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DEPARTMENT OF

CRIMINAL JUSTICE TRAINING

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KENTUCKY COURT OF APPEALS, KENTUCKY SUPREME COURT, U.S. SIXTH CIRCUIT COURT OF APPEALS

LEADERSHIP INSTITUTE BRANCH

LEGAL TRAINING SECTION

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NOTE:

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

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

KENTUCKY

PENAL CODE - KRS 507 – HOMICIDE

Young v. Com., 426 S.W. 3d 577 (Ky. 2014)

FACTS: On August 26, 2010, firefighters responded to a house fire at the Morgan home in Monroe County. The house was "fully engulfed" and Martin's body was found in the house. Although the body was badly burned, it was confirmed that Martin had died from two gunshot wounds to the head. Witnesses placed Martin at his home that evening, along with two other men, later identified as Jesse Parke and Jonathan Young. Both men were questioned. Young admitted he'd been at the house but stated they'd left about dark. When confronted with the witness's statement that he'd been at the house much later, he eventually agreed it could have been that late. He implicated Parke, however, stating he'd called Young several times through the night indicating the crime had been committed, apparently suggesting that a third party had in fact committed the murder, however.

The police investigated that allegation and found it to lack credibility. Young claimed Parke had made specific statements during overnight phone calls that indicate Martin's house was on fire. He agreed he'd met with Park to "keep their stories straight" – given they'd both been at that house that evening. He continued to change the details of his stories.

Finally, during a fourth interview, Young stated Parke shot Martin, using Martin's own handgun, and then poured an accelerant and started the fire. He said that Parke had kept the handgun, and had, in fact, returned to re-ignite the fire, which had gone out. Young claimed to have refused to assist in the murder. Young then made a call to Parke, "to help police gather more information about the murder, diagrammed the location of Martin's wounds, and provided police with a four-page written statement detailing the night of the murder." He admitted to having taken Xanax and money after the murder, but denied having that intent originally.

Young was charged, and eventually convicted, of complicity to commit murder, robbery and arson. He appealed.

ISSUE: For accomplice liability, must there be some proof that the person participated in the planning of the crime?

HOLDING: Yes

DISCUSSION: Young argued that there was insufficient proof that he'd "acted in complicity with Parke" to commit the murder. The Court looked to the "general rule" of accomplice liability and noted that he "reaches only crimes that defendant's intent or had a conscious objective to commit" – codified in KRS 502.020(1). Subsection (2), however, "expands upon the general rule and imposes accomplice liability on those persons who participate in conduct causing criminal results when such persons have the requisite state of mine with respect to those results."

The Court noted that homicide is a "result crime" – along with assault – and that the jury "must find the required result" has occurred. Under Tharp v. Com., the Court had held that an accomplice may be held liable for an intentional homicide "where there is evidence that a defendant 'actively participated in the actions of the principal, or failed in a legal duty to prevent those actions, with the intent that the victim's death … would result."[1] The Court agreed that the evidence indicated that although Young may not have pulled the trigger, he was actively involved with the murder and that his text messages to Parke "do not indicate an ambivalence to Martin's murder," but "the exact opposite." The Court agreed that the "text messages are a clear indication that [Young] was involved in the plot to murder Martin" and in fact, that he was "soliciting Parke to go through with the killing."

With respect to the Robbery charge, the Court argued that there was no proof of the robbery "in the absence of his statement to police," and that RCr 9.60 states that his "confession alone, unless made in open court, cannot be the only proof than an offense occurred." However, the Court noted, the later recorded phone conversation discusses "that cash" as well, so his confession was not the only proof of his involvement. Further, the Court noted the rule "relates only to proof that a crime was committed, not to whether the defendant committed it."[2] The Court agreed the telephone call was sufficient corroboration.

However, because of flaws in the jury instructions, which may have confused the jury with respect to the robbery and arson charges, the Court reversed the convictions on those offenses and remanded the case.

PENAL CODE – KRS 508 - ASSAULT

Helton v. Com., 2014 WL 1882266 (Ky. App. 2014)

FACTS: On Feb 7, 2011, Trooper Boggs (KSP) stopped Helton in Harlan County. He ordered Helton twice to get out; he finally did, closing the car door, and "walked briskly toward Boggs with his fists clinched." Boggs grabbed Helton to get him off the roadway, Boggs continued coming forward and attempted to hit him. Trooper Boggs tased Helton. Helton did not comply and was able to pull out one of the prongs. Trooper Hensley arrived, finding Helton "on his back and uncooperative." After a further struggle, Helton was handcuffed. He continued to argue and once inside the cruiser, "repeatedly hit his shoulder and head against the back door window."

Sgt. Pickerell arrived, as he was notified about the use of the taser. He too observed Helton's behavior. She directed Trooper Hensley to control Helton and when Hensley opened the door, Helton "leaned sideways and forcibly kicked Hensley in the right thigh causing him immediate pain and to stumble onto the highway." Helton was secured in the cruiser and transported. Helton claimed that he suffered from various back/shoulder problems that prevented him from the conduct he was alleged to have done and denied any attempt to hit the troopers. He was charged with Assault 3rd. At trial, photos that showed bruising on Young were offered into evidence and Helton was questioned at length by the trial judge as to what they actually depicted.

[1] 40 S.W.3d 356 (Ky. 2000).
[2] Lofthouse v. Com., 13 S.W.3d 236 (Ky. 2000).

(The two bruises, one allegedly from a kick and the other from a taser, appeared identical.) Helton was convicted of Assault 3rd with respect to kicking Hensley, along with other charges. He appealed.

ISSUE: Does a description of pain, connected to an assault charge, suffice to prove that an assault occurred?

HOLDING: Yes

DISCUSSION: Helton contended it was improper for the judge to question him about the photos (which arguably showed that one of the alleged bruisings was made by a marker) – while the Commonwealth argued that it was absolutely proper. The Court agreed that it too believed the markings were falsified but that judges must use caution "when suggesting a defendant's testimony is less than credible." However, it noted that it was certainly possible that the jurors would have caught the issue as well. Further, since it was acknowledged that Young was, in fact, tased, the bruising bore little relevance on the charges.

Finally, the Court discussed whether Trooper Hensley suffered a physical injury. The Court noted that Hensley's testimony that he experienced pain and was knocked back into the roadway was sufficient to prove physical injury, and that it was done intentionally.

The court affirmed Helton's convictions.

PENAL CODE – KRS 510 – RAPE

Parsons v. Com., Ky. App. 2014

FACTS: On December 12, 2009. Parsons allegedly raped an adult female on the dance floor of a local bar. He was convicted under the "physically helpless" provisions of that statute. He appealed.

ISSUE: Is evidence of extremely intoxication sufficient to prove physical helplessness?

HOLDING: Yes

DISCUSSION: Parsons argued that there was insufficient evidence that the victim was physically helpless at the time of the rape. The court noted there was "considerable evidence" that she had been drinking heavily and was significantly impaired preceding the assault. He pulled her pants down and she was "too weak to pull them up although she tried to do so." A witness testified that "she was slumped over in front of Parsons and that Parsons was holding her up by the hips." A witness that helped carry her said it was like carrying a dead body. At the ER, the victim's "behavior varied from incoherent to nonresponsive" and her BA was double the legal limit. Combined with the witness's testimony, especially that she was unable to support herself, the Court agreed that he would have been aware of her condition.

Parsons also argued there was insufficient proof of penetration, but again, the witnesses testified to details that indicated there had, in fact, been some penetration. DNA testing of both individuals indicated they had sexual intercourse .

The court upheld his conviction.

PENAL CODE – KRS 514 - IDENTITY THEFT

Com. v. Goss, 428 S.W.3d 619 (Ky. 2014)

FACTS: Garrison (Goss's ex-husband) discovered in November, 2007, that he'd been the victim of identity theft, as several credit cards had been opened in his name. In April, 2008, he learned that there as an open checking account in his name, but with a different address in Laurel County. (He only learned of this because an alert post office employee thought the address was incorrect and placed it in Garrison's post office box instead.) He knew that the address was linked to Goss. He filed an incident report with the Laurel County SO. During the same time frame, Syreeta Garrison (Goss's daughter), after filing a late tax return for the 2007 tax year, discovered that a tax return had been filed in the spring of 2008, for the 2007 tax year. When the Kentucky Revenue Cabinet notified her, they investigated and again linked Goss to the crime – through the address she listed and the source of the income reported.

Syreeta also claimed her mother took out credit cards in her name and filed incident reports to that effect. Goss was indicted on multiple counts of identity theft. She was convicted of the charge relating to her ex-husband and the tax return. She appealed and the Court of Appeals reversed her convictions, finding she should have received a directed verdict because the proof was insufficient, and "did nothing more than raise a suspicion." The Commonwealth appealed.

ISSUE: Should credit card fraud be brought under identity theft or credit/debit card fraud?

HOLDING: Credit/Debit Card fraud.

DISCUSSION: With respect to the identity theft charge brought by Garrison, in which 17 credit cards and a checking account were opened, the Court noted that Goss "could not, as a matter of law, have been convicted of identity theft under KRS 514.160 for obtaining credit cards fraudulently because KRS 514.160 (4) expressly excludes credit or debit card fraud." Instead, charges involved credit or debit card fraud should be brought under KRS 434.550 to .730. With respect to the checking account, the proof consisted of Garrison's testimony that only a few people, including Goss, would know his social security number and that she was tied to that address. The Court agreed that "admittedly, this shows she had the means and possibly the opportunity to commit the crimes. But that is it."

The instructions, however, did not differentiate between the two offenses and testimony also joined the two charges. The Court agreed the direct proof is not necessary and that circumstantial evidence can suffice, but … "circumstantial evidence has its limits." Since none of the checks were ever used (having been redirected to Garrison), and there was no proof about what "personal information was needed to open the checking accounts," the only connection

was the address and the fact she knew Garrison's social security number. The Court found that, simply, completely insufficient to sustain a conviction. The Court agreed reversal on that charge was appropriate.

With respect to the tax return charge, the Court noted that the filer had received a small tax refund sent to a South Dakota bank. Testimony indicated that anyone with the necessary information could e-file and that the system "relied on the integrity of the tax payer to put correct information into the system." There was no evidence "most significantly," that "anyone other than [] Goss ever had access to the unique information contained in her W-2" – which matched that used in the e-filing. That was sufficient to sustain the verdict in the identity theft case involving Syreeta.

Pullen v. Com., 2014 WL 2040135 (Ky. App. 2014)

FACTS: On January 5, 2012, the Boone county SO received a tip that Pullen, who had an active arrest warrant, might be found at a particular location. Deputies found him in a barn at that address. However, originally, when located, Pullen gave the name of Ronnie Lainhart. He was quizzed about particulars, address, social security number, etc. Deputy Studer ran the information, and discovered a Ronald/Ronnie Lainhart and later testified he would not have located it without a correct SSN for that individual. They obtained a photo of Pullen and compared it, and eventually, he admitted he was, in fact, Pullen.

Lainhart later testified as to his legal information, which included his middle name, address and birthdate – the latter three of which Pullen had given incorrectly. Pullen was, however, convicted of identity theft and appealed.

ISSUE: Is it identity theft to use someone else's name (or a version of it) and their social security card?

HOLDING: Yes

DISCUSSION: Pullen argued that the "informed he gave the officers was fictional, not the [true] identifying information of Ronnie Lainhart." He stated he gave the officers a variation of Lainhart's name (Ronald Edward rather than Ronnie Dale), but the evidence suggested he did mention Ronnie at some point, and that one of the two SSNs he provided was in fact, Lainhart's real one. Further, KRS 514.160 "only requires a name, not a first, middle, and last name." Given what was provided, the Court found it to be sufficient.

The Court upheld his conviction.

NON- PENAL CODE – DUI

Epperson v. Com., 2014 WL 1873570 (Ky. App. 2014)

FACTS; On November 14, 2011, in Powell County, Epperson collided with a vehicle occupied by Tharp and a passenger. Tharp died and the passenger was injured. Epperson suffered minor injury and refused medical treatment, but did submit to FSTs as well as blood

and urine testing. He was charged with Murder, Assault and DUI. The charge was later amended to being a case under KRS 189A.010(1)(c), as a result of toxicology which indicated he was under the influence of some drug.

Prior to trial, Epperson argued against the admission of the toxicology test, because the quantity of some of the drugs detected were not displayed and thus were prejudicial as not indicative of impairment. Following this hearing, Epperson's counsel learned of problems with the testing process and an additional motion was filed to suppress the testing and the technician's testimony. It was denied but in addition, the Commonwealth moved to amend the charge to being under KRS 189A.010(1)(d) instead of (c).

At trial, the technician testified as to the presence of "methadone, diazepam (Valium), nordiazepam, and oxycodone." The first two were not quantified due to the problems in the test. The technician also, unexpectedly, testified as to a document that indicated that the lab kit used had expired some 17 months before the accident, although attention was not drawn to that fact. Epperson was convicted of Manslaughter 2nd, Assault 4th and DUI. He appealed.

ISSUE: Is it unfair to treat someone differently who has a prescription for a controlled substance in a DUI case, from someone who does not?

HOLDING: No

DISCUSSION: Although the Court agreed that Epperson had been entitled to a continuance due to the change in the statute under which he was being prosecuted, the Court further addressed several other points in anticipation of a retrial. The Court agreed that it was proper to allow the technician to testify as an expert since, although there were questions about the test itself and the way it was conducted, he did not challenge the methodology or technique of how the test was typically done. Any criticism of how the test was handled, "goes to the weight of the evidence, not its admissibility."[3]

Finally, Epperson argued that equal protection was violation since those found with a prescription for certain substances (found in the blood after a stop) are treated differently than those who do not. In fact, the statute "does not provide a blanket of immunity for those with a prescription; it merely subtracts a single item of admissible evidence from the Commonwealth's arsenal of evidence." The Court equated it to the disparate treatment accorded to juveniles who are found to be intoxicated.

> The implication behind the provision of KRS 189A.010(4)(b) is that the individual who obtains a substance through a doctor's prescription is under a doctor's professional supervision regarding the consumption of that substance. A person who obtains medicine illicitly, presumably, is not and very well could be using that substance in unsafe amounts and in combination with other substances which would more significantly impair his ability to drive. This fact alone creates a rational basis for KRS 189A.010(4)(b)'s provision. Therefore, the statute does not violate equal protection.

[3] 136 S.W.3d 35 (Ky. 2004).

The Court upheld the admission of the blood analysis but agreed that he had been entitled to a requested continuance. It vacated the conviction and remanded the case.

Kilburn v. Com., 2014 WL 1514622 (Ky. 2014)

FACTS: On February 4, 2011, Joey Conn and his daughter Olivia (age 5) were travelling through Floyd County. They were struck head-on by a wrong-way vehicle, driven by Kilburn. At the time of the crash, he was going between 72 and 86 mph. Responders that tended to Kilburn noted a "strong alcohol odor, and several beer cans fell onto the roadway." Kilburn admitted to having had 10-12 beers that night, and a partial case was found in the backseat. His blood test came back at nearly three times the legal limit. Conn suffered broken ribs and severe bruising, his daughter had severe internal injuries and a broken back.

Kilburn was convicted of Assault 1st, Assault 4th, DUI, Operating on a suspended OL failure to maintain insurance and PFO 1st. He appealed.

ISSUE: Must there be an affirmative investigation (and proof) on the status of vehicle insurance for the charge to be placed?

HOLDING: Yes

DISCUSSION: First, Kilburn argued that he was entitled to a directed verdict on the failure to maintain insurance charge. Kilburn claimed that no one asked him if he had insurance. The Court agreed that an owner must maintain insurance on the vehicle, under KRS 304.99-060 and that in fact, both an owner and an operator can be cited – and in fact, an owner/operator can be cited under two separate provisions.[4] The Commonwealth must prove that there is no insurance on the vehicle at the time the charge is placed, but that does not require "that the only correct method of inquiry is a verbal request by a police officer" as "a failure to maintain insurance is a failure however it is discovered."

In this case, however, the only testimony on the issue came from the responding deputy, to the effect as to whether or not "any type of proof of insurance was every provided to him" by Kilburn. There was no indication he asked for it or whether any search was done to prove a negative. The Court agreed he was entitled to a directed verdict on that charge.

Kilburn also argued it was double jeopardy to place both the Assault 1st charge and the DUI charge, against him. The Court agreed that each charge required different elements and as such, using the Blockburger test, the two were not double jeopardy. [5]

The Court reversed the insurance charge and affirmed the remainder of the convictions.

[4] The statute penalizes to different types of conduct: failure to maint insurance (chargeable to thn owner of the motor vehicle) and operating a motor vehicle without insurance (chargeable to the operator).
[5] Blockburger v. U.S., 284 U.S. 299 (1932).

NON-PENAL CODE - DRUGS / METHAMPHETAMINE

Elkins v. Com., 2014 WL 3020175 (Ky. App. 2014)

FACTS: On March 7, 2011, Officers Lawson and Moore (London PD) were called to Monholland's apartment, on a complaint of an "unusual odor." Officer Lawson determined the odor was coming through a vent and both officers later "testified that they recognized the odor as consistent with that of a methamphetamine lab." They searched and localized the odor to the Elkins' apartment. (Elkins' father leased it, but it was occupied by Elkins and Mosley.)

The officers knocked but got no response. Fox, the apartment manager, brought a key and opened it. As soon as it opened, the chemical smell was overwhelming. They found Elkins and Mosley in the shower, allowed them to dress and then removed them from the apartment. Elkins' father gave them permission to search. They found a quantity of evidence in the bathroom, with a lesser amount in the bedroom. Hale, the Laurel County Public Safety Director, arrived to assist in the cleanup. He later testified that he found no ether or anhydrous ammonia, despite the odor, nor did he find any methamphetamine. Nothing in the apartment tested positive for pseudoephedrine, nor was there any evidence that the pair had purchased quantities of it. However, "particulate matter" found in the bathroom was consistent with "pill dough," – the "remaining inactive ingredients after the pseudoephedrine has been removed."

Elkins (and Mosley) were charged. Elkins was convicted and appealed.

ISSUE: May the presence of a methamphetamine lab be presumed by the odor, even if no chemicals are found?

HOLDING: Yes

DISCUSSION: Elkins argued that a verdict should have been directed in his favor since there was insufficient evidence he was involved in manufacturing. The court looked to the elements of KRS 218A.1432 and noted that the case proceeded under (1)(b), since no actual methamphetamine was found. The Court ruled that the statute does not require proof any particular chemicals or equipment, but only two of either. Further, intent may be showed by circumstantial evidence, and knowledge could be imputed by the presence of the strong and unusual ammonia odor.[6] Further, the door was located in a room where it would not normally be expected, and Elkins was present in that room as well. The evidence must be weighed by the jury and in this case, the jury found it to be sufficient. Elkins' conviction was affirmed.

Com. v. Hoskins, 2014 WL 2640654 (Ky. App. 2014)

FACTS: On September 26, 2011, Roser testified that he was awakened by his barking dog and discovered his dog was barking at an unfamiliar car near his Laurel County home. He was awakened again a short time later and Roser saw the car, "driving down the road without using headlights." On a third check, he saw the car stop in his neighbor's driveway and the man inside disappear behind the house. Roser called the police and waited outside, but did not see anyone come back to the car.

[6] Beaty v. Com., 125 S.W.3d 196 (Ky. 2003).

Sgt. Moore and Officer Lawson (London PD) arrived. They saw the "old beat-up car" that seemed out of place. Sgt. Moore roused a woman at the residence who led him to Hoskins, asleep. Hoskins agreed the car was his and consented to a search of it. Inside the vehicle, which was not registered to Hoskins, Sgt. Moore spotted Coleman fuel and coffee filters in plain view sticking out of a duffel bag. Searching the bag further, he found a number of items related to methamphetamine manufacturing and in the front seat, a bowl with coffee filters and a wet substance (later confirmed as methamphetamine) inside. Using MethCheck, Sgt. Moore confirmed Hoskins had purchased precursors four times in the past month, but had not exceeded the legal limit.

At trial, Hale, the EM director, testified that bottles of liquid contained very strong acids, which would be used in the final stage of production. The wet filters indicated it had been freshly manufactured. Hoskins argued that the items found were all legitimate (lithium batteries, etc.) and did not appear in the way such items would if being used for methamphetamine manufacturing." Further, there was no pseudoephedrine in the car.

Hoskins was convicted and appealed.

ISSUE: Is a combination of incriminating items sufficient to support a manufacturing conviction?

HOLDING: Yes

DISCUSSION: Hoskins argued that there was insufficient evidence for a jury to find he was involved in manufacturing as the items found indicate "only a mere possibility of wrongdoing, not the actual crime of manufacturing methamphetamine." The Court agreed that there was more than enough evidence that the items, found in the combination present, for a reasonable juror to find that Hoskins was involved in manufacturing. Hoskins' conviction was affirmed.

FORFEITURE

Whitt v. Com., 2014 WL 1884483, (Ky. App. 2014)

FACTS: On two days in March, 2010, Whitt sold crack cocaine to a CI in Kenton County – resulting in two separate cases. He was indicted and the two cases consolidated. On August 5, 2010, he was again arrested and a large amount of cash was recovered – but the amount and exact locations on his person was not recorded. That case did not result in an indictment, however. Whitt requested a return of the money seized on that day – but he requested it under the wrong case number, causing confusion. Because he used the number for the first two consolidated cases, to which he took a guilty plea, the Court awarded forfeiture. Whitt appealed.

ISSUE: May cash that is seized with a case that is dismissed be kept?

HOLDING: No

DISCUSSION: The Court agreed, and the Commonwealth did not contest, that the money in question was seized as a result of a case that had been dismissed. The forfeiture order was reversed.

FAMILY – DVO

Norris v. Jefferson, 2014 WL 2643276 (Ky. App. 2014)

FACTS: Norris and Jefferson were never married, but did have a child in common. As part of a custody dispute in Bracken County, Norris was limited to supervised visitation by the court but Jefferson continued to allow unsupervised visitation. In March, 2013, Jefferson discontinued this arrangement after a disagreement that became progressively heated, with "Norris sending Jefferson over 100 hostile text messages." Jefferson filed a criminal complaint of harassment in Campbell County. The Campbell County Attorney sent Norris several warning letters about it. Finally, after an incident at the child's school, Jefferson requested a DVO, alleging that Norris was unstable and owned guns, as well as detailing the continuing harassment.

The Court denied the EPO but scheduled the matter for a hearing in April, 2013. Jefferson reiterated her allegations at the hearing, stating Norris was "often verbally abusive and intimidating" and that she was afraid of him. She admitted he'd never physically harmed her, but had pushed her down some six years earlier. She had taken out both DVO and harassment charges in 2007 but did not follow through. Norris denied owning weapons but did admit to the text messages. He stated he would never be violent against Jefferson or their child, however.

The judge granted the DVO but admitted it was a close call. Jefferson then filed to amend the DVO, which was denied. Jefferson appealed.

ISSUE: Are "hostile" text messages necessarily threatening?

HOLDING: No

DISCUSSION: The Court noted that the statute required fear of "imminent" physical injury, not just imminent harassment. Since Jefferson agreed that Norris had not used physical force against her in six years and had never caused her physical injury, the Court was most concerned with the custody issues and the hostile text messages. It noted that Jefferson had permitted Norris unsupervised visitation so she too, was in violation of the court's visitation order. With respect to the text messages, it found that "while clearly meant to be intimidating, [they] were not overtly threatening." Even if the messages fell under harassing communications (KRS 525.080), there was no evidence of a threat of imminent harm. The Court reversed the order issuing the DVO.

ARREST

Barnes v. Com., 2014 WL 1514632 (Ky. 2014)

FACTS: In mid-April, 2011, KSP narcotics officers caught Moore trying to sell a prescription pill. In exchange for not being charged, the 18 year old agreed to cooperate. He "confessed to two investigating officers that he had been selling pills—thirty milligram Percocets 1 primarily—supplied by a person he knew as Lorenzo, a black male who sometimes drove a burgundy Chevy Tahoe with large chrome rims." Lorenzo [Barnes] would give him a quantity of pills (Percocet) to sell and he would keep roughly 25% as his share. He was due to make another exchange and agreed to set up a meeting.

On April 18, Moore arranged to meet Barnes to exchange 30 pills, but Barnes did not appear for the meeting. They tried again on April 21 at the same meeting place, but shortly after KSP had posted up there, Barnes changed the meeting place to a nearby location. When he pulled in, Moore told the troopers, via cell phone, that Barnes was driving the vehicle and a uniformed trooper pulled in.

