

THIRD QUARTER 2015

KENTUCKY

PENAL CODE – DEFENSES

Holland v. Com., 466 S.W.3d 493 (Ky. 2015)

FACTS: Holland and Weatherwax (the victim) grew up as part of a large Christian County family. Holland's wife had previously been married to Weatherwax, which led to friction. Over the night hours of September 8-9, 2012, Holland and Weatherwax engaged in threats of violence over the phone, with Holland indicating he was on his way to confront Weatherwax. Weatherwax armed himself with a board in anticipation. As Holland arrived, Weatherwax ran at Holland with the board and Holland shot and killed him. (Holland also ran over him.) Holland was charged with murder and he argued for self-defense. He was convicted of wanton murder and appealed.

ISSUE: Does the defense of Extreme Emotional Disturbance require proof of a triggering event?

HOLDING: Yes

DISCUSSION: Among other issues, Holland argued that he was entitled to an instruction of manslaughter and that he acted under an extreme emotional disturbance (EED). Such an instruction is warranted if there was evidence of a "temporary state of mind so enraged, inflamed, or disturbed as to overcome [his] judgment, and to cause [him] to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."¹ It is well-settled that to qualify for an instruction on EED, there must be evidence of an "event that trigger[ed] the explosion of violence on the part of the criminal defendant" and that event must be "sudden and uninterrupted."² "[I]t is wholly insufficient for the accused defendant to claim the defense of EED based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown."

In this case, Holland did not "not identify with particularity any specific triggering event to explain his violent actions; instead, he cites a series of disagreeable interactions and threatening exchanges that festered over a period of several months, culminating in the hostility Weatherwax exhibited just before he was shot." Given that Holland had prompted the fight, it is illogical that his response to Weatherwax's actions could be a triggering event.

The Court agreed the instruction was unwarranted and affirmed Holland's conviction.

PENAL CODE – KRS 503 – USE OF FORCE

Com. v. Eckerle (Judge) and Bennett, 470 S.W.3d 712 (Ky. 2015)

FACTS: Bennett was prosecuted for Assault 1st and Wanton Endangerment in Jefferson County. Arguing that he acted in self-defense, he demanded immunity under KRS 503.085. The judge reviewed the videotape submitted and "concluded that there was probable cause to believe that the force Bennett used was not legally justified." Another judge, however, believing that Bennett was entitled to a full hearing, set aside the ruling and scheduled it. The Commonwealth objected and demanded a writ to stop the hearing, which the Court of Appeals denied. The Commonwealth further appealed.

ISSUE: Is a full hearing required to assess an immunity defense?

¹ McClellan v. Com., 715 S.W.2d 464 (Ky. 1986).

² Foster v. Com., 827 S.W.2d 670 (Ky. 1991).

HOLDING: Not necessarily

DISCUSSION: The Court found the judge to have acted improperly, by “not first considering the evidence of record (numerous witness statements from the victims, the defendant, and other witnesses as well as a videotape of the incident) to determine if there was probable cause to believe the force Bennett used was unlawful.” If the record is too limited, a hearing might be proper, but “courts are not at liberty to bypass summarily the procedure outlined by this Court in Rodgers, a procedure designed to balance the important immunity shield with the equally important interest in having the elements of a criminal charge decided by a jury where probable cause is present.”³

The Court continued:

Our criminal justice system is premised on rules and case law precedent that provide for the collection of evidence, the pretrial exchange of information, i.e., discovery, and the pretrial disposition of discrete issues such as suppression of illegally obtained evidence and judicial determinations regarding the competency of the defendant or a witness. This orderly pretrial process, absent a plea agreement, is followed by a trial in which the evidence is presented to a jury for its consideration of the case, including its assessment of witness credibility, and an eventual verdict based on the law as set forth by the court in the jury instructions. Self-defense immunity is undoubtedly an important right but allowing (or in this case, requiring) a defendant claiming self-defense to subpoena the victims and other witnesses for sworn testimony at a pretrial evidentiary hearing before a jury is ever seated has "far-reaching implications," *id.*, given "the large volume of Kentucky cases for which immunity may be an issue" Acknowledging Kentucky's strong preference for jury trials on criminal matters, discussed *infra*; the minimal evidentiary standard applicable to the threshold immunity determination, i.e., probable cause that the force used was unlawful; and the inherent perils of allowing routine mini-trials in advance of the jury trial of assault and homicide cases where self-defense (and also defense of others or property) is raised, in Rodgers we rejected the proposition that a defendant has the right to an evidentiary hearing.

The Court agreed the Commonwealth was entitled to the writ.

PENAL CODE – KRS 508 - WANTON ENDANGERMENT

Hord v. Com., 2015 WL 5644151 (Ky. App. 2015)

FACTS: In July, 2012, Hord and Heil lived together. For three days in that month, Heil claimed that Hord “prevented her from leaving their house and that he had sexually assaulted and strangled her.” Hord claimed that they engaged in “consensual rough sex” and “erotic asphyxiation.” On July 27, police became involved when Heil’s sister requested a welfare check. Heil was taken to the hospital for a SANE (Sexual Assault Nurse Examiner) exam.

Hord was charged with Sodomy, Attempt-Rape, Sexual Abuse, Unlawful Imprisonment and Wanton Endangerment 1st (for the strangulation). He was acquitted of everything but the Wanton Endangerment, and appealed.

ISSUE: Can a strangulation be a threat of serious physical injury?

HOLDING: Yes

DISCUSSION: The Court looked to the elements of Wanton Endangerment 1st and the likelihood of death or serious physical injury with strangulation. The SANE testified that a person could lose consciousness in ten seconds and that a few minutes could prove fatal. Heil had testified she wasn’t sure

³ Rodgers v. Com., 285 S.W.3d 740 (Ky. 2009).

if she lost consciousness when she was strangled, but thought she had. The Court agreed as well that SANEs are trained about the dangers of strangulation and her testimony as to her training and experience was sufficient to support her testimony.⁴

The Court upheld his conviction.

PENAL CODE – KRS 508 - CRIMINAL ABUSE

Morris v. Com., 2015 WL 4967138 (Ky. 2015)

FACTS: During Morris's trial for Child Abuse and Wanton Murder of his daughter, age 3, evidence of the child's past injuries and ailments were admitted. Morris objected, arguing that the medical evidence of the prior injuries was "irrelevant and inadmissible because they contained no evidence that he had caused the prior injuries but there was evidence that the injuries were either accidental or else may have been inflicted by others." Over his objection, the evidence was admitted, and ultimately, he was convicted. He then appealed.

ISSUE: Must a link be made between injury and perpetrator in Child Abuse?

HOLDING: Yes

DISCUSSION: The Court noted that "In child abuse cases, the relevancy of other bad acts evidence "to establish intent and an absence of mistake or accident is well established."⁵ But "mere evidence that [the victim] had been physically abused without any proper evidence linking that abuse to the defendant is substantially more prejudicial than it is probative."⁶ And as this Court held in Parker, "the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence," so long as there is sufficient other evidence to allow the jury to "reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts."⁷ In other words, to introduce an abuse victim's prior injuries as other-bad-acts evidence, there must be sufficient proof to support a reasonable inference both that the injuries were the result of physical abuse and that the defendant was the perpetrator of that abuse.

The Court agreed that in this case, that evidence was clearly present and his convictions were affirmed.

Allen v. Com., 2015 WL 5731860 (Ky. App. 2015)

FACTS: Allen was convicted of Criminal Abuse 1st and conspiracy to commit Manslaughter 1st, for the death of her infant daughter, Kaylee Buchanan. The child's father was separately charged and convicted of Manslaughter and Criminal Abuse 1st. The facts indicated that the direct cause of the child's death was due to actions by her father and that at most, Allen heard the child cry out but did not respond, since at the time, she was in the care of her father in another room.

Allen appealed.

ISSUE: Must there be some indication of prior abuse by a third party to hold a parent responsible for what that third party does to their child?

HOLDING: Yes

⁴ See Edmonds v. Com., 433 S.W.3d 309 (Ky. 2014).

⁵ U.S. v. Harris, 661 F.2d 138 (10th Cir. 1981); accord Parker v. Com., 952 S.W.2d 209 (Ky. 1997) (holding that "evidence of prior injuries was relevant to demonstrate the animus of [the defendant] towards the child and to show absence of accident or mistake").

⁶ Jarvis v. Com., 960 S.W.2d 466 (Ky. 1998); see also U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) ("[A]s a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense.").

⁷ 952 S.W.2d at 213-14 (citing Huddleston v. U.S., 485 U.S. 681 (1988)).

DISCUSSION: The Court acknowledged, at the outset, that Allen had a legal duty to protect her child.⁸ Further, to sustain a complicity conviction, she had to know that Buchanan might harm Kaylee and that death was a possible result. Nothing in the facts indicated that he'd ever harmed her before to the extent that he did, or that he would harm her that night. The Court found no evidence that she acted with any "conscious disregard of a substantial and unjustifiable risk that death would result" from leaving the child with a responsible adult, her father.

The Court reversed her conviction for complicity to commit manslaughter.

PENAL CODE – KRS 509 - KIDNAPPING

Taylor v. Com., 2015 WL 5626433 (Ky. 2015)

FACTS: Langston and Ort, partners, held a birthday party at their McCracken County home. Jasmine Taylor attended, and at one point during the party, she became irrational. Her friend took her home about 2:30 a.m. At about 9 a.m., Sgt. Shepherd responded to a check the welfare call, and found Jasmine sitting in the road about two miles from her home. "Her appearance was bizarre: her bra was around her waist and on the outside of her clothes, she had on multiple layers of clothing, and over her shoulder were slung several handbags containing an assortment of household items. She had dark paint on her face and clothing." The officer took her home and spoke to her mother, Jamie. Later that day, he was dispatched to the hospital, and found that her parents, (Jamie and Mark, the defendant) had taken her to the ER because she alleged she'd been raped at the party. After talking to her, however, it was determined that no sexual assault had occurred. She was admitted to a psychiatric ward for five days, whereupon she again claimed she'd been raped at the party.

Her parents, however, believed her and began their own investigation. Ort and Wood, the men who'd taken Jasmine to the party, were lured to the Taylor home on a ruse. They were accused of raping Jasmine, because they were the only men at the party. Wood explained he'd brought Jasmine home. At some point, Taylor became enraged and threw a bucket of ammonia at the men, who promptly left. Their investigation then focused on Evrard, who Jasmine claimed had sold her out to be raped. The Taylors wanted to talk directly with Evrard and developed another ruse to get Evrard to the Taylor home.

There, Evrard denied having been involved. Jamie punched and fought with Evrard, joined in by Taylor, who held a knife to her throat until she finally admitted what she'd done. Jasmine brought a hammer into the bathroom, where they'd moved, and traded it for Taylor's knife. She cut Evrard and then Taylor took over, cutting Evrard's wrist and dousing her with bug spray. Ultimately, he stabbed her in the chest. She was dragged outside and beaten with a baseball bat, by another family member, and Jamie slashed Evrard's throat, killing her. Her body was bundled into a trash can and left at a nearby dump site; the knives and her belongings thrown into the river. More items were burned at the Taylor home.

She was reported missing within a few hours and her body was found the next day. Taylor was arrested within the week and he confessed to the homicide. All three of the Taylors were indicted for murder and kidnapping, and related charges, but only Mark Taylor actually went to trial. (The others, along with several relatives, took pleas.) He was convicted of Murder and Kidnapping and appealed.

ISSUE: May Kidnapping be charged along with Murder, if the facts support it?

HOLDING: Yes

DISCUSSION: Among other issues, Taylor argued that he was improperly also charged with kidnapping. Under Kentucky's kidnapping exemption:

⁸ Lane v. Com., 956 S.W.2d 874 (Ky. 1997)

A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

Taylor, to avoid the double charge, essentially argued that he always intended to murder Evrard and as such, her removal and restraint in the bathtub was incidental to the murder, so kidnapping wasn't an appropriate charge. In reviewing such a claim, the court took a three pronged approach:

(1) "[T]he underlying criminal purpose must be the commission of a crime defined outside of KRS 509[";] (2) "[T]he interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime["; and] (3) "[T]he interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime."⁹

The Court agreed that, looking at Taylor's confession, the "kidnapping was central to [his] purposes, not the murder," because he wanted her where he could intimidate and interrogate her. She was away from home, trapped, and "unquestionably, her liberty was restrained."

Taylor's conviction for Kidnapping, as well as Murder, was upheld.

PENAL CODE – KRS 516 – FORGERY

Early v. Com., 470 S.W.3d 729 (Ky. 2015)

FACTS: Herring was a dental assistant in McCracken County and as such, had access to pre-signed prescription blanks from her employer. Aware of her job, Early, a friend, asked her on January 4, 2013, to write him a prescription and she finally agreed to do so, putting it in the name of Barbara Miller. She gave him a prescription for Lortab, which he filled. Several days later, Early told Pierce about it and Pierce too asked for a prescription. Early then shopped out the possibility of prescriptions to several others. He asked Herring for three more prescriptions, asking that they be issued in specific names. After several more, she told him she could not give him any more.

Eventually, one of the women whose name was provided realized a prescription had been filled in her name (by her boyfriend) and followed up with law enforcement. Ultimately, all involved were indicted and agreed to testify against Early. He was convicted of Trafficking in Prescription Blanks, KRS 218A.286(3) and Forgery and appealed.

ISSUE: Is using a forged prescription still forgery?

HOLDING: Yes

DISCUSSION: Early argued that the prescriptions weren't in fact, forged by him. He never actually wrote on them or altered them in any way. He argued that Herring didn't either, that she "simply abused her authority." The Court noted that his charge didn't require him to participate in the Forgery at all and that all he had to be proven to have done was to sell or transfer them. The Court noted that Herring testified that she did forge them and pled guilty to that. She used the names that Early provided on the forms to induce the pharmacy to fill the prescriptions. At best, she had only "apparent authority" to prescribe, and while that would protect a pharmacist from liability for filling one of them, it did not defend Early or Herring from charges.

⁹ Wood v. Com., 178 S.W.3d 500 (Ky. 2005).

The Court agreed that it was proper to place five individual charges against him, rather than merge those given at the same time together and a single course of conduct. Early's convictions were affirmed.

PENAL CODE – KRS 520 - ESCAPE

Lackey v. Com., 468 S.W.3d 348 (Ky. 2015)

FACTS: Lackey was notified that he had violated his parole, by voicemail. He reported as ordered to the office in Hardin County and was immediately handcuffed and arrested by an officer. When Lackey complained about the cuff, the officer removed the left one, and then concerned about the other one, took off that cuff as well. Lackey then “bolted for the door,” colliding with the officer who tried to stop him. He got through the front door and “at this point, the chase was on.” The officer tried to tackle him but fell to the floor with a cut to his head. Undeterred, the officer wrapped his arms around Lackey’s leg but Lackey was able to spring free and sprint out of the building, with the officer giving chase. A local officer learned of the “breakaway” and spotted Lackey near a creek. Ultimately the detective tracked him to a nearby house and he was arrested.

Lackey was charged with Escape 1st, Assault 3d and related charges. He was convicted of Escape 2nd. Lackey appealed.

ISSUE: Must a person be in some form of restraint in order to be considered to escape?

HOLDING: No

DISCUSSION: Lackey argued that there was no proof he’d escaped from custody as required in Escape. The Court agreed that “custody ‘is defined as “restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes”’” The Court noted that “Lackey makes the incredible argument that he was in custody when handcuffed but custody ended the moment the handcuffs were removed—at his behest—because he was no longer subjected to any physical restraint. At that point, according to Lackey, the only restraint was the police officer’s body blocking the door—a restraint that Lackey was able to overcome.” Finding his argument “difficult to take seriously, the Court agreed that briefly, he was not physically restrained. However, if, as he suggested, he was “free to leave, then why was he running and why was the police officer chasing him?” Although “custody requires control,” control “exists in many forms apart from physical control.” The Court noted that he knew he was under arrest and that was the purpose for his arrival at the office in the first place.

The Court acknowledged that in Stroud v. Com., it had adopted the concept of “constructive custody” for those under the Home Incarceration Program (HIP).¹⁰ Further, the underlying parole was for a prior felony, and that was an extension of the punishment for that offense.

The Court upheld his conviction.

PENAL CODE – KRS 524 - INTIMIDATION

Pettway v. Com., 470 S.W.3d 706 (Ky. 2015)

FACTS: On March 23, 2009, Sheckles was murdered while sitting in a Louisville park. Witnesses gave a “largely consistent description” of the shooter. Pettway and Hammond were eventually charged with the murder, as well as intimidating and retaliating against a witness. The theory of the case was the Pettway killed Sheckles at the behest of Hammond, to prevent her from testifying against Hammond’s younger brother. Sheckles had identified that individual as having murdered her boyfriend, Sawyers. Pettway, age 16 at the time, looked up to Hammond as a mentor. They both knew Sheckles was an

¹⁰ 922 S.W.2d 382 (Ky. 1996).

essential witness in the upcoming murder trial. Pettway made numerous statements claiming credit for Sheckles' murder.

Pettway was convicted of Murder and Intimidation, and appealed.

ISSUE: Can one be considered to have intimidated a witness by killing them?

HOLDING: No

DISCUSSION: First, the Court noted that there was no question but that Pettway committed the murder.

However, with respect to the Intimidating and Retaliating charges, the Court noted that “both necessarily contemplate subsequent action by the intimidated person as a consequence of the perpetrator’s intimidation” – “it is aimed at the use of duress and coercion to convince a witness to *choose* not to testify.” However, by murdering Sheckles, Pettway eliminated her choice, as “a dead person cannot act and cannot choose.” “Killing a witness forecloses the possibility of influencing that witness’s testimony or inducing the witness to absent herself from trial.” Pettway was not convicted of Retaliation, which was in fact, a proper charge under the facts.

Pettway argued as well, that the Commonwealth failed to produce discovery material in the first trial until the second day (which created a mistrial) and failed to disclose additional material until a week before the second trial, which led to that material being excluded under RCr 7.24. Pettway claimed he was entitled to not be prosecuted as a result – but the prosecution argued that Pettway could not show any harm caused by the process.

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

DOMESTIC/FAMILY

Angell v. Avent, 2015 WL 4689538 (Ky. App. 2015)

FACTS: Angell and Avent became acquainted through an online dating service. They met for the first time in April, 2014, and Avent ended the relationship on June 29, 2014. On July 3, she requested a DVO, alleging various acts of domestic violence. Following a hearing, she was granted a DVO and Angell appealed.

ISSUE: Can living together for a month be a qualifying relationship for a DVO?

HOLDING: Yes

DISCUSSION: Angell argued that Avent lacked standing to obtain a DVO as they did not have a qualifying relationship. Avent testified that she and Angell had lived together for approximately a month and that was corroborated by witnesses. That, coupled with her description of Angell’s actions, which included stalking, was sufficient to justify the DVO.

The Court affirmed the DVO.

DUI

Com. v. Bedway, 466 S.W.3d 468 (Ky. 2015)

FACTS: On March 15, 2009, Deputy Sheriff Hayden (Jefferson County SO) made a traffic stop at about 5 a.m. He spotted Bedway’s vehicle with expired tags and “weaving and moving erratically on I-64.” The vehicle nearly struck a concrete barrier as well. When he made the stop and approached, he found Bedway to reek of alcohol and with slurred speech. Bedway failed three FSTs and was arrested for

DUI. At the jail, Officer Broome (Metro Corrections) advised Bedway he could attempt to contact an attorney before taking the Intoxilyzer. At the end of that, he took the test, getting a 0.161 BA. There was dispute as to what was said during the waiting period, with Bedway claiming he asked if he could call his daughter to get a specific attorney's information. That was refused by Broome, who directed him to a bank of phones and phone books, and numbers were also written on the wall. Bedway did not attempt to make the call. Broome did not recall that conversation but agreed that a subject is only allowed to call an attorney.

Bedway moved for suppression, arguing that the denial of his attempt to contact his daughter was improper. The Court denied the motion to suppress. Bedway took a conditional guilty plea and appealed to the Circuit Court, which reversed the decision, suppressing the results. The Court of Appeals upheld that decision and the Commonwealth appealed.

ISSUE: Should a subject be allowed to contact someone to get a phone number for an attorney, during the DUI waiting period?

HOLDING: Yes

DISCUSSION: First, the Court addressed the issue as to whether his right to contact an attorney was violated. The Court looked to KRS 189A.105(3) and prior case law and equated the situation most closely to Ferguson v. Com., in which a subject was denied the right to use her cell phone to get a number for her attorney.¹¹ In that case, the Court agreed that denying her access to the phone in which the number was stored denied her the right to contact an attorney, and that it was unreasonable to deny it. In both Ferguson and Bedway's situation, the need occurred at a time when an attorney would be unlikely to be at the number found in a telephone book. The Court agreed the denial was improper and that the right is "broader than simply providing a defendant access to a phone book or phone numbers written on the wall."

With respect to the remedy, the Court looked to see if suppression was appropriate. The Court agreed that under KRS 189A.103, a driver has given implied consent to testing, and that penalties exist for refusal. However, the Court noted, usually, the exclusionary rule is invoked to exclude evidence when there has been some form of direct or indirect official misconduct, however, it continued, such suppression is only required when a constitutional right is abrogated. By driving, the Court continued, he agreed to submit to testing, and even contacting an attorney does not relieve Bedway of that obligation. In Beach, the court had ruled that "exclusion of evidence for violating the provisions of the implied consent statute is not mandated absent an explicit statutory directive."¹²

The Court agreed that Bedway should have been allowed to contact his daughter, but not that suppression was warranted under the circumstances. The Court reversed the decision and remanded the case back to Jefferson County for reinstatement.

SEARCH & SEIZURE – ARREST WARRANT

Barrett v. Com., 470 S.W.3d 337 (Ky. 2015)

FACTS; Covington PD received an anonymous tip that Barrett, for whom there were multiple arrest warrants, was at the home. Further, previous police contact with him had occurred there and he was listed as the homeowner. (In fact, his father, Sr., was actually the homeowner.) Officer Edwards arrived and walked around the house to identify exit points, he could hear voices and other sounds inside. Officer Isaacs arrived and posted up at the back, while Edward went to the front door. He knocked and announced, and the voices inside stopped, but no one answered. Officer Christian arrived and took over for Isaacs, who then joined Edwards at the front.

¹¹ 362 S.W.3d 341 (Ky. App. 2011).

¹² 927 S.W.2nd at 828.

Officer Edwards knocked with his flashlight and the added force caused the door to swing open. (Later discussion affirmed that the door was not ajar but not secure, either.) Concerned about what might be going on, they acted “according to common yet unwritten department practice, they again announced their presence and, hearing no response, entered.” Inside, Officer Edwards posted up at the foot of a staircase while Officer Isaacs went through the downstairs rooms. Edwards, still calling out, heard a woman call out from upstairs – she complied when told to come downstairs. She identified herself as Deborah Barrett, the owner. She stated Ricky Barrett was upstairs hiding in a closet. Officers Isaacs and Christian proceeded upstairs.

While searching for Barrett, Officer Isaacs spotted drug paraphernalia in plain view. Officer Christian heard noises from a hallway closet and they found Barrett hiding inside. He was taken into custody and charged with possession of heroin (found on syringes in the paraphernalia). Barrett moved for suppression and was denied.

ISSUE: May officers enter with reasonable suspicion on an arrest warrant?

HOLDING: Yes

DISCUSSION: The Court noted that under Payton v. New York, “for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”¹³ However, the Court agreed it had never had occasion to interpret the “reason to believe” standard in Payton. The Court noted that the majority of courts that had done so “have considered the standard” to be “less exacting than probable cause.” Others have held it to be the same as probable cause and the remainder have simply not interpreted it at all.

The Court looked in particular to decisions from the Sixth Circuit, which followed the less than probable cause line. As a result of its analysis, the Court noted that it adopted “the plain language reason to believe standard from Payton and reject[ed] the probable cause standard.” As such, the Court said, “police executing a valid arrest warrant may lawfully enter a residence if they have reason to believe that the suspect lives there and is presently inside. Reason to believe is established by looking at common sense factors and evaluating the totality of the circumstances and requires less proof than does the probable cause standard.”

The Court noted that if the Court wished the standard to be probable cause in Payton, it could have simply done so – as the Court was “clearly aware of the differences and chose to require separate standards.” Next, it makes no sense that once police are holding a valid arrest warrant that they would need to make a second probable cause determination simply to enter a place where the suspect is known to be living. (The Court did note that “a third party’s rights are not infringed because a search warrant is required to enter a third-party’s residence to arrest a non-resident suspect.”¹⁴) In this case, they had good evidence that Barrett was living at the location listed on the warrant, although not, as it turned out, the actual homeowner, and that someone was present who was not responding to their knock.

The Court also agreed that the search of the upstairs was justified under the same standard and that officers were not confined to the immediate entryway. Once they determined that Barrett was in a particular closet, they ceased looking through the upstairs and arrested him – although they spotted the relevant evidence in another room prior to finding him. The Court agreed the bedroom search was justified as a protective sweep under Maryland v. Buie¹⁵ and Guzman v. Com.¹⁶ The Court agreed that like in Kerr v. Com., a bedroom near where Kerr was arrested in the house was quickly swept “as a place

¹³ 445 U.S. 573 (1980).

