2017 SECOND QUARTER

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 510 - SEXUAL OFFENSES

Baltazar v. Com. **2017 WL 1437982 (Ky. App. 2017)**

FACTS: On December 8, 2014, while alone with three children, Baltazar allegedly sexually touched his 15 year old stepdaughter. When the stepdaughter reported same to her mother, Judith, her mother immediately moved her children to St. Louis, Missouri. There, the stepdaughter was interviewed and detailed what had happened. St. Louis authorities shared the information with Bowling Green and Det. Angel followed up with Baltazar. He gave Baltazar Miranda in English and Baltazar asked to have it in Spanish as well, his first language. Det. Angel gave him a form with the rights written in Spanish and had Baltazar read them out loud. Baltazar then gave a recorded statement admitting to the crime.

Baltazar was indicted for sexual abuse. At some point, during the trial, the victim "backed off her prior statements to some degree," denying he'd actually touched her genitals. She admitted she'd lied in an earlier allegation and that she'd lied in this case, explaining she did not want to move back to Kentucky. She admitted to some touching, over her clothing, but not direct genital contact. Baltazar, however, had stated he had touched her skin at the edges of her panties, near her genitals.

He was convicted and appealed.

ISSUE: Is direct genital contact required for Sexual Abuse?

HOLDING: No

DISCUSSION: Baltazar contended that there "must be actual touching of the sexual or other intimate parts of the body to meet the statutory definition" of the crime. The Court looked to Bills v. Com. and noted that to determine if a body part is intimate, "it is necessary to consider: the area of the body where touching occurred; the manner of touching; and the circumstances in which the touching occurred." The Court agreed that the area admitted was unquestionably an intimate area, the area around of, and on top of, her panties. The context also suggested sexual motivation, when his wife was away and the victim apparently asleep.

The jury, being well aware of the recanted information, upheld the conviction.

Copass v. Com., 2017 WL 2609244 (Ky. App. 2017)

FACTS: Copass and Fogle had lived together in Lexington up until February of 2014. They resumed their relationship some months later but did not share a residence. In November, they jointly acquired a dog, Jax. Copass bought the dog and paid for its expenses. Fogle took care of the dog most of the time, because her schedule allowed it, although Copass came by to do so as well regularly, and the dog stayed at his home as well, on occasion.

On the morning in question, at about 2 a.m., Copass texted that he would be coming by in the morning to get the dog. They engaged in a series of texts messages concerning their relationship and who would get the dog. When Copass arrived, having been invited by Fogle, she did not let him in. He texted her to let him in and she told him to "break down the door." He tried to use a

key but the night locks were engaged. As Copass forced his way through the locks, Fogle called 911. They struggled and at one point, Fogle bit his hand, which was covering her mouth. Over conflicting accounts, Copass was indicated for Burglary and Assault. He was convicted and appealed.

ISSUE: May someone who has a key but who has to break in to enter, still be charged with Burglary?

HOLDING: Yes

DISCUSSION: Copass argued that he had permission to enter and had a key. He contended that Fogle had invited him over and that he came in simply to get his dog. The Court agreed that when Fogle attempted to bar him and latch the door, and that she terminated any possible permission when she screamed and threw her phone at him. When he came in, as well, he did not simply take the dog but engaged in an assault on Fogle.

The Court upheld his conviction.

PENAL CODE – KRS 514 - THEFT

Turner v. Com., 2017 WL 2399599 (Ky. App. 2017)

FACTS: In February, 2015, Bleakney contacted Turner to purchase a customized rifle. He gave a time frame and a hefty deposit. He sent additional items to Turner, for a total value of just under $10,000. When he did not get the rifle back, he demanded the return of everything, including the deposit. Nothing was returned. It also appeared, from later evidence, that Turner had damaged one of the items, a scope, and pawned it – he claimed he had done so to purchase a new one.

Bleakney filed suit and obtained a judgement – but Turner filed for bankruptcy. Bleakney's debt was discharged. He took criminal charges in Henderson County, and during the investigation, the scope was found.

Turner was tried and quickly convicted. Turner appealed.

ISSUE: Does pawning an item that is initially legally entrusted to you constitute Theft?

HOLDING: Yes

DISCUSSION: The Court looked at Theft by Failure to Make Required Disposition, KRS 514.070. Turner argued that he had raised a proper affirmative defense, but the Court agreed that he knew the rifle belonged to Bleakney and he had no claim of right to it, or the other equipment. As such, the Court indicated that he had no "claim of right" to any of the items. In this case, Turner breached Bleakney's trust and misapplied the property, and it was more than a debtor-creditor

relationship, but instead, a fiduciary-agent relationship – in that he misapplied property he'd received lawfully.

Turner further argued that it was a civil, and not a criminal, matter.[1] Further, he claimed that since it did, in fact, start as a civil matter, resulting in a judgement, it was a violation of the "election of remedies" doctrine. [2] Each requires a different level of proof, and in Gregory v. Com., the Court noted a civil court judgement is not admissible in ca criminal case, or vice versa.[3] The Court agreed it was proper to allow the criminal case to proceed. Further, it was proper to question him about the bankruptcy.

The Court upheld his conviction.

PENAL CODE – KRS 515 – ROBBERY

Brooks v. Com., 2017 WL 2705400 (Ky. 2017)

FACTS: On January 7, 2012, Brooks entered a Louisville convenience store, armed with a pistol. He grabbed an employee as a shield and demanded the cash. He fired one shot, although there was dispute later as to whether he was actually trying to hit someone. He fled and as he left, he exchanged gunfire with another clerk. Brooks was identified and his home searched, a gun was found. Following an interview, he was arrested for Robbery, Murder-Attempt and related charges. The government moved to demand a DNA sample, which was granted on the condition that DNA was found on the gun first. When KSP confirmed a "mixed sample" of DNA on the firearm, Brooks' DNA was collected and he proved to be a "contributor." Forensics tied the pistol to the scene.

Brooks moved to suppress his recorded statement and large portions of it was redacted. Ultimately, he took an Alford plea to Robbery. Brooks then moved to vacate his convictions for four counts of robbery (one for each person in the store), arguing his counsel was deficient.

ISSUE: May individual counts of Robbery be charged when there are several people present and threatened during the crime, although only one received a direct demand for cash?

HOLDING: Yes

DISCUSSION: In addition to other issues, Brooks argued that he committed only one count of Robbery, not the four which were placed. After one was dismissed, the Court agreed, three was appropriate because all three clerks were threatened during the course of the robbery, "each in distinct ways."

The Court upheld his plea.

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[1] Com. v. Jeter, 590 S.W.2d 346 (Ky. 1979).
[2] Owens v. University of Kentucky, 486 S.W.3d 266 (Ky. 2016).
[3] 610 S.W.2d 598 (Ky. 1980).

PENAL CODE – KRS 512 – CRIMINAL MISCHIEF

<u>Shelton v. Com.</u>, 2017 WL 1829722 (Ky. App. 2017)

FACTS: On the night of January 6, 2015, Grider's barn, in Cumberland County, burned to the ground. Firefighters could see a truck that had crashed through inside but could not immediately approach due to the heat. The barn and the truck were a complete loss. Trooper Brown (KSP) was at the scene and during his investigation, discovered the VIN too badly damaged to be read. However, he knew of the existence of "confidential VINs" in places not easy to find on the vehicle. Another trooper, knowledgeable on such VINs, was able to find one and link the vehicle to Shelton.

It was later learned that Dickens had received a summons from her "sometime paramour" Shelton that evening, asking her to pick him up about a half-mile from the Grider farm. She did so, finding Shelton and Claborn waiting. Shelton had facial injuries, which they explained away. She took the two men to a Wayne County hospital for treatment. Claborn later testified that he didn't remember a fire, but did remember crashing into a barn, and that they went to Monticello to try to avoid law enforcement.

Trooper Brown tracked down Shelton later that night, and spoke to him on the telephone. He believed Shelton was intoxicated because of his speech. Shelton agreed to meet the trooper the next day and Brown noted Shelton's facial injuries and limp, which again, he explained away. Shelton denied going to the hospital or being at the barn and claimed his truck had been stolen.

Shelton was indicted for Arson (later dismissed), criminal mischief and leaving the scene. He was convicted and appealed.

ISSUE: Is wanton conduct sufficient for criminal mischief?

HOLDING: Yes

DISCUSSION: In addition to several procedural issues, Shelton argued that he lacked to necessary mens rea (mental state) for the crime of criminal mischief. The Court agreed there was no indication of intentional conduct, but that crashing into the barn and then leaving without alerting anyone to the crash, despite having a working phone, indicated at least wanton conduct sufficient for the charge. He also took actions to conceal his involvement and providing inconsistent stories about his injuries. The Court agreed that his actions were wanton and supported the verdict.

The Court upheld his convictions.

NON-PENAL CODE OFFENSES

CONTROLLED SUBSTANCES

Redd v. Com., 2017 WL 2210742 (Ky. App. 2017)

FACTS: On June 8, 2015, Officer Gallichio (Newport PD) spotted a vehicle speeding and changing lanes. He radioed for Officer Laffin to stop it, and Officer Laffin did so. He approached and saw Redd, the driver, reaching for something inside. He also learned Redd had an outstanding warrant. Redd was arrested, and the officer searched the car, with consent. A drug dog alerted and heroin was found.

Redd was indicted on charges of Importing Heroin and Trafficking in a Controlled Substance 1st. He argued before trial that the two charges were double jeopardy. It was overruled. At trial, Laffin testified that Redd had confessed to buying the heroin in Ohio and returning to Kentucky to sell it. The video of the stop was introduced, at which point the information on the outstanding warrant could be heard. The parties stipulated that the arrest was lawful and the jury was so informed.

Redd was convicted of both and appealed.

ISSUE: Is the charge of Importing Heroin and Trafficking Double Jeopardy?

HOLDING: No

DISCUSSION: The Court looked to the newer charge, Importing Heroin. The question of Double Jeopardy was one of law, and the court assessed the two charges under the Blockburger test, but noted that "if the legislature wants to impose multiple punishments for the same offense, it may do so."[4] The Court agreed that the intent behind the crime of Importing Heroin was clear, to punish the conduct cumulative to other crimes in the same chapter. Redd was punished within the range for such offenses and as such, there was no double jeopardy.

Redd also argued that the inadvertent evidence as to the reason for the arrest prejudiced him. The Court, however, found it to be unpreserved as he didn't object to the admonition made to the jury. The Court found it to be harmless.

Redd's conviction was upheld.

FORFEITURE

Watts v. Louisville Metro Government, 2017 WL 2211084 (Ky. App. 2017)

FACTS: On December 2, 2009, Officer Kaufling (LMPD) seized over $40,000 in cash during a search warrant execution at Watts' home, in Louisville. He was charged with various trafficking

[4] Blockburger v. U.S., 284 U.S. 299 (1932), McNeil v. Com., 468 S.W. 3d 858 (2015).

offenses. A federal forfeiture action was brought on the cash, with the process directed to Watts' home address. He failed to respond to five different letters and the cash was declared forfeit in 2010. In 2011, he was acquitted of the underlying charges and in 2013, he demanded return of the cash. He was denied and appealed.

ISSUE: Is a local government that makes an arrest responsible for the federal forfeiture action?

HOLDING: **No**

DISCUSSION: The Court agreed the DEA followed the appropriate and legal process for notifying Watts of his options and Watts failed to take any appropriate actions in response. Further, since the case was a federal forfeiture action, Louisville Metro bore no responsibility for anything that occurred.

The Court affirmed the forfeiture action.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Com. v. Zamara / Alabiat, 2017 WL 1290671 (Ky. App. 2017)

FACTS: Det. Dunn (Newport PD) submitted a search warrant for a store operated by Zamara and Alabiat. It read, in part:

> The affiant observed in a display case, with only access from the rear, a wide array of drug paraphernalia items. Inside the case there were glass and metal pipes and bong's [sic] in plain view for sale to the public. Also tools used to shred marijuana for consumption. In a separate display case, to the left of the drug paraphernalia, is a rotating display that contains jewelry with marijuana leaves displayed on them.

The trial judge issued the warrant, and a number of items were seized. Both were arrested and moved to suppress. The circuit court found the warrant insufficient, and further, that the good faith rule in U.S. v. Leon "did not save the search."[5] The trial court noted that the suspect items were "in their new, unused and unsold condition, were not self-evidently drug paraphernalia (as they would be if found in someone's home with drug residue)." The Court noted that simply calling the items paraphernalia did not make them so or give probable cause. The Court emphasized that had the affidavit "explained the uses and conditions of the items," it might have been sufficient, however.

The Commonwealth appealed.

[5] 468 U.S. 897 (1984).

ISSUE: Must a legal item that could be used as drug paraphernalia be further explained in the search warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court noted that although normally, such matters are not appealable, in such case, when the order involves a suppression of "the Commonwealth's key evidence, such as the one at issue in the present case, may end the Commonwealth's case for all practical purposes."[6] The Court noted that ""[T]he test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place."[7]

The Court agreed that although the definition of "drug paraphernalia" was provided, that shed "no light on the detective's *observations* or *rationale*." Further, the items observed were sold in stores throughout the state and "there is nothing incriminating about these items absent other factors, such as drug residue or the presence of drugs. Near proximity to jewelry adorned with marijuana leaves does not transform an innocent item into drug paraphernalia." The Court emphasized: "[c]ritically absent from the detective's affidavit is the answer to the question "why." *Why* are pipes and bongs indicative of drug paraphernalia? *Why* is their proximity to the jewelry significant?"

With respect to the tool used to "shred marijuana," the Court noted that was conclusory and stated:

> How did the detective know these "tools" are routinely used to shred marijuana? What caused him to reach this conclusion? This is precisely the type of information that ought to be included in a warrant affidavit. Greater specificity of description would have been valuable to the district judge; it would have removed the taint of conclusion and allowed the district judge to adequately evaluate the detective's representations. Again, selling new, unused "tools" – even though these same tools may be used in other contexts to shred marijuana – is not a criminal act.

The Court found the cumulative impact of the affidavit to be "underwhelming" as all of the items involved have "legitimate, non-criminal uses" and all of the items were in their original condition and packaging. The Court agreed the warrant was insufficient.

With respect to Leon, the Court agreed that "The affidavit in this case is so lacking in detail, descriptions, and information that the detective's belief in the existence of probable cause was an entirely unreasonable basis for issuing a warrant." The Court did not make this decision likely, and acknowledged that there was nothing to indicate that the detective intentionally offered a deficient affidavit.

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[6] Parker v. Com., 440 S.W.3d 381 (Ky. 2014); Ballard v. Com., 320 S.W.3d 69 (Ky. 2010).
[7] Moore v. Com., 159 S.W.3d 325 (Ky. 2005).

The Court concluded that:

> Police must cautiously craft affidavits disclosing all, or at least enough, information to the issuing court such that it can determine probable cause. No matter the reason, if the affidavit lacks sufficient indicia of probable cause and is simply bare bones, the officer's reliance cannot be reasonable and suppression of the evidence seized is an available remedy.

The Court affirmed the trial court.

Thomas v. Com., 2017 WL 2615867 (Ky. App. 2017)

FACTS: On December 10, 2015, Boone County law enforcement executed a search warrant at Thomas's home. The warrant was signed by Judge Martin, who was serving as a temporary special judge. They found a number of items connected to methamphetamine manufacturing. Under arrest, he admitted that he was manufacturing methamphetamine there, at the home he shared with his pre-teen son. He was charged with manufacturing and endangerment.

Thomas moved for suppression, arguing a defective search warrant. That was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a warrant be signed by someone legally authorized to do so?

HOLDING: Yes

DISCUSSION: Thomas argued that the individual who signed the warrant was not authorized to do so. The judge was given that authority, the Court agreed, pursuant to a *nunc pro tunc* order from the Chief Justice of the Kentucky Supreme Court.[8] The Court agreed that although there may have been procedural flaws they did not change the Chief Justice's inherent authority to make such appointments.

And, the Court noted, even if actually improper, it would be saved by U.S. v. Leon, as the officers would have had no reason to know there were any flaws with the process.[9]

Maddle (David / Phillip) v. Com. , 2017 WL 2211085 **Ky App. 2017**

FACTS: On July 31, 2014, at about 9 p.m., Deputy Terry (Meade County SO) received a tip from a reliable CI that the Maddles (father and son) were manufacturing and selling methamphetamine from the garage. The CI made a controlled buy and also observed drugs in

[8] This order would have, in effect, backdated the judge's authority before the date it was actually signed.
[9] 468 U.S. 897 (1984).

the home, within 48 hours of the tip. Terry corroborated what he could, and on August 1, obtained a search warrant, but it was not served until August 6. The officers executed the warrant and arrested both men.

Both were subsequently indicted. Phillip's counsel moved to suppress the evidence, arguing there were "material misstatements of fact" and that once purged, the warrant was insufficient. He also argued that the delay in executing the warrant was fatal. The trial court found that the material was "incorrect, sloppy and mis-timed" but when purged of questionable information, it was still enough to justify issuing the warrant. The delay was reasonable, as well.

Each took a conditional guilty plea, and appealed.

ISSUE: Is a delay in serving a warrant necessarily fatal?

HOLDING: No

DISCUSSION: The Court looked at the facts asserted, which did not allege that the detective "purposefully or recklessly included false statements in – or omitted material facts from – his affidavit." The challenge centered more on the delay in execution and that the information presented was stale at the beginning and became even more so given the delay. Staleness, the Court agreed, had to be determined on a case by case basis. The Court agreed it was not stale when presented.

With respect to when it was executed, the facts indicated an ongoing criminal enterprise at a location where it could be expected to stay indefinitely. Thus, the delay did not cause probable cause to dwindle.

The Court upheld the pleas.

SEARCH & SEIZURE - TRAFFIC STOP

<u>Willoughby v. Com.</u>, 2017 WL 1290645 (Ky. App. 2017)

FACTS: On November 18, 2010, Officer Hardcorn (Kenton County PD) encountered a vehicle and ran its license plate through his MDT. AVIS provided the name and vehicle information, with the notation to "verify proof of insurance." He later testified that he routinely stopped vehicles with that notation as more often than not, the vehicle was not insured. The County Clerk testified as to the possible reasons for such a notification, which would include a change in a policy that had not been reflected in the system as yet.