A female passenger got out, and then Barnes. The trooper stopped and frisked Barnes and found no weapons, but recognized by feel a large wad of currency (discovered to be more than $6,700). He held Barnes for the detectives, who arrived in moments. One went after the female, Robinson, who'd entered the store (a Rite Aid) where they were parked.

Robinson "angrily protested being stopped and kept her arms folded tightly across her chest." She denied having drugs and consented to a search; the male detective requested a female officer from Lexington, as they were in Fayette County. That officer found a plastic bag containing 52 pills (Percocet and hydrocodone) in Robinson's bra. She initially said they were hers, but ultimately, at trial, admitted that Barnes had handed them to her at the scene and told her to go into the store.

Barnes was held in a car during this time, and subsequently, once the pills were found, was given his Miranda warnings and questioned. He gave conflicting statements, including stating that he didn't know if the pills Robinson had were his or not, that it "depended on what kind they were." A search of Barnes' vehicle revealed no additional drugs, but did reveal four cell phones – one of which matched the number Moore had used to set up the meeting. Three were functional, two were drop or throw phones, pre-paid phones difficult to trace. On one of those phones, however, Moore's number was listed by his first name, and there was a record of calls two and from him.

Both were detained and shortly thereafter, they heard noises from the car. They "found Barnes with what looked like particles and crumbs of a crushed pill or pills on his lips and around his mouth" and additional crumbs on his side of the car. He originally said it was a Tylenol, but then admitted it was a hydrocodone.

At the subsequent trial, a KSP trooper, who'd been a narcotics detective, "testified as an expert to explain in general terms some of the practices commonly employed by persons engaged in the illicit sale of prescription pills." He explained the process of fronting pills, using pre-paid cell

phones and the use of a female to carry the drugs. He also explained the carrying of such a large sum of money, mostly in twenties, and how the pills would be carried and how all these factors added up to trafficking.

Barnes requested suppression and was denied. At trial, Barnes' defense was simply that he had nothing to do with the pills Robinson had and that "no transaction" had taken place with Moore. Barnes was convicting of Trafficking 1st and Tampering with Physical Evidence. He appealed.

ISSUE: May a person be stopped when there is probable cause to arrest them?

HOLDING: Yes

DISCUSSION: Barnes argued that he was improperly stopped and searched. The Court agreed that under Williams v. Com.[7] and Beck v. Ohio,[8] officers are permitted to arrest a person under probable cause. In this case, Moore had no previous history as an informant but they "were not relying solely on [his] allegations." They had more cause that was had in Williams, and therefore, they "did not violate Barnes's rights when they detained him and searched his person."

> The subsequent search of Barnes's vehicle was also lawful under Arizona v. Gant, inasmuch as it was "'reasonable to believe the vehicle contain[ed] evidence of the offense of arrest.'"[9] And, of course, the discovery of the pills during the search of Barnes's companion, Robinson, tended to confirm the officers' belief that Barnes was involved in a felony and provided additional cause for his continued detention.

The Court upheld the search and seizure of the evidence found.

With respect to the expert witness, the Court noted that the trooper testified as to common practices of drug dealers. Barnes correctly noted that "an expert may not express an opinion that the defendant is guilty."[10] But, the Court continued, "as long as the expert refrains from drawing ultimate conclusions for the jury, drug-trade expert testimony is admissible, this Court has held, even if it supports a conclusion that the defendant possessed drugs intending to traffic, as opposed to possessing for personal use."[11] The expert was not involved in the investigation and had no direct knowledge of the facts, he simply gave an opinion based upon information provided to him. His background information, noting the seriousness of the drug trade, "would hardly have been news to the jury" and served only to put his comments in context.

The Court upheld his convictions.

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[7] 147 S.W.3d 1 (Ky. 2004).
[8] 379 U.S. 89 (1964);
[9] 556 U.S. 332 (2009), Robbins v. Com. , 336 S.W.3d 60 (Ky. 2011) (quoting Gant, 556 U.S. at 351).
[10] Ordway v. Com., 391 S.W.3d 762 (Ky. 2013)
[11] McCloud v. Com., 286 S.W.3d 780 (Ky. 2009).

SEARCH & SEIZURE – SEARCH WARRANT

Abney v. Com. 2014 WL 2040142 (Ky.App. 2014)

FACTS: On August 29, 2011, Deputy Reed (Powell County SO) received reports on a vehicle being driven erratically, from a fellow officer. He found and followed the vehicle and observed it swerving. He made a traffic stop. Cody Abney (age 18) was driving, with his father (Dallis, the defendant) as a passenger. Reed smelled marijuana and had both get out. Cody did not have a valid license. Abney, in pulling out his license, also pulled out flakes of what Reed believed to be marijuana, along with a roll of cash. Abney was arrested for trafficking and both were transported. Both were interviewed separately. Cody allegedly stated that there were 10-20 pounds of marijuana at the house, although it was unclear whether that implied it was there at the time.

The Abneys lived in Estill County, so KSP obtained the warrant. After talking to Reed, Trooper Brewer filed for a search warrant that contained the following: Cody Abney indicated that Dallis Abney keeps approximately 10 to 20 pounds of marijuana in the safe at the home along with proceeds from the sale of marijuana." The warrant was issued and served.

During the search, a large quantity of marijuana, plus prescription pills, were found. Abney was charged with a variety of drug offenses. He moved to suppress which was denied. He took a conditional guilty plea to most of the charges and appealed.

ISSUE: Must a search warrant state specifically when something is observed by a CI?

HOLDING: No

DISCUSSION: Abney argued that the "underlying affidavit was insufficient to establish probable cause to support the issuance of the search warrant" because he did not state when he saw the marijuana. The Court noted that "an affidavit stating that contraband is presently at the location to be searched whether made based on the affiant's personal observation or based on information or believe, required a positive statement as to when the contraband was observed."[12] However, in Gossett v. Com.,[13] the Court had shifted away from such strict requirements and in favor of the guidelines in U.S. v. Ventresca.[14] That case, and later Kentucky cases, requires that warrants be tested on the "totality of the circumstances" test outlined in Illinois v. Gates.[15] The Court agreed that Cody's statements "established his personal observation and detailed knowledge of an ongoing criminal enterprise at his own residence." As such, the affidavit was reliable. This was further emphasized because Cody was, in effect, a "named informant" and as such, it does not require that the warrant give information as to his credibility or reliability. The Court found there were no "material falsehoods" in the affidavit, even though there were questions about what the substance was that fell from Abney's pocket (which was never tested.)

[12] Henson v. Com., 347 S.W.2d 546 (Ky. 1961); Williams v. Com., 355 S.W.2d 302 (Ky. 1962).
[13] 426 S.W.2d 485 (Ky. 1968).
[14] 480 U.S. 102 (1965).
[15] 462 U.S. 213 (1983).

The Court upheld Abney's plea.

SEARCH & SEIZURE – REP

Nichols v. Com., 2014 WL 2795155 (Ky. App. 2014)

FACTS: Nichols was indicted for multiple counts of possession of matter portraying a sexual performance by a minor (KRS 531.335) in Marshall County. He moved for suppression of items seized from his girlfriend's home, that were taken with her consent. The Commonwealth moved to admit evidence of prior bad acts (KRE 404(b)) – prior criminal convictions involving sexual advances and acts with young boys. When the former was denied, and the latter granted, Nichols took a conditional guilty plea and appealed.

ISSUE: Does an occasional overnight guest have sufficient expectation of privacy as to items found in the bedroom of the regular occupant?

HOLDING: No

DISCUSSION: First, with respect to the seizure, the Court noted that Nichols's girlfriend had agreed to the seizure of a laptop bag and a shoebox, items Nichols claimed he held a legitimate expectation of privacy. In this case, Nichols was an occasional overnight guest but did not reside there. The items were found in the girlfriend's bedroom. The Court agreed that the girlfriend "possessed common authority over [the items] and that her consent to search was valid."[16] As such, the items were admissible.

With respect to the evidence of prior conviction, the Court agreed that the convictions were "admissible to demonstrate motive, plan and knowledge" and upheld the Commonwealth's position.

Nichols's plea was upheld.

Hawley v. Com., 435 S.W.3d 61 (Ky App. 2014)

FACTS: On August 28, 2012, Det. White (Madison County SO) learned from Det. Parker "than an anonymous tip had been received about an address on Richmond Road in Berea." They responded and upon arrival, Det. White "detected a strong chemical odor to the north side of the garage, which was attached to the house." He also saw a HCl generator (a soda bottle). The garage had two doors, one open and one shut. They saw no one inside the garage, but did spot evidence of manufacturing and an additional two "meth labs." They went to the partially open door of the house, knocked and announced themselves. When no one responded, they entered, "to ensure the safety of anyone who might be inside because it was not uncommon for residents to become asphyxiated due to the toxic gases." The officers cleared the house of occupants but did not search it. They did find Hawley "behind a bathroom door" and brought him out – he claimed to be there only to "wash clothes in the garage." Hawley stated his grandfather actually lived there. Hawley's mother, Vicki arrived and Det. White told her about

[16] U.S. v. Matlock, 415 U.S. 164 (1974).

the meth labs found already. Vicki Hawley stated the grandfather lived with her, that she was the administrator of the property and that she had dropped Hawley off to do laundry. The detective testified that she asked that a search be done, which she denied. He denied summoning her to the property, but she later testified that she had been called either by the sheriff's office or the state police to do so.

Hawley was denied suppression. He took a conditional guilty plea and appealed.

ISSUE: Does an occasional occupant of a house have a reasonable expectation of privacy?

HOLDING: No

DISCUSSION: The Court noted that "this case involves the warrantless search of a residence and garage." First it addressed the Commonwealth's "argument that Hawley does not have standing to challenge the warrantless search of the garage" – which had not previously been brought up.[17] The Court agreed, noting that Hawley claimed that the house belonged to his grandfather, and the evidence indicated that no one lived there, with Hawley only being there occasionally to do chores. As such, Hawley had no "possessory interest" and no reasonable expectation of privacy.

The Court noted, however, that even if he did, the search was still validly based on a combination of factors, including exigency and plain view.[18] The officers knew of the dangers posed by meth labs and had a valid concern that someone may be overcome inside. Further, the Court credited their assertion that Vicki Hawley gave consent.[19]

Hawley's plea was affirmed.

Morris (Jennifer / Brad) v. Com., 2014 WL 1882197 (Ky.App. 2014)

FACTS: On October 28, 2011, Troopers Allen, Moore and Hall (KSP) were trying to serve an arrest warrant on Brad Morris. They had a tip that he was staying in a camper inside a barn in Harrison County. They knocked and shouted to get the attention of the occupants, but could not be heard over a generator running inside. They could see the camper inside the barn and Trooper Allen slid open the barn door. Trooper Hall turned off the generator and knocked on the door. He could see feet on a bed inside, and later identified that as being Jennifer. She came out, admitted she was the subject of warrants and was arrested. She told them that Brad was inside. They called on him to come out, and he did so, and was immediately arrested and handcuffed. He asked if he could go inside and get his jacket, to which they refused. They offered to get the jacket, and he did not respond or object.

[17] Ordway v. Com., 352 S.W.3d 584 (Ky. 2011). Sussman v. Com., 610 S.W.2d 608 (Ky. 1980)

[18] Com. v. Hatcher, 199 S.W.3d 124 (Ky. 2006), Hazel v. Com., 833 S.W.2d 831 (Ky. 1992),

[19] Cook v. Com., 826 S.W.2d 329 (Ky. 1992), Com. v. Sebastian, 500 S.W.2d 417 (Ky. 1973).U.S. v. Watson, 423 U.S. 41 (1976). The test for determining if consent is constitutional is set out in Schneckloth v. Bustamonte, 412 U.S. 218, (1973).

Troopers Hall and Moore went inside and spotted what they believed to be marijuana in plain view. Morris refused to consent to a search so Trooper Moore obtained a search warrant. In the subsequent search they found more marijuana and a grinder with white powder residue. Both moved to suppress, which were denied with the trial court finding neither had standing to object. Both took conditional guilty pleas and appealed.

ISSUE: May consent be inferred by non-verbal conduct?

HOLDING: Yes

DISCUSSION: The Court noted that no evidence was presented "as to how Brad and Jennifer came to be in the barn or what interest or status they held on the property." The property was allegedly "owned by the family of a person that Brad's mother was living with" – which the court found insufficient. In addition, the court found that "consent may be inferred through the nonverbal conduct of a defendant, such as silence and/or acquiescence." Since he stated he wanted the jacket, and did not object to the trooper fetching it, the Court found that enough.

In addition, both argued that "the barn was within the curtilage of the camper"[20] and as such, the knock and talk was violated. However, since this issue was not raised in a timely manner, the Court declined to address it. The pleas were upheld.

SEARCH & SEIZURE – EXIGENT ENTRY

Wood v. Com., 2014 WL 2795153 (Ky. App. 2014)

FACTS: On March 28, 2011, Officers Tucker and Higgins arrived at the Woods' apartment complex, to serve a warrant on Banyon, who lived in 604. As they entered the 6th Floor, Officer Tucker smelled burning marijuana and localized it to 601, Woods' apartment. They could hear music and voices. Officer Tucker knocked and identified himself. The voices ceased and Wood opened the door, accompanied by the odor of marijuana. Officer Tucker could see a second person inside so they asked to come in. Wood refused but the officers came inside anyway. They recognized the second person as Banyon and arrested him. They swept the apartment, finding no one else. Banyon was searched and a roach was found. The officers obtained a search warrant for the apartment, finding methamphetamine.

Wood was indicted for the methamphetamine. Wood requested suppression but was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a sweep justified when there is no indication of evidence being destroyed or other exigent circumstances?

HOLDING: No

DISCUSSION: Wood argued that the officers "unlawfully entered his apartment and there were no exigent circumstances which would warrant entry. " The Court agreed that "in

[20] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008)

the absence of consent, police may not conduct a warrantless search or seizure within a private residence without both probable cause and exigent circumstances."[21] In King, the Court agreed, the "officer who performed the entry failed to articulate the specific details which would lead him to believe that evidence was being destroyed." The Court found the facts in this case to be undistinguishable from King, and that they entered solely only the observation "that marijuana was being smoked and people were present in the apartment." Nothing indicated any evidence was being destroyed. Looking to the sweep, the Court agreed it could, under the right facts, be permitted, but "no such facts exist herein which would support such an act."[22] "Protective sweeps are only to be performed in conjunction with an in-home arrest and when officers believe the residence may be harboring a dangerous person." In this case, the arrest took place after the entry and was not the reason for the entry. The officers never claimed, in fact, that they suspected anyone else was in the apartment at all.

The Court reversed the decision not to suppress.

SEARCH & SEIZURE – TERRY

Holt v. Com., 2014 WL 2795153 (Ky. App. 2014)

FACTS: On the day in question, Officer Hamblin (Covington PD) later testified that a male anonymous caller reported a male subject cross the bridge and go through a woman's purse. The caller found it odd because no female was with the subject. There had been no reports of a purse theft in the area. Officer Hamblin arrived, meeting Officer HP, who told him that some people had related to him that the man had been going across the bridge.[23] Officer Hamblin proceeded to try to cut off the subject, and then got another tip telling him where the individual was. There he found Holt, wearing a 'blue patterned shirt." He stopped Holt by pulling in front of him and explained why. The caller, who could see them, called dispatch to verify that was the person he'd seen with the purse. (In fact, Officer Hamblin saw the tipster on a nearby phone and recognized him as a regular caller, but there was no evidence as to the reliability of past tips.)

During a frisk, Officer Hamblin felt a syringe in Holt's pocket. He removed the syringe and arrested Holt. During the subsequent search, he also found heroin. Holt was charged and moved for suppression. Although not rendering a written order to suppress, it appears the motion was denied from the bench. Holt was convicted and appealed.

ISSUE: Must an anonymous tip bear some indicia of credibility to be acted upon?

HOLDING: Yes

DISCUSSION: Although the Commonwealth attempted, initially, to claim that the first encounter was consensual, the Court noted that Hamblin had cut Holt off with his cruiser, which made the consensual nature of it "very questionable." However, even if it was, the Court

[21] King v. Com. , 386 S.W.3d 119 (Ky. 2012).
[22] Maryland v. Buie, 494 U.S. 325 (1990); Guzman v. Com., 375 S.W.3d 805 (Ky. 2012).
[23] The officer in question is generally known in his jurisdiction by his initials, due to the difficultly in correctly spelling and pronouncing his name.

ruled that the subsequent frisk was "constitutionally invalid." The court looked to Hampton v. Com.[24] and noted that an "anonymous tip must bear some increased indicia of reliability such as independent verification before the police may rely on it." The Court did not find that the bare information given at the time was sufficient to justify the stop and once the officer identified the tipster, there was no evidence that he was known to be reliable.

The Court vacated Holt's conviction.

Martin v. Com., 2014 WL 2159359 (Ky. App. 2014)

FACTS: On March 27, 2012, at about 11:45 p.m., Officer Seger (Lancaster PD) was dispatched to a complaint of a vehicle playing loud music and shining lights in the complainant's window. Upon arrival he found a vehicle, matching the description, in the parking lot of a closed business. At the time, however, the lights were off and no music was playing. He approached and while talking to the occupant, spotted the "handle of a machete between the front seats of the vehicle." The officer had the occupant (Martin) get out and called for backup. As Martin climbed out, the officer spotted two handguns inside the car. Both occupants were questioned and identified as convicted felons. A further search of the car revealed more guns, power tools, jewelry and a box of checks on Broaddus's account.

The Garrard County Sheriff's Office confirmed that Broaddus's house had been burglarized and checks stolen. Broaddus came to the scene and identified several of the items. She identified Martin as her grandson and gave the officers his address. Officer Seger obtained a warrant and additional stolen items, along with a methamphetamine lab, was found.

Martin was indicted on a number of charges. He moved for suppression, arguing the officer lacked any cause to have him get out of the vehicle. Officer Seger testified about his concern about the machete – and he did cite Martin for having a concealed weapon as well. The trial court denied the motion. Martin took a conditional guilty plea and appealed.

ISSUE: May a driver be ordered out of their vehicle during a traffic stop?

HOLDING: Yes

DISCUSSION: The Court looked to Pennsylvania v. Mimms[25] which permits an officer to get the driver out of a vehicle, providing the initial stop is lawful. Passengers may be ordered out under Maryland v. Wilson.[26] The Court agreed that the facts known to Officer Seger were sufficient for a Terry stop, which was ongoing and reasonable when he ordered the occupants out of the vehicle. The presence of the machete, legal or not, further justified the officer's concern for safety.

The Court upheld the plea.

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[24] 231 S.W.
[25] 434 U.S. 106 (1977).
[26] 519 U.S. 408 (1997).

Kavanaugh v. Com., 427 S.W.3d 178 (Ky. 2014)

FACTS: On March 6, 2010, Officer Rice (Lexington PD) was on patrol at 3:40 a.m. in a high crime area. He spotted a vehicle on the side of the street, with only taillights illuminated. He drove past but saw no one inside. He was concerned, however, turned around and parked behind it, running the license plate. He then noticed that there were, in fact, two people in the vehicle. Officer Rice got out to investigate. He spoke to the driver, Kimeli; Kavanaugh was sitting in the passenger seat. The officer explained his suspicions and Kimeli stated they'd just dropped off a friend, and that she and Kavanaugh were just talking. Kimeli willingly produced her OL. Kavanaugh, however, never made eye contact and denied having any ID when asked. Rice asked for his name, and Kavanaugh asked why. He then began "reaching into his coat and digging in his pocket." Concerned, Rice asked him to get out.

Kavanaugh then pulled a small black item from his pocket and Rice ordered him to remove his hands from his pocket. Kavanaugh returned the item to his pocket and stepped towards Rice. Rice explained that he needed to frisk him, and did so. "Kavanaugh refused and then removed a small, black digital recording device from his pocket and spoke into it, saying something to the effect that he was being harassed. He refused to comply and finally, Rice frisked him, with Kavanaugh's hands behind him – although he continued to hold the recorder.

At some point, Rice removed Kavanaugh's wallet and Kavanaugh demanded it back. Kavanaugh spun around, put down the recorder and "bear-hugged" Rice. Officer Rice arrested him and called for backup. Eventually, he was found to have .5 grams of crack in his pants pocket. Kavanaugh was charged with Menacing and Possession of a Controlled Substance. When his motion to suppress was denied, he took a conditional guilty plea and appealed.

ISSUE: If an assault occurs during an arguably improper stop, is anything found as a result of the subsequent search admissible?

HOLDING: Yes

DISCUSSION: Kavanaugh argued that the investigatory stop was improper and required suppression of everything gained. The Court agreed that in the course of a stop, an officer "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond."[27] Whether identification is required during such a stop is determined by state law only.[28] Kentucky, however, is not a "stop and identify" state, but since an officer is permitted to request it, a failure to comply "may still be considered along with other sufficient factors demonstrating reasonable suspicion."

Although the court had reservations as to whether the frisk was reasonable, that did "not obviate the fact that Kavanaugh assaulted Officer Rice." Once that occurred, the officer has probable cause to arrest. The cocaine was found, not during the frisk, but during the search incident to the arrest. The Court noted that there was no right to use self-defense to prevent an unlawful

[27] Berkemer v. McCarty, 468 U.S. 420 (1984).
[28] Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 542 U.S. 177 (2004).

arrest.[29] In Kentucky, "the unlawfulness of an arrest may not be raised as a defense to a prosecution … [unless] the officer used more force than reasonably necessary to effect the arrest so that his conduct constitutes an assault on the person arrested."[30] As such, the Court agreed, "Kavanaugh's assault of Officer Rice constituted an intervening act that purged the taint, if any, that resulted from any detention which may have violated the Fourth Amendment..

The Court affirmed the plea.

SEARCH & SEIZURE – SEARCH INCIDENT TO ARREST

Patton v. Com., 430 S.W.3d 902 (Ky. App. 2014)

FACTS: On June 20, 2011, Trooper Eversole (KSP) contacted the Powell County SO regarding information from a CI, to the effect that he could buy drugs from Patton. Deputy Reed commenced a sting operation related to Patton. The deputy obtained cash (and photocopied it) for the transaction. He then met with the trooper and the CI in Wolfe County, and asked the CI why he was willing to do the buy, since he was "not under arrest or investigation." The trooper explained that Patton had been calling the CI in an effort to sell drugs and the CI "simply wanted the phone calls to stop."

The CI was wired, signed CI agreements and supplied with money. Deputy Reed searched the CI's vehicle as well. While still in Wolfe County, the CI picked up Patton and a female friend. They then drove into Powell County, followed by law enforcement. The CI eventually parked in Ratliff's driveway. Sheriff Rogers called one of Ratliff's neighbors, who had complained before about narcotics trafficking at that house. The neighbor agreed the CI's vehicle was there. The CI remained parked there for several minutes and then drove off. As prearranged, deputies stopped the vehicle and handcuffed all three occupants. Deputy Reed took the CI aside and removed the wire, and the CI told him that he'd given the money to Patton to make the buy and that he "believed that Patton was still carrying the narcotics he purchased somewhere on his person."

Deputy Reed approached Patton, asked "if he had "anything illegal on his person, frisked him, felt a pill bottle in his pocket, and removed it." He said that the label on the bottle "was partially obscured and difficult to read, but that it was possible" that it had Patton's name. He opened it, finding 2-3 hydrocodone pills and 11 oxycodone pills.[31] Patton was arrested, charged and indicted for trafficking.

Patton moved for suppression and was denied. The Court noted that "while generally an arrest must precede the search, in some cases a search conducted prior to an arrest is valid if it is conducted contemporaneous with a lawful arrest." Since Deputy Reed had probable cause to arrest before the search, the search was valid. Patton took a conditional guilty plea and appealed.

[29] Stopher v. Com., 57 S.W.3d 787 (Ky. 2001); Baze v. Com., 965 S.W.2d 817 (Ky. 1997).
[30] KRS 520.090; See also U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011).
[31] Because it turned to be a bottle intended for Patton's own hydrocodone prescription, he was only charged for the oxycodone.

ISSUE: May a search made just prior to an actual arrest still be considered a search incident to arrest?

