about 4:20 a.m., on his motorcycle, he was clocked as speeding more than 100 mph by Deputy Marino, Livingston County. He attempted a traffic stop, but Stamm speeded up. Marino's dash cam clocked Marino as travelling at 124 mph at one point and Stamm was still getting away from him.

As a result of being alerted to the approaching chase, Officer Miller (Fowlersville PD) entered the highway ahead of the pursued vehicle. Deputy Marino later said he would have terminated the pursuit at the county line. Officer Marino entered the driving lanes with emergency equipment activated, and was traveling at 36 mph in the right lane, sped up to 43 and then slowed down. He eventually blocked Stamm, who crashed into the back of the vehicle. Stamm died as a result.

Stamm's mother, representing the estate, filed suit, arguing that Officer Miller intended to stop her son by means intentionally applied to do so. Miller requested summary judgement and was denied. He then appealed.

ISSUE: Is it lawful to use deadly force against someone who presents no immediate risk of harm to others?

HOLDING: No

DISCUSSION: Miller argued that in fact, he was trying to get out of the way of Stamm, but the Court noted that "the video shows that Miller's police vehicle was traveling, at most, 43 miles per hour on a highway with a 70-mile-per-hour speed limit, when Miller knew Stamm's motorcycle was traveling at a speed of more than 100 miles per hour. The video also demonstrates that Miller's vehicle straddled the dividing line between the two lanes for about five seconds. Finally, the video shows that Miller got in front of Stamm while Stamm was changing lanes and braked several times while in front of Stamm.

[136] Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

The recording of the radio communication between Miller and Marino, the deputy who originally responded, also indicates that Miller's plan was to stay in front of Stamm."

The Court further noted that there were no other vehicles in the vicinity at the time that were endangered by Stamm's actions. The Court noted that "[i]t has been settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'"[137]

The Court upheld the denial of summary judgement.

Jackson v. Lubelan / Weinrick, 2016 WL 4932166 (6th Cir. 2016)

FACTS: On December 22, 2011, Officers Lubelan and Weinrick stopped Jackson for driving on expired tags. Once stopped, they discovered three warrants for driving without an OL. Jackson was arrested and handcuffed. He complained of numbness and pain in his hands, but was taken to the cruiser. One officer lifted him by the wrists to guide him into the back, and allegedly pinched his neck nerves. The pain was exacerbated by the awkward position in which Jackson was sitting. He stated he complained repeatedly about the cuffs. He later complained at the jail and a nurse examined him, but he indicated no problem other than arthritis.

He was released and eventually sought medical care about a month later. He received several diagnoses and treatments.

Jackson filed suit under 42 U.S.C. §1983 for excessive force. The trial court granted the motion for summary judgement in favor of the officers and Jackson appealed.

ISSUE: Are uncomfortable handcuffs a Fourth Amendment claim?

HOLDING: No

DISCUSSION: The Court noted that in this type of case, "an excessive force claim requires the claimant to show that the "particular use of force" was objectively unreasonable "in light of the facts and circumstances confronting" the officers on the scene.[138] The inquiry demands "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."[139] Because Jackson's claim arises from an encounter with government officials, here the police, he must overcome the hurdle of qualified immunity.[140] To make that leap, Jackson must demonstrate that "the officer[s'] conduct violated" the Fourth Amendment and that 'clearly established' law showed as much. We may review the two qualified-immunity questions in whichever order we wish."[141]

To start, the Court assessed the handcuffing claim:

> To establish an excessive force claim based on handcuffing, the claimant must show that "(1) he or she complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced 'some physical injury' resulting from the handcuffing."[142] While Jackson meets the first two requirements, he offers no evidence that the tightness of his handcuffs caused his injuries. Because Jackson does not allege that slightly looser handcuffs would have prevented his injuries, the traditional framework for

[137] Walker v. Davis, 649 F.3d 502(6th Cir. 2011) (quoting Tennessee v. Garner, 471 U.S. 1 (1985)).
[138] Graham v. Connor, 490 U.S. 386 (1989).
[139] Id. (quoting Tennessee v. Garner, 471 U.S. 1 (1985)).
[140] Saucier v. Katz, 533 U.S. 194, 200–01 (2001).
[141] See Pearson v. Callahan, 555 U.S. 223 (2009).
[142] Baynes v. Cleland, 799 F.3d 600 (6th Cir. 2015) (quoting Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394 (6th Cir. 2009)).

> injuries caused by overly tight handcuffs does not help him. There simply is no injury "resulting" from the handcuffing. And Jackson points to nothing in the record (indeed we see nowhere for him to point) that demonstrates a causal connection between his injuries and handcuffing. In truth, the record and Jackson's testimony suggest that the injuries stem from the nerve damage in his neck, which Jackson admits was not caused by the tightness of his handcuffs. In Jackson's words, "if they would have seated [him] . . . differently . . . it might have alleviated the pain." The only injury that Jackson plausibly alleges as "resulting" from the handcuffing is the pain and numbness he felt after the first minute. But a subjective assessment of pain does not amount to evidence of "physical injury."[143] That is not to say that a plaintiff's testimony can never establish an injury. It's to say that a subjective feeling of pain or numbness standing alone does not constitute a physical injury. A ruling to the contrary would allow every suspect who is handcuffed to create a material-fact dispute over an excessive-force claim simply by stating that they complained and that the handcuffs hurt.

The Court agreed that the brief lifting of his arms, to get him into the police car, did not violate the Fourth Amendment. Other cases involved much more violent conduct. Further, there is no case law "clearly establishing the right to be free from awkward or uncomfortable placement in a police cruiser." The heart of his claim was also not supported, that a combination of the two issues caused the problem. He gave no indication he needed any special accommodation that they needed to be aware of.

The Court dismissed the federal claims but remanded the case back for an examination of the Michigan issues which were not addressed by the federal court.

Burley v. Gagacki (and others), 729 F.3d 610 (6th Cir. 2016)

FACTS: The Burleys were inside their home located at 20400 Greeley Street in the City of Detroit on June 13, 2007, when they heard a loud boom. When Geraldine Burley came upstairs from the basement, an officer put a gun to her face and said "[g]et on the floor." She explained that she needed to ease herself to the floor because she had undergone two knee replacements. At that point, another officer appeared, ordered Geraldine to the floor, and shoved her into the table. She hit her head, shoulder, neck, and back against the table as she fell to the ground. Another officer walked on top of her body. When Geraldine's adult daughter, Caroline, heard the loud boom and entered the living room, an officer allegedly put a gun to her face and told her, "[s]top, put your hands up." The officer threw her against the wall and onto the floor. When he placed his foot on her back, Caroline hollered, "[g]et your feet out [of] my back. I've had back surgeries." Sometime thereafter, another officer placed his foot on her back, and Caroline again explained that she had undergone back surgeries.

Further, it was noted, the officers were completely covered, concealing their identities, and refused to give the two women their names, telling them instead they were "Team 11" – which was a "vast multi-law enforcement operation involving Wayne County, and federal, state, and municipal law enforcement agents." (It took two years of discovery for Wayne County to "disclose an investigation report that purportedly revealed the identities of the officers who executed the search warrant.") The defendants named " did not affirmatively assert their lack of involvement in the Burley raid, but only later, in depositions, and after the statute of limitations had run, did they allege they'd been serving a different warrant at the time."

In a previous action, the Sixth Circuit had reversed the trial court's ruling in favor of the officers, at the time expressing its "dismay regarding the manner in which the alleged perpetrators concealed their identities to plaintiffs' detriment: "[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." When

[143] *See* Getz v. Swoap, ___ F.3d ___, No. 15-3514, 2016 WL4363152, at *5 (6th Cir. Aug. 16, 2016) ("[N]ot all conduct that causes an arrestee discomfort or pain violates the Fourth Amendment."); see also Jones v. Garcia, 345 F. App'x 987 (6th Cir. 2009) ("[T]his is not a case where the suspect merely registered subjective complaints of pain.").

remanded, the trial court declined to apply "the burden-shifting approach [suggested by the Sixth Circuit in its ruling] similar to the approach taken by the Ninth Circuit in Dubner v. City & Cty. of San Francisco whereby once a plaintiff in an unlawful arrest case meets her burden on the issue of unlawful arrest, the burden of production then shifts to officers to produce evidence of probable cause.[144] This burden-shifting approach, reasoned Dubner, "prevent[s] this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence they cannot possibly acquire."

Ultimately the jury ruled in favor of the named officers, finding they did not participate in the raid in question. The Burleys appealed.

ISSUE: In a false arrest claim, must the plaintiff prove which officer actually made the arrest?