Officer Hardcorn made a traffic stop and talked to the driver, Willoughby. Martin was a passenger. He glanced around the inside of the vehicle with his flashlight. He spotted an electric coffee bean grinder. And asked a fellow officer to check KASPER for recent pseudoephedrine purchases. He soon learned that both had bought it that same day. He had Willoughby get out

and explained he was getting a warning for lacking proof of insurance. (In fact, although he did not have proof with him, he was insured.) The officer frisked Willoughby and found two bags of white powder hidden in his pants. He handcuffed him and placed him in the cruiser, but told him he was not under arrest.

Upon searching the vehicle (apparently with consent), the officers found further evidence of methamphetamine manufacturing. Willoughby then placed him under arrest. He sought suppression, arguing that the traffic stop was unsupported. The trial court concluded there was sufficient cause, based upon the officer's representations. Willoughby appealed, arguing that a stop based solely on AVIS was insufficient.

The appellate court agreed that further proof was necessary and remanded the case for further determination on the reliability of AVIS in this matter. In due course, the trial court did so, and held a hearing in which experts on the issue testified and explained the process. Despite this, the witnesses could not answer the critical question, because no statistics were available and collected to show how often that message appears when the vehicle is actually insured. However, the court agreed, extrapolating from available data, it was reasonable to suspect such vehicles are not, in fact, insured, a good deal of the time. As such, the trial court agreed that the AVIS system was "sufficiently accurate and reliable" to support the stop and he further appealed.

ISSUE: Is a hit on AVIS that suggests a vehicle may not be insured sufficient for a traffic stop?

HOLDING: Yes

DISCUSSION: The Court noted that reasonable suspicion, all that was needed for a traffic stop, was not probable cause. Although the AVIS message was not conclusive, it was still likely that the vehicle would turn out to be uninsured, based on available data.

The Court noted, however, that the issue of great interest was not before it, "the why and when and under what circumstances … a police officer [may] choose a license plate to run through the AVIS System. Using AVIS as a "fishing expedition" was of great concern under the Fourth Amendment. But, the Court agreed, that was "an issue for another case and another day." The Court upheld the decision to deny suppression.

<u>Atkins v. Com.</u>, 2017 WL 2705399 (Ky. App. 2017)

FACTS: On the day in question, at about 3 a.m., Keenan had come across a single-vehicle crash in Fayette County, on Mason-Headley Road. He was apparently only seconds behind the crash but did not see it. He could see two occupants (male/female) at the back of the vehicle. He identified the subjects as black, but, it was noted, there was little light in the area.

Officer Harris, Lexington PD, was dispatched to the crash and told the occupants were walking toward Versailles Road. He was given a description of the parties, a black male and a white

female, and a clothing description. He spotted two persons, Atkins and White, who were "slowly jogging over the hill," whose clothing matched the description. He stopped them and asked about the wreck, and they were evasive. He later stated that Atkins was "acting jittery and hostile," and the officer asked if he was on something. When the officer refused White's request to smoke, because she would have to reach into her purse, Atkins became agitated. He gave the cigarette to White and then "hopped up, and took off running." Officer Harris went in foot pursuit and saw Atkins discard a metallic item that appeared to be a firearm. He heard it hit a retaining wall and bounce over. With the help of other officers, Atkins was apprehended and handcuffed. Officer Harris and a second officer went to the location and found a pistol where the item had been discarded.

Because Atkins was a convicted felon, he was charged with possession of the firearm. During a suppression hearing regarding the weapon, White readily admitted Atkins had been driving and both had been drinking. She identified their clothing earlier that night as being completely different from the clothing description provided. She testified that the officer had frisked Atkins, although Officer Harris denied having done so. She also denied having seen Atkins with a gun, but did know they'd been in an accident and had walked away.

Finding reasonable suspicion for the original stop, the Court denied the suppression. On the day before trial, the defense moved to continue as White could not be found to testify. The Commonwealth did not want to play the recording of her testimony. The continuance was denied. Atkins took a conditional Alford plea to multiple charges including DUI and having the weapon, and appealed.

ISSUE: Must a description be perfect to justify a Terry stop?

HOLDING: No

DISCUSSION: Atkins first argued that the descriptions were too vague to justify a stop. The Court noted that in toto, the location close to the wreck, the time and the fact that there were no others in the area at the time were enough. Although not perfect, the description was sufficient, as well. In framing the stop as a Terry stop, the Court agreed there was more than enough reason to initiate the stop, and the degree of intrusion was minimal. As the couple became evasive, his suspicion was confirmed as well.

With respect to the continuance, the Court noted that although White had a court date in the future in an unrelated matter, there had been no subpoenas issued for her in Atkins case, which had been scheduled for trial for several months. She might not even show up for her own trial. There had also been multiple continuances already granted, mostly attributable to Atkins.

After weighing all of the factors, the Court agreed that the denial of the continuance was also proper and affirmed the plea.

SEARCH & SEIZURE – K9

<u>Johnson v. Com.</u>, 522 S.W.3d 207 (Ky. App. 2017)

FACTS: Officer Stallworth staked out the Paddy Wagon, a Richmond bar. He spotted some suspicious traffic actions with a vehicle that left the location and activated his lights, but the vehicle didn't stop until he "chirped" his siren. Johnson was the only occupant.

With Johnson having bloodshot eyes, dilated pupils and nervous demeanor, Stallworth believed he was DUI. Johnson kept putting his hands in his pockets and failed to provide a registration or insurance. He refused to open the glovebox to look for them as well. Stallworth told him to step out and Johnson initially refused. He complied only when Stallworth opened the door. Because he continued to reach into his pockets, he was briefly handcuffed and frisked. When nothing was found, Stallworth removed the cuffs and moved on with FSTs. When Johnson did not perform satisfactorily on any of the tests, he was taken into custody. Stallworth called for a K-9 to search. Goku and handler quickly arrived and alerted, methamphetamine and heroin were found. He also had over $3,000 in cash.

Stallworth was indicated and moved for suppression, arguing an unlawful extension of the stop. When denied, he took a conditional guilty plea and appealed.

ISSUE: Must a drug dog be certified in Kentucky?

HOLDING: No

DISCUSSION: The Court looked to whether Stallworth had adequate cause to extend the stop to investigate possible criminal activity. It was agreed that Stallworth had reason for the initial stop by all parties, and the Court agreed that his observations supported extending the stop and engaging in FSTs.

Johnson also argued that the K-9 was not property certified. However, Kentucky does not require such a certification and there was evidence that Goku was fully trained and performing satisfactorily, and was in fact, certified both before and after the time in question. Finally, the drugs would have been found either way, so the inevitable discovery doctrine applies.

SEARCH & SEIZURE – CONSENT

<u>Com. v. Tipton</u>, 2017 WL 2332683 (Ky. App. 2017)

FACTS: In October, 2014, members of the Nelson County drug task force were provided two anonymous tips, two days apart, that methamphetamine was being manufactured at Tipton's Bardstown home. CHFS was already working an open neglect case with Tipton and Baum (his girlfriend) on their two daughters and Baum's son. There were a number of allegations of

domestic violence and drug use, for which the pair had a case plan. Couch, the social worker, requested police while making a home visit due to the allegations.

On October 7, she met with Mattingly and Watts. Couch approached the main entry door (a side door) with the officers just outside, listening for voices. Couch knocked and Tipton responded, asking her to wait until he dressed. Two men emerged as she waited and Tipton called her inside. Tipton held open the door, which was the kitchen. As they walked from the kitchen into the living room, "Couch never told Tipton she had the police with her and Tipton could not see the officers from his vantage point." She discussed the reason for the visit while in the living room.

> Outside, the officers stopped the two men, and upon consent, found marijuana, paraphernalia and a "meth boat" on the two. The man with the latter said he'd recently smoked marijuana. They turned the pair over to a uniformed officer, and Mattingly headed inside, through the open side door. He later stated he entered out of concern for Couch. Couch went outside the interview Baum's son and Mattingly requested consent to search from Tipton. He denied consent, denied that anyone else was there (beyond the two daughters, also visible) and denied that Mattingly could search for anyone else. However, he decided to check the other rooms, two bedrooms and a bathroom. In one bedroom he saw a haze, with a chemical odor and a box of table salt. That room had only a chair in it. He saw nothing notable in the other two rooms.

Couch returned and found everyone in the living room. Mattingly asked Watts to try to get Tipton to consent to a search because they were acquainted. He told Tipton he had the right to consent, even though he was not on the lease. Tipton refused. Baum, fetched from work, also refused. Mattingly left to get a warrant while Watts "held the scene." Watts and Tipton chatted about a household repair. Watts offered to try to fix the problem and went outside to look at it; he saw a burn pile some 15-20 feet away. Watts noted a fuel can and frame of a washing machine there. Knowing that Bardstown had garbage pick-up and the evidence was often disposed of by burning, he walked over to look at it. He "observed spent lithium battery casings and folded pieces of aluminum foil that he believed were meth boats."

The Court noted:

> The burn pile was located about two-thirds of the way back in the yard, about 150 to 200 feet from the deck on which the side door was located and could be viewed from the deck. The suspicious contents of the burn pile could not been seen from the deck or from the pipe in the back yard. The back yard was surrounded by shrubs and may have been fenced.

Watts contacted Mattingly about the burn pile and it was added to the affidavit. Mattingly returned and the search warrant was executed, and a number of incriminating items were found in the one bedroom.

Tipton was charged. The trial court agreed to suppression and the Commonwealth appealed.

ISSUE: Can an individual who enters with consent bring officers inside, when they enter separately?

HOLDING: No

DISCUSSION: The "Commonwealth argued the officers had the right to go into the home to ensure the safety of Couch and the children in light of the report about manufacturing of methamphetamine in the home and were authorized to do a protective sweep to make sure there was no one else in the home and there was not an active methamphetamine lab." Further, it argued that Tipton agreed to Watts entering the backyard and from that point, he could see the burn pile. It also argued that in fact, probable cause was satisfied even without the evidence about the burn pile.

The Circuit Court ruled that although Couch had consent to enter, she could not give that consent to the officers, as she "did not announce them, they did not enter with her and they did not conduct their safety sweep when they first entered the home." The Court ruled that there were no exigent circumstances. Although the invitation to Watts to enter the back yard was purged from taint, what was known was insufficient before that for a search warrant.

The Court noted that Tipton never gave consent to the officers and did not even realize they were present initially. Mattingly's actions were not consistent with an exigency nor did Couch, with the officers, inspect the home. As such, nothing justified the search.

The Court agreed that generally, "evidence obtained through an illegal search is inadmissible against an accused, pursuant to the exclusionary rule.[10] "Neither did the independent source doctrine aid the Commonwealth, as the warrant was insufficient without the illegal evidence."

The evidence was properly suppressed and Tipton's motion to suppress was upheld.

SEARCH & SEIZURE – REGULATORY OFFICERS

Frasher v. Com., 2017 WL 2615869 (Ky. App. 2017)

FACTS: On October 18, 2014, Captain Gray and Officer Stafford (Ky Fish & Wildlife) arrested Frasher for hunting with a rifle out of season. When they arrived at his campsite, Frasher was in possession of a rifle, in plain view (not in a case) and wearing a knife. Frasher approached the two officers with his hand in his pocket and refused to remove it. Captain Grayson frisked him, finding a small glass pipe." He was told if he was clean he would be released, but, he had an outstanding warrant. He was arrested and the items found were seized, as well as marijuana in open view in his tent.

[10] Horn v. Com. , 240 S.W.3d 665 (Kiap. 2007). In Wong Sun v. U.S., 371 U.S. 471 (1963).

Frasher, a felon, was charged with possession of the firearms, possession of marijuana and paraphernalia. He moved to suppress the evidence and was denied. He took a conditional guilty plea and appealed.

ISSUE: May Fish and Wildlife officers enter private property in the performance of their specific, regulatory duties?

HOLDING: Yes

DISCUSSION: Frasher first argued the officers lacked reasonable suspicion to enter the campsite as it was based solely on an anonymous tip. The tip was in fact given by someone in person, although the officers did not document his name, but the tipster did give them Frasher's name. The Court agreed that gave the two officers sufficient cause to initiate an investigation, under KRS 150.090(4), which vests Fish and Wildlife with the authority to enter private property when investigating possible offenses in their bailiwick. Captain Gray had spoken in detail to the complainant, as the violation would have been a technical one requiring knowledge of hunting regulations and firearms.

With respect to the frisk, the Court agreed that the presence of the rifle and the knife justified the belief he might have additional weapons as well. When Frasher argued that the seizure of the pipe was unjustified as it was not readily apparently as a weapon or contraband, Captain Gray testified he'd seized 75-100 such pipes in his career and as such, he was quite familiar with its contours. The Court upheld its seizure.

The Court upheld his plea.

SUSPECT IDENTIFICATION

<u>Reagan v. Com.</u>, 2017 WL 2492060 (Ky. App. 2017)

FACTS: On January 27, 2015, Bridges and Berryman (her assistant) stopped by Couch's Lexington home to clean house. He had left a key for them to use. When Bridges, who entered first, came inside, she saw a man "rummaging through a box." She did not know him and did not believe anyone was supposed to be there. He claimed he was working and then walked out, squeezing past Berryman. Bridges did not get a good look at him, but Berryman did. He walked quickly away. Bridges called 911. Officers collected prints from the box, and Couch, who arrived, confirmed that a firearm had been stolen from it. Reagan's print was found on the box.

Det. Ruzzene assembled a photo array, including Reagan. Det. Fetko went to Bridges' home to show her the array, pursuant to Lexington policy which stated that the officer that creates the array should not be the one to present it to the witness. Bridges did not see the burglar's face, so he presented it to Berryman. Det. Ruzzene and Bridges were nearby, conversing. Berryman immediately selected Reagan and he was arrested.

Regan was indicted on a variety of charges and demanded suppression. When that was denied, he was convicted and appealed.

ISSUE: Does violation of a local policy negate an otherwise proper suspect identification process?

HOLDING: No

DISCUSSION: Regan argued there were several flaws in the process. In this case, although the policy indicated that photo arrays should be a double blind, Det. Fetko did know that Reagan was the suspect in this case and had earlier dealt with him. However, violation of a policy did not necessarily lead to an unduly suggestive process. Reagan complained that his was the only photo that included a "long face" but the court again noted that a distinctive feature does not invalidate the display. Finally, Ruzzene's presence did not affect the validity either, and Berryman was clearly (from the recording) quite clear on her identification. Det. Ruzzene spoke to her later, only after her selection of Reagan's photo, when he encouraged her to express her degree of certainty.

The Court affirmed the identification.

<u>Ashford v. Com.</u>, 2017 WL 2211372 (Ky. App. 2017)

FACTS: On September 4, 2010, Burns spent the day drinking and watching football at a friend's home. He left on foot to go home and was accosted by a man who offered him weed. Burns declined and immediately, another individual pointed a gun at him and told him to "give it up." He denied having anything and was beaten. The assault sobered him to some extent and he could give a clothing description of the men. Before the fled, the assailants took Burns' pants.

He called 911 just after 3 a.m. and described the six men involved as wearing red and black hoodies and driving a white Cadillac Coupe de Ville. Officer Williams found a similar vehicle just a few minutes later, less than a mile away. He found Ashford and Stokes hiding in the back seat, and a handgun on the ground behind the right rear tire, next to the curb. Neither had actual possession of the handgun.

Within the hours, Burns was taken to the scene and immediately identified the two men as having been involved, from their clothing. The owner of the vehicle, Evans, had loaned it to his daughter, who had then loaned it to Broughton. Broughton was picked up but Burns could not identify him from the photo pack. Stokes, however, placed Broughton at the scene and the driver of the vehicle and identified him from the same photo pack. He testified that only the three of them were in the car, and that all three fought with Burns. Stokes later testified that he had omitted information about the gun because he was afraid of Broughton, who had shot a woman previously. He agreed to testify against Ashford.

Ashford was convicted of complicity to Robbery, and of being in possession of a handgun as a convicted felon. He was convicted and appealed.

ISSUE: Is a victim's identification and finding a firearm in close proximity sufficient to establish probable cause for a felon being in possession of a firearm?

HOLDING: Yes

DISCUSSION: Ashford argued there was no probable cause to charge him with the firearm. The Court agreed that the arrest was proper and that his presentation at a show up was as well, as he was in "close geographical and temporal proximity to the robbery."

The Court upheld the conviction.

INTERROGATION

Hamilton v. Com., 2017 WL 2211404 (Ky. App, 2017)

FACTS: The Hamiltons, Demarcus and Tasha, had a tumultuous relationship. Hamilton was at another woman's house before he returned home and found Tasha asleep, with her boyfriend, Alexander, in the bed as well. Hamilton told Alexander to leave. Tasha and Alexander got up and Hamilton shot and killed Alexander. This occurred in Monroe County. The Hamiltons, their three children, Tasha's sister (Keisha) and Keisha's boyfriend left the scene and drove around. Keisha and Jonathan, the boyfriend, were dropped off and eventually the Hamiltons stopped at a motel. Tasha left to get medical attention, having been beaten by Hamilton. The police were called and Cookeville, TN, officers made the arrest.

Hamilton was charged with Murder and a number of related offenses. Hamilton moved for suppression of the statement taken by KSP and was denied. Ultimately he was convicted of Manslaughter 2nd and related offenses and appealed.

ISSUE: May someone arguably impaired give a valid statement?

HOLDING: Yes

DISCUSSION: Hamilton argued that he was too intoxicated to understand the Miranda rights given to him, and that therefore, his confession was voluntary. Det. Brooks (KSP), testified he found no drugs at any location which Hamilton was associated that day although Hamilton told him he'd taken crack cocaine the day before. Det. Brooks did not believe Hamilton was impaired at the time. Hamilton claimed that he'd drank a pint of gin and 5-6 primos, blunts laced with cocaine, shortly before the interview. He'd also taken a Klonopin. He still had roaches from the blunts on his person. He claimed the interview was coercive as he didn't understand the rights and the questions were "leading, 'fill-in-the-blank'" types.

The Court reviewed some of the video and found Hamilton coherent, as had the trial court, and heard the references to his drinking and smoking the night before. He was not slurring or having difficultly sitting in his chair. He provide details to what had happened. Although he was handcuffed, the discussion was calm and low-key. He was an adult, with a good grasp of the language, and had prior interaction with law enforcement.