HOLDING: Yes

DISCUSSION: The Court agreed that "a warrantless search preceding an arrest is also reasonable under the Fourth Amendment "so long as probable cause to arrest existed before the search, and the arrest and search were substantially contemporaneous. "Once an officer has probable or reasonable cause, the officer may arrest the person without a warrant, and in such situations it is immaterial that a search of the person without a search warrant may precede his arrest"[32] Patton asserted that the situation was similar to Florida v. J.L. and that the CI was unreliable.[33] The Court, however, ruled that the CI was non anonymous and he had a valid reason for pursuing the transaction. Tips by "citizen informants who either (1) have face-to-face contact with the police; or (2) may be identified are generally competent to support a finding of reasonable suspicion (and in some cases, probable cause) whereas the same tip from a truly anonymous source would likely not have supported such a finding."[34] Although the Court agreed that a "bare and uncorroborated tip" was not sufficient, in this case, they had far more – and in particular, noted that they ended up at a house known to be involved in drug trafficking.

The court affirmed Patton's plea.

SEARCH & SEIZURE – VEHICLE

Com v. Shorter (Eric and Jermaine), 2014 WL 1681324 (Ky. App. 2014)

FACTS: On December 5, 2006, Det. Brown (Louisville Metro PD) observed a drug transaction involving two cars. He pulled over the car he believed to be "receiving" the drugs, but did not record any information about the other car. Woosley was driving that vehicle and was found to have a quantity of marijuana and a gun. He indicated he'd purchased drugs in the past from the occupant in the other vehicle, at a specific address. Det. Brown set up surveillance at that house, but saw nothing suspicious until several weeks later, when he saw what he again believed to be a transaction. The Shorters (brothers) were in that vehicle. Jermaine, driving had a suspended OL, and was arrested; Eric was found to have an outstanding warrant. A small amount of marijuana was found in the vehicle. Det. Brown obtained a warrant for the address, which yielded 3 guns, marijuana and cocaine.

The Shorters were charged with a variety of drug and weapons charges. Both moved to suppress and ultimately, it was granted. The Commonwealth appealed.

ISSUE: Is simply being present in a "bad neighborhood" enough to support a traffic stop?

HOLDING: No

[32] Williams v. Williams
[33] 529 U.S. 266, (2000).
[34] Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005)

DISCUSSION: The trial court had ruled that the officer "did not have a reasonable, articulable suspicion to do the traffic stop" as it was not involved in the initial transaction and was based only on "sparse observations" on that day. The Court agreed with the Commonwealth, however, that it was necessary to use a totality of the circumstances assessment, as well as considering Det. Brown's experience.[35] However, at the suppression hearing, the detective "was unable to articulate the basis of his suspicion … - only that he had been suspicious." Although the incident took place in a "bad neighborhood," one's "mere presence … at night is insufficient" to justify a stop without more.[36] The Commonwealth argued that in fact, the detective had additional information, but the documented record did not support it – particularly with respect to conflicts with whether the Shorter's car was the car involved with Woosley or whether it had been seen at the target address before. (The original vehicle was brown, the Shorter's vehicle was white.) In fact, Det. Brown had argued that the "very lack of suspicious activity at the house was indicative" of Jermaine Shorter (who resided at the house) being a "high-level drug dealer." The Court found that argument to be "disturbing," as it was "wholly contrary" to logic. (Further, their criminal history was immaterial, as the detective stated he did not know who he was following in the first place."

The Court upheld the suppression of the evidence.

SEARCH & SEIZURE – VEHICLE EXCEPTION

Vincent v. Com., 2014 WL 2795168 (Ky. App. 2014)

FACTS: On July 3, 2012, Trooper McGehee stopped Vincent's vehicle, for failure of the driver and occupants to wear a seat belt. He noted the driver, Vincent, was "nervous and fidgeting" and suspected drug involvement. Because Vincent kept putting his hands in his pockets, the trooper patted him down. During the frisk, he found a single pill. He searched the vehicle, finding methamphetamine, marijuana and a pill bottle for the single pill, with the name of another individual.[37] Vincent failed two of three field sobriety tests. He was charged for a variety of drug and intoxication offenses.

Vincent moved for suppression of the evidence found in the vehicle. He stated he did not own the vehicle, but had only borrowed it. The trial court denied the motion, finding that upon the discovery that he was impaired, a search of the vehicle would have been proper and anything in it would have inevitably be discovered. Vincent took a conditional guilty plea and appealed.

ISSUE: May the inevitable discovery exception be used to admit evidence that would otherwise be inadmissible?

HOLDING: Yes

DISCUSSION: Vincent argued that all of the evidence, including the single pill found, should be excluded. The Commonwealth, however, asserted that "the drug and paraphernalia evidence was admissible as the fruit of a probable cause search pursuant to the automobile

[35] Baltimore v. Com., 119 S.W. 34 (Ky. App. 2003).
[36] Strange v. Com., 269 S.W.3d 847 (Ky. 2008).
[37] This pill was a legend drug, not a controlled substance.

exception to the warrant requirement." Further, it alleged that the evidence would have inevitably been found during a search incident to arrest, permitted even under the Gant restrictions.[38] Further, the Court noted that inevitable discovery rule as a valid way to admit evidence, as well.[39]

First, the Court looked to the automobile exception.[40] Looking to the totality of the evidence, and how the situation evolved, the Court agreed that the search was proper. Once he was arrested for DUI, which he would have been even if the initial pill had not been discovered, the Court agreed the search was proper under the automobile exception.

The Court upheld the plea.

SEARCH & SEIZURE – INVENTORY

Hinchey v. Com., 432 S.W.3d 710 (Ky App. 2014)

FACTS: On July 10, 2010, Mayfield police responded to a disturbance involving Hinchey, at his parents' home. He was yelling at other people when they arrived. When he spotted the officers, he "jumped in his car and sped off, nearly hitting two officers." They heard a loud bang, like a shot, as he fled, and he struck a curb, as well. The pursued him for several blocks, during which time he ducked down below sight. He pulled into his aunt's driveway and got out, holding a large knife. They tased him several times and were able to subdue him, although he continued to struggled as he was placed under arrest. Returning to the car, they saw a firearm, ammunition and knives in plain view, along with a deflated two-liter bottle that had been used to cook methamphetamine. They further searched the vehicle and found additional evidence, including two more guns. The vehicle was then towed.

Upon being charged with many of the items found in the car, Hinchey moved for suppression. The Court ruled that the items were seized properly. After the firearms charges were severed, to be tried separately, as he was a convicted felon, he was convicted of a variety of charges, including wanton endangerment, fleeing and evading and resisting arrest. He was subsequently found guilty of the firearms possession charges as well. Hinchey appealed.

ISSUE: May a passenger compartment be searched when there is evidence (in plain view) that a crime may be located there?

HOLDING: Yes

DISCUSSION: The Court noted that the Commonwealth relied on two different exceptions to the warrant requirement – the search incident to arrest and the inventory search. With respect to the first, the Court agreed that the second provision of Arizona v Gant [41] applied. Given what the officers knew at the time, the Court agreed, they had a reasonable basis to believe there was evidence of a crime in the vehicle. Further, it noted, they observed several

[38] Arizona v. Gant, Supra.
[39] Hughes v. Com., 87 S.W.3d 850 (Ky. 2002); Nix v. Williams, 467 U.S. 431 (1984).
[40] Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007); Cook v. Com., 826 S.W.2d 329 (Ky. 1992).
[41] Supra.

of the items in question in plain view, including weapons.[42] In addition, the officers did a lawful inventory search, based upon a standard policy. They had planned to tow the vehicle even before spotting the items, due to the serious nature of the charges against Hinchey.[43] The Court upheld the convictions.

In addition, Hinchey argued that the two handgun possession charges, based on the discovery of two firearms in the vehicle, should have been combined into one charge under KRS 527.040 and that not doing so constituted double jeopardy. The Court agreed, but noted that since the sentences were already concurrent, doing so did not change his ultimate sentence.

SUSPECT ID

Swain v. Com., 2014 WL 2810408 (Ky. App. 2014)

FACTS: On the day in question, a man and a woman, in Louisville, were robbed at gunpoint while sitting on their porch. Two men on bicycles pulled up, and one asked the male if he could urinate on the side of the house. He agreed. Instead, the two men conferred, pulled hoodies up and ran onto the porch. Both produced handguns and demanded money. The female tried to run, but was grabbed just inside the door, at which point her assailant "charged a round into the chamber" and repeated his demand. As she screamed, he fired a shot into the floor. She handed over all the cash she had. After robbing both, the men got on their bicycles and rode off, firing multiple rounds.

Det. Brown responded to investigate. The female gave only a basic description and was very upset. A few days later, she contacted the detective and told him of a possible suspect who had an identical twin. Det. Brown identified two brothers named Swain, learning one was incarcerated at the time. He created a photo pack that included the other brother, using a computer program to provide photos and suggestions. From the ones provided, he selected six photos, including Swain's. Because Swain was shirtless in his, he only used facial shots. The witness was appropriately cautioned, but immediately selected Swain's photo.

Swain was charged and moved to suppress. The Court declined the motion and Swain took a conditional plea to Robbery 2nd and Possession of a Firearm by a Convicted Felon. Swain appealed.

ISSUE: Is position (in the photopak) and background of photos critical in determining if it is too suggestive?

HOLDING: No

DISCUSSION: Swain argued that the photopak was two suggestive because his position (middle of bottom row), the fact that his photo background was the darkest, and because he had the darkest complexion. The Court found nothing prejudicial in the layout of the photopak, in any of the alleged ways. The witness had not given any indication of the relative shade of her assailant's skin. The detective's testimony as to his criteria for selection indicated that he chose

[42] Com. v. Hatcher, 199 S.W.3d 124 (Ky. 2006).
[43] Clark v. Com., 868 S.W.2d 101 (Ky.App. 1993).

"photos of individuals who had similar appearances, but not so similar that somebody who knew the suspect personally could not tell the difference amongst them" was a proper standard for selection.[44]

The Court agreed that the method was proper and upheld Swain's plea.

Jones v. Com., 2014 WL 2536836 (Ky. App. 2014)

FACTS: On January 6 and 7, 2010, two home invasions in Louisville resulted in multiple armed robberies of the occupants. At the first home, four adults were robbed by two masked men, but the mask of one (the white man) slipped several times and revealed his face. Witnesses could not identify anyone from photo packs. At the second home, an adult and a 15 year old were robbed. Electronics and cash were taken. In both cases, the suspects were believed to have fled the scene in a truck. In the second situation, the white man was not masked and left behind a ball cap. The black man wore a partial mask, covering the bottom of his face.

Carter (white) and Jones (black) became suspects, they were known to be friends. During the investigation, Carter and Jones had visited a witness, arriving in a truck and with a white laptop (similar to one taken in the second robbery). That witness, Carver, had learned of the second robbery from a friend, who had also had a home invasion in the same time frame in which a number of items were taken. They took a photo of Carter to the victims in the second robbery, but the adult did not recognize him. Carver and her friend (Taylor) went to the police and shared their suspicions. As a result, Jones threatened her with a gun.[45]

Two new photo packs were created, one including Jones and the other Carter. The victim in the second robbery picked Carter, but was only 70% certain; he could not identify Jones. Young, a victim in the first, selected no one, but McDowell, another victim, identified Carter and was 80% certain of Jones, after "debat[ing] between two photos." Jones and Carter were arrested. At the time of the arrest, Jones had in his possession the white laptop taken in the second robbery. Ammunition was found in his vehicle. Carter, arrested the next day, had a TV taken in the second robbery. A vehicle matching the description of the truck in the first robbery was also at Carter's home. The victims "were associated, some directly and others tangentially, to Powell – Jones's then-girlfriend" – with a suggestion that Powell targeted the homes. The trial court agreed the two crimes would be tried together because they "were closely related in character, circumstances and time." The court severed off the handgun charges but joined both the charges and the trials "because they were interrelated and much of the evidence would overlap."

Jones moved to prevent the witnesses from identifying him in the courtroom, arguing that Carver "may have talked victims into believing Jones was involved in the robberies." (He did not request the photopack identifications because Jones was not identified in them.) During the hearing, the detective was challenged on a report in which he said "all victims identified Carter and Jones," was incorrect. During a bond reduction motion, it was noted that one of the witnesses was "urged … to estimate his certainty," and that he really wasn't sure. Further, it was

[44] Neil v. Biggers, 409 U.S. 188 (1972); Gerlough v. Com., 156 S.W.3d 747 (Ky. 2005).

[45] He was also charged with intimidating a witness and possessing a handgun as a convicted felon, but was acquitted.

"stated the victims and defendants knew one another, had talked with one another, and had 'beefs' with one another." The bond was unchanged, and later, the motion to exclude the "in-court identification" was also denied.

At trial, a witness in the first robbery made a positive ID of Carter and Jones. The juvenile in the second robbery, who had not prior to that time been asked to view photos, identified Jones "from her memory of having seen the black man's eyes and nose." The adult witness in that second robbery equivocated in his identification of Jones. McDowell, in the first robbery, testified that he was in fact much more sure that Carter and Jones were the robbers than his original identification indicated. The detective testified that his statement about the identifications was a "typo."

Jones was convicted. During appeal proceedings, the appellate court was asked to agree to submission of the detective's grand jury testimony, but that was denied because it had not been made part of the record previously. Jones appealed.

ISSUE: May a witness who was never asked to make an out of court identification be challenged when they make an in-court identification?

HOLDING: No

DISCUSSION: Addressing the issue of the grand jury testimony, the Court noted that the detective's testimony was demonstrably false and this was exploited by defense counsel and argued to the jury. However, at no point was there an attempt to get the actual grand jury testimony admitted during the trial. The Court agreed that the trial court could not so supplement the record and affirmed the decision to exclude the grand jury testimony. The Court noted that Jones was aware for some months that the grand jury received inaccurate information in rendering the indictment, and that Jones had ample opportunity to correct that error by requesting, for example, a dismissal of an indictment.

In Carter's related appeal, the Court also agreed that there was no prejudice in joining the charges and the trials.

With respect to the challenged in-court identifications, the Court noted that the juvenile witness had never even been asked to attempt an identification before she identified both in court. She was not specifically asked to make an ID, but made it during the context of questioning. Further, because she'd never been asked to look at photos before trial, she could not have been argued to have been "subjected to an out-of-court confrontation – unduly suggestive or otherwise." The Court agreed that admitting her testimony was proper. McDowell, who gave an equivocal identification, was also "sufficiently tested by cross-examination" and that the overall process in which he viewed the photo paks was fair.[46]

Jones's conviction was upheld.

[46] Neil 409 U.S. at 199–200, 93 S.Ct. at 382; *see also* King v.Com., 142 S.W.3d 645 (Ky. 2004).

INTERROGATION – RIGHT TO SILENCE

Jennings v. Com., 2014 WL 2937778 (Ky.App. 2014)

FACTS: On the day in question, Jennings' boyfriend, McDaniel, shot Washington and Henderson. The shooting occurred after Jennings' daughter, Sally, got into a fight at school with the daughter of Washington and Henderson. Washington and Henderson went in search of Sally, finding her at her grandmother's home, and 'induced her into the street" to finish the fight. McDaniel, angry, went looking for Washington, finding him. When they met up, Washington approached the car and spoke to Jennings, who was sitting in McDaniel's car. McDaniel became enraged when he realized that the man was Washington, who he did not know by sight. McDaniel got out and approached, with pistol wrapped in a towel. McDaniel shot Washington several times; Henderson once. McDaniel later testified that Jennings did not know he had a firearm, and that he only shot when Washington lifted his shirt and showed a handgun.

McDaniel was convicted of assault and Jennings of facilitation to assault (of Washington). Jennings appealed.

ISSUE: Is evidence that one knows a fight is contemplated enough for a facilitation charge?

HOLDING: Yes

DISCUSSION: The Court analyzed Jennings's argument that there was insufficient proof of facilitation to assault. The Court looked at the elements of KRS 506.080 (Facilitation) and KRS 508.010 (Assault 1st). Jennings argued that "[s]imple knowledge that a crime will be committed is not enough to satisfy the knowledge element for facilitation....' Instead, the defendant must have knowledge that the principal actor intends to commit the crime the defendant is actually charged with facilitating." The Court noted that text messages between Jennings and McDaniel indicated that a fight was contemplated. However, the Court agreed that the instructions given, which omitted half of the relevant statute, required reversal.

Jennings also argued that the officers lacked the authority to seize her cell phone (for the text messages), that her consent, if any, did not reach to searching the phone and that her Miranda rights were violated. Because the first was unpreserved as an objection, the Court declined to address it. With respect to remaining argument, the Court looked at the taped statement that Jennings gave the evening of the shooting. Jennings arrived voluntarily and "was informed that she was not under arrest at that time but that she was a person of interest." She was asked for contact information and she provided her cell phone number. She was given Miranda and asked if she needed a lawyer, the detective told her "that he just reads the rights." The detective later agreed that Jennings had told them that she had "ingested two shots and three beers" and was intoxicated. (The tape indicated that she stated she wanted to talk to him when she was sober, but that "he replied that they were talking now and whether or not she was intoxicated was not his concern.") Jennings told the detective that her method of communicating with McDaniel was by text messaging and he asked to "look at her phone and get the number." He took the phone from the room. Jennings ended the interview a few minutes later. Det. Warner agreed that he logged the into evidence, but did not admit he'd taken the phone initially from her. He

stated he preferred that those being interviewed not have their cell phone. (When questioned about an outgoing call from the phone during the time Jennings was not in possession of it, he apparently had no explanation.)

Further:

> Detective Warner described Jennings's phone as an old-school cell phone, not a smart phone. He thought there was an icon that said missed calls or messages, and that when one attempted to access the messages only a phone number was visible. He said Jennings gave him consent to look for a phone number but not for texts or voicemail. He looked for the number for McDaniel and had to look under something like "my baby boy," which was a fictitious name. Detective Warner found McDaniel's number under "my man." The detective agreed that there was a photo next to "my man" and he gained access by clicking on it. He later stated that Jennings had instead given him permission to look at the phone instead of permission to look for a phone number. Detective Warner stated that he did not believe that he searched the phone for text messages but that he may have. Detective Warner then obtained a search warrant for Jennings's text messages.

In addition, Jennings argued that she invoked her right to an attorney and her right to silence, when she stated 'she did not want to answer any more questions." The detective "admitted that the conversation continued and that Jennings repeated that she did not want to talk to him anymore" but that "he thought her statement was ambiguous."

The Court noted that "A defendant must unambiguously assert her right to remain silent in order to cut off questions from the police."[47] The Court agreed that at the point argued, she did make a clear invocation of her right to remain silent and that right must be scrupulously honored.[48] Because that was not addressed by the trial court, the Court agreed reversal and remand was warranted. For purposes of guidance, the Court addressed Jennings' assertion that she invoked the right to counsel earlier in the interview, agreeing that in fact, she had not been "clear and unequivocal" until the same point it ruled she invoked her right to silence.

With respect to the search of the phone, and whether consent was given, the Court noted:

> "The standard for determining whether consent has been given 'is one of objective reasonableness.'"[49] "To determine whether consent to search is constitutional in a particular case, we review 'all the surrounding circumstances.'"[50] The objective reasonableness standard is also applied when measuring the scope of a consensual search. This is done by discerning what a reasonable person would have understood by the exchange between the party giving consent and the party receiving it.[51]

A consent does not give carte blanche, either, but it can be limited to the purpose behind the consent. However, since the trial court "concluded that there were many places to find the

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[47] See Buster v. Com., 364 S.W.3d 157(Ky. 2012) (citing Berghuis v. Thompkins, 560 U.S. 370 (2010)).
[48] Mosley
[49] Hallum v. Com., 219 S.W.3d 216 (Ky. App. 2007) (citing Com. v. Fox, 48 S.W.3d 24(Ky. 2001)).
[50] Id. (citing Cook v. Com., 826 S.W.2d 329(Ky. 1992)).
[51] Com. v. Fox, supra.

phone number on the phone and there was no evidence to suggest the detective was looking in a place where a number could not be found," that the court declined to reverse.

Finally, with respect to her alleged intoxication, the Court agreed there was no indication she was so impaired that her consent was invalid.

The case was reversed and remanded.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Crosthwaite v. Com., 2014 WL 2040140, (Ky. App. 2014)

FACTS: At some time prior to 2012, Crosthwaite had been hired by Barry to carry for Barry's children, as a live-in nanny. He did so, in Boone County, for eight years and during that time, also attended nursing school. He graduated in 2010 and moved to Lexington to work as a nurse. In 2011, he visited S.B., Barry's then teen-age son, over the Thanksgiving weekend. On Black Friday, they went shopping, along with E.D., a female friend, age 14. Crosthwaite bought a video game system and they returned to the Barry home. Along with others, they began drinking. Later that day, Crosthwaite sexually assaulted E.D.

E.D. reported the assault the next day to a friend, and finally, to her mother, and the police were notified. E.D. refused a vaginal exam, but did talk about the assault to Beatty, the SANE at the hospital. In particular, she denied knowing "any pertinent, distinguishing, characteristics of Crosthwaite" that would identify him.

Ultimately, at trial, Crosthwaite denied the assault, although he admitted he'd licked whipped cream off her abdomen and provided her with a "morning after" pill. He described that he'd had a penile piercing previously and that others he'd had sex with had noticed it. He described it, whereupon the Commonwealth explained to the judge that his description did not match a photo they had of his penis, on his cell phone. The photo was ultimately not introduced into evidence but was, however, shown to the judge and counsel.

Crosthwaite was convicted of Rape 3d and Sexual Abuse 1st. He appealed.

ISSUE: Is it error to read from a report into the record?

HOLDING: Yes

DISCUSSION: First, the Court noted that Crosthwaite did not object to the showing of the photo at trial. When he introduced his claim of a penile piercing, the Court agreed, it was proper to consider a photo that contradicted his claim in cross-examination. Crosthwaite acknowledged that the photo was of his penis. The jury did not see it, but they did see the reaction of the attorneys and there "was some nervous twittering." The reaction of his own attorney was "outside the trial court's purview." The Court denied any objection to it.

Next the Court addressed the SANE nurse's testimony, in which she "read into the record a section of her report," detailing what E.D. had told her. Crosthwaite argued that was hearsay

under KRE 801. The Court noted that statements made by a SANE "serve two purposes – medical treatment and the collection of evidence against a perpetrator.[52] As such, her testimony might be doubly inadmissible, if not made for the purpose of medical treatment. However, since E.D. did testify, and because Crosthwaite actually used the testimony in his own cross-examination of the nurse, it was not error in this particular situation.

Crosthwaite's conviction was affirmed.

Bunch v. Com., 2014 WL 2938403 (Ky. App. 2014)

FACTS: Bunch was charged with the sexual abuse of a young girl in Letcher County. At trial, she testified in detail about the abuse, which occurred between the ages of 4 and 11. She could not recall exact dates, but did know her approximate age when certain events occurred. The detective also testified that her testimony was "consistent with her initial report and all subsequent interviews." Bunch did not testify. He was convicted and appealed.

ISSUE: Is a victim's consistent testimony sufficient to support a conviction?

HOLDING: Yes

DISCUSSION: Bunch argued that the victim's testimony was insufficient, and that he was entitled to a directed verdict. The Court noted that in Garret v. Com., it had ruled that a "victim's testimony is sufficient evident to support a conviction as long as it has been consistent."[53] The fact that the witness could not be certain of exact dates was irrelevant, as it was "wholly unreasonable to expect a child of such tender years to remember specific dates, especially given the long time period over which the abuse occurred."[54]

The Court upheld Bunch's conviction.

Taylor v. Com., 2014 WL 2536891 (Ky.App. 2014)

FACTS: Between February 1 and March 9, 2011, Taylor and a CI engaged in three drug buys in Fayette County. Taylor was then arrested and indicted for trafficking and related charges. At trial, Det. Dunn (Lexington PD) testified that the CI was paid. A recording of the first buy was played and Taylor referred to "60." Dunn testified that was a reference to .6 grams of crack cocaine. The CI gave her what he had purchased following the two buys. During the second buy, it was noted, the CI told Taylor he was "already high." The last buy was planned to be a "take down buy," meaning she would arrest Taylor following the buy. When they moved in, Taylor put something in his mouth and chewed; cocaine base was recovered from his mouth.

Taylor was indicted, convicted and appealed.

ISSUE: May testimony be given as "background" by a non-expert?

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[52] KRE 801, 803(4); Hartsfield v. Com., 277 S.W.3d 239 (Ky. 2009).
[53] 48 S.W. 3d 6 (Ky. 2001).
[54] Farler v. Com., 880 S.W.2d 882 (Ky. App. 1994).