HOLDING: Yes

DISCUSSION: The Burleys' primary issue was the trial court's decision not to apply Dubner. In Dubner, "the plaintiff claimed San Francisco police officers falsely arrested her at a demonstration. Because she was unable to identify the officers who arrested her, Dubner filed §1983 false arrest claims against all the officers listed on her arrest report. Apparently, the City of San Francisco had a practice of listing officers who arrived first on scene as arresting officers—even if they did not participate in the arrest—in order to "deliberately . . . frustrate the efforts of potential plaintiffs in false arrest cases to establish lack of probable cause." After a bench trial, the district court found that the plaintiff could not prove her arrest's unlawfulness based upon her inability to conclusively identify her arresting officers. The Ninth Circuit had reversed that ruling, "relying upon cases that shift the burden of production regarding the existence of probable cause to a defendant upon the showing of a warrantless arrest. In such instances, the Ninth Circuit reasoned, "[i]f the defendant is unable or refuses to come forward with any evidence that the arresting officers had probable cause and the plaintiff's own testimony does not establish it, the court should presume the arrest was unlawful." "This minimal burden shifting forces the police department, which is in the better position to gather information about the arrest, to come forward with some evidence of probable cause. . . . By shifting the burden of production to the defendants, we prevent this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire."

The Court agree that it had looked at false arrest claims differently, and had "upheld the dismissal of a false arrest claim where a plaintiff was unable to "clearly identify" the police officer who made the arrest because she was unable to prove which defendant had violated her rights."[145] Because defending a false arrest claim requires officers to prove they had probable cause, "then the burden also fell to the police to come up with the identity of the officer who actually made the arrest …."

The Court ruled, however, that to rule in favor of the Burleys, however, "would stand §1983/Bivens liability jurisprudence on its head.[146] That case law teaches that in order to impose individual liability upon a law officer for engaging in unconstitutional misconduct, it is a plaintiff's burden to specifically link the officer's involvement to the constitutional infirmity; a plaintiff must be able to identify with particularity the individual who engaged in the alleged misconduct because an individual "is only liable for his or her own misconduct."[147] Under plaintiffs' proposal, a law officer who raises an "I wasn't there defense" can only *avoid* constitutional liability by mustering evidence of who was there instead, and by implication, who was responsible for the alleged excessive force. In other words, once a plaintiff has put forth some evidence of an officer being present at a raid in which a constitutional violation has allegedly occurred, that officer is presumed to be liable if he claims he was not there,

[144] 266 F.3d 959 (9th Cir. 2001)
[145] Thacker v. City of Columbus, 328 F.3d 244(6th Cir. 2003).
[146] Bivens v. Six Unknown Named Agents, 466 F.2d 1339 (1972).
[147] Ashcroft v. Iqbal, 556 U.S. 66 (2009); see also Binay v. Bettendorf, 601 F.3d 640 (6th Cir. 2010) (individual liability for excessive force means the plaintiff must show that the defendant was "personally involved" in the use of excessive force and "[e]ach defendant's liability must be assessed individually based on his actions").

unless he proves who was and who did it. Even Dubner does not go this far.[148] And this is contrary to the general rule we highlighted in the prior appeal: "[M]ere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability."[149]

The Court affirmed the jury verdict exonerating the named defendants.

Rolen (estate of Ficker) / Urbach v. City of Cleveland (and others), 2016 WL 3974120 (6th Cir. 2016)

FACTS: On July 3, 2011, Urbach, Ficker and their children attended a holiday party at a cousin's home. Mindek, the homeowner, "failed to mention that the upstairs was off limits to party guests." Most of the time, the couple were outside. They went to another party, at Urbach's mother's home, and then left their children there to spend the night. They proceeded to a local bar. At some point, Mindek realized her wallet was missing from her upstairs bedroom, and called her husband, a Cleveland officer, about it. He drove home, contacting another on-duty officer, Craska, along the way. Kim Mindek explained she had only seen Ficker upstairs, among all the guests, and that he'd expressed an interest about the layout of the home. Officer Mindek told Craska that Ficker was a convicted felon that had stolen from family before. Craska received permission to go to the Ficker/Urbach home to discuss the theft.

> The officers arrived at Ficker's house shortly before Urbach and Ficker pulled into the driveway. Urbach observed Mindek standing on the lawn next to a tree and Craska standing by his zone car on the street. Urbach parked in the driveway. As she and Ficker exited the car, Urbach asked Mindek what he was doing at their house. Mindek began yelling at the couple about the missing property, alleging that Ficker took it. Craska remained silent as he stood by his zone car. Urbach and Ficker met at the back of their car and began walking towards their house. Urbach asked Mindek to leave and said that she and Ficker did not have any of the stolen property. The pair also told the officers that they did not wish to speak to them. As Urbach reached the top step of her porch and attempted to enter the side door, she felt Ficker jerk away from her, and she turned around to see Craska forcing Ficker towards the zone car. While Craska shoved Ficker up against the trunk of the car, Urbach walked over to Mindek, who was still standing on the lawn near her car, and asked him to tell Craska to stop. Ficker began yelling, calling out to his neighbors for help and to observe the officers' conduct. Craska proceeded to search Ficker, finding a pocketknife, which he threw to the side.
>
> While Craska searched Ficker, Mindek demanded Urbach give him the keys to her car so he could search it. Urbach threw her keys at him, told him to search it, and explained that he would not find anything inside the car. Frustrated with the situation, Urbach called a friend who was a Parma police officer and then her local police department's non-emergency line to ascertain whether Craska, as a Cleveland police officer, could question someone outside of his jurisdiction. She paced back and forth between the fence and her car while she spoke on the phone. Her view of Craska and Ficker was obstructed and she did not see or hear the subsequent interactions between the two.
>
> Meanwhile, Craska attempted to shove Ficker into the zone car, while Mindek removed Ficker's hand from the car. Ficker resisted, grazing Craska's chest with his elbow. In response, Craska punched Ficker in the face and took him to the ground in an armbar. Craska informed Ficker that he was under arrest for assaulting a police officer, and the pair began wrestling. Ficker managed to lock his legs around Craska's head, at which point Mindek grabbed Ficker's legs. Mindek also attempted to handcuff Ficker and eventually succeeded at getting one handcuff on Ficker's wrist. At some point, Craska choked Ficker. As the fight continued, Ficker attempted to break free from Craska's grasp and stand up a few

[148] 266 F.3d at 965 ("The plaintiff still has the ultimate burden of proof.").
[149] Burley, 729 F.3d at 620 (citation omitted).

times. Eventually, he succeeded and moved several feet away from Craska. Without saying anything, Craska then pulled out his Taser and deployed it in Ficker's direction. Ficker windmilled his arms, attempting to stop the prongs from hitting him. He subsequently removed the one prong that hit his chest. Craska threw his Taser to the side and again moved towards Ficker. The pair fell to the ground and continued wrestling each other. Ficker grabbed Craska's radio cord as the two struggled.

Mindek then warned Craska that he thought Ficker was trying to reach for Craska's gun. In response, both Craska and Mindek put their hands on the gun, in an attempt to keep it in the holster. It was unclear if Craska knew whether Mindek or Ficker had their hand on the gun. Craska then released the gun from the holster and held it behind his back. Ficker escaped Craska's hold and backed away. Craska moved the gun to his hip and fired a shot towards Ficker, who was less than a foot away. Urbach heard the gunshot and turned around to find Ficker on the ground, a few feet away from the side entrance of the house. She called 911, and Ficker was pronounced dead later that night.

The defendants presented a version of facts as well. Rolen, representing the estate, and Urbach filed suit against the officers and the City of Cleveland. Qualified immunity was denied in the face of competing facts. The officers appealed.

ISSUE: If there is a dispute in facts, may a federal court give summary judgement?

HOLDING: No

DISCUSSION: The Court noted that it lacked jurisdiction to review an appeal if the dispute centered on facts, rather than law. In other words, the Court has jurisdiction to the extent that we can analyze the legal question without relying on disputed facts.[150]

In sorting out the timeline, the Court looked to whether "Craska violated Ficker's Fourth Amendment clearly established rights when he conducted an investigatory frisk of Ficker. Craska argues that he had sufficient information to justify a Terry frisk based on (1) Ficker's previous weapons conviction and (2) his observation that Ficker was severely intoxicated and that Ficker was becoming aggressive. He also claims that he "recognized approaching a person with questions about a theft could create a volatile situation." The plaintiffs, on the other hand, claim that Ficker's criminal background was unverified. They further allege that although Ficker had been drinking, he was not severely intoxicated. Lastly, they dispel any assertion that Ficker was violent or aggressive before Craska grabbed him. In fact, they claim that both Ficker and Urbach told the officers that they did not wish to speak to them and that the couple was attempting to enter their home when Craska forcefully intervened." The Court concluded that based upon the plaintiff's version (as it must at this stage), Craska lacked enough to make an investigatory stop.