¹⁴ Steagald v. U.S., 451 U.S. 204 (1981).

¹⁵ 494 U.S. 325 (1990).

¹⁶ 375 S.W.3d 805 (Ky. 2012).

adjoining the place of arrest from which an attack could be immediately launched.”¹⁷ As such, Officer Isaacs was lawfully in a position to see the drug paraphernalia and plain view applied.¹⁸

The Court upheld the denial of the suppression motion.

SEARCH & SEIZURE – REASONABLE EXPECTATION OF PRIVACY

Payne v. Com., 2015 WL 5655137 (Ky. 2015)

FACTS: Upon learning upon allegations that Payne sexually abused his granddaughter, age 5, Louisville Metro officers located and arrested him on an unrelated warrant. He was brought to the Crimes Against Children Unit at about 12:30 a.m.. During most of his time in the interview room, which was recorded, he was apparently asleep. About 42 minutes into his time there, Det. Merrick entered, awakened him, gave him his Miranda rights and “had him sign a waiver of those rights.” She tried to question him, but he only gave “several nonverbal responses” – remaining essentially nonresponsive to her questioning. (His facial features were not clear due to the position of the camera.) She left after 16 minutes. 25 minutes later she returned, but had more difficulty rousing him. She asked him for permission to do a buccal swab and eventually succeeded in getting his signature on the form – and it was noted that it was “notably more scribbled” than the one before. He allowed her to swab inside both cheeks.

At trial, he moved for suppression of the swab, arguing it was not voluntary. Det. Merrick testified that she believed he was pretending to be asleep and that she found him responsive, albeit nonverbal, to her questions. The Court denied the motion, finding that he did not appear to be intoxicated or unconscious. (The Court noted that no matter what, they would have ultimately gotten the DNA anyway.)

Ultimately he was convicted of incest, sodomy and sexual abuse. He then appealed.

ISSUE: Is taking a buccal DNA swab a search?

HOLDING: Yes

DISCUSIOSN: The Court agreed that “[U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search.”¹⁹ The “primary concern in determining “voluntariness” of consent to conduct a warrantless search is whether it was freely given or instead was the product of duress or coercion, either express or implied.”²⁰ In this case, the Court found no coercion and noted that the trial court’s finding that he “was conscious, nonverbally responsive to questioning, and not intoxicated, which again we must accept as conclusive, directly refute his claim that he was incapacitated and unable to give consent.”

The Court upheld his convictions.

Traft v. Com., 2015 WL 4597598 (Ky. App. 2015)

FACTS: On September 11, 2013, Traft was stopped by Deputy Schepis (Boone County SO) while driving on a public road. The stop was based on the deputy’s use of a license plate reading camera that indicated that the registered owner of the vehicle had a FTA warrant. Once he made the stop, he learned Traft had been drinking and Traft was charged with DUI after failing a FST.

Traft moved for suppression and was denied. He took a conditional guilty plea and appealed.

¹⁷ 400 S.W.3d 250 (Ky. 2013).

¹⁸ Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).

¹⁹ Maryland v. King, 133 S.Ct. 1958 (2013)

²⁰ See Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

ISSUE: Does the use of a license plate reader violate a reasonable expectation of privacy?

HOLDING: No

DISCUSSION: The Court noted that the only issue was whether the use of the license plate reader violated Traft's privacy. The Court agreed that although there was no Kentucky case law on point, that in U.S. v. Ellison, it had noted that there is no reasonable expectation of privacy in the license plate and the information it contains.²¹ The Court agreed that no reasonable suspicion was required to use the camera to read the plate, and that once he learned of the warrant on the owner, it was proper for the deputy to "stop the vehicle and ask for identification." In fact, Traft was the owner and once the deputy realized that, further investigation was also justified.

Traft's plea was upheld.

SEARCH & SEIZURE – TERRY

Jointer v. Com., 2015 WL 4385688 (Ky. App. 2015)

FACTS: On July 18, 2012, just before midnight, Lexington officers Moore and Muller spotted two individuals in and around a legally-parked vehicle, talking. The officers were on high visibility patrol as a result of several shootings in the area. They watched the two individuals for a couple of minutes – with Jointer sitting in the driver's seat, with the engine turned off and the door ajar, and the female (Brown) standing next to the car, smoking. They did not notice the officers until they were within 50 feet and then Brown spotted them and alerted Jointer.

As soon as he was "cued" to the presence of the officer, Jointer's movements – "reaching down, shifting his body away from the view of the Officers, and appearing to conceal something in the vehicle or on his person" raised their suspicions. He then "leapt or sprung from the vehicle" but did not flee. The officers split up and approached the car to discourage any flight. They smelled the "strong odor of burnt marijuana." Jointer was handcuffed and frisked, no weapon was found. Officer Moore sat Jointer down and searched the vehicle for weapons and marijuana. Only the latter was found. Jointer was told he would be cited for it and the handcuffs were removed. The officer asked if he could search Jointer's person, and apparently, he agreed.

The officer found 9.8 grams of cocaine, marijuana and \$580 in cash. Jointer was then recuffed and arrested. He gave a false name at the time, but later admitted to his real identity. At the suppression hearing, he argued that he did not give permission for the search, but the court noted his lack of credibility with respect to his identity. At some point, he took a conditional plea and appealed.

ISSUE: May movements made by a subject to hide from officers trigger a Terry stop?

HOLDING: Yes

DISCUSSION: Jointer argued that he was unlawfully seized and that led, ultimately, to the evidence that was used against him. The Court agreed that the facts known to the officers supported the Terry stop, which led to the frisk. The Court found nothing to indicate the officers "improperly prolonged Jointer's detention or unlawfully placed him in handcuffs prior to locating any contraband."

The Court affirmed his plea.

²¹ 462 F.3d 557 (6th Cir. 2006).

SEARCH & SEIZURE – VEHICLE STOP

Church v. Com., 2015 WL 4498792 (Ky. App. 2015)

FACTS: On December 5, 2013, Deputy Griggs (Muhlenberg County SO) arranged for a CI to buy drugs from Church. The deputy reviewed text messages between the two and the meeting place. Church described the vehicle he would be driving and that he had 100 (hydrocodone) pills to sell. The CI was provided with money and made the buy. Griggs made the stop and had backup officers hold him, while he went to meet with the CI and be briefed. More drugs and cash were found in Church's vehicle. Church was charged with Trafficking and related offenses. When his motion to suppress was denied, he took a conditional guilty plea and appealed.

ISSUE: May a vehicle stop be longer than usual if necessary?

HOLDING: Yes

DISCUSSION: Church asserted that the initial stop was improper and as such, anything found later should have been suppressed. He contended that since the deputy took ten minutes to leave the scene and confer with the CI, that it was improper to hold him. The Court noted that the deputy's testimony was credible and that he had individualized particularized suspicion to make the stop and to hold him, under Terry.

The Court upheld the trial court's decision.

Everette v. Com., 2015 WL 4978746 (Ky. App. 2015)

FACTS: Officers from the area suspected that illegal drugs were being brought into Kentucky from Detroit, through the bus station in Ashland. On March 27, 2013, several KSP troopers were positioned there, doing surveillance, and were assigned to "engage in conversation" with travelers getting off certain busses. The troopers were in plainclothes, but wore tactical vests emblazoned with "State Police." Everette got off a bus that arrived at 5:30, carrying a backpack. The troopers discreetly followed him to see if he got into another vehicle, as he left on foot. He did not, so they decided to make contact with him and try to talk to him. Det. Kelley, "maneuvered his vehicle to the curb next to Everette and activated the car's blue lights" – which they later explained was because it was in the wee hours of the morning and the vehicle was unmarked. He and Det. Goble got out and identified themselves. "Everette uttered an obscenity and ran away." They chased him and saw him toss away an item – later determined to be 200 oxycodone pills.

Everette was indicted for Trafficking 1st and related offenses. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does the use of blue lights (only to identify a plainclothes officer as police) elevate a stop to a Terry stop?

HOLDING: No

DISCUSSION: Everette argued that the use of the blue lights elevated the situation from a voluntary interaction to an unsupported Terry stop. The Court noted that Everette's argument "has a visceral, and universal appeal; everyone's reaction to the sight of flashing lights in his rear-view mirror is physiological." "Law abiding citizens regularly, if not universally, respond by yielding to law enforcement's show of authority and purpose of duty demonstrated by the activation of lights and sirens. Criminals are less inclined to do so, but often do so nonetheless."

However, the Court noted "at the moment immediately preceding the decision to yield or not to yield, there is no seizure." The interference by police "can be involuntary, as when there is some form of

physical force exerted by law enforcement, or voluntary, as when the citizen's conduct demonstrates submission to a show of authority by law enforcement." The Court agreed that the lights were not physical force.²² Further, because Everette did not submit, at all, he was not seized. As such, he was not seized until he was actually physically captured. (And because he discarded the pills before capture, they were properly collected as abandoned property.)²³

The Court upheld Everette's plea.

INTERROGATION

Salyers v. Com., 2015 WL 4984552 (Ky. 2015)

FACTS: Salyers was the president of the Iron Horsemen Motorcycle Club. He loaned money to Pyle, a member, for a motorcycle, but problems arose when Pyle did not repay the loan. Pyles left the club. In a renewed spirit of friendship, they began negotiations over the motorcycle and Salyers helped Pyles get a job. On the night in question, Salyers called that factory to discover if Pyles was there. Allegedly they met, along with Rigdon, who was with Salyers. Salyers argued that after Pyles insulted Rigdon, Rigdon killed Pyles. They fled and Rigdon demanded Salyers give him the truck they were in – and Rigdon later set it ablaze. Salyers reported the truck stolen and during a followup, willingly agreed to go along with officers to discuss the truck. Eventually they ended up at the police station, where Salyers was given Miranda and questioned about Pyle's murder. He was charged with complicity. He was convicted and appealed.

ISSUE: Are statements made before Miranda is required admissible?

HOLDING: Yes

DISCUSSION: First, Salyers argued that his pre-arrest statements should have been suppressed. The Court noted that:

Appellant initiated the contact with the police by reporting his truck stolen; 2) the police responded to this report by visiting Appellant at his home; 3) Appellant voluntarily took the officers to the site where he claimed to have last seen the vehicle; 4) Appellant voluntarily accompanied the police to the police station; 5) at the police station, the officers continued to question Appellant about the alleged theft of his truck as they shifted the subject of the conversation to Pyles' murder; 6) police rendered Miranda warnings to Appellant about 15-20 minutes before questioning Appellant about the murder; 7) the officers who informed Appellant of his Miranda rights were the same officers who interrogated him about the murder; 8) Appellant communicated that he understood his rights, voluntarily answered questions, and did not request an attorney; 9) Appellant was not restricted from taking his medication or denied the ability to move about freely; and 10) after Appellant took his medication he demonstrated an ability to recall and coherently convey details regarding the murder.

Based on that, the trial court had concluded that he was not in custody and that once he was given Miranda, he properly waived his rights. The Court differentiated between the pre-arrest statements, during which time he stated he was "lured" to the police station by the suspicious officers. He argued that the "lack of candor in their approach to his stolen vehicle report vitiated the voluntariness of his pre-Miranda statements, rendering them inadmissible." The Court disagreed, finding he voluntarily communicated with and accompanied the officers. As such, there was no need for Miranda. Once he made a statement about the truck at the station, he was given Miranda and cautioned that he might be committing insurance fraud. The Court agreed that "the police may employ deceptive tactics in order to

²² Taylor v. Com., 125 S.W.3d 216 (Ky. 2003). California v. Hodari D., 499 U.S. 621 (1991).

²³ Martin, 399 F.3 at 753.

elicit incriminating responses from suspects, so long as those tactics do not rise to the level of coercion or compulsion.²⁴

The Court noted:

Moreover, we remain mindful that the police approached Appellant only in response to his own ruse to deceive them into believing that his truck was stolen. The fact they pretended to believe his false story did not compel or coerce Salyers to speak against his own interest. After he was given Miranda, they continued their discussion, although some time passed before the murder was mentioned. He complained that he should have been given Miranda a second time, when the focus changed. Although Miranda warnings can “go stale,” not enough time had passed to consider that was in fact the case here. The same officers were involved in both situations, it occurred at the same location and the change occurred with 15-20 minutes of the onset of questioning. When he asked to stop, they did so. He took unknown prescribed medication during his time there, but nothing indicated he was intoxicated or impaired by it.

Finally, although the Court agreed it was error to admit statements made by his son, when the son did not testify and because he did not qualify as a co-conspirator under KRE 801(b)(5), Salyers echoed his son’s testimony when he took the stand, admitting he’d instructed his son how to corroborate the alibi he’d come up with.

In addition, the Court agreed that an ATF agent who testified as an expert on motorcycle gangs was properly qualified as an expert and that his testimony helped the jury understand the inner-workings of an organization like the Iron Horseman. His testimony put the matter into a cultural context that was relevant.

The Court also addressed his complaint that too many officers were in and around the courtroom, apparently as a result of his status in the motorcycle gang. The Court reviewed the video and found no “undue police presence in the courtroom itself.” The Court found no reason to question the presence of officers outside the courtroom, however.

After resolving several other issues, the Court upheld his conviction.

Fairchild v. Com., 2015 WL 4967150 (Ky. 2015)

FACTS: Walker and his girlfriend, Mauk, were killed during a robbery of their trailer in Fleming County. Six years later, Jackson and Dodson were charged in the crime, and arrested. They quickly implicated Fairchild, who was also charged. Both Dodson and Jackson took guilty pleas in exchange for testifying against Fairchild. Trial testimony indicated that several people were angry with Walker for informing to KSP and allegedly assaulting Fairchild’s sister and attempting to buy her baby, among other things. Dodson, however, testified that the murders were strictly motivated by money.

On the day of the murder, Dodson and Jackson went into the trailer, with Fairchild waiting outside. Fairchild then entered as well and they tried to coax Walker into coming to Ohio with them. At some point, Jackson and Dodson stated, Fairchild shot Walker and Mauk. They fled, then returned for the car keys, and Fairchild shot the pair again. They took cash and Fairchild directed Jackson to get rid of the gun.²⁵ They locked the trailer and left. The money was shared among the trio when they returned to Ohio. Fairchild, however, claimed Jackson was the shooter and that he wasn’t inside at the time, although he later admitted that he was inside during the shooting.

Fairchild was convicted, and appealed.

²⁴ See Leger v. Com., 400 S.W.3d 745, 750 (Ky. 2013) (“We recognize that our law allows, and should allow, police officers to use deception and artifice to ‘mislead a suspect or lull him into a false sense of security’ that, despite his understanding of the Miranda warning, might prompt him to speak against his own interest.”); Illinois v. Perkins, 469 U.S. 292 (1990); and Springer v. Com., 998 S.W.2d 439 (Ky. 1999).

²⁵ It was found in pieces in a pond, having been battered with a hammer.

ISSUE: Is “threatening” a polygraph coercive?

HOLDING: No

DISCUSSION: Fairchild first argued that his statement to the police was involuntary, and thus inadmissible. His statement was made before he submitted to a polygraph, and he agreed to do so to be cleared. He was taken to a small room under the jail and although the door was closed, he was told it was unlocked and he was free to leave at any time. He properly waived his Miranda rights before the interrogation. The Court disagreed with the assertion that he was coerced by being told he would remain a suspect if he did not undergo the polygraph and in fact, that was “factually accurate.” He was at home prior to the test and returned voluntarily to actually undergo the polygraph the next morning. In fact, he invoked his right to stop the interview, and it ended. Despite his attempt to “paint the ominous specter of the impending polygraph as improperly coercive,” the Court disagreed. Interrogations that have followed polygraphs have been found to be voluntarily.

Further his attempt to argue that the polygraph was done improperly also failed. Although deviation from accepted standards might undermine the results, their results are already “per se inadmissible because of their inherent unreliability.” He did not point to any “specific instances of coercive behavior” and did not cite to the transcript to the interview. The interviewer admitted that he “interrupted and spoke over Fairchild as an interrogation technique.” However, that might be annoying but was not objectively coercive. The discussion of potential penalties does not render a confession involuntary, so long as they are truthful.

Well before trial, the Commonwealth had acknowledged that any reference to a polygraph was not permitted, and it had prepared a “redacted audio recording from the original video recording of Fairchild’s statement to police.”²⁶ Fairchild requested that additional portions be redacted pursuant to KRE 404(b) – Prior Bad Acts, and that was also done. However, during opening, his own attorney discussed the polygraph and the Commonwealth then asked to play the full video, and was permitted to do so, excluding only the actual polygraph. (Later, Fairchild asked to have that played, and the Court allowed it.) In effect, he negated his own request to redact certain portions of the recording.

After resolving several other procedural issues, the Court affirmed his conviction.

Campbell v. Com., 2015 WL 5652016 (Ky. 2015)

FACTS: In August, 2009, Norris’s home in Lexington was invaded. He was tied up, struck and robbed of \$70,000. He was robbed again at home in October, 2010, this time his credit card was taken. Investigation into that robbery led to Washington. Washington, when arrested, implicated Campbell as the other participant. Campbell confessed, and eventually, the police linked him to the earlier robbery as well. He confessed to that one, as well.

Campbell was indicted in both crimes. He moved for suppression, arguing that “promises of leniency” ... “coerced him into confessing.” The Court denied him, and he took a conditional guilty plea and appealed.

ISSUE: May certain psychological tactics be used in an interrogation?

HOLDING: Yes

DISCUSSION: The Court agreed that “due process mandates that confessions or other statements procured through coercive means be excluded.” In this case, Campbell was certainly not mistreated in any physical way, but the Court agreed that coercion can be mental. However, “it is acceptable for police to use a certain degree of psychological tactics in obtaining a suspect’s confession.” Campbell’s interrogations were “calm affairs with neither Campbell nor police ever becoming agitated.” He was

²⁶ He was connected to the polygraph at the time.

given routine breaks, access to smoking, drinks and at one point, he even thanked officers for being kind to him. He was given Miranda warnings and waived them.

As a tactic, they focused first on the 2010 robbery and did not ask him if he had committed the robbery, but only why he had done so. He was reminded that his “best bargaining chip” was honesty. He only spoke about the earlier robbery after he’d removed an ankle monitor and fled to his girlfriend’s home, where he was found by U.S. Marshals. (His argument that she was threatened with prosecution for harboring him, and that he was thus coerced, was also baseless, as she certainly could have been charged for it.)

The Court noted that Campbell set the tone that he wanted something for confessing but “no promises were made to him.” Instead, officers specifically told him that they could make no promises at all. They agreed to talk to the prosecutor on his behalf, while he argued for leniency for himself and Washington (his cousin). In fact, he held an “informed and candid conversation with police about future punishment” – which indicated the opposite of his will being overborne. While he may have confessed in hope of leniency, it was not in response to “any promise of leniency.”

Campbell’s conviction was affirmed.

Brumley v. Com., 2015 WL 4967237 (Ky. 2015)

FACTS: On June 1, 1969, Sheriff Sizemore (Clay County) was shot and killed. Det. Cox (KSP) investigated and found little physical evidence. The case lay dormant until 1985 when Det. Huckabee received a tip that Brumley, an Ohio inmate, had information about the murder. When questioned, he implicated Wheeler, a fellow inmate – but investigation indicated that Brumley clearly knew more about the murder than Wheeler, and that they were trying to “con” the system into both being transferred to a Kentucky prison. In the early 1990s, Sheriff Jordan (Clay County) learned that highway department workers had discovered a gun in a culvert near the murder scene, but it had deteriorated so badly that it could not be linked to the murder with any certainty. This prompted the case to be reopened, however, and Sheriff Jordan interviewed Brumley. Brumley provided details and claimed to have driven the getaway car, implicating Wheeler and another man, Marcum. He did not state who actually did the shooting, however. Wheeler was discovered to have died in a Tennessee prison. That again put the brakes on the investigation.

Det. Senters (KSP) picked up the investigation in 2011. Upon reviewing the file, he discovered the information about Brumley and ultimately travelled to Ohio to interview him. Brumley refused to talk without a promise that he would be transferred to Kentucky prison. Det. Senters told him he could not promise but would try to make that happen. Brumley then confessed that he’d shot the sheriff for \$200, at the behest of another, who had also provided the gun. The Sheriff was lured to the site by a party who had also since died, where Brumley would “lay in wait.” As soon as the Sheriff got out of the car, Brumley shot him, and then continued to shoot when the Sheriff ran after him. He hid the gun and left the scene. Brumley claimed that in addition to the money, he also felt that the sheriff had wrongly accused his father of burglary and he was jailed, where he subsequently died. He did not further implicate anyone else in the murder. (Brumley was serving a life sentence in Ohio and knew he would never be released, he apparently simply wanted to serve out his time in Kentucky.)

Further investigation proved less than fruitful, due to the death or disability of other individuals in the case. The case finally went to the trial in 2012, but defense counsel noted that because the crime had occurred 44 years earlier, she had difficulty finding witnesses and evidence. At trial, it was learned that the Commonwealth had a recording of the interview with Brumley, which had not been produced, but it was learned that in fact, there was nothing exculpatory on it. Brumley testified in his own behalf, claiming to have lied in his confession because of his desire to die in a Kentucky prison. He claimed to have gathered details about the crime and has “used those details to weave his lies.” He explained that he and Wheeler had hoped to engineer an escape if they could be transferred back to Kentucky. A witness testified that Brumley was at her home near Lexington when news was heard on the radio that the Sheriff had been killed.

Brumley was convicted and appealed.

ISSUE: Is a confession that occurs without a commitment coerced?

HOLDING: No

DISCUSSION: First, the Court agreed that it was proper for the court not to allow a continuance on the morning of the trial, which he wanted due to his inability to find material evidence (due to the passage of time) to support his defense. The Court agreed that both Brumley and the Commonwealth were hampered in their production of evidence by the passage of time, “witnesses had died or were not easily located and documents were gone or in not easily accessible archives.”

Brumley also argued that the detective’s knowledge of Brumley’s strong desire to return to Kentucky was coercive in itself, but the Court noted Brumley had also willingly confessed without any commitment of a transfer. He also argued that he was entitled to a mistrial when it was learned that he had not been provided with a copy of the interview. The Court agreed that pursuant to RCr 7.24(2), he should have gotten it, but disagreed that it mandated a mistrial, as it included no useful information to Brumley’s defense. The information in the interview, in which Burns mentioned several names as the possible shooter, was provided by testimony of other witnesses.

Brumley’s conviction was affirmed.

SUSPECT ID

McNeil v. Com., 468 S.W.3d 858 (Ky. 2015)

FACTS: McNeil was accused of stealing money from the purse of a woman, Wheeler, with whom he was acquainted. She ran after him demanding the purse, and another female friend, Rose, stood in front of the car and looked him directly in the eye. He accelerated and knocked Rose down, dragging her a few feet. (She suffered serious injuries as a result.) There was another witness and security video, but it only provided very general information. Investigation of a telephone number Wheeler had led back to McNeil, and with that information, the officers prepared a photo pack. McNeil was identified by both women from his photo and they reiterated the identification at trial.

McNeil was convicted of both Assault and Robbery, and appealed.

ISSUE: May both Robbery and Assault be charged, when the facts support both?

HOLDING: Yes

DISCUSSION: The Court looked at whether Robbery and Assault constitute double jeopardy. It noted that in some cases, they would merge and in others, they stood as two distinct charges under Blockburger.²⁷ The Court noted that “first-degree robbery does not include all the elements of assault—the intent to injure or the injuring wantonly being an element of assault that is not required for a finding of first-degree robbery even under the physical injury theory.”

Specifically:

First-degree robbery involving physical injury requires proof of the following elements: (1) in the course of committing a theft, the perpetrator (2) uses or threatens the immediate use of physical force (3) with intent to accomplish the theft, and (4) causes physical injury to a person not a participant in the crime. First-degree assault requires that the perpetrator (1) intentionally (2)

²⁷ Blockburger v. U.S., 284 U.S. 299 (1932).

cause serious physical injury to another person (3) by means of a deadly weapon or dangerous instrument, or alternatively that the perpetrator (1) manifesting extreme indifference to the value of human life (2) wantonly (3) engage in conduct which creates a grave risk of death to another (4) thereby causing serious physical injury to another person.” As such, the court concluded, “under Blockburger, the physical-injury theory of robbery does not subsume assault of double jeopardy purposes. To the extent that O’Hara v. Com., held otherwise, it is hereby overruled.²⁸

McNeil’s convictions for both assault and robbery were upheld.

TRIAL PROCEDURE/EVIDENCE – CHAIN OF EVIDENCE

Grigsby v. Com., 2015 WL 4718894 (Ky. App. 2015)

FACTS: Grigsby was charged in Marion County with a variety of sex crimes involving his stepdaughter, age five. During the trial, a question arose concerning a piece of evidence, a blanket, which had been sent to the KSP crime lab for testing. It had been collected the day after the crime was reported, on April 15, 2011, but was not received at KSP until July 1. The blanket was tested and a DNA match was made to Grigsby. He moved for suppression and was denied.