HOLDING: Yes

DISCUSSION: At trial, Dunn was questioned about the CI stating he was already high, and she agreed she would not work with someone under the influence. She confirmed though, that there was a valid reason for the CI to claim to be high (to facilitate the buy) when in fact, he was not. Dunn argued that her statement arguably bolstered the later testimony of the CI, and it is "well established that a witness may not vouch for the truthfulness of another witness."[55] The Court, however, ruled that it did not find that her testimony "either directly or indirectly bolstered" that of the CI, because she offered no opinion either way on the CI's truthfulness. Her statement as to why a prospective buyer would tell a seller they were already high was akin to her testimony as to what "60" meant, background information based on her experience.

The Court upheld his convictions.

TRIAL PROCEDURE / EVIDENCE - INDEPENDENT SOURCE

Barrett v. Com., 2014 WL 2938197 (Ky. App. 2014)

FACTS: On June 3, 2007, Trooper Jones (KSP) pulled Barrett over for speeding (89 in a 65 mph zone) in Henderson County. He was driving a rental car and the trooper asked him about his travel plans, which were limited to the immediate area, even though he had a Georgia OL. He explained he used to live in Georgia. He could not give his mother's address, which was his intended destination. Because Barrett appeared "nervous and short in his answers" and seemed evasive, the trooper had Barrett get out. The trooper asked if there was anything illegal in the car and Barrett hesitated before asking why the trooper would question him about it. He denied consent to search the car so Jones called for K9. Barrett then told him he could search the car, but not the trunk (something Barrett later denied). When Barrett heard the sirens approaching, he took off running towards his car. Trooper Jones was able to apprehend him and ultimately arrested him for resisting arrest. (Barrett testified differently to the above, claiming that the trooper did not call for a K9 until after he was secured in the car.

Jones searched the passenger compartment and found nothing of interest. He could see that the back seat had been "opened a bit, allowing access to the trunk." He pushed it over and could see shoe boxes and a single shoe. One of the shoe boxes had "something wrapped in plastic inside." He waited for K9, and ultimately, the dog alerted on the trunk. Trooper Jones then opened the box and found a brick of cocaine. After failing to follow through as an informant, as originally planned, Barrett was indicted for Trafficking and relating charges, including the original speeding charge. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May evidence, otherwise inadmissibly found, be admitted under the independent source doctrine?

HOLDING: Yes

[55] Stringer v. Com., 956 S.W.2d (Ky. 1997).

DISCUSSION: The Court first looked to the search of the car. At the time it occurred, New York v. Belton[56] was still in effect, since Jones "claimed that he conducted the search of the car incident to Barrett's arrest for resisting arrest," the search of the passenger compartment was arguably valid. However, the search of the trunk was questionable. However, the Court agreed, the items found in the trunk were properly admitted under the independent source doctrine, since presumably, the K9 would have alerted to the drugs in the trunk, which would have given probable cause to search it.[57]

The Court upheld the plea.

TRIAL PROCEDURE / EVIDENCE - RECORDINGS

Irvin v. Com., 2014 WL 1882317 (Ky. App. 2014)

FACTS: Irvin and Bowling lived together in Richmond for a time. On November 2, 2011, Bowling obtained a DVO and Irvin moved out. In February, 2012, he moved back in, however. On April 12, they got into an argument by phone, and Bowling hung up. She did not answer a number of subsequent calls from Irvin. As she was leaving work (some distance away), she called to ask for a welfare check, as she believed that Irvin, a diabetic, might be having a high sugar emergency.

Officer Harris responded and knocked but got no answer. A neighbor reported that Irvin had run out when Harris knocked. Harris did not pursue and apparently left. When Bowling arrived, she called 911 for assistance, as in the meantime, she'd learned that Irvin was threatening to kill her and "had knives laid out." Officers Douglas and Harris met at the house and tried to get in, Bowling arrived in moments, with the key. When the door was opened, Irvin jumped out at them with two knives. He refused to drop them but "did not threaten the two officers" specifically. He was "not speaking coherently." Harris later testified that Irvin asked the officers to kill him.

Harris tried to tase Irvin, but missed, and this made Irvin more angry. He closed himself into the house and they could hear him screaming and throwing things. When additional officers arrived, they tried to talk him out, instead, he began dousing himself and the living room with gasoline. He opened the door and "smoke came billowing out," and he then closed it again, after saying he was "going to blow up the house." Fire and EMS were summoned.

After some 45 minutes, he finally surrendered. Officers found that the house had been extensively damaged; the house and furniture had to be completely cleaned. Total damage came to approximately $15,000.

Irvin was charged with criminal mischief, attempt to commit arson and related charges He tried to call his mental competency into question, to no avail. He then appealed.

ISSUE: Must all incriminating statements made (including recorded voicemails) be disclosed to the defense?

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[56] 453 U.S. 454 (1981)

[57] Johnson v. Com., 179 S.W.3d 882 (Ky. App. 2005).

HOLDING: Yes

DISCUSSION: Irvin argued that three voicemails he'd left should have been excluded for several reasons. First, he argued they were disclosed in an untimely manner. The initial report indicated that there were 17 voicemails – only three had been saved by Bowling, however. Two weeks prior to trial that was disclosed to the defense and copies were provided. (The prosecutor did not learn of them until that time.) The Court agreed that RCr 7.24(1) requires all incriminating statements made by a defendant to be disclosed, and that was done. At no time prior to trial did defense counsel complain about this and the three voicemails only totaled about four minutes. The Court agreed they were properly admitted. Further, although there were 17 voicemails originally, the fact that only three were admitted did not violate the "rule of completeness" under KRE 106, as each recording was complete in itself.[58] He also argued they were irrelevant. The Court noted that the messages "contained an excessive amount of profanity" and he threatened to "smash … televisions" at the house. The Court agreed that the messages were relevant to prove his state of mind. The Court noted that "there was little in the way of a defense [Irvin] could have put forth" since he was caught in the act.

Finally, Irvin argued he was entitled to a "missing evidence" instruction for the 14 messages that had been erased.[59] The Court found no evidence that the three were deleted in bad faith by the officers, they had been deleted by the victim, or that they were exculpatory or that there was anything really different about the deleted messages at all.

The Court affirmed his convictions.

TRIAL PROCEDURE / EVIDENCE – RELIGIOUS PRIVILEGE

Cline v. Com., 2014 WL 2159281, (Ky. App. 2014)

FACTS: Cline was the pastor of a Kenton county church, and C.W., age 13, attended the church and school affiliated with it. C.W. began spending time with Cline. On September 1, 2011, C.W. told his mother that Cline "had been giving him massages and touching him." Cline later told several women with the church that he'd been touching C.W. inappropriately. Cline was indicted. He moved to prohibit one of the women from testifying, claiming KRE 505, the religious privilege.

At a hearing the court reviewed the witness's taped statement and the text messages between the two. The witness testified that she was a unpaid, ordained minister with the church and that they worked together with youth. She did not minister to Cline, although they often talked. She did not consider their communications to be under her role as a minister and had "acted as a mandatory reporter once she learned of the sexual abuse." She had cautioned Cline to stop trying to confide in her, but he elected to continue to do so, by text and phone.

The trial court suppressed the text messages, finding that Cline may have thought he was talking to the witness as a counselor. However, once she told him to stop, he "could no longer believe

[58] See Soto v. Com., 139 S.W.3d 827 (Ky. 2004).
[59] See Estep v. Com., 64 S.W.3d 805 (Ky. 2002)

[she] was acting as a minister counseling him." The Court agreed that the phone conversation was thus admissible. At trial, the witnesses all testified and Cline was convicted of sexual abuse. Cline appealed.

ISSUE: Is information disclosed to a minister always covered under KRE 505?

HOLDING: No

DISCUSSION: Cline argued that the testimony was protected under KRE 505. The Court analyzed the rule, called the "priest-penitent or minister-penitent" privilege. For it to be protected, "it must be communicated to a member of the clergy when that person is acting as a spiritual advisor and the information is not meant to be transferred to anyone else." If they are not acting as such an advisor, it is not protected.[60] The Court affirmed Cline's conviction.

TRIAL PROCEDURE / EVIDENCE – RECUSAL

Minks v. Com., 427 S.W.3d 802 (Ky. 2014)

FACTS: In March, 2011, Deputy Woosley (Breckinridge County SO) went to William Minks' trailer to serve an arrest warrant on John Minks, the current defendant's brother. William confirmed that John was inside, but asked the deputy to wait outside. While waiting, the deputy noted the odor of marijuana coming from inside. He entered, finding John on the couch. He asked John where the marijuana was located and John pulled a plate from under the couch, claiming ownership of it. Deputy Woosley arrested John, and asked William for consent to search. William refused. Deputy Woosley obtained a search warrant from Judge Butler.

Upon executing the search warrant, Deputy Woosley found equipment to manufacture methamphetamine, as well as methamphetamine, at the house. Minks was charged and convicted. He then appealed.

ISSUE: May an adequate description save a warrant that includes an incorrect address?

HOLDING: Yes

DISCUSSION: Minks moved to suppress, and also asked to transfer the case to another judge, because Judge Butler was assigned to preside over the hearing. He was, potentially, a witness as well, because he issued the initial warrant. Judge Butler declined the request. The Court discussed whether Judge Butler could be impartial, under the Judicial Code of Ethics. The Court noted there was no claim that the judge "was not a detached and neutral magistrate capable of making a probable cause determination" for the initial search warrant.

The Court noted that the "jurisprudential landscape concerning this question is decidedly tilted in favor of the Commonwealth's position that recusal was not required." Federal case laws agrees that "a judge is not disqualified from later participating in the case by virtue of the fact

[60] Sanborn v. Com. , 892 S.W.2d 542 (Ky. 1994); Com. v. Buford, 197 S.W. 3d 66 (Ky. 2006); Wainscott v. Com., 562 S.W.2d 628 (Ky. 1978).

that he or she issued the search warrant in the case." The Court agreed that to require recusal, "there must be evidence drawing the judge's impartiality into question" first. The Court agreed there could be such circumstances, but they would have to be shown, not assumed.

With respect to the search warrant itself, the Court agreed that the facts provided "clearly indicate a fair probability that evidence of drug possession or other illegal drug activity would be found" at the trailer. His recitation in the warrant that he'd also obtained information from CIs, although it could have been better discussed in the warrant, only supported that assertion. The warrant did not cite methamphetamine specifically, although that was what was found. Finally, the Court agreed, an error (by street number) was insufficient to render the warrant "constitutionally infirm." Although the street address was incorrect – the officer used the address that was on the original warrant – it did describe the trailer and its location in sufficient detail.

The Court affirmed the conviction.

SHERIFFS

Estepp v. Sheriff Peters (Jordin Schmidt), 2014 WL 2640607 (Ky. App. 2014)

FACTS: Schmidt died as a result of a wreck on July 5, 2006. Two others were also involved in the crash, Estepp and Mayne. In 2008, Estepp filed a lawsuit against Schmidt's mother, Mary, who owned the vehicle, but he did not file an action against Jordin or his estate. As Mary was neither the driver that caused the accident, or a party of interest in the case, her insurance company (Encompass) did not pay the claim. (Had they sued Jordin or his estate, Encompass would have been responsible for that claim, however.) Following litigation, Douglas, the "purported administrator" of Jordin's estate entered an appearance, but the Court determined that he was not properly appointed the administrator of the estate and dismissed him. The trial court allowed a claim of bad faith to be brought against Encompass and subsequently, Sheriff Peters (Rockcastle County) was appointed the public administrator of Jordin's estate.

The trial court ruled, in 2011, that the case was time-barred – not brought within the required time frame because since there was no administrator for the estate, there was no one to serve. Estepp appealed.

ISSUE: May a Sheriff be appointed the public administrator of an estate?

HOLDING: Yes

DISCUSSION: The Court upheld the dismissal of all parties, including Sheriff Peters, and upheld the time-bar.

NOTE: This case reflects KRS 395.390 and .400, which allows for the District Court to appoint the sheriff as the administrator for an estate, when there is no other suitable representative and the county lacks a public administrator.

NOTE: *This case is included to highlight a little-known responsibility of Sheriff's offices.*

EMPLOYMENT – SEXUAL HARASSMENT

Turner v. Jefferson County Clerk's Office, 2014 WL 1407228 (Ky. App. 2014)

FACTS: Turner alleged that she was sexually harassed by another co-worker during her employment at the County Clerk's Office. Specifically, that employee would smack her on the backside, touched his own groin and made "inappropriate gestures, commented about her clothing and "began sleeping on the floor of her office, purportedly in an attempt to have a sexual encounter." She complained to her supervisor and to the County Clerk, but nothing was done – instead, she began to get unfavorable evaluations. (She also alleged that "improper gifts" were received by the office.) Turner was terminated and argued that the termination was as a result of her complaints and thus constituted a retaliatory discharge; she brought a claim of a hostile work environment and retaliation discharge. The trial court dismissed the action and she appealed.

ISSUE: May bad evaluations given following a complaint of harassment be used to support a retaliation claim?

HOLDING: Yes

DISCUSSION: First, the Court looked to the elements of a hostile work environment. The Kentucky Supreme Court had decided:

> For sexual harassment to be actionable under the Meritor standard, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. In other words, hostile environment discrimination exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Moreover, the incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.[61]

The determination as to whether harassment is severe or pervasive is for the jury to decide.[62] The Court agreed that the claims, so far, were sufficiently argued so as to survive dismissal. Further, the Court agreed, prior to reporting the harassment, it was unrefuted that she'd had a satisfactory employment history. The unfavorable reviews began only after she'd reported the harassment. The Court agreed that at this stage, a causal relationship had been proven and allowed the case to go forward.

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[61] Ammerman v. Board of Education of Nicholas County, 30 S.W.3d 793 (Ky. 2000) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)),

[62] Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814 (Ky. 1992).

EMPLOYMENT - WORKER'S COMPENSATION

Scott County Fiscal Court v. Cannon, 2014 WL 1407275 (Ky. App. 2014)

FACTS: Cannon worked as a deputy sheriff in Scott County. On March 14, 2011, her chair rolled out from under her as she sat down and she fell to the concrete floor. She sustained an injury to her lower back and was off approximately five weeks. She returned to work on April 24 on light duty and Scott County made accommodations, for example, she did not perform transport duties due to her inability to sit in a car for extended periods of time. At her deposition in the current case, she noted she'd missed perhaps 10 days since her return, due to the injury, and that she continued to experience pain and numbness in one leg.

At the hearing before the ALJ, the ALJ ruled that the fall brought a previously dormant, prior-existing condition "into disabling reality." The ALJ found it to be work-related and found a 12% whole person impairment. As such, she could not retain her current employment and the ALJ applied the 3x multiplier pursuant to KRS 342.730(1)(c)1. Scott County appealed to the Board, arguing that Cannon had returned to her previous position at the same or even higher pay than before. The Board upheld the decision of the ALJ and Scott County appealed.

ISSUE: In order to support a workers' compensation claim, must an employee be unable to return to the work they previous performed?

HOLDING: Yes

DISCUSSION: The Court noted that, to apply the multipler, the claimant must prove three elements.[63] First, that the claimant could not return to the "type of work" previously performed. Second, the ALJ must agree that the claimant has returned to work at an average weekly wage at least equal to the pre-injury wage. Third, the ALJ "must determine whether the claimant can continue to earn that level of wages into the indefinite future."

With respect to the first, Scott County argued that she had returned to the type of work she previously performed and that prisoner transport wasn't a requirement of the job. The court noted that the analysis must focus on the "specific jobs or tasks that the individual performed, rather than the title of the positon or the job classification." Since she could no longer do the jobs she'd previously done, the Court agreed she was entitled to the multiplier and affirmed the decision of the ALJ and the Board.

CIVIL LITIGATION

Grant (Paul and Patricia) v. City of Raceland, 2014 WL 3020383 (Ky. App. 2014)

FACTS: On October 17, 2001, Daniel Ellison (the step-son and son of the Grants, respectively) was found hanging in a closet at the home. Raceland PD and the Coroner concluded it was a suicide. The Grants did not believe that conclusion, however. In 2003, an inmate reported that another inmate had given a detailed confession of killing Daniel, including

[63] Fawbush v. Gwinn,

his motive and his staging to make it appear to be a suicide. The Grants hired an investigator and eventually, the body was exhumed and autopsied. Experts concluded that injuries to the body indicated a homicide rather than a suicide. Ultimately, the Coroner changed the cause of death to undetermined and the Justice Cabinet reviewed it, but no further criminal investigation ensued.

The Grants filed suit against Raceland and the PD, along with two others, claiming negligence in the training and the investigation. The defendants moved for dismissal on several grounds, which the Court granted. The Grants appealed.

ISSUE: Do officers have a duty to protect individual citizens from crime?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that "although police officers have a general duty to protect citizens from crime, this duty is owed to the public as a whole and cannot be breached by failure to protect an individual in the absence of a special relationship."[64] Such a special relationship exists only when the victim was in state custody, or otherwise restrained by the state, and the violence was committed by a state actor.[65] Because neither was the case in Daniel's death, the Court agreed it was proper to dismiss the case.

Jones (Matt and Lorie) v. Sheriff Bennett, 2014 WL 3026440 (Ky. App. 2014)

FACTS: On May 3, 2009, Matt Jones was injured in a wreck with Deputy Bertram (Russell County SO) who was pursing Lawless, a drunk driver. Jones claimed that Bertram was negligent in chasing Lawless, and also pressed claims against Sheriff Bennett. They claimed summary judgment and the Court agreed, dismissing the case under summary judgment. The Jones's appealed against Bertram and Bennett only.

ISSUE: Is an officer in pursuit of a violator acting within the course and scope of their employment?

HOLDING: Yes

DISCUSSION: The Court agreed that "qualified official immunity is available to public officials who are sued in their representative (official) capacities."[66] To decide if such immunity applies, the Court must look at the facts put forth "to see whether the defendant's actions are discretionary or ministerial."[67]

The Court agreed that the actions of the deputy were "within the course and scope of his employment." He was actively involved in the law enforcement task of pursing a drunk driver.

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[64] Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. App. 1992).
[65] Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995). Grogan v. Com., 577 S.W.2d 4 (Ky. 1979).
[66] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001); Gomex v. Toledo, 446 U.S. 635 (1980).
[67] See Kea-Ham Contracting Inc., v. Floyd County Dev. Auth., Ky., 37 S.W. 3d 703 (Ky. 2000); Franklin County, Kentucky v. Malone, 957 S.W.2d 195 (Ky. 1997); Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790 (Ky. 2009).

As such, both the deputy and the sheriff were entitled to qualified immunity. The Court upheld the dismissal.

Williams v. Cline/McCormick, 2014 WL 2040135 (Ky. App. 2014)

FACTS: Williams "claimed she was mistakenly arrested and jailed upon a criminal complaint charging her with first-degree trafficking in a controlled substance, by Cline (Morehead PD). The case was dismissed and she filed suit against Cline and McCormick (Rowan County Attorney's Office), alleging malicious prosecution, abuse of process, and negligence. The trial court dismissed all claims and she appealed. Initially the Court of Appeals affirmed the dismissal of the abuse of process claim, but reversed the malicious prosecution and negligence claims. The Court noted that the trafficking case "was dismissed upon an agreement with the Commonwealth and with a stipulation by Williams that probable cause existed to believe she committed the crime of trafficking in a controlled substance." To prove malicious prosecution, she would have to "demonstrate that the criminal proceedings were instituted or maintain without probable cause to believe she committed the crime" – and that the claim "would fail if the agreement containing the stipulation of probable cause was valid. It agreed that the "validity of the agreement was dependent upon three factors as outlined in the Sixth Circuit Court of Appeals decision of Coughlen v. Coots.[68] The case was returned to the trial court for reconsideration and it found that "both Cline and McCormick acted in good faith and were cloaked with immunity." The remaining claims were dismissed and Williams appealed.

ISSUE: Must an agreement to dismiss include the three elements of Coughlen?

HOLDING: Yes

DISCUSSION: The Court of Appeals determined that the trial court again "failed to analyze whether the agreement containing the stipulation of probable cause was valid by applying the three factors in" Coughlen. That requirement was mandatory and as such, the Court again remanded the case to the Circuit Court to "specifically address the three factors." With respect to the negligence claim, the Court agreed to that to "determine whether an official acted in good faith for qualified immunity purposes, that "good faith has both an objective component and a subjective component."

> The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights."[69] The subjective component refers to "permissible intentions." Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury...."[70] As further elucidated, the Supreme Court explained: Objectively, a court must ask whether the behavior demonstrates "a

[68] 5 F.3d 970 (6th Cir. 1993)
[69] Wood v. Strickland, 420 U.S. 308 (1975).
[70] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001) (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

> presumptive knowledge of and respect for basic, unquestioned constitutional rights." Subjectively, the court's inquiry is whether the official has behaved with "permissible intentions."[71]

Again, the Circuit Court failed to address both aspects of good faith, and the matter was vacated for a specific determination of both.

The matter was remanded to the trial court for further proceedings.

Plummer v. Lake, 2014 WL 1513294 (Ky. App. 2014)

FACTS: On January 16, 2009, Brandon Plummer was killed in a head-on collision with Cunningham, in Lancaster. Earlier that day, several 911 calls had reported a vehicle (Cunningham) being driven "erratically and dangerously." Lancaster PD radioed its officers to be on the lookout for the identified vehicle and Det. Lake and Officer Royce responded.

Det. Lake was driving an unmarked but fully equipped cruiser. He was flagged by a driver as he proceeded in search of the vehicle and was pointed towards Cunningham. The same driver, apparently, also approached Royce and directed him to Cunningham's car – Royce contacted Lake but did not leave his position, where he was parked. Lake spotted the vehicle at the end of a driveway but could not see the license plate. He saw the driver "hanging outside the sedan door looking 'lifeless'" and he "became concerned that the driver was experiencing a medical emergency." He turned around and drove back toward the car, and at that time could see the plate and that the driver was back in the car. He pulled into a nearby driveway because there wasn't sufficient room in the same driveway. He called Royce to assist and Royce then turned on his dashcam and headed that way.

Lake backed and headed toward Cunningham's vehicle; both officers had emergency lights activated. Instead of pulling forward, Cunningham backed out, waved at Lake and "drove off at a normal speed." Royce slightly angled his car in an attempt to get Cunningham to stop, but he did not do so, apparently almost striking Royce's car. The officers turned around, activated sirens and went after Cunningham – Lake was in the lead.

Because of the curves of Ky. 39, they lost visual contact periodically. Cunningham made an abrupt turn onto a side road and accelerated – Lake later estimated that Cunningham was going at least 100 miles an hour. Dispatch advised that Royce, in a marked car, should take the lead, but due to radio traffic, they didn't hear that request. "Both officers then slowed down when they realized that Cunningham was driving dangerously fast with no intention of stopping." When out of sight of the officers, he lost control and struck Plummer. Both were killed.

The Plummers (Brandon's parents) filed suit against Cunningham, the officers and Lancaster, alleged "direct negligence" against the officers and Lancaster, and vicarious liability against the City. Garrard County ruled in favor of the officers and the City, finding that "there is no duty for police officers to "contain" a suspect and, further, the decision to stop a subject is clearly discretionary, thereby entitling the officers to qualified official immunity." Further, since

[71] Id. (quoting Harlow, 457 U.S. at 815). Bryant v. Pulaski County Det. Center, 330 S.W.3d 46 (Ky. 2011).

neither office was directly involved in the crash, they were "not the legal cause of the collision between Cunningham and Plummer." The trial court concluded that the officers' actions to follow were not ministerial, but discretionary. The Plummers interpreted the Policy Manual to convert it to ministerial. Further, the Court agreed there was no evidence that the Lancaster PD failed to properly train or supervise them.

The Plummers appealed.

ISSUE: Do violations of a pursuit policy automatically lead to a finding of negligence?

HOLDING: No

DISCUSSION: First, the Court reviewed the claim that the "the police officers, Lake and Royce, operated their police vehicles in a negligent and careless manner, which was in direct contravention of the policies and procedures of the Lancaster Police Department Manual." They pointed first, to the officers' failure to "contain" Cunningham, next, to their high-speed pursuit and finally, to their failure to terminate the pursuit, arguing the latter "was a ministerial act rather than a discretionary act."

The Court discussed the doctrine of qualified official immunity, as according to "public officers and employees for acts performed in the exercise of their discretionary functions."[72] Further it is "based on the function performed and not by the status or title of the officer or employee."[73] In addition. "when public officers and employees are sued in their individual capacities, they only have the opportunity for qualified official immunity, which affords protection from damage liability for good faith judgment calls made in a legally uncertain environment." In other words, rather than sharing a government's immunity, "public employees acting in their individual capacities are entitled only to official immunity for their discretionary acts occurring within the scope of their employment and to no immunity for their ministerial acts."

> Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."

The Court emphasized … "The potential liability of a public employee for negligent acts again rests upon the distinction between discretionary and ministerial functions. An employee is not liable for discretionary acts performed in good faith but is exposed to liability for those considered ministerial.[74]

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[72] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[73] Citing Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989).
[74] Estate of Clark ex rel. Mitchell v. Daviess County, 105 S.W.3d 841 (Ky. App. 2003).

To determine the extent, if any, of the officers' liability in this case, the Court was called upon to "scrutinize whether their actions were discretionary or ministerial." First, the Court looked to "whether any known rules governed the officers' actions" – in this case there was state law (KRS 189.940(1)(b)) and a policy manual. The Court agreed the determination was not an "easy or straightforward task." As most tasks included a blend, the court must look at the "dominant nature of the act."[75]

The Court looked to the Policy and Procedures Manual, which stated under Chapter 17.10

> It shall be the policy of the Lancaster Police Department (LPD) to limit the use of vehicular pursuits to those situations, which involve the attempted apprehension of persons wanted for the commission of criminal acts that threaten, may have threatened, or will threaten health, life, or the safety of a person or persons.
>
> 17.10(A) of the policy:
> A. The LANCASTER Police Department will conduct vehicle pursuits only in the following instances:
> 1. On-sight pursuit of a known or suspected felon.
> Note: A felony charge that is a result of a police officer initiated pursuit, specifically, wanton endangerment, **is not case for continued pursuit.** (Emphasis in original)
> 2. On-sight pursuit of a traffic or misdemeanor violator, only if witnessed by the police officer or if a warrant is known to be in the file.
> 3. When directed by a supervisor to assist in a police pursuit.

The Plummers argued that they could not justify the pursuit, but "the undisputed facts show that Cunningham fled the traffic stop prior to any pursuit." His flight violated KRS 520.095(2) – Fleeing or Evading Police, a felony. As such, "this was not a felony charge that resulted from a police-initiated pursuit."

They also argued that Lake and Royce failed to provide information spelled out by the policy – but the Court noted that "dispatch already knew the unit numbers of the vehicles and description of Cunningham's vehicle."

Finally, the argued that Det. Lake being in the lead "violated Section 17.10(J):

> Officers in unmarked police vehicles should refrain from participating in vehicular pursuit. However if an officer in an unmarked vehicle is involved in a vehicle pursuit he should use the utmost of caution and awareness of safe vehicle operations. As soon as a marked police unit is in pursuit the unmarked police unit will become the secondary pursuit vehicle.

The Court noted that the language did not prohibit it, but only advised that it should not be done – and the Court noted, "for Royce to have assumed the lead, he would have had to pass Lake in the oncoming traffic lane on a narrow, curvy road in a densely populated rural area."

[75] Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010).

The Court agreed that nothing indicated that the officers "violated the spirit and rationale of the Manual – to keep both police and citizenry safe."

The Court continued:

> In Kentucky, qualified official immunity applies to public officials sued in their individual capacity if their actions were discretionary rather than ministerial, made in good faith, with the scope of their authority or employment, and do not violate a person's clearly established rights.[76] No evidence has been provided that Lake and Royce acted in bad faith and/or outside the scope of their authority as police officers. In addition, it has not been alleged than any person's constitutional rights were infringed upon.
>
> The Plummers do not contest the trial court's reasoning that the officers' decision to stop Cunningham, their methodology for doing so, and the decision to initiate a pursuit were discretionary. Nonetheless, they maintain that the officers' decision to continue and not stop the pursuit was ministerial and, therefore, under this line of reasoning, the officers are not entitled to qualified official immunity.
>
> According to Yanero, a discretionary act involves the exercise of discretion and judgment or personal deliberation, and a ministerial act is one that is "absolute, certain, and imperative, involving merely execution of a specific act -arising from fixed and designated facts." Further, as observed in Haney, since few acts are purely discretionary or purely ministerial, we must look for the "dominant nature of the act."[77]
> Further, the purpose of the immunity is to protect public employees - in the instant case, Lake and Royce - from liability for a good faith judgment in a legally uncertain environment.[78]

The Plummers acknowledged that the decision to pursue was discretionary. However, they failed to provide any rationale "to support that the decision to end the pursuit was somehow ministerial other than their reliance" on the manual, which provided no "absolute instruction." In such situations, the officers had to "ascertain whether stopping or continuing the pursuit is more advisable." Further, the Court recognized that law enforcement had received reports about Cunningham's erratic, reckless and dangerous driving, and noted that they had, in fact, stopped the pursuit prior to the crash.

The Court continued:

> It is our belief that the decision to discontinue the pursuit is logically an extension of the officers' judgment and not separable from the decisions to stop and pursue Cunningham, which the Plummers have already acknowledged was discretionary. This decision is discretionary because it was necessary to discern the correct action in a legally uncertain environment. This reasoning is supported by the federal decision, Walker v.

[76] Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006).
[77] *Haney*, 311 S.W.3d at 240.
[78] Jefferson County Fiscal Court v. Peerce, 132 S.W.3d 824 (Ky. 2004).

> Davis, which determined that law enforcement's decision to initiate or continue a pursuit of a suspect is discretionary in nature.[79]

The Court concluded:

> Finally, from a public policy perspective, it is important to consider the impact of withholding immunity when ascertaining whether acts are discretionary or ministerial. Police officers have a duty to protect the public. In hind sight, the aftermath of Lake and Royce not pursing Cunningham could have been equally devastating to the public at large.

The Court held that the officers were entitled to qualified official immunity for discretionary actions, and upheld the grant of summary judgment in their favor.

With respect to an argument for negligence, the court agreed that officers are not exonerated for their "duty of care in the operation and control of their vehicles." In Jones v. Lathram, the Court had agreed that the act of safely driving a cruiser, even in emergency situations, was generally ministerial.[80] However, unless previous case law, in this case, neither officers was involved in a collision. Kentucky law provides a speed exemption, provided the officers had lights and siren activated, which was the case in this situation. The Court found no evidence that "they did not drive with care in this difficult situation."

> In addition, there was no statute or case law that placed a duty on officers to "contain" a suspect in a crime. Negligence requires that the plaintiff prove four elements: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages.[81] Further, "the failure to prove any requisite element is fatal to a negligence claim."[82] With respect to duty, the Court looked to City of Florence, Kentucky v. Chipman,[83] to identify any potential duties. In this case, Plummer "was a motorist with no special relationship to Lake or Royce" – he was "not in state custody or otherwise restrained at the time the injury-producing act occurred." Absent that, they had "no affirmative legal duty to act on his behalf." Further, the Court recognized the "public duty doctrine" – in which "public officials are not required to insure the safety of every member of the public, nor are they personally accountable because the individual is a public official with a general duty of protecting the public. To impose a universal duty of care on public officials would severely impact their ability to engage in any discretionary decision-making on the spot. This doctrine reinforces that to impose a duty of care on a public official, there must exist a special relationship between the official and the third party."

With respect to legal causation for the crash, the court looked to the dispositive case of Chambers v. Ideal Pure Milk Co., in which it said "police cannot be made insurers of the

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[79] Walker v. Davis, 643 F.Supp.2d 921(W. D. Ky. 2009).
[80] 150 S.W.3d 50 (Ky. 2004),
[81] Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003).
[82] Illinois Cent. R.R. v. Vincent, 412 S.W.2d 874 (Ky. 1967) (quoting Warfield Natural Gas Co. v. Allen, 59 S.W.2d 534 (1933)).
[83] 38 S.W.3d 387 (Ky. 2001).

conduct of the culprits they chase."[84] The Court agreed the officers did not cause the wreck, which is fatal to the negligence claim.

The Court upheld the qualified official immunity and also the dismissal of the negligence claim.

Day v. City of Henderson, 2014 WL 1882286 (Ky. App. 2014)

FACTS: At about midnight, on February 11, 2011, a neighbor to Day's business noticed a man walking up to the fence line of the business. He called police. Before they arrived, he saw a second man join the first. Police apparently caught one of the two men. On February 15, he saw a man jump the fence and meet someone inside. Again officers responded and Officer Shehorn spotted a man looking into windows. He lost sight of the man, however.

Officer Hargitt responded with Santo, his K9. In the meantime, officers set up a perimeter at the fence line. When Officer Hargitt arrived, the decided to start searching the buildings, with Santo on lead. At the greenhouse, Hargitt challenged any occupants and then released Santo, who found Stone lying under some plants. Santo bit Stone. Hargitt apprehended Stone and put Santo back on lead. Another officer indicated someone was in the office building. Again Hargitt challenged the occupants and got no response, and then released Santo. Santo found a man inside and again bit him, but "unfortunately, this was not an intruder" – it was Day. Day was later learned to occasionally sleep at the location when it was cold, in case the greenhouse heaters failed.

Day sued Henderson and the officers involved, under trespassing and related claims. The officers claimed summary judgment under the Claims against Local Government, KRS 65.200. The trial court agreed that the officers' actions were discretionary and not ministerial. Although the agency had a K9 policy, that "did not transform the discretionary acts into ministerial acts." In this situation, the "officers were required to make moment by moment decisions in a decidedly fluid situation taking into account multiple factors." There was no proof Hargitt violated any policies or acted in bad faith. Day appealed.

ISSUE: Are discretionary acts protected by statutory immunity?

HOLDING: Yes

DISCUSSION: The Court noted that summary judgment, under state law, is only proper when there is proof that the plaintiff "could not prevail under any circumstances" – a very high standard.[85] Further, the Court noted "qualified official immunity" is never available for ministerial acts, but may be for discretionary acts. [86] That protection applies "for good faith judgment calls made in a legally uncertain environment."[87] In most cases, good faith is presumed absent a showing of bad faith. The Court looked to Haugh v. City of Louisville, which involved an entry and use of nonlethal force, as dispositive.[88]

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[84] 245 S.W.2d 589 (Ky. 1952),
[85] Steelvest v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).
[86] Yanero v. Davis, 65 S.W. 3d 510 (Ky. 2001).
[87] Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006).
[88] 242 S.W.3d 683 (Ky. App. 2007).

The Court agreed that with no evidence of bad faith, and at most, an honest oversight in not realizing that the property owner might be at his business at night, the Court agreed that Hargitt acted in a discretionary manner to use "a police dog to search a business possibly being burglarized." Finding no liability on Hargitt meant that Henderson was also not liable. The Court affirmed the trial court's decision.

STATUTORY CHALLENGE

Prather v. Com., 2014 WL 2536866 (Ky. App. 2014)

FACTS: Prather was charged in McCracken County for forcing his adult son into an incestuous relationship with his wife, the victim's stepmother. Allegedly, in 2011, the son was ordered to have sex with his stepmother and complied out of fear that his father would beat him. Ultimately, the three engaged in simultaneous sexual acts. The victim reported what had occurred and Prather was charged with Complicity to Incest, KRS 530.020. He was convicted and appealed.

ISSUE: Must a challenge to the validity of a statute include the Attorney General?

HOLDING: Yes

DISCUSSION: Upon appeal, Prather argued that the three of them had never been part of a "family unit." The Court noted that the statute, however, expressly prohibits a relationship between stepparent and stepchild, but he argued that only applied if they were in an actual "family unit," and that the stepmother never stood in that relationship with the victim as he was raised primarily by his biological mother. He claimed the stepparent relationship to be "merely technical." The Court disagreed, finding that the relationship exists no matter the age or "degree of familial bond" between them. The Court noted that "prohibiting sexual relations between stepparents and their stepchildren is rationally related to preventing a parent from using her influence in pursuit of her own sexual gratification."

In addition, the Court noted that, as a challenge to a statute, to have moved forward, Prather would have needed to make the mandatory notification to the Attorney General, something he failed to do.

SIXTH CIRCUIT

SEARCH & SEIZURE - ARREST

U.S. v. Ocean, 564 Fed.Appx. 765 (6th Cir. OH 2014)

FACTS: In August, 2011, Det. Carpenter (unidentified Ohio agency) investigated a drug dealer, with the aid of a CI. He finally learned the dealer was Ocean, who had outstanding warrants already. He obtained another warrant, along with a search warrant, "for an apartment where he had observed a controlled drug purchase involving Ocean." He reviewed Ocean's extensive criminal history, including drug, weapons, assault, etc.

On November 16, they executed the warrants, but did not find Ocean at the apartment for which they held a search warrant. They learned he was at the nearby apartment of his girlfriend, Tucker. When they asked, she denied he was there, but at some point, realizing he was there, they "called out to him" and he emerged. He was arrested in a hallway. (The Court noted that the sequence of events and specific locations were not clear in the records.) The officers handcuffed and searched Ocean and then did a protective sweep of the apartment, but did not search the bedroom. They did find cocaine in the toilet tank, however.

Tucker was questioned after being taken into a bedroom to get her away from Ocean. At that point, they spotted a firearm in plain view on a closet floor. Tucker said Ocean (a convicted felon) owned it, but that she knew about it. Ocean was charged with possession of the gun, and argued for suppression. Ocean argued it was improper to take Tucker into the bedroom and further, that she had a reason to lie, but the trial court ruled it was proper to remove her to another room for questioning. Ocean appealed.

ISSUE: Is moving a witness into a room away from a suspect permitted?

HOLDING: Yes

DISCUSSION: Ocean argued that moving Tucker into the bedroom and entering with her, "constituted an impermissible search under" the Fourth Amendment, and further, could not be justified as a protective sweep, either. The Court found it reasonable, however, to move a potential witness into a room where they could be questioned privately and there was no indication she was uncooperative or dragged into the bedroom. The arrest warrant further justified seizing Ocean, and holding Tucker, separate from him, as well.[89]

The Court upheld the discovery of the weapon and the denial of the motion to suppress.

[89] Michigan v. Summers

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Grooms, 566 Fed.Appx. 485 (6th Circ. TN 2014)

FACTS: Grooms operated a small grocery near the Great Smoky Mountains National Park, in Tennessee. Much of the business, however, involved the sale of cocaine and prescription drugs, as well as ginseng. In 2008, the U.S. Fish and Wildlife Service began investigating the harvesting of ginseng in the park and to that end, Agent Chisdock paid an undercover visit to the store. Over several months, he witnessed and recorded various transactions; Grooms was very open about his activities. Finally, in September, 2009, using that information, Officer Kimbrough, a member of a DEA task force, obtained search warrants for three locations connected to Grooms and seized a number of items.

Grooms and other family members were indicted for trafficking and weapons related charges. He moved to suppress the evidence seized from the store, which was denied. He was convicted of almost all of the charges, and appealed.

ISSUE: Does evidence of an ongoing criminal enterprise negate a staleness argument?

HOLDING: Yes

DISCUSSION: First, Grooms argued that the search warrant affidavit did not sufficiently aver as to the reliability of the CIs and that the information was stale (due to the passage of time). The Court agreed that an affidavit could be based on CI information, so long as there is a reasonable assurance that the information is credible and reliable.[90] The Court noted that while there were some inconsistencies, Grooms ignored the fact that Agent Chisdock's visits were discussed in detail, and that his information corroborated and buttressed that of the CI. The staleness argument failed because there was evidence of "the existence of an ongoing criminal enterprise."[91] The Court agreed the search warrant affidavit was sufficient.

Grooms convictions were affirmed.

SEARCH & SEIZURE – TERRY

U.S. v. Thompson, 2014 WL 2869169 (6th Cir. OH 2014)

FACTS: On October 12, 2011, King, the bartender, called 911 from a Toledo (OH) bar, to report that one patron had threatened another with a gun. She described the suspect, who had left the bar. Officers Bocik and Williamson arrived and spotted a person resembling the description, outside the bar. Bocik ordered the man (Thompson) to stop and was ignored. He repeated his order, the man turned, shoved him and then walked away. The two officers grabbed him and took him to the ground, during the scuffle, Officer Windnagle saw Thompson drop a handgun.

[90] U.S. v. Williams, 224 F.3d 530 (6th Cir. 2000).
[91] U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006).

Thompson, a felon, was charged with the possession of the gun. He was denied his motion to suppress and convicted. He then appealed.

ISSUE: Does a tip by a named information have credibility?

HOLDING: Yes

DISCUSSION: Thompson argued that the officers lacked reasonable suspicion to stop and search him, because they lacked any "corroborating evidence to support the reliability of the 911 call." However, in this case, a call by a named citizen, "especially those who give detailed accounts of the alleged conduct," do have credibility. However, the Court noted, "a person must yield to be seized."[92] When he ignored the request, he was not seized – and when he turned and laid hands on the officer, that "gave the officers probable cause to search and seize Thompson."[93] When they tackled him, and the gun fell to the ground, it had "fallen into plain view" and the officers were right to seize it.[94]

The Court upheld Thompson's conviction.

SEARCH & SEIZURE – TRAFFIC

U.S. v. Love, 561 Fed.Appx. 480 (6th Cir. TN 2014)

FACTS: The Memphis PD received a tip that Love and Eddings were selling drugs from an identified home. The tipster described the two men as well as Love's vehicle. Officer Norris, doing surveillance, saw that an "unusual number of cars" came and went with visitors being met by Love and leaving after only a few minutes. Love also left the residence several times in the identified vehicle. One day, they spotted him leaving in the vehicle, with a "large potato chip bag" and fail to use his seatbelt. They followed him and watched him make several unsignaled turns. Officer Brown was summoned to make a traffic stop; he also observed an unsignaled turn and that Love was not wearing a seatbelt. Brown made the stop and as he approached, detected the smell of marijuana. He saw marijuana in plain view, frisked Love and found a handgun. Love was arrested. A K-9 alerted to the presence of drugs and approximately two pounds of marijuana was found.

Officers Norris and Graves went back to the house, where they saw Eddings leaving. When he spotted the officers, he tried to swallow a large bag of marijuana. He spit it out on demand and was arrested. The officers swept the house and observed more marijuana. Officer Graves obtained a warrant, describing all that had occurred.

Love was indicted on marijuana trafficking, as well as for the firearm since he was a convicted felon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an observation of a traffic violation justify a stop?

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[92] California v. Hodari D., 499 U.S. 621 (1991).
[93] U.S. v. Allen, 619 F.3d 518 (6th Cir. 2010).
[94] Shamaeizadeh v. Cunigan, 338 F.3d 535 (6th Cir. 2003).

HOLDING: Yes

DISCUSSION: Love argued that he did not commit any traffic violations and thus, the stop was not justified. The trial court had chosen to believe the officers over Love; the Court did not choose to disturb that finding. The Court did not inconsistences between the officers' statements about what had occurred, what they could see, but the Court noted that "none of these arguments leave [it] with a firm conviction that a mistake was made." Because they observed traffic violations, they were justified in making the stop.[95]

Love also moved to suppress what was seen during the house search. The Court noted that the prosecution "conceded that the initial protective sweep of the residence was constitutionally suspect." However, although the warrant affidavit was based in part on evidence seen during that sweep, removing that reference still allowed for ample probable cause to support it. The Court upheld the warrant and Love's plea.

Kinlin v. Kline, 749 F.3d 573 (6th Cir. OH 2014)

FACTS: On March 11, 2011, Trooper Kline (Ohio State Patrol) watched Kinlin change lanes in an unsafe manner and made a traffic stop. Kinlin admitted having had two beers earlier, but refused to take a sobriety test. The trooper arrested him. Kinlin finally agreed to a test, but the trooper did not give him one. Later it was determined that his blood alcohol was minimal, well below the legal limit in Ohio.

Kinlin filed suit under 42 U.S.C. §1983, claiming that the trooper lacked probable cause for the stop. Both parties moved for summary judgment. The trial court agreed with the trooper, finding sufficient cause for the stop, which was visible, in part, on the officer's video camera. Kinlin appealed.

ISSUE: Is probable cause to be assessed at the moment an arrest is made?

HOLDING: Yes

DISCUSSION: The Court noted that probable cause "quite familiarly, depends on 'whether at the moment the arrest was made … the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.'"[96] In this case, the Court agreed that the trooper had objective probable cause, supported by the video recording, to initiate the stop. Once Kinlin admitted he had been drinking, smelled of an alcoholic beverage and thrice refused a FST, the Court agreed the trooper had enough to make the arrest, as well. Looking at the totality of the circumstances, the Court agreed that probable cause existed. Further, even if in hindsight, that was not the case, there was still sufficient evidence to find that qualified immunity protected Trooper Kline.

The decision finding summary judgment for Trooper Kline was affirmed.

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[95] U.S. v. Street, 614 F.3d 228 (6th Cir. 2010).
[96] U.S. v. Harness, 453 F.3d 752 (6th Cir. 2006); Beck v. Ohio, 379 U.S. 89 (1964).

SUSPECT ID

Legenzoff v. Steckel, 564 Fed.Appx. 136 (6th Cir. MI 2014)

FACTS: During the summer of 2007, Warren MI police received a number of larceny reports that shared a common modus operandi. An elderly man would pose as a friend or neighbor of the victim, ask for a drink, ask to use the restroom and then steal cash or items. He was described by victims. Nearly a year later, Canton police took two reports that were strikingly similar. Through a message in a statewide law enforcement network, several agencies reported similar cases, one of which named Legenzoff as a suspect. (They had been unable to prosecute due to the subsequent death of the witnesses.) Legenzoff was known to travel through the areas in question on business.

Canton police created a photo array, using photos through their state system, that include Legenzoff and five other similar men. The men wore different styles of shirts and most importantly, because Legenzoff's photo was from his driver's license, it had a blue background as opposed to gray for the other five. It was shown to two witnesses, both of whom selected Legenzoff's photo and expressed complete confidence. The detective then met with another witness, who also selected Legenzoff's photo but was not quite as confident, but that witness's wife, who has also seen the thief, identified him positively. Canton police obtained a warrant for Legenzoff in one of the two larcenies in their city – the other was denied. Ultimately, he was not convicted.

Legenzoff filed suit against Canton under 42 U.S.C. §1983, arguing that the agency had "used unduly suggestive identification procedures" and falsely arrested him. The two detectives involved moved for summary judgment – which was granted with respect to the identification claim but denied with respect to claims of unlawful arrest and malicious prosecution. The Court noted there was a dispute as to whether the photos shown were in color or black & white, and that a color array would have highlighted the difference in background color. That, combined with other differences in the photo might have, the Court concluded, tainted the identification. The detectives appealed.

ISSUE: Is an identification by an eyewitness sufficient to support probable cause?

HOLDING: Yes

DISCUSSION: The Court noted that when there is a "genuine issue of material fact," summary judgment under qualified immunity is not possible and interlocutory review is usually barred. With respect to whether Legenzoff had a constitutional right against false arrest (an arrest lacking in probable cause) - the Court framed the question as "whether it was 'clearly established that the circumstances with which [the officers were] confronted did not constitute probable cause'" under the Fourth Amendment. In Ahlers v. Schebel, it had been held that "an eye witness identification and accusation, by itself, is sufficient to establish probable cause."[97] The eyewitnesses gave clear, unequivocal identifications that, "even if the photo array was

[97] 188 F.3d 365 (6th Cir. 1999).

flawed," the identifications were reliable. With respect to the other, less certain, identification by one of the witnesses, the Court agreed that "probable cause does not require perfection, and witness identifications are 'entitled to a presumption of reliability and veracity.'"[98] Certainly, the Court agreed, "If an accusation by a single individual is sufficient to constitute probable cause, per Ahlers, it stands to reason that independent identification by two people, such as the Temples or the Whipples, would more than suffice, especially where the identifications are as strong as they are here."

Looking to the alleged discrepancies, the Court first addressed the difference in the background color, In U.S. v. McComb[99] and U.S. v. Soto[100] the Sixth Circuit had held that a difference in color did not, in itself, make the photo array improper. With respect to hair color, with Legenzoff's being the only photo that showed "purely white hair" – the hair color of the others ranged in shades from grayish-white to darker shades – the Court agreed that was sufficient based upon witness statements that the subject had gray hair. With respect the clothing, as only Legenzoff and another photo showed "nice clothing" – a collared shirt – the Court found that also be unpersuasive.

In both instances, the two witnesses (each a couple) were together when shown the photo arrays. But, the Court noted, one couple made the identifications independently, without discussion. In the other, one of the witnesses was initially alone when he made an equivocal identification, but was with his wife when she made a definite one. (And he still maintained that he was not sure.) Although "the identifications arguably might have been stronger if each had taken place in isolation from other potential witnesses, we cannot say that the conditions tainted the identifications, given the other indicia of reliability." Feedback provided after the identifications to the witnesses could not, of course, have tainted those identifications.