With respect to the attempted arrest, the Court noted disagreement as to when Craska attempted to arrest Ficker. "Whether the investigatory stop and frisk ripened into arrest depends on whether Craska's use of force "was reasonably related to the *Terry* stop's purpose."[151] The Court considered "three factors when determining whether a stop rises to the level of an arrest: "the length of the detention, the manner in which it is conducted, and the degree of force used."[152] However, because of the discrepancy in the versions, the Court lacked jurisdiction.

With respect to the deadly force, "Craska explicitly disputes the plaintiffs' version of the facts surrounding the fight between Ficker and Craska."

[150] *See* Thompson v. Grida, 656 F.3d 365 (6th Cir. 2011) (dismissing the interlocutory appeal because "[t]he officers' arguments for qualified immunity all hinge on acceptance of their version of the facts").
[151] Feathers v. Aey, 319 F.3d 843 (6th Cir. 2003) ("Although the Terry stop was invalid, we nonetheless must look to it in determining the point at which the stop escalated into an arrest.").
[152] Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006).

> Claims of deadly force are governed by the Fourth Amendment's reasonableness standard.[153] In Tennessee v. Garner, the Supreme Court forbade officers from using deadly force unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or to others."[154] When reviewing deadly force claims for reasonableness, we pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[155] "The central legal question is whether a reasonably well-trained officer in the defendant's position would have known that shooting the victim was unreasonable in the circumstances."

Moving to Mindek, the Court stated "Mindek claims that he is entitled to qualified immunity for the initial seizure, the grabbing of Ficker for the *Terry* frisk. Both parties seem to agree that Mindek removed Ficker's arm from the zone car. Thus, we have jurisdiction over this issue. Like Craska, Mindek cites to Thomas for the proposition that his minimal use of force did not result in a detention, and therefore, it does not implicate the Fourth Amendment, as there was never a "seizure." However, the Court noted, "The word 'seizure' [in the Fourth Amendment] readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."[156] Accordingly, Mindek's touch could constitute a Fourth Amendment violation.[157]

Mindek did not argue that he had reasonable suspicion, either, for the stop, and as such, qualified immunity was denied on this claim. Mindek also argued that he was entitled to qualified immunity on the claim that he "failed to intervene to prevent the use of deadly force." The Court agreed that it had, in the past, "held that police officers may be held liable for a failure to protect an individual from the use of excessive force.[158] "Generally speaking, a police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring."[159]" Without more, however, the Court could not assess the validity of his assertion that there was nothing he could have done.

The Court also addressed the argument that, when Parma, both officers were outside their jurisdiction and could take no law enforcement actions. Although Ohio law has some exceptions, none apply in this case. The Court agreed that they were not acting within the scope of their employment at the time. The Court upheld the denials of qualified immunity and dismissal.

Thompson v. City of Lebanon, TN (and others) 831 F.3d 366 (6th Cir. 2016)

FACTS: In the wee hours of April 28, 2010, Gregory Thompson was driving erratically on a two-lane Tennessee highway. He nearly collided head-on with Officer McKinley (Lebanon PD), and then reversed and took off. Officer McKinley, joined by Officer McDannald, gave chase. After about six minutes at high speed, Thompson lost control and ended up in the ditch. Officer McKinley ran to the car with his weapon drawn, and fired a shot. Officer McDannald followed, and fired 13 rounds. "The shooting ended within nineteen seconds of the crash. Thompson sat behind the wheel of his vehicle the entire time and did not make any threatening moves. It is unknown whether he was even conscious at the time. Thompson died at the scene due to the gunshot wounds."

Melinda Thompson (stepmother and estate administrator) filed suit against the officers and the City, allegedly excessive force. The defendants moved for summary judgement but the officers, and the

[153] Sova v. City of Mt. Pleasant, 142 F.3d 898 (6th Cir. 1998).
[154] 471 U.S. 1 (1985),
[155] Graham v. Connor, 490 U.S. 386 (1989).
[156] California v. Hodari D., 499 U.S. 621 (1991).
[157] *See* Florida v. Bostick, 501 U.S. 429 (1991) (indicating that an encounter between police and citizens could lose its consensual nature and constitutes a seizure when an officer, "by means of physical force . . . has in some way restrained the liberty of a citizen"
[158] Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).
[159] Id. (citing Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994)).

city, were denied. (The officers' supervisors were granted qualified immunity and dismissed.) Officers McKinley and McDannald appealed.

ISSUE: Is shooting a non-violent offender lawful?

HOLDING: No

DISCUSSION: To obtain qualified immunity, the plaintiff must show that "(1) the defendant violated a constitutional right and (2) that right was clearly established." They "must, at a minimum, offer sufficient evidence to create a "genuine issue of fact," that is, "evidence on which [a] jury could reasonably find for the plaintiff."[160] Under federal procedural law, the defendants have a right to an immediate appeal of a denial of qualified immunity.

The Court broke the legal issues down into three. First, the Court looked as to whether Officer McKinley seized Thompson. Looking at Floyd v. City of Detroit, the Court concluded that he did.[161] (Officer McKinley claimed he fired accidentally, and that he fired his weapon while transitioning to a baton to break the window, but Thompson presented evidence that was not the case.) In fact, McKinley's bullet did not strike Thompson, but allegedly, led to Officer McDannald firing the fatal shots. The Court upheld the denial.

The second issue is whether Officer McKinley's actions were "objectively unreasonable." Under Thompson's version of the facts, the answer is yes, as there was at least some evidence the shot was intentional, rather than accidental. As such, the denial was appropriate.

Finally, the Court looked at Officer McDannald's actions. The Court noted that if a jury believed Thompson, then "a reasonable officer would have been on notice that firing thirteen rounds into Thompson's vehicle and person violated his Fourth Amendment rights "when Thompson had been seen to do nothing more than flee from police during the vehicular pursuit for potential driving under the influence."[162]

The Court agreed that the denial of summary judgment was proper.

Rucinski v. County of Oakland 2016 WL 3613396 (6th Cir. 2016)

FACTS: On January 6, 2013, Jeremy Rucinski approached his girlfriend, Vandenbrook, to ask for his cigarettes, which she'd apparently hidden. She told him to keep smoking his e-cigarette instead. "In response, Rucinski yelled at Vandenbrook, pulled a switchblade knife from his pajama pants pocket, opened the blade, and demanded his cigarettes." She told him where they were, ran into the bathroom and called 911. She stated Rucinski was schizophrenic and having a breakdown, and that he had a switchblade. She stated he was alone in the garage and needed to go the hospital.

Deputy Sheriffs McCann, Beltz, Rymarz and Eastman (Oakland County SO) arrived on a welfare check. McCann and Beltz walked toward the garage, the other two went to the front door. The latter two were admitted and were led to the interior garage door so they could lift the exterior door.

> As the overhead garage door opened, the deputies spotted Rucinski in the far-back corner of the garage, and Beltz entered the garage between two parked cars with her taser drawn in order to speak with Rucinski. McCann, who had previously drawn her firearm, acted as "cover" for Beltz and took only a few steps into the garage.

Rymarz called to Rucinski by name; he pulled out his switchblade, saying ""bring it on" or "here we go," and began walking towards McCann. Rymarz stepped back some but had to stop at the

[160] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
[161] 518 F.3d 398 (6th Cir. 2008),
[162] Op. at 25; see also Murray-Ruhl, 246 F. App'x at 347 (recognizing that Tennessee v. Garner, 471 U.S. 1 (1985),

driveway, which was icy and slippery. Rucinski got within five feet of her. Beltz fired her taser at the same moment that McCann fired her pistol, hitting Rucinski with a single shot. They did first aid and he was transported, but passed away.

Debra Rucinski, the estate administrator, filed suit against McCann, Beltz and Oakland County for excessive force. The District Court dismissed all claims and Rucinski appealed.

ISSUE: Does it make a difference that a person threatening deadly force is mentally ill?

HOLDING: No

DISCUSSION: The Court began:

> An officer's use of deadly force is reasonable if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." [163] We have said that "[w]hen a person aims a weapon in a police officer's direction, that officer has an objectively reasonable basis for believing that the person poses a significant risk of serious injury or death."[164]

In this case, it was undisputed that Rucinski pulled a knife and approached McCann while brandishing it. Both deputies acted reasonably in firing their respective weapons.[165] The Court did not accept the argument that since Rucinski was mentally ill, the analysis is somehow different. The Court agreed that nothing restricts an officer in using deadly force because the subject is mentally ill, in fact, the opposite is the case.[166]

The Court was asked to ignore the Sixth Circuit's "segmented approach" in "analyzing Fourth Amendment excessive force claims, whereby we are required to evaluate the reasonableness of officers' use of force by focusing on the moments immediately preceding that use of force, and not on the adequacy of planning or the length of time spent thinking through the problem at hand.[167] Rucinski asks us to consider instead whether the deputies' lack of full investigation, poor planning, and alleged bad tactics in initiating contact with Rucinski either provoked Rucinski or created the circumstances that led to Beltz and McCann's use of force. Rucinski argues that we should abandon the "segmented approach" because it improperly operates to protect officers that proactively create a need for force that would not have otherwise existed, and reminds us that other circuits have adopted approaches that scrutinize whether officers created a provocation or other circumstances that led to officers' subsequent use of deadly force.