The Court upheld the denial of the suppression and his ultimate conviction.

Martter v. Potter, 2017 WL 2492059 (Ky. App. 2017)

FACTS: In July 2013, Martter was arrested by Deputy Johnson (Warren County SO) for DUI. Johnson had responded to a truck versus tree crash at 1:45 a.m., with the truck having been abandoned. Johnson discovered the owner and went to that address, whether he knocked. Martter answered and came out on the porch. Martter admitted to having been driving, saying he'd driven off the road. He smelled strongly of an alcoholic beverage. He did not perform satisfactorily on FSTs and was arrested at 2:18 a.m.

Martter argued he was in custody from the time he answered the door and that his statements were given without benefit of Miranda. The trial court granted suppression under U.S. v. Mendenhall.[11] The Commonwealth filed a petition for a writ of prohibition. The Circuit Court granted the writ, finding that Martter was not "in custody" until he was arrested and handcuffed, so his prior statements were admissible. Martter appealed.

ISSUE: Is questioning done at a home usually non-custodial?

HOLDING: Yes

DISCUSSION: The Court looked to Com. v. Lucas[12] and Quintana v. Com.[13] and agreed that Johnson was alone and lawfully following up on the crash. Martter readily answered Johnson's questions and the Court found "simply no evidence of physical intimidation, coercion, threatening behavior, or restraint of movement." As such, he was not in custody at the time he made the incriminating admissions. The Court upheld the Circuit Court's decision to accede to the writ.

Shearer v. Com. 2017 WL 1379789 (Ky. App. 2017)

FACTS: On September 1, 2013, Officer Richards (Lexington PD) spotted a vehicle in front of a known drug and prostitution house. He noted the place and went to turn around to return, but the vehicle was gone when he got back. He spotted the car a few minutes later in front of Shearer's house and pulled in behind it. He got out and approached the group (two females and

[11] 446 U.S. 544 (1980).
[12] 195 S.W.3d 403 (Ky. 2006)
[13] 276 S.W.3d 753 (Ky. 2008).

Shearer) and asked for ID. Shearer had been the front seat passenger and was standing in the roadway. Officer Richards ordered Shearer out of the street, fearing he would get struck, and later stated that Shearer stood there dazed. Officer Burnett arrived and also saw Shearer in the road, and heard Richards attempts to get him to move. He "stated that Shearer was unresponsive and appeared to be a little unsteady on his feet." He could see open beer cans in the vehicle and Shearer reeked of an alcoholic beverage. His eyes were bloodshot, watery and glazed-over. Burnett decided to arrest him for intoxication. As they moved to make the arrest, "Shearer kept his hand clenched in a fist as if he were attempting to conceal something in it." When the officers finally forced it open, they found a crumpled dollar bill with white powdery substance, apparently cocaine. Officer Richards testified that when he and Officer Burnett found the cocaine, he heard Shearer mumble to himself "should have thrown it" and "shouldn't have held it for Lenora."

One of the women admitted to possessing cocaine and gave them consent to search. Drugs and a crack pipe were found.

Shearer was charged with possession, drug paraphernalia and public intoxication. He moved for suppression, arguing Richards lacked reasonable suspicion to seize him. He moved to suppress his statements as he hadn't received Miranda. The trial court rejected his motion. He took a conditional guilty plea and appealed.

ISSUE: Are officers free to approach a group of people on the street?

HOLDING: Yes

DISCUSSION: The Court reviewed the initial contact between the officers and the group. The Court agreed that ""[l]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place[.]"[14] Further, "[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage . . . ."[15] Finally, only upon "a show of official authority such that 'a reasonable person would have believed he was not free to leave'" has a seizure within the meaning of the Fourth Amendment occurred.[16]

In Smith v. Com., the Court noted that "some of the factors that should be considered when applying the totality of the circumstances test include: the threatening presence of several officers; the display of weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled.[17]

[14] Florida v. Royer, 460 U.S. 491 (1983).
[15] U.S. v. Drayton, 536 U.S. 194 (2002).
[16] Royer, 460 U.S at 502; see also Baker v. Com., 5 S.W.3d 142 (Ky. 1999).
[17] Id. (citing Mendenhall, 466 U.S 544 (1980)).

In this case, the Court agreed that there "was not a sufficient display of authority to transform the consensual encounter into a seizure." Simply asking for ID is not enough.[18] The Court distinguished the facts from Com. v. Sanders, noting that in that case the court did not find that the seizure occurred when the officer asked for ID initially, but later in the interaction.[19]

The Court agreed that the situation was simply not so intimidating that Shearer would have felt detained. Further, "police officers are free to approach anyone in public areas for any reason[.]"[20] "No 'Terry' stop occurs when police officers engage a person on the street in conversation by asking questions."[21] The command to get out of the street was a reasonable one to get Shearer into a position of safety, not a Fourth Amendment issue.

As they lawfully interacted with him, the officers developed probably cause of alcohol intoxication, at the least, which was sufficient to detain, arrest and search him. Thus, the cocaine was admissible.

The statement, as well, as properly admitted, as it was not the fruit of an unlawful interrogation. "volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [Miranda]."[22] His comments were "spontaneous utterances not made in response to any questioning by the police."

The Court upheld his plea.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – PRIVILEGES

Com. v. Hinton, 519 S.W.3d 408 (Ky. App. 2017)

FACTS: In April, 2014, Trooper Halcomb, KSP, investigated a case in which Hinton had allegedly thrown the family's pet cat into a burning wood stove, causing its death. He was charged with Torture of Dog or Cat, KRS 525.135. He moved to assert his marital privilege to prevent his wife, Brenda, from being compelled to testify. The Commonwealth raised an exception, under KRE 504(c) because the cat was Brenda's personal property. (Hinton produced an affidavit in which Brenda had stated that the cat belonged to Hinton, who had rescued it.)

The Court upheld the motion for spousal privilege, and the Commonwealth appealed.

ISSUE: Can testimony by a spouse about destruction of property that is at least partially owned by the spouse be an exception to KRE 504(c) barring spousal testimony?

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[18] I.N.S. v. Delagado, 466 U.S. 210 (1984).
[19] 332 S.W.3d 739 (Ky. App. 2011)
[20] Strange v. Com.,269 S.W.3d 847, 850 (Ky. 2008) (quoting Com. v. Banks, 68 S.W.3d 347, 350 (Ky. 2001).
[21] Strange, 269 S.W.3d at 850 (citing Florida v. Royer, 460 U.S. 491 (1983)).
[22] Miranda, 384 U.S. at 478, 86 S.Ct. at 1630.

HOLDING: Yes

DISCUSSION: The Commonwealth argued that it was entitled to the claimed exception. The Court agreed that KRE 504 is not an absolute privilege, as there are stated exceptions to the general rule. Since the cat was arguably at least partially Brenda's property, the Court agreed the case should be remanded to allow consideration of this issue.

TRIAL PROCDURE / EVIDENCE – JUVENILE TESTIMONY

J.E. v. Com., 521 S.W.3d 210 (Ky. App. 2017)

FACTS: In 2013, the victim was six, her brother was ten and J.E. was 14. All three, and another boy, shared a house with the victim's father and J.E.'s mother, although the children themselves were not related. During a CHFS visit, the victim indicated that J.E. had touched her sexually, although there were various accounts of what had probably occurred, including both oral and manual contact and digital penetration.

The children were removed and J.E. charged with sodomy. The victim and her brother underwent a competency hearing. Over a year later, there was discussion as to whether the victim could testify over closed-circuit or be screened in some way. Ultimately, in 2015, it was decided that a screen could be used. Her grandmother (her custodian) was allowed to sit with her as she testified from the prosecution table. The Court also agreed she was competent to testify.

At the hearing the Court agreed that J.E. had committed the offense. He appealed, and the adjudication was upheld. He further appealed.

ISSUE: Must a court make a specific determination that a child witness needs to be screened?

HOLDING: Yes

DISCUSSION: The Court agreed that first, the trial court had properly executed a competency hearing on the victim and her brother, and both were considered competent, as the understood facts, knew what lying was and the importance of telling the truth, and could express themselves clearly and had good recall.

With respect to confrontation, the Court noted:

> Mindful of the infamous 1603 English treason trial of Sir Walter Raleigh, where a wrongful conviction resulted primarily from a dubious accusatory letter, the founding fathers of our nation included in our Constitution the right of an accused to confront those making the accusations face-to-face. This right has carried forward in our justice system, but Sixth Amendment jurisprudence has evolved and now informs us that "while face-to-face

confrontation is preferred, the primary right secured by the Confrontation Clause is that of cross-examination."[23]

However, in some cases, exceptions to face to face confrontation might be granted. In Maryland v. Craig, the acknowledged a preference, but in some cases, that preference must give way.[24] In KRS 421.350 and 26A.140,the Legislature saw fit to protect child victims of illegal sexual activity, when testifying.

However, the Court noted that there was no specific determination by the trial court that the child witness would be unable to testify, but only a statement from the prosecution to that effect. As such, the Court agreed a "compelling need" had not been made, and that violated J.E.'s right of confrontation. Taken in total, the Court agreed, the error was not harmless and warranted reversal.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Com. v. Burke / Wagner (RPI), (Ky. App. 2017)

FACTS: On January 26, 2014, Officer Eberenz (Louisville Metro PD) made a traffic stop of Wagner, citing three reasons: erratic driving, failure to signal and speeding. Once stopped, Wagner was found to be DUI as well. He moved for suppression, arguing a lack of reasonable suspicion for the stop.

During the suppression hearing, there was evidence that Officer Eberenz used a radar unit that had not been calibrated since 2011. The in-car video did not support any evidence of erratic driving (speeding up and slowing down), although the officer testified it occurred before he had turned on the video. The trial court also found that he'd knowingly given false testimony concerning the calibration and maintenance of his personally-owned radar unit. The Court granted suppression and the Commonwealth petition for a Writ of Prohibition, to allow the evidence to be used against Wagner, and was denied.

The Commonwealth appealed.

ISSUE: Is a witness that is mistaken necessarily lying?

HOLDING: No

DISCUSSION: As described in Grange Mut. Ins. Co. v. Trude:

[23] Sparkman v. Com., 250 S.W.3d 667 (Ky. 2008) (citing Ohio v. Roberts, 448 U.S. 56 (1980)) and "the right to confront is not absolute and may be limited to accommodate legitimate competing interests." Id. (citing Chambers v. Mississippi, 410 U.S. 284 (1973)).
[24] 497 U.S. 836 (1990).

> A writ of prohibition is an extraordinary remedy and we have always been cautious and conservative both in entertaining petitions for and in granting such relief. We have divided writ cases into two classes, which are distinguished by whether the inferior court allegedly is (1) acting without jurisdiction . . . , or (2) acting erroneously within its jurisdiction.
>
> [W]rits of prohibition ordinarily have not been granted unless the petitioner established, as conditions precedent, that he (a) had no adequate remedy by appeal or otherwise, *and* (b) would suffer great and irreparable injury (if error has been committed and relief denied). We have consistently . . . required the petitioner to pass the first test; i.e., he must show he has no adequate remedy by appeal or otherwise. The petitioner must then also meet the requirements of the second test, i.e., by showing great and irreparable injury, alternately defined as "something of a ruinous nature".[25]

The Court looked to the District Court's original decision (as upheld by the Circuit Court) and noted that its concern for the "alleged untruthful testimony of Officer Eberenz was its basis for granting the motion to suppress, even after the records from the radar unit had been provided. Certainly, if all of the officer's testimony and evidence were suppressed, there would be no case."

The Court also looks at the assertion that the officer "proffered knowing and intentionally false testimony in its court." The Court found that the "finding of intentional dishonesty on the part of Officer Eberenz is wholly unsupported by a nuanced reading of the record." The Court presented excerpts of the testimony and noted the confusion of the difference between verification and calibration of the unit, but agreed that there was no intent to deceive about the unit's status.

The Court agreed that there was sufficient reasonable, articulable suspicion of erratic driving, and "[a]s the Commonwealth correctly asserts, a police officer may provide lay witness testimony as to whether someone is speeding, meaning that Officer Eberenz was correct to initiate the investigatory stop based on his aforementioned observations and judgment as a police officer even in lieu of the disallowed radar and alleged lack of turn signal evidence.[26]

The Court ordered that the writ be granted, in effect, reinstating the case.

CIVIL LITIGATION

<u>Brown v. Fournier</u>, 2017 WL 2391709 (Ky. App. 2017)

FACTS: On September 8, 2013, Officer Fournier (Harrodsburg PD) worked a vehicle collision. Ten minutes after his arrived, Brown showed up in response to a text message from a

[25] 151 S.W.3d 803, 808 (Ky. 2004):
[26] <u>Quist v. Com.</u>, 338 S.W.3d 778(Ky. 2011).

friend who was one of the victims, who had asked for assistance and a ride. Brown later argued that the officer's actions toward her at the scene was tortious and filed a complaint, but ultimately, he was completely exonerated of criminal misconduct.

Brown then filed suit, alleged battery, false imprisonment and other claims. At trial, there was conflicting testimony from the parties, with Brown claiming he grabbed her and pushed her. As a result of surgery she'd recently had, one of her incisions opened causing a scar. The officer testified that he asked her to leave when he realized she wasn't directly involved, and she refused to do so, yelling at him. At one point, her actions caused him to think she was going to assault him and he intended to place her under arrest. He did not do so only because her brother (a deputy sheriff) intervened and directed her to go back to her car.

The Jury ruled in favor of Officer Fournier and Brown appealed.

ISSUE: (1) Are individuals required to obey an official order to disperse by law enforcement officers in dangerous proximity to an active emergency, including motor vehicle accidents?
(2) Are officers only allowed to make physical contact with persons in order to make arrests or defend themselves?

HOLDING: (1) Yes
(2) No

DISCUSSION: Brown argued that the jury instruction submitted stated that she had a "***legal duty to obey an official command of law enforcement officers to disperse***, issued to maintain public safety ***in dangerous proximity to the scene of an active emergency." She asserted that "***nothing in Kentucky jurisprudence requires an individual to obey an official command of law enforcement officers to disperse." The Court looked to KRS 525.060(1)(c), which "makes it a criminal offense "when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof," a person "[r]efuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency[.]"

The accident in question was serious, and both a hazard and a police emergency. Her failure to comply interfered with his duty to "secure the accident scene, facilitate the work of other first responders, and clear the scene of the accident as soon as possible to limit disruption to the public."

Further:

> Common sense also informs us that Brown's position cannot be correct. To find otherwise would undermine the authority vested in our law enforcement officials. Law and order would suffer a societally harmful breakdown if citizens believed it unnecessary to follow the reasonable and lawful commands of police officers, particularly those given to facilitate an officer's conduct of his duties at the scene of a motor vehicle accident or

> other emergency. Brown herself admitted at trial that Officer Fournier retained the authority to ask her to leave the accident scene. "When all else is said and done, common sense must not be a stranger in the house of the law."[27]

Brown further argued that the law gave an officer "no right or privilege in his or her interactions with a citizen to use any force or engage in any touching, no matter how minimal, unless such physical contact is in self-defense or is necessary to make a lawful arrest. Brown argues that, because she did not attack Officer Fournier and he did not arrest her, he had no right or privilege to touch her."

Brown argued that the provisions of KRS 503, which allows officers to use physical force to make arrests and protect themselves, meant that it was exclusive, and that they could NOT do so under other circumstances. The Court noted, however, that the "purpose of these statutes was not to identify all types of permissible touching by a police officer. We need only turn to our "stop and frisk" jurisprudence to refute Brown's position. In Terry v. Ohio, a police officer "'seized' [the] petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing."[28]

> The United States Supreme Court grappled in Terry with numerous Fourth Amendment questions of constitutional import. The Supreme Court ultimately concluded that, in certain circumstances, a police officer may stop and conduct a limited physical search of a person without effectuating an arrest.

The Court listed several examples of when it was permissible to touch a citizen within intending an arrest: self-harming, stopping conduct, obstructing (even unintentionally) an officer's pursuit of a suspect, etc.

Further:

As noted by the Sixth Circuit applying Graham:

> … we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policeman face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.[29] "The calculus of [the] reasonableness" of an officer's decision to use force, even absent an arrest or self-protection, "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are

[27] Cantrell v. Kentucky Unemployment Ins. Comm'n, 450 S.W.2d 235 (Ky. 1970).
[28] 392 U.S. 1 (1968).
[29] Smith v. Freland, 954 F.2d 343 (6th Cir. 1992).

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[30]

With respect to the battery claim, the Court noted that "In a case such as this, in which the claim of battery is against an on-duty police officer, we begin as with any battery claim by presuming any unwanted touching is unlawful. The plaintiff's proof of unwanted touching shifts the burden of going forward with the evidence to the defendant officer to establish that the touching was justified or privileged. That burden is met by admission of evidence that the officer's use of physical force was necessary or appropriate to the circumstances and such proof creates a rebuttable presumption that the force utilized was justified or privileged. That shifts the burden of going forward back to the plaintiff who may overcome the presumption by producing admissible evidence that the physical force used was excessive under the circumstances." The decision would then fall to the jury, and although the instructions may not have been perfect, they were more than adequate.

The Court upheld the jury verdict.

MISCELLANEOUS

Patterson v. Com., 2017 WL 2705668 (Ky. App. 2017)

FACTS: On June 23, 2014, McDougle was granted a restraining order with respect to Patterson, in Jefferson County. Some months later, he was accused of being in contempt of court, for violating it. At the subsequent hearing, the Court agreed that he parked very close to McDougle's home until she noticed him, and placed a menacing telephone call to her. He was convicted and appealed.

ISSUE: Is contempt of court a valid charge for someone who violates a court order?

HOLDING: Yes

DISCUSSION: In Com. v. Bailey, the Court defined contempt as "willful disobedience of – or open disrespect for – the rules or order of a court." [31] Civil contempt "involves the failure of one to perform an act pursuant to an order of the court,"[32] while criminal contempt is "conduct that demonstrates disrespect toward the court, obstructs justice, or brings the court into disrepute."[33] A contempt that occurs outside the courthouse is an indirect contempt, and of course, certain rights are in place to protect the individual. The Court agreed that his punishment took place after an appropriate hearing, in which he had the opportunity to present his side of the alleged interactions.