Taken together, the Court found no case law cited that would clearly indicate to the detectives "that a photo array taken under these conditions would not satisfy a probable cause determination." The Court agreed the detectives were entitled to qualified immunity on the false arrest claim.

The Court also determined that Legenzoff did not meet the standard for a malicious prosecution claim and ruled that the officers were entitled to qualified immunity on that claim as well. The Court reversed the trial court's decisions.

INTERROGATION

U.S. v. Miller (and others), 562 Fed.Appx. 272, 6th Cir. TN 2014)

FACTS: Miller, Dorsey, Carr, Maddox, Cooper, Ruffin and DeJesus were collectively convicted of a major conspiracy involving drug trafficking, money laundering, witness

[9898] Peet v. City of Detroit, 502 F.3d 557 ( )

[99] If an accusation by a single individual is sufficient to constitute probable cause, per Ahlers, it stands to reason that independent identification by two people, such as the Temples or the Whipples, would more than suffice, especially where the identifications are as strong as they are here.

[100] 124 F. App'x 956 (6th Cir. 2005)

intimidation and ammunition. Further facts with respect to Ruffin are developed as needed in the discussion.

ISSUE: May a properly given Miranda cure an improperly given one?

HOLDING: Yes

DISCUSSON: Among a myriad of other issues, Ruffin argued that Vicchio arrested him while driving through Johnson City, TN. He was given Miranda while being placed into the car and subsequently made incriminating statements in the car. He was taken to a DEA field office, again given Miranda and made additional incriminating statements. The trial court ruled, after a suppression hearing, to suppress the statements he made initially, finding that the Miranda warnings were insufficient "because it did not make clear Ruffin had the right to a lawyer *before* undergoing questioning." He admitted, however, the statements made at the field office, finding that the second Miranda was given properly. Further, the Court had rejected his argument that he was so impaired on cocaine that he could not give a knowing and voluntary waiver.

Ruffin argued that the second interrogation should have been suppressed under Missouri v. Seibert.[101] He argued that the "second round of questioning was merely a continuation of the first round, with the same officers asking the same or similar questions approximately thirty minutes later." The Court contrasted Seibert with Bobby v. Dixon and agreed that "a properly mirandized confession" — "following an unwarned and inadmissible confession" — may be admissible, if there was no "'nexus'" between the two sets of statements and if the circumstances of the interrogation had changed."[102] In Ruffin's situation, the two sets of questioning did not actually overlap, as each had a different focus. In fact, a video from the car made it clear that Vicchio had simply told him that he wanted Ruffin to tell him about the drug distribution, and that it was not part of an effort to question, but simply an explanation. (Vicchio stated he had no intention of interrogating Ruffin where others could see him and identify him as a "snitch.") Despite another agent's statement that suggested an improper intent, the agent's "statement does not show that Vicchio intentionally delivered an incomplete set of warnings at the scene of the arrest in order to interrogate Ruffin later outside the presence of counsel."

The Court agreed that the interrogation was properly admitted and that Ruffin did, in fact, waive his rights. The other agent testified that Ruffin "was extremely forthcoming," and a review of the situation showed no coercion by the officers. Seasoned agents testified that there was no indication of intoxication – and the trial court ruled that his statement to the effect that he was "f**ked up" did not suggest intoxication but was connected instead to his legal situation. He did, apparently test positive for cocaine that night, but that did not mean he was so impaired as to invalidate his waiver. [103]

After ruling on a multitude of other issues with respect to all of the defendants, the Court upheld Ruffin's conviction.

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[101] 542 U.S. 600 (2004).
[102] 132 S. Ct. 26 (2011).
[103] See U.S v. Dunn, 269 F. App'x 567 (6th Cir. 2008).

Hall v. Beckstrom, 563 Fed.Appx. 338 (6th Cir. KY 2014)

FACTS: On April 6, 2004, Hall, age 19, was walking with his uncle (Derek) and another family member (Dewayne), through downtown Louisville. Hall was considered to be seriously mentally handicapped. The three men came across Agnew, who was homeless and sleeping in an alley. Hall punched Agnew, later stating he saw him "reach for something." Hall and his uncle kicked Agnew; he later struck him with a ceramic pot he found nearby and stabbed him in the leg. Dewayne picked up Agnew's wallet, found it empty, and left. In the meantime, Derek continued to beat Agnew, despite Hall pleading with him to stop. Hall later stated that he was afraid to physically interfere, however. He walked away and returned several times. At one point, Derek viciously sodomized Agnew with several items.

At about 4 a.m., Officers Heitzman and Thomas (Louisville Metro PD) came across the two men. Hall ran off and disappeared, in fact, he'd run into a nearby shelter where he was staying. The officers found Agnew unconscious and he was immediately transported. He died 53 days later. Derek approached as the officers were working the scene; they found bloody sticks and the ceramic pot. A little later, Derek was arrested for Alcohol Intoxication and Disorderly Conduct, but he'd not yet been linked to the beating. Another homeless man, a few hours later, identified Hall from a photopak but disappeared before he could testify at trial.

Hall was arrested and questioned a few hours later. He was given a Miranda waiver form, which he initialed at the appropriate places, and signed and dated it as well. He stated he'd completed the 11th grade, although it was later learned he could read at only a second-grade level. As the questioning went on, he admitted to having struck Agnew multiple times and kicked him, because Derek was doing it. He also admitted stabbing him with the pocketknife found in the alley. He finally admitted that he watched Derek sodomize Agnew, although he denied having assisted him. Derek was then arrested. Subsequent testing of their clothing indicated a limited amount of spatter on Hall's pants, while Derek's pants and boots were soaked.

Following the arrests, Hall was allegedly pressured by Derek to "take the case" – take responsibility for what had occurred, and he signed a notarized letter to that effect. However, Hall, while in custody, contacted the detective and said he did not want to "take the fall" for it. The detective reminded him of his Miranda rights. He affirmed he wished to waive his rights and revealed what Dewayne did, and emphasized that only Derek committed the sodomy.

Following Agnew's death, all three men were jointly tried for murder, Robbery 1st and Sodomy 1st. A number of motions to limit or exclude testimony was decided, among others, that the testimony of the missing witness that identified Hall would be excluded. However, Dewayne's defense attorney mentioned him in opening statements, and two detectives did so as well, although the jury was cautioned to disregard. (Another witness, who visited the victim every day in the hospital and read to him, despite him being in a coma, was allowed to testify to "humanize" the victim. She also testified as to the thousands of cards he received while in the hospital, from all over the world.) Dewayne pled guilty during the trial to Robbery 2nd, while the other two were convicted of all three charges. Hall appealed and ultimately, the Kentucky Supreme Court upheld his convictions. He then appealed to the federal court under habeas corpus.

ISSUE: Is fatigue because someone has stayed up all night (prior to arrest) enough to invalidate a confession?

HOLDING: No

DISCUSSION: First, the Court addressed Hall's assertion that his initial admissions made to the detective were admitted in error, because his "statement was involuntary and that he did not knowingly and intelligently waive his Miranda rights before providing it." He further argued that the in-custody statement given later was taken in violation of Miranda and his Sixth Amendment rights. The Court agreed that Kentucky had ruled that Hall was "not deprived of food, sleep or medical attention," but Hall argued that he'd not had sufficient sleep for 24 hours, had not eaten that day and had an injured hand for which he'd not gotten treatment. The Court noted that he'd shown no evidence that any fatigue was due to police conduct, but simply because he'd chosen to be up all night. Further, as soon as it was suggested that he might be hungry – he mentioned he'd not had breakfast – the detective sought to get him some food (chips and a soft drink). The Court noted that "missing a single meal is not enough to render a Miranda waiver involuntary." With respect to his hand, "Hall did not say that it hurt, or request medical attention, or even stay with the issue." He acknowledged it was swollen and moved on to an explanation as to why. Once the interview was over, treatment was provided. The Court agreed that his statements were voluntary.

The Kentucky Supreme Court also noted he'd had prior law enforcement contacts, which Hall contested, arguing he had only one contact as a child. But during the interview, he admitted he had a "dope charge" pending, negating his own claim. He also claimed that the court's note that he confessed "almost immediately was incorrect – but in fact, from the transcript of the interrogation, he did admit, "within a short span of being asked," that he'd struck Agnew. Further, although the detective did lie to him – stating, for example, that Derek was already in custody, "not every deception by the police amounts to coercion or even impropriety."[104] Further "police trickery alone will not invalidate an otherwise voluntary statement."[105] The detective did not threaten him and in fact, was "kind and thoughtful throughout." Even though his IQ was very low, that is simply a factor, "not a dispositive element."[106]

With respect to whether he could even comprehend the Miranda form in the short time he looked at it, the Court noted he could read and understand English, and was given time to read it. He initialed each one of the statements and agreed he understood them. Further, "an express written or oral statement of waiver of the right to remain silence or of the right to counsel is usually strong proof of the validity of that waiver."[107] His explanation of his conduct was further proof that he understood and was competent to waive his Miranda rights. He clearly "understood he had done something wrong and that he faced serious consequences." Finally, since it must be judged from the point of view of the officers, not the subject, there was nothing that would have indicated that Hall's waiver was "anything but knowing and intelligent."

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[104] Harris v. Hatfield, 21 F.3d 427 (6th Cir. 1994).
[105] Frazier v. Cupp, 394 U.S. 731 (1969); Ledbetter
[106] Colorado v. Connelly, 479 U.S. 157 (1986); Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005).
[107] North Carolina v. Butler, 441 U.S. 369 (1979).

The Court further agreed that his second statement, made after he was in custody, was also done with a voluntary, knowing and intelligent waiver of both his Fifth and Sixth Amendment rights. Although the detective never used the term Miranda, he clearly "sufficiently presented Hall with Miranda warnings, or at least their equivalent." Hall initiated the conversation by having someone at the jail contact the detective and it was clearly established that despite having counsel (presumably appointed), he "wished to waive any related rights and speak" with the detective.

Finally, the Court addressed the admission of Milligan's statement, agreeing it was clearly error to do so, since Milligan was not present. However, because Hall placed himself at the scene of the crime, within minutes of the start of the interview, it was harmless error. Further, the evidence was introduced initially by Dewayne's counsel after he pled guilty, and made sense, because Milligan stated that only two men were present, and he, the third man, had left and was "therefore innocent of any wrongdoing."

The Court affirmed the denial of his petition.

42 U.S.C. §1983 – USE OF FORCE

Amerson v. Waterford Township, 562 Fed.Appx. 484 (6th Cir. MI 2014)

FACTS: In 2009, Amerson and Hathaway burglarized a home in Waterford Township, Michigan. Officer Stechly responded to the report and saw the pair, who ran when he tried to talk to them. Stechly and other officers quickly apprehended them and they surrendered. They obeyed orders to lay on their stomachs and were secured. Amerson later claimed that Stechly and Officer Mahoney handcuffed him, then punched him in the face and then kicked him in the head, while Mahoney "stood idly nearby." Sometime later, he began to suffer from seizures, and in 2011, a doctor found damage to his brain that could have triggered them.

Amerson filed suit under 42 U.S.C. §1983, against a number of officers, claiming that the force used during his arrest was improper. He also sued Waterford Township for failure to train. The District Court dismissed all of the officer except for Stechly and Mahoney, and also all claims against the Township. It then ruled in favor of the two officers on summary judgment. Appeals followed.

ISSUE: May a case be dismissed on summary judgment when there are different versions of the facts present?

HOLDING: No

DISCUSSION: The Court detailed the evidence that supported Amerson's story – noting in particular that it was clear that the officer described as assaulting him fitted the description of Stechley and not Mahoney, and the medical records indicated his seizures began shortly after the incident. The officers pointed to items in the record that rendered Amberson's version fiction, including his claims of varying numbers of hits/kicks, that he stated that the same officer who assaulted him also transported him (in fact, two other officers did so), and that the officer who

stopped him was not the officer who assaulted him (he was). The court noted that over time, and after discovery, his recollection could have improved, and that "different officers participated in chasing him down until he surrendered, handcuffing him and placing him under arrest, and transporting him to the police station." Further, "that he could confuse some of the officers is neither surprising nor fatal to his case." Finally, the absence of any evidence that he complained of injury at the time were not fatal – in fact, he claimed he did complain of a headache at the jail. Although booking photos and video do not show any "visible signs of injury" – that did not negate his claim, although it likely damaged its credibility. The Court noted that the "blatantly contradictory standard is a difficult one to meet and requires opposing evidence that is largely irrefutable."[108] In many cases, such evidence simply doesn't exist. In Amerson's case, he had evidence to support from his colleague in crime and medical records, and "no videotape or other incontrovertible type of evidence wholly discounts [his] version of events." As such, the Court agreed, his claim should survive summary judgment and the ruling in favor of Stechly was reversed.

With respect to Mahoney, the Court recognized an "inaction theory" for force cases in Bruner v. Dunaway, sometimes called the bystander officer theory.[109] To succeed, Amberson that in order to hold Mahoney liable, he would have to show that Mahoney "perceive[ed] that Stechly intended to apply excessive force upon Amerson, find an opportunity to thwart his effort, and develop a means to intercede.[110] In this case, the Court found that the circumstances suggest he would have no means to intervene and as such, liability against Mahoney could not stand. The Court affirmed the summary judgment in his favor.

Finally, with respect to Waterford Township, and beginning with the failure to train assertion, Amberson argued that the township's "non-lethal force policy has not been renewed since completion of field training; it has not offered training on when to intervene; and excessive-force training is not part of new field training." The Court noted that there had been no indication of police misconduct relating to force and there was nothing to suggest that the township needed to revisit the police. With respect to the failure to supervise claim, again, there was no indication that "wrongful conduct [had gone] unchecked" – even though the township had no annual or other regular review of performance. The Court agreed that previous unpublished Ohio case law had suggested it might possibly be a valid cause of action, the facts in this case did not show any deliberate indifference toward officer conduct. The Court agreed that Waterford Township was entitled to summary judgment on both.

Davis v. Pickell (and named deputy sheriffs), 562 Fed.Appx. 387 (6th Cir. MI 2014)

FACTS: On March 24, 2009, Davis was arrested for DUI. He was booked into a holding cell in Genesee County Jail. He claimed that he was assaulted and beaten, causing severe injury that resulted in surgery. The jail deputies, however, stated that the fight started when he because aggressive when they were trying move him to a single cell and to relieve him of his jacket and

[108] The court looked to Scott v. Harris, in which it was clear that the plaintiff's version was totally inopposite to what irrefutable evidence indicated, in that case, a videotape.
[109] 684 F.2d 422 (6th Cir. 1982).
[110] See Ontha v. Rutherford County, TN, 222 F.App'x 498 (6th Cir. 2007); Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).

shoes, as his behavior in the common cell had become a safety issue. He was tackled and ultimately pepper-sprayed.

Davis filed suit against the jail and several deputies, under 42 U.S.C. §1983. The magistrate judge reviewed the security footage and concluded it supported Davis's claim that the assault was without just cause, not to maintain discipline but "for the purpose of punishment." The magistrate judge also looked at the dispute between which constitutional right governs this type of claim – a pretrial detainee who had been accepted for booking, but who had not yet had an initial hearing. The current standard, as set for in Aldini v. Johnson,[111] now puts it under the Fourth Amendment (rather than the Fourteenth or the Eighth Amendments), but at the time it occurred, that case had not yet been decided. Either way, the District Court followed the magistrate's recommendation and denied summary judgment, albeit applying the stricter Fourteenth Amendment standard. The deputies appealed.

ISSUE: May an assault done without just cause, even if not malicious, be enough for a lawsuit?

HOLDING: Yes

DISCUSSION: The Court noted that if Davis "was neither threatening or resisting the officers, the force they used on a compliant inmate shocks the conscience" – the Fourteenth Amendment standard. The Court agreed that the deputies "would have been aware that" such force was a constitutional violation – even if the force was not identical to the types of force previously ruled on – and as such, qualified immunity was inappropriate. In addition, it agreed that state claims of assault and battery could also be maintained. Finally, the Court agreed that they were not entitled to immunity because their actions, although discretionary, were not done in a good faith manner but instead, done maliciously.

The District Court's judgment was affirmed.

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

FACTS: As part of a "corrupted investigation into the Mansfield, Ohio, drug trade,. the Richland County SO used Bray, a new CI. Bray was to make controlled drug buys. Bray was controlled by Detective Metcalf, Sgt. Mayer and Captain Faith. Officer Ansari (Cleveland PD) and Agent Verhiley (Ohio Bureau of Criminal Identification and Investigation) were also involved and deputized to the DEA. Robertson, Lovett, Spires, Matthews, Brooks and Brown were indicted and eventually pled guilty. Lucas was the case officer.

As the case was ongoing, Bray was jailed for unrelated reasons. He admitted that he had "abused his position as an informant." Evidence indicated, strongly, that in some cases, the officers were aware of and were involved in "Bray's misdeeds." Robertson and the others arrested produced evidence showing that Bray "framed innocent individuals, stole money and drugs from law enforcement, and dealt his own drugs on the side." In addition, officers altered evidence so as to corroborate Bray. Numerous law enforcement procedures were violated in the process. As a result, "the investigation fell apart." Bray pled guilty to various charges, but his

[111] 609 F.3d 858 (6th Cir. 2010).

plea did not relate to Robertson and fellow appellants. Det. Metcalf also pled guilty to criminal charges, but again not in cases related to Robertson and his fellow appellants in this case. Lucas, likewise was indicted and was tried, Bray testified as to what he had done, but indicated that the cases involving Matthews, Spires and Brooks were legitimate. He also stated that Lucas and Ansari were not involved and subsequently, Lucas was acquitted.

The prosecution determined that the situation with Bray entitled Robertson and the others to withdraw their guilty pleas, and that their cases be dismissed, even though many of the individuals did admit to involvement with drug trafficking. They then filed suit under 42 U.S.C. §1983 claiming false arrest, malicious prosecution and fabrication of evidence against the state officers, and a parallel action against the DEA under Bivens.[112] They also sued for violations of Brady v. Maryland.[113]

During a complex process, given the number of officers and agencies involved, the individual officers were granted summary judgment due to qualified immunity. Robertson appealed.

ISSUE: Is malicious prosecution a separate claim from false arrest?

HOLDING: Yes

DISCUSSION: The Court focused on Lucas, who was the "central figure." The claims against him were grouped together under the umbrella of a malicious prosecution claim.[114] The Court noted that the "tort of malicious prosecution is entirely distinct from that of false arrest, as the malicious prosecution tort remedies detention accompanied not by absence of legal process, but by *wrongful institution* of legal process."

The Court continued:

> To succeed on a Fourth Amendment malicious prosecution claim under § 1983 or Bivens, a plaintiff must prove the following: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. The basis of appellants' claim is that Lucas caused their prosecutions and their detentions unlawfully to continue by fabricating and withholding evidence, "the absence of either or both of which would have dissolved probable cause."

Lucas had testified as to the methods used, and permitted an inference that the methods were used properly. There was no evidence presented to indicate that Lucas "falsely testified to the officers' efforts to corroborate Bray's information about *them*." There was insufficient evidence that Lucas knew that Bray was setting up Robertson and that he knowingly or reckless testified falsely. Instead, the evidence suggested that it was done without his knowledge. As such, the Court upheld qualified immunity on his behalf.

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[112] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).
[113] 373 U.S. 83 (1963).
[114] Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006).

Claims against the other defendants allege that "they relied on a warrant that they knew issued without probable cause." In fact, of course, they "could hardly have known or should have known that Lucas testified falsely if he in fact did not do so." The Court agreed that there was no evidence that any of the officers "influenced Lucas's grand jury testimony, causing him to lie to or mislead the grand jury, thereby leading to" the arrest of Robertson and the others. The Court upheld qualified immunity on their behalf, was well.

Finally, with respect to the Brady claim, the court noted that U.S. v. Ruiz[115] held that ""the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." The Court explained why this was the case:

> This is so for three reasons. First, "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." Second, the Constitution does not require that a defendant entering into a plea agreement have complete knowledge of the circumstances surrounding the plea; a court is permitted to accept a guilty plea "despite various forms of misapprehension under which a defendant might labor." Third, the due process considerations that motivated Brady's disclosure requirement for impeachment information do not apply as strongly in the plea context.

In Robertson's case, the prosecutor had stated he had no knowledge of any exculpatory material, not that in fact, there was none – and there was no evidence this statement was false. As Ruiz "established that *impeachment* material need only be disclosed for trial."[116] The Court concluded that the officers "were under no clearly established obligation to disclose exculpatory Brady material to the prosecutors in time to be put to effective use in plea bargaining." It did not reach the issue as to whether Robertson had "constitutional right to receive exculpatory Brady material from law enforcement prior to entering into a plea agreement."

The Court upheld the summary judgments.

42 U.S.C. §1983 – ARREST

Bradley v. Reno, 749 F.3d 553 (6th Cir. OH 2014)

FACTS: On April 24, 2011, Reno (Ohio State Police) was patrolling a stretch of highway near Austintown. He spotted a tractor-trailer on the ramp and stopped to talk to the driver. As he approached, he saw the truck engine was running, but no one appeared to be in the cab. He knocked on the cab and after a few minutes, Bradley emerged from the sleeping area. Reno spotted several signs of intoxication and suspected that was the reason for the truck being stopped. Bradley admitted to having a quantity of beer at a truck stop some 15 miles away. He claimed to be intending to sleep when he parked, but could not explain why he stopped on the ramp, rather than a rest stop 200-300 feet down the road. He failed FSTs. He was arrested and breath testing confirmed that he was well over the legal limit for commercial drivers.

[115] 536 U.S. 622 (2002).
[116] See U.S. v. Wells, 260 F. App'x 902 (6th Cir. 2008).

Bradley was charged with drunk driving. He moved to suppress the breath test results, arguing the trooper lacked sufficient probable cause to arrest. After a hearing, the Court disagreed. At trial, however, he was acquitted. Bradley filed suit under 42 U.S.C. §1983, claiming false arrest. The trial court gave the trooper (and other officers involved in the arrest) summary judgment. Bradley appealed.

ISSUE: Should a probable cause ruling be appealable (even when the subject is later acquitted)?

HOLDING: Yes

DISCUSSION: The Court agreed that Bradley had had no opportunity to appeal the probable cause ruling, as Ohio does not permit an interlocutory appeal of such rulings. When he was acquitted, he had no opportunity to appeal it as the criminal case motion was moot "in every way." The Court noted that generally, an "unappealable order … does not bind later efforts to resolve the issue."[117]

The Court continued:

> A core function of issue preclusion also suggests that, in the absence of a chance to appeal, the rule should not apply. The rule tells a second court not to take a second crack at a question in part because we have confidence that the first court reached the correct answer. When the check of appellate review goes away, however, so does some of our assurance that the first court got it right. That is not because appellate judges are special; it is because an appeal permits at least two *more* judges, and occasionally many more judges, to review the issue. There is safety in numbers. The point grows stronger in the setting of probable-cause rulings made unreviewable by acquittals. An acquittal of course does not refute an earlier finding of probable cause; proof beyond a reasonable doubt demands more of the prosecution than probable cause does. But an acquittal at least blunts some confidence in it. In every way, a "system that gives unappealable trial court rulings preclusive effect treats acquitted defendants worse than convicted ones" – leaving an acceptable anomaly between convicted and acquitted defendants. The Court agreed that the general rule that "only appealable rulings are eligible for issue preclusion" is not inviolate, there are exceptions, but as a rule, that is the case.

Further, the Court noted, "police officers … do not need issue preclusion to protect themselves from vexing lawsuits" since "thanks to qualified immunity, any officer who behaves reasonably – even if, in hindsight, illegally, has nothing to fear from a lawsuit under §1983."[118]

The Court vacated and remanded the case.

[117] Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006).
[118] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

42 U.S.C. §1983 – SEARCH & SEIZURE

Regets v. City of Plymouth, 2014 WL 2596562 (**6th Cir. MI 2014)**

FACTS: Regets (age 26) and Steiner (age 62) were married in 2006. In 2009, Regets and her children (with different fathers) were living in Plymouth, MI, and Steiner was living at an extended stay hotel in Canton. Steiner had a variety of medical problems, his medicine was delivered to Regets and she would deliver it to him. In early 2009, she stopped "preparing [his] pills for him and let Steiner take his own medication." She kept much of his medication at her home, however. Steiner continually expressed his unhappiness with life and Regets feared he might commit suicide, so she kept a close watch on the pills he had at the hotel, to ensure he was taking them correctly.