Instead, the Court noted:

> And in any event, even if we were able to consider whether the deputies, through their lack of planning and alleged bad tactics in initiating contact with Rucinski, created circumstances that led to McCann's use of deadly force, the Supreme Court has recently weighed in on this very issue, stating that plaintiffs "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided."[168]

The Court affirmed the dismissal.

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[163] Tennessee v. Garner, 471 U.S. 1 (1985).
[164] Greathouse v. Couch, 433 F. App'x 370 (6th Cir. 2011).
[165] See also Rhodes v. McDannel, 945 F.2d 117 (6th Cir. 1991); Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009): Gaddis v. Redford Township., 364 F.3d 763, 776 (6th Cir. 2004), and Rhodes v. McDannel, 945 F.2d 117 (6th Cir. 1991),
[166] See, e.g., Sanders v. City of Minneapolis, 474 F.3d 523 (8th Cir. 2007) (quoting Bates ex rel. Johns v. Chesterfield County, Va., 216 F.3d 367 (4th Cir. 2000)) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves . . . when faced with threatening conduct by the disabled individual.").
[167] Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007),
[168] City & Cnty. of San Francisco v. Sheehan, 575 U.S. — (2015) (internal quotation marks omitted) (applying without adopting the Ninth Circuit law in Billington, 292 F.3d at 1190).

Crawford / Reed / Ornelas v. Geiger, 2016 WL 4245480 (6th Cir. 2016)

FACTS: On August 26, 2012, at about 9 p.m., Crawford was contacted by his mother that she and his sister (Ornelas) "had heard what sounded like a break-in at the family's furniture store, Crawford's Furniture. Ms. Crawford asked her son to come investigate the noise immediately." He and Reed, his nephew, armed themselves and proceeded to the scene, less than two minutes away. At the same time, Ornelas contacted Reed's wife and told her to call 911, who did so. 911 called Orenelas back to confirm and "informed Ornelas that police officers were en route to Crawford's Furniture and remained on the line with Ornelas until she saw an officer and his canine partner on the property."

Deputy Geiger arrived, and told Ornelas, sitting in her car, to go to the home on the property (apparently occupied by the mother.) The deputy began to investigate the warehouse, and in the meantime, Crawford and Reed arrived, armed, and drove toward the warehouses loudly and with the lights on bright. "At this time, they had no idea that Ornelas had called 911 or that Geiger, a police officer, was searching the premises."

Geiger encountered and stopped the truck, and "Reed and Crawford then exited the truck to "cover [the] perceived threat"—Reed armed with his rifle and Crawford holding his shotgun and wearing the pistol holstered on his left side. The parties' accounts of what occurred next diverge considerably. According to Plaintiffs, after Reed parked the truck, he and Crawford assumed a "triangle" formation in relation to the person shining the bright light—who they later learned was Deputy Geiger—with their firearms trained on the light source. Crawford announced, "Mark A. Crawford, identify yourself, you're trespassing on private property." Crawford continued to identify himself by name and as the property owner, and both he and Reed told Geiger "identify yourself" several times. According to Plaintiffs, Geiger never identified himself (by name or as a police officer), but instead trained his very bright flashlight on Crawford and Reed and shouted, "put [y]our guns down" and "get on the fucking ground." This "standoff" continued for approximately 15 to 40 seconds. At their respective depositions, both Crawford and Reed testified that they refused to obey Geiger's commands to drop their weapons and get on the ground because they could not see him in the dark, did not realize he was a police officer (at in least in part due to his refusal to identify himself), and perceived him as an "unknown threat."

About 30 to 40 seconds into the standoff, Crawford heard police radio traffic, a sound with which he was familiar based on his prior employment in the military and as a corrections officer. Upon hearing the radio traffic, Crawford "took a leap of faith," assumed the person shining the bright light in his direction was a law enforcement officer, and put his shotgun on the ground. Crawford also instructed Reed to drop his rifle and step away from the weapon. Reed complied. Crawford raised his hands in the "surrender position," but never reached for or removed the pistol on his belt because Geiger did not specifically instruct him to drop this second firearm and "anybody knows you don't touch a pistol locked down in your holster if your hands are up[.]"

Ornelas hurried to the scene. She later stated that Geiger kept ordering the men to the ground and saying he would shoot them. "Crawford refused to comply with this command because he believed Geiger was 'out of control' and feared for his own safety." Additional officers began arriving in response to Geiger's call that he'd encountered "armed suspects." Crawford complied and later argued he was handled roughly by Geiger. He yelled to Ornelas and Reed to start recording the encounter. Another officer intervened and took him to the ground. A scuffle ensued between the parties.

In 2013, Plaintiffs filed a civil rights complaint against Deputy Geiger, Deputy Lee, Sergeant Hart, Officer Evilsizer, and several other law enforcement officers who responded to Crawford's Furniture on the evening of August 26, 2012. Among other things, Plaintiffs' complaint alleged that the officers violated their constitutional rights under the First, Fourth, and Fourteenth Amendments by: preventing them from recording "government officials engaging in matters of public interest"; using excessive and objectively unreasonable force against their persons; and unreasonably seizing their persons. In

addition to suing the on-scene officers, Plaintiffs also sued the law enforcement agencies—and the corresponding supervisory officials—that employed them. The district court dismissed Plaintiffs' claims against the law enforcement agencies and supervisory officials, but permitted Plaintiffs' claims against the on-scene officers to proceed.[169] Thereafter, the officers filed motions for summary judgment on Plaintiffs' claims against them. In its summary judgment order, the district court granted summary judgment on Plaintiffs' First Amendment claims, and found that the Ohio State Highway Patrol troopers who had been named as defendants were entitled to qualified immunity on all claims against them. However, the district court concluded that: Deputy Geiger, Deputy Lee, and Sergeant Hart were not entitled to qualified immunity on Plaintiffs' excessive force and unreasonable seizure claims; and Officer Evilsizer was not entitled to qualified immunity on Plaintiffs' excessive force claim. Sergeant Hart and Officer Evilsizer (together, "Defendants")—but not Deputy Geiger or Deputy Lee—timely appealed those determinations.

ISSUE: Is mere presence of an officer at a scene enough to place liability?

HOLDING: No

DISCUSSION: The Court split out the claims against the multiple officers, and dismissed the claims against several, because their specific actions were reasonable under the circumstances. "As a general matter, [an officer's] mere presence during [an] altercation, without a showing of some direct responsibility, cannot suffice to subject them to liability."[170] Instead, in order to "hold an officer liable for the use of excessive force, a plaintiff must prove that the officer '(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force.'"[171] As such, the first officer discussed "may be held liable only for "his own individual conduct and not the conduct of others." [172] After responding to a 911 call about a possible felony, receiving calls for assistance from a fellow officer who had reportedly encountered two armed suspects, encountering that same fellow officer engaged in a shouting match with two unknown individuals, and observing that one of those individuals was wearing a holstered pistol, Evilsizer deployed only enough force to help another officer, Deputy Geiger, handcuff the armed individual. Examining the factors set out in Graham, and in light of the suspected felony in progress, as well as the fact Officer Evilsizer observed an armed Crawford engaging in a verbal confrontation with Deputy Geiger and therefore had reason to be concerned about an immediate threat to Geiger's safety, we find that it was objectively reasonable for Evilsizer to deploy sufficient physical force against Crawford to assist Deputy Geiger with placing Crawford in handcuffs. Accordingly, the Court rejected the district court's conclusion that Officer Evilsizer violated Crawford's Fourth Amendment right to be free from excessive force. Because there was no constitutional violation, it did not need to determine whether Crawford's claimed right was clearly established at the time of the incident.[173] As such, he was entitled to qualified immunity.