Grigsby was convicted and appealed.

ISSUE: Does a delay in testing necessarily invalidate the results?

HOLDING: No

DISCUSSION: Grigsby argued that the lengthy period of time, for which the location of the blanket could not be known, mandated that it be suppressed. The Court was unable to determine the reason for the delay because the deputy who initially seized the item, Rakes, was killed in the line of duty in 2012. The Court noted that “a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis.”²⁹ However, it agreed that “[e]ven with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that ‘the reasonable probability is that the evidence has not been altered in any material respect.’”³⁰ “Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.”

In this case, even if the blanket stayed in the trunk of Rakes’s cruiser for the time in question, there was “no reasonable scenario by which his DNA might have been surreptitiously planted on the blanket.” The DNA could not have degraded because it was, in fact, found on the blanket.

Grigsby’s conviction was reversed for procedural reasons unrelated to the topic of this summary.

TRIAL PROCEDURE/EVIDENCE – EXPERT TESTIMONY

Oliver v. Com., 2013 WL 4680423 (Ky. App. 2015)

FACTS: On September 16, 2010, Boggess, a cab driver, gave Oliver a ride from Lexington to Nicholasville. Upon arrival, Oliver stabbed Boggess through the window and tried to take cash from him, and then fled. Oliver was quickly apprehended and charged with Assault 1st and Robbery 1st. Oliver claimed he acted in self-defense and that the attack took place outside the vehicle, but the Commonwealth put on evidence that Boggess was inside the vehicle and that “Boggess was still wearing his seatbelt.”

²⁸ 781 S.W.2d 514 (Ky. 1989).

²⁹ Rabovsky v. Commonwealth, 973 S.W.2d 6 (Ky. 1998).

³⁰ Id. (quoting U.S. v. Cardenas, 864 F.2d 1528 (10th Cir. 1989)).

Oliver was convicted and appealed. Upon his first appeal, his conviction was modified for an unrelated reason and Oliver appealed that as well.

ISSUE: Is a Daubert hearing required for expert testimony?

HOLDING: Yes (as a rule)

DISCUSSION: Oliver argued that it was improper to allow Detective Elder (Nicholasville PD) to testify regarding blood spatter evidence, as no Daubert hearing was held on his “expert qualifications.”³¹ In fact, the Court noted, such a hearing was held and the court had held Det. Elder could testify as to crime scene reconstruction, including blood spatter.

The Court also agreed that the testing of blood evidence was properly denied, because there was no demonstration as to the purpose of said testing, given he admitted the stabbing itself. Finally, the Court agreed that he was properly convicted of both Robbery and Assault, and that was not double jeopardy.

TRIAL PROCEDURE/EVIDENCE – BUSINESS RECORDS

Wilson v. Com., 2015 WL 5655524 (Ky. 2015)

FACTS: Sleet called Covington police to report an armed robbery at her apartment during a poker game. She identified Wilson as the robber and gave the police information concerning his possible whereabouts. At his girlfriend’s apartment, officers found Wilson’s wallet. They checked her mother’s apartment – both were in the same complex – as well. Mullins, the mother, indicated that Wilson had been in her apartment earlier that night, unexpectedly. Ultimately, they returned to the girlfriend’s apartment and found Wilson trying to escape, and a shootout occurred, with two officers slightly wounded. Wilson escaped into a wooded area. He was arrested several days later on a multitude of charges, including three counts of attempted murder. He was convicted of some of the charges and appealed.

ISSUE: Are text messaging records from the company self-authenticating records under the Kentucky Rules of Evidence?

HOLDING: Yes

DISCUSSION: During the trial, text messages purportedly sent from Wilson were introduced, in which he essentially confessed to shooting at the officers. The trial court had found his connection to the number was clear and that the “ records were self-authenticating business records under KRE 902 and created a significant indicia of reliability.” Witnesses had testified that was the number they used for Wilson and that he replied to messages sent to that number. In some of the messages, he specifically used his name in the body of the text. The Court agreed that the burden of proving that Wilson sent the messages was slight, and in connection with the circumstances, was met.

The Court upheld Wilson’s convictions.

TRIAL PROCEDURE/EVIDENCE – HEARSAY

Dwyer v. Com., 2015 WL 5095838 (Ky. App 2015)

FACTS: On August 31, 2012, Sgt. Wilson (Kenton County PD) was called to investigate suspicious activity at a vacant residence. He found the back door unlocked and entered, and noted a “large number of free-standing kitchen cabinets.” He then left. Later that day Douglass, a neighbor,

³¹ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

noticed a red truck in the driveway and a man standing on the porch. He had cabinets on the porch. She called 911 and reported it. Her husband followed the men as they left.

Officer Bailey (Taylor Mill PD) received the call on a possible burglary. He found the truck and pulled it over, Dwyer was driving. Dwyer stated he'd purchased the cabinets off Craigslist. Officer Fultz arrived and told Dwyer he was a suspect in a burglary. He was given Miranda and initially said he didn't want to say anything. He did later stated he'd purchased the cabinets from Tom/Tommy, with no last name or phone number, and that he did not know the homeowner or have permission to enter the home. Dwyer was taken to the station where he asked for an attorney.

At trial, Douglass was asked if she could place Dwyer or Soard (the other man) actually inside the home, and she said she could not. She admitted that she'd told someone else that she never saw them inside, although Officer Fultz testified that Douglass had told Officer Price that "she had seen the men inside." He then "added that Dwyer later refused to say anything and requested his attorney at the police station."

During jury deliberations, the jury asked whether the "covered, wrap-around porch was part of the Residence." The court noted that it was certainly part of the building, even if not part of the dwelling.³² Dwyer was convicted of Burglary 3d and appealed.

ISSUE: Is the introduction of prior inconsistent statements a violation of the hearsay rule?

HOLDING: No

DISCUSISON: Dwyer argued it was improper to allow Officer Fultz to testify as to what Douglass told Officer Price. The Court noted that: The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'"³³ Further, KRE 801A "provides an exception to the general rule against the admission of hearsay evidence when a party seeks to introduce a witness' prior inconsistent statements."³⁴

The Court noted that "In Kentucky, it is well-settled that prior inconsistent statements may be introduced for both impeachment and substantive purposes 'regardless of whether the witness whose out-of-court statement is to be proved appears as a witness for the party who intends to prove it or as a witness for the adversary party.'"³⁵

In this case, the Court noted, there was no ongoing emergency and the "only reason Officer Price asked where the men stood during the incident was to establish an element of a crime for a future criminal prosecution." As such, her statements were testimonial. Since there was no foundation laid regarding any previous statement she made, Officer Fultz's "unresponsive answer contained statements that are generally inadmissible." However, since Dwyer did not raise the issue at trial, the court ruled it was proper for the jury to find that he had, in fact, entered and removed the cabinets.

With respect to the building/dwelling issue, the Court noted that Colwell v. Com., which provides that "every dwelling is a building, but every building is not a dwelling."³⁶ In Johnson v. Com., the Court had held that a porch attached to a residence constitutes a dwelling under Kentucky's burglary statute.³⁷ Further, the fact that the building was uninhabited, although about habitable, did not mean that a lesser degree of burglary wasn't warranted.

Finally, Dwyer argued that his rights were violated when "Officer Fultz testified that Dwyer invoked his Miranda rights." The Court noted that the comment came up when Soard's counsel asked him if Dwyer

³² Johnson v. Com., 875 S.W.2d 105 (Ky. App. 1994)

³³ Davis v. Washington, 547 U.S. 813 (2006) (quoting Crawford v. Washington, 541 U.S. 36 (2004)).

³⁴ McAtee v. Com., 413 S.W.3d 608 (Ky. 2013).

³⁵ Jett v. Com., 436 S.W.2d 788 (Ky. 1969).

³⁶ 37 S.W.3d 721 (Ky. 2000).

³⁷ 875 S.W.2d 105 (Ky. App. 1994).

claimed a third person was at the residence. He then was asked by the Commonwealth on redirect about it, and he replied that “Dwyer invoked his Fifth Amendment right to counsel and remained silent at the police station.” However, the Court noted, the questions leading up to this question indicated that the Commonwealth intended to (1) elicit testimony from Officer Fultz to impeach both Dwyer and Soard with their conflicting stories and (2) establish that Dwyer had a chilling effect on Soard. Taken together, we find the Commonwealth’s line of questioning smuggled Dwyer’s post-Miranda silence into evidence via a prosecutorial tool.

However, the court agreed, the error did not affect the ultimate verdict and upheld his conviction.

TRIAL PROCEDURE/EVIDENCE – TESTIMONY

Wooden / VanMeter v. Com., 2015 WL 4040122 (Ky. App. 2015)

FACTS: On March 13, 2012, Trooper Lee (KSP) was asked to accompany a CHFS worker to investigate the welfare of the Wooden’s children, in Grayson County. He asked to search the premises, and VanMeter (who was there with the Woodens) refused. Trooper Lee discovered Phildon Wooden had an outstanding warrant, and arrested him. He found a meth pipe in his wallet. He contacted Det. Henderson (KSP – Narcotics) and asked if he knew the Woodens or VanMeter; he agreed he’d heard of them. Trooper Lee ran a MethCheck and learned all three had recently purchased pseudoephedrine.

Det. Henderson came to the scene. VanMeter denied owning the property, having sold it to the Woodens, but still said he did not want the property searched. (Apparently he was in the process of moving out and still had belongings there and the Woodens were moving in.) Det. Henderson obtained a search warrant and upon service, found a great deal of evidence related to meth manufacturing.

VanMeter and the Woodens were all tried together, and convicted of meth manufacturing and related charges. They appealed.

ISSUE: May an officer testify to information that explains why they took a certain action?

HOLDING: Yes (but care must be taken to avoid improper testimony)

DISCUSSION: The defendants objected to Det. Henderson’s testimony that he’d previously heard their names from a CI. The Court looked to Sanborn v. Com., and agreed that “a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case.”³⁸ The Court agreed that the testimony should not have been admitted, as it was inadmissible hearsay. The Court noted there was no questions posed as to why the detective continued the investigation or did the Methcheck. However, the Court found the error to be harmless, given the other evidence available to the jury. Wooden (Brenda) also objected to the exclusion of testimony concerning blood that was taken immediately after her arrest, because the phlebotomist was not available to testify, because the report did not adequately document the chain of custody of the blood sample.

In VanMeter’s appeal, the court noted that the detective “appears to have misstated the extent of VanMeter’s pseudoephedrine purchases,” as he’d bought it once, not twice, as was indicated in the search warrant affidavit. The Court agreed that it was an error, but even if the entire statement had been excluded, there was still sufficient information to support the search warrant.

In addition, the Court agreed it was improper to present a defendant’s refusal to consent to a search as evidence of their guilt.³⁹ However, it could be introduced for other reasons, and in fact, the Commonwealth argued it was done to “support their claim that VanMeter exercised a degree of control and dominion over the premises.” Since all three “disclaimed ownership of the property,

³⁸ 754 S.W.2d 534 (Ky. 1988), overruled on other grounds by Hudson v. Com., 202 S.W.3d 17 (Ky. 2006).

³⁹ Deno v. Com., 177 S.W.3d 753 (Ky. 2005).

and constructive possession of the methamphetamine manufacturing materials discovered at the premises was a key issue in the prosecution's case."

Finally, the Court agreed that it was proper to use VanMeter's KASPER report to impeach his testimony about other medical conditions for which he claimed to be prescribed medications – when the report showed no such information. The Court agreed that it likely violated KRE 609(b) to use the document but that it was also harmless error.

The Court affirmed all convictions.

Durrett v. Com., 2015 WL 4979723 (Ky. 2015)

FACTS: On May 7, 2012, Durrett shot and killed Loud in front of a Louisville liquor store. He left the scene, but turned himself in several days later, claiming self-defense. He was charged with murder and tampering, convicted, and appealed. During the trial, there was testimony from the lead detective that characterized his conduct after the shooting (leaving the scene and hiding the gun) as inconsistent with someone who has shot someone in self-defense.

ISSUE: If allegedly improper testimony is actually used in impeachment, may it later be objected to?

HOLDING: No

DISCUSSION: Durrett argued that the detective was allowed to testify to his opinion, improperly. The Court noted that Durrett did not object to the testimony during the trial and in fact, used the testimony effectively in impeachment in which he attacked the detective's actual experience with the cases he claimed. He also noted that in all the cases discussed, the shooter had been sober, whereas Durrett was admittedly intoxicated.

The Court upheld Durrett's conviction.

TRIAL PROCEDURE / EVIDENCE – CHILD TESTIMONY

Rafferty v. Com., 2015 WL 4979772 Ky. 2015

FACTS: On March 28, 2013, Rafferty and his wife babysat their two granddaughters, Francine and Madison. Francine, age 3, was left alone with Rafferty at some point. Rafferty placed his mouth on the child's vagina and masturbated in front of her. About two weeks later, Francine told her parents what had happened, and Francine's father confronted Rafferty. He admitted to what he had done, and law enforcement was called. Det. Sims (Owensboro PD), interviewed Rafferty and obtained a confession.

Rafferty was indicted on Sodomy and Sexual Abuse charges. Francine, age 5, testified via closed circuit as to what had occurred. He was convicted and appealed.

ISSUE: May a young sexual assault victim be allowed to testify by closed circuit?

HOLDING: Yes

DISCUSSION: Rafferty argued that allowing Francine to testify by closed circuit TV, pursuant to KRS 421.350, violated his confrontation rights. Prior to the trial, the child had been questioned, and expressed a fear of Rafferty and her intent to "run away" if she had to see him. If forced to do so, a clinical social worker testified, she would suffer emotional distress. She was allowed to testify from the judge's

chambers, with Rafferty's attorney being present. (Rafferty and his attorney were provided with walkie-talkies to communicate, if needed.⁴⁰)

The Court looked to the statute, which was specifically designed for such situation. Her distress was far more than nervousness or reluctance to testify, but true fear, understandable under the circumstances. Her distress would almost certainly, as well, hindered her ability to testify.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Howard v. Com., 2015 WL 4039406 (Ky. App. 2015)

FACTS: On the day in question, Watkins was raising goats in Cumberland County. He kept the goats in a building close by his residence. Coming home, they discovered that PeeWee, one of the goats, was missing. He immediately suspected Howard, who had been seeking to purchase a goat. Watkins reported this to Deputy Groce and the pair went to Howard's home. They found PeeWee there, lacking her collar, but the "imprint on her neck was still visible." Davis, Howard's stepdaughter, confessed to having stolen the goat as a present for Howard, but then recanted when she was charged with Burglary 3rd, instead implicating Howard.

Howard was charged with Burglary 3rd and convicted. He appealed.

ISSUE: Is a comment that a person is on probation, by a witness, permitted?

HOLDING: No

DISCUSSION: During testimony, Deputy Groce repeated what Watkins had told him, about the earlier visit by Howard. The Commonwealth conceded that the statement was legally hearsay, but the Court had ruled it to be harmless as Watkins had already testified to the same thing. The Court agreed, and further stated that Howard had never actually denied he'd done so anyway.

The Court also ruled that a comment by the stepdaughter, to the effect that Howard was on probation, was improper under KRE 404(b). The trial court had denied a mistrial but did admonish the jury, which, the Court concluded, was sufficient, especially in light of the other, overwhelming, evidence of his guilt.

Howard's conviction was affirmed.

Gregory v. Com., 2015 WL 4978735 (Ky. App. 2015)

FACTS: On March 21, 2012, Deputy Brock (Bell County SO) set up a controlled drop buy using a CI named Trosper. Trosper used a provided vehicle to meet with Gregory and purchased drugs. He was provided with cash and a recording device. After the transaction, Brock met with Trosper and received two hydrocodone and change, along with the recording device.

Gregory was charged, convicted and appealed.

ISSUE: Must an objection to prior bad acts testimony be done at trial?

HOLDING: Yes

DISCUSSION: Alter the trial, Gregory argued that the recording included evidence of Gregory's past criminal behavior. He contended that was inadmissible under KRE 404(b) unless it was found to be

⁴⁰ He could "beep" his attorney on the radio, and the attorney could then leave the room to talk to him.

relevant, which was not the case. The Court noted that given the wealth of other evidence, from Trosper and Brock both, even if improper, it was not unduly prejudicial to use the recording.

The Court upheld his convictions.

Robinson v. Com., 2015 WL 4979794 (Ky. 2015)

FACTS: Robinson and his brother were jointly tried for a variety of sexual offenses (Rape, Sodomy, Sexual Abuse, Use of a Minor in a Sexual Performance and Incest) involving Robinson's son and stepchildren. The abuse happened over a period of some years, in Lincoln County. The brothers had acted together, and separately, to commit acts of abuse, complicating the witness testimony. Robinson argued that testimony from his stepdaughter should have been excluded as "other bad acts" evidence for which he was not specifically charged. He was convicted and appealed.

ISSUE: Is prior bad act evidence usually admissible?

HOLDING: No

DISCUSION: Looking to KRE 404(b) the Court noted that the Court must use the analysis laid out in Bell v. Com.⁴¹ In that, the Court laid out a three prong test:

(1) the first factor goes to relevance and asks, "the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused?," (2) the second factor goes to probativeness and asks, "[i]s evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence?," and (3) the third factor goes to prejudice and asks, "[d]oes the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?."

The Court had properly instructed the jury in the use of the information the girl provided and it had been admitted as relevant and indicative of a pattern of conduct. The Court noted that in Pendleton v. Com., this Court held "[e]vidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time provided the acts are relevant to prove intent, motive or a common plan or pattern of activity."⁴² The similarity between what he did to her, and his own son (for which he was charged) was enough to admit the testimony, and they were close enough in time, four years, and occurred in the same location (the bathroom) as well.

The Court agreed her testimony was properly admitted and upheld his convictions.

Moore v. Com., 2015 WL 4972249 (Ky. 2015)

FACTS: In 2009, Moore was living with his parents in Union, Kentucky. He had received pain medication for an injury but eventually "abused his medication and admitted to being a drug addict." This caused friction with his parents, as his mother was also on pain medication and Moore had stolen medication from her. His father took to keeping his wife's medication in a safe, which angered his wife. Eventually, on June 12, they got into an argument and he murdered both of his parents,

He tossed the handgun on the roof and called the police, stating that an unknown person had killed his parents and shot him (he also had a leg wound). Eventually, however, he claimed that his father shot his mother and that he'd killed his father in self-defense.

Moore was convicted and appealed.

⁴¹ 875 S.W.2d 882 (Ky. 1994).

⁴² 685 S.W.2d 549, 552 (Ky. 1985),

ISSUE: Is some prior bad act evidence admissible?

HOLDING: Yes

DISCUSSION: In support of the Commonwealth's theory that Moore killed his parents as a result of the ongoing friction, it presented evidence that he "stole money from his parents and others through several instances of check forgery and credit card fraud." (In fact, he admitted such in his own testimony.)

With respect to a note written to Moore by his father, threatening him if he stole pills from his mother, the Court agreed that the "note indicates Mr. Moore's present state of mind" - putting it under an exception to the hearsay rule, KRE 803(3). The statement was also relevant to prove Moore's motive in the murder. The Court noted that "[e]vidence of a drug habit along with evidence of insufficient funds to support that habit, is relevant to show a motive to commit a crime in order to gain money to buy drugs."⁴³ Other evidence was admitted for the same reason, and the court agreed, it was "highly probative and not unduly prejudicial."

Moore also argued that statements made to the police at the hospital should have been suppressed. He was questioned at the hospital about the murder and "possible suspects," but he was not given Miranda. At some point, he stated he wanted an attorney and was "done." The detective continued questioning but eventually, left. The Commonwealth noted that Moore was, at the time "free of any arrest restraints to leave the hospital at any time, and did return home when his treatment was completed." The Court agreed that was the case, and even if he was in custody, it was harmless.

He also asked for a "missing evidence instruction" because certain blood evidence was not retained for trial. The Court noted that "a missing evidence instruction is necessary 'only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.'⁴⁴ In the absence of bad faith or any other information demonstrating the potentially exculpatory nature of the material, we find that a missing evidence instruction was not warranted here."

The Court affirmed Moore's convictions.

TRIAL PROCEDURE/EVIDENCE – CI

Goben v. Com., 2015 WL 4967251 (Ky. 2015)

FACTS: Det. Healey (Louisville Metro Narcotics) received a tip from a CI that Goben was manufacturing meth. He observed a number of suspicious activities during surveillance, and elected to approach the truck in which Goben and Conaster had just entered. He saw two one-pot labs in plain view. He removed both from the truck and arrested both. Goben stated he'd just activated one of the labs and offered to "kill it" – make it safe. He also claimed all of the items and that Conaster was simply allowing him to use her house.

Goben was indicted for Manufacturing Methamphetamine. He was convicted and appealed.

ISSUE: Is the defendant entitled to the name of the confidential informant?

HOLDING: Not necessarily

⁴³ Caudill v. Com., 120 S.W.3d 635 (Ky. 2003) (citing Adkins v. Com., 96 S.W.3d 779 (Ky. 2003))."

⁴⁴ Estep v. Com., 64 S.W.3d 805 (Ky. 2002); Tinsley v. Jackson, 771 S.W.2d 331 (Ky. 1989) (holding that a court may give a missing evidence instruction to eliminate prejudice resulting from the unavailability of exculpatory evidence).

DISCUSSION: Under numerous other issues, Goben argued that he was entitled to the identity of the CI who provided the initial tip. Initially the Commonwealth apparently agreed to provide it, but later, “argued that the discovery did not require it to reveal the informant's identity but only to advise Goben whether the informant was a confidential informant.” The Commonwealth argued that the “the case against Goben depended on what was taken from the scene and what the investigating officers observed, not on what any informant had said or would say.” The judge asked for more explanation as to why the identity could not be released, and the detective asserted that the “the informant's life would be in danger if his identity were disclosed.” The Commonwealth argued that the CI was not in fact relevant, and the Court agreed, since the basis of the arrest was what Healey saw.

The Court affirmed Goben's conviction.

TRIAL PROCEDURE/EVIDENCE – BRADY

Hall v. Com., 2015 WL 5626625 Ky. 2015

FACTS: On the day in question, Pessolano and Hall met at a bar. During the evening, Hall's sister, Kim, noticed he had a handgun and told him to put it away. Pessolano and Hall hit it off, culminating with them having sex outside the bar. They left together shortly before 4 a.m. with Hall intending to spend the night with Pessolano. Along the way, they stopped so Hall could sell some pills to her friend, and he gave her ten pills to do so. When they caught back up together, she told Hall she'd been robbed of the money or the pills, and he responded by shooting her eight times, killing her.

Hall was charged with murder and related charges. He argued that Pessolano and another man had in fact, robbed him, and that he shot her in self-defense. He did not raise this until he was interrogated, however. He was convicted and appealed.

ISSUE: Is the failure to document evidence a Brady violation?

HOLDING: No

DISCUSSION: During the trial, Officer Salyer (Shively PD) testified that “during the investigation he stopped and briefly interviewed an unknown man walking down the street from the scene of Pessolano's murder.” He did not record the name or memorialize the encounter because he did not consider him relevant. Hall's counsel immediately objected that since this information was not provided in discovery, Hall was entitled to a mistrial. It was noted that this was mentioned, however, in another officer's report. Further, Hall argued that Salyer failed to “preserve and disclose evidence that could have been critical to his defense.”

The Court agreed that under Brady, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁴⁵ The Court however, noted that there was no additional duty, however, to “investigate or gather evidence.” The Court noted, as well, that “reversal is determined by whether there was “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁴⁶ Since this information was available to the defense, albeit indirectly, Brady was satisfied.

The Court agreed:

It is true that police knowledge is imputed to the government and the Commonwealth has a duty to learn of favorable evidence known by government agents, including police officers. With that

⁴⁵ Brady v. Maryland, 373 U.S. 83 (1963).

⁴⁶ Bowling v. Com., 80 S.W.3d 405 (Ky. 2002).

said, the Commonwealth has "no duty to disclose what it does not know and could not have reasonably discovered." So the Commonwealth's duty extends only to potentially exculpatory evidence in existence when conducting its own discovery.⁴⁷

No amount of investigation could have given Hall more, that the officer spoke to an unknown subject. This the defense knew, and exploited, during Salyer's cross examination.

After resolving several other issues, the Court upheld Hall's convictions.

TRIAL PROCEDURE/EVIDENCE – EXPERT WITNESS

Futrell / Lord v. Com., 471 S.W.3d 258 (Ky. 2015)

FACTS: During the trial for the wanton murder of Lord's 17 month old son in Wayne County, Dr. Currie testified as to the child's injuries. Dr. Currie is a board certified child-abuse pediatrician and testified that the child's fatal injuries were inflicted, rather than accidental. Both Lord and her boyfriend, Futrell, who were tried jointly, were convicted and appealed.

ISSUE: May a qualified forensic pediatrician testify as an expert?