Kish, the father of one of Regets's children, was not regularly involved with that child until June, 2009. At that time, he told her she was "screwed," which she interpreted as a threat, but she did not report it. She had refused to loan him money, as he requested. On June 18, 2009, Kish went to the Plymouth PD and talked to the officers about Regets, reporting she'd told him that "she was going to help Steiner commit suicide." (The PD was familiar with Regets because she'd had ongoing issues with her neighbors.") He gave a written, sworn statement in which he told about the plan and also drew a map to show where the pills were kept. The officers contacted the local prosecutor. The prosecutor wanted to talk directly to Kish, and the officers took him there the following day. He repeated the statement under oath.

Stevens, the prosecutor, told Officer Cox that they "needed to take Regets into custody and get a search warrant for her house." The officer understood that to mean that 'there was probable cause to take Regets into custody. (Later, Stevens denied telling them to take her into custody, but agreed that he had determined there was probable cause for a search warrant for her house and the hotel room."

Officer Cox obtained the warrants and the next day, they were executed. Regets was arrested at her home for attempting to assist a suicide. They confiscated 25 prescription bottles, marijuana and drug paraphernalia. Steiner was not present when his hotel room was searched. Officers found a number of lined up pill bottles and the officers concluded they were "daily medications." They elected not to take those, but did seize two mailing packages that they believed contained pills. They contacted Steiner by phone and he explained what the medications they seized were and advised they were strong and if he overdosed on them, "he believed he would die." He denied Regets had "ever helped him plan to commit suicide," however. He confirmed at the time, "he was feeling good and was not going to attempt suicide." He stated he had sufficient medication at the time and that he could refill the prescriptions if he needed them.

Regets was released on June 22. She discovered that during the time she'd been held, she'd had 30 phone calls from Steiner and 14 texts. She immediately went to the hotel and asked them to check on Steiner. Initially, she was told he was sleeping but concerned, she pressed them to check again. He was found to be deceased.

Ultimately, she filed suit under 42 U.S.C. §1983 against Plymouth and the officers involved, on behalf of herself and Steiner's estate. (An expert witness was prepared to testify that Steiner died from abruptly losing access to certain of the medications.) The District Court awarded summary judgment on the basis of qualified immunity, and Regets appealed.

ISSUE: Is a search made on a warrant presumptively valid?

HOLDING: Yes

DISCUSSION: Initially, Regets claimed that both her right and that of Steiner to be free of unreasonable search and seizure was violated, as the officers lacked probable cause for the search. Although the Court agreed that "the issuance of a warrant by a neutral magistrate does not end the inquiry," the threshold for establishing" that it should be overturned "is a high one."[119] In this case, they had sought guidance from a prosecutor and apparently made full disclosure of the relationship between Kish and Regents, and it was clear that an officer of reasonable competence would have sought the warrant.[120] Kish's statement was made under penalty of perjury and there was nothing that suggested he was not being truthful, even if he did have "ill motives." There was nothing that suggested they were aware of an incident between the pair that had occurred five years before. He was a known informant. The court agreed the search warrant was valid.

With respect to the alleged false arrest, the Court also agreed the officers had probable cause, based upon what they knew at the time. Kish's detailed statement appeared reliable and was consistent in two recitations, and was given under oath and penalty of perjury. It differentiated the matter from the facts in Radvansky v. City of Olmsted Falls when a statement was not given under oath and in which exculpatory evidence was ignored.[121]

With respect to the claims of the estate, the Estate claimed the officers should have known that seizing Reget deprived Steiner of a person who was, in effect, his caregiver. The Court noted that the officers specifically did not seize medication that they believed he was using at the time, and were told that he had enough for a few days and could replace it if needed. Since he was not present when they arrived, they had no reason to know he was limited to his room. There was no indication that they acted in "deliberate indifference to Steiner's health and safety."[122] Although the court acknowledged that this was the most viable of the proposed claims, it failed because there is not real indication that the officers did not take sufficient care to ensure Steiner was not being deprived of necessary medications. The court noted that "the question is whether Defendants possessed the requisite awareness that Steiner's health or safety was in danger when they took the prescription medicines from his hotel room." They were certainly aware that he had serious medical issues, as they noted 25 separate prescriptions during their investigation, but there was nothing to indicate that seizing the packages would cause a problem. He also questioned him about his mental state at length. They lacked any basis to take him into custody for evaluation, either.

Because the officers found no liability on the part of the officers, it could not find liability on the City of Plymouth. The Court affirmed the dismissal of all claims.

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[119] Messerschmidt v. Millender, 132 S. Ct. 1235 (2012).
[120] Malley v. Briggs, 475 U.S. 335 (1986).
[121] 395 F.3d 291 (6th Cir. 2005),
[122] See Farmer v. Brennan, 511 U.S. 825(1994).

42 U.S.C. §1983 – USE OF FORCE

Sheffey v. City of Covington, 564 Fed.Appx. 783 (6th Cir. KY 2014)

FACTS: In the afternoon of December 1, 2008, Hughes, age 52 and weighing 410 pounds, was walking down a street near two elementary schools. A witness saw him carrying a handgun, which he quickly placed in one pocket, putting magazines and ammunition in a separate pocket, as a bus approached. The witness called 911 but responding officers found no one matching the description given at the time. The witness, seeing officers pass Hughes, called back to give a precise description of his location.

Officers Allen and Bacon located Hughes. Officer Allen issued orders, which were ignored, instead, Hughes **"**shuffled back and forth on his feet and moved his hands around the area of his waistband, repeating the word "dynamite." Officer Allen reported to dispatch that the subject was non-compliant and might be intoxicated or mentally disturbed – in fact, he had long been diagnosed with paranoid schizophrenia. Officer Bacon arrived and also issued commands. Officer Bohman and Higgins came next. Officer Allen lowered his voice and tried to persuade Hughes "to show his hands and get onto the ground" but Hughes continued to behave as before. Officer Bacon holstered his gun and drew his Taser. Hughes then proceeded to "either approach Officer Bacon or to attempt to flee. Officer Bacon fired his taser, striking Hughes in the upper left shoulder/chest area" but he did not react except to say "ouch" and reach to remove the two probes. He continued to approach Bacon, who fired it a second time, to no effect. He then dropped the Taser, believing it would be ineffective.

Hughes threw a box of ammunition at Officer Allen, saying "it's not loaded." Officer Higgins fired his Taser twice, hitting Hughes in the back, again to little effect. With his attention diverted, however, other officers present "decided to use the opportunity of Mr. Hughes diverted attention to take him to the ground by force." They were able to get him on the ground but he refused to put his hands behind his back. They engaged in a long struggle to try to gain control. During that time, Hughes continued to reach for his waistband and attempted to get up, as well as attempting to bite Officer Bacon. Sgt. Webster, who had just arrived, and realizing that Hughes' heavy clothing might have kept the Taser from being effective, lifted Hughes's shirt and drive stunned him five times, again to no avail.

The officers were finally able to bring Hughes under control and using three sets of cuffs and a set of shackles, got him restrained. During a search, a loaded handgun, a speed loader, three loaded magazines, ammunition and a knife were found. At the time, although he would not respond to questions, he was "conscious, breathing, and alert." Shortly, however, he exhibited signs of distress and EMS responded. He went into arrest and stopped breathing, and was pronounced dead of a cardiac arrest related to his obesity and excited delirium from the Tasers.

Sheffey, Hughes' mother, filed suit against the officers involved and the City of Covington, under 42 U.S.C. 1983, for excessive force. The trial court awarded summary judgment to the officers, finding "no constitutional violation had occurred and that, even if constitutional violations occurred, the officers had all acted in an objectively reasonable manner under the circumstances and thus were entitled to qualified immunity." (It also ruled in favor of the City.) Sheffey appealed.

ISSUE: Is officer motivation critical in a use of force case?

HOLDING: No

DISCUSSION: To succeed, Sheffy "must both show that the officers (1) acted under color of state law and (2) that they deprived Mr. Hughes of a federal statutory or constitutional right."[123] It also falls to Sheffy to prove why the officers are not entitled to qualified immunity.[124] Using the process outlined in Morrison v. Bd. Of Trs. Of Green Twp.,[125] the plaintiff is required to prove first, that "the defendant violated a constitutional right," and second, if the plaintiff proves the first element, that "the right was clearly established" at the time of the alleged violation." are analyzed under the Fourth Amendment's objective-reasonableness test, which requires courts to analyze the entirety of the circumstances to weigh "the nature and quality" of the force used "against the countervailing governmental interests at stake."[126]

Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Officer motivation is, however, not relevant.[127] Further, "all determinations regarding objective reasonableness must be considered from the perspective of the officers at the time of the challenged incident, and cannot be considered "with the 20/20 vision of hindsight" and that "in many circumstances "police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation."[128]

The Court continued:

> Based upon its evaluation of the responding officers' actions under Graham test, the district court found that no evidence existed on the record to create a genuine issue of material fact with regard to the objective reasonableness of the actions of Officers Bacon, Higgins, and Webster in tasing Mr. Hughes during the incident on December 3, 2008. As such, the district court found that no constitutional violation could be found. On appeal, Sheffey argues that a reasonable jury could find that the actions of these officers were objectively unreasonable under the circumstances, due to Mr. Hughes's mental illness, because the illegal activity being investigated in the stop of Mr. Hughes constituted a misdemeanor under Kentucky law, and because Mr. Hughes's behavior was not violent and did not present a high degree of risk. For the reasons that follow, we find that the district court did not err in concluding that no genuine issue of material fact existed that would allow a reasonable juror to conclude that a constitutional violation occurred.

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[123] Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007)
[124] Ciminillo v. Streicher, 434 F.3d 461 (6th Cir. 2006) (citing Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000)).
[125] 583 F.3d 394 (6th Cir. 2009).
[126] Graham v. Connor, 490 U.S. 386 (
[127] Dunigan v. Noble, 390 F.3d 486 (6th Cir. 2004) (quoting Graham, 490 U.S. at 397).
[128] Supra.

The trial court had reviewed, as required by Dickerson v. McClellan, the "the reasonableness of each of the officer's conduct at each point in the encounter."[129]

> First, the district court considered the severity of the crime being investigated. As to this consideration, the district court stated that the responding officers were called to investigate whether Mr. Hughes was in violation of K.R.S. §527.020, Kentucky's concealed-carry law, which makes it a misdemeanor to carry a concealed firearm without a permit. The district court then noted that, while generally a violation of the concealed-carry law does not represent notably severe criminal activity, the totality of the circumstances in this particular case resulted in a serious and immediate threat and danger of violence. Sheffey argues on appeal that the district court erred as to this consideration because, objectively, a violation of K.R.S. §527.020 is a relatively minor crime, thus cutting against the force used against Mr. Graham.

However, the specific facts "created a risk significantly more severe than usual in an investigation" of that statute. He was near schools where children were present. Although the witness had indicated he'd actually removed the magazine from the weapon, it was found to still be loaded with one round. As such, "it is clear that, even if violations of K.R.S. §527.020 cannot reasonably be described as severe criminal activity, the surrounding location, coupled with the information received by the responding officers regarding Mr. Hughes's suspicious behavior and the very fact that he possessed both a firearm and ammunition, created at least the strong possibility of a serious and immediate safety concern from the time that the officers first located Mr. Hughes." Further, his responses to the officers' inquiries were abnormal and of high concern, as he constantly reached toward his waistband, "where officers believed a firearm to be located, eventually attempted to flee, and also violently resisted arrest."

The trial court had analyzed the actions of each officer and found, at each point, that the respective officers' actions were warranted. Specifically, despite Sheffey's argument to the contrary, the Court found that even on the ground, Hughes was dangerous as he was still noncompliant and was still armed. In fact, it noted that it would have been impossible for each of the officers to have actually known what others had done and that none were in a position to stop a fellow officer from deploying their taser. Each officers was "actively involved in the struggle" in some way and each was focused on bringing him under control. The Court agreed that each of the tasings was lawful.

Sheffey attempted to focus the case on Hughes' mental illness and suggested that as a result of that disability, the responding officers "handled the situation inappropriately." She claimed that the officers were issuing conflicting commands and that they "misperceived Mr. Hughes's level of resistance, when proper handling of the situation would have allowed Mr. Hughes a better chance to comply." The Court found the argument meritless and that the officers did not issue conflicting commands, although apparently at least two were issuing commands, they were consistent. The Court emphasized that "Sheffey neglects to explain how any of the officers present could have been aware of Mr. Hughes's actual mental disability." Responding officers realized that his conduct was abnormal, but that could have been due to intoxication, as well.

The Court affirmed the grant of summary judgment.

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[129] 101 F.3d 1151 (6th Cir. 1996),

42 U.S.C. §1983 – RETALIATION

Hunt / Conard v. City of Cleveland, 563 Fed.Appx. 404 (6th Cir. OH 2014)

FACTS: On October 5, 2008, Hunt's car was struck by Officer Carroscia (East Cleveland PD). Although both the officer's cruiser, and another police cruiser nearby, had cameras, both failed to capture the accident. Hunter later claimed that the evidence was destroyed. Officer Kiggins was assigned to investigate and both cars were taken in for investigation – Hunt's was ultimately destroyed. Hunt was found to have a blood alcohol over the legal limit and to also have marijuana and cocaine in his system. However, because the hospital that took the samples was not "certified" to do so, that case was not pursued.

Hunt filed suit against the officer and the city for the officer's alleged negligent driving and spoliation of evidence (the destruction of the video). During the same time frame, Kiggins asked for, and received, authorization to charge Hunt with driving under the influence, although he had received no new evidence, that case was dismissed some time later. Hunt then amended retaliation and related claims to his complaint. The District Court granted summary judgment on all claims and Hunt appealed.

ISSUE: Is it improper to bring charges in retaliation for a lawsuit?

HOLDING: Yes

DISCUSSION: First, Hunt argued that the charges were brought against him in retaliation for the lawsuit, but the Court noted that there was no evidence of such a link in communications revealed during discovery. Further, the Court agreed that there was no affirmative evidence to preserve Hunt's car, he was notified that his car would be disposed of if he did not retrieve it. It was then destroyed pursuant to the impound lot's usual procedures. The data recorder on the police cruiser was, Hunt alleged, destroyed but in fact, it was not ever so equipped. There was no evidence of any conspiracy to hide evidence.

The Court noted that the policy regarding the hospital's status was unclear and there was no evidence that Kiggins misrepresented the evidence to the prosecutor when he requested the charges later. Although "temporal proximity" is a factor in looking at retaliatory motive, it is not determinative.[130] Three months elapsed between the filing of the lawsuit and the filing of the charges, and neither Kiggins nor his agency (Cleveland) were parties to the lawsuit – East Cleveland being a separate municipality.

Hunt also challenged the dismissal of his malicious prosecution claim. Although "malice" is presumed by the name of the cause of action, in fact, none has to be demonstrated. However, in this case, there was no evidence that any officer directly involved in the wreck was directly involved in the decision to place the charges. The prosecutor made the decision to charge Hunt, and there was nothing to indicate that prosecutor lacked any relevant information in making that decision.

[130] Muhammad v. Close, 379 F.3d 413 (6th Cir. 2004); Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010).

The court upheld the summary judgment in favor of all plaintiffs.

42 U.S.C. §1983 – MEDICAL AID

Pierce v. Springfield Township (OH), 562 Fed.Appx. 431 (6th Cir. OH 2014)

FACTS: During the late evening/early morning of December 5-6, 2010, Drummond "fired several handgun rounds into the ground." At about 1:15 a.m., Officers Downs and Powers responded to calls about the gunshots and drove the short distance to investigate. Downs approached Drummond; Drummond fled, but not before Downs saw Drummond "put his hands in his front waistband." After a few steps, Downs heard a gunshot. Downs "saw Drummond stop momentarily, jump several times, and then continue running." Downs spotted a handgun in Drummond's hand and yelled to his partner that Drummond had a gun. Drummond collapsed nearby. The two officers approached with guns drawn, "unsure of whether Drummond was still armed." Drummond was conscious but bleeding, holding his right upper thigh with both hands. The EMTs arrived within five minutes, and within minutes, Drummond was en route to the hospital, where he died.

During the minutes they waited for EMS, neither officer touched Drummond. Officer Powers attempted to reassure Drummond that EMS was on the way. Drummond denied that he was armed, but Powers "felt he could not believe Drummond until [the] weapon was found." During those minutes, Drummond's uncle approached. He did not speak to the officers and they "did not know his identity, intentions, or whether he was armed." He was held at gunpoint momentarily and told not to approach. Sgt. Roberts arrived and placed Drummond's uncle in a cruiser. Powers stayed with Drummond, with his gun drawn, while Downs "left to retrace Drummond's path in search of the weapon," which was subsequently found in a nearby yard. "Powers consoled Drummond, reassuring him that the paramedics were coming that that he would not die." Lewis, Drummond's grandmother approached and was told what had happened, and again, was cautioned against approach because it was possible Drummond was still armed. Hunter, Drummond's girlfriend, was also nearby and observed what was happening. Eventually a number of officers were at the scene, and Hunter later stated she saw officers in SWAT gear. Hunter estimated that it took over a half hour for EMS to arrive.

Although Lewis and Drummond's uncle later testified that they would have given aid to Drummond, neither apparently informed the officers "of any qualifications or desire to render first aid." A paramedic stated the Drummond was unconscious when they arrived and that it took about 20 minutes to get him to the hospital. An expert later stated that controlling the bleeding with pressure or a tourniquet would have improved Drummond's possibility of survival.

Pierce, Drummond's mother, filed suit, as did Lewis and Drummond's uncle. Pierce asserts that the police officers deprived Drummond of his Fourteenth Amendment due-process right in three ways.

> First, Pierce argues that the officers neglected to provide medical aid to Drummond. Second, Pierce alleges that the officers exposed Drummond to a state-created danger by

preventing him from tending to his own wound. Third, Pierce alleges that the officers are liable for preventing a private rescue.

The District Court ruled in favor of the officers and Pierce appealed.

ISSUE: Is there a general duty for "the state" to protect its citizens?

HOLDING: No

DISCUSSION: The Court noted that "both parties recognize the centrality of the Supreme Court's seminal decision in DeShaney v. Winnebago County Department of Social Services, a case, like this one, with 'undeniably tragic' facts."[131] DeShaney "stands for the principle that there is no general duty on the part of the state to protect its citizens from private harms. Strict negative rights are a distinctive aspect of the American constitutional system. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."[132]

With respect to the first claim, the Court agreed that for the purposes of the Fourteenth Amendment and of DeShaney's custody exception, custody requires that the state restrain an individual "through incarceration, institutionalization, or other similar restraint." In this case, Drummond was not in custody, he was, instead, "incapacitated by a self-inflicted gunshot wound, and he collapsed to the ground before the officers reached him." The Court agreed, however, that the "that the officers' actions in securing a potential crime scene did not constitute custody under the DeShaney doctrine."

The Court further questioned "whether the officers even had the medical training to allow them to treat a gunshot wound. Downs stated that he received training in "basic first aid, CPR" at the police academy but that he has never received any other first-aid training. Downs stated that he would not feel comfortable treating an injury like Drummond's because he "did not know the extent of his injuries." The Court found that any failure to treat was at most negligent and "thus not actionable under 1983".

With respect to the second argument, Pierce claimed "that the officers exposed Drummond to danger by preventing him from applying pressure to his wound." However, all of the witnesses agreed that Drummond kept his hands around his leg almost the entire time. Their actions did not increase the risk of harm.

Finally, with respect to the allegation that they prevented a private rescue, the court looked to the case of Beck v. Haik.[133] In that case, the Court recognized that "official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts." However, the Court also agreed that public safety personnel had an interest in preventing an action if they did not believe that

[131] 489 U.S. 189 (1989).
[132] Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982).
[133] (Beck I), 234 F.3d 1267, 2000 WL 1597942 (6th Cir. 2000) (unpublished)

"would-be rescuers are equipped to make a viable rescue attempt." In this case, neither party "informed the officers of any ability on their part to render medical aid."

The Court concluded that although his death was tragic, there were no violations of his constitutional rights. The Court affirmed the decision of the District Court in favor of the officers.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

U.S. v. Parlier, 2014 WL 2898524 (6th Cir. TN 2014)

FACTS: In 2008, Det. Anderson (unknown agency) developed an investigation into methamphetamine manufacturing in North Carolina and Tennessee. He identified over 20 involved, including Parlier, and tracked more than 1,600 grams of pseudoephedrine. Parlier, specifically, was involving in making purchases of that drug for the purpose of providing it to another to manufacture, Ward. At the time of Parlier's arrest, nothing incriminating was found at her home. Ward was charged and admitted that he had made meth on Parlier's property in North Carolina and that he'd traded pills for methamphetamine from her. He testified he obtained other necessarily items from her as well. Other witnesses also implicated Parlier in the manufacturing.

Parlier was indicted for conspiracy in manufacturing, under federal law. She admitted her involvement and was convicted. She then appealed.

ISSUE: Must care be taken when repeating what a co-defendant had said at trial?

HOLDING: Yes

DISCUSSION: Parlier objected, first, that venue was improper, as the case was brought in Tennessee and she lived in North Carolina. Although the indictment specified she committed the acts in Tennessee, that was apparently incorrect, but she failed to raise the venue objection in a timely manner. As such, she waived it. Further, there was adequate evidence that the conspiracy encompassed the two states and there were not individual conspiracies in each state. Further, even if all the conspirators didn't interact with each other, that did not mean they were not all part of the same conspiracy.

Parlier also argued that testimony given by a detective, about the dangers associated with manufacturing, was not relevant to the question of guilt and that it was unduly prejudicial. Det. Anderson testified as an expert, under FRE 702, in a matter in which the average jury member would lack knowledge. The Court properly instructed the jury on the use of such evidence, as well.[134] The Court found the testimony to be properly admitted. Further testimony, about a prior search of Parlier's property and their probation status, were also not a violation of Rule 404(b). Finally, the Court addressed an assertion that the Confrontation Clause was violated when the detective "testified about the substance of a statement made by [a] co-defendant … who did not testify at trial." "The Sixth Amendment's Confrontation Clause bars the admission

[134] U.S. v. Swafford, 385 F.3d 1026 (6th Cir. 2004).

of a testimonial out-of-court statement by a non-testifying co-defendant that inculpated the defendant on trial."[135] It does not apply, however, "where a confession does not inculpate the accused; such statements are inherently non-testimonial."[136] In this matter, the statement implicated Ward, not Parlier and as such, it was properly admitted.

Parlier's conviction was affirmed.

U.S. v. Zertuche, 565 Fed.Appx. 377 (6th Cir. TN 2014)

FACTS: Zertuche, along with two co-defendants was involve in a large cocaine trafficking operation. During the course of the trial, an officer testified as to his opinion as to the significance of certain things. Zertuche was convicted, and appealed.

ISSUE: Must care be taken when testifying as to one's opinion (rather than fact)?

HOLDING: Yes

DISCUSSION: Zertuche argued that testimony given by one of the officers was impermissible opinion testimony, rather than proper lay testimony regarding facts. Under FRE 701, lay opinion testimony is limited to what is "rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The Court ruled that the testimony in question was in fact "rationally based on [the agent's] sensory and experiential observation." Another agency repeated information obtained from a third party to explain why officers took certain actions, what is known as "background evidence." However, the Court continued, in this case:

> Although it is not entirely clear, it does not appear to have been relevant to show why officers acted as they did, as would be typical of background evidence. Rather, it seems to have been offered to prove that defendant purchased a SIM card with a 704 area code on the day of the arrest that was used to communicate with Yebra. Thus, it appears that it was offered for the truth of the matter asserted.

However the evidence was considered to be harmless error and his conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – CRAWFORD

Tapke v. Brunsman, 565 Fed.Appx. 430 (6th Cir. TN 2014)

FACTS: In March, 2005, D.S., age 12, told her mother that Tapke had "raped and molested her for several years." Tapke had lived with his victim and her mother for several years earlier and continued to associate with her during the relevant time frame. The child was taken to the hospital and then referred for interviews and treatment. A social worker summarized each interview, and each summary "contained descriptions of D.S.'s statements

[135] Bruton v. U.S., 391 U.S. 123 (1968).
[136] U.S. v. Cromer, 389 F.3d 662 (6th Cir. 2004).

about abuse that occurred." Tapke gave a statement as well, giving certain admissions, although not a confession.