Another officer, Sgt. Hart, intervened by separating and pushing back Reed and Ornelas when they didn't respond to his command to do so. He then took Reed to the ground, and "While Hart was on the ground with Reed, Ornelas knelt in front of him with her face approximately six to ten inches away, yelling at him for pushing a woman. When Ornelas did not obey Hart's order to step back from his "compromised position" on the ground with Reed, Hart reached up and shoved her away, pushing hard enough to cause her to take a couple of steps backward. Hart then proceeded to handcuff Reed." Reed argued he was simply trying to get his phone. The Court agreed that Hart seized Ornelas, but also noted that with the discrepancy in the versions, they could not give qualified immunity. In addition, with respect to a force claim, at the time Hart seized Ornelas: she was not suspected of committing any crime, severe or otherwise; she was unarmed and did not pose an immediate threat to Hart or any of the surrounding officers; and she was not resisting arrest or even failing to comply with a command. In other words, a jury crediting Ornelas' testimony could find that

[169] Crawford v. Geiger, 996 F. Supp. 2d 603 (N.D. Ohio 2014).
[170] Burgess, 735 F.3d at 475.
[171] Binay, 601 F.3d at 650[171] (quoting Turner v. Scott, 119 F.3d 425 (6th Cir. 1997)).
[172] Pollard v. City of Columbus, Ohio, 780 F.3d 395 (6th Cir. 2015).5
[173]See Williams v. Sandel, 433 F. App'x 353 (6th Cir. 2011); Dunn v. Matatall, 549 F.3d 348 (6th Cir. 2008)."

all three Graham factors were absent at the time Hart pushed against her chest and caused her to fall back against Reed's truck. Further, at the time of Hart's conduct, "the right to be free from physical force when one is not resisting the police" was clearly established.[174] Under Plaintiffs' version of the facts, there is no indication that Ornelas was suspected of a crime, resisting arrest, or posed a threat to any of the surrounding officers when Sergeant Hart used force against her. Because her right to be free from force while complaint, non-resistant, and non-violent was clearly established prior to the date, the Court affirmed the district court's denial of qualified immunity on Ornelas' excessive force claim.

Sgt. Hart did not dispute he seized Reed, but argued it was reasonable given what he knew at the time. He argued that "Bletz v. Gribble, for the proposition that "[e]ven if there was not probable cause sufficient to support Reed's arrest, which there was, his arrest was still reasonable so that the scene and weapons could be secured in order to ensure the safety of the officers and persons at the scene and to allow the officers to conduct an investigation into the reported break-in."[175] However, his deposition testimony indicated that he had no "knowledge that would lead him to reasonably fear that Reed would attempt to grab or use a weapon against an officer." "Any arrest, whether formal or *de facto*, requires probable cause."[176] "Probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*."[177] "In this appeal, Sergeant Hart wishes to hang his hat on knowledge that, at the time he arrested Reed, Reed was reaching for an object at his waist and standing near unsecured weapons. However, there is no evidence that Sergeant Hart—as opposed to one of his fellow officers—had this knowledge. Instead, Hart's own deposition testimony indicates that he arrested Reed for a completely separate and distinct reason: an alleged chest bump. Thus, although Reed's own testimony states that he was reaching for his phone when Hart arrested him, Hart cannot retroactively rely on this act to resolve the qualified immunity question because there is no evidence that Hart *knew* of this act when he arrested Reed.[178] Probable cause to justify an arrest requires "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 shown, that the suspect has committed, is committing, or is about to commit an offense."[179]

In this case, by the time Hart had arrived on the scene, he observed that Reed was unarmed and that Deputy Lee was yelling at Reed and Ornelas with his firearm or Taser pointed at them. Further, there is no evidence that Hart believed, or was given any reason to believe, that Reed had committed the possible burglary or breaking and entering that gave rise to Ornelas' 911 call. For there to be probable cause, the officer's "belief of guilt must be particularized with respect to the person to be . . . seized."[180] Based on these circumstances, and the circumstances described above, a reasonable jury crediting Plaintiffs' version of the facts could find that Hart (1) arrested Reed even though Hart did not know that Reed made any type of reaching motion or was standing near unsecured weapons and (2) lacked probable cause to arrest Reed for burglary, breaking and entering, or any other crime.

In this case, because there is no indication that Hart believed Reed had committed a crime, knew Reed was standing near two discarded firearms, or intended to detain Reed only temporarily—facts that may have justified a limited detention under Bletz—a reasonable jury could find that Hart violated Reed's Fourth Amendment rights by arresting Reed without probable cause.

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[174] Wysong, 260 F. App'x at 856 (citing Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006); Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004)); see also Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007) (noting that it was clearly established that officers may not use gratuitous violence against an individual who "pose[s] no threat to the officers or anyone else").

[175] 641 F.3d 743 (6th Cir. 2011),

[176] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).

[177] Estate of Dietrich v. Burrows, 167 F.3d 1007 (6th Cir. 1999) (emphasis in original); see also Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012) (noting that an officer can only have knowledge of that which he observes or is told).

[178] See Green, 681 F.3d at 865; Dietrich, 167 F.3d at 1011–12; see also Sutkiewicz v. Monroe Cty. Sheriff, 110 F.3d 352, 362 (6th Cir. 1997) (Batchelder, J., dissenting) ("Evidence relat[ed] to probable cause that [the officers] did not know of is immaterial").

[179] Michigan v. DeFillippo, 443 U.S. 31 (1979).

[180] See U.S. v. Romero, 452 F.3d 610 (6th Cir. 2006) (citation and quotation marks omitted).

Finally, we must decide whether Sergeant Hart's use of force against Reed—throwing Reed to the ground—was objectively reasonable in light of the Graham factors. The first Graham factor relates to the severity of the crime at issue. In this case, officers originally responded to Crawford's Furniture based on a 911 call regarding a possible burglary or breaking and entering. Although burglary and breaking and entering are both felonies under Ohio law, and therefore crimes of notable severity, there is no evidence, including from Hart's own testimony, suggesting that Hart suspected that Reed had committed a burglary or breaking and entering.[181] Additionally, even though Hart himself responded to the scene after receiving Geiger's call for assistance, by the time Hart arrived, Reed was unarmed and was not behaving aggressively towards Geiger. Accordingly, a reasonable jury could find that there Hart had no reason to suspect Reed of a crime, severe or as Hart would have known that it was unlawful to arrest Reed if there was no indication that Reed had committed any crime.[182]

Hart is correct that Reed could not identify which of the officers present at the time of his arrest placed their feet or knees on his back after he was thrown to the ground. Because there is no evidence that it was Hart, as opposed to another officer, who placed his foot or knee on Reed's back, we do not consider this conduct in our examination of Reed's excessive force claim.[183] otherwise, when he used force against Reed. Thus, the first Graham factor weighs in favor of Plaintiffs. With regard to the second Graham factor—the immediate safety threat posed by the suspect to police and others—construing the facts in the light most favorable to Plaintiffs, there is no evidence that Hart had knowledge of facts that would give rise to a reasonable belief, on Hart's part, that Reed posed a threat to Hart's safety or anyone else's. Plaintiffs have put forth evidence that Reed was unarmed, was not disobeying orders, and was merely reaching for his cell phone at Crawford's request—an act that Hart apparently did not see—when Hart threw him to the ground. With regard to the third factor—whether the suspect was actively resisting or attempting to evade arrest—a reasonable jury could find that Reed was neither resisting arrest nor attempting to evade arrest (because no arrest had been initiated by Hart or anyone else) at the time Hart threw him to the ground. Instead, Reed claims that he was surprised by Hart throwing him down because he had received no commands from officers in the moments immediately before. As noted above, at the time of the August 26, 2012 incident, "the right to be free from physical force when one is not resisting the police" was clearly established.[184]; Although Sergeant Hart suggests that his use of force was permissible because Reed's act of reaching for his cell phone "could reasonably be interpreted as reaching for a weapon," because Hart testified that he did not see Reed reach for his cell phone or see anything else on Reed's person, this argument lacks merit.[185] (noting that courts have found that "tackling [rises] to the level of excessive force" in cases where the plaintiff "did not pose a tenable threat to the officers' safety" or "the police did not have an adequate level of suspicion to justify any seizure at all") (collecting cases). A reasonable jury crediting Plaintiffs' version of the facts could find that Sergeant Hart threw Reed to the ground while he was unarmed, non-threatening, and not resisting. Because Reed's right to be free from force when compliant and non-resistant was clearly established at the time of Hart's challenged conduct, [the court] affirms the district court's denial of qualified immunity on Reed's excessive force claim.

Lewis v. Charter Township of Flint, 2016 WL 4434499 (6th Cir. 2016)

FACTS: **"**When Flint Township Police Officer Janelle Stokes (Stokes) stopped Kenisha Williams (Williams) for speeding, Lewis was in the right rear passenger seat of Williams's vehicle.[186]

[181] See Ohio Rev. Code §§ 2911.12, 2911.13,
[182] See Mullenix, 136 S. Ct. at 314. 9
[183] See Binay, 601 F.3d at 650 ("Each defendant's liability must be assessed individually based on his own actions.").
[184] Wysong, 260 F. App'x at 856; see, e.g., Grawey v. Drury, 567 F.3d 302, 314 (6th Cir. 2009) (concluding that the plaintiff's clearly established rights were violated where the plaintiff "was not ordered under arrest, he stopped running away, [and] he waited for police with his hands against a wall, [but] he was [nonetheless] immediately pepper sprayed . . . until he lost consciousness")
[185] Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005)
[186] The narrative includes repeated time stamps to the referenced video – they have been removed for readability.