HOLDING: Yes

DISCUSSION: Both parties argued that Dr. Currie's testimony was inappropriately admitted. The Court looked to KRE 702, which covers the admissibility of expert testimony. It reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Daubert v. Merrell Dow Pharmaceuticals, Inc., it is the task of the trial court to assess proffered expert testimony to determine whether it "both rests on a reliable foundations and is relevant to the task at hand."⁴⁸ To do so, it must look to "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."⁴⁹ It is specifically not the role of the judge to determine if the expert is correct, but only to serve in a gatekeeping role to ensure that the jury is not misled by "junk science." Although there is no single, definitive checklist, under Daubert a number of factors have been offered: whether the principle, theory, or method in question "can be (and has been) tested," whether it "has been subjected to peer review and publication," whether it has a "known or potential rate of error," and whether it enjoys acceptance within "a relevant scientific community." The Court agreed that under Kumho Tire Co. v. Carmichael, a forensic doctor's opinion could be properly supported by the medical information and the doctor's own experience with similar cases.⁵⁰ In this, "Dr. Currie's testimony easily passes muster, with her years of both clinical practice and research into the topic of child abuse. By using a differential diagnosis process, which was recognized as a valid medical technique in Best v. Lowe's Home Ctr., Inc., the Sixth Circuit adopted a "test for assessing the reliability of a differential diagnosis in a given case: did the doctor (1) objectively ascertain the nature of the patient's injury; (2) "rule in" one or more potential causes of the injury using a valid methodology; and (3) reach a conclusion by engaging in standard diagnostic techniques to rule out alternative causes." She used⁵¹ normal scientific scrutiny to develop an educated opinion as to the

⁴⁷ Kyles v. Whitney, 514 U.S. 419 (1995).

⁴⁸ 509 U.S. 579 (1993).

⁴⁹ Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004)

⁵⁰ 526 U.S. 137, 150 (1999).

⁵¹ 563 F.3d 171 (2009).

“particular types of pediatric traumatic injury” and their likelihood to point to child abuse as a cause. Dr. Currie testified that she diagnosed inflicted injury conservatively, “when the evidence for it is compelling.” The Court agreed that although she rendered an opinion that the child’s injuries were inflicted, she did not cross the line and render an improper opinion that Lord and/or Futrell inflicted said injury.

The Court, however, reversed the convictions based on jury instruction issues, but elected to address the above issue in anticipation of it becoming an issue at a second trial.

TRIAL PROCEDURE / EVIDENCE – JURY USE OF EVIDENCE

Com. v. Wright, 467 S.W.3d 238 (Ky. 2015)

FACTS: During Wright’s trial for drug trafficking, the Commonwealth played an audio recording of a transaction with CI and introduced it into evidence. During jury deliberations, the jury asked to listen to a part of the recording. It was agreed and they were brought into the courtroom, and the recording was played for them several times. They returned to deliberations and again asked, this time wanting to listen to it within the jury room. Wright objected, under RCr 974, which provides that “all information must be presented to the jury in open court.” Ruling that it was instead an exhibit, the judge stated they could view the video in the jury room, as they could any other exhibit. However, the only equipment available on which to play it was the Commonwealth Attorney’s laptop, which the prosecutor admitted, might contain other information about the case. The jury was admonished to only listen to the recording (which was apparently on an external memory device of some kind) using the appropriate program on the laptop.

Wright was convicted and appealed. The Court of appeals reversed it, because of the possibility that the jury could have accessed other, improper, information. The Commonwealth appealed.

ISSUE: Is a jury allowed to view a video introduced as evidence?

HOLDING: Yes

DISCUSSION: The Court agreed that the “The recording was admitted into evidence as an exhibit, and “[t]he trial court ultimately has the discretion to allow or disallow certain exhibits into the jury deliberation room,” including recordings of real-time transactions.⁵² The Court further agreed that courts must anticipate such “contingencies and have ‘clean’ devices readily available for use by the jury.” However, the Court did not agree that the issue was reversible error, since there wasn’t even proof that there was prejudicial information on the laptop, and Wright could have asked the court to do an in camera review of the contents. Further, there was no indication that the jury had used the laptop to access the internet, or even that the internet access was available. The Court agreed that issue could stand.

Wright also objected to certain portions of the detective’s testimony, which effectively interpreted and narrated the audio recording. Although Wright did not object at the time, the Court reviewed the issue. The detective had indicated he knew Wright and recognized his voice on the recording. That was proper. However, his discussion of other matters on the recording, of which he had no personal knowledge, was improper, and it was also improper to characterize the role of one of the participants as a “hit man.” However, since his testimony tracked with that of the CI, who was physically present and who also testified, it was admissible. The last statement made was most problematic, since the detective was not an expert witness and should have restrained his testimony to “inferences or opinions rationally based on his perceptions.”⁵³ However, the Court did not agree that it rose to the level of reversible error, nor did his bolstering and vouching for the CI, who assured the jury was “honest, credible, and trustworthy. Such bolstering runs the risk of violating KRE 404(a), when the witness’s testimony had not been attacked in the first place.⁵⁴

⁵² Springfield v. Commonwealth, 410 S.W.3d 589 (Ky. 2013).

⁵³ KRE 701(a)

⁵⁴ See Fairrow v. Commonwealth, 175 S.W.3d 601, 606 (Ky. 2005)(“KRE 608(a)(2) requires credibility to be attacked before it is supported.”).

The Court reversed the Court of Appeals and reinstated the conviction.

TRIAL PROCEDURE / EVIDENCE - PHOTOS

Hall v. Com., 468 S.W.3d 814 (Ky. 2015)

FACTS: On March 20, 2008, Hall was sitting in his living room, in Floyd County, with his wife Charlotte, three adult sons and the girlfriend of one of the sons. At some point, a neighbor's dog wandered onto the porch and was shooed away by Charlotte. The neighbor, Lisa Tackett, complained about the shooting, since she claimed the Halls let their goats run around in the Tackett's yard.⁵⁵ A loud argument ensued between the two women. The son and his girlfriend (Matt and Darcy) became involved in the spat. Charlotte called the sheriff, who advised her to ignore Lisa.

Sometime later, Hall went upstairs to his bedroom, located a rifle, and shot Lisa Tackett, who was outside her home. Tackett came to the door in response to the gunshots and was also shot. The Tackett's four children were in the house, but were not injured. Charlotte and Matt found Hall in the bedroom, took possession of the rifle and they all went downstairs. Charlotte called 911 while Hall assisted in removing the Tackett children from the home.

Troopers Hicks and Gibson (KSP) arrived while Hall was checking Lisa's vital signs. Hall admitted, upon inquiry, to shooting both. He was cuffed, given Miranda and secured. Spent shell casings were found in his pocket. Lt. Welch interviewed Hall at the scene and Hall explained that he couldn't "handle the screaming and hollering and stuff." He became agitated and said he didn't understand why he'd shot the Tacketts, although he admitted to doing it. He also admitted to having "nerves" and that he took medicine to control his temper and allow him to "tolerate people."

Hall was charged with the homicide. During the trial, medical examiners testified as to the injuries to both parties and autopsy photos were used to illustrate their points. The defense raised the issue for temporary insanity or extreme emotional disturbance and presented testimony about Hall's history of mental illness and low intellectual functioning. (It was noted that there was a "striking family history of mental illness, including anxiety, depression, paranoia, bipolar and related conditions.) At the time of the shooting, Hall was prescribed, and presumably taking, Prozac, and his psychiatrist testified that the combination of things occurred at the time could have caused Hall to "snap."

Hall was convicted, but found guilty but mentally ill of Murder and Wanton Endangerment (for the children." He appealed.

ISSUE: May introduced crime scene photos be impermissibly cumulative?

HOLDING: Yes

DISCUSSION: Hall argued that using the 28 crime scene and autopsy photos at trial was cumulative, inflammatory and "lacked probative value that was substantially outweighed by their prejudicial nature." Because of the differences in the images, the court reviewed each in turn. Some of the photos involved the overall crime scene and the positions of the respective bodies. Some, close up, showed blood and soft tissue spatter. Three, in particular, showed that Alan's hand was "essentially exploded by a bullet," and also showed his massive head wound; those were extremely graphic. Other photos showed details of the blood and spatter. Autopsy photos of both victims showed details of the injuries as well, are were taken in close up and high resolution.

The Court agreed that prior court decisions had "generally approved of the admission of graphic photos."⁵⁶ In the past, the only exception were those when, for example, the "body had been mutilated

⁵⁵ Lisa Tackett was Hall's niece, as well.

⁵⁶ Brown v. Com., 934 S.W.2d 242 (Ky. 1996); Sanders v. Com., 801 S.W.2d 665 (Ky. 1990).

[after death] or has decomposed.”⁵⁷ The Court noted that did not mean such photos were to be automatically admitted, however, and that they are “subject to the balancing test of KRE 403.”⁵⁸ The Court ruled that “in all cases in which visual media showing gruesome or repulsive depictions of victims are sought to be introduced over objection,” the balancing test must be applied. Simply because it is gruesome⁵⁹ does not exclude it, but the trial judge should still weigh its evidentiary value. The rule required a three part evaluation: the “trial court must assess the probative worth of the proffered evidence,” “it must assess the risk of harmful consequences (i.e., undue prejudice) of the evidence if admitted,” and “it must evaluate whether the probative value is substantially outweighed by the harmful consequences.”⁶⁰ Photos must be evaluated “within the full evidentiary context of the case,” to determine its value to the prosecution. The primary risk from such gruesome photos is that it might invoke bias and sympathy from the jury, and was “particularly acute” in this type of a capital case. It was exacerbated by the prosecutor’s closing argument that emphasized the gruesome injuries. There was little probative value in showing the photos, and they illustrated nothing in dispute. Certainly some of the photos were admissible to show the corpus delicti, “as they showed both the crime scene and the devastating wounds suffered by the victims.” However, using all 28 was clearly too many, and some were needlessly cumulative. The trouble lie in admitting them as a group, rather than having them independently evaluated.

The Court noted that it had grave doubt that the admission of all of the photos was fair. The Court noted that clearly the verdict put some stock in Hall’s claim of insanity and EED, and it agreed that the photos might have tipped the scale away from an EED manslaughter verdict rather than the given verdict. As such, the court reversed the murder convictions and remanded the case for further proceedings.

The Court also ruled that in this situation, given the dynamics of the shooting, with bullets travelling through metal doors and walls, that wanton endangerment charges were appropriate. “Hall’s deadly aim notwithstanding, the danger to anyone inside the home was substantial” and it was only good fortune that none of the children were struck. The children were close enough to be heard screaming on the 911 call that Alan Tackett initiated before he was shot. The Court also ruled that it was proper to play the audio recording of the call, about 15 minutes in length, that open line call was admitted as was the 911 call made by one of Hall’s sons.⁶¹ The Court agreed that although the cordless phone under Alan’s leg was not documented as to its provenance, it was still properly admitted. There was no conversation via that phone that needed to be documented and the identity of the caller was irrelevant for the purposes of authentication. On retrial, the 911 dispatcher could testify to the authenticity of the recording. Certainly the call itself carried relevant information, including Hall’s voice as he directed the actions of his family members, and illustrated his state of mind at the time.

The Court agreed it was proper to allow Det. Cramer to testify as to Hall’s state of mind, given that family members also testified about it. Det. Cramer testified as to his observations of Hall at the crime scene and during subsequent interviews. In addition, Hall objected to testimony made by his wife (who by the time of the trial had been divorced and was remarried), and the Court noted that the “spousal testimony privilege [of KRE 504(a)] ends when the marriage is dissolved ... [while] the marital communications privilege of KRE 504[b] ... survives divorce.” Comments he made to his wife at the scene, while he was in the squad car, were not confidential, given the nature of the exchange. Other testimony noted the absence of communication as to his reasons for taking the actions Hall took, and the court agreed that was not protected.

⁵⁷ Clark v. Com., 833 S.W.2d 793 (Ky. 1991).

⁵⁸ Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

⁵⁹ Funk v. Com., 842 S.W.2d 476 (Ky. 1992).

⁶⁰ Webb v. Com., 387 S.W.3d 319 (Ky. 2012).

⁶¹ Further, the Court agreed that the calls were properly authenticated, even though they were lumped together as one incident under one CAD number. “The [second] report included a cross-reference to the open line call taken by another dispatcher, but it did not record the name, phone number, and address of the first call, which is information that would have been available had a separate CAD report been generated for this call.”

TRIAL PROCEDURE/EVIDENCE – TRANSLATION

Adams v. Com., 2015 WL 4039418 (Ky. App. 2015)

FACTS: In 2010, Adams was interviewed by the police concerning allegations of sexual abuse involving his girlfriend's daughter. Adams is deaf and communicates with ASL and apparently lip reading. Video of the interview indicated that the officer told him he was free to go, and showed "Adams answering questions appropriately, although sometimes the officer had to repeat or rephrase the questions before Adams understood and responded." Eventually, he confessed, and confirmed it minutes later.

Adams was charged with Sodomy 1st of a victim under 12. During court proceedings he was provided with a sign language interpreter. He ultimately pled guilty to an amended charge and later moved to withdraw his plea due to ineffective assistance of counsel, arguing he was not provided with an interpreter during the police interview. (He did not argue that the confession was "not knowing or voluntary, or was the result of misunderstanding a question.") Following several proceedings, including a writ of mandamus, the Court denied his request. Adams appealed.

ISSUE: Is a court-qualified interpreter required for a confession?

HOLDING: No

DISCUSSION: The Court noted that even assuming he qualified for an interpreter under KRS 30A.410(1)(a)1, that "he was not in custody when he confessed." KRS 30A.400(2) provides that the statutes "shall not deny a person the right to make a voluntary confession." The Court denied his motion.

MISCELLANEOUS

Ketron (Richard / Shannon) v. Burton (Chris / Sarah), 2015 WL 4880272 (Ky. App. 2015)

FACTS: The Ketrons and the Burtons were long standing neighbors in Boone County. Their friendly "relationship soon disintegrated" and "what emerged is disappointing: Adults devoted to harassing, terrorizing, and annoying one another." There emerged a "pattern of petty, juvenile games and conduct unbecoming role models for the children in the middle of this feud."

Both sets of parties requested injunctive relief against the "stalking, harassment, trespassing, threats of harms, and abusive, offensive, obscene, and profane language and conduct" which included "substantial police involvement."⁶² Ultimately the Court issues a temporary mutual restraining order against each. Because both parties frequented Perfect North Slopes, a ski resort in Indiana, there were specific provisions that allowed both to be present at that location at the same time, but indicated they were to avoid each other while there.⁶³ The Ketrons soon filed for contempt, arguing that Sarah Burton had violated the order. In the meantime, the Burtons moved to a different community but the controversy continuing, centering on the North Slopes issue. The Ketrons appealed.

ISSUE: May a Kentucky court make rulings that implicate behavior in another state?

HOLDING: Yes

DISCUSSION: The Ketrons (who were employed by the ski resort) argued that the Kentucky court lacked any jurisdiction over the Indiana venue, the ski resort. The Court noted that in this case, the Court was exercising subject-matter jurisdiction, not personal jurisdiction. The Ketrons argued that since it was

⁶² "One veteran law-enforcement officer commented he had not seen a neighbor dispute of this magnitude in all his years of policing."

⁶³ The Court noted that "In military terms, both parties claim Perfect North Slopes as their theater of operations: the circuit court intended that it be a demilitarized zone." However, it "remains a battlefield."

their place of employment, not just a “public venue” for them, the order was problematical. The Court, however, noted that the order “compels the *parties* [sic] conduct, not that of the Ketron’s employer.” Further, the Court noted that the business could take its own steps “to enforce its own rules regarding the conduct and civility expected of its patrons and employees.”

The Court agreed that the circuit court did not exercise jurisdiction over the venue, and that its order was proper.

EMPLOYMENT

Garrard County Fiscal Court v. Camps, 469 S.W.3d 409 (Ky. 2015)

FACTS: Camps worked as a paramedic full time for Garrard County EMS when she was injured on-duty. For almost the entire time leading up to the injury, she also worked for Clark County EMS. (Both counties were aware of Camps’ employment with the other.) She resigned from Clark County EMS on May 6, 2011 and on May 13, while at work, suffered a severe ankle injury that required surgery, while on duty with Garrard County. She filed for workers’ comp based on her Average Weekly Wage (AWW) including wages from both jobs. She later testified that it was common for paramedics to hold multiple jobs due to high demand and low wages. Garrard County did not contest her worker’s comp, but disputed the inclusion of the Clark County wages. The Administrative Law Judge (ALJ) agreed that it was improper to include the Clark County wages since she was not working for Clark County (or any secondary job) at the time of the injury. The Court of Appeals reversed that decision under KRS 342.140 and it’s “look-back” period. Camps appealed.

ISSUE: Is a person who has previously held a second job (during the look-back period) entitled to worker’s compensation that covers both incomes?

HOLDING: Not necessarily

DISCUSSION: The Court agreed that for an employee to be “considered to have concurrent employment, the employee must be working under two contracts for hire at the time of the injury and the employer at which the claimant was injured must be aware of the second job.”⁶⁴

The Court reversed the Court of appeals.

CIVIL LITIGATION

Woolridge / Bonzo v. Louisville Metro Government, 2015 WL 4718792 (Ky. App. 2015)

FACTS: Bonzo was a Louisville Metro Police officer. In 2006, he responded to a domestic complaint and made an arrest of Woolridge. Subsequently, Bonzo began a relationship with Woolridge’s girlfriend, Zimmerer, who was the subject of the complaint. He later arrested Woolridge for a probation violation and at the hearing, Bonzo denied having a relationship with Zimmerer. When it was learned he lied and an investigation was begun, Bonzo resigned.

Woolridge filed suit against Bonzo and Louisville Metro for false arrest and related claims, in federal court. Metro was subsequently dismissed. Bonzo requested a defense and indemnity through CALGA from Metro. Initially Metro denied him, but ultimately, Metro agreed to pay for Bonzo’s defense but the issue of indemnification was left unresolved. Following a mediation hearing, Bonzo agreed to a judgement of \$750,000, without involvement or approval from Metro. Following complex proceedings, the Circuit Court agreed that Metro was not obligated on the agreed judgement. Bonzo appealed.

⁶⁴ See Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004).

ISSUE: If an employee settles a case without the approval of the local government, is the local government obligated to cover it?

HOLDING: No

DISCUSSION: The Court looked to the statute in question, KRS 65.2005. The Court noted that clearly the General Assembly intended for the local government to provide a defense to employees in civil litigation, so long as the claims in question arise from their public duties. The Court differentiated between the duty to defend and the duty to indemnify, noting that the duty to defend is much broader, while the obligation to pay is much narrower and subject to exceptions set forth in the statute. Specifically, one of the exceptions is when an employee compromises or settles a claim without approval. The Court noted that Metro never said it would not entertain a reasonable settlement offer, although it had declined at least one. The Court agreed that Metro Louisville was not legally responsible for Bonzo's judgement.

C.A. v. Sparkman (and others), 2008 WL 4293507 (Ky. App. 2015)

FACTS: C.A. was a middle school student at Morgan County Middle School. She has severe disabilities and an IQ of 42. At the beginning of the 2005-06 school year, the parents were encouraged to read the school's code of conduct which allowed the parents to elect to allow the school to spank her, if it was deemed necessary. Her mother signed the form. On May 18, 2006, she became out of control and the school contacted her mother (and tried to contact her father) about options. The mother could not come to the school immediately (as she'd done in the past) and was unsuccessful in calming her down over the phone. She specifically asked the AP, Whitt, if he could spank her. He agreed he would tell the Principal, Sparkman. C.A. was subsequently paddled, under the supervision of three other staff members, who ensured that her hands would not be struck by the paddle by restraining her. She tried to get away after the first swat, but was brought back to the location for a total of three swats. She was screaming and crying. Her father arrived and it was discovered she had a "blood red whelp across her bottom, raised spots and a deep bruise." The father removed the child from the school and took her to CHFS, where he worked. She received no immediate medical treatment, but did see a nurse practitioner several days later.

Eventually, the matter was referred to a grand jury for child abuse, but the grand jury did not indict. The family filed suit under 42 U.S.C. §1983, claiming assault, battery and related claims. The federal court dismissed the federal claim, finding the use of the paddle did not "shock the conscience." The family filed suit in Kentucky "against the school personnel claiming negligent retention, assault and battery, and intentional infliction of emotional distress." The circuit court, following an extensive examination of the record, found that bruising was unfortunate but did not automatically violate the standard for corporal punishment and that the principal's actions were within his discretionary authority. The Circuit Court provided summary judgement and the family appealed.

ISSUE: Is corporal punishment permitted in schools?

HOLDING: Yes

DISCUSSION: The Court looked to the state standard for granting qualified immunity. The Court noted that:

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. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed.⁶⁵

⁶⁵ Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001) Autry v. W. Kentucky Univ., 219 S.W.3d 713 (Ky. 2007).

Further:

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.

When a duty is “established as ministerial, the only remaining question is whether the employee complied with such a duty or not.”⁶⁶

The analysis of whether an act is discretionary or ministerial is influenced by the source of any duty to act in a certain manner. A statute, regulation or even a common law duty “could render an act or function essentially ministerial . . . [if] the alleged action or inaction is an identifiable deviation from an ‘absolute, certain, and imperative’ obligation[.]”⁶⁷ Use of the term “shall” generally indicates a ministerial duty – “Where there is a mandatory rule that must be followed, a public employee’s actions relating to that rule are ministerial even if the employee retains discretion in how to follow the rule.”⁶⁸

The Court noted that:

The actions that school personnel may take to discipline students are strictly constrained by statutes, regulations and school district rules, which direct what schools are required to do, what they may do and what they cannot do. Local boards of education are required to address student discipline and safety issues.⁶⁹ Boards fulfill these mandates in part by adopting codes “of acceptable behavior and discipline” that are “designed to ensure the safety of all students[.]”⁷⁰

School personnel must “hold pupils to a strict account for their conduct on school premises[.]”⁷¹ They also have an affirmative duty “to take all reasonable steps to prevent foreseeable harm to [their] students.”⁷² School personnel, as persons in a “position of authority,”⁷³ are prohibited from abusing children in their care.⁷⁴ They cannot use adverse behavioral interventions that would cause physical or emotional trauma.⁷⁵ The state code permits districts to include corporal punishment as a possibility and Morgan County properly allows parents to opt out of corporal punishment on their children, and it must be used consistent with the protocols in place and it must be properly documented.

The Court agreed that the decision to use corporal punishment was discretionary, and it was within the principal’s authority to elect to use it. As such, his action was discretionary. The manner in which he used it, however, was ministerial, but the evidence indicated he performed it as required, even though bruising resulted. There was no evidence of “excessive” force in this particular case, although of course, each case needs to be judged on its merits.

The Court affirmed the dismissal of the case.

⁶⁶ Mattingly v. Mitchell, 425 S.W.3d 85 (Ky.App. 2013).

⁶⁷ Haney, 311 S.W.3d at 245 (quoting Yanero, 65 S.W.3d at 522).

⁶⁸ Marson v. Thomason, 438 S.W.3d 292 (Ky. 2014); James v. Wilson, 95 S.W.3d 875 (Ky.App. 2002).

⁶⁹ Kentucky Revised Statutes (KRS) 158.440(2); KRS 158.445(3)(4); KRS 160.290(1); KRS 161.180(1).

⁷⁰ KRS 158.148(4); 704 Kentucky Administrative Regulations (KAR) 7:160 § 2(1)(b).

⁷¹ KRS 161.180(1).

⁷² Williams, 113 S.W.3d at 148. See Yanero, 65 S.W.3d at 529; Nelson v. Turner, 256 S.W.3d 37 (Ky.App. 2008).

⁷³ KRS 532.045(1)(a),

⁷⁴ KRS 600.020(1)(a)1, 2.

⁷⁵ 704 KAR 7:160 § 1(1), § 3(2)(c).

SIXTH CIRCUIT

FREEDOM OF INFORMATION (FEDERAL)

Detroit Free Press, Inc. v. U.S. Dept. of Justice, 796 F.3d 649 (6th Cir. 2015)

FACTS: The Detroit Free Press requested copies of booking photos of officers in the Detroit area who had been indicted on federal charges. The U.S. Marshal's Service denied the request and the newspaper sued for access. The District Court, following the case of Detroit Free Press v. U.S. Dept. of Justice (known as Free Press I), ruled in favor of the newspaper, and the Dept. of Justice appealed.⁷⁶

ISSUE: Are federal booking photos releasable under FOIA?

HOLDING: Yes (in the Sixth Circuit)

DISCUSSION: The Court noted that under the federal Freedom of Information Act (FOIA), there is a "general philosophy of full agency disclosure" of any government record.⁷⁷ The statute does provide an exemption (Exemption 7(C)) that allowed law enforcement records compiled by a federal agency to be denied if the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Under Free Press I, the Court had held that the exemption did not apply to booking photos, when they are connected to ongoing criminal proceedings in which the names have already been released, and whose visages have already been made public.

Following Free Press I, the U.S. Marshals Service had changed its process and mandated that offices within the Sixth Circuit were obligated to follow the law and that offices in other jurisdictions must honor requests if they come from residents of the four states within the Sixth Circuit. As such, national media outlets began using "straw man" requestors in those states to obtain photos from states outside the circuit. For many years, only the Sixth Circuit had ruled on the issue, but after 2011, two other federal circuits had done so and both ruled in favor of denial.