Tapke was indicted on several charges. At trial, D.S. testified as to several of the instances of sexual abuse, although she could not recall a specific date, even with a chance to refresh her recollection with the report. Later, at trial, the hospital medical director authenticated the medical reports, including the social worker's reports, but the social worker did not testify.

Tapke was convicted of most of the charges, and appealed. Following unsuccessful appeals through the Ohio criminal courts, Tapke appealed to the federal courts.

ISSUE: Is double hearsay highly questionable?

HOLDING: Yes

DISCUSSION: Tapke argued that the admission of the report constituted "double hearsay: D.S.'s out-of-court statements to the social worker, and the social worker's out-of-court statements summarizing D.S.'s statements." The first level, the victim's statements to the social worker" were, he claimed, testimonial. The state court ruled they were not, and was, instead done for the primary purpose of medical treatment. Since D.S. was available at trial to testify, the Court ruled that to be permitted.

However, the second level hearsay, the social worker's summaries, were a closer call, as "the report summarizes, edits, and interprets the child's statements, meaning it bears the testimony of the social worker." Although close, the Court concluded that the statements were properly admitted in this type of an appeal.

U.S. v. Common, 563 Fed.Appx. 429 (6th Cir. TN 2014)

FACTS: On April 4, 2012, four Chattanooga PD officers "responded to a 911 call for a domestic disorder involving a weapon." They officers were familiar with the area as having "significant gun violence." They approached the location and "spotted a man in the middle of the street with what appeared to be a pistol in his hand." It was pointed toward a "woman or a small group of individuals." The woman yelled to them that the man had a gun, so they ordered everyone to the ground. The man did not comply, instead, he walked off and tossed the item he was holding. "He then walked back down the driveway while shouting that he did not have anything, and lay on the ground."

As the man (Common) was being arrested, other officers searched the area and found a small handgun in the grass. They did not specifically document its location and there was discrepancy as to precisely where it was located at trial. One officer did testify there was no condensation on it and it did not appear to have been there any length of time.

Common, a convicted felon, was charged with constructive possession of the handgun. He was convicted and appealed.

ISSUE: Are 911 calls, concerning an on-going situation, admissible under Crawford?

HOLDING: Yes

DISCUSION: Common argued that the witnesses were so inconsistent as to be unreliable. The trial court, however, had noted that while there were discrepancies, they could be "easily explained" by the different positons of the officers as they approached the scene.

Further, he argued that the admission of the 911 call violated Crawford.[137] The Court, however, found that the 'statements made during the 911 call were not testimonial in nature because they were made to assist the police in responding to a dangerous situation, namely, a man in possession of a gun, while the caller faced an ongoing emergency."[138] As such, the Confrontation Clause was not implicated.

Common's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EXCITED UTTERANCE

U.S. v. Overton, 2014 WL 1465492 (6th Cir. OH 2014)

FACTS: On April 29, 2012, at about 2 a.m., Gore was sitting in his car with the door open, waiting for a friend (Paschal) to pick him up. Overton approached and asked if he could borrow a lighter; Gore told him he did not have one. "Overton became more aggressive, walked closer to the car, and eventually pulled what appeared to be a firearm from his jacket." He forced Gore into the car at gunpoint and Overton then got behind the wheel.

Overton demanded the keys and Gore's phone. Gore tried to stall but finally surrendered them. He then jumped out of the passenger side and ran in one direction, while Overton drove off in the other direction. As soon as his friend arrived, Gore made two statements: "I just got robbed - Take me to the police department and "Man, he put a gun to my head man." They immediately went to the PD and made a report. Five days later, Cincinnati EMS received a 911 call and responded to an unconscious person in a vehicle. They were finally about to arouse the man, using a sternum rub. While trying to talk to him, the EMS crew spotted a weapon near his legs. They got him out of the vehicle and secured the weapon. It was then determined that he was in the stolen car.

Overton was indicated for a variety of charges related to the carjacking and his possession of the weapon. He pled guilty to the firearm charge but was tried on the carjacking and related charges. He was convicted and appealed.

ISSUE: Is there a specific time frame on an "excited utterance?"

HOLDING: No

137

138 Davis v. Washington, 547 U.S. 813 (2006).

DISCUSION: First, Overton argued that he should have been permitted to introduce evidence that the gun was, in fact, a BB gun, by using evidence about a BB gun found in his home. However, both parties had agreed not to use certain items of evidence, including that gun, at trial. Overton attempted to introduce a photo but was warned that if he did so, it would open the door for the prosecution to introduce other evidence seized from the home. It was stipulated that a BB gun was recovered from the home, however. The Court found no error in not permitting the photo.

The Court also agreed it was proper to admit Gore's statement, through Paschal, as to what had occurred. The Court agreed that the statement was properly an 'excited utterance" under FRE 803. To qualify as such, the statement, there first, "must be an event startling enough to cause nervous excitement." Next, "the statement must be made before there is time to contrive or misrepresent." Finally, it "must be made while the person is under the stress of the excitement caused by the event."[139] The first and third elements were clearly met, with only the second at issue. However, the Court agreed that even though the carjacking was over, qualifying statements need not be made during the event. Nor is a precise lapse of time required, only "a reasonable basis for continuing [to be] emotional[ly] upset."[140] The testimony indicated that "Gore was still nervous and distraught following the theft of his car." The Court agreed his statements were properly admitted.

Finally, the Court agreed that evidence that a .45 pistol was recovered from the stolen car was properly admitted and relevant as it "tends to make it more probable that Overton took Gore's car with the conditional intent to kill or cause serious bodily injury." It makes it more likely he did, in fact, brandish a firearm during the carjacking, as well.

Finally, the court also agreed that Overton lacked standing to object to the search of the stolen car. Under U.S. v. Hensel, "a person who knowingly possesses a stolen vehicle has no legitimate expectation of privacy therein."[141] The Court also noted that his argument that the EMS crew unreasonable seized him, because he told them he was fine and they wouldn't let him leave. (One of the firefighters testified that they would not have allowed him to leave out of fear for his health, given his condition when they found him.) The Court found the seizure, if it even was a seizure, to be reasonable.[142]

After resolving a number of procedural issues as well, the court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – PROOF

U.S. v. Smotherman, 564 Fed.Appx. 209 (6th Cir. OH 2014)

FACTS: In Fall, 2011, Columbus (OH) PD were investigating a house known to be frequented by heroin users. It was searched pursuant to a warrant, during which they found Smotherman "in the garage near a pile of cash and a box containing two handguns." They also

[139] U.S. v. Davis, 577 F.3d 660 (6th Cir. 2009); Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983).
[140] See U.S. v. McCullough, 150 F. App'x 507 (6th Cir. 2005).
[141] 672 F.2d 578 (6th Cir. 1992).
[142] Peete v. Metro Gov't of Nashville & Davidson Cnty., 486 F.3d 217 (6th Cir. 2007).

found 800 packets of heroin (25 grams), drug paraphernalia and more cash in a car behind the house. Smotherman was charged with numerous offenses. Smother moved to suppress evidence unsuccessfully and was ultimately convicted. He appealed.

ISSUE: May regular presence in a house (even though not the subject's residence) be proof of evidence of drug trafficking there?

HOLDING: Yes

DISCUSSION: Smotherman argued that he could not be tied to the evidence found in the house. The Court noted that although there were others in the house, co-conspirators placed him in the house involved in frequent drug transactions. Although he could legally have firearms at the time, he was not a convicted felon, witnesses testified that he carried a gun during drug transactions, a violation of federal law.[143]

Smotherman also argued that the identity of the CI should have been revealed to him, but the Court agreed that such disclosure will only occur when it is show that it is necessary to a fair trial.[144]

Smotherman's convictions were affirmed.

EMPLOYMENT

Hopkins/Boyles v. Chartrand, 566 Fed.Appx. 445 (6th Cir. OH 2014)

FACTS: Hopkins and Boyles worked as full time investigators for the Geauga County (OH) Coroner's Office for close to ten years. Both received a regular salary, bi-weekly. They worked during regular business hours but were also called out at night. They both regularly worked more than 40 hours a week, but did not receive overtime. They were paid by the current coroner in the same way they'd been paid by the previous office-holder. Both employees performed a myriad of tasks, both investigative and administrative. One also managed the evidence room.

In 2011, both men were laid off due to economic issues. Believing they were protected as civil servants from layoff, they filed an employment action under the FLSA and the FMLA. Chartrand (the coroner) answered that both were ineligible to receive overtime, although he did not expressly assert they were exempt. As the case continued, Hopkins and Boyles argued that since he did not plead it as an affirmative defense, he forfeited any argument that they were exempt employees. Following further procedural matters, the court allowed Chartrand to appeal his motion and claim they were exempt. The Court agreed that both were exempt administrative employees, but did not rule on the assertion that Hopkins "also qualified under the executive-employee exemption."

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[143] 18 U.S.C. 924(c).

[144] U.S. v. Moore, 954 F.2d 379 (6th Cir. 1992). U.S. v. Sharp, 778 F.2d 1182 (6th Cir. 1985)

Both men appealed, arguing that Chartrand should not have been permitted to amend his answer, and that they were not, in fact, exempt.

ISSUE: Is it critical to analyze a position to determine if the employee is exempt from overtime compensation?

HOLDING: Yes

DISCUSSION: The Court noted that to be exempt, three elements must be met. First, the employee must be paid at least $455 a week, on a salary basis. Second, the employee's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer." Third, the employee's "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."[145] Although the pair clearly met the first and third, it was never fleshed out in deposition the details of the second, because at that point, FLSA exemptions had not been claimed.

The Court remanded the matter for further inquiry into the primary duties of the two investigators.

Freeze / Colvin v. City of Decherd, 753 F.3d 661 (6th Cir. TN 2014)

FACTS: In 2002, Freeze became the chief of the Decherd (TN) PD. His brother-in-law, Colvin began as a patrol officer in 2007. In 2009, the Mayor and Board of Aldermen began conversations with Freeze concerning issues with the department, and soon, it moved on to more serious matters. It was discussed that he would be demoted to the position of sergeant, and Freeze, feeling "outnumbered" agreed to do that in order to keep a job. A few weeks later, at an open meeting, another officer, Madden, nearly came to blows with a city employee over an issue, and neither Colvin or Freeze, who were present, intervened. Madden was finally escorted out and terminated. Colvin became angry at an unrelated matter and he too was fired, along with Freeze. (At least one member indicated it was because the two were related.)

At the time of the discharge, neither were given specific reasons for the firings beyond the "betterment" of Decherd. Because they were not notified prior to the meeting that their terminations would be considered, although there was an assertion that they were both given oral notice that their performance would be discussed. They were given no opportunity for a hearing, however. At a subsequent unemployment process, the Mayor stated that the city "needed to go in a new direction." (At one point, it was alleged, the chief violated a state law on purchasing, but the city subsequently agreed that no such law existed.) Two pieces of city legislation were also in play, a resolution that stated that all city workers were at-will. Another resolution, however, indicated that police discipline would be "for cause" and follow due process. Further, progressive discipline was preferred and the employee must be informed in writing of the "exact offense violated."

Freeze and Colvin filed suit against the Mayor, specific aldermen, and the City, alleging violations of 42 U.S.C. §1983 and certain Tennessee law. They alleged that "they had a

[145] 29 C.F.R. 541.200 (a)(1)-(3).

reasonable expectation of continued employment and were fired without notice, explanation, or an opportunity to respond." The City argued the opposite. The District Court ruled in favor of the City and dismissed the claims. Freeze and Colvin appealed.

ISSUE: May resolutions (and similar official enactments) provide for a property interest in employment?

HOLDING: Yes

DISCUSSION: The Court noted that in Tennessee, there is a "broad presumption that employees are at will and, by default, lack a property right in their continued employment." Freeze and Colvin, however, argued that the "police resolution" gave them a "property right in continued employment, which includes the right to termination only for good cause." In Brown v. City of Niota, the Court had "held that a high standard applies in order for a handbook or manual to create not just a contract, but also a property right to termination only for good cause: the handbook must "contain[] unequivocal language demonstrating [the employer's] intent to be bound by the handbook's provisions."[146]

The Court agreed, that "the facts here meet this high bar." The resolution included "unequivocal language demonstrating the City's intent to be bound by the handbook's provisions," stating that the resolution "trumps any other convicting agreements pertaining to police-officer unemployment." The use of the words "shall" and "will" "creates a binding obligation." Looking at the language in context, the Court agreed that the city had entered into a contract with the two officers. The Court further disagreed that discipline and termination are two different things, with the Court agreeing that "termination is a type of discipline."

The Court reversed the decision of the trial court and remanded the case for further proceedings.

COMPUTER CRIME

Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398 (6th Cir. KY 2014)

FACTS: Richie was the manager of a website called www.TheDirty.com, and had previously founded a similar site which served "as a forum to post comments and observations about residents of Scottsdale who he believed warranted comment." As that site grew in popularity, it spread out and adopted the more neutral name listed above. The website got 600,000 hits a day and 18 million visits a month. As it grew, the focus and the format changed, and in recent years, rather than content being created entirely by Richie, users could upload "dirt" about any subject. All submissions appear as it "authored by a single, anonymous author – 'THE DIRTY ARMY.'" Most of the submissions related to local individuals who are not public figures. The submissions are reviewed and edited, with about 150-200 actually appearing on the site daily. (They edit out "nudity, obscenity, threats of violence, profanity and racial slurs.") Richie adds short comments under his own initials, but does not materially change the submission nor does he fact-check it.

[146]

Jones lives and works as a high school teacher in Edgewood, Kentucky, and is also a member of the Cincinnati Bengals football cheerleading squad. For several months, late 2009 through early 2010, she was the subject of several submissions, accusing her of sleeping with every member of the team, and comments were posted about her ex-boyfriend and their sexual activities, particularly noting that they had STDs. Jones pleaded, via email, for Richie to remove the postings, finally threatening a lawsuit. Unfortunately, she eventually sued the wrong entity (the defendant in this case), mistaking its website for the one being operated by Richie. That triggered additional postings, which by this time had national media attention. Eventually, Richie posted an open letter to her, telling her that she should have followed the correct process to get the postings removed and removed the postings.

Jones amended the lawsuit to name the correct parties, claiming defamation, libel, libel per se, false light and intentional infliction of emotional distress. Following an argument for dismissal, with Dirty World claiming that since they didn't author the comments, they were not responsible for them under the Communications Decency Act (CDA). Following a multitude of proceedings, including two trial, the Court found in favor of Jones, awarding her compensatory and punitive damages. Dirty World appealed.

ISSUE: Are website providers that publish postings from third parties immune from liability?

HOLDING: Yes (for the most part)

DISCUSSION: The Court first looked at the CDA, §230, which "immunizes providers of interactive computer services against liability arising from content created by third parties."[147] (Although the statute itself doesn't use the term immunity, subsequent case law had imputed that meaning to it.) This was a "departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others." Congress, in effect, "decided to treat the internet differently." The Court noted there were three purposes to the CDA:

> First, it "maintain[s] the robust nature of Internet communication and, accordingly, . . . keep[s] government interference in the medium to a minimum."[148] Second, the immunity provided by §230 protects against the "heckler's veto" that would chill free speech. Without §230, persons who perceive themselves as the objects of unwelcome speech on the internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability.[149] Third, §230 encourages interactive computer service providers to self-regulate.

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148 S*ee also* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

149 *See* Zeran, 129 F.3d at 331 ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect."). Immunity shields service providers from this choice. See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) ("[I]mmunity is an immunity from suit rather than a mere defense to liability and . . . is effectively lost if a case is erroneously permitted to go to trial." (internal quotation marks omitted)).

> An early internet case, Stratton Oakmont, held that at common law the provider of an electronic message-board service was potentially liable for its user's defamatory message because it had engaged in voluntary self-policing of the third-party content made available through its service.[150]

Since it was enacted, the CDA has been expanded, with a Court stating that "close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties."[151]

However, the CDA places a limitation when the service provider is also an "information content provider of the content at issue." Court have recognized that "that § 230 bars a claim if (1) the defendant asserting immunity is an interactive computer service provider, (2) the particular information at issue was provided by another information content provider, and (3) the claim seeks to treat the defendant as a publisher or speaker of that information." But "that § 230 bars a claim if (1) the defendant asserting immunity is an interactive computer service provider, (2) the particular information at issue was provided by another information content provider, and (3) the claim seeks to treat the defendant as a publisher or speaker of that information."[152] The trial court had ruled that "a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a 'creator' or 'developer' of that content and is not entitled to immunity." The Court discussed at length the meaning of the term development, noting that other circuits have provided 'a workable measure of "development" that not only preserves the broad immunity the CDA provides for website operators' exercise of traditional publisher functions but also highlights the limited circumstances under which exercises of those functions are not protected."[153] For a site that "solicits, edits, and displays content originating from third parties," it agreed "correcting spelling, removing obscenity or trimming for length" is permitted, but adding material that contributes to illegality is not. In other words, merely providing the mechanism for a third party to publish unlawful comments is not enough for liability. The Court agreed that the "material contribution test" was the appropriate one to adopt and did not adopt the District court's "encouragement test" for immunity. The Court did not agree that adding commentary (as Richie did) made him a creator or developer of any content beyond what he added.

Turning to the facts, the Court agreed that the third party statements, while defamatory, where not Richie's responsibility, even though they did specifically select them for publication. Nor were his own, identified, comments defamatory or materially contribute to the defamation of the third party.

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[150] 1995 WL 323710, at *4. Section 230 set out to abrogate this precedent. *See* S. Rep. No. 104- 230, at 194 (1996) ("One of the specific purposes of [§ 230] is to overrule Stratton Oakmont Prodigy and any other similar decisions . . . ."); *see also, e.g.*, Zeran, 129 F.3d at 331 ("Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to [Stratton Oakmont].")

[151] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).

[152] 47 U.S.C. § 230(f)(3).

[153] See Roommates

The Court concluded that this does not "leave persons who are the objects of anonymously posted, online, defamatory content without a remedy." Jones made no attempt to subpoena the identities of the posters in order to file suit against them. Under the CDA, however, she "cannot seek her recovery from the online publisher where that publisher did not materially contribute to the tortious content." The court vacated the judgment and remanded the case.

CHILD PORNOGRAPHY – DOUBLE JEOPARDY

U.S. v. Gerick, 2014 WL 2609522 (**6th Cir. MI 2014)**

FACTS: In 2011, as a result of an investigation that began in Spain that was shared with the FBI, the FBI obtained a search warrant and seized Gerick's computers, hard, drives and other storage devices in Michigan. They found 55 videos of child pornography and 51 images.

Gerick pled guilty but objected to his sentencing, which was based on a complex matrix that included points for using peer-to-peer software, the conduct in the videos and the number of images.

ISSUE: Is it double jeopardy to be charged with both receiving and possession of the same child pornography?

HOLDING: Yes

DISCUSION: First, Gerick argued that it was Double Jeopardy to be charged with both receiving and possession the same child pornography.[154] The Court agreed that was the case and vacated the charges.

Gerick also argued that he did not make the material available for public viewing, which caused a sentencing enhancement. However, the Court noted that since he was using a "peer-to-peer network" and the material was in a shared folder, it was fair to consider it available for distribution. The Court also agreed that the acts depicted (rape and sodomy of prepubescent children) were automatically to be considered sadistic, and as such, also warranted a sentencing enhancement.

FEDERAL INTERPRETATION OF STATE LAW

Price v. Haney, 562 Fed.Appx. 334 (6th Cir. KY 2014)

FACTS: Price, a Kentucky pastor, groped the breasts of a 14-year old victim, F.P., when he was 29. The girl had been staying at his home to assist Price's wife with chores. The sexual relationship "intensified" and eventually, they engaged in intercourse – at the time F.P worked as Price's administrative assistant (and would have been 22). F.P. later argued that the initial contact was forcible and he was charged with a number of first-degree (forcible) sexual offenses, including rape. He was convicted. The Kentucky appellate courts affirmed his convictions and he took a federal habeas corpus petition. The District Court invalidated the first two (groping)

[154] See U.S. v. Ehle, 640 F.3d 689 (6th Cir. 2011).

convictions, finding that he used surprise, rather than force, to achieve his aim, but upheld the remainder of his convictions.

Both sides appealed.

ISSUE: When a state criminal case is appealed to federal court, must the federal court then interpret state law as the state would have done?

HOLDING: Yes

DISCUSSION: In this case, the federal court is obliged to interpret a state statute and state court interpretation of that statute. The Court noted that the "Kentucky Supreme Court concluded that a jury could believe that Price overcame F.P.'s earnest resistance by implicitly threatening her with physical harm." The jury heard from F.P. directly that she "was fearful of an implied threat of force." "Evidence of such a threat, according to the Court, included (1) F.P.s subjective fear of God's physical retribution, (2) Price's physically and verbally abuse interaction with F.P., (3) the paternal authority Price exercised over F.P. as pastor and employer, and (4) F.P.'s familiarity with Price's temper." She testified that she "struggled to break free" of him at times and that was enough to satisfy the need for an "earnest resistance" of his approach.

The Court looked at the groping situation and agreed that a "surprise attack" did not constitute a threat and upheld the dismissal of those cases. However, the Court agreed that the later situations, which escalated into rape, did demonstrate forcible compulsion, even though she made little physical resistance to him.

The Court upheld his convictions.

FEDERAL LAW

U.S. v. Sadler (Lester and Nancy) 750 F.3d 585 (6th Cir. OH 2014)

FACTS: In 2001, the Sadlers opened "First Care" – a pain management clinic, in Garrison, Lewis County, Kentucky. The clinic was closed after the DEA confiscated the license of the clinic doctor for overprescribing. In 2002, they moved to Waverly, Ohio and opened first one, and then two clinics. The clinic hosted a large number of patients who were in and out in minutes, with prescriptions for hydrocodone, oxycodone and other pain meds. In addition, the clinic "treated phantom patients," who never set foot in the building, including a number of family members. In 2006 and 2007, their doctor was the "state's number one prescriber of hydrocodone," by a wide margin. They also dispensed directly, despite lacking a license to do so.

The Sadlers were charged with a variety of drug trafficking charges, as well as money laundering and wire fraud. They appealed.

ISSUE: Is it wire fraud to obtain medication under false pretenses, when the drugs have been paid for in full?

HOLDING: No

DISCUSSION: First, Nancy Sadler challenged her conviction for wire fraud, which was based on her lies to pharmaceutical distributors when purchasing controlled substances, using faxes, phone calls and interstate wire communications to do so. She did, however, pay full price for the medications and thus did not deprive them of their goods. One of the distributors, however, testified, they would have been concerned had they really known the nature of the operation. The court concluded this was insufficient, however, to support a criminal conviction.

They were also charged with "maintaining a drug premises," and the Court agreed that they did, in fact, do that, as a couple. They used the locations to unlawfully distribute pain medications, and both actively worked in the business. The Court considered that sufficient.

The Court dismissed the wire fraud charge, but upheld the drug related charges.

U.S. v. Reid, 751 F.3d 763 (6th Cir. TN 2014)

FACTS: In 2011, Reid (age 48) began a sexual relationship with J.H. (age 13). She thought of him as her boyfriend. At first, the sex occurred only in Memphis, where they lived, but then Reid took her to a hotel in Mississippi. A few weeks later, J.H. told Reid she wanted to run away and he agreed to go with her. He picked her up on her way to school and "Humbert Humbert-like, headed west, having sex along the way."[155] In Las Vegas, she got away from Reid and called home, and she was returned to Tennessee.

Reid was charged with a violation of the Mann Act, which prohibits knowingly transporting a minor in interstate commerce with intent that the minor engage in illegal sexual activity.[156] He was convicted of two counts, for each of the two trips. Reid appealed.

ISSUE: Is it unlawful to transport a female across state lines for the purposes of having illegal sex with her?

HOLDING: Yes

DISCUSSION: Reid argued that it was improper to use evidence of the pair having sex in Tennessee against him, called "propensity evidence" under KRE 404(b) The Court, however, admitted it to prove his intent, a permissible reason. Since the crime charged includes the element of "intent" to engage in an unlawful sex act, showing that he had a long-standing relationship with her helped prove that element - "[i]t blunts the possibility that Reid first took J.H. to another State and only later decided to have sex with her, and it bolsters the possibility that he had sex on his mind all along." The Court properly instructed the jury on the purpose for the evidence.

The Court upheld the convictions.

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[155] The protagonist in the book Lolita, by Vladimir Nabokov, in which a 37 year old man is obsessed with a 12 year old girl, eventually taking her on road trip around the country.
[156] 18 U.S.C. §2423(a)."