After asking for Williams's driver's license and returning to her cruiser, Stokes called for backup to search the vehicle based on her contention that she had smelled marijuana inside the vehicle. Needham responded and arrived a few minutes later. After Williams consented to a search, Stokes patted Williams down and allowed her to take her young daughter out of the back seat. Stokes then conducted a pat down of the front passenger. The dash-cam video then shows the following:

> As Stokes pats down the front passenger, who has his hands on the vehicle, Lewis climbs into the driver's seat; Stokes says, 'Hey hold up,' and Needham—coming into the video's view from the adjacent grass—approaches the car from the passenger side.. Lewis then starts the car; at the same time, Needham runs towards then across the front of the vehicle, stopping directly in front of the driver's side and appearing to have his gun drawn and pointed at Lewis. Lewis accelerates the car forward; the wheels can be heard screeching.. When the vehicle accelerates, Needham appears to scurry a few steps to his right to get out of the vehicle's path, lowering his weapon and placing an arm on the car as he does so. Although according to the First Amended Complaint, Needham yelled, "Stop! Police!" that cannot be heard on the video. It comes very close to Needham, but does not appear to hit him. As the car passes Needham he shoots into the driver's side window. Two shots can be heard on the video. The car then veers sharply left. Lewis died as a result of gunshot wounds. This incident occurred on a three-lane road with no buildings in sight and light to moderate traffic. The video shows approximately four to five other cars in the vicinity as Lewis attempts to drive away.

The Estate filed suit and Needham requested summary judgement. The Court permitted discovery and Needham appealed.

ISSUE: What is the standard for an excessive force case?

HOLDING: Objective reasonableness

DISCUSSION: The Court began:

> An officer's use of deadly force during an arrest implicates an arrestee's Fourth Amendment right to be free from excessive force.[187] We analyze excessive-force claims under the Fourth Amendment's objective reasonableness standard, which requires us to balance "the nature and quality of the intrusion on [a plaintiff's] Fourth Amendment interests against the countervailing governmental interests at stake,"[188] In particular, we carefully consider "the facts and circumstances of each . . . case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[189] In addition, we judge the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, . . . allow[ing] 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." It has long been established that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[190] However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[191] Where a person attempts to flee in a vehicle, "police officers are 'justified in using deadly force against

[187] See Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008).
[188] Graham v. Connor, 490 U.S. 386 (1989), Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013) (alteration in original) (quoting Ciminillo v. Streicher, 434 F.3d 461 (6th Cir. 2006)).
[189] Graham, 490 U.S. at 396; see also Burgess, 735 F.3d at 472–73.
[190] Tennessee v. Garner, 471 U.S. 1, 11 (1985).
[191] Brosseau v. Haugen, 543 U.S. 194 (2004) (alteration in original) (quoting Garner, 471 U.S. at 11); see also Pollard v. City of Columbus, Ohio, 780 F.3d 395 (6th Cir. 2015).

a driver who objectively appears ready to drive into an officer or bystander with his car," but "may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety.'"[192] Thus, "where the car no longer 'presents an imminent danger,' an officer is not entitled to use deadly force to stop a fleeing suspect."[193]

In this case, the dash-cam video is not conclusive, it shows Lewis trying to flee a traffic stop in a vehicle. And although that could present a risk to the public, it alone doesn't justify deadly force. Although it did not appear that Lewis was targeting Needham as he fled, "Lewis's intent does not matter, the facts known to Needham at the time do.[194]

Needham conceded that he fired into the driver's side window and as such, was not at immediate risk of being struck by the car. He claimed he did so while dodging the vehicle. Bit a reasonable jury could reach a different conclusion, especially since the video appears to show Needham lowering his weapon as he jumps out of the vehicle's path, and then raising it again as the vehicle drives by him.[195]

Needham pointed to Williams v. City of Grosse Pointe Park,, but the Court distinguished that, finding that the officer had far more information to determine that Williams was a threat.[196] The Court concluded that the dash-cam video did not indicate he was entitled to summary judgement.

The Court affirmed the decision that he was not at this point entitled to summary judgement.

Getz v. Swoap, 833 F.3d 646 (6th Cir. 2016)

FACTS: On November 27, 2011, Deputy Swoap (Bowling Green OH) was sitting in his cruiser, observing traffic. At about 7:20 p.m. he spotted a car pass him with only one headlight. Getz was driving. Swoap intended to give a citation for the detective light. The officer turned on his lights, but Getz did not pull over, instead continuing until he pulled into a residential driveway that was, unbeknownst to the officer, his own home. The time of the interaction, based on the radio traffic, was 7:22 p.m.

Getz did not stop, however, but continued on, driving to the barn, which he circled and then headed back towards Swoap, stopping only when they were bumper to bumper. Swoap used his spotlight and saw that the driver was an older male who appeared agitated. As he was radioing in the license plate (visible from the front), the vehicle lunged forward, backed up and then made as if to go around the cruiser. Swoap moved his vehicle to block the other car into the driveway. Getz's car continued to move and Swoap got out and yelled at him to stop. As the vehicle moved toward him, Swoap drew and pointed his weapon. Getz finally stopped and got out, and when Swoap saw he was not armed, he holstered his own weapon.

Getz was angry and told the deputy to get off of the property. He continued to yell and then got back into the car. Swap called for backup and went to the car, trying to pull Getz from the steering wheel and ordering him out. Getz resisted. As he was able to get Getz out, Swoap further radioed, at 7:23, to "step it up." He continued to struggle to get Getz handcuffed, with Getz spread-eagling himself over the hood of the car, at one point. Although he got the cuffs on, he was unable to check the tightness or double lock them. Even handcuffed, Getz tried to pull away, insisting he was going in the house. At 7:24, Swoap radioed that he had Getz in

[192] Godawa v. Byrd, 798 F.3d 457 (6th Cir. 2015) (quoting Cass v. City of Dayton, 770 F.3d 368 (6th Cir. 2014)).
[193] Id. (quoting Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)).
[194] See Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996) ("[W]e must consider only the facts the officers knew at the time of the alleged Fourth Amendment violation.") (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987)).
[195] Cf. Hermiz v. City of Southfield, 484 F. App'x 13 (6th Cir. 2012) (concluding "that [the officer] lacked justification to fire at least his final shot[,]" because "[e]ven if the car appeared to head toward [the officer] at one point, its single pass at five to ten miles per hour [did] not justify the inference that Hermiz posed an ongoing threat, especially considering that Hermiz's driving prior to the traffic stop presented no cause for concern.").
[196]

custody. At this point, Trish, Getz's daughter, other relatives and other officers began to arrive.

Trish recounted seeing Getz's face pushed up against the car window and being told he was under arrest. She stated Getz was complaining about his hands hurting and she said his hands and face were bleeding, which she attended to. Swoap offered to call EMS but was declined, with Trish stating Getz just needed a breathing treatment and that the equipment was in the house. She told Swoap she lived there, in fact, she did not, and he told her to go inside because she was invading the scene. She asked him to loosen the cuffs and went inside to talk to her mother Beverly, who was apparently inside the whole time and unaware. Trisha asked her mother to go outside and monitor while she called her brother, Tim. About 20 minutes later, Getz was released from the handcuffs and allowed to go inside for a breathing treatment. In the interim, Sgt. Spees had arrived, he had apparently been the one to remove the cuffs. Deputy Swoap's version indicated that Getz had remained argumentative even after Spees took over contacts with him, and that he continued to deny medical treatment.

Getz filed suit under 42 U.S.C. §1983, arguing false arrest, excessive force and failure to train and supervise. When he died some nine months later, Beverly Getz took over the case. The officers moved for summary judgement and were awarded it on all claims. Getz appealed only the award with respect to the excessive force claim.

ISSUE: Is uncomfortable handcuffing always a violation?

HOLDING: No

DISCUSSION: Looking at each instance of force, and using the Graham factors, the Court agreed that first, on the severity of the crime, Swoap used a reasonable amount of force in the initial handcuffing. Although the underlying offense was minor, "when Getz began obstructing official business, and gave cause for a custodial arrest, the confrontation began to escalate and the factor favoring Getz became more dilute." However, with the second and third factors, the Court noted that Getz's actions with his vehicle posed a threat to Swoap and the general public, and that he resisted arrest and/or attempted to flee, even after being handcuffed. Even Trisha testified that her father remained belligerent and that he physically resisted Swoap's attempts to control him.

Swoap admitted he did not check the handcuffs or double lock them, but even assuming that caused Getz pain, he argued it was reasonable under the circumstances, and that given the "arrestee's resistance an general noncompliance. The Court agreed that qualified immunity applied to this claim."

The Court noted that while the Fourth Amendment "prohibits unduly tight or excessively forceful handcuffing," that is only a general rule.[197] Most of the cases involving handcuffs that are litigated involved compliant subjects, and that has always been a factor in the decisions against officers. Within a few minutes, and once he had calmed down, the cuffs were removed. As such, again, Swoap was entitled to summary judgement. (The Court noted that although Trish indicated the time lapse was 20 minutes, the radio log indicated a much shorter time frame.) The Court emphasized the compliance was the critical difference in handcuffing cases, and it was "clear that Getz was in handcuffs *and compliant* for a very short period of time before the handcuffs were removed."