The Court held that despite the sister circuits finding differently, it was obligated to follow Free Press I, but encouraged the full court to reconsider the issue of the personal privacy interests inherent in booking photos.

FORCED LABOR

U.S. v. Callahan / Hunt, 801 F.3d 606 (6th Cir. 2015)

FACTS: S.E. was cognitively impaired and was kicked out of her mother's home at 18. She and her daughter, B.E. had "struggled to eke out an existence at the margins of society." They moved around and were often homeless, and depended upon SSI and other benefits. In May, 2010, S.E. and B.E. moved in with Callahan and Hunt, after S.E. was released from jail for a minor offense and reclaimed her daughter from foster care. Although initially they were "traditional roommates," it quickly deteriorated in S.E. effectively being a slave for Callahan and Hunt. Mother and daughter were forced to live in a sparsely furnished room and were locked in at night. When locked in, there was no bathroom access, forcing S.E. to either soil herself or relieve herself on the floor." S.E. was "forced to work from morning until night." She feared physical assault if she refused. She cared for the couple's dogs and would be abused if she didn't clean up after them quickly enough. She was allowed to run errands, under strict time limits, and she was punished and threatened if she disobeyed. While she was out, of course, they still had control of B.E., a toddler. The pair had inadequate clothing and bedding and were rarely allowed to bathe. Their food consisted of a single meal a day, only after all the work had been done. B.E. was

⁷⁶ 73 F.3d 93 (1996).

⁷⁷ U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749 (1989); 5 U.S.C. 552(a)(2)-(3).

also beaten and threatened. At one point, S.E. was shot multiple times with a BB gun for disobedience. S.E. was forced to beat her daughter, and the beatings were recorded, to use as threats should S.E. fail to follow orders or snitch. Finally, S.E. and B.E. managed to escape, but were lured back; S.E. was then threatened with Children's Service with the videos of her abusing her daughter.

Finally, S.E. was forced to obtain prescription pain killers – when Silsby (an indicted co-conspirator) smashed S.E.'s hand intentionally, and another time, when Callahan kicked her – in both instances, she was given painkiller prescriptions from the ER. Finally, two years later, S.E. was caught shoplifting a candy bar. Officers offered to take her home and finally, the situation unraveled. B.E. was removed and it was reported, “her hair was patchy and thin, she had no muscle tone, her stomach was distended, her rib cage was sunken in, she had dark circles under her eyes, her skin was poor, she was dirty, and an unpleasant odor emanated from her body.” When Callahan and Hunt showed two videos of S.E.'s alleged abuse, the FBI became involved.

Ultimately, Hunt and Callahan were convicted of conspiracy, forced labor and acquiring a controlled substance by deception.⁷⁸ Each forced labor violation included the offense of kidnapping or attempted kidnapping within the meaning of 18 U.S.C. §1589(d). Callahan and Hunt appealed.

ISSUE: Is the federal human trafficking law restricted to foreign-born victims?

HOLDING: No

DISCUSSION: The Court looked at the federal forced labor statute, which was “was enacted as part of the Victims of Trafficking and Violence Prevention Act of 2000 (also known as the Trafficking Victims Protection Act).” Callahan and Hunt argued that the statute was intended to combat international human trafficking, not the conduct of which they were convicted. (Prior cases involved “those who hold undocumented immigrants for peonage or domestic service and those who hold individuals for the sex trade.”)

Looking to the plain language of the statute, however,

- (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
 - (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
 - (2) by means of serious harm or threats of serious harm to that person or another person;
 - (3) by means of the abuse or threatened abuse of law or legal process; or
 - (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

The Court found no limitations of the application and noted that “a person” encompassed the victims in this case. There was no restriction to foreign-born victims, and could be used with exploitation of those with other vulnerabilities, as in intellectual disabilities. Looking at prior cases, as well, the Court agreed that the charged conduct in this case goes to the heart of the statute's concern, forced labor under physical and psychological threat to a vulnerable person. Certainly state laws were also violated, but it was not purely a “state” matter. The Court noted that “the circumstances of this case are analogous to the circumstances in many forced labor cases—squalid living conditions, extreme isolation, threat of legal process, and violence.” The Court agreed that their “conduct is proscribed by the forced labor statute” and upheld the forced labor convictions.

With respect to the controlled substances charge, the court agreed that they acquired Vicodin for personal use by deliberately injuring S.E. and coaching her as to what to tell the health care, and taking

⁷⁸ Conspiracy, in violation of 18 U.S.C. § 371 (Count I); forced labor, in violation of 18 U.S.C. §§ 1589(a) and 2 (Count II); and acquiring a controlled substance by deception, in violation of 21 U.S.C. § 843(a)(3) (Count IV).

the medication from her. They resorted to trickery to obtain medication that was not intended for them, and which would not have been given to her otherwise.

Finally, the Court agreed that although S.E. suffered from a cognitive disability, she was still competent to serve as a witness as she understood the importance of telling the truth. During her three days of testimony, the jury had a full opportunity to evaluate her capacity to testify and her credibility. The Court upheld the convictions of both Hunt and Callahan.

FEDERAL LAW – CHILD SOLICITATION

U.S. v. Roman, 795 F.3d 511 (6th Cir. 2015)

FACTS: On January 16, 2014, Agent Seig (Secret Service, also on a local Crimes Against Children task force in Ohio) was involved in “undercover work to identify individuals seeking to engage in sexual acts with children.” He began an email with an anonymous account (later connected with Roman) concerning the availability of Seig’s putative 11 year old daughter, with whom Seig, using his online persona, claimed to be “active.” (That was a code word indicating sexually active, according to his later testimony.) The two men communicated via text message throughout the day concerning what was intended. When a meet was anticipated, Roman asked for an assurance that Seig was not “the law.” After much discussion about the child’s likes and what Roman could bring to “break the ice,” the two men stopped texting when they “spotted each other in a store parking lot.”

After confirming that Roman was the expected subject, agents made the arrest. His vehicle was impounded and searched, and items discussed in text messages, such as Butterfinger candy, a flower, gum, condoms and personal lubricant, were seized.

Roman was charged with using the Internet (as a vehicle of interstate commerce) to entice sexual activity with an underage female, pursuant to 18 U.S.C. §2422(b). Roman argued for dismissal because in fact, he was never communicating with a child, and in fact, the agent was simply a “decoy parent” and no child ever existed. The Court denied his request for a dismissal and he ultimately took a conditional guilty plea and appealed.

ISSUE: Is it illegal under federal law to solicit an adult for sexual activity with a child, that does not actually exist?

HOLDING: Yes

DISCUSSION: The Court disagreed with Roman’s reading of the statute in question, noting that Congress clearly intended to “criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.” As a result, it was Roman’s mental state that was critical. His communication with an adult intermediary was clearly intended to obtain a minor child and constituted a criminal attempt to do so, since he took a substantial step (by arriving at the meet) to do so. Clearly he was pleased that the “father” was grooming the girl for sexual contact.

The Court upheld the plea.

FEDERAL LAW – FIREARM IN POSSESSION

U.S. v. Johnson, 803 F.3d 279 (6th Cir. 2015)

FACTS: In 2007, Johnson pled guilty to two Florida armed robberies. He moved to Michigan in violation of his probation and moved in with his girlfriend, Tweedly. Responding officers found Tweedly at the address, but not Johnson. They did, however, find a rifle under the bed. Tweedly claimed it belonged to Johnson, and that there was another gun which, if not in the apartment, was with

Johnson at work. They went to Johnson's workplace, finding him and a handgun under the driver's seat of the car he was driving.

Johnson was indicted for possession of both weapons and convicted. He appealed.

ISSUE: May a felon in close constructive possession of a handgun be charged with it?

HOLDING: Yes

DISCUSSION: Johnson argued that any evidence about who owned the handgun is inadmissible, but the court noted that even if the challenged statements (Tweedly's statements, for example) were excluded, there was still considerable evidence that Johnson possessed the handgun. The fact that no prints were found on the gun is not dispositive. As such, his conviction for the handgun was affirmed.

However, the Court agreed that the rifle conviction rested on hearsay evidence – apparently Tweedly's statement about the rifle under the bed – and as such, must be vacated.

SEARCH AND SEIZURE – SEARCH WARRANT

U.S. v. Brown, 801 F.3d 679 (6th Cir. 2015)

FACTS: On March 30, 2011, Agent Fitch (DEA) applied for a search warrant for Brown's home in Detroit. The search warrant read as follows:

On March 8, 2011, a cooperating witness, identified as DEA1, provided information concerning the heroin trafficking activities of Marzell Middleton to DEA Detroit Agents and Task Force Officers assigned to Enforcement Group 3. DEA1 identified Middleton as a heroin trafficker in the Detroit metropolitan area and provided two cell phone numbers that DEA1 had used to contact Middleton. DEA1 further identified Middleton's residence on Helen Street in Detroit and stated that this residence served as the drug distribution point for Middleton.

On March 8, at the direction of DEA agents, DEA1 made a series of consensually recorded phone calls to Middleton to set up a purchase of one-half kilogram of heroin. Surveillance units were posted at Middleton's residence before, during, and after the phone calls were made. At approximately 5:30 p.m., agents noticed a Chevrolet Silverado parked at the residence. At approximately 5:46 p.m., Middleton agreed over the phone to deliver the heroin to DEA1 at a predetermined location in Monroe, Michigan.

At approximately 7:52 p.m., DEA1 placed another consensually recorded phone call to Middleton, who advised DEA1 that he was waiting for someone to arrive and then he would leave in "ten minutes" to meet with DEA1 and deliver the heroin. At approximately 7:30 p.m. (before the previously-described phone call), a Yukon Denali towing a black cargo trailer arrived at Middleton's Helen Street residence. Surveillance officers watched as three males got out of the Yukon and entered the residence through the north entry door. At approximately 7:50 p.m., the three males left the residence through the same door. One man had a large, dark-colored object in his hand, which he placed in the bed of the Chevrolet Silverado. The Silverado and the Yukon departed the residence and traveled to a gas station. After both vehicles were fueled, the men traveled together on Interstate 94 west to southbound I-75 into the Monroe, Michigan area. Because the agents believed heroin was being transported to DEA1, they arranged for Michigan State Police (MSP) Troopers working in marked cars to execute simultaneous traffic stops of the Silverado and the Yukon. At approximately 9:00 p.m., MSP Trooper Peterson conducted a probable cause traffic stop of the Silverado and identified the sole occupant as Steven Patrick Woods. Woods was driving on a suspended Michigan driver's license and verbally consented to a search of the truck. A search revealed a black, plastic Dewalt power tool case in the bed of the truck. Inside the case was a clear plastic bag containing an off-white substance weighing

approximately 565 gross grams. A field test indicated the presence of heroin. Trooper Peterson placed Woods under arrest for possession of heroin.

At approximately 9:01 p.m., MSP Troopers Kiser and Ziecina stopped the Yukon Denali. Trooper Ziecina identified the driver as Middleton and the passenger as the defendant, Brown. Both were arrested for attempted delivery of the heroin transported by Woods in the Silverado. Trooper Ziecina recovered four cell phones from the interior of the Yukon during an inventory search. One phone was assigned (313) 449-6872, the number DEA1 had used to contact Middleton to arrange the heroin delivery. Another phone was assigned the number DEA1 told agents was Middleton's second cell phone, (313) 461-4913. Agent Fitch concluded that the other two cell phones, (313) 254-8330 and (313) 564-9054, belonged to Brown because one of them, (313) 564-9054, listed Middleton's two cell phone numbers as contacts under "M Z."

Following the arrests, all three men were booked at the MSP Post in Monroe. In answer to standard booking questions, Brown provided a residential address on Moross Road in Detroit. He possessed a Michigan driver's license listing the Moross Road address as his residence. Brown also possessed \$4,813 in currency, which was seized for forfeiture under Michigan state law. Agent Fitch averred, based on his training and experience, that the large amount of unsecured cash found in Brown's possession was consistent with drug trafficking proceeds. A search warrant was also obtained a few days later for another home, Middleton's, and 90 grams of heroin was found. A vehicle in which the drugs were found was seized. Agent Fitch, some nine days later, obtained a warrant to search four cell phones that were found in that vehicle and one of the phones was believed to belong to Brown. A text message suggested drug trafficking but because it was a "boost" phone, accurate subscriber information was unlikely. He also searched NCIC for Brown's history and discovered a prior arrest (but not conviction) for drug trafficking.

When Brown's home was searched on March 31, a loaded handgun and a quantity of marijuana was found. Additional ammunition was located through the house, along with a loaded shotgun, almost \$6,000 in cash and a drug ledger, were found as well. Brown moved for suppression, arguing staleness and a lack of probable cause. He was denied and convicted of various drug and firearm offenses, he was acquitted of charges involving heroin (none was found in the house) and convicted of the marijuana and firearm charges. He appealed.

ISSUE: Is it critical to prove nexus to the crime in a search warrant?

HOLDING: Yes

DISCUSSION: First, he argued there was a lack of nexus between the information and the evidence. "Whether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented."⁷⁹ The Court examined facts in several prior cases and compared to what was available in this case. Although the Court agreed the information was relatively sparse and that there was "no evidence that Brown distributed narcotics from his home, that he used the residence to store narcotics, or that any suspicious activity had taken place there." No evidence placed drugs there at all. However, there was evidence that he was, in fact, dealing in drugs and was connected to a vehicle where drugs were found – he was the registered owner. The Court agreed that it was sufficient.

With respect to staleness, the Court looked to Sgro v. U.S.⁸⁰ and noted that "staleness is measured by the circumstances of the case, not by the passage of time alone." Four variables, as outlined in U.S. v. Spikes, were to be used: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and] the place to be searched (mere criminal forum of convenience or secure operational base?)."⁸¹

⁷⁹ Illinois v. Gates, 462 U.S. 213 (1983).

⁸⁰ 287 U.S. 206 (1932)

⁸¹ U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998).

The character of the crime indicated it was an “ongoing drug trafficking conspiracy” – with Brown involved.⁸² The Court agreed the warrant was valid and affirmed the denial of the motion to suppress. The Court also touched on an objection to the use of a “drug ledger” at trial, which he argued was hearsay. The Court however, noted that “because the government did not offer the document for the truth of the matter asserted, it was not hearsay and the district court did not plainly err in admitting it into evidence.” The failure to authenticate the ledger, by demonstrating who created it, went to the weight, not the admissibility of the evidence under FRE 901(a).⁸³ It was not necessary to show it was in Brown’s handwriting as it was linked to Brown by matching the names in the ledger to names in his cell phone contacts.

Brown’s conviction was affirmed.

SEARCH AND SEIZURE – CREDIBILITY

U.S. v. Ellis, 2015 WL 5637551 (6th Cir. 2015)

FACTS: In January, 2012, Ellis bought a Volvo from Issa, his employer’s brother. Ellis “regretted his purchase” and returned the vehicle to Issa (who apparently owned a car lot) for repairs several times during the next weeks. At some point, Ellis “flashed” a gun. Eventually, they exchanged vehicles. Issa searched the new vehicle multiple time to assure himself that there was no gun in it before they made the exchange. When Ellis arrived to do the exchange, Issa saw a firearm on the floorboard of the Volvo. He did not specifically see Ellis move the gun, but testified he did not find a gun in the Volvo when it was left with him.

A few days later, Ellis was stopped by Officer Hogan (Eastern Michigan University PD) because he realized that the plate on the new vehicle, a Buick, belonged on a Volvo; Ellis showed paperwork concerning the transfer. Hogan smelled “fresh marijuana,” and upon being questioned, Ellis produced a small jar of marijuana from the center console.

Hogan searched the Buick for drugs – he found no drugs but did find a loaded pistol in the pocket behind the front passenger seat. The gun had been reported stolen. Only a single print was found on the magazine (not Ellis’s) and no discernible prints on the gun itself.

Ellis, a convicted felon, was charged with possession of the weapon and related offenses. He moved to suppress and was convicted. He then appealed.

ISSUE: Is an officer’s credibility subject to challenge at trial?

HOLDING: Yes

DISCUSSION: At the suppression hearing, Ellis’s counsel questioned Officer Hogan’s ability to smell the marijuana in the vehicle, given that it was sealed up in a jar. (He produced two similar jars, one with ammonia and the other with bleach, and asked the officer if he could detect what was in each one – he could not.) However, the trial court upheld Officer Hogan’s testimony and denied the motion to suppress. The Court noted that even if the jar had been closed when found, nothing indicated it could not have been opened prior to the stop and that the odor could have lingered in the vehicle.

⁸² U.S. v. Greene, 250 F.3d 471 (6th Cir. 2001)

⁸³ Requires the proponent of a document to “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” A document can be authenticated by evidence of “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” Fed. R. Evid. 901(b)(1), (4). “[A] document . . . may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him.” Fed. R. Evid. 901(b)(4) advisory committee note; U.S. v. Jones, 107 F.3d 1147 (6th Cir. 1997).

The Court also address the use of Ellis's outgoing text messages on his phone, which was also seized, to prove his intent to distribute marijuana. He argued that the phone's outgoing text were hearsay statements, and that it was unproven that Ellis is the declarant in fact. However, the court noted several indications it was his phone, as he possessed it, it contained photos of Ellis, and text messages used his initial or first name, and listed his brother and girlfriend in the contacts. With respect to incoming message, he argued they were "nonhearsay co-conspirator statements" – but the court found that none were hearsay "because they were used to prove that individuals repeatedly contacted Ellis for narcotics purchases, not for their truth."⁸⁴ The Court found no prejudice "resulting from relevant circumstantial evidence of Ellis's intent to distribute marijuana."

He also argued that a statement he made to Hogan after the gun was found – "You found a gun, that's bad. I never shouldn't [sic] have ever bought that car" should have been admitted. He argued it was a present sense impression (KRS 802(1)). The trial court had found that enough time had passed for Ellis to have contrived a story to explain the weapon. The Court agreed that the "present-sense-impression and excited-utterance exceptions are both grounded on the notion that a person is more likely to speak truthfully before he has time to reflect."⁸⁵ The Court agreed the statement was properly excluded from trial.

After addressing several other trial-related issues, the Court upheld his conviction.

SEARCH AND SEIZURE - PROBATION

U.S. v. Hilton, 2015 WL 5234820 (6th Cir. 2015)

FACTS: In 2002, Hilton was convicted in Missouri of distributing/transporting child pornography. He was released under supervision in 2006 and that was revoked in 2007 because it was discovered that had not disclosed certain things, which violated his conditions. He was sentenced to an additional term of imprisonment and supervised release. At that time, he had a variety of strict conditions, that he answer his probation officers truthfully," as well as "not possessing obscene material, not subscribing to Internet services without the permission of his probation officer, not possessing or using a device with Internet capability or audio or visual recording equipment without permission of his probation officer, and not possessing or using a computer without permission. He also had to "submit his person, residence, office, computer, or vehicle to a search, conducted by a United States Probation Officer [PO] at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release."

Through 2010, he was supervised and visited at random times at his sister's home, where he lived. In May, 2010, the PO was informed of a tip that Hilton, among others, had an account on Mocospace, a social network. The PO followed up and found a profile that was clearly Hilton "an apparently naked man taking a selfie in a mirror while wearing a Santa hat." He recognized it as a recent photo due to it being taken at the sister's house and showed Hilton "hefty" – "consistent with his recent weight gain." The site indicated his desire to sexually abuse children and his profile name was similar to names he'd used in the past. He coordinated a search and escorted Hilton to a cruiser where they sat for awhile. "Without giving Hilton Miranda warnings, Vestal began asking Hilton questions. [Id.] During this conversation, Hilton admitted to possessing child pornography on a Blackberry device." He admitted to profiles on Mocospace and Mbuzzzy, and indicated a woman had opened the social media accounts for him, and gotten him the Blackberry. The Blackberry was located during the search.

His release was revoked and in addition, Agent Roth (FBI) opened an investigation into the Internet usage. He got a warrant for the Blackberry's contents and found "many images and movies of child pornography on Hilton's phone. It also found text message conversations between Hilton and Nichole about exchanging images of child pornography, training children for sex, and abducting children from school." He and Agent Martin went to interview Hilton in prison and Hilton told them what they'd learned

⁸⁴ U.S. v. Rodriguez-Lopez, 565 F.3d 312 (6th Cir. 2009).

⁸⁵ Miller v. Stovall, 742 F.3d 642 (6th Cir. 2014).

from his PO. Hilton waived Miranda and provided information that led to the “the contents of various phone and email accounts hosted by Sprint, Yahoo, and Google.” Thousands of emails between Hilton and the woman (Nichole) was also used against him (and her).

Hilton was charged with counts related to production, transfer, receipt, and transportation of child pornography, as well as the commission of a felony involving a minor when required to register as a sex offender. He moved for suppression and was denied. He took a conditional plea and appealed.

ISSUE: Does a probation officer need reasonable suspicion to search a home?

HOLDING: Yes (as a general rule)

DISCUSSION: Hilton’s first motion to suppress concerned the Blackberry phone and Hilton’s claim that Vestal had lacked reasonable suspicion to conduct the warrantless search of his residence.

As mentioned, one of Hilton’s supervised release terms stipulated that he “shall submit his person, residence, office, computer, or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release.” “Reasonable suspicion is based on the totality of the circumstances and has been defined as requiring ‘articulable reasons’ and ‘a particularized and objective basis for suspecting the particular person . . . of criminal activity.’”⁸⁶ “An officer must be able to point to specific and articulable facts, together with rational inferences drawn from those facts, that reasonably suggest criminal activity has occurred or is imminent.” For the purposes of the Fourth Amendment, an individual’s violating the terms of his supervised release is comparable to his violating a criminal statute.⁸⁷ Thus, for constitutional purposes, a search based on reasonable suspicion can be used to seek evidence of either a violation of a criminal statute or a supervised release violation. Although Hilton spills much ink attempting to undermine Keith’s tip, his attempt misses the mark because Vestal’s reasonable suspicion does not depend on the tip. After following the link to the profile purporting to belong to Hilton, Vestal had reasonable suspicion to believe that Hilton had violated his supervised release by having the profile at all, which would have entailed using a computer or other Internet-ready device without Vestal’s permission. Hilton counters that someone else could have created the profile, but his “attempts to second-guess the officer’s reasonable suspicion” are unavailing because “reasonable suspicion need not rule out the possibility of innocent conduct.”⁸⁸ Reasonable suspicion requires only “a moderate chance of finding evidence of wrongdoing.”⁸⁹

Further, no matter who created the profile, it clearly showed Hilton.

With respect to the Blackberry and the accounts, it was conceded that the PO “did not give Miranda warnings to Hilton and so declared that it would not use Hilton’s statements, made during a custodial interrogation, in its case-in-chief.” The Court agreed this complied with case law “which held that “police do not violate a suspect’s constitutional rights (or the Miranda rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by Miranda”; rather, “[p]otential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.”⁹⁰ Thus, “with respect to mere failures to warn” there is “nothing to deter,” and so there is “no reason to apply the ‘fruit of the poisonous tree’ doctrine.” None of the evidence in question could be excluded “because none of the evidence was actually fruit of the unwarned statements.” The phone, no matter what, would have been found, as “inevitable discovery.” to the exclusionary rule applies when “the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably

⁸⁶ Northrop v. Trippet, 265 F.3d 372, 381 (6th Cir. 2001) (quoting U.S. v. Cortez, 449 U.S. 411 (1981)).

⁸⁷ See U.S. v. Herndon, 501 F.3d 683 (6th Cir. 2007).

⁸⁸ Navarette v. California, 134 S. Ct. 1683, 1691 (2014).

⁸⁹ Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

⁹⁰ U.S. v. Patane, 542 U.S. 630 (2004).

would have been discovered.”⁹¹ “The inevitable discovery doctrine applies with equal force to potential Fifth Amendment violations.”⁹² “The object of Vestal’s search was the Blackberry phone because that is the phone he had seen Hilton holding in the selfie on the Mocospace page. Because Vestal would have inevitably discovered the Blackberry even without Hilton’s statements, the phone was not fruit of the unwarned statements.” Further, his “supervised release terms surely provide one of these exceptions” to the warrant requirement. his search “may include retrieval and copying of all data from the defendant’s computer(s).” Although the object of the search was a Blackberry cell phone, “a modern cell phone is a computer.”⁹³ (“The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”). Because Vestal’s search based on reasonable suspicion would have inevitably found the Blackberry and also would have allowed him to retrieve and copy all data from the phone, there is no Fifth Amendment violation, and the district court did not err in denying suppression of the contents of the Blackberry.

Whereas the warrant for the contents of the Blackberry was premised largely on Hilton’s statements and thus might have created a Fifth Amendment violation but for the inevitable discovery doctrine, the warrants for the Sprint, Yahoo, and Google accounts barely mentioned the unwarned statements. In each warrant, the statement of facts featured twenty-one paragraphs, only one of which detailed Hilton’s statements during the search. It is well-settled that “when a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, if the lawfully obtained information . . . would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted.”⁹⁴

The warrants for the accounts focused almost exclusively on the information found on the Blackberry. As shown, this cell phone data was not fruit of the unwarned statements and was lawfully obtained pursuant to Hilton’s supervised release conditions. Because this lawfully obtained information would have justified issuance of the warrant apart from the paragraph about the unwarned statements, the information in the Sprint, Yahoo, and Google accounts is not fruit of the statements.