[30] Graham, supra.
[31] 970 S.W.2d 818 (Ky. 1998).
[32] Com. v. Burge, 947 S.W.2d 805 (Ky. 1996).
[33] Meyers v. Petrie, 233 S.W.3d 212 (Ky. App. 2007).

The Court noted that although he did not enter her home or speak to her, he did “make contact” and/or initiated communication that was likely to alarm McDougle. As such, he did what he was forbidden to do.

The Court upheld the finding that he was in contempt.

SIXTH CIRCUIT

POSSESSION OF A FIREARM BY A CONVICTED FELON

U.S. v. Randolph, 685 Fed.Appx. 429 (6th Cir. 2017)

FACTS: On March 7, 2014, Det. Vance (Shelby County, TN, SO) and others executed a search warrant for certain documents. When they found drugs, he obtained another search warrant to expand the search. Ultimately, they found a large quantity of various drugs and a loaded firearm. The owner indicated he'd leased the property to Randolph's wife, Polk, and that the couple shared the home. They also spent time at another residence in the area. At the time of the search, Randolph was incarcerated for another reason.

Vance visited Randolph and explained the purpose of his visit, which was to determine who owned the drugs. Randolph indicated he'd thought the drugs were garbage and intended to discard them. At that point, he was given Miranda and subsequently claimed ownership of everything at the house. He was charged with drug and firearms offenses, as he was a convicted felon. He was convicted and appealed.

ISSUE: May someone be held to be in possession of a firearm, even when not living at a location temporarily?

HOLDING: Yes

DISCUSSION: Randolph argued that although he owned the gun, he was not in possession of it for the purposes of 18 U.S.C. 922(g)(1). He noted that his connection to the house was attenuated and consisted of old documents, and his wife, not he, leased the property.

The Court noted that while he was not in actual possession, constructive possession applied. "Constructive possession exists when the defendant does not have possession but instead knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others."[34] Even though Randolph was incarcerated at the time, a jury could reasonably believe he intended to exercise the requisite interest in the firearm when released. Further, the weapon was easily accessible and in the same room as where the drugs were found, leading to the additional charge of "furtherance of a drug-trafficking offense."
The Court upheld his conviction.

[34] U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Talley, 692 Fed.Appx. 219 (6th Cir. 2017)

FACTS: In May, 2015, Dets. Bevis and Bowers visited 222 Lucile Street, Nashville, TN, looking for Talley. They smelled fresh marijuana from outside and knocked; they could hear someone inside, but no one came to the door. They relayed this information to Det. England, who did a trash search and found marijuana. He linked Talley to the home and learned he had an extensive criminal history including drugs.

Det. England obtained a search warrant, and during the search, found marijuana, a handgun and ammunition. Talley, a convicted felon, was charged and moved to suppress. He was denied and convicted, and then appealed.

ISSUE: Is a trash pull, supported by other evidence, sufficient for a search warrant?

HOLDING: **No**

DISCUSSION: Talley argued that the warrant did not support probable cause, but the court agreed that the information was sufficient. Talley argued that U.S. v. Abernathy[35] - involving a small quantity of marijuana in the trash, was insufficient – but the Court noted that was not all that the detective had. Instead, the Court noted, they detective had the information from the two officers that had visited the home, and the officers were experienced and knew the odor. Nothing in U.S. v. Elkins, the case he cited, indicated that the officers needed any particular documented expertise in recognizing the odor.[36]

Further Det. England created a valid link between Talley and the address. The Court upheld the warrant and his conviction.

U.S. v. Smith, 2017 WL 2459872 (6th Cir. 2017)

FACTS: Following a controlled buy at Smith's Akron home, the police obtained a search warrant. A stash of drugs and weapons were found and Smith was charged. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a warrant location be technically accurate in every detail?

HOLDING: No

[35] 843 F.3d 243 (6th Cir. 2016).
[36] 300 F.3d 638 (6th Cir. 2002).

DISCUSSION: Smith argued that the warrant did not satisfy probable cause. The Court noted that although there were alleged ambiguities in the wording in some places, that "a warrant need not be 'technically accurate in every detail," so long as the officer who executes it can be reasonable certain they are in the correct location. In this case, the warrant provided a detailed description of Smith's home.

The source of the information was one that had provided reliable information, as well. He was clearly connected as the source identified him, and the location was his residence.

The Court upheld his plea.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

U.S. v. Matthews, 689 Fed.Appx. 840 (6th Circ. 2017)

FACTS: On October 24, 2014, about 9:45, two Detroit offices spotted Matthews on the street. They believed he looked like the described suspect from a robbery more than a week before and tried to talk to him through the window. As one of the officers stepped out, Matthews ran, with the officer in foot pursuit. When Matthews pulled a pistol from his hoodie, the officer, only feet away, yelled "drop it or I'll shoot." He then ran into an alley and tossed the pistol toward a fence. He tripped and was arrested. The other officer, right behind him, retrieved the weapon.

Because he was a convicted felon, he was arrested. He moved to suppress it, arguing there was no reason for the initial interaction. He claimed they'd tripped him, as well, and planted the gun. The Court argued that he had no expectation of privacy in the weapon, which wasn't found on his person, and denied it. He also argued that the claim that he matched the physical description of the robber was untrue and that introducing that evidence would prejudice him. At trial, however, he argued that the description of the robber should be introduced, because there was, he alleged, a disparity. The Court ruled the evidence was irrelevant to the charge.

Matthews was convicted and appealed.

ISSUE: Is there a right to privacy to a discarded weapon?

HOLDING: No

DISCUSSION: The Court ruled that since he engaged in voluntary interaction with the officers, initially, that was not a seizure. When he discarded the weapon, it became abandoned property and he lost any expectation of privacy in it as well.

The Court upheld the conviction.

SEARCH & SEIZURE – CELL PHONE TRACKING

U.S. v. Riley, 858 F.3d 1012 (6th Cir. 2017)

FACTS: On June 23, 2015, a state court warrant for Riley was issued for the robbery of a local business. Two days later, he bought a cell phone (using AT&T) and the number was given to his girlfriend by a family member so she could contact him while a fugitive. She turned it over to Special Deputy Marshal Bowman, who obtained an order to obtain the records on the phone.

That order compelled disclosure of metadata on calls and cell-site location, as well as real-time tracking ("pinging") of the location of the phone. Using that process, within hours, Riley was located at a Memphis hotel. He was promptly apprehended. (And, since he had a firearm, he was also charged with possession of that firearm.)

Riley was extradited to Michigan, for the original state crime, and was then sent back to federal court in Tennessee on the firearms offense. He argued in both courts that there was "no known legal way" that he could have been located so quickly "absent the use of illegal cell tracking technology." The federal court allowed his motion to compel information on how it was done.

Riley moved for suppression in the federal case, arguing that the weapon was the fruit of an unconstitutional search. Both parties agreed that the state court's surveillance order was not, in fact, a search warrant, and Riley argued that he had an expectation of privacy in his location. The district court denied his motion, examining, among other information, that there was approximately one ping every 13 minutes. He was arrested on the first day of tracking. The Court agreed that the decision in "Skinner justified short-term GPS tracking without a warrant; second, on the ground that the warrant that had been issued for Riley's arrest justified obtaining real-time GPS information about Riley's location in order to effectuate his arrest." He took a conditional guilty plea and appealed.

ISSUE: Is there an expectation of privacy in one's location, as tracked by a cell phone?

HOLDING: No

DISCUSSION: The Court noted that the issue was whether "the government [violated] Riley's Fourth Amendment rights by compelling AT&T to disclose, and then by subsequently using, the real-time GPS location of Riley's cell phone over the course of approximately seven hours."

The Court noted that:

> Both the Supreme Court and our court have declined to recognize as reasonable a criminal suspect's expectation of privacy in his location while moving along public thoroughfares.[37]

[37] *See* U.S. v. Knotts, 460 U.S. 276 (1983) (holding the placement of a radio transmitter by narcotics officers in a container of chemicals to be purchased by a suspected methamphetamine manufacturer was not a search when officers used the transmitter to track a vehicle while it carried

In Skinner, we held that location data emitted by a "voluntarily procured" cell phone could not be subject to a reasonable expectation of privacy, even if the cell-phone user had no reason to expect that the government would compel the service provider to disclose those data. There, because "the defendant's movements could have been observed by any member of the public," we held that it could not possibly be a Fourth Amendment violation for law-enforcement officers to monitor those movements by using cell-phone location data just because such electronic monitoring was more efficient than relying on visual surveillance alone.

The Court noted that his movements, as tracked, would have been visible to public view, and this was an important factor. The data was not so precise that it could reveal movements inside an area of privacy, but only placed the phone at the motel. In other words, it only got them to the parking lot, it did not reveal movements inside the room itself. Although he was arrested in a motel was "of no moment," "for the government learned no more about Riley's whereabouts from tracking his cell-phone GPS data than what Riley exposed to public view by traveling *to the motel lobby* "along public thoroughfares,"—even if Riley meant to keep his location a secret, one cannot expect privacy in one's *public* movements. And had Riley truly wished to avoid detection, he could have chosen not to carry a cell phone at all, or to *turn it off*."[38]

The Court upheld the motion

SEARCH & SEIZURE – SWEEP

U.S. v. Friskey, 2017 WL 2645297 16-6263 (6th Cir. 2017)

FACTS: On November 13, 2012, Kenton County officers were dispatched on a 911 call of a suspicion person outside an area. There had been burglaries in the area. Initially, the officers went to the wrong house, having not been given a specific address. The discovered an unlocked house and entered to check, the caller approached and told them they were at the wrong house. They were directed to Friskey's house and told about a male lurking about the property and a suspicious vehicle.

At that home, they discovered the doors were unlocked so they entered to sweep. They smelled marijuana and found a trap door and when opened, a stronger odor. They searched the area and found marijuana plants but no people. They left, secured the property and obtained a search warrant. With the warrant they reentered the house. They found a suspected burglar hiding inside. They also seized over 500 plants and related items.

Friskey as the owner was charged. He moved to suppress and was denied. He appealed.

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the transmitter along public roads to a cabin, but when the transmitter did not enter the cabin itself); U.S. v. Skinner, 690 F.3d 772 (6th Cir. 2012) (holding government use of real-time cell-phone GPS data to track a suspected drug trafficker as he traveled for three days in a "motorhome that was driven on public roads" was not a search).

[38] U.S. v. Skinner, 690 F.3d 772 (6th Cir. 2012).

ISSUE: Is an entire house subject to a justified sweep?

HOLDING: Yes

DISCUSSION: The Court agreed, first, that the officers had probable cause to believe that there was a burglary in progress, which gave them the "necessary exigency" to enter without a warrant.[39] Further, entering the basement was within the scope of a protective sweep, as their observation of low windows confirmed there was one, despite the fact they could not find a door to the basement.[40]

As a result of their discovery in the basement, the officers properly secured the building and obtained a warrant.

The Court upheld his conviction.

SEARCH & SEIZURE – QUARLES EXCEPTION

U.S. v. Riley, 685 Fed.Appx. 390 (6th Cir. 2017)

FACTS: In October 2014, the FBI's Violent Crime Task Force (VCTF), out of Detroit, learned of an outstanding arrest warrant for Riley, from West Virginia, for the armed robbery of a home. Agent Krupa obtained a photo of Riley and two addresses associated with him, in Detroit. He checked the first one, and found it apparently vacant. He and Agent George went to the second one and spotted Riley, along with others, along with a vehicle registered to Riley at that first address. They surveilled for several hours and the vehicle did not move. They next day, they saw it again, and Riley coming and going. He and Murray loaded boxes into the vehicle and Riley's mother, Lucas, drove away in it. They decided to obtain a search warrant to effect an entry.

With warrant in hand, they surrounded the house and then announced themselves. With no response, they breached the doors and entered. They shot one aggressive dog and restrained two others. They continued to shout but no occupants emerged. They came to a locked door and Murray responded through the door. They talked through the door for several minutes and finally, Riley chimed in. He said the house was his mother's and there were no drugs. When Krupa asked about guns, he agreed that "there might be a gun in here." He did not respond when asked if the gun was in the room with him. After some negotiation, and some noise inside, the two men emerged unarmed and were arrested.

A rifle and magazine were found under a mattress. They obtained a search warrant for the entire house. A number of firearms were found in the same bedroom and paperwork that belonged to Riley, as well.

[39] U.S. v. McClain, 444 F.3d 556 (6th Cir. 2005).
[40] U.S. v. Brown, 449 F.3d 741 (6th Cir. 2006).

Both, being felons, were charged with the weapons. Riley moved to suppress, arguing that he should have been given Miranda before being asked about the gun, since he was not free to leave. The District Court denied it, holding that "Riley was neither in custody nor subject to interrogation, and that the public-safety exception to Miranda applied."

At trial, Murray testified that Riley was living with his mother because of the arrest warrant. Murray had joined them after he was released from prison and the guns were already there. He claimed Riley pushed him into the room when the police arrived. Riley argued that the guns belonged to Murray. Witnesses testified that Riley did not live at his mother's house.

Riley was convicted of the weapons charge and appealed.

ISSUE: Is asking about guns during a standoff a violation of Miranda?

HOLDING: No

DISCUSSION: Riley pursued the Miranda claim on appeal. The government responded that "Riley's statement, made during an armed standoff with the police, was not made while he was in custody or subject to interrogation." The Court first looked to it with respect to the public-safety doctrine and held that it clearly applied. The Court held that for it to apply, the officer must have a reasonable believe of danger,[41] which includes ""he must have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it."[42] Under the public safety exception, officers are permitted to "ask "questions necessary to secure their own safety or the safety of the public" as opposed to "questions designed solely to elicit testimonial evidence from a suspect."[43]

Given what the agents knew, it was reasonable to believe that Riley had firearms.[44] Since Murray was also inside, it was reasonable to believe he might, as well, access the suspected firearms.

The Court upheld denial of the suppression.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Jackson, 2017 WL 2772167 (6th Cir. 2017)

FACTS: On the night of July 17-18, 2013, three armed men attacked, assaulted and robbed a Chattanooga resident in his home. The next day, Officer Early talked to witnesses and one was

[41] Riley's statement, made during an armed standoff with the police, was not made while he was in custody or subject to interrogation.
[42] U.S. v. Williams, 483 F.3d 425 (6th Cir. 2007).
[43] New York v. Quarles, 467 U.S. 649 (1984).
[44] See U.S. v. Williams, 272 F. App'x 473 (6th Cir. 2008) (holding that "the police officers plainly had a reasonable belief that [defendant] might possess a weapon" because his "criminal history . . . suggested not only that he possessed weapons, but also that he was willing to use force, as evidenced by his aggravated robbery conviction and his arrest for discharging a weapon into a home or school").

able to describe a strange car that had been in the area that was missing the entire front bumper. Early was on the lookout for the vehicle, but had not as yet put the information in writing, as he didn't have the witness's name at the time. During the same time frame, a jewelry store nearby was robbed but the robbers fled, leaving behind items. Officer Early viewed the video of that robbery which included a similar vehicle with "blacked out" wheels. Just minutes later, he passed a vehicle missing the front bumper and hubcaps – given the wheels a blacked out look. Officers got the vehicle stopped and the investigator was summoned to the scene. Eventually, the other occupants were released but Jackson, whose grandmother owned the car, was held.

Early and Massengale, the investigator, went to Jackson's home, shared with the grandmother. She gave permission to search and a rifle was found, the grandmother also admitted missing a cell phone and laundry basket – one was left at the scene of the aborted robbery. She gave permission to search the phone, which they had seized from Jackson, and the car. Photos were found that were incriminating, including one of Jackson holding a rifle, although he was a convicted felon. Jackson was charged with the robbery as well as related federal claims relating to his possession of the rifle.

Jackson moved to suppress a variety of evidence, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is an identifiable tip credible?

HOLDING: Yes

DISCUSSION: Jackson argued first that the tip from the unnamed neighbor was unreliable. The Court agreed that anonymous tips must be viewed with suspicion.[45] However, in Navarette v. California, in some instances, identifiable witnesses (which was the case here, as Early knew where the witness lived) could be considered reliable as a rule.[46] As such, the tip was valid.

With respect to the stop, the court agreed that although a length of time had passed from the original robbery, the description of the suspect vehicle was unusual and particular. The proximity to the unusual car to the first scene was a relevant factor in creating reasonable suspicion.[47] In the light of number of bits of evidence supporting the connection of the car to both crimes, the traffic stop was valid.

The Court upheld Jackson's plea.

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[45] Florida v. J.L., 529 U.S. 266 (2000).
[46] 134 S.Ct. 1683 (2014).
[47] Houston v. Clark Cty. Sheriff Deputy John Does 1-5, 174 F.3d 809 (6th Cir. 1999).

42 U.S.C. §1983

42 U.S.C. §1983 – FALSE IMPRISONMENT

<u>Sampson v. Village of Mackinaw City</u>, 685 Fed.Appx. 407 (**6th Cir. 2017)**

FACTS: On March 13, 2913, Duncan offered Sampson money to give him a ride to Mackinaw City, to collect property. Sampson claimed he did not know Duncan also had heroin and would not have agreed had he known. Upon their arrival, at about 3 a.m., Duncan entered a hotel room while Sampson waited. Duncan returned in minutes and indicated Sampson should follow a car leaving the hotel. A few minutes later, Officer Klave made a traffic stop of Sampson's car, stating they'd run a stop sign. Duncan was arrested on an outstanding warrant and Sampson consented to a search of the car.

Officer Klave found two bags of heroin on the floor behind the passenger seat, Sampson denied ownership, while Duncan agreed it was his. Both men were charged, with possession and maintaining a drug vehicle. "But this was not a chance traffic stop; this was a hastily arranged sting operation, to orchestrate the traffic stop and the arrests." The individual with whom Duncan was dealing was in fact, a CI.

At a subsequent hearing, the CI testified that he'd dealt only with Duncan and that he had no knowledge of Sampson or whether Sampson was involved. Ultimately Duncan was bound over and Sampson was released from custody, although it did not engage in any analysis of the traffic stop.

Sampson filed suit under §1983, arguing false arrest and malicious prosecution. The trial court rejected the argument that the traffic stop was illegal, finding it was appropriate given what the officer knew. All claims were dismissed under summary judgement and Sampson appealed.

ISSUE: Is a traffic stop based on probable cause valid, even if a pretense?