The Court agreed the summary judgement was appropriate on all claims. (In its introduction, the Court noted that this claim "arises from the familiar setting of an interaction between an officer and an angry, uncooperative citizen. Further, these "facts illustrate yet again why it is a bad idea to question and argue, and to physically resist an investigating officer's reasonable commands and directions."

[197] Morrison v. Bd of Trs. Of Green Twp.,583 F.3d 394 (6th Cir. 2009).

TRIAL PROCEDURE / EVIDENCE – LAY TESTIMONY

U.S. v. Williamson, 2016 WL 4245470 (6th Cir. 2016)

FACTS: Williamson was involved in a major drug trafficking scheme. Although he'd been caught up by enforcement action at least twice, he had been released. Finally, in September, 2011, he was indicted, but numerous delays postponed his case. During his trial, Officer Robinson (Detroit PD) offered testimony concerning a surveillance and interpreted the meaning of two calls, by "both interpreting certain ambiguous phrases, and opining on the import of the calls." Finally, he was convicted, and appealed.

ISSUE: May an expert to some extent interpret jargon and terminology as a non-expert witness?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court noted that

> Federal Rule of Evidence 701 allows non-experts to give "testimony in the form of an opinion" only to the extent the testimony "is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Federal] Rule [of Evidence] 702." "The function of lay opinion testimony is to 'describe something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event.'"[198] "Courts often qualify law enforcement officers as *expert witnesses* under Rule 702 to interpret intercepted conversations that use 'slang, street language, and the jargon of the illegal drug trade.' In contrast, when an officer is *not* qualified as an expert, the officer's lay opinion is admissible 'only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.'"[199]. The burden is on the proponent of the testimony—here, the government—to show the testimony meets the foundational requirements of Rule 701.. We have previously criticized law enforcement officers who offer lay opinion testimony to interpret recorded calls for a jury.
>
> In U.S. v. Freeman, the government's case agent reviewed approximately 23,000 calls between and among various defendants, and based on that review gave opinion testimony about the meaning of 77 calls introduced at trial.[200] We determined that when an agent "provides interpretations of recorded conversations based on his knowledge of the entire investigation," he might impermissibly testify "based upon information not before the jury," which can lead the jury to think the agent has important knowledge about the case that they do not.[201]. In Freeman, the agent's testimony was based not on his own first-hand observations, but rather on the collective knowledge obtained by officers throughout the course of the investigation. He never specified any personal experiences that could have formed the basis for his opinion, instead relying on speculation and hearsay, and thus "lacked the firsthand knowledge required to lay a sufficient foundation for his testimony under Rule 701(a)." Furthermore, we found it was not helpful to the jury (under Rule 701(b)) to speculate or "spoon-fe[e]d his interpretations of the phone calls and the government's theory of the case to the jury." Jurors are competent to understand the meaning of recorded conversations that use "ordinary language." In Freeman, the agent "merely t[old] the jury what result to reach."[202] "At that point, his testimony is no longer evidence but becomes argument." Unlike

[198] U.S. v. Kilpatrick, 798 F.3d 365 (6th Cir. 2015) (quoting U.S. v. Freeman, 730 F.3d 590 (6th Cir. 2013)).
[199] Id. (quoting U.S. v. Peoples, 250 F.3d 630 (8th Cir. 2001)).
[200] 209 F.3d 464 (6th Cir. 2000).
[201] Id. at 596 (quoting U.S. v. Hampton, 718 F.3d 978 (D.C. Cir. 2013)).
[202] Id. at 597 (quoting McGowan v. Cooper Indus., Inc., 863 F.2d 1266 (6th Cir. 1988)).

Freeman, in this case Robinson was intimately involved in the investigation of Williamson. Although he testified that he had listened to "over thousands of phone calls" and often used the pronoun "we" when discussing the investigation, he made clear his active role in the surveillance. He listened to many of the calls as they were happening, spent hours watching the live feed from the pole camera, personally interacted with witnesses and informants, and coordinated a team of law enforcement officers carrying out the investigation. He had the firsthand knowledge necessary to give lay opinion testimony.[203] Much of Robinson's opinion testimony as to these calls constituted permissible identifications—explaining to the jury whom the voices on the calls belonged to, and what the investigation had revealed their roles in Williamson's enterprise to be.

Williamson has not contested the accuracy of these identifications or descriptions, and therefore has failed to show how these statements were prejudicial even if there were some error in admitting them. Other parts of Robinson's testimony constituted permissible interpretations of ambiguous phrases. For example, he explained that the phrase "four of them" in one conversation meant four kilograms of cocaine, that "32,5" meant the price was $32,500 per kilogram, and that the phrase "splitting the pros" in a subsequent conversation indicated an intent to split the profits from the sale. Robinson explained that he knew this based on the context of the conversation and his personal experience in the investigation, including through simultaneous surveillance of the conspirators and listening to their other intercepted phone calls. Williamson had access to all these recorded phone calls, and was free to challenge the accuracy of Robinson's interpretation of these ambiguous phrases through cross-examination. However, other parts of Robinson's testimony crossed the line into impermissible territory. Several times, the prosecutor asked Robinson to explain "the importance" or "the significance" of a particular phone call he had just played for the jury, which led to Robinson giving narrative statements about the content of the conversation and what the conspirators accomplished with it. For example, he interpreted one call to be Jones and Edwards arguing about the price of the cocaine. The government does not argue that the jury could not have determined this for itself once Robinson identified the speakers. Similarly, Robinson summarized the content of calls between Edwards and Williamson occurring after Sheppard had been arrested, even though the government has not asserted that there was any coded language in them. In one long exchange after a short recess, Robinson summarized all of the calls that had been played to the jury up to that point, including opining about who was supplying cocaine to whom, and on what terms. That egregious "spoon-feeding" of the government's theory of the case to the jury is exactly what *Freeman* warns against.

The Court, although finding the testimony to be in error, that the overwhelming evidence proved his guilt. Williamson's convictions were upheld.

TRIAL PROCEDURE / EVIDENCE – FIRE INVESTIGATION

Gavitt v. Born, 2016 WL 4547258 (6th Cir. 2016)

FACTS: In 1986, Gavitt was convicted of arson and felony murder, in which a house fire killed his wife and two daughters. In 2012, he moved for relief from his conviction based on newly discovered evidence, "in the nature of advancements in fire science research and investigation methods that tend to impugn some of the evidence on which Gavitt's convictions were based. The judgment was vacated, the charges dismissed, and Gavitt was released from prison." He then filed suit against a number of prosecution parties that were involved in his case, for "intentionally misrepresenting evidence and failing to disclose exculpatory evidence." The Court granted dismissal to all parties, except for the estate of the Michigan State Police forensic lab technician. All parties appealed.

[203] *See* Kilpatrick, 798 F.3d at 381 (distinguishing Freeman for similar reasons).

ISSUE: May changes in science be used against a party?

HOLDING: No

DISCUSSION: Gavitt's claim was based on the "complete revolution in the field of fire investigation" that has occurred since the time of the fire. Most particularly, in 1992, the "National Fire Protection Association adopted NFPA 921, the current standard of care for fire investigations, which for the first time put the field of fire investigation on a scientific basis." As a result of those changes, an expert fire investigator looked at the evidence in light of the new standards, and concluded that there was no reason to suspect arson in the fire. (Specifically, many factors once thought to be present only in accelerated fires are now understood to be present in natural fires that have undergone flashover and progressed to full room involvement, a phenomenon that was not understood in 1986.)

The Court upheld the dismissals of all but one of the defendants, and allowed the case to go forward on that case, finding there was sufficient factual reasons related to that specific defendant (the lab technician) to allow further discover.

WIRETAPS

U.S. v. Jenkins, 2016 WL 4578359 (6th Cir. 2016)

FACTS: A federal taskforce began investigating in the Chattanooga TN area in 2009. Several wiretap authorizations under Title III were obtained on Juanzell Jenkins' phones during that time. Although his brother, Joe, was not named as a potential interceptee of calls, he was mentioned in the affidavit as the two were in regular contact. "As required by Title III, Hixson also attested to the need for the wiretap as compared to other investigative methods, asserting that the wiretap was necessary to ascertain the scope of Juanzell's distribution organization in Chattanooga. Lastly, Hixson explained how the government planned to minimize the interception of non-pertinent calls, another Title III requirement. The district court authorized a thirty-day wiretap." When Juanzell stopped using the first phone and started using a second one, another authorization was sought, and in that Joe was listed as an interceptee. When that second authorization expired, a third one was sought, at this time, focusing on North and not mentioned Joe. North was suspected of being the supplier. Ultimately, in October, 2013, indictment were handed down. Joe moved to suppress, with Juanzell following suit. Both were overruled. Both took conditional guilty pleas and appealed.