The Court affirmed the denials.

SEARCH & SEIZURE – TERRY

U.S. v. Bridges, 2015 WL 5332448 (6th Cir. 2015)

FACTS: In December, 2013, Corporal Neese (Wayne County, MI) was on patrol with a partner. At about 5:30 p.m., they passed through a “known crime area” in a marked cruiser. He spotted a car about halfway down the street and could see a person sitting in the driver’s seat. As they got closer, the person’s silhouette was gone, and they could see Bridges (the occupant) had leaned over in an apparent attempt to hide. Neese pulled closer, blocked in the vehicle and shone his spotlight on it, telling the driver to show his hands. Bridges got out and took a swing at Neese. The two deputies tackled Bridges and a loaded magazine fell to the ground. A second magazine and two loaded speed loaders were also found. Inside the car, they found two handguns and crack cocaine in plain view.

Bridges, a felon, was charged for the weapon and the drugs. He requested suppression and was denied. He was then convicted and appealed.

ISSUE: May the context of a Terry stop be a factor in determining its validity?

HOLDING: Yes

⁹¹ U.S. v. Kennedy, 61 F.3d 494 (6th Cir. 1995).

⁹² U.S. v. Hodge, 714 F.3d 380 (6th Cir. 2013).

⁹³ U.S. v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012); see also Riley v. California, 134 S. Ct. 2473 (2014).

⁹⁴ U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005).

DISCUSSION: The Court noted that there were “contextual considerations” in finding reasonable suspicion for the interaction, and combined with Neese’s training and experience, the Court agreed the stop was valid. The Court noted that simple presence in a high crime area was not enough, but when combined with his attempt to hide in apparent response to the deputies’ presence nearby. “Ducking” was a factor in finding reasonable suspicion. Even though Bridges argued he was “checking his phone,” it was permissible for Neese to follow up to resolve what was going on.

The Court affirmed his conviction.

INTERROGATION

U.S. v. Ray, 453 F.3d 770 (6th Cir. 2015)

FACTS: Prior to August 22, 2012, Detroit PD received complaints about drugs being sold from a specific address. On that day, Officer Yopp used a CI to make a controlled buy. He had not done any surveillance of the address before that date. He could see the CI as the buy was made, but could not see the person inside the house. The CI returned to the vehicle with a small amount of marijuana, and described the person who had sold it and gave the name as Ray. Officer Yopp obtained a search warrant immediately.

The next day, the warrant was executed. They had found a teenage boy on the sidewalk and the boy stated his father was Ray and was inside. No one answered the knock and finding the door unlocked, they entered and secured the location. Officers found Ray and his long-time girlfriend asleep upstairs. They were brought downstairs to wait while the warrant was executed. Packaged marijuana and money was found, along with a shotgun, a rifle and ammunition. A good quantity of crack cocaine, individually packaged, was also found, along with a loaded handgun. Nothing suggested that anyone other than Ray (mail was found in his name), lived in the house.

Officer Robson had a conversation with Ray and Lee (the girlfriend) – the officer claimed it as nothing pertaining to the case, but Ray testified he told another officer that he would take responsibility for everything in the house to spare Lee’s son from seeing his mother arrested. Ray was arrested (but Lee was not). Officer Robson and Hill interrogated Ray, Officer Hill had given Miranda to Ray. Ray signed a waiver and admitted he sold marijuana, denied ownership of the guns (attributing those to his girlfriend’s uncle) and stated the cocaine belonged to a friend who had left it behind the night before.

Ray, a felon, was charged with the guns and various federal drug offenses. He moved for suppression and for a Franks hearing.⁹⁵

At the hearing, it was argued that:

Officer Yopp’s affidavit was insufficient to establish probable cause for a search warrant because: (1) Yopp was untruthful in the affidavit when he averred that he received complaints about narcotics being sold at Ray’s home prior to August 23, 2012; and (2) Ray in fact did not sell marijuana to the CI on August 22, 2012. Ray did not call any witnesses or otherwise proffer any evidence to the court. The Government called two witnesses: (1) the affiant, Officer Yopp; and (2) DPD Sergeant Jason Sloan. Officer Yopp testified that he received narcotics complaints about drug dealing at the address of 9241 Genessee Street, but that he could not recall any of the specific complaints, nor could he remember if any complaints were made to him directly or whether he learned of them through another officer. He also testified that none of the complaints made about 9241 Genessee Street was recorded or otherwise memorialized. Defense counsel insisted that the Defense’s investigator could not uncover any complaints made regarding the subject home, but the Defense did not call the investigator to testify or call any other witnesses at

⁹⁵ Franks v. Delaware, 438 U.S. 154 (1978).

the hearing. The Defense only offered Ray's affidavit stating that no one purchased marijuana from him on the day of the controlled buy.

The trial court denied the motion to suppress at the hearing.

In addition, Ray requested information about the CI, along with information that in fact documented that a buy took place. The trial court concluded that "because Ray was not charged with the controlled buy involving the CI, the CI could not testify as to any relevant fact in the case and, therefore, disclosure of the CI's identity or the circumstances of the controlled buy were irrelevant and not essential to a fair trial."

Further, he moved for suppression of his confession and other statements, arguing that they were coerced by threats that Lee would also be arrested and their son a ward of the state. The Court disagreed, finding the confession came after he waived Miranda and was voluntary. Ray was convicted and appealed.

ISSUE: Is an unloaded weapon in a spare bedroom "possessed in furtherance of drug trafficking?"

HOLDING: No

DISCUSSION: Among other issues, the court first addressed whether, under federal law, Ray possessed the shotgun or rifle for furtherance of drug trafficking. The shotgun was unloaded and propped behind a door, and while shells were in the same room, they were not nearby. The rifle was loaded, but in a completely different bedroom, in a closet, and no drugs were in that room. The handgun, however, was in a jacket pocket in the same closet where individually packaged cocaine was found, and it was loaded. (Of course, he unlawfully possessed all of the weapons.) The Court found only the handgun could be considered in the charge at hand – furthering drug trafficking with the weapon.

With respect to his statements, the Court looked to whether there was coercion. The Court noted that there are "three requirements for finding that a confession was involuntary due to police coercion: (i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; and (iii) the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement."⁹⁶ Moreover, determining whether a defendant's statement to police was voluntary requires examining the totality of the circumstances.⁹⁷

No actual violence was required, only a "credible threat."⁹⁸ For instance, "threats to arrest members of a suspect's family may cause a confession to be involuntary."⁹⁹ Whether a threat to prosecute a third party is coercive turns on whether the threat could have been lawfully executed.¹⁰⁰

With respect to the CI, the Court looked to Roviaro v. U.S.¹⁰¹ in which the government was given a "limited privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law," often called "the informer's privilege." The privilege must be balanced with fairness, and "when 'disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.'" The Court agreed in this case, there was no indication how the CI's identity would have added to his defense, since he was not charged with the buy.

The Court also agreed that the warrant was sufficiently supported with probable cause, given what the officer knew about the buy that took place that day.

⁹⁶ U.S. v. Mahan, 190 F.3d 416 (6th Cir. 1999).

⁹⁷ U.S. v. Finch, 998 F.2d 349 (6th Cir. 1993).

⁹⁸ Arizona v. Fulminante, 499 U.S. 279 (1991).

⁹⁹ Finch, 998 F.2d at 356

¹⁰⁰ U.S. v. Johnson, 351 F.3d 254 (6th Cir. 2003).

¹⁰¹ 353 U.S. 53 (1957).

Under Oregon v. Elstad and Missouri v. Seibert,¹⁰² the Court found the “[t]he threshold issue when interrogators question first and warn later is ... whether it would be reasonable to find that in these circumstances the warnings could function ‘effectively’ as Miranda requires.” Factors include: “(1) the completeness and detail involved in the first interrogation; (2) the overlapping content of the pre-and post-Miranda statements; (3) the timing and setting of the interrogations; (4) the continuity of police personnel during the two interrogations; and (5) the degree to which the interrogator’s questions treated the second round as continuous with the first.” The Court remanded the case with direction to consider the application of Seibert to the facts with respect to his statements, but upheld all other issues.

42 U.S.C. §1983 – EXIGENT CIRCUMSTANCES

Carlson v. Fewins/Jetter, Grand Traverse County and Drzewiecki, 801 F.3d 668 (6th Cir. 2015)

FACTS: On November 9, 2007, approximately 60 police officers converged (over a period of time) on the Carlson home, following telephone calls from family members that indicated Carlson was alone in his home, threatening suicide. They suggested he might be intending a “suicide by cop.” Carlson had also called in the past and asked for someone to respond “to talk.” A deputy had responded in the past and had found him intoxicated and very passive, but upon talking to Carlson’s sister, learned he was “well armed” and might seek a shootout with police. The deputy had shared that information with his agency. The incident began about 9 p.m., with officers gradually surrounding the house. At one point, he stepped outside and fired a shot into the air, but officers believed he was unaware of their presence as they’d parked out of sight. (They believed the shot might have been an attempt to draw attention and cause officers to arrive.) Sheriff Fewins (Grand Traverse County, MI) requested an interdepartmental emergency response team, which was led by Sgt. Drzewiecki (Traverse City). Officers flattened his vehicle tires to prevent an escape and helped most of the neighbors to safety, leaving only a disabled man who spent the night with his wife in the basement. Through the night, they had intermittent verbal contact with him, and he said he was “ready for war.” They cut off the gas and electrical power to the house. Carlson told the negotiator he knew that tear gas was coming, and hours later, “officers broke the windows and flooded the house with tear gas – in two separate volleys an hour apart. (He attempted to call his sister during that time, but she obeyed the request of the police not to take the calls.)

The Team maintained the siege of the house all night without seeking a warrant. They did request and receive coffee, granola bars, and hot chocolate. Fewins later indicated that he never considered asking for a warrant because he believed it was unnecessary. Sheriff Fewins later pointed to the shot into the woods, “reckless discharge of a weapon” a misdemeanor under state law, as the reason he did not need a warrant. He also noted that a warrant would have changed nothing.

Carlson did not emerge, however, at that time. The deputies tossed in a throw phone that also included a microphone and camera. Deputy Chellis, immediately outside, began to converse with Carlson with permission, and observed Carlson walking back and forth with a rifle pointed in their general direction. Some hours later, while still inside his home, “he began shouting and threatening officers in his yard.” A police sniper, Deputy Jetter, hearing Deputy Chellis’s request that someone get a “long gun with glass (a scope) on Carlson, and believing Carlson was preparing to shoot at Chellis or someone else, shot him, through a window, killing him.”

Carlson’s estate filed suit against a number of defendant officers, and the county, alleging excessive force and wrongful death under 42 U.S.C. §1983. The District Court granted summary judgement to the county and the officers in charge of the operation, and the Estate appealed. (The Court noted that the actual sniper had gone to trial but the jury returned a verdict in his favor.)

ISSUE: Should a warrant be obtained to do an entry in most situations?

HOLDING: Yes

¹⁰² 470 U.S. 298 (1985) and Missouri v. Seibert, 542 U.S. 600 (2004),

DISCUSSION: The Court noted that the District Court had concluded that “[e]xigent circumstances existed at the time of each alleged violation of the warrant requirement and therefore no constitutional violation occurred.” It did not consider how police action in the early hours of the conflict reduced the risk that Carlson could harm others. Nor did it consider whether Carlson’s hours of inaction before, during, and after the tear gas assault undermined the defendants’ claim of imminent danger. Instead, the court relied on a broad finding of perpetual exigency to hold that “the use of tear gas . . . was objectively reasonable” and therefore not an excessive use of force. The Court addressed the two rounds of tear gas dispersal and a continuing exigency as well. In other words, the trial court agreed “that exigent circumstances existed at 9:00 p.m. when the police began surrounding Carlson in his house and continued unabated for more than twelve hours until the sniper killed him there the next morning.”

The Court noted that “The Fourth Amendment prevents police officers from intruding into a person’s house without first securing permission from a disinterested magistrate unless exigent circumstances would make it unreasonable to wait for judicial approval. “To arrest a person in his home, police officers need both probable cause and either a warrant or exigent circumstances.”¹⁰³ For exigent circumstances to excuse a warrantless search or seizure, there must be both “compelling need for official action and no time to secure a warrant.”¹⁰⁴ “Police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”¹⁰⁵

Further, “time is an essential factor when an immediate threat forms the basis for police claims of exigency. We have held that “[e]xigent circumstances terminate when the factors creating the exigency are negated.”¹⁰⁶ If the dangers persist or increase, the exigent circumstances also persist.” However, “dangers may diminish over time as police gain a measure of control, and when they do, the exigency and reasonableness of warrantless intrusions diminish in tandem. When police initiate action after a long delay with no new provocation, the delay itself may suggest an unreasonable evasion of the Fourth Amendment rather than a reasonable response to a dynamic threat”¹⁰⁷ Any exigent circumstances that could have justified the warrantless use of tear gas and the throw phone would thus have to flow from some immediate threat posed by Carlson. The defendants do not claim to have been in hot pursuit of Carlson or otherwise concerned that he might destroy vital evidence. Indeed, nothing indicates that the Team was pursuing him for any past crimes, at least not for anything other than the possible reckless discharge of a weapon identified by Fewins as a likely misdemeanor. A misdemeanor such as that would not generally establish exigent circumstances to justify a warrantless entry into Carlson’s house.¹⁰⁸

The Court noted:

Viewing the totality of the circumstances from the perspective of a reasonable officer at the time of the first tear gas barrage, Carlson was thought to be (and actually was) alone in the house. His neighbors were safely out of Carlson’s reach (though not, as it turns out, entirely safe from the tear gas). The Team had Carlson contained with snipers and other officers carefully monitoring his floodlit house. Even after Carlson stopped responding to their negotiator, they had family members near at hand with open lines of communication. They had time to call a convenience store for refreshments; they had time to call a judicial officer.

The choice to call for granola bars but not a warrant appears to have been driven by the Sheriff’s misunderstanding of the Fourth Amendment. “[I]nconvenience to the officers and some slight delay . . . are never very convincing reasons . . . to bypass the constitutional [warrant] requirement.”¹⁰⁹ Fewins’s approach—choosing not to even request a warrant because he thought

¹⁰³ Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015).

¹⁰⁴ Missouri v. McNeely, 133 S. Ct. 1552 (2013) (quoting Michigan v. Tyler, 436 U.S. 499 (1978)).

¹⁰⁵ Terry v. Ohio, 392 U.S. 1 (1968).

¹⁰⁶ Bing v. City of Whitehall, 456 F.3d 555 (6th Cir. 2006) (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

¹⁰⁷ O’Brien v. City of Grand Rapids, 23 F.3d 990 (6th Cir. 1994).

¹⁰⁸ See Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (“When the government’s interest is only to arrest for a minor offense, th[e] presumption of unreasonableness [that attaches to all warrantless home entries] is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.” (footnote omitted)).

¹⁰⁹ Johnson, 333 U.S. at 15.

a misdemeanor arrest warrant would not have been “handy” or “put [the Team] in a better bargaining spot”—misses the point entirely. Judicial warrants are not intended to blindly facilitate whatever course of action a sheriff prefers. They are required by the Fourth Amendment “so that an objective mind might weigh the need to invade th[e] privacy [of the home] in order to enforce the law.”¹¹⁰ The Fourth Amendment thus protects people from the power of the state by requiring judicial preapproval, time permitting, of intrusive or forceful entrances and seizures.¹¹¹

Although the “warrant requirement is relaxed when an emergency situation makes it unreasonable to delay long enough to seek one, not when—as Fewins suggests here—a warrant simply would not have been particularly useful in the field. The facts available at summary judgment raise an inference that the Team had the time—and thus the constitutional obligation—to get a warrant from a judge before entering Carlson’s house with tear gas and surveillance equipment.”

A judge might have questioned the wisdom of a tear gas assault, and “clarified whether the Team was trying to save a disturbed and dangerous man or take him into custody on a misdemeanor weapons charge.” The Court agreed that judging exigency under such circumstances was the purview of a jury, and as such, reversed the summary judgement.

On a related note, the Court addressed the agency’s use of force policy, which the Estate claimed was violated by the sniper. The Court agreed that it was not feasible for a sniper to provide a verbal warning under the circumstances. The Court noted that “You can’t use a policy to create a [constitutional] standard.”¹¹²

Finally, the Court addressed an argument that the defendant officers “were responsible for the unavailability of evidence that might have supported its case—more complete logs and recordings of police radio transmissions and the clothing that Carlson was wearing when he died.” They asked for a “missing evidence” instruction. “Beginning with the communications records, the Estate argued that the logs and recordings maintained by the 911 system were altered or incomplete and that the defendants withheld and then destroyed relevant recordings from that evening. Uncontroverted testimony from the 911 Director indicated that neither Jetter nor even the 911 dispatchers who log the communications could have altered the logs. The testimony indicated that the “gaps” in the 911 transcripts during the operation that seemed suspicious to the Estate were caused by the officers on the scene using a local frequency not monitored by the 911 dispatchers, a standard practice. The Director also testified that she provided the Estate with copies of all requested recordings and only destroyed the backups more than a year later when the department updated its equipment.” Further, with respect to clothing, the Court argued that Jetter could have taken Carlson’s shirt, which was missing, there was controversy about whether Jetter was even present during the postmortem and could have taken it. (Initial evidence suggested he might have been there, but the medical examiner ultimately testified that he was not.)

The Court reversed the summary judgement and remanded the case.

42 U.S.C. §1983 – FORCE

Simmons v. Napier, Mahol and Villerot, 2015 WL 5449962 (6th Cir. 2015)

FACTS: On June 30, 2010, Officers Napier and Mahoi (Wayne State University) arrested Simmons following an argument with gas station clerks. The call indicated there was an “armed man threatening to shoot the clerks.” When they spotted Simmons, they ordered him to stop at gunpoint. When he did not comply, Officer Napier took him to the ground. A boxcutter was found on his person.

¹¹⁰ McDonald v. U.S., 335 U.S. 451 (1948).

¹¹¹ Johnson, 333 U.S. at 13–14.

¹¹² See Smith v. Freeland, 954 F.2d 343 (6th Cir. 1992) (“A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under § 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense.”).

Simmons (the man) refused to get into the cruiser and force and OC were used. He was taken to the hospital for removal of the OC, then booked into jail. He was released without charge the next day.

He immediately went to the hospital and was diagnosed with disc problems, for which he ultimately had surgery. Simmons argued he was cooperative during his arrest and that “violent and excessive force” caused his injury. He also complained of mental issues as a result.

Simmons filed suit under 42 U.S.C. §1983. Summary judgement on some issues was granted and qualified immunity denied with others. The officers were exonerated at trial. Simmons appealed.

ISSUE: May testimony about an officer’s prior conduct be admitted in a use of force trial?

HOLDING: No (as a general rule)

DISCUSSION: Among other procedural issues, Simmons argued he should have been allowed to question Officer Mahoi about claims from a deposition of another officer, who claimed Mahoi had used excessive force in prior arrests. The Court had denied it as overly prejudicial and barred by FRE 404, prior bad acts. The officers did not attempt to justify their conduct on the basis of a mistake or accident, which might allow it, but rather, argued they were using the appropriate and necessary amount of force. The officer’s possible intent was immaterial, since such cases require an objective, rather than subjective, assessment. Further, the other officer’s testimony that the officer who was involved was “no-nonsense or aggressive” did not demonstrate that he’d ever used “excessive” force. The officer in fact called Officer Mahoi very professional and a “great officer.” (The officer was unavailable to be cross-examined at trial.)

Simmons also argued it was improper to allow testimony by an ER physician that he was acutely intoxicated, but there were no medical tests introduced to prove that. The Doctor “did note that his ability to identify intoxication was based in part on his life experiences (as one might expect), he also explained that his medical training equipped him to understand when a person is intoxicated and to identify the “common presentation of alcohol intoxication.” Even as a lay witness, the court agreed that it was proper to introduce such an opinion. Nor was it truly a material factor in the case, in his favor, either way.

Finally, after Officer Mahoi improperly testified that one of the defense proposed witnesses was incarcerated, the Court remonstrated with him, struck the comment and told the jury to ignore it. The Court stated (when the jury was not present), that the statement was “highly inflammatory, irrelevant, unimpeached and totally without basis and foundation” and the resulting “misconduct to be knowing, intentional and completely violative of the rules.” However, since the witness was peripheral, at best, and did not observe the arrest, the court agreed it did not warrant a mistrial.

After addressing other procedural issues, the Court affirmed the jury’s verdict.

Lopez v. City of Cleveland, 2015 WL 5166954 (6th Cir. 2015)

FACTS: On July 29, 2011, Lopez was visiting Cruz, a friend, in Cleveland. His sisters lived a few doors away. At some point, Lopez got into an argument with a nephew, Cartagena, and used a baseball bat to break windows in his car. Officers Schramm and Milner responded to the call and were the first to arrive. They found Lopez sitting in the street, with a beer bottle and a machete. He refused to comply with an order to drop the machete, and was Tased. He did not react to the Taser, removing the probes from his body. The officers drew firearms and called for backup.

Additional officers arrived and again Lopez was tased. It took no effect and he “cut the taser wires with his machete.” He got up and began walking down the street, with the officers calling upon him to drop the machete to no avail. From this point, facts were in dispute, with Pla (one of the sisters) saying that she approached him and told him to drop it. She “yelled to the officers that she was Lopez’s sister, that he was sick, and that she could calm him down and get the machete from him.” At some point, though she walked away, and Lopez called to her to come and take the machete. As she walked to him, and was

about 7 feet away, he turned toward her. Officers opened fire. Another sister, Melba, and nephew, gave a different narrative, stating that Lopez brought the machete over his head and then turned toward Melba and asked “if that was the way she wanted him to die.” Noel, the nephew, stated that Lopez was going to stab himself. The officers stated later they did not know who Pla was and gave slightly differently variations of what they observed, but all indicated threatening movements with the machete held over his head toward Pla.

Three bullets struck Lopez and he was killed. A plaintiff’s expert indicated that Lopez did not have his hands over his head (waving the machete) or was turned to the right as was suggested.

Lopez’s Estate filed suit under 42 U.S.C. §1983, claiming excessive force. The officers requested and were granted summary judgement. The Estate appealed.

ISSUE: If there are material facts in dispute in a use of force case, is summary judgement permitted?

HOLDING: No

DISCUSSION: The Court identified the central issue as whether the officers “had probable cause to believe that Lopez posed a serious risk of harm to the officers or others.” All of the officers testified that they believed Pla was in imminent danger when they fired. While the officers described a threatening movement (raising the machete and moving toward Pla), other witnesses described it differently, and less threatening. (It should be noted that all of the witness were relatives of, and presumably heirs to, Lopez.) Two indicated they believed he intended suicide. The Court agreed there was a “Dispute of fact as to whether Lopez made any movement in those final moments that could reasonably be interpreted as threatening Pla.” As such, summary judgement could not be upheld.

The Court reversed the qualified immunity and summary judgment and remanded the case.

Gross (Mary Jane / Terry) v. City of Dearborn Heights, 2015 WL 5202948 (6th Cir. 2015)

FACTS: In August, 2012, Officers Szopko, Pellerito and Beedle-Peer (Dearborn Heights MI PD) arrived at the Gross home to serve an arrest warrant on Mary. The warrant sought extradition (to Kentucky) for felony drug trafficking. Mary Gross was 66 years old and had no prior criminal history. They had attempted to serve the same warrant five months before, and were told then that it was mistaken identity and that Margaret, Mary’s sister, had used Mary’s name to open credit cards. Lacking a mug shot or fingerprints and being unable to verify, they did not arrest her at that time.

This time, however, they received another warrant from Kentucky, including a photo and a letter confirming she was the person actually wanted. The officers gained entry, allegedly, by telling Terry Gross that a neighbor had called with a welfare check. Mary Gross identified herself to officers but refused to come outside. Officers entered and seized Mary. There was dispute as to exactly how they entered, however, but arguably both were told that the officers had a warrant. An audio recording from one of the officers indicated that when Mary Gross refused to come out, a “commotion ensued inside the house.” There was dispute about the timing of the certain events, but ultimately, during a struggle, Mary Gross was injured. She continued to dispute at the scene that she was the wanted subject. Both officers involved denied using any force beyond grabbing her arms to handcuff her. She was limping when taken to the car, she claimed she was “made to hop on one foot.” Although officers claimed they did not hear her complain of an injury or show difficulty walking, an audio recording indicated there was dialogue about a knee or leg injury. Officer Szopko admitted she was limping at the jail and complaining about a leg injury, and jail video showed that she was limping and having to be assisted inside. She was helped to stand for a booking photo and left the booking area in a wheelchair.

Eventually, Kentucky realized that in fact, she was not the person wanted, indeed, her sister was the party for whom the warrant was intended. Mary Gross suffered two leg fractures and a spinal

compression fracture, although with numerous abrasions. She filed suit and the officers moved for summary judgement, which was granted by the District Court. The Grosses appealed.

ISSUE: If there are material facts in dispute in a use of force case, is summary judgement permitted?