HOLDING: Yes

DISCUSSION: Sampson argued that he did not run the stop sign, which triggered the stop. However, the Court agreed that "Officer Klave had reasonable suspicion of drug activity to prompt the traffic stop."

> Detective Supernault had forewarned Klave that Duncan was under task-force investigation for drug trafficking, would be traveling to Mackinaw City that evening to meet a known CI, and would have drugs to sell; the CI alerted Klave at 3:15 a.m. that Duncan had arrived, that Duncan and another man would be following the CI in a white Dodge Intrepid when they departed the hotel momentarily, and that Duncan had heroin; minutes later, Klave observed the two men in the white Dodge Intrepid following the CI,

> as predicted. Officer Klave had reasonable suspicion of criminal activity to justify the initial traffic stop." As such, the traffic stop was valid.

With respect to the false arrest claim, the Court noted, ""To prevail on a false arrest claim brought under 42 U.S.C. §1983, 'a plaintiff must prove that the arresting officer lacked probable cause to arrest the plaintiff.'"[48] Even though the case was dismissed at the preliminary hearing, that did not indicate Officer Klave was at fault. The Court looked to Maryland v. Pringle, in which the court noted that "because "a car passenger … will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing," "it was reasonable for the officer [in Pringle] to infer a common enterprise."[49]

Although Duncan claimed ownership of the drugs, Officer Klave did have a probable cause to believe that Sampson was involved, as he had just driven Duncan five hours for a overnight rendezvous with an individual, in his own car. Both charges were appropriate, even if based on a mistaken belief.

Looking to malicious prosecution:

> Because malicious prosecution is "entirely distinct" from false arrest, the claim invokes a different test with different elements.[50] We have established a four-element test for a malicious-prosecution claim under §1983, under which the plaintiff must prove the following:
>
> First, … that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute.
>
> Second, … that there was a lack of probable cause for the criminal prosecution.
>
> Third, … that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure.
>
> Fourth, [that] the criminal proceeding … [was] resolved in the plaintiff's favor.[51]
>
> Under the first element, an investigating officer does not escape liability just because someone else (e.g., the prosecutor) made the actual decision to prosecute, so long as the plaintiff can show that the officer "influenced or participated in the decision to prosecute." But an officer's "participation must be marked by some kind of blameworthiness, something beyond mere negligence or innocent mistake."[52] And we

[48] Id. (quoting Voyticky v. Village of Timberlake, 412 F.3d 669 (6th Cir. 2005)
[49] Id. at 373 (quoting Wyoming v. Houghton, 526 U.S. 295 (1999)).
[50] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010); Maryland v. Pringle, 540 U.S. 366 (2003).
[51] Sykes, 625 F.3d at 308-09.
[52] Johnson v. Moseley, 790 F.3d 649 (6th Cir. 2015).

> have made "absolutely clear" our holding "that an officer will not be deemed to have commenced a criminal proceeding against a person when the claim is predicated on the mere fact that the officer turned over to the prosecution the officer's *truthful* materials."[53] Such is the claim here.

Officer Klave provided a truthful account to the prosecutor, and any claimed omissions to his affidavit (such as the name of the CI) were reasonable as well. None of the claimed misleading excluded facts led to Sampson being charged. He was not responsible for the case going forward.

The Court affirmed the dismissal of the action.

<u>Beckham / Lewis v. City of Euclid</u>, 689 Fed.Appx. 409 (6th Cir. 2017)

FACTS: As a result of a mistake, Beckham and Lewis spent the Easter weekend in jail in Euclid. They were believed to have violated a court order to do community service, but in fact, had completed the requirement. It was agreed by all parties that mistakes were made that led to the pair being arrested. When the problem was sorted out, on Monday, they were immediately released. Beckham, in particular, suffered harm, as she was fired for not coming to work, was sick from her pregnancy, her car was towed and her children left with a grandparent. The five defendant officers "each had a hand in their arrest and detention." Beckham and Lewis filed suit under 42 U.S.C. §1983 alleging violations of the Fourth and Fourteenth Amendments.

The trial court gave summary judgement to the defendants and Beckham and Lewis appealed.

ISSUE: Is a mistake necessarily actionable?

HOLDING: No

DISCUSSION: The Court agreed that while errors were made, they were reasonable errors based upon information available at the time to each of the parties. These errors, combined, led to the issuance of the warrant which was, again, based upon what is known at the time. The Court noted that "to be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection."[54] In each step along the way, the mistakes, while regrettable, were reasonable. Although certain things may have been done that would have kept it from occurring, what was done, was reasonable.

The Court concluded, "not every error in governmental judgement, even one that causes significant inconvenience, amounts to a violation of constitutional rights." The Court upheld the dismissal of the action.

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[53] <u>Sykes</u>, 625 F.3d at 314 (emphasis in original)
[54] <u>Heien v. N.C.</u>, 135 S.Ct. 530 (2014).

<u>Marshall (David / Chandra) v. City of Farmington Hills</u>, 693 Fed.Appx. 417 (6th Cir. 2017)

FACTS: On December 13, 2006, at about 1 a.m., Marshall, a Detroit police officer, was driving home from work, in his personal vehicle, still in a police uniform. Officer Meister (Farmington Hills PD) spotted him, and followed him, having witnessed a traffic violation. His dash cam captured a great deal of the following interaction. The officer followed Marshall and then activated his equipment, Marshall continued on for several seconds until he stopped in front of his home.

Officer Meister approached on foot and was "aggressive and antagonist from the start." They discussed, Marshall quietly and Meister more loudly, the traffic offense. Meister demanded ID, although Marshall pointed out he was in uniform. They continued sparring verbally although Meister handed over his police ID and OL. He asked for a supervisor to come to the scene, and Meister eventually summoned his supervisor to the scene. Marshall had gotten back into the car and they continued arguing, with Meister insisting that Marshall get out. Marshall did so. Meister demanded Marshall disarm and come back to his cruiser. Marshall objected to Meister putting his hands on him, and his right to order him out of the vehicle. Officer Jarrett arrived and the argument continued. Eventually Jarrett tased Marshall and seized his gun.

Supervisor Soderlund arrived and heard the story. Marshall was transported to the Farmington Hills PD, booked for interfering with and officer, and released. The parties later entered into a conditional release-dismissal agreement on the charge, with the charge dismissed if Marshall agreed not to sue – but only if they could agree on a press release. When they could not, Marshall demanded a trial, but the court denied it, finding the agreement valid and binding.

The Marshalls (husband and wife) filed suit. After several back and forth decisions, the District Court denied all claims against Farmington Hills and the officers involved, for false arrest and excessive force. The Marshalls again appealed.

ISSUE: Must an officer, who is also a suspect in a crime, surrender their weapon?

HOLDING: Yes

DISCUSSION: The Court looked first to the traffic stop. The Court agreed it was proper to make the stop, and that it was proper to require Marshall to get out of his vehicle. (In fact, he got out, voluntarily, and then got back in.) In fact, Meister never ran Marshall's license, and was "remarkably belligerent." However the stop went on because Marshall demanded a supervisor and refused to surrender his weapon. As such, the traffic stop was not unduly delayed.

Moving to the arrest, Marshall asserted he committed no crime. The Court agreed the question was "whether he was required to comply with Meister's demands" that he disarm himself. The Court agreed that the demand was lawful, "in light of the escalating tension" at the time.

With respect to the use of force, the Court looked to Graham v. Connor.[55]

> In determining whether the force used is reasonable, courts balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake, viewing the following factors: a) the severity of the crime at issue; b) whether the suspect poses an immediate threat to the safety of an officer or others; and c) whether he is actively resisting or attempting to evade arrest by flight. The subjective motivations of the individual officers have no bearing on the inquiry.
>
> The parties agree on two Graham factors: 1) the basis for the original stop, a traffic violation, did not constitute a severe crime, and 2) Marshall was not resisting or attempting to evade arrest. The dispute concerns whether Marshall posed an immediate threat to Defendants' safety such that the tasing was reasonable. Regardless whether Defendants forewarned Marshall that he was under arrest, Defendants' use of force was objectively reasonable under the circumstances because Marshall would not relinquish his gun after repeated requests. Additionally, once Defendant Jarrett arrived on the scene, he witnessed Meister requesting that Marshall give up his service weapon and Marshall's refusal to do so. As Jarrett approached Marshall with a Taser, Marshall placed his hand on his service weapon. A reasonable officer in Jarrett's position thus could have believed that there was an objectively reasonable basis to taser Marshall.

The Court also addressed a claim by Marshall on First Amendment. Although the Court agreed he had a right to question or criticize the officers, he was arrested for valid local law. As such, it was not legally retaliation for Marshall's speech.

Although the Court ruled in favor of the officers on the federal claims, it did allow the state law claims of assault and battery to go forward. The Court also allowed Chandra Marshall's claim of loss-of-consortium to go forward as well.

42 U.S.C. §1983 – SEARCH WARRANT

Bailey v. City of Ann Arbor, 516 U.S. 137 (6th Cir. 2017)

FACTS: On the evening of April 9, 2012, two masked men robbed a store, it was caught on video. The robber was wearing among other things, a distinctive zipped sweat shirt. Six weeks later, Dets. Fitzpatrick and Stanford visited Bailey's home and his mother showed them his room, to prove he wasn't home. There, they noticed a sweatshirt of the same design. Later, they did a search warrant affidavit and noted the sweatshirt, as well as an anonymous tip that indicated Bailey was the robber. After the search, in which a number of items were seized, they arrested Bailey when they located him the next day.

[55] 90 U.S. 386 (1989).

Ultimately he pled guilty to only a minor charge. He filed suit under 42 U.S.C. §1983, arguing that the affidavit was flawed and included a number of incorrect statements. The officers moved for summary judgement and were denied. They then appealed.

ISSUE: Do minor discrepancies make a warrant invalid?

HOLDING: No

DISCUSSION: The Court noted that Bailey had no "plausible argument" for any intentional deception. The Court agreed that Bailey's claims, that the robber was wearing something completely different than what was described with respect to the shirt, were refuted completely by the security video itself. In other words, his own pleadings "contradict verifiable facts central to his claims," which made his "allegations implausible." Although there was dispute as to the actual description as to the design on the sweatshirt, it was clearly dark, and not white, as Bailey claimed. In other words, the description in the warrant was not false, but instead, quite accurate. The only discrepancy was, with respect to height. Even if that information was excluded however, the warrant was still sufficient.

The Court reversed the denial.

42 U.S.C. §1983 – HECK

<u>Naselroad v. Mabry</u>, 686 Fed.Appx. 312 (6th Cir. 2017)

FACTS: On October 8, 2013, Det. Craycraft (Clark County SO) received a tip that Naselroad was growing marijuana on his property. He asked for officers to accompany him on a knock and talk to obtain consent. Deputy Sheriff Gurley joined the other officers and they proceeded to the Naselroad home. They introduced themselves to Naselroad's mother, Jeannie, who denied there being any marijuana on the property to her knowledge.

At some point, Naselroad walked outside his home through the back door. He denied knowing there were any officers present. Craycroft spotted him and ran to the backyard and drew his weapon. Naselroad pulled his own firearm in response. Mabry, hearing the commotion, ran there as well, and identified himself as an officer. He ordered Naselroad to drop his weapon. Naselroad alleged he was lowering his weapon when Mabry shot him once in the chest.

Naselroad was later convicted of marijuana. He filed suit under 42 U.S.C. §1983. The officers were granted summary judgement and Naselroad appealed.

ISSUE: May a conviction (or plea) negate a claim under civil litigation?

HOLDING: Yes

DISCUSSION: The Court noted that although neither party raised the issue, the case might be barred under Heck v. Humphrey.[56] The officers noted that if his claim is based on the illegality of a search of his property that did yield contraband that resulted in his conviction, "challenging that search would undermine the legitimacy of his conviction." Since the Heck doctrine had not been applied in this case, the court remanded the case for further evaluation.

42 U.S.C. §1983 – FALSE ARREST

Thibault v. Wierszewski, 2017 WL 2493454 (6th Cir. 2017)

FACTS: Wierszewski (Grosse Point Farms, MI) stopped Thibault for reckless driving. The officers had witnessed Thibault hit a median, he'd actually made a mistake on a turn and was trying to correct, being in an 18-wheeler. The truck also had several minor equipment violations. Wierszewski noted that he had his window down in the cold weather, was trying to smoke an unlit cigarette, and appeared disoriented and had slow speech. He was shaking and his face was flushed. He performed field sobriety tests, some satisfactorily and some not. Officer later stated they'd also seen a "white power-like substance" in his nose. However, when tests revealed neither drugs nor alcohol in his system, the charges were dismissed. Thibault filed suit and Wierszewski claimed qualified immunity and were denied. Wierszewski appealed

ISSUE: May a video be used to prove or disprove claims that an arrest was invalid?

HOLDING: Yes

DISCUSSION: In the face of Thibault's claim that he was arrested without probable cause, Wierszewski sought to interpose the defense of qualified immunity. The court-created concept of qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[57]

> Indeed, even in the absence of probable cause to arrest, "an officer is entitled to qualified immunity . . . if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent."[58]

The Court agreed that the initial stop was legitimate and agreed to by both parties. It looked at the video and postulated a legitimate reason for each of the facts that the officer considered suspect. (As an example, the officer considering Thibault's shivering to be suspect, as he'd been in a heated truck, but he was standing outside in cold weather without a coat while both officers

[56] 512 U.S. 477 (1994).
[57] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[58] Green v. Throckmorton, 681 F.3d 853(6th Cir. 2012).

were wearing heavy jackets and caps.) On the video, as well, he "walked as steadily and as rapidly" as the officer and his speech was "clear and coherent" – and nothing indicated he was "impaired in any way whatsoever."

When an arrest is dependent on field sobriety tests alone, as this one was, Wierszewski nevertheless rests his heaviest support for his decision to arrest the plaintiff on his assertion that Thibault failed to perform the field sobriety tests properly. In doing so, he cites in his appellate brief 17 decisions from various federal courts, all allegedly standing for the proposition that failure to perform field sobriety tests satisfactorily "constitutes reliable evidence upon which officers may premise probable cause determinations." What Wierszewski fails to mention, however, is the salient fact that, in 16 of the 17 cited cases, additional evidence existed to bolster the presumption that less-than-satisfactory performance on field sobriety tests indeed was indicative of intoxication or impairment.[59]

The seventeenth cited case, People v. Berger,[60] does not indicate specifically that the arresting officer relied on other observations other than the field sobriety tests themselves in concluding that he possessed probable cause to arrest the defendant. The Berger, decision, however, held only that the horizontal-gaze-nystagmus (HGN) test used by police officers as one tool to determine the intoxication of a motorist is admissible as evidence if the test is performed properly by an officer who is qualified to administer it.

> In any event, it is clear that a defendant like Wierszewski, who is seeking to rely upon the results of field sobriety tests to establish probable cause for an arrest, must establish that the tests were administered properly and that the results of the tests clearly demonstrate

[59] See Bradley v. Reno, 632 F. App'x 807 (6th Cir. 2015) (plaintiff's breath smelled of alcohol, his eyes were red and glassy, his speech was slurred, he admitted drinking a "couple" "small pitchers" of beer and a "couple" bottles of beer in the preceding two hours, and a breathalyzer test indicated a blood-alcohol level of .111%); Jolley v. Harvell, 254 F. App'x 483 (6th Cir. 2007) (officer reported odor of marijuana in car and noted plaintiff's bloodshot eyes); Wynn v. Morgan, 861 F. Supp. 622 (E.D. Tenn. 1994) (unusual behavior included plaintiff accelerating away from arresting officer after being stopped; after being stopped again, plaintiff screamed at officer and ran away from him as he attempted to handcuff her); Burgett v. Sanborn, No. 6:13-CV-1358-TC, 2015 WL 4644619, at *2 (D. Or. May 14, 2015) (officer noticed an odor of alcohol, and plaintiff admitted drinking a glass of whiskey and two glasses of wine a few hours earlier), report and recommendation adopted by 2015 WL 4644598 (D. Or. Aug. 4, 2015); Ketchum v. Khan, No. 10-14749, 2014 WL 3563437, at *1 (E.D. Mich. July 18, 2014) (officer smelled strong odor of intoxicants, and plaintiff admitted to consuming beer and ingesting Lorazepam); Cameron v. City of Riverview, No. 10-14098, 2011 WL 3511497, at *2 (E.D. Mich. July 26, 2011) (odor of intoxicants, plaintiff's speech was slurred, and plaintiff "admitted to consuming a couple of alcoholic beverages"), report and recommendation adopted by, 2011 WL 3511485 (E.D. Mich. Aug. 11, 2011); Mott v. Davis, No. 3:10-CV-270, 2011 WL 4729856, at *1 (E.D. Tenn. Oct. 5, 2011) (plaintiff's speech was slurred, one eye was bloodshot, and both eyes were "watery and glazed over"); Freeland v. Simmons, No. 4:09cv01384-WOB, 2012 WL 258105, at *2 (D. S.C. Jan. 27, 2012) (plaintiff seen at two bars, admitted that he had "had a few," officer detected a strong odor of alcohol and noted that plaintiff's eyes were red, glassy, and bloodshot); Rutherford v. Cannon, No. 8:09-2137-HMH-BHH, 2010 WL 3905386, at *2 (D. S.C. Sept. 2, 2010) (officer detected odor of alcohol and plaintiff admitted he had been drinking beer), report and recommendation adopted by 2010 WL 3834448 (D. S.C. Sept. 27, 2010); Shackleford v. Gutermuth, No. Civ.A. 301CV743S, 2005 WL 3050522, at *1 (W.D. Ky. Nov. 10, 2005) (plaintiff's eyes were dilated and not reactive to light); Briggs v. Holsapple, No. 08-6037-KI, 2009 WL 395134, at *1 (D. Or. Feb. 11, 2009) (officer smelled alcohol, plaintiff's eyes were watery and bloodshot, and plaintiff admitted he "had a couple of beers" earlier); Wilson v. City of Coeur d'Alene, No. 2:09-CV-00381-EJL, 2010 WL 4853341, at *1 (D. Idaho Nov. 19, 2010) (plaintiff stated he had come from a bar and had drunk "some beer," plaintiff's face was "very flushed and his eyes were red and glassy"); Corcoran v. Higgins, No. 08 Civ. 10734 (HB), 2010 WL 1957231, at *1 (S.D. N.Y. May 13, 2010) (plaintiff had glassy eyes, slurred speech, and impaired motor coordination); People v. Cloutier, No. 328255, 2016 WL 4947801, at *1 (Mich. Ct. App. Sept. 15, 2016) (officer smelled "heavy odor of intoxicants," defendant admitted drinking and had glassy, bloodshot eyes and slurred speech); U.S. v. Gorder, 726 F. Supp.2d 1307, 1309 (D. Utah 2010) (officer "noticed an alcoholic beverage odor," defendant had bloodshot eyes and slurred speech, and a "heavily intoxicated" passenger was in the vehicle); U.S. v. Hernandez-Gomez, No. 2:07-CR-0277-RLH-GWR, 2008 WL 1837255, at *2 (D. Nev. Apr. 22, 2008) (adopting in full the findings and recommendations of the magistrate judge that the arresting officer noticed the odor of alcohol, defendant's eyes were bloodshot, and defendant admitted to drinking "two or three beers").