ISSUE: Must a wiretap warrant be specifically justified?

HOLDING: Yes

DISCUSSION: The Jenkins brothers argued that "the wiretap applications were not supported by probable cause, that the wiretaps were not necessary to the investigation, and that non-pertinent communications were not properly minimized." The Court noted that "the basic standards for a wiretap are similar to those for a search warrant," and "the question that must be decided in issuing a warrant is whether there is probable cause to believe that evidence of a crime will be uncovered."[204]. The Court agreed the affidavits met that standard easily. Over a total of 8 wiretap warrants, the officers outlined a clear trail that led to a drug trafficking conspiracy. The call data showed that Juanzell was in regular contact with other drug traffickers and involved in a conspiracy.

Under Title III, in addition, the wiretap application 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," and the court may authorize interception only after a determination that this standard has been met.[205] This requirement "protects

[204] U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988); see also Giacalone, 853 F.2d 470 (1987).
[205] 18 U.S.C. § 2518(1)(c), (3)(c).

against the impermissible use of a wiretap as the 'initial step in [a] criminal investigation."[206] However, investigators need only "give serious consideration to the non-wiretap techniques prior to applying for wiretap authority," and explain to the court "the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate."[207] "[T]he purpose of the necessity requirement 'is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.'"[208] Thus, "a district court's finding that the requirements of §2518(1)(c) have been met are afforded 'considerable discretion.'[209]" Again, the Court agreed, the affidavits were well-crafted to outline the necessity of using the wiretap in addition to other methods. Confidential informants that were used never rose to a "position of trust" to be useful. Although certain boilerplate was used, it was reasonable under the circumstances.

With respect to minimization, the Court looked to 18 U.S.C. §2518(5). "The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations."[210] The investigators generally listened to a call for a minute to determine if it was relevant or not, if not, they would stop, and then spot check to see if anything relevant was being discussed. The phone calls themselves tended to be short. Joe's calls, in particular, were closely monitored as he was becoming a suspect as well.

The Court affirmed the denial of the motion to suppress.

EMPLOYMENT

O'Donnell (and others) v. City of Cleveland, 2016 WL 5335031 (6th Cir. 2016)

FACTS: In November, 2012, 13 Cleveland officers were involved in a fatal shooting of two individuals, following a high speed chase. "The public outcry was deafening; the event's racial underpinnings spawned extensive media coverage, and the community demanded resignations and answers. The officers involved in the traumatic incident were subsequently assigned to restricted duty pursuant to departmental policy." Being on restricted duty limited their ability to work overtime or secondary employment, or appear in court. Forty-five days is the default for such situations, but the Chief of Police had the discretion to extend it, or to assign the officer to a "non-sensitive" position as well. In this situation, they were left on limited duty from December 3, 2012 until June 13, 2014, essentially a year and a half. Nine of these officers, all white or Hispanic, are the plaintiffs in this case, and allege that they were left on restricted duty for longer than African-American officers in the same situation.

The trial court gave summary judgement to the City, and the officers appealed.

ISSUE: Must proof of comparable situations be provided in employment discrimination cases?

HOLDING: Yes

DISCUSSION: Although the case involved a number of interlocking claims, the Court noted that the "main claim is that they, as Caucasian police officers, were treated differently than African American police officers after a deadly force incident involving an African American suspect."

> The Plaintiffs argue that the district court erred in concluding that Franko v. City of Cleveland and testimony associated with that case is direct evidence that the City of

[206] Rice, 478 F.3d at 710 (alteration in original) (quoting United States v. Giordano, 416 U.S. 505 (1974)).
[207] Giacalone, 853 F.2d at 480 (quoting Alfano, 838 F.2d at 163–64)).
[208] Corrado, 227 F.3d at 539 (quoting U.S. v. Landmesser, 553 F.2d 17 (6th Cir. 1977)).
[209] Stewart, 306 F.3d at 304 (quoting Landmesser, 553 F.2d at 20)).
[210] Scott v. U.S., 436 U.S. 128 (1978).

> Cleveland engaged in discrimination in this case.[211] In Franko, the district court concluded that the plaintiff had "met his threshold burden of establishing the City of Cleveland is that unusual employer that discriminates against the majority." The Plaintiffs also argue that Lentz v. City of Cleveland, is direct evidence of discrimination in this case.[212] In Lentz, a jury concluded that the City of Cleveland engaged in discrimination against a Caucasian police officer after he shot an African American male during a pursuit of that individual's vehicle.
>
> The district court correctly concluded that these previous cases against the City of Cleveland were not direct evidence that McGrath discriminated against the Plaintiffs here. Franko and Lentz cases involved different traumatic events, different officers, different supervisors, and different decision-makers than the instant case. They do not demonstrate that McGrath had a discriminatory animus based on the November 2012 deadly force incident and that he acted on that animus. Thus, Franko and Lentz do not "require[] the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions" in *this* case.

The Court continued:

> A plaintiff can also prove a discrimination claim pursuant to a modified version of the McDonnell Douglas standard.[213] Under this standard, a plaintiff must demonstrate "(1) background circumstances supporting the inference that plaintiff's employer was the unusual employer who discriminated against non-minority employees, (2) that plaintiff was discharged (or that the employer took an action adverse to the plaintiff's employment), (3) that plaintiff was qualified for the position, and (4) that plaintiff was treated disparately from similarly situated minority employees."[214]

If a plaintiff successfully establishes a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employ[er]'s [decision].'"[215] If a defendant successfully articulates a legitimate, non-discriminatory reason for the employment decision, then the burden shifts back to the plaintiff to demonstrate that the reason is a pretext for discrimination. The plaintiff can demonstrate pretext by showing that the defendant's proffered reason "(1) has no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct."[216]

To succeed, the officers had to show that their "proffered 'comparables' are similar 'in all respects.'[217] In other words, the plaintiff must show that "all of the relevant aspects of his employment situation were 'nearly identical' to those of the [comparable employee's] employment situation.'"[218] For example, the comparables "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."[219]

The officers had proferred a spreadsheet of data, and the court addressed "the probative value of statistical information in Title VII discrimination cases"[220] Although the court agreed that such data was valuable, in this case, the data offered had "serious infirmities" that affected its credibility. (It lacked, for example, detail that would have provided a better comparison.) Further, other details did

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[211] 654 F.Supp. 2d 711 (N.D. Ohio 2009).
[212] 335 F. App'x 42 (6th Cir. 2009).
[213] *See* Weberg, 229 F.3d at 523; Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985).
[214] Courie v. ALCOA, 832 N.E.2d 1230 (Ohio Ct. App 2005); *see* Murray, 770 F.2d at 67.
[215] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
[216] Dews v. A.B. Dick Co., 231 F.3d 1016, 1021 (6th Cir. 2000); *see id.*
[217] Pohmer v. JPMorgan Chase Bank, N.A., No. 14AP-429 2015 WL 1432546, *9 (Ohio Ct. App. Mar. 31, 2015) (internal quotation marks, citations, and emphasis omitted).
[218] Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) (emphasis omitted) (quoting Pierce v. Com. Life Ins., 40 F.3d 796 (6th Cir. 1994)).
[219] *Id.* (quoting Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992))."
[220] Bazemore v. Friday, 478 U.S. 385 (1986).

not show that the decision to leave them (or return them, as occurred as well) to restricted duty was due to race, or some other reason.

The Court also discussed whether the officers had a property interest in the extra income they would normally get, with overtime and the like. Since the Court concluded they were all discretionary, there was no "legitimate claim of entitlement" to them.

The Court affirmed the decision in favor of the City of Cleveland.

MISCELLANEOUS – SHERIFF

Jones v. Hamilton County Sheriff (OH), 2016 WL 5539861 (6th Cir. 2016)

FACTS: Jones was arrested in 2013, and took a guilty plea on February 3, 2015. At sentencing the same day, the Court directed the sheriff to "process him." The judge predicted that he wouldn't likely even be transported given that in fact, he had effectively already served out his time. However, the sheriff had no paperwork that indicated Jones was to be released, and on February 6, he was transported to the prison. There, Jones was immediately released.

Jones sued Sheriff Neil, alleging he should never have been transported. The Sheriff moved for dismissal and it was granted. Jones appealed.

ISSUE: Is a sheriff protected for doing that which they had a statutory duty to do?

HOLDING: Yes

DISCUSSION: The Court noted that the "first – and unsurmountable – hurdle for Jones is the sheriff's claim of sovereign immunity." In Ohio, since the sheriff was doing something that state law required he do, transport a prisoner, he fell under the state umbrella of immunity. Only the Department of Corrections had the authority to apply time served, which took away all discretion from the Sheriff.

The Court affirmed the decision in favor of the Sheriff.