HOLDING: No

DISCUSSION: The Court noted that the audio recording was sufficient to create a genuine issue of material fact, particularly as to the timing of when the Grosses were told there was in fact a warrant (before or after the entry). There was also dispute as to the degree of force used. Further, there was dispute as to whether her medical need was obvious, and that even though an x-ray was needed to diagnose, there was a clear indication that she stated her leg had been broken. The Court did agree that there was no evidence that her request for clothing during the arrest was a motivating factor behind the officers' actions.

The Court reversed the decision of the District Court and remanded the case for further action.

Godawa v. Byrd, 798 F.3d 457 (6th Cir. 2015)

FACTS: On June 23, 2012, Godawa was shot by Officer Byrd (Elsmere KY PD) as Godawa was fleeing in a vehicle. At the time, Officer Byrd was a bicycle officer. He had been approached about 1 a.m. by a bar employee concerned about an individual who was walking around the parking lot, possibly underage, and drinking. By that time, the individual (Godawa) had gotten into a vehicle and was driving to the front of the lot. Officer Byrd stopped him and asked him if he was drinking. Although Godawa denied it, a beer bottle was in the cup holder, which Godawa stated belonged to his girlfriend. Byrd did not believe him and asked for ID – he was told that Godawa had an OL but not in his possession. He initially declined a FST, as “he was nervous and afraid he would fail.” Byrd obtained a pad and took down Godawa’s name and SSN. Godawa then admitted he’d had one or two drinks and that the beer was his. He then agreed to a FST and was told to hold on, with Byrd intending to get backup.

While [Byrd] was still at his bicycle, Godawa started his vehicle and began to back out of the parking spot. In the process of backing out of the parking spot, Godawa appears to hit or knock over [Byrd’s] bicycle. [Byrd] yelled ‘Hey’ and ‘Stop’ multiple times, but Godawa did not stop.

Under deposition, Byrd claimed that he ran along the vehicle, ordering Godawa to stop. He had his gun drawn and “positioned himself ahead and to the right of the car’s front passenger side while the car was temporarily stopped.” He appeared to “come into contact” with the car at some point, although there was dispute as to how that happened and the videos (including body cam) of the situation were not clear. The contact occurred off camera and Byrd was shown “moving off or pushing off the car and landing unsteadily on his feet.” He regained his balance and took “three strides alongside the vehicle before shooting through the rear passenger-side window.” The bullet entered the back of Godawa’s right shoulder and traveled diagonally through his chest. He continued driving. Byrd called for aid, stated shots had been fired. Godawa turned his vehicle and passed by Byrd, who observed Godawa slumped over the steering wheel. Godawa’s vehicle then struck a utility pole. When additional officers arrived, they all proceeded to the car. Godawa died shortly thereafter.

Godawa’s estate representative filed suit under 42 U.S.C. §1983, claiming excessive force. Byrd requested qualified immunity and summary judgement, which was granted. Godawa then appealed.

ISSUE: May an officer stand in front of a car and argue that justifies deadly physical force when the driver does not stop?

HOLDING: No

DISCUSSION: Byrd argued that Godawa's version of events (through his representative), "cannot be credited" because it is contradicted by video evidence. The Court noted that "both videos can reasonably be interpreted as indicating that [Byrd] was not directly in front of the vehicle, but rather was located ahead of the vehicle *to the right* of the passenger side," and as such, he could not have been targeted. Further, it appeared possible, even likely, that Byrd was "moving toward the car with his gun drawn" prior to the impact. As such, a juror could conclude that Byrd "initiated the contact with Godawa's car in an apparent attempt to stop Godawa from fleeing the parking lot." The Court agreed that the video from the bar could be interpreted that Byrd "was effectively chasing Godawa's car before he fired the shot that killed Godawa and that he was not in harm's way at that critical moment."

The Court agreed that some degree of force is permitted to make an arrest.¹¹³ The determination if an officer's actions are "objectively reasonable" in a case, it is necessary to follow the three factors developed in *Graham v. Connor*, (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.¹¹⁴ Certainly that determination "should account for the fact that, when faced with 'rapidly evolving' and tense situations, 'police officer are often forced to make split-second judgments' in deciding how much force is necessary given the circumstances."¹¹⁵

The Court then looked to *Tennessee v. Garner*, nothing that when a subject "poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."¹¹⁶ Deadly force might be used when a driver "appears ready to drive into an officer or bystander," but generally, once they are in a position of safety, it is not permitted.¹¹⁷ An officer could "continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car, ; but when it does not present an imminent danger, deadly force cannot be used to stop a fleeing subject."¹¹⁸ The Court emphasized that the officer "must have reason to believe that the car presents an imminent danger" for deadly force to be used. In this case, Byrd actively put himself in a dangerous position by trying to block the car with his body, and when he fired his weapon, he was at the side and rear of the vehicle, out of immediate danger. The only crime of which Godawa was suspected was underage drinking and having an open container. Although other felonies might be suggested, the court was required at this state to view the facts in Godawa's favor.

The Court reversed the trial court, finding that qualified immunity at this stage was inappropriate.

Rudlaff v. Gillispie/ Bielski, 791 F.3d 638 (6th Cir. 2015)

FACTS: On the day in question, Deputy Gillispie, (Michigan) was on regular patrol when he spotted Carpenter's truck going in the other direction. He knew Carpenter from three prior stops, all involving Carpenter having a suspended OL. In the last, he "took off running." He knew Carpenter had a history of drunk driving and fighting with police. As such he "knew Carpenter was violating the law because he was (at least) driving with a suspended license, and he was on high alert because of Carpenter's history with the police." Gillispie made a U-turn and turned on his lights. He called Deputy Bielski for backup, and Bielski arrived in moments. All three cars were parked on the narrow shoulder of a 2-lane, 55 mph, highway. Dash cam recorded Gillispie approaching Carpenter and telling him he was under arrest for the suspended OL. He was agitated but got out. The deputy ordered Gillispie to put his hands on the truck, but Carpenter did not comply. So, Gillispie tried to force him to do so, but Carpenter swung or jerked his armed back, apparently trying to keep him from putting on the handcuffs. They went back and forth, and Carpenter said that he would have complied if Gillispie had not "kept tugging" on him and had let him go.

¹¹³ *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir. 2001).

¹¹⁴ *Graham v. Connor, Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013)

¹¹⁵ *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

¹¹⁶ 471 U.S. 1 (1985).

¹¹⁷ *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014); *Saucier v. Katz*, 533 U.S. 194 (2001).

¹¹⁸ *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005).

“Yet Gillispie did not let go, and Carpenter did not comply. Gillispie performed a knee strike on Carpenter, attempting to force his compliance. But the knee strike did not succeed in subduing Carpenter, who still appeared to be struggling.” Bielski threatened to Tase him, and when Carpenter still resisted, he was Tased. He was then cuffed and arrested – he did later plead guilty to driving on a suspended OL.

Carpenter filed suit, claiming excessive force with respect to the knee strike and the Taser. (Carpenter passed away during the pendency of the case, and Rudlaff, representing the estate, took over. The officers requested summary judgment and were denied. The officers then appealed.

ISSUE: Is force justified during an arrest?

HOLDING: Yes

DISCUSSION; The Court agreed that the “police must act reasonably when seizing a person” and that “using “excessive force” during an arrest is unreasonable and thus violates the Fourth Amendment.¹¹⁹ To be held liable, the use of force must be “clearly established as excessive at the time of the arrest.”¹²⁰ That means existing caselaw must clearly and specifically hold that what the officer did—under the circumstances the officer did it—violated the Constitution. We therefore must determine (A) whether the officers’ conduct violated the Constitution; and (B) if so, whether it violated law that has been clearly established.

The Court agreed that it is “it is not excessive force for the police to tase someone (even multiple times) when the person is actively resisting arrest.¹²¹ And it includes refusing to move your hands for the police to handcuff you, at least if that inaction is coupled with other acts of defiance.¹²² But active resistance does not include being “compliant or hav[ing] stopped resisting,”¹²³ or having “done nothing to resist arrest,” or having “already [been] detained.”¹²⁴ A simple dichotomy thus emerges: When a suspect actively resists arrest, the police can use a taser (or a knee strike) to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot.

The Court continued:

No matter how you cut it, Carpenter actively resisted arrest. There is no genuine dispute of fact on this point. Carpenter never denies being verbally defiant, and in fact admits that he “told [Deputy Gillispie that he] wasn’t going to” comply. He puffed his chest and stared down Gillispie. He twice swung his arms in the officer’s direction. He locked up his body (“ball[ed] up”) and admittedly refused to give Gillispie his hands. And, pivotally, he admitted at his deposition that he tried to prevent Gillispie from handcuffing him—i.e., he conceded that he resisted arrest. (And yes, words, including Carpenter’s own words, do have power. A reasonable police officer observing this scene in the heat of the moment did not need to give Carpenter any more time to comply before tasing him. Because Carpenter “actively resist[ed] arrest and refus[ed] to be handcuffed,”¹²⁵ a reasonable jury applying the law of our circuit could conclude only that the officers were constitutionally able to use the force they did to subdue him.

¹¹⁹ Graham v. Connor, 490 U.S. 386 (1989).”

¹²⁰ Pearson v. Callahan, 555 U.S. 223, 231 (2009).

¹²¹ Hagans v. Franklin Cnty. Sheriff’s Office, 695 F.3d 505, 509 (6th Cir. 2012); e.g., Williams v. Sandel, 433 F. App’x 353 (6th Cir. 2011) (not excessive force to tase the suspect thirty-seven times (and use batons and pepper spray) because he actively resisted arrest). Active resistance includes “physically struggling with, threatening, or disobeying officers.” Cockrell v. City of Cincinnati, 468 F. App’x 491 (6th Cir. 2012) (collecting cases).

¹²² Caie v. W. Bloomfield Twp., 485 F. App’x 92, 94 (6th Cir. 2012); see Williams v. Ingham, 373 F. App’x 542 (6th Cir. 2010).

¹²³ Hagans, 695 F.3d at 509;

¹²⁴ Cockrell, 468 F. App’x at 496 (collecting cases). E.g., Eldridge v. City of Warren, 533 F. App’x 529 (6th Cir. 2013) (excessive force to tase someone whose “noncompliance was not paired with any signs of verbal hostility or physical resistance”); Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007) (excessive force for an officer who, if the plaintiff was believed, “almost immediately and without provocation” began choking the suspect).

¹²⁵ Hagans, 695 F.3d at 509,

Although Carpenter tried to characterize his behavior differently, his recitation is a “visible fiction” when looking at the video and his own admissions. Even if he subjectively intended to comply, the court is only expected to “view his actions objectively, from the perspective of a reasonable officer at the scene.”¹²⁶ From that perspective, Carpenter “strongly indicated his intentions were not innocent and compliant, but defiant and hostile.”

The Court concluded:

Nor, finally, will we read a de minimis resistance exception into the Fourth Amendment, as Carpenter and the concurrence would have us do. This exception would presumably prohibit the police from using force if a jury decided that the suspect only kind of resisted arrest. No, plain and simple: When a person resists arrest—say, by swinging his arms in the officer’s direction, balling up, and refusing to comply with verbal commands— the officers can use the amount of force necessary to ensure submission. A de minimus rule— say, that the arrestee’s arm swing needs to make direct contact with the officer, (Carpenter’s suggestion), or that the officers need to let the suspect resist for longer than thirty seconds before taking action (one minute? Two? Three?), —does not provide the necessary guidance for the police, and it risks the safety of all involved. Plus, this de minimus rule does not align with our caselaw, which has allowed force when the arrestee resisted less than Carpenter did here.¹²⁷

Mindful as we are that the “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving,”¹²⁸ we hold that because Carpenter actively resisted arrest, the one-time taser shot and knee strike to subdue him did not violate the Fourth Amendment. The Court, in an attempt to be complete, noted that even if their assessment was completely wrong, the officers were still entitled to qualified immunity. The Court agreed that “qualified immunity (as we’ve been reminded again and again) is an “exacting standard” that gives officers lots of leeway, requiring their conduct to violate clearly established law to defeat the defense.”¹²⁹ Where’s the clearly established law here? Neither Carpenter nor the district court has an answer.” Qualified immunity “operates in the “hazy border between excessive and acceptable force.”¹³⁰ When in such a haze—as the district court said it was in here—the proper course is to grant summary judgment to the officers, even if the court would hold the officers’ conduct unconstitutional in hindsight.¹³¹

The Court noted:

Carpenter conceded that he resisted arrest. The videos show the same. And the law says that when someone resists arrest, the police may constitutionally use force to ensure their compliance. A jury has nothing left to decide. Because the officers acted constitutionally—and because even if they didn’t, by all accounts they didn’t clearly act unconstitutionally—they are protected by qualified immunity. We reverse.

¹²⁶ Chappell v. City Of Cleveland, 585 F.3d 901 (6th Cir. 2009).

¹²⁷ E.g., Caie, 485 F. App’x at 96–97 (force allowed because the arrestee did not give up his hands for arrest, even though he was taken down and “arguably ‘subdued’”).

¹²⁸ Graham, 490 U.S. at 396–97.

¹²⁹ City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015); see also Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015). Existing caselaw, in other words, must put the precise question “beyond debate.” Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

¹³⁰ Saucier v. Katz, 533 U.S. 194 (2001); see Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992) (“Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”).

¹³¹ al-Kidd, 131 S. Ct. at 2083; see Brosseau v. Haugen, 543 U.S. 194 (2004).

42 U.S.C. §1983 – MEDICAL NEED

Linden v. Piotrowski / Zayto, 619 Fed.Appx. 495 (6th Cir. 2015)

FACTS: On January 18, 2013, Black (age 18) and several others were playing cards inside a Highland Park, MI, residence. About at 11:40 p.m., Bain, one of the players, “pulled out a gun and started firing.” Officers Piotrowski and Zayto responded, first finding Scott on the porch with the gun, which he’d “wrested away from Bain.” He complied with orders to put it down and he was detained in the cruiser.

Inside, they found two people down, Bain and Givens. Pulley was crouching above Givens. Bain appeared to be deceased. Black was also shot. The officers later testified that once inside, they called for EMS for multiple gunshot victims. Officer Piotrowski focused on Givens, who had an abdominal injury, “asking him what had happened, applying pressure to his wounds with a gloved hand, and trying to calm Pulley down.” He did this until EMS arrived. “Piotrowski said that he did not see Black until after EMS arrived, at which point he went to assess the rest of the scene and found Black ‘down the hallway towards the kitchen’ where he was sitting on the floor. Another officer was near Black, and after scouting around, returned to find Black handcuffed. Black, when questioned, did not say he’d been shot, but only that his stomach hurt. The officers lifted his shirt but saw nothing. They did not check his vital signs. They asked if he’d swallowed drugs as they knew the house was a “suspected drug house.” Piotrowski thought Black was acting odd, so he went to see if another EMS unit had arrived, he had requested two. (In fact, the second ambulance had been diverted to attend to another victim of the shooting, who’d run bleeding to a nearby business.) Finally, another EMS unit arrived and they were directed to Black.

Officer Zayto said he’d encountered Black moments after they’d entered, “when Black came walking into the room directly toward them.” He suspected Black was involved in the shooting, especially after they learned from the only other person in the house, Givens wife, Charlotte, that no one else was in the house. He stated that Black denied being shot at the time. Charlotte Givens later testified that Black told them he’d been shot and needed help multiple times. She claimed the officers told him he’d not been shot and that he was going to jail. Pulley told a similar story. Givens also claimed that he’d told officers Black had also been shot.

Black died later that night. His estate representative, Linden, filed suit under 42 U.S.C. §1983. The officers were denied summary judgement and appealed.

ISSUE: Are officers responsible for providing medical care to subjects?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that there were several discrepancies in the documents and reports produced as a result of the shooting. The officers claimed to do things that were not reflected in the house, and gave different timelines as to what they’d done initially. Both said they’d pulled up his shirt, but did not see the wound, which was on the back of one shoulder. The EMS dispatch record was consistent, however, and the medics noted that Black complained he could not breathe, but they observed no blood, apparently because he was wearing multiple shirts. As they were cutting them off, he started spitting foam and vomiting “brownish liquid.” They finally found the wound. He actually died in the ambulance. From the autopsy report, it appeared that most of the bleeding was internal.

The Court agreed that

The Eighth Amendment forbids “deliberate indifference to serious medical needs of prisoners” because it “constitutes the ‘unnecessary and wanton infliction of pain.’”¹³² The Fourteenth

¹³² Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153 (1976) (joint opinion)). “[I]ntentionally denying or delaying access to medical care” is a constitutional violation.

Amendment extends this right to adequate medical treatment to pretrial detainees.¹³³ “Deliberate indifference requires that the defendants knew of and disregarded a substantial risk of serious harm to [the plaintiff’s] health and safety.”¹³⁴ A showing of deliberate indifference thus has objective and subjective components.¹³⁵ The objective component is that the plaintiff must “show the existence of a ‘sufficiently serious’ medical need.”¹³⁶ The subjective component, by contrast, “requires a plaintiff to ‘allege facts which, if true, would show [1] that the official being sued subjectively perceived facts from which to infer substantial risk to the [detainee], [2] that he did in fact draw the inference, and [3] that he then disregarded that risk.’”¹³⁷ A plaintiff may make this showing through circumstantial evidence.

The Court agreed that the discrepancies in the facts were not so material as to preclude qualified immunity. Even if everything the plaintiff’s facts was true, “the conduct exhibited by Piotrowski and Zayto does not amount to deliberate indifference under clearly established law.” It was clear that within seven minutes, they arrived, secured the premises and called for EMS at least three times, reporting multiple gunshot victims. First, the argument that Black’s rights were violated, by the officers’ “failing to direct the first emergency medical responders who arrived on scene that they should aid or triage Black.” In other words, the contention was that the officers “should have redirected the first-arriving medics away from Robert Givens, who was closest to the door and was visibly bleeding from an obvious gunshot wound to his abdomen, to Black, who was saying he had been shot but had no blood visible on his clothing.” The Court found no such obligation, nor did they hinder the medics from dealing with the victims as they saw fit. The Court found no obligation to manage the work of EMS responders. Further, the Court found no obligation for the officers to elaborate on the injuries to dispatch, either, beyond the call that there were multiple gunshot victims. The Court accepted that the officers performed no medical care,¹³⁸ but noted that even EMS did not find the gunshot until they were removing his shirt. The officers did not cause Black’s injuries and the court found no violation in “only calling for medical assistance for someone who was saying that he had been shot but had a hard-to-discover gunshot wound and no blood on the exterior of his clothes.”

The Court agreed that the officers were entitled to qualified immunity.

Bonner-Turner v. City of Ecorse, 2015 WL 5332465 (6th Cir. 2015)

FACTS: On September 16, 2010, Turner was discharged from a mental health hospital, where he was undergoing treatment for longstanding paranoid schizophrenia and bipolar disorder. Ten days later, while drinking heavily, he told his wife (Bonner-Turner) that he was suicidal and wanted to go to the hospital. She called 911 and requested EMS, but reported he was “walking around with a gun” and “Talking about killing people.” Dispatch sent firefighter-EMTs and Officers Marks and Graham to assist. The EMTs found him lying face down in the street for no apparent reason. He said he wanted to go to the hospital and that he was “sick” and suicidal. The officers arrived and found that although his speech was slurred, he was reasonably understandable. Captain Wilson (EMT) knocked a cigar out of Turner’s hand, causing him to bleed, and he became agitated.

Turner was uncooperative. He refused to allow anyone to take his vital signs. But, according to Bonner-Turner, Turner again requested to be taken to a hospital, explaining that he had been diagnosed as bipolar and stating: “I’m suicidal, I don’t feel good, I’m sick, just take me to the hospital.” Marks and Graham were present for those statements. In fact, according to Bonner-Turner, at almost all times, every responder was standing close enough that he or she could hear anything said by anyone else. It is undisputed that Turner was yelling that he wanted to go to the hospital. According to Turner’s son, who was standing nearby, Turner also yelled out, “Fuck you all, fuck life, I just want to die.”

¹³³ Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001) (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983)).

¹³⁴ Watkins, 273 F.3d at 686 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

¹³⁵ Phillips v. Roane Cnty., 534 F.3d 531 (6th Cir. 2008).

¹³⁶ Id. (quoting Farmer, 511 U.S. at 834).

¹³⁷ Id. at 540 (quoting Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001)).

¹³⁸ Estate of Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005).

The officers tried to calm him. Bonner-Turner provided his history. Graham believed he needed medical attention for his mental health. He continued to refuse vitals and Marks drew his Taser. Family members begged him not to use the Taser and he reholstered it. Turner kept waffling between going to jail or the hospital. Marks finally decided to arrest him, handcuffed him and left the scene. On the short trip to the jail, Turner “flipped out” and began banging his head inside the car. Marks tased him twice, but only the second time was witnessed, by his supervisor. They got to the jail and Turner remained uncooperative and began to threaten the officers. They placed him in a cell to cool-down, leaving him with his clothing and shoes. McCaig (another officer) struggled to remove Turner’s cuffs. Despite policy, they did not strip him of items that might prove harmful. The video camera in the cell he was placed was inoperable, and it was later admitted it had been unusable for a while. Shackelford, in the next cell, later stated he heard him yelling that he could not breathe, and asking to go to the hospital. Marks went back and talked to the family, and Bonner-Turner was concerned that her husband was not at the hospital, where she thought he’d been taken.

Frierson, the jail commander, observed him several times and found he’d completely undressed. He told Turner he would have him checked out when he calmed down. He left for a meal break and did not provide any instructions to his relief to watch Turner. 75 minutes later, despite policy that checks be made hourly, Frierson “found Turner hanging dead from the ceiling by his shoelace.”

The Estate filed suit, but the District Court dismissed “all but two §1983 excessive force claims against Marks and McCaig for tasing Turner in the patrol car on the way to the jail.” The Estate appealed.

ISSUE: If a medical need would be obvious to a lay person, will an officer be liable for ignoring it?

HOLDING: Yes

DISCUSSION: The Estate’s “central claim is that defendants were deliberately indifferent to Turner’s serious medical needs in violation of the Fourteenth Amendment.” “Under the Fourteenth Amendment, the governing standard for a constitutional violation is “deliberate indifference” to a serious medical need.¹³⁹ This consists of both an objective and subjective component. The objective component requires a showing that there existed a “substantial risk of serious harm” to a detainee’s health or safety.¹⁴⁰

“Where the seriousness of a prisoner’s needs for medical care is obvious even to a lay person, the constitutional violation may arise.”¹⁴¹ Further, the person sued must be shown to have “subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk.”¹⁴² The deliberate indifference standard lies “somewhere between the poles of negligence at one end and purpose or knowledge at the other.”¹⁴³ In other words, a plaintiff “does not need to show that the correctional officers acted with the very purpose of causing harm or with knowledge that harm will result.”¹⁴⁴ Such a standard “satisfies our twin goals of keeping the standard high enough so that it does not amount to mere negligence and low enough that it is possible for a plaintiff to survive summary judgment without proving his or her entire case.”¹⁴⁵ “The line between negligence and deliberate indifference is particularly difficult to draw when the risk at issue is suicide because the officials will necessarily be accused of a failure to act, which usually falls in the domain of negligence.”¹⁴⁶ “We have clarified that the proper inquiry in a case where an inmate has committed suicide is ‘whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure [by a defendant] to take

¹³⁹ Estelle v. Gamble, 429 U.S. 97 (1976).

¹⁴⁰ Farmer v. Brennan, 511 U.S. 82 (1994).

¹⁴¹ Blackmore v. Kalamazoo Cnty., 390 F.3d 890 (6th Cir. 2004).

¹⁴² Comstock v. McCrary, 273 F.3d 693, 703 (6th C

¹⁴³ Farmer, 511 U.S. at 836.

¹⁴⁴ Phillips v. Roane Cnty., Tenn., 534 F.3d 531 (6th Cir. 2008) (quoting Farmer, *supra.*).

¹⁴⁵ Cooper, 222 F. App’x at 466–7.