[60] 551 N.W.2d 421 (Mich. Ct. App. 1996).

> the arrestee's intoxication or impairment. When, as in this case, the issue arises in the context of a defense motion for summary judgment, we must view that evidence in the light most favorable to the plaintiff,[61] and determine whether countervailing evidence casts doubt on the arresting officer's determination. However, if one version of the relevant facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[62] This result is especially true when a video, not alleged to have been altered in any way, depicts the actions at issue.
>
> Without question, the existence of probable cause to arrest an individual must be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[63] Moreover, reviewing courts must acknowledge "the difficulty inherent in making on-the-fly determinations regarding possible driving impairments" [and must] "recognize the severity of drunk driving and 'the potential consequences of an incorrect call.'" "Yet officers do not have free rein to administer field sobriety tests to whomever they please and then to arrest that person for making the slightest misstep while performing the tests."
>
> Prior to placing Thibault under arrest and transporting him to the Grosse Pointe Farms station house, Wierszewski forced the plaintiff to undergo eight field sobriety tests. Keeping in mind the principles set forth in Green, we examine those tests captured by Wierszewski's own video camera and microphone to determine whether there exists a sufficient factual dispute over the legitimacy of the criteria upon which the arresting officer relied so as to justify submitting the matter to a jury for resolution.

The Court individually assessed each of the tests, which were available on the video. In particular, the Court noted that in the walk and turn test, Thibault was forced to stand in the awkward heel to toe stance for over a minute, while the officer explained and demonstrated the process, and was able to do so without a balance problem. The officer also changed directions midstream for the one-legged stand.

Even after the tests, the officer was apparently unconvinced that he had enough proof, and with consent, spent seven minutes searching the cab. He appeared, according to the court, "clearly frustrated." He put him through a repeat of several of the tests and his statements on the recording, such as that Thibault "can't even walk" – were contradicted by the video. It was described, by an expert witness, as a "results based investigation."

The Court noted that although there was no way to verify the HGN results claimed by the officer, that the fact that two subsequent tests showed no impairing substances "is sufficient to cast doubt" on the officer's testimony. The Court agreed that denial of summary judgement was appropriate.

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[61] see Tolan v. Cotton, 134 S. Ct. 1861 (2014).
[62] Scott v. Harris, 550 U.S. 372 (2007).
[63] Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005) (quoting Klein v. Long, 275 F.3d 544 (6th Cir. 2001)).

42 U.S.C. §1983 – USE OF FORCE

Oliver v. Buckberry, 687 Fed.Appx. 480 (6th Cir. 2017)

FACTS: On September 16, 2013, Officer Buckberry (Farmington Hills PD, MI) made a traffic stop of Oliver for erratic driving. The stop was captured on Buckberry's dashcam. Oliver refused to get out several times. Finally, he told Oliver that he was under arrest and would be pepper-sprayed if he did not get out, but just two seconds later, he did spray him, yanked him from the vehicle and put him on the grown. He "held Oliver's legs still and forcefully put his knee into the left side of Oliver's neck and head, causing the right side of Oliver's head to slam into the pavement." Oliver complied with being handcuffed. He put his leg back into Oliver's neck and head after he had control of Oliver's hands. He was handcuffed and searched. He was told to "quit kicking around," although the video did not indicate any movement or attempt to get up. He finally jerked Oliver to his feet and took him to the cruiser.

Oliver filed suit under 42 U.S.C. §1983, arguing excessive force. Buckberry demanded qualified immunity and was denied. Buckberry appealed.

ISSUE: Is unnecessary force a violation of the Fourth Amendment?

HOLDING: Yes

DISCUSSION: The Court agreed that "it is unconstitutional under the Fourth Amendment for an officer to subject a person to excessive force during the course of an arrest."[64] The Court looked at the video, which it held to be inconclusive, and noted that it did not blatantly contradict the district court's determination that a reasonable juror could find Oliver was not resisting his arrest. The only movements observed appeared to be an attempt to avoid the pressure of Buckberry's knee, rather than an attempt to resist arrest.

The Court upheld the denial of summary judgement.

Estate of Corey Hill v. Miracle, 2017 WL 1228553 (6th Cir. 2017)

FACTS: In June 2013, Hill suffered from low blood sugar and went into a diabetic emergency. His girlfriend, Worrall, called EMS. Two EMS units, with four paramedics, arrived. Finding him disoriented, Paramedic Streeter tried to talk to him, explaining what he needed to do, but Hill was "agitated and combative." He pulled away from Streeter's attempt to do a finger prick for blood. Finally, Streeter was successful, and found Hill's blood sugar to be critically low, at 38. (Such a low blood sugar commonly results in combative behavior, confusion and potentially, life-threatening seizures.)

[64] Graham v. Connor, 490 U.S. 386 (1989).

Deputy Miracle (Oakland County, MI, Sheriff's Office) arrived, as was protocol in such medical calls. He was familiar with the signs of a diabetic emergency as well. When the deputy came into the room, the paramedics were trying to insert an IV to administer dextrose to raise Hill's blood sugar, but Hill was resisting. Streeter finally got the catheter inserted, but a "completely disoriented Hill" swung on Streeter, ripping the catheter out and causing a spray of blood. Streeter continued to try to stop the bleeding while the other paramedics tried to hold Hill down.

Miracle, who at this point, had not yet used any physical restraints, told Hill to relax, to no avail. He told Hill that he was going to use his Taser. He then deployed his Taser in drive-stun mode to Hill's thigh, which caused him to be still long enough for Streeter to get the IV restarted and dextrose into Hill's bloodstream. As soon as it took effect, Hill immediately "became an angel" and was "very apologetic" for what had happened.

Hill appeared to be uninjured and recovering from his diabetic emergency, but was transported for evaluation. His blood sugar, by that point, was normal. A minor puncture wound was visible but appeared to need no treatment.

Hill filed suit against Miracle, under 42 U.S.C. §1983, claiming excessive force for the Taser use. He also brought Michigan claims of assault and battery and intentional infliction of emotional distress. He argued that the Taser use worsened his diabetes and that he had a burn on his leg as well. Hill died a few months after filing the lawsuit, from diabetes, and his Estate Representative took over the lawsuit. Miracle moved for summary judgement, which was denied, in major part, by the District Court. Miracle appealed.

ISSUE: May a Taser be used to momentarily subdue a patient in a medical emergency, who is actively resisting life-saving treatment?

HOLDING: Yes

DISCUSSION: Miracle argued that he was entitled to qualified immunity. "Qualified immunity shields "government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" This doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[65]

In such cases, two questions must be asked: "(1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident."[66] This analysis can be performed in any order.[67]

[65] Pearson v. Callahan, 555 U.S. 223 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
[66] Kent v. Oakland County, 810 F.3d 384 (6th Cir. 2016).
[67] Pearson, supra.

An excessive force claim also requires the use of the objective-reasonableness test – ""whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[68] The District Court, using the Graham factors, found Miracle's action to be unreasonable, because he had not committed a crime nor was he resisting arrest. However, Graham does not easily apply to a medical emergency, and in fact, the court failed to see the proverbial forest for the trees. The Court noted that it had not previously provided any guidance to the "present atypical situation."

The closest case in the Sixth Circuit, the Court noted, is Caie v. West Bloomfield Township.[69] In that case, the Court held that the use of the Taser against a drug-impaired subject was appropriate. In such cases, the Court agreed that a "more tailored set of factors be considered in the medical-emergency context, always aimed towards the ultimate goal of determining "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them."

> Where a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:
>
> (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
> (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
> (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?
>
> If the answers to the first two questions are "yes," and the answer to the third question is "no," then the officer is entitled to qualified immunity.

Using its new analysis tool, the Court agreed that Miracle's actions were, in fact, appropriate, as Hill posted an immediate threat to both himself and others. It noted that given that four paramedics had been unable to control Hill, it could not fault Miracle for "not joining the fray." It could also not fault Miracle for his decision to use the Taser in an attempt to minimize the risk of injuring Hill further in a physical altercation.

The Court agreed, "Miracle acted in an objectively reasonable manner with the minimum force necessary" to allow treatment to be administered to Hill. The Court reversed the denial of summary judgement and remanded the case with instructions to dismiss with prejudice.

Moore v. City of Memphis, 853 F.3d 866 (6th Cir. 2017)

[68] Graham v. Connor, 490 U.S. 386 (1989).
[69] 485 Fed.Appx. 92 (6th Cir. 2012).

FACTS: On September 5, 2012, Memphis animal services received a third complaint about possible animal cruelty at the Moore home. Lynch went to investigate and was told by a neighbor, HIllis, that she was terrified of Moore. Lynch requested backup from Memphis PD. Moore came to the door and then cursed and went back inside, closing the door. Moore refused to talk to them. Lynch met with a criminal investigator, Morgret, and commanders at Memphis PD. On January 8, 2013, Officer Edwards and Lynch went to the home again; Edwards assured Moore that they simply wanted to verify that his animals were healthy. Moore called 911. The officers thought that Moore was simply angry, but not mentally ill. Hillis reported that after the officers left, Moore came outside with a gun and said he would kill Lynch

Morgret obtained a warrant and it was decided that TACT (Memphis's SWAT) would assist in the warrant. They decided a dynamic entry with flash bangs was appropriate. On January 11, Penny led the TACT team to the house and a flash bang was tossed into a broken window. They spotted Moore down a hallway, and in fact, Moore called 911 from his bedroom. Penny told him about the warrant and decided he needed to secure the door so that Moore could not barricade. A flash bang was tossed inside. Penny, at the door, saw that Moore had a pistol pointed toward him, and he began yelling "hands" and calling Moore by name. Penny shot Moore, fatally. Another officer secured the weapon from Moore's hand and found it fully loaded with a round in the chamber. Moore had another pistol on his belt, a rifle next to the front door and axes at each exterior door.

Moore's children filed suit under 42 U.S.C. §1983, arguing excessive force. The Court agreed that the officers were entitled to summary judgement and the Estate appealed.

ISSUE: Is a reasonable belief that a subject had a firearm sufficient to use deadly force?

HOLDING: Yes (but see decision)

DISCUSSION: The trial court had separated the event into three segments: the decision to use TACT, the dynamic entry and the use of deadly force. Ultimately, the Court looked to whether the decision to make a dynamic entry was proper, rather than attempting to enter by force. The Court agreed that in this case, the officers had sufficient reason to think that a knock and announce would be dangerous, and that Moore had threatened the safety of anyone who might enter the house. The flash bangs were also reasonable, and there was nothing to indicate they would harm him if used properly, and it was also proper to prevent him from barricading.

With respect to the decision to shoot, the Court agreed that deadly force was proper. Despite the dispute as to whether he had a gun in his hand, or something else, as was argued, all that mattered was whether Penny reasonable thought he did. Clearly, from the 911 recording (as the phone was still open when Penny entered), Penny thought he did. "In the end, Moore was shot, thought it just as easily could have been Penny." The Court agreed that while some of the decisions, to use force to enforce what would at most have been a misdemeanor, were not particular wise, they were constitutional.

The Court upheld the dismissal.

<u>Thomas v. City of Columbus</u>, 854 F.3d 361 (6th Cir. 2017)

FACTS: In 2012, Thomas lived in an apartment complex in Columbus. His door opened to a breezeway. On a July morning, two men broke into his home and he called 911. He spoke quietly but eventually they tried to force their way into the bedroom. As Thomas struggled, the dispatcher put out a burglary in progress call. Officer Kaufmann arrived first, having been updated by the dispatcher as he responded. Although protocol indicated two officers should enter, the first sworn officer on the scene could enter along if circumstances so dictated.

As he parked and ran to the scene, he could hear a commotion. Knowing the area, he expected a gun might be involved and has his weapon out. As he ran, two men came out and ran in the officer's direction, one armed. Officer Kaufman stopped and shouted, and then fired twice at the man with a gun. The second man fled. Officer Kaufman did not provide aid to the man he'd shot, because he considered it an active crime scene.

Unfortunately, the man he shot turned out to be Thomas, who had managed to disarm the burglar. The gun, in fact, was unloaded. At some point, Officer Kaufman realized it was the homeowner he'd shot. He later claimed Thomas pointed a gun at him which Thomas's father found implausible. The only witness was the actual burglar, who refused to testify; he was convicted of "felony murder" in Thomas's death.

Thomas's Estate filed suit under 42 U.S.C. §1983, arguing excessive force and related claims. The District Court granted summary judgement to the officer. The Estate appealed.

ISSUE: May even a mistaken shooting be justified?

HOLDING: Yes

DISCUSSION: The Court focused first on whether there was any genuine dispute on Kaufman's claim that Thomas pointed the gun in his direction. The Court agreed that perhaps his decision to rush to the scene was flawed, but that was not the issue. Instead, at the moment Kaufman had to make the decision, he was faced with a person running toward him with a firearm, even if that gun was never actually raised, his action was objectively reasonable. The Estate's argument "rely on the hindsight bias" that the court constantly warned against in such cases. Had the officer done as the Estate suggested, "tragedy may have been avoided." However, had Thomas "been an actual criminal with a loaded gun, an officer who followed this advice could well be dead."

The Court emphasized its decision did not mean an officer could shoot simply because the officer sees a gun, but that the entire circumstances had to be assessed.

With respect to the failure to render aid, the Court noted that "an officer does not act with reckless disregard when he immediately summons help and then focuses on his own safety." There was simply no violation of the Constitution by doing so.

The Court agreed that the offices "faced a tense, uncertain situation," and that it was reasonable to use deadly force under the circumstances. The Court affirmed the dismissal.

42 U.S.C. §1983 – FAILURE TO DETAIN

<u>Ryan v. City of Detroit</u>, 2017 WL 2829521 16-1557 (6th Cir. 2017)

FACTS: Ed and Katie Williams, both Detroit police officers, were married in 2006. They lived in Canton Township, Michigan. By 2009, Ed had moved out and Katie was dating another officer, Lee. On September 19, Ed came by and found Katie on the phone with Lee; he became enraged. Katie grabbed her keys and fled. Later, she went to the Canton PD and spoke to Officer Falk, asking for a "civil stand by" so she could retrieve some belongings from the house. She did not want charges but Falk noted that she had a mark on her face and insisted he had to take a report under the circumstances. Katie refused, concerned about Ed's reaction to possible charges. Falk agreed he would not arrest Ed but that he had to document the situation. She refused to provide ID or names, "because you're going to write a report as soon as I give you my ID." She decided against a civil standby and left. Falk did provide a report, on a different form, and told his commander of the conversation.

Early the next morning, Katie asked her mother (Ryan) to accompany her to the house. They found Ed there, with a gun and an empty liquor bottle. They argued and Ryan called 911; Ed fled. Canton officers arrived and they went through the house, finding only a note that suggested Ed might be suicidal. Lt. Shultz had already been briefed on the situation as a result of the prior visit to the station, and responded to the house to the 911 call as well. He contacted DPD about the situation and entered Ed into the system as missing, stating to DPD that he would remove him when he checked in and they could verify his mental status. Two DPD officers, Kozloff and Martel, who knew him, proceeded to try to contact him, as did Shultz.

Finally, about 6 p.m., Shultz reached Ed. Ed said he was not going to hurt himself and that he would go see his DPD supervisor. He spoke to Kozloff and the commander thought Shultz was fine, she also recommended he contact DPD's counseling service. The missing notice was cancelled.

Katie and Ed agreed to meet on September 22, in a public place, and did so, in the parking lot of the Canton library, next to the police station. At about 9:15, after they talked, Ed went to his car, got a handgun and shot Katie a total of four times, killing her. He then committed suicide.

Ryan, Katie's mother and estate representative, filed suit against the named Canton and Detroit officers. In discovery, it was discovered that CPD's policies preferred arrest and the completion of certain paperwork, which was not done in this case. Further, although discretion was

permitted, the wishes of either party or one's occupation were not to be factors, and a warrant should be sought if they could not immediately locate a suspect. Discovery also revealed that in virtually all other such cases, Falk or another officer had filed the normal DV report. In other cases involved officers, warrants had been requested.

The District Court dismissed the case, holding "that there was not enough evidence to prove that either officer affirmatively increased the risk of harm to Katie, rather than simply failed to act." Ryan appealed.

ISSUE: Is simply not taking a report (without identifying information) a violation of Equal Protection?

HOLDING: No

DISCUSSION: The Court noted that the posture of the case was unusual, as it was brought under Equal Protection. Ryan pointed to dozens of cases in which Falk obtained an arrest warrant, even when the victim declined to cooperate, when the assailant was a police officer. The Court noted, however, that "the problem with Ryan's argument is that Falk did not know Katie's or Ed's identities, making it much harder for him to investigate the case. In all the case files in the record, Falk was called to a particular address and was able to discover the identities of both the suspect and the victim. In contrast, in Katie's case, Falk talked to Katie in the Canton police station and Katie declined to give either her or Ed's name, such that Falk did not know the victim's identity, the assailant's identity, or even an address that could be tied to either the victim or assailant."

The Court agreed that Falk reiterated that he had to take some action on the complaint and did prepare a report based upon what he had. He could not arrest someone without an identity. They was no comparisons presented as to how Lt. Shultz might have treated a victim in a similar situation, nor was any discrimination or bias indicated either.

The Detroit defendants, as well, did not violate Katie's rights. Their actions did not place Katie in a worse situation but simply left her in the same situation. Had he been picked up and taken for evaluation, there was no indication that he would not have quickly been released. Finally, her agreement to meet with him in person was an "intervening cause" that caused the claim to fail.

The decision to dismiss the case was affirmed.

<u>Alexander v. County of Wayne / Merrow</u>, 689 Fed.Appx. 441 (6th Cir. 2017)

FACTS: In January 2012, Sgt. Merrow (Wayne County, MI, Sheriff's Office) saw Alexander leaving a suspected drug house. He made a traffic stop on minor offenses. Alexander initially cooperated, but when he learned his car was being impounded, he "started the vehicle and shut the driver's side door." Merrow tried to get the door open and warned Alexander not to drive off. When Alexander put the car in drive, Merrow reached inside and tried to turn the wheel, forcing it to the side. Alexander overpowered Merrow and drove the vehicle into the street,

striking Merrow and putting him off balance. Merrow lost his footing and was dragged, hanging onto the wheel. "Eyewitnesses were unequivocal that Merrow was being dragged and was in mortal danger." Merrow fired into the car, killing Alexander.

Alexander's estate representative, his mother, filed suit under 42 U.S.C. §1983, claiming Merrow used excessive force. The district court applied the factors established in Graham v. Connor,[70] and properly considered Merrow's reasonableness under the totality of the circumstances he faced at the time he decided to use force: while Alexander was dragging Merrow backwards alongside his car onto a public road.[71] As plaintiff never presented any evidence refuting that Alexander's car was dragging Merrow and that Merrow was at significant risk of injury or death, the district court properly held that Merrow was "entitled to qualified immunity because the undisputed facts establish[ed] that, as a matter of law, he did not violate Alexander's Fourth Amendment right to be free from excessive force."

The Estate appealed.

ISSUE: Is using deadly force in what started as a minor traffic situation lawful?

HOLDING: Yes

DISCUSSION: Although the Sixth Circuit simply adopted the reasoning and conclusion of the trial court, and upheld the decision in favor of Officer Merrow., it is worth noting that this case included a lengthy dissent, discussing the wisdom of needlessly escalating a situation that involved a minor traffic citation only. The dissenting court noted that "Merrow actively put himself in a dangerous position" by first grabbing the wheel and then not letting go. The dissent strongly suggested that had the officer not down so, deadly force would not have proved necessary.

U.S. v. Ray, 690 Fed.Appx. 366 (6th Cir. 2017)

FACTS: Upon receiving complaints on drug activity at a Detroit address, the police arranged for a controlled buy using a CI. He returned with marijuana he claimed he purchased from Ray. They obtained a search warrant and executed the next day. They discovered Ray and Lee (his girlfriend and mother of Ray's teenage son) asleep. They were rousted, handcuffed and the house searched. A number of items, including drugs and firearms were found. Officers passed back and forth through the room where they were held, but no single officer maintained custody the entire time.

Various officers asked questions and Ray took the blame for the guns to spare Lee being arrested or losing her job. At the subsequent trial, the officers denied having discussed the drugs or guns with Ray, nor did they admit to either an explicit or implicit threat to Ray. Officers testified they

[70] 490 U.S. 386 (1989).
[71] See Livermore ex rel Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007) (describing the "segmented analysis" this court uses to analyze use-of-force claims).

only asked booking information and engaged in routine chat. Officer Wiencek and Robson did, however, talk to Lee about her state job and about her son. It was left open that someone may have asked who owned the guns but they denied recalling Ray claiming ownership.

Ray was arrested and at the station, was given Miranda, both orally and in writing. He signed a Miranda form and agreed to talk. He allegedly said the marijuana and the shotgun belonged to him, but denied ownership of the crack cocaine and other drugs. (Ray later claimed he did so only because he'd already admitted it at the house, and was afraid if he denied it, they would retaliate against Lee.

Ray, a convicted felon was convicted of possession of the gun, the drugs and related federal charges. Lee was not charged. Lee appealed and his case was reversed, with a requirement that a hearing be held on the issue of the station-house confession in light of "midstream Miranda warnings," pursuant to Missouri v. Seibert.[72] The District Court did so, and "examined each of the five factors from Seibert and concluded that not one of them supported a finding that Ray's police-station confession was inadmissible." It also upheld his waiver.

Ray further appealed.

ISSUE: Is a mid-stream Miranda warning presumptively improper?

HOLDING: Yes

DISCUSSION: The Court was troubled that the trial court omitted any discussion of Lee's testimony, which mostly corroborated Ray's version of events. The Court found it entirely plausible that there was talk about the drugs and the guns while the police were at the house, as well as Ray's criminal record. The Court noted that the fact that only Ray was arrested, when it was Lee's house, indicated that they had more information from Ray at the outset. However, the Court accepted the District Court's ultimate decision.

The Court then looked to Seibert. Ray was handcuffed at the time, and thus in custody, and asking about the guns when he had a felony record was certainly interrogation.

The Court reviewed Seibert:

> The first Seibert factor—which looks to "the completeness and detail of the first round of Interrogation"—suggests that the Miranda warnings Ray ultimately received at the police stationwere ineffective. By asking Ray about his possession and ownership of the guns, as well as his prior stint in federal prison, the officers "asked pre-Miranda the [only] question[s] relevant to a felon-in-possession charge."[73] In Ashmore, as here, the initial, pre-Miranda questioning "was not as detailed as in Seibert." Nevertheless, we still

[72] 542 U.S. 600 (2004)
[73] Ashmore, 609 F. App'x at 317.

mandated suppression of the incriminating post-*Miranda* statements because the police asked, pre-Miranda, all the questions they needed to obtain a conviction.[74]

So too, here. Even accepting the district court's factual findings, the officers still asked Ray all the questions they needed to make an arrest, tailor their post-Miranda interrogation, and secure a conviction.[75]

Under these circumstances, the officers' initial questioning (and Ray's responses) were detailed and complete enough to suggest that the station-house *Miranda* warnings were ineffective.

The second Seibert factor—which looks to "the overlapping content of the two statements"—also suggests that the Miranda warnings Ray received at the police station were ineffective. The district court concluded that there was "minimal" overlap because Ray provided "extended admissions" at the police station that he did not give in his "abbreviated response[s] at the house." We disagree. At the house, Ray admitted to owning the guns and having served time in federal prison. During the station-house questioning, the officers followed up on those responses based on "the knowledge [they] gleaned during the initial questioning."[76]

As in Pacheco-Lopez, the questions regarding who owned the guns and what Ray knew about them were not "anomalous, which might support a finding that the warning was effective, but [were] the next logical question[s] based on the earlier statements."[77] To be sure, during their post-Miranda questioning, the officers *also* inquired about the drugs they discovered while executing the search warrant. And, because we accept the district court's factual findings, those would have constituted "new" questions during the second round of interrogation. But asking some "new" or "amplifying" questions during a post-Miranda interrogation does not render such a warning effective where pre-Miranda interrogation along similar lines already occurred.

In Pacheco-Lopez, for example, the officers asked questions regarding the defendant's identity, where he lived, and how and when he arrived at the target residence before reading him his Miranda rights. Upon learning that Lopez was from Mexico and had driven to the home in Kentucky that week, the officers read him his Miranda rights and then began asking follow-up questions as to whether he had brought any cocaine to the residence.

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[74] Id. ("Under the plurality's test, all of the factors suggest that Agent Jenkins' question-first, *Mirandize*-later tactic requires suppression of the post-Miranda admission.").

[75] *Id.*; *see also* U.S. v. Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008) (finding first factor satisfied where initial questioning consisted of asking defendant's name, where he lived, and how he arrived at the house in drug trafficking case).

[76] *See* Pacheco-Lopez, 531 F.3d at 428(finding the second factor satisfied where officers followed up on previous questions and answers).

[77] *Id.*; *see also* Ashmore, 609 F. App'x at 317 ("The second . . . factor[] favor[s] suppression because the pre- and post-Miranda questioning was materially the same . . . .").

Technically, these were "new" questions as compared to the pre-Miranda interrogation, but our court correctly viewed them as "the next logical question[s] based on the earlier statements"— thus satisfying the second Seibert factor for overlapping content. Likewise, in Ashmore, the arresting officer asked the defendant if he had any guns on him or in his car, or if his fingerprints would be found on any weapons they discovered in the vehicle, all before advising him of his Miranda rights. After Ashmore responded that the car "probably" contained a revolver, the officer arrested him and advised him of his Miranda rights. During the post-Miranda interrogation, the officer continued along the same line by asking Ashmore if he was a convicted felon and whether he knew that he could not lawfully possess firearms. But the officer did not stop there; instead, he also asked Ashmore whether he used illegal drugs, to which Ashmore responded that he smoked crack cocaine.

By that time, the officers searching the vehicle had discovered a gun and various drugs and drug paraphernalia in the car. As in Pacheco-Lopez, the post-Miranda interrogation involved some new and amplifying information. But rather than applying a hyper-technical analysis of whether the pre- and post-Miranda questioning and answers mirrored one another, our court found substantial overlap between the two and suppressed the post-Miranda statements. ("Agent Jenkins picked his line of questioning up post-Miranda right where he left off pre-Miranda—he wanted to know what Ashmore knew about the gun . . . ")

Even accepting the district court's factual findings, we find substantial overlap between the content of Ray's pre- and post-Miranda statements, thus satisfying the second Seibert factor. Ray elaborated on his earlier admissions, but that elaboration was made possible solely because of the overlapping content between what he was asked pre- and post-Miranda.

The third Seibert factor—which looks to "the timing and setting of the first and second interrogations"—is a wash. The district court found that the forty-five minute interval between when Ray was questioned at the house and the police station, coupled with the change in location, were enough "to create a new and distinct experience for Ray in making the decision of whether or not to admit his crimes."

Make no mistake: there was a break in the timing and setting of Ray's two interrogations that exceeds the facts from Seibert (twenty minute gap in time; same location); Pacheco-Lopez (no gap in time; same location); and Ashmore ("second interrogation followed shortly after the first"; slight change in location).[78]

Ray's first round of questioning occurred while he was handcuffed in the living room, with his face to the wall. Ray's second round of questioning occurred roughly forty-five minutes later, in an interrogation room at the local police station. Ordinarily, this separation "both in time and in setting" would suggest that "the third Seibert factor does not weigh as strongly against

[78] *See* Seibert, 542 U.S. at 616 (plurality opinion); Pacheco-Lopez, 531 F.3d at 427; Ashmore, 609 F. App'x at 317.

a finding of effectiveness as it otherwise might."[79] Ray argues that, from the vantage of a reasonable person in his shoes, the same coercive elements survived his brief transfer from the house to the police station. In other words, Ray argues that a forty-five minute break in questioning involving some of the same officers and the same topics is no different than the twenty minute break in Seibert. He likewise argues that both settings were coercive because in the first, he was: (1) handcuffed; (2) being asked about a set of guns the officers had discovered in their house; and (3) worried about protecting his long-time girlfriend, with whom he shared a young son; while in the second, he was: (1) under arrest; (2) at a police station; (3) being asked about the same incriminating topics; (4) segregated from Lee; and (5) still uncertain of her status.

Given these circumstances, we find that the timing and setting of the two interrogations "does not weigh as strongly against a finding of effectiveness as it otherwise might."[80] This factor cuts both ways and sheds little light on whether the stationhouse Miranda warnings were ineffective as "presenting a genuine choice whether to follow up on [Ray's] earlier admission[s]."

The fourth Seibert factor—which examines "the continuity of police personnel"— informs that the Miranda warnings Ray received at the police station were ineffective. The district court determined that this factor "does not support a finding of inadmissibility" because Ray testified "that the police officer who threatened Lee's arrest at the house was James Wiencek," while "the interrogating police officers who questioned Ray at the police station were Gregory Robson and Patrick Hill."[81] The district court was correct in one sense but still missed the bigger picture. In this case, the same officers who conducted the second interrogation were intimately involved in the first. Officers Robson and Hill were at the house during the execution of the search warrant. They worked for the same law-enforcement agency and the same task force as did Officer Wiencek. They traversed through the living room while Lee and Ray were handcuffed and detained. Indeed, Robson and Hill were within hearing of most, if not all, of the conversations and questioning while Ray was in custody and making his pre-Miranda statements. Thus, while the same *officer* did not conduct both the pre- and post-Miranda questioning, there was at least a "continuity of police *personnel*" during both rounds of questioning.

Contrast these facts with the Government's case-in-support, U.S v. Hernandez-Hernandez.[82] There, a state trooper and Border Patrol agent took turns conducting the initial, pre-Miranda questioning at a traffic stop and by telephone, only to have an Immigration and Naturalization Service agent conduct the follow-on, post-Miranda questioning five days later at the INS office. In affirming the partial denial of the defendant's motion to suppress, the Eighth Circuit took care to note that, not only had

[79] *See* Wooten, 602 F. App'x at 274; *see also* Coomer v. Yukins, 533 F.3d 477 (6th Cir. 2008) (holding that "[e]ven under the Seibert plurality's test," moving a suspect to a police station and waiting "several hours" to resume interrogation ordinarily constitutes a "new and distinct experience" for Miranda purposes (quotation omitted)).
[80] Wooten, 602 F. App'x at 274.
[81] Ray, 2016 WL 3180184, at *4 ("Thus . . . Ray's own testimony disqualifies him under this factor of the midstream Miranda test.").
[82] 384 F.3d 562 (8th Cir. 2004).

five days passed between the initial and subsequent questioning, but that the post-Miranda questioning "was conducted by an INS agent *who had no involvement in the earlier questioning*." Thus, the court concluded, "[i]t does not appear that the trooper, Border Patrol, and INS used a multi-step interrogation in a calculated way to undermine the Miranda warning." Here, in contrast, *all* of the officers involved in both steps of Ray's interrogation worked for the same police department, formed part of the same task force, and presumably had knowledge of Ray's initial, unwarned statements. Under these circumstances, we conclude that the fourth Seibert factor was met because there was *practical* continuity of police personnel between Ray's initial and follow-on interrogations. If *absolute* continuity were the test, then police departments could easily circumvent it by having one officer conduct the pre-Miranda questioning while another officer listens in, only to have the second officer (or another officer with knowledge of the confession) conduct the follow-on, post-Miranda interrogation. That cannot be right.

Finally, the fifth Seibert factor—which assesses "the degree to which the interrogators' questions treated the second round as continuous with the first"—suggests that the *Miranda* warnings Ray received at the police station were ineffective. The district court reasoned that this prong "does not indicate that Miranda warnings were ineffective" because "[t]here was no evidence the interrogating police officers referenced or used Ray's prior admissions at the house in the interrogation at the police station."

The record does not support the district court's conclusion. Once they advised Ray of his Miranda rights, Officers Robson and Hill asked him ten questions—several of which were derivative of his earlier admissions, even under the district court's factual findings regarding the "brief and cursory" statements Ray made at the house. For example, the officers did not ask Ray if he knew about the guns being in the house or if he possessed a gun. Instead, they asked, "[w]hich guns found in the house belong to you," presumably because they knew Ray already admitted to owning at least one of the guns.

Ray clarified that he owned only the shotgun found in the upstairs bedroom. Likewise, the officers did not ask Ray general questions regarding past run-ins with the law or whether he had a prior record. Instead, they asked him more specifically if he was "aware that [he] was a convicted felon"—presumably because Ray already admitted to doing time in a federal prison while being questioned at the house. The officers also asked a targeted question concerning whether Ray was "aware that owning a firearm is against the terms of [his] release," again, presumably as a follow-up to Ray's earlier admission about doing time. Those were the only questions the officers asked about the guns or Ray's status as a convicted felon. This lack of questioning suggests that the officers had very little work to do at the post-Miranda interrogation because they were just following up on Ray's prior admissions. As in Ashmore, the officers "picked [their] line of questioning up post-Miranda right where [they] left off pre-Miranda—[they] wanted to know what [Ray] knew about the gun[s] that, by that time, had been found." This suggests that "the Miranda warnings did not effectively advise [Ray] that he had a real choice about

giving an admissible statement because the unwarned and warned interrogations blended into one continuum."[83]

In summary, the first, second, fourth, and fifth factors identified by the Seibert plurality all show that "a reasonable person in [Ray's] shoes could [not] have seen the station house questioning as a new and distinct experience," while the third factor does not illuminate the inquiry. Under the totality of the circumstances, "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before."

All told, "the Miranda warnings could [not] have made sense as presenting a genuine choice whether to follow up on [Ray's] earlier admission[s]," and suppression of his post-Miranda statements is required.[84]

The Court agreed that the post arrest statements should have also been suppressed, and remanded the case.

42 U.S.C. §1983 – CORRECTIONS

Arrington-Bey v. City of Bedford Heights, 858 F.3d 988 (6th Cir. 2017)

FACTS: On June 21, 2013, Arrington-Bey drove her son, Omar, to a store to pick up his last paycheck. Omar began talking gibberish and the manager guided him out of the store. Omar became disruptive and the manager called 911. Officers Honsaker and Ellis responded.

Officers found Omar in the parking lot with his mother. As they investigated, Omar began to rant and rave and began talking about all sorts of things. His mother confirmed he was bipolar and off his medications, although he did have it with him. Omar was taken into custody.

Honsaker delivered Omar to Lee and Hill to be processed, and they were informed of what the officers knew. They decided to delay booking until he calmed down and because the two officers were female. They placed him in a segregation room. He would randomly became agitated and then calm down. Eventually, he was threatened with a restraint chair. At shift change, the oncoming officers were advised of his behavior. When he calmed down enough to be interviewed, he denied any psychiatric conditions. Although the pills he had on his person were found, there was no questions asked about their purpose.

Eventually, he attacked one of the officers and when pulled away, was found to be weak. He was transported to the hospital and died of a "sudden cardiac event."

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[83] *Id.* (quotation omitted); *see also* Pacheco-Lopez, 531 F.3d at 427-28 (finding the fifth factor satisfied where interrogations seemed "continuous" and "part of one sequence").

[84] *See id.* at 615-16; *see also* Pacheco-Lopez, 531 F.3d at 428 ("All five factors—and particularly factors three, four, and five—demonstrate that the Miranda warning was ineffective. As a result, Lopez's admission must be suppressed under Seibert's effectiveness test.").

Arrington-Bey filed suit against all of the officers involved. The District Court denied summary judgement and the officers appealed.