¹⁴⁶ *Id.* at 466.

adequate precautions amounted to deliberate indifference to the decedent's serious medical needs."¹⁴⁷

Although failure to follow administrative policies does not itself constitute deliberate indifference, evidence of such a violation may be considered as evidence of an officer's knowledge. The Court agreed that the officers' subjective knowledge of substantial risk may be reasonably inferred from their actual exposure to Turner's statements and behavior. In that regard, this case is distinguishable from cases in which a detainee's suicide risk is alleged merely through observation of a detainee in detention. Second, there is sufficient evidence from which a jury could reasonably conclude that each individual defendant perceived facts from which to infer a substantial risk of self-harm to Turner, drew the inference, and disregarded the risk. The following facts, viewed in plaintiff's favor, support such inference. Regarding Marks's subjective knowledge, he (1) admits that the nature of the dispatch was a "rescue assist," and a rational jury could infer that Marks interpreted the nature of the events as did Mark Wilson as a "medical" run for "possible suicide" or "attempted suicide," (2) witnessed Turner's bizarre behavior, (3) admits he heard Turner ask to go to the hospital and ask for "help," (4) observed Turner engage in self-harm by repeatedly banging his head against the Plexiglas partition in the patrol car, and (5) was told by Bonner-Turner that Turner was suicidal when Marks returned to the Turner home. A rational jury could also infer that (6) Marks heard Turner stating he was suicidal and wanted to die, and (7) Marks overheard Bonner-Turner tell Graham that Turner was bipolar and had not taken his medication. With respect to disregarding Turner's risk of suicide, Marks (1) arrested Turner instead of taking him to the hospital, (2) tased Turner instead of taking him to the hospital after Turner engaged in self-harm in the patrol car, (3) failed to follow jail protocol by not documenting Turner's mental health history, risk of suicide, or recent self-harm in the patrol car, (4) failed to inform Frierson of Turner's mental health history, risk of suicide, or recent self-harm in the patrol car, (5) failed to follow jail protocol by not removing Turner's clothing or shoelaces, despite knowledge of Turner's mental health history, risk of suicide, and recent self-harm in the patrol car, (6) actively assisted in putting Turner in a cell for a "cool down period" with his clothing and shoelaces, (7) did not check on Turner after placing him in the cell, and (8) after returning to the Turner home and being told by Bonner-Turner that Turner was suicidal, did not check on Turner or inform other officers of Turner's risk of suicide. These facts, viewed in plaintiff's favor, satisfy plaintiff's burden at summary judgment.

With respect to Graham's subjective knowledge, she (1) admits that the nature of the dispatch was a "rescue assist," and a rational jury could infer that she interpreted the nature of the events as did Mark Wilson as a "medical" run for "possible suicide" or "attempted suicide," (2) witnessed Turner's bizarre behavior, (3) admits she heard Turner ask to go to the hospital, (4) heard Turner tell her he was suicidal and had recently been released from the hospital, was bipolar, and had not taken his medication, (5) formed a belief that Turner needed medical assistance for his mental health, and (6) told Turner she would get him help. As to Graham's disregard of Turner's risk of suicide, Graham (1) did not take Turner to the hospital or ask Marks to take Turner to the hospital, despite knowledge of Turner's mental health history and risk of suicide, (2) at jail, failed to follow jail protocol by not documenting Turner's mental health history or risk of suicide, (3) at jail, failed to inform Frierson or other officers of Turner's mental health history or risk of suicide, (4) observed Marks and McCaig put Turner in a cell with his clothing and shoelaces and failed to intervene, (5) did not encourage anyone to take Turner to the hospital or provide medical care, and (6) did not check on Turner in his cell. These facts likewise satisfy plaintiff's burden at summary judgment.

Finally, Frierson's actions, viewed in plaintiff's favor, also support a reasonable inference that he knew of and disregarded a substantial risk of suicide. Frierson (1) took the 9-1-1 call requesting an ambulance, and a rational jury could infer Frierson's subjective knowledge based on Mark Wilson's characterization of the dispatch (made by Frierson) as a "medical run" for a "possible suicide" or "attempted suicide" as there were no other dispatchers that night, (2) admits to hearing Turner banging on the walls and doors of his

¹⁴⁷ *Id.* (quoting *Gray v. City of Detroit*, 399 F.3d 612 (6th Cir. 2005) (citing *Farmer*, 511 U.S. at 837).

cell, yelling that he needed to go to a hospital, and (3) observed Turner's bizarre behavior in custody, including standing completely naked in his cell. With respect to disregard, Frierson (1) did not take Turner to the hospital when requested, (2) failed to follow jail protocol by not monitoring Turner's cell, despite knowing that the video monitor in the cell was broken, (3) failed to follow jail protocol by not monitoring Turner every hour, (4) did not remove Turner's clothing or shoelaces when presented with the opportunity, and (5) did not instruct McCaig or another officer to check on Turner while Frierson left the jail on a break. On these facts, a reasonable jury could find in favor of plaintiff on the subjective component of deliberate indifference.

Specifically, with respect to Frierson, the evidence indicated that Turner was calling for help and indicating he had trouble breathing, and after he simply told him to lie down and calm down, he left on a break, giving his relief no direction. With respect to force at the jail, The Court looked first at "First at issue is McCaig's use of force in the processing room. This event is captured on video. For context, we assume as true the uncontroverted deposition testimony from McCaig and Marks that Turner made verbal threats against the officers from the moment he exited the patrol car at the jail. We also assume that Turner was spitting on the officers. The video corroborates that Turner was moving his mouth and sometimes his head toward McCaig. It also appears to corroborate that Turner spit on McCaig. The handcuffed Turner is otherwise compliant and allows McCaig to search Turner's person. Turner does not appear to resist. Soon after, McCaig shoves the still-handcuffed Turner face-first into the wall as Marks stands nearby.

A jury could find that McCaig's use of force was objectively unreasonable. Turner was handcuffed, not physically resisting, and, even if he had made verbal threats, a face-first shove into a wall was almost certainly gratuitous under the circumstances.

Defendants argue the force was not unreasonable because Turner remained standing the entire time. But gratuitous violence inflicted upon an incapacitated arrestee may be excessive even if the injuries are slight.¹⁴⁸

In this case, a reasonable juror could find that the shove cannot be reasonably "construed as a means of subduing [Turner]," especially because a reasonable juror could interpret the shove as "not to protect [McCaig], other officers, or the public," but rather an angry response to punish Turner. For purposes of qualified immunity, defendants do not dispute that Turner's constitutional right to be free from excessive force is clearly established. And under these circumstances, any reasonable officer would know that such gratuitous violence violated Turner's constitutional rights.¹⁴⁹ With respect to Marks's failure to intervene, because McCaig's use of force was the first overt use of force that Marks witnessed, Marks had no reason to know that excessive force would be used and therefore lacked an opportunity to intervene.¹⁵⁰ This claim was properly dismissed.

Plaintiff's final excessive force claims are against McCaig and Marks in the jail hallway, and against Graham for failure to intervene. Again, the events are captured on video. As above, for context we assume that Turner made verbal threats to the officers and spit on them. Although Plaintiff also argues that McCaig used excessive force in the processing room in moving Turner into the jail hallway. Any unnecessary use of force—i.e. that McCaig may have tugged Turner's hair—was particularly minor and incidental, as opposed to gratuitous force. Under these circumstances, no reasonable juror could find the use of force excessive.

Shackelford's affidavit states that he did not hear Turner make any threats, McCaig and Marks testified that such threats occurred from the moment Turner exited the patrol car, outside of Shackelford's earshot. Defendants argue that the force was necessary to control Turner as the officers escorted him to his cell, and to turn him away from the officers as they removed his handcuffs. McCaig also testified that Turner tensed up once he removed the first handcuff, as if

¹⁴⁸ See Morrison v. Bd. of Trustees of Green Twp., 583 F.3d 394 (6th Cir. 2009); Pigram ex rel. v. Chaudoin, 199 F. App'x 509 (6th Cir. 2006).

¹⁴⁹ See, e.g., Morrison, 583 F.3d at 407–08.

¹⁵⁰ See Goodwin, 781 F.3d at 328.

Turner was “about to push off,” so McCaig used the “least amount of force [he] had to control [Turner].” Graham’s police report states that Turner “refused to follow a command given by [McCaig] of putting his hand on his head while the handcuffs were being removed. Instead, Turner kept turning around towards [McCaig] while making threats.”

The district court correctly dismissed these claims. No reasonable juror could find that the officers used excessive force in light of undisputed testimony that Turner tensed up upon release of the first handcuff and refused to follow McCaig’s commands. And because there is no underlying constitutional violation, Graham may not be liable for failure to intervene.

The Court dismissed all claims with respect to supervisory liability, but reinstated claims for further proceeding.

TRIAL PROCEDURE / EVIDENCE – CHILD WITNESS

McCarley v. Kelly (Warden), 801 F.3d 652 (6th Cir. 2015)

FACTS: Puffenbarger and McCarley were in a dispute over his paying child support over a child they shared, and McCarley threatened to kill her if she did not drop the suit. On January 20, 1992, Puffenbarger was found dead in her home – although her two children were unharmed. Her three year old son, when seeing uniformed officers, told them that “he” – indicating a uniformed officer – “hurt mommy.” He made statements in the presence of his grandmother that indicated a “policeman” hit his mother. A child psychologist, Dr. Lord, “was able to elicit several similar statements” from him during multiple sessions. Three years later, in 1995, when investigating an unrelated matter, officers noted a deputy sheriff’s cap and jacket in McCarley’s workplace (a garage) and remembered what had happened previously. They confiscated the items, as he was not a law enforcement officer.

Ultimately McCarley was indicted on murder. During his trial, Dr. Lord testified as to what the child had told her, as the child was deemed legally incompetent to testify due to his age. The detective indicated that he’d sought Dr. Lord’s help to help communicate with the child and “extract information.” He agreed that he “absolutely planned to use any information provided by Dr. Lord in his investigation to assist him with identifying the persons responsible for the murder.” The grandmother also testified as to statements the child made, and which were admitted as excited utterances. The child was playing and talking to himself and to a photo of his mother, and she quickly began taking notes when he started talking. Officers also testified that the child made similar statements to every uniformed officer he saw at the scene of the murder.

McCarley was convicted and appealed under habeas corpus.

ISSUE: Does the Confrontation Clause apply to child witnesses?

HOLDING: Yes

DISCUSSION: He argued that using Dr. Lord’s testimony was improper because he had no opportunity to cross examine the child. The Court discussed whether the statements, made during therapy, were testimonial.¹⁵¹ The Court agreed that the “Confrontation Clause applies to informal, as well as formal, prior testimony.” In this case, the Court agreed, Dr. Lord was acting as an agent of law enforcement and her sessions “were more asking to police interrogations than private counseling sessions.” Any emergency situation was long passed and the detective’s testimony proved that the statements were testimonial evidence.

As such, the court had to then apply to “harmless error” analysis to determine if the conviction must stand. In this case, the Court noted, “importance of Dr. Lord’s testimony to the prosecution’s case against McCarley cannot be overstated.” The state heavily relied on it in its prosecution, and it was introduced to

¹⁵¹ Crawford v. Washington 541 U.S. 36 (2004).

prove “the truth of the matter asserted” – legal hearsay. The child’s statements, as repeated “provided crucial narrative details and the only eyewitness identification of the perpetrator.” The testimony was not duplicative or cumulative to other testimony that was legally admitted, such as his grandmother’s statements. The Court found Lord’s testimony to be “keystone holding the arch of the State’s case together.” If that was removed, the case collapsed into “disjointed pieces.” Without that evidence, the prosecution had virtually nothing but circumstantial evidence that was far from compelling. Finding that the error was not harmless, the Court overturned McCarley’s conviction.

CHILD PORNOGRAPHY

U.S. v. Reynolds, 2015 WL 5315518 (6th Cir. 2015)

FACTS: On April 7, 2011, Agent Blanton (FBI) “used a peer-to-peer file-sharing program to download images containing child pornography from a computer. The FBI traced the computer’s internet-protocol address to Donald Reynolds’s home in Canton, Michigan. On May 26, 2011, FBI agents executed a search warrant on the home and seized the desktop computer from which Blanton had downloaded the child-pornography images. In addition to Donald Reynolds, three other individuals regularly used that computer: Reynolds’s two adult children who lived with him—Arica and Andrew Reynolds—and Arica’s boyfriend, Michael Cook. All four individuals denied using the computer to view, download, or distribute child pornography. Reynolds admitted that he owned the computer and that he had an account at Match.com, an online dating service.” Over 8,000 images were found on the computer, and a computer analyst pinpointed the times a user downloaded the images precisely. Cellphone records from everyone but Donald Reynolds showed they were not at the house at the time, while Donald’s records indicated that he was. There was also activity on his Match.com account that indicated he was using the computer at the time.

Reynolds was charged with the receipt of child pornography, distribution and possession, all under 18 U.S.C. §2252. Agent Hess testified as an expert on “historical cell-site tracking analysis.” The Court did not require a Daubert hearing, however. The defense called an expert witness, and the government then called Smyk, a cell phone engineer, to rebut the defense’s witness. The latter was objected to, as the defense was not notified about it, but the Court noted that Smyk “offered ‘classic rebuttal’ testimony.” Two alibi witnesses were excluded.

Reynolds was convicted and appealed.

ISSUE: Is testimony about cell towers relevant in child pornography (transmitted by phone) cases?

HOLDING: Yes

DISCUSSION: Reynolds first argued that Hess’s testimony “was neither relevant or reliable.” The Court noted that “testimony ‘concerning how cell phone towers operate constitute[s] expert testimony because it involve[s] specialized knowledge not readily accessible to any ordinary person.’”¹⁵²

The Court agreed that”

Cellular technology relies on radio waves to carry transmissions between a cellphone and a cell site, also known as a cell tower. Each tower typically has three antennae, each responsible for covering a 120-degree wedge. In the area surrounding Canton, Michigan, cell towers are spaced approximately one to two miles apart. A cell site “sector” refers to the area contained within a (usually) hexagonal array of cell towers. A cellphone generates “historical” cell-site data when it places a call and connects to a specific cell tower. Such data includes the particular cell-tower antenna to which the cellphone connected and the duration of the call. The “one location” tracking approach assumes that the cellphone connected to the closest tower because that tower is most

¹⁵² U.S. v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011).

likely to produce the strongest signal. As most cell towers have three antennae facing different directions, the data generally indicate the direction of the caller relative to that tower—i.e., the 120-degree wedge serviced by the antenna—and thereby estimate the cell-site sector from which the call originated.¹⁵³ While cellphones are designed to connect to the tower with the strongest signal, that tower might not actually be the closest because factors such as weather, obstructions, and network traffic can cause a call to connect to a tower farther away. FBI historical cell-site tracking does not account for these factors.” District courts had rules in opposite ways whether the tracking methodology is reliable, and noted that “there is controversy as to whether cell-site tracking can pinpoint a call’s origin to a specific cell-sector.”

Further:

United States v. Schaffer, which lies at the heart of the anti-Evans citation chain, concluded that using historical cell-site tracking analysis to determine a person’s past whereabouts was reliable because the technique was “neither untested nor unestablished.”¹⁵⁴ But it reached this conclusion on the basis of testimony that the technique had been tested and accepted by the law-enforcement community, and not the scientific community. An FBI expert testified that the “FBI had been successful at least 1000 times” in locating suspects with historical cell-site tracking. *Ibid.* This claim appears to be precisely the sort of “ipse dixit of the expert” testimony that should raise a gatekeeper’s suspicion.¹⁵⁵ While being successfully employed “1000 times” may sound impressive, the claim is not subject to independent peer review and fails to establish an error rate with which to assess reliability because there was no information on how many times the technique was employed unsuccessfully.

The Schaffer court also concluded that “the technique has been accepted by approximately [sic] federal courts.”¹⁵⁶ But the two federal cases it cited— Sepulveda¹⁵⁷ and United States v. Weathers¹⁵⁸— do not support the proposition that historical cell-site tracking can reliably determine a caller’s location. At a sentencing hearing where the court’s gatekeeper function under Rule 702 was not triggered, Sepulveda rejected historical cell-site data as an unreliable indicator of the cell sector from which a call originated.¹⁵⁹ And Weathers simply did not involve the use of historical cell-site data to estimate a person’s past location in any way.

However, in this case, Hess was not placing subjects in a location, but excluding them from a location, and the court agreed that “it is reliable to assume that a call would not connect to a tower that was many sectors away.” While that could be challenged, it would go to the weight, not the admissibility. The Court upheld Reynolds’ convictions.

MISCELLANEOUS – FEDERAL LAW

Huff v. Spaw, 794 F.3d 543 6th Cir. 2015

FACTS: Huff was the chair of the Kenton County Airport Board (overseeing the Cincinnati/Northern Kentucky International Airport (CVG)). In October, 2013, he and his wife, Bertha, went on a business trip to Italy, along with Savage. Spaw worked for McGraw, the airport’s CEO, and her work included making travel arrangements for board members.

On October 24, Huff and Savage went outside their hotel to talk about CVG personnel matters, including replacing McGraw. During the conversation, Huff tried to call Spaw, on her cell, to make dinner reservations, but misdialed and was unsuccessful. So Savage called Spaw’s office phone and conveyed

¹⁵³ See Cisco, Wi-Fi Location-Based Services 4.1: Location Tracking Approaches 2-1 (2008).

¹⁵⁴ 439 F. App’x at 347.

¹⁵⁵ See Joiner, 522 U.S. at 146.

¹⁵⁶ 439 F. App’x at 347.

¹⁵⁷ 115 F.3d at 891,

¹⁵⁸ 169 F.3d 336 (6th Cir. 1999)

¹⁵⁹ 115 F.3d at 891; Fed. R. Evid. 1101(d)(3).

the request. Everyone hung up. A few minutes later, though, “the iPhone in James’s suit pocket placed a pocket-dial call to Spaw’s office phone.” Spaw answered, and could hear Huff and Savage talking, but they did not respond to her greeting. Hill tried to help Spaw figure out what the men were saying, and she put the phone on speaker. Within a minute and a half, they deduced that the two men were “discussing McGraw’s employment situation and that the call was not intended for them.: Spaw and Hill both began to take notes – Spaw later stated she believed the discussion involving an intention to : discriminate unlawfully against McGraw and felt that it was her responsibility to record the conversation and report it through appropriate channels. The pocket-dial call lasted approximately 91 minutes, during which Spaw listened continuously.”

The first 40 minutes involved their conversation, and the next 30 minutes, approximately, included a larger meeting. Spaw heard them chatting about innocuous activities at the end of the call for about five minutes, and then Huff returned to his hotel room and was talking to his wife about family matters and his conversation with Savage. “Spaw used an iPhone obtained from the CVG IT Department to record the final four minutes and 21 seconds of the conversation between the Huffs.” At some point, Huff realized his iPhone had an open call with Spaw but he thought it had been on for a 1 minute and 29 seconds, rather than the one hour and 29 minutes it was in reality. (Other records suggested it was one hour and 31 minutes. After the call ended, Spaw converted handwritten notes that she and Hill made into a typewritten summary. She also transferred the iPhone recording to a thumb drive, which she gave to a third-party company to enhance the audio quality. She eventually shared the typewritten summary and the enhanced audio recording with other members of the Airport Board.

The Huffs filed suit under federal law, claiming that “Spaw violated Title III by intentionally intercepting their oral communications, in violation of 18 U.S.C. § 2511(1)(a); disclosing the contents of intercepted oral communications, in violation of 18 U.S.C. § 2511(1)(c); and using the contents of intercepted oral communications, in violation of 18 U.S.C. § 2511(1)(d). The district court granted summary judgment to Spaw on January 24, 2014, holding that Title III does not protect the Huffs’ conversations because any expectation that their conversations would not be intercepted was not reasonable under the circumstances.¹⁶⁰ The Huffs now appeal.

ISSUE: Does one have an expectation of privacy in their own “pocket dial” situation?

HOLDING: No

DISCUSSION: First, the Court looked to Title III, which “makes it unlawful to “intentionally intercept[] . . . any wire, oral, or electronic communication.” 18 U.S.C. §2511(1)(a). The act defines “intercept” to mean “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” Id. §2510(4). Title III further prohibits intentional disclosure or use of “the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of wire, oral, or electronic communication in violation of [Title III].” Id. §2511(1)(c), (d).” The Court agreed that a “person engages in protected oral communication only if he exhibited “an expectation of privacy that is both subjectively and objectively reasonable.”¹⁶¹

This assessment parallels the reasonable-expectation-of-privacy test articulated by Justice Harlan in Katz v. United States,)¹⁶² The Court looked at the subjective and objective expectations of privacy and whether “the employees exhibit a (subjective) expectation of privacy by taking precautions? Second, was that expectation objectively reasonable?”

Certainly Huff did not expect his conversation with Savage to be intercepted, given the sensitive matter of the issue. The more private part of the conversation took place on a private balcony and a hotel bedroom. However, he initiated the pocket dial and “Exposure need not be deliberate

¹⁶⁰ Huff v. Spaw, 995 F. Supp. 2d 724 (E.D. Ky. 2014).3

¹⁶¹ Dorris v. Absher, 179 F.3d 420 (6th Cir. 1999).

¹⁶² 389 U.S. 347 (1967)

and instead can be the inadvertent product of neglect. Under the plain-view doctrine, if a homeowner neglects to cover a window with drapes, he would lose his reasonable expectation of privacy with respect to a viewer looking into the window from outside of his property.” “The doctrine applies to auditory as well as visual information” “Similarly, a person exposes his activities and statements, thereby failing to exhibit an expectation of privacy, if he inadvertently shares his activities and statements through neglectful use of a common telecommunication device.” The principle that a person does not exhibit a reasonable expectation of privacy when he knew or should have known that the operation of a device might grant others access to his statements or activities is applicable in the Title III context as well. In McKamey v. Roach, the plaintiffs brought a private Title III action against the defendant for intercepting their phone conversations where one plaintiff used a cordless phone.¹⁶³ Because Title III expressly excluded “the radio portion of a cordless telephone communication” from the definition of wire communication at the time,⁶ 18 U.S.C. § 2510(1) (1988), the plaintiffs sought to characterize their conversations as oral communications. We rejected this characterization, reasoning that the plaintiffs could not enjoy a reasonable expectation of privacy in their cordless-phone conversations because “cordless telephone communications are broadcast over the radio waves to all who wish to overhear,” and the plaintiffs knew or should have known of this risk because the owner’s manual provided an explicit warning.

In fact, Huff had admitted he’d place such pocket-dial calls in the past, and the Court acknowledged that there were technological measures to prevent such situations from happening. Because he did not use those methods, Huff was “no different from the person who exposes in-home activities by leaving drapes open or a webcam on and therefore has not exhibited an expectation of privacy.” As such, his “his statements do not qualify as oral communications and therefore cannot give rise to liability under Title III.”

The Court concluded that “In sum, a person who knowingly operates a device that is capable of inadvertently exposing his conversations to third-party listeners and fails to take simple precautions to prevent such exposure does not have a reasonable expectation of privacy with respect to statements that are exposed to an outsider by the inadvertent operation of that device.”

With respect to Bertha’s claim, she “knew that her husband owned a cellphone and that cellphones were capable of inadvertently transmitting conversations to third-party listeners via pocket-dial calls.” The Court did not agree, however, that “speaking to a person who may carry a device capable of intercepting one’s statements does not constitute a waiver of the expectation of privacy in those statements.” The Court also noted, however, that such devices may be used to actually purposefully “intercept face-to-face conversations, for example, by surreptitiously recording or transmitting them.” “As nearly every participant in a conversation is a potential cellphone carrier, such a conclusion would dramatically undermine the protection that Title III grants to oral communication.” The Court agreed that Bertha Huff “exhibited an expectation of privacy in statements she made to her husband in the hotel room, unless she exposed those statements to an outsider as her husband did.” Although the Court agreed that she did engage in “oral communications,” that did not mean that Spaw was liable, however, “Title III imposes liability only when a person “intentionally” uses a “device” to intercept oral communications.” The Court returned the issue to the trial court to determine if any of Spaw’s actions, “including (1) answering the phone, (2) turning up the volume, (3) transcribing notes, and (4) making an electronic recording, constituted an “intentional use of a device” to intercept Bertha Huff’s oral communications.”

The Court affirmed the dismissal with respect to Huff, but reversed and remanded the case with respect to Bertha.

¹⁶³ 55 F.3d 1236 (6th Cir. 1995).

FIRST AMENDMENT

Parsons (and others) v. U.S. Department of Justice, 801 F.3d 701 (6th Cir. 2015)

ISSUE: In 2011, the National Gang Intelligence Center (operated by the FBI) “released a congressionally-mandated report on gang activity that included a section on Juggalos.” Juggalos are fans of the band, the Insane Clown Posse, and the report indicated that “Juggalos are “a ‘hybrid gang’ and that subsets were involved in criminal activities.” As a result, Parsons, and others, in several states, claimed they were harassed and detained by law enforcement because they displayed the band’s distinctive

hatchetman logo - . Various defendants provided specific situations where they were told that the logo was the reason for the stop, and that the respective officers “considered Juggalos to be a criminal gang because of the DOJ’s designation.” Others were stopped due to visible tattoos and in one case, a potential military recruit was told the tattoo would keep him out, and he went through a process to cover and disguise the tattoo. Another active duty Army member claimed he believed that he was in imminent danger of discipline or discharge due to the logo. Finally, the ICP had a concert cancelled in Royal Oak, and it was conceded it was due to the designation.

The various defendants made claims against the DOJ and the FBI, arguing that the report “violated their rights under the First and Fifth Amendments.” The trial court dismissed the case and the defendants appealed.

ISSUE: Do individuals have a First Amendment right to join organizations?

HOLDING: Yes

DISCUSSION: The Court looked to the “injury” claimed by the various parties, individually. The allegations linked the report to the claimed injuries “by stating that the law enforcement officials themselves acknowledged that the DOJ gang designation had caused them to take the actions in question.” Although the DOJ and the FBI did not direct the third-party officers to take the actions involved, “it is still possible to motivate harmful conduct without giving a direct order to engage in said conduct.” The Court agreed that the chilling affect and reputational harm was more than speculative, and as such, the Court reversed the decision to dismiss.