ISSUE: Is someone mentally ill necessarily in need of immediate medical assistance?

HOLDING: No

DISCUSSION: Arrington-Bey argued that Omar had a right to appropriate medical treatment. Although all of the officers clearly understood he was mentally unstable, nothing suggested that they had to take him to a hospital rather than the jail at that moment. The street officers had "no reason to doubt that reasonable procedures would be used at that point" as they'd informed the jail of his situation.

The Court agreed that all of the officers (including the jail officers) were entitled to qualified immunity.

TRIAL PROCEDURE/ EVIDENCE

TRIAL PROCEDURE / EVIDENCE – PRIVILEGE

U.S. v. Schwartz, 2017 WL 2672667 (6th Cir. 2017)

FACTS: Schwartz married Bradley and moved in with her and her adolescent children. Schwartz drilled holes through a wall into the 12-year-old girls' bedroom and recorded her in various stages of undress. Bradley discovered a video on Schwartz's tablet computer and went after him at work. She took the tablet to the police but could not find the video, as Schwartz had tried to remove it remotely. With search warrants, real and simulated child pornography were found on his tablet and online.

Schwartz went to his pastor, who had already been contacted by Bradley. Pastor Parker told him that he was a "mandatory reporter" and would have to share information about any potential harm to others. Schwartz said he'd felt bad about the video and that he "didn't touch, but just looked." Schwartz left the state and called the police. He was arrested in South Carolina and returned, to be charged with sexual exploitation of a child, possession of child pornography and related offenses.

Schwartz was convicted and appealed.

ISSUE: Is there a pastoral privilege when the information is shared with a "mandatory reporter?"

HOLDING: No

DISCUSSION: Schwartz argued that his communication with Parker was a confidential communication, but the Court concluded that that since they met in a public place and that Parker told Schwartz he would be obligated to report, he had no expectation of privilege. The Court also looked at communications he had with his wife, Bradley. Marital privilege extends to confidential communications between a married couple and could be asserted by either spouse, even after divorce. However, the challenged statements took place when Schwartz yelled them at Bradley in a public parking lot and as such, are exempt from the privilege.

The Court also noted that Schwartz was charged with obstruction of justice by destroying evidence, deleting the video, after he was aware an official investigation was proceeding. The Court agreed that was also a proper charge.

Schwartz's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – BRADY

Wagle v. Sherry, 687 Fed.Appx. 487 (6th Cir. 2017)

FACTS: On the evening of June 23, 1998, five friends, including Wagle, went out for the evening. Eventually, Davis, one of the men, who was angry with Hudson, another of the men, went to deal with him. Allegedly, according to Wagle, Davis fatally shot Hudson but Wagle claimed that Davis did so.

The next day, Wagle went to the police station to inquire about the investigation and was told he was a suspect. He refused to give a statement and left. The physical evidence supported Wagle, rather than Davis, as the shooter and the firearm was ultimately found on the property of Wagle's uncle.

Wagle was charged with murder and possession of the firearm, as he was a felon. He was convicted in state court and appealed, demanding a habeas corpus petition, based on alleged Brady violations. The Michigan Courts denied his claim, as did the U.S. District Court, and he appealed.

ISSUE: Is all undisclosed evidence necessarily exculpatory?

HOLDING: No

DISCUSSION: Wagle argued that certain evidence was not disclosed under Brady v. Maryland.[85] To succeed, he "must show that the relevant evidence was (1) suppressed, (2) exculpatory or impeaching, and (3) material.[86] To satisfy the first element, the "evidence must be favorable to the defendant in a way that is apparent to law enforcement.[87] "To be impeaching, the evidence

[85] 373 U.S. 83 (1963).
[86] Strickler v. Greene, 527 U.S. 263 (1999).
[87] Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009).

must show the bias or prior inconsistency of one of the State's witnesses."[88] Finally, "to be material, the evidence must create a 'material probability' of a different outcome."[89] Although the issue of materiality had to be considered "in light of the evidence as a whole," undisclosed evidence had to be considered item by item.

The Court reviewed each of the items that were not disclosed, which included six interviews. Several of the interviews in fact, were not exculpatory but cumulative in placing the blame on Wagle. Most of the other interviewed subjects in fact, testified at trial consistent with their interviews. The remainder was "vague and more ambiguous than probative." The Court agreed that none satisfied the requirements of Brady.

Wagle also argued that his Fifth Amendment right was violated when it was introduced that he came to the police station but refused to be questioned. The Court noted that there was "some debate about whether introducing this noncustodial, post-Miranda statement amounts to a Fifth Amendment violation."[90]

Overall, the Court agreed, Wagle's conviction was upheld.

CHILD PORNOGRAPHY

U.S. v. Dunning, 857 F.3d 342 (6th Cir. 2017)

FACTS: A detective from KSP used Nordic Mule (a software package) to search for IP addresses that had "recently shared child pornography" on a peer-to-peer system. This led them to obtain a search warrant for the Dunning home, during which they seized numerous electronic devices/computers, and thousands of images and videos of child pornography. He was charged under 18 U.S.C. §2252(a)(2).

During discovery, he demanded the source code for the software. The government responded that the program (and its source code) was proprietary and not within the possession of the government. Dunning argued that he was entitled to suppression because the software had "uncertain reliability and accuracy" insufficient to support the warrant.

When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is a defendant entitled to computer source code for investigative software?

HOLDING: No

[88] U.S. v. Bagley, 473 U.S. 667 (1985).
[89] Kyles v. Whitley, 514 U.S. 419 (1995).
[90] Doyle v. Ohio, 426 U.S. 610 (1976).

DISCUSSION: In his affidavit, the detective set out his training and experience. He did not, of course, have the source code for the program, but did identify and confirm that the files had been shared by Dunning's IP on multiple occasions.

The Court looked to an out of circuit case to note that such software "merely combs through large amounts of data and takes note of when and what IP address downloaded suspect material" on public networks. (This was a task that given sufficient time, the detectives could do by hand as well.) The Court agreed that the process was sufficient.

The Court also agreed that it was appropriate to charge with both receipt of and possession of child pornography, as well as distribution. Dunning argued that there was no evidence that he knew that using such a network involved sharing (distribution) as well, but the court gave no credence to that claim, finding instead that his use of the software presumed that he knew how the process worked.

The Court upheld his plea.

U.S. v. Ladeau,734 F.3d 561 (6th Cir. 2017)

FACTS: In March, 2010, Daniel Ladeau was incarcerated pending trial for child pornography. He began communicating in writing with his brother, David, partially in code. The letters were intercepted and eventually deciphered. They proved to be a discussion of their "mutual sexual interest in boys" and how to "obtain and conceal child pornography." In August, law enforcement searched Daniel's home and interviewed him. He admitted to having child pornography, which he kept on thumb drives.

Both men were charged with conspiracy to possess child pornography. David pled guilty. Daniels' motion to suppress his confession and the thumb drives was granted, so the conspiracy was proven through David's testimony and the correspondence. Daniel was convicted and appealed.

ISSUE: May a party that discusses and instructs another in a crime be in a conspiracy?

HOLDING: Yes

DISCUSSION: Daniel argued that there was no agreement between them and as such, David "merely offered help and encouragement concerning a common interest." The Court agreed that "The crime of conspiracy requires an agreement, but it need not be formal." A '"tacit or mutual understanding among the parties' is sufficient" and it may be proven by direct or circumstantial evidence.

> The crime of aiding and abetting requires a defendant to associate himself with a criminal venture that he seeks, by his action, to make succeed. But he need not do so by virtue of an agreement.[91]

The Court summed up their relationship, close brothers, and their interest in child pornography predated the conspiracy. David had knowledge that Daniel lacked, and shared it with him, knowing it was risky to do so. They developed a code in order to communicate and exchanged over 80 letters in six months, they discussed the technical aspects, as Daniel was not knowledgeable about the technology. Although Daniel did not always follow David's advice, he did so more often than not.

The Court agreed that Daniel engaged in a conspiracy with David and upheld his conviction.

CIVIL LITIGATION

Jones v. Clark County, Ky. , 690 Fed.Appx. 334 (6th Cir. 2017)

FACTS: In October 2013, having tracked a child pornography video to Jones' IP address. A variety of electronic items were seized during a search warrant. Jones waived counsel and answered all questions, denying any knowledge of child pornography. The devices themselves were never examined, and in fact, did not contain child pornography. Charges were recommended and a grand jury indicted Jones with promotion a minor in a sexual performance, under state law.

Over a year later, with the devices still not having been examined, Jones' attorney had an expert examine them. When it was acknowledged that there was nothing on the devices, Jones was released, having spent 14 months in jail. He filed suit under numerous claims, including malicious prosecution. Murray moved to dismiss, which was granted, on a finding that "Jones had failed to allege that Murray had presented false testimony to the grand jury." Jones appealed.

ISSUE: May a case be made for malicious prosecution against an officer when they do more than simply testify in front of the grand jury?

HOLDING: Yes

DISCUSSION: "To succeed on a malicious-prosecution claim under §1983, the plaintiff must prove, among other things, that there was no probable cause for the criminal prosecution.[92]" An indictment, as a rule, "conclusively determines the existence of probable cause."[93] An exception, however, exists when there is proof that the defendant "knowingly or recklessly presented false testimony to, or omitted critical information from, the grand jury in order to obtain that

[91] U.S. v. Knox, 839 F.2d 285 (6th Cir. 1988). *See* U.S. v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990).
[92] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).
[93] Webb v. U.S., 789 F.3d 647 (6th Cir. 2015).

indictment." However, in "Sanders v. Jones,[94] we held that because "a grand jury witness has absolute immunity from any §1983 claim based on the witness' testimony," a plaintiff cannot base a malicious-prosecution claim solely on grand-jury testimony, even false or perjured testimony.[95] However, in the more recent "King v. Harwood,[96] we explained that, "while Sanders may control the outcome of many malicious-prosecution cases in which the sole or primary act of the defendant law-enforcement officer is delivering grand-jury testimony," it does not cover "actions that are prior to, and independent of, [the defendant's] grand-jury testimony."

In that case, the Court stated:

> [W]here (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.

Reportedly, the contention was that "Officer Murray misled the prosecutor, as well as the grand jury, through his deficient and reckless investigation and the critical omission of material evidence, namely that Jones's electronic devices contained no pornography." Had the items been examined, it would have been discovered that there was nothing on the devices. The Court agreed that dismissal was improper and reversed.

Gonzalez v. Kovacs, 687 Fed.Appx. 466 (6th Cir. 2017)

FACTS: On June 10, 2010, Gonzalez's fiancé, Bailey, fired a handgun at a target on their property and injured a man on a nearby property. There was no evidence Gonzalez knew about the weapon. Her ex-husband, Ciehanoski received temporary custody of their child, who was present at the shooting. At the subsequent hearing, her two children testified however, that Gonzalez did know about the firearm. Allegedly, Deputy Kovacs, who investigated, "manipulated" their testimony so that D.C. could remain with Ciehanoski.

Gonzalez was charged with falsification and obstruction, both misdemeanors that were dismissed. She was subsequently indicted for felony perjury, but acquitted at trial. She filed suit claiming false arrest and malicious prosecution.

The District Court granted the defendants' motion to dismiss, finding no indication that Deputy Kovacs had knowingly presented false testimony to the grand jury. Gonzalez appealed.

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[94] 845 F.3d 721 (6th Cir. 2017).
[95] Id. at 730 (quoting Rehberg v. Paulk, 132 S. Ct. 1497 (2012)
[96] 852 F.3d 568 (6th Cir. 2017).

ISSUE: Is a fair indictment proof of probable cause?

HOLDING: Yes

DISCUSSION: Under Barnes v. Wright, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause."[97] The Court agreed that she presented no indication in her claim that Kovacs or her ex-husband lied to the grand jury, or even that they testified before the grand jury, and that was simply insufficient to support her claim.

The Court upheld the dismissal.

EMPLOYMENT

EMPLOYMENT - FMLA

Reeder v. County of Wayne, 694 Fed.Appx. 1001 (**6th Cir. 2017**

FACTS: For 15 years, Reeder worked as a jail deputy in the Wayne County (Michigan) jail. Following several family situations, he began to suffer anxiety and depression, which caused physical symptoms. He was able to work an ordinary 8-hour shift but struggled to work overtime, which was often required. He refused mandatory overtime, finding his physical symptoms endangered his fellow officers. He suffered several disciplinary incidents for his refusals. When he was suspended in early 2014, he was given a disability absence and then returned to work with medical orders to work no more than eight hours. He provided the form to personnel but was never told of his rights to FMLA. He continued to refuse overtime and continued to be disciplined, and reminded his commanding officer about the medical restriction. He repeated the process, providing more medical documentation to personnel, with no response.

In April, his police powers were suspended and following a hearing, was terminated in May. He filed suit, arguing an interference with his FMLA rights. In a jury trial, he was awarded damages for that claim and the County appealed.

ISSUE: Must agencies that are aware of an employee's medical situation offer FMLA information?

HOLDING: Yes

DISCUSSION: The County argued that Reeder never asked for FMLA or provide enough medical information that indicated he suffered from a serious medical condition.

[97] 449 F.3d 709 (6th Cir. 2006).

To make a claim of FMLA interference, Reeder had to show that:
(1) he was an eligible employee;
(2) the County was an employer as defined under the FMLA;
(3) he was entitled to leave under the FMLA;
(4) he gave the County notice of his intention to take leave; and
(5) the County denied him FMLA benefits to which he was entitled.[98]

Although it was agreed that Reeder never formally requested it, he certainly gave notice of his medical situation.

> An employee need not expressly assert rights under the FMLA, but will be deemed to have given the employer sufficient notice by providing information from which the employer can reasonably conclude that an FMLA-qualifying circumstance is in play. *Id.* Once the employee has met this low threshold requirement, it is incumbent on the employer—if more information is needed to determine whether the condition is FMLA-qualifying—to require, *by written notice*, certification by a health-care provider. This written notice must also include notice of the consequences of an employee's failure to provide adequate certification.. Further, if the employee provides incomplete certification, the employer shall so advise the employee and "shall state in writing what additional information is necessary."[99]
>
> The instant question is thus whether Reeder presented sufficient evidence to support a reasonable finding that he gave the County adequate information from which it could reasonably conclude that he was subject to a serious health condition rendering him unable to perform the ordinary requirement of mandatory overtime. The record includes evidence that Reeder delivered to the County Personnel Office three notes of health-care providers certifying that he was unable to work in excess of eight hours per day. This evidence, viewed in the light most favorable to Reeder, was certainly enough to create a genuine question for the jury as to whether Reeder had given the County sufficient notice that he was subject to an FMLA-qualifying condition that would excuse him from mandatory overtime work. The County disagrees, but its arguments are all unavailing.
>
> First, the County argues that it had no obligation to provide FMLA leave where Reeder did not request it and where he sometimes chose to work more than eight hours in a day, despite his doctors' prescribed restrictions. But the specific question posed by the County's motion for judgment as a matter of law on Reeder's FMLA interference claim, and now by its appeal, is not whether Reeder was entitled to FMLA leave. The question is whether he provided the County sufficient information to trigger its obligation to give him written notice of his need to provide adequate medical certification, and of the consequences of failing to do so. Consider the pertinent language of the County's own FMLA Policy, which mirrors the standards summarized above:

[98] See Donald v. Sybra, Inc., 667 F.3d 757 (6th Cir. 2012).
[99] 29 C.F.R. § 825.305(c).

The employee shall give sufficient information to make the employer aware that the employee needs FMLA-qualifying leave. Wayne County may inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain necessary details of the leave to be taken, which includes questions to determine if the leave is because of a serious health condition.

Under this standard, Reeder clearly made a prima facie showing that he provided sufficient information to put the County on notice of its duty to inquire further about whether FMLA leave was being sought. We have no difficulty concluding, as did the district court, that the evidence that Reeder provided three medical notes to Personnel—relating his inability to work more than eight hours per day to atypical chest pain, situational anxiety and work related stress or, more generally, to a "medical problem"—was sufficient to create a jury question as to whether Reeder met his "notice of intention" burden.

Second, the County insists that it had an FMLA-compliant leave request procedure in place and Reeder simply did not comply with it. Citing Kobus v. College of St. Scholastica, Inc.,[100] the County argues that, under these circumstances, it was entitled to terminate Reeder's employment for excessive absenteeism. Kobus is clearly distinguishable. Kobus had not only failed to file an FMLA leave application, but, when presented with a leave application form, expressly disclaimed needing FMLA leave. Later, when his employer directly asked him whether he was requesting FMLA leave, advising him that a doctor's certification would be required, Kobus submitted his resignation instead of an FMLA leave request. Under these circumstances, the employer was properly awarded judgment because Kobus had failed to meet his threshold requirement of giving notice of intention to request FMLA leave.

Here, in contrast, there is no evidence that the County, in response to Reeder's assertion that he was unable to work overtime, asked if he was requesting FMLA leave, advised him of his FMLA rights, or provided him with an FMLA leave application form. Also distinguishing this case from Kobus is evidence showing that Reeder, in response to disciplinary actions taken because of his refusals to work overtime hours, had delivered three medical notes to Personnel and had advised his superiors that Personnel had the notes. Unlike Kobus, Reeder did not resign, but contested the disciplinary actions and continued working as much as possible within (and sometimes even beyond) his prescribed restrictions. Reeder might have communicated his intentions more clearly, but a reasonable juror certainly could infer that Reeder provided medical certification to Personnel in an effort to obtain excusal from mandatory overtime or, in other words, to obtain "intermittent leave" under the FMLA, as defined in the jury instructions.

[100] 608 F.3d 1034 (8th Cir. 2010).

> Whether this evidence was sufficient to meet Reeder's burden of showing notice of intention was properly deemed a jury question. Third, the County argues in effect that, because Reeder was aware of the County's FMLA leave request procedure, he could not be deemed to have provided sufficient notice to trigger further inquiry because he did not submit the leave request form required by County policy. The County bases this argument on the fact that Reeder, in 2008, had requested FMLA leave in connection with a different injury. This argument, at best, presents a disputed fact question properly left to the jury.

Although he had previously received FMLA leave, it was as the result of a serious car crash which involved a concussion. Reeder indicated he had no recollection of doing any FMLA paperwork on the crash.

The Court upheld the decision in Reeder's case.

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